

MOVING BEYOND THE BODY COUNT AND TOWARD COMPLIANCE: LEGISLATIVE OPTIONS FOR ENCOURAGING ENVIRONMENTAL SELF-ANALYSIS

INTRODUCTION

On July 22, 1993, the Colorado Department of Health (CDH) levied a \$1.05 million fine against Coors Brewing Company (Coors) for violations of Colorado's air pollution laws.¹ The fine was based on Coors' failure to control emissions of volatile organic compounds (VOCs) produced during the beer brewing process.² Coors was also cited for failure to submit required Air Pollution Emission Notification forms and failure to obtain permits for the emissions.³ The Coors fine was the largest fine ever levied by CDH for violations of air pollution laws.⁴ Even more significant, however, is the fact that the enforcement action resulted from Coors' voluntary disclosure of internal environmental compliance audit results.⁵

During a one million dollar environmental audit of its brewing process, Coors discovered that it was emitting surprisingly high levels of VOCs.⁶ Prior to this discovery, Coors, along with others in the brewing industry, was unaware of the high levels of VOCs emitted during commercial beer production.⁷ In fact, United States Environmental Protection Agency (EPA) guidance documents, relied on by the brewing industry, described VOC emissions from the brewing process as "negligible."⁸ Further, the findings of an influential California Air Resources Board (CARB) report proved to be grossly inaccurate.⁹ The CARB report concluded that a brewery producing 20.7 million barrels of beer per year would release only 42.6 tons of VOCs.¹⁰ In contrast, the Coors audit revealed that its brewery, which produced twenty million

1. *\$1.05 Million Fine Against Coors May Deter Corporate Environmental Audits, Firm Says*, 24 Env't Rep. (BNA) 570, 570 (July 30, 1993) [hereinafter *\$1.05 Million Fine*].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Companies Say EPA Enforcement Policy Collides With Voluntary Audit Programs*, 25 Env't Rep. (BNA) 416, 417 (June 24, 1994).

6. *Id.*; *\$1.05 Million Fine*, *supra* note 1, at 570. Specifically, the Coors audit revealed that high levels of VOCs are emitted during the fermentation of beer. *Id.* VOCs were also emitted from beer spilled during the production, packaging, and disposal processes. *Id.*

7. *\$1.05 Million Fine*, *supra* note 1, at 570.

8. *Id.* at 571.

9. *Id.*

10. *Id.*

barrels of beer per year, emitted nearly 850 tons of VOCs during the brewing process.¹¹

Based on the results of this audit, Coors reported the high level of VOC emissions to CDH.¹² Despite the voluntary disclosure, the high cost of the audit, and Coors' reliance on EPA emissions guidance, CDH nevertheless levied a large fine against Coors.¹³ In a subsequent settlement with CDH, the fine against Coors was reduced to \$237,000.¹⁴ Coors also agreed to spend millions of dollars on pollution control equipment in order to reduce VOC emissions by twenty-five percent.¹⁵

The Coors enforcement action resulted in a great deal of local criticism directed at CDH.¹⁶ CDH publicly justified the enforcement action by pointing out that Coors was required under law to analyze and disclose its air emissions.¹⁷ CDH further noted that the Coors audit was not voluntarily conducted.¹⁸ According to CDH, excess VOC emissions were long suspected to be originating from the Coors facility.¹⁹ Therefore, 1990 and 1991 permits for the Coors facility were issued with the understanding that Coors would undertake a comprehensive analysis of its VOC emissions.²⁰

Local critics nonetheless charged that CDH's punishment of Coors for voluntarily disclosed environmental violations was contrary to sound policy.²¹ Critics argued that by levying a large fine against a "good corporate citizen," CDH sent the wrong message to the regulated community.²² The enforcement action, claimed critics, sent the message

11. *Id.* The excess levels of VOC emissions at the Coors facility were not apparently caused by inferior production processes at the facility. Instead, Coors was simply the first brewer to undertake a comprehensive audit of brewery VOC emissions. *Id.* The Coors audit is expected to be influential in the establishment of new air emission standards for all breweries. *Id.*

12. *Id.*

13. *Id.* at 570.

14. *Coors Agrees To Pay Colorado \$237,000 Penalty*, 24 *Env't Rep.* (BNA) 1867, 1867 (Feb. 25, 1994).

15. Bill Scanton, *Coors Says it Will Reduce Pollution from Brewery*, ROCKY MOUNTAIN NEWS, Feb. 18, 1994, at 42A.

16. See, e.g., *The Million Dollar Mistake*, ROCKY MOUNTAIN NEWS, July 23, 1993, at 38A; *Protecting the Good Guys*, ROCKY MOUNTAIN NEWS, Aug. 20, 1993, at 49A; *The Coors' Fine, Part III*, ROCKY MOUNTAIN NEWS, Sept. 3, 1993, at 61A.

17. Patricia M. Nolan & Thomas P. Looby, *Coors Fine in Line with Emissions Violations*, ROCKY MOUNTAIN NEWS, Sept. 3, 1993, at 62A.

18. *Id.*

19. *Id.*

20. *Id.*

21. *The Million Dollar Mistake*, *supra* note 16, at 38A; *Protecting the Good Guys*, *supra* note 16, at 49A.

22. *Protecting the Good Guys*, *supra* note 16, at 49A.

not to "cooperate with regulators because they'll punish you for your honesty."²³

Critics of the Coors enforcement action also argued that the Colorado General Assembly should consider legislation which would protect Colorado businesses from unfair environmental enforcement actions.²⁴ CDH, claimed critics, could not be relied on to encourage voluntary compliance with environmental laws because it "suffers now and then from bouts of overzealousness and grandstanding."²⁵ Thus, the General Assembly was encouraged to provide "active protection of the law" to entities which discover and voluntarily report noncompliance with environmental laws.²⁶

Local critics were not alone in their criticisms of the Coors enforcement action.²⁷ Nationally, members of the regulated community seized on the Coors enforcement as a prime example of the need for legal protections to maintain the confidentiality of audit results.²⁸ The members of the regulated community claimed that the use of voluntarily generated audit results in governmental enforcement actions and private litigation substantially chills the willingness of regulated entities to voluntarily engage in effective self-auditing of environmental compliance.²⁹

Regulators, such as CDH, argue that the Coors enforcement action will not have a chilling effect on voluntary auditing because the Coors audit was not truly voluntary.³⁰ This argument, however, misses the mark. Even if the Coors audit was not voluntary, there is a perception within the regulated community that state and federal enforcement agencies routinely request and use documents generated in the course of self-

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. See David Rubenstein, *Organizations Fight for Confidentiality of Self-Audits*, CORP. LEGAL TIMES, Mar. 1995, at 18 (noting that "[t]he Coors/VOC incident received wide coverage in Colorado and, nationally, outraged corporate advocates and won support for Coors from parties not normally sympathetic to the company or its agenda, including some Colorado liberals").

28. See *\$1.05 Million Fine*, *supra* note 1, at 570 (John Schallenkamp, director of environmental control for Coors, noting that the fine "will discourage others from fully assessing their operations and reporting the results"); *Companies Say EPA Enforcement Policy Collides with Voluntary Audit Programs*, *supra* note 5, at 416 (noting comments of attorney James Moore).

29. See, e.g., Terrell E. Hunt & Timothy A. Wilkins, *Environmental Audits and Enforcement Policy*, 16 HARV. ENVTL. L. REV. 365, 367 (1992) (noting that "corporations currently face the reality that environmental audits undertaken for the purpose of uncovering and correcting environmental, health, and safety problems actually may increase the risk of civil proceedings, private litigation, or criminal prosecution"); James R. Moore, *Protection Will Increase Compliance*, ENVTL. F., Jan./Feb. 1992, at 36, 36.

30. See Nolan & Looby, *supra* note 17, at 62A.

initiated environmental compliance auditing.³¹ This perception, correct or not, is what drives corporate attitudes about potential liabilities surrounding environmental compliance auditing. As one attorney representing the regulated community put it: "More importantly than actual requests for an audit, is that *perception is reality*."³²

Under current federal and state environmental regulatory schemes, there are great incentives for entities to voluntarily undertake environmental compliance auditing.³³ Environmental laws and regulations are numerous and complex.³⁴ Most industry observers contend that,

31. A recent survey conducted by the NATIONAL LAW JOURNAL indicated that one-third of the corporate legal officials surveyed believe that self-audits are risky. Marianne Lavelle, *Companies Staff Up and Struggle to Stay Ahead of the Green Machine*, NAT'L L.J., Aug. 30, 1993, at S1, S2. Preliminary results of a survey conducted by the Indiana Manufacturer's Association found that 66% of respondents feared that the results of voluntary environmental compliance audits would be used against the entity in an enforcement action. *Environmental Protection Agency Auditing Public Meeting*, Afternoon Session, 7 (July 27, 1994) (transcript on file with author) (testimony of Blake Jeffery) [hereinafter *Auditing Public Meeting*, Day One, Afternoon Session]. There is, in fact, much debate as to whether audit results are routinely requested in environmental enforcement actions. Compare James R. Moore et al., *Why Risk Criminal Charges by Performing Environmental Audits?*, 6 TOXICS L. REP. (BNA) 503, 503 (Sept. 18, 1991) ("[O]ur experience is that audit documents are routinely seized by EPA criminal investigators whenever such documents are known or suspected to exist and may relate in some way to the ongoing investigation.") with *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations*, 60 Fed. Reg. 66,706, 66,611 (1995) ("EPA will not request or use an environmental audit report to initiate a civil or criminal investigation of the entity."). EPA recently stated that it "[e]ighteen months of public testimony and debate have produced no evidence that the Agency has deviated, or should deviate, from this policy [of not routinely requesting audit reports]." *Id.* at 66,708. According to Mark Winsler, of Trial Lawyers for Public Justice, surveys of state attorneys general have disclosed only one instance of information from an environmental audit being used in an environmental enforcement action. *Legal Privilege for Audit Information Continues to Frame Debate, Panelists Say*, 26 Env't Rep. (BNA) 606, 606 (July 21, 1995).

32. *Environmental Protection Agency Auditing Public Meeting*, Morning Session, 29 (July 28, 1994) [hereinafter *Auditing Public Meeting*, Day Two, Morning Session] (emphasis added) (testimony of Paul Wallach) (transcript on file with author).

33. Hunt & Wilkins, *supra* note 29, at 369-70. EPA defines environmental auditing as follows: Environmental auditing is a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements. Audits can be designed to accomplish any or all of the following: verify compliance with environmental requirements; evaluate the effectiveness of environmental management systems already in place; or assess risks from regulated and unregulated materials and practices.

Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004, 25,006 (1986) (footnote omitted). EPA recently reaffirmed this definition. See *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations*, 60 Fed. Reg. 66,706, 66,710 (1995) (incorporating definition of environmental audit by reference).

34. Frank Friedman, former vice president for environmental affairs at Occidental Petroleum, notes that, at four Occidental facilities in Texas, there were 140,000 monitoring points for fugitive emissions, resulting in the generation of four to seven million pieces of data. Lavelle, *supra* note 31, at S2. Mr. Friedman has also noted anecdotally:

particularly at large facilities, a perfect record of compliance is practically unachievable.³⁵ In addition, criminal, civil, and administrative enforcement of environmental laws and regulations is increasing yearly.³⁶ Some regulated entities have therefore turned to environmental auditing to help assess compliance, correct operational problems causing noncompliance, evaluate the risk of enforcement, and determine the need for capital expenditures to meet environmental standards.³⁷

Despite the threat of enforcement, however, some regulated entities still do not audit the environmental compliance of their operations.³⁸ This reluctance on the part of some entities to perform compliance audits may

[W]hen I was in law school, the last thing I wanted to do was become a tax lawyer because all I had to deal with would be some kind of incredible code and complex regulations.

Of course, I became an environmental lawyer, and I dealt with the Clean Air Act. When I deal with the Clean Air Act, I long for the simplicities of the Internal Revenue Code.

Environmental Protection Agency Auditing Public Meeting, Morning Session, 26 (July 27, 1994) [hereinafter Auditing Public Meeting, Day One, Morning Session] (testimony of Frank Friedman) (transcript on file with author).

35. See, e.g., Michael J. Walker, *Trust in Auditing, But Verify*, ENVTL. F., Jan./Feb. 1992 at 41, 41-42 (enforcement counsel for the Toxics Litigation Division of EPA noting that "full compliance with each and every regulatory requirement is difficult to achieve and maintain. Comprehensive and effective compliance assurance programs that include auditing are the only certain way of ensuring that compliance is sought and achieved in the majority of situations."); Moore et al., *supra* note 31, at 506 (noting that "100 percent environmental compliance is at best a theoretical state at any complex facility"); *Auditing Public Meeting, Day One, Morning Session, supra* note 34, at 20 (testimony of Frank Friedman) (noting that 100% compliance is "a goal companies continue to strive to achieve, but it is virtually impossible with today's massive regulatory complexity and record keeping requirements"); *id.* at 127 (testimony of Stephen Ramsey) (stating that "being in compliance all the time at every facility from every emission point is simply not something any responsible businessman or environmental health and safety manager would tell you is truly possible"). In a recent survey of more than 200 corporate general counsel, two-thirds of the respondents acknowledged that their business had operated in violation of state or federal regulations within the preceding year. Lavelle, *supra* note 31, at S1. Further, only 30% of those surveyed believed that full compliance with all environmental regulations is possible. *Id.* Reasons given for noncompliance ranged from employees disobeying instruction to "[s]tuff happens." *Id.* at S2.

36. EPA enforcement statistics indicate that records were set for both civil and criminal enforcement during the 1994 fiscal year. *Fact Sheet and Graphics on 1994 EPA Enforcement Statistics Released Nov. 30, 1994*, Daily Env't Rep. (BNA) No. 229, at d45 (Dec. 1, 1994). The 430 civil referrals and \$128.4 million in administrative and civil penalties were the highest in Agency history.. *Id.* The Agency also set records for criminal referrals to the Department of Justice (220 referrals), criminal charges filed (250 charges filed against individuals and corporations), criminal fines (\$36.8 million), and jail sentences (99 years). *Id.*

37. Frank J. Priznar, *The History of Environmental Auditing*, in AIR EMISSIONS, BASELINES, & ENVIRONMENTAL AUDITING 3, 4 (Jacqueline Shields ed., 1993).

38. A recent survey of corporate general counsel indicated that 65% of the responding entities had an auditing program in place to monitor environmental compliance. Lavelle, *supra* note 31, at S1. Another 18% indicated that they had plans to institute such a program in the future, while 16% had no plans to undertake compliance auditing. *Id.* at S2.

have several causes. Some entities may simply be ambivalent toward environmental regulations. Others, particularly smaller entities, may find the costs of implementing an auditing program to be prohibitive.³⁹ Still others may believe that the risks of environmental auditing outweigh the benefits.⁴⁰

In contrast to entities which do not audit environmental compliance, some entities, particularly larger ones, do perform compliance audits.⁴¹ Although these entities face the same risks as smaller entities, the benefits provided by an audit program may, because of the nature of the entity, be more attractive. Larger entities may be better able to absorb the costs of enforcement actions and implementation of corrective actions. Further, larger entities may require more certainty as to regulatory compliance for planning the allocation of resources. However, even when environmental compliance audits are performed, the audits may be ineffective or the results may be presented in a way that makes implementation of recommendations difficult or impossible.⁴²

Much of the reluctance to perform environmental compliance audits, as well as the deficiencies in audits that are performed, can be traced to the disincentives to auditing created by current judicial and agency treatment of audit results.⁴³ Neither EPA nor Department of Justice (DOJ) policies provide certainty that audit results will remain confidential.⁴⁴ Instead, these policies, by reserving agency authority to request audit results, force entities to consider the possibility that audit results may be

39. See *Auditing Public Meeting*, Day Two, Morning Session, *supra* note 32, at 36 (testimony of Carl Mattia). Carl Mattia noted that during his 12 years working at a small corporation, the corporation was reluctant to undertake compliance audits because:

[I]t was a part of corporate counsel's recommendations that we were going to be overexposed to liability; . . . it was going to cost a lot of money to run an audit; . . . we didn't have appropriate knowledge of how to conduct an audit; [and] . . . if we did conduct an audit, we had to correct things and we weren't sure, being a small business, that we had enough money to correct whatever we would find, if we did find something.

Id.

40. See BARRY M. HARTMAN, WRITTEN TESTIMONY BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY PUBLIC MEETING ON ENVIRONMENTAL AUDITING POLICY 28 (arguing that "without some certainty about how the discovery of an adverse environmental condition will be treated, businesses are less likely to risk exposing themselves to substantial potential liability and too often opt not to conduct self-evaluations at all") (on file with author).

41. See *supra* note 38 and accompanying text.

42. See *infra* notes 82-86 and accompanying text.

43. See *infra* Part I.

44. See *infra* Part I.B.

used by the agencies to prove noncompliance in subsequent enforcement actions.⁴⁵

Additionally, the judiciary has been slow to recognize a privilege for environmental compliance audits.⁴⁶ Although the courts have recognized a critical self-analysis privilege in areas such as medical malpractice, they have been reluctant to extend this privilege to environmental compliance audits, particularly in the context of governmental enforcement actions.⁴⁷ Instead, the courts have chosen to defer to enforcement agencies on this issue of environmental policy.⁴⁸ Hence, entities seeking to protect audit results are forced to structure the audit so that it satisfies one of the common-law privileges, such as the attorney-client privilege or the attorney work product doctrine.⁴⁹ Still, there is a great deal of uncertainty as to whether any particular privilege claim will be successful.⁵⁰ Further, such a strategy creates higher transaction costs by necessitating the involvement of an attorney, who often contributes very little to the audit.⁵¹

One solution that has been proposed to eliminate the uncertainties surrounding the use of compliance audits in enforcement actions and private litigation is a statutory privilege for the results of voluntary environmental compliance audits.⁵² Fourteen states have enacted such legislation.⁵³ Similar legislation has been introduced in numerous state legislatures and in both houses of Congress.⁵⁴ Although each of these fourteen statutes is unique in some way, most are similar in that the privilege applies only if the entity performing the audit promptly remedies any discovered noncompliance.⁵⁵ Further, all fourteen statutory privileges

45. *Id.* James O'Reilly notes that environmental audit reports could be used against an entity by the following agencies and parties:

[F]ederal EPA criminal investigators; regional EPA office enforcement specialists; other federal agencies, such as the Fish & Wildlife Service; state environmental enforcement and licensing agencies; state attorneys general; state and county prosecutors; regional or district agencies, such as a sewer system; municipal governments; citizen suit plaintiffs, typically environmental groups; zoning hearing opponents; and toxic tort plaintiffs alleging injuries to land or health.

James T. O'Reilly, *Environmental Audit Privileges: The Need for Legislative Recognition*, 19 SETON HALL LEGIS. J. 119, 124 (1994).

46. *See infra* Part I.A.

47. *See infra* note 115 and accompanying text.

48. *See infra* notes 121-22 and accompanying text.

49. *See infra* Part I.

50. *See infra* notes 87-90, 104-07, 119 and accompanying text.

51. *See infra* notes 91-93 and accompanying text.

52. *See infra* Part II.

53. *See infra* note 199 and accompanying text.

54. *See infra* note 200 and accompanying text.

55. *See infra* notes 229, 250 and accompanying text.

protect audit results only, and do not shield an entity from enforcement actions for violations which are discovered through independent sources such as agency monitoring and inspection.⁵⁶

This note argues that, in light of the need for certainty as to the future use of voluntary audit results, state and federal legislators should embrace statutory audit privileges as a matter of sound environmental policy. To set this discussion in its proper context, the note first examines the current treatment of environmental compliance audit results in enforcement proceedings and private litigation.⁵⁷ First, judicial treatment of audit results is explored, with emphasis on the use of common-law privileges to protect audit results.⁵⁸ Thereafter, an examination of EPA and DOJ policies pertaining to audit results is undertaken, noting the degree of uncertainty as to how the agencies will use audit results in enforcement proceedings.⁵⁹

The note next examines state statutory privileges for voluntary audit results.⁶⁰ First, the note examines the Oregon statute, which has been a model for numerous other audit privilege statutes.⁶¹ Next, the note examines the Colorado statute, which extends incentives to auditing by offering penalty immunity for voluntarily disclosed environmental violations.⁶² Finally, the note examines the Minnesota statute, which differs markedly from both the Oregon and Colorado models.⁶³

Next, the note analyzes the three options faced by legislators seeking to promote environmental quality through the expanded use of environmental auditing.⁶⁴ First, legislators may continue to defer to the agencies and the courts on this issue.⁶⁵ Second, as argued by some environmental and community rights groups, legislators may mandate self-auditing and disclosure of audit results.⁶⁶ Finally, legislators may remove disincentives to environmental auditing by enacting statutory audit privileges.⁶⁷ The analysis proceeds with an examination of the policy

56. See *infra* notes 231-34, 253-57 and accompanying text.

57. See *infra* Part I.

58. See *infra* Part I.A.

59. See *infra* Part I.B.

60. See *infra* Part II.

61. See *infra* Part II.A.

62. See *infra* Part II.B.

63. See *infra* Part II.C.

64. See *infra* Part III.

65. See *infra* notes 304-14 and accompanying text.

66. See *infra* notes 315-28 and accompanying text.

67. See *infra* notes 329-65 and accompanying text.

arguments for and against each of these legislative options.⁶⁸ The note concludes by arguing that carefully crafted state and federal statutes should be enacted to promote voluntary compliance with environmental regulations, thereby providing a higher degree of environmental quality.⁶⁹

I. ENVIRONMENTAL AUDITING UNDER CURRENT LAW

Since the birth of environmental compliance auditing in the late 1970s, there has been a clash of forces within the regulated community regarding auditing.⁷⁰ On the one hand, industry believes that compliance auditing is generally a good idea.⁷¹ On the other hand, regulated entities do not wish to suffer negative consequences from implementing auditing programs.⁷² One way the regulated community has sought to relieve this tension is by attempting to maintain the confidentiality of documents generated during environmental audits. Attempts to maintain the confidential nature of audit documents have occurred on three fronts: in the courts, in the administrative agencies, and more recently, in Congress and the state legislatures.

A. Environmental Auditing Under Common-Law Privileges

Entities seeking to maintain the confidentiality of environmental compliance audit results have traditionally looked to common-law privileges for protection.⁷³ Three specific strategies have been employed with varying degrees of success: the attorney-client privilege, the attorney work product doctrine, and the critical self-analysis privilege.⁷⁴ Entities anticipating the future need to shield audit results must carefully plan their

68. See *infra* Part III.

69. See *infra* notes 329-65 and accompanying text.

70. Priznar, *supra* note 37, at 5-6. Priznar notes that environmental auditing originated with three enforcement actions initiated by the Securities and Exchange Commission (SEC) in the late 1970s and early 1980s. *Id.* at 3-4. The SEC required Allied Chemical Corporation, United States Steel, and Occidental Petroleum to determine their environmental liabilities through corporate-wide auditing programs. *Id.* at 4. These companies responded with high-quality environmental auditing programs which were subsequently cited as model auditing programs. *Id.* Priznar also notes that, although environmental auditing originated from SEC enforcement actions, such enforcement actions now rarely drive audit programs. *Id.*

71. *Id.* at 5.

72. *Id.* at 5-6.

73. See generally Hunt & Wilkins, *supra* note 29, at 376-92 (discussing judicial treatment of environmental audits under the common-law privileges).

74. *Id.*

auditing programs to satisfy one or more of these privileges.⁷⁵ However, even with careful planning, each of these privileges suffers from inherent difficulties in the context of environmental compliance auditing. Because of the uncertainties attendant to the common-law privileges, as well as the prospect of incrimination if audit results are used in an enforcement action or private litigation, regulated entities may either be unwilling to undertake audits or audit in an overly-cautious manner.

1. Attorney-Client Privilege

One strategy commonly employed by entities seeking to protect audit results from discovery is to structure the audit so that it falls under the attorney-client privilege.⁷⁶ To warrant protection under the attorney-client privilege the communication must satisfy four elements.⁷⁷ First, the party asserting the privilege must be or have sought to become a client.⁷⁸ Second, the party with whom the communication was made must be an

75. John S. Guttman, *Environmental Reviews Can be Kept Confidential—Several Legal Doctrines Protect Companies' Reviews From Unwanted Disclosure*, NAT'L L.J., June 20, 1994, at C12 ("When planning either a review of an individual facility or a companywide environmental assessment program, a company should take into account the elements of [the common-law privileges] as well as a variety of practical considerations."). See generally David R. Erickson & Sarah D. Mathews, *Environmental Compliance Audits: Analysis of Current Law, Federal Policy and Practical Considerations to Best Protect Their Confidentiality*, 63 UMKC L. REV. 491, 521-24 (1995) (discussing practical considerations for maintaining the confidentiality of audit reports under the common-law privileges); Michael H. Levin et al., *Discovery and Disclosure: How to Protect Your Environmental Audit Report*, 24 Env't Rep. (BNA) 1606, 1607 (May 7, 1993) (discussing practical considerations for maintaining the confidentiality of audit reports under the common-law privileges).

76. See, e.g., *Olen Properties Corp. v. Sheldahl, Inc.*, 24 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,936 (C.D. Cal. Apr. 12, 1994) (holding that attorney-client privilege protected environmental audit memoranda). See also *Auditing Public Meeting*, Day One, Morning Session, *supra* note 34, at 47 (testimony Judge William W. Wilkins, Jr.) ("There is anecdotal evidence that companies may favor using lawyers . . . to increase the odds that auditing results may be subject to work product or attorney-client privileges."). See generally Hunt & Wilkins, *supra* note 29, at 376-82 (discussing the attorney-client privilege in the context of environmental auditing).

77. *United States v. United Shoe Machine Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950). To successfully invoke the attorney-client privilege, the following elements must be present:

- (1) [T]he asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Id.

78. *Id.* at 358.

attorney or an employee of an attorney.⁷⁹ Third, the communication must be made primarily for the purpose of securing legal advice or representation.⁸⁰ Finally, the privilege must not have been waived by the client.⁸¹

Based on these elements, several problems arise in the context of environmental compliance audits. Because the audit results must be addressed to legal counsel rather than directly to an entity's compliance officer, timely compliance may be inhibited in three ways.⁸² First, by requiring audit results to pass through an additional party prior to implementation, corrective action will be delayed.⁸³ Second, to avoid waiving the privilege, dissemination of the audit report within the entity must be limited.⁸⁴ Additionally, the uncertain protection of the attorney-client privilege encourages audit reports to be written in vague or legal terms, making it difficult for the personnel responsible for implementing audit reports to understand the recommendations.⁸⁵ The net result is often a poorly written audit report of limited distribution, which is unlikely to effect a cure for the underlying causes of noncompliance.⁸⁶

79. *Id.*

80. *Id.*

81. *Id.* at 359.

82. See Thomas E. Lindley & Jerry B. Hodson, *Environmental Audit Privilege: Oregon's Experiment*, 24 *Env't Rep. (BNA)* 1221, 1222 (Oct. 29, 1993) (noting that in an effort to protect the confidentiality of documents under the attorney-client privilege, documents are directed to attorneys rather than environmental compliance officers).

83. *Auditing Public Meeting*, Day One, Morning Session, *supra* note 34, at 69-70 (testimony of Frank Friedman) ("If you are doing it through the lawyers, it takes a lot of time and slows down the compliance.")

84. BARRY M. HARTMAN & LINDA L. RACLIN, *A PRIMER ON ENVIRONMENTAL AUDITING* 39 (National Legal Center for the Public Interest White Paper Vol. 6, No. 2, 1994) (stating that because, under the attorney-client privilege, dissemination of an audit report must be limited, the report is thus of lesser value as a "companywide learning tool").

85. Attorney James O'Reilly, Chairman of the Coalition for Improved Environmental Audits, has noted that:

Today the audit report that could be publicly reviewed in discovery is more likely to be written in overly cautious "lawyer's speech." In other words, they shade their meaning behind legalisms. They don't candidly describe what's wrong. They use euphemisms or evasive words that reduce the value of the document

Auditing Public Meeting, Day One, Morning Session, *supra* note 34, at 135 (testimony of James O'Reilly).

86. Marianne Lavelle, *Feds on the Defensive: Audit Privilege Mobilizes EPA, Business Bar—Four States Now Protect In-House Review of Environmental Compliance*, NAT'L L.J., Aug. 8, 1994, at A1, A23. As Attorney Paul G. Wallach noted at a recent public meeting on auditing:

While good companies are going to do audits anyway, they will be structured differently They are going to involve lawyers, and the distribution [through the company] will be much less, and they'll be written in vague language. These are all the things you do to invoke attorney-client privilege, and they are inimical to the purposes of the audit.

The attorney-client privilege also fails to provide certainty that audit results will be protected in a particular case.⁸⁷ For example, a court may conclude that the privilege is inapplicable because the attorney is involved in the audit for the sole purpose of invoking the privilege.⁸⁸ A court may also find that the privilege has been implicitly waived, for example, by putting the document at issue in litigation.⁸⁹ Based on the uncertainty of the attorney-client privilege, entities are understandably reluctant to voluntarily generate documents which may contain evidence of noncompliance.⁹⁰

Finally, use of the attorney-client privilege as a planning tool is unattractive because of the costs associated with such a strategy. To establish the requisite attorney-client relationship, entities generally engage

Id. See also *Auditing Public Meeting, Day One, Morning Session, supra* note 34, at 135 (testimony of James O'Reilly) ("If we characterize recommendations in terms of the innocuous words for plaintiff's lawyers or prosecutors, it won't be a road map anymore, then we're going to be much less effective in reaching environmental improvements."). Attorney James O'Reilly argues that poorly written audit reports also fail to promote compliance because of competition for resources within an entity. *Id.* at 134-35. A business manager, he points out, must allocate limited funds to different departments within an entity. *Id.* at 134. The managers of production, marketing, and compliance, for example, are all competing for these funds. *Id.* An audit report which is not "effective, candid, and clear" will not give the business manager a reasonable basis on which to act and adequate funds will not, therefore, be allocated to environmental compliance. *Id.* See generally O'Reilly, *supra* note 45, at 124-26 ("If auditors recognized that disclosure of their opinions and recommendations would occur, subtle circumspect language would be chosen, making it much more difficult to attract the capital investment from senior managers for corrective work.").

87. Hunt & Wilkins, *supra* note 29, at 382 (noting that "at least in some circumstances, corporations will be unable to rely on the attorney-client privilege to protect even a compliance audit's potentially damaging results from disclosure"). Hunt and Wilkins see the element of uncertainty attendant to both the attorney-client privilege and attorney work product doctrine as the largest single disincentive to auditing, stating that: "[T]he principle disincentive to auditing remains the uncertainty and incomplete coverage of the current privileges." *Id.* at 388.

88. Lindley & Hodson, *supra* note 82, at 1222 (noting that "an aggressive government agency might be able to convince a court that the report is not truly an attorney-client communication, but rather a communication between the consultant and the client outside of the privilege"). See also *United States v. Chevron U.S.A. Inc.*, 1989 WL 121616, at *6 (E.D. Pa. Oct. 16, 1989) (finding in the context of an environmental audit where an attorney was a member of the auditing team that "it is not enough to assert the privilege merely because an attorney was present or was one of the parties to whom the communication was made").

89. See, e.g., *Koppers Co. v. Aetna Casualty & Sur. Co.*, 847 F. Supp. 360 (W.D. Pa. 1994) (holding that communications between attorney and client regarding environmental liabilities are not protected by the attorney-client privilege where the party asserting the privilege has put the documents at issue in its complaint).

90. Hunt & Wilkins, *supra* note 29, at 382 (arguing that because of the uncertain ability of entities to invoke the attorney-client privilege "any corporation considering an audit understandably will be wary; only reluctantly will it perform an honest and thorough investigation and assessment").

legal counsel to contract with third party auditors.⁹¹ Because the attorney-client privilege necessitates the involvement of legal counsel, its application as a planning tool increases transaction costs.⁹² This cost is particularly burdensome on smaller entities, for whom the cost of employing counsel may be prohibitive.⁹³

2. Attorney Work Product Doctrine

The second common-law privilege that entities may employ to maintain the confidentiality of environmental audit documents is the attorney work product doctrine.⁹⁴ Under the attorney work product doctrine, documents prepared by an attorney in anticipation of litigation enjoy a qualified privilege from discovery.⁹⁵ Such documents are

91. Lindley & Hodson, *supra* note 82, at 1222. Even if the entity seeks to secure the protection of the attorney-client privilege by utilizing in-house counsel, such utilization must still be considered an expenditure of resources. However, entities with in-house counsel may be better advised to employ outside counsel. Courts may more easily construe in-house attorneys as business advisors rather than as attorneys. See *Chevron*, 1989 WL 121616, at *6.

92. Lindley & Hodson, *supra* note 82, at 1222. Upon introduction of a bill which would have recognized an audit privilege in the federal courts, Senator Mark Hatfield noted that "lawyers are no longer needed in Oregon to shield audit documents under the attorney-client privilege. Removing lawyers from this process has substantially reduced the cost of auditing and has created a better flow of information [within] companies." 140 CONG. REC. S10,941-09, S10,943 (daily ed. Aug. 8, 1994) (statement of Sen. Hatfield). As attorney James O'Reilly noted at a recent public meeting on auditing:

I don't consider the attorney-client privilege as productive or cost effective. A firm could hire expensive outside law firms, have the outside expense of an outside consulting engineer, and then try to figure out what message comes from these outside observers.

But why force companies to use such a continuing artificial communication? You want audits to produce the best attention. That's what an audit report should receive.

Auditing Public Meeting, Day One, Morning Session, *supra* note 34, at 136 (testimony of James O'Reilly).

93. Hunt & Wilkins, *supra* note 29, at 388 (noting that "[f]or small and medium-sized companies . . . the additional cost associated with hiring attorneys, who often will make little direct contribution to the outcome or performance of the audit, may be prohibitive").

94. See, e.g., *Olen Properties Corp. v. Sheldahl, Inc.*, 24 *Envtl. L. Rep. (Envtl. L. Inst.)* 20,936 (C.D. Cal. Apr. 12, 1994) (holding that auditor's notes are protected by the work product doctrine). See also *Auditing Public Meeting*, Day One, Morning Session, *supra* note 34, at 47 (testimony of Judge William W. Wilkins, Jr.) (citing evidence that entities tend to involve attorneys in environmental auditing to increase the likelihood of successfully invoking the attorney work product doctrine). See generally Hunt & Wilkins, *supra* note 29, at 383-88 (discussing the attorney work product doctrine in the context of environmental auditing).

95. FED. R. CIV. P. 26(b)(3). The Federal Rules of Civil Procedure provide that:

[A] party may obtain discovery of documents . . . otherwise discoverable . . . and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by

discoverable, however, if the party seeking discovery has a substantial need for the documents and is unable to obtain the substantial equivalent without undue hardship.⁹⁶ The privilege may be waived when the entity fails to maintain the confidentiality of the document by disclosing it outside the entity.⁹⁷ Additionally, the work product doctrine does not apply to documents prepared to further unlawful purposes.⁹⁸ For example, an audit report suggesting strategies for concealing noncompliance from regulators is discoverable because it furthers an unlawful purpose.⁹⁹

The attorney work product doctrine suffers from several drawbacks in the context of protecting the confidentiality of environmental audit results. The most important limitation stems from the reactive nature of the doctrine. Because only documents prepared in anticipation of litigation are protected from disclosure, entities have no incentive under this doctrine to proactively pursue compliance through auditing. Routine audits which would disclose noncompliance prior to enforcement are not protected under the work product doctrine.¹⁰⁰ Such proactive auditing, however, may be more important to remedying operational problems than are reactive audits prepared in anticipation of litigation.¹⁰¹

Further, reliance on the attorney work product doctrine is an inefficient means of protecting the confidentiality of audit documents. Like the attorney-client privilege, the necessary involvement of an attorney inevitably leads to increased transaction costs for the entity.¹⁰² Again,

other means.

Id.

96. *Id.*

97. See *In re Continental Ill. Sec. Litig.*, 732 F.2d 1302, 1314 (7th Cir. 1984) (noting that "protection from disclosure is available only when the party asserting a privilege has maintained confidentiality" of the documents).

98. See *In re Grand Jury Proceedings*, 604 F.2d 798, 803 (3d Cir. 1979) (stating that "[w]e have no doubt that the crime-fraud exception comes within 'good cause' to deny applicability of the work product doctrine").

99. Hunt & Wilkins, *supra* note 29, at 387. The crime-fraud exception may be particularly relevant when dealing with inexperienced auditors. If auditors suggest ways in which noncompliance may be hidden from regulators, the audit results may lose any protection which they would normally have under the attorney work product doctrine. *Id.* "Environmental audit reports prepared by inexperienced consultants, unreviewed by counsel, might well offer advice on how violations or environmental conditions may be hidden or remediated in a manner less stringent than required by law." *Id.*

100. *Id.* at 388.

101. See *id.* (noting that "[r]outine audits detect chronic environmental problems before they reach crisis proportions"). As Hunt and Wilkins note, "these routine audits are essential to the revelation and remediation of lingering, low-intensity environmental problems or management difficulties that often are more preventable, and that, over time, are potentially more dangerous than more acute and easily recognized problems." *Id.*

102. See *supra* note 92 and accompanying text.

these costs may fall particularly hard on small and medium-sized entities, where the attorney may add nothing substantive to the audit.¹⁰³

Finally, like the attorney-client privilege, there is little certainty that a work product claim will be successful in a particular case.¹⁰⁴ A court may, for example, construe the audit as routine business practice rather than as activity in anticipation of litigation.¹⁰⁵ In addition, there is a potential that a court may interpret audit recommendations as promoting an unlawful end, thereby stripping away the protection of the work product doctrine.¹⁰⁶ Also, if an adverse party can show substantial need for audit documents and the inability to procure the substantial equivalent without undue hardship, discovery may be allowed.¹⁰⁷

3. Critical Self-Analysis Privilege

The third common-law privilege which entities may attempt to invoke to protect the confidentiality of audit reports is the critical self-analysis privilege.¹⁰⁸ The critical self-analysis privilege was originally developed in *Bredice v. Doctors Hospital, Inc.*¹⁰⁹ In *Bredice*, a medical malpractice plaintiff sought discovery of the minutes and reports of medical staff

103. See *supra* note 93 and accompanying text.

104. HARTMAN & RACLIN, *supra* note 84, at 42 (noting that "for companies seeking to conduct audits in the regular course of business, the work-product doctrine will provide highly unreliable protection"). See also *supra* notes 87-90 and accompanying text (discussing the uncertainty of the attorney-client privilege).

105. See HARTMAN & RACLIN, *supra* note 84, at 40 ("If an environmental audit is conducted in the ordinary course of business, it is much less likely to be protected by the work-product privilege.").

106. Hunt & Wilkins, *supra* note 29, at 387 (noting that "over-zealous plaintiff's counsel, enforcement authorities, and prosecutors might mischaracterize the purpose of the audit, forcing corporations preparing work product doctrine audits with the best intentions to refute claims that such audits were prepared for the purpose of secreting relevant damaging information").

107. FED. R. CIV. P. 26(b)(3); Hunt & Wilkins, *supra* note 29, at 387.

108. See *Reichhold Chems., Inc. v. Textron, Inc.*, 157 F.R.D. 522 (N.D. Fla. 1994) (holding that environmental compliance audit report was protected by the critical self-analysis privilege). See generally Hunt & Wilkins, *supra* note 29, at 389-92 (discussing the critical self-analysis privilege in the context of environmental auditing). This privilege has been alternatively termed the "self-evaluative privilege," the "self-critical analysis privilege," the "self-critical privilege," the "self-evaluation privilege," and the "critical self-analysis privilege." See, e.g., *Federal Trade Comm'n v. TRW, Inc.*, 628 F.2d 207, 210 (D.C. Cir. 1980) ("self-evaluative privilege"); *Shipes v. BIC Corp.*, 154 F.R.D. 301, 306 (M.D. Ga. 1994) ("self-critical analysis privilege"); *United States v. Dexter Corp.*, 132 F.R.D. 8, 9 (D. Conn. 1990) ("self-critical privilege"); *Koppers Co. v. Aetna Casualty & Sur. Co.*, 847 F. Supp. 360, 362 (W.D. Pa. 1994) ("self-evaluation privilege" and "critical self-analysis privilege"). As a matter of consistency, the privilege will be referred to as the "critical self-analysis privilege" throughout this note.

109. *Bredice v. Doctors Hosp., Inc.*, 50 F.R.D. 249 (D.D.C. 1970).

review meetings during which the death of her decedent was discussed.¹¹⁰ The purpose of the staff review meetings was to improve medical care at the hospital by reviewing, analyzing, and evaluating the clinical work of the staff members.¹¹¹ The *Bredice* court held that the public interest justified a qualified privilege from discovery for the requested documents.¹¹² The privilege, reasoned the court, was based on the "overwhelming public interest in having [the] staff meetings held on a confidential basis so that the flow of ideas and advice can continue unimpeded."¹¹³

The same public interest in unhindered self-analysis seemingly applies in the context of voluntary environmental compliance audits.¹¹⁴ However, the courts have been slow to accept such an argument. For example, in *United States v. Dexter Corp.* a federal district court refused to apply the critical self-analysis privilege to environmental audit documents, noting that the privilege does not generally apply where the government is acting in its enforcement capacity.¹¹⁵

Indeed, the critical self-analysis privilege has been successfully invoked to protect audit results in only one reported case. In *Reichhold Chemicals, Inc. v. Textron, Inc.*, the federal district court held that documents prepared in connection with a retrospective environmental compliance analysis enjoyed a qualified privilege in private litigation.¹¹⁶

110. *Id.* at 249-50.

111. *Id.* at 250.

112. *Id.* at 251.

113. *Id.*

114. *Hunt & Wilkins*, *supra* note 29, at 392. See also *Auditing Public Meeting*, Day One, Morning Session, *supra* note 34, at 112-13 (testimony of Jean McCreary) (noting that in the medical malpractice context, the critical self-analysis privilege "encourages a candid dialogue with the aims of improving physician performance and overall betterment of the medical profession" and arguing that "[e]nvironmental health and safety audits warrant identical policy considerations").

115. *Dexter*, 132 F.R.D. at 10. The *Dexter* court reasoned that "since the 'self-critical' privilege is rooted in promotion of the public interest, a court should take cognizance, in an action brought by the United States to enforce duly enacted laws, of Congress's role in declaring what is in the public interest." *Id.* at 9. See also *Federal Trade Comm'n v. TRW, Inc.*, 628 F.2d 207, 210 (D.C. Cir. 1980) (noting that the conclusion that the critical self-analysis privilege may not be asserted in enforcement actions by the government "makes sense in light of the roots of the privilege in the public interest, and the strong public interest in having administrative investigations proceed expeditiously and without impediment"). *Hunt and Wilkins* argue that the judiciary's deference in this area is misguided, noting that "it is overinclusive to find that a legislative provision that bans the discharge of pollutants makes withholding any relevant document, regardless of its beneficial nature, inherently antithetical to the public interest." *Hunt & Wilkins*, *supra* note 29, at 392.

116. *Reichhold*, 157 F.R.D. at 527. In so holding, the district court adopted a four-part test, developed in *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423, 425-26 (9th Cir. 1992), to determine the applicability of the privilege. Under this test, the results of environmental compliance audits will be privileged if the following criteria are met:

This decision is significant in that it indicates an increased willingness on the part of the judiciary to apply the *Bredice* policy considerations to environmental self-analysis.¹¹⁷ However, nothing in *Reichhold* undermines the policy considerations set forth in *Dexter* or indicates that the federal courts are willing to extend the reach of the critical self-analysis privilege to governmental enforcement actions. Instead, based on the reasoning of *Dexter*, the judiciary's traditional deference to Congress and the administrative agencies on matters of enforcement policy is likely to continue.

The critical self-analysis privilege does not suffer from the same inefficiencies as the attorney-client privilege and the attorney work product doctrine.¹¹⁸ Because attorney involvement is not a necessary element of the privilege, the critical self-analysis privilege holds out the promise of eliminating the artificial and inefficient use of attorneys as discovery prophylactics. Unfortunately, like the attorney-client privilege and the attorney work product doctrine, application of the critical self-analysis privilege in the context of environmental compliance auditing is fraught

(1) the information must result from a critical self-analysis undertaken by the party seeking protection; (2) the public must have a strong interest in preserving the free flow of the type of information sought; (3) the information must be of a type whose flow would be curtailed if discovery was allowed [; and (4)] no document should be privileged unless it was prepared with the expectation that it would be [kept] confidential, and it has in fact been kept confidential.

Reichhold, 157 F.R.D. at 527 (citations omitted). Further, the court noted that the privilege is qualified and can be defeated "if one or more of the defendants can demonstrate extraordinary circumstances or special need." *Id.*

117. *Reichhold*, 157 F.R.D. at 527. The *Reichhold* court noted that: "Public knowledge of such analysis, and especially the potential use of such an analysis in litigation, would chill candid self-assessment and the preservation of such self-evaluation records." *Id. Contra Koppers Co. v. Aetna Casualty & Sur. Co.*, 847 F. Supp. 360 (W.D. Pa. 1994). In *Koppers*, a private action, the court refused to apply the critical self-analysis privilege to "communications between Koppers and its counsel relating to Koppers' expectation that its activities might cause environmental contamination." *Id.* at 364. In so holding, the court noted that:

[T]he self-evaluation privilege does not apply *a fortiori* to environmental reports, records, and memoranda. Indeed, we disagree that a corporation would face a Hobson's choice between due diligence and self-incrimination in the tightly-regulated environmental context, for that context requires strict attention to environmental affairs. We doubt that today potential polluters will violate regulations requiring environmental diligence for fear of these documents being used against them tomorrow.

Id. As the *Reichhold* court noted, however, *Koppers* may be distinguished on the fact that the environmental analysis in *Koppers* was prospective rather than retrospective. *Reichhold*, 157 F.R.D. at 527.

118. See *supra* notes 91-93, 102-03 and accompanying text for analysis of the inefficiencies associated with the attorney-client privilege and the attorney work product doctrine.

with uncertainty.¹¹⁹ Because the privilege apparently is not applicable in governmental enforcement actions, and its applicability in private litigation is still unsettled, entities seeking to maintain the confidentiality of audit reports would be ill-advised to rely on the critical self-analysis privilege for such protection.

In sum, the common-law privileges tend to discourage effective voluntary environmental compliance auditing primarily because of the uncertainty involved with invoking each of the privileges. The inefficiencies attendant to the attorney-client privilege and the attorney work product doctrine, in the form of increased transaction costs, also tend to discourage auditing by small and medium-sized entities. In light of these disincentives, many regulated entities either will not voluntarily audit environmental compliance or will audit ineffectively.¹²⁰

Additionally, several institutional or political limitations make it unlikely that the courts will provide increased protection for audit results in the near future. As demonstrated by *Dexter*, courts tend to defer to the legislatures and administrative agencies on matters of environmental enforcement policy.¹²¹ The judiciary may be particularly reluctant to extend privileges where broad environmental policy issues are implicated.¹²² Finally, because courts develop privileges on a case-by-case basis, the development and refinement of common-law privileges is generally a slow process. Hence, regulated entities have begun to look beyond the courts to find an appropriate means of protecting environmental audit reports from discovery.¹²³

119. See *supra* notes 87-90, 104-07 and accompanying text for analysis of the uncertainties associated with the attorney-client privilege and the attorney work product doctrine.

120. Hunt & Wilkins, *supra* note 29, at 392 ("Absent some reliable protection, accorded by the attorney-client privilege, work product doctrine, or critical self-evaluation privilege . . . corporations may be reluctant to fully audit their facilities, understandably fearing the heightened risk of prosecution, enforcement, and private litigation that such assessments may invite."). See also Moore, *supra* note 29, at 40 (arguing that "if a company self-polices, uncovers noncompliance, and eliminates the problem, there is a significant likelihood that it will still be punished, and the very information developed in its self-policing efforts will be utilized as evidence").

121. See *Dexter*, 132 F.R.D. at 9-10. As the *Dexter* court noted, "the application of the 'self-critical' privilege in this action would effectively impede the Administrator's ability to enforce the Clean Water Act, and would be contrary to stated public policy." *Id.* at 10.

122. See, e.g., *In re Grand Jury Proceedings*, 861 F. Supp. 386, 390 (D. Md. 1994) (noting that the defendant's policy arguments concerning application of the critical self-analysis privilege to environmental audit reports "should probably first be addressed to Congress or to the Executive Branch, before they are raised in a federal court proceeding of the within type").

123. See *infra* Part II.

B. Agency Responses to Environmental Auditing

The merits of a policy encouraging environmental compliance auditing by protecting audit results have also been debated in the federal administrative agencies.¹²⁴ Both EPA and DOJ have issued policy statements regarding agency use of audit results in environmental enforcement actions.¹²⁵ However, because neither EPA nor DOJ audit policies provide certainty as to the potential use of audit results in agency enforcement actions, the disincentives to effective compliance auditing seen under the common-law privileges have largely remained.

1. United States Environmental Protection Agency—1986 to 1995

In 1986, EPA issued its Environmental Auditing Policy Statement (Audit Policy).¹²⁶ In this policy statement, EPA acknowledged the importance of voluntary compliance auditing and encouraged regulated entities to institute programs designed to audit compliance with environmental regulations.¹²⁷ Citing concerns about the likely quality of mandated self-audits, EPA also took the position that environmental compliance auditing should not be mandated.¹²⁸

124. See generally Hunt & Wilkins, *supra* note 29, at 392-400 (discussing EPA and DOJ policies on environmental auditing).

125. See Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004 (1986); Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66,706 (1995); U.S. DEP'T OF JUSTICE, FACTORS IN DECISIONS ON CRIMINAL PROSECUTIONS FOR ENVIRONMENTAL VIOLATIONS IN THE CONTEXT OF SIGNIFICANT VOLUNTARY COMPLIANCE OR DISCLOSURE EFFORTS BY THE VIOLATOR (July 1, 1991) [hereinafter DOJ GUIDANCE] (on file with author).

126. 51 Fed. Reg. 25,004. See generally Hunt & Wilkins, *supra* note 29, at 392-96 (discussing the EPA Audit Policy).

127. 51 Fed. Reg. 25,006. EPA's policy stated that:

In particular, EPA encourages regulated entities subject to environmental regulations to institute environmental auditing programs to help ensure the adequacy of internal systems to achieve, maintain and monitor compliance. Implementation of environmental auditing programs can result in better identification, resolution and avoidance of environmental problems, as well as improvements to management practices.

Id.

128. *Id.* at 25,007 ("Because environmental auditing systems have been widely adopted on a voluntary basis in the past, and because audit quality depends to a large degree upon genuine management commitment to the program and its objectives, auditing should remain a voluntary activity."). EPA indicated, however, that it "may propose environmental auditing provisions in consent decrees and in other settlement negotiations where auditing could provide a remedy for identified problems and reduce the likelihood of similar problems recurring in the future." *Id.* (footnote omitted).

EPA fell short, however, of recognizing a privilege for audit reports. Though asserting that it will not routinely request audit reports, EPA specifically reserved its authority to request audit reports at the Agency's discretion.¹²⁹ The Agency, by way of illustration, suggested that audit reports would likely be requested when the audit is mandated by a consent decree, when the entity puts management practices at issue, or when the audit results are relevant to proving criminal intent.¹³⁰ EPA also declined to offer incentives, such as penalty mitigation or reduced inspections, to entities implementing auditing programs.¹³¹ Instead, the Agency relied on the deterrent value of agency enforcement to encourage auditing, reasoning that "a credible enforcement program provides a strong incentive for regulated entities to audit."¹³²

Although EPA's Audit Policy was intended to "encourage regulated entities to institutionalize effective audit practices," it is less than clear that the policy had such an effect.¹³³ The primary objection to EPA's Audit Policy was that, because of the retention of significant agency discretion, the regulated community was given no certainty as to the status of audit documents.¹³⁴ Indeed, this criticism plagued EPA's Audit Policy since its promulgation. During formulation of the Audit Policy, some commentators expressed fears that the Audit Policy would permit EPA to seek out audit reports in "environmental compliance 'witch hunts.'"¹³⁵ The commentators urged EPA to lay out its audit request policy more definitively to assuage

129. *Id.* In formulating its Audit Policy, EPA recognized that agency use of audit reports tends to discourage auditing, stating that "EPA believes routine Agency requests for audit reports could inhibit auditing in the long run, decreasing both the quantity and quality of audits conducted. Therefore, as a matter of policy, EPA will *not* routinely request environmental audit reports." *Id.* (footnote omitted). However, EPA reserved the right to request, on a case-by-case basis, an audit report "where the Agency determines it is needed to accomplish a statutory mission, or where the Government deems it to be material to a criminal investigation." *Id.*

130. *Id.*

131. *Id.* ("EPA will not promise to forgo inspections, reduce enforcement responses, or offer other such incentives in exchange for implementation of environmental auditing or other sound environmental management practices. Indeed, a credible enforcement program provides a strong incentive for regulated entities to audit."). However, EPA further noted that "while EPA inspections of self-audited facilities will continue, to the extent that compliance performance is considered in setting inspection priorities, facilities with a good compliance history may be subject to fewer inspections." *Id.*

132. *Id.*

133. *Id.* at 25,006.

134. *See, e.g.,* Hunt & Wilkins, *supra* note 29, at 396 (arguing that "these 'exceptions' [to EPA's general policy], by providing EPA with broad flexibility and discretion to request audit reports, might swallow the rule that EPA will not seek access to audit reports").

135. 51 Fed. Reg. 25,005.

such fears.¹³⁶ Despite these adverse comments, EPA's final policy statement did not substantively alter the portions of the interim policy to which commentors objected.¹³⁷

In 1994, EPA began the process of reevaluating its policy on environmental auditing.¹³⁸ On July 27 and 28, 1994, EPA held a public meeting in connection with these efforts.¹³⁹ Industry representatives argued that effective auditing will be discouraged unless companies are certain that audit results will not be used by the Agency as "roadmaps" in enforcement actions.¹⁴⁰ Some state officials and public interest groups, on the other hand, claimed that recognition of a privilege for audit results would allow dishonest companies to shield noncompliance.¹⁴¹

2. United States Environmental Protection Agency—Self-Policing Policy Statement

On December 22, 1995, EPA issued a final policy statement entitled *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations (Self-Policing Policy Statement)*.¹⁴² The Self-Policing Policy Statement is intended to "enhance protection of human health and the environment by encouraging regulated entities to voluntarily

136. *Id.*

137. *Id.* One of the reasons EPA cited for leaving the interim policy largely intact was the small number of commentors. *Id.* Only 13 written comments were submitted on the interim policy. *Id.* at 25,004. Twelve of these comments addressed the section concerning agency requests for audit reports. *Id.*

138. See Notice of Public Meeting on Auditing, 59 Fed. Reg. 31,914 (1994). EPA contemporaneously reaffirmed its 1986 policy statement on environmental auditing. See Restatement of Policies Related to Environmental Auditing, 59 Fed. Reg. 38,455 (1994).

139. 59 Fed. Reg. at 38,455; *Lines Drawn at Hearing on Self-Audits: Industry Representatives Favor Privilege*, 25 Env't Rep. (BNA) 587 (July 29, 1994) [hereinafter *Lines Drawn*]. Over 400 participants attended the July public meeting. *Id.* Compare this with the promulgation of EPA's original policy statement, where EPA received only 13 written comments. See *supra* note 137. EPA subsequently held focus group discussions on January 19 and 20, 1995. *Environmental Audits: EPA Holds Focus Group Meeting; Outlines Options for Audit Policy*, Nat'l Env't Daily (BNA), at d7 (Jan. 20, 1995). Participants in the 50-member focus group included representatives of the regulated community, state government, and public interest groups. *Id.* EPA issued an interim policy statement on April 3, 1995. See Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy Statement, 60 Fed. Reg. 16,875 (1995).

140. *Lines Drawn*, *supra* note 139, at 587.

141. *Id.* Some public interest groups also argued for increased disclosure of audit results by industry. *Id.*

142. 60 Fed. Reg. 66,706 (1995). The Self-Policing Policy Statement became effective on January 22, 1996. *Id.* at 66,712. See generally John J. Zodrow, *EPA's "Mitigated Enforcement" Policy*, NAT. RESOURCES & ENV'T, Winter 1996, at 60 (discussing EPA's Self-Policing Policy Statement).

discover, disclose, correct and prevent violations of federal environmental requirements."¹⁴³ This policy, to the extent that it is inconsistent with EPA's 1986 auditing policy statement, supersedes that policy statement.¹⁴⁴

The Self-Policing Policy Statement makes use of several incentives to promote environmental self-evaluation. First, EPA will, in certain instances, eliminate or substantially reduce the gravity, or punitive, component of civil penalties for regulated entities.¹⁴⁵ Second, EPA will not, in certain cases, refer cases to DOJ for criminal prosecution.¹⁴⁶ Finally, "EPA will not request or use an environmental audit report to initiate a civil or criminal investigation of the entity."¹⁴⁷

Entities must satisfy nine conditions to qualify for penalty reduction and protection from criminal prosecution. First, the regulated entity must have discovered the violation through an environmental audit or "an objective, documented, systematic procedure or practice reflecting the regulated entity's due diligence in preventing, detecting, and correcting violations."¹⁴⁸ Second, the entity must discover the violation "voluntarily, and not through a legally mandated monitoring or sampling requirement

143. *Id.* at 66,710.

144. *Id.* at 66,712.

145. *Id.* at 66,711.

146. *Id.*

147. *Id.*

148. *Id.* "Environmental audit" has the same meaning as given to the term in EPA's 1986 Environmental Auditing Policy Statement. *Id.* at 66,710. Under the Self-Policing Policy Statement: "Due Diligence" encompasses the regulated entity's systematic efforts, appropriate to the size and nature of its business, to prevent, detect and correct violations through all of the following:

(a) Compliance policies, standards and procedures that identify how employees and agents are to meet the requirements of laws, regulations, permits and other sources of authority for environmental requirements;

(b) Assignment of overall responsibility for overseeing compliance with policies, standards, and procedures, and assignment of specific responsibility for assuring compliance at each facility or operation;

(c) Mechanisms for systematically assuring that compliance policies, standards and procedures are being carried out, including monitoring and auditing systems reasonably designed to detect and correct violations, periodic evaluation of the overall performance of the compliance management system, and a means for employees or agents to report violations of environmental requirements without fear of retaliation;

(d) Efforts to communicate effectively the regulated entity's standards and procedures to all employees and other agents;

(e) Appropriate incentives to managers and employees to perform in accordance with the compliance policies, standards and procedures, including consistent enforcement through appropriate disciplinary mechanisms; and

(f) Procedures for the prompt and appropriate correction of any violations, and any necessary modifications to the regulated entity's program to prevent future violations.

Id. at 66,710-11.

prescribed by statute, regulation, permit, judicial or administrative order, or consent agreement."¹⁴⁹ Third, the entity must disclose violations in writing within ten days after discovery.¹⁵⁰ Fourth, the discovery and disclosure must be made prior to government or third-party action on the violation.¹⁵¹ Fifth, the regulated entity must correct the violation within sixty days of discovery and take "appropriate measures as determined by EPA to remedy any environmental or human harm due to the violation."¹⁵² Sixth, the entity must agree in writing to "take steps to a prevent recurrence of the violation."¹⁵³ Seventh, the violation must not have occurred at the facility within the past three years, and must not be "part of a pattern of federal, state or local violations by the facility's parent organization (if any), which have occurred within the past five years."¹⁵⁴ Eighth, the incentives do not apply to violations of judicial or administrative orders or consent agreements, and the violation must not have resulted in "serious actual harm, or . . . an imminent and substantial endangerment to, human health or the environment."¹⁵⁵ Finally, the regulated entity must cooperate with EPA and provide information necessary to determine the applicability of the policy.¹⁵⁶

If the regulated entity complies with these conditions, it is eligible for reduction of civil penalties in connection with the violation.¹⁵⁷ The penalty

149. *Id.* at 66,711. By way of example, the Self-Policing Policy Statement states that the policy does not apply to violations discovered through a continuous emissions monitor, through NPDES sampling or monitoring, or pursuant to a compliance audit mandated by a consent order. *Id.*

150. *Id.* The period for disclosure may be shorter if required by law. *Id.*

151. *Id.* Specifically, discovery and disclosure must be made prior to:

- (a) the commencement of a federal, state or local agency inspection or investigation, or the issuance by such agency of an information request to the regulated entity;
- (b) notice of a citizen suit;
- (c) the filing of a complaint by a third party;
- (d) the reporting of the violation to EPA (or other government agency) by a "whistleblower" employee, rather than by one authorized to speak on behalf of the regulated entity; or
- (e) imminent discovery of the violation by a regulatory agency.

Id.

152. *Id.* If the violation cannot be corrected within 60 days, the entity must so notify EPA within 60 days, and EPA may require the entity to enter into a "publicly available written agreement, administrative consent order or judicial consent decree." *Id.*

153. *Id.*

154. *Id.* at 66,712.

155. *Id.*

156. *Id.* "Cooperation includes, at a minimum, providing all requested documents and access to employees and assistance in investigating the violation, any noncompliance problems related to the disclosure, and any environmental consequences related to the violations." *Id.*

157. *Id.* at 66,711.

reduction applies only to the gravity element of the penalty.¹⁵⁸ EPA specifically reserves discretion to recover the economic benefit gained from the violation.¹⁵⁹ If the regulated entity complies with all nine conditions, then the gravity component of the penalty is eliminated.¹⁶⁰ If the discovery and disclosure satisfy the conditions set forth in the Self-Policing Policy Statement, but was not discovered pursuant to an environmental audit or the entity's due diligence, the entity is eligible for mitigation of seventy-five percent of the penalty's gravity component.¹⁶¹ This mitigation incentive is intended to "encourage companies to come forward and work with the Agency to resolve environmental problems and begin to develop an effective compliance management program."¹⁶²

Compliance with these nine conditions may also protect an entity from criminal prosecution.¹⁶³ Eligibility for this incentive is conditioned upon two additional criteria. The violation cannot involve "a prevalent management philosophy or practice that concealed or condoned environmental violations."¹⁶⁴ The incentive is also unavailable if high-level corporate officials or managers were consciously involved in or willfully blind to the violation.¹⁶⁵ This incentive does not apply to criminal acts of individual employees or managers.¹⁶⁶

As a final incentive, EPA states that it "will not request or use an environmental audit report to initiate a civil or criminal investigation of the

158. *Id.* To ensure that entities do not gain a competitive advantage through noncompliance, EPA has retained its authority to collect the economic benefit component of the penalty. *Id.* at 66,712. The gravity component is the amount necessary to "ensure that the violator is economically worse off than if it had obeyed the law." Environmental Protection Agency, Policy on Civil Penalties, 17 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 35,083, 35,083 (1984). The economic benefit component is the amount necessary to "remove any significant economic benefits resulting from failure to comply with the law." *Id.*

159. 60 *Fed. Reg.* 66,712.

160. *Id.* at 66,711.

161. *Id.*

162. *Id.* at 66,707.

163. *Id.* at 66,711. Even where the entity does not meet all nine of the conditions, "EPA may decline to recommend prosecution of a company or individual for many other reasons under Agency enforcement policies." *Id.* at 66,707. By way of example, the Self-Policing Policy Statement suggests that, notwithstanding failure to satisfy all nine conditions, prosecution may not be appropriate "where there is no significant harm or culpability and the individual or corporate defendant has cooperated fully." *Id.*

164. *Id.* at 66,711.

165. *Id.*

166. *Id.*

entity."¹⁶⁷ EPA did not, however, incorporate a privilege for voluntary compliance audits into the Interim Policy Statement.¹⁶⁸ Thus, if EPA believes that a violation has been committed, the Agency "may seek any information relevant to identifying violations or determining liability or extent of harm."¹⁶⁹ Such relevant information could, presumably, include environmental audit reports.

It is less than clear that these incentives will "encourag[e] regulated entities to voluntarily discover, disclose, correct and prevent violations of federal environmental requirements."¹⁷⁰ By setting forth EPA policy with greater precision, the Self-Policing Policy Statement has provided greater certainty as to EPA's enforcement response in certain circumstances.¹⁷¹ However, EPA retains broad discretion to request environmental audit reports after a violation is suspected to exist.¹⁷² Thus, even though EPA may not use audit results to initiate investigations, entities performing audits must note that the Agency might use audit results to subsequently document noncompliance.¹⁷³ If requested audit results disclose violations

167. *Id.* By way of example EPA states that it will not request audit reports in routine inspections. *Id.* An environmental audit report is defined in the Interim Policy Statement as "the analysis, conclusions, and recommendations resulting from an environmental audit, but does not include data obtained in, or testimonial evidence concerning, the environmental audit." *Id.*

168. *See id.* EPA justified this decision by noting that "a review of the criminal docket did not reveal a single criminal prosecution for violations discovered as a result of an audit self-disclosed to the government." *Id.* at 66,708. EPA offered no suggestion, however, that civil penalties have not resulted in the past from voluntarily disclosed audit results. Although stating that the Agency has not deviated from its 1986 Audit Policy, EPA also offered no evidence about how often non-disclosed audits were the basis of civil and criminal enforcement actions. *Id.*

169. *Id.* at 66,711.

170. *Id.* at 66,710.

171. This is particularly true with respect to the penalty reduction and criminal referral incentives, where regulated entities are provided with specific criteria to guide conduct. *See id.* at 66,711-12.

172. *See* Erickson & Mathews, *supra* note 75, at 509-10. Erickson and Mathews, reviewing the interim policy statement which the Self-Policing Policy Statement finalized, argue that:

EPA has attempted to appease industry groups by creating incentives for voluntary self-evaluations to discover, disclose, and correct violations. Whether this Interim Policy will encourage those companies sitting on the fence to conduct voluntary self-audits is doubtful since the EPA has retained the discretion to seek information gathered during the audit and to use such information against the entity who voluntarily conducted the audit.

Id.

173. *See* Paul J. Curran & Gregory J. Wallace, *The New EPA 'Interim Policy,' Which is Meant to Encourage Companies to Report Violations, May Have the Opposite Effect*, NAT'L L.J., July 31, 1995, at B4 (noting that the interim policy statement, upon which the Self-Policing Policy Statement is based, "does not rule out use of voluntary audit reports in civil and criminal proceedings"). *See also* Erickson & Mathews, *supra* note 75, at 512 (noting that, even with EPA assurances that audit results will not be used to initiate investigations, "the possibility that the audit report will be used as an enforcement 'road-map' still exists").

not previously suspected or investigated by EPA, it is unclear whether the agency will use these audit results to enforce the previously uninvestigated violations. Finally, the Self-Policing Policy Statement is intended as internal guidance only and "is not intended for use in pleading, at hearing or at trial".¹⁷⁴ Thus, the degree to which entities can rely on the Self-Policing Policy Statement is questionable.¹⁷⁵

Not only is there continuing uncertainty as to agency use of environmental audit reports, but the Self-Policing Policy Statement does nothing to alleviate concerns that audit results will be used against an entity in citizen suits or private litigation.¹⁷⁶ Entities seeking to take advantage of the incentives contained in the Self-Policing Policy Statement may actually increase the likelihood that audit results will be used against them in citizen suits or private litigation. To qualify for penalty reduction and protection from criminal prosecution, the entity must provide to EPA "such information as is necessary and requested by EPA to determine applicability of [the] policy."¹⁷⁷ To show that the violation was discovered through an environmental audit¹⁷⁸ EPA would presumably require submission of a copy of the audit report. Under the Freedom of Information Act,¹⁷⁹ these audit reports may become publicly accessible upon submission to the agency.¹⁸⁰ Thus, under the Self-Policing Policy

174. 60 Fed. Reg. 66,712. Specifically, the Self-Policing Policy Statement declares that: This policy sets forth factors for consideration that will guide the Agency in the exercise of its prosecutorial discretion. It states the Agency's views as to the proper allocation of its enforcement resources. The policy is not final agency action, and is intended as guidance. It does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties.

Id.

175. See *Interim Audit Policy Rapped by Group; Legislation Said Necessary for Privilege*, 26 Env't Rep. (BNA) 558, 558 (July 14, 1995) (noting similar criticisms of the interim policy statement upon which the Self-Policing Policy Statement is based).

176. See *Audit Legislation Gains in States, But Some Predict Slowdown in Future*, 26 Env't Rep. (BNA) 882 (Sept. 1, 1995) (Jean McCreary, vice-president of the Environmental Auditing Roundtable, predicting that the industry push for audit privileges will continue because the interim policy statement, upon which the Self-Policing Policy Statement is based, did not affect the ability of third parties, such as toxic tort litigants, to gain access to audit reports).

177. 60 Fed. Reg. 66,712.

178. *Id.* at 66,711.

179. 5 U.S.C. § 552 (1994).

180. See 60 Fed. Reg. 66,709 ("In general, the Freedom of Information Act will govern the Agency's release of disclosures made pursuant to this policy."). "EPA will, independently of FOIA, make publicly available any compliance agreements reached under the policy . . . as well as descriptions of due diligence programs submitted under . . . the [p]olicy." *Id.* As James O'Reilly notes: "The plaintiff's lawyers who are understaffed will look for [an audit report] to deal with it as the preeminent road map to facilitate his or her desire to get a large settlement. That civil tort issue is a separate use of the document apart from deciding to pursue [enforcement]." *Auditing Public*

Statement, EPA could become a clearinghouse for voluntary environmental audit reports.¹⁸¹

The EPA Self-Policing Policy Statement also creates uncertainties because it is not binding on the states. This uncertainty is of greater magnitude in states which have not codified a privilege for audit results. Entities in these states are actually discouraged from seeking leniency under the Self-Policing Policy Statement.¹⁸² Unless the state treats audit results disclosed to EPA as privileged, the state is free to use such disclosed audit results in civil or criminal enforcement against the entity.¹⁸³ Additionally, even in states where an audit privilege has been codified, voluntary disclosure to EPA may constitute a waiver of the privilege.¹⁸⁴ Given the continuing potential adverse use of audit results, it is unlikely that EPA's Self-Policing Policy Statement will encourage entities to voluntarily undertake environmental compliance auditing.

3. United States Department of Justice

The United States Department of Justice has also issued guidance on voluntary environmental compliance auditing.¹⁸⁵ In the DOJ Guidance on prosecutorial discretion, issued in 1991, DOJ declared its policy to "encourage self-auditing, self-policing and voluntary disclosure of environmental violations by the regulated community."¹⁸⁶ To promote these activities, prosecutors are invited to consider voluntary auditing and

Meeting, Day One, Morning Session, *supra* note 34, at 142 (testimony of James O'Reilly).

181. See *Citizen Suits Against Companies Unlikely if They Correct Violations*, *Official Says*, 25 *Env't Rep.* (BNA) 2530 (Apr. 28, 1995) (noting that some commentators on the interim policy statement argued that "individuals or environmental groups could obtain audit information from EPA through a Freedom of Information Act request and use such data as the basis for a citizen suit"). Proponents of EPA's policy contend that "[c]itizen groups are not going to put their resources into something that's already being corrected." *Id.* (quoting Frederic Hansen, EPA deputy administrator). However, citizen groups assert that audits submitted under the policy should be available under the Freedom of Information Act. In comments submitted to EPA, Public Citizen stated that "[a]ll audit information submitted to EPA under the policy should be publicly available under the Freedom of Information Act Without public access to audit information, the public and emergency response personnel will be kept in the dark about local pollution concerns." *States, Industry, Environmental Groups Call for Changes in Interim Policy*, 26 *Env't Rep.* (BNA) 689, 690 (Aug. 11, 1995).

182. Curran & Wallace, *supra* note 173, at B4.

183. Even if the state recognizes a privilege for voluntary environmental audit results, the state could probably use the disclosure itself as a basis for civil or criminal enforcement.

184. See *infra* notes 228, 248 for a discussion of waiver of statutory audit privileges.

185. DOJ GUIDANCE, *supra* note 125. See generally Hunt & Wilkins, *supra* note 29, at 396-400; Thomas L. Weisenbeck & Rita Elena M. Casavechia, *Guidelines for Prosecution of Environmental Violations: The Tension Between Self-Reporting and Self-Auditing*, 22 *Env't Rep.* (BNA) 2481 (Mar. 6, 1992) (analyzing the DOJ Guidance).

186. DOJ GUIDANCE, *supra* note 125, at 1.

disclosure of noncompliance "as mitigating factors in the Department's exercise of criminal environmental enforcement discretion."¹⁸⁷

Specifically, in the instance of an otherwise prosecutable case, the DOJ Guidance recommends consideration of three major factors in determining whether and how to prosecute.¹⁸⁸ First, prosecutors are encouraged to consider voluntary and timely disclosure of noncompliance as a mitigating factor.¹⁸⁹ Prosecutors are also invited to consider the "degree and timeliness of cooperation" with federal investigators.¹⁹⁰ Finally, the existence of preventative measures and compliance assurance programs may be considered as mitigating factors.¹⁹¹

187. *Id.*

188. *Id.* at 2. In addition to the three major mitigating factors, the DOJ Guidance states that the pervasiveness of noncompliance, the existence of an effective disciplinary system to punish employees who violate compliance standards, and subsequent compliance efforts may be relevant factors in the prosecutorial calculus. *Id.* at 5-6.

189. *Id.* at 3. The DOJ Guidance states that:

Consideration should be given to whether the person came forward promptly after discovering the noncompliance, and to the quantity and quality of information provided. Particular consideration should be given to whether the disclosure substantially aided the government's investigatory process, and whether it occurred before a law enforcement or regulatory authority . . . had already obtained knowledge regarding noncompliance.

Id.

190. *Id.*

191. *Id.* 4-5. The DOJ Guidance states that:

The attorney for the Department should consider the existence and scope of any regularized, intensive, and comprehensive environmental compliance program; such a program may include an environmental compliance or management audit. Particular consideration should be given to whether the compliance or audit program includes sufficient measures to identify and prevent future noncompliance, and whether the program was adopted in good faith in a timely manner.

Id. at 4. Although the DOJ Guidance recognizes that "[c]ompliance programs may vary," the following factors are considered in evaluating compliance programs:

- 1) "[S]trong institutional policy to comply with all environmental requirements";
- 2) Existence of "safeguards beyond those required by existing law";
- 3) Existence of "regular procedures, including internal or external compliance and management audits, to evaluate, detect, prevent and remedy circumstances like those that led to the noncompliance";
- 4) Existence of "procedures and safeguards to ensure the integrity of any audit conducted";
- 5) Evaluation of "all sources of pollution (*i.e.*, all media), including the possibility of cross-media transfers of pollutants";
- 6) Timely implementation of auditors recommendations;
- 7) Adequate commitment of resources "to the auditing program and to implementing its recommendations"; and
- 8) Whether "environmental compliance [was] a standard by which . . . performance was judged."

Id. at 4-5.

Although the DOJ Guidance provides some incentive for regulated entities to implement auditing programs, the uncertainty of ultimate mitigation may counsel against voluntary auditing and disclosure of noncompliance. While the DOJ Guidance encourages regulated entities to undertake voluntary compliance audits and voluntarily disclose discovered violations, no assurance is given that criminal enforcement will not be forthcoming.¹⁹² Indeed, by disclosing violations and audit results, criminal conviction may be assured.¹⁹³ In addition, because the DOJ Guidance is not binding on individual prosecutors, regulated entities have no certainty what weight, if any, an auditing program may receive.¹⁹⁴

The DOJ Guidance is also inconsistent with the common-law privileges an entity may wish to invoke to protect audit results in potential third party and enforcement litigation.¹⁹⁵ To qualify for mitigation under the DOJ Guidance, the entity must disclose noncompliance and cooperate with DOJ's investigation.¹⁹⁶ If noncompliance is discovered during a compliance audit, the required cooperation could include disclosure of the audit results. However, such disclosure will likely waive any privilege the audit results may have acquired under the common law.¹⁹⁷

192. Hunt & Wilkins, *supra* note 29, at 399-400.

193. An environmental audit report could assure conviction in two ways. First, the report could be used as evidence of noncompliance with environmental laws. Second, the report could be used to impute knowledge on corporate officers. See Levin et al., *supra* note 75, at 1610 (noting that "because audits tend to document 'knowledge' of facts constituting violations on the part of company officials, they can form a *per se* basis for criminal prosecutions"). For a good discussion of the ways that environmental audit reports could be used to establish the requisite knowledge in criminal environmental enforcement actions, see Robert W. Darnell, Note, *Environmental Criminal Enforcement and Corporate Environmental Auditing: Time for a Compromise?*, 31 AM. CRIM. L. REV. 123, 129 n.24 (1993).

194. Hunt & Wilkins, *supra* note 29, at 400. As a cautionary note the DOJ Guidance states: The decision to prosecute "generally rests entirely in [the prosecutor's] discretion." This discretion is especially firmly held by the criminal prosecutor. The criteria set forth . . . are intended only as internal guidance to Department of Justice attorneys. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States . . . DOJ GUIDANCE, *supra* note 125, at 14-15 (citations omitted).

195. Hunt & Wilkins, *supra* note 29, at 399 (noting that "the DOJ Guidance, with its 'disclosure' and 'normal course of business' prerequisites for obtaining prosecutorial lenience, forces companies to strip themselves of other legal protections").

196. DOJ GUIDANCE, *supra* note 125, at 2-3.

197. Hunt & Wilkins, *supra* note 29, at 398. See *supra* Part I.A for a discussion of the common-law privileges used to protect environmental audit results. As Hunt and Wilkins note: According to the Guidance, DOJ will treat a company that fails to disclose the results of its audit as uncooperative, and such a company will be ineligible for lenient prosecutorial treatment. Yet disclosure may cost the company the protection of traditional privileges. This combination of factors discourages the company from performing an audit in the first place.

Both EPA and DOJ policies intend to promote effective voluntary compliance auditing by the regulated community. However, neither is likely to achieve this objective. The unpredictability as to whether and how audit results will be used in future enforcement actions, combined with industry perceptions that the agencies routinely request and use audit reports in enforcement actions, instead encourage the regulated community either to refrain from formal auditing or to couch the results of environmental audits in vague terms.¹⁹⁸ Further, neither of these administrative policies offer any protection against disclosure of audit results in private litigation. Hence, the regulated community is well-advised to look beyond the agencies for appropriate protection of audit results.

II. LEGISLATIVE RESPONSES TO ENVIRONMENTAL AUDITING

Because of the inadequacies of the judicial and agency responses to voluntary environmental compliance auditing, the regulated community has begun to turn to the federal and state legislatures for recognition of an audit privilege. Fourteen state legislatures, led by Oregon, have recently enacted statutory privileges to protect results of voluntary environmental audits.¹⁹⁹ Similar legislation has been introduced in numerous state

Hunt & Wilkins, *supra* note 29, at 398 (footnote omitted). For example, both the attorney-client and work product privileges are waived if the formally privileged documents are disclosed. *See supra* notes 81, 97 and accompanying text. Under the common-law critical self-analysis privilege, documents must be prepared with the intention that they will be held confidential, and must in fact be kept confidential. *See, e.g.,* Reichhold Chems., Inc. v. Textron, Inc., 157 F.R.D. 522, 527 (N.D. Fla. 1994) ("[N]o document should be privileged unless it was prepared with the expectation that it would be [kept] confidential, and it has in fact been kept confidential.") (citations omitted). Disclosed documents may also lose protection under the state statutory audit privileges. *See infra* notes 228, 248 and accompanying text.

198. *See supra* notes 40, 85-86 and accompanying text. *See also* Hunt & Wilkins, *supra* note 29, at 401 (arguing that "[i]nstitutional privileges and governmental assurances provide only a patchwork of protections against disclosure and adverse use of results from audit reports. The inadequacy of these existing protections continues to counteract the positive incentives for environmental auditing created by increased enforcement.").

199. *See* 1995 Ark. Acts 350 (to be codified at ARK. CODE ANN. §§ 8-1-301 to 312); COLO. REV. STAT. §§ 13-90-107, 13-25-126.5, 25-1-114.5 (Supp. 1995); IDAHO CODE §§ 9-340, 9-801 to 811 (Supp. 1995); 415 ILL. COMP. STAT. ANN. § 5/52.2 (Smith-Hurd Supp. 1995); IND. CODE ANN. §§ 13-10-2-1 to 12 (Burns Supp. 1995); 1995 Kan. Sess. Laws 204; KY. REV. STAT. ANN. § 224.01-040 (Michie/Bobbs-Merrill 1995); 1995 Minn. Sess. Law Serv. 168 (West); 1995 Miss. Laws 627; OR. REV. STAT. § 468.963 (1993); TEX. REV. CIV. STAT. ANN. art. 4447cc (West Supp. 1996); UTAH CODE ANN. §§ 19-7-103 to 108 (1995); VA. CODE ANN. § 10.1-1198 to 1199 (Michie Supp. 1995); WYO. STAT. §§ 35-11-1105 to 1106 (Supp. 1995).

legislatures and in both houses of Congress.²⁰⁰ The policy underlying the statutory audit privileges is that environmental quality can be enhanced through self-policing and that increased and more effective self-policing will occur if the disincentives and impediments to voluntary compliance auditing are eliminated.²⁰¹

Early attempts to legislate audit privileges were unsuccessful.²⁰² In 1989, the Arizona Legislature defeated a bill which would have recognized a limited privilege for voluntary environmental audit reports.²⁰³ A similar bill was passed by the Colorado General Assembly in 1990, but was tabled indefinitely under threat of veto by the Governor.²⁰⁴ EPA has pressured the states to refrain from enacting privileges to protect environmental audit

200. See, e.g., H.R. 1047, 104th Cong., 1st Sess. (introduced Feb. 24, 1995); S. 582, 104th Cong., 1st Sess. (introduced Mar. 21, 1995); Ala. H.B. 735, 1995 Reg. Sess. (passed House July 11, 1995); Ariz. S.B. 1290, 42d Legis., 1st Reg. Sess. (vetoed Apr. 17, 1995); Fla. S.B. 944, 1995 Reg. Sess. (introduced Mar. 7, 1995); Ga. S.B. 244, 143d Gen. Ass., 1995-96 Reg. Sess. (passed Senate Feb. 13, 1995); Haw. S.B. 1304, 18th Legis. (introduced Jan. 26, 1995); Iowa H.B. 420, 76th Gen. Ass., 1995 Reg. Sess. (passed House Mar. 22, 1995); La. H.B. 2085, 1995 Reg. Sess. (passed House May 17, 1995); Md. S.B. 685, 1995 Legis. Sess. (withdrawn from consideration Mar. 20, 1995); Mass. H.B. 3593, 179th Gen. Ct., 1st Ann. Sess. (introduced Feb. 16, 1995); Mo. H.B. 338, 88th Gen. Ass. (introduced Jan. 26, 1995); Mont. H.B. 412, 54th Legis. Sess. (referred to conference committee Mar. 31, 1995); Neb. L.B. 731, 94th Legis., 1st Sess. (introduced Jan. 19, 1995); N.H. H.B. 275, 1995 Reg. Sess. (introduced Jan. 5, 1995); N.J. S.B. 1797, 206th Legis., 2d Ann. Sess. (passed Senate June 22, 1995); Ohio S.B. 138, 121st Gen. Ass., 1995-96 Reg. Sess. (introduced Apr. 19, 1995); Okla. H.B. 1388, 45th Legis., 1st Reg. Sess. (passed House Mar. 14, 1995); R.I. S.B. 853, 1995 Gen. Ass., Jan. Sess. (introduced Feb. 15, 1995); S.C. H.B. 3624, 1995-96 Statewide Sess. (passed House May 10, 1995); Tenn. H.B. 1745, 99th Gen. Ass., 1st Reg. Sess. (continued to 1996 Session June 7, 1995); W.Va. S.B. 362, 1995 Reg. Sess. (passed Senate Mar. 2, 1995); Wisc. S.B. 185, 92d Legis. Sess., 1995-96 Reg. Sess. (introduced May 10, 1995).

201. See, e.g., 1995 Ark. Acts 350 (to be codified at ARK. CODE ANN. § 8-1-301); COLO. REV. STAT. § 13-25-126.5(1); IDAHO CODE § 9-802; 1995 Miss. Laws 627, § 1; TEX. REV. CIV. STAT. ANN. art. 4447cc, § 2. For example, the Colorado General Assembly declared that:

[P]rotection of the environment is enhanced by the public's voluntary compliance with environmental laws and . . . the public will benefit from incentives to identify and remedy environmental compliance issues. It is further declared that limited expansion of the protection against disclosure will encourage such voluntary compliance and improve environmental quality and that the voluntary provisions of this act will not inhibit the exercise of the regulatory authority by those entrusted with protecting our environment.

COLO. REV. STAT. § 13-25-126.5(1). The Texas statute simply states that: "The purpose of this Act is to encourage voluntary compliance with environmental and occupational health and safety laws." TEX. REV. CIV. STAT. ANN. art. 4447cc, § 2.

202. Hunt & Wilkins, *supra* note 29, at 419.

203. Arizona S.B. 1446, 39th Leg., 1st Reg. Sess. (introduced Feb. 7, 1989) (defeated in legislature).

204. Colorado H.B. 90-1204, 57th Gen. Assembly, 2d Reg. Sess. (as amended on second reading, Feb. 23, 1990) (passed by General Assembly and tabled indefinitely). See generally Hunt & Wilkins, *supra* note 29, at 419-23 (discussing the Colorado legislation).

reports from disclosure.²⁰⁵ Fourteen states have, nonetheless, defied EPA and enacted statutory audit privileges.

Oregon was the first state to codify an environmental audit privilege.²⁰⁶ In 1993, the Oregon Legislature enacted S.B. 912, establishing a qualified privilege for the results of voluntary environmental compliance audits.²⁰⁷ The statute was enacted in connection with a legislative overhaul of the state's criminal environmental enforcement scheme.²⁰⁸ The legislation enjoyed broad support, representing a compromise between the regulated community and parties favoring strict criminal enforcement of environmental regulations.²⁰⁹ The comprehensive

205. See *States With Audit Privilege, Immunity Laws Could Lose Delegated Authority*, Browner Says, 25 Env't Rep. (BNA) 2378 (Mar. 31, 1995) (noting comments of EPA Administrator Carol Browner that states with audit privilege and immunity laws could lose authority over delegated environmental programs). In early 1995, EPA released an interim policy statement which stated that:

EPA will scrutinize enforcement more closely in states with audit privilege and/or penalty immunity laws and may find it necessary to increase federal enforcement where environmental self-evaluation privileges or penalty immunities prevent a state from obtaining:

1. information needed to establish criminal liability;
 2. facts needed to establish the nature and extent of a violation;
 3. appropriate penalties for imminent and substantial endangerment or serious harm to human health or the environment, or from recovering economic benefit;
 4. appropriate sanctions or penalties for criminal conduct and repeat violations;
- or
5. prompt correction of violations, and expeditious remediation of those that involve imminent and substantial endangerment to human health or the environment.

Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy Statement, 60 Fed. Reg. 16,875, 16,878 (1995). In its Self-Policing Policy Statement, EPA backed away from this threat, stating that:

As always, states are encouraged to experiment with different approaches that do not jeopardize the fundamental national interest in assuring that violations of federal law do not threaten the public health or the environment, or make it profitable not to comply. The Agency remains opposed to state legislation that does not include these basic protections, and reserves its right to bring independent action against regulated entities for violations of federal law that threaten human health or the environment, reflect criminal conduct or repeated noncompliance, or allow one company to make a substantial profit at the expense of its law-abiding competitors. Where a state has obtained appropriate sanctions needed to deter such misconduct, there is no need for EPA action.

Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66,706, 66,710 (1995).

206. Lindley & Hodson, *supra* note 82, at 1222.

207. OR. REV. STAT. § 468.963.

208. See James M. Whitty & Tom Lindley, *Oregon's Environmental Audit Privilege: Traveling the Path to Consensus*, PREVENTATIVE L. REP., Winter 1994, at 23, 23.

209. See Lindley & Hodson, *supra* note 82, at 1222 (noting that "SB 912 had the support of the Oregon Department of Environmental Quality, the Oregon Department of Justice, the Oregon Association of District Attorneys, the Oregon State Highway Patrol, Associated Oregon Industries (AOI), and others").

statute was intended to "change industry incentives by using both a carrot and a stick."²¹⁰

Most other state statutory environmental audit privileges are modelled on the Oregon statute.²¹¹ The Colorado General Assembly has gone one step beyond the audit privilege. The Colorado statute extends the incentives to compliance auditing by offering limited immunity for instances of noncompliance which are voluntarily disclosed.²¹² Several other states have followed Colorado's lead.²¹³ The Minnesota Legislature has deviated from the Oregon and Colorado models, establishing a comprehensive environmental disclosure pilot program.²¹⁴ This section first analyzes the Oregon statute, noting significant differences in other audit privilege statutes.²¹⁵ Thereafter, the legislative regime of the Colorado audit privilege and penalty immunity statute is examined.²¹⁶ Finally, this section concludes with an examination of the Minnesota disclosure program.²¹⁷

A. Oregon Statutory Audit Privilege

The stated purposes of the Oregon statutory audit privilege are two-fold. First, the privilege is intended to encourage regulated entities to "conduct voluntary internal environmental audits of their compliance programs and management systems."²¹⁸ Second, the privilege aims to encourage regulated entities to "assess and improve compliance" with environmental laws and regulations.²¹⁹ To accomplish these objectives, the statute provides that "an environmental audit privilege is recognized to protect the confidentiality of communications relating to . . . internal environmental audits."²²⁰

The Oregon statutory audit privilege is a qualified evidentiary privilege, limited in application to the admissibility of environmental audit

210. *Id.*

211. *See infra* Appendix for a summary of currently enacted state statutory audit privileges.

212. COLO. REV. STAT. ANN. § 25-1-114.5.

213. *See* 1990 IDAHO CODE § 9-809; 1995 Kansas Sess. Laws 204, §§ 7-8; 1995 Miss. Laws 627 §§ 5(7)(g), 6(g)(vii), 9(3)(g); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 10; VA. CODE ANN. § 10.1-1199; WYO. STAT. § 35-11-1106.

214. *See* 1995 Minn. Sess. Law Serv. 168.

215. *See infra* Part II.A.

216. *See infra* Part II.B.

217. *See infra* Part II.C.

218. OR. REV. STAT. § 468.963(1).

219. *Id.*

220. *Id.*

reports in civil, criminal, and administrative proceedings.²²¹ To qualify for the privilege, the document for which protection is sought must fall within the statutory definition of an environmental audit report.²²² To be considered an environmental audit report, the document must be labeled as such and have been prepared in connection with a voluntary environmental audit.²²³ Audit reports may have three components: the report of the auditor, memoranda and documents analyzing the audit report and implementation issues, and an implementation plan.²²⁴

The privilege, though generally protective of audit results, is not absolute. A court may, on the motion of a party, compel disclosure of audit results.²²⁵ After an *in camera* review, the court will compel disclosure if it determines that the privilege is inapplicable²²⁶ or that the

221. *Id.* § 468.963(2). Idaho's statute does not technically establish a privilege for environmental audit reports. Instead, Idaho law states that: "Notwithstanding any other provision of law to the contrary, no state of Idaho public official, employee or environmental agency shall require to be disclosed an environmental audit report prepared by or on behalf of any person, except from the state of Idaho or any political subdivision." IDAHO CODE § 9-804. The intricacies of Idaho law, such as whether judges are considered public officials, are beyond the scope of this note.

222. *See* OR. REV. STAT. § 468.963(2).

223. *Id.* § 468.963(6)(b). Specifically, an environmental audit report is:

[A] set of documents, each labeled "Environmental Audit Report: Privileged Document" and prepared as a result of an environmental audit. An Environmental Audit Report may include field notes and records of observations, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, computer-generated or electronically recorded information, maps, charts, graphs and surveys, provided such supporting information is collected or developed for the primary purpose and in the course of an environmental audit.

Id. The labeling requirement is intended to deter abuse of the privilege by preventing retroactive privilege claims. Lindley & Hodson, *supra* note 82, at 1222. Identifying audit reports as privileged at the time the documents are generated is also beneficial to regulated entities in that prosecutors executing search warrants will be aware of the privilege claim prior to examining the documents. An environmental audit is defined as:

[A] voluntary, internal and comprehensive evaluation of one or more facilities or an activity at one or more facilities regulated under ORS chapter 465, 466, 468, 468A, 468B, 761 or 767, or the federal, regional or local counterpart or extension of such statutes, or of management systems related to such facility or activity, that is designed to identify and prevent noncompliance and to improve compliance with such statutes.

OR. REV. STAT. § 468.963(6)(b).

224. OR. REV. STAT. § 468.963(6)(b)(A)-(C). The Indiana, Kentucky, and Wyoming audit privileges state that the audit report *must* contain these three components to qualify for the privilege. IND. CODE ANN. § 13-10-3-2(2)(A)-(C); KY. REV. STAT. ANN. § 224.01-040(1)(B)(1)-(3); WYO. STAT. § 35-11-1105(a)(ii)(A)-(C). The Indiana statute also provides that the report prepared by the auditor should contain the following four elements: "(i) The scope of the audit; (ii) [t]he information gained in the audit; (iii) [c]onclusions and recommendations; and (iv) [e]xhibits and appendices." IND. CODE ANN. § 13-10-3-2(2)(A)(i)-(iv).

225. OR. REV. STAT. § 468.963(3)(b)-(c).

226. *Id.*

entity is asserting the privilege for a fraudulent purpose.²²⁷ The privilege does not apply if it has been waived either expressly or by implication.²²⁸ Disclosure may also be compelled if the report contains evidence of noncompliance with environmental regulations and "appropriate efforts to achieve compliance . . . were not promptly initiated and pursued with reasonable diligence."²²⁹ Finally, disclosure of audit results containing evidence relevant to a criminal environmental violation may be compelled where a prosecutor has a compelling need for the information and no substantial equivalent is reasonably available to the prosecutor.²³⁰

The scope of the audit privilege is further limited in that only the results of voluntary audits are immune from discovery.²³¹ The privilege does not extend to documents, data, or other information required to be maintained or reported.²³² The privilege also does not protect facts underlying audit reports. Information obtained through sampling or monitoring by regulatory agencies, for example, remains admissible in civil, criminal, or administrative proceedings.²³³ Similarly, "[i]nformation obtained from a source independent of the environmental audit" does not fall within the ambit of the privilege.²³⁴

227. *Id.*

228. *Id.* § 468.963(3)(a). Whether disclosure to state officials constitutes a waiver of the privilege varies by state. Under Kentucky law, for example, the privilege will be waived as to the whole document if the party asserting the privilege has introduced any part of the document into evidence. KY. REV. STAT. § 224.01-040(4)(b). Under the Indiana audit privilege, in contrast, a party "may submit an environmental audit report to the department as a confidential document . . . without waiving a privilege to which the party would otherwise be entitled." IND. CODE ANN. § 13-10-3-9(b). Arkansas law goes even further—permitting the entity to disclose audit results to purchasers, customers, lenders, and insurers without waiving the privilege. 1995 Ark. Acts 350 (to be codified at ARK. CODE ANN. § 8-1-304(a)(3)(A)).

229. OR. REV. STAT. § 468.963(3)(b)-(c).

230. *Id.* § 468.963(3)(c)(D). The criminal environmental laws to which the Oregon statute applies are contained at OR. REV. STAT. §§ 468.922-468.956.

231. *Id.* § 468.963(5).

232. *Id.* § 468.963(5)(a). For example, reports required to be filed by generators of hazardous waste do not enjoy protection under the privilege. See Solid Waste Disposal Act, 42 U.S.C. § 6922(a)(6) (1988). Further, the results of a compliance audit mandated as part of an administrative consent decree are not privileged. See Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004, 25,007-08 (1986) (retaining EPA authority to propose the inclusion of compliance audits in consent decrees). The Indiana audit privilege provides that regulatory agencies may not "adopt a rule or a permit condition for the purpose of circumventing the privilege . . . by requiring disclosure of a report of a voluntarily conducted audit." IND. CODE ANN. § 13-10-3-11(b).

233. OR. REV. STAT. § 468.963(5)(b).

234. *Id.* § 468.963(5)(c).

The burden of proving the applicability of the audit privilege rests on the party asserting the privilege.²³⁵ If the audit report shows evidence of noncompliance with environmental regulations, the party asserting the privilege also carries the burden of proving that "appropriate efforts to achieve compliance were promptly initiated and pursued with reasonable diligence."²³⁶ The burden shifts to the party seeking disclosure, however, to prove that the privilege is asserted for a fraudulent purpose.²³⁷ Further, a prosecutor seeking disclosure of audit results in a criminal proceeding has the burden of proving that the audit report contains evidence of criminal environmental violations, that a compelling need for the information exists, and that a substantial equivalent is not reasonably available.²³⁸

A prosecutor having probable cause to believe that a criminal environmental violation has been committed may obtain audit reports pursuant to a search warrant, a criminal subpoena, or discovery.²³⁹ After receiving the audit report, the prosecutor must immediately place the report under seal.²⁴⁰ Within thirty days after the prosecutor obtains the report, the defendant may petition an appropriate court for an *in camera* review to determine whether the report qualifies for the privilege.²⁴¹ Failure to petition for review constitutes a waiver of the privilege.²⁴² If an *in camera* hearing is requested, the prosecutor may remove the seal and review the contents of the audit report for the sole purpose of preparing for the hearing.²⁴³ However, unless and until the court rules that the audit report may be disclosed, the contents of the report may not be used in

235. *Id.* § 468.963(3)(d). The allocation of burdens varies by state. Under some audit privilege statutes the party asserting the privilege has the burden of making a prima facie case for the applicability of the privilege. Thereafter, the burden shifts to the party seeking disclosure to prove that the privilege is not applicable. *See, e.g.*, VA. CODE ANN. § 10.1-1198(C).

236. OR. REV. STAT. § 468.963(3)(d).

237. *Id.*

238. *Id.*

239. *Id.* § 468.963(4)(a). The prosecutor's belief that an environmental crime has been committed must be based on information obtained from a source independent of the environmental audit report. *Id.*

240. *Id.* After placing the document under seal, the prosecutor may not review or disclose the contents of the report. *Id.*

241. *Id.* § 468.963(4)(b).

242. *Id.*

243. *Id.* § 468.963(4)(c).

agency investigations or enforcement proceedings, and must be kept confidential.²⁴⁴

B. Colorado Statutory Audit Privilege and Penalty Immunity

Like the Oregon audit privilege, the Colorado audit privilege statute establishes a qualified privilege to protect results of voluntary environmental compliance audits.²⁴⁵ Unlike other audit privilege statutes, however, the Colorado statute also provides immunity from administrative, civil, and criminal penalties to entities voluntarily disclosing noncompliance discovered in the course of an environmental audit.²⁴⁶

Under the Colorado audit privilege, reports generated through voluntary environmental compliance auditing are generally privileged.²⁴⁷ The privilege is, however, qualified and several exceptions provide for disclosure of audit results which would otherwise be privileged. Audit reports are not protected from disclosure if the privilege is waived by the person or entity for whom the report was prepared.²⁴⁸ Disclosure may also

244. *Id.* David Ronald, of the Arizona Attorney General's office, argues that because of this requirement, it would be very difficult to prosecute a criminal enforcement action if audit reports have been reviewed for an *in camera* hearing in which the report is deemed privileged. As Mr. Ronald notes, "the state would have to prosecute its case and demonstrate that none of the evidence obtained subsequent to viewing the information in the environmental audit report was tainted or related to the secret audit report, this burden is virtually impossible to meet." *Auditing Public Meeting*, Day One, Afternoon Session, *supra* note 31, at 33 (testimony of David Ronald). See also Craig N. Johnston, *An Essay on Environmental Audit Privileges: The Right Problem, The Wrong Solution*, 25 ENVTL. L. 335, 341-42 (1995) (discussing problems under the "fruit of the poisonous tree" doctrine).

245. COLO. REV. STAT. § 13-25-126.5(3).

246. *Id.* § 25-1-114.5.

247. *Id.* § 13-25-126.5(3). Environmental audit reports are defined as "any document, including any report, finding, communication, or opinion or any draft of a report, finding, communication, or opinion, related to and prepared as a result of a voluntary self-evaluation that is done in good faith." *Id.* § 13-25-126.5(2)(b). A voluntary self-evaluation is defined as:

[A] self-initiated assessment, audit, or review, not otherwise expressly required by environmental law, that is performed by any person or entity, for itself, either by an employee or employees employed by such person or entity who are assigned the responsibility of performing such assessment, audit, or review or by a consultant engaged by such person or entity expressly and specifically for the purpose of performing such assessment, audit, or review to determine whether such person or entity is in compliance with environmental laws. Once initiated, such voluntary self-evaluation shall be completed within a reasonable period of time. Nothing in this section shall be construed to authorize uninterrupted voluntary self-evaluations.

Id. § 13-25-126.5(2)(e). The Colorado audit privilege also specifies that employees and consultants employed for the purpose of performing voluntary audits "may not be examined as to the voluntary self-evaluation or environmental audit report without the consent of the person or entity" for whom the audit was performed. *Id.* § 13-90-107(1)(j)(I)(A).

248. *Id.* § 13-25-126.5(3)(a).

be obtained if a court or administrative law judge (ALJ) determines, after an *in camera* review, that "compelling circumstances exist that make it necessary to admit the environmental audit report into evidence."²⁴⁹ Disclosure may also be compelled if the report shows evidence of noncompliance and "appropriate efforts to achieve compliance" were not undertaken in a timely manner.²⁵⁰ Further, a court or ALJ may compel disclosure if the privilege is asserted for a fraudulent purpose or if the audit report was developed for the purpose of avoiding disclosure in an imminent enforcement proceeding.²⁵¹ Finally, the privilege will not protect an audit report from disclosure where information contained in the report "demonstrates a clear, present, and impending danger to the public health or the environment in areas outside of the facility property."²⁵²

Like other statutory audit privileges, the Colorado audit privilege applies only to the audit report, and not to underlying facts or documents generated outside the scope of the audit.²⁵³ Documents that are required to be maintained or disclosed under environmental laws and regulations enjoy no privilege.²⁵⁴ Further, information obtained through monitoring or sampling by regulatory agencies, or obtained by a source independent of the audit, is not protected.²⁵⁵ The existence of an audit report is also a discoverable fact.²⁵⁶ Finally, documents prepared before or after the audit, or developed in the course of "regularly conducted business activity or regular practice," are subject to disclosure.²⁵⁷

Under Colorado law, a party may obtain disclosure of audit results by petitioning a court or ALJ for an *in camera* determination as to the applicability of the privilege.²⁵⁸ An *in camera* hearing will be held if the party seeking disclosure shows, based on "independent knowledge, that

249. *Id.* § 13-25-126.5(3)(c).

250. *Id.* § 13-25-126.5(3)(b)(B). An entity may demonstrate that it has taken or is taking appropriate efforts to achieve compliance by "instituting a comprehensive program that establishes a phased schedule of actions to be taken to bring the person or entity into compliance." *Id.* § 13-25-126.5(3)(b)(II).

251. *Id.* § 13-25-126.5(3)(d). Specifically, an audit report will not be privileged if it was "prepared to avoid disclosure of information in an investigative, administrative, or judicial proceeding that was underway, that was imminent, or for which the entity or person had been provided written notification that an investigation into a specific violation had been initiated." *Id.*

252. *Id.* § 13-25-126.5(3)(e). The judge or ALJ determines whether the audit report contains information regarding a clear, present, and impending danger. *Id.*

253. *Id.* § 13-25-126.5(4).

254. *Id.* § 13-25-126.5(4)(a)-(b).

255. *Id.* § 13-25-126.5(4)(c)-(d).

256. *Id.* § 13-25-126.5(8).

257. *Id.* § 13-25-126.5(4)(e)-(g).

258. *Id.* § 13-25-126.5(5)(a).

probable cause to believe that an exception to the self-evaluation privilege . . . is applicable . . . or that the privilege does not apply to the environmental audit report."²⁵⁹ The court or ALJ may permit limited access to the audit documents to allow the party seeking disclosure to prepare for the *in camera* hearing.²⁶⁰ During the hearing, the burden of proving a *prima facie* case as to the applicability of the privilege rests on the party asserting the privilege.²⁶¹ Thereafter, the burden shifts to the party seeking disclosure to prove the inapplicability of the privilege.²⁶²

A unique feature of the Colorado statutory audit privilege is that a "safe-harbor" is created for entities voluntarily disclosing instances of environmental noncompliance.²⁶³ Entities voluntarily disclosing noncompliance are immune from civil and administrative penalties, as well as criminal penalties for negligent acts, in connection with the disclosed noncompliance.²⁶⁴ However, the disclosure must meet the statutory definition of a voluntary disclosure to qualify the entity for immunity.²⁶⁵ To be considered voluntary, the disclosure must meet four criteria.²⁶⁶ Most importantly, appropriate efforts to remedy noncompliance must be undertaken, and compliance must be achieved within two years.²⁶⁷ The disclosure must also arise out of a voluntary self-evaluation and have been voluntarily disclosed promptly after discovery.²⁶⁸ Finally, the entity must cooperate with CDH in its investigation of the disclosed violation.²⁶⁹

Even if these criteria are met, however, immunity is not unlimited. The immunity provisions do not apply, for example, to environmental

259. *Id.*

260. *Id.* A party obtaining limited access to an audit report is prohibited from disclosing information contained in the document. *Id.* Disclosure of such information may result in liability for "damages caused by the divulgence or dissemination of the information that are incurred by the person or entity for which the environmental audit report was prepared." *Id.* § 13-25-126.5(5)(b)(I). Public entities, officials, and employees divulging such information are subject to criminal sanctions, contempt of court, and penalties not exceeding \$10,000. *Id.* § 13-25-126.5(5)(b)(II).

261. *Id.* § 13-25-126.5(7).

262. *Id.*

263. *Id.* § 25-1-114.5.

264. *Id.* § 25-1-114.5(4).

265. *Id.*

266. *Id.* § 25-1-114.5(1)(a)-(d).

267. *Id.* § 25-1-114.5(1)(c). Specifically, the entity must have "initiate[d] the appropriate effort to achieve compliance, pursue[d] compliance with due diligence, and correct[ed] the noncompliance within two years after the completion of the voluntary self-evaluation." *Id.* The time period for achieving compliance may be extended if "it is not practicable to correct the noncompliance within the two-year period." *Id.* § 25-1-114.5(2).

268. *Id.* § 25-1-114.5(1)(a)-(b). Disclosures which are required under permit conditions or upon order of an agency are not considered voluntary. *Id.* § 25-1-114.5(3).

269. *Id.* § 25-1-114.5(1)(d).

"bad actors" with a history of serious environmental noncompliance.²⁷⁰ Further, immunity applies only to civil, criminal, and administrative penalties.²⁷¹ The authority of state agencies to require corrective actions in connection with disclosed noncompliance is not limited by the statute.²⁷²

Voluntary disclosure of noncompliance to the appropriate state agency raises a rebuttable presumption that the disclosure meets the statutory definition of a voluntary disclosure and that the entity is therefore immune from penalties.²⁷³ If a state enforcement agency seeks to impose penalties for the violation, the agency has the burden of rebutting this presumption.²⁷⁴ The agency may rebut the presumption by showing that the disclosure does not meet the statutory definition of a voluntary disclosure.²⁷⁵

C. Minnesota Audit Program

Unlike the Oregon and Colorado audit privilege statutes, the Minnesota Legislature has created a pilot program to encourage environmental auditing.²⁷⁶ To qualify for participation in the program, the entity must meet several criteria. First, the entity must not have had an enforcement action that resulted in a penalty initiated against it within the preceding year.²⁷⁷ Second, the qualifying entity must perform an

270. *Id.* § 25-1-114.5(6). Specifically, immunity does not apply:

[I]f a person or entity has been found by a court or administrative law judge to have committed serious violations that constitute a pattern of continuous or repeated violations of environmental laws, rules, regulations, permit conditions, settlement agreements, or orders on consent and that were due to separate and distinct events giving rise to the violations, within the three-year period prior to the date of the disclosure.

Id. Bad actor status may also be conferred upon an entity if it has entered into "multiple settlement agreements related to substantially the same alleged violations . . . that occurred within the three-year period immediately prior to the date of the voluntary disclosure." *Id.*

271. *Id.* § 25-1-114.5(4). Specifically, the immunity provisions apply to "any administrative and civil penalties associated with the issues disclosed and . . . criminal penalties for negligent acts associated with the issues disclosed." *Id.*

272. *Id.* § 25-1-114.5(7). The statute states that: "Except as specifically provided by this section, this section does not affect any authority the department of public health and environment has to require any action associated with the information disclosed in any voluntary disclosure of an environmental violation." *Id.*

273. *Id.* § 25-1-114.5(4).

274. *Id.* § 25-1-114.5(5).

275. *Id.* The showing required to rebut the presumption that the disclosure is voluntary must be made either to the commission in the Department of Public Health and Environment or to the State Board of Health. *Id.* It is unclear under the statute which party has the burden of proving whether the disclosing entity falls outside the confines of the immunity provisions by virtue of bad actor status.

276. 1995 Minn. Sess. Law Serv. 168, § 8.

277. *Id.* § 10(1).

environmental audit or self-evaluation.²⁷⁸ Third, the entity, depending on its size, must either "examine pollution prevention opportunities," or "prepare a pollution prevention plan and submit progress reports."²⁷⁹

Finally, the regulated entity must submit a report to the commissioner of the pollution control agency within forty-five days after completion of the final written audit findings.²⁸⁰ This report must contain five sections. First, the entity must certify that it has met the conditions for participation in the program.²⁸¹ Second, the entity must disclose all identified environmental violations and briefly describe proposed actions to correct the noncompliance.²⁸² Third, the entity must sign a commitment to correct disclosed violations "as expeditiously as possible under the circumstances."²⁸³ Fourth, if the discovered violations cannot be corrected within ninety days, the entity must submit a performance schedule and justify time periods set forth in the performance schedule.²⁸⁴ Finally, the entity must identify actions that it will take to prevent recurrence of the identified noncompliance.²⁸⁵

If the entity qualifies for and chooses to participate in the pilot program, the entity may take advantage of three incentives: enforcement advantages, use of the "Green Star Emblem," and use of a privilege for audit results.²⁸⁶ The enforcement advantages under the program are two-

278. *Id.* § 10(1)(1). The term "environmental audit" means "a systematic, documented, and objective review by a regulated entity of one or more facility operations and practices related to compliance with one or more environmental requirements and, if deficiencies are found, a plan for corrective action." *Id.* § 9(4). "Self-evaluation" means a systematic, documented, and objective review by a regulated entity of one or more facility operations and practices related to compliance with one or more environmental requirements, based upon an evaluation form prescribed or approved by the commissioner." *Id.* § 9(11).

279. *Id.* §§ 10(1)(2)-(3). The more stringent requirements apply to major facilities. *Id.* § 10(1)(2). A major facility is:

[A]n industrial or municipal wastewater discharge major facility . . . ; a feedlot that is permitted for 1,000 or more animal units; a large quantity hazardous waste generator . . . ; a hazardous waste treatment, storage, or disposal facility that is required to have a permit under the federal Resource Conservation and Recovery Act . . . ; a major stationary air emission source . . . ; an air emission source that emits 50 or more tons per year of any air pollutant . . . ; or an air emission source that emits 75 tons or more per year of all air pollutants . . .

Id. § 9(1)(8).

280. *Id.* §§ 10(1)(4), 10(2). If the entity performs a self-evaluation, the report must be filed within 45 days after completion of the self-evaluation. *Id.* § 10(2).

281. *Id.* § 10(2)(1).

282. *Id.* § 10(2)(2).

283. *Id.* § 10(2)(3).

284. *Id.* § 10(2)(4).

285. *Id.* § 10(2)(5).

286. *Id.* §§ 13-15.

fold. First, enforcement of identified violations will be deferred for at least ninety days after submission of the report.²⁸⁷ Further, if the entity corrects the identified violations in accordance with the approved performance schedule or within ninety days after submission of the report, the state may not impose administrative, civil, or criminal penalties on the entity for the reported violations.²⁸⁸ These enforcement advantages apply only to violations discovered during the audit or self-evaluation, and do not affect the state's authority to bring an enforcement action for violations discovered by the state.²⁸⁹

Participants in the pilot program may also display the Green Star Emblem at the participating facility.²⁹⁰ In addition to participation in the pilot program, entities seeking to display the emblem must meet two conditions.²⁹¹ First, the entity must certify that all discovered violations were corrected in accordance with the performance schedule or within ninety days after submission of the report.²⁹² Additionally, the entity must not have resolved any enforcement actions within the year preceding submission of the report.²⁹³ If the participating entity meets these conditions, it is permitted to display the Green Star Emblem for two years.²⁹⁴

Finally, audit reports prepared in connection with participation in the pilot program are privileged.²⁹⁵ The state is precluded from requesting any audit documents other than the report submitted to the commissioner of the pollution control agency.²⁹⁶ Audit documents prepared in connection with

287. *Id.* § 13(1). If the report contains an acceptable performance schedule, then enforcement is deferred during the term of the performance schedule. *Id.* Standards for the approval of performance schedules are set forth at 1995 Minn. Sess. Law Serv. 168, § 12.

288. *Id.* § 13(2). Several exceptions apply to the penalty waiver provision. The state may, despite participation in the pilot program, bring a criminal enforcement action for knowing violations under MINN. STAT. § 609.671. *Id.* § 13(3)(1). The state may also bring civil or administrative enforcement actions if the violation "caused serious harm to public health or the environment," or if the entity has, within the preceding year, resolved an enforcement action for the same violation. *Id.* § 13(3)(2). Finally, the state's authority to "enjoin an imminent threat to public health or the environment" is not affected by the penalty waiver provision. *Id.* § 13(3)(3).

289. *Id.* § 13(5).

290. *Id.* § 14.

291. *Id.* § 14(1).

292. *Id.* § 14(2).

293. *Id.* § 14(3).

294. *Id.*

295. *Id.* § 15.

296. *Id.* § 15(1). Specifically, the statute provides that:

The state may not request, inspect, or seize a final audit report, draft audit papers, a self-evaluation form, the notes or papers prepared by the auditor or the person conducting the self-evaluation . . . or the internal documents of a regulated entity establishing,

the pilot program are also privileged as to third parties.²⁹⁷ However, the report submitted to the commissioner does not fall within the purview of the privilege.²⁹⁸ Further, the commissioner publishes, on a quarterly basis, the names and locations of participating facilities.²⁹⁹

III. LEGISLATIVE OPTIONS FOR ENCOURAGING ENVIRONMENTAL AUDITING

Legislators seeking to promote environmental quality by encouraging the regulated community to undertake effective self-auditing are confronted with three potential approaches.³⁰⁰ First, legislators may continue to defer on the issue of environmental auditing, allowing the current development of agency and judicial policy to proceed.³⁰¹ Second, legislators may mandate environmental compliance auditing and disclosure of audit results.³⁰² Finally, following the lead of states such as Oregon and Colorado, legislators may craft privileges to protect the results of

coordinating, or responding to the audit or self-evaluation, other than the report required in section 10, subdivision 2, except in accordance with the agency's policy on environmental auditing, as adopted by the agency on January 24, 1995.

Id.

297. *Id.* § 15(2). The statute states that:

After receipt by the commissioner of a report that complies with section 10, subdivision 2, the final audit report, draft audit reports, the self-evaluation form, any notes or papers prepared by the auditor or by the person conducting the self-evaluation in connection with the audit or self-evaluation, and the internal documents of a regulated entity establishing, coordinating, or responding to the audit or self-evaluation covered by the report are privileged as to all persons other than the state provided that the regulated entity is in compliance with its commitments under sections 10 and 12 [relating to correction of violations].

Id.

298. *See id.*

299. *Id.* § 11. If a performance schedule has been submitted, the proposed time period for correcting violations is also reported. *Id.*

300. As Steven Herman, EPA Assistant Administrator for Enforcement and Compliance Assurance, noted in opening remarks at a public meeting on the reevaluation of EPA's audit policy: Today we have numerous options to discuss and consider. Toward one end of the spectrum, we can rewrite our laws and regulate to require auditing. At the other end, we can treat environmental audits as privileged information that cannot be used in enforcement actions. We also may discover that EPA's existing policy actually strikes the right balance of our different goals.

Auditing Public Meeting, Day One, Morning Session, *supra* note 34, at 9 (opening remarks of Steven Herman).

301. Moore et al., *supra* note 31, at 507. As noted in Part I.A, however, the courts have largely deferred to the agencies and legislatures on policy issues concerning environmental auditing. Therefore, power is vested almost exclusively in the agencies. *See supra* notes 115, 121-22 and accompanying text.

302. Moore et al., *supra* note 31, at 507.

voluntary compliance audits.³⁰³ Although each of these approaches has some merit and certain deficiencies, this note argues that enacting carefully crafted statutory audit privileges is the most effective and efficient means of maximizing compliance with environmental regulations through environmental auditing.

As discussed in Part I, current judicial and agency treatment of environmental audit results tends to discourage, rather than promote, effective environmental compliance auditing.³⁰⁴ Entities considering implementation of an environmental auditing program must take note of the possibility that the results of these audits may be used by DOJ or EPA to prove noncompliance in criminal, civil, or administrative enforcement actions.³⁰⁵ Further, although common-law privileges, such as the attorney-client privilege, the work product doctrine, and the critical self-analysis privilege, may provide some protection for audit reports, the application of each of these privileges in the context of environmental auditing is laden with uncertainty.³⁰⁶ In light of the prevalent uncertainties as to the ability to maintain the confidentiality of audit reports, regulated entities either fail to audit or audit ineffectively.³⁰⁷

EPA recently reevaluated and refashioned its policy on environmental auditing.³⁰⁸ However, EPA failed to provide the necessary certainty as to the potential detrimental use of audit results by the Agency in enforcement actions.³⁰⁹ EPA's inability to formulate an effective environmental auditing policy—that is, one which will provide certainty as to the agency's use of audit reports—may result in part from the discontinuity between federal environmental policy and the manner in which agency success is measured.³¹⁰ Federal environmental policy generally aspires to protect human health and the environment.³¹¹ EPA's success, however, is not

303. *Id.*

304. *See supra* Part I.

305. *See supra* Part I.B.

306. *See supra* Part I.A.

307. *See supra* notes 120, 133-37, 170-84, 192-97 and accompanying text.

308. *See supra* notes 138-42 and accompanying text.

309. *See supra* notes 170-84.

310. *See, e.g., State Environmental Audit Privilege Laws, Effect on Enforcement Undergoing EPA Review*, 25 *Env't Rep.* (BNA) 495 (July 15, 1994) (Oregon attorney Thomas Lindley expressing "fears that the agency's prosecutorial mindset will lead it to prejudge [audit privileges] and stray from the broader goal of seeing the environmental audit privilege as a way to improve compliance and protect the environment").

311. *See, e.g., Federal Water Pollution Control Act*, 33 U.S.C. § 1251(a) (1988) ("The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."); *Clean Air Act*, 42 U.S.C. § 7401(b)(1) (1988) (stating that one of the purposes of the Clean Air Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public

generally measured by environmental quality, but by agency enforcement statistics.³¹² Recognizing a clear and enforceable hands-off policy for audit results is seen by the agency as an erosion of its enforcement power.³¹³ Thus, barring a significant change in agency philosophy, it is unlikely that EPA will adopt the clear and enforceable policy necessary to promote greater environmental compliance through increased and more effective auditing.³¹⁴ EPA's apparent inability to promulgate a clear and enforceable

health and welfare and the productive capacity of its population"); Solid Waste Disposal Act, 42 U.S.C. § 6902(a) (1988) ("The objectives of this chapter are to promote the protection of health and the environment and to conserve valuable material and energy resources . . .").

312. See *Auditing Public Meeting*, Day One, Morning Session, *supra* note 34, at 23 (testimony of Frank Friedman). As attorney Frank Friedman noted at the recent EPA public meeting on auditing:

Compliance I suggest is not measured on the basis of the number of [enforcement] actions brought. There is a recent article that used the term body count. This is the way the public looks at it, the number of actions brought. Therefore, there is a strong enforcement program.

Congressional committees look at it if you haven't brought the same number of actions as the year before there's something wrong with the enforcement program.

But I think those of us who are professionals, at the EPA and in the room here, recognize that when you're looking . . . at compliance, you're looking at much more than a mere body count.

Id. See also *id.* at 125 (testimony of Stephen Ramsey) (stating that, in his experience, agency "resources were allocated base[d] on enforcement cases so there was a real incentive for strong enforcement programs. So, it is built into the system."); *id.* at 131 (testimony of James O'Reilly) ("Today we should . . . end the practice of counting penalty actions. Replace it with measuring continuous environmental improvements through self audits."); Hunt & Wilkins, *supra* note 29, at 426 (noting that "[u]nder pressure to punish environmental criminals, enforcers may be unable to resist using audit results, even though they recognize that doing so may contravene public policy").

313. See Notice of Public Meeting on Auditing, 59 Fed. Reg. 31,914 (1994). In requesting "documentary justification" of audit privilege legislation, EPA summarized its opposition to such legislation as follows:

EPA has consistently opposed this approach, principally because of the risk of weakening State enforcement programs, the imposition of unnecessary transaction costs and delays in enforcement actions, and the potential increase in the number of situations requiring the expenditure of scarce Agency resources, including the "overfiling" of State enforcement actions.

Id.

314. There is some indication, however, that EPA may be in the process of changing its approach to enforcement. For example, upon the introduction of the "Common Sense Initiative," an experimental EPA program which regulates by industry rather than by media, EPA Administrator Carol Browner recognized that EPA's past regulatory approach "hadn't really protected the environment. We hadn't prevented pollution. We only shuffled and shifted pollution." *Browner Says Six Industries to Participate in New Approach to Environmental Regulation*, 25 Env't Rep. (BNA) 525, 526 (July 22, 1994). Recent changes in enforcement practices may also reflect a changing enforcement philosophy within EPA. For example, EPA recently announced plans to begin issuing citations, or "traffic tickets," for minor environmental violations. *EPA to Craft New Policy on Corporate Audits*, Daily Env't Rep. (BNA) No. 5, at d44 (Jan. 9, 1995). EPA has also indicated that it will now "[look] for instances of real human health or environmental damage" as it initiates each new enforcement case." *Id.* Further, EPA is considering new ways to measure the success of its enforcement programs, such as including data on emissions reductions due to enforcement, and

policy favoring confidentiality for audit results counsels against continued legislative deferral to EPA. Instead, Congress and the state legislatures should proactively pursue the development of environmental policy that promotes environmental compliance by encouraging environmental self-evaluation.

One such proactive approach for improving environmental compliance is to mandate auditing and disclosure of audit results.³¹⁵ This approach, claim some environmental and community rights groups, would provide strong incentives for regulated entities to audit and attain compliance with environmental regulations.³¹⁶ Such requirements would promote compliance in two ways. First, citizens and the agencies, armed with publicly available audit reports, could bring enforcement actions against entities failing to comply with environmental laws and regulations.³¹⁷ Additionally, entities facing the adverse publicity attendant to public

compliance rates among particular industries. *Id.*

315. Moore et al., *supra* note 31, at 507. See also *Environmental Protection Agency Auditing Public Meeting*, Afternoon Session, 12 (July 28, 1994) (testimony of Sanford Lewis) (arguing that EPA should "mandate stakeholder audits and disclosure of internal audits") (transcript on file with author). In 1991, Senator Max Baucus introduced a bill to reauthorize the Federal Water Pollution Control Act which would have mandated auditing at facilities holding permits under the Act. Specifically, audits would have been required to, "at a minimum, establish the compliance of the facility with the terms, requirements, and conditions of discharge permits issued pursuant to [the Act] and any other applicable requirements of [the] Act and identify necessary steps and an appropriate schedule for improving the degree and extent of compliance." S. 1081, 102d Cong., 1st Sess. § 25(a)(2) (1991). The bill would have also required submission of audit reports to regulatory officials, and audit results would have been publicly available. *Id.* § 25(a)(5). As an alternative to mandating auditing, the Chief of the Environmental Protection Bureau of the New York Attorney General's Office recently indicated that his office would regard environmental audits as "essential business practice." *Prosecutor Says Environmental Audits Have Become "Essential Business Practice,"* 25 *Env't Rep.* (BNA) 987, 987 (Sept. 16, 1994) [hereinafter *Audits Have Become "Essential Business Practice"*].

316. See 137 CONG. REC. S5904 (daily ed. May 15, 1991) (statement of Sen. Baucus). As Senator Baucus noted upon introduction of S. 1081, "[t]here is growing evidence of substantial noncompliance with water discharge permits. A key objective of the bill is to better identify noncompliance and assure appropriate enforcement action." *Id.* Joan Bavaria, representing the Coalition for Environmentally Responsible Economies, has noted in the context of environmental auditing that:

In an ideal world, management practices and results would be completely transparent, and collaboration—cooperation between corporate [management] and the employees, the neighbors, their customers, and shareholders, and other constituents—would result in the maintenance of yet another critical balance between economic viability and prosperity and careful management of our planet.

Auditing Public Meeting, Day One, Morning Session, *supra* note 34, at 72-73 (testimony of Joan Bavaria).

317. The citizen suit provisions of various federal environmental laws permit citizen enforcement of environmental noncompliance when EPA fails to bring an enforcement action. See, e.g., Federal Water Pollution Control Act, 33 U.S.C. § 1365(a)(1) (1988); Clean Air Act, 42 U.S.C. § 7604(a)(1) (1988 & Supp. V 1993); Solid Waste Disposal Act, 42 U.S.C. § 6972(a)(1)(A) (1988).

disclosure of noncompliance are likely to take greater measures to ensure compliance.³¹⁸

Although mandating compliance audits and disclosure of audit results would appear, at first blush, to provide incentives to increased compliance, such a strategy suffers from weaknesses that make it an unattractive option. The major weakness is that mandatory audit programs would be a highly inefficient and ineffective means of ensuring continuing compliance.³¹⁹ Mandated auditing and disclosure of audit reports would result in the development of audits which, while meeting minimum imposed audit standards, fail to ensure long-term compliance.³²⁰ To effectively ensure long-term compliance, audits must be tailored to an entity's operations.³²¹ However, if auditing is mandated, the standards for audits must also be mandated.³²² Such standards would ensure only that an additional set of generic data is generated.³²³ This approach may, by forcing disclosure of instances of noncompliance, result in greater agency and citizen enforcement of environmental laws and regulations.³²⁴

318. See *Auditing Public Meeting*, Day One, Morning Session, *supra* note 34, at 91 (testimony of Sanford Lewis). Sanford Lewis, Director of the Good Neighbor Project for Sustainable Industries, notes the benefits of involving community groups in compliance auditing:

[I]t sensitizes the firm to community and work force concerns . . . gives the firm a better sense of what the community's real priorities are [and] provides an in-depth framework for accountability in which a community group, union, and others involved can question the management line by line in a credible format.

Id. Analogous to mandating disclosure of audit results is the toxic chemical release reporting requirement under the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11023 (1988) (EPCRTKA). Under EPCRTKA, entities with 10 or more employees are required to report releases of specified toxic chemicals. *Id.* § 11023(a). The reporting requirement is intended to "provide information to Federal, State, and local governments and the public, including citizens of communities surrounding covered facilities." *Id.* § 11023(h). Citizen groups have used this information to successfully pressure large emitters to reduce emissions. See Keith Schneider, *The Nation; For Communities, Knowledge of Polluters is Power*, N.Y. TIMES, Mar. 24, 1991, § 4, at 5.

319. See Moore et al., *supra* note 31, at 507.

320. See *Auditing Public Meeting*, Day One, Morning Session, *supra* note 34, at 17 (testimony of Frank Friedman).

321. *Id.* See also *id.* at 132 (testimony of James O'Reilly) (discussing the importance of "systematic audits of systems and processes that are designed to know when the problem occurs, to correct the problem, to oversee, to understand what in the system allowed the problem to occur, and to modify the system to eliminate the reason why the problem arose").

322. See Moore et al., *supra* note 31, at 507 (arguing that "[i]t would be difficult to develop uniform standards and regulations that would apply to the broad spectrum of regulated industries, especially given the diversity of management procedures within companies").

323. See Moore, *supra* note 29, at 40 (arguing that mandatory auditing programs would "require little more than a snapshot of a company's state of compliance").

324. Such enforcement would be primarily against conscientious entities that provide the agency with truthful audit results. These are the same entities currently seeking to achieve and maintain compliance and are either performing compliance audits or would perform audits in the absence of concerns about the use of audit results. Those entities seeking to remain "outside the system" could

However, by mandating superficial audits of operational processes, this approach fails to take advantage of the most beneficial aspect of environmental auditing—disclosing and remedying the underlying causes of noncompliance to ensure long-term compliance.³²⁵

Mandatory auditing and disclosure of audit results is also problematic from the agency standpoint. Enforcing compliance with auditing requirements would divert limited agency resources from the enforcement of substantive environmental regulations.³²⁶ The task of sifting through audit reports to determine whether enforcement under substantive law is appropriate would also require extensive and inefficient use of agency resources.³²⁷ Thus, mandatory auditing and disclosure programs should be rejected because they would be expensive to implement, and would fail to enhance long-term compliance or environmental quality.³²⁸

continue to operate in such a manner by simply falsifying audit reports or hiding noncompliance from auditors.

325. *Auditing Public Meeting*, Day One, Morning Session, *supra* note 34, at 17 (testimony of Frank Friedman). At an EPA sponsored public meeting on auditing, attorney Frank Friedman stated: I believe the greatest danger [is] that in any federally mandated auditing program it can become a procrustean bed—one size fits all.

They don't. Auditing must also consider programs that will be of most significance in the future in allowing companies to manage their environmental issues including, for example, efforts to develop various data management systems.

Id. See also *id.* at 113-14 (testimony of Jean McCreary) (noting that "many companies who now audit would audit differently if auditing and disclosure becomes mandatory").

326. Moore et al., *supra* note 31, at 507 (arguing that "[e]nforcement of auditing requirements would be overly burdensome for EPA. Regulatory resources are more efficiently and effectively employed in imposing and enforcing direct environmental protection standards."). See also Moore, *supra* note 29, at 40 (noting that a mandatory compliance auditing program would amount to "yet another expensive command-and-control regulatory program").

327. Moore, *supra* note 29, at 40 (noting that one of the results of a mandatory auditing program would be to "inundate the EPA with large volumes of data it cannot adequately review and address"). See also Moore et al., *supra* note 31, at 507 (arguing that "the effective return on investment of the government resources needed to impose auditing requirements on regulated entities is not likely to be significant").

328. Another argument that could be made against mandatory auditing and disclosure programs, though beyond the scope of this note, is that such programs may raise environmental equity concerns. Although mandating audits and disclosure of audit results may give community members additional information about local entities, compliance will be promoted only to the extent the community has the ability or political will to either bring a citizen suit or apply public pressure to entities in noncompliance. For example, some disempowered communities may be unable to bring a citizen suit or apply pressure by virtue of the relative inaccessibility of the reported information. Absence of political will may occur where the violating entity is a major force in the community's economy. An argument could be made that mandatory auditing and disclosure programs, by giving relatively affluent communities greater ability to apply public pressure and bring citizen enforcement actions, will encourage environmental bad actors to locate in disempowered communities which are unable or unwilling to bring citizen suits or apply public pressure.

Alternatively, legislators may proactively promote environmental quality through compliance auditing by enacting statutory audit privileges.³²⁹ Such an approach will not prompt the small number of environmental "bad actors"—those whose profits are dependent upon noncompliance—to come into compliance with environmental laws and regulations. A carefully crafted audit privilege will, nonetheless, dramatically affect the quantity and quality of audits performed by the majority of entities who seek to comply with environmental laws and regulations.³³⁰ Additionally, carefully crafted privilege legislation should prevent the use of the privilege as a delaying tactic or as a means of hiding noncompliance.³³¹

The primary advantage of statutory audit privileges is that entities, when deciding whether and how to implement an auditing program, are given some certainty concerning the ability to keep audit results confidential.³³² Unlike common-law privileges, which are uncertain in application,³³³ and current EPA and DOJ auditing policies, which maintain significant agency discretion,³³⁴ the ability of an entity to maintain confidentiality of audit results under statutory audit privileges is dependent almost entirely upon the actions of the entity.³³⁵ Under a statutory audit privilege, entities wishing to keep audit results confidential need only, in most cases, comply with the statutory requirements.³³⁶ Significantly, these statutory requirements demand that the entity remedy discovered noncompliance.³³⁷ The resulting certainty, combined with stringent agency enforcement of noncompliance, provides incentives for regulated entities

329. Hunt & Wilkins, *supra* note 29, at 418.

330. *Id.* at 420 (noting that "[b]y protecting the evaluative portions of the auditing process, government can provide the necessary incentives for companies to initiate or expand their auditing programs").

331. Lindley & Hodson, *supra* note 82, at 1222 (noting that "[w]hile a definition [of an audit report] must be flexible if it is to encompass the various forms of environmental audits, it must also be specific if it is to avoid improper, after-the-fact 'audit' designations of unprotected documents").

332. Hunt & Wilkins, *supra* note 29, at 421 (arguing that "under [a statutory audit privilege], the auditor would know that internal self-investigation will put the corporation at no greater risk than if it continued to ignore its environmental problems").

333. *See supra* notes 87-90, 104-07, 119 and accompanying text.

334. *See supra* notes 172-75, 192-94 and accompanying text.

335. *See Auditing Public Meeting, Day Two, Morning Session, supra* note 32, at 27 (testimony of Paul Wallach) ("You should have very clear elements of the privilege. The person should be able to determine whether his or her conduct is going to come within the privilege and to rely on that and move forward.").

336. *See supra* Part II. The ability to maintain the confidentiality of audit results will, however, be outside the control of the entity in the case of substantial need by prosecutors or if the audit report reveals a clear and impending danger. *See supra* notes 230, 249, 252 and accompanying text.

337. *See supra* notes 229, 250 and accompanying text.

to perform effective environmental compliance audits and implement the auditor's recommendations.³³⁸

Statutory audit privileges are also an efficient means, from both the agency and regulated community perspectives, of encouraging greater compliance with environmental regulations. It is well recognized that current agency resources are inadequate to provide for a "cop on every corner."³³⁹ Instead, supplementing the strong deterrent effects of the present enforcement program with elimination of the disincentives to compliance auditing will serve to accomplish increased compliance at a relatively low cost to the agencies.³⁴⁰

Statutory audit privileges will also promote efficiency in the way regulated entities audit environmental compliance. Attorneys will no longer be employed for the primary purpose of bringing audit results within the confines of the attorney-client privilege or the work product doctrine.³⁴¹ Thus, the cost of environmental compliance auditing will decrease, making auditing more attractive, particularly to smaller entities.

Finally, statutory audit privileges are preferable to other options because they promote the development of more effective auditing practices. Current agency and judicial treatment of environmental audit reports tends to encourage the generation of vaguely written audit documents which are thus incapable of effective implementation.³⁴² By providing certainty that audit results will not be used in subsequent enforcement actions or private litigation, statutory audit privileges promote critical self-analysis and the

338. Hunt & Wilkins, *supra* note 29, at 423 (arguing that statutory audit privileges "would add legal certainty to [the] currently nonbinding assertions [contained in EPA and DOJ policies], thereby removing the largest remaining deterrent to environmental auditing and encouraging the discovery and remediation of environmental hazards").

339. *Auditing Public Meeting*, Day One, Morning Session, *supra* note 34, at 8-9 (opening statement of Steven Herman, EPA Assistant Administrator for Enforcement and Compliance Assurance) (noting that "we want to encourage environmental auditing and allow the regulated community to self police because we cannot have a cop on every corner").

340. Moore, *supra* note 29, at 40 (arguing that "[c]ompliance can be increased and scarce public resources conserved . . . through a policy change that recognizes that the comprehensive nature of a company's compliance assurance program and the good faith of its operation are key to achieving and maintaining high compliance levels").

341. See *supra* notes 91-93, 102-03 and accompanying text.

342. See *supra* notes 82-86 and accompanying text. See also *Auditing Public Meeting*, Day Two, Morning Session, *supra* note 32, at 10-11 (testimony of Carl Mattia) ("The present lack of protection for audit reports creates a strong disincentive to environmental auditing and has a chilling effect which severely reduces the utility of the audits that are undertaken. It really inhibits . . . the find and fix scenario that audits are intended to develop."); *Auditing Public Meeting*, Day One, Morning Session, *supra* note 34, at 135-36 (testimony of James O'Reilly) (noting that "auditing privileges do away with that 'shell' that artfully insulates an audit report. We think the privilege delivers candor, clear expression, effective messages.").

free flow of information within an entity, making remediation of chronic operational problems underlying noncompliance more likely.³⁴³

The primary objection to statutory audit privileges is that these privileges will weaken agency enforcement programs.³⁴⁴ By limiting discovery of audit reports, critics argue, the ability of state and federal agencies to enforce environmental laws and regulations will be hampered.³⁴⁵ Because enforcement efforts will be hindered, the argument concludes, environmental quality will suffer as the deterrent effects of civil and criminal environmental enforcement diminish.³⁴⁶

Opponents of statutory audit privileges claim that environmental enforcement will be hampered in two ways. First, allowing entities to

343. See Moore, *supra* note 29, at 41 (arguing that auditing programs will "operate most effectively—because employees will be more candid with audit and compliance personnel—if there is some reasonable assurance that not all information developed in the process will be made public").

344. Restatement of Policies Related to Environmental Auditing, 59 Fed. Reg. 38,455, 38,459 (1994) ("EPA has consistently opposed [statutory audit privileges], principally because of the risk of weakening State enforcement programs . . ."). EPA's Self-Policing Policy Statement lists six specific objections to statutory audit privileges:

1. Privilege, by definition, invites secrecy, instead of the openness needed to build public trust in industry's ability to self-police. . . .

2. Eighteen months [of discussion on whether EPA should recognize a privilege for audit documents] have failed to produce any evidence that a privilege is needed. Public testimony on the interim policy confirmed that EPA rarely uses audit reports as evidence. Furthermore, surveys demonstrate that environmental auditing has expanded rapidly over the past decade without the stimulus of a privilege. . . .

3. A privilege would invite defendants to claim as "audit" material almost any evidence the government needed to establish a violation or determine who was responsible. . . .

4. An audit privilege would breed litigation, as both parties struggled to determine what material fell within its scope. . . .

5. The Agency's policy eliminates the need for any privilege as against the government, by reducing civil penalties and criminal liability for those companies that audit, disclose and correct violations. . . .

6. Finally, audit privileges are strongly opposed by the law enforcement community, including the National District Attorneys Association, as well as by public interest groups.

Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66,706, 66,710 (1995).

345. *Id.* See also Darnell, *supra* note 193, at 140 (arguing that "the increase in self-auditing would come, ironically, at a tremendous cost to the environment"); Jack Doyle, *Audits Are Their Own Reward*, ENVTL. F., Jan./Feb. 1992, at 38, 39 (arguing that "[t]here is no need to legalize safe harbors or create other such industry protections that would compromise the ability of prosecutors to bring stronger environmental enforcement charges when warranted").

346. Darnell, *supra* note 193, at 141. Darnell argues that "a strong enforcement program is the best incentive for companies to audit and comply with the law. Self-evaluative privilege legislation, by affording those who have engaged in criminal activity a means of blocking disclosure of their activities, would undermine the deterrent effect of enforcement by decreasing the government's enforcement leverage." *Id.* (footnotes omitted).

assert a statutory audit privilege will frustrate agency enforcement efforts by requiring increased expenditure of limited agency resources.³⁴⁷ This argument fails, however, for two reasons. Even if audit privilege legislation is not enacted, agency resources will be expended when entities raise common-law privileges, such as the attorney-client privilege, the attorney work product doctrine, and the critical self-analysis privilege. Further, EPA's assurance that it "will not request or use an environmental audit report to initiate a civil or criminal investigation" belies this argument.³⁴⁸ If EPA rarely requests audit reports, the privilege will rarely be raised, and the impact of a statutory audit privilege on agency resources will therefore be minimal.³⁴⁹

Second, opponents of audit privilege legislation argue that enforcement will be hampered because entities will be empowered to either shield noncompliance or shield evidence that the entity knew of a violation and failed to correct it.³⁵⁰ Currently enacted audit privilege statutes, however, adequately address these concerns. Noncompliance with environmental regulations cannot be shielded under statutory audit privileges because only the audit reports, and not facts underlying the reports, are protected.³⁵¹ Evidence gained through agency investigation and monitoring is not subject to the privilege.³⁵² Similarly, documents generated outside the confines of an audit, including documents which an entity is required to develop or disclose, are subject to discovery.³⁵³

347. Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66,706, 66,710 (1995). As argued in the EPA Self-Policing Policy Statement:

An audit privilege would breed litigation, as both parties struggled to determine what material fell within its scope. The problem is compounded by the lack of any clear national standard for audits. The "in camera" (i.e., non-public) proceedings used to resolve these disputes under some statutory schemes would result in a series of time-consuming, expensive mini-trials.

Id. See also Darnell, *supra* note 193, at 140 (noting that "even where the privilege would be inapplicable, state and federal enforcement efforts 'could become mired in motions to quash subpoenas, to suppress evidence, and to compel discovery'"); Johnston, *supra* note 244, at 340 ("Every time a privilege is asserted . . . the government would be required to go to court to establish either that the privilege does not apply or that the document is otherwise subject to disclosure.").

348. 60 Fed. Reg. 66,711.

349. Hunt & Wilkins, *supra* note 29, at 422.

350. See 60 Fed. Reg. 66,710 (stating that "[a] privilege would invite defendants to claim as 'audit' material almost any evidence the government needed to establish a violation or determine who was responsible"); *Auditing Public Meeting*, Day One, Afternoon Session, *supra* note 31, at 25 (testimony of David Gallogly) (stating that "[t]he privilege could be used by the irresponsible to hide the fact that noncompliance was found during an audit and nothing was done to correct it").

351. See *supra* notes 231-34, 253-57 and accompanying text.

352. See *supra* notes 233, 255 and accompanying text.

353. See *supra* notes 232, 254, 257 and accompanying text.

The audit privilege statutes may also be crafted so that evidence of knowledge for the purposes of criminal enforcement cannot be shielded by the privilege. Where the audit report shows criminal knowledge, discovery of the report should be allowed under two provisions of the audit privilege statutes. Under almost all statutory audit privileges, an audit report is not privileged if it discloses noncompliance which was not remediated in a timely manner.³⁵⁴ Further, if the audit report is the only document establishing criminal knowledge, discovery of the document may be allowed based on the substantial need exception to the privileges.³⁵⁵ Indeed, rather than impeding agency enforcement efforts, these provisions impel entities to move beyond mere auditing and toward remediation of noncompliance.

The argument that statutory audit privileges will deprive agency enforcement of its deterrent value is also tenuous. According to EPA enforcement statistics, the current federal environmental enforcement program is very strong.³⁵⁶ Concurrently, EPA insists that it does not routinely request audit reports in enforcement actions.³⁵⁷ Thus, EPA's current strong enforcement program must be based on enforcement actions in which evidence of noncompliance is obtained from sources independent of audits, such as reporting requirements or agency investigation and monitoring. Statutory audit privileges do not alter EPA's authority to conduct these activities or the statutory requirement that entities report certain data.³⁵⁸ Therefore, the deterrent value of EPA's strong enforcement program will remain even if audit privileges are codified.

Despite the removal of disincentives to auditing provided by the state audit privilege statutes, much of the uncertainty surrounding the use of audit reports in litigation remains. Entities in states recognizing an audit privilege must be cognizant of EPA and DOJ positions on such statutes. DOJ has announced that it intends to challenge one or more of the state audit privilege statutes.³⁵⁹ EPA has threatened that states recognizing an

354. See *supra* notes 229, 250 and accompanying text. Only the Idaho and Virginia audit privilege statutes do not require remediation of the noncompliance as a precondition for applicability of the privilege. See IDAHO CODE § 9-806 (Burns Supp. 1995); VA. CODE ANN. § 10.1-1198 (Michie Supp. 1995). However, the entity must remedy noncompliance to qualify for penalty immunity under Idaho and Virginia law. IDAHO CODE § 9-809(2)(c); VA. CODE ANN § 10.1-1199(iii).

355. See *supra* notes 230, 249 and accompanying text. Less than half of the currently enacted privilege statutes contain a compelling need exception. See *infra* Appendix for a comparison of currently enacted audit privilege statutes.

356. See *supra* note 36 and accompanying text.

357. 60 Fed. Reg. 66,711.

358. See *supra* notes 232-33, 254-55 and accompanying text.

359. *Audits Have Become "Essential Business Practice," supra* note 315, at 987 (noting comments of John Cruden, chief of DOJ's Environmental Enforcement Section).

audit privilege may be in danger of losing the authority to administer federal environmental laws.³⁶⁰ Further, EPA generally has co-extensive authority to enforce environmental regulations in states to which primary enforcement authority has been granted,³⁶¹ and has threatened to increase enforcement efforts in states with environmental audit privilege statutes.³⁶² Hence, even if a state recognizes a privilege for audit reports, these reports may still be vulnerable to federal enforcement authorities.

Regulated entities should look to Congress for relief from the uncertain prospects of disclosure in federal enforcement actions, thus promoting the quantity and quality of environmental compliance audits performed in states recognizing an audit privilege.³⁶³ Congress should be encouraged to enact audit privilege legislation similar to that which has been enacted in the states.³⁶⁴ By doing so, the overriding threat of disclosure of audit results in federal enforcement actions will be removed.³⁶⁵ The states will then be free to implement policies which

360. See *supra* note 205 and accompanying text.

361. See, e.g., Federal Water Pollution Control Act, 33 U.S.C. § 1319(a)-(b) (1988); Clean Air Act, 42 U.S.C. § 7413(a)-(b) (Supp. V 1993); Solid Waste Disposal Act, 42 U.S.C. § 6928(a) (1988).

362. Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy Statement, 60 Fed. Reg. 16,875, 16,878 (1995). EPA has subsequently backed away somewhat from this threat, instead stating that:

EPA remains firmly opposed to statutory environmental audit privileges that shield evidence of environmental violations and undermine the public's right to know, as well as to blanket immunities for violations that reflect criminal conduct, present serious threats or actual harm to health and the environment, allow noncomplying companies to gain an economic advantage over their competitors, or reflect repeated failure to comply with federal law. EPA will work with states to address any provisions of state audit privilege or immunity laws that are inconsistent with this policy, and which may prevent a timely and appropriate response to significant environmental violations. The Agency reserves its right to take necessary actions to protect public health or the environment by enforcing against any violations of federal law.

60 Fed. Reg. 66,712. It is unclear whether the state audit privileges would bind federal enforcement agencies. See Hunt & Wilkins, *supra* note 29, at 423 (noting that audit privilege statutes "would likely be inapplicable in investigations or enforcement proceedings by the federal government in federal courts under federal law"); Lindley & Hodson, *supra* note 82, at 1222 ("It is not clear what effect Oregon's statutory privilege will have on federal enforcement actions.").

363. Hunt & Wilkins, *supra* note 29, at 423.

364. Audit privilege legislation, similar to the currently enacted state privilege statutes, was introduced in both houses during the first session of the 104th Congress. See H.R. 1047, 104th Cong., 1st Sess. (1995); S. 582, 104th Cong., 1st Sess. (1995).

365. The uncertainty of EPA access to audit reports in states recognizing an audit privilege would be alleviated under a rider to the 1995-1996 appropriations bill for EPA. See H.R. 2099, 104th Cong., 1st Sess. (1995). The rider provided that:

[N]one of the funds appropriated under this heading may be used to obtain a voluntary environmental audit report or to assess an administrative, civil or criminal negligence penalty, in any matter subject to a state law providing a privilege for voluntary environmental audit reports or protections or immunities for the voluntary disclosure of

encourage voluntary environmental compliance by removing the disincentives to environmental auditing.

CONCLUSION

Environmental compliance auditing represents an opportunity to increase compliance with existing environmental laws and regulations with minimal expenditure of public funds. The regulated community has long been interested in pursuing increased compliance by way of self-auditing. However, current agency and judicial treatment of audit results has led many to wonder, both publicly and behind corporate doors, whether the benefits of self-auditing truly outweigh the risks. Some entities believe they do, and continue to audit their facilities, albeit often in an ineffective manner. Others simply do not audit.

Some state legislatures have begun to recognize the environmental value of self-auditing and have taken proactive steps to remove disincentives to auditing. These states believe that encouraging auditing, while maintaining a strong and credible enforcement program, will lead to greater voluntary compliance with environmental laws. Greater compliance will, in turn, lead to improved environmental quality.

Other state legislatures should follow this lead. Carefully crafted audit privilege legislation allows states to harness the regulated community's interest in environmental auditing to the benefit of the environment. Additionally, these benefits come at little cost to the state, allowing state regulators to focus enforcement resources on environmental bad actors.

Federal legislators, at a minimum, should support these independent state efforts to improve environmental quality. The overriding threat of discretionary use of audit results by EPA and DOJ in states recognizing an audit privilege should be removed. Such a federal policy would recognize that the states should be allowed to pursue legitimate environmental protection policy, and would encourage the development of other innovative environmental policies in the "laboratories of democracy."³⁶⁶

environmental concerns.

Id. However, this rider was subsequently changed to report language urging "EPA to work with Congress to develop 'an appropriate policy concerning state environmental audit or self evaluation privilege or immunity laws.'" *Conferees Approve EPA Funding of \$5.7 Billion; Temporary Spending, Reconciliation Bills Passed*, 26 *Env't Rep.* (BNA) 1265, 1266 (Nov. 24, 1995).

366. See *Auditing Public Meeting*, Day One, Morning Session, *supra* note 34, at 140 (testimony of James O'Reilly) ("Let the states move forward as laboratories of democracy. Let's move forward. Let's write clear and effective audits and act on them.").

Congress should, however, move beyond mere non-obstruction. Environmental self-analysis should be proactively embraced as sound federal environmental policy. Federal environmental policy should move beyond the agency enforcement "body count" paradigm and toward greater voluntary compliance. To do so, federal legislators should continue to support stringent enforcement of environmental violations. Contemporaneously, voluntary environmental auditing should be encouraged by the adoption of a qualified privilege for the results of self-initiated compliance audits. Adoption of such a policy will, in turn, encourage the states to adopt similar policies, resulting in greater protection of the environment.

Finally, the regulated community is faced with responsibilities beyond lobbying for audit privilege legislation. It is incumbent upon regulated entities to take a realistic and responsible view of statutory audit privileges. An audit privilege allows entities to effectively assess environmental compliance and correct chronic operational problems leading to noncompliance. It will not, however, protect against enforcement for violations of environmental laws and regulations. Within these confines, prudent use of the privilege by the regulated community will allow for the continued political viability of the audit privilege.³⁶⁷

Kirk F. Marty

367. See Michael Baram, *The New Environment for Protecting Corporate Information*, 25 *Env't Rep. (BNA)* 545, 548 (July 22, 1994) (arguing that "[p]rudent use of these doctrines for protecting information is needed to assure that the new corporate culture, developed at great cost, is not undermined or exposed as a sham, and its benefits lost").

APPENDIX

SUMMARY OF STATUTORY ENVIRONMENTAL AUDIT PRIVILEGES

Feature

Ark.³⁶⁸ Colo.³⁶⁹ Idaho³⁷⁰ Ill.³⁷¹ Ind.³⁷² Kan.³⁷³ Ky.³⁷⁴

Documents must be labelled as environmental audit report

Yes Yes No Yes Yes Yes Yes Yes

Audit report shall/may contain certain components

May May May May³⁷⁵ Shall May ShallWaiver of Privilege

Express waiver of privilege

Yes Yes Yes Yes Yes Yes Yes

Implied waiver of privilege

Yes Yes N/S N/S N/S Yes Yes Yes

368. 1995 Ark. Acts 350 (to be codified at ARK. CODE ANN. §§ 8-1-301 to 312).

369. COLO. REV. STAT. §§ 13-90-107, 13-25-126.5, 25-1-114.5 (Supp. 1995).

370. IDAHO CODE §§ 9-340, 9-801 to 811 (Supp. 1995).

371. 415 ILL. COMP. STAT. ANN. § 5/52.2 (Smith-Hurd Supp. 1995).

372. IND. CODE ANN. §§ 13-10-3-1 to 12 (Burns Supp. 1995).

373. 1995 Kan. Sess. Laws 204.

374. KY. REV. STAT. ANN. § 224.01-040 (Michie/Bobbs-Merrill 1995).

375. Although an audit report may contain four components, the audit report must contain "a written response to the findings of the audit." 415 ILL. COMP. STAT. ANN. § 5/52.2(f).

N/S: Not Stated N/A: Not Applicable

	<u>Ark.</u>	<u>Colo.</u>	<u>Idaho</u>	<u>Ill.</u>	<u>Ind.</u>	<u>Kan.</u>	<u>Ky.</u>
Waiver extends only to parts of report disclosed	Yes	N/S	Yes	N/S	N/S	N/S	No
<i>In camera</i> hearing to decide whether documents are privileged	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<u>Privilege does not apply if:</u>							
Asserted for fraudulent purpose	X	X	X	X	X	X	X
Documents are not subject to privilege	X	X ³⁷⁶	X	X	X	X	X
Entity did not promptly initiate and diligently pursue compliance	X	X	X	X	X	X	X
Imminent and substantial hazard or endangerment to human health or the environment		X					
Compelling need by prosecutor		X ³⁷⁷			X		X ³⁷⁸
<u>Privilege does not extend to:</u>							
Information required to be collected or reported	X	X	X	X	X	X	X

376. The privilege does not apply if "[t]he material is not an appropriate subject for an environmental audit." IDAHO CODE § 9-806(2)(b).

377. The compelling need exception is not, on its face, limited to prosecutors. COLO. REV. STAT. § 13-25-126.5(3)(c).

378. The privilege is inapplicable if the audit report contains relevant evidence of an offense under KY. REV. STAT. ANN. § 224.99-010(3)-(4), (6), (10)-(11) and the prosecutor has "a need for the information." KY. REV. STAT. ANN. § 224.01-040(4)(D)(4).

N/S: Not Stated N/A: Not Applicable

	<u>Ark.</u>	<u>Colo.</u>	<u>Idaho</u>	<u>Ill.</u>	<u>Ind.</u>	<u>Kan.</u>	<u>Ky.</u>
Information obtained by agency observation, sampling, or monitoring	X	X	X	X	X	X	X
Information obtained from independent sources	X	X	X	X	X	X	X
Documents existing prior to the commencement of audit		X					
Documents prepared subsequent to the completion of audit		X					
Documents prepared in the course of regular business activity		X					
<u>Prosecutor's Access to Audit Report</u>							
Prosecutor may, on the basis of probable cause, obtain audit report by subpoena, discovery, or warrant	Yes	No	N/S	No	Yes	Yes	Yes
Prosecutor must place audit report under seal	Yes	N/A	N/A	N/A	Yes	Yes	Yes
Prosecutor may have access to audit report to prepare for hearing	Yes	Yes ³⁷⁹	N/A	N/S	Yes	Yes	Yes
Prosecutor must limit distribution of audit report after removing seal	Yes	Yes	N/A	N/S	Yes	Yes	Yes
Time to seek review after prosecutor has obtained audit report	30 days	N/A	N/A	30 days ³⁸⁰	30 days	30 days	20 days

379. Private parties, in addition to prosecutors, may have access to audit reports to prepare for the *in camera* hearing. COLO. REV. STAT. § 13-25-126.5(5)(a).

380. The party asserting the privilege must petition for a hearing within 30 days after receiving a request for disclosure of the environmental audit. 415 ILL. COMP. STAT. ANN. § 5/52-2(e)(1).

N/S: Not Stated N/A: Not Applicable

Privilege is waived by failure to seek review

<u>Ark.</u>	<u>Colo.</u>	<u>Idaho</u>	<u>Ill.</u>	<u>Ind.</u>	<u>Kan.</u>	<u>Ky.</u>
Yes	N/A	N/A	Yes	Yes	Yes	Yes

Burdens of Proof

Burden of proving applicability rests on party asserting privilege

Yes	Yes ³⁸¹	No ³⁸²	Yes	Yes	Yes ³⁸³	Yes
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Burden of proving timely correction of noncompliance rests on party asserting privilege

Yes	Yes ³⁸⁴	N/A	No	Yes	Yes	Yes
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Burden of proving fraud rests on party seeking disclosure

Yes	Yes ³⁸⁵	Yes	Yes	Yes	Yes	Yes
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Burden of proving compelling need rests on prosecutor

N/A	Yes ³⁸⁶	N/A	N/A	Yes	N/A	Yes
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Immunity Provisions

Immunity from or reduction of penalties

No	Yes	Yes	No	No	Yes	No
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Immunity from criminal prosecution

No	Yes	Yes	No	No	Yes	No
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381. The party asserting the privilege has the burden of proving a prima facie case for the privilege. COLO. REV. STAT. § 13-25-126.5(7). Thereafter, the burden shifts to the party seeking disclosure to prove that the privilege does not exist. *Id.*

382. "A party seeking disclosure of the environmental audit report has the burden of proving the disclosure is appropriate." IDAHO CODE § 9-806(3).

383. In a criminal proceeding, the prosecutor has the burden of proving that the material is not subject to the privilege. 1995 Kan. Sess. Laws 204, § 3(e)(2).

384. See *supra* note 385.

385. See *supra* note 385.

386. See *supra* note 385.

N/S: Not Stated N/A: Not Applicable

SUMMARY OF STATUTORY ENVIRONMENTAL AUDIT PRIVILEGES

Feature	Minn. ³⁸⁷	Miss. ³⁸⁸	Or. ³⁸⁹	Tex. ³⁹⁰	Utah ³⁹¹	Va. ³⁹²	Wyo. ³⁹³
Documents must be labelled as environmental audit report	Yes	No	Yes	No ³⁹⁴	No	No	Yes
Audit report shall/may contain certain components	N/S	May	May	May	May	May	Shall
<u>Waiver of Privilege</u>							
Express waiver of privilege	N/S	Yes	Yes	Yes	Yes	N/S	Yes
Implied waiver of privilege	N/S	N/S	Yes	Yes	N/S	N/S	Yes
Waiver extends only to parts of report disclosed	N/A	N/S	N/S	N/S	N/S	N/S	Yes
<i>In camera</i> hearing to decide whether documents are privileged	No	Yes	Yes	Yes	Yes	Yes	Yes

387. 1995 Minn. Sess. Law Serv. 168 (West).

388. 1995 Miss. Laws 627.

389. OR. REV. STAT. § 468.963 (1993).

390. TEX. REV. CIV. STAT. ANN. art. 4447cc (West Supp. 1996).

391. UTAH CODE ANN. §§ 19-7-103 to 108 (1995).

392. VA. CODE ANN. §§ 10.1-1198 to 1199 (Michie Supp. 1995).

393. WYO. STAT. §§ 35-11-1105 to 1106 (Supp. 1995).

394. Failure to label the audit report does not constitute waiver of the privilege. TEX. REV. CIV. STAT. ANN. art. 4447cc, § 4(d).

N/S: Not Stated N/A: Not Applicable

	<u>Minn.</u>	<u>Miss.</u>	<u>Or.</u>	<u>Tex.</u>	<u>Utah</u>	<u>Va.</u>	<u>Wyo.</u>
<u>Privilege does not apply if:</u>							
Asserted for fraudulent purpose		X	X	X	X	X ³⁹⁵	X
Documents are not subject to privilege			X	X			X
Entity did not promptly initiate and diligently pursue compliance	X	X	X	X	X		X
Imminent and substantial hazard or endangerment to human health or the environment		X			X	X	X
Compelling need by prosecutor			X				X
<u>Privilege does not extend to:</u>							
Information required to be collected or reported	X	X	X	X	X	X	X
Information obtained by agency observation, sampling, or monitoring	X	X	X	X	X	X ³⁹⁶	X
Information obtained from independent sources	X	X	X	X	X	X ³⁹⁷	X

395. The privilege does not apply if the documents were generated in "bad faith." VA. CODE ANN. § 10.1-1198(B).

396. The privilege does not apply to documents "prepared independently of the voluntary environmental assessment process." *Id.* § 10.1-1198.

397. See *supra* note 400.

N/S: Not Stated N/A: Not Applicable

	<u>Minn.</u>	<u>Miss.</u>	<u>Or.</u>	<u>Tex.</u>	<u>Utah</u>	<u>Va.</u>	<u>Wyo.</u>
Documents existing prior to the commencement of audit		X				X	X
Documents prepared subsequent to the completion of audit							X
Documents prepared in the course of regular business activity							

Prosecutor's Access to Audit Report

Prosecutor may, on the basis of probable cause, obtain audit report by subpoena, discovery, or warrant

Prosecutor must place audit report under seal

Prosecutor may have access to audit report to prepare for hearing

Prosecutor must limit distribution of audit report after removing seal

Time to seek review after prosecutor has obtained audit report

Privilege is waived by failure to seek review

	N/A	No ³⁹⁸	Yes	Yes ³⁹⁹	No	No	Yes
	N/A	N/A	Yes	Yes	N/A	N/A	Yes
	N/A	Yes	Yes	Yes	No	Yes	Yes
	N/A	Yes ⁴⁰⁰	Yes	Yes	N/A	Yes	Yes
	N/A	N/A	30 days	30 days	N/A	N/A	20 days
	N/A	N/A	Yes	Yes	N/A	N/A	Yes

398. Any party may obtain limited access to an audit report upon a showing of probable cause to believe that the privilege does not apply. 1995 Miss. Laws 627, § 2(3)(a).
 399. The prosecutor may obtain an audit report if there is "reasonable cause to believe that a criminal offense has been committed under an environmental or health and safety law." TEX. REV. CIV. STAT. ANN. art. 4447cc, § 9(a).

400. The court places appropriate conditions on the party's access to the audit report to protect the confidentiality of the audit report. 1995 Miss. Laws 627, § 2(3)(a).
 N/S: Not Stated N/A: Not Applicable

Burdens of Proof

- Burden of proving applicability rests on party asserting privilege
- Burden of proving timely correction of noncompliance rests on party asserting privilege
- Burden of proving fraud rests on party seeking disclosure
- Burden of proving compelling need rests on prosecutor

Immunity Provisions

- Immunity from or reduction of penalties
- Immunity from criminal prosecution

	<u>Minn.</u>	<u>Or.</u>	<u>Tex.</u>	<u>Utah</u>	<u>Va.</u>	<u>Wyo.</u>
Burden of proving applicability rests on party asserting privilege	N/S	Yes ⁴⁰¹	Yes	Yes ⁴⁰²	Yes ⁴⁰³	Yes
Burden of proving timely correction of noncompliance rests on party asserting privilege	N/A	Yes ⁴⁰⁴	No	Yes ⁴⁰⁵	N/A	Yes
Burden of proving fraud rests on party seeking disclosure	N/A	Yes ⁴⁰⁶	Yes	Yes ⁴⁰⁷	Yes ⁴⁰⁸	Yes
Burden of proving compelling need rests on prosecutor	N/A	N/A	N/A	N/A	N/A	Yes
Immunity from or reduction of penalties	Yes	Yes	Yes	No	Yes	Yes
Immunity from criminal prosecution	Yes	No	Yes	No	No	No

401. The party asserting the privilege has the burden of proving a prima facie case for the privilege. 1995 Miss. Laws 627, § 2(5). Thereafter, the burden shifts to the party seeking disclosure. *Id.*

402. The party asserting the privilege has the burden of proving a prima facie case for the privilege. UTAH CODE ANN. § 19-7-106(3). Thereafter, the burden shifts to the party seeking disclosure to prove that the privilege does not apply. *Id.* § 19-7-106(4).

403. The party asserting the privilege has the burden of proving a prima facie case for the privilege. VA. CODE ANN. § 10.1-1198(C). Thereafter, the party seeking disclosure has the burden of proving applicability of an exception. *Id.*

404. See *supra* note 405.

405. See *supra* note 406.

406. See *supra* note 405.

407. See *supra* note 406.

408. See *supra* note 407.

N/S: Not Stated N/A: Not Applicable