

A STATE STATUTORY PRIVILEGE FOR ENVIRONMENTAL AUDITS: IS IT A SUIT OF ARMOR OR JUST THE EMPEROR'S NEW CLOTHES?

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INTRODUCTION

Environmental protection concerns have resulted in the enactment of a multitude of statutes and regulations in such diverse areas as air pollution, water pollution, hazardous waste management, underground storage tanks, polychlorinated biphenyls (PCB) management, liability under Superfund to remediate waste sites, pesticide management, and many others.¹ Failure of companies and individuals to abide by these statutes and regulations has resulted in significant civil and criminal penalties at the federal level.² Therefore, decision-makers within regulated entities must act to ensure compliance. The presence of regulatory agencies at all levels of government with inspection and enforcement authority require ongoing environmental compliance. To reduce the potential for enforcement action, regulated entities must be able to recognize and address deficiencies before the government identifies them.

For these reasons, a procedure is needed to monitor and enhance compliance with environmental regulations. One such method is the environmental audit.³ Environmental auditing is a functional and effective tool by which compliance with this myriad of regulations can be evaluated.⁴ Not only does it allow regulated entities to monitor their operations in light of regulatory requirements, but it can also assist in assessing their position in light of internal goals that may surpass

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1. THOMAS H. TRUITT ET AL., ENVIRONMENTAL AUDIT HANDBOOK 8 (2d ed. 1983). See generally Michael H. Levin et al., *Discovery and Disclosure: How to Protect Your Environmental Audit Report*, [24 Current Developments] Env't Rep. (BNA) 1606, 1606 (Jan. 7, 1994) (asserting that audits are essential to proactive environmental programs to bring facilities into compliance with environmental laws).

2. In fiscal year 1994, 2,249 federal enforcement actions were brought against individuals and companies regarding the violation of environmental statutes and regulations. This is over 100 more actions than were taken in 1993 by the Environmental Protection Agency (EPA) or Department of Justice and a 28% increase in the number of actions brought in 1991. In 1994, record fines totaling \$165.2 million, including civil fines of \$128.4 million and a record \$36.8 million in criminal fines, were collected. Although not guaranteeing records for 1995, the EPA intends to continue a vigorous enforcement program. *Environmental Agency's Activities in FY 1994 Break Records for Actions Pursued, Fines Levied*, [18 Current Reports] Chem. Reg. Rep. (BNA) 1316, 1316-17 (Dec. 2, 1994).

3. *Environmental Audits Provide an Extra Check*, CHEMECOLOGY, Nov./Dec. 1994, at 5.

4. See TRUITT ET AL., *supra* note 1, at 8-10.

mere compliance.⁵ Further, failure to perform an audit can expose a company to increased liability should an accident occur.⁶

According to the United States Environmental Protection Agency (EPA), "[e]nvironmental auditing is a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements."⁷ Audits can be structured to accomplish various objectives, such as enabling a regulated entity to "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."⁸ It can focus on an individual medium, such as air pollution, water pollution, or waste management; or it can be an analysis of multiple media or existing management programs designed to maintain compliance.⁹ The EPA has identified a number of elements that are usually found in an effective environmental auditing program, including support by management, an independent auditing team, training, and specific auditing objectives.¹⁰

Audits serve a variety of purposes, including compliance assessments, site

5. See generally *Environmental Audits Provide an Extra Check*, *supra* note 3, at 5 (identifying two companies whose audits go beyond mere compliance).

6. *Prosecutor Says Environmental Audits Have Become 'Essential Business Practice'*, [25 Current Developments] *Env't Rep. (BNA)* 987, 987 (Sept. 16, 1994) ("Environmental Audits now are an 'essential business practice' and a reasonable 'standard of care,'" and, therefore, may need to surpass merely determining the compliance status.) (quoting James Sevinski, Chief, Environmental Protection Bureau, New York Attorney General's Office, speaking at the ABA Annual Environmental Conference (August 8, 1994)).

7. Environmental Auditing Policy Statement, 51 *Fed. Reg.* 25,004, 25,006 (1986) (footnote omitted).

8. *Id.*

9. Paulette Mandelbaum, *Self-Audits Befitting Your Facility*, *ENVTL. PROTECTION*, Nov. 1994, at 32, 34.

10. Environmental Auditing Policy Statement, *supra* note 7, at 25,009. The general elements which EPA identified are:

- [1] [e]xplicit top management support for environmental auditing and commitment to follow-up on audit findings
- [2] [a]n environmental auditing function independent of audited activities
- [3] [a]dequate team staffing and auditor training
- [4] [e]xplicit audit program objectives, scope, resources and frequency
- [5] [a] process which collects, analyzes, interprets and documents information sufficient to achieve audit objectives
- [6] [a] process which includes specific procedures to promptly prepare candid, clear and appropriate written reports on audit findings, corrective actions, and schedules for implementation
- [7] [a] process which includes quality assurance procedures to assure the accuracy and thoroughness of environmental audits.

assessments, and many others.¹¹ Audits used to determine a regulated entity's compliance with environmental regulations must be structured to meet the specific needs of that entity.¹²

The first step in an audit is to determine its scope.¹³ Subsequent steps include: ensuring that facility personnel cooperate during the audit; determining who will participate on the audit team; determining the applicable regulations and deciding which aspects of the company to audit; collecting information about the entity; analyzing the results; preparing a report; and finally, reviewing the audit itself.¹⁴

When an environmental audit identifies areas of noncompliance, prompt and efficient problem recognition and resolution can reduce the liability associated with noncompliance. Conversely, a well-documented audit can provide regulatory agencies or other parties with a guide to specific areas of noncompliance during an enforcement or civil action.¹⁵ The Federal Rules of Civil Procedure generally allow the parties in a dispute to obtain, through discovery, any relevant information,¹⁶ including information that otherwise would not be admissible if that information could "reasonably . . . lead to the discovery of admissible evidence."¹⁷ If the environmental audit contains any information that would be relevant in a subsequent action, the federal rules allow it to be subject to discovery.¹⁸ Therefore, protecting this information is critical to an entity's defense in subsequent legal actions,¹⁹ and thus, the environmental audit must be carefully planned so that confidentiality can be preserved.²⁰ Besides specific statutory privileges, other mechanisms exist that may shield audits from discovery, including the attorney-client privilege, the work product doctrine, the self-evaluation privilege, and various governmental agency policies. However, the

11. Mandelbaum, *supra* note 9, at 32-35.

12. See TRUITT ET AL., *supra* note 1, at 80.

13. *Id.* This includes determining whether the audit will be comprehensive or limited in scope. *Id.* at 84-85. The scope will be impacted by financial issues as will the decision of whether the audit will be performed by a consultant or by facility personnel and whether the audit report will include an analysis of the costs to return to compliance, if any violations are identified. *Id.* at 89. See generally *id.* at 80-163 for a discussion of conducting an audit.

14. *Id.* at 80. See Matthew P. Weinstock, *Environmental Auditing: A Measure of Safety*, OCCUPATIONAL HAZARDS, May 1993, at 73, 75 (identifying important elements in an audit program).

15. See Levin et al., *supra* note 1, at 1606. See also James T. O'Reilly, *Environmental Audit Privileges: The Need for Legislative Recognition*, 19 SETON HALL LEGIS. J. 119, 119, 131 (1994).

16. FED. R. CIV. P. 26(b)(1). See TRUITT ET AL., *supra* note 1, at 33 (discussing Rule 26(b)(1)).

17. FED. R. CIV. P. 26(b)(1). See TRUITT ET AL., *supra* note 1, at 33-34.

18. TRUITT ET AL., *supra* note 1, at 34.

19. See *id.* at 32.

20. *Id.* at 33 ("[T]he environmental audit must from the outset be planned and conducted with meticulous regard for the requisites of confidentiality if the company has determined that disclosure is undesirable.").

effectiveness of these other mechanisms is debatable.²¹

Notwithstanding the potential drawbacks, regulated entities still voluntarily perform audits. According to a survey by Price Waterhouse, seventy-five percent of responding companies, including nearly all of the largest companies surveyed, are currently performing environmental audits.²² The survey also reported that outside groups had tried to obtain the audit information from twenty-five percent of the companies that were surveyed and fifteen percent stated that the attempts had succeeded.²³ Twelve percent of the respondents went on to state that voluntarily provided results "had been used against them in enforcement proceedings."²⁴ In addition, twenty percent of the responding companies that did not perform audits feared that the results of any future audits could be used against them.²⁵ Finally, almost two-thirds of the respondents that currently conduct audits would expand their programs if they could avoid penalties for areas of noncompliance that they identify, report, and correct.²⁶

The voluntary review of an entity's performance is essential to improve compliance with environmental regulations.²⁷ However, this benefit is threatened by the difficulty in concealing the audit's results from discovery. In response to this situation, Arkansas, Colorado, Idaho, Illinois, Indiana, Kansas, Kentucky, Minnesota, Mississippi, Oregon, Texas, Utah, Virginia, and Wyoming have enacted legislation designed to promote voluntary environmental audits by protecting the reports from discovery in subsequent proceedings.²⁸

Part I of this Note analyzes the privilege created by the various state statutes. Part II discusses other privileges and doctrines that might be utilized by regulated entities to protect information in environmental audits. Part III discusses policies established by the EPA and the Department of Justice (DOJ) regarding environmental audits. Part IV summarizes the protection provided by the states and discusses factors to consider in structuring an audit in light of these privileges. It also determines whether the statutes create an impenetrable suit of armor or merely the protective fabric used to craft the Emperor's new clothes.²⁹ Finally,

21. See *infra* notes 242-98, 301-37 and accompanying text.

22. Stephen L. Kass & Jean M. McCarroll, *The Corporate Environmental Audit: Will EPA's New Policy Finally Level The Playing Field?*, ENVTL. PROTECTION, June 1995, at 45, 45-46. See generally Cheryl Hogue, *Audit Legislation Gains in States, But Some Predict Slowdowns in Future*, [26 Current Developments] Env't Rep. (BNA) 882, 882 (Sept. 1, 1995) ("Many companies are now conducting voluntary audits of their operations to determine their compliance with . . . regulations . . .").

23. Kass & McCarroll, *supra* note 22, at 46.

24. *Id.*

25. *Survey: Auditing Discouraged by Penalty Threat*, ENVTL. REG. ADVISOR, July 1995, at 11.

26. *Id.*

27. Levin et al., *supra* note 1, at 1606.

28. See *infra* notes 30-239 and accompanying text.

29. HANS CHRISTIAN ANDERSEN, *The Emperor's New Clothes*, in ANDERSEN'S FAIRY TALES 199 (E.V. Lucas & H.B. Paull trans., 1945).

Part V concludes that the protection provided by the various state statutes is both limited and uncertain. Therefore, additional legislative protection should be provided to more uniformly shield the audits from discovery at both the state and federal level which should enhance compliance and protect the environment.

I. STATE STATUTES CODIFYING A PRIVILEGE FOR ENVIRONMENTAL AUDITS

As of August 1995, fourteen states had enacted legislation that provides a partial privilege from discovery for environmental audit documents.³⁰ In 1995, thirty-four of the forty-five states that did not already have an audit privilege law considered legislation to create the privilege.³¹ The United States Congress has also considered enacting a statute in this area.³²

Oregon was the first state to enact a statutory privilege for environmental audits.³³ Consequently, Oregon's legislation has become a model for many of the other states' statutes. Generally, the state statutes create a "qualified privilege for environmental audits."³⁴ In addition, some of the statutes have included a provision that grants either immunity from penalties or limits their extent.³⁵ This Note will discuss these state statutes by comparing their various provisions. Because Minnesota's statute is unique, its provisions will be discussed separately.

A. Purpose and Scope of the Statutes

The purpose of these statutes is to improve compliance with environmental regulations through self-assessment³⁶ that, in turn, protects the environment.³⁷ For

30. The states are: Arkansas, Colorado, Idaho, Illinois, Indiana, Kansas, Kentucky, Minnesota, Mississippi, Oregon, Texas, Utah, Virginia and Wyoming. See generally Patricia E. O'Toole, *State Legislation on Audit Privilege*, ENVTL. F., May/June 1995, at 18, 18-19 (providing a brief discussion of the various statutes and identifying other legislation).

31. Hogue, *supra* note 22, at 882. See generally O'Toole, *supra* note 30, at 18-19 (identifying the status of various state legislation).

32. S. 582, 104th Cong., 1st Sess. (1995). See generally Mark O. Hatfield, *The Environmental Audit Privilege Act*, ENVTL. F., May/June 1995, at 21.

33. The Oregon statute was passed in 1993. *Effects of State's Audit Privilege Law Still Unclear After First Year, Lawyers Say*, [25 Current Reports] Env't Rep. (BNA) 1621, 1621 (Dec. 16, 1994). See also John L. Wittenberg & Stephanie Siegel, *Table Of State Legislation On Environmental Audit Privileges*, [18 Current Report] Chem. Reg. Rep. (BNA) 447, 447 (July 15, 1994).

34. *Despite Lack of Confidentiality Laws, Companies Conducting Audits, Lawyer Says*, [26 Current Developments] Env't Rep. (BNA) 13, 13 (May 5, 1995). See O'Reilly, *supra* note 15, at 141-44 (briefly discussing the Oregon, Indiana, Kentucky and Colorado statutes).

35. *Despite Lack of Confidentiality Laws, Companies Conducting Audits, Lawyers Says*, *supra* note 34, at 13.

36. ARK. CODE ANN. § 8-1-301 (Michie Supp. 1995); COLO. REV. STAT. ANN. § 13-25-126.5(1) (West Supp. 1995); IDAHO CODE § 9-802(1)(a) (Supp. 1995); ILL. ANN. STAT. ch. 415, para. 5/52.2(a) (Smith-Hurd Supp. 1995); KY. REV. STAT. ANN. § 224.01-040(2) (Michie Butterworth 1995); OR. REV. STAT. § 468.963(1) (Supp. 1994); UTAH CODE ANN. § 19-7-102(2)

example, Oregon's statute is intended "to encourage owners and operators of facilities . . . to conduct voluntary internal environmental audits of their compliance programs and management systems and to assess and improve compliance with such statutes . . ." ³⁸ Kentucky's statute recognizes that "[i]n order to encourage owners and operators of facilities . . . to conduct voluntary internal environmental audits of their compliance programs . . . and to assess and improve compliance with statutory and regulatory requirements, an environmental audit privilege is created to protect the confidentiality of communication relating to . . . audits." ³⁹

Colorado's statute is also concerned with voluntary compliance but balances that with a desire to not hinder regulatory action. The statute states "that the voluntary provisions of [the] act will not inhibit the exercise of the regulatory authority by those entrusted with protecting [the] environment." ⁴⁰

Each of these statutes recognizes that voluntary compliance is essential to protection of the environment. However, the actual protection of the audits is limited. Under these statutes, audit reports that fall within the privilege cannot be admitted as evidence in administrative, civil, or criminal proceedings unless an exception is satisfied. ⁴¹ Although this new privilege is potentially broad, it is limited by both the types of audits that can be performed and the types of information and situations that will be protected from disclosure.

Audits that fall under these statutes are the result of an internal, voluntary, and generally comprehensive evaluation of facilities or activities regulated under specific portions of local, state, or federal laws, and are done to identify violations,

(1995).

37. ARK. CODE ANN. § 8-1-301 (Michie Supp. 1995); COLO. REV. STAT. ANN. § 13-25-126.5(1) (West Supp. 1995); IDAHO CODE § 9-802(1)(c) (Supp. 1995); UTAH CODE ANN. § 19-7-102(1) (1995).

38. OR. REV. STAT. § 468.963(1) (Supp. 1994).

39. KY. REV. STAT. ANN. § 224.01-040(2) (Michie Butterworth 1995).

40. COLO. REV. STAT. ANN. § 13-25-126.5(1) (West Supp. 1995).

41. ARK. CODE ANN. § 8-1-303(b) (Michie Supp. 1995) (However, this statute does not limit the public's rights under the Arkansas Freedom of Information Act (ARK. CODE ANN. §§ 25-19-101 to -107 (Michie 1992 & Supp. 1995)). ARK. CODE ANN. § 8-1-312(b).); COLO. REV. STAT. ANN. § 13-25-126.5(3) (West Supp. 1995); IDAHO CODE § 9-804 (Supp. 1995) (disclosure of environmental audit reports for nongovernmental entities cannot be compelled by the government); ILL. ANN. STAT. ch. 415, para. 5/52.2(b) (Smith-Hurd Supp. 1995); IND. CODE ANN. § 13-10-3-3 (West Supp. 1995); KAN. STAT. ANN. § 60-3333(a) (Supp. 1995) (the report is discoverable but not admissible); KY. REV. STAT. ANN. § 224.01-040(3) (Michie Butterworth 1995); MISS. CODE ANN. § 49-2-71(1) (Supp. 1995); OR. REV. STAT. § 468.963(2) (Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 5(b) (West Supp. 1996) (The government is also prohibited from requesting, using, or reviewing an audit report during an inspection. *Id.* § 5(e).); UTAH CODE ANN. § 19-7-105 (1995) (Utah's privilege only applies to administrative actions.); VA. CODE ANN. § 10.1-1198(B) (Michie Supp. 1995) (The document cannot be admitted without the owner or operator's written consent.); WYO. STAT. § 35-11-1105(c) (Supp. 1995).

prevent future violations, and improve overall compliance with those laws.⁴² However, the privilege is limited in scope. All of the states, with the exception of Texas, limit the application of their statutes to reports associated with environmental audits.⁴³ In addition to the environmental area, Texas allows the report to address compliance with occupational safety and health regulations.⁴⁴ Although these statutes use approximately the same language, the actual activities that the privilege covers may be different depending upon the state. The assessment of a facility's compliance with traditional environmental laws, such as hazardous waste, air pollution, or water pollution, should fall within the scope of each of the respective statutes. However, it may or may not include other environmental areas, such as community right to know requirements.⁴⁵ As previously stated, only Texas allows an audit of an entity's compliance with safety and health regulations to fall within the scope of the privilege.⁴⁶ The Texas statute also requires that "the term 'environmental or health and safety law'" be broadly interpreted "[t]o fully implement the privilege."⁴⁷ Further, a few of the statutes

42. ARK. CODE ANN. § 8-1-302(3)(A) (Michie Supp. 1995); COLO. REV. STAT. ANN. § 13-25-126.5(2)(e) (West Supp. 1995) (Colorado's language in this regard is more general than most of the other statutes.); IDAHO CODE § 9-803(3) (Supp. 1995) (Idaho's language is also very general.); ILL. ANN. STAT. ch. 415, para. 5/52.2(i) (Smith-Hurd Supp. 1995); IND. CODE ANN. § 13-10-3-1 (West Supp. 1995); KAN. STAT. ANN. § 60-3332(a) (Supp. 1995) (Kansas's statute does not use the word "comprehensive."); KY. REV. STAT. ANN. § 224.01-040(1)(a) (Michie Butterworth 1995); MISS. CODE ANN. § 49-2-2(f) (Supp. 1995) (Mississippi's statute does not use the word "comprehensive."); OR. REV. STAT. § 468.963(6)(a) (Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 3(a)(3) (West Supp. 1996) (Texas' statute also does not use the word "comprehensive" but instead calls for a "systematic . . . evaluation."); UTAH CODE ANN. § 19-7-103(4) (1995) (Utah's statute is very general and the language is nearly identical to that used in Colorado's statute.); VA. CODE ANN. § 10.1-1198(A) (Michie Supp. 1995) (Virginia's statute is also very general and does not use the word "comprehensive."); WYO. STAT. § 35-11-1105(a)(i) (Supp. 1995).

43. ARK. CODE ANN. § 8-1-302(4) (Michie Supp. 1995); COLO. REV. STAT. ANN. § 13-25-126.5(2)(b) (West Supp. 1995); IDAHO CODE § 9-803(4) (Supp. 1995); ILL. ANN. STAT. ch. 415, para. 5/52.2(i) (Smith-Hurd Supp. 1995); IND. CODE ANN. § 13-10-3-2 (West Supp. 1995); KAN. STAT. ANN. § 60-3332(b) (Supp. 1995); KY. REV. STAT. ANN. § 224.01-040(1)(b) (Michie Butterworth 1995); MISS. CODE ANN. § 49-2-(2)(e) (Supp. 1995); OR. REV. STAT. § 468.963(6)(b) (Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 4 (West Supp. 1996); UTAH CODE ANN. § 19-7-103(2) (1995); VA. CODE ANN. § 10.1-1198(A) (Michie Supp. 1995); WYO. STAT. § 35-11-1105(a)(ii) (1995).

44. TEX. REV. CIV. STAT. ANN. art. 4447cc, § 4 (West Supp. 1996).

45. OR. REV. STAT. §§ 453.307-414 (1992 & Supp. 1994). This section concerns the state emergency planning and community right to know requirements and is not one of the sections covered by the environmental audit privilege according to OR. REV. STAT. ANN. §§ 468.963(1), .963(6)(a). Conversely, Indiana's statute would include the Community Right-To-Know requirements which are found at IND. CODE ANN. § 13-7-37-1 to -21 (West Supp. 1995). See IND. CODE ANN. § 13-10-3-1 (West Supp. 1995).

46. See *supra* note 44 and accompanying text.

47. TEX. REV. CIV. STAT. ANN. art. 4447cc, § 3(e) (West Supp. 1996).

require that the audit, once begun, be completed within a reasonable amount of time.⁴⁸

Because work place safety rules and other nonenvironmental regulations are not usually included under the privilege, at least those parts of the report would be discoverable. Some statutes allow for only part of the document to lose the privilege.⁴⁹ For other statutes, it is unclear if the loss of the privilege for part of the report would, in turn, jeopardize the privilege for the remainder of the document.

B. Information that is Excluded from the Privilege

Not all information discovered during an audit would automatically be covered by the privilege. Each statute excludes certain types of information. Generally, any information that a facility must report, maintain, or have available for the government under a regulation, law, or permit; information that a regulatory agency obtains through its own efforts; or information obtained from someone who was not a part of the audit, is excluded from the privilege.⁵⁰ Beyond these three categories, Colorado's statute also excludes documents that were prepared either before the audit was begun or after it was completed and which were not part of the audit.⁵¹ In addition, information which does not otherwise fall within any other privilege and "is developed or maintained in the course of regularly conducted business activity or regular practice" is excluded.⁵² Further, even if the privilege protects the contents of the audit report, the existence of the report is discoverable.⁵³ Similarly, Wyoming also exempts documents that were

48. COLO. REV. STAT. ANN. § 13-25-126.5(2)(e) (West Supp. 1995); KAN. STAT. ANN. § 60-3332(a) (Supp. 1995); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 4(e) (West Supp. 1996); WYO. STAT. § 35-11-1105(a)(i) (Supp. 1995).

49. ARK. CODE ANN. § 8-1-311 (Michie Supp. 1995); ILL. ANN. STAT. ch. 415, para. 5/52.2(g) (Smith-Hurd Supp. 1995); IND. CODE ANN. § 13-10-3-8 (West Supp. 1995); KAN. STAT. ANN. § 60-3335(f) (Supp. 1995); KY. REV. STAT. ANN. § 224.01-040(5)(e) (Michie Butterworth 1995); OR. REV. STAT. § 468.963(4)(e) (Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 9(j) (West Supp. 1996); UTAH CODE ANN. § 19-7-106(2) (1995); UTAH R. EVID. 508(e)(3)(A) (1996); WYO. STAT. § 35-11-1105(c)(ix) (Supp. 1995).

50. ARK. CODE ANN. § 8-1-305 (Michie Supp. 1995); COLO. REV. STAT. ANN. §§ 13-25-126.5(4)(a)-(d) (West Supp. 1995); IDAHO CODE §§ 9-805, -807 (Supp. 1995); ILL. ANN. STAT. ch. 415, para. 5/52.2(h) (Smith-Hurd Supp. 1995); IND. CODE ANN. §§ 13-10-3-11(a) (West Supp. 1995); KAN. STAT. ANN. § 60-3336 (Supp. 1995); KY. REV. STAT. ANN. § 224.01-040(6) (Michie Butterworth 1995); MISS. CODE ANN. §§ 49-2-71(2)(a-d) (Supp. 1995); OR. REV. STAT. § 468.963(5) (Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 8(a) (West Supp. 1996) (Further, Texas' statute specifically states that a person can agree to perform an audit and disclose the report. *Id.* § 8(b).); UTAH R. EVID. 508(d)(6)-(8) (1996); WYO. STAT. § 35-11-1105(d)(i)-(iii) (Supp. 1995).

51. COLO. REV. STAT. ANN. § 13-25-126.5(4)(e)-(f) (West Supp. 1995).

52. *Id.* § 13-25-126.5(4)(g).

53. *Id.* § 13-25-126.5(8).

created before the audit was begun or after it was completed and were independent of the audit.⁵⁴

In addition to the three general categories of excluded information previously identified, Mississippi also excludes “[d]ocuments existing prior to the commencement of and independent of the voluntary self-evaluation with the exception of evidence establishing a request for compliance assistance to the appropriate government agency or authority.”⁵⁵ The Virginia statute excludes either a portion of, or the entire document if it contains “information that demonstrates a clear, imminent and substantial danger to the public health or the environment”⁵⁶ It also excludes documents that are required by a law or were created independently of the audit.⁵⁷ Finally, Virginia’s privilege is not applicable if either part of the report or the entire document was “collected, generated or developed in bad faith”⁵⁸

A number of regulations contain notification requirements regarding the facility’s situation or status.⁵⁹ For instance, if the audit uncovers evidence of a chemical spill in excess of the reportable quantity or locates unreported underground storage tanks, the facility must report such findings, and the privilege created by these statutes would not apply to that information.

Of the types of information excluded from the privilege created by these statutes, potentially the most problematic involves information that must be developed for, or reported to, the government due to a regulation or permit requirement. This category is also the easiest to expand through the issuance of new or revised permits and regulations. In spite of this, only Indiana, Texas, Illinois and Kentucky directly address this point. Indiana’s statute states that the “section does not allow the regulatory agency to 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.”⁶⁰ Texas provides that “[a] regulatory agency may not adopt a rule or impose a condition that circumvents the purpose of this [statute].”⁶¹ Conversely, Kentucky’s statute states that it does not “limit,

54. WYO. STAT. § 35-11-1105(d)(iv)-(v) (Supp. 1995).

55. MISS. CODE ANN. § 49-2-71(2)(e) (Supp. 1995).

56. VA. CODE ANN. § 10.1-1198(B) (Michie Supp. 1995).

57. *Id.*

58. *Id.*

59. Generators of hazardous waste are required to obtain an EPA identification number before they either ship their hazardous waste to another facility or manage it at their own facility. To obtain this number, they must request it from the EPA. 40 C.F.R. § 262.12 (1995). A facility is also required to notify the National Response Center if they have released a hazardous substance in an amount over the reportable quantity within a 24 hour period. This notification is required “as soon as he has knowledge of [the] release.” 40 C.F.R. § 302.6(a) (1995). If a facility has an underground storage tank that contains either petroleum or hazardous chemicals, they must inform the government. 40 C.F.R. § 280.22 (1995); 42 U.S.C. § 6991a (1994). *See also* TRUITT ET AL., *supra* note 1, at 164-98 (discussing various disclosure obligations).

60. IND. CODE ANN. § 13-10-3-11(b) (West Supp. 1995).

61. TEX. REV. CIV. STAT. ANN. art. 4447cc, § 11 (West Supp. 1996).

waive, or abrogate any reporting requirement . . . or permit condition[.]”⁶² Illinois’ statute is even broader because “[n]othing in [it] limits, waives, or abrogates existing or future obligations of regulated entities to monitor, record, or report information required under State, federal, regional, or local laws, ordinances, regulations, permits, or orders.”⁶³

Most of the statutes allow the audit to be performed by the facility’s owner, operator, employees, or a private contractor.⁶⁴ If any other party performs the audit, it is unlikely that the results would be privileged. For example, the results of an audit performed by an outside party, such as a vendor, customer or perhaps an insurance carrier, would probably not be protected unless they were acting as a private contractor hired specifically to conduct the audit.

The statutes also require that the audit be voluntary.⁶⁵ Therefore, audits required through some type of governmental action, such as part of a settlement negotiation⁶⁶ or a statute,⁶⁷ are not voluntary and are not protected.

62. KY. REV. STAT. ANN. § 224.01-040(8) (Michie Butterworth 1995).

63. ILL. ANN. STAT. ch. 415, para. 5/52.2(h) (Smith-Hurd Supp. 1995).

64. ARK. CODE ANN. § 8-1-302(3)(B) (Michie Supp. 1995); COLO. REV. STAT. ANN. § 13-25-126.5(2)(e) (West Supp. 1995) (Colorado’s statute specifies that the employees or consultant must be assigned the responsibility to perform the audit.); IDAHO CODE § 9-803(3) (Supp. 1995); ILL. ANN. STAT. ch. 415, para. 5/52(i) (Smith-Hurd Supp. 1995); IND. CODE ANN. § 13-10-3-1 (West Supp. 1995); KAN. STAT. ANN. § 60-3332(a) (Supp. 1995) (instead of a private contractor, Kansas requires the use of a “qualified auditor”); KY. REV. STAT. ANN. § 224.01-040(1)(a) (Michie Butterworth 1995); MISS. CODE ANN. § 49-2-2(f) (Supp. 1995) (Mississippi requires that one of these individuals perform the audit.); OR. REV. STAT. § 468.963(6)(a) (Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 3(3) (West Supp. 1996) (Texas also limits the performance of the audit to these groups.); UTAH CODE ANN. § 19-7-103(4) (1995); VA. CODE ANN. § 10.1-1198(A) (Michie Supp. 1995) (This statute does not specifically allow employees to perform the audit.); WYO. STAT. § 35-11-1105(a)(i) (Supp. 1995).

65. ARK. CODE ANN. § 8-1-302(3) (Michie Supp. 1995); COLO. REV. STAT. ANN. § 13-25-126.5(2)(e) (West Supp. 1995); IDAHO CODE § 9-803(3) (Supp. 1995) (The requirement for voluntariness is not specified but can be inferred from this section and from section 9-802(2).); ILL. ANN. STAT. ch. 415, para. 5/52(i) (Smith-Hurd Supp. 1995); IND. CODE ANN. § 13-10-3-1 (West Supp. 1995); KAN. STAT. ANN. § 60-3332(a) (Supp. 1995); KY. REV. STAT. ANN. § 224.01-040(1)(a) (Michie Butterworth 1995); MISS. CODE ANN. § 49-2-2(f) (Supp. 1995); OR. REV. STAT. § 468.963(6)(a) (Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 3(a)(3) (West Supp. 1996); UTAH CODE ANN. § 19-7-103(4) (1995); VA. CODE ANN. § 10.1-1198(A) (Michie Supp. 1995); WYO. STAT. § 35-11-1105(a)(i) (Supp. 1995).

66. Environmental Auditing Policy Statement, *supra* note 7, at 25,007 (the EPA may propose that audit requirements be included in certain types of settlement negotiations).

67. A number of statutes, including the Clean Air Act, 42 U.S.C. §§ 7401-7671q (1994), and the Emergency Planning and Community Right-To-Know Act, 42 U.S.C. §§ 11001-11050 (1994), have the potential to either directly or indirectly require environmental auditing. See generally Michael Herz, *Environmental Auditing and Environmental Management: The Implicit and Explicit Federal Regulatory Mandate*, 12 CARDOZO L. REV. 1241, 1241-63 (1991) (discussing various regulatory areas that can result in the imposition of audits); James R. Moore & David

C. Format of the Audit

Once an audit has been performed, the results must be reduced to writing. Some statutes require that the audit documents be labeled with a specific title,⁶⁸ while others do not require the use of any particular identification.⁶⁹ The Texas statute suggests that the documents be labeled with the words "COMPLIANCE REPORT: PRIVILEGED DOCUMENT" or similar language, but the "[f]ailure to label a document [as such] does not constitute a waiver of the audit privilege or create a presumption that the privilege does or does not apply."⁷⁰ The document itself can, and often should, include a wide range of items, such as field notes, photographs, drawings, opinions and other items generated from the audit.⁷¹

After the audit is done and information is generated, the final audit document can include various components. Some statutes require that an audit report include specific elements,⁷² while others merely suggest what elements to

Dabroski, *EPA Environmental Auditing Policy and Federal Criminal Enforcement*, C617 A.L.I.-A.B.A. 207, 219 (1991) (stating that certain statutes can allow EPA to require facilities to perform actions which are similar to an environmental audit).

68. ARK. CODE ANN. § 8-1-302(4) (Michie Supp. 1995) (audit documents must be labeled as "ENVIRONMENTAL AUDIT REPORT: PRIVILEGED DOCUMENT"); IDAHO CODE § 9-803(4) (1995) (documents must be labeled as "Environmental Audit Report" or with other language that is substantially equivalent); ILL. ANN. STAT. ch. 415, para. 5/52.2(i) (Smith-Hurd Supp. 1995) (audit documents must be labeled as "Environmental Audit Report: Privileged Document"); IND. CODE ANN. § 13-10-3-2 (West Supp. 1995) (audit documents must be labeled as "Environmental Audit Report; Privileged Document"); KAN. STAT. ANN. § 60-3332(b) (Supp. 1995) (audit documents must be labeled as "Audit Report: Privileged Document"); KY. REV. STAT. ANN. § 224.01-040(1)(b) (Michie Butterworth 1995) (audit documents must be labeled as "environment audit report: privileged document"); OR. REV. STAT. § 468.963(6)(b) (Supp. 1994) (audit documents must be labeled as "Environmental Audit Report: Privileged Document"); WYO. STAT. § 35-11-1105(a)(ii) (Supp. 1995) (audit documents must be labeled as "Environmental Audit Report: Privileged Document").

69. Such states include Colorado, Mississippi, Utah, and Virginia.

70. TEX. REV. CIV. STAT. ANN. art. 4447cc, § 4(d) (West Supp. 1996).

71. See ARK. CODE ANN. § 8-1-302(4)(A) (Michie Supp. 1995); COLO. REV. STAT. ANN. § 13-25-126.5(2)(b) (West Supp. 1995); IDAHO CODE § 9-803(4) (Supp. 1995); ILL. ANN. STAT. ch. 415, para. 5/52.2(i) (Smith-Hurd Supp. 1995) (these elements shall be included in the report, if applicable); IND. CODE ANN. § 13-10-3-2(1) (West Supp. 1995) (these items shall be included in the report); KAN. STAT. ANN. § 60-3332(b) (Supp. 1995); KY. REV. STAT. ANN. § 224.01-040(1)(b) (Michie Butterworth 1995); MISS. CODE ANN. § 49-2-2(e) (Supp. 1995); OR. REV. STAT. § 468.963(6)(b) (Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 4(c) (West Supp. 1996); UTAH CODE ANN. § 19-7-103(2) (1995); VA. CODE ANN. § 10.1-1198(A) (Michie Supp. 1995); WYO. STAT. § 35-11-1105(a)(ii) (Supp. 1995).

72. Indiana, Kentucky and Wyoming require the report to contain three elements:

- 1) A report from the auditor that discusses the audit's scope, information collected during the audit, findings, suggestions, and attachments,

include.⁷³ Although Illinois does not require the report to contain specific components, it does require that the report include a written response to the audit findings.⁷⁴ Finally, a few of the statutes do not discuss the elements of the report at all.⁷⁵

If a facility is performing an audit in Indiana, Kentucky or Wyoming, it must make certain that the final document contains each of the required elements. Failing to do so could result in a court determining that the resulting document does not satisfy the definition of an environmental audit report, and thus, it would not be eligible for the privilege.

If the facility performing the audit is located in a state whose statute merely suggests elements to be included, then that facility has a little more latitude. To more fully provide for the protection of the resulting document, the facility may wish to include all the suggested elements or at least mention why specific elements do not apply. Reports that contain all of the suggested elements should more fully satisfy the purpose of the statute, and therefore, have a better chance of falling within the privilege. Further, if an audit report identifies a problem but does not discuss corrective actions, a court may determine that the document does not fall within the statute.

D. How the Privilege Can Be Lost

The privilege does not automatically protect environmental audit reports that

2) An analysis of either the total report or a portion of it including issues involving the implementation of corrective actions, and

3) A plan to correct past problem areas, "improv[e] current compliance, and prevent[] future noncompliance."

IND. CODE ANN. § 13-10-3-2(2)(A)-(C) (West Supp. 1995); KY. REV. STAT. ANN. § 224.01-040(1)(b) (Michie Butterworth 1995); WYO. STAT. § 35-11-1105(a)(ii)(A)-(C) (Supp. 1995).

73. Arkansas, Illinois (with the exception noted below), Kansas, Oregon, and Texas suggest that the report include:

1) A discussion by the auditor of the audit's scope, the information identified during the audit, findings, and suggestions,

2) An analysis of either part or all of the report. This may include a discussion of issues involving implementation of corrective actions, and

3) A plan to correct areas of noncompliance which were identified and methods to provide for maintaining compliance in the future.

However, Idaho's statute is not as detailed. ARK. CODE ANN. § 8-1-302(4)(B)-(D) (Michie Supp. 1995); IDAHO CODE § 9-803(4) (Supp. 1995) (Although Idaho's statute is not as detailed, it states that the "audit report may include memoranda and documents analyzing portions or all of the audit report."); ILL. ANN. STAT. ch. 415, para. 5/52.2(i)(1)-(4) (Smith-Hurd Supp. 1995) (Illinois adds a fourth element for "[a]nalytical data"); KAN. STAT. ANN. § 60-3332(b)(1)-(3) (Supp. 1995); OR. REV. STAT. § 468.963(6)(b)(A)-(C) (Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 4(b) (West Supp. 1996).

74. ILL. ANN. STAT. ch. 415, para. 5/52.2(i) (Smith-Hurd Supp. 1995).

75. Such states include Colorado, Mississippi, Utah, and Virginia.

meet the various statutory definitions from discovery in all situations. Although the document would otherwise be protected from discovery, the privilege could be lost in a civil or criminal proceeding by either the actions of the facility for which the audit was performed or by a determination of the court.

Each of the statutes provides that the privilege can be waived.⁷⁶ However, some statutes limit the waiver of the privilege to the facility's owner or operator,⁷⁷

76. ARK. CODE ANN. § 8-1-304(a)(1) (Michie Supp. 1995) (The waiver must be expressly made; it can be for the entire report or for just a portion of the report. *Id.* § 8-1-304(b).); COLO. REV. STAT. ANN. § 13-25-126.5(3)(a) (West Supp. 1995); IDAHO CODE § 9-806(1) (Supp. 1995) (Idaho requires that the privilege be expressly waived. However, the privilege is only lost for the portions of the report which were specifically covered by the waiver.); ILL. ANN. STAT. ch. 415, para. 5/52.2(d)(1) (Smith-Hurd Supp. 1995) (The privilege must be expressly waived.); IND. CODE ANN. § 13-10-3-9(a) (West Supp. 1995) (The waiver can be either express or implied. Submitting the audit report under the state's confidentiality rules is not considered to be a waiver of the privilege. *Id.* § 13-10-3-9(b).); KAN. STAT. ANN. § 60-3334 (Supp. 1995) (This statute allows the audit report or information from the audit to be released to employees, the owner or operator's lawyer, or an independent contractor hired to address the problems identified in the audit; a potential purchaser under an agreement that specifically provides that the information will be kept confidential; or to the government under an agreement to keep the information confidential, without waiving the privilege. *Id.* § 60-3334(b)-(c).); KY. REV. STAT. ANN. § 224.01-040(4)(a) (Michie Butterworth 1995) (The waiver can be either implied or express. Attempting to introduce the report as evidence by the owner, operator or party who took part in the audit is considered to be a waiver. *Id.* § 224.01-040(4)(b). Attempting to introduce a portion of the audit report acts as a waiver for the entire report. *Id.*); MISS. CODE ANN. § 49-2-71(1)(a) (Supp. 1995) (waiver must be expressly made); OR. REV. STAT. § 468.963(3)(a) (Supp. 1994) (Oregon allows the privilege to be either expressly waived or waived by implication.); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 6(a) (West Supp. 1996) (The waiver must be expressly made. The audit report can be disclosed to limited classes of people and only for specific reasons without waiving the privilege. *Id.* § 6(b). If the party who received the report under a confidentiality agreement discloses it, that party is liable for damages and, if the party disclosing the document is a government official, then they have committed a misdemeanor. *Id.* § 6(c), (d).); UTAH R. EVID. 508(d)(1) (1996) (The waiver must be express.); WYO. STAT. § 35-11-1105(c)(i) (Supp. 1995) (Attempting to introduce the audit report by either the owner, operator or party who conducted an activity as evidence in a "proceeding, including reporting of violations" acts as a waiver for the applicable portions of the report.).

77. ARK. CODE ANN. § 8-1-304(a)(1) (Michie Supp. 1995) (Arkansas does not consider the releasing of the report under a confidentiality agreement between the owner or operator and a limited range of third parties or to an independent contractor which was hired to help bring the facility into compliance as a waiver. *Id.* § 8-1-304(a)(3). Attempting to introduce the report as evidence by either the owner, operator or person who performed an audit activity constitutes a waiver. *Id.* § 8-1-304(a)(2).); COLO. REV. STAT. ANN. § 13-25-126.5(3)(a) (West Supp. 1995); IDAHO CODE § 9-806(1) (Supp. 1995); ILL. ANN. STAT. ch. 415, para. 5/52.2(d)(1) (Smith-Hurd Supp. 1995); IND. CODE ANN. § 13-10-3-9(a) (West Supp. 1995); KAN. STAT. ANN. § 60-3334(a) (Supp. 1995); MISS. CODE ANN. § 49-2-71(1)(a) (Supp. 1995); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 6(a) (West Supp. 1996); UTAH R. EVID. 508(d)(1) (1996); WYO. STAT. § 35-11-1105(c)(i) (1995) (Attempting to introduce the report as evidence by either the owner, operator or

while others also allow parties involved in audit activities to waive the privilege.⁷⁸ Virginia's statute is silent regarding waiver.⁷⁹

The privilege created by most of these statutes can also be revoked if a court, following an *in camera* review in either an administrative, civil, or criminal action, determines that the privilege was claimed fraudulently,⁸⁰ that the material contained in the audit does not fall within the scope of the privilege,⁸¹ or that the audit contains evidence of a violation and efforts to correct the violation were not begun promptly or were not diligently pursued.⁸² Additionally, a few of the

person who conducted an activity constitutes a waiver.).

78. KY. REV. STAT. ANN. § 224.01-040(4)(a) (Michie Butterworth 1995); OR. REV. STAT. § 468.963(3)(a) (Supp. 1994).

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

80. ARK. CODE ANN. §§ 8-1-307(a)(1), -308(a)(1) (Michie Supp. 1995); COLO. REV. STAT. ANN. § 13-25-126.5(3)(d) (West Supp. 1995); IDAHO CODE § 9-806(2)(a) (Supp. 1995); ILL. ANN. STAT. ch. 415, para. 5/52.2(d)(2)(A) (Smith-Hurd Supp. 1995); IND. CODE ANN. §§ 13-10-3-4(a)(2)(A), -5(a)(2)(A) (West Supp. 1995); KAN. STAT. ANN. § 60-3334(d)(1) (Supp. 1995); KY. REV. STAT. ANN. §§ 224.01-040(4)(c)(1), -040(4)(d)(1) (Michie Butterworth 1995); MISS. CODE ANN. § 49-2-71(1)(c) (Supp. 1995); OR. REV. STAT. § 468.963(3)(b)(A), (c)(A) (Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 7(a)(1) (West Supp. 1996); UTAH R. EVID. 508(d)(2) (1996); WYO. STAT. § 35-11-1105(c)(ii)(A), (c)(iii) (Supp. 1995).

81. ARK. CODE ANN. § 8-1-307(a)(2), -308(a)(2) (Michie Supp. 1995); IDAHO CODE § 9-806(2)(b) (Supp. 1995); ILL. ANN. STAT. ch. 415, para. 5/52.2(d)(2)(B) (Smith-Hurd Supp. 1995); IND. CODE ANN. §§ 13-10-3-4(a)(2)(B), -5(a)(2)(B) (West Supp. 1995); KAN. STAT. ANN. § 60-3334(d)(3) (Supp. 1995); KY. REV. STAT. ANN. §§ 224.01-040(4)(c)(2), -040(4)(d)(2) (Michie Butterworth 1995); OR. REV. STAT. § 468.963(3)(b)(B), (c)(B) (Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 7(a)(2) (West Supp. 1996) (Referring to information the company is required by rule to retain, information the government obtains on its own, or information provided by a party not involved in the audit. *Id.* § 8(a).); WYO. STAT. § 35-11-1105(c)(ii)(B), (c)(iii) (Supp. 1995).

82. ARK. CODE ANN. §§ 8-1-307(a)(3), (4), -308(a)(3), (4) (Michie Supp. 1995) (If the violation involved failure to obtain a permit, the corrective action is considered diligent if the permit application is filed within 90 days or, if a longer period is needed, after notifying the agency within 90 days and with their approval, filing the permit on the extended schedule. *Id.* §§ 8-1-307(b), -308(b).); COLO. REV. STAT. ANN. § 13-25-126.5(3)(b)(I) (West Supp. 1995) (If the facility is not in compliance with multiple environmental laws, the compliance demonstration can be satisfied by implementing a comprehensive program with a schedule to achieve compliance. *Id.* § 13-25-126.5(3)(b)(II).); ILL. ANN. STAT. ch. 415, para. 5/52.2(d)(2)(C) (Smith-Hurd Supp. 1995); IND. CODE ANN. §§ 13-10-3-4(a)(2)(C), -5(a)(2)(C) (West Supp. 1995) (If the violation was failure to obtain a permit, the correction is considered diligently made if the permit application is filed within 90 days of identifying the violation. *Id.* § 13-10-3-4(b), -5(b).); KAN. STAT. ANN. § 60-3334(d)(4) (Supp. 1995); KY. REV. STAT. ANN. §§ 224.01-040(4)(c)(3), -040(4)(d)(3) (Michie Butterworth 1995); MISS. CODE ANN. § 49-2-71(1)(b) (Supp. 1995) (If the facility is in violation of multiple environmental laws, the initiation of a comprehensive plan to correct the violation according to a specific schedule can be used to show that efforts are appropriate. *Id.* § 49-2-71(1)(b)(iii).); OR. REV. STAT. § 468.963(3)(b)(C), (c)(C) (Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 7(a)(3) (West Supp. 1996); UTAH R. EVID. 508(d)(5) (1996) (If the audit indicates

statutes allow the privilege to be lost in a criminal action if the information contained in the audit report "is not otherwise available," and the prosecution needs it and cannot obtain the equivalent of the evidence without undue delay or cost.⁸³ This provision only applies in a criminal proceeding but is similar to the mechanism used to obtain information protected by the work product doctrine.⁸⁴ Therefore, a court may analyze this provision similarly when deciding if information protected by the privilege should be discoverable. In a criminal proceeding, Kentucky requires that the prosecution only need the information in order for it to be revealed.⁸⁵ The Kentucky statute also provides that the audit report is not privileged in a criminal proceeding if that privilege was previously lost in a civil action.⁸⁶

While most of the states incorporate some of the preceding concepts in their statutes, many have unique provisions that also must be reviewed prior to the initiation of an audit. For example, Colorado's regulation allows a court or administrative law judge to admit an audit report if it is "determine[d] that compelling circumstances exist that make it necessary to admit [it] into evidence or that make it necessary to subject [it] to discovery procedures."⁸⁷ Further, if the information in the report indicates that "a clear, present, and impending danger to the public health or the environment in areas outside of the facility property" exists, the report is admissible.⁸⁸ Finally, the privilege can be lost if the audit report was prepared to prevent information from being disclosed in a government action that was imminent, already underway, or one of which the facility had been notified in writing.⁸⁹

Indiana's statute limits the audit reports in which the privilege can be revoked in a criminal, civil, or administrative proceeding to those "report[s] [that were] first issued after July 1, 1994."⁹⁰ Therefore, if the report was prepared before July 1, 1994, the effective date of the statute, and otherwise satisfies the requirements of the statute, it may not be discoverable.⁹¹ It is unlikely, however, that an audit report prepared before the effective date of the statute would satisfy all of the requirements. Even if the audit report was issued after July 1, 1994, it would only

that the facility is in violation of "more than one environmental law, or if the noncompliance will require substantial resources," a facility can demonstrate that its efforts are appropriate "by instituting a comprehensive program that establishes a phased schedule of actions to be taken to bring the [facility] into compliance within a reasonable amount of time."); WYO. STAT. §§ 35-11-1105(c)(ii)(C), -1105(c)(iii) (Supp. 1995).

83. IND. CODE ANN. § 13-10-3-5(a)(2)(D) (West Supp. 1995); OR. REV. STAT. § 468.963(3)(c)(D) (Supp. 1994); WYO. STAT. § 35-11-1105(c)(iii) (Supp. 1995).

84. See *infra* notes 257-73 and accompanying text.

85. KY. REV. STAT. ANN. § 224.01-040(d)(4) (Michie Butterworth 1995).

86. *Id.* § 224.01-040(9).

87. COLO. REV. STAT. ANN. § 13-25-126.5(3)(c) (West Supp. 1995).

88. *Id.* § 13-25-126.5(3)(e).

89. *Id.* § 13-25-126.5(3)(d).

90. IND. CODE ANN. §§ 13-10-3-4(a)(1), -5(a)(1) (West Supp. 1995).

91. O'Reilly, *supra* note 15, at 143.

be discoverable if the court determines that the privilege was claimed fraudulently, "[t]he material [was] not subject to the privilege," the violation was not promptly corrected, or that "the prosecut[ion had] a compelling need for the information[, it was] not otherwise available," and the equivalent could not be obtained without unreasonable delay and cost.⁹²

In addition to reasons previously discussed, the Kansas statute allows an audit report to be discovered if "the party asserting the privilege has not implemented a management system to assure compliance with environmental laws."⁹³ Mississippi's statute allows the privilege to be lost if the court decides that the

report was prepared to avoid disclosure of information in . . . [a] proceeding that was underway, or for which the person had been provided written notification that an investigation into a specific violation had been initiated; or . . . [t]he court . . . determines that . . . a condition exists that demonstrates an imminent and substantial hazard or endangerment to the public health and safety or the environment.⁹⁴

Further, if the audit report is not "kept and maintained solely within the confines of the evaluated party," the privilege will be lost.⁹⁵

Similarly, Utah allows the privilege to be lost if the "audit report was prepared to avoid disclosure of information in . . . [an] investigation or proceeding that was

92. IND. CODE ANN. §§ 13-10-3-4(a)(2), -5(a)(2)(A)-(D) (West Supp. 1995).

93. KAN. STAT. ANN. § 60-3334(d)(2) (Supp. 1995). The statute goes on to identify important characteristics that the management system should have based on the traits of the entity. They include:

- (A) A system that covers all parts of the entity's operations regulated under one or more environmental laws;
- (B) a system that regularly takes steps to prevent and remedy noncompliance;
- (C) a system that has the support of senior management;
- (D) the entity implements a system that has policies, entity standards and procedures that highlight the importance of assuring compliance with all environmental laws;
- (E) the entity's policies, standards and procedures are communicated effectively to all in the entity whose activities could affect compliance achievement;
- (F) specific individuals within both high-level and plant- or operation-level management are assigned responsibility to oversee compliance with such standards and procedures;
- (G) the entity undertakes regular review of the status of compliance, including routine evaluation and periodic auditing of day-to-day monitoring efforts, to evaluate, detect, prevent and remedy noncompliance;
- (H) the entity has a reporting system which employees can use to report unlawful conduct within the organization without fear of retribution; and
- (I) the entity's standards and procedures to ensure compliance are enforced through appropriate employee performance, evaluation and disciplinary mechanisms[.]

Id.

94. MISS. CODE ANN. § 49-2-71(1)(c)-(d) (Supp. 1995).

95. *Id.* at § 49-2-2(e).

already underway and known to the person [invoking] the privilege.”⁹⁶ Utah also allows the privilege to be lost “[i]f the information contained in the . . . report must be disclosed to avoid a clear and impending danger to public health or the environment outside of the facility property.”⁹⁷ Wyoming revokes the privilege if the report has information that “demonstrates a substantial threat to the public health or environment or damage to real property or tangible personal property” outside the plant.⁹⁸

Virginia’s statute allows the court to obtain an audit report if reason exists to believe that either the entire report or part of it falls within an exception to the privilege and that knowledge is based on information independent of the audit.⁹⁹ The court can then review the relevant portions of the document to decide whether the information is privileged.¹⁰⁰ However, a party that receives access to the information cannot disclose that information unless allowed by the court or hearing examiner.¹⁰¹

Most of the statutes address the procedural issues for obtaining the audit report. The burden of proving the applicability of the privilege is generally assigned to the party claiming it and the burden of proving that the document falls within an exception is assigned to the party seeking disclosure of the audit report.¹⁰² Further, the entity who performed the audit bears the burden of proving

96. UTAH R. EVID. 508(d)(3) (1996).

97. *Id.* 508(d)(4).

98. WYO. STAT. § 35-11-1105(c)(ii)(D) (Supp. 1995).

99. VA. CODE ANN. § 10.1-1198(C) (Michie Supp. 1995).

100. *Id.*

101. *Id.*

102. ARK. CODE ANN. § 8-1-310 (Michie Supp. 1995) (The party requesting the document must prove fraud or, if the prosecutor is attempting to obtain the document, they must prove that the appropriate exceptions are satisfied.); COLO. REV. STAT. ANN. § 13-25-126.5(7) (West Supp. 1995); ILL. ANN. STAT. ch. 415, para. 5/52.2(d)(3), (e)(5) (Smith-Hurd Supp. 1995); IND. CODE ANN. § 13-10-3-6 (West Supp. 1995) (The party requesting the document must prove fraud or, if they are a prosecutor, that they need the information, cannot otherwise obtain it, and the substantially equivalent information is not available without undue delay or cost.); KAN. STAT. ANN. §§ 60-3334(e), 60-3335(e) (Supp. 1995) (The party attempting to obtain the document must prove “that the privilege is asserted for a fraudulent purpose or to prevent disclosure of past noncompliance” or, in a criminal action, that the material does not fall within the privilege.); KY. REV. STAT. ANN. § 224.01-040(4)(e) (Michie Butterworth 1995) (The party requesting the document must prove fraud and, if it is the prosecutor, that the document contains evidence of an offense and the prosecutor needs the information.); MISS. CODE ANN. § 49-2-71(5) (Supp. 1995); OR. REV. STAT. § 468.963(3)(d) (Supp. 1994) (The party seeking disclosure must show fraud or, if they are a prosecutor, that they need the information, cannot otherwise obtain it, and cannot get equivalent information without unnecessary delay and cost.); TEX. REV. CIV. STAT. ANN. art. 4447cc, §§ 5(f), 7(b) (West Supp. 1996) (The party claiming the privilege has the burden of proving that the privilege is applicable, while the party attempting to have the report disclosed in an administrative, civil, or criminal proceeding, must prove that an exception applies to the audit report.); UTAH CODE ANN. § 19-7-106(3)-(4) (1995); UTAH R. EVID. 508(f) (1996); VA. CODE

that appropriate corrective actions were promptly undertaken and diligently pursued.¹⁰³ Of course, the parties can stipulate whether or not specific information in the report is included in the privilege.¹⁰⁴

Idaho places the burden of proving that disclosing the document is appropriate or that the privilege was fraudulently claimed on the party seeking the information.¹⁰⁵ However, the fact that the entity has a "written environmental compliance policy" or has a plan in place to comply with applicable laws is *prima facie* evidence that the audit report was done to prevent violations and improve the entity's compliance; and thus, the report is eligible for protection.¹⁰⁶ Colorado allows the privilege to be lost if, based on information independent of the audit, a party can "show[] . . . that probable cause exists to believe that an exception . . . is applicable . . . or that the privilege does not apply"¹⁰⁷ If this occurs, then the party can get access to the document but must keep it confidential.¹⁰⁸ If they fail to do so, then they are liable for damages caused by the release of the information,¹⁰⁹ or, if the releasing party is employed by the government, they can be subject to a monetary penalty and be guilty of a misdemeanor.¹¹⁰ If a third party obtains the report in violation of the statute and in turn releases it, they too can be liable for damages.¹¹¹

Mississippi's rule, like Colorado's rule, allows the party to gain access to the report if they can show, based on knowledge independent of the audit, "that probable cause exists to believe that an exception . . . is applicable . . . or that the privilege does not apply"¹¹² Further, that party is forbidden from releasing the audit information unless the court allows it.¹¹³ If they do release information,

ANN. § 10.1-1198(C) (Michie Supp. 1995); WYO. STAT. § 35-11-1105(c)(iv) (Supp. 1995) (The party requesting the document must prove fraud and, in a criminal proceeding, the prosecutor has the burden of proving that the applicable elements exist for the privilege to be revoked.)

103. ARK. CODE ANN. § 8-1-310(a) (Michie Supp. 1995); IND. CODE ANN. § 13-10-3-6(b) (West Supp. 1995); KAN. STAT. ANN. § 60-3334(e)(1) (Supp. 1995); KY. REV. STAT. ANN. § 224.01-040(4)(e) (Michie Butterworth 1995); OR. REV. STAT. § 468.963(3)(d) (Supp. 1994); WYO. STAT. § 35-11-1105(c)(iv) (Supp. 1995).

104. ARK. CODE ANN. § 8-1-306 (Michie Supp. 1995); ILL. ANN. STAT. ch. 415, para. 5/52.2(f) (Smith-Hurd Supp. 1995); IND. CODE ANN. § 13-10-3-10 (West Supp. 1995); KAN. STAT. ANN. § 60-3335(e) (Supp. 1995); KY. REV. STAT. ANN. § 224.01-040(5)(d) (Michie Butterworth 1995); OR. REV. STAT. § 468.963(4)(d) (Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 9(i) (West Supp. 1996); WYO. STAT. § 35-11-1105(c)(viii) (Supp. 1995).

105. IDAHO CODE § 9-806(3) (Supp. 1995).

106. *Id.*

107. COLO. REV. STAT. ANN. § 13-25-126.5(5)(a) (West Supp. 1995).

108. *Id.*

109. *Id.* § 13-25-126.5(5)(b)(I).

110. *Id.* § 13-25-126.5(5)(b)(II).

111. *Id.* § 13-25-126.5(5)(b)(I).

112. MISS. CODE ANN. § 49-2-71(3)(a) (Supp. 1995).

113. *Id.*

without court approval, they are liable for damages.¹¹⁴ In addition, if a party obtains the report in violation of the statute and releases the information, they too are liable for damages.¹¹⁵

Utah's statute also states that if the audit report is disclosed in violation of the Utah Rules of Evidence, the information cannot be used as evidence in a criminal, civil, or administrative proceeding.¹¹⁶ Penalties for improperly disclosing the audit report can include fines, contempt of court, and conviction of a misdemeanor.¹¹⁷ The party who improperly discloses the information is responsible for damages associated with the disclosure.¹¹⁸

Regarding potential criminal proceedings, some of the statutes allow the prosecution to obtain the report if, based on information independent of the audit, probable cause exists to believe that an "offense has been committed."¹¹⁹ The burden is then placed on the facility's owner or operator to request a hearing to decide if the report is privileged.¹²⁰ If the owner or operator fails to request a hearing, they waive the privilege.¹²¹ If a hearing is requested, the prosecution can have access to the audit report to prepare for the hearing but cannot use any of the information against the facility unless the court determines it is subject to disclosure.¹²²

114. *Id.* § 49-2-71(3)(b).

115. *Id.*

116. UTAH CODE ANN. § 19-7-104(1) (1995).

117. *Id.* § 19-7-104(3).

118. *Id.* § 19-7-104(2).

119. ARK. CODE ANN. § 8-1-309(a)(1)-(2) (Michie Supp. 1995); IND. CODE ANN. § 13-10-3-7(a) (West Supp. 1995); KAN. STAT. ANN. § 60-3335(a) (Supp. 1995); KY. REV. STAT. ANN. § 224.01-040(5)(a) (Michie Butterworth 1995); OR. REV. STAT. § 468.963(4)(a) (Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 9(a) (West Supp. 1996); WYO. STAT. § 35-11-1105(c)(v) (Supp. 1995).

120. ARK. CODE ANN. § 8-1-309(b)(1) (Michie Supp. 1995); IND. CODE ANN. § 13-10-3-7(b) (West Supp. 1995); KAN. STAT. ANN. § 60-3335(b) (Supp. 1995); KY. REV. STAT. ANN. § 224.01-040(5)(b) (Michie Butterworth 1995); OR. REV. STAT. § 468.963(4)(b) (Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 9(c) (West Supp. 1996); WYO. STAT. § 35-11-1105(c)(vi) (Supp. 1995).

121. ARK. CODE ANN. § 8-1-309(b)(2) (Michie Supp. 1995); IND. CODE ANN. § 13-10-3-7(b) (West Supp. 1995); KAN. STAT. ANN. § 60-3335(b) (Supp. 1995); KY. REV. STAT. ANN. § 224.01-040(5)(b) (Michie Butterworth 1995); OR. REV. STAT. § 468.963(4)(b) (Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 9(c) (West Supp. 1996); WYO. STAT. § 35-11-1105(c)(vi) (Supp. 1995).

122. ARK. CODE ANN. § 8-1-309(c)(2)-(3) (Michie Supp. 1995); IND. CODE ANN. § 13-10-3-7(c) (West Supp. 1995); KAN. STAT. ANN. § 60-3335(c)-(d) (Supp. 1995) (Any evidence obtained from the report can be suppressed in criminal, civil, and administrative proceedings if information is disclosed in violation of this section. *Id.* § 60-3335(d).); KY. REV. STAT. ANN. § 224.01-040(5)(c) (Michie Butterworth 1995); OR. REV. STAT. § 468.963(4)(c) (Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 9(d)-(g) (West Supp. 1996); WYO. STAT. § 35-11-1105(c)(vii) (Supp. 1995).

The Illinois statute requires the party claiming the privilege to identify the portions of the document that are being claimed as privileged after it has been asserted that the privilege does not apply.¹²³ If the government has not been denied access to the report in a proceeding¹²⁴ and has made a written request for the report, the owner or operator must then request a hearing within a specific period of time.¹²⁵ If they fail to do so, they waive the privilege.¹²⁶ The court can also revoke the privilege if the document falls within an exception previously discussed.¹²⁷

The Texas privilege also provides that evidence from an audit report obtained in violation of the statute cannot be used in a criminal, civil, or administrative proceeding.¹²⁸ Further, the party that failed to comply with the privilege must prove that the evidence they wish to introduce did not originate from the audit report.¹²⁹ If the report has been disclosed in contempt of court, then relief can be ordered.¹³⁰

Utah also allows the court to perform an *in camera* review of the audit report.¹³¹ Unlike most of the other states, however, Utah does not allow the party requesting the audit, such as the government, access to the report until the court determines which portions, if any, will be subject to disclosure.¹³² Following this review, the court can release the portions of the report that are not privileged.¹³³ The portions of the report that are still privileged cannot be disclosed.¹³⁴

Besides the protection provided to the audit report itself, some of the states also prevent parties involved in the audit from being called to testify about it.¹³⁵ Colorado limits this provision to audits performed from June 1, 1994 to June 30, 1999.¹³⁶

123. ILL. ANN. STAT. ch. 415, para. 5/52.2(d)(4) (Smith-Hurd Supp. 1995).

124. *Id.* § 5/52.2(d)(5).

125. *Id.* § 5/52.2(e)(1).

126. *Id.*

127. *Id.* § 5/52.2(e)(4). *See supra* notes 80-82 and accompanying text.

128. TEX. REV. CIV. STAT. ANN. art. 4447cc, § 9(h) (West Supp. 1996).

129. *Id.*

130. *Id.* § 9(k).

131. UTAH R. EVID. 508(e)(1) (1996).

132. *Id.* 508(e)(2).

133. *Id.* 508(e)(3)(A).

134. *Id.* 508(e)(3)(B).

135. COLO. REV. STAT. ANN. § 13-90-107(1)(j)(I)(A) (West Supp. 1995) (The person for whom the audit was performed can allow the person to testify or the court can order the person to testify.); ILL. ANN. STAT. ch. 415, para. 5/52.2(c) (Smith-Hurd Supp. 1995); KAN. STAT. ANN. § 60-3333(b) (Supp. 1995); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 5(c) (West Supp. 1996) (The person can be compelled to testify about events regarding the violation which they witnessed but not about the audit document. *Id.* § 4(d).); UTAH CODE ANN. § 19-7-107(1) (1995) (The person for whom the audit was performed must grant permission for the person to be examined unless the court orders them to testify.); VA. CODE ANN. § 10.1-1198(B) (Michie Supp. 1995).

136. COLO. REV. STAT. ANN. § 13-90-107(1)(j)(II) (West Supp. 1995).

E. Relationship of the Statutory Audit Privilege to Other Privileges

With each of these statutes, the intent was that the newly created privilege would be in addition to any other privileges, including the attorney-client privilege and work product doctrine.¹³⁷ Therefore, if both a statutory audit privilege and a common law privilege apply to the audit, both can be used to protect it. Furthermore, if the audit report does not fall within the scope of the statute, the common law privileges can still be used to provide some protection from discovery of the report.

F. Immunity from and Reduction of Penalties

In addition to creating a privilege for audit documents, some states have created enforcement-based incentives. The first state to create an enforcement-based incentive was Colorado.¹³⁸ Colorado gives a facility immunity from civil and administrative penalties and "criminal penalties for negligent acts associated with the issues disclosed"¹³⁹ if the facility performs a "voluntary self-evaluation,"¹⁴⁰ promptly reveals information obtained,¹⁴¹ promptly corrects the problem,¹⁴² and cooperates with the government.¹⁴³ A presumption is created that the notification is voluntary,¹⁴⁴ but that presumption can be rebutted by the government.¹⁴⁵ However, the penalties will not be waived if the facility has a pattern of serious violations over the three-year period preceding the disclosure.¹⁴⁶

It should be noted that, in Colorado, a disclosure is not voluntary, and thus not eligible for a waiver of penalties, if the disclosure is required "under a specific permit condition or . . . an order . . ." ¹⁴⁷ Therefore, if the company discovers a problem that requires notification of the government due to a permit condition, has a history of serious noncompliance, or merely delays informing the government about the violation, immunity from prosecution would be lost. Even if the penalty

137. ARK. CODE ANN. § 8-1-312(a) (Michie Supp. 1995); COLO. REV. STAT. ANN. § 13-25-126.5(6) (West Supp. 1995); IDAHO CODE § 9-808 (Supp. 1995); ILL. ANN. STAT. ch. 415, para. 5/52.2(j) (Smith-Hurd Supp. 1995); IND. CODE ANN. § 13-10-3-12 (West Supp. 1995); KAN. STAT. ANN. § 60-3337 (Supp. 1995); KY. REV. STAT. ANN. § 224.01-040(7) (Michie Butterworth 1995); MISS. CODE ANN. § 49-2-71(4) (Supp. 1995); OR. REV. STAT. § 468.963(7) (Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 4447cc, § 13 (West Supp. 1996); UTAH R. EVID. 508(g) (1996); VA. CODE ANN. § 10.1-1198(B) (Michie Supp. 1995); WYO. STAT. § 35-11-1105(e) (Supp. 1995).

138. Colorado's law was passed in 1994.

139. COLO. REV. STAT. ANN. § 25-1-114.5(4) (West Supp. 1995).

140. *Id.* § 25-1-114.5(1)(b).

141. *Id.* § 25-1-114.5(1)(a).

142. *Id.* § 25-1-114.5(1)(c).

143. *Id.* § 25-1-114.5(1)(d).

144. *Id.* § 25-1-114.5(4).

145. *Id.* § 25-1-114.5(5).

146. *Id.* § 25-1-114.5(6).

147. *Id.* § 25-1-114.5(3).

is waived, the state is not limited regarding the type of response it can require a facility to take to address the problem that was disclosed.¹⁴⁸

Idaho also provides immunity for the voluntary disclosure of violations identified by an audit.¹⁴⁹ For the disclosure to be considered voluntary, the statute requires the disclosure be timely, identified through an audit, and immediate action be taken to come into compliance.¹⁵⁰ If the violation involves the failure to obtain a required permit, timely submission of the application can be used to show that appropriate actions were taken to come into compliance.¹⁵¹ Like Colorado,¹⁵² the disclosure is not considered voluntary if required by a permit or an order,¹⁵³ or if the company has a pattern of serious violations in the three years preceding the disclosure.¹⁵⁴ Idaho is also not limited in the types of actions it can order in response to the disclosed violation.¹⁵⁵ Finally, if the circumstance is such that Idaho's "governor deems an imminent and substantial danger to the public health or environment" exists, the information in the audit can be disclosed "as may be necessary to assure the protection of the public health or environment."¹⁵⁶ Otherwise, "[v]oluntarily prepared environmental audits, and voluntary disclosures of information submitted . . . to an environmental agency . . . which are claimed to be confidential business information" must be kept confidential.¹⁵⁷

Kansas has also created a presumption of immunity from civil, criminal, and administrative penalties if the disclosure is voluntarily made.¹⁵⁸ Kansas requires that the disclosure be made promptly¹⁵⁹ to the agency with jurisdiction over the violation,¹⁶⁰ be identified as a result of an audit,¹⁶¹ ensure corrective actions are diligently initiated,¹⁶² and that the entity cooperates with the regulatory agency during its subsequent investigation.¹⁶³ The immunity can be forfeited if the disclosure was required under state law,¹⁶⁴ the company willfully or intentionally committed the violation,¹⁶⁵ the violation was not corrected diligently,¹⁶⁶ or if the

148. *Id.* § 25-1-114.5(7).

149. IDAHO CODE § 9-809(1) (Supp. 1995).

150. *Id.* § 9-809(2).

151. *Id.* § 9-809(3).

152. *See supra* note 147 and accompanying text.

153. IDAHO CODE § 9-809(5) (Supp. 1995).

154. *Id.* § 9-809(6).

155. *Id.* § 9-809(7).

156. *Id.* § 9-810(2).

157. *Id.* § 9-340[45](43).

158. KAN. STAT. ANN. § 60-3338(a) (Supp. 1995).

159. *Id.* § 60-3338(a)(1).

160. *Id.* § 60-3338(a)(2).

161. *Id.* § 60-3338(a)(3).

162. *Id.* § 60-3338(a)(4).

163. *Id.* § 60-3338(a)(5).

164. *Id.* § 60-3338(b), (c)(1).

165. *Id.* § 60-3338(c)(2).

166. *Id.* § 60-3338(c)(3).

violation caused "significant environmental harm or a public health threat . . ." ¹⁶⁷ Even if the facility is not eligible for immunity, the fact that the facility "implemented an environmental management system" as described in Kansas' statute can be considered in determining the appropriate penalty for the violation. ¹⁶⁸

Mississippi also considers the voluntary identification of an environmental violation through an audit and subsequent disclosure as a factor in determining the amount of assessed penalties. ¹⁶⁹ If the company satisfies the requirements of the statute, penalties are to be set at a *de minimis* amount, excluding any economic benefit realized by the company due to its failure to comply with the regulations. ¹⁷⁰ Mississippi requires, among other factors, that the disclosure be voluntary ¹⁷¹ and that the violation "did not result in a substantial endangerment threatening the public health, safety or welfare or the environment." ¹⁷² Mississippi also allows the environmental audit and subsequent voluntary disclosure to be considered when assessing penalties under various acts. ¹⁷³ However, the Mississippi statute requires the state to establish and administer the audit privilege and the penalty reduction provisions so that the delegation of federal programs to the state is not lost. ¹⁷⁴

The Texas statute also grants immunity from civil, administrative, and criminal penalties if the company makes a voluntary disclosure of an environmental or health and safety violation. ¹⁷⁵ The disclosure, to be considered voluntary, must be made promptly after identifying the problem ¹⁷⁶ by certified mail to the agency with jurisdiction over the violation, ¹⁷⁷ and prior to an investigation or the identification of a violation by the government. ¹⁷⁸ In addition, the statute requires that the disclosure originates through an audit, ¹⁷⁹ appropriate actions are promptly taken and diligently pursued to correct the violation, ¹⁸⁰ the company cooperates with the government in investigating the violation, ¹⁸¹ and "the violation did not result in injury to one or more persons at the site or substantial off-site

167. *Id.* § 60-3338(c)(4).

168. *Id.* § 60-3339.

169. MISS. CODE ANN. § 17-17-29(7)(g) (1995).

170. *Id.*

171. *Id.* § 17-17-29(7)(g)(iv).

172. *Id.* § 17-17-29(7)(g)(vi) (Other factors include: the report is promptly made after the violation is discovered, appropriate actions are taken to correct the problem, the facility cooperates with the government, and an independent party or the government was not the source of the information. *Id.* § 17-17-29(7)(g)(i)-(iii), & (v).).

173. *See id.* §§ 17-17-29(1995), 49-17-43 (Supp. 1995), 49-17-427 (Supp. 1995).

174. 1995 Miss. Laws 627, § 1.

175. TEX. REV. CIV. STAT. ANN. art. 4447cc, § 10(a) (West Supp. 1996).

176. *Id.* § 10(b)(1).

177. *Id.* § 10(b)(2).

178. *Id.* § 10(b)(3).

179. *Id.* § 10(b)(4).

180. *Id.* § 10(b)(5).

181. *Id.* § 10(b)(6).

harm to persons, property, or the environment.”¹⁸² The immunity will be lost if the disclosure is required under an order,¹⁸³ if the entity has a pattern of serious violations over a three-year period,¹⁸⁴ or the violation satisfies the levels of culpability, severity, or cause specified in the statute.¹⁸⁵ The statute allows penalties to be mitigated based on a number of factors including the voluntary nature of the disclosure and the entity’s efforts to perform audits.¹⁸⁶

Unlike other states, Texas makes receiving immunity contingent upon the entity notifying the regulatory agency of its intent to perform the audit.¹⁸⁷ The statute specifies that the notice must identify the areas and facilities to be audited, the scope of the audit, and when the audit will occur.¹⁸⁸

Wyoming’s statute also grants immunity, but only for administrative and civil penalties.¹⁸⁹ To obtain this immunity, the disclosure must be made within sixty days of completing the audit.¹⁹⁰ Furthermore, it can be lost if the facility was being “investigat[ed] for any violation of this act at the time the violation [was] reported;”¹⁹¹ the owner does not correct the violation within the time period identified in an order;¹⁹² or

[t]he violation is the result of gross negligence or recklessness; or . . . [t]he department has assumed primacy over a federally delegated environmental law and a waiver of penalty authority would result in a state program less stringent than the federal program or the waiver would violate any federal rule or regulation required to maintain state primacy. If a federally delegated program requires the imposition of a penalty for a violation, the voluntary disclosure of the violation shall to the extent allowed under federal law or regulation, be considered a mitigating factor in determining the penalty amount.¹⁹³

The immunity established by Wyoming’s statute can also be lost if a rule, code, or law requires the violation to be reported,¹⁹⁴ or if the facility has a pattern of serious violations within the three-year period before disclosure.¹⁹⁵

Virginia also grants immunity and, like Wyoming, limits it to administrative

182. *Id.* § 10(b)(7).

183. *Id.* § 10(c).

184. *Id.* § 10(h).

185. *Id.* § 10(d).

186. *Id.* § 10(e) (other factors considered include corrective action, cooperation with the government, and other “relevant considerations”).

187. *Id.* § 10(g).

188. *Id.*

189. WYO. STAT. § 35-11-1106(a) (Supp. 1995).

190. *Id.*

191. *Id.* § 35-11-1106(a)(i).

192. *Id.* § 35-11-1106(a)(ii).

193. *Id.* § 35-11-1106(a)(iii)-(iv).

194. *Id.* § 35-11-1106(b).

195. *Id.* § 35-11-1106(d).

and civil penalties “[t]o the extent consistent with requirements imposed by federal law”¹⁹⁶ The factors that make a disclosure voluntary are that it is not required under a permit, order, or law; it was promptly made after discovery of the violation through an audit; and the violation was corrected diligently following a compliance schedule that was submitted to the government.¹⁹⁷ The immunity will be lost if the entity “making the voluntary disclosure has acted in bad faith.”¹⁹⁸ The statute specifies that the immunity “section does not bar the institution of a civil action claiming compensation for injury to person or property against an owner or operator.”¹⁹⁹

Indiana recently passed a statute that allows the government to limit civil penalties for small businesses that provide a written report of minor violations.²⁰⁰ The statute only applies to facilities with less than 500 employees.²⁰¹ To be eligible, the violation being corrected must be disclosed before a government inspection identifies it or a notice of violation is received.²⁰² The penalty will not be reduced if either the environment or public health is damaged or endangered, the violation is not corrected within the specified period, the violation was criminal, willful or intentional, or the entity has previously received a notification from the government regarding this violation or a previous violation.²⁰³

The provisions created by most of these statutes are ongoing. However, two of the statutes require that the privilege, disclosure exemption, or immunity end on a specific date.²⁰⁴

G. Minnesota's Statute

Minnesota's statute is unique in that the protection of an environmental audit is tied to a new program designed “to promote voluntary compliance with environmental requirements.”²⁰⁵ Companies that satisfy the statute's requirements are allowed to display a “green star” emblem.²⁰⁶

Minnesota's Environmental Improvement Pilot Program²⁰⁷ is limited to

196. VA. CODE ANN. § 10.1-1199 (Michie Supp. 1995).

197. *Id.*

198. *Id.*

199. *Id.*

200. IND. CODE ANN. § 13-7-13-5(b) (West Supp. 1995).

201. *Id.* § 13-7-13-5(a).

202. *Id.* § 13-7-13-5(b).

203. *Id.* § 13-7-13-5(a)(1)-(4).

204. COLO. REV. STAT. ANN. § 13-25-126.5(9) (West Supp. 1995) and COLO. REV. STAT. ANN. § 25-1-114.5(9) (West Supp. 1995) (privilege and immunity apply to audits performed through June 30, 1999); IDAHO CODE § 9-340[45](43) (Supp. 1995) and IDAHO CODE § 9-809 (Supp. 1995) (immunity and records exempt from disclosure include audits and disclosures submitted by December 31, 1997).

205. 1995 Minn. Sess. Law Serv. 168, § 8 (West).

206. *Id.* § 14.

207. *Id.*

facilities that have not had an enforcement action resulting in a penalty for at least one year.²⁰⁸ If a facility is eligible to take part in the program, it must, among other things, perform a self-evaluation or environmental audit.²⁰⁹ Following the assessment, the facility must submit a report²¹⁰ to the state and, in some cases, the local government, "within 45 days after the date of the final written report of . . . an environmental audit or . . . completion of a self-evaluation."²¹¹ The report must identify all violations,²¹² any corrective action,²¹³ and include "a commitment . . . to correct the violation[] as expeditiously as possible under the circumstances . . .,"²¹⁴ as well as other items.²¹⁵ After the facility submits the report, its name and location and, when applicable, the schedule to correct the identified violations will be included in a quarterly report to be published by the government.²¹⁶ If a schedule to correct the violation(s) is submitted, it must be reviewed and approved by the government.²¹⁷

If the facility submits a report as previously discussed, the state is required to postpone taking any enforcement action for either ninety days or until the expiration of a longer approved schedule, so long as the company meets performance goals identified in the approved schedule.²¹⁸ If the company timely corrects the problem and certifies that it has been corrected, then the state is barred from assessing any criminal, civil, or administrative penalties.²¹⁹ However, criminal penalties can be imposed if the violation was committed knowingly.²²⁰ Administrative or civil penalties can be assessed if the entity was involved in an enforcement action for the same violation as that identified in the report within the previous year, the "violation caused serious harm to public health or the environment . . .,"²²¹ or the state initiates an action to prevent "an imminent threat to public health or the environment."²²² There is no preclusion regarding enforcement actions if the state discovers the violation before the report is submitted.²²³

208. *Id.* § 10(1).

209. *Id.* § 10(1)(1).

210. *Id.* § 10(1)(4).

211. *Id.* § 10(2).

212. *Id.* § 10(2)(2).

213. *Id.*

214. *Id.* § 10(2)(3).

215. *Id.* § 10(2) (other items which the report must include are a certification that the facility satisfies all the qualification requirements, a compliance schedule if corrective actions will take more than 90 days, and a discussion of methods to prevent the violation from recurring).

216. *Id.* § 11.

217. *Id.* § 12(a).

218. *Id.* § 13(1).

219. *Id.* § 13(2).

220. *Id.* § 13(3)(1).

221. *Id.* § 13(3)(2).

222. *Id.* § 13(3)(3).

223. *Id.* § 13(5).

If the facility is not eligible for a penalty waiver, the amount of the penalty can still be reduced.²²⁴ One of the factors that must be considered when reducing the penalty is whether “the . . . entity demonstrated good faith efforts to achieve compliance since implementing an environmental auditing or self-evaluation program”²²⁵

The statute also prohibits the state from obtaining an audit report or items created as a result of an audit “except in accordance with the agency’s policy on environmental auditing.”²²⁶ The goal of the Minnesota Pollution Control Agency’s “policy is: [t]o promote environmental auditing; [t]o elevate the level of environmental compliance; [t]o appropriately reduce the concern about the risk of enforcement for those operating in good faith; and [t]o encourage progress beyond mere compliance, i.e. pollution prevention.”²²⁷ The policy provides that it will not routinely request audit documents if the audit was done in good faith, except when the agency believes the report contains evidence of a criminal violation.²²⁸ The policy also sets minimum standards of what constitutes good faith.²²⁹

Further, if the agency obtains an audit report, it will attempt to “limit the information sought to . . . the suspected criminal violation[] and will attempt to

224. *Id.* § 13(4).

225. *Id.* § 13(4)(5).

226. *Id.* § 15(1).

227. Minnesota Pollution Control Agency, Policy on Environmental Auditing 2-3 (January 24, 1995) (unpublished document) (on file with author).

228. *Id.* at 4

The [agency] will not, as a matter of routine procedure, request, inspect or seize environmental audit reports from regulated entities which have conducted environmental audits in good faith, except in the event that the [agency] reasonably believes that there is probable cause that a violation of the criminal law has been or is being committed and that such materials are evidence of the commission of a gross misdemeanor or felony.

Id.

229. *Id.* at 4-5.

A regulated entity shall be deemed to have acted in good faith under this policy when, at a minimum:

- a. It has conducted an environmental audit, and;
- b. It has taken corrective or preventative action, which can be demonstrated as reasonably timely under the circumstances, with respect to any identified deficiencies in environmental compliance; and
- c. It has cooperated fully and promptly with regulatory authorities in addressing issues of noncompliance; and
- d. The regulated entity, upon the discovery of a compliance shortfall through self-assessment, has not only corrected the noncompliance, but has gone further and implemented an active system or program to detect and prevent future occurrences of noncompliance of a similar nature.

Id.

obtain the needed information from other sources."²³⁰ Further, the agency will not disclose trade secrets if the entity successfully qualifies the information for such treatment.²³¹ The policy also identifies factors the agency will consider when determining the level of enforcement to take against entities that perform audits.²³² An environmental auditing program will be taken into consideration by the agency when determining if a penalty should be reduced.²³³

Minnesota's privilege statute states that the audit documents and associated information will be protected from disclosure to third parties if the report complies with the requirements previously discussed.²³⁴ In addition, the statute states that participation in this program does not limit any common law or other statutory protection for audit documents.²³⁵ However, the statute does not relieve entities from making reports as required by permits, rules, or laws.²³⁶

Finally, this program terminates on July 1, 1999,²³⁷ unless the legislature elects to extend the program following a report which the agency must file regarding its effectiveness.²³⁸ Audit reports filed prior to the expiration date will continue to be protected after the statute expires.²³⁹

Both Minnesota's statute and audit policy provide some protection to environmental audits. However, unlike the previously discussed statutes, Minnesota only addresses audits at facilities that are participating in the Green Star Program. If a facility is not in that program and performs an audit, that document will not be protected by the statute. Minnesota's only non-common law protection for environmental audits comes from its audit policy. While both the policy and the statute are helpful, they only provide limited protection for environmental audit documents.

II. OTHER METHODS OF PROTECTING THE FINDINGS OF AN ENVIRONMENTAL AUDIT

As previously noted, the state statutes do not limit common law privileges in any way. Three common law privileges used to protect environmental audits are the attorney-client privilege, the work product doctrine, and the self-evaluation

230. *Id.* at 5.

231. *Id.*

232. *Id.* at 7-8.

233. *Id.* at 8.

234. 1995 Minn. Sess. Law Serv. 168, § 15(2) (West). *See supra* notes 210-15 and accompanying text.

235. 1995 Minn. Sess. Law Serv. 168, § 15(3) (West).

236. *Id.* § 17.

237. *Id.* § 19.

238. *Id.* § 20.

239. *Id.* § 18.

privilege.²⁴⁰ Unfortunately, the applicability of each of these privileges is limited.²⁴¹

A. *The Attorney-Client Privilege*

Environmental audits have the potential to be protected by the attorney-client privilege. "The attorney-client privilege is the oldest of the privileges . . . known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and therefore promote broader public interests in the observance of law and administration of justice."²⁴² In *United States v. United Shoe Machinery Corp.*,²⁴³ the requirements of the attorney-client privilege were identified as: (1) the person holding the privilege is or wants to be a client; (2) the communication is to an attorney or the attorney's employee who is acting in that role; (3) the client confidentially relates a fact to the attorney to obtain either legal advice or services but not to commit a crime; and (4) the client claims the privilege and has not waived it.²⁴⁴

The use of the attorney-client privilege regarding environmental audits poses some difficulty because all of these elements must be satisfied. The primary purpose of the communication must be for legal advice.²⁴⁵ Therefore, if an attorney is part of the environmental auditing team but is not acting as an attorney, then the communication is not privileged. This would occur if the lawyer's role involved providing engineering, technical, or managerial assistance instead of legal advice.²⁴⁶

If the audit is performed by a consultant, that information may be included within the attorney-client privilege so long as the consultant is acting as "an agent of the attorney."²⁴⁷ Allowing this information to be protected promotes the policy underlying the privilege because it assists the attorney in obtaining all of the facts which are needed to adequately advise the client.²⁴⁸ However, as the number of

240. See *infra* notes 242-98 and accompanying text. For a discussion of these privileges as they relate to environmental audits, see Terrell E. Hunt & Timothy A. Wilkins, *Environmental Audits and Enforcement Policy*, 16 HARV. ENVTL. L. REV. 365, 376-92 (1992); Edmund B. Frost et al., *Environmental Audits and Litigation Risks*, C900 A.L.I.-A.B.A. 377, 383-98 (1994), and Linda Richenderfer & Neil R. Bigioni, *Going Naked into the Thorns: Consequences of Conducting an Environmental Audit Program*, 3 VILL. ENVTL. L.J. 71, 84-86 (1992).

241. See *supra* notes 242-98 and accompanying text.

242. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citation omitted).

243. 89 F. Supp. 357 (D. Mass. 1950).

244. *Id.* at 358-59. See also Hunt & Wilkins, *supra* note 240, at 376-77.

245. *United States v. Chevron U.S.A., Inc.*, No. 88-6681, 1989 WL 121616, at *6 (E.D. Pa. Oct. 16, 1989).

246. *Id.* ("[I]t 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."). See also Hunt & Wilkins, *supra* note 240, at 379.

247. Frost et al., *supra* note 240, at 385.

248. *Id.*

people with access to the audit report increases, the possibility increases that the requirement for confidentiality will be breached.²⁴⁹ Therefore, besides the attorney, all other parties involved must be clients or the privilege would be waived because the audit was not treated as confidential.²⁵⁰

When the client is a corporation, the privilege can be waived by the management of the corporation²⁵¹ through either words or actions that indicate a desire to forego the privilege.²⁵² It can also be lost by partially disclosing the information that would, in turn, make it unfair to allow the privilege to be invoked later.²⁵³ For this reason, any disclosure of information to others, such as employees whose responsibilities do not require that they have the information, could result in the privilege being waived.²⁵⁴

Finally, while the communication itself is privileged, the underlying facts are not. A client cannot be forced to reveal what was said or written to one's own attorney "but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney."²⁵⁵ Therefore, if a company performs an audit and then shares the results with an attorney to obtain advice, the communication would be privileged but not the facts contained within the report.

While the attorney-client privilege can provide protection to any legal advice regarding compliance issues identified through an audit, it is very limited in protecting the audit itself. However, if the audit focuses only on specific violations and related facts, the argument that the document was created to receive legal advice and, therefore, should be fully protected, may be strengthened.²⁵⁶

B. Work Product Doctrine

In 1947, the United States Supreme Court decided *Hickman v. Taylor*²⁵⁷ and recognized the work product doctrine. In *Hickman*, the problem concerned protecting a lawyer's work while balancing the interests of "reasonable and necessary inquiries."²⁵⁸ The policy underlying this doctrine is that "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel."²⁵⁹

249. See TRUITT ET AL., *supra* note 1, at 49 n.28.

250. See *id.*

251. KENNETH S. BROUN ET AL., MCCORMACK ON EVIDENCE 130 (John W. Strong ed., 4th ed. 1992).

252. *Id.*

253. *Id.*

254. Hunt & Wilkins, *supra* note 240, at 380.

255. *Upjohn Co. v. United States*, 449 U.S. 383, 396 (1981) (quoting *City of Philadelphia v. Westinghouse Electric Corp.*, 205 F. Supp. 830, 831 (E.D. Pa. 1962)).

256. Hunt & Wilkins, *supra* note 240, at 382.

257. 329 U.S. 495 (1947).

258. *Id.* at 497.

259. *Id.* at 510. See also Frost et al., *supra* note 240, at 387.

The Federal Rules of Civil Procedure have incorporated this privilege into Rule 26(b)(3). This Rule provides absolute protection for "the mental impressions, conclusions, opinions, or legal theories of an attorney" ²⁶⁰ However, "documents and tangible things . . . prepared in anticipation of litigation . . . [are discoverable] only upon a showing that the party seeking discovery has substantial need of the materials . . . and . . . is unable without undue hardship to obtain the substantial equivalent . . . by other means." ²⁶¹

Rule 26(b)(3) first requires that the document be "prepared in anticipation of litigation." ²⁶² This does not require an enforcement or other type of legal action to have actually begun, but an action shall be "imminent" ²⁶³ or "fairly foreseeable." ²⁶⁴ Generally, "the corporation must be legitimately concerned that some environmental, health, or safety violation or condition is about to be discovered and that, as a consequence, the government or some private party will bring enforcement proceedings or suit in the near future." ²⁶⁵ However, reports that are prepared merely to avoid the possibility of litigation are not protected. ²⁶⁶ Further, the document will not be protected if it is prepared as a normal business activity. ²⁶⁷

Unfortunately, with regard to this doctrine, audits are not generally prepared in response to pending litigation. ²⁶⁸ Therefore, the more common it is for an entity to perform an audit, the more likely it will be viewed as a normal business activity and thus not protected by the work product doctrine. However, the more closely the audit is tied to an event that could reasonably result in litigation, the likelihood that the results of the audit would be protected by the doctrine improve. ²⁶⁹

Even if the material is shielded by this doctrine, the protection is not absolute.

260. FED. R. CIV. P. 26(b)(3). See also Frost et al., *supra* note 240, at 387.

261. FED. R. CIV. P. 26(b)(3).

[A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule 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 other means.

Id. See also Frost et al., *supra* note 240, at 387; BROUN ET AL., *supra* note 251, at 137-38 (discussing the provisions of this rule); Hunt & Wilkins, *supra* note 240, at 383-84.

262. FED. R. CIV. P. 26(b)(3).

263. Hunt & Wilkins, *supra* note 240, at 384 (quoting *Enforce Admin. Subpoenas of SEC v. Coopers & Lybrand*, 98 F.R.D. 414, 416 (S.D. Fla. 1982)).

264. *Id.* (quoting *SEC v. Worldwide Coin Investments, Ltd.*, 92 F.R.D. 65, 66 (N.D. Ga. 1981)).

265. *Id.*

266. *Id.*

267. *Id.* at 385.

268. Frost et al., *supra* note 240, at 388.

269. Hunt & Wilkins, *supra* note 240, at 385.

Protected documents can still be obtained if the other party has a "substantial need" for the information and "is unable without undue hardship to obtain the substantial equivalent of the materials by other means."²⁷⁰ Conversely, an attorney's opinion is provided nearly absolute protection.²⁷¹ Therefore, the more closely the audit is characterized as conveying legal opinions instead of factual information, the more likely the document will be protected by this doctrine.

As was discussed regarding the attorney-client privilege, the work product doctrine can also be waived if the information is provided to employees who do not need the information.²⁷² Although limiting the dissemination of audit results is necessary to satisfy the confidentiality requirements of both the work product doctrine and the attorney-client privilege, that limitation also hinders one of the primary benefits of the audit: making employees aware of problems, and, as a result, creating an atmosphere that allows the problems to be corrected.²⁷³ To foster an awareness of compliance issues, employees should know the results of the audit. Unfortunately, that action may constitute a waiver and result in loss of the privilege for the entire document.

C. Self-Evaluation Privilege

A relatively new common law privilege that can potentially protect the results of an environmental audit is the self-evaluation privilege. The policy behind this privilege "is simply that preserving confidentiality enhances the frequency and quality of institutional self-critical analysis, and that the social utility of such self-evaluation exceeds the social utility of compelled disclosure during discovery."²⁷⁴

This privilege was recognized in *Bredice v. Doctors Hospital, Inc.*²⁷⁵ *Bredice* involved an attempt to obtain, through discovery, the reports and minutes of internal staff meetings that might contain information regarding the death of a patient.²⁷⁶ The court recognized that the staff meetings were established under the requirements of the Joint Commissions on Accreditation of Hospitals and that the only objective of the meetings was to improve care and treatment of patients.²⁷⁷ The court found that "[c]onfidentiality is essential to effective functioning of these staff meetings . . ."²⁷⁸ The court went on to find that it was in the public's interest to preserve the confidentiality of those reviews "[a]bsent evidence of extraordinary

270. FED. R. CIV. P. 26(b)(3).

271. *See id.*

272. Hunt & Wilkins, *supra* note 240, at 386.

273. *See generally* Hunt & Wilkins, *supra* note 240, at 386 (discussing the effects of disseminating the audit report).

274. Robert J. Bush, *Stimulating Corporate Self-Regulation—The Corporate Self-Evaluative Privilege: Paradigmatic Preferentialism or Pragmatic Panacea*, 87 NW. U. L. REV. 597, 603 (1993) (footnote omitted).

275. 50 F.R.D. 249 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973).

276. *Id.* at 249.

277. *Id.* at 250.

278. *Id.*

circumstances."²⁷⁹

Theoretically, the self-evaluation privilege could be very beneficial in protecting environmental audits. However, a significant barrier to the use of this privilege for environmental audits involves the limitations imposed by some courts which "dramatically undermine its applicability to recurring corporate self-regulatory behavior."²⁸⁰ These limitations include: (1) application of the privilege to only "subjective information;" (2) only covering documents required by governmental regulations; (3) not allowing the protection to apply if the government has subpoenaed the documents; and, (4) finding the privilege was waived if the documents are voluntarily given to the regulatory agency.²⁸¹

In general, the applicability of the self-evaluation privilege has not been universally accepted.²⁸² This is particularly true in the area of environmental auditing. In *United States v. Dexter Corp.*,²⁸³ the court refused to recognize the privilege in an enforcement action brought under a federal environment law.²⁸⁴ In *Dexter*, the company asserted the self-evaluation privilege in attempting to protect documents requested by the federal government.²⁸⁵ The court reasoned that allowing the use of the self-evaluation privilege "would effectively impede the Administrator's ability to enforce the Clean Water Act, and would be contrary to stated public policy."²⁸⁶

On the other hand, *Reichhold Chemicals, Inc. v. Textron, Inc.*,²⁸⁷ recently recognized the privilege in favor of environmental audits. In that case, Reichhold was attempting to protect documents from discovery by defendant companies in a suit to recover response costs under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).²⁸⁸ The court stated that the public interest served by allowing companies to assess their own environmental compliance outweighed the other parties' interests in obtaining the results.²⁸⁹ The court likened this privilege to the evidence rule regarding subsequent remedial measures.²⁹⁰ That rule does not allow evidence of actions taken after the fact which, if done earlier, would have lessened the likelihood of

279. *Id.* at 251.

280. Bush, *supra* note 274, at 609.

281. *Id.* See also Hunt & Wilkins, *supra* note 240, at 390.

282. Compare Bush, *supra* note 274, at 597-650 (supporting the self-evaluative privilege) with James F. Flanagan, *Rejecting a General Privilege for Self-Critical Analysis*, 51 GEO. WASH. L. REV. 551, 551-82 (1983) (questioning the need for the privilege). See also O'Reilly, *supra* note 15, at 133, 147-50 (discussing the self-evaluation privilege in regards to environmental audits).

283. 132 F.R.D. 8 (D. Conn. 1990).

284. *Id.* at 10. See also Hunt & Wilkins, *supra* note 240, at 391.

285. 132 F.R.D. at 8.

286. *Id.* at 10.

287. 157 F.R.D. 522, 527 (N.D. Fla. 1994).

288. *Id.* at 524. See O'Reilly, *supra* note 15, at 133-34.

289. *Reichhold Chemicals, Inc.*, 157 F.R.D. at 526.

290. *Id.*

the incident occurring, to be used as evidence that the party was negligent.²⁹¹ However, the court limited the privilege by requiring that certain criteria be met.²⁹² The criteria identified were that the information must result from a critical review by the party requesting the privilege; there must be a strong public interest to preserve the free exchange of information; that this exchange would be hindered if discovery of the information was allowed; and the party expected to keep, and did keep, the information confidential.²⁹³ Finally, the court stated that a risk assessment of a proposed action would not be protected, although an analysis of past actions would.²⁹⁴ This is consistent with the court's position that this privilege is comparable to the evidence rule regarding subsequent remedial measures.

Reichhold Chemicals, Inc., provides hope for the use of the self-evaluation privilege for environmental audits; however, the scope of the privilege is still uncertain. This is particularly true in light of the limitation of the privilege to purely retrospective reviews. If an audit includes an evaluation of a proposed action, such as a plant expansion and the resulting impact on any air pollution or wastewater permits, the privilege would probably not apply to the document if the *Reichhold Chemicals, Inc.*²⁹⁵ analysis were used. Further, the privilege has not been allowed to shield documents requested by the government.²⁹⁶ It is also possible that the privilege would not survive a discovery request brought by a private party under the citizen suit provisions found in many environmental laws.²⁹⁷ Therefore, it may be difficult to protect an environmental audit with the self-evaluation privilege.²⁹⁸

III. PROTECTION THROUGH FEDERAL GOVERNMENTAL POLICIES

In addition to the common law privileges, EPA and DOJ have also instituted policies concerning environmental audits.²⁹⁹ Like the common law privileges, these policies have serious limitations regarding both their ability to protect audit results and to encourage the performance of audits.³⁰⁰

291. FED. R. EVID. 407.

292. *Reichhold Chemicals, Inc.*, 157 F.R.D. at 527.

293. *Id.*

294. *Id.* (The court stated that the "privilege . . . applies only to reports which were prepared after the fact for the purpose of candid self-evaluation and analysis of the cause and effect of past pollution, and of *Reichhold's* possible role . . . in contributing to the pollution at the site.").

295. *See id.*

296. *See United States v. Dexter Corp.*, 132 F.R.D. 8 (D. Conn. 1990). *See also* Peter A. Gish, *The Self-Critical Analysis Privilege and Environmental Audit Reports*, 25 ENVTL. L. 73, 89 (1995).

297. Gish, *supra* note 296, at 89.

298. *Id.*

299. *See infra* notes 301-37 and accompanying text. *See also* O'Reilly, *supra* note 15, at 128-30.

300. *See infra* notes 301-37 and accompanying text.

A. United States Environmental Protection Agency Policy

EPA has developed its own policy regarding environmental audits³⁰¹ and has stated its opposition to the state-by-state approach of providing a privilege for these documents.³⁰² According to EPA, “[o]ne of . . . [its] most important responsibilities is ensuring compliance with federal laws that protect public health and safeguard the environment. . . . But EPA realizes that achieving compliance also requires the cooperation of thousands of businesses and other regulated entities subject to these requirements.”³⁰³ For this reason, EPA has issued a final policy statement which provides incentives for companies that “voluntarily discover, disclose, correct and prevent violations of federal environmental requirements.”³⁰⁴

EPA’s final policy contains two significant provisions. The first concerns a penalty policy for companies that perform self-assessments.³⁰⁵ The second concerns EPA’s policy toward the states who have implemented privileges or restrictions on penalties for facilities that perform environmental audits.³⁰⁶ EPA allows both environmental audits and “compliance management systems that demonstrate due diligence” to be the vehicles by which violations are discovered and reported.³⁰⁷

301. See Environmental Auditing Policy Statement, *supra* note 7; Voluntary Environmental Self-Policing and Self-Disclosures Interim Policy Statement, 60 Fed. Reg. 16,875 (1995); Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66,706 (1995). See also Jim Moore & Nancy Newkirk, *Not Quite a Giant Step*, ENVTL. F., May/June 1995, at 16-20 (discussing the development of EPA’s policy).

302. Restatement of Policies Related to Environmental Auditing, 59 Fed. Reg. 38,455, 38,459 (1994). See also Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, *supra* note 301, at 66,710 (stating its continuing opposition to statutes that create an “evidentiary privilege for environmental audits . . .” *Id.*).

303. Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, *supra* note 301, at 66,706.

304. *Id.* at 66,710. See also Moore & Newkirk, *supra* note 301, at 16 (discussing EPA’s interim policy); Kass & McCarroll, *supra* note 22, at 46-47 (discussing EPA’s interim policy); James T. Banks, *EPA’s New Enforcement Policy: At Last, a Reliable Roadmap to Civil Penalty Mitigation for Self-Disclosed Violations*, 26 Env’tl. L. Rep. (Env’tl. L. Inst.) 10,227 (May 1996) (discussing EPA’s policies).

305. Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, *supra* note 301, at 66,711-12.

306. *Id.* at 66,712.

307. *Id.* at 66,706-07. The following is a discussion of the due diligence requirements for compliance management systems:

‘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

If an entity satisfies all of the identified conditions including systematic and voluntary discovery, disclosure and prompt correction of any identified violation, and cooperates with the government, then the entity is eligible for a reduction of the civil penalty.³⁰⁸ The reduction involves all of the gravity-based penalty if all

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. See *supra* text accompanying note 7 for the definition of an environmental audit.

308. Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, *supra* note 301, at 66,711-12.

The conditions for reducing penalties are:

1. Systematic Discovery

The violation was discovered through:

(a) an environmental audit; or

(b) an objective, documented, systematic procedure or practice reflecting the regulated entity's due diligence in preventing, detecting, and correcting violations. The regulated entity must provide accurate and complete documentation to the Agency as to how it exercises due diligence to prevent, detect and correct violations according to the criteria for due diligence outlined in [*supra* note 307]. EPA may require as a condition of penalty mitigation that a description of the regulated entity's due diligence efforts be made publicly available.

2. Voluntary Discovery

The violation was identified voluntarily, and not through a legally mandated monitoring or sampling requirement prescribed by statute, regulation, permit, judicial or administrative order, or consent agreement. For example, the policy does not apply to:

(a) emissions violations detected through a continuous emissions monitor (or alternative monitor established in a permit) where any such monitoring is required;

(b) violations of National Pollutant Discharge Elimination System (NPDES) discharge limits detected through required sampling or monitoring;

(c) violations discovered through a compliance audit required to be performed by the terms of a consent order or settlement agreement.

3. Prompt Disclosure

The regulated entity fully discloses a specific violation within 10 days (or such shorter period provided by law) after it has discovered that the violation has occurred, or may have occurred, in writing to EPA;

4. Discovery and Disclosure Independent of Government or Third Party Plaintiff

The violation must also be identified and disclosed by the regulated entity 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;

5. Correction and Remediation

The regulated entity corrects the violation within 60 days, certifies in writing that violations have been corrected, and takes appropriate measures as determined by EPA to remedy any environmental or human harm due to the violation. If more than 60 days will be needed to correct the violations(s), the regulated entity must so notify EPA in writing before the 60-day period has passed. Where appropriate, EPA may require that to satisfy conditions 5 and 6, a regulated entity enter into a publicly available written agreement, administrative consent order or judicial consent decree, particularly where compliance or remedial measures are complex or a lengthy schedule for attaining and maintaining compliance or remediating harm is required;

6. Prevent Recurrence

The regulated entity agrees in writing to take steps to prevent a recurrence of the violation, which may include improvements to its environmental auditing or due diligence efforts;

7. No Repeat Violations

The specific violation (or closely related violation) has not occurred previously within the past three years at the same facility, or is not 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. For the purposes of this section, a violation is:

- (a) any violation of federal, state or local environmental law identified in a judicial or administrative order, consent agreement or order, complaint, or notice of violation, conviction or plea agreement; or
- (b) any act or omission for which the regulated entity has previously received penalty mitigation from EPA or a state or local agency.

8. Other Violations Excluded

The violation is not one which (i) resulted in serious actual harm, or may have presented an imminent and substantial endangerment to, human health or the environment, or (ii) violates the specific terms of any judicial or administrative order, or consent agreement.

9. Cooperation

The regulated entity cooperates as requested by EPA and provides such information as is necessary and requested by EPA to determine applicability of this policy.

conditions are satisfied and 75% of the gravity-based penalty if all but the first condition are satisfied.³⁰⁹ In any event, EPA still intends to recover any penalties associated with the economic benefits an entity obtained due to the violation.³¹⁰

The policy also states that "EPA will not recommend to the Department of Justice or other prosecuting authority that criminal charges be brought . . . where EPA determines that all of the conditions" identified to reduce civil penalties are satisfied and "the violation does not demonstrate or involve: [1] a prevalent management philosophy or practice that concealed or condoned environmental violations; or [2] high-level corporate officials' or managers' conscious involvement in, or willful blindness to, the violation."³¹¹ However, this incentive does not apply to "criminal acts of individual managers or employees."³¹² The policy is only directed to the entity, not to the actual individual involved in the criminal act.

The policy also states that "EPA will not request or use an environmental audit report to initiate a civil or criminal investigation of the entity."³¹³ During a normal investigation, an entity will not be asked to produce the audit.³¹⁴ If EPA believes that the entity has committed a violation, it may ask for "any information relevant

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.

309. *Id.* at 66,711.

1. No Gravity-Based Penalties

Where the regulated entity establishes that it satisfies all of the conditions [identified in *supra* note 308] of the policy, EPA will not seek gravity-based penalties for violations of federal environmental requirements.

2. Reduction of Gravity-Based Penalties by 75%

EPA will reduce gravity-based penalties for violations of federal environmental requirements by 75% so long as the regulated entity satisfies all of the conditions of [2 through 9 found in *supra* note 308].

Id.

310. *Id.* at 66,712.

Economic Benefit

EPA will retain its full discretion to recover any economic benefit [the facility] gained as a result of noncompliance to preserve a 'level playing field' in which violators do not gain a competitive advantage over regulated entities that do comply. EPA may forgive the entire penalty for violations which meet [the conditions in *supra* note 308] and, in the Agency's opinion, do not merit any penalty due to the insignificant amount of any economic benefit.

Id.

311. *Id.* at 66,711.

312. *Id.*

313. *Id.*

314. *Id.*

to identifying violations or determining liability or extent of harm.”³¹⁵ Therefore, if a violation is suspected, the Agency may request the audit report if it believes that report contains relevant information. Further, EPA’s definition of an environmental audit report “does not include data obtained in, or testimonial evidence concerning” the report.³¹⁶

Although the Agency’s position seems to clearly state that it will not request the audit document, it does leave the possibility open.³¹⁷ EPA’s final policy is an attempt to clarify when it will request an audit. However, the possibility that EPA will request audit documents appears to depend upon whether the Agency believes that an undisclosed violation exists and that the report contains evidence of that violation.

In addition to clarifying EPA’s position regarding audits, the policy also restates its firm opposition to the creation “of a statutory evidentiary privilege for environmental audits.”³¹⁸ The policy states that EPA believes the existence of a privilege for environmental audits could increase the costs of litigation, invite secrecy, and shield factual information.³¹⁹

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.* at 66, 710.

319. *Id.*

1. Privilege, by definition, invites secrecy, instead of the openness needed to build public trust in industry’s ability to self-police. American law reflects the high value that the public places on fair access to the facts. The Supreme Court, for example, has said of privileges that, ‘[w]hatever their origins, these exceptions to the demand for every man’s evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.’ *United States v. Nixon*, 418 U.S. 683 (1974). Federal courts have unanimously refused to recognize a privilege for environmental audits in the context of government investigations. See, e.g., *United States v. Dexter*, 132 F.R.D. 8, 9-10 (D. Conn. 1990) (application of a privilege ‘would effectively impede [EPA’s] ability to enforce the Clean Water Act, and would be contrary to stated public policy.’)

2. Eighteen months 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. Most recently, the 1995 Price Waterhouse survey found that those few large or mid-sized companies that do not audit generally do not perceive any need to; concern about confidentiality ranked as one of the least important factors in their decisions.

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. For example, most audit privilege bills under consideration in federal and state legislatures would arguably protect factual information—such as health studies or contaminated sediment data—and not just the conclusions of the auditors. While the government might have access to required monitoring data under the law, as some industry

Because of its opposition to the states' efforts to create privileges or immunities for audits, the policy details the Agency's position as it relates to states that have created a privilege.³²⁰ The policy states that "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."³²¹ To accomplish this objective, EPA retained its ability to bring an action itself

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.³²²

Finally, EPA's policy is intended to guide the exercise of prosecutorial discretion.³²³ The final policy replaces "any inconsistent provisions in . . . enforcement policies and EPA's 1986 Environmental Auditing Policy Statement."³²⁴

commenters have suggested, a privilege of that nature would cloak underlying facts needed to determine whether such data were accurate.

4. 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.

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. The 1995 Price Waterhouse survey indicated that companies would expand their auditing programs in exchange for the kind of incentives that EPA provides in its policy.

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.

Id.

320. *Id.* at 66,712.

321. *Id.* at 66,710.

322. *Id.*

323. *Id.* at 66,712.

324. *Id.* One such potentially conflicting policy discussed factors influencing EPA's decision whether to pursue an investigation as a criminal action. That policy considers how the facility responded to a violation identified through an audit. Memorandum from Earl E. Devaney, Director, United States Environmental Protection Agency Office of Criminal Enforcement, The Exercise of Investigative Discretion (January 12, 1994) (on file with author). See also Kenneth D. Woodrow, *The Proposed Federal Environmental Sentencing Guidelines: A Model For Corporate Environmental Compliance Programs*, [25 Current Developments] Env't Rep. (BNA) 325, 326 (1994) (discussing EPA's policy regarding criminal enforcement).

EPA's policy seeks to create a hospitable climate in which environmental audits can occur. Unfortunately, it does not go far enough. Although the final policy does provide an incentive for doing an environmental audit, companies may decide that the benefit is not worth the potential risk involving full, voluntary disclosure of the violation.

B. Department of Justice Policy

The DOJ has also issued a policy regarding environmental audits. Its policy discusses the factors to consider to determine if a criminal prosecution is warranted for the violation of an environmental statute.³²⁵ This policy attempts to encourage an entity to voluntarily perform audits and disclose violations.³²⁶ Further, the policy was issued to give both the regulated community and federal prosecutors direction in the exercise of prosecutorial discretion in environmental cases so that the discretion is uniformly applied across the country.³²⁷

Factors that must be considered include: (1) whether the disclosure was complete, voluntary, and made in a timely manner;³²⁸ (2) whether cooperation was

325. Memorandum from U.S. Department of Justice, Factors in Decisions in Criminal Prosecutions For Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator 1 (1991) (on file with author) ("This document is intended to describe the factors . . . [to be considered] in deciding whether to bring a criminal prosecution . . . so that such prosecutions do not create a disincentive to or undermine the goal of encouraging critical self-auditing, self-policing, and voluntary disclosure.").

326. *Id.*

327. *Id.*

It is designed to give federal prosecutors direction concerning the exercise of prosecutorial discretion in environmental criminal cases and to ensure that such discretion is exercised consistently nationwide. It is also intended to give the regulated community a sense of how the federal government exercises its criminal prosecutorial discretion with respect to such factors as the defendant's voluntary disclosure of violations, cooperation with the government in investigating the violations, use of environmental audits and other procedures to ensure compliance with all applicable environmental laws and regulations, and use of measures to remedy expeditiously and completely any violations and the harms caused thereby.

Id. at 1-2.

328. *Id.* at 3. Regarding this element,

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 (federal, state or local authority) had already obtained knowledge regarding noncompliance.

Id.

prompt and complete;³²⁹ (3) whether a compliance program existed to correct problems and, if so, to what extent;³³⁰ (4) how pervasive the noncompliance was;³³¹ (5) whether an effective internal disciplinary program was present;³³² and (6) whether the facility attempted to achieve compliance.³³³

While these factors provide internal guidance regarding the instigation of a criminal enforcement action on the federal level, the actions a prosecutor can ultimately take are not limited.³³⁴ The DOJ policy does not indicate the weight federal prosecutors should place on each of these factors.³³⁵ For these reasons, the policy statement does not provide any guarantee that the results of a company's audit will not be used against it. Further, the policy does not apply in federal civil actions, state actions, or citizen suits.³³⁶

An entity's active environmental audit program may be a factor in reducing an enforcement action from a criminal to a civil violation. To further lessen the possibility of a criminal prosecution, an entity should voluntarily provide the DOJ with any relevant information. Therefore, notwithstanding the fact that the DOJ policy statement may lack ironclad protection, it does give some indication that the results of an environmental audit may not be totally vulnerable if the entity voluntarily comes forward. Unfortunately, by actively attempting to satisfy these factors, an entity may end up waiving other potential common law or statutory privileges.³³⁷

329. *Id.* at 3-4 (This can include whether "all relevant information (including the complete results of any internal or external investigation . . .)" was provided.).

330. *Id.* at 4 ("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 and in a timely manner.").

331. *Id.* at 5 (This can "indicate systemic or repeated participation in or condonation of criminal behavior. It may also indicate the lack of a meaningful compliance program.").

332. *Id.* (Consideration should include "whether there was an effective system of discipline for employees who violated company environmental compliance policies. Did the disciplinary system establish an awareness in other employees that unlawful conduct would not be condoned?").

333. *Id.* at 5-6.

The promptness and completeness of any action taken to remove the source of the noncompliance and to lessen the environmental harm resulting from the noncompliance should be considered. Considerable weight should be given to prompt, good-faith efforts to reach environmental compliance agreements with federal or state authorities, or both. Full compliance with such agreements should be a factor in any decision whether to prosecute.

Id.

334. *Id.* at 14-15.

335. See Richenderfer & Bigioni, *supra* note 240, at 90. See also Hunt & Wilkins, *supra* note 240, at 399.

336. Richenderfer & Bigioni, *supra* note 240, at 91. See also Woodrow, *supra* note 324, at 328.

337. See Hunt & Wilkins, *supra* note 240, at 397-99 (stating that attempting to satisfy DOJ's policies can result in waiver of common law privileges).

IV. SUMMARY OF THE PROTECTION GRANTED BY THE STATES

The policy underlying the various state statutes is that by allowing regulated entities to assess their own environmental compliance status in at least a partially protected manner, they will be inclined to identify problems and correct them. This not only helps the entity to comply with the law but also improves the environment. The privilege created by the states adds important protection to the existing common law privileges for these documents. However, that protection is not absolute.

Entities that choose to perform environmental audits in any of these states must carefully review the applicable statutes to verify that the areas included in the review fall within the scope of the privilege. If the area to be audited is not covered by the applicable statute, then the entity must rely on the common law privileges to protect the document. Furthermore, some of the states require that any documents developed as a result of the audit be labeled with a specific title. Without that title on the documents, the privilege may be forfeited.

The audit document can contain various information. However, none of the statutes allow the protection of information which the facility is required to provide under a permit, order, regulation, or rule. Therefore, all of the information uncovered during the audit must be evaluated to determine if any of it triggers a reporting requirement or must otherwise be made available to the government. If any of it does, that information cannot be protected and, if included in the report, could threaten the applicability of the privilege to the entire document. For this reason, entities must strenuously negotiate with the government to prevent the imposition of additional reporting requirements in permits and orders not specifically required through an independent regulation. Every new reporting requirement creates an additional area that cannot be protected by the privilege.

Provided that the audit has been structured to cover only appropriate areas, the privilege created by most of the statutes can still be lost if the facility does something that could be interpreted as a waiver. Therefore, all audit reports must be carefully managed to maintain confidentiality and thus protect the privilege. Many of the statutes also allow for the privilege to be lost if the audit reveals problems that were not promptly corrected. The burden is on the regulated entity to prove it acted expeditiously to correct problems and, failing that, the information may not be protected. For this reason, it is critical to not begin an audit unless management has both the desire and the resources to correct any problems identified.³³⁸ If either are lacking, performing an audit may increase liability in subsequent litigation.³³⁹

Concerning waiver and the failure to address identified problems, it is the regulated entity's actions that will determine whether or not the privilege will be lost. Therefore, audits must be planned carefully. If the performance of the audit or the handling of the resulting report is careless, the privilege may be forfeited.

338. Weinstock, *supra* note 14, at 76. See also O'Reilly, *supra* note 15, at 121-23.

339. See Woodrow, *supra* note 324, at 328.

In addition to the factors under the entity's control, some states allow the privilege to be revoked in a criminal proceeding if the information cannot otherwise be easily reproduced. This is similar to the circumstances under which an item protected by the work product doctrine can be discovered. In Colorado, this factor applies in all types of actions. Some of the states also allow the privilege to be revoked if the audit is done after the entity knows an enforcement action is underway. In addition, some of the statutes revoke the privilege if the audit contains evidence of a serious threat off-site to the environment or to the public health.

Finally, some of the statutes have granted immunity from civil, administrative, and criminal penalties in certain circumstances to regulated entities that perform an audit and voluntarily notify the government of a violation. This provision is an important benefit missing from the other state statutes and should further encourage the performance of audits.

One of the major drawbacks to each of the state statutory privileges is the fact that they are applicable only at the state level.³⁴⁰ EPA and DOJ policies indicate that the results of an audit are discoverable by the federal government. Further, the EPA will more closely scrutinize enforcement actions in states with a privilege and may be more likely to file an action if it believes the privilege is inappropriately shielding a regulated entity.³⁴¹ The disclosure of information, including information from an audit, is important under EPA and DOJ policies in determining the type and extent of enforcement actions; however, that act can result in the state privilege being waived. The potential conflict between the state privileges and federal government policies place entities that audit in an untenable position.

V. RECOMMENDATION AND CONCLUSION

Environmental audits provide a formidable weapon in the ongoing battle to achieve and maintain compliance with environmental laws. A properly conducted audit should involve a hard look at the physical portion of the facility as well as its records to identify both acceptable and unacceptable conditions. The audit can mimic a governmental inspection or go beyond that to include the review of information and practices that are not required by any regulation but which an entity has internally determined to be important.

The actual audit, however, is not the most valuable aspect of the program. Asking the question is only the beginning. The answer, and what is done in response to that answer, constitutes the real benefits of this program.³⁴² Conversely, an audit will not provide any benefit to an entity if the internal commitment to correct identified problems is not present.

An environmental audit can provide valuable information to an entity

340. O'Reilly, *supra* note 15, at 132, 139-41.

341. Jennifer M. Porter et al., *Recent Developments in Energy Resource Law*, 30 TORT & INS. L.J. 340, 343 (1995).

342. O'Reilly, *supra* note 15, at 125.

regarding its compliance status. However, if the report is not protected by a privilege, it can provide that same information to any other group that is involved in legal action with the entity.

The protection provided by the common law privileges are only effective in specific situations. For the attorney-client privilege to even potentially apply, the audit must be crafted so that an attorney can use the information in providing legal advice. Also, the protection provided by the work product doctrine will only apply if there is a threat of litigation. Finally, the self-evaluation privilege is potentially applicable, but has not been widely accepted. The self-evaluation privilege is premised on the belief that the benefit to society of performing a critical review to identify and correct deficiencies outweighs the value of allowing the results to be discovered. This same premise underlies the state statutes.

The statutes provide some protection to audits at the state level; however, that protection is not comprehensive nor is it applicable in all types of actions. Therefore, although the statutes are helpful, standing alone, they are insufficient to completely protect these documents. To remedy this dilemma, Congress should pass a federal law regarding environmental audits which standardizes the confidentiality for the resulting documents. Until that is done, the only protection at the federal level, other than common law privileges, rests on the policy of the agency involved and the willingness of both the investigator and prosecutor to adhere to that policy.

Federal legislation will provide entities with a clearer understanding of the situations under which audits can be protected regardless of whether subsequent action is at the state or federal level. As a result, more entities should be encouraged to undertake a voluntary audit program. Further, a single privilege statute will remove possible confusion for multi-state entities who perform audits. By enacting a federal statute that preempts the state statutes, entities will not be forced to structure their audit program to satisfy different statutes with different requirements by creating separate programs for each state in which the entity operates. At this time, if a party should sue the "corporation in federal court under diversity jurisdiction, the judge must carefully consider whether state law controls the claimed privilege"³⁴³ and, if so, which state's law.³⁴⁴

Until a federal law is passed, entities must continue to structure their audits to satisfy not only the applicable state statutory privilege but also the common law privileges. In doing so, the regulated entity will improve the potential to shield the audit in any type of proceeding, whether it is initiated by the government or by a private party. At the state level, legislatures should continue to pass their own laws establishing a privilege at least until the federal government responds with

343. Gish, *supra* note 296, at 78.

344. See Porter et al., *supra* note 341, at 343. See also O'Reilly, *supra* note 15, at 152-54 (stating that a federal statute could "systematize the state privilege" and the benefit of the privilege in a civil action is highest if it applies in either federal or state court); Hogue, *supra* note 22, at 883 ("Coleman said uniform federal legislation is needed given the variability among state privilege laws." Quoting Mike Coleman, Executive Director of the Oklahoma Department of Environmental Quality.).

a uniform statute.

Any future legislation, whether at the state or federal level, should, like many of the statutes, mirror the Oregon model with certain modifications. The statutes should continue to place many of the factors which can result in the loss of the privilege in a civil or administrative action squarely in the control of the entity performing the audit. This will encourage entities to perform audits because, in a sense, they will control their own destiny regarding the use of the document in enforcement proceedings. To counterbalance an entity's control, the legislation should also provide for the privilege to be revoked if it is claimed fraudulently, if the information does not fall within the scope of the privilege, or if an entity fails to take prompt action to correct the problems that were identified. This will motivate entities to correct problems promptly in order to maintain the viability of the privilege.³⁴⁵

In addition to the factors listed above, a federal statute or any new state statute should include a provision similar to some of the existing state statutes that revoke the privilege if the document contains information regarding a serious threat to public health or the environment. Although that specific factor would not be in the control of the entity performing the audit, it would foster the basic goal of improving the environment.

The statute should also allow a regulated entity to correct compliance problems which may be identified. However, this should be balanced against the ultimate goal of protecting public health and the environment. Therefore, if the audit identifies a threat to the public which is significant, that fact should outweigh the entity's interest in protecting the audit results and, therefore, the privilege should be revoked. Any future statutes should also follow Oregon's model regarding access to the audit report in a criminal proceeding, burden of proof, and materials not subject to the privilege. Further, statutes should include a provision similar to the one found in the Indiana and Texas laws that prohibit the government from creating new reporting requirements to circumvent the privilege.

Finally, the provision allowing an entity to come forward without the fear of sanctions, found in some of the current statutes, should also be included. This provision should help improve the environment through enhanced compliance and foster an air of cooperation between industry and government.

An environmental audit, if properly performed, can provide an entity with valuable information. It can highlight successes and identify weaknesses. If the regulated entity uses the results of the audit to address any deficiencies, it can reduce its potential liability and improve overall compliance. Society also benefits from this action because the environment is preserved.

Although the state statutory privileges are not absolute, they do provide some additional protection to environmental audits in certain circumstances. This protection is strengthened if the audit is designed and performed with the limitations of the applicable statute in mind. Therefore, although the existing state statutes are not suits of armor in and of themselves, they provide a more substantial cloak to the potential exposure of the audit document than was

345. See O'Reilly, *supra* note 15, at 142 n.106.

provided to the Emperor by his new clothes.³⁴⁶

346. ANDERSEN, *supra* note 29. For a similar analysis of the benefit of protecting environmental audits which also includes information regarding the states included in this Note, see Kirk F. Marty, *Moving Beyond the Body Count and Toward Compliance: Legislative Options for Encouraging Environmental Self-Analysis*, 20 VT. L. REV. 495 (1995) which was published during the publication process of this Note.

