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Turning Environmental Litigation on Its E.A.R.: The Effects of Recent State Initiatives Encouraging Environmental Audits

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TURNING ENVIRONMENTAL LITIGATION ON ITS E.A.R.: THE EFFECTS OF RECENT STATE INITIATIVES ENCOURAGING ENVIRONMENTAL AUDITS

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I. INTRODUCTION

SINCE 1993, many states have considered and enacted legislation to encourage the regulated community to perform environmental audits. The statutes take two forms: statutes providing a limited privilege to environmental audit reports, and those granting immunity from prosecution for violations discovered in an environmental audit and voluntarily reported to authorities. Immunity affects the state’s right to collect civil or criminal penalties. On the other hand, the privilege to environmental reports has the potential adverse impact of shifting the burden of promoting environmental compliance to the private plaintiff, rather than to the public treasury. In determining the best approach for promoting environmental auditing and self-correction, state legislatures should consider

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the following question: who ought to bear the cost of promoting environmental audits, the public at large or the private litigant?

Most of the debate surrounding the environmental audit privilege centers on enforcement actions, particularly prosecutions of self-reported environmental violations. Little debate has focused on how the statutes will affect private litigants. Therefore, state legislatures that have recently passed environmental audit bills may not have fully considered the potential adverse impacts on the private litigant.

Several audit privilege and immunity statutes go beyond limiting the government's right to discover and use environmental audit documents in prosecution. Some of these statutes will have far-reaching effects on the rights of private parties, including those injured by environmental violations. For example, some of the privilege statutes potentially threaten the ability of individuals harmed by hazardous chemical releases to obtain vital information about those same releases. Plaintiffs in toxic tort law-suits, whose health and property values may have been damaged, face increased difficulties in proving their cases. The immunity statutes could prevent the punitive damages awards in some toxic tort suits; and even may, depending on their scope, halt citizen suit enforcement. Finally, businesses that have suffered economic disadvantages because of a competitor's noncompliance may not be able to prove their case.

This Article discusses the potential impact on private litigants of statutes providing privileges to environmental audit reports and statutes providing immunity from prosecution for voluntary reports of violations discovered in environmental audits. First, this Article provides a historical background of environmental audit provisions and reviews other privilege doctrines. It defines environmental audits and specifically discusses discovery issues in the audit context. Next, the Article details the state environmental audit statutes. It then discusses EPA's policy encouraging environmental audits. The Article concludes, suggesting how other states can enact environmental audit statutes that promote environmental protection while still protecting the rights of private parties in the future.

2. For a further discussion of various privilege doctrines, see infra notes 19-44 and accompanying text.

3. For a further discussion of state environmental audit statutes, see infra notes 49-222 and accompanying text.

4. For a further discussion of EPA's policy encouraging auditing and self-correction of violations, see infra notes 223-41 and accompanying text.
A. The Need for Legislation Encouraging Environmental Auditing and Self-Correction of Violations—Origins of the Environmental Audit Statutes

In an effort to encourage businesses to perform environmental audits, seventeen states have passed statutes making environmental audits privileged to a certain extent. 5 Eleven of the state environmental audit statutes provide some degree of immunity from prosecution for environmental law violations discovered in an audit and reported to authorities. 6 The legislatures of at least fifteen more states are currently considering or have considered similar legislation. 7 Bills intended to create a federal statutory privilege and to provide disclosure immunity have been introduced in both houses of Congress. 8

5. For a list of the states that have such statutes, see supra note 1.

6. Environmental audit privilege statutes in Colorado, Idaho, Kansas, Minnesota, New Hampshire, South Dakota and Texas include immunity from civil and criminal penalties when a violation is discovered in an audit and is voluntarily reported to authorities. See COLO. REV. STAT. § 25-1-114.5(4); IDAHO CODE § 9-809; KAN. STAT. ANN. § 60-3333(a); 1995 Minn. Sess. Law Serv. 168 § 13, subd. 1; N.H. REV. STAT. ANN. § 147-E:9; S.D. CODIFIED LAWS § 1-40-33; TEX. REV. CIV. STAT. ANN. art. 4447cc § 10. In Michigan, the regulated entity can avoid penalties for violations caused by negligence, but not those caused by gross negligence. MICH. COMP. LAWS § 324.14809(1) (1996). The statutes of Mississippi, Virginia and Wyoming provide immunity from civil penalties, but not from criminal prosecution. See MISS. CODE ANN. §§ 17-17-29(7)(g), 49-17-43(g)(vii), 49-17-427(3)(g); VA. CODE ANN. § 10.1-1199; WYO. STAT. ANN. § 35-11-1106. In New Jersey, a regulated entity will not be penalized for certain minor violations that it promptly reports and corrects, regardless of how the violation was discovered. N.J. STAT. ANN. § 13:1D-130. Six states—Arkansas, Illinois, Indiana, Kentucky, Oregon and Utah—have statutes providing for an environmental audit privilege, but not for immunity from prosecution. See ARK. CODE ANN. § 8-1-303; 415 ILL. COMP. STAT. ANN. § 5/52.2; IND. CODE ANN. § 13-11-2-68; KY. REV. STAT. ANN. § 224.01-040; OR. REV. STAT. § 468.963; UTAH R. EVID. 508.


cently issued a new policy on the proper use of voluntary environmental self-audits in enforcement actions.  

The regulated community fears that prosecuting authorities will improperly request and use internal environmental audits to bring civil and criminal actions against parties. Primarily, it fears that parties reporting violations discovered in the auditing process will be unfairly penalized. Although such prosecutions are rare, advocates of the audit privilege argue that easing the regulated community's fears sufficiently justifies the privilege.  

Businesses are concerned that environmental audits, often undertaken at considerable cost, will be used against them in subsequent legal proceedings. Business leaders object to the use of these documents in environmental prosecutions, calling the practice unfair and counterproductive. As a result, some businesses are reluctant to produce audits that prosecutors can use as evidence of violations or as a "road map" for further investigations. Published [hereinafter House bill 1047], introduced by Representative Hefley (R-Colorado). The Bills introduced in the 104th Congress are based on the Colorado statute and include provisions which would "immunize" a party from any administrative, civil or criminal penalty for violations voluntarily reported to the enforcement authorities. In 1994, Senator Hatfield introduced a more moderate version, based on the Oregon statute and including the audit privilege only. See S. 2371, 103d Cong. (1994).  


10. See Enforcement: Legislation to Prevent Disclosure of Audits Backed by Industry Groups, 26 ENV'T REP. 463 (1995). Corporate Environmental Enforcement Council, Inc., a coalition of 67 companies and industry groups sent a letter to Congress in support of the Federal Environmental Audit Privilege statute. Id. Steve Hellum, spokesman for the group, claimed that "[b]ecause regulated entities and their employees are now under the constant threat of enforcement or third-party action based on their own self-evaluations and disclosures, they are discouraged from identifying and disclosing potential non-compliance. Id. See also Interview with Stephanie Segal, counsel for Coalition for Improved Environmental Audits (April 3, 1995).  

11. Such arguments have been urged repeatedly by industry leaders in support of federal environmental audit privilege legislation. This is shown in letters published along with the 1994 version of Senator Hatfield's bill. See S. 2371, 140 Cong. Rec. S10,944-47 (daily ed. August 8, 1994). This is also shown in letters published along with the 1995 version of the same legislation. See S. 582, 140 Cong. Rec. S4262-65 (daily ed. April 13, 1993). The regulated community also made this argument in support of EPA Policy on Prevention of Violations, supra note 9. Copies of EPA Docket, as well as any of over three hundred comments considered by EPA, are available through the EPA Office of Air & Radiation, Docket No. C-94-01.
examples of prosecutors using audits against businesses are extremely rare. Nevertheless, many business advocates point to a situation involving Coors Brewing Company, located in Colorado, where the company became the subject of a state administrative enforcement action after it voluntarily reported violations discovered in an audit. These advocates argue that any use of an environmental audit against a company in subsequent litigation discourages businesses from initially performing audits. Why, the proponents ask, should a company do investigative work that may form the basis for either a state or federal prosecution or even a citizen suit?

A recent survey performed by Price Waterhouse addressed auditing practices by U.S. businesses and discussed the businesses' apprehensions. The survey revealed that nearly twenty-five percent of the companies who performed audits had some third party attempt to discover or to disclose the audit material. Forty-three of 271 companies surveyed, and who performed environmental audits, reported that either state or federal environmental agencies had attempted to obtain the audit information. However, third parties successfully obtained audit information in less than ten percent of the cases where the company resisted disclosure.

Most businesses, regulatory agencies, prosecuting authorities and environmental groups involved in environmental policy making recognize the need to encourage businesses to undertake audits. The intense monitoring, scientific analysis and legal analysis performed in an environmental audit is often the only means of

12. For a further discussion of the use of audits against businesses, see infra note 265.
13. See Coors agrees to Pay Colorado $237,000 Penalty, 24 ENV'T REP. 1867 (1994). Coors conducted an extensive audit, at a cost of $1 million. Id. The audit revealed that substantial amounts of ethanol were released in the brewing process due to evaporation of spilled beer. Id. It was previously thought that breweries were not significant sources of volatile organic chemicals (VOCs). Id. In spite of Coors' voluntary reporting and cooperation, the state health department initially proposed a $1 million fine, later settling for $237,000. Id. The penalty included $137,000, calculated to be Coors' economic benefit of noncompliance plus a civil penalty of $100,000. Id.
15. Id. Over 369 manufacturers within 14 industrial sectors responded to the survey. Id. at 1. The study reveals both particulars of audits conducted by industry and reasons why those who do not audit fail to do so. Id. at 22-69.
16. Id. at 34. The third parties were successful in obtaining the information in approximately fifteen percent of the situations. Id.
17. Id. at 30.
18. Id.
exposing environmental violations of which the company was previously unaware.

B. Other Protections for the Confidentiality of Environmental Audits

Before states began to enact statutory environmental audit privileges, several litigants successfully asserted that some other privilege theory protected their environmental audit from disclosure. These theories include the attorney-client privilege or attorney work-product doctrine and the judicially created “self-critical analysis privilege.” Where the environmental audit falls into one of the exceptions to the statute, the owner or operator may be able to assert one of these traditional privileges.19 Most of the statutes provide that they in no way limit, waive or abrogate the scope of any statutory or common law privilege, including the work-product doctrine and the attorney-client privilege.20 Even in a jurisdiction where a statutory environmental audit privilege exists, these other privileges provide a worthy litigation tool to practitioners representing the regulated community.

1. The Attorney-Client and Attorney Work-Product Privilege

The attorney-client or attorney work-product privilege may protect environmental audits where the company’s legal counsel was involved in the auditing process. This can occur when either the legal counsel hires an environmental consulting agency to perform the audit under counsel’s direction or the company forwards all documentation to an attorney, designating it as “confidential attorney-client communication.”

The U.S. magistrate for the Central District of California addressed the attorney-client privilege in Olen Properties Corp. v. Sheldahl.21 The court held that the environmental audit memorandum prepared by a company’s own personnel and communicated to its attorney for the purpose of securing a legal opinion was protected by the attorney-client privilege. In Olen Properties the issue

19. For a more detailed analysis of the use of the attorney-client and work product privileges to protect the confidentiality of audits, see Michael H. Levin, et. al., Discovery and Disclosure: How to Protect Your Environmental Audit Report, 24 Env’t Rep. 1606 (1994).


arose out of a CERCLA action brought by Olen Properties, a former building owner, against several of its tenants to recover cleanup costs. The supervisor of environmental engineering and safety for one of the defendants, BMC Industries, Inc., prepared the audit and subsequently shared it with counsel for the codefendants.22 The court upheld the attorney-client privilege, and also found that the joint defense doctrine preserved the privilege even where the attorney shared the information with a third party for the purposes of conducting a joint defense.

The attorney work-product doctrine may shield audits conducted in preparation for litigation. However, a drawback to pursuing an attorney work-product theory in environmental audit cases is that communication to third parties will often waive the privilege. For instance, in situations where a company wishes to cooperate with prosecutors in return for penalty mitigation, it risks waiving the privilege if it discloses the audit report. Several federal circuit courts have held that communication to government investigators will waive the privilege in subsequent cases brought by third parties.23 Moreover, in jurisdictions without audit privilege statutes, nothing prevents the government from disclosing the audit to third parties.24 Further, state or federal “freedom-of-information” laws may even require such disclosures.25 The policy of the Justice Department requires, however, that the violator “make all relevant information (including the complete results of any internal or external investigation and the names of all potential witnesses) available to investigators and prosecutors” in order to be favorably assessed.

22. Id.

23. See United States v. Billmyer, 57 F.3d 31 (1st Cir. 1995) (defendant charged under RICO statute could gain access to otherwise privileged information communicated to United States government by his former employer in cooperation with investigation under theory that such communication was implied waiver by former employer); Westinghouse Electric Corp. v. Republic of the Phil., 951 F.2d 1414 (3d Cir. 1991) (where defendant itself voluntarily revealed information to United States Department of Justice and the Securities and Exchange Commission in cooperation with an investigation, it waived privilege and could not assert work product doctrine in subsequent civil suit); Martin Marietta Corp. v. Pollard, 850 F.2d 619 (4th Cir. 1988) (production of internal audits by defendant’s employer, Martin Marietta, in cooperation with investigation of overcharges, constituted waiver of privilege; defendant who was charged with mail fraud in connection with same investigation could obtain audits), cert. denied, 490 U.S. 1011 (1989); United States ex. rel. Mayman v. Martin Marietta Corp., 886 F. Supp. 1243 (D. Md. 1995) (In qui tam action by former employee, defendant’s voluntary disclosure of documents to government during settlement negotiations constituted waiver of privilege).

24. Levin, supra note 19, at 1609.

25. Id.
considered for prosecutorial leniency. Therefore, companies have a disadvantage in trying to protect the audit under the work-product privilege.

2. The Self-Critical Analysis Privilege

The self-critical analysis privilege is a common law privilege that has recently been applied to environmental audits. First recognized in *Bredice v. Doctor’s Hospital, Inc.*, the self-critical analysis privilege protects from disclosure certain internal evaluations of a party’s own current or past activities. Although *Bredice* involved a hospital’s routine staff meetings, the purpose of which were to evaluate the treatment and care given to patients, other courts have since applied this common law privilege in a variety of contexts. The self-critical analysis doctrine potentially offers protection to environmental audits conducted without significant participation by legal counsel.


27. A party asserting a self-critical analysis privilege is required to meet the following criteria: (1) "the information must result from a critical self-analysis undertaken by the party seeking protection;" (2) "the public must have a strong interest in preserving the free flow of the type of information sought;" (3) "the information must be of the type whose flow would be curtailed if the discovery were allowed;" and (4) the document must be "prepared with the expectation that it would be kept confidential, and has in fact been kept confidential." *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423, 425-26 (9th Cir. 1992). For a more comprehensive analysis of the use of the self-critical analysis privilege to protect the confidentiality of environmental audits, see Peter A. Gish, *The Self-Critical Analysis Privilege and Environmental Audit Reports*, 25 ENVTL. L. 73 (1995).


29. *Id.* at 250-51. In *Bredice*, a hospital held staff meetings for the purpose of improving “through self-analysis, of the efficiency of medical procedures and techniques.” *Id.* at 250. The court found that there is “an overwhelming public interest in having . . . staff meetings held on a confidential basis so that the flow of ideas and advice can continue unimpeded. Absent evidence of extraordinary circumstances, there is no good cause shown requiring disclosure of the minutes of those meetings.” *Id.* at 251. Essentially, since the meetings were designed for the purpose of evaluating self-improvement, the minutes were entitled to a "qualified privilege." *Id.*

In Reichhold Chemicals v. Textron, Inc.,\(^{31}\) the federal district court for the Northern District of Florida applied the self-critical analysis privilege in a CERCLA contribution action. In Reichhold Chemicals, the owner of a contaminated industrial site, Reichhold, entered into a consent decree with the Florida Department of Environmental Protection, requiring it to undertake both investigatory and remedial measures regarding environmental hazards from one of its industrial plant sites.\(^{32}\) Reichhold sued eight defendants, including former owners, for contribution under both CERCLA and Florida law for its costs in cleaning up contaminated groundwater.\(^{33}\) Reichhold resisted discovery of its environmental audits regarding its own activities at the site.\(^{34}\) The district court applied the common law privilege of self-critical analysis, holding that the Reichhold environmental audits were analogous to a "subsequent remedial measure" under Federal Rule of Civil Procedure 407.\(^{35}\)

Not all federal courts agree that the self-critical analysis privilege should apply to environmental audits.\(^{36}\) For instance, in one case a federal judge refused to apply the doctrine of self-critical analysis in an enforcement action brought by EPA. In United States v. Dexter,\(^{37}\) the U.S. District Court for the District of Connecticut held that application of the doctrine to thwart an EPA enforcement action would be contrary to public policy.\(^{38}\) Additionally, state courts in at least two jurisdictions refused to apply this privilege to environmental audits. In CPC Int'l, Inc. v. Hartford Accident and Indemnity Co.,\(^{39}\) the Superior Court of New Jersey held that a corporation that sued its insurers for indemnification of defense and cleanup costs of hazardous waste sites must disclose its environmen-

\(^{31}\) 157 F.R.D. 522 (N.D. Fla. 1994).
\(^{32}\) Id. at 524.
\(^{33}\) Id.
\(^{34}\) Id.
\(^{35}\) Id. The district court found that Reichhold was entitled to a "qualified privilege for retrospective analyses of past conduct, practices, and occurrences, and the resulting environmental consequences." Id. at 527. Further, the privilege was limited to reports prepared "after the fact" to provide "candid self-evaluation and analysis of the cause and effect of past pollution, and of Reichhold's possible role, as well as other's, in contributing to the pollution at the site." Id.

\(^{36}\) For a list of cases and commentators asserting that the self-critical analysis privilege should not be recognized, see Reichhold Chemicals, Inc. v. Textron, 157 F.R.D. 522, 525-526 (N.D. Fla. 1994).
tal audits. Although the state of New Jersey previously recognized the self-critical analysis doctrine in other contexts, the CPC Int’l court refused to apply it in an environmental context. The court emphasized the public’s compelling interest in environmental regulation, rejecting the arguments that a privilege for the audits would promote the public’s interest in a clean environment. Because companies face the threat of fines if they fail to discover and correct the violations, the court dismissed the idea that companies might stop conducting environmental compliance audits if no privilege exists. Similarly, in State ex rel. Celebrezze v. CECOS Int’l Inc., the Ohio court of appeals upheld the trial court’s refusal to find information privileged because of the public’s strong interest in environmental protection even though this jurisdiction had applied the doctrine in other contexts.

In many respects, these traditional privileges provide greater protection than the limited privileges in environmental audit statutes. Thus, a company concerned about possible violations revealed through an audit may choose to involve its attorney in the auditing process to ensure that the attorney’s legal opinion concerning the existence of a violation remains confidential.

C. Discovery Issues Arising from Environmental Audits

Environmental audits are evaluations, conducted internally or by outside experts, designed to identify environmental issues. EPA defines an environmental audit as “a systematic, documented, periodic, and objective review by regulated entities of facility operation and practices related to meeting environmental requirements.”

Any discussion of the potential impact of the environmental audit statutes on litigation must also address the various issues regarding the environmental audit privilege that may arise. First, what documents does the privilege protect? The party opposing the privilege would like to obtain the environmental audit report (E.A.R.), and all attached documents, exhibits, photographs and

40. Id. at 468. New Jersey requires a party seeking to establish a new privilege to show that similar evaluations would cease if confidentiality was not assured. Here, the court found that the plaintiff did not meet this burden. Id. at 464-65.
41. Id. at 467.
42. Id. at 467-68.
43. 583 N.E.2d 1118 (Ohio 1990).
44. Id. at 1121. In Celebrezze, CECOS offered a public policy argument that its records revealing violations of environmental hazardous waste sites should be protected by the self-critical analysis doctrine. Id. at 1119.
similar documents. The auditors may have generated some of these documents during the audit process. However, the auditors probably also reviewed records, incident reports and internal company memoranda that were not generated during the course of the audit. Where a company does an internal audit a potential dispute may arise regarding the documents that were actually produced as part of the audit.

Second, can the party opposing the privilege obtain either testimony of persons with knowledge of the audit or factual information contained in the audit? Specifically, in order to establish that there was a violation of environmental law, the opponent may seek the testimony of persons who conducted the audit. Alternatively, the opponent might seek the testimony of the persons who conducted the audit in order to show knowledge by the violator; specifically seeking the testimony of company employees who have firsthand knowledge of violations. Finally, the party opposing the privilege may want the testimony of an employee or other person with knowledge of the facts in order to show that the employer acted knowingly, recklessly or with gross negligence.

Conversely, there are situations where the audited business will choose to introduce its own E.A.R., a portion thereof, or the testimony of a person with knowledge of the audit in litigation. The audited business may use the E.A.R. to show the absence of negligence or gross negligence after an accident. It may want to introduce the audit to show it was not the source of pollution in an enforcement action or toxic tort suit. Finally, it may try to introduce the testimony of the person who conducted the audit to show it was in compliance with all applicable laws.

These are a few of the basic issues that may arise when the courts start to interpret the new environmental audit privilege statutes. The extent to which an opponent can discover or admit environmental audit documents as evidence will vary slightly with each jurisdiction.

46. For instance, the existence of a violation would be directly at issue in a citizen suit, or in a tort suit to establish negligence per se.
47. Another issue is whether an opposing party can compel an employee who learned about violations during the audit to testify about those violations. For example, a manager who learns of a condition through discussions with a lower-level employee during the course of an audit.
48. For a discussion of knowing violations under environmental audit statutes, see infra notes 59-62 and accompanying text.
II. OVERVIEW OF STATE ENVIRONMENTAL AUDIT STATUTES

A. Immunity from Penalties for Voluntary Disclosure of Violations

"Immunity" or "amnesty" provisions allow a party who discovers a violation in an audit and who voluntarily reports it to authorities to escape penalties. To qualify under these provisions, the violator must have remedied or be in the process of remediying the violation. States have various approaches when legislatively addressing immunity issues. One common factor is that most statutes exclude parties who have committed certain serious violations, such as those that have caused off-site damage. In other formulations, some states provide that where the disclosed violation does not qualify for complete immunity, the voluntary disclosure reduces the gravity of any penalty.49 Eleven states presently offer disclosure immunity or reduction in penalties for violations discovered in an audit and voluntarily reported to authorities.50 In addition, New Jersey recently enacted legislation that reduces or eliminates penalties for violations promptly reported to state authorities, whether discovered in an audit or otherwise.51 New Jersey's law was intended to, and should be effective in encouraging auditing even though violations discovered in other ways are included.

Immunity and privilege are two separate issues. Several states offer a privilege, but no immunity.52 In two of the states with disclosure immunity, the privilege operates only against the state.53 In

49. Colorado, the second state to pass environmental legislation, initiated such a development. Colorado passed its law in reaction to the Coors Brewing company case, where Coors was fined after it self-reported violations discovered in an expensive voluntary audit. Cynthia Leap Goldman, a Colorado attorney, was the principal draftsperson of this legislation. The chances were minimal that the state authorities would have discovered Coors' audit survey. See Price Waterhouse Survey, supra note 14. Over 369 manufacturers within 14 industrial sectors responded to the survey. Id. at 1. The study reveals both particulars of audits conducted by industry and reasons why those who do not audit fail to do so. Id. at 22-69.


52. Six states, Arkansas, Illinois, Indiana, Kentucky, Oregon and Utah have statutes providing for an environmental audit privilege but not for immunity or mitigation of penalties for voluntary disclosures.

53. See IDAHO CODE § 9-804 (no state public official, employee or environmental agency can require disclosure of an environmental audit report); S.D. CODIFIED LAWS § 1-40-35 (Michie Supp. 1996). Note that certain audits or portions thereof
states that offer both privilege and immunity, the issues are distinct. For example, Virginia and Idaho have no requirement that the party asserting the privilege show prompt efforts to comply.\textsuperscript{54} However, that party cannot avoid prosecution unless it has eliminated, or is in the process of eliminating the violation.\textsuperscript{55}

1. Degree of Immunity Offered

Some states provide that the immunity can cover only civil and administrative enforcement; others include immunity from criminal sanction. In eight jurisdictions, the statutes include immunity from civil and some or all criminal penalties.\textsuperscript{56} The statutes of Mississippi, Virginia and Wyoming provide immunity from civil penalties, but not from criminal prosecution.\textsuperscript{57} In a specific example, Mississippi's statute provides for the reduction of the gravity portion of a penalty, reserving to the state the right to recover the economic benefits of noncompliance.\textsuperscript{58}

No state permits a party to escape criminal penalties for knowing violations. Specifically, the statutes of Kansas, Minnesota, South Dakota and Texas expressly state that violations committed knowingly or willfully by the person claiming the privilege do not qualify.\textsuperscript{59} Wyoming's statute excludes criminal violations, as well as any violation resulting from gross negligence or recklessness.\textsuperscript{60} Furthermore, Colorado, New Hampshire and Michigan include immunity only for those criminal violations resulting from ordinary negligence.\textsuperscript{61} In Mississippi, there is no express provision addressing knowing violations, however, because the statute requires that

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\textsuperscript{58} See Miss. Code Ann. §§ 17-17-29(7)(g), 49-17-43(g)(vii), 49-17-427(3)(g).
\textsuperscript{61} See, e.g., Colo. Rev. Stat. § 25-1-114.5(4). The violator has two years to remedy the violation, but the Colorado Department of Health may extend the time if it is not practicable to remedy the violation within that time. \textit{Id.}
the violation be "discovered in an audit," it, in effect, excludes any violation knowingly committed by that party. In comparison, Idaho does not use the term "discovered" in an audit. Rather, it requires that the disclosure arise out of an environmental audit. The essential element is that the violation was "discovered" in a "voluntary" audit. This is an attempt to ensure that no violator can escape penalties for violations that it knew of prior to the audit. As a general rule, a party who commits a knowing criminal violation, is perpetrating a more serious violation than negligence and, therefore, would not be eligible for disclosure immunity in any state.

2. Unauthorized Acts of Agents and Employees

Because a corporation can only act through its agents, a potential issue may arise as to whether a corporation can qualify for disclosure immunity if its officers or employees acted knowingly in committing the violation. Only one environmental audit statute discusses the issue of acts knowingly committed by a party's agents. In Texas, if an agent commits an act knowingly, and poor or nonexistent management systems contributed to the occurrence, there can be no immunity.

3. Exclusions for Repeated Violations

The potential use of disclosure immunity to protect bad actors is minimized by provisions preventing immunity for repeated violations. In most states with disclosure immunity, the regulated entity cannot qualify if it has a recent history of the same or similar violations. Colorado, Idaho, Michigan and Wyoming will not grant immunity to a violator guilty of repeated violations within the three year period prior to the disclosure. In South Dakota, the re-

64. Id. The Texas environmental audit statute states that immunity does not apply if "the offense was committed intentionally or knowingly by a member of the person's [making the disclosure] management or an agent of the person and the person's policies or lack of prevention systems contributed materially to the occurrence of the violation." Id.
65. See, e.g., Colo. Rev. Stat. § 25-1-114.5(6) (1989 & Supp. 1996). In Colorado there will be no elimination of penalties if the violator: [H]as been found by a court or administrative law judge to have committed serious violations that constitute a pattern of continuous or repeated violations of environmental laws, rules, regulations, permit conditions, settlement agreements, or orders on consent and that were due to separate and distinct events giving rise to the violations, within a three-year period prior to the date of the disclosure. Such a pattern of repeated violations may also be demonstrated by multiple settlement agreements related to substantially the same alleged violations ....
peated violation period is two years. In Texas, the violator cannot qualify for immunity if it engaged in a pattern of violations after the date the environmental audit statute became effective. In New Jersey, the person responsible for the violation must not have been responsible for a violation of the same requirement of the same permit or at the same facility within the preceding twelve months. In addition, that person cannot have a history of similar violations that indicate a pattern of noncompliance. In Minnesota, no party can qualify for participation in its environmental improvement program unless one year or more has “elapsed since the initiation of an enforcement action that resulted in the imposition of a penalty involving the facility.” Two statutes, Kansas and Virginia do not include similar requirements.

4. Exclusion of Violations Causing Serious Actual Harm or Harm Off-site

Several states refuse to grant immunity or penalty reduction for any violation that has caused substantial harm off-site. For example, in New Jersey, violations that pose more than a “minimal risk to public health” are by definition not “minor violations.” Therefore, they do not qualify for the “grace period.”

5. Requirement that Disclosure Be “Voluntary”

One issue destined to be debated is the question of what constitutes a “voluntary” disclosure to the authorities. Most state disclosure immunity statutes, as well as EPA’s penalty reduction policy,
require that the disclosure be voluntary in order to qualify for immunity.\footnote{73} Further, if the violator is otherwise required by law to report the violation to authorities, the disclosure is not considered "voluntary."\footnote{74} The problem is that there are few violations that one is not already required by law, regulation or permit to report if one knows about it.\footnote{75} Some critics of this provision argue that the immunity should depend on whether the audit was voluntary, not whether the report of the newly discovered violation to authorities was optional.\footnote{76} Possibly in response to such criticisms, South Dakota's statute was drafted with no voluntary disclosure requirement.\footnote{77}

6. **Requirement that Disclosure Arise out of a Voluntary Environmental Audit**

With the exception of New Jersey, all of the state environmental audit statutes require the disclosure to arise out of an environmental audit.\footnote{78} Most explicitly require that the environmental audit revealing the violation is also "voluntary."\footnote{79} Thus, the violator earns relief from penalties by its voluntary disclosure of privileged information. Therefore, whether the audit itself is "voluntary" may become an issue.


76. Interview with Stephanie Segal, supra note 10.


Two states have no requirement that the disclosure arise from a voluntary audit. New Jersey allows a grace period for any violation fitting its definition of a "minor violation," including violations uncovered by the state or local government authorities. It imposes no penalties as long as the person responsible for a minor violation reports it within thirty days of discovering it, whether or not there was an audit. In Idaho the privilege operates only against the government. Idaho requires that the violation be discovered in an audit, but does not explicitly require the audit to be "voluntary." Therefore, the statute minimizes potential abuse, such as a fraudulent claim of privilege.

7. Burden of Proof

There are two basic requirements for disclosure immunity and, therefore, two issues regarding the burden of proof. Under the basic scheme of most statutes, the party making the disclosure must provide some evidence showing, first, that the disclosure was "voluntary," and second, that the corrective measures were appropriate and timely. For example, in Colorado, the party making the disclosure initially provides evidence showing that the disclosure was "voluntary" as defined by the statute. The party must then show that the disclosure was prompt, that it arose out of a voluntary audit, and that efforts to remedy the violation were timely and appropriate. If successful in such a showing, there is a rebuttable presumption that the party making the disclosure is immune from penalties. The burden shifts to the Colorado Department of Public Health and Environment to rebut the presumption. In comparison, the Idaho statute creates a rebuttable presumption that a disclosure was voluntary where certain elements are present, however, it does not explicitly require the party making the disclosure to present evidence on those elements.

81. Id. § 13:1D-130.
82. IDAHO CODE § 9-803(3).
83. Id. The definition of "environmental audit" does not include the element of being "voluntary." Id.
84. COLO. REV. STAT. § 25-1-114.5(4).
85. Id. § 25-1-114.5(1).
86. Id. § 25-1-114.5(4).
87. IDAHO CODE § 9-809(2). The required elements in § 9-809(2)(a) require: "The disclosure is made by the owner or operator in a timely manner, after receipt of the environmental audit report to the environmental regulatory agency having regulatory authority." Id. § 9-809(2)(a). Section 9-809(2)(b) requires: "The disclosure arises out of an environmental audit." Id. § 9-809(2)(b). Section 9-809(2)(c) requires: "The owner or operator making the disclosure immediately
to create a rebuttable presumption that the entity is immune from penalties, the party must establish a *prima facie* case that the disclosure was "voluntary," prompt and in writing. In addition, the violation must not already have been under investigation at the time of the disclosure, must not have caused harm off-site, and must be remedied promptly. Three states, Mississippi, Virginia and Wyoming do not discuss the burden of proof for mitigation of penalties.

8. *Ability of States to Restrain Violations or Order Remedial Action*

Even though the state agencies may not impose monetary penalties for certain violations, the statutes do not prevent the state environmental agencies from using other theories to recover damages or to control the timing and method used to correct violations. For example, the Colorado statute provides that the section regarding disclosure immunity "does not affect any authority the department of public health and environment has to require any action associated with the information disclosed in any voluntary disclosure of an environmental violation." Idaho also reserves to the state environmental agency the authority to "require remedial action through a consent order or action in district court or to abate an imminent hazard." Minnesota requires a participant in the environmental improvement program to submit a performance schedule, which is subject to the approval of the state pollution control agency.

Where the statutes do not expressly reserve the authority in the states, the statutes usually speak only to immunity from the penalty portion of the agency's potential recovery. For example, Missippi initiates appropriate efforts to achieve compliance, pursues compliance with due diligence, and expeditiously achieves compliance within a reasonable period after the completion of the environmental audit." *Id.* § 9-809(2)(a)-(c).  

89. *Id.* § (10)(b).  
90. See MISS. CODE ANN. §§ 17-17-29(7)(g), 49-17-43(g)(vii), 49-17-427(3)(g) (1995 & Supp. 1996); VA. CODE ANN. § 10.1-1199 (Michie Supp. 1996); Wyo. STAT. ANN. § 35-11-1106 (Michie Supp. 1996). Mississippi does not discuss the burden or the procedure for voluntary reporting. It requires the department take into account a voluntary report of a violation and reduce the gravity portion of any penalty to a *de minimus* amount if the report was prompt, arose out of an audit, was not otherwise required by law and if the remedial action was prompt and appropriate. *Miss. CODE ANN.* §§ 17-17-29(7)(g), 49-17-43(g)(vii), 49-17-427(3)(g).  
93. 1995 Minn. Sess. Law Serv. 168 §§ 12, 13, subd. 1 (West).
sippi's voluntary disclosure provisions will only reduce the gravity portion of a penalty.\textsuperscript{94} The statute does not prevent the commission from bringing a civil or administrative enforcement action. Therefore, the state can still bring an action to require remediation, recover its costs incurred, and recover the cost of damage to wildlife, where applicable.\textsuperscript{95} Similarly, Kansas and Texas do not expressly reserve the authority of the state agency to order remedial action. The statutes only speak of immunity "from administrative, civil, or criminal penalties."\textsuperscript{96} The statutes do not appear to restrict any authority state agencies have to order remedial action.


The prohibition of penalties for self-reported violations raise inquiries as to whether citizens suits are barred under the environmental audit statutes and whether citizens can challenge the state's finding of immunity. For example, could a citizen plaintiff allege that the violation falls under one of the exceptions to the immunity statute, such as the exception for violations causing harm off-site?

There is no authority in the disclosure immunity statutes to allow citizens to challenge, in state court, the state agency's determination that the immunity applies to a self-reported violation. By the same token, there is no language that prevents a citizen from bringing an action against the violator after the state determines that it will not impose a penalty for a specific violation.\textsuperscript{97} In most cases, the state's refusal (or inability) to pursue penalties will not prevent the filing of a citizen suit.\textsuperscript{98} Only "diligent prosecution" of the violation by the state or EPA will deter citizen suit actions.\textsuperscript{99} However,

\textsuperscript{94} See Miss. Code Ann. §§ 17-17-29(7)(g), 49-17-43(g)(vii), 49-17-427(3)(g).
\textsuperscript{95} Id. §§ 17-17-29(2)-(3), 49-17-43(b)-(d). Where any person has violated hazardous and solid waste laws, the Mississippi Commission of Environmental Quality can bring action for mandatory or prohibitory injunctive relief, an action to recover its cost of remediation in lieu of or in addition to any penalty and an action to recover cost of wildlife in addition to any penalty. The Commission of Environmental Quality has the same remedies for violations of water quality laws. Id.
\textsuperscript{97} In such a case, the violator would presumably raise the immunity statute as a defense. The citizen plaintiff can then either allege that the statutory immunity from penalties does not apply, or seek injunction relief, restitution of damages to wildlife or other damages exclusive of penalties.
If the state and the violator enter into a consent order regarding how the violation will be remedied, the state’s enforcement of that consent order would impede a citizen suit.\textsuperscript{100} At least one federal court has recently held that “diligent prosecution” by the state does not require the state to assess penalties rather than rely exclusively on other remedies.\textsuperscript{101}

As an alternative, the plaintiffs could pursue penalties in federal court using federal citizen suit provisions. The prevailing view in federal district courts is that the citizen suit provisions of a federal environmental law still apply even where the federal environmental program has been “delegated” to the state.\textsuperscript{102} Where EPA has approved a state program, the state laws supersede the federal law. Thus, the citizen suit is grounded on violations of state, not federal, law.\textsuperscript{103} Several federal courts have held that the federal laws enable citizens to maintain an action in federal court alleging violations of the parallel state law.\textsuperscript{104}


\textsuperscript{103}See Sierra Club, 824 F. Supp. at 197.

The immunity statutes may affect remedies, but will not prevent citizen suits from being filed in state courts. Instead, it is the privilege statutes, not the immunity provisions, that may influence citizens to file in federal court.\textsuperscript{105} If a citizen brings an action in state court, the state law regarding whether environmental audits are privileged will apply. If the action is brought in federal court under the citizen suit provisions of federal law, federal law regarding privilege will most likely apply.\textsuperscript{106}

\textbf{10. Effect on Punitive Damages in Tort Suits}

In toxic tort suits, plaintiffs can recover three types of damages: damages to their property, damages to their health, and sometimes punitive damages when the defendant's gross negligence or reckless behavior caused the injury.\textsuperscript{107} An interesting question is raised as to whether the "immunity" statutes would completely prevent citizens from recovering punitive damages in toxic tort suits. A court could interpret the prohibition on "penalties" for self-reported violations as a prohibition on any damages other than those for out-of-pocket expenses. A court might find that punitive damages are penalties even though they are paid to private individuals rather than to the state treasury.

One argument against this interpretation is that punitive damages are a punishment for knowing or reckless behavior.\textsuperscript{108} They are not a penalty for the environmental violation itself. Virginia is the only state that specifies that the immunity does not affect the rights of injured parties to pursue damages.\textsuperscript{109} Only two of the existing statutes lend themselves to this interpretation. The Colorado

\textsuperscript{105} See Mark O. Hatfield, \textit{The Environmental Audit Privilege Act}, \textit{The EnvTL. Forum}, April/May 1995, at 21. Senator Hatfield (R-Oregon), co-sponsor of the Senate Environmental Audit Privilege Bill, has written that the potential for private litigants to avoid the state privilege simply by filing in federal court is a principal reason that a federal privilege statute is needed. \textit{Id.}

\textsuperscript{106} For a discussion of the law applied in federal court, see infra text accompanying notes 314-22.


\textsuperscript{109} VA. CODE ANN. § 10.1-1199 (Michie Supp. 1996) ("section does not bar the institution of a civil action claiming compensation for injury \ldots against an owner or operator").
statute, for example, provides that “[i]f any person . . . makes a voluntary disclosure of an environmental violation . . . the person is . . . immune from any administrative and civil penalties associated with the issues disclosed . . .”110 The use of the term “issues disclosed” rather than “violation” or similar terminology makes the Colorado statute seem particularly broad. Kansas grants immunity from “any administrative, civil, or criminal penalties for the violation . . . .”111 Other statutes make it clear that the penalties to which disclosure immunity provisions refer are only those imposed by the state.112

11. Conclusion

The various disclosure immunity statutes will be effective in promoting environmental compliance. The statutes contain several important limitations to prevent bad actors from abusing the immunity provisions. In addition, the requirement that the violation be discovered in an audit will doubtless inspire smaller businesses to audit, where they may have never done so before. Furthermore, as more regulated entities conduct thorough audits and make frank disclosures, state agencies will have more information to recognize environmental compliance problems that are likely to arise with each type of regulation. This recognition will let the agencies know how they can best assist the regulated community in its compliance efforts, and it may also help the state agencies determine how to focus enforcement efforts. In the future, the states may consider the advantages of including other elements in the immunity provisions. In particular, states may want to encourage businesses to develop permanent environmental compliance management systems

111. KAN. STAT. ANN. § 60-3338(a) (Supp. 1995).
112. For example, Idaho declares the self-reporter “shall be immune from state prosecution, suit or administrative action for any civil or criminal penalties . . . .” IDAHO CODE § 9-809(1) (Supp. 1996). Similarly, Texas defines “penalty” as a sanction “imposed by the state . . . .” TEX. REV. CIV. STAT. ANN. art. 4447cc § 3(5) (West Supp. 1997). Wyoming provides that “the department shall not seek civil penalties” against a person who voluntarily reports a violation discovered in an audit. Wyo. STAT. ANN. § 35-11-1106(a) (Michie Supp. 1996). Minnesota provides that “the state may not impose any administrative, civil, or criminal penalties” for violations discovered in the course of an audit performed in accordance with the “environmental improvement program.” 1995 Minn. Sess. Law Serv. ch. 168 § 13, subd. 2 (West). In Mississippi, the statute does not use the term “immunity,” but provides that the state will reduce any fine to a de minimus amount where the violation is voluntarily reported. Miss. CODE ANN. §§ 17-17-29(7)(g), 49-17-43(g)(vii), 49-17-427(3)(g) (1995 & Supp. 1996).
by including violations discovered through those systems for potential disclosure immunity.113

B. Privilege

The environmental audit privilege is a very limited one—so much so that one could say the privilege is defined by its limits. The regulated entity in any given jurisdiction must follow strict guidelines to ensure its environmental audit is privileged and remains privileged. Statutes include requirements that the violations be promptly corrected and create exceptions in cases of fraud or actual harm to ensure that the privilege will not protect bad actors. However, in litigation, the environmental audit privileges sometimes apply differently where the challenge is brought by a third party litigant rather than when it is brought by state or local government authorities. The difficulties faced by a private litigant range from none in Idaho and South Dakota, where the privilege operates only against the state, to insurmountable in Michigan, where the exceptions to the privilege apply only to the state.114

1. Requirement of Prompt Initiation of Effort to Remedy Violation

To preserve the privilege, one important requirement, found in most of the statutes, is that the owner or operator remedy all instances of noncompliance uncovered in the audit.115 If an audit reveals both major and minor violations, the owner or operator would essentially have to remedy all violations with reasonable diligence in order to prevent any violations from being discovered in a subsequent enforcement action. For instance, the Arkansas statute provides that the privilege does not apply to an audit if "the material shows evidence of noncompliance with . . . federal or state law [or] . . . [environmental] regulation [and] . . . the person claiming the privilege did not promptly initiate and pursue appropriate efforts to achieve compliance with reasonable diligence."116

113. The EPA has included this in its Policy on Prevention of Violations, supra note 9, at 66,711. See infra text accompanying notes 223-41.

114. See IDAHO CODE § 9-804 ("[N]o state . . . official, employee or environmental agency shall require to be disclosed an environmental audit report . . ."); S.D. CODIFIED LAWS § 1-40-35 (Michie Supp. 1996) ("[D]epartment [of Environment] may not request results of an environmental audit"); MICH. COMP. LAWS §§ 324.14804, 324.14805 (1996). Michigan's exceptions to the privilege are provided in the section of the statute that creates procedures for the state or local government to seize or demand the Environmental Audit Report.

115. This requirement is found in all the privilege statutes except Virginia and Idaho.

Virginia's and Idaho's statutes do not require a showing of prompt efforts to comply in order to preserve the privileged nature of an audit. Instead, Virginia's statute excepts from privilege any document or portion of the document that demonstrates a "clear, imminent and substantial danger to the public health or the environment . . . ."\(^\text{117}\) Therefore, in Virginia the violator can do nothing to correct a violation and still claim a privilege so long as no evidence of a "clear, imminent, and substantial danger" to the public is available to outsiders.\(^\text{118}\)

In Idaho, there is a presumption of non-disclosure and the statute requires only that the party asserting the privilege establish a *prima facie* case by presenting evidence of "the existence of a written environmental compliance policy or the adoption of a plan of action to meet applicable environmental laws."\(^\text{119}\) Disclosure is appropriate only if the state demonstrates that one of two exceptions applies: that the privilege is asserted for a fraudulent purpose, or that the "material is not an appropriate subject for an audit."\(^\text{120}\) Therefore, Idaho's statute falls short of a requirement that the violator come into compliance within a reasonable time to preserve the privilege. Because opposing parties cannot challenge the privilege on the grounds that the violator did not take prompt remedial action, there is less incentive to take prompt remedial action than in other states that have this requirement.\(^\text{121}\)

Some of the statutes requiring an owner or operator to remedy non-compliance include guidance regarding what would constitute "prompt" efforts to comply. On a national level, the bill introduced by Senator Hatfield (R-Oregon) would require compliance in order to preserve the privilege.\(^\text{122}\) Where there are several violations, several states allow the owner or operator to show reasonable diligence by adopting a phased program for coming into compliance.\(^\text{123}\) This provision allows the violator to address the more


\(^{118}\) Id. § 10.1-1198(C). In Virginia, the party opposing the privilege has the burden to prove, based on information independent of the audit, that an exception applies. Id.

\(^{119}\) Idaho Code § 9-806(3).

\(^{120}\) Id. § 9-806(2).

\(^{121}\) However, both Virginia and Idaho require the owner or operator to come into compliance promptly in order to gain immunity from prosecution. Id. § 9-809(2)(c); Va. Code Ann. § 10.1-1199.

\(^{122}\) Senate Bill 580, supra note 8.

\(^{123}\) For example, Colorado allows the multiple violator to institute "a comprehensive program that establishes a phased schedule of actions to be taken to bring the person or entity into compliance . . . ." Colo. Rev. Stat. 13-25-126.5 (3)(b)(II) (Supp. 1996). Mississippi and Utah have similar provisions. See Miss.
urgent violations first. Furthermore, this language allows for leniency in instances where violations may require the installation of pollution control equipment and may take a considerable time to resolve. Where the violation is a failure to apply for a permit, some statutes specify a time period within which submitting an application would constitute a "prompt effort to comply." 124

2. Voluntariness of Audit

Just as the "disclosure immunity" statutes require the audit to be voluntary, in most states the statutory privilege only applies to "voluntary" audits. For example, an audit undertaken as a "supplemental environmental audit" in settlement with the federal EPA ordinarily would not be considered "voluntary." 125 One can easily imagine other scenarios where the "voluntariness" of an audit or disclosure is called into question. Is an audit conducted in response to inquiries by the public "voluntary?" After notice of impending citizen suit? How about in response to an accident?

Colorado answers this voluntariness question by explicitly providing that the privilege does not apply in certain situations, and implies that asserting the privilege to protect audits conducted under those circumstances is fraudulent. An environmental audit is not privileged when:

- a court of record, or ... administrative law judge, after an *in camera* review, determines that the privilege is being asserted for a fraudulent purpose or that the environmental audit report was prepared to avoid disclosure of information in an investigative, administrative, or judicial proceeding that was underway, that was imminent, or for which the entity or person had been provided written notifica-

124. For example, Arkansas specifically requires that if the violation is a failure to obtain a permit, the owner or operator has ninety days to submit, to the Arkansas Department of Pollution Control, either an application or a schedule showing when it can finish its permit application. Ark. Code Ann. § 8-1-307(b) (Michie Supp. 1995). Indiana also provides that ninety days is timely for submitting an application. Ind. Code Ann. § 13-28-4-2(b), 3(b) (West Supp. 1996). Colorado, Illinois, Kansas, Kentucky, Mississippi, Oregon, Texas, Utah and Wyoming do not specify a time frame for submitting applications.

125. For a discussion of audits as "supplemental environmental projects," see *infra* notes 242-47 and accompanying text.
tion that an investigation into a specific violation had been initiated.\textsuperscript{126}

Not all statutes require that the audit be voluntary. Idaho does not include the element of voluntariness in its definition of "environmental audit."\textsuperscript{127}

3. Waiver of the Privilege

\textit{a. Express and Implied Waiver}

It is not always clear under what circumstances the owner or operator waives the privilege. Eight states make it clear that any waiver must be express.\textsuperscript{128} The statutes of Indiana, Kentucky, New Hampshire and Oregon state that waiver of a privilege can be implied, but do not specify what constitutes an implied waiver.\textsuperscript{129} Three states, Colorado, Kansas and Wyoming are unclear as to whether waiver must be express or whether it can be implied.\textsuperscript{130} Minnesota's statute does not discuss waiver at all.\textsuperscript{131}

\textsuperscript{126} COLO. REV. STAT. § 13-25-126.5(3)(d) (Supp. 1996). This provision would apply to prevent a party from asserting the privilege where an audit was performed in response to notification of an impending citizen suit as well as an audit performed in response to a state or EPA investigation.

\textsuperscript{127} IDAHO CODE § 9-803(3) (Supp. 1996).

\textsuperscript{128} See Ark. Code Ann. § 8-1-304(a) ("privilege . . . does not apply to the extent that . . . [i]t is waived expressly . . "); IDAHO CODE § 9-806(1) (prohibition against compelled disclosure does not apply to extent that it is expressly waived); 415 ILL. COMP. STAT. ANN. § 5/52.2(d)(1) (West Supp. 1996) ("[p]rivilege . . . does not apply to the extent that it is expressly waived"); MICH. COMP. LAWS § 324.14809(1) (1996) ("[p]rivilege may be expressly waived by the person for whom the environmental audit report was prepared"); MISS. CODE ANN. § 49-2-71(1)(a) (Supp. 1996); TEX. REV. CIV. STAT. ANN. art. 4447cc § 6(a) (West Supp. 1997) ("[p]rivilege . . . of this Act does not apply to the extent the privilege is expressly waived"); UTAH R. EVID. 508(d)(1); VA. CODE ANN. § 10.1-1198(B) (written consent of the owner or operator is required to introduce audit report in court).


\textsuperscript{130} See COLO. REV. STAT. § 13-25-126.5(3)(a); KAN. STAT. ANN. § 60-3334(a) (Supp. 1995); WYO. STAT. ANN. § 35-11-1105(c)(i) (Michie Supp. 1996).

\textsuperscript{131} 1995 Minn. Sess. Law Serv. ch. 168 § 15 subd. 2 (West). "After receipt by the commissioner of a report that complies with section 10, subdivision 2, the [documents related to the audit] are privileged as to all persons other than the state provided that the regulated entity is in compliance with its commitments under [the voluntary pollution prevention program]." \textit{Id.}
b. Distribution or Communication to Third Parties

In general, a legal privilege is waived where the information is communicated to a third party. In the states where any waiver must be express, communication to third parties will not raise the issue of implied waiver. Where the statute specifically allows or where it is silent regarding implied waivers, communication to third parties may waive the privilege. Courts will usually find that there is no "expectation of privacy," where the party entitled to claim the privilege willingly distributes information to outsiders.

In the case of an environmental audit, however, some communications may be necessary to achieve compliance. This would include distribution to outside experts who are to help with remediating noncompliance or improving management systems. The Kansas statute specifically anticipates such communications and preserves the privilege, but many other statutes do not address this question. Because such communications would further the purpose of the statute, courts may hesitate to interpret this as an implied waiver.

Other communications, particularly those made under a confidentiality agreement, are consistent with an expectation of privacy. For example, the party entitled to the privilege may want or need to distribute audit results to lenders and potential purchasers. The Kansas environmental audit statute addresses this issue by providing that disclosure made under a confidentiality agreement will not waive the privilege.

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133. See Kan. Stat. Ann. § 60-3334(b). The laws of Texas and Arkansas have specific provisions for these communications; however, implied waiver is not an issue in those states because the statutes clearly provide that a waiver must be express. Tex. Rev. Civ. Stat. Ann. art. 4447cc § 6(b); Ark. Code Ann. § 8-1-304(a)(3).


135. Kan. Stat. Ann. § 60-3334(c). Arkansas, Michigan and Texas also anticipate this issue, although these states require any waiver of a privilege to be express. See Ark. Code Ann. § 8-1-304(a)(3)(A) (disclosure made under confidentiality agreement to potential purchaser, or existing or potential lender, customer or insurer); Mich. Comp. Laws § 324.14803(3)(A) (1996) (disclosure made to potential or existing partners, transferees, lenders, or to a trustee, parent, or subsidiary); Tex. Rev. Civ. Stat. Ann. art. 4447cc § 6(b)(2), (3) (disclosure made under confidentiality agreement with existing or potential partner, lender, transferee, or insurer, or made under claim of confidentiality to government official does not waive privilege).
c. Introduction of the Audit or Portion of an Audit in a Proceeding

In some jurisdictions, introduction of a portion of the audit in a proceeding waives the privilege. The party entitled to the privilege may think it advantageous to introduce only a portion of its audit report as evidence. It may, for example, want to show that its auditor determined the facility to be in compliance with certain regulations or with its discharge permits. Therefore, the owner or operator may have to face the dilemma of whether it wants to risk losing the privilege.

Three statutes specifically provide that such disclosures will waive the privilege. The Kentucky and New Hampshire statutes provide that if the regulated entity introduces a portion of the audit report in any proceeding, it waives the privilege for the entire report.136 In a more narrow exception, the Wyoming statute provides that if the holder of the privilege introduces any portion of the audit report in a proceeding, the privilege is waived for those sections of the audit report for that media.137 This includes any disclosures made to the state for purposes of self-disclosing violations.138 In all three jurisdictions, it is unclear whether the owner or operator has waived the privilege for all subsequent proceedings. Obviously, waiver is not a significant issue if the privilege is only waived in the proceeding where the owner wants it introduced.

d. Disclosure to Government Agencies

The issue of waiver may also arise in private litigation when the party claiming the privilege previously disclosed the audit to government agencies. In states with disclosure immunity, it would potentially create an odd result if disclosure encouraged by a statute also waived a privilege granted by the same statute. Under federal law, several courts have found that a defendant waives similar privileges for any future action if he discloses the documents to the government in cooperation with an investigation.139 State courts could use a similar provision to interpret the state privilege.

136. See, e.g., Ky. Rev. Stat. Ann. § 224.01-040(4) (b) ("[s]eeking to introduce any part of the report shall constitute waiver of the privilege . . . for the entire report").


138. Id.

139. See cases cited supra note 23 and accompanying text. In Westinghouse Electric Corp. v. Republic of the Philippine, 951 F.2d 1414 (3d Cir. 1991), documents relating to outside counsel’s investigations into alleged bribes by Westinghouse employees were disclosed to the SEC and DOJ under the terms of a
Several states expressly provide that disclosure of the audit to an environmental enforcement authority does not waive the privilege. In contrast, Wyoming explicitly states that the reporting of violations in order to qualify for immunity waives the privilege. Neither Mississippi nor Virginia address the issue. Because both require waiver to be express, however, one could not argue that the disclosure constitutes an implied waiver. Colorado is the only state with disclosure immunity that does not directly address this issue and which may have an implied waiver. Therefore, of the eight states that have "disclosure immunity," in only one may the result of disclosure to government officials be uncertain.

Similar waiver issues exist in states where there is no disclosure immunity, because violators will still self-report violations in those jurisdictions. For instance, state law or the permit stipulations may require the violator to report any known violation. Alternatively, companies may voluntarily report violations to reduce the gravity portion of any penalty assessed by the state or EPA. In the states that do not have "disclosure immunity," only two consider disclosure of privileged materials to the government. Arkansas and Indiana both preserve the privilege where a party voluntarily discloses privileged information to authorities.

confidentiality agreement. The court found that the documents were nonetheless waived for purposes of a later civil action by the Philippine government against Westinghouse. Id. at 1419. United States ex rel. Mayman v. Martin Marietta Corp., 886 F. Supp. 1243 (D. Md. 1995), also involved waiver by the defendant. However, United States v. Billmyer, 57 F.3d 31 (5th Cir. 1995), and In re Martin Marietta Corp., 856 F.2d 619 (4th Cir. 1988), cert. denied, 490 U.S. 1011 (1989), involved waiver by a non-party.


145. See Ark. Code Ann. § 8-1-304(a)(3)(B); Ind. Code § 13-28-4-7(b) (Supp. 1996). The legislatures of these two states may have been anticipating that the owner or operator would use the audit reports to show compliance and good faith efforts to comply.
Where the state environmental audit privilege statutes are silent on the issue, and waiver may be implied, disclosure of the E.A.R. to government officials may waive the privilege. To prevent what seems to be a harsh result, and which conflicts with the spirit, if not the letter of the law, the best solution would be to provide the authorities with a summary of the factual information and not the privileged documents themselves. Because privileges protect "communications, . . . not facts," a court should not find a waiver in the communication of purely factual information.

An interesting issue is whether the audit remains privileged after disclosure to regulatory authorities where the violation disclosed does not qualify for immunity. For example, in those states where any violation causing actual harm off-site cannot qualify for immunity, would the owner or operator waive the privilege by disclosing the violation to authorities? If the disclosure compromises the privilege, the owner or operator would have less incentive to report such violations. From a policy view it is even more essential that a violation that may have caused off-site harm be reported than one where the owner is confident that no such harm has occurred.

e. Failure to Request an In Camera Hearing

Several of the audit statutes allow state and local authorities to obtain audit reports, then require the party asserting the privilege to request an in camera hearing on the issue of privilege. If the party entitled to claim the privilege fails to request an in camera hearing, the privilege does not apply.


148. This argument failed in United States v. Billmyer, 57 F.3d 31 (1st Cir. 1995). In that case, the party claiming privilege had used the documents developed in its investigation to convince the United States that its employee, and not itself, was guilty of mail fraud and RICO violations. Id. When the employee/defendant sought the documents in preparing for his defense, the employer claimed privilege. Id. Although it would be harsh to deny a criminal defendant access to the information under these circumstances, a court may be less likely to find a waiver in less compelling circumstances. Id.

149. For a further discussion of off-site harm, see supra notes 71-72 and accompanying text.

150. Price Waterhouse Survey, supra note 14, at 47. According to a recent survey, when companies that did not audit were asked why they did not, twenty percent revealed concerns of audits being used against the company. Id. When companies that did audit were asked what factors would make them expand existing auditing programs, sixty-five percent cited disclosure immunity, while forty-two percent cited privilege as a factor. Id. at 28.
hearing, the privilege is waived. All of the statutes with this provi-
sion require the state to follow similar procedures.\textsuperscript{151} Typically, the
state environmental agency or attorney general's office can obtain
the audit report upon reasonable suspicion through subpoena, war-
rant or discovery, but it cannot review the documents.\textsuperscript{152} The rep-
resentative of the state environmental agency must demonstrate
probable cause, based on a source independent of the E.A.R., to
believe that the environmental audit will reveal an environmental
violation. In the event that probable cause is established, the state
representative must immediately place the E.A.R. under seal and
may not review its contents. If the party opposing discovery or re-
sisting the warrant or subpoena fails to file a petition for an \textit{in camera}
hearing within a proscribed time period, the privilege is
waived.\textsuperscript{153} If the owner or operator makes a timely request for an \textit{in camera}
hearing, the court must schedule a hearing within forty-five
days of the owner's request.\textsuperscript{154}

The issue germane to private litigation is whether the failure to
request an \textit{in camera} hearing waives the privilege only in the state
proceeding, or in future actions as well. For example, in a state
proceeding, the state may have sought the E.A.R. because it had
reasonable suspicion that there were more violations than those dis-
closed by the owner or operator. If, in fact, no more violations ex-
ist, it may be irrelevant for the owner or operator challenging the
state's action to request an \textit{in camera} proceeding. If, after reviewing
the E.A.R., the owner or operator is confident that the state envi-

\textsuperscript{151} See \textit{Ark. Code Ann.} § 8-1-309; \textit{415 Ill. Comp. Stat. Ann.} § 5/52-2(e);

\textsuperscript{152} See \textit{Ark. Code Ann.} § 8-1-309; \textit{415 Ill. Comp. Stat. Ann.} § 5/52-2(e);
§ 224.01-040(5); Mich. Comp. Laws §§ 324.14804(1), 324.14805(1); Tex. Rev. Civ.

\textsuperscript{153} See \textit{Ark. Code Ann.} § 8-1-309(b) (must request a hearing within thirty
days); \textit{415 Ill. Comp. Stat. Ann.} § 5/52-2(e) (must request a hearing within thirty
days); \textit{Ind. Code Ann.} § 13-10-3-7 (must request within thirty days); \textit{Kan. Stat.
Ann.} § 60-3335(b) (thirty days to request \textit{in camera} hearing); \textit{Ky. Rev. Stat. Ann.
§ 224.01-040(5)(b) (must request within twenty days); Mich. Comp. Laws
§§ 324.14804(1), 324.14805(1) (must request within thirty days); \textit{Or. Rev. Stat.
§ 468.963(4)(b) (Supp. 1996) (must request within thirty days); Tex. Rev. Civ.
§ 35-11-1105(c)(vi) (must request within twenty days). This is not the law in Color-
ado, Idaho, New Hampshire, Mississippi, Minnesota, South Dakota, Virginia or
Utah.

\textsuperscript{154} The request period is thirty days in Kentucky and Wyoming. \textit{See Ky. Rev.
Environmental enforcement agency has no reason to bring an action, the owner or operator may consider the matter unworthy of contesting. That is, unless failure to request a hearing in the state’s action would waive the privilege in future actions by third parties.

4. Exception to Privilege in Cases of Public Emergency or Danger

Seven states make an exception to the privilege in cases of public emergency or where there is a substantial threat to public health or property.155 In six states, this exception applies regardless of whether the party opposing the privilege is the government or a private litigant.156 Three states limit this exception to danger to the public or property outside the audited facility.157 In Colorado, the exception applies where the report shows a “clear, present, and impending danger to the public health or the environment in areas outside the facility property.”158 If a party, based on independent knowledge, can show there is probable cause to believe the exception applies, then it can get access to the audit for an in camera review. In the Utah environmental audit statute, there is an exception that “the information contained in the environmental audit report must be disclosed to avoid a clear and impending danger to public health or the environment outside the facility property.”159 Wyoming’s statute creates an exception to the privilege where information contained in the E.A.R. demonstrates a “substantial threat to the public health or environment or damage to real property or tangible personal property in areas outside of the facility property.”160

In Virginia and Mississippi, the exception for public emergency or danger apparently applies even where the danger is imminent only to those inside the facility.161 In Mississippi, an exception exists where “a condition exists that demonstrates an imminent and substantial hazard or endangerment to the public health and safety


159. Utah R. Evid. 508(d)(4).


or the environment.”162 Virginia's privilege, however, “does not extend to a document, portion of a document or information that demonstrates a clear, imminent and substantial danger to the public health or the environment . . . .”163

In Idaho, if “the governor deems an imminent and substantial danger to the public health or the environment, the governor may disclose such information excluding trade secrets . . . .”164 It is unclear how the governor of Idaho will know that an imminent and substantial endangerment exists when the audit report is secret. This exception appears so obvious that it seems strange that not all states with a privilege include it.165 However, each of the states that do not have a public emergency exception do have an exception for audits revealing uncorrected violations.166 In making a decision to omit the public emergency exemption, the legislatures may have reasoned that provisions requiring prompt and appropriate correction would void the privilege whenever a continuing violation is causing a dangerous situation.

5. Exception to Privilege Where Opponent Has a Compelling Need for the Information

In some states the authorities can get the audit report if they can demonstrate a substantial or compelling need for the information and the information is not available from other sources.167 A typical provision is Indiana's statute, which applies only in criminal actions:

[the prosecutor can obtain an environmental audit report if] the material contains evidence relevant to the commission of an offense . . . and: (i) the prosecutor has a compelling need for the information; (ii) the information is not otherwise available; and (iii) the prosecutor is unable to obtain the substantial equivalent of the information by any means without incurring unreasonable cost and delay.168

165. Arkansas, Indiana, Illinois, Kansas, Kentucky, Minnesota, Oregon and Texas have no such exception.
166. For a discussion of uncorrected violation exceptions, see supra text accompanying notes 115-24.
167. Arkansas, Idaho, Illinois, Kansas, Texas and Virginia have no similar exception.
The statutes of Kentucky, New Hampshire, Oregon and Wyoming all have similar exceptions that apply only in criminal proceedings.\(^{169}\)

In contrast, Colorado's statute has an exception, which applies to any litigant, where the court determines that there are "compelling circumstances" to allow discovery of the audit or admit audit documents into evidence.\(^{170}\) The statute, however, does not include any guidance as to what would be a "compelling circumstance."

6. **Penalties and Damages for Disclosure of Privileged Material**

Many of the statutes have damage provisions for unauthorized disclosures of privileged materials. These come in two forms. Most statutes only punish a party who violates a court order restricting disclosure of the material. Two statutes, however, punish parties not under court order who wrongfully disclose privileged materials.

Colorado has a provision typical of the first type. In Colorado, any party who knowingly divulges information in violation of a court order is liable for damages incurred by the party entitled to the privilege.\(^{171}\) The Colorado statute operates by allowing any party to gain access to an E.A.R. through an *in camera* hearing by first showing probable cause that some exception applies.\(^{172}\) The court then renders its decision specifying what information, if any, the opponent can use in a subsequent proceeding, or otherwise divulge.\(^{173}\) Any person who gained access to the audit in an *in camera*

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171. *Id.* § 13-25-126.5(5)(b)(I).

172. *Id.* § 13-25-126.5(5)(a).

173. *Id.*
hearing is liable for damages caused by any disclosure of information that violates the court's order.\textsuperscript{174} Anyone provided information by another person in violation of the court's order can also be liable for damages if the person discloses the privileged material.\textsuperscript{175} If that party is a state employee or a public official, the party may also be guilty of a class 1 misdemeanor, held in contempt of court, and fined up to $10,000.\textsuperscript{176}

Mississippi and Texas have provisions for damages similar to those of Colorado. In Mississippi, a court can hold a party liable for damages, and can also hold both that party and his attorney in contempt, imposing sanctions for violating its order after an \textit{in camera} review.\textsuperscript{177} In Texas, any public employee or official who discloses information revealed under an agreement of confidentiality commits a misdemeanor.\textsuperscript{178} An attorney for the state may also be held in contempt for wrongfully disclosing information applicable to suspected criminal activity in violation of the \textit{in camera} procedures.\textsuperscript{179} The Texas statute also provides a cause of action for damages for any unauthorized disclosure of material covered by a confidentiality agreement.\textsuperscript{180} In contrast to these damage provisions, under the Utah statute any person who discloses information covered by the privilege is "liable for all damages proximately caused," whether under a court order or not.\textsuperscript{181} A person who "willfully" does so is guilty of a class B misdemeanor, subject to a civil penalty up to $10,000, and subject to penalties for contempt of court.\textsuperscript{182}

The other environmental audit statutes have no provisions defining damages for wrongful disclosure. This is not to say that in those jurisdictions there is no legal recourse for the party entitled to claim the privilege against a person who makes a wrongful disclosure. The person claiming a privilege may have an action at common law under business tort theories or for breach of contract if the disclosure violated a confidentiality agreement. The provisions allowing the holder of the privilege to pursue damages raises the issue of how to measure those damages. For instance, if it helps a plaintiff win a case against the holder of the privilege, is the plain-

\textsuperscript{174} Id. § 13-25-126.5(5)(b)(I).
\textsuperscript{175} Id.
\textsuperscript{176} COLO. REV. STAT. § 13-25-126.5(5)(b)(II).
\textsuperscript{177} MISS. CODE ANN. § 49-2-51(3)(b) (Supp. 1996).
\textsuperscript{178} TEX. REV. CIV. STAT. ANN. art. 4447cc § 6(d) (West Supp. 1997).
\textsuperscript{179} Id. § 9(k).
\textsuperscript{180} Id. § 6(c).
\textsuperscript{181} UTAH CODE ANN. § 19-7-104(2) (1996).
\textsuperscript{182} Id. § 19-7-104(3).
tiff’s recovery equal to the damages for wrongful disclosure? None of the statutes allowing the privilege holder to pursue a cause of action offers guidance on how to measure damages “proximately caused” by wrongful disclosure of an audit.

7. Frivolous and Fraudulent Claims

Generally, plaintiffs will be denied the protection of the privilege if it is asserted in a frivolous or fraudulent claim. Only two states attempt to control frivolous assertions of the privilege by imposing sanctions. Michigan provides that a fraudulent assertion of privilege is a misdemeanor punishable by a fine of up to $25,000.183 Texas holds a person subject to civil sanctions for wrongfully claiming privilege for material he knows is not privileged.184 Most of the statutes provide that the privilege does not apply if asserted for a fraudulent purpose.185 However, most give little or no guidance in characterizing what constitutes a fraudulent purpose. The Virginia and New Hampshire statutes provide a little more explicit language than most. New Hampshire states that undertaking an audit to avoid disclosing “violations known to exist or reasonably believed to


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exist by the regulated entity" is included in the definition of fraud.¹⁸⁶ Virginia's privilege does not extend to documents "generated or developed in bad faith."¹⁸⁷

8. Burden of Proof

Determining which party carries the burden of proving the privilege will be a major factor in determining the extent of protection the various environmental audit statutes offer. The state statutes differ regarding who has the burden of proof. Most require that the party asserting the privilege establish a prima facie case that the privilege exists.¹⁸⁸

The issue of which party has the burden of showing whether the facility has corrected all violations with due diligence will be a crucial one. In about half of the states with a privilege statute, the party asserting the privilege has the burden of showing reasonable diligence in correcting the violation in order to assert the privilege.¹⁸⁹ In Colorado, Mississippi, Texas and Utah, after the party asserting the privilege establishes a prima facie case, the burden shifts to the party opposing the privilege to show that an exception

¹⁸⁸. See Ark. Code Ann. § 8-1-310(a) ("party asserting the environmental audit privilege . . . has the burden of proving the privilege . . ."); Colo. Rev. Stat. § 13-25-126.5(7) (Supp. 1996) ("[p]erson . . . asserting . . . privilege has burden of proving a prima facie case as to the privilege"); Idaho Code § 9-806(3) (Supp. 1996) ("[t]he existence of a written environmental compliance policy or adoption of a plan of action to meet applicable environmental laws shall constitute prima facie evidence that an environmental audit report . . . is protected from disclosure"); Ind. Code § 13-28-4-4(a) (Supp. 1996) (party asserting privilege has burden of proving that "the party may exercise the privilege"); Ill. Comp. Stat. Ann. § 5/52.2(d)(3) ("owner or operator asserting the environmental audit privilege . . . has the burden of demonstrating the applicability of the privilege"); Kan. Stat. Ann. § 60-3334(e)(1) ("party asserting the audit privilege . . . has the burden of demonstrating the applicability of the privilege"); Ky. Rev. Stat. Ann. § 224.01-040(4)(e) (a party asserting the privilege has the burden of proving the privilege); Miss. Code Ann. § 49-2-71(5) ("person asserting a voluntary self-evaluation privilege has the burden of proving a prima facie case as to the privilege"); Or. Rev. Stat. § 468.963(3)(d) (party asserting the environmental privilege has burden of proving the privilege); Tex. Rev. Civ. Stat. Ann. art. 4447cc § 5(f) ("party asserting the privilege . . . has the burden of establishing the applicability of the privilege"); Utah R. Evid. 508(f) ("person asserting the environmental self-evaluation privilege has the burden of establishing a prima facie case of privilege"); Wyo. Stat. Ann. § 35-11-1105(c)(iv) (party asserting privilege has the burden of proving the privilege). Minnesota is the exception. 1995 Minn. Sess. Law Serv. ch. 168 § 15 subd. 2 (West).
under the statute applies. The Illinois statute provides that where the state is the party opposing the privilege, it has the burden of proving that one of the exceptions applies. Illinois does not expressly shift the burden where the opponent is not the state. Finally, in Idaho and Virginia, the owner or operator does not have to correct all violations in order to claim the privilege. Therefore, no one has a “burden of proof” on this issue in those jurisdictions.

Most of the statutes place the burden of proving that the privilege is asserted for a fraudulent purpose on the party opposing the privilege. Moreover, in those states where the state or district attorney can get the audit by showing a “compelling need,” the state has the burden of proving that issue. For example, in the Colorado statute, where a private litigant can also get the audit re-

190. See Colo. Rev. Stat. § 13-25-126.5(7) (“party seeking disclosure has the burden of proving that such privilege does not exist. . .”); Miss. Code Ann. § 49-2-71(5); Tex. Rev. Civ. Stat. Ann. art. 4447cc § (7)(b); Utah R. Evid. 508(f). In Colorado and Mississippi, the burden is particularly difficult for the opposing party, because in both jurisdictions the opposing party must first show the court probable cause, based on independent knowledge, that an exception to the privilege applies in order to request an in camera hearing on the issue. Colo. Rev. Stat. § 13-25-126.5(5)(a); Miss. Code Ann. § 49-2-71(3)(a).


192. For a further discussion of violation correction, see supra notes 117-21 and accompanying text. In Idaho, the party asserting the privilege only has to show the existence of a “written compliance policy or adoption of a plan of action” to comply with environmental laws. Idaho Code § 9-806(3) (Supp. 1996).


port in "compelling circumstances," that party has the burden of proving the "compelling circumstances."195

9. Other Special Restrictions

Many states prescribe audit procedures in order to bring them under the purview of the statute. For example, Wyoming requires, by definition, that an audit be completed within 180 days of initiation, otherwise the audit would not qualify for the privilege under the statute or for disclosure immunity.196 In Texas, the owner or operator must give advance notice to the state agency of his intention to audit the facility in order to qualify for disclosure immunity.197 Texas does not require that the operator give advance notice of the audit for the report to be privileged.198 Further, in Texas, the owner or operator must complete the audit within a reasonable time not exceeding six months, unless the applicable regulatory authority approves an extension.199 Several states also require that the audit documents be labeled "environmental audit" and "privileged," or similar words, in order to qualify for the privilege.200

Some states require a party intending to take advantage of the privilege or immunity provisions to give advance notice to the state. In Texas, in order to receive immunity, the party must give notice to the appropriate regulatory agency of the fact that it is planning to commence the audit.201 The notice must describe the facility, the time the audit will begin, and the scope of the audit.202

195. COLO. REV. STAT. § 13-25-126.5(7).
196. WYO. STAT. ANN. § 35-11-1105(a)(i).
197. TEX. REV. CIV. STAT. ANN. art. 4447cc § 10(g).
198. See id. § 10.
199. Id. § 4(e).

201. TEX. REV. CIV. STAT. ANN. art. 4447cc § 10(g). However, advanced notice is not required for privilege. Id. § 7.
202. Id. § 10(g).
sota’s environmental improvement program requires all participants to conduct an audit and file a report of their results within forty-five days after the audit is complete. The privilege attaches after the regulated entity makes a report to the commissioner of the state pollution control agency. Except for certain serious violations, the pollution control agency grants deferred enforcement and waives penalties for all violations discovered.

10. Testimonial Privilege

Several state statutes include a limited testimonial privilege that prevents persons involved in producing the audit from divulging information relating to the investigation. Typically these provisions keep third parties from using direct testimony to circumvent the privilege attached to E.A.R. The testimonial privilege may apply either solely to the party involved in producing the audit or may extend to any person to whom the audit is disclosed. In Illinois, “an officer or employee involved with the environmental audit, or any consultant who is hired for the purpose of performing the environmental audit, may not be examined as to the environmental audit or the environmental audit report . . . .” The Kansas statute prevents “any person who conducted the audit [and] . . . anyone to whom the audit results are disclosed, unless such disclosure constitutes a waiver . . . [from] be[ing] compelled to testify regarding any matter which was the subject of the audit . . . .” In Virginia, no person involved in preparing the audit or who has possession of the report can be compelled to disclose the document, information about its contents or the details of its preparation.

An individual involved in preparing the audit who is also a witness to the violation may sometimes be permitted to testify about the events comprising the violation to prevent a regulated entity from covering up a known violation by involving all witnesses in a subsequent audit. The Texas statute illustrates this distinction:

203. 1995 Minn. Sess. Law Serv. ch. 168 § 10, subd. 2 (West).
204. See id. § 15.
205. See id. § 10-13.
206. See 415 ILL. COMP. STAT. ANN. § 5/52.2(c) (West Supp. 1996); KAN. STAT. ANN. § 60-3333(b) (Supp. 1995); MICH. COMP. LAWS § 324.14802(4) (1996); TEX. REV. CIV. STAT. ANN. art. 4447cc § 5(c), (d) (West Supp. 1997); See also VA. CODE ANN. § 10.1-1198(B) (Michie Supp. 1996). Arkansas, Colorado, Idaho, Indiana, New Hampshire, Minnesota, Mississippi, Oregon, South Dakota, Utah and Wyoming do not have a testimonial privilege.
207. 415 ILL. COMP. STAT. ANN. § 5/52.2(c).
208. KAN. STAT. ANN. § 60-3333(b) (Supp. 1995).
209. VA. CODE ANN. § 10.1-1198(B).
A person who conducts or participates in the preparation of an environmental or health and safety audit and who has actually observed physical events of violation, may testify about those events but may not be compelled to testify about or produce documents related to the preparation of any privileged part of an environmental or health and safety audit or [related documents listed elsewhere in the statute].

11. Audits Exempt from State Freedom of Information Laws

Many jurisdictions protect information disclosed to state authorities in accordance with the environmental audit statutes from public requests for the information under state freedom of information statutes. Most of the states that have adopted disclosure immunity statutes include similar provisions. A few of the states that have not adopted disclosure immunity statutes, however, also include these provisions. Where a state does not have disclosure immunity, the exemption from freedom of information laws may be necessary to protect documents that prosecutors obtained for the purposes of an in camera hearing. Unlike most states with disclosure immunity, Wyoming makes the environmental audit reports presumptively available to the public. It puts the burden on the regulated entity to show that its records would reveal trade secrets and should therefore remain confidential. While Arkansas does not exempt environmental audits from its Freedom of Information Act, the state does allow the owner or operator to disclose the audit to government officials under the terms of a confidentiality agreement. On a quarterly basis, Minnesota publishes the names

210. TEX. REV. CIV. STAT. ANN. art. 4447cc § 5(c), (d).
211. See IDAHO CODE § 9-340(45) (1995) (exempts from Freedom of Information Act "[v]oluntarily prepared environmental audits, and voluntary disclosures of information submitted . . . to an environmental agency . . . which are claimed to be confidential business information"); KAN. STAT. ANN. § 60-3334; MISS. CODE ANN. § 49-2-71 (Supp. 1996) (audits that are privileged are also exempt from the provisions of the Mississippi Public Records Act of 1983, MISS. CODE ANN. § 25-61-11); TEX. GOV'T CODE ANN. § 552.124 (health, safety or environmental audits that qualify for the privilege are exempt from freedom of information requirements).
212. See IND. CODE ANN. § 5-14-3-4 (Supp. 1996) (party may submit environmental audit report to department as "confidential document" under state freedom of information law); UTAH CODE ANN. § 19-7-104(4) (1996).
213. See, e.g., UTAH CODE ANN. § 19-7-104(4) (1996).
214. WYO. STAT. ANN. § 35-11-1101(a) (Michie 1997).
215. Id.
and locations of the facilities that submit environmental audit reports to the state as part of its “environmental improvement” program.\(^{218}\) If the regulated entity has included a performance schedule, that information is also published.\(^{219}\) All other information remains confidential.\(^{220}\)

Colorado and Virginia, two states with disclosure immunity, do not expressly exempt audit reports from their respective Freedom of Information acts.\(^{221}\) Colorado’s version of the Freedom of Information law renders all privileged information and trade secrets exempt from public disclosure requirements.\(^{222}\) Virginia, however, does not have a similar general exception for privileged information in its Freedom of Information Act.

III. AN ALTERNATIVE APPROACH—EPA’S NEW POLICY ENCOURAGING ENVIRONMENTAL AUDITS

A. EPA Policy on Discovery, Disclosure, Correction and Prevention of Violations

EPA’s new policy encouraging auditing and self-correction of violations offers an approach that avoids the potential pitfalls associated with an environmental audit privilege.\(^{223}\) EPA opposes a privilege to the extent it would operate against enforcement authorities.\(^{224}\) It has developed a policy designed to achieve the same result as the state privilege statutes without keeping the audit secret from EPA.

After an eighteen month study by its Office of Enforcement and Compliance Assurance, EPA released its new policy regarding environmental audits on December 22, 1995.\(^{225}\) Prior to the release of the new policy, the department released an interim policy on March 31, 1995, followed by a period for public comment.\(^{226}\)

\(^{218}\) 1995 Minn. Sess. Law Serv., ch. 168 § 11 (West).
\(^{219}\) Id.
\(^{220}\) Id. § 13.
\(^{222}\) COLO. REV. STAT. § 24-72-204(3)(a)(IV).
\(^{223}\) EPA Policy on the Prevention of Violations, supra note 9, at 66,706-07.
\(^{224}\) Id. at 66,710.
\(^{225}\) Id. at 66,706. This policy is the final policy and aims to “protect[ ] . . . health and the environment by encouraging regulated entities to voluntarily discover, and disclose and correct violations of environmental requirements.” Id. As a reward to those who voluntarily audit, identify and correct violations, EPA intends a significant reduction in “the gravity component of civil penalties and . . . [in the] recommending [of] cases for criminal prosecution.” Id.
\(^{226}\) Interim Policy, supra note 9, at 16,875.
addition to public comments, EPA considered existing EPA and other federal policies regarding auditing, self-disclosure and correction, relevant surveys on auditing practices and state and local policies and legislation.\footnote{227}{Id. See also Statement accompanying the March 31 release of its Interim Policy Statement. On July 27, 1994, over 400 representatives of industry, state officials and environmental groups attended a public meeting. In January 1995, a day-long focus group meeting was conducted in the offices of EPA Region IX in San Francisco with the participation of fifty invitees including representatives from industry, trade associations, state attorneys general offices, district attorneys and environmental agencies and representatives from environmental and public interest groups. The day after the focus group met, EPA and DOJ held another public comment session in San Francisco. EPA considered over eighty written comments submitted to the environmental auditing policy docket. See Statement accompanying the March 31 release of its Interim Policy Statement. EPA considered over 300 comments submitted after the release of the Interim Policy Statement. \emph{Id.}}

EPA's new policy differs substantially from the interim policy. In the new policy, EPA has developed and fine-tuned several ideas that will encourage the regulated community to vigorously discover and self-correct violations.\footnote{228}{EPA Policy on the Prevention of Violations, \emph{supra} note 9, at 66,707-12.} \footnote{229}{The policy released in April, 1995, was entitled "Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy Statement," whereas the revised final version is entitled "Policy on Discovery, Disclosure and Prevention of Violations." \emph{See id.} See also \emph{Interim Policy, supra} note 9.} Even the difference in the titles of the two policies is telling.\footnote{230}{\emph{Compare EPA Policy on Prevention of Violations, supra} note 9, at 66,711 with \emph{Interim Policy, supra} note 9.} The new policy rewards a spectrum of responsible environmental compliance efforts. Unlike the interim policy, the final policy gives the potential for immunity to companies who report violations discovered through demonstrated due diligence as well as those violations discovered during an audit.\footnote{231}{EPA Policy on Prevention of Violations, \emph{supra} note 9, at 66,710-11. The due diligence requirements, set forth in Section B, require: (1) that the regulated entity have compliance policies; (2) that overall responsibility for overseeing compliance and responsibility at each facility is assigned to specific persons; (3) that the entity have mechanisms to ensure that monitoring is adequate to detect violations; and (4) that the entity communicate environmental policy standards and procedures to employees and also provide incentives to management and employees to ensure compliance. \emph{Id.} at 66,710.} This encourages companies to implement permanent environmental management systems which may be more appealing to certain industries than periodic or one-time audits.

EPA's new policy has the following important features: (1) where violations are discovered through voluntary environmental audits or due diligence efforts, and all other conditions are met, EPA will not seek any gravity-based penalties against the violator,\footnote{231}{EPA Policy on Prevention of Violations, \emph{supra} note 9, at 66,710-11. The due diligence requirements, set forth in Section B, require: (1) that the regulated entity have compliance policies; (2) that overall responsibility for overseeing compliance and responsibility at each facility is assigned to specific persons; (3) that the entity have mechanisms to ensure that monitoring is adequate to detect violations; and (4) that the entity communicate environmental policy standards and procedures to employees and also provide incentives to management and employees to ensure compliance. \emph{Id.} at 66,710.} nor will EPA recommend the case to the Department of Justice for

\footnote{227}{\emph{Id.} See also Statement accompanying the March 31 release of its Interim Policy Statement. On July 27, 1994, over 400 representatives of industry, state officials and environmental groups attended a public meeting. In January 1995, a day-long focus group meeting was conducted in the offices of EPA Region IX in San Francisco with the participation of fifty invitees including representatives from industry, trade associations, state attorneys general offices, district attorneys and environmental agencies and representatives from environmental and public interest groups. The day after the focus group met, EPA and DOJ held another public comment session in San Francisco. EPA considered over eighty written comments submitted to the environmental auditing policy docket. \emph{See Statement accompanying the March 31 release of its Interim Policy Statement. EPA considered over 300 comments submitted after the release of the Interim Policy Statement. \emph{Id.}}}
criminal prosecution of the company if the unauthorized criminal conduct of an employee caused the violation;\(^{232}\) (2) if a violation not found through an audit or compliance management system is promptly reported and corrected, EPA will reduce the gravity-based portion of the penalty by seventy-five percent, providing that all conditions are met;\(^{233}\) (3) EPA will continue, at its discretion, to impose penalties to recover the “economic benefits of noncompliance;”\(^{234}\) (4) violators must remedy any environmental harm in addition to correcting the violation;\(^{235}\) (5) public access to information is ensured by provisions directing an entity in certain cases to enter a written agreement, which EPA will make publicly available as a condition for mitigation of penalties;\(^{236}\) EPA may also require that the entity receiving a mitigation of penalties make a description of its due diligence efforts available to the public;\(^{237}\) (6) instead of routinely requesting audits, EPA will request an audit only if it has independent evidence of the existence of a violation;\(^{238}\) and (7) both the discovery and the disclosure of the violation must be voluntary. Disclosure of a violation by a “whistleblower” employee, after notice of a citizen suit or legal complaint by a third party would not be a voluntary disclosure, and EPA would not reduce the violator’s penalty.\(^{239}\)

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232. Id. at 66,711. EPA will bring criminal charges where the violation stems from “a prevalent management philosophy or practice that concealed or condoned environmental violations” or “conscious involvement . . . or willful blindness” by high ranking employees. Id.

233. Id.

234. Id. at 66,712. EPA’s goal is to “level [the] playing field . . . and [prevent] violators [from] . . . gain[ing] a competitive advantage over the companies that do comply.” Id. Several federal environmental laws authorize EPA to recover the economic benefits of noncompliance in assessing an administrative penalty. See, e.g., Federal Water Pollution Control Act, § 309(d), 33 U.S.C. § 1319 (1986). EPA uses a computer model to calculate any economic benefit a company may have reaped by its delay in compliance (the “BEN model”). These benefits include the avoidance of “monitoring and reporting expenses (including costs of sampling and laboratory analysis, capital equipment improvements and repairs, . . . operation and maintenance expenses (e.g., labor, power, chemicals)) . . .” EPA Interim Clean Water Act Settlement Penalty Policy, (March 1, 1995), 71 DAILY ENV’T REP., Apr. 13, 1995, at D-43.

235. EPA Policy on Prevention of Violations, supra note 9, at 66,709.

236. Id. For a discussion of state legislation concerning third party disclosures, see supra notes 192-95 and accompanying text.

237. Id. The EPA included this provision in response to suggestions by environmental organizations, and is designed to “allow the public to judge the adequacy of compliance management systems, lead to enhanced compliance, and foster greater public trust in the integrity of compliance management systems.” Id.

238. Id. at 66,711.

239. Id. For a comprehensive analysis of the “whistleblower’s protection,” see infra notes 331-71 and accompanying text.
B. Drawbacks to EPA's Policy

EPA's policy does not reduce penalties that purport to recover the economic benefits of noncompliance where the company's due diligence revealed the violation. There are two drawbacks to this refusal to reduce penalties. First, it introduces an element of uncertainty, so that the violator has no assurance that he will avoid a penalty when self-reporting a violation. Second, the "economic benefit of noncompliance" does not take into account the expenditures incurred in undertaking the audit or in implementing the compliance management system. EPA should weigh these expenses against any costs the company avoided by delaying compliance. Without such considerations, EPA greatly reduces the incentive for a regulated entity to incur self-reporting expenses. Although EPA could simply add the element of the costs incurred in the audit to its benefits of noncompliance (BEN) model, this would add a further element of uncertainty.

On the other hand, where the violation was not discovered through an audit or a compliance management system, the reduction of penalties is less significant. Under such circumstances, the regulated entity has not undertaken any unusual expense and only has the choice of whether to report the known violation. It has little ground for complaint if the only benefit of self-reporting is a seventy-five percent reduction in the gravity portion of a potential penalty.

C. Interim Revised EPA Supplemental Environmental Projects Policy

EPA also encourages environmental audits through its new interim policy, published in May 1995, on Supplemental Environmental Projects (SEPs). EPA also encourages environmental audits through its new interim policy, published in May 1995, on Supplemental Environmental Projects (SEPs). SEPs are environmentally beneficial projects

240. EPA Policy on Prevention of Violations, supra note 9, at 66,708, 66,612. See also Miss. Code Ann. §§ 17-17-29(7)(g), 49-17-43(g)(vii), 49-17-427(3)(g) (1995 & Supp. 1996). Mississippi has also reserved the authority of the state Commission on Environmental Quality to assess penalties to recover the economic benefits of noncompliance. Id.

241. The entire BEN model has been criticized as inaccurate because it is based on unrealistic assumptions on tax benefits and the time value of money and fails to take into account all relevant factors affecting the cost of compliance. See, e.g., Robert H. Fuhrman, A Discussion of Technical Problems with EPA's BEN Model, 1 THE ENVTL. LAW. 561, 579-582 (1995).

242. Interim Revised EPA Supplemental Environmental Projects Policy, 60 Fed. Reg. 24,856 (1995). In order to facilitate compliance and regulate enforcement, EPA enacted SEPs, thereby responding to complaints directed against the awkward 1991 policy. Id.
that a party agrees to perform in settlement of an EPA enforcement action.\textsuperscript{243} The new policy includes guidelines denoting when an audit will be accepted as an appropriate SEP.\textsuperscript{244} EPA accepts environmental audits as appropriate SEPs for small businesses.\textsuperscript{245} However, because most large businesses perform audits as a matter of course, EPA will not approve an environmental audit in place of a SEP for larger companies.\textsuperscript{246} Violations uncovered in an environmental audit undertaken as a SEP pursuant to a settlement with EPA would not qualify for immunity as a "self-reported violation" under most state statutes, because of the requirement in those statutes that the audit be "voluntary."\textsuperscript{247}

IV. PROBLEMS ASSOCIATED WITH THE PRIVILEGE

The EPA, in its recently published policy regarding environmental auditing and self-disclosure of violations, articulated the problems associated with an environmental audit privilege:

[Privileges can] shield evidence of violations . . . and undermine the public's right to know, as well as to blanket immunities for violations that reflect criminal misconduct, health and the environment, allow noncomplying companies to gain an economic advantage over their competitors, or reflect a repeated failure to comply with federal law.\textsuperscript{248}

There are three principal arguments against having a privilege statute specifically designed to protect environmental audit reports. First, the privilege promotes secrecy and places at a disadvantage parties who have no other access to information essential to their

\textsuperscript{243} Id. The report defines and identifies the key characteristics of the SEP. \textit{Id.} at 24,857. Environmentally beneficial means "a SEP must improve, protect, or reduce risks to public health, or the environment at large." \textit{Id.} In the settlement of an enforcement action is defined as "(1) EPA has the opportunity to help shape the scope of the project before it is implemented; and (2) the project is not commenced until after the Agency has identified a violation." \textit{Id.}

\textsuperscript{244} \textit{Id.} at 24,858.

\textsuperscript{245} \textit{Id.} at 24,858 n.9.

\textsuperscript{246} \textit{Id.}

\textsuperscript{247} For further discussion of voluntariness of audits, see supra notes 125-27 and accompanying text.

\textsuperscript{248} EPA Policy on Prevention of Violations, supra note 9, at 66,709. The Agency also noted numerous disincentives to creating a statutory privilege: (1) privileges invite secrecy and create an atmosphere of distrust between regulators; (2) interim policy and new policy suggest that privilege is not needed; (3) defendants are encouraged to claim all material privileged; (4) privilege would promote litigation and increase costs; and (5) public policy opposes privileges. \textit{Id.} at 66,709-10.
case. Although some statutes include exceptions to the privilege in a civil, administrative or criminal enforcement action where the government needs the information, there are usually no such exceptions for private parties or for citizens. Second, the privilege may be unnecessary to promote audits by industry, as research shows that more and more companies are performing audits regardless of privilege. Third, the privilege and immunity statutes can have the effect of removing the public from its role in policing pollution. Finally, the privilege encourages audits at the expense of private litigants, who should not bear this cost. Instead, other legislative means, such as disclosure immunity, could better serve this purpose without including a privilege that can adversely affect private litigants.

A. Shifting the Burden of Promoting Environmental Compliance to the Private Litigant

1. The Privilege May Result in the Incorrect Disposal of Litigation

State legislatures should hesitate before creating privileges for the simple reason that secrecy interferes with the legal system’s search for truth. Regarding privileges, the Supreme Court has said 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 the truth.” Dean Wigmore proposed that one of the four prerequisites to creating a new privilege should be that “[t]he injury that would inure to the relation by the disclosure of the communications must be greater


250. Colorado has permitted an exception for cases in which the court determines there are “compelling circumstances” that favor admission of the material. Colo. Rev. Stat. § 15-25-126.5(3)(c) (Supp. 1996).

251. For a discussion of audit practices by U.S. businesses, see supra notes 15-18.

252. The state of Idaho has apparently taken this approach. Its privilege only prevents state public officials, employees and environmental agencies from requiring the disclosure of environmental audit reports. See Idaho Code § 9-804 (Supp. 1996). There is no express provision that would prevent discovery of an audit in private litigation. Id. See also Katherine B. Crawford, Act Provides Limited Immunity for Environmental Law Violations, Advoc., Oct. 1995, at 23. For a further discussion of case law governing privileges and prevention of violations, see EPA Policy on Prevention of Violations, supra note 9, at 66,712.

than the benefit thereby gained for the correct disposal of litigation." ²⁵⁴

The environmental audit will certainly interfere with the "correct disposal of litigation." State legislatures, however, have for the most part failed to consider the impact of the privilege on the private litigant and to weigh it against the benefit of increasing auditing. One commentator has noted the near total absence of discussion concerning these impacts:

But where is there any meaningful examination of what information will be denied to individuals harmed by environmental activities if an audit privilege is adopted? For example, perhaps we, as a society, might wish to keep evidence of the source of groundwater contaminants out of the hands of those suffering from cancer (a likely result in the case of most environmental audit privilege statutes enacted so far), but wouldn't it be nice to know that such consequences were actually considered by those enacting the legislation? ²⁵⁵

The privilege affects private litigants whereas the immunity affects only the right of the state to collect civil or criminal penalties. If the immunity provisions are justified as the most efficient method of ensuring prompt environmental compliance, the privilege cannot be justified on the same grounds. The immunity provisions are successful because the state's goal is to maximize compliance, not to collect penalties per se. If the "carrot" method promotes greater compliance than the "stick" of prosecution, then immunity statutes best serve the agency's purpose. In the context of private litigation, however, the privilege statute benefits the violator by increasing the difficulty an opponent faces in proving its case.

Two commentators have even suggested extending "immunity" statutes to cover private tort actions for violations uncovered in audits. ²⁵⁶ Fortunately, few would argue that it is appropriate to deny

²⁵⁴. 8 Wigmore, Evidence § 2285 (McNaughton rev. 1961) (emphasis in original).
²⁵⁶. Hartman & King, supra note 75, at 25. Hartman and King find it ironic that "no legislature has considered a bill that would grant immunity to private tort actions." Id. They point out that the environmental audit privilege has origins in the "self-critical analysis privilege" claimed often in medical malpractice cases. Id. The authors ignore the fact that the "self-critical analysis privilege" is only a privi-
injured persons access to the courts simply because the negligence that caused them harm was also an illegal environmental violation. Private parties who bring actions against a violator seek damages, not "penalties." The private parties are not made whole by the violator's delayed compliance. Thus, while the privilege encourages both audits and environmental compliance, it does so at the expense of private parties. Legislatures should weigh the effectiveness of the privilege in promoting environmental audits against its adverse effect on private litigants.

2. The Privilege will Increase Litigation Costs

The privilege statutes clearly have the potential to drive up the cost of litigation for the private litigant. First, the privilege protects any factual information developed or conclusions reached by the auditor concerning potential violations of environmental law. The statutes typically list information protected by the privilege.257 EPA, in enumerating its objections to the privilege statutes, cautioned that the owner or operator could claim information such as health studies or contaminated sediment data as privileged if developed as part of an audit.258 Thus, if the opponent wanted the type of data generated in the environmental audit, he would have to pay experts to duplicate the tests already performed as part of the audit.

Two exceptions which are often used to prevent violators from hiding violations that have previously caused injury fail to cover all situations in which private parties suffer harm. While six states' statutes make an exception for "public emergency or danger,"259 the exception might not apply to parties whose injuries are not classified as dramatic or severe. For example, a plaintiff who has been exposed to a high level of carcinogens may not exhibit a current injury; therefore, a court may not grant the plaintiff's request for an
audit under the "public emergency or danger" provisions. A similar exception that allows a party to discover audit documents upon a showing of "compelling need" applies only to private litigants in Colorado. Whether a court finds that an exception to the privilege exists or not, the parties will certainly incur attorney's fees and expend judicial resources litigating the issue.

B. Other Incentives to Perform Environmental Audits

1. The Threat of Enforcement

Both the increasing number of audits performed and the rarity of their use in prosecutions may show that the privilege is unnecessary to promote auditing. Despite claims that lack of privilege deters auditing, many businesses, particularly larger ones, are conducting more audits. The Price Waterhouse survey indicated that seventy-five percent of responding companies performed environmental audits. Furthermore, enforcement authorities rarely use audits to discover and prove environmental violations. Since 1986, EPA's own policy has limited the occasions where it will seek discovery of audits. Prosecution of audit-revealed, self-reported violations rarely occurs either at the state or federal level.


262. For a further discussion of business auditing practices, see supra notes 15-18 and accompanying text.

263. See PRICE WATERHOUSE SURVEY, supra note 14. Also, the survey revealed that those companies not regularly performing audits do not find it necessary, furthermore, the degree of confidentiality afforded audit-related information was not heavily factored into their decision to perform an audit. Id. at 40-41; See also EPA Policy on Prevention of Violations, supra note 9 at 66,710.

264. EPA Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004 (1986). The policy states that EPA believes routine agency requests for audit reports could inhibit auditing in the long run, decreasing both the quantity and quality of audits conducted. Id. at 1. Instead, EPA would request audit reports as necessary on a case-by-case basis. Id. The situations when EPA would request the audit include: (1) when an audit is material to a criminal investigation; (2) when the audit was conducted under a consent decree or settlement agreement; (3) when a company's management practices were raised as a defense; or (4) when the audit is needed to show state of mind or intent. Id.

265. David Ronald, The Case Against An Environmental Audit Privilege, NAT'L ENVT'L. ENFORCEMENT J., Sept. 1994, at 3. The author is Assistant Attorney General and Chief of the Environmental Crimes Unit for the Arizona Office of Attorney General. An informal survey of state enforcement officials determined that audits are rarely used in enforcement. Id. The author uncovered only one instance in which state or federal authorities pursued civil or criminal penalties against an entity that discovered a violation as a result of a voluntary self-audit and voluntarily
Some opponents of the privilege fear that disclosure immunity statutes remove the threat of prosecution even in situations where such a threat is necessary to ensure compliance.\(^\text{266}\) Others insist that there is no need to offer a privilege to encourage businesses to perform audits because it is already in the self-interest of businesses to perform audits.\(^\text{267}\) Companies face the threat of state enforcement, federal “over-filing” or citizen suits if they fail to discover and correct violations. Furthermore, operators in environmentally dangerous businesses may have a common law obligation to perform audits in order to prevent accidents. The New York Attorney General’s Office has taken the position that environmental audits have become a common business practice and are therefore part of a “reasonable standard of care” for companies doing business in the state.\(^\text{268}\) Therefore, a company that neglects to audit and subsequently is confronted with a serious accident could face charges of.

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\(^{266}\) In a brief submitted to EPA in opposition to the proposed policy on audits and self-disclosed violations, Stanford Lewis of the Good Neighbor Project for Sustainable Industries described three categories of potential abuses of disclosure immunity statutes: (1) the possibility that audits would be conducted to pre-empt anticipated inspections; (2) disclosure will give businesses a competitive advantage by extending the time to come into compliance than competitors; and (3) falsifying the data of detection to make it appear the company acted in “good faith” and took timely remedial action. Brief of S.J. Lewis at 5 EPA Office of Air and Radiation Docket C-94-01, Environmental Auditing Policy Compliance, IV-D-02, August 6, 1994.

\(^{267}\) Ronald, supra note 265, at 3.

\(^{268}\) See Companies That Fail to Audit May Face State Criminal Charges, Prosecutor Says, Daily Env’t Rep., Sept. 9, 1994, at AA, quoting James Sevinski, Chief of the Environmental Protection Bureau of the New York Attorney General’s Office (warning attorneys in attendance at ABA annual environmental enforcement conference that their clients may be subject to criminal liability if they do not incorporate environmental audits into their standard of care in conducting their businesses).
criminal negligence. These factors alone should prove to be a sufficient incentive for companies to conduct business in a safe and legal manner.

In the past, EPA has opposed state privilege statutes on the grounds that they will weaken state enforcement programs, impose cost and delays in enforcement actions, and may increase EPA "over-filing" of enforcement actions that would have been a state responsibility had the privilege not been in effect. Because statutes such as RCRA, CAA and CWA require that states have adequate enforcement programs, EPA may withdraw its approval of delegated state environmental programs and in some cases has threatened to do so. Several state attorneys general opposed to a federal statutory privilege have argued that the use of a company's self-audit in enforcement actions should be a matter of prosecutorial discretion. These state attorneys general feel the privilege is particularly inappropriate in criminal actions, where prosecutors may require audit documents in order to prove the defendant acted knowingly.

269. Id.

270. Restatement of Environmental Auditing Policies, 59 Fed. Reg. 38,455, 38,459 (1994). EPA urged states to hold off on passing audit privilege statutes until EPA could fully consider the ramifications of such statutes. Id.


2. Environmental Auditing Can Be Promoted Through Other Means

State legislatures or environmental agencies could promote increased self-discovery and correction of violations through means that do not involve a privilege and which have corresponding adverse effects on private parties. EPA's policy rewards auditing and other due diligence efforts without a privilege and with no substantial effects on private litigants. States should consider the approach taken by New Jersey, which recently enacted a “grace period” for minor violations that are promptly reported and corrected. The New Jersey statute encourages diligent environmental self-review by excluding any violation exceeding twelve months in duration. Alternatively, the states could take an approach similar to that of Idaho and South Dakota, which have made the privilege effective only against the state. The Illinois Environmental Protection Agency, in cooperation with the Illinois Department of Commerce and Community Affairs, has developed an “Environmental Amnesty Program” that provides incentives similar to the immunity statutes. Illinois does have a privilege, but there is no reason why states would have to enact a privilege or an immunity statute in order to develop a similar amnesty program.

3. Incentives to Conform to International Environmental Standards

The International Organization for Standardization (ISO) is in the process of formulating new standards for environmental performance, including new standards for environmental auditing. International trade can provide a significant incentive for businesses to conform to the standards. Interestingly, one of the most controversial issues the environmental auditing subcommittee

276. Id. § 13:1D-129(b)(4).
279. Naomi Roht-Arriaza, Shifting the Point of Regulation: The International Organization for Standardization and Global Lawmaking on Trade and the Environment, 22 Ecology L.Q. 479. Roht-Arriaza explores the role a “global system of private ordering” should have in protecting the environment. Id. at 481.
280. Id. at 507-508.
281. Id. at 486. The standards may affect the public regulatory process in a number of ways:
faced concerned whether the standard should require the publication of environmental auditing reports. The Europeans on the subcommittee generally favored the required public disclosure of audit results, as is currently required by European standards.

C. Remediyaing a Violation Is Not Equivalent to Compensating for Damages to People, Private Property or the Environment

State statute privilege provisions requiring the owner or operator to "remedy the violation" do not necessarily require that the damage already caused by a violation be cleaned up or that its victims be compensated. The lack of mandatory compensation to people for personal injury or property damage resulting from violations is a significant shortcoming of the privilege. In contrast, EPA's Policy on Prevention of Violations makes it clear that both the violation and any resulting damages must be remedied before a violator qualifies for mitigation of penalties.

D. Adverse Effect on Public Right to Know

The privilege statutes may affect the public's ability to keep informed regarding ongoing violations. Although the failure to promptly initiate efforts to comply always waives the privilege, it may take years for the violator to get the pollution control equipment installed. In all environmental audit statutes except Minnesota's, specific information, including the identity of the violator,
remains confidential. 286 Therefore, the public may never know about the threats posed as long as the violator is initiating efforts to comply.

V. CONFLICT OF LAW ISSUES

One of the more provocative aspects of audit privilege legislation is the potential for conflicts of law. In general, the law of the state where the facility is located would govern the confidentiality of the audit. 287 Nevertheless, a business wanting to ensure confidentiality should not rely on this factor alone. The possibility that out-of-state courts could require disclosure of the material is a great concern to businesses that want to take advantage of privilege and immunity laws.

A. Potential Issues Involving Conflicts of Law

Potential problems arise wherever a state court can assert jurisdiction over a lawsuit involving an audited facility in another state. For example, a tort plaintiff may reside in a state not recognizing an audit privilege, even though his alleged injury came from a facility located in a state recognizing the privilege. In the alternative, a plaintiff might file suit in its own state of residence against a violator located upstream in a neighboring state, claiming that pollution from the violator's facility flowed across state lines. The plaintiff may choose to file suit in the defendant's state of incorporation, which may not recognize the privilege. In each example, a defendant which conducted an audit of a facility where the privilege is recognized may find itself trying to persuade an out-of-state court to recognize the privilege of a foreign jurisdiction.

Similar complications arise if a company does a comprehensive audit of facilities in more than one state. If the audit includes a facility in a jurisdiction that does not recognize a privilege, there is the possibility that a court in that jurisdiction could order disclosure of audit materials relating to all facilities. If there is a single audit, the court may order it produced in its entirety, although a court is more likely to allow redacted versions of the E.A.R. to be produced. If there are separate audits, the court might require disclosure only of the audits of the in-state facilities. However, the

286. Information disclosed to state authorities is exempt in most jurisdictions from state freedom of information laws. For a further discussion see supra notes 211-22 and accompanying text.

287. For a discussion of conflicts of law issues in out-of-state situations, see infra text accompanying notes 291-98.
party opposing the privilege may argue that the audits of the out-of-state facilities are relevant on theories that the audit reveals a common practice of the defendant.\textsuperscript{288} A plaintiff may want an out-of-state audit to show that the company had reason to know of a violation. For example, if a 1995 audit shows that a certain practice is illegal in Pennsylvania, the company is immediately on notice that a similar practice in a Texas facility may also be illegal.\textsuperscript{289} If the company delays in investigating the practice in the Texas facility, but then later claims a privilege and immunity, the party opponent may assert that the privilege does not apply or is claimed for a fraudulent purpose.\textsuperscript{290}

Another potential conflict arises when communications relating to the audit take place outside the state where the facility is located. For example, the auditor may interview a former plant manager who has moved to another state. Such a communication may not be privileged under the laws of the state where the manager is located. Likewise, another potential issue is whether the privilege can be lost for all purposes if an audit is revealed in an out-of-state proceeding. Even if only the portions of the E.A.R. relating to an out-of-state facility were produced in the prior proceeding, there may be a question as to whether it could be admissible in the in-state proceeding on a theory of waiver.

Another conflict arises where a party attempts discovery in one state ("discovery state") for litigation pending in another state. For example, if the manager of a plant in Texas (privilege) retires to Florida (no privilege), a Florida court may face the issue of whether to enforce a subpoena to take the manager's deposition in Florida for purposes of audit-related litigation pending in Texas. Similarly, a Texas court may need to decide whether to enforce a subpoena for information regarding a Florida facility for litigation pending in Florida.

\textsuperscript{288} Hartman & King, \textit{supra} note 75, at 20. This is more often an issue in prosecution than in private litigation, but is also likely to arise in a citizen suit. \textit{Id.}

\textsuperscript{289} Naturally, the party asserting the privilege will not always be the defendant in the lawsuits. In Reichhold Chemicals v. Textron, Inc., 157 F.R.D. 522 (N.D. Fla. 1994), the plaintiff was allowed to keep its audit documents confidential under the "self-critical analysis" doctrine even though it had raised the environmental issue itself by bringing a CERCLA contribution action. However, the plaintiff chooses the forum; if the party asserting a privilege wants to keep the privilege, it should sue in jurisdictions where the privilege is recognized. For an examination of the "self-critical analysis privilege," see \textit{supra} notes 27-44 and accompanying text.

\textsuperscript{290} See discussion of fraudulent purpose exception, \textit{supra} notes 183-87 and accompanying text.
B. Principles of Conflicts of Law

A state court will look at two or three basic considerations in deciding whether to apply its own privilege law or the law of another jurisdiction. First, it will consider which state has the most significant contact with the litigation or cause of action. Second, it will determine which state has the most significant relationship with the communication. The court ruling on privilege may decide that it is not the forum for the whole of the litigation, but is only the “discovery state.”

The “state with the most significant relationship to the communication” is usually the state where the communication took place. In the environmental audit context, this should be the state in which the facility is located. Where the forum for the litigation is not the state with the “most significant relationship to the communication,” the Restatement of the Law (Second) describes two basic rules for resolving conflicts between states concerning applicability of a privilege:

1. Evidence that is not privileged under local law of the state which has the most significant relationship with the communication will be admitted, even though it would be privileged under the local law of the forum, unless the admission of such evidence would be contrary to the strong public policy of the forum.
2. Evidence that is privileged under the local law of the state which has the most significant relationship with the communication but which is not privileged under the local law of the forum will be admitted unless there is some special reason why the forum policy favoring admission should not be given effect.

The rules set forth in the Restatement clearly favor admission of the material. No state court, however, has been willing to recognize a foreign state’s privilege in a lawsuit pending in its own forum. This remains true even where the court recognizes that

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291. *Restatement (Second) of Conflict of Laws* § 139 cmt. e (1971). There are a few exceptions to this rule arising primarily when there was a prior relationship between the parties and the relationship was “centered.” For example, where a communication takes place between husband and wife who are temporarily visiting another state, the state of marital residence would ordinarily have the “most significant relationship to the communication.” *Id.*
292. *Id.* § 139.
293. A few courts have recognized a foreign state’s privilege in deciding whether to enforce discovery in a suit pending in another state. For a discussion of these issues, see *infra* notes 295-313 and accompanying text.
the foreign state has a more significant relationship with the communication.\textsuperscript{294}

Despite this preference for admission of the material, a court in a jurisdiction with no privilege should recognize a foreign state's privilege if there is a "special reason" to do so.\textsuperscript{295} The court may find that other factors would make it unfair to admit evidence developed by a party with the expectation of confidentiality. A fairness argument may be particularly persuasive where the foreign state has both the most significant contact with the communication and with the underlying transaction.\textsuperscript{296} Such a situation may arise where a tort plaintiff sues the defendant in its state of incorporation for damages for an injury allegedly caused by its facility in a state recognizing the privilege. Although a court in the state of incorporation could assert jurisdiction over the case, it may find it appropriate to apply the privilege laws of the state where the facility is located.

Another "special reason" to recognize the privilege of the state where the facility is located is that the privilege is part of that state's system of environmental protection. The state in which the facility is located has the responsibility to regulate the facility as well as an interest in ensuring that the facility is in compliance with environmental laws. Because that jurisdiction enacted the environmental audit privilege to promote compliance, another jurisdiction's disregard of this privilege would undermine the environmental protection scheme of the state regulating the facility.

Where the local law of the forum recognizes the privilege, but the state in which the audited facility is located does not, there is an exception to the general preference for disclosure where the forum state has a "strong public policy" favoring confidentiality.\textsuperscript{297}

\begin{itemize}
\item \textsuperscript{294.} See, e.g., Consolidation Coal Co. v. Bucyrus-Erie Co., 416 N.E.2d 1090 (Ill. App. Ct. 1981), \textit{vacated}, 432 N.E.2d 250 (Ill. 1982). The following facts supported the Illinois court's findings that Wisconsin was the state with the most significant relationship: Wisconsin company manufactured excavator; it collapsed and caused injury in Illinois; and internal investigation was conducted in Wisconsin. \textit{Id.} Applying the Restatement's rationale, the court found no "special reason" to apply Wisconsin's law of privilege. \textit{Id.} at 1094. Therefore, the forum's policy favoring disclosure outweighed Wisconsin's policy favoring confidentiality. \textit{Id.} at 1092-94.
\item \textsuperscript{295.} \textit{Restatement (Second) of Conflict of Laws} § 139(2) (1971).
\item \textsuperscript{296.} See Danklef v. Wilmington Med. Ctr., 429 A.2d 509 (Del. Super. Ct. 1981). A Delaware court refused to enforce a subpoena \textit{duces tecum} which was sought relative to a medical malpractice suit pending in Colorado because it found that Delaware had more significant contacts with the underlying transaction. \textit{Id.} The Delaware court supported its decision by noting that the operation and the communications took place in Delaware, and Colorado's jurisdiction was based only on personal jurisdiction. \textit{Id.} at 512.
\item \textsuperscript{297.} \textit{Restatement (Second) of Conflict of Laws} § 139(1) (1971).
\end{itemize}
Any state having a privilege statute may be likely to find such a "strong public policy." This is particularly true in those states where the environmental audit statute provides for fines and civil liability for wrongful disclosure of the material.\(^{298}\) As a consequence, courts in states recognizing the environmental audit privilege may not admit audit documents even where the state in which the facility is located is found to have the "most significant relationship with the communication" and does not have a privilege statute.

Alternatively, the forum may try to determine whether courts in the state in which the facility is located would apply another privilege to protect the audit. Where the courts of that state have declined to apply privileges such as the attorney-client, work product or self-evaluative privilege to environmental audits,\(^{299}\) the forum may decline to grant protection to an audit that would not be privileged in the state in which it was performed.

To determine whether a special reason exists for recognizing a foreign privilege, the comments accompanying the Restatement enumerate several factors that a court will consider, including:

1. the number and nature of the contacts that the state of the forum has with the parties and with the transaction involved;
2. the relative materiality of the evidence sought to be admitted;
3. the kind of privilege involved; and
4. fairness to the parties.\(^{300}\)

The first factor, applied to the environmental audit context, would be where the facility is located and the damage occurred.\(^{301}\) For example, suppose a toxic tort plaintiff who sustains an injury while living next to a plant in Colorado, then subsequently moves to New Mexico. A New Mexico court may find that it should recognize Colorado's privilege because both the communication and the tortious action that forms the basis of the suit took place in Colorado. The

\(^{298}\) Colorado, Mississippi, Texas and Utah all impose some version of liability for wrongful disclosures. See COLO. REV. STAT. § 13-25-126.5(5)(b) (Supp. 1996); MISS. CODE ANN. § 57-39-23 (1972); TEX. REV. CIV. STAT. ANN. art. 4447cc § 6(d) (West Supp. 1997); UTAH CODE ANN. § 19-7-104(2) (1996).


\(^{300}\) RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 139 cmt. d (1971).

\(^{301}\) Id.
second consideration, materiality of the evidence, would depend on how directly the violation relates to the plaintiff's harm. For example, if the audit reveals a violation, such as an unreported spill, which caused plaintiff's harm and demonstrates negligence per se, the court may find the evidence material. In contrast, an audit that reveals only "paper violations" may have only a slight relationship to the plaintiff's cause of action. Third, the court looks at the kind of privilege involved to determine if it is well established and recognized in many states. Applying this consideration, courts might be reluctant to recognize a foreign state's environmental audit privilege, because only fourteen states have E.A.R. privileges and the first statute only dates from 1993. The final consideration noted by the Restatement, fairness to the parties, should include whether the parties making the communication relied on its confidentiality. The owner or operator certainly relies on the privilege whenever an audit is conducted in a state that recognizes the privilege. Another example of reliance on the confidentiality of the communication might be a former plant manager who speaks to an auditor concerning a facility located in another state. Any one or more of these factors may be sufficient to persuade a court in a state that does not have a privilege law to protect an audit performed in a state that does have a privilege.

Where a party pursues discovery in another state the inquiry is complicated further by a third "variable," the law of the place of taking the deposition. Some courts have held that where the discovery takes place in a state other than that in which the underlying proceeding is being conducted, the forum state should apply the out-of-state rule. The Supreme Court of Mississippi recently considered this issue in *Barnes v. Confidential Party*. In that case, the Mississippi court held that a nonparty deposition witness to a Georgia divorce case could assert a privilege recognized in Georgia even though Mississippi did not recognize the privilege. The court so held even though the deposition was to be taken in Mississippi, the witness was a domiciliary of Mississippi, and the questions were re-
garding events that had occurred in Mississippi. 307 Although there are few cases on this precise issue, the Barnes court found a New York case persuasive: "[w]hen an examination before trial is conducted pursuant to a commission issued by a foreign court, logic requires that all issues regarding the propriety of questions put to the witness be referred to the trial court." 308 The New York court held that because the trial court would make the ultimate rulings on the admissibility of evidence, the forum state's law should determine all discovery questions. 309 It should be noted, however, in Barnes the court found an additional rationale for applying Georgia's privilege law: under Mississippi's own choice of law principles, the forum state's law should apply to the proceeding. 310

On the other hand, some states refuse to apply the forum state's privilege law to discovery where the deposition state is also the state with the most significant contact with the communication. In Dankleff v. Wilmington Medical Center, 311 a Delaware court refused to enforce a subpoena ducès tecum pursuant to a medical malpractice case pending in Colorado. Because both the operation and the communications took place in Delaware, the court found that Delaware had the most significant relationship with the communication and its law of privilege would control. 312 Most significantly, the court found no need to consider whether Colorado would recognize the Delaware privilege. 313 Therefore, the Delaware court used a much different analysis than used by the Mississippi and New York courts in the cases discussed above.

C. Law Applied in Federal Court

Where the federal court exercises diversity jurisdiction over a cause of action originating under state law, the court will use an analysis similar to that used in the courts of that state. The federal rules of evidence require federal courts sitting in diversity to determine which state's substantive law will apply to a proceeding. 314 Based on the facts before the court, a Mississippi court would apply Georgia law because the “center of gravity” of the case is in Georgia. 315 Therefore, the Delaware court used a much different analysis than used by the Mississippi and New York courts in the cases discussed above.

307. Barnes, 628 So. 2d at 286.
308. Id. at 288 (quoting Jarvis v. Jarvis, 533 N.Y.S. 2d 207, 210 (N.Y. Sup. Ct. 1988)).
310. Barnes, 628 So. 2d at 289. Mississippi applies a "center of gravity" test to determine which state's substantive law will apply to a proceeding. Id. Based on the facts before the court, a Mississippi court would apply Georgia law because the "center of gravity" of the case is in Georgia. Id. The "center of gravity" test is used to determine which state has the most substantial contacts with the parties or the subject matter of the action. Id.
312. Id.
313. Id.
mine privilege in accordance with state law, although this does not necessarily answer the question of which state's law it will apply. Under the *Erie v. Tompkins* doctrine, state law governs all substantive issues in a diversity action, including choice of law issues. State created privileges are substantive law. A district court exercising diversity jurisdiction will apply the privilege as it would be applied by the courts of the state in which it sits.

Where federal court jurisdiction is based on a federal cause of action, with pendant state claims, the federal law of privilege will govern the whole case. Although a few federal district courts have found environmental audits privileged based on the self-critical analysis or work product doctrines, federal courts do not uniformly find environmental audits to be privileged. Similarly, in federal cases in which the citizen plaintiffs assert pendant state claims, the federal privilege law governs the entire case. Therefore, the entire issue turns on whether a citizen suit is an action under state or federal law.

Is an action brought under a provision of a federal statute (e.g., the citizen suit provision of the underlying federal statute) but alleging violations of a state law (where the program has been delegated) a state law question or a federal question case with pendant state law claims? There is not an obvious answer to this question in states where the permitting program has been delegated to the state. It is at least arguable that if all the alleged violations are of state law, these state claims provide the entire substance of the suit. Some commentators have suggested that a federal environmental audit statute would not resolve the conflicts of law issues presented

316. 304 U.S. 64 (1938).
320. See Hancock v. Hobbs, 967 F.2d 462, 466 (11th Cir. 1992); Hancock v. Dodson, 958 F.2d 1367, 1373 (6th Cir. 1992); Von Bulow v. Von Bulow, 811 F.2d 136, 141 (2d Cir. 1987); Wm. T. Thompson Co. v. General Nutrition Corp., 671 F.2d 100, 104 (3rd Cir. 1982); Memorial Hosp. v. Shadur, 664 F.2d 1058, 1061 n.3 (7th Cir. 1981).
321. See Hancock v. Hobbs, 967 F.2d at 466; Hancock v. Dodson, 958 F.2d at 1373; Von Bulow, 811 F.2d at 141; Wm. T. Thompson Co., 671 F.2d at 104; Shadur, 664 F.2d at 1061 n.3.
by the conflicting state privilege laws; 322 however, if a citizen's suit in a delegated state is based entirely on violations of state law, a federal statute will not resolve this conflict. The statute would only provide the law of privilege where the underlying suit is based on federal, not state, law.

The conflicts of law issues related to the environmental audit privilege have the potential to cause considerable expense and delay in private litigation. These conflicts may be resolved if other state legislatures embrace the privilege at the rate seen in 1995. State courts may also resolve the conflicts by adopting the self-critical analysis privilege or extending it to environmental audits.

VI. EFFECT ON EMPLOYEES OF REGULATED ENTITIES

A. Extent to Which Privilege and Immunity Statutes Protect Employees

1. Will Employees of the Regulated Entity Be Immune from Prosecution?

Because environmental prosecutions are often brought against both a corporation and employees who may have been directly involved with a violation, whether immunity extends to employees will be an important issue. In the past, state and federal authorities have brought civil, administrative and criminal actions against certain individual employees who were involved in environmental violations as well as against the corporate employer. These individuals include employees who performed illegal acts, managers who directed them to do so, 323 and even "responsible corporate officers" who knew or should have known of the violation. 324 When the violation is revealed in an audit, and reported to authorities, will these individuals also be immune from prosecution? The existing statutes do not explicitly address this issue. One can, however, arrive at a possible solution by reading the privilege and immunity statutes

323. United States v. Ward, 676 F.2d 94, 95-96 (4th Cir. 1982); United States v. Greer, 850 F.2d 1447, 1451 (11th Cir. 1988).
324. United States v. Johnson & Towers, Inc., 741 F.2d 662, 664-66 (3d Cir. 1984). The court found a mid-level manager criminally liable when the corporation disposed of waste without a RCRA permit. Id. at 664. Although the RCRA provisions under which the officer was convicted require scienter, the court found such knowledge could be inferred by the fact that the manager should have known a permit was required. Id. at 668-69. See generally Raymond Banoun and Harold Damelin, Criminal Liability of Corporate Officers and Employees for Environmental Offenses C667 ALI-ABA 275, 280-87 (October 31, 1991) (explaining development and limits of "Responsible Corporate Officer" doctrine).
together and keeping in mind the purpose of the laws. Each immunity statute requires the violation be “discovered” in an audit. Therefore, any employee who knew his actions were illegal should not escape prosecution.

What of the employee who did not know that his actions were illegal? What of the corporate officer who was responsible, but unaware of a particular practice at his facility? A real-life example should illustrate. In a Colorado facility, employees regularly using small amounts of acetone to clean equipment, reported that it had been dumping acetone in sanitary sewers. Afterwards, the employees dumped leftover amounts on the ground outside the warehouse door. Management, however, assumed that the employees used the acetone until the containers were empty. When an audit revealed the practice, management ordered the practice discontinued and disclosed the violation to the Colorado Department of Public Health and Environment. The Department found that the company had met all conditions under the statute for immunity from prosecution. In so holding, the court recognized the statute’s goal of encouraging employee honesty and declined to interpret the statute so narrowly that employees would be afraid to tell the truth.

2. Privilege Is Held by Employer Only

The employee may not be aware that the privilege created by the statutes belongs only to the owner and operator of the facility and not to the employee. Thus, the owner or operator may waive the privilege, and the employee’s statements may be used against him. Likewise, the employee may have the erroneous impression that he will be immune from prosecution for violations he discloses in an audit. None of the statutes provide any protection for the employee from being mislead by his employer as to the existence of a privilege or immunity. Ironically, laws hailed as a way to help “innocent” industrial facilities identify violations may have the effect of subjecting to prosecution or disciplinary action workers who were unaware that their work practices were illegal.

325. For a discussion of immunity for discovering audit violations, see supra notes 49-55 and accompanying text.
327. Id.
328. Id.
329. Id.
330. Id.
B. "Whistleblower" Protection and the Privilege Laws

1. Overview of Protection

The federal environmental statutes include important provisions designed to encourage employees to speak up about violations. The premise of whistleblower protection is that greater public scrutiny of industry will enhance environmental protection. Because outsiders are rarely aware of environmental violations, and because enforcement agency resources for inspection and testing are limited, employee whistleblowers are an important means of protecting the environment and public health against serious violations. Therefore, federal law, as well as statutory and common law in many states, protect employees who report violations from employers who terminate or discriminate against an employee whistleblower.

A variety of federal statutes and state common law doctrines protect employees who "blow the whistle" on their employers by reporting environmental violations. There are two basic rationales for whistleblower protection. First, the laws protect employees from: unfair termination or disciplinary action; coerced participation in criminal activity; and the danger caused by the underlying violation. Second, such employee protection doctrines promote compliance with the law by the employer.

In states where there is now a privilege, an employee who reports an environmental violation may be reporting information that the company was legally entitled to claim as confidential. Depending on the timing, an employee who speaks out may also be subjecting his employer to legal prosecution that it could have avoided under the new immunity statutes. EPA has stated in its Policy on Prevention of Violations that it will not consider violations reported by an unauthorized employee (e.g., a whistleblower) to be a "self-reported" violation eligible for penalty mitigation. If an employer terminates an employee for revealing such information, does the employee have a cause of action for wrongful termination?

a. Protection of Whistleblowers Under Federal Law

All the major federal environmental laws include "whistleblower protection" provisions. These provisions make it illegal

331. For a further discussion of federal statutory whistleblower provisions, see infra notes 333-39 and accompanying text.
332. EPA Policy on Prevention of Violations, supra note 9, at 66,709.
to fire or discriminate against an employee because he has reported a violation of the particular statute.\textsuperscript{334} An employee who has experienced such discrimination can file a complaint with the Department of Labor.\textsuperscript{335} After an investigation, the Secretary of Labor may order: (1) that the employer abate the discriminatory action; (2) that the employee be reinstated with back pay; (3) that the employer pay compensatory damages; and (4) where appropriate, that the employer pay exemplary damages.\textsuperscript{336}

Courts have interpreted the federal whistleblower statutes expansively to provide a great deal of protection to employees. For example, no employer can discriminate against an employee who reports a violation to federal authorities even where the violator and the government settle the matter prior to any formal enforcement action.\textsuperscript{337} Another case held that an employee was protected by the whistleblower provision of the CWA even though his report of illegal action complaint was made internally and not to outside authorities.\textsuperscript{338}

Now, in many states, there are two statutes that may come in conflict with each other. First, the environmental law says no employer may fire an employee for cooperating with an investiga-

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\textsuperscript{334} See, e.g., TSCA § 23(a), 15 U.S.C. § 2622(a) (1994): "No employer may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation . . . because the employee . . . has—(1) commenced, caused to be commenced, or is about to commence or cause to be commenced, a proceeding under this chapter; (2) testified or is about to testify in any such proceeding; or (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter." \textit{Id.}

\textsuperscript{335} See, e.g., TSCA § 23(b), 15 U.S.C. § 2622(b) (1994). The statute provides that "[a]ny employer who believes that the employee has been discharged or otherwise discriminated against by any person . . . may . . . file . . . a complaint with the Secretary of Labor." \textit{Id.}


\textsuperscript{337} Neal v. Honeywell, 33 F.3d 860, 862 (7th Cir. 1994) (Where employer immediately settled with Federal authorities after its employee reported its violation of False Claims Act, 31 U.S.C §§ 3729-31, employee was nonetheless protected from retaliatory harassment and physical threats by employee protection portion of Act).

\textsuperscript{338} Passaic Valley Sewerage Comm'rs v. United States Dep't of Labor, 992 F.2d 474, 478 (3d Cir. 1993) (whistleblower provisions of Clean Air Act, §507(a), 42 U.S.C. § 1367(a), protect employees who report violations internally).
Second, the environmental audit law prohibits the employee from revealing certain information relevant to a violation.

b. State Whistleblower Protection Statutes

The employee's remedy under federal law is not exclusive, however, even where the violation that the employee reported was a federal violation. Over half the states have enacted whistleblower protection statutes that prevent employers from firing employees for reporting illegal activity. Some of these statutes apply only to public employees, while the rest cover both public and private employees. State law protects private employees who report a violation of any state or federal law or regulation to authorities in California, Connecticut, Hawaii, Michigan, Oregon and Tennessee. In Louisiana, state law protects any employee who reports a violation of environmental laws either to a supervisor


340. A recent summary of state whistleblower statutes is provided in chart form in Elletta Sangrey Callahan & Terry Morehead Dworkin, Who Blows the Whistle to the Media, and Why: Organizational Characteristics of Media Whistleblowers, 32 AM. BUS. LAW J. 151, appendix A (1994). This chart shows whether the statute applies to private employees as well as public employees and whether to be protected under the statute the employee must make the report of wrongdoing to a particular body. Id.

341. Statutes protecting private employees are in effect in many states. See CAL. LAB. CODE § 1102.5 (West 1989); CONN. GEN. STAT. ANN. § 31-51m (1987); HAW. REV. STAT. § 378-62 (1993); ILL. COMP. STAT. ANN. 395/1 (West 1993); LA. REV. STAT. ANN. § 30:2027 (West 1989 & Supp. 1997); ME. REV. STAT. ANN. tit. 26 § 833 (West 1988); MICH. COMP. LAWS ANN. § 15.36 (West 1994); MINN. STAT. ANN. § 181.932 (West 1993); N.H. REV. STAT. ANN. § 275-E:2 (Supp. 1995); N.J. STAT. ANN. § 34:19-4 (West 1988); N.Y. LAB. LAW § 740 (McKinney 1988); OR. REV. STAT. § 659.550 (Supp. 1996); TENN. CODE ANN. § 50-1-304 (1991). Statutes that protect only public servants are effective in several other states. Because the environmental audit privilege and immunity statutes effectively apply only to private companies, these statutes will not be considered.

342. CAL. LAB. CODE § 1102.5. No employee can be fired or discriminated against for reporting any violation of state or federal law or regulation to a government or law enforcement authority.

343. CONN. GEN. STAT. ANN. § 31-51m.

344. HAW. REV. STAT. § 378-62.

345. MICH. COMP. LAWS ANN. § 15.362.

346. OR. REV. STAT. § 659.550 (employee cannot be fired or discriminated against for reporting criminal activity to authorities or cooperating in criminal investigation, nor for bringing civil action against employer or testifying in a civil action against employer).

347. TENN. CODE ANN. § 50-1-304 ("no employee can be terminated for refusing to participate in, or remain silent about, illegal activities," which are defined as

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or public body. Three of the states with "whistleblower protection" statutes—Illinois, Minnesota and Oregon—have since enacted privilege statutes. Minnesota also offers immunity. Several other states with "whistleblower protection" statutes have considered environmental audit privilege and immunity bills in the past year.

The state whistleblower statutes differ as to whether the report of illegal activity must be internal or external. Some states require that the employee's "whistleblowing" must be made to a public authority in order to fall under the protection of the statute. In contrast, others require that the employee must have made his complaint of wrongdoing internally with the company before "going public." Finally, some jurisdictions do not specify to whom any violation of state or federal law, civil or criminal law or any regulation designed to protect public health, safety or welfare).

348. LA. REV. STAT. ANN. § 30:2027 (West 1989 & Supp. 1997) No employer can discriminate against any employee who:

(1) Discloses or threatens to disclose to a supervisor or to a public body an activity, policy, practice of the employer, or another employer with whom there is a business relationship, that the employee reasonably believes is in violation of an environmental law, rule, or regulation.

(2) Provides information to, or testifies before any public body conducting an investigation, hearing, or inquiry into any environmental violation by the employer, or another employer with whom there is a business relationship, of any environmental law, rule, or regulation.

Id.


351. For a discussion of states considering environmental audit privilege and immunity bills, see supra note 2 and accompanying text.

352. See, e.g., CAL. LAB. CODE § 1102.5(b) (West 1989): "No employer shall retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or violation or noncompliance with a state or federal regulation." Id. An employee's internal report to his supervisor is insufficient to support a claim for wrongful discharge under this statute. See American Computer Corp. v. Superior Court, 261 Cal. Rptr. 796 (1989). Interestingly, California's statute makes an exception to allow an employer to terminate an employee who reveals certain confidential information: "[t]his section shall not apply to . . . actions against . . . employees who violate the confidentiality of the lawyer-client privilege. . . the physician-patient privilege, . . . or trade secret information." CAL. LAB. CODE § 1102.5(c) (West 1989).

353. See, e.g., N.Y. LAB. LAW § 740.2-740.3 (McKinney 1988). The statute provides in pertinent part:

An employer shall not take any retaliatory personnel action against an employee because such employee, . . . discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety; . . . [this section] shall not apply to an employee who makes
the report should be made. The approach requiring the employee to report the offense to authorities before he can invoke the "whistleblower" protection statute offers some assurances that a terminated employee will not raise a false claim that he was a "whistleblower." On the other hand, where the employee must report his concerns internally first, the employer has an opportunity to correct the wrongdoing, or the employee's mistaken perception of wrongdoing. With this approach, the employer can avoid government enforcement proceedings and negative media attention.

c. Whistleblower Protection Under State Common Law

Even where there is no state statute protecting whistleblowers, there is often a recognized common law remedy for employees fired for reporting illegal activities. Many states have developed common law theories that limit the employer's right to terminate an employee "at will" in circumstances that would violate public policy. At least nine jurisdictions have recognized a cause of action for retaliation by an employer for an employee who reports illegal activity, either internally or externally. This includes five states who have adopted privilege statutes, two of which also have "disclosure immunity."

Many employers have unsuccessfully argued that the federal environmental statute "occupied the field" of the area of regulation, preemption the employee's wrongful termination cause of action under state law. The Supreme Court rejected this argument in English v. General Electric Company. Historically, many employ-

such disclosure to a public body unless the employee has brought the activity, policy or practice . . . to the attention of a supervisor of the employer and has afforded such employer a reasonable opportunity to correct such . . . practice.

*Id.*


355. For a complete discussion of these and other states which have adopted privilege statutes, see supra note 1 and accompanying text.


ees who find themselves terminated for whistleblowing prefer to waive their protection under federal law and proceed under state common law theories for wrongful termination.

One intended effect of the environmental audit privilege laws is that employees, knowing their communications are privileged, will be more honest with the auditor about violations taking place. States designed the laws granting immunity for self-reported violations in order to encourage employers to discover violations before the authorities do. Therefore, an employer should reward, rather than punish, the employee who reports violations internally. Ideally, giving the employer the opportunity to report and correct the violation without the risk of penalty will reduce any incentive the employer has to fire the employee for "internal" whistleblowing.

2. How the Privilege Statutes May Affect Whistleblowers

The new audit secrecy laws may affect whistleblowers in a variety of ways. In some cases revealing privileged material may be illegal; whistleblowers may lose their protection in states where the remedy is judge-made law. This could not only subject employees to civil or criminal penalties but could also provide a legitimate basis for firing an employee. Further, ambiguity in the law may make it difficult for an employee to know when he should "blow the whistle."

a. Possible Loss of State Common Law Protection

In some situations, employee whistleblowers may lose the protection of state common law in those jurisdictions where there is a statutory E.A.R. privilege. There is a potential conflict between the right of an employee to go public with information concerning violations and the employer's right to keep the information secret, particularly where the employee gained knowledge of the violation through an audit. The new state statute would override any conflicting judge-made law.

Where employees become aware of the violation solely through the audit, the privilege always applies. They cannot be forced to reveal the information in court. However, if an employee voluntarily chooses to "go public" with that same information, the privilege statute is violated. In this situation, the employer may have grounds to discharge the employee. The employer can now

358. See, e.g., Senate bill 580, supra note 8 (comments included in letters to Sen. Hatfield in support of proposed legislation).
say the employee committed an *illegal act* against the employer's interest.

At least eight states have recognized a common law action for retaliatory discharge but have no whistleblower statute.³⁵⁹ Four of those states have passed E.A.R. privilege laws, and more have bills under consideration by the legislature.³⁶⁰ Where state common law protections are lost, the employee who "blows the whistle" should be able to "fall back on" the protections of the underlying federal environmental statute.

*b. Reporting the Information May Subject the Employee to Civil Liability or to Criminal Sanction*

Several privilege statutes provide sanctions for unauthorized disclosures of privileged information.³⁶¹ These often apply only to parties who are under a court order restricting dissemination of the audit report. However, some apply to any party, including an employee. Utah's statute provides particularly harsh sanctions which apply to anyone who "willfully" divulges privileged information.³⁶² That person can be guilty of a class B misdemeanor, subject to a civil penalty of up to $10,000, and liable for all damages proximately caused by disclosure of the information.³⁶³ Even if the employee's job is secured by a whistleblower protection statute, these penalties may be sufficient to encourage him to keep silent about his employer's environmental violations. However, if an employee goes public with violations he knows from experience, the employer has no ground for saying the employee violated privileged information. The information is not subject to the privilege, and therefore, the employer should not be able to fire the employee for reporting the violation to authorities or for going public.

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³⁵⁹. Arkansas, Arizona, Illinois, Kansas, Kentucky, Maryland and New Mexico. For a further discussion of whistleblower protection under state common law, see *supra* notes 355-58.

³⁶⁰. Arkansas, Illinois, Kansas and Kentucky already have environmental audit privilege legislation. Maryland and Arizona are among those who have recently considered such legislation. For a list of the states considering environmental audit privilege legislation, see *supra* note 7.

³⁶¹. For a discussion of sanctions for unauthorized disclosure of privileged information, see *supra* notes 171-82 and accompanying text.


³⁶³. *Id.*
c. An Employee May Need Privileged Material to Prove His Case for Wrongful Termination

The employee may need the audit for a wrongful termination case in two situations. First, if the employee is fired in retaliation for going public, he would want to use the audit to show he was not spreading lies about the company. Second, an employee may need the audit to prove that he made statements to the auditor and his employer fired him in retaliation. Where corporate officers may not have been aware of the violation prior to the audit, a low-level employee's supervisor may have been aware of the problem and ignored it. In that situation, if an employee is honest with the auditor, his immediate supervisor may retaliate against him. The employer should not be able to take any retaliatory action against the employee for revealing problems to the auditor because it removes the purpose of the environmental audit privilege statute—to let the employer know where it has environmental compliance problems. Therefore, if an employee charges that he was fired for revealing such information, he would need the audit to prove motive for the discharge. However, Colorado is the only state that has an exception to the privilege that may apply in this situation—where the court finds “compelling circumstances.”

d. Ambiguity in the Laws

Environmental audit legislation contains several ambiguities that confuse matters for the employee considering “going public” with information concerning environmental violations at work. One problem is the conditional nature of the privilege. Unlike other privileges, in most states the privilege applies only where the violator takes steps to correct the problem. As a result, the employment relation is upset. For a discussion of corrective measures, see supra notes 115-24 and accompanying text.
ployee may be unaware that a privilege applies because management has taken steps to remedy the problem.\textsuperscript{367}

In most states, the employer must "initiate appropriate efforts to achieve compliance with environmental law within a reasonable amount of time after the noncompliance was discovered."\textsuperscript{368} An employee may be in no position to determine whether the privilege properly applies. The employee may not know what if anything is being done to correct the problem. If the employee reports a violation, and there is an investigation by authorities, is the employee estopped from contesting the court's determination in the prosecution that the document is privileged? What if the employee has complained about the violation before?

If the employee goes public with what he knows from personal experience, there should be no conflict with the privilege law. Only information the employee knows through the audit should be covered by the privilege; but the statutes are not clear on this point. Only the Texas statute clearly states that the privilege does not prevent the employee from reporting what he has seen through his own eyes.\textsuperscript{369}

If the employee does lose his job for reporting information he knows from personal experience, should he be able to use the audit to prove that he was not lying? Colorado's exception to the privilege in "compelling circumstances" is the only exception that may apply to this situation.\textsuperscript{370} As long as the employer is correcting the violations revealed in the audit, there is no exception in any of the other statutes that would let an employee use the audit as evidence in a wrongful termination suit.\textsuperscript{371} The environmental audit statutes should be designed to supplement, not supplant, existing environmental, health and safety protections. In order to ensure that employees still feel free to speak up about environmental violations, the statutes should include provisions protecting their speech and their jobs.

\textsuperscript{367} Another ambiguity is the definition of what constitutes an "audit" and when one is taking place. Should the privilege only apply to those audits which comply with ISO standards, or will a more freewheeling definition take place?

\textsuperscript{368} For a discussion of statutes dealing with initiation of efforts, see supra notes 115-24 and accompanying text.


\textsuperscript{371} Of course, since Idaho's privilege operates only as against the government, the employee would not be prevented from obtaining an audit through discovery or introducing it as evidence there either. Idaho Code § 9-804 (Supp. 1996).
VII. CONCLUSION

The goal of this Article is to suggest a balance between maximizing environmental safety and protecting the rights of private individuals in environmental litigation. As shown by the EPA's new Policy on the Prevention of Violations, this can be done administratively as well as legislatively.372

The economic interests of the regulated community figure into this equation only to the extent that making it economically advantageous for the community to perform audits promotes environmental safety. Therefore, the courts should interpret the existing statutes in a manner that places the highest interest on environmental protection, with the economic interests of the litigants a secondary consideration.

Legislatures should enact statutes that promote early detection and self-reporting, but do not disadvantage the private litigant. In the future, the states can achieve these goals while still protecting the rights of private litigants and without removing the public's voice in environmental protection. The EPA's policy offers an alternative approach that balances the interests of the public and the regulated communities.373 State legislatures should also consider Idaho's solution, where the privilege operates only against the state government.374 This alternative would not affect private parties while still providing incentives to audit.375

Granting the regulated community a chance to avoid penalties for self-reported violations should be a highly effective means to promote auditing.376 Providing immunity for self-reported and corrected violations discovered in an audit that did not cause damages off-site is equally effective. To encourage the entity to undertake the expense of the audit or implement an environmental management system, the statute should eliminate any penalty and do away with the "economic benefits of noncompliance," if discovered through those methods.377 State statutes or environmental agencies should include immunity for violations discovered through due diligence, as does EPA's policy. For violations not discovered in that manner, the economic benefit of noncompliance should still

373. Id.
375. Id.
376. See PRICE WATERHOUSE, supra note 14, at 43-44 (discussing factors that would encourage companies to perform more audits).
377. Id.
be recoverable because the regulated entity did not undertake any special expense.

One area where the statutes could be improved is the way in which they address violations causing damages off-site. Some statutes exempt from immunity violations causing off-site damages. No statute has an exemption to the privilege where the audit reveals damages off-site. The state statutes are emphasizing the wrong things if they want to protect people and the environment. If the violation did cause damages off-site, the violator should have to remediate before the state considers the matter settled. There should be an exception to the privilege as against any property owner whose property may have been damaged by a violation. The statute could possibly provide some alternative dispute resolution for adjacent property owners to recover damages. For example, once the violator has corrected the violation, remedied the damages and settled with its affected neighbors, it would be immune from any prosecution. This solution would emphasize cleanup and compensation, as opposed to penalties.

Citizens should have the right to intervene in the state’s approval of the method and timetable for correction of the violations. The statutes or administrative policy should set out a simple administrative procedure through which the public could comment. Such a procedure may complicate the matters at the outset, but could avoid citizen suits in the future. The public should have the right to intervene if there are damages to public property off-site. Concerned citizens should also be able to question whether the violator is eligible for immunity from prosecution. For example, the public should be able to argue that the regulated entity knew of the violation prior to the audit.

One disturbing aspect of the privilege statutes is the possibility that persons who reveal facts because they are concerned about the dangers presented by violations could face unreasonable punishment. Damages for revealing privileged information should only apply to a person under a court order to keep the information confidential. These damages should not apply to anyone who has personal knowledge of the facts concerning a violation. Persons such as employees who are trying to keep the community informed of dangers should not be subject to damages if they reveal information

378. For a further discussion of off-site damages, see supra notes 71-72 and accompanying text.

379. For a further discussion of citizens suits, see supra notes 100-06 and accompanying text.
relevant to a violation.\textsuperscript{380} Instead, the holder of the privilege should only have a cause of action when there has been a knowing and therefore bad faith communication of an E.A.R. marked "privileged."

Furthermore, the statutes should provide some guidance on how to measure the damages for wrongful disclosure. The plaintiff in a suit for wrongful disclosure should not be able to claim that his damages are measured by the damages recovered against him in a toxic tort or penalties recovered in a citizen suit. The states should ensure that their statutes reward companies that make environmental compliance a priority. The regulated community must keep itself under constant scrutiny to prevent violations. States should encourage this by foregoing penalties when the companies voluntarily disclose violations. An environmental audit privilege, however, encourages secrecy and is a step in the wrong direction.

\textsuperscript{380} For a further discussion of whistleblower statutes and application to environmental audits, see \textit{supra} notes 97-106 and accompanying text.