ENVIRONMENTAL AUDIT PRIVILEGES: THE NEED FOR LEGISLATIVE RECOGNITION

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I. Introduction

In a psychological sense, self-examination may be good for the soul, but it appears to be bad for the survival of today's environmentally regulated entity. A conundrum exists for the environmentally prudent corporation. Critical self-examination of the environmental weaknesses of facilities or practices leads to positive changes and improvements, but it results in an audit document that can help outsiders to prosecute or otherwise penalize the corporation. Faced with the task of choosing between effective candor or circumspect risk-avoidance, some companies are foregoing the benefits of environmental self-audits in an effort to avoid future confrontations over the content of these reports.

This article focuses on legislative solutions that create an evidentiary privilege, which is intended to stimulate the positive benefits of environmental auditing among industrial companies. First, the article explains environmental audits, their functions, and the attendant risks they create for the industrial users of audits. Next, the article discusses evidentiary privileges and their adaption to the needs of environmental auditors. Then, the means by which an audit privilege could be created through legislation is examined. The article then describes the positive and negative arguments surrounding audit privileges, court developments in this field, and state and federal alternatives. Finally, the article concludes that legislative enactment of an evidentiary privilege for environmental audits is best accomplished through both state initiatives and the adoption of privileges to accompany the codification of the Federal Sentencing Guidelines for environmental crimes.

II. What Are Environmental Audits?

The environmental audit is a systematic examination of a facil-

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ity, product line, or corporation as a whole. This audit functions by measuring compliance with environmental norms and then reporting the results, complete with a set of corrective actions that are necessary for the facility, product line, or corporation to achieve compliance.[1] The 1986 Environmental Protection Agency policy statement defines audits as "systematic, documented, periodic and objective reviews by regulated entities of facility operations and practices related to meeting environmental requirements."[2] Similarly, the Oregon Legislature defines an "environmental audit" as:

> a voluntary, internal and comprehensive evaluation of one or more facilities [regulated under Oregon laws, federal or local laws] or of management systems related to such facility or activity, that is designed to identify and prevent noncompliance and to improve compliance with such statutes.[3]

Environmental audits include examination of the facility's physical activity, such as records and labels. Auditing also includes examination of a facility's management activity, such as responsibility, training, and systems.[4] According to the individuals that actually perform such audits for leading corporations, focus on the management system is the wave of the future.[5]

The standards for an adequate environmental audit are evolving as a consensus process among those who actually perform and rely upon such audits. The standards for an acceptable site audits for environmental conditions at a facility for which acquisition or major investments are being considered have been published by the American

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[1] Terrell E. Hunt & Timothy A. Wilkins, *Environmental Audits and Enforcement Policy*, 16 HARV. ENVTL. L. REV. 365, 365-66 (1992).

[2] EPA Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004, 25,006 (1986). The EPA stated that "environmental auditing includes a variety of compliance assessment techniques which go beyond those legally required and are used to identify actual and potential environmental problems." (footnote omitted) *Id.*

[3] OR. REV. STAT. § 468.963(6)(a) (1993).

[4] *See Auditing Management Systems*, 4 ENVTL. MANAGER, June, 1993, at 7 (stating the importance of auditing environmental management systems).

[5] Matthew Weinstock, *Environmental Auditing: A Measure of Safety*, OCCUPATIONAL HAZARDS, May, 1993 at 73, 75. The focus on the management system is progressively becoming more pronounced as the auditing process becomes more sophisticated. *Id.* at 77. Auditors are trying to go beyond assessing mere compliance to discover reasons for compliance. *Id.* at 75. To make this determination, many auditors believe it is necessary to study and assess the management system that ultimately controls compliance outcomes. *Id.* at 75. Auditors insist that the more familiar managers are with their systems, the better equipped they will be in complying with governmental and company environmental policies in the future. *Id.*

Society for Testing and Materials.[6] A voluntary group of environmental professionals, the Environmental Audit Roundtable (hereinafter EAR), is working on standards for audits.[7] EAR has defined the key elements of successful audits to include qualifications of the individuals in the fields being reviewed, skill and objectivity in auditing, independence of the auditor, and clear, explicit directions for the auditor.[8] A national Coalition for Improved Environmental Audits has been formed to help the establishment of auditing programs and their recognition as a form of beneficial communications that merits legal privilege.[9]

From this author's experience, the internal corporate effectiveness of an audit appears to be directly related to the vigorous post-audit, intra-corporate expression of a need for corrective action. While virtually no reported cases have yet reached appellate courts on the subject of environmental auditing, experience affirms that the straight, blunt honesty of a strong report works best in convincing facility and corporate level managers to invest in environmental upgrading to avoid civil or criminal enforcement.[10]

For example, a corporate internal environmental audit team will review the waste practices, air emissions, water pollution control documentation, and other aspects of an operating plant.[11] A facility graded "poor" because of the potential for a gas release during a fire should immediately respond to the audit with better gas-handling equipment, a fire safety upgrade, and other responsive precautionary steps.[12] Audits generally uncover needs that were not addressed in

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6 STANDARDS FOR ACCEPTABLE SITE AUDITS FOR ENVIRONMENTAL CONDITIONS E1528-93 (American Society for Testing and Materials 1993).

7 *Environmental Protection Agency, Auditing Public Meetings*, morning session, at 111 (July 27, 1994) (statement of James McCreary, Vice President, EAR). EAR is creating standards for management of environmental auditing programs and is involved in an audit standards effort by the International Standards Organization. *Id.*

8 Weinstock, *supra* note 5, at 75.

9 *Industry Coalition Embarks on Effort to Promote Federal Law Creating Environmental Audit Privilege*, 1 PREVENTION OF CORP. LIABILITY REP. (BNA) No. 12, at 8 (Jan. 17, 1994).

10 *Environmental Protection Agency, Auditing Public Meetings*, (July 27-28, 1994). The overwhelming number of speakers from industry at the July 27-28, 1994 U.S. EPA public hearings on environmental audits reiterated that internal candor is essential, and is being diminished by concerns about disclosures.

11 *See* Weinstock, *supra* note 5, at 74 (providing a useful synopsis of the audit process).

12 *See* Weinstock, *supra* note 5, at 76. Corporate managers must be prepared to

annual facility budget requests.[13] Capital and personnel to meet these needs should be shaken loose from the pre-existing corporate priority assignments in response to such a report. This activity will occur if the regulatory and tort liability consequences of inactivity are made clear, in terms sharp enough to make the audit impactful.[14] Unfortunately, if the audit is disclosed to adversaries, such shocking language converts the document into a potential weapon against the company.[15]

A. *Need for the Audits*

The need for environmental self-audits is widely recognized.[16] In a well-managed company, the failings that an audit finds are remedied quickly because the operating unit knows that audit weaknesses draw immediate management attention, especially when they are reported to higher management.[17] Yet, a "failure" found in an audit is less likely to be an illegal dumping, and more likely to be the result of the complexity of today's paper-laden compliance standards.[18] "The huge number of waste rules under the Resource Conservation & Recovery Act (RCRA),[19] for example, challenges even the experts within well staffed companies to keep up with the mass of new regulatory controls."[20] The outlook is for even more intense regulatory activity in the 1990s, and the Environmental Protection Agency is just one of the many players.

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correct problems discovered through an audit. *Id.* Failure to take corrective action may lead to a "willful violation enforcement action." *Id.*

13 *See* Hunt & Wilkins, *supra* note 1, at 372-73.

14 Hunt & Wilkins, *supra* note 1, at 373.

15 *Id.* For example, audits may increase the potential for liability in relation to toxic torts and environmental violations. *Id.*

16 Weinstock, *supra* note 5, at 73. By allowing managers to rank and prioritize needs and achievements against multiple sites, internal auditing provides continuity between the various plants of a company.

17 *Environmental Protection Agency, Auditing Public Meetings*, afternoon session, Breakout Group C, at 4-5 (July 27-28, 1994) (Statement of WMX Technologies).

18 James W. Moorman & Laurence Kirsch, *Environmental Compliance Assessments, Why Do Them, How To Do Them, and How Not To Do Them*, 26 WAKE FOREST L. REV. 97 (1991).

19 42 U.S.C. § 6901 (1988).

20 42 U.S.C. § 6902 (1988). For example the company might be the unwitting owner of a "treatment storage and disposal" facility by operation of law, if it delays removal of wastes from its site. By default, the facility has assumed obligations to comply with state and federal waste, storage, and treatment rules. 42 U.S.C. § 6924; *See also*, JAMES O'REILLY, ET AL., RCRA AND SUPERFUND: A PRACTICE GUIDE WITH FORMS § 4.01 (2d ed. 1993).

Traditional regulation has been a two-way street of regulator and regulated; today the facility is in the middle of many streams of regulation and enforcement.[21]

B. *The Conditional Tie to Corrective Action*

Should laws that recognize an audit privilege tie this privilege to actual corrective measures? Most findings of problems will, of course, generate serious attention to corrections.[22] Privilege issues arise after a document is created and usually long after the follow-up action has been implemented. Some legislation requires that the audit document actually be applied to correct the situation, as a part of the ongoing remedial efforts of the company that generated the audit. The Oregon, Indiana, Colorado, and Kentucky statutes and the proposed state legislation discussed in Part Four of this article require that the audit actually lead to some corrective plan or remediation program. Colorado's law allows the voluntarily reported violation to be cleaned up within two years. If the audit results recommend corrective action but none is undertaken, then the audit does not qualify as protectable under conditions included in some of the privilege legislation.[23] This qualifying precondition to privilege illustrates the close connection between the audit function and the remedial responsibility that should follow from it.

III. Potential Enforcement Use of Audit Results

The authors of an internal environmental audit are paying close attention to the "unintended beneficiaries" of the audit report. These are the set of potential future discovery recipients or subpoena-equipped prosecutors that would be interested in the contents of such an audit report.[24] The audit report is phrased,

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[21] The facility's litigation exposure to state rules, local ordinances, citizen suits, toxic tort complaints, and federal enforcement actions combines to make the task of the comprehensive environmental auditor quite complex and difficult.

[22] Actually, aggressively following up on audit findings is important to the legal defense of an audit finding. This follow-up assures that all violations are identified as soon as possible to eliminate any sanctions. *See* Alex Karlin, *Conducting a Legal Checkup of an Environmental Audit Program*, LOS ANGELES LAW., June 1994, at 15, 19.

[23] *See* COLO. REV. STAT. § 13-25-126.5(3)(b)(I)(B) (1994)(denying immunity to persons or entities who do not comply with environmental regulations within a reasonable amount of time).

[24] The overwhelming response of industry managers in the July 27-28, 1994 U.S.

targeted, and written for internal effect. It is not simply offered as an additional tool for the state or federal EPA to use in making its periodic inspections of a plant, or for tort plaintiffs' attorneys to use as a menu of causes of action against the plant. Today's environmental audit reports, if they were readily discoverable, could conceivably be used for enforcement purposes by adversaries including:

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

Access by these parties is adversarial to the interests of the document's creator, unintended by the creator of the audit, and impacts on future behavior. Once access occurs, a chilling of future audits will result, thereby compromising audit clarity.[25]

The process of actually obtaining a large corporate investment in environmental remediation or pollution prevention varies among companies. But the internal tug and pull for resources is well understood by managers who have experience in corporate budgeting. Competition for capital and personnel is often intense. Remedying past oversights requires the advocate who seeks corrective action first to get the attention of senior managers, and then to emphasize the benefits of rapid corrective action. Advocacy does not occur in a vacuum but in a dynamic competition for limited funds. To succeed, the

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EPA hearings was concern and alarm about the demands for such documents. *Environmental Protection Agency, Auditing Public Meetings* (July 27-28, 1994). The state officials from Pennsylvania and Arizona who testified told EPA that they will routinely seek copies of such audit reports in their enforcement cases. *See id.* (statement of Dave Gallogly, Pennsylvania Department of Environmental Resources at 23-31; (statement of David Ronald, Criminal Unit Chief of the Arizona Attorney General's Office, afternoon session, at 31-37 (opposing the creation of an evidentiary privilege)).

25 Edward Felsenthal, *Laws Shield Internal Company Reviews*, WALL ST. J., Aug. 2, 1994, at B2.

auditor must bluntly lay out the harms that could occur from a decision not to invest in such corrective action.

The environmental audit document serves a wholly internal function, as the advocate of change uses it to critique the performance of a unit of the corporation, to point out exactly what "fixing" should be done to the unit, its facility, or its managers. This role as a tool of persuasion is essential to the process of auditing, since the end sought is not the report, but the action that implements the report.

For example, a company that holds a wastewater discharge permit for discharges into a coastal bay should have a functioning pretreatment plant that reduces the levels of undesired pollutant chemicals to a level safely within the conditions set by its permit. If the pretreatment system breaks down, a discharge monitoring report (DMR) should report the exceedance over permit allowances so that the state agency that supervises permits can investigate and, if appropriate, compel the company to speed up the repair or suspend production pending completion of the repairs. In some cases a violation revealed by the DMR reports will lead to a penalty. The DMRs themselves are not privileged, since they are a mandatory routine report that is regularly filed with the state or local agency.[26]

Assume that an internal environmental audit team visits the plant, challenges plant managers' assumptions about the reliability and durability of the pretreatment equipment, and predicts that unless an upgrade is achieved soon, the equipment may fail and unacceptable levels of wastewater pollutants may be released. Forceful auditors want immediate funding for the repair. The corporate managers should spare no effort to achieve the necessary changes, thereby enabling compliance to continue.

If auditors recognized that disclosure of their opinions and recommendations would occur, subtle circumspect language would be

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[26] None of the advocates of an environmental self-audit privilege, e.g. at the U.S. EPA environmental audit hearings in July 1994, have sought to change the public status of such emission or effluent reports, which are deemed by statute to be nonconfidential. *See Environmental Protection Agency, Auditing Public Meetings* (July 27-28); 33 U.S.C. § 1318(b) (1987). 33 U.S.C. 1318(b) states that "any records, reports, or information obtained under this section (1) shall, in the case of effluent data, be related to any applicable effluent limitations, toxic, pretreatment, or new source performance standards, and (2) shall be available to the public. . . ." *Id.* The statute, however, carves out an exception to disclosure for information which qualifies as a trade secret or confidential information in accordance with section 1905 of Title 18. *Id.*

chosen, making it much more difficult to attract the capital investment from senior managers for corrective work. If a statute allowed a privilege, then candor would prevail. If the statute conditioned privileges upon post-audit activity, the audit would remain confidential unless the management decided to ignore the recommended changes and to accept deficient conditions until the predicted breakdowns occur.

The rationale for an evidentiary privilege for such audit documents is that the privilege will promote candid, frank discussion within the corporation. Brutally honest comments about the facility and its needs will be effective in gaining corrective action. These comments must be in written form because of the large number of managers who must concur in a significant capital expenditure. The character of the audit document will change if it must be scrubbed clean. In the words of one company that was criminally charged with a "knowing" violation because of an audit report done by its consultant, "sanitized" audits result in a process of auditing that is "substantially perverted."[27] Scrubbed clean, these reports could then appear as perfunctory, insipid checklists of little evidentiary value to toxic tort plaintiffs or environmental prosecutors. What is *lost* by that subtle circumspection is the kind of effective communication that hastens positive change.

A. *Chilling Effects of Audit Disclosure*

Courts have recognized that there is a "chilling effect" on the frankness of environmental audits when they are compelled to be disclosed in litigation.[28] Their enforcement use, especially where self-reporting of audit findings is voluntarily made, is especially chilling.[29] Scholars who have studied the privilege issues have

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[27] *Environmental Protection Agency, Auditing Public Meetings*, July 27, 1994, afternoon session (statement of Roger Lewis of Diamond Boart Inc: "The risk of sanitized reports in such cases is obvious since the attorney-client privilege may provide inadequate protection from disclosure for companies unless the audit process is substantially perverted.").

[28] Ohio v. CECOS Int'l Inc., 583 N.E.2d 1118, 1119-20 (Ohio App. 3d 1990). Specifically, the court stated that the disclosure of environmental audits could both discourage employees from reporting any encountered difficulties and discourage the company from conducting thorough examinations. *Id.* at 1120.

[29] *See $1.05 Million Fine Against Coors May Deter Corporate Environmental Audits, Firm Says* 24 ENV'T REP. (BNA) 570 (July 30, 1993). The Coors Brewing Company of Golden, Colorado, conducted a million dollar study on volatile organic compounds (VOCs) emissions. *Id.* The study was the first of its kind to reveal that a greater

found that disclosure of audits will impact adversely upon several aspects of corporate behavior, such as:

1. Fewer internal activities will be examined;
2. Fewer types of investigations will be undertaken;
3. Less critical analyses will be performed with the results;
4. Fewer of the findings will be translated into corrective plans;
5. Management will hear fewer criticisms of past practices;
6. Criticism will be less widely distributed; and
7. Analyses will be retained for a shorter period.[30]

In the periodical *Corporate Conduct Quarterly*, a corporate expert in auditing encouraged companies to have an "interactive" system.[31] Audits should generate meetings, debates, and internal re-prioritization. Finance, manufacturing, engineering, process, and environmental managers are likely to be interactive and contentious in the post-audit meetings.

The paradigm of auditor inter-activity is the financial institution audit. The United States banking industry's regulators won specific legislation allowing them to shield their financial audit reports from disclosure to the public.[32] However, the auditor shares the criticism in each report directly with the bank that is being audited, so that corrections can be forcefully advocated.[33] Courts have upheld the decision to routinely withhold audits because these "frank evaluations . . . may undermine public confidence" in the bank and "may also strain the cooperation . . . that is essential to the examination process."[34]

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number of VOCs are emitted during fermentation than was previously known. *Id.* at 571. Subsequently, Coors Brewing was fined $1.05 million for alleged violations of air pollution laws. *Id.* at 570. A Coors official commented that this type of occurrence might deter corporations from conducting future internal environmental audits. *Id.*

30 Richard Gruner, *What Compliance Review Activity Does Litigation Chill?* 2 CORP. CONDUCT Q., Winter 1992, at 38.

31 Joseph Murphy, *Compliance on Ice*, 2 CORP. CONDUCT Q., Winter 1992, at 36. An interactive system represents what could be done in an environment that had stronger compliance protection. *Id.* Under this system, managers are accountable for the company's compliance responsibilities and will initiate more compliance audits and other high-risk compliance efforts. *Id.* at 41.

32 5 U.S.C. § 552(b)(8) (1991).

33 *See* Gregory v. Fed. Deposit Ins. Corp., 631 F.2d 896, 898-99 (D.C. Cir. 1980) (stating financial examination by FDIC is common).

34 Public Citizen v. Farm Credit Admin., 938 F.2d 290, 293 (D.C. Cir. 1991) (concluding that non-depository institutions are financial institutions for the purposes of exemption 8 of 5 U.S.C. § 552 (b)(8) and are thus protected from disclosure).

Though the environmental audit is not interactive with government agents, as bank audits are, many of the corporate self-audit programs have established defined units which perform these evaluations. These units consider themselves the functional equivalent of a regulatory agency and apply regulators' measurements to the compliance performance that is being examined.[35] Audit reports are not public, so they do not have the legal polish and public relations gloss that should typify the communications sent to external organizations or to the general public on environmental matters. The choice of an interactive approach allows candid responses and dialogue without the masking of intentions that a more legalistic approach would produce.

B. *The Federal Incentives for Self-Audits*

Federal agencies such as the Justice Department and the Environmental Protection Agency (EPA) encourage companies to prudently avoid enforcement actions by conducting their own internal audits of environmental conditions. The EPA's 1986 guidance document set a positive tone that was very supportive of such audits, and the EPA said it would not routinely request such audits except those "material to a criminal investigation."[36] A "restatement" in 1994 said that the EPA encourages audits, and the agency detailed its position concerning use of audits in criminal investigations, saying it has "consistently opposed" an audit privilege.[37] A 1991 Department of Justice guidance spoke of that agency's "goal of encouraging critical self-auditing, self-policing and voluntary disclosure."[38]

The benefit of having performed an audit is that it enhances

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[35] For example, International Paper's audit program, headed by a former career EPA and state environmental official, has fifteen auditors and a budget of $1.25 million. *Environmental Protection Agency, Auditing Public Meetings*, July 28, 1994, morning session, at 64 (statement of Thomas Jorling).

[36] 1986 Policy statement, *supra* note 2, *reprinted in* CHRISTOPHER HARRIS ET AL., ENVIRONMENTAL CRIMES app. E-24 (1992). The EPA rejected a recommendation it would only request audits "material to a criminal investigation." *Id.* The reports will likely be obtained from monitoring, reporting, or other data otherwise available to the agency. *Id.*

[37] EPA Restatement of Policies Related to Environmental Auditing, 59 Fed. Reg. 38,455, 38,459 (1994).

[38] U.S. Dept. of Justice, *Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator* (July 1, 1991), *reprinted in* HARRIS, *supra* note 36, at app. E-3.

the good faith defense by an industrial defendant who asserts that the release or spill occurred even though the company had systems in place to deal with such a problem. At the federal EPA hearings on environmental auditing on July 27-28, 1994,[39] several recurring themes were presented: systems should be in place to protect the environment; a company should audit its systems to make certain that protections afforded by the systems are functioning; and the prosecutorial discretion to charge a lesser offense will be used and the sentencing policy to impose a lesser penalty should be incurred when the company has a self-audit program that is operational and that produces results. The disagreement at the hearings was about the degree of public benefit from an audit privilege.[40]

The federal courts sentence the violators of environmental laws to punishments including individual incarceration.[41] United States Sentencing Commission Guidelines may be adopted, effective in 1995, which define the environmental defendant's federal sentence and limit the court's choices of sentence options. As with other sentencing recommendations, recommended guidelines on environmental crimes that were submitted by an advisory committee to the United States Sentencing Commission are subject to change.[42] The draft suggested early in 1994 would lessen the punishment for those companies that performed environmental self-audits. The audits must be frequent and must follow up on deficiencies.[43] Sentencing Commission Chair William Wilkins testified in the EPA's 1994 environmental audit hearings to urge cooperation and dialogue as the issue is studied further. Wilkins did not condemn the passage of state audit privilege statutes. He focused on the benefits of audit programs in helping to differentiate among the companies that sought to comply and those who

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39 A transcript of the hearings is on file with the *Seton Hall Legislative Journal.*

40 *See EPA, DOJ Hear Debate on Protecting Environmental Audits from Disclosure,* DAILY ENV'T REP. (BNA) No. 143, at AA-1 (July 28, 1994).

41 Moorman & Kirsch, *supra* note 18, at 100.

42 *Rules Proposed on Environmental Sentencing,* NAT'L LAW J., Mar. 14, 1994, at A7, A19. This article reflects the debate on whether the revision committee's hearings should be public. *Id.* Although the D.C. Circuit ruled the proceedings should be mostly private, there are those that argue that the commission is not a court and thus should not be subject to public scrutiny. *Id.* at A19.

43 Draft, Advisory Committee Recommendations to the U.S. Sentencing Commission, § 9D1.1(a)(3), released for comment January 1994.

awaited detection by regulators.[44]

Comparable programs encouraging self-evaluation also contain immunity for reporting of violations found during a voluntary self-audit. These include the Federal Aviation Administration self-reporting system[45] and the Justice Department's 1993 Corporate Leniency Policy for antitrust self-reports. The largest program is that of the Occupational Safety & Health Administration for Voluntary Protection Programs.[46]

The message for prudent companies seems clear: perform an effective audit of your facilities *before* their environmental problems precipitate an enforcement action. If a company performs an audit, the federal government will refrain from seeking access to those audit documents. Performing an audit, with some exceptions, will be considered in mitigating a conviction. This mitigation lessens the punitive consequences of an inadvertent violation.

IV. The Concept of an Audit Privilege

The concept of an evidentiary privilege reflects a balance of a desired beneficial use for the selected type of communication, such as attorney-client or priest-penitent, which sets this particular type of communication apart from the flow of routine oral and written communications.[47] Disclosure of an audit in litigation is not simply the disclosure of another document in a box of discovery response documents. The audit has a distinct value to its creators: its stimulation of a near-term correction of a condition sets it apart from fact-recording, policy-setting, or other routine documents in the corporate files. To rise above the background level of

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[44] Honorable William Wilkins, Chair, United States Sentencing Commission, before EPA Environmental Audit hearings, Washington DC (July 27, 1994).

[45] FAA Compliance/Enforcement Bulletin No. 90-6, 2150.3A, app. 1, at 22 (March 29, 1990). The FAA will not use a voluntary self-audit to penalize an air carrier in a civil action if: (1) the air carrier informs the agency of non-compliance before the agency learns itself; (2) the failure is not intentional or deliberate; (3) the failure does not indicate a lack, or reasonable question, of basic qualification of the certificate holder; (4) upon discovery of failure, corrective action is undertaken; and (5) the air carrier has taken, or has agreed to take remedial action. *Id.* at 24.

[46] 47 Fed. Reg. 29,025 (1982). The OSHA program is designated as a give and take agreement between employers and the agency. *Id.*

[47] *See, e.g.*, United States v. Nixon, 418 U.S. 683, 711-12 (1974) (weighing a privilege in a criminal context).

routine communications, many auditors describe the potential consequences of the violation or noncompliance situation.

Self-audits are paradigmatic "admissions against interest." They are the free road map for the toxic tort plaintiff's counsel.[48] Such admissions would likely be admissible in the civil enforcement case, "citizen suit," toxic torts suit, or the criminal trial, as admissions against interest, absent a privilege. The opinions expressed by the auditors could corroborate the problems that the plaintiff alleged in its initial complaint and they might fuel an amended complaint with additional causes of action.[49] The self-evaluation benefit clashes with the prosecutorial incentive. On balance, the concept of environmental self-audit privilege accords with the policies for which the evidentiary privileges are recognized, as discussed below.

A. *Why Evidentiary Privileges are Recognized*

Privileges for documents are recognized under federal and state statutes and rules of evidence, when the societal benefit of allowing withholding of a record exceeds the resulting loss to society's enforcement efforts.[50] Courts recognize privileges most readily when a statute creates the privilege.[51] Courts explain the recognition of a privilege as a balancing of social policy factors; legislatures do the same. For example, self-evaluation privileges are sometimes recognized by courts which find the balance favors

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[48] "Because audit reports disclosed to the EPA could be accessible to persons involved in civil litigation against a company, through the Freedom of Information Act, such reports could constitute a roadmap for this individual, unless an exception or protection is made." *Environmental Protection Agency, Auditing Public Meetings*, July 27, 1994, morning session, at 114 (statement by Jean McCreary, Environmental Audit Roundtable).

[49] The auditor's identified problems must be addressed. One company disbelieved the audit report of a contractor whose audit appeared to be a self-serving effort to induce the company to purchase more consulting services. The company did not act, and a later criminal subpoena found the audit and used it as a basis for a criminal conviction for "knowing" violations. *Id.* at July 28, 1994, morning session (statement by Testimony of Roger Lewis, Diamond Boart Inc.).

[50] *Nixon*, 418 U.S. at 711-12.

[51] Privileges are not easily recognized absent such a statute. *See* United States v. Arthur Young & Co., 465 U.S. 805 (1984) (refusing to allow the Internal Revenue Service to penetrate privilege protecting accountant-client privilege, despite an apparent grant of authority to obtain such documents in the Internal Revenue Code §7602); *In re* Grand Jury Proceedings, 810 F.2d 580, 584 (6th Cir. 1987) (holding Michigan's reporters' shield law not violative of Equal Protection clause).

confidentiality.[52]

State statutory privileges apply in state litigation, in federal diversity civil actions,[53] and in other appropriate federal court actions.[54] For example, a privilege for the internal peer review of hospital physicians' work is recognized in many states,[55] and state privilege principles apply to federal tort claims against the government arising in that state.[56]

The social policy rationale underlying the environmental audit privilege is that remediation is best done rapidly and completely by the persons most knowledgeable about the situation. Compliance with environmental laws is a strong legislative value. As discussed earlier, the audit's blunt incentives for change will be less impactful if the writer "softens" the audit because the auditor fears disclosure of the blunt words to adversaries. The auditor who knows that others with an incentive to punish the activity that was audited are "looking over the auditor's shoulder" as the audit is written, will be much more circumspect. The specter that the records will become public carries a direct threat that the records will be used against the writer and the writer's employers. A command to "clean up this risky situation immediately" is more likely to be transformed by the disclosure-averse auditor in terms like "this plant's effort can be enhanced in the near term by closer attention to augmenting the present level of compliance." Instead, an evidentiary privilege for the contents of the environmental audit will retain the audits' internal character, where the audit results have the most impact.

The reality that corporate budget reallocation toward environmental projects is spurred by candid, effective internal communication of audits, seemingly self-evident to environmental managers

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52 Reichhold Chem., Inc. v. Textron Inc., No. 92-30393-RV, 1994 U.S. Dist. LEXIS 13806 (N.D. Fla. 1994) (reviewing precedents supporting privilege ruling).

53 *See, e.g.*, KAN. STAT. ANN. § 65-4914 (1994). *See also* Fretz v. Keltner, 109 F.R.D. 303, 309, 311 (D. Kan. 1986) (applying the Kansas statute and exempting discovery of certain hospital peer review committee records).

54 *See, e.g.*, Huzjak v. United States, 118 F.R.D. 61, 63 (N.D. Oh. 1987) (referring to OHIO REV. CODE ANN. § 2317.02).

55 *See, e.g.*, HAW. REV. STAT. § 624-25.5 (1992); NEB. REV. STAT. § 71-2048 (1990); Fretz v. Keltner, 109 F.R.D. 303, 309 (D. Kan. 1986); CHARLES A. WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE & PROCEDURE: EVIDENCE § 5431 (1994).

56 Huzjak v. United States, 118 F.R.D. 61, 63 (N.D. Ohio 1987) (citing Richards v. United States, 369 U.S. 1 (1962)).

within large companies, may be invisible to prosecutors whose budgets are less encumbered. A natural temptation for the public sector person is to assume that writings need not be shielded because oral presentations will be sufficient to get the message across. The fact of intra-corporate communications is that environmental change often requires capital and personnel. To obtain those assets, a decision moving ahead on paper is the only means of successful hierarchical communication. If the request for $2.2 million is written in lawyer-proof bland prose, it will be competing for the same dollars with a dynamic advertising proposal, a vigorous sales campaign, and an urgent research opportunity. An evidentiary privilege that makes environmental audits successful tools of change presumably alleviates this problem by allowing auditors to state bluntly the changes necessary for compliance.

Discussion about the concept of self-evaluative privilege is still evolving in the courts. The standard for a recognition of a self-evaluative privilege has been that "extraordinary circumstances" justify nondissemination of the evaluative record.[57] The "chilling effect" of disclosure is conceded,[58] but recognition by courts of a self-evaluative privilege is not automatic and is not universal.

B. *Judicial Views of Environmental Audit Privilege*

In September 1994, a federal court in Florida extensively examined the arguments for and against environmental self-audit privileges and granted protection for most audit records without awaiting passage of legislation.[59] The common law and legal policy issues were explored in depth and led the court to conclude that:

> It is self evident that pollution poses a serious public health risk, and that there is a strong public interest in promoting the voluntary identification and remediation of industrial pollution. The public interest is allowing individuals and corporations to candidly assess their compliance with environmental regulations "promotes sufficiently important interests to outweigh" the in-

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57 Bredice v. Doctors Hosp. Inc., 50 F.R.D. 249, 251 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973) (holding that hospital documents about deceased patients, that were designed to review and evaluate clinical work relating to the deceased patients, were entitled to qualified privilege to protect the public interest).

58 *CECOS International*, 583 N.E.2d at 1119-20.

59 Reichhold Chemicals Inc. v. Textron Inc., No. 92-30393-RV, 1994 U.S. Dist. LEXIS 13806 (N.D. Fla. 1994).

> terest of opposing private litigants in discovering this potentially highly prejudicial, but minimally relevant, evidence. I . . . have no difficulty concluding in the abstract that an entity's retrospective self-assessment of its compliance with environmental regulations should be privileged in appropriate cases.[60]

The court differentiated other case law dealing with pre-occurrence reports that concerned proposed future activities of the company.[61] Because the self-evaluation privilege promotes the interests of justice, a qualified privilege should be recognized for "retrospective analyses of past conduct, practices, and occurrences, and the resulting environmental consequences."[62] This is the most comprehensive treatment of common law privilege issues to date and will be useful to the interests of auditing companies.

C. *Encumbered Privileges*

An indoor environment case illustrates the limitations which now encumber privilege claims. In *Martin v. Bally's Park Place Hotel & Casino*, the privilege issue arose when the federal Occupational Safety & Health Administration (OSHA) investigated and planned to charge a violation of workplace safety laws against a company.[63] The legal counsel for the employer hired an outside consultant to measure the indoor environmental exposure to chemicals at a work station. The employer then claimed work product privilege for the report against an OSHA subpoena, and also claimed privilege during discovery in a penalty action. The federal administrative body that reviews OSHA penalty cases, the Occupational Safety & Health Review Commission, endorsed the privilege claim.[64] On judicial review, the Third Circuit upheld the privilege because of the context: specific litigation was being defended by company attorneys, so the self-evaluative record of chemical exposure was exempt from disclosure.[65] The appellate panel noted that the same result would occur if the records were sought by subpoena or by penalty citation, for both were "coercive means" to obtain the pri-

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60 *Id.*

61 *Id.* The court distinguished *Reichhold* from *Koppes Co. Inc. v. Aetna Casualty & Surety Co.*, 847 F. Supp. 360, 364 (W.D. Pa. 1994). *Id.*

62 *Id.*

63 Martin v. Bally's Park Place Hotel & Casino, 983 F.2d 1252 (3d Cir. 1993).

64 *Id.* at 1254.

65 *Id.* at 1259.

vate evaluation.[66] But the court restricted privileges to only those cases with a "prospect of litigation."[67] This tracked the advisory committee's notes underlying the creation of the privilege in Section 26(b)(3) of the Federal Rules.[68] In the case of a corporate environmental audit, advocates of the audit privilege would assert that statutes widening Rule 26(b)(3) opportunities would make sense in light of the much wider scope of penalties that are available today for environmental violations.

D. *Justification for the Privilege*

The environmental audit privilege will induce improved compliance with environmental laws by encouraging blunt corrective messages within the corporation with a minimum of legal involvement in what is essentially a technical audit process. Technical experts and engineers evaluate the problem and recommend that it be corrected. The shortest distance between two points is a straight line, but we lawyers prefer to draw circuitous lines. By making the audit report a piece of anticipatable legal evidence, subtlety replaces candor, and winning the capital for remediation will be less certain.

Precedents for a qualified self-evaluation privilege exist with hospital review boards, National Science Foundation panels, EEOC audits, and SEC internal compliance investigations. An example of the self-evaluative privilege is the securities audit in *Diversified Industries v. Meredith*.[69] The Eighth Circuit allowed a company that performed a self-evaluation to keep those documents confidential from a third party litigant, even *after* the records had been disclosed, in confidence, to federal investigators.[70]

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66 *Id.*

67 *Id.* at 1260 (quoting *In re* Grand Jury Proceedings, 604 F.2d 798, 803 (3d Cir. 1979)).

68 FED. R. CIV. P. 26(b)(3) advisory committee note. *See also* 8 CHARLES A. WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 2024 (1970) and 4 JAMES W.M. MOORE & JO DESHA LUCAS, MOORE'S FEDERAL PRACTICE ¶ 26.64[2] (2d ed. 1991).

69 572 F.2d 596 (8th Cir. 1977)(en banc) (describing SEC investigatory privilege); *accord*, this is not a blanket waiver of privilege, Byrnes v. IDS Realty, 85 F.R.D. 679 (N.Y.S.D. 1980).

70 *Meredith*, 572 F.2d at 611.

E. *The Attorney-Client Privilege Claim*

Attorney-client communications are privileged from disclosure.[71] This privilege is a well-established and very extensively recognized subset of today's evidentiary privileges. Attorney-client privilege has been recognized at the trial court level as a basis for withholding environmental audits prepared for company counsel by a technical manager within the company.[72] The option of using outside law firms to conduct audits, in order to assert legal privilege for an audit, is feasible but it is at best awkward for the corporation. Routine auditing produces the best results, and the costs and extra communication efforts necessary in outside counsel's use for the auditing role lessens the experiential value of developing an audit staff within the company who apply their expertise and utilize their internal channels for effecting change after the audit is done.

Attorney client privilege is an absolute privilege and, once it applies, it protects the confidential request to counsel for legal advice.[73] In a 1981 decision, *Upjohn Co. v. United States*, the Supreme Court rejected a narrow reading of the privilege for attorney-client communications because that reading threatened to limit corporate counsels' effort to help compliance with the law.[74] The *Upjohn* case proposes that privileges that are uncertain or subject to widely varying applications are "little better than no privilege at all."[75] The drafters of the Federal Rules of Evidence considered a specific Rule 502 provision recognizing attorney-client and other privileges; however, Congress did not accept the proposed Rule.[76]

The highest cost option for environmental auditing is to pay two sets of professionals to learn about the plant and its work, and

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71 Privileges are well established, *see, e.g.*, Upjohn Co. v. United States, 449 U.S. 383 (1981) (holding communications by defendant's employees to counsel are privileged under attorney-client privilege); United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950) (holding certain exhibits were within the attorney-client protective privilege); and these are to be implemented routinely in the courts, *see* FED. R. CIV. P. 26(b)(3); FED. R. EVID. 501.

72 Olen Properties Corp. v. Sheldahl, Inc., Civ. 91-6446 (C.D. Cal. 1994) (magistrate judge's opinion in discovery matter).

73 SCOTT STONE & RON LIEBMAN, TESTIMONIAL PRIVILEGES § 1.24 (1983).

74 449 U.S. 383 (1981).

75 *Id.* at 392.

76 *See* 10 J.W. MOORE, FEDERAL PRACTICE § 500.01 (1993); 12 BENDER'S FORMS OF DISCOVERY § 5.02 (1993 Supp.).

then to have an insider translate their findings into the persuasive, intra-corporate reasoning for investing in the recommended remedial actions. Thus, an outside law firm retained by the corporation could hire an engineering firm or other technical consultant. The law firm would then study the results of that report before making its client aware of the results so that internal advocacy could begin.[77] Attorney-client privilege would presumably apply to the documents that pass through this two-step process because the legal advice regarding violations of law will be well charted.

Nevertheless, the translation into action is muffled by distance and by the awkwardness of multiple layers of reviewers who are external to the culture of the corporation. The auditor and the intermediary attorney will be perceived as outside inspectors, which perception lessens the degree of cooperation that insiders within the company would receive at the same site. The two-step outside audit by lawyers and engineers of the plant's management systems, as opposed to measurable factual parameters, will be particularly costly and difficult because of unfamiliarity with the corporate systems. Thus, the outside attorney-directed audit will lack the immediate impact that an experienced internal audit group's findings will have within the corporation.

Communications between attorney and client made for the purpose of committing crimes are not privileged.[78] Therefore, the company cannot use the audit device to channel existing and past records into the hands of the attorney in an effort to shield them from discovery.[79] For example, an audit privilege would not be available to "sweep under the rug" all records of wastewater monitoring, because these are subject to mandatory reporting and cannot be confidential.[80] A scholarly study of the audit privilege has observed:

If, in hindsight, courts determine that the audit was conducted

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[77] This author's experience confirms the opinion of a scholarly study which concluded that the additional costs "associated with hiring attorneys, who often will make little direct contribution to the outcome or performance of the audit, may be prohibitive." Hunt & Wilkins, *supra* note 1, at 388.

[78] United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950).

[79] *See In re* Int'l Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235, 1242 (5th Cir. 1982) (accounting documents constituting work product doctrine not discoverable by shareholders in derivitive suit with substantial need and crime-fraud exception applies to work product).

[80] 33 U.S.C. § 1318(b) (1988).

primarily for the purpose of raising a shield against the disclosure of these occurrences by telling the lawyer about them, assuming they were not properly addressed initially, they are likely to reject assertions of the attorney-client privilege.[81]

F. *The Work Product Privilege Claim*

Beyond the attorney-client privilege for routine legal advice is the privilege for attorney work product prepared prior to and during litigation, for, by, or under direction of an attorney.[82] Work product privilege is not absolute and can be penetrated by showing that the adverse party has a substantial need for the material and will suffer undue hardship from the unavailability of the records.[83]

Documents that are reviewed by lawyers as part of the trial preparation phase may qualify for this privilege. However, the environmental audit is a part of the affirmative compliance effort of the company and does not usually arise in the litigation context. Of course, in a climate of litigious environmental challenges, site evaluations rather than conventional audits could be deemed part of the pretrial case preparation work.[84] Work product privilege may be waived by a limited disclosure where, for example, a toxic tort plaintiff seeks an audit that had been shared with EPA investigators.[85]

The weakness of work product claims lies in the doctrine's tie to litigation and the doctrine's nonapplicability to routine practices.[86] A routine environmental audit of a factory by an internal audit team that reports on a scheduled basis to a designated company legal officer may not be considered as work "in anticipation of

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81 Hunt & Wilkins, *supra* note 1, at 380.

82 Hickman v. Taylor, 329 U.S. 495 (1947) (recognizing work product doctrine and holding an attorney's case preparation as essential to legal system; absent substantial need, such work product is privileged).

83 *Id.* at 511-12.

84 *See* Waste Management Inc. v. Florida Power & Light Co., 571 So. 2d 507 (Fla. Dist. Ct. App. 1990) (holding work product doctrine applicable to photos and file prepared at direction of counsel upon worker's death).

85 Waiver of work product privilege is sometimes found in complex litigation. *See e.g.*, Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414 (3d Cir. 1991) (holding voluntary disclosure of documents to DOJ and SEC did not waive attorney-client privilege or work product doctrine).

86 *See* FED. R. CIV. P. 26(b)(3).

litigation"[87] for purposes of this privilege.

Beyond the work product privilege, a limited self-evaluative privilege has been recognized in some cases. This recognition is discussed in Part Five of this article.

G. *What Role Would State Privileges Play in Federal Enforcement?*

The presence of a state statute recognizing an environmental audit privilege would be considered by a federal judge in a case arising under federal environmental laws. The judge is very likely to accept the claim of state privilege in a civil case, such as a localized toxic torts claim whose federal court status arises out of diversity jurisdiction.[88] The congressional decision not to enact Rule 502 of the Federal Rules of Evidence left federal courts with the vague norm of governing privilege decisions "by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[89]

The same result is likely in the "citizen suit" brought by persons or organizations who claim standing to enforce environmental laws.[90] The parties to such a suit are each private entities and the cases arise in a particular local environmental site context.[91] The vast majority of citizen suits are based upon mandatory reports of quantitative noncompliance with permits. The audit report recommendations carry little marginal benefit to the court's determination of citizen suit liability. Recognition of the state privilege does not inhibit the public policy of enforcement of environmental laws.

The more difficult balance between prosecutors' wishes and private rights will be presented when the federal environmental enforcer demands access to an audit report, or when such a report is obtained and offered into evidence in federal court. The federal district judge will be balancing the factors that the Supreme Court

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

88 Erie v. Tompkins, 304 U.S. 64 (1938). Further, the federal evidence rules are silent on the privilege issue.

89 FED. R. EVID. 501.

90 *See, e.g.*, 42 U.S.C. 6972 (stating the conditions on which a person may institute a civil action on their own behalf); Hallstrom v. Tillamook County, 493 U.S. 20 (1991); MICHAEL GREVE & F. SMITH, ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS 105 (1992).

91 ROBERT STEINBERG & ROBIN WIENER, RCRA COMPLIANCE AND ENFORCEMENT MANUAL 241 (1993).

addressed in *University of Pennsylvania v. EEOC*,[92] a faculty tenure evaluation privilege case. The Court found that the statutory scheme for employment discrimination cases is the same in both tenure decisions and in other employment decisions.[93] In reviewing the legislative determinations involving document access, the Court found that the conclusions were so vigorously remedial, in garnering all types of relevant documents, that an inference of an intent to allow tenure decisions to be privileged could not be found.[94]

In an environmental self-audit privilege case, the court will discover a very different situation than the closed tenure discussion minutes of the academic faculty in the *University of Pennsylvania* case. Rather, the court will have the following:

1. A legislative decision of the state where the court sits, recognizing the existence of a privilege serving the public interest;

2. A self-audit process intended to augment enforcement, encouraged by enforcers and the Sentencing Commission,[95] a process that did not exist when most federal environmental laws were adopted;

3. An agency expression of self-restraint regarding audit reports[96] that is consistent with (albeit not as strong as) the state legislation; and

4. An administrative record with full access to the quantitative factual portions of the company's records that were accessible to the self-audit team as well as to the enforcer.

It is too early to tell whether the balancing of policies will go against the self-evaluative privilege statutes in a federal agency enforcement case. The factual setting of the case will determine the propensity of the judge to sympathize with the need for recognition of the privilege. Assuming good faith in performance of the audit and reliance by the company upon the privilege under state law, the court is likely to uphold the policy reflected in state law and to deny access to the audit recommendations. Appellate

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92 493 U.S. 182 (1990).

93 *Id.* at 190.

94 *Id.* at 191-92.

95 *Environmental Protection Agency, Auditing Public Meetings*, July 27, 1994, morning session, at 38-39 (statement of the Honorable William Wilkins, Chair of the United States Sentencing Commission).

96 51 Fed. Reg. 25,004 (1986).

courts faced with the Tenth Amendment[97] implications of federal agencies undoing state legislation (especially in cases of federally-delegated state enforcement authority) are unlikely to disregard the prior reliance interests under which the confidential audit recommendations had been recorded.

V. State Approaches

A. *The Oregon Statute*

The 1993 Oregon statute which creates a qualified privilege for environmental self-audits[98] is a landmark compromise between the interests of the public, the prosecutors, and the regulated community. The law was adopted as part of an omnibus environmental crimes package.[99] Its audit provision is part of an overall systemic reform of the state's environmental requirements.[100]

The elements of the environmental self-audit privilege emphasize that it is a *qualified*, rather than an absolute, opportunity to sheild audit results.[101] The documents for which privilege can be sought include the auditor's report, exhibits and recommendations, memoranda analyzing the report and "potentially discussing implementation issues," and the implementation plan "that addresses correcting past noncompliance, improving current compli-

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97 U.S. CONST. amend. X.

98 OR. REV. STAT. § 468.963 (1993).

99 Thomas Lindley & Jerry Hodson, *Environmental Audit Privilege: Oregon's Experiment* ENV'T REP. (BNA) 1221 (Oct. 29, 1993). This legislation, signed into law on July 22, 1993 by Oregon Governor Barbara Roberts, has a dual purpose of criminalizing violations of environmental laws and regulations, and establishing incentives for regulated businesses to conduct internal environmental audits. *Id.*

100 *Id.* at 1222. The audit provision encourages industries and other regulated entities to remedy their environmental problems. *Id.* Specifically, regulated entities will be given an opportunity to locate their environmental violations through an auditing process and put forth the appropriate remedies without fear that their audit reports can be used against them in civil or criminal actions. *Id.*

101 *Id.* According to Oregon law, audit reports may be utilized in limited circumstances, and access to these privileged documents is permitted in a civil proceeding if (1) the privilege was asserted for fraudulent purposes, or; (2) the subject matter is not subject to the privilege; or (3) the regulated entity has failed to remedy any discovered environmental violations. OR. REV. STAT. § 468.963 3(a), 3(b)(A)(B). Further, the government may gain access to the audit documents in a criminal proceeding where (1) that there was a compelling need for the information, (2) that the information was not otherwise available, and (3) that he or she was unable to obtain the substantial equivalent of the information without incurring unreasonable cost or delay. *Id.* § 468.963 3(c)(D).

ance and preventing future noncompliance."[102]

The procedural steps in the Oregon bill are oriented to preserving the prosecutor's ability to penetrate a "sham" use, such as covering up serious wrongdoing through the artifice of an audit that is truly not a means of internal improvement through systematic inquiry. The drafters wanted to "avoid improper, after-the-fact 'audit' designations of unprotected documents."[103] The onus is on the auditing company to promptly initiate and pursue with reasonable diligence "appropriate efforts to achieve compliance."[104]

Oregon allows the privilege to be removed after an *in camera* hearing before a state judge.[105] The judge's actual review of the document enhances the acceptability of the process since the burden is placed on the company to justify its withholding.[106] In the event of a subpoena, the record is to be sealed and the creator of the audit has the opportunity to assert its privileged status before the prosecutor can make use of the audit.[107]

The Oregon legislature adopted the compromise bill in

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102 OR. REV. STAT. § 468.963(6)(b).

103 *See* Lindley and Hodson, *supra*, note 99, at 1222. The drafters of the legislation, including the Associated Oregon Industries Blue Ribbon Environmental Crimes Task Force of industrial and legal experts, Oregon state representatives, and the Oregon senate Judiciary Committee, had difficulty determining the bounds of this new evidentiary privilege. *Id.* The drafters concluded, however, that, to protect the various forms an environmental audit may assume, the definition of audit must be flexible. *Id.*

104 OR. REV. STAT. § 468.963(3)(b)(C). *See also supra* note 101. The statute states:

(3)(b) In a civil or administrative proceeding, a court of record, after in camera review consistent with the Oregon Rules of Civil Procedure, shall require disclosure of material for which the privilege described in subsection (2) of this section is asserted, if such court determines that:

> (c) . . . the material shows evidence of non compliance with ORS chapter 465, 466, 468, 468A, 468B, 761 or 767, or with the federal, regional, or local counterpart or extension of such statutes, appropriate efforts to achieve compliance with which were not promptly initiated and pursued with reasonable diligence.

Id.

105 *Id.* § 468.963 (3)(b), (3)(c).

106 Lindley & Hodson, *supra*, note 99, at 1222. Commenting on the Oregon statute, the authors noted that, "[a]t the very least, the new law will encourage those who perform audits to use diligent efforts to remedy any problems in an audit so that the audit privilege will not be lost in any subsequent proceeding." *Id.*

107 OR. REV. STAT. § 468.963(4)(b). Once the Attorney General obtains the report, the reporting company has thirty days to petition for an in camera hearing on whether the report or parts thereof are privileged. *Id.* A company that fails to file within thirty days effectively waives their privilege. *Id.*

1993.[108] Courts will begin to implement its terms in 1994-95. The expected outcome will be a series of cases in which the Oregon courts determine the boundaries of the privilege in the context of contested *in camera* proceedings.

B. *The Indiana Statute*

Indiana's environmental audit privilege, effective July 1, 1994, is tied to the state's progressive voluntary compliance programs which have earned praise for their creativity.[109] The Indiana Code's new chapter 13-10 recognizes that voluntary audits that are internal and "comprehensive" can include both facility audits and audits of environmental management systems.[110] Audits are generally privileged and inadmissible in civil, criminal, or administrative actions.[111] The exceptions that allow qualified use of the audits do not apply to audits performed prior to July 1, 1994, so these remain categorically privileged.[112]

Indiana exceptions allowing use of the audit include fraudulent purposes and failure to "promptly initiate and pursue appropriate efforts to achieve compliance with reasonable diligence."[113] The burden of showing fraud is on the challenger who seeks the audit; the burden of showing prompt efforts is on the defender of the audit.[114] In criminal cases, the method for obtaining access to the audit involves a court petition and an *in camera* review of the sealed document, in a manner similar to that adopted in Oregon.[115]

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108 1993 OR. LAWS 422. The compromise is discussed in Lindley & Hodson, *supra* note 99.

109 *See* James T. O'Reilly, *Environmental Racism, Site Cleanup and Inner City Jobs: Indiana's In-Fill Incentives*, 11 YALE J. ON REG. 43, 56-57 (1994). The provisions of the Indiana voluntary cleanup law offer hope for the states' inner cities. *Id.* The law encourages clean-ups while lessening the strain on government bureaucracy. *Id.* The legislation also enlivens the inner-city economy, which should attract and keep more businesses and thus lead to the hiring of more employees. *Id.* at 57-58.

110 *See* IND. CODE § 13-10 (West 1994).

111 IND. CODE § 13-10-3-3 (West 1994). This inadmissibility is generally true except as provided in sections 4 and 5 of this chapter.

112 IND. CODE § 13-10-3-4(a)(1) (West 1994). No action is necessary to secure privilege for one's pre-1994 audits; privileges for these are covered as a category.

113 IND. CODE § 13-10-3-4(a)(2) (West 1994).

114 IND. CODE § 13-10-3-6 (West 1994).

115 IND. CODE § 13-10-3-7(b) (West 1994). *Compare with* the Oregon statute, *infra* notes 98-107 and accompanying text.

C. *The Kentucky Legislation*

Kentucky's environmental audit privilege is very similar to the Indiana and Oregon statutes.[116] The court performs the same screening function in criminal cases as described above, and the same generic presumption of confidentiality attaches to the audit, as is the case in the Oregon and Indiana legislation. As with other states, the Kentucky audit privilege does not apply to documents required to be submitted to a governmental regulatory body.[117]

D. *The Colorado Statute*

Colorado adopted a comprehensive statute in 1994 that went beyond the outlines of the Oregon law.[118] Colorado's law adopts the Oregon foundation and also covers the testimonial privilege of the persons involved with performance of the audit,[119] punishes the unauthorized disclosure of an audit report by public officials if they obtain the report and leak it without authority,[120] and allows the self-reporting of audit findings to state officials without penalties or prosecution so long as the self-report was a voluntary and qualified report.[121]

E. *The Ohio Bill*

Ohio's legislature recessed last term without acting on proposed legislation that would create a three-part environmental au-

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116 KY. REV. STAT. ANN. § 224.01-0401 (Michie 1994).

117 *Id.* at § 1 224.01-040(6).

118 COLO. REV. STAT. § 13-90-107(j) (West 1994).

119 COLO. REV. STAT. § 13-90-107(j)(I)(A) (West 1994). The law specifically includes among those privileged any person or entity of the entity or person involved with voluntary self evaluation. *Id.* The privilege will be lost if the person or entity consents or via court order. *Id.*

120 COLO. REV. STAT. § 13-25-126.5(5)(b)(II) (West 1994). An audit report, or parts of it, can only be reviewed by the public official upon judicial order. *Id.* §§ 13-25-126.5(5)(a).

121 COLO. REV. STAT. § 25-1-114.5 (West 1994). There are several prerequisites for the disclosure to be voluntary. For example, the disclosure must be promptly made once knowledge is gained and the disclosure stems from a statutorily defined "voluntary self-evaluation." *Id.* at § 25-1-114.5(1)(a)-(c). The latter term describes the requirement that disclosure be made by an auditor attempting to comply with due diligence and correcting non-compliances within two years of occurrence. If the non-compliance was a failure to obtain a permit, etc., the efforts need take place within a reasonable time.

dit program.[122] The proposed Ohio law would encourage self-audits within the state's environmental prosecution guidelines, privileges for the audit in civil, criminal and administrative actions, and a proposed mitigation term under which a sentencing judge in an environmental case would be required to consider a defendant's good faith voluntary self-audit program in determining whether a lighter sentence should be imposed.[123]

If the privilege legislation is adopted in 1995, the Ohio Legislature would then be accepting the invitation of a state appellate court to address issues of self-evaluative privilege in the legislature.[124] An effort to assert such a privilege for a landfill operator drew recognition from the court that such a privilege

> would have a positive environmental effect because it would encourage companies . . . to make changes in procedure and to frankly document mistakes without fear of prosecution by state and federal regulatory authorities.[125]

Despite its recognition of a "chilling effect" of environmental audit disclosure, the court left the recognition of an environmental self-audit privilege to the legislature.[126] Other states have considered but not yet adopted the environmental audit privilege.[127]

F. *The New Jersey Suggestion*

New Jersey's chief environmental crimes prosecutor suggested in 1993 that companies seek a privilege for their environmental compliance audit programs.[128] Stephen J. Madonna's proposal for a privilege or an immunity would "make those within the organization feel free to investigate possible wrongdoing and communicate what they find without fear that the documents or other evidence

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122 H.B. 810, 120th Gen. Assy. (1993-94 Ohio Legis. Sess.).

123 *Id.*

124 *CECOS International*, 583 N.E.2d at 1121.

125 *Id.* at 1119.

126 *Id.* at 1120-21. The court noted that because the legislature clearly intended that the hazardous waste industry be subject to public scrutiny, it could not adopt a policy preventing the disclosure of company records to regulatory officials. *Id.*

127 Bills are pending in Pennsylvania (H.B. 2566) and Illinois (S.B. 1724), and were filed but not acted upon in Virginia (H.B. 968). Colorado legislation passed in 1994 after an earlier bill was tabled. Hunt and Wilkins, *supra* note 1, at 419 n. 259.

128 *Self-Evaluative Immunity?*, DAILY ENV'T NEWS (BNA) No. 153, at A6 (Aug. 11, 1993).

so generated will later be used against them or the corporation."[129] Madonna specifically proposed a one-year term of immunity during which companies could "clean house."[130] As of the time this article went to press, the New Jersey legislature had not considered such a privilege.

G. *The Illinois Bill*

The Illinois Legislature is expected to consider a bill establishing an environmental audit privilege in late 1994.[131] The bill contains a limited immunity for violations discovered during a voluntary audit and reported to the state.[132] Illinois state officials' concurrence in the legislation's goals played a significant role in negotiating the new proposals.

VI. Evolution

A. *Countervailing Arguments About the Privilege*

The environmental self-audit privilege could be said to be in transition. Federal courts "are in disarray" over self-evaluative privilege issues, as one court has observed.[133] One argument against a privilege is that fraud and misconduct should be revealed wherever the public prosecutors and enforcement agents can find it.[134] It is arguably in the "public interest" to make prosecution as simple as possible for the bureaucracy.[135] Using the rationale of absolute enforcement that had been embodied in the 1974 *United States v. Nixon* subpoena case,[136] the public has a right to protection, and

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129 *Id.*

130 *Id.*

131 Ill. S.B. 1724 (pending 1994).

132 *Id.*

133 Siskonen v. Stanadyne Inc., 124 F.R.D. 610 (W.D. Mich. 1989).

134 *See generally* Annette Crawley, Note, *Environmental Auditing and the Good Samaritan Doctrine: Implications For Parent Corporations*, 28 GA. L. REV. 223, 225 (1993).

135 *See* discussion *infra* and accompanying text of United States v. Dexter Corp., 132 F.R.D. 8 (D. Conn. 1990) notes 150-51.

136 United States v. Nixon, 418 U.S. 683 (1974). President Nixon was issued a subpoena directing him to produce particular tape recordings and documents relating to certain conversations. *Id.* at 686. Nixon contested the subpoena, asserting absolute executive privilege. *Id.* The Supreme Court concluded that the grounds for asserting privilege are based on a general interest in maintaining confidentiality, not an individual interest. *Id.* at 713. The Court stated that an absolute privilege in confidentiality of communications cannot prevail over the demands of justice and due process of the law. *Id.*

surrogates of the public need subpoenaed evidence to convict violators. As with many absolutist arguments, the counterpoint is that some greater societal benefits can be advanced with a privilege, i.e., the records could be obtained but not used against the corporation or its personnel.[137]

An argument used by a federal prosecutor[138] is that immunity bars the government from using the materials and compels the agency to develop sources independent of the immunized materials.[139] The same can be asserted against inconveniences that impair prosecution efforts such as the privilege against self-incrimination[140] and the warrant requirement for most environmental inspections.[141] Sources of factual data are readily available from monitoring devices and from other pure measurement information acquired by inspectors, but the privilege aspect of the environmental audit is directed to the opinions and recommendations of the auditor.

B. *Judicial Treatment of Self-Evaluative Activities*

Self-evaluative activities that benefit the greater good of society should receive respect from the courts. The self-evaluative privilege is a judicially-recognized qualified privilege.[142] Historically,

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137 *See* Crawley, *supra* note 134, at 226.

138 *Self-Evaluative Immunity?* DAILY ENV'T NEWS (BNA) No. 153, at A-6 (Aug. 11, 1993) (quoting a Justice Department source).

139 *See* Kastigar v. United States, 406 U.S. 441 (1972).

140 U.S. CONST. amend. V. "No person shall . . . be compelled in any criminal case to be a witness against himself." *Id.*

141 U.S. CONST. amend. IV. The Fourth Amendment specifically states that, "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *Id. But see* Dow Chemical Co. v. United States, 476 U.S. 227 (1986). In *Dow Chemical*, the Dow Chemical Company denied an Environmental Protection Agency request to inspect the company's facilities. *Id.* at 229. In response, the Environmental Protection Agency employed a commercial air photographer to take aerial photographs of Dow's industrial facilities and the surrounding open areas. *Id.* at 229-30. Dow then filed suit, alleging that the aerial photographs were taken without a warrant and violated Dow's Fourth Amendment rights. *Id.* Specifically, Dow argued that the plant has constitutional protections similar to that of the curtilage of a private home and these protections were violated by the warrantless aerial search. *Id.* at 234-35. The Court concluded that the open area of Dow's industrial plant are not analogous to curtilage and held that the aerial photographs did not constitute a search prohibited by the Fourth Amendment. *Id.* at 239.

142 *Reichhold*, 1994 U.S. Dist. LEXIS 13806. *See also* Note, *The Privilege for Self-Critical Analysis*, 96 HARV. L. REV. 1083 (1983). Courts have recognized the self-evaluative

the privilege was first recognized for medical staff evaluations in the hospital setting, where peer review of physician performance serves an important public interest.[143] The privilege is useful for protecting desirable institutional evaluation of a company's or site's regulated activities.[144] Such a privilege would be available where documents are prepared pursuant to government requirements, are subjective or evaluative, and the policy basis for withholding these documents clearly outweighs the need of the party seeking the records.[145]

Self-evaluation privileges in personnel cases are sometimes recognized, but are unlikely to be upheld when the act of evaluation is compelled by mandatory rules, as has been the practice in employment discrimination case law.[146] There, the regulations of the relevant federal agency expressly declare the federal intent to obtain the evaluations.[147] In the environmental context, by contrast, audits are voluntary and the agencies, by guidelines, have stated that documents will not routinely be obtained.[148] Federal courts sitting in states that have not recognized self-critical privileges are less likely to recognize such privileges in the absence of a statute.[149]

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privilege that shields from discovery information meeting three criteria; "[f]irst, the information must result from a critical self-analysis undertaken by the party seeking protection, second, the public must have a strong interest in preserving the free flow of the type of information sought, finally, the information sought must be of the type whose flow would be curtailed if discovery were allowed." *Id.* at 1094.

143 Bredice v. Doctors Hosp., 50 F.R.D. 249, 251 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973)

144 *See* Banks v. Lockheed-Georgia Co., 53 F.R.D. 283 (N.D. Ga. 1971) (holding that plaintiff in discrimination suit could not discover reports of company's research team studying the problem of equal opportunity employment).

145 Webb v. Westinghouse Elec. Corp., 81 F.R.D. 431, 434 (E.D. Pa. 1978) (holding that where plaintiff's need outweighs the policy favoring exclusion, items constituting self-critical analysis are discoverable).

146 *See, e.g., Banks*, 53 F.R.D. 283 (favoring privilege); Witten v. A.H. Smith & Co., 100 F.R.D. 446 (D. Md. 1984) (disfavoring privilege, noting that privilege would hamper law enforcement too greatly); O'Connor v. Chrysler Corp., 86 F.R.D. 211 (D. Mass. 1980) (disfavoring privilege; no chilling effects from disclosure if the report is mandatory).

147 41 C.F.R. § 1-12.811.

148 1986 EPA statement, *supra* note 2.

149 *See* Williams v. Vulcan-Hart Corp., 136 F.R.D. 457 (W.D. Ky. 1991) (stating that since Kentucky courts are unlikely to recognize self-critical privilege, employers could be compelled to produce reports); Siskonen v. Stanadyne Inc., 124 F.R.D. 610 (W.D. Mich. 1989).

In *United States v. Dexter Corp.*, one of the first attempts to establish a self-evaluative privilege in environmental defense litigation, the EPA defeated a regulated firm's claim of privilege by asserting that the EPA's role as a public agency included the determination of the "public interest."[150] In the face of the government's argument, the court deferentially accepted the EPA's view that, where the public agency needed access to the record, no self-evaluative privilege would be in the public interest. The flaws in that court's very deferential analysis are many. Total delegation to an administrative agency of a traditional judicial determination like evidentiary pleading is an abdication of judicial powers. The *Dexter* court ceded the judiciary's common law jurisdiction to declare evidentiary privilege matters to un-elected bureaucrats who regulate, but who must rely upon others to appear in court on their behalf.[151] Such a deference is extreme. This deference eliminates the opportunity for a private person to have a court neutrally determine the merits of an agency subpoena on such a ground because, by extension, the agency's decision to issue the subpoena is in the same "public interest" that the submissive *Dexter* court found.

Routine post-accident safety reviews have not been accorded a privileged status by the courts. In *Dowling v. American Hawaii Cruises, Inc.*, the court was skeptical that permitting civil discovery of internal safety audits would cause the curtailment of safety reviews.[152] That decision concerned a review of an accident by the company that was later named a defendant in a suit. However, an accident investigation directed by company counsel has been held confidential because they were prepared in anticipation of litigation.[153]

The differences between reviews of post-accident evidence in anticipation of tort suits and environmental self-audits of facilities are that:

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150 United States v. Dexter Corp., 132 F.R.D. 8 (D. Conn. 1990). The *Dexter* court concluded that, while the self evaluative privilege has been recognized in a variety of actions, "the courts have refused its application where . . . the documents in question have been sought by a governmental agency." *Id.* at 9 (quoting Federal Trade Commission v. TRW, Inc., 628 F.2d 207, 210 (D.C. Cir. 1980)).

151 *Id.* at 9-10.

152 Dowling v. American Hawaii Cruises Inc., 971 F.2d 423 (9th Cir 1992).

153 Waste Management Inc. v. Florida Power & Light Co., 571 So. 2d 507, 510 (Fla. Dist. Ct. App. 1990).

1. Audits prevent injuries from occurring and thereby avoid litigation;
2. Criminal penalties attach to so many environmental violations, while criminal penalties for accidents are infrequent; and
3. The detailed self-examination of an environmental audit is wider in dimension and deeper in detail than the conventional safety self-audit present in *Dowling* and other accident litigation.

In response to employee complaints in *Bally's*, indoor air measurements were held privileged, as discussed previously, in a case of judicial confrontation between agency power and an attorney-directed inquiry.[154] There, the work product-type privilege was determinative.[155] So long as *Dexter's* deference is followed, the route to self-evaluative privilege in the environmental field must run through the legislative rather than the administrative routes.

C. *The Standards for Agencies' Own Documents*

Corporations would gladly embrace the standard with which the federal government zealously guards its own records of this type from disclosure. The federal government and many states already exclude their own internal reviews of performance from the view of the interested public.

Under exemption 5 of the Freedom of Information Act,[156] the agency internal reviews of performance with recommendations for change and improvement will be withheld from private sector requesters.[157] The exempt status of internal documents stems from the agency desire for candor and the desire to avoid chilling the frank internal discussion of weaknesses in the agencies' policy positions.[158] The dialogue inside the agency would be less effective if the external community regulated by that agency would be receiving copies of these internal audits. Too much caution and too much "Aesopian language" would be necessary in internal reports

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154 *Bally's*, 983 F.2d at 1259.

155 *Id.*

156 5 U.S.C. § 552(b)(5) (1976).

157 *Id. See also* United States v. Weber Aircraft Co., 465 U.S. 792 (1984) (holding Air Force statements protected from discovery under exemption 5 of Freedom of Information Act); *see* JAMES T. O'REILLY, FEDERAL INFORMATION DISCLOSURE § 15.11 (2d ed., 1994 Supp.) (examining cases relating to investigatory privilege claims).

158 *See, e.g.*, Wolfe v. Dept. of Health & Human Serv., 839 F.2d 768, 775-76 (D.C. Cir. 1988) (en banc) (stating that the function of document and not its classification or type determines its exempt status).

if this agency exemption were not present.[159]

For that reason, which sounds like the rationale used by advocates of an environmental audit privilege, the Freedom of Information Act does not require disclosure of the internal audits of performance by the agencies and their managers.[160] What is good for the agencies should be good for those whom the agencies supervise.

In addition, opinions about the causes of accidents that are examined by the National Transportation Safety Board are expressly forbidden to be used in federal *or* state damage actions.[161] Courts strictly apply this provision and have held the opinions and reports to be privileged and exempt from disclosure.[162] Such records would also be exempt from Freedom of Information Act access.[163]

VII. Alternative Vehicles

A. *Federal Privileges*

The federal civil evidence system evolves slowly. The law requires that Congress pass upon each new privilege that is added to the Federal Rules of Evidence, and Congress has sometimes rejected privilege proposals.[164] Congress can opt to act upon a recommendation for codification of a rule that was sent to Congress by the Judicial Conference. The statute provides that congressional failure to act constitutes approval of the rule. In the alternative, Congress could prepare and adopt a statutory privilege if it chose to do so. Senate Bill S. 2371, in the 1994 session, offered such a privilege for environmental self-audits.[165]

Recognition of a privilege for environmental audits via an amendment to the Federal Rules would require the judicial branch

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159 Access Reports v. Dep't. of Justice, 926 F.2d 1192, 1196 (D.C. Cir. 1991).

160 5 U.S.C. § 552(b)(5); *see, e.g.*, Frank v. Dept. of Justice, 480 F. Supp. 596 (D.D.C. 1979) (holding FBI records prepared as a result of official investigation are exempt from disclosure under Freedom of Information Act).

161 49 U.S.C. § 1441(e) (1958), implemented by rules at 49 C.F.R. § 801.54.

162 *See In re* Air Crash at Dallas/Fort Worth Airport, 117 F.R.D. 392 (N.D. Tex. 1987).

163 5 U.S.C. § 552(b)(3)(A).

164 28 U.S.C. § 2074(b)(1988); privileges in proposed Federal Rule of Evidence 502 were rejected by Congress, *see* 10 J. W. MOORE, FEDERAL PRACTICE § 500.01 (1993).

165 S. 2371, 102d Cong., 2d Sess. (1994); *Environmental Audit Privilege Bill Introduced in Congress*, PESTICIDE & TOXIC CHEMICAL NEWS, at 13 (Aug. 17, 1994).

advisory committee on rules, the Supreme Court, and the Congress to agree to recognition. On the other hand, a statutory privilege would require simpler statutory approval. Although either is possible, a more expeditious means would be through legislative creation of the privilege in a separate legislative enactment.[166] Another possibility is to include the privilege as part of the statutory implementation of the Sentencing Guidelines for environmental crimes[167] when Congress considers those guidelines in 1995. The Sentencing Guidelines will create the incentive for performance of the environmental self-audits,[168] thereby making it relatively simple for the statutory program adopted by Congress to include an accompanying privilege protection for such audits. The fact that prosecutors are acutely aware of the guidelines will also encourage a full and robust debate on the privilege issue.

B. *State Privileges*

Most evidentiary privileges are created under state law and by judicial precedents.[169] The benefit of creating an audit privilege by state statute is that the privilege would then apply in state criminal, civil, and administrative proceedings, and would have persuasive value in a federal district court in that state.[170] Ultimately, a federal privilege could augment and perhaps systematize the state privileges for general use in all district courts of the federal system.

State toxic tort lawsuits pose the greatest threat for adverse, unintended use of a company's environmental audits. The self-audited company's exposure to transaction costs and damages is also

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166 *See, e.g.*, S. 2371, 102d Cong., 2d Sess. (1994).

167 *Rules Proposed on Environmental Sentencing*, NAT'L L. J., March 14, 1994, at A7, A19. The 16 member advisory committee revising the Sentencing Guidelines seeks to send environmental violators to prison. *Id.* The revision is subject to considerable debate. *Id.*

168 *Environmental Protection Agency, Auditing Public Meetings*, July 27, 1994, morning session, at 42 (statements by Judge William Wilkins, of the Fourth Circuit Court of Appeals, and U.S. Sentencing Commission).

169 This creation includes self-evaluative privileges. *See* CHARLES WRIGHT & K. GRAHAM, FEDERAL PROCEDURE: EVIDENCE § 5431 (1993 Supp.).

170 *See* Fretz v. Keltner, 109 F.R.D. 303, 309 (D. Kan. 1986) (deciding the statutory privilege for medical self evaluation committees). Kansas state law created a privilege surrounding hospital peer review committee records. *Id.* Such documents are not discoverable. *Id.* As with environmental audits, peer reviews are conducted within the industry without judicial intervention. *Id.* at 311.

greatest in toxic tort cases.[171] The toxic tort suits are likely to be brought in state court nearest the facility from which the injurious chemical releases were alleged to have occurred. A plaintiff's lawyer with little energy or technical skill might reach into the audits in hopes of finding grounds of possible causation that would not otherwise be found by conventional pre-litigation technical research or routine discovery. The civil litigation benefit of an environmental audit privilege, therefore, seems likely to be most potent if it were available to defendants by means of statutes that would apply in both state and federal courts.

Beyond the state toxic tort cases, state environmental regulators also bring many more enforcement actions than their federal counterparts, thereby stressing the importance of a state privilege. The majority of environmental violation cases in air and water pollution matters are brought in state agency and state court cases. These cases typically arise out of a permit issued by a state or regional agency. Audits showing noncompliance with permits are as much an admission as are the controversial self-reporting of environmental permit exceedances that are required under some programs.[172]

State support for the environmental self-audit process was manifest at EPA hearings in July 1994. The surveys of smaller and medium size entities in the states showed an overwhelming support for the stimulation of audits through a privilege.[173] Colorado officials encouraged the federal agencies to endorse audit privileges.[174] A former EPA Assistant Administrator, later head of New

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171 For background on these causes of action, *see* JAMES O'REILLY, TOXIC TORTS PRACTICE GUIDE (2d ed. 1993).

172 *See* United States v. Ward, 448 U.S. 242 (1980). The Federal Water Pollution Control Act requires report of discharge and that such notification cannot be used in a criminal case. *Id.* at 251. The statute was found to impose civil, not criminal, liability. *Id.* at 255.

173 Surveys of businesses in Indiana and Colorado manifested the assertion that more self-audits of environmental conditions would be performed if such audits were privileged from disclosure. *Environmental Protection Agency, Auditing Public Meetings*, July 27, 1994, afternoon session, at 8 (statement of by Blake Jeffrey, Indiana Manufacturers Assn.); *id.* (statement of Cynthia Goldman for the Colorado Assn. of Commerce and Industry).

174 *Id.*, July 28, 1994, morning session, at 143 (statement by J. M. Thrasher, manager of Environmental Services Division, Colorado Springs); *id.*, July 27, 1994, afternoon session, at 18 (statement by Cynthia Goldman, Colorado Association of Commerce and Industry).

York State's Department of Environmental Conservation, now supervises an industry self-audit program and strongly supports recognition of the privilege by EPA.[175] But Pennsylvania enforcers and an assistant attorney general from Arizona expressed reservations about privilege issues.[176]

C. *Next Steps: The Safe Harbor*

Colorado's innovative 1994 legislation moved beyond privileges to the protection of a "safe harbor."[177] If a company that performed a self-evaluation found a violation, and first initiated remedial efforts and then notified state officials, the company would be protected by statute from environmental penalties or prosecutions under the Colorado law.[178] Audits must be performed voluntarily as a prerequisite for shielding the company. Thus, no one could hide the offense until enforcement began and then claim belatedly the shield of such a privilege.[179] Colorado's law addresses the problem that one who performs a self-audit may be "torn between disclosing an environmental audit, thereby exposing himself to possible sanctions, or instead solving the environmental shortcoming on his own."[180] The law "makes the decision easier by providing certainty as to the results of reporting," a certainty that federal guidelines do not now supply.[181] If other states followed

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175 *Id.* (statement of Thomas Jorling).

176 *Id.* (statement of David Ronald, Arizona Asst. Atty. Gen., and David Gallogly, Penn. Dept. of Envtl. Resources).

177 *See supra* notes 118 to 121 and accompanying text.

178 COLO. REV. STAT. § 13-90-107(j)(I)(A) (West 1994). The statute provides a privilege for persons or entities involved with self-evaluations. *Id.* The privilege can be waived or lifted by judicial order. *Id.*

179 COLO. REV. STAT. §13-25-126.5(2)(e) (West 1994). An environmental audit will not be privileged if the privilege is waived, or an *in camera* review finds that the company violated environmental law and did not initiate appropriate means of compliance. *Id.* at (3)(b). The privilege can also be lifted if a judge finds compelling reasons to do so or discovers the privilege is being asserted for fraudulent purposes. *Id.* at (3)(b)(I)(B). The last basis for losing the privilege is if a clear, present and impending danger to public health or the environment is found to exist. *Id.* at (3)(e). The claim is not accepted if the company has had multiple past settlements or enforcement actions within the 3 years prior to the date of the voluntary disclosure. COLO. LEGIS. SERV. § 25-1-114.5(6) (West 1994).

180 *Environmental Protection Agency, Auditing Public Meetings*, July 27, 1994, afternoon session, at 20 (statement of Cynthia Goldman for the Colorado Assn. of Commerce and Industry).

181 *Id.*

the Colorado example, the tangible incentive to perform audits would expand, as companies will have both a rationale for prompt action and a rationale for self-reporting to government about the post-audit remedial actions.

A Colorado company that seeks this "safe harbor" for its findings must (1) promptly inform the state of the violation; (2) the identification of the violation must have come from a voluntary self-evaluation; (3) the noncompliance must be corrected within two years; and (4) the reporting company must fully cooperate with the regulatory agency.[182] This mandate responded to the much-publicized case of a penalty that followed a self-reported emission discovery.[183] A Colorado brewery that discovered volatile organic compounds (VOCs) were released when its beer cans were filled.[184] The unknown VOC release was found in a self-audit, voluntarily reported, and then a fine in excess of one million dollars was imposed for air permit exceedances.[185] The creation of a voluntary reporting incentive is a natural progression beyond the voluntary self-auditing incentive.

VIII. Conclusion

Government's desire for maximum correction of environmental problems cannot be met with existing public sector budgets and personnel for enforcement. Augmenting these public funds with more self-evaluation of site environmental conditions by prudent corporations serves a public benefit. Audits will augment the beneficial work of public agencies, but only if effective and candid self-audits can be encouraged. The trend toward environmental audits suggests that use of these means of positive change are on the increase, but they are under a cloud that deters their use.

Dispelling the cloud of uncertainty that hangs over audits will require legislation, rather than the rocky road of case law evolution. The audit privilege, such as the Colorado law and the Ohio proposals, fosters the public benefit from rapid corporate self-im-

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182 COLO. REV. STAT. § 25-1-114.5(1) (West 1994).

183 *Environmental Protection Agency, Auditing Public Meetings*, July 27, 1994, afternoon session at 20 (statement by Cynthia Goldman for Colorado Assn. of Commerce and Industry).

184 *See supra* note 29.

185 *Environmental Protection Agency, Auditing Public Meetings*, July 28, 1994, morning session, at 19-20 (statement by Scott Smith, Adolph Coors Co.).

provement. This is an important value which legislators will balance against the public agency's need for evidence in support of enforcement cases.

The trends in environmental litigation suggest that civil actions in the nature of environmental toxic torts will be the venue in which audit disclosure will be most hotly contested. The Oregon and Colorado legislation, and the efforts in other states, surely bode well for the future recognition of environmental auditing privileges. The case for an environmental audit privilege can be made to legislators, and it will require more education and more effort on the part of environmentally prudent companies. Perhaps the optimal legislation will be a form of evidentiary privilege combined with a "safe harbor" for self-reported noncompliance. At the end of the process, the privilege will encourage the kind of swift and effective change that our nation's environmental policies cannot advance on public funds alone.