

ENCOURAGING REGULATED ENTITIES TO COMPLY WITH FEDERAL ENVIRONMENTAL MANDATES: THE NEED FOR A FEDERAL ENVIRONMENTAL AUDIT PROTECTION STATUTE

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INTRODUCTION

Since the early 1980s, environmental protection issues have occupied a prominent position in national political debate. A major facet of the current debate centers on the most effective way to increase the private sector's compliance with existing federal environmental laws. While political leaders universally accept compliance as a policy goal, these leaders disagree on the means that should be employed to achieve such compliance.

This disagreement has given rise to two competing philosophical approaches regarding the regulation of owners and operators of facilities subject to environmental mandates ("regulated entities"). The first approach favors a deterrence-based regulatory regime that primarily focuses on strict enforcement of environmental standards and severe punishment of individual and corporate violators. Proponents of this philosophy believe that more laws, more enforcement, and stiffer penalties most effectively induce environmental compliance. Conversely, the second approach favors a collaborative regulatory structure, whereby compliance is achieved by coupling standard enforcement programs with legal incentives aimed at encouraging regu-

lated entities to engage in environmental self-policing. Those promoting this approach argue that the federal government can only successfully enforce its environmental standards through a system that fosters cooperation between the government and the regulated community.

Present federal environmental protection policies embody the deterrence-based approach. While the Clinton Administration argues that these policies are achieving unparalleled success,¹ the current regulatory regime in fact renders complete and sustained environmental compliance virtually impossible to attain. Two particular characteristics of the current regime explain this difficulty. First, federal environmental regulation has grown exponentially, both in the sheer number of legal requirements and in the complexity of such requirements.² Since 1972, the federal government has promulgated an aver-

1. Under the federal deterrence-based approach, success is not measured in terms of reductions in pollution levels or other indicators of actual environmental compliance; rather, success is measured by the number of enforcement actions, criminal indictments, and similar proceedings initiated by the government against suspected violators. Using this deterrence-based yardstick, the Clinton Administration can claim a degree of success. In 1983, the United States Department of Justice (DOJ) reported only 40 criminal indictments for environmental crimes; by 1993, that number had grown to 186 with 168 guilty pleas or convictions. *See* Clinton J. Elliot, *Kentucky's Environmental Self-Audit Privilege: State Protection or Increased Federal Scrutiny?*, 23 N. KY. L. REV. 1, 9 (1995) (citation omitted). In fiscal year 1996, 221 defendants were indicted on environmental charges—107 individual defendants and 33 corporate defendants subsequently pleaded or were found guilty of environmental crimes. *See* OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, U.S. ENVTL. PROTECTION AGENCY, ENFORCEMENT AND COMPLIANCE ASSURANCE ACCOMPLISHMENTS REP.: FY 1996, at 2-2 (1997) [hereinafter 1996 EPA ACCOMPLISHMENTS REP.]. In fiscal year 1996, the total jail time to which defendants were sentenced was 1,160 months, compared to 860 months in 1995. *See id.* In addition, more than \$76.7 million in criminal fines and restitution were assessed in fiscal year 1996, compared with \$23 million in fiscal year 1995. *See id.*

In 1997, EPA referrals to the DOJ rose to a record high of 278, with a total of 322 individual and corporate defendants being charged in criminal proceedings. *See* OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, U.S. ENVTL. PROTECTION AGENCY, ENFORCEMENT AND COMPLIANCE ASSURANCE ACCOMPLISHMENTS REP.: FY 1997, at 2-2 (1998) [hereinafter 1997 EPA ACCOMPLISHMENTS REP.]. In fiscal year 1997, defendants were sentenced to a total of 2,351 months of jail time as compared to 1,116 months in fiscal year 1996. *See id.* Criminal fines and restitution assessed against environmental violators increased from \$76.7 million in fiscal year 1996 to over \$169 million in fiscal year 1997. *See id.* at 2-2 to 2-3. Civil and administrative penalties have also reached record levels. A total of \$66.2 million in judicial penalties and \$30 million in administrative penalties were assessed in fiscal year 1996. *See* 1996 EPA ACCOMPLISHMENTS REP. at 2-2. In 1997, judicial penalties declined slightly to \$46 million; however, total assessed administrative penalties rose almost 65 percent to \$49.2 million. *See* 1997 EPA ACCOMPLISHMENTS REP. at 2-3.

2. *See* Mia Anne Mazza, Comment, *The New Evidentiary Privilege for Environmental Audit Reports: Making the Worst of a Bad Situation*, 23 *ECOLOGY L.Q.* 79, 80-

age of 600 pages of environmental statutes and regulations each year, resulting in the annual publication of literally thousands of pages of notices, proposed rulemaking, guidance, and final rulemaking in the *Federal Register*.³ Second, federal agencies no longer have the resources to do all the monitoring, inspections, and investigations necessary to enforce the myriad of federal environmental standards.⁴ Because the current regulatory regime does not effectively encourage environmental self-policing by regulated entities, the ever increasing costs of evaluating environmental compliance fall almost exclusively on the federal government.

In contrast to the federal regulatory structure, many states have implemented collaborative regimes that promote self-policing activities through official recognition of evidentiary privileges and immunities for regulated entities that conduct environmental self-audits (“privilege and immunity statutes”).⁵ Environmental self-audits are voluntary evaluations of operating facilities undertaken by regulated entities to improve compliance with existing environmental laws, to determine liability under these laws, or to assess the effectiveness of an environmental compliance management system.⁶ Regulated

81 (1996); see also Lisa Koven, Comment, *The Environmental Self-Audit Evidentiary Privilege*, 45 UCLA L. REV. 1167, 1168 (1998) (discussing enactment of environmental laws during 1980s that placed “increasingly stringent compliance requirements on entities”); Marianne Lavelle, *Environmental Vise: Law, Compliance*, NAT’L L.J., Aug. 30, 1993, at S1 (arguing that complexity and breadth of “green laws” makes full compliance by corporations impossible).

3. See PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* 26 (1994) (noting that “EPA alone has over 10,000 pages of regulations”); DIXY LEE RAY & LOU GUZZO, *ENVIRONMENTAL OVERKILL: WHAT EVER HAPPENED TO COMMON SENSE?* 161-68 (1993); Elliot, *supra* note 1, at 7; Ronnie P. Hawks, Comment, *Environmental Self-Audit Privilege and Immunity: Aid to Enforcement or Polluter Protection?*, 30 ARIZ. ST. L.J. 235, 235 (1998); Marianne Lavelle, *Survey: General Counsel Face Environmental Toll*, NAT’L L.J., Mar. 16, 1992, at S2 (claiming that federal environmental laws have recently branched into every corner of corporate world).

4. See *The Federal-State Relationship: Environmental Self-Audits: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Commerce*, 105th Cong. 49 (1998) (statement of Gale A. Norton, Colorado Attorney General) (“[T]here are simply not enough inspectors to go around . . .”) [hereinafter Norton Statement].

5. See, e.g., MISS. CODE ANN. §§ 49-2-2, 49-2-71 (Supp. 1998). In addition to environmental self-audit privilege and immunity statutes, so-called “safe harbor” statutes have been enacted to allow regulated entities a grace period to correct minor violations before any enforcement action may be taken. See, e.g., N.J. STAT. ANN. § 13:1D-127 (West Supp. 1999). These types of laws will not be discussed as they fall outside the scope of this Note.

6. See, e.g., S. 866, 105th Cong. § 3605(10) (1997). Senate Bill 866 defines “voluntary environmental self-evaluation” as:

entities generally use reports and other documents generated from environmental self-audits as tools to identify existing and potential problems regarding environmental compliance, thereby permitting these entities to comply with environmental laws.⁷ Similar to the deterrence-based approach, complete and sustained environmental compliance remains the primary goal of these collaborative regimes; however, in contrast to the deterrence-based approach, state statutory self-audit protections available under these collaborative regimes provide an incentive for regulated entities to willingly assume a portion of the burden of evaluating environmental compliance. While state privilege and immunity statutes provide considerable protection to regulated entities in state-initiated legal actions, no protection is extended to civil, criminal, or administrative actions initiated by the federal government.

Under the current federal regulatory regime, federal agencies or private parties may use reports generated from an environmental self-

an assessment, audit investigation, or review that is—(A) initiated by a person or government entity; (B) carried out by an employee of the person or government entity, or a consultant employed by the person or government entity, for the purpose of carrying out the assessment, evaluation, investigation, or review; and (C) carried out for the purpose of determining or improving compliance with, or liability under, a covered Federal law, or to assess the effectiveness of an environmental compliance management system.

See id. The Environmental Protection Agency defines an “environmental audit” as “a systematic, documented, periodic and objective review by regulated entities of facility operations and practices relating to meeting environmental requirements.” *See Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations*, 60 Fed. Reg. 66,706, 66,710 (1995) [hereinafter EPA Final Policy]. Although the nature and scope of environmental self-audits vary greatly, comprehensive audits generally include the following elements: (1) objective, trained auditors; (2) a system of review to ensure quality and accuracy; (3) documented objectives and follow-up plans; (4) a determination regarding compliance and noncompliance; (5) documentation of audit findings presented to management; (6) a determination of reporting requirements to regulatory authorities; and (7) a commitment from management to mitigate any identified violations. *See Lynn Holdsworth, Comment, Florida’s Environmental Self-Audit Legislation: An Incentive For the Environmentally-Conscientious Business or an Opportunity For the Corporate Polluter to Suppress the Truth?*, 27 STETSON L. REV. 211, 214 (1997); *Environmental Auditing Policy Statement*, 51 Fed. Reg. 25,004, 25,009 (1986) [hereinafter 1986 EPA Policy] (stating that effective environmental auditing system would include: management support for audit and commitment to follow-up audit’s findings; adequate staffing; trained auditors; explicit audit objectives, scope, resources, and frequency; a process to collect, analyze, interpret, and document information sufficient to achieve audit objectives; process to produce written reports and proposed corrective actions; and process to assure accuracy and thoroughness of environmental audit).

7. *See* Holdsworth, *supra* note 6, at 215-16.

audit as a “virtual road map detailing environmental law violations”⁸ and subsequently introduce such reports as evidence in legal actions against the self-auditing entity.⁹ Therefore, without a federal evidentiary privilege, immunity, or some other form of effective legal protection, regulated entities that perform environmental self-auditing activities face what has been termed a “compliance conundrum.”¹⁰

Present environmental regulations are so voluminous and complex that regulated entities are basically required to conduct environmental self-evaluations to avoid liability arising from unintentional environmental violations.¹¹ Moreover, prospective periodic self-evaluation often generates future economic benefits to the entity such as compliance cost reductions, higher profits, improved attractiveness to investors, and favorable publicity.¹² Nevertheless, even the most will-

8. Koven, *supra* note 2, at 1169.

9. See generally Joseph E. Murphy & Ilise L. Feitshans, *Protecting the Compliance Audit*, in CORPORATE COMPLIANCE, HOW TO BE A GOOD CITIZEN CORPORATION THROUGH SELF-POLICING 667, 670 (PLI Corp. Law & Practice Course Handbook Series No. B-943, 1996); DAVID E. SELLINGER & CHRISTINE R. ENGELMAIER, THE SELF-EVALUATIVE PRIVILEGE: PRESERVING CONFIDENTIALITY OF COMPLIANCE INFORMATION 1 (Washington Legal Found. Critical Legal Issues Working Paper No. 66, 1996) (indicating that problem facing self-policing companies is that they create compliance paper trail that may be discoverable in legal proceeding against company). For example, in December 1996 and January 1997, five Texas companies were confronted with threatening EPA letters shortly after they voluntarily disclosed violations to the state environmental protection agency. See *The Federal-State Relationship: Environmental Self Audits: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Commerce*, 105th Cong. 64 (1998) (statement of John Aloysius Riley, Director of the Litigation Support Division, Texas Natural Resource Conservation Commission) [hereinafter Riley Statement]. In addition, the EPA requested certain information that tracked disclosures made by these companies under the Texas self-audit protection statute. See *id.*; see also Norton Statement, *supra* note 4, at 52 (noting that Denver Water Board voluntarily disclosed violations in reliance on Colorado self-audit protection law and subsequently received requests relating to such information from EPA).

Private entities typically gain access to self-audit materials because most statutes authorize public disclosure of company documents relating to environmental issues upon completion of a government inspection. See Elliot, *supra* note 1, at 14; Hawks, *supra* note 3, at 239. For example, in *Friends of the Earth v. Eastman Kodak Co.*, 656 F. Supp. 513, 515-17 (W.D.N.Y. 1987), *aff'd*, 834 F.2d 295 (2d Cir. 1987), the plaintiff brought its suit under the Federal Water Pollution Control Act upon defendant's self-reporting documents filed with government.

10. See Mazza, *supra* note 2, at 82; see also *Companies Would Perform More Audits if Penalties Were Eliminated, Survey Says*, [Current Developments] 25 Env't Rep. (BNA) 2447, 2447 (Apr. 14, 1995) (indicating that according to Price Waterhouse survey released on April 6, 1995, U.S. companies would conduct environmental audits more frequently if they had assurance that results would not be used against them) [hereinafter *Survey Says*].

11. See Mazza, *supra* note 2, at 82.

12. See Michael Ray Harris, *Promoting Corporate Self-Compliance: An Examination of the Debate over Legal Protection for Environmental Audits*, 23 ECOLOGY L.Q.

ing regulated entities may hesitate to conduct environmental self-evaluations because they risk manufacturing what would likely be the most incriminating evidence of noncompliance that could be introduced into any legal action in which the entity is a defendant.¹³ This risk is especially great given that the existence or severity of environmental violations, and the associated costs of remediation, liability, or sanction, are often not evident until after a self-audit is completed.¹⁴

Regulated entities that do perform varying degrees of environmental self-evaluation have traditionally sought to minimize liability exposure through a combination of common law privileges;¹⁵ however, the inconsistent application of these doctrines coupled with their limited scope renders this form of protection largely ineffective.¹⁶ The United States Environmental Protection Agency (EPA) and the United States Department of Justice (DOJ) (collectively referred to as the "Clinton Administration" or the "Administration") have policies that provide for limited discretionary protection of environmental self-audit materials.¹⁷ Nevertheless, these policies are not uniformly applied (as they do not have the force of law), and when applied, have

663, 680 (1996) (arguing that environmental auditing presents not only means to prevent noncompliance, but also perfect opportunity for companies to gather information and analyze their operating costs); *see also* Daryl Ditz et al., *Environmental Accounting, An Overview*, in GREEN LEDGERS: CASE STUDIES IN CORPORATE ENVIRONMENTAL ACCOUNTING 1, 37-44 (Daryl Ditz et al. eds., 1995) (discussing how businesses can benefit from environmental cost information).

13. *See* Holdsworth, *supra* note 6, at 216 ("[A] business is put in the precarious position of balancing the benefits of performing an environmental self-audit against the potential repercussions of compiling a self-incriminating record of environmental violations identified during the audit."); Mazza, *supra* note 2, at 82 ("Corporate officers and owners are faced with the question of whether it is more dangerous to know or not to know about areas of noncompliance, given that it is nearly impossible for a company to be in continual and total compliance with the myriad of environmental laws and regulations in effect."). For specific examples of such consequences in Texas and Colorado, *see supra* note 9.

14. *See* Holdsworth, *supra* note 6, at 216.

15. *See* Hawks, *supra* note 3, at 240-47.

16. *See id.*

17. *See* EPA Final Policy, *supra* note 6, at 66,706-07 (establishing EPA's policy for encouraging voluntary audits through series of incentives, which include eliminating or substantially reducing gravity component of civil penalties and not recommending cases for criminal prosecutions for those who voluntarily disclose and promptly correct violations); ENVIRONMENT AND NATURAL RESOURCES DIVISION, U.S. DEP'T OF JUSTICE, FACTORS IN DECISIONS ON CRIMINAL PROSECUTIONS FOR ENVIRONMENTAL VIOLATIONS IN THE CONTEXT OF SIGNIFICANT VOLUNTARY COMPLIANCE OR DISCLOSURE EFFORTS BY THE VIOLATOR 1-6 (1991) [hereinafter DOJ POLICY] ("It is the policy of the Department of Justice to encourage self-auditing, self-policing and voluntary disclosure of environmental violations by the regulated community by indicating that these activities [such as voluntary disclosure, cooperation, preventive measures, internal disciplinary action, and subsequent compliance efforts]

not provided the degree of protection required to effectively encourage environmental self-auditing.¹⁸

This Note explores the need for a federal environmental self-audit protection statute, and proposes such a bill, entitled the Environmental Protection Collaboration Act (EPCA). The proposed bill, if enacted, would grant an evidentiary privilege and limited immunity to certain environmental self-audit materials and communications. Unlike existing forms of self-audit protection, the EPCA would provide powerful legal incentives to encourage environmental self-policing while at the same time maintaining the federal government's authority to punish environmental noncompliance that threatens human health, public safety, or the environment.

The EPCA would also enable the federal government to more efficiently pursue its policy goal of full environmental compliance. Under the present deterrence-based approach, the federal government expends tremendous resources identifying environmental noncompliance and prosecuting discovered violators. Yet, much of this expense is wasted by investigating regulated entities that are pursuing full compliance in good faith, as well as entities that would engage in substantial self-policing activities if not for the lack of effective environmental self-audit protection. Under the collaborative EPCA regulatory approach, federal regulators could target their investigative efforts specifically at regulated entities unwilling to conduct environmental self-auditing. The proposed bill would also enable the EPA to perform more detailed monitoring of the self-auditing activities of regulated entities, thereby improving the federal government's ability to prevent unscrupulous entities from evading federal environmental laws through the fraudulent invocation of a self-audit privilege or immunity.

Part I of this Note will review the existing common law and statutory forms of environmental self-audit protection and will discuss how each fails to adequately protect self-audit materials and communications. Part II will outline recent failed attempts by Congress to enact a federal self-audit privilege and immunity statute. Part III will set forth the EPA and DOJ's opposition to recognition of an environmental self-audit privilege or limited immunity. Part IV will examine the merits of the proposed EPCA and explain the ways the EPCA is superior to existing forms of state and federal environmental self-audit protection. The Note concludes by contemplating the growing need

are viewed as mitigating factors in the Department's exercise of criminal environmental enforcement discretion.").

18. See *infra* note 142 and accompanying text.

for a federal environmental self-audit protection statute as the number of environmental regulations balloons and the federal budget shrinks.

I EXISTING FORMS OF ENVIRONMENTAL SELF- AUDIT PROTECTION

Regulated entities that perform environmental self-auditing place themselves at substantial risk because the reports and communications generated by self-audits can serve as a comprehensive “road map detailing environmental law violations.”¹⁹ When litigation arises, these entities generally attempt to prevent discovery of self-incriminating audit materials and communications by asserting one or more existing environmental self-audit protections. The protections presently available to regulated entities include: (1) common law evidentiary privileges, most notably the attorney-client and attorney work product privileges, as well as the more recently developed privilege of self-critical analysis;²⁰ (2) state statutes that establish an environmental self-audit privilege or limited immunity;²¹ and (3) EPA and DOJ policies that limit the assessment of penalties for violations of federal environmental law.²² Each of these existing protections has been asserted alone, or in combination, by regulated entities with varying degrees of success.²³

A. *Common Law Privileges*

1. *Attorney-Client Privilege*

The attorney-client privilege guarantees confidentiality in communications between attorneys and their clients.²⁴ As applied to the

19. Koven, *supra* note 2, at 1169; *see also supra* notes 8-10 and accompanying text.

20. *See infra* notes 24-68 and accompanying text.

21. The evidentiary privileges contained in these statutes generally include two forms of protection. First, federal or state regulatory agencies may be precluded from gaining access to privileged self-audit reports pursuant to applicable state or federal rules of administrative procedure. *See Koven, supra* note 2, at 1171 (citing COLO. REV. STAT. § 13-25-126.5(3) (1996) and MISS. CODE ANN. § 49-2-71 (1995)). Second, privileged environmental self-audit reports may not be subject to discovery during civil or criminal litigation. *See id.*

22. *See infra* notes 114-37 and accompanying text.

23. *See Hawks, supra* note 3, at 239.

24. *See, e.g., Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citing 8 JOHN HENRY WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961) (“The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.”)); *United States v. Louisville & Nashville R.R. Co.*, 236 U.S. 318, 335 (1915) (holding that railroads cannot be compelled to turn over correspondence with

attorney-corporate client relationship, the privilege protects communications between a corporation's employees, most notably directors and officers, and its legal counsel.²⁵ Based on the Supreme Court's holding in *Upjohn Co. v. United States*,²⁶ courts generally require five elements to be present before a communication may be protected by the attorney-client privilege.²⁷ First, the information for which the privilege is sought must be communicated from an employee to corporate counsel.²⁸ Second, the attorney must be acting in his role as corporate counsel and not in any other personal or professional capacity.²⁹ Third, the information must concern the employee's corporate du-

their attorneys for inspection by Interstate Commerce Commission); *In re Lindsey*, 158 F.3d 1263, 1267 (D.C. Cir. 1998); *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950).

25. See *Commodity Futures Trading Comm'n. v. Weintraub*, 471 U.S. 343, 348 (1985) (holding that it is "by now well established" that corporations can claim attorney-client privilege); *Upjohn*, 449 U.S. at 390; *Reed v. Baxter*, 134 F.3d 351, 356 (6th Cir. 1998), cert. denied, 119 S. Ct. 61 (1998); *Carter v. Cornell Univ.*, 173 F.R.D. 92, 95 (S.D.N.Y. 1997). In its *Upjohn* opinion, the Court explained that the attorney-client privilege did not develop in the corporate setting without raising a number of legal issues. See *Upjohn*, 449 U.S. at 389. These legal issues concerned the scope of the privilege: Would the attorney-client privilege extend to all employees or only a select few? See *id.* at 390-91. For a period of time, courts appeared to adopt a "control test" which extended the privilege only to communications between attorneys and those corporate functionaries in a position of control or substantial authority. See *id.* at 390; *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483, 485 (E.D. Pa. 1962) (holding that communications of employee would be protected by attorney-client privilege only if that employee was in position of enough control to make decision based on attorney's advice).

Eventually, in *Upjohn*, the Court rejected the "control test" in favor of a broader application of the attorney-client privilege that extended the privilege to certain communications of employees who did not fall into the "control test" group. See *Upjohn*, 449 U.S. at 392-93; *Miller v. Federal Express Corp.*, 186 F.R.D. 376, 388 (W.D. Tenn. 1999) ("In *Upjohn*, the Court rejected the more narrow 'control-group test' and found that the privilege would apply to communications between corporate counsel and corporate employees when the purpose of such communication is to secure legal advice from counsel."); *Carter*, 173 F.R.D. at 95. A major policy reason for this extension of the attorney-client privilege was to encourage the flow of information from middle and lower-level employees to the corporate counsel. See *Upjohn*, 449 U.S. at 390-91.

26. 449 U.S. 383 (1981).

27. See *Upjohn*, 449 U.S. at 394-95. The Court in *Upjohn* explicitly refused to formulate a definitive standard for the application of the attorney-client privilege to the corporate scenario, and instead called for a case-by-case analysis, see *Upjohn*, 449 U.S. at 396; *Hawks*, *supra* note 3, at 241; nevertheless, the salient facts relied upon by the Court in *Upjohn* to render its opinion have become a de facto test. See 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *FEDERAL EVIDENCE* § 189, at 338-39 (2d ed. 1994) (stating that although Court in *Upjohn* expressly disclaimed any broad prescriptive purpose, factors stressed in opinion appeared to set new federal standard).

28. See *Upjohn*, 449 U.S. at 394-95; MUELLER & KIRKPATRICK, *supra* note 27, at 339.

29. See *Upjohn*, 449 U.S. at 394.

ties.³⁰ Fourth, the employee must be “sufficiently aware that [he is] being questioned [by corporate counsel] in order that the corporation [can] obtain legal advice.”³¹ Fifth, the information must be treated as confidential by all parties from the moment of first communication onward, and any memorialization of such communication must be labeled as confidential.³²

Since *Upjohn*, at least one federal court has permitted a regulated entity to invoke the attorney-client privilege to protect information acquired through voluntary environmental self-auditing.³³ In *Olen Properties Corp. v. Sheldahl, Inc.*,³⁴ a private Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) cost recovery action, plaintiff sought to compel production of an environmental self-audit report prepared by a witness for the defendant’s attorneys to assist the attorneys in evaluating the defendant’s compliance with relevant laws and regulations. The United States District Court for the Central District of California held the reports to be protected by the attorney-client privilege, stating that the documents appeared to have been prepared “for the purpose of securing an opinion of law.”³⁵

2. Attorney Work Product Privilege

The attorney work product privilege protects from disclosure certain legal research, records, correspondence, reports, and memoranda, to the extent that they contain the opinions, theories, or conclusions of lawyers.³⁶ While the scope of this privilege is, in many respects,

30. See *id.* at 394; MUELLER & KIRKPATRICK, *supra* note 27, at 339.

31. *Upjohn*, 449 U.S. at 394.

32. See *id.* at 395; MUELLER & KIRKPATRICK, *supra* note 27, at 339.

33. See *Olen Properties Corp. v. Sheldahl, Inc.*, 38 Env’t Rep. Cas. (BNA) 1887, 1888 (C.D. Cal. Apr. 12, 1994). In reaching its decision, the court found not only that “[t]he circumstances surrounding the preparation of the [self-audit] reports” satisfied the first three elements of the *Upjohn* and *United Shoe Machinery* test, but also that the fourth element was met since the self-audit materials were prepared to assist the corporate counsel in evaluating the regulated entity’s compliance with relevant environmental laws and regulations. See *id.*

34. 38 Env’t Rep. Cas. (BNA) 1887 (C.D. Cal. Apr. 12, 1994).

35. *Id.*

36. See *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947). In *Hickman*, the Court held that “it is essential for attorneys to work with a certain degree of privacy, free from unnecessary intrusions by opposing parties.” *Id.* at 510; see also *United States v. Nobles*, 422 U.S. 225, 238-39 (1975) (“At its core, the work product doctrine shelters the mental process of the attorney.”); *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998) (stating that work product doctrine protects adversarial process by ensuring that attorneys can prepare for litigation without fear that opponents may obtain their private notes, memoranda, correspondence, and other written materials); *Miller v. Federal Express Corp.*, 186 F.R.D. 376, 387-88 (W.D. Tenn. 1999) (protecting corpo-

broader than that of the attorney-client privilege, it does have two principal limitations. First, the application of the privilege may be overcome by a “substantial showing” that the party seeking discovery is in need of the materials and is unable without undue hardship to obtain substantially equivalent materials by other means.³⁷ Second, the work product privilege only extends to information collected specifically for the litigation at hand, or in anticipation of impending litigation.³⁸

Due primarily to the volume and complexity of environmental regulations, at least one court has invoked the work product privilege to protect materials generated from environmental self-auditing activities.³⁹ In *Arizona ex rel. Corbin v. Ybarra*,⁴⁰ individual and corporate defendants were charged by a grand jury with violations of a state hazardous waste management law.⁴¹ Defendants challenged the grand jury’s probable cause determination, claiming that a hazardous chemical report prepared by an expert retained by defense counsel was protected by the attorney work product doctrine.⁴² The Supreme Court of Arizona, sitting en banc, held that the report was protected by the work product privilege, stating, “[T]he rule protects the report and other memoranda of the investigation if the contents of the report

ration’s internal investigations from discovery requests made by employee who filed EEOC claim); FED. R. CIV. P. 26(b)(3). Ordinary work product encompasses not only communications between a lawyer and a client, but also such items as photographs and other raw materials. See *Gundacker v. Unisys Corp.*, 151 F.3d 842, 848 n.4 (8th Cir. 1998), cert. denied, 119 S. Ct. 801 (1999). Work product also includes the work of “consultant[s], surety[s], indemnitor[s], insurer[s], or agent[s].” FED. R. CIV. P. 26(b)(3).

37. See, e.g., *In re Grand Jury Investigation*, 599 F.3d 1224, 1230-32 (3d Cir. 1979) (permitting discovery of opposing party’s questionnaire and interview memoranda of deceased interviewee); *Raso v. CMC Equip. Rental, Inc.*, 154 F.R.D. 126, 129 (E.D. Pa. 1994) (holding witness’s subsequent memory loss as valid exception to work product privilege); *Reedy v. Lull Eng’g Co., Inc.*, 137 F.R.D. 405, 408 (M.D. Fla. 1991) (upholding defendant’s request for photographs from plaintiff because plaintiff possessed only set of photographs that adequately depicted conditions at time of accident); *McNulty v. Bally’s Park Place, Inc.*, 120 F.R.D. 27, 30 (E.D. Pa. 1988) (allowing plaintiff to discover defendant’s work product due to witness’s subsequent disappearance). The difficulty in overcoming work product protection increases significantly when the material sought to be discovered reveals or reflects the attorney’s thought process as opposed to a mere collection of facts. See *United States v. Lockheed Martin Corp.*, 995 F. Supp. 1460, 1465 (S.D. Fla. 1998).

38. See *infra* note 57.

39. See *Arizona ex rel. Corbin v. Ybarra*, 777 P.2d 686, 688-91 (Ariz. 1989).

40. 777 P.2d 686 (Ariz. 1989).

41. See *id.* at 687.

42. See *id.* at 689.

would be protected work product had the attorney produced it himself.”⁴³

3. *Privilege of Self-Critical Analysis*

The privilege of self-critical analysis was first recognized twenty-nine years ago in *Bredice v. Doctors Hospital, Inc.*⁴⁴ and protects an organization or individual against compelled disclosure of certain self-incriminating records if the records were derived from a voluntary and candid assessment of compliance with regulations.⁴⁵ The information for which the privilege is sought must meet several criteria before the possibility of such protection arises. First, the information must originate from a critical self-analysis.⁴⁶ Second, “the public must have a strong interest in preserving the free flow of the type of information” sought to be protected by the privilege.⁴⁷ Third, the information’s flow would be curtailed if discovery were allowed.⁴⁸ In addition to the preceding three elements, some courts require all documents for which the privilege is sought to have been prepared with the expectation that they would be kept confidential, and in fact, have been kept

43. *Id.* at 690.

44. 50 F.R.D. 249, 250-51 (D.D.C. 1970), *aff’d*, 479 F.2d 290 (D.C. Cir. 1973) (holding that minutes of staff meetings regarding improvements to patient care were protected from disclosure, because of strong public policy in allowing hospitals to appraise patient care critically).

45. *See, e.g.*, *Reichhold Chems., Inc. v. Textron, Inc.*, 157 F.R.D. 522, 524 (N.D. Fla. 1994) (holding that owner of environmentally contaminated property could protect self-audit materials in action brought against eight previous owners to recover costs of clean-up). Self-critical evaluations of the following types of policies or procedures have thus far been protected under this privilege: progress of an affirmative action compliance program, *see, e.g.*, *Banks v. Lockheed-Georgia Co.*, 53 F.R.D. 283, 285 (N.D. Ga. 1971); hospital committee reports, *see, e.g.*, *Gillman v. United States*, 53 F.R.D. 316, 318 (S.D.N.Y. 1971); academic peer reviews, *see, e.g.*, *Gray v. Board of Higher Educ.*, 692 F.2d 901, 908 (2d Cir. 1982); railroad accident investigations, *see, e.g.*, *Granger v. National R.R. Passenger Corp.*, 116 F.R.D. 507, 510 (E.D. Pa. 1987); product safety determinations, *see, e.g.*, *Lloyd v. Cessna Aircraft Co.*, 74 F.R.D. 518, 522 (E.D. Tenn. 1977); and equal employment opportunity assessments, *see, e.g.*, *Sheppard v. Consolidated Edison Co.*, 893 F. Supp. 6, 8 (E.D.N.Y. 1995).

46. *See Bredice*, 50 F.R.D. at 250; Note, *The Privilege of Self-Critical Analysis*, 96 HARV. L. REV. 1083, 1086 (1983).

47. *The Privilege of Self-Critical Analysis*, *supra* note 46, at 1086; *see Bredice*, 50 F.R.D. at 251 (holding that there is overwhelming public interest in preserving confidentiality of medical staff meetings, because such confidentiality promotes free flow of ideas and advice).

48. *See Bredice*, 50 F.R.D. at 250 (recognizing chilling effect of opening confidential evaluations of clinical practices to discovery process); S. Kay McNab, Note, *Criticizing the Self-Criticism Privilege*, 1987 U. ILL. L. REV. 675, 684-85 (1987) (“In deciding that materials are not discoverable, courts must believe that revealing such information will injure open communications within the institutional setting.”); *The Privilege of Self-Critical Analysis*, *supra* note 46, at 1086.

confidential.⁴⁹ Although the Supreme Court of the United States has never expressly recognized the existence of a privilege of self-critical analysis, a federal district court in Florida applied the privilege in a groundwater contamination action brought under CERCLA and various Florida state laws.⁵⁰ In *Reichhold Chemicals, Inc. v. Textron, Inc.*,⁵¹ the district court recognized a qualified privilege of self-critical analysis, but only for “retrospective analyses of past conduct, practices, and occurrences, and the resulting environmental consequences.”⁵²

4. *Limitations of Common Law Privileges*

The degree of protection available to self-auditing entities under the common law is extremely limited. The attorney-client, attorney work product, and self-critical analysis privileges, if available at all in particular jurisdictions, are applied in an ad hoc fashion by courts.⁵³ Moreover, the many technical requirements governing the application of each doctrine also substantially limit the degree of protection afforded to regulated entities under the common law.

To protect environmental self-audit materials from discovery under the attorney-client privilege, a regulated entity’s corporate counsel would likely have to manage its entire self-auditing process.⁵⁴ Also, according to *Upjohn*, the attorney-client privilege does not protect reports and documents prepared as a normal part of a business

49. See *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423, 426 (9th Cir. 1992); James F. Flanagan, *Rejecting a General Privilege for Self-Critical Analyses*, 51 GEO. WASH. L. REV. 551, 574-76 (1983) (citing 8 JOHN HENRY WIGMORE, *Evidence* § 2285 (McNaughton rev. 1961)). At least one court has proposed a balancing test to determine whether the privilege applies. The factors balanced included: (1) the extent to which the information was available from other sources; (2) the degree of harm caused the opposing party by the lack of information; and (3) prejudice to a government investigation caused by the privilege. See *Harding v. Dana Transport, Inc.*, 914 F. Supp. 1084, 1100 (D.N.J. 1996) (citing *Todd v. South Jersey Hosp. Sys.*, 152 F.R.D. 676, 683 (D.N.J. 1993)).

50. See *Reichhold Chems., Inc. v. Textron, Inc.*, 157 F.R.D. 522, 527 (N.D. Fla. 1994).

51. 157 F.R.D. 522 (N.D. Fla. 1994).

52. *Id.* (emphasis added). The *Reichhold* court’s decision to reject the contradictory holding of *Koppers Co., Inc. v. Aetna Cas. and Sur. Co.*, 847 F. Supp. 360 (W.D. Pa. 1994), *vacated*, 40 F.3d 1240 (3d Cir. 1994) (denying existence of self-critical analysis privilege in environmental audit context), was based primarily on a finding that the public interest in promoting voluntary remediation of industrial pollution outweighed the interest of opposing parties in discovering evidence of liability created by critical self-analysis. See *Reichhold*, 157 F.R.D. at 526-27.

53. See *Hawks*, *supra* note 3, at 240.

54. See *id.* at 242.

practice.⁵⁵ Thus, regulated entities pursuing environmental compliance through regularly conducted self-auditing programs risk being judged as performing non-privileged business activities, rather than as obtaining privileged legal advice.⁵⁶

Under the attorney work product doctrine, privilege applies only to information gathered in preparation for present or impending litigation.⁵⁷ Under no circumstances does this privilege protect self-audit materials generated to avoid future litigation,⁵⁸ even though many private companies conduct self-audits primarily to avoid future noncompliance. Furthermore, an opposing litigant can overcome the work product privilege by a substantial showing of need; namely, that the opposing party cannot obtain the same information without “undue hardship.”⁵⁹

The privilege of self-critical analysis perhaps offers self-auditing entities the least protection. The Supreme Court of the United States

55. See *Upjohn Co. v. United States*, 449 U.S. 383, 394 (1981) (extending attorney-client privilege to communications conducted to provide legal advice); *United States v. Lockheed Martin Corp.*, 995 F. Supp. 1460, 1464 (M.D. Fla. 1998) (“[A] client claiming the privilege must establish the communication occurred in the rendition of legal (not business) advice . . .”).

56. See *Hawks*, *supra* note 3, at 242.

57. See *Binks Mfg. Co. v. National Presto Indus., Inc.*, 709 F.2d 1109, 1119 (7th Cir. 1983) (holding that memorandum, written by company’s associate resident counsel, was not protected by work product privilege, because litigation was not threatened); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 865 (D.C. Cir. 1980) (holding that party asserting work product privilege must prove that “at the very least some articulable claim, likely to lead to litigation, [has] arisen.”); *Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb Inc.*, 125 F.R.D. 51, 54 (S.D.N.Y. 1989) (refusing to protect from discovery, information gathered from interviews that were conducted in course of ordinary corporate duties and not in anticipation of any litigation). The test has also been articulated as follows: “whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.” See 8 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2024 (2d ed. 1994).

58. See, e.g., *In re Grand Jury Investigation*, 412 F. Supp. 943, 948 (E.D. Pa. 1976) (“Advising a client about matters which may or even likely will ultimately come to litigation does not satisfy the ‘in anticipation of’ standard.”); see also *FED. R. CIV. P.* 26(b)(3) advisory committee’s note (“Materials assembled in the ordinary course of business or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity provided by this subdivision.”); *Hawks*, *supra* note 3, at 244.

59. See *supra* note 37; see also *Arizona ex rel. Corbin v. Ybarra*, 777 P.2d 686, 692 (Ariz. 1989); *Sherman L. Cohn, The Work-Product Doctrine: Protection, Not Privilege*, 71 *GEO. L.J.* 917, 930 (1983) (describing circumstances that would permit discovery of work product, including: witness cannot be found, has died, or is otherwise unavailable; or witness is antagonistic, will not cooperate, or claims memory loss).

does not recognize a privilege of self-critical analysis,⁶⁰ and as a result, many lower courts, perceiving the Court's silence as disfavor for the privilege, have been hesitant to apply the privilege at all.⁶¹ Under all circumstances, however, federal courts at all levels agree that the privilege does not apply where the documents in question have been sought by a government agency.⁶² Furthermore, even particular courts that recognize the existence of a self-critical analysis privilege refuse to apply the privilege to self-audit materials in cases where disclosure would not decrease the flow of audit-related information,⁶³ where public policy would favor disclosure,⁶⁴ or where an opposing party can make a substantial showing of need.⁶⁵

In addition, an environmental self-audit may be judged part of a "voluntary routine safety review," an activity which the Ninth Circuit

60. See Koven, *supra* note 2, at 1176. The Supreme Court has not only refused to recognize a self-critical analysis privilege, it has expressed disapproval over the creation of wholesale evidentiary privileges under Federal Rule of Evidence 501. See *University of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1990).

61. See, e.g., *Etienne v. Mitre Corp.*, 146 F.R.D. 145, 148-49 (E.D. Va. 1993) (noting that application of privilege of self-critical analysis would contravene important public right to discover material information); *Combined Communications Corp. v. Public Serv. Co.*, 865 P.2d 893, 898 (Colo. Ct. App. 1993) (noting that Colorado does not recognize privilege for self-critical analysis); 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *FEDERAL EVIDENCE* § 219, at 502 (2d ed. 1994) (claiming that most courts have either denied existence of privilege of self-critical analysis or refused to recognize privilege based on facts before them).

62. See *Mazza*, *supra* note 2, at 106; *University of Pennsylvania*, 493 U.S. at 189 (holding that Congress provided broad subpoena powers to government agencies that will not be circumvented by new common law privilege); *Federal Trade Comm'n v. TRW, Inc.*, 628 F.2d 207, 211 (D.C. Cir. 1980) (holding that any self-evaluative privilege does not apply to documents sought by FTC through valid subpoena); *United States v. Dexter*, 132 F.R.D. 8, 9-10 (D. Conn. 1990) (refusing to privilege self-evaluative documents in action commenced by EPA to enforce Clean Water Act).

63. See, e.g., *In re Grand Jury Proceedings*, 861 F. Supp. 386, 390 (D. Md. 1994) (finding that incentives, such as avoidance of future liability, still exist for self-analysis despite disclosure); *Louisiana Env'tl. Action Network Inc. v. Evans Indus., Inc.*, 43 E.R.C. 1190, 1192 (E.D. La. 1996) (stating that there are enough incentives currently in place (possibility of criminal sentences, substantial civil penalties, debarment from entering into government contracts, and public disapproval) for companies to audit themselves; therefore, possibility of disclosure of these audits in court ordered discovery would not deter such self-evaluations).

64. See, e.g., *Dexter*, 132 F.R.D. at 9 (noting significant public policy of prosecuting entities that dump hazardous materials into navigable waterways); *Ohio ex rel. Celebrezze v. CECOS Int'l, Inc.*, 583 N.E.2d 1118, 1120 (Ohio Ct. App. 1983) (refusing to extend privilege of self-critical analysis to self-audits conducted by operators of hazardous waste facilities due to importance of protecting public and prosecuting violators); *CPC Int'l, Inc. v. Hartford Accident and Ins. Co.*, 262 N.J. Super. 191, 202 (Super. Ct. Law Div. 1992) (emphasizing specific public interest in preventing and remediating environmental pollution).

65. See *supra* note 37.

in *Dowling v. American Hawaii Cruises, Inc.*⁶⁶ specifically held to be undeserving of privilege protection.⁶⁷ In that case, defendant Hawaii American Cruises was compelled to disclose minutes of a particular vessel's safety committee meetings for a two-year period preceding plaintiff's slip-and-fall accident on the vessel's deck.⁶⁸

B. State Environmental Self-Audit Protection Legislation

Acknowledging the lack of protection afforded by the common law, many state legislatures have enacted environmental self-audit privilege or immunity statutes. While the federal government has primary authority over environmental regulation, major federal environmental legislation, most notably Title V of the Clean Air Act,⁶⁹ contain provisions that allow the EPA to place portions of environmental protection programs under state control ("delegated federal programs").⁷⁰ Under this system of delegation, the EPA develops the requirements and standards mandated by the statute, assists in state assumption of the responsibility for the program, and attempts to maintain uniform national policies relating to environmental protection.⁷¹ In addition, the federal government provides substantial fund-

66. 971 F.2d 423 (9th Cir. 1992).

67. *See id.* at 426.

68. *See id.* The court justified its failure to apply a self-critical analysis privilege to the minutes of the Safety Committee meetings as follows:

First, such reviews will rarely, if ever, be curtailed simply because they may be subject to discovery. . . .

Second, we do not expect that such reviews are always performed with the expectation that they will be kept confidential. . . .

Finally, the fairness rationale offered to justify application of the privilege to documents that a party has been legally required to prepare is inapplicable to voluntarily conducted safety reviews.

Id.

69. 42 U.S.C. §§ 7401-7671(q) (1994). Other environmental programs that contain state delegation provisions include the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6921-6992(k) (1994), the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1994) [hereinafter Clean Water Act], and the Safe Drinking Water Act, 42 U.S.C. § 300f-300j (1994). *See* Holdsworth, *supra* note 6, at 227.

70. *See* Hawks, *supra* note 3, at 265 (citing 33 U.S.C. § 1342(b) and 42 U.S.C. §§ 6921-6931). The benefits of this arrangement are enjoyed by both the EPA and participating states: The EPA is able to delegate a significant portion of the responsibility of operating every federal environmental program in all fifty states, thereby employing state resources to achieve federal policy goals. *See id.* Likewise, participating states achieve greater flexibility in responding to their individualized environmental needs and avoid the intrusive presence of the federal government. *See id.* at 265-66.

71. *See, e.g.*, 40 C.F.R. § 71.10 (1998).

ing to participating states to further facilitate the operation of delegated programs.⁷²

Nevertheless, as a condition of accepting responsibility for implementing these federal programs, states must establish regulatory regimes that are approved by the EPA as being capable of enforcing applicable federal environmental mandates.⁷³ Furthermore, EPA regulations expressly provide that the agency may withdraw its approval of any state program if the state does not respond to known environmental violations or does not seek adequate enforcement penalties.⁷⁴ State environmental self-audit protection statutes provide regulated entities privilege or immunity protection in state-initiated legal actions brought under state law or a delegated federal program.

1. *Description of State Self-Audit Privilege and Immunity Laws*

In 1993, Oregon became the first state to adopt legislation protecting environmental self-audit materials from discovery in legal actions brought against self-auditing entities.⁷⁵ Since that time, other states have followed Oregon's example,⁷⁶ and two principal types of

72. See Hawks, *supra* note 3, at 265.

73. See *States' Alternative Environmental Compliance Strategies: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Commerce*, 105th Cong. 7 (1998) (statement of Michael Gryszkowiec, Director of Planning and Reporting, United States General Accounting Office) ("Most major environmental statutes allow EPA to delegate the responsibility for key programs to qualified States. For the States to obtain such responsibility, the statutes generally require them to have adequate authority to inspect, monitor and enforce the programs.") [hereinafter Gryszkowiec Statement].

74. See *id.* at 10.

75. See OR. REV. STAT. § 468.963 (1997).

76. As of February 1999, twenty-three states have enacted some form of environmental audit privilege or immunity legislation. See ALASKA STAT. § 09.25.450-.490 (Michie 1998); ARK. CODE ANN. § 8-1-301 to -312 (Michie Supp. 1997); COLO. REV. STAT. ANN. §§ 13-25-126.5, 25-1-114.5 (West 1998); 13 ILL. COMP. STAT. ANN. 5/52.2 (West 1998); IND. CODE ANN. §§ 13-11-2-68, -69, 13-28-4-1 to -10 (West 1998); KAN. STAT. ANN. § 60-3332 to -3339 (Supp. 1998); KY. REV. STAT. ANN. § 224.01-.040 (Michie Supp. 1998); MICH. COMP. LAWS ANN. § 324.14801-.14810 (West 1999); MINN. STAT. ANN. § 114C.20-.28 (West 1997); MISS. CODE ANN. §§ 49-2-2, -71 (1998); MONT. CODE ANN. § 75-1-1201 to -1206 (1997); NEB. REV. STAT. § 25-21,254 to -21,264 (Supp. 1998); NEV. REV. STAT. § 445C.010-.120 (1997); N.H. REV. STAT. ANN. § 147-E:1 to -E:9 (Supp. 1996); OHIO REV. CODE ANN. § 3745.70-.74 (West 1998 and Supp. 1999); OR. REV. STAT. § 468.963 (1997); R.I. GEN. LAWS § 42-17.8-1 to -8 (Supp. 1998); S.C. CODE ANN. § 48-57-10 to -110 (Law. Co-op. Supp. 1998); S.D. CODIFIED LAWS § 1-40-33 to -37 (Michie Supp. 1999); TEX. GOV'T CODE ANN. § 552.125 (West Supp. 1999); TEX. REV. CIV. STAT. ANN. art. 4447cc (West Supp. 1999); UTAH CODE ANN. § 19-7-101 to -109 (Supp. 1998); VA. CODE ANN. §§ 10.1-1198, -1199 (Michie Supp. 1998); WYO. STAT. ANN. §§ 35-11-1105, -1106 (Michie Supp. 1999). Idaho also passed a self-audit protection statute (bringing the number of enacted statutes up to twenty-four); however, the statute was automati-

protective statutes have emerged. The first establishes a qualified evidentiary privilege that prevents discovery of certain records and reports generated during the performance of voluntary environmental self-audits (“privilege-only statutes”).⁷⁷ However, virtually every privilege-only statute circumscribes the scope of protection by limiting the materials to which the privilege applies,⁷⁸ limiting the consequences that attach to a determination that materials are privileged,⁷⁹ and restricting the proceedings in which the evidentiary privilege may be asserted.⁸⁰

cally repealed pursuant to a sunset provision on December 31, 1997. *See* IDAHO CODE § 9-801 to -809 (1998).

A November 10, 1997 memorandum issued by the EPA Office of Enforcement and Compliance Assurance identified forty-eight states that had or were considering environmental self-audit privilege or immunity laws, or had adopted policies on the matter. *See* Alec Zacoroli, *13 State Audit Laws Have Problems, EPA Says in Outlining Policy for Regions*, 28 Env’t Rep. (BNA) 1421, 1421 (Nov. 21, 1997). For a list of environmental self-audit protection legislation proposed in 1997, see Holdsworth, *supra* note 6, at 217-18 n.27.

77. As of February 1999, six states had enacted privilege-only statutes. *See* ARK. CODE ANN. § 8-1-301 to -312; 13 ILL. COMP. STAT. ANN. 5/52.2; IND. CODE ANN. §§ 13-11-2-68 to -69, 13-28-4-1 to -10; MISS. CODE ANN. §§ 49-2-2, -71; OR. REV. STAT. § 468.963; R.I. GEN. LAWS § 42-17.8-1 to -8. Most state legislation establishing a qualified self-audit privilege includes a set of provisions regarding waiver of the privilege. *See, e.g.*, ALASKA STAT. § 09.25.455(a). Generally, waiver applies only to portions of an environmental audit report that are expressly waived. *See, e.g.*, MICH. COMP. LAWS ANN. § 324.14803(1). Perhaps the most common event giving rise to implied waiver is the introduction of an environmental audit report, by a regulated entity, as evidence in a legal proceeding. *See, e.g.*, ARK. CODE ANN. § 8-1-304(a)(2). Many state self-audit privilege laws also mandate particular circumstances under which disclosure of otherwise privileged self-audit information does not result in the loss of protection. *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 4447cc(6)(b)(1)-(3) (providing for no waiver if disclosure made under terms of confidentiality agreement between regulated entity and partner or potential partner, transferee or potential transferee, lender or potential lender, governmental official, or person or entity engaged in business of insuring, underwriting, or indemnifying regulated entity).

78. Generally, state self-audit protection statutes grant a qualified evidentiary privilege to information that is acquired as a result of a self-audit and is included in an environmental audit report. *See, e.g.*, 13 ILL. COMP. STAT. ANN. 5/52.2.

79. State self-audit protection statutes typically provide that one or more of the following consequences attaches to materials deemed privileged:

- (1) the materials are not admissible in evidence;
- (2) the materials are not subject to discovery (or are exempt or protected from disclosure);
- (3) persons associated with preparation of the materials cannot be compelled to testify concerning, or otherwise reveal, privileged information;
- (4) the holder of the privilege can prevent any other person from disclosing the privileged material; and/or
- (5) the holder can recover damages for the unauthorized disclosure of privileged material.

See John-Mark Stensvaag, *The Fine Print of State Environmental Audit Privileges*, 16 UCLA J. ENVTL. L. & POL’Y 69, 146 (1997).

80. Many states extend the privilege only to civil and administrative proceedings, implicitly denying its application to criminal proceedings. *See, e.g.*, MICH. COMP.

The second type of legislation, by far the most common, provides not only an evidentiary privilege of the kind contained in privilege-only statutes, but also a grant of limited immunity to regulated entities for certain violations discovered through self-auditing (“immunity statutes”).⁸¹ To receive immunity, regulated entities must voluntarily disclose all discovered environmental violations to the appropriate regulatory agency, demonstrate that such disclosures arose out of an environmental self-audit, and comply with certain statutory preconditions, such as time limits for disclosing and remedying discovered environmental violations.⁸²

Notwithstanding basic differences in the nature of protection offered by these two types of statutes, virtually all state environmental self-audit protection laws share many of the same statutory elements. In particular, each state privilege-only or immunity statute generally includes: a section detailing the procedural means by which claims of self-audit protection are adjudicated, a section that defines all relevant terms employed in the statute, and a collection of provisions that limit the availability of the self-audit privilege or immunity.

LAWYERS ANN. § 324.14802(4). Four states—Colorado, South Carolina, Utah, and Virginia—describe in much more vague terms the proceedings in which an audit privilege may be asserted. *See, e.g.*, S.C. CODE ANN. § 48-57-30(A) (“An environmental audit report is privileged . . . in a legal action . . .”). For further discussion of the proceedings in which the privilege may be asserted, see Stensvaag, *supra* note 79, at 145-54.

81. As of February 1999, sixteen states have enacted immunity statutes. *See* ALASKA STAT. § 09.25.450-.490; COLO. REV. STAT. ANN. §§ 13-25-126.5, 25-1-114.5; KAN. STAT. ANN. § 60-3331 to -3339; KY. REV. STAT. ANN. § 224.01-.040; MICH. COMP. LAWS ANN. § 324.14801-.14810; MINN. STAT. ANN. § 114C.20-.31; MONT. CODE ANN. § 75-1-1201 to -1206; NEB. REV. STAT. § 25-21,254 to -21,264; NEV. REV. STAT. § 445C.010-.120; N.H. REV. STAT. ANN. § 147-E:1 to -E:9; OHIO REV. CODE ANN. § 3745.70-.74; S.C. CODE ANN. § 48-57-10 to -110; TEX. GOV'T CODE ANN. § 552.125, TEX. REV. CIV. STAT. ANN. art. 4447cc; UTAH CODE ANN. § 19-7-101 to -109; VA. CODE ANN. §§ 10.1-1198, -1199; WYO. STAT. ANN. §§ 35-11-1105, -1106. South Dakota's environmental self-audit protection statute provides only limited voluntary disclosure immunity (no evidentiary self-audit privilege is available). *See* S.D. CODIFIED LAWS § 1-40-33 to -37. A handful of states have immunity provisions that apply to civil, criminal, and administrative penalties. *See, e.g.*, KAN. STAT. ANN. § 60-3338(a). Several states extend their immunity protections only to civil and administrative sanctions. *See, e.g.*, KY. REV. STAT. ANN. § 224.01-040(10). South Dakota's self-audit protection statute stands alone in providing that the state “may not pursue civil penalties or criminal prosecution.” S.D. CODIFIED LAWS § 1-40-34. Under Wyoming's immunity provision, the state regulatory agency responsible for environmental protection is not permitted to seek injunctive relief for violations voluntarily disclosed in accordance with the statute. *See* WYO. STAT. ANN. § 35-11-1106(a).

82. *See, e.g.*, KY. REV. STAT. ANN. §224.01-040(5)(b) (Michie Supp. 1998).

Every self-audit protection law provides that a court or administrative tribunal determine whether the statutory privilege or immunity applies to particular self-audit materials or communications.⁸³ Generally, a court makes such a determination following an *in camera* review of all relevant evidence presented in favor of, or in opposition to, the invocation of self-audit protection.⁸⁴ All oral and written evidence introduced at the hearing is held in confidence by all participants, and any transcript of the hearing is sealed and not considered a public record.⁸⁵ Often, but not always, such review is conducted during the course of an ongoing proceeding.⁸⁶ While most state self-audit protection laws contain express directives regarding burdens of proof at play during an *in camera* review,⁸⁷ states differ considerably as to whether or when parties opposing a claim of self-audit protection may obtain and review allegedly privileged materials to prepare for an *in camera* hearing.⁸⁸

State self-audit privilege and immunity statutes also generally include a comprehensive definition section, which delineates the precise

83. *See, e.g.*, OHIO REV. CODE ANN. § 3745.71(C)(3) (West 1998).

84. An “*in camera*” hearing is a hearing or review that takes place in a courtroom, hearing room, or chambers to which the general public is not admitted. *See* Stensvaag, *supra* note 79, at 169-70. Of the twenty-three states with environmental self-audit protection legislation, eighteen states specifically mandate *in camera* review prior to a determination as to the applicability of self-audit protections. *See, e.g.*, COLO. REV. STAT. ANN. § 13-25-126.5(3)(b) (West 1998). A great majority of state statutes are silent with respect to which party must petition for *in camera* review; only Michigan, New Hampshire, and Utah mandate explicitly which party may (or must) file such a petition. *See* MICH. COMP. LAWS ANN. § 324.14804 (West 1999); N.H. REV. STAT. ANN. § 147-E:6(I) (Supp. 1996); UTAH CODE ANN. § 19-7-106(1) (Supp. 1998).

85. *See* Stensvaag, *supra* note 79, at 169 (quoting COLO. REV. STAT. ANN. § 13-25-126.5(2)(d) (West 1997)).

86. *See id.* at 167.

87. Generally, states allocate burdens concerning the applicability of self-audit protection, the prompt initiation of reasonable efforts to achieve compliance, and the existence of particular statutory exceptions to protection. *See, e.g.*, 13 ILL. COMP. STAT. ANN. 5/52.2(e)(5) (West 1998) (holding that party asserting privilege has both burden of producing evidence sufficient to make out *prima facie* case of privilege and burden of persuasion with regard to availability of privilege).

88. *Compare* UTAH CODE ANN. § 19-7-106(2)(b) (mandating that “the privileged portions of the environmental audit report may not be disclosed”) *with* COLO. REV. STAT. ANN. § 13-25-126.5 (5)(a) (providing that court or administrative tribunal may allow party opposing claim of privilege “limited access to the environmental audit report for the purposes of an *in camera* review only”). The statutes of a number of states establish special procedures whereby law enforcement officials, outside of an ongoing proceeding, may obtain documents that are claimed to be privileged. *See, e.g.*, KY. REV. STAT. ANN. tit. 18, § 224.01-.040(5)(a) (Michie Supp. 1998).

scope of self-audit protections available to self-auditing entities.⁸⁹ The statutory definition of “voluntary environmental audit” is used by states primarily to limit the modes of self-evaluation that may give rise to an evidentiary privilege or limited immunity.⁹⁰ Several states also use this provision to limit the total number of days regulated entities have to conduct environmental self-audits.⁹¹ States utilize the definition of “environmental audit report” to dictate the particular communications and documents eligible for environmental self-audit protection.⁹² While state laws vary considerably with regard to the

89. See, e.g., MICH. COMP. LAWS ANN. § 324.14801 (West 1999). Occasionally, courts bar completely the party seeking disclosure from reviewing self-audit materials during an in camera review. See Stensvaag, *supra* note 79, at 169-70.

Other statutory provisions that limit the scope of environmental audit protection are as wide-ranging as the laws themselves. The statutes of a few states establish a termination date (referred to as a “sunset provision”) for their respective self-audit protection laws. See, e.g., N.H. REV. STAT. ANN. § 147-E (“The repeal of the act shall not affect the validity of any privilege which attached to any environmental audit report completed before June 30, 2002 . . .”). Wyoming’s audit protection statute provides that the state environmental regulatory agency shall not waive any penalty if doing so would violate any federal rule or regulation required to maintain state primacy over a federally delegated environmental law. See WYO. STAT. ANN. § 35-11-1106(a)(iv) (Michie Supp. 1999). Several state laws also include provisions that expressly preserve the state environmental protection agency’s authority to respond to environmental emergencies. See, e.g., ALASKA STAT. § 09.25.475(i) (Michie 1998) (preserving state regulatory agency’s authority to issue emergency orders, to seek injunctive relief, and to obtain facts independently, to conduct necessary inspections, or to take appropriate action regarding implementation and enforcement of applicable environmental laws). Yet other states explicitly require their respective state regulatory agencies to mitigate any penalties for environmental violations in cases where regulated entities have demonstrated good-faith efforts concerning voluntarily disclosure and prompt remediation. See, e.g., NEV. REV. STAT. § 445C.070(1) (1997).

90. A number of states define “environmental self-audit” in extremely precise terms. See, e.g., ALASKA STAT. § 09.25.490(a)(4)(A)-(B) (definition is almost entire page in length). Other states define self-audits in much broader terms. See, e.g., TEX. REV. CIV. STAT. ANN. art. 4447cc(3)(3) (West Supp. 1999) (defining self-audit as “systematic voluntary evaluation, review, or assessment of compliance with environmental or health and safety laws or any permit issued under those laws”).

91. A great many states—twelve as of February 1999—do not specify any maximum length of time whatsoever for completion of environmental self-audits. See, e.g., ARK. CODE ANN. § 8-1-301 to -312 (Michie Supp. 1997). Of the states that limit the length of self-audits, Colorado and Kansas each require merely that the audit be completed “within a reasonable period of time.” See COLO. REV. STAT. ANN. § 13-25-126.5(2)(e) (West 1998); KAN. STAT. ANN. § 60-3332(a) (Supp. 1998). The remaining states specify the number of days a self-audit may last. See, e.g., MICH. COMP. LAWS ANN. § 324.14801(a) (West 1998) (specifying six months unless written extension request approved by state environmental protection agency). While state self-audit privilege and immunity statutes differ significantly with regard to time limits, most laws expressly provide that self-audit protections do not extend to uninterrupted or continuous self-audits. See, e.g., COLO. REV. STAT. ANN. § 13-25-126.5(2)(e).

92. See, e.g., KY. REV. STAT. ANN. § 224.01-040(1)(b).

specific materials that may be protected, self-audit reports typically include field notes, records of observations, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, computer-generated or electronically recorded information, maps, charts, graphs and surveys.⁹³

State privilege and immunity laws also include several provisions that limit the availability of their respective self-audit protections. Several states require regulated entities to satisfy particular reporting and remediation duties as conditions precedent to claiming self-audit protection. Although generalization as to these provisions is virtually impossible, the procedural requirements contained in the Rhode Island Environmental Compliance Incentive Act (ECIA) are illustrative of the types of obligations regulated entities must fulfill to receive a state statutory self-audit privilege or immunity.⁹⁴

Section 42-17.8-5 of the ECIA requires that “the regulated entity shall provide the [state environmental protection] department with not less than three (3) business days advance written notice of the anticipated start date of a proposed audit.”⁹⁵ The ECIA also provides that to qualify for self-audit protection, a regulated entity must: (1) correct all discovered violations within sixty days from the date the violations were disclosed to the appropriate regulatory agency; (2) certify in writing that the violations were corrected; and (3) take appropriate measures to remedy any environmental harm or threat to public health or safety resulting from the violation.⁹⁶ The ECIA also conditions the grant of self-audit protection on the voluntary written disclosure of all actual or potential violations discovered through self-auditing within a specified number of days of discovery.⁹⁷

Furthermore, virtually every state protection law includes statutory exceptions to the general grant of a self-audit privilege or immunity.⁹⁸ First, several states deny self-audit protection based on the nature of certain materials for which protection is sought. For instance, the protections granted by the New Hampshire self-audit pro-

93. See, e.g., KAN. STAT. ANN. § 60-3332(b). Several self-audit protection statutes also require that each document in an environmental audit report be: (1) labeled with “AUDIT REPORT: PRIVILEGED DOCUMENT,” or comparable language, see, e.g., OHIO REV. CODE ANN. § 3745.71(C)(12)(a) (West Supp. 1999); and (2) be collected or developed for the purpose and in the course of an environmental self-audit. See, e.g., KAN. STAT. ANN. § 60-3332(b).

94. See R.I. GEN. LAWS § 42-17.8-1 to -8 (Supp. 1998).

95. *Id.* § 42-17.8-5(1).

96. See *id.* § 42-17.8-7(a).

97. See *id.* § 42-17.8-6(1).

98. See, e.g., KAN. STAT. ANN. § 60-3336 (Supp. 1998).

tection statute do not extend to information obtained by observation, sampling, or monitoring, by a regulatory agency, or through an independent source not involved in the self-audit.⁹⁹ Second, particular actions taken by a regulated entity before, during, or after an environmental self-audit may result in the forfeiture of all self-audit protections. Perhaps the most common example of such an exception is the denial of the privilege in cases where self-audit information is collected, developed, made, or maintained by a regulated entity in bad faith or for a fraudulent purpose.¹⁰⁰

99. See N.H. REV. STAT. ANN. § 147-E:5(II) (Supp. 1996). Protections established by state self-audit protection legislation may also not apply to: (1) information required by a government agency to be collected, developed, maintained, or reported, *see, e.g.*, NEB. REV. STAT. § 25-21,258(1) (Supp. 1998); (2) information that is independent of a voluntary environmental audit, whether prepared or existing before, during, or after the audit, *see, e.g.*, WYO. STAT. ANN. § 35-11-1105(d)(iii) (Michie Supp. 1999); (3) information collected, developed, or maintained in the course of a regularly conducted business activity or regular practice, other than a voluntary environmental audit, *see, e.g.*, ALASKA STAT. § 09.25.460(a)(4) (Michie 1998); or (4) information collected, developed, or maintained pursuant to an agreement or order between the regulated entity and a state regulatory agency regarding a compliance plan or strategy, *see id.* § 09.25.460(a)(6).

100. *See, e.g.*, COLO. REV. STAT. ANN. § 13-25-126.5(3)(d) (West 1998). In addition, a regulated entity may not be granted self-audit protections if: (1) an environmental self-audit shows evidence of noncompliance with federal environmental laws and the regulated entity fails to promptly initiate reasonable efforts to achieve compliance, pursue compliance with reasonable diligence, or achieve compliance within a statutorily prescribed number of days of discovery or disclosure, *see, e.g.*, OHIO REV. CODE ANN. § 3745.71(C)(8)(a) (West Supp. 1999); (2) the environmental audit report was prepared to avoid disclosure of information in an investigative, administrative, or judicial proceeding that was underway, that was imminent, or for which the regulated entity had been provided written notification that an investigation into a specific violation had been initiated, *see, e.g.*, COLO. REV. STAT. ANN. § 13-25-126.5(3)(d); (3) the voluntary environmental audit reveals a violation that resulted in serious, actual harm or created an imminent and substantial endangerment to human health, public safety, or the environment, *see, e.g.*, VA. CODE ANN. § 10.1-1198(B) (Michie Supp. 1998); (4) the violation was committed intentionally, knowingly, or as a result of gross negligence, *see, e.g.*, MONT. CODE ANN. §§ 75-1-1206(1)(a), (b) (1997); (5) the regulated entity had a management pattern or practice that had the effect of condoning or concealing violations of federal environmental laws, *see, e.g.*, R.I. GEN. LAWS § 42-17.8-4(3)(c) (Supp. 1998); (6) information was knowingly misrepresented or misstated, or knowingly deleted or withheld, from an environmental audit report, whether or not included in a subsequent environmental audit report, *see, e.g.*, S.C. CODE ANN. § 48-57-30(A)(6) (Law. Co-op. Supp. 1998); (7) the regulated entity had within a specified time period preceding the violation, committed, at the same facility or associated facilities, a pattern of violations that were the same as or closely related to the violation for which protection was sought, or had not attempted to bring the facility into compliance so as to constitute a pattern of disregard for federal environmental laws, *see, e.g.*, ALASKA STAT. § 09.25.480(a)(1)(B); (8) a regulated entity conducted a previous voluntary environmental audit that disclosed a violation and the regulated entity intentionally failed to voluntarily disclose such violations, *see, e.g.*, NEV. REV. STAT. § 445c.090(6); (9) the regulated entity failed to cooperate fully with a governmental

2. *Limitations of State Self-Audit Privilege and Immunity Laws*

Similar to the common law privileges, state statutory self-audit protections are subject to numerous limitations. First, the degree of self-audit protection bestowed upon regulated entities by particular states varies greatly. Each state's grant of a self-audit privilege or immunity extends only as far as its jurisdictional reach; therefore, self-auditing entities may be completely protected from legal action in one state, while left wholly unprotected in another state. Consequently, regulated entities that conduct business in multiple states are virtually precluded from implementing cost-effective, enterprisewide self-auditing programs.

Second, state self-audit protections do not extend to civil, criminal, or administrative actions initiated by the federal government.¹⁰¹ An increasing proportion of these federal actions are initiated against regulated entities in cases where state authorities would normally possess lead enforcement authority.¹⁰² Such federal enforcement actions, referred to as "overfiling," are often targeted against self-auditing entities that seek state statutory self-audit protection.¹⁰³ From October 1995 through September 1996, the EPA overfiled in only two cases in the entire United States.¹⁰⁴ In recent years, however, EPA overfilings have increased dramatically in states with environmental self-audit protection statutes. For example, in the first four months of 1997, the EPA overfiled in three cases in Colorado alone and threatened to overfile against Colorado companies in at least ten more cases.¹⁰⁵ By bringing a federal enforcement action based on information acquired as a result of an environmental self-audit, the EPA or DOJ circum-

agency in maintaining environmental compliance, *see, e.g.*, R.I. GEN. LAWS § 42-17.8-4(6).

101. *See* Riley Statement, *supra* note 9, at 63-64.

102. *See id.* (stating that EPA initiated enforcement actions against five Texas companies that had voluntarily disclosed environmental violations to Texas Natural Resource Conservation Commission in reliance on Texas Audit Act); *Environmental Audits: Hearing Before the Senate Comm. on Env't and Pub. Works*, 105th Cong. 89-90 (1997) (statement of Patricia S. Bangert, Director of Legal Policy, Colorado Attorney General's Office) (claiming that there is ample evidence that EPA will overfile in states with privileges and immunities statutes) [hereinafter 1997 Bangert Statement]; *see also* Hawks, *supra* note 3, at 271.

103. *See* Riley Statement, *supra* note 9, at 63-64; 1997 Bangert Statement, *supra* note 102, at 89-90.

104. *See* 1997 Bangert Statement, *supra* note 102, at 90.

105. *See id.* Bangert compared the drastic difference in fines sought by the EPA and its state counterpart against violators: against Denver Radiation, the EPA sought \$466,000 in fines, whereas the state sought only \$160,000; against Conoco, the EPA sought \$666,771, whereas the state sought \$33,000; and against Platte Chemical, the EPA sought \$1,200,000 while the state sought \$400,000. *See id.*

vents any evidentiary privilege or immunity protection available to a regulated entity under state law.¹⁰⁶ Moreover, even if an enforcement action is not actually brought by federal authorities, mere threats of overfiling may dissuade regulated entities from conducting environmental self-audits or from voluntarily disclosing discovered violations in accordance with state privilege and immunity laws.¹⁰⁷ As Patricia Bangert, an official in the Colorado Attorney General's Office, testified before a Congressional subcommittee in 1997:

Nothing can be more intimidating to companies wanting to use the audit [protection] law than the EPA actions I have personally spoken to several attorneys representing Colorado companies and they have indicated that they would not advise their clients to utilize the audit law because of the threat of federal action.¹⁰⁸

The federal government also has attempted to curtail the effect of state self-audit privilege and immunity laws by questioning particular states' competence to enforce delegated federal programs. Over the past several years, the EPA has threatened to deny final delegation approval to several states due to concerns over their respective self-audit protection laws.¹⁰⁹ The genesis of such a policy was a memo-

106. See Hawks, *supra* note 3, at 271.

107. See 1997 Bangert Statement, *supra* note 102, at 89-90.

108. *Id.* at 90.

109. A November 10, 1997 memorandum issued by the EPA's Office of Enforcement and Compliance Assurance identified thirteen states—Alaska, Arkansas, Colorado, Idaho, Indiana, Illinois, Kentucky, New Hampshire, Nevada, Oregon, South Carolina, Virginia, and Wyoming—with delegation issues arising from their respective self-audit privilege and immunity laws. See Zacoroli, *supra* note 76, at 1421. The EPA has also threatened to deny final delegation approval to the states of Texas, see *Texas: Audit Law Changes Clear Way for State to Run Federal Enforcement Programs*, 28 Env't Rep. (BNA) 388, 388 (June 20, 1997); Michigan, see *Michigan: Narrower Audit Law Would Clear Way for Final Delegation Approval, EPA Says*, 28 Env't Rep. (BNA) 484, 484-85 (July 11, 1997); Montana, see *Montana Enacts Audit Law After EPA Consultation*, 28 Env't Rep. (BNA) 93, 93 (May 16, 1997); Ohio, see *Ohio: Groups Opposed to Audit Privilege Law Want State Enforcement Power Revoked*, 27 Env't Rep. (BNA) 2047, 2047-48 (Feb. 7, 1997); Utah, see *Utah: Governor Signs Legislation to Amend State's Environmental Audit Privilege Law*, 27 Env't Rep. (BNA) 2358, 2358 (Apr. 4, 1997); South Dakota, see *State Privilege-Immunity Laws for Audits Could Hurt Program Delegation, Official Says*, [Current Developments] 26 Env't Rep. (BNA) 2253, 2253 (Mar. 29, 1996); Kansas, see *id.*; and Minnesota, see *id.* For a detailed account of EPA delegation approval difficulties in Texas, see Riley Statement, *supra* note 93, at 62-64. Under the Clean Air Act, the EPA generally consults with states upon identification of delegation issues and allows them to correct problems. See Hawks, *supra* note 3, at 266. Pursuant to the Clean Air Act § 502(g), the EPA will grant interim approval to those states with environmental self-audit protection legislation, but will also identify specific provisions that must be changed before final approval will be granted. See *id.*

randum issued by the EPA's Office of Enforcement and Compliance Assurance, which stated, in part:

The EPA has 'consistently opposed blanket amnesties which excuse repeated noncompliance, criminal conduct, or violations from regulators and jeopardize the public's right to know about noncompliance.' . . . '[A] State Title V program should not be approved if State law provides immunity from civil penalties for repeat violations, violations of previous court or administrative orders, violations resulting in serious harm or risk of harm, or violations resulting in substantial economic benefit to the violator.'¹¹⁰

In February 1997, the EPA issued a similar memorandum that set forth factors that regional administrators should consider when determining whether a state's enforcement program satisfies federal delegation program requirements.¹¹¹ Specifically, with regard to state self-audit protection statutes, EPA administrators were instructed to discern each state's ability to: (1) obtain immediate and complete injunctive relief to stop a violation, correct noncompliance, and prevent recurrences; (2) recover civil penalties for significant economic benefit, repeat violations, violations of judicial or administrative orders, serious harm, and activities that may present imminent and substantial endangerment; and (3) obtain criminal sanctions for willful and knowing violations of federal law, as well as violations that result from gross negligence.¹¹² As a direct result of these memoranda, most participating states now refrain from extending any self-audit privilege to criminal activities, and allow public access to voluntarily disclosed information concerning environmental noncompliance.¹¹³

C. Federal Environmental Self-Audit Protection Policies

The EPA and DOJ staunchly oppose recognition of an evidentiary self-audit privilege or voluntary disclosure immunity.¹¹⁴ Never-

110. See Holdsworth, *supra* note 6, at 226 (quoting Memorandum from Steven A. Herman, Assistant Administrator, OECA, to Jackson Fox, Regional Council, Region X 2 (Apr. 5, 1996) (on file with the *Stetson Law Review*)).

111. See Memorandum from Steven A. Herman, Assistant Administrator, OECA, et al., to Regional Administrators, (Feb. 14, 1997), available in <<http://www.arentfox.com/enviro/epa/epamemo.html>> [hereinafter Second Herman Memorandum]; see also Holdsworth, *supra* note 6, at 226-27.

112. See Second Herman Memorandum, *supra* note 111; see also Holdsworth, *supra* note 6, at 226; Hawks, *supra* note 3, at 266-68.

113. See Hawks, *supra* note 3, at 266-68; Holdsworth, *supra* note 6, at 226-27.

114. Such opposition appears not to be wavering even as the number of state self-audit protection laws reaches twenty-three. See EPA Final Policy, *supra* note 6, at 66,710 ("The Agency remains firmly opposed to the establishment of a statutory evidentiary privilege for environmental audits . . ."); DOJ POLICY, *supra* note 17, at 14-15 ("The criteria set forth above are intended only as internal guidance to Department

theless, in response to the apparent public sentiment in favor of environmental self-auditing, both the EPA and DOJ have adopted and implemented policies designed to encourage compliance auditing and candid disclosure of identified violations.¹¹⁵

1. Description of EPA and DOJ Self-Audit Policies

In 1986, the EPA issued its first formal response to clamoring by numerous regulated entities for some form of environmental self-evaluation protection.¹¹⁶ As part of the 1986 policy, the agency announced that it would refrain from “routinely” requesting self-audit materials when investigating possible environmental violations.¹¹⁷ In addition, the EPA stated that it would consider, on a case-by-case basis, a regulated entity’s efforts to discover, remedy, and prevent recurrence of environmental violations when assessing enforcement penalties.¹¹⁸

Almost ten years later, on December 18, 1995, the EPA released a Final Policy Statement to clarify its position on environmental self-auditing (“Final Policy”).¹¹⁹ The Final Policy was the culmination of an “eighteen-month public evaluation of the optimum way to encourage voluntary self-policing while preserving fair and effective enforcement.”¹²⁰ The Final Policy, which extends to the assessment of penalties for violations of federal environmental statutes administered

of Justice attorneys. . . . [The criteria do not] constitute any legal requirement . . . to forego or modify any enforcement action or the use of any evidentiary material.”); *see also* Koven, *supra* note 2, at 1186 (stating that federal agencies have consistently denied existence of self-audit privilege).

115. *See generally* EPA Final Policy, *supra* note 6, at 66,706-12; DOJ POLICY, *supra* note 17, at 1; Mazza, *supra* note 2, at 87-88 (outlining factors used in 1991 DOJ criminal enforcement policy).

116. *See, e.g.*, 1986 EPA Policy, *supra* note 6.

117. *See id.* at 25,007.

118. *See id.*

119. *See, e.g.*, EPA Final Policy, *supra* note 6. The Final Policy explicitly “supercedes any inconsistent provisions in media-specific penalty or enforcement policies and EPA’s 1986 Environmental Auditing Policy Statement.” *Id.* at 66,712.

120. *Id.* at 66,706. In April 1995, the EPA released an “interim policy” and asked interested parties for comments. *See* Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy Statement, 60 Fed. Reg. 16,875 (1995) [hereinafter EPA Interim Policy]. Additionally, the EPA held public meetings to garner reaction to the Interim Policy. *See id.* Based upon the responses received, recommendations from the American Bar Association, and experience gained from the interim policy, the EPA developed its Final Policy Statement. *See* EPA Final Policy, *supra* note 6, at 66,706. The EPA issued a similar policy statement regarding small businesses, defined as those with 100 or fewer employees, on June 3, 1996. *See* Interim Policy on Compliance Incentives for Small Businesses, 61 Fed. Reg. 27,984 (1996).

by the EPA,¹²¹ consists of four separate incentives to encourage environmental self-evaluation.¹²²

First, the EPA will not seek gravity-based penalties for violations discovered through environmental self-auditing if the violations are promptly disclosed and corrected.¹²³ Such penalties will also be waived for violations discovered by a regulated entity through any documented self-policing procedure that evidences systematic efforts, appropriate to the size and nature of the business, to prevent, detect, and correct violations in a manner consistent with a number of EPA “due diligence” standards.¹²⁴

Before the EPA acts in accordance with the first incentive, a regulated entity must meet nine conditions set forth in the Final Policy.¹²⁵ These conditions are as follows: (1) systematic discovery of the violation through an environmental self-audit or due diligence; (2) voluntary discovery independent of any legally required monitoring system; (3) written disclosure within ten days of discovering any violation or potential violation; (4) discovery and disclosure prior to government investigation or third-party lawsuit; (5) remediation within sixty days of discovery, unless otherwise extended by the EPA; (6) written agreement to take measures preventing recurrence; (7) no similar violations having occurred within the past three years at the same facility, or within the past five years as part of a pattern of violation by a parent company; (8) exclusion of violations that resulted in “serious actual harm, or which may have presented an imminent and substantial endangerment to public health or the environment,” as well as exclusion of all “violations of the specific terms of any [judicial or administrative] order, consent agreement, or plea agreement;” and (9) cooperation in any EPA investigation of the violation and potential application of the Final Policy.¹²⁶ The EPA expressly reserves the right, however, to collect any economic benefit that is realized by regulated entities as

121. See EPA Final Policy, *supra* note 6, at 66,712.

122. See *id.* at 66,707-08 (eliminating gravity-based penalties, reducing gravity-based penalties by 75 percent, declining to recommend criminal prosecution, and refraining from routine requests for audits).

123. See *id.* at 66,707. “Gravity-based penalty” is defined as “that portion of a penalty over and above the economic benefit, i.e., the punitive portion of the penalty, rather than that portion representing a defendant’s economic gain from non-compliance.” *Id.* at 66,711. Gravity-based penalties generally reflect the seriousness of a violator’s misconduct. See *id.* at 66,707.

124. See *id.* For a complete listing of all “due diligence” standards set forth in the Final Policy, see *id.* at 66,710-11.

125. See *id.* at 66,708.

126. See *id.* at 66,708-10.

a result of environmental noncompliance, even where such companies have met all other Final Policy conditions.¹²⁷

The second incentive is a 75 percent reduction in gravity-based penalties for violations voluntarily discovered through means other than self-auditing or due diligence, promptly disclosed to the EPA, and expeditiously corrected.¹²⁸ To take advantage of this incentive, a regulated entity must satisfy conditions two through nine set forth in the preceding paragraph.¹²⁹ According to the EPA, these conditions “are reasonable and essential to achieving compliance,” and mandating the satisfaction of such conditions provides regulated entities with “greater clarity and predictability.”¹³⁰

As a third incentive, the EPA will not recommend criminal prosecution of regulated entities that uncover violations through environmental self-auditing or due diligence, promptly disclose and expeditiously correct all discovered violations, and meet all nine Final Policy conditions.¹³¹ This incentive is further qualified in three ways: (1) it applies only to corporate officials who are not consciously involved in or willfully blind to violations, or who do not conceal or condone environmental noncompliance; (2) it does not apply to violations causing “serious harm or which may pose imminent and substantial endangerment to human health or the environment;” and (3) the EPA retains the right to prosecute any culpable person or entity for criminal acts.¹³²

As a final means of encouraging environmental self-evaluation, the EPA reaffirms its policy, in effect since 1986, to refrain from “routine requests for audits.”¹³³ While the EPA specifically reserves the right to request relevant information to further investigative efforts upon discovery of independent evidence of a violation, the agency notes in the Final Policy that “a review of the criminal docket did not

127. *See id.* at 66,707. However, this economic benefit penalty may be waived by the EPA if the agency determines that the benefit was insignificant. *See id.*

128. *See id.*

129. *See id.* Interestingly, this requirement represents a meaningful policy change from the EPA’s 1995 Interim Policy regarding treatment of environmental violations discovered absent self-auditing or due diligence. *Compare id.* with EPA Interim Policy, *supra* note 120, at 16,876-77. Specifically, the EPA eliminated language from the Interim Policy indicating that penalties may be reduced “up to 75%” where “most” of the policy conditions are met. *See id.*

130. EPA Final Policy, *supra* note 6, at 66,707.

131. *See id.*

132. *Id.*

133. *See id.* at 66,708.

reveal a single criminal prosecution for violations discovered as a result of an audit self-disclosed to the government.”¹³⁴

In July of 1991, the Department of Justice addressed the subject of environmental self-auditing by issuing an internal “guidance” memorandum to its environmental crimes prosecutors.¹³⁵ The memorandum advised United States prosecutors to consider, before making decisions regarding the prosecution of environmental violations, whether the accused entity had: (1) promptly and completely disclosed all discovered violations; (2) cooperated with the federal government concerning investigation of such violations; (3) instituted preventive measures and compliance programs; and (4) actually corrected the violations.¹³⁶ DOJ officials have gone as far as to claim that the mitigating effect of these guidelines could be sufficient to convince prosecutors that a criminal case should not be brought at all.¹³⁷

2. *Limitations of EPA and DOJ Self-Audit Policies*

The self-audit protection policies issued by the EPA and DOJ do not provide the clarity and predictability required to protect effectively self-auditing entities from significant liability exposure. The EPA issued its Final Policy Statement in response to what it perceived as a lack of uniform national standards concerning the treatment of environmental self-auditing.¹³⁸ Nevertheless, the EPA’s policy itself has failed to establish such standards. Different EPA regional offices interpret and implement the Final Policy in an inconsistent manner.¹³⁹

134. *Id.*

135. *See, e.g.*, DOJ POLICY, *supra* note 17; *see also* Koven, *supra* note 2, at 1186; *Environmental Audits: Hearing Before the Senate Comm. on Env’t and Pub. Works*, 105th Cong. 129 (1997) (joint statement of Robert C. Bundy, United States Attorney For the District of Alaska, and Lois J. Schiffer, Assistant Attorney General, Environment and Natural Resources Division, United States Department of Justice) (testifying that DOJ memorandum was designed to encourage audits and compliance) [hereinafter Bundy & Schiffer Statement].

136. *See* DOJ POLICY, *supra* note 17, at 2-6; *see also* Bundy & Schiffer Statement, *supra* note 135, at 129. The DOJ memorandum includes the above-referenced factors among others generally taken into account regarding prosecutorial decision making. Other relevant factors include state of mind, duration of violations, human health or environmental effects, and whether the violations reflected a common attitude within an organization. *See id.*

137. *See* DOJ POLICY, *supra* note 17, at 6 (“In the ideal situation, if a company fully meets all of the criteria, the result may be a decision not to prosecute that company criminally.”); *see also* Bundy & Schiffer Statement, *supra* note 135, at 129.

138. *See, e.g.*, EPA Final Policy, *supra* note 6.

139. *See* Gryzkowicz Statement, *supra* note 73, at 12-13 (remarking that regional offices place different emphasis on traditional and nontraditional means of achieving compliance). The DOJ guidelines have also been subject to inconsistent interpretation and implementation. Recently, the DOJ removed central oversight for prosecuting

Many executives of regulated entities have complained that the fragmented and inconsistent treatment of environmental self-auditing among different EPA offices “has made it difficult to devise a coherent, results-oriented approach acceptable to all key EPA stakeholders.”¹⁴⁰ Regional EPA officials have voiced similar complaints. In a December 1996 internal agency study, EPA staff members from several regions claimed that “they had received mixed messages about the relative priority of enforcement and compliance assurance.”¹⁴¹

Furthermore, both the EPA Final Policy and the DOJ guidelines are mere policies, not regulations, and thus are not binding on either agency.¹⁴² In the words of the EPA’s Final Policy, “[t]he policy is not final agency action, and is intended as guidance. It does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties.”¹⁴³ Nor do these policies constitute binding authority in a court of law;¹⁴⁴ “[t]he only way to assure that an audit privilege will be recognized in the federal courts is to adopt a federal

environmental matters from its Environmental Crimes section in Washington; thus, decision-making power regarding the use of environmental self-audit reports and the liability for disclosed violations now rests in the hands of hundreds of local prosecutors. See Hawks, *supra* note 3, at 264. Ironically, inconsistent enforcement is among the most often proffered criticisms made against state self-audit protection laws. See Hawks, *supra* note 3, at 264 n.177. As Hawks aptly stated, “This would indicate that the EPA is not opposed to decentralization as much as it is suspicious of the ability of other entities, (i.e., state agencies), to make correct decisions regarding enforcement.” *Id.*; see also Timothy A. Wilkins & Cynthia A. M. Stroman, *Delegation Blackmail: EPA’s Misguided War on State Audit Privilege Laws* 26 (Washington Legal Found. Critical Legal Issues Working Paper No. 69, 1996) (arguing that EPA is ultimately motivated by its lack of trust in state agencies).

140. Gryszkowiec Statement, *supra* note 73, at 13.

141. *Id.*

142. See *Voluntary Environmental Audit Protection Act: Hearing on S. 582 Before the Senate Comm. on the Judiciary*, 104th Cong. 59 (1996) (statement of Patricia S. Bangert, Director of Legal Policy, Colorado Attorney General’s Office) (emphasizing that “the EPA final policy is not an adequate substitute for federal legislation”) [hereinafter 1996 Bangert Statement]; see also EPA Final Policy, *supra* note 6, at 66,706 (issuing final policy rather than legally binding regulations); DOJ POLICY, *supra* note 17, at 15 (explaining that factors in DOJ Policy to be considered by prosecutors “do not derive from, find their basis in, nor constitute any legal requirement, whether constitutional, statutory, or otherwise”); Hawks, *supra* note 3, at 264.

143. EPA Final Policy, *supra* note 6, at 66,712.

144. See *Voluntary Environmental Self-Evaluation Act: Hearing on H.R. 1047 Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary*, 104th Cong. 177 (1997) (statement of Harry H. Kelso, Director of Enforcement and Policy, Virginia Department of Environmental Quality) (explaining that courts are guided by statutes and regulations, and policies are only weak authority in courts).

law.”¹⁴⁵ Absent such legislation, the EPA and DOJ are not prevented from requesting environmental self-audit reports or initiating criminal prosecutions against regulated entities that henceforth discover environmental violations through self-auditing.¹⁴⁶ Perhaps even more troubling to regulated entities, the EPA appears to be subjecting regulated entities that seek self-audit protection under state privilege and immunity laws to heightened scrutiny.¹⁴⁷ As previously discussed, the EPA and DOJ are increasingly overfiling against such self-auditing entities.¹⁴⁸

The EPA also requires that all self-audit reports be placed in the public record before regulated entities may receive penalty mitigation under the Final Policy.¹⁴⁹ Not only does such public disclosure harm the corporate reputations of those entities that voluntarily disclose violations to the EPA,¹⁵⁰ it also creates greater liability exposure for self-auditing entities.¹⁵¹ Other public or private actors may file suit against

145. Tom Alkire, *Federal Law Needed on Privilege, Industry Lawyer Tells Conference*, 28 Env't Rep. (BNA) 1586, 1586 (Dec. 12, 1997).

146. See EPA Final Policy, *supra* note 6, at 66,712 (“The Agency reserves its right to take necessary actions to protect public health or the environment by enforcing against any violations of federal law.”); DOJ POLICY, *supra* note 17, at 1 (emphasizing that DOJ memorandum “is designed to give federal prosecutors direction concerning the exercise of discretion”). Often, the EPA justifies requesting self-audit materials by claiming that it discovered “independent evidence of a violation.” See EPA Final Policy, *supra* note 6, at 66,708; Hawks, *supra* note 3, at 264 (claiming that although EPA states that environmental investigations will not be premised upon request for audit report, EPA never renounced its prerogative to gather such information based on any independent reason to believe that violation has occurred). The Coors Brewing Company case is a well-known example of a regulatory agency requesting an environmental audit report and sanctioning a regulated entity based on information contained in the report. See *\$1.05 Million Fine Against Coors May Deter Corporate Environmental Audits*, 24 Env't Rep. (BNA) 570, 570 (July 30, 1993). In 1993, Coors conducted a voluntary study, costing \$1 million, that revealed violations and information concerning Volatile Organic Compound (VOC) emissions which were previously unknown to breweries or federal regulators. See *id.* When Coors voluntarily disclosed the information to the Colorado Department of Health, the agency fined Coors \$1.05 million, despite the fact that there were no specific requirements for the brewery to monitor VOC emissions. See *id.*

147. See Riley Statement, *supra* note 9, at 64 (illustrating how EPA closely scrutinized five Texas companies in 1997 that took advantage of Texas environmental audit protection); 1996 Bangert Statement, *supra* note 142, at 59 (“The EPA has made it clear that it will scrutinize delegated programs in states with privileges and immunities laws . . .”).

148. For further discussion of EPA overfiling, see *supra* Part I.B.2.

149. See Hawks, *supra* note 3, at 264; Wilkins & Stroman, *supra* note 139, at 13.

150. See Holdsworth, *supra* note 6, at 235.

151. See Hawks, *supra* note 3, at 264 (noting that EPA’s policies do not prevent company from being held liable at state level or by third parties choosing to sue); Koven, *supra* note 2, at 1196 (calling fact that EPA policy only applies to document requests by EPA and not to requests made by other parties “large loophole”); Wilkins

self-auditing entities based upon evidence of environmental noncompliance acquired from public voluntary disclosure records even if the federal government decides not to take any legal action based upon voluntarily disclosed self-audit reports.¹⁵²

The Clinton Administration contends that, notwithstanding the above-mentioned limitations, current EPA and DOJ policies effectively encourage environmental self-policing.¹⁵³ As support, the Administration cites a 1995 Price Waterhouse survey that evidences a marked increase in self-auditing activities.¹⁵⁴ Nevertheless, both the survey and the Clinton Administration completely ignore several variables that break the causal link between present federal policies and increased environmental self-auditing. The virtual explosion of environmental regulations has compelled many regulated entities to initiate self-auditing programs regardless of the risk of liability exposure. Additionally, the Price Waterhouse survey is silent about whether self-auditing entities presently report discovered violations to regulatory officials, and it does not distinguish between comprehensive self-evaluation programs and quick, random assessments of particular internal operations.¹⁵⁵ Furthermore, even if a regulated entity initiates an environmental self-audit, employee informants who are asked to disclose instances of environmental noncompliance are often reluctant to do so given the negative implications such disclosure could have for the company.

Finally, a large portion of the regulated community remains reluctant to self-audit due to the fact that DOJ and EPA policies do not have the force of law. Countless regulated entities fear that voluntarily disclosed self-audit reports would provide federal enforcement authorities a road map of potential and actual environmental violations for which they could eventually face considerable sanctions.

& Stroman, *supra* note 139, at 13 (“[Y]ou must place your findings in the public record ensuring that EPA, as well as state agencies, environmental groups, and other potential plaintiffs have full access to this information to use against you.”).

152. See Hawks, *supra* note 3, at 264; Koven, *supra* note 2, at 1196; Wilkins & Stroman, *supra* note 139, at 13.

153. See Bundy & Schiffer Statement, *supra* note 135, at 130.

154. See *id.*; Koven, *supra* note 2, at 1196.

155. See Koven, *supra* note 2, at 1196.

II
PRIOR FAILED ATTEMPTS TO ENACT FEDERAL
ENVIRONMENTAL AUDIT PROTECTION
LEGISLATION

The Congress of the United States, like many state legislatures, the EPA, and the DOJ, has contemplated various proposals aimed at encouraging environmental self-auditing. During the past four years, bills that would have established an environmental self-audit privilege and limited immunity were introduced in both the House of Representatives and the Senate.¹⁵⁶ Each bill subsequently died in committee before reaching the floor for debate.¹⁵⁷

A. 1995 Bills

In early 1995, both houses of Congress considered, for the first time, proposed environmental self-audit protection legislation. House Bill 1047 and Senate Bill 582 both provided that environmental self-audit reports would not be subject to discovery or admissible as evidence in any civil, criminal, or administrative proceeding.¹⁵⁸ These bills would have also created a rebuttable presumption of limited immunity from civil, administrative, and criminal penalties for violations voluntarily disclosed to a state or federal official responsible for administering federal environmental laws.¹⁵⁹ Nevertheless, under both House Bill 1047 and Senate Bill 582, the privilege protection would not have applied: (1) to information required to be collected, developed, maintained, or reported pursuant to federal environmental laws; (2) to information obtained by observation, sampling, or monitoring by any regulatory agency; (3) to information obtained from a source independent of an environmental self-audit; (4) to information as to which the regulated entity waived the privilege; (5) if a self-audit report showed evidence of noncompliance with federal environmental laws and appropriate efforts to achieve compliance were not promptly initiated and pursued with reasonable diligence; or (6) if the regulated entity asserted the privilege for a fraudulent purpose.¹⁶⁰ Under the House Bill, the privilege also would not have applied if a self-audit

156. See Voluntary Environmental Audit Protection Act, S. 582, 104th Cong. (1995); Voluntary Environmental Self-Evaluation Act, H.R. 1047, 104th Cong. (1995).

157. See *Bill Summary & Status for the 104th Congress*, LIBRARY OF CONGRESS (visited Sept. 2, 1999) <<http://thomas.loc.gov>>; see also Holdsworth, *supra* note 6, at 223 & n.70.

158. See S. 582 § 3801(a)(1); H.R. 1047 § 4(a).

159. See S. 582 § 3803(c); H.R. 1047 § 6(c).

160. See S. 582 § 3801(a)(3)(B); H.R. 1047 § 4(a)(2).

report showed evidence of noncompliance and compelling circumstances made it necessary to mandate involuntary disclosure, or if the report was prepared for the purpose of avoiding disclosure required for a proceeding that, at the time of preparation, was imminent or in progress.¹⁶¹

Similar to most state self-audit protection statutes, both 1995 bills provided for in camera review of all claims of environmental self-audit privilege or immunity.¹⁶² However, these bills differed significantly in their respective assignments of the burdens of production and persuasion among the opposing parties. House Bill 1047 was silent as to which party, in an in camera hearing, would shoulder the burden of establishing the availability of self-audit protection, providing only that “the appropriate Federal court” must determine whether a self-audit report is privileged.¹⁶³ On the other hand, Senate Bill 582 expressly provided:

[A] party invoking the protection of [privilege under] subsection (a)(1) shall have the burden of proving the applicability of such subsection including, if there is evidence of noncompliance with an applicable environmental law, the burden of proving a prima facie case that appropriate efforts to achieve compliance were promptly initiated and pursued with reasonable diligence.¹⁶⁴

B. 1997 Bill

In 1997, the Senate again considered, but failed to bring to the floor, an environmental self-audit privilege and immunity statute.¹⁶⁵ The provisions of Senate Bill 866 generally tracked those of the 1995 bills; however, five particular differences deserve mention. First, under the 1997 bill, law enforcement officials could seize an environmental audit report if they had probable cause to believe an environmental crime was committed by a self-auditing entity.¹⁶⁶ Second, Senate Bill 866 provided that the party seeking the protection of the privilege would have to prove only a prima facie case as to both the availability of self-audit protection and the initiation and diligent pursuit of appropriate efforts to achieve compliance.¹⁶⁷ The burden of

161. See H.R. 1047 § 4(a)(2)(B), (D).

162. See *id.* § 4(a)(2); S. 582 § 3801(b).

163. See H.R. 1047 § 4(a)(2).

164. S. 582 § 3801(c)(1).

165. See S. 866, 105th Cong. (1997). Senate Bill 1332, 105th Cong. (1997), a federal “safe harbor” statute, was also introduced during the 104th Congress; however, these types of protection statutes are beyond the scope of this Note.

166. See S. 866 § 3601(c)(2)(A).

167. See *id.* § 3601(c)(3)(A)-(B).

persuasion as to application of the privilege, however, would have rested on the party opposing protection.¹⁶⁸ Third, the bill provided for mitigation of penalties based on factors related to the nature of the violation, circumstances of the disclosure, efforts to prevent or resolve the violations, and “other relevant considerations.”¹⁶⁹

Fourth, Senate Bill 866 included exceptions to the grant of limited immunity that were absent from both of the 1995 bills. Specifically, the immunity provisions would not have precluded: (1) imposition of a civil, criminal, or administrative sanction to the extent that a violation was committed intentionally and willfully; (2) imposition of a criminal sanction if the disclosed violation was a “knowing endangerment offense” (as defined in the bill), or the entity’s policies or lack of preventive actions or systems contributed materially to the occurrence of the violation; or (3) admission of information into evidence for the purpose of seeking injunctive relief against a regulated entity to remedy a continuing adverse public health or environmental effect of a violation.¹⁷⁰

Perhaps the most significant difference between the 1995 bills and Senate Bill 866 was a section entitled, “Recognition of State efforts to encourage compliance.”¹⁷¹ The first portion of this section expressly recognized a state’s ability to enact environmental self-audit protection legislation.¹⁷² The latter portion of the section would have prohibited federal agencies from creating impediments to the use of state law, such as refusing to grant primary enforcement authority over a delegated federal program to a state agency because that state had enacted a self-audit privilege and immunity statute; or conditioning a permit, license, or other authorization on a regulated entity’s waiver of self-audit protection.¹⁷³

III

CLINTON ADMINISTRATION OPPOSITION TO SELF-AUDIT PROTECTION LAWS

The Clinton Administration does not oppose environmental self-auditing; in fact, the Administration, in the EPA’s Final Policy, the DOJ guidelines, congressional testimony and the like, publicly encourages environmental self-auditing. Recognizing their limited en-

168. *See id.*

169. *See id.* § 3603(b)(3).

170. *See id.* § 3603(b)(2).

171. *See id.* § 3604.

172. *See id.* § 3604(a)-(b).

173. *See id.* § 3604(c).

forcement capabilities, the EPA and DOJ openly acknowledge the growing need for environmental self-policing. Nevertheless, the Clinton Administration staunchly opposes all state and federal statutory grants of environmental self-audit privilege or immunity.¹⁷⁴ The Administration's arguments in opposition generally take one of two forms: (1) any recognition of self-audit privilege or immunity is unacceptable as a policy matter; or (2) inclusion of particular provisions in self-audit protection statutes reduce, rather than encourage, environmental compliance.

A. *Opposition to Any Recognition of Self-Audit Privilege or Immunity*

Perhaps the most oft-asserted EPA contention is that self-audit privileges and immunities invite secrecy and deny the public fair access to facts relating to environmental noncompliance.¹⁷⁵ Under current federal self-audit protection policies, voluntarily disclosed reports are placed in the public domain regardless of their contents. If an evidentiary privilege or immunity is granted, however, only the select parties present at the in camera hearing will have access to the self-audit materials. According to the EPA, this secrecy erodes the public's trust in the ability of regulated entities to self-police and reduces citizens' ability to acquire information concerning potential or actual environmental hazards existing in their communities.¹⁷⁶ Furthermore, the Clinton Administration claims that permitting such secrecy disables the policing effect of public scrutiny.¹⁷⁷ Absent the prospect of public disclosure, argue DOJ officials, regulated entities will not need to reduce pollution levels to maintain good corporate reputations.¹⁷⁸

174. See EPA Final Policy, *supra* note 6, at 66,710.

175. See EPA Final Policy, *supra* note 6, at 66,709 ("Privilege, by definition, invites secrecy, instead of the openness needed to build public trust in industry's ability to self-police.").

176. See *Voluntary Environmental Audit Protection Act: Hearing on S. 582 Before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary*, 105th Cong. 23 (1996) (joint statement of Lois Schiffer, Assistant Attorney General, Environment and Natural Resources Division, Department of Justice, and Veronica Coleman, United States Attorney for the Western District of Tennessee) (quoting *University of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1990) (citations omitted)) ("Privileges interfere with the truth seeking process by limiting access to relevant and often very persuasive evidence, contravening 'the fundamental principle that the public . . . has a right to every man's evidence.'" [hereinafter Schiffer & Coleman Statement]).

177. See *id.* ("The impediments that S. 582 would create for criminal investigation are profound.").

178. See Bundy & Schiffer Statement, *supra* note 135, at 131.

The Clinton Administration also argues that self-audit privileges and immunities thwart the enforcement of environmental laws by undermining the authority of the federal government to investigate potential environmental noncompliance and to execute federal environmental regulations.¹⁷⁹ A DOJ official offered an example of such effect during a hearing before the Senate Committee on Environment and Public Works:

In the face of an environmental audit privilege, an investigator may be unable to pursue [a whistle blower's] tip effectively because the investigator would not know whether the corroboration provided by the whistle blower came from an environmental audit report. Even the whistle blower might not know whether the document was originally created as part of an audit.¹⁸⁰

The Clinton Administration also contends that environmental self-audit privileges and immunities reduce whistle blowers' incentive to report known or potential violations to law enforcement authorities.¹⁸¹ EPA officials assert that under current federal policies, employees and other associates of regulated entities "actively and intelligently participate in [their] own environmental protection" by reporting evidence of noncompliance to enforcement authorities.¹⁸² In contrast, the Clinton Administration posits that such persons are less likely to whistle-blow and risk possible retaliation by their employers if evidence brought to light could not be used against self-auditing entities that invoke an environmental self-audit privilege or immunity.¹⁸³

Administration officials also argue that environmental self-audit privilege or immunity statutes do not promote compliance, but rather increase the likelihood that regulated entities will commit environmental violations. According to the DOJ, unscrupulous regulated entities routinely invoke such expansive self-audit protections to shield all kinds of evidence of wrongdoing from authorities.¹⁸⁴ In 1996, a

179. *See id.* at 132.

180. *Id.* If the investigation proceeded despite such uncertainty and it was later determined that the corroborating evidence was protected by a self-audit privilege, "all subsequently obtained evidence could be suppressed as fruits of the privileged document, even if that evidence demonstrated criminal conduct." *Id.*

181. *See Environmental Audits: Hearing Before the Senate Comm. on Env't and Pub. Works*, 105th Cong. 51-52 (1997) (statement of Steven A. Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance, Environmental Protection Agency) [hereinafter 1997 Herman Statement].

182. *Id.* at 51.

183. *See id.* at 51-52.

184. *See* Schiffer & Coleman Statement, *supra* note 176, at 24.

United States Attorney, appearing on behalf of the Attorney General before a Senate Judiciary subcommittee, testified:

Many of the defendants in environmental criminal enforcement actions have defrauded or lied to the government as well as violated environmental laws. People who would lie about other aspects of their business or environmental practices could be expected to falsely label documents as 'environmental audit reports' as well to claim a privilege.¹⁸⁵

The EPA makes two additional contentions that are derivative of the above argument relating to the unscrupulousness of certain regulated entities. First, environmental self-audit privileges and immunities greatly reduce regulated entities' zeal to identify violations prior to government investigation or to promptly remediate violations once discovered.¹⁸⁶ Second, such regulated entities may go unpunished under many self-audit protection statutes for environmental violations caused by reckless, grossly negligent, or even intentional conduct.¹⁸⁷

The EPA further asserts that environmental self-audit protection statutes breed litigation. In particular, the agency posits that under most statutory schemes, an *in camera* review of disputed claims of self-audit privilege or immunity often results in a series of time consuming, expensive mini-trials.¹⁸⁸ The Clinton Administration argues that the resulting misallocation of judicial resources places unmanageable strain on the already overwhelming dockets of state and federal trial courts across the country.¹⁸⁹

185. *Id.*

186. See Bundy & Schiffer Statement, *supra* note 135, at 131 ("The existence of an audit privilege diminishes the incentive to correct violations promptly, and reduces the urgency to identify violations before enforcement authorities do."); 1997 Herman Statement, *supra* note 181, at 52 (testifying that audits may decrease incentives for prompt correction of violations).

187. See *Voluntary Environmental Self-Evaluation: Hearing on H.R. 1047 Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary*, 104th Cong. 90 (1995) (statement of Steven A. Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance, Environmental Protection Agency) (stating that even environmental disasters resulting from intentional conduct could go unpunished) [hereinafter 1995 Herman Statement].

188. See *id.*

189. See EPA Final Policy, *supra* note 6, at 66,710 (stating that audit privilege would breed litigation concerning scope of its coverage); Bundy & Schiffer Statement, *supra* note 135, at 132 (highlighting danger in diverting scarce judicial and prosecutorial resources to litigation of privilege issues); 1995 Herman Statement, *supra* note 187, at 90 (claiming that H.R. 1047 would "encourage litigation that will further burden our already taxed judicial system").

B. Opposition to Particular Provisions of Environmental Self-Audit Protection Statutes

Part and parcel to its unwavering opposition to recognition of any federal environmental self-audit privilege or immunity statute, the Clinton Administration has expressed heightened concern over particular provisions of existing and proposed self-audit protection laws.¹⁹⁰ First, the EPA contends that many self-audit protection bills protect not simply the opinions, conclusions, and recommendations of the auditors, but also the underlying factual information giving rise to the violations.¹⁹¹ Such overbroad protection, argue EPA officials, renders regulated entities essentially immune from prosecution for violations independently discovered by federal regulators.¹⁹² Second, the Administration argues that self-audit protection laws often do not mandate complete remediation as a precondition to the grant of an evidentiary privilege or immunity.¹⁹³ A DOJ official, while arguing against the 1995 House bill, noted, “[b]ecause initiating steps toward future compliance appears to be all that is required, [a regulated entity] would not even be required to clean up the ground water. Immunizing such conduct will discourage companies from maintaining a high standard of care.”¹⁹⁴

Third, the EPA opposes the prospect of procedural handcuffs being placed on environmental regulatory agencies by self-audit privi-

190. See *Voluntary Environmental Self-Evaluation Act: Hearing on H.R. 1047 Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary*, 104th Cong. 157 (1995) (statement of Randall Rathbun, United States Attorney for the District of Kansas) (claiming that enactment of environmental self-audit privilege would allow violators to go unpunished, frustrate legitimate enforcement efforts, and discourage regulated entities from taking precautionary proactive measures) [hereinafter Rathbun Statement]; 1995 Herman Statement, *supra* note 187, at 90 (stating that H.R. 1047 would eliminate punishment for criminal violations voluntarily disclosed and would allow industries to keep voluntarily disclosed violations secret from public’s knowledge).

191. See 1995 Herman Statement, *supra* note 187, at 90 (arguing that H.R. 1047 goes beyond attorney-client and work product privileges by shielding virtually all factual information about environmental noncompliance); EPA Final Policy, *supra* note 6, at 66,710.

192. See 1995 Herman Statement, *supra* note 187, at 90; EPA Final Policy, *supra* note 6, at 66,710.

193. See Schiffer & Coleman Statement, *supra* note 176, at 22; Rathbun Statement, *supra* note 190, at 162 (“It does not even appear to be a prerequisite to obtaining immunity that the violator remedy any environmental harm resulting from the underlying violation.”).

194. Rathbun Statement, *supra* note 190, at 168.

lege and immunity laws.¹⁹⁵ An EPA official, during testimony before Congress regarding the 1997 Senate self-audit protection bill, expressed particular concern about a provision that would have required the government, under certain circumstances, to petition for an in camera hearing to litigate grants of immunity.¹⁹⁶ “Human health is also jeopardized . . . because the default provision in S. 866 not only gives immunity for violations causing serious actual harm, but also gives immunity to all violations—no matter how egregious—if the government fails to challenge a disclosure within 60 days.”¹⁹⁷

According to the DOJ, many self-audit protection laws also contain provisions that prevent law enforcement personnel from executing search warrants, subpoenas, and the like, when such officials have probable cause to believe that an environmental crime has been committed.¹⁹⁸ The Department further alleges that many immunity provisions frustrate states’ ability to obtain cease and desist orders or other forms of injunctive relief against regulated entities that violate environmental laws.¹⁹⁹ The continued availability of such tools of enforcement, the DOJ argues, is necessary to states’ ability to control environmental emergencies.²⁰⁰

Finally, the Administration believes that self-audit privilege and immunity laws allow regulated entities to conceal environmental violations and benefit from the cost savings of noncompliance. The EPA argues that many routine business activities are reclassified by regulated entities as “compliance activities” in order to fall within a statutory definition of “voluntary environmental self-evaluation.”²⁰¹ EPA officials have stated that “[p]roving such evasion could be nearly impossible.”²⁰² Likewise, the DOJ claims that environmental self-audit privilege and immunity statutes effectively punish law abiding companies by not requiring violators to disgorge all economic benefits

195. See 1997 Herman Statement, *supra* note 181, at 51 (arguing that self-audit privileges erect “procedural barriers” for government prosecutors seeking information necessary to prosecute violators and protect public health).

196. See *id.* at 54 (claiming that Senate Bill 866 “fails to protect public access to information”); Bundy & Schiffer Statement, *supra* note 135, at 132.

197. See 1997 Herman Statement, *supra* note 181, at 54.

198. See Schiffer & Coleman Statement, *supra* note 176, at 23 (addressing difficulties that would arise during execution of search warrant due to existence of self-audit privilege—unlike attorney-client correspondences which are usually labeled and thereby avoided, law enforcement officers may not be able to recognize which documents are protected by self-audit privilege and which are not); Rathbun Statement, *supra* note 190, at 168; 1995 Herman Statement, *supra* note 187, at 90.

199. See Rathbun Statement, *supra* note 190, at 168.

200. See *id.*

201. See 1995 Herman Statement, *supra* note 187, at 90.

202. *Id.*

spawned from environmental violations.²⁰³ A DOJ official, using a water pollution hypothetical, attempted to illustrate this point: “A company that makes the expenditures necessary to treat its wastewater should not be [at] a competitive disadvantage to one that ignores the law for years and decides to confess and obey the law only when the resulting water pollution is unmistakable.”²⁰⁴ Additionally, many states also decree a “multiple violation exception”²⁰⁵ to their general grant of self-audit protection.²⁰⁶ This exception has been attacked by the Administration because it gives regulated entities the opportunity to violate environmental laws repeatedly without sanction.

C. Any Change to the Current Federal System Is Unnecessary

Among the arguments most frequently proffered by the Clinton Administration in opposition to self-audit privileges and immunities is that recognition of such protections is unnecessary to encourage self-auditing.²⁰⁷ This argument has two related elements. First, the EPA asserts that increasing numbers of regulated entities are conducting environmental self-evaluations absent a federal environmental self-audit privilege and immunity statute.²⁰⁸ Second, the agency contends that its present policy—a reduction in civil and criminal liability for companies that audit, disclose, and correct violations—effectively encourages self-auditing.²⁰⁹ As part of its Final Policy, the EPA stated:

Public testimony on the interim [self-audit] policy confirmed that EPA rarely uses audit reports as evidence. Furthermore, surveys demonstrate that environmental auditing has expanded rapidly over the past decade without the stimulus of a privilege. Most recently,

203. See Schiffer & Coleman Statement, *supra* note 176, at 22.

204. *Id.*

205. See, e.g., R.I. GEN. LAWS § 42-17.8-4(5) (Supp. 1998) (barring regulated entity from availing itself of statutory “compliance incentives” where “[t]he violation(s) in question is a ‘repeat violation’ that has occurred within the past three (3) years at the same facility, or is part of a pattern of federal, state or local, violations by the regulated entity”). An administrator for the EPA stated that such a provision “gives [regulated entities] multiple bites at the compliance apple.” See 1997 Herman Statement, *supra* note 181, at 54.

206. See, e.g., OHIO REV. CODE ANN. § 3745.72 (West 1997) (excepting from immunity noncompliance that constitutes pattern of continuous violations within three-year period).

207. See EPA Final Policy, *supra* note 6, at 66,710; 1997 Herman Statement, *supra* note 181, at 52 (claiming that environmental auditing “has increased to the point where it is already standard practice for 75 percent of corporations responding to a 1995 survey by Price Waterhouse, and is growing among the remaining 25 percent as well”).

208. See EPA Final Policy, *supra* note 6, at 66,710.

209. See *id.*

the 1995 Price Waterhouse survey found that those few large or mid-sized companies that do not audit generally do not perceive any need to; concern about confidentiality ranked as one of the least important factors in their decisions.²¹⁰

IV

PROPOSED ENVIRONMENTAL PROTECTION COLLABORATION ACT

The statute proposed at the conclusion of this Note, the Environmental Protection Collaboration Act (EPCA), represents a workable compromise between the Clinton Administration, individual states, and regulated entities regarding the treatment of environmental self-auditing.²¹¹ Under this proposed bill, self-auditing entities may protect information acquired through environmental self-evaluation by claiming a qualified evidentiary privilege or limited voluntary disclosure immunity. The EPCA leaves intact, however, the authority of the EPA and DOJ to fairly and effectively enforce federal environmental mandates. Furthermore, this proposed legislation cures many of the deficiencies present in existing forms of environmental self-audit protection.

A. Examination of the EPCA

1. Environmental Self-Audit Protections

The EPCA's evidentiary privilege provides that "an environmental audit report prepared as a result of a voluntary environmental audit . . . shall be privileged and shall not be discoverable or admissible as evidence in any civil, criminal, or administrative legal action, including enforcement actions."²¹² In addition, the privilege protects auditors from being compelled to reveal information acquired as a result of their participation in auditing activities.²¹³ Under the EPCA, a regulated entity may waive the privilege expressly in writing or by introducing self-audit materials into evidence to support its legal position in a judicial or administrative proceeding.²¹⁴

The scope of the EPCA privilege is circumscribed primarily by the statutory definitions of "voluntary environmental audit," which de-

210. *See id.*

211. *See infra* app., Environmental Protection Collaboration Act (EPCA).

212. *Id.* § 4(A).

213. *See id.*

214. *See id.* § 4(D). The EPCA, however, does not follow the example of many states that allow waiver by implication. *See, e.g.,* IND. CODE ANN. § 13-28-4-7(a)(2) (West 1998).

lineates acceptable forms of environmental self-evaluation, and “environmental audit report,” which identifies the types of materials eligible for self-audit protection. The bill defines “voluntary environmental audit” in broad terms, so regulated entities themselves, rather than the federal government, may tailor the nature and scope of environmental self-auditing activities to meet individualized financial or compliance objectives.²¹⁵ However, the EPCA explicitly requires all self-audits to be completed within six months or another reasonable time set forth in a compliance schedule²¹⁶ submitted to, and approved by, the EPA.²¹⁷ This time limit provision precludes regulated entities from substituting environmental compliance with unending self-evaluation—a principal concern of the EPA regarding many state protection laws. While broad in its application, this statutory definition employs extremely specific language to reduce the degree of judicial interpretation that would be required to implement the proposed law. Perhaps the most notable difference between the above definition and those of most state statutes is that the EPCA expressly authorizes self-audits in response to specific events.²¹⁸ Such targeted self-evaluation arguably would not be protected by several state privilege and immunity statutes.²¹⁹

To provide the greatest possible protection to self-auditing entities, the EPCA definition of “environmental audit report” encompasses virtually all documents “developed in good faith for the primary purpose of conducting an environmental audit.”²²⁰ Nevertheless, the bill explicitly mandates that each document in an environmental audit report be labeled with “‘AUDIT REPORT: PRIVILEGED DOCUMENT,’ or substantially comparable language.”²²¹ In addition, the EPCA requires that each report contain

215. See *infra* app., EPCA § 2(E)(i).

216. See 40 C.F.R. § 60.21(g).

217. Compare *id.* with ARK. CODE ANN. § 8-1-301 to -312 (Michie Supp. 1997) (no mandated time limit for environmental self-audits). While the EPCA may allow regulated entities to conduct particular self-audits lasting longer than six months, the proposed bill expressly disavows uninterrupted or continuous self-auditing. See *infra* app., EPCA § 2(E)(ii).

218. Compare *infra* app., EPCA § 2(E)(i), with TEX. GOV'T CODE ANN. § 4447cc(3)(3) (West Supp. 1999) (noting that audit is “systematic voluntary evaluation”) (emphasis added).

219. See, e.g., 13 ILL. COMP. STAT. ANN. 5/52.2(i) (West 1998).

220. *Infra* app., EPCA § 2(F)(ii).

221. *Infra* app., EPCA § 2(F)(iv). Unlike many states that mandate the use of particular labeling language, the EPCA requirement places substance over form—otherwise privileged documents would not be rendered unprotected under the proposed bill simply because of a technical labeling mishap. However, self-audit protection under several state laws would likely be lost under such circumstances. See, e.g., MICH. COMP.

specific information concerning: (1) the scope of the audit and data collected during the audit; (2) analysis of audit findings; and (3) an implementation plan that addresses the correction of past noncompliance, improving current compliance, and preventing future noncompliance.²²² The EPCA imposes this degree of standardization among audit reports principally to assure that the federal government would receive from self-auditing entities the type and quantum of information necessary to effectively monitor remediation efforts.

The EPA often argues that statutory self-audit privileges are overbroad, extending far beyond the purview of common law doctrines to protect underlying factual information that gives rise to environmental audit reports.²²³ On the contrary, the EPCA explicitly provides, “[a]ny privilege established by this chapter shall apply only to those communications, oral or written, pertaining to and made in connection with the voluntary environmental audit and shall not apply to the underlying facts relating to the violation(s) itself.”²²⁴ Also, the EPCA’s privilege does not apply to information independent of an environmental audit, “whether prepared or existing before, during, or after the audit.”²²⁵ Thus, whistle blowers may communicate to government officials any information that would have existed absent self-auditing, even if such information was subsequently included in an environmental audit report. Under the EPCA, federal regulators likewise remain free to conduct independent investigations without fear that acquired information would not be subject to disclosure in subsequent enforcement actions.

The EPCA, like many state self-audit protection statutes, also contains a grant of limited immunity for environmental violations voluntarily disclosed to the EPA.²²⁶ Voluntary disclosure under the proposed bill consists primarily of obligations that a regulated entity must satisfy subsequent to discovery of potential or actual environmental violations. Specifically, a regulated entity must disclose violations to the EPA within thirty days of discovery, the disclosure must be made

LAWs ANN. § 324.14801(b) (West 1999) (explaining that “environmental audit report” is limited to “a document or a set of documents, each labeled at the time it is created ‘environmental audit report: privileged document’ and created as a result of an environmental audit”).

222. See *infra* app., EPCA § 2(F)(iii). Generally, state self-audit protection laws merely suggest the inclusion of such information. See, e.g., WYO. STAT. ANN. § 35-11-1105(a)(ii)(A)-(C) (Michie 1999).

223. See Rathbun Statement, *supra* note 190, at 168.

224. *Infra* app., EPCA § 4(C).

225. *Id.* § 6(A)(iv).

226. See *id.* § 5(A)(i).

by certified mail, the disclosure must arise out of an environmental self-audit, and the disclosure must not be required under federal environmental laws.²²⁷ Furthermore, a disclosure is deemed voluntary only if “an investigation of the violation was not initiated or the violation was not independently detected by the [EPA] before the disclosure was made”²²⁸

Upon receipt of a regulated entity’s voluntary disclosure, the EPA is required merely to “defer for at least sixty days the imposition of administrative or civil penalties” for all disclosed violations.²²⁹ Within this sixty-day period, or such period set forth in an approved compliance schedule, the regulated entity must correct all violations for which immunity is sought and certify to the EPA that such action has been taken.²³⁰ Only at such time as the EPA verifies that complete remediation has taken place is a regulated entity entitled to final waiver of administrative or civil penalties.²³¹ Once immunity is granted, the EPCA penalty waiver applies to “violation(s) based on the facts disclosed, and . . . violation(s) discovered because of the disclosure that was unknown to the regulated entity that made the disclosure.”²³²

The immunity provisions of the proposed bill answer several concerns raised by the EPA. First and foremost, the EPCA’s grant of immunity is conditioned upon complete remediation of all violations for which immunity is sought.²³³ Prompt, complete remediation of environmental violations is among the EPA’s most cherished goals.²³⁴ Second, limited immunity under the EPCA is available only for civil and administrative penalties.²³⁵ The proposed bill, following the recommendation of the EPA, expressly excludes criminal penalties from the ambit of its immunity protection.²³⁶ Third, regulated entities that do not promptly disclose discovered violations lose the protections

227. *See id.* § 2(G).

228. *Id.* § 2(G)(ii)(b).

229. *Id.* § 5(A).

230. *See id.* § 5(A)(i).

231. *See id.*

232. *Id.* § 5(A)(ii).

233. *See id.* § 5(A)(i).

234. *See* Schiffer & Coleman Statement, *supra* note 176, at 22; Rathbun Statement, *supra* note 190, at 167; 1997 Herman Statement, *supra* note 181, at 54.

235. *See infra* app. § 5(A)(i).

236. *See id.* § 5(A)(iii). For further discussion of the EPA’s opposition to immunity for criminal penalties, see Tom Alkire, *State Environmental Officials Consider Response to EPA Concerns Over Audit Law*, 29 *Env’t Rep.* (BNA) 759, 759 (Aug. 7, 1998).

provided by the EPCA.²³⁷ This mandate would likely inhibit what the EPA perceives as a corporate mentality of “burying” discovered violations until the agency initiates an investigation. Moreover, the thirty-day disclosure provision requires much less judicial interpretation than similar state laws that demand “prompt” disclosure judged by a subjective standard.²³⁸

2. *Statutory Preconditions*

A regulated entity must satisfy three prerequisites before any self-audit protection may be granted under the EPCA.²³⁹ First, the self-auditing entity must demonstrate that “more than one year has elapsed since the initiation of an enforcement action that resulted in the imposition of a penalty involving the regulated entity.”²⁴⁰ While the primary purpose of the EPCA is to encourage self-auditing through legal incentives, recent violators must first demonstrate their ability to comply with environmental laws before they are entrusted with the responsibility of self-policing their operations. Second, any regulated entity that wishes to conduct an environmental self-audit must give notice to the EPA of such intention no later than fifteen days prior to commencement of any self-evaluation activities.²⁴¹ This “intent to audit” notice serves two important functions: it immediately informs the federal government of a regulated entity’s intention to seek protection under the EPCA and fosters candid dialogue regarding environmental protection between the federal government and the regulated entity. The EPCA further provides that the notice “be made publicly available upon receipt by the Agency.”²⁴² Public dissemination of these communications will evidence the self-policing efforts of regulated entities to members of their respective communities without disclosing protected self-audit information.

Third, regulated entities must correct discovered environmental violations within sixty days of the date on which such violations were reported to the EPA (or as specified in an approved compliance schedule).²⁴³ Additionally, self-auditing entities must submit a notification of remediation to the EPA that contains “information adequate to al-

237. *See infra* app., EPCA § 2(G)(ii)(b).

238. Texas’ self-audit protection statute includes a provision that mandates merely “prompt” disclosure upon discovery. *See* TEX. REV. CIV. STAT. ANN. art. 4447cc(10)(b)(1) (West Supp. 1999).

239. *See infra* app., EPCA § 3(A)-(C).

240. *Id.* § 3(A).

241. *See id.* § 3(B).

242. *Id.*

243. *See id.* § 3(C)(ii).

low the Agency to confirm that corrective and remedial actions were implemented in accordance with [the EPCA].”²⁴⁴ The proposed bill demands, however, that all submitted compliance schedules and “confirmation of remediation” notices be kept confidential by the EPA upon receipt.²⁴⁵

3. *Statutory Exceptions*

Section 6 of the EPCA sets forth several exceptions to the bill’s general grant of an environmental self-audit privilege and immunity.²⁴⁶ Similar to most state self-audit privilege and immunity laws, the EPCA withholds protection based on the nature of the materials for which protection is sought, as well as on particular actions taken by regulated entities relating to the self-auditing process.²⁴⁷ The cornerstone of the EPCA inapplicability section is the mandate that a regulated entity shall not be granted any environmental self-audit protections if it fails to: (1) promptly initiate reasonable efforts to achieve compliance; (2) pursue compliance with reasonable diligence; or (3) achieve compliance within sixty days or other time period defined in an approved compliance schedule.²⁴⁸ A variation of this exception is contained in the EPA Final Policy Statement, as well as in virtually every state self-audit protection law.²⁴⁹ Most state statutes, however, require merely that prompt remediation efforts be “initiated,” rather than actually completed.²⁵⁰ The EPCA exception, on the other hand, satisfies the EPA’s demand for swift and complete remediation prior to any grant of self-audit protection.²⁵¹

Perhaps the greatest concern of the EPA regarding self-audit protection laws is that regulated entities avoid compliance with environ-

244. *Id.*

245. *See id.* § 3(C)(iii).

246. *See id.* § 6.

247. Several of the exceptions created by the EPCA actually mirror “conditions for penalty mitigation” set forth in the EPA Final Policy, *supra* note 6, at 66,708, and many more EPCA exceptions answer particular concerns expressed by the EPA regarding recognition of self-audit privilege or limited immunity. For a discussion of EPA concerns pertaining to recognition of an environmental self-audit privilege or voluntary disclosure immunity, see *supra* Part III.

248. *See infra* app., EPCA § 6(B)(i).

249. *See* EPA Final Policy, *supra* note 6, at 66,709; *see, e.g.*, 13 ILL. COMP. STAT. ANN. 5/52.2(d)(2)(C) (West 1998) (stating that self-audit protections are lost if corrective action not taken by regulated entity within reasonable time).

250. *See, e.g.*, IND. CODE ANN. § 13-28-4-2(a)(2) (West 1998).

251. *See infra* app., EPCA § 3(C)(ii). For a discussion of the EPA’s demand for complete remediation prior to a grant of any environmental self-audit protection, see 1997 Herman Statement, *supra* note 181, at 51, and 1995 Herman Statement, *supra* note 187, at 89.

mental regulations through strategic, and often fraudulent, behavior.²⁵² Section 6 contains several exceptions that address this concern directly.²⁵³ First, a regulated entity is not entitled to either a self-audit privilege or immunity if “information is knowingly misrepresented or misstated, or is knowingly deleted or withheld from an environmental audit report.”²⁵⁴ Even if a regulated entity were to properly disclose such information in a subsequent report, it would not be eligible for protection under the EPCA.²⁵⁵ Similarly, a regulated entity is forbidden from intentionally failing to disclose information concerning environmental violations acquired during the course of a self-audit.²⁵⁶

Second, EPCA self-audit protections do not apply to information “collected, developed, made, or maintained in bad faith or for a fraudulent purpose.”²⁵⁷ Thus, EPCA self-audit privilege or immunity would not protect unscrupulous entities that seek to avoid the burden of environmental compliance by whatever deceitful means. As an example, regulated entities that falsely label documents as “privileged” would lose EPCA self-audit protections with regard to all information contained in the “tainted” report. Self-audit protections are also lost under the proposed bill if a regulated entity prepares a self-audit report “to avoid disclosure of information in an investigative, administrative, or judicial proceeding that was underway, that was imminent, or for which the regulated entity had been provided written notification that an investigation into a specific violation had been initiated.”²⁵⁸

Another argument made by EPA officials is that, under several state self-audit protection statutes, “tremendous environmental damage caused by negligent or intentional conduct goes completely unpunished.”²⁵⁹ This argument is essentially moot under the EPCA. The self-audit privilege and immunity established under the proposed bill do not apply to violations that are “committed intentionally, knowingly, or as a result of gross negligence, or if the regulated entity has a management pattern or practice that has the effect of condoning or concealing violation(s) of federal environmental laws.”²⁶⁰ While

252. See 1995 Herman Statement, *supra* note 187, at 90 (contending that evidentiary privilege and immunity law might allow companies to conceal intentional conduct).

253. See *infra* app., EPCA § 6. In addition, certain provisions contained in section 8 of the EPCA are designed to reduce strategic behavior of regulated entities. See *id.* § 8(E) (“SANCTIONS FOR ABUSE OF THIS CHAPTER”).

254. *Id.* § 6(B)(vi).

255. See *id.*

256. See *id.* § 6(B)(viii).

257. *Id.* § 6(B)(ii).

258. *Id.* § 6(B)(iii).

259. See 1995 Herman Statement, *supra* note 187, at 90.

260. *Infra* app., EPCA § 6(B)(iii).

merely negligent conduct on the part of a regulated entity does not fall under this exception, virtually all culpable conduct renders the EPCA protections inapplicable. Moreover, complete remediation of violations resulting from protected negligent conduct is assured under the proposed bill. The EPA's desire to sanction even negligent conduct is likely grounded in its punishment-oriented enforcement philosophy—a philosophy that, in practice, ranks fines and prosecutions ahead of remediation. In addition to providing an exception based on culpable conduct, the EPCA also does not protect information that “reveals a violation that resulted in serious, actual harm or created an imminent and substantial endangerment to human health, public safety, or the environment.”²⁶¹ This exception employs virtually identical language to that used in condition 8 of the EPA Final Policy.²⁶²

One of the most significant concessions made to the EPA in the proposed bill is an exception, contained in section 6(b)(x), precluding application of limited immunity to criminal proceedings.²⁶³ In addition, the EPCA permits federal authorities to obtain self-audit materials if a court, after an *in camera* review, determines that the materials show evidence of the commission of a federal environmental crime, there is a compelling need for the materials, the information is not otherwise available, and the equivalent of such information cannot be obtained without incurring unreasonable cost and delay.²⁶⁴ Given the character of these two exceptions, the EPA's contention that self-audit protection laws significantly undermine law enforcement authority is not nearly as persuasive when made in opposition to the EPCA.²⁶⁵

The particular types of self-audit materials ineligible for protection under the EPCA also fall outside the purview of most state statutes and the EPA Final Policy; therefore, only a handful of these exemptions deserve further mention. First, the EPCA's self-audit privilege and immunity do not apply to any information that is required by law to be collected or reported.²⁶⁶ This provision eliminates the possibility that EPCA protections would frustrate existing federal

261. *Id.* § 6(B)(iv).

262. See EPA Final Policy, *supra* note 6, at 66,709 (“[P]enalty reductions are not available under this policy for violations that resulted in serious actual harm or which may have presented an imminent and substantial endangerment to public health or the environment.”).

263. See *infra* app., EPCA § 6(B)(x).

264. See *id.*

265. See 1997 Herman Statement, *supra* note 181, at 51-52; 1995 Herman Statement, *supra* note 187, at 90-91. For further discussion of EPA's claim that environmental self-audit privilege and immunity hamstring law enforcement efforts, see *supra* Part III.

266. See *infra* app., EPCA § 6(A)(i).

environmental collection or reporting requirements.²⁶⁷ Second, the bill excepts from its purview information acquired by the federal government through observation, sampling, or monitoring.²⁶⁸ Therefore, regulated entities that fail to act upon known violations until after such violations are independently discovered by the EPA will lose all protections offered by the proposed bill. Likewise, EPCA protections do not apply to information that the EPA obtains from sources independent of a self-audit.²⁶⁹ Finally, the EPA has expressed concern that regulated entities will classify even routine business activities as forms of environmental self-auditing to shield themselves from any and all enforcement actions.²⁷⁰ Unlike most state legislation, however, the EPCA expressly exempts from protection any “document, communication, data, report, or other information collected, developed, or maintained in the course of a regularly conducted business activity or regular practice other than a voluntary environmental audit.”²⁷¹

4. *Procedures Governing Disputed Claims of Protection*

The procedures established by the EPCA for resolving disputed claims of self-audit protection are straightforward, yet innovative. The application of the EPCA is generally determined during an in camera review of environmental self-audit materials. Unlike a great majority of state self-audit protection laws, the proposed bill provides that “any party to a proceeding may file with the court or administrative tribunal having jurisdiction over the matter a motion requesting an in camera hearing”²⁷² This provision allows parties besides the one seeking protection under the EPCA to obtain a ruling on the law’s applicability during the course of an ongoing proceeding. Under no circumstances, however, may a party claim protection under the proposed bill without first participating in an in camera review of all materials for which protection is claimed.²⁷³ These provisions, taken together, provide the federal government the opportunity, but not the obligation, to petition for review of particular self-audit materials. Consequently, a case would never arise where egregious environmental violations go unpunished due to a failure of a government official to petition for an in camera hearing.

267. See Hawks, *supra* note 3, at 250.

268. See *infra* app., EPCA § 6(A)(ii).

269. See *id.* § 6(A)(iv).

270. See 1995 Herman Statement, *supra* note 187, at 90.

271. *Infra* app., EPCA § 6(A)(v).

272. *Id.* § 7(A)(i).

273. See *id.* § 7(A)(ii).

In addition to establishing the procedures for initiating judicial action, the EPCA also defines two means by which particular parties may gain access to self-audit materials to prepare for an *in camera* hearing. First, in any civil, criminal, or administrative proceeding, the court order scheduling the hearing must require that a copy of all allegedly protected materials be submitted to the court for appropriate distribution “within a reasonable period of time preceding the *in camera* hearing.”²⁷⁴ Second, in criminal actions only, a federal prosecuting authority may obtain an environmental audit report under a search warrant, a subpoena, or through discovery, if the federal official, “based on information obtained from a source independent of an environmental audit report, has probable cause to believe a violation of federal environmental laws has been committed.”²⁷⁵ Considering the additional investigative authority this provision gives law enforcement officials, the EPCA cannot reasonably be viewed as undermining federal law enforcement authority.

Perhaps the single most important group of EPCA provisions is that which establishes the evidentiary burdens applicable to *in camera* review of self-audit materials.²⁷⁶ The initial burden of proving a *prima facie* case as to the availability of a self-audit privilege or immunity rests with the regulated entity that claims such protection.²⁷⁷ If there is evidence of noncompliance contained in the self-audit report, satisfaction of the above burden by a regulated entity must include a showing that all EPCA preconditions have been satisfied.²⁷⁸ The ultimate burden of persuasion with regard to the application of protection, however, must always be met by the party opposing its availability.²⁷⁹

5. *Miscellaneous Provisions*

In addition to employing many commonplace statutory provisions, the EPCA also includes several miscellaneous provisions that affect both the federal government and the regulated community.²⁸⁰ Section 8(A) explicitly permits the federal government to issue emergency orders, seek injunctive relief, and take “any other appropriate action regarding implementation and enforcement of applicable fed-

274. *Id.* § 7(A)(v)(a).

275. *Id.* § 7(A)(v)(b).

276. *See id.* § 7(B).

277. *See id.* § 7(B)(i).

278. *See id.*

279. *See id.* § 7(B)(ii).

280. *See id.* § 8.

eral environmental laws, except as expressly provided” by the EPCA.²⁸¹ In essence, this provision allows the EPA to retain all means by which it currently controls environmental emergency situations.

The proposed bill also contains a sunset provision, which would automatically repeal the law five years from the date of its enactment.²⁸² The EPCA would establish a system of environmental regulation so fundamentally different from the present “command and control” structure that requiring further congressional action to perpetuate the law would provide a necessary check on the Act’s future application. Nevertheless, section 8(B)(ii)(b) ensures that the legislative decision regarding renewal of the statute would be an informed one—within ninety days of the expiration of the Act, the EPA would be required to report to Congress on whether the law had been effective in encouraging environmental self-auditing, voluntary disclosure of violations, and prompt remediation.²⁸³ Likewise, the EPA would maintain a database of voluntary disclosures made under the EPCA, as well as publish an annual report of such information so citizens may judge the effectiveness of the statute.²⁸⁴

Perhaps most importantly, section 8 of the EPCA explicitly prohibits the EPA from creating impediments to state self-audit protection legislation.²⁸⁵ Among the most likely EPA impediments to existing and future state privilege and immunity statutes are adoption of additional reporting requirements that are exempted from most state laws, and denial of final delegation authority to states due to a perceived lack of state enforcement capability. Both actions are expressly forbidden by the EPCA.²⁸⁶ However, states are required to “provide self-audit protection at least as protective as those established by [the EPCA].”²⁸⁷ Such a “protection floor” is necessary to prevent individual states from undermining clearly defined federal environmental regulations. Finally, the EPCA establishes sanctions to be imposed on those that attempt to abuse any provision of the proposed bill.²⁸⁸ For instance, “[a]ny person who uses the protections established by this chapter to commit fraud is guilty of a misdemeanor punishable by a

281. *Id.* § 8(A).

282. *See id.* § 8(B)(i).

283. *See id.* § 8(B)(ii)(b).

284. *See id.* § 8(B)(ii)(a).

285. *See id.* § 8(C).

286. *See id.* § 8(C)(iv)-(v).

287. *Id.* § 8(D).

288. *See id.* § 8(E).

fine of not more than \$25,000.”²⁸⁹ Such monetary penalties, coupled with the loss of all environmental self-audit protection, would likely create a deterrent effect sufficient to dissuade regulated entities from abusing the self-audit privilege and immunity protections of the EPCA.

B. General Advantages of the EPCA over Existing Forms of Self-Audit Protection

The EPCA compares favorably to existing forms of environmental self-audit protection in several fundamental respects. First, the protection provided to regulated entities by the proposed bill is vastly superior to that offered by any existing common law privilege. The EPCA’s clear and predictable self-audit protections allow regulated entities from all fifty states to conduct comprehensive environmental self-auditing without fear of self-incrimination. Moreover, the EPCA expressly allows regulated entities to employ environmental specialists and other outside auditors, rather than solely attorneys, to perform self-auditing activities.²⁹⁰ The result of such allowance would likely be improved quality and considerable cost savings over attorney-managed self-evaluation.

The EPCA, unlike the attorney work product privilege, generally protects regulated entities that conduct self-auditing activities either in anticipation of impending legislation or to avoid possible future litigation. Self-audit privilege or immunity under the proposed bill also applies notwithstanding a showing of need made by an opposing party. Additionally, courts would not be entitled to apply the proposed bill, as they have the privilege of self-critical analysis, in a manner that would warrant disclosure of self-audit materials in instances where the flow of such information would not be decreased by disclosure or where public policy favored disclosure.

Second, the EPCA eliminates the disparate treatment of environmental self-audit information between individual state privilege and immunity laws. Consequently, self-auditing entities that conduct business in multiple states would be able to implement enterprisewide auditing programs, rather than a patchwork of various local initiatives. Moreover, the EPCA forbids the federal government from circumventing state self-audit protections by withholding final delegation from states’ authority or overfiling against self-auditing entities.

289. *Id.* § 8(E)(iii).

290. *See id.* § 2(D).

Third, the proposed federal self-audit protection statute cures many of the deficiencies evident in current federal self-audit protection policies. Most significantly, the EPCA is a federal statute that is legally binding on all instrumentalities of the federal government. Under the proposed bill, self-auditing entities would no longer have to rely solely on individual federal officials (often assigned to relatively autonomous regional or local offices) to follow the Clinton Administration's non-binding pledge not to "routinely" request environmental audit reports or initiate criminal prosecutions for disclosed violations. The single national self-audit protection standard established by the EPCA would also eliminate confusion among EPA regional offices regarding the implementation of federal policy, as well as dissipate the growing distrust of the federal government among regulated entities.

The EPCA also expressly prohibits any federal department or official from revealing voluntarily disclosed self-audit information. This provision is a significant departure from present federal policy that mandates public disclosure of all audit reports as a precondition to receiving penalty mitigation.²⁹¹ Thus, self-auditing entities would not be required to trade their corporate reputations and possible liability exposure to potential plaintiffs and prosecutors for the mere opportunity to receive federal environmental self-audit protection.

Finally, the proposed statute would create two additional public benefits. Substantial private resources, rather than public resources, would be allocated almost immediately to environmental compliance. Especially when one considers the recent political trend toward limiting federal expenditures, environmental self-policing appears to be the only means by which environmental protection may be accomplished effectively in the coming decades. The EPCA would also destroy the compliance conundrum that presently faces self-auditing entities; regulated entities would no longer be forced to choose between inevitable noncompliance and probable self-incrimination.

CONCLUSION

Current federal policy concerning environmental protection focuses almost entirely on ex post punishment of violators rather than ex ante collaboration between federal regulators and regulated entities. Both the EPA and DOJ apparently believe that "a bigger stick, in the form of criminal prosecutions, is necessary" to achieve full environ-

291. See Hawks, *supra* note 3, at 264; Wilkins & Stroman, *supra* note 139, at 13. See generally EPA Final Policy, *supra* note 6, at 2, 7-8.

mental compliance.²⁹² Nevertheless, this command and control, punishment oriented structure is collapsing under its own weight. Government agencies do not have the resources to perform all the inspections and monitoring that are necessary to enforce effectively existing environmental standards. Given the ever-increasing volume and complexity of federal environmental laws, regulated entities likewise lack the resources required to maintain perpetual full compliance. The EPCA employs powerful legal incentives to encourage regulated entities to participate in the policing of environmental noncompliance through self-auditing activities. At the same time, the bill maintains the federal government's authority to take action if discovered violations threaten human health or public safety, or if the protections offered by the EPCA are abused.

The self-audit privilege and immunity established by the EPCA would provide regulated entities a degree of protection much superior to that made available under the common law, existing state self-audit protection laws, and current federal self-audit policies. In particular, under the proposed bill, regulated entities would no longer face the dilemma of noncompliance versus self-incrimination that has plagued them over the past several years. Although the EPCA builds from Congress's initial legislative attempts to recognize a federal environmental self-audit privilege and immunity, the proposed statute greatly reduces, if not completely cures, many of the deficiencies believed by the EPA and DOJ to be associated with statutory grants of self-audit protection.

The debate over how to most effectively foster compliance with federal environmental mandates is a significant one. Although past and present administrations favored deterrence-based regulatory regimes, continued failures of such regimes and the predicted enormity of the task of enforcing environmental compliance in the years to come indicate that the current situation is entering "a threshold where new methods of environmental protection are necessary."²⁹³ As one scholar stated, "[i]ndustry can no longer be seen as the enemy; corporate America now realizes the value of environmental awareness to its reputation and its bottom line. Corporate America should be encouraged to do what it does best[,] come up with innovative, cost-effective solutions to problems."²⁹⁴

292. Hawks, *supra* note 3, at 236.

293. *Id.* at 272.

294. *Id.* at 273.

APPENDIX

A BILL

TO AMEND TITLE 28, UNITED STATES CODE, TO PROVIDE A LIMITED EVIDENTIARY PRIVILEGE AND IMMUNITY TO CERTAIN VOLUNTARY DISCLOSURES OF VIOLATIONS OF FEDERAL ENVIRONMENTAL LAWS MADE AS A RESULT OF VOLUNTARY ENVIRONMENTAL AUDITS.

BE IT ENACTED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, THAT PART VI OF TITLE 28, UNITED STATES CODE, IS AMENDED BY INSERTING AFTER CHAPTER 176 THE FOLLOWING:

CHAPTER 177-VOLUNTARY AUDIT PROTECTION

SECTION 1. SHORT TITLE.

THIS ACT MAY BE CITED AS THE “ENVIRONMENTAL PROTECTION COLLABORATION ACT.”

SECTION 2. DEFINITIONS.

IN THIS CHAPTER:

(A) **EFFECTIVE DATE**- THE PROTECTIONS ESTABLISHED BY THIS CHAPTER SHALL APPLY ONLY TO DOCUMENTS, COMMUNICATIONS, DATA, REPORTS, OR OTHER INFORMATION GENERATED BY A VOLUNTARY ENVIRONMENTAL AUDIT-

(i) INITIATED ON OR AFTER THE DATE OF ENACTMENT OF THIS CHAPTER; OR

(ii) INITIATED WITHIN A REASONABLE TIME PRIOR TO THE ENACTMENT DATE OF THIS CHAPTER BUT NOT COMPLETED BY SUCH DATE.

(B) **REGULATED ENTITY**- THE TERM “REGULATED ENTITY” MEANS A PUBLIC OR PRIVATE ORGANIZATION THAT IS SUBJECT TO REGULATION UNDER FEDERAL ENVIRONMENTAL LAWS.

(C) **AGENCY**- THE TERM “AGENCY” MEANS THE DIRECTOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY OR ANY EMPLOYEE, OR AGENT AUTHORIZED BY THE DIRECTOR TO EXERCISE AUTHORITY REGARDING THE APPLICATION OF THIS CHAPTER.

(D) **AUDITOR**- THE TERM “AUDITOR” MEANS THE REGULATED ENTITY THAT PREPARED THE AUDIT OR CAUSED THE AUDIT TO BE PREPARED, PERSONS WHO CONDUCTED ALL OR A PORTION OF THE AUDIT, PERSONS TO WHOM CONFIDENTIAL SELF-EVALUATION OR ANALYSIS WAS DISCLOSED UNDER THIS CHAPTER, A CUSTODIAN OF AUDIT RESULTS, OR PERSONS WHO PARTICIPATED IN THE PREPARATION OF THE AUDIT.

(E) VOLUNTARY ENVIRONMENTAL AUDIT-

(i) **IN GENERAL-** THE TERM “VOLUNTARY ENVIRONMENTAL AUDIT” MEANS A SELF-INITIATED ASSESSMENT, AUDIT, OR REVIEW, NOT OTHERWISE EXPRESSLY REQUIRED UNDER FEDERAL ENVIRONMENTAL LAWS, THAT IS PERFORMED BY AN AUDITOR, WHETHER OR NOT ON A REGULAR BASIS OR IN RESPONSE TO A PARTICULAR EVENT, FOR THE PURPOSE OF DETERMINING OR IMPROVING COMPLIANCE WITH, OR LIABILITY UNDER, FEDERAL ENVIRONMENTAL LAWS, OR TO ASSESS THE EFFECTIVENESS OF AN ENVIRONMENTAL COMPLIANCE MANAGEMENT SYSTEM.

(ii) **ONCE INITIATED,** A VOLUNTARY ENVIRONMENTAL AUDIT SHALL BE COMPLETED WITHIN A REASONABLE TIME, NOT TO EXCEED SIX (6) MONTHS, UNLESS A WRITTEN REQUEST FOR AN EXTENSION IS APPROVED BY THE AGENCY ON REASONABLE GROUNDS.

(iii) **NOTHING IN THIS CHAPTER AUTHORIZES UNINTERRUPTED OR CONTINUOUS VOLUNTARY ENVIRONMENTAL AUDITS.**

(F) ENVIRONMENTAL AUDIT REPORT-

(i) **IN GENERAL-** THE TERM “ENVIRONMENTAL AUDIT REPORT” MEANS A DOCUMENT PREPARED AS A RESULT OF A VOLUNTARY ENVIRONMENTAL AUDIT.

(ii) **INCLUSION-** THE TERM “ENVIRONMENTAL AUDIT REPORT” INCLUDES- FIELD NOTES, RECORDS OF OBSERVATIONS, FINDINGS, OPINIONS, SUGGESTIONS, CONCLUSIONS, DRAFTS, MEMORANDA, DRAWINGS, PHOTOGRAPHS, COMPUTER-GENERATED OR ELECTRONICALLY RECORDED INFORMATION, MAPS, CHARTS, GRAPHS, AND SURVEYS, PROVIDED THAT SUCH INFORMATION IS COLLECTED OR DEVELOPED IN GOOD FAITH AND FOR THE PRIMARY PURPOSE OF CONDUCTING A VOLUNTARY ENVIRONMENTAL AUDIT.

(iii) **REQUIREMENTS-** AN ENVIRONMENTAL AUDIT REPORT, SHALL INCLUDE, WHEN COMPLETED, THE FOLLOWING THREE (3) COMPONENTS:

(a) AN ENVIRONMENTAL AUDIT REPORT PREPARED BY THE AUDITOR THAT INCLUDES THE SCOPE OF THE AUDIT, THE INFORMATION GAINED IN THE AUDIT, CONCLUSIONS AND RECOMMENDATIONS, AND EXHIBITS AND APPENDICES;

(b) MEMORANDA AND DOCUMENTS ANALYZING A PART OR ALL OF THE AUDIT REPORT AND DISCUSSING IMPLEMENTATION ISSUES; AND

(c) AN IMPLEMENTATION PLAN THAT ADDRESSES CORRECTING PAST NONCOMPLIANCE, IMPROVING CURRENT COMPLIANCE, AND PREVENTING FUTURE NONCOMPLIANCE.

(iv) LABELING- EACH DOCUMENT IN AN AUDIT REPORT THAT CONTAINS CONFIDENTIAL SELF-EVALUATION OR ANALYSIS SHALL BE LABELED WITH “AUDIT REPORT: PRIVILEGED DOCUMENT,” OR SUBSTANTIALLY COMPARABLE LANGUAGE.

(a) IT IS AN AFFIRMATIVE DEFENSE TO THE CLERICAL DISSEMINATION OF A PRIVILEGED AUDIT REPORT THAT THE REPORT WAS NOT LABELED WITH “AUDIT REPORT: PRIVILEGED DOCUMENT,” OR SUBSTANTIALLY COMPARABLE LANGUAGE.

(b) THE LACK OF LABELING MAY NOT BE RAISED AS A DEFENSE IF THE PERSON, GOVERNMENTAL AGENCY, OR OTHER ENTITY SEEKING DISCLOSURE KNEW OR HAD REASON TO KNOW THAT THE AUDIT REPORT WAS PRIVILEGED.

(G) VOLUNTARY DISCLOSURE-

(i) THE TERM “VOLUNTARY DISCLOSURE” MEANS A DISCLOSURE OF EACH SPECIFIC VIOLATION, MADE WITHIN THIRTY (30) DAYS (OR SUCH SHORTER PERIOD PROVIDED BY LAW) OF DISCOVERY.

(ii) A DISCLOSURE IS VOLUNTARY FOR THE PURPOSES OF THIS CHAPTER ONLY IF-

(a) THE DISCLOSURE IS MADE IN WRITING BY CERTIFIED MAIL TO THE AGENCY;

(b) AN INVESTIGATION OF THE VIOLATION(S) WAS NOT INITIATED OR THE VIOLATION(S) WAS NOT INDEPENDENTLY DETECTED BY THE AGENCY BEFORE THE DISCLOSURE WAS MADE USING CERTIFIED MAIL. FOR THE PURPOSES OF THIS SUBSECTION, THE AGENCY HAS THE BURDEN OF PROVING THAT AN INVESTIGATION OF THE VIOLATION(S) WAS INITIATED OR THE VIOLATION WAS DETECTED BEFORE RECEIPT OF THE CERTIFIED MAIL;

(c) THE DISCLOSURE ARISES OUT OF A VOLUNTARY ENVIRONMENTAL AUDIT; AND

(d) THE DISCLOSURE IS NOT REQUIRED UNDER FEDERAL ENVIRONMENTAL LAWS.

(H) DELEGATED FEDERAL LAW- THE TERM “DELEGATED FEDERAL LAW” MEANS A FEDERAL LAW WITH RESPECT TO WHICH A STATE HAS BEEN DELEGATED PRIMARY AUTHORITY FOR ENFORCEMENT IN ACCORDANCE WITH THE FEDERAL LAW, TO THE EXTENT THE STATE HAS BEEN DELEGATED THE AUTHORITY.

SECTION 3. PREREQUISITES TO APPLICATION OF THIS CHAPTER.

FOR A REGULATED ENTITY TO QUALIFY FOR THE PROTECTIONS ESTABLISHED BY THIS CHAPTER, ALL OF THE FOLLOWING PREREQUISITES MUST BE SATISFIED:

(A) MORE THAN ONE (1) YEAR MUST HAVE ELAPSED SINCE THE INITIATION OF AN ENFORCEMENT ACTION THAT RESULTED IN THE IMPOSITION OF A PENALTY INVOLVING THE REGULATED ENTITY;

(B) AT LEAST FIFTEEN (15) DAYS BEFORE CONDUCTING A VOLUNTARY ENVIRONMENTAL AUDIT, THE REGULATED ENTITY THAT WISHES TO CONDUCT, OR CAUSE TO BE CONDUCTED, THE AUDIT MUST GIVE NOTICE BY ELECTRONIC FILING, CERTIFIED MAIL WITH RETURN RECEIPT REQUESTED TO THE AGENCY, OR ANY OTHER MODE OF COMMUNICATION ACCEPTABLE TO THE AGENCY.

(i) THE NOTICE MUST SPECIFY THE FACILITY, OPERATION, OR PROPERTY OR PORTION OF THE FACILITY, OPERATION, OR PROPERTY TO BE AUDITED, THE DATE THE AUDIT WILL BEGIN AND END, AND THE GENERAL SCOPE OF THE AUDIT. THE NOTICE MAY PROVIDE NOTIFICATION OF MORE THAN ONE SCHEDULED VOLUNTARY ENVIRONMENTAL AUDIT AT A TIME.

(ii) THE NOTICE SHALL BE MADE PUBLICLY AVAILABLE UPON RECEIPT BY THE AGENCY.

(C) VOLUNTARY DISCLOSURE- A REGULATED ENTITY MUST FULLY AND VOLUNTARILY DISCLOSE EACH SPECIFIC VIOLATION DISCOVERED DURING THE COURSE OF A VOLUNTARY ENVIRONMENTAL AUDIT.

(i) THE WRITTEN DISCLOSURE SHALL IDENTIFY:

(a) EACH VIOLATION DISCOVERED;

(b) HOW EACH VIOLATION WAS DISCOVERED;

(c) INFORMATION SUPPORTING THE DISCOVERY OF EACH VIOLATION; AND

(d) ALL ACTIONS THAT HAVE BEEN OR WILL BE TAKEN BY THE REGULATED ENTITY TO BRING ITSELF INTO COMPLIANCE, TO MITIGATE ANY ACTUAL OR THREATENED HARM, AND TO REMEDIATE ANY RESULTING DAMAGE.

(ii) REMEDIATION- A REGULATED ENTITY MUST CORRECT THE DISCLOSED VIOLATION(S) WITHIN SIXTY (60) DAYS FROM THE DATE SAID VIOLATION(S) WAS REPORTED TO THE AGENCY, CERTIFY IN WRITING THAT THE VIOLATION(S) HAS BEEN CORRECTED, SUBMIT INFORMATION ADEQUATE TO ALLOW THE AGENCY TO CONFIRM THAT CORRECTIVE AND REMEDIAL ACTIONS WERE IMPLEMENTED IN ACCORDANCE WITH THIS CHAPTER, AND TAKE APPROPRIATE MEASURES, AS DE-

TERMINED BY THE AGENCY, TO REMEDY ANY ENVIRONMENTAL HARM OR THREAT TO PUBLIC HEALTH OR SAFETY RESULTING FROM THE VIOLATION(S). IF MORE THAN SIXTY (60) DAYS IS NEEDED TO CORRECT THE VIOLATION(S), THE REGULATED ENTITY SHALL PROVIDE THE AGENCY WITH A REASONABLE WRITTEN COMPLIANCE SCHEDULE BEFORE THE SIXTY (60) DAY PERIOD HAS PASSED.

(iii) THE COMPLIANCE SCHEDULE AND THE CONFIRMATION OF REMEDIATION NOTICE SHALL BE KEPT CONFIDENTIAL. PUBLIC DISCLOSURE OF INFORMATION CONTAINED IN SUCH DOCUMENT MAY RESULT IN THE IMPOSITION OF SANCTIONS UNDER SECTION 8(e)(ii).

SECTION 4. ENVIRONMENTAL AUDIT PRIVILEGE.

(A) IN GENERAL- EXCEPT AS PROVIDED BY SECTION 6 OF THIS CHAPTER, AN ENVIRONMENTAL AUDIT REPORT PREPARED AS A RESULT OF A VOLUNTARY ENVIRONMENTAL AUDIT CONDUCTED CONSISTENT WITH THE EFFECTIVE DATE OF THIS CHAPTER SHALL BE PRIVILEGED AND SHALL NOT BE DISCOVERABLE OR ADMISSIBLE AS EVIDENCE IN ANY CIVIL, CRIMINAL, OR ADMINISTRATIVE LEGAL ACTION, INCLUDING ENFORCEMENT ACTIONS. PURSUANT TO THIS SECTION, AN AUDITOR SHALL NOT BE REQUIRED OR OTHERWISE BE COMPELLED TO REVEAL INFORMATION WHICH IS PRIVILEGED UNDER THIS SECTION.

(B) NOTHING IN THIS SECTION SHALL BE CONSTRUED-

(i) TO ABRIDGE THE RIGHT OF ANY PERSON TO RECOVER ACTUAL DAMAGES RESULTING FROM ANY VIOLATION(S); OR

(ii) TO LIMIT, WAIVE, OR ABROGATE THE SCOPE OR NATURE OF ANY STATUTORY OR COMMON LAW RULE REGARDING DISCOVERY OR ADMISSIBILITY OF EVIDENCE, INCLUDING THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT PRIVILEGE.

(C) ANY PRIVILEGE ESTABLISHED BY THIS CHAPTER SHALL APPLY ONLY TO THOSE COMMUNICATIONS, ORAL OR WRITTEN, PERTAINING TO AND MADE IN CONNECTION WITH A VOLUNTARY ENVIRONMENTAL AUDIT AND SHALL NOT APPLY TO THE UNDERLYING FACTS RELATING TO THE VIOLATION(S) ITSELF.

(D) WAIVER- THE PRIVILEGE ESTABLISHED BY THIS SECTION DOES NOT APPLY TO THE EXTENT IT IS EXPRESSLY WAIVED IN WRITING BY THE REGULATED ENTITY WHO PREPARED THE ENVIRONMENTAL AUDIT REPORT OR CAUSED THE REPORT TO BE PREPARED. THE PRIVILEGE ESTABLISHED BY THIS SECTION IS DEEMED WAIVED IF A REGULATED ENTITY INTRODUCES PART OF AN ENVIRONMENTAL AUDIT REPORT INTO EVIDENCE IN A CIVIL OR ADMINISTRATIVE PROCEEDING TO PROVE THAT

THE REGULATED ENTITY DID NOT VIOLATE, OR IS NO LONGER VIOLATING, FEDERAL ENVIRONMENTAL LAWS.

(i) DISCLOSURE OF A PART OF AN ENVIRONMENTAL AUDIT REPORT OR INFORMATION CONSISTING OF CONFIDENTIAL SELF-EVALUATION OR ANALYSIS DOES NOT WAIVE THE PRIVILEGE ESTABLISHED BY THIS SECTION IF:

(a) A DISCLOSURE IS MADE TO ADDRESS OR CORRECT A MATTER RAISED BY THE VOLUNTARY ENVIRONMENTAL AUDIT AND IS MADE TO A PERSON EMPLOYED BY THE REGULATED ENTITY, INCLUDING TEMPORARY AND CONTRACT EMPLOYEES; THE REGULATED ENTITY'S LAWYER OR LEGAL REPRESENTATIVE; AN OFFICER OR DIRECTOR OF THE REGULATED ENTITY, OR THE REGULATED ENTITY'S FACILITY, OPERATION, OR PROPERTY; A PARTNER OF THE REGULATED ENTITY; AN INDEPENDENT CONTRACTOR RETAINED BY THE REGULATED ENTITY; OR THE PRINCIPAL OF THE INDEPENDENT CONTRACTOR WHO CONDUCTED A VOLUNTARY ENVIRONMENTAL AUDIT ON THE PRINCIPAL'S BEHALF;

(b) DISCLOSURE IS MADE UNDER THE TERMS OF A CONFIDENTIALITY AGREEMENT BETWEEN THE REGULATED ENTITY WHO PREPARED THE ENVIRONMENTAL AUDIT REPORT OR CAUSED THE REPORT TO BE PREPARED AND-

(1) A PARTNER OR POTENTIAL PARTNER OF THE REGULATED ENTITY, OR THE REGULATED ENTITY'S FACILITY, OPERATION, OR PROPERTY;

(2) A TRANSFEREE OR POTENTIAL TRANSFEREE OF AN INTEREST IN THE REGULATED ENTITY, OR THE REGULATED ENTITY'S FACILITY, OPERATION, OR PROPERTY;

(3) A LENDER OR POTENTIAL LENDER FOR THE REGULATED ENTITY, OR THE REGULATED ENTITY'S FACILITY, OPERATION, OR PROPERTY;

(4) A PERSON ENGAGED IN THE BUSINESS OF INSURING, UNDERWRITING, OR INDEMNIFYING THE REGULATED ENTITY, OR THE REGULATED ENTITY'S FACILITY, OPERATION, OR PROPERTY; OR

(5) A PERSON WHO, ALONG WITH THE REGULATED ENTITY WHO PREPARED THE ENVIRONMENTAL AUDIT REPORT OR CAUSED THE REPORT TO BE PREPARED, IS AN OWNER OR OPERATOR OF THE REGULATED ENTITY, OR THE REGULATED ENTITY'S FACILITY, OPERATION, OR PROPERTY.

(c) DISCLOSURE IS MADE UNDER A WRITTEN CLAIM OF CONFIDENTIALITY TO A GOVERNMENT OFFICIAL OR AGENCY BY THE REGULATED ENTITY WHO PREPARED THE ENVIRONMENTAL AUDIT REPORT OR WHO CAUSED THE AUDIT REPORT TO BE PREPARED.

(ii) WHEN AN ENVIRONMENTAL AUDIT REPORT IS OBTAINED, REVIEWED, OR OTHERWISE USED IN A CRIMINAL PROCEEDING, THE PRIVILEGE IS NOT WAIVED AS TO ANY CIVIL OR ADMINISTRATIVE PROCEEDING.

(D) STIPULATION TO PRIVILEGE- THE PARTIES TO A LEGAL ACTION MAY AT ANY TIME STIPULATE TO THE ENTRY OF AN ORDER THAT DIRECTS THAT SPECIFIC INFORMATION CONTAINED IN AN ENVIRONMENTAL AUDIT REPORT IS OR IS NOT SUBJECT TO THE PRIVILEGE.

SECTION 5. LIMITED IMMUNITY.

(A) EXCEPT AS PROVIDED BY SECTION 6 OF THIS CHAPTER, THE AGENCY MUST DEFER FOR AT LEAST SIXTY (60) DAYS THE IMPOSITION OF ADMINISTRATIVE OR CIVIL PENALTIES ARISING FROM VOLUNTARY DISCLOSURE OF A VIOLATION OF FEDERAL ENVIRONMENTAL LAWS, OR OF CIRCUMSTANCES, CONDITIONS, OR OCCURRENCES THAT CONSTITUTE OR MAY CONSTITUTE A VIOLATION. IF A COMPLIANCE SCHEDULE IS APPROVED BY THE AGENCY, THE AGENCY MUST DEFER ENFORCEMENT FOR THE TERM OF THE APPROVED SCHEDULE UNLESS THE REGULATED ENTITY FAILS TO MEET AN INTERIM PERFORMANCE DATE CONTAINED IN THE SCHEDULE.

(i) IF, WITHIN SIXTY (60) DAYS AFTER THE VIOLATION(S) IS DISCLOSED TO THE AGENCY OR WITHIN THE TIME PERIOD SPECIFIED IN AN APPROVED COMPLIANCE SCHEDULE, THE REGULATED ENTITY CORRECTS THE VIOLATION(S) IDENTIFIED IN THE VOLUNTARY ENVIRONMENTAL AUDIT AND CERTIFIES TO THE AGENCY THAT THE VIOLATION(S) HAS BEEN CORRECTED, THE AGENCY MAY NOT IMPOSE OR BRING AN ACTION FOR ANY ADMINISTRATIVE OR CIVIL PENALTIES AGAINST THE REGULATED ENTITY FOR THE DISCLOSED VIOLATION(S) OF FEDERAL ENVIRONMENTAL LAWS, OR OF CIRCUMSTANCES, CONDITIONS, OR OCCURRENCES THAT CONSTITUTE OR MAY CONSTITUTE THE VIOLATION(S). FINAL WAIVER OF PENALTIES AND FINES IS NOT GRANTED UNTIL FULL COMPLIANCE HAS BEEN CERTIFIED BY THE AGENCY OR OTHER FEDERAL ENFORCEMENT AUTHORITY AS OCCURRING WITHIN SIXTY (60) DAYS OR IN ACCORDANCE WITH AN APPROVED COMPLIANCE SCHEDULE.

(ii) FOR THE PURPOSES OF THIS SECTION, THE GRANT OF IMMUNITY SHALL EXTEND TO ADMINISTRATIVE OR CIVIL PENALTIES FOR VIOLATION(S) BASED ON THE FACTS DISCLOSED, AND FOR VIOLATION(S) DISCOVERED BECAUSE OF THE DISCLOSURE THAT WAS UNKNOWN TO THE REGULATED ENTITY THAT MADE THE DISCLOSURE.

(iii) NOTHING IN THIS SECTION SHALL BE CONSTRUED TO PROVIDE IMMUNITY FROM CRIMINAL PENALTIES.

(B) MITIGATION- IN THOSE CASES WHERE THE CONDITIONS OF A VOLUNTARY DISCLOSURE ARE NOT MET BUT A GOOD-FAITH EFFORT WAS MADE TO VOLUNTARILY DISCLOSE AND RESOLVE A VIOLATION DETECTED IN A VOLUNTARY ENVIRONMENTAL AUDIT, FEDERAL ENFORCEMENT AUTHORITIES SHALL CONSIDER THE NATURE AND EXTENT OF ANY GOOD-FAITH EFFORT IN DECIDING THE APPROPRIATE ENFORCEMENT RESPONSE AND SHALL MITIGATE ANY CIVIL PENALTIES BASED ON A SHOWING THAT ONE OR MORE OF THE CONDITIONS FOR VOLUNTARY DISCLOSURE HAVE BEEN MET.

SECTION 6. INAPPLICABILITY OF THIS CHAPTER.

(A) PROTECTIONS ESTABLISHED BY THIS CHAPTER DO NOT APPLY TO THE FOLLOWING:

(i) A DOCUMENT, COMMUNICATION, DATA, REPORT OR OTHER INFORMATION REQUIRED BY A GOVERNMENT AGENCY TO BE COLLECTED, DEVELOPED, MAINTAINED, OR REPORTED UNDER FEDERAL ENVIRONMENTAL LAWS, UNDER A PERMIT ISSUED UNDER FEDERAL ENVIRONMENTAL LAWS, AS A REQUIREMENT FOR OBTAINING, MAINTAINING, OR RENEWING A LICENSE, AS A REQUIREMENT UNDER A CONTRACT OR LEASE WITH THE FEDERAL GOVERNMENT, OR AS A REQUIREMENT UNDER AN ADMINISTRATIVE ORDER OR COURT ORDER OR DECREE;

(ii) INFORMATION THAT THE AGENCY OBTAINS BY OBSERVATION, SAMPLING, OR MONITORING;

(iii) INFORMATION THAT THE AGENCY OBTAINS FROM A SOURCE THAT WAS NOT INVOLVED IN COMPILING, PREPARING, OR CONDUCTING THE ENVIRONMENTAL AUDIT REPORT;

(iv) A DOCUMENT, COMMUNICATION, DATA, REPORT, OR OTHER INFORMATION THAT IS INDEPENDENT OF THE VOLUNTARY ENVIRONMENTAL AUDIT, WHETHER PREPARED OR EXISTING BEFORE, DURING, OR AFTER THE AUDIT;

(v) A DOCUMENT, COMMUNICATION, DATA, REPORT, OR OTHER INFORMATION COLLECTED, DEVELOPED, OR MAINTAINED IN THE COURSE OF A REGULARLY CONDUCTED BUSINESS ACTIVITY OR REGULAR PRACTICE OTHER THAN A VOLUNTARY ENVIRONMENTAL AUDIT;

(vi) A DOCUMENT, COMMUNICATION, DATA, REPORT, OR OTHER INFORMATION COLLECTED, DEVELOPED, OR MAINTAINED PURSUANT TO AN AGREEMENT OR ORDER BETWEEN THE REGULATED ENTITY AND THE AGENCY REGARDING A COMPLIANCE PLAN OR STRATEGY.

(B) A REGULATED ENTITY SHALL NOT BE GRANTED ANY OF THE PROTECTIONS ESTABLISHED BY THIS CHAPTER IF:

(i) AN ENVIRONMENTAL AUDIT REPORT SHOWS EVIDENCE OF NONCOMPLIANCE WITH FEDERAL ENVIRONMENTAL LAWS, AND THE REGULATED ENTITY FAILS TO:

(a) PROMPTLY INITIATE REASONABLE EFFORTS TO ACHIEVE COMPLIANCE UPON DISCOVERY OF THE NONCOMPLIANCE THROUGH AN ENVIRONMENTAL AUDIT;

(b) PURSUE COMPLIANCE WITH REASONABLE DILIGENCE; OR

(c) ACHIEVE COMPLIANCE IN ACCORDANCE WITH SECTION 3(C)(ii) OF THIS CHAPTER;

(ii) THE INFORMATION IS COLLECTED, DEVELOPED, MADE, OR MAINTAINED IN BAD FAITH OR FOR A FRAUDULENT PURPOSE;

(iii) THE ENVIRONMENTAL AUDIT REPORT WAS PREPARED TO AVOID DISCLOSURE OF INFORMATION IN AN INVESTIGATIVE, ADMINISTRATIVE, OR JUDICIAL PROCEEDING THAT WAS UNDERWAY, THAT WAS IMMINENT, OR FOR WHICH THE REGULATED ENTITY HAD BEEN PROVIDED WRITTEN NOTIFICATION THAT AN INVESTIGATION INTO A SPECIFIC VIOLATION HAD BEEN INITIATED;

(iv) THE VOLUNTARY ENVIRONMENTAL AUDIT REVEALS A VIOLATION THAT RESULTED IN SERIOUS, ACTUAL HARM OR CREATED AN IMMINENT AND SUBSTANTIAL ENDANGERMENT TO HUMAN HEALTH, PUBLIC SAFETY, OR THE ENVIRONMENT;

(v) THE VIOLATION WAS COMMITTED INTENTIONALLY, KNOWINGLY, OR AS A RESULT OF GROSS NEGLIGENCE, OR IF THE REGULATED ENTITY HAS A MANAGEMENT PATTERN OR PRACTICE THAT HAS THE EFFECT OF CONDONING OR CONCEALING VIOLATION(S) OF FEDERAL ENVIRONMENTAL LAWS;

(vi) INFORMATION IS KNOWINGLY MISREPRESENTED OR MISSTATED, OR IS KNOWINGLY DELETED OR WITHHELD FROM AN ENVIRONMENTAL AUDIT REPORT, WHETHER OR NOT INCLUDED IN A SUBSEQUENT ENVIRONMENTAL AUDIT REPORT;

(vii) THE REGULATED ENTITY HAS WITHIN THIRTY-SIX (36) MONTHS PRECEDING THE VIOLATION, COMMITTED, AT THE SAME FACILITY OR ASSOCIATED FACILITIES, A PATTERN OF VIOLATIONS THAT ARE THE SAME AS OR CLOSELY RELATED TO THE VIOLATION FOR WHICH PROTECTION IS SOUGHT UNDER THIS CHAPTER, OR HAS NOT ATTEMPTED TO BRING THE FACILITY INTO COMPLIANCE SO AS TO CONSTITUTE A PATTERN OF DISREGARD FOR FEDERAL ENVIRONMENTAL LAWS;

(viii) A REGULATED ENTITY CONDUCTED A PREVIOUS VOLUNTARY ENVIRONMENTAL AUDIT THAT DISCLOSED A VIOLATION AND THE REGULATED ENTITY INTENTIONALLY FAILED TO REPORT THE VIOLATION TO THE AGENCY;

(ix) THE REGULATED ENTITY FAILS TO COOPERATE FULLY WITH THE AGENCY IN MAINTAINING ENVIRONMENTAL COMPLIANCE. COOPERATION INCLUDES, AT A MINIMUM, PROVIDING THE AGENCY WITH ALL RELEVANT DOCUMENTS, ACCESS TO THE REGULATED ENTITY'S FACILITIES, ASSISTANCE IN INVESTIGATING THE DISCLOSED VIOLATION(S) AND ANY ENVIRONMENTAL CONSEQUENCES RESULTING FROM THE VIOLATION(S), AND ANY OTHER INFORMATION NECESSARY FOR THE AGENCY TO DETERMINE THE APPLICABILITY OF THIS CHAPTER;

(x) IN A CRIMINAL PROCEEDING ONLY, A COURT, AFTER AN IN CAMERA REVIEW MADE IN ACCORDANCE WITH SECTION 7 OF THIS CHAPTER, DETERMINES THAT THE REVIEWED MATERIAL SHOWS EVIDENCE OF THE COMMISSION OF A CRIMINAL OFFENSE UNDER FEDERAL ENVIRONMENTAL LAWS, AND A FEDERAL ENFORCEMENT AUTHORITY DEMONSTRATES THAT IT HAS A COMPELLING NEED FOR THE INFORMATION, THE INFORMATION IS NOT OTHERWISE AVAILABLE, AND THE FEDERAL ENFORCEMENT AUTHORITY IS UNABLE TO OBTAIN EQUIVALENT INFORMATION BY ANY MEANS WITHOUT INCURRING UNREASONABLE COST AND DELAY.

SECTION 7. PROCEDURES GOVERNING APPLICATION OF THIS CHAPTER.

(A) IN CAMERA REVIEW-

(i) IN THE EVENT OF A DISPUTE IN ANY CIVIL, CRIMINAL, OR ADMINISTRATIVE PROCEEDING OVER WHETHER AN ENVIRONMENTAL AUDIT REPORT IS PRIVILEGED OR EVIDENCES VIOLATIONS SUBJECT TO LIMITED IMMUNITY, ANY PARTY TO A PROCEEDING MAY FILE WITH THE COURT OR ADMINISTRATIVE TRIBUNAL HAVING JURISDICTION OVER THE MATTER A MOTION REQUESTING AN IN CAMERA HEARING TO DETERMINE WHETHER SUCH ENVIRONMENTAL AUDIT REPORT OR PORTIONS THEREOF ARE PROTECTED BY SECTIONS 4 OR 5 OF THIS CHAPTER. ANY SUCH MOTION SHALL STATE THE GROUNDS ON WHICH THE PARTY IS FILING THE MOTION. UPON THE FILING OF SUCH MOTION, AN IN CAMERA HEARING SHALL BE SCHEDULED AND HELD IN ACCORDANCE WITH THIS SECTION.

(ii) NOTWITHSTANDING THE ABILITY OF ANY PARTY TO FILE A MOTION REQUESTING AN IN CAMERA HEARING PURSUANT TO PARAGRAPH (i) OF THIS SUBSECTION, IN ORDER TO CLAIM ANY PROTECTION UNDER THIS CHAPTER, A REGULATED ENTITY MUST FILE A PETITION FOR AN IN CAMERA REVIEW TO DETERMINE THE APPLICABILITY OF THIS CHAPTER.

(iii) UPON FILING SUCH MOTION, THE OPPOSING PARTY SHALL HAVE TEN (10) DAYS TO FILE AN OBJECTION OR RESPONSE TO SUCH

MOTION. UPON THE RECEIPT OF THE OPPOSING PARTY'S OBJECTION OR RESPONSE, THE COURT SHALL ISSUE AN ORDER SCHEDULING AN IN CAMERA HEARING TO BE HELD WITHIN FORTY-FIVE (45) DAYS OF THE FILING OF THE MOTION.

(iv) **DECLARATORY RULINGS-** IN THE ABSENCE OF AN ONGOING PROCEEDING, WHERE THE PARTIES ARE NOT IN AGREEMENT AS TO THE APPLICABILITY OF ANY PROVISION OF THIS CHAPTER, THE AGENCY MAY SEEK A DECLARATORY RULING FROM THE DISTRICT COURT ON WHETHER ANY MATERIALS CONTAINED IN AN ENVIRONMENTAL AUDIT REPORT ARE, IN ANY WAY, PROTECTED UNDER THIS CHAPTER, AND WHETHER SUCH PROTECTION, IF EXISTING, SHOULD BE REVOKED UNDER ANY PROVISION OF THIS CHAPTER.

(v) **MEANS OF OBTAINING ENVIRONMENTAL AUDIT REPORT-** AN ENVIRONMENTAL AUDIT REPORT MAY BE OBTAINED AND REVIEWED FOR THE PURPOSES OF PREPARING FOR AN IN CAMERA HEARING THROUGH THE FOLLOWING:

(a) IN ANY CIVIL, CRIMINAL, OR ADMINISTRATIVE PROCEEDING, THE COURT ORDER SCHEDULING THE IN CAMERA REVIEW SHALL REQUIRE THAT A COPY OF THE ENVIRONMENTAL AUDIT REPORT BE IMMEDIATELY PROVIDED TO THE COURT OR ADMINISTRATIVE TRIBUNAL SO THAT ALL RELEVANT PORTIONS OF SUCH REPORT MAY BE DISTRIBUTED, AT THE DISCRETION OF THE COURT OR ADMINISTRATIVE TRIBUNAL, TO ANY PARTY TO A PROCEEDING WITHIN A REASONABLE PERIOD OF TIME IN ADVANCE OF THE IN CAMERA HEARING. THE DISTRIBUTION AND REVIEW OF THE ENVIRONMENTAL AUDIT REPORT SHALL BE LIMITED SOLELY TO RELEVANT PORTIONS OF SUCH ENVIRONMENTAL AUDIT REPORT FOR THE PURPOSE OF THE IN CAMERA HEARING; OR

(b) IN CRIMINAL ACTIONS ONLY, A FEDERAL PROSECUTING AUTHORITY WHO, BASED ON INFORMATION OBTAINED FROM A SOURCE INDEPENDENT OF AN ENVIRONMENTAL AUDIT REPORT, HAS PROBABLE CAUSE TO BELIEVE A VIOLATION OF FEDERAL ENVIRONMENTAL LAWS HAS BEEN COMMITTED, MAY OBTAIN AN ENVIRONMENTAL AUDIT REPORT FOR WHICH A PRIVILEGE IS ASSERTED UNDER SECTION 4 OF THIS CHAPTER.

(1) THE FEDERAL PROSECUTING AUTHORITY MAY OBTAIN THE REPORT UNDER A SEARCH WARRANT, UNDER A SUBPOENA, OR THROUGH DISCOVERY. THE PROSECUTING AUTHORITY SHALL IMMEDIATELY PLACE THE REPORT UNDER SEAL AND SHALL NOT REVIEW OR DISCLOSE THE CONTENTS OF THE REPORT UNLESS AND UNTIL A COURT ORDER IS ISSUED THAT PERMITS THE PROSECUTING AUTHORITY TO BREAK THE SEAL, OR THE PRIVILEGE IS WAIVED BY THE REGULATED ENTITY.

(2) NOT LATER THAN THIRTY (30) DAYS AFTER THE PROSECUTING AUTHORITY OBTAINS THE REPORT UNDER SUBPARAGRAPH (B), THE REGULATED ENTITY THAT PREPARED THE REPORT OR CAUSED THE REPORT TO BE PREPARED MAY FILE WITH THE APPROPRIATE COURT OR ADMINISTRATIVE TRIBUNAL A PETITION REQUESTING AN IN CAMERA HEARING TO DETERMINE THE APPLICABILITY OF THIS CHAPTER. THE RIGHT TO CLAIM THE PROTECTIONS ESTABLISHED BY THIS CHAPTER IS WAIVED IF THE REGULATED ENTITY DOES NOT FILE A PETITION UNDER THIS SUBPARAGRAPH WITHIN THIRTY (30) DAYS.

(c) A MOVING PARTY WHO OBTAINS ACCESS TO A DOCUMENT OR INFORMATION THROUGH THE COURT, ADMINISTRATIVE TRIBUNAL, OR ANY OTHER MEANS, MAY NOT DIVULGE ANY INFORMATION FROM THE DOCUMENT OR OTHER INFORMATION EXCEPT AS SPECIFICALLY AUTHORIZED BY SUCH COURT OR ADMINISTRATIVE TRIBUNAL.

(B) BURDENS OF PROOF-

(i) A REGULATED ENTITY ASSERTING ANY PROTECTION ESTABLISHED BY THIS CHAPTER HAS THE BURDEN OF PROVING A PRIMA FACIE CASE AS TO SUCH PROTECTION, INCLUDING A PRIMA FACIE CASE IF THERE IS EVIDENCE OF NONCOMPLIANCE WITH FEDERAL ENVIRONMENTAL LAWS, THAT THE PREREQUISITES LISTED IN SECTION 3 OF THIS CHAPTER HAVE BEEN SATISFIED BY THE REGULATED ENTITY.

(ii) A PARTY SEEKING DISCLOSURE OF AN ENVIRONMENTAL AUDIT REPORT, OR SANCTIONS FOR VIOLATIONS CONTAINED THEREIN, HAS THE BURDEN OF PROVING, BY A PREPONDERANCE OF THE EVIDENCE, THAT THE PROTECTIONS ESTABLISHED BY THIS CHAPTER DO NOT APPLY.

SECTION 8. OTHER PROVISIONS OF THIS CHAPTER.

(A) THIS CHAPTER MAY NOT BE CONSTRUED TO PREVENT THE AGENCY FROM ISSUING AN EMERGENCY ORDER, SEEKING INJUNCTIVE RELIEF, INDEPENDENTLY OBTAINING RELEVANT FACTS, CONDUCTING NECESSARY INSPECTIONS, OR TAKING OTHER APPROPRIATE ACTION REGARDING IMPLEMENTATION AND ENFORCEMENT OF APPLICABLE FEDERAL ENVIRONMENTAL LAWS, EXCEPT AS EXPRESSLY PROVIDED IN THIS CHAPTER.

(B) EXPIRATION OF THIS CHAPTER-

(i) THIS CHAPTER APPLIES ONLY TO INFORMATION AND COMMUNICATIONS THAT ARE PART OF A VOLUNTARY ENVIRONMENTAL AUDIT INITIATED ON OR BEFORE THE DATE FIVE YEARS FROM THE ENACTMENT DATE OF THIS CHAPTER.

(ii) EPA REPORTING REQUIREMENTS- THE AGENCY SHALL-

(a) ESTABLISH AND MAINTAIN A DATA BASE OF THE VOLUNTARY DISCLOSURES MADE UNDER THIS CHAPTER. THE DATA BASE SHALL INCLUDE THE NUMBER OF VOLUNTARY DISCLOSURES MADE ON AN ANNUAL BASIS AND SHALL SUMMARIZE IN GENERAL CATEGORIES THE TYPES OF VIOLATIONS AND THE TIME NEEDED TO ACHIEVE COMPLIANCE. THE AGENCY SHALL ANNUALLY PUBLISH A REPORT CONTAINING THE INFORMATION IN THIS DATA BASE; AND

(b) WITHIN NINETY (90) DAYS OF THE EXPIRATION OF THIS CHAPTER, THE AGENCY SHALL PREPARE AND SUBMIT TO THE STANDING COMMITTEES OF THE CONGRESS OF THE UNITED STATES WITH JURISDICTION OVER ISSUES PERTAINING TO NATURAL RESOURCES AND THE ENVIRONMENT, A REPORT EVALUATING THE EFFECTIVENESS OF THIS CHAPTER AND SPECIFICALLY DETAILING WHETHER THIS CHAPTER HAS BEEN EFFECTIVE, USING RESULTS-ORIENTED MEASURES, IN ENCOURAGING THE USE OF VOLUNTARY ENVIRONMENTAL AUDITS AND IN IDENTIFYING AND CORRECTING ENVIRONMENTAL PROBLEMS AND CONDITIONS.

(C) PROHIBITED IMPEDIMENTS TO STATE VOLUNTARY ENVIRONMENTAL AUDIT PROTECTION- THE AGENCY SHALL NOT-

(i) REFUSE TO DELEGATE A DELEGATED FEDERAL LAW TO A STATE OR LOCAL AGENCY OR REFUSE TO APPROVE OR AUTHORIZE A STATE OR LOCAL PROGRAM UNDER A DELEGATED FEDERAL LAW BECAUSE THE STATE HAS IN EFFECT A STATUTE THAT ESTABLISHES LIMITED PROTECTION OF VOLUNTARY ENVIRONMENTAL AUDIT REPORTS;

(ii) MAKE A PERMIT, LICENSE, OR OTHER AUTHORIZATION, A CONTRACT, OR A CONSENT DECREE OR OTHER SETTLEMENT AGREEMENT CONTINGENT ON A REGULATED ENTITY WAIVING A STATE LAW PROTECTION OF VOLUNTARY ENVIRONMENTAL AUDIT REPORTS;

(iii) TAKE ANY OTHER ACTION THAT HAS THE EFFECT OF REQUIRING A STATE TO RESCIND OR LIMIT ANY PROTECTION OF A STATE LAW THAT ESTABLISHES PROTECTION OF VOLUNTARY ENVIRONMENTAL AUDIT REPORTS;

(iv) ADOPT A RULE OR PERMIT CONDITION FOR THE PURPOSE OF CIRCUMVENTING THE PROTECTION ESTABLISHED IN THIS CHAPTER BY REQUIRING DISCLOSURE OF A REPORT OF A VOLUNTARY ENVIRONMENTAL AUDIT, OR OTHERWISE ATTEMPT TO CIRCUMVENT OR LIMIT THE PROTECTION PROVIDED IN THIS CHAPTER; OR

(v) DENY A STATE ENFORCEMENT AUTHORITY OVER DELEGATED FEDERAL LAWS, CITING AN INABILITY TO RECOVER CIVIL PENALTIES FOR SIGNIFICANT ECONOMIC BENEFIT, BECAUSE A STATE STATUTE PROVIDES PROTECTION OF VOLUNTARY ENVIRONMENTAL AUDIT REPORTS.

FOR THE PURPOSES OF THE AGENCY'S REQUIREMENTS FOR STATE DELEGATION AUTHORITY, A REGULATED ENTITY DOES NOT RECEIVE A SIGNIFICANT ECONOMIC BENEFIT THAT GIVES SUCH ENTITY A CLEAR ADVANTAGE OVER ITS BUSINESS COMPETITORS DUE TO THE EXPENSE INCURRED BY THE REGULATED ENTITY TO REMEDIATE VOLUNTARILY DISCLOSED VIOLATIONS OF FEDERAL ENVIRONMENTAL LAW IN ACCORDANCE WITH THIS CHAPTER.

(D) MANDATED MINIMUM STATE SELF-AUDIT PROTECTION- EACH STATE SHALL PROVIDE SELF-AUDIT PROTECTION AT LEAST AS PROTECTIVE AS THOSE ESTABLISHED BY THIS CHAPTER. THE EPA SHALL WITHHOLD FINAL DELEGATION APPROVAL TO ANY STATE THAT REFUSES TO PROVIDE SUCH PROTECTION.

(E) SANCTIONS FOR ABUSE OF THIS CHAPTER-

(i) IF ANY PARTY DIVULGES ALL OR ANY PART OF THE INFORMATION CONTAINED IN AN ENVIRONMENTAL AUDIT REPORT IN VIOLATION OF A PROVISION OF THIS CHAPTER OR IF ANY OTHER PERSON OR ENTITY KNOWINGLY DIVULGES OR DISSEMINATES ALL OR ANY PART OF THE INFORMATION CONTAINED IN AN ENVIRONMENTAL AUDIT REPORT THAT WAS PROVIDED TO SUCH PERSON OR ENTITY IN VIOLATION OF A PROVISION OF THIS CHAPTER, SUCH PARTY OR OTHER PERSON OR ENTITY IS LIABLE FOR ANY DAMAGES CAUSED BY THE DIVULGENCE OR DISSEMINATION OF THE INFORMATION THAT ARE INCURRED BY THE REGULATED ENTITY.

(ii) IF ANY PUBLIC ENTITY, PUBLIC EMPLOYEE, OR PUBLIC OFFICIAL DIVULGES ALL OR ANY PART OF THE INFORMATION CONTAINED IN AN ENVIRONMENTAL AUDIT REPORT IN VIOLATION OF THE PROVISIONS OF THIS CHAPTER OR KNOWINGLY DIVULGES OR DISSEMINATES ALL OR ANY PART OF THE INFORMATION CONTAINED IN AN ENVIRONMENTAL AUDIT REPORT THAT WAS PROVIDED TO SUCH PUBLIC ENTITY, PUBLIC EMPLOYEE, OR PUBLIC OFFICIAL IN VIOLATION OF A PROVISION OF THIS CHAPTER, SUCH PUBLIC ENTITY, PUBLIC EMPLOYEE, OR PUBLIC OFFICIAL SHALL BE GUILTY OF A CLASS 1 MISDEMEANOR, MAY BE FOUND IN CONTEMPT OF COURT, AND MAY BE ASSESSED A PENALTY NOT TO EXCEED \$10,000 BY A COURT OR ADMINISTRATIVE TRIBUNAL.

(iii) ANY PERSON WHO USES THE PROTECTIONS ESTABLISHED BY THIS CHAPTER TO COMMIT FRAUD IS GUILTY OF A MISDEMEANOR PUNISHABLE BY A FINE OF NOT MORE THAN \$25,000.

(iv) A PERSON MAY NOT KNOWINGLY MAKE A FALSE MATERIAL STATEMENT OR REPRESENTATION IN A VOLUNTARY DISCLOSURE OR ENVIRONMENTAL AUDIT REPORT. ANY PERSON FOUND TO HAVE MADE SUCH A STATEMENT SHALL BE SUBJECT TO ADMINISTRATIVE PENALTIES.

(v) A PARTY TO A CONFIDENTIALITY AGREEMENT DESCRIBED IN THIS CHAPTER WHO VIOLATES THE AGREEMENT IS LIABLE FOR DAMAGES CAUSED BY THE VIOLATION AND FOR ANY OTHER PENALTIES STIPULATED IN THE AGREEMENT.