The Fine Print of State Environmental Audit Privileges

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I.
INTRODUCTION

For the past five years, scholars, legislators, regulated entities, and environmental advocates have debated the merits of an abstract concept: the environmental audit privilege. Proponents of the privilege have urged that compliance with environmental laws will be enhanced when the promise of confidentiality induces regulated entities to engage in searching self-audits. Opponents have decried the secrecy inherent in the establishment of such a privilege.

Much has been written at an abstract level about this topic. Many articles discuss whether shielding adverse environmental

compliance information is a good[1] or a bad[2] idea, and whether it will actually induce the desired results.[3] Proceeding on the assumption that confidentiality is desirable, numerous authors have examined alternative approaches,[4] such as the attorney-client

1. *See, e.g.*, Terrell E. Hunt & Timothy A. Wilkins, *Environmental Audits and Enforcement Policy*, 16 HARV. ENVTL. L. REV. 365, 426-27 (1992) (calling for a limited environmental audit privilege, coupled with an amnesty program); John P. Kaisersatt, *Criminal Enforcement as a Disincentive to Environmental Compliance: Is a Federal Environmental Audit Privilege the Right Answer?*, 23 AM. J. CRIM. L. 405 (1996) (concluding that "the privilege establishes a workable system of trade-offs"); Kirk F. Marty, *Moving Beyond the Body Count and Toward Compliance: Legislative Options for Encouraging Environmental Self-Analysis*, 20 VT. L. REV. 495, 549 (1995); James T. O'Reilly, *Environmental Audit Privileges: The Need for Legislative Recognition*, 19 SETON HALL LEGIS. J. 119 (1994). *See also* Eric Bregman & Arthur Jacobson, *Environmental Performance Review: Self-Regulation in Environmental Law*, 16 CARDOZO L. REV. 465 (1994) (describing the benefits of self-regulation schemes); Robert J. Bush, Comment, *Stimulating Corporate Self-Regulation — The Corporate Self-Evaluative Privilege: Paradigmatic Preferentialism Or Pragmatic Panacea*, 87 NW. U. L. REV. 597 (1993) (describing development of the self-evaluation privilege and recommending expansion of the privilege).

2. *See, e.g.*, Craig N. Johnston, *An Essay on Environmental Audit Privileges: The Right Problem, the Wrong Solution*, 25 ENVTL. L. 335, 340 (1995) (concluding that "the creation of privileges is a seriously flawed approach to the problem at hand"); Mia Anna Mazza, *The New Evidentiary Privilege for Environmental Audit Reports: Making the Worst of a Bad Situation*, 23 ECOLOGY L.Q. 79, 119-26 (1996) (setting forth "the case against an environmental audit privilege"); Linda A. Spahr, *Environmental Self-Audit Privilege: The Straw That Breaks the Back of Criminal Prosecutions*, 7 FORDHAM ENVTL. L.J. 635, 676 (1996) ("The devastating implications of audit privilege legislation has only begun to sink in as criminal investigations have progressed with the specter of such laws lurking in the background").

3. *See, e.g.*, David Sorenson, *The U.S. Environmental Protection Agency's Recent Environmental Auditing Policy and Potential Conflict with State-Created Environmental Audit Privilege Laws*, 9 TUL. ENVTL. L.J. 483, 485 (1996) (opposing privilege on pragmatic grounds).

4. *See, e.g.*, Virginia Morton Creighton, *Colorado's Environmental Audit Privilege Statute: Striking the Appropriate Balance?*, 67 U. COLO. L. REV. 443, 469-72 (1996); John Davidson, *Privileges for Environmental Audits: Is Mum Really the Word?*, 4 S.C. ENVTL. L.J. 111, 116-23 (1995); David R. Erickson & Sarah D. Mathews, *Environmental Compliance Audits: Analysis of Current Law, Policy, and Practical Considerations to Best Protect their Confidentiality*, 63 UMKC L. REV. 491, 495-503 (1995); Peter A. Gish, *The Self-Critical Analysis Privilege and Environmental Audit Reports*, 25 ENVTL. L. 73 (1995); Michael Ray Harris, *Promoting Corporate Self-Compliance: An Examination of the Debate Over Legal Protection for Environmental Audits*, 23 ECOLOGY L.Q. 663, 684-98 (1996); Hunt & Wilkins, *supra* note 1, at 376-92; Michael H. Levin, Allan D. Hymes, & Sean Mullaney, *Discovery and Disclosure: How to Protect Your Environmental Audit Report*, 24 Env't Rep. (BNA) 1606 (1994); Thomas E. Lindley & Jerry B. Hodson, *Environmental Audit Privilege: Oregon's Experiment*, 24 Env't Rep. (BNA) 1221 (1993); Somendu B. Majumdar, *Voluntary Environmental Compliance Auditing: A Primer*, 7 FORDHAM ENVTL. L.J. 817, 830-40 (1996); Marty, *supra* note 1, at 503-12; O'Reilly, *supra* note 1, at 135-40; Linda Richenderfer & Neil R. Bigioni, *Going Naked Into the Thorns: Consequences of Conducting an Environmental Audit Program*, 3 VILL. ENVTL. L.J. 71, 84-86

privilege, the work product rule, and an embryonic common law "self-evaluation" (or "self-critical analysis") privilege.[5] Most of these confidentiality proponents have concluded that adverse environmental compliance discoveries cannot be shielded sufficiently under alternative theories, and that only a formal environmental audit privilege will provide the reliable protection necessary to induce widespread auditing.[6]

The United States Environmental Protection Agency is not convinced.[7] The United States Department of Justice remains un-

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(1992); Michael T. Scanlon, *A State Statutory Privilege for Environmental Audits: Is It a Suit Of Armor or Just the Emperor's New Clothes?*, 29 IND. L. REV. 647, 674-80 (1996); Sorenson, *supra* note 3, at 490-92; John Calvin Conway, Note, *Self-Evaluative Privilege and Corporate Compliance Audits*, 68 S. CAL. L. REV. 621, 631-60 (1995).

5. The so-called "self-critical analysis privilege" has been referred to by many different labels, including "self-evaluative report" and "self-evaluative document" privilege. *See* Gish, *supra* note 4, at 91 n.1 (1995). A thorough examination of the privilege would require the analysis of dozens of reported opinions in contexts ranging from hospital staff meetings reviewing medical care, to railroad accident investigations, to tenure review by faculty members, to employment discrimination investigations.

Two federal district court decisions have applied the "self-critical analysis privilege" to protect from discovery documents that might be characterized as "environmental audit" or "environmental self-evaluation" materials. *See* Reichhold Chem. v. Textron, 157 F.R.D. 522, 525-27 (N.D. Fla. 1994) (applying the privilege under the court's Federal Rule of Evidence 501 common law power, in a CERCLA response-cost action, to reports "prepared after the fact for the purpose of candid self-evaluation and analysis of the cause and effect of past pollution, and of [defendant's] possible role, as well as other's, in contributing to the pollution at the site"); Joiner v. Hercules, Inc., 169 F.R.D. 695 (S.D. Ga. 1996) (holding, in a vaguely described factual setting, that a self-critical analysis privilege should be recognized in connection with materials developed during an environmental compliance investigation).

A federal district court decision has rejected the recognition of such a privilege in environmental cases. *See* United States v. Dexter Corp., 132 F.R.D. 8, 9-10 (D. Conn. 1990) (concluding that the privilege should not be recognized in an action brought by the United States government to enforce the Clean Water Act). *See also* State *ex rel.* Celebrezze v. CECOS Int., Inc., 583 N.E.2d 1118, 1121 (Ohio Ct. App. 1990) (rejecting self-critical analysis privilege claim in an action brought by the State of Ohio, alleging violations of various state hazardous waste laws); CPC Int., Inc. v. Hartford Accident & Indem. Co., 620 A.2d 462 (N.J. Super. Ct. 1992) (rejecting privilege in private action by insured against its insurers for reimbursement of environmental cleanup costs).

6. *See, e.g.*, Gish, *supra* note 4, at 91; Hunt & Wilkins, *supra* note 1, at 426; O'Reilly, *supra* note 1, at 155-56.

7. The Environmental Protection Agency ("EPA") adopted an environmental audit policy on December 18, 1995, providing that "where violations are found through voluntary environmental audits or efforts that reflect a regulated entity's due diligence, and are promptly disclosed and expeditiously corrected, EPA will not seek gravity-based (i.e., non-economic benefit) penalties and will generally not recommend criminal prosecution against the regulated entity." EPA Final Policy Guidance Document, Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations, 60 Fed. Reg. 66706 (1995). In adopting the policy, the EPA

persuaded.[8] Congress has not yet been moved.[9] But state legislators have listened, and they have been mightily impressed. In the past four years, legislative enactments in nineteen states have transformed the abstract concept of an environmental audit privilege into reality.[10] In these jurisdictions, the environmental audit privilege is no longer an idea, but fully formed law, enshrined in the statute books.

This move from the ideal to the real requires a new kind of scrutiny. To be sure, arguments about the abstract virtues and demerits of the privilege will continue. But from Alaska to Virginia — and in seventeen states in between — regulated entities and those seeking to obtain environmental audit materials must now grapple with the first principle of modern environmental law: *the fine print matters.*

I have explored elsewhere the extraordinary importance of statutory and regulatory minutiae in the present era of "microenvironmental law,"[11] suggesting that "fine print" — or "not so fine print" — has three attributes: (1) it is hidden and difficult to detect; (2) it has been crafted by someone who seeks

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considered and rejected the establishment of a privilege. *See id.* at 35,642 ("The Agency remains firmly opposed to the establishment of a statutory evidentiary privilege for environmental audits . . . .").

For a thorough analysis of the detailed conditions that must be met before the EPA will confer the benefits of its policy on a regulated entity, *see* James T. Banks, *EPA's New Enforcement Policy: At Last, a Reliable Roadmap to Civil Penalty Mitigation for Self Disclosed Violations*, 26 ENVTL. L. REP. 10,227 (1996).

8. The Department of Justice ("DOJ") released a criminal environmental enforcement policy in 1991. *See* U.S. Dept. of Justice, Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator (July 1, 1991) (available from the Environmental Law Reporter Document Service, ELR Order No. AD-505). The DOJ guidelines set forth several factors for federal prosecutors to consider in determining whether or not to bring *criminal* charges; the guidelines do not purport to have any application in civil proceedings. The DOJ guidelines do not recognize or establish an environmental audit privilege, and do not accord any confidentiality to audit reports.

9. Congress failed to enact two federal environmental audit privilege bills introduced in the 104th Congress. Representative Joel Hefley (R-Colo.) introduced H.R. 1047 in the House of Representatives on February 24, 1995. *See* Voluntary Environmental Self-Evaluation Act, H.R. 1047, 104th Cong., 1st Sess. (1995). Senator Mark O. Hatfield (R-Or.) introduced S. 582 in the Senate on March 21, 1995. Voluntary Environmental Audit Protection Act, S. 582, 104th Cong., 1st Sess. (1995).

10. The nineteen states and their statutes are set forth *infra* at TABLE 1 & note 18.

11. When I coined the term "microenvironmental law" in 1994, I had no idea that it would resonant so deeply with colleagues teaching and writing about other statutory and regulatory disciplines. Based on their responses, a more apt label might be "environmental microlaw." This term recognizes that environmental law is just one of many disciplines in which the study of fine print has become essential.

to use it to his or her advantage; and (3) it leads to unexpected outcomes.[12] The previous article concluded with the following observations:

> The fine print is here to stay. As a result, modern environmental law is seldom what it appears to be.
>
> The rise of microenvironmental law has profound ramifications for persons who study, practice, and implement this law, as well as those who seek to shape and reform its content. Students must be forced to confront the likelihood that their initial understanding of each environmental control scheme is misleading, because the scheme will be shown to be vastly different once the fine print has been explored. Practitioners must likewise shed their simplistic first impressions. . . .
>
> Ultimately, however, the task of clarifying microenvironmental law will fall disproportionately on the shoulders of the academy. Environmental law scholars must continue to bring all of their analytic powers to bear on what has become a truly frightening tangle of materials, illuminating the fine print and flushing it out for public scrutiny. . . .[13]

The purpose of this article, therefore, is to confront the *texts* of the statutory environmental audit privileges enacted in those states where proponents of the privilege have at least temporarily won the day. What do those texts provide? What types of interpretive issues will they pose? What are the implications of the texts for regulated entities and parties seeking to obtain allegedly privileged information?[14] By illuminating the fine print for public scrutiny, this article demonstrates that each state's environmental

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12. *See* John-Mark Stensvaag, *The Not So Fine Print of Environmental Law*, 27 LOY. L.A. L. REV. 1093, 1094 (1994).

13. Stensvaag, *supra* note 12, at 1103.

14. Wholly apart from issues of textual interpretation, the enactment of state environmental audit privilege statutes poses three significant real-world questions that are beyond the scope of this article.

First, will state environmental audit privileges apply in federal proceedings? Under many circumstances, the answer is an unqualified "no." An excellent generic discussion of the applicability of state privileges to federal proceedings may be found in 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE §§ 172, 174 & 177 (2d ed. 1994). *See also* 2 JACK B. WEINSTEIN, MARGARET A. BERGER & JOSEPH M. MCLAUGHLIN, WEINSTEIN'S EVIDENCE ¶ 501[02], at 501-25 to -26 (1989). For an analysis of how state environmental audit privileges may fare in federal proceedings, *see* Christina Austin, Comment, *State Environmental Audit Privilege Laws: Can EPA Still Access Environmental Audits In Federal Court?*, 26 ENVTL. L. 1241 (1996); Sorenson, *supra* note 3, at 500-04.

Second, when the activities of a privilege holder (or disputes between litigants) involve more than one state, whose privilege law will apply? An excellent generic discussion of this issue may be found in 2 MUELLER & KIRKPATRICK, *supra* § 176, at 270-78.

audit privilege — like much modern environmental law — is seldom what it appears to be.

II.

THE REALITY OF STATE ENVIRONMENTAL AUDIT PRIVILEGES

On July 22, 1993, Oregon's environmental audit privilege statute became the "first legislative measure . . . ever enacted in the nation to create a privilege for *any* type of voluntarily initiated

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Third, will the adoption of a state environmental audit privilege lead to the repeal of delegated state authority under various federal environmental statutes, such as the Clean Water Act, because the state no longer has sufficient enforcement authority as the federal statutes require? For a discussion of this issue, *see* Creighton, *supra* note 4, at 462-68 & nn. 144 & 148; Clinton J. Elliott, *Kentucky's Environmental Self-Audit Privilege: State Protection or Increased Federal Scrutiny?*, 23 N. KY. L. REV. 1, 23 (1995). Brief accounts of the ongoing power struggle between the EPA and environmental groups on the one hand, and privilege-enacting states on the other, may be found in *State Privilege-Immunity Laws for Audits Could Hurt Program Delegation, Official Says*, 26 Env't Rep. (BNA) 2253 (1996); *[Texas] Title V Program Gets Only Interim OK as EPA Voices Concerns about Audit Law*, 27 Env't Rep. (BNA) 506 (1996); *Texas Prepares to Seek Judicial Review of Clean Air Act New Source Review Rules*, 27 Env't Rep. (BNA) 884 (1996); *State Audit-Privilege Laws Must Uphold Minimum Federal Standards, EPA Official Says*, 27 Env't Rep. (BNA) 1043 (1996); *Audit, Takings Laws Compromise Ability to Run Injection Control Program, EPA Tells [Texas]*, 27 Env't Rep. (BNA) 1203 (1996); *Groups Opposed to Audit Privilege Law Want [Ohio] State Enforcement Power Revoked*, 27 Env't Rep. (BNA) 2047 (1997); *[Michigan] Governor Seeks Congressional Hearings on EPA Actions Regarding Audit Statutes*, 27 Env't Rep. (BNA) 2075 (1997); *Administration of [Texas] Injection Program Not Threatened by Audit Law, Opinion Says*, 27 Env't Rep. (BNA) 2082 (1997); *Guidance Sets Criteria For Judging Effect Audit Laws Have On Delegating Programs*, 27 Env't Rep. (BNA) 2176 (1997); Marianne Lavelle, *EPA Says That Voluntary Environmental Audits Work*, NAT'L. L.J., Feb. 10, 1997, at A10 (quoting industry attorney, characterizing EPA's position as "delegation blackmail").

The Mississippi legislature, in creating that state's self-evaluation privilege in 1995, sought to head off the loss of federally-delegated authority, by declaring:

> It is the intent of the Legislature that the Department of Environmental Quality administer and implement the provisions of Sections 2, 5, 6 and 9 of Senate Bill No. 3079, 1995 Regular Session, so as not to result in a loss of state delegation of federal environmental programs.

995 Miss. Laws Ch. 627 (S.B. 3079) § 1. Idaho may allow its environmental audit privilege to lapse, in part because of its quarrel with the EPA over delegation. *See infra* p. 175.

In February, 1997, the EPA published the principles that it will use in assessing the delegation issue. *See Guidance Sets Criteria for Judging Effect Audit Laws Have on Delegating Programs*, 27 Env't. Rep. (BNA) 2176 (1997). At least two states have now amended their environmental audit privilege statutes to resolve the delegation impasse. *See Texas Audit Law Changes Clear Way for State to Run Federal Enforcement Programs*, 28 Env't. Rep. (BNA) 388 (1997); *Utah Governor Signs Legislation to Amend State's Environmental Audit Privilege Law*, 27 Env't. Rep. (BNA) 2358 (1997). *See also infra* note 362.

reports used for a company's self-evaluation."[15] In the forty-seven-month period commencing with that enactment, a total of eighteen additional states adopted environmental audit[16] privilege statutes, bringing the total number of statutory environmental audit privilege jurisdictions to nineteen.[17] TABLE 1 shows the order in which the various states have enacted environmental audit privilege statutes, and the dates of their adoption:[18]

15. Mazza, *supra* note 2, at 91 (emphasis added).

16. As a technical matter, not all states use the term "environmental audit," when defining the materials and investigatory activities protected by the privilege. Three states extend the protection to "environmental self-evaluations." *See* COLO. REV. STAT. § 13-25-126.5(2)(e) (1997); MISS. CODE ANN. § 49-2-2(f) (Supp. 1996); UTAH CODE ANN. § 19-7-103(4) (1995); UTAH R. EVID. 508(a)(5) (1997). One state — Virginia — provides a privilege for "environmental assessments." *See* VA. CODE AN. § 10.1-1198(A) (Michie Supp. 1997). This article uses the terms "environmental audit," "environmental self-evaluation," and "environmental assessment" interchangeably, employing a technically correct alternative label only when the context so requires. Occasionally, the more inclusive term "investigation" will be used as appropriate.

17. At times in this article, the total number of states having statutes dealing with one or more components of environmental auditing will add up to twenty, rather than the nineteen jurisdictions that have enacted environmental audit privileges. This numbering anomaly occurs because South Dakota has enacted an environmental audit statute — defining environmental audits and creating a presumption against penalties for violations found in an environmental audit and reported to state officials — but has *not* enacted an environmental audit *privilege*. *See* S.D. CODIFIED LAWS § 1-40-35 (Michie Supp. 1997).

18. *See* 1993 Or. Laws ch. 422; IND. CODE ANN. §§ 13-11-2-68 to 13-28-4-10 (West 1996 and Supp. 1997); 1994 Ky. Acts 430; 1994 Colo. Laws S.B. 139; ILL. COMP. STAT. ANN. 415/5-52.2 (West 1997); 1995 Ark. Acts 350; 1995 Wyo. Sess. Laws 58; UTAH R. EVID. 508 (1997); 1995 Utah Laws ch. 304 (S.B. 84), establishing UTAH CODE ANN. §§ 19-7-101 to -109 (1995 and Supp. 1997); 1995 Idaho Sess. Laws. 359 (S.B. 1142); Va. Acts Ch. 564 (H.B. 1845); 1995 Miss. Laws 627 (S.B. 3079); 1995 Kan. Sess. Laws 204 (S.B. 76); 1995 Tex. Ch 219 (H.B. 2473); 1996 Mich. Pub. Acts 132 (S.B. 728); 1996 N.H. Laws Ch. 4 (H.B. 275); 1996 Minn. Ch. Law 437 (S.F. No. 1956); 1996 S.C. Acts 384 (H.B. 3624); 1996 Ohio Laws (S.B. 138).

TABLE 1
CHRONOLOGY OF STATE ENVIRONMENTAL
AUDIT PRIVILEGE ENACTMENTS

State	Date of Enactment	State	Date of Enactment
Oregon	7/22/93	Indiana	3/8/94
Kentucky	4/11/94	Colorado	6/1/94
Illinois	1/24/95	Arkansas	2/17/95
Wyoming	2/18/95	Utah Rule of Evidence Statute	2/28/95 3/20/95
Idaho	3/22/95	Virginia	3/24/95
Mississippi	4/7/95	Kansas	4/22/95
Texas	5/23/95	Michigan	3/18/96
New Hampshire	3/18/96	Minnesota*	4/3/96
South Carolina	6/4/96	Ohio	12/12/96
Alaska	5/11/97		

*The Minnesota environmental improvement pilot program includes a *partial* environmental audit privilege for qualified program participants only. *See infra* p. 98.

There is no reason to believe that the number of environmental audit privilege states will be limited to the foregoing nineteen. As indicated in TABLE 2, legislators in at least twenty-four additional states have introduced environmental audit privilege bills in the past two years.[19] Indeed, research suggests that the legislatures of only six states — Connecticut, Louisiana,[20] Montana, Nevada, New Mexico, and North Dakota — have thus far ignored the privilege.

19. Where bills have been introduced in successive years, only the most recently proposed bills are included in TABLE 2.

20. Louisiana has a privilege statute for self-evaluations at banks and other financial institutions. *See* LA. REV. STAT. ANN. § 6:336 (West 1996).

TABLE 2
PROPOSED STATE ENVIRONMENTAL
AUDIT PRIVILEGE LEGISLATION

State	Bill(s)	Date of Introduction
Alabama	1997 Ala. S.B. 388	2/13/97
Arizona	1996 Ariz. S.B. 1381	1/30/96
California[21]	1997 Cal. S.B. 423	2/18/97
Delaware	1997 Del. H.B. 32	1/21/97
Florida	1997 Fla. S.B. 1480 1997 Fla. H.B. 1153	3/4/97 3/6/97
Georgia	1997 Ga. H.B. 701	2/21/97
Hawaii	1997 Haw. H.B. 1245	1/21/97
Iowa	1997 Ia. H.F. 216 1997 Ia. H.F. 681	2/12/97 3/18/97
Maine	1997 Me. H.P. 816	2/18/97
Maryland	1996 Md. H.B. 1057 1996 Md. S.B. 682	2/6/96
Massachusetts	1995 Mass. H.B. 3593	2/16/95
Missouri	1997 Mo. S.B. 48 1997 Mo. S.B. 125	1/8/97
Nebraska	1995 Neb. L.B. 731	1/19/95
New Jersey	1996 N.J. S.B. 384 1996 N.J. S.B. 385 1996 N.J. H.B. 273	1/11/96
New York	1997 N.Y. A.B. 1183 1997 N.Y. A.B. 3154	1/13/97 1/30/97
North Carolina	1997 N.C. H.B. 247	2/17/97
Oklahoma	1997 Ok. H.B. 1814	2/3/97
Pennsylvania	1997 Pa. S.B. 381	2/6/97
Rhode Island	1997 R.I. S.B. 526	2/11/97
Tennessee	1997 Tenn. S.B. 33 1997 Tenn. S.B. 394	1/15/97 2/5/97
Vermont	1996 Vt. S.B. 314	1/3/96
Washington	1996 Wash. H.B. 2377	1/10/96
West Virginia	1997 W.Va. H.B. 2154 1997 W.Va. S.B. 99	2/19/97 2/21/97
Wisconsin	1995 Wis. S.B. 185 1995 Wis. A.B. 1088	5/10/95 3/27/96

21. The California Environmental Protection Agency adopted an environmental audit policy on July 8, 1996. *See* Cal/EPA Policy on Incentives for Self-Evaluation (July 8, 1996); Gary A. Meyer, *California's New Environmental Audit Policy*, LOS ANGELES LAWYER 26 (Dec. 1996). The California EPA's audit policy closely tracks the United States EPA audit policy, *see supra* note 7, although there are some differences between the two documents. *See* Meyer, *supra* at 29. The California EPA's audit policy does not provide an environmental audit privilege. *See id.* at 30.

III.

EXPLORING THE FINE PRINT OF THE ENVIRONMENTAL AUDIT PRIVILEGE STATUTES

A. *Expressed Purposes and Goals*

The environmental audit privilege statutes of thirteen states set forth express purposes or goals, or contain legislative findings articulating the purposes of the privilege.[22] In those states in which the legislature has spoken on the subject, the wording may vary. Nevertheless, the expressed purposes of the privilege are almost always to encourage regulated entities to engage in two activities:

1. To conduct voluntary internal environmental audits of their compliance programs, and
2. To assess and improve compliance with environmental laws.[23]

It is pointless to linger on the precise wording of each state's statute on this topic; wording about purposes is rarely likely to rise to the level of "fine print," significantly affecting the outcomes of analyses in unexpected ways.

B. *Effective Date*

Because the various state environmental audit privilege statutes were enacted at different times,[24] they obviously take effect on different dates. A less obvious aspect of the fine print is that these statutes have considerably varying *approaches* to defining their effective dates.

The statutes of two states are simply silent about their effective dates.[25] Statutes in seventeen other states provide (sometimes in rather convoluted ways) that they take effect on specified dates.[26]

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22. *See* ARK. CODE ANN. §§ 8-1-301, 8-1-303(a) (Michie Supp. 1997); COLO. REV. STAT. § 13-25-126.5(1) (1997); IDAHO CODE § 9-802 (Supp. 1997); ILL. COMP. STAT. ANN. 415/5-52.2(a) (West 1997); KY. REV. STAT. ANN. § 224.01-040(2) (Michie Supp. 1997); MINN. STAT. ANN. § 114C.20 (West 1997); 1995 Miss. Laws Ch. 627 (S.B. 3079) § 1; 1996 N.H. Laws Ch. 4 (H.B. 275) at § 1; OR. REV. STAT. § 468.963(1) (Supp. 1996); S.C. CODE ANN. § 48-57-10(A) (Law Co-op. Supp. 1997); TEX. REV. CIV. STAT. ANN. art. 4447cc § 2 (West Supp. 1998); UTAH CODE ANN. § 19-7-102 (1995); WY. STAT. ANN. § 35-11-1105(b) (Michie 1997). Statutes in six states — Alaska, Indiana, Kansas, Michigan, Ohio, and Virginia — are silent on the matter.

23. *See, e.g.*, ARK. CODE ANN. § 8-1-303(a) (Michie Supp. 1997); ILL. COMP. STAT. ANN. 415/5-52.2(a) (West 1997).

24. *See supra* TABLE 1.

25. *See* ARK. CODE ANN. §§ 8-1-301 to -312 (Michie Supp. 1997); VA. CODE ANN. § 10.1-1198 (Michie Supp. 1997).

26. *See* 1994 Colo. Laws S.B. 139 § 4 (June 1, 1994); 1995 Idaho Sess. Laws. 359 (S.B. 1142) § 4 (June 1, 1995); Ill. Pub. Act 88-690 § 10 (1994) (January 24, 1995); IND. CODE ANN. § 13-10-3-1 (Burns 1994) (July 1, 1994); 1995 Kan. Sess. Laws 204

What does it mean, however, for a privilege statute to "take effect" on a given date? Several statutes present unique twists on this matter. An examination of the fine print highlights a number of unresolved interpretive issues and illustrates the importance of carefully reviewing and considering the significance of any given statute's effective date.

1. Defining the Effective Date by Reference to the Dates of Certain Proceedings

The statutes of three states — Oregon, South Carolina, and Utah — link the effective dates of their respective privileges to the pendency or non-pendency of the legal proceedings in which the privilege is being invoked. The Utah environmental self-evaluation privilege applies to "all administrative and judicial proceedings commenced on or after March 21, 1995."[27] Similarly, the Oregon statute provides that the portion of the statute creating the environmental audit privilege "shall apply to all legal actions or administrative proceedings, whether civil or criminal, that *commence* after the effective date of this 1993 Act."[28]

Read literally, the Utah and Oregon statutes (and the Utah Rule of Evidence) suggest that a qualifying environmental investigation need not have been commenced or completed after their effective dates. Accordingly, a report resulting from an environmental investigation commenced (and even, perhaps, completed) prior to July 22, 1993, in Oregon — or prior to March 21, 1995, in Utah — may arguably qualify for the privilege, as long as the

(S.B. 76) at § 23 (statute "shall take effect and be in force from and after its publication in the statute book," presumably the date of signing by the Governor, recorded in 1995 Kan. Sess. Laws 204 (S.B. 76), as April 22, 1995); KY. REV. STAT. ANN. § 224.01-040 (West 1995) (July 15, 1994); MICH. COMP. LAWS ANN. § 324.14810 (West 1996) (March 18, 1996); 1996 Minn. Ch. Law 437 (S.F. No. 1956) at § 25 (April 4, 1996); 1995 Miss. Laws Ch. 627 (S.B. 3079) § 14 (July 1, 1995); 1996 N.H. Laws Ch. 4 (H.B. 275) at § 5(II) (July 1, 1996); 1996 Ohio Laws File 257 (S.B. 138) (March 13, 1997); 1993 Or. Laws ch. 422 § 21 (presumably providing an effective date as of the date of signing on July 22, 1993, as recorded in 1993 Or. Laws ch. 422 § 20); 1996 S.C. Acts 384 (H.B. 3624) at § 3 (effective upon approval by Governor, recorded in 1996 S.C. Acts 384 (H.B. 3624) as June 4, 1996); 1995 Tex. Ch. 219 (H.B. 2473) at § 15 (effective upon the date of enactment, recorded in 1995 Tex. Ch. 219 (H.B. 2473) as May 23, 1995); UTAH R. EVID. 508(h) (1997) (March 21, 1995); 1995 Utah Laws ch. 304, § 9 (March 20, 1995); 1995 Wyo. Sess. Laws 58 at § 5 (February 18, 1995); 1997 Alaska Sess. Laws ch. 29 § 2 (August 9, 1997).

27. UTAH R. EVID. 508(h) (1997). *See also* UTAH CODE ANN. § 19-7-108 (Supp. 1995) (using identical language).

28. 1993 Or. Laws ch. 422 § 21 (emphasis added). The effective date of the Oregon statute is apparently July 22, 1993. *See supra* note 26.

claim of privilege is asserted in a post-enactment proceeding. This seems somewhat odd, because the stated legislative intent in both states was to create a climate in which *future* environmental investigations would be encouraged.[29] To be sure, the privilege will not apply to a pre-enactment investigation unless the regulated entity has complied with all statutory conditions; noncompliance with one or more conditions seems likely, because an auditing company could not know what those conditions were prior to enactment.

Another feature of the Utah and Oregon effective dates is that persons involved in legal actions or administrative proceedings commenced prior to July 22, 1993, in Oregon — or prior to March 21, 1995, in Utah — may be unable to invoke the privilege in connection with those proceedings, even for investigations conducted after that date. The South Carolina statute makes express what Utah and Oregon merely imply: the environmental audit privilege "does not apply to any administrative, civil, or criminal proceedings pending . . . before the effective date of this act."[30]

It may seem peculiar to deny privileged status to investigations undertaken after the effective date of the relevant statute, merely because the privilege is being asserted in a pre-existing proceeding. However, other portions of the Utah, Oregon, and South Carolina privilege statutes may compel such a result in any event. Investigations conducted after commencement of a legal action or administrative proceeding may fail the requirements in Oregon and South Carolina that an environmental audit must be "voluntary,"[31] or the similar requirement in Utah that an environmental self-evaluation must be "self-initiated."[32]

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29. The Oregon privilege was created "to encourage [regulated entities] . . . to conduct voluntary internal environmental audits . . . and to assess and improve compliance with [environmental laws]." OR. REV. STAT. § 468.963(1) (Supp. 1996). Utah articulated similar purposes. *See* UTAH CODE ANN. § 19-7-102 (Michie 1997) (to "enhance the environment through voluntary compliance . . . and [to] provide incentives to voluntarily identify and remedy environmental compliance problems").

30. S.C. CODE ANN. §§ 48-57-10 (Law Co-op. Supp. 1997). The South Carolina effective date is presumably June 4, 1996. *See supra* note 26.

31. *See* OR. REV. STAT. § 468.963(6)(a) (Supp. 1996); S.C. CODE ANN. § 48-57-20(2) (Law Co-op. Supp. 1997).

32. *See* UTAH R. EVID. 508(a)(5) (1997); UTAH CODE ANN. § 19-7-103(4) (1995).

2. Defining the Effective Date by Reference to the Dates of Auditing Activities

The statutes of five states — Alaska, Colorado, Michigan, New Hampshire, and Texas — link the effective dates of their respective privileges to the dates of certain auditing activities. The New Hampshire privilege applies only to those environmental audit reports that have been "*prepared* pursuant to and after the effective date" of the statute.[33] This language suggests that the privilege will protect the results of investigations commenced prior to the statute's effective date, as long as the *report* is prepared after that date.

The Michigan and Texas statutes provide that an investigation cannot qualify as an environmental audit, for purposes of the privilege, unless the evaluation is "*conducted* on or after the effective date"[34] of the respective statutes. The Alaska statute provides that it applies to "environmental audits conducted on or after August 9, 1997."[35] Can an evaluation commenced before the magical date, but continuing thereafter, be said to be one that has been "conducted on or after" the statute's effective date? Arguably, by using the phrase "*on* or after" the Alaska, Michigan, and Texas legislatures recognized that some environmental audits might be in progress on the enactment date, and expressed the intention that such audits be protected, no matter when commenced. Proponents of this view can argue that the legislature did not specify that qualifying audits must have been *commenced* after the statute's enactment.

The Colorado privilege "applies only to all voluntary self-evaluations that are *performed* during the period beginning June 1, 1994, and ending June 30, 1999."[36] This language may not support the argument that an investigation commenced prior to the statute's effective date and continuing thereafter may qualify for the privilege. Proponents of the privilege may reasonably assert, however, that the legislature intended to require no more than *partial* performance of the investigation after June 1, 1994.

33. N.H. REV. STAT. ANN. § 147-E:3 (Supp. 1997) (emphasis added). The effective date in New Hampshire is July 1, 1996. *See supra* note 26.

34. MICH. COMP. LAWS ANN. § 324.14801(a) (West 1996) (emphasis added); TEX. REV. CIV. STAT. ANN. art. 4447cc § 12 (West Supp. 1998) (emphasis added). For the effective dates of the Michigan and Texas statutes, *see supra* note 26.

35. 1997 Alaska Sess. Laws § 2, ch. 29.

36. COLO. REV. STAT. § 13-25-126.5(9) (1997) (emphasis added). For a discussion of the "sunset" provisions of various privilege statutes, *see infra* p. 175.

3. Indiana: A Special Instance of Effective Date Confusion

The Indiana statute was enacted on March 18, 1994,[37] and has an express effective date of July 1, 1994.[38] One would ordinarily assume that an "effective date" establishing a new statutory privilege would deny privileged status to environmental audit materials created before that date. One Indianapolis practitioner has reached this conclusion: "It is important to understand that the privilege applies only to audit reports first issued after July 1, 1994."[39] Such an interpretation makes sense. Although Indiana's statute is silent on the matter,[40] most states declare that the purpose of the statutory privilege is to encourage environmental auditing.[41] Obviously, audits conducted prior to the creation of a statutory privilege cannot have been motivated by the privilege.

Although the foregoing analysis seems sound, the Indiana statute contains confusing language suggesting that the privilege may protect environmental audit privilege materials developed before the effective date and, indeed, these materials may be exempt from exclusions that would deny privileged status to materials prepared after July 1, 1994. Like the statutes of many states, the Indiana law provides that a court must order disclosure of otherwise privileged materials if: (1) the privilege is asserted for a fraudulent purpose;[42] (2) the material is not subject to the privilege;[43] or (3) the material shows evidence of noncompliance with specified laws and the holder has failed to promptly initiate and pursue with reasonable diligence appropriate efforts to achieve compliance.[44] Inexplicably, however, the Indiana statute provides that these exclusionary circumstances will not trigger court-

37. *See* IND. CODE ANN. §§ 13-11-2-68 to 13-28-4-10 (West 1996 and Supp. 1997).

38. *See* IND. CODE ANN. § 13-10-3-1 (Burns 1994) ("P.L.16-1994, § 16 declared an emergency and § 8 provided that this chapter take effect July 1, 1994"). The Indiana environmental audit privilege was recodified by Ind. Pub. L. 1-1996 as IND. CODE ANN. §§ 13-11-2-68 to 13-28-4-10 (West 1996 and Supp. 1997).

39. Thomas A. Barnard, *Ignoring Inspections Can be Costly Mistake*, INDIANAPOLIS BUS. J. Oct. 14, 1996, at 23.

40. *See supra* note 22.

41. *See supra* p. 213.

42. IND. CODE ANN. § 13-28-4-2(a)(2)(A) (West 1996) (civil or administrative proceedings); *id.* at § 13-28-4-3(a)(2)(A) (criminal proceedings). This provision is found in the statutes of seventeen states. *See infra* p. 155.

43. IND. CODE ANN. § 13-28-4-2(a)(2)(B) (West 1996) (civil or administrative proceedings); *id.* at § 13-28-4-3(a)(2)(B) (criminal proceedings). This provision is found in the statutes of nine states. *See infra* p. 158.

44. IND. CODE ANN. § 13-28-4-2(a)(2)(C) (West 1996) (civil or administrative proceedings); *id.* at § 13-28-4-3(a)(2)(C) (criminal proceedings). This provision is found in the statutes of fourteen states. *See infra* p. 158.

ordered disclosure unless "[t]he environmental audit report was first issued after July 1, 1994."[45] Read at one level, this language seems nonsensical if the environmental audit privilege fails to protect materials "issued" prior to July 1, 1994. Why would the legislature refer to a cut-off date in defining *exclusions*, if the privilege does not cover materials issued prior to that cut-off date?

At least two commentators have concluded, based on this language, that the Indiana statutory environmental audit privilege protects the confidentiality of documents prepared prior to the statute's July 1, 1994, effective date. One commentator has stated: "The exceptions that allow qualified use of the audits do not apply to audits performed prior to July 1, 1994, so these remain categorically privileged."[46] This commentator goes on to declare: "No action is necessary to secure privilege for one's pre-1994 audits; privileges for these are covered as a category."[47] Another commentator says:

> Indiana's statute limits the audit reports in which the privilege can be revoked . . . to those "report[s] [that were] first issued after July 1, 1994." Therefore, if the report was prepared before July 1, 1994, the effective date of the statute, and otherwise satisfies the requirements of the statute, it may not be discoverable.[48]

To be sure, this commentator continues with the observation: "It is unlikely, however, that an audit report prepared before the effective date of the statute would satisfy all of the requirements."[49] This is not self-evident, however. One of the most important requirements — that the privilege holder promptly initiate and pursue with reasonable diligence reasonable efforts to remedy noncompliance — would *not* apply to audit materials developed prior to July 1, 1994.

The notion that a statutory privilege would protect documents prepared before the statute's effective date is not illogical. Unlike the statutes of most other states,[50] the Indiana statute does not set forth legislative purposes.[51] Nevertheless, the Indiana statute

45. IND. CODE ANN. § 13-28-4-2(a)(1) (West 1996) (civil or administrative proceedings); *id.* at § 13-28-4-3(a)(1) (criminal proceedings).

46. O'Reilly, *supra note* 1, at 143 (citing what is now codified as IND. CODE ANN. § 13-28-4-2(a)(1) (West 1996)).

47. *Id.* at 143 n.112.

48. Scanlon, *supra* note 4, at 661.

49. *Id.*

50. *See supra* p. 213.

51. *See supra* note 22.

may have been designed, in part, to protect actors who conducted good faith audits even before the date of enactment. In a sense, the Indiana legislature may have been saying: "There has always been a privilege for environmental audit materials, and we now simply codify it for the first time."

The more closely one scrutinizes the Indiana scheme, however, the more peculiar it looks. The difficulty comes when one adds the implied protection for pre-existing audit materials to the language withholding the privilege under enumerated circumstances, but *only* if the audit materials have been first issued after July 1, 1994. Taken literally, the statute's language suggests that materials first issued *prior* to July 1, 1994, will *not* be subject to court-ordered disclosure, even if the privilege is asserted for a fraudulent purpose or even if the materials are not subject to the privilege. This makes even less sense than the conclusion that the privilege protects pre-enactment materials. The legislature would have no reason whatsoever to decree that a court may not order disclosure of materials *not* subject to the privilege, simply because they were first issued prior to July 1, 1994. The legislature may have intended to say that materials prepared prior to July 1, 1994, remain protected by the privilege, even if the holder fails to take appropriate steps to remedy noncompliance.[52] The language goes much further than this, however, effectively providing that the privilege is not lost for pre-existing documents, even if the materials are not privileged.

When all is said and done, it is impossible to ascribe any sensible meaning to the statutory language limiting the exclusions to materials first issued after July 1, 1994. Given this confusion, the safest course of action may be to assume that materials prepared prior to July 1, 1994, are not protected by the Indiana environmental audit privilege.

C. *Actors by whom and Investigations for which the Privilege may be Invoked*

In specifying the actors who may invoke the privilege and the investigations that will qualify for the "environmental audit" label, the various state legislatures have presumably attempted to distinguish privileged "environmental" audits from nonprivi-

52. This is the third ground mandating court-ordered disclosure. *See* IND. CODE ANN. § 13-28-4-2(a)(2)(C) (West 1996) (civil or administrative proceedings); *id.* § 13-28-4-3(a)(2)(C) (criminal proceedings); *supra* note 44.

leged, non-environmental audits. Many statutes are surprisingly weak in articulating this distinction. Moreover, the universe of actors who may invoke the privilege, and the proper subjects of environmental audits vary to a startling degree from state to state.

Some statutes seek to narrow the universe of potential privilege claimants by specifying that only owners and operators of "facilities" and persons conducting other "activities" *regulated under* specifically enumerated statutes or their state, federal, or local counterparts and extensions may conduct a qualifying environmental audit.[53] The statutes cross-referenced in this manner are sometimes underinclusive (failing to include significant environmental laws that the legislature probably meant to denote) or overinclusive (including laws that seem to have no relationship to the environment).[54] Other statutes are wholly open-ended, referring to actors regulated under *any* laws, who have undertaken investigation to address compliance with such laws.[55]

This portion of the Article will set forth the texts of each statute in greater detail than the remaining explorations of the fine print for two reasons. First, articulation of the actors and activities eligible for each state's privilege plays a critical gatekeeping role in defining the scope of that privilege. Second, as we will see, even subtle changes in wording may have a profound influence on the scope of a state's privilege.

1. Open-Ended, Overinclusive Language

Statutes in four states — Illinois, Indiana, Michigan, and Mississippi — provide remarkably open-ended definitions of the actors and activities by which and for which environmental audits may be conducted. Each statute presents unique interpretive wrinkles, but the core issue in each jurisdiction is identical; the statutory wording seems to embrace every person and business enterprise in the United States. Nothing in these statutes — other than their titles and their repeated references to the vaguely defined "environmental audits" — distinguishes *environmental* audits from all other investigations designed to assess and improve compliance with state, federal, or local laws.

53. *See, e.g.*, ARK. CODE ANN. § 8-1-303(a) (Michie Supp. 1997); OR. REV. STAT. § 468.963(1) (Supp. 1996).

54. *See, e.g.*, OR. REV. STAT. § 468.963(1) (Supp. 1996).

55. *See, e.g.*, ILL. COMP. STAT. ANN. 415/5-52.2(a) (West 1997).

a. Illinois

The Illinois legislature has enacted vague language concerning the actors who may invoke the environmental audit privilege. The portion of the statute expressly creating the privilege states that it is designed to encourage "owners and operators of facilities and persons conducting other activities *regulated under* State, federal, regional, or local laws, ordinances, regulations, permits, or orders"[56] to engage in environmental auditing. The portion of the statute defining "environmental audit" provides in slightly different language that a privileged audit must involve an evaluation of a facility (or an activity or management system at a facility) "regulated under State, federal, regional, or local laws or ordinances."[57] Arguably, these are meant to be synonyms. This suggests that qualifying audits may be performed at facilities and for activities regulated under *any* state, federal or local laws.

b. Indiana

The Indiana statute poses the same problem, but with greater hints of an appropriate solution. The portion of the Indiana statute defining "environmental audit" provides that a privileged audit must involve an evaluation of a facility (or an activity or management system at a facility) "regulated under":

(1) Title 13 of the Indiana Code (entitled "Environment");[58]
(2) a rule or standard adopted under Indiana Code Title 13;[59]
(3) any determination, permit, or order made or issued by the commissioner under Indiana Code Title 13;[60] or
(4) federal law.[61]

Thus, qualifying audits may apparently be performed at facilities and for activities regulated under *any* federal laws.

It makes no sense for the legislature to limit qualifying facilities and activities to those regulated under Indiana *environmental* laws, while simultaneously embracing facilities and activities regulated under *any* federal laws. Accordingly, the Indiana courts may be expected to interpret the statute narrowly to include only

56. *Id.* (emphasis added).
57. *Id.* 415/5-52.2(i).
58. IND. CODE ANN. § 13-11-2-68(1)(A) (West 1996).
59. *Id.* § 13-11-2-68(1)(B).
60. *Id.* § 13-11-2-68(1)(C).
61. *Id.* § 13-11-2-68(1)(D). Unlike many states, *see, e.g.*, ILL. COMP. STAT. ANN. 415/5-52.2(a) (West 1997), the Indiana statute does not refer to facilities and activities regulated under local laws.

facilities and activities regulated under federal "environmental laws" — a phrase of limitation that will require further fleshing out.

In addition to the "environmental audit" label, one additional portion of the Indiana statute provides powerful evidence that the legislature sought to protect only investigations associated with environmental laws. In declaring that the privilege will be lost if the report discloses evidence of noncompliance that has not been the subject of appropriate and diligent compliance efforts, the legislature specified that its concern was noncompliance with Indiana Code Title 13 (including rules, standards, permits, determinations, or orders adopted, made, or issued under Title 13) and "the federal, regional, or local *counterpart*" of such state laws.[62]

c. Michigan

The Michigan statute is similarly flawed. The portion of the Michigan statute defining "environmental audit" provides that a privileged audit must involve an evaluation of one or more facilities (or an activity or other enumerated items at one or more facilities) "regulated under state, federal, regional, or local laws or ordinances."[63] Technically, therefore, qualifying audits may seemingly be performed at facilities and for activities regulated under *any* state, federal, regional, or local laws.

The problem is not solved by examining the purposes that will make an evaluation an "environmental" audit. The Michigan statute provides that an "environmental audit" must be "designed to identify historical or current noncompliance and prevent noncompliance or improve compliance with 1 or more of *those* laws" — referring to the open-ended list previously set forth — "*or* to identify an environmental hazard, contamination, or other adverse environmental condition, *or* to improve an environmental management system or process."[64]

d. Mississippi

An "environmental self-evaluation report" is defined in Mississippi as "any document . . . [or] communication . . . prepared

62. IND. CODE ANN. § 13-28-4-2(a)(2)(C)(iii) (West 1996) (civil or administrative proceedings) (emphasis added); *id.* § 13-28-4-3(a)(2)(C)(iii) (criminal proceedings) (emphasis added).

63. MICH. COMP. LAWS ANN. § 324.14801(a) (West 1996).

64. *Id.* (emphasis added).

solely as a part of or in connection with a voluntary self-assessment[65] that is done in good faith . . . ."[66] "Voluntary self-evaluation," in turn, is defined as "a self-initiated internal assessment . . . of a facility or an activity at a facility, or management systems related to a facility or an activity . . . designed to identify and prevent noncompliance with environmental laws, and improve compliance with environmental laws."[67] Finally, "environmental law" is defined to mean "any federal, state or local statute, rule or regulation, or any order, award, agreement, release, permit, license, standard or notice from or issued by a federal, state or local court, agency or governmental authority in pursuance thereof."[68]

The foregoing convoluted analysis is important. The basic notion is that only self-evaluations conducted for the purpose of complying with "environmental laws" — as the Mississippi statute peculiarly defines them — may qualify for the privilege. But Mississippi's definition of "environmental law" is unbounded: "*any* federal, state, or local statute, rule or regulation," plus orders, awards, agreements, permits, and the like issued under such statutes or regulations. The difficulty with this language is that it seems to embrace every federal, state, or local law in the United States.

2. Oddball Cross-References Leading to Over- and Underinclusive Coverage

The statutes of two states — Arkansas and Oregon — define the actors and activities by which and for which qualifying audits may be performed by cross-referencing other portions of the relevant state's code. These cross-references are apparently flawed, leading to overinclusive and underinclusive coverage for the privilege.

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65. The Mississippi statute uses the phrase "voluntary self-*assessment*" when defining an environmental self-evaluation report, even though the statute in other locations refers to "voluntary self-*evaluation*," and only the latter term is defined by statute. *See* MISS. CODE ANN. § 49-2-2(f) (Supp. 1996). Indeed, the subsection defining the self-evaluation report is the only portion of the Mississippi statute to use the phrase "self-assessment." Presumably, it is meant to be a synonym for "self-evaluation."

66. MISS. CODE ANN. § 49-2-2(e) (Supp. 1996).

67. *Id.* § 49-2-2(f).

68. *Id.* § 49-2-2(g).

a. Oregon

Only actors who fall within the following description may assert the Oregon environmental audit privilege:

> owners and operators of facilities and *persons conducting other activities regulated under* ORS 824.050 to 824.114 or ORS chapter 465, 466, 468, 468A, 468B or 825, or the federal, regional or local counterpart or extension of such statutes . . . .[69]

The actors cross-referenced in this manner include persons conducting activities regulated under Oregon's hazardous waste,[70] environmental quality,[71] air quality,[72] or water quality[73] statutes, *or* any "federal, regional, or local counterpart or extension" of these statutes.[74] Arguably, the reference to federal counterparts includes actors regulated under the major federal environmental statutes, such as the Clean Water Act,[75] the Clean Air Act,[76] the Resource Conservation and Recovery Act,[77] the Comprehensive Environmental Response, Compensation, and Liability Act,[78] and the Community Right-to-Know Act.[79]

In addition, persons conducting activities regulated under Oregon's motor carrier code[80] and persons conducting activities regulated under portions of the state's railroad code[81] (as well as any federal, regional, or local counterpart or extension of those provisions) may invoke the Oregon environmental audit privilege.[82] The inclusion of these activities in defining the actors who may assert the environmental audit privilege is something of a

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69. OR. REV. STAT. § 468.963(1) (Supp. 1996) (emphasis added).

70. *See Id.* Ch. 465 (1993) (titled "Hazardous Waste and Hazardous Materials I"); *Id.* Ch. 466 (1993) (titled "Hazardous Waste and Hazardous Materials II").

71. *See id.* Ch. 468 (1993) (titled "Environmental Quality Generally").

72. *See id.* Ch. 468A (1993) (titled "Air Quality").

73. *See id.* Ch. 468B (1993) (titled "Water Quality").

74. *Id.* § 468.963(1) (Supp. 1996).

75. *See* 33 U.S.C. §§ 1251-1387 (1995).

76. *See* 42 U.S.C. §§ 7401-7671q (1995).

77. *See* 42 U.S.C. §§ 6921-6933e (1994).

78. *See* 42 U.S.C. §§ 9601-9675 (1994).

79. *See* 42 U.S.C. §§ 11001-11050 (1994).

80. *See* OR. REV. STAT. Ch. 825 (Supp. 1996) (titled "Motor Carriers"). As originally enacted, the environmental audit privilege statute referred to Chapter 767, rather than 825. The motor carrier provisions were codified in Chapter 767 at that time. *See* OR. REV. STAT. § 468.963(1) (Supp. 1996); OR. REV. STAT. Ch. 767 (1994).

81. *See* OR. REV. STAT. §§ 824.050-114 (1996). As originally enacted, the environmental audit privilege statute referred to Chapter 761, rather than to §§ 824.050-114. The railroad provisions were codified in Chapter 761 at that time. *See* OR. REV. STAT. § 468.963(1) (Supp. 1996); OR. REV. STAT. Ch. 761 (1994).

82. OR. REV. STAT. § 468.963(1) (Supp. 1996).

mystery. To be sure, portions of the cross-referenced motor carrier and railroad codes have some connection with environmental law.[83] But many of the cross-referenced statutory sections have no apparent connection with environmental regulation.[84]

b. *Arkansas*

The Arkansas legislature has enacted somewhat confusing language concerning the actors who may invoke the environmental audit privilege. On the one hand, the portion of the statute expressly creating the privilege states that it is designed to encourage "owners and operators of facilities and persons conducting other activities *regulated under this chapter, or its federal counterparts or extensions*"[85] to engage in auditing. The portion of the statute defining "environmental audit," on the other hand, provides that a privileged audit must involve an evaluation of a facility (or an activity at a facility) "regulated under this chapter, or federal, *regional, or local* counterparts or extensions thereof."[86] Arguably, the broader language — used in defining "environmental audit" — should prevail. If so, this means that qualifying audits may be performed at facilities and for activities regulated under regional or local counterparts (or extensions) of the pertinent federal and state laws.

Who are the actors cross-referenced in this manner? They include, first, persons conducting activities regulated under "this *chapter*" of the Arkansas Code. It is at least questionable, however, that the legislature meant the cross-reference to be this narrow. Chapter 1 ("General Provisions") of Arkansas Code Title 8 ("Environmental Law") — the chapter in which the environmental audit privilege is codified — consists of three subchapters: (1) provisions setting up a system of permit issuance fees and authorizing inspections;[87] (2) provisions setting forth additional powers

83. *See, e.g.*, OR. REV. STAT. § 824.068 (Supp. 1996) ("water quality and sanitation facility standards for locomotives and caboose cars"); OR. REV. STAT. § 824.086 (Supp. 1996) ("designation of hazardous materials and notice requirements" for railroad operations); OR. REV. STAT. § 825.026 (Supp. 1996) ("applicability of [motor carrier] chapter to certain otherwise exempt vehicles when transporting hazardous wastes").

84. *See, e.g.*, OR. REV. STAT. § 824.052 (Supp. 1996) (railroad "track clearances"); OR. REV. STAT. § 824.060 (Supp. 1996) ("first aid kits required on locomotives and caboose cars"); OR. REV. STAT. § 825.224 (Supp. 1996) ("rate regulation of [motor] carriers of passengers and of household goods").

85. ARK. CODE ANN. § 8-1-303(a) (Michie 1997) (emphasis added).

86. *Id.* § 8-1-302(3)(A) (emphasis added).

87. *Id.* § 8-1-101 to -107 (Michie 1993 and Michie Supp. 1997).

of the Arkansas Department of Pollution Control and Ecology and the Arkansas Pollution Control and Ecology Commission;[88] and (3) the environmental audit privilege.[89] If the audit privilege extended literally to only those facilities and persons whose activities were regulated under those subchapters, it might protect very few actors and, more importantly, might serve as a trap to unsuspecting companies.

What the legislature most likely meant to say was "facilities and persons conducting . . . activities under this *title*" — meaning Title 8 of the Arkansas Code. Other chapters in Title 8 cover such things as environmental testing,[90] water and air pollution,[91] water pollution control facilities,[92] solid waste,[93] and hazardous wastes.[94] Given the logic of the environmental audit privilege, it may well be that the legislature intended to refer to persons regulated under these statutory programs, *or* under any "federal, regional, or local counterparts or extensions"[95] of these statutes.

3. Reasonably Bright-Line Tests

The remaining states have crafted reasonably bright-line tests for distinguishing the actors by whom and investigations for which the privilege may be invoked. Nevertheless, each state marches to its own drummer on this issue. Some refuse to accord a privilege to investigations conducted to assess compliance with federal (or local) law, as opposed to state law. That such a limitation — extraordinarily important to the practitioner — may be buried in the fine print of an intricate statute, is simply one example of the critical importance of parsing the statutory texts with care.

a. Alaska

Alaska is one of only three states[96] ascribing a specific label to an actor who may invoke the privilege: the "owner or operator"

88. *Id.* § 8-1-201 to -205 (Michie 1993 and Michie Supp. 1997).
89. *Id.* § 8-1-301 to -312 (Michie Supp. 1997).
90. *Id.* § 8-2-201 to -209 (Michie 1993).
91. *Id.* §§ 8-4-101 to -315 (Michie 1993 and Michie Supp. 1997).
92. *Id.* §§ 8-5-201-04 to -701-03 (Michie Supp. 1997).
93. *Id.* §§ 8-6-201 to -1801 (Michie 1993 and Michie Supp. 1997).
94. *Id.* §§ 8-7-101 to -1016 (Michie 1993 and Michie Supp. 1997).
95. For a possible interpretation of "federal counterparts," *see supra* p. 92.
96. The other two states are Minnesota, *see infra* p. 99 & note 120, and New Hampshire. *See infra* p. 100 & note 128.

of a "regulated facility, operation, or property."[97] The latter phrase means "a facility, operation, or property that is regulated under an environmental law."[98] "Environmental law," in turn, means

> (A) a federal or state environmental law implemented by the [D]epartment [of Environmental Conservation]; or
> (B) a rule, regulation, or municipal ordinance adopted in conjunction with or to implement a law described by (A) of this paragraph.[99]

Finally, an investigation is an "environmental audit" in Alaska only if "specifically designed and undertaken to assess compliance with environmental laws or a permit, license, or approval issued under those laws . . . ."[100]

Although the "environmental law" definition includes both state and federal laws, it excludes all laws not being implemented by the Alaska Department of Environmental Conservation. Thus, if federal environmental law requirements—such as the Clean Air Act's Prevention of Significant Deterioration permit program or portions of the federal Safe Drinking Water Act—are not being implemented by the state agency, investigations undertaken to assess compliance with such requirements could not qualify for the Alaska audit privilege. The Alaska statute does, however, declare: "To fully implement the privilege . . . the term 'environmental law' shall be construed broadly."[101]

b. Colorado

An "environmental audit report" is defined in Colorado as "any document . . . [or] communication . . . related to and prepared as a result of a voluntary self-evaluation that is done in good faith."[102] "Voluntary self-evaluation," in turn, is defined as "a self-initiated assessment . . . performed . . . to determine whether [a] person or entity is in compliance with environmental laws."[103] Finally, "environmental law" is defined as:

> any requirement contained in Article 20.5 of title 8, [Colo. Rev. Stat.], Articles 7, 8, 11, and 15 of title 25, [Colo. Rev. Stat.], or

97. The audit report privilege protects only such an owner or operator. *See* ALASKA STAT. § 09.25.450(a) (Michie Supp. 1997).
98. ALASKA STAT. § 09.25.490(a)(9) (Michie Supp. 1997).
99. *Id.* § 09.25.490(a)(5).
100. *Id.* § 09.25.490(a)(4).
101. *Id.* § 09.25.490(b).
102. COLO. REV. STAT. § 13-25-126.5(2)(b) (1997).
103. *Id.* § 13-25-126.5(2)(e).

> Article 20 of title 30, [Colo. Rev. Stat.], in regulations promulgated under such provisions, or in any orders, permits, licenses, or closure plans under such provisions.[104]

Given these definitions, only self-evaluations conducted for the purpose of complying with "environmental laws" — as the Colorado statute peculiarly defines them — may qualify for the privilege. Colorado seems to have a drawn a relatively bright line between environmental and non-environmental self-evaluations by focusing on enumerated portions of the Colorado Revised Statutes. Unlike statutes in many other states,[105] the Colorado definition of voluntary self-evaluation does not appear to reach investigations conducted for the purpose of assessing compliance with federal or local environmental laws.

c. Idaho

The Idaho statute is expressly designed "to encourage owners and operators of facilities, and persons conducting activities regulated under federal, state and local *environmental* laws, regulations, rules, ordinances and permits,"[106] to engage in voluntary auditing. "Environmental law" means "any federal, state or local law, regulation, rule, ordinance or permit terms and conditions designed to protect or enhance the quality of land, water or air for the protection of human health, wildlife, other biota, or the environment."[107]

Thus, the legislature expressly sought to change the behavior of persons regulated by federal and local, as well as state "environmental" laws. To be sure, the Idaho statute does not expressly provide that only such actors may invoke the privilege. Indeed, the definition of "environmental audit" is surprisingly open-ended: "an internal evaluation done pursuant to a plan or protocol that is designed to identify and prevent noncompliance and to improve compliance with statutes, regulations, permits and orders."[108] Nevertheless, when the statement of legislative purpose and the environmental audit definition are read together, it

104. *Id.* § 13-25-126.5(2)(c). The portions of the Colorado Revised Statutes referenced by this definition govern petroleum storage tanks, *see Id.* §§ 8-20.5-101 *et seq.*, air quality, *see id.* §§ 25-7-101 *et seq.*, water quality, *see id.* §§ 25-8-101 *et seq.*, radiation control, *see id.* §§ 25-11-101 *et seq.*, hazardous waste, *see id.* §§ 25-15-101 *et seq.*, and solid waste. *See id.* §§ 20-10-101 *et seq.*

105. *See, e.g.*, OR. REV. STAT. § 468.963(6)(a) (Supp. 1996).

106. IDAHO CODE § 9-802(2) (Supp. 1997) (emphasis added).

107. *Id.* § 9-803(5).

108. *Id.* § 9-803(3).

seems reasonably clear that only persons regulated under "environmental laws" and only investigations designed to assess compliance with "environmental laws" may benefit from the privilege.

One ambiguous clause in the Idaho legislation arguably addresses the ability of government entities to claim the environmental audit privilege. The statute provides that "no state of Idaho public official, employee or . . . environmental agency shall require to be disclosed an environmental audit report prepared by or on behalf of any *person, except from any governmental entity.*"[109] This may mean one of at least two things: (1) environmental audit reports *prepared by or for* a "government entity" are not protected from disclosure; or (2) environmental audit reports that are *in the hands of* a "government entity" (no matter who they were prepared by or for) are not protected from disclosure.

The Idaho legislature has provided evidence that the first interpretation is the correct one, by defining "person" in the following way:

> "Person" means any individual, firm, association, partnership, joint stock company, trust, estate, local governmental entity, public or private corporation, or any other legal entity which is recognized by the law as the subject of rights and duties, *but does not include any state or federal governmental entity or its contractors and/or subcontractors in the performance, operation or management of governmental activities, programs, functions, facilities or sites.*[110]

Accordingly, government entities may be precluded from invoking Idaho's environmental audit privilege.

d. Kansas

Unlike some states, which have effectively provided that only actors "regulated under" certain laws may invoke the privilege,[111] Kansas defines a qualifying "audit" as an assessment "ini-

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109. *Id.* § 9-804 (emphasis added). Regulations of the Idaho Department of Agriculture and the Idaho Department of Health and Welfare provide:

> Notwithstanding any other provision of law to the contrary, no State of Idaho public official, employee or environmental agency shall require to be disclosed an environmental audit report or any part thereof, prepared by or on behalf of any person, *except from the State of Idaho or any political subdivision.*

Idaho APA § 02.01.04.010 (1996) (emphasis added) (regulation of the Department of Agriculture). *See also id.* § 16.01.10.011 (regulation of the Department of Health and Welfare).

110. IDAHO CODE § 9-803(6) (Supp. 1997) (emphasis added).

111. *See, e.g.*, OR. REV. STAT. § 468.963(1) (Supp. 1996); *id.* § 468.963(6)(a).

tiated by the owner or operator of a facility for the express and specific purpose of determining whether a facility, operation within a facility or facility management system complies with environmental laws."[112] "Environmental law" is defined, in turn, to mean "any requirement contained in state environmental statutes and in rules and regulations promulgated under such statutes."[113]

The result of these definitions is that the environmental audit privilege may be available to any "owner or operator of a facility," but only in connection with evaluations designed to assess compliance with *state* environmental statutes and regulations promulgated under such state statutes. Investigations undertaken solely to assess compliance with federal or local environmental laws seem ineligible for the Kansas privilege.

e. Kentucky

The Kentucky environmental audit privilege may be asserted only by actors who fall within the following description: "owners and operators of facilities and persons conducting other activities regulated under this chapter, or its federal, regional, or local counterparts or extensions . . . ."[114]

Who are the actors cross-referenced in this manner? They include persons conducting activities regulated under Chapter 224 of the Kentucky Revised Statutes, entitled "environmental protection," as well as persons whose activities are regulated under the federal, regional, or local counterparts or extensions of that chapter.[115]

f. Minnesota

Minnesota has not enacted a generally available statutory environmental audit privilege. The Minnesota legislature has, however, established an "environmental improvement pilot program."[116] This unique program is probably best understood as a blend between a partial environmental audit privilege and a voluntary disclosure immunity.[117]

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112. KAN. STAT. ANN. § 60-3332(a) (Supp. 1997).
113. *Id.* § 60-3332(e).
114. KY. REV. STAT. ANN. § 224.01-040(2) (Michie Supp. 1997).
115. For a possible interpretation of "federal counterparts," *see supra* p. 92.
116. *See* MINN. STAT. ANN. § 114C.20 (West 1997).
117. For a description of voluntary disclosure immunities, *see infra* p. 175.

If a regulated entity participates in Minnesota's environmental improvement pilot program and meets all requirements and conditions, certain audit report or self-evaluation documents are "privileged as to all persons *other* than the state."[118] Participation in the program is highly formalized, and requires submission of a report to the Commissioner of the Minnesota Pollution Control Agency (and, under some circumstances, to a local governmental unit), within 45 days after completion of a self-evaluation or the final written report of findings for an environmental audit.[119] The statutory environmental audit privilege does not protect companies and persons who have not taken the necessary formal steps to participate in the environmental improvement pilot program.

The Minnesota environmental improvement pilot program is available to "regulated entities."[120] A "regulated entity" is defined as "a public or private organization that is subject to environmental requirements."[121] "Environmental requirement" means a requirement in:

(1) a law administered by the [Minnesota Pollution Control Agency], a rule adopted by the agency, a permit or order issued by the agency, an agreement entered into with the agency, or a court order issued pursuant to any of the foregoing; or
(2) an ordinance or other legally binding requirement of a local government unit under authority granted by state law relating to environmental protection, including solid and hazardous waste management.[122]

The Minnesota statute sets forth the following qualifications for participation in the environmental improvement pilot program:

> For a facility to qualify for participation in the environmental improvement program, more than one year must have elapsed since the initiation of an enforcement action that resulted in the imposition of a penalty involving the facility.[123] In addition, a regulated entity must:
>
> (1) conduct an environmental audit or a self-evaluation;

118. MINN. STAT. ANN. § 114C.26(2) (West 1997) (emphasis added).
119. *See Id.* § 114C.22(2).
120. *Id.* § 114C.22. Alaska and New Hampshire are the only other states ascribing the "regulated entity" (or similar) label to an actor who may invoke the privilege. *See supra* p. 95 & note 98; *infra* p. 99 & note 127.
121. MINN. STAT. ANN. § 114C.21(10) (West 1997).
122. *Id.* § 114C.21(3).
123. "Facility" means "all buildings, equipment, structures, and other stationary items that are located on a single site or on contiguous or adjacent sites and that are

(2) for a major facility,[124] prepare a pollution prevention[125] plan and submit progress reports in accordance with sections 115D.07 to 115D.09;
(3) for a facility that is not a major facility, examine pollution prevention opportunities at the facility; and
(4) submit a report in accordance with subdivision 2.[126]

g. New Hampshire

New Hampshire is one of only three states ascribing a specific label to an actor who may invoke the privilege: "regulated entity."[127] "Regulated entity" is defined as "any person who owns or operates a facility or conducts activities that are regulated under any environmental law."[128] "Environmental law" is defined by reference to a long list of specific New Hampshire statutes,[129] and "any rules adopted under such statutes, as well as any permits and licenses issued under such statutes and rules."[130] Finally, an "environmental audit" is defined as an "evaluation of one or more facilities, activities, or management systems . . . undertaken specifically to identify areas of noncompliance and to improve compliance with one or more environmental laws."[131]

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owned or operated by the same person." MINN. STAT. ANN. § 114C.21(6) (West 1997).

124. "Major facility" means

> an industrial or municipal wastewater discharge major facility as defined in rules of the agency; a feedlot that is permitted for 1,000 or more animal units; a large quantity hazardous waste generator as defined in rules of the agency; a hazardous waste treatment, storage, or disposal facility that is required to have a permit under the federal Resource Conservation and Recovery Act, United States Code, title 42, section 6925; a major stationary air emission source as defined in rules of the agency; an air emission source that emits 50 or more tons per year of any air pollutant regulated under rules of the agency; or an air emission source that emits 75 tons or more per year of all air pollutants regulated under rules of the agency.

MINN. STAT. ANN. § 114C.21(8) (West 1997).

125. "Pollution prevention" means "the elimination or reduction at the source of the use, generation, or release of pollutants." MINN. STAT. ANN. § 114C.21(9) (West 1997).

126. *Id.* § 114C.22(1).

127. The other states are Alaska, *see supra*, p. 95 & note 98, and Minnesota. *See supra* p. 99 & note 120.

128. N.H. REV. STAT. ANN. § 147-E:1(IX) (Supp. 1997).

129. The list includes N.H. REV. STAT. ANN. §§ 125-C, 125-D, 125-I, those portions of § 141-E implemented by the department of environmental services, §§ 146-A, 146-C, 147-A, 147-B, 149-M, 481, 482, 482-A, 483, 483-B, 485, 485-A, 485-C, and 487. *See* N.H. REV. STAT. ANN. § 147-E:1(VI) (Supp. 1997).

130. N.H. REV. STAT. ANN. § 147-E:1(VI) (Supp. 1997).

131. *Id.*

When the foregoing provisions are stitched together, it becomes clear that only audits conducted for the purpose of complying with "environmental laws" — as the New Hampshire statute peculiarly defines them — may qualify for the privilege. New Hampshire has drawn a relatively bright line between environmental and non-environmental audits by focusing on enumerated portions of the New Hampshire Revised Statutes. Those statutes govern air pollution,[132] acid rain,[133] air toxic controls,[134] asbestos management and control,[135] oil discharge or spillage in surface water or groundwater,[136] underground storage facilities,[137] hazardous waste management,[138] hazardous waste cleanup,[139] solid waste management,[140] state dams, reservoirs, and water conservation projects,[141] dams, mills, and flowage,[142] fill and dredge in wetlands,[143] rivers management and protection,[144] comprehensive shoreland protection,[145] safe drinking water,[146] water pollution and waste disposal,[147] groundwater protection,[148] and marine pollution.[149]

Unlike statutes in many other states,[150] the New Hampshire definition of voluntary audit does not appear to reach investigations conducted for the purpose of assessing compliance with federal or local environmental laws.

h. Ohio

The Ohio statute provides that "[a]n environmental audit may be conducted by the owner or operator of a facility or property,"[151] and grants a privilege to "the owner or operator of a

132. *See id.* §§ 125-C:1 through C:21 (1996 and Supp. 1997).
133. *See id.* §§ 125-D:1 through D:3.
134. *See id.* §§ 125-I:1 through I:3.
135. *See id.* §§ 141-E:1 through E:19.
136. *See id.* N.H. REV. STAT. ANN. §§ 146-A:1 through A:17.
137. *See id.* §§ 146-C:1 through C:13.
138. *See id.* §§ 147-A:1 through A:20.
139. *See id.* §§ 147-B:1 through B:15.
140. *See id.* §§ 149-M:1 through M:42.
141. *See id.* §§ 481:1 through 481:33.
142. *See id.* §§ 482:1 through 482:93.
143. *See id.* §§ 482-A:1 through A:27.
144. *See id.* §§ 483:1 through 483:15.
145. *See id.* §§ 483-B:1 through B:20.
146. *See id.* §§ 485:1 through 485:60.
147. *See id.* §§ 485-A:1 through A:57.
148. *See id.* §§ 485-C:1 through C:20.
149. *See id.* §§ 487:1 through 487:25.
150. *See, e.g.*, OR. REV. STAT. § 468.963(6)(a) (Supp. 1996).
151. OHIO REV. CODE ANN. § 3745.70(a) (Banks-Baldwin Supp. 1997).

facility or property who conducts an environmental audit."[152] This open-ended language is narrowed by the definition of "environmental audit," which means a "self-evaluation of one or more activities at one or more facilities or properties . . . designed to improve compliance . . . with environmental laws."[153] "Environmental laws" is defined, in turn, to include certain enumerated portions of the Ohio Revised Code,[154] "any other sections or chapters of the revised code the principal purpose of which is environmental protection . . . [and] any federal or local counterparts or extensions of those sections or chapters . . . ."[155] "Environmental laws" also includes "rules adopted under any such sections, chapters, counterparts, or extensions; and terms and conditions of orders, permits, licenses, license renewals, variances, exemptions, or plan approvals issued under such sections, chapters, counterparts, or extensions."[156]

Companies intending to embark on an auditing program will want to consult the specifically enumerated cross-referenced statutes with care, because legal requirements stemming from these statutes are appropriate topics for a privileged audit. The enumerated portions of the Ohio Revised Code for which audits may be conducted are: "1511.02 and 1531.29, chapters 3704, 3734, 3745, 3746, 3750, 3751, 3752, 6109, and 6111 of the revised code."[157] These cross-references may become important if a dispute arises about whether a given self-assessment concerned compliance with "environmental laws."

However, the generic phrase "any other sections or chapters of the revised code the principal purpose of which is environmental protection . . . [and] any federal or local counterparts or extensions of those sections or chapters" means that the Ohio environmental audit privilege also protects audits assessing compliance with nonenumerated Ohio statutes (and the federal and local counterparts or extensions of such statutes).

After wending one's way through the statutory language, it becomes clear that the Ohio privilege is available to any owner or operator of a facility of property who undertakes a self-evaluation to assess compliance with: (1) any Ohio statute having the

152. *Id.* § 3745.71(a).
153. *Id.* § 3745.70(a).
154. *See id.* § 3745.70(e).
155. *Id.* § 3745.70(e).
156. *Id.* § 3745.70(e).
157. *Id.* § 3745.70(e).

"principal purpose" of "environmental protection" (or compliance with rules, permits, or orders issued under such statutes); or (2) any federal or local counterpart or extension of such a statute.[158]

i. South Carolina

An "environmental audit report" is defined in South Carolina as "a document . . . prepared in connection with an environmental audit."[159] "Environmental audit," in turn, is defined as "a voluntary, internal evaluation or review of one or more facilities or an activity at one or more facilities regulated under federal, state, regional, or local environmental law . . . if designed to identify and prevent noncompliance and to improve compliance with these laws."[160] Finally, "environmental laws" is defined to mean "all provisions of federal, state, regional, and local laws, regulations, and ordinances pertaining to environmental matters."[161]

When the foregoing dots are connected, it becomes clear that only audits conducted for the purpose of assessing compliance with "environmental laws" — as the South Carolina statute peculiarly defines them — may qualify for the privilege. And "environmental laws" include *all* provisions, of *every* level of government, *"pertaining to environmental matters."*[162] South Carolina's method of articulating actors and audits protected by the privilege is more sweeping than the approach used by many states, some of which confine "environmental" audits to those assessing compliance with a closed list of enumerated statutes,[163] and some of which confine such audits to investigations assessing compliance with *state* laws.[164]

j. Texas

The Texas statute effectively protects an "owner or operator."[165] An "owner or operator" is defined as "a person who

158. For a possible interpretation of "federal counterparts," *see supra* p. 92.

159. S.C. CODE ANN. § 48-57-20(3) (Law Co-op. Supp. 1997).

160. *Id.* § 48-57-20(2).

161. *Id.* § 48-57-20(4).

162. *Id.* § 48-57-20(4) (emphasis added).

163. *See, e.g.*, ARK. CODE ANN. § 8-1-302(3)(A) (Michie Supp. 1997); N.H. REV. STAT. ANN. § 147-E:1(VI) (Supp. 1997).

164. *See, e.g.*, COLO. REV. STAT. §§ 13-25-126.5(2)(c) & (e) (1997); KAN. STAT. ANN. § 60-3332(e) (Supp. 1997).

165. Because these are the actors who may waive the privilege, *see* TEX. REV. CIV. STAT. ANN. art. 4447cc § 6(a) (West Supp. 1998), they are the holders of the privilege.

owns or operates a regulated facility or operation."[166] A "regulated facility or operation" is "a facility or operation that is regulated under an environmental or health and safety law."[167] "Environmental or health and safety law" is defined, in turn, as:

> (A) a federal or state environmental or occupational health and safety law; or
> (B) a rule, regulation, or regional or local law adopted in conjunction with a law described by Paragraph (A) of this subdivision.[168]

The statute further provides: "To fully implement the privilege established by this Act, the term "environmental or health and safety law" shall be construed broadly."[169]

Accordingly, the actors who may invoke the environmental audit privilege in Texas are owners or operators of facilities or operations regulated under federal or state environmental or occupational health and safety laws (or regional or local laws adopted in conjunction with such federal or state laws), all as those terms are broadly construed.

k. Utah

Utah Rule of Evidence 508 provides that "[t]he privilege may be claimed by the person for whom an environmental self-evaluation is conducted or for whom an environmental audit report is prepared."[170] Given this language, one cannot discern the potential beneficiaries of the privilege without examining Utah's definition of "environmental audit report" and "environmental self-evaluation."

Utah defines an "environmental audit report" as "any document . . . [or] communication . . . prepared as the result of or in response to an environmental self-evaluation."[171] "Environmental self-evaluation" is defined as "a self-initiated assessment . . . performed to determine whether a person is in compliance with environmental laws."[172] Finally, "environmental law" means

166. TEX. REV. CIV. STAT. ANN. art. 4447cc § 3(a)(4) (West Supp. 1998).
167. *Id.* art. 4447cc § 3(a)(7).
168. *Id.* art. 4447cc § 3(a)(2).
169. *Id.* art. 4447cc § 3(e).
170. UTAH R. EVID. 508(c) (1997). The Rule further provides, in language not found in the privilege statutes of other states: "The privilege may also be claimed by such person's guardian, conservator, personal representative, trustee, or successor in interest." *Id.*
171. UTAH R. EVID. 508(a)(3) (1997); UTAH CODE ANN. § 19-7-103(2) (1995).
172. UTAH R. EVID. 508(a)(5) (1997); UTAH CODE ANN. § 19-7-103(4) (1995).

"any requirement contained in Title 19 Utah Code Ann. (1953), or in rules made under Title 19 . . . or in any rules, orders, permits, licenses, or closure plans issued or approved by the department,[173] or in any other provision or ordinance addressing protection of the environment."[174]

Given these provisions, only self-evaluations conducted for the purpose of complying with "environmental laws" — as peculiarly defined by the Utah statute and Rule of Evidence — may qualify for the privilege. Utah seems to have drawn a relatively bright line between environmental and non-environmental self-evaluations by focusing on Title 19 of the Utah Code and requirements promulgated under that statute. However, the final phrase of the "environmental law" definition is ambiguous: "any requirement contained in . . . *any other provision or ordinance addressing protection of the environment.*"[175] This language arguably does not refer solely to requirements imposed by Utah *state* agencies, because it uses the term "ordinance," evoking local law. If this clause is ultimately interpreted to embrace *federal* environmental requirements, the breadth of Utah's privilege may mirror that of other states, which refer to facilities and activities regulated under specified state laws and "federal, regional, or local counterparts or extensions thereof."[176]

l. Virginia

Virginia distinguishes between privileged environmental assessments and nonprivileged, non-environmental assessments not by focusing on actors, but by specifying the purpose of a qualifying voluntary environmental assessment:

> "Environmental assessment" means a voluntary evaluation of activities or facilities or of management systems related to such activities or facilities that is designed to identify noncompliance with environmental laws and regulations, promote compliance with environmental laws and regulations, or identify opportunities for improved efficiency or pollution prevention.[177]

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173. As used in Utah Evidence Rule 508, "department" means the Department of Environmental Quality. *See* UTAH R. EVID. 508(a)(2) (1997).

174. UTAH R. EVID. 508(a)(4) (1997); UTAH CODE ANN. § 19-7-103(3) (1995).

175. UTAH R. EVID. 508(a)(4) (1997) (emphasis added); UTAH CODE ANN. § 19-7-103(3) (1995) (emphasis added).

176. *See, e.g.*, ARK. CODE ANN. § 8-1-302(3)(A) (Michie Supp. 1997).

177. VA. CODE ANN. § 10.1-1198(A) (Michie Supp. 1997).

Unlike legislation in other states,[178] the Virginia statute does not define "environmental laws." As a result, *any* actor engaging in a voluntary evaluation of an activity, facility, or management system for the purpose of assessing compliance with environmental laws and regulations (or to identify opportunities for improved efficiency or pollution prevention) may benefit from the privilege.

m. Wyoming

The Wyoming statute includes unique language *authorizing* environmental audits:[179] "Owners and operators of facilities and persons whose activities are regulated under this act may conduct a voluntary internal environmental audit of compliance programs and management systems to assess and improve compliance with this act."[180] This language suggests that only the following actors may invoke the Wyoming environmental audit privilege: "[o]wners and operators of facilities and persons whose activities are regulated under this act . . . ."[181] The legislature has provided elsewhere that references to "this act" embrace essentially all of Wyoming Statutes Title 35, Chapter 11, entitled "Environmental Quality."[182] Unlike many environmental audit statutes, the Wyoming legislation does not refer to facilities and activities regulated under federal or local counterparts of state environmental laws.

D. *Definition of "Environmental Audit" or "Environmental Self-Evaluation"*

The environmental audit (or environmental self-evaluation) privilege statutes vary considerably in their definitions of the activity that is to be encouraged and protected. Nevertheless, many elements of the environmental audit (or environmental self-eval-

178. *See, e.g.*, COLO. REV. STAT. ANN. § 13-25-126.5(2)(c) (West 1997).

179. Other states simply assume that such audits may be conducted, and move directly to the creation of a privilege. *See, e.g.*, OR. REV. STAT. § 468.963(1) (Supp. 1996).

180. WY. STAT. ANN. § 35-11-1105(b) (Michie 1997).

181. *Id.*

182. *See id.* § 35-11-103(xiii) ("'This act' means [WY. STAT. ANN. §§] 35-11-101 through 35-11-403, 35-11-405, 35-11-406, 35-11-408 through 35-11-1106 and 35-11-1414 through 35-11-1428"). The referenced portions of the Wyoming Statutes govern air, water, and land quality, and solid waste management. The portions of Chapter 11 apparently excluded from "this act" deal with abandoned mine reclamation, mine subsidence, and radioactive waste storage facilities. *See* WY. STAT. ANN. §§ 35-11, 12-13, 15 (Michie 1997).

uation) definition are common to multiple statutes. Accordingly, those elements are addressed in the following sections.

1. "Voluntary," "Self-Initiated," or "Not Otherwise Required by Law"

The statutes of seventeen states effectively provide that the environmental audit privilege will apply only if an audit or self-evaluation is "voluntary."[183] Legislatures in three states — two of whom also require that the evaluation be "voluntary" — require that qualifying environmental audits (or "self-evaluations") must be "self-initiated."[184] Kansas specifies that an audit must be "initiated by the owner or operator of a facility."[185]

These requirements are presumably intended to exclude from the privilege the results of auditing activities that are required by statute, regulation, permit condition, consent decree, or judicial order.[186] Because the purpose of the environmental audit privilege is to encourage regulated entities to undertake audits that would not otherwise occur, it makes sense to provide that only

183. *See* ALASKA STAT. § 09.25.490(a)(4) (Michie Supp. 1997); ARK. CODE ANN. § 8-1-302(3)(A) (Michie Supp. 1997); COLO. REV. STAT. § 13-25-126.5(2)(b) (West 1997); ILL. COMP. STAT. ANN. 415/5-52.2(i) (1996); IND. CODE ANN. § 13-11-2-68 (West 1996); KAN. STAT. ANN. § 60-3332(a) (Supp. 1997); KY. REV. STAT. ANN. § 224.01-040(1)(a) (Michie Supp. 1997); MICH. COMP. LAWS ANN. § 324.14801(a) (West 1996); MISS. CODE ANN. § 49-2-2(e)-(f) (Supp. 1996); N.H. REV. STAT. ANN. § 147-E:1(IV) (Supp. 1997); OHIO REV. CODE ANN. § 3745.70(a) (Banks-Baldwin Supp. 1997); OR. REV. STAT. § 468.963(6)(a) (Supp. 1996); S.C. CODE ANN. § 48-57-20(2) (Laws Co-op. Supp. 1997); S.D. CODIFIED LAWS § 1-40-33 (Michie Supp. 1997); TEX. REV. CIV. STAT. ANN. art. 4447cc § 3(a)(3) (West Supp. 1998); VA. CODE ANN. § 10.1-1198(A) (Michie Supp. 1997); WY. STAT. ANN. § 35-11-1105(a)(i) (Michie 1997). *See also* IDAHO CODE §§ 9-340(45) & 9-803 (Supp. 1997) (effectively declaring that "[v]oluntarily prepared environmental audits" submitted to an environmental agency on or before December 31, 1997, are exempt from disclosure, notwithstanding the public's right to examine public records under Idaho Code § 9-338); UTAH R. EVID. 508(a)(5) (1997) (protecting the results of a "self-initiated" assessment "not otherwise expressly required by an environmental law").

184. *See* COLO. REV. STAT. § 13-25-126.5(2)(3) (1997) (defining "voluntary self-evaluation"); MISS. CODE ANN. § 49-2-2(f) (Supp. 1996); UTAH CODE ANN. § 19-7-103(4) (1995) (defining "environmental self-evaluation"); UTAH R. EVID. 508(a)(5) (1997) (same).

185. KAN. STAT. ANN. § 60-3332(a) (Supp. 1997). The unique phrases requiring "self-initiation" or providing that an audit must be "initiated by" an owner or operator may increase the risk that an audit conducted at the request of a potential lender or purchaser will fail to gain protection of the privilege.

186. *See, e.g.*, Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations, 60 Fed. Reg. 66706 (1995) (providing examples of violations discovered through non-voluntary investigations). *See also* Scanlon, *supra* note 4, at 656 ("audits required through some type of governmental action, such as part of a settlement negotiation or a statute, are not voluntary and are not protected").

voluntary or self-initiated audits merit the privilege. There is no need to encourage audits that are already mandatory.[187] Nevertheless, the terms "voluntary" and "self-initiated" may pose interpretive difficulties.

Imagine, for example, an audit undertaken to satisfy a prospective creditor or purchaser. If Company A seeks to obtain a loan from Company B (or seeks to sell property or assets to Company B), will Company B's request for an environmental audit at Company A render such an investigation insufficiently "voluntary" or "self-initiated" under the statute to qualify for the privilege? On the one hand, supporters of the privilege may reasonably argue that the audit is fully voluntary or self-initiated, because it is not being imposed on Company A by a regulatory agency or a court; Company A is going beyond what the law requires. On the other hand, opponents of the privilege may argue that the legislature could not have intended to protect the results of such an audit, because there is no need to *encourage* such an investigation; the prospective loan or purchase transaction has already created sufficient incentive to generate an audit. Companies must worry that a reviewing court may find the latter argument more persuasive, because it may be more faithful to the purpose underlying creation of the privilege.[188]

The South Carolina statute contains unique language withholding the official "environmental audit" label from at least some investigations associated with commercial transactions: "For the purposes of this act, an environmental audit does *not* include an environmental site assessment of a facility conducted solely in anticipation of the purchase, sale, or transfer of the business or facility."[189] The inclusion of this clause in the South Carolina statute poses the inevitable question: does the *absence* of such language in the statutes of other states mean that such assessments *may* fall within their "environmental audit" definition?

Outside influences other than impending commercial transactions may also pose interpretive difficulties in ascertaining whether an audit is "voluntary" or "self-initiated." Suppose, for example, that an audit is begun after the commencement of a

187. The requirement that an environmental audit must be voluntary is closely related to the statutory exclusion from privileged status in nineteen states for any information required to be collected, developed, maintained, reported or otherwise made available to a regulatory agency pursuant to any law. *See, e.g.*, OR. REV. STAT. § 468.963(5)(a) (Supp. 1996). *See infra* pp. 133-136.

188. *See supra* p. 81.

189. S.C. CODE ANN. § 48-57-20(2) (Law Co-op. Supp. 1997) (emphasis added).

federal or state inspection, investigation, information request, or lawsuit, after receipt of notice of an impending citizen suit, after receipt of a complaint by a third party, or after the reporting of alleged environmental law violations to a public agency or the press by a "whistle-blower" employee.[190] When a company scurries to assess its environmental compliance in response to one or more of these influences, is its audit truly "voluntary" or "self-initiated" within the meaning of an environmental audit privilege statute? Opponents of the privilege may be expected to argue that such an audit would be undertaken without the incentive of the environmental audit privilege and that, accordingly, the audit should not be considered "voluntary" or "self-initiated."

A further interpretive problem may be posed by audits undertaken to make a company more attractive to investors. One commentator has asserted that this influence is significant:

> A sound environmental management program can also be important in attracting and maintaining corporate investors. Due to the potentially high costs of civil penalties, citizen suits, and hazardous waste cleanup under CERCLA and the Resource Conservation Recovery Act (RCRA), investors increasingly scrutinize a firm's environmental compliance record; for example, a growing number of investment funds will only invest in corporations with good environmental records. Sound environmental management can also curtail shareholder resolutions and derivative actions brought to pressure management into considering the environmental impacts of business decisions.[191]

For all of these influences — from impending commercial transactions to whistle-blowers to investors — a company seeking to claim the privilege may reasonably assert that the audit is nevertheless "voluntary" or "self-initiated" because no legal or other requirement makes it mandatory. Dictionaries, unfortunately, may be of little help, because they include such defini-

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190. *See* Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations, 60 Fed. Reg. 66706 (1995) (indicating that *disclosures* of violations in response to such influences — or in response to "imminent discovery of the violation by a regulatory agency" — will not be considered to be "voluntary"). *See also* Marianne Lavelle, *Feds on the Defensive: Audit Privilege Mobilizes EPA, Business Bar*, NAT'L L.J., Aug. 8, 1994, at A1. (describing a case beginning with an anonymous tip to state officials, who then staked out a sawmill, witnessed paint waste being dumped into a storm drain, and interviewed local residents, with these events triggering preparation of the audit).

191. Michael Ray Harris, *Promoting Corporate Self-Compliance: An Examination of the Debate Over Legal Protection for Environmental Audits*, 23 ECOLOGY L.Q. 663, 681-82 (1996).

tions for "voluntary" as "[a]cting or performed without external persuasion or compulsion" (arguably eliminating from the "voluntary" category most examples discussed in the preceding paragraphs) and "without legal obligation, payment, or valuable consideration"[192] (arguably embracing as "voluntary" many of the same examples).

The answer to this ambiguity may be to interpret the phrases "voluntary" or "self-initiated" by focusing on the statutory purpose: to induce auditing activity — and only that auditing activity — that would not otherwise occur. But if courts take a narrow view of "voluntary" or "self-initiated" — excluding, for example, audits undertaken to attract investors — potentially regulated entities may find themselves deprived of a privilege that they may have reasonably assumed would apply.

The Ohio legislation, enacted on December 16, 1996, is the only environmental audit privilege statute setting forth a definition for the term "voluntary":[193]

> "voluntary" means, with respect to an environmental audit of a particular activity, that all of the following apply when the audit of that activity commences:
> (1) the audit is not required by law, prior litigation, or an order by a court or a government agency;
> (2) the owner or operator who conducts the audit does not know or have reason to know that a government agency has commenced an investigation or enforcement action that concerns a violation of environmental laws involving the activity or that such an investigation or enforcement action is imminent.[194]

Statutes in four states define environmental audits or self-evaluations to embrace evaluations that are "not otherwise required by environmental law,"[195] or "not otherwise expressly required by environmental law."[196] Ohio's unique definition of the term "voluntary" similarly requires that the "audit is not required by law."[197] It is plain from this wording that evaluations *required* by

192. AMERICAN HERITAGE DICTIONARY 1355 (2d college ed. 1991).

193. Regulations in Idaho set forth a detailed definition of the term "voluntary." *See* Idaho APA § 02.01.04.004.06(c) (1996); *id.* § 16.01.10.010.06(c).

194. OHIO REV. CODE ANN. § 3745.70(b) (Banks-Baldwin Supp. 1997).

195. COLO. REV. STAT. § 13-25-126.5(2)(3) (1997) (defining "voluntary self-evaluation").

196. *See* KAN. STAT. ANN. § 60-3332(a) (Supp. 1997) (defining "audit"); MISS. CODE ANN. § 49-2-2(f) (Supp. 1996) (defining "voluntary self-evaluation"); UTAH CODE ANN. § 19-7-103(4) (1995) (defining "environmental self-evaluation"); UTAH R. EVID. 508(a)(5) (1997) (same).

197. OHIO REV. CODE ANN. § 3745.70(c)(1) (Banks-Baldwin Supp. 1997).

environmental laws fail the environmental audit or self-evaluation definition. It is not clear, however, that evaluations *not* required by environmental laws automatically qualify as "voluntary" or "self-initiated." On the one hand, the phrases "voluntary," "self-initiated," and "not otherwise required by environmental law," may be read as synonyms; under such a reading, compliance with the third condition guarantees compliance with the first two. On the other hand, the phrases may be read to establish three independent and discrete conditions; under such a reading, even an evaluation "not otherwise required by environmental law" may be insufficiently "voluntary" or "self-initiated" to qualify for the privilege.

2. "Internal"

The statutes of thirteen states effectively provide that the environmental audit privilege will apply only if an audit or self-assessment is "internal."[198] An "internal" audit is arguably one in which a regulated entity examines its *own* compliance with the relevant statutory programs. If a company brings in an outside consultant to assist in the company's self-evaluation, the audit is arguably no less "internal" than would be the case if outside assistance not been sought, and many statutes expressly authorize the use of outside auditors.[199]

But sometimes one company may analyze another in connection with a proposed transaction, such as a loan or acquisition. Such an evaluation may be more difficult to characterize. If Company B analyzes the environmental activities of Company A to evaluate Company A's loan application (or in connection with a proposed acquisition), does such an audit fail the statutory re-

198. *See* ARK. CODE ANN. § 8-1-302(3)(A) (Michie Supp. 1997); IDAHO CODE § 9-803(3) (Supp. 1997); ILL. COMP. STAT. ANN. 415/5-52.2(i) (West 1997); IND. CODE ANN. § 13-11-2-68 (West 1996); KAN. STAT. ANN. § 60-3332(a) (Supp. 1997); KY. REV. STAT. ANN. § 224.01-040(1)(a) (Michie Supp. 1997); MICH. COMP. LAWS ANN. § 324.14801(a) (West 1996); MISS. CODE ANN. § 49-2-2(f) (Supp. 1996); OR. REV. STAT. § 468.963(6)(a) (Supp. 1996); S.C. CODE ANN. § 48-57-20(2) (Law Co-op. Supp. 1997); S.D. CODIFIED LAWS § 1-40-33 (Michie Supp. 1997); WY. STAT. ANN. § 35-11-1105(a)(i) (Michie 1997). The Alaska statute provides that the privilege covers only "the parts of the report that consist of confidential self-evaluation and analysis of the owner's or operator's compliance with environmental laws," ALASKA STAT. § 09.25.450(a) (Michie Supp. 1997); it then provides that "confidential self-evaluation and analysis" means the part of an audit report that is, *inter alia*, "internal." ALASKA STAT. § 09.25.490(a)(2)(A) (Michie Supp. 1997).

199. *See, e.g.*, OR. REV. STAT. § 468.963(6)(a) (Supp. 1996) ("An environmental audit may be conducted by the owner or operator, by the owner's or operator's employees *or by independent contractors*") (emphasis added).

quirement that it be "internal"? Would it make a difference, if Company B induced Company A to undertake the investigation on Company B's behalf? Because they contain no definition for the term "internal," the statutes do not give guidance on such questions.

3. "Comprehensive Evaluation" of a "Facility," "Activity," or "Management System"

The statutes of eight states — primarily those based on the original Oregon environmental audit privilege — contain variations on language declaring that the privilege applies only if an audit is a "comprehensive" (or "thorough") "evaluation of one or more facilities, activities, or management systems related to such facilities or activities . . . ."[200]

What do these statutes mean when they say that an investigation cannot qualify as an environmental audit unless it is a "comprehensive evaluation" of one or more "facilities," "activities," or "management systems"? A "comprehensive evaluation of one or more *facilities*"[201] sounds like a thorough, top-to-bottom, facility-wide review of environmental compliance with at least one enumerated statute. Similarly, a "comprehensive evaluation of . . . *management systems* related to [a] facility or activity"[202] suggests an extensive undertaking. But these eight statutes also define an environmental audit as a "comprehensive evaluation of . . . an *activity* at one or more facilities . . . ."[203] "Activity" is a malleable term that may be interpreted in various ways.[204] Is the conversion of raw materials (iron ore, plastic, and so forth) into a finished product (an automobile) an "activity"? It would appear so. But labeling a small bucket of wastes generated in a single step of a manufacturing sequence is also arguably an "activity."

200. N.H. REV. STAT. ANN. § 147-E:1(IV) (Supp. 1997). *See* ARK. CODE ANN. § 8-1-302(3)(A) (Michie Supp. 1997); ILL. COMP. STAT. ANN. 415/5-52.2(i) (West 1997); IND. CODE ANN. § 13-11-2-68 (West 1996); KY. REV. STAT. ANN. § 224.01-040(1)(a) (Michie Supp. 1997); OR. REV. STAT. § 468.963(6)(a) (Supp. 1996); WY. STAT. ANN. § 35-11-1105(a)(i) (Michie 1997). *See also* OHIO REV. CODE ANN. § 3745.70(a) (Banks-Balsdwin Supp. 1997) (providing that an "environmental audit" is a "*thorough*, and discrete self-evaluation of one or more activities at one or more facilities or properties" (emphasis added).

201. OR. REV. STAT. § 468.963(6)(a) (Supp. 1996) (emphasis added).

202. *Id.*

203. *Id.*

204. The Ohio legislation is the only statute defining "activity," providing that the term "means any process, procedure, or function that is subject to environmental laws." OHIO REV. CODE ANN. § 3745.70(b) (Banks-Baldwin Supp. 1997).

To speak of the comprehensive evaluation of such an activity is incongruous. If the courts cannot devise a satisfactory method for distinguishing between activities qualifying for comprehensive evaluation and those failing to do so, the statutes in these eight states may end up protecting a startling number of mini-audits.

Notwithstanding these declarations that only "comprehensive" evaluations will qualify as "environmental audits," the statutes in these eight jurisdictions thus pose difficult questions about how *ambitious* an environmental audit must be, to merit statutory protection.

The statutes of three states — Alaska, Minnesota, and New Hampshire — provide that an environmental audit (or self-evaluation) must be "objective."[205] Statutes in three states provide that an environmental audit (or self-evaluation) must be "documented."[206]

4. Distinguishing Environmental from Non-Environmental Audits

The very title of the environmental self-audit privilege indicates that self-evaluations undertaken to assess compliance with non-environmental laws — for example antitrust, occupational safety, or anti-discrimination laws — cannot benefit from the privilege. But this general notion must be fleshed out in concrete ways. The statutes of some states are remarkably imprecise at distinguishing *environmental* audits from *non*-environmental audits.

The confusion frequently arises in the definition of "environmental audit." Some states effectively provide that an evaluation is an environmental audit only if it concerns one or more facilities or activities regulated under a list of enumerated or cross-referenced statutes.[207] This method is sometimes overinclusive (embracing investigations seeming to have nothing to do with en-

205. *See* ALASKA STAT. § 09.25.490(a)(4)(A) (Michie Supp. 1997); MINN. STAT. ANN. §§ 114C.21(4) & (11) (West 1997); N.H. REV. STAT. ANN. § 147-E:1(IV) (Supp. 1997).

206. *See* ALASKA STAT. § 09.25.490(a)(4)(B) (Michie Supp. 1997); MINN. STAT. ANN. §§ 114C.21(4) & (11) (West 1997); OHIO REV. CODE ANN. § 3745.70(a) (Anderson 1996).

207. *See, e.g.*, ARK. CODE ANN. § 8-1-302(3)(A) (Michie Supp. 1997); OR. REV. STAT. § 468.963(6)(a) (Supp. 1996).

vironmental law)[208] or underinclusive (failing to reach evaluations that seem to deal with environmental matters).[209] Other statutes define the acceptable subject matter of privileged environmental audits so narrowly that it excludes evaluations designed to assess compliance with federal or local environmental laws.[210]

Companies contemplating environmental audits must review the statutes of their jurisdictions with care concerning the proper subject matter of privileged environmental audits. It is dangerous to assume that evaluations of matters that *seem* to be "environmental" will qualify for the privilege. As one commentator warns, in connection with the Kentucky environmental audit privilege:

> Often . . . an "environmental" audit will include an evaluation of related health and safety issues that the unwary business may assume are protected, but which may not be protected under this privilege. For example, certain regulations pertaining to asbestos, labeling of hazardous chemicals, and permissible exposure limits for air contaminants are actually found in Kentucky's occupational safety and health standards and not in the "Environmental Protection" chapter of the statutes.[211]

This problem is not unique to Kentucky. Many statutes are quite precise on the proper subject matter of a bona fide environmental audit; some of these statutes draw distinctions between environmental and non-environmental audits in ways that are not wholly logical.[212]

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208. *See, e.g.*, OR. REV. STAT. § 468.963(6)(a) (Supp. 1996) (seeming to protect evaluations assessing compliance with a statute governing rates charged by motor carriers for the transport of household goods).

209. *See, e.g.*, ARK. CODE ANN. § 8-1-305(3)(A) (Michie Supp. 1997) (seeming to exclude from the privilege evaluations assessing compliance with water and air pollution statutes).

210. *See, e.g.*, COLO. REV. STAT. § 13-25-126.5(2)(c) (1997) (defining "environmental laws" to include only certain portions of the Colorado Revised Statutes, and regulations, orders, and permits issued thereunder).

211. Clinton J. Elliott, *Kentucky's Environmental Self-Audit Privilege: State Protection or Increased Federal Scrutiny*? 23 N. KY. L. REV. 1, 18 n.67 (1995).

212. For further discussion of the actors and activities eligible for the privilege, *see supra* pp. 87-106.

5. Purpose of the Audit

The statutes of eighteen[213] states[214] effectively provide that materials cannot qualify for the environmental audit privilege unless they result from an investigation: (1) "designed to identify and prevent noncompliance and to improve compliance with"[215] certain programs, statutes, or types of requirements; or (2) undertaken for such a purpose.[216] Accordingly, the subjective *purpose* underlying an internal evaluation may become an important issue when assessing the applicability of the privilege.

Companies surely undertake comprehensive self-evaluations of their facilities and activities for a host of reasons. Some investigations are motivated by a desire to identify ways in which costs may be reduced or eliminated. Other investigations may be

213. The total number of states discussed in this section adds up to twenty, rather than the nineteen jurisdictions that have enacted environmental audit privileges. For an explanation for this numbering anomaly, *see supra* note 17.

214. The Texas statute does not directly address the purpose of the audit. *See* TEX. REV. CIV. STAT. ANN. art. 4447cc § 3(a)(3) (West Supp. 1998) ("a systematic voluntary evaluation, review, or assessment of compliance"). The Minnesota statute does not directly address the purpose of the audit, requiring only that a qualifying audit be "*related* to compliance" and include a corrective action plan, if deficiencies are found. MINN. STAT. ANN. § 114C.21(4) (West 1997) (emphasis added).

215. OR. REV. STAT. § 468.963(6)(a) (Supp. 1996) (emphasis added). *See* ARK. CODE ANN. § 8-1-302(3)(A) (Michie Supp. 1997); IDAHO CODE § 9-803(3) (Supp. 1997); ILL. COMP. STAT. ANN. 415/5-52.2(i) (West 1997); IND. CODE ANN. § 13-11-2-68 (West 1996); KY. REV. STAT. ANN. § 224.01-040(1)(a) (Michie Supp. 1997); MISS. CODE ANN. § 49-2-2(f) (Supp. 1996); OHIO REV. CODE ANN. § 3745.70(a) (Banks-Baldwin Supp. 1997); S.C. CODE ANN. § 48-57-20(2) (Law Co-op. Supp. 1997); VA. CODE ANN. § 10.1-1198(A) (Michie Supp. 1997); WY. STAT. ANN. § 35-11-1105(a)(i) (Michie 1997). *See also* MICH. COMP. LAWS ANN. § 324.14801(a) (West 1996) ("designed to identify historical or current noncompliance and prevent noncompliance or improve compliance with 1 or more of those laws, or to identify an environmental hazard, contamination, or other adverse environmental condition, *or to improve an environmental management system or process*") (emphasis added).

216. *See* ALASKA STAT. § 09.25.490(a)(4) (Michie Supp. 1997) ("specifically designed and undertaken to assess compliance with environmental laws . . . ."); COLO. REV. STAT. § 13-25-126.5(2)(b) (1997) ("environmental audit report" must be the result of a "voluntary self-evaluation"); *id.* § 13-25-126.5(2)(e) (defining "voluntary self-evaluation" to mean a "review . . . performed . . . expressly and specifically *for the purpose of . . . determin[ing]* whether such person or entity is in compliance with environmental laws") (emphasis added); S.D. CODIFIED LAWS § 1-40-33 (Michie Supp. 1997) (employing similar language); KAN. STAT. ANN. § 60-3332(a) (Supp. 1997) ("for the express and specific *purpose* of determining whether a facility, operation within a facility or facility management system complies with environmental laws") (emphasis added); N.H. REV. STAT. ANN. § 147-E:1(IV) (Supp. 1997) ("undertaken specifically to identify areas of noncompliance and to improve compliance with one or more environmental laws"); UTAH R. EVID. 508(a)(5) (1997) ("performed to determine whether a person is in compliance with environmental laws"); UTAH CODE ANN. § 19-7-103(4) (1995) (same).

driven by the goal of improving products or services. Yet others may be designed to reduce accidents, to improve employee morale, to increase productivity, or to speed up operations and beat competitors to the market. In many states, opponents of the privilege may argue that evaluations undertaken for such purposes are not "environmental audits" or "self-evaluations." Technically, only evaluations designed to identify and prevent *noncompliance* and to improve *compliance* with one or more enumerated regulatory regimes may gain the protection of the environmental audit privilege in those states.

To be sure, companies wishing to take advantage of the environmental audit privilege may contemporaneously document their purpose, using the magic language of the statute. Assume, for example, that a company in Oregon attached something like the following to the front of its environmental audit report:

> We hereby commence a comprehensive, internal, environmental audit for the sole purpose of identifying and preventing noncompliance and to improve compliance with Oregon Revised Statutes sections 824.050 to 824.114, and chapters 465, 466, 468, 468A, 468B, and 825, as well as federal, regional, and local counterparts and extensions of those statutes.

What is a reviewing court to do, when a dispute arises about the true purposes underlying a company's self-evaluation exercise? The Oregon statute, for example, declares that "[a] party asserting the environmental audit privilege . . . has the burden of proving the privilege."[217] Must a court accept the company's assertion that its motivations — a subjective matter — were in accord with the statutory requirements, absent contrary proof by the party opposing the claim of privilege? This may be the only workable approach to resolving the motivation issue.

What if a reviewing court becomes convinced that there were multiple purposes underlying a self-evaluation? Can an evaluation qualify as an environmental audit under the relevant statute if the goal of assessing compliance with the enumerated statutory programs was merely one of several motivations for the undertaking? Nothing in these statutes provides that assessing compliance with the enumerated programs must be the *only* goal of the evaluation. Accordingly, the presence of additional purposes

217. OR. REV. STAT. § 468.963(3)(d) (Supp. 1996).

should at least arguably not vitiate the privilege. But should a reviewing court insist that compliance assessment must be the *primary* goal? Such an interpretation might be most faithful to the underlying statutory purpose: to encourage companies to engage in compliance-assessment audits that would not otherwise be conducted without the inducement of the privilege.[218]

Wholly apart from the question of mixed motives, what does it mean to say that the audit must be "designed to identify and prevent noncompliance . . . and to improve compliance with" the enumerated statutes? Under some circumstances, a company may seek to assess noncompliance and to improve compliance, not as an end in itself, but as the means to another desired end. Assume, for example, that Company A analyzes its own facilities and activities because it seeks a loan from Company B (or wishes to sell property to Company B). Company B declares that it will refuse to go forward with the proposed transaction until the self-audit by Company A has been satisfactorily completed. Is such an evaluation "designed to identify and prevent noncompliance and to improve compliance with" one or more of the enumerated statutes, as the Oregon statute requires? Or does the audit have an ultimately separate, disqualifying purpose?

On the one hand, supporters of the privilege may reasonably argue that such an audit is designed to identify and prevent noncompliance; indeed, Company B insists on the audit precisely because it wants matters of noncompliance cured prior to completing the transaction. This argument comports with the literal words of the Oregon statute, and may be accepted under a "plain meaning" approach. On the other hand, opponents of the privilege may argue that the legislature could not have intended to protect the results of such an audit, because there is no need to *encourage* such an investigation; the prospective loan or purchase transaction has already created sufficient incentive to generate an audit. A reviewing court may find the latter argument more persuasive, because it may be more faithful to the purpose underlying creation of the privilege.[219]

The Idaho statute addresses this problem uniquely by declaring that:

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218. *See supra* p. 81. *See also* OR. REV. STAT. § 468.963(6)(b) (Supp. 1996) (providing that certain documents will be said to be part of the privileged environmental audit report only if "collected or developed for the *primary purpose* of . . . [the] audit") (emphasis added).

219. *See supra* p. 81.

> [t]he existence of a written environmental compliance policy or adoption of a plan of action to meet applicable environmental laws shall constitute prima facie evidence that an environmental audit report was *designed* to prevent noncompliance and improve compliance with environmental laws and that the environmental audit is protected from disclosure.[220]

The resolution to this situation for other states may be a separate provision found in fourteen statutes denying privileged status to audits showing evidence of noncompliance for which appropriate efforts to achieve compliance were not promptly initiated and pursued with reasonable diligence.[221] If violations uncovered by Company A's audit have been promptly cured, a court will presumably be much more likely to accept the claim that the audit was *designed* to bring the company into compliance; if such violations remain uncorrected, the court is more likely to conclude that the audit was designed for a different, disqualifying purpose.

The Virginia statute contains a unique provision defining "environmental assessment" (the activity protected by the Virginia privilege) to include an evaluation designed "to identify . . . *opportunities for improved efficiency or pollution prevention.*"[222] This language is intriguing for two reasons. First, it poses the startling possibility that efficiency evaluations having nothing to do with environmental controls might benefit from the privilege. A literal reading of the statute's words might support such a reading. Opponents of the privilege may be expected to argue, however, that the term being defined — "*environmental* assessment" — requires that efficiency evaluations must relate to environmental controls to qualify for protection. Second, the reference to "improved efficiency" conveys the unmistakable impression that evaluations undertaken to save money in environmental control expenditures are just as entitled to the privilege as investigations designed to determine whether a facility is or is not in compliance. There is no other state environmental audit privilege statute conferring the protection on such an evaluation.

E. *Audit Formalities*

The various statutory definitions of "environmental audit" typically articulate various conditions that must be met before an

220. IDAHO CODE § 9-806(3) (Supp. 1997) (emphasis added).
221. *See infra* p. 158.
222. VA. CODE ANN. § 10.1-1198(A) (Michie Supp. 1997) (emphasis added).

evaluation will be found to qualify for the environmental audit classification.[223] However, with the exception of language requiring the precise labeling of environmental audit report documents,[224] most statutes are remarkably silent about the formalities that separate bona fide "audits" from other investigations of facilities and activities.[225] If a supervisor directs an employee to "figure out what we've been doing with the contents of those drip pails, and report back to me with your findings," have the two of them embarked on an "audit"? After all, they are arguably engaged in a comprehensive evaluation of an "activity."[226]

The failure of most statutes to specify the formal hallmarks of a qualifying audit is understandable. The operations of the regulated entities who may seek to invoke the environmental audit privilege are bewilderingly diverse. Such entities range in size from mom-and-pop operations to massive industrial enterprises. Nevertheless, the legislatures' failure to articulate formal steps in a qualifying audit will require reviewing courts to develop at least some formal requirements to distinguish non-qualifying investigations from bona fide audits.

One limitation seems plain on the face of most statutes: there can be no environmental audit triggering the privilege claim unless an investigation involves written materials. This is so, because the privilege in nineteen states protects the environmental audit report (sometimes denominated by a slightly different name)[227] — a term defined in fifteen states to include only documents.[228]

Thus, if (1) a supervisor orally directs an employee to "figure out what we've been doing with the contents of those drip pails, and report back to me with your findings," (2) the employee complies with this directive and reports back to the supervisor orally, and (3) the supervisor delivers oral instructions to the employee on how to handle the pails in the future, there can be no privilege, because the investigation has involved no written docu-

223. *See supra* pp. 106-118.

224. *See infra* pp. 127-130.

225. For a discussion of audit formalities in light of evolving uniform international environmental management standards, *see* Jack H. Goldman, *Will Implementing ISO 14001 Destroy the Confidentiality of Environmental Compliance Audits?*, 27 Env't Rep. (BNA) 426 (1996).

226. *See supra* p. 112.

227. *See infra* p. 124.

228. *See infra* p. 126.

ments. An identical case generating a single document — eventually stamped by the company as "Environmental Audit Report: Privileged Document"[229] — might also fail to qualify for the privilege in the nine states in which an audit report is defined as "a *set* of documents."[230] However, an identical case in such a state generating at least two documents may require a reviewing court to tackle difficult distinctions between bona fide audits (protected by the privilege) and less formal investigations not meriting protection.

F. *Defining the Beginning and the End of an Environmental Audit*

No attribute of an environmental audit is more essential to an intelligent application of the statutory privilege scheme than the starting and ending points of the audit. In nineteen states, the privilege protects the environmental audit report.[231] The statutes of fifteen states effectively define the report to include only documents "prepared as a result of"[232] (or similar words) an environmental audit or self-assessment. In eleven states, the privileged report includes supporting documents (such as field notes, drawings, maps, and surveys) only if they have been prepared "in the course of" the audit or self-assessment.[233]

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229. *See infra* pp. 127-130.

230. *See supra* p. 127 & note 261.

231. *See infra* p. 124.

232. *See* ARK. CODE ANN. § 8-1-302(4) (Michie Supp. 1997); COLO. REV. STAT. § 13-25-126.5(2)(b) (1997); IDAHO CODE § 9-803(4) (Supp. 1997); ILL. COMP. STAT. ANN. 415/5-52.2(i) (West 1997); IND. CODE ANN. § 13-11-2-69 (West 1996); KAN. STAT. ANN. § 60-3332(b) (Supp. 1997); KY. REV. STAT. ANN. § 224.01-040(1)(b) (Michie Supp. 1997); MICH. COMP. LAWS ANN. § 324.14801(b) (West 1996); OR. REV. STAT. § 468.963(6)(b) (Supp. 1996); WY. STAT. ANN. § 35-11-1105(a)(ii) (Michie 1997). *See also* MISS. CODE ANN. § 49-2-2(e) (Supp. 1996) ("prepared solely as a part of or in connection with a voluntary self-assessment"); N.H. REV. STAT. ANN. § 147-E:2(II) (Supp. 1997) (components of audit report include "information generated during, or as a result of, the audit and the conclusions and recommendations made during or as a result of the audit"); VA. CODE ANN. § 10.1-1198(B) (Michie Supp. 1997) ("document" means information "resulting from" an environmental assessment). *See also* UTAH R. EVID. 508(a)(3) (1997) ("prepared as the result of *or in response to* an environmental self-evaluation") (emphasis added); OHIO REV. CODE ANN. § 3745.70(d) (Banks-Baldwin Supp. 1997) ("'[e]nvironmental audit report' means . . . documents . . . that are necessary to an environmental audit and are collected, developed, made, and maintained in good faith as part of the audit").

233. *See* ALASKA STAT. § 09.25.490(a)(1)(A) (Michie Supp. 1997); IDAHO CODE § 9-803(4) (Supp. 1997); ILL. COMP. STAT. ANN. 415/5-52.2(i) (West 1997); KAN. STAT. ANN. § 60-3332(b) (Supp. 1997); KY. REV. STAT. ANN. § 224.01-040(1)(b) (Michie Supp. 1997); MICH. COMP. LAWS ANN. § 324.14801(b) (West 1996); N.H.

These commonly used phrases link to the issue of timing. Nothing can be prepared "as a result of" an environmental audit unless it has been prepared *after* the audit begins. Nothing can be prepared "in the course of" an environmental audit unless it has been prepared *after* the audit begins and *before* the audit ends. One might assume, therefore, that the statutes provide a clear demarcation for the beginning and the end of an environmental audit. For many states, this is not the case.

The uncertainty surrounding the beginning and ending dates of environmental audits may lead to considerable litigation. Companies may assert that documents prepared before any formal initiation of an audit were nevertheless part of the audit process; opponents of the privilege may be expected to assert the contrary. Because many statutes fail to require any formal event denoting the commencement of an environmental audit, these disputes cannot be promptly and consistently resolved. Similar confusion may arise in connection with documents that opponents claim were prepared after the (undefined) end of an environmental audit.

Responsible companies may alleviate much of this confusion by carefully documenting the beginning and the end of their auditing activities. Some companies might view this as a strategically wise move, because it will enhance the likelihood that documents prepared *during* the defined period are protected by the privilege. Other companies may yield to the contrary temptation. If the beginning and ending dates are unclear, the privilege may be asserted for embarrassing or otherwise harmful documents whose dates bear some relationship to the general time period during which the environmental audit allegedly took place.

Regulated entities may encounter an even greater temptation to engage in a process of what might be called continuous or perpetual auditing. If a company is constantly in the process of assessing its compliance with the enumerated statutory programs — a plausible claim — the company may assert that *all* documents prepared within the company and addressed to activities and facilities regulated under the enumerated statutes are privileged, no matter when generated. The indifference in many state

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REV. STAT. ANN. § 147-E:2(II) (Supp. 1997); OR. REV. STAT. § 468.963(6)(b) (Supp. 1996); S.C. CODE ANN. § 48-57-20(3) (Law Co-op. Supp. 1997); TEX. REV. CIV. STAT. ANN. art. 4447cc § 4(c) (West Supp. 1998); WY. STAT. ANN. § 35-11-1105(a)(ii) (Michie 1997).

statutes to an environmental audit's beginning and ending points invites this assertion.

The statutes of seven states seek to head off excessively broad claims of "perpetual" auditing by addressing the timing issue in their privilege statutes. Statutes in two states effectively declare that, once initiated, an environmental audit "shall be completed within a reasonable period of time."[234] The Kansas statute further provides: "Nothing in this section shall be construed to authorize uninterrupted or continuous auditing."[235] The statutes in three states provide (or strongly suggest) that an environmental audit, once initiated, must be completed within 180 days (or six months).[236] When these timing provisions are coupled with language requiring mandatory components in completed audit reports,[237] companies may incorrectly assume that their auditing activities will qualify for the privilege, only to discover that the privilege is unavailable.

A fifth state, South Carolina, addresses the timing issue in three ways. First, the South Carolina statute requires formal notification at the outset of an environmental audit:

> In order to assert the privilege . . . the facility coordinating the environmental audit shall, within ten days of commencing the audit, notify the [South Carolina Department of Health and Environmental Control] that an audit is being conducted, and shall include in that notification the beginning date of the audit and the scheduled completion date.[238]

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234. *See* KAN. STAT. ANN. § 60-3332(a) (Supp. 1997); COLO. REV. STAT. § 13-25-126.5(2)(e) (1997) (defining "voluntary self-evaluation"). *See also* S.C. CODE ANN. § 48-57-20(2) (Law Co-op. Supp. 1997) (declaring vaguely that "[a]n environmental audit must be a discrete activity with a specified beginning date and scheduled ending date reflecting the author's bona fide intended completion schedule").

235. *See* KAN. STAT. ANN. § 60-3332(a) (Supp. 1997). *See also* COLO. REV. STAT. § 13-25-126.5(2)(e) (1997) ("Nothing in this section shall be construed to authorize uninterrupted voluntary self-evaluations."); S.C. CODE ANN. § 48-57-30(A)(5) (Law Co-op. Supp. 1997).

236. *See* WY. STAT. ANN. § 35-11-1105(a)(i) (Michie 1997) ("Once initiated the voluntary environmental audit shall be completed within . . . 180 days"); TEX. REV. CIV. STAT. ANN. art. 4447cc § 4(e) (West Supp. 1998) ("Once initiated, an audit shall be completed within a reasonable time not to exceed six months unless an extension is approved by the governmental entity with regulatory authority over the regulated facility or operation based on reasonable grounds"); N.H. REV. STAT. ANN. § 147-E:2(I) (Supp. 1997) ("the anticipated date for completion of the audit," — required as part of a mandatory written plan in the completed audit report — must "in no event . . . be more than 6 months from the date of commencement").

237. *See infra* p. 131.

238. S.C. CODE ANN. § 48-57-45 (Law Co-op. Supp. 1997).

Second, the South Carolina statute declares: "An environmental audit must be a discrete activity with a specified beginning date and scheduled ending date reflecting the auditor's bona fide intended completion schedule."[239] Finally, the South Carolina statute provides that "documents prepared as a result of multiple or continuous self auditing conducted in an effort to intentionally avoid liability for violations" are "not entitled to the privilege."[240]

The seventh and final state, Alaska, has enacted a variant of the South Carolina approach. First, the Alaska statute uniquely requires formal notification *before* commencement of the audit:

> to qualify for the privilege . . . at least 15 days before conducting the audit, the owner or operator conducting the audit must give notice by electronic filing that complies with an ordinance or regulation authorized under (j) of this section or by certified mail with return receipt requested to the commissioner's office of the department, and, when the audit includes an assessment of compliance with a municipality's ordinances, to the municipal clerk, of the fact that it is planning to commence the audit. 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 environmental audit at a time.[241]

Second, Alaska provides that "an audit shall be completed within a reasonable time, but no longer than 90 days, unless a longer period of time is agreed upon between the owner or operator and the department or the municipality, as appropriate."[242] The report itself must be completed in an undefined "timely manner."[243] Finally, the Alaska statute declares that it "may not be construed to . . . authorize a privilege for uninterrupted or continuous environmental audits."[244]

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239. *Id.* § 48-57-20(2). *See also id.* § 48-57-20(3) (defining "environmental audit report" as "a document marked or identified as such with a completion date"). *Compare* N.H. REV. STAT. ANN. § 147-E:2(I) (Supp. 1997) ("[a]n environmental audit report, *when completed*, shall [include] . . . [a] written plan . . . that identifies . . . the *anticipated* date for completion of the audit, which in no event shall be more than 6 months from the date of commencement") (emphasis added).

240. S.C. CODE ANN. § 48-57-30(A)(5) (Law Co-op. Supp. 1997).

241. ALASKA STAT. § 09.25.450(b) (Michie Supp. 1997).

242. *Id.*

243. *Id.*

244. *Id.*

G. *Acceptable Auditors*

In defining acceptable auditors, most statutes use wording similar to that found in the Indiana statute, which provides that audits may be "conducted by an owner or operator of a facility or . . . activity by an employee of the owner or operator or by an independent contractor."[245] Kansas is the only state requiring that audits undertaken by *outside* actors by performed by a "qualified auditor."[246] A "qualified auditor" is defined in Kansas as "a person or organization with education, training and experience in preparing studies and assessments."[247]

H. *Privileged Materials*

The heart of any privilege is its articulation of the materials protected by the privilege. The statutes of nineteen states effectively provide that the privilege protects at least the "environmental audit report," "audit report," "environmental self-evaluation report," or "environmental assessment document."[248] The statutes of eleven of those states go further by effectively providing that the privilege also precludes oral testimony about at least some aspects of the audit and the audit report's contents.[249]

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245. IND. CODE ANN. § 13-11-2-68 (West 1996).

246. KAN. STAT. ANN. § 60-3332(b) (Supp. 1997).

247. KAN. STAT. ANN. § 60-3332(d) (Supp. 1997).

248. *See* ALASKA STAT. § 09.25.450(a) (Michie Supp. 1997) (protecting "the parts of the report that consist of confidential self-evaluation and analysis of the owner's or operator's compliance with environmental laws"); ARK. CODE ANN. § 8-1-303(b) (Michie Supp. 1997); COLO. REV. STAT. § 13-25-126.5(3) (1997); IDAHO CODE § 9-804 (Supp. 1997); ILL. COMP. STAT. ANN. 415/5-52.2(b) (West 1997); IND. CODE ANN. § 13-28-4-1 (West 1996); KAN. STAT. ANN. § 60-3333(a) (Supp. 1997) ("audit report"); KY. REV. STAT. ANN. § 224.01-040(3) (Michie Supp. 1997); MICH. COMP. LAWS ANN. § 324.14802(2) (West 1996); MISS. CODE ANN. § 49-2-71(1) (Supp. 1996) ("environmental self-evaluation report"); N.H. REV. STAT. ANN. § 147-E:3 (Supp. 1997); OHIO REV. CODE ANN. § 3745.71(a)(1) (Banks-Baldwin Supp. 1997); OR. REV. STAT. § 468.963(2) (Supp. 1996); S.C. CODE ANN. § 48-57-30(A) (Law Co-op. Supp. 1997); TEX. REV. CIV. STAT. ANN. art. 4447cc § 5(b) (West Supp. 1998) ("audit report"); UTAH R. EVID. 508(b) (1997); VA. CODE ANN. § 10.1-1198(B) (Michie 1996) ("environmental assessment document"); WY. STAT. ANN. § 35-11-1105(c) (Michie 1997). *See also* MINN. STAT. ANN. § 114C.26(1) (West 1997) (providing that such documents are "privileged as to all persons other than the state," *if* the regulated entity conducting the audit or self-evaluation has complied with the formal conditions necessary for participation in the Minnesota environmental improvement pilot program).

249. *See* COLO. REV. STAT. § 13-90-107(1)(j)(I)(A) (1997); ILL. COMP. STAT. ANN. 415/5-52.2(c) (West 1997); KAN. STAT. ANN. § 60-3333(b) (Supp. 1997); MICH. COMP. LAWS ANN. § 324.14802(4) (West 1996); N.H. REV. STAT. ANN. § 147-E:8 (Supp. 1997); OHIO REV. CODE ANN. § 3745.71(b) (Banks-Baldwin Supp. 1997);

1. Limitation to the Environmental Audit Report

The statutes of eight states effectively provide that the privilege protects *only* the environmental audit *report* (sometimes denominated by a slightly different name).[250] This is true even though such statutes typically provide that "an environmental audit privilege is created to protect the confidentiality of *communications*."[251]

This limitation is not trivial. Assume, for example, that an actor involved in an environmental audit were asked to testify in one of these eight states about matters observed during the audit, or about statements made by audit participants. In such a situation, the actor is not asked to relate what the environmental audit report *says*, but to divulge what he or she personally *knows* by virtue of the auditing activity. The statutes in these states do not expressly provide a testimonial privilege to preclude such inquiry,[252] but probing into the knowledge of audit participants may defeat the purpose of the privilege.

The statutes of the eight states expressly protecting only the audit report lie somewhere between two polar positions staked out by the United States Environmental Protection Agency and the eleven states that have effectively created a testimonial privilege. The EPA's Final Policy Guidance Document on the environmental audit privilege issue declares: "'Environmental audit report' means the analysis, conclusions, and recommendations resulting from an environmental audit, but *does not include* data obtained in, or *testimonial evidence concerning, the environmental audit.*"[253] By contrast, the statutes of eleven states effectively

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S.C. CODE ANN. § 48-57-30(B) (Law Co-op. Supp. 1997); TEX. REV. CIV. STAT. ANN. art. 4447cc § 5(c) (West Supp. 1998); UTAH CODE ANN. § 19-7-107 (1995); VA. CODE ANN. § 10.1-1198(B) (Michie Supp. 1997).

250. *See* ARK. CODE ANN. § 8-1-303(b) (Michie Supp. 1997); IDAHO CODE § 9-804 (Supp. 1997); IND. CODE ANN. § 13-28-4-1 (West 1996); KY. REV. STAT. ANN. § 224.01-040(3) (Michie Supp. 1997); MISS. CODE ANN. § 49-2-71(1) (Supp. 1996); OR. REV. STAT. § 468.963(2) (Supp. 1996); WY. STAT. ANN. § 35-11-1105(c) (Michie 1997). *See also* MINN. STAT. ANN. § 114C.26(2) (West 1997) (providing that qualifying documents are "privileged as to all persons other than the state," *if* the regulated entity has complied with all formal conditions necessary for participation in the Minnesota environmental improvement pilot program).

251. ARK. CODE ANN. § 8-1-303(a) (Michie Supp. 1997) (emphasis added). *See* IDAHO CODE § 9-802(1)(a) (Supp. 1997); ILL. COMP. STAT. ANN. 415/5-52.2(a) (West 1997); KY. REV. STAT. ANN. § 224.01-040(2) (Michie Supp. 1997); OR. REV. STAT. § 468.963(1) (Supp. 1996); WY. STAT. ANN. § 35-11-1105(b) (Michie 1997).

252. For a discussion of testimonial privilege, *see infra* p. 148.

253. EPA Final Policy Guidance Document, Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations, 60 Fed. Reg. 66706 (em-

create a testimonial privilege in connection with environmental audits.[254]

2. Definition of "Environmental Audit Report"

All nineteen states effectively providing that the privilege protects the "environmental audit report," "audit report," "environmental self-evaluation report," or "environmental assessment document,"[255] have enacted statutory definitions for the report or document.

a. Limitation to Documents

In fifteen of the nineteen states effectively providing that the privilege protects the environmental audit report (sometimes denominated by a slightly different name),[256] it appears that nothing is a privileged report unless it is a document or set of documents.[257] Accordingly, this portion of the privilege does not apply, by its terms, to anything other than written materials.[258]

Texas and Utah use language suggesting that the privileged "report" may technically include things other than written documents.[259] However, because these states provide for a testimonial

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phasis added). The definition of "environmental audit report" is central to the articulation of the environmental audit privilege in the eight states limiting the privilege to the report. By contrast, because the EPA has refused to recognize an environmental audit privilege, *see supra* note 7, the EPA's definition of "environmental audit report" is *not* designed to demarcate the outer bounds of a privilege.

254. *See infra* p. 148.

255. *See supra* p. 124.

256. *See supra* note 248.

257. *See* ARK. CODE ANN. § 8-1-302(4) (Michie Supp. 1997); COLO. REV. STAT. § 13-25-126.5(2)(b) (1997); IDAHO CODE § 9-803(4) (Supp. 1997); ILL. COMP. STAT. ANN. 415/5-52.2(i) (West 1997); IND. CODE ANN. § 13-11-2-69 (West 1996); KAN. STAT. ANN. § 60-3332(b) (Supp. 1997) ("audit report"); KY. REV. STAT. ANN. § 224.01-040(1)(b) (Michie Supp. 1997); MICH. COMP. LAWS ANN. § 324.14801(b) (West 1996); MISS. CODE ANN. § 49-2-2(e) (Supp. 1996) ("environmental self-evaluation report"); N.H. REV. STAT. ANN. § 147-E:1(V) (Supp. 1997); OHIO REV. CODE ANN. § 3745.70(d) (Banks-Baldwin Supp. 1997); OR. REV. STAT. § 468.963(6)(b) (Supp. 1996); S.C. CODE ANN. § 48-57-20(3) (Law Co-op. Supp. 1997); VA. CODE ANN. § 10.1-1198(A) (Michie Supp. 1997) ("document"); WY. STAT. ANN. § 35-11-1105(a)(ii) (Michie 1997).

258. In the eleven states providing a testimonial privilege, *see supra* note 249, protection is also accorded to oral testimony concerning at least some aspects of the audit and the audit report's contents. *See infra* p. 148.

259. *See* TEX. REV. CIV. STAT. ANN. art. 4447cc §§ 4(a)-(c) (West Supp. 1998) ("audit report includes each document *and communication* . . . .") (emphasis added); UTAH R. EVID. 508(a)(3) (1997) ("any document, information, report, finding, *communication* . . . .") (emphasis added).

privilege, confusion about whether a report must be written should not cause interpretive difficulties.[260]

The statutes of nine states define an "environmental audit report" or "audit report" as "a *set* of documents."[261] A purist might insist that a single document will not fit the bill. An investigation generating a single, short document — even if technically qualifying as a "comprehensive" evaluation of an "activity"[262] — would not appear to be the type of audit that merits a privilege.

b. Labeling Requirement

The statutes of fourteen states declare in effect that documents may not be protected by the environmental audit privilege unless they are formally labeled in highly specific ways.[263] Most statutes set forth the precise words to be used in labeling. For example, under the Oregon statute, the environmental audit report includes only documents that have been labeled: "Environmental Audit Report: Privileged Document."[264] The formality and specificity of the labeling requirement stands in sharp contrast to many vague aspects of the environmental audit privilege statutes.

The wording of the statutes varies slightly in a way that may have significant consequences. The statutes in eleven states effectively provide that *each document* must be formally labeled.[265]

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260. *See* ALASKA STAT. § 09.25.450(d) (Michie Supp. 1997); TEX. REV. CIV. STAT. ANN. art. 4447cc § 5(c) (West Supp. 1998); UTAH CODE ANN. § 19-7-107 (1995).

261. ARK. CODE ANN. § 8-1-302(4) (Michie Supp. 1997); IDAHO CODE § 9-803(4) (Supp. 1997); ILL. COMP. STAT. ANN. 415/5-52.2(i) (West 1997); IND. CODE ANN. § 13-11-2-69 (West 1996); KAN. STAT. ANN. § 60-3332(b) (Supp. 1997); KY. REV. STAT. ANN. § 224.01-040(1)(b) (Michie Supp. 1997); N.H. REV. STAT. ANN. § 147-E:1(V) (Supp. 1997); OR. REV. STAT. § 468.963(6)(b) (Supp. 1996); WY. STAT. ANN. § 35-11-1105(a)(ii) (Michie 1997).

262. *See supra* p. 113.

263. *See* ALASKA STAT. § 09.25.450(f) (Michie Supp. 1997) ("To facilitate identification, each document . . . shall be labeled . . . ."); ARK. CODE ANN. § 8-1-302(4) (Michie Supp. 1997); IDAHO CODE § 9-803(4) (Supp. 1997); ILL. COMP. STAT. ANN. 415/5-52.2(i) (West 1997); IND. CODE ANN. § 13-11-2-69 (West 1996); KAN. STAT. ANN. § 60-3332(b) (Supp. 1997); KY. REV. STAT. ANN. § 224.01-040(1)(b) (Michie Supp. 1997); MICH. COMP. LAWS ANN. § 324.14801(b) (West 1996); N.H. REV. STAT. ANN. § 147-E:1(V) (Supp. 1997); OHIO REV. CODE ANN. § 3745.71(c)(11) (Banks-Baldwin Supp. 1997); OR. REV. STAT. § 468.963(6)(b) (Supp. 1996); TEX. REV. CIV. STAT. ANN. art. 4447cc § 4(d) (West Supp. 1998); WY. STAT. ANN. § 35-11-1105(a)(ii) (Michie 1997). *See also* S.C. CODE ANN. § 48-57-20(3) (Law Co-op. Supp. 1997) ("a document marked or identified as such [presumably, "environmental audit report"] with a completion date").

264. OR. REV. STAT. § 468.963(6)(b) (Supp. 1996).

265. *See, e.g.*, OR. REV. STAT. § 468.963(6)(b) (Supp. 1996) ("a set of documents, *each* labeled . . . .") (emphasis added). *See also* ALASKA STAT. § 09.25.450(f) (Michie Supp. 1997); IDAHO CODE § 9-803(4) (Supp. 1997); ILL. COMP. STAT. ANN. 415/5-

The statutes in two states are more ambiguous, and may be read to require either that each document be labeled, or that the *set* of documents be labeled.[266] The difference in meaning will be of great importance in situations in which individual documents have not been labeled.

Opponents of the environmental audit privilege may argue that a condition of *contemporaneous* labeling should be read into the statute. After all, the rigorous application of such a formal requirement might assist in distinguishing genuine audit materials from a host of other documents bearing on the subject of environmental compliance.[267] Moreover, the clarity introduced by rigid adherence to a rule of contemporaneous labeling would help to resolve the vexing question of when an audit has begun and when it has ended.[268] Nevertheless, only Michigan's statute provides that labeling must occur "at the time [the document] is created."[269] None of the other statutes expressly provides that each document must be labeled during the auditing event or prior to its completion. As worded, therefore, most statutes do not preclude a regulated entity from responding to a discovery request by sorting through its files, picking out those documents that are believed to have been part of an auditing exercise, and affixing the required labels. To be sure, many statutes provide that a court must order disclosure of materials if the court determines that "the privilege is asserted for a fraudulent purpose."[270] Mislabeling non-privileged materials to avoid disclosure might trigger this provision.

The labeling provision in eleven states requires the use of precise words, such as: "Environmental Audit Report: Privileged

52.2(i) (West 1997); KAN. STAT. ANN. § 60-3332(b) (Supp. 1997); KY. REV. STAT. ANN. § 224.01-040(1)(b) (Michie Supp. 1997); MICH. COMP. LAWS ANN. § 324.14801(b) (West 1996); N.H. REV. STAT. ANN. § 147-E:1(V) (Supp. 1997); OHIO REV. CODE ANN. § 3745.71(c)(11)(a) (Banks-Baldwin Supp. 1997); TEX. REV. CIV. STAT. ANN. art. 4447cc § 4(d) (West Supp. 1998); WY. STAT. ANN. § 35-11-1105(a)(ii) (Michie 1997).

266. *See* ARK. CODE ANN. § 8-1-302(4) (Michie Supp. 1997) ("a *set* of documents prepared as a result of an environmental audit, and labeled . . . .") (emphasis added); IND. CODE ANN. § 13-11-2-69 (West 1996) (same). The phrase "and labeled" may be read to modify the noun "set" (requiring only one label for the collection of documents making up the report) or may be read to modify the noun "documents" (requiring that each document be labeled).

267. *See supra* pp. 118-120.

268. *See supra* pp. 120-123.

269. MICH. COMP. LAWS ANN. § 324.14801(b) (West 1996).

270. *See, e.g.*, OR. REV. STAT. § 468.963(3)(b)(A) (Supp. 1996) (civil or administrative proceedings); *id.* § 468.963(3)(c)(A) (criminal proceedings).

Document."[271] Three other states provide some leeway in their statutes. The Idaho statute requires specific words, "or a substantially equivalent label,"[272] and the Ohio statute effectively requires specific words "or substantially comparable language."[273] The Texas statute requires specific wording, or "words of similar import," but then declares uniquely that "failure to label a document under this section does *not* constitute a waiver of the audit privilege or create a presumption that the privilege does or does not apply."[274]

In the eleven states in which the statute is strictly worded, what should be done in the case of near misses, in which the labels affixed to audit documents do not quite match the statutory language? A purist might insist that failure to use the mandated language will remove a document from the protected "environmental audit report" category. It may be excessive, however, to deny the privilege to documents bearing a slightly different label — for example "Environmental Audit Material: Confidential" — if regulated entities are free (as may be true in every state but Michigan) to affix labels at some point subsequent to the audit; an actor caught in this circumstance might simply re-stamp the documents with the magic words in response to a discovery request. If the materials would otherwise qualify for the environmental audit privilege, the actor can reasonably argue that such re-labeling should not defeat the privilege, because the privilege would not be "asserted for a fraudulent purpose."

Certainly, companies embarking on environmental audits today will want to use the precise magic language of the relevant statute on each and every *privileged* piece of paper generated during the audit. But it may be risky to label everything in sight.

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271. OR. REV. STAT. § 468.963(6)(b) (Supp. 1996). *See* ALASKA STAT. § 09.25.450(f) (Michie Supp. 1997); ARK. CODE ANN. § 8-1-302(4) (Michie Supp. 1997); ILL. COMP. STAT. ANN. 415/5-52.2(i) (West 1997); IND. CODE ANN. § 13-11-2-69 (West 1996); KAN. STAT. ANN. § 60-3332(b) (Supp. 1997); KY. REV. STAT. ANN. § 224.01-040(1)(b) (Michie Supp. 1997); MICH. COMP. LAWS ANN. § 324.14801(b) (West 1996); N.H. REV. STAT. ANN. § 147-E:1(V) (Supp. 1997); S.C. CODE ANN. § 48-57-20(3) (Law Co-op. Supp. 1997); WY. STAT. ANN. § 35-11-1105(a)(ii) (Michie 1997).

272. IDAHO CODE § 9-803(4) (Supp. 1997).

273. OHIO REV. CODE ANN. § 3745.71(c)(11) (Banks-Baldwin Supp. 1997).

274. TEX. REV. CIV. STAT. ANN. art. 4447cc § 4(d) (West Supp. 1998) (emphasis added).

The danger of mislabeling non-privileged materials is addressed elsewhere in this article.[275]

c. *Prepared as a Result of an Environmental Audit*

The statutes of fifteen states define the privileged audit report (sometimes denominated by a slightly different name) to include only documents "prepared as a result of"[276] an environmental audit or self-assessment. This language raises issues of causation.

If a regulated entity has not undertaken a qualifying environmental audit, of course, no documents will qualify as an environmental audit report. Even if a regulated entity has engaged in a qualifying environmental audit, the privilege protects no document unless it was "prepared as a result of" the audit. Determining whether a specific document is covered by the privilege may therefore require close analysis of the events and motives that led to the generation of the document. This may require detailed inquiry into how the company has conducted its activities and generated its documents during the (often ill-defined) auditing period.

Suppose that the person responsible for a bona fide environmental audit (the "auditor") engages in a widespread search for pre-existing documents, or directs company employees to routinely send to the auditor copies of documents relating to the enumerated statutory programs. It appears that such assembled documents have not been "*prepared* as a *result*" of the audit, no matter how valuable the documents may be to the auditor, and no matter how formally they are collected, sorted, and labeled with the magic words of the statute.[277] Arguably, only documents uniquely prepared *because of* the audit fulfill the statutory proviso that environmental audit report documents are limited to those "prepared as a result of" the audit.

In twelve states the privileged report includes supporting documents (such as field notes, drawings, maps, and surveys) only if they have been collected, prepared, or developed prepared "for the primary purpose" of an environmental audit or self-assessment.[278] Compliance with this condition may be difficult to as-

275. *See infra* p. 157.

276. *See supra* note 232.

277. *See supra* pp. 127-130.

278. *See* ALASKA STAT. § 09.25.490(a)(1)(A) (Michie Supp. 1997); ARK. CODE ANN. § 8-1-302(4)(A) (Michie Supp. 1997); IDAHO CODE § 9-803(4) (Supp. 1997); ILL. COMP. STAT. ANN. 415/5-52.2(i) (West 1997); IND. CODE ANN. § 13-11-2-69(1)

sess. Not only may reviewing courts be required to determine the "primary purpose" behind the generation of large numbers of documents — each of which may have been prepared for multiple reasons — but such courts may also be required to ascertain whether these documents were collected or developed for the purpose of preparing an audit that has no clear beginning or end.[279]

d. Permissible and Mandatory Environmental Audit Report Documents

In the nineteen states providing that the privilege protects the "environmental audit report," "audit report," "environmental self-evaluation report," or "environmental assessment document,"[280] the statutes describe types of materials that may or must be in a privileged report. Statutes in twelve states provide or suggest simply that the enumerated documents "may" be included in a privileged report.[281]

Statutes in five states indicate that at least some listed materials "shall" or "must" be included in a report or in a "completed report."[282] What are the consequences of failing to include a mandatory component in a "completed" audit report? The statutes are silent on this issue. A party opposing the claim of privi-

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(West 1996); KAN. STAT. ANN. § 60-3332(b) (Supp. 1997); KY. REV. STAT. ANN. § 224.01-040(1)(b) (Michie Supp. 1997); MICH. COMP. LAWS ANN. § 324.14801(b) (West 1996); OR. REV. STAT. § 468.963(6)(b) (Supp. 1996); S.C. CODE ANN. § 48-57-20(3) (Law Co-op. Supp. 1997); TEX. REV. CIV. STAT. ANN. art. 4447cc § 4(c) (West Supp. 1998); WY. STAT. ANN. § 35-11-1105(a)(ii) (Michie 1997).

279. *See supra* pp. 120-123.

280. *See supra* p. 124 and note 248.

281. *See* ALASKA STAT. § 09.25.490(a)(1) (Michie Supp. 1997); ARK. CODE ANN. § 8-1-302(4) (Michie Supp. 1997); COLO. REV. STAT. § 13-25-126.5(2)(b) (1997); IDAHO CODE § 9-803(4) (Supp. 1997); KAN. STAT. ANN. § 60-3332(b) (Supp. 1997); MISS. CODE ANN. § 49-2-2(e) (Supp. 1996); OHIO REV. CODE ANN. § 3745.70(d) (Banks-Baldwin Supp. 1997); OR. REV. STAT. § 468.963(6)(b) (Supp. 1996); S.C. CODE ANN. § 48-57-20(3) (Law Co-op. Supp. 1997); TEX. REV. CIV. STAT. ANN. art. 4447cc §§ 4(a)-(c) (West Supp. 1998); UTAH CODE ANN. § 19-7-103(2) (1995); UTAH R. EVID. 508(a)(3) (1997); VA. CODE ANN. § 10.1-1193(A) (Michie Supp. 1997).

282. *See* ILL. COMP. STAT. ANN. 415/5-52.2(i) (West 1997) (report may include four enumerated components, and shall include other items); KY. REV. STAT. ANN. § 224.01-040(1)(b) (Michie Supp. 1997) (may include listed types of materials, and "when completed, shall have" three enumerated components); MICH. COMP. LAWS ANN. § 324.14801(b) (West 1996) (may include various things, and "shall include supporting information"); N.H. REV. STAT. ANN. § 147-E:2 (Supp. 1997) (report, "when completed, shall have" four enumerated components); WY. STAT. ANN. § 35-11-1105(c)(ii) (Michie 1997) (may include listed types of materials, and "when completed, shall have" three enumerated components). *But see* IND. CODE ANN. § 13-11-2-69 (West 1996) (ambiguous language, using neither "may" nor "shall").

lege may be expected to argue that the absence of a mandatory component destroys the assertion that there is an "audit report" worth protecting. The party claiming the privilege may argue that many ostensibly mandatory components are so loosely worded that loss of the privilege would be an inappropriately harsh consequence.

In most states, the statutes do not by their terms alone require that any given environmental audit be brought to completion.[283] Moreover, the statutes typically fail to require that the environmental audit report be organized, coherent, or in the form of a summary. Accordingly, a regulated entity might seek to invoke the environmental audit privilege to preclude disclosure of a messy collection of raw investigatory documents that has never led to a final report. An opponent of the claim of privilege might exclaim, "You call that mess a report?" Oddly, however, nothing in these statutes expressly requires that an environmental audit report include a "report," as a dictionary defines it: "an account presented usually in detail"[284] or "a formal account of the proceedings or transactions of a group."[285]

Statutes in two states declare that, once initiated, an environmental audit "shall be completed within a reasonable period of time."[286] The statutes in three states provide (or strongly suggest) that an environmental audit, once initiated, must be completed within 180 days (or six months).[287] A sixth state, Alaska, provides that an audit must be completed within 90 days, unless a longer period is approved by the appropriate regulatory body;[288] the report itself must be completed in an undefined "timely manner."[289]

283. The statutes in fourteen states effectively provide, however, that disclosure may be required if a court finds that the materials indicate noncompliance with various laws or regulations, where such noncompliance has not been the subject of promptly initiated and diligently pursued efforts to achieve compliance. *See, e.g.*, ARK. CODE ANN. § 8-1-307(a)(3)-(4) (Michie Supp. 1997) (civil or administrative proceedings); *id.* § 8-1-308(a)(3)-(4) (criminal proceedings).

284. AMERICAN HERITAGE DICTIONARY 1158 (3d college ed. 1993).

285. *Id.*

286. *See supra* p. 122.

287. *See supra* p. 122.

288. *See* ALASKA STAT. § 09.25.450(b) (Michie Supp. 1997).

289. *Id.*

e. Done in Good Faith

The statutes of three states provide that nothing is an environmental audit report unless "done in good faith."[290] This language is closely related to the provision, contained in the statutes of seventeen states, that the privilege is lost if asserted for a fraudulent purpose.[291]

I. *Non-Privileged Materials*

All states with environmental audit privileges provide that some materials are not protected by the privilege.

1. Information Required by Law

Legislatures in nineteen states have provided that the environmental audit privilege does not extend to documents or information required to be collected, developed, maintained, or reported, under various laws.[292] For example, the Oregon environmental audit privilege does not extend to any information (including "documents, communications, data, and reports") "required to be collected, developed, maintained, reported or otherwise made available to a regulatory agency pursuant to" any "federal, state or local law, ordinance, regulation, permit or order."[293] The application of this language to a given claim of privilege should be relatively straightforward; the privilege does not apply if *any* law commands that a document or information must be collected, developed, maintained, or made available to a regulatory agency. Similar language exists in all privilege statutes.

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290. *See* COLO. REV. STAT. § 13-25-126.5(2)(e) (1997); MISS. CODE ANN. § 49-2-2(e) (Supp. 1996); OHIO REV. CODE ANN. § 3745.70(d) (Banks-Baldwin Supp. 1997).

291. *See infra* p. 155.

292. *See* ALASKA STAT. § 09.25.460(a)(1) (Michie Supp. 1997); ARK. CODE ANN. § 8-1-305(1) (Michie Supp. 1997); COLO. REV. STAT. § 13-25-126.5(4)(a)-(b) (1997); IDAHO CODE §§ 9-805, 9-807(1) (Supp. 1997); ILL. COMP. STAT. ANN. 415/5-52.2(h)(1) (West 1997); IND. CODE ANN. § 13-28-4-9(a)(1) (West 1996); KAN. STAT. ANN. § 60-3336(a) (Supp. 1997); KY. REV. STAT. ANN. § 224.01-040(6)(a) (Michie Supp. 1997); MICH. COMP. LAWS ANN. § 324.14802(3)(a) (West 1996); MINN. STAT. ANN. § 114C.28 (West 1997); MISS. CODE ANN. § 49-2-71(2)(a)-(b) (Supp. 1996); N.H. REV. STAT. ANN. § 147-E:5(I) (Supp. 1997); OHIO REV. CODE ANN. § 3745.71(c)(4) (Banks-Baldwin Supp. 1997); OR. REV. STAT. § 468.963(5)(a) (Supp 1996); S.C. CODE ANN. § 48-57-30(A)(3) (Law Co-op. Supp. 1997); TEX. REV. CIV. STAT. ANN. art. 4447cc § 8(a)(1) (West Supp. 1998); UTAH R. EVID. 508(d)(6) (1997); VA. CODE ANN. § 10.1-1193(B) (Michie Supp. 1997); WY. STAT. ANN. § 35-11-1105(d)(i) (Michie 1997).

293. OR. REV. STAT. § 468.963(5)(a) (Supp. 1996).

This makes sense. The various state legislatures created the environmental audit privileges to encourage regulated entities to undertake compliance audits that would not otherwise take place.[294] There is no need to provide encouragement for investigations that are already mandatory.

a. Reports Containing Information Required and Not Required by Law

The exception for information required by law is closely related to the requirement in seventeen states that an evaluation cannot be a privileged environmental audit unless it is "voluntary."[295] The two provisions overlap but are not identical. If an investigation consists of nothing more than the collection and development of information already required by law, the evaluation is probably not voluntary and cannot qualify as an environmental audit.[296] It is possible, however, that an investigation may include a broad mix of data-gathering activities, some required by law, and the rest not so required. Under such circumstances, it appears that the investigation may be (at least in part) an "environmental audit," but that the privilege will not protect the portions of any resulting environmental audit report containing information required by law.

Such mixed investigations are probably quite common. It would make no sense for an auditor to commence an environmental audit by instructing employees to make sure that they do not communicate information otherwise required by law. Given the complexities of modern environmental regulation, it would be impossible to keep such information out of the auditing process. To the contrary, any well-run environmental audit *should* include a consideration of large amounts of information required to be collected and developed by law. Such information will inevitably wind up in the environmental audit report — especially since many statutes define the "report" to embrace all documents "prepared as a result of" the audit.[297] For example, a comprehensive audit of a facility's compliance with the Clean Water Act will probably include summaries of the facility's discharge monitoring reports — periodic measurements of pollutants required by the facility's National Pollution Discharge Elimination System per-

294. *See supra* p. 81.
295. *See supra* pp. 107-110.
296. *See, e.g.*, OR. REV. STAT. § 468.963(5)(a) (Supp. 1996).
297. *See, e.g., id.* § 468.963(6)(b).

mit. The inclusion of such information in an otherwise voluntary environmental audit report should at least arguably not cause loss of the privilege for the environmental audit report as a whole. However, portions of the report (specifically, the discharge monitoring report summaries) are probably *not* protected by the privilege.

Because modern environmental reporting requirements are so extensive (and because "environmental audit report" is broadly defined to include all supporting documents),[298] one might expect that almost *no* environmental audit report will ever be completely devoid of nonprivileged materials. Stated another way, materials failing this portion of the various privilege statutes are virtually guaranteed to be included in the assemblage of documents that makes up the "report." For this reason, a reviewing court should view with extreme skepticism any blanket claim by a regulated entity that the privilege protects all portions of all documents contained in its environmental audit report.

To lend credibility to its claim of an environmental audit privilege, a regulated entity may choose to label contemporaneously as "NON-Privileged Material" all portions of its environmental audit report that relate information required by law. This counterintuitive approach might help to convince a court during *in camera* review[299] that the company claiming the privilege has acted in good faith and is not trying to bury non-privileged matters in a massive collection of papers. Moreover, the purposeful highlighting of non-privileged material may also help to defeat a claim of fraud by demonstrating that the company has not sought to hide non-privileged matter.[300]

b. Potential Destruction of the Privilege By Expanding the Scope of Information Required by Law

The legislatures in nineteen states have provided that the environmental audit privilege does not extend to documents or information required to be collected, developed, maintained, or reported, under various laws.[301] Accordingly, if *any* law commands that a document or information must be collected, developed, maintained, or made available to a regulatory agency, the document or information is excluded from privileged status. The

298. *See, e.g., id.* § 468.963(6)(b).
299. *See infra* pp. 166-168.
300. *See infra* p. 157.
301. *See supra* p. 133 and note 292.

scope of this exclusion is obviously at the mercy of lawmakers — legislatures, agencies, and local governments — who may expand the category of excluded materials by imposing new legal requirements in statutes, regulations, permits, and orders.[302] This power to remove materials from privileged status by promulgating new legal requirements may effectively destroy the privilege and the auditing incentives that motivated its creation.

The Illinois statute is especially worrisome for companies contemplating a confidential audit, because it provides: "Nothing in this Section limits, waives, or abrogates existing or *future obligations* of regulated entities to monitor, record, or report information required under State, federal, regional, or local laws, ordinances, regulations, permits, or orders."[303] The legislatures of three states have anticipated this danger and have effectively provided that a regulatory agency may not adopt a rule or permit condition for the purpose of circumventing the privilege.[304]

2. Information Obtained by a Regulatory Agency

The statutes of sixteen states creating an environmental audit privilege have effectively provided that the privilege does not extend to information obtained by a regulatory agency.[305] For example, the Oregon environmental audit privilege does not

302. *See* SCANLON, *supra* note 4, at 655 ("This category is . . . the easiest to expand through the issuance of new or revised permits and regulations"). *See also id.* 692 (recommending that states adopt protective language similar to that of the Indiana or Texas statutes).

303. ILL. COMP. STAT. ANN. 415/5-52.2(h) (West 1997) (emphasis added). The Kentucky statute is ambiguous: "Nothing in this section shall limit, waive, or abrogate any reporting requirement in accordance with this chapter or permit conditions." KY. REV. STAT. ANN. § 224.01-040(8) (Michie Supp. 1997).

304. *See* IND. CODE ANN. § 13-28-4-9(b) (West 1996) ("This section does not allow the regulatory agency to adopt a rule or a permit condition for the purpose of circumventing the privilege established in this chapter by requiring disclosure of a report of a voluntarily conducted audit"); S.C. CODE ANN. § 48-57-110 (Law Co-op. Supp. 1997) ("No state or local governmental rule, regulation, guidance, policy, or permit condition may circumvent or limit the privileges established by this chapter or the exercise of the privileges"); TEX. REV. CIV. STAT. ANN. art. 4447cc § 1 (West Supp. 1998) ("A regulatory agency may not adopt a rule or impose a condition that circumvents the purpose of this Act").

305. *See* ALASKA STAT. § 09.25.460(a)(2) (Michie Supp. 1997); ARK. CODE ANN. § 8-1-305(2) (Michie Supp. 1997); COLO. REV. STAT. § 13-25-126.5(4)(c) (1997); IDAHO CODE § 9-807(2) (Supp. 1997); ILL. COMP. STAT. ANN. 415/5-52.2(h)(2) (West 1997); IND. CODE ANN. § 13-28-4-9(a)(2) (West 1996); KAN. STAT. ANN. § 60-3336(b) (Supp. 1997); KY. REV. STAT. ANN. § 224.01-040(6)(b) (Michie Supp. 1997); MICH. COMP. LAWS ANN. § 324.14802(3)(b) (West 1996); MISS. CODE ANN. § 49-2-71(2)(c) (Supp. 1996); N.H. REV. STAT. ANN. § 147-E:5(II) (Supp. 1997); OR. REV. STAT. § 468.963(5)(b) (Supp. 1996); S.C. CODE ANN. § 48-57-30(A)(1) (Law Co-op.

extend to "[i]nformation obtained by observation, sampling or monitoring by any regulatory agency."[306] The legislatures' decision to include this language appears odd, because it seems self-evident that information developed by an agency cannot qualify for the privilege; after all, such information would be expected to reside in the agency's files rather than those of the auditing company. Nevertheless, the statutory language may be designed to clarify that the privilege does not protect information "obtained . . . by" an agency's observation, sampling, or monitoring, even if the same information appears in the environmental audit report.[307]

One puzzling question is how the exclusion for information "obtained by observation, sampling or monitoring by any regulatory agency" relates to the wholly separate exclusion for information "obtained from a source independent of the environmental audit."[308] One might assume that the latter "independent source" language would automatically cover the former situation, in which a regulatory agency has obtained the information. Upon deeper reflection, however, the exclusion for information obtained by a regulatory agency might be read to deny privileged status to some information that does not fall within the "independent source" exclusion. Why else would the legislature articulate two exclusions separated by the disjunctive "or"?

This conclusion is startling, because it suggests that observation, sampling, and monitoring information developed by a regulatory agency only *because* it has somehow learned of the contents of a privileged audit — in other words, information derived as a "fruit" of the audit — may be denied privileged status. Suppose, for example, that the contents of a privileged audit are improperly conveyed (by someone lacking the right to waive the privilege) to a regulatory agency. The audit discloses a violation that the agency would not otherwise have discovered — for example, large quantities of a regulated air pollutant illegally escaping to the atmosphere through a previously unnoticed emission point. If the agency acts on this information to undertake its own sampling and monitoring, the results of its investigation will ar-

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Supp. 1997); TEX. REV. CIV. STAT. ANN. art. 4447cc § 8(a)(2) (West Supp. 1998); UTAH R. EVID. 508(d)(7) (1997); WY. STAT. ANN. § 35-11-1105(d)(ii) (Michie 1997).

306. OR. REV. STAT. § 468.963(5)(b) (Supp. 1996).

307. *See* Richard M. Kuntz, *State Adopts Protections for Environmental Audits*, 141 CHI. DAILY L. BULL, Feb. 17, 1995, at 5 (referring to the Illinois statute).

308. OR. REV. STAT. § 468.963(5)(c) (Supp. 1996). *See infra* pp. 138-141.

guably be excluded from privileged status because "obtained by observation, sampling or monitoring by [a] regulatory agency,"[309] even though these results would not have existed *but for* the privileged audit.[310]

Although this reading of the statute may be technically compelled by the legislature's enactment of two separate privilege exclusions, the result is troubling. It seems unfair to allow a regulatory agency to take advantage of violations discovered only because a regulated entity believed the legislature's representation that unfavorable audit information would not be used against the auditing company.

3. Information Obtained from an Independent Source

The statutes of seventeen states with environmental audit privileges effectively provide that the privilege does not extend to information obtained from a source other than the environmental audit.[311] The Oregon environmental audit privilege, for example, does not extend to "[i]nformation obtained from a source independent of the environmental audit."[312] This limitation serves, in part, to reinforce elements of the privilege that are already articulated in other ways.

For example, the only material expressly accorded privileged status in many states is the environmental audit *report*;[313] the environmental audit report, in turn, is frequently limited by statutory definition to those documents that have been "prepared *as a*

309. *Id.* § 468.963(5)(b) (Supp. 1996).

310. This example may become even more complicated if the evidence adduced by the agency indicates that the privilege may have been lost due to the company's failure to promptly initiate and pursue with reasonable diligence efforts to achieve compliance with the law. *See, e.g.*, OR. REV. STAT. § 468.963(3)(b)(C) (Supp. 1996) (civil or administrative proceedings); *id.* § 468.963(3)(c)(C) (criminal proceedings); *see infra* pp. 158-163.

311. *See* ALASKA STAT. § 09.25.460(a)(3) (Michie Supp. 1997); ARK. CODE ANN. § 8-1-305(3) (Michie Supp. 1995); COLO. REV. STAT. § 13-25-126.5(4)(d) (1997); IDAHO CODE § 9-807(3) (Supp. 1997); ILL. COMP. STAT. ANN. 415/5-52.2(h)(3) (West 1997); IND. CODE ANN. § 13-28-4-9(a)(3) (West 1996); KAN. STAT. ANN. § 60-3336(c) (Supp. 1997); KY. REV. STAT. ANN. § 224.01-040(6)(c) (Michie Supp. 1997); MICH. COMP. LAWS ANN. § 324.14802(3)(d) (West 1996); MISS. CODE ANN. § 49-2-71(2)(d) (Supp. 1996); OHIO REV. CODE ANN. § 3745.71(c)(5) (Banks-Baldwin Supp. 1997); OR. REV. STAT. § 468.963(5)(c) (Supp. 1996); S.C. CODE ANN. § 48-57-30(A)(2) (Law Co-op. Supp. 1997); TEX. REV. CIV. STAT. ANN. art. 4447cc § 8(a)(3) (West Supp. 1998); UTAH R. EVID. 508(d)(8) (1997); VA. CODE ANN. § 10.1-1193(B) (Michie Supp. 1997); WY. STAT. ANN. § 35-11-1105(d)(iii) (Michie 1997).

312. OR. REV. STAT. § 468.963(5)(c) (Supp. 1996).

313. *See supra* pp. 125-126.

result of an environmental audit."[314] Thus, a document *not* prepared as a result of an environmental audit is probably a "source independent of the . . . audit." Moreover, information obtained from persons who played no role in the audit and who have not seen any of the environmental audit report documents is probably also from an independent source.[315]

The most difficult interpretive problems posed by the commonly articulated privilege exclusion for information obtained from an independent source may involve situations in which privileged information found in an environmental audit report becomes known to a third party (such as a regulator, citizen group, or private plaintiff) under circumstances suggesting that the true source of the information is the audit report, rather than an independent source. Under such circumstances, the party invoking the privilege may insist that the "independent source" exclusion cannot apply, and that the privilege must be honored.

Companies will most likely seek to defeat the "independent source" exclusion by arguing that the allegedly independent information actually originated from the privileged audit, and was either: (a) leaked by someone lacking the authority to waive the privilege;[316] or (b) properly viewed by third parties during an *in camera* review of the audit report,[317] but thereafter used inappropriately against the privilege holder. In neither circumstance has the information been obtained from a source independent of the environmental audit. The facts in such cases may present difficult and disputed issues of "independence," including "fruit-of-the-poisonous tree" problems.[318]

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314. *See, e.g.*, OR. REV. STAT. § 468.963(6)(b) (Supp. 1996) (emphasis added). *See supra* pp. 130-131.

315. If such persons received their information from actors involved in the audit, there may be issues of waiver. *See infra* p. 151.

316. For an analysis of the waiver issue, *see infra* p. 151.

317. For a discussion of *in camera* review, *see infra* pp. 166-168.

318. "The 'fruit-of-the poisonous tree' doctrine excludes evidence obtained from or as a consequence of lawless official acts." Costello v. United States, 365 U.S. 265, 278 (1961). "Lawless official acts" are usually acts involving violation of a constitutional right, such as the right to be free from unlawful search and seizure under the Fourth Amendment. *See* James M. Paul, *Immunity Through Reporting Oil Spills — A Safe Harbor, or Just the Tip of an Iceberg?*, 48 WASH. U. J. URB. & CONTEMP. L. 239, 254-57 (1995). The doctrine does not exclude "evidence obtained from an 'independent source.'" *Costello*, 365 U.S. at 278. Distinguishing "fruits" from "independent" evidence may present difficult factual questions. *See, e.g.*, Kastigar v. United States, 406 U.S. 441, 460-61 (1972).

Because many environmental audit privilege statutes exclude from privileged status information obtained from an independent source, analogous difficulties may

Suppose, for example, that Company C discovers during the course of an environmental audit that cyanide is being discharged illegally into navigable waters downstream from the monitoring point specified in the company's Clean Water Act NPDES permit. The periodic discharge monitoring reports filed by the company fail to disclose cyanide violations, because the discharge has evaded measurement. If a third party receives leaked information to this effect (or learns of it through *in camera* review of the audit report), and consequently monitors cyanide at the newly disclosed location, have the resulting laboratory test results been "obtained from a source independent of" the audit? A plausible argument can be made that such information has *not* been obtained from an independent source, but has been *derived from use* of the environmental audit.

Given the difficulties of sorting out how information has been obtained, the burden of proof on this issue may be important. Unfortunately, many environmental audit statutes do not say who must meet the burden of establishing that disputed information has or has not been obtained from an independent source.[319] In *Kastigar v. United States*,[320] the United States Supreme Court held that the government could prosecute an immunized witness without violating the Fifth Amendment privilege against self-incrimination, but only if the *government* could prove by a preponderance of the evidence that the information it wished to use came from "a legitimate source wholly independent of the compelled testimony."[321]

The various state environmental audit privileges do not have constitutional stature. Nevertheless, because the state legislatures sought to encourage auditing activities, a similarly strict approach — placing the burden of proof on the party opposing the

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arise in applying the privilege. *See Penalty Mitigation Seen as Incentive for Reporting, Correcting Violations*, 25 Env't Rep. (BNA) 1836 (1995); Craig N. Johnston, *An Essay on Environmental Audit Privileges: The Right Problem, the Wrong Solution*, 25 ENVTL. L. 335, 341-42 (Spring 1995); Kirk F. Marty, *Moving Beyond the Body Count and Toward Compliance: Legislative Options for Encouraging Environmental Self-Analysis*, 20 VT. L. REV. 495, 532 n. 244 (1995). *See also* Clinton J. Elliott, *Kentucky's Environmental Self-Audit Privilege: State Protection or Increased Federal Scrutiny?* 23 N. KY. L. REV. 1, 23 n.91 (1995); Spahr, *supra* note 2, at 636, 659 & nn.2 & 63.

319. For example, the Oregon statute allocates the burden of proof with respect to several enumerated topics, *see* OR. REV. STAT. § 468.963(3)(d) (Supp. 1996), but is silent on the "independent source" issue.

320. 406 U.S. 441, 460-61 (1972).

321. *Id.* at 460.

privilege — might be appropriate here. Particularly if *in camera* hearings become routine, regulated entities may be reluctant to conduct environmental self-audits, if they fear that government officials will use what they have learned during the *in camera* process to derive equivalent non-privileged information through their own monitoring efforts. Strict interpretation of the "independent source" exclusion is also supported in Oregon, for example, by statutory language providing that "the information used in preparation for the *in camera* hearing *shall not be used* in any investigation or in any proceeding against the defendant . . . unless and until such information is found by the court to be subject to disclosure."[322]

Viewed in their entirety, the various environmental audit statutes suggest that a persuasive argument can be made that the principles of the *Kastigar* case should be followed in ascertaining whether information has been "obtained from a source independent of the environmental audit," and in determining whether someone has improperly "used" information obtained through an *in camera* hearing. Ironically, however, the separate exclusion for information "obtained by observation, sampling or monitoring by any regulatory agency"[323] may deny privileged status for official monitoring and sampling information, even if the investigation generating such information has been motivated by the privileged contents of the audit report.[324]

4. Documents Existing Prior to Commencement of the Audit

The statutes of five states effectively provide that the privilege does not attach to documents existing or prepared prior to the commencement of the environmental audit.[325] Even where not expressly articulated, this limitation is inherent in the fifteen states declaring that the environmental audit report consists of

322. OR. REV. STAT. § 468.963(4)(c) (Supp. 1996) (emphasis added).

323. *See, e.g., id.* § 468.963(5)(b).

324. *See supra* pp. 136-138.

325. *See* COLO. REV. STAT. § 13-25-126.5(4)(e) (1997); MISS. CODE ANN. § 49-2-71(2)(e) (Supp. 1996); S.C. CODE ANN. § 48-57-30(A)(4) (Law Co-op. Supp. 1997); WY. STAT. ANN. § 35-11-1105(d)(iv) (Michie 1997). *See also* VA. CODE ANN. § 10.1-1193(A) ("'Document' does not mean information generated or developed before the commencement of a voluntary environmental assessment showing noncompliance with environmental laws or regulations.").

only those materials "prepared as a result of"[326] an environmental audit or self-assessment.[327]

5. Documents Prepared Subsequent to Completion of the Audit

The statutes of three states effectively provide that the privilege does not attach to documents prepared subsequent to completion of the environmental audit.[328] Colorado's privilege does not apply to "[d]ocuments prepared subsequent to the completion of *and independent of* the voluntary self-evaluation."[329] Similarly, Wyoming's privilege does not extend to "[d]ocuments prepared subsequent to *and independent of* the completion of the environmental audit."[330] The language of both statutes may add little to the privilege definition, because such documents prepared "independent of" the environmental audit or self-evaluation would probably fail the separate proviso — common to fifteen states[331] — that qualifying audit report documents include only materials "prepared as a result of" an environmental audit.[332]

By contrast, South Carolina law flatly provides that "documents prepared . . . subsequent to the completion date of the audit report" are not entitled to the privilege.[333] This language is potentially far more important, because it suggests that even documents "prepared as a result of" the environmental audit (i.e., documents *not* prepared "independent of" the audit), will lose protection of the privilege if they are prepared after a cutoff event: "the completion date of the audit report." South Carolina is not, however, one of the seven states requiring that an environmental audit be completed within a fixed or "reasonable" time.[334] Accordingly, the event that renders subsequently pre-

326. *See supra* note 232.

327. *See supra* pp. 130-131.

328. *See* COLO. REV. STAT. § 13-25-126.5(4)(f) (1997) ("[d]ocuments prepared subsequent to the completion of and independent of the voluntary self-evaluation"); S.C. CODE ANN. § 48-57-30(A)(4) (Law Co-op. Supp. 1997) ("documents prepared . . . subsequent to the completion date of the audit report"); WY. STAT. ANN. § 35-11-1105(d)(v) (Michie 1997) ("[d]ocuments prepared subsequent to and independent of the completion of the environmental audit").

329. COLO. REV. STAT. § 13-25-126.5(4)(f) (1997) (emphasis added).

330. WY. STAT. ANN. § 35-11-1105(d)(v) (Michie 1997) (emphasis added).

331. *See supra* p. 120.

332. *See* WY. STAT. ANN. § 35-11-1105(a)(ii) (Michie 1997).

333. S.C. CODE ANN. § 48-57-30(A)(4) (Law Co-op. Supp. 1997).

334. *See supra* p. 122.

pared materials ineligible for the South Carolina privilege — "the completion date of the audit report" — may be murky and uncertain.

6. Information Developed or Maintained in the Course of Regularly Conducted Business Activity

The statutes of three states provide that the privilege does not attach to documents or other information "developed or maintained in the course of regularly conducted business activity or regular practice."[335] This language may be designed to reinforce the commonly articulated provision that the privileged environmental audit report embraces only those documents that have been prepared "as a result of" the environmental audit or self-evaluation.[336]

7. Documents Prepared as a Result of Multiple Audits or Continuous Self-Auditing

The South Carolina statute contains a unique provision declaring that "documents prepared as a result of multiple or continuous self auditing conducted in an effort to intentionally avoid liability for violations" are "not entitled to the privilege."[337] This exclusion is part of South Carolina's three-pronged attack on the problem of continuous auditing.[338]

8. Information Knowingly Misrepresented or Withheld

The South Carolina statute uniquely provides that the following materials are "not entitled to the privilege": "information which is knowingly misrepresented or misstated or which is knowingly deleted or withheld from an environmental audit report, whether or not included in a subsequent environmental audit report."[339]

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335. COLO. REV. STAT. § 13-25-126.5(4)(g) (1997). *See also* ALASKA STAT. § 09.25.460(a)(4) (Michie Supp. 1997); N.H. REV. STAT. ANN. § 147-E:5(III) (Supp. 1997).

336. *See supra* p. 120.

337. S.C. CODE ANN. § 48-57-30(A)(5) (Law Co-op. Supp. 1997).

338. *See supra* p. 122.

339. S.C. CODE ANN. § 48-57-30(A)(6) (Law Co-op. Supp 1997).

9. Inapplicability of the Privilege to Facts Relating to a Violation

The South Carolina statute contains a unique provision declaring that the privilege covers only communications and not any underlying facts:

> Notwithstanding any other provisions of law, any privilege granted by this chapter shall apply only to those communications, oral or written, pertaining to and made in connection with the self-audit and shall not apply to the facts relating to the violation itself.[340]

How will this clause be applied in practice? Can a reliable line be drawn between privileged "communications" and unprivileged "facts"? Difficulties may arise in two contexts: (1) when the party opposing the privilege seeks to introduce portions of the environmental audit report, alleging that they are unprivileged "facts"; and (2) when the party opposing the privilege seeks to compel the testimony of various actors about the underlying "facts."

The first context seems more problematic. Any statements in the environmental audit report itself, including statements of "fact," are arguably protected "communications . . . pertaining to and made in connection with the self-audit." Perhaps, therefore, the clause may play its most significant role in the second context — in connection with South Carolina's *testimonial* privilege.

When the privilege holder seeks to prohibit the compelled testimony of persons associated with the environmental audit, the party opposing the privilege may assert that inquiry concerning underlying facts must be permitted, even if the witness *knows* of the underlying facts only because of the auditing *activity*. After all, the legislature provided that the privilege protects only "communications" and not "facts." However, if the witness knows of the underlying facts only because he or she has read *communications* in the audit report, a court might conclude that he or she is inappropriately being asked to repeat the privileged "communications."

10. No Protection from Criminal Investigation or Prosecution

The South Carolina statute contains unique language declaring that the environmental audit privilege shall *not* have the effect of

340. *See id.* § 48-57-10(C).

protecting actors or facilities from a criminal investigation or prosecution:

> Notwithstanding any other provisions of law, nothing in this chapter shall be construed to protect individuals, entities, or facilities from a criminal investigation and/or prosecution carried out by any appropriate governmental entity.[341]

It is hard to know what this language means. If — as the statute elsewhere provides — the privilege prohibits the discovery and admissibility of the environmental audit report,[342] and also prohibits the compelled testimony of certain actors concerning the report's contents,[343] the privilege may, in fact, make it more difficult for some actors or facilities to be criminally investigated or prosecuted.

11. Inapplicability of Privilege in Criminal Proceedings

The Alaska statute uniquely provides that environmental audit materials are fully discoverable and admissible in criminal proceedings.[344] This limitation will presumably undercut the legislature's efforts to induce voluntary environmental auditing, because regulated facilities cannot know in advance whether the fruits of their audits will remain confidential.

J. *Effects of Privilege*

What does it mean to say that something is "privileged"?[345] Perhaps the most helpful articulation may be found in the draft Federal Rules of Evidence 502 through 508 that were excised by

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341. *Id.* 48-57-10(B).

342. *See id.* § 48-57-30(A).

343. *See id.* § 48-57-30(B).

344. Privileged information is inadmissible and nondiscoverable only in civil actions and administrative proceedings other than workers' compensation proceedings. *See* ALASKA STAT. § 09.25.450(a) (Michie Supp. 1997). "There is no privilege . . . for documents or communications in a criminal proceeding." ALASKA STAT. § 09.25.450(k) (Michie Supp. 1997). With respect to workers' compensation proceedings, *see infra* p. 165.

345. Black's Law Dictionary defines "privileged communications" as "[t]hose statements made by certain persons within a protected relationship . . . which the law protects from forced disclosure on the witness stand . . . ." BLACK'S LAW DICTIONARY 1198 (6th ed. 1990). Another definition declares: "privileges . . . say, in essence, that certain kinds of information will be exempt from the usual insistence that courts are entitled to every person's evidence *if* specified conditions are met." Frank O. Bowman, III, *A Bludgeon by Any Other Name: The Misuse of "Ethical Rules" Against Prosecutors to Control the Law of the State*, 9 GEO. J. LEGAL ETHICS 665, n.172 (1996). *See also id.* (because "[a]ll privileges are conditional . . . [a]ny definition of a privilege is, rightly considered, merely a list of the conditions").

Congress from the finally enacted version of the Rules. These draft rules declared that the holder of a given privilege "has a privilege to refuse to disclose and to prevent any other person from disclosing"[346] the material covered by the privilege.

The various state environmental audit privilege statutes typically provide that one or more of the following consequences attaches to the privileged materials (usually defined as the "environmental audit report"): (1) the materials shall not be 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 may not be compelled to testify concerning or otherwise reveal the 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.

Laws concerning all five of these privilege consequences frequently pose two closely related questions in our federal system. First, will a state privilege be honored in a federal judicial proceeding? Second, whose privilege law will apply when the activities of a privilege holder (or disputes between litigants) involve more than one state? These issues are briefly addressed elsewhere in this article.[347]

1. Inadmissibility of Privileged Material

The statutes of seventeen states use language effectively providing that the privileged materials (usually defined as the "environmental audit report") shall not be admissible as evidence.[348] This aspect of the privilege is straightforward: if the privilege applies, the evidence is inadmissible.

346. DRAFT FED. R. EVID. 502-504, 506, 508 (1973).

347. *See supra* note 14.

348. *See* ALASKA STAT. § 09.25.450(a) (Michie Supp. 1997); ARK. CODE ANN. § 8-1-303(b) (Michie Supp. 1997); COLO. REV. STAT. § 13-25-126.5(3) (1997); ILL. COMP. STAT. ANN. 415/5-52.2(b) (Michie Supp. 1997); IND. CODE ANN. § 13-28-4-1(2) (West 1996); KAN. STAT. ANN. § 60-3333(a) (Supp. 1997); KY. REV. STAT. ANN. § 224.01-040(3) (Michie Supp. 1997); MICH. COMP. LAWS ANN. § 324.14802(4) (West 1996); MISS. CODE ANN. § 49-2-71(1) (Supp. 1996); N.H. REV. STAT. ANN. § 147-E:3 (Supp. 1997); OHIO REV. CODE ANN. § 3745.71(b) (Banks-Baldwin Supp. 1997); OR. REV. STAT. § 468.963(2) (Supp. 1996); S.C. CODE ANN. § 48-57-30(A) (Law Co-op Supp. 1997); TEX. REV. CIV. STAT. ANN. art. 4447cc § 5(b) (West Supp. 1998); UTAH R. EVID. 508(b) (1997); VA. CODE ANN. § 10.1-1198(B) (Michie Supp. 1997); WY. STAT. ANN. § 35-11-1105(c) (Michie 1997).

2. Nondisclosure and Nondiscoverable Nature of Privileged Material

The statutes of seventeen states use language expressly or arguably providing that the privileged materials (usually defined as the "environmental audit report") are not discoverable (or are exempt or protected from disclosure). Privileged materials are expressly made nondiscoverable in eleven of those seventeen states.[349] In six of the seventeen states, the nondiscoverable nature of privileged materials must be implied, primarily by coupling the term "privilege" with language specifying circumstances in which a court may order disclosure.[350] Legislatures in two of the seventeen states have provided that the *existence* of a privileged environmental audit report is discoverable,[351] and one of the seventeen states has provided that the privilege does not cover the facts of an environmental audit or that an audit report exists.[352]

The Minnesota statute — not counted among the foregoing seventeen states — declares that qualifying materials of formal participants in that state's environmental improvement pilot program "are privileged as to all persons other than the state . . . ."[353] Statutes in two states — also not counted in the foregoing seventeen states — expressly provide that an environmental audit report is discoverable. South Dakota provides that "an environmental audit is subject to discovery according to the rules of civil or criminal procedure."[354] The Kansas statute provides that "[a]n audit report shall be subject to discovery proce-

349. *See* ALASKA STAT. § 09.25.450(a) (Michie Supp. 1997); COLO. REV. STAT. § 13-25-126.5(3) (1997); IDAHO CODE § 9-804 (Supp. 1997); *id.* § 9-340(45); MICH. COMP. LAWS ANN. § 324.14802(2) (West 1996); MISS. CODE ANN. § 49-2-71(1) (Supp. 1996); N.H. REV. STAT. ANN. § 147-E:3 (Supp. 1997); OHIO REV. CODE ANN. § 3745.71(b) (Banks-Baldwin Supp. 1997); S.C. CODE ANN. § 48-57-30(A) (Law Co-op Supp. 1997); TEX. REV. CIV. STAT. ANN. art. 4447cc § 5(b) (West Supp. 1998); UTAH R. EVID. 508(b) (1997); VA. CODE ANN. § 10.1-1198(B) (Michie Supp. 1997).

350. *See* ARK. CODE ANN. §§ 8-1-307 to -308 (Michie Supp. 1997); ILL. COMP. STAT. ANN. 415/5-52.2(d)(2) (West 1997); IND. CODE ANN. § 13-28-4-2(a) (West 1996); KY. REV. STAT. ANN. §§ 224.01-040(4)(c)-(d) (Michie Supp. 1997); OR. REV. STAT. §§ 468.963(3)(b)-(c) (Supp. 1996); WY. STAT. ANN. §§ 35-11-1105(c)(ii)-(iii) (Michie 1997).

351. *See* COLO. REV. STAT. § 13-25-126.5(8) (1997); UTAH R. EVID. 508(b) (1997).

352. *See* N.H. REV. STAT. ANN. § 147-E:5(IV) (Supp. 1997).

353. MINN. STAT. ANN. § 114C.26(2) (West 1997).

354. S.D. CODIFIED LAWS § 1-40-35 (Michie Supp. 1997).

dures but shall be privileged and shall not be admissible as evidence . . . ."[355]

The discoverable nature of the audit report, as provided in Kansas and South Dakota, may generate difficult issues when the party opposing a privilege claim asserts that information is not protected, because "obtained from a source independent of the audit."[356] Suppose, for example, that the audit report is produced through discovery (as authorized by Kansas law) and the discovering party learns that a specific violation of environmental law is occurring. When the discovering party thereafter undertakes its own investigation of the violation, has any resulting information been "obtained from a source independent of the audit?" On the one hand, the introduction into evidence of information developed subsequent to, but solely as a result of discovery would seriously undermine the purposes of the privilege. On the other hand, the Kansas statute does not expressly contain "fruit of the poisonous tree"[357] language.

One might think that these difficulties can be avoided by resorting to the separate testimonial privilege set forth in the Kansas statute.[358] However, that language declares only that no one may be *compelled* to testify regarding privileged information; it does not provide that the privilege holder may *prohibit* a discovering party from either testifying about the report's contents or developing additional proof based on what has been learned through discovery.

3. Testimonial Privilege

The statutes of eleven states effectively provide for a "testimonial privilege," precluding the forced testimony of certain persons associated with a qualified environmental audit.[359] The Kansas statute, for example, declares that

355. KAN. STAT. ANN. § 60-3333(a) (Supp. 1997).

356. *Id.* § 60-3336(c).

357. *See supra* note 318.

358. *See* KAN. STAT. ANN. § 60-3333(b) (Supp. 1997).

359. *See* ALASKA STAT. § 09.25.450(d) (Michie Supp. 1997); COLO. REV. STAT. § 13-90-107(1)(j)(I)(A) (1997); ILL. COMP. STAT. ANN. 415/5-52.2(c) (West 1997); KAN. STAT. ANN. § 60-3333(b) (Supp. 1997); MICH. COMP. LAWS ANN. § 324.14802(4) (West 1996); N.H. REV. STAT. ANN. § 147-E:8 (Supp. 1997); OHIO REV. CODE ANN. § 3745.71(b) (Banks-Baldwin Supp. 1997); S.C. CODE ANN. § 48-57-30(B) (Law Co-op. Supp. 1997); TEX. REV. CIV. STAT. ANN. art. 4447cc § 5(c) (West Supp. 1998); UTAH CODE ANN. § 19-7-107 (Supp. 1997); VA. CODE ANN. § 10.1-1193(B) (Michie Supp. 1997).

> neither any person who conducted the audit nor anyone to whom the audit results are disclosed, unless such disclosure constitutes a waiver of the privilege . . . can be compelled to testify regarding any matter which was the subject of the audit and which is addressed in a privileged part of the audit report.[360]

4. Prohibiting Persons from Disclosing the Environmental Audit Report

Utah Rule of Evidence 508 uniquely provides that "[a] person for whom an environmental self-evaluation is conducted or for whom an environmental audit report is prepared can . . . prevent any other person from disclosing an environmental audit report."[361]

5. Damages and Penalties for Unauthorized Disclosure

Laws in three states effectively provide that certain persons who engage in unauthorized disclosure of privileged environmental audit information may be liable for damages proximately caused by the disclosure or dissemination of the material.[362] Colorado provides that unauthorized disclosure of privileged environmental audit materials under certain conditions is a misdemeanor, and may be subject to specified sanctions.[363]

K. *Waiver*

The statutes of sixteen states effectively provide that the environmental audit privilege does not apply to the extent that it has been waived.[364] For example, the Oregon statute provides that

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360. KAN. STAT. ANN. § 60-3333(b) (Supp. 1997).

361. UTAH R. EVID. 508(b) (1997).

362. *See* COLO. REV. STAT. § 13-25-126.5(5)(b)(I) (1997); MISS. CODE ANN. § 49-2-71(3)(b) (Supp. 1996); TEX. REV. CIV. STAT. ANN. art. 4447cc § 6(c) (West Supp. 1998).

The Utah statute formerly contained such a "whistle-blower" provision, *see* UTAH CODE ANN. § 19-7-104(2) (Supp. 1997), but it was repealed in April 1997, *see* 1997 Utah Laws ch. 387 § 1, in response to the U.S. Environmental Protection Agency's refusal to delegate authority for the enforcement and implementation of various federal environmental laws. *See Utah Governor Signs Legislation to Amend State's Environmental Audit Privilege Law*, 27 Env't. Rep. (BNA) 2358 (1997). *See also supra* note 14.

363. *See* COLO. REV. STAT. § 13-25-126.5(5)(b)(2) (1997). The Utah statute formerly contained such a provision. *See* UTAH CODE ANN. § 19-7-104(3)(a) (Supp. 1997), but it was repealed in 1997. *See also* 1997 Utah Laws ch. 387 § 1.

364. *See* ALASKA STAT. § 09.25.455(a) (Michie Supp. 1997); ARK. CODE ANN. § 8-1-304(a)(1) (Michie Supp. 1997); IDAHO CODE § 9-806(1) (Supp. 1997); ILL. COMP. STAT. ANN. 415/5-52.2(d)(1) (West 1997); IND. CODE ANN. § 13-28-4-7(a)

the environmental audit privilege "does not apply to the extent that it is waived expressly or by implication by the owner or operator of a facility or persons conducting an activity that prepared or caused to be prepared the Environmental Audit Report."[365] This language incorporates a standard feature of all privileges: the rights to preclude the disclosure and admission into evidence of protected materials may be lost if the privilege is waived.

To the extent that the conditions constituting waiver are not spelled out in the various environmental audit privilege statutes, the courts may tend to apply waiver principles developed under other privileges, such as the attorney-client privilege. This article does not address those general principles.

1. Express Waiver

The statutes of fourteen states provide that the environmental audit privilege will not apply if it has been expressly waived.[366] An express waiver arguably involves the "intentional relinquishment of a known right."[367]

(West 1996); KAN. STAT. ANN. § 60-3334(a) (Supp. 1997); KY. REV. STAT. ANN. § 224.01-040(4)(a) (Michie Supp. 1997); MICH. COMP. LAWS ANN. § 324.14803(1) (West 1996); MISS. CODE ANN. § 49-2-71(1)(a) (Supp. 1996); N.H. REV. STAT. ANN. § 147-E:4(I)(a) (Supp. 1997); OHIO REV. CODE ANN. § 3745.71(c)((7) (Banks-Baldwin Supp. 1997); OR. REV. STAT. § 468.963(3)(a) (Supp. 1996); S.C. CODE ANN. § 48-57-40(A) (Law Co-op. Supp. 1997); TEX. REV. CIV. STAT. ANN. art. 4447cc § 6(a) (West Supp. 1998); UTAH R. EVID. 508(d)(1) (1997); WY. STAT. ANN. § 35-11-1105(c)(i) (Michie 1997).

365. OR. REV. STAT. § 468.963(3)(a) (Supp. 1996).

366. *See* ALASKA STAT. § 09.25.455(a) (Michie Supp. 1997) ("expressly waived in writing"); ARK. CODE ANN. § 8-1-304(a)(1) (Michie Supp. 1997); IDAHO CODE § 9-806(1) (Supp. 1997); ILL. COMP. STAT. ANN. 415/5-52.2(d)(1) (West 1997); IND. CODE ANN. § 13-28-4-7(a)(1) (West 1996); KY. REV. STAT. ANN. § 224.01-040(4)(a) (Michie Supp. 1997); MICH. COMP. LAWS ANN. § 324.14803(1) (West 1996); MISS. CODE ANN. § 49-2-71(1)(a) (Supp. 1996); N.H. REV. STAT. ANN. § 147-E:4(I)(a) (Supp. 1997); OR. REV. STAT. § 468.963(3)(a) (Supp. 1996); S.C. CODE ANN. § 48-57-40(A) (Law Co-op. Supp. 1997) ("expressly waived in writing"); TEX. REV. CIV. STAT. ANN. art. 4447cc § 6(a) (West Supp. 1998); UTAH R. EVID. 508(d)(1) (1997). *See also* OHIO REV. CODE ANN. § 3745.71(c)(7) (Banks-Baldwin Supp. 1997) (privilege does not apply where the holder "waives the privilege . . . explicitly or by engaging in conduct that manifests a clear intent that the information not be privileged").

367. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

2. Implied Waiver

The statutes of eleven states directly or effectively provide that waiver of the environmental audit privilege may be implied.[368] The statutes in five states provide that the privilege is waived when the privilege holder seeks to introduce an environmental audit report into evidence.[369] In two states — Kentucky and New Hampshire — efforts to introduce any part of the report into evidence constitutes waiver of the privilege for the entire report.[370] Wyoming provides that "the privilege is waived as to those sections of the report dealing with that media sought to be introduced into evidence."[371] Ohio provides that the privilege is waived "with respect to all information in the audit report that is relevant to" the issue for which the holder has sought to introduce the evidence.[372]

In the traditional law of privilege, the most commonly articulated event triggering implied waiver is disclosure of the privileged information in a communication which is not itself protected by a privilege.[373] The Advisory Committee to the Federal Rules of Evidence has explained the rationale of the implied waiver principle:

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368. *See* ARK. CODE ANN. §§ 8-1-304(2)-(3), 8-1-309(b)(2) (Michie Supp. 1997); ILL. COMP. STAT. ANN. 415/5-52.2(e)(1) (West 1997); IND. CODE ANN. §§ 13-28-4-5(c), 13-28-4-7(a)(2) (West 1996); KAN. STAT. ANN. § 60-3335(b) (Supp. 1997); KY. REV. STAT. ANN. §§ 224.01-040(4)(a)-(b), 224.01-040(5)(b) (Michie Supp. 1997); MICH. COMP. LAWS ANN. §§ 324.14804(1), 324.14805(1) (West 1996); N.H. REV. STAT. ANN. §§ 147-E:4(I)(a)-(b) (Supp. 1997); OHIO REV. CODE ANN. § 3745.71(c)(7) (Banks-Baldwin Supp. 1997); OR. REV. STAT. §§ 468.963(3)(a), 468.963(4)(b) (Supp 1996); TEX. REV. CIV. STAT. ANN art. 4447cc § 9(c) (West Supp. 1998); WY. STAT. ANN. § 35-11-1105(c)(vi) (Michie 1997).

369. *See* ARK. CODE ANN. § 8-1-304(a)(2) (Michie Supp. 1997); KY. REV. STAT. ANN. § 224.01-040(4)(b) (Michie Supp. 1997); N.H. REV. STAT. ANN. § 147-E:4(I)(b) (Supp. 1997); OHIO REV. CODE ANN. § 3745.71(c)(7) (Banks-Baldwin Supp. 1997); WY. STAT. ANN. § 35-11-1105(c)(i) (Michie 1997).

370. *See* KY. REV. STAT. ANN. § 224.01-040(4)(b) (Michie Supp. 1997); N.H. REV. STAT. ANN. § 147-E:4(I)(b) (Supp. 1997).

371. WY. STAT. ANN. § 35-11-1105(c)(i) (Michie 1997). "Media" probably refers to the environmental medium affected by the regulated entity's conduct, such as air, water, land, or groundwater.

372. OHIO REV. CODE ANN. § 3745.71(c)(7) (Banks-Baldwin Supp. 1997).

373. For example, the draft Federal Rules of Evidence provided:

> A person upon whom these rules confer a privilege against the disclosure of the confidential matter or communication waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to the disclosure of any significant part of the matter or communication. This rule does not apply if the disclosure is itself a privileged communication.

DRAFT FED. R. EVID. 511 (1973).

> The central purpose of most privileges is the promotion of some interest or relationship by endowing it with a supporting secrecy or confidentiality. It is evident that the privilege should terminate when the holder by his own act destroys this confidentiality. . . . [O]nce confidentiality is destroyed, no subsequent claim of privilege can restore it.[374]

Given the traditional rule that that disclosure ordinarily results in waiver,[375] the statutes of seven states describe situations in which disclosure of information in an environmental audit report will *not* constitute waiver of the privilege.[376] For example, New Hampshire provides that "[a] claim of privilege is not defeated by a disclosure that was made inadvertently."[377]

3. Persons Who May Waive the Privilege

The various state statutes articulate who may waive the privilege in different ways. For example, the Arkansas statute provides that the environmental audit privilege may be waived "by the owner or operator of the facility that prepared or caused to be prepared the environmental audit report."[378] Ohio provides that waiver may be effected only by "an officer, manager, partner, or other comparable person who has a fiduciary relationship with the owner or operator and is authorized generally to act on behalf of the owner or operator or is a person who is authorized

374. DRAFT FED. R. EVID. 511 (1973) (advisory committee's note). Under traditional waiver doctrine, it does not matter whether or not the privilege holder knew that the privilege existed. *See id.* However, the contours of the waiver doctrine in the traditional law of privilege are beyond the scope of this Article.

375. The Arkansas statute expressly provides that the authorized disclosure of the audit report "to any party" results in waiver, except under enumerated circumstances. *See* ARK. CODE ANN. § 8-1-304(3) (Michie Supp. 1997).

376. *See* ALASKA STAT. § 09.25.455(b) (Michie Supp. 1997); ARK. CODE ANN. § 8-1-304(a)(3) (Michie Supp. 1997); KAN. STAT. ANN. §§ 60-3334(b)-(c) (Supp. 1997); MICH. COMP. LAWS ANN. §§ 324.14803(2)-(3) (West 1996); S.C. CODE ANN. §§ 48-57-40(B)-(C) (Law Co-op. Supp. 1997); TEX. REV. CIV. STAT. ANN art. 4447cc § 6(b) (West Supp. 1998); UTAH CODE ANN. § 19-7-104(2) (Supp. 1997).

The Alaska statute uniquely provides: "[a] government agency or its employees or agents may not, as a condition of a permit, license, or approval issued under an environmental law, require an owner or operator to waive the privilege . . . ." ALASKA STAT. § 09.25.450(g) (Michie Supp. 1997).

377. N.H. REV. STAT. ANN. § 147-E:4(I)(a) (Supp. 1997). *See also* ARK. CODE ANN. § 8-1-304(a)(3)(A)(i) (Michie Supp. 1997) (disclosures made under terms of a confidentiality agreement between a facility and a potential purchaser); MICH. COMP. LAWS ANN. § 324.14803(2)(c) (West 1996) (disclosures to an agent retained to address issues raised by the audit report).

378. ARK. CODE ANN. § 8-1-304(a)(1) (Michie Supp. 1997); *id.* § 8-1-304(a)(3). *See also id.* § 8-1-304(a)(2) (referring to "the owner or operator of a facility or person conducting an activity").

specifically to assert or waive the privilege."[379] Waiver authority under such statutes seems intended to be relatively narrow, confined to the "owner or operator" of a facility. This reference fits nicely with the "owner or operator" concept found in much modern environmental law and will probably mirror the definition used in the underlying environmental program giving rise to the audit. Thus, for example, if a Clean Water Act NPDES permit specifically defines "owner or operator," a reviewing court might logically rely on that definition when ascertaining the owner or operator, for waiver purposes, of a facility that has undertaken an environmental audit of Clean Water Act compliance. In many situations, of course, a corporation is the owner or operator of a facility, and corporations must act through their agents and employees. Disputes about waivers may therefore require a reviewing court to examine the authority of specific agents and employees to disclose the environmental audit report.

Some statutes provide that a "person conducting an activity" for which an environmental audit has been prepared may also waive the privilege.[380] This language resurrects the confusion about the meaning of "activity" in the eight states that have modeled their privileges on the Oregon statute.[381] If "activity" is defined to include such discrete tasks as labeling a small bucket of wastes generated in a single step of a manufacturing sequence, the "person conducting [the] activity" may be far down the corporate ladder. Nevertheless, these statutes technically empower all such employees with the ability to waive the privilege.

4. Partial Waiver

The statutes of fifteen states provide that waiver may be partial, usually by specifying that the privilege does not apply "to the extent"[382] that waiver or non-privileged disclosure occurs, or by

379. OHIO REV. CODE ANN. § 3745.71(d) (Banks-Baldwin Supp. 1997).

380. *See, e.g.*, OR. REV. STAT. § 468.963(3)(a) (Supp. 1996).

381. *See supra* p. 113.

382. This language is used by eleven states. *See* ALASKA STAT. § 09.25.455(a) (Michie Supp. 1997); ARK. CODE ANN. § 8-1-304(a) (Michie Supp. 1997); IDAHO CODE § 9-806(1) (Supp. 1997); ILL. COMP. STAT. ANN. 415/5-52.2(d)(1) (West 1997); IND. CODE ANN. § 13-28-4-7(a) (West 1996); KAN. STAT. ANN. § 60-3334(a) (Supp. 1997); KY. REV. STAT. ANN. § 224.01-040(4)(a) (Michie Supp. 1997); N.H. REV. STAT. ANN. § 147-E:4(I) (Supp. 1997); OR. REV. STAT. § 468.963(3)(a) (Supp. 1996); S.C. CODE ANN. § 48-57-40(A) (Law Co-op. Supp. 1997); TEX. REV. CIV. STAT. ANN art. 4447cc § 6(a) (West Supp. 1998).

expressly declaring that the privilege is lost for only those portions of the report covered by any waiver,[383] or both.[384]

L. *Court-Ordered Disclosure*

The statutes in seventeen states effectively provide that a court or administrative tribunal must (or may) order disclosure of otherwise privileged materials under specified circumstances. The most common circumstances are where the decisionmaker determines that:

1. The privilege is asserted for a fraudulent purpose[385];
2. The material is not subject to the privilege;[386] or
3. The material shows evidence of noncompliance with certain laws and appropriate efforts to achieve compliance were not promptly initiated and pursued with reasonable diligence.[387]

Most states articulating the foregoing circumstances effectively provide that a decisionmaker "*shall* require disclosure" of materials if a circumstance is found to exist. The statutes of two states — Texas[388] and Wyoming[389] — use the discretionary phrase "may require disclosure." Michigan provides that a court "shall require disclosure" under the first circumstance and under a variation of the third circumstance,[390] and "may require disclosure" under the second circumstance.[391]

The statutes of ten states effectively provide that when a reviewing court or administrative tribunal determines that one or more of these grounds is met, the court or administrative tribunal may compel disclosure of only those parts of an environmental audit report that are relevant to the disputed issues in the pro-

383. *See* ARK. CODE ANN. § 8-1-304(b) (Michie Supp. 1997); IDAHO CODE § 9-806(1) (Supp. 1997); MICH. COMP. LAWS ANN. § 324.14803(1) (West 1996); WY. STAT. ANN. § 35-11-1105(c)(i) (Michie 1997).

384. *See also* OHIO REV. CODE ANN. § 3745.71(c)(7) (Banks-Baldwin Supp. 1997) (privilege may be waived "in whole or in part").

385. *See, e.g.*, ARK. CODE ANN. § 8-1-307(a)(1) (Michie Supp. 1997) (civil or administrative proceeding); *id.* § 8-1-308(a)(1) (criminal proceeding).

386. *See, e.g., id.* § 8-1-307(a)(2) (civil or administrative proceeding); *id.* § 8-1-308(a)(2) (criminal proceeding).

387. *See, e.g., id.* §§ 8-1-307(a)(3)-(4) (civil or administrative proceeding); *id.* §§ 8-1-308(a)(3)-(4) (criminal proceeding).

388. *See* TEX. REV. CIV. STAT. ANN art. 4447cc § 7(a) (West Supp. 1998).

389. *See* WY. STAT. ANN. § 35-11-1105(c)(ii) (Michie 1997) (civil or administrative proceeding); *id.* § 35-11-1105(c)(iii) (criminal proceeding).

390. MICH. COMP. LAWS ANN. § 324.14804(4) (West 1996); *id.* § 324.14805(4).

391. MICH. COMP. LAWS ANN. § 324.14804(5) (West 1996); *id.* § 324.14805(5).

ceeding.[392] This language suggests that the officially-compelled disclosure envisioned by these legislatures will take place in an on-going civil, criminal, or administrative proceeding, having a purpose *other* than the discovery of documents — hence the reference to "issues in dispute in the proceeding," to which the disclosed portions of the report may be "relevant."

These statutes typically have no language expressly providing that the portions subject to the compelled disclosure order should be limited to the specific materials found to have triggered the reason for disclosure. Nevertheless, this may be the most sensible way to read the statutes. For example, the Arkansas statute provides for compelled disclosure where "the *material* shows evidence of noncompliance"[393] with certain laws, and appropriate compliance efforts were not promptly initiated and pursued with reasonable diligence.[394] Arguably, the court or administrative tribunal should order disclosure of no more than: (1) "the material" showing evidence of such noncompliance; and (2) evidence of such failure to initiate and pursue appropriate compliance efforts.

1. Fraudulent Purpose

The statutes in seventeen states effectively require that a court must order disclosure of materials for which a privilege is asserted if "the privilege is asserted for a fraudulent purpose."[395]

392. *See* ARK. CODE ANN. § 8-1-311 (Michie Supp. 1997) (entitled "Partial Disclosure"); ILL. COMP. STAT. ANN. 415/5-52.2(g) (West 1997); IND. CODE ANN. § 13-28-4-6 (West 1996); KAN. STAT. ANN. § 60-3335(f) (Supp. 1997); KY. REV. STAT. ANN. § 224.01-040(5)(e) (Michie Supp. 1997); MICH. COMP. LAWS ANN. § 324.14806(3) (West 1996); OR. REV. STAT. § 468.963(4)(e) (Supp 1996); WY. STAT. ANN. § 35-11-1105(c)(ix) (Michie 1997). In two states, this language apparently applies only to circumstances in which an attorney representing the state has sought privileged materials in a criminal investigation. *See* OHIO REV. CODE ANN. § 3745.71(g)(6) (Banks-Baldwin Supp. 1997); TEX. REV. CIV. STAT. ANN art. 4447cc § 9(j) (West Supp. 1998).

393. ARK. CODE ANN. §§ 8-1-307(a)(3)-(4) (Michie Supp. 1997) (civil or administrative proceeding) (emphasis added); *id.* §§ 8-1-308(a)(3)-(4) (criminal proceeding) (emphasis added).

394. *See infra* pp. 158-160.

395. *See* ARK. CODE ANN. § 8-1-307(a)(1) (Michie Supp. 1997) (civil or administrative proceeding); *id.* § 8-1-308(a)(1) (criminal proceeding); COLO. REV. STAT. § 13-25-126.5(3)(d) (1997); IDAHO CODE § 9-806(2)(a) (Supp. 1997); ILL. COMP. STAT. ANN. 415/5-52.2(d)(2)(A) (West 1997); *id.* § 5/52.2(e)(4)(A) (procedure on petition by State's Attorney or Attorney General); IND. CODE ANN. § 13-28-4-2(a)(2)(A) (West 1996) (civil or administrative proceeding); *id.* § 13-28-4-3(a)(2)(A) (criminal proceeding); KAN. STAT. ANN. § 60-3334(d)(1) (Supp. 1997); KY. REV. STAT. ANN. § 224.01-040(4)(c)(1) (Michie Supp. 1997) (civil or administrative pro-

This language contains echoes of the "crime or fraud" exception to the traditional attorney-client privilege.[396] But how do ordinary notions of fraud apply in the context of environmental auditing?

Suppose that a company has undertaken a bona fide environmental audit and has prepared an environmental audit report protected by one of these privilege statutes. The report describes one or more violations of environmental laws. The company may argue that it is not fraudulent for the company to oppose disclosure of this information, because the legislature sought to encourage auditing by promising that just such disclosure would be prevented. Would the company's attempts to prohibit disclosure become fraudulent if the violations involve criminal sanctions? The company will assert that such efforts should not be considered fraudulent, because a great many environmental law violations are technically criminal offenses, and the failure to shield information about such activities might thwart the legislature's goal of encouraging self-auditing.

What, then, is a "fraudulent purpose" when asserting an environmental audit privilege under the various statutes? One could argue that it is fraudulent to assert a privilege claim and withhold from discovery materials known by the claimant to fail the statutory definition of "environmental audit report."[397] The problem, of course, lies in discerning the claimant's knowledge. The various statutory definitions of "environmental audit report" contain so many ambiguities that it may be hard to overcome the claim-

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ceeding); *id.* § 224.01-040(4)(d)(1) (criminal proceeding); MICH. COMP. LAWS ANN. § 324.14804(4)(a) (West 1996) (procedure on petition by state or local law enforcement authorities); *id.* § 324.14805(4)(a) (procedure on petition following seizure pursuant to search warrant); MISS. CODE ANN. § 49-2-71(1)(c) (Supp 1996); N.H. REV. STAT. ANN. § 147-E:4(IV)(a)(1) (Supp. 1997); OHIO REV. CODE ANN. § 3745.71(c)(6) (Banks-Baldwin Supp. 1997); OR. REV. STAT. § 468.963(3)(b)(A) (Supp 1996) (civil or administrative proceeding); *id.* § 468.963(3)(c)(A) (criminal proceeding); TEX. REV. CIV. STAT. ANN art. 4447cc § 7(a)(1) (West Supp. 1998); UTAH R. EVID. 508(d)(2) (1997); UTAH R. EVID. 508(d)(2) (1997); WY. STAT. ANN. § 35-11-1105(c)(ii)(A) (Michie 1997). *See also* VA. CODE ANN. § 10.1-1193(B) (Michie Supp. 1997) ("privilege does not apply to a document or portion of a document collected, generated or developed in bad faith"); S.C. CODE ANN. § 48-57-50(1) (Law Co-op. Supp. 1997) (in administrative or civil proceeding, privilege may be revoked if "the privilege is asserted for purposes of deception or evasion"); *id.* § 48-57-60(1) (criminal case).

396. *See, e.g.*, DRAFT FED. R. EVID. 503(d)(1) (1973) (providing that there is no privilege "[i]f the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud").

397. *See supra* p. 126.

ant's assertion that it acted with a confused, rather than fraudulent, state of mind.

Similarly, it might be considered fraudulent to label[398] as privileged matter portions of an environmental audit report that obviously do not qualify for the privilege — for example, information required to be collected and made available by law.[399] Imagine, for instance, that publicly available discharge monitoring reports of a Clean Water Act NPDES permittee are incorrectly labeled under the Oregon statute, "Environmental Audit Report: Privileged Document."[400] When the company's attorney subsequently withholds these portions of the report from discovery, is this assertion of the privilege "for a fraudulent purpose"? Such questions underscore the argument for properly labeling environmental audit materials as privileged or nonprivileged in the first instance. Indeed, an auditing company might choose to contemporaneously label as "Non-Privileged Material" all portions of its environmental audit reports that relate information required by law; such behavior might later bolster the company's claim that it has not fraudulently asserted the privilege claim.[401]

The only explicit sanction in most environmental audit statutes for fraudulent assertion of the privilege is court-ordered disclosure of the material.[402] If the fraud involves asserting a claim of privilege for non-privileged materials, this sanction may be too feeble to prevent the fraud, depending on the scope of court-ordered disclosure. On the one hand, if the only consequence of being caught fraudulently asserting a privilege is the court-ordered disclosure of materials that were not privileged in any event, an actor who withholds nonprivileged information under such a regime arguably risks nothing. On the other hand, if a finding of fraud might lead a court to require disclosure of the entire report — including those portions qualifying for the privilege — the activity of withholding nonprivileged material may entail significant risk.

The Michigan statute contains unique language providing: "A person who uses this part to commit fraud is guilty of a misdemeanor punishable by a fine of not more than $25,000.00."[403] The

398. *See supra* pp. 127-130.
399. *See supra* pp. 133-136.
400. OR. REV. STAT. § 468.963(6)(b) (Supp. 1996).
401. *See supra* pp. 127-130.
402. *See, e.g.*, OR. REV. STAT. § 468.963(3)(b)(A) (Supp. 1996) (civil or administrative proceeding); *id.* § 468.963(3)(c)(A) (criminal proceeding).
403. MICH. COMP. LAWS ANN. § 324.14807 (West 1996).

Texas statute contains unique language declaring: "A person claiming the privilege is subject to sanctions as provided by Rule 215 of the Texas Rules of Civil Procedure if the court finds that the person intentionally or knowingly claimed the privilege for unprotected information as provided in Section 8 of this Act."[404]

2. Not Privileged

The statutes of nine states effectively provide for court-ordered disclosure under circumstances in which a judge determines that the material "is not subject to the privilege."[405] Even where the legislature has not enacted such language, it is inherent in the doctrine of any privilege that the court will not protect from disclosure materials failing to qualify for the privilege.

3. Failure to Take "Appropriate Efforts" Toward Remedying Noncompliance

The statutes of fourteen states effectively provide for court-ordered disclosure where otherwise privileged materials show evidence of noncompliance, and the person claiming the privilege has not promptly initiated and pursued with reasonable diligence appropriate compliance efforts.[406] Regulated entities in these

404. TEX. REV. CIV. STAT. ANN art. 4447cc § 7(d) (West Supp. 1998).

405. *See* ARK. CODE ANN. § 8-1-307(a)(2) (Michie Supp. 1997) (civil or administrative proceedings); *id.* § 8-1-308(a)(2) (criminal proceedings); IND. CODE ANN. § 13-28-4-2(a)(2)(B) (West 1996) (civil or administrative proceedings); *id.* § 13-28-4-3(a)(2)(B) (criminal proceedings); KAN. STAT. ANN. § 60-3334(d)(3) (Supp. 1997); KY. REV. STAT. ANN. § 224.01-040(4)(c)(2) (Michie Supp. 1997) (civil or administrative proceedings); *id.* § 224.01-040(4)(d)(2) (criminal proceedings); OHIO REV. CODE ANN. § 3745.71(c)(3) (Banks-Baldwin Supp. 1997); OR. REV. STAT. § 468.963(3)(b)(B) (civil or administrative proceedings) (Supp 1996)); *id.* § 468.963(3)(c)(B) (criminal proceedings); TEX. REV. CIV. STAT. ANN art. 4447cc § 7(a)(2) (West Supp. 1998); WY. STAT. ANN. § 35-11-1105(c)(ii)(B) (Michie 1997) (civil or administrative proceedings); *id.* § 35-11-1105(c)(iii) (criminal proceedings). *See also* IDAHO CODE § 9-806(2)(b) (Supp. 1997) (prohibition on disclosure "does not apply if the environmental agency or court after *in camera* review determines that . . . [t]he material is not an appropriate subject for an environmental audit").

406. *See* ARK. CODE ANN. §§ 8-1-307(a)(3)-(4) (Michie Supp. 1997) (civil or administrative proceedings); *id.* §§ 8-1-308(a)(3)-(4) (criminal proceedings); COLO. REV. STAT. § 13-25-126.5(3)(b) (1997); IND. CODE ANN. § 13-28-4-2(a)(2)(C) (West 1996) (civil or administrative proceedings); *id.* § 13-28-4-3(a)(2)(C) (criminal proceedings); KAN. STAT. ANN. § 60-3334(d)(4) (Supp. 1997); KY. REV. STAT. ANN. § 224.01-040(4)(c)(3) (Michie Supp. 1997) (civil or administrative proceedings); *id.* § 224.01-040(4)(d)(3) (criminal proceedings); MISS. CODE ANN. § 49-2-71(1)(b)(ii) (Supp. 1996); N.H. REV. STAT. ANN. § 147-E:4(II) (Supp. 1997); OHIO REV. CODE ANN. § 3745.71(c)(8) (Banks-Baldwin Supp. 1997); OR. REV. STAT. § 468.963(3)(b)(C)(Supp 1996)(civil or administrative proceedings); *id.* § 468.963(3)(c)(C) (criminal proceedings); TEX. REV. CIV. STAT. ANN art. 4447cc

states are likely to conclude that this clause is by far the most important aspect of the environmental audit privilege.

The "appropriate efforts" clause adds a twist to the environmental audit privilege. Under this provision, a perfectly solid privilege may be lost solely due to *inaction* by the privilege holder. For any environmental audit report uncovering a violation, therefore, the environmental audit privilege may well provide no more than a *temporary* protection that evaporates with the passage of time. It is imperative that regulated companies undergoing environmental audits in these fourteen states recognize this pitfall: violations uncovered in the audit for which compliance is not initiated and pursued diligently may be subject to court-ordered disclosure, even if the privilege originally attached to the information.

The logic behind the "appropriate efforts" clause is manifest. Opponents of the environmental audit privilege have expressed the fear that the privilege may operate to conceal environmental law violations. The "appropriate efforts" clause speaks to that concern by declaring that companies may preserve confidentiality only with respect to those violations that they promptly address and seek to remedy.

As expressed in most statutes, the clause does not provide that retention of the privilege hinges on the *curing* of violations. Instead — to use the example of Oregon's statute — the provision typically requires only that "appropriate *efforts* to achieve compliance . . . [be] promptly *initiated* and *pursued* with reasonable diligence."[407] This litigation-breeding phrase will require considerable fleshing out by the courts. The statute provides no guidance for ascertaining the appropriateness and reasonable diligence of efforts, or the promptness of initiation. Application of the statute's language will probably proceed on an *ad hoc* basis until a pattern emerges from the case law.

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§ 7(a)(3) (West Supp. 1998); UTAH R. EVID. 508(d)(5) (1997); WY. STAT. ANN. § 35-11-1105(c)(ii)(C) (Michie 1997) (civil or administrative proceedings); *id.* § 35-11-1105(c)(iii) (criminal proceedings). *See also* ILL. COMP. STAT. ANN. 415/5-52.2(d)(2)(C) (West 1997) ("The material shows evidence of noncompliance . . . and the owner or operator failed to undertake appropriate corrective action or eliminate any reported violation within a reasonable time"); *id.* 5/52.2(e)(4)(C) (using substantially similar language); S.C. CODE ANN. §§ 48-57-50(2) & -60(2) (Law Co-op. Supp. 1997) (unique language requiring proof of "appropriate action" in specially described situations).

407. OR. REV. STAT. § 468.963(3)(b)(C) (Supp. 1996) (civil or administrative proceeding) (emphasis added); *id.* § 468.963(3)(c)(C) (criminal proceeding) (emphasis added).

The statutes of two states specifically address the meaning of appropriate compliance efforts where the noncompliance described in an environmental audit report constitutes the failure to obtain a required permit. The statutes in these states effectively provide that the auditing company or person will be deemed to have made appropriate efforts to achieve compliance if the actor files a permit application not later than ninety days from the date on which the actor became aware of the noncompliance.[408]

The laws of three states address the possibility that an environmental audit may uncover a large number of violations, presenting the auditing party with a daunting compliance challenge. The Colorado statute is typical of these states:

> [i]f the evidence shows noncompliance by a person or entity with more than one environmental law, the person or entity may demonstrate that appropriate efforts to achieve compliance were or are being taken by instituting a comprehensive program that establishes a phased schedule of actions to be taken to bring the person or entity into compliance with all of such environmental laws.[409]

In addition to the uncertainty that may surround the discernment of reasonable diligence and the like, the "appropriate efforts" clause poses two special challenges. First, the clause may raise difficult issues about the evidence that can be used in making the "appropriate efforts" determination. Second, the peculiar nature of the clause — making the privilege hinge on events occurring subsequent to the auditing exercise — may profoundly undercut the auditing incentive that the legislature sought to create.

a. Evidence to be Considered in Ruling on "Appropriate Efforts"

What evidence may a reviewing court consider, when seeking to ascertain whether disclosure of environmental audit materials should be compelled, because the privilege holder failed to promptly initiate appropriate compliance efforts and pursue them with reasonable diligence?

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408. *See* ARK. CODE ANN. § 8-1-307(b) (Michie Supp. 1997) (civil or administrative proceeding); *id.* § 8-1-308(b) (criminal proceeding); IND. CODE ANN. § 13-28-4-2(b) (West 1996) (civil or administrative proceeding); *id.* § 13-28-4-3(b) (criminal proceeding).

409. COLO. REV. STAT. § 13-25-126.5(3)(b)(II) (1997). *See also* MISS. CODE ANN. § 49-2-71(1)(b)(iii) (Supp. 1996); UTAH R. EVID. 508(d)(5) (1997).

Suppose, for example, that Company C discovers during an environmental audit that it is illegally discharging cyanide into navigable waters downstream from the monitoring point specified in the company's Clean Water Act NPDES permit. The periodic discharge monitoring reports filed by the company fail to disclose cyanide violations, because the discharge has evaded measurement. If a third party receives unauthorized (leaked) information to this effect and consequently monitors cyanide at the newly disclosed location, the resulting laboratory test results have arguably *not* been "obtained from a source independent of" the audit;[410] instead the new test results are arguably the "fruits"[411] of the unauthorized disclosure. Accordingly, unless the new test results have been obtained by observation, sampling, or monitoring by a regulatory agency,[412] the privilege holder has a plausible argument that the new test results should be covered by the privilege. If a reviewing court accepts this argument, the new test results will be inadmissible and/or nondiscoverable.

Suppose further, however, that the new test results (the "fruits") indicate that the court should order disclosure of the underlying audit report, due to the company's failure to promptly initiate and pursue with reasonable diligence appropriate efforts to achieve compliance with the law.[413] May a court properly consider the privileged "fruit" — subsequent proof that the cyanide violation has continued — when seeking to determine whether the privilege has been lost?[414] Arguably, because the reviewing court must undertake an "*in camera*" inspection to determine the "appropriate efforts" issue,[415] the court should be free to consider *any* privileged matter relevant to the appropriate efforts issue — not just the environmental audit report itself.

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410. *See supra* pp. 138-141.

411. *See supra* note 318.

412. *See supra* pp. 136-138.

413. *See supra* pp. 158-160.

414. Under Federal Rule of Evidence 104(a), governing "preliminary questions concerning . . . the existence of a privilege," the court "is not bound by the rules of evidence *except those with respect to privileges.*" FED. R. EVID. 104(a) (1996) (emphasis added). This language suggests that the court could *not* consider the privileged fruit in determining whether the privilege has been lost.

415. *See infra* pp. 166-168.

b. *"Appropriate Efforts" Condition and the Audit Incentive*

The most important consequence of an "appropriate efforts" clause may be that it profoundly undercuts the auditing incentive that the legislature sought to create — even for those companies that intentionally set out to discover *and correct* any and all environmental law violations. This side-effect can best be understood by separating out the three incentives that must be created by an effective environmental audit privilege.

First, companies and other regulated entities must be induced to conduct environmental audits. The creation of an audit privilege — protecting the auditing entity from being hurt by its own audit report — may genuinely help to foster a climate in which companies are more willing to audit their activities. The "appropriate efforts" clause — best understood as an ongoing condition that must be met to avoid evaporation of the audit privilege — may undercut that encouragement. The auditing enterprise runs the risk that this condition may not be met. If that happens, of course, the auditing report must be disclosed and may be admitted in evidence against the company. The state legislature presumably hopes that companies will respond to the "appropriate efforts" clause by creating and implementing detailed procedures for following up on and curing violations uncovered in the auditing process. Company *policy*, therefore, may decrease the likelihood that violations will remain uncorrected and come back to haunt the company.

Second, the individual actors who conduct the environmental audit — as well as the employees whom they interview — must be encouraged to dig deeply and search without reservation for any and all environmental law violations. Because of the "appropriate efforts" condition, these auditors and their sources will know that each and every newly discovered violation must be promptly addressed by appropriate curative measures. And herein lies the difficulty. These actors may sense that, no matter how good the company's policies may look on the books, one or more violations will not be adequately addressed by the people who are charged with carrying out these policies. For some violations, therefore, the environmental audit privilege will almost certainly be "lost," resulting in court-ordered disclosure. For *which* violations and for which portions of the audit will the privilege be lost? No one can know in advance, because loss of the privilege is contingent on *future* conduct — frequently the con-

duct of *actors* other than the auditors and the persons whom they interview. Therefore, the auditor cannot truthfully say "Trust me. Whatever you say here will remain privileged and will not be disclosed to the outside world." A more honest prelude to the auditing exercise would be: "The outside world will eventually know some of this stuff. Which stuff? We won't know, until we see which things get fixed in response to the audit. Now then, tell me about any noncompliance with the law that you see."

Third, the people who write the audit report must be encouraged to be as detailed and blunt in their assessments of environmental law violations as possible. Only such detail and bluntness is likely to free up the resources necessary to undertake compliance initiatives. The legislature says, "Be blunt. Be detailed. The privilege will keep your statements confidential." Company policy says, "Be blunt. Be detailed. Any violations that you uncover will be met with swift compliance initiatives." But the voice in the report writer's head may well say, "Be careful. Anything you put in writing can be used against the company. Sure, it is true that this information is privileged. But any violations that I mention will not be privileged, unless the company promptly initiates and pursues with reasonable diligence appropriate efforts to bring us into compliance. I know that this just won't happen with some fraction of the violations. How many? I don't know. Which ones? I don't know. There is no way that I can tell today, which of the things I put down on paper will eventually be blasted into the sunshine by court-ordered discovery. It all depends on what happens in this company *after* the report leaves my hands."[416]

4. Compelling Need in a Criminal Case

The statutes of five states effectively provide that a reviewing court must order disclosure of otherwise privileged material if the court determines in a criminal proceeding that the material contains evidence relevant to the commission of a criminal offense and the prosecutor makes a sufficient showing of need and inability to obtain the substantial equivalent of the information

416. In another context, the Supreme Court has declared that "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." Upjohn v. United States, 449 U.S. 383, 393 (1981).

by other reasonable means.[417] The wording of these statutes differs considerably, and should be reviewed with care.[418]

These provisions assume a preexisting criminal proceeding in which privileged materials are alleged to be relevant. Statutes in ten states also establish special procedures whereby law enforcement officials may gain access to the contents of an environmental audit report.[419]

5. Substantial Threat to Public Health or Environment

The statutes in four states effectively provide that the privilege does not apply (or disclosure may be ordered), if information in the audit report demonstrates or reveals a substantial threat to the public health or the environment. The New Hampshire statute declares that the privilege "shall not apply to the extent that . . . the report reveals a threat of imminent and substantial harm to the public health or the environment."[420] The Wyoming statute provides that a decisionmaker in a proceeding "may require disclosure" if information in the report "demonstrates a substantial threat to the public health or environment or damage to real property or tangible personal property in areas outside of the facility property."[421] The Idaho statute authorizes the governor to disclose otherwise privileged material when "an imminent and substantial danger to the public health or the environment" makes it "necessary."[422] The Mississippi statute provides that the environmental self-audit privilege does not apply if a court or hearing officer finds that "a condition exists that demonstrates an imminent and substantial hazard or endangerment to the public health and safety or the environment."[423]

417. *See* IND. CODE ANN. § 13-28-4-3(a)(2)(D)(West 1996); KY. REV. STAT. ANN. § 224.01-040(4)(d)(4)(Michie Supp. 1997); N.H. REV. STAT. ANN. § 147-E:4(IV)(b)(Supp. 1997); OR. REV. STAT. § 468.963(3)(c)(D)(Supp. 1996); WY. STAT. ANN. § 35-11-1105(c)(iii) (Michie 1997). The Alaska statute provides that the privilege does not apply in *any* criminal proceeding. *See supra* p. 145.

418. For a discussion of the burden of proof on these mechanisms, *see infra* at p. 174.

419. *See infra* p. 168.

420. N.H. REV. STAT. ANN. § 147-E:4(III) (Supp. 1997).

421. WY. STAT. ANN. § 35-11-1105(c)(ii)(D) (Michie 1997) (civil or administrative proceeding). *See also id.* § 35-11-1105(c)(iii) (incorporating this ground in criminal proceedings).

422. IDAHO CODE § 9-810(2) (Supp. 1997).

423. MISS. CODE ANN. § 49-2-71(1)(d) (Supp. 1996).

6. Avoidance of Disclosure in a Known Investigation or Proceeding

Laws in four states effectively declare that no privilege exists (or the court must order disclosure) if an environmental audit report was prepared to avoid disclosure of information in an ongoing investigation known to the person asserting the privilege.[424] This provision is closely related to the principle, recognized by seventeen states, that the privilege should be denied if invoked for a fraudulent purpose.[425]

7. Failure to Implement a Management System

The Kansas statute contains a unique provision — found in no other state — mandating court-ordered disclosure if "the party asserting the privilege has not implemented a management system to assure compliance with environmental laws."[426] The statute provides considerable detail about "primary characteristics" which, if met, will justify the conclusion that the management system satisfies the requirements of the act.[427]

8. Inapplicability of Privilege in Workers' Compensation Proceedings

The Alaska and South Carolina statutes contain unique language overriding the environmental audit privilege in workers' compensation proceedings. South Carolina law provides:

> Nothing contained in this chapter may restrict a party in a proceeding before the South Carolina Workers' Compensation Commission from obtaining or discovering any evidence necessary or appropriate for the proof of any issue pending in the case, regardless of whether evidence is privileged pursuant to this chapter. Further, nothing contained in this chapter may prevent the admissibility of evidence which is otherwise relevant and admissi-

424. *See* COLO. REV. STAT. § 13-25-126.5(3)(d) (1997) ("prepared to avoid disclosure of information in an investigative, administrative, or judicial proceeding that was underway, that was imminent, or for which the entity or person had been provided written notification that an investigation into a specific violation had been initiated"); MISS. CODE ANN. § 49-2-71(1)(c) (Supp. 1996) (using similar language); N.H. REV. STAT. ANN. § 147-E:4(IV)(a)(1) (Supp. 1997) ("to avoid disclosure to regulators of violations known to exist or reasonably believed to exist by the regulated entity"); UTAH R. EVID. 508(d)(3) (1997) ("prepared to avoid disclosure of information in a compliance investigation or proceeding that was already underway and known to the person asserting the privilege").

425. *See supra* p. 155.

426. KAN. STAT. ANN. § 60-3334(d)(2) (Supp. 1997).

427. *Id.* §§ 60-3334(d)(2)(A)-(I).

> ble in a proceeding before the South Carolina Workers' Compensation Commission, regardless of whether the evidence is privileged pursuant to this chapter. However, the commission, upon motion made by a party to the proceeding, may issue appropriate protective orders preventing disclosure of information outside of the workers' compensation proceeding.[428]

The Alaska statute effectively declares that privileged information is admissible and discoverable in workers' compensation proceedings.[429]

M. *Procedures for Resolving Claims of Privilege*

1. In Camera Review in Civil, Administrative, or Criminal Proceeding

Whenever a disputed claim of privilege cannot be resolved without examining the contents of an environmental audit report, the statutes of seventeen states effectively provide for *in camera* review.[430] The statutes of ten states refer to the "court of record" (or administrative tribunal),[431] and statutes in ten states

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428. S.C. CODE ANN. § 48-57-30(C) (Law Co-op. Supp. 1997).

429. *See* ALASKA STAT. § 09.25.450(a)(2) (Michie Supp. 1997).

430. *See* ARK. CODE ANN. § 8-1-307(a) (Michie Supp. 1997) (civil or administrative proceeding); *id.* § 8-1-308(a) (criminal proceeding); COLO. REV. STAT. §§ 13-25-126.5(3)(b)-(e) (1997); IDAHO CODE § 9-806(2) (Supp. 1997); ILL. COMP. STAT. ANN. 415/5-52.2(d)(2) (West 1997); IND. CODE ANN. § 13-28-4-2(a) (West 1996) (civil or administrative proceeding); *id.* § 13-28-4-3(a) (criminal proceeding); KAN. STAT. ANN. § 60-3334(d) (Supp. 1997); MICH. COMP. LAWS ANN. § 324.14804 (West 1996) (request by state or local law enforcement authorities for disclosure of an environmental audit report); MISS. CODE ANN. §§ 49-2-71(1)(b)-(c) (Supp. 1996); N.H. REV. STAT. ANN. §§ 147-E:4(IV)(a)-(b) (Supp. 1997); *id.* § 147-E:6 (*in camera* proceedings); OHIO REV. CODE ANN. §§ 3745.71(f)-(g) (Banks-Baldwin Supp. 1997); OR. REV. STAT. § 468.963(3)(b) (Supp. 1996) (civil or administrative proceeding); *id.* § 468.963(3)(c) (criminal proceeding); S.C. CODE ANN. § 48-57-50 (Law Co-op. Supp. 1997) (civil or administrative proceeding); *id.* § 48-57-60 (criminal proceeding); TEX. REV. CIV. STAT. ANN art. 4447cc § 7(a) (West Supp. 1998); UTAH CODE ANN. § 19-7-106 (1995); UTAH R. EVID. 508(e) (1997); VA. CODE ANN. § 10.1-1193(C) (Michie Supp. 1997); WY. STAT. ANN. §§ 35-11-1105(c)(ii)-(iii) (Michie 1997). *See also* KY. REV. STAT. ANN. § 224.01-040(4)(c) (Michie Supp. 1997) ("private review" in a civil or administrative proceeding); *id.* § 224.01-040(4)(d) ("private review" in a criminal proceeding).

431. *See* ARK. CODE ANN. § 8-1-307(a) (Michie Supp. 1997) (civil or administrative proceeding); *id.* § 8-1-308(a) (criminal proceeding); COLO. REV. STAT. §§ 13-25-126.5(3)(b)-(e) (1997); ILL. COMP. STAT. ANN. 415/5-52.2(d)(2) (West 1997); IND. CODE ANN. § 13-28-4-2(a) (West 1996) (civil or administrative proceeding); *id.* § 13-28-4-3(a) (criminal proceeding); KAN. STAT. ANN. § 60-3334(d) (Supp. 1997); KY. REV. STAT. ANN. § 224.01-040(4)(c) (Michie Supp. 1997) (civil or administrative proceeding); *id.* § 224.01-040(4)(d) (criminal proceeding); MISS. CODE ANN. §§ 49-2-71(1)(b)-(c) (Supp. 1996) ("court or record or hearing officer"); OHIO REV. CODE

speak of such *in camera* review taking place in a civil, administrative, or criminal proceeding.[432] Furthermore, ten states effectively provide that a decisionmaker may compel the disclosure of only those portions of an environmental audit report relevant to issues in dispute in a proceeding.[433] The language of these statutes suggests that the compelled disclosure contemplated by the various legislatures will take place in an on-going civil, criminal, or administrative proceeding, having a purpose *other* than the discovery of documents — hence the reference to "issues in dispute in the proceeding," to which the disclosed portions of the report must be "relevant."

This understanding of the statutes, if correct, is highly significant. Read in this way, the statutes do not provide for the initiation of civil proceedings — akin to Freedom of Information Act lawsuits — solely to obtain documents claimed to be privileged.[434] Instead, privilege is an issue to be contested only in the context of *other* proceedings, and only insofar as a party opposing the privilege asserts that the materials are relevant or otherwise discoverable. This would mean, for example, that citizen groups would not be able to obtain allegedly privileged environ-

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ANN. § 3745.71(f) (Banks-Baldwin Supp. 1997); OR. REV. STAT. § 468.963(3)(b) (Supp. 1996) (civil or administrative proceeding); *id.* § 468.963(3)(c) (criminal proceeding); UTAH CODE ANN. § 19-7-106(1) (1995); *id.* § 19-7-106(2)(a); UTAH R. EVID. 508(e)(1) (1997). *See also* N.H. REV. STAT. ANN. § 147-E:6(I) (Supp. 1997) (referring to "the court having jurisdiction"); TEX. REV. CIV. STAT. ANN art. 4447cc § 7(a) (West Supp. 1998) ("A court or administrative hearings official with competent jurisdiction").

432. *See* ARK. CODE ANN. § 8-1-307(a) (Michie Supp. 1997) (civil or administrative proceeding); *id.* § 8-1-308(a) (criminal proceeding); ILL. COMP. STAT. ANN. 415/5-52.2(d)(2) (West 1997); IND. CODE ANN. § 13-28-4-2(a) (West 1996) (civil or administrative proceeding); *id.* § 13-28-4-3(a) (criminal proceeding); KAN. STAT. ANN. § 60-3334(d) (Supp. 1997); N.H. REV. STAT. ANN. §§ 147-E:4(IV)(a)-(b) (Supp. 1997); OR. REV. STAT. § 468.963(3)(b) (Supp 1996) (civil or administrative proceeding); *id.* § 468.963(3)(c) (criminal proceeding); S.C. CODE ANN. § 48-57-50 (Law Co-op. Supp. 1997) (civil or administrative proceeding); *id.* § 48-57-60 (criminal proceeding); TEX. REV. CIV. STAT. ANN art. 4447cc § 7(a) (West Supp. 1998); VA. CODE ANN. § 10.1-1193(C) (Michie Supp. 1997); WY. STAT. ANN. §§ 35-11-1105(c)(ii)-(iii) (Michie 1997). *See also* OHIO REV. CODE ANN. § 3745.71(f) (Banks-Baldwin Co-op. Supp. 1997) (referring to "the tribunal or presiding officer in an administrative proceeding").

433. *See supra* p. 290 -.

434. The Arkansas statute provides: "Nothing in this subchapter may limit, waive, or abrogate the rights of the public as provided for in the Arkansas Freedom of Information Act." ARK. CODE ANN. § 8-1-312(b) (Michie Supp. 1997), *referring to id.* § 25-19-101 *et seq.* However, neither the Arkansas statute nor any other state's environmental audit privilege statute appears to create a new civil cause of action for the sole purpose of obtaining documents claimed to be privileged.

mental audit reports by simply marching into court and demanding *in camera* review.

2. Procuring Audit Reports in Law Enforcement Investigations

Although environmental audit privilege statutes provide for *in camera* review primarily in the context of an ongoing civil, administrative, or criminal proceeding — i.e., a proceeding initiated for purposes *other* than discovery of the report[435] — the statutes in ten states establish special procedures whereby law enforcement officials may gain access to the contents of an environmental audit report. Statutes in three states effectively provide that the special procedures apply only in criminal investigations;[436] statutes in three states suggest that any official law enforcement investigation — civil or criminal — may suffice;[437] and statutes in three states use ambiguous language suggesting, but not expressly stating, that the mechanism is limited to criminal investigations.[438]

In addition to these provisions whereby law enforcement officials may gain access to audit reports, the statutes of five states effectively provide that a reviewing court must order disclosure

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435. *See supra* pp. 166-168.

436. *See* KAN. STAT. ANN. § 60-3335 (Supp. 1997) ("procedures to procure report in criminal investigations"); MICH. COMP. LAWS ANN. § 324.14805 (West 1996) (procedure following seizure of environmental audit report by state or local law enforcement authorities pursuant to the code of criminal procedure); OR. REV. STAT. § 468.963(4) (Supp. 1996) (procedure following seizure or criminal discovery of report by district attorney or the Attorney General upon probable cause to believe that environmental crime has been committed); TEX. REV. CIV. STAT. ANN art. 4447cc § 9 (West Supp. 1998) (procedure following seizure or discovery of report by "attorney representing the state," upon probable cause to believe that criminal offense has been committed).

437. *See* ILL. COMP. STAT. ANN. 415/5-52.2(e) (West 1997) (procedure upon written request for disclosure of environmental audit report by "State's Attorney or Attorney General"); MICH. COMP. LAWS ANN. § 324.14804 (West 1996) (procedure on "request by state or local law enforcement authorities for disclosure of an environmental audit report"); OHIO REV. CODE ANN. § 3745.71(g) (Banks-Baldwin Supp. 1997) (procedures initiated by "a search warrant, subpoena, or discovery under the rules of civil procedure or the rules of criminal procedure").

438. *See* ARK. CODE ANN. § 8-1-309 (Michie Supp. 1997) (proceeding by "prosecuting authority" to obtain report where there is probable cause to believe that an "offense has been committed"); IND. CODE ANN. § 13-28-4-5 (West 1996) (access to report by "prosecuting attorney" having probable cause to believe that "an offense has been committed"); WY. STAT. ANN. §§ 35-11-1105(c)(v)-(vii) (Michie 1997) (procedure following seizure or discovery of report by district attorney or the attorney general upon probable cause to believe that "offense" has been committed under specific portion of Wyoming statutes).

of otherwise privileged material if the court determines in a criminal proceeding that the material contains evidence relevant to the commission of a criminal offense and the prosecutor makes a sufficient showing of need and inability to obtain the substantial equivalent of the information by other reasonable means.[439]

3. Meaning of "In Camera" Review

Although statutes in seventeen states provide for *in camera* review, the wording of the statutes suggests that the meaning of "*in camera*" review may be surprisingly varied. Many environmental audit privilege statutes provide neither a definition nor a significant description of the *in camera* review process. Where definitions or descriptions are set forth, they differ considerably, particularly on the key issue of whether the party opposing the privilege will be allowed access to the audit report.

Statutes in five states require *in camera* review "consistent with" the appropriate procedural code.[440] The statutes of three states provide essentially the following definition for *in camera* review:

> "In camera review" means a hearing or review in a courtroom, hearing room, or chambers to which the general public is not admitted. After such hearing or review, the content of the oral and other evidence and statements of the judge and counsel shall be held in confidence by those participating in or present at the hearing or review, and any transcript of the hearing or review shall be sealed and not considered a public record, until and unless its contents are disclosed by a court or administrative law judge having jurisdiction over the matter.[441]

While ambiguous, this language suggests that the party seeking disclosure of the report may view or be informed about the contents of the privileged report during the *in camera* hearing.

Utah defines *in camera* review to mean "a confidential review in which only the court has access to the privileged informa-

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439. *See supra* p. 163.

440. *See* KAN. STAT. ANN. § 60-3334(d) (Supp. 1997) ("*in camera* review consistent with the code of civil procedure"); OHIO REV. CODE ANN. § 3745.71(f) (Banks-Baldwin Supp. 1997) ("in a manner consistent with applicable rules of procedure"); OR. REV. STAT. § 468.963(3)(b) (Supp 1996) ("*in camera* review consistent with the Oregon Rules of Civil Procedure"); TEX. REV. CIV. STAT. ANN art. 4447cc § 7(a) (West Supp. 1998) ("*in camera* review consistent with the appropriate rules of procedure"); WY. STAT. ANN. § 35-11-1105(c)(ii) (Michie 1997) ("consistent with the Wyoming Rules of Civil Procedure").

441. COLO. REV. STAT. § 13-25-126.5(2)(d) (1997). *See also* IDAHO CODE § 9-803(7) (Supp. 1997); WY. STAT. ANN. § 35-11-1105(a)(iii) (Michie 19976).

tion,"[442] and further declares that "the party seeking disclosure of the environmental audit report may *not* have access to the environmental audit report" during *in camera* review.[443] By contrast, Colorado declares that "a court . . . or . . . administrative law judge, *may* allow [a] party [opposing the privilege] limited access to the environmental audit report for the purposes of an *in camera* review only."[444]

Statutes in eleven states provide fragmentary descriptions of how *in camera* review will operate.[445] The text of six of these statutes — all dealing with special procedures to procure audit reports by criminal enforcement officials — unambiguously provides that the order scheduling an *in camera* hearing *must* allow the enforcement officials to unseal and review the report,[446] and the Kansas statute strongly suggests that criminal enforcement officials taking advantage of the special procedures will be free to examine the report.[447]

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442. UTAH R. EVID. 508(d)(6) (1997).

443. UTAH R. EVID. 508(e)(2) (1997) (emphasis added).

444. COLO. REV. STAT. § 13-25-126.5(5)(a) (1997) (emphasis added).

445. *See* ARK. CODE ANN. § 8-1-309 (Michie Supp. 1997) (proceeding by "prosecuting authority" to obtain report); IND. CODE ANN. § 13-28-4-5 (West 1996) ("access to reports by prosecutors"); KAN. STAT. ANN. § 60-3335 (Supp. 1997) ("procedures to procure report in criminal investigations"); MICH. COMP. LAWS ANN. § 324.14804 (West 1996) (procedure on "request by state or local law enforcement authorities for disclosure of an environmental audit report"); *id.* § 324.14805 (procedure following seizure of environmental audit report by state or local law enforcement authorities); MISS. CODE ANN. § 49-2-71(3)(a) (Supp. 1996) (procedure upon showing by "any party" of "probable cause" to believe that a report is not protected or has lost protection of the statute); N.H. REV. STAT. ANN. § 147-E:6(III) (Supp. 1997) (procedure upon request by "any party" in a civil or criminal proceeding for an *in camera* hearing); OHIO REV. CODE ANN. § 3745.71(g) (Banks-Baldwin Supp. 1997); OR. REV. STAT. § 468.963(4) (Supp. 1996) (procedure following seizure or discovery of report by district attorney or the Attorney General); TEX. REV. CIV. STAT. ANN art. 4447cc § 9 (West Supp. 1998) (procedure following seizure or discovery of report by "attorney representing the state"); VA. CODE ANN. § 10.1-1198(C) (Michie Supp. 1997) (procedure upon showing by "any party" of "probable cause" to believe that an exception to the privilege exists); WY. STAT. ANN. §§ 35-11-1105(c)(v)-(vii) (Michie 1997) (procedure following seizure or discovery of report by district attorney or the attorney general).

446. *See* ARK. CODE ANN. § 8-1-309(c)(2) (Michie Supp. 1997) ("prosecuting authority"); IND. CODE ANN. § 13-28-4-5(d) (West 1996) ("prosecuting attorney"); OHIO REV. CODE ANN. § 3745.71(g)(3) (Banks-Baldwin Supp. 1997); OR. REV. STAT. § 468.963(4)(c) (Supp 1996) ("district attorney or Attorney General"); TEX. REV. CIV. STAT. ANN art. 4447cc § 9(d)(2) (West Supp. 1998) ("attorney representing the state"); WY. STAT. ANN. § 35-11-1105(c)(vii) (Michie 1997) ("district attorney or attorney general").

447. *See* KAN. STAT. ANN. § 60-3335(c) (Supp. 1997) (order scheduling *in camera* hearing "shall allow the county or district attorney or attorney general to place appropriate limitations on distribution and review of the report to protect against un-

Other statutes describe *in camera* review in *all* proceedings, not just those triggered by criminal enforcement officials. The Mississippi statute expressly declares that, upon showing by "any party" of "probable cause" to believe that a report is not protected or has lost protection of the statute, the court or hearing officer "may allow such party limited access to the environmental self-evaluation report for the purposes of an *in camera* review only."[448] Language in the Virginia statute, although ambiguous, suggests that a party opposing the claim of privilege may obtain access to information in the report.[449] The New Hampshire statute uniquely provides that, upon request by "any party" in a civil or criminal proceeding for an *in camera* hearing, the court order scheduling the hearing "shall require that a copy of the . . . report be immediately provided to the department of justice," which shall limit review and distribution of the report.[450]

4. The Logistics of "In Camera" Review

Judges and administrative hearing officers given the chore of policing the various statutory environmental audit privileges through *in camera* review may well find it a daunting task. In some instances, only the proponent of the privilege will know what is in the bundle of documents said to comprise the environmental audit report.[451] Opponents who have not seen the report must struggle to guide the court in concrete ways by speculating about the report's probable contents.

Judges will probably bring a wide range of attitudes to this task. Some may be inclined to defer to the company asserting the claim of privilege, on the theory that the privilege is a statutory creature, having the imprimatur of the legislature. Others may approach review with a more skeptical attitude.

Whatever the attitude of the reviewing court, credibility may be quickly lost or won. If a company has stamped as "Privileged" documents that are obviously excluded from privileged status — such as discharge monitoring reports under the Clean Water

necessary disclosure," and these actors "may consult with enforcement agencies regarding the contents of the report as necessary to prepare for the *in camera* review").

448. MISS. CODE ANN. § 49-2-71(3)(a) (Supp 1996).

449. *See* VA. CODE ANN. § 10.1-1198(C) (Michie Supp. 1997) ("moving party who obtains access to" report or information therein may not divulge such information "except as specifically allowed by the hearing examiner or the court").

450. N.H. REV. STAT. ANN. § 147-E:6(III) (Supp. 1997) .

451. *See supra* pp. 169-171.

Act's NPDES permit program — the party seeking disclosure may find that its cause has been bolstered. For that reason, opponents of the environmental audit privilege may routinely ask reviewing courts to look for such telltale signs that the proponent's claim is unreasonably broad and designed to hide non-qualifying materials. By the same token, if the proponent of the privilege can point to the methodical and accurate marking and generous disclosure of materials that do not qualify for the privilege, its credibility may be advanced.

5. Burdens of Proof

The statutes of seventeen states contain express directives regarding burdens of proof.[452] In eleven states, the party asserting the privilege has the burden of proving the privilege.[453] In five states, the party asserting the privilege has the burden of proving a prima facie case of privilege, and the party seeking disclosure has the burden of proving that the privilege does not exist.[454]

Idaho puts no burden on the party claiming the privilege. Instead, "[a] party seeking disclosure of the environmental audit report has the burden of proving the disclosure is appropri-

452. *See* ALASKA STAT. § 09.25.450(e) (Michie Supp. 1997); ARK. CODE ANN. § 8-1-310 (Michie Supp. 1997); COLO. REV. STAT. § 13-25-126.5(7) (1997); IDAHO CODE § 9-806(3) (Supp. 1997); ILL. COMP. STAT. ANN. 415/5-52.2(d)(3) & (e)(5) (West 1997); IND. CODE ANN. § 13-28-4-4 (West 1996); KAN. STAT. ANN. § 60-3334(e) (Supp. 1997); KY. REV. STAT. ANN. § 224.01-040(4)(e) (Michie Supp. 1997); MICH. COMP. LAWS ANN. § 324.14806(1) (West 1996); MISS. CODE ANN. § 49-2-71(5) (Supp. 1996) ; OHIO REV. CODE ANN. § 3745.71(e) (Banks-Baldwin Supp. 1997); OR. REV. STAT. § 468.963(3)(d) (Supp. 1996); S.C. CODE ANN. § 48-57-70 (Law Co-op. Supp. 1997); TEX. REV. CIV. STAT. ANN art. 4447cc §§ 5(f), 7(b) & 9(h) (West Supp. 1998); UTAH CODE ANN. §§ 19-7-106(3)-(4) (1995); UTAH R. EVID. 508(f) (1997); VA. CODE ANN. § 10.1-1193(C) (Michie Supp. 1997); WY. STAT. ANN. § 35-11-1105(c)(iv) (Michie 1997).

453. *See* ALASKA STAT. § 09.25.450(e) (Michie Supp. 1997); ARK. CODE ANN. § 8-1-310(a) (Michie Supp. 1997); ILL. COMP. STAT. ANN. 415/5-52.2(d)(3) & (e)(5) (West 1997); IND. CODE ANN. § 13-28-4-4(a) (West 1996); KAN. STAT. ANN. § 60-3334(e)(1) (Supp. 1997); KY. REV. STAT. ANN. § 224.01-040(4)(e) (Michie Supp. 1997); OHIO REV. CODE ANN. § 3745.71(e) (Banks-Baldwin Supp. 1997); OR. REV. STAT. § 468.963(3)(d) (Supp. 1996); S.C. CODE ANN. § 48-57-70 (Law Co-op. Supp. 1997); TEX. REV. CIV. STAT. ANN art. 4447cc § 5(f) (West Supp. 1998); WY. STAT. ANN. § 35-11-1105(c)(iv) (Michie 1997).

454. *See* COLO. REV. STAT. § 13-25-126.5(7) (1997); MICH. COMP. LAWS ANN. § 324.14806(1) (West 1996) (person seeking disclosure must prove by preponderance of the evidence that the privilege does not exist); MISS. CODE ANN. § 49-2-71(5) (Supp 1996); UTAH CODE ANN. §§ 19-7-106(3)-(4) (1995); UTAH R. EVID. 508(f) (1997); VA. CODE ANN. § 10.1-1198(C) (Michie Supp. 1997).

ate."[455] Idaho offers even further protection to the party asserting the privilege:

> The existence of a written environmental compliance policy or adoption of a plan of action to meet applicable environmental laws shall constitute prima facie evidence that an environmental audit report was *designed* to prevent noncompliance and improve compliance with environmental laws and that the environmental audit is protected from disclosure.[456]

Of the fourteen states effectively providing that the privilege is lost if the holder has failed to promptly initiate and diligently pursue "appropriate efforts" toward compliance in connection with any noncompliance disclosed in the report,[457] seven states provide that the burden of proving prompt initiation and diligent pursuit of appropriate efforts falls on the party asserting the privilege.[458] The statutes of three states place the burden of proof with respect to appropriate compliance efforts on the party seeking disclosure.[459] Arkansas places the burden of proof concerning appropriate compliance efforts on the party claiming the privilege in civil and administrative proceedings, and on the "prosecuting authority" in criminal cases.[460] The statutes of the four remaining states having the "appropriate efforts" condition — Colorado, Mississippi, New Hampshire, and Utah — are silent concerning the burden of proof on that issue.

In ten states, the burden of proving that the privilege is asserted for a fraudulent purpose (or asserted for purposes of deception or evasion) is assigned to the party seeking disclosure.[461]

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455. IDAHO CODE § 9-806(3) (Supp. 1997).

456. *Id.* § 9-806(3) (emphasis added). For a discussion of the difficulties involved in ascertaining whether an audit is *designed* to prevent noncompliance, *see supra* pp. 115-118.

457. *See supra* p. 158.

458. *See* IND. CODE ANN. § 13-28-4-4(b) (West 1996); KAN. STAT. ANN. § 60-3334(e)(1) (Supp. 1997); KY. REV. STAT. ANN. § 224.01-040(4)(e) (Michie Supp. 1997); OHIO REV. CODE ANN. § 3745.71(e) (Banks-Baldwin Supp. 1997); OR. REV. STAT. § 468.963(3)(d) (Supp. 1996); S.C. CODE ANN. § 48-57-70 (Law Co-op. Supp. 1997) (party asserting privilege "has the burden of proving . . . diligence toward compliance"); WY. STAT. ANN. § 35-11-1105(c)(iv (Michie 1997).

459. *See* ILL. COMP. STAT. ANN. 415/5-52.2(d)(3) & (e)(5) (West 1997) (burden on State's Attorney or Attorney General); S.C. CODE ANN. § 48-57-70 (Law Co-op. Supp. 1997); TEX. REV. CIV. STAT. ANN art. 4447cc § 7(b) (West Supp. 1998).

460. *See* ARK. CODE ANN. § 8-1-310(c) (Michie Supp. 1997) (criminal proceedings); *id.* § 8-1-310(a) (general rule with respect to "appropriate efforts" burden of proof).

461. *See id.*, §§ 8-1-310(b) & (d); IDAHO CODE § 9-806(3) (Supp. 1997); ILL. COMP. STAT. ANN. 415/5-52.2(d)(3) & (e)(5) (West 1997); IND. CODE ANN. § 13-28-4-4(c) (West 1996); KAN. STAT. ANN. § 60-3334(e)(2) (Supp. 1997); KY. REV. STAT.

In the five states in which the court may order disclosure of an audit report, due to compelling need in a criminal proceeding,[462] the burden of proof on that issue is placed on the prosecution.[463]

A unique provision in the Texas statute addresses the claim of a privilege holder that evidence offered in a civil, criminal, or administrative proceeding should be suppressed on the theory that it has been derived through the unauthorized use of materials viewed during an *in camera* proceeding.[464] The Texas statute provides that the burden of proof on the issue of unauthorized review, disclosure, or use, is assigned to the party opposing suppression of the evidence.[465]

N. *Retention of Pre-Existing Privileges*

The statutes of seventeen states effectively provide that nothing in the environmental audit statute shall limit, waive, or abrogate the scope or nature of existing privileges. Statutes in thirteen of these states effectively refer to "any statutory or common law privilege, including the work product doctrine and the attorney-client privilege."[466] Statutes in four states effectively refer to "any statutory or common law privilege."[467] Accordingly, even where a claim of the environmental audit privilege fails, the party opposing disclosure in these seventeen states may succeed by asserting other grounds for nondisclosure.

ANN. § 224.01-040(4)(e) (Michie Supp. 1997); OR. REV. STAT. § 468.963(3)(d) (Supp. 1996); TEX. REV. CIV. STAT. ANN art. 4447cc § 7(b) (West Supp. 1998); WY. STAT. ANN. § 35-11-1105(c)(iv (Michie 1997). *See also* S.C. CODE ANN. § 48-57-70 (Law Co-op. Supp. 1997) (burden of proof on party seeking disclosure, when privilege arguably lost because asserted for purposes of deception or evasion).

462. *See supra* p. 163.

463. *See* IND. CODE ANN. § 13-28-4-4(d) (West 1996); KY. REV. STAT. ANN. § 224.01-040(4)(e) (Michie Supp. 1997); OR. REV. STAT. § 468.963(3)(d) (Supp. 1996); WY. STAT. ANN. § 35-11-1105(c)(iv) (Michie 1997).

464. For a discussion of *in camera* proceedings, *see supra* pp. 169-171.

465. *See* TEX. REV. CIV. STAT. ANN art. 4447cc § 9(h) (West Supp. 1998).

466. *See* ARK. CODE ANN. § 8-1-312(a) (Michie Supp. 1997); IDAHO CODE § 9-808 (Supp. 1997); ILL. COMP. STAT. ANN. 415/5-52.2(j) (West 1997); IND. CODE ANN. § 13-28-4-10 (West 1996); KAN. STAT. ANN. § 60-3337 (Supp. 1997); KY. REV. STAT. ANN. § 224.01-040(7) (Michie Supp. 1997); MICH. COMP. LAWS ANN. § 324.14808 (West 1996); N.H. REV. STAT. ANN. § 147-E:7(II) (Supp. 1997); OHIO REV. CODE ANN. § 3745.71(h) (Banks-Baldwin Supp. 1997); OR. REV. STAT. § 468.963(7) (Supp. 1996); S.C. CODE ANN. § 48-57-90 (Law Co-op. Supp. 1997); TEX. REV. CIV. STAT. ANN art. 4447cc § 13 (West Supp. 1998); WY. STAT. ANN. § 35-11-1105(e) (Michie 1997).

467. *See* COLO. REV. STAT. § 13-25-126.5(6) (1997); MISS. CODE ANN. § 49-2-71(4) (Supp 1996); UTAH R. EVID. 508(g) (1997); VA. CODE ANN. § 10.1-1193(B) (Michie Supp. 1997).

O. *Sunset Feature*

The statutes of five states effectively provide for a "sunset" or termination date for the statutory environmental audit (or self-assessment) privilege.[468] For example, the statutory Colorado voluntary self-evaluation privilege applies only to evaluations "performed during the period beginning June 1, 1994, and ending June 30, 1999."[469] Regulated entities contemplating environmental audits must carefully review the statutes of their particular jurisdictions to determine whether the privilege is still in effect.

The sunset provisions are not academic. Idaho Governor Phil Blatt announced in his "State of the State" address on January 7, 1997, that he would not endorse legislation extending that state's environmental audit privilege — at least in its present form — beyond its December 31, 1997, sunset date.[470] The United States EPA had earlier granted only interim approval to Idaho's program for implementing the Clean Air Act's Title V permitting program, concluding that some immunity and disclosure portions of the Idaho environmental audit privilege statute deprived the state of adequate authority to enforce Title V.[471] In an indication that the environmental audit privilege has not lived up to its promise, the Idaho Association of Commerce and Industry — the statute's original sponsor — has indicated it will not push for reauthorization.[472]

P. *Relationship of Privilege to Voluntary Disclosure Immunity*

Statutes in sixteen states include variations on a device most commonly called a "voluntary disclosure immunity."[473] Legisla-

468. *See* COLO. REV. STAT. § 13-25-126.5(9) (1997) (voluntary self-evaluation ending date of June 30, 1999); *id.* § 13-90-107(1)(j)(II) (identical ending date for associated testimonial privilege); IDAHO CODE § 9-340(45) (Supp. 1997) (sunset date of December 31, 1997); MINN. STAT. ANN. § 114C.30 (West 1997) (repealing environmental improvement pilot program on July 1, 1999); 1996 N.H. Laws Ch. 4 (H.B. 275) § 4:4 (repealing privilege effective July 1, 2002, "unless specifically extended by legislative enactment"); OHIO REV. CODE ANN. § 3745.71(i) (Banks-Baldwin Supp. 1997) ("the privilege . . . applies only to information and communications that are part of environmental audits conducted before January 1, 2001").

469. COLO. REV. STAT. § 13-25-126.5(9) (1997). *See also id.* § 25-1-114.5(9) (identical beginning and ending dates for voluntary disclosure immunity); *id.* § 13-90-107(1)(j)(II) (identical beginning and ending dates for testimonial privilege).

470. *See State's Audit Privilege Law Will Expire by Year's End Unless Legislature Acts*, 27 ENV'T REP. (BNA) 1911 (1997).

471. *See id. See also supra* note 14.

472. *See supra* note 471.

473. For an analysis of voluntary disclosure immunities, *see* David A. Dana, *The Perverse Incentives of Environmental Audit Immunity*, 81 IOWA L. REV. 969 (1996).

tures in twelve jurisdictions have enacted provisions providing immunities from certain penalties, in circumstances in which regulated entities have voluntarily disclosed violations of certain laws to state officials and have complied with various conditions set forth in the immunity statute.[474] Indiana provides for discretionary waiver of civil penalties for minor violations of environmental laws reported to the Department of Environmental Management and corrected within 90 days of such notification.[475] Mississippi has adopted language providing that the Mississippi Commission on Environmental Quality, in computing penalties under various environmental laws, should reward persons who have discovered and reported noncompliance "as the result of a voluntary self-evaluation."[476] The Minnesota environmental improvement pilot program statute provides that regulated entities qualifying for that program will be entitled to a "penalty waiver."[477] And a South Dakota statute establishes a "presumption against the imposition of civil or criminal penalties" for violations found in an "environmental audit" and disclosed to the Department of Environment and Natural Resources.[478]

The sixteen states with voluntary disclosure immunity variations typically impose time limits for the reporting and curing of violations, and most statutes set forth detailed conditions that must be met to qualify for the immunity or penalty waiver. These conditions, which are often complex, must be carefully reviewed before one can determine whether a given disclosure will qualify for the immunity.

This article does not address the detailed conditions for obtaining the benefits of the various voluntary disclosure immunity statutes. However, the typical voluntary disclosure immunity provision is tightly integrated with the statutory environmental audit privilege. The relationship is critical in every state except Indiana, because disclosures cannot qualify for the immunity unless

474. *See* ALASKA STAT. § 09.25.475 (Michie Supp. 1997); COLO. REV. STAT. § 25-1-114.5 (1997); IDAHO CODE § 9-809 (Supp. 1997); KAN. STAT. ANN. § 60-3338 (Supp. 1997); KY. REV. STAT. ANN. § 224.01-040(10) (Michie Supp. 1997); MICH. COMP. LAWS ANN. § 324.14809 (West 1996); OHIO REV. CODE ANN. § 3745.72 (Banks-Baldwin Supp. 1997); S.C. CODE ANN. § 48-57-100 (Law Co-op Supp. 1997); TEX. REV. CIV. STAT. ANN art. 4447cc § 10(a) (West Supp. 1998); UTAH CODE ANN. § 19-7-109 (Supp. 1997); VA. CODE ANN. § 10.1-1199 (Michie Supp. 1997); WY. STAT. ANN. § 35-11-1106 (Michie 1997).

475. *See* IND. CODE ANN. § 13-30-4-3 (West 1996).

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

477. MINN. STAT. ANN. § 114C.24(2) (West 1997).

478. S.D. CODIFIED LAWS § 1-40-33 (Michie Supp. 1997).

they "arise out of" (or are discovered by, or through, or as a result of) an environmental audit (or self-evaluation), as defined by the privilege statute. In short, the various voluntary immunity statutes shield *only* those actors who have engaged in a bona fide "environmental audit" (or "voluntary self-evaluation"), as defined by the relevant privilege statute, and who meet all other conditions imposed by the disclosure immunity statute.

IV.
CONCLUSION

The abstract concept of an environmental audit privilege is now a reality in nineteen states. Legislators in at least twenty-four additional states have considered such legislation within the past two years; in sixteen of these states, bills to establish such a privilege have already been introduced and are now pending in the 1997 legislative session.[479]

Even though the typical environmental audit privilege statute is relatively brief,[480] the implementation and consequences of each privilege will hinge on how an extraordinary thicket of complicated fine print is interpreted and applied. This article has highlighted many perplexing interpretative issues that will confront persons seeking to invoke or defeat the various statutory enactments.

As the article demonstrates, each state's environmental audit privilege is accompanied by a host of intricate conditions. These conditions are so easy to flunk that we may expect many instances of "overclaiming" — persons asserting that the privilege applies when, in fact, the disputed materials are not privileged. The process of separating legitimate from illegitimate privilege claims promises to be contentious, time-consuming, and frustrating.

The Supreme Court has noted that "[a]n uncertain privilege, or one which purports to be certain but results in widely varying interpretations by the courts, is little better than no privilege at all."[481] Given their fine print, it seems inevitable that the various state environmental audit privileges are destined to become "uncertain privilege[s], or one[s] resulting in widely varying interpretations by the courts." Such a development may prove a recipe

479. *See supra* p. 80, Table 2.

480. The texts of the statutes range from approximately 900 words in Virginia to approximately 3,200 words in Michigan, Minnesota, and Texas.

481. Upjohn Co. v. United States, 449 U.S. 383, 393 (1981).

for unhappiness on all quarters. Regulated entities may lack confidence that their auditing activities are truly privileged. Persons seeking to obtain information on environmental compliance matters may be thwarted by the convenient assertion that the materials are privileged. And judges and administrative hearing officers may find that a significant portion of their time must be spent on the inevitable bickering that fine print engenders.

In the end, the state environmental audit privilege statutes are not simple. Now that the concept of a privilege has become the law of nineteen jurisdictions, the time has come to confront their complexity.