THE U.S. ENVIRONMENTAL PROTECTION AGENCY'S RECENT ENVIRONMENTAL AUDITING POLICY AND POTENTIAL CONFLICT WITH STATE-CREATED ENVIRONMENTAL AUDIT PRIVILEGE LAWS

I. INTRODUCTION

On December 22, 1995, the United States Environmental Protection Agency (EPA) released a final policy statement outlining the EPA's position regarding companies that discover environmental law violations pursuant to self-audits.[1] The policy provides for penalty

1. Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66,706 (1995) [hereinafter Policy Statement]. The policy was to take

reductions to companies that discover violations as a result of environmental auditing.[2] The policy does, however, expressly reject recognition of an evidentiary privilege for environmental audit documents.[3] Because several states have recently passed laws creating an evidentiary privilege for environmental audit documents,[4] a potential for considerable conflict exists between state and federal environmental enforcement programs. The EPA policy statement does not address the EPA's likely response to state-created privileges.[5] It also leaves unanswered a number of questions regarding the applicability of state-created privileges in various enforcement situations.

Part II of this comment will set out the development of the EPA's environmental audit policy and describe its provisions. Part III will discuss the development of a judicially recognized environmental audit privilege. It will also discuss recent efforts within state legislatures to create a statutory immunity and an evidentiary privilege. Part IV will examine the likely application of state-created privileges in cases brought in federal court under both state and federal law. Parts V and VI discuss the limitations of statutory environmental audit privileges and the ramifications of limited immunity. Of particular interest is the likely outcome of cases brought under federal environmental laws that are administered primarily by the states.[6] The central thesis of this comment

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effect on January 22, 1996. The term "environmental audit" is defined by the EPA in its 1986 policy on environmental auditing as "a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements." 51 Fed. Reg. 25,004, 25,006 (1986). Definitions contained in state statutes are roughly analogous. For instance, Illinois defines an environmental audit as a "voluntary, internal, and comprehensive evaluation of one or more facilities or any activity at one or more facilities regulated under State, federal, regional or local laws or ordinances, or of management systems related to the facilities or activity, that is designed to identify and prevent noncompliance and to improve compliance with those laws." ILL. ANN. STAT. ch. 415, para. 5/52.2 (i) (Smith-Hurd 1995).

2. Policy Statement, *supra* note 1, at 66,711.

3. *Id.* at 66,712.

4. *State Privilege Legislation Multiplies in 1995; Predictions Differ About 1996*, BNA ST. ENV'T DAILY, Aug. 30, 1995, *available in* LEXIS, Nexis Library, CURNWS File. These states are Arkansas, Colorado, Idaho, Illinois, Indiana, Kansas, Kentucky, Minnesota, Mississippi, Oregon, Texas, Utah, Virginia, and Wyoming. *Id.* Idaho, Kansas, Minnesota, Texas, Virginia, and Wyoming provide immunity in addition to an evidentiary privilege.

5. The interim policy does suggest that the EPA will increase its scrutiny of environmental programs in states that have an environmental audit privilege. *See* Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy Statement, 60 Fed. Reg. 16,875 (1995) [hereinafter Interim Policy Statement].

6. For instance, the Clean Water Act allows states to take control of discharge permit programs. 33 U.S.C. § 1342(b) (1986).

is that qualified immunity from the imposition of civil and criminal penalties provides the necessary incentive to encourage companies to conduct environmental audits. Where limited immunity is granted, recognition of an evidentiary privilege is extraneous and will have significant adverse impacts. Recognition of an evidentiary privilege will result in increased litigation as the parties attempt to discern whether or not the privilege applies and to define what materials are covered by the privilege. Moreover, the lack of consistency between state and federal policy and between different states' privilege laws will place a burden on companies that operate in more than one state or that are regulated under both state and federal law.

II. THE DEVELOPMENT OF AN EPA ENVIRONMENTAL AUDIT POLICY

The EPA first concerned itself with the development of an environmental auditing policy in 1985 and 1986.[7] In 1986, the EPA published a general policy statement on environmental auditing.[8] The policy sought to encourage regulated entities to conduct environmental audits.[9] The policy statement indicated that the EPA would not routinely request environmental audit reports.[10] Nevertheless, it retained the authority to decide whether to request audit reports and stated that it would evaluate any such requests on a case-by-case basis.[11] The 1986 statement also indicated that the EPA would not forego or alter enforcement responses based on whether or not a company conducted audits.[12] The EPA did, however, suggest that facilities with environmental auditing systems in place would be subject to fewer inspections.[13] It also stated that environmental audits would be proposed as part of settlement negotiations in certain circumstances.[14] In general, although the 1986 policy announced certain benefits that might flow from

7. The EPA published an interim environmental audit policy statement in November of 1985. 50 Fed. Reg. 46,504 (1985).

8. Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004 (1986).

9. *Id.* at 25,006.

10. *Id.* at 25,007.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

conducting environmental audits, it failed to create concrete incentives to encourage regulated entities to conduct such audits.[15]

The lack of incentive in the EPA's environmental audit policy was widely viewed as thwarting a substantial increase in the use of environmental audits.[16] Because the EPA retained the authority to request documents created during an environmental audit, companies may have been reluctant to create additional, potentially incriminating, materials.[17] Moreover, the lack of any penalty reductions for companies that conduct environmental audits failed to provide an incentive for companies to conduct such audits.[18]

In response to the perceived inadequacies of the 1986 policy, the EPA instituted a project designed to reassess its audit policy.[19] In 1995, the EPA announced an interim audit policy that provided incentives for companies that conduct environmental audits.[20] The interim policy stated that the EPA would reduce civil penalties for companies that conduct environmental audits.[21] It also announced that the EPA would not refer cases to the Department of Justice (DOJ) for criminal prosecution.[22]

The interim policy set out a number of conditions which companies must adhere to in order to be eligible for these incentives. A company must discover the violation as a result of an environmental audit, and must disclose the violation voluntarily.[23] A company must also take steps to correct the violation and to ensure that the violation does not occur in the future.[24] The interim policy required the company to cooperate with federal, state, and local agencies and also provided for the elimination of gravity-based penalties if the above requirements were

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15. Terrell Hunt & Timothy Wilkins, *Environmental Audits and Enforcement Policy*, 16 HARV. ENVTL. L. REV. 365, 366 (1992).

16. *Id.*

17. *Id* at 367-68.

18. *Id.*; Policy Statement, *supra* note 1, at 66,706.

19. Restatement of Policies Related to Environmental Auditing, 59 Fed. Reg. 38,455 (1994) (announcing the beginning of a project to reevaluate the 1986 policy).

20. Interim Policy Statement, *supra* note 5.

21. *Id.* at 16,877.

22. *Id.* at 16,877-78. DOJ has guidelines that it uses when deciding whether to prosecute environmental violations. *See* Vincent J. Marella, *The Department of Justice Prosecutive Guidelines in Environmental Cases Involving Voluntary Disclosure—A Leap Forward or a Leap of Faith?*, 29 AM. CRIM. L. REV. 1179 (1992) (discussing the factors that DOJ will take into consideration and the potential for inconsistent application of the policy).

23. Interim Policy Statement, *supra* note 5, at 16,877.

24. *Id.*

met.[25] It also provided for a seventy-five percent reduction in gravity-based penalties in cases where most of the above requirements were met.[26]

The interim policy indicated the EPA's strong opposition to state-created privileges.[27] In particular, it indicated that the EPA would evaluate the possibility of increasing federal enforcement actions in states that had enacted statutory privileges for environmental audit documents.[28] The EPA's primary concern in this regard was the maintenance of uniform enforcement standards. The interim policy indicated that the EPA would notify a state if that state's environmental audit privilege law raised questions about its ability to meet federal environmental standards.[29]

The final policy statement retains many of the same features identified in the interim statement. Specifically, the policy lists nine requirements for a complete elimination of gravity-based penalties: (1) the violation must have been discovered pursuant to an environmental audit or other systematic procedure for identifying compliance problems; (2) the regulated entity must have discovered the violation voluntarily and not as a result of a monitoring program otherwise required by law; (3) the regulated entity must disclose any violations within ten days; (4) the regulated entity must discover and disclose the violation prior to the commencement of an agency action or a citizen suit; (5) the regulated entity must correct the violation within sixty days (or notify the EPA in writing if the correction will take longer than sixty days) and take measures to remedy any harm; (6) the regulated entity must agree in writing to institute measures to prevent a recurrence; (7) the regulated entity must not have experienced the same violation within the last three years; (8) the violation must not have resulted in serious harm or imminent and substantial endangerment, and it must not have violated the terms of a judicial order or consent agreement; and (9) the regulated

25. *Id.* Gravity-based penalties are those beyond the amount necessary to recover any economic benefit that a violator gained as a result of the violation.

26. *Id.* Under the interim policy, the EPA would only refer cases for criminal enforcement if the violation revealed management practices that concealed/condoned environmental violations, high-level involvement in violations (or willful failure to notice violations), or serious actual harm. *Id.* at 16,878.

27. *Id.* The policy also objected to complete immunity and recognized the necessity of penalizing companies to the extent that they had gained an economic advantage over other companies through noncompliance. *Id.*

28. *Id.* at 16,878.

29. *Id.*

entity must cooperate with the EPA by providing information and access to employees.[30] If a regulated entity does not conduct environmental audits or self-evaluations, but meets all of the other requirements listed above, the EPA will reduce gravity-based penalties by seventy-five percent.[31]

An additional incentive contained in the new policy is the EPA's assurance that it will not recommend criminal charges against a regulated entity if it meets the above requirements and if its management does not engage in practices or policies that encourage violations.[32] The policy also states that the EPA will not request or use environmental audit reports to initiate investigations. The EPA may, however, request environmental audit documents if it has independent knowledge of the violation.[33]

Although the policy states that the EPA will not, under normal circumstances, request environmental audit documents, the policy does confirm EPA's opposition to state created privileges, largely for the same reasons announced in the interim policy. The policy cites the judicially recognized principle that evidentiary privileges are not favored as a matter of public policy.[34] The EPA also points to a survey of large and mid-sized companies which indicates that a lack of confidentiality is not one of the primary reasons that such companies failed to conduct audits.[35] The policy notes that privilege laws in many states protect not only the audit report itself, but the underlying facts and data used to create the audit report.[36] Additionally, the policy states that the existence of an evidentiary privilege will result in increased litigation as the parties attempt to determine the scope of the privilege.[37] Finally, the policy notes that the incentives contained in the new policy obviate the need for a privilege.[38] The EPA points to the aforementioned survey, which

30. Policy Statement, *supra* note 1, at 66,711-12.
31. *Id.* at 66,711.
32. *Id.*
33. *Id.*
34. *Id.* at 66,709 (citing United States v. Nixon, 418 U.S. 683 (1974)). The Court in *Nixon*, pointed to the value to the public of having complete access to information so that courts are able to fulfill their truth-seeking function. *Id.*
35. *Id.*
36. *Id.* at 66,710.
37. *Id.*
38 *Id.*

indicates that companies would expand audit activities as a result of the incentives contained in the new policy.[39]

Assuming that the EPA will frequently discover violations, the incentives contained in the policy are more than adequate to encourage companies to conduct environmental audits and to comply with the penalty reduction conditions outlined in the policy. Companies that anticipate possible violations are faced with two rather stark alternatives: they can wait for the EPA to discover any violations and face imposition of the full range of civil and criminal penalties, or they can conduct audits and comply with the conditions outlined in the policy. If the cost of implementing an audit system, taking into account the likelihood that EPA will discover a violation, is estimated to be less than possible penalties, then companies should prefer to comply with the terms of the new policy.[40]

Recognition of a privilege for environmental audit documents fosters secrecy and increases litigation costs. Moreover, it also introduces a number of incalculable variables into the corporate decision-making processes. Most important, it is extremely difficult to calculate the extent to which a privilege will protect a company from liability.[41] In enforcement actions, federal and state agencies and citizens may be able to discover evidence of violations independently of the audit documents. While an environmental audit privilege will most certainly increase the costs of conducting an enforcement action, it does not decrease potential liability.

Despite the EPA's willingness to reduce penalties for companies that conduct audits and its opposition to the creation of an evidentiary privilege, a number of states have recently passed laws creating a privilege for environmental audits. The creation of such a privilege raises questions about the extent to which the privilege applies. It also raises important practical questions about the extent to which the existence of

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39. *Id.*

40. If the possibility that an agency or citizen will discover a violation is low, companies may be inclined to bear the risk of imposition of penalties rather than comply with the policy requirements. The inclination to risk imposition of penalties is significantly lower where company officials face criminal liability (including imprisonment). Hunt & Wilkins, *supra* note 15, at 369-75 (discussing the costs and benefits of environmental auditing).

41. *See* Policy Statement, *supra* note 1, at 66,710.

an environmental audit privilege in a particular state will alter the EPA enforcement practices in that state.[42]

III. JUDICIAL AND STATUTORY CREATION OF AN EVIDENTIARY PRIVILEGE FOR ENVIRONMENTAL AUDIT DOCUMENTS

The documents created as a result of environmental audits may be protected under more than one theory of privilege. A common method of avoiding discovery of environmental audit documents is to construct an environmental self-evaluation system so that the resulting documentation is covered by the attorney-client privilege.[43] Another potential means of protecting environmental audit documents from discovery is by claiming that such documents fall under a self-critical analysis privilege.[44]

A. Judicial Recognition of Privilege and its Application to Environmental Audits

The attorney-client privilege is one possible mechanism for protecting environmental audit documents from discovery. In order to claim an attorney-client privilege, a party must show: (1) that the party is, or sought to become, a client; (2) that a communication was made to an attorney or an attorney's subordinate and that the attorney was acting as a lawyer at the time the communication was made; (3) that the communication was made by a client outside of the presence of strangers for the purpose of receiving a legal opinion, advice, or assistance; and (4) that the privilege has been claimed and not waived.[45] These requirements indicate that in order to claim an attorney-client privilege for environmental audit documents, an attorney (retained or employed by the company) must supervise or direct the audit.[46] The audit must also be

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42. The interim policy statement indicated that the EPA might increase its activities in states where the privilege might interfere with effective enforcement of environmental laws. Interim Policy Statement, *supra* note 5, at 16,878. The final policy statement does not clearly indicate what action, if any, the EPA will take in states with environmental audit privileges. *See* Policy Statement, *supra* note 1.

43. Hunt & Wilkins, *supra* note 15, at 376-82, (discussing generally the application of the attorney-client privilege to environmental audit materials).

44. *See* Peter A. Gish, *The Self-Critical Analysis Privilege and Environmental Audit Reports*, 25 ENVTL. L. 73 (1995). This brief overview of possible theories of privilege for environmental audits is concerned only with privileges recognized by federal courts.

45. United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950). *United Shoe Machinery* contains the principle statement of the requirements for application of the attorney-client privilege. Hunt & Wilkins, *supra* note 15, at 377 n.42.

46. Hunt & Wilkins, *supra* note 15, at 377.

conducted so that the attorney will use it to provide legal advice.[47] The primary purpose of the audit must be to allow the attorney to advise the corporation on legal or regulatory matters. The audit results cannot be communicated to an attorney with the sole intent to conceal incriminating evidence.[48] Finally, the company must not have waived its privilege by, for instance, revealing the information contained in an audit to third parties.[49]

Although the attorney-client privilege is frequently invoked with respect to environmental audit documents, its application is limited. The attorney-client privilege will only protect the contents of the communications, not the underlying facts.[50] Moreover, the privilege will only apply where the information contained in the audit is presented to the attorney so that the attorney may give legal advice.[51] Thus, information that is not central to the attorney's legal advice is arguably excluded. It is also difficult to discern when, and to what extent, the privilege will apply.[52]

Federal courts have, in certain circumstances, recognized a critical self-analysis privilege. The most widespread recognition of such a privilege protects the self-evaluative discussions of doctors and hospital staff intended to improve the provision of medical care.[53] Courts have, however, applied the self-critical analysis privilege only in very limited circumstances. The privilege may apply if the party seeking to invoke the privilege can show that: (1) it gathered the information in the context of a self-critical evaluation; (2) there is a strong public interest in ensuring that such information is freely exchanged; and (3) the exchange of such information would be curtailed if it was not privileged.[54] An important limitation of the self-critical analysis privilege is its inapplicability in

47. *Id.*
48. *Id.* at 379-80.
49. *Id.* at 380
50. *Id.* at 378
51. *Id.* at 379.
52. *Id.* at 382.
53. *In re* Grand Jury Proceedings, 861 F. Supp. 386, 387 (D. Md. 1994); *see also* Bredice v. Doctors Hosp. Inc., 50 F.R.D. 249 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973).
54. *In re* Grand Jury Proceedings, 861 F. Supp. at 388 (quoting Dowling v. Am. Hawaii Cruises, Inc., 971 F.2d 423, 425-26 (9th Cir. 1992)).

cases where the government is seeking to discover documents that might otherwise be protected.[55]

In *Reichhold Chemicals, Inc. v. Textron, Inc.*,[56] the District Court for the Northern District of Florida applied the self-critical analysis privilege to protect environmental audit documents. The court found that environmental audits that evaluate past conduct and violations meet the criteria for application of the privilege.[57] It noted the strong public interest in promoting the voluntary identification and correction of pollution problems.[58] The court found that this interest outweighed the interest of the opposing party in obtaining the reports.[59] *Reichhold Chemicals* represents the only case in which environmental self-evaluation documents were held to be privileged under a self-critical analysis privilege. The *Reichhold* court did not hold that the privilege would apply to environmental audit documents containing information concerning a current violation.[60] It appears that federal courts will not readily extend the self-critical analysis privilege to environmental audit documents.[61] Thus, the self-critical analysis privilege is of limited usefulness to corporations seeking to keep environmental self-evaluation materials confidential.

B. Statutory Privileges under State Law

In response to the limited nature of judicially recognized privileges for environmental audit documents, business interests have made serious efforts at both the state and federal level to enact legislation creating both privileges for environmental audits and immunity for companies that conduct such audits.[62] In the 1994 and 1995 terms, many

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55. *Id.* (finding the self-critical analysis privilege inapplicable where the Food and Drug Administration sought discovery, even though the materials might have been discoverable by a private litigant).

56. 157 F.R.D. 522 (N.D. Fla. 1994).

57. *Id.* at 526.

58. *Id.*

59. *Id.* The court relied heavily on the retrospective nature of the documents, noting that they were not sufficiently relevant to the current action.

60. *Id.*

61. Gish, *supra* note 43, at 91.

62. *See* H.R. 1047, 104th Cong., 1st Sess. (1995); S. 582, 104th Cong., 1st Sess. (1995). The House bill provides for an environmental audit privilege, barring discovery unless it is expressly waived. Audit materials may also be discovered after an *in camera* judicial review if: (1) the party failed to initiate efforts to achieve compliance, (2) there are compelling circumstances justifying discovery, or (3) the audit was prepared for a fraudulent purpose or to avoid disclosure.

state legislatures considered environmental audit privilege bills. Currently, fourteen states have environmental audit privilege and/or immunity statutes.[63] The extent to which state laws protect companies from disclosure or from civil and criminal penalties varies from state to state. Generally, state statutes can be divided into two categories: (1) those providing a qualified privilege and immunity; and (2) the larger category, those providing a qualified privilege but no immunity.

1. Laws Providing a Limited Evidentiary Privilege

The largest number of state privilege laws provide a qualified privilege for environmental audit reports and documents related to the preparation of environmental audit reports.[64] Each of these laws contains a number of common elements. They uniformly provide a privilege for environmental audit documents.[65] A number of exceptions are then listed. All of the state privilege statutes provide that the privilege will not apply where it is expressly waived by the entity for whom the audit was conducted.[66] If a party challenges the applicability of the privilege, the statutes uniformly provide for an *in camera* review process.[67] After the

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The bill would not apply to disclosures already required by law. The bill also provides for immunity if the violation is disclosed and certain other requirements are met. The Senate bill is substantially the same. *See also* 140 CONG. REC. S10,942 (daily ed. Aug. 8, 1994) (statement of Sen. Hatfield) (discussing a previously introduced environmental audit privilege bill).

63. *State Privilege Legislation Multiplies in 1995; Predictions Differ About 1996, supra* note 4. These states are: Arkansas, Colorado, Idaho, Illinois, Indiana, Kansas, Kentucky, Minnesota, Mississippi, Oregon, Texas, Utah, Virginia, and Wyoming. *Id*; *See* ARK. CODE ANN. §§ 8-1-301 - 8-1-312 (Michie 1995); COLO. REV. STAT. § 13-25-126.5 (1995); 1995 Idaho Sess. Laws 359; ILL. REV. STAT. ch. 415, para. 5/52.2 (1995); IND. CODE ANN. §§ 13-10-3-1 - 13-10-3-12 (Burns 1995); 1995 Kan. Sess. Laws 204; KY. REV. STAT. ANN. § 224.01-040 (Michie/Bobbs-Merrill 1995); 1995 Minn. Laws 168; MISS. CODE ANN. § 49-2-71 (1995); OR. REV. STAT. § 468.963 (1995); 1995 Tex. Gen. Laws 219; UTAH CODE ANN. §§ 19-7-103 - 19-7-107 (1995); VA. CODE ANN. § 10.1-1198 (1995); WYO. STAT. §§ 35-11-1105 - 35-11-1106 (1995). At the time of this writing, a number of other state legislatures are considering such bills. The New Jersey Senate, for instance, recently passed a privilege bill. Valerie L. Brown & D. Todd Sidor, *Pending Legislation*, N.J. LAWYER, Jan. 1, 1996, at 4.

64. States having laws that provide a qualified privilege are Arkansas, Colorado, Illinois, Kentucky, Indiana, Mississippi, Oregon, and Utah. ARK. CODE ANN. §§ 8-1-301 - 8-1-312 (Michie 1995); COLO. REV. STAT. § 13-25-126.5 (1995); ILL. REV. STAT. ch. 415, para. 5/52.2 (1995); IND. CODE ANN. §§ 13-10-3-1 - 13-10-3-12 (Burns 1995); 1995 Kan. Sess. Laws 204; KY. REV. STAT. ANN. § 224.01-040 (Michie/Bobbs-Merrill 1995); MISS. CODE ANN. § 49-2-71 (1995); OR. REV. STAT. § 468.963 (1995); UTAH CODE ANN. §§ 19-7-103 - 19-7-107 (1995); VA. CODE ANN. § 10.1-1198 (1995).

65. *Id.*

66. *Id.*

67. *Id.*

court has conducted an *in camera* review, the privilege will not apply in cases where the court determines that the privilege is being asserted for a fraudulent purpose or where the court determines that the materials are not covered by the privilege.[68] In most states, the court may determine that the materials are not privileged if there is evidence that the regulated entity is not in compliance with environmental laws and evidence that the regulated entity has not taken the appropriate steps to remedy the lack of compliance.[69] This provision is aimed at forbidding companies from using the audit privilege to hide substandard or nonexistent corrective measures.[70]

The state laws vary in their description of the types of activities that a company must engage in to remedy any noncompliance in order for the privilege to apply. Illinois' statute, for instance, does not allow the regulated entity to claim a privilege where "[t]he material shows evidence of noncompliance with State, federal or local environmental laws, regulations, ordinances, permits, or orders, and the owner or operator failed to undertake appropriate corrective action or eliminate any reported violation within a reasonable time."[71] The Illinois law allocates the burden of proving that materials are privileged to the party asserting the privilege, but a party that wishes to challenge the application of the exception noted above must prove that the exception does not apply.[72] If the state attorney or the attorney general requests disclosure of the audit, the regulated entity must provide the date of the audit, the name of the party that conducted the audit, and the location of the facility.[73] It must also identify which portions of the audit it is claiming are privileged.[74] The regulated entity must file a petition requesting *in camera* review of the materials within thirty days or the privilege is waived.[75]

Utah's privilege law uses a slightly different approach. The Utah statute provides for substantially the same procedural mechanisms as the Illinois statute; however, the provisions regarding exceptions for noncompliance and lack of corrective action are more expansive:

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68. *Id.*
69. *Id.*
70. *Id.*
71. ILL. REV. STAT. ch. 415, para. 5/52.2(d)(2)(C) (1995).
72. *Id.* at para. 5/52.2(d)(3).
73. *Id.* at para. 5/52.2(d)(4)(A)-(C).
74. *Id.* at para. 5/52.2(d)(4)(D).
75. *Id.* at para. 5/52.2(e).

> No privilege exists under this rule: . . . If the environmental audit report was prepared to avoid disclosure of information in a compliance investigation or proceeding that was already underway and known to the person asserting the privilege. . . . If the information contained in the environmental audit report must be disclosed to avoid a clear and impending danger to public health or the environment outside of the facility property. . . . If the environmental audit report conclusively shows . . . [noncompliance] with an environmental law and . . . the person did not initiate appropriate efforts to achieve compliance within a reasonable amount of time. . . . [If there is more than one violation, or compliance will be costly] the person 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 into compliance within a reasonable amount of time.[76]

In cases where the privilege is challenged on grounds of failure to comply with environmental laws, the Utah statute allows a regulated entity to claim the privilege not only where it has initiated efforts to comply within a reasonable time but also where it institutes a comprehensive compliance and/or cleanup program.[77]

The ambiguity of the exception set out above points to the likelihood that adverse parties will expend a great deal of effort showing that the privilege does or does not apply. Both the Illinois and Utah laws require a company to engage in compliance efforts within a "reasonable time."[78] Because the statutes do not define "reasonable time" or

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76. UTAH CODE ANN. § 19-7-104(4)(d)(3)-(5) (1995). The statute does not privilege materials that the government requires the company to provide under existing law. It also does not privilege materials obtained from an independent source. These provisions are typical in state privilege statutes.

77. *Id.* at § 19-7-104(4)(d)(5). The statute is not precisely clear as to whether the comprehensive compliance program may be instituted after the privilege is challenged or whether it must be instituted before the challenge is brought. It can be read, however, to allow a regulated entity to wait until a challenge to the privilege is actually brought before beginning the compliance program.

78. *Id.*; ILL. REV. STAT. ch. 415, para. 5/52.2 (d)(2)(C) (1995).

"reasonable diligence,"[79] the judiciary will be responsible for deciding what constitutes a "reasonable time" on a case-by-case basis. Thus, a regulated entity cannot be entirely certain that the privilege will apply. Moreover, should an agency challenge the applicability of the privilege, both the regulated entity and the company will expend time and money arguing the issue, thereby reducing the amount of time and money available for addressing the violation.[80]

An additional problem with state-created privilege laws is the lack of uniformity among state laws. Businesses operating in more than one state cannot be certain that audit programs instituted throughout the company will be equally protected, even if all the states in which a company operates have enacted privilege statutes.[81] Creation of a federal law recognizing a privilege would address this concern. It would not, however, reduce the time and expense of demonstrating that the privilege does or does not apply.[82]

Another potentially time consuming aspect of state privilege laws is their scope. The types of documents protected by the privilege vary from state to state. Some states, Colorado, for example, cast a wide net: "'Environmental audit report' means any document, including any report, finding, communication, or opinion or any draft of a report, finding, communication, or opinion, related to and prepared as a result of a voluntary self-evaluation that is done in good faith."[83] Other states place more stringent limits on the content of environmental audit documents by indicating that documents must be prepared during the audit for the primary purpose of conducting the audit.[84] The definitions of "privileged material" invariably contain ambiguities. For instance, memoranda prepared by a business to assess whether or not to conduct an environmental audit may or may not be privileged, depending upon the language of the particular state law and/or the decision of a particular

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79. *See, e.g.*, OR. REV. STAT. § 468.963(3)(b)(2) (1995). A few state privilege laws provide some concrete guidance to the types of compliance measures that must be instituted in order for the privilege to apply. Indiana, for instance, provides that if the noncompliance is a failure to get a permit, an "appropriate effort" at achieving compliance is filing an application for the permit within 90 days from the time the noncompliance became known. IND. CODE ANN. §§ 13-10-3-4(b) (1995).

80. *See Companies Conducting Audits Despite Lack of Privilege Laws, Lawyer Says*, BNA ST. ENV'T DAILY, Apr. 28, 1995, *available in* LEXIS, Nexis Library, CURNWS File.

81. *Patchwork of State Privilege Laws Illuminates Need for Federal Policy*, BNA ST. ENV'T DAILY, June 23, 1995, *available in* LEXIS, Nexis Library, CURNWS File.

82. *Id.*

83. COLO. REV. STAT. § 13-25-126.5(2)(b) (1995).

84. *See, e.g.*, OR. REV. STAT. § 468.963(6)(b) (1995).

judge after an *in camera* review.[85] Ambiguity in the definition of the materials that may be subject to a privilege illustrates the uncertainty of the application of the privilege to a particular document. In many cases, a regulated entity will not be able to determine whether a given document is privileged.[86]

2. Laws Providing Both a Qualified Privilege and Immunity

In addition to a qualified privilege, several states provide immunity from civil and criminal prosecution in cases where the company elects to disclose violations.[87] These laws place several conditions on application of the privilege. Texas' statute is typical: "a person who makes a voluntary disclosure of a violation of an environmental or health and safety law is immune from any administrative, civil, or criminal penalty for the violation disclosed."[88]

In order for a disclosure to be "voluntary," companies typically must: (1) disclose the violation promptly after it is discovered; (2) disclose the violation in writing; (3) disclose the violation prior to the initiation of an investigation by an agency; (4) discover the violation pursuant to an environmental or health and safety audit; (5) initiate appropriate efforts to achieve compliance; and (6) cooperate with agency officials.[89] Additionally, the violation cannot have caused substantial harm to off site persons or property and cannot have been reported pursuant to an enforcement order or decree.[90] Immunity is not provided where the regulated entity intentionally or knowingly committed the violation or if the violation was committed recklessly and substantial off-site harm resulted.[91]

Minnesota's immunity law differs from other states' immunity laws. The Minnesota law establishes a pilot program for voluntary

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85. After an *in camera* review, a judge may determine that materials are not covered by the privilege. *See, e.g.*, ARK. CODE ANN. § 8-1-307 (Michie 1995).

86. *Patchwork of State Privilege Laws Illuminates Need for Federal Policy*, *supra* note 78 (suggesting that companies should structure audits to fall well within the privilege).

87. These states are: Idaho, 1995 Idaho Sess. Laws. 359; Kansas, 1995 Kan. Sess. Laws 204; Minnesota, 1995 Minn. Laws 168; Texas, 1995 Tex. Gen. Laws 219; Virginia, VA. CODE ANN. § 10.1-1198 (1995); and Wyoming, WYO. STAT. §§ 35-11-1105 - 35-11-1106 (1995).

88. 1995 Tex. Gen. Laws 219(10)(a).

89. *Id.* at 219 (10)(b).

90. *Id.* at 219 (10)(b)-(c).

91. *Id.* at 219 (10)(d).

compliance.[92] In order to participate, a regulated entity must not have been the subject of an enforcement action resulting in a penalty for at least one year prior to registration in the pilot program.[93] Program participants are required to conduct an environmental audit and prepare a pollution prevention plan.[94] Regulated entities must then submit a report to the Minnesota Pollution Control Agency within forty-five days from the time the environmental audit was completed.[95] The report must disclose all violations at the facility and the steps that will be taken by the facility to remedy the violations.[96] If the regulated entity will take more than ninety days to correct the violation, the report must contain a performance schedule that identifies the time needed to remedy the violation.[97]

The Minnesota Pollution Control Agency must make public the names of the companies that have submitted reports and the time period identified in any performance schedule.[98] If the identified remedy or performance schedule is approved, the Pollution Control Agency may not pursue an enforcement action for ninety days.[99] And if the remedy identified in the report is completed within the amount of time identified, the state may not impose civil or criminal penalties.[100] If a regulated entity complies with the program requirements, the agency may not access the environmental audit documents except in accordance with its policy.[101] Additionally, the environmental audit documents are privileged as to parties other than the state if a regulated entity complies with the program requirements.[102]

Although Minnesota does provide an evidentiary privilege in some situations, the focus of Minnesota's law is immunity for companies

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92. 1995 Minn. Ch. Law 168 § 8.

93. *Id.* § 10.

94. *Id.* Facilities that are not "major facilities" within the meaning of the statute are required to identify pollution prevention opportunities. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* § 11.

99. *Id.* § 13.

100. *Id.* Section 12 lists the criteria used by the Pollution Control Agency in deciding whether a submitted report is adequate. In deciding whether a report is reasonable, the agency must take into account the nature of the violations, the environmental and health consequences, the economic circumstances of the facility, the availability of equipment and material, and the time needed to remedy the violation. *Id.* § 12.

101. *Id.* § 15.

102. *Id.*

that conduct audits. In order for a company to be eligible to participate in the program, and thus acquire immunity, it must first demonstrate that it does not habitually violate environmental regulations.[103] It must also demonstrate its willingness and ability to comply by working to correct any violations.[104] By placing the focus of the program on immunity rather that privilege, the incentives to participate and comply are more concrete and certain than any incentive created by a privilege law. Uncertainty is, however, introduced into the statute by the wide discretion given the agency to approve or disapprove compliance plans.

The privilege provided by the Minnesota statute is, in many respects, superfluous. It does not apply to companies that are not participating in the pilot program, and it does not apply to the Pollution Control Agency except to the extent circumscribed by the agency's environmental audit policy. The privilege will, however, hamper the objectives of the policy in cases where the agency has approved compliance programs, but the violation nonetheless causes harm to private individuals.[105]

Immunity from civil and criminal penalties is problematic in a number of respects. First, it derogates the widely held notion that polluters should be punished.[106] Second, in states where immunity is defined in broad terms, there is the possibility that immunity will be granted to individuals and businesses that have intentionally or recklessly violated environmental laws.[107] Broadly drafted immunity laws also raise the possibility of inconsistent application.[108] Nevertheless, limited immunity statutes that are carefully drafted provide a clear incentive to regulated entities to conduct audits and otherwise structure their activities to ensure compliance. Moreover, limited immunity statutes provide a greater incentive to remedy violations because immunity applies regardless of whether or not the information contained in environmental audit documents is disclosed.

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103. *Id.*

104. *Id.* § 10.

105. *Id.* § 15. If the Pollution Control Agency has approved a compliance program that is sufficiently thorough to prevent additional harm, the privilege will prevent citizens from discovering documents that might be relevant to the prosecution of, for example, a tort action.

106. Interim Policy Statement, *supra* note 5, at 16,878.

107. *Id.*

108. *Id.*

IV. APPLICATION OF STATE CREATED PRIVILEGES IN STATE AND FEDERAL COURT: THE LIKELIHOOD THAT THE PRIVILEGE WILL APPLY

Recently created environmental audit privilege statutes may increase the amount of litigation over the scope and application of the privilege. It is unlikely, however, that state-created privileges will provide broad protection against the discovery and admissibility of environmental audit documents. It is clear that state-created privileges will apply where the audit discovered a violation within the state, and a claim is brought in state court under state law. A state privilege law will also apply in diversity cases (i.e., where the court has jurisdiction based on the fact that the parties live in different states and no federal law is at issue) where the claim is based solely on state law, and the state's choice of law rules mandate that the state created privilege (or the privilege recognized by another state) will apply.[109] The privilege will not apply in federal court to claims based on federal law. Moreover, the privilege will not apply to cases brought in federal court where the court has supplemental jurisdiction over state claims as well as federal claims.

A. The Choice Between State and Federal Law in Federal Courts

The beginning point for determining whether or not an evidentiary privilege applies in federal court is Federal Rule of Evidence 501, which provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress . . . the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege . . . shall be determined in accordance with State law.[110]

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109. 28 U.S.C. § 1332 (1995) (providing federal court jurisdiction where there is diversity of citizenship).

110. FED. R. EVID. 501.

Despite the lobbying efforts of regulated entities, Congress has not passed an environmental audit privilege law.[111] Moreover, although the self-critical analysis privilege discussed above has occasionally been applied in the environmental audit context, it is unlikely that its application will be expanded.[112] Thus, federal courts do not recognize an environmental audit privilege unless the court's jurisdiction is based on diversity.

In suits filed in federal court based on diversity, all of the "element[s] of a claim or defense" which supply the "rule[s] of decision" are based on state law.[113] Thus, state privilege laws will apply in diversity cases. In contrast, where the court has jurisdiction based on a federal law, state law privileges will not apply because the "element[s] of a claim or defense" which supply the "rule[s] of decision" will be a matter of federal law.[114] The court in such cases should rely on privileges recognized by federal common law, or created by federal statutes.

The more difficult case is where federal courts have supplemental jurisdiction. If the federal court has original jurisdiction over a claim, it also has jurisdiction over other claims related to the original federal claim.[115] In such a situation, Rule 501 seems to require the court to apply the state created privilege to state claims but not to federal claims. Application of a privilege to one claim but not another in the same litigation is contrary to the reasons for the existence of a privilege in the first place.[116] It is also impracticable. The Senate Judiciary Committee suggested at the time Rule 501 was drafted that when the court is hearing both state and federal claims, the court should apply the privilege rules derived from federal common law.[117] Courts have uniformly followed this rule. In *von Bulow by Auersperg v. von Bulow*,[118] the federal court issued a subpoena for records prepared during the course of a criminal trial. The defendant, in challenging a contempt order, claimed a

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111. *See supra* note 60.

112. Gish, *supra* note 43, at 74.

113. FED. R. EVID. 501.

114. 28 U.S.C. § 1331 (1995) (providing federal question jurisdiction); FED. R. EVID. 501.

115. 28 U.S.C. § 1391 (1995).

116. *See generally* Earl C. Dudley, Jr., *Federalism and Federal Rule of Evidence 501: Privilege and Vertical Choice of Law*, 82 GEO. L.J. 1781 (1994) (discussing the impetus for providing privileges generally).

117. S. REP. NO. 1277, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7059.

118. 811 F.2d 136 (2d. Cir. 1987).

journalist's privilege recognized under state law.[119] The underlying charge was based on one federal law claim and nine pendent state law claims.[120] The court nevertheless concluded that federal common law privilege rules applied.[121]

Similarly, in *Reichhold Chemicals, Inc. v. Textron*, *Inc*.,[122] the court considered whether environmental audit documents that were not discoverable under federal law were discoverable under state law.[123] The court found that in cases containing both federal and state claims, the federal law of privileges applies.[124] Since the court in *Reichhold* recognized a self-critical analysis privilege under federal law, it applied to all claims including the pendent claims under which the materials would have been discoverable under state law.[125]

Despite the fact that the courts have applied federal privilege law to cases where the court has supplemental jurisdiction under state law claims, Rule 501 by its terms makes it possible for the courts to apply federal privilege law to federal claims, while at the same time applying state privilege law to state claims. If courts contemplate such a course, they may be guided by a recognition of the underlying policies of environmental protection laws in general. There are strong policy reasons favoring imposition of federal rather than state evidentiary law regarding an environmental audit privilege (i.e., not recognizing the privilege). One such reason would be uniformity in the application of environmental protection laws to prevent, among other things, the unfair competitive advantages gained by businesses operating in areas with less stringent environmental laws.[126]

If courts continue to apply federal privilege laws in cases where there are pendent state claims, state evidentiary privilege laws will

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119. *Id.* at 138.
120. *Id.* at 139.
121. *Id.* at 141.
122. 157 F.R.D. 522 (N.D. Fla. 1994).
123. *Id.* at 527.
124. *Id.* at 528.
125. *Id.*; *see also* Wm. T. Thompson Co. v. General Nutrition Corp., Inc., 671 F.2d 100 (3d Cir. 1982) (finding that a state recognized accountant-client privilege did not apply in cases where the court exercised supplemental jurisdiction over state claims).
126. Dudley, *supra* note 111. Dudley argues that the choice-of-law analysis should be based on whether the extra-courtroom behavior protected by the privilege law is governed by federal or state law. In the case of an environmental audit privilege, the underlying behavior sought to be affected is largely derived from federal statutory law. Moreover, most state environmental protection laws exist as a direct result of federal environmental laws and mandates.

become even less applicable due to the existence of citizen suit provisions in many major environmental statutes.[127] In many cases, citizens who wish to bring state law claims based in tort (nuisance, negligence, etc.) will be able to bring their suit in federal court because they will also have a claim under a federal environmental statute. If citizens have a cause of action under a federal environmental law, the federal court may also exercise supplemental jurisdiction over tort claims based on state law.[128] It is possible that continued recognition of state privilege laws will result in an increased tendency of plaintiffs to take cases based principally in state tort law to federal court under federal environmental statutes.

B. Choice of Law in Diversity Actions: Which State's Privilege Law Applies?

In *Klaxon Co. v. Stentor Elec. Mfg., Co., Inc.*,[129] the Supreme Court held that federal courts sitting in diversity must apply the conflict-of-laws rules of the state in which the court sits.[130] This principle raises important questions about the applicability of state created privileges in diversity cases. It is entirely possible that a regulated entity will perform an act in a state that recognizes an environmental audit privilege, while the act causes harm to individuals residing in a state that does not recognize a privilege. Moreover, a federal court may exercise diversity jurisdiction over a corporation even if the facility that gave rise to the harm is located in the same state as the plaintiff.[131] If an action is brought in a federal court located in a state that does not recognize the privilege, the federal court will apply that state's choice-of-law rules.[132] This means that the privilege will not apply unless the state in which the

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127. *See, e.g.*, Clean Air Act, 42 U.S.C. § 7604 (1995); Clean Water Act 33 U.S.C. § 1365 (1986).

128. 28 U.S.C. § 1362 (1995). "[D]istrict courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy . . . ." *Id.*

129. 313 U.S. 487 (1941).

130. *Id.* at 496.

131. 28 U.S.C. § 1332(c) (1995). A corporation is deemed a citizen of both the state in which it is incorporated and the state where it has its principle place of business. *Id.* Courts have employed various methods for determining whether a corporation has its principle place of business in a particular state. One such method is to ask where the corporate "nerve center" is. *See, e.g.*, Toms v. Country Quality Meats, Inc., 610 F.2d 313 (5th Cir. 1980). A corporation that operates plants in several states may be subject to diversity jurisdiction even though the plaintiff is a citizen of the state in which the harm occurs. This is true because the court may determine that the plant is not the "principle place of business" of the corporation.

132. *Klaxon Co.*, 313 U.S. at 496.

action is brought would apply the privilege to actions brought in its own state courts.[133]

The "horizontal" choice-of-law question is a difficult one, and it is made more difficult by the relative novelty of environmental audit privilege statutes. Under Restatement principles, the privilege recognized in the state where the communication occurred (i.e., where the audit took place) would take precedence over the privilege laws of the state in which an action is brought.[134] The argument in support of such a rule is that the interests of the state recognizing the privilege are frustrated when the privilege is not applied in the forum state, and the forum state's interests in not recognizing the privilege usually do not outweigh the interests of the "communication" state.[135] In litigation where choice-of-law questions are likely to arise concerning the applicability of an environmental audit privilege, the interests of the forum state will often outweigh (or at least equal) the interests of the "communication" state in applying the privilege.[136]

V. POSSIBLE RAMIFICATIONS OF STATE CREATED PRIVILEGES

The above discussion reveals that state created evidentiary privileges will have a limited impact in cases brought in federal court.[137] It also illustrates that their effect in state court cases is uncertain. Any incentive provided by state privileges to encourage voluntary compliance with environmental laws is ameliorated by the uncertainty of their application, and the substantial costs of litigating the issue of whether or not the privilege applies.[138] Moreover, application of the privilege to a particular cases does not mean that a business will not be found liable—although this may be the practical effect in cases where the plaintiffs have limited resources to conduct discovery by other means.

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133. *See* Pritchard-Keang Nam Corp. v. Jaworski, 751 F.2d 277, 281 n.4 (8th Cir. 1984) (indicating that where the forum state does not have a particular choice-of-law provision, the federal court will look to the actual law of the forum state).

134. David W. Louisell & Christopher B. Mueller, FEDERAL EVIDENCE § 205, 721 (1985) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139(1) (1971)).

135. *Id.* at 713.

136. *Id.* An in-depth analysis of the application of choice-of-law rules to environmental audit privileges as they apply in particular states is beyond the scope of this comment.

137. There is a question as to whether or not privilege laws make much difference at all. A LEXIS search conducted in January of 1996 revealed no reported cases citing to a state environmental audit privilege statute.

138. *See* Policy Statement, *supra* note 1, at 66,709.

Despite the limited potential of environmental audit privileges to provide incentives for voluntary compliance, state privilege laws may have a number of negative effects. One such effect is the possibility that the EPA will increase its enforcement efforts in states that have enacted privilege laws.[139] In its final policy statement on environmental auditing, the EPA voiced its strong opposition to state created privileges for environmental audits.[140] The interim policy statement indicated a number of situations in which the EPA might increase enforcement actions in order to maintain consistency in environmental protection efforts.[141] The interim policy indicated that the EPA would watch enforcement activities more closely in states that have audit privilege laws.[142] The interim report also stated that the EPA would consider increasing federal involvement when privilege laws would prevent the state from obtaining information concerning criminal liability and the facts needed to establish the existence of a violation.[143] It also indicated that the EPA might increase enforcement efforts where the state privilege law prevents appropriate penalties for substantial endangerment of human health and the environment, appropriate criminal penalties, and timely correction of violations.[144] The EPA indicated in the interim policy that it would work with the states to address these concerns.[145] Although the final policy retains the interim policy's opposition to state created privileges, it does not indicate that the EPA will increase its activities in states having an environmental audit privilege.[146] Despite the EPA's retreat from its earlier position, it remains possible that the EPA will increase its enforcement efforts in states with privilege laws.

Another likely effect of privilege laws is the potential for increased public opposition to laws that discourage openness about

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139. Interim Policy Statement, *supra* note 5, at 16,878.

140. *Id.*; Policy Statement, *supra* note 1, at 66,709. For example, as the Virginia legislature considered the passage of an environmental audit privilege bill, the EPA notified the Virginia Department of Environmental Quality that it would increase federal enforcement in Virginia. *State Lawmakers Ask for Relief From EPA Enforcement Scrutiny*, BNA DAILY REP. FOR EXECUTIVES, Oct. 25, 1995, at A206.

141. *See State Lawmakers Ask For Relief From EPA Enforcement Scrutiny*, *supra* note 133.

142. Interim Policy Statement, *supra* note 5, at 16,878.

143. *Id.*

144. *Id.*

145. *Id.*

146. Policy Statement, *supra* note 1, at 66,709.

environmental problems.[147] Privilege laws are designed precisely to keep information from agencies and the government. Some states' privilege laws are, however, drafted in such a way that both the public and government agencies will not have access to information about violations that pose a serious threat to health or the environment.[148]

State-created privilege laws may also increase the amount of litigation over the issue of when the privilege applies.[149] State privilege laws are drafted in broad and ambiguous terms.[150] There are a number of borderline situations where a business will not be able to predict accurately whether the privilege will apply.[151] Likewise, agencies and citizens will not be able to predict what materials are covered by the privilege.[152] State privilege laws will shift the emphasis in any enforcement action from remedial and compliance efforts to litigation over the discoverability of potentially privileged materials.[153] It is also important to point out in this regard that evidentiary privileges do not provide a guarantee to businesses that they will not be subject to penalties or liability.

Yet another potential problem with state-created privileges is the lack of uniformity among state privilege laws. Companies that operate in more than one state may be protected by the privilege in one state but not another. A number of commentators have called for uniform national legislation creating a privilege.[154] Even if Congress were to pass a privilege law, uniformity of application would not be assured. In light of the ambiguities inherent in privilege statutes, judicial decisions would necessarily vary, depending on the facts of each case. Several years or

147. *Id.* (citing United States v. Nixon, 418 U.S. 683 (1974) for the proposition that there is a strong public policy encouraging disclosure of evidence); *see also State Privilege Legislation Multiplies in 1995; Predictions Differ About 1996*, *supra* note 4.

148. A few statutes attempt to overcome this problem by stating that the privilege does not apply where there is threat to health or the environment. Utah's law, for instance, provides an exception "[i]f the information contained in the environmental audit report must be disclosed to avoid a clear and impending danger to public health or the environment outside of the facility property." UTAH CODE ANN. § 19-7-104(4)(d)(4). Most state privilege laws do not contain such provisions.

149. Policy Statement, *supra* note 1, at 66,710.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *See Companies Conducting Audits Despite Lack of Privilege Laws, Lawyer Says*, *supra* note 77; *Patchwork of State Privilege Laws Illuminates Need for Federal Policy*, *supra* note 78.

decades would pass before a sufficient body of case law developed to ensure the application of privilege laws with any regularity.

VI. LIMITED IMMUNITY IN THE ABSENCE OF AN EVIDENTIARY PRIVILEGE

The EPA's final policy statement on environmental auditing encourages states to develop laws that are consistent with the new policy.[155] Carefully drafted statutes that provide immunity in certain situations would supplement, rather than counter the EPA's policy. Moreover, limited immunity provides incentives to conduct audits that are far less ambiguous than the uncertain application of environmental audit privileges.[156] The EPA's policy statement provides incentives for a company to conduct audits without rewarding companies that consistently violate environmental laws. The final policy fails, however, to address a number of industry concerns. State laws can potentially address these concerns while maintaining consistency with the EPA policy.

Business interests have indicated that the EPA policy falls short of addressing several of their concerns. Business interests have expressed concern that even though companies that conduct environmental audits and otherwise comply with policy requirements will face reduced penalties, the policy does not reduce the ability of private litigants to pursue the full range of available penalties and damage awards.[157] Business interests have also pointed to several ambiguities in the policy. For instance, the requirement that violations be disclosed within ten days of discovery is difficult to apply when it is uncertain that a violation has occurred.[158]

State legislatures could address these concerns with legislation granting limited immunity in certain situations. Concern over the

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155. Policy Statement, *supra* note 1, at 66,712.

156. *See Former DOJ Official Says Law Needed to Grant Immunity to Firms that Audit*, BNA NAT'L ENV'T DAILY, Aug. 1, 1994, *available in* LEXIS, Nexis Library, CURNWS File.

157. *See* Amy A. Fraenkel, *EPA Issues Interim Policy on Voluntary Audits and Disclosure*, N.Y. Envt'l Compliance Update, May 1995, *available in* LEXIS, Nexis Library, CURNWS File; Channing J. Martin, *EPA Says No to Audit Privilege*, VA. ENVTL. COMPLIANCE UPDATE, May 1995, *available in* LEXIS, Nexis Library, CURNWS File; *State Privilege Legislation Multiplies in 1995; Predictions Differ About 1996*, *supra* note 4.

158. *See supra* note 150; *Final EPA Policy on Voluntary Audits Draws Praise, Criticism,* BNA NAT'L ENV'T DAILY, Jan. 16, 1996, *available in* LEXIS, Nexis Library, CURNWS File; Policy Statement, *supra* note 1, at 66,711.

ambiguous terms of the policy can be addressed by supplementing EPA policy with state laws and regulations that spell out in concrete terms when immunity will apply. State agency discretion in determining when a regulated entity is in compliance should be minimized. Kansas' immunity provisions, for instance, provide a rebuttable presumption of immunity from civil, administrative, and criminal penalties where disclosures are made "promptly" and where the entity making the disclosure initiates remedial action in a "diligent manner."[159] The terminology of the Kansas statute leaves the interpretation of prompt disclosure and diligent action up to agencies and the courts. Thus, there is a distinct possibility that the immunity law will be applied inconsistently.

Statutes granting limited immunity should specify with as much clarity as possible the necessary steps a regulated entity must take in order for the immunity to apply. Wherever possible, specific time limits for disclosure and cleanup should be provided. Minnesota's immunity provisions approach this type of specificity, and thus might operate as a model for immunity provisions enacted in the future.[160] The Minnesota law requires companies participating in the audit program to disclose violations within forty-five days after the completion of the audit.[161] Minnesota businesses must remedy violations within ninety days or, in certain circumstances, within a time period approved by the Minnesota Pollution Control Agency.[162] Such provisions minimize any uncertainty over whether immunity will be granted.

Industry's other major concern, private party lawsuits, need not be addressed by providing a privilege for environmental audit documents. Instead, state statutes could limit or eliminate the ability of private litigants to seek punitive damages in cases where a business has been granted immunity from state-imposed penalties. A company that complies with the requirements of a qualified immunity statute should, in theory, not be subject to punitive damages in any case. Such a provision will limit the exposure of companies that conduct environmental audits, while still allowing private parties to recover any actual losses they have suffered. Further, a provision limiting the imposition of punitive damages is consistent with the EPA's policy of eliminating the gravity

159. Kan. Sess. Laws 204, § 7.
160. 1995 Minn. Laws 168, § 10.
161. *Id.*
162. *Id.* § 13.

component of penalties, while retaining the right to impose penalties that negate the economic benefits of noncompliance.[163]

Immunity laws, in addition to eliminating uncertainty, should not in any way work to advantage companies that fail to comply with environmental laws. In particular, penalty reductions should not allow companies to benefit economically from noncompliance. Moreover, immunity laws should not grant immunity to companies that repeatedly violate environmental laws. Repeat violations are a clear indication that a business has not taken steps to prevent violations, and companies that fail to take appropriate corrective action should not be rewarded. Businesses should not be immune from the imposition of penalties for intentional and reckless criminal violations.[164]

In general, carefully drafted statutes providing limited immunity from imposition of civil and criminal penalties present a greater potential than privilege statutes for inducing companies to conduct environmental audits, because such statutes are more certain in their application. Immunity statutes are able to address the concerns that the EPA's policy does not address. Further, unlike privilege statutes, limited immunity for companies that conduct audits is consistent with, and may further, the EPA's environmental audit policy.

VII. CONCLUSION

The EPA's policy statement provides several incentives for industry to conduct environmental audits. Recently passed state laws granting an evidentiary privilege to environmental audit documents are contrary to the EPA's policy. State privilege laws are of limited use in providing incentives to industry to conduct environmental audits. State privilege statutes will not apply in federal courts where the court has federal question jurisdiction. Moreover, the application of privilege statutes is uncertain in diversity jurisdiction cases and in cases brought in state court. In any event, privilege legislation will engender a substantial amount of litigation, imposing a large cost on businesses, agencies, courts, and private litigants. Privilege legislation does not guarantee that penalties will not be imposed, even where a company has made every good faith effort to comply with environmental laws.

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163. Policy Statement, *supra* note 1, at 66,711.

164. *See id.* at 66,707.

For states that wish to provide clear incentives to encourage industry to conduct environmental audits, statutes providing a limited immunity and no privilege will be more effective. The incentives in such statutes are not subject to the types of uncertainty encountered in privilege statutes. Clearly drafted statutes will also reduce litigation over issues of applicability. Additionally, statutes granting limited immunity in certain circumstances would be consistent with, and expand upon, the EPA's environmental audit policy.

Industry's concern with the availability of environmental audit documents to private litigants need not be addressed through privilege laws. A better means of addressing this concern is to limit the availability of punitive damages in cases where a violation has caused harm, but where the regulated entity has complied with the terms of a limited immunity statute. At a minimum, limited immunity statutes should require disclosure of the violation and prompt correction of the problem. They should also require the regulated entity to demonstrate that it has not experienced similar violations in the past, and that it has taken steps to remedy the problem. If a regulated entity complies with these provisions, a limitation on punitive damages would be consistent with both the EPA's policy and with the general proposition that punitive damages should not be levied against parties that act diligently to avoid and remedy violations. Most importantly, plaintiffs would be able to pursue

remedies for actual harms without overcoming the often insurmountable obstacle presented by the inability to discover relevant information.

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