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The New Evidentiary Privilege for Environmental Audit Reports: Making the Worst of a Bad Situation

Mia Anna Mazza

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The New Evidentiary Privilege for Environmental Audit Reports:
Making the Worst of a Bad Situation

Mia Anna Mazza*

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INTRODUCTION

During the 1980s and early '90s, the number and complexity of environmental laws and regulations affecting the actions of businesses increased drastically.\(^1\) Growing public awareness of and concern over environmental contamination, and the creation of new cleanup liabilities under the Superfund law, compelled owners and managers of industrial companies to try to discover actual or potential problem areas before they were discovered by someone else.\(^2\) For many industrial

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2. COALITION FOR IMPROVED ENVIRONMENTAL AUDITS, DRAFT CIEA WHITE PAPER SUPPORTING A QUALIFIED SELF-EVALUATION PRIVILEGE FOR INTERNAL ENVIRONMENTAL AUDITS 1 (1994) [hereinafter CIEA].
companies, voluntary environmental audits became necessary to assure reasonable compliance with environmental laws and to reduce the risk of penalties.\textsuperscript{3}

During the same period, criminal penalties were being incorporated into both new and existing legislation. Based on the legislative histories of these laws, it appears that Congress was extremely concerned about public health and safety goals, and "deeply believed that the use of powerful enforcement provisions was crucial to successful implementation of [public health and safety goals]."\textsuperscript{4} For example, in the deliberations over the Clean Air Act in 1990, Senator John Chafee declared:

If we want to do something about the better health of the citizens of our country, or to improve the environment, the land that we love, and pass it on in better shape to our children and grandchildren, then it is absolutely essential that there be . . . strong enforcement provisions in this Bill.\textsuperscript{5}

The Bill Senator Chafee was advocating created two new air pollution crimes: "negligent endangerment," carrying a punishment of up to one year in prison,\textsuperscript{6} and "knowing endangerment," carrying a punishment of up to fifteen years in prison.\textsuperscript{7}

Recognizing that criminal penalties have the potential for achieving greater general deterrence than the more traditional civil or administrative remedies, the federal government hired its first environmental crime investigators in 1982, and dedicated a small unit of prosecutors to this investigatory effort.\textsuperscript{8} Subsequently, a series of federal court decisions heightened the deterrent effect of criminal penalties by relaxing the scienter requisite for securing a criminal conviction of a corporate officer, even under those laws requiring a showing of "wilfulness."\textsuperscript{9}

\textsuperscript{3} Id.


\textsuperscript{6} Clean Air Act § 113(c)(4), 42 U.S.C.A. § 7413(c)(4) (West 1995).

\textsuperscript{7} Clean Air Act § 113(c)(5), 42 U.S.C.A. § 7413(c)(5) (West 1995).

\textsuperscript{8} Helen J. Brunner, Environmental Criminal Enforcement: A Retrospective View, 22 Envtl. L. 1315, 1315 (1992).

\textsuperscript{9} See generally Barber, supra note 4. For further analysis of the erosion of mens rea requirements for criminal environmental laws, see also Kevin L. Colbert, Considerations of the Scienter Requirement and the Responsible Corporate Officer Doctrine for Knowing Violations of Environmental Statutes, 33 S. Tex. L.J. 699 (1992); Jane F. Barrett & Veronica M. Clarke, Perspectives on the Knowledge Requirement of Section 6928(d) of RCRA after United States v. Dee, 59 Geo. Wash. L. Rev. 862 (1991); Truxtun Hare, Reluctant
These developments in environmental criminal law and enforcement have created a conundrum for the officers and owners of companies regulated by environmental laws. On one hand, they are all but required to conduct environmental audits in order to learn of environmental violations and thereafter come into compliance with the law. On the other hand, an audit report revealing violations could act as a "smoking gun" which provides just the right evidence to convince a prosecutor to turn a civil case into a criminal one. Corporate officers and owners are faced with the question of whether it is more dangerous to know or not to know about areas of noncompliance, given that it is nearly impossible for a company to be in continual and total compliance with the myriad of environmental laws and regulations in effect.

This Comment examines the efforts of federal and state legislatures to relieve businesses of this dilemma by creating an evidentiary privilege for environmental audits. Legislators are attracted to this approach because it appears to solve the problem without requiring any substantive changes to existing environmental laws. As of this writing, fourteen states have passed laws creating environmental audit privileges. Nearly every other state legislature and the United States Congress are considering bills that would create the same type of privilege.

Although it may be more politically acceptable than tampering with established environmental laws, the environmental audit privilege is an ill-conceived "solution" to the environmental audit problem. In this Comment, I will illustrate the ways in which the privilege rep-


10. See infra part I.B.

11. See Lavelle, supra note 1, at S1 (citing a nationwide survey of corporate general counsels of which only 30 percent felt full compliance with environmental laws was possible).

12. These states are Arkansas, Colorado, Idaho, Illinois, Indiana, Kansas, Kentucky, Minnesota, Mississippi, Oregon, Texas, Utah, Virginia, and Wyoming. Cheryl Hogue, Audit Legislation Gains in States, but Some Predict Slowdown in Future, 26 Env't Rep. (BNA) No. 18, at 882 (Sep. 1, 1995). In establishing "environmental audit privileges," the different states generally rely, to varying degrees, on two primary weapons. One approach is to adopt a true evidentiary privilege for environmental audit reports, barring them from discovery and other stages of litigation in all criminal, civil, and administrative actions. A second approach is to provide certain levels of immunity for transgressions brought to light by an environmental audit and promptly disclosed to authority. This paper focuses on the first of these two approaches as represented by the Oregon environmental audit privilege statute. The second approach, while touched upon in this paper, see infra part II.C, warrants its own detailed discussion in a separate paper.

13. As of September 1995, environmental audit privilege bills were introduced in 34 of the 45 states that did not have such laws by the end of 1994. Id. See also State Audit Legislation Could Cause Programs to Revert to EPA, Browner Says, Daily Env't Rep. (BNA) No. 59 (Mar. 28 1995), available in WESTLAW, BNA-ENV Database.
resresents a dramatic break with fundamental traditions of the law of evidence. I will also show how the exceptions to the privilege threaten to swallow the rule and entirely undermine the policy upon which it was created. Finally, I will outline the efforts of federal and state courts and regulatory agencies to use other means to protect environmental audit reports, methods which provide alternative models for future policymaking efforts in this area of law.

I

BACKGROUND

A. Environmental Crime and Its Prosecution

"White collar" crime has been recognized for a number of decades as a distinct class of crime, as are "street" or "violent" crimes. Environmental crime is a newly recognized form of white collar crime. According to a 1984 study, industrial environmental crime is considered by the public to be worse than armed robbery, bribing a public official, heroin smuggling, or skyjacking. For this reason, prosecutors have increasingly made efforts to enforce the state and federal criminal laws against environmental offenders in much the same way that such laws are enforced against defendants in the more traditional crimes.

Over the brief history of environmental crime prosecution in the United States, prosecutors have learned that there is no clear difference between the conduct involved in environmental crime and the more traditional felonies: "[t]he acts are generally willful, deliberate, rational, premeditated and committed with some forethought over a long period of time. . . . [N]o perceptible defense is generally offered—except that compliance was too expensive." As with most cases of white collar crime, however, the perpetrators of environmental crime are generally "educated and privileged people," "oriented basically to legitimate and respectable careers." Prosecutors therefore feel that the public has been particularly cheated and betrayed by

15. Judson W. Starr, Countering Environmental Crimes, 13 ENVTL. AFF. 379, 380 n.1. (citing a U.S. Department of Justice, Bureau of Justice Statistics Bulletin survey in which 60,000 people were asked to rank severity of several crimes).
16. See id. at 381.
17. Id. at 382.
18. Id.
19. Sutherland, supra note 14, at 35. As early as 1940, Sutherland wrote: "[b]ecause of their social status [white collar criminals] have a loud voice in determining what goes into the statutes and how the criminal law as it affects themselves is implemented and administered." Id.
defendants in environmental crime cases. "Individuals who commit environmental crimes—particularly those involving hazardous waste—commonly demonstrate a complete disrespect for the law and disregard for the safety of others, and are motivated by a desire to enjoy the substantial profits that can be derived from such illegal activities." 20

When a federal, state, or local prosecutor or regulatory agency becomes aware of a criminal environmental violation, he, she, or it has the "prosecutorial discretion" to file either a civil or a criminal complaint against the violator. The governments have recognized that criminal penalties have the potential for greater general deterrence against criminal violations than the more traditional civil or administrative remedies. 21

For large corporations, the threat and reality of criminal prosecution by the government is much less manageable than civil prosecution. 22 A civil, monetary penalty can be absorbed by these companies as a cost of doing business. 23 The financial profit to be gained from illegal conduct is clearly of primary concern to prosecutors, both civil and criminal, in formulating a strategy for deterrence. 24 Civil and administrative enforcement actions focus on recouping economic benefit and re-attaining compliance, imposing burdens which are quite significant upon defendant businesses. 25 Criminal enforcement, on the other hand, focuses upon removing the incentive of economic benefit and replacing it with the even more highly feared alternative of a criminal conviction, and in some cases, a prison sentence for responsi-

20. Starr, supra note 15, at 382. (Judson W. Starr was Director of the Environmental Crime Unit of the Land and Natural Resources Division of the United States Department of Justice at the time the cited piece was written.)

21. See E. Dennis Muchnicki, Only Criminal Sanctions Can Ensure Public Safety, ENVTL. F., May-June 1990, at 31, 31. (Mr. Muchnicki was with the Ohio Attorney General's Office at the time the cited article was published.)


23. Muchnicki, supra note 21, at 31.

24. Telephone interview with Michael Penders, supra note 22; Telephone interview with Gilbert Jensen, supra note 22; Telephone interview with Edwin Lowry, supra note 22; Starr, supra note 15, at 383. As Starr explains: "[T]he financial profit that motivated the illegal act must be removed by sentences imposed, or the conduct will in the end have been 'worth it.' If these profits are not removed, non-compliance will be viewed simply as a less expensive way of doing business." Id.

25. Telephone interview with Michael Penders, supra note 22; Telephone interview with Edwin Lowry, supra note 22.
ble corporate officers.\textsuperscript{26} Recognizing that large companies are able to budget for predicted fines, prosecutors have in recent years become more and more interested in imposing criminal convictions and prison sentences rather than, or in addition to, monetary penalties as punishment for environmental crimes.\textsuperscript{27} The stigma of a criminal conviction and the imprisonment of corporate officers and managers have no reasonable financial equivalent and cannot be figured into a company's operating budget.\textsuperscript{28}

When prosecutors are tough on environmental crime, they play a role in preserving a fair business environment for regulated entities by providing deterrents to violations.\textsuperscript{29} When environmental prosecutors speak of their responsibility to businesses, they often refer to their role in "leveling the playing field."\textsuperscript{30} When a company takes shortcuts and violates environmental laws, the company can reduce its short-term costs and, consequently, its prices. On the other hand, when a company makes every effort to achieve compliance, its short-term costs are higher, and its prices must remain high. Consistent and fair prosecution of environmental crime arguably promotes healthy business competition.\textsuperscript{31} For this reason, the business community has a love-hate relationship with environmental crime prosecution: corporations love to see their competitors being prosecuted, but hate the thought of being prosecuted themselves.\textsuperscript{32}

In the thirteen years since the federal government initiated a formal environmental crime enforcement effort, environmental prosecutions by federal, state, and local authorities have been fairly successful. At the federal level, over 900 indictments have been returned and over 700 convictions or guilty pleas have been obtained. Convicted defendants have spent an aggregate of over 250 years in

\textsuperscript{26} Telephone interview with Michael Penders, \textit{supra} note 22; Telephone interview with Gilbert Jensen, \textit{supra} note 22; Telephone interview with Edwin Lowry, \textit{supra} note 22; Starr, \textit{supra} note 15, at 383.

\textsuperscript{27} Telephone interview with Michael Penders, \textit{supra} note 22; Telephone interview with Gilbert Jensen, \textit{supra} note 22; Telephone interview with Edwin Lowry, \textit{supra} note 22.

\textsuperscript{28} Telephone interview with Michael Penders, \textit{supra} note 22; Telephone interview with Gilbert Jensen, \textit{supra} note 22; Telephone interview with Edwin Lowry, \textit{supra} note 22.

\textsuperscript{29} In California, for example, when a criminal complaint is filed against a business for environmental violations, the charge of "Unfair Business Practice" is almost always included. Telephone Interview with Gilbert Jensen, \textit{supra} note 22; Telephone Interview with Edwin Lowry, \textit{supra} note 22.


\textsuperscript{31} Telephone interview with Michael Penders, \textit{supra} note 22; Telephone interview with Edwin Lowry, \textit{supra} note 22.

\textsuperscript{32} \textit{Id.}
prison. State and local environmental prosecutors have presumably achieved comparable results. It is not difficult to recognize why a noncomplying business would be concerned.

B. Environmental Audits and Industry's Conundrum

As defined by the Environmental Protection Agency (EPA), an environmental audit is "a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements." An environmental audit can have a variety of purposes. Primarily, an audit aids a company in its continuous review of the effectiveness of its operations. This includes:

- reviewing an entire operation from start to finish to ensure that all waste streams (air, water, and solid) are accounted for; confirming that required tests of waste streams and other materials are being prepared correctly and properly (e.g., the testing protocol is up-to-date and properly executed); reviewing training programs and evaluating their effectiveness; reviewing and testing monitoring equipment to ensure that it is calibrated correctly and functioning properly; and reviewing reports submitted to regulatory authorities to ensure that the preparer, signer, and any other responsible individuals are familiar with all applicable requirements and are preparing those reports correctly and accurately.

There are many incentives for a company to institute an environmental audit program. If the company can discover environmental violations and come into compliance before contamination gets too extensive, it could "sav[e] thousands or even millions of dollars in potential compliance costs, fines, and settlements." By conducting a periodic complete analysis of its compliance status and the effectiveness of its environmental management systems, a company may be able to prepare its budgets more accurately and make business plans. A company may also increase its current profitability as a result of conducting an environmental audit program, if the audit uncovers inefficiencies or redundancies in operations that may be eliminated. Finally, by assuming a proactive stance toward compliance with environmental laws, a company is best able to insulate itself against

36. Id. at 6.
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civil or criminal prosecution. 38 "Corporations are quickly learning that, in the area of environmental liability, what you don’t know can hurt you." 39

Although the incentives for auditing are numerous, in the final analysis many companies decide not to pursue a formal auditing program because they perceive the risks as outweighing the benefits. "Audit conclusions can set off a chain of reporting violations, business interruptions, costly remediation efforts, negative publicity, and litigation by both regulatory agencies and private citizens." 40 Moreover, when violations disclosed in an audit report are ignored, the existence and content of the audit report increases the company's exposure to criminal liability, significant civil punitive damages, or both. 41 In this respect, the audit report has been likened to a "smoking gun." 42

C. The Federal Search for Solutions

In hopes of mollifying industry coalitions complaining that these risks were creating a disincentive to conduct environmental audits, the U.S. Environmental Protection Agency and U.S. Department of Justice have both published policy statements on environmental audits. EPA in 1986 published its Policy Statement on Environmental Auditing. 43 The statement maintains that "as a matter of policy, EPA will not routinely request [that a company turn over] environmental audit reports." 44 In considering enforcement responses to violations, EPA stated that it would "take into account, on a case-by-case basis, the honest and genuine efforts of regulated entities to avoid and promptly correct violations and underlying environmental problems . . . [and] may exercise its discretion to consider such actions as honest and genuine efforts to assure compliance." 45

In 1991, the U.S. Department of Justice issued internal guidelines which attempted to clarify the exercise of discretion in criminal prose-

38. Id.
39. Id. at 229.
40. Id.
41. Id. at 229-30.
42. Id. at 230. See also Frank B. Friedman, Environmental Management and the Avoidance of Potential Criminal Liability: Knowledge is Power or What You Don't Know Will Hurt You, C496 ALI-ABA 325, 331 (1990), available in WESTLAW, ALI-ABA Database; Bruce Rubenstein, Threat of Prison Gets Top Executives' Attention, CORP. LEGAL TIMES, Nov. 1993, at 33; Daniel Riesel & Michael D. Zarin, Environmental Action Program Model, 12 CARDOZO L. REV. 1297, 1297 (1991).
43. 1986 EPA Auditing Policy, supra note 34. EPA has subsequently issued a new Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy. 60 Fed. Reg. 16,875 (1995). For discussion of this policy, see infra part V.D.
44. 1986 EPA Auditing Policy, supra note 34, at 25,007.
45. Id. Favorable consideration "applies particularly when a regulated entity promptly reports violations or compliance data which otherwise were not required to be recorded or reported to EPA." Id.
cutions for environmental violations. The DOJ guidelines set forth several factors for federal prosecutors to consider in determining whether or not to bring criminal charges: (1) "whether the [violator] made a voluntary, timely, and complete disclosure of the matter under investigation”; (2) “the degree and timeliness of cooperation by the [violator]”; (3) “the scope of any regularized, intensive, and comprehensive environmental compliance program” the company may have; and (4) several “additional factors,” such as the pervasiveness of noncompliance, the implementation of internal disciplinary action for employees who violate company environmental compliance policies, and compliance efforts after disclosure of the violation.

Although the express intent of both federal policy statements was to “encourage regulated entities to institutionalize effective audit practices as one means of improving compliance and sound environmental management,” industry reception was lukewarm at best. This can be attributed to one primary factor: the absence of any guarantee to auditing companies that agencies would not use voluntarily initiated audit information in an enforcement action. Both agencies explicitly retained their discretion to subpoena and use such information in an enforcement context, while industry coalitions complained that it was precisely this broad agency discretion that fostered their fear of auditing.

D. The Attack on Prosecutorial Discretion

Commentators maintain that while federal policy retains broad agency discretion, enforcement officials have always acted reasonably

47. Id. at 3.
48. Id.
49. Id. at 4.
50. Id. at 5-6. The guidelines also provided hypothetical examples intended to assist prosecutors in their exercise of discretion. Id. at 6-14.
51. 1986 EPA Auditing Policy, supra note 34, at 25,006. “It is the policy of the Department of Justice to encourage self-auditing and voluntary disclosure of environmental violations by the regulated community . . . .” DOJ POLICY, supra note 46, at 1.
53. One-third of corporate general counsels responding to a National Law Journal survey responded that they “believed [environmental] self-audits were risky, because the federal government has provided no assurances that these documents will not be used in future enforcement against corporations.” Lavelle, supra note 1, at S2.
and have refrained from criminally prosecuting socially responsible companies.\textsuperscript{55} Industry commentators have been characterized as developing a "folklore of misperception" around the issue of environmental auditing that has unnecessarily raised fear in the regulated community.\textsuperscript{56}

There have been only two reported federal criminal cases in which the government has used information from voluntarily initiated environmental audits in a criminal enforcement context.\textsuperscript{57} In both of these cases, the government's use of the audit information was supported by the courts. In \textit{United States v. Weyerhaeuser}, company audits revealed that Weyerhaeuser was aware of an illegal discharge long before EPA discovered it and had purposefully delayed in remedying the violation.\textsuperscript{58} Similarly, in \textit{U.S. v. Dexter},\textsuperscript{59} facility management personnel were slow to remediate noncompliance discovered by an audit, suggesting intentional disregard for the law.\textsuperscript{60}

Despite the government's proper exercise of discretion, industry coalitions continued their search for a guarantee of confidentiality for voluntary environmental audit reports. While continuing to lobby federal government agencies, they turned to their state legislatures, from whom greater support for business might be expected.

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\textsuperscript{55} See Jack Doyle, \textit{Audits Are Their Own Reward}, ENVTL. F., Jan.-Feb. 1992, at 38; Darnell, \textit{supra} note 54, at 133.

\textsuperscript{56} Darnell, \textit{supra} note 54, at 134 n.52. See also Michael J. Walker, \textit{Trust in Auditing, But Verify}, ENVTL. F., Jan.-Feb. 1992, at 41, 41.

\textsuperscript{57} Michael J. Walker and Robert W. Darnell both cite the two cases of United States v. Dexter Corp., 132 F.R.D. 8 (D. Conn. 1990) and of United States v. Weyerhaeuser Co., No. CR90-298S (W.D. Wash. Nov. 16, 1990). Walker, \textit{supra} note 56, at 41; Darnell, \textit{supra} note 54, at 133. The second case, United States v. Weyerhaeuser Co., was resolved upon Weyerhaeuser Co.'s pleading guilty of violating the Clean Water Act. \textit{Weyerhaeuser Pleads Guilty in Washington to Charges of Water Act Violations at Sawmill}, 21 Env't Rep. (BNA) No. 30, at 1398 (Nov. 23, 1990). Research by the author and the editors failed to reveal additional cases. Of course, one must also consider those unreported cases in which a criminal complaint was filed but no challenge to the government's use of the audit was made. Although there is little or no data to indicate the number of such cases in which information from a voluntarily initiated environmental audit was used against the defendant, it is likely they have occurred, and their combined effect has had an impact on the "folklore" running through industry circles. The emotional and economic trauma associated with having a criminal complaint filed against a person, regardless of the outcome, should not be underestimated.

\textsuperscript{58} Walker, \textit{supra} note 56, at 41 ("The common theme to \textit{[Weyerhaeuser and Dexter]} is that self-audits identified compliance problems, but facility management personnel were slow to implement corrective activities, suggesting knowing and willful disregard for the law.").

\textsuperscript{59} 132 F.R.D. 8 (D. Conn. 1990).

\textsuperscript{60} Walker, \textit{supra} note 56, at 41.
II
STATUTORY ENVIRONMENTAL AUDIT PRIVILEGES AND THEIR COMMON LAW ROOTS

A. The Oregon 1993 Environmental Crimes Act

On July 22, 1993, Oregon Governor Barbara Roberts signed into law Senate Bill 912C-Engrossed, The 1993 Environmental Crimes Act.61 This Act created the first state evidentiary privilege for environmental audit reports.62 At the signing ceremony, Governor Roberts said that “the bill sends a clear message that violations of the environmental laws will not be tolerated in [Oregon].”63 State Senator Ron Cease hailed the bill as “a great piece of legislation that other states are looking to as a model for their environmental crime laws.”64

The Act established felony and misdemeanor authority for the environmental crimes of unlawful air pollution; unlawful water pollution; and unlawful disposal, storage, treatment, or transportation of hazardous waste.65 The bill also created the crimes of environmental endangerment, supplying false information to the Department of Environmental Quality (DEQ), and refusal to supply information to the DEQ.66 Finally, the Act created a qualified “environmental audit privilege” for reports prepared as a result of voluntary environmental audits.67

Oregon’s environmental audit privilege is expressly designed to “encourage owners and operators of facilities and persons . . . both to conduct voluntary internal environmental audits of their compliance programs and management systems and to assess and improve compliance [with environmental laws].”68 By offering a qualified privilege for such information, both from discovery and from use in any sort of legal proceeding, the drafters of the Oregon Act apparently sought to protect businesses making an honest effort at compliance without immunizing auditing companies from all potential liability.

61. Holly Duncan, The 1993 Environmental Crimes Act, OR. ENVTL. & NAT. RESOURCES L. NEWS (Oregon State Bar Association), Aug. 1993, at 1. Two bills, Senate Bills 88 and 912, had been introduced to the 1993 Oregon legislature to create criminal enforcement authority for violations of Oregon’s environmental laws. In its final form, Senate Bill 912C-Engrossed set forth the consensus reached by the sponsors of the two bills. Id. at 1-2.
63. Duncan, supra note 61, at 1.
64. Id.
65. Id. at 2.
66. Id.
67. Id. at 3.
69. See infra part IV.B.
B. The Oregon Privilege and the Common Law Self-Evaluative Privilege

To say that the privilege created by the Oregon Act was revolutionary would be an understatement. Not only was it the first legislative measure to create a privilege for environmental audit reports; it was also the first ever enacted in the nation to create a privilege for any type of voluntarily initiated reports used for a company's self-evaluation.

In the years before and after the Oregon legislature adopted its environmental audit privilege, many legal commentators and industry representatives had advocated this sort of statutory privilege. Their writings touted a statutory environmental audit privilege as a codification of the qualified "self-evaluative privilege" sometimes applied to peer reviews and equal employment evaluations in the common law. However, as the following discussion will explain, the Oregon privilege is, for the most part, unlike the common law privilege.

1. Origins of the Common Law Self-Evaluative Privilege: Richard, Bredice, and Banks

The common law "self-evaluative privilege" originated as a judicially-created exception to the general discovery rule that all relevant evidence should be produced. Although certain state courts have allowed the privilege to develop in the common law, the birth and (arguably mutant) growth of the privilege largely took place in the United States District Courts.

The first federal case in which a court denied a plaintiff discovery of documents in a defendant corporation's possession because of their internal, investigatory nature was Richards v. Maine Central Rail-

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70. See, e.g., CIEA, supra note 2; Hunt & Wilkins, supra note 54, at 366; James T. O'Reilly, Environmental Audit Privileges: The Need for Legislative Recognition, 19 SETON HALL LEGIS. J. 199 (1994).
In this case, a railroad motor car had collided with an automobile, killing the plaintiff’s husband who had been riding on the railroad car in the course of his employment with the defendant company. At the time of the accident, Maine statutory law required that the railroad company prepare and submit an accident investigation report to the Maine Public Utilities Commission. The statute expressly accorded a privilege to such reports and investigations.

The plaintiff administratrix brought an action against the railroad company under the Safety Appliance Act and the Federal Employers’ Liability Act. During pre-trial discovery, she moved, under Rule 34 of the Federal Rules of Civil Procedure, to compel production of the accident investigation report. Although the language of the Maine statute’s privilege provision was silent as to whether the privilege was applicable to pre-trial discovery proceedings under the Federal Rules of Civil Procedure, the District Court denied plaintiff’s motion, holding that to require production of such reports would clearly violate the public interest in the improvement of railroad safety.

At the time Richards was decided, the Federal Rules of Civil Procedure required a showing of “good cause” for discovery to be obtained. Furthermore, by that time, the courts had established that “the public interest may be a reason for not permitting inquiry into particular matters by discovery.” Consequently, the Richards court’s evaluation required a balancing test between the public interest in learning the truth and the public interest in safety and health.

In conducting this balancing test, the court looked to the Maine legislature for guidance. First, the court considered the fact that the Maine statute required a railroad company to prepare accident re-

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75. 21 F.R.D. 593 (D. Maine 1957). This decision was handed down on December 10, 1957. On September 30, 1957, the same district court had decided related issues in the case. Richards v. Maine Central Railroad, 21 F.R.D. 590.
77. Id. at 594.
78. Id.
81. 21 F.R.D. at 593, 594.
82. Id.
83. FED. R. CIV. P. 34; 329 U.S. 857 (1946). The requirement of good cause was eliminated when Rule 34 was revised in 1970. The good cause requirement had “furnished an uncertain and erratic protection to the parties from whom production [was] sought and [was] rendered unnecessary by virtue of the more specific provisions added to Rule 26(b) relating to materials assembled in preparation for trial and to experts retained or consulted by parties.” FED. R. CIV. P. 34 advisory committee’s note.
ports. Second, it considered the fact that the Maine statute accorded a privilege to reports prepared pursuant to its mandates. Although the statute's language did not specifically mention discovery, the court extrapolated that if a matter were to be accorded an absolute privilege during the trial, it should not be made available for pre-trial discovery. Third, the court determined that the public policy evidenced by the statute was that it is in the public interest to improve railroad safety. Fourth, it considered the relevancy of the requested documents to the case at hand, and concluded that "[w]hat someone . . . at a subsequent date thought of [the railroad's] acts or omissions is not relevant to the case." Based upon all of these factors, the court held that the public interest in improving railroad safety outweighed the plaintiff's need for the accident reports in order to prove negligence.

A similar balancing test was employed more than a decade later, in the next self-evaluative privilege case, the oft-cited Bredice v. Doctors Hospital, Inc. There, the plaintiff filed a medical malpractice suit against the defendant hospital after her husband died while under the hospital's care. During pre-trial discovery the plaintiff filed a motion for production and inspection of "Minutes and reports of any Board or Committee of Doctors Hospital or its staff concerning the death of Frank J. Bredice on December 11, 1966." The hospital had prepared such minutes and reports after Mr. Bredice's death, pursuant to the requirements of the Joint Commissions on Accreditation of Hospitals (JCAH).

At that time, the JCAH required its accredited hospitals to conduct staff meetings in order to improve, through self-analysis, the efficiency of medical procedures and techniques. The meetings were not a part of current patient care but were in the nature of a retrospective review of the effectiveness of certain medical procedures. The hospitals held the meetings with the understanding that all communications therein were confidential. While lacking legal licensing authority, the JCAH was prestigious, and could substantially affect the standing of hospitals which failed to follow its requirements. Accreditation by the JCAH could be maintained only by following its requirements.

The court based its decision to deny the plaintiff's motion for production on factors similar to those considered in Richards. The
Bredice court first considered that the JCAH required hospitals to hold retrospectively-focused staff meetings and to prepare the minutes and reports of such meetings. Second, it considered that the value of the staff meetings, the unimpeded flow of ideas and advice, would be destroyed if the meetings and the names of those participating were opened to the discovery process. Third, the court considered the public policy evidenced by the JCAH requirement: the public has an interest in improving the care and treatment of hospital patients. Fourth, it considered the relevancy of the requested documents to the case at hand, and echoed the Richards court’s conclusion that “what someone . . . at a subsequent date thought of these acts or omissions is not relevant to the case.” Based upon all of these factors, the court held that “[a]bsent evidence of extraordinary circumstances, . . . these committee meetings, being retrospective with the purpose of self-improvement, are entitled to a qualified privilege on the basis of this overwhelming public interest.

The Bredice opinion confirmed the qualified privilege created in Richards and articulated two limitations that had not been explicitly addressed in the earlier case. First, the court in Bredice emphasized that the requested reports, like those in Richards, were irrelevant to the question of negligence prior to the mistake because they concerned meetings held solely for the purpose of retrospective review. Second, the Bredice court added the qualification that extraordinary circumstances, although not present in that case, may shift the public policy balance in other cases.

Courts and commentators have treated the Bredice opinion as the seminal statement of the common law self-evaluative privilege. However, critics maintain that the Bredice court’s creation of a qualified self-evaluative privilege was entirely unnecessary. Because the Bredice court also found that the information sought had no relevance to the malpractice action, they argue, it necessarily follows that there was not good cause for the discovery sought therein. In the absence of “good cause for discovery,” as was then required by the Federal Rules of Civil Procedure, critics conclude that the Bredice court did

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95. Id. at 250-51.
96. Id. at 250.
97. Id. at 251 (quoting Richards v. Maine Cent. R.R., 21 F.R.D. 590, 592 (D. Maine 1957)).
98. Id.
100. See 50 F.R.D. at 251.
not have to reach the issue of privilege. This problem made it potentially awkward for courts to rely upon Bredice for a precedent or standard in applying a self-evaluative privilege in subsequent cases. Such may have been the case when, the following year, the U.S. District Court for the Northern Division of Georgia rendered a similarly confounding opinion in Banks v. Lockheed-Georgia Company.

In Banks, the plaintiffs brought a number of discrimination suits, the first of which was filed in 1968 against their employer. In 1970, Lockheed appointed a "team" of employees to determine the progress, if any, of the company's Affirmative Action Compliance Programs. The company compiled substantive findings of this study in two formal reports which were required to be prepared and submitted to the United States Department of Defense pursuant to Executive Order 11,246. Lockheed had also prepared informal internal reports of the studies which included "a candid self-analysis and evaluation of the Company's actions in the area of equal employment opportunities." The plaintiffs filed motions to compel the production of these informal reports, and the defendant objected, seeking protection under the attorney work-product privilege.

The court agreed with the defendant's claim that the informal reports could be said to have been "made in preparation for trial," rendering them privileged under the attorney work-product doctrine. The court also found that "the report could be said to include the 'mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation' which would further protect it from discovery by the plaintiffs" under Federal Rule of Civil Procedure 26(b)(3). Without further exploring these options, however, the court denied plaintiffs' motions under the public policy rationale set forth in Bredice and Richards.

While the Banks court protected the subjective reports, it simultaneously ordered the defendant to "provide the plaintiffs with any factual or statistical information that was available to the members of Lockheed's research 'team' at the time they conducted their study."


Id. at 284.
Id.
Id.
See id. at 285.
Id.
trine as later courts considered the discovery of internal corporate documents.¹¹⁰

2. Congressional and Supreme Court Limitations on the Common Law Self-Evaluative Privilege Prior to 1975

In the years following the Banks decision, the United States Supreme Court issued two rulings that evidenced its intent to restrain the district courts in the further creation or extension of common law privileges.

In United States v. Nixon,¹¹¹ the United States Supreme Court considered whether the President’s confidential communications were privileged. Because this privilege had not previously been established, the Court considered the matter de novo in a pretrial setting.¹¹² Denying the President’s assertion of an absolute privilege, the Court affirmed the “ancient proposition of law” that “the public has a right to every man’s evidence.”¹¹³ While acknowledging that there are occasions where the Constitution, statutes, or the common law may require some information to be privileged, the Court held that “these exceptions to the demand for every man’s evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.”¹¹⁴ The Nixon court’s statement effectively forced the federal courts to consider seriously the precedential effects of creating or expanding common law privileges.

At the time Bredice and Banks were decided, “the question of what evidentiary law the federal courts were to apply in deciding privilege issues remained distinctly unsettled.”¹¹⁵ In both criminal and civil cases, the federal courts had no explicit guidance regarding the applicability of either state evidentiary law or common law principles of evidence.¹¹⁶ This led to inconsistent privilege rules in the lower federal court system—a result which displeased both the American Bar Association and the Supreme Court.¹¹⁷

In 1972, the Supreme Court promulgated the Federal Rules of Evidence.¹¹⁸ The Rules were created in response to a 1958 American

¹¹² Id. at 692.
¹¹³ Id. at 709 (quoting Branzburg v. Hayes, 408 U.S. 665, 688 (1972)).
¹¹⁴ Id. at 710.
¹¹⁶ Id. at 1463-64.
¹¹⁷ Id. at 1464-65.
¹¹⁸ Developments, supra note 115, at 1465.
Bar Association resolution urging the Judicial Conference of the United States to consider adopting uniform rules of evidence for use in federal district courts.119

The proposed Federal Rules of Evidence sought to codify the law of privilege. Article V of the proposed rules set forth nine discrete privileges.120 The Rules proposed that federal common law development of privileges be frozen, and that state privilege law—whether legislatively or judicially created—be superseded in all federal cases.121

After the Proposed Rules were sent to Congress on February 5, 1973,122 they were subjected to heated criticism, with concerns ranging from Erie123 considerations to the gross overexpansion of government privileges.124 Fearing that a prolonged battle over the privilege rules would delay the enactment of the other rules of evidence,125 Congress ultimately deleted Article V from the proposal.126 In its place, the 1975 Federal Rules of Evidence contained a single, general privilege rule—Rule 501:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be gov-

120. Among these were privileges for communications between attorney and client, psychotherapist and patient, and clergy and communicant. Article V also contained an adverse spousal testimony privilege and privileges protecting certain types of information, including state secrets, government informant identities, and reports required to be submitted to the government. Conspicuously absent were, among others, a general physician-patient privilege, a journalist's privilege, and a husband-wife communications privilege. See Developments, supra note 115, at 1465.
122. Developments, supra note 115, at 1465.
123. See Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).
124. Developments, supra note 115, at 1466-69. "[C]ritics noted that the proposed rules evidenced the heavy hand of the Justice Department in their expansion of privileges for government and state secrets and their restriction of personal privileges. One commentator summed up his criticism of the proposed rules by claiming that 'Article V . . . is so internally inconsistent and poorly thought out that serious advocacy of enactment in present form is inconceivable.'" Id. at 1469 (quoting Krattenmaker, supra note 121, at 117).
126. "Congress could have left article V intact and made it applicable solely to federal question cases. This approach [combined with other amendments] would have assuaged [opponents' most controversial] concerns. . . . That Congress chose instead to abandon any attempt at codification is evidence of the powerful social forces at work in the area of privilege." Developments, supra note 115, at 1469 n. 121.
erned 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 of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.127

In federal question cases, Rule 501 lists three general sources of privilege law: the Constitution, acts of Congress, and federal common law "developed in the light of reason and experience."128 Commentators have argued that the federal courts should adopt state privilege law unless there is a strong federal policy to the contrary.129 However, Rule 501 leaves federal courts free to develop privilege law without any such constraints.130

3. Developments After 1975

The federal courts appeared to take the Nixon holding and the proposed Rules of Evidence as a strong message from the Supreme Court disfavoring any further creation or expansion of common law privileges. With few exceptions, they cautiously applied the self-evaluative privilege after 1975. Although federal courts generally continued to apply a common law self-evaluative privilege to protect peer reviews131 and equal employment evaluations from discovery,132 at-

132. The Banks decision prompted defendants in a slew of later Title VII discrimination suits to claim protection from discovery of both Affirmative Action Plans (required to be prepared and submitted to the government) and accompanying studies (typically voluntary, subjective analyses) under the self-evaluative privilege. While some courts completely denied discovery of Affirmative Action plans as well as accompanying studies,
tempts to use Richards, Bredice, or Banks to protect other types of documents usually failed.

In the vast majority of these post-Rules cases, the lower courts seriously questioned the existence of any common law self-evaluative privilege and found that, whatever its boundaries, it did not extend to the requested documents. In other cases, courts explicitly recognized the privilege, but held that it does not apply to the case at hand because either: (1) disclosure would not produce "a chilling effect" on the self-evaluative process at issue; or (2) the petitioner's overwhelming need for the material outweighed the defendant's need for confidentiality. In a few cases, courts held that any existing self-evaluative privilege applies only to reports required to be prepared and submitted to a government agency. Few courts have applied the privilege to documents that were not so required.

To date, the Supreme Court and the circuit courts "have neither definitively denied the existence of [a general self-evaluative] privilege nor accepted it and defined its scope." Rather, when confronted with a claim that the privilege should be applied, they have consistently refused to consider application of such a privilege to the facts before them.

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138. Id. See also University of Pa. v. EEOC, 493 U.S. 182, 184 (1989) (holding that Title VII does not support a privilege "against disclosure of peer review materials that are relevant to charges of racial or sexual discrimination in tenure decisions"); Memorial Hosp. v. Shadur, 664 F.2d 1058 (7th Cir. 1981) (refusing to apply privilege to peer review materials in doctor's antitrust action against hospital on grounds that the information was crucial to plaintiff's suit and that public interest in private antitrust enforcement was strong); FTC v. TRW, Inc., 628 F.2d 207 (D.C. Cir. 1980) (holding that privilege does not apply to gov-
4. Application of the Common Law Self-Evaluative Privilege to Documents Sought by the Government

The federal courts at all levels have agreed on one aspect of the self-evaluative privilege: it does not apply where the documents in question have been sought by a governmental agency.\textsuperscript{139} In \textit{Federal Trade Commission v. TRW Inc.}, the U.S. Court of Appeals for the D.C. Circuit first articulated this restriction.\textsuperscript{140}

Acting on consumer complaints, the Federal Trade Commission began an informal investigation of the credit reporting practices of TRW, Inc. in 1971. By the fall of 1972, TRW was convinced that a suit by the FTC was imminent. In response, TRW undertook what it termed a National Consumer Relations Audit (NCRA) which generated the set of documents at issue in this case. The NCRA consisted of in-house audits of TRW's consumer relations branch offices which reviewed compliance with federal and state fair credit reporting laws. The auditors prepared reports which contained their evaluations of the branch offices' compliance and lists of observed problems and suggested solutions. The reports were distributed to the affected branch managers, who submitted written responses outlining any corrective action that they planned to take.\textsuperscript{141}

The purpose of the program was twofold: (1) to maintain consistent procedures for all branch consumer relations offices, thus assuring overall compliance with federal and state fair credit reporting laws; and (2) to provide management and legal counsel with information to be used in formulating new compliance policies.\textsuperscript{142} In 1976, the FTC issued a subpoena duces tecum ordering the production of some twenty-four categories of documents including the NCRA audits. In total, there were 167 NCRA reports and responses sought by the FTC.\textsuperscript{143} TRW produced more than 40,000 pages of documents, but withheld certain documents, including the NCRA reports and responses, claiming protection under a self-evaluative privilege.\textsuperscript{144}

After discussing the reluctance among federal courts to allow "even a qualified 'self-evaluative' privilege,"\textsuperscript{145} the D.C. Circuit up-


\textsuperscript{140} 628 F.2d 207 (D.C. Cir. 1980).

\textsuperscript{141} \textit{Id.} at 209.

\textsuperscript{142} \textit{Id.}

\textsuperscript{143} \textit{Id.}

\textsuperscript{144} \textit{Id.} at 209-10.

\textsuperscript{145} \textit{Id.} at 210.
held the district court's order requiring TRW to produce the NCRA reports and responses.\textsuperscript{146} The court held that "the strong public interest in having administrative investigations proceed expeditiously and without impediment" outweighed TRW's interest in confidentiality:\textsuperscript{147}

\begin{quote}
'The very backbone of an administrative agency's effectiveness in carrying out the congressionally mandated duties of industry regulation is the rapid exercise of the power to investigate'... This important governmental interest in the expeditious investigation of possible unlawful activity would be undermined if a party could use a subpoena enforcement action to raise the full panoply of objections to an administrative proceeding.'\textsuperscript{148}
\end{quote}

The fact that the FTC was the party that had subpoenaed the NCRA reports and responses gave the \textit{TRW, Inc.} court an independent reason for declining to apply a self-evaluative privilege.\textsuperscript{149} In light of the broad statutory subpoena power accorded the FTC by Congress,\textsuperscript{150} the court felt that the judiciary was left with "little discretion to second-guess legitimate agency requests":\textsuperscript{151}

The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.\textsuperscript{152}

Courts have repeatedly applied \textit{TRW, Inc.} to deny any self-evaluative privilege to documents and reports that are requested by the government.\textsuperscript{153} In a 1990 decision, \textit{United States v. Dexter Corp.},\textsuperscript{154} a federal district court in Connecticut relied on the \textit{TRW, Inc.} holding in

\begin{itemize}
\item \textsuperscript{146} \textit{Id.} at 211.
\item \textsuperscript{147} \textit{Id.} at 210.
\item \textsuperscript{148} \textit{Id.} at 211 (quoting FTC v. Anderson, 631 F.2d 741, 744-45 (D.C. Cir. 1979)).
\item \textsuperscript{149} FTC v. TRW, Inc., 628 F.2d 207, 211 (D.C. Cir. 1980).
\item \textsuperscript{151} FTC v. TRW, Inc., 628 F.2d at 211. "Congress itself has decided the policy issue, and it is not for the courts to challenge that determination." \textit{Id.} (quoting U.S. v. Noall, 587 F.2d 123, 126 (2d Cir. 1978)).
\item \textsuperscript{152} \textit{Id.} at 211 (quoting United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950)).
\item \textsuperscript{154} 132 F.R.D. 8 (D. Conn. 1990).
\end{itemize}
granting a motion to compel the production of an environmental audit report. In this enforcement action brought under the Clean Water Act, the court interpreted *TRW, Inc.* as suggesting that:

[A] court should take cognizance, in an action brought by the United States to enforce duly enacted laws, of Congress's role in declaring what is in the public interest. . . . For as Justice Holmes noted, 'the legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed.'

First, the court noted that Congress had explicitly declared the public policy behind the Clean Water Act: "it is the policy of the United States that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States . . ." Second, it noted that the suit was brought at the request of the EPA Administrator who has the power to "commence a civil action" against any person who has violated the Clean Water Act. Finally, the court held that the application of a self-evaluative privilege in this action "would effectively impede the Administrator's ability to enforce the Clean Water Act, and would be contrary to stated public policy."

In *University of Pennsylvania v. EEOC*, decided the same year as *Dexter*, the United States Supreme Court, for the first and to date only time, considered the common law self-evaluative privilege. The university had denied tenure to a female associate professor. She filed a complaint with the Equal Employment Opportunity Commission (EEOC), alleging discrimination on the basis of race, sex, and national origin in violation of Title VII of the Civil Rights Act of 1964.

In the course of its investigation, the EEOC issued a subpoena seeking, *inter alia*, the professor's tenure-review file and the tenure files of five male faculty members identified in the charge as having received more favorable treatment. The university asked the EEOC to modify the subpoena to exclude what it termed "confidential peer review information." The EEOC denied the request and successfully sought enforcement of the subpoena by a Pennsylvania district court. The Court of Appeals for the Third Circuit affirmed, rejecting petitioner's claim that policy considerations required the recognition of a qualified self-evaluative privilege that would require the EEOC

155. *Id.* at 9 (quoting FTC. v. Jantzen, Inc., 386 U.S. 228, 233 (1967)).
156. *Id.* (quoting 33 U.S.C. § 1321(b)(1)).
157. *Id.* at 9-10 (quoting 33 U.S.C. § 1321(b)(6)(B)).
158. *Id.* at 10.
to demonstrate some particularized need, beyond a showing of relevance, to obtain peer review materials.\textsuperscript{162}

Justice Blackmun, writing for a unanimous Court, affirmed the Third Circuit's decision and rejected petitioner's assertion of a self-evaluative privilege. The Court found that the government's interest in "ferreting out invidious discrimination" is great, if not compelling, in comparison with a university's need for confidentiality in conducting tenure reviews.\textsuperscript{163} The Court recognized that the information to be found in peer reviews is most likely to be the only evidence of such discrimination available.\textsuperscript{164} Therefore, the Court agreed with the EEOC that adopting a qualified privilege for peer reviews "would place a substantial litigation-producing obstacle in the way of the Commission's efforts to investigate and remedy alleged discrimination."\textsuperscript{165} The Court stated: "we are reluctant to 'place a potent weapon in the hands of employers who have no interest in complying voluntarily with the Act, who wish instead to delay as long as possible investigations by the EEOC.'"\textsuperscript{166}

Finally, the Court found a lack of precedent to support the University's claim of a self-evaluative privilege. The Court noted that other common law privileges, such as the privilege for grand jury proceedings, in contrast, either had constitutional foundations or dated back to "immemorial tradition."\textsuperscript{167}

5. \textit{Comparing the Oregon Statute with the Common Law Self-Evaluative Privilege}\textsuperscript{168}

The common law self-evaluative privilege "at the most remains largely undefined and has not generally been recognized."\textsuperscript{169} Those courts that have recognized the privilege all conclude that its purpose is to encourage and protect communications when protecting the free

\textsuperscript{162.} \textit{Id.} at 187-88.
\textsuperscript{163.} \textit{Id.} at 193.
\textsuperscript{164.} \textit{Id.}
\textsuperscript{165.} \textit{Id.} at 194.
\textsuperscript{166.} \textit{Id.} (quoting EEOC \textit{v. Shell Oil Co.}, 466 U.S. 54, 81 (1984)).
\textsuperscript{167.} \textit{Id.} at 194-95 (quoting \textit{Clark v. United States}, 289 U.S. 1, 13 (1933)).
\textsuperscript{168.} While a number of states have subsequently passed environmental audit privilege statutes, \textit{see supra} note 12 and accompanying text, this paper concentrates on the Oregon legislature's formulation of the privilege. This is because it was the first such privilege, and has therefore served as a model for many of the later legislative endeavors, and because it is prototypical of the "evidentiary privilege" formulation of an environmental audit privilege. Much of the following analysis is applicable to other statutory environmental audit privileges that follow this approach; it may be less applicable to the environmental audit privilege statutes of states that have adopted the "immunity" formulation of the privilege. \textit{See infra} part II.C.
flow of information will best serve the public interest.\textsuperscript{170} Generally, the prerequisites for application of the common law self-evaluative privilege, assuming it exists, are as follows:

1. Only subjective, evaluative materials within a document are protected. The privilege does not extend to objective, factual data in the same report;
2. The party seeking disclosure is not a government agency seeking to enforce public laws;
3. The materials protected must be prepared for mandatory government reports;
4. The information must be of the type whose flow would be curtailed if discovery were allowed;
5. The policy favoring protection from disclosure must outweigh the plaintiff's need for information.\textsuperscript{171}

The Oregon statutory environmental audit privilege does not require any of these prerequisites in order for a corporate defendant to enjoy the protections of the privilege.\textsuperscript{172} A preliminary analysis of these discrepancies reveals that its purpose is quite different from the purposes of the common law self-evaluative privilege.

\textit{a. The Oregon Privilege Protects Both Subjective and Objective Materials}

Whereas the common law self-evaluative privilege protects only "subjective, evaluative material," the Oregon privilege protects both subjective and objective material. In applying the common law privilege, federal courts have routinely denied protection to factual and objective data contained in documents which are protected by a self-evaluative privilege.\textsuperscript{173} For example, names or statements of witnesses or statistical information must be disclosed.\textsuperscript{174} The primary rationale behind this limitation is that compelled disclosure of mere fact

\begin{thebibliography}{99}
\end{thebibliography}
has a less adverse impact on future corporate self-analysis; therefore, the primary purpose behind the privilege—to foster the kind of critical self-evaluations which might not be conducted in the absence of an assurance of confidentiality—does not apply.  

175 “The public has a much greater interest in the disclosure of relevant facts than in gaining access to the subjective evaluations of a source of confidential information.”  

176 At least one commentator has noted that since the distinction between “discoverable facts and non-discoverable, subjective conclusions is necessarily blurred,” the fact that courts have devoted little time to describing the exact materials protected, or to identifying the specific criteria that justify protection, suggests that the common law self-evaluative privilege protects “only obviously subjective and conclusory material.”  

177 The Oregon statute shields “Environmental Audit Reports.”  

178 Such reports are prepared as a result of environmental audits, and may include:

- A set of documents, each labeled “Environmental Audit Report: Privileged Document” and prepared as a result of an environmental audit. An Environmental Audit Report may include field notes and records of observations, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, computer-generated or electronically recorded information, maps, charts, graphs and surveys, provided such supporting information is collected or developed for the primary purpose and in the course of an environmental audit. An Environmental Audit Report, when completed, may have three components:
  - (A) An audit report prepared by the auditor, which may include the scope of the audit, the information gained in the audit, conclusions and recommendations, together with exhibits and appendices;
  - (B) Memoranda and documents analyzing portions or all of the audit report and potentially discussing implementation issues; and
  - (C) An implementation plan that addresses correcting past noncompliance, improving current compliance and preventing future noncompliance.  

While a few of the items in this description might be fairly characterized as “subjective, evaluative materials,” many of the above components of the “Environmental Audit Report” could not be reasonably characterized as anything but “objective and factual.”

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176. Weiss, supra note 175, at 161.

177. Flanagan, supra note 173, at 557.


The Oregon statute appears to address critics of the fact/evaluation distinction in the common law self-evaluative privilege by protecting information that is indisputably factual. Although it is the cornerstone of any common law self-evaluative privilege, the fact/evaluation distinction has been criticized by some commentators. As one author writes, the "chilling effects of disclosure often operate on facts as well as evaluations." The distinction between facts and evaluation is often vague, and when documents contain both facts and evaluation, excising the evaluative portions can prove complex and costly. The Oregon statute's drafters apparently believed that a significant number of Oregon corporations will not conduct environmental audits at all unless there is a privilege protecting factual information.

The stated purpose of the privilege is to encourage auditing. Factual information can be neither "candid" nor "evasive"—qualities "subjective evaluations" may demonstrate. Factual information is either true or false. Few corporations would purposefully prepare an audit based upon false data. Therefore, the protection of factual information reveals a belief that a significant number of corporations will not conduct audits at all unless the factual portions are privileged.

b. The Oregon Privilege Shields Information from Both Private Plaintiffs and the Government

While the Oregon privilege will be used primarily to shield information from the government, the common law self-evaluative privilege has no effect where the documents are being sought by government agencies. Courts have agreed that the self-evaluative privilege does not apply when a government agency is seeking the documents. This limitation upon the common law privilege was created in FTC v. TRW, Inc. and U.S. v. Dexter. In University of Pennsylvania v. EEOC, which continues to be valid precedent, the Supreme Court affirmed this limitation.

180. See id. ("An Environmental Audit Report may include...drawings, photographs, computer-generated or electronically recorded information, maps, charts, graphs and surveys.").
182. Id.
183. Id. at 1095-96. On the other hand, it might be argued that the litigation costs are no lower when a judge prevents discovery of all documents containing both facts and evaluation, than when she or he allows discovery of all such documents.
185. See supra part II.B.4.
186. 628 F.2d 207 (D.C. Cir. 1980).
The central statement of privilege incorporated into the Oregon statute reads as follows: "an Environmental Audit Report shall be privileged and shall not be admissible as evidence in any legal action in any civil, criminal or administrative proceeding." While civil proceedings may be instituted by either government agencies or private third parties, only government agencies may institute criminal and administrative proceedings. The statute's application to government agencies is indistinguishable from its application to private third parties.

The Oregon privilege appears to be calculated primarily at shielding information from the regulatory and law enforcement agencies responsible for ensuring compliance with environmental laws. In fact, the institution of such a privilege was motivated by regulated industries' frustration with the breadth and complexity of environmental regulations, coupled with seemingly aggressive enforcement by government agencies. This aspect of the privilege is especially disconcerting to criminal prosecutors, who fear that abuses, and even many good-faith assertions of the privilege, will significantly impede the enforcement of criminal provisions of environmental statutes.

Regulatory and law enforcement agencies and organizations across the country have nearly unanimously articulated strong opposition to the creation of any statutory environmental audit privilege. Of interest to them is the support the Oregon statute received from the Oregon District Attorneys Association (ODAA) in 1993. The ODAA played an active role on the committee which "fixed" the broad environmental audit privilege, proposed by the Associated Oregon Industries. The final privilege was viewed as being immune to abuse "while at the same time protecting businesses who were making an honest effort to comply with the law."

The ODAA representative to the drafting committee, John C. Bradley, maintains that the qualified privilege in the Oregon statute includes sufficient safeguards against abuse to ensure that the environ-

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190. See, e.g., CIEA, supra note 2, at 1.
192. See, e.g., id. See also NATIONAL DISTRICT ATTORNEY'S ASSOCIATION, ENVIRONMENTAL PROTECTION COMMITTEE RESOLUTION (July 23, 1994); Marianne Lavelle, Prosecutors Battle Shield on Records, NAT'L L.J., Sept. 26, 1994, at 16.
194. Letter from John C. Bradley, First Assistant District Attorney, Multnomah County, and ODAA Representative to the Drafting Committee of Oregon EAP, to James W. Whitty, Legal Counsel of Associated Oregon Industries 1 (July 25, 1994) (on file with author).
195. Id.
ment will be "the clear winner."\textsuperscript{196} In Bradley's opinion, the only scenarios where the privilege would apply would be situations that did not justify prosecution.\textsuperscript{197} As Bradley put it, "[i]f we lose evidence in one case, but 25 or 50 companies [conduct] audits and [clean] up problems, I believe we are better overall."\textsuperscript{198} However, these assurances are not echoed by other law enforcement organizations.\textsuperscript{199}

c. The Oregon Privilege Protects Only Voluntary Reports

While the common law self-evaluative privilege generally applies only to reports that the state requires of regulated entities which are later sought by third parties,\textsuperscript{200} the Oregon privilege applies only to voluntarily prepared reports. From the creation of the common law self-evaluative privilege to date, the federal courts have restricted its application to required reports in all but a few cases.\textsuperscript{201} The courts did not explain what made these exceptions unique. Apparently disregarding these rare cases, the federal courts have maintained that one of the public policies upon which the common law self-evaluative privilege rests is "to assure fairness to persons who have been required by law to engage in self-evaluation."\textsuperscript{202} In other words, the common law privilege was founded in the belief that "the government should not compel companies to candidly evaluate their strengths and weaknesses and then force them to disclose these evaluations to private plaintiffs for use in [law] suits."\textsuperscript{203}

The process that the Oregon statute protects with its qualified privilege, the "Environmental Audit," is defined as

a voluntary, internal, and comprehensive evaluation of one or more facilities or an activity at one or more facilities regulated under ORS chapter 465 [hazardous waste generators], 466 [storage, treatment, and disposal of hazardous waste], 468 [environmental quality generally], 468A [air quality], 468B [water quality], 761 [transportation of hazardous materials by railroad], or 767 [transportation of hazardous materials by motor carrier], or the federal, regional or local counterpart or extension of such statutes, or of management systems related to such

\begin{footnotes}
\item[196.] Id. at 2.
\item[197.] Id.
\item[198.] Id.
\item[199.] See supra notes 191-93 and accompanying text.
\item[200.] See supra part II.B.1, and note 135 and accompanying text.
\end{footnotes}
facility or activity, that is designed to identify and prevent noncompliance and to improve compliance with such statutes.\textsuperscript{204}

This definition describes the exact opposite of a process giving rise to a mandatory government report. Although both the federal and the Oregon governments require companies to file certain environmental reports,\textsuperscript{205} the Oregon statute explicitly states that its privilege does not extend to "documents, communications, data, reports or other information required to be collected, developed, maintained, reported or otherwise made available to a regulatory agency pursuant to . . . federal, state or local law, ordinance, regulation, permit or order."\textsuperscript{206}

EPA generally does not mandate the preparation of environmental audit reports or their submission to the government. In fact, "with the exception of audits initiated as a condition of consent agreements or decrees, the EPA . . . rarely ever seeks to obtain or use any information contained in audit reports."\textsuperscript{207} The same is substantially true of state-run regulatory agencies, many of which have adopted environmental audit policies similar to U.S. EPA's 1986 Policy on Environmental Audits. California Environmental Protection Agency (Cal/EPA), for example, has a written policy which states, "Cal/EPA believes routine Agency requests for audit reports could inhibit auditing in the long run, decreasing both the quantity and quality of audits conducted. Therefore, as a matter of policy, Cal/EPA will not routinely request environmental audit reports."\textsuperscript{208} The federal and state governments do not generally mandate environmental audits, therefore audit reports cannot be considered to be required.

The public policy behind the Oregon environmental audit privilege departs drastically from that of the common law self-evaluative privilege which protects entities required to conduct self-evaluations. The common law privilege which protects required reports grew out of a partnership between the regulators and the regulated. In an effort to achieve compliance with the law, they shared information, and such information was shielded from outside parties. In contrast, the Oregon environmental audit privilege appears to have developed out of a deep distrust between prosecutors and corporations. The former seem to believe that corporations will do anything to save a buck; the latter believe that prosecutors will do anything to secure a conviction.

\textsuperscript{204} OR. REV. STAT. § 36-468.963(6)(a) (1993).
\textsuperscript{206} OR. REV. STAT. § 36-468.963(5)(a) (1993).
\textsuperscript{207} Walker, supra note 56, at 41 (emphasis in original).
\textsuperscript{208} Memorandum from William W. Carter, Assistant Secretary for Law Enforcement and Counsel, Cal/EPA, to Directors 2 (Mar. 8, 1993) (on file with author).
d. The Oregon Privilege Does Not Necessarily Promote the Flow of Information

In considering the creation and application of a common law self-evaluative privilege, courts and commentators have consistently questioned whether disclosure of documents would noticeably curtail the flow of essential information. However, the Oregon environmental audit privilege assumes that this chilling effect exists. Therefore, by universally denying discovery to environmental audit reports, the statute attempts to eliminate certain perceived obstacles to the flow of information.

By mitigating the fear of discovery, the Oregon audit privilege seeks to increase the diligence of individuals conducting environmental audits and the accuracy of the information provided by the employees who are interviewed during such audits. One author identified two distinct chilling effects which the specter of discovery may have on the self-evaluative process:

First, if a plaintiff obtains discovery, there may be a direct chilling effect on the institutional or individual self-analyst; this effect operates to discourage the analyst from investigating thoroughly or even from investigating at all. . . . Second, courts should be concerned about the ability of the self-analyst to gather the information that it needs to make its evaluation. Knowledge that a final report may be disclosed will often discourage individuals from coming forward with relevant information.

The company's owner, officers, auditing employees, or independent auditing consultants conducting the audit will experience the first effect. Without a blanket privilege, the fear of discovery leads the auditor to steer clear of problem areas, deliver watered-down warnings and implementation suggestions, and/or utilize an attorney at every turn.

The employees of the audited company experience the second effect. A good portion of many environmental audits consists of a series of interviews with line employees, who give the auditors essential information about what is and is not working. The fear of discovery may lead the interviewees to withhold information when they believe it may harm their employer in a future lawsuit. Employees recognize that harm to the employer may lead to the loss of a job, whether it be through firing or the shutdown of the business.


However, proponents of a statutory environmental audit privilege fail to recognize that these fears do not dissipate when only a qualified environmental audit privilege is enacted. The myriad exceptions to the privilege\(^\text{211}\) create a situation in which future disclosure during litigation of all or part of an audit remains a distinct and real possibility despite the promise of a "privilege."\(^\text{212}\) For this reason, it is unlikely the privilege will actually change the behavior of auditors or employees. Therefore, the statute decreases public access to information without effectively removing impediments to the flow of information.

e. The Oregon Privilege Does Not Allow the Courts To Determine, on a Case by Case Basis, Whether Shielding the Information Would Best Serve the Public Interest

The Oregon privilege denies courts the discretion to make case-by-case determinations. Federal courts will not automatically apply the common law self-evaluative privilege even after determining that allowing discovery of certain information would produce a chilling effect on the flow of information. Instead, federal courts have routinely conducted a balancing test to determine whether the public interest would best be served by shielding the information or by subjecting it to discovery. The federal courts applying a self-evaluative privilege have insisted that shielding information from the public is only warranted when the policy favoring protection outweighs the public's need for that information.\(^\text{213}\) The Oregon privilege allows for no similar, case-by-case balancing test.

The policy behind the protection provided in the Oregon statute, as set forth in its preamble, is as follows:

to encourage owners and operators of facilities and persons conducting other activities regulated under [Oregon environmental statutes] or their federal, regional or local counterpart or extension of such statutes, both to conduct voluntary internal environmental audits of their compliance programs and management systems and to assess and improve compliance with such statutes.\(^\text{214}\)

The policy favoring an environmental audit privilege, like the policy behind the self-evaluative privilege, is to strengthen the self-evaluation process by "creating an effective incentive structure for candid and unconstrained self-evaluation."\(^\text{215}\) However, unlike the self-evaluation privilege, when the public interest would clearly be better

\(^{211}\) See infra part IV.B.
\(^{212}\) See infra part IV.C.
\(^{213}\) See supra note 134 and accompanying text.
served by discovery than by maintaining such a structure, the Oregon statute does not allow for discovery. Further, the statute includes no legislative findings that shielding environmental audits from discovery is per se in the public interest.

C. The Colorado Environmental Audit Privilege Statute

As noted earlier, in the two years following Oregon's passage of an environmental audit privilege statute, a large number of states have followed suit. During the 1994 legislative session, a year after the Oregon statute was passed, Indiana and Kentucky each passed legislation containing environmental audit privileges nearly identical to Oregon's. Many of the later-adopted statutory privileges were likewise similar to Oregon's. In contrast, Colorado, the second state to adopt an environmental audit privilege, chose to adopt legislation that represented a marked change from the approach embraced by Oregon.

Colorado passed Senate Bill 94-139 in 1994, "concerning environmental self-evaluation, and, in connection therewith, creating an environmental self-evaluation privilege and creating a presumption against the imposition of any administrative, civil, or criminal penalties for voluntary disclosures arising out of any environmental self-evaluation." The Colorado statute is based upon the same policy considerations as the Oregon statute, but contains several differing provisions that some commentators have claimed makes it a superior law. None of these differences bring the statute more in alignment with the common law self-evaluative privilege; on the contrary, they create an even larger gap between the judicially-sanctioned privilege and that codified into law.

The most significant difference is the Colorado statute's provision immunizing companies for violations discovered as a result of an environmental audit and then promptly disclosed to the proper authorities. If the entity making the disclosure "initiates the appropriate effort to achieve compliance, pursues compliance with due diligence, and corrects the noncompliance within two years after the completion of the [audit]," and "cooperates with the [authorities] regarding investigation of the issues identified in the disclosure," the entity is

216. See supra note 12.
217. Ind. Code Ann. §§ 13-10-3-1 to 13-10-3-12 (Burns 1994).
220. Telephone interview with W. Hugh O'Riordan, Partner with Givens Pursley & Huntley and Member of Washington Legal Foundation's Legal Policy Advisory Board (June 1994).
“immune from any administrative and civil penalties associated with the issues disclosed and is immune from any criminal penalties for negligent acts associated with the issues disclosed.”223 The immunity, however, does not apply if the entity “is required to make a disclosure to [the Department of Health] under a specific permit condition or under an order issued by the [Department of Health].”224 The Colorado Department of Health has the sole power to determine whether a disclosure is “voluntary” under all the requirements of the statute, and therefore makes the final decision as to whether immunity applies.225

In contrast to the Oregon statute, the Colorado statute also includes a provision which mandates penalties for unauthorized disclosure of audit information. Both statutes provide the prosecuting agency with limited access to an audit report for the purpose of preparing for an in camera hearing on the issue of whether the document is privileged.226 The prosecutor may not divulge any information from the report (including non-privileged information) except as specifically allowed by the court or administrative law judge.227 Under the Colorado statute, the prosecuting agency, employee, or official may “be found guilty of a class 1 misdemeanor, may be found in contempt of court by a court of record, and may be assessed a penalty not to exceed ten thousand dollars by a court of record or an administrative law judge” if he, she, or it divulges any information from the report.228

In addition, the Colorado statute contains a testimonial privilege not found in the Oregon statute: if all or a portion of an environmental audit report is found to be privileged, then no person or entity participating in or performing the audit may testify regarding that audit without the consent of the audited party, unless ordered to do so by a court.229 Finally, the Colorado statute clarifies the exceptions to the privilege and extends them beyond the parameters of the Oregon privilege.230

Proponents of an environmental audit privilege prefer the Colorado statute to the Oregon statute because it takes further steps both to protect the confidentiality of environmental audits (through the testimonial privilege) and to increase the likelihood that such audits will

230. See infra part IV.B.
lead to greater voluntary compliance (through the voluntary disclosure immunity).

Opponents of the privilege have reason to view the Colorado statute as even more dangerous than the Oregon statute. The voluntary disclosure immunity provisions take away a prosecutor’s discretion to file criminal charges against a violator, and place that discretion in the hands of the Department of Health. In the opinion of at least one state Attorney General, this legislative redistribution of power violates the separation of powers doctrine as set forth in many state constitutions.

D. The 1995 Federal Proposals

On February 24, 1995, United States Representative Joel Hefley (R-Colo.) introduced Bill 1047 in the House of Representatives. On March 21, 1995, United States Senator Mark O. Hatfield (R-Or.) introduced Bill 582 in the Senate. The language of both bills is similar to that of the Colorado privilege enacted in 1994. For example, both federal bills would make voluntary environmental self-evaluative reports inadmissible and not subject to discovery in “any” civil, criminal, or administrative action under Federal law. Furthermore, both federal bills place the burden of rebutting the existence of the privilege on the government. The federal bills, like the Colorado statute, also provide for a testimonial privilege. Last, both federal bills follow Colorado’s lead in granting immunity from any proceeding regarding a violation uncovered by an audit, provided the violator promptly initiated efforts to come into compliance.

The introduction of a federal bill which proposes such an evidentiary privilege constitutes a sharp departure from Congress’ tradi-

233. Environmental Audit Legislation—Constitutionality, 95 Op. Tenn. Att’y Gen. No. 28, at 3-6 (Apr. 4, 1995). The Tennessee Attorney General also opined that privileges such as Colorado’s may violate the due process and equal protection clauses of the United States Constitution, because they condition criminal immunity upon the ability to pay for site remediation. Id. at 6-9. As the Tennessee Attorney General admits, because this argument only applies where the subject of criminal prosecution is indigent, id. at 6-9, its relevance is severely limited, bringing it beyond the scope of this comment.
tional restraint in creating evidentiary privileges that are not sanctioned by the judiciary. Although at the time of this writing the chance for success of these bills is unknown, their introduction to the United States Congress has created a forum for discussing the environmental audit privileges in the context of federal law.

As discussed earlier, the environmental audit privilege does not follow the policies underlying the common law self-evaluative privilege. Nevertheless, the federal legislature, like many state legislatures, is allowed to create statutory privileges out of thin air, if it so wishes. However, Congress seldom chooses to create entirely new statutory privileges that are not judicially endorsed.

III
STATUTORY PRIVILEGES, THE FEDERAL RULES OF EVIDENCE, AND THE FEDERAL COURTS

Under Federal Rule of Evidence 501, privileges are "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," except "as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority . . . ." Although many statutes enacted by Congress "directly or by implication affect the admissibility of evidence," few of them fall within this "exception in Rule 501."

Professor Wright, perhaps the only commentator to have written at length on the subject of statutory privileges, has theorized that federal statutes falling within this exception to Rule 501 have three characteristic properties: (1) when adjudicating preliminary questions of fact, the court cannot compel disclosure of matters falling within the statute; (2) the protection afforded by the statute applies at all stages of the proceedings; and (3) matters protected by the statute are not only inadmissible, but also not discoverable.

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240. The House Subcommittee on Commercial and Administrative Law held a hearing on H.R. 1047 on June 29, 1995. Other than the addition of co-sponsors, this is the last reported legislative activity on either bill. See 1995 Bill Tracking S. 582; 1995 Bill Tracking H.R. 1047, available in LEXIS, Legis Library, BLTRCK File.
241. See supra part II.B.5.
243. Id.
244. 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5437, at 891-97 (1980).
245. Id. at 891-92.
Although many federal statutes "affect the admissibility of evidence," 246 and several others create "quasi-privileges," 247 Professor Wright has identified "only a handful of statutes which can be said to clearly fall within the exception to Rule 501" 248 under the above definition. Some of these are meant to "displace an existing [common law] privilege or to make clear that no derogation of an existing [common law] privilege is intended." 249 Others do not involve any common law privilege, but rather create a new privilege out of whole cloth by using language that immunizes the information from process or provides simply that a person cannot be compelled to reveal the information under any circumstance. 250

Professor Wright voiced a fairly popular sentiment when he suggested that: "[i]t would certainly be desirable in subsequent enactments for Congress to use the word 'privilege' when it intends that the statute be within the present exception. Meanwhile, courts will have to determine the applicability of statutes under Rule 501 on a case-by-case basis." 251

Both Senate Bill 582 and House Bill 1047 provide that an environmental audit report shall not be subject to discovery and shall not be admitted into evidence in any civil or criminal action or administrative proceeding before a federal court or agency. 252 Although the language in neither of the proposed federal statutes follows Professor Wright's advice and uses the word "privilege," the language in both bills brings them "within the exception in Rule 501" 253 by explicitly limiting the admissibility and discovery of environmental audits.

However, as discussed supra, the proposed federal statutes, based upon the Oregon and Colorado statutes, have little or no basis in the

246. Id. at 891. For an exhaustive discussion and listing of statutes falling outside the exception, see id. at 892-93. These primarily consist of statutes that forbid disclosure of information that the government requires of individuals and businesses. Id. at 892.

247. Id. at 894. Wright has identified a number of federal statutes that go beyond confidentiality to make the material furnished inadmissible but which do not appear to bar discovery. Id. at 894-95. The argument for privilege is stronger where the statute conditions admissibility on the consent on particular persons. Id. at 894. However, case law is inconclusive on this point. Id. at 895. For a listing of statutes falling under the category of "quasi-privilege," see id. at 894-95, nn. 22-34 and accompanying text.

248. Id. at 896.

249. Id.

250. Id.

251. Id.

252. See S. 582, 104th Cong., 1st Sess. (1995) ("[A]n environmental audit shall not be subject to discovery and shall not be admitted into evidence in any civil or criminal action or administrative proceeding before a federal court or agency . . . . "); H.R. 1047, 104th Cong., 1st Sess. § 4 (1995) ("[A] voluntary environmental self-evaluation that is made in good faith shall not be admissible evidence in any legal action or administrative procedure under federal law and shall not be subject to any discovery procedure under federal law . . . . ").

253. 23 WRIGHT & GRAHAM, JR., supra note 244, § 5437, at 892.
common law. A review of the federal statutory privileges cited by Wright indicates that to date the very broadest federal statutory privilege without significant common law roots is contained in the confidentiality provisions of the Census Act.\textsuperscript{254} As the following discussion will illustrate, the federal courts' application of this Census report privilege is instructive in predicting how the federal courts will apply a federal statutory environmental audit privilege.

Although Congress has broad power to require individuals to submit responses to census questionnaires, an accurate census depends in large part on public cooperation.\textsuperscript{255} To stimulate that cooperation, Congress has incorporated into the census laws assurances that information furnished to the government by individuals is to be treated as strictly confidential.\textsuperscript{256} Sections 8(b)\textsuperscript{257} and 9(a)\textsuperscript{258} of the Census Act explicitly provide for the nondisclosure of individual census reports.\textsuperscript{259} The Census Bureau does not have the discretion to disclose the information referred to in sections 8(b) and 9(a).\textsuperscript{260}

In \textit{St. Regis Paper Co. v. United States},\textsuperscript{261} the Supreme Court had the opportunity to construe the confidentiality portions of the Census Act when it was asked to determine whether the Census Act protected a corporation's copies of census reports submitted to the Census Bureau from compulsory production to the Federal Trade Commission. The Court held that, although the privilege provisions of the Census Act prevented the Census Bureau from providing the original reports to the FTC, the documents were not privileged, because the statute did not expressly state that they would be.\textsuperscript{262} When a court considers a statutory privilege, the Court stated, it has a "duty

\begin{itemize}
\item \textsuperscript{254} 13 U.S.C. §§ 1-401 (1994).
\item \textsuperscript{255} Baldrige v. Shapiro, 455 U.S. 345, 354 (1982).
\item \textsuperscript{256} \textit{Id.;} 13 U.S.C. §§ 8(b), 9(a) (1994).
\item \textsuperscript{257} 13 U.S.C. § 8(b) (1994). This section provides that, subject to specified limitations, "the Secretary [of Commerce] may furnish copies of tabulations and other statistical materials which do not disclose the information reported by, or on behalf of, any particular respondent . . . ."
\item \textsuperscript{258} 13 U.S.C. § 9(a) (1988). This section provides further assurances of confidentiality:
\begin{quote}
Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof . . . may, except as provided in section 8 . . . of this title—
\begin{enumerate}
\item use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or
\item make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or
\item permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.
\end{enumerate}
\end{quote}
\item \textsuperscript{259} Baldrige v. Shapiro, 455 U.S. at 355.
\item \textsuperscript{260} \textit{Id.}
\item \textsuperscript{261} 368 U.S. 208, 218 (1961).
\item \textsuperscript{262} \textit{Id.} at 215-20.
\end{itemize}
to avoid a construction that would suppress otherwise competent evidence unless the statute, strictly construed, requires such a result."\textsuperscript{263}

The strict construction of statutory grants of privilege is one of this nation's oldest common law traditions. As the Supreme Court stated in 1892:

The doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of... privileges in which the Government or the public has an interest. Statutory grants of that character are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld; nothing passes by mere implication. This principle, it has been said, is a wise one, as it serves to defeat any purpose concealed by the skillful use of terms to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies.\textsuperscript{264}

The intended effect of this strict rule of construction is that the authors of laws be forced to state explicitly what is to be protected under a new privilege. If the courts' subsequent application is not sufficient for the beneficiaries of the privilege, they will be forced to lobby for new, broader language. Shortly after the \textit{St. Regis Paper} decision, Congress adopted language to supplement section 9(a)(3) of the Census Act to overrule that holding.\textsuperscript{265}

The doctrine of strict construction may explain why, to date, Congress has exercised restraint in creating new statutory privileges that have not already been sanctioned by the judiciary. As stated above, the confidentiality provisions of the Census Act appear to create the broadest statutory privilege with no roots in the common law; however, it appears to be a very narrow privilege. Unlike a statutory privilege for environmental audit report information, the privilege for individual census information does not concern activities that are highly regulated by the government. On the contrary, it protects an activity which is of little or no interest to law enforcement agencies. Furthermore, the activity it protects occurs only once every ten years, in contrast to environmental audits, which may be conducted several times each year. Finally, the falsification of census reports has presumably never been of great public concern. The falsification of envi-


\textsuperscript{264} Coosaw Mining Co. v. South Carolina, 144 U.S. 550, 562 (1892).

\textsuperscript{265} Pub. L. No. 87-813, 76 Stat. 922 (1962). The amended text provided that copies of census reports retained by an establishment submitting census data would be immune from legal process. \textit{Id.} "The legislative history pertaining to the amendment shows its limited purpose. The purpose of this legislation is to provide specifically that company-retained copies of census reports submitted to the Bureau of the Census shall have the same confidential status which is afforded to the original census reports . . . [cite omitted]." Carey v. Klutznick, 653 F.2d 732, 741 (1981) (Stewart, J. concurring).
ronmental audit reports, however, is of substantial public concern. If the federal courts have applied the doctrine of strict construction to the confidentiality provisions of the Census Act, we can be sure they will apply this doctrine to statutory environmental audit privileges in the future.

Given the variety of open-ended exceptions to the proposed and extant statutory environmental audit privileges,\textsuperscript{266} it will not be difficult for courts to construe the language of such privileges so as to “avoid a construction that would suppress otherwise competent evidence.”\textsuperscript{267} Applying the rule of strict construction, the courts could use this standard to render the privilege nearly devoid of any application.

IV

THE CASE AGAINST AN ENVIRONMENTAL AUDIT PRIVILEGE

A. Effects on Law Enforcement

The institution of a statutory environmental audit privilege significantly increases the cost of prosecuting companies. Since the prosecution can only use unprivileged information, two teams of attorneys and investigators must be assigned to each environmental prosecution. While one team investigates the audit reports and litigates discovery issues, the other team prepares for the trial on the merits. The first team can only convey unprivileged information to the second team. This requirement will either double the personnel costs of prosecuting environmental crime, or cut the allowable number of prosecutions in half. Pre-trial litigation on the audit report discovery issue may necessitate long periods in court, forcing deputy district attorneys to ignore their other cases for those periods.

The proponents of an audit privilege argue that the privilege should not affect enforcement of environmental laws, because it does not place prosecutors in any worse position than if the environmental audit had never been conducted. In theory, this may be true; in practice, it is not. Since the privilege statute contains no sanctions for attempting to shield documents in an audit report, a prosecutor cannot assume that such documents have not been included in the set of documents labeled “environmental audit report.” The prosecution thus has a public duty to review the entire audit report to ensure that documents not subject to the privilege, including documents entirely outside the scope of an environmental audit, are made available to the public and used to enforce the laws.

\textsuperscript{266} See infra part IV.B.
\textsuperscript{267} St. Regis Paper Co. v. United States, 368 U.S. 208, 218 (1961).
Once the prosecution has viewed the entire report, all subsequent enforcement actions relating even tangentially to the issues raised in the privileged portions of the report become subject to allegations of taint. Not only must the prosecution institute the dual-prosecutor "Ethics Wall" to avoid such allegations, but it must prove that discovery came from an independent source. This substantially complicates and lengthens the litigation process and will lead to less effective enforcement of environmental laws.

Since viewing an environmental audit report creates many complications, prosecutors may institute policies of refraining from the review of audit reports entirely, allowing the court to view the documents without the presence of the prosecution. This would only further aggravate the separation of powers problem which arises with the implementation of the privilege.

If an audit report shows evidence of noncompliance with an environmental law, the magistrate determines in camera whether efforts to initiate compliance were pursued promptly and with reasonable diligence. If the judge finds that such efforts were prompt and reasonable, the materials are privileged and the prosecutor may be effectively barred from prosecuting the case criminally. This transfers the discretion to make charging decisions from the prosecutor to the magistrate. Prosecutors maintain that there is no need to undercut their discretionary authority in this way, because there is no evidence of abuse of this prosecutorial discretion in the past.

It may be argued that this feature of the privilege will create criminal immunity for companies that find violations in their audit reports, even if such violations had been ongoing for years due to the company's criminal negligence. Such a privilege would unfairly advantage polluting companies by protecting them from civil or criminal penalties by allowing them to make it appear as though the audit uncovered problems that they otherwise would not have known about.

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268. The term of art, "Chinese Wall," is traditionally but objectionably used by courts and commentators to describe a procedural barrier "used as a hermetic seal to prevent two-way communication between two groups." Peat, Marwick, Mitchell & Co. v. Superior Court, 245 Cal.Rptr. 873, 888 (Cal. App. 1988) (Low, J., concurring). Justice Low has criticized the term for its ethnic focus, "which many would consider a subtle form of linguistic discrimination." Id. at 887. The term "ethics wall" has been suggested as "more suitable phraseology." Id. at 888.


270. See supra note 233 and accompanying text.

271. Or. Rev. Stat. §§ 36-468.963(3)(d), 36-468.963(4)(b) (1993). The Colorado statute provides that if the audit evidences noncompliance with environmental laws, it must be shown to the satisfaction of the court or administrative law judge that "appropriate efforts" were initiated "promptly" in order for the privilege to apply. Colo. Rev. Stat. § 13-25-126.5(3)(b)(f) (1994).

272. See supra note 55 and accompanying text.
Furthermore, opponents to the privilege argue, a pre-trial *in camera* review is not the appropriate forum for determining whether a company's efforts to come into compliance were prompt and reasonable; such review deprives prosecutors of discretion and raises separation of powers questions.273 Finally, *in camera* review places issues into the hands of judges which arguably should be determined by jurors.

**B. The Exceptions Swallow the Rule**274

The existing and proposed environmental audit privileges contain a myriad of exceptions that threaten to destroy the privilege and undermine its purpose. In contrast to the statutory privilege that is incorporated into the Census Act, which has no exceptions, the qualified environmental audit privilege gives courts many opportunities to find that the privilege does not apply to the report in question. Since the applicability of the privilege depends in great part upon how the company uses the audit report after the audit is completed, an environmental auditor has no way of knowing whether the privilege will actually provide protection during litigation. This brings into question one of the main rationales behind this privilege: protecting the confidentiality of audit reports to allow auditors to be more candid in disclosing violations of the law and other problem areas.

Under the existing Oregon and Colorado statutes, the environmental audit privilege does not apply if the owner or operator of a facility that prepared or commissioned the audit report waives the privilege.275 Although only the Oregon statute articulates that waiver may be either express or by implication, this meaning will probably be read into any waiver exception unless it specifies that waiver must be express.

In a criminal proceeding, unless the party invoking the privilege can prove that appropriate efforts to achieve compliance with the law were promptly initiated and pursued with reasonable diligence, the environmental audit privilege does not apply to an audit report, or a portion of a report, if the report provides evidence of noncompliance

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274. This portion of the discussion will focus on the language of the statutory privileges enacted in Oregon and Colorado, which will be posited as the best examples of privilege language that have been drafted as a result of protracted negotiations between various parties at interest. As discussed above, *supra* part II.D, the privileges proposed by Senator Hatfield and Representative Hefley are similar to the privileges enacted in Oregon and Colorado, but may be subject to lengthy revision prior to any enactment.
with an applicable environmental law. Under the Oregon statute, if the court finds evidence of noncompliance, the burden of proving that appropriate efforts to achieve compliance were promptly initiated and pursued with reasonable diligence rests with the party invoking the privilege. In Colorado, the party asserting the privilege must only establish a prima facie case as to the privilege; the party seeking disclosure then has the burden of proving the privilege does not apply.

Even where the party invoking the privilege can prove that efforts to achieve compliance were exerted, the privilege does not apply to a report if the prosecutor has "a compelling need for the information." Under the Oregon statute, the prosecutor must support a claim of "compelling need" by showing that the information is not otherwise available and that the prosecutor "is unable to obtain the substantial equivalent of the information by any means without incurring unreasonable cost and delay." If the prosecutor seeks discovery under this exception, the burden of proving the elements of "compelling need" rests with the prosecutor. Under the Colorado statute, the privilege does not apply if the court finds that "compelling circumstances" exist which favor the admission of the environmental audit into evidence.

The environmental audit privilege does not apply to materials that are "not subject to the privilege." The category of materials not subject to the privilege includes information required to be made available to a regulatory agency and information independently obtained by a regulatory agency. The Colorado statute also states that the privilege does not apply to "documents existing prior to the commencement of [or] prepared subsequent to the completion of... the voluntary self-evaluation," provided that such documents are "independent" of the self-evaluation. It also does not apply to "any information, not otherwise privileged, ... that is developed or main-

279. OR. REV. STAT. § 36-468.963(3)(c)(D) (1993). This exception is only available in criminal cases. See id. The Colorado statute provides that "compelling circumstances" may allow disclosure of an environmental audit. COLO. REV. STAT. § 25-126.5(3)(c) (1994). The exception is available in both civil and criminal cases in Colorado. See COLO. REV. STAT. § 25-126.5(3) (1994).
tained in the course of regularly conducted business activity or regular practice." In courts desiring a strict construction, these distinctions will probably also be read into the Oregon statute and others like it. The privilege does not apply to an environmental audit report if the privilege is "asserted for a fraudulent purpose." The privilege statutes provide no definition as to what constitutes a "fraudulent purpose." However, it would seem reasonable to assume that a court would apply a definition similar to the crime/fraud exception to the attorney-client privilege. As originally proposed to Congress, the Federal Rules of Evidence would have contained an exception to the attorney-client privilege providing that the privilege does not apply "[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 . . . ." Assuming a similar definition will be applied, it may be anticipated that courts will declare the statutory environmental audit privilege inapplicable where it is proven that the audit was conducted in order for the corporation to enable or aid anyone to commit what the corporation knew (or reasonably should have known) to be a crime or fraud. One indicator of such fraudulent purpose might be the inclusion in the audit report, as "PRIVILEGED DOCUMENTS," of items that were not collected or developed for the primary purpose of, or in the course of, the environmental audit. Under the Oregon and Colorado statutes, the party seeking disclosure under this exception has the burden of proving that the privilege is asserted for a fraudulent purpose.

Finally, the Colorado privilege is taken away if "the information contained in the environmental audit report demonstrates a clear, present, and impending danger to the public health or the environment in areas outside of the facility property." A court faced with the duty to "avoid a construction that would suppress otherwise competent evidence" might find a "clear, present, and impending danger" in a wide range of violations.

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C. Effects on Corporate Incentives to Comply

The statutory creation of the proposed qualified privilege does not encourage the frank and candid reporting of audit findings. When an auditor is reporting such findings, he or she does not know whether the company will come into compliance, much less whether such compliance will be deemed by a magistrate to be prompt and reasonable.292 Furthermore, he or she does not know whether, several years down the line, a prosecutor will be able to convince a magistrate that there is a compelling need for the information or that the report is being used for fraudulent purposes. Therefore, the auditor cannot determine whether or not the report will ultimately be privileged for litigation purposes.

If an auditor nevertheless uses honest, candid language, he or she essentially forces the company to promptly come into compliance and prevents the fraudulent use of the report. This type of auditor will not be very popular with companies who wish to have more control over the timing of compliance measures and the use of their completed reports. Instead, companies will likely instruct auditors to relate findings of problematic areas orally or forget they ever found such areas. Since the employer may retaliate if an auditor’s reports lead to increased liability, an auditing employee will be just as inhibited from making a candid record of problematic findings as he or she was before the privilege. Similarly, an independent auditor will be equally inhibited from making a candid report because the auditor’s business will suffer if he or she makes candid findings.

D. Potential for Abuse

When a prosecutor secures and reviews an audit report through a search warrant, the prosecutor will be unable to use any new information contained in the report concerning secondary violations because the court may only compel the disclosure of those portions of an environmental audit report that are relevant to issues in the original dispute.293 Therefore, potential for abuse of the privilege depends upon how the courts define what constitutes an “issue” relevant to the in camera privilege determination.

If the courts determine that the privilege is lost for only the portions of an audit report that are relevant to the issue(s) for which the prosecutor had probable cause for the initial search warrant, the pros...
executor does not ever have the option of using the audit report for a "fishing expedition." If the courts determine that prosecutors may have access to all portions of an audit report which fall within an exception to the privilege, the prosecutor will be able to use the audit report for a "fishing expedition" only if the report contains any evidence of such a violation.

If the latter course is followed, a greater chance exists that the statutory privilege will increase voluntary compliance with the law. If a company knows that one ignored violation could potentially lead to a complete loss of the privilege and a judicially sanctioned "fishing expedition," the company will be more likely to address all violations that are uncovered during an audit. The real cost of failing to come into compliance within a reasonable amount of time will exceed the civil or criminal penalties associated with that particular violation. Significantly, it will expand to include the other violations disclosed in the audit report.

If, however, a company can ignore a violation without losing the privilege for the entire audit report, voluntary compliance will likely decrease, and opportunities to abuse the privilege will increase. Since the company is essentially immunized from prosecution for secondary violations that a prosecutor discovers by reading a privileged report, a company will want to include all information about any violations in its audit report. Any evidence introduced to prove these secondary violations will be suspect as originating from privileged information, and the prosecutor will have the burden of proving that each item of evidence was secured independently of the audit report review.294 Most likely, prosecutors will not have the resources to bring a criminal prosecution under this burden, and will choose to either accept a civil settlement or forgo prosecution altogether.

Furthermore, depending upon the court's definition of "required reports," the protection afforded an audit report may be rendered so narrow as to be almost illusory. Under the language of the Colorado statute, the privilege will not apply to "[d]ocuments or other information required to be available or furnished to a regulatory agency pursuant to any environmental law or any other law or regulation."295 Various federal, state, and local laws require companies to report violations of environmental laws to regulatory authorities when they occur or as soon as they are discovered.

294. See supra note 269 and accompanying text.
295. Colo. Rev. Stat. § 13-25-126.5(4)(b) (1994); see also Or. Rev. Stat. § 36-468.963(5)(a) (1993) (providing privilege does not apply to "documents . . . or other information required to be collected . . . or otherwise made available to a regulatory agency.") The proposed federal privileges limit reporting requirements to federal law; however, this area may be revised prior to any adoption into law.
For example, under the Federal Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), facility owners or operators must notify the state and local authorities of any release of statutorily defined "hazardous" substances. State and local reporting requirements may (and often do) supplement federal reporting requirements in order to increase reporting requirements. Recent developments in Security Exchange Commission reporting have also expanded environmental reporting requirements.

If a court defines "required reports" as only those reports required to be put in writing and transmitted to regulators for some specific purpose, this limitation on the privilege could be relatively insignificant. However, since the federal courts strictly construe statutory privileges, they may interpret the "required reports" exception to include all information that must be communicated to the government. Under this broad reading, one would be hard pressed to imagine a criminal violation that would not fall under this exception.

V

PREFERABLE ALTERNATIVES TO AN ENVIRONMENTAL AUDIT PRIVILEGE

Although a statutory privilege for environmental audit reports may not bring about the effects its proponents seek, recent developments in the federal courts and regulation policy present alternative approaches to protecting the confidentiality of these reports that are preferable to a statutory environmental audit privilege. Since privileges are "not [to be] created lightly," if any alternatives can accomplish the same objectives, they should be pursued first.

A. Use of the Attorney-Client Privilege To Shield Environmental Audit Reports

Until recently, courts have generally not been persuaded by industry attempts to shield environmental audit reports using the attor-
However, in *Olen Properties Corp. v. Sheldahl, Inc.*, the U.S. District Court for the Central District of California articulated the standard for allowing the use of this privilege to shield environmental audit reports.

The plaintiff in *Olen Properties* filed a motion to compel production of environmental audit memoranda prepared by an independent auditor. The independent auditor submitted a declaration stating that he prepared the documents to gather information for the defendant’s attorneys to assist the attorneys in evaluating compliance with relevant laws and regulations. The matter was assigned to a Magistrate Judge to determine whether the attorney-client privilege extended to such memoranda.

Looking to the District Court of Massachusetts’ decision in *United States v. United Shoe Machinery Corp.*, the court recognized four elements that must be satisfied in order for the attorney-client privilege to apply:

1. The asserted holder of the privilege is or sought to become a client;
2. The person to whom the communication was made:
   a. is a member of the bar of a court, or his subordinate; and
   b. in connection with this communication is acting as a lawyer;
3. The communication relates to a fact of which the attorney was informed:
   a. by his client;
   b. without the presence of strangers;
   c. for the purpose of securing primarily either:
      i. an opinion of law or
      ii. legal services or
      iii. assistance in some legal proceeding, and not
   d. for the purpose of committing a crime or tort; and
4. The privilege has been:


306. Id. at *2-*3.

307. Id. at *1.

(a) claimed; and
(b) not waived by the client.  

The court found that "[t]he reports appear to have been prepared for the purpose of securing an opinion of law," and that the other elements of the United Shoe Machinery test were also satisfied. Therefore, the court held that the environmental audit memoranda were privileged and that the defendant did not need to produce them for plaintiff's discovery.

Proponents of an environmental audit privilege argue that the attorney-client privilege does not provide adequate protection to increase the overall frequency of, or candor in, environmental auditing. For example, Terrell Hunt and Timothy Wilkins have asserted that, under the attorney-client privilege, to protect audit documents from discovery, an attorney must supervise the auditing process directly. This may not create a significant additional burden for larger corporations with in-house counsel. For small and medium-sized companies, however, the additional cost associated with hiring attorneys, who often will make little direct contribution to the outcome or performance of the audit, may be prohibitive.

Under Olen Properties, however, the attorney need not supervise the audit directly but merely initiate the preparation of an audit report to assist the attorney in evaluating compliance. Furthermore, although an attorney might in some circumstances "make little direct contribution to the outcome or performance of the audit," there may be no better way to ensure that the business will indeed use the audit to comply voluntarily with environmental laws.

Without an attorney's supervision, a company is left to its own devices to interpret and implement the environmental audit report. This set-up is prone to criticism that the fox is guarding the henhouse. Officers and managers of the auditing company could do absolutely nothing with the results of an audit. On the other hand, an attorney is under a professional duty to advise his or her clients at every step in the decisionmaking process where the law is being broken. An auditing company might be unable to ignore or intentionally to break the law when the company attorney constantly warns the auditor of the consequences of noncompliance.

This reliance upon attorneys would arguably make the auditing process cost-prohibitive for some small- and medium-sized companies.

310. Id.
311. Id. at *3.
312. Hunt & Wilkins, supra note 54, at 388.
However, litigating the myriad of pre-trial questions that undoubtedly will arise prior to the successful shielding of documents under a statutory environmental audit privilege will also be costly. Moreover, even with a statutory privilege in place, a great majority of the companies that audit may require the assistance of an attorney to interpret the audit reports, to determine the priority of remediation measures, and to deal with regulators, law enforcement agencies, and/or potential private complainants. If an environmental audit privilege statute were in effect, any wise auditing company would hire an attorney at some early point to ensure that the privilege is not lost under one of the many exceptions. The incremental cost of hiring an attorney to initiate the auditing process and to advise the company as to the results of an audit are, in the long run, likely to be recouped via increased goodwill and decreased penalties (whether private, administrative, civil, or criminal) for nuisances and other violations of the law.

Proponents of environmental audit privileges have argued that, since the attorney-client privilege and the attorney work product immunity do not protect environmental audit reports that were prepared without the involvement of an attorney, there is a need for an environmental audit privilege. However, this argument begs the question of whether a privilege for environmental audit reports is desirable. The attorney-client relationship is protected because, "[h]istorically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients." The environmental auditor is bound by no similar duty, and this is precisely why a separate privilege for environmental audit reports is not advisable in the present regulatory atmosphere.

In fact, one of the most significant impediments to a more workable environmental audit policy is the current lack of standards or a professional code for environmental auditors. At the January 20, 1995, Environmental Audit Policy Forum meeting of the Environmental Protection Agency, a representative of the Institute on Environmental Auditing testified that the Institute's top priority was not the creation of a privilege for environmental audit reports, but rather the formation and promulgation of EPA-sanctioned uniform standards for environmental auditors and their audits.

Without such uniform standards, the value of environmental audits can never be quantified, because audits can contain information of widely varying quality. This lack of standards makes the creation of

314. See, e.g., Hunt & Wilkins, supra note 54, at 376-88.
any privilege for environmental audit reports extremely problematic. Consistent with this assertion, the Institute listed the creation of an environmental audit privilege or other incentives for auditing as only a third priority.\footnote{317}

\section*{B. Use of Evidence Rule 407 To Shield Retrospective Environmental Audit Reports}

Federal Rule of Evidence 407, or analogous state evidentiary rules, could also provide a shield for environmental audit reports sufficient to allay the fears of auditing companies. Rule 407 provides that when measures are taken after an event which would have made the event less likely to occur if taken previously, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event.\footnote{318}

In 1994, the U.S. District Court for the Northern District of Florida decided \textit{Reichhold Chemicals, Inc. v. Textron, Inc.}\footnote{319} Although Federal Rule of Evidence 407 does not directly apply to pretrial discovery proceedings, this District Court achieved similar effect by using its power to regulate discovery to deny discovery (on grounds of relevancy) of an environmental audit report.\footnote{320}

The facts in \textit{Reichhold Chemicals} are as follows. In 1984, the Florida Department of Environmental Regulation (DER) and Reichhold entered into a consent order obligating Reichhold to investigate and remediate the contamination of groundwater on and under an industrial plant site it owned in Pensacola. For over 60 years, former owners had used various parts of the site for a variety of manufacturing purposes, resulting in a host of environmental problems.\footnote{321} Pursuant to the order, Reichhold produced a number of documents and undertook a number of costly measures. In 1992, Reichhold brought suit against eight defendants, mostly former owners of at least portions of the site, asserting cost-recovery claims under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),\footnote{322} among other claims. The defendants requested discovery of several of Reichhold's documents, including reports prepared in response to the DER order; Reichhold asserted that thirteen of the requested documents were protected by a self-evaluative privilege.\footnote{323}

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317. \textit{Id.}
318. \textit{See Fed. R. Evid. 407.}
320. \textit{See id.} at *9, *20-*22.
321. \textit{Id.} at *7.
322. \textit{Id.} (citing 42 U.S.C §§ 9607(a), 9613(f)).
323. \textit{Id.} at *8.
\end{flushright}
The court denied application of the common law formulation of the self-evaluative privilege to protect all of the prospectively-focused documents requested by the defendants. It held that "evaluations of the potential environmental risks of a proposed course of action, made in advance of the decision to adopt that course of action, are not protected from discovery." However, noting a significant difference between pre-accident and post-accident analysis, the court upheld a qualified privilege for the report prepared pursuant to the Florida DER order. "This distinction [between pre-accident and post-accident analysis]," the court stated, "is of vital importance, and has been ignored by those who fear that the privilege might be used to prevent discovery of a defendant's prior knowledge of the risks of his actions." The qualified privilege was limited to reports which were prepared after the fact for the purpose of candid self-evaluation and analysis of the cause and effect of past pollution. In addition, the reports were only privileged if they were created with the expectation that they would be confidential, and had in fact been kept confidential. Moreover, if one or more of the defendants could demonstrate extraordinary circumstances or special need, the privilege could be overcome.

Although the Reichhold court did not specifically mention Rule 407, it did note that "retrospective analysis is generally not relevant." The "retrospective analysis" privilege falls squarely within the public policy protection afforded by Rule 407. After the occurrence of an environmental accident, companies must investigate the causes and effects of that accident in order to prevent further harm. This type of investigation will frequently apprise the company of measures which, if taken earlier, would have prevented the accident. However, under Rule 407, this information is not admissible as evidence to show negligence or intent. Therefore, a court may justifiably find it irrelevant during pre-trial discovery proceedings. On the other hand, as the Reichhold court noted, "[t]he fact that an actor had actual prior knowledge of the harm that would or could result from a course of action, and, nevertheless, deliberately chose to act is highly relevant in a negligence action and should ordinarily be discoverable."

324. Id. at *21.
325. Id. at *19-*20. See also Results of Company's Audit Shielded by Self-Evaluative Privilege, Court Says, Env't Rep. (BNA) No. 187, at D-10 (Sept. 29, 1994).
327. Id. at *21.
328. Id. at *22.
329. Id.
330. Id. at *20.
331. Id.
Proponents of a statutory environmental audit privilege would not be without support in heralding *Reichhold* as the judicial embrace of a privilege of the sort introduced at the federal level. While *Reichhold*, to a certain extent, correctly applies the common law self-evaluative privilege to a retrospective and required report, the environmental audit privilege, as adopted by the Oregon legislature, bears little resemblance to the common law self-evaluative privilege.\(^{332}\) Furthermore, the decision is more accurately characterized as "based on the same policy considerations as Federal Rule of Evidence 407."\(^{333}\)

Proponents of a statutory privilege could argue that, since *Reichhold* does not protect all environmental audit reports (and does not reach the question of whether retrospective audit reports should be shielded from the government), a broader privilege is necessary. However, this analysis again begs the question of whether a privilege for environmental audit reports is desirable. The policy behind Rule 407 is to encourage retrospective analyses of accidents in order to promote public health and safety.\(^{334}\) There is no analogous public health policy behind a rule that would shield prospective reports, or that would shield any audit reports from government agencies whose mission is to protect public health and safety.

### C. Use of Protective Orders to Limit Discovery of Environmental Audit Reports

The courts are given broad discretion in regulating the discovery process through the use of protective orders. In the federal court system, Federal Rule of Civil Procedure 26(c) allows a court to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . ."\(^{335}\) The Rule explicitly provides for eight kinds of protective orders, including orders that restrict discovery.\(^{336}\) However, a court is not limited to the eight specified types of orders and may develop inventive orders to fit the requirements of particular cases.\(^{337}\) A number of federal courts that have rejected the common law self-evalu-

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332. *See supra* part II.B.5.
336. *Id.*
D. Revised Regulatory Policies Provide Assurances for Auditing Companies

On April 3, 1995, EPA released its revised Policy on Voluntary Environmental Self-Policing and Self-Disclosure. EPA developed this policy after nearly a year of forums and workshops with both industry and law enforcement representatives. The revised policy “is intended to promote environmental compliance by providing greater certainty as to EPA’s enforcement response to voluntary self-evaluations . . . .” One of the principles upon which the policy is based is that “EPA should not seek voluntary environmental audit information to trigger an investigation of a civil or criminal violation of environmental laws.” This policy supersedes EPA’s 1986 Policy on Environmental Audits.

EPA was not willing to support a statutory or other privilege for environmental audit reports. However, EPA does provide significant incentives to perform audits and protections for companies that do audit. First, the policy offers a reduction in civil penalties for any violation discovered as a result of conducting an audit and disclosed to EPA in a timely manner. Second, the policy guarantees that “EPA will not recommend to the Department of Justice that criminal charges be brought” against a company for any violation discovered as a result of conducting an audit and disclosed to EPA in a timely manner. Third, the policy guarantees that “EPA will not request a voluntary environmental audit report to trigger a civil or criminal investigation. For example, EPA will not request an audit in routine inspections.” However, “[o]nce the Agency has reason to believe a violation has been committed, EPA may seek through an investigation

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340. Id. at 16,875-76.
341. Id. at 16,876.
342. Id.
343. See supra part I.C.
344. 60 Fed. Reg. 16,877.
345. Id. at 16,877-16,878.
346. Id. at 16,878.
or enforcement action any information relevant to identifying violations or determining liability or extent of harm."\(^{347}\)

The EPA policy also articulates the consequences for states that pass a statutory environmental audit privilege. "EPA will scrutinize enforcement more closely in states with audit privilege and/or penalty immunity laws and may find it necessary to increase federal enforcement where environmental self-evaluation privileges or penalty immunities prevent a state from obtaining [effective environmental enforcement]."\(^{348}\) At a conference of state attorneys general, Carol Browner, the EPA Administrator, warned that authorization to enforce federal laws may be revoked for states passing such laws.\(^{349}\)

This revised policy is EPA's alternative to an environmental audit privilege, and provides many of the protections sought by industry without obstructing law enforcement efforts. The revision of EPA's policy is just one of many measures that the Clinton Administration has announced to make environmental compliance less of a headache for regulated entities.\(^{350}\)

CONCLUSION

When the development of a common law rule renders it rife with exceptions, commentators often begin to question the underlying rule. The same must be done with proposed and extant statutes, particularly in the area of evidentiary privileges. As the United States Supreme Court has noted, "[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."\(^{351}\) The drafters of statutory environmental audit privileges should be commended for their efforts to incorporate measures to ensure against abuse. However, the exceptions that are necessary to protect against abuses are the very same exceptions that render the privilege ineffectual in significantly reducing companies' fear of the disclosure of information in an environmental audit.

Unfortunately, even with a qualified environmental audit privilege, auditing companies will still be faced with the conundrum of whether to conduct an audit and risk increased criminal liability, or to remain ignorant of violations and risk being prosecuted for criminal negligence. The adoption of a privilege will do little more than com-

\(^{347}\) Id.

\(^{348}\) Id.


plicate this decision and make subsequent litigation more involved. If the privilege’s effect of making litigation more complex and lengthy is in itself palliative of corporate fears, then perhaps this measure will have some beneficial effects for industry. Otherwise, no one stands to gain from this ambitious project, and the health of the public and the environment may stand to lose.

Proponents of a statutory privilege believe that the framework of environmental laws in this country is too complex and confusing and that shielding environmental audits would ease compliance efforts. Proponents of a statutory privilege believe that the framework of environmental laws in this country is too complex and confusing and that shielding environmental audits would ease compliance efforts.352 Even the nation’s prosecutors, the strictest opponents of a federal privilege statute, agree that the complex environmental regulatory framework in this country makes it difficult for companies to be 100% in compliance. While it is virtually impossible to be 100% in compliance, the agencies responsible for enforcing environmental laws and regulations do not acknowledge this impossibility in their policies. One writer has responded to this complaint as follows: “Enacting a privilege to deal with these problems would be like pouring perfume on a pig; instead, it is time to clean up the pig.” However, advocating a reform of the environmental laws constitutes much more direct action than creating an environmental audit privilege.

Perhaps it is politically easier for states and even the federal government to enact privilege statutes, which most voters would not interpret as “soft on crime,” than to increase, for example, the scienter required for a corporate officer to be convicted of an environmental crime. Unfortunately for the politicians, however, many of the nation’s law enforcement officials are so strongly opposed to proposed privilege statutes that this political decision is no longer an easy one.356

Only time will tell the fate of the environmental audit privilege. As of this writing, fourteen states have passed environmental audit privilege statutes. Thirty-four other states, as well as the federal legislature, have audit privilege bills in some stage of the legislative

353. See, e.g., Walker, supra note 56, at 41.
357. See supra note 12.
Meanwhile, in Oregon and Colorado there is no evidence of any significant increase in voluntary compliance or disclosure as a result of these states having passed privilege statutes.\textsuperscript{359}

In order for the privilege to gain nationwide acceptance, its proponents would have to convince law enforcement authorities that some workable compromise is not only possible, but essential to protect the environment and public safety. However, law enforcement interests fear that "environmental audit privilege legislation may simply be a first target for more sweeping corporate information privileges."\textsuperscript{360} As long as industry remains unable to point to concrete examples of widespread prosecutorial abuse of environmental audit information, it appears that law enforcement authorities will never accept a compromise that incorporates any sort of evidentiary privilege.

\textsuperscript{358} See supra note 13.

\textsuperscript{359} See, e.g., Testimony of Trish Bangert, Colorado Deputy Attorney General, RT, supra note 316, at 64 (Jan. 20, 1995).

\textsuperscript{360} Lowry, supra note 356, at 6 ("For example, a company might discover that it has been guilty of tax or government contract fraud, bribery, or any of a variety of other misdeeds. Once discovered, a company might wish to keep the information secret from public and prosecutorial view, and, if revealed, out of the realm of punishment.") Id.