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### Environmental Audit Privilege Laws: Stripping the Public's Right to Know

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# ENVIRONMENTAL AUDIT PRIVILEGE LAWS: STRIPPING THE PUBLIC'S RIGHT TO KNOW

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## I. INTRODUCTION

Throughout the 1980s, the residents of a Cincinnati, Ohio neighborhood located near the ELDA landfill complained of odors and suspected that medical problems in their neighborhood might be linked to the nearby landfill.<sup>1</sup> Citizens complained to government agencies that the odors kept them from spending time in their yards and forced them to keep their windows shut during the summer.<sup>2</sup> The citizens were concerned about how exposure to this unknown gas might impact their health, and

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<sup>1</sup>Richard Dahl, *Audit-Privilege Laws: The Right to Know Nothing?*, 107 ENVIRONMENTAL HEALTH PERSPECTIVES 10, 107-8 (1999), available at <http://ehpnet1.niehs.nih.gov/docs/1999/107-10/spheres.html>.

<sup>2</sup>Testimony of Linda Briscoe and Rev. Solomon Lundy, Committee on Environment and Public Works of the United States Senate (1997), available at <http://www.environlaw.com/cepw/index.html> [hereinafter Briscoe & Lundy].

they wanted to know what was causing the pattern of health problems that were showing up at the local health clinic.<sup>3</sup>

Waste Management, Inc., the owner and operator of the ELDA landfill and the nation's largest waste management company, claimed that the odors were coming from other chemical companies in the area.<sup>4</sup> Ironically, the citizens confirmed their suspicions that the ELDA landfill was the source of the odors when Waste Management took community members on a public relations tour of the facility.<sup>5</sup> The ELDA landfill opened in 1973 and had not been built under modern standards, and it was still operating over a decade after it was slated to close.<sup>6</sup> In 1989, despite community outrage, Waste Management tried to expand ELDA.<sup>7</sup> The residents responded by filing suit against Waste Management to oppose the expansion.<sup>8</sup> Through the discovery process, the attorney for the residents uncovered internal auditing documents indicating violations of federal environmental laws.<sup>9</sup> Although Waste Management provided incomplete reports and documents, many documents indicated that Waste Management knew of the migration of potentially dangerous gases<sup>10</sup> into the neighborhood and that it was obligated to stop this problem. Nonetheless, Waste Management did nothing to implement remedial measures.<sup>11</sup>

In 1993, as the case continued to drag on, the Ohio legislature was debating an environmental audit privilege bill, which would allow companies to keep secret information discovered during a company's voluntary environmental audits.<sup>12</sup> In anticipation of the Ohio audit privilege bill becoming law, Waste Management fought to withhold the additional incriminating audit documents from the plaintiffs and the court before the governor signed the bill.<sup>13</sup> A state administrative hearing judge refused to allow Waste Management to use the audit privilege because the bill was not yet in effect.<sup>14</sup> As a result, Waste Management had to turn over the rest of its environmental audit documents.<sup>15</sup> The documents confirmed that Waste Management knew that the dangerous gases were migrating from the ELDA landfill

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<sup>3</sup>*Id.*

<sup>4</sup>*Id.*

<sup>5</sup>*Id.*

<sup>6</sup>*Id.*

<sup>7</sup>Brisco & Lundy, *supra* note 2.

<sup>8</sup>*Id.* See also Dahl, *supra* note 1, at 107-8.

<sup>9</sup>Briscoe & Lundy, *supra* note 2.

<sup>10</sup>These gases included high levels of methane, as well as "benzene, ethylbenzene, toluene, xylene, 1-1-1 tri-chloroethane, ethylene chloride, trichloroethane, vinyl chloride, and many other chemicals. Exposure to these chemicals can affect the liver, kidney, respiratory systems, eyes, and skin. Several of these chemicals are carcinogenic." *Id.*

<sup>11</sup>Dahl, *supra* note 1, at 107-8.

<sup>12</sup>*Id.*

<sup>13</sup>*Id.*

<sup>14</sup>Briscoe & Lundy, *supra* note 2.

<sup>15</sup>*Id.*

and that it had deceived government agencies about the problem.<sup>16</sup> Some of the most incriminating documents indicated that Waste Management failed to follow the advice of its own consultants who had advised the company about how to update the facility to stop the release and migration of toxic gases.<sup>17</sup> Eventually, the citizens defeated the expansion of the ELDA landfill and then filed a citizen suit under the Resource Conservation and Recovery Act<sup>18</sup> to enforce Waste Management's compliance with federal environmental laws and to implement the remedial measures that the company's consultants recommended to abate the toxic gas migration.<sup>19</sup>

During the federal proceedings, Waste Management, using Ohio's new environmental audit privilege law, tried to force the plaintiffs to return the audit documents and claimed that the documents were privileged because they resulted from Waste Management's voluntary audits.<sup>20</sup> These documents included those used in the state hearing to block the landfill expansion, as well as other documents beyond the scope of that proceeding.<sup>21</sup> A federal administrative hearing examiner denied Waste Management's privilege claim and stated that the privilege could not be applied retroactively to protect audit documents made before Ohio's environmental audit privilege law was enacted.<sup>22</sup> The parties settled in federal court and Waste Management agreed to pay for the residents' health examinations and to implement the remedial procedures to stop the release of the toxic gases.<sup>23</sup>

It is likely that if Ohio had enacted its audit privilege law a few years earlier, Waste Management would not have been forced to disclose these "smoking gun" documents that led to the settlement.<sup>24</sup> Without this information, citizens living near the landfill would have had a difficult, if not impossible, task of showing that Waste Management was liable for its harm and that the company deliberately violated public health laws.<sup>25</sup> Environmentalists and citizens groups argue that if companies can keep secret the information gathered while conducting voluntary environmental audits, the public will have a more difficult time learning of actual or potential environmental threats in their communities.<sup>26</sup> Indeed, the information found in the audits "is of no small use in determining the nature and extent of the violation, verifying exposure information, fashioning a remedy for the violation and issuing

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<sup>16</sup>*Id.*

<sup>17</sup>*Id.*

<sup>18</sup>42 U.S.C.A. §§ 6901-6992k (West 2002).

<sup>19</sup>Briscoe & Lundy, *supra* note 2.

<sup>20</sup>*Id.*

<sup>21</sup>*Id.*

<sup>22</sup>*Id.*

<sup>23</sup>*Id.*

<sup>24</sup>Briscoe & Lundy, *supra* note 2.

<sup>25</sup>Dahl, *supra* note 1, at 107-8.

<sup>26</sup>*Id.*

penalties consistent with the federal law and the violations.”<sup>27</sup> Public health and environmental advocates say that the ELDA landfill case represents a prime instance of the threats to public health that are implicit in environmental audit privilege laws.<sup>28</sup>

Proponents of the environmental audit privilege legislation argue that these laws provide companies an opportunity to investigate their own systems and police themselves.<sup>29</sup> Additionally, environmental audits give companies a less restrictive method of learning about their systems without a regulatory agency imposing deadlines or guidelines.<sup>30</sup> Proponents, including industry and trade associations<sup>31</sup> and many state governments, also argue that this new privilege encourages companies to conduct audits to ensure compliance with environmental regulations, while limiting the possibility that the audits will be used against the facility in the event of investigation or litigation by an agency or the public.<sup>32</sup>

Contrarily, opponents of the legislation, including environmental groups, the U.S. Environmental Protection Agency, and the U.S. Department of Justice, argue that environmental audit privilege statutes unreasonably limit the public’s right to know, which is one of the backbones of environmental laws, and deny information to regulatory agencies.<sup>33</sup> The public’s right to know what a regulated industrial neighbor is emitting and whether the facility is complying with the law is critical to fulfilling the main purpose of environmental statutes, which is to protect human

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<sup>27</sup>D. David Altman & Mark Hughes, An Open Letter from Ohio and Colorado Petitioners to U.S. EPA Administrator Browner, November 10, 1997, *available at* <http://www.environlaw.com/usepa/index.html>. This letter was submitted to U.S. EPA with an attached Petition to request that U.S. EPA withdraw Ohio’s and Colorado’s enforcement authority of federal environmental laws due in part to Ohio’s and Colorado’s passage of environmental audit privilege statutes.

<sup>28</sup>Dahl, *supra* note 1, at 107-8.

<sup>29</sup>John-Mark Stensvaag, *The Fine Print of State Environmental Audit Privileges*, UCLA J. ENVTL. L. POL’Y 69, 72 (1998).

<sup>30</sup>Stensvaag, *supra* note 29, at 72.

<sup>31</sup>Three industry organizations based in Washington, D.C. are the primary forces lobbying for federal and state audit privilege statutes. The Compliance Management and Policy Group (CMPG), founded in 1991, is the oldest and includes the American Forest & Paper Association; American Petroleum Institute; Chemical Manufacturers Association; National Solid Waste Management Association; Browning Ferris Industries; General Electric; Monsanto; and Waste Management. The Corporate Environmental Enforcement Council (CEEC) includes AT&T; BF Goodrich; Caterpillar; Coors Brewery Company; DuPont; Elf Atochem of North America, Inc.; Georgia Pacific Corp.; Hoechst-Celanese Corp.; ITT Corp; Kaiser Aluminum & Chemical; Kohler Corp.; 3M Corp.; Owens-Corning; Pfizer, Inc.; Polaroid; Procter & Gamble; Westinghouse Electric; and Weyerhaeuser. At the state level the Coalition for Improved Environmental Audits (CIEA) has been most active. CIEA’s members include ASARCO; Bell Atlantic; Caterpillar; Dow Chemical; Hoechst-Celanese; Weyerhaeuser; and the American Automobile Manufacturers Association. Good Neighbor Project for Sustainable Communities at [www.enviroweb.org/gnp](http://www.enviroweb.org/gnp) (last updated July 31, 2000).

<sup>32</sup>Stensvaag, *supra* note 29, at 72. *See also*, Dahl, *supra* note 1, at 109.

<sup>33</sup>Stensvaag, *supra* note 29, at 74.

health and the environment.<sup>34</sup> As a result of recent environmental audit privilege laws passed in twenty-two states,<sup>35</sup> citizen “watchdogs” are losing access to information that had enabled them to help police regulated industries’ compliance with environmental laws and regulations. The lack of access to information has had a subsequent chilling effect on the public’s role in enforcement of environmental laws.<sup>36</sup>

A facility may use the environmental audit privilege statute to keep its environmental audits secret<sup>37</sup> and restrict the public’s access to information about a regulated facility’s impact on the environment. Using the environmental audit privilege, a corporation may refuse to disclose the existence of regulatory violations that are discovered during voluntary internal audits and are contained in audit reports, so long as the corporation corrects any detected violations within a reasonable period of time.<sup>38</sup> The nature of an environmental audit means that a company may also keep information privileged about a facility’s impacts on the environment that, although not currently regulated, may cause harm.<sup>39</sup>

<sup>34</sup>See, e.g., Clean Air Act, 42 U.S.C.A. § 7401(b) (West 2002) (declaring that the purposes of this Act is “to promote the public health and welfare and the productive capacity of its population”).

<sup>35</sup>ALASKA STAT. § 09.25.450-490 (Michie 2000); MINN. STAT. § 114C.22 through § 114C.28 (1998); ARK. CODE ANN. § 8-1-301-312 (Michie 2000); COLO. REV. STAT. § 13-25-126.5 (2000) and COLO. REV. STAT. § 25-1-114.5 (2000); IDAHO CODE § 9-340 (Michie 1998); 415 ILL. COMP. STAT. 5/52.2 (1998); IND. CODE § 13-28-4-1 (1998) through § 13-28-4-10 (1998); IOWA CODE § 445J.1(1998) through § 455J.13 (1998); KAN. STAT. ANN. § 60-3332 (1997) through § 60-3339 (1997); KY. REV. STAT. ANN. 224.01-040 (Michie 2000); MICH. COMP. LAWS § 324.14801 (1999) through § 324.14810 (1999); MISS. CODE ANN. 49-2-71 (1997); MO. REV. STAT. § 490 (1999); NEV. REV. STAT. § 445C.010 (1998) through § 445C.120 (1998); N.H. CODE ADMIN. R. ANN. PUBLIC HEALTH 147-E:1 (1999) through 147-E:9 (1999); OHIO REV. STAT. ANN. § 3745.70 (West 2000) through § 3745.74 (West 2000); OR. REV. STAT. § 468.963 (1997); S.C. CODE ANN. § 1-40-33 (Law. Co-op. 1998) through § 1-40-37 (Law. Co-op. 1998); TEX. GOV’T CODE ANN. § 552.125 (Vernon 2000) and TEX. REV. CIV. STAT. ANN. art. § 4447cc (Vernon 2000); UTAH CODE ANN. § 19-7-101 (1999) through § 19-7-109 (1999); VA. CODE ANN. § 10.1-1198 (1998) and § 10.1-1199 (1998); WYO. STAT. ANN. § 35-11-1105 (1999) and § 35-11-1106 (1999).

<sup>36</sup>M. Koran, *Ohio Sierra Club Questions Audit Privilege Law*, 8 OHIO ENVTL. L. LETTER 10 (1997).

<sup>37</sup>Each state statute has a slightly different definition of an environmental audit, however, Oregon’s is a representative example. “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.” OR. REV. STAT. § 468.963 (1999). See also *infra* Part II(C) of this note.

<sup>38</sup>David A. Dana, *The Perverse Incentives of Environmental Audit Immunity*, 81 IOWA L. REV. 969, 971 (1996).

<sup>39</sup>For example, relatively few of the thousands of chemicals that are used by industry are regulated. Bradley C. Karkkainen, *Information As Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L. J. 257 (2001) (citing Kenneth Geiser, *The Unfinished Business of Pollution Prevention*, 29 GA. L. REV. 473 (1995) (noting that as of 1995, EPA had completed full-scale health assessments on fewer than 100

Most audit privilege laws contain two primary components: a privilege component and an immunity component. The component that is the focus of this Note is the “privilege” component, which affords secrecy to the environmental audit information gathered voluntarily by companies, but which is not subject to mandatory disclosure under a statute or regulation. Many state statutes also contain an environmental audit “immunity” component that prohibits the government from penalizing companies when the company discloses and corrects certain types of internally discovered violations.<sup>40</sup>

This Note argues that because the public places a high premium on its right to know, Congress should enact a federal statute that prohibits a privilege for environmental audits. A federal prohibition on a privilege for environmental audits will make the state statutes unconstitutional under the Supremacy Clause of the United States Constitution.<sup>41</sup> This Note has six parts. Part II provides background on the traditional environmental regulatory regime and the role that the public plays in enforcing environmental statutes. Part III is an analysis of some of the typical state environmental audit privilege laws, including a discussion of the major themes of the statutes. Part IV is a discussion of the EPA Final Policy Statement on Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations (U.S. EPA’s Audit Policy). Part V is a discussion of the public’s right to know and how creating a privilege for environmental audits conflicts with the public’s right to know. Part VI advocates for the passage of federal legislation that prohibits the use of a privilege for environmental audits, which would leave the state environmental audit privilege statutes unconstitutional and therefore unavailable for use.

## II. BACKGROUND

### A. *The Traditional Environmental Regulatory Regime*

Environmental law has evolved into a complex regulatory system during the past three decades.<sup>42</sup> Federal, state, and local governments are responsible for designing,

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chemicals)). Environmental audits will invariably contain information about regulated chemicals as well as unregulated chemicals. Simply because a chemical is not currently regulated does not mean that the chemical is not known to be, or will not become known to be, harmful and therefore will perhaps be regulated in the future.

<sup>40</sup>Dana, *supra* note 38, at 971. Seventeen states’ statutes contain an immunity provision in addition to the environmental audit privilege provision. They are: Alabama, Alaska, Colorado, Idaho, Kansas, Kentucky, Michigan, Minnesota, Montana, Nevada, New Hampshire, Ohio, South Carolina, Texas, Utah, Virginia, Wyoming. *See* text accompanying *supra* note 35 for statutes citations. This Note contains only a surface discussion of the immunity provisions of these statutes. Although the immunity provisions provide a disincentive for regulatory compliance and are problematic for effective environmental regulatory enforcement, unlike audit privilege provisions, immunity provisions do not conflict with the public’s right to know. *See generally*, Dana, *supra* note 36, at 969 (for a thorough discussion of the environmental audit immunity provisions).

<sup>41</sup>U.S. CONST. art. VI, cl.2.

<sup>42</sup>Miri Berlin, *Environmental Auditing: Entering the Eco-Information Highway*, 6 N.Y.U. ENVTL. L.J. 618 (1998).

implementing, and enforcing environmental statutes and regulations.<sup>43</sup> Additionally, citizens, both individuals and through environmental groups, play an integral role in the enforcement of environmental and public health laws through education, public pressure, and citizen suits.<sup>44</sup>

The U.S. Environmental Protection Agency (EPA) is the primary agency charged with implementing and enforcing the environmental laws, regulations, and policies.<sup>45</sup> Corporations and individuals must comply with numerous environmental statutes and corresponding regulations, including the Clean Air Act (CAA),<sup>46</sup> the Clean Water Act (CWA),<sup>47</sup> the Resource Conservation and Recovery Act (RCRA),<sup>48</sup> the Emergency Planning and Community Right to Know Act (EPCRA),<sup>49</sup> as well as many others.<sup>50</sup> These statutes require that certain data, usually information relevant to monitoring pollutants leaving the facility, be compiled, recorded, and reported to state and federal enforcement agencies, usually for the purpose of ensuring permit compliance.<sup>51</sup> One of the reasons that many companies may work to maintain

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<sup>43</sup>See, e.g., The Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), 42 U.S.C.A. §§ 11001-11050 (West 2002), which establishes emergency plans in the event of a large hazardous chemical release and requires reporting of toxic releases, was passed by Congress and is implemented and enforced by the U.S. EPA, which, delegates enforcement authority in Ohio to the Ohio EPA, which also enforces the Ohio Community Right-to-Know regulations as promulgated by the Ohio legislature. Local fire departments oversee parts of the community right-to-know laws as well, and the judiciary sorts out legal challenges to these regulations. See, e.g., *Ohio Chamber of Commerce v. State Emergency Response Comm.*, 597 N.E.2d 487 (Ohio 1992). Other environmental statutes that will be discussed in this Note include the Clean Air Act, 42 U.S.C.A. §§ 7401-7671 (West 2002); Clean Water Act, 33 U.S.C.A. §§ 1251-1387 (West 2002); The Resource Conservation and Recovery Act (RCRA), 42 U.S.C.A. §§ 6901-6992 (West 2002).

<sup>44</sup>See, e.g., *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987) (discussing connection between the citizen suit provisions in the Clean Air Act and Clean Water Act); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1997); *Hallstrom v. Tillamook County*, 493 U.S. 1037 (1989) (individual property owners RCRA action dismissed for failing to conform to citizen suit notice requirements). For an excellent example of citizens asserting public pressure in the form of "good neighbor agreements" see, Marianne F. Adriatico, *The Good Neighbor Agreement: Environmental Excellence Without Compromise*, 5 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 285 (1999).

<sup>45</sup>Thomas F.P. Sullivan, FUNDAMENTALS OF ENVIRONMENTAL LAW, ENVIRONMENTAL LAW HANDBOOK 1 (Thomas F.P. Sullivan ed., 1997).

<sup>46</sup>42 U.S.C.A. §§ 7401-7671q (West 2002).

<sup>47</sup>33 U.S.C.A. §§ 1251-1387 (West 2002).

<sup>48</sup>42 U.S.C.A. §§ 6901-6992K (West 2002).

<sup>49</sup>42 U.S.C.A. §§ 11001-11050 (West 2002).

<sup>50</sup>Berlin, *supra* note 42, at 618.

<sup>51</sup>The Clean Water Act's National Pollutant Discharge Elimination System permits requires monitoring at the point of discharge of effluent into the receiving waters the results of which must be reported to the permitting agency at least once a year. 40 C.F.R. § 122.44(i)(2) (2002). The Clean Air Act requires state implementation plans (SIP) for achieving national ambient air quality standards (NAAQS) whereby the SIP must include monitoring and periodic reporting of emissions by stationary sources, correlate emission reports with relevant



compliance is that penalties for violating environmental regulations include, but are not limited to, company fines or injunctions, and incarceration and fines for employees or corporate officers who are held responsible.<sup>52</sup>

*B. Role of the Public in Enforcing Environmental Statutes*

The process by which a pollutant comes to be regulated is complex and generally only occurs after extensive study determines that the pollutant poses a significant risk to human health or the environment at particular levels of environmental concentration or exposure.<sup>53</sup> Only after often enormously costly studies and a slow process<sup>54</sup> does the EPA determine the regulatory standards for the allowable emission or exposure levels of a pollutant.

It is within this process of determining regulatory standards that the public plays an integral role in implementing and enforcing environmental statutes and advocating for the protection of public health. The public participates in the process in both substantive and procedural ways. The substantive role of the public occurs when the EPA drafts the regulatory requirement or pollutant standard, at which time industries, environmental advocates, and citizens may challenge the appropriateness of the regulation or standard.<sup>55</sup> The public's procedural involvement occurs when a company is statutorily required to report environmental data to the EPA, or when a facility applies for a permit, and this information is then made accessible to the public.<sup>56</sup> Through these processes, the public plays a critical role in ensuring

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emissions limitations, and make the reports available to the EPA and for public inspection. Clean Air Act, § 110(a)(2)(E) (2002); EPCRA requires notification of toxic releases that exceed allowable limits. 40 C.F.R. § 355.40(a) (2002).

<sup>52</sup>See, e.g., EPCRA, 42 U.S.C.A. § 11045 (West 2002) (providing for civil penalties of up to \$25,000 per violation and criminal penalties of up to \$25,000 or imprisonment for not more than two years, or both); Toxic Substance Control Act, 15 U.S.C.A. § 2615 (West 2002) (providing for civil penalties of up to \$25,000 per violation and criminal penalties of up to \$25,000 or imprisonment for not more than one year, or both). See, e.g., Clean Water Act, 33 U.S.C.A. § 1319 (West 2002) (providing for criminal penalties for negligence of a fine of not less than \$2,500 nor more than \$25,000 per day of violation, or by imprisonment for not more than one year, or both; and providing that any person who knowingly violates the statute shall be punished by a fine of not less than \$5,000 nor more than \$50,000 per day of violation, or imprisonment for not more than three years, or both; a violation that knowingly endangers another person in imminent danger of death or serious bodily injury carries a fine of not more than \$250,000 or imprisonment of not more than fifteen years, or both; however, organizations convicted of knowing endangerment face up to \$1,000,000 fines).

<sup>53</sup>Karkkainen, *supra* note 39, at 257 (citing John S. Applegate, *The Perils of Unreasonable Risk: Information, Regulatory Policy, and Toxic Substances Control*, 91 COLUM. L. REV. 261, 276-77 (1991)).

<sup>54</sup>*Id.* at 266.

<sup>55</sup>*Id.* at 268. Citizens and industries may “question the agency’s assumptions, question the adequacy of its data and present contrary evidence in the rule making record” thus influencing the language of the final regulation, or if the regulation is already implemented, the challenge may influence the chance of the regulation surviving judicial review. *Id.*

<sup>56</sup>See, e.g., Resource Conservation and Recovery Act § 3007(a)-(e) (2000); Clean Air Act, 40 C.F.R. § 110(a)(2)(E) (2000); EPCRA, 42 U.S.C.A. § 11044(a) (West 2002).

environmental compliance in the process of developing environmental standards and ensuring compliance with the standards once they are in place.

Citizens, primarily through environmental organizations, are also critical to environmental enforcement through their education of the public and application of pressure on agencies and industries to achieve compliance.<sup>57</sup> In the form of “good neighbor campaigns,” citizens who are most affected by a local facility’s activities become involved as stakeholders and work for improvements in their community.<sup>58</sup> Good neighbor campaigns “treat polluting companies as part of the community, and treat chemical hazards as a problem to be resolved within the community and directly with the company. The goal is to eliminate the chemical hazard in a way that restores the relationship between the company and its neighbors, with honest communication, mutual trust, and real accountability.”<sup>59</sup> Good neighbor campaigns may also include stakeholder audits, whereby neighbors and workers engage in “direct, on-site evaluation of a local facility to identify any changes that may be needed to ensure sustainability.”<sup>60</sup>

As will be discussed below, the public additionally plays an on-going role in enforcement through citizen suits, a mechanism whereby a citizen can sue an alleged violator or the government for alleged lack of enforcement of an environmental statute or regulation.<sup>61</sup> The following discussion demonstrates how four of the major federal environmental statutes incorporate the public’s right to know into the statute and provide mechanisms, particularly the citizen suit provision, for citizens to enforce public health laws.

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<sup>57</sup>See, e.g., Ohio Citizen Action (OCA), available at [www.ohiocitizen.org](http://www.ohiocitizen.org) (last visited June 6, 2001) (an Ohio statewide consumer rights and environmental organization, uses good neighbor campaigns to organize, educate, and empower citizens to work with neighboring facilities to reduce toxic emissions. National organizations like the Public Interest Research Groups (PIRGs), Sierra Club, Environmental Defense Fund, National Toxics Campaign, as well as numerous local environmental groups, have also played crucial roles in environmental enforcement).

<sup>58</sup>Adriatico, *supra* note 5, at 288. Local stakeholders include private citizens, community organizations, environmental organizations and labor unions. See Good Neighbor Project for Sustainable Industries, Model Principles for Stakeholder Evaluation, at [www.enviroweb.org/gnp](http://www.enviroweb.org/gnp) (last updated July 31, 2000).

<sup>59</sup>E-mail from Amy Ryder, Cleveland Program Director, Ohio Citizen Action (Feb. 21, 2001) (on file with the author).

<sup>60</sup>See Good Neighbor Project for Sustainable Communities, available at [www.enviroweb.org/gnp/gnas.htm](http://www.enviroweb.org/gnp/gnas.htm) (last visited Feb. 10, 2001).

<sup>61</sup>See *infra*, text at II(B)(1-4). The citizen suit provision that is now found in all environmental statutes administered by the EPA, except the Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA”), has its origin in the Clean Air Act. Originally citizens were only authorized to sue for injunctive relief to force a regulated entity into compliance with a statute or regulation, or to require the EPA to perform a mandatory duty required by the statute. As a result of the Clean Air Act amendments in 1990, citizens can now sue a regulated entity for civil penalties. Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws: The Citizen Suit Provisions*, SE98 ALI-ABA 303, 307 (2000) [hereinafter Miller].

### 1. Emergency Planning and Community Right to Know Act

The Emergency Planning and Community Right to Know Act of 1986 (EPCRA)<sup>62</sup> is one example of the public's right to know being clearly incorporated into environmental legislation. EPCRA grants the public access to information about certain facilities' toxic inventories and releases.<sup>63</sup> The 'Right to Know' component of EPCRA "aims to compile accurate, reliable information on the presence and release of toxic chemicals and to make that information available (to the government, the facilities' employees, and the public) at a reasonably localized level."<sup>64</sup> Facilities that meet minimum size and emission thresholds and release specified toxic chemicals<sup>65</sup> into the environment must inventory chemicals used at their facilities and report these releases annually<sup>66</sup> in what is known as the Toxic Release Inventory (TRI) database.<sup>67</sup>

The Toxic Release Inventory is a national database that contains information on the specific toxic chemical releases and other waste management activities reported annually by specified industry groups<sup>68</sup> as well as federal facilities.<sup>69</sup> The current

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<sup>62</sup>42 U.S.C.A. §§ 11001-11050 (West 2002).

<sup>63</sup>*Citizens for a Better Env't v. Steel Co.*, 90 F.3d 1237, 1239 (7<sup>th</sup> Cir. 1996).

<sup>64</sup>*Id.* See also, EPCRA, 42 U.S.C.A. § 11021 (West 2002) (requiring that Material Safety Data Sheets be given to employees); EPCRA, 42 U.S.C.A. § 11022 (West 2002) (requiring that emergency and hazardous chemical inventory forms be given to local fire departments and local and state emergency response departments); 42 U.S.C.A. § 11044 (West 2002) (requiring public availability of emergency plans, data sheets, and forms).

<sup>65</sup>42 U.S.C.A. § 11022 (West 2002) (containing the hazardous chemical inventory reporting requirements).

<sup>66</sup>42 U.S.C.A. § 11023 (West 2002) (detailing requirements for reporting chemical releases).

<sup>67</sup>Karkkainen, *supra* note 39, at 259. The complete EPA Toxic Release Inventory database is available through the National Library of Medicine's TOXNET system at <http://www.toxnet.nlm.nih.bog/index.html> (last modified Aug. 11, 2000). See also U.S. EPA website, available at <http://www.epa.gov.triexplorer> for general TRI information (last visited Feb. 10, 2001). See generally Karkkainen, *supra* note 39 (an excellent overview of the TRI and advocating for expansion of this regulatory system).

<sup>68</sup>Industries regulated under the TRI include those in food; tobacco; textiles; apparel; lumber and wood; furniture; paper; printing and publishing; chemicals; petroleum and coal; rubber and plastics; leather; stone, clay and glass; primary metals; fabricated metals; machinery (excluding electrical); electrical and electronic equipment; transportation equipment; instruments; miscellaneous manufacturing. As of the 1998 Reporting Year, additional industries must report TRI information, including: metal mining; coal mining; electrical utilities that combust coal and/or oil; Resource Conservation and Recovery Act Subtitle C hazardous waste treatment and disposal facilities; chemicals and allied products wholesale distributors; petroleum bulk plants and terminals; and solvent recovery services. U.S. EPA website, available at <http://www.epa.gov.tri/siccode.html> (last modified Feb. 10, 2000).

<sup>69</sup><http://www.epa.gov.triexplorer> (last modified Oct. 12, 2000).

TRI chemical list contains 579 individual chemicals divided into twenty-eight categories.<sup>70</sup>

The TRI data is useful for identifying which facilities release certain toxic chemicals into the environment and provides estimates of those toxic releases; however, the TRI data has certain limitations.<sup>71</sup> One limitation is the accuracy of the data because the TRI data is reported on a good faith basis by the industry and only requires reasonable estimates, not exact figures.<sup>72</sup> Additionally, the TRI data does not reflect the public's exposure to those chemicals and is not sufficient to calculate potential adverse health effects.<sup>73</sup> Nevertheless, this information is crucial to ensuring compliance because "cross checking between the TRI data and data made available under other statutes makes citizen enforcement of EPCRA and other federal environmental statutes possible."<sup>74</sup> Additionally, before environmental audit privilege laws were passed, it was useful for plaintiffs to compare TRI data and a facility's environmental audit information that would be available to the public through a state agency or a lawsuit. The comparison may show that the company is not accurately or properly reporting information to federal and state agencies.

In addition to EPCRA recognizing the public right to access information, EPCRA grants citizens the right to sue facilities that violate the law in the event that the federal or state government fails to take enforcement action against the violator.<sup>75</sup> A citizen may also sue a government agency when the agency fails to enforce the law or fails to provide a "mechanism for public availability of information."<sup>76</sup> If the EPA or a state agency is "diligently pursuing" enforcement against a violator, the statute

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<sup>70</sup><http://www.epa.gov/tri/chemical.htm> (last modified Mar. 23, 2000). For an excellent report on Ohio's TRI data see CITIZENS POLICY CENTER, POISONS IN OUR MIDST (1998) (available at Citizens Policy Center, 614 W. Superior Avenue, Suite 1200, Cleveland, Ohio 44113).

<sup>71</sup><http://www.epa.gov/tri/chemical.htm> (last modified Mar. 23, 2000).

<sup>72</sup>"In order to provide the information required...a facility may use readily available data (including monitoring data) collected pursuant to other provisions of law, or, where such data are not readily available, reasonable estimates of the amounts involved." EPCRA, 42 U.S.C.A. § 11023 (West 2002).

<sup>73</sup><http://www.epa.gov.triexplorer> (last modified Oct. 12, 2000). See also, Karkainen *supra* note 37, at 331 (noting that TRI does not factor in "proximity to population, exposure route, dispersion, persistence, sensitivity of exposed populations, or other important risk-related factors" and therefore TRI is not "a very good guide to actual human and environmental risks").

<sup>74</sup>Miller, *supra* note 61, at 307.

<sup>75</sup>EPCRA, 42 U.S.C.A. § 11046(a) (West 2002). Generally, the person(s) bringing the suit is required to have standing, subject matter jurisdiction, and must give the EPA and violator 60 days notice before a suit is filed. Under other environmental statutes, however, a suit may be filed immediately after notice is given for violations of hazardous pollutant or substance requirements under the Clean Air Act, 42 U.S.C.A. § 7604(b)(1)(A) (West 2002), Clean Water Act, 33 U.S.C.A. § 1365(b)(1)(A) (West 2002); Resource Conservation and Recovery Act, 42 U.S.C.A. § 6972(b)(1)(A) (West 2002). Miller, *supra* note 61, at 315.

<sup>76</sup>EPCRA, 42 U.S.C.A. § 11046(a) (West 2002).

bars a citizen suit against the same violator for the same violation.<sup>77</sup> EPCRA does permit private suits for claims of personal injury or property damage, regardless of whether an agency is pursuing enforcement.<sup>78</sup>

## 2. Clean Water Act

The public also plays a role in enforcement of the Clean Water Act, which governs discharges of pollutants into surface waters.<sup>79</sup> Any facility that has a point source<sup>80</sup> that discharges pollution into surface waters must obtain a National Pollution Discharge Elimination System (NPDES) permit.<sup>81</sup> The EPA generally requires owners and operators of facilities to maintain records and make reports regarding the facility's discharges.<sup>82</sup> With the exception of a company's trade secrets, the statute provides that information in the reports must be made available to the public.<sup>83</sup> Citizens may use this information to ensure a facility's compliance by applying public pressure on the agency to enforce the law.

Additionally, citizens<sup>84</sup> may file suit against the government for failure to enforce a non-discretionary duty of the Clean Water Act, or directly against the alleged violator.<sup>85</sup> An incentive for the public to use the citizen suit is the provision that the court may award costs of litigation, including reasonable attorney and expert witness fees to any prevailing or substantially prevailing party, whenever the court determines such an award is appropriate.<sup>86</sup> This provision is critical to ensuring that

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<sup>77</sup>Miller, *supra* note 61, at 316. However, most courts have refused to bar a citizen suit because the government had taken administrative action; *see, e.g.*, Public Interest Research Group of N.J. v. Witco Chemical Corp. 331, EERC 1571 (D.N.J. 1990); but some courts have barred citizen suits if the government agency has administrative enforcement powers comparable to a court. *See, e.g.*, Public Interest Research Group of N.J. v. Fritzsche, Dodge & Olicott, Inc., 759 F.2d 1131 (3rd Cir. 1985).

<sup>78</sup>Miller, *supra* note 61, at 316.

<sup>79</sup>33 U.S.C.A. §§ 1251-1387 (West 2002).

<sup>80</sup>The term "point source" means any "discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural storm water discharges and return flows from irrigated agriculture." 33 U.S.C.A. § 1362(14) (West 2002).

<sup>81</sup>Berlin, *supra* note 42, at 627 (citing 33 U.S.C. § 1342 (1994)).

<sup>82</sup>*Id.* (citing 33 U.S.C. § 1318 (1994)).

<sup>83</sup>*Id.* (citing 33 U.S.C. § 1318(b) (1994)).

<sup>84</sup>The term "citizen" means a person or persons having an interest that is or may be adversely affected. 33 U.S.C.A. § 1365(g) (West 2002).

<sup>85</sup>33 U.S.C.A. § 1365(a) (West 2002). Before filing the action, the citizen must give sixty days notice to the EPA Administrator, the state in which the alleged violation occurred, and the alleged violator. Additionally, a citizen may not file suit if the administrator or state has already commenced civil or criminal proceedings against the alleged violator for the same violation. 33 U.S.C.A. § 1365(b) (West 2002).

<sup>86</sup>33 U.S.C.A. § 1365(d) (West 2002).

members of the public who file citizen suits will be able to find competent attorneys who will take the case because the citizens are not forced to provide the resources necessary to carry out successful litigation.

### 3. Clean Air Act

The Clean Air Act<sup>87</sup> provides, among other things, the EPA with authority to establish national ambient air quality standards (NAAQS) for individual air pollutants,<sup>88</sup> and also contains express provisions that the public may participate in the Act's enforcement.<sup>89</sup> NAAQS are implemented through state implementation plans (SIPs) which are required to include emission limits, measures for controlling air pollution, and methods for compiling and analyzing data.<sup>90</sup> If a major new facility wants to locate in an area that has achieved its NAAQS, then the facility must get a prevention of significant deterioration (PSD) permit.<sup>91</sup> Permit applicants must collect continuous air quality monitoring data for one year prior to applying for the PSD permit.<sup>92</sup> The public has a right to participate in the hearing on the PSD permit application and, therefore, the monitoring data must be made publicly available at the hearing.<sup>93</sup> Facilities that keep improper records<sup>94</sup> make themselves vulnerable to criminal sanctions and civil penalties.<sup>95</sup> By allowing the public to participate in the hearing process and to access the permit application and monitoring data, the Clean Air Act lays out an explicit public right to know what quantity and type of pollutants will be added to the community's air quality if the permit is granted.

The public may also play a role in enforcement of the Clean Air Act through the Act's citizen suit provision.<sup>96</sup> Similar to the citizen suit requirements of the Clean Water Act, a member of the public may file a citizen suit against any person, including the government or an agency, who is alleged to have violated an emission standard or limitation or an order issued by the Administrator or a State with respect to a standard or limitation.<sup>97</sup> A citizen may also file a citizen suit against the EPA Administrator for an alleged failure to perform a non-discretionary duty,<sup>98</sup> or against

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<sup>87</sup>Berlin, *supra* note 42, at 626 (citing 42 U.S.C. §§ 7401-7671 (1994)).

<sup>88</sup>*Id.* (citing 42 U.S.C. §§ 7408-7409 (1994)).

<sup>89</sup>*Id.* (citing 42 U.S.C. §§ 7475(e) (1994)).

<sup>90</sup>*Id.* (citing 42 U.S.C. §§ 7410 (1994)).

<sup>91</sup>42 U.S.C.A. § 7475(a)(3)(B) (West 2002) and 40 C.F.R. § 52.21 (1996)).

<sup>92</sup>Berlin, *supra* note 42, at 627 (citing 42 U.S.C. § 7475(e) (1994)).

<sup>93</sup>*Id.* (citing 42 U.S.C. § 7475(e)(1994)). *See also* 42 U.S.C.A. § 7475(a)(2) (West 2002).

<sup>94</sup>42 U.S.C.A. § 7413 (West 2002).

<sup>95</sup>Berlin, *supra* note 42, at 627.

<sup>96</sup>42 U.S.C.A. § 7604 (West 2002).

<sup>97</sup>42 U.S.C.A. § 7604(a)(1) (West 2002)). An emission standard or limitation is defined further in 42 U.S.C.A. § 7604(f) (West 2002).

<sup>98</sup>42 U.S.C.A. § 7604(a)(2) (West 2002).

a person who constructs a facility without a permit if the facility required a permit.<sup>99</sup> Importantly, the court may also award reasonable attorney and expert witness fees to “any prevailing or substantially prevailing party,” when the court determines it is appropriate.<sup>100</sup>

Congress included the citizen suit provision because it recognized that “neither federal nor state governments have the resources to ensure that generators of air pollutants are consistently in compliance with the Act. Therefore to supplement governmental enforcement of the Clean Air Act citizen suits provide interstitial means for enforcement of the environmental standards in furtherance of the remedial purpose of the Act.”<sup>101</sup>

#### 4. Resource Conservation and Recovery Act

The public’s role in enforcement of environmental laws is also incorporated into the Resource Conservation and Recovery Act (RCRA),<sup>102</sup> which regulates the disposal of hazardous waste. RCRA requires the comprehensive development of a record keeping, manifest, and reporting system to track certain types of waste from the time the waste is created until the waste is disposed.<sup>103</sup> RCRA requires hazardous waste generators<sup>104</sup> to file biennial reports describing their waste production.<sup>105</sup> Treatment, storage, and disposal facilities (TSDs) serve as final destinations of waste and are subject to extensive permitting requirements and other regulations.<sup>106</sup> TSD owners and operators must keep records of all waste received and stored and make these records available to the EPA, which subsequently makes the information available to the public.<sup>107</sup> The EPA may enforce high civil liability or criminal sanctions against RCRA violators.<sup>108</sup>

Similar to other environmental statutes, under RCRA, a citizen or environmental group may file a citizen suit against a facility that violates RCRA requirements.<sup>109</sup> Congress clearly included the public’s right to know in RCRA because the statute gives the public the right to access vital information about hazardous waste in our communities and to participate in the enforcement of the RCRA through citizen suits.

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<sup>99</sup>42 U.S.C.A. § 7604(a)(3) (West 2002).

<sup>100</sup>42 U.S.C.A. § 7604(d) (West 2002).

<sup>101</sup>*Sierra Club v. Public Serv. Co. of Colo.*, 894 F. Supp. 1455 (D. Colo. 1995).

<sup>102</sup>42 U.S.C.A. §§ 6901-6992k (West 2002).

<sup>103</sup>42 U.S.C.A. §§ 6921(b), 6922 (West 2002).

<sup>104</sup>Berlin, *supra* note 42, at 628 (citing 40 C.F.R. § 260.10 (1996)).

<sup>105</sup>*Id.* (citing 40 C.F.R. § 262.41(a) (1996)).

<sup>106</sup>*Id.* (citing 40 C.F.R. § 264.73 (1996)).

<sup>107</sup>40 C.F.R. § 264.73 (1996).

<sup>108</sup>Berlin, *supra* note 42, at 628 (citing 42 U.S.C. § 6928 (1994)).

<sup>109</sup>*Id.* (citing 42 U.S.C. § 6972 (1994)).

C. What is an Environmental Audit?

The U.S. Environmental Protection Agency defines environmental audits as “systematic, documented, periodic, and objective reviews by regulated entities of facility operations and practices related to meeting environmental requirements.”<sup>110</sup> There are various types of environmental audits each of which are used for different purposes. The two most common environmental audits are compliance audits and management audits.<sup>111</sup> Compliance audits are conducted by internal or external environmental specialists and have three primary purposes.<sup>112</sup> Two interrelated purposes of the compliance audit are to investigate a facility's compliance with applicable environmental laws and regulations, and to evaluate the facility's vulnerability to enforcement action.<sup>113</sup> The third primary purpose is to identify environmental liability risks that are not necessarily associated with regulations, but may expose the facility to a private lawsuit.<sup>114</sup> The compliance audit will also evaluate the need and methods used for fixing any existing environmental problems.<sup>115</sup>

Management audits evaluate procedures related to environmental systems within a facility.<sup>116</sup> These audits include a review of the facility's management systems and procedures for controlling risk to find and remedy possible violations and potentially problematic environmental conditions.<sup>117</sup> The environmental audit privilege statutes may relate to either the compliance audit or the management audit.

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<sup>110</sup>EPA Final Policy Statement on Incentives for Self-Policing: Discovery, Disclosure, correction, and Prevention of Violations, 65 Fed. Reg. 19618, 19625 (2000) [hereinafter EPA Audit Policy].

<sup>111</sup>Terrell E. Hunt & Timothy A. Wilkins, *Environmental Audit and Enforcement Policy*, 16 HARV. ENVTL. L. REV. 365, 366 (1992).

<sup>112</sup>*Id.*

<sup>113</sup>*Id.*

<sup>114</sup>*Id.* Private lawsuits or “non-regulatory risks” include potential liability associated with toxic tort actions, off-site disposal, or citizen suits.

<sup>115</sup>*Id.*

<sup>116</sup>Hunt & Wilkins, *supra* note 111, at 366 (“Management audits evaluate a corporation's or facility's management systems or procedures for (1) identifying environmental noncompliance, (2) assessing environmental risks, (3) informing the corporation's decision makers of such risks, (4) designing and implementing measures to prevent environmental violations and mitigate non-regulatory environmental risk, and (5) remediating or otherwise responding to potential or actual environmental hazards.”).

<sup>117</sup>*Id.* (A comprehensive management audit will review the organization, structure, and placement of the environmental oversight functions; will evaluate the adequacy of existing statements of the company's environmental mission, goals, and objectives; and will consider the adequacy of current planning and control mechanisms to ensure that environmental criteria are adequately considered in evaluating both individual and organizational performance. It also entails developing operating procedures, training manuals, preventive maintenance programs, proactive planning, and total quality management enhancements to convert high-minded policy statements into a pervasive corporate culture of environmental stewardship).



A facility may conduct an environmental audit because a governmental agency compels it to or because it voluntarily chooses to do so. The EPA may require a violator to conduct an audit as part of a settlement agreement with the EPA,<sup>118</sup> however, generally the EPA either requires or conducts audits to evaluate compliance not related to any previous violation.<sup>119</sup> Many state and federal environmental laws also require regulated entities to disclose to agencies violations that are discovered during voluntary internal compliance audits so as to ensure compliance where agency-conducted audits are not feasible.<sup>120</sup>

As described above, many regulated companies voluntarily conduct environmental audits to comprehensively evaluate their facilities, operations, and procedures to determine whether they are in compliance with applicable environmental regulations.<sup>121</sup> Many facilities also regularly conduct environmental audits to detect inefficiencies and problems in their own systems.<sup>122</sup> Trade associations often encourage industries to conduct environmental audits in order to promote corporate responsibility.<sup>123</sup> Voluntary environmental audits are important because they can provide a facility with a cost effective method of discovering existing or potential environmental violations.<sup>124</sup> Timely discovery can reduce pollution before or immediately after it is unexpectedly released.<sup>125</sup>

#### *D. Why Other Privilege Doctrines Do Not Protect Environmental Audits*

Regulated companies that conduct voluntary environmental audits have found that these audits provide an effective and proactive means to detect actual or potential environmental violations.<sup>126</sup> Many companies have discovered, however, that if the information is disclosed, it may also “create road maps for external

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<sup>118</sup>Virginia Morton Creighton, Comment, *Colorado's Environmental Audit Privilege Statute: Striking the Appropriate Balance?*, 67 U. COLO. L. REV. 443, 446 (1996).

<sup>119</sup>See, e.g., Resource Conservation and Recovery Act § 3007(a)-(e). However, “EPA’s inspection activities under RCRA Section 3007 are subject to the Fourth Amendment’s protection against unreasonable searches and seizures.” David R. Case, *Resource Conservation and Recovery Act*, in ENVIRONMENTAL LAW HANDBOOK 355 (Thomas F.P. Sullivan ed., 1997).

<sup>120</sup>Dana, *supra* note 38, at 969 (citing Arnold W. Reitze, Jr. & Lee D. Hoffman, *Self-Reporting and Self-Monitoring Requirements Under Environmental Laws*, 1 ENVTL. L. 681 (1995) (comprehensively reviewing reporting requirements)).

<sup>121</sup>Keith M. Casto & Tiffany Billingsley Potter, *Environmental Audits: Barriers, Opportunities and a Recommendation*, 5 HASTINGS W.-N.W. J. ENVTL. L. & POL’Y 233 (1999).

<sup>122</sup>A 1995 Price-Waterhouse survey found that 90% of the corporate respondents who conduct audits said that a motivating factor to conducting audits was to find and correct violations before they were found by government inspectors. Audit Policy, *supra* note 110 (stating that the Price-Waterhouse survey is contained in the Docket as Document VIII-A-76).

<sup>123</sup>Kevin Mark Smith, *Preventing Discovery of Internal Investigation Materials: Protecting Oneself From One’s Own Petard*, 69 J. KAN. BAR ASS’N. 28, 31 (Aug. 2000).

<sup>124</sup>*Id.* at 30.

<sup>125</sup>*Id.*

<sup>126</sup>*Id.* at 31.

investigations which could lead to unforeseen legal liability.”<sup>127</sup> Lawyers caution companies that audits may lead plaintiffs and regulators to information that amounts to the “smoking gun” that could be used against the company.<sup>128</sup>

There are several state and federally recognized privileges, each of which allows certain types of documents or communications to be kept confidential. Generally, however, companies cannot use traditional evidentiary privileges, such as attorney-client and work-product privileges, to withhold their environmental audits from government agencies or private litigants.<sup>129</sup> The attorney-client privilege allows confidential communications between an attorney and his/her client to remain privileged so long as the communication is in regards to legal advice made in the course of the relationship.<sup>130</sup> This privilege precludes protection of communication concerning general business advice or advice given in the ordinary course of business.<sup>131</sup> The voluntary environmental audits are usually conducted during the ordinary course of business and are used to determine regulatory compliance; they are not conducted under the auspices of receiving specific legal advice or services.<sup>132</sup> Additionally, the attorney-client privilege cannot be used to hide the underlying facts, only communications regarding the facts. The purpose of an audit is to determine facts about a facility’s environmental management and compliance, and therefore audits are comprised primarily of facts and data, not communications between the attorney and client. Therefore environmental audits fall outside the scope of attorney-client privilege protection.

The work-product privilege also may be inappropriate to protect voluntary environmental audits. The work-product privilege protects documents prepared in anticipation of a client’s pending or potential litigation regarding the attorney’s legal impressions, strategy, and thought processes.<sup>133</sup> Environmental audits generally do not qualify for protection under the work-product doctrine because audits are not usually prepared by a lawyer in anticipation of pending or potential litigation.<sup>134</sup> Additionally, like the attorney-client privilege, the work-product privilege does not hide facts, only legal impressions and strategies regarding those facts, and it is not intended to hide the truth.<sup>135</sup> Environmental audits, however, when kept privileged have a strong potential to hide facts and the truth of the alleged violations. For example, data related to emissions of air pollutants that are beyond the scope of the statutory reporting requirements are facts that could be privileged. Therefore, the

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<sup>127</sup>*Id.*

<sup>128</sup>Gary W. Ballesteros, *The Limitations of State Environmental Audit Privilege Statutes*, ENV’T TODAY, April 1995, available at <http://www.jenner.com/practice/enviro/articles/gwb9601.html>.

<sup>129</sup>Dana, *supra* note 38, at 969.

<sup>130</sup>*See* Upjohn Co. v. United States, 449 U.S. 383 (1981).

<sup>131</sup>*Id.*

<sup>132</sup>Karen Heyob, *Ohio’s New Statutory Audit Privilege: Promoting Environmental Performance or a Dirty Little Secrets Act?*, 26 CAP. U. L. REV. 379, 391-93 (1997).

<sup>133</sup>*Id.* at 396.

<sup>134</sup>*Id.*

<sup>135</sup>JON R. WALTZ & ROGER C. PARK, EVIDENCE: CASES AND MATERIALS 564 (9th ed. 1999).

privilege is inconsistent with the reasoning behind the work-product privilege, which only protects the attorney's legal strategy, analysis, and thoughts, not the underlying facts.

Some states and federal jurisdictions have recognized a "critical self-evaluation" privilege that protects evaluative (as opposed to objective factual) statements contained in the self-critical reports of businesses.<sup>136</sup> The courts that have recognized a critical self-evaluation privilege have generally required that the proponent satisfy four elements.<sup>137</sup> First, "the information must result from a critical self-analysis undertaken by the party seeking protection; second, the public must have a strong interest in preserving the free flow of that type of information sought [to be protected; third], the information must be of the type whose flow would be curtailed if discovery were allowed;"<sup>138</sup> and fourth, "the document must have been prepared with the expectation of confidentiality, and that confidentiality has been preserved." No jurisdiction, however, has applied this privilege to environmental self-policing,<sup>139</sup> and at least two courts have rejected a claim of self-evaluative privilege in the environmental context.<sup>140</sup>

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<sup>136</sup>Dana, *supra* note 38, at 1006 (citing generally Note, *The Privilege of Self-Critical Analysis*, 96 HARV. L. REV. 1083, 1087-1091 (1983)). See *Bredice v. Doctors Hospital, Inc.*, 50 F.R.D. 249 (D.D.C. 1970), *aff'd without op.*, 479 F. 2d 920 (D.C. Cir. 1973) (creating a privilege for physician peer reviews concerning the quality of patient care); *Tharp v. Sivyer Steel Corp.*, 149 F.R.D. 177 (S.D. Iowa 1993) (collecting cases); *Banks v. Lockheed-Georgia Co.*, 53 F.R.D. 283 (N.D. Ga. 1971) (extending the privilege to a company's internal assessment of its equal employment opportunity practices). See also *United States v. Dexter*, 132 F.R.D. 8, (D. Conn. July 9, 1990) ("The 'self-critical' privilege has also been recognized in a variety of actions in which confidentiality is 'essential to the free flow of information and ... the free flow of information is essential to promote recognized public interests.' [ ] These cases suggest that since the 'self-critical' privilege is rooted in promotion of the public interest, a court should take cognizance ... of Congress's role in declaring what is in the public interest. Cf. *United States v. Noall*, 587 F.2d at 126 ([T]he privilege does not apply to enforcement of tax laws because Congress has decided the policy issue.")). *Id.*

<sup>137</sup>*Heyob*, *supra* note 132, at 393.

<sup>138</sup>*Carr, Sr. v. El Dorado Chemical Co.* 1997 U.S. Dist. LEXIS 5752, \* 22 (1997) (citing *LEAN, Inc. v. Evans Indus., Inc.* 1996 U.S. Dist. LEXIS 8117 (E.D. La. 1996) (citing *Dowling, v. American Hawaii Cruises, Inc.* 971 F.2d 423, 426 (9th Cir. 1992)).

<sup>139</sup>Dana, *supra* note 38, at 1006.

<sup>140</sup>See *United States v. Dexter*, 132 F.R.D. 8 (D. Conn. July 9, 1990) (The court determined that "Congress ha[d] made an explicit declaration of public policy for '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...' 33 U.S.C. § 1321(b)(1) (1994). Furthermore, while the named plaintiff is the United States of America, the suit was brought 'at the request of the Administrator of the Environmental Protection Agency,' who is empowered to 'commence a civil action' against any person who has violated the Clean Water Act, 33 U.S.C. § 1321(b)(6)(B) (1994). [Therefore the court found that] the application of the 'self-critical' 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.")). See also *Carr, Sr. v. El Dorado Chemical Co.*, 1997 U.S. Dist. LEXIS 5752 (W.D. Ark. April 14, 1997); *In re Grand Jury Proceedings*, 861 F. Supp. 386 (D. Md. 1994) (company must comply with a subpoena under Food, Drug, and Cosmetics Act for self-evaluative documents).

For good reason, industries do not feel that they can rely on the attorney-client, work-product, or rare critical self-evaluation privileges to shelter themselves from potential legal liability. As a result, many industries lobbied state legislatures to create a statutory scheme that would ensure that environmental audit information could not be disclosed to regulatory agencies and the public.<sup>141</sup> The results in twenty-two states are environmental audit privilege laws.<sup>142</sup>

Under the audit privilege regime, neither the public agencies charged with enforcing environmental laws, nor the public can access the audit once a company claims the information is privileged under the state statute.<sup>143</sup> Companies must still disclose certain information under the various environmental laws and regulations. The production and disclosure requirements under the various federal environmental laws typically are designed to produce only those specific pieces of information that are necessary to develop or enforce particular regulatory standards under a particular statute.<sup>144</sup> The advantage to the public of obtaining voluntarily conducted audits is that this type of audit frequently contains valuable pieces of information that are not subject to mandatory disclosure, but provides to agencies and the public a better picture of actual or potential public health problems that exist at a facility.<sup>145</sup> It is also this type of information that enables the public to mount successful good neighbor campaigns and citizen suits. For these reasons, it is access to precisely this type of information that the proponents of the environmental audit privilege statutes want to keep secret.

### III. ANALYSIS OF VARIOUS STATE ENVIRONMENTAL AUDIT PRIVILEGE STATUTES

In 1993, Oregon became the first state to pass an environmental audit privilege law.<sup>146</sup> Oregon allows companies to conduct voluntary self-audits of their environmental compliance programs and management systems and then claim privilege over the audit information.<sup>147</sup> Twenty-two states have enacted various versions of Oregon's environmental audit privilege statute.<sup>148</sup>

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<sup>141</sup>Stensvaag, *supra* note 29, at 74-5.

<sup>142</sup>*See supra* note 35 and accompanying text (list of all twenty-two states with an environmental audit privilege law).

<sup>143</sup>*See, e.g.,* ARK. CODE ANN. § 8-1-303 (Michie 1999) (creating a privilege to "protect the confidentiality of communications relating to voluntary internal environmental audits" which "shall not be admissible as evidence in any civil or administrative legal action, including enforcement actions"); *See also*, OHIO REV. CODE ANN. § 3745.71 (West 2002) (extending the privilege to civil and administrative proceedings; provides that the audit is not subject to discovery or admissible as evidence; but the privilege does not apply to criminal proceedings).

<sup>144</sup>Karkkainen, *supra* note 39, at 284.

<sup>145</sup>*See supra* note 39 and accompanying text.

<sup>146</sup>OR. REV. STAT. ANN. § 468.963 (West 2002).

<sup>147</sup>OR. REV. STAT. ANN. § 468.963(2) (West 2002).

<sup>148</sup>*See supra* text accompanying note 35, which contains a complete listing of all state audit privilege statutes. The twenty-two states does not include New Jersey, South Dakota, and Rhode Island, each of which has an environmental audit immunity statute that does not include an audit privilege.

In Ohio, Oregon, and other states, owners or operators of a facility whose activities are regulated by various environmental statutes may invoke the privilege over a voluntary environmental audit.<sup>149</sup> Ohio also includes a rather generic provision whereby the privilege may be invoked when the facility conducts activities under “any other sections or chapters of the revised code the principal purpose of which is environmental protection ... [and] any federal or local counterparts or extensions of those sections or chapters.”<sup>150</sup> This language appears to mean that the environmental audit privilege extends to any and all audits assessing compliance with any Ohio statute having the “principal purpose” of “environmental protection” or to any federal or local counterpart or extension of such a statute.<sup>151</sup> This is a broad privilege that may be invoked over specific environmental information, as well as information discovered during an environmental audit that may be related to, but not directly involved in, any environmental statute, regulation, or ordinance.<sup>152</sup>

In order to protect the environmental audit privilege, some states require that the documents be formally labeled in a specific way.<sup>153</sup> Ohio requires that the front cover or first page of the report be prominently labeled with “Environmental Audit Report: Privileged Information” or substantially comparable language.<sup>154</sup> Texas requires that the audit report be labeled “COMPLIANCE REPORT: PRIVILEGED DOCUMENT,” or words of similar import.<sup>155</sup> In Ohio, if the audit report is not properly labeled, the privilege cannot apply;<sup>156</sup> however, in Texas, failure to “label a document under this section does not constitute a waiver of the audit privilege or create a presumption that the privilege does or does not apply.”<sup>157</sup>

Invoking the environmental audit privilege is generally subject to several exceptions. One of Ohio’s exceptions to the privilege is that it does not apply to criminal investigations or proceedings.<sup>158</sup> Oregon and Illinois, however, require an *in camera* review of the audit to determine if the audit privilege can still apply in a criminal proceeding.<sup>159</sup> If, during a criminal proceeding, the court determines that a

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<sup>149</sup>OR. REV. STAT. ANN. § 468.963(1) (West 2002); OHIO REV. CODE ANN. § 3745.71(A) (West 2002). Stensvaag, *supra* note 28 at 88, 101.

<sup>150</sup>OHIO REV. CODE ANN. § 3745.71(A) (West 2002).

<sup>151</sup>Stensvaag, *supra* note 29, at 102.

<sup>152</sup>*Id.* Under this provision, it is foreseeable that information affecting OSHA could be included in the audit, because although OSHA is not an environmental statute, it is related to various provisions of environmental statutes.

<sup>153</sup>*Id.* at 127. See, e.g., 415 Ill. Comp. Stat. 5/52.2(i) (1998) (“‘Environmental Audit Report’ means a set of documents, each labeled ‘Environmental Audit Report: Privileged Document’ and prepared as a result of an environmental audit”).

<sup>154</sup>OHIO REV. CODE ANN. § 3745.71(C)(12)(a)-(b) (West 2002) (providing for electronic record labeling also).

<sup>155</sup>TEX. REV. CIV. STAT. ANN. art. § 4447cc(4)(d) (Vernon 2002).

<sup>156</sup>OHIO REV. CODE ANN. § 3745.71(C)(12)(a)-(b) (West 2002).

<sup>157</sup>TEX. REV. CIV. STAT. ANN. art. § 4447cc(4)(d) (Vernon 2002).

<sup>158</sup>OHIO REV. CODE ANN. § 3745.71(C) (West 2002).

<sup>159</sup>OR. REV. STAT. § 468.963(3)(c) (1999); 415 ILL. COMP. STAT. 5/52.2(d)(2) (1998).

company has asserted the privilege for fraudulent purposes, or the material is not subject to the privilege, or the audit shows evidence of violation of any environmental law or regulation that was not corrected or reported in a reasonable time, the privilege will be revoked.<sup>160</sup>

An additional exception that most legislatures have provided is that the privilege may not extend to documents or information that is required to be “collected, developed, maintained, or reported, under various laws.”<sup>161</sup> This provision is consistent with the purported purpose of the audit privilege statutes, which is to encourage facilities to conduct compliance audits that would not otherwise occur.<sup>162</sup> Besides, there is no need to provide encouragement for audits and investigations that are currently mandated.<sup>163</sup>

Similarly, most statutes do not allow the privilege to extend to information that is obtained independently from the audit.<sup>164</sup> Ohio’s statute contains a limitation that any “observation, sampling, monitoring, a communication, a record, or a report that is not part of the audit on which the audit report is based” may not be claimed privileged information.<sup>165</sup> For example, the only material expressly accorded privileged status in most states is the audit report itself; therefore, as Ohio’s statute indicates, documents that are not prepared for the environmental audit and are not “part of the audit on which the audit report is based” are probably “independently obtained.”<sup>166</sup> This is also consistent with the purported purpose of the statutes, which is to encourage self-policing of the facility, in that this privilege cannot prohibit agencies or others from disclosing compliance information that was independently gathered from the audit.<sup>167</sup> When one broadly interprets Ohio’s language, it appears that as long as the information is gathered during the audit and is related to the audit, it may be included in the environmental audit report. This statutory provision appears to provide an incentive to include anything in the audit that one would like to be privileged.

Finally, after a regulated company conducts an audit, it may assert the privilege. Upon initiation of litigation, however, a regulated company asserting privilege over its environmental audit has the burden of proving that the privilege should apply.<sup>168</sup> Generally, this means that the company must simply show that the information in the audit was gathered for the purpose of the audit and that the audit was done in the

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<sup>160</sup>OR. REV. STAT. § 468.963(3)(c)(A)-(D) (West 1999); 415 ILL. COMP. STAT. 5/52.2(d)(2)(A)-(C) (1998).

<sup>161</sup>Stensvaag, *supra* note 29, at 133.

<sup>162</sup>*Id.* at 134.

<sup>163</sup>*Id.*

<sup>164</sup>*Id.* at 138.

<sup>165</sup>OHIO REV. CODE ANN. § 3745.71(C)(5) (West 2002).

<sup>166</sup>Stensvaag, *supra* note 29, at 138.

<sup>167</sup>*Id.*

<sup>168</sup>*See, e.g.,* OR. REV. STAT. § 468.963(3)(c) (2002); OHIO REV. CODE ANN. § 3745.71 (E) (West 2002) (setting the burden of proof at a preponderance of the evidence); ARK. CODE ANN. § 8-1-310 (Michie 1999).

ordinary course of business, as opposed to being conducted at the mandate of a governmental agency.

In order to overcome the privilege, the party seeking disclosure of the audit must then prove that the privilege is being asserted for a fraudulent purpose.<sup>169</sup> The burden to prove that the privilege is being asserted for a fraudulent purpose results in a tremendous irony: it is difficult to prove a fraudulent purpose if the very information that would be used as evidence of fraud is legally withheld from evidence.

The state audit privilege statutes appear to be fair in the criminal context, where most statutes exempt audit reports from the privilege in the event of a criminal investigation. Additionally, some statutes require the audit report to be appropriately labeled privileged. Most state statutes, however, including Ohio's, have broad language that may have the effect of granting greater discretion to invoke the privilege than even the state legislatures foresaw. Whether the statutes are read narrowly or broadly, their effect is to foreclose the public's access to information that it has a right to know so that it may better protect our quality of life and participate in the regulatory enforcement process as provided for in most environmental statutes.

#### IV. U.S. EPA FINAL POLICY STATEMENT ON INCENTIVES FOR SELF-POLICING

As opposed to the state environmental audit privilege statutes, the U.S. EPA has a more appropriate policy for encouraging the use of voluntary environmental audits. This policy is also more consistent with protecting public health and the public's right to know. The U.S. EPA Final Policy Statement on Incentives for Self-Policing (hereinafter Policy) is the EPA's policy on voluntary environmental audits and its position on environmental audit privilege.<sup>170</sup> According to the EPA, the Policy is designed to promote increased compliance with laws and regulations that protect human health and the environment, while simultaneously allowing the regulated community to reasonably police itself using voluntary environmental audits.<sup>171</sup> In order to achieve a balance in enforcement and compliance, the Policy provides waivers from certain types of penalties and procedures if a facility's voluntary environmental audit meets certain conditions.<sup>172</sup> Instead of granting privilege or immunity for disclosure of violations, the EPA offers reduced or waived penalties for prompt disclosure and corrective action.<sup>173</sup>

The EPA will waive some penalties and prosecutorial procedures once a company conducts a voluntary audit and detects a violation or potential violation, provided the company meets eight conditions.<sup>174</sup> The first condition is that the

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<sup>169</sup>OR REV. STAT. § 468.963(3)(c) (2002).

<sup>170</sup>EPA Audit Policy, 65 Fed. Reg. at 19,618.

<sup>171</sup>*Id.* The EPA defines an environmental audit as "a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements." *Id.* at 19,625.

<sup>172</sup>*Id.* at 19,618. This is similar to many state immunity provisions, but discussion is outside the scope of this Note. See generally Dana, *supra* note 38.

<sup>173</sup>Dahl, *supra* note 1, at 110.

<sup>174</sup>EPA Audit Policy, 65 Fed. Reg. at 19,620.

company must voluntarily discover the environmental violation.<sup>175</sup> For example, a voluntary discovery is not the result of “monitoring, sampling or an auditing procedure that is required by statute, regulation, permit, judicial or administrative order, or consent agreement.”<sup>176</sup> The second condition, and arguably the most important, is that the facility must disclose to the EPA violations discovered through the audit within twenty-one days of discovery.<sup>177</sup> Prompt disclosure is evidence of the facility’s good faith effort to achieve or return to compliance as quickly as possible and not to conceal the violation.<sup>178</sup>

The third condition is that both discovery and disclosure must be independent of any government agency or a third party, which encourages facilities to take initiative to uncover problems.<sup>179</sup> For example, if a citizens’ group has provided notice of its intent to sue under a citizen suit provision, or where a whistleblower has reported the violation, the problem then has been discovered and disclosed by a third party, and the facility cannot meet this third condition.<sup>180</sup>

The fourth condition is that the facility must begin correction and remediation no later than sixty days from the discovery date, or as expeditiously as possible.<sup>181</sup> This enables the EPA to ensure that the regulated facility will be publicly accountable for its commitment to correct the violation.<sup>182</sup> Fifth, the facility is required to take steps to ensure prevention of recurrence.<sup>183</sup> Preventative measures may include, but are not limited to, improving the entity’s environmental auditing and disclosure efforts or improving compliance management systems.<sup>184</sup> Sixth, a facility may not have the same or closely related violations at the same facility within three years in order to be eligible for the penalty exemptions under the Policy.<sup>185</sup> Seventh, the violation must not result in injury that causes “serious actual harm to the environment” or

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<sup>175</sup>*Id.* at 19,621.

<sup>176</sup>*Id.*

<sup>177</sup>*Id.*

<sup>178</sup>*Id.* at 19,622.

<sup>179</sup>EPA Audit Policy, 65 Fed. Reg. at 19,622.

<sup>180</sup>*Id.* Additionally, discovery will not be considered independent where a third party has already filed a complaint (either formally in the judicial or administrative context or informally to an agency) or where discovery of the violation by the government was imminent. *Id.*

<sup>181</sup>The EPA recognizes that some corrections involving technology issues or capital expenditures require more time than sixty days, however, the facility will still be expected to “do its utmost to achieve or return to compliance as expeditiously as possible.” *Id.* Additionally, after the correction and remediation have been completed, the facility must certify in writing to all appropriate Federal, State, and local authorities that it has corrected the violation, thereby ensuring public accountability. *Id.*

<sup>182</sup>EPA Audit Policy, 65 Fed. Reg. at 19,622.

<sup>183</sup>*Id.*

<sup>184</sup>*Id.*

<sup>185</sup>*Id.* “This condition covers situations in which the regulated entity has had clear notice of its noncompliance and an opportunity to correct the problem.” *Id.* at 19,623.



presents “an imminent and substantial danger to public health or the environment.”<sup>186</sup> Lastly, the facility must cooperate with and provide information to the EPA, so that the EPA can determine how the Policy applies to the facility’s situation.<sup>187</sup>

The Policy provides three incentives for facilities to conduct environmental audits that meet these eight established conditions. These incentives include reducing gravity-based civil penalties by 75-100%, declining to recommend criminal prosecution, and refraining from routine requests for audits.<sup>188</sup> These three incentives provide a framework for regulated facilities to legally avoid some of the most costly and burdensome sanctions resulting from environmental noncompliance.

The first incentive is limiting or eliminating gravity-based penalties, which are punitive fines that reflect the severity of the violator’s behavior.<sup>189</sup> These fines are usually added to the economic-based penalty, which is a fine equal to the financial benefit gained when the violator derives a financial advantage over its competitors by breaking the law.<sup>190</sup> For two reasons, the EPA remains “firmly committed” to its discretionary policy to penalize companies for the economic benefit derived from noncompliance.<sup>191</sup> First, regulated facilities are more likely to comply with regulations in a timely manner when there is a risk of losing an economic benefit that is gained from noncompliance.<sup>192</sup> Second, collecting the economic benefit preserves a level playing field between law-abiding companies and those who seek to undercut their competitors by not complying.<sup>193</sup> For example, if a facility fails to comply with a regulation that requires facilities of its type to install scrubbers on its smoke stacks, then by not expending capital to upgrade its equipment, the violating facility gains a competitive advantage over the facilities that do comply; this monetary difference is assessed as an economic-based penalty.<sup>194</sup>

As a second incentive for facilities to conduct environmental audits, the EPA avoids implementing criminal enforcement when facilities voluntarily discover, promptly disclose, and quickly correct violations in addition to other conditions

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<sup>186</sup>EPA Audit Policy, 65 Fed. Reg. at 19,623. However, although a release into the environment may be potentially seriously harmful, it is not necessarily “actually” seriously harmful, nor will a release necessarily present an imminent and substantial danger. *Id.*

<sup>187</sup>*Id.* To this end, the facility cannot “hide, destroy, or tamper with possible evidence” after discovery of a potential environmental violation. *Id.*

<sup>188</sup>*Id.* at 19,619-20.

<sup>189</sup>EPA Audit Policy, 65 Fed. Reg. at 19,620.

<sup>190</sup>*Id.*

<sup>191</sup>*Id.* However, since the inception of the policy in January 1996, 450 companies have disclosed violations at 1,870 facilities and EPA has granted reduction or forgiveness of gravity-based penalties to 164 companies and 540 facilities. *See Enforcement: FY 1998 EPA Action Led to \$184 Million in Criminal, Civil, Administrative Penalties*, 23 CHEM. REG. REP. 22 (1999).

<sup>192</sup>EPA Audit Policy, 65 Fed. Reg. at 19,620.

<sup>193</sup>*Id.*

<sup>194</sup>For further discussion of economic-based penalties, *see* Calculation of the Economic Benefit of Noncompliance in EPA’s Civil Penalty Enforcement Cases, 64 Fed. Reg. 32, 948 (1999).

discussed above.<sup>195</sup> There are, however, two important limitations to the “no recommendation for criminal prosecution” incentive.<sup>196</sup> First, there can be no evidence of “potentially culpable behavior.”<sup>197</sup> For example, the facility could not have intentionally or knowingly violated the law. Second, violations that cause serious harm or which may pose an imminent and substantial danger to human health or the environment will most likely be criminally prosecuted.<sup>198</sup>

The third incentive for conducting self-audits is that the EPA will not routinely request audit reports, which in the past were used to trigger enforcement investigations.<sup>199</sup> Through its Audit Policy, the EPA wants to encourage discovery, disclosure, and prompt correction of environmental violations; therefore facilities are generally assured that the information disclosed will reduce their liability, not expand it.<sup>200</sup> This incentive also has its limitations. For example, if there is independent evidence of a violation, the EPA may request an audit report that has not been previously disclosed in order to determine the extent and nature of the violation and degree of culpability.<sup>201</sup>

According to the EPA, the Audit Policy has been widely used and is successful in encouraging disclosure of existing problems, “while preserving fair and effective enforcement.”<sup>202</sup> Almost three and one half years after the EPA first implemented the Audit Policy, “approximately 670 organizations had disclosed actual or potential violations at more than 2700 facilities.”<sup>203</sup> Additionally, EPA conducted an Audit Policy User’s Survey in 1999, which revealed that 88% of respondents said “that they would use the Policy again, and 84% stat[ed] that they would recommend the Policy to clients and/or their counterparts.”<sup>204</sup> Most importantly, none of the survey respondents said that they would be unwilling to use the Policy again or would be unwilling to recommend use of the Policy to others.<sup>205</sup> During the first three years,

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<sup>195</sup>As discussed in the text above, in addition to voluntary discovery, disclosure within twenty-one days after discovery and prompt correction and remediation, the violation discovery and disclosure must be independent of government or a third party plaintiff, prevention of recurrence must occur, there can be no repeat violations, the injury may not result in serious actual harm to the environment or present an imminent and substantial danger to public health or the environment, and the facility must cooperate as required by EPA. EPA Audit Policy, 65 Fed. Reg. at 19,621-23.

<sup>196</sup>EPA Audit Policy, 65 Fed. Reg. at 19,620.

<sup>197</sup>*Id.*

<sup>198</sup>*Id.*

<sup>199</sup>*Id.* It has been EPA’s policy to refrain from routine requests for audit reports since 1986 and it will only request a report where the information contained in the audit report is not readily available elsewhere and where EPA decides that the information is necessary to determine whether the terms and conditions of the Policy have been met. *Id.*

<sup>200</sup>EPA Audit Policy, 65 Fed. Reg. at 19,620.

<sup>201</sup>*Id.*

<sup>202</sup>*Id.* at 1B.

<sup>203</sup>*Id.*

<sup>204</sup>*Id.*

<sup>205</sup>*Id.*

the EPA granted reduction or forgiveness of penalties to 540 facilities and 164 companies.<sup>206</sup>

The Audit Policy creates a comprehensive system, whereby companies who discover, disclose, and remedy their violations promptly and in good faith are rewarded with reduced penalties.<sup>207</sup> Through the Audit Policy, the EPA reserves the appropriate rights to investigate and prosecute those companies who do not discover or disclose their violations, or in the worse case scenario, intentionally violate the law or act slowly to correct the violation. Most importantly, the Policy is consistent with protecting the public's right to know what it is being exposed to in our communities and is therefore more protective of public health and the environment.

#### V. THE PUBLIC'S RIGHT-TO-KNOW AND ITS CONFLICT WITH A PRIVILEGE FOR ENVIRONMENTAL AUDITS

The public's right to know is a concept that, although not explicitly stated in federal or state environmental statutes, is nevertheless one of the bases for passage of many environmental laws and is strongly supported by the public. The right to know is the theory where, once the public has information on the "nature and amount of chemical that industry releases into the environment, the public will motivate industry to reduce pollution in a way that the EPA cannot – by protesting, by boycotting, and, most importantly, by shining the media's spotlight on the company."<sup>208</sup> The public relies on this right to know policy to help enforce environmental statutes and regulations as evidenced by its use of good neighbor campaigns and, particularly, citizen suits. To facilitate such public pressure and involvement in pollution prevention and reduction, the EPA has made the public right to know "one of the Agency's top priorities" as evidenced by its expansion of the Toxic Release Inventory.<sup>209</sup>

In support of the public's right to know, the EPA states in its Audit Policy that "the public relies on timely and accurate reports from the regulated community, not only to measure compliance, but to evaluate health or environmental risk and gauge progress in reducing" pollution.<sup>210</sup> Congress has also repeatedly recognized a right to know policy as evidenced by the fact that EPCRA,<sup>211</sup> the Clean Air Act,<sup>212</sup> the Clean Water Act,<sup>213</sup> and the Resource Conservation and Recovery Act<sup>214</sup> all contain provisions that imply a public right to know by providing the right of the public to

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<sup>206</sup>Cheryl Hogue, 23 CHEM 22 (1999).

<sup>207</sup>See generally Dana, *supra* note 38 and accompanying text to note 40 (on how immunity provisions may deter effective enforcement of environmental laws).

<sup>208</sup>Peter L. Gray, *Environmental Data on the Internet: A Wired Public Setting Environmental Policy*, 30 ENVTL L. REP. 10122 (2000).

<sup>209</sup>*Id.* See also text *supra* II(B)(1).

<sup>210</sup>EPA Audit Policy, 65 Fed. Reg. at 19,621.

<sup>211</sup>42 U.S.C.A. §§ 11001-11050 (West 2002).

<sup>212</sup>42 U.S.C.A. §§ 7401-7671q (West 2002).

<sup>213</sup>33 U.S.C.A. §§ 1251-1387 (West 2002).

<sup>214</sup>42 U.S.C.A. §§ 6901-6992k (West 2002).

participate in the permitting processes for polluting facilities, to access information compiled by industries regarding compliance, and to enforce the environmental statutes and regulations through citizen suits.

There is, however, no explicit provision in any federal environmental statute that compels disclosure of the kind of information found in a voluntary environmental audit and may be claimed privileged under the states' environmental audit privilege statutes.<sup>215</sup> Additionally, there is no direct statutory conflict between a federal statute and the state environmental audit privilege statutes, where the federal statute would preempt the state environmental audit privilege statutes, thereby rendering the state statutes unconstitutional.<sup>216</sup>

Proponents of the audit privilege statutes argue that because the environmental statutes do not require disclosure of the voluntarily discovered audit information, that this information should be privileged. Opponents of the audit privilege and immunity laws argue that the public's right to know, which is one of the implicit bases of each of the federal environmental statutes, is in direct conflict with these state audit privilege statutes.<sup>217</sup> Opponents further argue that although the environmental statutes do not contain explicit language requiring disclosure of voluntary audits, there is an explicit right to know policy behind disallowing a privilege over the information gathered from these audits.<sup>218</sup>

There is a diverse group that opposes the state audit privilege laws based on the alleged conflict with the public's right to know. This group includes environmental, consumer, public health, and civil rights non-profit organizations, the U.S. EPA, and the United States Department of Justice, as well as community groups and advocates. The EPA is steadfastly opposed to the environmental audit privilege laws because these statutes "shield evidence of wrongdoing and prevent investigation of environmental violations."<sup>219</sup> Additionally, the EPA feels that in light of its Audit Policy, the state audit privilege laws "undermine law enforcement, impair protection of human health and the environment, and interfere with the public's right to know of potential and existing environmental hazards."<sup>220</sup>

The United States Department of Justice (DOJ) has said that the state environmental audit privilege laws create "a corporate environmental secrecy act [that] is contrary to the public's right to know that underlies much of the reporting and disclosure requirements in current environmental law."<sup>221</sup> Additionally, the DOJ

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<sup>215</sup>It has been argued that EPA could tighten up its regulations and broaden what it compels to be disclosed to the agency. See Dahl *supra* note 1, at 107. Mandating broader reporting requirements is likely to be met with great opposition by the regulated community. Additionally, the process of drafting, soliciting comments, conducting hearings, and rewriting numerous regulatory procedures and requirements is likely to take years to implement.

<sup>216</sup>U.S. CONST. art. VI, § 2.

<sup>217</sup>Good Neighbor Project for Sustainable Communities at [www.environweb.org/gnp](http://www.environweb.org/gnp) (last updated Oct. 5, 2001).

<sup>218</sup>*Id.*

<sup>219</sup>EPA Audit Policy, 65 Fed. Reg. at 19,618, 19,623.

<sup>220</sup>EPA Audit Policy, 65 Fed. Reg. at 19,618, 19,623.

<sup>221</sup>Steven P. Solow, *Audit Privilege and Immunity Legislation and the Department of Justice Policy on Voluntary Disclosure*, SD19 ALI-ABA 21, 26 (Sept. 17, 1998).

has stated that the “law sends a powerful message that knowledge gives rise to a duty to remedy. An audit privilege undercuts this message by taking the extraordinary step of creating an evidentiary privilege that would have significance only where the duty to remedy had been violated.”<sup>222</sup> This gets to the heart of the conflict – that there would be little reason to withhold environmental audit information from the public and regulatory agencies if there were nothing to hide.

Many legislators and environmental groups are opposed to Ohio’s audit privilege law, which also contains an immunity component, because of the perceived threat to the public’s right to access information about environmental problems in their communities. During Ohio State Senate debates, then Ohio State Senator Dennis Kucinich called the Ohio audit privilege and immunity bill a “polluters protection bill” and stated that “this bill is not in the interest of the community because people have a right to know what kind of pollutants are being poured into their neighborhoods.”<sup>223</sup> The Ohio Chapter of the Sierra Club characterized the bill as one that would “protect polluters from oversight and penalties by creating secret documents that hide violations of environmental laws.”<sup>224</sup>

A look at some of the provisions of the audit privilege statutes provides ample support that the conflict is real, and not just theoretical. Although on the surface the “independent source” exception to Ohio’s audit privilege may be helpful to resourceful citizens, it may also present a serious problem for the public’s right to know.<sup>225</sup> For example, if privileged audit information is leaked by a whistleblower who does not have the authority to waive the privilege, and this sets off a third party investigation, will the results of the third party investigation be considered “obtained from an independent source?”<sup>226</sup> If information regarding a violation is obtained from an independent source, then the information is admissible in legal proceedings. The defendant company could, however, argue that, consistent with the “fruits of the poisonous tree” Fourth Amendment doctrine, that the third party information has not been obtained independently of the audit and is therefore not admissible evidence.<sup>227</sup> The extension of the privilege in this manner presents a serious affront to the public’s right to know. Without the privilege, the information would likely be disclosed by the company out of fear of prosecution, but with the privilege in place; even well meaning third parties may not be able to uncover information from an audit.

The overbroad language in the Ohio environmental audit privilege statute provides another conflict with the public’s right to know. Ohio allows the inclusion of information in an audit that may be only peripherally related to environmental issues or environmental statutes. This creates the potential that everything but the

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<sup>222</sup>*Id.* at 27.

<sup>223</sup>T.C. Brown, *Senate Passes Bill to Protect Businesses in Pollution Audits*, THE PLAIN DEALER, Jan. 11, 1996, at A12.

<sup>224</sup>*Id.*

<sup>225</sup>Stensvaag, *supra* note 29, at 139, 140.

<sup>226</sup>*Id.*

<sup>227</sup>*Id.*

proverbial kitchen sink could be included in the privileged environmental audit, thereby keeping critical non-environmental information from the public as well.

Most compellingly, the federal statutory right of citizens to sue violators is in direct conflict with state environmental audit privilege laws. The right of a citizen to sue a violator is critical for understanding the conflict that state audit privilege laws present to the public's right to know. If a citizen can file a lawsuit against a violating facility, it is reasonably foreseeable that citizens would have grounds to successfully pursue these suits, provided there were sufficient facts and evidence.<sup>228</sup> In order for a plaintiff to successfully meet its required burden of proof that a violation exists or has occurred, plaintiffs must have access to information about the facility's alleged illegal conduct. It makes no sense for Congress to consistently include in all major federal environmental statutes the right of the people to sue a violator of the law, if it had anticipated that information crucial to successful litigation would be precluded from disclosure and discovery as a result of a state statutory privilege. Before the state audit privilege laws existed,<sup>229</sup> when a citizen suit was filed pursuant to one of the federal environmental statutes, the environmental audit was most likely discoverable under the Federal Rules of Civil Procedure.<sup>230</sup> Additionally, under the EPA's Audit Policy, once a formal settlement has been reached between the EPA and a facility, the EPA makes available to the public a copy of the settlement agreement and other documents related to the company's disclosure.<sup>231</sup> The EPA has explicitly stated that it makes these documents available to the public because it "supports the public's right to know about environmental violations and the Agency's response to violations."<sup>232</sup> The disclosed information could likely aid citizens in building or proving a private tort claim against a company. Additionally, the information may lead citizens to evidence of other violations that were not part of the settlement agreement between the EPA and the company. In that instance, it may be possible for citizens to submit a notice of intent to file a citizen suit against the company or the EPA to enforce compliance with the statute or regulation.<sup>233</sup> If a company does not choose to use the EPA Audit Policy, and instead invokes a state privilege over its environmental audits, the public is precluded from accessing this vital information for use in citizen suits or private suits.

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<sup>228</sup>Congress would not likely have passed a provision that allowed citizens to file frivolous lawsuits against regulated industries.

<sup>229</sup>And in states that have not passes a privilege for environmental audits.

<sup>230</sup>FED. R. CIV. P. 26 (setting forth general provisions governing discovery; duty of disclosure). As a practical note, most citizen suits are filed in federal court or are removed to federal court where the Federal Rules of Civil Procedure apply.

<sup>231</sup>EPA Audit Policy, 65 Fed. Reg. at 19,624. The documents would not be released to the public if "the disclosing entity claims them as Confidential Business Information (and that claim is validated by U.S. EPA), [or if] another exemption under the Freedom of Information Act is asserted and/or applies, or the Privacy Act or any other law would preclude such release." *Id.*

<sup>232</sup>*Id.*

<sup>233</sup>For example, under the Clean Air Act, a citizen must file with the EPA a notice of intent to sue at least sixty days prior to filing a complaint against the EPA or a facility for an alleged violation of the Clean Air Act. 42 U.S.C.A. § 7604(b)(1)(A) (West 2002).

Another related criticism of the environmental audit privilege statutes is that these statutes may inhibit criminal prosecutions and civil litigation because the privileged audits may only be revealed, if at all, once the discovery phase has commenced in litigation, not prior.<sup>234</sup> For these reasons, the only solution to prevent the potential harm caused by state environmental audit privilege statutes is to enact federal legislation prohibiting a privilege for voluntarily conducted environmental audits.

#### VI. ADVOCATING FOR FEDERAL LEGISLATION TO PREEMPT STATE ENVIRONMENTAL AUDIT PRIVILEGE STATUTES

As discussed above, none of the federal environmental statutes compels disclosure of the type of information generally included in an environmental audit. The environmental audits are usually quite detailed and comprehensive, which is why the information is so valuable and crucial to the public's right to know what it is being exposed to by any given facility. On the contrary, most environmental statutes only require the disclosure of small pieces of information, or static "snap shots" of what is occurring at a facility on a given date, and the facility usually has notice of when the "snap shot" will be taken. As one court observed,

An entity which has notice when an observation is to occur will be motivated to meet the compliance standard at that time. But continuous compliance, not contrived compliance is the goal here ... It is fair to assume that compliance data being reported by States do not indicate what is happening at a facility on a day-to-day basis, but rather whether the source has been determined to be in compliance at an announced inspection after it has had the opportunity to optimize the performance of its control equipment. Thus, it indicates whether the source is capable of being in compliance rather than whether it is in compliance in its day-to-day operations.<sup>235</sup>

Therefore, like the TRI data that is reported in best estimate quantities by facilities, the "snap shots" have limited use in pursuing enforcement action against an alleged violator. Additionally, it is unlikely that a facility will provide access to a citizen to monitor whether a facility is in compliance.<sup>236</sup> Therefore, if a citizen cannot practicably collect accurate data oneself because one lacks the right to access the facility, and the facility's compliance data is neither comprehensive nor representative, and the monitoring data and other information collected by the facility is unavailable to citizens because it is privileged, then it "follows that the alleged violator is afforded a large measure of control over enforcement of the [environmental laws] by citizens groups."<sup>237</sup> In this circumstance, Congress' intent that citizens could successfully pursue alleged violators of public health laws through citizen suits is effectively thwarted.

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<sup>234</sup>See generally Allen Kezsbom, *Discovery Issues in Environmental Litigation*, SE98 ALI-ABA 207 (2000).

<sup>235</sup>*Sierra Club*, 894 F. Supp. at 1460.

<sup>236</sup>*Id.*

<sup>237</sup>*Id.*

One solution to bypass the state environmental audit privilege statutes would be to broaden the mandatory reporting requirements for certain data under the current federal environmental statutes. This solution, however, is likely to be unsuccessful for several reasons. First, because of the complex process of amending regulations, the amount of time required to broaden reporting requirements would take years. In the mean time, the public's right to know would continue to be compromised and public health potentially jeopardized. Second, even if time were not a factor, the political challenge to modifying all of these regulations would be enormous. Industries watch carefully and respond immediately to EPA proposals to strengthen environmental standards that impact their activities. The process of attempting to strengthen regulations may also be less advantageous to environmental groups and the public, who are usually less aware of changes in environmental regulations, and are therefore less equipped to respond to industry arguments. Third, Congress has included in many statutes provisions that only allow the EPA to promulgate specific regulations under the statute. Therefore, the EPA may not have the authority to enact regulations to broaden reporting requirements.

Additionally, repealing these state statutes, although a preferred option, is not realistic either. Environmental groups and public health advocates would not likely have the staff and monetary resources necessary to launch massive campaigns to repeal these statutes, currently on the books in twenty-two states. In many states, public interest organizations campaigned actively against the passage of these statutes and yet the bills were enacted into law regardless. When confronted with the sophisticated public relations and lobbying campaigns of deep-pocketed industries, a public interest campaign to repeal a law already on the books would not likely be successful; twenty-two separate campaigns stand an even worse chance of success.

The best solution to protect public health and the public's right to know is to enact federal legislation to prohibit the use of the privilege for environmental audits.<sup>238</sup> The language of the federal legislation could be substantially similar to the U.S. EPA's Policy on Self-Audits and would ban the use of a privilege for environmental audits. A federal law would extinguish the future use of the state environmental audit privilege statutes because of the Supremacy Clause of the United States Constitution.<sup>239</sup>

Proponents of environmental audit privilege argue that the privilege encourages more voluntary environmental audits, which is positive for the facility, public health, and the environment. But as the court in *LEAN, Inc. v. Evans Industries, Inc.* stated, "there is no reason to believe that the possibility of disclosure during discovery would deter" voluntary environmental audits because "the consequences of failure to

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<sup>238</sup>The author recognizes that "the Federal Rules of Evidence generally defer to state or common law on the issue of privilege." Gary W. Ballesteros, *The Limitations of State Environmental Audit Privilege Statutes*, ENVIRONMENT TODAY, April 1995, available at <http://www.jenner.com/practice/enviro/articles/gwb9601.html>. Interestingly, however, at the time of publication, there have been no proceedings in federal court where state environmental audit privilege statutes have been tested. It is my belief that federal courts will not rule in favor of defendants' use of the environmental audit privilege because this privilege conflicts with the public's right to know and is inconsistent with other public policies that support other evidentiary privileges. Defense counsels may be playing it safe in this regard.

<sup>239</sup>U.S. CONST. art. VI, cl. 2. The Supremacy Clause stands for the proposition that federal law is supreme over state law that is inconsistent with the federal law.



comply with state and federal environmental laws and regulations ... debarment from entering into government contracts and public disapproval – make it essential that corporations constantly evaluate their compliance with those laws and regulations.”<sup>240</sup> In fact, prior to the passage of all state environmental audit privilege statutes except Oregon’s, a 1995 Price Waterhouse survey of U.S. businesses found that over half of the companies who responded were performing “some auditing activity...[and] among companies with over \$1 billion annual sales or 10,000 employees, virtually all performed some form of environmental auditing.”<sup>241</sup> A reasonable extrapolation of the figures in this survey supports the argument that if the regulated community was conducting voluntary environmental audits prior to the enactment of environmental audit privilege statutes, then they are likely not going to discontinue auditing if the privilege is revoked. Additionally, that same survey found that over sixty percent of the companies that conducted audits stated that the “key to encouraging more auditing would be the regulators’ adoption of an enforcement policy eliminating penalties for self-identified, reported, and remedied items.”<sup>242</sup> This recommendation is precisely what the EPA provided when it introduced its Audit Policy in late 1995, and this remains the practice of the EPA today.

Federal legislation preempting the environmental audit privilege supports the public policy underlying all environmental legislation - that the public has a right to know information regarding environmental pollution in its community, and has the right to participate in the enforcement of facility compliance when the government cannot or will not act on the public’s behalf. Enacting federal legislation is the most effective and efficient way to guarantee that the public and regulatory agencies can obtain the results of voluntary environmental audit information to ensure compliance with state and federal environmental laws and to protect public health and the environment.

## VII. CONCLUSION

State environmental audit privilege statutes allow regulated industries to conduct self-audits of environmental systems, claim privilege over the information, and in most cases, receive complete or limited immunity from criminal and civil penalties, when, or if, the information is disclosed. Currently there is no explicit law-based conflict with states’ voluntary audit privilege statutes, but there is a significant public policy conflict. In particular, the legislatively created environmental audit privilege is diametrically opposed to the policy of the public’s right to know what pollutants regulated facilities are emitting and whether facilities are in compliance with environmental and public health laws.

The conflict between audit privilege and the public’s right to know frustrates one of the primary purposes of environmental laws, which is to protect human health and the environment. There are several possible solutions, but only one that is

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<sup>240</sup>1996 U.S. Dist. LEXIS 8117, 1996 WL 32558 at \*2, 43 ERC 1190 (E.D. La. 1996).

<sup>241</sup>Heyob, *supra* note 132, at 384 (citing Price Waterhouse L.L.P., THE VOLUNTARY ENVIRONMENTAL AUDIT SURVEY OF U.S. BUSINESS 22 (1995)).

<sup>242</sup>*Id.* at 384-5. (citing Price Waterhouse L.L.P., THE VOLUNTARY ENVIRONMENTAL AUDIT SURVEY OF U.S. BUSINESS 42 (1995)). “The second most commonly cited factor (by 49 percent) was a federal audit privilege law. *Id.*

realistically achievable. Repeal of the state statutes is politically unlikely, and would require individual campaigns in twenty-two states. Additionally, an effort to broaden the mandatory reporting requirements under each of the major federal environmental statutes would require years of negotiating and would likely result in legal battles. The only realistic solution to the problems presented by environmental audit privilege laws is federal legislation codifying the U.S. EPA's Policy on Self-Audits. Federal legislation enacting the U.S. EPA policy and statutorily recognizing the public's right to know would neuter the state environmental audit privilege statutes by making them unconstitutional and is in the best interest of the public's indisputable right to know.

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