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I. Introduction

One of the most controversial topics in the field of Environmental Law is the statutory environmental audit privilege. This privilege is currently sweeping through state legislatures and twenty-one states have adopted this privilege in one form or another.[1]

The evidentiary privilege has its beginning in the common law privilege for self-critical analysis. Both of these privileges, as with any privilege, must be carefully scrutinized to ensure their justification.

> For more than three centuries it has now been recognized as fundamental maxim that the public . . . has a right to everyman's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.[2]

Some argue that there is sufficient public interest in encouraging environmental audits to justify departing from this general rule and keeping regulatory agencies and private litigants from being able to acquire and to use results of the audit. This argument notes

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1. Arkansas, Colorado, Idaho, Illinois, Indiana, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Montana, New Hampshire, New Jersey, Ohio, Oregon, South Carolina, South Dakota, Texas, Utah, Virginia and Wyoming have all passed a statutory evidentiary privilege for environmental audits.

2. United States v. Bryan, 339 U.S. 323, 331 (1950) (quoting WIGMORE Evidence (3d ed.) at 2192). "Everyman's evidence" is an ancient phrase, invoked by both the Duke of Argyll and Lord Chancellor Hardwicke during debate at the House of Lords May 25, 1742. *See also* Jaffee v. Redmond, 116 S. Ct. 1923, 1928 n.8 (1996).

that regulatory agencies alone cannot find all the deviations from what the law says is necessary to protect human health and the environment. Instead, incentives may secure the eager cooperation of the regulated community in searching out causes of pollution. These regulated entities, knowing their own operations, are in a much better position to know where to look than are government inspectors.

II. Self-Critical Analysis

A. Origination in Federal Courts

The self-critical analysis privilege is a relatively new common law privilege carved out by the federal courts. Decisions upholding its existence and validity have almost exclusively been relegated to the district courts.[3] Federal Rule of Evidence 501 allows the federal courts to develop the law of privilege. It states:

> Except as otherwise required by the Constitution of the United States or provided by act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.[4]

This rule directs the courts to "continue the evolutionary development of testimonial privileges."[5] An exception to the general rule is justified when a proposed privilege "promotes sufficiently important interests to outweigh the need for probative evidence."[6]

The direct ancestor of the common law privilege for self-critical

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3. *See* Aramburu v. Boeing Co., No. 93-4064-SAC, 1994 WL 810246, at *2 (D. Kan. Sept. 22, 1994). "[N]either the United States Supreme Court, the Tenth Circuit Court of Appeals, nor any other Circuit Court of Appeals has expressly recognized the privilege." *Id.* at *3.

4. FED. R. EVID. 501.

5. *Jaffee* 116 S. Ct. at 1923 (citing Trammel v. United States, 445 U.S. 40, 47 (1980)).

6. *Id.* at 1928 (citing *Trammel*, 455 U.S. at 51).

analysis is *Southern Railway v. Lanham*.[7] The Fifth Circuit Court of Appeals upheld a privilege against production of documents in order to promote the public interest of complete and thorough investigation of railroad accidents.[8] Although ordering discovery of underlying statements and facts, the court held that the mental processes and impressions of the railroad's accident investigators were privileged absent a strong showing of necessity or justification based on hardship or injustice. This burden is similar to that required to overcome the attorney work-product privilege.[9]

The self-critical analysis privilege was first enunciated in *Bredice v. Doctors Hospital*.[10] In *Bredice*, the plaintiff had sought discovery of medical staff reviews concerning the death of Frank Bredice at Doctors Hospital.[11] The court found that the sole objective of the medical staff reviews is improvement in the care and treatment of patients.[12] The court also determined that confidentiality is essential and opening the process to public inspection would hinder the free flow of information and destroy the medical staff reviews' value.[13] Since the public has an overwhelming interest in preserving this free flow of information, discovery was denied.[14] Additionally, the court found that "what someone . . . at a subsequent date thought of these acts or omissions is not relevant to the case."[15]

The privilege seemed to gain credibility in the circuit court decision of *Keyes v. Lenoir Rhyne College*.[16] This opinion did not mention self-critical analysis by name; however, the rationale used by the court applies equally to self-critical analysis.[17] *Keyes*

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7. 403 F.2d 119 (5th Cir. 1968). The case came before the court when the railroad appealed a contempt of court fine from the district court over its refusal to turn over an accident investigation report when sought in discovery.

8. A railroad investigating officer would submit a report containing an evaluation of the case and whether the railroad should settle any lawsuits. The court held fear of discovery of this report might deter the railroad from seeking full, candid evaluations of the cause of accidents and the proper disposition of the resulting claims. Absent complete honest reports, effective accident evaluation may be impaired and prevention of future accidents hampered. *Id.* at 138.

9. *See Southern Railway,* 403 F.2d at 138.

10. 50 F.R.D. 249 (D.D.C. 1970).

11. *See id.* at 249.

12. *See id.* at 250.

13. *See id.*

14. *See id.*

15. *Bredice* 50 F.R.D. at 250.

16. 552 F.2d 579 (4th Cir. 1977), *cert. denied* 434 U.S. 904 (1977).

17. Several courts have used *Keyes* as precedent in the area of self-critical analysis.

concerned an employment discrimination suit.[18] Plaintiff sought production of annual peer evaluations which had been performed on each faculty member.[19] The college asserted that confidentiality of the information was essential in order to receive honest, candid appraisals.[20] The district court refused to order defendant Lenoir Rhyne College to turn over the information and the court of appeals upheld its decision as no abuse of discretion.[21]

The rise of the self-critical analysis privilege was dealt a severe blow by the United States Supreme Court in *University of Pennsylvania v. Equal Employment Opportunity Commission.*[22] In a case very similar to *Keyes*,[23] confidential peer review information of college professors was held not privileged and subject to discovery by the Equal Employment Opportunity Commission.[24] Neither the parties nor the Court used the term "self-critical analysis." However, as in *Keyes* the Court's rationale appears to apply.[25]

The Court stated that a new privilege should not be created unless it "promote[s] sufficiently important interests to outweigh the need for probative evidence," and that normally the "public has a right to everyman's evidence."[26]

Most damaging to a common law privilege for self-critical analysis, the Court opined that the balancing of conflicting interests of this type was particularly a legislative function.[27] Also important in the Court's decision was the realization that adoption of a requirement that the Equal Employment Opportunity Commission demonstrate a specific reason for disclosure beyond a showing of relevance would place a substantial litigation producing obstacle in the way of the Commission's mandate to investigate and remedy

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18. *Keyes,* 552 F.2d at 579.
19. *See id.*
20. *See id.* at 581.
21. *See id.*
22. 493 U.S. 182 (1990).
23. A major difference is that in *Keyes*, the trial court upheld the privilege, while in *University of Pennsylvania* the trial court ordered discovery. The *University of Pennsylvania* decision was upheld by the Third Circuit Court of Appeals. As the standard of review is abuse of discretion, this factor is significant.
24. *See University of Pennsylvania,* 493 U.S. at 200.
25. Other courts deciding issues of self-critical analysis have considered *University of Pennsylvania* relevant to the issue. *See*, Dorothy Hammond Warren v. Legg Mason Wood Walker, Inc., 896 F. Supp. 540 (E.D.N.C. 1995), reversing a magistrate's ruling which recognized the self-critical analysis privilege in the Fourth Circuit based on *Keyes*. The district court held that decision is seriously questioned if not explicitly overruled by *University of Pennsylvania.*
26. *University of Pennsylvania,* 493 U.S. at 189.
27. *See id.*

workplace discrimination.[28] Although the decision lends strong guidance, it does not dispose of the issue of self-critical analysis, because the actual issue decided in *University of Pennsylvania* was narrowly drawn to whether a new privilege should be created for peer review at colleges.[29]

B. Analyzing the Privilege

In 1992, the Ninth Circuit Court of Appeals further weakened any common law foundation for the self-critical analysis privilege by overruling a district court's decision in *Dowling v. America Hawaii Cruises, Inc.*.[30] A sailor, who sued under the Jones Act for personal injuries incurred aboard ship, was denied discovery of the minutes of the ship's safety committee when defendant asserted the self-critical analysis privilege.[31] The magistrate, who was upheld by the district court determined that the plaintiff was not entitled to delve into the minds of the safety committee members.[32]

The Ninth Circuit noted that neither the Supreme Court nor any circuit court had decided whether or not the self-critical analysis privilege existed.[33] Instead, all prior decisions had been decided on narrow grounds declining to grant the privilege on the circumstances of the particular case.[34] The Ninth Circuit then followed this trend and without stating whether the privilege does in fact exist, determined that it would not in any event apply to the case at bar.[35]

However, the court did examine what the self-critical analysis privilege would require if it were recognized. The four criteria needed to establish the privilege were: (1) the information must result from critical self-analysis; (2) the public must have a strong interest in preserving the free flow of information of this type; (3) the information must be of the type in which free flow would stop if discovery is allowed; and (4) the information must have been prepared with the anticipation it would be privileged.[36]

The Ninth Circuit concluded that the district court had merely weighed the litigants' interests, and found that the chilling effect of

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28. *See id.* at 194.
29. *See id.* at 189.
30. 971 F.2d 423 (9th Cir. 1992).
31. *See id.*
32. *See id.* at 424.
33. *See id.* at 426 n.1.
34. *See id.* at 426.
35. *Dowling*, 971 F.2d at 426.
36. *See id.* at 426.

turning the information over outweighed the plaintiff's interest in acquiring the information for use in his suit.[37] In reversing the decision, the court of appeals stated that the district court had struck the wrong balance.[38] The Ninth Circuit characterized the information as "routine internal review," and that it was not prepared in anticipation of being privileged.[39] It acknowledged that it may be unfair to require the production of reports and documents that the government requires to be prepared as in the employment discrimination field.[40] However, that concern does not exist where the information was voluntarily prepared.[41]

C. Application in the Environmental Area

Federal district courts have considered the application of the privilege for self-critical analysis in the environmental field. These courts have been unable to reach a consensus. The court in *Koppers Company, Inc. v. AETNA Casualty and Surety Co.*[42] found the self-critical analysis privilege inapplicable in the area of environmental disclosure.[43] The court considered the privilege for self-critical to be a "[r]arely recognized privilege . . . premised on a policy rationale that encourages individuals and corporations to act responsibly and deliberately."[44]

Analyzing the competing policy interests, the court held that

> the self-evaluation privilege does not apply a fortiori to environmental reports, records, and memoranda. Indeed, we disagree that a corporation would face a Hobson's choice between due diligence and self-incrimination in the tightly regulated environmental context, for that context requires strict attention to environmental affairs. We doubt that today potential polluters will violate regulations requiring environmental diligence for fear of these documents being used against them tomorrow.[45]

The opinion does not state that only documents required to be kept and information required to be collected by the various environmental laws and regulations is being sought in discovery. However,

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37. *See id.*
38. *See id.*
39. *Id.* at 427.
40. *Dowling*, 971 F.2d at 426-27.
41. *See id.*
42. 847 F. Supp. 360 (W.D.Pa. 1994).
43. *See id.* at 364.
44. *Id.* at 364.
45. *Id.* Self-critical analysis is sometimes referred to as self-evaluation.

in disavowing the "Hobson's choice," it appears the court assumed this to be true. The court went on, however, and made clear the opinion's rationale was not so limited, stating that "public need for disclosure of documents relating to environmental pollution and the circumstances of such pollution outweighs the public's need for confidentiality in such documents."[46]

On the other hand, the opposite result was reached in *Reichhold Chemicals Inc. v. Textron, Inc.*[47] This time, the court granted a protective order prohibiting discovery of information relating to an investigation Reichhold had performed as part of a consent order with the Florida Department of Environmental Regulation.[48] Reichhold had agreed to investigate and remediate groundwater under and storm-water runoff from an industrial facility.[49] They then sued Textron and other defendant's under CERCLA,[50] state statutes and state common law for contribution.[51]

The court considered the rational behind the self-critical analysis privilege and found it analogous to Federal Rule of Evidence 407, which excludes evidence of subsequent remedial measures.[52] It found self-critical analysis to be widely accepted in the medical peer review context, with most states having codified privileges protecting patient care from discovery.[53] However, it is not universally accepted. Where it is accepted, the privilege often covers only subjective impressions and opinions, not objective facts.[54] Occasionally, the privilege has been held not to apply to documents when subpoenaed by a government regulatory agency.[55] The privilege is usually qualified, and can be overcome by a showing of extraordinary circumstance or special need.[56]

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46. *Id.* (quoting CPC Int'l Inc. v. Hartford Accident and Indemnity Co., 620 A.2d 462, 467 (N.J. Super. 1992)).

47. 157 F.R.D. 522 (N.D. Fla. 1994). For other U.S. district court opinions upholding the self-critical analysis privilege in the environmental field, *See* Arkwright Mutual Ins. v. National Union Fire Ins., 1993 U.S. Dist. LEXIS 174 (S.D.N.Y. 1993) and Joiner v. Hercules, 169 F.R.D. 695 (S.D. Ga. 1996).

48. *See Reichhold,* 157 F.R.D. at 528.

49. *See id.* at 524.

50. "CERCLA" is the common acronym for the Comprehensive Environmental Response, Compensation, and Liability Act. 426 U.S.C. §§ 9601-9675 (1994).

51. *See Reichhold*, 157 F.R.D. at 524.

52. *See id.*

53. *See id.* at 525.

54. *See id.* at 526.

55. *See id.*

56. *See id.* at 525-526.

In weighing the competing policy objectives, the court found that pollution is a serious public health risk, giving rise to a strong public interest in promoting the voluntary identification and remediation of industrial pollution.[57] This public interest in allowing candid assessment of compliance with regulations promotes a sufficient public interest to outweigh the interests of opposing private litigants in discovery of the material.[58] This particular material was described by the court as potentially highly prejudicial but minimally relevant after an in camera review.[59]

This rationale raises several questions. The information was discovered during an remedial investigation conducted by Reichhold as part of a consent decree. Therefore, the degree to which it was voluntarily conducted is questionable. Since Reichhold had to conduct the investigation, making the results privileged does not encourage its performance of anything it was not already bound to do. Additionally, since the information was not disclosed, its degree of relevance in the weighing process cannot be evaluated.

The court considered unfounded arguments that the privilege could be used to hide discovery of a defendant's prior knowledge of the risk of his actions.[60] Finding a vital importance in the difference between pre-accident and post-accident analysis, the court held that post-accident analysis is generally not relevant.[61] This leads to the rather narrow holding granting a privilege for retrospective analysis of past conduct and practices and the resulting environmental consequences, which can be overcome by a showing of special need, or extraordinary circumstances.[62]

D. Application to Government Requests

The applicability of the self-critical analysis privilege regarding a government regulatory agency's request for document production was addressed in *Federal Trade Commission v. TRW*.[63] In response to an investigative subpoena duces tecum by the Federal Trade Commission (FTC), TRW raised the privilege for self-evaluation as a basis to avoid providing materials.[64]

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57. *See Reichhold*, 157 F.R.D. at 526.
58. *See id.* at 527.
59. *Id.* at 526-527.
60. *See id.* at 527.
61. *Id.*
62. *See id.*
63. 628 F.2d 207 (D.C.Cir. 1980) [hereinafter *TRW*].
64. As noted above, self-critical analysis is often referred to as self-evaluation. In 1971, the FTC began an investigation of TRW. In 1972, TRW undertook a

The court found an important difference between a private litigant's request for information and a regulatory agency's request.[65] The rationale behind the privilege for self-critical analysis is promotion of public interest. The court held that there is a strong public interest in having administrative investigations proceed without impediment.[66] "[T]he 'very backbone of an administrative agency's effectiveness in carrying out the congressionally mandated duties of industry regulation is the rapid exercise of the power to investigate.'"[67]

The court also justified its decision on another ground. Finding a genuine difference between a discovery request under Federal Rule of Civil Procedure 26, and a statutorily authorized investigatory subpoena of an administrative agency. A discovery request under Federal Rule of Civil Procedure 26, under which all findings of privilege had arisen, leaves a court much discretion. The broad statutory grant of subpoena power leaves a court little discretion not to enforce the request for information. Congress has already decided the policy issue.[68]

> Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.[69]

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voluntary self-audit, checking for compliance. The auditors prepared reports containing their opinions as to compliance, identified problems and suggested solutions. *See id.* at 208.

65. *See id.* In what the court realized was a common refrain, it noted that it was not deciding whether the privilege existed. Instead holding that "whatever may be the status of the 'self-evaluative' privilege in the context of private litigation, courts with apparent uniformity have refused its application where, as here, the documents in question have been sought by a government agency." *Id.*

66. *See id.*

67. *TRW*, 628 F.2d at 211, (citing FTC v. Texaco, Inc., 555 F.2d 862, 872 (D.C. Cir.) (en banc), *cert. denied*, 431 U.S. 974 (1977), and FMC v. Port of Seattle, 521 F.2d 431, 433 (9th Cir. 1975)).

68. *See TRW*, 628 F.2d at 211. *See also* United States v. Noall, 587 F.2d 123 (2d Cir. 1978).

69. *TRW*, 628 F.2d at 211.

This rationale was followed in *United States v. Dexter Corp.*,[70] an environmental case concerning an assertion of privilege for information sought by the Environmental Protection Agency (EPA). The district court held that Congress had made an explicit decision of public policy in the Clean Water Act.[71] Application of the self-critical analysis privilege would impede the Administrator's ability to enforce the CWA, and therefore would be contrary to public policy. "[S]ince the 'self-critical' privilege is rooted in promotion of the public interest, a court should take cognizance, in an action brought by the United States to enforce duly enacted laws, of Congress's role in declaring what is in the public interest."[72]

E. State Decisions

State courts have been even more reluctant than federal courts to find the privilege for self-critical analysis. Oftentimes this is due to an inability of a state court to invent or find a non-statutory evidentiary privilege.[73] However, even in jurisdictions which allow the courts to develop the law of privileges, self-critical analysis has not received much acceptance.

Ohio considered the application of the self-critical analysis privilege in the hazardous waste field in *State ex rel. Celebrezze v. CECOS International, Inc.*.[74] The State sought discovery of reports and documents generated by the defendant during an internal performance evaluation for use in an action alleging violation of various Ohio hazardous waste laws. The trial court ordered production and defendant appealed.[75]

The court of appeals found three criteria for the application of the privilege for self-critical analysis. These are: (1) the informa-

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70. 132 F.R.D. 8 (D.Conn. 1990).

71. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1994) [hereinafter "CWA"].

72. U.S. v. Dexter, 132 F.R.D. 8, 9 (D.Conn. 1990).

73. *See e.g.* Southern Bell Telephone and Telegraph Company v. Thomas M. Beard, 597 So. 2d 873 (Fla. Cir. Ct. 1992); Scoggins v. Uniden Corp. of America, 506 N.E. 2d 83 (Ind. Ct. App. 1987); Vibeke Cloud v. The Superior Court of Los Angeles County, 58 Cal. Rptr. 2d 365 (Calif. Dist. Ct. App. 1996). *See also* DeMoss Rexall Drugs v. Dobson, 540 N.E.2d 655 (Ind. Ct. App. 1989) holding that although there may be policy considerations in favor of a privilege for self-critical analysis, creation of a privilege is the prerogative of the legislature.

74. 583 N.E.2d 1118 (Ohio Ct. App. 1990) [hereinafter *Celebrezze*].

75. *See id.* at 1120 n.2. Ohio courts are authorized to interpret the law of privileges in light of reason and experience per Ohio Evidence Rule 501.

tion must result from a critical self-analysis undertaken by the party seeking the privilege; (2) the public must have a strong interest in preserving the free flow of the type of information sought; and (3) the information must be of a type whose flow would be curtailed if discovery is ordered.[76] CECOS argued that by granting the privilege, courts will give incentive to companies to make changes in procedure and frankly document mistakes without fear of prosecution by regulatory authorities.[77]

The court found the second factor to be the most difficult question.[78] The State has a strong interest in protecting its citizens from hazardous waste and in prosecuting violators of hazardous waste laws. The company, though, has an interest to self-audit in order to avoid prosecution and secure profits.[79] The court determined that discovery could create a dual chilling effect both discouraging a company from investigating and discouraging company troubleshooters from reporting problems.[80]

However, in the end, the court declined to grant the privilege.[81] Defendant was engaged in a potentially dangerous activity.[82] The legislature has provided for a system of extensive regulation of the industry.[83] The court could not ignore what it found to be a "clear legislative directive that the hazardous waste industry be subject to public scrutiny."[84] Noting that no precedential authority existed in Ohio for a privilege for self-critical analysis, the court stated that even if such precedent existed "the strong public interest in hazardous waste regulation would adequately distinguish the facts in the action currently before us."[85]

The New Jersey courts, including its supreme court, recently analyzed the privilege for self-critical analysis.[86] As in Ohio, New Jersey courts may develop the law of privileges absent legislative

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76. *See id.*
77. *See id.* at 1119.
78. *See id.* at 1121.
79. *Celebrezze,* 583 N.E.2d at 1121.
80. *See id.* at 1121.
81. *See id.*
82. *See id.*
83. *See id.*
84. *Id.*
85. *Celebrezze*, 583 N.E.2d at 1121.
86. *See* Payton v. New Jersey Turnpike Authority, 691 A.2d 321 (N.J. 1997). *See also* Korostynski v. N.J. Div. of Gaming Enf., 630 A.2d 342 (N.J. Super. 1993); Bundy v. Sinopli, 580 A.2d 1101 (N.J. Super. 1990); Wylie v. Mills, 478 A.2d 1273 (N.J. Super. 1984).

action.[87]

The first New Jersey court to recognize the privilege was the trial court in *Wylie v. Mills*.[88] The defendant PSE&G asserted the privilege for self-critical analysis in order to protect the information it had collected on a motor vehicle accident involving one of its employees, and whether the company should alter its procedures.[89]

The court found that for the privilege to apply the information must be criticisms or evaluations conducted by the party opposing the request.[90] The public need for confidentiality of the analysis must be such that the unfettered internal availability of such information should be encouraged as a matter of public policy.[91] As a corollary to the second point, the analysis or evaluations must be of a type which would cease to be performed in the future if the information is subject to disclosure.[92] The court recognized that frank criticism relies on confidentiality and is essential to recognize the cause of past problems and eliminate future ones.[93] If the public policy of safety improvements is to advance, the individual's need for disclosure may have to give way.[94] Therefore the court held the evaluative portions of the reports and documents privileged.[95] However, the underlying factual information was ordered to be disclosed.[96]

Although seeming to accept that the privilege for self-critical analysis existed, the New Jersey Superior Court found the privilege inapplicable in the environmental area.[97] In *CPC,* the plaintiff sought coverage under insurance policies which the defendant refused to provide.[98] The defendants sought discovery of documents which CPC claimed were privileged by self-critical analysis.[99]

The court found the clear direction of the New Jersey legislature to be in favor of effective regulation in the hazardous waste

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87. Hague v. Williams, 37 N.J. 328 (1962), creating a qualified physician-patient privilege in the absence of statutory authority. *See also Wylie*, 478 A.2d at 339 n.3.
88. 478 A.2d 1273 (N.J. Super. 1984).
89. *See id.* at 1274.
90. *See id.* at 1277.
91. *See id.*
92. *See id.*
93. *Wylie*, 478 A.2d at 1277.
94. *See id.*
95. *See id.* at 1278.
96. *See id.* at 1277-1278.
97. CPC International, Inc. v. Hartford Accident and Indemnity Co., 620 A.2d 462 (N.J. Super. 1992) [hereinafter *CPC*].
98. *See id.* at 463.
99. *See id.*

field.[100] Upholding a privilege would be contrary to public policy.[101] The public interest in preventing and remediating pollution is in favor of disclosure. Disclosure is appropriate, the court held, whether the party seeking discovery is the government or a private plaintiff.[102] Additionally, the court found that it is in the best business interest of companies to continue to evaluate their pollution problems whether the evaluations are discoverable or not.[103]

In *Payton*, the Supreme Court of New Jersey analyzed the existence of the privilege in a sexual harassment suit.[104] After noting the lower court decisions accepting the privilege, the supreme court declined to accept the privilege and expressly "disavow[ed] the statements in those lower court decisions that have accorded materials covered by the supposed privilege near absolute protection from disclosure."[105]

The supreme court found that any protection which a court may wish to extend to information deemed privileged by self-critical analysis is better analyzed under the more general claim for protection of any sensitive material.[106] Creating a broad privilege is inappropriate. Instead, courts should address the concern as one part of the balance conducted when weighing whether any confidential material should be disclosed.[107]

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100. *See id.* at 467.

101. *See id.*

102. *CPC*, 620 A.2d at 466-467.

103. *See id.* at 466-468.

104. Payton sued her employer, the N.J. Turnpike Authority, under the Law Against Discrimination, P.L. 1945, c. 169(c.10:5-1 et. seq.), for failure to take adequate steps to curtail harassment by her supervisors. The Authority answered that it had taken appropriate steps. Payton requested minutes of the investigation of the incidents conducted by the Authority, who contended the minutes were privileged under the inherent confidentiality of the Law Against Discrimination, Attorney-Client privilege, and the privilege for self-critical analysis. The trial court held the information was privileged: The Appellate Division ordered an in camera review to redact the documents to eliminate privileged material. The N.J. Supreme Court declined to prohibit discovery on the first two contentions of defendant before analyzing the claim of privilege for self-critical analysis. *Payton*, 691 A.2d at 321.

105. *Payton*, 691 A.2d at 321.

106. *See id.*

107. *See id.* at 331-336. *See also* Kansas Gas & Electric v. Eye, 789 P.2d 1161 (Kan. 1990). In disposing of a claim of privilege for self-critical analysis, the court analyzed the criteria necessary to protect a confidential communication. The court then applied a balancing of interests test and ordered disclosure. New Jersey and Kansas would then seem to agree that the privilege for self-critical analysis is just a subset of the larger issue of general confidentiality and is not deserving of separate or unique analysis.

The rationale expressed by the court is not based on a perception that self-critical analysis is not beneficial for society. Instead, unlike the balance struck by the court in *Wylie*, the *Payton* court was not convinced that absolute confidentiality is necessary to encourage frankness.[108] Disclosure may shed light on the frankness of the self-evaluation, and promote rather than inhibit full frank analysis.[109]

III. State Statutory Privileges for Environmental Audits

A. Beginnings

State legislatures took to heart the United States Supreme Court's words that the balancing of competing public policy interests is particularly a matter for legislatures.[110] As stated by the Colorado legislature:

> The general assembly hereby finds and declares that protection of the environment is enhanced by the public's voluntary compliance with environmental laws and that the public will benefit from incentives to identify and remedy environmental compliance issues. It is further declared that limited expansion of the protection against disclosure will encourage such voluntary compliance and improve environmental quality and that the voluntary provisions of this act will not inhibit the exercise of
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> the regulatory authority by those entrusted with protecting our

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108. *See Payton*, 691 A.2d at 331-332.

109. *See id.*

110. *See University of Pennsylvania*, 493 U.S. at 189. Corporate director's may have a powerful incentive to conduct environmental audits regardless of the existence of a privilege. The highly influential Delaware Court of Chancery has recently stated it is "of the view that a director's obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system is adequate, exists, and that failure to do so under some circumstances may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards." In Re Caremark International Inc., Derivative Litigation, 698 A.2d 959 (Del. Ch. 1996). Additionally, James Sevinsky, Chief of the Environmental Protection Bureau in the New York Attorney General's Office has stated that audits are now part of the reasonable standard of care and an essential business practice. Prosecutors will determine if companies consciously tried to avoid harm, and that the state of the art is a proactive approach to pollution prevention. Prosecutors will determine whether companies have met this standard in light of guidance such as ISO 14000, requiring positive management steps to eliminate pollution. BNA STATE ENVIRONMENTAL DAILY, *Companies That Fail to Audit May Face State Criminal Charges, Prosecutor Says*, September 9, 1994 at d2.

environment.[111]

The statutes enacted by the different states have shown a great deal of variability. The main issues to consider when examining the various state statutes are: (1) how is audit defined, leading to what information is privileged; (2) for what type of proceeding does the privilege apply; (3) what steps must an investigating criminal or regulatory agency take to overcome the privilege; (4) under what circumstances may the privilege be lost; and (5) does disclosure of violations found pursuant to the audit result in immunity from penalties.

The first state to pass a statutory privilege for environmental audits was Oregon.[112] Although the Oregon statute provides for a privilege, unlike most later state statutory schemes, it does not provide for immunity from penalty for violations reported pursuant to the audit. The privilege is for an "Environmental Audit Report"[113] which is defined to be:

> [A] set of documents, each labeled 'Environmental Audit Report: Privileged Document' and prepared as a result of an environmental audit. An Environmental Audit Report may include field notes and records of observations, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, computer-generated or electronically recorded information, maps, charts, graphs and surveys, provided such supporting information is collected or developed for the primary purpose and in the course of an environmental audit.[114]

The environmental audit is defined as "a voluntary, internal and comprehensive evaluation of one or more facilities . . . that is designed to identify and prevent noncompliance and to improve compliance with such statutes. An environmental audit may be conducted by the owner or operator, by the owner's or operator's employees or by independent contractors."[115]

While many cases involving the privilege for self-critical analysis emphasized that only subjective opinions were privileged, the Oregon statute, as with most of its progeny, makes no such distinction. The definition extends the privilege to information

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111. COLO. REV. STAT. § 13-25-126.5(1) (1997).

112. Oregon's privilege was signed into law on July 22, 1993. Alabama Environmental Compliance Update, Vol. 2, Issue 12, January 1995.

113. OR. REV. STAT. § 468.963(2) (1997).

114. *Id.* at § 468.963(6)b.

115. *Id.* at § 468.963(6)a.

collected and data produced to perform the audit, as well as subjective opinions. Exempted from the privilege are reports, documents and information required to be kept or reported to the regulatory agency; information obtained by the regulatory agency through its own observation, sampling or monitoring; and information obtained from an independent source.[116]

The self-critical analysis privilege was claimed only in civil cases. However, when state legislatures began codifying the privilege for environmental audits, many chose to provide for the privilege in criminal investigations and prosecutions as well as civil litigation. The Oregon statute provides a privilege for civil, criminal and administrative proceedings.[117]

The Oregon privilege is not absolute. In a civil or administrative proceeding, a court may order disclosure after an in-camera inspection. Disclosure is appropriate if the reviewing court decides that the privilege is asserted for a fraudulent purpose, the material is not subject to privilege, or it shows noncompliance without appropriate efforts to achieve compliance "promptly initiated and pursued with reasonable diligence."[118] The privilege may also be waived either expressly or by implication.[119] Unfortunately, the statute does not define "promptly" or "reasonable diligence." The court will thus have tremendous discretion without the benefit of the adversarial process to assist in making the decision as it is an in camera proceeding.

In a criminal proceeding, there are additional avenues for the court to order disclosure. The court may order disclosure if "[t]he material contains evidence relevant to commission of an offense . . . the district attorney or Attorney General has a compelling need for the information, the information is not otherwise available . . . the substantial equivalent of the information [cannot be obtained] by any means without incurring unreasonable cost and delay."[120] Also, the Attorney General or a district attorney may obtain the audit report by search warrant, criminal subpoena or discovery, provided he has probable cause obtained from an independent source to believe an offense has occurred. Once obtained, the report is placed under seal and the preparer of the report has the opportunity to request a hearing on the applicability

116. *See id.* at § 468.963(5).
117. *See id.* at § 468.963(2).
118. *Id.* at § 468.963(3).
119. *See* OR. REV. STAT. § 468.963(3).
120. *See id.* at § 468.963(3)b(D).

of the privilege to the report. The government agency is prohibited from disclosing the report's contents after being given the chance to review it for the hearing.[121]

The use of the privilege in criminal proceedings is one of the most controversial aspects of the audit privilege. Especially dangerous is the requirement that probable cause be determine prior to the subpoena of the audit report by the grand jury. Traditionally, a grand jury is allowed near unfettered discretion in investigating criminal wrongdoing. Applying a standard for its ability to request evidence may cause litigation. The statute does not specify what remedy is available for subpoenas without probable cause. Criminal defendant's will certainly argue suppression is appropriate. Additionally, "fruit of the poisonous tree" arguments[122] will be appropriate for evidence collected after a later suppressed audit is acquired.

B. The Statutes Become More Aggressive

Colorado accelerated the audit debate when it passed its version of a statutory privilege for environmental self-evaluation.[123] Not only is the Colorado statute more aggressive than the Oregon statute, but Colorado officials became ambassadors attempting to export the privilege to other states and the federal government.[124]

The Colorado privilege law follows the basic scheme laid down by the Oregon statute. It applies to civil, criminal and administrative proceedings.[125] However, there are several important differences between the Colorado and Oregon statutes. The Colorado

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121. *See id.* at § 468.963(4).

122. *See* Nardone v. United States, 308 U.S. 338 (1939) and Oregon v. Elstad, 470 U.S. 298 (1985).

123. The Colorado statute was enacted after Coors Beer conducted a voluntary audit and discovered that emissions from spilled and evaporating beer were worse than assumed. After disclosure, Coors was assessed a $100,000 civil penalty, and a $237,000 economic benefit fine. Although this has been overstated in the press as Coors being penalized for discovering an industry-wide problem no one knew that in reality Coors also was alleged to have failed to submit emission notification forms and to obtain permits. Valerie Richardson, *Punishment for Coors Good Deed Sparks Public Outcry,* WASHINGTON TIMES, March 18, 1997, at A9.

124. *See* Federal Document Congressional Testimony, May 21, 1996, Capital Hill Hearing Testimony, Testimony of Colorado State Senator Don Ament; Federal Document Congressional Testimony, May 21, 1996, Capital Hill Hearing Testimony, Testimony of Patricia S. Bangert, Senior Deputy Solicitor General, Colorado Department of Law.

125. *See* COLO. REV. STAT. § 13-25-126.5(3) (1997).

privilege appears harder to lose. It relaxes somewhat the requirement that prompt remediation be used to maintain the privilege. The statute requires that: "[t]he person or entity did not initiate appropriate efforts to achieve compliance with the environmental law or complete any necessary permit application promptly after the noncompliance . . . was discovered and, as a result, . . . did not or will not achieve compliance . . . or complete the . . . application within a reasonable amount of time."[126] Apparently, the entity must start remediation efforts. However, once started, it requires a laxer standard on how the efforts proceed than the Oregon statute.

If more than one violation is found, then the entity may delay compliance further. Instead of promptly correcting the problem an entity may wait and install a "comprehensive program that establishes a phased schedule of actions to be taken to bring the person or entity into compliance . . . ."[127]

A court may allow discovery of the audit if it "determines that compelling circumstances exist that make it necessary to admit the environmental audit report into evidence or that make it necessary to subject the environmental audit report to discovery procedures."[128] If the privilege is asserted fraudulently to avoid disclosure of information to an investigation underway or imminent, then it may be disclosed.[129] The privilege is also lost if the court's in-camera inspection reveals information that "demonstrates a clear, present, and impending danger to the public health or the environment in areas outside of the facility property."[130]

The Colorado statute also provides for limited access by outside parties to the report. If a party based upon independent knowledge, demonstrates that probable cause exists and that an exception to the self-evaluation privilege is applicable to an environmental audit report, then a court or any administrative law judge may allow the party limited access to the environmental audit report for the purposes of an in-camera review.[131] However, if the party gaining access discloses any of the information without the court's permission, then it is liable for damages. Any public employee, official or entity, who discloses information improperly

126. *Id.* at § 13-25-126.5(3)(b)(1)(B).
127. *Id.* at § 13-25-126.5(3)(b)(1)(B)(II).
128. *Id.* at § 13-25-126.5(3)(c).
129. *See id.* at § 13-25-126.5(3)(d).
130. *Id.* at § 13-25-126.5(3)(e).
131. *See* COLO. REV. STAT. § 13-25-126.5(5)(a).

is guilty of a class 1 misdemeanor.[132]

While the Colorado statute placed a criminal penalty on unauthorized disclosure, it also took the unprecedented step of granting immunity to violators of environmental laws who disclose the violation pursuant to an audit. A violation which is subject to a disclosure made promptly after the information is obtained in a self-evaluation has a presumption against imposition of civil, criminal or administrative penalties, as long as the disclosing party initiates the appropriate effort to achieve compliance, pursues compliance with due diligence and cooperates with the appropriate state agency in the investigation of the incident.[133]

The burden, therefore, is on the state to demonstrate that these factors do not exist.[134] Immunity also "does not apply if a person or entity has been found . . . to have committed serious violations that constitute a pattern of continuous or repeated violations . . . and that were due to separate and distinct events giving rise to the violations, within the three-year period prior to the date of the disclosure.[135] Patterns may also be shown through multiple settlement agreements relating to substantially the same alleged violations of noncompliance occurring within a three-year period before voluntary disclosure."[136]

Critics of environmental audit statutory immunity have shown concern that companies may be able to escape penalties by claiming they are performing continuous audits. The Colorado statute addresses this concern by not applying the privilege to "[a]ny information, not otherwise privileged, including the privilege created by this section, that is developed or maintained in the course of regularly conducted business activity or regular practice."[137] However, this would appear to allow the privilege's extension to information gathered in the regular course of business and used in a self-evaluation. The statute does state, however, that an audit must be completed within a reasonable time, and explicitly does not authorize uninterrupted self-evaluation.[138] The problem with this exclusion is that it does not give any guidance to what is

132. *See id.* at § 13-25-126.5(5)(b).
133. *See id.* at § 25-1-114.5(1). Note that for immunity the party must pursue compliance with due diligence, a requirement in addition to what is needed to merely maintain the privilege as discussed above.
134. *See id.* § 25-1-114.5(5).
135. *See id.* at § 25-1-114.5(6).
136. *Id.* at § 25-1-114.5(6).
137. COLO. REV. STAT. § 13-25-126.5(4)(g) (1997).
138. *See id.* at § 13-25-126.5(2)(e).

reasonable.

C. *The Attempt to Scale Back The Privilege*

The EPA and Department of Justice have consistently opposed these audit privilege laws.[139] Federal officials have written to state governors asking that such bills be vetoed, testified before state legislatures in opposition to the bills, and used the threat of increased compliance inspections and the withdrawal of federal delegation of environmental programs in order to convince states to not pass, or at least tone down, their statutory privileges for environmental audits.[140]

These tactics have met with some success. Utah has amended its statutory privilege for environmental audits in several important ways. The most significant change is in the area of criminal law.

The Utah statute was amended in 1997 to change the definition of judicial proceeding from a civil or criminal proceeding to only a civil proceeding.[141] This has several effects on the statutes' functioning. First, information disclosed in violation of the privilege

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139. Compare these audit statutes to the EPA Final Audit Policy, 60 Fed. Reg. 246 (1995). The policy states that if an entity performs a voluntary self-audit and discloses violations which are promptly corrected, there will be no gravity-based penalty. However, the EPA retains discretion to recover economic benefit. Repeat, serious or re-occurring problems are not covered by the policy. The EPA also asserts it has never recommended for criminal prosecution any violation voluntarily disclosed which was discovered in a voluntary self-evaluation. EPA further states that it has a long-standing practice of not requesting audit reports to trigger enforcement actions. An important difference between this is a policy, not a statute or regulation, and therefore would give EPA great discretion in its application. *See also*, Steven M. Morgan & Allison K. Obermann, *Perils of the Profession: Responsible Corporate Officer Doctrine May Facilitate a Dramatic Increase in Criminal Prosecutions of Environmental Offenders*, 45 SW. L.J. 1119, 1213 (1991). This discusses the Department of Justice policy regarding the effect voluntary self-auditing will have on the exercise of discretion by criminal prosecutors.

140. See, Richardson, *supra* note 124, at A9. *EPA at Odds With States Over Voluntary Cleanup Privilege;* THE ENERGY DAILY, April 18, 1996, *EPA: Permitting Power May Be Denied to States With Environmental Audit Laws;* BNA STATE ENVIRONMENTAL DAILY, *Texas Committee Approves Bill to Make Changes Sought by EPA in Audit Statutes*, April 7, 1997; BNA STATE ENVIRONMENTAL DAILY, *Governor Leavith Signs Legislation Amending State Audit Privilege*, April 4, 1997; BNA STATE ENVIRONMENTAL DAILY, *States, EPA Square Off Over Audits; Seek Ways to Work Together, Officials Say,* March 20, 1997; BNA STATE ENVIRONMENTAL DAILY, September 20, 1996, *State Immunity, Privilege Laws Examined For Conflicts Affecting Delegated Programs*, September 20, 1996; THE POST COURIER, April 24, 1996, Section B, at p.4.

141. *See* 1997 Utah SJR.14(1)(a)(7) (1997).

cannot be admitted into evidence in any judicial proceeding.[142] Second, although discoverable, the existence of an environmental audit is not admissible in a judicial proceeding.[143] Finally, the change in definition allows for introduction into evidence at a criminal trial of the fact that an audit was performed, as well as the audit report itself if law enforcement officials obtain it.

Obtaining the audit report is also much easier for law enforcement officials in Utah under the amended statute. Previously, there were heavy sanctions for disclosure of privileged environmental audit information. A person improperly disclosing an audit was liable for all damages proximately caused by the disclosure. This provision applied to governmental entities as well as private parties. Private parties improperly disclosing another's environmental audit information were also potentially guilty of a class B misdemeanor and subject to up to a $10,000 civil fine, as well as facing contempt of court proceedings.[144] However, these penalties have been deleted from the law.[145] These changes provide protection to the audit information in the event it is used in a criminal proceeding. However, this is not applicable for civil or administrative forums.[146]

Texas has also tentatively agreed to revise its very aggressive environmental audit privilege. The Texas statute is very similar to the Colorado statute.[147] To retain authority over federally delegated enforcement programs, Texas has agreed to eliminate immunity and privilege for criminal violators, and to eliminate civil immunity when the violation results in serious threat to human health, the environment, or where the violator has received substantial economic benefit which has given it an economic advantage over its competitors.[148]

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142. *See* UTAH CODE ANN. § 19-7-104(1) (1997).
143. *See* U.R.E. 508(7)(b) (1997).
144. *See* UTAH CODE ANN. § 19-7-104(2).
145. *See* 1997 Utah SB 223.
146. *See* 1997 Utah SJR. 14(1)(a)(7)(b).
147. Colorado, however, is resisting any efforts to alter its audit privilege. Officials insist it is working. Industry is aggressively lobbying to retain the law, which sunsets in 1999. BNA STATE ENVIRONMENTAL DAILY, State Not Interested in Changing Its Self Audit Law, Officials Say, April 2, 1997.
148. BNA ENVIRONMENTAL REPORT CURRENT DEVELOPMENTS, Vol. 27, No. 46, March 28, 1997, p.321. Despite this agreement, EPA remains deeply opposed to the audit privilege in any form. Citizen groups, such as Sierra Club, also oppose the privilege for civil actions. The senior vice president of the Texas Chemicals Council stated, however, that business will find the agreement satisfactory. A civil privilege was what the Council wanted all along. *Id.*

D. Other Statutory Innovations

The South Carolina environmental audit privilege seeks to allow flexibility for criminal law enforcement. For civil actions the South Carolina privilege is typical.[149] However, it explicitly states "nothing in this chapter shall be construed to protect individuals, entities, or facilities from a criminal investigation and/or prosecution carried out by any appropriate governmental entity."[150] This strong statement is contradicted by a later section granting privilege and immunity from discovery in any legal proceeding, which presumably would include criminal actions.[151]

However, "[i]n a criminal proceeding, any information in the audit report not otherwise available shall be made available to circuit solicitors and the Attorney General upon request . . . ."[152] The statute does not elaborate on any procedure necessary for the prosecutor to obtain the information. Presumably it would be by the same procedure to obtain any documents in an investigation, i.e. subpoena duces tecum. Such a disclosure is not a waiver of the privilege. The prosecutor obtaining the information is not free to share the information with other agencies or parties.[153] The information remains privileged and a court must revoke the privilege for the audit report to be admissible. The privilege is revoked if asserted for deception or evasion; if the information shows wilful noncompliance; or the party asserting the privilege has not promptly initiated and pursued with diligence appropriate action to achieve compliance.[154]

What constitutes privileged information is also spelled out in a different way than most other statutes. The privilege applies to communications pertaining to the audit, but does not apply to the facts relating to a violation.[155] This would seem to restrict the privilege more to subjective opinions as the case law for the self-critical analysis privilege suggests it should. As with many statutes, voluntary disclosure to the South Carolina regulatory agency provides immunity from penalty. Immunity is contingent on: (1) the violation not having been intentional or wilful; (2) the violation

149. *See* S.C. CODE ANN. § 48-57-10 (149.12 (1997).
150. *Id.* at § 48-57-10(B).
151. *See id.* at § 47-57-30(A).
152. *Id.* at § 48-57-30(D).
153. *Id.*
154. *See id.* at § 48-57-60.
155. *See* S.C. CODE ANN. § 48-57-10(C).

being corrected in a diligent manner; (3) the existence of no significant environmental harm or public health threat; and (4) no similar violation occurring at the same facility within the past year for which immunity was received.[156] Final waiver of penalties is not given until full compliance has occurred.[157] Information disclosed is subject to Freedom of Information Act requests.[158]

To obtain the privilege in Kansas,[159] a party must implement a management system to assure compliance with environmental laws. The act sets out in detail what entails such a management system. The system must: (1) cover all parts of the entity's operation subject to regulation; regularly take steps to prevent and remedy noncompliance; (2) have the support of senior management; (3) have policies, standards and procedures highlighting the importance of compliance; communicate these policies, standards and procedures to all who can affect compliance; (4) assign specific individuals at both high-level and plant or operations-level to oversee compliance with such standards and procedures; (5) regularly undertake review of compliance; (6) provide for a system to allow reporting of unlawful conduct without fear of retribution; and (7) provide for enforcement of the standards and procedures through employee performance, evaluation and disciplinary mechanisms.[160] The Kansas law forces companies into environmental responsibility in order to take advantage of the audit privilege.

On the other hand, New Jersey's audit statute is unique.[161] It does not provide for an evidentiary privilege. Instead it provides for immunity for minor violations which are disclosed fully within 30 days of discovery and promptly remedied.[162] Even absent finding and disclosing a minor violation, if the state regulatory agency discovers a minor violation, then the party can escape penalty provided it promptly corrects the problem. The state regulatory agency is directed to promulgate regulations defining "minor violation",[163] taking into account that a minor violation: (1) is not purposeful, knowing, reckless or criminally negligent; (2) is a minimal risk to public health, safety, or natural resources; (3)

156. *See id.* at § 48-57-100.
157. *See id.* at § 48-57-100(F).
158. *See id.* at § 48-57-100(E).
159. *See* KAN. STAT. ANN. § 60-3333 (1997).
160. *See id.* at § 60-3333(d)(2).
161. *See* N.J. STAT. ANN. § 13:1D-125 (1997).
162. *See id.* at § 13:1D-130.
163. *Id.* at § 13:1D-133.

does not substantially undermine a regulatory program; (4) has existed less than twelve months; (5) is not a repeat violation; and (6) does not demonstrate a pattern of violation.[164]

In the end, the New Jersey statute provides much less protection than other states. However, it still provides a great incentive to audit. Most violations discovered by an audit and covered by the state privilege will be minor. Moreover, the New Jersey statute serves to provide an incentive to audit in order to find violations before they have occurred for too long.

IV. Conclusion

EPA and DOJ leverage to hold back aggressive state audit privileges is in jeopardy. A bill is about to be introduced in the 105th Congress which would prohibit the EPA from non-delegation of enforcement programs to a state based on the existence of a state audit privilege. Additionally, although a federal environmental audit privilege bill was defeated in the 104th Congress, another version is said to be ready for introduction.[165]

A major issue to be resolved is whether a state audit privilege will have any effect in federal court. Federal Rule of Evidence 501 gives great discretion to the trial court in making evidence rulings regarding privilege.

In federal cases applying federal statutes, state privilege laws do not control. However, as statutory environmental audit laws become more common, the privilege for self-critical analysis may make a resurgence. Although Federal Rule of Evidence 501 would indicate that federal law, not state law, would control a decision on federal substantive law, a federal court may "resort to state law analogies for the development of a federal common law of privileges in instances where the federal rule is unsettled."[166]

As noted earlier the Supreme Court in *University of Pennsylvania*, decided not to grant a privilege to confidential peer review for college professors because the balancing of conflicting interests of this type is particularly a matter for the legislature.[167] In *Dowling*, the Ninth Circuit decided against a claim for privilege for

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164. *See id.* at § 13:1D-129.

165. Statement of Stephen J. O'Dell, United States Senate Committee on Environment and Public Works, at ALI-ABA conference on Criminal Enforcement of Environmental Crimes, May 8-9, 1997.

166. Wm. T. Thompson Co. v. General Nutrition Corp., 671 F.2d 100, 104 (3d Cir. 1982).

167. *See University of Pennsylvania,* 493 U.S. at 189.

self-critical analysis mainly on the basis that the report was not prepared with the expectation of privilege.[168] The propagation of environmental audit statutes may cause the balancing of these issues to change.

Although not controlling, state legislatures declaring policies in favor of a privilege for environmental audits may be used to distinguish *University of Pennsylvania.* In a state where the privilege applies, a party defending against an EPA overfiling for discovery may legitimately assert that the audit was prepared with the anticipation it would be confidential, and thus distinguish *Dowling.* Therefore, the rationale behind the two main cases limiting the privilege for self-critical analysis may no longer apply. As the standard of review used in evidentiary matters is abuse of discretion, this will prove especially problematic to the DOJ and the EPA in attempts to overfile. A court hostile to environmental criminal actions, environmental regulation or perceived federal interference will have a tool to frustrate federal action.

At least one federal district court has already grappled with this argument and declined to hold the material privileged. In *Roy A. Carr v. El Dorado Chemical Company*,[169] the defendant argued that the environmental audit it had performed was privileged as self-critical analysis. The forum state, Arkansas, had recently enacted an environmental audit statute.[170] Although the court held the material not privileged, its holding relies heavily on the fact that the audit had been performed two years prior to enactment of the Arkansas statute, which precluded its preparation with the anticipation of privilege, therefore failing the *Dowling* test. The court also noted that at the time only five states recognized the self-critical analysis privilege in a context other than medical peer review.[171] Therefore there was no consistent interpretation by the states which would support recognition of the privilege.

The strong trend toward state establishment of the statutory environmental audit privilege raises many issues yet to be resolved. Weighing the competing public interests is clearly within the prerogative of the legislatures. However, the policy choices of those legislatures which have chosen to enact legislation protecting

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168. *See Dowling,* 971 F.2d at 427.

169. W.D. AR. April 14, 1997, Civil No. 96-1081, unpublished.

170. *See* ARK. CODE ANN. § 8-1-301 (1997).

171. The court listed Louisiana's financial institution privilege and the environmental privileges of Colorado, Minnesota, Mississippi, and Utah. The court apparently missed the Oregon statute.

environmental audits should be carefully monitored. Court decisions regarding self-critical analysis point out that the privilege is not without dangers. The state statutes, by and large, go beyond the scope of the common law privilege. The statutory privileges protect information not just from private litigants, but also from government agencies. Oftentimes the statutory privilege is extended into the criminal sphere. Immunity provisions may give incentive to postpone compliance in order to gain an advantage over the competition.

Proponents of the privilege insist that the statutes will cause more audits to be performed and therefore lead to discovering and correction of more environmental problems. They argue that the only people not in favor of the privilege are those whose real purpose is to assess penalties rather than actually clean up the environment. Critics argue that they give a powerful tool to the worst actors those who are most secretive and would seek to do their harm out of the public view. The privilege removes the prosecutor's best evidence in separating those companies who legitimately have made mistakes and those who have consciously avoided responsible action in the quest for a competitive advantage and greater profits.[172] These questions will be answered in time. Hopefully, if the critics are correct, the answer will not occur in the form of an environmental disaster.

172. Statement of Herb Johnson, Trial Attorney, United States Department of Justice, Environmental Crimes Section, Environment and Natural Resources Division, phone conversation with author.