

COMMENT

FLORIDA'S ENVIRONMENTAL SELF-AUDIT LEGISLATION: AN INCENTIVE FOR THE ENVIRONMENTALLY-CONSCIENTIOUS BUSINESS OR AN OPPORTUNITY FOR THE CORPORATE POLLUTER TO SUPPRESS THE TRUTH?

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The greater portion of evidence of wrongdoing by an organization or its representatives is usually to be found in the official records and documents of that organization. Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible.¹

INTRODUCTION

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This Comment is dedicated in loving memory of my mother, Mary Holdsworth, 1936–1993, whose insightful and supportive words live on, inspiring me to do more than I ever imagined possible and to continue to reach for my goals, even when they feel so far from my grasp. I would like to thank Carrie, Jeremiah, Annie, Larry, and Paul for their unwavering encouragement and support during this project and so much more. Finally, I owe special thanks to Professor Gardner, Professor Dickerson, Jolee Land, and Michele Stephenson for their indispensable guidance and assistance with this Comment.

1. United States v. White, 322 U.S. 694, 700 (1944).

Despite the Supreme Court's austere admonition against invoking evidentiary privileges that might make otherwise discoverable corporate records inaccessible,² corporations are attempting to create a new statutory privilege in their respective states. This privilege would throw a cloak around environmental self-audit records and make enforcement and civil redress far more complicated. Further, in many states, legislators, prompted by their state's industrial interests, are attempting to create statutory exemptions from civil, administrative, and in some instances, criminal liability for environmental violations. Such legislation, depending on its scope and statutory construction, could totally frustrate enforcement and civil retribution efforts.

Confronted with a multitude of environmental laws and regulations, Florida's businesses have also been forced to explore new ways to protect themselves from exposure to civil and criminal sanctions and litigation. One recent strategy is environmental self-audit privilege and immunity legislation, which was proposed but not passed in 1995, 1996, and 1997.³ Proponents of the legislation depicted it as the "Find It, Fix It" bill,⁴ an incentive for industry to voluntarily identify, disclose, and prevent environmental non-compliance.⁵ Opponents of the bills asserted that this legislation was not necessary and that it would allow polluters to keep "dirty secrets" regarding

2. *See id.*

3. *See* H.R. 707, Reg. Sess. (Fla. 1995) [hereinafter H.R. 707]; H.R. 709, Reg. Sess. (Fla. 1995) [hereinafter H.R. 709]; S. 934, Reg. Sess. (Fla. 1995) [hereinafter S. 934]; S. 944, Reg. Sess. (Fla. 1995) [hereinafter S. 944]; H.R. 1817, Reg. Sess. (Fla. 1996) [hereinafter H.R. 1817]; S. 1902 (Fla. 1996) [hereinafter S. 1902]; H.R. 1153, Reg. Sess. (Fla. 1997) [hereinafter H.R. 1153]; S. 1480, Reg. Sess. (Fla. 1997) [hereinafter S. 1480]. The 1995 proposed legislation, in addition to creating immunity and privilege, also would have created a public records requirement exemption for publicly-owned corporations that performed environmental audits (records of publicly owned corporations would have been privileged documents in some instances). *See* H.R. 709, *supra*; S. 934, *supra*. This proposal, however, directly conflicted with Florida's Government-in-the-Sunshine Laws and was met with strong opposition. *See* FLA. STAT. § 286.0115 (1995). The 1996 bills included no such language, nor did the 1997 legislation.

4. FLORIDA CHAMBER OF COMMERCE, ENVIRONMENTAL SELF-AUDIT LEGISLATION FOR FLORIDA: THE "FIND IT, FIX IT" BILL (asserting on its cover that "[t]he mission of the Florida Chamber of Commerce is to be the leader in the formulation and advocacy of sound public policy for Florida business.").

5. *See id.* at 2; 1996 *Environmental*, 1996 LEGIS. ISSUES, (Associated Indus. of Fla.) Mar. 4, 1996, at 3-21; *Point/Counterpoint: Key Legislative Issues*, ENVTL. & LAND USE L. REP., July 1996, at 4 (discussing the industry perspective of the 1996 proposed legislation).

their non-compliance, thus denying the public access to valuable information concerning violations of environmental, public health, and safety regulations.⁶ Proposed self-audit privilege and immunity legislation for 1997, titled the “Environmental Improvement Program,” was filed in the Florida House and Senate in March.⁷ The Senate bill died in committee on May 2, however, the House bill will be carried over to the 1998 Session.⁸ The 1997 legislation, as its predecessors, immediately attracted sharp criticism from its opponents,⁹ but also garnered passionate support for its potential positive environmental impact.¹⁰

This Comment will explore Florida's role in what has become a nationwide controversy over environmental self-audit legislation. Part I will discuss the concept of environmental self-audits and briefly explore the controversy surrounding self-audit privilege and immunity laws. Part II will review legislation for self-audit privilege and immunity in other states, proposed federal self-audit legislation,

6. See HILLSBOROUGH COUNTY ENVIRONMENTAL PROTECTION COMMISSION, SELF-AUDIT PRIVILEGE AND IMMUNITY BILL HB 1817 — SB 1092 (1996); METRO-DADE DEPARTMENT OF ENVIRONMENTAL RESOURCES, REJECT HB 1817/ SB 1902 POLLUTER PRIVILEGE AND IMMUNITY BILL (1996); OFFICE OF THE ATTORNEY GENERAL, DEPARTMENT OF LEGAL AFFAIRS, WHY SB 1902 SHOULD NOT BECOME LAW (1996).

7. See H.R. 1153, *supra* note 3; S. 1480, *supra* note 3.

8. See *General Bill H1153: Environmental Improvement Program* (visited May 3, 1997) <www.scri.fsu.edu/fla-leg/bill-info/1997/h1153.html>; *General Bill S1480: Environmental Improvement Program* (visited May 3, 1997) <www.scri.fsu.edu/fla-leg/bill-info/1997/s1480.html>.

9. Interview with Diana Sawaya-Crane, Cabinet Aide to Attorney General Bob Butterworth, in Tallahassee, Fla. (Feb. 27, 1997). Crane prefaced her concerns regarding self-audit legislation by stating that she believes voluntary audits are a good idea, however, she expressed caution regarding the language of the 1995, 1996, and 1997 bills as they pertained to the granting of privilege and immunity.

10. Interview with Karen M. Peterson, Associate at Hopping Green Sams & Smith, P.A. and a primary drafter of the 1997 bills, in Tallahassee, Fla. (Feb. 28, 1997) [hereinafter Peterson Interview 1]. Peterson vehemently asserted her belief that the 1997 legislation, as written, would benefit the environment. Various members of Peterson's firm are registered as lobbyists for industries throughout Florida, including: Florida Independent Petroleum Producers Association, Kaiser Aluminum and Chemical Corp., Waste Management Inc. of Florida, Florida Power Electric Coordinating Group Inc., QO Chemicals, Sugar Cane Growers Cooperative of Florida, Association of International Automobile Manufacturers Inc., Florida Waterworks Association, Mobil Oil Corp., National Marine Manufacturers Association, and Florida Power and Light Co. See *Florida Legislature On-Line Sunshine* (visited June 5, 1997) <<http://www.scri.fsu.edu/fla-leg/lobbyist/name/full.html>>. Peterson and other members of her firm also represent other non-industrial organizations as well. Moreover, any views expressed in this Comment are not necessarily those of their clients. Peterson Interview 1, *supra*.

and the United States Environmental Protection Agency's response. Part III of this Comment will examine other statutory and common law alternatives to a statutory self-audit privilege, including the attorney-client privilege, the attorney work-product doctrine, and the self-evaluative privilege. Part IV will present an overview of Florida's proposed legislation and the Florida Department of Environmental Protection's response. Additionally, it will discuss the controversy over Florida's most recently proposed self-audit legislation, as well as some observations and opinions regarding the 1997 Senate and House bills. Part V will explore possible motivations fueling Florida businesses' drive to pass self-audit privilege and immunity legislation. It will revisit anti-SLAPP (strategic lawsuits against public participation) legislation proposed in 1992 and 1993, and briefly discuss 1997 legislative efforts in Florida to limit citizen standing in suits pertaining to environmental regulation and permitting. Further, Part V will examine inconsistencies between Florida industries' responses to anti-SLAPP legislation when compared to self-audit and citizen standing bills. Part VI concludes that self-audits, when properly utilized by environmentally-conscientious corporations, might result in a proactive, preventative approach to industrial environmental regulatory compliance. This concluding section points out, however, that since the 1997 bills contained too many loopholes that could have enabled the corporate polluter to hide its dirty secrets at the expense of innocent third parties, the Florida Legislature correctly refused to enact the legislation.

I. BACKGROUND: WHAT IS AN ENVIRONMENTAL SELF-AUDIT?

The United States Environmental Protection Agency (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."¹¹

11. Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004, 25,006 (1986) [hereinafter 1986 Policy]. Senate Bill 1902 defined an "environmental self-audit" as a voluntary internal evaluation or review that is designed to identify or prevent noncompliance with environmental law, assure or improve compliance with such law or identify opportunities to improve environmental protection [that] may be conducted on a facility, activity, property, or impact on environmental media, or on a related management system.

S. 1902, *supra* note 3, § 1(4).

Elements of an effective audit include: 1) objective, trained auditors; 2) a system of review to insure quality and accuracy; 3) documented objectives and follow-up plans; 4) a determination regarding compliance and non-compliance; 5) documentation of the audit findings presented to management; 6) a determination of reporting requirements to regulatory authorities; and 7) a commitment from management to mitigate any identified violations.¹²

In addition to being a tool to identify potential problems regarding environmental compliance, the audit can assist a company in evaluating risk assessment, cutting costs, and planning for future growth.¹³ The audit process can also serve as a tool to educate employees, to prevent or reduce fines for environmental violations, and to enhance the company's public image.¹⁴ Thus, the company can appear more desirable to the potential investor.¹⁵

An environmental audit may provide a company with a wealth of information and an opportunity to proactively comply with environmental regulations. The same report,¹⁶ however, may in some

12. See 1986 Policy, *supra* note 11, at 25,009.

13. See Paula C. Murray, *The Environmental Self-Audit Privilege: Growing Movement in the States Nixed by EPA*, 24 REAL EST. L.J. 169, 169 (1995).

14. See *id.*

15. See *id.* The EPA has also recognized the value of environmental auditing, stating:

Auditing serves as a quality assurance check to help improve the effectiveness of basic environmental management by verifying that management practices are in place, functioning and adequate Auditing can result in improved facility environmental performance, help communicate effective solutions to common environmental problems, focus facility managers' attention on current and upcoming regulatory requirements, and generate protocols and checklists which help facilities better manage themselves.

1986 Policy, *supra* note 11, at 25,004, 25,006. Additionally, the General Accounting Office has noted that benefits of environmental auditing include: "(1) improving compliance with environmental laws, (2) strengthening the management systems necessary to achieve compliance, (3) heightening employees' environmental awareness, and (4) achieving cost savings by reducing cleanup costs, avoiding fines and penalties, and identifying more cost effective ways to operate." UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO THE RANKING MINORITY MEMBER, COMM. ON GOVERNMENTAL AFFAIRS, U.S. SENATE, ENVIRONMENTAL AUDITING: A USEFUL TOOL THAT CAN IMPROVE ENVIRONMENTAL PERFORMANCE AND REDUCE COSTS 47-48 (1995) [hereinafter GAO REPORT].

16. In Florida, under the 1996 legislation, "environmental self-audit report" was defined to include "any combination of documents prepared or samples collected as a direct result of an environmental self-audit." S. 1902, *supra* note 3, § 1(5). "Documents" were broadly defined to include

all tangible materials of any kind, including, but not limited to, data, letters, correspondence, reports, memoranda, notes, diaries, statements, logs, maps,

instances be a “smoking gun” sitting in the company's filing cabinet. Remedial and reporting obligations documented in the report, if not corrected, might have evidentiary value in criminal prosecutions because they might demonstrate willful violations of environmental laws.¹⁷ The audit might also document the company's tortious acts.¹⁸ Accordingly, a business is put in the precarious position of balancing the benefits of performing an environmental self-audit against the potential repercussions of compiling a self-incriminating record of environmental violations identified during the audit. Furthermore, until the audit is completed, the company has no way to determine the nature or severity (and thus the potential cost and degree of remedial actions) of any deficiencies identified by the audit.¹⁹

Nonetheless, a 1995 Price Waterhouse study revealed that of the 369 survey participants, 278 companies (approximately seventy-five percent) conducted some form of an environmental audit for an average of seven years, despite the potential ramifications of doing so.²⁰ The survey reported a positive correlation between the size of the business and the performance of self-audits.²¹ In addition, only twenty-five companies (approximately nine percent) reported that their audit findings were involuntarily disclosed or discovered, and only thirty-one companies (approximately eleven percent) reported instances of voluntarily disclosed reports being used against them

studies, and other analyses, whether handwritten, typed, filmed, computer-based, or otherwise prepared or stored; graphs, charts, diagrams, photographs, film, or other graphic matter, however produced; all mechanical or electrical sound or video recordings or transcripts thereof; or computer-generated or computer-stored information.

Id. While the 1997 legislation did not define “environmental self-audit report” or “document,” it did reference “[i]nformation, documents, or records prepared as a result of an environmental self-audit” in the language creating the evidentiary privilege of such data. H.R. 1153, *supra* note 3, § 1(4); S. 1480, *supra* note 3, § 1(4).

17. *See* Murray, *supra* note 13, at 169.

18. *See id.*

19. This assumes that the company's motivation for performing the audit was not influenced by knowledge of existing violations and a desire to obtain statutory relief from civil or criminal sanctions.

20. *See* PRICE WATERHOUSE LLP, THE VOLUNTARY ENVIRONMENTAL AUDIT SURVEY OF U.S. BUSINESS 5, 28 (1995) [hereinafter PRICE WATERHOUSE SURVEY]. Of companies reporting both domestic and international operations, 88% reported performing environmental audits, while 59% of those reporting only domestic operations performed self-audits. *See id.* at 22.

21. *See id.* All companies reporting over \$3 billion in U.S. sales, over 10,000 employees, or more than 100 facilities performed some sort of self-audit. *See id.*

for enforcement purposes.²²

Of the ninety-one companies that reported they did not conduct any sort of environmental self-audit activities, approximately one-third stated that they intend to initiate self-audit programs in the future.²³ Of the companies reporting that they conduct environmental audits, sixty-four percent responded that an enforcement policy eliminating penalties for self-identified deficiencies that were rectified and reported would encourage them to perform more frequent audits.²⁴ Forty-nine percent of the companies performing audit activities reported that a federal privilege law would produce the same result, while only forty-two percent asserted that a state privilege law would do so.²⁵

II. SELF-AUDIT LEGISLATION AND REACTIONS

A. Overview of State Legislation

As of January 1997, twenty states have enacted laws pertaining to an environmental self-audit privilege or immunity,²⁶ while at

22. *See id.*

23. *See id.* at 5. The reason most frequently cited for not performing environmental self-audits was that a company's products or processes are perceived as having a negligible environmental impact. *See id.* Chemical companies, however, often cited fear of the audit results being used against them. *See id.* at 48-49.

24. *See id.* at 42-44.

25. *See* PRICE WATERHOUSE SURVEY, *supra* note 20, at 43-44.

26. Arkansas, Colorado, Idaho, Illinois, Indiana, Kansas, Kentucky, Michigan, Minnesota, Mississippi, New Hampshire, Ohio, Oregon, South Carolina, Texas, Utah, Virginia, and Wyoming have passed environmental self-audit privilege legislation. *See* ARK. CODE ANN. §§ 8-1-301 to 8-1-312 (Michie 1995); COLO. REV. STAT. ANN. § 13-25-126.5 (West 1997); IDAHO CODE §§ 9-801 to 9-808 (1996); 415 ILL. COMP. STAT. 5/52.2 (West 1997); IND. CODE ANN. §§ 13-28-4-1 to 13-28-4-10 (West 1997); KAN. STAT. ANN. §§ 60-3332 to 60-3337 (1995); KY. REV. STAT. ANN. § 224.01-040 (Banks-Baldwin 1997); MICH. COMP. LAWS ANN. §§ 324.14801 to 324.14808 (West 1997); MINN. STAT. ANN. § 114C.26 (West 1997); MISS. CODE ANN. § 49-2-71 (1996); 1996 N.H. Laws 147-E; OHIO REV. CODE ANN. §§ 3745.70 to 3745.71 (Banks-Baldwin 1997); OR. REV. STAT. § 468.963 (1995); 1996 S.C. Acts 384; TEX. REV. CIV. STAT. ANN. art. 4447cc (West 1997); UTAH CODE ANN. §§ 19-7-101 to 19-7-108 (1996) (§ 19-7-104 amended by 1997 Utah Laws 387); VA. CODE ANN. § 10.1-1198 (Michie 1996); WYO. STAT. ANN. § 35-11-1105 (Michie 1996). Colorado, Idaho, Kansas, Kentucky, Michigan, Minnesota, Mississippi, New Hampshire, Ohio, South Carolina, South Dakota, Texas, Utah, Virginia, and Wyoming have immunity provisions for voluntarily disclosed violations. *See* COLO. REV. STAT. ANN. § 25-1-114.5 (West 1997); IDAHO CODE § 9-809 (1996); KAN. STAT. ANN. §§ 60-3338 to 60-3339 (1995); KY. REV. STAT. ANN. § 224.01-040 (Banks-Baldwin 1997); MICH. COMP. LAWS ANN.

least twenty-four more, including Florida, addressed similar legislation during their 1997 sessions.²⁷ The first state environmental self-audit law was passed in Oregon in 1993.²⁸ This law provides the self-auditor with a statutory evidentiary privilege in any legal proceeding — civil, criminal, or administrative.²⁹ It includes a provision for in camera review in criminal, civil, and administrative proceedings to evaluate materials the self-auditor seeks to protect by the privilege.³⁰ Additionally, Oregon's law does not protect the self-auditor who waives the privilege, asserts it with fraudulent intent, or fails to comply with the statute.³¹ Oregon's law opened the door to

§ 324.14809 (West 1997); MINN. STAT. ANN. § 114c.24 (West 1997); MISS. CODE ANN. § 17-17-79 (1996) (pertaining to de minimis solid waste disposal violations); 1996 N.H. Laws 147-E; OHIO REV. CODE ANN. §§ 3745.70 to 3745.71 (Banks-Baldwin 1997); 1996 S.C. Acts 384; S.D. CODIFIED LAWS §§ 1-40-33 to 1-40-34 (Michie 1996); TEX. REV. CIV. STAT. ANN. art. 4447cc (West 1997); UTAH CODE ANN. § 19-7-109 (1996); VA. CODE ANN. § 10.1-1199 (Michie 1996); WYO. STAT. ANN. § 35-11-1106 (Michie 1996). Additionally, New Jersey provides a grace period to remediate minor environmental infractions and has declared that its "Department of Environmental Protection should refrain from imposing monetary sanctions for violations immediately and voluntarily disclosed, provided certain conditions are met." N.J. STAT. ANN. § 13:ID-125 (West 1997).

27. Alabama, Alaska, California, Delaware, Florida, Hawaii, Iowa, Maine, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Virginia, West Virginia, Wisconsin, and Wyoming all had self-audit legislation filed in 1997. *See* S. 388, Reg. Sess. (Ala. 1997); S. 41, 20th Leg., 1st Sess. (Alaska 1997); S. 423, Reg. Sess. (Cal. 1997); H.R. 32, 139th Gen. Assembly (Del. 1997); H.R. 1153, Reg. Sess. (Fla. 1997); S. 1480, Reg. Sess. (Fla. 1997); H.R. 1245, 19th Leg. (Haw. 1997); H.R. 216, 77th Gen. Assembly, 1st Sess. (Iowa 1997); H.R. 681, 77th Gen. Assembly, 1st Sess. (Iowa 1997); H.R. 816, 118th Leg., 1st Reg. Sess. (Me. 1997); H.R. 435, 80th Reg. Sess. (Minn. 1997); S. 125, 89th Gen. Assembly, 1st Reg. Sess. (Mo. 1997); S. 48, 89th Gen. Assembly, 1st Reg. Sess. (Mo. 1997); H.R. 293, 55th Reg. Sess. (Mont. 1997); Neb. Leg. 208, 95th Leg., 1st Reg. Sess. (Neb. 1997); Neb. Leg. 395, 95th Leg., 1st Reg. Sess. (Neb. 1997); Neb. Leg. 541, 95th Leg., 1st Reg. Sess. (Neb. 1997); Nev. Assembly 355, 69th Reg. Sess. (Nev. 1997); H.R. 1149, 43d Leg., 1st Reg. Sess. (N.M. 1997); N.Y. Assembly 1183, 220th Leg. (N.Y. 1997); N.Y. Assembly 3154, 220th Leg. (N.Y. 1997); S. 4870, 220th Leg. (N.Y. 1997); H.R. 247, Reg. Sess. (N.C. 1997); S. 957, Reg. Sess. (N.C. 1997); H.R. 1814, 46th Leg., 1st Sess. (Okla. 1997); S. 31, 46th Leg., 1st Sess. (Okla. 1997); S. 381, 181st Gen. Assembly, Reg. Sess. (Pa. 1997); S. 526, Leg. Sess. (R.I. 1997); H.R. 33, 100th Gen. Assembly (Tenn. 1997); H.R. 786, 100th Gen. Assembly (Tenn. 1997); S. 394, 100th Gen. Assembly (Tenn. 1997); S. 1293, 100th Gen. Assembly (Tenn. 1997); H.R. 2768, Reg. Sess. (Va. 1997); H.R. 2154, 73d Leg. (W. Va. 1997); H.R. 2206, 73d Leg. (W. Va. 1997); S. 99, 73d Leg. (W. Va. 1997); Wis. Assembly 235, 93d Reg. Sess. (Wis. 1997); H.R. 256, 54th Leg. (Wyo. 1997).

28. *See* OR. REV. STAT. § 468.963 (1995).

29. *See id.*

30. *See id.* §§ 468.963(3)(a), (3)(c).

31. *See id.* §§ 468.963(3)(b)(A),(C), 468.963 (3)(c)(A),(C).

self-audit legislation throughout the country.

In 1994, Colorado fined Coors Brewing Company of Colorado \$237,000 (\$100,000 in civil penalties and \$137,000 in payment for economic benefit gained as a result of the violation) when Coors reported a deficiency uncovered by an environmental audit.³² The State responded by passing legislation providing for a five-year program, that allowed both limited self-audit evidentiary privilege and immunity from criminal, civil, and administrative penalties if the company voluntarily discloses the violation.³³ The same year, Illinois and Indiana passed voluntary self-audit privilege legislation and Kentucky passed laws providing for both privilege and immunity.³⁴

In 1995, seven more states passed privilege and immunity bills,³⁵ while two other states, Arkansas and Utah, passed privilege-only legislation.³⁶ At the same time, similar legislation was defeated in twenty-six other states.³⁷ Four states, Michigan, New Hampshire,

32. See Virginia Morton Creighton, *Colorado's Environmental Audit Privilege Statute: Striking the Appropriate Balance?*, 67 U. COLO. L. REV. 433, 461 (1996).

33. See COLO. REV. STAT. ANN. §§ 13-25-126.5, 25-1-114.5(4) (West 1997).

34. See ILL. COMP. STAT. 5/52.2 (West 1997); IND. CODE ANN. §§ 13-28-4-1 to 13-28-4-10 (West 1997); KY. REV. STAT. ANN. § 224.01 to 224.040 (Banks-Baldwin 1997).

35. See IDAHO CODE §§ 9-801 to 9-809 (1996); KAN. STAT. ANN. §§ 60-3332 to 60-3339 (1995); MINN. STAT. ANN. §§ 114C.20 to 114C.31 (West 1997); MISS. CODE ANN. § 49-2-71 (1996); TEX. REV. CIV. STAT. ANN. art. 4447cc (West 1997); VA. CODE ANN. § 10.1-1198 (Michie 1996); WYO. STAT. ANN. §§ 35-11-1105 to 35-11-1106 (Michie 1996). Minnesota's law contains a privilege against third-parties, but limits the privilege against the State. See MINN. STAT. ANN. § 114C.24 (West 1997). Virginia and Wyoming void immunity when inconsistent with federal laws. See VA. CODE ANN. § 10.1-1198 (Michie 1996); WYO. STAT. ANN. § 35-11-1106(a)(iv) (Michie 1996).

36. See ARK. CODE ANN. §§ 8-1-301 to 8-1-312 (Michie 1995); UTAH CODE ANN. §§ 19-7-101 to 19-7-108 (Michie 1996) (§ 19-7-104 amended by 1997 Utah Laws 387).

37. See S. 629, Reg. Sess. (Ala. 1995); S. 1290, 42d Leg., 1st Reg. Sess. (Ariz. 1995); Cal. Assembly 856, Reg. Sess. (Cal. 1995); S. 944, Reg. Sess. (Fla. 1995); S. 934, Reg. Sess. (Fla. 1995); H.R. 707, Reg. Sess. (Fla. 1995); H.R. 709, Reg. Sess. (Fla. 1995); S. 244, 143d Gen. Assembly, Reg. Sess. (Ga. 1995); S. 1304, 18th Leg. (Haw. 1995); H.R. 390, 18th Leg. (Haw. 1995); H.R. 1547, 89th Gen. Assembly, Reg. Sess. (Ill. 1995); H.R. 420, 76th Gen. Assembly, Reg. Sess. (Iowa 1995); S. 685, Leg. Sess. (Md. 1995); H.R. 785, Leg. Sess. (Md. 1995); H.R. 3426, 179th Gen. Ct., 1st Sess. (Mass. 1995); H.R. 3593, 179th Gen. Ct., 1st Sess. (Mass. 1995); S. 728, 88th Leg., Reg. Sess. (Mich. 1995); S. 1314, 79th Leg., Reg. Sess. (Minn. 1995); H.R. 1479, 79th Leg., Reg. Sess. (Minn. 1995); S. 1759, 79th Leg., Reg. Sess. (Minn. 1995); S. 350, 88th Gen. Assembly (Mo. 1995); S. 363, 88th Gen. Assembly (Mo. 1995); H.R. 338, 88th Gen. Assembly (Mo. 1995); H.R. 412, 54th Leg. Sess. (Mont. 1995); Neb. Leg. 731, 94th Leg., 2d Sess. (Neb. 1995); H.R. 275, Reg. Sess. (N.H. 1996); S. 1797, 206th Leg., 2d Sess. (N.J. 1995); S. 1891, 206th Leg., 2d Sess. (N.J. 1995); N.J. Assembly 2521, 206th Leg., 2d Sess. (N.J. 1995); H.R. 817, Reg. Sess. (N.C. 1995); S. 138, 121st Gen. Assembly, Reg. Sess. (Ohio 1995); H.R. 1388, 45th Leg., 1st Reg. Sess. (Okla. 1995); S. 1295, 179th Gen. Assembly, Reg. Sess.

Ohio, and South Carolina, created privilege and immunity laws in 1996, while New Jersey, South Dakota, and Utah passed immunity legislation.³⁸

1. Privilege Provisions

Generally, state privilege statutes prevent discovery of records compiled during the performance of a voluntary environmental self-audit. However, definitions vary tremendously from state to state, and in some instances are so vague that one could interpret the privilege to apply to reports generated during an ongoing self-evaluative process of undefined duration.³⁹ Other definitions are very specific regarding the duration of the audit process, and require that it be a "discrete activity with a specified beginning date and a scheduled ending date"⁴⁰ or that it "be completed within a reasonable period of time."⁴¹ Wyoming requires that the audit be finalized within 180 days of its initiation.⁴²

Most statutes do not apply the privilege to records that state or federal law require be disclosed, reports generated for fraudulent purposes, or reports prepared without prompt compliance with the statute.⁴³ Additionally, some states will not apply the privilege when

(Pa. 1995); H.R. 6618, Gen. Assembly, Jan. Sess. (R.I. 1995); S. 853, Gen. Assembly, Jan. Sess. (R.I. 1995); S. 15, Statewide Sess. (S.C. 1995); H.R. 3624, Statewide Sess. (S.C. 1995); S. 1135, 99th Gen. Assembly, 1st Reg. Sess. (Tenn. 1995); S. 362, Reg. Sess. (W. Va. 1995); S. 185, 92d Leg. Sess. (Wis. 1995); Wis. Assembly 512, 92d Leg. Sess. (Wis. 1995).

38. See MICH. COMP. LAWS ANN. §§ 324.14801 to 324.14809 (West 1997); 1996 N.H. Laws 147-E; OHIO REV. CODE ANN. §§ 3745.70 to 3745.73 (Banks-Baldwin 1997); 1996 S.C. Acts 384; N.J. STAT. ANN. § 13:ID-125 (West 1997); S.D. CODIFIED LAWS §§ 1-40-33 to 1-40-34 (Michie 1996); UTAH CODE ANN. § 19-7-109 (1996) (the privilege law in Utah was enacted in 1995).

39. See 1996 N.H. Laws 147-E:1 (defining "environmental audit" as "a voluntary, objective, and comprehensive evaluation of one or more facilities, activities, or management systems related to such facilities or activities that is undertaken specifically to identify areas of noncompliance and to improve compliance with one or more environmental laws"); see also UTAH CODE ANN. § 19-7-103 (1996) (defining an "environmental self-evaluation" as "a self-initiated assessment, audit, or review, not otherwise expressly required by an environmental law, that is performed to determine whether a person is in compliance with environmental laws").

40. 1996 S.C. Acts 384 § 48-57-20.

41. KAN. STAT. ANN. § 60-3332 (1995); see also COL. REV. STAT. ANN. § 13-25-126.5. (West 1995).

42. See WYO. STAT. ANN. § 35-11-1105 (Michie 1996).

43. See, e.g., ARK. CODE ANN. §§ 8-1-305, 8-1-307 (Michie 1995).

there is "a threat of imminent and substantial harm to the public health or the environment."⁴⁴ South Carolina does not apply the privilege in proceedings before its Worker's Compensation Commission.⁴⁵ Minnesota creates a third-party privilege for all documents reported to the commissioner of the pollution control agency when a company comes into compliance with the State's Environmental Audit Pilot Program, but does not extend the privilege to companies that do not participate in the program.⁴⁶

Many states provide for an in camera hearing in civil, administrative, or criminal proceedings to determine whether the privilege applies to the material sought,⁴⁷ while placing the burden of proof on the party asserting the privilege.⁴⁸ Most legislation omits sanctions for improperly asserting the privilege, although Michigan includes a provision that makes asserting the self-audit privilege for fraudulent purposes a misdemeanor, punishable by a fine of up to \$25,000.⁴⁹ Further, the Colorado, Texas, and Utah statutes make it illegal for a public employee, public entity, or public official to disclose information contained within privileged documents, forbid any involved party from disclosing such information, and hold anyone who does, liable for all damages arising from the act.⁵⁰

2. Immunity Provisions

Some states, such as Colorado and Idaho, provide broad-sweeping immunity, even for criminal violations, when the infractions are voluntarily disclosed and promptly remediated.⁵¹ Michigan provides

44. 1996 N.H. Law 147-E:4; *see also* VA. CODE ANN. § 10.1-1198 (Michie 1996); WYO. STAT. ANN. § 35-11-1105(c)(ii)(D) (Michie 1996).

45. *See* 1996 S.C. Acts 384 § 48-57-30(C).

46. The privilege, however, does not apply to the State. *See* MINN. STAT. ANN. § 114C.26 (West 1997).

47. *See, e.g.*, COL. REV. STAT. ANN. § 13-25-126.5 (West 1997); KAN. STAT. ANN. §§ 60-3334, 60-3335 (1995).

48. *See, e.g.*, ARK. CODE ANN. §§ 8-1-309 to 8-1-310 (Michie 1995); WYO. STAT. ANN. § 35-11-1105 (Michie 1996).

49. *See* MICH. COMP. LAWS ANN. § 324.14807 (West 1997).

50. *See* COL. REV. STAT. ANN. § 13-25-126.5 (West 1997); TEX. REV. CIV. STAT. ANN. art. 4447cc(6)(d) (West 1997); UTAH CODE ANN. § 19-7-104 (1996). Mississippi creates liability for any party or person who illegally obtains privileged information and then discloses it. *See* MISS. CODE ANN. § 49-2-71(3)(b)(1996).

51. *See* COL. REV. STAT. ANN. § 21-1-114.5 (West 1997); IDAHO CODE § 9-809(1) (1996).

criminal immunity except when evidence of gross negligence exists.⁵² South Dakota also has a criminal immunity provision, although immunity is waived if the violation results in harm to human health or the environment.⁵³ Others, including Kansas and Mississippi, will mitigate criminal penalties if the company identified the violation through a self-audit.⁵⁴

Immunity from civil and administrative sanctions varies tremendously from state to state. Several states will, in many instances, provide an administrative penalties waiver to a business that voluntarily reports and remediates an environmental violation.⁵⁵ New Jersey provides a grace period during which time a company can correct minor environmental violations to avoid administrative penalties.⁵⁶

Other states provide companies with blanket immunity from any civil or administrative penalties associated with the disclosed violations,⁵⁷ though most states carve out an exception when the infraction causes significant harm to the environment or to public health.⁵⁸ Most states exclude from their immunity provisions a company's voluntary disclosures that exhibit a pattern of environmental regulatory non-compliance, either through repeated, recent compliance actions or many settlement agreements relating to the violations.⁵⁹

Minnesota's Environmental Audit Pilot Program is somewhat different from others.⁶⁰ The program creates a five-year pilot program and limits participation to companies that have not incurred penalties for environmental violations for more than one year.⁶¹ Each participant is required to conduct an environmental self-audit and then to prepare and submit to regulatory officials a report disclosing the identified environmental violations and a remedial action plan; each participant must also submit follow-up reports.⁶² The

52. See MICH. COMP. LAWS ANN. § 324.14809(1) (West 1997).

53. See S.D. CODIFIED LAWS § 1-40-34 (1996).

54. See KAN. STAT. ANN. § 60-3339 (1995); MISS. CODE ANN. § 17-17-29(7)(g) (1996).

55. See, e.g., KY. REV. STAT. ANN. § 224.01-040(10) (Banks-Baldwin 1997).

56. See N.J. STAT. ANN. § 13:ID-125 (West 1997).

57. See, e.g., OHIO REV. CODE ANN. § 3745.72(A) (Banks-Baldwin 1997).

58. See, e.g., 1996 N.H. LAWS § 147-E:9.

59. See, e.g., IDAHO CODE § 9-809(6) (1996).

60. See MINN. STAT. ANN. §§ 114C-20 to 114C-31 (West 1997).

61. See *id.* § 114C.22.

62. See *id.*

Minnesota statute waives state administrative, civil, and criminal penalties when the company takes corrective actions within ninety days, unless the violation was knowingly committed, created a serious threat to human health or the environment, or was a repeat violation within the past year.⁶³ Further, a company's good faith efforts to remediate a violation may mitigate the penalties.⁶⁴ A company deemed to be in compliance with the program by the commissioner of the pollution control agency may display a green star emblem at its facility,⁶⁵ communicating to the public the company's commitment to environmental protection.

B. Federal Self-Audit Legislation and the EPA's Response

Bills that would have created a limited environmental audit privilege similar to that of many state laws were introduced in the United States House of Representatives and the United States Senate in February 1995 and March 1995, respectively.⁶⁶ The bills also would have allowed for immunity from civil, administrative, or criminal penalties if a self-auditor reported violations identified during the audit to regulatory authorities.⁶⁷ Both bills would have created an evidentiary privilege for voluntary environmental audit reports in civil, criminal, and administrative proceedings,⁶⁸ and would have placed the burden of rebutting the existence of the privilege on the government.⁶⁹ Both bills died in committee.⁷⁰

In April 1995, in response to the federal legislation and a nationwide onslaught of state environmental self-audit privilege and immunity legislation, the EPA issued an interim policy statement pertaining to self-monitoring and voluntary reporting of environmental infractions.⁷¹ Carol M. Browner, EPA administrator, lauded

63. *See id.* § 114C.24.

64. *See id.*

65. *See id.* § 114C.25 (1995).

66. H.R. 1047, 104th Cong. (1995); S. 582, 104th Cong. (1995).

67. *See* H.R. 1047, 104th Cong. § 4(2)(A); S. 582, 104th Cong. § 2.

68. *See* H.R. 1047, 104th Cong. § 4(a); S. 582, 104th Cong. § 2(a).

69. *See* H.R. 1047, 104th Cong. § 6(d); S. 582, 104th Cong. § 2(a).

70. *See Bill Summary and Status for the 104th Congress* (visited Mar. 16, 1997) <[http://thomas.loc.gov/cgi-bin/bdque . . . p/~bdzN71:@@@L/bss/d104query.html](http://thomas.loc.gov/cgi-bin/bdque...p/~bdzN71:@@@L/bss/d104query.html)>, <[http://thomas.loc.gov/cgi-bin/bdque . . . p/~bdN1nh:@@@L/bss/d104query.html](http://thomas.loc.gov/cgi-bin/bdque...p/~bdN1nh:@@@L/bss/d104query.html)>.

71. *See* Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy, 60 Fed. Reg. 16,875 (1995) [hereinafter Interim Policy].

the interim policy as providing “real incentives for industry and others to voluntarily identify and correct environmental violations.”⁷² This policy reduced civil penalties for companies that discover violations and promptly report them, and eliminated or reduced gravity or “punitive” penalties in many cases.⁷³ To level the playing field for companies that complied with environmental regulations, the EPA would still collect penalties for economic benefit.⁷⁴ Additionally, the EPA would not recommend criminal sanctions to the Department of Justice (DOJ) when companies voluntarily disclosed violations.⁷⁵ Furthermore, the EPA would not request audit reports for the purpose of triggering civil or criminal investigations.⁷⁶

72. Letter from Carol M. Browner to Lawton Chiles, Governor, State of Florida (Apr. 3, 1995) (on file with the *Stetson Law Review*). Browner previously served as the Secretary of Florida's Department of Environmental Regulation. Her prior involvement in Florida's government may play a role in the national fight to enlist Florida as another state having passed self-audit legislation.

73. See Interim Policy, *supra* note 71, at 16,877. The criteria to qualify for reduced civil penalties included: 1) the regulated entity must have identified the violation during the performance of an environmental audit; 2) the violation must have been reported to regulatory authorities before: a) an investigation or request for information by an enforcement agency, b) notice of suit by a citizen, c) a third-party legal complaint, or d) knowledge by the auditor that discovery of the violation was imminent; 3) the violation must have been promptly remediated within 60 days of discovery or as soon as reasonably practicable; 4) if an “imminent and substantial danger to human health or the environment” existed, it must have been immediately corrected; 5) the environmental harm caused must have been remedied and preventative measures enacted; 6) steps to avoid the violation must have been taken; and 7) cooperation with the EPA to determine whether the incident would qualify for the penalty reduction must have been provided. See *id.* A reduction of up to 75% of the gravity-based penalties could be granted if some but not all of the above were present. See *id.*

74. See *id.*

75. See *id.* at 16,877–78. In testimony before the House Judiciary Committee's Subcommittee on Commercial and Administrative Law regarding the federal environmental self-audit legislation, Lois J. Schiffer, Assistant Attorney General for the Environment and Natural Resources Division of the U.S. Department of Justice, stated:

[T]he Department has committed to the following: [w]e will not seek information concerning environmental auditing from a regulated entity prior to receipt of other information suggesting that the entity has committed violations of environmental law. We will also view the use of effective programs to prevent and detect violations of law, as well as self-reporting, cooperation and acceptance of responsibility, as mitigating factors in the sentencing phase of environmental criminal cases against corporations.

Hearing on H.R. 1047 Before the Subcomm. on Commercial and Admin. Law Comm. on the Judiciary, 104th Cong. 3 (1995) (statement of Lois J. Schiffer, Assistant Attorney General).

76. See Interim Policy, *supra* note 71, at 16,878.

In December 1995, the EPA issued its Final Policy Statement regarding environmental audits, which was to take effect January 22, 1996.⁷⁷ The final policy is quite similar to the interim one, although it applies to violations discovered as the result of either an audit or efforts reflective of due diligence.⁷⁸ The final policy provides that the EPA will not demand gravity-based penalties or generally recommend criminal prosecution when a company, through an audit or as the result of due diligence, identifies, promptly remediates, and reports the violation.⁷⁹ For the violation not identified by either due diligence or an environmental audit, the EPA will reduce the gravity-based fines by up to seventy-five percent when the company timely reports and remediates it.⁸⁰ However, the policy denies reduced penalties when the violation is the same or closely related to an occurrence within the prior three years.⁸¹ Additionally, the EPA will continue to refrain from requesting audit reports as a technique for triggering investigations.⁸²

The EPA did not, however, grant any privilege to audit reports, asserting that “[t]he agency remains firmly opposed to the establishment of a statutory evidentiary privilege for environmental audits”⁸³ The EPA cited the following reasons for its stance: 1) the value that our country places on freedom to access information; 2) no evidence suggests that such a privilege is necessary; 3) such a privilege encourages a company to be overly broad in asserting its privilege, thus concealing objective data necessary to determine accuracy of reported information; 4) environmental audit privilege increases litigation; 5) the reduction in criminal and civil penalties eliminates the need for any such privilege against the government; and 6) opposition to audit privilege by law enforcement and public interest groups is too strong to justify creating such a privilege at this time.⁸⁴ Accordingly, the EPA “reserves its right to bring independent action against regulated entities for violations of federal

77. *See* Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66,706 (Dec. 22, 1995) [hereinafter *Incentives*].

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

79. *See id.*

80. *See id.*

81. *See id.* at 66,712.

82. *See id.* at 66,708.

83. *Incentives*, *supra* note 77, at 66,710.

84. *See id.*

law," regardless of state privilege and immunity laws.⁸⁵

This policy, as of January 1997, has resulted in 105 companies disclosing environmental violations.⁸⁶ The EPA asserts that these voluntary reports prove audit privileges and blanket amnesties are not necessary to encourage environmental self-auditing.⁸⁷ Critics are quick to note that 105 reports over almost one year (just more than an average of two per state) is hardly persuasive evidence of the program's effectiveness.⁸⁸

To encourage small businesses to engage in the audit process, the EPA issued its Final Policy on Compliance Incentives for Small Businesses on June 3, 1996.⁸⁹ The policy applies to companies employing one hundred or fewer people.⁹⁰ Subject to certain conditions, it eliminates or reduces civil penalties for small businesses that seek on-site compliance assistance or conduct environmental audits to conform to environmental laws.⁹¹ Additionally, the policy provides enforcement guidance to state and local government, deferring to the state actions consistent with the policy.⁹²

Since March 1996, the EPA, in an attempt to stifle pending environmental self-audit legislation, sent warnings to at least three states, including Florida, stating that enacting such legislation would result in revocation of the states' Clean Air Act Title V programs.⁹³ In a memorandum issued by the Office of Enforcement and Compliance Assurance (OECA), its assistant administrator asserted that the EPA has "consistently opposed blanket amnesties which excuse repeated noncompliance, criminal conduct, or violations that result in serious harm or risk, as well as audit privileges that shield

85. *Id.* at 66,712.

86. *See From the Assistant Administrator*, AUDIT POLICY UPDATE (U.S. Env'tl. Protection Agency), Jan. 1997, at 1.

87. *See id.*

88. Peterson Interview 1, *supra* note 10.

89. *See Interim Policy on Compliance Incentives for Small Businesses*, 61 Fed. Reg. 27,984 (1996).

90. *See id.* at 27,985.

91. *See id.* at 27,985. The conditions for mitigating penalties include: 1) the violation must be the first of that nature for the company; 2) criminal conduct may not be involved; 3) the violation must pose no significant threat of harm to health, safety, or the environment; and 4) the deficiency must be remediated in accordance with the time frame set forth in the policy. *See id.* at 27,985-86.

92. *See id.* at 27,984.

93. *See Enviro Auditing: EPA Opposition Squelches Some State Bills*, GREENWIRE, (American Political Network) June 12, 1996.

evidence of violations from regulators and jeopardize the public's right-to-know about noncompliance."⁹⁴ This memorandum also advised that "a State Title V program should not be approved if State law provides immunity from civil penalties for repeat violations, violations of previous court or administrative orders, violations resulting in serious harm or risk of harm, or violations resulting in substantial economic benefit to the violator."⁹⁵

In February 1997, a memorandum was issued to regional administrators by the EPA detailing the factors to evaluate when determining whether a state's enforcement authority satisfies federal environmental program requirements.⁹⁶ In regard to state immunity laws, the memorandum cited as significant factors, the state's ability to:

- 1) [o]btain immediate and complete injunctive relief; 2) [r]ecover civil penalties for: significant economic benefit; repeat violations and violations of judicial or administrative orders; serious harm; activities that may present imminent and substantial endangerment; [and] 3) [o]btain criminal fines/sanctions for willful and knowing violations of federal law, and in addition for violations that reset [sic] from gross negligence under the Clean Water Act.⁹⁷

Additionally, the memorandum stated that, regarding audit privilege laws, states will be expected to continue to gather the information required by regulations pertaining to delegated or authorized programs.⁹⁸ It also asserted that states should refrain from passing any privilege laws that apply to criminal activities and should maintain the public's right to access information regarding environmental noncompliance.⁹⁹ Thus far, the EPA has required Idaho, Michigan, and Texas to amend their self-audit laws if they are to

94. Memorandum from Steven A. Herman, Assistant Administrator, OECA, to Jackson Fox, Regional Council, Region X 2 (Apr. 5, 1996) (on file with the *Stetson Law Review*).

95. *Id.* at 4.

96. See Arent Fox, *EPA Statement on State Enforcement, Impact of Audit Immunity/Privilege*, Dated Feb. 14, 1997 (visited May 3, 1997) <<http://calvin.arentfox.com/enviro/epa/epamemo.html>> (reproducing a memorandum directed to Regional Administrators: Statement of Principles, Effect of State Audit Immunity/Privilege Laws on Enforcement Authority for Federal Program).

97. *Id.*

98. *See id.*

99. *See id.*

receive delegation to enforce the Clean Air Act programs.¹⁰⁰ The Agency, however, most likely lacks the resources to assume responsibility for monitoring the Clean Air Act as well as other environmental laws in all of the states that have, or are contemplating, enacting similar legislation.¹⁰¹ Nonetheless, private citizens and public interest groups have filed petitions in at least five states, demanding that the EPA revoke the states' authority or withhold state delegation to administer environmental laws such as Title V of the Clean Air Act (CAA),¹⁰² Resource Conservation and Recovery Act (RCRA),¹⁰³ the Clean Water Act (CAA),¹⁰⁴ the Safe Drinking Water Act (SDWA),¹⁰⁵ and the National Pollution Discharge Elimination System (NPDES).¹⁰⁶ These petitions are all the result of passage of state environmental audit privilege and immunity laws.¹⁰⁷

III. STATUTORY AND COMMON-LAW DISCOVERY LIMITATIONS AND THEIR APPLICABILITY TO ENVIRONMENTAL AUDITS

Proponents of Florida's self-audit legislation assert that industry must be offered incentives such as privilege and immunity to

100. See Jessica Gavora, *EPA Threatens States that Let Companies Monitor Pollution*, SACRAMENTO BEE, Dec. 28, 1996, at B7.

101. See OPPAGA, *infra* note 155, at 4.

102. 42 U.S.C. §§ 7661-7661f (1994).

103. 42 U.S.C. §§ 6906-6992k (1994).

104. 33 U.S.C. §§ 1251-1387 (1994).

105. 42 U.S.C. §§ 300f-300i(18) (1994).

106. 33 U.S.C. § 1342 (1994). See Arent Fox, *supra* note 96. An environmental group in Michigan filed its petition in June, 1996, requesting that the EPA revoke NPDES approval, withhold delegation of the Title V permit under the CAA, revoke the Prevention of Significant Deterioration delegation under the CAA, and withhold RCRA delegation for the Boiler and Industrial Furnace program. See *id.* In Texas, the Environmental Defense Fund is seeking withdrawal of the SDWA Underground Injection Control Program approval. See *id.* An environmental group in Idaho is requesting the EPA to revoke RCRA Subtitle C program authorization, SDWA enforcement authority, and the SDWA's Underground Injection Control program. See *id.* In January of this year, the Ohio Environmental Council and other environmental organizations filed a petition requesting that the EPA revoke the State's RCRA Subtitle C program authority and CAA Title V program authority. See *id.* Since then, private citizens have filed similar petitions and have also requested that the EPA revoke the State's NPDES program authority. See *supra* note 96. In Colorado, several public interest groups, including the Sierra Club, have filed a petition requesting that the EPA revoke the State's Clean Water Act administration authority. See *id.*

107. See Arent Fox, *supra* note 96.

encourage consistent environmental monitoring.¹⁰⁸ However, some statutory and common-law discovery limitations are already available to environmentally-conscientious companies. Although the attorney-client privilege, the attorney work-product doctrine, and the self-evaluative privilege may not provide companies with the same degree of insulation from prosecution and liability as the proposed legislation, these mechanisms are applicable, in many instances, to environmental self-audits.

A. Attorney-Client Privilege

Florida Rule of Evidence 90.502 creates an evidentiary privilege intended to promote an open exchange of information between attorney and client, thus enabling the attorney to render effective legal services.¹⁰⁹ While the rule states that such a communication “is

108. Peterson Interview 1, *supra* note 10.

109. Section 90.502 reads as follows:

(1) For purposes of this section:

(a) A “lawyer” is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(b) A “client” is any person, public officer, corporation, association, or other organization or entity, either public or private, who consults a lawyer with the purpose of obtaining legal services or who is rendered legal services by a lawyer.

(c) A communication between lawyer and client is “confidential” if it is not intended to be disclosed to third-persons other than:

1. Those to whom disclosure is in furtherance of the rendition of legal services to the client.
2. Those reasonably necessary for the transmission of the communication.

(2) A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications when such other person learned of the communications because they were made in the rendition of legal services to the client.

(3) The privilege may be claimed by:

(a) The client.

(b) A guardian or conservator of the client.

(c) The personal representative of a deceased client.

(d) A successor, assignee, trustee in dissolution, or any similar representative of an organization, corporation, or association or other entity, either public or private, whether or not in existence.

(e) The lawyer, but only on behalf of the client. The lawyer's authority to claim the privilege is presumed in the absence of contrary evidence.

(4) There is no lawyer-client privilege under this section when:

(a) The services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew was a crime or fraud.

'confidential' if it is not intended to be disclosed to third persons,"¹¹⁰ exceptions exist for parties the attorney must communicate with in "furtherance of the rendition of legal services to the client" and for parties "reasonably necessary for the transmission of the communication."¹¹¹ If the client communicates with the attorney in public or discloses the information to disinterested third parties, the privilege is waived.¹¹² This privilege attaches only to the communications, however, and, as it pertains to self-audit communications, would not apply to information that could be gathered from extraneous sources.¹¹³ Accordingly, this privilege would not apply to information

(b) A communication is relevant to an issue between parties who claim through the same deceased client.

(c) A communication is relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer, arising from the lawyer-client relationship.

(d) A communication is relevant to an issue concerning the intention or competence of a client executing an attested document to which the lawyer is an attesting witness, or concerning the execution or attestation of the document.

(e) A communication is relevant to a matter of common interest between two or more clients, or their successors in interest, if the communication was made by any of them to a lawyer retained or consulted in common when offered in a civil action between the clients or their successors in interest.

(5) Communications made by a person who seeks or receives services from the Department of Revenue under the child support enforcement program to the attorney representing the department shall be confidential and privileged as provided for in this section. Such communications shall not be disclosed to anyone other than the agency except as provided for in this section. Such disclosures shall be protected as if there were an attorney-client relationship between the attorney for the agency and the person who seeks services from the department.

FLA. R. EVID. 90.502.

110. *Id.* at (1)(c).

111. *Id.* at (1)(c)(2).

112. *See* FLA. R. EVID. 90.502 sponsors' note.

113. While no Federal Rule of Evidence provides for an evidentiary attorney-client privilege, a common-law privilege does exist. In *United States v. United Shoe Manufacturing Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950), the court found that such a privilege would apply when:

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

regarding communications which were obtained from sources outside the attorney-client relationship.

While corporate employees may not be parties to the attorney-client relationship, their communications to corporate attorneys are in some instances privileged. The Florida Supreme Court, in *Southern Bell Telephone & Telegraph Co. v. Deason*,¹¹⁴ held that corporate communications are protected by this privilege when:

- 1) [T]he communication would not have been made but for the contemplation of legal services;
- 2) The employee making the communication did so at the direction of his or her corporate superior;
- 3) The superior made the request of the employee as part of the corporation's effort to secure legal advice or services;
- 4) The content of communication relates to the legal services being rendered, and the subject matter of the communication is within the scope of the employee's duties;
- 5) The communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.¹¹⁵

Accordingly, for the privilege to apply, the corporation seeking to perform a self-audit should retain an attorney for the express purpose of obtaining legal advice regarding the status of the company's environmental compliance. The *attorney* would then hire the consultant to perform the audit, the findings of which would be reported to the attorney and then related to the client by the attorney. Any subsequent disclosure to a disinterested third party would result in a waiver of the privilege. Additionally, the privilege would not apply if the client initiated the attorney contact with the intent of committing a crime or fraud. It appears, however, the privilege *would* apply if an environmental violation had already been committed, even if the non-compliance had not been remediated.¹¹⁶

waived by the client.

Id.; see also FED. R. EVID. 501 (providing that privileges "shall be governed by the principles of the common law").

114. 632 So. 2d 1377 (Fla. 1994).

115. *Id.* at 1383.

116. Unlike the attorney-client privilege, the self-audit privilege proposed by the 1997 legislation would have required that the client correct the violations for the privilege to attach. Proponents of Florida's self-audit legislation asserted that this requirement would have resulted in more efficient remediation of environmental violations. See Peterson Interview 1, *supra* note 10. It seems, however, that if self-audit legislation is passed, polluters with the financial resources to secure counsel will have the option of

B. Attorney Work-Product Doctrine

Florida Rule of Criminal Procedure 3.220(g)(1) provides that “[d]isclosure shall not be required of legal research or of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories, or conclusions of the prosecuting or defense attorney, or members of their legal staffs.”¹¹⁷ Similarly, Rule 1.280(b)(3) of the Florida Rules of Civil Procedure provides that “[i]n ordering discovery of materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation” unless “the party seeking discovery has need of the materials . . . and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.”¹¹⁸ For the work-product doctrine to apply, however, the company must have initiated its environmental self-audit in response to pending litigation or in anticipation of future litigation.¹¹⁹

Courts will not apply this doctrine when the audit is performed as a normal part of routine day-to-day operations of the company.¹²⁰ Accordingly, this privilege is more likely to be asserted by the company that has become aware of a violation and, subsequently, seeks legal counsel and implements an environmental audit to minimize its exposure to criminal or civil liability. The work-product doctrine, however, provides only a qualified privilege, unlike the absolute protection provided by the attorney-client privilege.¹²¹ Thus, it is unlikely that a company is going to rely upon this doctrine when deciding whether it should perform an environmental audit.

asserting the attorney-client privilege when the violation is too costly to remediate or to assert the self-audit privilege when compliance is not as burdensome. See H.R. 1153, *supra* note 3, § 1(4)(b)(1); S. 1480, *supra* note 3, § 1(4)(b)(1).

117. FLA. R. CRIM. P. 3.220(g)(1). Federal Rule of Criminal Procedure 16(b)(2) provides the corresponding federal work-product doctrine.

118. FLA. R. CIV. P. 1.280(b)(3). The corresponding federal rule can be found in Federal Rule of Civil Procedure 26(b)(3) requiring a “*substantial* need of the materials in preparation of the party’s case.” (emphasis added).

119. See FED. R. CIV. P. 26(b)(3); FLA. R. CIV. P. 1.280(b)(3).

120. See FED. R. CIV. P. 26(b)(3) advisory committee’s notes.

121. See FED. R. CIV. P. 26(b)(3); FLA. R. CIV. P. 1.280(b)(3).

C. Self-Evaluative Privilege

Courts have applied the self-evaluative privilege (also referred to as the self-critical analysis privilege) to documentation of critical self-appraisals and have allowed the entity to assess its compliance with legal requirements while protecting the documentation from discovery in future litigation.¹²² The privilege is similar to the evidentiary exclusion provided under Federal Rule of Evidence 407, which states that measures taken after an event, which could have reduced the likelihood of the event occurring, will not be admissible to prove either negligence or culpability in a civil suit.¹²³ The basis for excluding subsequent remedial measures from disclosure “rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety.”¹²⁴ The self-evaluative privilege has been applied to medical peer review records,¹²⁵ confidential assessments of equal employment opportunity practices,¹²⁶ securities law,¹²⁷ investigation of railroad accidents,¹²⁸ products liability,¹²⁹ peer reviews in the academic setting,¹³⁰ and product safety evaluations.¹³¹

Reichhold Chemicals, Inc. v. Textron Inc.,¹³² appears to be the first case applying the self-evaluative privilege in a federal environmental setting.¹³³ Reichhold produced approximately 35,000 pages of materials pursuant to a discovery request, but retained thirteen

122. See *Reichhold Chems., Inc. v. Textron, Inc.*, 157 F.R.D. 522, 524 (N.D. Fla. 1994).

123. See FED. R. EVID. 407. The rule reads as follows:

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence of culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Id.

124. *Id.* advisory committee's note.

125. See *Bredice v. Doctor's Hosp., Inc.*, 50 F.R.D. 249 (D.D.C. 1970).

126. See *Banks v. Lockheed-Georgia Co.*, 53 F.R.D. 283 (N.D. Ga. 1971).

127. See *In re Crazy Eddie Sec. Litig.*, 792 F. Supp. 197 (E.D.N.Y. 1992).

128. See *Granger v. National R.R.*, 116 F.R.D. 507 (E.D. Pa. 1987).

129. See *Bradley v. Melroe Co.*, 141 F.R.D. 1 (D.D.C. 1992).

130. See *Keyes v. Lenoir Rhyne College*, 552 F.2d 579 (4th Cir. 1977).

131. See *Lloyd v. Cessna Aircraft Co.*, 74 F.R.D. 518 (E.D. Tenn. 1977).

132. 157 F.R.D. 522 (N.D. Fla. 1994).

133. See *id.* at 522.

requested documents, asserting that they were protected because of the self-critical analysis privilege.¹³⁴ While cautioning that it is “a qualified privilege, which can be overcome by a showing of extraordinary circumstances or special need,”¹³⁵ the court asserted that a “self-evaluation privilege promotes the interests of justice and should be applied in appropriate environmental cases, just as in other kinds of cases.”¹³⁶ The court adopted the privilege criteria set forth in *Dowling v. American Hawaii Cruises, Inc.*¹³⁷

(1) [T]he information must result from a critical self-analysis undertaken by the party seeking protection; (2) the public must have a strong interest in preserving the free flow of the type of information sought; (3) the information must be of a type whose flow would be curtailed if discovery was allowed . . . [and (4)] no document should be privileged unless it was prepared with the expectation that it would be [kept] confidential, and it has in fact been kept confidential.¹³⁸

Accordingly, “Reichhold [was] entitled to a qualified privilege for retrospective analysis of past conduct, practices, and occurrences, and the resulting environmental consequences.”¹³⁹ This privilege was limited, however, to only those reports prepared with the expectation that they would not be subject to disclosure and would be kept confidential.¹⁴⁰ The court also maintained that this holding applied only to “reports which were prepared after the fact for the purpose of candid self-evaluation and analysis of the cause and effect of past pollution, and of Reichhold's possible role, as well as other's, in contributing to the pollution at the site.”¹⁴¹

Reichhold provides little solace to the company attempting to insulate itself from liability resulting from events occurring *after* a self-audit, since these records would not be privileged, though they

134. *See id.* at 523.

135. *Id.* at 526.

136. *Id.* at 527. *But see* *McMann v. SEC*, 87 F.2d 377, 378 (1937) (stating that “[t]he suppression of truth is a grievous necessity at best, more especially when as here the inquiry concerns the public interest; it can be justified at all only when the opposed private interest is supreme”).

137. 971 F.2d 423 (9th Cir. 1992).

138. *Reichhold*, 157 F.R.D. at 527.

139. *Id.*

140. *See id.*

141. *Id.*

may be incriminating. Courts may also be less likely to find a strong public interest when corrective measures recommended in a report are not taken. Further, the judiciary generally has been unwilling to extend the self-evaluative privilege to material sought by government agencies.¹⁴² Additionally, Rule 90.501 of the Florida Evidence Code provides that state courts will recognize only privileges provided by the state's Evidence Code, the United States Constitution, Florida's Constitution, or other statutory mandates, thereby disregarding common-law privileges.¹⁴³ Accordingly, proponents of Florida's environmental self-audit legislation might assert that a more expansive statutory privilege would be more effective in encouraging self-auditing.

IV. SELF-AUDIT ACTIVITY IN FLORIDA

A. An Overview of the Controversy Over Self-Audit Privilege and Immunity in Florida

All of Florida's environmental self-audit legislation, to date, has received tremendous support from the State's industrial interests.¹⁴⁴

It has also been the target of vehement opposition from the Attorney General's Office, as well as the Florida Prosecuting Attorneys Association, state regulatory agencies, and numerous environmental organizations.¹⁴⁵ Much of the conflict has resulted from the intent of the bills, while other debate has focused on the actual language of the proposed legislation.

Proponents of self-audit privilege and immunity assert that regulators should provide industry with incentives to perform self-audits because these reports currently can be accessed for evidentiary purposes and used against the environmentally conscientious

142. *See* Federal Trade Comm'n v. TRW, Inc., 628 F.2d 207, 210 (D.C. Cir. 1980); *see also* United States v. Dexter Corp, 132 F.R.D. 8, 10 (D. Conn. 1990) (refusing to apply the self-evaluative privilege, finding that permitting a company to block discovery violates public policy regarding the discharge of contaminants into the environment and impedes that EPA's enforcement activities and authority).

143. *See* FLA. R. EVID. 90.502.

144. Associated Industries of Florida and the Florida Chamber of Commerce launched community education programs in an effort to gather support for the proposed bills. *See supra* note 4.

145. Metro Dade Department of Environment Resource Management, Florida Local Environmental Resource Agencies, and the Office of the Attorney General each printed leaflets encouraging rejection of the 1996 legislation. *See supra* note 6.

company.¹⁴⁶ Thus, “[r]egulated entities which do more than the law requires may be convicted by their own good efforts.”¹⁴⁷ Self-audit legislation advocates assert that some safeguard should exist to protect companies from litigants on evidentiary fishing expeditions.¹⁴⁸ Furthermore, they assert that the bad press associated with reporting environmental violations is detrimental to the company's image and, in many instances, what makes for a good soundbite may be only a small part of the whole story.¹⁴⁹ Proponents are skeptical of EPA and Florida Department of Environmental Protection (DEP) policies that promise to mitigate damages for the auditor who promptly remediates and reports violations identified through the audit process and to refrain from using audit requests to trigger investigations. These proponents assert that this is not a statutory requirement, but rather a policy that is always subject to change,¹⁵⁰ and that businesses want more predictability than these policies offer.¹⁵¹ The United States General Auditing Office (GAO), in its report to the Senate pertaining to environmental audits, echoed similar sentiments stating, “[T]he further development of environmental auditing . . . is . . . hampered by . . . EPA policies and practices that provide managers with only vague assurance that taking the initiative to audit for compliance and to correct violations will in any measure reduce the penalties for violations.”¹⁵²

Opponents counter that incentives should not be necessary to motivate companies to comply with the law, and that such legislation would put the company that does not violate environmental law at a disadvantage.¹⁵³ While the DEP's policy *could* be changed or disregarded, proponents cannot point to any such occurrence in the

146. See Questions and Answers: Environmental Self-Audit Legislation The “Find It, Fix It” Bill 1 (unpublished lobbying document) (on file with the *Stetson Law Review*).

147. *Id.*

148. Peterson Interview 1, *supra* note 10.

149. *Id.* Karen Peterson spoke of the hypothetical soundbite which reveals a multitude of environmental violations without disclosing that most or all presented no imminent danger but may have been related to administrative duties such as record keeping and timely reporting. While this is certainly a concern with which big businesses must grapple, it seems rare that smaller companies might have to contend with such issues. *Id.*

150. *Id.*

151. *Id.*

152. GAO REPORT, *supra* note 15, at 49.

153. See HILLSBOROUGH COUNTY ENVIRONMENTAL PROTECTION COMMISSION, SELF-AUDIT PRIVILEGE AND IMMUNITY BILL: HB 1817 — SB 1902 (1996).

time since the DEP established this policy. Opponents of self-audit privilege and immunity assert that such legislation would “hide valuable information about public health, safety and environmental issues behind a new privilege applicable in all civil and administrative cases” and that the privilege would prevent those affected by the violations from gaining access to information about possible health and safety risks involved.¹⁵⁴ Furthermore, the proposed legislation did not contain any provision that would prevent repeated violations or contain any disincentive to prevent a regulated entity from claiming the privilege when it was not applicable. Opponents assert that the legislation's broad, overly vague language would have resulted in increased litigation.¹⁵⁵ Moreover, there is no evidence of a need for self-audit privilege and immunity.¹⁵⁶

B. The OPPAGA Report

In 1996, the Office of Program Policy Analysis and Government Accountability (OPPAGA) issued an extensive report relating to an environmental self-audit policy.¹⁵⁷ The report found little evidence indicating that Florida businesses have been excessively fined or prosecuted for violating environmental regulations,¹⁵⁸ and it applauded the DEP's policy regarding self-audits.¹⁵⁹ Additionally, the OPPAGA did not find any data indicating that self-audit policies were effective in states with such legislation.¹⁶⁰ This finding was attributed to the relative novelty of these laws.¹⁶¹ The OPPAGA acknowledged that an environmental self-audit privilege and immunity policy could improve reporting compliance without negatively impacting regulatory activities.¹⁶² However, it expressed concern that such a policy could negatively impact third-party rights, reduce

154. OFFICE OF THE ATTORNEY GENERAL, WHY SB 1902 SHOULD NOT BECOME LAW (1996).

155. *See id.*

156. OFFICE OF PROGRAM POLICY ANALYSIS AND GOVERNMENT ACCOUNTABILITY, REVIEW OF THE ISSUES RELATED TO AN ENVIRONMENTAL SELF-AUDIT POLICY 4 (1996) [hereinafter OPPAGA].

157. *See id.*

158. *See id.* at 2.

159. *See id.*

160. *See id.*

161. *See id.* at 2.

162. *See* OPPAGA, *supra* note 156, at 2.

identification of existing violations, increase litigation, reduce funds (created by civil penalties and fines) for restoration projects that result from unknown responsible parties, or jeopardize EPA state delegation of federal programs.¹⁶³ The OPPAGA report concluded that “an environmental self-audit policy that provides privilege and immunity does not appear to be necessary at this time.”¹⁶⁴

Proponents of a statutory self-audit privilege and immunity policy, attorneys Wade L. Hopping and Karen M. Peterson,¹⁶⁵ assert that the OPPAGA report is flawed in several ways. They argue that current measures used to assess the success of self-audit incentives are not appropriate.¹⁶⁶ They assert that the number of fines collected should not be the measure of success in protecting the environment.¹⁶⁷ Instead, they propose that the effectiveness of the system should be evaluated by measuring the timeliness and thoroughness of identification and remediation of environmental threats.¹⁶⁸ Additionally, they urge OPPAGA to consider the impact of regulatory agencies not included in its study.¹⁶⁹ Citing a study by the GAO,

163. *See id.* at 3.

164. *Id.* at 4.

165. Wade L. Hopping and Karen M. Peterson are attorneys with the law firm of Hopping Green Sams & Smith, P.A., in Tallahassee, Florida. Hopping is a registered lobbyist for the Association of International Automobile Manufacturers, Inc., the Florida Chamber of Commerce, Florida Electric Power Coordination Group, Inc., Mobil Oil Corp., Sugar Cane Growers Cooperative of Florida, Property Rights Coalition, and National Marine Manufacturers Association, as well as other Florida interests. Peterson is a registered lobbyist for interests such as Avatar Utilities Incorporated, Florida Waterworks Association, and Waste Management Incorporated of Florida. *See Florida Legislature On-Line Sunshine* (visited June 5, 1997) <http://www.scri.fsu.edu/fla-leg/lobbyist-1996/name/by_letter/G_I.html>; *Florida Legislature On-Line Sunshine* (visited June 5, 1997) <http://www.scri.fsu.edu/fla-leg/lobbyist-1996/name/by_letter/P_R.html>. This Author does not suggest that the views in this Comment are necessarily the views of clients represented by Hopping or Peterson.

166. Wade L. Hopping & Karen M. Peterson, OPPAGA Review of Issues Related to an Environmental Self-Audit Policy 1 (unpublished comments) [hereinafter OPPAGA Comment] (on file with the *Stetson Law Review*).

167. *See id.*

168. *See id.* Peterson suggests as an example, that identifying a problem such as a crack in a secondary containment system as opposed to discovering it when there is an actual spill is the potential benefit of early identification and remediation. Telephone Interview with Karen M. Peterson, Associate, Hopping Green Sams & Smith, P.A. (June 6, 1997) [hereinafter Peterson Interview 2].

169. Hopping and Peterson assert that local pollution control programs, water management districts, and other environmental enforcement agencies present additional enforcement policies not addressed by the report. The impact of these regulatory authorities, they continue, should be evaluated when assessing the risk Florida businesses face

which concluded that the EPA's policy regarding self-audits "has had a 'chilling effect' that has impeded environmental auditing in both public and private organizations,"¹⁷⁰ Hopping and Peterson assert that a "promise of 'prosecutorial discretion' provides inadequate assurance" to compel companies to risk the costs of an effective environmental self-audit.¹⁷¹

Hopping and Peterson challenge OPPAGA's assertion that it is too early to determine the effect of self-audit policies, stating that Florida cannot afford to wait for "enough" data to be generated.¹⁷² They insist that innovative policies always involve risk and that when it comes to self-audit legislation, since the auditor is under a duty to fix any deficiencies identified, the magnitude of the benefit will outweigh the risk of harm.¹⁷³ These proponents disagree with the OPPAGA finding that there is insufficient data to determine the benefits of self-audit policies and assert that there is insufficient data to identify the *disadvantages* of such a policy.¹⁷⁴ Additionally, third parties are benefitted by self-audit privilege and immunity because such a policy creates incentives for companies to *prevent* potentially harmful circumstances from occurring and remediate any such problems in a timely fashion. The intent of the legislation, they assert, is *pollution prevention*.¹⁷⁵

Furthermore, Hopping and Peterson assert that the report creates the mistaken impression that third parties would not be able to obtain *any* company documents regarding environmental infractions when, in fact, materials not prepared as the result of an environmental audit would not be included under the privilege.¹⁷⁶ They argue that the proposed privilege would also require the company asserting it to remediate the violations if it were to receive its bene-

when contemplating voluntary self-auditing. See OPPAGA Comment, *supra* note 165, at 1.

170. *Id.* at 2 (quoting GAO REPORT, *supra* note 13, at 6).

171. *Id.* at 2.

172. *See id.*

173. *See id.*

174. *See id.*

175. *See* OPPAGA Comment, *supra* note 166, at 2-3.

176. *See id.* at 3. The following information would have been excluded from the privilege: information gathered before the audit or after the audit as well as that statutorily required to be reported, information gathered for other than audit purposes, and information otherwise lawfully gathered by regulatory official. *See id.*

fit.¹⁷⁷ Additionally, they challenge the assertion that the proposed legislation will create additional litigation, suggesting instead that increased environmental compliance will result in less litigation.¹⁷⁸ Finally, Hopping and Peterson assert that while funding for restoration projects may be lessened due to immunity from administrative penalties, there would be less need for these funds due to voluntary compliance.¹⁷⁹

C. Florida's Proposed Solutions

1. 1995 Bills

In 1995, legislation was introduced in the Florida House and Senate that in many instances would have provided the corporation that was willing to engage in voluntary self-audits with an evidentiary privilege pertaining to the content of the environmental self-audit report.¹⁸⁰ An entitled party could continue to assert this privilege even when another entitled party waived the privilege and opted to disclose information pertaining to the audit report.¹⁸¹ The same bill would have provided the company that timely reported its prompt remediation of violations with immunity from administrative penalties and fines, as well as civil and criminal liability.¹⁸² The proposed legislation also would have created a statutory public records exemption for publicly-owned corporations that engaged in environmental self-audits.¹⁸³ Thus, the 1995 bills have been characterized as a "Christmas tree"¹⁸⁴ for Florida businesses. It may be, however, that the sweeping language of the legislation created an atmosphere in which proponents and opponents became too polarized to engage in the process of compromise.

2. 1996 Bills

177. *See id.*

178. *See id.* at 4.

179. *See id.*

180. *See* H.R. 707, *supra* note 3, § 1.93.01(3); S. 944, *supra* note 3, § 1.93.01(3).

181. *See* H.R. 707, *supra* note 3, § 1.93.01(4); S. 944, *supra* note 3, § 1.93.01(4).

182. *See* H.R. 707, *supra* note 3, § 1.93.03; S. 944, *supra* note 3, § 1.93.03.

183. *See* H.R. 707, *supra* note 3; S. 944, *supra* note 3.

184. Peterson Interview 1, *supra* note 10.

House Bill 1817 and Senate Bill 1902 were introduced to the Florida Legislature in 1996.¹⁸⁵ The proposed public record exemption and the immunity from criminal prosecution, included in the 1996 bills, were eliminated. The broad privilege waiver language was reworked, however, it still allowed for one party to assert the privilege even when another party disclosed all or part of the audit report.¹⁸⁶

These bills would have created an evidentiary privilege for environmental self-audit reports, except when the self-auditor failed to remediate any deficiencies identified in a timely manner, the auditor knew about the deficiency before the audit, or the auditor knowingly failed to comply with the legislation.¹⁸⁷ The privilege would also exclude portions of the report documenting any “imminent and substantial hazard to human health or the environment.”¹⁸⁸ Addition-

185. Senate Bill 1902 was sponsored by Senator W.G. “Bill” Bankhead, a Republican from the 8th District. Senator Bankhead is a manager for CSX Transportation and holds over \$10,000 in CSX corporate stock. See JOHN D. MCKINNON, *GUIDEBOOK TO FLORIDA LEGISLATORS 1995–1996*, at 2–3 (1995). One co-sponsor for Senate Bill 1902 was Senator John H. “Buddy” Dyer. Senator Dyer is an attorney with the firm of Winderwee, Haines, Ward & Woodman, P.A., whose representative clients include Georgia-Pacific Corp. See MARTINDALE-HUBBELL LAW DIRECTORY FL1000B (1996). House Bill 1817 was sponsored by Representative Kelley R. Smith, a Democrat. Representative Smith is a timber company manager from District 21, which includes Putnam County, where Georgia-Pacific Corporation operates numerous lumber product plants. See MCKINNON, *supra*, at 317–18. Campaign finance statistics from 1994 report that nearly 10% of his campaign contributions came from the timber and paper industry and over 10% came from utilities, manufacturing, and industry. See MCKINNON, *supra*. Georgia-Pacific Corporation recently agreed to a \$35.25 million settlement with the Department of Justice and the EPA. See Steven H. Herman, *CAA Settlement with Georgia-Pacific Corporation Shows Advantages of Federal Initiatives Against Large National Corporations*, NAT’L ENVTL. ENFORCEMENT J., Aug. 1996, at 10. The settlement was in response to charges that Georgia-Pacific submitted inaccurate pollution emissions reports, Georgia-Pacific failed to obtain necessary permits, and Georgia-Pacific failed to adequately control the release of volatile organic compounds at 11 of its wood-processing plants located in Florida and 7 other southeastern states. See *Georgia-Pacific to Pay \$35 Million in Settling Suit Over Air Pollution*, ATLANTA J. & CONST., July 19, 1996, at B3; Herman, *supra*, at 10. The settlement also requires that Georgia-Pacific perform mandatory self-audits and provides for further penalties for any future non-compliance with Clean Air Act requirements. See Herman, *supra*, at 12. The Georgia-Pacific settlement involved more alleged violations and facilities than any other action arising under the Clean Air Act provisions applicable to containment areas. See *Georgia-Pacific Settlement Shows Benefits of Federal Initiatives Against Large Corporations*, OECA ECHO, (Office of Enforcement and Compliance Assurance) Oct./Nov. 1996, at 5.

186. See H.R. 1817, *supra* note 3; S. 1902, *supra* note 3.

187. See H.R. 1817, *supra* note 3; S. 1902, *supra* note 3.

188. See H.R. 1817, *supra* note 3, § 1.93.09(3); S. 1902, *supra* note 3, § 1.93.09(3).

ally, no privilege would be extended to the self-auditor who fraudulently prepared a self-audit report or who utilized the report to engage in fraudulent acts.¹⁸⁹

Moreover, the proposed legislation provided for an in camera hearing and review to determine whether the asserted privilege was applicable to the documents sought.¹⁹⁰ Further, the burden of proof would be placed on the self-auditor to prove that the documents were in fact part of an environmental self-audit, as defined by the bill, and that any appropriate remedial activities were timely completed, or were in the process of being completed.¹⁹¹ Excluded from the report were preexisting materials, records required by law to be reported, public records, day-to-day business records that would be generated in the normal course of business, and any information that was otherwise lawfully obtained.¹⁹²

The second incentive proposed in the bills was immunity from civil liability and regulatory penalties or fines for the self-auditor who voluntarily disclosed the deficiencies within ninety days of completing the audit report, and who attempted to remedy the violation effectively and in a timely manner.¹⁹³ Actual knowledge of the deficiency, knowingly committing the deficiency, failure to disclose imminent and substantial hazards to human well-being or the environment, failure to remedy the violation in a timely manner, and fraudulent preparation or use of an audit report were all exempted from the immunity.¹⁹⁴ Both bills died in the Committee on Natural Resources on May 4, 1996.¹⁹⁵

While the 1995 bills may have failed in part due to oppositional

189. See H.R. 1817, *supra* note 3, § 1.93.09(4); S. 1902, *supra* note 3, § 1.93.09(4).

190. See H.R. 1817, *supra* note 3, § 1.93.11(3); S. 1902, *supra* note 3, § 1.93.11(3).

191. See H.R. 1817, *supra* note 3, § 1.93.11(4); S. 1902, *supra* note 3, § 1.93.11(4).

Timely efforts to correct noncompliance means initiating appropriate corrective action and achieving compliance as soon as practicable after noncompliance is discovered. In circumstances where a permit is required to achieve compliance, the term also includes the additional requirement to promptly submit a good faith application and, upon issuance of the permit, to comply with its terms.

H.R. 1817, *supra* note 3, § 1.93.05(8); S. 1902, *supra* note 3, § 1.93.05(8).

192. See H.R. 1817, *supra* note 3, § 1.93.05(5); S. 1902, *supra* note 3, § 1.93.05(5).

193. See H.R. 1817, *supra* note 3, § 1.93.13(3); S. 1902, *supra* note 3, § 1.93.13(3).

194. See H.R. 1817, *supra* note 3, § 1.93.09(2)-(4); S. 1902, *supra* note 3, § 1.93.09(2)-(4).

195. See *General Bill H1817: Environmental Self-Audits* (visited Mar. 2, 1997) <www.scri.fsu.edu/fla-leg/bill-info/1996/h1817/html>; *General Bill S1902: Environmental Self-Audits* (visited Mar. 2, 1997) <www.scri.fsu.edu/fla-leg/bill-info/1996/s1902/html>.

resistance to compromise,¹⁹⁶ opponents of the self-audit legislation provided opportunities to reach a middle ground during the 1996 legislative session. Substitute bills were offered in both the House and the Senate. These bills would have precluded environmental regulatory agencies from imposing civil or administrative fines or penalties for environmental regulatory violations when the noncompliance was identified during a voluntary environmental audit, it was promptly corrected and reported, and measures were taken to prevent recurrence.¹⁹⁷ Apparently, business interests were not as concerned about regulatory enforcement as they professed — proponents of the legislation expressed no willingness to agree to this compromise unless the bills included an evidentiary privilege.¹⁹⁸

3. Florida Department of Environmental Protection's Self-Audit Policy

In April 1996, a new policy intending to encourage self-auditing went into effect for the DEP.¹⁹⁹ Under this policy, the DEP will waive all gravity-based penalties (punitives) for a company that discovers a violation during a voluntary, routine audit or through due diligence, expediently remediates it, and reports the violation to the DEP within ten days of discovery.²⁰⁰ The company must perform the audit before any regulatory investigation or request for information, notice of a third-party suit or third-party complaint, complaint by a party other than one authorized to speak on the auditor's behalf (*i.e.*, whistle-blowing employee), or imminent discovery.²⁰¹ The company must also agree to implement preventative measures.²⁰² The DEP, however, excludes from penalty mitigation repeat violations similar to any occurrence within the previous three years.²⁰³ Further, the DEP retains full discretion to assess penalties for an eco-

196. ASSOCIATED INDUSTRIES OF FLORIDA, 1997 ENVIRONMENTAL SELF-AUDIT PRIVILEGE 4-5 to 4-6 (1997) [hereinafter 1997 ENVIRONMENTAL].

197. *See* H.B. 1817 amend. 1 (1996) (offered by Representative Eggelation); S. 1902 amend. 2 (1996) (offered by Senator Brown-Waite).

198. *See Point/Counterpoint*, *supra* note 5, at 3.

199. *See* FLORIDA DEPT OF ENVTL. PROTECTION, DEP 922, INCENTIVES FOR SELF-EVALUATION BY THE REGULATED COMMUNITY (1996) [hereinafter DEP 922].

200. *See id.* §§ 3, 4.

201. *See id.* § 4.

202. *See id.*

203. *See id.*

conomic benefit gained as a result of the violation.²⁰⁴ Additionally, there is an evaluative component to be completed within three years of the effective date.²⁰⁵

The DEP asserts that the policy is “[g]ood for [b]usiness . . . and [g]ood for the [e]nvironment.”²⁰⁶ It states that this policy provides regulated businesses the opportunity to work in a collaborative manner with the DEP toward mutually advantageous goals.²⁰⁷ To date, however, there have been insufficient self-reports to declare the program a success.²⁰⁸

4. Overview of the 1997 Bills

Despite OPPAGA findings that self-audit and immunity laws were not necessary, similar legislation titled the “Environmental Improvement Program,”²⁰⁹ was filed with the Florida Senate and the House in 1997 but again was not passed. The language of House Bill 1153 and Senate Bill 1480 was almost identical.²¹⁰ The proposed

204. *See id.* § 5.

205. *See* DEP 922, *supra* note 199, § 7.

206. FLORIDA DEP'T OF ENVTL. PROTECTION, TAKING ADVANTAGE OF THE FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION'S SELF AUDIT POLICY 1 (1996).

207. *See id.*

208. Telephone Interview with Molly Glover Palmer, DEP, Special Assistant, Office of the Secretary (Jan. 28, 1997).

209. House Bill 1153 and Senate Bill 1480 were both filed with the House and the Senate in March 1997. *See General Bill H1153: Environmental-Improvement Program* (visited May 3, 1997) <www.scri.fsu.edu/fla-leg/bill-info/1997/h1153.html>; *General Bill S 1480: Environmental Improvement Program* (visited May 3, 1997) <www.scri.fsu.edu/fla-leg/bill-info/1997/s1480.html>. Senate Bill 1480 was introduced to the Senate on March 12, 1997, and was referred to Natural Resources, Rules Calendar, and Ways and Means Committees. *See General Bill S1480: Environmental Improvement Program* (visited May 3, 1997) <www.scri.fsu.edu/fla-leg/bill-info/1997/s1480.html>. Senator John H. “Buddy” Dyer, Jr. sponsored Senate Bill 1480. *See supra* note 185 for biographical data on Senator Dyer. House Bill 1153 was sponsored by Representative Kelley R. Smith and Representative Jerrold “Jerry” Burroughs, a Republican from District 1, which consists of parts of Okaloosa, Escambia, and Santa Rosa counties. *See supra* note 185 (containing biographical information on Representative Smith); *Representative Jerrold “Jerry” Burroughs — Online Sunshine* (visited May 31, 1997) <<http://www.leg.state.fl.us/house/members/h1.html>>. Major private sector employers in these counties include manufacturers such as Monsanto Co., Vanity Fair Mills, Air Products and Chemicals, Champion International (paper products manufacturer), Cytec, Inc. (manufacturer of acrylic fibers), and Mold-Ex Rubber Co. *See* BUREAU OF ECON. ANALYSIS, DIVISION OF ECON. DEV., FLA. DEP'T OF COMMERCE, FLORIDA COUNTY PROFILE (1995).

210. The effective date of House Bill 1153 would have been July 1, 1997. *See* H.R. 1153, *supra* note 3, § 6. That of Senate Bill 1480 would have been October 1, 1997. *See* S. 1480, *supra* note 3, § 6. Other variations between the two bills are minor and stylistic

legislation for 1997, however, was transformed in terms of its appearance. The definitions section was drastically reduced, the language was less wordy, and the title was changed to the more marketable and socially appealing “Environmental Improvement Program.” The bills would have created a five-year pilot program and would have included an evaluative element.

Nowhere in the text of these bills were the words “privilege” or “immunity.” Instead, self-audit records, in some instances, “[would] not be subject to discovery or introduction into evidence in any civil or administrative action or to disclosure pursuant to 403.091,”²¹¹ and “no civil or administrative enforcement action [would] be maintained against a program participant for violations of any environmental law which is detected by an environmental self-audit and reported.”²¹² Nonetheless, the language of these bills was rigorously contested and created a great deal of debate amongst its proponents and its opponents.

5. The Language of and Controversy Surrounding the 1997 Bills

Opponents of the 1997 proposed bills objected to nearly every aspect of the language in this legislation, as drafted. The language was overly vague in many respects and would most likely have opened the door to extensive litigation regarding the legislative intent. While the name of this legislation, the Environmental Improvement Program, implied that Florida's environment would benefit from enactment of the bills, it was too wide-sweeping and vague to safeguard against abuse of the privilege and immunity proposed.

a. The Pilot Project

The legislation, if passed, would have created a five-year pilot project to assess the effectiveness of environmental self-audit legislation and privilege laws in Florida as they pertain to civil and administrative proceedings.²¹³ The privilege and immunity would not have applied to “laws or procedures relating to the prosecution of

in nature (e.g., “which” replaced with “that”).

211. H.R. 1153, *supra* note 3, § 1(4); S. 1480, *supra* note 3, § 1(4).

212. H.R. 1153, *supra* note 3, § 1(6); S. 1480, *supra* note 3, § 1(6).

213. *See* H.R. 1153, *supra* note 3; S. 1480, *supra* note 3.

criminal violations.”²¹⁴ Inclusion of program participants would have been broad, and exclusion would have occurred only in clearly defined instances.

Under the proposed language, environmental self-audit was defined as “a systematic and documented review of one or more facilities or facility programs, operations, or practices which is used to determine compliance with one or more environmental laws or to identify opportunities to improve environmental protection.”²¹⁵ The term “environmental law” was defined extremely broadly and, as written, could have encompassed almost any law, regulation, code, or ordinance that in any way pertained to the environment.²¹⁶ Thus, almost any systematic, documented review that in any way related to the environment would have been entitled to evidentiary privilege. The legislation would have entitled any entity that conducted as few as one environmental self-audit to program participation.²¹⁷

The language asserted that the program's purpose was “to encourage regulated entities to conduct voluntary self-audits to improve compliance with environmental laws and to protect the environment from harm which is preventable through early detection and timely cleanup.”²¹⁸ However, if an entity filed notice to the DEP of its intent to participate in the program pursuant to the legislation, the DEP would have been granted only thirty days to deny or approve such a request.²¹⁹ Given the lack of personnel re

214. H.R. 1153, *supra* note 3, preamble; S. 1480, *supra* note 3, preamble.

215. H.R. 1153, *supra* note 3, § 1(1)(c); S. 1480, *supra* note 3, § 1(1)(c).

216. The language reads: “Environmental law’ means any special or general law, rule, regulation, ordinance, code, certification, order, permit, or license designed to protect or preserve the environment or prevent pollution.” H.R. 1153, *supra* note 3, § 1(1)(b); S. 1480, *supra* note 3, § 1(1)(b).

217. *See* H.R. 1153, *supra* note 3, § 1(2); S. 1480, *supra* note 3, § 1(2).

218. H.R. 1153, *supra* note 3, § 1(2); S. 1480, *supra* note 3, § 1(2).

219. *See* H.R. 1153, *supra* note 3, § 1(3); S. 1480, *supra* note 3, § 1(3). The language reads:

(3) A person must provide notice to the department of the person's intent to participate in the program for a 12-month period. The department shall have 30 days after the date notice is received during which to deny a person admission into the program. A person shall be admitted and, if subsequent notice is refiled, shall be readmitted into the program unless the person has been found guilty within the prior 5 years of any willful violation of s. 403.161, Florida Statutes. Any person whom the department fails to deny in writing within the 30-day period shall be admitted into the program.

H.R. 1153, *supra* note 3, § 1(3); S. 1480, *supra* note 3, § 1(3). Section 403.161 of the Florida Statutes pertains to prohibitions and sanctions against various environmental

sources available to the DEP and the other regulatory functions it already performs, it is improbable that the agency could have responded in a timely manner (especially during the commencement of such a program). The only justification for excluding an entity from the program would have been a history of willful violations committed within the prior five years.²²⁰ A company found liable for committing a negligent toxic tort, regardless of the degree of harm inflicted, would still have been qualified to participate in the program if the DEP identified no other willful violations. Further, once an entity was a program participant, readmission into the program at the end of twelve months of participation would have been mandated unless the applicant was found guilty of any willful violations pursuant to section 403.161 within the previous five years.²²¹ This mandatory readmission would have placed the investigatory burden on the DEP and would not have provided any mechanism for the DEP to exclude a company which had consistently operated its business in an environmentally *negligent* manner. Furthermore, this readmission policy did not provide any incentive to remediate existing negligent operating procedures.

b. The Privilege

The 1997 legislation, with limited exceptions, would have created an evidentiary privilege, applicable in both civil and administrative actions, for all documents, information, and records prepared as the result of a voluntary self-audit.²²² Unlike the 1995 and 1996

crimes. See FLA. STAT. § 403.161 (1995).

220. See H.R. 1153, *supra* note 3, § 1(3); S. 1480, *supra* note 3, § 1(3).

221. See H.R. 1153, *supra* note 3, § 1(3); S. 1480, *supra* note 3, § 1(3).

222. See H.R. 1153, *supra* note 3, § 1(4); S. 1480, *supra* note 3, § 1(4). Section 1(4) of the bill reads as follows:

(4) Information, documents, or records prepared as a result of an environmental self-audit conducted by a program participant shall not be subject to discovery or introduction into evidence in any civil or administrative action or to disclosure pursuant to s. 403.091, Florida Statutes, unless:

(a) The environmental self-audit:

1. Is conducted to avoid liability resulting from an agency enforcement action which is imminent or pending; or

2. Is specifically required to be performed pursuant to the terms of an order or settlement agreement;

(b) The information, documents, or records identify a violation and:

1. The participant does not initiate corrective measures and achieve compliance within the period specified by environmental law or, if no period is

legislation, it appears that the 1997 legislation would have shifted the burden of proof to the party seeking the documentation to establish that the material in question was not covered by this privilege (a difficult task without being able to view the records). No provisions for an in camera hearing and review were delineated to determine the applicability of the privilege to the documents sought.

The legislation required that, for the privilege to apply, corrective action and compliance must have been completed within a "reasonable period" unless an environmental law stated otherwise.²²³ However, it was unclear whether the privilege would attach before remediation, and there was no mention of restorative measures to correct any environmental damage that might have resulted from the incident. Furthermore, the term "reasonable period" was vague and would likely have been the subject of much litigation.

While the bills provided that information required to be reported pursuant to environmental laws would not have been privileged,²²⁴ the passage of such legislation could ultimately have resulted in stricter reporting laws in an effort to circumvent the evidentiary exclusion. And, while self-audit records disclosing violations which create "imminent and substantial hazard to human health or the environment"²²⁵ would not have been privileged, the determination as to whether such a hazard existed would have been

specified, within a reasonable period after the violation is discovered; or

2. The participant knew or was willfully blind to the violation at the time the environmental self-audit was initiated; or

(c) The information, documents, or records:

1. Are otherwise subject to public disclosure pursuant to chapter 119, Florida Statutes, or s. 24, Art. I of the State Constitution;

2. Are required to be collected, developed, maintained, reported, or otherwise made available to an agency pursuant to an environmental law;

3. Disclose a violation which is an imminent and substantial hazard to human health or the environment;

4. Existed prior to the commencement of the environmental self-audit;

5. Are obtained by observation, sampling, or monitoring by any agency; or

6. Are obtained from a source independent of the environmental self-audit.

H.R. 1153, *supra* note 3, § 1(4); S. 1480, *supra* note 3, § 1(4).

223. See H.R. 1153, *supra* note 3, § 1(4)(b)(1); S. 1480, *supra* note 3, § 1(4)(b)(1).

224. Among laws mandating reporting are: RCRA (Resource Conservation and Recovery Act), 42 U.S.C. §§ 6906–6992k (1994); CERCLA (Comprehensive Environmental Response, Compensation, and Liability Act), 42 U.S.C. §§ 9601–9675 (1994); SARA (Superfund Amendments and Reauthorization Act of 1986), Pub. L. No. 990499, § 101-405; and the Clean Water Act, 33 U.S.C. §§ 1251–1387 (1994).

225. H.R. 1153, *supra* note 3, § 1(4)(c)(3); S. 1480, *supra* note 3, § 1(4)(c)(3).

left to the company that created the risk. Furthermore, no standard by which to determine when a risk to human health or the environment became "imminent" or "substantial" was set forth. One wonders what a company's propensity to minimize might be, given the privilege afforded otherwise potentially damaging evidence. The legislation's language provided no tool to determine whether such concealment was occurring, nor did it provide any sanctions for the company that falsely asserted such privilege.

The legislation also provided for the voluntary disclosure of otherwise privileged information by a person who was involved in the self-audit process.²²⁶ However, the legislation would have prohibited compelled testimony from any person who participated in the self-audit.²²⁷ While an occasional whistle-blower might come forward to disclose otherwise privileged information, such an occurrence would most probably be rare.

c. The Immunity

In addition to creating a new evidentiary privilege, the legislation would have provided immunity from civil or administrative enforcement actions to companies that initiated corrective actions and reported the violations identified by a self-audit to the DEP.²²⁸

226. See H.R. 1153, *supra* note 3, § 1(5); S. 1480, *supra* note 3, § 1(5). "No person who has participated in an environmental self-audit may be compelled to testify in any civil or administrative proceeding regarding matters related to the environmental self-audit, except regarding any matter of which the person has actual knowledge independent of the environmental self-audit." H.R. 1153, *supra* note 3, § 1(5); S. 1480, *supra* note 3, § 1(5).

227. See H.R. 1153, *supra* note 3, § 1(5); S. 1480, *supra* note 3, § 1(5).

228. See H.R. 1153, *supra* note 3, § 1(6); S. 1480, *supra* note 3, § 1(6). The language reads:

(6) No civil or administrative enforcement action shall be maintained against a program participant for a violation of any environmental law which is detected by an environmental self-audit and reported to the department within 30 days of completing the environmental self-audit, unless:

(a) The participant does not initiate corrective measures and achieve compliance within the period specified by environmental law or, if no period is specified, within a reasonable period after the violation is discovered;

(b) The environmental self-audit is conducted or the violation is reported to avoid liability resulting from an agency enforcement action which is imminent or pending;

(c) The violation is detected pursuant to an environmental self-audit that is required to be performed pursuant to the terms of an order or settlement agreement; or

While Karen M. Peterson, one of the drafters of the legislation, asserted that the immunity provision did not apply to third-party suits,²²⁹ the language was not clear on this issue and would likely have created litigation that might otherwise have been avoided by more concise wording.

The legislation would not have allowed an entity to receive immunity when the participant knew about a violation or chose to put its head in the sand regarding such noncompliance. However, it could quite possibly have resulted in, or perhaps perpetuated, a “don't talk rule” among employees who did not want to report to their supervisors or to regulatory authorities violations that might have required costly corrective action. The immunity language, too, was vague, neglecting to address restoration actions and referring to corrective actions completed within “a reasonable period after the violation is discovered.”²³⁰

While immunity would have been available to the participants who wanted it, there was no requirement that a company report its violations or the extent of environmental damage. If a company chose not to, it would have lost the immunity benefit.²³¹ The self-audit documentation would, however, in most circumstances, still have been privileged. Thus, the company would have been faced with a balancing test to determine whether the benefits of immunity outweighed the incentive to remediate and conceal the violation.²³² Furthermore, the participant, if it chose to report, would have been required to report only the “nature of the violation and briefly describe the action which is proposed to be taken or has been taken to correct the violation.”²³³ If corrective actions were going to take longer than ninety days, the participant would have been required to provide a proposed schedule of remedial activities to the DEP.²³⁴ The legislation would have permitted regulatory agencies to inspect

(d) The participant knew or was willfully blind to the violation at the time the environmental self-audit was initiated.

H.R. 1153, *supra* note 3, § 1(6); S. 1480, *supra* note 3, § 1(6).

229. Peterson Interview 1, *supra* note 10.

230. H.R. 1153, *supra* note 3, § 1(6)(a); S. 1480, *supra* note 3, § 1(6)(a).

231. H.R. 1153, *supra* note 3, §§ 1(6), 1(7); S. 1480, *supra* note 3, §§ 1(6) 1(7).

232. In the event of a toxic tort with substantial injury to human beings and the environment, such immunity could have proven to be quite beneficial, especially if the language of the bills was interpreted to provide immunity from third-party civil suits.

233. H.R. 1153, *supra* note 3, § 1(7); S. 1480, *supra* note 3, § 1(7).

234. *See* H.R. 1153, *supra* note 3, § 1(7); S. 1480, *supra* note 3, § 1(7).

to ensure that remediation was proceeding as scheduled, however, this might have been difficult to determine without knowing the specifics of the violation involved.²³⁵ Further, the proposed legislation did not provide any mechanism to permit or facilitate state or third-party injunctive relief.

d. The Evaluative Component

The legislation, if passed, would have been repealed on July 1, 2002, and the results would have been evaluated by the Division of Economic and Demographic Research of the Joint Legislative Management Committee (DEDR).²³⁶ DEDR is not an environmental agency. Accordingly, while DEDR may have been able to assess the economic impact of the program, its ability to assess environmental factors might have been limited. Furthermore, the legislation did not provide for assessment of the effectiveness of individual corrective measures, the financial impact on third-parties, the impact on litigation, or the effect upon revenue for restorative efforts that result from unidentified responsible parties' failures to comply with environmental laws. Thus, as written, the 1997 legislation skewed the evaluative component results before the evaluative process even began.

V. SO WHAT IS THE REAL MOTIVATION?

While there was a great deal of debate about the intent and language of the 1997 legislation, there was a very strong undercurrent of distrust amongst its opponents that causes one to wonder: Were there issues that were not being discussed? Some have asserted that the wave of self-audit legislation sweeping the country is an effort on the part of big business to initiate tort reform.²³⁷ While this may or may not be the case throughout the country, the legislative history suggests that this may be the motivation in Florida.

In 1992 and 1993, a powerful legislative movement began in Florida to defeat anti-SLAPP (Strategic Lawsuits Against Public

235. See H.R. 1153, *supra* note 3, § 1(7); S. 1480, *supra* note 3, § 1(7).

236. See H.R. 1153, *supra* note 3, § 2; S. 1480, *supra* note 3, § 2.

237. See Christopher Bedford, *Dirty Secrets: The Corporations' Campaign for an Environmental Audit Privilege* (visited Mar. 15, 1997)

<<http://www.envirolink.org/orgs/gnp/dirty1.html>>.

Participation) suit legislation.²³⁸ Similar legislation had begun to appear throughout the nation.²³⁹ Essentially, a SLAPP suit is a defensive legal tactic, usually aimed at a citizen, or occasionally an organization, who speaks out in a public forum against a pending or actual governmental action or outcome related to corporate activities.²⁴⁰ Actual or threatened allegations of conduct such as slander, defamation, or tortious interference are asserted against the outspoken citizen. This assertion is also usually accompanied by a corporation's complaint alleging millions of dollars in damages as a result of the citizen's protest to its activities.²⁴¹ The intent is to silence the opposition, and often it does so immediately. However, it sometimes takes months of litigation and inordinate legal fees to defend such claims. Eventually, however, almost all SLAPP suits are dismissed.²⁴²

238. See H.R. 759, Reg. Sess. (Fla. 1992) [hereinafter H.R. 759]; S. 2188, Reg. Sess. (Fla. 1992) [hereinafter S. 2188]; H.R. 185, 13th Leg., 1st Reg. Sess. (Fla. 1993) [hereinafter H.R. 185]; S. 70, 13th Leg., Reg. Sess. (Fla. 1993) [hereinafter S. 70].

239. As of January 1997, 11 states have passed anti-SLAPP legislation. See CAL. CIV. PROC. CODE § 425.16 (West 1997); DEL. CODE ANN. tit. 10, §§ 8136-8138 (1996); GA. CODE ANN. § 9-11-11.1 (1997); MASS. GEN. LAWS ANN. ch. 231, § 59H (West 1997); MINN. STAT. ANN. §§ 554.01-554.05 (West 1997); NEB. REV. STAT. §§ 25-21,241 to 25-21,246 (1996); NEV. REV. STAT. ANN. §§ 41.640-41.670 (Michie 1995); N.Y. CIV. RIGHTS LAW §§ 70-a, 76-a (McKinney 1997); N.Y. C.P.L.R. 3211(g), 3212(h) (McKinney 1997); 42 PA. CONS. STAT. ANN. § 8351 (West 1997); R.I. GEN. LAWS §§ 9-33-1 to 9-33-4 (1996); WASH. REV. CODE ANN. §§ 4.24.500-4.24.520 (West 1996). Anti-SLAPP legislation has been considered in Connecticut, Florida, Maryland, Michigan, New Jersey, Pennsylvania, Tennessee, Texas, and Virginia. See SLAPP SURVEY, *infra* note 241, at 17-18; H.R. 759, *supra* note 238; S. 2188, *supra* note 238; H.R. 185, *supra* note 238; S. 70, *supra* note 238; Catherine M. Brennan, *House Bill Calls for Stop to SLAPP Lawsuits*, DAILY REC., Jan. 17, 1997, at A1; Ed Golder, *Horton, ACLU in Rare Alliance*, GRAND RAPIDS PRESS, May 5, 1997, at B1; Judith Miller, *New Law Muzzles Lawsuits Aimed at Silencing Critics*, SAN DIEGO UNION-TRIB., June 29, 1996, at A25. Of the 18 states that have enacted qualified audit evidentiary privilege, only Minnesota, as of January 1997, has been identified as having passed anti-SLAPP legislation. See MINN. STAT. ANN. §§ 554.01-554.05 (West 1997). Clearly there has been a very distinct polarity between the states passing anti-SLAPP legislation and the states passing environmental self-audit legislation. Compare MASS. GEN. LAWS ANN. ch. 231, § 59H (West 1997) with ILL. COMP. STAT. 5/52.2 (West 1997).

240. See GEORGE W. PRING & PENELOPE CANAN, SLAPPS GETTING SUED FOR SPEAKING OUT 8 (1996).

241. A survey compiled by the Florida Attorney General's Office reported that the average damage claim exceeded \$99,035,000. See OFFICE OF ATTORNEY GENERAL ROBERT A. BUTTERWORTH, STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION: (SLAPPS) IN FLORIDA: SURVEY AND REPORT 4 (1993) [hereinafter SLAPP SURVEY].

242. See Alexandra Dylan Lowe, *The Price of Speaking Out*, A.B.A. J., Sept. 1996, at 50.

In 1993, the Attorney General's Office issued a report regarding the status of SLAPP suits in Florida.²⁴³ It reported twenty-one complaints of SLAPP suits and ten threats of such suits.²⁴⁴ Of those filed, three were voluntarily dismissed, one failed for lack of prosecution, and nine resulted in rulings for the defendant.²⁴⁵ The cost to defend these SLAPP suits ranged from \$500 to \$106,000.²⁴⁶ The unresolved cases had been pending an average of thirty months at a cost of \$7000 to \$50,000.²⁴⁷ Several other callers who had learned about the survey through word of mouth or the media would not agree to put their reports on public record.²⁴⁸

After two years of attempts to pass anti-SLAPP bills, proponents determined that the political atmosphere was too hostile toward such legislation to continue their efforts. Much of that resistance was attributed to Associated Industries of Florida (AIF). In its rebuttal to the Attorney General's Report, AIF asserted that "[i]f individuals have the power to cause these types of damages they should be expected to be held accountable for their actions."²⁴⁹ AIF went on to assert that:

[w]hen a person has been subject to abusive behavior they are guaranteed the right to have their grievances heard by a court of law under the Florida Constitution. The list of safeguards adopted by the courts to prevent frivolous litigation is long. The Federal Rules of Civil Procedure, the Florida Rules of Civil Procedure, the ABA Model Rules of Professional Conduct, and the Rules Regulating the Florida Bar all set forth effective deterrents to filing claims lacking legal merit Therefore, a plaintiff will not be burdened with the costs of litigation because the case will be dismissed before trial begins. The Rules of Procedure and the Rules Regulating the Florida Bar provide for monetary sanctions as well as disciplinary action for lawyers engaging in litigation known to be frivolous. As a result, citizens and lawyers are free to file claims but not without

243. See SLAPP SURVEY, *supra* note 241.

244. See *id.* at ii.

245. See *id.*

246. See *id.* at 5. One of the defendants was sued on four separate occasions incurring a total of \$106,000 in legal fees, while another defendant was represented pro bono. See *id.*

247. See *id.*

248. See *id.*

249. ASSOCIATED INDUSTRIES OF FLORIDA, A PERSPECTIVE ON SLAPP SUITS IN FLORIDA 1.5 (1993).

any fear of retribution for unfounded claims. A similar stance should be adopted in analyzing the SLAPP suit issue. Individuals should continue to exercise their right of free speech but not without accepting liability for any damages caused by abuse of the privilege. If these safeguards are not invoked often enough to satisfy SLAPP legislation supporters, their complaint lies with the judiciary.²⁵⁰

Apparently, the legislature found this assertion to be a persuasive argument. The Attorney General's Office reports that complaints of SLAPP suits continue to filter in, although the office is not continuing to compile data.²⁵¹ AIF affirms that the number of SLAPP suits is, in fact, increasing each year; however, it attributes this increase to "relaxed standing requirements for public interest groups and increased political activism on environmental issues."²⁵²

It seems that opponents of the proposed environmental self-audit legislation have very similar sentiments regarding self-audit privilege and immunity, but this time AIF and other supporters of environmental audit legislation believe that the judicial process and remedies are not as sufficient as they once asserted. Now, they insist that those subjected to abusive behavior have a right to have their grievances heard, but with limitations on the access of evidence regarding the nature and severity of the abuse, evidence that might be valuable in a judicial proceeding. Furthermore, they request that a privilege be enacted with *no* liability for damages caused by abuse of that privilege.

Additionally, in its "1997 Legislative Issues" publication, AIF proposes that "limitations of standing for actions pursuant to the Environmental Protection Act, section 403.412(5)" of the Florida Statutes should be implemented.²⁵³ This section of the Florida Environmental Protection Act (FEPA) applies to any administrative, licensing, and other proceedings carried out for state environmental protection purposes. FEPA provides the state's citizens "standing to intervene as a party on the filing of a verified pleading asserting that the activity, conduct, or product to be licensed or permitted has

250. *Id.*

251. Interview with Diana Sawaya-Crane, Cabinet Aide to Attorney General Bob Butterworth, in Tallahassee, Fla. (Feb. 28, 1997).

252. 1997 ENVIRONMENTAL, *supra* note 196, at 4-7.

253. *Id.* at 4-29.

or will have the effect of impairing, polluting, or otherwise injuring the air, water, or other natural resources of the state.”²⁵⁴ This proposal is grounded upon assertions that safeguards are not in place to protect business from individuals who assert standing to either delay projects or to achieve monetary gain.²⁵⁵

Interestingly, a bill was filed in the Florida House on March 14, 1997,²⁵⁶ which would have required any person who filed or intended to file “any objection, raise any issue of fact, or allege any violation of any provision”²⁵⁷ of the FEPA or the Florida Water Resources Act of 1972²⁵⁸ to produce technical or scientific information in support of the objection or allegation. The legislation, if enacted, would deny standing to any person who failed to comply with this provision.²⁵⁹ The legislation was not passed during the 1997 Session but will be carried over to the 1998 Session.²⁶⁰

While companies may be seeking innovative new ways to reduce the prevalence of nuisance suits filed by litigants fishing for evidence of wrongdoing, AIF reminds us that there are a many judicial safeguards to protect a defendant from such frivolous attacks. Nonetheless, now that Florida businesses, by suppressing anti-

254. FLA. STAT. § 403.412(5) (1995).

255. See 1997 ENVIRONMENTAL, *supra* note 196, at 4-29.

256. See H.R. 1509, Reg. Sess. (Fla. 1997) [hereinafter H.R. 1509]. This legislation was filed by Representative J.R. “Joe” Spratt, whose occupational involvement includes construction, real estate development, and management. See *Representative J.R. “Joe” Spratt — Online Sunshine* (visited May 6, 1997) <<http://www.leg.state.fl.us/house/members/h77.html>>.

257. H.R. 1509, *supra* note 256, § 1.

258. See FLA. STAT. § 373 (1995). This Act relates to state-wide surface and ground water management and Everglades improvement management. See *id.*

259. H.R. 1509, section 1 reads as follows:

In addition to the provisions of chapters 120, 373, and 403, Florida Statutes, any person who files or intends to file any objection, raise any issue of fact, or allege any violation of any provision of chapter 373 or chapter 403, Florida Statutes, or any rule adopted under such chapters, relating to any project for which a permit is required under chapter 373 or chapter 403, Florida Statutes, shall, concurrently with such action or activity, submit technical or scientific information which supports such objection, contention, or allegation. A person who fails to comply with the requirements of this section shall not have standing to bring any administrative or judicial action under chapter 120, Florida Statutes, or under any provision of chapter 373 or chapter 403, Florida Statutes, relating to such project.

H.R. 1509, *supra* note 256, § 1. Chapter 120 of the Florida Statutes is the State's Administrative Procedure Act. See FLA. STAT. §120 (1995).

260. See *Environmental Permitting/Objections* (visited May 6, 1997) <<http://www.scri.fsu.edu/fla-leg/bill-info/1997/h1509.html>>.

SLAPP legislation, have secured the right to silence their opposition with threats of litigation, they move on to push for innovative statutory techniques such as environmental self-audit privilege and immunity laws to suppress incriminating evidence. State industrial interests' future goals include limiting citizens' legal rights to resist activities which have the potential to damage the natural resources of the state and of its citizens.²⁶¹ However, in its "1997 Legislative Issues" release, AIF continues to assert that it "opposes any legislation limiting the ability for business to sue."²⁶²

Given the legislative history of anti-SLAPP proposals and self-audit bills, as well as the business-friendly environmental legislation limiting citizen standing, it appears evident that the proposed environmental self-audit legislation for 1997 was much more than an incentive to encourage and reinforce businesses' efforts to be environmentally conscious. It seems that the self-audit legislative effort was just one facet of a political agenda designed to insulate Florida businesses from civil and administrative liability in the event of regulatory violations or environmental torts, and to remove the obstacles encountered when citizens speak out about environmental concerns regarding industrial growth within the state.

VI. CONCLUSION

There can be no doubt that environmental self-audits can provide positive benefits for the environment and for the companies that perform them. This notion is supported by the large percentage of companies reporting that they regularly perform such audits despite the potential repercussions of such action.²⁶³ However, the proposed legislation introduced to the Florida House and Senate thus far has contained too many loopholes for businesses that are not sufficiently motivated to protect the environment. If this legislation had passed, these businesses would have been invited to take advantage of the opportunity to cloak the truth regarding environmental infractions and injuries to third-parties beneath an asserted privilege. Unless some penalty for engaging in such action is integrated into such legislation, the unintended, possible benefit to busi-

261. See 1997 ENVIRONMENTAL, *supra* note 196, at 4-29.

262. *Id.* at 4-7.

263. See PRICE WATERHOUSE SURVEY, *supra* note 20, at 5.

nesses could be enormous, and the anticipated effect on the potential third-party plaintiff could be devastating.

The EPA's "evidence" that its Incentives for Self-Policing Policy is working is less than impressive. It is unfortunate that the DEP has not gathered sufficient data to declare its policy a success. However, both policies have likely been sabotaged by existing self-audit privilege and immunity laws in several states, and by industries' ongoing effort to affect what amounts to tort reform through self-audit privilege and immunity legislation.

The EPA's policy has resulted in favorable outcomes for most of the companies that have availed themselves of the opportunity to report their violations in exchange for mitigated civil penalties. If the EPA and the DEP hold firm to their policies, as more companies have similar positive experiences, it is probable that the air of distrust may begin to clear. There are already sufficient procedural mechanisms available to deter frivolous lawsuits against Florida businesses.²⁶⁴ Additionally, statutory and common-law provisions, such as attorney-client privilege and the self-evaluative privilege, may in some instances be available to businesses that opt to engage in self-auditing activities. Accordingly, rather than passing laws that have not been proven necessary and could prove to be a substantial hindrance to innocent third-parties seeking to recover damages, the Florida Legislature was correct in refraining from enacting the proposed Environmental Improvement Program and affording the EPA and DEP policies an opportunity to succeed or fail.

264. See ASSOCIATED INDUSTRIES OF FLORIDA, A PERSPECTIVE ON SLAPP SUITS IN FLORIDA 1.5 (1993).