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Environmental Audits in Wyoming: A Practitioner's Guide

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ENVIRONMENTAL AUDITS IN WYOMING: A Practitioner's Guide[1]

INTRODUCTION

A client comes to your office seeking advice. His company is trying to decide whether to perform an environmental audit.[2] The company's environmental compliance manager wants to evaluate the company's facilities for compliance with applicable state and federal environmental regulations. She is concerned that the company's past and/or present operating practices might be putting the company at risk of violating environmental laws. She argues that only a comprehensive audit of all the company's facilities can give it the information necessary to evaluate this potential risk and take action to eliminate it, if necessary. She has reminded her company of the size of potential fines that can be assessed by regulatory agencies for regulatory noncompliance.

However, other corporate managers are concerned that conducting such an audit might be the equivalent of opening Pandora's box. As the situation currently stands, they know of no environmental problems at any of the company's facilities. Conducting an audit could lead to the State or others obtaining a comprehensive summary of the company's environmental problems on a silver platter. As these managers see it, the benefits the company might realize from conducting an audit are outweighed by the possibility that regulatory agencies might use the company's own audit

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2. An "environmental audit" is a:

> voluntary, internal and comprehensive evaluation of one (1) or more facilities or an activity at one (1) or more facilities regulated under this [Wyoming Environmental Quality] Act, or of management systems related to the facility or activity, that is designed to identify and prevent noncompliance and to improve compliance with this act.

WYO. STAT. ANN. § 35-11-1105(a)(i) (Michie Supp. 1996).

The statute also provides that "[o]nce initiated the voluntary environmental audit shall be completed within one hundred eighty (180) days. Nothing in this section shall be construed to authorize uninterrupted voluntary environmental audits." *Id.*

See also Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004, 25,006 (1986) (defining environmental audit as a "systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements") [hereinafter Auditing Policy]; EPA Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy Statement, 60 Fed. Reg. 16,875, 16,877 (1995) [hereinafter Interim Policy] (adopting the 1986 definition of audit) .

against the company and assess fines for regulatory noncompliance based on information from the audit. Why go looking for trouble, they argue, when it is the State's job to protect the environment?

Your client has come to you because he recalls that Wyoming recently enacted "some kind of protection for companies that do their own environmental audits." He wants to know more about Wyoming's environmental audit law and how it might help his company. However, he is also concerned about the implications of having conducted an audit if the Environmental Protection Agency (EPA) ever inspects his facilities because he is uncertain of the EPA's policy regarding audits.

This comment will provide direction to Wyoming attorneys whose clients seek advice about an environmental audit. We first focus on the specifics of the Wyoming environmental audit law. We next consider the potential for federal preemption of Wyoming's law and how that could affect clients. Given the possibility of federal preemption, we then examine the EPA's environmental audit policy. Finally, we offer possible changes to Wyoming's environmental audit law that could benefit both the regulated industry and Wyoming's Department of Environmental Quality.

BACKGROUND

History and Context of Wyoming's Environmental Audit Law

In 1995, the Wyoming Legislature joined a growing number of states[3] passing environmental audit laws. As originally introduced, the audit legislation would have provided both an evidentiary privilege and immunity from civil penalties for environmental violations discovered during audits.[4] Environmental and citizens' groups were concerned that regulated industries would receive a complete evidentiary privilege for

3. For states providing an evidentiary privilege only see: ARK. CODE ANN. §§ 8-1-301 to -312 (Michie 1995); ILL. COMP. STAT. ANN. 5/52.2 (West 1995); IND. CODE ANN. §§ 13-10-3-1 to -12 (Michie 1995); MISS. CODE ANN. § 49-2-71 (1995); OR. REV. STAT. § 468.963 (1995).

For states providing both an evidentiary privilege and a penalty immunity see: COLO. REV. STAT. § 13-25-126.5 (Supp. 1995); IDAHO CODE §§ 9-801 to -811 (1995); KAN. STAT. ANN. §§ 60-3332 to 3339 (Michie 1995); KY. REV. STAT. ANN. § 224.01-010 (1995); MICH. COMP. LAWS ANN. §§ 324.14801 to -.14810 (West 1996); MINN. STAT. ANN. §§ 114C.20 to -.31 (West 1995); N.J. STAT. ANN. §§ 13:1D-125 to -133 (West 1996); S.D. CODIFIED LAWS §§ 1-40-33 to -37 (Michie 1996) (immunity only); TEX. REV. CIV. STAT. ANN. art. 4447cc (1995); UTAH CODE ANN. §§ 19-7-101 to -109 (1996); VA. CODE ANN. §§ 10.1-1198 to 1199 (Michie 1995); WYO. STAT. ANN. §§ 35-11-1105 to 1106 (Michie Supp. 1996).

4. Deirdre Stoelzle, *Environmental Groups Gear Up for Legislature*, CASPER STAR-TRIB., Jan. 7, 1995, at A1; Joan Barron, *Pollution Audit Debate Looms*, CASPER STAR-TRIB., Jan. 21, 1995, at A1.

their audits and escape fines from the Wyoming Department of Environmental Quality (DEQ).[5] However, the legislation as enacted only provides limited evidentiary privileges[6] and immunities[7] from civil fines for regulated entities conducting environmental audits.[8]

Governor Geringer directed the DEQ to prepare an annual report on use of the self-audit provisions by industry.[9] The first such report was filed by the DEQ in January of 1997.[10] As of December, 1996, the DEQ reported no use of the audit provisions by regulated entities in Wyoming.[11] However, three regulated entities had sought the advice of the DEQ regarding audit-related issues. One reported a violation for which the DEQ normally does not assess penalties; another sought technical assistance and was not seeking either the waiver of immunity or the privilege (the DEQ provided the assistance); and the third submitted a description of problems identified in the audit but did not submit the entire audit document and was ineligible for penalty protection.[12]

The DEQ, puzzled by the low participation rate, developed a questionnaire to assess regulated parties' reasons for declining to use the audit provisions.[13] Only 21% of the responding parties (200 questionnaires/78 returned) were aware of the audit provision prior to receipt of the DEQ's questionnaire.[14] However, 90% of respondents indicated an interest in learning more about the self-audit process and 68% of them reported planning to conduct a self-audit in the coming year.[15] The results of the survey indicate a likely growth in use of the audit provisions.

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5. *See, e.g.*, *Letters to the Editor*, CASPER STAR-TRIB., Jan. 26, 1995, at A9; Joan Barron *Bill on Environmental Self-Audits Wins Approval*, CASPER STAR-TRIB., Jan. 27, 1995, at B1; *Letters to the Editor*, CASPER STAR-TRIB., Jan. 31, 1995, at A7; *Letters to the Editor*, CASPER STAR-TRIB., Feb. 2, 1995, at A7; *Encourage Environmental Compliance, Offer Companies Help, Not Web of Secrecy*, CASPER STAR-TRIB., Feb. 12, 1995, at A4.

6. *See infra* notes 24-35 and accompanying text.

7. *See infra* notes 36-39 and accompanying text.

8. Joan Barron, *Geringer Signs Environmental Self-Audit Bill*, CASPER STAR-TRIB., Feb. 21, 1995, at A1.

9. *Id.*

10. Dennis Hemmer, Memorandum to Joint Minerals, Business and Economic Development Interim Committee (Jan. 14, 1997) [hereinafter Memorandum] (on file with the *Land and Water Law Review*).

11. *Id. See also* Joan Barron, *Self-Audit Waivers Haven't Been Used. Debate Continues Over Law's Impact*, CASPER STAR-TRIB., Sept. 22, 1996, at A1 (providing both environmental and industry perspectives on the lack of use of the audit provisions).

12. Memorandum, *supra* note 10, at 1. Note that the regulated entity that submitted a portion of the audit likely has retained its privilege with regard to the entire audit. *See* WYO. STAT. ANN. § 35-11-1105 (Michie Supp. 1996).

13. Memorandum, *supra* note 10, attachs. (Environmental Audit Questionaire, Environmental Self-Audit Questionaire Results).

14. *Id.*

15. *Id.*

The DEQ has also announced a related rulemaking that will create an incentive for small businesses[16] to voluntarily disclose incidents of environmental noncompliance.[17] The rule's purpose is to encourage regulated entities to scrutinize their operations and approach the DEQ for assistance upon discovery of a violation.[18] Under the proposed regulations, small businesses can obtain a penalty waiver for voluntarily reporting violations or discovery of violations through requests for compliance assistance or compliance assistance seminars, provided they take corrective action after discovering violations.[19] The proposed rule thus distinguishes between the mere reporting of an incident of noncompliance and the reporting of an incident of noncompliance within the context of an audit.[20] A penalty waiver for small businesses will be unavailable in certain circumstances.[21] This proposed rule should encourage small businesses, who might not be able to conduct a full audit, to at least examine their operations for environmental compliance.

Wyoming's Approach To Environmental Audits

Wyoming's environmental audit provisions are codified at sections 35-11-1105 and 35-11-1106 of the Wyoming Statutes. Section 35-11-1105 provides definitions and establishes an evidentiary privilege for information obtained through an environmental audit.[22] Section 35-11-1106 provides limited immunity from civil penalties or injunctive relief.[23]

A. Section 35-11-1105: Environmental Audit Privilege

The limited evidentiary privilege is a cornerstone of Wyoming's environmental audit law.[24] This privilege protects an environmental audit

16. The proposed rule defines small business as a regulated entity with 100 or fewer employees in all of its facilities or operations. Small Business Voluntary Disclosure Incentive § 2(a) (proposed) (on file with the *Land and Water Law Review*) [hereinafter Small Business].

17. Joan Barron, *DEQ Drafts Self-Audit Policy For Small Businesses*, CASPER Star-Trib., Oct. 6, 1996, at B1.

18. Small Business, *supra* note 16, § 1.

19. *Id.* § 3(a),(b).

20. *See infra* notes 22-23 and accompanying text. *See also infra* text accompanying notes 100-02 (describing the EPA's penalty reduction policy available to entities reporting violations outside of the context of an audit).

21. Small Business, *supra* note 16, §§ 4(a)(i)-(x).

22. *See infra* notes 24-35 and accompanying text.

23. *See infra* notes 36-39 and accompanying text.

24. The statutory evidentiary privilege established by WYO. STAT. ANN. § 35-11-1105(b) was "created to protect the confidentiality of communications relating" to voluntary environmental audits regulated entities may conduct to "assess and improve compliance with the [Wyoming Environmental Quality] [A]ct." *Id.*

report[25] from admission as "evidence in any civil, criminal, or administrative proceeding."[26] The "party asserting the privilege . . . has the burden of proving the privilege."[27] The party seeking the privilege may waive it either by failing to assert it or introducing "any part of an environmental audit report as evidence in any proceeding, including reporting of violations under W.S. 35-11-1106(a)."[28] This means that the privilege and the immunity provisions provided under Wyoming Statutes are mutually exclusive.[29]

This section does provide for disclosure of information from the audit in certain situations. After an *in camera* review,[30] a civil court or a

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25. An "environmental audit report" is defined as:

> [A] set of documents, each labeled "Environmental Audit Report: Privileged Document," prepared as a result of an environmental audit and may include field notes and records of observations, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, computer-generated or electronically recorded information, maps, charts, graphs and surveys if supporting information is generated or developed for the primary purpose and in the course of an environmental audit. An environmental audit report, when completed, shall have three (3) components:
>
> (A) An audit report prepared by the auditor, including the scope, commencment [sic] and completion dates of the audit, the information gained in the audit, conclusions and recommendations, together with exhibits and appendices;
>
> (B) Memoranda and documents analyzing the audit report and discussing implementation issues; and
>
> (C) An audit implementation plan that corrects past noncompliance, improves current compliance and prevents future noncompliance.

WYO. STAT. ANN. § 35-11-1105(a)(ii) (Michie Supp. 1996).

26. *Id.* § 1105(c). The privilege expressly does *not* extend to:

> (i) Documents, communications, data, reports or other information required to be collected, developed, maintained, reported or otherwise made available to a regulatory agency pursuant to any regulatory requirement of this act or any other federal or state law or regulation;
>
> (ii) Information obtained by observation, sampling or monitoring by any regulatory agency;
>
> (iii) Information obtained from a source independent of the environmental audit;
>
> (iv) Documents existing prior to the commencement of the environmental audit; or
>
> (v) Documents prepared subsequent to and independent of the completion of the environmental audit.

Id. § 1105(d).

27. *Id.* § 1105(c)(iv).

28. *Id.* § 1105(c)(i).

29. *See infra* notes 40-52 and accompanying text (discussing clients' possible courses of action in recognition of this mutual exclusivity).

30. For purposes of the audit provisions, "*in camera* review" is defined as "a hearing or review in a courtroom, hearing room or chambers to which the general public is not admitted." WYO. STAT. ANN. § 35-11-1105(a)(iii) (Michie Supp. 1996). This section further provides that "[a]fter such hearing or review, the content of oral and other evidence and statements of the judge and counsel shall be held in confidence by those participating in or present at the hearing or review, and any transcript of the hearing or review shall be sealed and not considered a public record until its contents are disclosed, pursuant to this section, by a court having jursidiction over the matter." *Id.*

hearing officer in an administrative proceeding may require disclosure of all or part[31] of the report if the court or hearing officer determines that:

> (A) the privilege is asserted for a fraudulent purpose;
> (B) the material is not subject to the privilege;
> (C) material shows evidence of noncompliance with this act or any federal environmental law or regulation and appropriate efforts to achieve compliance were not initiated as promptly as circumstances permit and pursued with reasonable diligence; or
> (D) the information contained in the report demonstrates a substantial threat to the public health or environment or damage to real property or tangible personal property in areas outside of the facility property.[32]

In a criminal proceeding, different procedures exist for asserting the privilege. The prosecuting attorney can obtain the audit report with probable cause, but must place it under seal.[33] The privilege is waived if the person seeking to protect the audit report does not file with the court a petition requesting an *in camera* hearing within twenty days.[34] The prosecuting attorney may then review the privileged material after a judge issues an order scheduling the *in camera* review hearing.[35]

B. Section 35-11-1106: Limited Immunity

The other cornerstone of Wyoming's environmental audit law is the limited immunity available under certain circumstances. Operators who voluntarily disclose violations discovered through an audit within sixty days of its completion may avoid civil penalties or injunctions.[36] However, this immunity is limited in several ways. If reporting the violation is required under federal, state, local ordinance or court order, the immunity does not exist because the reporting is considered mandatory.[37] Additionally, the immunity is not available if a court finds a pattern of serious violations within a three year time period.[38] Finally, the immunity may also be lost if any one of the following conditions is met:

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31. *See Id.* § 1105(c)(ix) (providing for disclosure of "those portions of an environmental audit report relevant to issues in dispute in the proceeding").
32. *Id.* § 1105(c)(ii).
33. *Id.* § 1105(c)(v).
34. *Id.* § 1105(c)(vi).
35. *Id.*
36. *Id.* § 1106(a).
37. *Id.* § 1106(b).
38. *Id.* § 1106(d) .

(i) The facility is under investigation for any violation of this act at the time the violation is reported;
(ii) The owner or operator does not take action to eliminate the violation within the time frame specified in an order affirmed by the council or otherwise made final pursuant to W.S. 35-11-701(c)(ii);
(iii) The violation is the result of gross negligence or recklessness; or
(iv) The department has assumed primacy over a federally delegated environmental law and a waiver of penalty authority would result in a state program less stringent than the federal program or the waiver would violate any federal rule or regulation required to maintain state primacy. If a federally delegated program requires the imposition of a penalty for a violation, the voluntary disclosure of the violation shall to the extent allowed under federal law or regulation, be considered a mitigating factor in determining the penalty amount.[39]

Other factors potentially affecting the client's ability to assert the privilege and immunities include; the client's environmental history, possible preemption by federal law, and the State's primacy over environmental programs.

C. Importance of Client's Environmental History

For purposes of applying Wyoming's environmental audit law, clients can be divided into two general categories. The first group includes companies with clean environmental records. The second group of clients are those with poor environmental records. The protections available to a client under the environmental audit provisions depend on which group the client is in.

Accordingly, attorneys will want to consult with their client about its environmental record. "Clean" clients likely will be eligible for the penalty immunities under the audit provisions.[40] However, clients with more complicated environmental records may not be eligible for the penalty immunities.[41] A record showing violations that arose from the use of a particular water treatment system, for instance, may not be problematic if

39. *Id.* § 1106(a)(i-iv). *See also infra* text accompanying notes 75-105 (regarding the EPA's response to audit laws in states with primacy over federal environmental laws).
40. *See supra* notes 36-39 and accompanying text.
41. *Id.*

the client is now, more than three years later, experiencing air quality violations.[42] However, any record of serious violations that a court might construe as a "pattern of continuous or repeated violations of environmental laws . . . that were due to separate and distinct events giving rise to the violations, within the three (3) year period prior to the date of disclosure" may indicate that a client might not benefit from the audit provisions.[43] Accordingly, properly characterizing a client's environmental record before advising him to proceed with an environmental audit is important.

A client with no history of environmental violations has few reasons not to pursue an environmental audit. The audit provision encourages a "clean" client to report if it discovers a serious violation[44] that includes effects beyond its property line or presents a substantial threat to the public health or environment.[45] The client cannot assert a privilege in such a situation since the privilege does not extend to audit report results that demonstrate such a violation.[46] However, the client will likely still be eligible for immunity from civil penalties.[47]

Cleaning up a violation of this type likely will be costly to the client. However, by reporting the violation to the DEQ at the time of discovery, the client may avoid civil penalties and may also have an opportunity to take proactive steps to remediate some of the environmental damage beyond its property. In addition, the client who has disclosed the violation (and possibly has begun remediation) is arguably in a better bargaining position if plaintiffs begin filing civil lawsuits. Finally, the incentive to report encourages companies to be good corporate citizens.

If, however, the violation is one which is easily corrected, a "clean" client may not wish to use the immunity but rather use the privilege. By applying for immunity, the client will lose the privilege; the audit then becomes discoverable and the client is open to civil suit for the violation. Relying on the privilege might be more prudent for such a client since the possibililty of civil action is reduced. Additionally, if an enforcement agency conducts an inspection and the violation has been cleaned up, the

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42. WYO. STAT. ANN. § 35-11-1106(d) (Michie Supp. 1996).

43. *Id.*

44. The Wyoming statute (consistent with all other states' environmental audit provisions) provides no definition of "serious violation."

45. The Wyoming statute (consistent with all other states' environmental audit provisions) provides no definition of "substantial threat to the public health or environment."

46. *Id.* § 1105(c)(ii)(D) .

47. *See supra* notes 36-39 and accompanying text. Note that the immunity may not apply if DEQ's waiver of the penalty would jeopardize the state's federally delegated authority under any federal environmental law. *Id.*

investigator will either have no questions (if the remediation is not obvious) or will have to overcome the client's privilege to learn about the violation.[48] If projected remediation costs are less than or equal to the possible penalty, the client might see it as an advantage to simply clean up the violation and avoid disclosure.

While the audit privilege provision seems to encourage immediate remediation of a "clean" client's minor violations, this course is not without risk. For instance, if remediation becomes more complicated than the client first imagined, the wisest route may be to report the violation prior to the sixty day deadline, receive the penalty immunity, and continue the remediation. The stakes are too high to be caught in the middle of remediating an unreported violation.

Clients with a history of environmental violations should be more cautious about conducting environmental audits, since the penalty immunity might not be available to them. However, as the EPA targets its investigations on facilities with poor environmental compliance records, a company is not likely to avoid civil penalties in any event.[49] In addition, by learning of violations through an audit, the company has the opportunity to begin remediation and possibly save money that might otherwise be spent in years of litigation.

Clients with poor environmental compliance histories are not constrained from asserting the privilege for their audit results. Such clients have no incentives to report the violation, as penalty immunity is unlikely, so they will not automatically waive the privilege.[50] If the company takes prompt action to clean up the violation, the audit privilege may hold, even if challenged by the EPA, the DEQ, or a citizen's group. The burden of proof is on the company to provide evidence that the appropriate efforts to clean up the violation were promptly made and that clean up has been pursued with due diligence.[51]

The privilege does not extend to any violations that are demonstrated to be a substantial threat to public health or the environment or that threaten damage to real or tangible personal property outside the

48. *See supra* notes 30-35 and accompanying text.

49. Auditing Policy, *supra* note 2, at 25,007. *See also* Restatement of Policies, 59 Fed. Reg. 38,455, 38,458 (1994) (adopting the 1986 enforcement policy) [hereinafter Restatement]; Incentives for Self-Policing, 60 Fed. Reg. 66,707, 66,712 (1995) (establishing the applicability of the final policy statement "to the extent existing EPA enforcement policies are not inconsistent") [hereinafter Incentives].

50. WYO. STAT. ANN. § 35-11-1105(c)(i) (Michie Supp. 1996).

51. *Id.* § 1105(c)(ii)(C) .

company's property.[52] A serious violation of this sort should be reported immediately to the DEQ, although no penalty immunity will be available to a bad actor and no privilege can be asserted. Companies, particularly those with a history of compliance violations, are at a disadvantage if serious violations they learned of through an audit are also discovered by an enforcement agency.

D. Federal Preemption of State Audit Laws

In advising a client whether to conduct an audit, a practitioner should consider the possibility of federal law preempting Wyoming's audit law. As in all legislative realms occupied by both states and the federal government, state audit laws can be subject to federal preemption[53] because of the evidentiary privilege which conflicts with the purpose of most federal environmental statutes. The Federal Rules of Evidence, Rule 501, reflect the federal courts' general rejection of state-created statutory and common law privileges in federal civil cases brought under a federal statute.[54]

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52. *Id.* § 1105(c)(ii)(D).

53. *See, e.g.*, Kleppe v. New Mexico, 426 U.S. 529 (1976) (holding New Mexico's law allowing the round-up, removal and sale of burros from federal public land under the New Mexico Estuary Law was in direct conflict with the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. 1331 (1994)).

Congress has the power to preempt state law under the Supremacy Clause of the United States Constitution. Pacific Gas & Elec. v. State Energy Resources Conservation Comm'n, 461 U.S. 190 (1983). Federal law may preempt state law expressly. *Id.* (quoting Fidelity Federal Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982)). Federal law may also preempt state law if Congress' intent may be found from a "scheme of federal regulations pervasive as to make reasonable the inference that Congress left no room to supplement it." *Id.* (internal quotations marks omitted) (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963)). Neither of these types of preemption apply to state environmental audit laws. Although Congress has considered federal environmental audit legislation, none has been enacted into law. However, a third type of preemption may apply with regard to audit laws. Audit laws creating statutory privileges may be preempted to the extent that state audit laws actually conflict with federal law. "Such a conflict arises when compliance with both federal and state regulations is a physical impossibility." *Id.*

State environmental audit laws that contain either privilege or immunity from penalty provisions may substantially conflict with the purpose of federal environmental laws. *See infra* notes 54-70 and accompanying text.

54. The Supreme Court, for example, has said, "[w]hatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." United States v. Nixon, 418 U.S. 683, 710 (1974). *See generally* FED. R. EVID. 501.

Preemption also raises delegation issues, as most states have been granted primacy in administering federal environmental laws. Audit statutes with broad immunity or privilege language may abrogate state primacy, causing EPA to withdraw recognition of the state's administration program. *See infra* notes 71-72 and accompanying text. Wyoming's statute arguably does not raise delegation issues because penalty immunities are unavailable if they would violate federal law or rules or regulations regarding state primacy. *See infra* notes 73-74 and accompanying text. *See also* Virginia Morton Creighton, Comment, *Colorado's Environmental Audit Privilege Statute: Striking The Appropriate Balance?*, 67 U. COLO. L. REV. 443, 465-67 (1996).

However, federal courts will recognize state privileges where state decisional law provides the rule of decision.[55] A federal district court recognized the self-critical analysis privilege in *Bredice v. Doctor's Hospital, Inc.*,[56] a medical malpractice action.[57] In *Bredice*, the court refused to order discovery of documents relating to staff meetings held to review, analyze and evaluate clinical work of staff members for the purpose of continued improvements in care and treatment of patients.[58]

On the other hand, the seventh circuit refused to recognize a state privilege in a federal antitrust suit brought by a private litigant against an Illinois hospital.[59] The court distinguished *Bredice* because it was a malpractice action whereas an action under federal antitrust law implicated a strong public interest in favor of private enforcement actions.[60]

Environmental audit privileges protect regulated entities in the same way as the self-critical analysis privilege discussed by the courts in *Bredice* and *Memorial Hospital* protects hospitals. Thus, it is likely that federal courts hearing a tort or other state law cause of action which provides a state rule of decision will find the regulated entity's privilege

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55. FED. R. EVID. 501. "However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law." *Id.*

The Report of the House Committee on the Judiciary concluded that this proviso was to ensure that State privilege law applied in civil actions governed by the Erie doctrine. "The rationale underlying the proviso is that federal law should not supersede that of the States in substantive areas such as privilege absent a compelling reason." HOUSE COMM. OF JUDICIARY, FED. RULES OF EVID., H.R. REP. NO. 650, at 8 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7082.

56. 50 F.R.D. 249 (D.D.C. 1970). The self-critical analysis privilege was first identified in the *Bredice* case where the court concluded that the public interest dictated that certain types of information remain confidential so that the flow of ideas and advice "can continue unimpeded." *Id.* at 251. The self-critical analysis privilege is widely believed to be the common law privilege that forms the basis of a number of state audit statutory privileges. *See generally* David Sorenson, Comment, *Auditing Policy and Potential Conflict with State-Created Environmental Audit Privilege Laws*, 9 TUL. ENVTL. L.J. 483 (1996).

Commentators have examined two other privileges that might protect audits. *See* Kirk F. Marty, Note, *Moving Beyond the Body Count and Toward Compliance: Legislative Options for Encouraging Environmental Self-Analysis*, 20 VT. L. REV. 495 (1995) (discussing the work product privilege and the attorney client privilege); John Davidson, *Privileges for Environmental Audits: Is Mum Really the Word?*, 4 S.C. ENVTL. L. J. 111 (1995). The focus of this comment is Wyoming practitioners' use of the audit statute; common law privileges will not be discussed in detail as they are not provided for in the statute.

57. *Id.*

58. *Bredice*, 50 F.R.D. at 250. *Compare with* Harston v. Campbell County Mem'l Hosp., 913 P.2d 870 (Wyo. 1996) (deciding that the district court improperly denied discovery of certain hospital records without an *in camera* review to determine if the statutory privilege extends to plaintiff's incident reports and materials relating to the appointment and review of her physician).

59. Memorial Hosp. for McHenry County v. Shadur, 664 F.2d 1058 (7th Cir. 1981).

60. *Id.* at 1062.

survives. However, if the entity is sued under federal law, the court is likely to find that the public interest in private enforcement actions outweighs the state privilege.[61]

An entity in federal court under both federal and state law causes of action may find that the state privilege survives. Again, no federal court has considered this question with regard to an audit privilege statute or any other state privilege statute. However, a Florida district court applied Florida's common law self-critical analysis privilege in a CERCLA and state law action for cost recovery.[62] The court compared the self-critical analysis privilege to Rule 407 of the Federal Rules of Evidence, which excludes evidence of subsequent remedial measures.[63] It adopted the common law privilege under the authority of Rule 501 which allows a court to recognize a privilege when it "promotes sufficiently important interests to outweigh the need for probative evidence."[64]

Finally, federal courts have not recognized state evidentiary privileges when an enforcement action is brought by the federal government.[65] The *Dexter* court discussed the self-critical analysis privilege in the context of the defendant's motion to prevent discovery of self-evaluative documents.[66] Numerous courts have recognized the self-critical analysis privilege, based on the proposition that "[t]he public interest may be a reason for not permitting inquiry into particular matters of discovery."[67] However, the court declined to recognize the self-critical analysis privilege in *Dexter* because it would frustrate Congress' express declaration of public policy in the Clean Water Act.[68]

Thus, a regulated entity asserting an evidentiary privilege under Wyoming law to protect audit results is unlikely to succeed if sued in federal court under federal question jurisdiction.[69] Further, the evidentiary audit privilege is nonexistent if the entity is sued in federal court by the federal government. Finally, the survival of an evidentiary privilege in suits in federal court under mixed questions of state and federal is uncer-

61. *Id.*
62. Reichold Chemicals, Inc. v. Textron, Inc., 157 F.R.D. 522 (N.D. Fla. 1994).
63. *Id.* at 524.
64. *Id.* at 526 (quoting Trammel v. United States, 445 U.S. 40, 51 (1980)).
65. United States v. Dexter Corp., 132 F.R.D. 8 (D. Conn. 1990).
66. *Id.* at 9.
67. *Id.* (internal quotation marks omitted, citing *Bredice*, 50 F.R.D. at 250-251).
68. *Dexter*, 132 F.R.D. at 9-10.
69. *Memorial Hosp. for McHenry County*, 664 F.2d at 1063."As to the Hospital's claim that this conflict between state and federal law [relating to privilege] places him [sic] 'on the horns of an insoluble dilemma,' we view this dilemma as wholly illusory when considered in light of the Supremacy Clause of the United States Constitution." *Id.*

tain.[70] At a minimum, attorneys should stress the inherent unreliability of the statutory audit privilege.

E. State Delegated Authority

Explicit delegation issues arise in the context of many state audit laws when the statute calls for blanket reduction or elimination of penalties for reported violations of federal environmental laws.[71] Under most federal environmental laws, states may undertake enforcement programs with the approval of federal agencies; generally, state programs must meet certain criteria laid out in the federal statute that the state seeks to enforce. Thus, if an audit law provides blanket penalty immunities, it will likely conflict with the enforcement purposes of the federal legislation the state has been delegated to enforce.

If a state's environmental audit law is preempted because it impermissibly conflicts with the purposes of a federal law, a state risks losing its delegated authority. For example, the EPA recently rejected proposals from Idaho, Michigan and Texas to administer the Acid Rain provisions of the Clean Air Act. The EPA indicated that these states may receive final approval of their permit programs upon modification of their audit laws.[72]

However, Wyoming's audit law contains a specific provision denying penalty immunities if extending the immunity would result in a state program less stringent than the federal program or if penalty immunity would itself be a violation of federal regulations required to maintain state

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70. *Textron*, 157 F.R.D. at 526 (holding that the privilege survives). *But see* Memorial Hosp., 664 F.2d at 1061 (holding that the privilege does not survive). *See also* Perrignon v. Bergen Brunswig Corp., 77 F.R.D. 455 (N.D. Cal. 1978); Robinson v. Magovern, 83 F.R.D. 79, 84 (W.D. Pa. 1979). Courts that have rejected the privilege focused on the almost certain failure of plaintiff's case without the requested information. *Memorial Hosp.*, 664 F.2d at 1062 ("To deny Dr. Tambone access to this information may very well prevent him from bringing his action altogether."). *Id.* at 1063.

71. Audit privileges raise implicit delegation issues because the privilege provisions are not in direct conflict with a federal statute that the state must enforce. However, to the extent that statutory privileges hamper a state's enforcement efforts, a federal agency may find that the state can no longer uphold its federally delegated responsibilities. *See infra* note 105 and accompanying text (discussing the implications of Wyoming's audit privilege and concerns it might raise for the EPA).

72. Targeted Environmental Legislation Given Best Chance in Congress, (BNA) Jan. 24, 1997. *See also* Clean Air Act Proposed Disapproval or in the Alternative, Proposed Interim Approval of Operating Permits Program; State of Idaho, 60 Fed. Reg. 54,990, 55,000 (1995).

EPA's suggestion that Idaho could receive interim approval to operate its Title V program by agreeing to modify its audit statute by removing the statutory blanket immunity provisions may be mooted by the fact that Idaho's audit law expires in 1997. However, neither Michigan nor Texas has indicated any intention of bringing their audit laws into line with EPA requirements. Targeted Environmental Legislation Given Best Chance In Congress, *supra*.

primacy.[73] This delegation savings provision was added to the law to ensure that Wyoming would not, through operation of its audit law, run afoul of its federally delegated responsibilities. For instance, an entity seeking a penalty immunity for a Clean Air Act violation discovered during an audit will not receive the immunity if the Clean Air Act mandates certain penalties. Thus, as a purely legal matter, the Wyoming law will likely survive EPA scrutiny.[74] However, the savings provision creates uncertainty for the regulated community because the particular violation which might trigger the savings provision in a specific case cannot be known until application is made for the immunity.

EPA's Approach To Environmental Audits

Despite Wyoming's attempts to create an audit statute which will not raise delegation issues directly, other portions of the Wyoming statute may cause the EPA to question the state's ability to satisfy its federally delegated responsibilities. For instance, the privilege provisions raise hurdles for the state in pursuing a criminal enforcement action.[75] The EPA has stated that it will carefully scrutinize any statute that does not appear to guarantee basic protections to public health and the environment.[76] As the EPA has the power to reassert primacy for enforcement of federal environmental laws, a practitioner should consider how the EPA's audit policy differs from the Wyoming law.

The EPA first issued an environmental auditing policy statement in July of 1986, encouraging industry to use audits as a means to greater environmental compliance.[77] The agency regards environmental audits as a means of establishing cooperation between the regulated community and federal enforcement efforts, which can result in greater compliance with federal environmental laws.[78] The EPA recognized that any official policy

73. *See supra* note 38 and accompanying text. States such as Texas and Colorado extend blanket civil and criminal immunity from penalties for reported violations. In states such as these, the EPA may withdraw its approval of the state program to administer federal environmental laws. This would drastically change the enforcement environment in a state. *See* Creighton, *supra* note 54, at 466-69.

74. *See infra* note 105 and accompanying text.

75. *See supra* notes 32-34 and accompanying text. Note, however, that the statute requires that any records, reports or other information required by federal law be turned over to DEQ and cannot be protected by the audit privilege.

76. Incentives, *supra* note 49, at 66,710.

77. Auditing Policy, *supra* note 2, at 25,004.

78. Incentives, *supra* note 49, at 66,707. *See also* Auditing Policy, *supra* note 2, at 25,006 ("Auditing can result in improved facility environmental performance, help communicate effective solutions to common environmental problems, . . . and generate protocols and checklists which help facilities better manage themselves.").

to request audits could be a disincentive to industry to conduct audits.[79] However, EPA acknowledged that it would continue to address enforcement efforts at facilities with poor environmental records and might request audits in the course of enforcement proceedings.[80] The EPA also encouraged states to adopt auditing policies but to be mindful of state responsibilities under federal statutes.[81]

The EPA's 1986 policy was widely viewed as creating few incentives for industry to engage in audits.[82] The EPA promised to continue to request audits in its enforcement actions; however, the agency also promised to continue to direct its inspections toward those facilities with poor environmental records.[83] In addition, while the EPA encouraged states in their programs to consider case-by-case reductions in civil fines if a company has self-reported, it created no across-the-board reductions in fines.[84] Due to criticisms of the 1986 policy, the EPA began a reevaluation process of its audit policy in 1994.[85] The first document it released was an interim audit policy that announced proposed changes in its penalty and enforcement provisions to provide audit incentives to industry.[86]

To be eligible for these incentives, companies must comply with a number of conditions. A company must engage in self-policing and voluntarily disclose and correct violations promptly.[87] Violations posing an imminent and substantial endangerment must be expediently remedied; companies must also seek to avoid repeat violations.[88] Companies must demonstrate that they have taken appropriate precautions to avoid violations.[89] Finally, companies should cooperate with the EPA to the extent necessary for the EPA to determine whether its policy may be applied.[90] In most cases, companies meeting these conditions could receive a seventy-five percent reduction in gravity based penalties.[91]

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79. Incentives, *supra* note 49, at 66,707.

80. *Id.*

81. *Id.*

82. Sorenson, *supra* note 56, at 483; Robert Darnell, Note, *Environmental Criminal Enforcement and Corporate Environmental Auditing: Time for a Compromise?*, 31 AM. CRIM. L. REV. 123 (1993). *But see* Linda Richenderfer & Neil R. Bigioni, *Going Naked Into the Thorns: Consequences of Conducting an Environmental Audit Program*, 3 VILL. ENVTL. L.J. 71 (1992) (concluding that some benefits accrue to companies undertaking environmental audits).

83. Auditing Policy, *supra* note 2, at 25,007.

84. *Id.* at 25,008.

85. Restatement, *supra* note 49, at 38,455.

86. Interim Policy, *supra* note 2, at 16,875.

87. *Id.* at 16,877.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* "Gravity based penalties" are defined by EPA as "that portion of the penalty over and

The Interim Policy announced the EPA's strong objection to state created audit privileges and promised greater scrutiny of states with privilege or penalty immunity laws.[92] The EPA's concern with state privilege laws was the potential for vastly different penalties under federal law depending on a company's location.[93] However, the EPA recognized the importance of states as "partners in federal enforcement" and indicated that it would notify states of any provisions of their audit statutes that concerned the EPA.[94]

This Final Policy extends many of the same incentives to industry as were offered in the Interim Policy.[95] However, the regulated community has additional incentive in EPA's elimination of all gravity based penalties contingent upon nine conditions.[96] If companies do not meet all nine conditions, they are still eligible for a 75 percent reduction in penalties, as set out in the Interim Policy and extended in the final policy.[97]

In addition to audit incentives that eliminate or minimize civil fines, companies meeting the nine conditions to avoid civil penalties will also not be recommended by the EPA for criminal charges.[98] The EPA will also continue the policy of not requesting audits to initiate enforcement investigations. However, if the EPA learns independently of the violation, it may request the audit.[99]

Thus, while the EPA has signaled its approval of state penalty reduction and immunity provisions, significant differences remain between the EPA guidelines and the Wyoming audit law. First, the EPA will not recognize a state audit privilege.[100] An attorney cannot stress enough the

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above the economic benefit, i.e., the punitive portion . . . rather than that representing a defendant's economic gain from non-compliance." Incentives, *supra* note 49, at 66,711.

92. Interim Policy, *supra* note 2, at 16,878.

93. *Id.*

94. *Id. See also infra* note 105.

95. *See* Incentives, *supra* note 49, at 66,707.

96. Those conditions are: (1) the violation must have been discovered during an environmental audit; (2) the company must have discovered the problem voluntarily, and not as a result of any legal assessment requirements; (3) the company must disclose the violation within ten days; (4) the company must discover and disclose the violation prior to institution of agency action or citizen suit; (5) the company must rectify the violation within 60 days or notify EPA in writing if correction will take longer than 60 days; (6) the company must agree in writing to prevent a recurrence of the violation; (7) the company must not have any similar violation on its record within the last three years; (8) the violation must not have resulted in serious harm or imminent and substantial endangerment or have violated the terms of any judicial consent agreement or court order; (9) the company must cooperate with EPA in providing access to its information and employees. *Id.* at 66,711-66,712.

97. *Id.* at 66,711.

98. *Id.*

99. *Id.*

100. This policy has been explicit since 1994. *See* Restatement, *supra* note 49, at 38,457; Incentives, *supra* note 49, at 66,710.

uncertainty that attaches to the state audit privilege in the context of federal authority.[101] Second, the EPA will not recommend a criminal prosecution if a company fully discloses a violation and acts expediently to clean it up. Under the Wyoming law, reporting the violation to be eligible for the immunity eliminates the privilege—the two are mutually exclusive—although the statute does not expressly exempt a party from criminal prosecution if the violation is reported. However, implicit in the EPA's criminal prosecution policy is a rejection of the Wyoming provision allowing the entity time to assert the privilege and have a court conduct an *in camera* review.[102]

Last, the EPA will assess a 75 percent reduction in penalties for violations reported outside of the context of an environmental audit. In this respect the EPA's policy is broader than the Wyoming statute because the only statutory means to penalty immunity is through reporting the violation discovered through an audit.[103] In addition, the EPA will continue to impose economic penalties, even if it grants the penalty reduction or immunity.[104] This contrasts with the state law, which does not impose economic penalties.[105]

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101. *See supra* notes 65-99 and accompanying text.

102. *See supra* notes 33-35 and accompanying text.

103. *See supra* notes 25-26 and accompanying text.

104. "Economic penalties" are the amount of economic benefit conferred on an entity for noncompliance with an environmental law. Incentives, *supra* note 49, at 66,712.

105. EPA has begun no official review of Wyoming's audit statute to determine whether any of the environmental programs delegated to the state should be revoked. Chris Tollefson, *EPA Denies Lagging in Protection Program Transfer*, CASPER STAR-TRIB., Mar. 11, 1997 at A1; Chris Tollefson, *No Violations Withheld From Public, Law's Proponets Say*, CASPER STAR-TRIB., Mar. 19, 1997 at A1. However, the EPA released a policy statement to ensure that state audit laws are reviewed in a consistent manner. The EPA signalled approval of state audit laws that: allow the state (1) to obtain complete and immediate injunctive relief, (2) to recover various civil penalties, (3) to obtain criminal sanction and fines for willful and knowing violations of federal law, (4) to retain information gathering authority as required under federal law, (5) to make evidentiary privileges inapplicable in criminal proceedings, and (6) to preserve the right of the public to obtain information about noncompliance, report violations and the like. *EPA Issues Multimedia Policy to Oversee Review of State Audit Laws*, INSIDE EPA, Feb. 21, 1997, at 6. The EPA stated that it will resolve ambiguities in state laws by consulting state attorneys general for opinion letters.

Wyoming's statute provides most of these safeguards but may suffer from ambiguity. *See supra* notes 22-39 and accompanying text. For instance, the evidentiary privilege is not presumptive in criminal prosecutions, but the entity may assert the privilege by application to the court within 20 days of the suit. *See supra* notes 33-35 and accompanying text. However, the law provides for court ordered disclosure of material that shows evidence of noncompliance with any federal environmental law. WYO. STAT. 35-11-1105(c)(iii) (referring to WYO. STAT. 35-11-1105(c)(ii) (Michie Supp. 1996) ("The material shows evidence of noncompliance with this act or any federal environmental law . . . .").

ANALYSIS

Recommendations

Environmental audit provisions have the potential to greatly assist agencies in their monitoring and enforcement of environmental compliance. Because few regulated entities seem to be taking advantage of Wyoming's audit statute, the audit provisions might be modified either through legislative action or DEQ rulemaking to make the provisions more attractive to the business community.[106] The legislature or the DEQ could look at several options for modifying the current provisions.

One option is to generally reconsider the privilege provision. The EPA cites a Price-Waterhouse study that found industry looked for immunity from penalty-type incentives in deciding whether to conduct audits.[107] Availability of an audit privilege was not an element in the entity's decision to conduct audits.[108] The legislature might consider removing the privilege portion of the audit provisions entirely. South Dakota took this approach in passing its environmental audit provisions.

The South Dakota audit statute creates no privilege for audit documents.[109] Regulated entities are only eligible for civil and criminal penalty immunity if violations discovered during an audit are reported to South Dakota's Department of Environmental Quality.[110] The statute expressly makes audit documents subject to discovery.[111] In addition, the audit may not be used as a defense to a civil or criminal action under certain conditions: willful violation of state or federal environmental laws; a pattern of repeated environmental violations; failure to correct within sixty days of discovery of a violation; or assessment of a civil penalty following notice of violation within two years of the date of disclosure.[112] The advantage to South Dakota's approach is that it eliminates any uncertainty concerning an audit's confidentiality.

However, simply better defining Wyoming's environmental audit privilege provision is probably more beneficial to regulated entities. Such action would also remove much of the uncertainty regarding the confidentiality of the audit.[113] In addition, it would not necessarily impede either

106. Alternatively, the regulated community may be showing little interest because the law was enacted less than two years ago.

107. Incentives, *supra* note, 49 at 66,707.

108. *Id.* at 66,710.

109. S.D. CODIFIED LAWS §§ 1-40-33 to -37 (Michie 1996).

110. *Id.* § 1-40-34.

111. *Id.* § 1-40-35.

112. *Id.* § 1-40-36.

113. However, the regulated community should still be wary of the extent of a state evidentiary

the DEQ's enforcement mission or civil litigants pursuing state or federal causes of action. As Wyoming's law is presently written, an entity can perform an audit and receive the protection of an evidentiary privilege in civil actions, subject to *in camera* review by a court or hearing officer.[114] This gives unwary defendants the sense that their audit may be more well-protected than it is.

In addition to the possibility of a federal court simply refusing to recognize the state privilege,[115] the *in camera* review process is treacherous. The questions to be asked at an *in camera* review are fact based and can be highly technical. Presumably, a court could render a reasonable decision on the issue of fraudulent assertion of the privilege.[116] However, determining which material is properly "in" the audit documents and thus subject to the privilege may be difficult as the information is likely to be highly technical.[117] In addition, assessing whether the audit results demonstrate a serious threat to public health or the environment can also be a highly technical question.[118]

Some of the uncertainty regarding the outcome of an *in camera* review could be eliminated if the courts and the DEQ developed a list of well-respected experts in such fields as hydrology and hazardous waste. Courts or administrative hearing officers could draw from this list to appoint Special Masters who could review the evidence and render a decision about whether the audit meets the conditions which would force disclosure.[119]

Alternatively, the courts might defer to the DEQ in making *in camera* determinations about audit documents. While this would create a greater risk of bias than appointing a Special Master (presumably one from out-of-state, to avoid the appearance of an insider reviewing industries' audits), it would free the courts from making decisions about highly technical information. The DEQ might appoint someone from within the agency with special expertise to determine whether the privilege should apply. The DEQ could accomplish either of these alternatives to *in camera* review of audits through a rulemaking.

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privilege. *See supra* notes 53-70 and accompanying text.

114. WYO. STAT. ANN. § 35-11-1105(c) (Michie Supp. 1996). Note that § 35-11-1105(c)(iii)-(ix) establishes a different procedure for criminal prosecutions, which requires an affirmative act to assert the privilege on the part of the entity following disclosure of the audit with probable cause. *See supra* notes 33-35 and accompanying text.

115. *See supra* notes 59-60 and accompanying text.

116. *Id.* § 35-11-1105(c)(ii)(A).

117. *Id.* § 35-11-1105(c)(ii)(B).

118. *Id.* § 35-11-1105(c)(iii)(D).

119. *Id.* § 35-11-1105(c).

In addition to injecting greater certainty into the *in camera* review process, the legislature might consider modifying the statutory language to eliminate certain types of situations from privilege, without reference to *in camera* review. The legislature might study the patterns emerging in the case law regarding state statutory and common law privileges that resemble audit privileges.[120] For instance, following *United States v. Dexter*,[121] the legislature might exclude from the privilege enforcement actions taken by the federal government.

The legislature might also consider making the audits discoverable but excluding them from admissibility in court.[122] The Wyoming statute currently creates an evidentiary privilege but no presumption of discoverability. An explicit provision allowing discovery would eliminate uncertainty and legal maneuvering by both plaintiffs and defendants.[123]

Finally, another simple approach the legislature might consider is an "opt in" type approach, where the regulated entity notifies the DEQ of its intention to conduct an audit.[124] This fosters good communication between the regulated community and the DEQ. Further, it is beneficial to the DEQ because the agency can then direct its inspection and enforcement efforts elsewhere.

CONCLUSION

Wyoming's environmental audit provisions provide incentives to businesses to proactively manage their facilities for environmental compliance. As yet, these audit provisions are untested, but likely will see more use as the business community becomes more aware of the law and how it might benefit businesses. To make the law more attractive to the business community, the legislature and the DEQ should consider minor changes.

Practitioners should familiarize themselves with the law, keeping their client's unique situations in mind, since the law applies differently depending on a facility's environmental compliance history. Because no case law exists concerning the viability of environmental audit privileges, practitioners should be somewhat wary when advising their clients. Ac-

120. *See supra* notes 53-70 and accompanying text.

121. 132 F.R.D. 8 (D. Conn. 1990). *See also supra* notes 65-68 and accompanying text.

122. KAN. STAT. ANN. § 60-3333 (1996).

123. Note that WYO. STAT. ANN. § 35-11-1101 (Michie Supp. 1996) already expressly allows discovery of documents *related* to the audit by third parties.

124. An example is TEX. REV. CIV. STAT. ANN. art. 4447cc, § 10(g) (1995) (requiring a facility to give notice to the appropriate agency before conducting its environmental audit in order to qualify for the immunity provision).

cordingly, practitioners should inform interested clients not only of the state audit law, but also federal environmental audit policy.

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