

Environmetnal Self-Audit Privilege: The
Straw That Breaks the Back of Criminal
Prosecutions

Linda A. Spahr*

*

ENVIRONMENTAL SELF-AUDIT PRIVILEGE: THE STRAW THAT BREAKS THE BACK OF CRIMINAL PROSECUTIONS

Linda A. Spahr*

The past three years have seen a precipitous surge of state legislation creating a "limited" or "qualified" environmental self-audit privilege.¹ These adjectives are misleading; the privilege

* Assistant District Attorney, Suffolk County District Attorney's Office, Chief of District Attorney's Environmental Crime Unit.

1. As practiced in the business community, professional health and safety audits fall into two basic categories, compliance audits and management systems audits. A compliance audit is a comparison of business practices with regulatory requirements, organizational policies and good management practices. The goal of such an audit is to find and eliminate noncompliance. A management systems audit is an evaluation of how environmental, health, and safety activities are managed so as to promote compliance and limit liability exposures. The goal of a management systems audit is to manage and reduce risk.

Industry interests gave rise to environmental audits in the mid-1970s, and they are now widely used for economic and managerial reasons as much as for regulatory compliance. Audits lead to economic improvement and competitive advantages since they are an invaluable way to increase efficiency and productivity. Use of audits can detect sloppy practices, and can sometimes convert waste into profit.

Companies that conduct audits significantly reduce their potential civil liability when they discover and correct problems before they become serious. Government contractors can avoid suspension and debarment by remaining aware of their compliance status. Also, industry trade associations, such as the Chemical Manufacturers Association, are essentially requiring environmental auditing programs as a condition of membership. *See generally* Jack Doyle, *Audits Are Their Own Reward*, ENVTL. F. Jan./Feb. 1992; Robert W. Darnell, *Environmental Criminal Enforcement and Corporate Environmental Auditing: Time for a Compromise?*, 31 AM. CRIM. L. REV. 123 (1993); Patrick J. Ennis, *Environmental Audits: Protective Shields or Smoking Guns? How to Encourage the Private Sector to Perform Environmental Audits and Still Maintain Effective Enforcement*, 42 WASH. U. J. URB. & CONTEMP. L. 389, 408 (1992).

is extensive in both scope and impact.²

Given the current climate of regulatory reform, it is no surprise that well-intentioned legislatures so readily enact laws that offer the attractive illusion of helping both industry and the environment. Since privilege legislation has been so fervently lobbied by business groups, and the laws are viewed as essentially benign, sponsorship of privilege bills has become an expedient way to both appease industry and drive home a message of discontent to the EPA and state environmental regulatory agencies.

The "privilege movement" has succeeded without regard to regulatory and prosecutorial concerns that the laws have been neither adequately studied, nor their impact adequately assessed.³

The most recent study about audit practices in this country was commissioned by private professional auditing associations to provide the Environmental Protection Agency ("EPA") with input as it reviewed its policies to encourage voluntary compliance. In general, the larger the business in terms of the number of employees, the number of facilities, and the amount of sales, the more likely it is to conduct audits. *The Voluntary Environmental Audit Survey of U.S. Business*, March 1995, Price Waterhouse LLP [hereinafter Price Waterhouse study].

See *infra* notes 2-5 and accompanying text for a general description of privilege and immunity statutes and a list of state statutes.

2. These newly created privileges are much broader than any existing privileges derived from common law or the Constitution in that existing privileges apply only to communications. See *infra* note 62 and accompanying text. Environmental audit privileges, however, apply to documents and activities. Existing privileges do not prohibit the use in evidence of information derived from privileged communications, while environmental audit privileges apply the "fruit of the poisonous tree" doctrine and prohibit the use of evidence developed from intentional or unintentional review of privileged documents. See *infra* note 63 and accompanying text. Also, the burden of proof in asserting all existing privileges is on the person claiming the privilege; the environmental audit privilege shifts the burden of proof to the prosecutor who must prove that a privilege does not apply, but who is prohibited from conducting an investigation on the matter prior to a hearing. See *infra* part IV.B.2. For a complete discussion of privilege laws and the constitutional impact of environmental audit privileges, see *Position Paper of the California District Attorneys Association, Environmental Protection Committee on The Concept of Immunity for Self-Critical Analysis and the Federal Statutory Environmental Audit Privilege*, November 1994, [hereinafter CDAA Position Paper] on file in EPA Air Docket C-94-01, Document IV-G-11 (items on file in the Air Docket will hereinafter be cited as "Air Docket" followed by the document number. An index to all items on file, and copies of those items, may be obtained by calling EPA at (202) 260-7548). See also, *infra* part IV.

3. See Air Docket Document IV-G-11 (CDAA Position Paper), *supra* note 2;

Despite EPA's extensive review of its enforcement policy, and subsequent enactment of broad regulatory reforms to encourage both environmental self-auditing and voluntary compliance in general,⁴ state privilege laws have been enacted with whirlwind

Ronald David, *Case Against Environmental Audit Privilege*, NAT'L ENVTL. ENFORCEMENT J., Sept. 1994; Air Docket Document II-C-14 (comments of Fourteen State Attorneys General); Air Docket Document IV-G-11 (comments of National District Attorneys Association).

4. In May 1994, the Administrator of EPA asked the Office of Enforcement and Compliance Assurance to assess whether further incentives were necessary in order to encourage the voluntary disclosure and correction of violations uncovered during environmental audits and self-evaluations. To that end, EPA held a major two-day public meeting in Washington, D.C., in July 1994, and a closed two-day information gathering session in October 1994 at which individuals were invited to make presentations. EPA also held a focus group meeting in San Francisco on January 19, 1995 with key stakeholders from industry, trade groups, state environmental commissions, state attorneys' general offices, district attorneys' offices, environmental and public interest groups, and professional environmental auditing groups. This was followed by a public comment session in San Francisco on January 20, 1995 wherein EPA invited comment from the public and conducted its own analysis of relevant facts.

On December 22, 1995, EPA issued its final policy to encourage regulated entities to voluntarily discover, disclose, correct, and prevent violations of environmental law. Where violations are discovered through voluntary environmental audits or efforts that reflect the entity's due diligence, EPA will not seek gravity-based penalties; and will generally not recommend criminal prosecution. Further, EPA will reduce gravity-based penalties by 75% for violations that are voluntarily discovered, and are promptly disclosed and corrected, even if not found through an audit or due diligence. Finally, EPA restated its practice of refraining from routine requests for environmental audit reports. *See* Incentive for Self-Policing: Discovery, Disclosures, Corrections and Preventions of Violations, 60 Fed. Reg. 66,706 (1995) [hereinafter EPA policy].

In connection with its new policy, EPA reiterated its firm opposition to the establishment of statutory environmental audit privileges, clearly stating its reasons as: (1) the secrecy engendered by a privilege is contrary to legal precedent and public policy as recognized by the Supreme Court; (2) during its eighteen month study, no evidence was produced demonstrating the need for a privilege because the practice of environmental auditing has expanded broadly; (3) a privilege would invite defendants to claim as "audit" material almost any evidence needed to establish violations or responsibility for conduct; (4) audit privilege would breed litigation, with *in camera* proceedings resulting in time-consuming mini-trials; (5) by reducing penalties and liabilities in the manner which the Price Waterhouse study indicated would increase auditing programs, the EPA policy

speed. As of March, 1996, seventeen states had passed such laws.⁵

Because these statutes were enacted with such haste, it was almost inevitable that serious, albeit unintended, consequences would be overlooked. The most significant consequence is that privilege legislation, with its built in presumptions, notifications and hearings, will dramatically interfere with the prosecution of crimes that were never the subject of environmental audits. It will shield those who intentionally dump toxic substances in our woods and streams, and who defraud legitimate, law abiding businesses.

Part I of this Article will discuss the various elements of environmental self-audit privilege statutes. Part II describes the assertions of privilege proponents, and argues that their support for privilege legislation is based on a lack of knowledge and understanding of the types of environmental crimes which are

eliminates the need for privileges against government; and (6) audit privileges are strongly opposed by the law enforcement community, including the National Association of District Attorneys, as well as by public interest groups. 60 Fed. Reg. 66,706, 66,710.

5. The state laws which have been enacted are: Arkansas, 1995 Ark. Acts 350 (codified at ARK. CODE ANN. §§ 8-1-301 to 8-1-312 (Michie Supp. 1995)); Colorado, 1994 Colo. Legis. Serv. 304 (West) (codified at COLO. REV. STAT. § 13-25-126.5 (Supp. 1996)); Idaho, 1995 Idaho Sess. Laws 359 (codified at IDAHO CODE §§ 9-801 to 9-811 (Supp. 1996)); Illinois, 1994 Ill. Legis. Serv. P.A. 88-690 (West) (codified at ILL. ANN. STAT. ch. 415, para. 5/52.2 (Smith-Hurd Supp. 1996)); Indiana, Ind. Acts P.L. 1-1996, § 18 (codified at IND. CODE §§ 13-28-4-1 to 13-28-4-10 (Burns 1996)); Kansas, 1995 Kan. Sess. Laws 204 (codified at KAN. STAT. ANN. §§ 60-3332 to 60-3339 (Supp. 1995)); Kentucky, 1994 Ky. Acts 430 (codified at KY. REV. STAT. ANN. § 224.01-040 (Michie/Bobbs-Merrill Supp. 1994)); Michigan, 1996 Mich. Legis. Serv. P.A. 132 (West) (to be codified at MICH. COMP. LAWS ANN. §§ 324.14801 to 324.14810); Minnesota, 1995 Minn. Sess. Law Serv. 168 (West); Mississippi, 1995 Miss. Laws 627 (codified at MISS. CODE ANN. § 49-2-71 (Supp. 1996)); New Hampshire, 1996 N.H. Laws 4 (to be codified at N.H. REV. STAT. ANN. § 147-E); Oregon, 1993 Or. Laws 422 (codified at OR. REV. STAT. § 468.963 (Supp. 1996)); South Dakota, 1996 S.D. Laws 18 (codified at S.D. CODIFIED LAWS ANN. §§ 1-40-33 to 1-40-37 (1996)); Texas, 1995 Tex. Sess. Law Serv. 219 (Vernon) (codified at TEX. REV. CIV. STAT. ANN. art. 4447cc (West Supp. 1996)); Utah, 1995 Utah Laws 304 (codified at UTAH CODE ANN. §§ 19-7-101 to 19-7-109 (1995 & Supp. 1996)); Virginia, 1995 Va. Acts 564 (codified at VA. CODE ANN. § 10.1-1198 to 10-1-1199 (Michie Supp. 1996)); Wyoming, 1995 Wyo. Sess. Laws 58, §1 (codified at WYO. STAT. § 35-11-1105 (Supp. 1996)).

prosecuted. Part III of this Article describes the types of environmental crimes which are in fact prosecuted. Part IV argues that privilege statutes will affect the decision to prosecute, and will hamper actual prosecution of environmental crimes. This Article concludes that the unanticipated implications of privilege laws are only beginning to be felt, and that any alleged benefit of such laws will be greatly outweighed by their negative impacts on the environment and on prosecution of environmental crimes.

I. GENERAL PROVISIONS OF PRIVILEGE AND IMMUNITY STATUTES

While the privilege and immunity laws are varied, they share common features. Almost all of the laws provide that environmental self-audit reports are privileged.⁶ Thus, they are not accessible to third parties, including government, absent a waiver or court order.⁷ About half also provide immunity from criminal, civil, and administrative prosecution and penalties, or all three, if a self-discovered violation is disclosed and corrected.⁸ Others provide immunity for disclosed violations, but no actual privilege.⁹

6. The language in the Arkansas statute is typical: "An environmental audit report shall be privileged and shall not be admissible as evidence in any civil, criminal, or administrative legal action, including enforcement actions." ARK. CODE ANN. § 8-1-303(b). For statutes with similar language, see OR. REV. STAT. § 468.963(2) and ILL. ANN. STAT. ch. 415, para. 5/52.2(b). Some statutes specifically provide that audit reports are not subject to discovery procedures in administrative, civil, or criminal cases. *See, e.g.*, MISS. CODE ANN. § 49-2-71(1).

7. An express waiver is usually provided for in the statute. *See, e.g.*, MISS. CODE ANN. § 49-2-71(1)(a). Some statutes allow a party to waive the privilege to selected portions of an audit report. *See, e.g.*, ARK. CODE ANN. § 8-1-304(b). In others, the right to assert the privilege is deemed waived where the owner or operator fails to file a petition for an *in camera* hearing on the applicability of the privilege within a specified time after the prosecution obtains a copy. The audit report remains sealed and inaccessible to the prosecution during the waiting period. *See, e.g.*, IND. CODE § 13-28-4-5.

8. *See, e.g.*, 1996 Mich. Legis. Serv. P.A. 132 (to be codified at MICH. COMP. LAWS ANN. § 324.14809(1)). A small minority of audit privilege laws do not require correction of discovered violations to keep the audit report secret. For example, the Virginia statute provides civil and administrative (but not criminal) immunity for violations which are disclosed and corrected. However, it does not require violations to be corrected for an audit report to remain privileged, unless it demonstrates a "clear, imminent and substantial danger to the public health or the environment . . ." VA. CODE ANN. § 10.1-1198(B).

9. For example, under the South Dakota statute, if a company completes an

The laws typically define an environmental audit as a systematic review of a facility's practices to determine non-compliance with certain environmental laws.¹⁰ Most specify a variety of documents which may be considered a part of such reports and to which the privilege extends. These include field notes, records of observations, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, maps, charts, graphs, and surveys.¹¹

Most of the laws prohibit parties that participated in audits from disclosing, testifying, or being compelled to testify about the audit report or underlying facts.¹² Included with participants would be those who were made privy to audits, those who did work, and those who provided estimates for corrective work arising from the audit. Some even provide civil or criminal penalties for disclosure of privileged audit information.¹³ Virtually all prohibit the use in

environmental audit "there shall be a presumption against the imposition of civil or criminal penalties for violations found and disclosed." S.D. CODIFIED LAWS ANN. § 1-40-33. The Minnesota law limits disclosure to third parties only if the company corrects its violations. *See* 1995 Minn. Sess. Law Serv. 168.

10. For example, the Idaho statute defines an environmental audit as "an internal evaluation done pursuant to a plan or protocol that is designed to identify and prevent noncompliance and to improve compliance with statutes, regulations, permits, and orders." IDAHO CODE § 9-803(3). *See also* KY. REV. STAT. ANN. § 224.01-040(1)(a) (similar language); WYO. STAT. § 35-11-1105(a)(i) (similar language).

11. For example, the Wyoming statute defines an environmental audit report 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." WYO. STAT. § 35-11-1105(a)(ii). *See also* IDAHO CODE § 9-803(4) (similar language); KY. REV. STAT. ANN. § 224.01-040(1)(b) (similar language).

12. The Illinois statute states: "an officer or employee involved with the environmental audit, or any consultant who is hired for the purpose of performing the environmental audit, may not be examined as to the environmental audit or any environmental audit report . . ." ILL. ANN. STAT. ch. 415, para. 5/52.2(c).

13. According to the Mississippi statute: "If any party divulges all or any part of the information contained in an environmental self-evaluation report in violation of . . . this subsection . . . such party . . . is liable for any damages caused by the divulgence . . ." MISS. CODE ANN. § 49-2-71(3)(b). In Texas, a govern-

evidence of any privileged documents or audit activities, or any evidence derived therefrom if it was not obtained in accordance with the procedures set forth in the applicable statute.¹⁴

The laws which establish a privilege generally require that a prosecutor coming into possession of an audit report, or a document labeled as such, seal it without reading it, and file it with a court pending an *in camera* review or hearing to determine the applicability of the privilege.¹⁵ Yet, most statutes allow a prosecutor to review the presumptively privileged documents prior to the *in camera* review, provided the documents are only to be used to prepare for the review or hearing itself.¹⁶ None of the laws specify how such a hearing is to be conducted, whether witnesses can be called to testify, or what evidence would be admissible. If the documents are determined to be privileged, none of the evidence developed to prepare for the hearing may be used either for investigative purposes or as evidence against a company.

Most laws specify the parties, or classes of parties, to whom an audit document may be shown without causing a waiver of the privilege. These may include lawyers, environmental consultants, employees, potential purchasers, lenders, and contractors providing estimates for services in connection with corrective efforts resulting from an audit.¹⁷

ment official may be guilty of a misdemeanor for disclosing information in violation of the privilege law even if the document is not labeled privileged, though lack of labeling may be raised as an affirmative defense. TEX. REV. CIV. STAT. ANN. art. 4447cc § (6)(d). Utah law imposes both civil and criminal liability for unlawful disclosure of privileged information. See UTAH CODE ANN. §§ 19-7-104(2), 19-7-104(3). For similar language, see also COLO. REV. STAT. § 13-25-126.5(5)(b)(I), (b)(II).

14. In Texas, a party that allegedly fails to comply with this requirement "has the burden of proving . . . that the evidence . . . was not derived from the unauthorized review . . ." of privileged materials. TEX. REV. CIV. STAT. ANN. art. 4447cc § (9)(h). See also UTAH CODE ANN. § 19-7-106(4) (similar language).

15. See, e.g., ARK. CODE ANN. §§ 8-1-309(a)(1)(3), (b)(1); KY. REV. STAT. ANN. § 224.01-040(5)(a); KAN. STAT. ANN. § 60-3335(a)-(b).

16. In Texas, "Information used in preparation for the *in camera* review . . . (1) is confidential . . . [and] . . . (2) may not be used in any investigation or legal proceeding . . ." TEX. REV. CIV. STAT. ANN. art. 4447cc § (9)(f). See also IND. CODE § 13-28-4-5(d), 5(e).

17. See ILL. ANN. STAT. ch. 415, para. 5/52.2(i). In Texas, disclosure of an

Most of the laws provide exceptions which will void a claim of privilege and make documents available to litigants, including prosecutors. Those exceptions are the basis for describing the privileges as "limited" or "qualified." However, none of the states allow the presumptively privileged documents to be used for any investigative purposes until after the court determines that an exception applies. The more common exceptions to the statutory privilege are invoked when:

- a) the privilege is asserted for a fraudulent purpose. (The term is never defined).¹⁸
- b) the material is not subject to the privilege (doesn't satisfy statutory definition).¹⁹
- c) the material shows evidence of non-compliance with designated environmental laws and efforts were not made to correct the problems. Some statutes say corrective action must be taken "promptly" or "with reasonable diligence."²⁰ None, however, set forth the means by which a court is to make those factual determinations, or provide for review of the determination if new evidence is discovered.
- d) a few statutes provide exceptions to the privilege if the audit report shows evidence of an imminent threat to public health or safety.²¹ But that determination, again addressed in an apparent

audit report to employees for the purpose of correcting violations does not waive the privilege. TEX. REV. CIV. STAT. ANN. art. 4447cc § (6)(b)(1). Nor is it waived if an audit report is disclosed under a confidentiality agreement to a potential partner, transferee, lender, or insurer. *Id.* § (6)(b)(2).

18. IND. CODE § 13-28-4-3(a)(2)(A); KY. REV. STAT. ANN. § 224.01-040(4)(d)(1).

19. KY. REV. STAT. ANN. § 224.01-040(4)(d)(2).

20. In Mississippi, the privilege does not apply if the party "did not initiate appropriate efforts to achieve compliance . . . promptly . . . and, as a result, . . . did not or will not achieve compliance . . . within a reasonable amount of time." MISS. CODE ANN. § 49-2-71(1)(b)(ii). *See also* ILL. ANN. STAT. ch. 415, para. 5/52.2(d)(2)(c) ("reasonable time"), and IND. CODE § 13-28-4-3(a)(2)(c)(iii) ("reasonable diligence").

21. In Mississippi, the *in camera* review must convince the hearing officer that "a condition exists that demonstrates an imminent and substantial hazard or endangerment to the public health and safety or the environment" to overcome the privilege. MISS. CODE ANN. § 49-2-71(1)(d). However, the *in camera* pro-

evidentiary void, is not made until the *in camera* hearing is held on the admissibility of unread and sealed documents.

e) some laws provide exceptions to the privilege if documents show evidence of certain violations, and proof of those violations is not otherwise available to the prosecution.²² How the assertion can be made by a prosecutor who has no access to the documents in the first place is not explained.

II. THE ILLUSION THAT PRIVILEGE AND IMMUNITY STATUTES ARE BENIGN

Among privilege proponents, there is a universal belief that privilege and immunity laws will have little or no effect on the appropriate enforcement of environmental law. Proponents of privilege laws have garnered support for such laws by advancing the notion that privileges are limited and will always allow for prosecution of the "truly" bad actors.

While introducing a bill proposing the federal Environmental Audit Protection Act, legislation modeled after the first state privilege law passed in his home state of Oregon,²³ Senator Mark Hatfield described it as creating a "very limited legal privilege."²⁴ The Senator also asserted that his "bill would not bar any enforcement action for any environmental violation No environmental law is decriminalized, and the enforcement agencies are not barred from pursuing action."²⁵

Endorsing the Hatfield bill for its progressiveness, many members of industry and the legal community in Oregon seemed surprised that it would face opposition. One law firm that consulted with Senator Hatfield on developing his bill commented:

The objections of the Environmental Protection Agency and the United States Department of Justice to the environmental audit privilege are very difficult to understand, especially if the privilege

ceeding cannot be brought on without probable cause, from an independent source, that the condition exists.

22. See, e.g., IND. CODE 13-28-4-3(a)(2)(D); KY. REV. STAT. ANN. § 224.01-040(4)(d)(4); OR. REV. STAT. § 468.963(3)(c)(D).

23. See OR. REV. STAT. § 468.963.

24. 140 CONG. REC. S10,942 (daily ed. Aug. 8, 1994).

25. *Id.*

is limited in the manner provided in the Oregon law. We are hard pressed to think of any circumstances under which the audit privilege would frustrate civil or criminal investigations or enforcement.²⁶

The confusion is understandable. The Oregon privilege law was part of a crime bill which for the first time enacted felony provisions in that state's environmental statutes. As part of a compromise bill, the privilege law was a trade-off for passage of stiffer criminal penalties. Though state prosecutors only supported the bill in "lukewarm fashion,"²⁷ it has been suggested that passage was driven by a misapprehension that it was necessary to seek felony sanctions to comply with the state's authorization.²⁸

The attorney who represented the Oregon District Attorneys Association in the committee that negotiated the bill explained the efforts made to avoid abuse of the privilege:

When the privilege was first proposed by the Associated Oregon Industries, it was a broad privilege [Proponents] acknowledged that changes had to be made to ensure that there were not abuses The committee spent the next several months trying to fix the privilege to avoid problems As we continued the process, we reviewed cases and tried to create hypothetical situations that might arise The only scenarios we could envision where the privilege applied were situations that did not justify prosecution. I know there are people within the EPA who have a real fear of the audit privilege. I have talked to these people and asked them to give me circumstances where the privilege would result in loss of evidence to the state in cases that we would want to prosecute. They were unable to do so [One downside to the law is that] it will create an extra hoop . . . to jump through to get evidence of guilt. There may be other downsides that we did not envision. I am sure we did not draft the perfect law and someday we could see a side of this law that we did not anticipate. If

26. *Id.* at 10,947 (letter from J. Mark Morford, Stoel Rives Boley Jones & Grey, to Sen. Mark Hatfield).

27. Air Docket Document VIII-13, at 84 (remarks of Craig Johnston, Lewis and Clark University Law School, at USEPA Environmental Auditing Open Mike Session in San Francisco, CA, Jan. 20, 1995 [hereinafter January 20, 1995 EPA meeting]) (transcript of proceedings).

28. *Id.* (remarks of Gil Jensen, Alameda County, CA District Attorney's Office).

that happens, I will be the first to say I made a mistake.²⁹

This career prosecutor's instincts about unforeseen consequences of the law were correct.

It is understandable that those outside the criminal justice system, particularly those who make a living trying to bring companies into compliance with complex environmental regulations, would assess the impact of privilege and immunity laws in the limited context of potential prosecutions for violations which they themselves discover. Because those in the private sector do not know what types of crimes are generally prosecuted, nor how those crimes are investigated, it follows that they would "not believe that privilege would be a significant impairment of the government's enforcement program"³⁰

The author of Colorado's privilege and immunity statute,³¹ the second such law enacted in the country, is also adamant that the law does not affect government's ability to enforce environmental laws.³² This is so despite the bill author's candid admission to EPA that at least one problematic scenario — one in which the statute would preclude use of an audit which should be available to prosecutors — had not been envisioned in the bill's drafting.³³

While environmental prosecutors generally agree that there is a need for regulatory reform, and a need to create programs to induce voluntary compliance with environmental laws, they vehemently oppose privilege legislation.³⁴ Neither EPA nor prosecutorial agencies routinely request audit reports; an audit report has

29. Air Docket Document II-F-09 (letter from John C. Bradley, First Assistant District Attorney, Multnomah County, Oregon, to James M. Whitty, Legislative Counsel, Associated Oregon Industries (July 25, 1994)).

30. Air Docket Document VIII-13, at 15 (remarks of Scott Leheka, Atlantic Richfield Company, at January 20, 1995 EPA meeting).

31. See COLO. REV. STAT. § 13-25-126.5.

32. Air Docket Document VIII-11 at 5 (remarks of Cindy Goldman, Colorado Association of Commerce and Industry, at October 6, 1994 EPA Environmental Auditing Policy Workgroup Meeting).

33. *Id.* at 6 (the scenario posed to Cindy Goldman was one in which a company conducts an audit that reveals no violations of law, but identifies problems that could impact future operations. The problems are not corrected because the company has no money to correct them, but three years later a major violation occurs).

34. *Supra* note 3.

never been used to criminally prosecute a company for violations it discovered as a result of an environmental self-audit.³⁵ Accordingly, statutes prohibiting government from seeking such reports are simply unnecessary.

Even privilege proponents agree that EPA has adhered to its policy of not routinely requesting audit documents. In supporting the introduction of the Hatfield bill, one major corporation wrote:

In 1986, a year before [we] began environmental auditing, . . . [EPA] published the Environmental Auditing Policy Statement EPA stated that it would not routinely request audit documents The policy gave some of industry a limited amount of comfort it sought to be able to initiate internal environmental auditing programs. In the years since the Policy was published, EPA has demonstrated its integrity by adhering to the policy Since 1986, [EPA] has been very conscientious about adhering to the Policy. But it doesn't have to. That is what continues to worry many in industry.³⁶

It is clear that the entire audit "problem," as it applies to the use of audit documents by government agencies, is simply a *perception*. While acknowledging that there is no history of such abuse, privilege proponents repeatedly cite a fear that government will misuse audits *in the future*.

That illusory fear would never have provided the impetus for intense lobbying which has driven the privilege movement. The real driving fear, it seems, is not government abuse, but private party abuse were audit are documents readily available. This more realistic industry concern has been downplayed in the national debate, but is alluded to repeatedly: "[g]iven the sensitivity of environmental issues, there is a sincere concern that such documents could be used abusively by private litigants unless protected."³⁷

The Compliance Management and Policy Group ("CMPG"), an industry coalition that actively lobbies for privilege legislation, has lobbied even harder for the type of compliance policies which

35. *Supra* note 4; *see also* David, *supra* note 3, at 4.

36. 140 CONG. REC. S10,942, S10,947 (letter from David Wilson, Senior Environmental Engineer, PacifiCorp, to Sen. Mark Hatfield).

37. *Id.* at S10,946 (letter from Bert P. Krages, II, Louisiana-Pacific Corporation, to Sen. Mark Hatfield).

have now been promulgated by EPA.³⁸ It sees private litigant access to audit documents as the only significant problem which cannot be cured by regulatory reform:

In addition [to changes in regulatory enforcement policy], in order to ensure that these policy objectives are not circumvented by citizen enforcement and that environmental audits are not discouraged by the risk of other private litigation, a limited environmental self-evaluation privilege should be recognized and supported by EPA and states when the aforementioned necessary enforcement policy changes have been made. As with self-evaluative privileges that protect the hospital peer review process in some cases, environmental audit privileges could be crafted not to keep audit information from regulators, but from non-governmental parties who are not bound to follow the governmental enforcement policy regime.³⁹

If the problem giving rise to privilege legislation is regulatory in nature, then the obvious answer is regulatory reform. If the real concern is citizen suits, toxic tort litigation and other non-governmental interactions with auditing companies, then those issues should be addressed squarely in a public forum. They should not be the silent engine that drives a legislative movement which will have a demonstrably devastating impact on the ability to prosecute those whom even privilege proponents believe should be prosecuted.

Because some privilege proponents have prior environmental enforcement experience, their assertions that privilege laws will cause no harm are cloaked in a presumption of validity. Responding to government concerns that privilege laws would lead to increased litigation and wasted resources, one such privilege advocate observed:

It is correct that audit results have been used infrequently in actual prosecutions by governmental enforcers. Thus, unless regulators

38. Virtually all of CMPG's recommendations for improving the effectiveness of enforcement, vis-a-vis compliance efforts, were enacted by EPA in its policies which took effect in January, 1996. Compare Jim Moore, *A Response to "The Case Against an Environmental Audit Privilege,"* NAT'L ENVTL. ENFORCEMENT J., Dec. 1994-Jan. 1995, at 8 (CMPG recommendations) with EPA policy, *supra* note 4 (enacted policies).

39. Moore, *supra* note 38, at 8 (footnote omitted).

are planning to use them more in the future (which most regulators claim not to be their intention), audit privileges cannot lead to more litigation.⁴⁰

To a prosecutor who routinely investigates and prosecutes environmental crimes, the conclusion is a *non sequitur*. The statement assumes that criminal cases — both the inception and the evidence that supports them — comes *from* a regulatory process. Nothing could be further from the truth.

The speaker clearly does not know that most criminal cases are initiated by informants, 911 calls about dumping incidents, and proactive investigations. Those criminal investigations which *are* initiated by referrals from regulatory agencies generally involve continuing patterns of illegal dumping or fraudulent conduct on the part of the targets.⁴¹

Another former prosecutor is also apparently unfamiliar with the types of environmental cases which are criminally prosecuted and how they are investigated: “[i]f . . . EPA and DOJ rarely rely on environmental audit materials to prosecute in situations where any violations found are promptly corrected . . . such a privilege would not impede federal enforcement significantly.”⁴² If law enforcement efforts consisted of prosecuting companies for self-discovered and self-corrected violations, without access to audit reports, the speaker’s conclusion that audit privilege would have little impact on continued enforcement would be correct. However, those cases are *not* criminally prosecuted.

Such hypothetical cases provide a fruitless frame of reference for examining the effect of audit privilege laws. To reasonably assess how such laws will impact the criminal justice system and

40. *Id.* at 8-9.

41. Comment in text is based on author’s experience in Suffolk County District Attorney’s Office, and on exchanges with local prosecutors through professional district attorneys associations. For a review of environmental crime cases typically handled by local prosecutors, see *The Local Prosecution of Environmental Crimes, A Literature Review*, National District Attorneys Association, American Prosecutors Research Institute, National Environmental Crime Prosecution Center, Aug. 14, 1992.

42. Joseph G. Block & Gregory S. Braker, *Environmental Auditing in the Current Enforcement Climate*, ALI-ABA Course on Criminal Enforcement of Environmental Laws, Oct. 21, 1994, Washington, D.C., at 20.

public health and safety, one must look at the criminal cases which *are* prosecuted, and how they will be affected.

III. ENVIRONMENTAL CRIME PROSECUTIONS

The nation's district attorneys conduct the overwhelming majority of environmental crime prosecutions. Their involvement in environmental crime prosecution has grown at an almost exponential rate over the last decade. During the first six months of 1992, more criminal cases were prosecuted by district attorneys than the Justice Department prosecuted in the prior ten years.⁴³ Their corporate defendants are typically small companies, with fewer than fifty employees.⁴⁴

At best, EPA can only handle about ten percent of the necessary environmental enforcement in the country.⁴⁵ Since most illegal dumping of hazardous waste takes place within a twenty-five mile radius of the site of generation,⁴⁶ and most companies that commit those crimes are small in size, investigation of dumping incidents is necessarily a local concern. The local official's responsiveness to community concerns explains why district attorneys around the country are devoting ever increasing portions of their resources to a field which might easily be left to federal or state officials.⁴⁷

43. *EPA's Criminal Enforcement Program: Hearings Before the Subcomm. on Oversight and Investigations, of the House Comm. on Energy and Commerce*, 103d Cong., 1st Sess. 111-12 (1993) (statement of Richard T. Nixon, Director, National District Attorneys Association Environmental Crime Prosecution Center).

44. DONALD J. REBOVICH, *DA DANGEROUS GROUND: THE WORLD OF HAZARDOUS WASTE CRIME* 31 (1992).

45. Statement of Hon. Herbert Tate, Assistant Administrator of EPA, *Transcripts and Selected Proceedings from A Colloquium on the Prosecution of Urban Environmental Crimes and the Use of Multi-Agency Strike Forces*, presented by National District Attorneys Association, American Prosecutors Research Institute, National Environmental Crime Prosecution Center, in cooperation with the NDAA Environmental Protection and Metropolitan Prosecutors Committees, July 20, 1992, Amelia Island, Florida, at 11 [hereinafter *Colloquium*].

46. *Id.*

47. In Riverside, California, the District Attorney first prosecuted illegal dumping on a Native American reservation. *See, Colloquium, supra* note 45, at 13. In Monmouth County, New Jersey, a local prosecutor decided that the quality

Privilege advocates claim that the benefit of more companies self-auditing outweighs the harm of prosecutions being precluded by privilege laws.⁴⁸ The argument reflects a lack of knowledge

of life in the county was so affected by littering that a felony littering law was necessary. *Id.* at 6. In Alameda County, California, with the fifth highest homicide rate in the country, an Environmental Crimes Division exists in the District Attorney's Office because the community sees environmental crime as a public safety issue. *Id.* at 13. In Staten Island, New York, illegal out-of-state hazardous waste haulers who were using a landfill as a dumpsite were prosecuted for bribing landfill officials; when the existing environmental laws were inadequate, the District Attorney of Staten Island was responsible for writing tougher new laws. *Id.* at 2-5.

48. The Oregon prosecutor who participated in drafting the state privilege law opined: "[i]f we lose evidence in one case, but 25 or 50 companies got audits and cleaned up problems, I believe we are better overall. Obviously, only time will tell." Air Docket Document II-F-09, *supra* note 29. His opinion, like that of others, was presumably influenced by the fact that there was "virtually no experience" to draw on in the state. There had only been three or four criminal environmental investigations ever conducted under state law (which did not include felonies) and no more than four or five conducted by federal investigators. Air Docket Document VIII-13, *supra* note 27, at 114 (remarks of Craig Johnston at January 20, 1995 EPA meeting).

Though environmental self-audit privilege legislation has been sold as a means by which more companies will be induced to audit, and thus lead to more environmental compliance and less pollution, there is no support for this notion. The Price Waterhouse study, which was commissioned by two groups that endorsed audit privilege legislation, was conducted to provide EPA with up-to-date information on auditing practices of United States companies. The study was potentially skewed to support audit legislation, since most of the respondents belonged to the very associations which commissioned the study and had already favorably endorsed such laws. Despite the potential bias in the study, it provided no evidence at all that privilege legislation would cause companies who do not already audit to begin doing so. The reasons most commonly cited by companies who didn't audit were that: (a) they didn't believe the need exists to perform these audits (52%), (b) their processes and products have insignificant environmental impacts (43%), or (c) it was otherwise not necessary (18%). Though respondents to the survey were instructed to check all applicable answers to the question, only 20% of the companies who do not audit cited as a reason a "concern that audit information could somehow be used against the company". Accordingly, there is no reason — save the blanket assertions of privilege proponents — to believe that the privilege laws will even accomplish what they are designed to do. See Price Waterhouse study, *supra* note 1. What would induce companies to come into compliance with the environmental laws is simpler

about the crimes being committed. As the cost of environmental compliance has increased, so has incidence of environmental crime and fraud in the environmental services industry. Consider the following scenarios: midnight dumping, "on-site" dumping, unlawful dealing in hazardous waste, and environmental fraud.

A. *Midnight Dumping Cases*

"Midnight dumping" typically involves the abandonment of fifty-five gallon drums of waste dumped on roadsides or in secluded wooded areas.⁴⁹ In recent years, midnight dumpers have gotten smarter and the quantities of waste dumped have dramatically increased.

During the last eighteen months in Suffolk County, New York,⁵⁰ four separate incidents have been investigated in which hazardous substances have been disposed of by hiding drums of waste in stolen forty-foot trailers. Three of those incidents each involved more than one hundred fifty-five gallon drums of waste product. In one instance, the waste was generated more than a thousand miles away, and was left in a stolen trailer near a public shopping center within the county.⁵¹ In another, the waste was transported to and disposed of in an adjoining state.⁵² In a third, all of the labels, lot numbers, and identifying features, as well as

regulations, penalty mitigation for self-disclosed and reported violations, and other programs which provide certainty for companies dealing with regulatory agencies. *See generally* transcript of January 20, 1995 EPA meeting, *supra* note 27, and December 22, 1995 EPA policy, *supra* note 4.

49. Illegally dumped drums discovered in the author's jurisdiction over the last thirteen years have been traced to a wide range of generators: among them are automotive repair companies, print shops, plating operations, chemical manufacturers and illegal cocaine laboratories.

50. The District Attorney's office in Suffolk County has prosecuted environmental crimes since the mid-1970s. A full-time assistant district attorney and detective investigator were assigned to the Environmental Crime Unit in 1984. Since 1990, the author has been the chief of the Unit, which now has three attorneys and five investigators. The Unit also works regularly with criminal investigators from the New York State Department of Environmental Conservation, EPA, Federal Bureau of Investigation, Department of Defense, and other state and local police agencies.

51. Suffolk County District Court Docket No. 29237-96.

52. Investigation pending.

the vehicle identification number on the trailer, were obliterated with a heavy duty grinding tool to prevent tracing before the two hundred containers were loaded at a business site in the adjoining county, and abandoned in an industrial park.⁵³

B. "On-Site" Dumping Cases

Illegal "on-site" discharges of waste are frequently committed by companies that create and conceal illegal disposal systems at their places of business. These include, for example, hidden piping systems leading to unregistered cesspools dug for industrial waste disposal, waste pits installed underneath manufacturing facilities, and parallel waste routing systems which divert waste streams around treatment systems and directly into sewage pipes. In most cases, the motive for such activity is financial. Illegal on-site dumpers frequently decide to dump after obtaining estimates for lawful disposal of waste. At least three companies with prior criminal convictions in Suffolk County for illegal dumping or disposal of waste, are presently under investigation or indictment by the District Attorney's Office. All of those cases involve discharges of hazardous substances, which pose grave danger to the county's water supply.⁵⁴

53. Suffolk County Indictment No. I-1654A-96, 1654B-96, and 1654C-96.

54. Suffolk County, the eastern most county on Long Island, sits atop an aquifer which provides all of its drinking water. More than ninety percent of the county is without a sewer system. Most of its heavy industry is located in areas with cesspools and storm drains that leach directly into the ground. Its coastline stretches out to over one thousand miles. These factors are responsible for the county's aggressive environmental policies, including the active industrial inspections by its health department, the existence of one of the largest public environmental laboratories, and the requirement that county police sector car drivers handle illegal dump sites as crime scenes which necessitates that they call out emergency service officers and environmental crime detectives. *See* Suffolk County, N.Y., Standard Operating Procedure #H-05 (August 1989); Suffolk County, N.Y., Police Department Rules and Procedures, *Illegal Dumping of Hazardous Materials* 5.35-37. Additionally, the enactment of local laws such as the nation's first underground storage tank removal program, help to protect the county's precious resources. *See* SUFFOLK COUNTY, N.Y., SANITARY CODE, art.12, §§ 760-1201 to 760-1220 (adopted Sept. 12 1979).

C. *Unlawful Dealing in Hazardous Waste*

Generators looking to save money on hazardous waste disposal frequently pay unlicensed haulers to take their waste away. Others will pay licensed haulers to take some of it "off the books" and introduce it into an unsuspecting business' waste stream, to be paid for by that business. Those bad actor generators can only be caught with the use of traditional undercover investigative techniques that are used to catch drug dealers or stolen property rings. These undercover "hazardous waste sting operations" can only be conducted with the assistance of an informant to make "introductions" between police and bad actor generators. Usually, those informants have themselves been arrested for environmental crimes, and have already engaged in unlawful dealing of hazardous waste with the target companies. Their motivation to assist undercover police, as in all criminal cases, is to gain favorable treatment from prosecutors and the courts.⁵⁵

D. *Environmental Fraud Cases*

A 1995 study commissioned by the American Society for Testing and Materials revealed that eighty-seven percent of environmental professionals surveyed believed that users of environmental services are not able to distinguish between legitimate and sham credentials.⁵⁶ For this reason, efforts are now underway by national organizations to establish accreditation criteria for use in evaluating environmental professional certification programs.⁵⁷

55. The need for an informant is two-fold. First, people rarely engage in criminal conduct with people whom they do not know and trust. Second, the entrapment laws, as a practical matter, prevent successful prosecution of persons who are dealing with undercover police unless such persons were already predisposed to commit the crime. At least three different prosecutors' offices have conducted successful hazardous waste dealing stings in New York State (Suffolk County, Westchester County, and the Attorney General). Attempts to conduct such an investigation without an informant by a jurisdiction in another state led to dismal failure, with terrible public outrage, extensive media coverage, and ultimate dismissal of the charges.

56. *Emerging Environmental Standards Set New Ground Rules*, DATALINK (Envtl. Data Resources, Inc.), Winter 1996, at 2, 6.

57. *Id.*

While the professional environmental industry has come to recognize that others in the business may be unqualified, the problem goes far beyond poor job performance by those with sham credentials. There are bad actors in the environmental services industry who use their businesses to steal. Law enforcement was the first to see, and, where possible, apprehend those bad actors.

Fraud in the environmental industry takes many forms. Victims and perpetrators alike are found in every sector: manufacturers, waste generators, transportation/storage/disposal ("TSD") facilities, government, parties to real estate or business transactions, lenders, environmental consultants, and the general public. It has become easy and common to falsify weight tickets or gallonage measurements in the transport and disposal of waste products. Despite the fact that such over-billing is routine, generators and the consultants, in-house managers, and lawyers who guide them, are unaware that those events occur.

Dishonest environmental laboratories willingly falsify sample analysis, or close their eyes to the fact that a submitted sample is actually tap water. "Clean" sample results are frequently the keystone to multi-million dollar loans, purchase money mortgages, stock acquisitions, or closings on commercial real estate transactions.

Sham consultants with simple desk-top computers and color printers turn out fraudulent trucking manifests, hazardous waste manifests, and certificates of destruction or recycling. Generators, particularly those with deep pockets and active environmental compliance programs, frequently pay more money to have waste recycled in order to avoid the potential civil liability associated with waste disposal. However, where there is collusion, or a pattern of intentional fraudulent conduct, no degree of diligence can fully protect an unknowing company whose waste is simply dumped or buried.⁵⁸

58. The fraudulent conduct described in the text is all based on investigations, prosecutions, witness testimony or informant debriefings conducted in Suffolk County. However, conversations with other federal, state and local law enforcement agencies reveal that the described conduct is becoming prevalent throughout the country.

IV. IMPACT OF PRIVILEGE LAWS ON CRIMINAL ENFORCEMENT

Privilege proponents find it difficult to fathom how investigations would be impacted by privilege laws. Prosecutors find it difficult to fathom how they can intelligently allocate resources to a case when they do not know where an investigation will take them, and what legal roadblocks they will encounter when they get there.

A. *The Allocation of Resources: When to Investigate*

The costs of conducting environmental investigations are extremely high. Money is a crucial factor, entering into decisions such as whether a warrant can be executed or how many samples to take. Execution of search warrants for evidence of illegal waste dumping requires large numbers of specially trained and equipped personnel to satisfy Occupational Safety and Health Administration ("OSHA") requirements for the handling of hazardous materials.⁵⁹ Laboratory costs for analyzing environmental samples are

In 1995, two individuals and three companies in Suffolk County were convicted (by trial and plea) of falsifying records to make it appear that illegally dumped waste from more than a dozen generators was properly recycled. In one case, a publicly owned hospital paid hundreds of thousands of dollars to remove and recycle contaminated soil. One of the subcontractors falsified the transportation and disposal records submitted to the hospital for payment, including trucking manifests, scale tickets and certificates of destruction. Though the hospital had no way of knowing it, half the soil never made it to the recycling facility. When another subcontractor became suspicious because it had not been paid enough, a meeting was held to straighten the matter out. A third subcontractor, for a paltry fee of thirty thousand dollars, helped protect the original forgers by creating new and better forged documents to present to the hospital for payment. Until contacted by criminal investigators, the hospital never knew it had been defrauded. Other victims in this scheme included multinational oil companies, public utilities, municipalities and major manufacturers. None of them were aware they had paid top dollar to contractors who had simply buried their waste. See Suffolk County Indictment No. I-455D-94, 455E-94, 455H-94.

59. The Superfund Amendments and Reauthorization Act of 1986 (SARA), included an emergency planning and community right to know provision known as Title III. 42 U.S.C. §§ 9601-75 (1994). SARA Title III required OSHA to enact health and safety standards for workers who handle hazardous substances. The regulations enacted include, among other things, site study and site control procedures; necessary personal protective equipment for workers who handle

exorbitant since most jurisdictions do not have government laboratories certified to perform required tests.

Environmental cases frequently involve the use of witnesses and physical evidence from other jurisdictions. Consultants, transporters, and TSD facilities that had contact with a target frequently do business across state lines. Resources must be available to engage in interstate subpoena litigation, interviews in far away locations, and potential court hearings in foreign state jurisdictions.

The decision to devote precious resources to an environmental investigation is complex. Prosecutors must ask themselves questions such as: What is the nature and extent of the suspected (or already discovered) harm? Are there investigative means available to determine whether a crime took place? What are the exact crimes that would be charged, depending on possible outcomes of investigative leads? Are all the legal elements of those crimes provable? Will the evidence be legally admissible in court? What is the likelihood of conviction? How expensive and time-consuming will the investigation be? How serious are the allegations here compared to other allegations which might go uninvestigated if resources are devoted to this case?

B. Effect of Privilege Laws on Tools of the Prosecutor

Privilege laws deal the hardest blow to the prosecutor's ability to fairly exercise judgement and discretion. Criminal prosecutions are bound by both constitutional and statutory standards. Though the rules change through court decisions, statutes clearly set forth the tools that are available to police and prosecutors in criminal cases. It is through the faithful and vigorous use of those tools that a prosecutor is able to make decisions that are in the public interest. Privilege legislation changes or affects the usefulness or reliability of every such crucial tool.

hazardous materials; training requirements; medical surveillance, including annual baseline exams for such workers; requirements for safety backups and rescue plans. See 29 C.F.R. pt. 1910 (1995).

1. Grand Jury's Broad Constitutional Power to Investigate Will Be Thwarted

The duty to testify before a grand jury is a basic obligation owed to the Government by every citizen.⁶⁰ The Fifth Amendment meshes with the grand jury power in that a subpoenaed witness in a federal grand jury hearing receives "use immunity". This means that neither the witness' testimony, nor evidence derived therefrom, can be used in evidence against the witness. A New York grand jury witness automatically receives "transactional immunity". There, the witness can *never* be prosecuted for any of the transactions about which testimony is given, even if the transactions were not the subject of the grand jury's investigation.⁶¹ This broad power to compel evidence, together with the

60. See *United States v. Bryan*, 339 U.S. 323, 331 (1950). The power of the grand jury to investigate criminal activity and compel persons to appear and testify is exceedingly broad. It is "a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime." *Blair v. United States*, 250 U.S. 273, 282 (1919). The grand jury's investigative powers to inquire into violations of criminal law and its "constitutional prerogatives are rooted in long centuries of Anglo-American history." *Hannah v. Larche*, 363 U.S. 420, 489-90 (1960). "The grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials The grand jury's investigative power must be broad if its public responsibility is adequately to be discharged." *United States v. Calandra*, 414 U.S. 338, 343-44 (1974). The courts may not suspend or impair the functioning of the law's ancient investigatory body whose action "may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors." *Branzburg v. Hayes*, 408 U.S. 665, 701 (1972).

61. Immunity in New York grand jury proceedings differs from federal practice. In federal practice, the witness must invoke the Fifth Amendment privilege against self incrimination before the government may trade transactional immunity for testimony. See, e.g., *United States v. Washington*, 431 U.S. 181 (1977). However, under the New York Criminal Procedure Law, a witness cannot invoke the privilege against self incrimination in the grand jury and no one confers immunity upon the witness. Immunity is automatic. See N.Y. CRIM. PROC. LAW §§ 50.20(1), 190.40(1) (McKinney 1992). This automatic transactional immunity provision raises difficulties which may occur when a prosecutor inadvertently

immunity protection for witnesses from whom evidence is compelled, assures that society's interests can be protected by a complete investigation when criminal wrongdoing or government misconduct or nonfeasance is suspected.

The privilege laws identify whole classes of people, such as employees, consultants, contractors, transporters, lenders, and buyers who cannot be compelled to testify before a grand jury to determine whether a crime has been committed or the public health and safety is at risk even though those people could not be prosecuted if they committed crimes. It is unconscionable to prosecutors that a grand jury should have reduced power to investigate in cases which pose potentially grave risks to society.

2. Audit Privilege Laws Have Broader Application Than Other Existing Privileges

Very few existing privileges can be used to withhold evidence from a grand jury⁶² or from a government agency investigating

calls as a witness a perpetrator who is not suspected of complicity. Upon giving an answer responsive to any inquiry that has bearing on an incident, the witness automatically receives immunity and can never thereafter be prosecuted. *See* *People v. Williams*, 438 N.E.2d 1146 (N.Y. 1982). Indeed, a witness may even receive transactional immunity for a crime totally unrelated to the one under investigation by responding to a simple question regarding an innocuous fact — i.e., his occupation. *See* *People v. McFarlan*, 366 N.E.2d 1357 (N.Y. 1977).

62. The confidentiality of subpoenaed documents is protected by grand jury secrecy requirements. *See* FED. R. CRIM. P. 6 (e); N.Y. CRIM. PROC. LAW art. 190 (McKinney 1992). While secrecy concerns are recognized, in limited circumstances, as justification for a privilege where confidentiality would provide an identifiable social benefit (*see, e.g.*, *Bredice v. Doctors Hospital, Inc.*, 50 F.R.D. 249 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973)), they do not constitute reasons to withhold information from a criminal investigation. "The divulgence of potentially incriminating evidence against [a subject] is naturally unwelcome Yet such divulgence . . . is a necessary part of the process of law enforcement . . ." *Couch v. United States*, 409 U.S. 322, 329 (1973). Accordingly, privileges which apply in private actions do not apply where government seeks the documents. *See* *Federal Trade Commission v. TRW, Inc.*, 628 F.2d 207 (D.C. Cir. 1980); *Emerson Electric Co. v. Schlesinger*, 609 F.2d 898 (8th Cir. 1979); *United States v. Noall*, 587 F.2d 123 (2d Cir. 1978), *cert. denied*, 441 U.S. 923 (1979); *Reynolds Metals Co. v. Rumsfeld*, 564 F.2d 663 (4th Cir. 1977), *cert. denied sub nom. Reynolds Metals Co. v. Brown*, 435 U.S. 995

public welfare issues. Where existing privileges can be asserted to withhold evidence from a grand jury, they only protect communications. Environmental audit privilege laws, however, shield documents and underlying facts and knowledge of targets from grand jury scrutiny. Unlike existing privileges, which a claimant must prove applies to preclude admission of evidence, audit privilege laws presume a privilege exists. Prosecutors must disprove the existence of a privilege before conducting an investigation.

3. Audit Privilege Laws Impose Suppression of Evidence, and the "Fruit of the Poisonous Tree" Doctrine in Cases Where There Has Been No Police Misconduct and No Unlawful Seizure of Evidence

Environmental audit privileges prohibit the admission of any evidence which was developed from audit documents that are later ruled privileged, whether or not the prosecutor knew that a witness' knowledge derived from such a report. This contradicts existing law, under which evidence is admissible even if it was developed from a privileged communication; only the privileged communication itself is inadmissible.⁶³

(1978). Privilege laws which would deny access to audit documents would be contrary to long established New York law as well. *See, e.g.*, *People v. Tissois*, 526 N.E.2d 1086 (N.Y. 1988) (social worker privilege); *Knight-Ridder v. Greenberg*, 511 N.E.2d 1116 (N.Y. 1987) (shield law); *In re Grand Jury Subpoenas [X & Y]*, 505 N.E.2d 925 (N.Y.), *cert. denied*, 482 U.S. 928 (1987) (physician-patient privilege); *People v. Wilkins*, 480 N.E.2d 373 (N.Y. 1985) (psychologist-patient privilege); *Stern v. Morgenthau*, 465 N.E.2d 349 (N.Y. 1984) (confidential records of state Commission on Judicial Conduct); *Virag v. Hynes*, 430 N.E.2d 1249 (N.Y. 1981).

63. The "fruit of the poisonous tree" doctrine is a long-standing extension of the exclusionary rule, embodying federal courts' early efforts to deter police misconduct. When an officer would procure evidence in a manner that violated the defendant's Fourth or Fifth Amendment rights, such evidence would be suppressed under the exclusionary rule. Furthermore, any evidence procured directly as a result of the misconduct — the "fruit" of the officer's illegal activity — would similarly be suppressed. *See Wong Sun v. United States*, 371 U.S. 471 (1963).

The primary purpose of the exclusionary rule is not to remedy the injury to the privacy of the defendant. Rather, the rule is primarily intended to deter future unlawful police conduct which usurps the guarantees of the Fourth and Fifth

4. Privilege Laws Create A Fifth Amendment Privilege For Corporations

Under the Constitution, only natural persons are guaranteed a right against self-incrimination. Corporations, as fictional entities,

Amendments. *Calandra*, 414 U.S. at 347. "The rule is calculated to prevent, not to repair. Its purpose is to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it." *Id.* (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)). *Accord*, *Terry v. Ohio*, 392 U.S. 1, 29 (1968); *Tehan v. United States*, 382 U.S. 406, 416 (1966).

Consequently, federal courts have repeatedly refused to apply this doctrine where the privilege asserted is not rooted in constitutional right. In *United States v. Lefkowitz*, 618 F.2d 1313 (9th Cir.), *cert. denied*, 449 U.S. 824 (1980), the defendant, Lefkowitz, under investigation for various tax fraud offenses, moved boxes of corporate records to his secretary's apartment so that cosmetically altered duplicates could be provided to the IRS in response to a summons. The defendant's wife assisted him in moving the boxes and knew all about his alteration of the originals. Four months later, she anonymously telephoned the IRS agents investigating her husband and informed them of the falsified books, the removal of the originals, and the fact that some of the original records were moved back into the office after the return on the IRS summons. Pursuant to this information, the IRS issued search warrants for the Lefkowitz corporate offices and Lefkowitz's residence. The affidavit did not reveal that the secret informant was Lefkowitz's wife.

Much of the evidence used to convict Lefkowitz was obtained through the execution of these warrants. Lefkowitz sought to suppress this evidence because it was the "fruit" of information protected under the confidential marital communications privilege. The court found the evidence admissible, but stated that because the marital communications privilege is not grounded in constitutional rights, a secondary source of information obtained through this communication would not likely be "tainted." *Id.* at 1318-19.

Ten years later, the Ninth Circuit again considered a "fruit" suppression request based upon the marital communications privilege in *United States v. Marashi*, 913 F.2d 724 (9th Cir. 1990). The court held the spousal testimony admissible despite the privilege, and therefore did not need to address the "fruit" suppression request. However, the court relied on the *Lefkowitz* dicta in stating:

[W]e need not resolve Marashi's claim that all evidence derived [from the marital communications testimony] should be excluded as fruits of the poisonous tree. Suffice it to say that no court has ever applied this theory to *any* evidentiary privilege and that we have indicated we would not be the first to do so. *Id.* at 731 n.11.

are required to produce all records subpoenaed by a grand jury. Only the individuals who are subpoenaed to testify receive immunity. Under the environmental privilege laws however, corporations receive greater protection from criminal investigations, and prosecutors have weaker tools to conduct such prosecutions, though the crimes under investigation pose a threat to the environment and public safety.⁶⁴

5. Privilege Laws Conflict With Constitutionally and Statutorily Derived Rules Regarding Admissibility of Evidence

Because excess litigation unreasonably interferes with the effective and expeditious discharge of a grand jury's duties, exclusionary rules cannot be invoked by grand jury witnesses.⁶⁵ Audit privilege laws compel hearings on the admissibility of audit documents which ultimately preclude such documents, or evidence derived from them, from consideration by a grand jury. In this way, the provisions of those laws as they apply to grand jury subpoenas, squarely contradict the unequivocal holdings of the

64. It has long been established in the federal common law that corporations and other "collective entities" are entitled to no protection under the privilege against self-incrimination. See *United States v. White*, 322 U.S. 694 (1944); *Wilson v. United States*, 221 U.S. 361 (1911); *Hale v. Henkel*, 201 U.S. 43 (1906). Furthermore, the custodian of corporate "books and papers" has no privilege to refuse their production although their contents tend to incriminate him or her. *Wilson*, 221 U.S. at 382. See *Braswell v. United States*, 487 U.S. 99, 110 (1988).

65. The remedy of suppression is only available to a party if and when an indictment is returned and the allegedly unlawfully seized evidence is intended to be used against him, or when the seizure has been previously adjudicated unlawful. *Calandra*, 414 U.S. 338; *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920). In deciding whether to apply the exclusionary rule to the grand jury, the Courts have consistently balanced the potential benefits of applying the rule to the grand jury against the detrimental impact on the functions of that body. *Calandra*, 414 U.S. 338. Reaffirming its oft stated position that a grand jury investigation should not be saddled with mini-trials on possibly tangential issues, the Supreme Court refused to allow a grand jury witness to invoke the exclusionary rule: "In the context of a grand jury proceeding, we believe that the damage to that institution from the unprecedented extension of the exclusionary rule urged by respondent outweighs the benefit of any possible incremental deterrent effect." *Id.* at 354.

Supreme Court and state appellate courts regarding the conduct of grand jury investigations.⁶⁶

Federal and state criminal procedure laws set forth timetables for raising both constitutional issues and evidentiary questions, namely, after accusatory instruments have been filed.⁶⁷ Litigating such issues before charges are filed is a waste of government and judicial resources. Privilege laws interfere with the orderly conduct of criminal cases by vesting in a variety of courts the obligation to make premature evidentiary rulings on matters which will be outside their jurisdiction if charges are even filed. No one can guess what the legal impact of such unorthodox procedures will be when a defendant appeals a conviction, claiming error regarding an evidentiary ruling made by a court without jurisdiction over the criminal case.

6. Audit Privilege Laws Will Have An Unpredictable Impact on the Interstate Subpoena Power of Prosecutors

The Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings has been enacted by all fifty states.⁶⁸ The act sets forth clear cut procedures for prosecutors to establish that out-of-state witnesses (and documents) are material and necessary to a criminal trial or grand jury investigation. The prosecutor makes such a showing in the court with jurisdiction over the case ("requesting court"), which certifies the need for the witness to the court having jurisdiction over the witness whose evidence is required ("sending court"). The sending court gives notice to the witness, who may only challenge the interstate subpoena on the grounds that attendance would cause undue hardship.⁶⁹ Claims of privilege, as a basis for challenging

66. *See supra* note 61 and accompanying text.

67. Rule 12 (b) of the Federal Rules of Criminal Procedure and article 710 of the New York State Criminal Procedure Law both provide that suppression motions shall be made after arraignment on the indictment. *See* FED. R. CRIM. P. 12(b); N.Y. CRIM. PROC. LAW art. 710 (McKinney 1995).

68. 11 U.L.A. 5 (1936). In New York, the act is codified at N.Y. CRIM. PROC. LAW § 640.10 (McKinney 1995).

69. The constitutionality of the statute has been upheld on the ground that a state's power to deliver a material witness within its borders to a sister state is an inherent implication of our federalism. *New York v. O'Neill*, 359 U.S. 1 (1959).

a subpoena, have been relegated to the court in which the witness will testify because evidentiary rulings are deemed within the purview of the court which has jurisdiction over the proceeding.⁷⁰

It is impossible to predict exactly how the idiosyncratic privilege procedures will interplay with what has always been a straightforward, dependable tool for obtaining evidence from other jurisdictions. The only sure impact will be confusion, increased layers of litigation and delay. In short, all the rules are changed by privilege laws, but law enforcement agencies will never get a copy of the rule book. The lack of predictability in how evidence can be obtained, and the inability to assure that a costly, labor-intensive prosecution will be viable, is certain to drive prosecutors out of the environmental field.

C. *Use of Audit Reports Against Companies Which Audit*

The issue for prosecutors is not whether an audit report should be admissible to criminally prosecute someone for inadvertent violations committed prior to, and discovered during, the course of an audit. That situation has never arisen, and is not likely to arise in the future. On the other hand, if a company is found to be illegally dumping waste today, information in a previously conducted audit report will be extremely relevant. For that matter, all contacts by the company with environmental consultants, disposal facilities, transporters, and regulators will be relevant. Knowledge obtained through an audit conducted two years ago may well be the motive for today's illegal dumping.

To explain the problem with privilege statutes, as they apply to the use of audit reports in evidence against the company that conducted the audit, consider the following hypothetical example: Assume that someone at a suspect company is, in fact, engaging in the illegal dumping of a highly toxic substance. Further assume

For a discussion of the statute as it applies to production of documents, see Jay M. Zitter, Annotation, *Availability Under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings of Subpoena Duces Tecum*, 7 A.L.R. 4th 836 (1994).

70. *Codey ex rel. New Jersey v. Capital Cities, American Broadcasting Corp., Inc.*, 626 N.E.2d 636 (N.Y. 1993).

that the company, several years ago, conducted a good faith, legitimate audit. The audit, which disclosed that drums of hazardous waste were improperly handled and stored, set forth proper handling and storage methods for the particular raw product and waste materials at the site. It also provided lawful treatment and disposal options for the waste product. The company then corrects the problem, creating appropriate containment areas. It lawfully disposes of its waste for the next two years. When disposal prices go up (or the company faces other financial problems) the owners decide to hire an unlicensed hauler to get rid of the drums. They are dumped deep in a wooded area near a stream; a child is injured.

When the drums are traced back to the site of generation, a search warrant is executed or subpoena issued for any and all documents, including audit documents, relating to waste generation, storage, and disposal. It is uncontroversial that the audit documents would be useful to prove that the owners knew what the illegally dumped waste product was, its characteristics, and the lawful method of disposal. The documents would also lead investigators to others who were familiar with those facts and could be compelled to testify regarding the owners' knowledge and decision to change their method of disposal. Given the facts described, it would be disingenuous to argue that the owners should not be prosecuted or the documents used against them.

Under most environmental audit privilege laws, the audit documents in this hypothetical could not be used: The audit was not conducted for a fraudulent purpose; it was done in good faith and the problems were immediately corrected.⁷¹ It does not disclose evidence of the crimes which are the subject of the prosecution, and the information is available through other means.⁷² That those means might require compelling every single employee to testify about company procedures, granting them immunity in the process, is not a factor considered by the privilege statutes.⁷³

While there are numerous fact scenarios which would demonstrate why legitimate audit reports should be available to criminal

71. *See supra* notes 18-21 and accompanying text.

72. *See supra* note 22 and accompanying text.

73. *See generally supra* notes 60-61.

investigators in connection with a review of the audited company's activities, the short of it is this: audit reports are really only useful, and would only be used, in the investigation and prosecution of crimes which are committed *subsequent* to the audit. The specific evidentiary value is to show the knowledge, motive, and intent of the bad actor.

D. *The Presumption of Privilege: Roadblocks to Investigations*

The most significant obstruction caused by privilege laws derives from the procedures and presumptions that are supposed to make them work. In many statutes and bills, audit reports and supporting documents must be labeled as such with an indication that they are privileged.⁷⁴ Some statutes do not require labeling, and in some it is optional.⁷⁵

Documents which are labeled are *presumptively privileged*. Prosecutors who obtain those documents must seal them, without ever reading them.⁷⁶ Then, an *in camera* hearing is held to determine whether those particular documents are covered by the privilege.⁷⁷ If they are determined to be privileged, neither the documents, nor information learned from them, nor information learned from people who saw them, nor testimony from persons who participated in the audits, nor information developed from any of those sources can be used against the company in a criminal proceeding.⁷⁸ This is the case even if the prosecutor did not know that an informant's source of information was an audit report.⁷⁹

If the problem were to be faced only with regard to legitimate

74. See, e.g., ARK. CODE ANN. § 8-1-302(4).

75. In Texas, for example, labeling is optional, even though government officials may be criminally liable for disseminating privileged audit materials. TEX. REV. CIV. STAT. ANN. art. 4447cc § (6)(d).

76. See, e.g., ARK. CODE ANN. §§ 8-1-309(a)(1)(3), (b)(1); KY. REV. STAT. ANN. § 224.01-040(5)(a); KAN. STAT. ANN. § 60-3335(a), (b).

77. See ARK. CODE ANN. §§ 8-1-309(b)(1), (c)(1); KY. REV. STAT. ANN. § 224.01-040(5)(b), (c); KAN. STAT. ANN. § 60-3335(b), (c).

78. See, e.g., TEX. REV. CIV. STAT. ANN. art. 4447cc §5; ARK. CODE ANN. § 8-1-309(B).

79. Though not explicit in the statutes, it is the author's opinion that a reading of the statutes affords no other logical conclusion.

audits, the consequences of the statutes would not be so broad. Yet, the presumptions apply to any labeled document.

While it may be fair to assume for argument that professional auditors and Fortune 500 companies would not apply the label to items that do not squarely fit the definition of an audit document, it would be foolhardy to assume that no one will do so. With the proliferation of self-proclaimed environmental "experts" and the rampant increase of fraud in the industry, we must assume that virtually all documents generated in the environmental arena, including sampling analysis, estimates for disposal of waste, waste management and treatment proposals, site assessments, underground tank removal plans, audit documents prepared in support of loan applications or real estate transactions, and sales pitches for new equipment will bear the "privileged" label.

In reviewing — informally — twelve years of environmental crime prosecutions in Suffolk County, no cases were discovered in which an audit document which *could legitimately be determined to be privileged* under the various privilege statutes was used in evidence against a company to prosecute it for crimes which occurred prior to an audit. On the other hand, there have been occasions in which documents which *might* qualify as privileged under the statutes have been used to prove financial motive for illegal dumping which occurred after an audit-type activity at the company.⁸⁰ Similarly, legitimate audit documents *which would clearly qualify as privileged* under the statutes are routinely used in investigations and prosecutions of persons who defraud

80. As a general rule, the prosecution must prove that a defendant charged with illegally dumping hazardous or regulated substances knew that those substances were "bad." Knowledge is often proved with documents. Those documents may include material safety data sheets (MSDS), chemical labels, estimates for disposal, payments for prior lawful disposal, contact with regulatory agencies regarding the substances, manifests, reports or waste management proposals from environmental consultants, copies of regulations, or other paperwork in the defendant's possession which explain proper handling and disposal of waste. In some cases prosecuted, the documents have been reports which evaluate systems being utilized by the company, and provide treatment or disposal alternatives and estimates. It is possible that those documents would fit the statutory definition of audit reports. Those reports always pre-date the dumping crimes under investigation, and are used to prove knowledge and financial motive for the current illegal activities.

the companies which were audited or illegally dispose of the audited company's waste.⁸¹

Virtually every prosecution and investigation of environmental crime has utilized documents which, in retrospect, would *probably not be determined to be privileged* were a hearing held in accordance with the various statutes.⁸² However, all of those documents, which were necessary to prove knowledge and intent on the part of defendants engaged in illegal dumping or larcenous conduct, would in all likelihood be labeled "privileged" today if a statute were in place in this jurisdiction.⁸³ That simple act of labeling, and the ramifications of the *presumption of privilege*, are the crux of the problem.

Because privilege laws preclude even the examination of a labeled document, and provide that evidence derived from a privileged document cannot be used in an investigation or in evidence at trial, a prosecutor cannot make a knowing and educated guess about whether it would be admissible in evidence. Nor can a prosecutor determine whether talking to a whistleblower, who has knowledge of grievous wrongdoing and evidence to prove it, will lead to suppression of all evidence and dismissal of a criminal case.

In conducting an investigation relating to hazardous chemicals,

81. Legitimate audits conducted by a company seeking to come into compliance must be shared, in whole or in part, with companies hired to remove and/or recycle waste or provide other compliance services. When the fraudulent service provider charges the audited company for services it did not provide, or illegally dumps waste which the audited company paid it to properly recycle, the audit report is necessary to prove knowledge and criminal intent on the part of the fraudulent service provider.

82. Simple waste disposal estimates and materials describing waste treatment methods would probably be determined to not be privileged if those documents were not created as part of an audit, though they would be privileged if contained within an audit report.

83. Newsletters and advisories abound in the environmental industry. Law firms, professional associations, engineers, publishing companies, and environmental "consultants" routinely mail notices of legal developments, regulatory changes, and new programs to clients and potential clients. Passage of an audit privilege law, and a brief summary of its provisions, would no doubt lead to labeling of routine environmental documents as "privileged," whether from ignorance, a desire to impress clients, or just to be "safe."

interviews focus on people who either handle the product or handle the paperwork associated with it. Those people will invariably be the ones most likely to have participated in an audit, or been made privy to audit related materials. Accordingly, any witness interviews or testimony stands a marked risk of being "tainted" under the privilege laws.

The witnesses with the most knowledge of willful, dangerous activity are precluded from coming forward, in contravention of federal and state "whistleblower" laws and statutory rewards for reporting illegal dumping.⁸⁴ In Colorado, the privilege law makes a person who discloses information from audit material *personally liable for any financial loss suffered by the company*.⁸⁵ That liability apparently attaches whether or not the company was engaged in illegal activity. The same law makes it a *crime* for a law enforcement official to disclose the contents of an audit report which is determined to be privileged.⁸⁶

While significant penalties are imposed for revealing audit information, whether or not it is ultimately determined to be privileged, statutory penalties are rarely, if ever, provided for individuals who mislabel documents as privileged and bring the

84. A broad range of federal and state laws have been enacted to protect employees from unsafe working conditions. "Whistleblower" laws encourage employees to report environmental, health and safety violations in the workplace to government authorities. Some give workers the right to sue employers who violate regulatory consent orders; others require employers to notify workers when health violations exist. Privilege laws that prohibit reporting which is protected by the "whistleblower" laws undermine the dramatic progress made in the last decade toward worker safety. See 30 U.S.C. § 813 (1994) (coal mines); 42 U.S.C. §§ 7621, 7622 (1994) (air pollution); 42 U.S.C. §§ 6971, 6972 (1994) (solid waste); 33 U.S.C. §§ 1365, 1367 (1994) (water pollution). In New York, see N.Y. LAB. LAW §§ 215 (McKinney 1986 & Supp. 1996), 740 (McKinney 1988); N.Y. CIV. SERV. LAW § 75-b (McKinney Supp. 1996). In New York State, the Environmental Conservation Law provides for monetary rewards of up to twenty-five thousand dollars for reporting environmental crimes. See N.Y. ENVTL. CONSERV. LAW § 71-2726 (McKinney Supp. 1996).

85. Any party who divulges all or any part of an environmental audit report in violation of the Colorado statute "is liable for any damages caused by the divulgence or dissemination of the information that are incurred by the person or entity for which the environmental audit report was prepared. COLO. REV. STAT. § 13-25-126.5(5)(b)(I).

86. COLO. REV. STAT. § 13-25-126.5(5)(b)(II).

statutory prohibitions into play.⁸⁷ One can only expect that most businesses who learn of privilege laws, and most providers of environmental services, will play it safe and label everything as privileged. After all, there is no harm to a company if a court later determines the labeled documents do not qualify for protection.

Further, there is nothing to prevent truly bad actors from intentionally labeling certain documents "privileged" as trip-wires to warn them that law enforcement is getting close to them in an investigation. Some of the statutes require that a company be notified that a labeled document is in the possession of the prosecutor, who is prohibited from looking at it before making the notification. Other statutes simply preclude use of such documents or derivative evidence unless they are obtained by means of a search warrant or subpoena, which give the company actual knowledge of their possession.⁸⁸

The privilege laws, and the presumption of privilege, will also pose dramatic threats to the health and safety of both criminal investigators and the communities in which offending companies are located. Before a search warrant is executed to gather samples and other physical evidence of illegal on-site dumping at a facility, investigators must consider what protective equipment is necessary for personnel, what substances are likely to be encountered, and whether the surrounding community will be impacted. If there is an allegation of hidden discharge pipes or waste pools, plans must be made to locate, uncover, sample, and safeguard the site. Frequently, heavy equipment is needed to accomplish these goals.

The more dangerous the chemicals, and the more wantonly they are stored or used at a facility, the greater the risk to the personnel going into the facility. Once inside, they cannot leave until they have accomplished their goals.

87. According to the Texas statute: "A person claiming the privilege is subject to sanctions . . . if the court finds that the person intentionally or knowingly claimed the privilege for unprotected information . . ." TEX. REV. CIV. STAT. ANN. art. 4447cc § (7)(d).

88. See, e.g., TEX. REV. CIV. STAT. ANN. art. 4447cc § (9)(h); UTAH CODE ANN. § 19-7-106(4).

To help the investigators in their search, and to provide evidence of knowledge and intent for the prosecution, search warrants routinely call for seizure of documents which relate to the manufacturing processes, changes to the physical plant, treatment, storage and disposal of waste, material safety data sheets, and contact with regulatory agencies or environmental service providers. Such documents may warn searchers that unexpected chemicals posing unforeseen dangers are located on the site, causing them to upgrade personal protective equipment or safety procedures in searching the facility. They may help to identify hidden piping systems, illegal dumping pools, or "hot spots" within the facility.

With a privilege law in place, some or all of those documents will no doubt bear "privilege" labels. Whether or not they are audit materials, and whether or not prosecutors might prevail in a later hearing and be able to use them at trial, the police executing the search warrant cannot even look at them. To do so risks total preclusion of evidence in the case, even though the court issuing the search warrant has determined that there is probable cause to believe such documents will tend to prove that the facility managers or owners committed the crimes under investigation.

By precluding access to documents which will help find evidence of hidden disposal sites when there is probable cause to believe they exist, and lawful authority to search for them, the presumptions in the privilege laws will shield the most serious offenders. By precluding access to information about potentially life threatening conditions when a search is being executed to prove criminal conduct by bad actors, the privilege laws will place at risk the very investigators who are willing to take on the hazardous duty assignment of trying to stop intentional dumping. Additionally, by precluding access to documents which might help search personnel to assess the extent of a problem at a site where hazardous waste is being dumped, privilege laws place at risk the natural resources and the communities our environmental laws were designed to protect.

The lack of criminal investigative experience on the part of bill drafters is most glaringly apparent by what the laws do not address. Most of the statutes set forth procedures for determining the applicability of the privilege when a document is obtained by

search warrant or subpoena.⁸⁹ Some include a provision for a letter of request, or formal discovery through criminal procedure statutes.⁹⁰ Virtually all the statutes provide for preclusion from evidence of any audit document — or evidence developed from it or someone who saw it — that was obtained in any other manner.⁹¹

The most common way of obtaining information about illegal activity is through informants. Cases have been initiated in Suffolk County by both expected and unexpected types of people: a sales manager who saw illegal activity while paying a call on a customer; employees who are being paid off the books, but think improper waste handling is wrong; a former state prison convict who was outraged that he had to bury drums of hazardous substances; an admitted armed robber who turned in his “drug rip”⁹² partner for dumping waste oil into a storm drain; chemists who quit their jobs at licensed laboratories due to lax or fraudulent testing of environmental samples; or licensed industrial waste haulers who were offered bribes to illegally take hazardous waste.⁹³

When informants come forward, they are usually anxious to prove their reliability. If they have proof, they bring it. With privilege laws in place however, it will never be safe to look at that proof.

Criminal investigations in the environmental field, though expensive, labor intensive, and complicated, are handled exactly the same as any other criminal investigation. The rules of play for

89. See, e.g., ARK. CODE ANN. § 8-1-309(a)(2); KAN. STAT. ANN. § 60-3335(a); OR. REV. STAT. § 468.963(4)(a).

90. See, e.g., ARK. CODE ANN. § 8-1-309(a)(2)(C); COLO. REV. STAT. § 13-25-126.5(3)(c); ILL. ANN. STAT. ch. 415, para. 5/52.2(d)(4); WYO. STAT. § 35-11-1105(c)(v).

91. See, e.g., TEX. REV. CIV. STAT. ANN. art. 4447cc § (9)(h); UTAH CODE ANN. § 19-7-106(4).

92. A “drug rip” is a robbery of illegal drugs from dealers. They are frequently violent, and rarely reported to the police.

93. The author’s knowledge of these facts is derived from her first-hand experience as Assistant District Attorney and chief of the Environmental Crime Unit of the Suffolk County District Attorney’s Office. In order to protect the identities of informants, specific case numbers are not provided.

criminal cases are far more stringent than those for civil litigation and private party actions. While they are rigorous, the constitutional and statutory protection for defendants and restrictions on law enforcement conduct are at least born of the criminal justice system in which they apply. Those rules are the only ones that police and prosecutors should have to worry about.

By injecting artificially created concepts and procedures into the criminal arena, privilege laws shackle those who try to detect, punish, and deter the most serious environmental crimes. That is clearly not the intent of bill drafters and bill proponents.⁹⁴

E. *Privilege Shields for Environmental Fraud*

While it is further not the intent of bill drafters and bill proponents to shield from prosecution the sham environmental experts who are driving up the price of compliance by stealing from legitimate businesses,⁹⁵ privilege laws will do just that.

The one place we can clearly expect to see a proliferation of "privilege" labels is in the offices of those sham environmental experts. Months of speculation and endless brainstorming among members of the author's staff have failed to spark a plan which could enable the investigation and prosecution of a fraudulent environmental consultant with privilege laws in place.

In any kind of fraud case which involves routine forgery or falsification of records, the key to the investigation is the records themselves. When an informant comes forward with insider information on a scheme to defraud, the whole first phase of the investigation is geared at corroborating the informant and developing probable cause for a search warrant.⁹⁶ The search warrant is utilized to seize all potentially forged documents, blank forms, financial records, correspondence, forgery devices (such as computers and printers), and other records which will help prove the fraudulent conduct.

The next phase of the investigation, which may take months, involves among other things the comparison of the documents to

94. *See supra* part II.

95. *See supra* part II.

96. Subpoenas are generally useless since records that are surrendered, if they are surrendered, are invariably altered or incomplete.

each other, interviews with purported signers of the documents, acquisition of evidence from third parties, and analysis of financial records. The ultimate goal is to determine which documents are false, who falsified them, and who was defrauded.

If the records bear privilege labels, and they no doubt will if the target company is in the environmental field, they will have to be sealed without having been reviewed. Computers used to forge documents cannot be accessed, for they would have in them information relating to presumptively privileged documents. It will be impossible to identify, let alone notify the companies whose facilities were the subject of the audit documents within the procedural framework of the statutes.⁹⁷ No investigation can be done. None of the exceptions set forth in the various privilege laws would apply so as to allow use of the documents in evidence (especially those which might not have been forged) without the consent of the companies involved.

Even if the "fraud" exception could be argued, prosecutors could not prove the fraudulent intent of the target without access to the documents which cannot be used until the fraudulent intent is established. In short, the ultimate trial issue — the fraud — would have to be litigated before the documents would be available to conduct the investigation. Knowing that an investigation is doomed to failure would preclude even the most aggressive prosecutor from wasting resources in the attempt.

In many cases of environmental fraud, there are also ordinary environmental crimes being committed. If a serious environmental problem exists, it is not as easy to walk away from the investigation. The scenario which will be used to illustrate the impact of the privilege laws is quite simple, and according to informants, quite common: Assume an employee comes forward with an allegation that there is a serious waste dumping problem at his factory. He also informs the investigator that the boss had recently obtained a huge loan based on false financial and environmental audit reports. He is familiar with the hazardous chemicals used at the factory, and was privy to or at least got a quick look at the environmental audit report in question.

97. The statutes all presume that audit documents would be obtained by prosecutors from the audited company itself.

The potential crimes being committed fall into two general categories. The first is environmental crime, for the illegal disposal or release into the environment of the waste. The second is fraud, for forgery, falsification of business records, and grand larceny. The usual investigative approaches in the two types of cases have to be carefully utilized and timed so that they do not jeopardize the other.

The first items the prosecutor needs to see are the documents submitted to the lender in order to obtain the loan. Those documents — applications, financial reports, SEC filings, credit records, sales data, and the environmental audit report — are the keystone of the investigation. In fact, they will determine whether there will even be an investigation. In reviewing them, the prosecution will look for the following:

How accurate is the informant's information? How much knowledge does he have? Can additional information he provides be expected to be reliable?

How relevant are the alleged falsities in the documents? Are the purportedly false statements significant enough that the lender would care? Would truthful statements have affected the loan risk assessment, and would the loan proceeds still have been paid?

Assuming the statements are false, are they provably false? Or are they just vague representations and careful omissions? What documentation might exist to prove they are false if a search warrant was executed in the facility's office?

With regard to the dumping allegation: are the representations in the environmental audit report specific as to raw products used and waste handling? If they are false, are they provably false? Would a search warrant provide evidence that would tend to show the truth or falsity of the representations in the report?

How serious is the alleged dumping? If you take the waste described in the report and dump it in the manner described by the informant, how bad would it be?

From the documents given to the bank, is it evident who in the company actually participated in and/or saw the audit report? According to the informant, are any of those who are responsi-

ble for the dumping the same people who were privy to the report? Did any of those same people participate in the loan application process?

If the informant's allegations are true, is there an investigative means to catch illegal dumping in the act, or observe the boss giving instructions? Is there any way to get the boss on a re-
lating talking about the falsehoods in the reports, or the illegal dumping, or the obtaining of the loan?

The basic elements of the environmental crimes and the fraud crimes are similar. For the environmental crimes, the prosecution must prove that the dumping occurred, that the defendant was responsible (either personally or by directing that it be done), and that the defendant (generally) knew what was being dumped.

For the fraud crimes, the prosecution must prove that the defendant made representations to the lender about how waste is handled, that those representations were false, that the defendant knew they were false, and that the lender paid money to the defendant based on a belief that the representations were true.

Assuming the informant's story is true, a thorough investigation is likely to elicit clear proof that illegal dumping has occurred. Surveillance techniques, covert recording of conversations, review of regulatory inspection files, and sampling under the authority of a search warrant will assure this part of the criminal case. Proof of knowledge and intent will be the key, and the documents that were submitted to the lender will reveal whether an investigation should be commenced.

The evaluative process that is necessary before a decision can be made to dedicate investigative resources all turns on the very document which, under privilege laws, the prosecutor cannot see. Under most privilege statutes, privilege would not be waived by the company that provides the audit report to a lender, or potential partner or buyer. The lender in this scenario cannot give it to the prosecution *even if it wants to, and even if the prosecutor reveals a suspicion that a fraud was committed*. If the environmental audit report is obtained in a manner other than provided in the privilege laws, all information in it and evidence derived from it is subject to preclusion from evidence. Even if the prosecutor refuses to look at the report, there is no way to determine if the

informant's information was derived from the report.

In short, the only way to lawfully see the documents that were used to commit the fraud — absent a search warrant — is to subpoena them from the company, wait the appropriate period of time for a hearing, and try to prove a fraud that cannot be proved until a criminal investigation is conducted. Such an investigation, of course, is impossible without access to the documents in the first place. It goes without saying that issuing a subpoena would also give notice of the investigation to the target and preclude any undercover investigative efforts.

The only other option, a search warrant, could not be obtained without an investigation to develop probable cause to believe that crimes were committed at the facility and that the documents sought constitute evidence of the crime. That too, is another impossibility without access to the very documents which are sought.

Even if probable cause could be established based on the informant's sworn statements to obtain a warrant to search for evidence of the illegal dumping, no prosecutor would devote the necessary resources without first being able to judge whether the informant's information was both reliable and "untainted" by exposure to a potentially privileged document. With privilege laws in place, the prosecutor could never make that necessary judgment.

In short, an investigation would never take place.

CONCLUSION

The devastating implications of audit privilege legislation has only begun to sink in as criminal investigations have progressed with the specter of such laws lurking in the background. With each increasingly worse dumping incident, and with each discussion of the roadblocks that will confront us, it becomes more apparent to prosecutors that the extent of harm caused by the privilege movement will not be known for years to come.

Even if privilege laws would serve the stated purpose of causing more companies to conduct environmental self-audits, which is not conceded, their grave impact on law enforcement, on the businesses they serve to protect, and on public health, safety and the environment, makes further enactment of such laws uncon-

scionable.

The fact that such consequences were clearly unintended makes the need for repeal or reform of such laws all the more compelling.

