PRIVILEGE BY DESIGN: A PROPOSAL TO USE EXPERIMENTAL JURISPRUDENCE TO DEFINE ENVIRONMENTAL SELF-AUDIT PROTECTION

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INTRODUCTION

Secrecy can make regulators nervous. As a result, environmental regulators have often resisted proposals to keep certain activities—such as self-assessments or communications with professional counselors—outside the scope of reporting requirements or compelled disclosure. This suspicion, however, arises in a vacuum: we lack comprehensive data on whether, or to what extent, these types of privileges actually help promote good behavior or hobble the ability of regulators to enforce laws.

This dynamic has long driven efforts to encourage facilities to audit themselves for compliance with environmental or health and safety laws. Despite the Environmental Protection Agency's (EPA) vigorous opposition to environmental audit privileges, it has promised limited protection under its own policies. State legislatures and agencies have adopted a motley collection of differing policies and laws to protect information from this type of self-examination.

We now have a rare window to rationally and explicitly craft a new privilege or protection based on experimental jurisprudence. A majority of states, and many federal agencies, now have differing policies and laws that offer varying levels of protection to environmental self-audits. This slowly emerging consensus has arguably reached critical mass, and federal courts could now find that a form of limited protection for environmental audit information now exists as a matter of federal evidentiary common law. To provide new data that could help clearly craft and delineate this new protection, this article suggests a research experimental framework that courts or federal agencies could use to explicitly define and shape the most effective version of this new common law evidentiary protection. This approach could serve as a template for the development of future new evidentiary protections or privileges.

Because information—its acquisition, control, and disclosure—sits at the heart of regulatory law and environmental regulation,[1]

1. Information disclosure obligations play an especially dominant role in environmental law. Every key federal environmental statute requires the reporting of data to regulators and the public, and come statutes rely almost solely on disclosure as their primary tool to achieve statutory and regulatory goals. These same statutes and programs place a high premium on making those data accessible and transparent to the public. For example, in the field of environmental law bedrock

regulatory tools that allow data to remain secret, frequently draw vigorous scrutiny and objections. Environmental policymakers and jurists have generally assumed that more disclosure is almost always better: the use of mandatory or voluntary disclosures theoretically encourages both beneficial environmental behavior as well as improved compliance with regulatory obligations. This mindset largely views disclosure as an unalloyed good in most contexts.[2] While some commentators have noted in passing the costs of requiring the collection of information, most analyses simply conclude that more disclosure is typically preferable.

This emphasis on information and data transparency, however, may underplay secrecy's role as a regulatory tool. The ability to refrain from investigation, or to withhold data in certain ways once they're obtained, powerfully shapes behavior as much as complementary obligations to disclose. As a result, important aspects of environmental law explicitly allow the suppression or withholding of information as a regulatory tool.[3]

legal holdings and economic principles view risks and injuries as avoidable outcomes of imperfect information. Better data about the costs imposed by nuisances, for example, theoretically would allow the market to include those externalities in an improved price signal or tally of damages. Along similar lines, fuller disclosure about emissions and discharges should favor more efficient production and reduce environmental side effects. On a local scale, improved site monitoring and data disclosure at regulated facilities can bolster the power of permits and regulations to strengthen environmental performance without needlessly impairing economic production. *See generally* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (9th ed. 2014) (providing a foundational assessment of the role of information asymmetries in pricing signals for environmental goods).

2. Some scholars and practitioners have suggested using broad disclosure as a tool to correct flaws in markets that otherwise might foment environmental externalities, as a method to protect individual autonomy from potential incursions caused by undisclosed emissions, and as a strategy to reduce environmental discharges through sociological pressures resulting from concerns over public reputation or commercial good will. *See* Daniel C. Esty, *Environmental Protection in the Information Age*, 79 N.Y.U. L. REV. 115, 121–54 (2004); *see generally* ARTHUR P. J. MOL, ENVIRONMENTAL REFORM IN THE INFORMATION AGE: THE CONTOURS OF INFORMATIONAL GOVERNANCE (2008) (arguing the importance of information in dealing with environmental challenges). For a contrary viewpoint that notes the risks of too much disclosure, see Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L. J. 1321, 1324–25 (2010) (noting the risk that current regulatory systems can encourage "excess information" that obscures salient information and leads to "information capture").

3. Beyond regulatory efficacy, the demand for regulatory secrecy can arise from numerous other policy concerns. For example, the federal Freedom of Information Act allows the concealment of data for reasons of national security, protection of trade secrets, maintaining the integrity and effectiveness of law enforcement and regulatory inspections, shielding the identity of confidential informants and

These two facets of environmental regulation suggest a mismatch: while environmental governance theory tends to favor disclosure, actual statutory obligations and regulatory practices temper that perspective with significant exclusions and limits. Most of these positions, on both sides, rely on assumptions that have little empirical support about the effect of secrecy and confidentiality on behavior. Bluntly put, we do not know with certainty the extent to which the behavior of regulated entities and persons actually changes in response to promises of confidentiality or secrecy in an environmental context.

A long-gestating development in environmental law may now offer a platform to test this disconnect. After decades of dispute and conflicting federal and state policies, a nascent federal environmental audit privilege has arguably emerged from a welter of varying state laws and policies. The federal courts have not yet squarely ruled on the status of this new privilege, and this moment of crystallization offers an opportunity to consciously test and shape the contours of the federal privilege. As opposed to the typical ad hoc evolution of federal evidentiary privilege through multiple judicial holdings, the relevant federal or delegated state agencies can help guide this final step through offering a clear statement of the new federal privilege's best scope and limitations.

This article offers two analyses. First, it outlines the contentious history and incipient emergence of a federal evidentiary privilege for environmental audits. Second, it suggests ways that the federal government and stakeholders can expressly direct and shape the contours of that privilege short of outright statutory changes or compulsory regulatory action. Rather than rely on untested assumptions about the operation and effect of privileges on behavior and compliance, we have an opportunity to rationalize the use of regulatory secrecy and lay an empirical basis for the development of future regulatory privileges and self-disclosure policies. It concludes with a proposal for a field experiment or demonstration to provide an empirical basis for the design of a federal environmental audit privilege as well as for regulatory secrecy tools used in other legal fields.

This deliberate design approach for implementation of a new privilege would foster a new systemic perspective on the uses of

whistleblowers. Freedom of Information Act, 5 U.S.C. § 552 (2018). Other federal laws and policies seek to minimize the imposition of unnecessary costs and burdens of producing marginally relevant information. *See*, *e.g.*, Paperwork Reduction Act of 1995, 44 U.S.C. § 3501; Exec. Order No. 12866, 50 Fed. Reg. 190 (1993).

privilege—and other forms of instrumental secrecy—as a tool for regulation. The policy effects of an individual rule that provides secrecy or constrains disclosure obligations will effectively be a self-emergent property of a broad implementation of specific decisions. This emergent pattern of action will effectively serve as the indirect, yet primary, outcome of the new rule. While environmental law offers an excellent forum to initially test them, these emergent principles might also apply with equal force in other fields of law. General precepts for the use of regulatory secrecy may also offer a fruitful area for verification through legal empirical experimentation.

I. THE RISE OF ENVIRONMENTAL AUDIT PROTECTIONS

A. State Audit Privilege Laws & Practices

Faced with increasingly complex environmental obligations, large toxic tort verdicts, expanding criminal enforcement efforts,[4] growing criminal penalty authority,[5] and narrower intent standards for environmental crimes,[6] some members of the regulated community faced a difficult choice in the 1980s. The complexity of environmental regulations raised the risk that some portion of their operations might fall out of compliance but conducting a self-audit to identify those shortfalls could generate documentary evidence of the corporation's knowledge of violations discovered by the audit. To offset this source of hesitation and encourage candid, thorough compliance reviews, industry and many states and scholars advocated on public policy grounds a privilege to effectively bar regulatory agencies and other parties from obtaining and adversely using materials generated as part of a voluntary environmental audit.[7] This protection only applies when

4. Katherine C. Kellner, *Separate But Equal: Double Jeopardy and Environmental Enforcement Actions*, 28 ENV'T L. 169, 169 (1998) (discussing the "remarkable increase in number of criminal prosecutions for environmental law violations in the last several year").

5. Sean J. Bellew & Daniel T. Surtz, *Criminal Enforcement of Environmental Laws: A Corporate Guide to Avoiding Liability*, 8 VILL. ENV'T L. J. 205, 205 (1997) (discussing that "[n]early every environmental statute enacted since the dawn of the environmental movement initially contained, or has been amended to include, a criminal enforcement section."); *see* Kenneth A. Hodson et al., *The Prosecution of Corporations and Corporate Officers for Environmental Crimes: Limiting One's Exposure for Environmental Criminal Liability*, 34 ARIZ. L. REV. 553, 553 (1992).

6. Joseph E. Cole, *Environmental Criminal Liability: What Federal Officials Know (or Should Know) Can Hurt Them*, 54 A.F. L. REV. 1, 36 (2004).

7. *See* John-Mark Stensvaag, *The Fine Print of State Environmental Audit Privileges*, 16 UCLA J. ENV'T L. & POL'Y 69, 107 (1997).

existing reporting requirements did not already compel disclosure of the information.[8]

In recognition of the policy benefits of encouraging environmental self-policing, twenty-seven states have enacted audit privilege/immunity statutes, one state has enacted audit privilege/immunity rules, and nineteen states have published audit protection policies since 1993.[9] After almost-successful attempts to pass privilege legislation over EPA's objections in Arizona and Colorado in 1989 and 1990, respectively, the proponents of an audit privilege began a new push in 1993, enacting strong privilege laws in Oregon in 1993,[10] in Kentucky,[11] Indiana[12] and Colorado[13] in 1994, in eight additional States—Arkansas,[14] Kansas,[15] Minnesota,[16] Mississippi,[17] Texas,[18] Utah,[19] Virginia,[20] and Wyoming[21]—in 1995, and in five more States—Michigan,[22] New Jersey,[23] South Carolina,[24] South Dakota,[25] and Ohio[26] in 1996. In 1997, the Alaska legislature overwhelmingly overrode the veto of the state's governor to enact an audit privilege statute.[27] Nevada[28] joined the privilege club that year as well. And in 1998, Nebraska[29] and Iowa[30] adopted privilege

8. *See id*. at 107–10.

9. *See State Audit Privilege and Immunity Laws & Self-Disclosure Laws and Policies*, U.S. ENV'T PROT. AGENCY, https://19january2021snapshot.epa.gov/compliance/state-audit-privilege-and-immunity-laws-self-disclosure-laws-and-policies_.html (last visited May 24, 2022).

10. S.B. 912, 67th Leg. Assemb., Reg. Sess. (Or. 1993).

11. H.B. 681, 1994 Leg., Reg. Sess. (Ky. 1994).

12. 1996 Ind. Legis. Serv. P.L. 1-1996 (S.E.A. 56) (West).

13. 1994 Colo. Legis. Serv. 304 (S.B. 94-139) (West).

14. H.B. 1487, 80th Gen. Assemb., Reg. Sess. (Ark. 1995).

15. 1995 Kan. Legis. Serv. 204 (S.B. 76) (West).

16. 1995 Minn. Sess. Law Serv. Ch. 168 (H.F. 1479) (West).

17. 1995 Miss. Legis. Serv. Ch. 627 (S.B. 3079) (West).

18. 1995 Tex. Sess. Law Serv. 219 § 1–13 (West).

19. 1995 Utah. Legis. Serv. Ch. 304 (S.B. 84) (West).

20. 1995 Va. Legis. Serv. Ch. 564 (H.B. 1845) (West).

21. 1995 Wyo. Legis. Serv. Ch. 58 (S.F. 96) (West).

22. 1996 Mich. Legis. Serv. P.A. 142 (S.B. 728) (West).

23. 1996 N.J. Sess. Law Serv. Ch. 296 (Assemb. 1521) (West).

24. 1996 S.C. Acts 384 (H.B. 3624).

25. 1996 S.D. Sess. Laws ch. 18 § 1–5.

26. S.B. 138, 1996 Leg., 121st Gen. Assemb. (Ohio 1997).

27. S.B. 41, 20th Leg., Reg. Sess. (Alaska 1997).

28. 1997 Nev. Stat. Ch. 297 (A.B. 355).

29. 1998 Neb. Laws L.B. 395.

30. 1998 Iowa Legis. Serv. Ch. 1109 (H.F. 681) (West).

statutes. Four other states, Idaho,[31] Illinois,[32] Montana,[33] and New Hampshire,[34] passed audit privilege statutes but subsequently repealed or allowed the statutes to sunset. Arizona enacted an audit privilege statute that never became effective because it was conditioned on passage of an appropriations bill to fund the program, which was never passed.[35] Additionally, in 1997 Oklahoma Department of Environmental Quality passed audit privilege rules.[36]

While most state legislative and regulatory efforts to shield self-disclosures from enforcement took place in the 1990s and early 2000s, states continue to deploy audit and self-disclosure protection to promote compliance. For example, the California Air Resources Board adopted a new enforcement directive on October 14, 2020 that provided up to a seventy-five percent reduction in penalties for companies self-disclosed software in mobile sources (such as defeat devices) that violated air quality regulations.[37]

Voluntary environmental self-audits play a pivotal role in environmental compliance and enforcement. While it is difficult to tally the total number of environmental self-audits performed in the United States,[38] the U.S. Environmental Protection Agency (EPA) has received over 3,500 self-disclosures of environmental violations from over 10,000 facilities since 1995.[39] State agencies see similar levels of activity.[40] For example, in 2019 the Texas Commission on

31. 1995 Idaho Sess. Laws Ch. 359 (S.B. 1142) (allowed to sunset on December 31, 1997).

32. 1994 Ill. Legis. Serv. P.A. 88-690 (S.B. 1724) (West) (repealed 2005).

33. 1997 Mont. Laws Ch. 534 (H.B. 293) (expired in 2001).

34. 1996 N.H. Law Ch. 4 (H.B.275) (allowed to sunset in July 2003).

35. *See* U.S. ENV'T PROT. AGENCY, *supra* note 9.

36. *Id.*

37. CAL. AIR RES. BD., ENFORCEMENT POLICY 12 (Apr. 2020), https://ww2.arb.ca.gov/sites/default/files/2020-04/Enforcement_Policy_Apr_2020%20_Amendments_R.pdf.

38. Federal and state laws typically do not compel facilities to disclose that they intend to perform voluntary self-audits. *See* discussion *supra* note 7–8. In addition, EPA and state environmental agencies do not consolidate or harmonize any of their respective data about self-disclosures they receive on violations discovered by self-audits.

39. *EPA Announces Web-Based System for Companies To Self-Disclose Environmental Violations*, WATER ONLINE (Aug. 11, 2008), https://www.wateronline.com/doc/epa-announces-web-based-system-for-companies-0001.

40. *See* TEXAS COMM'N ON ENV'T QUALITY, ANNUAL ENFORCEMENT REPORT: FISCAL YEAR 2008 1-7–1-8 (2008), https://www.tceq.texas.gov/assets/public/compliance/enforcement/enf_reports/AER/histo

Environmental Quality (TCEQ) received 2,421 notices from facilities that intended to perform environmental audits, and it also received 839 self-disclosed notices of violation during the same period.[41] Corporations now routinely point to their environmental auditing programs as key components to their risk management strategies, sustainability efforts and environmental compliance systems.[42]

Despite the prevalence of environmental audits, the levels of protection accorded to them by state and federal policies used widely varying incentives.[43] The strength of these assurances differed in fundamental ways, and ranged from a statutory immunity against future enforcement actions (albeit this immunity typically did not extend to criminal behavior or required injunctive relief), protection against civil penalties, a commitment not to use self-disclosed audit results in future enforcement actions by the state, and a broader

rical/Annual-Enforcement-Report-FY2008.pdf [hereinafter TEXAS COMM'N ON ENV'T QUALITY 2008].

41. TEXAS COMM'N ON ENV'T QUALITY, ANNUAL ENFORCEMENT REPORT: FISCAL YEAR 2019 1-7–1-8 (2019), https://www.tceq.texas.gov/assets/public/compliance/enforcement/enf_reports/AER/historical/Annual-Enforcement-Report-FY2019.pdf [hereinafter TEXAS COMM'N ON ENV'T QUALITY 2019]. This level of disclosures in Texas is typical and consistent with historical disclosure practices since Texas implemented its statutory audit privilege and self-disclosure immunity program. *See, e.g.*, TEXAS COMM'N ON ENV'T QUALITY 2008, *supra* note 40, at 1-10.

42. *See* GOODYEAR, 2020 CORPORATE RESPONSIBILITY REPORT 18 (2020), https://corporate.goodyear.com/content/dam/goodyear-corp/documents/responsibility/corp-responsibility-reports/2020-corporate-responsibility-report.pdf.coredownload.pdf; *see also Audit Protocols*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/compliance/audit-protocols (last updated Nov. 30, 2021) ("Environmental audit reports are useful to a variety of businesses and industries, local, state and federal government facilities, as well as financial lenders and insurance companies that need to assess environmental performance."); Mark Cramer, *Environmental Compliance Audits Require Follow-Up*, ENV'T, HEALTH & SAFETY SOLS. (Jan. 26, 2016), https://ei1.com/2016/01/26/environmental-compliance-audits-require-follow-up/ ("[m]any companies incorporate third party environmental compliance audits conducted by experienced environmental consulting professionals into their overall compliance programs to supplement their day-to-day environmental compliance activities. Typically, these third party audits can be very effective in providing meaningful input to the compliance leadership and staff by identifying deficiencies or recommending improvements."); U.S. GENERAL ACCOUNTING OFF., GAO/RCED-95-37, ENVIRONMENTAL AUDITING: A USEFUL TOOL THAT CAN IMPROVE ENVIRONMENTAL PERFORMANCE AND REDUCE COSTS 4, 10 (1995), https://www.gao.gov/assets/rced-95-37.pdf; TEXAS COMM'N ON ENV'T QUALITY 2019, *supra* note 41, at 1-7.

43. *See* Mary F. Evans et al., *Do Environmental Audits Improve Long-term Compliance? Evidence from Manufacturing Facilities in Michigan*, 40 J. REGUL. ECON. 279, 283–84 (2011).

general privilege against the use of self-evaluations in any future civil litigation by the state or private parties.[44]

Importantly, even in the face of strong opposition and threats by EPA to withdraw State delegation of authority to enforce federal programs—an approach called "delegation blackmail" elsewhere[45] — twenty-five States have adopted statutes since 1993 which expressly grant investigative and evidentiary privileges for environmental audit materials.[46] New Jersey[47] and Rhode Island[48] have instituted audit immunity programs by statute but not a privilege. Oklahoma effectively has done the same thing by rule rather than statute.[49] In addition, the environmental regulatory authorities of at least nineteen other states have implemented policies that at least reflect the spirit of the audit privilege and/or immunity laws.[50] This sweeping change has altered not only the evidence rules of those states which have adopted audit laws and policies, but it has fostered a re-evaluation of the applicable federal practices as well.[51]

B. EPA's Self-Disclosure Policy.

As states increasingly offered protections for environmental audits and self-disclosures, EPA aggressively pursued a different path. While EPA and other federal environmental officials generally supported efforts by facilities to self-audit their environmental compliance, they strongly opposed the creation of a full-fledged privilege for environmental audits.[52] Regulated facilities in turn

44. *See* Thomas A. Barnard & Kim K. Burke, *Environmental Audit: What Your Biz Needs To Know*, LAW 360 (May 27, 2011, 4:45 PM), https://www.law360.com/articles/247702/environmental-audits-what-your-biz-needs-to-know.

45. TIMOTHY A. WILKINS & CYNTHIA STROMAN, DELEGATION BLACKMAIL: EPA'S USE OF PROGRAM DELEGATION TO COMBAT STATE AUDIT PRIVILEGE STATUS 2 (1996).

46. *See* U.S. ENV'T PROT. AGENCY, *supra* note 9.

47. *Id.*; *see* N.J. STAT. ANN. § 13:1D-125–130 (West 2021).

48. U.S. ENV'T PROT. AGENCY, *supra* note 9; *see* 42 R.I. GEN. LAWS §§ 42-17.8-1–8-8 (2022).

49. U.S. ENV'T PROT. AGENCY, *supra* note 9; *see* OKLA. ADMIN. CODE § 252:4-9-5 (1997).

50. *See* U.S. ENV'T PROT. AGENCY, *supra* note 9.

51. *See* U.S. DEPARTMENT OF JUSTICE, *Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator* (Dec. 8, 2020), https://justice.gov/enrd/factors-decisions-criminal-prosecutions-environmental-violations-context-significant-voluntary.

52. Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19,618, 19,623 (Apr. 11, 2000).

vigorously argued that unshielded environmental audits could create an unacceptable risk that prosecutors or third parties would use audit reports as roadmaps for enforcement and as grounds for admissions against self-interest.[53]

These conflicts reached a fevered pitch in the late 1980s and early 1990s. As numerous state legislatures passed laws to protect audits, state environmental agencies promulgated administrative policies to insulate audits from routine discovery.[54] EPA strongly objected to many of these initiatives and, in some cases, threatened to withhold delegation from states whose audit laws or policies failed to include key exclusions that, EPA felt, were necessary to protect criminal enforcement efforts or federal civil enforcement policies.[55]

The disputes spurred EPA in 1986 to adopt its own environmental auditing policy ("Audit Policy").[56] EPA's Audit Policy attempted to strike a delicate balance: while it assured the regulated community that EPA would not routinely seek disclosure of environmental audits and would provide penalty relief for operators who self-disclosed any non-compliance discovered in audits, it also starkly laid out EPA's objections to a full evidentiary privilege for environmental audits.[57]

53. *See* Brian Riedel, *EPA, State Officials Disagree on Details of Audit Law Provisions*, *in* INSIDE EPA'S WATER POLICY REPORT 19–20 (1996), https://www.jstor.org/stable/pdf/45262179.pdf.

54. *See* discussion *infra* note 162.

55. EPA's opposition to state statutory audit privileges plays a prominent role in its current Self-Disclosure Policy:

> The Agency remains firmly opposed to statutory and regulatory audit privileges and immunity. Privilege laws shield evidence of wrongdoing and prevent States from investigating even the most serious environmental violations. Immunity laws prevent States from obtaining penalties that are appropriate to the seriousness of the violation, as they are required to do under Federal law. Audit privilege and immunity laws are unnecessary, undermine law enforcement, impair protection of human health and the environment, and interfere with the public's right to know of potential and existing environmental hazards.

Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19,623 (Dec. 22, 1995); s*ee* Riedel, *supra* note 53, at 19–20; WILKINS & STROMAN, *supra* note 45, at 1.

56. *See generally* Environmental Auditing Policy Statement, 51 Fed. Reg. 25004 (July 9, 1986) ("Policy") (an EPA policy encouraging the use of environmental auditing by regulated entities). EPA has since clarified and expanded its Policy on several occasions. *See, e.g.*, Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66,706, 66,706 (Dec. 22, 1995) [hereinafter "EPA 1995 Audit Policy"].; Interim Approach to Applying the Audit Policy to New Owners, 73 Fed. Reg. 44,991, 44,991 (Aug. 1, 2008).

57. *See* Environmental Auditing Policy Statement, 51 Fed. Reg. at 25,007.

As the regulated community grew used to EPA's policy, disputes between EPA and audit privilege advocates dwindled and environmental audits and self-disclosures grew rapidly in number and scope.[58]

As the audit protection groundswell grew, EPA responded with an updated audit policy that provided a more dilute form of audit protection via certain limited and discretionary incentives to companies that voluntarily audited and then disclosed and corrected discovered violations.[59] EPA did not retreat, however, from its insistence on the availability of audit documents for enforcers.[60] In December 1995, EPA published its policy entitled *Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations*[61] to expand on and resolve questions left open by its 1986 audit policy.[62] The 1986 policy acknowledged a need to not discourage auditing by using audit materials against companies, but it promised only to "not routinely request" such materials while expressly reserving the right and indicating an intention to use such materials in criminal proceedings.[63] In 1994, EPA effectively admitted that the reassurance ostensibly intended in adopting this policy did not provide the additional certainty and clarity sought by the regulatory community and expressly acknowledged that, at a minimum, the policy had a "PR problem."[64]

While providing some fairly definite incentives in the form of penalty mitigation,[65] EPA's 1995 audit policy retained many of stringent and narrow requirements associated with the original. EPA's 1995 Policy establishes nine conditions that must be met in order for the EPA to eliminate gravity-based penalties.[66] If a regulated entity

58. *See* Incentives for Self-Policing, 65 Fed. Reg. at 19,619.

59. Incentives for Self-Policing, 60 Fed. Reg. at 66,706–66,708.

60. 60 Fed. Reg. at 66,709.

61. 60 Fed. Reg. at 66,706.

62. *Id.*

63. Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004, 25,007 (July 9, 1986).

64. WILKINS & STROMAN, *supra* note 45, at 8.

65. Incentives for Self-Policing, 60 Fed. Reg. at 66,707.

66. Incentives for Self-Policing, 60 Fed. Reg. at 66,708. The Audit Policy's nine conditions include:

> 1. The violation must be discovered through an environmental audit or through due diligence. The keys to this are that the violation must have been discovered through either (a) a "systematic, objective, and periodic" environmental audit as defined in the 1986 policy, or

meets all nine conditions of the Policy, EPA will waive all gravity-based penalties.[67] If the regulated entity meets conditions two through nine, but did not discover the violation through an environmental

(b) a "documented, systematic procedure or practice which reflects the regulated entity's due diligence in preventing detecting, and correcting violations."

2. The discovery must be voluntary and any discovery promptly disclosed. The discovery of the violation cannot have occurred as part of a "monitoring, sampling, or auditing procedure that is required by statute, regulation, permit, judicial or administrative order, or consent agreement." Additionally, any violation must be promptly disclosed to the EPA.
3. The discovery and disclosure of the violation must be independent of Government or any third-party plaintiff. In order to be a "voluntary" disclosure under number 2 above, "the violation must be identified and disclosed by the regulated entity prior to: the commencement of a federal state or local agency inspection, investigation, or information request; notice of a citizen suit; legal complaint by a third party; the reporting of the violation to EPA by a 'whistleblower' employee; and imminent discovery of the violation by a regulatory agency."
4. The violation must be corrected and any environmental harm must be remedied. The regulated entity must not only "voluntarily [discover] and promptly [disclose] a violation, but [must] expeditiously [correct] it, [remedy] any harm caused by that violation . . . , and expeditiously [certify] in writing to appropriate state, local and EPA authorities that violations have been corrected."
5. "[T]he regulated entity must agree to take steps to prevent a recurrence of the violation." The policy indicates that "preventive steps may include improvements to a regulated entity's environmental auditing or due diligence efforts to prevent recurrence of the violation."
6. The violation cannot be a repeat violation. The policy makes clear that "the same or closely-related violation must not have occurred previously within the past three years at the same facility, or be part of a pattern of violations on the regulated entity's part over the past five years. . . The term 'violation' includes any violation subject to a federal or state civil judicial or administrative order, consent agreement, conviction or plea agreement."
7. The policy "makes clear that penalty reduction are not available . . . for violations that resulted in serious actual harm or which may have presented an imminent and substantial endangerment to public health or the environment." Additionally, the "policy also excludes penalty reductions for violations of the specific terms of any order, consent agreement, or plea agreement."
8. Finally, the regulated entity must cooperate with the EPA. EPA insists that the regulated entity assist "in determining the facts of any related violations suggested by the disclosure, as well as the disclosed violation itself."

Incentives for Self-Policing: Discovery, Disclosure Correction and Prevention of Violation, 60 Fed. Reg. at 66,707–10.

67. 60 Fed. Reg. at 66,708.

audit, and the regulated entity cannot document due diligence, EPA will reduce gravity-based penalties by seventy-five percent.[68] Gravity-based penalties are penalties over and above the economic benefit received by the regulated entity for its non-compliance and generally reflect the seriousness of the violator's behavior.[69] EPA expressly "reserves the right to collect any economic benefit that may have been realized as a result of noncompliance, even where companies meet all other conditions of the policy."[70] "Economic benefit may be waived, however, where the Agency determines that it is insignificant."[71] EPA also states that it will generally not pursue criminal charges against regulated entities that satisfy all of the conditions above.[72] However, EPA specifically "reserves the right to recommend prosecution for the criminal acts of individual managers or employees under existing policies guiding the exercise of enforcement discretion."[73]

In 2000, EPA significantly revised its Policy guidelines.[74] While EPA lengthened the prompt disclosure period to twenty-one days, confirmed that the independent discovery condition does not automatically preclude Audit Policy credit in the multi-facility context, and clarified how the prompt disclosure and repeat violations conditions apply in the acquisitions context,[75] the audit policy is still subject to the same limitations that were present in the 1995 policy.[76] None of these changes, however, affected EPA's core objections to extending a full-bodied privilege to information generated during self-audits.[77]

While the EPA states that it has a "long-standing practice of not requesting copies of regulated entities' voluntary audit reports to trigger Federal enforcement investigations,"[78] the policy still leaves the decision of whether to ask for the audit report to the discretion of the EPA.[79] Although EPA has generally honored its non-binding commitment to eschew audit materials, in a 1995 survey, Price

68. *Id.*
69. 60 Fed. Reg. at 66,711.
70. 60 Fed. Reg. at 66,707.
71. *Id.*
72. 60 Fed. Reg. at 66,708.
73. 60 Fed. Reg. at 66,711.
74. *See* Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19,618, 19,618 (Apr. 11, 2000).
75. 65 Fed. Reg. at 19,618.
76. *Id.*
77. 65 Fed. Reg. at 19,623.
78. 65 Fed. Reg. at 19,618.
79. 65 Fed. Reg. at 19,620; WILKINS & STROMAN, *supra* note 45, at 10–11.

Waterhouse reported that "[n]ine percent of [survey participants] reported that their audit findings had been disclosed involuntarily, while 12 percent of the firms said audit results they had provided voluntarily to state or federal regulators had been used against them for enforcement purposes."[80] Additionally, "[t]hirty one of the firms that reported enforcement action following voluntary disclosure of audit information said that this had happened to them on more than one occasion."[81]

Even if the federal government uses voluntary environmental self-audits as evidence against companies in rare instances, this circumstance offers limited comfort to companies considering audits. For example, private parties can still use self-disclosed violations under EPA's policy to bring citizen suits under federal and state environmental laws.[82] State agencies also would have the discretion to bring their own enforcement actions based on disclosures to EPA, even if the federal agency declined to act.[83] As the Supreme Court stated, "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."[84]

An additional uncertainty is that penalty mitigation is not available for "violations that resulted in serious actual harm to the environment."[85] While the 2000 Policy specifically states that "this condition does not bar an entity from qualifying for Audit Policy relief solely because the violation involves release of a pollutant to the environment,"[86] the lack of specificity of what could be considered "serious actual harm" is a deterrent to performing an audit, especially when the violation did result in a release to the environment.[87] This policy has the perverse effect of acting as a disincentive to those entities with the most serious reasons to perform environmental audits.

80. INT'L ENV'T DAILY, ELIMINATION OF PENALTIES COULD BOOST ENVIRONMENTAL SELF-AUDITING, SURVEY SAYS A-1 (Apr. 7, 1995).

81. *Id.*

82. *See* Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. at 19,622.

83. *See* 65 Fed. Reg. at 19,624.

84. Upjohn Co. v. United States, 449 U.S. 383, 393 (1981); Terrell E. Hunt & Timothy A. Wilkins, *Environmental Audits and Enforcement Policy*, 16 HARV. ENV'T. L. REV. 365, 396 (1992).

85. Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19,618, 19,623. (Apr. 11,2000).

86. *Id.*

87. *Id.*

Last, EPA noted that its Self-Disclosure Policy "is not final agency action and is intended as guidance. It does not create any rights, duties, obligations or defenses, implied or otherwise, in any third parties."[88]

Even though state environmental enforcement officials have endorsed their states' respective statutory audit privileges,[89] EPA has "remain[ed] firmly opposed to statutory environmental audit privileges."[90] EPA's opposition arises from its belief that such privileges "are unnecessary, undermine law enforcement, impair protection of human health and the environment, and interfere with the public's right to know of potential and existing environmental hazards."[91] Nearly two decades of experience with state audit privilege statutes have not yielded declines in enforcers' capabilities[92] nor have they impaired the public's right to know.[93] Indeed, environmental compliance efforts and public access to environmental information are at an all-time high.[94] And notably, EPA's own policies acknowledge the disincentive to auditing created by the possibility of adverse use, claiming that it will "not routinely request" audit reports, although refusing to make any reliable, enforceable commitment to do so.[95] Of course, industry sources view EPA's non-binding "policy" of not requesting audits as especially suspect in light of the agency's continued vigorous opposition to audit privileges and state audit legislation and the habit of different administrations viewing prior nonbinding commitments as subject to reinterpretation.[96]

88. WILKINS & STROMAN, *supra* note 45, at 10.

89. *See id.* at 7 (summarizing testimony by John A. Riley, Director of TNRCC Litigation Support Division, and testimony of Patricia Bangert, Colorado Deputy Solicitor General, Hearings on S.582 and Voluntary Environmental Audits, U.S. Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, May 21, 1996).

90. Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19,526 (Apr. 11, 2000).

91. 65 Fed. Reg. at 19,623.

92. WILKINS & STROMAN, *supra* note 45, at 7.

93. *See id.* This argument, of course, can cut both ways. The prominence of environmental self-audits under EPA's self-disclosure policy (which denies any privilege or enforceable protections) arguably also shows that EPA's policy has not undermined environmental auditing or limited the production of useful environmental compliance information.

94. *See id.*

95. Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. at 19,620.

96. *See* WILKINS & STROMAN, *supra* note 45, at 4.

C. Stalemate

The long struggle between EPA and the states who implemented audit privileges under state laws resulted, ultimately, in a stalemate. Facility operators who seek to conduct environmental audits can face a complex choice between overlapping and conflicting options. They can disclose the results of their investigations under the federal EPA self-disclosure policy and seek a waiver of the gravity-based portion of a penalty at EPA's discretion.[97] Alternatively, they can shield the results of their environmental audits under state laws, regulations, and policies or seek penalty relief.[98] While an operator may occasionally have a clear option to disclose under both frameworks simultaneously, the choice may also pose a risk that the federal disclosure may jeopardize the state privilege or conflict with the state's requirements for penalty relief.[99]

In an ironic turn, EPA has recently taken steps to de-emphasize the prominence of its Self-Disclosure Policy. Noting that the Policy had yielded relatively few disclosures of material environmental violations that would justify the effort of processing large volumes of minor disclosures, EPA has recently implemented an automated eDisclosure Platform.[100] This new portal allows operators to self-report minor violations, such as inaccuracies in reports under the Emergency Planning and Community Right-to-Know Act, and receive an automatic confirmation that EPA will forego enforcement or penalties for these "Category 1" disclosures.[101] While this system offers a speedy and efficient avenue to resolve minor violations, it leaves disclosures of other "Category 2" environmental non-compliance in limbo: the eDisclosure Platform will only provide an Acknowledgement Letter noting EPA's receipt of the disclosure.[102] This letter will not provide any determination that the violation qualifies for penalty mitigation.[103] Submitters instead must await a subsequent enforcement action to learn whether EPA will accept their determination.[104] As a result, a facility operator may self-report a

97. *See* Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. at 19,620.

98. *See* 65 Fed. Reg. at 19,623.

99. *See id.* at 19,624.

100. *See* Notice of eDisclosure Portal Launch: Modernizing Implementation of EPA's Self-Policing Incentive Policies, 80 Fed. Reg. 76,476, 76,477 (Dec. 9, 2015).

101. 80 Fed. Reg. at 76,478.

102. *See id.* at 76,477.

103. *Id.*

104. *Id.*

substantial environmental violation, and then rely on EPA's automated acceptance of the electronic submittal—which EPA may then reject in a subsequent enforcement action.[105]

EPA's most recent action in this area arose at the dawn of the Biden Administration. On February 5, 2021, EPA posted a new Frequently Asked Questions (FAQs) to its website to elaborate its current perspectives on the Audit Policy.[106] The FAQs expressly superseded any previous EPA interpretative guidance on the Audit Policy, and it incorporated earlier interpretations that remained salient.[107] EPA's new statement supported the agency's efforts to expand the Audit Policy's use, which had seen a seventy-five percent increase in annual self-disclosures since the initiation of the eDisclosure Platform.[108] Notably, the new FAQ still excludes any self-reported violations from penalty relief if the violation cause "serious actual harm" or "imminent and substantial endangerment", although EPA noted that it had exercised this exception less than a dozen times out of nearly 28,000 facilities disclosing noncompliance between 1995 to 2020.[109] The FAQ makes another important point via omission: it fails to discuss, or even mention, potential claims of privilege that could apply to environmental audits.[110]

These simmering conflicts, rather than fading with time, can threaten to resurface with greater vigor. For example, environmental advocates previously have petitioned EPA to revoke the authorization of Texas to administer its own air and water permitting programs because of lack of opportunities for the public to obtain information and oppose proposed permits.[111] While EPA has not withdrawn delegations of state environmental programs based on concerns over self-disclosure protection statutes, fears of delegation withdrawal or

105. *Id.*

106. *See* OFF. OF CIV. ENF'T, U.S. EPA, EPA'S AUDIT POLICY PROGRAM: FREQUENTLY ASKED QUESTIONS 1 (2021), https://www.epa.gov/sites/default/files/2021-02/documents/epaauditpolicyprogramfaqs2021.pdf.

107. *Id.* at i.

108. U.S. ENV'T PROT. AGENCY, EPA ANNOUNCES RENEWED EMPHASIS ON SELF-DISCLOSED VIOLATION POLICIES 1 (2018), https://www.epa.gov/sites/default/files/2018-05/documents/refreshannouncementfordisclosures.pdf.

109. OFF. OF CIV. ENF'T, U.S. ENV'T PROT. AGENCY, *supra* note 106, at 9.

110. *See id.*

111. *See Advocates Petition EPA to Strip Texas of Some Environmental Responsibilities*, ENV'T DEF. FUND (Jan. 12, 2016), https://www.edf.org/media/advocates-petition-epa-strip-texas-some-environmental-responsibilities.

withholding have led states to modify their laws to account for EPA's objections.[112]

A flare of conflict in a parallel area of regulatory law offers an instructive example of this latent risk: attempts by the Occupational Safety and Health Administration (OSHA) to force production of allegedly privileged self-audits by employers. After OSHA disclaimed that its self-disclosure policy applied in litigation because the agency had never subjected it to notice-and-comment rulemaking, OSHA began to seek self-audits as part of its enforcement actions.[113] This strategy, unsurprisingly, provoked bitter litigation, and OSHA faced judicial resistance to its attempt to override its own prior audit policy.[114] For example, OSHA issued citations and sought fines up to $3 million against BP for workplace safety violations at its Ohio refinery in 2010.[115] OSHA used BP's self-audits to identify the violations underlying its citations.[116] After OSHA's Review Commission and administrative law judge found that the attempted production was inconsistent with OSHA's prior policy, it allowed the enforcement action to proceed (albeit with reduced fines).[117] The Administrative Law Judge specifically found that OSHA's "extensive

112. TEX. COMM'N ON ENV'T QUALITY, RG-173, A GUIDE TO THE TEXAS ENVIRONMENTAL, HEALTH, AND SAFETY AUDIT PRIVILEGE ACT 2–3 (2013), tceq.texas.gov/downloads/rules/publications/rg-173.pdf; *see Hearing Before the Committee on Environment and Public Works*, 105th Cong. 12–13 (1997) (statement by Sen. Baucus on Texas Legislature's modification of environmental audit statute to answer EPA objections).

113. *See* Delek Refining, Ltd., 23 OSHC 1567 (No. 09-0844, 2011) (OSHA subpoena to third-party consultant allegedly under attorney-client privilege); Solis v. Grinnell Mut. Reinsurance Co., No. 11 C 50014, 2011 U.S. Dist. LEXIS 46732, at *8–9 (N.D. Ill. May 2, 2011) (insurance company assessment of grain elevator safety provided in third-party consultant's report under audit privilege remained subject to OSHA subpoena); Solis v. Grede Wis. Subsidiaries, LLC, No. 13-cv-017-wmc, 2013 U.S. Dist. LEXIS 109198, at *2 (W.D. Wis. Feb. 1, 2013) (despite Fourth Amendment concerns, court found that OSHA retained broad subpoena powers and could seek audit report submitted under OSHA's self-audit policy if independent basis for investigation existed).

114. *See* BP Prods. N. Am., Inc., & BP-Husky Refin., LLC, 2013 OSAHRC LEXIS 73, at *8–10 (O.S.H.R.C. A.L.J. Aug. 16, 2013).

115. *U.S. Labor Department's OSHA Proposes More than $3 Million in Fines to BP-Husky Refinery Near Toledo, Ohio*, U.S. DEP'T OF LAB. (Mar. 8, 2010), https://www.osha.gov/news/newsreleases/national/03082010.

116. BP Prod. N. Am., Inc., & BP-Husky Refining, LLC, 2013 OSAHRC LEXIS 113, at *5–10 (Aug. 12, 2013).

117. BP Prod. N. Am., Inc., & BP-Husky Refining, LLC, 2013 OSAHRC LEXIS 73, at *5.

use" of EP's self-disclosed draft safety audits was a "blatant contravention of its policy."[118]

II. TRANSFORMING ENVIRONMENTAL AUDIT PROTECTIONS INTO COMMON LAW PRIVILEGE

Ironically enough, the long-standing armistice between EPA and the states has led to an unexpected outcome. As EPA and states routinely provide protection to environmental audits, that practice has grown into the basis for a federal common law evidentiary privilege for environmental audits.[119] Alternatively, even if that practice has not yet matured into a full privilege, the nearly universal policy of protecting voluntary environmental audits in most circumstances arguably translates into a limited protection for environmental audits akin to doctrines that protect attorney work product or that bar attempts to use subsequent repairs of dangerous conditions as an admission against interest.

This development could have important consequences. First, current federal and state policies only protect environmental audits from discovery by governmental actors.[120] A common law privilege or protection for audits could also shield them against discovery by private plaintiffs or third-party litigants seeking those audits in citizen suits or tort actions. Second, the disparity among EPA's audit policy and various state audit laws and policies can leave federal courts without consistent guidance on how to resolve discovery disputes over environmental audits. A uniform federal common law privilege or protection would help assure that audits receive similar treatment regardless of their timing or location. Last, a federal common law environmental audit doctrine would guarantee an appropriate role for the federal judiciary in resolving evidentiary disputes over environmental audits. Current policies leave decisions over the degree of protection for audits solely to the discretion of federal agencies with little or no judicial review or remedy.[121] While this situation reflects

118. *Id.* at *9–10.

119. *See* James Cox, *The Case Against a Judicially Created, Common-Law Self-Audit or Self-Evaluation Privilege Applicable to Environmental Cases*, 15 FORDHAM ENV'T L. REV. 1, 1 (2004).

120. *See* Michael Ray Harris, *Promoting Corporate Self-Compliance: An Examination of the Debate Over Legal Protection for Environmental Audits*, 23 ECOLOGY L. Q. 663, 684 (1996).

121. *See* Mia Anna Mazza, *The New Evidentiary Privilege for Environmental Audit Reports: Making the Worst of a Bad Situation*, 23 ECOLOGY L. Q. 79, 88 (1996).

the important role that the executive branch should hold in exercising its enforcement discretion, it deprives the judiciary of its proper function in assuring that enforcement actions comport with constitutional and statutory protections for due process, equal protection and appropriate punishment and sentencing.

A. Creating Privilege

Federal Rule of Evidence 501 governs the application of privilege law in the federal judicial system. Eschewing a list of specific privileges, Rule 501 incorporates the background common law and the privilege rules under several state laws:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.[122]

This language suggests two alternative sources where the federal system may find a privilege. The first prong supplies a general rule that the federal courts should look to the "principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[123] In other words, the courts can use history and reason to determine the applicability of privileges developed or developing throughout the nation. The second prong of Rule 501 instructs the federal courts to incorporate the privilege law of that state when the state's law supplies the rule of decision.[124]

Rule 501 reflects a carefully balanced policy decision by Congress. In 1972, the Chief Justice transmitted to Congress the proposed Federal Rules of Evidence which had been formulated by the Judicial Conference Advisory Committee on the Federal Rules of Evidence.[125] The Chief Justice recommended that Congress adopt

122. FED. R. EVID. 501 (2010) (amended 2011).
123. *Id.*
124. *Id.*
125. Jaffee v. Redmond, 518 U.S. 1, 9 n.7 (1996).

specific and narrow federal privileges authorizing primarily traditionally-recognized privileges.[126] However, Congress rejected the Chief Justices recommendation to adopt specific privileges in favor of Rule 501's general mandate to look at the principles of common law in light of reason and experience.[127] In doing so, Congress appealed to the traditional, case-by-case method by which privileges had developed and, rather than instituting or overruling any particular privilege, delegated to the courts the power to use their judgment to resolve questions of privilege.[128]

By adopting Rule 501 in its present form, "Congress manifested an affirmative intention not to freeze the law of privilege. Its purpose rather was to 'provide the courts with flexibility to develop rules of privilege on a case-by-case basis,' and to leave the door open to change."[129] Congress' decision on Rule 501 created no new privileges and overturned no old privileges; it simply redelegated to the courts the authority to create, refine, and destroy privileges on a case-by-case basis.[130]

Under both prongs of rule 501, the federal courts should recognize a carefully defined privilege to protect environmental audits. The second prong makes clear that where State law provides the rule of decision in a federal case, the federal courts should apply the statutory privilege for environmental audit materials, if any, which is applicable in that State. The courts, however, should more generally apply a rule of privilege for environmental audits in light of nationwide legislative and policy trends, as well as the overwhelming weight of scholarship on the subject—in other words, in light of reason and experience.

B. Prong One: Environmental Audit Privilege Arising Under Federal Common Law

On its face, the language of Rule 501's first prong is somewhat ambiguous. The Rule expressly references "common law" as applied in the "courts of the United States."[131] Arguably this language excludes state legislative enactments and state court decisions from incorporation under Rule 501. Fortunately, such a reading of Rule 501

126. *Id.*
127. *Id.*
128. *Id.* at 8.
129. Trammel v. United States, 445 U.S. 40, 47 (1980).
130. *Id.* at 47 n.8.
131. FED. R. EVID. 501 (2010) (amended 2011).

has long since been rejected by the federal courts and, in particular, by the U.S. Supreme Court.

The Supreme Court considered the proper sources of federal law evidentiary privileges in *Jaffee v. Redmond*[132] when it addressed the availability of a psychotherapist-patient privilege in the federal courts. This case, arising from a claim of police brutality, considered whether a plaintiff could use as evidence any statements made by a police officer in subsequent counseling sessions.[133] The Supreme Court, applying the standards contained in the first prong of Rule 501, affirmed the conclusion of the U.S. Court of Appeals for the Seventh Circuit[134] and held that the federal common law recognizes a psychotherapist-patient privilege.[135]

The *Jaffee* opinion looks to a number of important criteria in determining whether to endorse a federal common law psychiatrist-patient privilege pursuant to Rule 501. First, however, the *Jaffee* court discussed the general function of Rule 501.[136] Noting its duty to construe arguments for privilege by interpreting common law principles in the light of reason and experience, *Jaffee* noted that the law of privilege is akin to the common law and, therefore, is "not immutable but flexible, and by its own principles adapts itself to varying conditions."[137] *Jaffee* restates the common law of privilege generally, and it noted the traditional rule that "[f]or more than three centuries it has been recognized as a fundamental maxim that the public . . . has a right to every man's evidence."[138] At the same time, this general rule can be overridden by a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth."[139]

Turning to the particular factors relied upon by the *Jaffee* Court to find a federal psychiatrist-patient privilege, the Court strongly restated the requirement of a public interest.[140] As the attorney-client privilege favors candor between counsel and client and as a spousal privilege encourages marital harmony, so other federally-recognized

132. *See* Jaffee v. Redmond, 518 U.S. 1, 3 (1996).
133. *See id.*
134. *See id.* at 7–8.
135. *See id.* at 15.
136. *See id.* at 6–11.
137. *See Jaffee*, 518 U.S. at 8.
138. *See id.* at 9.
139. *See id.*
140. *See id.* at 10–11.

privileges must further "serve [some] public ends."[141] The Court found the public's mental health to be a sufficiently important interest.[142] As a subset of this issue, the *Jaffee* Court also found that a privilege must not cause significant policy disadvantages.[143] Responding to suggestions that important evidence would be lost in the psychiatrist-patient context, the *Jaffee* Court noted that little such harm would result without the privilege because, in its absence, such communications would be chilled and the "evidence" in question would not likely be created in the first place.[144]

Next, the Court looked to prior policy decisions as one measure of "reason and experience."[145] Noting that all fifty states and the District of Columbia have enacted legislative privileges for psychiatrist-patient communications, the *Jaffee* Court explained that these "policy decisions of the states bear on the question [of] whether federal courts should recognize a new privilege or amend the coverage of an existing one."[146] Importantly, the Court also pointed out that a federal decision to reject the privilege would undermine the policy decisions of each of the states by creating the very "chill" that the state legislation had been designed to overcome.[147]

The Court directly rejected the notion that rule 501's reference to the "common law" meant that the State law statutory privileges were to be ignored because they were of legislative rather than judicial origin.[148] Following its prior decision in *Funk v. United States*,[149] the Court "recognized that it is appropriate to treat a consistent body of policy determinations by the state legislatures as reflecting both 'reason' and 'experience.'"[150] The plaintiffs also pointed to variations in the details of the privilege laws from state to state to contend that states did not uniformly support the privilege.[151] This argument was also roundly rejected by the Court which stated that the "variations in the scope of the protection are too limited to undermine the force of

141. *See id.* at 11.
142. *See Jaffee*, 518 U.S. at 11.
143. *Id.*
144. *Id.* at 12.
145. *Id.* at 13.
146. *Id.* at 12–13 (first citing Trammel v. United States, 445 U.S. 40, 48–50 (1980); and then citing United States v. Gillock, 445 U.S. 360, 369, n.8 (1980)).
147. *Jaffee*, 518 U.S. at 13.
148. *Id.*
149. Funk v. United States, 290 U.S. 371, 380 (1933).
150. *Jaffee*, 518 U.S. at 13 (citing *Funk*, 290 U.S. at 376–81).
151. *Id.*

the States' unanimous judgment that some form of psychotherapist-patient privilege is appropriate."[152]

Finally, the court noted that the psychotherapist-patient privilege was among the specific privileges recommended by the Judicial Conference Advisory Committee on the Federal Rules of Evidence.[153] While clearly not binding on the Court, the Court found that this recommendation "reinforced" the overwhelming judgment of the states favoring the privilege at issues in *Jaffee*.[154]

For those familiar with the environmental audit debate, the *Jaffee* Court's arguments supporting a federal privilege for psychotherapist-patient communications under the first prong of Rule 501 would, at least facially, similarly endorse recognition of an environmental audit privilege under that prong.

First, a privilege for oral and written communications arising from an environmental compliance review furthers an important public good. As discussed below, audits without privilege protections create a risk of worsening rather than improving one's enforcement and liability posture by digging up compliance concerns that might otherwise pass unnoticed by regulators. The absence of a privilege against adverse use of such audit-derived evidence substantially discourages the candor and thoroughness of environmental audits.[155] In fact, in a survey performed by Price Waterhouse LLP, twenty percent of companies who did not perform environmental audits stated that the main reason they did not perform audits was because they feared the information could be used against them in an enforcement action.[156] The Survey pointed out that "U.S. companies would conduct more environmental audits if they had assurances that the results would not be used to penalize them."[157] States that have enacted audit privileges have done so with the stated purpose of increasing auditing and thereby improving the detection and correction of environmental concerns and enhancing environmental compliance.[158] States with

152. *Id.* at 14 n.13.

153. *Id.* at 13–14.

154. *Id*. at 14.

155. *See* Terrell E. Hunt & Timothy A. Wilkins, *Environmental Audits and Enforcement Policy*, 16 HARV. ENV'T L. REV. 365, 368 (1992).

156. INT'L ENV'T DAILY, *supra* note 80, at A-1.

157. *Id.; see also* U.S. GENERAL ACCOUNTING OFF., GAO/RCED-95-37, *supra* note 42, at 57–58 (noting chilling effect of EPA's inconsistent application of its original Self-Disclosure Policy and uncertainty of penalty relief).

158. *See* Clinton J. Elliott, *Kentucky's Environmental Self-Audit Privilege: State Protection or Increased Federal Scrutiny?*, 23 N. KY. L. REV. 1, 4 (1995).

aggressive audit legislation have, in fact, allegedly noted such improvements.[159]

Second, there are no significant policy disadvantages to an environmental audit privilege. As suggested by the Supreme Court in *Jaffee*, much of the desirable evidence to which the EPA seeks access is unlikely to come into being without a privilege because "unspoken 'evidence' . . . serve[s] no greater truth-seeking function than if it had been spoken and privileged."[160] Under this rationale, EPA would not be disadvantaged by recognizing an audit privilege because in the absence of an audit privilege, much of the evidence that it desired would not exist.[161] More importantly, the publics' health and safety will not be disadvantaged in many cases because enforcement can likely still be pursued without this evidence.

Third, forty-six states have implemented some form of environmental audit privilege or protection.[162] As the *Jaffee* Court stated, "[b]ecause state legislatures are fully aware of the need to protect the integrity of the fact finding functions of their courts, the existence of a consensus among the States indicates that 'reason and experience' support recognition of the privilege."[163] The Court also commented on the "divergence among the States concerning the types of . . . relationships protected and the exceptions recognized,"[164] and it noted that while each state's privilege law was different, "[t]hese variations in the scope of the protection are too limited to undermine the force of the States' unanimous judgment that *some* form of psychotherapist privilege is appropriate."[165]

This analysis also holds true in the case of environmental audit privileges. Variances in state statutes, and preference of some states

159. *See* WILKINS & STROMAN, *supra* note 45, at 6–7. *See* discussion *infra* at Section III on design of possible experiments to confirm effect of audit protections on disclosures**.**

160. Jaffee v. Redmond, 518 U.S. 1, 12 (1996).

161. *See id.* The *Jaffee* court's argument here, admittedly, is extremely difficult to prove because it relies on a counterfactual assumption and attempts to prove a negative—namely, that the absence of a full privilege would suppress the generation of material amounts of compliance data. *See id.*

162. *See* U.S. ENV'T PROT. AGENCY, *supra* note 9; Maureen Harbourt & Laurent Rucinski, *Louisiana: The Latest State to Jump on the Environmental Self-Audit Bandwagon,* POWER ENG'RS (Nov. 11, 2021), https://www.powereng.com/library/louisiana-the-latest-state-to-jump-on-the-environmental-self-audit-bandwagon.

163. *Jaffee*, 518 U.S. at 13.

164. *Id.* at 14 n.13.

165. *Id.* (emphasis added).

for policies rather than statutes, should not distract from the states' judgment that some form of privilege is appropriate.

In response, critics may contend that Congress implicitly rejected audit privilege claims when it passed environmental statutes that did not explicitly protect such communications. Similar arguments have proven successful in other cases involving tenure panel review and medical malpractice review panels.[166] In the end, however, this argument proves too much—it would make any attorney-client, doctor-patient or other recognizably privileged communication remain subject to discovery unless Congress expressly protects those communications in legislative provisions setting out information-gathering authorities.

C. Prong Two: Use of State Audit Privilege Laws Where State Law Provides the Rule of Decision

Federal common law is not the only source for a federal audit privilege. In certain circumstances, Rule 501 of the Federal Rules of Evidence requires federal courts to defer to state privilege laws whenever that state's law controls the action.[167] In particular, Rule 501 would bar the introduction of environmental audits in civil actions as privileged under state law with respect to any element of a claim or defense as to which that state's law supplies the rule of decision.[168] Rule 501 may have particularly sweeping effects on actions brought under federal environmental laws because these statutes have allowed EPA to delegate to states the authority to manage and enforce numerous environmental statutes in lieu of federal programs. [169] As state laws, those delegated programs would operate under state privilege laws despite their federal origins.[170]

166. *See, e.g.*, Gray v. Bd. of Higher Educ., 692 F.2d 901, 908 (2d. Cir. 1982).

167. *See* FED. R. EVID. 501.

168. *See id.*

169. As noted earlier, EPA has the statutory and regulatory authority to consider a state's environmental audit privileges or self-disclosure immunity programs when it reviews the state's request to delegate federal environmental programs for state administration. Under these authorities, EPA may argue that a state's audit protection policies and laws weaken its environmental programs to the point that they no longer meet federal standards for delegation. *See* discussion *supra* notes 45 & 55 and accompanying text.

170. While it is unclear whether federal Administrative Judges would also turn to federal common law principles to identify environmental audit protections or rely on applicable state laws, EPA's consolidated rules of procedure for administrative hearings do not set out a separate or independent rule for privileges or admission of evidence. *See* 40 C.F.R. §§ 22.21–22.26 (2022). As a forum established by EPA

Rule 501 gives clear and unambiguous directions to federal courts that hear privilege claims raised in civil proceedings governed by state law.[171] Under Rule 501, "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."[172] This language reflects the Advisory Committee's intent that federal courts not use comparatively narrow federal evidentiary privileges to frustrate the full application of state law in cases where state law controls the proceeding.[173]

Given the Committee's original intent, Rule 501 was meant to play a primary role in civil actions brought within the federal district courts' diversity jurisdiction.[174] Outside of diversity jurisdiction, however, federal law's incorporation of a state law privilege remains a matter of federal common law, and state law does not supply the rule of decision (even if the federal court decides to apply a rule derived from state privilege).[175]

under the authority of the executive branch, EPA Administrative Law Judges and EPA's Environmental Appeals Board (EAB) arguably can hold hearings outside the requirements of Article III and have greater flexibility to choose varying evidentiary rules. To date, however, EPA's decisions have not reflected any acceptance of such an argument by either Administrative Law Judges or by the EAB. The federal courts have also typically rejected arguments that courts under Article I need not offer equivalent levels of procedural protection to litigants. *See* 5 U.S.C. § 559 (2018) ("Except as otherwise required by law, requirements or privileges relating to evidence or procedure apply equally to agencies and persons"); *see also* Ernest Gellhorn, *Rules of Evidence and Official Notice in Formal Administrative Hearings*, 1 DUKE L. J. 1, 32 (1971).

171. *See* FED. R. EVID. 501 (2010) (amended 2011).

172. *Id.*

173. *See* Notes of Committee on the Judiciary, H.R. Rep. No 93-650 (1974).

174. *See id.; see also* 28 U.S.C. § 1331 (1997).

175. *See* Notes of Committee on the Judiciary, H.R. Rep. No 93-650 (first citing CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 251–52 (2d ed. 1970); then citing Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946); and then citing De Sylva v. Ballentine, 351 U.S. 570, 581 (1956); and then citing 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2408 (3d. ed. 2008)*; see also* Hancock v. Hobbs, 967 F.2d 462, 466–67 (11th Cir. 1992); *see also* Virmani v. Novant Health Inc., 259 F.3d 284, 286 n.3 (4th Cir. 2001); *see also* Pearson v. Miller, 211 F.3d 57, 66 (3d Cir. 2000); *see also* Von Bulow v. Von Bulow, 811 F.2d 136, 141 (2d Cir. 1987); *see also* Crowe v. Cnty. of San Diego, 242 F.Supp. 2d 740, 749–50 (S.D. Cal. 2003).

The prior effects of Rule 501 on federal environmental judicial actions, as a result, appear limited.[176] Rule 501 remained quiescent in this arena until growing pressures to protect audit reports began to clash with federal administrative opposition to an environmental audit privilege.[177]

Rule 501 may play an especially vital role in environmental law. Federal environmental law's widespread bifurcation of legal authority between the states and federal government enhances the extension of state law privileges to environmental audits under Rule 501. Most federal environmental statutes use some aspects of the mechanism of "delegation" whereby a state can assume primary responsibility for enforcing environmental standards set out by the federal statute.[178] For example, federal statutes governing air emissions,[179] wastewater discharges,[180] and hazardous and solid waste management[181] all use this programmatic approach. Because these state law regimes effectively supplant their respective federal programs in most respects, state law privileges that accompany these programs arguably should receive deference as part of the delegated program.

Importantly, Rule 501's mandate that federal courts must use state laws for decision on privilege differs from general conflicts of law principles that might independently dictate that a court choose a particular state's privilege law to resolve a dispute. For example, a federal or state court would turn to general conflicts principles to determine whether federal or state law (or which state's law) would apply when a person conducts a sweeping single audit that includes facilities in multiple states.[182] Conflicts principles would also apply

176. There does not appear to be any prior instance where Rule 501 has led a federal court to bar introduction of preferred evidence in a federal environmental lawsuit governed by state law solely because of a state law privilege. Numerous prior decisions, however, have analyzed the effect of expansive attorney-client privilege claims arising from state laws in similar circumstances. *See, e.g.*, Soriano v. Treasure Chest Casino, No. 95-3945, 1996 U.S. Dist. LEXIS 19185, at *3–5 (E.D. La. Dec. 20, 1996).

177. *See* Ellen Page DelSole, *An Environmental Audit Privilege: What Protection Remains After EPA's Rejection of the Privilege?*, 46 CATH. U. L. REV. 325, 345 (1997).

178. For a review of delegation of federal environmental programs to states for implementation (and EPA oversight of delegated programs) *see* U.S. ENV'T PROT. AGENCY, EPA POLICY CONCERNING DELEGATION TO STATE AND LOCAL GOVERNMENTS 1 (1985).

179. *See* 42 U.S.C. § 7416 (2018).

180. *See* 33 U.S.C. § 1251 (2018).

181. *See* 42 U.S.C. § 6926 (2018).

182. *See* Notes of Committee on the Judiciary, H.R. Rep. No 93-650 (1974).

when a person creates an audit report at corporate headquarters for a facility located in another state.[183]

1. Delegation of Federal Environmental Programs to States

Although the mechanics vary among each statute, a few key principles remain the same for delegation of any federal environmental program. First, a state must develop a program which is "at least as stringent" as the Federal standard.[184] Then the state must petition the EPA for authorization to manage the program.[185] If the Administrator of the EPA authorizes a state program, the state will have the delegated authority to manage the applicable program.[186]

Importantly, each of these principles plays a pivotal role in an analysis of the potential applicability of a state evidentiary audit privilege in a federal environmental judicial action. For clarity, this memorandum will use the example of the delegation process under Resource Conservation and Recovery Act (RCRA), although it will make significant differences among statutes that might affect the protection afforded to audits.

Delegation typically proceeds through several steps. First, the federal government must promulgate a base regulatory program to provide the minimum foundation that a state program must encompass.[187] Obviously, a federal program must come into being before a state can receive delegation to enforce its own standards which must be at least as stringent as federal standards.[188]

Once the federal government promulgates a regulatory program and a state chooses to seek delegation, the state must prepare an application to demonstrate that its program meets the federal requirements.[189] Under RCRA, this process is painstaking: states must document and correlate each state regulation that satisfies each corresponding federal rule.[190] EPA, in return, must verify that each

183. *See id.*

184. *See, e.g.*, 40 C.F.R. § 271.25 (2020).

185. *See, e.g.*, 40 C.F.R. § 271.20(c) (2020).

186. *See id.*

187. *See Delegation of Clean Air Act Authority*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/caa-permitting/delegation-clean-air-act-authority (last visited May 25, 2022).

188. *See* 40 C.F.R. § 271.5 (2020). This logical prerequisite, however, does not limit a state's ability to fill in the regulatory vacuum before the federal government takes action. In doing so, the State assumes the risk that its program will not meet the federal government's standards and require amendment.

189. *See id.*

190. *See id.*

state requirement actually operates in a manner sufficiently effective to meet federal standards.[191] This cumbersome administrative process can literally take years to complete and thousands of pages to satisfy, especially if EPA and the state disagree about portions of the program.[192]

The final result of this process typically consists of a detailed Memorandum of Agreement (MOA) between EPA and the state.[193] The MOA will spell out exactly how state laws fulfill federal requirements, describe the state's enforcement priorities and commitments, and specify the areas where EPA retains enforcement authority.[194] This agreement also undergoes public notice-and-comment rule making.[195]

In addition to assessing whether State regulations meet federal minimum standards, EPA also answers the equally important question of whether the state regulations go too far. Although state programs invariably can regulate "more stringently" than federal requirements, that portion of the state regulation which exceeds federal requirements falls outside of the federally-delegated program.[196] For example, under RCRA a state can still receive delegation for a state role that sets a treatment standard for hazardous wastes destined for land disposal that is more stringent than comparable federal treatment standards.[197] By contrast, if a state program regulates wastes as hazardous that EPA deems non-hazardous, that portion of the state's program is broader rather than more stringent than the federal program, and therefore does not fall under the state's delegated RCRA authority.[198]

191. *See id.* at § 271.6.

192. Inevitably, political complications can frustrate this process. For example, EPA has recently withheld delegation from several States, and threatened revocation of previously delegated programs because it disagreed that State programs were not hampered by laws providing privilege protection for audits, private property takings compensation and limits on standing allowed for public participation. EPA's use of this administrative blunderbuss remains controversial. *See generally* WILKINS & STROMAN, *supra* note 45 (discussing the origins and development of state statutes granting privileges for environmental compliance audits, as well as EPA's longstanding opposition to such privileges).

193. *See* 40 C.F.R. § 271.8(a).

194. *See id.* § 271.8(b).

195. *See id.* § 271.20(a) (requiring publication of EPA's decision to delegate in the Federal Register).

196. *Id.* § 271.1.

197. *See id.*

198. Letter from Bruce R. Weddle, Acting Dir., Permits and State Programs Div., EPA, to Michael A. Verde, Tech. Sales Representative, CECOS Int'l (May 18, 1984) (on file with author).

2. Enforcement Actions in Delegated States: A Matter of State Law

Given the extensive delegation of authority to states to enforce their own environmental laws and regulations in lieu of federal programs, state law may provide the "rule of decision" as described in Rule 501 when a person or agency brings an environmental enforcement action in a state that has received delegation.[199] While this issue can be complex and controversial, state law should control in the majority of such enforcement actions.

In the simplest case where the federal government seeks to enforce solely state law requirements under a delegated program, state privilege laws would indisputably apply.[200] This circumstance, however, is rare because the federal government will typically bring an enforcement action that relies on both federal and state law in an administrative complaint.[201]

The more likely scenario that would raise these issues would be an overfiling action by EPA. If EPA concludes that a state environmental agency has failed to seek appropriate enforcement against a violator, EPA can bring an independent enforcement action under its oversight authority.[202] EPA typically retains its ability to bring overfiling actions when it delegates program authorization to a state.[203] To exercise its overfiling authority, EPA must first provide notice to the affected state and give it an opportunity to undertake the action itself.[204] Under this framework EPA can bring an action to enforce both specific state environmental regulatory requirements as well as the overarching federal statutory mandates.[205] This mixed complaint, for example, might include both a suite of state environmental regulatory violations coupled with counts seeking injunctive relief under corresponding federal environmental regulations and statutes to halt imminent and substantial endangerments to human health or the environment.

199. *See* FED. R. EVID. 501.

200. *See* Crowe v. Cnty. of San Diego, 242 F. Supp. 2d 740, 749 (S.D. Cal. 2003).

201. To the extent that compliance with state laws is a defense to a federal enforcement action, Rule 501 requires use of state privilege law when evaluating that defense. FED. R. EVID. 501 ("But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.").

202. *See* 42 U.S.C. § 6928(a) (2018).

203. *See id.*

204. *See id.* § 6928(b).

205. *See id.* § 6928(b).

Rule 501's second prong lacks any clear interpretative guidance from the U.S. Supreme Court on how to resolve privilege claims within an action that raises both federal and state law claims for its decision. Because the federal courts remain in disagreement over this issue, the *Jaffee* opinion expressly declined to rule on it.[206]

Some leading commentators have suggested that federal courts should make a case-by-case determination on whether state law privilege should apply in mixed-claim cases.[207] Under this approach, the court would review several factors that would clarify whether federal or state law provides the driving impetus for the decision and should govern privilege claims.[208] These factors can include, for example, federalism concerns,[209] the need for consistent application of any privilege to assure its reliability, [210] and the policy preference reflected in state audit laws, regulations and policies to encourage environmental self-audits.[211] In many instances, these factors would likely support adherence to a state law environmental audit privilege in mixed-claim cases.

III. USING EXPERIMENTAL JURISPRUDENCE FOR DELIBERATE DESIGN OF ENVIRONMENTAL AUDIT PROTECTION

A. Rationales and Terminology

The incipient arrival of a new federal audit privilege offers an opportunity to attempt a different approach to crafting its parameters and application. First, rather than use the traditional format for privilege claims used by state self-disclosure protection statutes, the self-audit shield could instead use a flexible degree of protection based on the parameters that best promote environmental protection and regulatory compliance. Second, in setting the appropriate scope of

206. *See* Jaffee v. Redmond, 518 U.S. 1, 16 n.15 (1996).

207. *See* 23A CHARLES WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 5434 (Supp. 2020).

208. *See id.*

209. The U.S. Supreme Court long ago rejected aspirations to build a broad-based federal common law that would override State laws. Since *Erie Railroad v. Tompkins*, the federal courts have relied on either State law in diversity cases or federal law in federal question cases to provide the basis for decision. *See* 304 U.S. 64, 72–73 (1938). Given the substantive interests at stake, State laws ensconcing environmental audit privileges would often deserve deference.

210. The U.S. Supreme Court has noted that a partial privilege or inconsistent application of a privilege can be worse than no privilege at all. *See Jaffee*, 518 U.S. at 18.

211. *See* discussion *supra* note 7.

protection, the appropriate governmental agency (here, EPA or a representative delegated state program) can conduct an empirical investigation to delineate the best parameters for the self-disclosure program and regulatory policies to support them. This empirical testing, for example, could help resolve long-running disputes over how much compelled disclosure actually deters self-assessment, the additional compliance effort and corrective measures triggered by a safe harbor, and the interplay between potential civil and criminal liability claims against the backdrop of a privilege or statutory immunity for self-disclosure in certain circumstances.

This approach to crafting privilege would mark a radically different approach to establishing self-disclosure protections. Rather than scry the dimensions of an emerging privilege through a welter of individual decisions, or using a legislative or regulatory structure to peremptorily set the dimensions of a new privilege, this approach would partner regulatory agencies with the judiciary to set the contours of privilege through an empirical and deliberative process.

Because of the novelty of this approach, we lack clear precedents or models from successful attempts in the past. This blank legal canvas, however, offers an opportunity. The burgeoning new field of experimental jurisprudence may provide a basis to rigorously test some of the assumptions underlying much of the current debate over self-disclosure protections or immunities. Some of this research has focused so far on some of the law understandings of legal constructs that underlie core legal concepts such as proximate cause or accepted notions of consent.[212] While this type of empirical research may not provide useful answers to normative legal questions and hypothetical scenarios may offer only limited insight into actual behavior,[213] the yardsticks for measuring privilege—beneficial changes in the regulated community, and continued effective enforcement and oversight options for regulators—seem well suited to an empirical test.

A research program into the empirical basis for privilege could illuminate the most effective scope of protection offered by a new

212. *See* Roseanna Sommers, *Experimental Jurisprudence*, SCIENCE, July 2021, at 394–95*; see generally* Joshua Knobe & Scott Shapiro, *Proximate Cause Explained: An Essay in Experimental Jurisprudence*, 88 U. CHI. L. REV. 165 (2021); *see also* Roseanna Sommers, *Commonsense Consent*, 129 YALE L. J. 2232 (2020); *see also* Tess Wilkinson-Ryan & David Hoffman, *The Common Sense of Contract Formation*, 67 STAN. L. REV. 1269 (2015).

213. *See* Roseanna Sommers & Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 YALE L. J. 1962, 1962–2033 (2019).

evidentiary protection. All of these approaches would focus on the same goal: identifying the baseline elements of protection that would strike a workable balance between encouraging self-investigation, correcting non-compliance, reducing environmental risk, and preserving the integrity of environmental accountability via enforcement and tort liability.

Against this backdrop, some possible investigative pathways include:

- *Data mining and informational coalescence.* EPA and state environmental agencies have compiled extensive datasets of self-disclosures and notifications from regulated entities taking advantage of existing self-disclosure penalties policies and immunities. For example, EPA has maintained electronic depositories of all notifications provided under its eDisclosure platform (albeit for predominantly minor violations), and state agencies presumably maintain records of prior disclosures of self-reported violations as administrative agency records.[214]

As an initial step to explore correlations between rates of self-investigation and disclosure activity, research could focus on how disclosure rates differed under federal and state self-disclosure programs for the same entities within a single state. This work could also compare relative percentages of the regulated community that participate in the federal self-disclosure policy program compared with more restrictive or liberal state disclosure programs within the same state.

- *Updated and expanded surveys of stakeholders and regulated community.* When the concept of environmental audit privilege first began to draw attention in the early 1990s, several accounting and consulting groups conducted surveys of the regulated community to gauge the difficulty of compliance without self-auditing[215] and the increased willingness of operators to investigate themselves for potential violations if a privilege or penalty protection was

214. *See* Notice of eDisclosure Portal Launch: Modernizing Implementation of EPA's Self-Policing Incentive Policies, 80 Fed. Reg. 76,476 (Dec. 9, 2015).

215. *See* INT'L ENV'T DAILY, *supra* note 80, at A-1.

extended to them.[216] None of these surveys, however, have been updated or extended since that time.

Given the experience built up under the EPA Self-Disclosure Policy and various state environmental audit privileges and immunity statutes, the regulated community and public at large may have significantly different concerns and expectations of an environmental audit privilege or immunity. Updating these surveys could offer a complementary set of data to the field experiments described below to assure that investigators focus on the most salient data that affects compliance planning and community acceptance.

- *Controlled simulations and field experimentation.* The ultimate benchmark for empirical audit design would be classical controlled experimentation or field research that isolates and tests the impact of controlled variables. For environmental audits, researchers could simulate the dynamics and influence of self-disclosure protections through asking test groups to work through factual scenarios that include options to self-disclose. These experiments may need to assure that the subjects do not know the goal of the simulation or the importance of self-disclosure protections. In addition, these simulations could modify the test subject populations to confirm the effects of other relevant factors, such as environmental justice concerns, prior environmental compliance history, and available resources for enforcement or monitoring.

B. Lessons from Parallel Privileges and Protections

When evaluating privilege claims, the federal courts should not overlook an equally important venue to promote environmental auditing: relevance objections. Even if the courts are reluctant to acknowledge a full-blown privilege for voluntary environmental audits, the same policy and legal trends described above would also support judicial steps to limit the use of such audits at trial and to avoid practices that would discourage voluntary self-assessments.

While Federal Rule of Evidence 403 controls whether a court can exclude proffered evidence as irrelevant, a separate federal evidentiary rule offers an instructive analogy.[217] Under Rule 407, a federal court

216. *See id.*
217. *See* FED. R. EVID. 403.

will not accept proffered evidence of a subsequent remedial measure to prove negligence or a failure to comply with duties that might trigger strict liability:

> When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove: negligence, culpable conduct, a defect in a product or its design; or a need for a warning or instruction. But the court may admit this evidence for another purpose, such as impeachment or – if disputed – proving ownership, control, or the feasibility of precautionary measures.[218]

This rule has an unclear rationale, but it arose from common law doctrines in a majority of states that excluded attempts to introduce subsequent corrective measures to prove negligence in tort cases.[219] The drafters of Rule 407 simply acknowledged the existing common law exclusion and memorialized it in the federal evidentiary rules. Several commentators also noted that protection of subsequent remedial measures would serve the public interest because the admission of such evidence would inevitably discourage needed repairs and create far more prejudicial impact than any useful and relevant information.[220]

Despite this argument's surface appeal, Rule 407 and the subsequent remedial measures common law exception cannot provide a basis to protect voluntary environmental audits from discovery in most circumstances. Importantly, the subsequent remedial measures doctrine only applies to corrective steps taken after an injury or violation has already occurred.[221] By contrast, most environmental audits attempt to identify potential violations or dangerous situations before they can cause harm or regulatory violations.[222] Second, the doctrine only applies to repairs of conditions that directly led to an

218. *See* FED. R. EVID. 407 (2021).

219. *See* Ralph Ruebner & Eugene Goryunov, *A Proposal to Amend Rule 407 of the Federal Rules of Evidence to Conform with the Underlying Relevancy Rationale for the Rule in Negligence and Strict Liability Actions*, 3 SETON HALL CIRCUIT REV. 435, 437–38 (2007).

220. Other protective doctrines rooted in relevance objections also bar the introduction into evidence of any information related to other activities that society wishes to promote. *See* FED. R. EVID. 408, 409 (barring introduction of evidence on payment of medical expenses for injured party or on offers of compromise).

221. *See* FED. R. EVID. 407.

222. *See* Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19,618, 19,619 (Apr. 11, 2000).

injury or harm.[223] As a result, it does not protect audits that address a broad range of circumstances or operations beyond the specific incident that led to a claim.[224] Third, the doctrine has traditionally applied to tort claims sounding in negligence or strict liability.[225] While some courts have used Rule 407 to exclude subsequent remedial steps taken in antitrust or contract injury claims, it is unclear whether the doctrine would apply in a lawsuit centered on regulatory compliance or environmental violations.[226] Last, the courts have limited the application of Rule 407 in numerous circumstances. For example, a plaintiff can introduce evidence of subsequent remedial measures for purposes other than proving the defendant's negligence (e.g., to prove ownership of the property).[227] As a result, Rule 407 has become porous with exclusions and would be unreliable as a bulwark to protect environmental audits.

While this rationale clearly applies to efforts by a regulated facility to correct a condition that it had self-reported, the disclosures of the underlying violations themselves in an environmental audit would almost certainly provide directly relevant information in an enforcement action. The same principles, however, could justify extending the relevance objections to the underlying report itself. Similar policy concerns, for example, led the U.S. Supreme Court to partially shield information created by attorney work product from discovery in litigation, even if that information was clearly relevant and germane to the underlying lawsuit.[228]

Nonetheless, if a company conducts a self-audit and then performs corrective action upon discovering any noncompliance or violation of duty before a claim arises, the relevance principles underlying the subsequent repair doctrine could help guide the court's admission of the audit as well to the corrective action. A court could rely on Rule 403 to bar or limit the introduction of environmental audits except for narrow circumstances where the audits' probative value would outweigh their prejudicial effect. While this approach would not provide the absolute protection offered by an outright privilege, it could offer a substantial shield against routine discovery or production of environmental audits. While an uncertain privilege

223. *See* FED. R. EVID. 407.
224. *See id.*
225. *See id.*
226. *See id.*
227. *See id.*
228. *See* Hickman v. Taylor, 329 U.S. 495, 510 (1947).

may be no better than no privilege at all, substantial protection for confidential audit work product can still provide significant societal benefits. This pragmatic approach has shielded attorney work product without a full privilege for nearly seventy years.[229] While plaintiffs might overcome this protection in limited circumstances, the general level of protection would still minimize the risk that discovery would discourage environmental audits to promote compliance.

C. Limitations on the Scope of State and Federal Audit Privilege Protections

Even if the federal courts ultimately adopt federal common law protections for audits, the scope will not extend to broad areas of information under traditional audit doctrines. These limits may in turn help limit the potential impact that audit protections may have on enforcement of federal environmental laws.

Federal mandatory reporting requirements. While audit privileges or protections would shield the audit report itself or the communications and materials that created it, the privilege would not protect underlying data or information subject to mandatory reporting requirements.[230] For example, many federal environmental statutes and regulatory programs rely on mandatory reporting requirements to address releases of hazardous substances or pollutants in amounts that exceed reporting thresholds.[231] The federal Clean Water Act also requires permittees to submit reports that disclose non-compliance of their permit discharge limits.[232] A federal common law privilege or protection would not override the statutory reporting obligation.[233]

This exemption, however, should not allow EPA to circumvent the privilege or protections simply by issuing an administrative order to compel disclosure. Section 104(e) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) facially authorizes EPA to issue information requests that could compel the disclosure of information underlying an audit

229. *See id.*

230. *See* Rebecca Fiechtl, *Know When to Hold Em: Minimizing Disclosure of Corporate Environmental Information*, 31 ENV'T L. 951, 962 (2001).

231. *See* 42 U.S.C. § 11004(a)–(b) (2018).

232. *See* 33 U.S.C. § 1251–1388 (2018).

233. *See, e.g.*, State *ex. rel.* Celebrezze v. Cecos Int'l, Inc., 583 N.E.2d 1118, 1121 (Ohio Ct. App. 1990) (holding that a self-evaluation privilege cannot allow the defendant to avoid discovery because of clear legislative directive that the hazardous waste industry be subject to public scrutiny).

protected under state law.[234] In that instance, the parties who received the information request strongly objected to the information request but nonetheless produced the privileged information under seal as confidential business information.[235] EPA accepted the information, but it has not taken any further enforcement action based on the disclosure.[236] EPA apparently has not used audit disclosures protected under state audit privileges to support an enforcement action in any reported opinion.[237]

Crime-fraud exception. Privilege protections do not extend communications or actions that perpetrate a fraud or crime.[238] This exclusion may remove broad categories of potential environmental violations from audit protection. For example, many federal environmental statutes impose criminal liability for knowing violations of environmental requirements.[239] If a facility operator conducts an audit and discovers a condition that constitutes an ongoing violation, the operator's failure to disclose or halt that violation may trigger environmental criminal liability that falls outside any audit protection.[240] An ongoing reporting obligation may also create a knowing violation that a common law privilege would not protect.

234. The author is aware anecdotally of at least one instance where an EPA regional office issued a CERCLA 104(e) information request for audits privileged under state law, but it apparently did not seek to enforce the order. *See also* E. Blaine Rawson, *Overfiling and Audit Privileges Strain EPA-State Relations*, 13 NAT'L. RES. & ENV'T 483, 486 (1999) (Tricia Bangert, director of Legal Policy of the Colorado Attorney General's Office, testified to a Senate subcommittee in October 1997 that "EPA has 'overfiled' against several companies who took advantage of Colorado's environmental self-audit privilege and has specifically threatened to overfile against three other entities who have made disclosures under Colorado's environmental self-audit law.").

235. *See id.*

236. *See id.*

237. While proof of a negative proposition is always difficult, EPA has responded to the author's FOIA request that it cannot identify any other instances where the agency has used its statutory authorities under CERCLA, RCRA, TSCA, the Clean Air Act, or the Clean Water Act to obtain environmental audit information over the respondent's objections that the information fell under a federal, state, or common law privilege.

238. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 82 ("[t]he attorney-client privilege does not apply to a communication occurring when a client: (a) consults a lawyer for the purpose, later accomplished, of obtaining assistance to engage in a crime or fraud or aiding a third person to do so, or (b) regardless of the client's purpose at the time of consultation, uses the lawyer's advice or other services to engage in or assist a crime or fraud.").

239. *See* Fiechtl, *supra* note 230, at 953.

240. *See id.*

Privilege Doesn't Protect Facts. Because they typically promote candid communications that benefit societal interests, privileges only shield the communications themselves and not the underlying facts.[241] As a result, a federal common law environmental audit privilege would not relieve facility operators from any independent obligation to produce the underlying facts contained in the audit. For example, if a facility discovered groundwater contamination during an environmental audit, a privilege would allow the facility operator to withhold the audit report itself in response to an interrogatory or subpoena. If the interrogatory requested the disclosure of the existence of any groundwater contamination, however, the audit privilege would not allow the facility operator to conceal the fact of contamination or, most likely, the data themselves.

Lack of Other Sources for the Information. If the environmental audit receives protection under relevance or subsequent repair doctrine rationales rather than a privilege, that protection (unlike a privilege) can be overridden.[242] For example, litigants can overcome a claim of attorney work product protection by showing that they cannot obtain the requested information from any other source and that the information was critical to just resolution of the case.[243] Under an analogous analysis, claimants might also defeat federal environmental audit protections when those audits contain information vital to their claim which cannot be obtained from any other source.

VI. THE BIG PICTURE: CONSCIOUS DESIGN OF REGULATORY SECRECY

Privileges rely on a precarious balance between the need to protect beneficial societal activities and communications against the court's necessity for information to hear cases and resolve disputes. The Federal Rules of Evidence acknowledge the fluid and evolving nature of this balance by expressly declining to codify specific privileges, and they instead look to common law and statutory developments to identify emerging privileges. The U.S. Supreme Court has broadened to scope of materials that help demonstrate the existence of new privileges by looking to state statutory privileges and other collateral sources.

Environmental audit protection under state statutory and regulatory policies has likely evolved to the point where the federal

241. *See id.* at 961.

242. *See* FED. R. EVID. 407.

243. *See* Donna Denham & Richard Bales, *The Discoverability of Surveillance Videotapes Under the Federal Rules*, 52 BAYLOR L. REV. 753, 762 (2000).

courts should extend common law privilege protection to them under Rule 501. While the level of protection varies among them, at least forty-six states now shield voluntary environmental audits to some degree against routine discovery and use as admissions against interest in environmental enforcement litigation. At the least, state privileges for environmental audits will play a controlling role in diversity cases where state law dictates the outcome. Non-diversity cases brought under environmental programs that EPA has delegated to states offer an analogous setting where state law "controls the outcome" and therefore require the federal court to look to state law environmental audit privileges when reaching a decision.

Even if federal courts do not extend full privilege protection to environmental audits, they still retain the power to provide some degree of partial protection to environmental audits. A more flexible approach could rely on precedents drawn from Rule 403's relevance guidelines, Rule 407's protection for subsequent remedial measures, and other evidentiary protections offered outside of privilege such as attorney work product. Under this approach, the federal courts could acknowledge the consistent level of protection that states provide to environmental audits and shield them from routine production unless the claimant can meet an appropriate burden of showing that the information cannot be obtained from any other source.

Voluntary environmental audits serve a vital role in assuring regulatory compliance and protecting the environment, yet they lose much of their value if facilities feel a need to censor their own audit reports out of fear that they might return to haunt them in a future enforcement action or tort suit. Despite EPA's long resistance to a privilege for environmental audits, the widespread adoption of protection for environmental audits under state law have reshaped the backdrop for EPA's opposition and, in effect, rendered it moot. The federal courts should acknowledge this reality and craft either a privilege for environmental audits or provide reasonable protections for audits against routine discovery requests. This approach would protect the court's vital need for information to dispense justice while still giving good-faith facility operators the assurance they need to ask probing questions and seek the hard answers they need to promote compliance without fear of self-incrimination.