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Environmental Audit Privilege Legislation: Secrecy and Forgiveness for Environmental Violators

by Joseph P. Bindbeutel¹

A variety of bills are currently being debated by the Missouri Legislature providing for a so called environmental audit privilege. In their purest forms, these bills empower polluters to conceal violations of law from the public and environmental agencies and also immunize illegal conduct from both civil and criminal process. The promise of these proposals is that companies who are otherwise fearful of regulatory reprisal for violations of law found in audits, will, if granted both an evidentiary privilege for audit reports and immunity for acts discovered in the audit process, conduct audits and subsequently correct any deficiencies discovered. Bills containing both the privilege and immunity provisions, however only serve to hamper environmental enforcement efforts in Missouri. Such bills represent a radical departure from traditional notions of the law of privileges and are unnecessary in light of current enforcement policies in Missouri which adequately recognize and reward self-evaluation, self-reporting and prompt remediation. Of course, environmental audits are a

useful tool for companies, both large and small, to review their compliance status and address any outstanding violations. A central theme under our system of justice is that all persons are obligated to find out what legal standards apply to their activities and conform their behavior to such standards. Environmental audits are nothing more than a formalized, technical effort to discharge this fundamental responsibility. However, an audit privilege allowing the information contained in such an evaluation to be withheld from the public and governmental agencies is unnecessary. There has never been an environmental enforcement case cited in the State of Missouri where an environmental audit has been used to advance a civil or criminal prosecution. Accordingly, protections from the perceived evil of overreaching regulators, are simply not needed. By allowing environmental violators to secrete environmental problems from the public, receive immunity for environmental misdeeds, and then delaying environmental enforcement with protracted pretrial litigation, these proposals

reverse the conventional motivations to remedy problems as promptly as possible. Our environmental laws currently send a powerful message that those who are in a position to prevent or remedy environmental violations must do so. The notion that a company can escape prosecution, even from criminal conduct, solely by auditing and belatedly taking some action to correct its wrongdoing is unparalleled in any other enforcement scheme of which the author is aware. Should not other criminals enjoy similar protection if they simply confess and agree to mend their ways?

PRIVILEGES AND IMMUNITIES ARE UNNECESSARY IN FACT AND UNFAVORED IN LAW

The Office of the Attorney General serves as legal counsel in environmental enforcement litigation, both civil and criminal, brought by the State of Missouri. This office works hand-in-hand with the Department of Natural Resources, and its boards and commissions to implement a fair and even-handed approach to environmental prosecutions across the state. We also cooperate fully with federal authorities, including the Environmental Protection Agency and the Department of Justice, to bring federal criminal prosecution in selected cases of substantial environmental violations. In the last three years the Attorney General's office has resolved well over four hundred enforcement matters and collected over \$5 million in penalties, fines, forfeitures, response costs and natural resource damages from environmental violators in the state. Our active enforcement caseload is approximately four hundred fifty cases. During this time, the Office of the Attorney General has never used an environmental audit or the information contained in an audit

(continued on Page 136)

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(continued from Page 132)

Some state legislatures have responded by enacting laws that create an environmental audit privilege and, in some cases, providing limited immunity for companies who report their non-compliance. In July of 1993, the State of Oregon enacted the first environmental audit privilege law.⁵ Not surprisingly, the Colorado legislature followed Oregon's lead in 1994, enacting a statute that provided an environmental privilege and limited immunity for companies that self-report their non-compliance.⁶ That same year, privilege statutes were passed in Kentucky⁷ as well as Indiana.⁸ Last year, privilege statutes were enacted in ten other states: Arkansas,⁹ Idaho,¹⁰ Illinois,¹¹ Kansas,¹² Minnesota,¹³ Mississippi,¹⁴ Texas,¹⁵ Utah,¹⁶ Virginia,¹⁷ and Wyoming.¹⁸ This year Michigan,¹⁹ New Hampshire²⁰ and South Dakota²¹ have all passed privilege statutes.

The enactment of seventeen laws over a period of three years is remarkable progress for a new environmental issue, especially since ten of those laws were adopted in 1995 alone. In the midwest, in particular, state legislators have embraced the concept of

environmental audit privileges. Missouri is nearly surrounded by states with new privilege laws - Illinois, Kansas, Arkansas, and Kentucky. Fortunately, the Missouri legislature has taken action as well. Two bills have been introduced in the Missouri House and Senate to establish an environmental self-evaluation privilege.²² In addition, these bills and two others²³ provide limited immunity for companies that voluntarily disclose non-compliance discovered through an environmental self-evaluation. On January 23, 1996, the House Energy and Environmental Committee passed a privilege and immunity bill, House Bill (H.B.) 945, to the full House with a "do-pass" recommendation. On March 25, H.B. 945 passed the full House. If the Missouri legislature passes H.B. 945, the regulated community will be encouraged to conduct environmental self-evaluations. This will serve to enhance environmental compliance in Missouri.

The traditional means of compliance monitoring in Missouri, and elsewhere, has been to impose standards by legislative fiat. Police compliance then follows through inspections by EPA and DNR representatives. However, as the

volumes of statutes, regulations, rules and court decisions have grown over the decades, state agency budgets have not kept pace. In Missouri, DNR currently employs approximately 170 inspectors/investigators; they cannot possibly "police" the tens of thousands of regulated facilities across the state. The regulated community, with more intimate knowledge of their own facilities, has both the resources and the expertise to police themselves. For those companies that may lack in-house compliance auditors, there are many sophisticated environmental consulting firms in Missouri with auditing expertise. In fact, some of those consulting firms utilize former DNR inspectors and enforcement chiefs. But whether a compliance audit is conducted by in-house personnel or outside consultants, it is axiomatic that the audited company, not a government agency, is in the best position to correct non-compliance. Companies will be better positioned to correct any such non-compliance if they are encouraged to self-evaluate their facilities.

Critics of audit privilege laws are quick to claim that the regulated community may abuse such laws by *hiding* non-compliance in an audit report. If that were the case, the

⁵ OR. REV. STAT. § 468.963 (1993).

⁶ COLO. REV. STAT. § 13-25-126.5 (1994).

⁷ KY. REV. STAT. ANN. § 224.01-040 (Baldwin 1994).

⁸ IND. CODE § 13-10-3-1 (1994).

⁹ ARK. CODE § 8-1-301 to -312 (1995).

¹⁰ IDAHO CODE § 9-802 (1995).

¹¹ ILL. ANN. STAT. ch. 415, § 5/52.2 (Smith-Hurd 1995).

¹² KAN. STAT. ANN. §§ 60-3332 to -3339 (1996).

¹³ Minnesota's Environmental Improvement Act is a 4-year pilot project that allows the waiver of penalties against companies that utilize a self-evaluation checklist to audit their facilities, report problems, and commit to prompt correction of violations. This pilot project does not have an audit privilege component. H.R. 1479, 79th Leg., Reg. Sess. (1995) (enacted).

¹⁴ MISS. CODE ANN. § 49-2-71 (1995).

¹⁵ TEX. REV. CIV. STAT. ANN. art. 4447 cc. (West 1996).

¹⁶ UTAH CODE ANN. § 19-7-104 (1996).

¹⁷ VA. CODE ANN. § 10.1-199 (Michie 1995).

¹⁸ WYO. STAT. § 35-11-1105 to -1106 (1995).

¹⁹ MICH. STAT. ANN. § 324.101 (Callaghan 1996).

²⁰ N.H. REV. STAT. ANN. § 4-147[E] (1996).

²¹ S.D. CODIFIED LAWS ANN. §§ 1-40-33 to -37 (1996).

²² S.B. 529, 88th leg., 2d Sess. (1996) and H.B. 945, 88th leg., 2d Sess. (1996).

²³ S.B. 561, 88th leg., 2d Sess. (1996) and H.B. 1053, 88th leg., 2d Sess. (1996). These are not privilege bills; they would establish limited immunity, however, for companies that voluntarily report non-compliance discovered through an environmental audit. Under these bills, DNR is authorized (but not mandated) to keep environmental audit reports confidential, and closed to the public. If the public obtained the reports, from DNR or elsewhere, however, no privilege would attach.

legislatures in fourteen states have been duped into passing cover-up laws. Nothing could be further from the truth. The audit privilege laws enacted across the country do not allow companies to hide their non-compliance. Missouri S.B. 529 and H.B. 945 contain similar safeguards. First, in order to be privileged, the audit must be conducted to "determine compliance." If non-compliance is discovered, it must be remedied. Otherwise, no privilege will be available. Furthermore, if evidence establishes that the audit was conducted for a "fraudulent purpose," no privilege would attach. For example, if a company knew, or had reason to know that it was out of compliance, then conducted the audit as a means of "shielding" the results, that audit would not be privileged.

In addition, the privilege would not attach if the non-compliance has to be reported under existing environmental laws. There are many laws that require reports to DNR and EPA in areas such as accidental spills, hazardous waste disposal, and permit violations. Under S.B. 529 and H.B. 945, the privilege would have no effect on existing reporting obligations. Furthermore, DNR would retain full authority to inspect facilities, identify non-compliance and issue penalties. Audits will not shield or hide non-compliance from the government.

The most effective part of an environmental privilege statute, in my opinion, is a requirement that the company have an "implementation plan" that addresses the correction of past non-compliance, improvement of current compliance, or prevention of future non-compliance. For the statute to be

fair, environmental audits should be encouraged *and* should lead to improved compliance. Only then will a privilege law benefit the environment.

Environmental enforcement officials in Missouri argue that they typically do not seek audit reports, therefore, an audit privilege is unnecessary. Surprisingly, however, Missouri enforcement officials are not willing to forego the *ability* to obtain audit reports. They simply oppose audit privileges. Apparently, therefore, when enforcement actions warrant, those officials want to be able to use audit reports against the companies that prepared them. An inherent conflict exists when enforcement officials say they do not request audits, yet fight to retain the *right* to do so.²⁴

That conflict has a simple solution. Government officials should, indeed, have full access to environmental audits reports and should be able to use those reports against the subject companies when it *really counts* - when the companies fail to correct the non-compliance uncovered in their own audits. But, if a company takes appropriate corrective action, the government should not use the most critical compliance tool, the audit report, as a hammer for penalties. Under Missouri H.B. 945 and S.B. 529, enforcement agencies will be able to use audit reports against companies that fail to correct violations discovered in their self-evaluations; but not against the companies that "do the right thing."

I close this article by examining, the "worst nightmare" offered by critics of the Missouri privilege legislation: "What if Russell Bliss²⁵ could have taken advantage of an audit privilege law?"

My answer to that question is simple and straightforward: I wish he *had* taken advantage of a privilege law. In order to do so, Mr. Bliss would have 1) conducted compliance audits of his tank farm facilities and the various sites in Eastern Missouri at which he sprayed dioxin; 2) discovered extensive contamination at all of those sites; and 3) cleaned up those sites.

Obviously, Mr. Bliss could not have afforded such an undertaking. But those opposed to an audit privilege are quick to argue that Bliss might have covered his tracks if he had conducted the audits and "cloaked" the audit reports in a privilege. Nothing could be further from the truth. Without performing a clean up, none of his assessment reports would be privileged. More importantly, enforcement officials would retain their full range of investigation authority. Everything that EPA and DNR did in the 1970's and 1980's, the soil sampling, the interviews of truck drivers, obtaining Bliss' corporate records through subpoena, interrogating Bliss, etc., would remain available in spite of a privilege law. In the final analysis, only two things could happen if Russell Bliss had been able to utilize a self-evaluation privilege: 1) the government would conduct the same investigation conducted in the '70's and '80's, because privilege statutes do not affect the government's power to investigate and prosecute; or 2) Mr. Bliss would have taken advantage of the privilege statute by identifying all his contaminated sites and cleaning them up. Think how the latter result would have changed environmental enforcement in Missouri.

²⁴ According to the 1995 Price Waterhouse survey, EPA and state agencies have not refrained from requesting audit reports. Three industry groups reported that 25% of their ranks had been asked for audit reports (Business Services and Supplies industry; Food, Beverage & Tobacco industries; and Forest or Paper Products). The industry group reporting the *lowest* frequency of government requests for audit reports was the Industrial or Farm Equipment Industry. Even there, one in ten companies reported that government agencies had requested copies of their audit reports. PRICE WATERHOUSE SURVEY, *supra* note 3, at 33.

²⁵ Mr. Russell Bliss was responsible for spraying dioxin at a number of sites in Eastern Missouri in the late 1970s and early 1980s.

(continued from Page 133)

to discover and then prosecute a violation. We have never employed formal discovery to obtain an environmental audit, nor have we ever sought a punitive civil penalty or jail time for violators of environmental standards who have discovered their own misdeeds, promptly reported them to proper authorities and swiftly remedied all resulting environmental harm. We give substantial credit, in our prosecutorial discretion, for those environmental violators who disclose their exceedences and promptly commit to a timely and adequate remediation of any environmental damage occasioned by such violations. Admittedly, most environmental regulatory schemes do carry, *inter alia*, significant statutory penalties.² However, most environmental non-compliance is resolved prior to any enforcement activity by a state or federal agency. Remaining non-compliance is most often resolved prior to trial by settlements which are most appropriately reached after the participants have openly exchanged information about the alleged violation and the best means to remedy the same. Should trial be necessary, all information relevant to how and why a violation occurred and how it is best remedied, should be before the trier of fact. A privilege and immunity will turn our system around by rewarding violators who withhold information and prevent regulators from making the wisest enforcement decisions. The flexibility that environmental enforcement agencies currently possess in this complex area of law enforcement is necessary to achieve an appropriate result in each case.

Federal agencies have made similar, although more formal policy pronouncements in this area. The Environmental Protection Agency has recently published its environmental audit policy³ and the

Department of Justice has adopted a parallel policy encouraging voluntary compliance indicating they will not seek environmental audits from regulated entities prior to receipt of other information suggesting the entity has committed violations of environmental law. Self-reporting, cooperation and acceptance of responsibility are effective programs which those federal agencies wish to advance. These acts are mitigating factors in the sentencing phase of environmental criminal cases. The United States, in appropriate cases, waives all civil penalties against those who promptly act to remedy violations discovered in so-called "compliance assistance programs" and also reduces civil penalties in cases where entities self-report violations.

Aside from the practical problems, the measures would pose in enforcement, evidentiary privileges are quite limited in our legal system. They interfere with the truth-seeking process by limiting access to relevant and often very persuasive evidence. As the Supreme Court has stated in *Tammel v. the United States*:

[P]rivileges contravene the well-established principle that 'the public. . . has a right to every man's evidence' and, therefore, they must be strictly construed and accepted only to the very limited extent that permitting refusal to testify or excluding relevant evidence as a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.⁴

At common law, privileges were established to protect socially favored relationships (clergy-confessor, doctor-patient, husband-wife, attorney-client) which required confidentiality to assure complete, frank exchanges of

information. No such hallowed relationship exists between corporation and environmental consultant.

Also, current proposals not only establish a privilege, but extend it beyond historical, constitutional bounds. Unlike individuals, corporations enjoy no general privilege under the 5th Amendment against self-incrimination. Traditionally, corporations could not withhold incriminating documents that are responsive to government subpoenas or discovery requests. This would change with the proposed privilege law.

Fundamentally, the environmental audit privilege would restrict the law enforcement community's ability to cleanly and efficiently gather information necessary for a successful environmental enforcement effort. The privilege interferes with the ability of enforcers to obtain relevant evidence and their ability to determine the truth. These bills contained lengthy, complex procedural mechanisms whereby *in camera* examinations are to be held to review the audit prior to disclosure to law enforcement authorities. The bills would set up "mini trials" over whether a particular audit would be deserving of the privilege, whether it had been waived or whether it was done for a fraudulent purpose. Prosecutors will be at a profound disadvantage in those hearings because they will have none of the information at the time of the *in camera* examination upon which to make such determinations which would be left solely to the reviewing court.

The environmental field is not the only legal arena involving complex legislative and regulatory systems. For instance, tax, securities, governmental contracts involved equally or frequently far more complex regulations and self-reporting as well, but there is no commensurate evidentiary privilege for audits or internal reviews performed in connection with these subjects.

² For instance, the Missouri Clean Water Law carries a statutory maximum penalty of \$10,000 per violation, per day. MO. REV. STAT. § 644.076.1 (1994).

³ Incentives for Self Policing: Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66,706.

⁴ 445 U.S. 40, 50 (1980) [emphasis added].

Advocates of the audit privilege contend that strong environmental enforcement has discouraged environmental auditing by regulated companies. The most recent survey of trends in environmental auditing, Price Waterhouses' *Voluntary Environmental Audit Survey of U.S. Business* (March 1995), however, finds that 75% of companies surveyed have existing auditing programs, and one-third of those companies without existing auditing programs soon plan to begin such auditing.⁵ One of the main reasons for the increase in auditing is the strength of federal, state and local environmental enforcement programs. Companies aware of their own environmental violations tend to address those violations if they know that they will be subject to potentially severe criminal sanctions, civil penalties and the prohibitive costs of remediating the environmental harm.

Also, in exchange for granting blanket immunity, how is the public interest advanced? A number of the bills are somewhat vague in describing when a company would obtain the immunity and whether past, unremediated environmental harm resulting from the underlying violation must be addressed to merit forgiveness. In this regard, Senate Bill

529 extends the privilege in the event the violator "initiates an . . . appropriate effort to achieve compliance, pursues compliance with due diligence and corrects the non-compliance within two years after the completion of the environmental audit."⁶ Such ambiguous standards give critics little comfort and assurance that the immunity will result in either better environmental behavior or a cleaner environment. An absolute and unambiguous commitment to achieve and maintain compliance, as well as remedy any past environmental harm should be a threshold requirement for any level of amnesty.

ROLE OF THE PUBLIC

Importantly, our state and federal environmental statutes are grounded in the assumption that the people have a right to know about and to protect themselves and their families from environmental hazards.⁷ Also, environmental statutes give citizens an opportunity to provide input with respect to a variety of regulatory determinations, such as permitting, environmental impact statements and draft regulations. Citizens also have a right to challenge those actions in court, to protect their interests in a safe and healthy environment. Citizens' suits are

another tool citizens have to stop ongoing violations when the government has failed to do so. Statutory authorization for companies to conceal violations runs counter to the traditional effort to have citizens involved in improving environmental performance. Without ready access to public information regarding the compliance status of facilities, the public's role as enforcement watchdog in the process would be greatly reduced.

ALTERNATIVES

There are some environmental audit initiatives which have been met with great support in the law enforcement community. A process which would allow companies to self-evaluate, report findings to the appropriate environmental agency, receive substantial relief from punitive civil enforcement actions and contain a strong presumption of no criminal action for underlying violations found (in the event all violations are addressed and environmental harm remediated) is a promising approach. However, the privilege (secrecy) portion of most existing bills and the blanket immunity provisions are simply not wise policy and will not achieve the promised results.

⁵ See also, note, *Environmental Criminal Enforcement and Corporate Environmental Auditing: Time for Compromise?*, 31 AM. CRIM. L. REV. 123 (1993).

⁶ S. 529, 88th Cong., 1996 Mo. Legis. Serv. § 490.762.1.[3].

⁷ See Emergency Planning and Community Right-to-Know Act, CERCLA Title 3, 42 U.S.C. § 1101-05.