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Bradley S. Hiles

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A SELF-EVALUATION PRIVILEGE WILL ENHANCE ENVIRONMENTAL COMPLIANCE IN MISSOURI

by Bradley S. Hiles¹

During the 1990's, one of the most striking and beneficial developments in the environmental realm has been the use of environmental self-evaluations (sometimes referred to as compliance audits) by the regulated community. Faced with literally volumes of state and federal environmental regulations, many companies have created staff positions and even departments of experts to evaluate environmental compliance. Other companies, small businesses in particular, retain outside experts to audit their facilities. In many cases, these audits are performed without advance notice to facility personnel. Often, where non-compliance is found, these companies implement voluntary corrective measures. These actions are taken without prompting by governmental agencies. Some companies, in fact, have established goals of "environmental excellence" which exceed the requirements of law.²

Unfortunately, Missouri's environmental laws and tort laws have the effect of discouraging broad

self-evaluations. This effect may not be intended, but it is real. By their very nature, environmental audits identify and document non-compliance. This creates a record which is potentially available to enforcement officials and private party plaintiffs. Missouri law fails to distinguish between the companies trying to "do the right thing," (e.g. committing resources to the discovery and correction of non-compliance) from those companies that do not.

Missouri is not alone. In most states, a corporate executive who authorizes an environmental audit has already decided to accept the risk that the audit report may be used in an enforcement action or toxic tort lawsuit against his company. Here is a case in point: On July 22, 1993 the Colorado Department of Health fined Coors Brewing Company \$1.05 million for alleged violations of state air pollution laws. This fine was imposed after Coors conducted a \$1 million self-evaluation that revealed higher-than-expected VOC emissions at its Golden, Colorado

brewery. Prior to this self-evaluation, Coors had relied upon a California study which had estimated VOC emissions in the brewing industry. Before Coors' \$1 million study, other major brewers, Colorado's Health Department, and even EPA were not aware that breweries emit larger amounts of VOCs than previously estimated in the California study. Coors was a trailblazer; the company invalidated an emissions study previously considered reliable by industry and the government. Their reward was the largest fine ever issued by the Colorado Department of Health.

Incidents like these chill the desires of corporate officials to investigate their companies' environmental compliance. A study of environmental self-evaluations performed in 1995 by Price Waterhouse, L.L.P. proves this concern is real. Companies which had some variety of audit programs were asked to identify reasons they would not expand those programs. Fifty-one percent of the respondents cited fear of civil enforcement action. Other reasons cited as "detractors" for environmental auditing were use in a citizen's suit (48%), toxic tort litigation (46%), and criminal enforcement actions (49%).³ Companies were also asked to identify factors that would encourage more audits. The most often cited factor (64%) was the elimination of penalties imposed by enforcement agencies for companies who have identified, reported and corrected non-compliance. The second most often cited factor to encourage audits was a federal privilege law (49%). In addition, 42% of the respondents said they would be encouraged to conduct audits if their state had a privilege law.⁴

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¹ Mr. Hiles is a partner in the St. Louis office of Peper, Martin, Jensen, Maichel & Helage, where he chairs the firm's Environmental Department. In 1994, he served as the administrator of a state-wide working group of attorneys, engineers, and industry representatives that drafted model legislation for an environmental audit privilege law in Missouri.

² The Monsanto Company, for example, adopted "The Monsanto Pledge" in 1990, establishing such lofty goals as a 90% reduction in air emissions for 300 chemicals, worldwide.

³ PRICE WATERHOUSE, LLP, THE VOLUNTARY ENVIRONMENTAL AUDIT SURVEY OF U.S. BUSINESS 45, Figure S (March 1995).

⁴ *Id.* at 45, Figure R.