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BILL ANALYSIS

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Senate Bill 728
Sponsor: Senator Loren Bennett
Committee: Natural Resources and Environmental Affairs

Date Completed: 10-27-95

SUMMARY OF SENATE BILL 728 as introduced 10-18-95:

The bill would amend the Natural Resources and Environmental Protection Act to provide for environmental audits, specify that they generally would be privileged and protected from disclosure, specify the conditions under which they could be disclosed, provide for hearings on objections to disclosure, specify penalties for violations of the bill, provide for immunity for a violation of the Act if a person made a voluntary disclosure to the appropriate State or local agency, create a rebuttable presumption that a disclosure was voluntary, and require a report to the legislature on the bill's effectiveness.

"Environmental audit" would mean a voluntary and internal evaluation conducted on or after the effective date of the bill of one or more facilities or an activity at one or more facilities regulated under State, Federal, regional, or local laws or ordinances, or of environmental management systems or processes related to the facilities or activity or of a specific instance of noncompliance, that was designed to identify historical or current noncompliance and prevent noncompliance or improve compliance with one or more of the laws, or to identify an environmental hazard, contamination, or other adverse environmental condition, or to improve an environmental management system or process. "Environmental audit report" would mean a document or a set of documents, each labeled "environmental audit report: privileged document" and created as a result of an environmental audit. The report would have to include supporting information, which could include field notes, records of observations, findings, opinions, suggestions, conclusions, drafts, memoranda, follow-up reports, drawings, photographs, computer-generated or electronically recorded information, maps, charts, graphs, and surveys, if the supporting information or documents were collected or developed for the primary purpose and in the course of or as a result of an environmental audit. An environmental audit report also could include an implementation plan that addressed correcting past noncompliance, improving current compliance, improving an environmental management system, and preventing future noncompliance, as appropriate.

Privilege

The owner or operator of a facility, or his or her employee or agent, at any time could conduct an environmental audit, and could create an environmental audit report. Generally, an environmental audit report created under the bill would be privileged and protected from disclosure. The privilege, however, would not extend to any of the following regardless of whether they were included within an environmental audit report:

-- Documents, communication, data, reports, or other information required to be made available or reported to a regulatory agency or any other person by statute, rule, ordinance, permit, order, consent agreement, or as otherwise provided by law.
-- Information obtained by observation, sampling, or monitoring by any regulatory agency.
-- Information legally obtained from a source independent of the environmental audit.
-- Machinery and equipment maintenance records.

Except as otherwise provided in the bill, a person who conducted an environmental audit and a person to whom the environmental audit results were disclosed could not be compelled to testify regarding any matter that was the subject of the environmental audit or that was a privileged

portion of the environmental audit report. Further, the privileged portions of a report would not be subject to discovery and would not be admissible as evidence in any civil, criminal, or administrative proceeding.

The privilege provided for in the bill could be waived by the person for whom the environmental audit report was prepared. The waiver would apply only to the portion or portions of the environmental audit report that were specifically waived.

Disclosure

Disclosure of an environmental audit report, and information generated by it, by the person for whom the report was prepared, or by the person's employee or agent, to an employee or legal representative of the person or to an agent of the person retained to address an issue or issues raised by the environmental audit would not waive the privilege. Further, the privilege would not be waived if the disclosure were made under the terms of a confidentiality agreement between the person for whom the environmental audit report was prepared and either of the following:

-- A partner or potential partner, or a transferee or potential transferee of, or a lender or potential lender for, or a trustee of, the business or facility audited.
-- Governmental officials.

A request by State or local law enforcement authorities for disclosure of an environmental audit report would have to be made by a written request delivered by certified mail or a demand by lawful subpoena.

In addition, to the extent authorized by the Code of Criminal Procedure, State or local law enforcement authorities could seize an environmental audit report for which privilege was asserted, pursuant to a lawful search warrant. Upon seizure, the law enforcement authorities immediately would have to place the report under seal, and file it with the court that authorized the search warrant. The law enforcement authorities or the court also would have to provide notice of the filing to any person who was eligible to assert the privilege. Unless and until the court ordered disclosure, or the privilege had been waived, the law enforcement authorities could not inspect, review, or disclose the contents of the report.

Within 60 days after receipt of a request for disclosure or subpoena or after notice of the filing had been provided, the person asserting the privilege could object in writing to the disclosure of the report on the basis that it was privileged. Upon receipt of such an objection, the State or local law enforcement authorities could file with the circuit court, and serve upon the person, a petition requesting an in camera hearing (in private, or in the judge's chambers) on whether the report or portions of it were privileged or subject to disclosure. The motion would have to be brought in camera and under seal. The circuit court would have jurisdiction over a petition requesting a hearing after receipt of a request for disclosure or subpoena. Failure of the person asserting the privilege to object to disclosure would waive the privilege as to that person.

Upon the filing of a petition for an in camera hearing, the person asserting the privilege would have to demonstrate in the in camera hearing the year the report was prepared, the identity of the entity conducting the audit, the name of the audited facility or facilities, and a brief description of the portion or portions of the report for which privilege was claimed. A person asserting the privilege in response to a request for disclosure or subpoena also would have to provide a copy of the environmental audit report to the court.

Upon the filing of a petition for an in camera hearing, the court would have to issue an order under seal scheduling, within 45 days after the filing of the petition, an in camera hearing to determine whether the report or portions of it were privileged or subject to disclosure.

The court, after in camera review, could require disclosure of material for which privilege was asserted, if the court determined that the privilege was asserted for a fraudulent purpose; the material was not subject to the privilege; or, even if subject to the privilege, the material showed evidence of noncompliance with State, Federal, regional, or local environmental laws, permits, consent agreements, regulations, ordinances, or orders, and the owner or operator failed to take corrective action or eliminate any violation of law identified during the audit within a reasonable time.

If the court determined that the material was not privileged, but the party asserting the privilege filed an appeal of this finding, the material, motions, and pleadings would have to be kept under seal during the pendency of the appeal.

Prima Facie Case

A person asserting the privilege would have the burden of proving a prima facie case as to the privilege (a case established by sufficient evidence, which can be overcome by contradictory evidence). A person seeking disclosure of an

environmental audit report would have the burden of proving by a preponderance of the evidence that privilege did not exist under the bill. The parties disputing the existence of the privilege at any time could stipulate to entry of an order directing that specific information contained in a report would or would not be subject to the privilege. Upon making a disclosure determination the court could compel the disclosure only of those portions of a report relevant to issues in dispute in the proceeding.

Penalties

A person who knowingly divulged or disseminated all or part of the privileged information contained in an environmental audit report in violation of the bill, or knowingly divulged or disseminated all or part of the information contained in a report that was provided to the person in violation of the bill, would be guilty of a misdemeanor punishable by a maximum fine of $25,000. In addition, the court could sanction the person through contempt proceedings and could order other relief, including dismissal or suppression of evidence, as it determined appropriate. The bill specifies that this provision would not be intended to limit any rights the aggrieved party could have.

The bill would not limit, waive, or abrogate the scope or nature of any statutory or common law privilege, including the work product doctrine and the attorney-client privilege.

Immunity

A person would be immune from any administrative or civil sanctions and fines and from criminal penalties and fines for negligent acts or omissions related to a violation of the Act, or the rules promulgated under it, if he or she made a voluntary disclosure to the appropriate State or local agency. The person making the voluntary disclosure under these provisions would have to provide information to support his or her claim that the disclosure was voluntary at the time it were made to the State or local agency. A disclosure of information would be voluntary if it was made promptly after knowledge of the information disclosed was obtained by the person and it arose out of an environmental audit, and the person making the disclosure initiated an appropriate and good-faith effort to achieve compliance, pursued compliance with due diligence, and promptly corrected the noncompliance or condition after discovery of the violation. If evidence showed that the noncompliance was the failure to obtain a permit, appropriate and good-faith efforts to correct the noncompliance could be demonstrated by the submittal of a complete permit application within a reasonable time.

Rebuttable Presumption

There would be a rebuttable presumption that a disclosure made under the bill was voluntary. The presumption of voluntary disclosure could be rebutted by presentation of an adequate showing to the administrative hearing officer or appropriate trier of fact that the disclosure did not satisfy the requirements for a voluntary disclosure. The State or local agency would have to bear the burden of rebutting the presumption of voluntariness. Agency action determining that disclosure was not voluntary would have to be considered final agency action subject to judicial review.

Unless a final determination showed that a voluntary disclosure had not occurred, a notice of violation or cease and desist order could not include any administrative or civil sanction or fine or any criminal penalty or fine for negligent acts or omissions by the person making the voluntary disclosure.

The elimination of administrative or civil sanctions or fines or criminal penalties or fines would not apply if a person had been found by a court or administrative law judge to have committed serious violations that constituted a pattern of continuous or repeated violations of environmental laws, rules, regulations, permit conditions, settlement agreements, or orders on consent and that were due to separate and distinct events giving rise to the violations, within the three-year period prior to the date of the disclosure. A pattern of continuous or repeated violations also could be demonstrated by multiple settlement agreements related to substantially the same alleged violations concerning serious instances of noncompliance with environmental laws that occurred within the three-year period immediately prior to the date of the voluntary disclosure. In determining whether a person had a pattern of continuous or repeated violations, the court or administrative law judge would have to base the decision on the compliance history of the specific facility at issue.

In those cases in which the conditions of a voluntary disclosure were not met but a good faith effort was made voluntarily to disclose and resolve a violation detected in a voluntary environmental audit, the State and local environmental and law enforcement authorities would have to consider the nature and extent of any good faith effort in deciding the appropriate enforcement response and would have to mitigate any penalties based on a showing that one or

more of the conditions for voluntary disclosure had been met.

The immunity provided by these provisions would not abrogate a person's responsibilities as provided by law to correct the violation, conduct necessary remediation, or pay damages, when appropriate.

Report

Within five years after the effective date of the bill, the Department of Environmental Quality would have to prepare and submit to the standing committees of the Legislature with jurisdiction over issues pertaining to natural resources and the environment a report evaluating the effectiveness of the bill and specifically detailing whether the bill had been effective in encouraging the use of environmental audits and in identifying and correcting environmental problems and conditions.

Proposed MCL 324.14801-324.14810

Legislative Analyst: L. Burghardt

FISCAL IMPACT

The bill would have no direct fiscal impact on the Department of Environmental Quality.

Fiscal Analyst: G. Cutler