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SFA BILL ANALYSIS

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House Bills 5092 and 5093 (as reported without amendment)
Sponsor: Representative Tom Alley (H.B. 5092)
Representative Kwame Kilpatrick (H.B. 5093)
House Committee: Conservation, Environment and Recreation
Senate Committee: Natural Resources and Environmental Affairs

Date Completed: 10-29-97

RATIONALE

Public Act 132 of 1996 was enacted to encourage businesses to perform environmental self-evaluations by assuring them protection against the disclosure and use of audit findings. Reportedly, however, the U.S. Environmental Protection Agency (EPA) has threatened to remove Michigan's delegated authority under Federal environmental programs, such as the Clean Air Act programs, because the current law is inconsistent with Federal antipollution laws. The Department of Environmental Quality (DEQ) administers a variety of programs on behalf of the Federal government under the condition that State regulations are consistent with and no more lenient than applicable Federal regulation. Apparently, there is some concern that Michigan's law puts unreasonable constraints on the State's enforcement of environmental regulations. Some people also believe that the privilege and immunity provisions encourage polluters to hide their violations and escape legal penalties. To resolve legal concerns raised by the EPA and alleviate lingering fears of environmentalists, it has been suggested that the language of the law that enables industries to keep their audits confidential and avoid criminal penalties should be tightened.

CONTENT

The bills would amend Part 148 of the Natural Resources and Environmental Protection Act (NREPA) to specify a time limit for conducting environmental audits that receive privilege and immunity; specify additional conditions under which privilege and immunity could not apply; allow audit reports to be used in criminal proceedings; specify criminal violations that would not be subject to immunity; specify additional conditions under which civil, administrative, or criminal immunity would not apply; require supporting information of voluntary disclosure; and require facilities to notify the DEQ of plans to conduct an audit, in order to receive immunity.

(Part 148, which was added by Public Act 132 of 1996, provides for environmental audits that are privileged and protected from disclosure; specifies conditions under which environmental audits may or must be disclosed; and provides immunity for violations of the NREPA if a person voluntarily discloses a violation. "Environmental audit" means a voluntary and internal evaluation conducted on 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 is 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.)

The bills are tie-barred to each other. Following is a brief description of each bill.

House Bill 5092

The bill provides that, once initiated, an audit would have to be completed within a reasonable time, not to exceed six months, unless a written request for an extension were approved by the Director of the DEQ on reasonable grounds.

Under the Act, the privilege does not extend to

specific items regardless of whether they are included within an environmental audit report. These items include documents, communication, data, reports, or other information required to be reported or made available to a regulatory agency or any other person by statute, rule, ordinance, permit, order, consent agreement, or as otherwise provided by law. The bill also would refer to information required to be collected or maintained by law.

In addition, under the bill, the privilege would not extend to information in instances where the privilege was asserted for a fraudulent purpose; or to information in instances where 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 had failed either to take prompt corrective action or to eliminate any violation of law identified in the audit report within a reasonable time, but not exceeding three years after the discovery of the noncompliance or violation, unless a longer period of time had been set forth in a schedule of compliance in an order issued by the Department of Environmental Quality and the DEQ had determined that acceptable progress was being made.

The Act provides that the privileged portions of an environmental report are not subject to discovery and are not admissible as evidence in any civil, criminal, or administrative proceedings. The bill would delete reference to criminal proceedings, and specifies that the privilege created by Part 148 would not apply to criminal investigations or proceedings. Where an audit report was obtained, reviewed, or used in a criminal proceeding, the privilege applicable to administrative or civil proceedings would not be waived or eliminated. The bill also would delete provisions that describe procedures for law enforcement authorities to seize audit reports and for courts to determine whether seized reports are privileged.

The Act also prescribes procedures under which State or local law enforcement authorities may request an environmental audit report by making a written request or a demand by lawful subpoena. If the person asserting the privilege objects to disclosure, the law enforcement authorities may request a hearing. After reviewing the report, the court may require disclosure of material if the court determines that it is not subject to the privilege. Under the bill, the court would be required, rather than permitted, to require disclosure if it determined that the material was not privileged.

The bill states that the privilege provided by Part 148 would not limit, waive, or abrogate any existing ability or authority to challenge privilege under State law.

House Bill 5093

Currently, a person is immune from any administrative or civil penalties and fines under the NREPA and from criminal penalties and fines for negligent acts or omissions under the Act related to a violation of Article 2 and Chapters 1 and 3 of Article 3, if the person makes a voluntary disclosure to the appropriate State or local agency. (Article 2 pertains to pollution control. Chapter 1 of Article 3 governs habitat protection and inland waters, and Chapter 3 concerns management of nonrenewable resources.) The immunity does not apply to any criminal penalties and fines for gross negligence.

The bill also provides that the immunity would not apply to any criminal penalties and fines for violations of Part 301, 303, 315, or 325, or Section 3108 or 3115a. (Parts 301, 303, 315, and 325 are within Chapter 1 of Article 3 and pertain to inland lakes and streams, wetland protection, surplus waters, and Great Lakes submerged lands, respectively. Sections 3108 and 3115a are within Chapter 1 of Article 2 and pertain to floodplain violations.)

Currently, the person making the voluntary disclosure must provide information supporting his or her claim that the disclosure is voluntary. A disclosure is voluntary if certain conditions occur (e.g., the disclosure is made promptly, the person initiates an appropriate and good-faith effort to achieve compliance, and the audit occurs before the person knows that he or she is under investigation). Under the bill, the person would have to provide information showing that these conditions were met.

Currently, there is a rebuttable presumption that a disclosure made pursuant to the Act is voluntary. The presumption of voluntary disclosure may 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 voluntary disclosure. Under the bill, the presumption would apply if the disclosure were made pursuant to *and* in full compliance with the Act. In any administrative or judicial proceeding, the person claiming voluntary disclosure would have to provide the required

supporting information, show the appropriate and good-faith effort to achieve compliance, pursue compliance with due diligence, and promptly correct the noncompliance in the period since the date of disclosure.

Under the Act, the elimination of administrative or civil penalties or fines or criminal penalties or fines does not apply if the trier of fact finds that the person has been found by a court or administrative law judge to have knowingly committed a criminal act, or that the person committed serious violations that constitute a pattern of repeated environmental law violations. Under the bill, the elimination of fines or penalties would not apply if the trier of fact found that the person had knowingly committed a criminal act; the person had committed significant violations that constituted a pattern of continuous or repeated environmental law violations; the violation had resulted in a substantial economic benefit that gave the violator a clear advantage over its business competitors; the instance of noncompliance had resulted in serious harm or in imminent and substantial endangerment to human health or the environment; or the violation was of the terms of an administrative or judicial order.

Under the bill, in order to receive immunity, a facility conducting an environmental audit would have to notify the DEQ of its plan to conduct the audit, specifying the facility or portion of the facility, the anticipated time the audit would begin, and the general scope of the audit. The notice could provide notification of more than one scheduled environmental audit at a time.

MCL 324.14801 et al. (H.B. 5092)
324.14809 (H.B. 5093)

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The bills would satisfy concerns that audit privileges and immunity will create a shield of secrecy from the public and allow an escape from criminal penalties. The EPA believes that the State should not jeopardize the fundamental national interest in assuring that violations of Federal law do not threaten public health or the environment, or make it profitable not to comply. Under the bill, privileged portions of an audit report would be subject to discovery and admissible as evidence in criminal proceedings. Thus, important environmental data could not be withheld from law enforcement agencies and the public in certain circumstances. Also, immunity would not apply if the trier of fact found that the person had knowingly committed a criminal act or repeated environmental law violations, the noncompliance had resulted in serious harm or in imminent and substantial endangerment to human health or the environment, or the violation were of the terms of an administrative or judicial order. Further, the notice and time limit provisions under the bills would inform the public which companies were conducting an audit and approximately when those results would be expected. These requirements would prevent companies from enjoying an unfair economic advantage over their complying competitors.

Supporting Argument

The current law should be revised rather than repealed, as some might suggest. Repealing the law would set back Michigan's environmental quality, decrease compliance activity, and increase costs to business. It would be far better to amend the law to satisfy the concerns of the EPA. The bills would retain full control of the State's delegated environmental authority and would preserve the environmental audit's paramount goal of removing fear and increasing environmental compliance, an acceptable compromise.

Legislative Analyst: N. Nagata

FISCAL IMPACT

The bills would have no direct fiscal impact on State or local government.

Fiscal Analyst: G. Cutler

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