Ohio Legislative Service Commission

122nd Senate Bill Analysis

Sub. S.B. 219

122nd General Assembly

(As Passed by the Senate)

Sens. Gardner, Cupp, Kearns, Suhadolnik, Nein

Risk management program

- In accordance with provisions of the federal Clean Air Act Amendments of 1990 and regulations adopted under those provisions, requires the owner or operator of a stationary source that has more than a threshold quantity of a regulated substance in a process at the source to develop and submit a risk management plan, and generally requires the plan to be revised every five years.
- Establishes criteria for covered processes at stationary sources to be used to determine which of certain specified risk management requirements are to be met by the owners or operators of those sources.
- Authorizes the Director of Environmental Protection to adopt rules for the purposes of the risk management program.
- Requires owners and operators of stationary sources who are required to submit risk management plans to pay specified annual fees, creates the Risk Management Plan Reporting Fund to receive moneys from the fees, and requires the fund to be used exclusively for the administration and enforcement of the risk management program.
- Requires anyone violating the bill or a rule adopted or order issued under it to pay a civil penalty of not more than $25,000 for each day of each violation, and establishes other enforcement mechanisms, including authority for the issuance of abatement orders and injunctive relief.
- Generally establishes civil immunity for the state and any officer or employee of the state with regard to the inspection, investigation, review, or acceptance of a risk management plan.

Environmental audits

- Requires an environmental audit, once initiated, to be completed within a reasonable time, not to exceed six months, unless a written request for an extension is approved by the Director.
- Provides that a person who possesses privileged information cannot be compelled to testify in any civil or administrative proceeding concerning the privileged portions of the environmental audit.
- Specifies that the privilege does not apply to criminal investigations and that, where an audit report is obtained, reviewed, or used in a criminal proceeding, the privilege applicable to civil or administrative proceedings is not waived or eliminated.
- Alters and adds to the list of circumstances under which the environmental audit privilege does not apply.

• Removes the provision under which the immunity from administrative and civil penalties does not apply to the owner or operator of a facility or property who, within the previous year, made a disclosure with respect to a particular activity and received immunity with respect to that activity, and instead provides that the immunity does not apply under specified circumstances, including those involving a pattern of violations.
• Stipulates that where a disclosed violation has resulted in significant economic benefit, there is no immunity for the economic benefit component of the administrative and civil penalties for that violation.
• Extends the sunset provisions from January 1, 2001, to January 1, 2004, and extends the deadline for the Director's report concerning the impact of the environmental audit statutes from March 31, 2000, to March 31, 2002.
• States that the environmental audit statutes cannot be construed to limit or affect the authority or obligation of any government agency under the public records statute or any employee protection rights under federal or state laws.

CONTENT AND OPERATION

I. ***Risk management program***

Background

Included in the federal Clean Air Act Amendments of 1990 are provisions requiring the preparation of risk management plans by the owners or operators of stationary sources from which accidental releases of specified regulated substances may occur. Based on specified eligibility criteria, an owner or operator also may be required to conduct certain activities such as a hazard assessment as part of the risk management activities.

The bill establishes a program governing risk management plans that is based on the provisions of the federal statute and regulations adopted under it. State statutory authority for such a program is a prerequisite for the delegation of the federal program to the state by the U.S. Environmental Protection Agency (USEPA).

Definitions

For the purposes of the new statutes governing the risk management program, the bill defines the following terms:

(1) "Accidental release" means an unanticipated emission of a regulated substance into the ambient air from a stationary source.

(2) "Covered process" means a process that has a regulated substance present in an amount that is in excess of the threshold quantity established in rules adopted under the bill (see "***Rules***," below).

(3) "Environmental receptor" means natural areas such as national or state parks, forests, or monuments; federally designated or state-designated wildlife sanctuaries, preserves, refuges, or areas; and federal wilderness areas, that could be exposed at any time to toxic concentrations, radiant heat, or overpressure greater than or equal to the endpoints prescribed in rules adopted under the bill and that can be identified on U.S. Geological Survey maps (see "***Rules***," below; see **COMMENT** 1).

(4) "Owner or operator" means any person who owns, leases, operates, controls, or supervises a stationary source.

(5) "Process" means any activity involving a regulated substance, including any use, storage, manufacturing, handling, or on-site movement of the substance or any combination of these activities. A group of vessels that are interconnected, or separate vessels that are located in such a manner that a regulated substance potentially could be involved in a release, must be considered a single process.

(6) "Public" means any person except employees or contractors at a stationary source.

(7) "Public receptor" means off-site residences, institutions such as schools or hospitals, industrial, commercial, and office buildings, parks, or recreational areas inhabited or occupied by the public at any time where the public could be exposed to toxic concentrations, radiant heat, or overpressure as a result of an accidental release.

(8) "Regulated substance" means a toxic or flammable substance listed in rules adopted under the bill (see "***Rules***," below).

(9) "Stationary source" means any buildings, structures, equipment, installations, or substance-emitting stationary activities that belong to the same industrial group as described in the Standard Industrial Classification Manual, 1987, that are located on one or more contiguous properties under the control of the same person or persons, and from which an accidental release may occur. Properties cannot be considered contiguous solely because of a railroad or pipeline right-of-way. The term includes transportation containers that are used for storage not incident to transportation and transportation containers that are connected to equipment at a stationary source for loading and unloading, but does not include the transportation, including storage incident to transportation, of any regulated substance under the bill. The term also does not include naturally occurring hydrocarbon reservoirs.

(10) "Transportation" includes, without limitation, transportation that is subject to oversight or regulation under federal regulations governing the transportation of natural or other gas by pipeline, liquefied natural gas facilities, or the transportation of hazardous liquids by pipeline or to a state natural gas or hazardous liquid program for which the state has in effect a certification to the U.S. Department of Transportation under a federal statute that allows a state to establish safety standards and practices for intrastate pipeline facilities or intrastate pipeline transportation if the state submits an annual certification to do so.

(11) "Threshold quantity" means the quantity established for a regulated substance in rules adopted under the bill that, if exceeded, subjects an owner or operator to compliance with the bill and rules adopted under it (see "***Rules***," below);

(12) "Vessel" means any reactor, tank, drum, barrel, cylinder, vat, kettle, boiler, pipe, hose, or other container. (Sec. 3753.01.)

Risk management plans

Preparation and submission of plans

The bill stipulates that effective on the date that the USEPA delegates the risk management program to the Ohio Environmental Protection Agency (EPA), an owner or operator of a stationary source that has a covered process must develop and submit a risk management plan not later than the latest of June 21, 1999, the date on which a regulated substance is first present above a threshold quantity in a process at the stationary source, or three years after the date on which a regulated substance at the stationary source is first listed under applicable federal regulations (sec. 3753.03(A)). An owner or operator who is subject to the bill's requirements must submit a single risk management plan that reflects all covered processes at the stationary source by the applicable deadline and that is in the form required by the Director of Environmental Protection in rules adopted under the bill (see "***Rules***," below). The risk management plan must include all of the following, as applicable:

(1) A registration that reflects all covered process at the stationary source pursuant to applicable federal regulations;

(2) The applicable information required to be submitted with the plan under the bill (see "***Other requirements***," below); and

(3) A summary of the actions taken to comply with all of the other applicable requirements of the bill (see "***Other requirements***," below). (Sec. 3753.03(B).)

An owner or operator who has submitted a risk management plan or submitted an update to a risk management plan is required to revise, update, and submit the plan not later than five years after the initial submission of the plan, not later than five years after its most recent update, or as otherwise provided in rules adopted under the bill (see "***Rules***," below), whichever is applicable (sec. 3753.03(C)).

The bill prohibits an owner or operator who is required to submit a risk management plan from failing to do so (sec. 3753.03(D)). Anyone who purposely violates that prohibition must be fined not more than $20,000 or imprisoned for not more than one year, or both. Each day of violation is a separate offense. (Sec. 3753.99.) Additionally, an owner or operator who is required to submit a risk management plan and who knowingly makes a false statement in the plan, on a record upon which information in the plan is based, or on or pertaining to any other information or records required to be maintained under the bill or rules adopted under it is guilty of falsification (sec. 3753.03(E)). Under law not affected by the bill, falsification is a first degree misdemeanor, the penalty for which is a fine of not more than $1,000, a term of imprisonment of not more than six months, or both (secs. 2921.13 and 2929.21, not in the bill).

Other requirements

In addition to the requirements related to the submission of risk management plans (see above), the owner or operator of a stationary source at which one or more covered processes are present, as part of the owner or operator's risk

management program, must comply with Program 1, Program 2, or Program 3 requirements established under the bill or with a combination of those requirements. An owner or operator is required to determine which of those requirements apply to the covered processes that are present at the stationary source (see below). An owner or operator must comply with all levels of program requirements that apply to the covered processes at the owner or operator's stationary source. (Sec. 3753.04(A).)

The owner or operator of a stationary source at which a covered process is present is subject to Program 1 requirements if the covered process meets all of the following conditions:

(1) For the five years prior to the submission of a risk management plan, the process has not had an accidental release of a regulated substance where exposure to the substance, its reaction products, overpressure generated by an explosion involving the substance, or radiant heat generated by a fire involving the substance led to the death of or injury to any person off-site or response or restoration activities for an environmental receptor;

(2) The distance to a toxic or flammable endpoint for a worst case release assessment conducted pursuant to a hazard assessment as specified in rules adopted under the bill is less than the distance to any public receptor (see "***Rules***," below); and

(3) Emergency response procedures have been coordinated between the stationary source and local emergency planning and response organizations. (Sec. 3753.04(B).)

The owner or operator of a stationary source at which one or more covered processes are present that are subject to Program 1 requirements is required to comply with all of the following requirements:

(1) Submit with the risk management plan an analysis of the worst case release scenario for each covered process and documentation that the nearest public receptor is beyond the distance to a toxic or flammable endpoint;

(2) Submit with the risk management plan a five-year accident history for the process;

(3) Ensure that response actions have been coordinated with local emergency planning and response agencies; and

(4) Certify the following in the plan: "Based upon criteria in rules adopted by the Director of Environmental Protection under (the bill), the distance to the specified endpoint for the worst case release scenario for the following process(es) is less than the distance to the nearest public receptor: (list processes). Within the past five years, the process(es) has (have) had no accidental release that caused off-site impacts as described in rules adopted by the Director. No additional measures are necessary to prevent off-site impacts from accidental releases. In the event of fire, explosion, or a release of a regulated substance from the process(es), entry within the distance to the specified endpoints may pose a danger to the public emergency responders. Therefore, public emergency responders should not enter this area except as arranged with the emergency contact indicated in the risk management plan. The undersigned certifies that, to the best of my knowledge, the information submitted is true, accurate, and complete. (signature, title, date signed)" (Sec. 3753.04(E).)

The owner or operator of a stationary source at which a covered process is present is subject to Program 2 requirements if the covered process does not meet the conditions established for Program 1 or Program 3 (see below) (sec. 3753.04(C)). The owner or operator of a stationary source at which one or more covered processes are present that are subject to Program 2 requirements must comply with all of the following:

(1) Develop and implement a management system in accordance with rules adopted under the bill (see "***Rules***," below);

(2) Conduct a hazard assessment in accordance with rules adopted under the bill (see "***Rules***," below);

(3) Implement Program 2 or Program 3 prevention requirements in accordance with rules adopted under the bill (see "***Rules***," below);

(4) Submit as part of the risk management plan information on prevention program elements for covered processes that are subject to Program 2 requirements; and

(5) Develop and implement an emergency response program in accordance with rules adopted under the bill (see "***Rules***," below). (Sec. 3753.04(F).)

The owner or operator of a stationary source at which a covered process is present is subject to Program 3 requirements if the covered process does not meet the conditions established for Program 1 requirements and the process either is in standard industrial classifications code 2611, 2812, 2819, 2821, 2865, 2869, 2873, 2879, or 2911 (see **COMMENT** 2) or is subject to the U.S. Occupational Safety and Health Administration safety management standard regarding highly hazardous chemicals (sec. 3753.04(D)). An owner or operator subject to Program 3 requirements must do all of the following:

(1) Develop and implement a management system in accordance with rules adopted under the bill (see "***Rules***," below);

(2) Conduct a hazard assessment in accordance with rules adopted under the bill (see "***Rules***," below);

(3) Implement Program 3 prevention requirements in accordance with rules adopted under the bill (see "***Rules***," below);

(4) Submit as part of the risk management plan information on prevention program elements for covered processes that are subject to Program 3 requirements; and

(5) Develop and implement an emergency response program in accordance with rules adopted under the bill (see "***Rules***," below). (Sec. 3753.04(G).)

If at any time a covered process at a stationary source no longer meets the conditions established under the bill for its program level, the owner or operator must comply with the requirements of the new program level that applies to the covered process and must update the risk management plan and information submitted with it not later than six months after the change (sec. 3753.04(H)).

Rules

For the purposes of implementing and administering the risk management program, the bill authorizes the Director to adopt, amend, and rescind rules in accordance with the Administrative Procedure Act. The rules must be consistent with, equivalent in scope, content, and coverage to, and no more stringent than the requirements of the provision in the federal Clean Air Act Amendments of 1990 establishing the risk management program and regulations adopted under that provision (see "***Background***," above). The rules may do any or all of the following:

(1) Identify and list regulated substances and establish a threshold quantity for any regulated substance in a process at a stationary source;

(2) Add regulated substances to or delete regulated substances from that list or revise the threshold quantity for any regulated substance;

(3) Prescribe toxic and flammable endpoints for regulated substances;

(4) Prescribe the forms and all of the elements of risk management plans;

(5) Prescribe the schedule and format for the submission of risk management plans and other information required to be submitted under the bill;

(6) Prescribe criteria for developing and implementing a management system that is required by the bill to oversee the implementation of elements of a risk management program (see "***Risk management plans; Other requirements***," above);

(7) Prescribe criteria for conducting a hazard assessment required under the bill, including, but not limited to, criteria for a worst case release assessment (see "***Risk management plans; Other requirements***," above);

(8) Prescribe criteria for the implementation of prevention requirements for covered processes that are subject to Program 2 or Program 3 requirements (see "***Risk management plans; Other requirements***," above);

(9) Prescribe criteria for developing an emergency response program (see "***Risk management plans; Other requirements***," above);

(10) Prescribe record-keeping and audit requirements, including at least requirements governing the availability of records to individuals and other persons as provided in the Clean Air Act Amendments; and

(11) Establish any other requirements that the Director determines to be necessary or appropriate to implement and administer the bill. (Sec. 3753.02.)

Fees

The bill requires an owner or operator who is required to submit a risk management plan to pay annually to the EPA a fee of $50 together with any of the following applicable fees:

(1) A $65 fee if a covered process in the stationary source includes propane and propane is the only regulated substance at the stationary source over the threshold quantity;

(2) A $65 fee if a covered process in the stationary source includes anhydrous ammonia that is sold for use as an agricultural nutrient and is on-site over the threshold quantity; and

(3) A $200 fee for each regulated substance over the threshold quantity. Propane must be considered a regulated substance subject to the $200 fee only if it is not the only regulated substance over the threshold quantity, and anhydrous ammonia must be considered a regulated substance subject to that fee only if it is not sold for use as an agricultural nutrient. (Sec. 3753.05(A).)

In accordance with rules adopted under the bill (see "***Rules***," above), the fees assessed under the bill must be collected for the year 1999 not later than June 21, 1999. Thereafter, the fees must be collected not later than September 1 each year. The fees assessed for a stationary source must be based on the regulated substances present over the threshold quantity identified in the risk management plan on file for the calendar year 1999 as of June 21, and for each subsequent calendar year as of September 1. (Sec. 3753.05(B).)

Under the bill, an owner who is required to submit a risk management plan and who fails to submit such a plan within 30 days after the applicable filing date must submit with the plan a late filing fee of 15% of the total fees due as described above (sec. 3753.05(C)). The bill authorizes the Director to establish fees to be paid by persons, other than public officers or employees, to cover the costs of obtaining copies of documents or information submitted to the Director under the bill and rules adopted under it. The Director may charge the actual costs involved in accessing any computerized data base established or used for the purposes of assisting in the administration of the bill. (Sec. 3753.05(D).)

All moneys received from the fees and charges discussed above must be credited to the Risk Management Plan Reporting Fund, which the bill creates. The fund must be administered by the Director and used exclusively for the administration and enforcement of the bill and rules adopted under it. (Sec. 3753.05(E).)

The bill requires the Director, beginning in fiscal year 2001 and every two years thereafter, to review the total amount of moneys in the fund to determine if that amount exceeds $750,000 in either of the two preceding fiscal years. If the total amount in the fund exceeded that amount in either fiscal year, the Director, after review of the fee structure and consultation with affected persons, must issue an order reducing the amount of the annual fees described above so that the estimated amount of moneys resulting from the fees will not exceed $750,000 in any fiscal year. Conversely, if, upon review of the fees and after the fees have been reduced, the Director determines that the total amount of moneys collected and accumulated is less than $750,000, the Director, after review and consultation, may issue an order increasing the amount of the annual fees so that the estimated amount of moneys resulting from the fees will be approximately $750,000. However, fees never can be increased to an amount exceeding the amount specified in the bill as discussed above.

The bill states that notwithstanding that part of the Administrative Procedure Act requiring an adjudicatory hearing prior to the issuance of an adjudication order, the Director may issue an order changing the amount of fees without the necessity to hold such a hearing. It also stipulates that the issuance of such an order is not an act or action that is subject to appeal to the Environmental Review Appeals Commission (formerly the Environmental Board of Review). (Sec. 3753.05(F).)

Enforcement

The bill prohibits anyone from violating any of its provisions or any rule adopted or order issued under it (sec. 3753.06). Anyone violating the prohibition must pay a civil penalty of not more than $25,000 for each day of each violation. The Attorney General or the prosecuting attorney of the county or director of law of the city where a violation has occurred or is occurring, upon the Director's written request, must bring an action for the imposition of the civil penalty against the violator. Moneys resulting from civil penalties must be credited to the Risk Management Plan Reporting Fund (see "***Fees***," above). (Sec. 3753.09(B).)

Under the bill, the Director or his authorized representative, upon proper identification and upon stating the purpose and necessity of an inspection, may enter at reasonable times on any private or public property, real or personal, to inspect, investigate, obtain samples, and examine and copy records to determine compliance with the bill and rules adopted or orders issued under it. The Director or his authorized representative may apply for, and any judge of a court of record may issue for use within the court's territorial jurisdiction, an administrative inspection warrant or other appropriate search warrant necessary to achieve the purposes of the bill and rules adopted or orders issued under it. (Sec. 3753.07.)

The bill authorizes the Director to issue orders requiring an owner or operator who is subject to the bill to abate a violation of the bill or a rule adopted or order issued under it. Such an order may be issued as a final order without issuing a proposed action under the Environmental Protection Agency Law and without holding an adjudication hearing. The bill specifies that issuance of an abatement order is not a condition precedent to bringing a civil or criminal action under the bill. (Sec. 3753.08.)

Upon written request of the Director, the Attorney General or the prosecuting attorney of the county or director of law of the city where a violation has occurred or is occurring must prosecute to termination any person who has violated the requirement to submit a risk management plan or bring an action for injunction against any person who has violated the bill or any rule adopted or order issued under it. The court of common pleas in which an action for injunction is filed has

the jurisdiction to and must grant preliminary and permanent injunctive relief upon a showing that the person against whom the action is brought has violated or is violating the bill or a rule adopted or order issued under it. The bill requires the court to give precedence to such an action over all other cases. (Sec. 3753.09(A).)

Upon the certified written request of any person, the Director must conduct investigations and make inquiries that are necessary to secure compliance with the bill or rules adopted or orders issued under it. Upon request or upon his own initiative, the Director may investigate or make inquiries into any violation of the bill or rules adopted or orders issued under it. (Sec. 3753.09(C).)

Relief from civil liability

The bill stipulates that the state and any officer or employee of the state is not liable in a tort action when the state inspects, investigates, reviews, or accepts a risk management plan from an owner or operator who is subject to the bill unless an action or omission of the state or of an officer or employee of the state constitutes willful or wanton misconduct or intentionally tortuous conduct. Any action brought against the state under this provision must be brought in the Court of Claims. (Sec. 3753.10(B).) For these purposes, "tort action" is defined as a civil action for damages for harm, but does not include a civil action for damages for a breach of contract or other agreement between persons or for a breach of a warranty that exists pursuant to state statute or common law. "Harm" means injury to, death of, or loss to person or property. (Sec. 3753.10(A).)

The above provision does not create, and cannot be construed as creating, a new cause of action against or substantive legal right against the state or an officer or employee of the state. It also does not affect, and cannot be construed as affecting, any immunities from civil liability or defenses established by state statute, the U.S. Constitution, or the Ohio Constitution or available at common law to which the state, or an officer or employee of the state, may be entitled under circumstances not covered by this provision. (Sec. 3753.10(C)(1) and (2).)

The bill states that the existing statute conferring civil immunity on state officers and employees while performing their duties does not apply to an officer or employee of the state if the officer or employee is performing work in connection with inspecting, investigating, reviewing, or accepting a risk management plan from an owner or operator who is subject to the bill at the time that the officer or employee allegedly caused the harm or caused or contributed to the presence or release of toxic or flammable substances for which damages are sought in a tort action. In the alternative, the immunities conferred by the bill apply to that individual. (Sec. 3753.10(C)(3).)

II. ***Environmental audits***

Background

Current law authorizes an owner or operator of a facility or property to conduct environmental audits to improve compliance or identify, correct, or prevent noncompliance with environmental laws. It establishes a privilege with respect to the contents of the environmental audit report and the contents of certain communications related to the environmental audit and establishes exceptions to that privilege. In addition, it creates an immunity from administrative and civil penalties under certain circumstances for violations of environmental laws. The bill revises several of the provisions in the environmental audit statutes.

Completion of an environmental audit within a reasonable time

Current law defines "environmental audit" to mean a voluntary, thorough, and discrete self-evaluation of one or more activities at one or more facilities or properties that is documented; is designed to improve compliance, or identify, correct, or prevent noncompliance, with environmental laws; and is conducted by the owner or operator of a facility or property or the owner's or operator's employee or independent contractor. It specifies that an environmental audit may be conducted by the owner or operator of a facility or property, the owner's or operator's employees, or independent contractors. The bill specifies that once initiated, an audit must be completed within a reasonable time, not to exceed six months, unless a written request for an extension is approved by the Director of Environmental Protection based on a showing of reasonable grounds. An audit is not considered to be initiated until the owner or operator or the owner's or operator's employee or independent contractor actively has begun the self-evaluation of environmental compliance. (Sec. 3745.70(A).)

Environmental audit privilege

Under current law, the owner or operator of a facility or property who conducts an environmental audit of one or more activities at a facility or property has a privilege with respect to the contents of an environmental audit report that is based on the audit, and the contents of communications between the owner or operator and employees or contractors of the owner or operator, or among employees or contractors of the owner or operator, that are necessary to the audit and are

made in good faith as part of the audit after the employee or contractor is notified that the communication is part of the audit (sec. 3745.71(A)).

Information that is privileged under current law is not admissible as evidence or subject to discovery in any criminal, civil, or administrative proceeding and a person who possesses such information as a result of conducting or participating in an environmental audit cannot testify in any criminal, civil, or administrative proceeding concerning the contents of that information. The bill instead provides that the privilege does not apply to criminal investigations or proceedings and that a person who possesses privileged information cannot be compelled to testify in any civil or administrative proceeding concerning the privileged portions of the environmental audit. Additionally, the bill provides that where an audit report is obtained, reviewed, or used in a criminal proceeding, the privilege applicable to civil or administrative proceedings is not waived or eliminated. (Sec. 3745.71(B) and (C).)

The bill alters some of the circumstances specified in current law under which the environmental audit privilege does not apply. Current law provides that the environmental audit privilege does not apply if the information is required by law to be collected, developed, maintained, reported, or otherwise made available to a government agency. The bill adds to this exemption information that otherwise is required by law to be disclosed publicly. (Sec. 3745.71(C)(4).) Additionally, current law provides that the privilege does not apply if the information in the environmental audit shows evidence of noncompliance with environmental laws and reasonable efforts to achieve compliance with those laws are not initiated and pursued with reasonable diligence. The bill amends this provision by specifying instead that the privilege does not apply if the information in the environmental audit shows evidence of noncompliance with environmental laws and the owner or operator fails to promptly initiate reasonable efforts to achieve compliance upon discovery of the noncompliance through an environmental audit, pursue compliance with reasonable diligence, or achieve compliance within a reasonable time. (Sec. 3745.71(C)(8).) The bill also alters a provision of current law that exempts information that contains evidence regarding an alleged violation of environmental laws if a government agency charged with enforcing any of those laws has a substantial need for the information to protect public health or safety or to prevent imminent and substantial harm to property or the environment by removing the requirement that the harm to property and the environment be imminent (sec. 3745.71(C)(10)).

In addition to altering provisions of existing law that provide for circumstances under which the environmental audit privilege does not apply, the bill adds to the list of such circumstances. The bill specifies that the privilege does not apply if the information contained in the environmental audit contains evidence that a government agency charged with enforcing environmental laws alleges the information is necessary to prevent imminent and substantial endangerment or harm to human health or the environment (sec. 3745.71(C)(9)). The bill also excludes from the environmental audit privilege information existing prior to the initiation of the environmental audit (sec. 3745.71(C)(13)).

Under current law, if a person seeking disclosure of information with respect to which an environmental audit privilege is asserted shows evidence of noncompliance with environmental laws, the person asserting the privilege has the burden of proving by a preponderance of the evidence that reasonable efforts to achieve compliance with those laws were initiated and pursued with reasonable diligence. The bill provides that the person asserting the privilege must also prove that the reasonable efforts to achieve compliance were initiated promptly and that compliance was achieved within a reasonable time. (Sec. 3745.71(E).)

Immunity from administrative and civil penalties

Under current law, the owner or operator of a facility or property who conducts an environmental audit of the facility or property and promptly and voluntarily discloses information contained in or derived from an audit report that is based on the audit and concerns an alleged violation of environmental laws to the director of the state agency that has jurisdiction over the alleged violation is immune from any administrative and civil penalties for that violation. The bill specifies that the immunity is only applicable to the specific violation that is disclosed**,** except that where the disclosed violation has resulted in significant economic benefit, there is no immunity for the economic benefit component of the administrative and civil penalties for that violation. (Sec. 3745.72(A).)

The bill eliminates a provision of current law under which the immunity from administrative and civil penalties does not apply to an owner or operator of a facility who, within the previous year, made a disclosure with respect to a particular activity and received immunity with respect to that activity. Instead, the bill provides that the immunity from administrative and civil penalties does not apply under any of the following circumstances:

(1) Within the three-year period prior to disclosure, the owner or operator of a facility or property has committed significant violations that constitute a pattern of continuous or repeated violations of environmental laws, settlement agreements, or judicial orders and that arose from separate and distinct events. For the purposes of this provision, a pattern of continuous or repeated violations also may be demonstrated by multiple settlement agreements related to substantially the same alleged significant violations that occurred within the three-year period immediately prior to the voluntary disclosure. Determination of whether a person has a pattern of continuous or repeated violations must be based on the compliance history of the property or specific facility at issue;

(2) With respect to a specific violation, the violation resulted in serious harm or in imminent and substantial endangerment to human health or the environment; or

(3) With respect to a specific violation, the violation is of a specific requirement of an administrative or judicial order. (Sec. 3745.72(E).)

Extension of the sunset of the environmental audit privilege and immunity and extension of deadline for Director's report

Under current law, the environmental audit privilege applies only to information and communications that are part of an audit conducted before January 1, 2001, and the immunity provided under the environmental audit statutes applies only to disclosures made concerning environmental audits conducted before that date. The bill provides that the privilege and immunity apply to an audit initiated after March 13, 1997, and completed before January 1, 2004. (Secs. 3745.71(I) and 3745.72(F).) In addition, current law requires the Director, not later than March 31, 2000, and in consultation with public and private entities to prepare a report on the impacts of the environmental audit statutes. The bill extends this deadline to March 31, 2002, and requires state agencies to submit information relevant to the report by January 31, 2002. (Sec. 3745.73.)

Public records statute; employee rights

The bill provides that nothing in the environmental audit statutes can be construed to limit or affect the authority or obligation of any government agency under the public records statute or any employee protection rights under federal or state laws (sec. 3745.74).

COMMENT

1. Several of the bill's provisions are based on provisions in federal regulations. Those provisions contain technical terms such as "overpressure" and "endpoints." The bill does not define these terms. In some cases, the federal regulations contain definitions or descriptions of the terms; in other cases, they do not. Presumably, the meaning of each such technical term for the bill's purposes is the meaning contained in the federal regulations or, absent that, the dictionary meaning.

2. The types of industries included in the standard industrial classification codes listed in the bill are as follows:

2611 Pulp Mills

2812 Alkalies and Chlorine

2819 Industrial Inorganic Chemicals, Not Elsewhere Classified

2821 Plastics Materials, Synthetic Resins and Nonvulcanizable Elastomers

2865 Cyclic Organic Crudes and Intermediates and Organic Dyes and Pigments

2869 Industrial Organic Chemicals, Not Elsewhere Classified

2873 Nitrogenous Fertilizers

2879 Pesticides and Agricultural Chemicals, Not Elsewhere Classified

2911 Petroleum Refining

HISTORY

ACTION DATE JOURNAL ENTRY

Introduced 01-22-98 p. 1564
Reported, S. Energy,
Natural Resources,
& Environment 03-25-98 p. 1784
Passed Senate (22-9) 03-25-98 pp. 1787-1788

Top of Page

State of Ohio