

SENATE ENVIRONMENT COMMITTEE

STATEMENT TO

SENATE, No. 384

with committee amendments

STATE OF NEW JERSEY

DATED: JANUARY 18, 1996

The Senate Environment Committee favorably reports Senate Bill No. 384 with committee amendments.

As amended, this bill would remove disincentives and create incentives to promote the performance of voluntary environmental audits. The bill seeks to strike the proper balance between the needs of the regulated community to have an expectation of privacy in the environmental audit reports, the needs of governmental entities in enforcing the State's environmental laws, and the needs of individuals who may have been harmed by the actions of a person performing an environmental audit.

The bill strikes this balance by establishing limitations on when a governmental entity seeking to enforce an environmental law can seek audit information, by providing immunity or relief from civil penalties for businesses that perform environmental audits and discover and report violations of the law, and by establishing an evidentiary privilege for audit reports.

Section 2 of the bill sets forth the policy reasons for why environmental audits need to be promoted and why the provisions of the bill are necessary to that promotion. The bill states that enforcement policies should promote compliance with the law rather than merely sanction violations and that the audits would help achieve the goal of voluntary compliance with environmental laws. Further, the benefits that environmental audits would have for business, such as saving money and avoiding potential liabilities are recognized.

Section 3 of the bill establishes the definitions for "environmental audit" and "environmental audit report." The environmental audit is to be voluntary and comprehensive. It is intended to evaluate activities or management systems at facilities in an effort to prevent noncompliance with environmental laws and to improve operations. The bill sets forth the essential components for successful environmental audits. The environmental audit report is expansively

defined so that the information prepared as part of the audit would be considered part of the report and subject to the bill's protections, except as otherwise provided.

Section 4 sets forth the limitations on when an enforcement agency can seek audit information. It establishes a five part test to establish when an enforcement agency is entitled to the information which consists of (1) reasonable grounds to believe a violation occurred; (2) a showing that the violation may result in serious harm to human health or the environment; (3) knowledge of the violation by independent means; (4) a substantial need for the information; and (5) the information is not otherwise available or the substantial equivalent of the information cannot not be obtained without unreasonable cost or delay.

Conditions (4) and (5) are substantially similar to the test to obtain documents prepared in anticipation of litigation as set forth in Rule 4:10-2 of the Rules Governing Civil Procedure. The intent is that the same limitations and analysis governing the Court Rule be applied in this context.

If all of the above conditions are met, an enforcement agency may then seek to obtain only those portions of the audit that are relevant to the underlying violation. The bill also prescribes the process by which the enforcement agency can seek the information.

Although this section strictly limits when enforcement agencies can obtain audit information, the enforcement agencies will retain all necessary powers to obtain audit information when truly necessary. For instance, the bill provides that these limitations do not apply to criminal investigations or prosecutions. The provisions in this section limit governmental "fishing expeditions," and the use of audit information in the civil enforcement of relatively minor violations. If, however, the government knows of a serious environmental violation, substantially needs the information, and cannot get the information from another source, the audit information would be available.

The bill further provides that certain information, such as information required to be prepared, reported, or disclosed by law, as well as the underlying factual basis for the audit report, is not subject to the protections provided by the bill. The intent of this provision is to prevent a person from shielding otherwise available information by the use of an environmental audit. However, the bill recognizes that tests performed as part of the audit will be considered part of the audit unless otherwise required to be disclosed.

Section 5 of the bill provides that enforcement agencies should give a low priority for nonmandatory inspections for facilities in which an environmental audit has been performed.

Section 6 of the bill provides that the Department of Environmental Protection shall consider the performance of an audit as a mitigating factor in assessing civil penalties. This section will apply to all violations even if not discovered and disclosed as part of

an audit. The bill allows the department to propose, not require, that an environmental audit be performed to prevent a regulated entity from experiencing future violations.

This section also expresses support for the current policy guideline of the Attorney General whereby prosecutors may use the performance of an environmental audit as a mitigating factor in the exercise of their prosecutorial discretion.

It is the intent in both provisions of this section that whenever the performance of an environmental audit serves as a mitigating factor for penalties, that the relevant enforcing agency consider the usefulness of the audit, its comprehensiveness, and the extent that it exceeds the requirements for internal investigations that may exist in the law.

Section 7 establishes limited immunity from civil penalties for regulated entities that perform an audit, find a violation, and voluntarily disclose it to the proper enforcement agency. In order to qualify for the immunity from penalties, the regulated entity must also correct the violation and achieve compliance within a reasonable time. If compliance cannot be achieved within 90 days, the regulated entity would be given a reasonable schedule to comply. The regulated entity would also be required to take expeditious action to remedy conditions that pose imminent and substantial endangerment to human health, safety or the environment. Further, the regulated entity would have to take steps to prevent the violation from recurring and to fully remediate any harm that may have occurred.

Even if all these steps are not taken, the bill encourages the enforcement agency to reduce or not impose any penalty under the proper circumstances. If a regulated entity discloses a violation pursuant to this section they would also be protected from a citizen suit pursuant to the "Environmental Rights Act." This section does not limit an enforcement agency from seeking equitable relief.

Section 8 of the bill provides that information voluntarily disclosed under section 7 shall not be disclosed by the enforcement agency.

Section 9 provides that other privileges are not affected by this bill, that other legal requirements are not changed, and that governmental entities may not try to circumvent the provisions of this bill.

Section 10 allows the Department of Environmental Protection to adopt necessary rules and regulations.

Sections 11 through 18 establish the evidentiary privilege for environmental audits. The bill will allocate these sections to the evidentiary provisions in Title 2A of the New Jersey Statutes whereas the prior sections will be allocated to Title 13 of the Revised Statutes. This privilege does not affect an enforcement agency from obtaining audit information pursuant to section 4 of the bill but sets up different evidentiary protections from disclosure of the report to other persons as well as to enforcement agencies.

Section 11 sets forth the same definitions as in the prior sections of the bill.

Section 12 establishes an evidentiary privilege for environmental audit reports. The privilege will prevent the information from being admissible or discoverable in any civil or administrative proceeding.

Section 13 provides exceptions to the privilege. The exceptions are (1) when the privilege is waived by the owner or operator of the regulated facility; (2) when the privilege is being asserted for a fraudulent or criminal purpose; (3) if the public interest outweighs the expectation of confidentiality and the information cannot otherwise be obtained; (4) when the information is not privileged; or (5) when the audit uncovered a violation of an environmental law and proper efforts were not taken to correct the violation. The balancing test in paragraph (3) is not applicable to enforcement agencies except when an enforcement agency is seeking injunctive relief to prevent serious harm to human health or the environment.

The test in paragraph (3) is the same test that is used when a person is seeking to obtain information that is protected by the attorney-client privilege. This test was articulated by the New Jersey Supreme Court in Matter of Nackson, 114 N.J. 527 (1989). The committee recognizes that the articulation of the public policy reasons for the attorney-client privilege has been extensively developed over the years and that an environmental audit evidentiary privilege does not share the same history. The committee, however, believes that the environmental audit evidentiary privilege is as important to the public good and welfare as is the attorney-client privilege. Therefore, it is the intent of the committee that the test to obtain privileged environmental audit reports pursuant to this paragraph be no less stringent than the test for obtaining information subject to the attorney-client privilege.

Section 14 provides that privileged information may not be used to obtain other information and allows courts to issue certain protective orders.

Section 15 sets forth the information that is not subject to the privilege. This provision is identical to the one that appears in section 4 of the bill.

Section 16 provides that existing privileges are not impacted by the bill.

Section 17 provides that existing legal requirements are not impacted by the bill.

Section 18 provides that the privilege provisions may not be circumvented by governmental entities by the adoption of a requirement to disclose privileged information.

Section 19 provides that the bill is to take effect immediately and apply to audits conducted on or after July 1, 1995. This date allows regulated entities to begin to conduct environmental audits in anticipation of this bill.

The committee made technical and clarifying amendments to the bill. In addition, the committee amended section 7 of the bill to

increase the amount of time that a regulated entity is accorded to achieve compliance before a schedule must be approved by the department. As amended, if the regulated entity achieves compliance within 90 days or pursuant to a schedule approved by the department, and meets all other conditions articulated in section 7 of the bill, then the enforcement agency shall waive civil or civil administrative penalties.

This bill was pre-filed for introduction in the 1996 session pending technical review which has been performed.