TESTIMONY OF BERTRAM C. FREY
DEPUTY REGIONAL COUNSEL, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 5
BEFORE THE OHIO SENATE ENERGY, NATURAL RESOURCES, AND ENVIRONMENT COMMITTEE
CONCERNING THE PORTION OF OHIO SENATE BILL 138
THAT DEALS WITH ENVIRONMENTAL AUDIT PRIVILEGES AND IMMUNITIES
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Good morning. My name is Bertram Frey. I am Deputy Regional Counsel for the United States Environmental Protection Agency (U.S. EPA), Region 5. Region 5 includes six Midwest states, including Ohio. I appreciate the opportunity to testify today on the portion of Senate Bill 138 that deals with proposed privileges and immunities for environmental audits in Ohio. I believe it is essential that federal and state efforts are coordinated to establish consistency in enforcement of the environmental laws throughout the country. The U.S. EPA is concerned with both the privilege and immunities provisions of the proposed Ohio bill. The U.S. EPA does not support an audit privilege because the proposed environmental audit privilege will not necessarily result in any significant increase in voluntary auditing and compliance, it promotes secrecy by allowing companies to withhold important evidence from law enforcement agencies and the local public, it complicates investigations and criminal prosecutions, it may increase litigation, it protects facts not just legal conclusions, and it is so broad that it can cover almost any violation discovered by the facility on its own. The U.S. EPA also has concerns over the immunity provisions of the bill, since the provisions 1) immunize what under certain federal laws would be reckless or negligent criminal conduct; and 2) extend immunity to repeat violations, violations that present an imminent and substantial endangerment, or violations where there has been serious actual harm. In addition, the immunity provisions would allow regulated entities to reap the economic benefits of their non-compliance, thereby enjoying an unfair economic advantage over their complying and law-abiding competitors.

I will begin by reviewing the U.S. EPA's policies on environmental audits, voluntary environmental self-policing, and self-disclosures, then discuss some data on self-auditing, and finally highlight some of the key differences between U.S. EPA's policies and the Ohio bill and provide more detail of U.S. EPA's concerns regarding the bill.

In May 1994, the Administrator of U.S. EPA called for a review of U.S. EPA's policies on self-auditing and voluntary disclosures to determine whether additional incentives were necessary to encourage voluntary disclosure and correction of violations discovered during environmental audits and self-evaluations. In July of 1994, the Agency held a major two-day meeting in Washington, D.C., attended by over 400 interested parties who gave oral comments on these issues. In addition to considering the oral comments, the Agency has reviewed the over 80 written comments that have been submitted to the environmental auditing policy docket. In January 1995, the Agency held a focus group meeting in San Francisco with key stakeholders

from industry, trade groups, state environmental agencies, State Attorneys General offices, district attorneys offices, environmental and public interest groups, and professional environmental auditing groups.

This major undertaking reflects the seriousness with which the U.S. EPA views the subject of environmental self-auditing. One of the Agency's most important responsibilities is obtaining compliance with the laws that protect public health and safeguard the environment. This goal can be achieved only with the voluntary cooperation of businesses and other regulated entities subject to those requirements. Because the vast majority of regulated entities comply with the environmental laws, the focus of our enforcement efforts is on violators, not compliers. There is no doubt that Ohio shares the U.S. EPA's goal of achieving

cooperation of regulated entities to obtain compliance with environmental laws. The critical question is how to achieve that goal without intentionally shielding environmentally irresponsible behavior.

U.S. EPA's extensive study of the environmental audit issue resulted in the promulgation of a new interim policy which contains incentives to encourage environmentally responsible behavior from regulated entities. This policy, a copy of which I submit for the record, took effect on April 18 of this year. Note that it is an interim policy about which U.S. EPA is taking further comments until June 30, 1995. After reviewing and considering all the comments, the Agency anticipates issuing a final policy later this year. The interim policy is a good example of a common sense approach to environmental protection. It is a well balanced one that provides predictable incentives, but does not limit enforcement, in appropriate circumstances, or the public's right to know about environmental problems.

The U.S. EPA policy applies when a regulated entity undertakes a voluntary environmental audit or self-evaluation. The policy provides three incentives to conduct environmental audits or self-evaluations and to disclose violations that may be discovered during them.

First, the Agency will completely eliminate gravity-based (or "punitive') penalties for companies or public entities that voluntarily identify, disclose and correct violations in accordance with the policy conditions. The U.S. EPA will also reduce gravity-based penalties by up to 75% for regulated entities that meet most, but not all of the conditions of the policy. U.S. EPA believes that this ability to partially reduce penalties when penalty elimination is not appropriate is preferable to an all or nothing approach.

Secondly, the U.S. EPA will not recommend to the Department of Justice (DOJ) that criminal charges be brought against a company acting in good faith to identify, disclose, and correct violations, so

long as no serious actual harm has occurred. Under the federal system, DOJ has the ultimate authority on criminal prosecutions, but U.S. EPA recommendations carry significant weight.

Thirdly, the U.S. EPA will not request voluntary environmental audit reports to trigger or initiate enforcement investigations. This policy, which has been the Agency's policy and practice since 1986, will alleviate fears that an audit report will invite investigations that would not otherwise occur. The U.S. EPA may, however, request audit report information if violations have been identified by other means.

In summary, the U.S. EPA through its April 1995 policy has struck a balance between the encouragement of good behavior and the loss of some regulatory discretion. The policy allows the U.S. EPA to exercise its enforcement discretion in those cases where environmental violations must be addressed by the severity of criminal sanctions. U.S. EPA will also be able to assess penalties where the violator has realized an economic benefit as a result of the violation, since the Agency believes that even a company that inadvertently violates an environmental law company should not gain a business advantage over companies that comply with the environmental laws. In addition, the April 1995 policy allows U.S. EPA to reduce penalties where only portions of the policy's conditions apply, if full elimination of the penalties is not appropriate. Moreover, the policy affords the Agency the opportunity to obtain relevant facts that may be contained in an audit report when an independent basis exists for the investigation, and those facts are critical to the fact-finding effort.

Several independent studies support the U.S. EPA's April 1995 policy's goals and conclusions. For example, an Arthur Anderson survey of corporate general counsels in 1992 revealed that 59.2 percent of corporations have had a compliance audit performed between 1989 and 1991, and another 3.6 percent before 1989, while only 37.4 percent of corporations surveyed had never undertaken a formal compliance

audit. This shows that a majority of corporations have already found it to their advantage to conduct compliance audits. Of those corporations conducting audits, only 16 percent of the general counsels reported that they altered their procedures for conducting audits because of concerns that the violations they find can be used against them, while the overwhelming majority expressed no such concern.

Voluntary cooperation by regulated entities is also exemplified in a study of the Investor Responsibility Research Center (IRRC). In its 1994 Corporate Environmental Profiles Directory, the IRRC surveyed more than 249 companies in 75 of the 86 Standard & Poors industry groups concerning their methods of environmental management. The study found a large amount of voluntary compliance through various programs. For example:

o 83% of the companies surveyed have established written environmental practices;

o 33% subscribe to codes of conduct;

o 53% have a board of directors's committee that addresses environmental issues;

o 85% have established audit programs (average age of which is 8 years); and

o 72% have audited their domestic facilities within the last two years.

The preliminary results from a U.S. EPA internal survey on the use of information from voluntary self-disclosures and voluntarily performed environmental audits supports U.S. EPA's policy goals and show that in general even prior to its April 1995 policy, the Agency did not initiate enforcement actions on the basis of voluntarily self-disclosed information. The regions of U.S. EPA reported that of over 4,600 enforcement actions taken during fiscal years 1993 and 1994, only 62 reported actions, a mere 1.3%, were initiated on the basis of voluntarily self-disclosed information. Of those actions, in 40 cases the penalty was or very likely will be mitigated for self-disclosure to the maximum extent allowable under the applicable

enforcement policy. In the remaining 22 enforcement actions, the disclosing entity was provided a lower level of enforcement. To summarize, both the independent surveys and the internal survey support the EPA's April 1995 policy.

To U.S. EPA's and the Department of Justice's knowledge, the federal government has never initiated a criminal enforcement case based upon a voluntarily submitted environmental audit.

I will next address some of U.S. EPA's more detailed concerns with the Ohio bill currently before you. I will begin with the privilege provisions and then discuss the immunity provisions.

The U.S. EPA opposes the creation and adoption of new environmental evidentiary privileges. The issues associated with the privileges and subsequent litigation create serious resource drains on government and private litigators. The bill encourages litigation over the scope of the privilege that will further burden our already taxed judicial system. As stated by the U.S. Supreme Court in a number of opinions, privileges are impediments to the search for truth and should not be created lightly, nor construed broadly. A privilege should not be created that could potentially shield from the government and the public virtually all factual information about an aspect of environmental non-compliance. In addition, in Oregon and the other audit privilege states, the existence of an environmental audit privilege has not led to any increase in environmental auditing or voluntary compliance in those states. Moreover, the in camera process complicates investigations and criminal prosecutions because the government must establish by a preponderance of the evidence that one of the bill's exceptions would apply to the audit information sought. Furthermore, if an audit report is deemed privileged in an in camera proceeding, the prosecutor would then have the burden of proving that other evidence used to prosecute the violator was not tainted (i.e., not the "fruit of the poisonous tree") by the evidence deemed privileged.

Unlike common law privileges, the audit privilege contained in the Ohio bill protects factual data as well as legal conclusions. This restricts access to important evidence that would determine whether a violation has occurred or whether a potential environmental disaster might be possible. In addition, the definition of audit is so broad that it can cover and protect almost any violation that is discovered by the company on its own. The bill, too, allows industry to dictate its own pace in correcting violations because it only calls for "reasonable diligence" in coming into compliance with the law. Thus, compliance might be slower than would be in the best interest of protecting public health and the environment. In contrast, the U.S. EPA normally insists that violators must achieve full and final compliance as expeditious as practicable.

Another concern that the U.S. EPA has with Senate Bill 138 is with its impacts on criminal law prosecution under the immunity provisions. Under the proposed law, immunity from criminal prosection for criminal acts other than knowing acts is granted with respect to environmental audit information promptly and voluntarily disclosed to the Ohio EPA. Under the provisions of the bill, it appears that criminal negligence or recklessness, or even recklessness with a total disregard for human life would be shielded. For example, consider a situation in which a company that produces a dangerous chemical, such as ethylene oxide, conducts an environmental audit and finds no violation of the environmental laws, but the results of the audit reveal "an environmental disaster waiting to happen." Suppose that the company recklessly, or even negligently disregards the potential risk, and sometime later the toxic gas escapes and several employees and a few nearby residents are killed or injured by the gas. If the company promptly discloses the release of the gas as it is occurring, the disclosure would qualify as voluntary and prompt. Under this scenario, the company and its officials would be completely immunized from criminal prosection or from civil penalties that would otherwise be rightfully imposed on a company that recklessly or

negligently caused people to lose their lives or be seriously injured. It is impossible to imagine that Ohio would risk such an event within its borders, but this type of criminal or at least grossly negligent tortious activity is exactly what such immunity provision would protect.

Moreover, the bill should not extend immunity to repeat violations, violations which present an imminent and substantial endangerment, or violations where, as described above, there has been serious actual harm. U.S. EPA's April policy does not give rise to these concerns, because it does not accord immunity to regulated entities. Instead, it provides a reasonable incentive program that applies if its conditions are met.

Finally, the immunity provisions of the bill inappropriately would allow a violating company to benefit from its violations of the environmental laws and obtain a competitive economic advantage over complying competitors. To maintain a level playing field, Ohio should reserve its right to collect a penalty that is equal to or greater than the economic benefit the violator has received as a result of its non-compliance, even where there has been a prompt and voluntary disclosure of the violation. The U.S. EPA firmly believes that the recovery of an economic benefit of a violation ensures that a violator does not gain a competitive advantage, even if it was unintentional, over others who invested resources to meet environmental requirements. U.S. EPA is required to establish a certain minimum consistency in enforcement across the country, so that the sanctions a business faces for violating federal environmental law do not depend on where the business is located. As the Agency conducted public meetings across the country to discuss these issues, industry leaders voiced support for the recapture of economic benefit under these circumstances.

In closing, I urge that you not enact this legislation. U.S. EPA has considered many of the issues facing this committee and is aware that the task at hand is not easy. I hope you will consider the merits of the April 1995 interim U.S. EPA policy on voluntary environmental self-policing and self-disclosure, which was adopted only after more than a year of fact-finding and consideration of the views of hundreds of stakeholders across the country. U.S. EPA recognizes the states are important partners in federal enforcement, and that it is desirable to create a climate in which states can be innovative. If, however, Ohio constrains its enforcement through passage of the proposed audit privilege/immunity legislation, U.S. EPA may find it necessary to increase federal enforcement in Ohio. I thank you for inviting me to testify on this important issue today.