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BEFORE THE OHIO HOUSE ENERGY 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. At least 19 state attorneys general and the National District Attorneys Association oppose privilege and immunity legislation and agree with the federal approach of granting incentives for self-policing while preserving government's ability to protect public health and the environment.

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 promotes secrecy by allowing companies to withhold important evidence from law enforcement agencies and the local public, it will not necessarily result in any significant increase in voluntary auditing and compliance, 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 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 and environmental self-policing, 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.

One of the U.S. EPA's most important responsibilities is obtaining and ensuring compliance with the laws that protect public health and safeguard the environment. This goal can be achieved only with the voluntary cooperation of thousands 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.

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. Over the next 18 months the Agency held numerous meeting 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. The information gathered from these stakeholders helped EPA develop an interim policy that was announced

on April 3, 1995. The Agency received and reviewed over 300 comments on the interim policy and also gathered additional input from industry, states, and public interest groups during five days of dialogue sponsored by a subcommittee of the American Bar Association. The Agency's final policy, a copy of which I submit for the record, was promulgated on December 22, 1995, and became effective on January 22, 1996.

U.S. EPA received a letter dated January 26, 1996, from 19 state attorneys general expressing support for the EPA Audit Policy. The attorneys general feel that, "[t]his Policy encourages responsible self-policing by greatly reducing potential penalties and minimizing the risk of criminal prosecution...while preserving the right of government officials to protect health and the environment... as well as the right of the public to know the nature of compliance problems." These state officials also expressed appreciation for state input and find the Audit Policy to be, "an excellent example of how EPA and the states work in harmony to encourage both voluntary compliance and effective law enforcement." U.S. EPA strongly encourages Ohio to strike this balance as well. In particular, EPA's policy provides three incentives for environmental self-policing.

First, the policy promotes a higher standard of self-policing by waiving gravity-based (or punitive) penalties for violations that are promptly disclosed and corrected, and which were discovered through voluntary environmental audits or compliance management systems that demonstrate due diligence. To further promote compliance, the policy reduces gravity-based penalties by 75% for any violation voluntarily discovered and promptly disclosed and corrected, even if not found through an audit or compliance management program. 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 regulated entity that uncovers a violation through environmental audits or due diligence, promptly discloses and expeditiously corrects those violations, and meets all other conditions of the policy. The policy is limited to good actors, and therefore has some important limitations. It will not apply where corporate officials are consciously involved or willfully blind to violations, or condone noncompliance. Violations that cause serious harm or which may pose imminent and substantial endangerment to human health or the environment are not covered; nor are repeat violations covered. In addition, U.S. EPA reserves the right to recommend prosecution for the criminal conduct of any culpable individual. Under the federal system, DOJ has the ultimate authority on criminal prosecutions, but U.S. EPA recommendations carry significant weight. Please note that the Agency has never recommended criminal prosecutions of a regulated entity based upon voluntary disclosure of violations discovered through audits and disclosed to the government before an investigation was already under way.

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's December 1995 policy has struck a balance between the encouragement of good behavior and the loss of some regulatory discretion. The policy allows U.S. EPA to exercise its enforcement discretion in those cases where environmental violations must be addressed by the severity of criminal sanctions. With an exception for limited grace periods for certain small businesses that qualify under the Agency's June 1995 policy on compliance incentives for small businesses, U.S. EPA

will also be able to assess penalties where the violator has realized an economic benefit as a result of the violation. This also applies to a company that inadvertently violates an environmental law, since EPA believes that even a violator in those circumstances should not gain a business advantage over companies that comply with the environmental laws. In addition, 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 goals and conclusions of U.S. EPA's self-policing policy. Voluntary cooperation by regulated entities is 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.

More than 90% of the corporate respondents of a 1995 Price-Waterhouse survey who conduct environmental audits said that one of the reasons they did so was to find and correct violations before found by government inspectors. More than half of the respondents to the same Price-Waterhouse survey stated that they would expand environmental auditing in exchange for reduced penalties for violations discovered

and corrected. While many companies already audit or have due diligence programs, U.S. EPA believes that the incentives offered in the December 1995 policy will improve the frequency and quality of these self-monitoring efforts.

The preliminary results from a U.S. EPA internal survey on its use of information from voluntary self-disclosures and voluntarily performed environmental audits show that in general even prior to its April 1995 interim 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 approximately 1% were initiated on the basis of voluntarily self-disclosed information. Of those few actions, in the majority of cases the penalty was or will be mitigated to the maximum extent allowable under the applicable enforcement policy. In the remaining such 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 December 1995 policy.

I will next address some of U.S. EPA's more detailed concerns with the Ohio bill 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 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, U.S. EPA normally insists that violators must achieve full and final compliance as expeditiously as practicable.

Additionally, the proposed provision against unauthorized disclosure of privileged audit information contained in Section 3745.73(C)(1) produces an unacceptable "chilling effect" on individuals with information regarding any matter that was the subject of an environmental audit or that would be privileged within the audit report. This provision, which was added to the original Ohio Senate bill, would inappropriately subject an individual who might have information about harm to human health or the environment, or threats of harm, to liability for damages for disclosing the information. Similarly outrageous

is Section 3745.73(C)(2), which would subject a public official who discloses any information on harm to human health or the environment or the threat of endangerment that was hidden in an audit report to contempt charges, a $1000 fine, and a criminal misdemeanor charge.

Another concern that the U.S. EPA has with Senate Bill 138 is with its impacts on criminal law prosecution and civil enforcement actions under the immunity provisions.

Under the proposed law, immunity from criminal prosection for criminally negligent acts or omissions is granted with respect to environmental audit information promptly and voluntarily disclosed to the Ohio EPA. 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 problem waiting to happen." Suppose that the company merely files away the report, and a year 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 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 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 December 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. Even industry leaders, including the Compliance Management Policy Group, which represents the Chemical Manufacturers Association, the American Paper Institute, and other major trade associations, have 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 December 1995 U.S. EPA policy on voluntary environmental self-policing and self-disclosure, which was adopted only after more than eighteen months 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 compliance assurance and assistance. The Agency respects the states' rights to

be autonomous and innovative in developing enforcement programs, although in U.S. EPA's view audit privilege and immunity legislation such as that proposed in Ohio Senate Bill 138 puts an unreasonable constraint on state enforcement. The Agency reserves its right to perform its statutory duty to protect public health or the environment from violations of federal law where necessary, including Ohio. I thank you for inviting me to testify on this important issue today.