

**TESTIMONY OF BERTRAM C. FREY
OHIO CITIZEN ACTION HEARING
PRESENTED ON SEPTEMBER 19, 1998**

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 this opportunity to present U.S. EPA's views on Ohio's environmental audit privilege and immunity law. In particular, I will be addressing the changes to the audit law which are reflected in the recently enacted Ohio Senate Bill 219, which will become effective on September 30, 1998.

As Nancy Stoner has already discussed, U.S. EPA opposes, as a matter of policy, state audit privilege laws because those laws invite secrecy by allowing companies to withhold important evidence from law enforcement agencies and the public. As the Supreme Court has stated, "these exceptions to the demand for every man's evidence . . . are in derogation of the search for truth." Similarly, U.S. EPA opposes the immunity from penalties and fines those laws confer on companies that violate environmental laws.

In 1996 and 1997, citizen groups, including the Ohio Citizen Action, Ohio Environmental Council, Sierra Club, Rivers Unlimited, Inc., and Sandusky County Organized to Protect the Environment (SCOPE), joined in petitions seeking the withdrawal of Ohio's authority to implement the Resource Conservation and Recovery Act, which regulates pollution of the land, the Clean Water Act and the Clean Air Act. Region 5 received nearly **2,000** letters -- an unprecedented number -- from Ohio citizens in support of those petitions. In response to the petitions and citizen concerns, U.S. EPA

staff held **four** stakeholder meetings in Columbus with the Ohio EPA, the Ohio Attorney General's Office, petitioners, and representatives of industry. In addition, U.S. EPA participated in numerous calls with these parties from August 1997 through spring 1998.

On March 24, 1998, EPA reached a final agreement with Ohio EPA and the Ohio Attorney General's Office regarding amendments to and clarification of the Ohio audit law. The changes are those that are legally necessary for Ohio to maintain its federally approved, authorized or delegated environmental programs. On May 27, 1998, the Ohio legislature passed a bill enacting these amendments. The bill was signed into law on July 1, 1998, with an effective date of September 30, 1998.

The old Ohio audit law had many glaring legal defects. I will briefly review the principal ones. The law prohibited testimony in criminal, civil, and administrative proceedings concerning the contents of audit information. The law inappropriately allowed violators to withhold evidence of noncompliance, including data and prevented the Ohio EPA from collecting administrative or civil penalties for violations. The old law shielded evidence of noncompliance in situations where efforts to achieve compliance were not prompt or successful. It made it difficult for an Ohio government agency to obtain evidence about imminent dangers. The old law was so broad that it could be interpreted to include documents that existed prior to the audit, including documents related to past criminal conduct. The old law allowed immunity from penalties for some egregious or repeated violations, regardless of the threat or harm or the economic advantage gained over complying competitors.

The amendments to the law now meet minimum federal requirements. In particular, the following significant changes to the old law have been made:

- < Privilege for environmental audits in criminal proceedings has been eliminated.
- < Testimonial privilege has been eliminated. The amendments provide that any person preparing or participating in an audit “shall not be compelled to testify” concerning privileged portions of the audit.
- < The scope of the privilege in civil and administrative matters has been narrowed. It now excludes:
 1. Information required by law to be disclosed publicly as well as information required by law to be collected, developed, maintained, reported or otherwise made available to a government agency;
 2. Information existing prior to the initiation of audit;
 3. Information containing evidence that a government agency has reasonable cause to believe is necessary to prevent imminent and substantial endangerment or harm to human health or the environment;
 4. Information showing evidence of noncompliance with environmental laws and owner/operator does not initiate prompt efforts to achieve compliance or compliance is not achieved within a reasonable period of time.
- < The amendments clarify that Ohio audit law applies only to audits initiated after March 17, 1997, the effective date of the old audit law, and completed before January 1, 2004.
- < The new law prevents audit privilege from limiting the authority or obligation of any government agency under Ohio’s public records law.
- < It provides that audits must be conducted within 6 months, unless an extension is approved by

Ohio EPA for “reasonable grounds.”

- < Lastly, the law prevents privilege from limiting employee protection rights under federal or State law.

In addition to the amendments affecting privilege, the portion of the law allowing immunity from penalties has been amended to provide exceptions to immunity, including the following:

- < There is no immunity for the “significant economic benefit” component of a civil or administrative penalty. This means that a violating company will not get an economic advantage over its complying competitor.
- < No immunity is given if the owner/operator has significant violations constituting a “pattern of continuous or repeated violations” within a 3-year period prior to the disclosure.
- < No immunity is extended if the violation resulted in serious harm or in imminent and substantial endangerment to human health or the environment.

and finally

- < There will be no immunity if the violation is of a specific requirement of an administrative or judicial order.

In addition to the statutory changes, the Ohio Attorney General has issued an opinion clarifying the following:

- < The scope of Ohio’s authority to access and obtain information needed for full injunctive relief. The opinion finds that Ohio meets the minimum requirements under federal law for delegated environmental programs.
- < The authority of the public to challenge the privilege. A citizen litigant has the same standing to

challenge privilege as the State of Ohio.

- < The scope of Ohio's information gathering authority. Existing Ohio authorities remain intact.
- < The legal limitations of stipulations under Chapter 3745.71(G)(5) of the Ohio Audit Law. Ohio committed not to use those authorities in a manner that would violate federal law.
- < The scope of immunity in the situation where a person provides a good faith disclosure to a state agency that does not have authority over the alleged violation. The opinion states that a company cannot use this provision to subvert the law.
- < The applicability of immunity where the violations are discovered through a required inquiry. The opinion makes it clear that those violation are not "voluntarily" disclosed.

U.S. EPA wants Ohio to have a strong environmental protection program with full and effective enforcement authorities 1) to prevent harm or potential harm to human health and the environment, 2) to redress other environmental wrongs, and 3) to prosecute environmental crimes. Although U.S. EPA feels that the recent negotiations in Ohio have produced substantial and productive changes in the audit law, U.S. EPA is aware of and shares your concerns about secrecy and immunity laws generally and will continue in its efforts to ensure state compliance with federal environmental laws. Thank you for inviting me here today and for your time. I will now take any questions you may have.