Enviornmental Auditing, Reporting & Confidentiality Issues

Walter G. Wright Jr.
ENVIRONMENTAL AUDITING, REPORTING, & CONFIDENTIALITY ISSUES

By: Walter G. Wright, Jr.*

I. SUMMARY OF THE NEW ARKANSAS ENVIRONMENTAL AUDIT PRIVILEGE

Arkansas has joined the ranks of a handful of states that now have an evidentiary privilege for information obtained through an internal environmental audit. Oregon, Indiana, Kentucky, Colorado, and Illinois all have similar statutes, and most recently, on February 17, 1995, Arkansas became the sixth state to have such a provision, when Governor Tucker signed Act 350 into law (attached to this outline).

The Arkansas Environmental Federation played the key role in the enactment of this initiative. The Arkansas Department of

* The author would like to thank Jennifer Horton, a third year law student at the University of Arkansas at Little Rock School of Law, for her assistance in the preparation of this article.
Pollution Control & Ecology was also instrumental in the drafting and enactment of the Act. Arkansas' environmental audit report privilege extends to owners and operators, and their potential purchasers, customers, lending institutions and insurance companies having existing or proposed relationships with them. Like the other state statutes, Arkansas' new law is qualified. Although at first glance, Act 350 pronounces that environmental audit reports should be privileged in order to encourage voluntary audits, the statutory provisions, like their counterparts in other states, point out that the privilege may be waived or inapplicable in certain situations.

The privilege is intended to provide protection from governmental agencies or private individuals or companies obtaining an environmental compliance audit. The traditional reason for privileges is that they benefit the public good by encouraging the free flow of information about environmental compliance issues. Without the protection of a "privilege," an environmental compliance audit performed by a company might be obtained by federal or state agencies through the broad information gathering provisions of the environmental statutes or a private litigant through the discovery process. If environmental auditing will encourage compliance with environmental laws, then disincentives such as the risks of disclosure had to be addressed. Act 350 is one attempt to eliminate such disincentives.

A theme of Act 350 is compliance. The privilege may not be asserted unless the person claiming the privilege can make a
showing of "reasonable diligence" to correct the problems pointed out by the audit. The concern with compliance and the language of the Act suggest that owners and operators attempting to invoke the privilege should have made a reasonable effort to achieve compliance. Those who wish to conduct internal audits should be prepared to face the necessary remedies that are uncovered by the audit report. Otherwise, they may find themselves attempting to invoke the privilege when it's already too late.

The Need to Remove the Disincentives To Auditing and Disclosure

When people think of voluntary environmental auditing, they often think of the Coors Brewing Company case where the Colorado Department of Health delivered a record $1.05 million dollar fine for air permit violations discovered in a voluntary audit. In that case, decided in 1993, Coors conducted a $1 million study that revealed for the first time what many people did not know: that breweries were emitting more volatile organic compounds ("VOCs") than was originally thought. Even EPA was unaware of the problem. Although Coors was the first to conduct a comprehensive and voluntary study of the VOC emissions that result from fermentation, the company was penalized even though it voluntarily disclosed its findings. Although the fine was later reduced to $237,000, it is a case often cited by proponents of voluntary auditing.

Waiver of the Privilege

Act 350 provides that the environmental audit privilege may be waived for one of three reasons: the owner or operator of a facility can expressly waive it, the owner or operator may choose
to introduce the audit report into evidence, or the owner or operator may authorize certain disclosures, except where disclosures are made under a confidentiality agreement and certain conditions apply, or where the disclosure is made to an independent contractor retained to assess environmental compliance. Environmental Audit Reports, ch. 1, 1995 Ark. Acts 350. Compliance must be sought with "reasonable diligence", a key word in many of the environmental audit privilege statutes addressing compliance. Also, the privilege may be waived as to all or part of the environmental audit.

Exceptions to the Privilege

Act 350 outlines several exceptions to the privilege, and these exceptions are similar to those found in the other states. The privilege does not apply to information, documents, etc., which would otherwise be reportable to a regulatory agency due to:

1. federal or state law (i.e., for example, Superfund reporting requirements);
2. a rule or standard adopted by ADPC&E;
3. a determination, permit or order made by ADPC&E (i.e., for example, a RCRA TSD permit reporting requirement); or
4. any other federal or state laws, permits or orders.

The privilege also does not apply to information obtained from a source unrelated to the environmental audit.

Disclosure in Spite of the Privilege

As similar statutes in other states provide, disclosure of information in a civil, criminal, or administrative proceeding may be required in spite of the audit privilege. Usually in these situations, there is a determination made that there was a
fraudulent purpose for asserting the privilege, the material was not actually subject to the privilege, or that even though the material is subject to the privilege, there is "evidence of noncompliance" with various federal or state regulations, permits, or orders. Also, there is the "reasonable diligence" requirement. A person must have initiated and pursued compliance efforts with "reasonable diligence" in order to claim the privilege. If the noncompliance involves simply the lack of a required permit, the Act adds that filing for a permit within 90 days shall be considered reasonable diligence, and the ADPC&E may even consider more than 90 days to be reasonable diligence where a compliance schedule is submitted and approved.

Disclosure Due to Probable Cause

Disclosure of information may also be obtained where a prosecuting authority has probable cause to believe that there has been an offense committed under basically any environmental standard, rule, order or permit adopted or issued by the Arkansas Pollution Control and Ecology Commission or ADPC&E. Where there is probable cause, the audit may be obtained by search warrant, subpoena or through discovery.

The proceeding requires the prosecuting attorney to place the information under seal immediately and to not review or disclose the material. The owner or operator has thirty (30) days from the time the report is obtained by the prosecutor to request an in camera hearing to determine if the information is privileged. If a hearing is not requested within thirty days, the right to claim
the privilege is waived. Within forty-five (45) days after the petition is filed, the court or administrative tribunal will issue an order setting the date for the in camera hearing. Although the entry of an order scheduling the hearing triggers the prosecutor's right to break the seal, review the audit report, and place limits on its disclosure, the information used to prepare for the hearing may not be presented in proceedings against the defendant unless it is found to be "subject to disclosure." Otherwise, the information will be held to be confidential.

Burden of Proof

Of course, the party seeking to invoke the privilege has the burden of proving the privilege, including compliance with relevant federal and state laws. Where there is some evidence of noncompliance with these laws, that party must show that compliance efforts were initiated promptly and sought after with "reasonable diligence". In addition, the parties seeking to have the information disclosed must show that the other party has a fraudulent purpose for invoking the privilege. Also, the prosecuting authority must show reasons for disclosure which are set forth under the Act.

Partial Disclosure

The court or administrative tribunal may only require disclosure those parts of the audit relevant to the proceedings.

Scope of the Act

Act 350 does not limit the scope of any other common law privileges that might be invoked to spare environmental audits from
being disclosed, such as the work-product or attorney client privileges. These are discussed in subsequent sections of this outline.

Act 350 also does not limit other public rights to disclosure under the Arkansas Freedom of Information Act.

II. THE ENVIRONMENTAL AUDIT PRIVILEGE IN OTHER STATES

In 1993, the Oregon legislature passed the first statutory environmental audit report privilege, which was signed into law on July 22, 1993. Since that time, at least five (5) other states have passed similar legislation, and others are considering doing the same. Those states that have already enacted legislation have very similar statutes, all presumably modeled after the Oregon law.

The Oregon Model

Oregon's statute can basically be broken down into six (6) main parts: those dealing with the purpose of the privilege, exceptions to the privilege, burdens of proof, procedural aspects, and other exceptions. This structure provides a good blue print for subsequent state laws, and has been mirrored in more recent audit privilege statutes.

Oregon provides several exceptions to the privilege, which can be found in either a civil, criminal or administrative context. There will be an exception to the privilege requiring disclosure of the information when: it is asserted for a fraudulent purpose, the material is not subject to the privilege, or the material is subject to the privilege, but shows evidence of noncompliance and
lacks proof that compliance has been initiated with "reasonable
diligence."

Likewise, there is also an exception where there is shown to
be "a compelling need" for disclosure by the district attorney or
Attorney General. The requirements for this exception are that the
information is "not otherwise available" and the prosecuting
authority is "unable to obtain the substantial equivalent of the
information....without incurring unreasonable cost and delay."

The Oregon blueprint provides that several burdens of proof
must be satisfied; the party asserting the privilege must prove the
privilege, including "reasonable diligence" to correct evidence of
noncompliance. In addition, the party seeking disclosure must
prove that the privilege is asserted fraudulently, and the
prosecuting authorities must prove conditions for disclosure as
(1994).

The Oregon statute also provides that the prosecuting
authority may, upon a finding of probable cause based upon
information from a source that is independent of the audit report,
obtain the report under a search warrant, subpoena, or discovery.
Afterwards, the owner or operator who had the report prepared has
thirty (30) days to petition for an in camera hearing, to determine
which portion or portions of the report may be subject to the
privilege. This procedure is very important; failure to file a

After the petition is filed, the hearing will be scheduled to be held within forty-five (45) days. Once the order is entered, the prosecuting authorities may open the sealed documents and review their contents, although only information deemed to be subject to disclosure may be used later in a proceeding against the defendants. The prosecutor may also consult with enforcement authorities in order to prepare for the hearing. Or. Rev. Stat. Ann. § 468.963(4)(c) (1994).

Under the Oregon statute, the privilege also does not extend to documents or other information that is otherwise reportable to an environmental agency under any other law, or information obtained by sampling, or from independent sources. Or. Rev. Stat. Ann. § 468.963(5)(a)-(c) (1994).

Unlike the Arkansas statute however, the privilege does not expressly extend to purchasers, customers, lending institutions or insurance companies involved with the owner or operator of a facility.

The Indiana Audit Privilege

The Indiana statute is substantially similar to the Oregon law, and is found in Ind. Code Ann. §§ 13-10-3-1 to 13-10-3-11 (Burns 1994). The only major difference is found in the waiver provision. Section 13-10-3-9 provides that the environmental audit privilege may be waived either expressly or impliedly; however, subsection (b) also allows a party to submit an audit report as
confidential, and without waiving a privilege the party would be entitled to otherwise, under this statute. Ind. Code. Ann. (Burns 1994).

The Colorado Environmental Self-evaluation Privilege

The Colorado statute is substantially similar in form, but differs in substance from the Oregon law. Colo. Rev. Stat. § 13-25-126.5 (1994). The definition of "environmental audit report" requires a voluntary audit to be conducted in "good faith". In addition, the "reasonable diligence" requirement found in the Oregon law is substituted with the words "reasonable amount of time"; therefore, the Colorado law requires that noncompliance be corrected within a "reasonable amount of time" for an audit to be considered entitled to the privilege. The Colorado statute also addresses multiple cases of noncompliance, and will require comprehensive programs to correct these situations.

Also, under the Colorado law, in order for the information to be subject to disclosure, it must be demonstrated to present "a clear, present, and impending danger to the public health or the environment in areas outside of the facility property," a provision which clearly limits disclosure of such audit reports.

In addition, Colorado allows any party to have an in camera review of an audit report, if that party is able to show probable cause for believing the environmental audit report is not subject to the privilege.

Lastly and perhaps most importantly, only Colorado provides immunity from penalties where the reporting is prompt and
noncompliance is corrected within two years. However, immunity will not apply where there is shown to be a pattern of noncompliance. Colo. Rev. Stat. § 25-1-114.5 (1994).

The Kentucky Evidentiary Privilege

The Kentucky evidentiary privilege is substantially similar to the Oregon statute and other statutes, and is found in Ky. Rev. Stat. Ann. § 224.01-40 (Michie 1994). The only substantial difference found in this statute is the time limit for filing a petition for a hearing. Kentucky allows twenty (20) days from the date the prosecutor obtains the report, and thirty (30) days from the entering of the order until the hearing is scheduled. All others allow thirty (30) days and forty-five (45), respectively.

Arkansas' Environmental Audit Report Privilege

Arkansas became the sixth state to offer an evidentiary privilege for voluntarily conducted environmental audit reports, on February 17, 1995, when Governor Tucker signed Act 350 into law. Arkansas' law is substantially similar to the Oregon model, except that the Act expands the privilege to allow coverage for potential purchasers, customers, lending institutions and insurance companies doing business with the owner or operator of a facility. Environmental Audit Reports, ch. 1, 1995 Ark. Acts 350.

The Illinois Audit Privilege

The Governor of Illinois signed a bill in January that created an evidentiary privilege for environmental audit reports in Illinois. This Act is currently being revised.
A bill (S.B. 3079) creating a limited self-evaluation privilege to encourage facilities to conduct voluntary environmental audits was recently signed by Governor Kirk Fordice. Besides creating a limited privilege, the law required the Mississippi Commission on Environmental Quality to reduce any penalty if self-disclosure provisions are satisfied.

Other States

Currently, twenty-five other states are said to be considering Oregon-type legislation which would create a similar privilege. Those states considering the privilege include Arizona, California, Idaho, Minnesota, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, Utah, Virginia and Washington.

III. THE CURRENT FEDERAL ENFORCEMENT POSITION ON COMPLIANCE AUDITING

Many companies recognize the various incentives for conducting voluntary environmental compliance audits. Nevertheless, some companies are reluctant to conduct audits because of the possibility these documents might be obtained by government agencies or private litigants (i.e., for example, someone bringing a "citizen suit"). As previously discussed, many states including Arkansas have put limited environmental audit protection in place.

Unfortuately, the federal environmental enforcement authorities have stated that they believe they are not bound by state audit privilege laws. EPA and the federal Department of Justice ("DOJ") have opposed such laws and indicated they may