

FIRST REGULAR SESSION

# SENATE BILL NO. 335

91ST GENERAL ASSEMBLY

INTRODUCED BY SENATOR KINDER.

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1372S.011

TERRY L. SPIELER, Secretary.

## AN ACT

To amend chapter 490, RSMo, by adding thereto seven new sections relating to environmental audit privileges, with penalty provisions.

*Be it enacted by the General Assembly of the State of Missouri, as follows:*

Section A. Chapter 490, RSMo, is amended by adding thereto seven new sections, to be known as sections 490.750, 490.753, 490.755, 490.757, 490.759, 490.762 and 490.765, to read as follows:

**490.750. 1. An environmental audit privilege as provided in sections 490.750 to 490.765 is hereby created to protect the confidentiality of communications relating to voluntary internal environmental audits.**

**2. Except as provided in section 490.755, an environmental audit and an environmental audit report as defined in section 490.753 shall be privileged and shall not be admissible as evidence in any legal action in any civil, criminal or administrative proceeding, nor shall such information be required to be disclosed in response to a regulatory inspection or inquiry.**

**490.753. As used in sections 490.750 to 490.765, the following terms mean:**

**(1) "Environmental audit", a voluntary, internal evaluation of one or more facilities, processes or activities regulated under the environmental laws of the United States, this state, or a political subdivision thereof, or of management systems related to such facility, process or activity, that is designed to determine compliance with such laws. An environmental audit may be conducted by the owner or operator, by the owner's or operator's employees, or by independent contractors;**

**(2) "Environmental audit report", a set of documents prepared as a result of an environmental audit, including all information and documents generated and collected**

by the auditor which may be based upon and may include, but shall not be limited to field notes and records of observations, samples, analytical results, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, computer-generated or electronically recorded information, maps, charts, graphs and surveys, interviews, discussions, correspondence and communications related to the environmental audit; provided that such supporting information is collected or developed for the primary purpose and in the course of an environmental audit. An environmental audit report, when completed, may have three components:

(a) An audit report prepared by the auditor, which may include the scope of the audit, the information gained in the audit, conclusions and recommendations, together with exhibits and appendices;

(b) Memoranda and documents analyzing portions or all of the audit report and discussing potential implementation issues; and

(c) An implementation plan that addresses correcting past noncompliance, improving current compliance or preventing future noncompliance;

(3) "Waive" or "waiver", disseminating the environmental audit or environmental audit report in whole or in part to someone other than the owner or operator of the facility and its employees, agents, affiliates, and successors in interest, the auditor and its employees, agents, subcontractors and successors in interest, and current or prospective lending institutions of the owner or operator, where disclosure is required as a condition of lending; and a prospective purchaser where disclosure is made under a confidentiality agreement. Waiver is not deemed to occur when:

(a) The facility owner or operator or the auditor is compelled by an administrative body or court of competent jurisdiction to disclose all or part of the environmental audit or environmental audit report;

(b) Dissemination of the environmental audit or environmental audit report, in whole or in part, is done to prevent noncompliance or improve compliance with federal, state, or local environmental laws.

**490.755. 1.** The privilege described in subsection 2 of section 490.750 does not apply to the extent that it is waived by the owner or operator of a facility at which an environmental audit was conducted and which owner or operator prepared or caused to be prepared the environmental audit report as a result of the audit.

**2.** In any proceeding before a court or administrative body, after in camera review consistent with rules of procedure, the court or administrative body may require disclosure of material for which the privilege described in subsection 2 of section 490.750 is asserted, if the court or administrative body determines that:

(1) The privilege is asserted for a fraudulent purpose;

**(2) The material is not subject to the privilege; or**

**(3) Even if subject to the privilege, the material reasonably tends to show noncompliance with the environmental laws of the United States, the state of Missouri, or a political subdivision thereof, and the party asserting the privilege did not exercise ordinary care to initiate and pursue compliance upon discovery of noncompliance. Such a determination shall not constitute a final judgment regarding compliance.**

**3. A party asserting the environmental audit privilege described in subsection 2 of section 490.750 has the burden of demonstrating the applicability of the privilege, including if there is evidence of noncompliance with applicable environmental laws, proof that the party exercised ordinary care to initiate and pursue compliance upon discovery of noncompliance; provided, however, that a party seeking disclosure under subdivision (1) of subsection 2 of this section has the burden of proving that the privilege is asserted for a fraudulent purpose and, in a criminal proceeding, the state has the burden of proving the conditions for disclosure set forth in subdivision (2) of subsection 2 of this section.**

**490.757. 1. The state, having probable cause to believe a criminal offense has been committed under the environmental laws of the state of Missouri based upon information obtained from a source independent of an environmental audit report, may obtain an environmental audit report for which a privilege is asserted under subsection 2 of section 490.750 pursuant to discovery as allowed by the Missouri supreme court rules. The state shall immediately place the report under seal and shall not review or disclose the contents of the report until ordered by a court or until the privilege is waived. The burden shall be on the state to show the information came from a source independent of an environmental audit report.**

**2. Within thirty days of the state's obtaining an environmental audit report, the owner or operator who prepared or caused to be prepared the report may file with the appropriate court a petition requesting an in camera review in accordance with subsection 4 of this section on whether the environmental audit report or portions thereof are privileged or subject to disclosure under sections 490.750 to 490.765.**

**3. In a civil or administrative proceeding, the existence of an environmental audit report is subject to disclosure to the inquiring litigant. The party in possession of such report may assert the privilege in any response made. The party in possession need not provide the inquiring party with a copy of such report. The inquiring party may file, with the appropriate court or administrative body, a petition requesting an in camera review in accordance with subsection 4 of this section on whether the environmental audit report or portions thereof are privileged or subject to disclosure**

**under sections 490.750 to 490.765. Failure by the inquiring party to file such petition shall forfeit the party's argument that the report is not privileged.**

**4. Upon filing of a petition for in camera review, the court or administrative body shall issue an order scheduling an in camera review, within forty-five days of the filing of the petition, to determine whether the environmental audit report or portions thereof are privileged or subject to disclosure under sections 490.750 to 490.765. Such order further shall allow, in the case of a criminal proceeding, the prosecuting attorney, circuit attorney, or attorney general to remove the seal from the report to review the report and shall place appropriate limitations on the distribution and review of the report to protect against unnecessary disclosure. The prosecuting attorney, circuit attorney, or attorney general may consult with law enforcement agencies regarding the contents of the report as necessary to prepare for the in camera review. The information used in preparation for the in camera review shall not be used in any investigation or in any legal proceeding, and shall otherwise be kept confidential, unless and until such information is found by the court or administrative body to be subject to disclosure.**

**5. In the case of a civil or administrative proceeding, the court or administrative body shall issue such order as is appropriate regarding whether the information in the report is subject to disclosure. The court or administrative body shall also be vested with the authority to place appropriate limitations on the distribution and review of the report to protect against unnecessary disclosure.**

**6. Failure to comply with the review, disclosure or use prohibitions of this section shall be the basis, in any civil, criminal or administrative proceeding, for suppression of any evidence arising or derived from the unauthorized review, disclosure or use. The party failing to comply with this section shall have the burden of proving that proffered evidence did not arise and was not derived from the unauthorized activity.**

**7. The parties may at any time stipulate to entry of an order directing that specific information contained in an environmental audit report is or is not subject to the privilege provided under subsection 2 of section 490.750.**

**8. Upon making a disclosure determination under subsection 2 of section 490.755, the court or administrative body may compel the disclosure only of those portions of an environmental audit report relevant to issues in dispute in the proceeding.**

**9. In the event the order requiring disclosure is made by an administrative body, the aggrieved party may seek an immediate appeal to a court of competent jurisdiction. Such appeal shall be filed within ten days after receipt of the order requiring disclosure, and shall serve as an immediate stay of the order requiring**

**disclosure.**

**10. If any public entity, public employee, or public official divulges all or any part of the information contained in an environmental audit report in violation of the provisions of this section or knowingly divulges or disseminates all or any part of the information contained in an environmental audit report that was provided to such public entity, public employee, or public official in violation of the provisions of this section, such public entity, public employee, or public official shall be guilty of a class A misdemeanor.**

**11. Any disclosure or dissemination described in this section shall not abrogate the privilege afforded by section 490.750, provided the environmental audit report otherwise meets the requirements of sections 490.750 to 490.765.**

**490.759. The privilege described in subsection 2 of section 490.750 shall not extend to:**

**(1) Documents, communications, data, reports or other information required to be collected, developed, maintained, reported or otherwise made available to a regulatory agency pursuant to the environmental laws, ordinances, regulations, permits, or orders of the United States, this state, or a political subdivision thereof. This subsection shall not exclude from the privilege any observations, findings, opinions, suggestions or conclusions derived from the above by the state auditor;**

**(2) Information obtained by observation, sampling or monitoring by any regulatory agency; or**

**(3) Information obtained from a source independent of the environmental audit or the environmental audit report.**

**490.762. 1. For the purposes of this section, a disclosure of information by a person or entity to any division or agency within the department of natural resources regarding any information related to an environmental law is voluntary if all of the following are true:**

**(1) The disclosure is made promptly after knowledge of the information disclosed is obtained by the person or entity;**

**(2) The disclosure arises out of an environmental audit;**

**(3) The person or entity making the disclosure initiates an appropriate effort to achieve compliance, pursues compliance with due diligence, and corrects the noncompliance within two years after the completion of the environmental audit. Where such evidence shows the noncompliance is the failure to obtain a permit, appropriate efforts to correct the noncompliance may be demonstrated by the submittal of a complete permit application within a reasonable time; and**

**(4) The person or entity making the disclosure cooperates with the appropriate**

**division or agency in the department of natural resources regarding investigation of the issues identified in the disclosure.**

**2. For the purposes of subdivision (3) of subsection 1 of this section, upon application to the department of natural resources, the time period within which the noncompliance is required to be corrected may be extended by the department if it is not practicable to correct the noncompliance within the two-year period. A request for a de novo review of the decision of the department of natural resources may be made to the appropriate court.**

**3. If a person or entity is required to make a disclosure to a division or program within the department of natural resources under a specific permit condition or under an order issued by the division or program, then the disclosure is not voluntary with respect to that division or program.**

**4. If any person or entity makes a voluntary disclosure of an environmental violation to a division or program within the department of natural resources, the department shall not seek any administrative or civil penalties associated with the issues disclosed from the person or entity nor shall the department seek any criminal penalties for negligent acts associated with the issues disclosed. The person or entity shall provide information supporting its claim that the disclosure is voluntary at the time that the disclosure is made to the division or program; in so doing, the person or entity creates a rebuttable presumption that the disclosure is voluntary.**

**5. To rebut the presumption that a disclosure is voluntary, the appropriate division or program shall show to the satisfaction of the respective commission in the department of natural resources, or to the department if the program is not under a commission, that the disclosure was not voluntary based upon the factors set forth in subdivisions (1), (2), and (3) of subsection 1 of this section. A decision by the commission regarding the voluntary nature of a disclosure is final agency action. The division or program may not include any administrative penalty or seek a civil penalty or a criminal conviction for negligent acts on any underlying environmental violation that is alleged absent a finding by the respective commission that the division or program has rebutted the presumption of voluntariness of the disclosure. The burden to rebut the presumption of voluntariness is on the division or program. A commission decision, or a department decision for a program not under a commission, regarding voluntariness may be appealed to a court of competent jurisdiction by the person or entity making the initial disclosure. Such an appeal shall be filed within ten days after receipt of the order regarding voluntariness, and shall serve as an immediate stay of the order regarding voluntariness.**

**6. The prohibition against administrative, civil, or criminal penalties under this**

**section does not apply if a person or entity has been found by a court or administrative body to have committed serious violations that constitute a pattern of continuous or repeated violations of environmental laws, rules, regulations, permit conditions, settlement agreements, or orders on consent and that were due to separate and distinct events giving rise to the violations, within the three-year period prior to the date of the disclosure. Such a pattern of continuous or repeated violations may also be demonstrated by multiple settlement agreements related to substantially the same alleged violations concerning serious instances of noncompliance with environmental laws that occurred within the three-year period immediately prior to the date of the voluntary disclosure.**

**7. Except as specifically provided in this section, this section does not affect any authority the department of natural resources has to require any action associated with the information disclosed in any voluntary disclosure of an environmental violation.**

**490.765. Nothing in sections 490.750 to 490.765 shall limit, forfeit or abrogate the scope or nature of any statutory or common law privilege, including the critical self-analysis or self-evaluative privilege, the work product doctrine and the attorney-client privilege.**

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