SECOND REGULAR SESSION

SENATE COMMITTEE SUBSTITUTE FOR

SENATE BILL NO. 989

92ND GENERAL ASSEMBLY

Reported from the Committee on Commerce and the Environment, February 24, 2004, with recommendation that the Senate Committee Substitute do pass.

TERRY L. SPIELER, Secretary.

3573S.02C

AN ACT

To amend chapter 490, RSMo, by adding thereto eight new sections relating to environmental audit privileges.

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

Section A. Chapter 490, RSMo, is amended by adding thereto eight new sections, to be known as sections 490.750, 490.753, 490.755, 490.757, 490.759, 490.762, 490.765, and 490.768, to read as follows:

490.750. In order to encourage owners and operators of facilities regulated under state, federal, regional, or local laws, ordinances, regulations, permits, or orders to conduct voluntary internal environmental audits of their compliance programs and management systems and in order to assess and improve compliance with those laws, and to promote the prompt disclosure to the department of natural resources in order to correct any deficiencies discovered, no environmental audit shall be disclosed except as provided in sections 490.750 to 490.768 to protect the confidentiality of communications relating to voluntary internal environmental audits.

490.753. As used in sections 490.750 to 490.768, the following terms mean:

(1) "Compliance management system" or "environmental management system", a regulated entity's documented systematic efforts, appropriate to the size and nature of its business, to prevent, detect, and correct noncompliance through all of the following:

(a) Compliance policies, standards, and procedures that identify how employees and agents are to meet the requirements of laws, regulations, permits, enforceable agreements, and other sources of authority for environmental requirements;

(b) Assignment of overall responsibility for overseeing compliance with

policies, standards, and procedures, and assignment of specific responsibility for assuring compliance at each facility or operation;

(c) Mechanisms for systematically assuring that compliance policies, standards, and procedures are being carried out, including monitoring and auditing systems reasonably designed to detect and correct noncompliance, periodic evaluation of the overall performance of the compliance management system, or environmental management system, and a means for employees or agents to report noncompliance of environmental requirements without fear of retaliation;

(d) Efforts to communicate effectively the regulated entity's standards and procedures to all employees and other agents;

(e) Appropriate incentives to managers and employees to perform in accordance with the compliance policies, standards, and procedures, including consistent enforcement through appropriate disciplinary mechanisms; and

(f) Procedures for the prompt and appropriate correction of any noncompliance, and any necessary modifications to the regulated entity's compliance management system or environmental management system to prevent future noncompliance;

(2) "Department", the department of natural resources;

(3) "Environmental audit", a systematic, documented, periodic, and objective review by regulated entities of facility operations and practices related to meeting environmental requirements;

(4) "Environmental audit report", the documented analysis, conclusions, and recommendations resulting from an environmental audit, but not including data obtained in or testimonial evidence concerning such audit;

(5) "Regulated entity", any entity, including a federal, state, or municipal department or facility, which is regulated under federal environmental laws.

490.755. If a regulated entity establishes that it satisfies all of the conditions of section 490.765, the department shall not seek penalties for noncompliance of state, federal, regional, or local laws, ordinances, regulations, permits, or orders relating to environmental requirements discovered and disclosed by the entity.

490.757. If a regulated entity establishes that it satisfies subdivisions (1) to (9) of section 490.765, the department shall not recommend to the attorney general or other prosecuting authority that criminal charges be brought against the disclosing entity, as long as the department determines that the noncompliance is not part of a pattern or practice that demonstrates or involves:

(1) A prevalent management philosophy or practice that conceals or condones environmental noncompliance; or

(2) High-level corporate officials' or managers' conscious involvement in, or willful blindness to, noncompliance of federal environmental law.

490.759. Regardless of whether the department recommends the regulated entity for criminal prosecution, the department may recommend for prosecution the criminal acts of individual managers or employees under existing policies guiding the exercise of enforcement discretion.

490.762. 1. The department, the attorney general, and any prosecuting attorney shall not request or use an environmental audit report to initiate a civil or criminal investigation of an entity, including but not limited to the use of such report in routine inspections. If the department has an independent reason to believe that noncompliance has occurred, the department may seek any information relevant to identifying noncompliance or determining liability or extent of harm.

2. Notwithstanding the provisions of subsection 1 of this section, an environmental audit report commissioned by counsel is privileged information under the attorney-client or work-product privilege, and is inadmissible as evidence in any legal action in any civil, criminal, or administrative proceeding instituted by any other third party.

490.765. In order for a report to constitute an "environmental audit report" as defined in subdivision (4) of section 490.753 and to receive the benefits of sections 490.750 to 490.768, owners and operators of facilities regulated under state, federal, regional, or local laws, ordinances, regulations, permits or orders must establish that each of the following conditions have been met:

(1) The noncompliance was discovered through:

(a) An environmental audit; or

(b) A compliance management system, reflecting the regulated entity's due diligence in preventing, detecting, and correcting noncompliance. The regulated entity shall provide accurate and complete documentation to the department as to how its compliance management system meets the criteria or due diligence and how the regulated entity discovered the noncompliance through its compliance management system. The department may require the regulated entity to make available to the public a description of its compliance management system;

(2) The noncompliance was discovered voluntarily and not through a legally mandated monitoring or sampling requirement prescribed by statute, regulation, permit, judicial, or administrative order, or consent agreement. Sections 490.750 to 490.768 shall not apply to:

(a) Emissions noncompliance detected through a continuous emissions monitor, or alternative monitor established in a permit, where any such

monitoring is required;

(b) Noncompliance of National Pollutant Discharge Elimination System discharge limits detected through required sampling or monitoring; or

(c) Noncompliance discovered through a compliance audit required to be performed by the terms of a consent order or settlement agreement, unless the audit is a component of agreement terms to implement a comprehensive environmental management system;

(3) The regulated entity fully discloses the specific noncompliance in writing to the department within twenty-one days, or such shorter time period as may be required by law, after the entity discovers that the noncompliance has, or may have, occurred. The time at which the entity discovers that a noncompliance has, or may have, occurred begins when any officer, director, employee, or agent of the facility has an objectively reasonable basis for believing that a noncompliance has, or may have, occurred;

(4) The regulated entity discovers and discloses the potential noncompliance to the department prior to:

(a) The commencement of a federal, state, or local department inspection or investigation, or the issuance by such department of an information request to the regulated entity, in which the department determines that the facility did not know that it was under civil investigation, and the department determines that the entity is otherwise acting in good faith, in which case the department is authorized to reduce or waive civil penalties in accordance with sections 490.750 to 490.768;

(b) Notice of a citizen suit;

(c) The filing of a complaint by a third party;

(d) The reporting of the noncompliance to the department or other government agency by a whistle-blower employee and not be one authorized to speak on behalf of the regulated entity; or

(e) Imminent discovery of the noncompliance by a regulatory department or agency;

(5) The regulated entity shall correct the noncompliance within sixty calendar days from the date of discovery, certifying in writing that the noncompliance has occurred and taking appropriate measures as determined by the department to remedy any environmental or human harm due to the noncompliance. The department retains the authority to order an entity to correct a noncompliance within a specific time period shorter than sixty days whenever correction in such shorter time period is feasible and necessary to protect adequately public health and the environment. If more than sixty days is needed to correct the noncompliance, the regulated entity shall so notify the department

in writing prior to the expiration of the sixty-day period. If appropriate, the department may require a regulated entity to enter into a publicly available written agreement, administrative consent order, or judicial consent decree as a condition for obtaining relief under sections 490.750 to 490.768, in particular where compliance or remedial measures are complex or a lengthy schedule for attaining and maintaining compliance or remediating harm is required;

(6) The regulated entity shall agree in writing to take steps to prevent a recurrence of the noncompliance, including improvements to its environmental auditing or compliance management system;

(7) The specific noncompliance, or a closely related noncompliance, has not occurred within the previous three years at the same facility and has not occurred within the past five years as part of a pattern at multiple facilities owned or operated by the same entity. For the purposes of this section, noncompliance includes:

(a) Any noncompliance of federal, state, or local environmental law identified in a judicial or administrative order, consent agreement or order, complaint, or notice of noncompliance, conviction, or plea agreement; or

(b) Any act or omission for which the regulated entity has previously received penalty mitigation from the department or another state or local department;

(8) The noncompliance is not one which:

(a) Resulted in serious actual harm, or may have presented an imminent and substantial endangerment, to human health or the environment; or

(b) Violates the specific terms of any judicial or administrative order or consent agreement; and

(9) The regulated entity cooperates as requested by the department and provides such information as is necessary and requested by the department to determine applicability of sections 490.750 to 490.768.

490.768. The department shall make available to the public the terms and conditions of any compliance agreement reached pursuant to sections 490.750 to 490.768, including the nature of the noncompliance, the remedy, and the schedule for returning to compliance; provided, however, that the results of any audit or audit report to the extent disclosed to the department are not public records and shall not be subject to disclosure pursuant to chapter 610, RSMo.