

Rachel's Environment & Health News

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American corporations are successfully pursuing a new strategy to evade environmental laws and regulations. As the NEW YORK TIMES describes the new strategy, "Urged on by a coalition of big industries, one state after another is adopting legislation to protect companies from disclosure or punishment when they discover environmental offenses at their own plants." [1] In essence, state laws are giving corporations immunity from punishment if they self-report violations of environmental laws. Furthermore, any documents related to the self-reporting become officially secret, cannot be divulged to the public, and cannot be used as evidence in any legal proceedings. "This is a disaster for environmental enforcement," says David Ronald, chief of the environmental crimes division in the Arizona State Attorney General's Office. "It has been creeping through the states without anybody paying much attention." [1]

The strategy took root in 1993 when the Oregon state legislature passed the first-ever "audit privilege" law, as they are called. Such laws -- which have now been passed in at least 21 states and are pending in 13 or 14 others -- typically contain the following provisions:

** Corporations that report violations discovered during a self-audit are immune from prosecution for their violations. They cannot be fined or otherwise punished if they disclose violations promptly to government authorities and take "reasonable" steps to achieve compliance.

** Individuals who participate in conducting an environmental audit cannot be called to testify in any judicial proceeding or administrative hearing.

** Perhaps most importantly, if a corporation conducts an environmental self-audit of its operations, the information in the self-audit cannot be disclosed to the public and cannot be used as evidence in any legal proceedings, including lawsuits and/or regulatory actions. Any information related to a self-audit becomes "privileged." This exemption typically covers any documents, notes, communications, data, or opinions related in any way to the audit. The corporation itself decides what is related to its self-audit and what is not. In essence, audit privilege laws allow a corporation to stamp any document "audit-related" and thus exempt it from public disclosure, discovery, or use as evidence in any legal proceeding. For companies facing Superfund lawsuits, or toxic tort actions, this exemption can translate into billions of dollars in avoided costs.

** Some states, such as Texas, have included additional provisions that make it a crime for employees or government officials to divulge anything related to environmental self-audits. In Texas, if a person divulges such information and it leads to penalties against a polluter, the individual who divulged the information must pay the polluters' fines, penalties, and other costs. This is a blatant "anti-whistle-blower" provision, clearly intended to silence individuals who might otherwise come forward with information about violations of law.

Audit privilege laws --which are sometimes called Corporate Dirty Secrets Laws, or Right to Know Nothing Laws --apply not only to private corporations but also to governments as well. Thus citizens of a municipality can lose their right to know about pollution from their own local landfill when their state legislature passes an "audit privilege" law.

The 21 states that have, so far, passed "audit privilege" laws include: Alaska, Arkansas, Colorado, Idaho, Illinois, Indiana, Ohio, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Montana, New Hampshire, Oregon, South Carolina, South Dakota, Texas, Utah, Virginia, and Wyoming.

The Clinton administration supports environmental self-auditing. They say that companies know how to audit their own facilities

better than the government does, and can do a better job of it. However, initially the administration took the position that companies should receive no immunity from fines or other punishment if their self-audits revealed violations. Further, the administration initially took the position that self-audit information should not be privileged or secret, saying workers and communities had a right to know what local corporations were doing to the environment.

To give these views clout, Environmental Protection Agency (EPA) administrator Carol Browner threatened to take enforcement authority away from any state that passed a typical audit privilege law. (Most U.S. federal environmental laws allow EPA to delegate enforcement authority to the states with the provision that federal standards must be met.)

Specifically, EPA put Texas on notice that their audit privilege law was unacceptable because it would compromise the ability of all governments (federal, state, and local) to enforce environmental laws. However, in March, 1997, Ms. Browner reversed her position and said that the Texas law, with minor changes, would be acceptable to EPA. The Texas law gives both immunity from prosecution AND privilege to the information produced during a self-audit, and, as we have seen, it contains a blatant anti-whistle-blower provision.

Most observers believe the administration cut a deal with Texas to appease anti-environment forces in the 105th Congress. As expected, EPA's stance in Texas has been widely regarded as the administration's acceptance of all states' audit privilege laws. More state laws are expected to pass, now that the threat of EPA sanctions has been withdrawn.

However, the anti-environment forces in Congress have refused to be appeased. This month, they proposed national "audit privilege" legislation. Senate Majority Leader Trent Lott (R-Miss.) personally endorsed S. 866, "The Environmental Protection Partnership Act," which is a standard audit privilege bill. [2] It gives immunity to violators who self-report violations; and it gives a privilege of secrecy to all information related to self-audits. Notably, S. 866 specifically prohibits EPA from revoking enforcement authority of states who pass audit privilege laws. A companion bill has been introduced in the House of Representatives --H.R. 1884, the "Voluntary Environmental Self-Evaluation Act."

For five years, corporations have been promoting environmental audit bills around the country, arguing that such laws would improve environmental protection and public health. Companies promoting audit privilege laws include AT&T, Caterpillar, Coors Brewing, DuPont, Eli Lilly, 3M, Pfizer, Procter & Gamble, Weyerhaeuser, and Waste Management, Inc. (WMI).

However, protecting public health may not be the first priority for all these corporations. For example, as soon as Ohio passed its "audit privilege" law in December, 1996, WMI demanded that a citizens' group return documents --some of them dating back to 1988 --which the citizens had obtained during litigation aimed at forcing the cleanup of the ELDA landfill near Cincinnati. WMI says the documents are now "privileged" under Ohio law and cannot be used in a federal court case brought by local citizens. [3] Some of the documents in question are stamped "audit" and others were simply claimed to be "audits" after the fact. Thus WMI has revealed unmistakably what "audit privilege" laws are really about.

Some 80 citizen groups have formed a vigorous coalition to fight audit privilege laws. Contact The Network Against Corporate Secrecy led by Sanford Lewis in Boston: (617) 354-1030; or sanlewis@igc.apc.org. Their informative Web site can be found at http://www.envirolink.org/orgs/gnp/nacs_toc.htm.

As we step back and try to get this "right to know nothing" trend into perspective, it appears to us that this is just another aspect of

the rapidly-growing power of corporations in America and worldwide.

Big corporations approved the passage of all the major U.S. environmental laws now on the books. (If they had seriously opposed any of them, they would not be on the books.) These laws impose onerous requirements for gathering and reporting data. Large corporations complain about these features of our national laws, but in truth these reporting requirements provide a competitive advantage for large corporations vs. small. It is small businesses that get hurt by all the paperwork that our environmental laws entail. A big company just assigns a team to the task and gets it done. So big corporations created our complicated laws, partly for the competitive advantage that it gives them over their smaller, more nimble competitors.

Occasionally, however, our environmental laws cost some big polluter a major fine of \$50 or \$100 million dollars. And toxic tort lawsuits can cost them hundreds of millions from time to time. To reduce the likelihood of bearing such costs, big polluters now want "audit privilege" laws to protect them from public scrutiny and to give them immunity against major penalties. This retains the burdensome paperwork in the laws, which gives them a competitive advantage, while reducing the risks of major costs. The anti-environment Congress is doing its part to carry out this corporate strategy. Passing a federal "audit privilege" law would clearly benefit the big polluters. Congress has already taken other steps that fit into this strategy: the federal EPA is now so weak that it cannot possibly enforce all the laws on the books. Speaking of EPA's Carol Browner recently, the NEW YORK TIMES said in an editorial, "As a practical matter, the task of issuing individual permits for thousands of companies nationwide is beyond her staff's capabilities." [4] This weakening has not happened by accident. Congress has systematically reduced the capacity of the federal government to enforce our laws. In response, Ms. Browner has willingly formed voluntary "partnerships" with the states, giving them greater enforcement authority.

State enforcement is weaker than federal enforcement because states compete with each other for jobs. Any state that becomes known as a "pollution haven" will be looked upon favorably by polluters. Conscientious states find themselves at a disadvantage under these circumstances.

Sure enough, reports the NEW YORK TIMES, "Pennsylvania and some other big industrial states are reporting only a handful of major pollution violations, suggesting that inspectors in those states may be turning a blind eye to pollution problems.... Federal inspectors said the state [Pennsylvania] should have found at least 10 times as many violations as were reported in 1995." [5] The TIMES later said about 25% of all the states are failing to enforce the nation's environmental laws. [4]

We must note once again that the fundamental problem is the unfettered power of the modern corporation. The Clinton administration bears as much responsibility as any in this department. As the TIMES has said, "Ever since Bill Clinton came to office, he has done more for the Fortune 500 than virtually any other President in this century...." [6]

Corporations have limited capacity for self-restraint; they want it all and they want it now and they don't want anyone telling them what they can and cannot do. Until we recognize this --the nature of the corporate form --as the key problem of our time, the environment and human health will continue to deteriorate.

--Peter Montague (National Writers Union, UAW Local 1981/AFL-CIO)

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[1] John H. Cushman, Jr., "Many States Give Polluting Firms New Protections," NEW YORK TIMES April 7, 1996, pg. 1. See also, John H. Cushman, Jr., "Colorado and Ohio Accused of Skirting Federal Environmental Laws," NEW YORK TIMES January 30, 1997, pg. B7.

[2] Trent Lott, "Voluntary Environmental Self-Audit," CONGRESSIONAL RECORD June 11, 1997, pg. S5494.

[3] The attorney representing the citizens is David Altman; phone: (513) 721-2180.

[4] "Environmental Defiance [editorial]," NEW YORK TIMES December 20, 1996, pg. A38.

[5] John H. Cushman, Jr., "State Neglecting Pollution Rules, White House Says," NEW YORK TIMES December 15, 1996, pg. A1.

[6] David E. Sanger, "The Big One: Washington's Political Earthquake," NEW YORK TIMES September 24, 1995, Section 4 ("Week in Review"), pg. 1.

Descriptor terms: enforcement; audit privilege laws; environmental audits; right to know nothing; corporate dirty secrets laws; corporations; Alaska; Arkansas; Colorado; Idaho; Illinois; Indiana; Ohio; Kansas; Kentucky; Michigan; Minnesota; Mississippi; Montana; New Hampshire; Oregon; South Carolina; South Dakota; Texas; Utah; Virginia; and Wyoming; bill clinton; congress;