SUBJECT: Limiting immunity under the Environmental Audit Privilege Act

COMMITTEE: Environmental Regulation — committee substitute recommended

VOTE: 7 ayes — Chisum, Jackson, Allen, Hirschi, Howard, Puente, Talton

0 nays

2 absent — Dukes, Kuempel

WITNESSES: For — Gary Gibbs, Central and South West Corporation; Kinnan Golemon, ASARCO, Incorporated

Against — Jim Marston, Environmental Defense Fund; Richard Lowerre

On — Barry McBee and John Riley, Texas Natural Resource Conservation Commission; Reggie James, Consumers Union

BACKGROUND: The 74th Legislature in 1995 enacted the Environmental, Health, and Safety Audit Privilege Act, which grants limited immunity from administrative, civil and criminal penalties for violations of environmental, health and safety laws that are voluntarily disclosed to an appropriate regulatory agency. The disclosure must arise from an environmental health or safety audit, and the violation cannot be independently detected by an enforcement agency. No immunity is allowed if the person claiming the immunity intentionally, knowingly, or recklessly commits a violation or if the person repeatedly commits serious violations. Immunity is lost if if the person making the disclosure fails to make appropriate and timely efforts to correct the violation.

The act also created a privilege against disclosure of reports produced from voluntary environmental or health and safety audits. Such reports are not admissible as evidence or subject to discovery in a civil, criminal or administrative proceeding except in certain situations. Privileged reports are also exempt from public information requirements under the Texas Open Records Act. Privilege automatically arises when an audit is conducted, but it can be lost in a number of ways, including if a judge finds that an entity is

asserting privilege fraudulently or if the auditing entity does not take appropriate efforts to correct a problem once a violation is discovered.

DIGEST:

CSHB 3459 would revoke or limit certain immunities under the Environmental, Health, and Safety Audit Privilege Act. It would eliminate immunity from criminal penalties and remove the privilege against disclosure in criminal proceedings, rendering such reports admissible as evidence or subject to discovery in such proceedings. If an audit report was used in a criminal proceeding, the civil and administrative evidentiary privilege now available would not be waived or eliminated. Any persons receiving privileged information that had been publicly disclosed would have to prove that evidence they offered in court was not derived from review of privileged information.

The bill would make limited immunity from administrative and civil penalties inapplicable when a violation resulted in imminent and substantial risk of serious injury to one or more persons at the site or when a violation resulted in off-site substantial actual harm or imminent and substantial risk of harm to persons, property or the environment. Immunity could not be granted to a person who had repeatedly committed significant, rather than serious, violations.

Immunity from civil or administrative penalties would not be granted if a violation of environmental, health or safety laws resulted in a substantial economic benefit that would give the violator a clear advantage over its business competitors.

A state agency would be permitted to review privileged information required to be reported under state or federal law, but this would not waive or eliminate the civil or administrative evidentiary privilege granted by the act. If state or federal laws required the information in an audit report to be made public, a governmental authority would have to notify the person claiming privilege that there was a possibility of public disclosure before it obtained such information.

The bill would provide that audit privilege protections granted under current law would not affect the safeguards afforded by state and federal laws for individuals who disclose information to law enforcement agencies. The bill

would also remove federal agencies from the list of those to whom disclosure of audit information could be made without waiving audit privilege, given certain conditions.

The bill would take effect September 1, 1997, and would apply only to an environmental audit prepared on or after that date.

SUPPORTERS SAY:

CSHB 3459 would make changes to the Texas Audit Privilege Act in order to obtain and keep state delegation of various federal environmental programs. In 1996, the Environmental Protection Agency (EPA) announced that Texas' environmental audit law contained provisions that compromised state authority to implement federal environmental statutes and minimum federal requirements.

At the request of the governor, the Texas Natural Resource Conservation Commission (TNRCC) discussed potential amendments to the audit law with EPA, and the agency has received assurances that if the changes proposed in CSHB 3459 are made, the EPA would no longer pose a barrier to continued or future delegation of federal programs based on the Texas Audit Privilege Act. There is urgency to making these changes since Texas is in the process of trying to comply with deadlines to seek federal delegation of the National Pollutant Discharge Elimination System (NPDES) program, Title V operating permit programs under the federal Clean Air Act, and the Underground Injection Control Program. Delegation of these programs would mean that companies operating in Texas would only have to apply for and comply with paperwork and recordkeeping requirements for a single permit rather than dual state and federal permits, for considerable savings to everyone.

There is no reason to amend or change the Environmental, Health and Safety Audit Privilege Act any more than is required to keep delegation of federal programs. The act has significantly improved industry compliance with state rules since facilities are no longer afraid to voluntarily identify and correct problems. Many of these self-disclosed violations would not have been detected in an ordinary inspection and would therefore have gone unnoticed and unremedied without the audit act. There is an injunction inherent in both both immunity and privilege under Texas law: neither can be claimed if regulated entities do not clean up the problem in a timely

manner. The result is that problems discovered in voluntary audits are quickly remedied, and compliance with environmental, health and safety laws is encouraged.

Since the environmental audit law was enacted, TNRCC has received approximately 468 notices of intent to conduct voluntary audits. Approximately 69 self-disclosures have been made to the agency. Some audits uncover only recordkeeping problems, but even these disclosures are important: accurate data are fundamental to TNRCC monitoring systems and necessary for any effective pollution control and prevention plan. Nineteen other states have enacted environmental audit acts establishing immunity from certain penalties, evidentiary privilege for certain documents, or both.

The Texas law currently does not extend immunity and privilege to violations committed knowingly or recklessly or that resulted in injury to persons on-site or substantial harm off-site. These exceptions already cover most of the "egregious violations" complained about by critics of the program, ensuring that the state continues to protect its environment and the safety and health of its citizens.

CSHB 3459 would add another layer of protection. Removing immunity for criminal penalties would ensure that polluters would be held accountable for criminal actions when they violate environmental or health and safety laws. The bill would also strengthen public protections by making immunity available only if violations do not result in imminent or substantial risk of harm. Under current law, immunity is inapplicable only if violations result in injury or harm. CSHB 3459 would ensure that if a violation presented even a risk of harm to the public although no injury had actually taken place, a violator could not hide behind a claim of immunity. Problems, therefore, would be nipped in the bud before they caused injury or harm.

The bill also would ensure that noncompliant companies could not use the law to gain an economic advantage over competitors. No Texas company — not even utilities — would be exempted from this provision because all Texas businesses have competitors, whether locally, statewide, or in regional or national markets.

Changes in CSHB 3459 would increase access to audit information that otherwise might not have become available to the public and would provide protection for whistle blowers by ensuring that the safeguards afforded them under state and federal law could not be circumvented by the audit privilege act.

The Texas audit privilege act cannot be used in federal court cases and does not apply to federal entities like the Pantex weapons plant.

Current law provides that courts may require disclosure of material for which privilege has been fraudulently claimed. Limiting audit privilege to cover old violations would remove the incentive for companies to perform audits at all. Furthermore, it would not make sense to require that companies protesting use of audit information in court cases have the burden of proof in establishing where that information came from. Only the person presenting evidence at a trial can prove that it was developed independently from privileged materials.

OPPONENTS SAY:

CSHB 3459 would not go far enough to satisfy EPA complaints and ensure delegation of federal programs in Texas. The bill should include a clear statement that the environmental audit law would apply to suits brought in federal court and provision for penalties for anyone fraudulently claiming privilege for information that did not qualify.

It is laudable that the bill would remove immunity if a violation resulted in economic benefit to the violator, but the bill should delete additional requirements that the economic benefit would have to give the violator a clear advantage over its business competitors. Some polluting industries, such as utilities, do not have business competitors and could claim that this provision would not apply to them. Another problem with this provision is that it would be extremely difficult for TNRCC to judge whether or not a company had gained an economic benefit giving them an advantage over their business competitors.

The bill should be amended to stipulate that privilege would not apply if TNRCC demonstrated a compelling need for information that could not be reproduced independently in order to protect human health or the

environment. This would give the state some discretion over privilege if it were necessary to protect the public, but would apply in very few cases and so would not discourage industry from doing voluntary audits. The bill should also be amended to give the state some discretion to assess penalties for a violation that was voluntarily disclosed if the governor and the attorney general agreed that a penalty should be assessed. The state should be given this discretion, which would probably be rarely exercised, to make sure that a egregious violator would not escape penalties.

The bill should also provide that a regulatory agency could obtain and copy, as well as review, information required to be made available under state or federal law. Also, privilege should cover only old violations so that companies would be encouraged to mitigate past problems. Allowing immunity for new problems encourages companies to keep on polluting.

Furthermore, the burden of proof should be shifted to the persons claiming the privilege of immunity to explain why a document should be privileged, rather than forcing those who want to use certain materials as evidence to prove that they were developed independently from privileged materials.

Privilege should not apply to federal and state entities, such as Pantex or the Texas Low Level Radioactive Waste Authority, which should be held to the highest standards of accountability to the public. Privilege should also not apply to raw data, such as laboratory analyses of contaminated water.

Violations that could create a significant risk to public health or the environment or violate worker health laws should be reported immediately, rather than six months later when an audit is complete.

OTHER OPPONENTS SAY:

Texas should not cave in to the EPA by changing its audit privilege law. EPA has been inconsistent with its determinations regarding state program delegation approvals in the past, and there is no guarantee that CSHB 3459 would actually bring about the long-promised delegation of federal environmental programs.

Alternatively, he entire audit privilege act should be repealed rather than merely adjusted to satisfy EPA complaints. The immunity granted by the Texas Audit Privilege Act allows polluters to escape being held accountable

when they violate environmental health and safety laws and provides an unprecedented privilege against discovery.

Polluters should be held liable for damages and hazards caused by all violations of environmental and safety laws, no matter how the problem is discovered. Individuals harmed by a violation of an environmental law might sue for damages only to find that a privileged audit report contained the only direct evidence of a violation. Audit privileges have the effect of voiding portions of the state's health, safety and environmental statutes and removing important public protections.

NOTES:

The committee substitute added a number of provisions concerning review and public disclosure of privileged materials, violations resulting in immanent or substantial risk, economic benefit resulting from violations, and whistle blower protections. The substitute deleted provisions allowing a penalty for voluntary disclosures if the governor and the attorney general agreed and stipulating that certain audit privilege protections would not apply if a state official demonstrated a compelling need for the information to protect public safety or the environment, and the material could not be reproduced through any independent means.

The companion bill, SB 158 by Brown, has been referred to the Senate Natural Resources Committee.

A related bill, HB 1571 by Tillery et al., would make a number of changes to the Audit Privilege Act. HB 1571 would specify that audits could cover only past activities and would require audits to be completed in three rather than six months. It also would establish that immunity could not apply to more than 80 percent of a penalty when violations were corrected or 60 percent for all others, so long as this would not preclude the collection of a penalty equal to the economic benefit gained by the person. HB 1571 has been referred to the House Environmental Regulation Committee.