Secrecy in Ohio Environmental Law

Alexandra Beer
Lake Forest College, beerai@lakeforest.edu

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Secrecy in Ohio Environmental Law

Abstract
Ohio audit privilege and immunity laws authorize private industry to withhold environmental compliance information from the public. By authorizing secrecy of environmental information, Ohio audit privilege and immunity laws come at a great cost to the public. This study examines how these laws serve to undermine federal citizen right to know guarantees, avenues in place for citizen participation and enforcement of environmental law. The purpose of this research is to shed light on how Ohio audit privilege fundamentally conflicts with principles of environmental law. This study also highlights how the secrecy authorized by Ohio audit privilege challenges our conception of democracy and the way in which democratic participation and personal liberty are exercised in the United States. In conclusion, the findings of this research and analysis suggest that Ohio audit privilege should be abolished based on the tenants of environmental law and democratic theory.

Document Type
Thesis

Degree Name
Bachelor of Arts (BA)

Department or Program
Politics

First Advisor
Chad McCracken

Second Advisor
Evan Oxman

Third Advisor
James Marquardt

Keywords
Ohio legislation, environmental law, audit privilege and immunity

Subject Categories
American Politics | Legal Studies

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**Thesis Title:** Secrecy in Ohio Environmental Law

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Lake Forest College

Senior Thesis

Secrecy in Ohio Environmental Law

by

Alexandra Beer

April 22, 2015

The report of the investigation undertaken as a Senior Thesis, to carry two courses of credit in the Department of Politics

________________________
Michael T. Orr
Krebs Provost and Dean of the Faculty

________________________
Chad McCracken, Chairperson

________________________
Evan Oxman

________________________
James Marquardt
Abstract

Ohio audit privilege and immunity laws authorize private industry to withhold environmental compliance information from the public. By authorizing secrecy of environmental information, Ohio audit privilege and immunity laws come at a great cost to the public. This study examines how these laws serve to undermine federal citizen right to know guarantees, avenues in place for citizen participation and enforcement of environmental law. The purpose of this research is to shed light on how Ohio audit privilege fundamentally conflicts with principles of environmental law. This study also highlights how the secrecy authorized by Ohio audit privilege challenges our conception of democracy and the way in which democratic participation and personal liberty are exercised in the United States. In conclusion, the findings of this research and analysis suggest that Ohio audit privilege should be abolished based on the tenants of environmental law and democratic theory.
For my parents

and all those who fought

and continue to fight

for our circle.
Acknowledgements

First and foremost, I would like to thank my thesis committee: Professor Chad McCracken, Professor Evan Oxman, and Professor James Marquardt. To Professor McCracken, the chair of my committee and Professor Oxman, my advisor for the past three years, I greatly appreciate the guidance and support I have received throughout the process of working through my thesis.

I am extremely grateful for the classes I have been fortunate to take with Professor Todd Beer and Kathryn Dohrmann. In taking these classes I was inspired to learn more about environmental justice issues and pursue a thesis related to my personal experience.

In writing this thesis, I would like to acknowledge David Altman and his efforts as an advocate for environmental justice in Ohio. His work and advocacy has provided the foundation for this study.

Finally, I have to acknowledge my mom for accepting my phone calls at 4:30 am and being the best mom a daughter writing a senior thesis could ask for.
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Preface

My family and neighborhood were damaged by the illegal dumping of toxic waste by Vernay Laboratories Inc., a multinational corporation in the business of making rubber parts (Vernay, 2015). Enabling and aggravating the adversity my family faced were secretive environmental law loopholes in place to benefit large corporations at the cost of the public. These policies, established specifically for the purpose of reducing governmental “red tape,” include Ohio audit privilege and the Ohio Voluntary Action Program (Ohio Sierra Club).

In cases of illegal toxic waste disposal, like the dumping that effected the neighborhood I grew up in, there are numerous obstacles challenging those affected. Communities are placed at risk for severe health problems, local and familiar environments are degraded beyond remediation, property value is negatively affected, and there is emotional adversity as homes and neighborhoods are made unsafe. While there are waste disposal regulations and protective agencies in place to monitor environmental and human health, these institutions are often lacking or under the sway of the much more powerful corporations responsible for contamination.

When considering issues of environmental contamination, it is disheartening to discover that many laws, such as those mentioned above, enable secrecy in relation to environmental compliance. This makes it extremely challenging to hold polluters accountable as these loopholes allow for the parties out of compliance with existing environmental laws and regulations to take action without oversight and public disclosure, negating the ability of those affected to become aware of environmental health issues and to seek justice. For neighbors who don’t know what toxins they have
been exposed to, an important part of their medical history is blank. Community members often have no other recourse than to remain in toxic living situations.

The implications of environmental secrecy are illustrated in the case of my family and neighborhood. Vernay Laboratories Inc. was established in Yellow Springs, Ohio, around 65 years ago. The factory site, at 875 Dayton Street, is located in a residential area and the one high school in the village, Yellow Springs High School, is located across the street. The factory was built abutting the historically Black neighborhood I grew up in. In retrospect, the proximity of the factory to the predominately Black neighborhood raises concerns of environmental racism. While this issue should be taken into consideration, there is no way to tell if the neighborhood was targeted based on demographics or if it was simply one of the few open lots within the village where construction of the facility was possible.

Environmental racism is the disproportionate placement of environmental hazards and degradation in relation to minority and low-income communities. The residents of these communities often lack the political and economic ability to oppose industrial operations or take action in response to activities that have unfavorable effects upon the wellbeing of residents. In many cases it is unclear if marginalized communities were specifically targeted for the industrial sites or if underprivileged communities developed around the preexisting industry due to financial and social constraints (Taylor, 2014). Regardless of the chicken or egg scenario, high-minority and low income communities are unequally exposed to environmental health threats.

Often times, industries benefit from plant locations in proximity to low income or high minority areas as industry is not held accountable for actions negatively impacting the community. Low-income and high-minority communities maintain little access to the
resources needed to oppose industry and seek justice. Along with this, community members are often reliant upon plants and industry for jobs and the economic wellbeing of the area. This creates a complex situation as jobs are provided at the stake of the health and wellbeing of community members and the environment.

Contamination at Vernay Laboratories Inc., which was at one point a prominent employer in Yellow Springs, was originally found in 1989. Years later in 1998, more extensive contamination was uncovered. There is evidence of illegal chemical waste dumping beginning in the 1980s and continuing through the 1990s. While it is presumed that active dumping occurred for at least 10 years, there is no certainty of when the dumping began (Ohio Sierra Club).

Throughout the recognized time period, chemical waste containing high levels of Volatile Organic Chemicals (VOC’s) such as Polychlorinated biphenyl (PCE), Trichloroethylene (TCE), and Freon were dumped into French drains, trenches serving the purpose of redirecting surface and ground water, located on the factory property (US EPA, April 12, 2012). Along with chemical waste from the Dayton Street site, additional hazardous waste was illegally transported from other sites around the country to be dumped on the property directly behind my family’s home. This illegal disposal of hazardous waste was performed with full knowledge of the illegality and the human and environmental impacts of such actions. No effort was made by Vernay personnel to halt contamination or take corrective action.

As a result, plumes of TCE, PCE, and Freon accumulated on Vernay’s property and to areas southeast of the property. The chemical contamination was found to be more than 20,000 times the legal limit. Due to this contamination leaching into the ground water, well water was made unsafe to drink and vapor intrusion presented an imminent
danger. Vapor intrusion is when toxic vapors such as volatile organic chemicals in contaminated soil and groundwater seep into above building structures. The accumulation of these vapors present major health risks (United States District Court for the Southern District of Ohio, 2001).

After ongoing dumping of toxic waste for several years, Vernay took part in a confidential environmental audit of the Dayton Street facility. This confidential audit was made possible by Ohio audit privilege laws (Ohio Revised Code, 1998). With the audit, Vernay became aware of many waste management issues and was advised by the environmental contractor to evaluate the extent of soil and ground water contamination surrounding the property “at the earliest possible time”. Despite this advice, Vernay sought to “correct known problems without seeking knowledge of the whole situation”. At the recommendation of informing the public and alerting regulatory agencies, the corporation chose to “do the minimum to attract attention”. So, for ten years while Vernay was fully aware of the contamination caused by their illegal waste practices, my family purchased property and built a house abutting their property and our neighbors unknowingly lived with soil and ground water contamination suspected to cause nerve damage and cancer (Ohio Sierra Club).

In 1997, a decade after Vernay performed the environmental audit, Vernay attempted to participate in the Ohio Voluntary Action Program. This program allows private enterprise to independently investigate and clean up suspected environmental contamination. Once cleanup has reached minimal standards set forth by the Ohio Environmental Protection Agency (EPA), a “covenant not to sue” is issued and the property or business owner can never again be held responsible for further investigation or clean up (Ohio EPA, August 1, 2014).

1 Relevant parts of the Ohio Revised Code are attached in Appendix A, B, and C.
In attempt to initiate the program, Vernay held an “invitation only” meeting for neighbors. In this meeting, while not fully and accurately disclosing of the extent of contamination, plant management members informed my mother and neighbors about the existing chemical contamination and their plans to install monitoring wells in front of our home in an effort to rapidly remediate the pollution. Vernay held this meeting to disclose information as neighbors were becoming suspicious of factory practices and were concerned about compliance with environmental regulations.

With awareness of the corruption of the Ohio EPA, the unethical behavior of Vernay Inc., and fear of the leniency of the Ohio Voluntary Action Program, my parents decided to become a party to a civil lawsuit with other neighbors against Vernay in 1998. My parents and participating neighbors sought to hold Vernay’s cleanup to federal EPA standards and gain cleanup oversight through the civil lawsuit provisions of the Resource Conservation and Recovery Act (RCRA) (United States District Court for the Southern District of Ohio, 2001). When communities are adversely affected by illegal hazardous waste disposal, civil lawsuit provisions within environmental acts allow for legal action to be taken. This is a tangible solution for justice, however it is not preventative action as people are often already sick with cancer and other catastrophic illnesses and the environment is already degraded beyond the point of timely remediation.

With the initiation of the lawsuit, discovery, and full investigation and analysis by experts, it was uncovered that there was significant groundwater contamination, soil saturation, and leeching from Vernay’s property. A toxic plume of TCE, PCE, Freon, and other hazardous chemicals sat directly below the neighborhood I grew up in. This contamination is the cause of extensive environmental degradation. At the time of the investigation, contaminants in the soil were expected to continue to leech into ground
water and cause toxic chemical levels for thirty years. Restoration of the ground water aquifer through extraction and treatment was expected to take more than sixty years. Ground water remains unsafe to drink and residents exposed to the contamination are suspected to be at risk for cancer and nerve damage among other health concerns. As seen with many environmental justice cases, the health effects of exposure to pollutants are not “proven”. This means that while there are cancer clusters and irregular sickness and health patterns, a direct or cause and effect linkage is not made, preventing significant recourse by those injured. Along with the physical risks involved with toxic waste, lifestyle and livelihood are also threatened. My mother enjoyed gardening, however when the contamination was uncovered she no longer planted in the soil around our house.

In 2001, while we still lived in our house behind Vernay, the citizen lawsuit that my parents and neighbors initiated against Vernay, Inc. was settled. After three years of litigation, the court for the Southern District of Ohio signed an order for Vernay to initiate a cleanup plan for the contamination they caused. Vernay ultimately had to pay over $1 million in legal and cleanup fees. Along with the mandate for Vernay to cleanup, my parents and the other plaintiffs were granted clean up oversight (Chiddister, 2002). Relative to other cases of environmental contamination, the time spent in legal proceedings was rather prompt and the result was considered to be successful.

However, fitting with the status quo, direct and effective cleanup has yet to be initiated despite the courtroom victory. Environmental remediation has not begun as Vernay has failed to devise an EPA approved action plan for cleanup. The contamination site continues to be monitored and my parents and neighbors remain active in the process to ensure an environmental cleanup.
The action and ability to hold Vernay, Inc. accountable for their wrongdoing has been possible through the citizen lawsuit provisions in the RCRA (US EPA, March 15, 2015). As mentioned above, citizen lawsuit provisions in environmental statutes allow those who are affected to advocate for themselves. However, with the presence of laws that enable secrecy in terms of environmental compliance, like Ohio audit privilege and the Voluntary Action Program, the role of community members in compliance enforcement is limited. The privileges of secrecy held by regulated entities prevent community members from having access to information regarding public health and environmental wellbeing. With this absence of accessibility to information, community members are inhibited when initiating lawsuits and taking action in the cases of noncompliance or wrongdoing. Furthermore, greater reliance is placed on the self-policing of industry and the monitoring and enforcement of the EPA. With the decreased role of the public in environmental compliance, the interests of those most negatively impacted by environmental contamination and degradation are easily overlooked.

Often times people unaffected by issues of environmental injustice question why individuals and families don’t simply move and leave unhealthy or unsafe living situations. It is important to understand that in most cases, especially those involving environmental racism and environmental injustice, people do not necessarily have the financial ability or resources to move. Along with this, there is an emotional burden to bear. *While property and houses are made toxic, they are still homes for those living in them. While neighborhoods become dangerous with contamination, neighbors are still friends and chosen family.*

After filing a lawsuit and having awareness of property contamination, full disclosure is necessary to sell a house. Aside from this, there are other challenges. My
parents struggled ethically with the idea of selling our house. While they resented the idea of raising their children in a toxic house, they could not rationalize selling the house to others when they felt it unfit for their children and themselves. Due to this ethical struggle among other factors, my family remained in our house for thirteen years after becoming aware of the contamination. Nine years after the case was settled, my father became ill with symptoms of the same kind of cancer that three other people in our neighborhood of roughly sixty houses were struggling with. Around the same time that he was being examined and treated, our house was foreclosed and eventually sold to another family with several children.
I. Background

A. Overview

In order to detail how pollution secrecy thrives in Ohio environmental law, there will be examination of Ohio audit and immunity laws. In analyzing these laws, there will be explanation of how the laws conflict with federal environmental statutes and citizen right to know principles that are the foundation of environmental law and enforcement. There will also be explanation of how these laws serve to inhibit democratic participation and infringe upon the liberty of individuals to make fully informed decisions regarding their property, families, communities, and local environments.

In doing this there will first be a brief overview of environmental compliance and how environmental enforcement is carried out. This will be followed by identification of environmental audits and audit privilege. The legislative history along with the perspectives of supporters and opponents and will then be explored. After exploration of these components the implementation of audit privilege will be analyzed in terms of its use as a measure of self-policing and its employment at the state and federal levels.

At the heart of this examination, the issues surrounding Ohio audit privilege will then be detailed. The issues discussed will be the lack of reporting that may go hand in hand with audit privilege, the ways in which audit privilege hampers the initiation of citizen lawsuits, and the conflicts that audit privilege presents to federal environmental statutes and our right to know as citizens. Following the discussion of these issues, there will be exploration of a case study that details the dangers of Ohio audit privilege.

In connection to the threats that audit privilege presents, there will be a more theoretical examination of how audit privilege infringes upon our conception of
democracy and ability to act upon our personal interests. In conclusion, solutions to audit privilege will be offered.

B. Environmental Compliance

Corporations, individuals, and all entities are responsible for complying with the environmental statutes set forth by the federal government. Examples of these statutes include the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act, and the Emergency Planning and Community Right to Know Act. As a result of these acts, states have enacted laws and governmental agencies like the federal Environmental Protection Agency (EPA) set forth regulations, essentially rules that ensure environmental laws will be complied with.

Many regulations have to do with how data and pollutant information is collected and reported. Federal environmental acts often mandate that data and pollutant information is to be collected, recorded, and reported to the appropriate state and federal agencies. Data collection and reporting ensure that permits and regulations are being complied with. In instances of noncompliance and violation of environmental regulations, there are penalties that include fines, injunctions, and even incarceration of those who are for responsible for violations (US EPA, April 9, 2015).

As mentioned, the USEPA is a governmental regulatory agency. It was established by the government with the mission of protecting human health and the environment. In doing this the USEPA works to enforce federal environmental law and ensure that people are protected from public health and environmental risks as they carry out their lives. Efforts to carry out the agency initiative and limit and reduce environmental risks are based on scientific information related to the environment and human health. Environmental protection carried out by the EPA concerns natural
resources, human health, economic growth, energy, transportation, agricultures, industry, and trade. The mission if the EPA is to ensure that state, local, and tribal governments, businesses, communities, and individuals have available information so that there can be participation in the environmental regulatory process and there can be effective management of public and environmental health (US EPA, October 6, 2014).

The USEPA has several offices handling different areas of environmental protection. Along with this, there are ten USEPA regions in the United States. Ohio is in the jurisdiction of Region 5, which also encompasses Michigan, Indiana, Illinois, Wisconsin, and Minnesota. Each state has its own state environmental protection agencies; however they may not necessarily be identified as the state “EPA”. For instance, Indiana has the “Indiana Department of Environmental Management”. The Ohio environmental protection agency is conveniently named the Ohio EPA (US EPA, October 6, 2014).

While there is some federal oversight and there are federal programs and efforts that specifically fall under the authority of the federal agency, state departments are responsible for implementing and enforcing environmental protection within their states. Consequently, states can implement distinct statutes (Ohio EPA, n.d.). With this division between state and federal environmental agencies, some of the issues and tensions that arise with federalism are apparent. Ohio audit privilege and immunity laws are an example of this. The state of Ohio has implemented laws that seemingly infringe upon the scope of federal environmental statutes and the rights guaranteed to citizens with these environmental acts.
C. Environmental Audit

Environmental audits are assessments of a regulated entities’ environmental practices, procedures, management, and monitoring systems. The owner, operator, or contractor of a facility perform environmental audits for the purpose of assessing compliance with environmental laws and regulations along with the risk potential for environmental concerns and the likelihood of violations. Audits are used as a tool to evaluate environmental performance and identify how to better manage environmental practices and pollution systems. In this context environmental audits can be thought of as similar to the energy audits that evaluate the energy usage of a facility or structure (State Audit Privilege, 1998).

While there are various types of environmental audits, the two major types of audits used are compliance and management audits. Compliance audits are carried out for the purposes of investigating compliance with environmental law. Along with this, the compliance audits may assess the vulnerability of the facility in terms of enforcement action and the risk of liability related to lawsuits. Management audits evaluate procedures related to the environmental systems within the facility. The risk control is assessed and solutions for problems or hazardous conditions are offered. Ohio audit privilege encompasses both compliance and management audits. Environmental audits performed by a private facility may be done voluntarily or under recommendation of the EPA or specified regulatory agency (Ohio Revised Code, 1998).

Voluntary environmental audits provide a cost effective avenue of discovering existing or potential environmental violations and concerns. There is no doubt that self-assessments of environmental monitoring systems, practices, and procedures are productive and beneficial in terms of being able to effectively identify and address
immediate and potential environmental concerns. Environmental audits provide regulated entities with the opportunity to recognize compliance issues and environmental concerns that may otherwise be left unaddressed for an extended period of time or go undiscovered by regulatory agencies. Along with promoting time effective discovery and action, voluntary audits allow businesses to utilize private services and technology that may be more advanced and efficient than state monitoring tools and procedures. With self-assessments, inspection and monitoring is taken on by private industry and the workload of regulatory agencies is lessened. This is a major benefit as it allows government funds to be allocated elsewhere. Limited funds result in limitations on the inspections and regulation that can be performed by government agencies. Self-assessments and monitoring essentially save work in terms of oversight and allow government time and resources to be used more effectively (Ohio EPA, September, 1, 2012).

With recognition of the benefits of voluntary environmental audits, the state EPA, the USEPA, and the Ohio legislature encourage voluntary environmental audits as a means of fostering environmental compliance and mitigating potential environmental and public health hazards. In the past, despite the encouragement of the state, businesses and facilities were apprehensive to perform environmental audits. The reservations of regulated businesses and facilities regarding the performance of environmental audits stemmed from the fear that audits could be used against them in terms of lawsuits and penalty enforcement. Facility operators and owners feared that the violations and concerns potentially revealed in audits would lead to penalties, lawsuits, and external investigations uncovering further compliance issues.
D. Audit Privilege

In response to these business and industry concerns, lobbying efforts were put forth in Ohio to address the fears associated with independent environmental audits. As a result of these pro industry lobbying initiatives, Ohio audit privilege and immunity laws were adopted. This legislation served to abate the concerns of private industry by providing facility operators and owners with greater confidentiality and protection in terms of the information compiled in environmental audits (Lukas Jackson, J., 2001).

Ohio audit privilege and immunity laws authorize private industry and businesses to maintain audit information as secret; environmental audit information can be legally withheld from the public and regulatory agencies. The audit privilege and immunity laws that the Ohio legislature passed ensure that regulated entities performing voluntary environmental audits are protected from the results of the audits being used against them by the government or any party filing a lawsuit (Ohio Revised Code, February 9, 2004).

While audit privilege and immunity laws promote the use of environmental audits and lessen business reservations related to unfavorable findings, there are extreme costs for the public.

Through Ohio audit privilege and immunity laws, environmental audit information, including evidence of existing or potential public health problems, is gathered and withheld from the public and government agencies. Not only does this conflict with right to know laws and provisions in federal environmental acts, but Ohio audit privilege and immunity laws threaten the foundations of environmental law and the governing institution of democracy that is practiced in the United States. Through the authorization of privileged information related to public interest, the rights and democratic participation of citizens are hindered. Citizens are prevented from full
awareness and decision making in terms of environmental public health and wellbeing (D. David Altman Co., 1998).

E. Legislative History

In order to foster a better understanding of Ohio audit privilege and immunity laws and how this threat to public health and democratic participation was initiated, it is necessary to review legislative history. The history of audit privilege began in the early 1990s with a national movement to enact state environmental audit privilege and immunity laws. As previously mentioned, this national movement was founded by various industries lobbying legislatures at the state level to devise statutes to protect environmental audit information from regulatory agencies and the public (Lukas Jackson, J., 2001). In 1993, in the midst of this nation-wide crusade to enact such statutes, Oregon became the first state to pass audit privilege and immunity laws. Soon after the legislative actions of Oregon, many other states followed lawsuit. There was pressure to enact similar audit privilege and immunity statutes in Ohio, however proponents of the laws faced opposition until the late 1990s. In 1996, after several other states implemented statutes similar to Oregon’s, Ohio enacted its own environmental audit privilege and accompanying immunity laws (Ohio State Legislature, January 1, 1998). These audit privilege and immunity statutes are in codified in 3745.70, 3745.71, and 3745.72 of the Ohio Revised Code. Passage of Ohio audit privilege has served to provide legal basis for nondisclosure of the exact information that industry desires to be kept secret from the public and regulatory agencies.

State implementation of environmental audit privilege and immunity laws has continued to expand. Currently, there are a total of 23 states that offer audit privilege, immunity, or both audit privilege and immunity. As is the case in Ohio, most state audit
and immunity statutes are similar in nature. The statutes are fairly broad, extending to any
audit assessing compliance with local, state, or federal environmental law and
encompassing any information discovered during the audit process (Lukas Jackson, J.,
2001).

Since originally being introduced in 1996, Ohio’s statutes addressing audit
privilege and immunity have been amended on several occasions. Senate Bill 138 was
introduced in 1996 and became effective on March 19, 1997. Senate Bill 219, which was
introduced to the 122nd General Assembly, amended audit privilege statutes on
September 30, 1998. Sponsors of the bill, all of whom were Republicans, included
Senators Randy Garner, Robert Cupp, Merle Kearns, Gary Suhadolnik, and Scott Nein
(Ohio State Legislature, 2015).

Senate Bill 219 required environmental audits to be completed within a
reasonable time frame with exceptions for authorized extensions from regulatory
agencies. It also provided the legal authority for a person with privileged information to
abstain from testifying in a civil or administrative proceeding having to do with the
environmental audit performed. The bill specified that audit information was not
privileged in the case of criminal investigations, however it also stated that audit
information obtained or used in criminal investigations did not warrant waived or
eliminated privilege in terms of civil and administrative proceedings. Conditions under
which environmental audit privilege did not apply were enumerated in this amendment.
The bill authorized immunity for facility operators or owners who disclosed a violation
and received immunity within the last year, however immunity did not apply when there
had been a pattern of violations. While there was immunity from most civil and
administrative penalty, the Environmental Protection Agency (EPA) reserved the right to
fine a violating party when violations resulted in significant economic benefit for the party that was out of compliance. Along with these provisions, the amendment extended the sunset date for environmental statutes from January 1, 2001 to January 1, 2004. Lastly, the amendment stipulated that environmental audit statutes could not be interpreted to limit the authority of governmental agencies (Ohio legislative Service Commission, 1998).

Despite several sunset dates, Ohio audit privilege and immunity laws have been extended through various legislative actions and audit privilege remains prominent in Ohio. Along with the extension of audit privilege, the associated bills have included other alterations to Ohio Revised Code 3745.71 and 3745.72. These amendments include House Bill 179 passed in 2004, Senate Bill 372 passed in 2008, House Bill 59 passed in 2013, and House Bill 483 passed in 2014 (Ohio State Legislature, 1997).

In 2008, Senator Tom Niehaus introduced Senate Bill 372. The bill was passed that same year and became effective on January 1, 2009. Its passage extended the effectiveness of audit privilege and immunity until 2014, when House Bill 483 was enacted (Ohio Revised Code, February 9, 2004). House Bill 483 eliminated the component of the amendment stipulating that privilege does not apply to audits after January, 1, 2014. In effect, House Bill 483 has eradicated the expiration of privileged information and communication encompassed in environmental audits. Once again, the bill also stipulates that the information and communication carried out in regard to environmental audits is not eligible to be used as evidence in civil or administrative proceedings. In addition, the information and communication is not subject to discovery (Ohio Legislative Commission, 2014).
F. Supporters

Proponents of both federal and state audit privilege include industry stakeholders, trade associations, and state government officials. Supporters of audit privilege contend that environmental self-evaluations offer significant advantages to business and market practices. These benefits are recognized as being self-policing, less restrictive regulation in terms of procedure and deadlines, and greater flexibility and accessibility as far as compliance and the initiation of independent action. Environmental audit privilege allows for more independence with regard to meeting environmental compliance requirements, innovation in technological assistance and environmental performance, and, most prominently, leniency and minimized punishments or sanctions, enabling less restrained business and more beneficial market practices.

Other business benefits include protection from investigation and litigation for the party utilizing audit privilege. It is unlikely that audits will be used against the participating party in a court of law. Improved environmental performance and regulatory compliance, which is recognized as the legislative intent of audit privilege, is considered to be positive for environmental health and all of the parties involved, including the regulated facility, regulatory agencies, and the public. If used properly, prompt reporting and corrective action will be performed more effectively than in the absence of audit privilege (Luckas Jackson, J., 2001). Audit privilege is also recognized as being an alternative to some of the disadvantages of rigid enforcement such as high compliance costs that hinder productivity and industry profits (Potoski & Prakash, 2004). Another point in support of audit privilege is that voluntary audits and self-policing lessen the workload of the overburdened EPA and minimize the need for government oversight. Proponents contend that with self-policing, monitoring that otherwise may not be
performed, is carried out. This is of particular pertinence when taking current government budget allocations into consideration; the EPA has neither the staff nor the budget to monitor every regulated facility for compliance with environmental compliance standards.

Supporters of audit privilege find legal justification for state audit privilege and immunity laws in the fact that federal statutes do not require disclosure of information discovered in voluntary audits. The privilege of audit information is recognized by some as a necessary incentive because self-policing and voluntary audits are a major responsibility and are often a financial burden to the facility. Self-policing and monitoring increase work load and require expertise to be enlisted in order to perform the environmental audits. With the incentive of audit privilege, facilities are much more likely to participate in voluntary audit programs.

As mentioned earlier, audit privilege legislation of the 1990s was a result of industry lobbying. Many of the corporations who promoted audit privilege and are active in maintaining measures for audit secrecy have been the subject of scrutiny in terms of their environmental practices. General Electric, Browning Ferris Industries, Waste Management, Monsanto, Proctor & Gamble, DuPont, BF Goodrich, Georgia-Pacific, Caterpillar, Coors Brewing Company, Polaroid, and Dow Chemical are included in the long list of corporations that back audit privilege legislation. In connection to these corporations, state and national efforts have been set forth by the Compliance Management and Policy Group, the Corporate Environmental Enforcement Council and the Coalition for Improved Environmental Audits. The Ohio Chamber of Commerce and the Ohio Manufacturers Association are also among the proponents of audit privilege legislation. With this extensive network of industry lobbying efforts, the campaign for
secrecy of environmental compliance and performance information has been rather successful (Bedford, 1996). As a testament to this success, the support and efforts set forth by the American Legislative Exchange Council (ALEC) cannot be overlooked. ALEC is a politically right-leaning legislative organization that is notorious for their efforts to weaken and dismantle government regulation of business. ALEC developed the model legislation for Ohio audit privilege and the similar audit privilege legislation in other states throughout the nation. When comparing the model legislation to the Ohio Revised Code, it is very apparent that the model devised by ALEC was in fact used to develop Ohio audit privilege laws (American Legislative Exchange Council, 2015).

The aggressive tactics of industry lobbying efforts are clear when examining the intentions behind the first proposed legislation. When Ohio legislation was being drafted, industry pushed for provisions to fine and punish community members and workers who reveal audit information. The provisions called for a $10,000 fine and up to a year in jail for individuals disclosing privileged information. This provision was even intended to include cases when the individuals sharing audit information were unaware of its “privileged” classification. The intention of the industry in backing audit privilege is not necessarily to keep audit and environmental information secret from the government, it is to prevent the public from accessing audit information. The motivation of lobbying efforts is protection from citizen oversight (Bedford, 1996).

G. Opponents

While some of the incentives are recognized as beneficial, opponents find audit privilege to be in direct conflict with the public right to know and fundamental ideas of democratic participation that govern society in the United States. The federal Environmental Protection Agency (USEPA) is opposed to state environmental audit
privilege. The USEPA contends that with state audit privilege statutes, evidence of wrongdoing is shielded from the public and investigations of violations are curtailed and, in many cases, prevented. State audit privilege programs also undermine law enforcement, hinder the protection of human and environmental health, and interfere with the right-to-know in relation to existing and potential hazards (Lukas Jackson, J., 2001).

Despite opposing audit privilege offered by state governments, the USEPA promotes the use of the more limited federal policy for voluntary audits and immunity. The federal voluntary audit program waives penalties under certain conditions, however the waivers offered are not as far-reaching and extensive as those offered in state programs such as Ohio’s. Rather than offering privilege or immunity for disclosures of violations, the USEPA grants reduced or waived penalties for instances of prompt disclosure and corrective action (US EPA, January 29, 2014).

The USEPA recognizes the federal voluntary audit policy as being very effective. It has been widely used and is successful in encouraging the disclosure of existing environmental problems faced by facilities and operators. Along with effectiveness, the USEPA identifies the federal voluntary audit policy as being more protective of public health and the publics’ right-to-know than state audit privilege statutes. The federal voluntary audit policy states, “The public relies on timely and accurate reports from the regulated community, not only to measure compliance, but to evaluate health or environmental risk and gauge progress in reducing pollution (Lukas Jackson, J, 2001).” With its creation of safeguards for the public right-to-know, the federal policy is recognized as a measure providing the same advantages as state audit privilege programs with greater assurance for the protection of human and environmental health. Like state statutes, the federal voluntary audit program utilizes self-policing as an incentive to
promote increased compliance with the laws and regulations in place to protect human and environmental health. Supporters believe that this self-policing allows for regulated parties to have greater and more effective control over monitoring and regulatory action. This is recognized as being beneficial to all parties as it is not possible for the EPA to monitor all areas of compliance for every regulated entity on a regular basis (Lukas Jackson, J., 2001).

Aside from the USEPA, opponents include environmental, consumer, public health, and civil rights organizations and nonprofits, community advocacy groups, and the US Department of Justice (Lukas Jackson, J., 2001). In Ohio, community and advocacy groups oppose audit privilege statutes due to the limitations it places on citizens when attempting to access information regarding the environmental problems effecting neighborhoods and communities. While this type of environmental privacy questions the integrity of democracy in terms of information withheld from citizens, it also presents a major concern for community members in terms of health and wellbeing. In connection to this, a heightened concern exists for low-income, minority, and disadvantaged communities as these populations are often at a greater risk for environmental concerns and lack the resources to carryout litigation and initiate government processes when environmental conditions present actual and possible threats. The secrecy regarding public health information provided for in Ohio audit privilege magnifies these issues of environmental racism and environmental justice.

In regard to many of the same concerns presented by community organizations, students and scholars of law have been critical of Ohio audit privilege and immunity laws. *Environmental Audit Privilege Laws: Stripping the Public's Right to Know* by Jennifer Lukas Jackson, is an analysis of Ohio audit privilege published in the Cleveland
State Law Review. This examination, which details how Ohio audit privilege laws essentially deny the public of their right to know environmental information, is heavily relied upon in this study of Ohio audit privilege and its costs to the public.

David Altman, the attorney who represented the families of my neighborhood against Vernay, Inc., is a major opponent of audit privilege. As an attorney working from Cincinnati, Ohio, who typically represents families living in close proximity to sources of environmental pollution and contamination, he has testified about the threats that audit privilege presents. On February 27, 1996, David Altman gave a testimony to the Ohio House Committee on Energy and the Environment regarding the dangers of proposed audit privilege legislation, Senate Bill 138 (D. David Altman Co., 1996).

In detailing the pitfalls of the bill, three major issues are discussed: secrecy provisions, anti-watchdog provisions, and immunity provisions. Altman explains that in infringing upon the rights of individuals and families to know about the pollution information that directly impacts them, their quality of life and enjoyment of their property is threatened and “unprecedented privilege” is created for polluters. Essentially, he contends that Senate Bill 138 authorizes pollution to be hidden from families. The bill allows for secrecy in the courts of law and “turns the clock back on truth and right-to-know”. Altman states that “the search for the facts about threats to your home and your family are the most fundamental and sacred duties of family members” and with the passage of audit privilege legislation like Senate Bill 138, that search becomes “virtually impossible” (D. David Altman Co., 1996).

One Ohio politician who has publically opposed Ohio audit privilege is Denis Kucinich, a Democrat. Kucinich has identified audit privilege legislation as the “polluter’s protection bill”. From his perspective, audit privilege is not in the interest of
the people because it prevents community members from utilizing their right-to-know when it comes to the pollutants they are being exposed to in their own neighborhoods and communities. The Sierra Club has raised similar concerns, stating that Ohio audit privilege “protects polluters by creating secret documents that hide violations of environmental law (Lukas Jackson, J., 2001).” The result of audit privilege according to the Sierra Club is that community members are unable to take action in response to environmental violations and wrongdoing.

According to the US Department of Justice, state environmental audit privilege laws are “a corporate environmental secrecy act that is contrary to the public’s right to know that underlies much of the reporting and disclosure requirements in current environmental law (Lukas Jackson, J., 2001).” Also, environmental law “sends a powerful message that knowledge gives rise to a duty to remedy. An audit privilege undercuts this message by taking the extraordinary step of creating an evidentiary privilege that would have significance only where the duty to remedy has been violated.”

The US Department of Justice identifies that authorizing regulated agencies to withhold important information from the public and monitoring agencies is problematic as it makes it difficult to recognize wrongdoing and hold violators of the law accountable. In theory, if a regulated entity is abiding by the law and acting in a morally sound manner, there should be no reason to hide or withhold information.
II. Implementation of Audit Privilege

A. Audit Privilege: A Measure of Self-Policing

Audit privilege is an incentive offered to regulated facilities to encourage the performance of self-policing. Self-policing in terms of environmental compliance and enforcement of regulation is the discovery, disclosure, correction, and prevention of violations by an independent facility or regulated party (US EPA, April 6, 2000). Essentially, regulated parties regulate and police themselves. Along with identifying violations of environmental law, actions taken to come into compliance are performed independently by the operator or owner of the facility. This type of environmental regulation is defined by the independent assessment and enforcement of environmental law, which replaces inspection and enforcement by the government, specifically the state and federal EPA.

Ohio audit privilege and the federal audit policy are both measures to incentivize self-audits and self-policing. In considering the federal audit policy, the USEPA and other proponents believe that this form of self-policing is an "efficient and economical means of ensuring and improving compliance with environmental laws and regulations (Stafford, S., 2004)." On the other hand, opponents contend that self-policing coupled with the legal protections provided through audit privilege serve to protect violators of the law from consequences, negating the incentive to comply that stems from punishment of law breakers (Stafford, S., 2004).

In discussing self-policing, it is important to also identify and explain self-reporting. Self-reporting is when facilities and regulated entities report environmental

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2 This quote was stated in the U.S. Environmental Protection Agency’s Audit Policy Update of Spring 1999. There have been more recent revisions, making this update obsolete, however the quote on improving compliance remains relevant.
performance or how they perform on certain regulations. Self-reporting is mandated by federal environmental acts and is an important component of the regulatory process. Self-reporting does not necessarily encompass self-policing. Self-policing is when a facility informs the EPA or regulating agency that there has been a violation of the law. Self-reporting is often required by law while self-policing in many situations is voluntary (Stafford, S., 2004).

Self-policing is utilized by the EPA and the government for several reasons. The first and most obvious reason is that due to limited staff, budget, and resources, the EPA is not able to inspect and enforce every regulation at every facility or site. With it being completely infeasible for the government and regulatory agency to so much as plan to carryout comprehensive and complete regulation, self-policing offers the potential for increased disclosure and corrective action to be taken in response to environmental violations. In principal, self-policing extends the hand of the EPA and offers the potential for greater regulation and subsequent compliance to be carried out. The idea is that regulated parties take on the role of regulation in recognizing, reporting, and correcting problems. Not only does this contribute to regulatory efforts, it saves the EPA time and money and increases the likelihood of improved environmental performance. With independent facilities regulating themselves, more prompt recognition and corrective action can be carried out (Potoski & Prakash, 2004).

The article, The Regulation Dilemma: Cooperation and Conflict in Environmental Governance, expounds on the benefits and purposes of self-policing and voluntary action. The authors of this article identify improved environmental performance and regulatory compliance along with prompt reporting and corrective action as some of the benefits of self-regulation. With these advantages, self-regulation is recognized as a win-win
situation if trust and cooperation can be garnered. These elements of trust and cooperation are important factors as regulation through self-policing is wholly dependent upon regulated facilities acting as mandated without government oversight or coercion. In order for self-policing to be effective in achieving environmental compliance, facilities participating in self-regulation must cooperate with the state and fulfill the duties of regulation on their own accord (Potoski & Prakash, 2004).

Self-policing addresses some of the major drawbacks of traditional state regulation through deterrence. State inspection and enforcement is limited due to the finite time and resources available to regulatory agencies. Along with the inability of the EPA and government to assess and correct all regulatory issues, rigid enforcement and “red tape” are considered by some to encourage evasion and secrecy in terms of environmental compliance (Potoski & Prakash, 2004). Many people representing industry and business interests assert that rigid regulatory enforcement stifles business by limiting business decisions, interfering with the free market, and forcing money to be spent on compliance when it could otherwise be used more effectively by private businesses.

Regulation through self-policing offers greater freedom to the business sector and encourages technological advances and innovation in terms of environmental compliance. Without rigid enforcement, independent facilities are able to devise their own methods of ensuring environmental compliance and correcting issues and violations when they arise. With this, it is possible for there to be increased environmental performance through more cost-effective measures. Self-policing allows for environmental compliance and performance to advance as a sector or industry, serving to benefit environmental wellbeing and public health.
As mentioned previously, trust and cooperation are integral to self-policing. If facilities and independent parties are to evade the responsibilities and obligations of self-policing, the entire premise of self-regulation fails. Rather than improved environmental compliance and performance, lack of integrity in the process leads to failure in environmental compliance and performance; violations go unreported and unaddressed and there is economic loss. This economic loss stems from a failure of the state to impose the fines and penalties associated with violations and noncompliance that would be discovered through agency inspection. With self-policing being completely reliant upon trust, cooperation, and ultimately the moral goodness of industry and business owners, it is a risky method of administering environmental regulation.

Due to the nature of self-policing, especially in consideration of audit privilege and the federal audit policy, it is extremely challenging to develop models and attempt to identify the effectiveness as compared to government policing. One example of the challenges that exist when examining the effectiveness of self-policing is the lack of complete data on facilities that perform self-policing. Full data and information is not available because firstly, audit performance plans do not have to be detailed and secondly, the EPA only shares information in settled audit cases (Stafford, S., 2004). As a result, there has not been significant empirical analysis of the policy and how it effects compliance. From 1994 to 1999, there was an analysis of audit cases performed by Pfaff and Sanchirico. In this analysis there is a comparison between disclosed violations and all violations including both those disclosed to and those discovered by regulatory agency. Not surprisingly, the examination found the disclosed violations to be mainly minor. While the researchers do offer some explanations for these results, there is no analysis of the effect of audit policy in regard to compliance (Pfaff & Sanchirico, 2004).
Further analysis of self-policing and audit policies has been compiled with the study, *Does Self-Policing Help the Environment? EPA’s Audit Policy and Hazardous Waste Compliance* by Sarah Stafford, Associate Professor of Economics at the College of William and Mary. This analysis was made possible through funding by Resources for the Future and U.S. Environmental Protection Agency’s Science to Achieve Results program. The study has found there to be little basis to contend that state and federal policies for self-policing have led to decreased compliance. The results seemingly identify that since the implementation of state and federal policies, there has been a decrease in the probability of violations occurring. Along with this, compliance is shown to increase when the probability of inspection decreases. This finding suggests that facilities performing audits are able to more quickly identify and address compliance issues before they become violations of environmental regulations. In connection to increased mitigation of compliance issues, it is found that when states offer environmental audit privilege, there is more significant effect on compliance than the federal audit privilege policy (Stafford, S., 2004).

While these findings do suggest that self-policing, and the use of state audit privilege, do lead to greater environmental compliance, the limitations of this research highlight the need for more comprehensive analysis of self-policing and state audit privilege laws. Targeted research is needed on the effect of self-policing and audit policies on the decisions to perform audits and the decisions to disclose violations. Further analysis would allow us to understand the effects associated with various measures of self-policing. As a result, more thorough comprehension of self-policing would lead to better policy formation and greater compliance in the most cost-effective manner (Stafford, S., 2004).
When considering how to carry out further analysis of self-policing and audit privilege, it is essential to consider and incorporate the cost to the public that accompany such methods of environmental regulation. When privilege is offered in regard to self-policing measures, the major issues of public awareness, access to information, democratic participation, and action related to personal liberty become problematic. These significant costs to the public must not be overlooked in the cost-benefit analysis of self-policing and audit programs.

The benefits of self-policing and audit privilege should be analyzed by comparing environmental audits performed with and without the authorization of privilege. This would be an extremely useful analysis because many businesses may still see it fit and beneficial to perform audits without the legal right of secrecy provided for with audit privilege. Regardless of audit privilege, performing voluntary environmental audits is good business practice. Even without audit privilege, responsible businesses and corporations perform audits because they make sense in terms of safety, operation efficiency, and cost-effectiveness. This point of smart and responsible business practices supports the idea that audit privilege essentially serves to benefit businesses that have something to hide and have an interest in keeping undisclosed information from the public (Bedford, C., 1996).

An alternative to drastic incentives for self-policing that violate citizens’ rights is citizen participation and enforcement in partnership with business and regulatory agencies. Citizen enforcement and participation in the regulatory process is advantageous as impacted community members have a vested interest in environmental compliance, the wellbeing of the local environment, and the success of local business and industry. In providing avenues for community awareness and action, citizens are able to exercise their
rights. Rather than violating federal statutes through incentives for self-policing, compliance is fostered through community standards. Similar to self-policing, citizen enforcement offers a win-win situation, however there is less risk involved. The role and importance of citizens and communities in the enforcement process of environmental compliance and performance will be furthered detailed throughout this study along with the rights afforded through federal environmental law. Furthermore, there will be insight into the issues and concerns that arise when citizen awareness and enforcement of environment compliance is prevented.

B. Federal Environmental Audit Privilege

A federal environmental audit is a voluntary, detailed, and documented self-assessment of a facility’s or facilities’ compliance with federal environmental law and regulations. Rather than the USEPA performing compliance inspections and evaluations, private facilities perform their own assessments of compliance with environmental regulations. Through federal audit privilege, owners, employees, or individuals contracted by the regulated party examine compliance and complete environmental compliance audits. With the audits, the practices, procedures, activities, and operations carried out at the facility or facilities are assessed (US EPA, February 2, 2015).

The purpose of federal audit privilege is to encourage compliance with the federal environmental regulations to which regulated entities are subject. The federal audit privilege program is dependent upon private entities to discover and self-report compliance issues to the USEPA or other specified regulatory agency. As an incentive for participating in this self-policing program, participating parties are offered privilege to audit information. This means that information contained in the audit is classified information and can be withheld by the party that performed the audit. Parties
participating in federal audit privilege also have the freedom to carry out independent corrective action in case of the discovery of noncompliance and violations. Information regarding corrective action may also be maintained as privileged along with the environmental audit.

As further incentive, the private entity exercising audit privilege may be eligible for full mitigation of federal penalties that would normally be applied as a result of violations. This waiving of penalties is dependent upon meeting the requirements set forth with the federal audit privilege policy. Federal audit privilege policy also specifies that criminal prosecution will not be pursued by the USEPA. Aside from the privilege of nondisclosure of audit and corrective action information, the mitigation of penalties, and the commitment of the USEPA to refrain from recommendation for criminal prosecution, the USEPA points out that in very few circumstances will there be a request to review the environmental audit information compiled by the private party (US EPA, January 29, 2014).

In order for audit privilege incentives such as waived penalties and avoidance of criminal prosecution to be honored, the participating party must meet several requirements. These requirements include the following: 1. Systemic and voluntary discovery of the violation through required monitoring, an environmental audit or a compliance management system. 2. The disclosure of the violation to the appropriate EPA within 21 days of the discovery of noncompliance. Discovery is considered to be when any officer, director, employee, or agent develops reason to believe that a violation has taken place. With the discovery there must be written notice to the EPA. 3. It is required that discovery and disclosure be independent from any government agency or third party. It is also necessary for the discovery of the violation to occur before the EPA.
would likely discover the failure of compliance. 4. Commencement of corrective action or remediation must take place no later than sixty days after the discovery the violation. 5. It is required that appropriate steps be taken to ensure the prevention of reoccurrence of the violation. 6. The party must not have the same or similar violations at the same facility within the past three years, and the violation cannot be part of a greater pattern over the past five years. 7. The violation must not be the cause of injury, “serious actual harm to the environment”, or “imminent or substantial danger to public health or the environment.” Finally, the facility must cooperate and provide all needed information to the EPA when requested. Aside from these program requirements, noncompliance issues violating specific administrative terms, judicial orders, or consent order agreements are excluded from participation in the federal voluntary audit program. When new owners or operators are participating in the program there are a separate list of requirements as the USEPA does not wish to penalize new owners or operators for the wrongdoing or mistakes of previous operators (US EPA, January 29, 2014).

As mentioned before, one incentive for the use of environmental audit privilege is the mitigation of penalties incurred as a result of violations. The policy outlines that civil penalties can be reduced by 75% to 100%. Civil penalties and the portion by which they are mitigated is based on the severity of the violation that has taken place. These penalties are added to economic based penalties, which reflect the financial benefit gained by the party who has not complied with the law. While these incentives to waive penalties are outlined, the USEPA maintains the authority to set and collect fines. This authority is preserved as enforcing fines entices facilities to comply with regulations in a timely manner. The action of collecting profits gained from violations is also a way of
leveling the playing field between entities in compliance and those out of compliance with the law (Lukas Jackson, J., 2001).

One major factor that differentiates federal audit privilege from Ohio audit privilege is that federal audit privilege is a program encompassed in rules and regulations. Ohio audit privilege is provided for through actual legislation. In order to utilize federal audit privilege, a party must be admitted into the program. This is significant as the federal government maintains the authority to approve and deny applicants. If a party applying to utilize audit privilege has an egregious environmental track record, it is within the bounds of federal regulators to deny participation in the program. This is not the case with Ohio audit privilege as it is part of the Ohio Revised Code and applies to all regulated facilities performing audits.

Another component that exists in federal audit privilege but not Ohio audit privilege is that data and evidence contained in an environmental audit are not shielded from disclosure or public awareness. It still remains possible for analysis, conclusions, and contractor suggestions to go undisclosed in some situations. Despite the possibility of audit analysis, conclusions, and suggestions going undisclosed, the fact that data and evidence are not held as privileged is a major differentiating point that serves to protect the right-to-know of the public (D. David Altman Co., 1996).

While federal audit privilege offers considerably less leniency and more protection for public and environmental health than the Ohio state audit privilege policy, there remain major concerns. One issue is the leniency in regard to the mitigation of penalties and discovery. An entity exercising federal audit privilege is eligible for 75% of total penalty mitigation even when “systemic discovery”, a requirement of the program, has not been carried out. This troublesome leniency also extends to violations of criminal
law. In the case that a violation of criminal law is disclosed to the USEPA, there will be no recommendation for criminal prosecution as long as the participating party has met the outlined requirements of the audit privilege program. The concern of violations of criminal law going unaddressed with the use audit privilege is not theoretical; there have been very few cases where violations of criminal law have resulted in prosecution by the Department of Justice. The federal audit policy outline explicitly notes the tendency of the EPA to refrain from prosecution. In connection to refraining from criminal prosecution, the USEPA also abstains from requesting audit reports. The federal audit policy outline specifies that in almost all circumstances, the USEPA does request the audit reports (US EPA, January 29, 2014).

This is significant as parties exercising the federal audit policy perform audits, make discoveries and disclosures, and take (or do not take) corrective action with full knowledge of the little likelihood of governmental oversight and incurring penalties for violations. The private party utilizing audit privilege can be confident that the information regarding violations will not be acted upon by the USEPA or released to the public. In the case of criminal investigations, it is possible for audits to be requested and obtained in order to determine the level of culpability or the nature and extent of the violation (Lukas Jackson, J., 2001). While this is outlined in the audit privilege policy, it is necessary to consider that audit privilege provides private entities participating in audit privilege with the support and reason to challenge audit requests in court. These challenges may not prove to be successful, however the legal action creates a time delay and causes procedural challenges and ineffectiveness.

Another problematic aspect of federal audit privilege is the limited significance of a corporation’s previous history of wrongdoing. While the USEPA considers corporate
patterns when assessing eligibility for the audit privilege program, there are very few instances where past wrongdoing has prevented participation in the program. Only one percent of all applicants of the federal audit privilege program have been denied on the basis of identification of a corporate pattern of wrongdoing. This tendency to ignore previous violations and wrongdoing is concerning as parties with a history of violations, are entrusted to police themselves (US EPA, April 1, 2000).

While the USEPA reserves the authority to deny audit privilege on the basis of serious actual harm, there have been very few instances of such action. With 3,500 disclosures made to the USEPA through the audit privilege program, there have been two cases of denial. In one of these cases an employee died and in the other case a community was forced to evacuate (US EPA, April 1, 2007). From an outsider’s perspective, both of these cases had absolutely devastating implications. With these being the only events that have resulted in the denial of participation in the audit privilege program, there is major concern regarding the level and significance of violations that do not result in the denial of audit privilege. With death and community evacuation being the standard for denial, one is led to believe that many violations are overlooked. While these violations may not be as severe as death and community evacuation, they may still present a threat that effected communities should be informed of.

C. Federal Audit Privilege Revisions

In 2000, the EPA Audit Policy Coordination Team (ACT), chaired by the Office of Civil Enforcement, revised the federal audit policy. These revisions lengthened the amount of time for disclosure from ten to twenty-one days after initial discovery, established that a new owner of a facility is eligible for audit privilege, and made the
provisions that repeat violations by an owner or facility disqualify that party from participation in the audit privilege program.

The revised and updated federal EPA audit privilege guidelines establish a sixty-day corrective period after the date of discovery. This means that the private company or entity participating in the program has sixty days to correct an identified compliance issue. The sixty day period begins on the date of discovery. In consideration of the corrective period, the EPA does reserve the right to grant extensions to the deadline.

Repeat violations and repeat violators are considered to be violations that are closely related and have occurred within the previous five years at a facility or facilities under the same ownership. These repeat violations represent a corporate pattern. While the EPA does consider corporate patterns, audit privilege is not denied when the disclosing company has taken appropriate action in response to violations. Exclusion on the basis of a corporate pattern is applied by the EPA in an extremely narrow fashion; only one percent of all cases have been subject to rejection on the basis of identification of a “corporate pattern”.

With the revision that a new owner can qualify for audit privilege, a new owner or operator of a facility will not be held responsible for the actions of the previous owner. In the case that previous owners or operators were responsible for violations or a corporate pattern, these previous violations and concerns will not be considered as part of the new owner or operator’s history. Essentially, new owners or operators receive a clean slate for participation in the federal audit privilege program.

Despite the new owner and other accompanying revisions, it is made clear that the USEPA retains the authority to deny audit privilege based on serious actual harm. While the USEPA maintains this right of denial, there have been very few instances of usage.
According to USEPA records, there have been 3,500 disclosures and of those there have only been two instances of denial based on serious actual harm. In one of those instances, an employee died and in the other instance a community was forced to evacuate (USEPA, April 1, 2007).

The lack of denial of federal audit privilege along with the severity of the few denial cases is very concerning. With the standard of denial seeming to be death and forced evacuation, it leads one to believe there is significant leniency and acceptance for violations and irresponsible behavior. While violations and actions may not be as drastic as death or evacuation, the situations may present environmental and public health risks that would be of concern to the public. In the interest of environmental and public health, people should be able to access information regarding environmental hazards even when the severity is not death or forced evacuation. Allowing for the public to access information regarding environmental and public health provides the opportunity for people to take action and address the issues facing their community and local environment. When considering the severity of public health risks, it is necessary to note that the environmental and human health impacts of many pollutants are unknown and may present long term consequences rather than immediately noticeable dangers.

D. Ohio Audit Privilege

Ohio audit privilege, the subject of this study, is defined by the Ohio EPA as a “tool available to help companies minimize, if not prevent, escalated enforcement (Ohio EPA, January 1, 2009)”. According to the Ohio Revised Code, an environmental audit is "a voluntary, thorough, and discrete self-evaluation of one or more activities at one or more facilities or properties that is documented (Ohio Revised Code, September 30, 1998)". The audit is performed by the owner, facility operator, facility employee, or an
independent business contracted by the owner of the facility being audited. The purpose of performing an audit is to identify, correct, and prevent violations of environmental law and ultimately improve compliance with environmental regulations (Ohio Revised Code, September 30, 1998).

Ohio audit privilege contains two components, privilege and immunity. Privilege authorizes secrecy in regard to audit information. This part of the law also identifies that audit information is not subject to disclosure. Immunity prohibits the government and regulatory agencies from penalizing companies when disclosure and corrective action have taken place. In order for immunity to be applicable, all action and behavior must have taken places with good intentions. With both audit privilege and immunity being included in Ohio law, a facility owner or operator is protected from disclosing compliance violations discovered during an environmental audit. This protection exists as long as there is no evidence of intentional wrongdoing and corrective action has been carried out in response to the noncompliance issues discovered in the audit (Lukas Jackson, J., 2001). The legal protection from disclosure offered by Ohio audit privilege and immunity laws is significant as it prevents the public from ever having access to information related to violations and corrective action. Essentially, the environmental practices of regulated industry, which may significantly impact the wellbeing of people and environment, are shielded from the public.

Audit privilege and immunity are outlined in 3745.70, 3745.71, and 3745.72 of the Ohio Revised Code. Revised Code 3745.71 specifies that the owner or operator of the facility or property conducting an environmental audit has the privilege of nondisclosure in respect to the contents of the audit report. Revised Code 3745.71 also stipulates that the communication between the owner or operator and employees or contractors who are
involved is protected. Information that is identified as privileged under the state audit
privilege statute includes all communication related to the audit along with the
environmental audit report. The environmental audit report encompasses the results of the
audit and includes the final data, records, compiled documents, and plans. The
information in an environmental audit is usually in the form of laboratory data and
reports, field notes and observations, findings, opinions, recommendations, memoranda,
maps, charts, graphs, surveys, and photographs. This information can be used to identify
and explain the scope and objectives of the audit, management policies related to the
audit, and conclusions related to audit findings (Ohio Revised Code, September 30,
1998).

This means that audit communication and more importantly, audit reports, do not
become part of public record and cannot be accessed through the Freedom of Information
Act or other citizen efforts. Information regarding environmental practices, pollution
behavior, and community exposure to contaminants is shielded from public and
prohibited from being accessed. If for some reason audit information is uncovered, the
privileged information cannot be used as evidence against the participating operator or
facility as far as enforcing penalties or filing lawsuits and it is not subject to discovery in
civil or administrative court proceedings. Access to audit information is dependent upon
the owner or operator of the facility voluntarily releasing the information.

In order for the outlined communication to qualify as privileged, it must be made
in good faith (Ohio revised Code, February 9, 2004). While there is a requirement of
good faith in the Ohio Revised Code, there is, in actuality, no way to ensure that a given
violation, audit process, or measure of corrective action has taken place with good
intentions. This is the case as the EPA rarely exercises the authority to review audit
reports and investigate when there is suspicion of wrongdoing. So while it is mandated that intentions and practices of the facility must be within legal bounds and have the goals of ensuring safety and compliance with environmental law, there is little to no way to enforce this component of the law.

The Ohio revised code details that the information obtained in an environmental audit cannot be withheld during criminal investigation and proceedings, even when identified as private. While this is seemingly a safeguard, it presents a major obstacle. It is unlikely for a criminal investigation or prosecution to be carried out when there is little to no way to access information obtained and withheld as private under audit privilege. In the case of criminal prosecution of a facility or property owner, probable cause must be based on information obtained from a source other than an environmental audit report. In very few circumstances will the government request to access audit information, however if audit information is requested to be made available to the government, the information must be collected, developed, maintained, or reported to the appropriate government agency. In these instances, audit privilege is no longer honored because the information must then be disclosed of as requested. The Ohio Revised Code also states that information obtained through a source other than an environmental audit report, like observation, sampling, monitoring, or non-audit communication, is not privileged and is not warranted to be part of the audit privilege program.

Section 3745.72 of the Ohio revised code outlines immunity laws pertaining to environmental audits. The revised code specifies that the owner or operator conducting the audit has immunity, or is exempt, from administrative and civil penalties related to the violation being disclosed. While the owner or operator does not have to undergo the consequences of civil and administrative penalties, economic penalties are not included in
the immunity provision of the Ohio Revised Code. This means that economic penalties can be enforced by the state. Along with this, when making use of the immunity laws, the owner or operator has the burden of proving eligibility of immunity with relevant evidence (Ohio Revised Code, March 3, 2004).

With the immunity granted in the Ohio Revised Code, judgment is upon the court to grant and deny immunity to facilities and operators. The Ohio EPA does issue an opinion as to whether the requirements for immunity have been met, however the final decision is left to the court (Ohio EPA, September 1, 2012). Audit privilege and immunity are offered by the state in order to foster greater environmental compliance among regulated facilities. With the protections offered to regulated industry through the immunity component of the law, the intention is that facilities will be more apt to identify, disclose, and address issues of noncompliance and environmental or public health risks.

The privilege of withholding audit information and being immune from penalties related to the disclosure of violations has provided industry with an incentive to evaluate and assess environmental practices. As a result, audit privilege and immunity laws have undoubtedly led to the disclosure and correction of noncompliance issues along with many environmental concerns that are not required to be monitored by law. If not for the incentive of audit privilege and immunity, many of these disclosures and corrections would go uninvestigated and unaddressed.

While Ohio audit privilege and immunity laws have led to environmental assessments and subsequent violation disclosures and corrective action, this compliance has come at a significant cost to the public. The audit privilege and immunity offered by the state create excessive leniency. As a result of the corporate freedom granted through
audit privilege and immunity laws in Ohio, there is a lack of EPA oversight. This lack of EPA oversight is compounded by the inability of citizens to access public health information and participate in the regulatory process. With audit privilege and immunity laws, citizens are prevented from accessing information regarding violations and noncompliance with environmental regulations (US EPA, April 1, 2007). This legal right of nondisclosure provided to companies and corporations through audit privilege means that information regarding environmental and public health risks is withheld from community members who may be impacted. This not only presents major public health concerns, but it raises concerns about democratic participation and the level of secrecy that can be justified within the bounds of the law.

As discussed throughout this study, regulation utilizing audit privilege and immunity incentives is dependent upon participating parties alerting the EPA when violations are discovered. Regulated parties are entrusted to discover and disclose noncompliance information to the EPA. If one is to assume that all parties will act in good faith in terms of disclosing and correcting violations, this system is ideal. However, expecting that all parties participating in audit privilege will act in good faith and with a high moral standard is not realistic.
III. Issues

A. Lack of Reporting

Trusting corporations and regulated entities to act in good faith causes many problems. One major and very troubling issue with audit privilege and immunity in Ohio is the likelihood of violations to go unreported. While the audits performed by regulated entities uncover noncompliance issues, regulated parties make the choice to report violation findings to the appropriate agency. It is possible for entities participating in the program to illegally refrain from reporting violations as they seek to avoid regulatory and governmental attention. Businesses and private industry are likely to avoid reporting violations and compliance issues out of fear that the EPA will collect the economic profit gained from being out of compliance. In attempt to avoid this collection of profit and the costs associated with coming into compliance, businesses refrain from reporting violations. In some circumstances, the motivation for failing to report violations is that the violations would uncover criminal or ill-intentioned behavior.

The tendency of violations to go unnoticed by regulatory agencies when businesses fail to report is further incentive to for businesses to avoid reporting. When making the decision to not report violations, regulated parties can do so with fairly high confidence that the violations will go undiscovered by governmental agencies and the public. To expect a company or business to admit to violations and wrongdoing when there is a strong likelihood of noncompliance issues to otherwise go unnoticed is unrealistic. Self-policing, which is the basis of audit privilege, is dependent upon companies and businesses abiding by an extremely high moral standard. In considering the interest of a private entity, it seems logical to expect a facility to discover violations and environmental risks and take corrective action without alerting agencies and
governmental officials. In taking corrective action without notification of government agencies and the public, the goals of compliance are achieved and the corporation avoids any unfavorable repercussions as a result from noncompliance.

While this may be favorable for regulated parties, the interest of the public is compromised. To further understand how public interest is neglected with pollution secrecy, it is necessary to consider the significance of public information and the basis of environmental law, which is community action and enforcement (Plater, 1995). Accessible information is fundamental to citizen and community action in opposition to pollution and environmental and public health threats. Citizens and environmental groups enforce environmental law and regulations and protect the health of their communities by gaining access to information through right-to-know laws and provisions in federal environmental acts specifically in place for citizen action and enforcement. With insight into pollution information, compliance records, and the behavior of regulated facilities, community members are able to fully participate in public processes and community input periods administered by the EPA. Furthermore, there must be publically accessible pollution and compliance information in order for community members to exercise rights and actions such as outreach or education, public pressure, and citizen lawsuits.

Pollution information and compliance history are also important when monitoring government agencies. In many circumstances, environmental groups and concerned citizens act as watchdogs for regulatory agencies by ensuring that the appropriate and required enforcement action is taken by the EPA and other agencies. These watchdog efforts are crucial to the regulatory process as concerned citizens and impacted community members have vested interest in the health and wellbeing of the local
community and environment and can observe local public health and environmental problems that may otherwise fly under the radar of state and federal agencies. Community members act as stakeholders and place pressure on industry and government agencies to act appropriately and ensure compliance (Lukas Jackson, J., 2001) Without the ability of environmental groups, concerned citizens, and impacted community members to access and evaluate the pollution behavior and compliance records of regulated industrial facilities, it is next to impossible to safeguard environmental and human health through compliance with environmental statutes. Community enforcement is the backbone of environmental law and the federal statutes that were considered to be monumental in the 1970’s.

B. Citizen Lawsuits

In theory, environmental law and federal environmental acts rely on the free flow of environmental and public health information to the public. This is the case as the enforcement of environmental statutes and regulations is dependent upon the public. With citizen monitoring and community action and involvement being the basis of environmental law, the public’s right to know underlies the federal environmental statutes that came out of the early 1970s. Along with the underlying principle of community involvement and action, citizen enforcement is explicitly highlighted with the citizen lawsuit provisions included in several of the federal environmental statutes. These citizen lawsuit provisions in environmental statutes provide impacted community members with the right to carry out lawsuits in response to violations of environmental law. Citizen lawsuits can be brought against a person, facility, or government agency in violation of emission and pollution standards (Altman, Hartford, & Newman). Provisions in federal environmental statutes also impart citizens with the right to participate in the permitting
process and grant access to certain compliance information compiled by industry. Along with the major role of the public in federal environmental statutes, the USEPA identifies the public-right-to-know as a chief objective of the agency (US EPA, October 6, 2014).

The inclusion of citizen lawsuit provisions was done so by Congress in a very intentional manner. Congress specifically included lawsuit provisions for citizens for the purpose of addressing government failure to enforce statute standards. Lawsuit provisions for citizens were specifically included by Congress for the purpose of addressing government failure to enforce statute standards. Through citizen lawsuits, the court may award the costs of litigation, including reasonable attorney and expert witness fees, to the plaintiffs if the lawsuit is settled in their favor. This aspect of citizen lawsuits is extremely pertinent to cases of environmental injustice and economically restrained plaintiffs as it allows for impacted citizens to utilize competent attorneys without having to pay for the costs associated with litigation. Citizen lawsuit provisions, an avenue of action for impacted community members, and the underlying principle of the public’s right to know are included in the Emergency Planning and Community Right to Know Act, the Clean Water Act, the Clean Air Act, and the Resource Conservation and Recovery Act.

As discussed, citizen lawsuit provisions grant citizens the right to sue facilities or parties that have violated the law and have not been held accountable by the federal or state government. With these provisions, citizens are provided with an avenue to enforce the law when there has been a failure to do so by the presiding government or regulatory agency. Citizen lawsuits essentially serve as a safety net for the public as they are designed to be utilized in instances where the government has neglected to take the appropriate action to follow the laws established to protect people and the environment.
With this being the purpose of citizen lawsuits, a citizen may not file suit against a violating party when the government is already pursuing a lawsuit.

When considering citizen lawsuit provisions, the legality of Ohio audit privilege comes into question. Ohio audit privilege directly conflicts with the citizen lawsuit provisions of federal environmental acts. Ohio audit privilege inhibits the rights granted to citizens in federal environmental acts and circumvents the ability of individuals to pursue lawsuits that are specifically provided for in federal environmental statutes. As a result of the legal nondisclosure of audit information and the stipulation that environmental audits cannot be used against a regulated party in court, citizens of Ohio are prevented from exercising their right to enforce environmental statutes.

With citizen lawsuits of federal environmental acts, there must be evidence supporting the claims being made, like all lawsuits filed and litigated. When utilizing the citizen lawsuit provisions of a given environmental act, the party filing the lawsuit must be able to demonstrate how the federal environmental act has been violated or undermined. While this seems relatively straightforward, Ohio audit privilege presents a major caveat to this. First and foremost, in many cases, Ohio audit privilege serves to preclude citizen lawsuits as community members are shielded and kept uninformed of information that would lead to a lawsuit. If community members are not aware of environmental violations, negligent environmental practices, or public health risk factors, citizen lawsuits are obviously not going to be pursued. Furthermore, if citizens do somehow gain insight into facility behavior or noncompliance, information obtained through an independent audit cannot be accessed or used in court. When pursuing a lawsuit and seeking disclosure of an environmental audit, the plaintiff must prove that the environmental audit was performed with fraudulent intent. This is a major challenge as
the very evidence showing fraudulence is withheld from evidence. With the exact evidence that would be used to carry out a citizen lawsuit being withheld from community members and legally prevented from being presented in court, it is unlikely that an effective lawsuit will be carried out (Lukas Jackson, J., 2001).

C. Right to Know and Federal Acts

Below, the various citizen lawsuit provisions and community right to know guarantees of federal acts are outlined. Detailing these aspects of federal environmental law gives support to the notion that environmental law is based upon and made functional through citizen awareness and enforcement. Along with demonstrating the pertinence of community involvement in the theory of environmental law, these federal stipulations will illustrate how Ohio audit privilege and immunity laws conflict with the principles of federal environmental law.

The Emergency Planning and Community Right to Know Act of 1986 recognizes the public’s right to access information and also includes the citizen lawsuit provisions that are common among several federal environmental statutes. The Emergency Planning and Community Right to Know Act mandates public access to information about toxic inventories and releases. The purpose of the act and its provisions for toxic inventories and releases is to compile accurate and reliable information regarding the presence and emission of toxic chemicals so that vital information can be made available to governmental agencies and the public at a localized level. One system created with this statute is the Toxic Release Inventory database. This database compiles information regarding chemical release and toxic waste management issues and activities (Lukas Jackson, J., 2001). The role of community awareness and knowledge of environmental risk information is made clear with the passage of this act by congress. The right of the
community to know about toxic releases and waste management issues is explicit. This explicit right is directly tied to the role and importance of community participation in enforcement as knowledge and awareness allows impacted community members to take action.

Similarly, the Clean Water Act includes the same provisions for citizen lawsuits that are found in the Emergency Planning and Community Right to Know Act. The role of public knowledge and access to information is further outlined with the reporting requirements mandated in the act. Any facility with a point source discharging pollutants into surface waters has to obtain a National Pollutant Discharge Elimination System permit. Along with this, the Clean Water Act mandates that owners or operators of facilities maintain records and submit reports identifying discharges (Lukas Jackson, J., 2001). These reporting measures included in the act highlight the importance of public access to information.

Providing further evidence of the role of citizen participation and enforcement of environmental law is the Clean Air Act. The right of citizens to participate in the enforcement of clean air regulations is encompassed in the Clean Air Act. One specific stipulation is the role of the public in the Prevention of Significant Deterioration permit application process. The monitoring data associated with applications is required to be made available to the public. This provides the public with ability to know the type and quantity of pollution that is proposed to be emitted into the local air. With this knowledge, citizens have the opportunity to raise opposition to pollution proposals. Awareness of pollution information also provides citizens with the ability to more easily and effectively enforce regulations and, in the case of severe violations and government failure, carry out citizen lawsuits (Lukas Jackson, J., 2001).
Comparable to the mandated record keeping in the Clean Water Act and Clean Air Act, the Resource Conservation and Recovery Act requires waste information be recorded and submitted to the EPA so it can be made available to the public. This includes thorough treatment, storage, and disposal information. As a result of the Resource Conservation and Recovery Act, citizens have the right to access vital information regarding hazardous waste. Like the other federal environmental statutes mentioned, the Resource Conservation and Recovery Act includes provisions for citizens to file lawsuits when there have been violations to the act and the presiding regulatory agency has failed to enforce the environmental regulations associated with the legislation (Lukas Jackson, J., 2001).

In considering the right to know and citizen lawsuit provisions provided for in the various federal environmental statutes mentioned, Ohio audit privilege is in direct conflict with these federal acts. The right to know and citizen lawsuit provisions included in the federal acts cannot be initiated or carried out when audit privilege is being employed. Furthermore, Ohio audit privilege serves to undermine and circumvent the rights provided to citizens with federal environmental acts. The provisions discussed have been afforded to protect community members, however they are only effective as long as audit privilege is not being utilized.

Ohio audit privilege denies citizens access to information compiled in environmental audits and withholds information disclosing potential violations and wrongdoing. Not only is vital information withheld from the public, but the potential for citizens to take action or carryout citizen lawsuits is curtailed as the information and evidence needed to initiate a lawsuit or address wrongdoing is made inaccessible to the public and those impacted by environmental violations. Lawsuits cannot be initiated in
the absence of information and evidence identifying wrongdoing or violations of environmental law. In scenarios where audit privilege is in use, information proving wrongdoing and illegal action is often times withheld from the public, making it next to impossible for citizens to exercise federal rights allowing community members to carry out citizen suits and enforce environmental statutes.

The overarching concept of the public’s right to know and citizen lawsuit provisions is that these two components are extremely pertinent to the enforcement of environmental law and regulations. Citizen lawsuits and the right of the public to know about environmental risk information were specifically devised and included in federal environmental statutes for the protection and right of citizens to enforce environmental law and protect themselves, the community, and their local environment. At its heart, these provisions in environmental acts preserve the idea of democracy and democratic participation. Provisions for public access to information and the right carry out lawsuits provide citizens with the ability to take individual action, defend their personal and community interest, and influence the way law is exercised and carried out.

D. ELDA

Issues resulting from the use of private audits and the failure to report known violations are exemplified with innumerable cases of environmental injustice throughout Ohio. One fairly well-known case is the administrative action and citizen lawsuit filed by residents of a Cincinnati, Ohio neighborhood against Waste Management Inc. Residents living in close proximity to the ELDA landfill fought expansion of a facility and initiated a Resource Conservation and Recovery Act lawsuit against Waste Management, the operators of the ELDA landfill in 1989. When considering the conditions of the ELDA landfill, it is important to note that when the facility was built in 1973, it failed to meet
landfill standards of the time. Despite this failure to meet modern standards, Waste Management Inc. continued to operate the ELDA landfill over a decade after it was designated to be closed. In 1989, Waste Management Inc.’s attempt to expand the facility was met with community opposition. In response to this opposition, Waste Management Inc. carried out a public relations promotional stint and allowed the community to tour the landfill facility. As a result of this tour, citizens were able to link community health problems and pollution concerns to the landfill. Neighborhood residents then fought the expansion of the landfill through administrative proceedings and filed a lawsuit.

In the discovery process of the lawsuit it was found that Waste Management Inc., like Vernay Inc., gained awareness of compliance issues through internal auditing which revealed violations of federal environmental law. Waste Management Inc. knew of environmental law violations and the migration of potentially harmful gases into the surrounding neighborhood. Despite knowledge of hazardous environmental risks to the surrounding area, the operators chose not to report violations or take corrective action. Rather than fulfilling their obligation to come into compliance and mitigate the environmental hazards, they provided incomplete reports and intentionally avoided disclosing the compliance issues. Along with this, operators also failed to follow the advice of environmental consultants.

Using the Ohio environmental audit privilege bill being debated by the Ohio state legislature in 1993, Waste Management attempted to force the plaintiffs to return the environmental audit documents found by the plaintiffs in the discovery process. The claim was that the documents were privileged as they were part of voluntary self-evaluations performed by Waste Management. This claim of privilege was denied by a state administrative hearing judge as the environmental audit privilege bill had yet to
become law. During federal proceedings of the citizen lawsuit, after the passage of Ohio environmental audit privilege, Waste Management Inc. attempted to have audit documents returned based on the reasoning that they were privileged under the law. This claim was then denied as the audits took place before Ohio audit privilege was enacted and the law cannot be applied in a retrospective manner.

The issue here is that if Waste Management Inc. had in fact been eligible for audit privilege, they would not have been forced to disclose audit documents and the evidence proving violations of the Resource Conservation and Recovery Act would not have been authorized in court. Without the audit documents revealing known compliance issues and advice to report and correct issues, it would have been extremely difficult and next to impossible for the plaintiffs to show wrongdoing and liability of harm by Waste Management Inc. If Ohio audit privilege had passed through the Ohio state legislature any sooner, these documents would have been legally withheld and it is likely that the case would not have resulted in Waste Management being ordered to pay for resident health examinations and remedial action to address the release of toxic gas to the surrounding neighborhood (Lukas Jackson, J., 2001). With Ohio audit privilege being a viable defense presently and for the past several years, it is concerning to think about how many similar situations go unaddressed because there is not feasible evidence for concerned citizens to bring an action in court.
IV. Ramifications

A. Democracy?

The Waste Management Inc. case highlights the major problem arising from Ohio Audit Privilege: when private entities have the authority to keep secret information regarding environmental audits and compliance issues, barriers are placed on the public and impacted communities can become more susceptible to environmental dangers. The ability of individuals to access information and learn about actual and potential environmental threats is severely restricted by the environmental audit privilege offered by the state of Ohio. Audit privilege and the profit motive often tempt industries into withholding information from government agencies and the public. As a result, actions to hold wrongdoers accountable are undercut.

Hypothetically speaking, if audit privilege did not present concerns of environmental violations going unreported and solely served to improve environmental compliance and disclosure, concerns related to democratic participation would remain an issue. To utilize secretive protections that limit the role and interest of the public is to obstruct civic participation, the foundation of democracy in the United States. People are inhibited from taking action and enforcing environmental law as they are either unaware of issues of environmental compliance or lack the legal support for doing so as information is withheld from them. With this being the case, any benefits stemming from Ohio audit privilege are negated.

Secrecy and nondisclosure of information are sensitive issues because they conflict with our expectation that we will at least have notice and a right to be heard about the things that affect us. The American public is uncomfortable and weary of
secrecy in the context of government affairs and professional relationships. Examples of institutional secrecy are national security and attorney-client privilege.

This public apprehensiveness to secrecy stems from our concept of democracy and the idea that free flowing information is an inherent part of the way our society and government function. Democracy is based upon the premise that people consent to be governed and they can consent only if they are informed about the nature of the government they are consenting to be governed by. Open access to information is necessary to the development of well-informed opinions and decisions. With the formation of these educated opinions and decisions, well thought out civic participation and action that reflects one’s interest can be pursued. In this context, civic action and participation might be voting, participating in community comment periods, or otherwise pressuring society and the government to take certain actions. Democracy means that citizens are a governing force, partaking in and influencing government decisions and behavior. When secrets prevent citizens from making well-informed decisions reflecting personal perspective, democracy is weakened

While the public is skeptical and apprehensive to the nondisclosure of information, the benefit and reasoning of secrecy is understandable in exceptional circumstances. For instance, with national security the benefit to public safety is obvious. With attorney-client privilege, while we may believe the public would be better off with the information shared in this legal relationship, we understand that protecting our right against self-incrimination has greater importance. While there is a cost associated with these instances of secrecy, the American people generally agree that the benefit outweighs the cost. However, even with this widespread approval, secrecy is met with vigilance.
Ohio audit privilege and the secrecy of environmental information that it authorizes are extreme costs to the public. The benefits, unlike the other exceptional circumstances, are rather unclear. The costs to citizens are that they are unaware of environmental compliance, prevented from knowing about potential threats to their community, and greatly hindered in terms of their ability to take action against environmental injustice. The perceived benefit is that there may be greater environmental compliance among regulated industry. This benefit does not overcome the extreme cost to the public that is incurred with environmental secrecy.

The secrecy that is authorized by Ohio audit privilege serves to circumvent public awareness and citizen participation in the enforcement of environmental law and ultimately governance. With citizen participation being fundamental to the exercise of democracy in the United States, the American public and the democratic system of governance generally hold citizen participation in high regard. While individuals may choose to abstain from participating in public comment periods, community forums, government proceedings, or elections, the right of participation and influence is available to each citizen. This ability to impart influence upon governance is generally believed to be a right that in unspecified circumstances cannot and should not be taken away. With regard to citizen participation, Ohio audit privilege greatly counteracts public opinion and the democratic principles that are valued in our society.

Furthermore it is clear that environmental audit privilege and immunity laws undermine our fundamental conception of democracy. These laws serve to skirt the truth and inhibit the participation of citizens in government processes and decisions, the very basis of democracy. Again, with respect to the democracy exercised in United States, the truth can be privileged or hidden in only the most exceptional of circumstances. While
these instances of privileged information are arguably necessary and beneficial to the wellbeing of citizens, there remains a significant need for vigilance of abuse of such privilege. In connection to this, a line must be drawn in regard to where secrecy is authorized and to what extent (D. David Altman Co., 1998).

The secrecy codified in Ohio’s environmental audit privilege and immunity laws has extremely dangerous implications. Providing for pollution secrecy to be recognized and protected in the same manner as issues of national security or attorney-client privilege, violates the guarantees of federal environmental law and prevents impacted individuals from being able to exercise their role in democracy and make informed decisions regarding the health and wellbeing of their property, their families and their communities. In a testimony to the U.S. House Commerce Subcommittee on Oversight and Investigations, David Altman stated, “Citizens, who are the object of the legal guarantee of environmental protection, have a right to full information. Unless they have the right to the whole truth, their participation in decisions that affect their families and their property will be meaningless. Their right to directly enforce federal law will have been stolen from them (D. David Altman Co., 1998).” Audit privilege and immunity laws prevent people from knowing the truth about the air, water, and soil, which they are exposed to each day. This inhibits the ability of people to exercise rights that have been granted by the federal government. Citizens are essentially losing the ability to participate in government processes and advocate for their personal interest.

Audit privilege and immunity laws challenge the integrity of democracy by violating citizens’ rights and hindering each person’s ability to exercise and act upon personal decisions. Ohio audit privilege also raises issues of federal protections and how the state abides by these protections. In the same testimony mentioned above, Altman
points to this very issue when stating that the “debate about who has custody of the truth and who has the right of access to the truth is not a mere policy dispute. It is a dispute that, at its heart, requires interpretation of federal environmental law and regulation.” In interpreting the federal environmental law, it is clear that state audit privilege and immunity laws are not legally sound (D. David Altman Co., 1998).

The implications of Ohio audit privilege and the threats it poses to our concept of democracy and practice of civil liberties have real world ramifications. For instance, issues arise with property ownership. One of the most obvious concerns to citizens who are property owners is the protection and wellbeing of their property. The concept of property ownership is a fundamental value that dates back to the founding of the United States and stimulates strong feelings and emotions among the American public. The right to pursue, maintain, and have freedom of decision over one’s property is held in high regard. With audit privilege the rights associated with property ownership are greatly compromised. People lack awareness and access to information that directly impacts the wellbeing and monetary value of their property.

In detailing the issues with rights to property, a potential scenario can be examined. A young family has worked hard for several years to save money and buy property and a house where they plan to raise their family and live for the greater part of the future. In doing this, the family becomes somewhat dependent on the property, utilizing all of their savings and making what seems to be a wise investment in the home and property. The property that the family has invested in and made a commitment to is in close proximity to a local factory. Due to Ohio audit privilege, the family is unaware of some of the environmental factors that may negatively affect the wellbeing and value of their property. Even when becoming suspicious of environmental noncompliance, the
family is prevented from investigating. Suppose the environmental threats caused by the factory become increasingly worse or extensive environmental issues are uncovered. After putting their life savings into their property, the family suffers a financial loss. Their property value has taken a hit, other neighbors have moved selling houses for far below previous market values and thus the family is financially stuck. Not only has the house and property failed in terms of their hopes for the future, but they now face extreme obstacles in trying to move or better their living situation.

In this hypothetical situation, which is an actual result of Ohio audit privilege and similar to the situation my parents and family found themselves in, individuals and families lose the ability to manage the wellbeing of their property and make important decisions regarding their property and finances. The right of people to exercise the privileges and enjoyment that come with property ownership is compromised at the hands of corporations whose contaminants have trespassed onto their property. Throughout the state of Ohio, corporations are granted extensive privilege to hide information that directly impacts the property rights that we hold at such a high regard in the United States.

Aside from hampering individuals’ ability to fully exercise property rights, Ohio audit privilege presents situations of even greater concern. In examining prior case studies and thinking about the ramifications of audit privilege, it is clear that there are major public health concerns that accompany the pollution secrecy provided through audit privilege. In a case study provided by David Altman in The Danger of Audit Privilege Laws: An Open Letter from Ohio and Colorado Petitioners to USEPA Administrator Browner public health concerns are personalized. Altman describes the situation Nancy Hetler found herself in when attempting to access information regarding
toxic gas releases emitted by the large steel mill next to where she and her family lived. Hetler sought full disclosure of the nature and extent of coke oven gases after her son became deathly ill. Despite the extreme circumstances of this situation, the large steel mill plant argued that the releases did not amount to quantities in need of reporting, meaning the information would not be made accessible to her. Even with her son being ill, Hetler only received partial disclosure and this access to information was not provided until after an EPCRA and RCRA lawsuit was filed (D. David Altman Co., 1997).

It is not difficult to imagine situations where it is even more challenging to uncover and address public health concerns. Suppose a child becomes seriously ill. The cause of this illness is unknown and the child, their family, and medical professionals perform endless tests and research attempting to understand the illness and its cause so that the child can be treated. While the child and family live close to a manufacturing plant, they have never been alerted to public health concerns stemming from emissions by the neighborhood manufacturing plant. While the plant may know of environmental harms caused by their environmental practices, they do not release this information to the public as they are under no legal obligation to do so. One may argue that there is a moral obligation, however a moral or ethical obligation is not contractual. So while a child is sick, the very information that could be used to treat the child and may have even prevented the illness in the first place, is withheld from the family. With this scenario, it is clear that problematic situations of environmental pollution are further compounded when secrecy is involved. While situations of environmental contamination are already unfortunate, secrecy poses greater obstacles to addressing and solving the unfortunate situations.
When considering this, the social justice implications of environmental audit privilege should also not go overlooked. With low income and minority communities being disproportionately impacted by environmental hazards, Ohio audit privilege is serving to create further problems for under resourced and underrepresented communities attempting to address environmental concerns in their communities. While this is not to say that all Ohio citizens are not vulnerable to the threats of Ohio audit privilege, it is likely that this law has the most devastating impact on communities facing issues of environmental racism.

In understanding the many negative implications of Ohio audit privilege, the public health concerns that arise from environmental contamination and audit privilege are possibly the most critical and are ultimately the driving force behind this research and much of the action to abolish Ohio audit privilege. It is imperative for people to be alerted of public health concerns and have full information when these concerns are present. While all cases of pollution and linked sickness and health effects are concerning, secrecy related to these health concerns creates even more troubling situations. Complete information needs to be available so that people are able to take appropriate action in regard to their health.

It is clear that the issues arising with the Ohio state environmental audit privilege are more than a debate over policy or disagreement over the best method of achieving environmental compliance. Ohio audit privilege has far reaching effects. There are real people being impacted and hurt. With this pollution secrecy authorized by the state, the health and wellbeing of Ohio citizens is being compromised. Essentially, we are providing measures for corporations to damage our property and make us sick, and then obstruct principles of our democracy and hide it from us.
B. Conclusion

As a result of state audit privilege, environmental law is circumvented in the state of Ohio. The federal guarantees regarding citizen action and enforcement of the law that are outlined in federal environmental statutes are undermined and people are made more vulnerable to environmental and public health threats. The very basis of environmental law that regular people depend on for the health and wellbeing of their families, communities, and local environments is weakened to benefit private enterprise. The right and ability of people to participate in the enforcement of environmental law and democracy has essentially been bought by business and industry. The liberty of individuals to make well informed decisions regarding their families, property, and local environment has been denied.

In *Environmental Audit Privilege Laws: Stripping the Public’s Right to Know*, Ohio audit privilege laws are examined based on the ways in which the laws neglect the public’s right to know environmental information and hinder the ability of the public to take action to enforce environmental law. In analyzing how audit privilege violates the rights of citizens, the author suggests several avenues that could be used to bypass the major issues presented with the audit privilege and immunity laws. While action on behalf of the state legislature to overturn audit privilege is considered, it is improbable because the state legislature is responsible for authorizing and repeatedly extending audit privilege. Federal amendments to address audit privilege concerns are more likely to occur. One possibility for federal change is for Congress to expand the mandatory reporting requirements of federal statutes. While this may be more likely than state action overturning audit privilege, it would be extremely ineffective in terms of time. Along with the factor of time, issues may arise with broadening regulations as certain areas of
environmental enforcement are designated specifically to the state (Lukas Jackson, J., 2001).

Aside from state and federal legislative changes, state audit privilege statutes could be repealed through grassroots efforts. For these grassroots efforts to be an effective and realistic mode of change, there would need to be significant action and work on the part of environmental groups and public health advocates. While public support and pressure could be garnered with these efforts, it would be challenging to raise enough money to staff and launch the necessary campaign opposing audit privilege statutes. Along with these challenges, the competition presented by industry lobbying would be a major obstacle. It is also important to note that state audit privilege exists in twenty-two states, meaning there would need to be twenty-two separate and equally successful campaigns carried out (Lukas Jackson, J., 2001).

In considering avenues of change, the author advocates for a different and potentially more realistic option: the enactment of federal legislation prohibiting the use of state audit privilege. Ideally, this legislation would be similar to the USEPA environmental audit policy. Introducing and enacting such legislation would offer the business benefits of audit privilege while also banning the excessive leniency and privilege that poses threats to public and environmental health. As a result of the supremacy clause, not only would current audit privilege be overturned, but future state attempts to enact audit privilege would be prevented. Enacting federal environmental legislation to overturn state audit privilege would guarantee that the public and regulatory agencies could obtain the results of audits to ensure environmental compliance and protection (Lukas Jackson, J., 2001).
On the subject of a solution to state environmental audit privilege, David Altman suggests that four parameters must be met by the state and in the case that these parameters are not met, he urges the USEPA to take action. Firstly, factual information about pollution must be made available to the public and specifically those directly impacted. Along with this, threats to human and environmental health must be made accessible to the public and not hidden or withheld as privileged. There must be legal assurance that violators of environmental law acting with bad intentions are held accountable for their wrongdoing. Finally, there must be protections for citizens in terms of using pollution information when seeking environmental compliance and safeguarding the health and wellbeing of their families and communities. If these parameters are not met by state authority, Altman proposes that the federal government deny use of the federal audit privilege program (D. David Altman Co., 1998).

It is absolutely essential for the state to meet the parameters outlined by Altman. When considering these four stipulations, the state is not being asked to act excessively or in a manner that offers more protections to the public than authorized by law. The parameters set forth merely ask that the state government comply with federal law and respect the rights that are granted to the people of the United States. With respect to the situation at hand, it is essential for the USEPA and the federal government to step in. It is clear that federal law is being violated with Ohio audit privilege. Furthermore, it is concerning that the USEPA and the federal authorities have thus far, failed to take action in response to the state audit privilege laws that are in effect in twenty-two states throughout the nation. While the USEPA and the Department of Justice are openly opposed to state audit privilege laws like those of Ohio, their lack of action is a failure to the people of Ohio and the twenty-one other states with similar laws.
USEPA action to uphold federal law and abolish state audit privilege is the most promising action in terms of overcoming the threats presented with Ohio audit privilege. As an alternative to state audit privilege laws, policies that reflect many of the same components of the federal audit privilege program should be implemented. While policies similar to the federal audit privilege program offer significant industry benefit and incentive, right to know guarantees and the role of citizen enforcement are still maintained. These policies would be a good jumping off point in terms of improving environmental compliance and respecting the rights of citizens, however many of the same concerns regarding environmental compliance and the rights of citizens that exist with state audit privilege also exist with the federal program. As an alternative to audit privilege and measures of self-policing, I suggest increased citizen and community enforcement of environmental regulations through heightened citizen-policing.

It is clear that overburdened, understaffed, and under resourced government agencies cannot comprehensively carryout the enforcement and assurance of environmental compliance. The EPA and governmental agencies should not be expected to do so either. The task of inspecting every regulated facility for every regulation next to impossible. Rather than relying solely on self-policing as an alternative to this government inspection and enforcement, avenues for greater citizen monitoring and enforcing should be established. In place of offering pro-industry incentives, like audit privilege, there should greater opportunities for public involvement and participation in the regulatory and policing process. Rather than compromising the rights afforded citizens by incentivizing self-policing, the foundation of environmental law that is citizen involvement should be employed to a greater extent. Creating avenues for greater citizen participation and involvement is extremely advantageous in terms of regulation as
citizens and community members who are impacted by environmental compliance at the local level have a vested interest in fulfilling the objectives of a safe and healthy environment. It is not outlandish to say that self-interest is the greatest motivation in enforcing environmental compliance. Individuals personally impacted by the circumstances of their local environmental are more likely to stand up for themselves, their families, and their community than those hired by private industry to perform self-assessments of a facility or government workers with the duty of inspecting regulated entities.

With this alternative there are many challenges. In fact, there are most likely more obstacles with increased citizen enforcement than there are with self-policing and the traditional governmental enforcement. Some of the major challenges are that citizens do not have the time, education, or resources to carryout inspections, citizens may simply not desire to perform such duties, and industry and regulated entities may be opposed to such policing.

In considering these challenges, several solutions come to mind. Firstly, businesses and industry must be forced to become more transparent in terms of environmental performance and compliance. Citizens, people living near regulated facilities should be authorized to question, visit, and inspect facilities and the practices carried out. The USEPA and state EPA should redirect some of the budget and work that goes into inspection, to citizen education and training in relation to inspections, reporting, and participation in environmental enforcement. Citizens can then be educated and trained on how to carryout inspections, file reports and complaints, and participate in enforcement and decisions regarding environment wellbeing and public health.
Citizen inspections and assessments will not serve to replace all EPA inspections and oversight, they will merely add to EPA efforts and help to tip the EPA off to facilities that need further inspection and oversight. This essentially extends the workforce of the EPA; it is the same principle employed with self-policing. Citizen policing shall not be as specialized or in depth as EPA oversight. The point here is to train citizens so that they are able to visit facilities and report red flags. As mentioned, greater openness in terms of citizens visiting and inspecting facilities is required. In terms of safety and hazards in visiting facilities, the same precautions will be taken as when EPA employees carry out inspections. Along with this, allowing greater citizen inspection and enforcement of less dangerous facilities will free the EPA up to focus on facilities that citizens are not able to visit and inspect. While industry may be apprehensive, citizen policing will encourage greater compliance as industry will not only be held accountable to the people, but will be vulnerable to more extensive inspection and oversight. While the private sector may contend that this hinders business practices and the free-market, it is the cost of doing business; as a people, through the passage of federal statutes, we have prioritized the welfare of the public and the environment.

Given that community members are voluntarily carrying out these inspections, it is likely that economically disadvantaged communities may not have the time and mobility to utilize the avenues of citizen policing that I propose. In response to this, I suggest that the EPA, through Environmental Justice screening tools, that have recently been developed, identify and focus on these communities more heavily in terms of oversight and providing education and resources (US EPA, January 1, 2014). \(^3\) In connection to community members not having the ability to carry out the policing that I suggest.

\(^3\) EJSCREEN is a screening and mapping tool developed by the USEPA in 2014 that takes demographics into consideration when examining environmental indicators and environmental hazards. The tool is for EPA and public use. There has recently been an effort to incorporate this tool into permitting processes.
suggest, there may be communities and citizens that do not wish to perform this policing. This decision is completely acceptable and understandable. However the ability to carry out such policing must be available to community members. This can be equated to other areas of democratic participation. For instance, citizens are not forced to vote in elections, however those qualifying to vote must have the opportunity to do so.

Ultimately, we need to foster greater community awareness for the role of citizen enforcement in environmental law. Community members need to be activated in order to employ the principles of environmental law that already exist. EPA efforts should be redirected to carrying out greater community education in terms of how the public and community members can become involved in environmental compliance. There should also be greater programing in terms of community participation in environmental compliance and enforcement.

In the present, there is a pressing need to alert the public that audit privilege exists; people need to be informed of the information that can be withheld from them. The public needs to first and foremost be made aware of the information that they do not know. Right now, people *do not even know what they do not know*. Spreading awareness about Ohio audit privilege is the first avenue of potentially changing this law. Awareness can be achieved by informing attorneys who practice environmental law, contacting environmental and community groups, publicizing documents and writing letters to the editor about Ohio audit privilege, reaching out to law school and college student organizations in the state, and contacting representatives. This awareness can then be transferred into social action that leads to responsive action from the legislature or federal government.
Sharing my personal story, carrying out this research, and writing this thesis is my first step in alerting the public and seeking social change to address the secrecy that exists in Ohio environmental law. I am seeking change to address this secrecy as I do not wish for other families and communities to be made unaware of environmental hazards that may pose significant danger or hardship. Without question, all people should be able to enjoy the liberty of making fully informed decisions regarding the wellbeing of their families, communities, and local environments. Along with this, all people should be able to exercise the concept of democracy that is inherent in our society by participating in the avenues of citizen action and enforcement of environmental that are granted to us.
References


Ohio Revised Code

3745.70 Environmental audit definitions.

As used in sections 3745.70 to 3745.73 of the Revised Code:

(A) "Environmental audit" means a voluntary, thorough, and discrete self-evaluation of one or more activities at one or more facilities or properties that is documented; is designed to improve compliance, or identify, correct, or prevent noncompliance, with environmental laws; and is conducted by the owner or operator of a facility or property or the owner's or operator's employee or independent contractor. An environmental audit may be conducted by the owner or operator of a facility or property, the owner's or operator's employees, or independent contractors. Once initiated, an audit shall be completed within a reasonable time, not to exceed six months, unless a written request for an extension is approved by the head officer of the governmental agency, or division or office thereof, with jurisdiction over the activities being audited based on a showing of reasonable grounds. An audit shall not be considered to be initiated until the owner or operator or the owner's or operator's employee or independent contractor actively has begun the self-evaluation of environmental compliance.

(B) "Activity" means any process, procedure, or function that is subject to environmental laws.

(C) "Voluntary" means, with respect to an environmental audit of a particular activity, that both of the following apply when the audit of that activity commences:

(1) The audit is not required by law, prior litigation, or an order by a court or a government agency;

(2) The owner or operator who conducts the audit does not know or have reason to know that a government agency has commenced an investigation or enforcement action that concerns a violation of environmental laws involving the activity or that such an investigation or enforcement action is imminent.

(D) "Environmental audit report" means interim or final data, documents, records, or plans that are necessary to an environmental audit and are collected, developed, made, and maintained in good faith as part of the audit, and may include, without limitation:

(1) Analytical data, laboratory reports, field notes and records of observations, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, computer-generated or electronically recorded information, maps, charts, graphs, and surveys;

(2) Reports that describe the scope, objectives, and methods of the environmental audit, audit management policies, the information gained by the environmental audit, and conclusions and recommendations together with exhibits and appendices;
(3) Memoranda, documents, records, and plans analyzing the environmental audit report or discussing implementation, prevention, compliance, and remediation issues associated with the environmental audit.

"Environmental audit report" does not mean corrective or remedial action taken pursuant to an environmental audit.

(E) "Environmental laws" means sections 1511.02 and 1531.29, Chapters 3704., 3734., 3745., 3746., 3750., 3751., 3752., 6109., and 6111. of the Revised Code, and any other sections or chapters of the Revised Code the principal purpose of which is environmental protection; any federal or local counterparts or extensions of those sections or chapters; rules adopted under any such sections, chapters, counterparts, or extensions; and terms and conditions of orders, permits, licenses, license renewals, variances, exemptions, or plan approvals issued under such sections, chapters, counterparts, or extensions.

Effective Date: 09-30-1998
Ohio Revised Code

3745.71 Privilege of nondisclosure as to environmental audit.

(A) Except as otherwise provided in division (C) of this section, the owner or operator of a facility or property who conducts an environmental audit of one or more activities at the facility or property has a privilege with respect to both of the following:

(1) The contents of an environmental audit report that is based on the audit;

(2) The contents of communications between the owner or operator and employees or contractors of the owner or operator, or among employees or contractors of the owner or operator, that are necessary to the audit and are made in good faith as part of the audit after the employee or contractor is notified that the communication is part of the audit.

(B) Except as otherwise provided in or ordered pursuant to this section, information that is privileged under this section is not admissible as evidence or subject to discovery in any civil or administrative proceeding and a person who possesses such information as a result of conducting or participating in an environmental audit shall not be compelled to testify in any civil or administrative proceeding concerning the privileged portions of the environmental audit.

(C) The privilege provided in this section does not apply to criminal investigations or proceedings. Where an audit report is obtained, reviewed, or used in a criminal proceeding, the privilege provided in this section applicable to civil or administrative proceedings is not waived or eliminated. Furthermore, the privilege provided in this section does not apply to particular information under any of the following circumstances:

(1) The privilege is not asserted with respect to that information by the owner or operator to whom the privilege belongs.

(2) The owner or operator to whom the privilege belongs voluntarily testifies, or has provided written authorization to an employee, contractor, or agent to testify on behalf of the owner or operator, as to that information.

(3) A court of record in a civil proceeding or the tribunal or presiding officer in an administrative proceeding finds, pursuant to this section, that the privilege does not apply to that information.

(4) The information is required by law to be collected, developed, maintained, reported, disclosed publicly, or otherwise made available to a government agency.

(5) The information is obtained from a source other than an environmental audit report, including, without limitation, observation, sampling, monitoring, a communication, a record, or a report that is not part of the audit on which the audit report is based.
(6) The information is collected, developed, made, or maintained in bad faith or for a fraudulent purpose.

(7) The owner or operator to whom the privilege belongs waives the privilege, in whole or in part, explicitly or by engaging in conduct that manifests a clear intent that the information not be privileged. If an owner or operator introduces part of an environmental audit report into evidence in a civil or administrative proceeding to prove that the owner or operator did not violate, or is no longer violating, any environmental laws, the privilege provided by this section is waived with respect to all information in the audit report that is relevant to that issue.

(8)

(a) The information shows evidence of noncompliance with environmental laws and the owner or operator fails to do any of the following:

(i) Promptly initiate reasonable efforts to achieve compliance upon discovery of the noncompliance through an environmental audit;

(ii) Pursue compliance with reasonable diligence;

(iii) Achieve compliance within a reasonable time.

(b) "Reasonable diligence" includes, without limitation, compliance with section 3745.72 of the Revised Code.

(9) The information contains evidence that a government agency federally authorized, approved, or delegated to enforce environmental laws has reasonable cause to believe is necessary to prevent imminent and substantial endangerment or harm to human health or the environment.

(10) Any circumstance in which both of the following apply:

(a) The information contains evidence regarding an alleged violation of environmental laws and a government agency charged with enforcing any of those laws has a substantial need for the information to protect public health or safety or to prevent substantial harm to property or the environment.

(b) The government agency is unable to obtain the substantial equivalent of the information by other means without unreasonable delay or expense.

(11) The information consists of personal knowledge of an individual who did not obtain that information as part of an environmental audit.

(12) The information is not clearly identified as part of an environmental audit report. For purposes of this section, clear identification of information as part of an environmental audit report includes, without limitation, either of the following:
(a) The information is contained in a document and the front cover, the first page, or a comparable part of the document is prominently labeled with "environmental audit report: privileged information" or substantially comparable language.

(b) The information is contained in an electronic record and the record is programmed to display or print prominently "environmental audit report: privileged information" or substantially comparable language before the privileged information is displayed or printed.

(13) The information existed prior to the initiation of the environmental audit under division (A) of section 3745.70 of the Revised Code.

(D) If the privilege provided in this section belongs to an owner or operator who is not an individual, the privilege may be asserted or waived, in whole or in part, on behalf of the owner or operator only by an officer, manager, partner, or other comparable person who has a fiduciary relationship with the owner or operator and is authorized generally to act on behalf of the owner or operator or is a person who is authorized specifically to assert or waive the privilege.

(E) A person asserting the privilege provided in this section has the burden of proving the applicability of the privilege by a preponderance of the evidence. If a person seeking disclosure of information with respect to which a privilege is asserted under this section shows evidence of noncompliance with environmental laws pursuant to division (C)(8) of this section, the person asserting the privilege also has the burden of proving by a preponderance of the evidence that reasonable efforts to achieve compliance with those laws were initiated promptly and that compliance was pursued with reasonable diligence and achieved within a reasonable time.

(F) When determining whether the privilege provided by this section applies to particular information, a court of record that is not acting pursuant to division (G) of this section, or the tribunal or presiding officer in an administrative proceeding, shall conduct an in camera review of the information in a manner consistent with applicable rules of procedure.

(G)

(1) The prosecuting attorney of a county or the attorney general, having probable cause to believe, based on information obtained from a source other than an environmental audit report, that a violation has been committed under environmental laws for which a civil or administrative action may be initiated, may obtain information with respect to which a privilege is asserted under this section pursuant to a search warrant, subpoena, or discovery under the Rules of Civil Procedure. The prosecuting attorney or the attorney general immediately shall place the information under seal and shall not review or disclose its contents.

(2) Not later than sixty days after receiving an environmental audit report under division (G)(1) of this section, the prosecuting attorney or the attorney general may file with the court of common pleas of a county in which there is proper venue to bring a civil or
administrative action pertaining to the alleged violation a petition requesting an in camera hearing to determine if the information described in division (G)(1) of this section is subject to disclosure under this section. Failure to file such a petition shall cause the information to be released to the owner or operator to whom it belongs.

(3) Upon the filing of a petition under division (G)(2) of this section, the court shall issue an order scheduling an in-camera hearing, not later than forty-five days after the filing of the petition, to determine if any or all of the information described in division (G)(1) of this section is subject to disclosure under this section. The order shall allow the prosecuting attorney or the attorney general to remove the seal from the report in order to review it and shall place appropriate limitations on distribution and review of the report to protect against unnecessary disclosure.

(4) The prosecuting attorney or the attorney general may consult with government agencies regarding the contents of the report to prepare for the in-camera hearing. Information described in division (G)(1) of this section that is used by the prosecuting attorney or the attorney general to prepare for the in-camera hearing shall not be used by the prosecuting attorney, the attorney general, an employee or agent of either of them, or an agency described in division (G)(4) of this section in any investigation or proceeding against the respondent, and otherwise shall be kept confidential, unless the information is subject to disclosure under this section.

(5) The parties may stipulate that information contained in an environmental audit report is or is not subject to disclosure under this section.

(6) If the court determines that information described in division (G)(1) of this section is subject to disclosure under this section, the court shall compel disclosure under this section of only the information that is relevant to the proceeding described in division (G)(1) of this section.

(H) Nothing in this section affects the nature, scope, or application of any privilege of confidentiality or nondisclosure recognized under another section of the Revised Code or the common law of this state, including, without limitation, the work product doctrine and attorney-client privilege.

(I) The privilege provided by this section applies only to information and communications that are part of environmental audits initiated after March 13, 1997, in accordance with the time frames specified in division (A) of section 3745.70 of the Revised Code.

Amended by 130th General Assembly File No. TBD, HB 483, §101.01, eff. 9/15/2014.

Effective Date: 02-09-2004; 2008 SB372 01-06-2009
Appendix C

Ohio Revised Code

3745.72 Voluntary disclosure of information - immunity.

(A) The owner or operator of a facility or property who conducts an environmental audit of the facility or property and promptly and voluntarily discloses information contained in or derived from an audit report that is based on the audit and concerns an alleged violation of environmental laws to the director of the state agency that has jurisdiction over the alleged violation is immune from any administrative and civil penalties for the specific violation disclosed, except that where the disclosed violation has resulted in significant economic benefit to the owner or operator of the facility or property, there is no immunity for the economic benefit component of the administrative and civil penalties for that violation. An owner or operator asserting entitlement to such immunity has the burden of proving that entitlement by a preponderance of the evidence.

(B) For the purposes of this section, a disclosure of information is voluntary with respect to an alleged violation of environmental laws only if all of the following apply:

(1) The disclosure is made promptly after the information is obtained through the environmental audit by the owner or operator who conducts the environmental audit.

(2) A reasonable, good faith effort is made to achieve compliance as quickly as practicable with environmental laws applicable to the information disclosed.

(3) Compliance with environmental laws applicable to the information disclosed is achieved as quickly as practicable or within such period as is reasonably ordered by the director of the state agency that has jurisdiction over the alleged violation.

(4) The owner or operator cooperates with the director of the state agency that has jurisdiction over the alleged violation in investigating the cause, nature, extent, and effects of the noncompliance.

(5) The disclosure is not required by law, prior litigation, or an order by a court or a government agency.

(6) The owner or operator who makes the disclosure does not know or have reason to know that a government agency charged with enforcing environmental laws has commenced an investigation or enforcement action that concerns a violation of such laws involving the activity.

(C) For the purposes of this section, a disclosure shall be in writing, dated, and hand delivered or sent by certified mail to the director of the state agency that has jurisdiction over the alleged violation, and shall contain all of the following in a printed letter attached to the front of the disclosure:

(1) The name, address, and telephone number of the owner or operator making the disclosure;
(2) The name, title, address, and telephone number of one or more persons associated with the owner or operator who may be contacted regarding the disclosure;

(3) A brief summary of the alleged violation of environmental laws, including, without limitation, the nature, date, and location of the alleged violation to the extent that the information is known by the owner or operator;

(4) A statement that the information is part of an environmental audit report and is being disclosed under section 3745.72 of the Revised Code in order to obtain the immunity provided by that section.

(D) This section does not provide immunity from the payment of damages for harm to persons, property, or the environment; the payment of reasonable costs incurred by a government agency in responding to a disclosure; or responsibility for the remediation or cleanup of environmental harm under environmental laws.

(E) The immunity provided by this section does not apply under any of the following circumstances:

(1) Within the three-year period prior to disclosure, the owner or operator of a facility or property has committed significant violations that constitute a pattern of continuous or repeated violations of environmental laws, environmental related settlement agreements, or environmental related judicial orders and that arose from separate and distinct events. For the purposes of division (E)(1) of this section, a pattern of continuous or repeated violations also may be demonstrated by multiple settlement agreements related to substantially the same alleged significant violations that occurred within the three-year period immediately prior to the voluntary disclosure. Determination of whether a person has a pattern of continuous or repeated violations under division (E)(1) of this section shall be based on the compliance history of the property or specific facility at issue.

(2) With respect to a specific violation, the violation resulted in serious harm or in imminent and substantial endangerment to human health or the environment.

(3) With respect to a specific violation, the violation is of a specific requirement of an administrative or judicial order.

(F) The immunity provided by this section applies only to disclosures made concerning environmental audits initiated after March 13, 1997, in accordance with the time frames specified in division (A) of section 3745.70 of the Revised Code.

(G) The immunity provided by this section applies to a person who makes a good faith disclosure to a state agency under this section even though another state agency is determined to have jurisdiction over an alleged violation of environmental laws indicated in the disclosure.

(H) Each state agency that receives a disclosure under this section promptly shall record receipt of the disclosure, determine whether it has jurisdiction over the alleged violation of environmental laws indicated in the disclosure, and, if it does not have such
jurisdiction, deliver the disclosure documents to the director of a state agency that has jurisdiction over the alleged violation. If a disclosure indicates alleged violations of environmental laws that are under the jurisdiction of more than one state agency, the state agency that first receives the disclosure and has jurisdiction over any of the alleged violations promptly shall notify the director of each state agency that has jurisdiction over any of such alleged violations. The director of each state agency that receives a disclosure under this section, or is notified by another state agency that the director's agency has jurisdiction over an alleged violation of environmental laws indicated in the disclosure, promptly shall deliver written notice of that fact by certified mail to the owner or operator who made the disclosure. The notice shall identify the state agency that sends the notice; state the name, title, address, and telephone number of a person in the agency whom the owner or operator may contact regarding the disclosure; and state the name, address, and telephone number of the director of any other state agency notified about the disclosure because that agency has jurisdiction over an alleged violation of environmental laws indicated in the disclosure.

Amended by 130th General Assembly File No. 25, HB 59, §101.01, eff. 9/29/2013.

Effective Date: 03-09-2004; 2008 SB372 01-06-2009
1. Backyard

This image shows the backyard of my family’s property. The property of Vernay Inc. borders the back of this yard. This property is on the plume of contamination caused by the illegal waste management practices of Vernay Inc.

2. Environmental Monitoring and Investigation

Vernay Inc. hired hydrogeologists to drill a well as part of the process to delineate the plume of contamination. This is taking place in front of the house I was living in.
3. Oversight

As part of the lawsuit, a hydrogeologist hired by the plaintiffs was on site to oversee the construction of the 100 foot well.

4. Well Construction

This is another image depicting the construction of the monitoring well in front of our property.
This is the neighborhood school bus stop on the first day of school in August of 1998. This photo was taken around the same time that contamination of the neighborhood was being uncovered by residents. Every child photographed in the image lived on or in close proximity to the plume of contamination caused by Vernay, Inc. I am the angry child holding the stop sign.