KRC TESTIMONY IN OPPOSITION TO HOUSE BILL 136

Mr. Chairman and members of the Committee,

Good morning to you all- my name is Audrey Ernstberger, a staff attorney and lobbyist for Kentucky Resources Council. With me is my colleague, Byron Gary, a program attorney with KRC who has almost a decade of experience working with the Clean Air Act as an employee of the Air Pollution Control District and with Kentucky Resources Council. He is here today providing his substantive expertise. For those of you who aren't familiar, Kentucky Resources Council is a non-profit and nonpartisan group of lawyers, policy experts, and advocates working for environmental quality, justice, and health across the Commonwealth.

We appreciate this opportunity to appear before you this morning, to ask that you reject this version of HB136. We have concerns regarding this bill and have shared them with the Sponsor, although unfortunately, we haven't had a chance to work through them, but we still welcome that opportunity. We also have substantive concerns related to the underlying law, concerns the EPA has shared in the past, the application of which this bill seeks to expand.

HB136 seeks to extend the evidentiary privilege for environmental audit reports found in KRS 224.1-040- which currently only applies to facilities regulated by the Kentucky Energy and Environment Cabinet- to facilities regulated by Air Pollution Control Districts under KRS Chapter 77. Louisville Metro Air Pollution Control District is the only one currently active.

First, some quick background on the environmental audit privilege and how it currently functions in the state. This privilege is, essentially, a safeguard for industries- it prevents the Cabinet from using audit reports of environmental compliance, conducted by companies, as evidence against them. It also prohibits the Cabinet from seeking penalties against companies that voluntarily disclose violations under certain conditions.

The stated purpose of the privilege is to encourage voluntary investigations and disclosures related to environmental compliance. HB 136 would extend both the privilege and protection from penalty to companies regulated by the Louisville Metro Air Pollution Control District, bringing renewed attention to the problematic aspects of this statute.

We have two primary concerns here. First, is that the law rewards bad behavior that puts community health at risk. In many circumstances companies are already required by law to routinely investigate their compliance with environmental laws and disclose noncompliance. Granting a privilege for such disclosures may shield companies from consequences for violations, essentially allowing them a free pass. The law could ***disincentivize*** industries from taking steps to eliminate violations, seeing as they won't face penalty. This could also further perpetuate environmental injustices borne by some Kentucky communities.

The second is more of a substantive legal issue, in that we believe aspects of this bill in its current form are inconsistent with Kentucky's obligations as administrators of the Title V

program of the Clean Air Act. This could compromise Kentucky's delegated status to administer the Title V program.

Title V of the Clean Air Act (CAA), governs permitting for large industrial air pollution sources.

This program requires that state permitting authorities issue permits and assure that each source required to have a permit is in compliance with each applicable standard, regulation or requirement. Permitting authorities are also required to retain authority to "recover civil penalties." In fact, the EPA stated in its Audit Policy Program FAQ, CAA violations are not generally able to be "voluntarily discovered" because facilities regulated under Title V are already required to ensure and certify compliance with "all applicable requirements" at least annually.

When this provision of the KRS Chapter 224 was originally adopted in the early 90s, it resulted in the EPA issuing a Notice of Deficiency alleging that it "unduly restricted Kentucky's ability to adequately administer and enforce the criminal enforcement, civil penalty, and public access provisions of its Title V program." The notice stated that unless concerns were remedied, the US EPA could withdraw approval of Kentucky's authority to administer the program.

This is the scenario we fear this bill, as drafted, could create and the result we wish to avoid. Kentucky, and local Air Pollution Control Districts, administering the CAA Title V program – which includes local inspections and local enforcement- is preferable for environmental and industry interests alike. The alternative, losing delegated status, would mean companies needing a Title V permit, whether they are in Jefferson County or not, would have to obtain it through the EPA office in Atlanta- incurring extra time and money.

While we still take issue with the underlying substance of the bill, we believe that some concerns could be addressed through amendments that would reduce the possibility that the proposed expansion of this privilege would interfere with KY's ability to administer the Title V program. Possible amendments include:

- Distinguishing the definition of "environmental audit" and "environmental audit report" from ordinary required reporting (including that which identifies a possible violation) required by permits under the CAA.

- Distinguishing the definition of "voluntary discovery." Specifically, that the definition should exclude monitoring, recordkeeping, reporting, testing, sampling, visual observations, etc. required under a Title V permit.

- Excluding legally-mandated monitoring, recordkeeping, reporting, testing, sampling, visual observations, etc. from the existing conditions for prohibiting penalties for voluntarily-disclosed violations.

- Requiring public disclosure of violations uncovered through this policy, even if the audit report itself were privileged, which would help with public perception and transparency issues.

- Finally, the bill could create a new section to avoid creating conflict with existing provisions, for example, KRS 77.990, Penalties, which plainly states that "[a] person who violates any provision of this chapter shall be liable for the assessment by the district of a civil penalty not to exceed ten thousand dollars ($10,000)."

It is for the reasons provided, we request that you reject HB136 as drafted.

Thank you for your time and service to the Commonwealth. Byron and I would be happy to answer any questions that you might have.