

STATE OF OKLAHOMA

1st Session of the 45th Legislature (1995)

HOUSE BILL NO. 1388

By: Rice

AS INTRODUCED

An Act relating to environment and natural resources; creating the Oklahoma Voluntary Environmental Audit Act; providing purpose; defining terms; providing exemptions; providing for disclosure; specifying privileges; providing for responsibility for demonstrating applicability of privilege; providing for disclosure for certain activities and crimes; providing for certain petitions; specifying certain procedures; providing for exemptions to disclosure authorization; providing exceptions; providing for liability; providing for voluntary disclosure; providing for codification; and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

Part 4. Oklahoma Voluntary Environmental Audit Act.

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-4-101 of Title 27A, unless there is created a duplication in numbering, reads as follows:

This act shall be known and may be cited as the "Oklahoma Voluntary Environmental Audit Act".

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-4-102 of Title 27A, unless there is created a duplication in numbering, reads as follows:

A. The Oklahoma Legislature hereby finds and declares that:

1. Protection of the environment rests principally on the public's voluntary compliance with environmental laws;

2. Voluntary compliance is most effectively achieved through the implementation of regular self-evaluation activities, such as audits of compliance status and management systems to assure compliance; and

3. It is in the public interest to encourage such activities by assuring limited protection of audit findings and of fair treatment of those who report audit findings to regulatory authorities.

B. In order to encourage owners and operators of facilities and other persons conducting any environmental activity regulated by a state environmental agency to conduct voluntary internal environmental audits of their compliance programs and management systems and to assess and improve compliance with such statutes, an environmental audit privilege is recognized to protect the confidentiality of communications relating to such voluntary internal environmental audits.

C. An environmental audit report shall be privileged, shall not be subject to discovery, and shall not be admissible as evidence in any civil, criminal or administrative proceeding, except as provided in Section 4 of this act.

D. Unless such disclosure constituted a waiver of the privilege under Section 4 of this act, if an environmental audit report, or any part thereof, is subject to the privilege recognized in this section, neither the person who conducted the audit or anyone to whom the audit results are disclosed can be compelled to testify regarding any matter which was the subject of the audit and which is addressed in a privileged part of the environmental audit report.

SECTION 3. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-4-103 of Title 27A, unless there is created a duplication in numbering, reads as follows:

As used in the Oklahoma Voluntary Environmental Audit Act:

1. "Environmental audit" means a voluntary, internal and comprehensive evaluation of environmental activities or facilities regulated to any state environmental agency or of management systems related to such facilities or activities that is designed to identify and prevent noncompliance and to improve compliance with such statutes. An environmental audit may be conducted by the owner or operator of such facility, by the owners' or operator's employees or by independent contractors;

2. "Environmental audit report" means a set of documents, each labeled "Environmental Audit Report: Privileged Document" and prepared as a result of an environmental audit. An environmental audit report may include 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, provided such supporting information is collected or developed for the primary purpose and in the course of an environmental audit. An environmental audit report, when completed, may have three components:

- a. an audit report prepared by the auditor, which may include the scope of the audit, the information gained in the audit, conclusions and recommendations, together with exhibits and appendices,
- b. memoranda and documents analyzing portions or all of the audit report and potentially discussing implementation issues, and

- c. an implementation plan that addresses correcting past noncompliance, improving current compliance and preventing future noncompliance; and

3. "Environmental crime" means a crime described by the Environmental Crimes Act.

SECTION 4. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-4-104 of Title 27A, unless there is created a duplication in numbering, reads as follows:

A. The privilege described in Section 2 of this act shall not apply to the extent that it is waived by the owner or operator of a facility at which an environmental audit was conducted and who prepared or caused to be prepared the environmental audit report as a result of the audit.

1. The environmental audit report and information generated by the environmental audit may be disclosed to any person employed by the owner or operator of the audited facility, any legal representative of the owner or operator or any independent contractor retained by the owner or operator to address an issue or issues raised by the environmental audit, without waiving the privilege in Section 2 of this act.

2. Disclosure of the environmental audit report or any information generated by the environmental audit under the following circumstances shall not waive the privilege in Section 2 of this act:

- a. disclosure made under the terms of a confidentiality agreement between the owner or operator of the facility audited and a potential purchaser of the business or facility audited, and
- b. disclosure made under the terms of a confidentiality agreement between governmental officials and the owner or operator of the facility audited.

B. In a civil, criminal or administrative proceeding, a court of record, after in camera review consistent with the Oklahoma Code of Civil Procedures, shall require disclosure of material for which the privilege described in Section 2 of this act is asserted, if such court determines that:

1. The privilege is asserted for a fraudulent purpose;
2. The material is not subject to the privilege; or
3. Even if subject to the privilege, the material shows evidence of an environmental crime or of noncompliance with any rules promulgated by the state environmental agency regulating such facility or activity and appropriate efforts to achieve compliance with such laws or rules were not promptly initiated and pursued with reasonable diligence upon discovery of noncompliance or violation.

C. A party asserting the environmental audit privilege described in Section 2 of this act has the burden of demonstrating the applicability of the privilege, including, if there is evidence of noncompliance with an environmental crime or of any rules promulgated by the state environmental agency regulating such facility or activity, proof that appropriate efforts to achieve compliance were promptly initiated and pursued with reasonable diligence; provided, however, that a party seeking disclosure under Section 5 of this act has the burden of proving that the privilege is asserted for a fraudulent purpose and, in a criminal proceeding, the state has the burden of proving the conditions for disclosure set forth in Section 5 of this act.

SECTION 5. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-4-105 of Title 27A, unless there is created a duplication in numbering, reads as follows:

A. The state, having probable cause to believe an environmental crime has been committed or a violation has occurred related to any facility or activity regulated by a state environmental agency based upon information obtained from a source independent of an

environmental audit report, may obtain an environmental audit report for which a privilege is asserted under Section 2 of this act pursuant to search warrant, criminal subpoena or discovery as allowed by the Code of Criminal Procedures of the State of Oklahoma.

B. Within thirty (30) days of the states's obtaining an environmental audit report, the owner or operator who prepared or caused to be prepared the report may file with the appropriate court a petition requesting an in camera review on whether the environmental audit report or portions thereof are privileged or subject to disclosure pursuant to the Oklahoma Voluntary Environmental Audit Act. Failure by the owner or operator to file such petition shall waive the privilege.

C. Upon filing of such petition, the court shall issue an order scheduling an in camera review, within forty-five (45) days of the filing of the petition, to determine whether the environmental audit report or portions thereof are privileged or subject to disclosure pursuant to the Oklahoma Voluntary Environmental Audit Act. Such order further shall allow the district attorney or Attorney General to remove the seal from the report to review the report and shall place appropriate limitations on distribution and review of the report to protect against unnecessary disclosure. The district attorney or Attorney General may consult with enforcement agencies regarding the contents of the report as necessary to prepare for the in camera review. However, the information used in preparation for the in camera review shall not be used in any investigation or in any legal proceeding, and shall otherwise be kept confidential, unless and until such information is found by the court to be subject to disclosure.

D. Failure to comply with the review, disclosure or use prohibitions of this section shall be the basis, in any civil, criminal or administrative proceeding, for suppression of any evidence arising or derived from the unauthorized review, disclosure

or use. The party failing to comply with this section shall have the burden of proving that proffered evidence did not arise and was not derived from the unauthorized activity.

E. The parties may at any time stipulate to entry of an order directing that specific information contained in an environmental audit report is or is not subject to the privilege provided under Section 2 of this act.

F. Upon making a disclosure determination, the court may compel the disclosure only of those portions of an environmental audit report relevant to issues in dispute in the proceeding.

SECTION 6. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-4-106 of Title 27A, unless there is created a duplication in numbering, reads as follows:

The privilege described in Section 2 of this act shall not extend to:

1. Documents, communications, data, reports or other information required to be collected, developed, maintained or reported to a regulatory agency pursuant to state environmental law, or other federal, state or local law, ordinance, regulation, permit or order;

2. Information obtained by observation, sampling or monitoring by any state environmental agency; or

3. Information obtained from a source independent of the environmental audit.

SECTION 7. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-4-107 of Title 27A, unless there is created a duplication in numbering, reads as follows:

Nothing in the Oklahoma Voluntary Environmental Audit Act shall limit, waive or abrogate the scope or nature of any statutory or common law privilege, including the work product doctrine and the attorney-client privilege.

SECTION 8. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-4-108 of Title 27A, unless there is created a duplication in numbering, reads as follows:

A. If any person or entity makes a voluntary disclosure of a violation of an environmental crime or of a rule promulgated by a state environmental agency regulating such facility or activity, there shall be a rebuttable presumption that the person or entity is immune from any administrative, civil or criminal penalties for the violation disclosed.

B. For the purposes of this section, a "voluntary disclosure" is one:

1. Made promptly after knowledge of the information disclosed is obtained by the person or entity;

2. Made to an agency having regulatory authority with regard to the violation disclosed;

3. Arising out of a voluntary environmental audit;

4. For which the person or entity making the disclosure initiates action to resolve the violations identified in the disclosure in a diligent manner; and

5. In which the person or entity making the disclosure cooperates with the appropriate agency in connection with investigation of the issues identified in the disclosure.

C. A disclosure is not voluntary for purposes of this section if it is required by state law to be reported to a regulatory authority.

D. The presumption recognized in subsection A of this section may be rebutted and penalties may be imposed under state law if any of the following are established:

1. That the disclosure was not voluntary within the meaning of this section;

2. That the violation was committed intentionally and willfully by the person or entity making the disclosure;



3. That the violation was not fully corrected in a diligent manner; or

4. That significant environmental harm or a public health threat was caused by the violation.

E. In any enforcement action brought against a person or entity regarding a violation for which the person or entity claims to have made a voluntary disclosure within the meaning of this section, the burden of proof concerning voluntariness of the disclosure shall be allocated as follows:

1. The person or entity making the voluntary disclosure claim shall have the burden of establishing a prima facie case that the disclosure was voluntary within the meaning of subsections B and C of this section; and

2. Once a prima facie case of voluntariness is established, the enforcement authority shall have the burden of rebutting the presumption under the provisions of subsection D of this section by a preponderance of the evidence.

SECTION 9. This act shall become effective November 1, 1995.

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