

STATE OF OKLAHOMA

1st Session of the 47th Legislature (1999)

COMMITTEE SUBSTITUTE
FOR
SENATE BILL 679

By: Mickle

COMMITTEE SUBSTITUTE

[Environment and Natural Resources; creating the
Oklahoma Environmental, Health and Safety Audit
Privilege Act - codification -

effective date]

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

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
Environmental, Health and Safety Audit Privilege 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:

The purpose of the Oklahoma Environmental, Health and Safety
Audit Privilege Act is to encourage voluntary compliance with
environmental and occupational health and safety laws.

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:

A. As used in the Oklahoma Environmental, Health and Safety
Audit Privilege Act:

1. "Audit report" means an audit report described by Section 4
of this act;

2. "Environmental or health and safety law" means:

- a. a federal or state environmental or occupational health and safety law, or
- b. a rule, regulation, or regional or local law adopted in conjunction with a law described by subparagraph a of this paragraph;

3. "Environmental or health and safety audit" means a systematic voluntary evaluation, review, or assessment of compliance with environmental or health and safety laws or any permit issued under those laws conducted by an owner or operator, an employee of the owner or operator, or an independent contractor of:

- a. a regulated facility or operation, or
- b. an activity at a regulated facility or operation;

4. "Owner or operator" means a person who owns or operates a regulated facility or operation;

5. "Penalty" means an administrative or civil sanction imposed by the state to punish a person for a violation of a statute or rule. The term does not include injunctive or other coercive relief by a regulatory authority, including a technical or remedial provision ordered by a regulatory authority;

6. "Person" means an individual, corporation, business trust, partnership, association, and any other legal entity; and

7. "Regulated facility or operation" means a facility or operation that is regulated by the Department of Environmental Quality under an environmental or health and safety law.

B. For purposes of the Oklahoma Environmental, Health and Safety Audit Privilege Act, a person acts knowingly, or with knowledge, with respect to the nature of the person's conduct when the person is aware of the person's physical acts. A person acts knowingly, or with knowledge, with respect to the result of the person's conduct when the person is aware that the conduct will cause the result.

C. To fully implement the privilege established by the Oklahoma Environmental, Health and Safety Audit Privilege Act, the term "environmental or health and safety law" shall be construed broadly.

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. An audit report is a report that includes each document and communication, other than those set forth in Section 8 of this act, produced from an environmental or health and safety audit.

B. General components that may be contained in a completed audit report include:

1. A report prepared by an auditor, monitor, or similar person, which may include:

- a. a description of the scope of the audit,
- b. the information gained in the audit and findings, conclusions, and recommendations, and
- c. exhibits and appendices;

2. Memoranda and documents analyzing all or a portion of the materials described by paragraph 1 of this subsection or discussing implementation issues; and

3. An implementation plan or tracking system to correct past noncompliance, improve current compliance, or prevent future noncompliance.

C. The types of exhibits and appendices that may be contained in an audit report include supporting information that is collected or developed for the primary purpose of and in the course of an environmental or health and safety audit, including:

1. Interviews with current or former employees;
2. Field notes and records of observations;
3. Findings, opinions, suggestions, conclusions, guidance, notes, drafts, and memoranda;
4. Legal analyses;

5. Drawings;
6. Photographs;
7. Laboratory analyses and other analytical data;
8. Computer-generated or electronically recorded information;
9. Maps, charts, graphs, and surveys; and
10. Other communications associated with an environmental or health and safety audit.

D. To facilitate identification, each document in an audit report should be labeled "COMPLIANCE REPORT: PRIVILEGED DOCUMENT", or labeled with words of similar import. Failure to label a document under this section does not constitute a waiver of the audit privilege or create a presumption that the privilege does or does not apply.

E. Once initiated, an audit shall be completed within a reasonable time not to exceed six (6) months unless an extension is approved by the governmental entity with regulatory authority over the regulated facility or operation based on reasonable grounds.

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. An audit report is privileged as provided in this section.

B. Except as provided in Sections 6, 7, 8 and 9 of this act, any part of an audit report is privileged and is not admissible as evidence or subject to discovery in:

1. A civil action, whether legal or equitable; or
2. An administrative proceeding.

C. A person, when called or subpoenaed as a witness, cannot be compelled to testify or produce a document related to an environmental or health and safety audit if:

1. The testimony or document discloses any item listed in Section 4 of this act that was made as part of the preparation of an

environmental or health and safety audit report and that is addressed in a privileged part of an audit report; and

2. For purposes of this subsection only, the person is:

- a. a person who conducted any portion of the audit but did not personally observe the physical events,
- b. a person to whom the audit results are disclosed under subsection B of Section 6 of this act, or
- c. a custodian of the audit results.

D. A person who conducts or participates in the preparation of an environmental or health and safety audit and who has actually observed physical events of violation, may testify about those events but may not be compelled to testify about or produce documents related to the preparation of or any privileged part of an environmental or health and safety audit or any item listed in Section 4 of this act.

E. An employee of a state agency may not request, review, or otherwise use an audit report during an agency inspection of a regulated facility or operation, or an activity of a regulated facility or operation.

F. A party asserting the privilege described in this section has the burden of establishing the applicability of the privilege.

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:

A. The privilege described by Section 5 of this act does not apply to the extent the privilege is expressly waived by the owner or operator who prepared the audit report or caused the report to be prepared.

B. Disclosure of an audit report or any information generated by an environmental or health and safety audit does not waive the privilege established by Section 5 of this act if the disclosure:

1. Is made to address or correct a matter raised by the environmental or health and safety audit and is made only to:

- a. a person employed by the owner or operator, including temporary and contract employees,
- b. a legal representative of the owner or operator,
- c. an officer or director of the regulated facility or operation or a partner of the owner or operator, or
- d. an independent contractor retained by the owner or operator;

2. Is made under the terms of a confidentiality agreement between the person for whom the audit report was prepared or the owner or operator of the audited facility or operation and:

- a. a partner or potential partner of the owner or operator of the facility or operation,
- b. a transferee or potential transferee of the facility or operation,
- c. a lender or potential lender for the facility or operation,
- d. a governmental official of a state or federal agency, or
- e. a person or entity engaged in the business of insuring, underwriting, or indemnifying the facility or operation; or

3. Is made under a claim of confidentiality to a governmental official or agency by the person for whom the audit report was prepared or by the owner or operator.

C. A party to a confidentiality agreement described in paragraph 2 of subsection B of this section who violates that agreement is liable for damages caused by the disclosure and for any other penalties stipulated in the confidentiality agreement.

D. Information that is disclosed under paragraph 3 of subsection B of this section is confidential and is not subject to disclosure pursuant to the Open Records Act.

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:

A. A court or administrative hearings official with competent jurisdiction may require disclosure of a portion of an audit report in a civil or administrative proceeding if the court or administrative hearings official determines, after an in-camera review consistent with the appropriate rules of procedure, that:

1. The privilege is asserted for a fraudulent purpose;
2. The portion of the audit report is not subject to the privilege under Section 8 of this act; or
3. The portion of the audit report shows evidence of noncompliance with an environmental or health and safety law and appropriate efforts to achieve compliance with the law were not promptly initiated and pursued with reasonable diligence after discovery of noncompliance.

B. A party seeking disclosure under this section has the burden of proving that paragraph 1, 2 or 3 of subsection A of this section applies.

C. A decision of an administrative hearings official under paragraph 1, 2 or 3 of subsection A of this section is directly appealable to a court of competent jurisdiction without disclosure of the audit report to any person unless so ordered by the court.

D. A person claiming the privilege is subject to contempt if the court finds that the person intentionally or knowingly claimed the privilege for unprotected information as provided in Section 8 of this act.

E. A determination of a court under this section is subject to interlocutory appeal to an appropriate appellate court.

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. The privilege described in the Oklahoma Environmental, Health and Safety Audit Privilege Act does not apply to:

1. A document, communication, datum, or report or other information required by a regulatory agency to be collected, developed, maintained, reported or submitted under a federal or state environmental or health and safety law;

2. Information obtained by observation, sampling, or monitoring by a regulatory agency; or

3. Information obtained from a source not involved in the preparation of the environmental or health and safety audit report.

B. This section does not limit the right of a person to agree to conduct and disclose an audit report.

SECTION 9. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-4-109 of Title 27A, unless there is created a duplication in numbering, reads as follows:

A. Where an audit report is obtained, reviewed, or used in a criminal proceeding, the administrative or civil evidentiary privilege created by this act is not waived or eliminated for any other purpose.

B. Notwithstanding the privilege established under this act, a regulatory agency may review information that is required to be available under a specific state or federal law, but such review does not waive or eliminate the administrative or civil evidentiary privilege where applicable.

C. If information is required to be available to the public by operation of a specific state or federal law, the governmental authority shall notify the person claiming the privilege of the potential for public disclosure prior to obtaining such information under subsection A or B of this section.

D. If privileged information is disclosed under subsection B or C of this section, on the motion of a party, a court or the appropriate administrative official shall suppress evidence offered in any civil or administrative proceeding that arises or is derived from review, disclosure, or use of information obtained under this section if the review, disclosure, or use is not authorized under Section 8 of this act. A party having received information under subsection B or C of this section has the burden of proving that the evidence offered did not arise and was not derived from the review of privileged information.

SECTION 10. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-4-110 of Title 27A, unless there is created a duplication in numbering, reads as follows:

A. Except as provided by this section, a person who makes a voluntary disclosure of a violation of an environmental or health and safety law is immune from an administrative or civil penalty for the violation disclosed.

B. A disclosure is voluntary only if:

1. The disclosure was made promptly after knowledge of the information disclosed is obtained by the person;

2. The disclosure was made in writing by certified mail to an agency that has regulatory authority with regard to the violation disclosed;

3. An investigation of the violation was not initiated or the violation was not independently detected by an agency with enforcement jurisdiction before the disclosure was made using certified mail;

4. The disclosure arises out of a voluntary environmental or health and safety audit;

5. The person who makes the disclosure promptly initiates an appropriate effort to achieve compliance, pursues that effort with

due diligence, and corrects the noncompliance including remediation of environmental impact within a reasonable time;

6. The person making the disclosure cooperates with the appropriate agency in connection with an investigation of the issues identified in the disclosure; and

7. The violation did not result in injury to one or more persons at the site or substantial off-site harm to persons, property, or the environment.

C. A disclosure is not voluntary for purposes of this section if it is a report to a regulatory agency required solely by a specific condition of an enforcement order or decree.

D. The immunity established by subsection A of this section does not apply and an administrative or civil penalty may be imposed under applicable law if:

1. The person who made the disclosure intentionally or knowingly committed or was responsible for the commission of the disclosed violation;

2. The person who made the disclosure recklessly committed or was responsible for the commission of the disclosed violation and the violation resulted in substantial injury to one or more persons at the site or off-site harm to persons, property, or the environment;

3. The offense was committed intentionally or knowingly by a member of the person's management or an agent of the person and the person's policies or lack of prevention systems contributed materially to the occurrence of the violation; or

4. The offense was committed recklessly by a member of the person's management or an agent of the person, the person's policies or lack of prevention systems contributed materially to the occurrence of the violation, and the violation resulted in substantial injury to one or more persons at the site or off-site harm to persons, property, or the environment.

E. A penalty that is imposed under subsection D of this section should, to the extent appropriate, be mitigated by factors such as:

1. The voluntariness of the disclosure;
2. Efforts by the disclosing party to conduct environmental or health and safety audits;
3. Uncompelled remediation;
4. Cooperation with government officials investigating the disclosed violation; or
5. Other relevant considerations.

F. In a civil or administrative enforcement action brought against a person for a violation for which the person claims to have made a voluntary disclosure, the person claiming the immunity has the burden of establishing a prima facie case that the disclosure was voluntary. After the person claiming the immunity establishes a prima facie case of voluntary disclosure, other than a case in which under subsection D of this section immunity does not apply, the enforcement authority has the burden of rebutting the presumption by a preponderance of the evidence.

G. In order to receive immunity under this section, a facility conducting an environmental or health and safety audit under this act must give notice to the appropriate regulatory agency or agencies of the fact that it is planning to commence the audit. The notice shall specify the facility or portion of the facility to be audited, the anticipated time the audit will begin, and the general scope of the audit. The notice may provide notification of more than one scheduled environmental or health and safety audit at a time.

H. The immunity under this section does not apply if a court or administrative law judge finds that the person claiming the immunity has, after the effective date of this act, repeatedly or continuously committed serious violations so as to constitute a pattern of disregard of environmental or health and safety laws. In

order to be considered a "pattern", the person must have committed a series of violations that were due to separate and distinct events within a three-year period at the same facility or operation.

I. A violation that has been voluntarily disclosed and to which immunity applies must be identified in a compliance history report as being voluntarily disclosed.

SECTION 11. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-4-111 of Title 27A, unless there is created a duplication in numbering, reads as follows:

A regulatory agency may not promulgate a rule or impose a condition that circumvents the purpose of the Oklahoma Environmental, Health and Safety Audit Privilege Act.

SECTION 12. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-4-112 of Title 27A, unless there is created a duplication in numbering, reads as follows:

The privilege created by the Oklahoma Environmental, Health and Safety Audit Privilege Act applies to environmental or health and safety audits that are conducted on or after the effective date of this act.

SECTION 13. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-4-113 of Title 27A, unless there is created a duplication in numbering, reads as follows:

This act does not limit, waive, or abrogate the scope or nature any statutory or common law privilege, including the work product doctrine and the attorney-client privilege.

SECTION 14. This act shall become effective November 1, 1999.

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