

STATE OF OKLAHOMA

2nd Session of the 48th Legislature (2002)

SENATE BILL 1261

By: Dunlap

AS INTRODUCED

An Act relating to environmental, health and safety audits; creating the "Oklahoma Environmental, Health and Safety Audit Privilege and Qualified Disclosure Act"; providing short title; stating findings of the Legislature; defining terms; providing for waiver of certain privilege; authorizing certain audit report and information to be disclosed to certain persons without waiving privilege; stating exceptions; stating procedure for review of environmental, health and safety audit reports; requiring written request or subpoena by certain law enforcement authorities; requiring petition to be filed by person asserting certain privilege within certain time period; stating failure to file petition waives privilege; stating requirements for person asserting privilege; requiring Court schedule certain hearing within certain time period; authorizing Court or Administrative Law Judge require disclosure after certain determination; providing for seizure of privileged environmental, health and safety audit reports; requiring search warrant; providing for audit report to be sealed and filed with certain Court; prohibiting inspection, review or disclosure of audit report contents; requiring certain hearing within certain time period to determine if audit report is privileged or subject to disclosure; failure to file petition shall waive privilege; stating items to be included in petition; requiring Court to schedule hearing within certain time period; authorizing Court to require disclosure of material upon certain determinations; stating procedure for certain proceedings not covered by act; stating certain parties divulging or disseminating privileged information guilty of misdemeanor offense; stating penalty; authorizing additional sanctions; stating party asserting privilege has burden of demonstrating applicability of privilege; stating party seeking disclosure has burden of proof that privilege is not applicable; failure to comply with review, disclosure or use prohibitions of act shall be basis for suppression of certain evidence in certain proceedings; authorizing parties to stipulate to certain order; stating Court may compel disclosure of certain relevant material; stating exemptions to privilege for certain materials; stating limitations of act relating to certain privileges; providing for rebuttable presumption for qualifying disclosure of certain violations; defining qualifying disclosure; stating procedure for disclosure of compliance management system; stating procedure for rebutting presumption authorized by act; authorizing civil

penalties to be imposed; authorizing criminal sanctions under certain circumstances; providing for certain penalties to be mitigated; allocating burden of proof in certain enforcement actions; stating requirements; providing for codification; and providing an 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 1-1-301 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 and Qualified Disclosure Act".

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-1-302 of Title 27A, unless there is created a duplication in numbering, reads as follows:

The Oklahoma Legislature hereby finds and declares that:

1. Protection of the environment and industrial health and safety rests principally on the public's voluntary compliance with environmental, health and safety laws; that voluntary compliance is most effectively achieved through the implementation of regular self-evaluative activities such as audits of compliance status and management systems to assure compliance; and that 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;

2. To encourage owners and operators of facilities and other persons conducting activities regulated under state environmental, health and safety statutes, both to conduct voluntary programs and management systems and to assess and improve compliance with such statutes, an audit privilege as provided in this act is recognized to protect confidentiality and communications relating to such voluntary internal audits;

3. An Environmental, Health and Safety (EHS) Audit Report shall be privileged, shall not be subject to discovery, and shall not be admissible as evidence in any civil, criminal or administrative proceedings, except as provided by Section 4 of this act; and

4. If an EHS Audit Report, or any part thereof, is subject to the privilege recognized in this act, neither any person who conducted the audit nor anyone to whom the audit results are disclosed, unless such disclosure constituted a waiver of the privilege under Section 4 of this act, 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 audit report.

SECTION 3. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-1-303 of Title 27A, unless there is created a duplication in numbering, reads as follows:

As used in this act:

1. "Environmental, Health and Safety Audit (EHS Audit)" means a voluntary and internal evaluation, review or assessment of one or more operations or facilities, or any activity at one or more operations or facilities regulated under the statutes of the State of Oklahoma or the rules promulgated by any state agency, or of management systems related to such operations, facilities or activities, that is designed to identify and prevent noncompliance or to improve compliance with such laws or agency rules. An EHS Audit may be conducted by the owner or operator of such operation, facility or activity by the owner's or operator's employees or by independent contractors;

2. "EHS Audit Report" means a set of documents prepared as a result of an EHS Audit. In order to facilitate identification, each document in the set shall be labeled "EHS Audit Report: Privileged Document" or words to that effect; however, failure to label a document shall not constitute a waiver of the audit privilege and shall not create any presumption that such privilege does not apply.

Any EHS Audit Report shall include any notes, drafts, memoranda, drawings, photographs, computer-generated or electronically-recorded information, maps, charges, graphs, or surveys or any other information pertaining to observations, findings, opinions, suggestions, or conclusions, provided such supporting information is collected or developed for the primary purpose and in the course of an EHS Audit. An EHS Audit Report, when completed, may include, but is not limited to nor required to contain, the following general component parts:

- a. a 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 or discussing implementation issues, and
- c. an implementation plan or tracking system that addresses correcting past noncompliance, improving current compliance or preventing future noncompliance;

3. "Compliance Management System" means a voluntary compliance assurance program having at least the following elements:

- a. an environmental policy requiring conduct of operations in compliance with environmental requirements,
- b. incentives to encourage employees to ensure compliance and report violations to senior management,
- c. a clear definition of responsibility for compliance for each facility or operation,
- d. adequate resources dedicated to compliance assurance activities,
- e. training for employees with responsibilities related to compliance operations,

- f. systematically implemented procedures for bringing about compliance at each facility or operation,
- g. regular facility or operation-specific reviews of compliance,
- h. auditing of compliance by qualified personnel who are independent from those who manage facility or site operations,
- i. a mechanism to ensure prompt action to correct noncompliance and address the underlying cause of noncompliance,
- j. a mechanism for disciplining employees who intentionally or negligently contribute to the commission of violations,
- k. effective management oversight of compliance and compliance correction, and
- l. a regular management review of compliance performance and management systems to identify needed improvements; and

4. "Intentional and willful" means both intentional and willful acts and intentional and willful disregard of the law. A pattern of continuous or repeated violations may be considered in determining whether a person or entity has intentionally and willfully disregarded the law.

SECTION 4. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-304 of Title 27A, unless there is created a duplication in numbering, reads as follows:

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

B. The EHS Audit Report and information generated by the EHS 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 EHS Audit, without waiving the privilege in Section 2 of this act.

C. Disclosure of the EHS Audit Report or any information generated by the EHS Audit under the following circumstances shall not waive the privilege in Section 2 of this act:

1. Disclosure made under the terms of a confidentiality agreement between the entity or person for whom the EHS Audit Report was prepared or the owner or operator of the facility audited and a partner or potential partner, a transferee or potential transferee of, or a lender or potential lender for, the business or facility audited; and

2. Disclosure made under the terms of a confidentiality agreement between government officials and the entity or person for whom the EHS Audit Report was prepared or the owner or operator of the operation or facility audited.

SECTION 5. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-1-305 of Title 27A, unless there is created a duplication in numbering, reads as follows:

A. This section provides the exclusive procedure for the review of EHS Audit Reports.

B. 1. Request for disclosure of an EHS Audit Report shall be made by any authorized state law enforcement authority by written request or subpoena. State law enforcement authorities may:

- a. make a written request for disclosure of an EHS Audit Report under the provisions of this section, provided such request is delivered by certified mail, or
- b. demand by lawful subpoena the disclosure of an EHS Audit Report.

Within sixty (60) days after receipt of such request or subpoena, all persons asserting the privilege may file with the appropriate

court or administrative law judge and serve upon the requesting state law enforcement authority, a petition requesting an in camera hearing to determine whether the EHS Audit Report or portions of the report are privileged under this act or subject to disclosure. The District Courts of this state shall have jurisdiction over a petition filed under this section requesting such a hearing. Failure of any person asserting the privilege to file such a petition shall waive the privilege.

2. The person asserting the privilege in response to a request or subpoena for disclosure under this section shall provide a copy of the EHS Audit Report to the Court and shall also include in its request for an in camera hearing all of the following:

- a. the year the EHS Audit Report was prepared,
- b. the identity of the entity conducting the audit,
- c. the name of the audited facility or facilities, and
- d. a brief description of the portion or portions of the EHS Audit Report for which privilege is claimed;

3. Upon the filing of a petition under the provisions of this section, the Court shall issue an order scheduling, within forty-five (45) days after the filing of the petition, an in camera hearing to determine whether the EHS Audit Report or portions of such report are privileged or subject to disclosure under this section.

4. The Court or Administrative Law Judge, after in camera review, may require disclosure of the material for which the privilege in this section is being asserted, if such Court or Administrative Law Judge determines that:

- a. the privilege is asserted for a fraudulent purpose,
- b. the material is not subject to the privilege, or
- c. even if subject to the privilege, the material shows evidence of noncompliance with state, federal, regional or local environmental, health and safety

laws, regulations, ordinances or orders and the owner or operator failed to undertake appropriate corrective action or to eliminate any violation of law identified during the EHS Audit within a reasonable time.

C. 1. To the extent authorized by the Oklahoma State Statutes appropriate authorities may seize an EHS Audit Report for which a privilege is asserted under the provisions of this act, pursuant to a lawful search warrant. The authorities shall immediately place the EHS Audit Report under seal and shall immediately file it with the Court which authorized the search warrant. Unless and until the Court orders disclosure under the provisions of this section, or the privilege has been waived, the authorities shall not inspect, review or disclose the contents of the EHS Audit Report. Within sixty (60) days after the seizure, all persons asserting the privilege shall file with the Court a petition requesting an in camera hearing to determine whether the EHS Audit Report or portions of the report are privileged under this section or subject to disclosure. Failure of any person asserting the privilege to file such a petition shall waive the privilege.

2. The person asserting the privilege in response to a request for disclosure under this subsection shall include in the request for an in camera hearing all of the following:

- a. the year the EHS Audit Report was prepared,
- b. the identity of the entity conducting the audit,
- c. the name of the audited facility or facilities, and
- d. a brief description of the portion or portions of the EHS Audit Report for which privilege is being claimed.

3. Upon the filing of a petition under this section, the Court shall issue an order scheduling within forty-five (45) days after the filing of the petition, an in camera hearing to determine whether the Environmental Audit Report or portions of such report are privileged or subject to disclosure under this section.



4. The Court, after in camera review, may require disclosure of material for which the privilege is asserted under this section, if such Court determines that:

- a. the privilege is asserted for fraudulent purpose,
- b. the material is not subject to the privilege, or
- c. even if subject to the privilege, the material shows evidence of noncompliance with state, federal, regional or local environmental, health or safety laws, regulations, ordinances, or orders and the owner or operator failed to undertake appropriate corrective action or to eliminate any violation of law identified during the EHS Audit within a reasonable time.

D. In any proceeding not covered by subsection B or C of this section, a Court of Record, after in camera review consistent with Oklahoma rules of civil or criminal procedure, may require disclosure of the material for which the privilege in this act is being 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 noncompliance with state, federal, regional or local environmental, health or safety laws, regulations, ordinances, or orders and the owner or operator failed to undertake appropriate corrective action or to eliminate any violation of law identified during the EHS Audit within a reasonable time.

E. If any person divulges or disseminates all or any part of the information contained in an EHS Audit Report in violation of the provisions of this act, or knowingly divulges or disseminates all or any part of the information contained in an EHS Audit Report that was provided to such person in violation of the provisions of this act, such person shall be guilty of a misdemeanor and shall be fined not more than Twenty Five Thousand Dollars (\$25,000.00). In

addition the Court may sanction such person through contempt proceedings and may order such other relief as the Court deems appropriate.

F. A party asserting the EHS Audit privilege as provided by Section 2 of this act has the burden of demonstrating to the Court or Administrative Law Judge, *ex parte*, a *prima facie* basis for the applicability of the privilege, including if there is evidence presented by the party seeking disclosure of the EHS Audit Report of noncompliance by the party asserting the privilege with state statute or agency rules, a showing that to the extent such noncompliance was identified by the EHS Audit, appropriate efforts to achieve compliance were promptly initiated and pursued with reasonable diligence; provided, however, that a party seeking disclosure under the provisions of this act has the ultimate burden of proof that the privilege does not apply and disclosure is appropriate.

G. Failure to comply with the review, disclosure or use prohibitions of this act 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. A party allegedly 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.

H. The parties may at any time stipulate to entry of an order directing that specific information contained in an EHS Audit Report is or is not subject to the privilege provided in Section 2 of this act.

I. Upon making a disclosure determination under the provisions of this act, the Court may compel the disclosure of only those portions of an EHS 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 1-1-306 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, federal, regional or local laws, ordinances, regulations, rules, permits or orders;
2. Information obtained by observation, sampling or monitoring by any regulatory agency; or
3. Information obtained from a source independent of the EHS Audit.

SECTION 7. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-1-307 of Title 27A, unless there is created a duplication in numbering, reads as follows:

Nothing in this 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 1-1-308 of Title 27A, unless there is created a duplication in numbering, reads as follows:

A. If any person or entity, consistent with the requirements of this act, makes a qualifying disclosure, as provided in subsection B of this section, of a violation of any state statute or agency rule 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 purpose of this section, a qualifying 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 either a voluntary EHS Audit or the operation of a compliance management system;

4. For which the person or entity making the disclosure initiates the appropriate effort to achieve compliance, pursues compliance with due diligence, and corrects the noncompliance within a reasonable time; 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. 1. If the disclosing person or entity has a Compliance Management System and the disclosure arises out of the operation of that system, the disclosure does not qualify for purposes of subsections A and B of this section if it is a report to a regulatory authority of monitoring that is required to be reported by a specific monitoring and reporting condition of an enforcement order or decree.

2. If the disclosure does not arise out of the operation of a compliance management system but is the result of a voluntary EHS Audit, the otherwise qualifying disclosure does not qualify for purposes of subsections A and B of this section if it is a report to a regulatory authority of monitoring results that are required to be reported by a specific permit term or an enforcement order or decree.

D. 1. The presumption recognized in Section 8 of this act may be rebutted and civil penalties may be imposed under state law if, and to the extent that, any of the following are established:

a. that the disclosure did not qualify within the meaning of this section,

- b. that the violation was committed intentionally and willfully by the person or entity making the disclosure,
- c. that the violation was not fully corrected in a diligent manner,
- d. that significant environmental harm or a significant adverse public health effect was caused by the violation, or
- e. that the person or entity making the disclosure realized significant economic advantage from the violation, after taking into consideration the cost of remedying the noncompliance.

2. The presumption recognized in Section 8 of this act may be rebutted and criminal penalties may be imposed under state law against a disclosing person or entity satisfying all the conditions of Section 8 of this act only in the following circumstances:

- a. criminal sanctions may be sought against such a person only where the person committed, or aided or abetted the commission of, the disclosed violation, intentionally and willfully, or
- b. criminal sanctions may be sought against such an entity only where the offense was committed intentionally and willfully by a member of the entity's management and the entity's policies or lack of prevention actions or systems contributed materially to the occurrence of the violation.

E. A penalty imposed because of establishment of one or more of the exceptions in subsection D of this section, should, to the extent appropriate, be mitigated due to factors relating to the nature of the disclosure, efforts of the disclosing person or entity to prevent violations or harm to the environment, or other relevant considerations.

F. In any enforcement action brought against a person or entity regarding an alleged violation for which the person or entity claims to have made a qualifying 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 qualifying disclosure claim shall have the burden of establishing a prima facie case that the disclosure was qualified within the meaning of subsection B of this section; and

2. Once a prima facie case under paragraph 1 of subsection B of this section is established, the enforcement authority shall have the burden of rebutting the presumption by a preponderance of evidence or, in a criminal case, by proof beyond a reasonable doubt.

SECTION 9. This act shall become effective November 1, 2002.

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