

1 ENGROSSED SENATE  
2 BILL NO. 1003

By: Allen and Daniels of the  
Senate

3 and

4 McBride of the House  
5

6 An Act relating to environment and natural resources;  
7 creating the Oklahoma Environmental, Health and  
8 Safety Audit Privilege Act; stating purpose of act;  
9 applying act to certain agencies; defining terms;  
10 specifying general and supporting information to be  
11 contained in complete audit reports; requiring audit  
12 documents to be labeled in certain manner; specifying  
13 failure to label documents does not constitute waiver  
14 of certain privilege; establishing timeline for  
15 completed audit with certain exception; establishing  
16 audit report as privileged in certain circumstances;  
17 prohibiting certain persons from compelled testimony  
18 or production of audit documents in certain  
19 circumstances; authorizing certain persons to  
20 voluntarily testify or produce audit documents;  
21 prohibiting certain persons from requesting or  
22 reviewing audit documents for certain purpose;  
23 establishing burden of proof; providing exception to  
24 privilege if expressly waived by certain persons;  
establishing certain disclosures of audit information  
as non-waiver disclosures; classifying certain  
information as confidential; establishing affirmative  
defense for disclosure; providing construing clause;  
authorizing court or administrative hearing to  
require disclosure of certain audit information in  
certain circumstances; establishing decision of  
administrative hearing as appealable without certain  
disclosure; establishing sanctions for persons  
violating Oklahoma Rules of Civil Procedure in  
claiming certain privilege; establishing  
determination of district court as subject to certain  
appeal; establishing exceptions to certain privilege  
for audit documents; providing exception to waiver in  
certain circumstances; authorizing agency to review  
certain information; requiring notification for  
certain privileged information; requiring court to  
suppress privileged information in certain

1        circumstances; authorizing court to find certain  
2        persons in contempt of court; providing immunity for  
3        certain persons; establishing provisions of voluntary  
4        disclosure of audit information or report; requiring  
5        certain certification for voluntary disclosure;  
6        requiring certain notice to potential purchaser;  
7        providing exceptions to immunity; establishing  
8        mitigating factors for certain penalty; establishing  
9        circumstances required for developing a pattern;  
10       requiring certain notification to regulatory agency;  
11       establishing required information in notification;  
12       establishing applicability of act; providing for  
13       codification; and providing an effective date.

14  
15 BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

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

19       This act shall be known and may be cited as the "Oklahoma  
20       Environmental, Health and Safety Audit Privilege Act".

21       SECTION 2.       NEW LAW       A new section of law to be codified  
22       in the Oklahoma Statutes as Section 1-4-111 of Title 27A, unless  
23       there is created a duplication in numbering, reads as follows:

24       A.    The purpose of this act is to encourage voluntary compliance  
25       with environmental and occupational health and safety laws.

26       B.    A regulatory agency in this state shall not adopt a rule or  
27       impose a condition that circumvents the purpose of this act.

28       SECTION 3.       NEW LAW       A new section of law to be codified  
29       in the Oklahoma Statutes as Section 1-4-112 of Title 27A, unless  
30       there is created a duplication in numbering, reads as follows:

1       A. As used in this act:

2       1. "Acquisition closing date" means the date on which ownership  
3 of, or a direct or indirect majority interest in the ownership of, a  
4 regulated facility or operation is acquired in an asset purchase,  
5 equity purchase, merger or similar transaction;

6       2. "Audit report" means the final report in a written document  
7 which contains the comments and recommendations of the auditor;

8       3. "Environmental or health and safety audit" or "audit" means  
9 a systematic voluntary evaluation, review or assessment of  
10 compliance with environmental or health and safety laws or with any  
11 permit issued under an environmental or health and safety law  
12 conducted by an owner or operator, an employee of an owner or  
13 operator, a person, including an employee or independent contractor  
14 of the person, that is considering the acquisition of a regulated  
15 facility or operation, or an independent contractor of:

16           a. a regulated facility or operation, or

17           b. an activity at a regulated facility or operation;

18       4. "Environmental or health and safety law" means:

19           a. a federal or state environmental or occupational  
20 health and safety law, or

21           b. a rule, regulation or regional or local law adopted in  
22 conjunction with a law described by subparagraph a of  
23 this paragraph;  
24

1        5. "Owner or operator" means a person who owns or operates a  
2 regulated facility or operation;

3        6. "Penalty" means an administrative, civil or criminal  
4 sanction imposed by the state to punish a person for a violation of  
5 a statute or rule. The term does not include a technical or  
6 remedial provision ordered by a regulatory authority; and

7        7. "Regulated facility or operation" means a facility or  
8 operation that is regulated under an environmental or health and  
9 safety law.

10       B. A person acts willfully for purposes of this act if the  
11 person acts willfully within the meaning of Section 92 of Title 21  
12 of the Oklahoma Statutes.

13       C. A person acts knowingly for purposes of this act if the  
14 person acts knowingly within the meaning of Section 96 of Title 21  
15 of the Oklahoma Statutes.

16       To fully implement the privilege established by this act, the  
17 term "environmental or health and safety law" shall be construed  
18 broadly.

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

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

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

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

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

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

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

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

- 19       1. Interviews with current or former employees;
- 20       2. Field notes and records of observations;
- 21       3. Findings, opinions, suggestions, conclusions, guidance,  
22 notes, drafts and memoranda;
- 23       4. Legal analyses;
- 24       5. Drawings;

1       6. Photographs;

2       7. Laboratory analyses and other analytical data;

3       8. Computer-generated or electronically recorded information;

4       9. Maps, charts, graphs and surveys; and

5       10. Other communications associated with an environmental or  
6 health and safety audit.

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

13       E. Unless an extension is approved by the governmental entity  
14 with regulatory authority over the regulated facility or operation  
15 based on reasonable grounds, an environmental or health and safety  
16 audit must be completed within a reasonable time not to exceed six  
17 months after:

18       1. The date the audit is initiated; or

19       2. The acquisition closing date, if the person continues the  
20 audit.

21       F. Paragraph 1 of subsection E of this section does not apply  
22 to an environmental or health and safety audit conducted before the  
23 acquisition closing date by a potential purchaser that is  
24 considering the acquisition of the regulated facility or operation.

1       SECTION 5.       NEW LAW       A new section of law to be codified  
2 in the Oklahoma Statutes as Section 1-4-114 of Title 27A, unless  
3 there is created a duplication in numbering, reads as follows:

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

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

8       1. A civil action, whether legal or equitable; or

9       2. An administrative proceeding.

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

13      1. The testimony or document discloses any item listed in  
14 Section 4 of this act that was made as part of the preparation of an  
15 environmental or health and safety audit report and that is  
16 addressed in a privileged part of an audit report; and

17      2. The person is:

18          a. a person who conducted any portion of the audit but  
19             did not personally observe the physical events,

20          b. a person to whom the audit results are disclosed under  
21             Section 6 of this act, or

22          c. a custodian of the audit results.

23      D. A person who conducts or participates in the preparation of  
24 an environmental or health and safety audit and who has actually

1 observed physical events of violation may testify about those events  
2 but may not be compelled to testify about or produce documents  
3 related to the preparation of or any privileged part of an  
4 environmental or health and safety audit or any item listed in  
5 Section 4 of this act.

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

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

12 G. No audit report or any associated information or records  
13 shall be subject to Section 24A.1 et seq. of Title 51 of the  
14 Oklahoma Statutes. All records collected pursuant to this act shall  
15 be deemed confidential.

16 SECTION 6. NEW LAW A new section of law to be codified  
17 in the Oklahoma Statutes as Section 1-4-115 of Title 27A, unless  
18 there is created a duplication in numbering, reads as follows:

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

23

24



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

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

- 6           a. a person employed by the owner or operator, including  
7               temporary and contract employees,
- 8           b. a legal representative of the owner or operator,
- 9           c. an officer or director of the regulated facility or  
10               operation or a partner of the owner or operator,
- 11           d. an independent contractor retained by the owner or  
12               operator,
- 13           e. a person considering the acquisition of the regulated  
14               facility or operation that is the subject of the  
15               audit, or
- 16           f. an employee, temporary employee, contract employee,  
17               legal representative, officer, director, partner or  
18               independent contractor of a person described in  
19               subparagraph e of this paragraph;

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

- 23           a. a partner or potential partner of the owner or  
24               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 agency, or
- e. a person 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 under Section 24A.1 et seq. of Title 51 of the Oklahoma Statutes. A public entity, public employee or public official who discloses information in violation of this subsection is subject to penalty. It is an affirmative defense to the clerical dissemination of a privileged audit report that the report was not clearly labeled "COMPLIANCE REPORT: PRIVILEGED DOCUMENT" or words of similar import. The lack of labeling may not be raised as a defense if the

1 entity, employee or official knew or had reason to know that the  
2 document was a privileged audit report.

3 E. This section may not be construed to circumvent the  
4 protections provided by federal or state law for individuals who  
5 disclose information to law enforcement authorities.

6 SECTION 7. NEW LAW A new section of law to be codified  
7 in the Oklahoma Statutes as Section 1-4-116 of Title 27A, unless  
8 there is created a duplication in numbering, reads as follows:

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

14 1. The privilege is asserted for a fraudulent purpose;  
15 2. The portion of the audit report is not subject to the  
16 privilege under Section 8 of this act; or

17 3. The portion of the audit report shows evidence of  
18 noncompliance with an environmental or health and safety law and  
19 appropriate efforts to achieve compliance with the law were not  
20 promptly initiated and pursued with reasonable diligence after  
21 discovery of noncompliance.

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

1 C. Notwithstanding Section 250 et seq. of Title 75 of the  
2 Oklahoma Statutes, a decision of an administrative hearings official  
3 under paragraph 1, 2 or 3 of subsection A of this section is  
4 directly appealable to a court of competent jurisdiction without  
5 disclosure of the audit report to any person unless so ordered by  
6 the court.

7 D. A person claiming the privilege is subject to sanctions as  
8 provided by Section 3226.1 of Title 12 of the Oklahoma Statutes if  
9 the court finds that the person willfully or knowingly claimed the  
10 privilege for information as provided in Section 8 of this act.

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

13 SECTION 8. NEW LAW A new section of law to be codified  
14 in the Oklahoma Statutes as Section 1-4-117 of Title 27A, unless  
15 there is created a duplication in numbering, reads as follows:

16 A. The privilege established by Section 5 of this act does not  
17 apply to:

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

22 2. Information obtained by observation, sampling or monitoring  
23 by a regulatory agency; or  
24

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

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

5        SECTION 9.        NEW LAW        A new section of law to be codified  
6 in the Oklahoma Statutes as Section 1-4-118 of Title 27A, unless  
7 there is created a duplication in numbering, reads as follows:

8        A. If an audit report is obtained, reviewed or used in a  
9 criminal proceeding, the administrative or civil evidentiary  
10 privilege established by Section 5 of this act is not waived or  
11 eliminated for any other purpose.

12        B. Notwithstanding the privilege established by Section 5 of  
13 this act, a regulatory agency may review information that is  
14 required to be available under a specific state or federal law, but  
15 that review does not waive or eliminate the administrative or civil  
16 evidentiary privilege if applicable.

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

22        D. If privileged information is disclosed under subsection B or  
23 C of this section on the motion of a party, a court or the  
24 appropriate administrative official shall suppress evidence offered

1 in any civil or administrative proceeding that arises or is derived  
2 from review, disclosure or use of information obtained under this  
3 section unless the review, disclosure or use is authorized under  
4 Section 8 of this act. A party having received information under  
5 subsection B or C of this section has the burden of proving that the  
6 evidence offered did not arise and was not derived from the review  
7 of privileged information.

8 SECTION 10. NEW LAW A new section of law to be codified  
9 in the Oklahoma Statutes as Section 1-4-119 of Title 27A, unless  
10 there is created a duplication in numbering, reads as follows:

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

15 B. A disclosure is voluntary only if:

16 1. The disclosure was made:

- 17 a. promptly after knowledge of the information disclosed  
18 is obtained by the person making the disclosure, and  
19 b. no later than forty-five (45) days after the  
20 acquisition closing date, if the violation was  
21 discovered during an audit conducted before the  
22 acquisition closing date by a person considering the  
23 acquisition of the regulated facility or operation;

24

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

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

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

10       5. The person who makes the disclosure initiates an appropriate  
11 effort to achieve compliance, pursues that effort with due  
12 diligence, and corrects the noncompliance within a reasonable time;

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

16       7. The violation did not result in:

17           a. injury or imminent and substantial risk of serious

18           injury to one or more persons at the site, or

19           b. off-site substantial harm or imminent and substantial

20           risk of harm to persons, property, or the environment.

21       C. For a disclosure described in subparagraph b of paragraph 1  
22 of subsection B of this section, the person making the disclosure  
23 must certify in the disclosure that before the acquisition closing  
24 date:

1        1. The person was not responsible for the environmental,  
2 health, or safety compliance at the regulated facility or operation  
3 that is subject to the disclosure;

4        2. The person did not have the largest ownership share of the  
5 seller;

6        3. The seller did not have the largest ownership share of the  
7 person; and

8        4. The person and the seller did not have a common corporate  
9 parent or a common majority interest owner.

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

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

16       1. The person who made the disclosure willfully or knowingly  
17 committed or was responsible within the meaning of state laws for  
18 the commission of the disclosed violation;

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



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

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

11       5. The violation has resulted in a substantial economic benefit  
12 that gives the violator a clear advantage over its business  
13 competitors.

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

16       1. The voluntariness of the disclosure;

17       2. Efforts by the disclosing party to conduct environmental or  
18 health and safety audits;

19       3. Remediation;

20       4. Cooperation with government officials investigating the  
21 disclosed violation;

22       5. The period of ownership of the regulated facility or  
23 operation; or

24       6. Other relevant considerations.

1       G. In a civil or administrative enforcement action brought  
2 against a person for a violation for which the person claims to have  
3 made a voluntary disclosure, the person claiming the immunity has  
4 the burden of establishing a prima facie case that the disclosure  
5 was voluntary. After the person claiming the immunity establishes a  
6 prima facie case of voluntary disclosure, other than a case in which  
7 under subsections D and E of this section immunity does not apply,  
8 the enforcement authority has the burden of rebutting the  
9 presumption by a preponderance of the evidence.

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

18       I. In order to receive immunity under this section, a potential  
19 purchaser:

20       1. That acquires a regulated facility or operation that is the  
21 subject of an audit begun prior to acquisition may continue the  
22 audit after the acquisition closing date if, no later than forty-  
23 five (45) days after the acquisition closing date, the person  
24

1 provides notice to an appropriate regulatory agency of the fact that  
2 the potential purchaser intends to continue the ongoing audit;

3 2. The notice must specify:

- 4 a. the facility or portion of the facility being audited,
- 5 b. the date the audit began, and
- 6 c. the general scope of the audit; and

7 3. The potential purchaser must certify that before the  
8 acquisition closing date:

- 9 a. the potential purchaser was not responsible for the  
10 scope of the environmental, health, or safety  
11 compliance being audited at the regulated facility of  
12 operation,
- 13 b. the potential purchaser did not have the largest  
14 ownership share of the seller,
- 15 c. the seller did not have the largest ownership share of  
16 the potential purchaser, and
- 17 d. the potential purchaser and the seller did not have a  
18 common corporate parent or a common majority interest  
19 owner.

20 J. The immunity under this section does not apply if a court or  
21 administrative law judge finds that the person claiming the immunity  
22 has, after the effective date of this act:

23 1. Repeatedly or continuously committed significant violations;  
24 and

1        2. Not attempted to bring the facility or operation into  
2 compliance, so as to constitute a pattern of disregard of  
3 environmental or health and safety laws.

4        For violations to be considered a pattern, the person shall have  
5 committed a series of violations that were due to separate and  
6 distinct events occurring within a three-year period at the same  
7 facility or operation.

8        SECTION 11.        NEW LAW        A new section of law to be codified  
9 in the Oklahoma Statutes as Section 1-4-120 of Title 27A, unless  
10 there is created a duplication in numbering, reads as follows:

11        The privilege established by this act applies to environmental  
12 or health and safety audits that are conducted on or after the  
13 effective date of this act.

14        SECTION 12.        NEW LAW        A new section of law to be codified  
15 in the Oklahoma Statutes as Section 1-4-121 of Title 27A, unless  
16 there is created a duplication in numbering, reads as follows:

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

20        SECTION 13. This act shall become effective November 1, 2019.  
21  
22  
23  
24

1 Passed the Senate the 14th day of March, 2019.

2  
3 \_\_\_\_\_  
4 Presiding Officer of the Senate

5 Passed the House of Representatives the \_\_\_\_ day of \_\_\_\_\_,  
6 2019.

7  
8 \_\_\_\_\_  
9 Presiding Officer of the House  
10 of Representatives