

An Act

ENROLLED SENATE
BILL NO. 1003

By: Allen and Daniels of the
Senate

and

McBride and Caldwell (Chad)
of the House

An Act relating to environment and natural resources; creating the Oklahoma Environmental, Health and Safety Audit Privilege Act; stating purpose of act; applying act to certain agencies; defining terms; specifying general and supporting information to be contained in complete audit reports; requiring audit documents to be labeled in certain manner; specifying failure to label documents does not constitute waiver of certain privilege; establishing timeline for completed audit with certain exception; establishing audit report as privileged in certain circumstances; prohibiting certain persons from compelled testimony or production of audit documents in certain circumstances; authorizing certain persons to voluntarily testify or produce audit documents; prohibiting certain persons from requesting or reviewing audit documents for certain purpose; establishing burden of proof; providing exception to 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 circumstances; authorizing court to find certain persons in contempt of court; providing immunity for certain persons; establishing provisions of voluntary disclosure of audit information or report; requiring certain certification for voluntary disclosure; requiring certain notice to potential purchaser; providing exceptions to immunity; establishing mitigating factors for certain penalty; establishing circumstances required for developing a pattern; requiring certain notification to regulatory agency; establishing required information in notification; establishing applicability of act; providing for codification; and providing an effective date.

SUBJECT: Oklahoma Environmental, Health and Safety Audit Privilege Act

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 1-4-110 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 1-4-111 of Title 27A, unless there is created a duplication in numbering, reads as follows:

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

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

SECTION 3. 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:

A. As used in this act:

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

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

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

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

4. "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;

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

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

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

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

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

To fully implement the privilege established by this 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 1-4-113 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. Unless an extension is approved by the governmental entity with regulatory authority over the regulated facility or operation based on reasonable grounds, an environmental or health and safety audit must be completed within a reasonable time not to exceed six months after:

1. The date the audit is initiated; or
2. The acquisition closing date, if the person continues the audit.

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

SECTION 5. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-4-114 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 through 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, may not 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. 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 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.

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

SECTION 6. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-4-115 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,
- d. an independent contractor retained by the owner or operator,
- e. a person considering the acquisition of the regulated facility or operation that is the subject of the audit, or
- f. an employee, temporary employee, contract employee, legal representative, officer, director, partner or independent contractor of a person described in subparagraph e of this paragraph;

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

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

SECTION 7. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-4-116 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. Notwithstanding Section 250 et seq. of Title 75 of the Oklahoma Statutes, 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 sanctions as provided by Section 3226.1 of Title 12 of the Oklahoma Statutes if the court finds that the person willfully or knowingly claimed the privilege for 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 1-4-117 of Title 27A, unless there is created a duplication in numbering, reads as follows:

A. The privilege established by Section 5 of this 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 or reported 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 1-4-118 of Title 27A, unless there is created a duplication in numbering, reads as follows:

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

B. Notwithstanding the privilege established by Section 5 of this act, a regulatory agency may review information that is required to be available under a specific state or federal law, but that review does not waive or eliminate the administrative or civil evidentiary privilege if 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 before obtaining the 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 unless the review, disclosure or use is 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 1-4-119 of Title 27A, unless there is created a duplication in numbering, reads as follows:

A. Except as otherwise provided by this act, 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:

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

2. Notice of 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 initiates an appropriate effort to achieve compliance, pursues that effort with due diligence, and corrects the noncompliance 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:

- a. injury or imminent and substantial risk of serious injury to one or more persons at the site, or

- b. off-site substantial harm or imminent and substantial risk of harm to persons, property, or the environment.

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

1. The person was not responsible for the environmental, health, or safety compliance at the regulated facility or operation that is subject to the disclosure;
2. The person did not have the largest ownership share of the seller;
3. The seller did not have the largest ownership share of the person; and
4. The person and the seller did not have a common corporate parent or a common majority interest owner.

D. 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.

E. 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 willfully or knowingly committed or was responsible within the meaning of state laws for the commission of the disclosed violation;
2. The person who made the disclosure recklessly committed or was responsible within the meaning of state laws 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 willfully 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;

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; or

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

F. 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. Remediation;

4. Cooperation with government officials investigating the disclosed violation;

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

6. Other relevant considerations.

G. 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 subsections D and E of this section immunity does not apply, the enforcement authority has the burden of rebutting the presumption by a preponderance of the evidence.

H. 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 an appropriate regulatory agency 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.

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

1. That acquires a regulated facility or operation that is the subject of an audit begun prior to acquisition may continue the audit after the acquisition closing date if, no later than forty-five (45) days after the acquisition closing date, the person provides notice to an appropriate regulatory agency of the fact that the potential purchaser intends to continue the ongoing audit;

2. The notice must specify:

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

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

- a. the potential purchaser was not responsible for the scope of the environmental, health, or safety compliance being audited at the regulated facility of operation,
- b. the potential purchaser did not have the largest ownership share of the seller,
- c. the seller did not have the largest ownership share of the potential purchaser, and

- d. the potential purchaser and the seller did not have a common corporate parent or a common majority interest owner.

J. 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:

1. Repeatedly or continuously committed significant violations; and

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

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

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

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

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

This act shall not 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 13. This act shall become effective November 1, 2019.

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

Presiding Officer of the Senate

Passed the House of Representatives the 23rd day of April, 2019.

Presiding Officer of the House
of Representatives

OFFICE OF THE GOVERNOR

Received by the Office of the Governor this _____

day of _____, 20_____, at _____ o'clock _____ M.

By: _____

Approved by the Governor of the State of Oklahoma this _____

day of _____, 20_____, at _____ o'clock _____ M.

Governor of the State of Oklahoma

OFFICE OF THE SECRETARY OF STATE

Received by the Office of the Secretary of State this _____

day of _____, 20_____, at _____ o'clock _____ M.

By: _____