

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1993

H

1

HOUSE BILL 1949*

Short Title: Encourage Environmental Audits.

(Public)

Sponsors: Representative B. Miller.

Referred to: Judiciary III.

June 1, 1994

A BILL TO BE ENTITLED

1
2 AN ACT TO ENCOURAGE THE PERFORMANCE OF ENVIRONMENTAL
3 AUDITS AND SIMILAR ENVIRONMENTAL SELF-ASSESSMENTS BY
4 PROVIDING LIMITED PROTECTION AGAINST THE MISUSE OF AUDITS
5 BY CIRCUMSCRIBING THEIR DISCLOSURE, AND ALSO BY PROVIDING
6 LIMITED PROTECTIONS FOR COMPANIES WHO ACT DILIGENTLY TO
7 CORRECT PREVIOUSLY UNKNOWN DEFICIENCIES DISCOVERED
8 DURING THE AUDITING OR ASSESSMENT PROCESS, AS RECOMMENDED
9 BY THE ENVIRONMENTAL REVIEW COMMISSION.

10 Whereas, the General Assembly of North Carolina recognizes the importance
11 of protecting the environment of this State, as well as the health and safety of its
12 inhabitants and employees; and

13 Whereas, the ever-increasing complexity and pervasiveness of environmental
14 regulation makes the performance of audits increasingly advantageous and advisable for
15 businesses and municipalities in North Carolina; and

16 Whereas, the threat of enforcement, both civil and criminal, for
17 environmental violations makes performing audits both potentially beneficial, but also
18 potentially harmful if the contents are inappropriately disclosed or otherwise misused;
19 and

1 Whereas, various governmental agencies and other entities, including the
2 United States Environmental Protection Agency, have adopted policies having varying
3 degrees of formality which are designed to encourage audits; and

4 Whereas, confidentiality of documents is largely a matter of State law; Now,
5 therefore,

6 The General Assembly of North Carolina enacts:

7 Section 1. Chapter 8C of the General Statutes is amended by adding a new
8 section to read:

9 **"§ 8C-2. Privilege for environmental audits.**

10 (a) Purpose. In order to encourage owners and operators of facilities and persons
11 conducting activities regulated under those portions of the General Statutes listed in
12 subsection (c) of this section, or conducting activities regulated under federal, regional,
13 or local counterparts or extensions of those statutes, to conduct voluntary internal
14 environmental audits of their compliance programs and management systems and to
15 assess and improve compliance with statutes, an environmental audit privilege is
16 recognized to protect the confidentiality of communications relating to voluntary
17 internal environmental audits.

18 (b) Definitions. As used in this section:

19 (1) 'Environmental audit' means a voluntary, comprehensive evaluation of
20 one or more facilities or an activity at one or more facilities regulated
21 under those portions of the General Statutes listed in subsection (c) of
22 this section, or the federal, regional, or local counterpart or extension
23 of those statutes, or of management systems related to the facility or
24 activity, that is designed to identify and prevent noncompliance and to
25 improve compliance with environmental laws, and shall include all
26 self-assessments by whatever name known, including all
27 environmental audits or assessments performed pursuant to standards
28 adopted by the American Society for Testing and Materials, and
29 regardless of whether the assessment is conducted by the owner or
30 operator, by the owner's or operator's employees, or by independent
31 contractors.

32 (2) 'Environmental audit report' means all documents produced in the
33 course of performing the environmental audit, including, without
34 limitation:

35 a. An audit report prepared by the auditor, which may include the
36 scope of the audit, the information gained in the audit,
37 conclusions, recommendations, exhibits, and appendices.

38 b. Memoranda and documents analyzing any portion of an audit
39 report or issues relating to the implementation of an audit
40 report.

41 c. An implementation plan that addresses correcting past
42 noncompliance, improving current compliance, or preventing
43 future noncompliance.

1 d. All supporting information collected or developed for the
2 primary purpose and in the course of an environmental audit,
3 including all field notes and reports of observations, findings,
4 opinions, suggestions, conclusions, drafts, information, maps,
5 charts, graphs, and surveys.

6 (c) Scope. This act encourages the performance of environmental audits by
7 creating a 'disclosure' privilege for environmental audit reports that would prevent the
8 use of the reports as evidence in civil, criminal, or administrative proceedings provided
9 that the noncompliance discovered during the course of the audit was not known to the
10 owner or operator of the facility prior to the initiation of the audit. This section applies
11 to activities regulated under the following portions of the General Statutes and to
12 activities regulated under federal, regional, or local counterparts or extensions of these
13 statutes:

- 14 (1) Article 7 of Chapter 74.
- 15 (2) Chapter 104E.
- 16 (3) Chapter 104G.
- 17 (4) Article 25 of Chapter 113.
- 18 (5) Articles 1, 4, and 7 of Chapter 113A.
- 19 (6) Article 9 of Chapter 130A.
- 20 (7) Chapter 130B.
- 21 (8) Articles 21, 21A, and 21B of Chapter 143.

22 (d) Privilege. An environmental audit report shall be privileged and shall not be
23 admissible as evidence in any legal action in any civil, criminal, or administrative
24 proceeding, except as provided in subsection (e) of this section. This privilege shall
25 apply to all legal actions or administrative proceedings, whether civil or criminal, that
26 commence after the effective date of this act.

27 (e) Disclosure Under Limited Circumstances.

- 28 (1) The privilege described in subsection (d) of this section does not apply
29 to the extent that it is waived expressly by the owner or operator of a
30 facility that caused the environmental audit report to be prepared.
31 However, the disclosure by the owner or operator of information in an
32 environmental audit report to enforcement agencies shall not constitute
33 a waiver. Disclosed information shall be kept confidential by the
34 enforcement agencies and may not be used by them in any
35 investigation or in any proceeding against the defendant unless the
36 information is found by a court of record to be subject to disclosure
37 under subdivision (2) or (3) of this subsection.
- 38 (2) In a civil or administrative proceeding, the court of record, after **in**
39 camera review consistent with Chapter 1A of the General Statutes,
40 shall require disclosure of material for which the privilege described in
41 subsection (d) of this section is asserted only if the court determines
42 that:
 - 43 a. The privilege is asserted for a fraudulent purpose;
 - 44 b. The material is not subject to the privilege; or

- 1 c. The material shows evidence of substantial noncompliance with
2 any provision of law to which this section applies for which the
3 party has failed to undertake appropriate efforts to achieve
4 substantial compliance with reasonable diligence.
- 5 (3) In a criminal proceeding, a court of record, after **in camera** review as
6 described in subsection (f) of this section shall require disclosure of
7 material for which the privilege described in subsection (d) of this
8 section is asserted, if the court determines that:
- 9 a. The privilege is asserted for a fraudulent purpose;
10 b. The material is not subject to the privilege;
11 c. The material shows evidence of substantial noncompliance with
12 any provision of law to which this section applies for which the
13 party has failed to undertake appropriate efforts to achieve
14 substantial compliance with reasonable diligence; or
15 d. The material contains evidence relevant to a criminal offense
16 under any provision of law to which this section applies, a
17 district attorney or the Attorney General has a compelling need
18 for the information, the information is not otherwise available
19 and the district attorney or Attorney General is unable to obtain
20 the substantial equivalent of the information by any means
21 without incurring unreasonable cost and delay.
- 22 (4) A party asserting the environmental audit privilege under subsection
23 (d) of this section has the burden of proving the privilege, including, if
24 there is evidence of noncompliance with any provision of law to which
25 this section applies, proof that appropriate efforts to achieve
26 compliance were pursued with reasonable diligence. A party seeking
27 disclosure under subdivision (2)a. or (3)a. of this subsection has the
28 burden of proving that the privilege is asserted for a fraudulent
29 purpose. A district attorney or the Attorney General seeking
30 disclosure under subdivision (3)d. of this subsection has the burden of
31 proving the conditions for disclosure set forth in subdivision (3)d. of
32 this subsection.
- 33 (f) **In Camera** Review in Criminal Proceeding.
- 34 (1) If a district attorney or the Attorney General has probable cause to
35 believe a criminal offense has been committed under any provision of
36 law to which this section applies based upon information obtained
37 from a source independent of an environmental audit report the district
38 attorney or Attorney General may obtain an environmental audit report
39 for which a privilege is asserted under subsection (d) of this section
40 pursuant to search warrant, criminal subpoena, or discovery as allowed
41 by Chapter 15A of the General Statutes. The district attorney or
42 Attorney General shall immediately place the report under seal and
43 shall not review or disclose its contents.

1 (2) Within 30 days of the date on which the district attorney or Attorney
2 General obtains an environmental audit report, the owner or operator
3 who prepared or caused to be prepared the report may file with the
4 appropriate court a petition requesting an **in camera** hearing on
5 whether the environmental audit report or portions thereof are
6 privileged under this act or subject to disclosure. Failure by the owner
7 or operator to file a petition shall waive the privilege.

8 (3) Upon filing of such petition, the court shall issue an order scheduling
9 an **in camera** hearing, within 45 days of the filing of the petition, to
10 determine whether the environmental audit report or portions thereof
11 are privileged under this subsection or subject to disclosure. The order
12 shall allow the district attorney or Attorney General to remove the seal
13 from the report, review the report, and place appropriate limitations on
14 distribution and review of the report to protect against unnecessary
15 disclosure. The district attorney or Attorney General may consult with
16 enforcement agencies regarding the contents of the report as necessary
17 to prepare for the **in camera** hearing. However, the information used
18 in preparation for the **in camera** hearing shall not be used in any
19 investigation or in any proceeding against the defendant, and shall
20 otherwise be kept confidential, unless and until such information is
21 found by the court to be subject to disclosure.

22 (g) Entry of Order by Parties. The parties may at any time stipulate to entry of an
23 order directing that specific information contained in an environmental audit report is or
24 is not subject to the privilege provided under subsection (d) of this section.

25 (h) Limited Disclosure. Upon making a determination under subdivision (2) or
26 (3) of subsection (e) of this section, the court may compel the disclosure only of those
27 portions of an environmental audit report relevant to issues in dispute in the proceeding.

28 (i) Privilege Not Applicable. The privilege described in subsection (d) of this
29 section shall not extend to:

30 (1) Documents, communications, data, reports, or other information
31 required to be collected, developed, maintained, reported, or otherwise
32 made available to a regulatory agency pursuant to any provision of law
33 to which this section applies;

34 (2) Information obtained by observation, sampling, or monitoring by any
35 regulatory agency; or

36 (3) Information obtained from a source independent of the environmental
37 audit.

38 (j) Other Privileges Intact. Nothing in this act shall limit, waive, or abrogate the
39 scope or nature of any statutory or common law privilege, including the work- product
40 doctrine, the attorney-client privilege, and the self-evaluation privilege.

41 (k) Protection for Parties Who Implement Results of Audit. For any violation or
42 noncompliance shown in the audit that was not known to the owner or operator of the
43 facility prior to the initiation of the audit, the owner or operator:

- 1 (1) May not be prosecuted criminally or penalized civilly or
2 administratively if the party immediately prepares and submits:
3 a. A request for a special order by consent under G.S. 143-215.2
4 or G.S. 143-215.110; or
5 b. An application for any permit necessary to conduct the activity
6 that gives rise to the violation or noncompliance.
7 (2) May continue to operate or otherwise maintain the status quo of the
8 action discovered by the audit although otherwise contrary to statute,
9 rule, or permit (but for this provision) during the continuation of any
10 consent order and pending action on all permit applications and the
11 expiration of all times for appeal of those actions."
12 Sec. 2. This act is effective upon ratification.