

**GENERAL ASSEMBLY OF NORTH CAROLINA**

**SESSION 1997**

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**HOUSE BILL 247**

Short Title: Environmental Audits.

(Public)

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Sponsors: Representatives Mitchell; and Weatherly.

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Referred to: Environment, if favorable, Judiciary II.

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February 17, 1997

**A BILL TO BE ENTITLED**

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2 **AN ACT TO ENCOURAGE THE PERFORMANCE OF ENVIRONMENTAL AUDITS**  
3 **BY PROVIDING A LIMITED PRIVILEGE AGAINST THE DISCLOSURE OF AN**  
4 **ENVIRONMENTAL AUDIT REPORT AND TO GRANT EXEMPTIONS FROM**  
5 **CIVIL PENALTIES TO A PERSON OR OTHER ENTITY THAT VOLUNTARILY**  
6 **DISCLOSES A VIOLATION OF AN ENVIRONMENTAL LAW, AS**  
7 **RECOMMENDED BY THE ENVIRONMENTAL REVIEW COMMISSION.**

8 The General Assembly of North Carolina enacts:

9       Whereas, the General Assembly recognizes the importance of protecting the  
10 environment of this State and the health and safety of its citizens; and

11       Whereas, the ever-increasing complexity and pervasiveness of environmental  
12 regulation makes the voluntary performance of environmental self-assessments, or  
13 environmental audits, increasingly advantageous and advisable for businesses, local  
14 governments, and other entities regulated by the environmental laws of North Carolina;  
15 and

16       Whereas, self-assessments by regulated entities provide for an effective and  
17 efficient method for increasing environmental compliance and for protecting the  
18 environment, public health, and natural resources of North Carolina without additional  
19 governmental spending; and

1           Whereas, the General Assembly desires to encourage the performance of  
2 beneficial environmental audits by responsible members of the regulated community;  
3 Now, therefore,

4 The General Assembly of North Carolina enacts:

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

7 **"§ 8-53.9. Privilege for environmental audits.**

8           (a) Purpose. – For the purpose of encouraging the performance of environmental  
9 audits, a limited privilege is created to protect environmental audits.

10          (b) Definitions. – As used in this section:

11           (1) 'Audit team' means those persons and entities who perform an  
12 environmental audit and prepare an environmental audit report.

13           (2) 'Environmental audit' means a confidential voluntary evaluation or self-  
14 assessment of one or more facilities, one or more activities at any of  
15 those facilities, or one or more management systems related to those  
16 facilities or activities for the purpose of identifying noncompliance with  
17 environmental laws, preventing noncompliance with environmental  
18 laws, improving compliance with environmental laws, identifying and  
19 encouraging waste minimization or pollution prevention, or reducing  
20 risks to human health or the environment, whether or not the audit is  
21 conducted by the owner or operator of the facility or activity, by  
22 employees or agents of the owner or operator, or by independent  
23 contractors.

24           (3) 'Environmental audit report' means any document generated in the  
25 course of performing an environmental audit that addresses the  
26 correction of past noncompliance, the improvement of current  
27 compliance, or the prevention of future noncompliance, including both  
28 draft and final documents, and including each of the following:

29           a. Any report prepared by any member of the audit team, including  
30 exhibits and appendices to the report.

31           b. Any executive summary of the final report.

32           c. Any document analyzing the final report.

33           d. Any document concerning the implementation of the audit report,  
34 including documents concerning tracking of corrective efforts as  
35 described in G.S. 143B-279.8(c)(5) and G.S. 143-469.1(c)(5).

36           e. All work papers generated by members of the audit team in  
37 connection with the audit, including, without limitation, all  
38 working papers, field notes, and reports of observations, findings,  
39 opinions, suggestions, conclusions, drafts, information, maps,  
40 charts, graphs, and surveys.

41           f. Written communication to or from any member of the audit team  
42 concerning the audit.

1 'Environmental audit report' does not include any document,  
2 communication, data, report, or other communication:

3 a1. Required to be collected, developed, maintained, reported, or  
4 otherwise made available to a governmental agency pursuant to  
5 any permit governing an audited activity.

6 b1. Required to be collected, developed, maintained, reported, or  
7 otherwise made available to a governmental agency pursuant to  
8 any environmental law governing an audited activity.

9 c1. Required to be collected, developed, maintained, reported, or  
10 otherwise made available to a governmental agency by order of  
11 any governmental agency or court.

12 d1. Obtained by observation, sampling, or monitoring by any  
13 governmental agency except when obtained in evaluating the  
14 facilities, activities, or management systems of the agency itself  
15 in the course of an environmental audit.

16 e1. Obtained from a source independent of the environmental audit.

17 f1. Existing prior to the commencement of the environmental audit.

18 g1. Prepared subsequent to the completion of, and independent of,  
19 the environmental audit.

20 h1. Not otherwise privileged that is developed or maintained in the  
21 course of a regularly conducted business activity or regular  
22 practice other than an environmental audit.

23 i1. Concerning a violation of an environmental law that constitutes  
24 an imminent hazard as defined in G.S. 130A-2.

25 (4) 'Environmental law' means all of the following portions of the General  
26 Statutes, any comparable federal, regional, or local laws or extensions of  
27 those statutes, and any rules, regulations, or interpretations that  
28 implement the following portions of the General Statutes or comparable  
29 federal, regional, or local laws:

30 a. Article 7 of Chapter 74.

31 b. Chapter 104E.

32 c. Article 25 of Chapter 113.

33 d. Articles 4 and 7 of Chapter 113A.

34 e. Articles 9, 10, 11, and 19 of Chapter 130A.

35 f. Articles 21, 21A, 21B, and 52 of Chapter 143.

36 (c) Privilege. – An environmental audit report that complies with the requirements  
37 set forth in subsection (d) of this section is privileged against disclosure to any person  
38 except when lawfully obtained pursuant to a criminal investigation and solely for the  
39 purpose of a criminal investigation. An environmental audit report that complies with the  
40 requirements set forth in subsection (d) of this section is not admissible as evidence in  
41 any civil or administrative proceeding except as provided in subsection (e) of this section.  
42 No person shall be competent to testify in any civil or administrative proceeding  
43 concerning an environmental audit report that is privileged under this section unless the

1 privilege is waived or disclosure is ordered under subsection (e) of this section. The  
2 privilege created by this section protects an environmental audit report and any oral  
3 communication concerning the environmental audit report to or from any person or entity  
4 who is a member of the audit team, but does not protect the underlying facts or activities  
5 that are the subject of the environmental audit report. An environmental audit report  
6 prepared for an agency or subdivision of the government of this State shall be subject to  
7 disclosure as provided in Chapter 132 of the General Statutes but shall be privileged as  
8 provided in this section. The release of information in an environmental audit report by  
9 an agency or subdivision of the government of this State pursuant to Chapter 132 of the  
10 General Statutes shall not constitute a waiver of the privilege.

11 (d) Environmental Audit Report Requirements. – In order to be privileged under  
12 subsection (c) of this section, an environmental audit report must: (i) be based on an  
13 environmental audit that is started and completed on dates certain and performed under a  
14 definite and determinate scope of work; (ii) be dated, identify the scope of the  
15 environmental audit described in the report, and identify all members of the audit team;  
16 and (iii) contain pages that are consecutively paginated and that are each labeled  
17 'Environmental Audit Report: Privileged Document.' An environmental audit report that  
18 does not meet these requirements is privileged under subsection (c) of this section if, in  
19 any civil or administrative proceeding in which the privilege is asserted, the court or the  
20 administrative law judge finds that the requirements of this subsection have been  
21 substantially met and the audit team made a good faith effort to comply with these  
22 requirements and to maintain the confidentiality of the environmental audit report during  
23 its preparation.

24 (e) Procedure for Seeking Disclosure in Civil or Administrative Proceedings. –  
25 When a party to a civil or an administrative proceeding seeks access to an environmental  
26 audit report or seeks to conduct discovery regarding that report, the provisions of this  
27 subsection apply. Discovery may be had without judicial intervention as to the  
28 following: the fact that an environmental audit took place; the existence of any  
29 environmental audit report; the starting and ending dates of the environmental audit; the  
30 facility or facilities that were audited; and the identities of the members of the audit team  
31 and any other persons who have had access to the environmental audit report. Where  
32 disclosure is sought in a civil or administrative proceeding of any other fact or aspect of  
33 an environmental audit or an environmental audit report and the privilege has not been  
34 waived, the court or the administrative law judge, after an in camera review in  
35 accordance with the provisions of Rule 26(c) of the Rules of Civil Procedure, shall  
36 require disclosure of material for which the privilege described in subsection (c) of this  
37 section is asserted, only if the court or administrative law judge determines that the:

- 38 (1) Material is not subject to the privilege;
- 39 (2) Privilege is asserted for a fraudulent purpose; or
- 40 (3) Privilege is waived pursuant to subsection (f) of this section.

41 (f) Waiver. –

- 42 (1) A person holding the privilege created by subsection (c) of this section  
43 waives the privilege by:

- 1           a.     Expressly waiving the privilege in writing.  
2           b.     Signing a consent special order or settlement agreement binding  
3                 on the person holding the privilege and expressly stating that the  
4                 privilege is waived.  
5           c.     Introducing into evidence in any civil, administrative, or criminal  
6                 proceeding all or any portion of the environmental audit report.  
7                 Introduction of any portion of an environmental audit report into  
8                 evidence waives the privilege as to that portion of the  
9                 environmental audit report that was introduced into evidence. In  
10                addition, the court may compel disclosure of all or any other  
11                portion of the environmental audit report if the court determines  
12                that disclosure is necessary to a proper administration of justice  
13                and that the disclosure is not prohibited by other statute or rule.  
14           d.     Failing to make a report or disclosure of noncompliance required  
15                 by an environmental law that is identified in the environmental  
16                 audit report.  
17           e.     Failing to promptly initiate appropriate efforts to achieve  
18                 compliance, to correct the violation in a reasonably diligent  
19                 manner, and to take steps to prevent any recurrence of any  
20                 noncompliance identified in the environmental audit report.  
21           f.     Releasing information in any environmental audit report in a  
22                 manner that is inconsistent with an intent to protect the  
23                 confidentiality of the information. Release of any portion of an  
24                 environmental audit report to any State agency waives the  
25                 privilege as to that portion of the environmental audit report that  
26                 was released.  
27        (2)     The disclosure by the owner or operator of a facility of information in  
28                 an environmental audit report to an employee, agent, representative of  
29                 the owner or operator, lender, or prospective purchaser of the operation  
30                 or facility shall not constitute a waiver of the privilege under this  
31                 subsection so long as the owner or operator has entered into a written  
32                 confidentiality agreement with the recipient of the information or has  
33                 acted in a manner consistent with an intent to protect the confidentiality  
34                 of the information.  
35        (3)     In determining whether a party has waived any privilege under this  
36                 subsection, the court or the administrative law judge shall be guided by  
37                 the principles that govern the waiver of privileges under the common  
38                 law of this State, except to the extent that the common law doctrines of  
39                 this State are inconsistent with this subsection.  
40        (g)     Protective Orders. – Any required disclosure of any environmental audit report,  
41                 or any portion thereof, shall be under terms that will protect from improper disclosure all  
42                 privileged information in the report. The court, in its discretion, may issue a protective  
43                 order, an order limiting copying or further dissemination of the report, an order redacting

1 the report, or any other order necessary to protect the confidentiality of information in the  
2 report.

3 (h) Stipulations. – The parties to a proceeding under subsection (e) of this section  
4 may at any time stipulate to entry of an order directing that specific information  
5 contained in an environmental audit report is or is not subject to the privilege provided  
6 under this section.

7 (i) Other Privileges Intact. – Nothing in this section shall limit, waive, or abrogate  
8 the scope or nature of any statutory or common law privilege recognized under the law of  
9 this State.

10 (j) Burdens of Persuasion and Proof. – The person asserting the privilege under  
11 this section has the burden of proving that the information is privileged. If the person  
12 asserting the privilege establishes prima facie that the information is entitled to protection  
13 under this section, any person requesting access to, or right of disclosure of, that  
14 information has the burden of proving that the material is not subject to the privilege, that  
15 the privilege is asserted for a fraudulent purpose, or that the privilege has been waived."

16 Section 2. Part 1 of Article 7 of Chapter 143B of the General Statutes is  
17 amended by adding a new section to read:

18 "**§ 143B-279.8. Penalty exemption for voluntarily disclosed violations.**

19 (a) Definitions. – For purposes of this section:

20 (1) 'Environmental audit report' has the same meaning as in G.S. 8-53.9.

21 (2) 'Environmental law' means all of the following portions of the General  
22 Statutes, any comparable federal, regional, or local laws or extensions of  
23 those statutes, and any rules, regulations, or interpretations that  
24 implement the following portions of the General Statutes or comparable  
25 federal, regional, or local laws:

26 a. Article 7 of Chapter 74.

27 b. Chapter 104E.

28 c. Article 25 of Chapter 113.

29 d. Articles 4 and 7 of Chapter 113A.

30 e. Articles 9, 10, 11, and 19 of Chapter 130A.

31 f. Articles 21, 21A, and 21B of Chapter 143.

32 (3) 'Imminent hazard' has the same meaning as in G.S. 130A-2.

33 (4) 'Department' means the Department of Environment, Health, and  
34 Natural Resources.

35 (5) 'Regulatory permit' means any permit that is granted by action of  
36 environmental law, where there is no written permit, or where the  
37 permit contains terms incorporated by reference from any  
38 environmental law, and shall include, but is not limited to, any  
39 permission to operate an animal waste management system under Part  
40 9A of Article 21 of Chapter 143 of the General Statutes.

41 (b) Penalty Exemption for Voluntary Disclosure. – No civil penalty may be  
42 imposed on a person or other entity that voluntarily discloses a violation of an  
43 environmental law pursuant to this section. This exemption applies to any violation

1 disclosed voluntarily, whether the disclosure is the result of an environmental audit report  
2 or otherwise, so long as the violation is disclosed pursuant to subsection (c) of this  
3 section.

4 (c) Voluntary Disclosure. – A violation is voluntarily disclosed for purposes of  
5 this section if the disclosure satisfies all of the following:

6 (1) The violation does not result in an imminent hazard.

7 (2) The person or other entity voluntarily notifies the Department and, if  
8 required, notifies the United States Environmental Protection Agency or  
9 the United States Nuclear Regulatory Commission of the violation  
10 before: (i) the Department, the United States Environmental Protection  
11 Agency, or the United States Nuclear Regulatory Commission learns of  
12 the violation; or (ii) the commencement of a local, state, or federal  
13 inspection, investigation, or information request. Notice must be given  
14 in the manner required by law, and within the time required by law or  
15 within 30 days of discovery, whichever is earlier.

16 (3) The person or other entity voluntarily makes a complete and accurate  
17 written report of the violation to the Department and, if required, to the  
18 United States Environmental Protection Agency or the United States  
19 Nuclear Regulatory Commission in accordance with any applicable law,  
20 rule, regulation, or order, or within 60 days after notification is made  
21 under subdivision (2) of this subsection, whichever is earlier.

22 (4) The disclosure is not expressly required by a permit, regulatory permit,  
23 law, rule, order, or consent agreement governing the facility at which  
24 the violation occurred or the disclosure, even if expressly required by a  
25 law or rule, is made as a result of an environmental audit report.

26 (5) The person or other entity promptly initiates appropriate efforts to  
27 achieve compliance, acts to correct the violation in a reasonably diligent  
28 manner, and takes all steps reasonably necessary to prevent any  
29 recurrence of the violation.

30 (6) The violation is not the result of an intentional or willfully reckless  
31 activity or action."

32 Section 3. Part 5 of Article 52 of Chapter 143 of the General Statutes is  
33 amended by adding a new section to read:

34 **"§ 143-469.1. Penalty exemption for voluntarily disclosed violations.**

35 (a) Definitions. – For purposes of this section:

36 (1) 'Environmental audit report' has the same meaning as in G.S. 8-53.9.

37 (2) 'Environmental law' means this Article, any comparable federal,  
38 regional, or local laws or extensions of this Article, and any rules,  
39 regulations, or interpretations that implement this Article or comparable  
40 federal, regional, or local laws.

41 (3) 'Imminent hazard' has the same meaning as in G.S. 130A-2.

42 (4) 'Department' means the Department of Agriculture.

1           (5) 'Regulatory permit' means any permit that is granted by action of  
2 environmental law, where there is no written permit, or where the  
3 permit contains terms incorporated by reference from any  
4 environmental law, and shall include, but is not limited to, any  
5 permission to operate an animal waste management system under Part  
6 9A of Article 21 of Chapter 143 of the General Statutes.

7           (b) Penalty Exemption for Voluntary Disclosure. – No civil penalty may be  
8 imposed on a person or other entity that voluntarily discloses a violation of an  
9 environmental law pursuant to this section. This exemption applies to any violation  
10 disclosed voluntarily, whether the disclosure is the result of an environmental audit report  
11 or otherwise, so long as the violation is disclosed pursuant to subsection (c) of this  
12 section.

13           (c) Voluntary Disclosure. – A violation is voluntarily disclosed for purposes of  
14 this section if the disclosure satisfies all of the following:

15           (1) The violation does not result in an imminent hazard.

16           (2) The person or other entity voluntarily notifies the Department and, if  
17 required, notifies the United States Environmental Protection Agency or  
18 the United States Nuclear Regulatory Commission of the violation  
19 before: (i) the Department, the United States Environmental Protection  
20 Agency, or the United States Nuclear Regulatory Commission learns of  
21 the violation; or (ii) the commencement of a local, state, or federal  
22 inspection, investigation, or information request. Notice must be given  
23 in the manner required by law, and within the time required by law or  
24 within 30 days of discovery, whichever is earlier.

25           (3) The person or other entity voluntarily makes a complete and accurate  
26 written report of the violation to the Department and, if required, to the  
27 United States Environmental Protection Agency or the United States  
28 Nuclear Regulatory Commission in accordance with any applicable law,  
29 rule, regulation, or order, or within 60 days after notification is made  
30 under subdivision (2) of this subsection, whichever is earlier.

31           (4) The disclosure is not expressly required by a permit, regulatory permit,  
32 law, rule, order, or consent agreement governing the facility at which  
33 the violation occurred or the disclosure, even if expressly required by a  
34 law or rule, is made as a result of an environmental audit report.

35           (5) The person or other entity promptly initiates appropriate efforts to  
36 achieve compliance, acts to correct the violation in a reasonably diligent  
37 manner, and takes all steps reasonably necessary to prevent any  
38 recurrence of the violation.

39           (6) The violation is not the result of an intentional or willfully reckless  
40 activity or action."

41 Section 4. G.S. 74-64 is amended by adding a new subsection to read:

42           "(c) G.S. 143B-279.8 governs civil penalties under this Article."

43 Section 5. G.S. 104E-24 is amended by adding a new subsection to read:

1       "(e) G.S. 143B-279.8 governs civil penalties under this Chapter."

2       Section 6. G.S. 113A-64 is amended by adding a new subsection to read:

3       "(c) G.S. 143B-279.8 governs civil penalties under this Article."

4       Section 7. G.S. 113A-126 is amended by adding a new subsection to read:

5       "(e) G.S. 143B-279.8 governs civil penalties under this Article."

6       Section 8. Part 2 of Article 1 of Chapter 130A of the General Statutes is  
7 amended by adding a new section to read:

8       "**§ 130A-26.3. Penalty exemption for voluntarily disclosed violations.**

9       G.S. 143B-279.8 governs civil penalties under Articles 9, 10, 11, and 19 of this  
10 Chapter."

11       Section 9. G.S. 143-215.6A is amended by adding a new subsection to read:

12       "(l) G.S. 143B-279.8 governs civil penalties under this Part."

13       Section 10. G.S. 143-215.88A is amended by adding a new subsection to read:

14       "(c) G.S. 143B-279.8 governs civil penalties under this Part."

15       Section 11. G.S. 143-215.102 is amended by adding a new subsection to read:

16       "(c) G.S. 143B-279.8 governs civil penalties under this Part."

17       Section 12. G.S. 215.114A is amended by adding a new subsection to read:

18       "(h) G.S. 143B-279.8 governs civil penalties under this Part."

19       Section 13. The Environmental Review Commission shall monitor the  
20 implementation of this act. To assist the Environmental Review Commission in  
21 monitoring the implementation of this act, the Department of Environment, Health, and  
22 Natural Resources and the Department of Agriculture shall annually assess the  
23 implementation of this act and shall report their findings and recommendations to the  
24 Environmental Review Commission. The report shall be made on or before 1 October of  
25 each year, beginning 1 October 1998, and shall address at least:

26       (1) The number of environmental audits that are conducted, based on  
27 information available to each department and information voluntarily  
28 supplied to the departments by persons who have conducted  
29 environmental audits.

30       (2) Whether the exemption from civil penalties for violations that are  
31 voluntarily disclosed should be modified to allow for the imposition of a  
32 civil penalty in an amount necessary to offset the economic benefit  
33 gained by the violator as a result of the violation and if so, how the  
34 amount of the economic benefit would be calculated.

35       (3) The effect of this act on compliance with environmental law including  
36 improved compliance as a result of environmental audits.

37       (4) The effect of this act on federal delegation of program authority to the  
38 State and on federal approval of State programs that implement federal  
39 law and regulations.

40       Section 14. This act becomes effective 1 October 1997. Section 1 of this act  
41 applies to environmental audits begun on or after the date this act becomes effective. The  
42 exemption from civil penalties created by Sections 2 through 12 of this act applies to any

1 violation of an environmental law that is voluntarily disclosed as provided by this act on  
2 or after the date this act becomes effective.

3           Section 15. This act expires 1 October 2000. An environmental audit report  
4 that is privileged against disclosure under Section 1 of this act while this act is in force  
5 shall remain privileged against disclosure as provided in Section 1 of this act after 1  
6 October 2000. An exemption from a civil penalty that is created under Sections 2  
7 through 12 of this act while this act is in force shall continue to exist as provided in  
8 Sections 2 through 12 of this act after 1 October 2000.