

1 **SENATE FLOOR VERSION**

2 February 28, 2019

3 COMMITTEE SUBSTITUTE  
4 FOR

5 SENATE BILL NO. 1003

6 By: Allen

7 An Act relating to environment and natural resources;  
8 creating the Oklahoma Environmental, Health and  
9 Safety Audit Privilege Act; stating purpose of act;  
10 applying act to certain agencies; defining terms;  
11 specifying general and supporting information to be  
12 contained in complete audit reports; requiring audit  
13 documents to be labeled in certain manner; specifying  
14 failure to label documents does not constitute waiver  
15 of certain privilege; establishing timeline for  
16 completed audit; establishing audit report as  
17 privileged in certain circumstances; prohibiting  
18 certain persons from compelled testimony or  
19 production of audit documents in certain  
20 circumstances; authorizing certain persons to  
21 voluntarily testify or produce audit documents;  
22 prohibiting certain persons from requesting or  
23 reviewing audit documents for certain purpose;  
24 establishing burden of proof; providing exception to  
privilege if expressly waived by certain persons;  
establishing certain disclosures of audit information  
as non-waiver disclosures; providing for damages and  
fines for disclosure of privileged information;  
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;

1 authorizing agency to review certain information;  
2 requiring notification for certain privileged  
3 information; requiring court to suppress privileged  
4 information in certain circumstances; authorizing  
5 parties in criminal proceeding to determine whether  
6 certain information is privileged; authorizing court  
7 to compel certain disclosure of privileged  
8 information; authorizing court to find certain  
9 persons in contempt of court; providing immunity for  
10 certain persons; establishing provisions of voluntary  
11 disclosure of audit information or report; providing  
12 exceptions to immunity; establishing mitigating  
13 factors for certain penalty; requiring certain  
14 notification to regulatory agency; establishing  
15 required information in notification; authorizing  
16 certain penalty for voluntary disclosure in certain  
17 circumstances; establishing applicability of act;  
18 providing for codification; and providing an  
19 effective date.

20 BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

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

24 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.

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

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

6 A. As used in this act:

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

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

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

21 a. a regulated facility or operation, or

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

23 4. "Environmental or health and safety law" means:  
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- 1 a. a federal or state environmental or occupational  
2 health and safety law, or  
3 b. a rule, regulation or regional or local law adopted in  
4 conjunction with a law described by subparagraph a of  
5 this paragraph;

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

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

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

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

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

21 A. An audit report is a report that includes each document and  
22 communication, other than those set forth in Section 8 of this act,  
23 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. Once initiated, an audit shall be completed within a  
14 reasonable time not to exceed six (6) months unless an extension is  
15 approved by the governmental entity with regulatory authority over  
16 the regulated facility or operation based on reasonable grounds.

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

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

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

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

1        2. An administrative proceeding.

2        C. A person, when called or subpoenaed as a witness, cannot be  
3 compelled to testify or produce a document related to an  
4 environmental or health and safety audit if:

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

9            2. For purposes of this subsection only, the person is:

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

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

14            c. a custodian of the audit results.

15        D. A person who conducts or participates in the preparation of  
16 an environmental or health and safety audit and who has actually  
17 observed physical events of violation may testify about those events  
18 but may not be compelled to testify about or produce documents  
19 related to the preparation of or any privileged part of an  
20 environmental or health and safety audit or any item listed in  
21 Section 4 of this act.

22        E. An employee of a state agency may not request, review or  
23 otherwise use an audit report during an agency inspection of a  
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1 regulated facility or operation, or an activity of a regulated  
2 facility or operation.

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

5 G. No audit report or any associated information or records  
6 shall be subject to the Oklahoma Open Records Act. All records  
7 collected pursuant to this act shall be deemed confidential.

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

11 A. The privilege described by Section 5 of this act does not  
12 apply to the extent the privilege is expressly waived by the owner  
13 or operator who prepared the audit report or caused the report to be  
14 prepared.

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

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

- 20 a. a person employed by the owner or operator, including  
21 temporary and contract employees,  
22 b. a legal representative of the owner or operator,  
23 c. an officer or director of the regulated facility or  
24 operation or a partner of the owner or operator, or

1           d.    an independent contractor retained by the owner or  
2                   operator;

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

6           a.    a partner or potential partner of the owner or  
7                   operator of the facility or operation,

8           b.    a transferee or potential transferee of the facility  
9                   or operation,

10          c.    a lender or potential lender for the facility or  
11                   operation,

12          d.    a governmental official or a state or federal agency,  
13                   or

14          e.    a person or entity engaged in the business of  
15                   insuring, underwriting or indemnifying the facility or  
16                   operation; or

17          3.    Is made under a claim of confidentiality to a governmental  
18 official or agency by the person for whom the audit report was  
19 prepared or by the owner or operator.

20          C.    A party to a confidentiality agreement described in  
21 paragraph 2 of subsection B of this section who violates that  
22 agreement is liable for damages caused by the disclosure and for any  
23 other penalties stipulated in the confidentiality agreement.

1 D. Information that is disclosed under paragraph 3 of  
2 subsection B of this section is confidential and is not subject to  
3 disclosure. A public entity, public employee or public official who  
4 discloses information in violation of this subsection commits an  
5 offense. An offense under this subsection is a misdemeanor  
6 punishable by fine not to exceed Five Hundred Dollars (\$500.00) or  
7 confinement for not more than six (6) months. It is an affirmative  
8 defense to the clerical dissemination of a privileged audit report  
9 that the report was not clearly labeled "COMPLIANCE REPORT:  
10 PRIVILEGED DOCUMENT" or words of similar import. The lack of  
11 labeling may not be raised as a defense if the entity, employee or  
12 official knew or had reason to know that the document was a  
13 privileged audit report.

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

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

20 A. A court or administrative hearings official with competent  
21 jurisdiction may require disclosure of a portion of an audit report  
22 in a civil, criminal or administrative proceeding if the court or  
23 administrative hearings official determines, after an in camera  
24 review consistent with the appropriate rules of procedure, that:

1 1. The privilege is asserted for a fraudulent purpose;

2 2. The portion of the audit report is not subject to the  
3 privilege under Section 8 of this act; or

4 3. The portion of the audit report shows evidence of  
5 noncompliance with an environmental or health and safety law and  
6 appropriate efforts to achieve compliance with the law were not  
7 promptly initiated and pursued with reasonable diligence after  
8 discovery of noncompliance.

9 B. A party seeking disclosure under this section has the burden  
10 of proving that paragraph 1, 2 or 3 of subsection A of this section  
11 applies.

12 C. Notwithstanding any other law, a decision of an  
13 administrative hearings official under paragraph 1, 2 or 3 of  
14 subsection A of this section is directly appealable to a court of  
15 competent jurisdiction without disclosure of the audit report to any  
16 person unless so ordered by the court.

17 D. A person claiming the privilege is subject to sanctions as  
18 provided by the Oklahoma Rules of Civil Procedure if the court finds  
19 that the person intentionally or knowingly claimed the privilege for  
20 unprotected information as provided in Section 8 of this act.

21 E. A determination of a district court under this section is  
22 subject to interlocutory appeal to an appropriate appellate court.

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

4 A. The privilege described in this act does not apply to:

5 1. A document, communication, datum or report or other  
6 information required by a regulatory agency to be collected,  
7 developed, maintained or reported under a federal or state  
8 environmental or health and safety law;

9 2. Information obtained by observation, sampling or monitoring  
10 by a regulatory agency;

11 3. Information obtained from a source not involved in the  
12 preparation of the environmental or health and safety audit report;  
13 or

14 4. Material or information contained in the audit report that  
15 cannot be reproduced through any independent means, if a government  
16 official charged with the enforcement of an environmental or health  
17 and safety law demonstrates a compelling need for the information to  
18 protect human health or the environment.

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

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

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

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

10       C. If information is required to be available to the public by  
11 operation of a specific state or federal law, the governmental  
12 authority shall notify the person claiming the privilege of the  
13 potential for public disclosure before obtaining the information  
14 under subsection A or B of this section.

15       D. If privileged information is disclosed under subsection B or  
16 C of this section on the motion of a party, a court or the  
17 appropriate administrative official shall suppress evidence offered  
18 in any civil or administrative proceeding that arises or is derived  
19 from review, disclosure or use of information obtained under this  
20 section unless the review, disclosure or use is authorized under  
21 Section 8 of this act. A party having received information under  
22 subsection B or C has the burden of proving that the evidence  
23 offered did not arise and was not derived from the review of  
24 privileged information.

1 E. The parties of a criminal proceeding may stipulate to entry  
2 of an order directing that specific information contained in an  
3 audit report is or is not subject to the privilege.

4 F. A court may compel the disclosure of only those portions of  
5 an audit report relevant to issues in dispute in the proceeding.

6 G. A court may find a person who discloses information in  
7 violation of this section in contempt of court and may order other  
8 appropriate relief.

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

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

16 B. A disclosure is voluntary only if:

17 1. The disclosure was made promptly after knowledge of the  
18 information disclosed is obtained by the person;

19 2. The disclosure was made in writing by certified mail to an  
20 agency that has regulatory authority with regard to the violation  
21 disclosed;

22 3. An investigation of the violation was not initiated or the  
23 violation was not independently detected by an agency with  
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1 enforcement jurisdiction before the disclosure was made using  
2 certified mail;

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

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

8 6. The person making the disclosure cooperates with the  
9 appropriate agency in connection with an investigation of the issues  
10 identified in the disclosure; and

11 7. The violation did not result in injury to one or more  
12 persons at the site or substantial off-site harm to persons,  
13 property or the environment.

14 C. A disclosure is not voluntary for purposes of this section  
15 if it is a report to a regulatory agency required solely by a  
16 specific condition of an enforcement order or decree.

17 D. The immunity established by subsection A of this section  
18 does not apply and an administrative or civil penalty may be imposed  
19 under applicable law if:

20 1. The person who made the disclosure intentionally or  
21 knowingly committed or was responsible within the meaning of Penal  
22 Code of the State of Oklahoma for the commission of the disclosed  
23 violation;

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1           2. The person who made the disclosure recklessly committed or  
2 was responsible within the meaning of Penal Code of the State of  
3 Oklahoma for the commission of the disclosed violation and the  
4 violation resulted in substantial injury to one or more persons at  
5 the site or off-site harm to persons, property or the environment;

6           3. The offense was committed intentionally or knowingly within  
7 the meaning of Penal Code of the State of Oklahoma by a member of  
8 the person's management or an agent of the person and the person's  
9 policies or lack of prevention systems contributed materially to the  
10 occurrence of the violation; or

11           4. The offense was committed recklessly within the meaning of  
12 Penal Code of the State of Oklahoma by a member of the person's  
13 management or an agent of the person, the person's policies or lack  
14 of prevention systems contributed materially to the occurrence of  
15 the violation, and the violation resulted in substantial injury to  
16 one or more persons at the site or off-site harm to persons,  
17 property or the environment.

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

20           1. The voluntariness of the disclosure;

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

23           3. Remediation;

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1 4. Cooperation with government officials investigating the  
2 disclosed violation; or

3 5. Other relevant considerations.

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

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

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

24 1. Repeatedly or continuously committed serious violations; 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 In order to be considered a "pattern," the person must have  
5 committed a series of violations that were due to separate and  
6 distinct events within a three-year period at the same facility or  
7 operation.

8 I. Notwithstanding any provision of this act regarding the  
9 elimination of a penalty, a penalty may be assessed for a violation  
10 that has been voluntarily disclosed if the regulatory agency with  
11 jurisdiction over the disclosed violation, the governor and the  
12 attorney general unanimously agree that the penalty should be  
13 assessed.

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

17 The provisions established of this act apply to environmental or  
18 health and safety audits that are conducted on or after the  
19 effective date of this act.

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

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

4 SECTION 13. This act shall become effective November 1, 2019.

5 COMMITTEE REPORT BY: COMMITTEE ON ENERGY  
6 February 28, 2019 - DO PASS AS AMENDED  
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