

ASSEMBLY, No. 273

STATE OF NEW JERSEY

Introduced Pending Technical Review by Legislative Counsel

PRE-FILED FOR INTRODUCTION IN THE 1996 SESSION

By Assemblymen BATEMAN and DORIA

1 AN ACT establishing an environmental audit report evidentiary
2 privilege in certain cases and supplementing Title 2A of New Jersey
3 Statutes.

4

5 **BE IT ENACTED** by the Senate and General Assembly of the State
6 of New Jersey:

7

8 1. The Legislature finds and declares that environmental audits can
9 be an effective and meaningful tool in preventing, discovering and
10 correcting violations or potential violations of environmental law and
11 regulation which may pose a danger to the environment, the general
12 quality of life in our State, and the well-being of our neighborhoods
13 and workers, and that for these reasons the regulated community
14 should be strongly encouraged to voluntarily undertake such audits.

15 The Legislature further finds that in order to encourage owners and
16 operators of facilities and persons conducting activities regulated
17 under federal, State, or local environmental laws to undertake
18 voluntary internal environmental audits of their operations, activities,
19 or environmental compliance programs and management systems, and
20 to assess and, if appropriate and necessary, correct and improve
21 compliance with statutory and regulatory requirements, an
22 environmental audit privilege should be established to protect the
23 confidentiality of communications and documents relating to such
24 voluntary internal environmental audits.

25 The Legislature further declares that its intent in establishing such
26 privilege is to create a predictable and cooperative regulatory climate
27 for those responsible members of the regulated community who
28 voluntarily undertake such audits in order to determine whether they
29 are in compliance with State, federal and local environmental statutes
30 and regulations, and in those cases where such audits reveal instances
31 of non-compliance or indicate deviations from or infractions of those
32 statutory and regulatory requirements, proceed in a timely, thorough
33 and effective manner to make the improvements and corrections that
34 are necessary in order to come into compliance with those statutory
35 and regulatory requirements.

1 Finally, the Legislature most strongly declares that the voluntary
2 environmental audit program established under this act should not be
3 misconstrued or implemented in a manner so as to afford any
4 unintended protections, legal defenses or avenues of escape for those
5 few irresponsible and incorrigible members of the regulated community
6 who seek to evade their statutory and regulatory responsibilities to the
7 detriment of all who live and work in this State, and that the
8 provisions of this act in no way interfere or otherwise impede any
9 legitimate investigatory or enforcement activities or any resultant
10 prosecutorial effort against such recalcitrants.

11

12 2. As used in this act:

13 "Environmental audit report" means a set of documents prepared as
14 the result of an environmental audit. The report, which shall be
15 labeled "Environmental Audit Report," shall include a statement
16 setting forth the scope of the environmental audit, a certified index
17 identifying the documents in the report, and the calendar dates on
18 which the environmental audit was initiated and completed. The
19 environmental audit report also may include, as applicable, information
20 gained in the environmental audit, exhibits and appendices, and
21 conclusions and recommendations; memoranda and documents
22 analyzing part or all of the audit report and discussing implementation
23 issues; an audit implementation plan that addresses correcting past
24 non-compliance, improving current compliance, and preventing future
25 non-compliance; documentation associated with the tracking of
26 corrective actions for non-compliance audit findings; and supporting
27 information including field notes and records of observations, findings,
28 suggestions, conclusions, drafts, memoranda, drawings, photographs,
29 environmental sampling results, computer-generated or electronically
30 recorded information, maps, charts, graphs, and surveys, provided,
31 however, that the supporting information is collected or developed for
32 the purpose of and in the course of an environmental audit.

33 "Enforcement action" means an administrative order or a criminal
34 investigation or prosecution involving any violation that has been
35 designated as a "high priority violation" by the Department of
36 Environmental Protection and the United States Environmental
37 Protection Agency pursuant to the federal "Resource Conservation and
38 Recovery Act," 42 U.S.C. §6901 et seq.; any violation of a requirement
39 in any environmental law which requires that a person notify the
40 department of a discharge, spill, leak, emission, release or other
41 pollution event; or any violation that is the result of the knowing,
42 purposeful, reckless or criminally negligent conduct of the person
43 responsible for the violation. For the purposes of this act, the issuance
44 of a "Notice of violation" shall not constitute an enforcement action,
45 nor shall any violation for which a grace period, or other period during
46 which the violation may be corrected or conformance achieved without

1 prejudice or penalty, is provided by statute, regulation, or order,
2 unless the person responsible for that violation shall fail to correct the
3 violation and achieve compliance within the period prescribed by that
4 statute, regulation, or order.

5 "Voluntary environmental audit" means a self-initiated, internal
6 evaluation, assessment or review, not otherwise required by statute,
7 regulation or permit, of one or more facilities or an activity at one or
8 more facilities regulated under any federal, State, or local
9 environmental laws, or of management systems related to that facility
10 or activity, that is designated to identify and prevent noncompliance
11 and to improve compliance with statutory or regulatory requirements,
12 and that is conducted by the owner or operator, by the owner's or
13 operator's employees, or by independent contractors;

14

15 3. An environmental audit report prepared pursuant to the
16 provisions of P.L. , c. (C.)(now pending before the Legislature
17 as this bill) shall be privileged and shall not be admissible or
18 discoverable as evidence in any legal action, in any criminal, civil or
19 administrative proceeding or review, except as provided in section 4
20 and section 6 of this act.

21

22 4. The privilege established in section 3 of this act shall not apply
23 if:

24 a. an enforcement action is taken, that enforcement action is
25 contested, and a court of competent jurisdiction, in accordance with
26 the rules of discovery set forth in the New Jersey Rules of Court,
27 requires disclosure of materials and documents pertaining to that
28 enforcement action; or

29 b. there is a statutory requirement that the violation identified or
30 discovered as a result of the voluntary environmental audit be
31 reported.

32 The disclosure authorized under subsections a. and b. of this section
33 shall apply only to those sections and portions of the environmental
34 audit report that pertain to the specific violation which is the subject
35 of the enforcement action. All other sections and portions of the
36 environmental audit report shall remain privileged.

37 In any case where there is a dispute concerning the sections or
38 portions of an environmental audit report subject to disclosure, a court
39 of competent jurisdiction, upon petition of either party, shall conduct
40 an in camera review of those sections or portions subject to dispute
41 and shall, within 45 days of the filing of the petition, render a finding.

42

43 5. No person shall use any privileged information to discover any
44 other information and any information so discovered shall be
45 inadmissible in any action or proceeding. If a court or an
46 administrative law judge determines that any information is not

1 privileged, it shall by the entry of appropriate protective orders ensure
2 that information is disclosed only to the extent required for the proper
3 conduct of the subject action or proceeding.

4
5 6. The privilege established in section 3 of this act shall not extend
6 to:

7 a. Documents, communications, data, reports, or other information
8 required to be collected, developed, maintained, reported, or made
9 available to a regulatory agency pursuant to any federal, State or local
10 law, ordinance, regulation, permit or order;

11 b. Information obtained by observation, sampling, or monitoring by
12 any regulatory agency; or

13 c. Information obtained from a source independent of the
14 environmental audit.

15
16 7. Nothing in this act shall limit, waive or abrogate the scope or
17 nature of any statutory or common law privilege, including the work
18 product doctrine and the attorney-client privilege.

19
20 8. Nothing in this act shall limit, waive, or abrogate any reporting
21 requirements or permit conditions.

22
23 9. No State, local, or regional regulatory agency may adopt a rule
24 or a permit condition for the purpose of circumventing the privilege
25 established in this act by requiring disclosure of a report of a
26 voluntarily conducted environmental audit.

27
28 10. a. Whenever a person responsible for a violation of an
29 environmental law or regulation, discovered as a result of an
30 environmental audit, voluntarily discloses either to the Department of
31 Environmental Protection or to a local government agency the
32 existence of that violation, the department or local government
33 agency, as the case may be, shall not impose a criminal, civil or civil
34 administrative penalty for the violation, provided that the person
35 responsible for the violation discloses the violation within 60 days of
36 completion of the audit, and initiates steps to remedy or reduce the
37 violation, and provided that the person responsible for the violation
38 demonstrates, and the department or local governmental agency, as the
39 case may be, determines, that the violation is not the result of
40 knowing, purposeful, reckless or criminally negligent conduct. For
41 purposes of this subsection, filing a permit application shall constitute
42 adequate steps to achieve compliance.

43 b. Whenever a person responsible for a violation of an
44 environmental law or regulation, discovered as a result of an
45 environmental audit, does not disclose that violation either to the
46 Department of Environmental Protection or a local government

1 agency, as prescribed in subsection a. of this section, but initiates
2 appropriate steps, prior to any action being brought by an enforcing
3 authority, to remedy or reduce the violation, the department or local
4 government agency, as the case may be, shall consider those steps to
5 remedy or reduce the violation as mitigating factors when considering
6 the criminal, civil or civil administrative penalty to be imposed for the
7 violation. For the purposes of this subsection, filing a permit
8 application shall constitute the initiating step to remedy or reduce the
9 violation. The provisions of this subsection shall not apply in any case
10 where the department or local governmental agency, as the case may
11 be, determines that the violation is the result of the knowing,
12 purposeful, reckless or criminally negligent conduct of the violator.
13

14 11. a. Information contained within an environmental audit report
15 and disclosed to the department or local government agency as part of
16 an action to remedy the violation pursuant to section 10 of this act
17 shall be exempt from public disclosure by the department or local
18 government agency.

19 b. No person who discloses information for the purposes of
20 subsection a. of section 10 of this act or, pursuant to section 4 of this
21 act, is required to do so shall be obligated to disclose whether that
22 information is a portion or section of an environmental audit report or
23 whether a voluntary environmental audit has been performed by the
24 person disclosing that information.
25

26 12. Notwithstanding any other provision of law, a person,
27 including any officer or employee of the person, that performs an
28 environmental audit, may not be required to give testimony in a court
29 or administrative proceeding of a governmental agency without the
30 consent of the person concerning the environmental audit, including a
31 report, finding, opinion, or other communication with respect to that
32 report.
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34 13. This act applies to all environmental audits begun on or after
35 January 1, 1994.
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37 14. Nothing herein shall be construed to permit any third party
38 access to any environmental audit report subject to the provisions of
39 this act. For the purpose of this section, third party shall mean a
40 person other than:

41 a. A State or local enforcing agency; or

42 b. A person who has particularized property interest sufficient to
43 require a hearing on constitutional or statutory grounds.
44

45 15. This act shall take effect immediately.

STATEMENT

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3 The bill establishes a program designed to encourage the regulated
4 community to undertake voluntary environmental audits.

5 The voluntary environmental audits covered under the proposed
6 program are not those currently required under any current law,
7 regulation, or permit condition or application process. They are
8 self-initiated, internal evaluations, assessments or reviews undertaken
9 by facility owners or operators as a means to identify whether the
10 facility, or a particular process or activity within the facility, is in
11 compliance with environmental requirements set forth in statute and
12 regulation. The information acquired through these audits will enable
13 owners and operators to readily assess their operations, activities,
14 compliance programs, and management systems and, if appropriate
15 and necessary, move in a timely and effective manner to prevent or
16 correct violations or potential violations.

17 To encourage the regulated community to participate in this
18 program, the bill establishes privilege for certain information and
19 documents relating to voluntary audits and offers immunities from
20 criminal, civil and civil administrative penalties under certain
21 circumstances.

22 The privilege afforded under the bill applies only to audit
23 information and documents that are included in an "Environmental
24 Audit Report." In addition to all the documentary information and
25 analyses generated by the audit, the report is to include a summary of
26 the scope of the audit, a certified index identifying the specific
27 documentary materials included, and calendar dates citing when the
28 audit was initiated and completed.

29 The bill clearly specifies that the privilege does not extend to any
30 audit information or documents which:

31 (1) relate to a violation for which there is a statutory reporting
32 requirement, or

33 (2) relate to a contested enforcement action and which a court of
34 competent jurisdiction, in accordance with the New Jersey Rules of
35 Court, requires disclosure.

36 In addition, the bill provides that an enforcing agency may not
37 publicly disclose any audit information it is given by an owner or
38 operator as part of a compliance or remediation immunity agreement.

39 The bill further provides that a person wishing to take advantage of
40 the immunities afforded under the bill or to fulfill a statutory reporting
41 responsibility is not obligated to disclose whether the information
42 relating to that request for immunity or reporting requirement is part
43 of a voluntary environmental audit.

1 Furthermore, the bill limits access to a State or local enforcing
2 agency, or any person who has a particularized property interest
3 sufficient to require a hearing on constitutional or statutory grounds.

4 The immunities offered under the bill are available only in those
5 instances where a violation, discovered as the result of an audit, is
6 disclosed to the appropriate enforcing agency within 60 days of the
7 completion of the audit and initiates steps to correct or remediate the
8 violation. In such cases, there is immunity from any criminal, civil or
9 civil administrative penalty.

10 If a person does not report a violation which was discovered
11 through an audit, but initiates steps to correct or remediate the
12 violation, there is no immunity, but the substitute does direct the
13 enforcing agency in such cases to consider those steps to correct or
14 remediate as mitigating factors when considering what penalties should
15 be imposed.

16 The purpose of this bill is:

17 (1) to establish a predictable and cooperative regulatory
18 environment which will encourage responsible members of the
19 regulated community to undertake voluntary internal environmental
20 audits of their operations, activities, compliance programs and
21 management systems; to assess their effectiveness and, if appropriate
22 and necessary, make improvements and corrections; and

23 (2) to accord a clearly defined level and scope of confidentiality,
24 protections, and immunities to responsible members of the regulated
25 community who participate in the program and, when discovering
26 violations or non-compliances, move in a timely, thorough and
27 effective manner to make necessary corrections and improvements

28 The purpose of the bill is not:

29 (1) to afford any privileges or immunities for violations designated
30 as a "high priority violation" by the Department of Environmental
31 Protection and the United States Environmental Protection Agency
32 pursuant to the federal "Resource Conservation and Recovery Act,"
33 42 U.S.C. §6901 et seq.; any violation of any requirement in any
34 environmental law which requires that a person notify the department
35 of a discharge, spill, leak, emission, release or other pollution event;
36 or any violation that is the result of the knowing, purposeful, reckless
37 or criminally negligent conduct of the person responsible for the
38 violation; or

39 (2) to afford any unintended protections, legal defenses, or avenues
40 of escape for irresponsible members of the regulated community who
41 seek to evade their statutory and regulatory responsibilities to the
42 detriment of all who live and work in this State; or

43 (3) to in any way interfere or otherwise impede any legitimate
44 investigatory or enforcement activities and any resultant prosecutorial
45 effort against such persons.

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3 Establishes evidentiary privilege for environmental audits in certain

4 cases.