

Stricken language would be deleted from and underlined language would be added to law as it existed prior to the 82nd General Assembly.

1 State of Arkansas  
2 82nd General Assembly  
3 Regular Session, 1999  
4

*As Engrossed: S2/25/99*

## A Bill

Act 871 of 1999  
SENATE BILL 424

5 By: Senator Hoofman  
6  
7

### For An Act To Be Entitled

9 "AN ACT TO REPEAL PROVISIONS OF THE ENVIRONMENTAL  
10 AUDIT PRIVILEGE LAW APPLYING TO CRIMINAL ACTIONS; TO  
11 AMEND ARKANSAS CODE 8-1-303(b), 8-1-305, and 8-1-  
12 307(b)(2); TO REPEAL ARKANSAS CODE 8-1-308, 8-1-  
13 309(c)(3)(A), 8-1-309(c)(3)(B), 8-1-310(c) AND 8-1-  
14 310(d); TO AMEND ARKANSAS CODE 8-1-311; AND FOR OTHER  
15 PURPOSES."

### Subtitle

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17  
18 "TO REPEAL THE APPLICABILITY OF THE  
19 ENVIRONMENTAL AUDIT PRIVILEGE TO  
20 CRIMINAL ACTIONS."  
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22

23 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:  
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25 SECTION 1. Arkansas Code 8-1-303(b) is amended to read as follows:

26 "(b) An environmental audit report shall be privileged and shall not be  
27 admissible as evidence in any ~~legal action in any civil, criminal, or~~  
28 administrative legal action, including enforcement actions."  
29

30 SECTION 2. Arkansas Code 8-1-305 is amended to read as follows:

31 "8-1-305. Exceptions.

32 The privilege described in § 8-1-303 does not apply to the following:

33 (1) Documents, communications, data, reports, or other information that  
34 must be collected, developed, maintained, reported, or otherwise made  
35 available to the public, or a regulatory agency under:

36 (A) Federal or state law or extensions thereof;

- 1 (B) A rule or standard adopted by the commission;
- 2 (C) A determination, a permit, or an order made or issued by the
- 3 commission or the director; or
- 4 (D) Any other federal, state, or local law, permit, or order;
- 5 (2) Information obtained by observation, sampling, or monitoring by any
- 6 regulatory agency;
- 7 (3) Information obtained from a source independent of the environmental
- 8 audit."

9

10 SECTION 3. Arkansas Code 8-1-307(b)(2) is amended to read as follows:

11 "(2) In the event additional time is required to prepare a permit

12 application, the person shall, within ninety (90) days, submit a schedule to

13 the Arkansas Department of Pollution Control and Ecology Environmental Quality

14 which identifies the activities required to complete the application, and, if

15 the schedule is acceptable to the Arkansas Department of Pollution Control and

16 Ecology Environmental Quality, the filing of the application pursuant to the

17 submitted schedule shall constitute reasonable diligence to achieve compliance

18 for a failure to obtain a required permit. Nothing in this section authorizes

19 a facility to operate without the proper permit having been issued."

20

21 SECTION 4. Arkansas Code 8-1-308 is repealed.

22 ~~8-1-308. Disclosure in a criminal proceeding.~~

23 ~~\_\_\_\_\_ (a) In a criminal proceeding, a court of record after an in camera~~

24 ~~review shall require disclosure of material for which the privilege described~~

25 ~~in § 8-1-303 is asserted, if the court determines one (1) of the following~~

26 ~~applies:~~

27 ~~\_\_\_\_\_ (1) The privilege is asserted for a fraudulent purpose;~~

28 ~~\_\_\_\_\_ (2) The material is not subject to the privilege;~~

29 ~~\_\_\_\_\_ (3) The material is subject to the privilege and the material shows~~

30 ~~evidence of noncompliance with:~~

31 ~~\_\_\_\_\_ (A) Federal or state law or extensions of such statutes; or~~

32 ~~\_\_\_\_\_ (B) Any rule or regulation adopted by the commission; or~~

33 ~~\_\_\_\_\_ (C) A determination, permit, or order issued by the commission or the~~

34 ~~director; or~~

35 ~~\_\_\_\_\_ (4) The person claiming the privilege did not promptly initiate and~~

36 ~~pursue appropriate efforts to achieve compliance with reasonable diligence.~~

1 ~~\_\_\_\_\_ (b)(1) If the noncompliance described in subdivision (a)(3) of this~~  
2 ~~section constitutes a failure to obtain a required permit, the person is~~  
3 ~~deemed to have made appropriate efforts to achieve compliance if the person~~  
4 ~~filed an application for the required permit not later than ninety (90) days~~  
5 ~~after the date the person became aware of the noncompliance.~~

6 ~~\_\_\_\_\_ (2) In the event additional time is required to prepare a permit~~  
7 ~~application, the person shall, within ninety (90) days, submit a schedule to~~  
8 ~~the Department of Pollution Control and Ecology which identifies the~~  
9 ~~activities required to complete the application, and, if the schedule is~~  
10 ~~acceptable to the Department of Pollution Control and Ecology, the filing of~~  
11 ~~the application pursuant to the submitted schedule shall constitute reasonable~~  
12 ~~diligence to achieve compliance for failure to obtain a required permit.~~

13  
14 SECTION 5. Arkansas Code 8-1-309 is amended to read as follows:

15 ~~"8-1-309. Proceeding to obtain environmental audit report Audit~~  
16 ~~privilege reserved for administrative or civil proceedings.~~

17 ~~(a)(1) A prosecuting authority who, based on information obtained from a~~  
18 ~~source independent of an environmental audit report, has probable cause to~~  
19 ~~believe an offense has been committed under this subchapter or a rule or~~  
20 ~~standard adopted by the commission, or a determination, permit, or order~~  
21 ~~issued by the commission or director, may obtain an environmental audit report~~  
22 ~~for which a privilege is asserted under § 8-1-303.~~

23 ~~(2) The prosecuting authority may obtain the report:~~

24 ~~(A) Under a search warrant;~~

25 ~~(B) Under a subpoena; or~~

26 ~~(C) Through discovery.~~

27 ~~(3) The prosecuting authority shall immediately place the report under seal~~  
28 ~~and shall not review or disclose the contents of the report.~~

29 ~~(b)(1) Not later than thirty (30) days after the date the prosecutor obtained~~  
30 ~~the report under subsection (a) of this section, the owner or operator who~~  
31 ~~prepared the report or caused the report to be prepared may file with the~~  
32 ~~appropriate court or administrative tribunal a petition requesting an in~~  
33 ~~camera hearing on whether the report or portions of the report are:~~

34 ~~(A) Privileged under this chapter; or~~

35 ~~(B) Subject to disclosure.~~

36 ~~(2) The right to claim the privilege is waived if the owner or operator does~~

1 ~~not file a petition under this subsection.~~

2 ~~(c)(1) A court or administrative tribunal that receives a petition under~~  
 3 ~~subsection (b) of this section shall issue an order scheduling an in camera~~  
 4 ~~hearing for a date that is not later than forty-five (45) days after the date~~  
 5 ~~the petition was filed under subsection (b) of this section.~~

6 ~~(2) An order issued under this subsection must allow the prosecuting~~  
 7 ~~authority to do the following:~~

8 ~~(A) Remove the seal from the environmental audit report;~~

9 ~~(B) Review the environmental audit report;~~

10 ~~(C) Place appropriate limits on the distribution and review of the~~  
 11 ~~environmental audit report to protect against unnecessary disclosure.~~

12 ~~(3)(A) The prosecuting authority may consult with enforcement agencies~~  
 13 ~~regarding the contents of the environmental audit report as necessary to~~  
 14 ~~prepare for the in camera hearing.~~

15 ~~(B) However, the contents of the environmental audit report used in~~  
 16 ~~preparation for the in camera hearing may not be used in any investigation or~~  
 17 ~~in any proceeding against the defendant unless determined by a court or~~  
 18 ~~administrative tribunal not to be subject to the privilege set forth in § 8-1-~~  
 19 ~~303, and shall otherwise be kept confidential unless the information is found~~  
 20 ~~by the court to be subject to disclosure.~~

21 The privilege created by § 8-1-303 does not apply to criminal  
 22 investigations or proceedings. Where an audit report is obtained, reviewed or  
 23 used in a criminal proceeding, the privilege created by this section  
 24 applicable to administrative or civil proceedings is not waived or  
 25 eliminated."

26  
 27 SECTION 6. Arkansas Code 8-1-310(c) and (d) are repealed.

28 ~~(c) The prosecuting authority seeking disclosure under § 8-1-308(a)(4)~~  
 29 ~~has the burden of proving the conditions for disclosure set forth in § 8-1-~~  
 30 ~~308(a)(4).~~

31 ~~—— (d) The party seeking disclosure under § 8-1-308(a)(1) has the burden~~  
 32 ~~of proving that the privilege is asserted for a fraudulent purpose.~~

33  
 34 SECTION 7. Arkansas Code 8-1-311 is amended to read as follows:

35 "8-1-311. Partial disclosure.

36 Upon making a determination under § 8-1-307 or ~~§ 8-1-308~~, the court of

1 record or administrative tribunal may compel disclosure of only those parts of  
2 an environmental audit report that are relevant to issues in dispute in the  
3 proceeding. ”

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5 SECTION 8. All provisions of this act of a general and permanent nature  
6 are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas Code  
7 Revision Commission shall incorporate the same in the Code.

8  
9 SECTION 9. If any provision of this act or the application thereof to  
10 any person or circumstance is held invalid, such invalidity shall not affect  
11 other provisions or applications of the act which can be given effect without  
12 the invalid provision or application, and to this end the provisions of this  
13 act are declared to be severable.

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15 SECTION 10. All laws and parts of laws in conflict with this act are  
16 hereby repealed.

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18 SECTION 11. EMERGENCY CLAUSE. It is hereby found and determined by the  
19 Eighty-second General Assembly that immediate implementation of these statutes  
20 is necessary in order to ensure that the state meets immediate Environmental  
21 Protection Agency requirements for authorization and delegation of federal  
22 programs to the State of Arkansas. Therefore, an emergency is declared to  
23 exist and this act being immediately necessary for the preservation of the  
24 public peace, health and safety shall become effective on the date of its  
25 approval by the Governor. If the bill is neither approved nor vetoed by the  
26 Governor, it shall become effective on the expiration of the period of time  
27 during which the Governor may veto the bill. If the bill is vetoed by the  
28 Governor and the veto is overridden, it shall become effective on the date the  
29 last house overrides the veto.

30 /s/ Hoofman

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33 APPROVED: 3/25/1999