

1 **State of Arkansas**
2 **80th General Assembly**
3 **Regular Session, 1995**

A Bill

ACT 350 OF 1995
HOUSE BILL 1487

4 **By: Representatives Malone, Horn, G. Hendrix, Laverty, McJunkin, George, Purdom, Bush,**
5 **Thicksten, B. Wood, Jones, K. Wood, Cunningham, T. Smith, Schexnayder, Booker,**
6 **Lancaster, Sheppard, Luker, Pappas, Courtway, Vess, Ferrell, Simmons, Murphy, Beatty,**
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8 **and Stalnaker**

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For An Act To Be Entitled

12 "AN ACT CONCERNING ENVIRONMENTAL AUDIT REPORTS; AND
13 FOR OTHER PURPOSES."

14
15

Subtitle

16 "AN ACT CONCERNING ENVIRONMENTAL AUDIT
17 REPORTS."

18

19 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

20

21 SECTION 1. Title 8, Chapter 1 of the Arkansas Code Annotated is hereby
22 amended to add a new subchapter to read as follows:

23 "SUBCHAPTER 3 -- ENVIRONMENTAL AUDIT REPORTS

24 8-1-301. Purpose.

25 The General Assembly hereby finds and declares that protection of the
26 environment is enhanced by the public's voluntary compliance with
27 environmental laws and that the public will benefit from incentives to
28 identify and remedy environmental compliance issues. It is further declared
29 that limited expansion of the protection against disclosure will encourage
30 such voluntary compliance and improve environmental quality and that the
31 voluntary provisions of this act will not inhibit the exercise of the
32 regulatory authority by those entrusted with protecting our environment.

33 8-1-302. Definitions.

34 For the purposes of this subchapter, unless the context otherwise
35 requires:

36 (1) Commission means the Arkansas Pollution Control and Ecology

1 Commission.

2 (2) Director means the Director of the Arkansas Department of
3 Pollution Control and Ecology.

4 (3) Environmental audit means a voluntary, internal and comprehensive
5 evaluation of one (1) or more facilities or an activity at one (1) or more
6 facilities regulated under this chapter, or federal regional or local
7 counterparts or extensions thereof, or of management systems related to that
8 facility or activity, that is designed to identify and prevent noncompliance
9 and to improve compliance with statutory or regulatory requirements. An
10 environmental audit may be conducted by the owner or operator, by the owner's
11 or operator's employees, or by independent contractors; and

12 (4) Environmental audit report means a set of documents prepared as a
13 result of an environmental audit and labeled ENVIRONMENTAL AUDIT REPORT;
14 PRIVILEGED DOCUMENT that may include:

15 (A) field notes, records of observations, findings, opinions,
16 suggestions, conclusions, drafts, memoranda, drawings, photographs, computer
17 generated or electronically recorded information, maps, charts, graphs, and
18 surveys collected or developed for the primary purpose of preparing an
19 environmental audit; and

20 (B) An audit report prepared by the auditor that includes:

- 21 (1) The scope of the audit;
- 22 (2) The information gained in the audit;
- 23 (3) Conclusions and recommendations; and
- 24 (4) Exhibits and appendices.

25 (C) Memoranda and documents analyzing a portion of or all of the audit
26 report and discussing implementation issues.

27 (D) An implementation plan that addresses correcting past compliance,
28 improving current compliance, and preventing future non-compliance.

29 8-1-303. Privilege.

30 (a) In order to encourage owners and operators of facilities and persons
31 conducting other activities regulated under this chapter, or its federal
32 counterparts or extensions, both to conduct voluntary internal environmental
33 audits of their compliance programs and management systems and to assess and
34 improve compliance with statutory and regulatory requirements, an
35 environmental audit privilege is created to protect the confidentiality of

1 communications relating to voluntary internal environmental audits.

2 (b) An environmental audit report shall be privileged and shall not be
3 admissible as evidence in any legal action in any civil, criminal, or
4 administrative legal action including enforcement actions.

5 8-1-304. Waiver.

6 (a) The privilege described in § 8-1-303 does not apply to the extent
7 that:

8 (1) It is waived expressly by the owner or operator of the facility that
9 prepared or caused to be prepared the environmental audit report;

10 (2) The owner or operator of a facility or person conducting an activity
11 seeks to introduce an environmental audit report as evidence.

12 (3) The owner or operator of a facility authorizes the disclosure of the
13 environmental audit report to any party, except where:

14 (A) disclosure is made under the terms of a confidentiality
15 agreement between the owner or operator of a facility and:

16 (1) a potential purchaser of the facility; or

17 (2) a customer, lending institution, or insurance company
18 with an existing or proposed relationship with the facility; or

19 (B) disclosure is made under the terms of a confidentiality
20 agreement between government officials and the owner or operator of a
21 facility; or

22 (C) disclosure is made to an independent contractor retained by
23 the owner or operator of the facility for the purpose of identifying
24 noncompliance with statutory or regulatory requirements and assisting the
25 owner or operator in achieving compliance with reasonable diligence.

26 (b) The waiver of the privilege described in § 8-1-303 may be for part
27 or all of the environmental audit report and said waiver of privilege extends
28 only to that part of the environmental audit report expressly waived by the
29 owner or operator of a facility.

30 8-1-305. Exceptions.

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

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

35 (1) federal or state law or extensions thereof;

1 (2) A rule or standard adopted by the Commission;

2 (3) A determination, a permit, or an order made or issued by the
3 Commission or the Director; or

4 (4) Any other federal, state, or local law, permit, or order.

5 (b) Information obtained by observation, sampling, or monitoring by any
6 regulatory agency.

7 (c) Information obtained from a source independent of the environmental
8 audit.

9 8-1-306. Stipulation.

10 The parties to a legal action may at any time stipulate that the entry
11 of an order that directs that specific information contained in an
12 environmental audit report is or is not subject to the privilege provided
13 under § 8-1-303.

14 8-1-307. Disclosure in civil or administrative proceeding.

15 (a) In a civil or administrative proceeding, a court of record or
16 administrative tribunal, after an in camera review, shall require disclosure
17 of material for which the privilege described in § 8-1-303 is asserted, if the
18 court or administrative tribunal determines one of the following:

19 (1) The privilege is asserted for a fraudulent purpose;

20 (2) The material is not subject to the privilege;

21 (3) The material is subject to the privilege and the material
22 shows evidence of noncompliance with:

23 (A) federal or state law or extensions of such statutes; or

24 (B) any rule or regulation adopted by the Commission; or

25 (C) a determination, permit, or order issued by the

26 Commission or the Director; and

27 (D) the person claiming the privilege did not promptly
28 initiate and pursue appropriate efforts to achieve compliance with reasonable
29 diligence.

30 (b) If the noncompliance described in subsection (a) (3) above
31 constitutes a failure to obtain a required permit, the person is deemed to
32 have made appropriate efforts to achieve compliance if the person filed an
33 application for the required permit not later than ninety (90) days after the
34 date the person became aware of the noncompliance. In the event additional
35 time is required to prepare a permit application, the person shall, within

1 ninety (90) days, submit a schedule to the Department of Pollution Control and
2 Ecology which identifies the activities required to complete the application,
3 and if the schedule is acceptable to the Department of Pollution Control and
4 Ecology, the filing of the application pursuant to the submitted schedule
5 shall constitute reasonable diligence to achieve compliance for a failure to
6 obtain a required permit.

7 8-1-308. Disclosure in a criminal proceeding.

8 (a) In a criminal proceeding, a court of record after an in camera
9 review shall require disclosure of material for which the privilege described
10 in § 8-1-303 is asserted, if the court determines one of the following apply:

11 (1) The privilege is asserted for a fraudulent purpose;

12 (2) The material is not subject to the privilege;

13 (3) The material is subject to the privilege and the material
14 shows evidence of noncompliance with:

15 (A) federal or state law or extensions of such statutes; or

16 (B) any rule or regulation adopted by the
17 Commission; or

18 (C) a determination, permit or order issued by the
19 Commission or the Director; and

20 (D) the person claiming the privilege did not promptly
21 initiate and pursue appropriate efforts to achieve compliance with reasonable
22 diligence.

23 (b) If the noncompliance described in subsection (a) (3) above
24 constitutes a failure to obtain a required permit, the person is deemed to
25 have made appropriate efforts to achieve compliance if the person filed an
26 application for the required permit not later than ninety (90) days after the
27 date the person became aware of the noncompliance. In the event additional
28 time is required to prepare a permit application, the person shall, within
29 ninety (90) days, submit a schedule with the Department of Pollution Control
30 and Ecology which identifies the activities required to complete the
31 application and, if the schedule is acceptable to the Department of Pollution
32 Control and Ecology, the filing of the application pursuant to the submitted
33 schedule shall constitute reasonable diligence to achieve compliance for
34 failure to obtain a required permit.

35 8-1-309. Proceeding to obtain environmental audit report.

1 (a) A prosecuting authority who, based on information obtained from a
2 source independent of an environmental audit report, has probable cause to
3 believe an offense has been committed under this Act or a rule or standard
4 adopted by the Commission, or a determination, permit, or order issued by the
5 Commission or Director may obtain an environmental audit report for which a
6 privilege is asserted under § 8-1-303. The prosecuting authority may obtain
7 the report:

- 8 (1) under a search warrant;
- 9 (2) under a subpoena; or
- 10 (3) through discovery.

11 The prosecuting authority shall immediately place the report under seal
12 and shall not review or disclose the contents of the report.

13 (b) Not later than thirty (30) days after the date the prosecutor
14 obtained the report under subsection (a), the owner or operator who prepared
15 the report or caused the report to be prepared, may file with the appropriate
16 court or administrative tribunal a petition requesting an in camera hearing on
17 whether the report or portions of the report are:

- 18 (1) Privileged under this chapter; or
- 19 (2) Subject to disclosure.

20 The right to claim the privilege is waived if the owner or operator does
21 not file a petition under this subsection.

22 (c) A court or administrative tribunal that receives a petition under
23 subsection (b) shall issue an order scheduling an in camera hearing for a date
24 that is not later than forty-five (45) days after the date the petition was
25 filed under subsection (b). An order issued under this subsection must allow
26 the prosecuting authority to do the following:

- 27 (1) Remove the seal from the environmental audit report.
- 28 (2) Review the environmental audit report.
- 29 (3) Place appropriate limits on the distribution and review of the
30 environmental audit report to protect against unnecessary disclosure.

31 The prosecuting authority may consult with enforcement agencies
32 regarding the contents of the environmental audit report as necessary to
33 prepare for the in camera hearing. However, the contents of the environmental
34 audit report used in preparation for the in camera hearing may not be used in
35 any investigation or in any proceeding against the defendant unless determined

1 by a court or administrative tribunal not to be subject to the privilege set
2 forth in § 8-1-303, and shall otherwise be kept confidential unless the
3 information is found by the court to be subject to disclosure.

4 8-1-310. Burden of proof.

5 (a) A party asserting the environmental audit privilege under §8-1-303
6 has the burden of proving the privilege, including if there is evidence of
7 noncompliance with federal or state law or extensions thereof, proof that
8 appropriate efforts to achieve compliance were promptly initiated and pursued
9 with reasonable diligence. A party seeking disclosure under §8-1-307 has the
10 burden of proving the privilege is asserted for a fraudulent purpose. The
11 prosecuting authority seeking disclosure under § 8-1-308 (a) (4) has the burden
12 of proving the conditions for disclosure set forth in § 8-1-308 (a) (4). The
13 party seeking disclosure under § 8-1-308 (a) (1) has the burden of proving that
14 the privilege is asserted for a fraudulent purpose.

15 8-1-311. Partial disclosure.

16 Upon making a determination under §§ 8-1-307 or 8-1-308, the court of
17 record or administrative tribunal may compel disclosure of only those parts of
18 an environmental audit report that are relevant to issues in dispute in the
19 proceeding.

20 8-1-312. Scope.

21 (a) Nothing in this Act may limit, waive, or abrogate the scope of any
22 statutory or common law privilege, including the work product doctrine and the
23 attorney-client privilege.

24 (b) Nothing in this Act may limit, waive or abrogate the rights of the
25 public as provided for in the Arkansas Freedom of Information Act."

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27 SECTION 2. All provisions of this Act of a general and permanent nature
28 are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas Code
29 Revision Commission shall incorporate the same in the Code.

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31 SECTION 3. If any provisions of this Act or the application thereof to
32 any person or circumstance is held invalid, such invalidity shall not affect
33 other provisions or applications of the act which can be given effect without
34 the invalid provision or application, and to this end the provisions of this
35 Act are declared to be severable.

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2 SECTION 4. All laws and parts of laws in conflict with this Act are
3 hereby repealed.

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APPROVED: 2-17-95

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