

1 State of Arkansas  
2 80th General Assembly  
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# A Bill

HOUSE BILL 1487

4 By: Representatives Malone, Horn, G. Hendrix, Laverty, McJunkin, George,  
5 Purdom, Bush, Thicksten, B. Wood, Jones, K. Wood, Cunningham, T. Smith,  
6 Schexnayder, Booker, Lancaster, Sheppard, Luker, Pappas, Courtway, Vess,  
7 Ferrell, Simmons, Murphy, Beatty, Calhoun, Allen, Dawson, Watts, Hudson,  
8 Cash, Thomas, M. Wilson, Mitchell, Dietz, Wallis, and Stalnaker

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## For An Act To Be Entitled

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"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.

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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.

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8-1-302. Definitions.

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

1 (1) Commission means the Arkansas Pollution Control and Ecology  
 2 Commission.

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

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

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

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

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

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

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

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

30 8-1-303. Privilege.

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

1 an environmental audit privilege is created to protect the confidentiality of  
2 communications relating to voluntary internal environmental audits.

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

6 8-1-304. Waiver.

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

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

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

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

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

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

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

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

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

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

31 8-1-305. Exceptions.

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

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

- 1 (1) federal or state law or extensions thereof;
- 2 (2) A rule or standard adopted by the Commission;
- 3 (3) A determination, a permit, or an order made or issued by the
- 4 Commission or the Director; or
- 5 (4) Any other federal, state, or local law, permit, or order.

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

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

10 8-1-306. Stipulation.

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

15 8-1-307. Disclosure in civil or administrative proceeding.

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

- 20 (1) The privilege is asserted for a fraudulent purpose;
- 21 (2) The material is not subject to the privilege;
- 22 (3) The material is subject to the privilege and the material  
23 shows evidence of noncompliance with:

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

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

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

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

32 (b) If the noncompliance described in subsection (a)(3) above  
33 constitutes a failure to obtain a required permit, the person is deemed to  
34 have made appropriate efforts to achieve compliance if the person filed an  
35 application for the required permit not later than ninety (90) days after the

1 date the person became aware of the noncompliance. In the event additional  
 2 time is required to prepare a permit application, the person shall, within  
 3 ninety (90) days, submit a schedule to the Department of Pollution Control  
 4 and Ecology which identifies the activities required to complete the  
 5 application, and if the schedule is acceptable to the Department of Pollution  
 6 Control and Ecology, the filing of the application pursuant to the submitted  
 7 schedule shall constitute reasonable diligence to achieve compliance for a  
 8 failure to obtain a required permit.

9 8-1-308. Disclosure in a criminal proceeding.

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

- 13 (1) The privilege is asserted for a fraudulent purpose;
- 14 (2) The material is not subject to the privilege;
- 15 (3) The material is subject to the privilege and the material  
 16 shows evidence of noncompliance with:
  - 17 (A) federal or state law or extensions of such statutes; or
  - 18 (B) any rule or regulation adopted by the  
 19 Commission; or
  - 20 (C) a determination, permit or order issued by the  
 21 Commission or the Director; and
  - 22 (D) the person claiming the privilege did not promptly  
 23 initiate and pursue appropriate efforts to achieve compliance with reasonable  
 24 diligence.

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

1 failure to obtain a required permit.

2 8-1-309. Proceeding to obtain environmental audit report.

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

10 (1) under a search warrant;

11 (2) under a subpoena; or

12 (3) through discovery.

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

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

20 (1) Privileged under this chapter; or

21 (2) Subject to disclosure.

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

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

29 (1) Remove the seal from the environmental audit report.

30 (2) Review the environmental audit report.

31 (3) Place appropriate limits on the distribution and review of  
 32 the environmental audit report to protect against unnecessary disclosure.

33 The prosecuting authority may consult with enforcement agencies  
 34 regarding the contents of the environmental audit report as necessary to  
 35 prepare for the in camera hearing. However, the contents of the

1 environmental audit report used in preparation for the in camera hearing may  
 2 not be used in any investigation or in any proceeding against the defendant  
 3 unless determined by a court or administrative tribunal not to be subject to  
 4 the privilege set forth in § 8-1-303, and shall otherwise be kept  
 5 confidential unless the information is found by the court to be subject to  
 6 disclosure.

7       8-1-310. Burden of proof.

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

18       8-1-311. Partial disclosure.

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

23       8-1-312. Scope.

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

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

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

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34       SECTION 3. If any provisions of this Act or the application thereof to  
 35 any person or circumstance is held invalid, such invalidity shall not affect

1 other provisions or applications of the act which can be given effect without  
2 the invalid provision or application, and to this end the provisions of this  
3 Act are declared to be severable.

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

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