

**GENERAL ASSEMBLY OF NORTH CAROLINA**

**SESSION 1993**

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SENATE BILL 1639\*

Short Title: Encourage Environmental Audits.

(Public)

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Sponsors: Senators Blackmon; and Carpenter.

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Referred to: Environment and Natural Resources.

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June 1, 1994

A BILL TO BE ENTITLED

1 AN ACT TO ENCOURAGE THE PERFORMANCE OF ENVIRONMENTAL  
2 AUDITS AND SIMILAR ENVIRONMENTAL SELF-ASSESSMENTS BY  
3 PROVIDING LIMITED PROTECTION AGAINST THE MISUSE OF AUDITS  
4 BY CIRCUMSCRIBING THEIR DISCLOSURE, AND ALSO BY PROVIDING  
5 LIMITED PROTECTIONS FOR COMPANIES WHO ACT DILIGENTLY TO  
6 CORRECT PREVIOUSLY UNKNOWN DEFICIENCIES DISCOVERED  
7 DURING THE AUDITING OR ASSESSMENT PROCESS, AS RECOMMENDED  
8 BY THE ENVIRONMENTAL REVIEW COMMISSION.

9  
10       Whereas, the General Assembly of North Carolina recognizes the importance  
11 of protecting the environment of this State, as well as the health and safety of its  
12 inhabitants and employees; and

13       Whereas, the ever-increasing complexity and pervasiveness of environmental  
14 regulation makes the performance of audits increasingly advantageous and advisable for  
15 businesses and municipalities in North Carolina; and

16       Whereas, the threat of enforcement, both civil and criminal, for  
17 environmental violations makes performing audits both potentially beneficial, but also  
18 potentially harmful if the contents are inappropriately disclosed or otherwise misused;  
19 and

20       Whereas, various governmental agencies and other entities, including the  
21 United States Environmental Protection Agency, have adopted policies having varying  
22 degrees of formality which are designed to encourage audits; and

1           Whereas, confidentiality of documents is largely a matter of State law; Now,  
2 therefore,

3 The General Assembly of North Carolina enacts:

4           Section 1. Chapter 8C of the General Statutes is amended by adding a new  
5 section to read:

6 **"§ 8C-2. Privilege for environmental audits.**

7       (a) Purpose. In order to encourage owners and operators of facilities and persons  
8 conducting activities regulated under those portions of the General Statutes listed in  
9 subsection (c) of this section, or conducting activities regulated under federal, regional,  
10 or local counterparts or extensions of those statutes, to conduct voluntary internal  
11 environmental audits of their compliance programs and management systems and to  
12 assess and improve compliance with statutes, an environmental audit privilege is  
13 recognized to protect the confidentiality of communications relating to voluntary  
14 internal environmental audits.

15       (b) Definitions. As used in this section:

16       (1) 'Environmental audit' means a voluntary, comprehensive evaluation of  
17 one or more facilities or an activity at one or more facilities regulated  
18 under those portions of the General Statutes listed in subsection (c) of  
19 this section, or the federal, regional, or local counterpart or extension  
20 of those statutes, or of management systems related to the facility or  
21 activity, that is designed to identify and prevent noncompliance and to  
22 improve compliance with environmental laws, and shall include all  
23 self-assessments by whatever name known, including all  
24 environmental audits or assessments performed pursuant to standards  
25 adopted by the American Society for Testing and Materials, and  
26 regardless of whether the assessment is conducted by the owner or  
27 operator, by the owner's or operator's employees, or by independent  
28 contractors.

29       (2) 'Environmental audit report' means all documents produced in the  
30 course of performing the environmental audit, including, without  
31 limitation:

32       a. An audit report prepared by the auditor, which may include the  
33 scope of the audit, the information gained in the audit,  
34 conclusions, recommendations, exhibits, and appendices.

35       b. Memoranda and documents analyzing any portion of an audit  
36 report or issues relating to the implementation of an audit  
37 report.

38       c. An implementation plan that addresses correcting past  
39 noncompliance, improving current compliance, or preventing  
40 future noncompliance.

41       d. All supporting information collected or developed for the  
42 primary purpose and in the course of an environmental audit,  
43 including all field notes and reports of observations, findings,

1 opinions, suggestions, conclusions, drafts, information, maps,  
2 charts, graphs, and surveys.

3 (c) Scope. This act encourages the performance of environmental audits by  
4 creating a 'disclosure' privilege for environmental audit reports that would prevent the  
5 use of the reports as evidence in civil, criminal, or administrative proceedings provided  
6 that the noncompliance discovered during the course of the audit was not known to the  
7 owner or operator of the facility prior to the initiation of the audit. This section applies  
8 to activities regulated under the following portions of the General Statutes and to  
9 activities regulated under federal, regional, or local counterparts or extensions of these  
10 statutes:

- 11 (1) Article 7 of Chapter 74.
- 12 (2) Chapter 104E.
- 13 (3) Chapter 104G.
- 14 (4) Article 25 of Chapter 113.
- 15 (5) Articles 1, 4, and 7 of Chapter 113A.
- 16 (6) Article 9 of Chapter 130A.
- 17 (7) Chapter 130B.
- 18 (8) Articles 21, 21A, and 21B of Chapter 143.

19 (d) Privilege. An environmental audit report shall be privileged and shall not be  
20 admissible as evidence in any legal action in any civil, criminal, or administrative  
21 proceeding, except as provided in subsection (e) of this section. This privilege shall  
22 apply to all legal actions or administrative proceedings, whether civil or criminal, that  
23 commence after the effective date of this act.

24 (e) Disclosure Under Limited Circumstances.

25 (1) The privilege described in subsection (d) of this section does not apply  
26 to the extent that it is waived expressly by the owner or operator of a  
27 facility that caused the environmental audit report to be prepared.  
28 However, the disclosure by the owner or operator of information in an  
29 environmental audit report to enforcement agencies shall not constitute  
30 a waiver. Disclosed information shall be kept confidential by the  
31 enforcement agencies and may not be used by them in any  
32 investigation or in any proceeding against the defendant unless the  
33 information is found by a court of record to be subject to disclosure  
34 under subdivision (2) or (3) of this subsection.

35 (2) In a civil or administrative proceeding, the court of record, after **in**  
36 **camera** review consistent with Chapter 1A of the General Statutes,  
37 shall require disclosure of material for which the privilege described in  
38 subsection (d) of this section is asserted only if the court determines  
39 that:

- 40 a. The privilege is asserted for a fraudulent purpose;
- 41 b. The material is not subject to the privilege; or
- 42 c. The material shows evidence of substantial noncompliance with  
43 any provision of law to which this section applies for which the

- 1                   party has failed to undertake appropriate efforts to achieve  
2                   substantial compliance with reasonable diligence.
- 3           (3)   In a criminal proceeding, a court of record, after **in camera** review as  
4           described in subsection (f) of this section shall require disclosure of  
5           material for which the privilege described in subsection (d) of this  
6           section is asserted, if the court determines that:
- 7                   a.   The privilege is asserted for a fraudulent purpose;  
8                   b.   The material is not subject to the privilege;  
9                   c.   The material shows evidence of substantial noncompliance with  
10                  any provision of law to which this section applies for which the  
11                  party has failed to undertake appropriate efforts to achieve  
12                  substantial compliance with reasonable diligence; or  
13                  d.   The material contains evidence relevant to a criminal offense  
14                  under any provision of law to which this section applies, a  
15                  district attorney or the Attorney General has a compelling need  
16                  for the information, the information is not otherwise available  
17                  and the district attorney or Attorney General is unable to obtain  
18                  the substantial equivalent of the information by any means  
19                  without incurring unreasonable cost and delay.
- 20           (4)   A party asserting the environmental audit privilege under subsection  
21           (d) of this section has the burden of proving the privilege, including, if  
22           there is evidence of noncompliance with any provision of law to which  
23           this section applies, proof that appropriate efforts to achieve  
24           compliance were pursued with reasonable diligence. A party seeking  
25           disclosure under subdivision (2)a. or (3)a. of this subsection has the  
26           burden of proving that the privilege is asserted for a fraudulent  
27           purpose. A district attorney or the Attorney General seeking  
28           disclosure under subdivision (3)d. of this subsection has the burden of  
29           proving the conditions for disclosure set forth in subdivision (3)d. of  
30           this subsection.
- 31           (f)   **In Camera** Review in Criminal Proceeding.
- 32                   (1)   If a district attorney or the Attorney General has probable cause to  
33                   believe a criminal offense has been committed under any provision of  
34                   law to which this section applies based upon information obtained  
35                   from a source independent of an environmental audit report the district  
36                   attorney or Attorney General may obtain an environmental audit report  
37                   for which a privilege is asserted under subsection (d) of this section  
38                   pursuant to search warrant, criminal subpoena, or discovery as allowed  
39                   by Chapter 15A of the General Statutes. The district attorney or  
40                   Attorney General shall immediately place the report under seal and  
41                   shall not review or disclose its contents.
- 42                   (2)   Within 30 days of the date on which the district attorney or Attorney  
43                   General obtains an environmental audit report, the owner or operator  
44                   who prepared or caused to be prepared the report may file with the

1 appropriate court a petition requesting an **in camera** hearing on  
2 whether the environmental audit report or portions thereof are  
3 privileged under this act or subject to disclosure. Failure by the owner  
4 or operator to file a petition shall waive the privilege.

5 (3) Upon filing of such petition, the court shall issue an order scheduling  
6 an **in camera** hearing, within 45 days of the filing of the petition, to  
7 determine whether the environmental audit report or portions thereof  
8 are privileged under this subsection or subject to disclosure. The order  
9 shall allow the district attorney or Attorney General to remove the seal  
10 from the report, review the report, and place appropriate limitations on  
11 distribution and review of the report to protect against unnecessary  
12 disclosure. The district attorney or Attorney General may consult with  
13 enforcement agencies regarding the contents of the report as necessary  
14 to prepare for the **in camera** hearing. However, the information used  
15 in preparation for the **in camera** hearing shall not be used in any  
16 investigation or in any proceeding against the defendant, and shall  
17 otherwise be kept confidential, unless and until such information is  
18 found by the court to be subject to disclosure.

19 (g) Entry of Order by Parties. The parties may at any time stipulate to entry of an  
20 order directing that specific information contained in an environmental audit report is or  
21 is not subject to the privilege provided under subsection (d) of this section.

22 (h) Limited Disclosure. Upon making a determination under subdivision (2) or  
23 (3) of subsection (e) of this section, the court may compel the disclosure only of those  
24 portions of an environmental audit report relevant to issues in dispute in the proceeding.

25 (i) Privilege Not Applicable. The privilege described in subsection (d) of this  
26 section shall not extend to:

27 (1) Documents, communications, data, reports, or other information  
28 required to be collected, developed, maintained, reported, or otherwise  
29 made available to a regulatory agency pursuant to any provision of law  
30 to which this section applies;

31 (2) Information obtained by observation, sampling, or monitoring by any  
32 regulatory agency; or

33 (3) Information obtained from a source independent of the environmental  
34 audit.

35 (j) Other Privileges Intact. Nothing in this act shall limit, waive, or abrogate the  
36 scope or nature of any statutory or common law privilege, including the work- product  
37 doctrine, the attorney-client privilege, and the self-evaluation privilege.

38 (k) Protection for Parties Who Implement Results of Audit. For any violation or  
39 noncompliance shown in the audit that was not known to the owner or operator of the  
40 facility prior to the initiation of the audit, the owner or operator:

41 (1) May not be prosecuted criminally or penalized civilly or  
42 administratively if the party immediately prepares and submits:

43 a. A request for a special order by consent under G.S. 143-215.2  
44 or G.S. 143-215.110; or

- 1                    b. An application for any permit necessary to conduct the activity  
2                    that gives rise to the violation or noncompliance.
- 3            (2) May continue to operate or otherwise maintain the status quo of the  
4            action discovered by the audit although otherwise contrary to statute,  
5            rule, or permit (but for this provision) during the continuation of any  
6            consent order and pending action on all permit applications and the  
7            expiration of all times for appeal of those actions."
- 8            Sec. 2. This act is effective upon ratification.