

103^D CONGRESS
2^D SESSION

S. 2371

To encourage owners and operators of facilities to conduct voluntary internal audits of the compliance of the facilities with applicable Federal environmental laws, and for other purposes.

IN THE SENATE OF THE UNITED STATES

AUGUST 8, 1994

Mr. HATFIELD introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

A BILL

To encourage owners and operators of facilities to conduct voluntary internal audits of the compliance of the facilities with applicable Federal environmental laws, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Environmental Audit
5 Protection Act”.

6 **SEC. 2. PURPOSE.**

7 The purpose of this Act is to encourage owners and
8 operators of facilities, and other persons conducting activi-

1 ties, regulated under applicable environmental laws to con-
2 duct voluntary internal environmental audits of their com-
3 pliance programs and management systems and to assess
4 and improve compliance with applicable environmental
5 laws by protecting the confidentiality of communications
6 relating to voluntary internal environmental audits.

7 **SEC. 3. DEFINITIONS.**

8 As used in this Act:

9 (1) **APPLICABLE ENVIRONMENTAL LAW.**—The
10 term “applicable environmental law” means—

11 (A) the Federal Insecticide, Fungicide, and
12 Rodenticide Act (7 U.S.C. 136 et seq.);

13 (B) the Toxic Substances Control Act (15
14 U.S.C. 2601 et seq.);

15 (C) the Federal Water Pollution Control
16 Act (33 U.S.C. 1251 et seq.);

17 (D) the Oil Pollution Act of 1990 (33
18 U.S.C. 2701 et seq.);

19 (E) title XIV of the Public Health Service
20 Act (commonly known as the “Safe Drinking
21 Water Act”) (42 U.S.C. 300f et seq.);

22 (F) the Noise Control Act of 1972 (42
23 U.S.C. 4901 et seq.);

24 (G) the Solid Waste Disposal Act (42
25 U.S.C. 6901 et seq.);

1 (H) the Clean Air Act (42 U.S.C. 7401 et
2 seq.);

3 (I) the Comprehensive Environmental Re-
4 sponse, Compensation, and Liability Act of
5 1980 (42 U.S.C. 9601 et seq.);

6 (J) the Emergency Planning and Commu-
7 nity Right-To-Know Act of 1986 (42 U.S.C.
8 11001 et seq.); and

9 (K) the Pollution Prevention Act of 1990
10 (42 U.S.C. 13101 et seq.).

11 (2) ENVIRONMENTAL AUDIT.—The term “envi-
12 ronmental audit” means a voluntary, internal, and
13 comprehensive evaluation of a facility or an activity
14 at a facility regulated under an applicable environ-
15 mental law, or of a management system related to
16 the facility or activity, that—

17 (A) is designed to identify and prevent
18 noncompliance and to improve compliance with
19 an applicable environmental law; and

20 (B) is conducted by the owner or operator
21 of the facility, by an employee of the owner or
22 operator, by another person conducting an ac-
23 tivity regulated under an applicable environ-
24 mental law, or by an independent contractor.

25 (3) ENVIRONMENTAL AUDIT REPORT.—

1 (A) IN GENERAL.—The term “environ-
2 mental audit report”—

3 (i) means a report comprised of 1 or
4 more components, each labeled “Environ-
5 mental Audit Report: Privileged Docu-
6 ment”, that is prepared as a result of an
7 environmental audit; and

8 (ii) includes any supporting informa-
9 tion (such as a field note or record of ob-
10 servations, finding, opinion, suggestion,
11 conclusion, draft, memorandum, drawing,
12 photograph, computer-generated or elec-
13 tronically recorded information, map,
14 chart, graph, or survey) that is collected or
15 developed for the primary purpose and in
16 the course of the environmental audit.

17 (B) COMPONENT.—As used in subpara-
18 graph (A), the term “component” means any of
19 the following 3 items:

20 (i) An audit report prepared by the
21 auditor, which may include information on
22 the scope of the audit, information gained
23 from the audit, and conclusions and rec-
24 ommendations relating to the audit, to-
25 gether with exhibits and appendices.

1 (ii) A memorandum or other docu-
2 ment that analyzes a portion or all of the
3 audit report and that may include informa-
4 tion concerning the implementation of the
5 report.

6 (iii) An implementation plan that ad-
7 dresses the correction of past noncompli-
8 ance, the improvement of current compli-
9 ance, and the prevention of future non-
10 compliance.

11 **SEC. 4. PROTECTION OF ENVIRONMENTAL AUDITS.**

12 (a) GENERAL RULE.—

13 (1) IN GENERAL.—Except as provided in para-
14 graph (2) and subsections (b) and (c), an environ-
15 mental audit report shall not be subject to discovery
16 and shall not be admitted into evidence in any civil
17 or criminal action or administrative proceeding be-
18 fore a Federal court or agency.

19 (2) EXCLUSION OF CERTAIN TYPES OF INFOR-
20 MATION.—Paragraph (1) shall not apply to—

21 (A) any document, communication, data,
22 report, or other information required to be col-
23 lected, developed, maintained, reported, or oth-
24 erwise made available to a regulatory agency
25 pursuant to an applicable environmental law, or

1 other Federal, State, or local law, ordinance,
2 regulation, permit, or order;

3 (B) information obtained by observation,
4 sampling, or monitoring by any regulatory
5 agency; or

6 (C) information obtained from a source
7 independent of the environmental audit.

8 (b) WAIVER.—Subsection (a) shall not apply with re-
9 spect to an environmental audit report to the extent that
10 subsection (a) is waived expressly or by implication by the
11 owner or operator of a facility, or other person conducting
12 an activity, that is regulated under an applicable environ-
13 mental law, who prepared or caused to be prepared the
14 environmental audit report.

15 (c) INAPPLICABILITY OF GENERAL RULE.—

16 (1) CIVIL AND ADMINISTRATIVE PROCEED-
17 INGS.—

18 (A) IN GENERAL.—In a civil action or an
19 administrative proceeding, subsection (a) shall
20 not apply to an environmental audit report, or
21 a portion of the report, if—

22 (i) subsection (a) is invoked for a
23 fraudulent purpose; or

1 (ii)(I) the report or portion provides
2 evidence of noncompliance with an applica-
3 ble environmental law; and

4 (II) appropriate efforts to achieve
5 compliance with the law were not promptly
6 initiated and pursued with reasonable dili-
7 gence.

8 (B) DETERMINATION OF INAPPLICABIL-
9 ITY.—In determining whether subsection (a)
10 applies to a report or portion of a report, a
11 court or administrative law judge shall conduct
12 an in camera review of the report or portion of
13 the report.

14 (2) CRIMINAL PROCEEDINGS.—

15 (A) IN GENERAL.—In a criminal proceed-
16 ing, subsection (a) shall not apply to an envi-
17 ronmental audit report, or a portion of the re-
18 port, if—

19 (i) subsection (a) is invoked for a
20 fraudulent purpose;

21 (ii)(I) the report or portion provides
22 evidence of noncompliance with an applica-
23 ble environmental law; and

24 (II) appropriate efforts to achieve
25 compliance with the law were not promptly

1 initiated and pursued with reasonable dili-
2 gence; or

3 (iii)(I) the report or portion contains
4 evidence relevant to the commission of an
5 offense under an applicable environmental
6 law;

7 (II) the Attorney General has a com-
8 pelling need for the information;

9 (III) the information is not otherwise
10 available; and

11 (IV) the Attorney General is unable to
12 obtain the substantial equivalent of the in-
13 formation by any means without incurring
14 unreasonable cost and delay.

15 (B) DETERMINATION OF INAPPLICABILITY
16 OF GENERAL RULE.—In determining whether
17 subsection (a) applies to a report or portion of
18 a report, a court or administrative law judge
19 shall conduct an in camera review of the report
20 or portion of the report in accordance with sub-
21 paragraph (C).

22 (C) IN CAMERA REVIEW PROCEEDINGS.—

23 (i) IN GENERAL.—If the Attorney
24 General has probable cause to believe that
25 an offense has been committed under an

1 applicable environmental law based on in-
2 formation obtained from a source inde-
3 pendent of an environmental audit report,
4 the Attorney General may obtain an envi-
5 ronmental audit report, or a portion of the
6 report, for which subsection (a) is invoked
7 pursuant to a search warrant, criminal
8 subpoena, or discovery in a criminal pro-
9 ceeding. The Attorney General shall imme-
10 diately place the report under seal and
11 shall not review or disclose the contents of
12 the report.

13 (ii) FILING OF PETITION.—Not later
14 than 30 days after the Attorney General
15 obtains an environmental audit report, or a
16 portion of the report, under clause (i), the
17 owner or operator, or other person con-
18 ducting an activity regulated under an ap-
19 plicable environmental law, who prepared
20 or caused to be prepared the report, may
21 file with the court a petition requesting an
22 in camera hearing on whether subsection
23 (a) applies to the environmental audit re-
24 port or portion. Failure by the owner or

1 operator or other person to file the petition
2 shall constitute a waiver of subsection (a).

3 (iii) SCHEDULING ORDER.—As soon
4 as practicable after the filing of the peti-
5 tion, the court shall issue an order schedul-
6 ing an in camera hearing on the petition
7 not later than 45 days after the filing of
8 the petition.

9 (iv) REVIEW BY THE ATTORNEY GEN-
10 ERAL.—

11 (I) IN GENERAL.—An order de-
12 scribed in clause (iii) shall allow the
13 Attorney General to remove the seal
14 from the report to review the report
15 and shall place appropriate limitations
16 on the distribution and review of the
17 report to protect against unauthorized
18 disclosure. The Attorney General may
19 consult with any enforcement agency
20 regarding the contents of the report
21 as the Attorney General determines is
22 necessary to prepare for the in camera
23 hearing.

24 (II) USE OF INFORMATION FROM
25 REVIEW.—The information used in

1 preparation for the in camera hearing
2 shall not be used in any investigation
3 or in any proceeding against the de-
4 fendant, and shall be kept confiden-
5 tial—

6 (aa) unless and until the in-
7 formation is found by the court
8 to be subject to disclosure under
9 subparagraph (A); or

10 (bb) unless the person using
11 the information demonstrates
12 that the information was ob-
13 tained from a source independent
14 of the environmental audit re-
15 port.

16 (v) STIPULATIONS BY THE PAR-
17 TIES.—With respect to proceedings under
18 this subparagraph, the parties may at any
19 time stipulate to entry of an order direct-
20 ing that subsection (a) does or does not
21 apply to specific information contained in
22 an environmental audit report.

23 (3) RELEVANCE REQUIREMENT.—Upon making
24 a determination under paragraph (1) or (2) that an
25 environmental audit report, or a portion of the re-

1 port, should be subject to disclosure, the court may
2 require the disclosure of only such portions of the
3 report as are relevant to an issue in dispute in the
4 proceeding.

5 (d) BURDENS OF PROOF.—

6 (1) IN GENERAL.—Except as provided in para-
7 graphs (2) and (3), a party invoking the protection
8 of subsection (a) shall have the burden of proving
9 the applicability of subsection (a), including, if there
10 is evidence of noncompliance with an applicable envi-
11 ronmental law, the burden of proving that appro-
12 priate efforts to achieve compliance were promptly
13 initiated and pursued with reasonable diligence.

14 (2) FRAUD IN A CIVIL ACTION.—If a party
15 seeks discovery under subsection (c)(1)(A)(i), the
16 party shall have the burden of proving that sub-
17 section (a) is invoked for a fraudulent purpose.

18 (3) ATTORNEY GENERAL.—If the Attorney
19 General seeks discovery under subsection
20 (c)(2)(A)(iii), the Attorney General shall have the
21 burden of proving the matters described in sub-
22 section (c)(2)(A)(iii).

23 **SEC. 5. EFFECT ON OTHER RULES.**

24 Nothing in this Act shall limit, waive, or abrogate the
25 scope or nature of any statutory or common law rule re-

1 guarding discovery or admissibility of evidence, including
2 the attorney-client privilege and the work product doc-
3 trine.

4 **SEC. 6. APPLICABILITY.**

5 This Act shall apply to each Federal civil or criminal
6 action or administrative proceeding that is commenced
7 after the date of enactment of this Act.

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