



performing such audits potentially beneficial, but also potentially harmful if the contents are inappropriately disclosed or otherwise misused; and

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

The General Assembly of North Carolina enacts:

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

**"§ 8-53.9. Privilege for environmental audits.**

(a) Purpose. – For the purpose of encouraging the performance of environmental audits of environmental, health, and safety programs and management systems and compliance with environmental laws, a privilege is created to protect environmental audits.

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

(1) 'Environmental audit' means a voluntary evaluation of one or more facilities, one or more activities at any of these facilities, or one or more management systems related to these facilities or activities, which evaluation has as its purpose to identify noncompliance with environmental laws, prevent noncompliance with environmental laws, improve compliance with environmental laws, identify and encourage waste minimization or pollution prevention, or reduce risks to human health or the environment; or any other self-assessment, whether or not the audit is conducted by the owner or operator, by the owner's or operator's employees or agents, or by independent contractors.

(2) 'Environmental audit report' means all documents generated in the course of performing the environmental audit, including both drafts and final documents, and including each of the following:

a. Any report prepared by the person conducting the audit, or persons working with the person conducting the audit, together with exhibits and appendices.

b. Any executive summary of the final report.

c. Any legal or other similar memoranda and documents analyzing the final report.

d. Any implementation plan that addresses the correction of past noncompliance, the improvement of current compliance, or the prevention of future noncompliance.

e. All work papers generated by persons performing the audit or in connection with the audit, including, without limitation, all working papers, field notes, and reports of observations, findings, opinions, suggestions, conclusions, drafts, information, maps, charts, graphs, and surveys.

'Environmental audit report' does not include:

- 1           a1. Any documents, communications, data, reports, or other  
2 information required to be collected, developed, maintained,  
3 reported, or otherwise made available to a regulatory agency  
4 pursuant to any permit governing the activities being audited.
- 5           b1. Any documents, communications, data, reports, or other  
6 information required to be collected, developed, maintained,  
7 reported, or otherwise made available to a regulatory agency  
8 pursuant to any environmental law governing the activities being  
9 audited.
- 10          c1. Any documents, communications, data, reports, or other  
11 information required to be collected, developed, maintained,  
12 reported, or otherwise made available to a regulatory agency by  
13 order of any governmental agency or court.
- 14          d1. Any data or other information obtained by observation, sampling,  
15 or monitoring by any regulatory agency.
- 16          e1. Any documents, communications, data, reports, or other  
17 information obtained from a source independent of the  
18 environmental audit.
- 19          f1. Any documents or reports existing prior to the commencement of  
20 the environmental audit.
- 21          g1. Any documents or reports prepared subsequent to the completion  
22 of, and independent of, the environmental audit.
- 23          h1. Any documents, communications, data, reports, or other  
24 information not otherwise privileged that is developed or  
25 maintained in the course of a regularly conducted business  
26 activity or regular practice, other than the performance of  
27 environmental audits.

28       (3) 'Environmental laws' shall include all of the following portions of the  
29 General Statutes, and any comparable federal, regional, or local laws or  
30 extensions of those statutes, and any rules, regulations, interpretations,  
31 or other similar applications of those provisions:

- 32           a. Article 7 of Chapter 74.  
33           b. Chapter 104E.  
34           c. Chapter 104G.  
35           d. Article 25 of Chapter 113.  
36           e. Articles 1, 4, and 7 of Chapter 113A.  
37           f. Articles 9, 10, 11, and 19 of Chapter 130A.  
38           g. Chapter 130B.  
39           h. Articles 21, 21A, 21B, and 52 of Chapter 143.

40       (c) Privilege. – An environmental audit report that complies with the requirements  
41 set forth in subsection (c1) of this section shall be privileged against disclosure to any  
42 party, and further shall not be admissible as evidence in any legal action in any civil,  
43 criminal, or administrative proceeding, except as provided in subsection (d) of this

1 section. No person shall be competent to testify in any civil, criminal, or administrative  
2 proceeding concerning any information with respect to an environmental audit report that  
3 is privileged under this section.

4 (c1) In order to be eligible for the privilege under subsection (c) of this section, the  
5 environmental audit report must satisfy all of the following requirements:

6 (1) Be based on an environmental audit that is started and completed on  
7 dates certain and performed under a definite and determinate scope of  
8 work.

9 (2) Be dated, identify the scope of the environmental audit described in the  
10 report, and identify persons who performed the environmental audit and  
11 prepared the environmental audit report.

12 (3) Contain pages that are consecutively paginated and that are each  
13 labelled 'Environmental Audit Report: Privileged Document.'

14 An environmental audit report that does not satisfy the requirements under this subsection  
15 shall be eligible for the privilege under subsection (c) of this section if the court or the  
16 administrative law judge finds that there was a good faith effort in the conduct of the  
17 environmental audit and in the preparation of the environmental audit report.

18 (d) Procedures for Seeking Disclosure in Civil or Administrative Proceedings.  
19 – When a party seeks access to an environmental audit report or seeks to conduct  
20 discovery regarding that report in a civil or administrative proceeding, the provisions of  
21 this subsection apply. Discovery may be had without judicial intervention as to the  
22 following: the fact that an environmental audit took place; the existence of any  
23 environmental audit report; the starting and ending dates of the audit; the facility or  
24 facilities that were audited; and the identities of any members of the audit team and other  
25 persons who have had access to the environmental audit report. Where disclosure is  
26 sought in a civil or administrative proceeding of all other facts or aspects of an  
27 environmental audit or an environmental audit report, the court or the administrative law  
28 judge, after an in camera review in accordance with Chapter 1A of the General Statutes,  
29 shall require disclosure of material for which the privilege described in subsection (c) of  
30 this section is asserted, only if the court or administrative law judge determines that:

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

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

33 (3) The privilege is waived pursuant to subsection (f) of this section.

34 (e) Procedures for Seeking Disclosure in Criminal Proceedings. – A district  
35 attorney or the Attorney General, having probable cause to believe a criminal offense has  
36 been committed under any of the environmental laws, based upon information obtained  
37 from a source independent of an environmental audit report, may obtain an  
38 environmental audit report for which a privilege is asserted under subsection (c) of this  
39 section pursuant to a search warrant, criminal subpoena, or discovery in accordance with  
40 the provisions of Chapter 15A of the General Statutes. Discovery may be had without  
41 judicial intervention as to the following: the fact that an environmental audit took place;  
42 the existence of any environmental audit report; the starting and ending dates of the audit;  
43 the facility or facilities that were audited; and the identities of any members of the audit

1 team and other persons who have had access to the environmental audit report. The  
2 provisions of subdivisions (1) through (4) of this subsection apply to discovery of other  
3 facts and aspects of an environmental audit and environmental audit report and the  
4 contents of the environmental audit report.

5 (1) The district attorney or Attorney General shall immediately place the  
6 report under seal and shall not review or disclose its contents.

7 (2) Within 30 days of the district attorney's or Attorney General's obtaining  
8 an environmental audit report, the person who prepared the report or  
9 caused the report to be prepared may file with the court a petition  
10 requesting an in camera hearing on whether the environmental audit  
11 report or portions thereof are privileged under this section or subject to  
12 disclosure. Failure by the owner or operator to file such petition shall  
13 waive the privilege.

14 (3) Upon filing a petition under subdivision (2) of this subsection, the court  
15 shall issue an order scheduling an in camera hearing, within 45 days of  
16 the filing of the petition, to determine whether the environmental audit  
17 report or portions thereof are privileged under this section or subject to  
18 disclosure. Such an order shall allow the district attorney or the  
19 Attorney General to remove the seal from the report to review the report  
20 and shall place appropriate limitations on distribution and review of the  
21 report to protect against unnecessary disclosure. The district attorney or  
22 Attorney General may consult with enforcement agencies regarding the  
23 contents of the report as necessary to prepare for the in camera hearing.  
24 The information used in preparation for the in camera hearing shall not  
25 be used in any investigation or in any proceeding against the defendant,  
26 and shall otherwise be kept confidential, unless and until such  
27 information is found by the court to be subject to disclosure under  
28 subdivision (4) of this subsection.

29 (4) In a criminal proceeding, the court after an in camera review, shall  
30 require disclosure of material for which the privilege under this section  
31 is asserted, if the court determines that:

32 a. The privilege is asserted for a fraudulent purpose;

33 b. The material is not subject to the privilege;

34 c. The privilege is waived pursuant to subsection (f) of this section;  
35 or

36 d. The material contains evidence relevant to commission of a  
37 criminal offense under the environmental laws, the district  
38 attorney or Attorney General shows a compelling need for the  
39 information, the information is not otherwise available, and the  
40 substantial equivalent of the information cannot be obtained by  
41 any other means without incurring unreasonable cost and delay.

42 (f) Waiver; Limited Disclosure; Protective Orders. – The person asserting the  
43 privilege under subsection (c) of this section may waive the privilege by:

- 1           (1) Express written waiver;
- 2           (2) Signing a special order on consent or settlement agreement binding on  
3           the person holding the privilege and expressly stating that the privilege  
4           is waived;
- 5           (3) Introducing into evidence in any civil, administrative, or criminal  
6           proceeding all or part of any environmental audit report waives the  
7           privilege as to that portion of the environmental audit report that was  
8           introduced as evidence;
- 9           (4) Failing to make a report or disclosure of noncompliance required by an  
10           environmental law and identified in an environmental audit;
- 11           (5) Failing to undertake appropriate efforts with reasonable diligence to  
12           correct the matters of noncompliance noted in the environmental audit  
13           report, resulting in a continued failure to achieve substantial compliance  
14           with environmental laws; or
- 15           (6) Releasing information in any environmental audit report in a manner  
16           that is inconsistent with an intent to restrict the dissemination of the  
17           information. Release of any portion of an environmental audit report to  
18           the Department or any other State agency waives the privilege as to that  
19           portion of the environmental audit report that was released.

20           In determining whether a party has waived any privilege under this subsection, the  
21           court or the administrative law judge shall be guided by the principals that govern the  
22           waiver of privileges under common law, except to the extent that such common law  
23           doctrines are inconsistent with this subsection.

24           The disclosure by the owner or operator of a facility of information in an  
25           environmental audit report to entities such as employees, agents, or representatives of the  
26           owner or operator or prospective purchasers of the operation or facility audit shall not  
27           constitute a waiver of the privilege under this subsection.

28           Upon making a determination under subsection (d) or (e) of this section, the court  
29           may compel the disclosure only of those portions of an environmental audit report  
30           relevant to issues in dispute in the proceeding. Any required disclosure of any  
31           environmental report, or any portion thereof, shall be under such terms as will protect  
32           from disclosure all privileged information in that environmental report, including, but not  
33           limited to, the issuance of protective orders or orders limiting the copying or further  
34           dissemination of those reports, the reduction of portions of those reports, and similar  
35           efforts within the discretion of the court.

36           The parties to a proceeding under subsection (d) of this section may at any time  
37           stipulate to entry of an order directing that specific information contained in an  
38           environmental audit report is or is not subject to the privilege provided under this section.

39           (g) Other Privileges Intact. – Nothing in this section shall limit, waive, or abrogate  
40           the scope or nature of any statutory or common law privilege.

41           (h) Burdens of Persuasion and Proof. – The person asserting the privilege has the  
42           burden to prove that the information is privileged under the provisions of this section. If  
43           the person asserting the privilege under this section establishes prima facie that the

1 information asserted falls within the privilege of this section, the burden of proof shifts to  
2 the party requesting access or right of disclosure of that information to prove that the  
3 privilege is asserted for a fraudulent purpose or that the privilege has been waived."

4 Sec. 2. Part 1 of Article 21 of Chapter 143 of the General Statutes is amended  
5 by adding a new section to read:

6 **"§ 143-215.6E. Immunity from prosecution for voluntarily disclosed violations.**

7 Immunity for Voluntary Disclosure. – No civil or criminal penalty may be imposed on  
8 an entity that voluntarily discloses a violation of an environmental law pursuant to this  
9 section. This immunity applies to any violation disclosed voluntarily, whether the result  
10 of an environmental audit report within the meaning of Chapter 8C of the General  
11 Statutes or otherwise, so long as the violation is disclosed pursuant to subsection (b)  
12 of this section.

13 (b) Voluntary Disclosure. – A violation is voluntarily disclosed for purposes of  
14 this section if the disclosure satisfies all of the following:

15 (1) The regulated entity voluntarily and promptly notifies the Department  
16 and, if required, notifies the United States Environmental Protection  
17 Agency of the violation before the Department or the Environmental  
18 Protection Agency learns of it and completely discloses the violation to  
19 the Department and, if required, the United States Environmental  
20 Protection Agency within 30 days from the discovery of the violation,  
21 provided this subdivision does not require that the disclosure be made  
22 complete by any certain time.

23 (2) The disclosure is not required by a permit, order, or consent agreement  
24 governing the facility at which the violation was discovered.

25 (3) The party acts to correct the violation in a reasonably diligent manner.

26 (4) The violation is not the result of an intentional or willfully reckless  
27 activity or action.

28 (c) Definitions. – For purposes of this section:

29 (1) 'Environmental laws' has the same meaning as set forth in G.S. 8-53.9  
30 and also means any comparable federal, regional, or local counterparts  
31 or extensions of those statutes, and any rules, regulations,  
32 interpretations, or other similar applications of those provisions.

33 (2) 'To correct the violation in a reasonably diligent manner' means the  
34 party acts to correct the violation within three years of the report of the  
35 violation, or where it is not practical to correct the noncompliance  
36 within a two-year period, within an extended period to be determined by  
37 the Department."

38 Sec. 3. Part 2 of Article 21A of Chapter 143 of the General Statutes is  
39 amended by adding a new section to read:

40 **"§ 143-215.88C. Immunity from prosecution for voluntarily disclosed violations.**

41 (a) Immunity for Voluntary Disclosure. – No civil or criminal penalty may be  
42 imposed on an entity that voluntarily discloses a violation of an environmental law  
43 pursuant to this section. This immunity applies to any violation disclosed voluntarily,

1 whether the result of an environmental audit report within the meaning of Chapter 8C of  
2 the General Statutes or otherwise, so long as the violation is disclosed pursuant to  
3 subsection (b) of this section.

4 (b) Voluntary Disclosure. – A violation is voluntarily disclosed for purposes of  
5 this section if the disclosure satisfies all of the following:

6 (1) The regulated entity voluntarily and promptly notifies the Department  
7 and, if required, notifies the United States Environmental Protection  
8 Agency of the violation before the Department or the Environmental  
9 Protection Agency learns of it and completely discloses the violation to  
10 the Department and, if required, the United States Environmental  
11 Protection Agency within 30 days from the discovery of the violation,  
12 provided this subdivision does not require that the disclosure be made  
13 complete by any certain time.

14 (2) The disclosure is not required by a permit, order, or consent agreement  
15 governing the facility at which the violation was discovered.

16 (3) The party acts to correct the violation in a reasonably diligent manner.

17 (4) The violation is not the result of an intentional or willfully reckless  
18 activity or action.

19 (c) Definitions. – For purposes of this section:

20 (1) 'Environmental laws' has the same meaning as set forth in G.S. 8-53.9  
21 and also means any comparable federal, regional, or local counterparts  
22 or extensions of those statutes, and any rules, regulations,  
23 interpretations, or other similar applications of those provisions.

24 (2) 'To correct the violation in a reasonably diligent manner' means the  
25 party acts to correct the violation within three years of the report of the  
26 violation, or where it is not practical to correct the noncompliance  
27 within a two-year period, within an extended period to be determined by  
28 the Department."

29 Sec. 4. Part 2 of Article 1 of Chapter 130A of the General Statutes is amended  
30 by adding a new section to read:

31 **"§ 130A-26.3. Immunity from prosecution for voluntarily disclosed violations.**

32 (a) Immunity for Voluntary Disclosure. – No civil or criminal penalty may be  
33 imposed on an entity that voluntarily discloses a violation of an environmental law  
34 pursuant to this section. This immunity applies to any violation disclosed voluntarily,  
35 whether the result of an environmental audit report within the meaning of Chapter 8C of  
36 the General Statutes or otherwise, so long as the violation is disclosed pursuant to  
37 subsection (b) of this section.

38 (b) Voluntary Disclosure. – A violation is voluntarily disclosed for purposes of  
39 this section if the disclosure satisfies all of the following:

40 (1) The regulated entity voluntarily and promptly notifies the Department  
41 and, if required, notifies the United States Environmental Protection  
42 Agency of the violation before the Department or the Environmental  
43 Protection Agency learns of it and completely discloses the violation to

1           the Department and, if required, the United States Environmental  
2           Protection Agency within 30 days from the discovery of the violation,  
3           provided this subdivision does not require that the disclosure be made  
4           complete by any certain time.

5           (2) The disclosure is not required by a permit, order, or consent agreement  
6           governing the facility at which the violation was discovered.

7           (3) The party acts to correct the violation in a reasonably diligent manner.

8           (4) The violation is not the result of an intentional or willfully reckless  
9           activity or action.

10       (c) Definitions. – For purposes of this section:

11       (1) 'Environmental laws' has the same meaning as set forth in G.S. 8-53.9  
12       and also means any comparable federal, regional, or local counterparts  
13       or extensions of those statutes, and any rules, regulations,  
14       interpretations, or other similar applications of those provisions.

15       (2) 'To correct the violation in a reasonably diligent manner' means the  
16       party acts to correct the violation within three years of the report of the  
17       violation, or where it is not practical to correct the noncompliance  
18       within a two-year period, within an extended period to be determined by  
19       the Department."

20       Sec. 5. This act is effective upon ratification and applies to any civil action,  
21       criminal action, or any administrative proceeding commenced on or after that date.