

**GENERAL ASSEMBLY OF NORTH CAROLINA**

**SESSION 1995**

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HOUSE BILL 817  
Committee Substitute Favorable 5/2/95

Short Title: Environmental Audits.

(Public)

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Sponsors:

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Referred to:

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April 11, 1995

A BILL TO BE ENTITLED

1 AN ACT TO ENCOURAGE THE PERFORMANCE OF ENVIRONMENTAL AUDITS  
2 BY PROVIDING A LIMITED PRIVILEGE AGAINST THE DISCLOSURE OF AN  
3 ENVIRONMENTAL AUDIT REPORT AND TO GRANT IMMUNITY FROM  
4 CIVIL AND CRIMINAL PENALTIES TO A PERSON OR OTHER ENTITY THAT  
5 VOLUNTARILY DISCLOSES A VIOLATION OF AN ENVIRONMENTAL LAW.  
6

Whereas, the General Assembly recognizes the importance of protecting the environment of this State and the health and safety of its citizens; and

Whereas, the ever-increasing complexity and pervasiveness of environmental regulation makes the voluntary performance of environmental self-assessments, or environmental audits, increasingly advantageous and advisable for businesses, local governments, and other entities regulated by the environmental laws of North Carolina; and

Whereas, self-assessments by regulated entities provide for an effective and efficient method for increasing environmental compliance and for protecting the environment, public health, and natural resources of North Carolina without additional governmental spending; and

Whereas, there are serious disincentives to the performance of beneficial environmental audits by responsible members of the regulated community; Now, therefore,

7 The General Assembly of North Carolina enacts:

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

3 **§ 8-53.9. Privilege for environmental audits.**

4 (a) Purpose. – For the purpose of encouraging the performance of environmental  
5 audits, a limited privilege is created to protect environmental audits.

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

7 (1) 'Audit team' means those persons and entities who perform an  
8 environmental audit and prepare an environmental audit report.

9 (2) 'Environmental audit' means a confidential voluntary evaluation or self-  
10 assessment of one or more facilities, one or more activities at any of  
11 those facilities, or one or more management systems related to those  
12 facilities or activities for the purpose of identifying noncompliance with  
13 environmental laws, preventing noncompliance with environmental  
14 laws, improving compliance with environmental laws, identifying and  
15 encouraging waste minimization or pollution prevention, or reducing  
16 risks to human health or the environment, whether or not the audit is  
17 conducted by the owner or operator of the facility or activity, by  
18 employees or agents of the owner or operator, or by independent  
19 contractors.

20 (3) 'Environmental audit report' means any document generated in the  
21 course of performing an environmental audit and any document  
22 prepared in response to the environmental audit that addresses the  
23 correction of past noncompliance, the improvement of current  
24 compliance, or the prevention of future noncompliance, including both  
25 draft and final documents, and including each of the following:

26 a. Any report prepared by any member of the audit team, including  
27 exhibits and appendices to the report.

28 b. Any executive summary of the final report.

29 c. Any document analyzing the final report.

30 d. All work papers generated by members of the audit team in  
31 connection with the audit, including, without limitation, all  
32 working papers, field notes, and reports of observations, findings,  
33 opinions, suggestions, conclusions, drafts, information, maps,  
34 charts, graphs, and surveys.

35 e. Written communication to or from any member of the audit team  
36 concerning the audit.

37 'Environmental audit report' does not include any document,  
38 communication, data, report, or other communication:

39 a1. Required to be collected, developed, maintained, reported, or  
40 otherwise made available to a governmental agency pursuant to  
41 any permit governing an audited activity.

- 1            b1. Required to be collected, developed, maintained, reported, or  
2            otherwise made available to a governmental agency pursuant to  
3            any environmental law governing an audited activity.  
4            c1. Required to be collected, developed, maintained, reported, or  
5            otherwise made available to a governmental agency by order of  
6            any governmental agency or court.  
7            d1. Obtained by observation, sampling, or monitoring by any  
8            governmental agency.  
9            e1. Obtained from a source independent of the environmental audit.  
10          f1. Existing prior to the commencement of the environmental audit.  
11          g1. Prepared subsequent to the completion of, and independent of,  
12          the environmental audit.  
13          h1. Not otherwise privileged that is developed or maintained in the  
14          course of a regularly conducted business activity or regular  
15          practice other than an environmental audit.

16          (4) 'Environmental law' means all of the following portions of the General  
17          Statutes, any comparable federal, regional, or local laws or extensions of  
18          those statutes, and any rules, regulations, or interpretations that  
19          implement the following portions of the General Statutes or comparable  
20          federal, regional, or local laws:

- 21            a. Article 7 of Chapter 74.  
22            b. Chapter 104E.  
23            c. Article 25 of Chapter 113.  
24            d. Articles 4 and 7 of Chapter 113A.  
25            e. Articles 9, 10, 11, and 19 of Chapter 130A.  
26            f. Articles 21, 21A, 21B, and 52 of Chapter 143.

27          (c) Privilege. – An environmental audit report that complies with the requirements  
28          set forth in subsection (d) of this section is privileged against disclosure to any person.  
29          An environmental audit report that complies with the requirements set forth in subsection  
30          (d) of this section is not admissible as evidence in any civil, criminal, or administrative  
31          proceeding except as provided in subsections (e) and (f) of this section. No person shall  
32          be competent to testify in any civil, criminal, or administrative proceeding concerning an  
33          environmental audit report that is privileged under this section unless the privilege is  
34          waived or disclosure is ordered under subsection (e) or (f) of this section. The privilege  
35          created by this section protects an environmental audit report and any oral  
36          communication concerning the environmental audit report to or from any person or entity  
37          who is a member of the audit team, but does not protect the underlying facts or activities  
38          that are the subject of the environmental audit report.

39          (d) Environmental Audit Report Requirements. – In order to be privileged under  
40          subsection (c) of this section, an environmental audit report must: (i) be based on an  
41          environmental audit that is started and completed on dates certain and performed under a  
42          definite and determinate scope of work; (ii) be dated, identify the scope of the  
43          environmental audit described in the report, and identify all members of the audit team;

1 and (iii) contain pages that are consecutively paginated and that are each labeled  
2 'Environmental Audit Report: Privileged Document.' An environmental audit report that  
3 does not meet these requirements is privileged under subsection (c) of this section if, in  
4 any civil, criminal, or administrative proceeding in which the privilege is asserted, the  
5 court or the administrative law judge finds that the audit team made a good faith effort in  
6 the conduct of the environmental audit and in the preparation of the environmental audit  
7 report to comply with these requirements and to maintain the confidentiality of the  
8 environmental audit report.

9 (e) Procedure for Seeking Disclosure in Civil or Administrative Proceedings. –  
10 When a party to a civil or an administrative proceeding seeks access to an environmental  
11 audit report or seeks to conduct discovery regarding that report, the provisions of this  
12 subsection apply. Discovery may be had without judicial intervention as to the  
13 following: the fact that an environmental audit took place; the existence of any  
14 environmental audit report; the starting and ending dates of the environmental audit; the  
15 facility or facilities that were audited; and the identities of the members of the audit team  
16 and any other persons who have had access to the environmental audit report. Where  
17 disclosure is sought in a civil or administrative proceeding of any other fact or aspect of  
18 an environmental audit or an environmental audit report and the privilege has not been  
19 waived, the court or the administrative law judge, after an in camera review in  
20 accordance with Chapter 1A of the General Statutes, shall require disclosure of material  
21 for which the privilege described in subsection (c) of this section is asserted, only if the  
22 court or administrative law judge determines that the:

- 23 (1) Material is not subject to the privilege;
- 24 (2) Privilege is asserted for a fraudulent purpose; or
- 25 (3) Privilege is waived pursuant to subsection (g) of this section.

26 (f) Procedure for Seeking Disclosure in Criminal Proceedings. – A district  
27 attorney or the Attorney General who, based upon information obtained from a source  
28 independent of an environmental audit report, has probable cause to believe a criminal  
29 offense has been committed under any environmental law, may obtain an environmental  
30 audit report for which a privilege is asserted under subsection (c) of this section pursuant  
31 to a search warrant, criminal subpoena, or discovery in accordance with the provisions of  
32 Chapter 15A of the General Statutes. Discovery may be had without judicial intervention  
33 as to the following: the fact that an environmental audit took place; the existence of any  
34 environmental audit report; the starting and ending dates of the environmental audit; the  
35 facility or facilities that were audited; and the identities of the members of the audit team  
36 and any other persons who have had access to the environmental audit report. The  
37 provisions of subdivisions (1) through (4) of this subsection apply to discovery of any  
38 other fact and aspect of an environmental audit or an environmental audit report, unless  
39 the privilege has been waived:

- 40 (1) The district attorney or Attorney General shall immediately place the  
41 report under seal and shall not review or disclose the contents of the  
42 report.

- 1           (2)   Within 30 days after the district attorney or Attorney General obtains an  
2           environmental audit report, the person who prepared the report or  
3           caused the report to be prepared may petition the court for an in camera  
4           hearing to determine whether the report or any portion thereof is  
5           privileged under this section. If the person who prepared the report or  
6           caused the report to be prepared fails to petition the court for a  
7           determination within 30 days, the privilege is waived.
- 8           (3)   If a petition is filed under subdivision (2) of this subsection, the court  
9           shall order that an in camera hearing be held within 45 days of the date  
10           the petition is filed. The order shall allow the district attorney or the  
11           Attorney General to remove the seal from the report in order to review  
12           the report and shall place appropriate limitations on distribution and  
13           review of the report to protect against unnecessary disclosure. The  
14           district attorney or Attorney General may consult with appropriate  
15           governmental agencies regarding the contents of the report to the extent  
16           necessary to prepare for the in camera hearing. The information used in  
17           preparation for the in camera hearing shall not be used in any  
18           investigation or in any proceeding against the defendant, and shall  
19           otherwise be kept confidential, unless the information is found by the  
20           court to be subject to disclosure under subdivision (4) of this subsection.
- 21           (4)   In a criminal proceeding, the court, after an in camera review, shall  
22           require disclosure of material for which the privilege under this section  
23           is asserted, if the court determines that the:
- 24           a.    Material is not subject to the privilege.  
25           b.    Privilege is asserted for a fraudulent purpose.  
26           c.    Privilege is waived pursuant to subsection (g) of this section.  
27           d.    Material contains evidence relevant to commission of a criminal  
28           offense under an environmental law, the district attorney or  
29           Attorney General shows a compelling need for the information,  
30           the information is not otherwise available, and substantially  
31           equivalent information cannot be obtained by any other means  
32           without incurring unreasonable cost and delay.
- 33           (g)   Waiver. –
- 34           (1)   A person holding the privilege created by subsection (c) of this section  
35           waives the privilege by:
- 36           a.    Expressly waiving the privilege in writing.  
37           b.    Signing a consent special order or settlement agreement binding  
38           on the person holding the privilege and expressly stating that the  
39           privilege is waived.  
40           c.    Introducing into evidence in any civil, administrative, or criminal  
41           proceeding all or any portion of the environmental audit report.  
42           Introduction of any portion of an environmental audit report into  
43           evidence waives the privilege as to that portion of the

1 environmental audit report that was introduced into evidence. In  
2 addition, the court may compel disclosure of all or any other  
3 portion of the environmental audit report if the court determines  
4 that disclosure is necessary to a proper administration of justice  
5 and that the disclosure is not prohibited by other statute or rule.

6 d. Failing to make a report or disclosure of noncompliance required  
7 by an environmental law if the failure to make the report or  
8 disclosure of noncompliance is identified in the environmental  
9 audit.

10 e. Failing to undertake appropriate efforts with reasonable diligence  
11 to correct any noncompliance identified in the environmental  
12 audit report.

13 f. Releasing information in any environmental audit report in a  
14 manner that is inconsistent with an intent to protect the  
15 confidentiality of the information. Release of any portion of an  
16 environmental audit report to any State agency waives the  
17 privilege as to that portion of the environmental audit report that  
18 was released.

19 (2) The disclosure by the owner or operator of a facility of information in  
20 an environmental audit report to an employee, agent, representative of  
21 the owner or operator, lender, or prospective purchaser of the operation  
22 or facility shall not constitute a waiver of the privilege under this  
23 subsection so long as the owner or operator has entered into a written  
24 confidentiality agreement with the recipient of the information or has  
25 acted in a manner consistent with an intent to protect the confidentiality  
26 of the information.

27 (3) In determining whether a party has waived any privilege under this  
28 subsection, the court or the administrative law judge shall be guided by  
29 the principles that govern the waiver of privileges under common law,  
30 except to the extent that common law doctrines are inconsistent with  
31 this subsection.

32 (h) Protective Orders. – Any required disclosure of any environmental audit report,  
33 or any portion thereof, shall be under terms that will protect from disclosure all privileged  
34 information in the report. The court, in its discretion, may issue a protective order, an  
35 order limiting copying or further dissemination of the report, an order redacting the  
36 report, or any other order necessary to protect the confidentiality of information in the  
37 report.

38 (i) Stipulations. – The parties to a proceeding under subsections (e) and (f) of this  
39 section may at any time stipulate to entry of an order directing that specific information  
40 contained in an environmental audit report is or is not subject to the privilege provided  
41 under this section.

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

1       (k) Burdens of Persuasion and Proof. – The person asserting the privilege under  
2 this section has the burden of proving that the information is privileged. If the person  
3 asserting the privilege establishes prima facie that the information is entitled to protection  
4 under this section, any person requesting access to, or right of disclosure of, that  
5 information has the burden of proving that the privilege is asserted for a fraudulent  
6 purpose or that the privilege has been waived."

7           Sec. 2. Part 1 of Article 7 of Chapter 143B of the General Statutes is amended  
8 by adding a new section to read:

9 **"§ 143B-279.6. Immunity for voluntarily disclosed violations.**

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

11           (1) 'Environmental audit report' has the same meaning as in G.S. 8-53.9.

12           (2) 'Environmental law' means all of the following portions of the General  
13 Statutes, any comparable federal, regional, or local laws or extensions of  
14 those statutes, and any rules, regulations, or interpretations that  
15 implement the following portions of the General Statutes or comparable  
16 federal, regional, or local laws:

17               a. Article 7 of Chapter 74.

18               b. Chapter 104E.

19               c. Article 25 of Chapter 113.

20               d. Articles 4 and 7 of Chapter 113A.

21               e. Articles 9, 10, 11, and 19 of Chapter 130A.

22               f. Articles 21, 21A, and 21B of Chapter 143.

23           (3) 'Imminent hazard' has the same meaning as in G.S. 130A-2.

24           (4) 'Department' means the Department of Environment, Health, and  
25 Natural Resources.

26       (b) Immunity for Voluntary Disclosure. – No civil or criminal penalty may be  
27 imposed on a person or other entity that voluntarily discloses a violation of an  
28 environmental law pursuant to this section. This immunity applies to any violation  
29 disclosed voluntarily, whether the disclosure is the result of an environmental audit report  
30 or otherwise, so long as the violation is disclosed pursuant to subsection (c) of this  
31 section.

32       (c) Voluntary Disclosure. – A violation is voluntarily disclosed for purposes of  
33 this section if the disclosure satisfies all of the following:

34           (1) The violation does not result in an imminent hazard.

35           (2) The person or other entity voluntarily and promptly notifies the  
36 Department and, if required, notifies the United States Environmental  
37 Protection Agency or the United States Nuclear Regulatory Commission  
38 of the violation before the Department, the United States Environmental  
39 Protection Agency, or the United States Nuclear Regulatory  
40 Commission learns of the violation. Notice must be given in the  
41 manner required by law, and within the time required by law or within  
42 30 days, whichever is less.

- 1           (3)    The person or other entity voluntarily makes a complete and accurate  
2           written report of the violation to the Department and, if required, to the  
3           United States Environmental Protection Agency or the United States  
4           Nuclear Regulatory Commission in accordance with any applicable law,  
5           rule, regulation, or order, and within a reasonable time after notification  
6           is made under subdivision (2) of this subsection.
- 7           (4)    The disclosure is not required by a permit, order, or consent agreement  
8           governing the facility at which the violation occurred.
- 9           (5)    The person or other entity acts to correct the violation in a reasonably  
10          diligent manner.
- 11          (6)    The violation is not the result of an intentional or willfully reckless  
12          activity or action."

13          Sec. 3. Part 5 of Article 52 of Chapter 143 of the General Statutes is amended  
14 by adding a new section to read:

15 **"§ 143-469.1. Immunity for voluntarily disclosed violations.**

16          (a)    Definitions. – For purposes of this section:

- 17           (1)    'Environmental audit report' has the same meaning as in G.S. 8-53.9.  
18           (2)    'Environmental law' means this Article, any comparable federal,  
19           regional, or local laws or extensions of this Article, and any rules,  
20           regulations, or interpretations that implement this Article or comparable  
21           federal, regional, or local laws.
- 22           (3)    'Imminent hazard' has the same meaning as in G.S. 130A-2.  
23           (4)    'Department' means the Department of Agriculture.

24          (b)    Immunity for Voluntary Disclosure. – No civil or criminal penalty may be  
25          imposed on a person or other entity that voluntarily discloses a violation of an  
26          environmental law pursuant to this section. This immunity applies to any violation  
27          disclosed voluntarily, whether the disclosure is the result of an environmental audit report  
28          or otherwise, so long as the violation is disclosed pursuant to subsection (c) of this  
29          section.

30          (c)    Voluntary Disclosure. – A violation is voluntarily disclosed for purposes of  
31          this section if the disclosure satisfies all of the following:

- 32           (1)    The violation does not result in an imminent hazard.  
33           (2)    The person or other entity voluntarily and promptly notifies the  
34           Department and, if required, notifies the United States Environmental  
35           Protection Agency of the violation before the Department or the United  
36           States Environmental Protection Agency learns of the violation. Notice  
37           must be given in the manner required by law, and within the time  
38           required by law or within 30 days, whichever is less.
- 39           (3)    The person or other entity voluntarily makes a complete and accurate  
40           written report of the violation to the Department and, if required, to the  
41           United States Environmental Protection Agency or the United States  
42           Nuclear Regulatory Commission in accordance with any applicable law,



1 rule, regulation, or order, and within a reasonable time after notification  
2 is made under subdivision (2) of this subsection.

3 (4) The disclosure is not required by a permit, order, or consent agreement  
4 governing the facility at which the violation occurred.

5 (5) The person or other entity acts to correct the violation in a reasonably  
6 diligent manner.

7 (6) The violation is not the result of an intentional or willfully reckless  
8 activity or action."

9 Sec. 4. G.S. 74-64 is amended by adding a new subsection to read:

10 "(c) G.S. 143B-279.6 governs civil and criminal penalties under this Article."

11 Sec. 5. G.S. 104E-23 is amended by adding a new subsection to read:

12 "(c) G.S. 143B-279.6 governs criminal penalties under this Chapter."

13 Sec. 6. G.S. 104E-24 is amended by adding a new subsection to read:

14 "(e) G.S. 143B-279.6 governs civil penalties under this Chapter."

15 Sec. 7. G.S. 113-337 is amended by adding a new subsection to read:

16 "(c) G.S. 143B-279.6 governs criminal penalties under this Article."

17 Sec. 8. G.S. 113A-64 is amended by adding a new subsection to read:

18 "(c) G.S. 143B-279.6 governs civil and criminal penalties under this Article."

19 Sec. 9. G.S. 113A-126 is amended by adding a new subsection to read:

20 "(e) G.S. 143B-279.6 governs civil and criminal penalties under this Article."

21 Sec. 10. Part 2 of Article 1 of Chapter 130A of the General Statutes is  
22 amended by adding a new section to read:

23 "**§ 130A-26.3. Immunity for voluntarily disclosed violations.**

24 G.S. 143B-279.6 governs civil and criminal penalties under Articles 9, 10, 11, and 19  
25 of this Chapter."

26 Sec. 11. G.S. 143-215.6A is amended by adding a new subsection to read:

27 "(l) G.S. 143B-279.6 governs civil penalties under this Part."

28 Sec. 12. G.S. 143-215.6B is amended by adding a new subsection to read:

29 "(k) G.S. 143B-279.6 governs criminal penalties under this Part."

30 Sec. 13. G.S. 143-215.58 is amended by adding a new subsection to read:

31 "(d) G.S. 143B-279.6 governs criminal penalties under this Part."

32 Sec. 14. G.S. 143-215.88A is amended by adding a new subsection to read:

33 "(c) G.S. 143B-279.6 governs civil penalties under this Part."

34 Sec. 15. G.S. 143-215.88B is amended by adding a new subsection to read:

35 "(h) G.S. 143B-279.6 governs criminal penalties under this Part."

36 Sec. 16. G.S. 143-216.98 is amended by designating the existing text as  
37 subsection (a) and by adding a new subsection to read:

38 "(b) G.S. 143B-279.6 governs criminal penalties under this Part."

39 Sec. 17. G.S. 143-215.102 is amended by adding a new subsection to read:

40 "(c) G.S. 143B-279.6 governs civil and criminal penalties under this Part."

41 Sec. 18. G.S. 215.114A is amended by adding a new subsection to read:

42 "(h) G.S. 143B-279.6 governs civil penalties under this Part."

43 Sec. 19. G.S. 143-215.114B is amended by adding a new subsection to read:

1       "(k) G.S. 143B-279.6 governs criminal penalties under this Part."

2           Sec. 20. This act is effective upon ratification. Section 1 of this act applies to  
3 environmental audits begun on or after the date this act becomes effective. The immunity  
4 from civil and criminal penalties created by Sections 2 through 19 of this act applies to  
5 any violation of an environmental law that is voluntarily disclosed as provided by this act  
6 on or after the date this act becomes effective.