CHAPTER 57

Environmental Audit Privilege and Voluntary Disclosure

**SECTION 48‑57‑10.** Purpose.

 (A) The General Assembly finds that the protection of the environment rests principally on the public's voluntary compliance with environmental laws; that voluntary compliance is most effectively achieved through the implementation of regular self‑evaluative activities such as audits of compliance status and management systems to assure compliance; and that it is in the public's interest to encourage these activities by assuring limited protection of audit findings and of fair treatment of those who report an environmental compliance violation or audit findings to regulatory authorities in accordance with Section 48‑57‑100. In order to encourage owners and operators of facilities and persons conducting other activities regulated under federal, state, regional, or local laws to conduct voluntary internal environmental audits of compliance programs or management systems and to assess and improve compliance with these laws, an environmental audit privilege is established and recognized to protect the confidentiality of communications relating to voluntary internal environmental audits and a limited protection from penalties is established for those who disclose an environmental compliance violation or audit findings to regulatory authorities.

 (B) Notwithstanding any other provisions of law, nothing in this chapter shall be construed to protect individuals, entities, or facilities from a criminal investigation or prosecution carried out by any appropriate governmental entity.

 (C) Notwithstanding any other provision of law, any privilege granted by this chapter shall apply only to those communications, oral or written, pertaining to and made in connection with the self‑audit and shall not apply to the facts relating to the violation itself.

HISTORY: 1996 Act No. 384, Section 2; 2000 Act No. 270, Section 1.

**SECTION 48‑57‑20.** Definitions.

 As used in this chapter:

 (1) "Department" means the South Carolina Department of Health and Environmental Control.

 (2) "Environmental audit" means a voluntary, internal evaluation or review of one or more facilities or an activity at one or more facilities regulated under federal, state, regional, or local environmental law, or of compliance programs, or management systems related to the facility or activity if designed to identify and prevent noncompliance and to improve compliance with these laws. For the purposes of this act, an environmental audit does not include an environmental site assessment of a facility conducted solely in anticipation of the purchase, sale, or transfer of the business or facility. An environmental audit may be conducted by the owner or operator, the parent corporation of the owner or operator or by their officers or employees, or by independent contractors. An environmental audit must be a discrete activity with a specified beginning date and scheduled ending date reflecting the auditor's bona fide intended completion schedule.

 (3) "Environmental audit report" means a document marked or identified as such with a completion date existing either individually or as a compilation prepared in connection with an environmental audit. An environmental audit report may include, but is not limited to, field notes and records of observations, findings, opinions, suggestions, recommendations, conclusions, drafts, memoranda, drawings, photographs, computer‑generated or electronically‑recorded information, maps, charts, graphs, and surveys, provided the supporting information is collected or developed for the primary purpose and in the course of an environmental audit. An environmental audit report, when completed, may have these components:

 (a) an audit report prepared by an auditor, which may include the scope and date of the audit and the information gained in the audit, together with exhibits and appendices and may include conclusions and recommendations;

 (b) memoranda and documents analyzing the report and discussing implementation issues;

 (c) an audit implementation plan that addresses correcting past noncompliance, improving current compliance, and preventing future noncompliance.

 (4) "Environmental laws" means all provisions of federal, state, regional, and local laws, regulations, and ordinances pertaining to environmental matters.

HISTORY: 1996 Act No. 384, Section 2; 2000 Act No. 270, Section 1.

**SECTION 48‑57‑30.** Environmental audit report; privilege.

 (A) An environmental audit report or any part of an environmental audit report is privileged and, therefore, immune from discovery and is not admissible as evidence in a civil or administrative penalty action, except as provided in Sections 48‑57‑40 and 48‑57‑50. These documents are not entitled to the privilege:

 (1) information obtained by observation by a regulatory agency;

 (2) information obtained from a source independent of the environmental audit;

 (3) documents, communication, data, reports, or other information required to be collected, maintained, otherwise made available, or reported to a regulatory agency or any other persons by statute, regulation, ordinance, permit, order, consent agreement, or as otherwise provided by law;

 (4) documents prepared either prior to the beginning of the environmental audit or subsequent to the completion date of the audit report, and in all cases, any documents prepared independent of the audit or audit report;

 (5) documents prepared as a result of multiple or continuous self‑auditing conducted in an effort to intentionally avoid liability for violations;

 (6) information which is knowingly misrepresented or misstated or which is knowingly deleted or withheld from an environmental audit report, whether or not included in a subsequent environmental audit report;

 (7) information in instances where the material shows evidence of noncompliance with state, federal, regional, or local environmental laws, permits, consent agreements, regulations, ordinances, or orders and the owner or operator failed to either promptly take corrective action or eliminate any violation of law identified during the environmental audit within a reasonable period of time, but not exceeding three years after discovery of the noncompliance or violation unless a longer period of time is set forth in a schedule of compliance in an order issued by the department, after notice in the State Register and following the department's determination that acceptable progress is being made.

 (B) If an environmental audit report or any part of an environmental audit report is subject to the privilege provided for in subsection (A), no person who conducted or participated in the audit or who significantly reviewed the audit report may be compelled to testify regarding the audit report or a privileged part of the audit report except as provided for in Section 48‑57‑30(E) or in Sections 48‑57‑40 or 48‑57‑50.

 (C) Nothing contained in this chapter may restrict a party in a proceeding before the South Carolina Workers' Compensation Commission from obtaining or discovering any evidence necessary or appropriate for the proof of any issue pending in the case, regardless of whether evidence is privileged pursuant to this chapter. Further, nothing contained in this chapter may prevent the admissibility of evidence which is otherwise relevant and admissible in a proceeding before the South Carolina Workers' Compensation Commission, regardless of whether the evidence is privileged pursuant to this chapter. However, the commission, upon motion made by a party to the proceeding, may issue appropriate protective orders preventing disclosure of information outside of the workers' compensation proceeding.

 (D) The privilege created by this section does not apply to criminal investigations or proceedings. Where an audit report is obtained, reviewed, or used in a criminal proceeding, the privilege created by this section shall continue to apply and is not waived in civil and administrative proceedings, and is not discoverable or admissible in civil or administrative proceedings even if disclosed during a criminal proceeding.

 (E) Nothing in this chapter may be construed to circumvent the employee protection provisions provided by federal or state law.

HISTORY: 1996 Act No. 384, Section 2; 2000 Act No. 270, Section 1.

**SECTION 48‑57‑40.** Waiver of privilege.

 (A) The privilege provided for in Section 48‑57‑30 does not apply to the extent that it is expressly waived in writing by the owner or operator of a facility at which an environmental audit was conducted and who prepared or caused to be prepared the audit report as a result of the audit.

 (B) The audit report and information generated by the audit may be disclosed without waiving the privilege in Section 48‑57‑30 to:

 (1) a person employed by the owner or operator or the parent corporation of the audited facility;

 (2) a legal representative of the owner or operator or parent corporation; or

 (3) an independent contractor retained by the owner or operator or parent corporation to conduct an audit on or to address an issue or issues raised by the audit.

 (C) Disclosure of an audit report or information generated by the audit under these circumstances does not waive the privilege in Section 48‑57‑30:

 (1) disclosure made under the terms of a confidentiality agreement between the owner or operator of the facility audited and a potential purchaser of the business or facility audited;

 (2) disclosure made under the terms of a confidentiality agreement between governmental officials and the owner or operator of the facility audited;

 (3) disclosure made under the terms of a confidentiality agreement between a customer, lending institution, or insurance company with an existing or proposed relationship with the facility.

HISTORY: 1996 Act No. 384, Section 2; 2000 Act No. 270, Section 1.

**SECTION 48‑57‑45.** Notification of audit.

 In order to assert at any time in the future the privilege established in Section 48‑57‑30, the facility conducting the environmental audit shall, upon inspection by the department of the facility or no later than ten working days after completion of the department's inspection, notify the department of the existence of any audit relevant to the subject of the department's inspection as well as the beginning date and completion date of that audit. A responsible official from the facility or company shall certify by his or her signature in writing on the cover of the audit report the beginning date, the anticipated completion date, and the actual completion date of the audit.

HISTORY: 1996 Act No. 384, Section 2; 2000 Act No. 270, Section 1.

**SECTION 48‑57‑50.** Revocation of privilege in administrative proceedings.

 In an administrative proceeding before an administrative law judge, the department may seek by motion a declaratory ruling on the issue of whether an environmental audit report is privileged. The administrative law judge shall revoke the privilege granted in Section 48‑57‑30 to an audit report if the factors set forth in this section apply. In a civil proceeding, the court, after an in camera review, shall revoke the privilege provided for in Section 48‑57‑30 if the court determines that disclosure of the environmental audit report was sought after the effective date of this chapter, and:

 (1) the privilege is asserted for purposes of deception or evasion; or

 (2) even if subject to the privilege provided for in Section 48‑57‑30:

 (a) the material shows evidence of significant noncompliance with applicable environmental laws;

 (b) the owner or operator of the facility has not promptly initiated and pursued with diligence appropriate action to achieve compliance with these environmental laws or has not made reasonable efforts to complete any necessary permit application; and

 (c) as a result, the owner or operator of the facility did not or will not achieve compliance with applicable environmental laws or did not or will not complete the necessary permit application within a reasonable period of time.

HISTORY: 1996 Act No. 384, Section 26; 2000 Act No. 270, Section 1.

**SECTION 48‑57‑60.** Privilege in criminal proceedings.

 The privilege provided for in Section 48‑57‑30 is not applicable in any criminal proceeding.

HISTORY: 1996 Act No. 384, Section 2; 2000 Act No. 270, Section 1.

**SECTION 48‑57‑70.** Burden of proof.

 A party asserting the privilege provided for in Section 48‑57‑30 has the burden of proving that the materials claimed as privileged constitute an environmental audit report as defined by Section 48‑57‑20 and also of proving that compliance has been achieved or will be achieved through the exercise of best efforts. A party seeking disclosure under Section 48‑57‑50 has the burden of proving the condition for disclosure set forth in that section.

HISTORY: 1996 Act No. 384, Section 2; 2000 Act No. 270, Section 1.

**SECTION 48‑57‑80.** Stipulations; declaratory rulings.

 The parties may at any time stipulate to entry of an order directing that specific information contained in an environmental audit report is or is not subject to the privilege. In the absence of an on‑going proceeding, where the parties are not in agreement, the department may seek a declaratory ruling from the circuit court on the issue of whether the materials are privileged under Section 48‑57‑30 and whether the privilege, if existing, should be revoked pursuant to Section 48‑57‑50.

HISTORY: 1996 Act No. 384, Section 2; 2000 Act No. 270, Section 1.

**SECTION 48‑57‑90.** Construction.

 Nothing in this chapter limits, waives, or abrogates:

 (1) the scope or nature of any statutory or common law privilege, including the work‑product privilege or the attorney‑client privilege;

 (2) any existing ability or authority under state law to challenge privilege; or

 (3) the department's authority to obtain or use documents or information that the department otherwise has the authority to obtain under state regulations promulgated pursuant to federally‑approved programs.

HISTORY: 1996 Act No. 384, Section 2; 2000 Act No. 270, Section 1.

**SECTION 48‑57‑100.** Voluntary disclosure.

 (A) If a person or entity makes a voluntary disclosure of an environmental compliance violation of the state's laws, or the federal, regional, or local counterpart or extension of these laws, that person has the burden of proving that the disclosure is voluntary by establishing the elements in Section 48‑57‑100(B) and that the person is therefore entitled to immunity from any administrative or civil penalties associated with the issues disclosed. Nothing in this section may be construed to provide immunity from criminal penalties.

 (B) For purposes of this section, disclosure is voluntary if:

 (1) the disclosure is made within fourteen days following a reasonable investigation;

 (2) the disclosure is made to an agency having regulatory authority with regard to the violation disclosed;

 (3) the person or entity making the disclosure initiates an action to resolve the violation identified in the disclosure in a diligent manner;

 (4) the person or entity making the disclosure cooperates with the appropriate agency in connection with investigation of the issues identified in the disclosure; and

 (5) the person or entity making the disclosure diligently pursues compliance and promptly corrects the noncompliance within a reasonable time.

 (C) A disclosure is not voluntary for purposes of this section if:

 (1) specific permit conditions require monitoring or sampling records and reports or assessment plans and management plans to be maintained or submitted to the department pursuant to an established schedule;

 (2) specific permit conditions, final departmental orders, or environmental laws require notification of releases to the environment;

 (3) the violation was committed intentionally, wilfully, or through criminal negligence by the person or entity making the disclosure;

 (4) the violation was not corrected in a diligent manner;

 (5) significant environmental harm or a public health threat was caused by the violation;

 (6) the violation occurred within one year of a similar prior violation at the same facility and immunity from civil and administrative penalties was granted by the department for the prior violation;

 (7) the violation has resulted in a substantial economic benefit which gives the violator a clear economic advantage over its business competitors; or

 (8) the violation is a violation of the specific terms of a judicial or administrative order.

 (D) If a person meets the burden of proving that the disclosure is voluntary, the burden shifts to the government to prove that the disclosure was not voluntary, based upon the factors set forth in this section. The person claiming immunity under this chapter retains the ultimate burden of proving the voluntariness of the disclosure.

 (E) A voluntary disclosure made pursuant to this section is subject to disclosure by the agency pursuant to the South Carolina Freedom of Information Act.

 (F) Final waiver of penalties and fines is not granted until full compliance has been certified by the department as occurring in a reasonable time. If full compliance is not certified by the department, the department shall retain discretion to assess penalties based on the department's Uniform Enforcement Policy.

HISTORY: 1996 Act No. 384, Section 2; 2000 Act No. 270, Section 1.

**SECTION 48‑57‑110.** Effect of state or local governmental rule, regulation, guidance, policy, or permit condition.

 No state or local governmental rule, regulation, guidance, policy, or permit condition may circumvent or limit the privileges established by this chapter or the exercise of the privileges or the presumption and immunity established by this chapter.

HISTORY: 1996 Act No. 384, Section 2; 2000 Act No. 270, Section 1.