

# AN ACT

To amend sections 3745.71 and 3745.72 of the Revised Code to extend from January 1, 2009, to January 1, 2014, the time by which environmental audits must be completed in order to be within the scope of certain privileges and immunities that apply to such audits, and to declare an emergency.

*Be it enacted by the General Assembly of the State of Ohio:*

SECTION 1. That sections 3745.71 and 3745.72 of the Revised Code be amended to read as follows:

Sec. 3745.71. (A) Except as otherwise provided in division (C) of this section, the owner or operator of a facility or property who conducts an environmental audit of one or more activities at the facility or property has a privilege with respect to both of the following:

(1) The contents of an environmental audit report that is based on the audit;

(2) The contents of communications between the owner or operator and employees or contractors of the owner or operator, or among employees or contractors of the owner or operator, that are necessary to the audit and are made in good faith as part of the audit after the employee or contractor is notified that the communication is part of the audit.

(B) Except as otherwise provided in or ordered pursuant to this section, information that is privileged under this section is not admissible as evidence or subject to discovery in any civil or administrative proceeding and a person who possesses such information as a result of conducting or participating in an environmental audit shall not be compelled to testify in any civil or administrative proceeding concerning the privileged portions of the environmental audit.

(C) The privilege provided in 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 provided in this section applicable to civil or administrative proceedings is not waived or eliminated. Furthermore, the privilege provided in this section does not apply to

particular information under any of the following circumstances:

(1) The privilege is not asserted with respect to that information by the owner or operator to whom the privilege belongs.

(2) The owner or operator to whom the privilege belongs voluntarily testifies, or has provided written authorization to an employee, contractor, or agent to testify on behalf of the owner or operator, as to that information.

(3) A court of record in a civil proceeding or the tribunal or presiding officer in an administrative proceeding finds, pursuant to this section, that the privilege does not apply to that information.

(4) The information is required by law to be collected, developed, maintained, reported, disclosed publicly, or otherwise made available to a government agency.

(5) The information is obtained from a source other than an environmental audit report, including, without limitation, observation, sampling, monitoring, a communication, a record, or a report that is not part of the audit on which the audit report is based.

(6) The information is collected, developed, made, or maintained in bad faith or for a fraudulent purpose.

(7) The owner or operator to whom the privilege belongs waives the privilege, in whole or in part, explicitly or by engaging in conduct that manifests a clear intent that the information not be privileged. If an owner or operator introduces part of an environmental audit report into evidence in a civil or administrative proceeding to prove that the owner or operator did not violate, or is no longer violating, any environmental laws, the privilege provided by this section is waived with respect to all information in the audit report that is relevant to that issue.

(8)(a) The information shows evidence of noncompliance with environmental laws and the owner or operator fails to do any of the following:

(i) Promptly initiate reasonable efforts to achieve compliance upon discovery of the noncompliance through an environmental audit;

(ii) Pursue compliance with reasonable diligence;

(iii) Achieve compliance within a reasonable time.

(b) "Reasonable diligence" includes, without limitation, compliance with section 3745.72 of the Revised Code.

(9) The information contains evidence that a government agency federally authorized, approved, or delegated to enforce environmental laws has reasonable cause to believe is necessary to prevent imminent and substantial endangerment or harm to human health or the environment.

(10) Any circumstance in which both of the following apply:

(a) The information contains evidence regarding an alleged violation of environmental laws and a government agency charged with enforcing any of those laws has a substantial need for the information to protect public health or safety or to prevent substantial harm to property or the environment.

(b) The government agency is unable to obtain the substantial equivalent of the information by other means without unreasonable delay or expense.

(11) The information consists of personal knowledge of an individual who did not obtain that information as part of an environmental audit.

(12) The information is not clearly identified as part of an environmental audit report. For purposes of this section, clear identification of information as part of an environmental audit report includes, without limitation, either of the following:

(a) The information is contained in a document and the front cover, the first page, or a comparable part of the document is prominently labeled with "environmental audit report: privileged information" or substantially comparable language.

(b) The information is contained in an electronic record and the record is programmed to display or print prominently "environmental audit report: privileged information" or substantially comparable language before the privileged information is displayed or printed.

(13) The information existed prior to the initiation of the environmental audit under division (A) of section 3745.70 of the Revised Code.

(D) If the privilege provided in this section belongs to an owner or operator who is not an individual, the privilege may be asserted or waived, in whole or in part, on behalf of the owner or operator only by an officer, manager, partner, or other comparable person who has a fiduciary relationship with the owner or operator and is authorized generally to act on behalf of the owner or operator or is a person who is authorized specifically to assert or waive the privilege.

(E) A person asserting the privilege provided in this section has the burden of proving the applicability of the privilege by a preponderance of the evidence. If a person seeking disclosure of information with respect to which a privilege is asserted under this section shows evidence of noncompliance with environmental laws pursuant to division (C)(8) of this section, the person asserting the privilege also has the burden of proving by a preponderance of the evidence that reasonable efforts to achieve compliance with those laws were initiated promptly and that compliance was pursued with reasonable diligence and achieved within a reasonable time.

(F) When determining whether the privilege provided by this section applies to particular information, a court of record that is not acting pursuant to division (G) of this section, or the tribunal or presiding officer in an administrative proceeding, shall conduct an in camera review of the information in a manner consistent with applicable rules of procedure.

(G)(1) The prosecuting attorney of a county or the attorney general, having probable cause to believe, based on information obtained from a source other than an environmental audit report, that a violation has been committed under environmental laws for which a civil or administrative action may be initiated, may obtain information with respect to which a privilege is asserted under this section pursuant to a search warrant, subpoena, or discovery under the Rules of Civil Procedure. The prosecuting attorney or the attorney general immediately shall place the information under seal and shall not review or disclose its contents.

(2) Not later than sixty days after receiving an environmental audit report under division (G)(1) of this section, the prosecuting attorney or the attorney general may file with the court of common pleas of a county in which there is proper venue to bring a civil or administrative action pertaining to the alleged violation a petition requesting an in camera hearing to determine if the information described in division (G)(1) of this section is subject to disclosure under this section. Failure to file such a petition shall cause the information to be released to the owner or operator to whom it belongs.

(3) Upon the filing of a petition under division (G)(2) of this section, the court shall issue an order scheduling an in camera hearing, not later than forty-five days after the filing of the petition, to determine if any or all of the information described in division (G)(1) of this section is subject to disclosure under this section. The order shall allow the prosecuting attorney or the attorney general to remove the seal from the report in order to review it and shall place appropriate limitations on distribution and review of the report to protect against unnecessary disclosure.

(4) The prosecuting attorney or the attorney general may consult with government agencies regarding the contents of the report to prepare for the in camera hearing. Information described in division (G)(1) of this section that is used by the prosecuting attorney or the attorney general to prepare for the in camera hearing shall not be used by the prosecuting attorney, the attorney general, an employee or agent of either of them, or an agency described in division (G)(4) of this section in any investigation or proceeding against the respondent, and otherwise shall be kept confidential, unless the information is subject to disclosure under this section.

(5) The parties may stipulate that information contained in an environmental audit report is or is not subject to disclosure under this section.

(6) If the court determines that information described in division (G)(1) of this section is subject to disclosure under this section, the court shall compel disclosure under this section of only the information that is relevant to the proceeding described in division (G)(1) of this section.

(H) Nothing in this section affects the nature, scope, or application of any privilege of confidentiality or nondisclosure recognized under another section of the Revised Code or the common law of this state, including, without limitation, the work product doctrine and attorney-client privilege.

(I) The privilege provided by this section applies only to information and communications that are part of environmental audits initiated after March 13, 1997, and completed before January 1, ~~2009~~ 2014, in accordance with the time frames specified in division (A) of section 3745.70 of the Revised Code.

Sec. 3745.72. (A) The owner or operator of a facility or property who conducts an environmental audit of the facility or property and promptly and voluntarily discloses information contained in or derived from an audit report that is based on the audit and concerns an alleged violation of environmental laws to the director of the state agency that has jurisdiction over the alleged violation is immune from any administrative and civil penalties for the specific violation disclosed, except that where the disclosed violation has resulted in significant economic benefit to the owner or operator of the facility or property, there is no immunity for the economic benefit component of the administrative and civil penalties for that violation. An owner or operator asserting entitlement to such immunity has the burden of proving that entitlement by a preponderance of the evidence.

(B) For the purposes of this section, a disclosure of information is voluntary with respect to an alleged violation of environmental laws only if all of the following apply:

(1) The disclosure is made promptly after the information is obtained through the environmental audit by the owner or operator who conducts the environmental audit;

(2) A reasonable, good faith effort is made to achieve compliance as quickly as practicable with environmental laws applicable to the information disclosed;

(3) Compliance with environmental laws applicable to the information disclosed is achieved as quickly as practicable or within such period as is reasonably ordered by the director of the state agency that has jurisdiction

over the alleged violation;

(4) The owner or operator cooperates with the director of the state agency that has jurisdiction over the alleged violation in investigating the cause, nature, extent, and effects of the noncompliance;

(5) The disclosure is not required by law, prior litigation, or an order by a court or a government agency;

(6) The owner or operator who makes the disclosure does not know or have reason to know that a government agency charged with enforcing environmental laws has commenced an investigation or enforcement action that concerns a violation of such laws involving the activity.

(C) For the purposes of this section, a disclosure shall be in writing, dated, and hand delivered or sent by certified mail to the director of the state agency that has jurisdiction over the alleged violation, and shall contain all of the following in a printed letter attached to the front of the disclosure:

(1) The name, address, and telephone number of the owner or operator making the disclosure;

(2) The name, title, address, and telephone number of one or more persons associated with the owner or operator who may be contacted regarding the disclosure;

(3) A brief summary of the alleged violation of environmental laws, including, without limitation, the nature, date, and location of the alleged violation to the extent that the information is known by the owner or operator;

(4) A statement that the information is part of an environmental audit report and is being disclosed under section 3745.72 of the Revised Code in order to obtain the immunity provided by that section.

(D) This section does not provide immunity from the payment of damages for harm to persons, property, or the environment; the payment of reasonable costs incurred by a government agency in responding to a disclosure; or responsibility for the remediation or cleanup of environmental harm under environmental laws.

(E) The immunity provided by this section does not apply under any of the following circumstances:

(1) Within the three-year period prior to disclosure, the owner or operator of a facility or property has committed significant violations that constitute a pattern of continuous or repeated violations of environmental laws, environmental related settlement agreements, or environmental related judicial orders and that arose from separate and distinct events. For the purposes of division (E)(1) of this section, a pattern of continuous or repeated violations also may be demonstrated by multiple settlement

agreements related to substantially the same alleged significant violations that occurred within the three-year period immediately prior to the voluntary disclosure. Determination of whether a person has a pattern of continuous or repeated violations under division (E)(1) of this section shall be based on the compliance history of the property or specific facility at issue.

(2) With respect to a specific violation, the violation resulted in serious harm or in imminent and substantial endangerment to human health or the environment.

(3) With respect to a specific violation, the violation is of a specific requirement of an administrative or judicial order.

(F) The immunity provided by this section applies only to disclosures made concerning environmental audits initiated after March 13, 1997, and completed before January 1, ~~2009~~ 2014, in accordance with the time frames specified in division (A) of section 3745.70 of the Revised Code.

(G) The immunity provided by this section applies to a person who makes a good faith disclosure to a state agency under this section even though another state agency is determined to have jurisdiction over an alleged violation of environmental laws indicated in the disclosure.

(H) Each state agency that receives a disclosure under this section promptly shall record receipt of the disclosure, determine whether it has jurisdiction over the alleged violation of environmental laws indicated in the disclosure, and, if it does not have such jurisdiction, deliver the disclosure documents to the director of a state agency that has jurisdiction over the alleged violation. If a disclosure indicates alleged violations of environmental laws that are under the jurisdiction of more than one state agency, the state agency that first receives the disclosure and has jurisdiction over any of the alleged violations promptly shall notify the director of each state agency that has jurisdiction over any of such alleged violations. The director of each state agency that receives a disclosure under this section, or is notified by another state agency that the director's agency has jurisdiction over an alleged violation of environmental laws indicated in the disclosure, promptly shall deliver written notice of that fact by certified mail to the owner or operator who made the disclosure. The notice shall identify the state agency that sends the notice; state the name, title, address, and telephone number of a person in the agency whom the owner or operator may contact regarding the disclosure; and state the name, address, and telephone number of the director of any other state agency notified about the disclosure because that agency has jurisdiction over an alleged violation of environmental laws indicated in the disclosure.

SECTION 2. That existing sections 3745.71 and 3745.72 of the Revised Code are hereby repealed.

SECTION 3. This act is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health, and safety. The reason for such necessity is that the deadline by which environmental audits must be completed in order to be within the scope of certain privileges and immunities currently is January 1, 2009, thus necessitating the immediate extension of that deadline in order to continue the environmental audit program. Therefore, this act shall go into immediate effect.

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*Speaker* \_\_\_\_\_ *of the House of Representatives.*

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*President* \_\_\_\_\_ *of the Senate.*

Passed \_\_\_\_\_, 20\_\_\_\_

Approved \_\_\_\_\_, 20\_\_\_\_

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*Governor.*

S. B. No. 372

127th G.A.

The section numbering of law of a general and permanent nature is complete and in conformity with the Revised Code.

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*Director, Legislative Service Commission.*

Filed in the office of the Secretary of State at Columbus, Ohio, on the \_\_\_ day of \_\_\_\_\_, A. D. 20\_\_\_\_.

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*Secretary of State.*

File No. \_\_\_\_\_ Effective Date \_\_\_\_\_