

As Passed by the Senate

**127th General Assembly
Regular Session
2007-2008**

S. B. No. 372

Senator Niehaus

**Cosponsors: Senators Schaffer, Harris, Lehner, Morano, Patton, Roberts,
Sawyer, Seitz, Stivers, Turner, Wagoner**

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A B I L L

To amend sections 3745.71 and 3745.72 of the Revised 1
Code to extend from January 1, 2009, to January 1, 2
2014, the time by which environmental audits must 3
be completed in order to be within the scope of 4
certain privileges and immunities that apply to 5
such audits, and to declare an emergency. 6

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That sections 3745.71 and 3745.72 of the Revised 7
Code be amended to read as follows: 8

Sec. 3745.71. (A) Except as otherwise provided in division 9
(C) of this section, the owner or operator of a facility or 10
property who conducts an environmental audit of one or more 11
activities at the facility or property has a privilege with 12
respect to both of the following: 13

(1) The contents of an environmental audit report that is 14
based on the audit; 15

(2) The contents of communications between the owner or 16
operator and employees or contractors of the owner or operator, or 17
among employees or contractors of the owner or operator, that are 18

necessary to the audit and are made in good faith as part of the 19
audit after the employee or contractor is notified that the 20
communication is part of the audit. 21

(B) Except as otherwise provided in or ordered pursuant to 22
this section, information that is privileged under this section is 23
not admissible as evidence or subject to discovery in any civil or 24
administrative proceeding and a person who possesses such 25
information as a result of conducting or participating in an 26
environmental audit shall not be compelled to testify in any civil 27
or administrative proceeding concerning the privileged portions of 28
the environmental audit. 29

(C) The privilege provided in this section does not apply to 30
criminal investigations or proceedings. Where an audit report is 31
obtained, reviewed, or used in a criminal proceeding, the 32
privilege provided in this section applicable to civil or 33
administrative proceedings is not waived or eliminated. 34
Furthermore, the privilege provided in this section does not apply 35
to particular information under any of the following 36
circumstances: 37

(1) The privilege is not asserted with respect to that 38
information by the owner or operator to whom the privilege 39
belongs. 40

(2) The owner or operator to whom the privilege belongs 41
voluntarily testifies, or has provided written authorization to an 42
employee, contractor, or agent to testify on behalf of the owner 43
or operator, as to that information. 44

(3) A court of record in a civil proceeding or the tribunal 45
or presiding officer in an administrative proceeding finds, 46
pursuant to this section, that the privilege does not apply to 47
that information. 48

(4) The information is required by law to be collected, 49

developed, maintained, reported, disclosed publicly, or otherwise 50
made available to a government agency. 51

(5) The information is obtained from a source other than an 52
environmental audit report, including, without limitation, 53
observation, sampling, monitoring, a communication, a record, or a 54
report that is not part of the audit on which the audit report is 55
based. 56

(6) The information is collected, developed, made, or 57
maintained in bad faith or for a fraudulent purpose. 58

(7) The owner or operator to whom the privilege belongs 59
waives the privilege, in whole or in part, explicitly or by 60
engaging in conduct that manifests a clear intent that the 61
information not be privileged. If an owner or operator introduces 62
part of an environmental audit report into evidence in a civil or 63
administrative proceeding to prove that the owner or operator did 64
not violate, or is no longer violating, any environmental laws, 65
the privilege provided by this section is waived with respect to 66
all information in the audit report that is relevant to that 67
issue. 68

(8)(a) The information shows evidence of noncompliance with 69
environmental laws and the owner or operator fails to do any of 70
the following: 71

(i) Promptly initiate reasonable efforts to achieve 72
compliance upon discovery of the noncompliance through an 73
environmental audit; 74

(ii) Pursue compliance with reasonable diligence; 75

(iii) Achieve compliance within a reasonable time. 76

(b) "Reasonable diligence" includes, without limitation, 77
compliance with section 3745.72 of the Revised Code. 78

(9) The information contains evidence that a government 79

agency federally authorized, approved, or delegated to enforce 80
environmental laws has reasonable cause to believe is necessary to 81
prevent imminent and substantial endangerment or harm to human 82
health or the environment. 83

(10) Any circumstance in which both of the following apply: 84

(a) The information contains evidence regarding an alleged 85
violation of environmental laws and a government agency charged 86
with enforcing any of those laws has a substantial need for the 87
information to protect public health or safety or to prevent 88
substantial harm to property or the environment. 89

(b) The government agency is unable to obtain the substantial 90
equivalent of the information by other means without unreasonable 91
delay or expense. 92

(11) The information consists of personal knowledge of an 93
individual who did not obtain that information as part of an 94
environmental audit. 95

(12) The information is not clearly identified as part of an 96
environmental audit report. For purposes of this section, clear 97
identification of information as part of an environmental audit 98
report includes, without limitation, either of the following: 99

(a) The information is contained in a document and the front 100
cover, the first page, or a comparable part of the document is 101
prominently labeled with "environmental audit report: privileged 102
information" or substantially comparable language. 103

(b) The information is contained in an electronic record and 104
the record is programmed to display or print prominently 105
"environmental audit report: privileged information" or 106
substantially comparable language before the privileged 107
information is displayed or printed. 108

(13) The information existed prior to the initiation of the 109

environmental audit under division (A) of section 3745.70 of the Revised Code. 110
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(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. 112
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(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. 120
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(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. 131
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(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 137
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obtain information with respect to which a privilege is asserted 142
under this section pursuant to a search warrant, subpoena, or 143
discovery under the Rules of Civil Procedure. The prosecuting 144
attorney or the attorney general immediately shall place the 145
information under seal and shall not review or disclose its 146
contents. 147

(2) Not later than sixty days after receiving an 148
environmental audit report under division (G)(1) of this section, 149
the prosecuting attorney or the attorney general may file with the 150
court of common pleas of a county in which there is proper venue 151
to bring a civil or administrative action pertaining to the 152
alleged violation a petition requesting an in camera hearing to 153
determine if the information described in division (G)(1) of this 154
section is subject to disclosure under this section. Failure to 155
file such a petition shall cause the information to be released to 156
the owner or operator to whom it belongs. 157

(3) Upon the filing of a petition under division (G)(2) of 158
this section, the court shall issue an order scheduling an in 159
camera hearing, not later than forty-five days after the filing of 160
the petition, to determine if any or all of the information 161
described in division (G)(1) of this section is subject to 162
disclosure under this section. The order shall allow the 163
prosecuting attorney or the attorney general to remove the seal 164
from the report in order to review it and shall place appropriate 165
limitations on distribution and review of the report to protect 166
against unnecessary disclosure. 167

(4) The prosecuting attorney or the attorney general may 168
consult with government agencies regarding the contents of the 169
report to prepare for the in camera hearing. Information described 170
in division (G)(1) of this section that is used by the prosecuting 171
attorney or the attorney general to prepare for the in camera 172
hearing shall not be used by the prosecuting attorney, the 173

attorney general, an employee or agent of either of them, or an 174
agency described in division (G)(4) of this section in any 175
investigation or proceeding against the respondent, and otherwise 176
shall be kept confidential, unless the information is subject to 177
disclosure under this section. 178

(5) The parties may stipulate that information contained in 179
an environmental audit report is or is not subject to disclosure 180
under this section. 181

(6) If the court determines that information described in 182
division (G)(1) of this section is subject to disclosure under 183
this section, the court shall compel disclosure under this section 184
of only the information that is relevant to the proceeding 185
described in division (G)(1) of this section. 186

(H) Nothing in this section affects the nature, scope, or 187
application of any privilege of confidentiality or nondisclosure 188
recognized under another section of the Revised Code or the common 189
law of this state, including, without limitation, the work product 190
doctrine and attorney-client privilege. 191

(I) The privilege provided by this section applies only to 192
information and communications that are part of environmental 193
audits initiated after March 13, 1997, and completed before 194
January 1, ~~2009~~ 2014, in accordance with the time frames specified 195
in division (A) of section 3745.70 of the Revised Code. 196

Sec. 3745.72. (A) The owner or operator of a facility or 197
property who conducts an environmental audit of the facility or 198
property and promptly and voluntarily discloses information 199
contained in or derived from an audit report that is based on the 200
audit and concerns an alleged violation of environmental laws to 201
the director of the state agency that has jurisdiction over the 202
alleged violation is immune from any administrative and civil 203
penalties for the specific violation disclosed, except that where 204

the disclosed violation has resulted in significant economic 205
benefit to the owner or operator of the facility or property, 206
there is no immunity for the economic benefit component of the 207
administrative and civil penalties for that violation. An owner or 208
operator asserting entitlement to such immunity has the burden of 209
proving that entitlement by a preponderance of the evidence. 210

(B) For the purposes of this section, a disclosure of 211
information is voluntary with respect to an alleged violation of 212
environmental laws only if all of the following apply: 213

(1) The disclosure is made promptly after the information is 214
obtained through the environmental audit by the owner or operator 215
who conducts the environmental audit. 216

(2) A reasonable, good faith effort is made to achieve 217
compliance as quickly as practicable with environmental laws 218
applicable to the information disclosed. 219

(3) Compliance with environmental laws applicable to the 220
information disclosed is achieved as quickly as practicable or 221
within such period as is reasonably ordered by the director of the 222
state agency that has jurisdiction over the alleged violation. 223

(4) The owner or operator cooperates with the director of the 224
state agency that has jurisdiction over the alleged violation in 225
investigating the cause, nature, extent, and effects of the 226
noncompliance. 227

(5) The disclosure is not required by law, prior litigation, 228
or an order by a court or a government agency. 229

(6) The owner or operator who makes the disclosure does not 230
know or have reason to know that a government agency charged with 231
enforcing environmental laws has commenced an investigation or 232
enforcement action that concerns a violation of such laws 233
involving the activity. 234

(C) For the purposes of this section, a disclosure shall be 235
in writing, dated, and hand delivered or sent by certified mail to 236
the director of the state agency that has jurisdiction over the 237
alleged violation, and shall contain all of the following in a 238
printed letter attached to the front of the disclosure: 239

(1) The name, address, and telephone number of the owner or 240
operator making the disclosure; 241

(2) The name, title, address, and telephone number of one or 242
more persons associated with the owner or operator who may be 243
contacted regarding the disclosure; 244

(3) A brief summary of the alleged violation of environmental 245
laws, including, without limitation, the nature, date, and 246
location of the alleged violation to the extent that the 247
information is known by the owner or operator; 248

(4) A statement that the information is part of an 249
environmental audit report and is being disclosed under section 250
3745.72 of the Revised Code in order to obtain the immunity 251
provided by that section. 252

(D) This section does not provide immunity from the payment 253
of damages for harm to persons, property, or the environment; the 254
payment of reasonable costs incurred by a government agency in 255
responding to a disclosure; or responsibility for the remediation 256
or cleanup of environmental harm under environmental laws. 257

(E) The immunity provided by this section does not apply 258
under any of the following circumstances: 259

(1) Within the three-year period prior to disclosure, the 260
owner or operator of a facility or property has committed 261
significant violations that constitute a pattern of continuous or 262
repeated violations of environmental laws, environmental related 263
settlement agreements, or environmental related judicial orders 264
and that arose from separate and distinct events. For the purposes 265

of division (E)(1) of this section, a pattern of continuous or 266
repeated violations also may be demonstrated by multiple 267
settlement agreements related to substantially the same alleged 268
significant violations that occurred within the three-year period 269
immediately prior to the voluntary disclosure. Determination of 270
whether a person has a pattern of continuous or repeated 271
violations under division (E)(1) of this section shall be based on 272
the compliance history of the property or specific facility at 273
issue. 274

(2) With respect to a specific violation, the violation 275
resulted in serious harm or in imminent and substantial 276
endangerment to human health or the environment. 277

(3) With respect to a specific violation, the violation is of 278
a specific requirement of an administrative or judicial order. 279

(F) The immunity provided by this section applies only to 280
disclosures made concerning environmental audits initiated after 281
March 13, 1997, and completed before January 1, ~~2009~~ 2014, in 282
accordance with the time frames specified in division (A) of 283
section 3745.70 of the Revised Code. 284

(G) The immunity provided by this section applies to a person 285
who makes a good faith disclosure to a state agency under this 286
section even though another state agency is determined to have 287
jurisdiction over an alleged violation of environmental laws 288
indicated in the disclosure. 289

(H) Each state agency that receives a disclosure under this 290
section promptly shall record receipt of the disclosure, determine 291
whether it has jurisdiction over the alleged violation of 292
environmental laws indicated in the disclosure, and, if it does 293
not have such jurisdiction, deliver the disclosure documents to 294
the director of a state agency that has jurisdiction over the 295
alleged violation. If a disclosure indicates alleged violations of 296

environmental laws that are under the jurisdiction of more than 297
one state agency, the state agency that first receives the 298
disclosure and has jurisdiction over any of the alleged violations 299
promptly shall notify the director of each state agency that has 300
jurisdiction over any of such alleged violations. The director of 301
each state agency that receives a disclosure under this section, 302
or is notified by another state agency that the director's agency 303
has jurisdiction over an alleged violation of environmental laws 304
indicated in the disclosure, promptly shall deliver written notice 305
of that fact by certified mail to the owner or operator who made 306
the disclosure. The notice shall identify the state agency that 307
sends the notice; state the name, title, address, and telephone 308
number of a person in the agency whom the owner or operator may 309
contact regarding the disclosure; and state the name, address, and 310
telephone number of the director of any other state agency 311
notified about the disclosure because that agency has jurisdiction 312
over an alleged violation of environmental laws indicated in the 313
disclosure. 314

Section 2. That existing sections 3745.71 and 3745.72 of the 315
Revised Code are hereby repealed. 316

Section 3. This act is hereby declared to be an emergency 317
measure necessary for the immediate preservation of the public 318
peace, health, and safety. The reason for such necessity is that 319
the deadline by which environmental audits must be completed in 320
order to be within the scope of certain privileges and immunities 321
currently is January 1, 2009, thus necessitating the immediate 322
extension of that deadline in order to continue the environmental 323
audit program. Therefore, this act shall go into immediate effect. 324