

HOUSE BILL NO. 1336

Introduced by

Representatives Keiser, D. Anderson, Lefor

Senators Klein, Unruh

1 A BILL for an Act to create and enact chapter 23-49 of the North Dakota Century Code, relating
2 to environmental or health safety audits; and to provide a penalty.

3 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

4 **SECTION 1.** Chapter 23-49 of the North Dakota Century Code is created and enacted as
5 follows:

6 **23-49-01. Definitions.**

- 7 1. "Acquisition closing date" means the date on which ownership, or a direct or indirect
8 majority interest in the ownership, a regulated facility, or operation is acquired in an
9 asset purchase, equity purchase, merger, or similar transaction.
- 10 2. "Audit report" means an audit report described by section 23-49-03.
- 11 3. "Environmental or health and safety law" means:
12 a. A federal or state environmental or occupational health and safety law; or
13 b. A rule, regulation, or regional or local law adopted in conjunction with a law
14 described under subdivision a.
- 15 4. "Environmental or health and safety audit" or "audit" means a systematic voluntary
16 evaluation, review, or assessment of compliance with environmental or health and
17 safety laws or with any permit issued under an environmental or health and safety law
18 conducted by an owner or operator, an employee of an owner or operator, a person,
19 including an employee or independent contractor of the person that is considering the
20 acquisition of a regulated facility or operation, or an independent contractor of:
21 a. A regulated facility or operation; or
22 b. An activity at a regulated facility or operation.
- 23 5. "Owner or operator" means a person that owns or operates a regulated facility or
24 operation.

1 6. "Penalty" means an administrative, civil, or criminal sanction imposed by the state to
2 punish a person for a violation of a law or rule. The term does not include a technical
3 or remedial provision ordered by a regulatory authority.

4 7. "Regulated facility or operation" means a facility or operation regulated under an
5 environmental or health and safety law.

6 **23-49-02. Intent - Construction.**

7 1. A person acts intentionally for purposes of this chapter if the person acts intentionally
8 within the meaning of section 12.1-02-02.

9 2. For purposes of this chapter, a person acts knowingly or with knowledge with respect
10 to the nature of the person's conduct if the person is aware of the person's physical
11 acts. A person acts knowingly or with knowledge with respect to the result of the
12 person's conduct if the person is aware the conduct will cause the result.

13 3. A person acts recklessly or is reckless for purposes of this chapter if the person acts
14 recklessly or is reckless within the meaning of section 12.1-02-02.

15 4. To fully implement the privilege established by this chapter, the term "environmental or
16 health and safety law" must be construed broadly.

17 **23-49-03. Audit report.**

18 1. An audit report is a report that includes each document and communication, other than
19 those set forth in section 23-49-09, produced from an environmental or health and
20 safety audit.

21 2. General components that may be contained in a completed audit report include:

22 a. A report prepared by an auditor, monitor, or similar person, which may include:

23 (1) A description of the scope of the audit;

24 (2) The information gained in the audit and findings, conclusions, and
25 recommendations; and

26 (3) Exhibits and appendices;

27 b. Memoranda and documents analyzing all or a portion of the materials described
28 by subdivision a or discussing implementation issues; and

29 c. An implementation plan or tracking system to correct past noncompliance,
30 improve current compliance, or prevent future noncompliance.

- 1 3. The types of exhibits and appendices that may be contained in an audit report, include
2 supporting information that is collected or developed for the primary purpose of and in
3 the course of an environmental or health and safety audit, including:
- 4 a. Interviews with current or former employees;
5 b. Field notes and records of observations;
6 c. Findings, opinions, suggestions, conclusions, guidance, notes, drafts, and
7 memoranda;
8 d. Legal analyses;
9 e. Drawings;
10 f. Photographs;
11 g. Laboratory analyses and other analytical data;
12 h. Computer-generated or electronically recorded information;
13 i. Maps, charts, graphs, and surveys; and
14 j. Other communications associated with an environmental or health and safety
15 audit.
- 16 4. To facilitate identification, each document in an audit report must be labeled
17 "COMPLIANCE REPORT: PRIVILEGED DOCUMENT", or labeled with words of
18 similar import. Failure to label a document under this section does not constitute a
19 waiver of the audit privilege or create a presumption the privilege does or does not
20 apply.
- 21 5. A person that begins an audit before becoming the owner of a regulated facility or
22 operation may continue the audit after the acquisition closing date if the person gives
23 notice under section 23-49-09.
- 24 6. Unless an extension is approved by the governmental entity with regulatory authority
25 over the regulated facility or operation based on reasonable grounds, an audit must be
26 completed within a reasonable time not to exceed six months after:
- 27 a. The date the audit is initiated; or
28 b. The acquisition closing date, if the person continues the audit under
29 subsection 5.

1 7. Subdivision a of subsection 6 does not apply to an audit conducted before the
2 acquisition closing date by a person that is considering the acquisition of the regulated
3 facility or operation.

4 **23-49-04. Privilege.**

5 1. An audit report is privileged as provided in this section.

6 2. Except as provided in sections 23-49-05, 23-49-06, and 23-49-07, any part of an audit
7 report is privileged and is not admissible as evidence or subject to discovery in:

8 a. A civil action, whether legal or equitable; or

9 b. An administrative proceeding.

10 3. A person, when called or subpoenaed as a witness, may not be compelled to testify or
11 produce a document related to an environmental or health and safety audit if:

12 a. The testimony or document discloses any item listed in section 23-49-03 which
13 was made as part of the preparation of an environmental or health and safety
14 audit report and which is addressed in a privileged part of an audit report; and

15 b. For purposes of this subsection, the person is:

16 (1) A person that conducted a portion of the audit but did not personally
17 observe the physical events;

18 (2) A person to which the audit results are disclosed under section 23-49-05; or

19 (3) A custodian of the audit results.

20 4. A person that conducts or participates in the preparation of an environmental or health
21 and safety audit and that has actually observed physical events of violation, may
22 testify about those events but may not be compelled to testify about or produce
23 documents related to the preparation of or any privileged part of an environmental or
24 health and safety audit or any item listed in section 23-49-03.

25 5. An employee of a state agency may not request, review, or otherwise use an audit
26 report during an agency inspection of a regulated facility or operation or an activity of a
27 regulated facility or operation.

28 6. A party asserting the privilege described in this section has the burden of establishing
29 the applicability of the privilege.

1 **23-49-05. Exception - Waiver.**

2 1. The privilege described by section 23-49-04 does not apply to the extent the privilege
3 is expressly waived by the owner or operator that prepared the audit report or caused
4 the report to be prepared.

5 2. Disclosure of an audit report or any information generated by an environmental or
6 health and safety audit does not waive the privilege established by section 23-49-04 if
7 the disclosure:

8 a. Is made to address or correct a matter raised by the environmental or health and
9 safety audit and is made only to:

10 (1) A person employed by the owner or operator, including temporary and
11 contract employees;

12 (2) A legal representative of the owner or operator;

13 (3) An officer or director of the regulated facility or operation or a partner of the
14 owner or operator;

15 (4) An independent contractor of the owner or operator;

16 (5) A person considering the acquisition of the regulated facility or operation
17 that is the subject of the audit; or

18 (6) An employee, temporary employee, contract employee, legal
19 representative, officer, director, partner, or independent contractor of a
20 person described by paragraph 5;

21 b. Is made under the terms of a confidentiality agreement between the person for
22 which the audit report was prepared or the owner or operator of the audited
23 facility or operation and:

24 (1) A partner or potential partner of the owner or operator of the facility or
25 operation;

26 (2) A transferee or potential transferee of the facility or operation;

27 (3) A lender or potential lender for the facility or operation;

28 (4) A governmental official of a state; or

29 (5) A person engaged in the business of insuring, underwriting, or indemnifying
30 the facility or operation; or

- 1 c. Is made under a claim of confidentiality to a governmental official or agency by
2 the person for which the audit report was prepared or by the owner or operator.
- 3 3. A party to a confidentiality agreement described in subdivision b of subsection 2 which
4 violates that agreement is liable for damages caused by the disclosure and for any
5 other penalties stipulated in the confidentiality agreement.
- 6 4. Information disclosed under subdivision c of subsection 2 is confidential. A public
7 entity, public employee, or public official that discloses information in violation of this
8 subsection is subject to any penalty provided in section 44-04-18.4. It is an affirmative
9 defense to the clerical dissemination of a privileged audit report that the report was not
10 clearly labeled "COMPLIANCE REPORT: PRIVILEGED DOCUMENT" or words of
11 similar import. The lack of labeling may not be raised as a defense if the entity,
12 employee, or official knew or had reason to know the document was a privileged audit
13 report.
- 14 5. This section may not be construed to circumvent the protections provided by federal or
15 state law for individuals who disclose information to law enforcement authorities.

16 **23-49-06. Exception - Disclosure.**

- 17 1. A court or administrative hearing officer with competent jurisdiction may require
18 disclosure of a portion of an audit report in a civil or administrative proceeding if the
19 court or administrative hearing officer determines, after an in-camera review consistent
20 with the appropriate rules of procedure:
- 21 a. The privilege is asserted for a fraudulent purpose;
- 22 b. The portion of the audit report is not subject to the privilege under section
23 23-49-07; or
- 24 c. The portion of the audit report shows evidence of noncompliance with an
25 environmental or health and safety law and appropriate efforts to achieve
26 compliance with the law were not promptly initiated and pursued with reasonable
27 diligence after discovery of noncompliance.
- 28 2. A party seeking disclosure under this section has the burden of proving subdivision a
29 of subsection 1 applies.

- 1 3. Notwithstanding chapter 28-32, a decision of an administrative hearings officer under
2 subdivision c of subsection 1 is directly appealable to a court of competent jurisdiction
3 without disclosure of the audit report to any person unless so ordered by the court.
- 4 4. A person claiming the privilege is subject to sanctions as provided by section 28-26-31
5 or to a fine not to exceed ten thousand dollars if the court finds, consistent with
6 fundamental due process, the person intentionally or knowingly claimed the privilege
7 for unprotected information as provided in section 23-49-07.
- 8 5. A determination of a court under this section is subject to interlocutory appeal to an
9 appropriate appellate court.

10 **23-49-07. Nonprivileged material.**

- 11 1. The privilege described in this chapter does not apply to:
- 12 a. A document, communication, datum, or report or other information required by a
13 regulatory agency to be collected, developed, maintained, or reported under a
14 federal or state environmental or health and safety law;
- 15 b. Information obtained by observation, sampling, or monitoring by a regulatory
16 agency; or
- 17 c. Information obtained from a source not involved in the preparation of the
18 environmental or health and safety audit report.
- 19 2. This section does not limit the right of a person to agree to conduct and disclose an
20 audit report.

21 **23-49-08. Review of privileged documents by governmental authority.**

- 22 1. If an audit report is obtained, reviewed, or used in a criminal proceeding, the
23 administrative or civil evidentiary privilege created by this chapter is not waived or
24 eliminated for any other purpose.
- 25 2. Notwithstanding the privilege established under this chapter, a regulatory agency may
26 review information required to be available under a specific state or federal law, but
27 the review does not waive or eliminate the administrative or civil evidentiary privilege if
28 applicable.
- 29 3. If information is required to be available to the public by operation of a specific state or
30 federal law, the governmental authority shall notify the person claiming the privilege of

1 the potential for public disclosure before obtaining such information under
2 subsection 1 or 2.
3 4. If privileged information is disclosed under subsection 2 or 3 on the motion of a party,
4 a court or the appropriate administrative official shall suppress evidence offered in any
5 civil or administrative proceeding which arises or is derived from review, disclosure, or
6 use of information obtained under this section if the review, disclosure, or use is not
7 authorized under section 23-49-07. A party having received information under
8 subsection 2 or 3 has the burden of proving the evidence offered did not arise and was
9 not derived from the review of privileged information.

10 **23-49-09. Voluntary disclosure - Immunity.**

- 11 1. Except as provided by this section, a person that makes a voluntary disclosure of a
12 violation of an environmental or health and safety law is immune from an
13 administrative or civil penalty for the violation disclosed.
14 2. A disclosure is voluntary only if:
15 a. The disclosure was made:
16 (1) Promptly after knowledge of the information disclosed is obtained by the
17 person; or
18 (2) Not more than forty-five days after the acquisition closing date, if the
19 violation was discovered during an audit conducted before the acquisition
20 closing date by a person considering the acquisition of the regulated facility
21 or operation;
22 b. The disclosure was made in writing by registered mail to an agency that has
23 regulatory authority with regard to the violation disclosed;
24 c. An investigation of the violation was not initiated or the violation was not
25 independently detected by an agency with enforcement jurisdiction before the
26 disclosure was made using registered mail;
27 d. The disclosure arises out of a voluntary environmental or health and safety audit;
28 e. The person that makes the disclosure initiates an appropriate effort to achieve
29 compliance, pursues that effort with due diligence, and corrects the
30 noncompliance within a reasonable time;

- 1 f. The person making the disclosure cooperates with the appropriate agency in
2 connection with an investigation of the issues identified in the disclosure; and
- 3 g. The violation did not result in injury or imminent and substantial risk of serious
4 injury to one or more persons at the site or offsite substantial actual harm or
5 imminent and substantial risk of harm to persons, property, or the environment.
- 6 3. For a disclosure described by paragraph 1 of subdivision a of subsection 2, the person
7 making the disclosure shall certify in the disclosure that before the acquisition closing
8 date:
- 9 a. The person was not responsible for the environmental, health, or safety
10 compliance at the regulated facility or operation that is subject to the disclosure;
- 11 b. The person did not have the largest ownership share of the seller;
- 12 c. The seller did not have the largest ownership share of the person; and
- 13 d. The person and the seller did not have a common corporate parent or a common
14 majority interest owner.
- 15 4. A disclosure is not voluntary for purposes of this section if it is a report to a regulatory
16 agency required solely by a specific condition of an enforcement order or decree.
- 17 5. The immunity established by subsection 1 does not apply and an administrative or civil
18 penalty may be imposed under applicable law if:
- 19 a. The person that made the disclosure intentionally or knowingly committed or was
20 responsible within the meaning of section 12.1-03-01, for the commission of the
21 disclosed violation;
- 22 b. The person that made the disclosure recklessly committed or was responsible
23 within the meaning of section 12.1-03-01, for the commission of the disclosed
24 violation and the violation resulted in substantial injury to one or more persons at
25 the site or offsite harm to persons, property, or the environment;
- 26 c. The offense was committed intentionally or knowingly by a member of the
27 person's management or an agent of the person and the person's policies or lack
28 of prevention systems contributed materially to the occurrence of the violation;
- 29 d. The offense was committed recklessly by a member of the person's management
30 or an agent of the person, the person's policies or lack of prevention systems
31 contributed materially to the occurrence of the violation, and the violation resulted

- 1 in substantial injury to one or more persons at the site or offsite harm to persons,
2 property, or the environment; or
- 3 e. The violation resulted in a substantial economic benefit that gives the violator a
4 clear advantage over its business competitors.
- 5 6. A penalty imposed under subsection 5, to the extent appropriate, is mitigated by
6 factors such as:
- 7 a. The voluntariness of the disclosure;
8 b. Efforts by the disclosing party to conduct environmental or health and safety
9 audits;
10 c. Remediation;
11 d. Cooperation with government officials investigating the disclosed violation;
12 e. The period of ownership of the regulated facility or operation; or
13 f. Other relevant considerations.
- 14 7. In a civil or administrative enforcement action brought against a person for a violation
15 for which the person claims to have made a voluntary disclosure, the person claiming
16 the immunity has the burden of establishing a prima facie case the disclosure was
17 voluntary. After the person claiming the immunity establishes a prima facie case of
18 voluntary disclosure, other than a case in which under subsection 5 immunity does not
19 apply, the enforcement authority has the burden of rebutting the presumption by a
20 preponderance of the evidence or, in a criminal case, by proof beyond a reasonable
21 doubt.
- 22 8. To receive immunity under this section, a facility conducting an environmental or
23 health and safety audit under this chapter shall provide notice to an appropriate
24 regulatory agency of the fact it is planning to commence the audit. The notice must
25 specify the facility or portion of the facility to be audited, the anticipated time the audit
26 will begin, and the general scope of the audit. The notice may provide notification of
27 more than one scheduled environmental or health and safety audit at a time. This
28 subsection does not apply to an audit conducted before the acquisition closing date by
29 a person considering the acquisition of the regulated facility or operation that is the
30 subject of the audit.

1 9. A person that begins an audit before becoming the owner of the regulated facility or
2 operation may continue the audit after the acquisition closing date if, not more than
3 forty-five days after the acquisition closing date, the person provides notice to an
4 appropriate regulatory agency of the fact the person intends to continue an ongoing
5 audit. The notice must specify the facility or portion of the facility being audited, the
6 date the audit began, and the general scope of the audit. In the notice the person shall
7 certify that before the acquisition closing date:

- 8 a. The person was not responsible for the scope of the environmental, health, or
9 safety compliance being audited at the regulated facility or operation;
10 b. The person did not have the largest ownership share of the seller;
11 c. The seller did not have the largest ownership share of the person; and
12 d. The person and the seller did not have a common corporate parent or a common
13 majority interest owner.

14 10. The immunity under this section does not apply if a court or administrative hearing
15 officer finds the person claiming the immunity, after the effective date of this chapter,
16 repeatedly or continuously has committed significant violations and not attempted to
17 bring the facility or operation into compliance, so as to constitute a pattern of disregard
18 of environmental or health and safety laws. To be considered a pattern, the person
19 must have committed a series of violations that were due to separate and distinct
20 events within a three-year period at the same facility or operation.

21 11. A violation that has been voluntarily disclosed and to which immunity applies must be
22 identified in a compliance history report as being voluntarily disclosed.

23 **23-49-10. Circumvention by rule prohibited.**

24 A regulatory agency may not adopt a rule or impose a condition that circumvents the
25 purpose of this chapter.

26 **23-49-11. Applicability.**

27 The privilege created by this chapter applies to environmental or health and safety audits
28 conducted on or after the effective date of this chapter.

29 **23-49-12. Relationship to other recognized privileges.**

30 This chapter does not limit, waive, or abrogate the scope or nature of any statutory or
31 common law privilege, including the work product doctrine and the attorney-client privilege.