



Reprinted  
April 6, 1999

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# ENGROSSED SENATE BILL No. 397

DIGEST OF SB 397 (Updated April 5, 1999 6:06 pm - DI 78)

**Citations Affected:** IC 13-14; IC 13-27; IC 13-28; noncode.

**Synopsis:** Environmental rulemaking and audit privilege. Provides that a statement, policy, or guidance document of the department of environmental management does not take effect until 30 days after statement, policy, or guidance document is presented to the air pollution control board, water pollution control board, or the solid waste management board. Specifies that the voluntary environmental audit privilege does not apply to criminal actions. Makes confirming amendments. Prohibits public disclosure of certain portions of certain voluntary environmental audit reports submitted to the department. Provides that when the department or a prosecuting attorney obtains or uses an environmental audit report in a criminal proceeding, the  
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**Effective:** Upon passage; July 1, 1999.

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(HOUSE SPONSORS — STURTZ, WOLKINS)

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January 11, 1999, read first time and referred to Committee on Environmental Affairs.  
February 25, 1999, amended, reported favorably — Do Pass.  
March 2, 1999, read second time, ordered engrossed.  
March 3, 1999, engrossed. Read third time, passed. Yeas 49, nays 0.

HOUSE ACTION

March 8, 1999, read first time and referred to Committee on Environmental Affairs.  
March 25, 1999, reported — Do Pass.  
April 5, 1999, read second time, amended, ordered engrossed.

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administrative or civil evidentiary privilege is not waived. Requires the department to: (1) maintain certain statistics on the use of environmental audit reports; and (2) propose an enforcement policy that provides relief from civil penalties for a voluntary disclosure that results from an audit. Requires the department to report annually to the environmental quality service council on: (1) the use of environmental audit reports; and (2) the use and effectiveness of the enforcement policy.

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Reprinted  
April 6, 1999

First Regular Session 111th General Assembly (1999)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 1998 General Assembly.

## ENGROSSED SENATE BILL No. 397

A BILL FOR AN ACT to amend the Indiana Code concerning environmental law.

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

- 1 SECTION 1. IC 13-14-1-6 IS AMENDED TO READ AS  
2 FOLLOWS [EFFECTIVE JULY 1, 1999]: Sec. 6. (a) The department  
3 shall, in cooperation with other state agencies, establish programs to  
4 educate:  
5 (1) students;  
6 (2) consumers; and  
7 (3) businesses;  
8 about the benefits of solid waste recycling and source reduction.  
9 (b) To implement the programs established under subsection (a), the  
10 department shall, **subject to IC 13-14-1-11.5**, develop guidance  
11 documents and technical assistance programs.  
12 SECTION 2. IC 13-14-1-11.5 IS AMENDED TO READ AS  
13 FOLLOWS [EFFECTIVE JULY 1, 1999]: Sec. 11.5. (a) If the  
14 department utilizes a policy or statement that:  
15 (1) interprets, supplements, or implements a statute or rule;  
16 (2) has not been adopted in compliance with IC 4-22-2;

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1 (3) is not intended by the department to have the effect of law;  
 2 and  
 3 (4) is not related solely to internal department organization;  
 4 the policy or statement may **not** be put into effect ~~once~~ **until thirty (30)**  
 5 **days after** the policy or statement is made available for public  
 6 inspection and ~~copying~~ **comment and presented to the appropriate**  
 7 **board.**

8 (b) If the department utilizes a policy or statement described in  
 9 subsection (a), the department shall distribute:

- 10 (1) two (2) copies of the policy or statement to the publisher of
- 11 the Indiana Register for publication in the Indiana Register; and
- 12 (2) the copies required under IC 4-23-7.1-26 to the Indiana library
- 13 and historical department.

14 (c) The department shall:

- 15 (1) maintain a current list of all department policies and
- 16 statements described in subsection (a) that the department may
- 17 use in the department's external affairs; and
- 18 (2) update the list at least one (1) time each month.

19 (d) The department shall include the following information on the  
 20 list described in subsection (c) for each policy or statement:

- 21 (1) The title of the policy or statement.
- 22 (2) The identification number of the policy or statement.
- 23 (3) The date the policy or statement was originally adopted.
- 24 (4) The date the policy or statement was last revised.
- 25 (5) A reference to all other policies or statements described in
- 26 subsection (a) that are repealed or amended by the policy or
- 27 statement.
- 28 (6) A brief description of the subject matter of the policy or
- 29 statement.

30 (e) At least one (1) time every three (3) months, the department  
 31 shall distribute two (2) copies of the list maintained and updated under  
 32 subsection (c) to the following:

- 33 (1) The publisher of the Indiana Register.
- 34 (2) The Indiana library and historical department.

35 SECTION 3. IC 13-27-7-2 IS AMENDED TO READ AS  
 36 FOLLOWS [EFFECTIVE JULY 1, 1999]: Sec. 2. (a) Guidance  
 37 documents, technical assistance manuals, and policies developed or  
 38 used in implementing programs under this article are not binding on  
 39 participating businesses.

40 (b) Subject to subsection (e), the air pollution control board, the  
 41 water pollution control board, the solid waste management board, or  
 42 the department may not do the following:

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- 1 (1) **Subject to IC 13-14-1-11.5**, incorporate documents, manuals,  
 2 or policies developed under this article into rules adopted under  
 3 IC 4-22-2.
- 4 (2) Adopt rules under IC 4-22-2 requiring business  
 5 implementation of pollution prevention practices or of clean  
 6 manufacturing by means of any of the following:
- 7 (A) Permit conditions.  
 8 (B) Enforcement actions.  
 9 (C) Other department actions.
- 10 (c) Subsection (b) only applies to pollution prevention as defined in  
 11 this title.
- 12 (d) Subsection (b) does not apply to authority granted under federal  
 13 law to implement pollution prevention as defined under any of the  
 14 following:
- 15 (1) Federally delegated air, water, solid waste, and other  
 16 programs.  
 17 (2) Guidance documents developed to implement programs  
 18 described in subdivision (1).  
 19 (3) Programs established under IC 13-20-3, IC 13-20-22, or  
 20 IC 13-21.
- 21 (e) The department shall do the following:
- 22 (1) Present pollution prevention as an option to businesses in any  
 23 of the following:
- 24 (A) Permit conditions.  
 25 (B) Enforcement actions.  
 26 (C) Other department actions.
- 27 (2) Direct manufacturers to the clean manufacturing technology  
 28 and safe materials institute for technical assistance in clean  
 29 manufacturing.
- 30 SECTION 4. IC 13-28-4-1 IS AMENDED TO READ AS  
 31 FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 1. Except as  
 32 provided in ~~sections~~ **section 2 and 3** of this chapter, an environmental  
 33 audit report:
- 34 (1) is privileged; and  
 35 (2) is not admissible as evidence in a civil ~~a criminal~~, or an  
 36 administrative legal action, including enforcement actions under  
 37 IC 13-30-3.
- 38 SECTION 5. IC 13-28-4-4 IS AMENDED TO READ AS  
 39 FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 4. (a) A party  
 40 asserting the privilege described in section 1 of this chapter has the  
 41 burden of proving that the party may exercise the privilege.  
 42 (b) A party asserting the privilege described in section 1 of this



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1 chapter has the burden of establishing evidence that the person made  
 2 appropriate efforts to achieve compliance as described in ~~sections~~  
 3 **section 2(b) and 3(b)** of this chapter if the evidence indicates that the  
 4 person was in noncompliance as described in section 2(a)(2)(C) ~~or~~  
 5 ~~3(a)(2)(C)~~ of this chapter.

6 (c) A party seeking disclosure of material in an environmental audit  
 7 report under section 2(a)(2)(A) ~~or 3(a)(2)(A)~~ of this chapter has the  
 8 burden of proving that the privilege is being asserted for a fraudulent  
 9 purpose.

10 (d) ~~A prosecuting attorney seeking disclosure under section~~  
 11 ~~3(a)(2)(D) of this chapter has the burden of proving the conditions for~~  
 12 ~~disclosure described in section 3(a)(2)(D) of this chapter.~~

13 SECTION 6. IC 13-28-4-6 IS AMENDED TO READ AS  
 14 FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 6. Upon making a  
 15 determination under section 2 ~~or 3~~ of this chapter, the court may  
 16 compel the disclosure of only those parts of an environmental audit  
 17 report that are relevant to issues in dispute in the proceeding.

18 SECTION 7. IC 13-28-4-7 IS AMENDED TO READ AS  
 19 FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 7. (a) Subject to  
 20 ~~subsection subsections~~ **(b) and (c)**, the privilege described in section  
 21 1 of this chapter does not apply to the extent that the privilege is  
 22 waived:

23 (1) expressly; or

24 (2) by implication;

25 by the owner or operator who prepared the environmental report or  
 26 caused the report to be prepared.

27 (b) ~~A party may submit an environmental audit report to the~~  
 28 ~~department as a confidential document under IC 5-14-3 without~~  
 29 ~~waiving a privilege to which the party would otherwise be entitled~~  
 30 ~~under this chapter. A party that submits an environmental audit~~  
 31 ~~report to the department waives any privilege to which the party~~  
 32 ~~would otherwise be entitled under this chapter. If the department~~  
 33 ~~determines under IC 5-14-3-4(a) that part of an environmental~~  
 34 ~~audit report is excepted from IC 5-14-3-3, then that part of the~~  
 35 ~~environmental audit report may not be disclosed by a public~~  
 36 ~~agency unless access to the report is required by a state or federal~~  
 37 ~~statute or is ordered by a court as provided under IC 5-14-3-4(a).~~

38 (c) **When the department or a prosecuting attorney obtains,**  
 39 **reviews, or uses an environmental audit report in a criminal**  
 40 **proceeding, the administrative or civil evidentiary privilege**  
 41 **created by this chapter is not waived or eliminated for any other**  
 42 **purpose.**



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1 SECTION 8. IC 13-28-4-11 IS ADDED TO THE INDIANA CODE  
 2 AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE  
 3 UPON PASSAGE]: **Sec. 11. (a) The department shall maintain  
 4 statistics on the use of environmental audit reports in department  
 5 compliance and enforcement activities, including statistics on:**

6 **(1) the number of times the reports are disclosed to the  
 7 department;**

8 **(2) the number and types of violations disclosed to the  
 9 department through the reports;**

10 **(3) the civil penalties collected for the violations; and**

11 **(4) the time necessary for the violations to be corrected.**

12 **The department shall report annually to the environmental quality  
 13 service council on the use of environmental audit reports.**

14 **(b) The department shall propose an enforcement policy,  
 15 pursuant to IC 13-14-1-11.5, that provides relief from civil  
 16 penalties for a voluntary disclosure that results from an internal  
 17 environmental audit. In developing this enforcement policy, the  
 18 department shall consider similar policies implemented by:**

19 **(1) the United States Environmental Protection Agency; and**

20 **(2) states contiguous to Indiana.**

21 **(c) The department shall report annually to the environmental  
 22 quality service council on the use and effectiveness of the  
 23 enforcement policy.**

24 SECTION 9. THE FOLLOWING ARE REPEALED [EFFECTIVE  
 25 UPON PASSAGE]: IC 13-28-4-3; IC 13-28-4-5.

26 SECTION 10. [EFFECTIVE UPON PASSAGE] **(a) Before  
 27 September 1, 1999, the department of environmental management  
 28 shall present the enforcement policy described in IC 13-28-4-11, as  
 29 added by this act, to the environmental quality service council for  
 30 discussion.**

31 **(b) Before November 1, 1999, the department of environmental  
 32 management shall publish the enforcement policy consistent with  
 33 IC 13-14-1-11.5, as amended by this act.**

34 **(c) This SECTION expires November 2, 1999.**

35 SECTION 11. An emergency is declared for this act.

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COMMITTEE REPORT

Mr. President: The Senate Committee on Environmental Affairs, to which was referred Senate Bill No. 397, has had the same under consideration and begs leave to report the same back to the Senate with the recommendation that said bill be AMENDED as follows:

Page 2, line 3, after "may" insert "**not**".

Page 2, line 3, strike "once" and insert "**until**".

Page 2, line 4, delete "." and insert "**and approved by the appropriate board.**".

Page 2, delete lines 32 through 42

Page 3, delete lines 1 through 4

Page 3, delete line 42.

Delete page 4.

and when so amended that said bill do pass.

(Reference is to SB 397 as introduced.)

GARD, Chairperson

Committee Vote: Yeas 6, Nays 1.

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COMMITTEE REPORT

Mr. Speaker: Your Committee on Environmental Affairs, to which was referred Senate Bill 397, has had the same under consideration and begs leave to report the same back to the House with the recommendation that said bill do pass.

STURTZ, Chair

Committee Vote: yeas 12, nays 0.

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## HOUSE MOTION

Mr. Speaker: I move that Engrossed Senate Bill 397 be amended to read as follows:

Page 2, line 4, after "until" insert "**thirty (30) days after**".

Page 2, line 5, strike "copying" and insert "**comment**".

Page 2, line 6, delete "approved by" and insert "**presented to**".

Page 3, after line 28, begin a new paragraph and insert:

"SECTION 4. IC 13-28-4-1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 1. Except as provided in ~~sections~~ **section 2 and 3** of this chapter, an environmental audit report:

(1) is privileged; and

(2) is not admissible as evidence in a civil ~~a criminal~~, or an administrative legal action, including enforcement actions under IC 13-30-3.

SECTION 5. IC 13-28-4-4 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 4. (a) A party asserting the privilege described in section 1 of this chapter has the burden of proving that the party may exercise the privilege.

(b) A party asserting the privilege described in section 1 of this chapter has the burden of establishing evidence that the person made appropriate efforts to achieve compliance as described in ~~sections~~ **section 2(b) and 3(b)** of this chapter if the evidence indicates that the person was in noncompliance as described in section 2(a)(2)(C) ~~or 3(a)(2)(C)~~ of this chapter.

(c) A party seeking disclosure of material in an environmental audit report under section 2(a)(2)(A) ~~or 3(a)(2)(A)~~ of this chapter has the burden of proving that the privilege is being asserted for a fraudulent purpose.

~~(d) A prosecuting attorney seeking disclosure under section 3(a)(2)(D) of this chapter has the burden of proving the conditions for disclosure described in section 3(a)(2)(D) of this chapter.~~

SECTION 6. IC 13-28-4-6 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 6. Upon making a determination under section 2 ~~or 3~~ of this chapter, the court may compel the disclosure of only those parts of an environmental audit report that are relevant to issues in dispute in the proceeding.

SECTION 7. IC 13-28-4-7 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 7. (a) Subject to ~~subsection~~ **subsections (b) and (c)**, the privilege described in section 1 of this chapter does not apply to the extent that the privilege is waived:

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- (1) expressly; or
- (2) by implication;

by the owner or operator who prepared the environmental report or caused the report to be prepared.

(b) ~~A party may submit an environmental audit report to the department as a confidential document under IC 5-14-3 without waiving a privilege to which the party would otherwise be entitled under this chapter.~~ **A party that submits an environmental audit report to the department waives any privilege to which the party would otherwise be entitled under this chapter. If the department determines under IC 5-14-3-4(a) that part of an environmental audit report is excepted from IC 5-14-3-3, then that part of the environmental audit report may not be disclosed by a public agency unless access to the report is required by a state or federal statute or is ordered by a court as provided under IC 5-14-3-4(a).**

(c) **When the department or a prosecuting attorney obtains, reviews, or uses an environmental audit report in a criminal proceeding, the administrative or civil evidentiary privilege created by this chapter is not waived or eliminated for any other purpose.**

SECTION 8. IC 13-28-4-11 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 11. (a) The department shall maintain statistics on the use of environmental audit reports in department compliance and enforcement activities, including statistics on:**

- (1) the number of times the reports are disclosed to the department;
- (2) the number and types of violations disclosed to the department through the reports;
- (3) the civil penalties collected for the violations; and
- (4) the time necessary for the violations to be corrected.

**The department shall report annually to the environmental quality service council on the use of environmental audit reports.**

(b) **The department shall propose an enforcement policy, pursuant to IC 13-14-1-11.5, that provides relief from civil penalties for a voluntary disclosure that results from an internal environmental audit. In developing this enforcement policy, the department shall consider similar policies implemented by:**

- (1) the United States Environmental Protection Agency; and
- (2) states contiguous to Indiana.

(c) **The department shall report annually to the environmental quality service council on the use and effectiveness of the**



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**enforcement policy.**

SECTION 9. THE FOLLOWING ARE REPEALED [EFFECTIVE UPON PASSAGE]: IC 13-28-4-3; IC 13-28-4-5.

SECTION 10. [EFFECTIVE UPON PASSAGE] (a) **Before September 1, 1999, the department of environmental management shall present the enforcement policy described in IC 13-28-4-11, as added by this act, to the environmental quality service council for discussion.**

(b) **Before November 1, 1999, the department of environmental management shall publish the enforcement policy consistent with IC 13-14-1-11.5, as amended by this act.**

(c) **This SECTION expires November 2, 1999.**

SECTION 11. **An emergency is declared for this act."**

Renumber all SECTIONS consecutively.

(Reference is to ESB 397 as printed March 26, 1999.)

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