

IC 13-28-4

Chapter 4. Voluntary Environmental Audits

IC 13-28-4-1

Reports privileged

Sec. 1. (a) The privilege created by this section does not apply to criminal investigations or proceedings. Environmental audit reports are admissible in criminal investigations or proceedings.

(b) Except as provided in section 2 of this chapter, an environmental audit report:

(1) is privileged; and

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

As added by P.L.1-1996, SEC.18. Amended by P.L.224-1999, SEC.12.

IC 13-28-4-2

Reports not privileged; civil or administrative actions

Sec. 2. (a) In a civil or an administrative proceeding, a court of record, after an in camera review, shall require disclosure of material for which the privilege described in section 1 of this chapter is asserted if the court determines that both subdivisions (1) and (2) apply:

(1) The environmental audit report was first issued after July 1, 1994.

(2) One (1) of the following applies:

(A) The privilege is asserted for a fraudulent purpose.

(B) The material is not subject to the privilege.

(C) The material is subject to the privilege and the material shows evidence of noncompliance with:

(i) this title or a rule or standard adopted by one (1) of the boards;

(ii) a determination, a permit, or an order issued by the commissioner under this title; or

(iii) the federal, regional, or local counterpart of item (i) or (ii);

and the person claiming the privilege did not promptly initiate and pursue appropriate efforts to achieve compliance with reasonable diligence.

(b) If the noncompliance described in subsection (a)(2)(C) constitutes a failure to obtain a required permit, the person is considered to have made appropriate efforts to achieve compliance if the person filed an application for the required permit not later than ninety (90) days after the date the person became aware of the noncompliance.

As added by P.L.1-1996, SEC.18.

IC 13-28-4-3

Repealed

(Repealed by P.L.224-1999, SEC.17.)

IC 13-28-4-4

Burden of proof regarding privilege

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 section 2(b) of this chapter if the evidence indicates that the person was in noncompliance as described in section 2(a)(2)(C) of this chapter.

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

As added by P.L.1-1996, SEC.18. Amended by P.L.224-1999, SEC.13.

IC 13-28-4-5

Repealed

(Repealed by P.L.224-1999, SEC.17.)

IC 13-28-4-6

Disclosure limited to relevant portions of reports

Sec. 6. Upon making a determination under section 2 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.

As added by P.L.1-1996, SEC.18. Amended by P.L.224-1999, SEC.14.

IC 13-28-4-7

Waiver of privilege

Sec. 7. (a) Subject to subsections (b) and (c), the privilege described in section 1 of this chapter does not apply to the extent that the privilege is waived:

- (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 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. *As added by P.L.1-1996, SEC.18. Amended by P.L.224-1999, SEC.15.*

IC 13-28-4-8

Stipulations regarding privilege

Sec. 8. The parties to a legal action may at any time stipulate to the entry of an order that directs that specific information contained in an environmental audit report is or is not subject to the privilege provided under section 1 of this chapter.

As added by P.L.1-1996, SEC.18.

IC 13-28-4-9

Applicability of privilege

Sec. 9. (a) The privilege described in section 1 of this chapter does not apply to the following:

(1) Documents, communications, data, reports, or other information that must be collected, developed, maintained, reported, or otherwise made available to a regulatory agency under:

(A) this title;

(B) a rule or standard adopted under this title;

(C) a determination, a permit, or an order made or issued by the commissioner under this title; or

(D) any other federal, state, or local law, permit, or order.

(2) Information obtained by observation, sampling, or monitoring by any regulatory agency.

(3) Information obtained from a source independent of the environmental audit.

(b) This section does not allow the regulatory agency to adopt a rule or a permit condition for the purpose of circumventing the privilege established in this chapter by requiring disclosure of a report of a voluntarily conducted audit.

As added by P.L.1-1996, SEC.18.

IC 13-28-4-10

Effect on other privileges

Sec. 10. This chapter does not limit, waive, or abrogate the scope or nature of any statutory or common law privilege, including the following:

(1) The work product doctrine.

(2) The attorney client privilege.

As added by P.L.1-1996, SEC.18.

IC 13-28-4-11

Statistics on use of reports; enforcement policy

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 enforcement policy.

As added by P.L.224-1999, SEC.16.