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## HOUSE BILL NO. 968

Offered January 25, 1994

A *BILL to amend the Code of Virginia by adding in Title 10.1 a chapter numbered 11.2, containing sections numbered 10.1-1193 through 10.1-1198, relating to privileged information in environmental audit reports.*

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Patron—Wagner

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Referred to Committee on Conservation and Natural Resources

**Be it enacted by the General Assembly of Virginia:**

**1. That the Code of Virginia is amended by adding in Title 10.1 a chapter numbered 11.2, containing sections numbered 10.1-1193 through 10.1-1198, as follows:**

**CHAPTER 11.2.****ENVIRONMENTAL AUDIT REPORT PRIVILEGE.****§ 10.1-1193. Definitions.**

*As used in this chapter, unless the context requires a different meaning:*

*"Environmental audit" means a voluntary, internal and comprehensive evaluation of one or more facilities or an activity at one or more facilities regulated under any environmental law, or of management systems related to such facility or activity, that is designed to identify and prevent noncompliance and to improve compliance with such environmental law. An environmental audit may be conducted by the owner or operator, by the owner's or operator's employees or by independent contractors.*

*"Environmental audit report" means a document, or a set of documents, each labeled "Environmental Audit Report: Privileged Document" and prepared as a result of an environmental audit. An environmental audit report may include field notes and records of observations, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, computer-generated or electronically recorded information, maps, charts, graphs and surveys, provided such supporting information is collected and developed for the primary purpose and in the course of an environmental audit. An environmental audit report, when completed, may have the following three components:*

*1. An audit report prepared by the auditor, which may include the scope of the audit, the information gained in the audit, conclusions and recommendations, together with exhibits and appendices;*

*2. Memoranda and documents analyzing portions or all of the audit report and potentially discussing implementation issues; and*

*3. An implementation plan that addresses correcting past noncompliance, improving current compliance and preventing future noncompliance.*

*"Environmental law" means any state or local law, rule, regulation, or ordinance relating to protection of the environment or human health which falls within the responsibilities of the Secretariat of Natural Resources and all federal counterparts thereto.*

**§ 10.1-1194. Environmental audit privilege.**

*A. In order to encourage owners and operators of facilities and other persons conducting activities regulated under environmental laws to conduct voluntary internal environmental audits of their compliance programs and management systems and to assess and improve compliance with environmental laws, an environmental audit privilege is recognized to protect the confidentiality of communications relating to such voluntary internal environmental audits.*

*B. An environmental audit report shall be privileged and shall not be admissible as evidence in any legal action in any civil, criminal or administrative proceeding, except as provided in §§ 10.1-1195 and 10.1-1196.*

**§ 10.1-1195. Waiver of privilege; in camera review; required disclosure.**

*A. The privilege described in § 10.1-1194 of this article does not apply to the extent that it is waived by the owner or operator of a facility at which an environmental audit was conducted and who prepared or caused to be prepared the environmental audit report as a result of the audit.*

*B. In a civil, criminal or administrative proceeding, a court of record, after in camera review, shall require disclosure of material for which the privilege described in § 10.1-1194 is asserted, if such court determines that:*

*1. The privilege is asserted for a fraudulent purpose;*

*2. The material is not subject to the privilege; and*

*3. Even if subject to the privilege, the material shows evidence of noncompliance with environmental*

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60 laws, and appropriate efforts to achieve compliance with such laws were not promptly initiated and  
61 pursued with reasonable diligence upon discovery of noncompliance.

62 C. A party asserting the environmental audit privilege described in § 10.1-1194 has the burden of  
63 demonstrating the applicability of the privilege, including, if there is evidence of noncompliance with  
64 environmental laws, proof that appropriate efforts to achieve compliance were promptly initiated and  
65 pursued with reasonable diligence; provided, that a party seeking disclosure under subdivision B1 has  
66 the burden of proving that the privilege is asserted for a fraudulent purpose, and, in a criminal  
67 proceeding, the Commonwealth has the burden of proving the conditions for disclosure set forth in  
68 subdivision B2.

69 § 10.1-1196 Availability of environmental audit reports in criminal proceedings.

70 A. The Attorney General, having probable cause to believe a criminal offense has been committed  
71 under any environmental law, based upon information obtained from a source independent of an  
72 environmental audit report, may obtain an environmental audit report for which a privilege is asserted  
73 pursuant to search warrant, criminal subpoena or discovery. The Attorney General shall immediately  
74 place the report under seal and shall not review or disclose the contents of the report.

75 B. Within thirty days of the Attorney General's obtaining an environmental audit report, the owner or  
76 operator who prepared or caused to be prepared the report may file with the appropriate court a  
77 petition requesting an in camera review on whether the environmental audit report or portions thereof  
78 are privileged or subject to disclosure under this chapter. Failure by the owner or operator to file such  
79 petition shall waive the privilege.

80 C. Upon filing such petition, the court shall issue an order scheduling an in camera review, within  
81 forty-five days of the filing of the petition, to determine whether the environmental audit report or  
82 portions thereof are privileged or subject to disclosure under this chapter. Such order further shall  
83 allow the Attorney General to remove the seal from the report to review the report and shall place  
84 appropriate limitations on the distribution and review of the report to protect against unnecessary  
85 disclosure. The Attorney General may consult with enforcement agencies regarding the contents of the  
86 report as necessary to prepare for the in camera review. However, the information used in preparation  
87 for the in camera review shall not be used in any investigation or in any legal proceeding, and shall  
88 otherwise be kept confidential, unless and until such information is found by the court to be subject to  
89 disclosure.

90 D. Failure to comply with the review, disclosure or use prohibitions of this section shall be the  
91 basis, in any civil, criminal or administrative proceeding, for suppression of any evidence arising or  
92 derived from the unauthorized review, disclosure or use. The party failing to comply with this section  
93 shall have the burden of proving that proffered evidence did not arise and was not derived from the  
94 unauthorized activity.

95 E. The parties may at any time stipulate to entry of an order directing that specific information  
96 contained in an environmental audit report is or is not subject to the privilege provided under  
97 § 10.1-1194.

98 F. Upon making a disclosure determination under subsection B of § 10.1-1195, the court may compel  
99 the disclosure only of those portions of an environmental audit report relevant to the issues in dispute in  
100 the proceeding.

101 § 10.1-1197. Limitations on privilege.

102 The privilege described in § 10.1-1194 shall not extend to:

103 1. Documents, communications, data, reports or other information required to be collected,  
104 developed, maintained, reported or otherwise made available to a regulatory agency pursuant to any  
105 environmental law or other federal, state or local law or ordinance or any regulation, permit or order;

106 2. Information obtained by observation, sampling or monitoring by any regulatory agency; or

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

108 § 10.1-1198. No limit on other privileges.

109 Nothing in this chapter shall limit, waive or abrogate the scope or nature of any statutory or  
110 common law privilege, including the work product doctrine and the attorney-client privilege.