

2019 Regular Session

HOUSE BILL NO. 510

BY REPRESENTATIVE BISHOP

Prefiled pursuant to Article III, Section 2(A)(4)(b)(i) of the Constitution of Louisiana.

ENVIRONMENT/ENFORCEMENT: Authorizes certain voluntary health, safety, and environmental audits by facilities subject to regulation by the Department of Environmental Quality

1 AN ACT

2 To enact R.S. 30:2044, relative to environmental compliance; to authorize the performance
3 of voluntary health, safety, and environmental audits; to provide for definitions; to
4 provide for a voluntary health, safety, and environmental audit procedure; to limit
5 administrative or civil penalties for certain violations disclosed as part of a voluntary
6 health, safety, and environmental audit; to provide for a privilege from disclosure in
7 civil or administrative proceedings reports under the auspices of the Department of
8 Environmental Quality of certain information contained in a voluntary health, safety,
9 and environmental audit; to provide an effective date; and to provide for related
10 matters.

11 Be it enacted by the Legislature of Louisiana:

12 Section 1. R.S. 30:2044 is hereby enacted to read as follows:

13 §2044. Voluntary health, safety, and environmental audits

14 A. Voluntary health, safety, and environmental audit. Facilities subject to
15 regulation under the provisions of this Subtitle, the rules promulgated pursuant to
16 this Subtitle, and the conditions of permits issued pursuant to this Subtitle may
17 conduct voluntary health, safety, and environmental audits as delineated in this
18 Section. These audits are intended to encourage voluntary discovery, disclosure, and
19 corrective action for minor regulatory deficiencies in order to achieve and maintain

1 compliance with regulatory requirements. Such audits, and any privilege granted
2 herein, shall not include examination of any of the following items:

3 (1) Any violations that may pose imminent or substantial threat or cause
4 serious injury.

5 (2) Criminal activity.

6 (3) Reports or inspections required under the provisions of this Subtitle, the
7 rules pursuant to this Subtitle, and the conditions of permits issued pursuant to this
8 Subtitle.

9 (4) State or federal investigations.

10 B. Voluntary health, safety, and environmental audit procedure. (1) A
11 facility may only initiate a voluntary health, safety, and environmental audit by
12 written notice to the department. Such notice shall describe the facility or portion
13 of the facility to be audited, the audit start and termination dates, and the general
14 scope of the audit. Except upon approval by the department, the termination date
15 shall be no more than six months after the start date. However, the termination date
16 may be extended upon approval by the department.

17 (2) In the event of a transfer of ownership or operation of the facility while
18 a voluntary health, safety, and environmental audit is in progress, the voluntary audit
19 shall be completed prior to the transfer of the facility unless the purchaser or new
20 operator requests the audit under the provisions of Subsection C of this Section.

21 (3) An audit report and any violations discovered through the voluntary audit
22 shall be disclosed in writing to the department within six months after completion
23 of the voluntary health, safety, and environmental audit or by a later date that is
24 acceptable to the department.

25 (4) At the same time violations uncovered by the voluntary audit are
26 disclosed to the department, the owner or operator shall submit a proposed
27 compliance plan to the department for review and approval. The compliance plan
28 shall provide a schedule to achieve compliance and correction of the violation as
29 soon as is reasonable with agreed upon benchmarks and final deadlines for
30 compliance. The owner or operator or the department may request revisions to the

1 compliance plan or extensions of compliance deadlines. If the owner or operator and
2 the department cannot agree on a schedule to achieve compliance and correction of
3 the violation, and substantial harm to persons, property, or the environment is
4 imminent, the department may issue a compliance order to the owner or operator and
5 may require compliance within a reasonable time.

6 (5) The owner or operator shall cooperate with the department in order to
7 achieve compliance. If the owner or operator fails to correct the violation in
8 accordance with the approved compliance plan or order, the department may issue
9 a compliance order to the owner or operator and revoke the immunity granted by this
10 Section. The owner or operator shall submit a written report of progress toward
11 restoration of compliance to the department at least every six months after disclosure
12 or when significant progress toward compliance is made until compliance is
13 achieved.

14 C. Voluntary health, safety, and environmental audit procedure for potential
15 purchasers. (1) When an agreement to purchase or potentially purchase a facility
16 requires the initiation of a health, safety, or environmental audit before actual
17 transfer of ownership, at the request of the purchaser, the facility may continue an
18 ongoing audit after the acquisition closing date if the new owner of the facility, not
19 later than the forty-fifth day after the acquisition closing date, provides notice to the
20 department of the fact that the owner intends to continue an ongoing audit or may
21 initiate a voluntary audit under the procedures outlined in Subsection B of this
22 Section.

23 (2) The notice to the department shall specify the following items:

24 (a) The facility or portion of the facility being audited.

25 (b) The date the audit began.

26 (c) The general scope of the audit.

27 (e) The termination date of the audit that is not more than six months after
28 the acquisition closing date.

29 (3) The new owner must certify in the notice to the department that before
30 the acquisition closing date the following things are true:

1 (a) The new owner was not responsible for the scope of the health, safety,
2 or environmental compliance being audited at the regulated facility.

3 (b) The new owner did not have the largest ownership share of the seller.

4 (c) The seller did not have the largest ownership share of the new owner.

5 (d) The new owner and the seller did not have a common corporate parent
6 or a common majority interest owner.

7 D. Privilege. (1) In a civil or administrative proceeding, the owner or
8 operator of a facility shall not be compelled to disclose or reference, and may prevent
9 another person from disclosing or referencing, any information contained in a
10 voluntary health, safety, and environmental audit report. This privilege does not
11 apply to criminal investigations and proceedings nor shall it be construed to
12 circumvent the protections provided by federal or state law for persons who disclose
13 information to law enforcement authorities. The privilege for a voluntary health,
14 safety, and environmental audit report does not extend to the following:

15 (a) Any violations that may pose imminent or substantial threat or cause
16 serious injury.

17 (b) Criminal activity.

18 (c) Reports or inspections required under the provisions of this Subtitle, the
19 rules pursuant to this Subtitle, and the conditions of permits issued pursuant to this
20 Subtitle.

21 (d) State or federal investigations.

22 (e) Information that is required to be collected, developed, maintained, or
23 reported, pursuant to this Subtitle, the rules promulgated pursuant to this Subtitle, or
24 the conditions of permits issued pursuant to this Subtitle.

25 (f) Information obtained by observation, sampling, or monitoring by the
26 department.

27 (g) Information obtained from a source that was not involved in the audit.

28 (2) Neither a subpoena nor a court order may be issued to an owner or
29 operator of a facility or to a person who conducted any part of a voluntary health,
30 safety, and environmental audit, a person who received a voluntary health, safety,

1 and environmental audit report, or a custodian of any results of a voluntary health,
2 safety, and environmental audit report to appear or testify in any civil or
3 administrative investigation or proceeding where the purpose of the subpoena or
4 order is to seek testimony about, or a document that is part of, a voluntary health,
5 safety, and environmental audit report and its exhibits and appendices.

6 (3) To facilitate identification of privileged information, each voluntary
7 environmental audit report may be labeled "Environmental Audit Report: Privileged
8 Document" or words of similar import. Failure to so label a document shall neither
9 constitute a waiver of the privilege under the provisions of this Section nor create a
10 presumption that the privilege does not apply.

11 (4) Except as otherwise provided in this Section and specifically, if the
12 owner or operator does not comply with the provisions of Paragraph (B)(5) of this
13 Section, the department may not request, review, or otherwise use any information
14 contained in a voluntary health, safety, and environmental audit report during any
15 civil or administrative proceeding with regard to a penalty for violations disclosed
16 in the audit report or during any inspection or permitting of the facility or facility
17 operations. The owner or operator shall provide the department a copy of the
18 voluntary health, safety, and environmental audit report upon written request of the
19 secretary or an assistant secretary but the report shall be held by the department
20 under the confidentiality provisions of LAC 33:I.501 et seq. The department shall
21 not publicly disclose information contained in a voluntary health, safety, and
22 environmental audit report or any part thereof without the written permission of the
23 owner or operator.

24 E. Who may claim the privilege. (1) The privilege delineated in Subsection
25 D of this Section may be claimed by the owner or operator of a facility that is the
26 subject of a voluntary health, safety, and environmental audit unless a court or
27 administrative law judge finds that the person claiming the privilege has been
28 engaged in a pattern of disregard of the requirements of this Subtitle, the rules
29 promulgated pursuant to this Subtitle, or the conditions of permits issued pursuant
30 to this Subtitle over the prior three years that has resulted in repeated or continuing

1 violations at the facility of any requirement of this Subtitle, the rules promulgated
2 pursuant to this Subtitle, or the conditions of permits issued pursuant to this Subtitle.

3 (2) A person asserting the privilege under this Section shall have the burden
4 of establishing the applicability of the privilege.

5 F. Waiver. (1) The owner or operator who prepared or caused the voluntary
6 health, safety, and environmental audit report to be prepared may expressly waive
7 the privilege at any time.

8 (2) The privilege shall not be waived by the disclosure of the voluntary
9 health, safety, and environmental audit report or part of the report or exhibits or
10 appendices by anyone other than the owner or operator who prepared or caused the
11 voluntary health, safety, and environmental audit report to be prepared or a new
12 owner or operator of the facility subject to a voluntary audit.

13 (3) Disclosure of the voluntary health, safety, and environmental audit report
14 or part of the report for any of the following reasons shall not waive the privilege:

15 (a) The disclosure is reasonably made in furtherance of correcting a
16 violation, conducting a voluntary health, safety, and environmental audit, or
17 evaluating whether a voluntary health, safety, and environmental audit is needed or
18 desired.

19 (b) The disclosure is reasonably made in furtherance of the sale of the
20 facility being audited.

21 (c) The disclosure is reasonably made under a confidentiality agreement.

22 (d) The disclosure is reasonably made to a court or governmental agency.

23 (e) The disclosure is reasonably related to a state or federal law requiring the
24 disclosure.

25 G. Immunity. (1) Except as provided by this Section, a person who
26 specifically discloses a violation as part of a voluntary health, safety, and
27 environmental audit and complies with the environmental audit procedure in
28 Subsection B or C of this Section shall be immune from an administrative or civil
29 penalty for the violation disclosed.

1 (2) The immunity established by Paragraph (1) of this Subsection shall not
2 apply and an administrative or civil penalty may be imposed under applicable law
3 if any of the following actions have occurred:

4 (a) The violation is found to have resulted in a substantial injury to one or
5 more persons at the site or substantial actual harm to persons, property, or the
6 environment has occurred off-site.

7 (b) The person who made the disclosure is found to have intentionally or
8 knowingly committed the disclosed violation or the violation is found to have been
9 committed through criminal negligence, as defined in R.S. 14:12, by a member of
10 the person's management or an agent of the person, and the person's policies or lack
11 of prevention systems contributed materially to the occurrence of the violation.

12 (c) The person who made the disclosure is found to have been criminally
13 negligent, as defined by R.S. 14:12, for the commission of the disclosed violation.

14 (d) The violation is found to have been committed intentionally or
15 knowingly by a member of the person's management or an agent of the person, and
16 the person's policies or lack of prevention systems contributed materially to the
17 occurrence of the violation.

18 (e) The violation is found to have resulted in an economic benefit that gives
19 the violator an advantage over its business competitors, in which case, the penalty,
20 if the department determines to assess a penalty, shall not exceed the amount of the
21 economic benefit obtained by the owner or operator of the facility. For purposes of
22 this Subparagraph, the word "found" means that the referenced circumstances are
23 found by a court or administrative law judge with jurisdiction over the matter.

24 H. Relationship to other privileges. The provisions of this Section shall not
25 affect any other privileges allowed under law, such as those related to work product
26 or the attorney-client relationship.

27 I. Rules; circumvention of privilege prohibited. The department may adopt
28 rules and regulations to implement this Section, but no department or state entity
29 may adopt a rule or impose a condition that circumvents the privilege granted by this
30 Section. The rules and regulations authorized pursuant to this Subsection may

1 provide that costs associated with the department's role in the implementation of this
2 Section fall under the provisions of R.S. 30:2014(B) and shall be paid by the owner
3 or operator at the conclusion of the audit.

4 J. Definitions. For the purposes of this Section, the following terms shall
5 have the following meanings:

6 (1) "Acquisition closing date" means the date on which ownership of, or a
7 direct or indirect majority interest in the ownership of, a regulated facility or
8 operation is acquired in an asset purchase, equity purchase, merger, or similar
9 transaction.

10 (2) "Exhibits and appendices" means supporting information that is collected
11 or developed for the primary purpose of or in the course of a voluntary health, safety,
12 and environmental audit, such as the following items:

13 (a) Interviews with current or former employees.

14 (b) Field notes and records of observations.

15 (c) Findings, opinions, suggestions, conclusions, guidance, notes, drafts and
16 memoranda, legal analyses, drawings, photographs, laboratory analyses, and
17 analytical data.

18 (d) Computer generated or electronically recorded information.

19 (e) Maps, charts, graphs, and surveys.

20 (f) Communications associated with a health, safety, and environmental
21 audit.

22 (3) "Owner or operator" with respect to a facility means any one or more of
23 the following persons:

24 (a) A person having an ownership interest in land upon which the audited
25 facility is located.

26 (b) A person with a contract to operate the audited facility.

27 (c) A person operating the audited facility.

28 (d) A person to whom a permit related to facility operations was granted by
29 the department.

1 (e) A person with an agreement to purchase or potentially purchase the
2 audited facility.

3 (4) "Voluntary health, safety, and environmental audit" means a systematic
4 voluntary investigation, including monitoring, evaluation, review, or assessment, of
5 a facility's compliance with the requirements of this Subtitle, the rules promulgated
6 pursuant to this Subtitle, and the conditions of permits issued pursuant to this
7 Subtitle when such audit is conducted not at the direction of the department but by,
8 or at the request of, an owner or operator or a new or potential owner or operator of
9 the facility. The audit shall consist of an investigation that goes above and beyond
10 what is otherwise required to determine, demonstrate, report, or certify compliance
11 with applicable requirements. The audit shall not include an investigation of
12 violations discovered prior to the commencement of the audit but may include an
13 investigation of violations that were identified as a result of the audit. A voluntary
14 health, safety, and environmental audit shall also meet all the following conditions:

15 (a) The voluntary health, safety, and environmental audit follows the audit
16 procedure requirements of Subsection B or C of this Section.

17 (b) Any finding of violation, at the time of the audit, is not required to be
18 collected, developed, maintained, or reported by this Subtitle, the rules promulgated
19 pursuant to this Subtitle, or the conditions of permits issued pursuant to this Subtitle.

20 (c) The privilege granted by this Section is not automatically waived by the
21 owner or operator with respect to a violation found. Such privilege must be
22 expressly waived by the owner or operator.

23 (d) The violation found has not been independently detected by the
24 department or a state or federal entity before the disclosure of the violation to the
25 department and the environmental audit was not initiated in response to an
26 investigation at the facility by the department or a state or federal entity.

27 (5) "Voluntary environmental audit report" means a report that includes all
28 documents, including exhibits and appendices, generated from a voluntary health,
29 safety, and environmental audit. A voluntary health, safety, and environmental audit
30 report may include:

1 (a) A report prepared by an auditor, monitor, or similar person, which may
2 include the following:

3 (i) A description of the scope of the audit.

4 (ii) The information gained in the audit and findings, conclusions, and
5 recommendations thereof.

6 (iii) Exhibits and appendices associated with the audit.

7 (b) An implementation plan or tracking system to correct past violations,
8 improve current compliance, or prevent future violations.

9 K. Limitations. Anything contained in this Section to the contrary
10 notwithstanding, this Section shall have no effect on the following:

11 (1) The protections afforded to employees under R.S. 23:967 and R.S.
12 30:2027.

13 (2) The ability of the department to issue orders requiring a respondent to
14 comply with specified provisions of this Subtitle, the rules promulgated pursuant to
15 this Subtitle, or the conditions of permits issued pursuant to this Subtitle and require
16 non-privileged information from the owner or operator of the facility in connection
17 therewith.

18 L. Applicability. This Section shall apply to voluntary health, safety, and
19 environmental audits initiated after July 1, 2019.

20 Section 2. This Act shall become effective upon signature by the governor or, if not
21 signed by the governor, upon expiration of the time for bills to become law without signature
22 by the governor, as provided by Article III, Section 18 of the Constitution of Louisiana. If
23 vetoed by the governor and subsequently approved by the legislature, this Act shall become
24 effective on the day following such approval.

DIGEST

The digest printed below was prepared by House Legislative Services. It constitutes no part of the legislative instrument. The keyword, one-liner, abstract, and digest do not constitute part of the law or proof or indicia of legislative intent. [R.S. 1:13(B) and 24:177(E)]

HB 510 Original

2019 Regular Session

Bishop

Abstract: Authorizes certain voluntary health, safety, and environmental audits by facilities subject to regulation by the Department of Environmental Quality

Proposed law authorizes facilities subject to regulation by the Dept. of Environmental Quality (DEQ) to conduct voluntary health, safety, and environmental audits (voluntary audit). Excludes from these audits the following items:

- (1) Violations that may pose imminent or substantial threat or cause serious injury.
- (2) Criminal activity.
- (3) Reports or inspections required by law, regulation, or permit conditions.
- (4) State or federal investigations.

Proposed law provides a procedure for a voluntary audit as follows:

- (1) Initiation of a voluntary audit by written notice to DEQ describing the facility or portion of a facility to be audited, the start and end dates for the audit, and the general scope of the audit.
- (2) Unless approved by DEQ, the audit is to conclude within six months of the start date. Provides that if the facility transfers ownership or operator during the audit the audit is to conclude prior to transfer of the facility unless the purchaser or new operator requests continuation.
- (3) Requires disclosure of the audit report and findings of violations to DEQ within six months after the completion of the audit.
- (4) Requires submission of a proposed compliance plan to DEQ and agreement on a schedule for compliance. In the absence of agreement and the possibility of imminent substantial harm to persons, property, or the environment, allows DEQ to issue a compliance order to ensure timely compliance.
- (5) Requires the owner or operator to cooperate with DEQ in order to achieve compliance; submit periodic reports of progress to compliance, and authorizes DEQ to issue a compliance order if the owner or operator fails to correct the violation in accordance with the compliance plan.

Proposed law provides that when an agreement to purchase or potentially purchase a facility requires the initiation of a voluntary audit prior to transfer of ownership, the purchaser may, within 45 days of the acquisition closing date, request that an ongoing voluntary audit be continued after the acquisition closing date. The purchaser is required to submit the following information to DEQ:

- (1) The facility or portion thereof being audited.
- (2) The date the audit began.

- (3) The general scope of the audit.
- (4) The termination date of the audit that cannot be more than six months after the acquisition closing date.

Proposed law also requires the new owner to certify that prior to the acquisition closing date the following was true:

- (1) The new owner was not responsible for the scope of the voluntary audit.
- (2) The new owner did not have the largest ownership share of the seller.
- (3) The seller did not have the largest ownership share of the new owner.
- (4) The new owner and the seller did not have a common corporate parent or common majority interest owner.

Proposed law provides that in a civil or administrative proceeding, the owner or operator is not compelled to disclose or reference, and may prevent another person from disclosing or referencing, any information contained in a voluntary audit. Provides that the privilege granted does not extend to criminal investigations nor is it to be construed to circumvent protections provided by federal or state law for people who disclose information to law enforcement authorities. The privilege also does not extend to the following:

- (1) Any violations that may pose imminent or substantial threat or cause serious injury.
- (2) Criminal activity.
- (3) Reports or inspections required under the provisions of this Subtitle, the rules pursuant to this Subtitle, and the conditions of permits issued pursuant to this Subtitle.
- (4) State or federal investigations.
- (5) Information that is required by law, regulation, or permit conditions to be collected, developed, maintained, or reported.
- (6) Information obtained by observation, sampling, or monitoring by DEQ.
- (7) Information obtained from a source that was not involved in the audit.

Proposed law provides that neither a subpoena nor court order to appear or testify in any civil or administrative investigation or proceeding seeking information or testimony about a voluntary audit can be issued to the owner or operator or the facility audited, a person who conducted any part of a voluntary audit, a person who received a voluntary audit, or the custodian of any results of a voluntary audit. Further prohibits DEQ from requesting or using any information resulting from a voluntary audit during a civil or administrative proceeding with regard to a penalty for violations disclosed in a voluntary audit. Authorizes DEQ to request copies of information related to the voluntary audit but requires that the report be held confidential and prohibits DEQ from disclosing and information contained in a voluntary audit report.

Proposed law specifies that the owner or operator of a facility subject to a voluntary audit unless court or an administrative law judge finds that person to have been engaged in a pattern of disregard of law or regulation that has resulted in repeated or continuing violations at the facility over the prior three years. Provides that the person claiming the privilege has the burden of establishing the applicability of the privilege.

Proposed law authorizes the owner or operator to waive privilege at any time. Provides that privilege cannot be waived by the disclosure of the audit report or any part of the report by anyone other than the owner or operator who prepared the audit or a new owner of a facility subject to a voluntary audit. Specifies that disclosure of any of the following does not waive privilege:

- (1) Disclosure reasonably made in furtherance of correcting a violation or conducting an audit.
- (2) Disclosure made for the sale of the facility.
- (3) Disclosure under a confidentiality agreement.
- (4) Disclosure to a court or governmental agency.
- (5) Disclosure related to a law requiring disclosure.

Proposed law provides for immunity from a civil or administrative penalty for a person who discloses a violation except in the following instances:

- (1) The violation resulted in substantial injury to a person, property, or the environment.
- (2) The person disclosing intentionally committed the disclosure violation or the violation was committed through criminal negligence.
- (3) The person disclosing was criminally negligent.
- (4) The violation was committed intentionally by a member of the person's management team or agent of the person.
- (5) The violation economically benefitted the violator as an advantage over its competitors.

Proposed law provides that the privilege granted shall not affect other privileges granted under law.

Proposed law authorizes DEQ to adopt rules but prohibits the rules from circumventing the privilege granted.

Proposed law provides the following definitions:

- (1) "Acquisition closing date" means the date on which ownership of a facility is acquired.
- (2) "Exhibits and appendices" means supporting information collected for a voluntary audit.
- (3) "Owner or operator" means a person having ownership interest in land on which a facility is located; a person contracted to operate the facility; a person operating a facility; a person to whom a permit for operations was issued; or a person with an agreement to purchase a facility.
- (4) "Voluntary health, safety, and environmental audit" means a voluntary investigation of a facility's compliance with laws, rules, and permit conditions conducted by or at the request of the owner or operator of a facility under the procedures outlined in law.
- (5) "Voluntary environmental audit report" means a report that includes all information generated from a voluntary audit.

Proposed law specifically provides that protections afforded to employees under other laws are not affected by proposed law. In addition proposed law does not affect DEQ's ability to issue compliance orders under the law, regulations, and permit conditions applicable to a facility.

Proposed law applies to voluntary audits initiated after July 1, 2019.

Effective upon signature of governor or lapse of time for gubernatorial action.

(Adds R.S. 30:2044)