

2019 Regular Session

HOUSE BILL NO. 615 (Substitute for House Bill No. 510 by Representative Bishop)

BY REPRESENTATIVE BISHOP

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 limit administrative or civil penalties for certain violations of statutes, regulations,
5 or permits disclosed as part of a voluntary health, safety, and environmental audit;
6 to provide for a privilege from disclosure in civil or administrative proceedings
7 reports of certain information contained in a voluntary health, safety, and
8 environmental audit; to provide an effective date; and to provide for related matters.

9 Be it enacted by the Legislature of Louisiana:

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

11 §2044. Voluntary health, safety, and environmental audits

12 A. Voluntary health, safety, and environmental audit. Facilities subject to
13 regulation under the provisions of this Subtitle, the rules promulgated pursuant to
14 this Subtitle, and the conditions of permits issued pursuant to this Subtitle may
15 conduct voluntary health, safety, and environmental audits. Such audits are intended
16 to discover and correct deficiencies in compliance with applicable environmental
17 requirements in order to further reduce risk to human health and the environment.
18 To encourage voluntary auditing, this Section provides a limited evidentiary
19 privilege to prevent audit information from being used in civil and administrative

1 proceedings against the owner or operator of the facility that conducted the audit.

2 Further, this Section provides a mechanism for facility owners and operators to
3 obtain a limited immunity from civil and administrative penalties for violations
4 voluntarily identified in audits, disclosed to the department, and timely corrected.

5 B. Privilege.

6 (1) In a civil or administrative proceeding, the owner or operator of a facility
7 shall not be compelled to disclose or reference, and may prevent another person from
8 disclosing or referencing, any information contained in a voluntary health, safety,
9 and environmental audit report. The evidentiary privilege granted by this Section
10 shall not be available in criminal proceedings. The privilege granted in this Section
11 shall not extend to the following "excluded issues":

12 (a) Reports or inspections that are required to be prepared or submitted by
13 the provisions of this Subtitle, the rules promulgated pursuant to this Subtitle, and
14 the conditions of permits issued pursuant to this Subtitle.

15 (b) Information that is required to be collected, developed, maintained, or
16 reported by this Subtitle, the rules promulgated pursuant to this Subtitle, or the
17 conditions of permits issued pursuant to this Subtitle.

18 (c) Information obtained by observation, sampling, or monitoring conducted
19 by the department.

20 (d) Information describing violations committed repeatedly by an owner or
21 operator of a facility with no attempt to bring the facility or operation into
22 compliance, so as to constitute a pattern of disregard of environmental or health and
23 safety laws. In order to be considered a pattern, the person must have committed
24 multiple violations of closely-related requirements resulting from separate and
25 distinct events within a three-year period at the same facility or operation.

26 (2) Except with respect to any excluded issue delineated in Paragraph (B)(1)
27 of this Section or for any information for which a waiver has been granted pursuant
28 to Subsection D of this Section, neither a subpoena nor a court order may be issued
29 to an owner or operator of a facility or to a person who conducted any part of a

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

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

12 (4) The department may not request, review, or otherwise use any
13 information contained in a voluntary health, safety, and environmental audit report
14 in a civil or administrative proceeding, except information related to any excluded
15 issues delineated in Paragraph (B)(1) of this Section or any information for which
16 a waiver has not been granted pursuant to Subsection D of this Section.

17 C. Who may claim privilege.

18 (1) The privilege granted in Subsection B of this Section may be claimed by
19 the owner or operator of a facility that is the subject of a voluntary health, safety, and
20 environmental audit unless in a civil or administrative proceeding a court or
21 administrative law judge finds that the claim of privilege is unavailable to the extent
22 the claim seeks protection for excluded issues listed in Paragraph (B)(1) of this
23 Section or for any information for which there has been a waiver granted pursuant
24 to Subsection D of this Section.

25 (2) The person who may claim the privilege under the provisions of
26 Subsection B of this Section may include an owner or operator of a facility who at
27 the time of the audit was a potential purchaser of, or was otherwise pursuing a
28 transaction involving, the facility in question.

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

3 D. Waiver of privilege.

4 (1) The owner or operator who prepared or caused the voluntary health,
5 safety, and environmental audit report to be prepared may waive the privilege at any
6 time by expressly acknowledging in writing that he waives the privilege as to a
7 particular voluntary health, safety, and environmental audit report or a particular
8 portion of the report.

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

13 (3) Disclosure of the voluntary health, safety, and environmental audit report
14 or part of the report to a third party for any of the following reasons shall not be
15 deemed to waive the privilege:

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

19 (b) Disclosure made in furtherance of the sale of the facility being audited.

20 (c) Disclosure made under a confidentiality agreement or comparable claim
21 of confidentiality.

22 (d) Disclosure made to a court or governmental agency pursuant to a
23 requirement or order of that court or agency or pursuant to a voluntary audit
24 disclosure program including, without limitation, the immunity mechanism provided
25 in Subsection E of this Section.

26 E. Immunity.

27 (1) Except as otherwise provided by this Section, an owner or operator who
28 discloses a violation identified in a voluntary health, safety, and environmental

1 audit to the department shall be immune from any administrative or civil penalty for
2 the violation disclosed.

3 (2) In order to be eligible for immunity pursuant to Paragraph (1) of this
4 Subsection, the owner or operator of the facility shall disclose in writing to the
5 department within six months of the conclusion of the voluntary health, safety, and
6 environmental audit in question describing the following:

7 (a) The facility that has been audited, including the facility address relevant
8 permit numbers.

9 (b) The audit finding or findings for which the owner or operator seeks
10 immunity, including the facts associated with the disclosed findings and the relevant
11 principal statutory, regulatory, or permit terms.

12 (c) The corrective actions the owner or operator plans to implement to
13 establish compliance with respect to each such finding.

14 (d) A date for completing such corrective actions, which shall be no more
15 than one hundred eighty days after the date of the disclosure. However, the
16 department may approve additional reasonable time to complete such corrective
17 actions in appropriate circumstances in response to the owner or operator's request.

18 (3) The immunity established by Paragraph (1) and claimed in Paragraph (2)
19 of this Subsection shall not be available if any of the following circumstances are
20 found to have occurred:

21 (a) The violation is found to present a major degree of risk or impact to
22 human health and the environment pursuant to LAC 33:I:705.

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

28 (c) The violation disclosed is found to have been independently detected by
29 the department or a state or federal entity before the disclosure of the violation was

1 submitted to the department or the environmental audit was initiated pursuant to
2 an order or directive of the department or a state or federal entity.

3 (d) The violation is found to have resulted in an economic benefit that gives
4 the person disclosing such violation an economic advantage over business
5 competitors, in which case, the department may assess a penalty not exceeding the
6 amount of the economic benefit found to have been experienced by the owner or
7 operator of the facility as a direct result of the disclosed violation.

8 (e) The person claiming immunity with respect to a disclosed violation is
9 found to have failed to return to compliance with applicable requirements for that
10 disclosed violation within a time that is reasonable under the circumstances,
11 provided in Subparagraph (2)(d) of this Subsection.

12 (4) The department shall maintain as confidential any audit disclosure and
13 associated materials submitted by an owner or operator pursuant to this Subsection
14 and shall not release any such disclosure or materials until such time as any
15 applicable statute of limitation on such disclosure shall have lapsed.

16 F. Relationship to other privileges. The provisions of this Section shall not
17 affect any other privileges allowed under law, such as those related to work product
18 or attorney-client relationship.

19 G. Rules; circumvention prohibited. The department may adopt rules and
20 regulations to implement this Section, but no department or state entity may adopt
21 a rule or impose a condition that circumvents the privilege or immunity granted by
22 this Section. The rules and regulations authorized pursuant to this Subsection may
23 provide that costs associated with the department's role in the implementation of the
24 immunity provisions of this Section fall under the provisions of R.S. 30:2014(B) and
25 shall be requested by the department and paid by the owner or operator promptly
26 after any disclosure to the department by the owner or operator.

27 H. Definitions. For the purposes of this Section, the following terms shall
28 have the following meanings:

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

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, legal analyses, drawings, photographs, laboratory analyses, and
8 analytical data.

9 (d) Computer generated or electronically recorded information.

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

11 (f) Communications associated with a health, safety, and environmental
12 audit.

13 (2) "Owner or operator" means any one or more of the following persons:

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

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

17 (c) A person operating the audited facility.

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

20 (e) A potential owner or operator of the facility, as evidenced by an
21 agreement, letter of intent, or comparable instrument for the future purchase or
22 potential future purchase of the audited facility or agreement regarding the operation
23 of the facility, or of any portion of the facility.

24 (3) "Voluntary health, safety, and environmental audit" means a systematic
25 voluntary investigation, including monitoring, evaluation, review, or assessment, of
26 a facility's compliance with certain requirements of this Subtitle, the rules
27 promulgated pursuant to this Subtitle, and the conditions of permits issued pursuant
28 to this Subtitle when such audit is conducted not at the direction of the department

1 but by, or at the request of, an owner or operator or a new or potential owner or
2 operator of the facility.

3 (4) "Voluntary environmental audit report" means a report that includes all
4 documents, including exhibits and appendices, generated from a voluntary health,
5 safety, and environmental audit. A voluntary health, safety, and environmental audit
6 report may include information prepared by an auditor, monitor, or similar person,
7 which may include a description of the scope of the audit; information gathered in
8 the audit and findings, conclusions, and recommendations of the audit; and exhibits
9 and appendices associated with the audit.

10 (5) "Find" or "found" means the referenced circumstances are found by a
11 court or administrative law judge with jurisdiction over the matter.

12 I. Limitations. Anything contained in this Section to the contrary
13 notwithstanding, this Section shall have no effect on the following:

14 (1) The protections afforded to employees under R.S. 23:967 and R.S.
15 30:2027.

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

21 J. Applicability. This Section shall apply to voluntary health, safety, and
22 environmental audits initiated after July 1, 2019.

23 Section 2. This Act shall become effective upon signature by the governor or, if not
24 signed by the governor, upon expiration of the time for bills to become law without signature
25 by the governor, as provided by Article III, Section 18 of the Constitution of Louisiana. If
26 vetoed by the governor and subsequently approved by the legislature, this Act shall become
27 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 615 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).

Proposed law provides that in a civil or administrative proceeding, the owner or operator of a facility is not compelled to disclose or reference any information contained in a voluntary audit report. Provides that the evidentiary privilege is not available in criminal proceedings. In addition, prohibits privilege in the following circumstances:

- (1) Reports or inspections already required under the DEQ regulatory regimes.
- (2) Information already required under the DEQ regulatory regimes.
- (3) Information obtained by observation, sampling, or monitoring conducted by DEQ.
- (4) Information relative to repeated violations with no attempt to bring the facility or operation into compliance.

Proposed law provides that for any information for which privilege has been granted, neither a subpoena nor a court order may be issued where the purpose of the subpoena or order is to seek testimony about, or a document that is part of, a voluntary audit report and its exhibits and appendices.

Proposed law prohibits DEQ from requesting, reviewing, or otherwise using any information contained in a voluntary audit report in a civil or administrative proceeding unless that hearing pertains to the circumstances where privilege does not apply or any information for which a waiver has not been granted.

Proposed law provides that the privilege may be claimed by the owner or operator of a facility that is the subject of a voluntary audit unless in a civil or administrative proceeding a court or administrative law judge finds that the claim of privilege is unavailable to the extent the claim seeks protection from issues for which privilege cannot be granted or for any information for which there has been a waiver granted.

Proposed law provides that the owner or operator of a facility, or a person who was a potential purchaser of, or was otherwise pursuing a transaction involving the facility in question at the time of the voluntary audit can claim the privilege. In addition, provides that a person asserting the privilege has the burden of establishing the applicability of the privilege.

Proposed law provides that the owner or operator who prepared or caused the voluntary health, safety, and environmental audit report to be prepared may waive the privilege at any time by expressly acknowledging in writing that he waives the privilege as to a particular voluntary audit report or a particular portion thereof. Further provides, however, privilege is not waived as a result of the disclosure of a report or exhibits or appendices by anyone other than the owner or operator.

Proposed law further provides that disclosure of the report to a third party is not waiving privilege if it was for any of the following reasons:

- (a) Disclosure made to correct a violation, conduct an audit, or evaluate whether an audit is needed or desired.
- (b) Disclosure made in furtherance of the sale of the facility being audited.
- (c) Disclosure made under a confidentiality agreement or comparable claim of confidentiality.
- (d) Disclosure made to a court or governmental agency pursuant to a requirement or order of that court or agency or pursuant to a voluntary audit disclosure program including without limitation the immunity mechanism.

Proposed law provides immunity from any administrative or civil penalty for an owner or operator who discloses to the department a violation identified in a voluntary audit. Provides that qualification for immunity includes disclosure in writing to the department within six months of the conclusion of the voluntary audit describing the following:

- (1) The facility that has been audited, including the facility address relevant permit numbers.
- (2) The audit finding for which the owner or operator seeks immunity.
- (3) The corrective actions the owner or operator plans to implement to establish compliance.
- (4) A date no more than one hundred eighty days after the date of the disclosure for completing such corrective actions.

Provides that the following circumstances prohibit the granting of immunity:

- (1) The violation is found to present a major degree of risk or impact to human health and the environment pursuant to LAC 33:I:705.
- (2) The person who made the disclosure is found to have intentionally or knowingly committed the disclosed violation or the violation is found to have been committed through criminal negligence, as defined in R.S. 14:12, by the person or a member of the person's management, and the person's policies or lack of prevention systems contributed materially to the occurrence of the violation.
- (3) The violation disclosed is found to have been independently detected by the department or a state or federal entity before the disclosure of the violation was submitted to the department or the environmental audit was initiated pursuant to an order or directive of the department or a state or federal entity.
- (4) The violation is found to have resulted in an economic benefit that gives the person disclosing such violation an economic advantage over business competitors, in which case, the department may assess a penalty not exceeding the amount of the economic benefit found to have been experienced by the owner or operator of the facility as a direct result of the disclosed violation.
- (5) The person claiming immunity is found to have failed to return to compliance with applicable requirements for that disclosed violation within a reasonable time.

Proposed law requires DEQ to maintain the confidentiality of any audit disclosure and associated materials until the statute of limitation on such disclosure shall have lapsed.

Proposed law prohibits the adoption of rules and regulations that circumvent the privilege or immunity granted. Further provides that costs associated with the DEQ's role in the implementation of the immunity provisions shall be paid by the owner or operator.

Proposed law provides the following definitions:

- (1) "Exhibits and appendices" means supporting information collected for a voluntary audit.
- (2) "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.
- (3) "Voluntary health, safety, and environmental audit" means a voluntary investigation of a facility's compliance with certain 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.
- (4) "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)