

**HOUSE BILL NO. 1336**

Introduced by

Representatives Keiser, D. Anderson, Lefor

Senators Klein, Unruh

1 A BILL ~~for an Act to create and enact chapter 23-49 of the North Dakota Century Code, relating~~  
2 ~~to environmental or health safety audits; and to provide a penalty.~~ for an Act to provide for  
3 limitations of penalties for environmental audits.

4 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

5 ~~SECTION 1. Chapter 23-49 of the North Dakota Century Code is created and enacted as~~  
6 ~~follows:~~

7 ~~23-49-01. Definitions.~~

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

11 ~~2. "Audit report" means an audit report described by section 23-49-03.~~

12 ~~3. "Environmental or health and safety law" means:~~

13 ~~a. A federal or state environmental or occupational health and safety law; or~~

14 ~~b. A rule, regulation, or regional or local law adopted in conjunction with a law~~  
15 ~~described under subdivision a.~~

16 ~~4. "Environmental or health and safety audit" or "audit" means a systematic voluntary~~  
17 ~~evaluation, review, or assessment of compliance with environmental or health and~~  
18 ~~safety laws or with any permit issued under an environmental or health and safety law~~  
19 ~~conducted by an owner or operator, an employee of an owner or operator, a person,~~  
20 ~~including an employee or independent contractor of the person that is considering the~~  
21 ~~acquisition of a regulated facility or operation, or an independent contractor of:~~

22 ~~a. A regulated facility or operation; or~~

23 ~~b. An activity at a regulated facility or operation.~~

1 ~~5. "Owner or operator" means a person that owns or operates a regulated facility or~~  
2 ~~operation.~~

3 ~~6. "Penalty" means an administrative, civil, or criminal sanction imposed by the state to~~  
4 ~~punish a person for a violation of a law or rule. The term does not include a technical~~  
5 ~~or remedial provision ordered by a regulatory authority.~~

6 ~~7. "Regulated facility or operation" means a facility or operation regulated under an~~  
7 ~~environmental or health and safety law.~~

8 ~~**23-49-02. Intent - Construction.**~~

9 ~~1. A person acts intentionally for purposes of this chapter if the person acts intentionally~~  
10 ~~within the meaning of section 12.1-02-02.~~

11 ~~2. For purposes of this chapter, a person acts knowingly or with knowledge with respect~~  
12 ~~to the nature of the person's conduct if the person is aware of the person's physical~~  
13 ~~acts. A person acts knowingly or with knowledge with respect to the result of the~~  
14 ~~person's conduct if the person is aware the conduct will cause the result.~~

15 ~~3. A person acts recklessly or is reckless for purposes of this chapter if the person acts~~  
16 ~~recklessly or is reckless within the meaning of section 12.1-02-02.~~

17 ~~4. To fully implement the privilege established by this chapter, the term "environmental or~~  
18 ~~health and safety law" must be construed broadly.~~

19 ~~**23-49-03. Audit report.**~~

20 ~~1. An audit report is a report that includes each document and communication, other than~~  
21 ~~those set forth in section 23-49-09, produced from an environmental or health and~~  
22 ~~safety audit.~~

23 ~~2. General components that may be contained in a completed audit report include:~~

24 ~~a. A report prepared by an auditor, monitor, or similar person, which may include:~~

25 ~~(1) A description of the scope of the audit;~~

26 ~~(2) The information gained in the audit and findings, conclusions, and~~  
27 ~~recommendations; and~~

28 ~~(3) Exhibits and appendices;~~

29 ~~b. Memoranda and documents analyzing all or a portion of the materials described~~  
30 ~~by subdivision a or discussing implementation issues; and~~

- 1 ~~c. An implementation plan or tracking system to correct past noncompliance,~~  
2 ~~improve current compliance, or prevent future noncompliance.~~
- 3 ~~3. The types of exhibits and appendices that may be contained in an audit report, include~~  
4 ~~supporting information that is collected or developed for the primary purpose of and in~~  
5 ~~the course of an environmental or health and safety audit, including:~~
- 6 ~~a. Interviews with current or former employees;~~  
7 ~~b. Field notes and records of observations;~~  
8 ~~c. Findings, opinions, suggestions, conclusions, guidance, notes, drafts, and~~  
9 ~~memoranda;~~
- 10 ~~d. Legal analyses;~~  
11 ~~e. Drawings;~~  
12 ~~f. Photographs;~~  
13 ~~g. Laboratory analyses and other analytical data;~~  
14 ~~h. Computer-generated or electronically recorded information;~~  
15 ~~i. Maps, charts, graphs, and surveys; and~~  
16 ~~j. Other communications associated with an environmental or health and safety~~  
17 ~~audit.~~
- 18 ~~4. To facilitate identification, each document in an audit report must be labeled~~  
19 ~~"COMPLIANCE REPORT: PRIVILEGED DOCUMENT", or labeled with words of~~  
20 ~~similar import. Failure to label a document under this section does not constitute a~~  
21 ~~waiver of the audit privilege or create a presumption the privilege does or does not~~  
22 ~~apply.~~
- 23 ~~5. A person that begins an audit before becoming the owner of a regulated facility or~~  
24 ~~operation may continue the audit after the acquisition closing date if the person gives~~  
25 ~~notice under section 23-49-09.~~
- 26 ~~6. Unless an extension is approved by the governmental entity with regulatory authority~~  
27 ~~over the regulated facility or operation based on reasonable grounds, an audit must be~~  
28 ~~completed within a reasonable time not to exceed six months after:~~
- 29 ~~a. The date the audit is initiated; or~~  
30 ~~b. The acquisition closing date, if the person continues the audit under~~  
31 ~~subsection 5.~~

1 ~~7. Subdivision a of subsection 6 does not apply to an audit conducted before the~~  
2 ~~acquisition closing date by a person that is considering the acquisition of the regulated~~  
3 ~~facility or operation.~~

4 ~~**23-49-04. Privilege.**~~

5 ~~1. An audit report is privileged as provided in this section.~~

6 ~~2. Except as provided in sections 23-49-05, 23-49-06, and 23-49-07, any part of an audit~~  
7 ~~report is privileged and is not admissible as evidence or subject to discovery in:~~

8 ~~a. A civil action, whether legal or equitable; or~~

9 ~~b. An administrative proceeding.~~

10 ~~3. A person, when called or subpoenaed as a witness, may not be compelled to testify or~~  
11 ~~produce a document related to an environmental or health and safety audit if:~~

12 ~~a. The testimony or document discloses any item listed in section 23-49-03 which~~  
13 ~~was made as part of the preparation of an environmental or health and safety~~  
14 ~~audit report and which is addressed in a privileged part of an audit report; and~~

15 ~~b. For purposes of this subsection, the person is:~~

16 ~~(1) A person that conducted a portion of the audit but did not personally~~  
17 ~~observe the physical events;~~

18 ~~(2) A person to which the audit results are disclosed under section 23-49-05; or~~

19 ~~(3) A custodian of the audit results.~~

20 ~~4. A person that conducts or participates in the preparation of an environmental or health~~  
21 ~~and safety audit and that has actually observed physical events of violation, may~~  
22 ~~testify about those events but may not be compelled to testify about or produce~~  
23 ~~documents related to the preparation of or any privileged part of an environmental or~~  
24 ~~health and safety audit or any item listed in section 23-49-03.~~

25 ~~5. An employee of a state agency may not request, review, or otherwise use an audit~~  
26 ~~report during an agency inspection of a regulated facility or operation or an activity of a~~  
27 ~~regulated facility or operation.~~

28 ~~6. A party asserting the privilege described in this section has the burden of establishing~~  
29 ~~the applicability of the privilege.~~

1 ~~23-49-05. Exception - Waiver.~~

2 ~~1. The privilege described by section 23-49-04 does not apply to the extent the privilege~~  
3 ~~is expressly waived by the owner or operator that prepared the audit report or caused~~  
4 ~~the report to be prepared.~~

5 ~~2. Disclosure of an audit report or any information generated by an environmental or~~  
6 ~~health and safety audit does not waive the privilege established by section 23-49-04 if~~  
7 ~~the disclosure:~~

8 ~~a. Is made to address or correct a matter raised by the environmental or health and~~  
9 ~~safety audit and is made only to:~~

10 ~~(1) A person employed by the owner or operator, including temporary and~~  
11 ~~contract employees;~~

12 ~~(2) A legal representative of the owner or operator;~~

13 ~~(3) An officer or director of the regulated facility or operation or a partner of the~~  
14 ~~owner or operator;~~

15 ~~(4) An independent contractor of the owner or operator;~~

16 ~~(5) A person considering the acquisition of the regulated facility or operation~~  
17 ~~that is the subject of the audit; or~~

18 ~~(6) An employee, temporary employee, contract employee, legal~~  
19 ~~representative, officer, director, partner, or independent contractor of a~~  
20 ~~person described by paragraph 5;~~

21 ~~b. Is made under the terms of a confidentiality agreement between the person for~~  
22 ~~which the audit report was prepared or the owner or operator of the audited~~  
23 ~~facility or operation and:~~

24 ~~(1) A partner or potential partner of the owner or operator of the facility or~~  
25 ~~operation;~~

26 ~~(2) A transferee or potential transferee of the facility or operation;~~

27 ~~(3) A lender or potential lender for the facility or operation;~~

28 ~~(4) A governmental official of a state; or~~

29 ~~(5) A person engaged in the business of insuring, underwriting, or indemnifying~~  
30 ~~the facility or operation; or~~

- 1 ~~c. Is made under a claim of confidentiality to a governmental official or agency by~~  
2 ~~the person for which the audit report was prepared or by the owner or operator.~~
- 3 ~~3. A party to a confidentiality agreement described in subdivision b of subsection 2 which~~  
4 ~~violates that agreement is liable for damages caused by the disclosure and for any~~  
5 ~~other penalties stipulated in the confidentiality agreement.~~
- 6 ~~4. Information disclosed under subdivision c of subsection 2 is confidential. A public~~  
7 ~~entity, public employee, or public official that discloses information in violation of this~~  
8 ~~subsection is subject to any penalty provided in section 44-04-18.4. It is an affirmative~~  
9 ~~defense to the clerical dissemination of a privileged audit report that the report was not~~  
10 ~~clearly labeled "COMPLIANCE REPORT: PRIVILEGED DOCUMENT" or words of~~  
11 ~~similar import. The lack of labeling may not be raised as a defense if the entity,~~  
12 ~~employee, or official knew or had reason to know the document was a privileged audit~~  
13 ~~report.~~
- 14 ~~5. This section may not be construed to circumvent the protections provided by federal or~~  
15 ~~state law for individuals who disclose information to law enforcement authorities.~~
- 16 ~~**23-49-06. Exception - Disclosure.**~~
- 17 ~~1. A court or administrative hearing officer with competent jurisdiction may require~~  
18 ~~disclosure of a portion of an audit report in a civil or administrative proceeding if the~~  
19 ~~court or administrative hearing officer determines, after an in-camera review consistent~~  
20 ~~with the appropriate rules of procedure:~~
- 21 ~~a. The privilege is asserted for a fraudulent purpose;~~
- 22 ~~b. The portion of the audit report is not subject to the privilege under section~~  
23 ~~23-49-07; or~~
- 24 ~~c. The portion of the audit report shows evidence of noncompliance with an~~  
25 ~~environmental or health and safety law and appropriate efforts to achieve~~  
26 ~~compliance with the law were not promptly initiated and pursued with reasonable~~  
27 ~~diligence after discovery of noncompliance.~~
- 28 ~~2. A party seeking disclosure under this section has the burden of proving subdivision a~~  
29 ~~of subsection 1 applies.~~

- 1 ~~3. Notwithstanding chapter 28-32, a decision of an administrative hearings officer under~~  
2 ~~subdivision c of subsection 1 is directly appealable to a court of competent jurisdiction~~  
3 ~~without disclosure of the audit report to any person unless so ordered by the court.~~
- 4 ~~4. A person claiming the privilege is subject to sanctions as provided by section 28-26-31-~~  
5 ~~or to a fine not to exceed ten thousand dollars if the court finds, consistent with~~  
6 ~~fundamental due process, the person intentionally or knowingly claimed the privilege~~  
7 ~~for unprotected information as provided in section 23-49-07.~~
- 8 ~~5. A determination of a court under this section is subject to interlocutory appeal to an~~  
9 ~~appropriate appellate court.~~
- 10 ~~**23-49-07. Nonprivileged material.**~~
- 11 ~~1. The privilege described in this chapter does not apply to:~~
- 12 ~~a. A document, communication, datum, or report or other information required by a~~  
13 ~~regulatory agency to be collected, developed, maintained, or reported under a~~  
14 ~~federal or state environmental or health and safety law;~~
- 15 ~~b. Information obtained by observation, sampling, or monitoring by a regulatory~~  
16 ~~agency; or~~
- 17 ~~c. Information obtained from a source not involved in the preparation of the~~  
18 ~~environmental or health and safety audit report.~~
- 19 ~~2. This section does not limit the right of a person to agree to conduct and disclose an~~  
20 ~~audit report.~~
- 21 ~~**23-49-08. Review of privileged documents by governmental authority.**~~
- 22 ~~1. If an audit report is obtained, reviewed, or used in a criminal proceeding, the~~  
23 ~~administrative or civil evidentiary privilege created by this chapter is not waived or~~  
24 ~~eliminated for any other purpose.~~
- 25 ~~2. Notwithstanding the privilege established under this chapter, a regulatory agency may~~  
26 ~~review information required to be available under a specific state or federal law, but~~  
27 ~~the review does not waive or eliminate the administrative or civil evidentiary privilege if~~  
28 ~~applicable.~~
- 29 ~~3. If information is required to be available to the public by operation of a specific state or~~  
30 ~~federal law, the governmental authority shall notify the person claiming the privilege of~~

1 ~~the potential for public disclosure before obtaining such information under~~  
2 ~~subsection 1 or 2.~~

3 ~~4. If privileged information is disclosed under subsection 2 or 3 on the motion of a party,~~  
4 ~~a court or the appropriate administrative official shall suppress evidence offered in any~~  
5 ~~civil or administrative proceeding which arises or is derived from review, disclosure, or~~  
6 ~~use of information obtained under this section if the review, disclosure, or use is not~~  
7 ~~authorized under section 23-49-07. A party having received information under~~  
8 ~~subsection 2 or 3 has the burden of proving the evidence offered did not arise and was~~  
9 ~~not derived from the review of privileged information.~~

10 ~~**23-49-09. Voluntary disclosure – Immunity.**~~

11 ~~1. Except as provided by this section, a person that makes a voluntary disclosure of a~~  
12 ~~violation of an environmental or health and safety law is immune from an~~  
13 ~~administrative or civil penalty for the violation disclosed.~~

14 ~~2. A disclosure is voluntary only if:~~

15 ~~a. The disclosure was made:~~

16 ~~(1) Promptly after knowledge of the information disclosed is obtained by the~~  
17 ~~person; or~~

18 ~~(2) Not more than forty five days after the acquisition closing date, if the~~  
19 ~~violation was discovered during an audit conducted before the acquisition~~  
20 ~~closing date by a person considering the acquisition of the regulated facility~~  
21 ~~or operation;~~

22 ~~b. The disclosure was made in writing by registered mail to an agency that has~~  
23 ~~regulatory authority with regard to the violation disclosed;~~

24 ~~c. An investigation of the violation was not initiated or the violation was not~~  
25 ~~independently detected by an agency with enforcement jurisdiction before the~~  
26 ~~disclosure was made using registered mail;~~

27 ~~d. The disclosure arises out of a voluntary environmental or health and safety audit;~~

28 ~~e. The person that makes the disclosure initiates an appropriate effort to achieve~~  
29 ~~compliance, pursues that effort with due diligence, and corrects the~~  
30 ~~noncompliance within a reasonable time;~~



- 1 ~~f. The person making the disclosure cooperates with the appropriate agency in~~  
2 ~~connection with an investigation of the issues identified in the disclosure; and~~
- 3 ~~g. The violation did not result in injury or imminent and substantial risk of serious~~  
4 ~~injury to one or more persons at the site or offsite substantial actual harm or~~  
5 ~~imminent and substantial risk of harm to persons, property, or the environment.~~
- 6 ~~3. For a disclosure described by paragraph 1 of subdivision a of subsection 2, the person~~  
7 ~~making the disclosure shall certify in the disclosure that before the acquisition closing~~  
8 ~~date:~~
- 9 ~~a. The person was not responsible for the environmental, health, or safety~~  
10 ~~compliance at the regulated facility or operation that is subject to the disclosure;~~
- 11 ~~b. The person did not have the largest ownership share of the seller;~~
- 12 ~~c. The seller did not have the largest ownership share of the person; and~~
- 13 ~~d. The person and the seller did not have a common corporate parent or a common~~  
14 ~~majority interest owner.~~
- 15 ~~4. A disclosure is not voluntary for purposes of this section if it is a report to a regulatory~~  
16 ~~agency required solely by a specific condition of an enforcement order or decree.~~
- 17 ~~5. The immunity established by subsection 1 does not apply and an administrative or civil~~  
18 ~~penalty may be imposed under applicable law if:~~
- 19 ~~a. The person that made the disclosure intentionally or knowingly committed or was~~  
20 ~~responsible within the meaning of section 12.1-03-01, for the commission of the~~  
21 ~~disclosed violation;~~
- 22 ~~b. The person that made the disclosure recklessly committed or was responsible~~  
23 ~~within the meaning of section 12.1-03-01, for the commission of the disclosed~~  
24 ~~violation and the violation resulted in substantial injury to one or more persons at~~  
25 ~~the site or offsite harm to persons, property, or the environment;~~
- 26 ~~c. The offense was committed intentionally or knowingly by a member of the~~  
27 ~~person's management or an agent of the person and the person's policies or lack~~  
28 ~~of prevention systems contributed materially to the occurrence of the violation;~~
- 29 ~~d. The offense was committed recklessly by a member of the person's management~~  
30 ~~or an agent of the person, the person's policies or lack of prevention systems~~  
31 ~~contributed materially to the occurrence of the violation, and the violation resulted~~

1 ~~in substantial injury to one or more persons at the site or offsite harm to persons,~~  
2 ~~property, or the environment; or~~

3 ~~e. The violation resulted in a substantial economic benefit that gives the violator a~~  
4 ~~clear advantage over its business competitors.~~

5 ~~6. A penalty imposed under subsection 5, to the extent appropriate, is mitigated by~~  
6 ~~factors such as:~~

7 ~~a. The voluntariness of the disclosure;~~

8 ~~b. Efforts by the disclosing party to conduct environmental or health and safety~~  
9 ~~audits;~~

10 ~~c. Remediation;~~

11 ~~d. Cooperation with government officials investigating the disclosed violation;~~

12 ~~e. The period of ownership of the regulated facility or operation; or~~

13 ~~f. Other relevant considerations.~~

14 ~~7. In a civil or administrative enforcement action brought against a person for a violation~~  
15 ~~for which the person claims to have made a voluntary disclosure, the person claiming~~  
16 ~~the immunity has the burden of establishing a prima facie case the disclosure was~~  
17 ~~voluntary. After the person claiming the immunity establishes a prima facie case of~~  
18 ~~voluntary disclosure, other than a case in which under subsection 5 immunity does not~~  
19 ~~apply, the enforcement authority has the burden of rebutting the presumption by a~~  
20 ~~preponderance of the evidence or, in a criminal case, by proof beyond a reasonable~~  
21 ~~doubt.~~

22 ~~8. To receive immunity under this section, a facility conducting an environmental or~~  
23 ~~health and safety audit under this chapter shall provide notice to an appropriate~~  
24 ~~regulatory agency of the fact it is planning to commence the audit. The notice must~~  
25 ~~specify the facility or portion of the facility to be audited, the anticipated time the audit~~  
26 ~~will begin, and the general scope of the audit. The notice may provide notification of~~  
27 ~~more than one scheduled environmental or health and safety audit at a time. This~~  
28 ~~subsection does not apply to an audit conducted before the acquisition closing date by~~  
29 ~~a person considering the acquisition of the regulated facility or operation that is the~~  
30 ~~subject of the audit.~~

1 ~~9. A person that begins an audit before becoming the owner of the regulated facility or~~  
2 ~~operation may continue the audit after the acquisition closing date if, not more than~~  
3 ~~forty five days after the acquisition closing date, the person provides notice to an~~  
4 ~~appropriate regulatory agency of the fact the person intends to continue an ongoing~~  
5 ~~audit. The notice must specify the facility or portion of the facility being audited, the~~  
6 ~~date the audit began, and the general scope of the audit. In the notice the person shall~~  
7 ~~certify that before the acquisition closing date:~~

8 ~~a. The person was not responsible for the scope of the environmental, health, or~~  
9 ~~safety compliance being audited at the regulated facility or operation;~~

10 ~~b. The person did not have the largest ownership share of the seller;~~

11 ~~c. The seller did not have the largest ownership share of the person; and~~

12 ~~d. The person and the seller did not have a common corporate parent or a common~~  
13 ~~majority interest owner.~~

14 ~~10. The immunity under this section does not apply if a court or administrative hearing~~  
15 ~~officer finds the person claiming the immunity, after the effective date of this chapter,~~  
16 ~~repeatedly or continuously has committed significant violations and not attempted to~~  
17 ~~bring the facility or operation into compliance, so as to constitute a pattern of disregard~~  
18 ~~of environmental or health and safety laws. To be considered a pattern, the person~~  
19 ~~must have committed a series of violations that were due to separate and distinct~~  
20 ~~events within a three-year period at the same facility or operation.~~

21 ~~11. A violation that has been voluntarily disclosed and to which immunity applies must be~~  
22 ~~identified in a compliance history report as being voluntarily disclosed.~~

23 ~~**23-49-10. Circumvention by rule prohibited.**~~

24 ~~A regulatory agency may not adopt a rule or impose a condition that circumvents the~~  
25 ~~purpose of this chapter.~~

26 ~~**23-49-11. Applicability.**~~

27 ~~The privilege created by this chapter applies to environmental or health and safety audits~~  
28 ~~conducted on or after the effective date of this chapter.~~

29 ~~**23-49-12. Relationship to other recognized privileges.**~~

30 ~~This chapter does not limit, waive, or abrogate the scope or nature of any statutory or~~  
31 ~~common law privilege, including the work product doctrine and the attorney-client privilege.~~

1       **SECTION 1.**

2       **Environmental audits - Violations.**

3       1. As used in this section:

4           a. "Environmental audit" means a voluntary, internal, and comprehensive evaluation  
5           of a facility or activity which is intended to prevent noncompliance with  
6           environmental laws, rules, or permits enforced by a regulatory agency under  
7           chapter 23-25, 23-20.3, 23-29, 38-08, or 61-28. An environmental audit may be  
8           conducted by an owner, operator, or prospective owner or operator. An employee  
9           or independent contractor may conduct an environmental audit on behalf of the  
10          owner, operator, or prospective owner or operator.

11          b. "Environmental audit report" means a set of documents labeled "Environmental  
12          Audit Report: Privileged Document" prepared as a result of an environmental  
13          audit which must include a description of the scope of the audit; the information  
14          gained in the audit and findings, conclusions, and recommendations; and exhibits  
15          and appendices. The exhibits and appendices to the environmental audit report  
16          may include interviews with current or former employees, field notes and records  
17          of observations, findings, opinions, suggestions, conclusions, guidance, notes,  
18          drafts, memoranda, legal analyses, drawings, photographs, laboratory analyses  
19          and other analytical data, computer-generated or electronically recorded  
20          information, maps, charts, graphs, and surveys and other communications  
21          associated with an environmental audit.

22          c. "Regulatory agency" means the agency with regulatory authority over the facility  
23          or activity.

24          d. "Willfully" has the same meaning as provided under section 12.1-02-02.

25       2. A regulatory agency may not pursue civil penalties for a violation found during an  
26       environmental audit which the regulated entity discloses to the regulatory agency in  
27       writing within forty-five days after the violation is found, unless:

28           a. The violation caused imminent or substantial harm to human health or the  
29           environment;

30           b. The violation is found by the regulatory agency before the regulated entity  
31           discloses the violation in writing to the regulatory agency;

1 c. The regulated entity does not correct the violation within sixty days of discovery  
2 or, if correction within sixty days is not possible, within a reasonable period as  
3 agreed upon in writing by the regulatory agency, but not to exceed three hundred  
4 sixty-five days;

5 d. The regulated entity established a pattern of repeated violations of environmental  
6 law, rule, permit, or order by committing the same or similar violation that resulted  
7 in the imposition of a penalty by a regulatory agency more than once within two  
8 years before the date of the disclosure;

9 e. The regulated entity willfully violated a state or federal environmental law, rule, or  
10 permit;

11 f. The violation is a result of gross negligence, as defined under section 1-01-17; or

12 g. The regulatory agency assumed primacy over a federally delegated  
13 environmental program and a waiver of penalty authority for the violation would  
14 result in a state program less stringent than the federal program or the waiver  
15 would violate any federal rule required to maintain primacy. If a federally  
16 delegated program requires the imposition of a penalty for a violation, to the  
17 extent allowed under federal law or rule, the voluntary disclosure must be  
18 considered a mitigating factor in determining the penalty amount.

19 3. To qualify for a penalty exemption under subsection 2, the regulated entity shall notify  
20 the regulatory agency in writing before beginning the environmental audit. The notice  
21 must specify the facility or portion of the facility to be audited, the audit's anticipated  
22 start date, and the general scope of the audit. Unless the regulatory agency agrees in  
23 writing to an extension, the environmental audit must be completed within one  
24 hundred eighty days of the start date. This section may not be construed to authorize  
25 uninterrupted or continuous environmental audits.

26 4. Reporting a violation is mandatory if the reporting is required under chapter 23-25,  
27 23-20.3, 23-29, 38-08, or 61-28, any rule or permit implementing those chapters, any  
28 federal law or rule, or any administrative or court order.

29 5. Notwithstanding subsection 2, the regulatory agency may pursue civil penalties  
30 against a regulated entity for a violation disclosed under this section if the regulatory  
31 agency finds the regulated entity:

- 1           a. Intentionally misrepresented material facts concerning the violation disclosed or  
2           the nature of extent of any damage to human health or the environment; or  
3           b. Initiated a self-audit to avoid liability for a violation after the regulated entity's  
4           knowledge or imminent discovery.
- 5           6. Unless the privilege is expressly waived by the regulated entity that prepared the  
6           report, an environmental audit report is privileged and not admissible evidence in a  
7           civil action or proceeding. The regulated entity asserting this privilege has the burden  
8           of proving the privilege. The privilege does not apply to:
- 9           a. Information relating to the types of violations listed in subsection 2.  
10           b. Information relating to a violation subject to a regulatory agency's finding under  
11           subsection 5.
- 12           c. Disclosures, notifications, and other information provided by the regulated entity  
13           to the regulatory agency under this section.
- 14           7. Failure to label a document in an exhibit or appendix to an environmental audit report  
15           does not constitute a waiver of the audit privilege under this section or create a  
16           presumption the privilege does not apply.