

## CHAPTER 32-40.2 ENVIRONMENTAL AUDITS

### 32-40.2-01. Environmental audits - Violations.

1. As used in this section:
  - a. "Environmental audit" means a voluntary, internal, and comprehensive evaluation of a facility or activity which is intended to prevent noncompliance with environmental laws, rules, or permits enforced by a regulatory agency under chapter 23.1-04, 23.1-06, 23.1-08, 38-08, or 61-28. An environmental audit may be conducted by an owner, operator, or prospective owner or operator. An employee or independent contractor may conduct an environmental audit on behalf of the owner, operator, or prospective owner or operator.
  - b. "Environmental audit report" means a set of documents labeled "Environmental Audit Report: Privileged Document" prepared as a result of an environmental audit which must include a description of the scope of the audit; the information gained in the audit and findings, conclusions, and recommendations; and exhibits and appendices. The exhibits and appendices to the environmental audit report may include interviews with current or former employees, field notes and records of observations, findings, opinions, suggestions, conclusions, guidance, notes, drafts, memoranda, legal analyses, drawings, photographs, laboratory analyses and other analytical data, computer-generated or electronically recorded information, maps, charts, graphs, and surveys and other communications associated with an environmental audit.
  - c. "Regulatory agency" means the agency with regulatory authority over the facility or activity.
  - d. "Willfully" has the same meaning as provided under section 12.1-02-02.
2. A regulatory agency may not pursue civil penalties for a violation found during an environmental audit which the regulated entity discloses to the regulatory agency in writing within forty-five days after the violation is found, unless:
  - a. The violation caused imminent or substantial harm to human health or the environment;
  - b. The violation is found by the regulatory agency before the regulated entity discloses the violation in writing to the regulatory agency;
  - c. The regulated entity does not correct the violation within sixty days of discovery or, if correction within sixty days is not possible, within a reasonable period as agreed upon in writing by the regulatory agency, but not to exceed three hundred sixty-five days;
  - d. The regulated entity established a pattern of repeated violations of environmental law, rule, permit, or order by committing the same or similar violation that resulted in the imposition of a penalty by a regulatory agency more than once within two years before the date of the disclosure;
  - e. The regulated entity willfully violated a state or federal environmental law, rule, or permit;
  - f. The violation is a result of gross negligence, as defined under section 1-01-17; or
  - g. The regulatory agency assumed primacy over a federally delegated environmental program and a waiver of penalty authority for the violation would result in a state program less stringent than the federal program or the waiver would violate any federal rule required to maintain primacy. If a federally delegated program requires the imposition of a penalty for a violation, to the extent allowed under federal law or rule, the voluntary disclosure must be considered a mitigating factor in determining the penalty amount.
3. To qualify for a penalty exemption under subsection 2, the regulated entity shall notify the regulatory agency in writing before beginning the environmental audit. The notice must specify the facility or portion of the facility to be audited, the audit's anticipated start date, and the general scope of the audit. Unless the regulatory agency agrees in writing to an extension, the environmental audit must be completed within one hundred

- eighty days of the start date. This section may not be construed to authorize uninterrupted or continuous environmental audits.
4. Reporting a violation is mandatory if the reporting is required under chapter 23.1-04, 23.1-06, 23.1-08, 38-08, or 61-28, any rule or permit implementing those chapters, any federal law or rule, or any administrative or court order.
  5. Notwithstanding subsection 2, the regulatory agency may pursue civil penalties against a regulated entity for a violation disclosed under this section if the regulatory agency finds the regulated entity:
    - a. Intentionally misrepresented material facts concerning the violation disclosed or the nature or extent of any damage to human health or the environment; or
    - b. Initiated a self-audit to avoid liability for a violation after the regulated entity's knowledge or imminent discovery.
  6. Unless the privilege is expressly waived by the regulated entity that prepared the report, an environmental audit report is privileged and not admissible evidence in a civil action or proceeding. The regulated entity asserting this privilege has the burden of proving the privilege. The privilege does not apply to:
    - a. Information relating to the types of violations listed in subsection 2.
    - b. Information relating to a violation subject to a regulatory agency's finding under subsection 5.
    - c. Disclosures, notifications, and other information provided by the regulated entity to the regulatory agency under this section.
  7. Failure to label a document in an exhibit or appendix to an environmental audit report does not constitute a waiver of the audit privilege under this section or create a presumption the privilege does not apply.