

105TH CONGRESS
1ST SESSION

S. 1332

To amend title 28, United States Code, to recognize and protect State efforts to improve environmental mitigation and compliance through the promotion of voluntary environmental audits, including limited protection from discovery and limited protection from penalties, and for other purposes.

IN THE SENATE OF THE UNITED STATES

OCTOBER 29, 1997

Mr. ENZI introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

A BILL

To amend title 28, United States Code, to recognize and protect State efforts to improve environmental mitigation and compliance through the promotion of voluntary environmental audits, including limited protection from discovery and limited protection from penalties, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “State Environmental
5 Audit Protection Act”.

1 **SEC. 2. FINDINGS.**

2 Congress finds that—

3 (1) consistent with the purpose of voluntary en-
4 vironmental audits of enhancing United States envi-
5 ronmental mitigation efforts, it is in the interest of
6 the United States to allow and encourage States to
7 enact and implement such incentive programs as are
8 consistent with the specific and respective needs and
9 situations of the States;

10 (2) State environmental incentive laws should
11 be allowed and encouraged by the Federal govern-
12 ment as a means of enabling regulated entities to set
13 minimum requirements in environmental mitigation
14 efforts by the entities;

15 (3) a strong regulatory enforcement effort is
16 necessary to ensure compliance with Federal, State,
17 and local laws that protect the environment and
18 public health;

19 (4) the use of voluntary environmental audits,
20 in accordance with respective State laws, is intended
21 to supplement, not supplant, regulatory enforcement
22 efforts to improve the environmental compliance of
23 regulated entities;

24 (5) the protections offered by the amendments
25 made by this Act do not relieve regulated entities
26 from the need to comply with otherwise applicable

1 requirements to disclose information under Federal,
2 State, or local environmental laws; and

3 (6)(A) law and regulatory policies provide
4 ample precedent for the constructive use of vol-
5 untary audits;

6 (B) the final policy on the use of environmental
7 audits (60 Fed. Reg. 66706) issued by the Adminis-
8 trator of the Environmental Protection Agency—

9 (i) provides incentives for conducting au-
10 dits; and

11 (ii) includes limited protection from discov-
12 ery and disclosure of audit information and dis-
13 cretionary relief from an enforcement action for
14 voluntary disclosure of violations;

15 (C) Advisory Circular 120–56, issued by the
16 Administrator of the Federal Aviation Administra-
17 tion, commits to a policy of cooperative problem-solv-
18 ing and use of self-evaluation incentives as a means
19 of enhancing aviation safety in the commercial air-
20 line industry; and

21 (D) the Equal Credit Opportunity Act (15
22 U.S.C. 1691 et seq.) provides discovery protection
23 for information developed by creditors as a result of
24 self-tests that are voluntarily conducted to determine
25 the level of compliance with that Act.

1 **SEC. 3. VOLUNTARY AUDIT PROTECTION.**

2 (a) IN GENERAL.—Part VI of title 28, United States
3 Code, is amended by inserting after chapter 176 the fol-
4 lowing:

5 **“CHAPTER 177—VOLUNTARY AUDIT**
6 **PROTECTION**

“Sec.

“3601. Recognition of State efforts to provide voluntary environmental audit in-
centives.

“3602. Performance Report.

“3603. Definitions.

7 **“§ 3601. Recognition of State efforts to provide vol-**
8 **untary environmental audit incentives**

9 “(a) VOLUNTARY ENVIRONMENTAL AUDIT INCEN-
10 TIVE LAWS.—

11 “(1) LIMITED PROTECTION FROM DISCOV-
12 ERY.—

13 “(A) IN GENERAL.—Except as provided in
14 subparagraph (C), a State law may provide that
15 a voluntary environmental audit report, or a
16 finding, opinion, or other communication relat-
17 ed to and constituting part of a voluntary envi-
18 ronmental audit report, shall not be—

19 “(i) subject to discovery or any other
20 investigatory procedure governed by Fed-
21 eral, State, or local law; or

1 “(ii) admissible as evidence in any
2 Federal, State, or local judicial action or
3 administrative proceeding.

4 “(B) TESTIMONY.—Except as provided in
5 subparagraph (C), a State law may provide that
6 an entity, or an individual who performs a vol-
7 untary environmental audit on behalf of the en-
8 tity, shall not be required to give testimony in
9 any Federal, State, or local judicial action or
10 administrative proceeding concerning the vol-
11 untary environmental audit.

12 “(C) INFORMATION NOT SUBJECT TO PRO-
13 TECTION.—The protections described in sub-
14 paragraphs (A) and (B) shall not apply to any
15 information that is otherwise required to be dis-
16 closed under a Federal, State, or local law.

17 “(2) LIMITED PROTECTION FOR DISCLOSURE.—

18 “(A) IN GENERAL.—Except as provided in
19 subparagraph (B), a State law may provide
20 that an entity that promptly discloses informa-
21 tion about noncompliance with a covered Fed-
22 eral law, that is discovered as a result of a vol-
23 untary environmental audit or through a com-
24 pliance management system, to an appropriate
25 Federal, State, or local official may be pro-

1 tected, in whole or in part, from an enforcement
2 action in a Federal, State, or local judicial or
3 administrative proceeding.

4 “(B) DISCLOSURE NOT SUBJECT TO PRO-
5 TECTION.—A State law described in subpara-
6 graph (A) shall not apply to noncompliance
7 with a covered Federal law that is—

8 “(i) not discovered voluntarily; or

9 “(ii) the result of a willful and know-
10 ing violation or gross negligence by the en-
11 tity disclosing the information.

12 “(b) PROHIBITED FEDERAL ACTIVITIES.—A Federal
13 agency shall not—

14 “(1) refuse to delegate enforcement authority
15 under a covered Federal law to a State or local
16 agency or refuse to approve or authorize a State or
17 local program under a covered Federal law because
18 the State has in effect a voluntary environmental
19 audit incentive law;

20 “(2) make a permit, license, or other authoriza-
21 tion, a contract, or a consent decree or other settle-
22 ment agreement contingent on a person waiving any
23 protection under a State voluntary environmental
24 audit incentive law; or

1 “(3) take any other action that has the effect
2 of requiring a State to rescind or limit any protec-
3 tion of a State voluntary environmental audit incen-
4 tive law.

5 **“§ 3602. Performance report**

6 “(a) IN GENERAL.—Section 3601 shall not apply to
7 a State voluntary environmental audit incentive law unless
8 the appropriate State agency compiles and submits to ap-
9 propriate Federal agencies an annual report in accordance
10 with this section on the performance of the State vol-
11 untary environmental audit incentive law during the pre-
12 vious calendar year.

13 “(b) PROVISIONS OF REPORT.—The performance re-
14 port shall include—

15 “(1) the number of noncompliance disclosures
16 that were received by the State pursuant to the
17 State voluntary environmental audit incentive law,
18 with an indication of the noncompliance disclosures
19 that were made by—

20 “(A) regulated entities that are normally
21 inspected; and

22 “(B) regulated entities that are not on in-
23 spection schedules;

24 “(2) the categories and sizes of regulated enti-
25 ties that disclosed noncompliance problems pursuant

1 to the State voluntary environmental audit incentive
 2 law and a description of the noncompliance problems
 3 that were disclosed;

4 “(3) the status of remediation undertaken by
 5 regulated entities in the State to correct noncompli-
 6 ance problems that were disclosed pursuant to the
 7 State voluntary environmental audit incentive law;
 8 and

9 “(4) a certification from the State attorney gen-
 10 eral that the State maintains the necessary regu-
 11 latory authority to carry out administration and en-
 12 forcement of delegated programs in light of the
 13 State voluntary environmental audit incentive law.

14 “(c) ADDITIONAL INFORMATION.—In addition to the
 15 information required under subsection (b), the State agen-
 16 cy may include additional information in the annual per-
 17 formance report that the State agency considers important
 18 to demonstrate the performance of a State voluntary envi-
 19 ronmental audit law.

20 **“§ 3603. Definitions**

21 “In this chapter:

22 “(1) COVERED FEDERAL LAW.—

23 “(A) IN GENERAL.—The term ‘covered
 24 Federal law’ means—

1 “(i) the Federal Insecticide, Fun-
2 gicide, and Rodenticide Act (7 U.S.C. 136
3 et seq.);

4 “(ii) the Toxic Substances Control Act
5 (15 U.S.C. 2601 et seq.);

6 “(iii) the Federal Water Pollution
7 Control Act (commonly known as the
8 ‘Clean Water Act’) (33 U.S.C. 1251 et
9 seq.);

10 “(iv) the Oil Pollution Act of 1990
11 (33 U.S.C. 2701 et seq.);

12 “(v) the Safe Drinking Water Act (42
13 U.S.C. 300f et seq.);

14 “(vi) the Noise Control Act of 1972
15 (42 U.S.C. 4901 et seq.);

16 “(vii) the Solid Waste Disposal Act
17 (42 U.S.C. 6901 et seq.);

18 “(viii) the Clean Air Act (42 U.S.C.
19 7401 et seq.);

20 “(ix) the Comprehensive Environ-
21 mental Response, Compensation, and Li-
22 ability Act of 1980 (42 U.S.C. 9601 et
23 seq.);

1 “(x) the Emergency Planning and
2 Community Right-To-Know Act of 1986
3 (42 U.S.C. 11001 et seq.);

4 “(xi) the Pollution Prevention Act of
5 1990 (42 U.S.C. 13101 et seq.);

6 “(xii) the Endangered Species Act of
7 1973 (16 U.S.C. 1531 et seq.);

8 “(xiii) chapter 51 of title 49, United
9 States Code;

10 “(xiv) section 13 or 16 of the Act en-
11 titled ‘An Act making appropriations for
12 the construction, repair, and preservation
13 of certain public works on rivers and har-
14 bors, and for other purposes’, approved
15 March 3, 1899 (commonly known as the
16 ‘River and Harbor Act of 1899’) (33
17 U.S.C. 407, 411);

18 “(xv) the Surface Mining Control and
19 Reclamation Act of 1977 (30 U.S.C. 1201
20 et seq.); and

21 “(xvi) any other law enacted after the
22 date of enactment of this chapter that ad-
23 dresses subject matter similar to a law
24 listed in clauses (i) through (xv).

1 “(B) INCLUSIONS.—The term ‘covered
2 Federal law’ includes—

3 “(i) a regulation or other binding
4 agency action issued under a law referred
5 to in subparagraph (A);

6 “(ii) the terms and conditions of a
7 permit issued or other administrative ac-
8 tion taken under a law referred to in sub-
9 paragraph (A); and

10 “(iii) a State law that operates as a
11 federally enforceable law under a law re-
12 ferred to in subparagraph (A) as a result
13 of the delegation, approval, or authoriza-
14 tion of a State activity or program.

15 “(2) ENFORCEMENT ACTION.—

16 “(A) IN GENERAL.—The term ‘enforce-
17 ment action’ means a civil or administrative ac-
18 tion undertaken for the purpose of imposing a
19 penalty or any other punitive sanction, includ-
20 ing imposition of a restriction on providing to
21 or receiving from the United States or any
22 State or political subdivision a good, material,
23 service, grant, license, permit, or other approval
24 or benefit.

1 “(B) EXCLUSION.—The term ‘enforcement
2 action’ does not include an action solely for the
3 purpose of seeking injunctive relief to remedy a
4 continuing adverse public health or environ-
5 mental effect of a violation.

6 “(4) ENVIRONMENTAL COMPLIANCE MANAGE-
7 MENT SYSTEM.—The term ‘environmental compli-
8 ance management system’ means the systematic ef-
9 fort of a person or government entity, appropriate to
10 the size and nature of the person or government en-
11 tity, to prevent, detect, and correct a violation of a
12 covered Federal law through—

13 “(A) a compliance policy, standard, or pro-
14 cedure that identifies how an employee or agent
15 shall meet the requirements of the law;

16 “(B) assignment of overall responsibility
17 for overseeing compliance with policies, stand-
18 ards, and procedures, and assignment of spe-
19 cific responsibility for ensuring compliance at
20 each facility or operation;

21 “(C) a mechanism for systematically en-
22 suring that compliance policies, standards, and
23 procedures are being carried out, including—

1 “(i) a monitoring or auditing system
2 that is reasonably designed to detect and
3 correct a violation; and

4 “(ii) a means for an employee or
5 agent to report a violation of an environ-
6 mental requirement without fear of retalia-
7 tion;

8 “(D) an effort to communicate effectively
9 the standards and procedures of the person or
10 government entity to employees and agents of
11 the person or government entity;

12 “(E) an appropriate incentive to managers
13 and employees of the person or government en-
14 tity to perform in accordance with any compli-
15 ance policy or procedure of the person or gov-
16 ernment entity, including consistent enforce-
17 ment through an appropriate disciplinary mech-
18 anism; and

19 “(F) a procedure for—

20 “(i) the prompt and appropriate cor-
21 rection of any violation of law; and

22 “(ii) making any necessary modifica-
23 tions to the standards or procedures of the
24 person or government entity to prevent fu-
25 ture violations of law.

1 “(5) FEDERAL AGENCY.—

2 “(A) IN GENERAL.—The term ‘Federal
3 agency’ has the meaning given the term ‘agen-
4 cy’ in section 551 of title 5, United States
5 Code.

6 “(B) INCLUSIONS.—The term ‘Federal
7 agency’ includes any agency or instrumentality
8 of an Indian Tribe with authority to administer
9 or enforce a covered Federal law.

10 “(6) REGULATED ENTITY.—

11 “(A) IN GENERAL.—The term ‘regulated
12 entity’ means a person regulated under a cov-
13 ered Federal law, including an officer, agent, or
14 employee of the person.

15 “(B) EXCLUSIONS.—The term ‘regulated
16 entity’ does not include an entity owned or op-
17 erated by a Federal or State agency.

18 “(7) STATE AGENCY.—The term ‘State agency’
19 means an agency or instrumentality of the executive
20 branch of a State or local government with the au-
21 thority to administer or enforce any covered Federal
22 law, including an agency or instrumentality of 2 or
23 more States or local governments, whether or not
24 the localities are in different States.

1 “(8) VOLUNTARY ENVIRONMENTAL AUDIT.—

2 The term ‘voluntary environmental audit’ means an
3 assessment, audit, investigation, or review that is—

4 “(A) initiated voluntarily by a regulated
5 entity, including an officer, agent, or employee
6 of a regulated entity, but not including a regu-
7 lated entity owned or operated by a State or
8 Federal agency;

9 “(B) carried out by an employee of the
10 person, or a consultant employed by the person,
11 for the purpose of carrying out the assessment,
12 evaluation, investigation, or review; and

13 “(C) carried out in good faith for the pur-
14 pose of determining or improving compliance
15 with, or liability under, a covered Federal law,
16 or to assess the effectiveness of an environ-
17 mental compliance management system.

18 “(9) VOLUNTARY ENVIRONMENTAL AUDIT RE-
19 PORT.—

20 “(A) IN GENERAL.—The term ‘voluntary
21 environmental audit report’ means a document
22 prepared as a result of a voluntary environ-
23 mental audit.

24 “(B) INCLUSIONS.—The term ‘voluntary
25 environmental audit report’ includes—

1 “(i) a field note, draft, memorandum,
2 drawing, photograph, computer software,
3 stored or electronically recorded informa-
4 tion, map, chart, graph, survey, analysis
5 (including a laboratory result, instrument
6 reading, or field analysis), and other infor-
7 mation pertaining to an observation, find-
8 ing, opinion, suggestion, or conclusion, if
9 the information is collected or developed
10 for the primary purpose and in the course
11 of creating a voluntary environmental
12 audit;

13 “(ii) a document prepared by an audi-
14 tor or evaluator, which may describe the
15 scope of the evaluation, the information
16 learned, any conclusions or recommenda-
17 tions, and any exhibits or appendices;

18 “(iii) an analysis of all or part of a
19 voluntary environmental audit or issues
20 arising from the audit; and

21 “(iv) an implementation plan or track-
22 ing system that addresses an action taken
23 or to be taken by the owner or operator of
24 a facility as a result of a voluntary envi-
25 ronmental audit.”.

1 (b) CONFORMING AMENDMENT.—The table of chap-
 2 ters of part VI of title 28, United States Code, is amended
 3 by inserting after the item relating to chapter 176 the fol-
 4 lowing:

“177. Voluntary Audit Protection 3601”.

5 **SEC. 4. ASSISTANCE FROM SMALL BUSINESS DEVELOP-**
 6 **MENT CENTERS.**

7 Section 21(c)(3) of the Small Business Act (15
 8 U.S.C. 648(c)(3)) is amended—

9 (1) in subparagraph (Q), by striking “and” at
 10 the end;

11 (2) in subparagraph (R), by striking the period
 12 at the end and inserting “; and”; and

13 (3) by adding at the end the following:

14 “(S) assisting small businesses in comply-
 15 ing with the requirements necessary to receive
 16 protections provided by any applicable State
 17 voluntary environmental audit incentive law.”.

○