

ALEC EXPOSED

"ALEC" has long been a secretive collaboration between Big Business and "conservative" politicians. Behind closed doors, they ghostwrite "model" bills to be introduced in state capitols across the country. This agenda-underwritten by global corporations-- includes major tax loopholes for big industries and the super rich, proposals to offshore U.S. jobs and gut minimum wage, and efforts to weaken public health, safety, and environmental protections. Although many of these bills have become law, until now, their origin has been largely unknown. With **ALEC EXPOSED**, the Center for Media and Democracy hopes more Americans will study the bills to understand the depth and breadth of how big corporations are changing the legal rules and undermining democracy across the nation.

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DID YOU KNOW? Corporations VOTED to adopt this. Through ALEC, global companies work as "equals" in "unison" with politicians to write laws to govern your life. Big Business has "a VOICE and a VOTE," according to newly exposed documents. **DO YOU?**

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Environmental Audit Privilege and Qualified Disclosure Act

Summary

This Act provides confidentiality and limited protection from civil, criminal or administrative proceedings to companies that conduct voluntary internal environmental audits to identify, prevent and correct areas of noncompliance with federal, state and local environmental statutes. The Audit Privilege is designed to give industry greater incentive to comply with environmental laws. The Audit Privilege does not apply to companies that intentionally and willfully disregard environmental laws or who have a history of continuous or repeated violations. State law enforcement authorities may make a written request or subpoena for an Audit Report and request an in camera hearing to determine whether the Audit Report is subject to disclosure.

Model Legislation

Section 1. {Title.} This Act may be cited as the "Uniform State Environmental Audit Privilege and Qualified Disclosure Act."

Section 2. {Legislative findings & declarations.} The legislature hereby finds and declares that:

(A) Protection of the environment and industrial health and safety rests principally on the public's voluntary compliance with environmental, health and safety laws; that voluntary compliance is most effectively achieved through the implementation of regular self-evaluative activities such as audits of compliance status and management systems to assure compliance; and that it is in the public interest to encourage such activities by assuring limited protection of audit findings and of fair treatment of those who report audit findings to regulatory authorities.

(B) In order to encourage owners and operators of facilities and other persons conducting activities regulated under [the state's environmental, health and safety laws], or the federal, regional or local counterpart or extension of such statutes, both to conduct voluntary internal environmental, health and safety (EHS) audits of their compliance programs and management systems and to assess and improve compliance with such statutes, an EHS audit privilege is recognized to protect the confidentiality of communications relating to such voluntary internal environmental audits.

(C) An EHS Audit Report shall be privileged, shall not be subject to discovery, and shall not be admissible as evidence in any civil, criminal or administrative proceeding, except as provided in Section 3 of this Act.

(D) If an EHS Audit Report, or any part thereof, is subject to the privilege recognized in Section 2(C), neither any person who conducted the audit nor anyone to whom the audit results are disclosed (unless such disclosure constituted a waiver of the privilege under Section 4(A) of this Act), can be compelled to testify regarding any matter which was the subject of the audit and which is addressed in a privileged part of the Audit Report.

Section 3. {Definitions.}

 As used in this Act:

(A) "EHS Audit" means a voluntary and internal evaluation, review or assessment of one or more operations or facilities, or any activity at one or more operations or facilities, regulated under [the State's EHS laws,] or the federal, regional or local counterpart or extension of such statutes, or of management systems related to such operations, facilities or activities, that is designed to identify and prevent noncompliance or to improve compliance with such statutes. An environmental audit may be conducted by the owner or operator of such operation, facility or activity by the owner's or operator's employees or by independent contractors. *

(* Note: The inclusion of "health and safety" within the audit is an optional part of this model.)

(B) "EHS Audit Report" means a set of documents prepared as a result of an environmental audit. In order to facilitate identification, each document in the set should be labeled "EHS Audit Report: Privileged Document" or words to that effect; however, failure either to label a document or to label it precisely as recommended does not constitute a waiver of the audit privilege and shall not create any presumption that such privilege does not apply. An EHS Audit Report shall include any notes, drafts, memoranda, drawings, photographs, computer-generated or electronically-recorded information, maps, charts, graphs, or surveys or any other information pertaining to observations, findings, opinions, suggestions, or conclusions, provided such supporting information is collected or developed for the primary purpose and in the course of an EHS audit. An EHS Audit Report, when completed, may include, but is neither limited to

Did you know the trade group for the gas industry was a corporate co-chair in 2011?

nor required to contain, the following general component parts:

- (1) A report prepared by the auditor, which may include the scope of the audit, the information gained in the audit, conclusions and recommendations, together with exhibits and appendices;
 - (2) Memoranda and documents analyzing portions or all of the audit report or discussing implementation issues; and
 - (3) An implementation plan or tracking system that addresses correcting past noncompliance, improving current compliance or preventing future noncompliance.
- (C) A "Compliance Management System" is a voluntary compliance assurance program having at least the following elements: *
- (* Note: The inclusion of any provisions dealing with "Compliance Management Systems" is an optional feature of the model bill.)
- (1) An environmental policy requiring conduct of operations in compliance with environmental requirements;
 - (2) Incentives to encourage employees to ensure compliance and report violations to senior management;
 - (3) A clear definition of responsibility for compliance for each facility or operation;
 - (4) Adequate resources dedicated to compliance assurance activities;
 - (5) Training for employees with responsibilities related to compliance operations;
 - (6) Systematically implemented procedures for bringing about compliance at each facility or operation;
 - (7) Regular facility or operation-specific reviews of compliance;
 - (8) Auditing of compliance by qualified personnel who are independent from those who manage facility or site operations;
 - (9) A mechanism to ensure prompt action to correct noncompliance and address the underlying cause;
 - (10) A mechanism for disciplining employees who intentionally or negligently contribute to the commission of violations;
 - (11) Effective management oversight of compliance and compliance correction; and
 - (12) A regular management review of compliance performance and management systems to identify needed improvements.
- (D) "Intentional and willful" as used in this Act include both intentional and willful acts and intentional and willful disregard of the law. A pattern of continuous or repeated violations may be considered in determining whether a person or entity has intentionally and willfully disregarded the law.

Section 4. {Privilege waivers.}

(A) The privilege described in Section 2(C) of this Act does not apply to the extent that it is waived by the owner or operator of a facility at which an EHS audit was conducted and who prepared or caused to be prepared the EHS Audit Report as a result of the audit.

(1) The EHS Audit Report and information generated by the EHS audit may be disclosed to any person employed by the owner or operator of the audited facility, any legal representative of the owner or operator, or any independent contractor retained by the owner or operator to address an issue or issues raised by the EHS audit, without waiving the privilege in Section 2(C).

(2) Disclosure of the EHS Audit Report or any information generated by the EHS audit under the following circumstances shall not waive the privilege in Section 2(C):

(i) Disclosure made under the terms of a confidentiality agreement between the entity or person for whom the Audit Report was prepared or the owner or operator of the facility audited and a partner or potential partner, a transferee or potential transferee of, or a lender or potential lender for, the business or facility audited;

(ii) Disclosure made under the terms of a confidentiality agreement between government officials and the entity or person for whom the Audit Report was prepared or the owner or operator of the operation or facility audited.

Section 5. {Review of an Environmental Audit Report.}

(A) This section provides the exclusive procedure for the review of Environmental Audit Reports.

(B) Request by State Law Enforcement Authorities by Written Request or Subpoena.

(1) State Law Enforcement Authorities may (i) make a written request for disclosure of an EHS Audit Report under this subsection, provided such request is delivered by certified mail or (ii) demand by lawful subpoena the disclosure of an EHS Audit Report. Within 60 days after receipt of such request or subpoena, the person asserting the privilege may file with the appropriate court or administrative law judge*, and serve upon the requesting state law enforcement authority, a petition requesting an in camera hearing on whether the EHS Audit Report or portions of the report are privileged under

this Act or subject to disclosure. The [Insert appropriately] Courts of this State shall have jurisdiction over a petition filed under this subsection requesting such a hearing. Failure of the person asserting the privilege to file such a petition waives the privilege as to that person.

(* Note: Substitute local state equivalent of "administrative law judge" if necessary.)

(2) The person asserting the privilege in response to a request or subpoena for disclosure under this subsection shall provide a copy of the EHS Audit Report to the Court and shall also include in its request for an in camera hearing all of the following:

- (i) The year the EHS Audit Report was prepared;
- (ii) The identity of the entity conducting the audit;
- (iii) The name of the audited facility or facilities;
- (iv) A brief description of the portion or portions of the EHS Audit Report for which privilege is claimed.

(3) Upon the filing of a petition under this subsection, the Court shall issue an order scheduling, within 45 days after the filing of the petition, an in camera hearing to determine whether the EHS Audit Report or portions of such report are privileged or subject to disclosure under this Section.

(4) The court or administrative law judge*, after in camera review, may require disclosure of material for which the privilege in this Subsection is asserted, if such court or administrative law judge * determines that:

(* Note: Substitute local state equivalent of "administrative law judge" if necessary.)

- (i) The privilege is asserted for a fraudulent purpose;
- (ii) The material is not subject to the privilege; or
- (iii) Even if subject to the privilege, the material shows evidence of noncompliance with State, federal, regional or local environmental, health and safety law, regulations, ordinances or orders and the owner or operator failed to undertake appropriate corrective action or eliminate any violation of law identified during the EHS Audit within a reasonable time.

(C) Seizure by Law Enforcement Authorities.

(1) To the extent authorized by [the State's criminal procedure] the State may seize an EHS Audit Report for which a privilege is asserted under Section 2(C) of this Act, pursuant to a lawful search warrant. The State shall immediately place the EHS Audit Report under seal and shall also immediately file it with the Court which authorized the search warrant. Unless and until the Court orders disclosure under subparagraph (C)(5) below, or the privilege has been waived, the State shall not inspect, review or disclose the contents of the EHS Audit Report. Within 60 days after seizure, the person asserting the privilege may file with the Court a petition requesting an in camera hearing on whether the EHS Audit Report or portions of the report are privileged under this Section or subject to disclosure. Failure of the person asserting the privilege to file such a petition waives the privilege as to that person.

(2) The person asserting the privilege in response to a request for disclosure under this subsection shall include in its request for an in camera hearing all of the following:

- (i) The year the EHS Audit Report was prepared;
- (ii) The identity of the entity conducting the audit;
- (iii) The name of the audited facility or facilities;
- (iv) A brief description of the portion or portions of the EHS Audit Report for which privilege is claimed.

(3) Upon the filing of a petition under this subsection, the Court shall issue an order scheduling, within 45 days after the filing of the petition, an in camera hearing to determine whether the Environmental Audit Report or portions of such report are privileged or subject to disclosure under this Section.

(4) The Court, after in camera review, may require disclosure of material for which the privilege is asserted under this Subsection, if such Court determines that:

- (i) The privilege is asserted for a fraudulent purpose;
- (ii) The material is not subject to the privilege; or
- (iii) Even if subject to the privilege, the material shows evidence of noncompliance with State, federal, regional or local environmental, health or safety law, regulations, ordinances or orders and the owner or operator failed to undertake appropriate corrective action or eliminate any violation of law identified during the EHS Audit within a reasonable time.

(D) In any proceeding not covered by subsection (B) or (C) of this Section, a court of record, after in camera review consistent with the [State's] rules of civil or criminal procedure, may require disclosure of the material for which the privilege described in Section 2(C) of this Act is asserted, if such court determines that:

- (1) The privilege is asserted for a fraudulent purpose;
- (2) The material is not subject to the privilege; or

(3) Even if subject to the privilege, the material shows evidence of noncompliance with State, federal, regional or local environmental law, regulations, ordinances or orders and the owner or operator failed to undertake appropriate corrective action or eliminate any violation of law identified during the EHS Audit within a reasonable time.

(E) If any party divulges or disseminates all or any part of the information contained in an EHS audit report in violation of the provisions of this Section, or knowingly divulges or disseminates all or any part of the information contained in an EHS Audit Report that was provided to such party in violation of the provisions of this Section, such party shall be guilty of a [State law] misdemeanor and shall be penalized not more than twenty-five thousand dollars. The Court may also sanction such person through contempt proceedings and may order such other relief as appropriate.

(F) A party asserting the EHS audit privilege described in Section 2(C) of this Act has the burden of demonstrating to the court or administrative law judge, ex parte, a prima facie basis for the applicability of the privilege, including -- if there is evidence presented by the party seeking disclosure of the EHS Audit Report of noncompliance by the party asserting the privilege with [the State's EHS laws], or the federal, regional or local counterpart or extension of such statutes -- a showing that to the extent such noncompliance was identified by the EHS audit, appropriate efforts to achieve compliance were promptly initiated and pursued with reasonable diligence; provided, however, that a party seeking disclosure under Section 5(B) of this Act has the ultimate burden of persuasion that the privilege does not apply and disclosure is appropriate.

(G) Failure to comply with the review, disclosure or use prohibitions of this section shall be the basis, in any civil, criminal or administrative proceeding, for suppression of any evidence arising or derived from the unauthorized review, disclosure or use. A party allegedly failing to comply with this Section shall have the burden of proving that proffered evidence did not arise and was not derived from the unauthorized activity.

(H) The parties may at anytime stipulate to entry of an order directing that specific information contained in an EHS Audit Report is or is not subject to the privilege provided under Section 2(C) of this Act.

(I) Upon making a disclosure determination under Section 5(B)-(D) of this Act, the Court may compel the disclosure only of those portions of an EHS Audit Report relevant to issues in dispute in the proceeding.

Section 6. {Extent of privilege.}

(A) The privilege described in Section 2(C) of this Act shall not extend to:

(1) Documents, communications, data, reports or other information required to be collected, developed, maintained, or reported to a regulatory agency pursuant to [State EHS law], or other federal, State or local law, ordinance, regulation, permit or order;

(2) Information obtained by observation, sampling or monitoring by any regulatory agency; or

(3) Information obtained from a source independent of the EHS audit.

Section 7. {Scope of privilege.} Nothing in this Act shall limit, waive or abrogate the scope or nature of any statutory or common law privilege, including the work product doctrine and the attorney-client privilege.

Section 8. {Qualifying disclosure.}

(A) If any person or entity, consistent with the requirements of Section 6(A)(2), makes a qualifying disclosure of a violation of [the State's EHS laws,] or the federal, regional or local counterpart or extension of such laws, there shall be a rebuttable presumption that the person or entity is immune from any administrative, civil or criminal penalties for the violation disclosed.

(B) For the purposes of this Section, a qualifying disclosure is one
:

(1) made promptly after knowledge of the information disclosed is obtained by the person or entity;

(2) made to an agency having regulatory authority with regard to the violation disclosed;

(3) arising out of either a voluntary EHS audit or the operation of a Compliance Management System;*

[*Note: If it is decided that Section 6 should not be extended to cover disclosures from the operation of a Compliance Management System but should cover only EHS audits, this Section should read: "(3) arising out of a voluntary EHS audit;" and Section 3(C) should be deleted]

(4) for which the person or entity making the disclosure initiates the appropriate effort to achieve compliance, pursues compliance with due diligence, and corrects the noncompliance within a reasonable time; and

(5) in which the person or entity making the disclosure cooperates with the appropriate agency in connection with investigation of the issues identified in the disclosure.

(C) (1) If the disclosing person or entity has a Compliance Management System and the disclosure arises out of the operation of that system, the disclosure does not qualify for purposes of subsection (A) and (B) of this Section if it is a report to a regulatory authority of monitoring that is required to be reported by a specific monitoring and reporting condition of an enforcement order or decree.

(2) If the disclosure does not arise out of the operation of a Compliance Management System but is the result of a voluntary EHS Audit, the otherwise qualifying disclosure does not qualify for purposes of subsection (A) and (B) of this Section if it is a report to a regulatory authority of monitoring results that are required to be reported by a specific permit term or an enforcement order or decree.*

[*Note: If it is decided that Section 8 should not be extended to cover disclosures from the operation of a Compliance Management System but should cover only EHS Audits, this Section should read: "(C) A disclosure does not qualify for purposes of this Section if it is a report to a regulatory authority of monitoring results that are required to be reported under the specific terms of a permit or enforcement order or decree."]

(D) (1) The presumption recognized in Section 8(A) may be rebutted and civil penalties may be imposed under State law if, and to the extent that, any of the following are established:

(i) That the disclosure did not qualify within the meaning of this Section;

(ii) That the violation was committed intentionally and willfully by the person or entity making the disclosure;

(iii) That the violation was not fully corrected in a diligent manner;

(iv) That significant environmental harm or a significant adverse public health effect was caused by the violation; or *

(v) That the person or entity making the disclosure realized significant economic advantage from the violation (after taking into account the cost of remedying the noncompliance).*

(* Note: Subparagraphs iv and v are optional provisions in the model bill.)

(2) The presumption recognized in Section 8(A) may be rebutted and criminal penalties may be imposed under State law against a disclosing person or entity satisfying all of the conditions of Section 8(B) only in the following circumstances:

(i) Criminal sanctions may be sought against such a person only where the person committed, or aided or abetted the commission of, the disclosed violation intentionally and willfully.

(ii) Criminal sanctions may be sought against such an entity only where the offense was committed intentionally and willfully by a member of the entity's management and the entity's policies or lack of prevention actions or systems contributed materially to the occurrence of the violation.

(E) A penalty imposed because of establishment of one or more of the exceptions in subsection

(D) should, to the extent appropriate, be mitigated due to factors relating to the nature of the disclosure, efforts of the disclosing person or entity to prevent violations or harm to the environment, or other relevant considerations.

(F) In any enforcement action brought against a person or entity regarding an alleged violation for which the person or entity claims to have made a qualifying disclosure within the meaning of this Section, the burden of proof concerning voluntariness of the disclosure shall be allocated as follows:

(1) The person or entity making the qualifying disclosure claim shall have the burden of establishing a prima facie case that the disclosure was qualified within the meaning of subsection (B).

(2) Once a prima facie case under subsection (B)1 is established, the enforcement authority shall have the burden of rebutting the presumption by a preponderance of evidence or, in a criminal case, by proof beyond a reasonable doubt.

Section 9. {Severability clause.}

Section 10. {Repealer clause.}

Section 11. {Effective date.}

Were your laws repealed?

ALEC's Sourcebook of American State Legislation 1996

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Exposed

By the Center for
Media and Democracy
www.prwatch.org

From CMD: This "model" bill would prevent the use of a corporation's internal environmental audits in civil, criminal, or administrative lawsuits. For example, if an energy corporation "fracking" for oil finds in an internal audit that it is poisoning groundwater, a person injured by that poisoned groundwater could not use the internal audit as evidence in a lawsuit. The Act establishes a procedure for obtaining the audit records for a criminal investigation. However, this is of little value in a civil lawsuit for personal injury: the state must have instituted criminal proceedings before a person brings their personal injury lawsuit, and even if some records are released in the course of those criminal proceedings, only records relevant to the criminal charges will be released (which may not necessarily be relevant to the civil lawsuit). See also Uniform State Environmental Audit Privilege Act

The following states had laws similar to this one on their books as of early April 2004, according to the EPA (http://www.epa.gov/region5/enforcement/audit/article_auditlaws/intro.html): Alaska (Alaska Stat. §§ 09.25.450-490 (2002)), Colorado (Colo. Rev. Stat. §§ 13-25-126.5, 25-1-114.5 (2003)), Iowa (Iowa Code Ann §§ 455K.1 to -12 (2002)), Kansas (Kan. Stat. Ann. §§ 60-3332 to -3339 (2002)), Kentucky (Ky. Rev. Stat. Ann. §§ 224.01 to -040 (Banks-Baldwin 2003)), Michigan (Mich. Comp. Laws §§ 324.14801 -14809 (2003)), Minnesota (Minn. Stat. §§ 114C.20-31 (2003)), Mississippi (Miss. Code Ann §§ 49-2-71, 49-17-43, 49-17-427, 17-17-29 (2003)), Nebraska (Neb. Rev. Stat. §§ 25-21,254 -264 (2002)), Nevada (Nev. Rev. Stat. §§ 445C.020 -120 (2002)), New Jersey (N.J. Stat. Ann. §§ 13:1D-125 to -130 (2003)), Ohio (Ohio Rev. Code Ann. §§ 3745.70 -73 (West 2003)), Rhode Island (R.I. Gen. Laws §§ 42-17.8-1 to -4 (2002)), South Carolina (S.C. Code Ann. §§ 48-57-10 to -110 (2002)), South Dakota (S.D. Codified Laws §§ 1-40-33 to -37 (2003)), Texas (Tex. Rev. Civ. Stat. Ann. art. 4447cc (2001)), Utah (Utah Code Ann. §§ 19-7-101 to -109 (2002)), Virginia (Va. Code Ann. §§ 10.1-1198 to -1199 (2003)) and Wyoming (Wy. S. 1977 s 35-11-1105 to -1106 (West 2002)).