

State of Arizona  
House of Representatives  
Fiftieth Legislature  
Second Regular Session  
2012

**CHAPTER 251**  
**HOUSE BILL 2199**

AN ACT

AMENDING TITLE 49, ARIZONA REVISED STATUTES, BY ADDING CHAPTER 10; RELATING  
TO ENVIRONMENTAL AUDITS.

(TEXT OF BILL BEGINS ON NEXT PAGE)

1 Be it enacted by the Legislature of the State of Arizona:

2 Section 1. Title 49, Arizona Revised Statutes, is amended by adding  
3 chapter 10, to read:

4 CHAPTER 10

5 ENVIRONMENTAL AUDIT PRIVILEGE  
6 ARTICLE 1. GENERAL PROVISIONS

7 49-1401. Definitions

8 IN THIS CHAPTER, UNLESS THE CONTEXT OTHERWISE REQUIRES:

9 1. "ACTUAL HARM" MEANS DAMAGE, LOSS OR INJURY.

10 2. "AUDIT REPORT" MEANS AN AUDIT REPORT PRESCRIBED BY SECTION 49-1402.

11 3. "ENVIRONMENTAL LAW" MEANS A FEDERAL, STATE OR LOCAL LAW, RULE,  
12 REGULATION OR ORDINANCE, OR A PERMIT ISSUED UNDER A FEDERAL, STATE OR LOCAL  
13 LAW, RULE, REGULATION OR ORDINANCE, RELATING TO PROTECTION OF THE  
14 ENVIRONMENT.

15 4. "ORGANIZATION" MEANS A COMPANY, CORPORATION, POLITICAL SUBDIVISION,  
16 FIRM, ENTERPRISE OR INSTITUTION, OR ANY PART OR COMBINATION THEREOF, WHETHER  
17 INCORPORATED OR NOT, PUBLIC OR PRIVATE, THAT HAS ITS OWN FUNCTIONS AND  
18 ADMINISTRATION. FOR ORGANIZATIONS WITH MORE THAN ONE OPERATING UNIT, A SINGLE  
19 OPERATING UNIT MAY BE DEFINED AS AN ORGANIZATION.

20 5. "PERSON" HAS THE SAME MEANING PRESCRIBED IN SECTION 49-201.

21 6. "REGULATED FACILITY OR OPERATION" MEANS A FACILITY OR OPERATION  
22 THAT IS REGULATED UNDER AN ENVIRONMENTAL LAW.

23 49-1402. Audit report; contents

24 A. AN AUDIT REPORT SHALL INCLUDE EACH DOCUMENT AND COMMUNICATION,  
25 OTHER THAN THOSE SET FORTH IN SECTION 49-1406, THAT IS CREATED FOR AN  
26 ENVIRONMENTAL AUDIT TO EVALUATE COMPLIANCE WITH ENVIRONMENTAL LAWS.

27 B. AN AUDIT REPORT MAY INCLUDE THE FOLLOWING:

28 1. A REPORT PREPARED BY AN AUDITOR, CONSULTANT, MONITOR OR OTHER  
29 SIMILAR PERSON, WHICH MAY INCLUDE:

30 (a) A DESCRIPTION OF THE SCOPE OF THE AUDIT.

31 (b) THE INFORMATION GAINED IN THE AUDIT AND FINDINGS, CONCLUSIONS AND  
32 RECOMMENDATIONS.

33 (c) EXHIBITS AND APPENDICES.

34 2. MEMORANDA AND DOCUMENTS ANALYZING ALL OR A PORTION OF THE MATERIALS  
35 DESCRIBED BY SUBSECTION C, PARAGRAPH 1 OF THIS SECTION OR DISCUSSING  
36 IMPLEMENTATION ISSUES.

37 3. AN IMPLEMENTATION PLAN OR TRACKING SYSTEM TO CORRECT PAST  
38 NONCOMPLIANCE, IMPROVE CURRENT COMPLIANCE OR PREVENT FUTURE NONCOMPLIANCE.

39 C. THE TYPES OF EXHIBITS AND APPENDICES THAT MAY BE CONTAINED IN AN  
40 AUDIT REPORT INCLUDE SUPPORTING INFORMATION THAT IS COLLECTED OR DEVELOPED  
41 FOR THE PRIMARY PURPOSE OF AND GATHERED IN THE COURSE OF AN ENVIRONMENTAL  
42 AUDIT, INCLUDING:

43 1. INTERVIEWS WITH CURRENT OR FORMER EMPLOYEES.

44 2. FIELD NOTES AND RECORDS OF OBSERVATIONS.

45 3. FINDINGS, OPINIONS, SUGGESTIONS, CONCLUSIONS, GUIDANCE, NOTES,  
46 DRAFTS AND MEMORANDA.

1           4. LEGAL ANALYSES.  
2           5. DRAWINGS.  
3           6. PHOTOGRAPHS.  
4           7. LABORATORY ANALYSES AND OTHER ANALYTICAL DATA.  
5           8. COMPUTER GENERATED OR ELECTRONICALLY RECORDED INFORMATION.  
6           9. MAPS, CHARTS, GRAPHS AND SURVEYS.  
7           10. OTHER COMMUNICATIONS ASSOCIATED WITH AN ENVIRONMENTAL AUDIT.  
8           D. TO FACILITATE IDENTIFICATION, EACH DOCUMENT IN AN AUDIT REPORT  
9 SHOULD BE LABELED "COMPLIANCE REPORT: PRIVILEGED DOCUMENT" OR LABELED WITH  
10 WORDS OF SIMILAR IMPORT. THE FAILURE TO LABEL A DOCUMENT DOES NOT CONSTITUTE  
11 A WAIVER OF THE AUDIT PRIVILEGE OR CREATE A PRESUMPTION THAT THE PRIVILEGE  
12 DOES OR DOES NOT APPLY.  
13           E. ONCE INITIATED, AN AUDIT SHALL BE COMPLETED WITHIN A REASONABLE  
14 TIME NOT TO EXCEED SIX MONTHS UNLESS AN EXTENSION IS BASED ON REASONABLE  
15 GROUNDS.  
16           49-1403. Privilege  
17           A. EXCEPT AS PROVIDED IN SECTIONS 49-1404, 49-1405 AND 49-1406, ANY  
18 PART OF AN AUDIT REPORT IS PRIVILEGED AND IS NOT ADMISSIBLE AS EVIDENCE OR  
19 SUBJECT TO DISCOVERY IN ANY OF THE FOLLOWING:  
20           1. A CIVIL ACTION, WHETHER LEGAL OR EQUITABLE.  
21           2. AN ADMINISTRATIVE PROCEEDING.  
22           B. WHEN CALLED OR SUBPOENAED AS A WITNESS, A PERSON CANNOT BE  
23 COMPELLED TO TESTIFY OR PRODUCE A DOCUMENT RELATED TO AN AUDIT IF BOTH OF THE  
24 FOLLOWING APPLY:  
25           1. THE TESTIMONY OR DOCUMENT DISCLOSES ANY PRIVILEGED PART OF AN AUDIT  
26 REPORT OR ANY ITEM LISTED IN SECTION 49-1402.  
27           2. FOR THE PURPOSES OF THIS SUBSECTION ONLY, THE PERSON IS:  
28           (a) A PERSON WHO CONDUCTED ANY PORTION OF THE AUDIT BUT WHO DID NOT  
29 PERSONALLY OBSERVE THE PHYSICAL EVENTS.  
30           (b) A PERSON TO WHOM THE AUDIT RESULTS ARE DISCLOSED UNDER SECTION  
31 49-1404, SUBSECTION B.  
32           (c) A CUSTODIAN OF THE AUDIT RESULTS.  
33           C. A PERSON WHO CONDUCTS OR PARTICIPATES IN THE PREPARATION OF AN  
34 ENVIRONMENTAL AUDIT AND WHO HAS ACTUALLY OBSERVED PHYSICAL EVENTS OF  
35 VIOLATION MAY TESTIFY REGARDING THOSE EVENTS BUT MAY NOT BE COMPELLED TO  
36 TESTIFY ABOUT OR PRODUCE DOCUMENTS RELATED TO ANY PRIVILEGED PART OF AN AUDIT  
37 OR ANY ITEM LISTED IN SECTION 49-1402.  
38           D. A STATE AGENCY EMPLOYEE MAY NOT REQUEST, REVIEW OR OTHERWISE USE AN  
39 AUDIT REPORT DURING AN AGENCY INSPECTION OF A REGULATED FACILITY OR OPERATION  
40 OR AN ACTIVITY OF A REGULATED FACILITY OR OPERATION.  
41           E. A PARTY ASSERTING THE PRIVILEGE PRESCRIBED IN THIS SECTION HAS THE  
42 BURDEN OF ESTABLISHING THE APPLICABILITY OF THE PRIVILEGE.

1           49-1404. Exception: waiver: violation: classification

2           A. THE PRIVILEGE PRESCRIBED IN SECTION 49-1403 DOES NOT APPLY TO THE  
3 EXTENT THE PRIVILEGE IS EXPRESSLY WAIVED BY THE OWNER OR OPERATOR WHO  
4 PREPARED THE AUDIT REPORT OR CAUSED THE REPORT TO BE PREPARED.

5           B. DISCLOSURE OF AN AUDIT REPORT OR ANY INFORMATION GENERATED BY AN  
6 ENVIRONMENTAL AUDIT DOES NOT WAIVE THE PRIVILEGE ESTABLISHED BY SECTION  
7 49-1403, IF THE DISCLOSURE COMPLIES WITH ANY OF THE FOLLOWING:

8           1. IS MADE TO ADDRESS OR CORRECT A MATTER RAISED BY THE ENVIRONMENTAL  
9 AUDIT AND IS MADE ONLY TO:

10           (a) A PERSON EMPLOYED BY THE OWNER OR OPERATOR, INCLUDING TEMPORARY  
11 AND CONTRACT EMPLOYEES.

12           (b) A LEGAL REPRESENTATIVE OF THE OWNER OR OPERATOR.

13           (c) AN OFFICER OR DIRECTOR OF THE REGULATED FACILITY OR OPERATION OR A  
14 PARTNER OF THE OWNER OR OPERATOR.

15           (d) AN INDEPENDENT CONTRACTOR RETAINED BY THE OWNER OR OPERATOR,  
16 INCLUDING ITS INDEPENDENT EXTERNAL AUDITORS.

17           2. IS MADE UNDER THE TERMS OF A CONFIDENTIALITY AGREEMENT BETWEEN THE  
18 PERSON FOR WHOM THE AUDIT REPORT WAS PREPARED OR THE OWNER OR OPERATOR OF THE  
19 AUDITED FACILITY OR OPERATION AND ANY OF THE FOLLOWING:

20           (a) A PARTNER OR POTENTIAL PARTNER OF THE OWNER OR OPERATOR OF THE  
21 REGULATED FACILITY OR OPERATION.

22           (b) A TRANSFEREE OR POTENTIAL TRANSFEREE OF THE REGULATED FACILITY OR  
23 OPERATION.

24           (c) A LENDER OR POTENTIAL LENDER FOR THE REGULATED FACILITY OR  
25 OPERATION.

26           (d) A GOVERNMENTAL OFFICIAL OF A STATE.

27           (e) A PERSON OR ENTITY ENGAGED IN THE BUSINESS OF INSURING,  
28 UNDERWRITING OR INDEMNIFYING THE FACILITY OR OPERATION.

29           3. IS MADE UNDER A CLAIM OF CONFIDENTIALITY TO A GOVERNMENTAL OFFICIAL  
30 OR AGENCY BY THE PERSON FOR WHOM THE AUDIT REPORT WAS PREPARED OR BY THE  
31 OWNER OR OPERATOR.

32           C. A PARTY TO A CONFIDENTIALITY AGREEMENT DESCRIBED IN SUBSECTION B,  
33 PARAGRAPH 2 OF THIS SECTION WHO VIOLATES THAT AGREEMENT IS LIABLE FOR DAMAGES  
34 CAUSED BY THE DISCLOSURE AND FOR ANY OTHER PENALTIES PRESCRIBED IN THE  
35 CONFIDENTIALITY AGREEMENT.

36           D. INFORMATION THAT IS DISCLOSED UNDER SUBSECTION B, PARAGRAPH 3 OF  
37 THIS SECTION IS CONFIDENTIAL AND IS NOT SUBJECT TO DISCLOSURE. AN ENTITY,  
38 EMPLOYEE OR OFFICIAL OF THIS STATE WHO DISCLOSES INFORMATION IN VIOLATION OF  
39 THIS SUBSECTION IS GUILTY OF A CLASS 1 MISDEMEANOR. IT IS AN AFFIRMATIVE  
40 DEFENSE TO THE CLERICAL DISSEMINATION OF A PRIVILEGED AUDIT REPORT THAT THE  
41 REPORT WAS NOT CLEARLY LABELED "COMPLIANCE REPORT: PRIVILEGED DOCUMENT" OR  
42 LABELED WITH WORDS OF SIMILAR IMPORT AS PRESCRIBED BY SECTION 49-1402. THE  
43 LACK OF LABELING MAY NOT BE RAISED AS A DEFENSE IF THE ENTITY, EMPLOYEE OR  
44 OFFICIAL KNEW OR HAD REASON TO KNOW THAT THE DOCUMENT WAS A PRIVILEGED AUDIT  
45 REPORT.

1 E. THIS SECTION SHALL NOT BE CONSTRUED TO CIRCUMVENT THE PROTECTIONS  
2 PROVIDED BY FEDERAL OR STATE LAW FOR INDIVIDUALS WHO DISCLOSE INFORMATION TO  
3 LAW ENFORCEMENT AUTHORITIES.

4 49-1405. Exception: disclosure required by court or  
5 administrative hearing official

6 A. A COURT OR ADMINISTRATIVE HEARING OFFICIAL WITH COMPETENT  
7 JURISDICTION MAY REQUIRE DISCLOSURE OF A PORTION OF AN AUDIT REPORT IN A  
8 CIVIL OR ADMINISTRATIVE PROCEEDING IF THE COURT OR ADMINISTRATIVE HEARING  
9 OFFICIAL DETERMINES AFTER AN IN CAMERA REVIEW CONSISTENT WITH THE APPROPRIATE  
10 RULES OF PROCEDURE THAT ANY OF THE FOLLOWING APPLIES:

11 1. THE PRIVILEGE IS ASSERTED FOR A FRAUDULENT PURPOSE.

12 2. THE PORTION OF THE AUDIT REPORT IS NOT SUBJECT TO THE PRIVILEGE  
13 UNDER SECTION 49-1406.

14 3. THE PORTION OF THE AUDIT REPORT SHOWS EVIDENCE OF NONCOMPLIANCE  
15 WITH AN ENVIRONMENTAL LAW AND APPROPRIATE EFFORTS TO ACHIEVE COMPLIANCE WITH  
16 THE LAW WERE NOT PROMPTLY INITIATED AND PURSUED WITH REASONABLE DILIGENCE  
17 AFTER THE DISCOVERY OF THE NONCOMPLIANCE.

18 B. A PARTY SEEKING DISCLOSURE UNDER THIS SECTION HAS THE BURDEN OF  
19 PROVING THAT SUBSECTION A OF THIS SECTION APPLIES.

20 C. NOTWITHSTANDING ANY OTHER LAW, A DISCLOSURE DECISION OF AN  
21 ADMINISTRATIVE HEARING OFFICIAL UNDER SUBSECTION A OF THIS SECTION IS  
22 DIRECTLY APPEALABLE TO A COURT OF COMPETENT JURISDICTION WITHOUT DISCLOSURE  
23 OF THE AUDIT REPORT TO ANY PERSON UNLESS SO ORDERED BY THE COURT.

24 D. A PERSON CLAIMING THE PRIVILEGE TO AVOID THE REQUESTED DISCLOSURE  
25 OF MATERIALS IS SUBJECT TO SANCTIONS AS PRESCRIBED BY THE ARIZONA RULES OF  
26 CIVIL PROCEDURE OR TO A FINE NOT TO EXCEED TEN THOUSAND DOLLARS IF THE COURT  
27 FINDS, CONSISTENT WITH FUNDAMENTAL DUE PROCESS, THAT THE PERSON INTENTIONALLY  
28 OR KNOWINGLY CLAIMED THE PRIVILEGE FOR NONPRIVILEGED MATERIALS AS PRESCRIBED  
29 BY SECTION 49-1406.

30 E. A COURT DETERMINATION UNDER THIS SECTION IS SUBJECT TO  
31 INTERLOCUTORY APPEAL TO AN APPROPRIATE APPELLATE COURT.

32 49-1406. Nonprivileged materials

33 A. THE PRIVILEGE DESCRIBED IN THIS CHAPTER DOES NOT APPLY TO:

34 1. A DOCUMENT, COMMUNICATION, DATUM OR REPORT OR OTHER INFORMATION  
35 REQUIRED BY A REGULATORY AGENCY TO BE COLLECTED, DEVELOPED, MAINTAINED OR  
36 REPORTED UNDER AN ENVIRONMENTAL LAW.

37 2. INFORMATION OBTAINED BY OBSERVATION, SAMPLING OR MONITORING BY A  
38 REGULATORY AGENCY.

39 3. INFORMATION OBTAINED FROM A SOURCE NOT INVOLVED IN THE PREPARATION  
40 OF THE ENVIRONMENTAL AUDIT REPORT.

41 B. THIS SECTION DOES NOT LIMIT THE RIGHT OF A PERSON TO AGREE TO  
42 CONDUCT AND DISCLOSE AN AUDIT REPORT.

