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**IDAPA 02
TITLE 01
CHAPTER 04**

02.01.04 - ENVIRONMENTAL AUDIT PROTECTION RULES

000. LEGAL AUTHORITY.

The Idaho Legislature has given the Idaho Department of Agriculture the authority to promulgate these rules in Section 9-810, Idaho Code. (3-20-97)

001. TITLE AND SCOPE.

These rules shall be cited as IDAPA 02.01.04, Rules of the Idaho Department of Agriculture, Environmental Audit Protection Rules. These rules implement the Environmental Audit Protection Act, Sections 9-801 et seq., Idaho Code. These rules are intended to encourage owners and operators of facilities and other persons conducting activities regulated under applicable environmental laws to conduct voluntary internal environmental audits of their activities, operations, compliance programs and management systems and to assess and improve compliance with applicable environmental laws while protecting confidentiality of communications relating to voluntary internal environmental audits. These rules are not intended to protect those who willfully violate environmental laws. (3-20-97)

002. WRITTEN INTERPRETATIONS.

There are no written interpretations of these rules. (3-20-97)

003. ADMINISTRATIVE APPEALS.

Hearing and appeal rights are set forth in Title 67, Chapter 52, Idaho Code. There is no provision for administrative appeal before the Department of Agriculture under these rules. (3-20-97)

004. DEFINITIONS.

01. Certification. For purposes of Section 015, an owner or operator of a facility shall certify in writing, based on information and belief formed after a reasonable inquiry, that all necessary and reasonable steps have been taken to achieve compliance. (3-20-97)

02. Compliance Plan. A document which may be included in the Environmental Audit Report that describes the activities to be performed to correct a potential violation and to maintain compliance into the future. (3-20-97)

a. A compliance plan shall include: (3-20-97)

i. The activities to be taken to achieve and maintain compliance; (3-20-97)

ii. The timetable needed to complete compliance plan activities; and (3-20-97)

iii. An explanation supporting the timetable. (3-20-97)

03. Department. The Idaho Department of Agriculture. (3-20-97)

04. Document. A source from which information can be obtained or translated including, but not limited to, writings, drawings, graphs, charts, photographs, phone records, and other data compilations, including electronic. (3-20-97)

05. Environmental Agency. Any department or division of the State, local government, or health board with the authority to enforce any state environmental law. (3-20-97)

06. Environmental Audit. A voluntary internal evaluation conducted pursuant to a plan or protocol that is designed to identify and prevent noncompliance and to improve compliance with environmental laws. (3-20-97)

a. An environmental audit may be conducted by an owner or operator, an owner's or operator's employees, or by an independent contractor. (3-20-97)

- b. An environmental audit may include: (3-20-97)
 - i. One (1) or more facilities; (3-20-97)
 - ii. Any activity at one (1) or more facilities; (3-20-97)
 - iii. Impacts on one (1) or more environmental media at a facility or facilities; or (3-20-97)
 - iv. Management systems related to a facility, an activity or an impact on environmental media. (3-20-97)
- c. An environmental audit is not voluntary for purposes of immunity if it is initiated as a result of: (3-20-97)
 - i. The commencement of a federal or state inspection, investigation or information request; (3-20-97)
 - ii. Notice of a citizen suit; (3-20-97)
 - iii. Legal complaint by a third party; or (3-20-97)
 - iv. The owner's or operator's knowledge that the discovery of the violation by a regulatory agency or third party is imminent. (3-20-97)
- 07. Environmental Audit Plan or Protocol. A document outlining an owner's or operator's intent to perform a systematic, scheduled, and objective environmental audit. An environmental audit plan or protocol may include or be a part of a corporate environmental policy or memoranda or other documents describing portions or all of the audit and shall include: (3-20-97)
 - a. The specific facilities, processes, and equipment audited; (3-20-97)
 - b. The inclusive dates and times of the audit; (3-20-97)
 - c. The audit procedures and protocols; (3-20-97)
 - d. The purpose of the audit; and (3-20-97)
 - e. Any circumstances identified which may constitute a violation of environmental law. (3-20-97)
- 08. Environmental Audit Report. A set of documents, each labeled "Environmental Audit Report" (or a substantially equivalent label) and prepared as a result of an environmental audit. The environmental audit report may include a compliance plan, field notes, records of observations, findings, opinions, suggestions, implementation plans, conclusions, drafts, memoranda, drawings, photographs, computer-generated or electronically recorded information, maps, data, charts, graphs, and surveys, provided such supporting information is collected or developed for the primary purpose and in the course of an environmental audit. An environmental audit report may include memoranda and documents analyzing portions or all of the environmental audit report. (3-20-97)
- 09. Environmental Law. Any federal, state, or local law, regulation, rule, ordinance, or permit terms and conditions designed to protect or enhance the quality of land, water, or air for the protection of human health, wildlife, other biota, or the environment. (3-20-97)
- 10. In Camera Review. A hearing or review in a courtroom, hearing room, or chambers to which the general public is not admitted. After such hearing or review, the content of the oral or other evidence, and statements of judge, hearing officer and counsel, shall be held in confidence by those participating in or present at the hearing or review, and any transcript of the hearing or review shall be sealed and not considered a public record until or unless its contents are disclosed by a court having jurisdiction over the matter. (3-20-97)
- 11. Owner or Operator. A person subject to an environmental law. (3-20-97)

12. Person. Any individual, firm, association, partnership, joint stock company, trust, estate, local governmental entity, public or private corporation, or any other legal entity which is recognized by the law as the subject of rights and duties, but does not include any state or federal governmental entity or its contractors and/or subcontractors in the performance, operation or management of governmental activities, programs, functions, facilities or sites. (3-23-98)

005. FINDINGS.

These rules are promulgated pursuant to Section 67-5226, Idaho Code, in compliance with the deadlines in amendments in the governing law, Title 9, Chapter 8, Idaho Code. (3-23-98)

006. -- 009. (RESERVED).

010. PROHIBITION AGAINST COMPELLED DISCLOSURE.

Notwithstanding any other provision of law to the contrary, no state of Idaho public official, employee or environmental agency shall require to be disclosed an environmental audit report prepared by or on behalf of any person, except from any governmental entity. (3-23-98)

011. REQUIRED DISCLOSURES.

Nothing in these rules shall be construed to prohibit a request for information, investigation or disclosure of information required to be disclosed pursuant to a federal and state law, rule or regulation. Documents, communications, data, reports and other information which must be collected, developed and reported pursuant to a federal and state law, rule and regulation must be disclosed in accordance with the applicable law, rule or regulation. (3-20-97)

012. EXCEPTIONS TO COMPEL DISCLOSURE.

01. Express Waiver. A state of Idaho public official, employee or environmental agency may compel disclosure of an environmental audit report to the extent that the protections of the Environmental Audit Protection Act, and these rules have been expressly waived in writing by the owner or operator of a facility. The waiver shall apply only to the portions of the environmental audit report which are specifically waived. (3-20-97)

02. Fraudulent or Improper Purpose. The prohibition against compelled disclosure does not apply if the environmental agency or court after an in camera review determines that: (3-20-97)

a. Protection for the audit report is for a fraudulent purpose; or (3-20-97)

b. The material is not an appropriate subject for an environmental audit. (3-20-97)

03. Burden of Proof. A party seeking disclosure of an environmental audit report has the burden of proving the disclosure is appropriate. The existence of a written environmental compliance policy or adoption of a plan of action to meet applicable environmental laws shall constitute prima facie evidence that an environmental audit report was designed to prevent noncompliance and improve compliance with environmental laws and that the environmental audit is protected from disclosure. A party seeking disclosure under Subsection 012.02.a. has the burden of proving that the privilege is asserted for a fraudulent purpose. (3-20-97)

013. EXISTING EVIDENTIARY PRIVILEGES RETAINED.

Nothing in these rules is intended to be inconsistent with the Idaho Rules of Evidence or in any way 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. (3-20-97)

014. IMMUNITY FOR VOLUNTARY DISCLOSURE ARISING FROM ENVIRONMENTAL AUDIT.

01. Immunity. Any person that makes a voluntary disclosure of an environmental audit report, or relevant portions thereof, which identifies circumstances which may constitute a violation of any state environmental law to the appropriate environmental agency, shall be immune from state prosecution, suit or administrative action for any civil or criminal penalties, or incarceration for such violations, subject to Section 015. (3-20-97)

02. Presumption of Voluntary Disclosure. A disclosure is rebuttably presumed voluntary if: (3-20-97)
- a. The disclosure is made to the environmental regulatory agency having regulatory authority by the owner and operator in a timely manner after completion of the environmental audit; (3-20-97)
 - b. The disclosure arises out of an environmental audit; and (3-20-97)
 - c. The owner or operator making the disclosure immediately initiates appropriate efforts to achieve compliance, pursues compliance with due diligence, and expeditiously achieves compliance within a reasonable period after the completion of the environmental audit. (3-20-97)

03. Limitations on Immunity. Immunity from administrative, civil or criminal penalties or incarceration or other type of enforcement action in this section does not apply if a person has been found by a court to have committed serious violations that constitute a pattern of continuous or repeated violations of environmental laws, regulations, permit conditions, settlement agreements, consent orders, and were due to separate distinctive events giving rise to the violations within the three (3) year period prior to date of disclosure. Such a pattern of continuous repeated violations may also be demonstrated by multiple settlement agreements related to substantially the same alleged violations concerning serious instances of noncompliance with environmental laws that occurred within the three (3) year period immediately prior to the date of the voluntary disclosure. (3-20-97)

04. Compliance. Except as specifically provided, this section does not affect any authority of an environmental agency to require compliance through a consent order or action in district court or to abate an imminent hazard, associated with the information disclosed in any voluntary disclosure of an environmental violation. (3-20-97)

015. COMPLIANCE TIMETABLES.

01. Timetable to Achieve Compliance. The immunity described in Section 9-809, Idaho Code, and Section 014 shall apply if: (3-20-97)

- a. Compliance is achieved within sixty (60) days after the completion of the environmental audit, and compliance is certified by the owner or operator; or (3-20-97)
- b. Compliance that cannot be achieved and certified within sixty (60) days is achieved within the timetable set forth in an approved compliance plan; or (3-20-97)
- c. An environmental audit report shows noncompliance to be failure to obtain a permit, or other governmental permission, a permit application or equivalent document is submitted to the environmental agency within sixty (60) days. If an owner or operator is unable to submit a permit application within sixty (60) days after completion of an environmental audit, compliance is achieved within the timetable set forth in an approved compliance plan; or (3-20-97)
- d. The environmental agency and the owner or operator enter into a written agreement, administrative consent order or judicial consent decree. A consent order may be appropriate in circumstances where remedial measures are complex or a lengthy schedule for obtaining and maintaining compliance is required. (3-20-97)

02. Review of Compliance Plan. If an owner or operator submits a compliance plan under Subsection 015.02.b. or 015.02.c., the environmental agency shall approve or disapprove the plan within thirty (30) days of the submittal or within a timetable agreed upon by the owner or operator and the environmental agency. The following factors shall be considered by the environmental agency in reviewing the compliance plan for approval or disapproval: (3-20-97)

- a. The nature of the noncompliance; (3-20-97)
- b. The environmental and health consequences of the noncompliance; (3-20-97)
- c. The suitability of the timetable to achieve compliance; and (3-20-97)

d. The adequacy of the compliance activities. (3-20-97)

03. Modification of Approved Compliance Plan. Once approved, a compliance plan may be modified only upon written approval from the environmental agency. (3-20-97)

016. TREATMENT OF ENVIRONMENTAL AUDIT REPORTS AND CONFIDENTIAL BUSINESS INFORMATION.

01. Definition. Confidential business information is information which is claimed to pertain to the interests of any business, which was developed or acquired by that business, and which is disclosed to the environmental agency. A voluntarily prepared environmental audit report and voluntary disclosures of information to an environmental agency which are claimed to be confidential business information are exempt from public disclosure pursuant to Section 9-340, Idaho Code. A claim for treatment as confidential business information exists if:

(3-20-97)

a. The person making the submittal has shown that it has taken, and will maintain, reasonable measures to protect the confidentiality of the information; (3-20-97)

b. The information is not, and has not been, reasonably attainable without the consent of the person making the submittal by other persons through legitimate means; (3-20-97)

c. No environmental law requires disclosure of the information; and (3-20-97)

d. The person making the submittal has shown that disclosure of the information is likely to cause substantial harm to that person's competitive position. (3-20-97)

02. Exempt From Disclosure. Any information submitted to an environmental agency which is claimed to be confidential business information must be: (3-20-97)

a. Clearly identified and labeled at the time of submittal by a cover sheet or other suitable form of notice employing language such as Environmental Audit Report, Confidential Business Information or substantially equivalent label; and (3-20-97)

b. Submitted along with a claim for protection as confidential business information. Claims of confidentiality for the name and address of any permit applicant or permittee will be denied. (3-20-97)

03. Claim of Business Confidentiality. Any person submitting information may assert a claim of business confidentiality covering all or part of that information. If no such claim accompanies the information when submitted to the environmental agency, the information is not exempt from public disclosure. (3-20-97)

017. ENVIRONMENTAL AGENCY PROCEDURES FOR PROTECTING CONFIDENTIAL BUSINESS INFORMATION.

01. Secured Files. The environmental agency shall secure all confidential business information in locked cabinets or rooms. Access to confidential business information shall be prohibited except to state officials acting in their official capacity. (3-20-97)

02. Return of Environmental Audit Information. The environmental agency shall return any confidential environmental audit report one (1) year after date of receipt or upon correction of the condition reported upon the request of the owner or operator. (3-20-97)

03. Imminent and Substantial Endangerment. In the event the Governor of the state of Idaho determines that circumstances exist which constitute an imminent and substantial danger to the public health or the environment, the Governor may disclose such confidential business information, excluding trade secrets as defined in Idaho Code Section 9-340, contained in the environmental audit as may be necessary to assure protection of the public health or environment. (3-20-97)

018. -- 999. (RESERVED).

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