

HOUSE CS FOR CS FOR SENATE BILL NO. 41(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered: 4/10/97

Referred: Finance

Sponsor(s): SENATORS LEMAN, Pearce, Taylor

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to environmental audits to determine compliance with certain
2 laws, permits, and regulations."

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

4 * Section 1. FINDINGS; INTENT. The legislature finds and intends as follows:

5 (1) as environmental regulations evolve, performance-based standards will
6 increasingly replace the traditional command-and-control approach of state regulatory
7 practices; this shift is expected to save money for both the state and regulated entities and to
8 lead to the integration of environmental protections and normal operating procedures for
9 regulated facilities and operations; in order to foster a partnership between the public and
10 private sectors and promote this integration, it is the intent of the legislature to establish under
11 this Act a responsible incentive program to encourage voluntary, critical self-evaluation and
12 analysis by regulated entities of their compliance with environmental requirements by
13 authorizing certain qualified privileges and immunities related to those self-evaluations;

14 (2) the public has a strong interest in encouraging routine self-review of

environmental business practices and procedures; this encouragement can best be achieved by preserving the free flow of information; the free flow of the kind of information that is generated by self-audits would be curtailed if a privilege for the audits were not available; therefore, it is the intent of the legislature to recognize an audit privilege under this Act to protect the confidentiality of communications related to voluntary internal environmental audits; however, the legislature does not intend that the parts of an audit report consisting of confidential self-evaluation and analysis that are privileged under this Act may be used to shield a person from liability under applicable laws and regulations by blocking access to underlying facts;

(3) the public also has a strong interest in obtaining cost-effective correction of inadvertent environmental violations; this goal can best be achieved by offering qualified immunity from administrative and civil penalties to regulated persons who promptly report known violations of environmental regulations that are uncovered as part of an audit so that the violations can promptly be corrected and a compliance plan can be negotiated with the appropriate government agency;

(4) an effective enforcement program is also necessary to protect the public health and welfare and the environment; the legislature intends that the audit privilege and the immunities established in this Act should be applied in a manner that promotes compliance with environmental laws, whether through voluntary compliance or through enforcement efforts.

* **Sec. 2.** AS 09.25 is amended by adding new sections to read:

Article 5. Privileges and Immunities

Related to Disclosure of Certain Self-Audits and Violations.

Sec. 09.25.450. Audit report privilege. (a) Except as provided in AS 09.25.460, an owner or operator who prepares an audit report or causes an audit report to be prepared has a privilege to refuse to disclose, and to prevent another person from disclosing, the parts of the report that consist of confidential self-evaluation and analysis of the owner's or operator's compliance with environmental laws. Except as provided in AS 09.25.455 - 09.25.480, the privileged information is not admissible as evidence or subject to discovery in

(1) a civil action, whether legal or equitable; or

1 (2) an administrative proceeding, except for workers' compensation
2 proceedings.

3 (b) With respect to confidential self-evaluation and analysis in an
4 environmental audit, in order to qualify for the privilege under this section and the
5 immunity under AS 09.25.475, at least 15 days before conducting the audit, the owner
6 or operator conducting the audit must give notice by electronic filing that complies
7 with an ordinance or regulation authorized under (j) of this section or by certified mail
8 with return receipt requested to the commissioner's office of the department, and, when
9 the audit includes an assessment of compliance with a municipality's ordinances, to
10 the municipal clerk, of the fact that it is planning to commence the audit. The notice
11 must specify the facility, operation, or property or portion of the facility, operation, or
12 property to be audited, the date the audit will begin and end, and the general scope of
13 the audit. The notice may provide notification of more than one scheduled
14 environmental audit at a time. Once initiated, an audit shall be completed within a
15 reasonable time, but no longer than 90 days, unless a longer period of time is agreed
16 upon between the owner or operator and the department or the municipality, as
17 appropriate. The audit report must be completed in a timely manner.

18 (c) The following persons may claim the privilege available under (a) of this
19 section:

20 (1) the owner or operator who prepared the audit report or caused the
21 audit report to be prepared;

22 (2) a person who conducted all or a portion of the audit but did not
23 personally observe or participate in the relevant instances or events being reviewed for
24 compliance;

25 (3) a person to whom confidential self-evaluation or analysis is
26 disclosed under AS 09.25.455(b); or

27 (4) a custodian of the audit results.

28 (d) A person who conducts or participates in the preparation of an audit report
29 and who actually observed or participated in conditions or events being reviewed for
30 compliance may testify about those conditions or events but may not, in a proceeding
31 covered by (a) of this section, be compelled to testify about or produce documents

1 consisting of confidential self-evaluation and analysis.

2 (e) A person claiming the privilege described in this section has the burden of
3 establishing the applicability of the privilege.

4 (f) To facilitate identification, each document in an audit report that contains
5 confidential self-evaluation or analysis shall be labeled "AUDIT REPORT:
6 PRIVILEGED DOCUMENT."

7 (g) A government agency or its employees or agents may not, as a condition
8 of a permit, license, or approval issued under an environmental law, require an owner
9 or operator to waive the privilege available under this section.

10 (h) Except when the privilege is waived under AS 09.25.455(a) or disclosure
11 is made under AS 09.25.455(b)(3) or 09.25.475 or 09.25.480, neither a government
12 agency nor its employees or agents may review or otherwise use the part of an audit
13 report consisting of confidential self-evaluation or analysis during an inspection of a
14 regulated facility, operation, or property or an activity of a regulated facility, operation,
15 or property.

16 (i) This section may not be construed to

17 (1) prevent a government agency from issuing an emergency order,
18 seeking injunctive relief, independently obtaining relevant facts, conducting necessary
19 inspections, or taking other appropriate action regarding implementation and
20 enforcement of an applicable environmental law, except as otherwise provided in
21 AS 09.25.475; or

22 (2) authorize a privilege for uninterrupted or continuous environmental
23 audits.

24 (j) The department or municipality may, by regulation or ordinance,
25 respectively, allow the notice required under (b) of this section to be filed by facsimile
26 or other electronic means if the means ensures adequate proof of

27 (1) submittal of the notice by the owner or operator; and

28 (2) receipt by the department or municipality.

29 (k) There is no privilege under this section for documents or communications
30 in a criminal proceeding.

31 **Sec. 09.25.455. Waiver and disclosure.** (a) The privilege in AS 09.25.450

1 does not apply to the extent the privilege is expressly waived in writing by the owner
2 or operator who prepared the audit report or caused the report to be prepared.

3 (b) Disclosure of the part of an audit report or information consisting of
4 confidential self-evaluation or analysis does not waive the privilege established by
5 AS 09.25.450 if the disclosure is made

6 (1) to address or correct a matter raised by the environmental audit and
7 is made to

8 (A) a person employed by the owner or operator, including
9 temporary and contract employees;

10 (B) the owner's or operator's lawyer or the lawyer's
11 representative;

12 (C) an officer or director of the regulated facility, operation, or
13 property;

14 (D) a partner of the owner or operator;

15 (E) an independent contractor retained by the owner or operator;

16 or

17 (F) the principal of the independent contractor who conducted
18 an audit on the principal's behalf;

19 (2) under the terms of a confidentiality agreement between the owner
20 or operator who prepared the audit report or caused the audit report to be prepared and

21 (A) a partner or potential partner of the owner or operator of the
22 facility, operation, or property;

23 (B) a transferee or potential transferee of an interest in the
24 facility, operation, or property;

25 (C) a lender or potential lender for the facility, operation, or
26 property;

27 (D) a person engaged in the business of insuring, underwriting,
28 or indemnifying the facility, operation, or property; or

29 (E) a person who, along with the person who prepared the audit
30 report or caused the audit report to be prepared, also is an owner or operator
31 of part or all of the facility, operation, or property; or

1 (3) under a written claim of confidentiality to a government official or
2 agency by the owner or operator who prepared the audit report or who caused the audit
3 report to be prepared.

4 (c) Documents consisting of confidential self-evaluation and analysis that are
5 disclosed under (b)(3) of this section are required to be kept confidential and are not
6 subject to disclosure under AS 09.25.110 - 09.25.220.

7 (d) A party to a confidentiality agreement described in (b)(2) of this section
8 who violates the agreement is liable for damages caused by the violation and for other
9 penalties stipulated in the agreement.

10 **Sec. 09.25.460. Nonprivileged materials.** (a) There is no privilege under
11 AS 09.25.450 for that part of an audit report that contains the following:

12 (1) a document, communication, datum, report, or other information
13 required by a government agency to be collected, developed, maintained, or reported
14 under an environmental law, under a permit issued under an environmental law, as a
15 requirement for obtaining, maintaining, or renewing a license, as a requirement under
16 a contract or lease with the state or a municipality, or as a requirement under an
17 administrative order or court order or decree;

18 (2) information that a government agency obtains by observation,
19 sampling, or monitoring;

20 (3) information that a government agency obtains from a source that
21 was not involved in compiling, preparing, or conducting the environmental audit
22 report;

23 (4) a document, communication, datum, report, or other information
24 collected, developed, or maintained in the course of a regularly conducted business
25 activity or regular practice other than an environmental audit;

26 (5) a document, communication, datum, report, or other information
27 that is independent of the environmental audit, whether prepared or existing before,
28 during, or after the audit; and

29 (6) a document, communication, datum, report, or other information,
30 including an agreement or order between a government agency and an owner or
31 operator, regarding a compliance plan or strategy.

(b) An audit report is not privileged and is admissible as evidence and subject to discovery and use in a proceeding relating to pipeline rates, tariffs, fares, or charges. The owner or operator who prepared the audit report or caused the report to be prepared is entitled to a protective order in a proceeding relating to pipeline rates, tariffs, fares, or charges to maintain the confidentiality of the audit from discovery, use, or admission in evidence in other types of proceedings. Discovery, use, or admission in evidence in a proceeding relating to pipeline rates, tariffs, fares, or charges is not considered to have waived the privilege for any other purpose.

Sec. 09.25.465. Exception: disclosure required by court. (a) A court or administrative hearing officer with jurisdiction may require disclosure of confidential self-evaluation and analysis contained in an audit report in a civil or administrative proceeding if the court or administrative hearing officer determines, after an in camera review consistent with the appropriate rules of procedure, that the

(1) privilege is asserted for a criminal or fraudulent purpose;

(2) information for which the privilege is claimed is evidence of substantial injury, or the imminent or present threat of substantial injury, to one or more persons at the site audited or to persons, property, or the environment offsite or is evidence of the causes and circumstances leading to such injury or the imminent or present threat of such injury;

(3) audit report shows evidence of noncompliance with an environmental law and appropriate efforts to achieve compliance with the law were not promptly initiated and pursued with reasonable diligence after discovery of noncompliance;

(4) audit report was prepared for the purpose of avoiding disclosure of information required for an investigative, administrative, or judicial proceeding that, at the time of the report's preparation, was imminent or in progress; or

(5) privilege would result in a miscarriage of justice or the denial of a fair trial to the party challenging the privilege.

(b) A party seeking an in camera review as provided under (a) of this section shall provide to the court or administrative hearing officer a factual basis adequate to support a good faith belief by a reasonable person that the documents or

communications for which disclosure is sought are likely to reveal evidence to establish that an exception in (a) of this section applies.

(c) A party seeking disclosure of confidential self-evaluation and analysis during an in camera review under this section has the burden of proving that an exception in (a) of this section applies.

Sec. 09.25.475. Voluntary disclosure; immunity. (a) Except as provided by this section, an owner or operator who makes a voluntary disclosure of a violation of an environmental law, or of circumstances, conditions, or occurrences that constitute or may constitute such a violation, is immune from an administrative or civil penalty for the violation disclosed, for a violation based on the facts disclosed, and for a violation discovered because of the disclosure that was unknown to the owner or operator making the disclosure.

(b) Immunity is not available under this section if the violation resulted in, or poses or posed an imminent or present threat of, substantial injury to one or more persons at the site audited or to persons, property, or the environment offsite.

(c) A disclosure is voluntary for the purposes of this section only if

(1) the disclosure is made promptly after knowledge of the information disclosed is obtained by the owner or operator;

(2) the disclosure is made in writing by certified mail to the department or a municipality with enforcement jurisdiction with regard to the violation disclosed;

(3) an investigation of the violation was not initiated or the violation was not independently detected by the department or a municipality with enforcement jurisdiction before the disclosure was made using certified mail; under this paragraph, the department or municipality has the burden of proving that an investigation of the violation was initiated or the violation was detected before receipt of the certified mail; and

(4) the disclosure arises out of a voluntary environmental audit.

(d) To qualify for immunity under this section, the owner or operator making the disclosure must

(1) promptly initiate appropriate efforts to achieve compliance and remediation and pursue those efforts with due diligence;

1 (2) promptly initiate appropriate efforts to discontinue, abate, or
2 mitigate any conditions or activities causing injury or likely to cause imminent injury
3 to one or more persons at the site audited or to person, property, or the environment
4 offsite;

5 (3) correct the violation within 90 days or enter into a compliance
6 agreement with the department or the municipality, as appropriate, that provides for
7 completion of corrective and remedial measures within a reasonable time;

8 (4) implement appropriate measures designed to prevent the recurrence
9 of the violation; and

10 (5) cooperate with the department or municipality, as appropriate, in
11 connection with an investigation of the issues identified in the disclosure; the
12 department or municipality may request that the owner or operator allow the
13 department or municipality to review, under a written claim of confidentiality as
14 described in AS 09.25.455(b)(3), the part of the audit report that describes the
15 implementation plan or tracking system developed to correct past noncompliance,
16 improve current compliance, or prevent future noncompliance.

17 (e) A disclosure is not voluntary for purposes of this section if it is a
18 disclosure to the department or municipality expressly required by an environmental
19 law, a permit, a license, or an enforcement order or decree.

20 (f) Immunity under this section for violation of an environmental law is
21 available only for a violation that is discovered as a result of information or documents
22 first produced or obtained during the time period specified in the notice required under
23 AS 09.25.450(b).

24 (g) During the period between receipt of the audit notice required under
25 AS 09.25.450(b) and the specified end date of the audit, the department or
26 municipality may not initiate an inspection, monitoring, or other investigative activity
27 concerning the audited facility, operation, or property based on the receipt of a notice
28 under AS 09.25.450. The department or municipality has the burden of proving that
29 an inspection, monitoring, or other investigative activity concerning the audited facility,
30 operation, or property initiated after receiving a notice under AS 09.25.450 was not
31 initiated based on receiving the notice.

1 (h) A violation that has been voluntarily disclosed and to which immunity
2 applies under this section shall be identified by the department or municipality in its
3 compliance history report as having been voluntarily disclosed.

4 (i) This section may not be construed to prevent the department or
5 municipality from

6 (1) seeking injunctive relief; or

7 (2) issuing an emergency order in a situation involving an imminent
8 and substantial danger to public health or welfare or the environment.

9 **Sec. 09.25.480. Exceptions to immunity; mitigation.** (a) There is no
10 immunity under AS 09.25.475 if a court or administrative hearing officer finds that

11 (1) the owner or operator claiming the immunity has

12 (A) intentionally, knowingly, or recklessly committed or
13 authorized the violation;

14 (B) within the 36 months preceding the violation, committed,
15 at the same facility or associated facilities located in the state, a pattern of
16 violations that are the same as or closely related to the violation for which the
17 immunity is sought; or

18 (C) not attempted to bring the facility, operation, or property
19 into compliance so as to constitute a pattern of disregard of environmental
20 laws;

21 (2) the violation was authorized or committed intentionally, knowingly,
22 or recklessly by a member of the owner's or operator's management and the owner's
23 or operator's policies contributed materially to the occurrence of the violation; or

24 (3) the owner or operator, after taking into account the cost of
25 completing corrective and remedial measures within a reasonable time and
26 implementing appropriate measures to prevent recurrence of the violation, realized
27 substantial economic savings in not complying with the requirement for which a
28 violation is charged; the exception to immunity in this paragraph applies only to that
29 portion of a penalty that reflects the economic savings of noncompliance after taking
30 into account the cost of completing the corrective, remedial, and preventive measures
31 necessary to qualify for immunity.

(b) There is no immunity under AS 09.25.475 from an administrative or civil penalty for the violation of an administrative or court order or for violation of a term or condition of an administrative or court order.

(c) An administrative or civil penalty that is imposed on an owner or operator for violation of an environmental law when the owner or operator has made a voluntary disclosure under AS 09.25.475(a) but is not granted immunity because of (a) of this section may, to the extent appropriate and not prohibited by law, be mitigated by

(1) the good faith actions of the owner or operator in disclosing the violation;

(2) efforts by the owner or operator to conduct environmental audits and to complete any resulting implementation plan or tracking system for corrective and preventive action;

(3) remediation;

(4) cooperation with government officials investigating the disclosed violation;

(5) the nature of the violation; and

(6) other relevant considerations.

Sec. 09.25.485. Relationship to other recognized privileges. AS 09.25.450 - 09.25.490 do not limit, waive, or abrogate the scope or nature of a statutory or common law privilege, including the work product doctrine, the attorney-client privilege, and any other privilege recognized by a court with appropriate authority in this state.

Sec. 09.25.490. Definitions. (a) In AS 09.25.450 - 09.25.490,

(1) "audit report" means a report that includes each document and communication, other than those set out in AS 09.25.460, produced from an environmental audit; general components that may be contained in a completed audit report include

(A) a report, prepared by an auditor, monitor, or similar person, including the scope of the audit, the dates the audit began and ended, the information gained in the audit, findings, conclusions, recommendations,

exhibits, and appendices; the types of exhibits and appendices that may be contained in an audit report include supporting information that is collected or developed for the primary purpose and in the course of an environment audit, including

- (i) interviews with current or former employees;
- (ii) field notes and records of observations;
- (iii) findings, opinions, suggestions, conclusions, guidance, notes, drafts, and memoranda;
- (iv) legal analyses;
- (v) drawings;
- (vi) photographs;
- (vii) laboratory analyses and other analytical data;
- (viii) computer generated or electronically recorded information;
- (ix) maps, charts, graphs, and surveys; and
- (x) other communications and documents associated with an environmental audit;

(B) memoranda and documents analyzing all or a portion of the materials described in (A) of this paragraph or discussing implementation issues; and

(C) an implementation plan or tracking system to correct past noncompliance, improve current compliance, or prevent future noncompliance;

(2) "confidential self-evaluation and analysis" means the part of an audit report that consists of interviews with current or former employees conducted by the auditor; field notes and records of observations made by the auditor; findings, opinions, suggestions, conclusions, guidance, notes, drafts, and analyses performed by the auditor; memoranda and documents that evaluate or analyze all or part of the material contained in the audit report, including findings, conclusions, opinions, recommendations made by the auditor, and an audit implementation plan or tracking system to correct past noncompliance, improve current compliance, or prevent future noncompliance with an environmental law, and that is

(A) a voluntary, confidential, critical, internal, and retrospective review, self-evaluation, or analysis of conduct, practices, and occurrences and their resulting consequences; and

(B) prepared and maintained with the expectation that it will be kept confidential;

(3) "department" means the Department of Environmental Conservation;

(4) "environmental audit" means a voluntary audit that an owner or operator of a regulated facility, operation, or property conducts or causes to be conducted, whether or not on a regular basis or in response to a particular event, that is specifically designed and undertaken to assess compliance with environmental laws or a permit, license, or approval issued under those laws, including an assessment that is part of the owner's or operator's compliance management system and that is a

(A) systematic, objective, and periodic review of the facility, operation, or property related to meeting the requirements of environmental laws or a permit, license, or approval issued under those laws; or

(B) documented, systematic procedure or practice that reflects the owner's or operator's due diligence in preventing, detecting, and correcting violations of environmental laws or a permit, license, or approval issued under those laws at the facility, operation, or property;

(5) "environmental law" means

(A) a federal or state environmental law implemented by the department; or

(B) a rule, regulation, or municipal ordinance adopted in conjunction with or to implement a law described by (A) of this paragraph;

(6) "operator" means a person or persons who direct, control, or supervise all or part of a regulated facility, operation, or property;

(7) "owner" means a person or persons with a proprietary or possessory interest in a regulated facility, operation, or property;

(8) "penalty" means an administrative or civil sanction imposed by the state or a municipality to punish a person for a violation of a statute, rule, regulation, or ordinance; the term does not include a technical or remedial provision ordered by

1 a government agency, nor an administrative or civil sanction relating to pipeline rates,
2 tariffs, fares, or charges;

3 (9) "regulated facility, operation, or property" means a facility,
4 operation, or property that is regulated under an environmental law.

5 (b) To fully implement the privilege and immunity established under
6 AS 09.25.450 - 09.25.490, the term "environmental law" shall be construed broadly.

7 (c) For purposes of this chapter, unless the context requires otherwise, a person
8 acts

9 (1) "intentionally" with respect to a result described by a provision of
10 law defining a violation when the person's conscious objective is to cause that result;
11 when intentionally causing a particular result is an element of a violation, that intent
12 need not be the person's only objective;

13 (2) "knowingly" with respect to conduct or to a circumstance described
14 by a provision of law defining a violation when the person is aware that the conduct
15 is of that nature or that the circumstance exists; when knowledge of the existence of
16 a particular fact is an element of a violation, that knowledge is established if a person
17 is aware of a substantial probability of its existence, unless the person actually believes
18 it does not exist; a person who is unaware of conduct or a circumstance of which the
19 person would have been aware had that person not been intoxicated acts knowingly
20 with respect to that conduct or circumstance;

21 (3) "recklessly" with respect to a result or to a circumstance described
22 by a provision of law defining a violation when the person is aware of and consciously
23 disregards a substantial and unjustifiable risk that the result will occur or that the
24 circumstance exists; the risk must be of such a nature and degree that disregard of it
25 constitutes a gross deviation from the standard of conduct that a reasonable person
26 would observe in the situation; a person who is unaware of a risk of which the person
27 would have been aware had that person not been intoxicated acts recklessly with
28 respect to the risk.

29 * **Sec. 3. APPLICABILITY.** The privilege and immunity created by AS 09.25.450 -
30 09.25.490, added by sec. 2 of this Act, apply to environmental audits that are conducted on
31 or after the effective date of this Act.