

SENATE BILL NO. 199

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - SECOND SESSION

BY SENATORS LEMAN, Pearce

Introduced: 1/8/96

Referred: Resources

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to environmental audits and health and safety audits to
2 determine compliance with certain laws, permits, and regulations; and amending
3 Alaska Rules of Appellate Procedure 202, 402, 602, 603, 610, and 611."

4 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

5 * **Section 1.** AS 09.25 is amended by adding new sections to read:

6 ARTICLE 5. PRIVILEGES AND IMMUNITIES

7 RELATED TO DISCLOSURE OF SELF-AUDITS.

8 Sec. 09.25.450. AUDIT REPORT PRIVILEGE. (a) Except as provided in
9 AS 09.25.455 - 09.25.475, an audit report is privileged and is not admissible as
10 evidence or subject to discovery in

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

12 (2) a criminal proceeding; or

13 (3) an administrative proceeding.

14 (b) A person, when called or subpoenaed as a witness, may not be compelled

1 to testify or produce a document related to an environmental or health and safety audit
2 if

3 (1) the testimony or document discloses an item listed in
4 AS 09.25.490(a)(1) that was made as part of the preparation of an environmental or
5 health and safety audit report and that is addressed in a privileged part of an audit
6 report; and

7 (2) for purposes of this subsection only, the person is a

8 (A) person who conducted a portion of the audit but did not
9 personally observe the relevant physical events;

10 (B) person to whom the audit results are disclosed under
11 AS 09.25.455(b); or

12 (C) custodian of the audit results.

13 (c) A person who conducts or participates in the preparation of an
14 environmental or health and safety audit and who has actually observed physical events
15 of violation may testify about those events but may not be compelled to testify about
16 or produce documents related to the preparation of or a privileged part of an
17 environmental or health and safety audit or an item listed in AS 09.25.490(a)(1).

18 (d) An employee of a state agency may not request, review, or otherwise use
19 an audit report during an agency inspection of a regulated facility or operation or an
20 activity of a regulated facility or operation.

21 (e) To facilitate identification, each document in an audit report shall be
22 labeled "COMPLIANCE REPORT: PRIVILEGED DOCUMENT," or labeled with
23 words of similar import. However, failure to label a document under this section does
24 not constitute a waiver of the audit privilege or create a presumption that the privilege
25 does or does not apply.

26 (f) A party asserting the privilege described in this section has the burden of
27 establishing the applicability of the privilege.

28 Sec. 09.25.455. EXCEPTION: WAIVER. (a) The privilege in AS 09.25.450
29 does not apply to the extent the privilege is expressly waived by the owner or operator
30 who prepared the audit report or caused the report to be prepared.

31 (b) Disclosure of an audit report or information generated by an environmental

1 or health and safety audit does not waive the privilege established by AS 09.25.450
2 if the disclosure is made

3 (1) to address or correct a matter raised by the environmental or health
4 and safety audit and is made only to

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

7 (B) a legal representative of the owner or operator;

8 (C) an officer or director of the regulated facility or operation
9 or a partner of the owner or operator; or

10 (D) an independent contractor retained by the owner or
11 operator;

12 (2) under the terms of a confidentiality agreement between the person
13 for whom the audit report was prepared or the owner or operator of the audited facility
14 or operation and a

15 (A) partner or potential partner of the owner or operator of the
16 facility or operation;

17 (B) transferee or potential transferee of the facility or operation;

18 (C) lender or potential lender for the facility or operation;

19 (D) government official or a state or federal agency; or

20 (E) person or entity engaged in the business of insuring,
21 underwriting, or indemnifying the facility or operation; or

22 (3) under a claim of confidentiality to a government official or agency
23 by the person for whom the audit report was prepared or by the owner or operator.

24 (c) A party to a confidentiality agreement described in (b)(2) of this section
25 who violates that agreement is liable for damages caused by the disclosure and for
26 other penalties stipulated in the confidentiality agreement.

27 (d) Information that is disclosed under (b)(3) of this section is confidential and
28 is not subject to disclosure under AS 09.25.110 - 09.25.125. A public entity, public
29 employee, or public official who discloses information in violation of this subsection
30 is guilty of a class B misdemeanor.

31 (e) It is an affirmative defense to an action based on the clerical dissemination

1 of a privileged audit report that the report was not clearly labeled "COMPLIANCE
2 REPORT: PRIVILEGED DOCUMENT" or words of similar import. The lack of
3 labeling may not be raised as a defense if the defending entity, employee, or official
4 knew or had reason to know that the document was a privileged audit report.

5 Sec. 09.25.460. EXCEPTION: DISCLOSURE REQUIRED BY COURT OR
6 ADMINISTRATIVE HEARINGS OFFICIAL. (a) A court or administrative hearing
7 official with competent jurisdiction may require disclosure of a portion of an audit
8 report in a civil, criminal, or administrative proceeding if the court or administrative
9 hearing official determines, after an in camera review consistent with the appropriate
10 rules of procedure, that the

11 (1) privilege is asserted for a fraudulent purpose;

12 (2) portion of the audit report is not subject to the privilege under
13 AS 09.25.465; or

14 (3) portion of the audit report shows evidence of noncompliance with
15 an environmental or health and safety law and appropriate efforts to achieve
16 compliance with the law were not promptly initiated and pursued with reasonable
17 diligence after discovery of noncompliance.

18 (b) A party seeking disclosure under this section has the burden of proving that
19 (a) of this section applies.

20 (c) Notwithstanding AS 44.62 (Administrative Procedure Act), a decision of
21 an administrative hearing official under (a) of this section is directly appealable to a
22 court of competent jurisdiction without disclosure of the audit report to any person
23 unless so ordered by the court.

24 (d) A person claiming the privilege is subject to sanctions as provided by the
25 Alaska Rules of Civil Procedure if the court finds that the person intentionally or
26 knowingly claimed the privilege for unprotected information as provided in
27 AS 09.25.465.

28 (e) A determination of a court under this section is subject to interlocutory
29 appeal.

30 Sec. 09.25.465. NONPRIVILEGED MATERIALS. (a) The privilege under
31 AS 09.25.450 does not apply to

1 (1) a document, communication, datum, report, or other information
2 required by a regulatory agency to be collected, developed, maintained, or reported
3 under a federal or state environmental or health and safety law;

4 (2) information obtained by observation, sampling, or monitoring by
5 a regulatory agency; or

6 (3) information obtained from a source not involved in the preparation
7 of the environmental or health and safety audit report.

8 (b) This section does not limit the right of a person to agree to conduct and
9 disclose an audit report.

10 Sec. 09.25.470. COURT REVIEW AND DISCLOSURE. (a) If there is
11 reasonable cause to believe a criminal offense has been committed due to violation of
12 an environmental or health and safety law, the attorney representing the state may
13 obtain an audit report for which a privilege is asserted under this Act under a search
14 warrant, criminal subpoena, or discovery as allowed by AS 12 and the Alaska Rules
15 of Criminal Procedure.

16 (b) On receipt of the audit report, the attorney representing the state shall seal
17 the report and may not review or disclose the contents of the report unless otherwise
18 allowed under AS 09.25.450 - 09.25.490.

19 (c) Not later than the 30th day after the date that an audit report is received
20 under (a) of this section, the owner or operator who prepared the report or for whom
21 the report was prepared may file with a court of competent jurisdiction a petition
22 requesting an in camera review to determine whether all or a portion of the report is
23 privileged or is subject to disclosure under AS 09.25.450 - 09.25.490. An owner or
24 operator who fails to file a petition under this subsection within the period specified
25 by this subsection waives the privilege.

26 (d) On the filing of a petition under (c) of this section, the court shall issue an
27 order that

28 (1) schedules the in camera review for a date not later than the 45th
29 day after the date the petition is filed; and

30 (2) authorizes the attorney representing the state to remove the seal
31 from the report to review the report, subject to appropriate limitations on distribution

1 or disclosure of the report that are specified in the order to protect against unnecessary
2 disclosure.

3 (e) The attorney representing the state may consult with enforcement agencies
4 regarding the contents of the report as necessary to prepare for the in camera review.

5 (f) Except as determined by a court, information used in preparation for the
6 in camera review under (e) of this section

7 (1) is confidential;

8 (2) may not be used in an investigation or legal proceeding; and

9 (3) is not subject to disclosure under AS 09.25.110 - 09.25.125.

10 (g) On the motion of a party, a court or the appropriate administrative official
11 shall suppress evidence offered in a civil, criminal, or administrative proceeding that
12 arises or is derived from review, disclosure, or use of information obtained under this
13 section if the review, disclosure, or use is not authorized under this section. A party
14 allegedly failing to comply with this section has the burden of proving that the
15 evidence offered did not arise and was not derived from the unauthorized review,
16 disclosure, or use.

17 (h) The parties may stipulate to entry of an order directing that specific
18 information contained in an audit report is or is not subject to the privilege.

19 (i) A court may compel the disclosure of only those portions of an audit report
20 relevant to issues in dispute in the proceeding.

21 (j) A court may find a person who discloses information in violation of this
22 section in contempt of court and may order other appropriate relief.

23 Sec. 09.25.475. VOLUNTARY DISCLOSURE; IMMUNITY. (a) Except as
24 provided by this section, a person who makes a voluntary disclosure of a violation of
25 an environmental or health and safety law is immune from an administrative, civil, or
26 criminal penalty for the violation disclosed.

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

28 (1) the disclosure was made promptly after knowledge of the
29 information disclosed is obtained by the person;

30 (2) the disclosure was made in writing by certified mail to an agency
31 that has regulatory authority with regard to the violation disclosed;

1 (3) an investigation of the violation was not initiated or the violation
2 was not independently detected by an agency with enforcement jurisdiction before the
3 disclosure was made using certified mail;

4 (4) the disclosure arises out of a voluntary environmental or health and
5 safety audit;

6 (5) the person who makes the disclosure initiates an appropriate effort
7 to achieve compliance, pursues that effort with due diligence, and corrects the
8 noncompliance within a reasonable time;

9 (6) the person making the disclosure cooperates with the appropriate
10 agency in connection with an investigation of the issues identified in the disclosure;
11 and

12 (7) the violation did not result in injury to one or more persons at the
13 site or substantial off-site harm to persons, property, or the environment.

14 (c) A disclosure is not voluntary for purposes of this section if it is a report
15 to a regulatory agency required solely by a specific condition of an enforcement order
16 or decree.

17 (d) The immunity established by (a) of this section does not apply and an
18 administrative, civil, or criminal penalty may be imposed under applicable law if the

19 (1) person who made the disclosure intentionally or knowingly
20 committed or was responsible for the commission of the disclosed violation;

21 (2) person who made the disclosure recklessly committed or was
22 responsible for the commission of the disclosed violation and the violation resulted in
23 substantial injury to one or more persons at the site or off-site harm to persons,
24 property, or the environment;

25 (3) offense was committed intentionally or knowingly by a member of
26 the person's management or an agent of the person and the person's policies or lack
27 of prevention systems contributed materially to the occurrence of the violation; or

28 (4) offense was committed recklessly by a member of the person's
29 management or an agent of the person, the person's policies or lack of prevention
30 systems contributed materially to the occurrence of the violation, and the violation
31 resulted in substantial injury to one or more persons at the site or off-site harm to

1 persons, property, or the environment.

2 (e) A penalty that is imposed on a person for violation of an environmental or
3 health and safety law when the person has made a voluntary disclosure under (a) of
4 this section but is not granted immunity because of (d) of this section may, to the
5 extent appropriate and not prohibited by law, be mitigated by factors such as

6 (1) the voluntariness of the disclosure;

7 (2) efforts by the disclosing party to conduct environmental or health
8 and safety audits;

9 (3) remediation;

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

12 (5) other relevant considerations.

13 (f) In a civil, administrative, or criminal enforcement action brought against
14 a person for a violation for which the person claims to have made a voluntary
15 disclosure, the person claiming the immunity has the burden of establishing a prima
16 facie case that the disclosure was voluntary. After the person claiming the immunity
17 establishes a prima facie case of voluntary disclosure, other than a case in which under
18 (d) of this section immunity does not apply, the enforcement authority has the burden
19 of rebutting the presumption by a preponderance of the evidence or, in a criminal case,
20 by proof beyond a reasonable doubt.

21 (g) In order to receive immunity under this section, a facility conducting an
22 environmental or health and safety audit must give notice to an appropriate regulatory
23 agency of the fact that it is planning to commence the audit. The notice must specify
24 the facility or portion of the facility to be audited, the anticipated time the audit will
25 begin, and the general scope of the audit. The notice may provide notification of more
26 than one scheduled environmental or health and safety audit at a time. Once initiated,
27 an audit shall be completed within a reasonable time not to exceed six months unless
28 an extension is approved by the governmental entity with regulatory authority over the
29 regulated facility or operation based on reasonable grounds.

30 (h) The immunity under this section does not apply if a court or administrative
31 law judge finds that the person claiming the immunity has, on or after the effective

1 date of this Act,

2 (1) repeated or continuously committed serious violations; and

3 (2) not attempted to bring the facility or operation into compliance, so
4 as to constitute a pattern of disregard of environmental or health and safety laws; in
5 order to be considered a pattern, the person must have committed a series of violations
6 that were due to separate and distinct events within a three-year period at the same
7 facility or operation.

8 (i) A violation that has been voluntarily disclosed and to which immunity
9 applies must be identified in a compliance history report as being voluntarily disclosed.

10 Sec. 09.25.480. CIRCUMVENTION BY REGULATION PROHIBITED. A
11 regulatory agency may not adopt a regulation or impose a condition that circumvents
12 the purpose of AS 09.25.450 - 09.25.490.

13 Sec. 09.25.485. RELATIONSHIP TO OTHER RECOGNIZED PRIVILEGES.
14 AS 09.25.045 - 09.25.490 do not limit, waive, or abrogate the scope or nature of a
15 statutory or common law privilege, including the work product doctrine and the
16 attorney-client privilege.

17 Sec. 09.25.490. DEFINITIONS. (a) In AS 09.25.450 - 09.25.490,

18 (1) "audit report" means a report that includes each document and
19 communication, other than those set out in AS 09.25.465, produced from an
20 environmental or health and safety audit; general components that may be contained
21 in a completed audit report include

22 (A) a report, prepared by an auditor, monitor, or similar person,
23 that may include a description of the scope of the audit, the information gained
24 in the audit, findings, conclusions, recommendations, exhibits, and appendices;
25 the types of exhibits and appendices that may be contained in an audit report
26 include supporting information that is collected or developed for the primary
27 purpose of and in the course of an environmental or health and safety audit,
28 including

29 (i) interviews with current or former employees;

30 (ii) field notes and records of observations;

31 (iii) findings, opinions, suggestions, conclusions,

1 guidance, notes, drafts, and memoranda;
2 (iv) legal analyses;
3 (v) drawings;
4 (vi) photographs;
5 (vii) laboratory analyses and other analytical data;
6 (viii) computer generated or electronically recorded
7 information;
8 (ix) maps, charts, graphs, and surveys; and
9 (x) other communications associated with an
10 environmental or health and safety audit;
11 (B) memoranda and documents analyzing all or a portion of the
12 materials described in (A) of this paragraph or discussing implementation
13 issues; and
14 (C) an implementation plan or tracking system to correct past
15 noncompliance, improve current compliance, or prevent future noncompliance;
16 (2) "environmental or health and safety audit" means a systematic
17 voluntary evaluation, review, or assessment of compliance with environmental or
18 health and safety laws or a permit issued under those laws conducted by an owner or
19 operator, an employee of the owner or operator, or an independent contractor of
20 (A) a regulated facility or operation; or
21 (B) an activity at a regulated facility or operation;
22 (3) "environmental or health and safety law" means
23 (A) a federal or state environmental or occupational health and
24 safety law; or
25 (B) a rule, regulation, or municipal ordinance adopted in
26 conjunction with or to implement a law described by (A) of this paragraph;
27 (4) "intentionally" has the meaning given in AS 11.81.900;
28 (5) "knowingly" has the meaning given in AS 11.81.900;
29 (6) "owner or operator" means a person who owns or operates a
30 regulated facility or operation;
31 (7) "penalty" means an administrative, civil, or criminal sanction

1 imposed by the state to punish a person for a violation of a statute or rule; the term
2 does not include a technical or remedial provision ordered by a regulatory authority;

3 (8) "recklessly" has the meaning given in AS 11.81.900;

4 (9) "regulated facility or operation" means a facility or operation that
5 is regulated under an environmental or health and safety law.

6 (b) To fully implement the privilege established under AS 09.25.450 -
7 09.25.490, the term "environmental or health and safety law" shall be construed
8 broadly.

9 * **Sec. 2.** AS 12.45 is amended by adding a new section to read:

10 Sec. 12.45.052. PRIVILEGE RELATING TO CERTAIN SELF-AUDITS. An
11 audit report based on an environmental or health and safety audit is privileged under
12 AS 09.25.450 - 09.25.490.

13 * **Sec. 3.** COURT RULES. (a) AS 09.25.460(c), enacted by sec. 1 of this Act, has the
14 effect of amending Alaska Rules of Appellate Procedure 602, 603, 610, and 611 by providing
15 for interlocutory appeal of certain decisions of administrative hearing officials as a matter of
16 right and by limiting disclosure of certain documents during the pendency of the appeal unless
17 disclosure is ordered by the court.

18 (b) AS 09.25.460(e), enacted by sec. 1 of this Act, has the effect of amending Alaska
19 Rules of Appellate Procedure 202 and 402 by providing for interlocutory appeal of certain
20 decisions of a court as a matter of right.

21 * **Sec. 4.** APPLICABILITY. The privilege created by AS 09.25.450 - 09.25.490, added
22 by sec. 1 of this Act, applies to environmental or health and safety audits that are conducted
23 on or after the effective date of this Act.