

CS FOR SENATE BILL NO. 199(RES)

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - SECOND SESSION

BY THE SENATE RESOURCES COMMITTEE

Offered: 3/12/96
Referred: Finance

Sponsor(s): SENATORS LEMAN, Pearce

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."

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

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

5 ARTICLE 5. PRIVILEGES AND IMMUNITIES

6 RELATED TO DISCLOSURE OF CERTAIN SELF-AUDITS.

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

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

11 (2) a criminal proceeding; or

12 (3) an administrative proceeding, except for workers' compensation
13 proceedings.

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 all or a portion of the audit but did
9 not personally observe or participate in the relevant instances or events being
10 reviewed for compliance;

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

13 (C) custodian of the audit results.

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

20 (d) A regulatory agency and an employee of a regulatory agency may not
21 request, review, or otherwise use an audit report during an agency inspection of a
22 regulated facility or operation or an activity of a regulated facility or operation.

23 (e) To facilitate identification, each document in an audit report shall be
24 labeled "COMPLIANCE REPORT: PRIVILEGED DOCUMENT," or labeled with
25 words of similar import.

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 in writing by the owner
30 or operator 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.

29 (e) Disclosure of a portion of an audit report after waiver of the privilege
30 under (a) of this section, after disclosure under (b) of this section, or through any other
31 means may not be construed to waive the privilege established under AS 09.25.450 for

1 any other part of the audit report.

2 Sec. 09.25.465. NONPRIVILEGED MATERIALS. (a) The privilege under
3 AS 09.25.450 does not apply to that part of an audit report that contains

4 (1) a document, communication, datum, report, or other information
5 required by a regulatory agency to be collected, developed, maintained, or reported
6 under an environmental or health and safety law, under a permit issued under an
7 environmental or health and safety law, as a requirement for obtaining, maintaining,
8 or renewing a license, or as a requirement under a contract with the state;

9 (2) information that a regulatory agency obtains by observation,
10 sampling, or monitoring; or

11 (3) information that a regulatory agency obtains from a source that was
12 not involved in the compilation or preparation of the environmental or health and
13 safety audit report.

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

16 Sec. 09.25.475. VOLUNTARY DISCLOSURE; IMMUNITY. (a) Except as
17 provided by this section, a person who makes a voluntary disclosure of a violation of
18 an environmental or health and safety law is immune from an administrative, civil, or
19 criminal penalty for the violation disclosed, for a violation based on the facts disclosed,
20 and for a violation discovered because of the disclosure that was unknown to the
21 person making the disclosure.

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

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

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

27 (3) an investigation of the violation was not initiated or the violation
28 was not independently detected by an agency with enforcement jurisdiction before the
29 disclosure was made using certified mail; under this paragraph, the agency has the
30 burden of proving that an investigation of the violation was initiated or the violation
31 was detected before receipt of the certified mail;

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

3 (5) the person who makes the disclosure initiates, within a reasonable
4 time, an appropriate effort to achieve compliance, pursues that effort with due
5 diligence, and corrects or implements a series of measures designed to remedy the
6 noncompliance within a reasonable time;

7 (6) the person making the disclosure cooperates with the appropriate
8 agency in connection with an investigation of the issues identified in the disclosure and
9 agrees under terms of a confidentiality agreement to disclose to the agency, on request
10 of the agency, the part of the audit report that describes the implementation plan or
11 tracking system developed to correct past noncompliance, improve current compliance,
12 or prevent future noncompliance; and

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

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

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

20 (1) person who made the disclosure knowingly committed the disclosed
21 violation;

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

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

29 (4) offense was committed recklessly by a member of the person's
30 management or an agent of the person, the person's policies or lack of prevention
31 systems contributed materially to the occurrence of the violation, and the violation

1 resulted in substantial injury to one or more persons at the site or substantial off-site
2 harm to persons, property, or the environment.

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

7 (1) the voluntariness of the disclosure;

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

10 (3) remediation;

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

13 (5) other relevant considerations.

14 (f) In order to receive immunity under this section, a facility conducting an
15 environmental or health and safety audit must give notice by certified mail to an
16 appropriate regulatory agency of the fact that it is planning to commence the audit.
17 The notice must specify the facility or portion of the facility to be audited, the date the
18 audit will begin and end, and the general scope of the audit. Immunity under this
19 section is available only for information and documents first produced or obtained
20 during the time period specified in the notice. The notice may provide notification of
21 more than one scheduled environmental or health and safety audit at a time. Once
22 initiated, an audit shall be completed within the time period specified in the notice
23 unless an extension is approved by the governmental entity with regulatory authority
24 over the regulated facility or operation based on reasonable grounds.

25 (g) A regulatory agency may not initiate an inspection, monitoring, or other
26 investigative activity based solely on the receipt of a notice under (f) of this section.
27 The agency has the burden of proving that an inspection, monitoring, or other
28 investigative activity initiated after receipt of a notice under (f) of this section was not
29 initiated based solely on the receipt of the notice.

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 an unreasonable number of times or continuously
3 committed violations that are the same as, or similar to, the violation for which
4 immunity is sought under this section; and

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

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

12 Sec. 09.25.485. RELATIONSHIP TO OTHER RECOGNIZED PRIVILEGES.
13 AS 09.25.450 - 09.25.490 do not limit, waive, or abrogate the scope or nature of a
14 statutory or common law privilege, including the work product doctrine, the attorney-
15 client privilege, and any other privilege recognized by a court with appropriate
16 authority in this state.

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 voluntary
17 evaluation, review, or assessment of compliance with environmental or health and
18 safety laws or a permit issued under those laws conducted randomly, regularly,
19 spontaneously, or in response to a particular event by an owner or operator, an
20 employee of the owner or operator, or an independent contractor of
21 (A) a regulated facility or operation; or
22 (B) an activity at a regulated facility or operation;
23 (3) "environmental or health and safety law" means
24 (A) a federal or state environmental or occupational health and
25 safety law; or
26 (B) a rule, regulation, or municipal ordinance adopted in
27 conjunction with or to implement a law described by (A) of this paragraph;
28 (4) "intentionally" has the meaning given in AS 11.81.900;
29 (5) "knowingly" has the meaning given in AS 11.81.900;
30 (6) "owner or operator" means a person who owns or operates a
31 regulated facility or operation;

1 (7) "penalty" means an administrative, civil, or criminal sanction
2 imposed by the state to punish a person for a violation of a statute or rule; the term
3 does not include a technical or remedial provision ordered by a regulatory authority;

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

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

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

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

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

14 * **Sec. 3.** APPLICABILITY. The privilege created by AS 09.25.450 - 09.25.490, added
15 by sec. 1 of this Act, applies to environmental or health and safety audits that are conducted
16 on or after the effective date of this Act.