

CS FOR SENATE BILL NO. 199(FIN)

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - SECOND SESSION

BY THE SENATE FINANCE COMMITTEE

Offered: 4/3/96
Referred: Rules

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 that is privileged under (a) of this
22 section during an agency inspection of a regulated facility or operation or an activity
23 of a regulated facility or operation.

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

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

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

1 (b) Disclosure of an audit report or information generated by an environmental
2 or health and safety audit does not waive the privilege established by AS 09.25.450
3 if the disclosure is made

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

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

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

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

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

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

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

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

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

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

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

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

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

28 (d) Information that is disclosed under (b)(3) of this section is confidential and
29 is not subject to disclosure under AS 09.25.110 - 09.25.125.

30 (e) Disclosure of a portion of an audit report after waiver of the privilege
31 under (a) of this section, after disclosure under (b) of this section, or through any other

1 means may not be construed to waive the privilege established under AS 09.25.450 for
2 any other part of the audit report.

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

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

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

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

15 (b) An audit report is not privileged and is admissible as evidence and subject
16 to discovery in a proceeding relating to pipeline rates, tariffs, fares, or charges.

17 (c) This section does not limit the right of a person to agree to conduct and
18 disclose an audit report.

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

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

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

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

30 (3) an investigation of the violation was not initiated or the violation
31 was not independently detected by an agency with enforcement jurisdiction before the

1 disclosure was made using certified mail; under this paragraph, the agency has the
2 burden of proving that an investigation of the violation was initiated or the violation
3 was detected before receipt of the 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, within a reasonable
7 time, an appropriate effort to achieve compliance, pursues that effort with due
8 diligence, and corrects or implements a series of measures designed to remedy the
9 noncompliance within a reasonable time;

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

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

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

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

23 (1) person who made the disclosure knowingly committed the disclosed
24 violation;

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

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

1 (4) offense was committed recklessly by a member of the person's
2 management or an agent of the person, the person's policies or lack of prevention
3 systems contributed materially to the occurrence of the violation, and the violation
4 resulted in substantial injury to one or more persons at the site or substantial off-site
5 harm to persons, property, or the environment.

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

- 10 (1) the voluntariness of the disclosure;
- 11 (2) efforts by the disclosing party to conduct environmental or health
12 and safety audits;
- 13 (3) remediation;
- 14 (4) cooperation with government officials investigating the disclosed
15 violation; and
- 16 (5) other relevant considerations.

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

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

1 initiated based solely on the receipt of the notice.

2 (h) The immunity under this section does not apply if a court or administrative
3 law judge finds that the person claiming the immunity has, on or after the effective
4 date of this Act,

5 (1) repeated an unreasonable number of times or continuously
6 committed violations that are the same as, or similar to, the violation for which
7 immunity is sought under this section; and

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

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

15 (j) A person is not immune under this section if the disclosure is in a
16 proceeding relating to pipeline rates, tariffs, fares, or charges.

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

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

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

27 (A) a report, prepared by an auditor, monitor, or similar person,
28 that may include a description of the scope of the audit, the information gained
29 in the audit, findings, conclusions, recommendations, exhibits, and appendices;
30 the types of exhibits and appendices that may be contained in an audit report
31 include supporting information that is collected or developed for the primary

1 purpose of and in the course of an environmental or health and safety audit,
2 including

- 3 (i) interviews with current or former employees;
- 4 (ii) field notes and records of observations;
- 5 (iii) findings, opinions, suggestions, conclusions,
6 guidance, notes, drafts, and memoranda;
- 7 (iv) legal analyses;
- 8 (v) drawings;
- 9 (vi) photographs;
- 10 (vii) laboratory analyses and other analytical data;
- 11 (viii) computer generated or electronically recorded
12 information;
- 13 (ix) maps, charts, graphs, and surveys; and
- 14 (x) other communications associated with an
15 environmental or health and safety audit;

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

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

21 (2) "environmental or health and safety audit" means a voluntary
22 evaluation, review, or assessment of compliance with environmental or health and
23 safety laws or a permit issued under those laws conducted randomly, regularly,
24 spontaneously, or in response to a particular event by an owner or operator, an
25 employee of the owner or operator, or an independent contractor of

26 (A) a regulated facility or operation; or

27 (B) an activity at a regulated facility or operation;

28 (3) "environmental or health and safety law" means

29 (A) a federal or state environmental or occupational health and
30 safety law; or

31 (B) a rule, regulation, or municipal ordinance adopted in

1 conjunction with or to implement a law described by (A) of this paragraph;

2 (4) "intentionally" has the meaning given in AS 11.81.900;

3 (5) "knowingly" has the meaning given in AS 11.81.900;

4 (6) "owner or operator" means a person who owns or operates a
5 regulated facility or operation;

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

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

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

12 (b) To fully implement the privilege established under AS 09.25.450 -
13 09.25.490, the term "environmental or health and safety law" shall be construed
14 broadly.

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

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

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