

HOUSE CS FOR CS FOR SENATE BILL NO. 199(RES)

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE RESOURCES COMMITTEE

Offered: 5/2/96

Referred: Labor and Commerce, Finance

Sponsor(s): SENATORS LEMAN, Pearce

REPRESENTATIVE James

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.** 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 by
12 regulated entities of their compliance with environmental requirements by authorizing certain
13 qualified privileges and immunities relating to those self-evaluations;

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

1 environmental business practices and procedures; this encouragement can best be achieved
2 by preserving the free flow of information; the free flow of the kind of information that is
3 generated by self-audits would be curtailed if a privilege for the audits was not available;
4 therefore, it is the intent of the legislature to recognize an audit privilege under this Act in
5 order to protect the confidentiality of communications relating to voluntary internal
6 environmental audits; however, the legislature does not intend that audit reports privileged
7 under this Act may be used to shield a person from liability under applicable laws and
8 regulations by blocking access to relevant facts;

9 (3) the public also has a strong interest in obtaining cost-effective correction
10 of inadvertent environmental violations; this goal can best be achieved by offering qualified
11 immunity from administrative and civil penalties to regulated entities that promptly report
12 known violations of environmental regulations that are uncovered as part of an audit so that
13 the violations can promptly be corrected and a corrective action plan can be negotiated with
14 the appropriate governmental regulatory agency;

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

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

21 **ARTICLE 5. PRIVILEGES AND IMMUNITIES**

22 **RELATED TO DISCLOSURE OF CERTAIN SELF-AUDITS.**

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

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

27 (2) a criminal proceeding; or

28 (3) an administrative proceeding, except for workers' compensation
29 proceedings.

30 (b) A person, when called or subpoenaed as a witness, may not be compelled
31 to testify or produce a document related to an environmental audit if

1 (1) the audit report is privileged under (a) of this section and is
2 inadmissible in the same proceeding;

3 (2) 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 audit
5 report and that is addressed in a privileged part of an audit report; and

6 (3) for purposes of this subsection only, the person is a

7 (A) person who conducted all or a portion of the audit but did
8 not personally observe or participate in the relevant instances or events being
9 reviewed for compliance;

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 audit and who has actually observed or participated in instances or
15 events being reviewed for compliance may testify about those instances or events but
16 may not, in a proceeding covered by (a) of this section, be compelled to testify about
17 or produce documents related to the preparation of or a privileged part of an
18 environmental audit or an item listed in AS 09.25.490(a)(1).

19 (d) A regulatory agency and an employee of a regulatory agency may not
20 request, review, or otherwise use an audit report that is privileged under (a) of this
21 section during an agency inspection of a regulated facility, operation, or property or
22 an activity of a regulated facility, operation, or property.

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 (g) This section may not be construed to

29 (1) prevent a regulatory agency from issuing an emergency order,
30 seeking injunctive relief, independently obtaining relevant facts, conducting necessary
31 inspections or taking other appropriate action regarding implementation and

1 enforcement of an applicable environmental law, except as otherwise provided in
2 AS 09.25.475; or

3 (2) authorize a privilege for uninterrupted or continuous environmental
4 audits.

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

8 (b) Disclosure of an audit report or information generated by an environmental
9 audit does not waive the privilege established by AS 09.25.450 if the disclosure is
10 made

11 (1) to address or correct a matter raised by the environmental audit and
12 is made only to

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

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

16 (C) an officer or director of the regulated facility, operation, or
17 property;

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

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

20 (2) under the terms of a confidentiality agreement between the person
21 for whom the audit report was prepared or the owner or operator of the audited
22 facility, operation, or property and a

23 (A) partner or potential partner of the owner or operator of the
24 facility, operation, or property;

25 (B) transferee or potential transferee of the facility, operation,
26 or property;

27 (C) lender or potential lender for the facility, operation, or
28 property;

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

30 (E) person or entity engaged in the business of insuring,
31 underwriting, or indemnifying the facility, operation, or property; or

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

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

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

8 (e) Disclosure of a portion of an audit report after waiver of the privilege
9 under (a) of this section, after disclosure under (b) of this section, or through any other
10 means may not be construed to waive the privilege established under AS 09.25.450 for
11 any other part of the audit report.

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

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

19 (2) portion of the audit report is not subject to the privilege under
20 AS 09.25.465;

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

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

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

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

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 an environmental law, under a permit issued under an environmental law, as a
4 requirement for obtaining, maintaining, or renewing a license, or as a requirement
5 under a contract or lease with the state;

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

8 (3) information that a regulatory agency obtains from a source that was
9 not involved in compiling, preparing, or conducting the environmental audit report;

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

13 (5) a document existing before the commencement of, and independent
14 of, the environmental audit; or

15 (6) a document prepared after the completion of, and independent of,
16 the environmental audit.

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

19 (c) An audit report is not privileged and is admissible as evidence and subject
20 to discovery if the report was commenced after the owner or operator knew of an
21 impending inspection or investigation by a regulatory agency.

22 (d) This section does not limit the right of a person to agree to conduct and
23 disclose an audit report.

24 Sec. 09.25.475. VOLUNTARY DISCLOSURE; IMMUNITY. (a) Except as
25 provided by this section, a person who makes a voluntary disclosure of a violation of
26 an environmental law is immune from an administrative or civil penalty for the
27 violation disclosed, for a violation based on the facts disclosed, and for a violation
28 discovered because of the disclosure that was unknown to the person making the
29 disclosure.

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

31 (1) the disclosure was made promptly after knowledge of the

1 information disclosed is obtained by the person;

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

4 (3) an investigation of the violation was not initiated or the violation
5 was not independently detected by an agency with enforcement jurisdiction before the
6 disclosure was made using certified mail; under this paragraph, the agency has the
7 burden of proving that an investigation of the violation was initiated or the violation
8 was detected before receipt of the certified mail;

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

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

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

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

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

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

27 (1) person who made the disclosure knowingly committed the disclosed
28 violation;

29 (2) person who made the disclosure recklessly committed or was
30 responsible for the commission of the disclosed violation and the violation resulted in
31 substantial injury to one or more persons at the site or substantial off-site harm to

1 persons, property, or the environment;

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

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

10 (e) An administrative or civil penalty that is imposed on a person for violation
11 of an environmental law when the person has made a voluntary disclosure under (a)
12 of this section but is not granted immunity because of (d) of this section may, to the
13 extent appropriate and not prohibited by law, be mitigated by

14 (1) the voluntariness of the disclosure;

15 (2) efforts by the disclosing party to conduct environmental audits;

16 (3) remediation;

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

19 (5) the nature of the violation; and

20 (6) other relevant considerations.

21 (f) In order to receive immunity under this section, a facility conducting an
22 environmental audit must give notice by certified mail 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 date the audit will begin and
25 end, and the general scope of the audit. Immunity under this section is available only
26 for violations that are revealed through or discovered as a result of information and
27 documents first produced or obtained during the time period specified in the notice.
28 The notice may provide notification of more than one scheduled environmental audit
29 at a time. Once initiated, an audit shall be completed within the time period specified
30 in the notice except that the audit period may be extended once for up to 60 days if
31 the facility gives notice of the extension and its duration to the appropriate regulatory

1 agency by certified mail before the original time period expires.

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

7 (h) The immunity under this section does not apply if a court or administrative
8 law judge finds that the person claiming the immunity has

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

12 (2) not attempted to bring the facility, operation, or property into
13 compliance, so as to constitute a pattern of disregard of environmental laws.

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

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

18 (k) A person may not be required to waive immunity as a condition of a
19 compliance plan or similar agreement.

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

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

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

30 (A) a report, prepared by an auditor, monitor, or similar person,
31 that may include a description of the scope of the audit, the information gained

1 in the audit, findings, conclusions, recommendations, exhibits, and appendices;
2 the types of exhibits and appendices that may be contained in an audit report
3 include supporting information that is collected or developed for the primary
4 purpose of and in the course of an environmental audit, including

5 (i) interviews with current or former employees;

6 (ii) field notes and records of observations;

7 (iii) findings, opinions, suggestions, conclusions,
8 guidance, notes, drafts, and memoranda;

9 (iv) legal analyses;

10 (v) drawings;

11 (vi) photographs;

12 (vii) laboratory analyses and other analytical data;

13 (viii) computer generated or electronically recorded
14 information;

15 (ix) maps, charts, graphs, and surveys; and

16 (x) other communications associated with an
17 environmental audit;

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

21 (C) an implementation plan or tracking system to correct past
22 noncompliance, improve current compliance, or prevent future noncompliance;
23 however, "audit report" does not include formal communications or agreements
24 between an owner or operator and the appropriate agency regarding a
25 compliance implementation plan or strategy;

26 (2) "environmental audit" means a voluntary, confidential, critical,
27 internal, and retrospective review, evaluation, or analysis of current or past conduct,
28 practices, and occurrences and their resulting consequences, including an assessment
29 that is a part of the owner's or operator's compliance management system, that is
30 conducted randomly, regularly, or in response to a particular event by an owner or
31 operator or by an employee or independent contractor of an owner or operator and is

1 (A) conducted in the expectation that it will be confidential; and
2 (B) specifically and exclusively designed and undertaken for the
3 purpose of determining compliance with environmental laws or a permit issued
4 under those laws;

5 (3) "environmental law" means

6 (A) a federal or state environmental law; or

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

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

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

11 (6) "owner or operator" means a person who owns or operates a
12 regulated facility, operation, or property;

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

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

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

19 (b) To fully implement the privilege and immunity established under
20 AS 09.25.450 - 09.25.490, the term "environmental law" shall be construed broadly.
21 However, the term "environmental law" may not be construed so broadly as to include
22 a law governing occupational health and safety, and the term "environmental audit"
23 may not be construed to include a health and safety audit.

24 * **Sec. 3.** AS 12.45 is amended by adding a new section to read:

25 Sec. 12.45.052. PRIVILEGE RELATING TO CERTAIN SELF-AUDITS. An
26 audit report based on an environmental audit is privileged to the extent provided under
27 AS 09.25.450 - 09.25.490.

28 * **Sec. 4.** APPLICABILITY. The privilege created by AS 09.25.450 - 09.25.490, added
29 by sec. 2 of this Act, applies to environmental audits that are conducted on or after the
30 effective date of this Act.