

SENATE BILL NO. 41

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY SENATORS LEMAN, Pearce, Taylor

Introduced: 1/13/97

Referred: L&C, Judiciary, Finance

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

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

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

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

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

22 **Article 5. Privileges and Immunities**

23 **Related to Disclosure of Certain Self-Audits.**

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

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

28 (2) 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 or health and safety audit

1 if

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

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

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

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

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

14 (C) custodian of the audit results.

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

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

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

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

30 (g) This section may not be construed to

31 (1) prevent a regulatory agency from issuing an emergency order,

1 seeking injunctive relief, independently obtaining relevant facts, conducting necessary
2 inspections, or taking other appropriate action regarding implementation and
3 enforcement of an applicable environmental or health and safety law, except as
4 otherwise provided in AS 09.25.475; or

5 (2) authorize a privilege for uninterrupted or continuous environmental
6 or health and safety audits.

7 **Sec. 09.25.455. Exception: waiver.** (a) The privilege in AS 09.25.450 does
8 not apply to the extent the privilege is expressly waived in writing by the owner or
9 operator who prepared the audit report or caused the report to be prepared.

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

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

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

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

18 (C) an officer or director of the regulated facility, operation, or
19 property;

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

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

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

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

27 (B) a transferee or potential transferee of the facility, operation,
28 or property;

29 (C) a lender or potential lender for the facility, operation, or
30 property;

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

1 (E) a person or entity engaged in the business of insuring,
2 underwriting, or indemnifying the facility, operation, or property; or

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

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

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

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

14 **Sec. 09.25.460. Exception: disclosure required by court or administrative**
15 **hearing officer.** (a) A court or administrative hearing officer with competent
16 jurisdiction may require disclosure of a portion of an audit report in a civil or
17 administrative proceeding if the court or administrative hearing officer determines,
18 after an in camera review consistent with the appropriate rules of procedure, that the

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

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

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

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

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

31 **Sec. 09.25.465. Nonprivileged materials.** (a) The privilege under

1 AS 09.25.450 does not apply to that part of an audit report that contains

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

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

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

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

15 (5) a document existing before the commencement of, and independent
16 of, the environmental or health and safety audit; or

17 (6) a document prepared after the completion of, and independent of,
18 the environmental or health and safety audit.

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

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

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

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

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

2 (1) the disclosure is made promptly after knowledge of the information
3 disclosed is obtained by the person;

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

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

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

13 (5) the person making the disclosure initiates, within a reasonable time,
14 an appropriate effort to achieve compliance, pursues that effort with due diligence, and
15 corrects or implements a series of measures designed to remedy the noncompliance
16 within a reasonable time;

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

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

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

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

30 (1) the person who made the disclosure knowingly committed the
31 disclosed violation;

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

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

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

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

17 (1) the voluntariness of the disclosure;

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

20 (3) remediation;

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

23 (5) the nature of the violation; and

24 (6) other relevant considerations.

25 (f) In order to receive immunity under this section, a facility conducting an
26 environmental or health and safety audit must give notice by certified mail to an
27 appropriate regulatory agency of the fact that it is planning to commence the audit.
28 The notice must specify the facility or portion of the facility to be audited, the date the
29 audit will begin and end, and the general scope of the audit. Immunity under this
30 section is available only for violations that are revealed through or discovered as a
31 result of information and documents first produced or obtained during the time period

1 specified in the notice. The notice may provide notification of more than one
2 scheduled environmental or health and safety audit at a time. Once initiated, an audit
3 shall be completed within the time period specified in the notice except that the audit
4 period may be extended once for up to 60 days if the facility gives notice of the
5 extension and its duration to the appropriate regulatory agency by certified mail before
6 the original time period expires.

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

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

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

17 (2) not attempted to bring the facility, operation, or property into
18 compliance, so as to constitute a pattern of disregard of environmental or health and
19 safety laws.

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

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

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

26 **Sec. 09.25.485. Relationship to other recognized privileges.** AS 09.25.450 -
27 09.25.490 do not limit, waive, or abrogate the scope or nature of a statutory or
28 common law privilege, including the work product doctrine, the attorney-client
29 privilege, and any other privilege recognized by a court with appropriate authority in
30 this state.

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

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

5 (A) a report, prepared by an auditor, monitor, or similar person,
6 that may include a description of the scope of the audit, the information gained
7 in the audit, findings, conclusions, recommendations, exhibits, and appendices;
8 the types of exhibits and appendices that may be contained in an audit report
9 include supporting information that is collected or developed for the primary
10 purpose of and in the course of an environmental or health and safety audit,
11 including

- 12 (i) interviews with current or former employees;
13 (ii) field notes and records of observations;
14 (iii) findings, opinions, suggestions, conclusions,
15 guidance, notes, drafts, and memoranda;
16 (iv) legal analyses;
17 (v) drawings;
18 (vi) photographs;
19 (vii) laboratory analyses and other analytical data;
20 (viii) computer generated or electronically recorded
21 information;
22 (ix) maps, charts, graphs, and surveys; and
23 (x) other communications associated with an
24 environmental or health and safety audit;

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

28 (C) an implementation plan or tracking system to correct past
29 noncompliance, improve current compliance, or prevent future noncompliance;
30 however, "audit report" does not include formal communications or agreements
31 between an owner or operator and the appropriate agency regarding a

1 compliance implementation plan or strategy;

2 (2) "environmental or health and safety audit" means a voluntary,
3 confidential, critical, internal, and retrospective review, evaluation, or analysis of
4 current or past conduct, practices, and occurrences and their resulting consequences,
5 including an assessment that is a part of the owner's or operator's compliance
6 management system, that is conducted randomly, regularly, or in response to a
7 particular event by an owner or operator or by an employee or independent contractor
8 of an owner or operator and is

9 (A) conducted in the expectation that it will be confidential; and

10 (B) specifically and exclusively designed and undertaken for the
11 purpose of determining compliance with environmental or health and safety
12 laws or a permit issued under those laws;

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

14 (A) a federal or state environmental or occupational health and
15 safety law; or

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

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

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

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

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

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

26 (9) "regulated facility, operation, or property" means a facility,
27 operation, or property that is regulated under an environmental or health and safety
28 law.

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

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

2 **Sec. 12.45.052. Privilege relating to certain self-audits.** An audit report
3 based on an environmental or health and safety audit is privileged to the extent
4 provided under AS 09.25.450 - 09.25.490.

5 * **Sec. 4. APPLICABILITY.** The privilege created by AS 09.25.450 - 09.25.490, added
6 by sec. 2 of this Act, applies to environmental or health and safety audits that are conducted
7 on or after the effective date of this Act.