

**CS FOR SENATE BILL NO. 41(L&C)**

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY THE SENATE LABOR AND COMMERCE COMMITTEE

Offered: 1/31/97

Referred: Judiciary, Finance

Sponsor(s): SENATORS LEMAN, Pearce, Taylor

**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 and analysis by regulated entities of their compliance with  
13 environmental and health and safety requirements by authorizing certain qualified privileges  
14 and immunities 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 the  
 8 parts of an audit report consisting of confidential self-evaluation and analysis that are  
 9 privileged under this Act may be used to shield a person from liability under applicable laws  
 10 and regulations by blocking access to relevant facts;

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

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

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

23 **Article 5. Privileges and Immunities**

24 **Related to Disclosure of Certain Self-Audits and Violations.**

25 **Sec. 09.25.450. Audit report privilege.** (a) Except as provided in  
 26 AS 09.25.460, an owner or operator who prepares an audit report or causes an audit  
 27 report to be prepared has a privilege to refuse to disclose, and to prevent another  
 28 person from disclosing, the parts of the report that consist of confidential self-  
 29 evaluation and analysis of the owner's or operator's compliance with environmental  
 30 or health and safety laws. Except as provided in AS 09.25.455 - 09.25.480, the  
 31 privileged information is not admissible as evidence or subject to discovery in

- 1 (1) a civil action, whether legal or equitable; or  
2 (2) an administrative proceeding, except for workers' compensation  
3 proceedings.

4 (b) With respect to confidential self-evaluation and analysis in an  
5 environmental audit, in order to qualify for the privilege under this section and the  
6 immunity under AS 09.25.475, at least 15 days before conducting the audit, the owner  
7 or operator conducting the audit must give notice by certified mail to the department  
8 of the fact that it is planning to commence the audit. The notice must specify the  
9 facility, operation, or property or portion of the facility, operation, or property to be  
10 audited, the date the audit will begin and end, and the general scope of the audit. The  
11 notice may provide notification of more than one scheduled environmental audit at a  
12 time. Once initiated, an audit shall be completed within 30 days unless a longer period  
13 of time is agreed upon between the owner or operator and the department. The audit  
14 report must be completed in a timely manner.

15 (c) The following persons may claim the privilege available under (a) of this  
16 section:

17 (1) the owner or operator who prepared the audit report or caused the  
18 audit report to be prepared;

19 (2) a person who conducted all or a portion of the audit but did not  
20 personally observe or participate in the relevant instances or events being  
21 reviewed for compliance;

22 (3) a person to whom confidential self-evaluation or analysis is  
23 disclosed under AS 09.25.455(b); or

24 (4) a custodian of the audit results.

25 (d) A person who conducts or participates in the preparation of an audit report  
26 and who actually observed or participated in conditions or events being reviewed for  
27 compliance may testify about those conditions or events but may not, in a proceeding  
28 covered by (a) of this section, be compelled to testify about or produce documents  
29 consisting of confidential self-evaluation and analysis.

30 (e) A person claiming the privilege described in this section has the burden of  
31 proving the applicability of the privilege.

1 (f) To facilitate identification, each document in an audit report that contains  
2 confidential self-evaluation or analysis shall be labeled "AUDIT REPORT:  
3 PRIVILEGED DOCUMENT."

4 (g) A government agency or its employees or agents may not, as a condition  
5 of a permit, license, or approval issued under an environmental law, require an owner  
6 or operator to waive the privilege available under this section.

7 (h) Except when the privilege is waived under AS 09.25.455(a) or disclosure  
8 is made under AS 09.25.455(b), neither an agency nor its employees or agents may  
9 review or otherwise use the part of an audit report consisting of confidential self-  
10 evaluation or analysis during an inspection of a regulated facility, operation, or  
11 property or an activity of a regulated facility, operation, or property.

12 (i) This section may not be construed to

13 (1) prevent a regulatory agency from issuing an emergency order,  
14 seeking injunctive relief, independently obtaining relevant facts, conducting necessary  
15 inspections, or taking other appropriate action regarding implementation and  
16 enforcement of an applicable environmental or health and safety law, except as  
17 otherwise provided in AS 09.25.475; or

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

20 **Sec. 09.25.455. Waiver and disclosure.** (a) The privilege in AS 09.25.450  
21 does not apply to the extent the privilege is expressly waived in writing by the owner  
22 or operator who prepared the audit report or caused the report to be prepared.

23 (b) Disclosure of the part of an audit report or information consisting of  
24 confidential self-evaluation or analysis does not waive the privilege established by  
25 AS 09.25.450 if the disclosure is made only

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

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

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

31 (C) an officer or director of the regulated facility, operation, or

1 property;

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

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

4 or

5 (F) the principal of the independent contractor who conducted  
6 an audit on the principal's behalf;

7 (2) under the terms of a confidentiality agreement between the owner  
8 or operator who prepared the audit report or caused the audit report to be prepared and

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

11 (B) a transferee or potential transferee of an interest in the  
12 facility, operation, or property;

13 (C) a lender or potential lender for the facility, operation, or  
14 property; or

15 (D) a person engaged in the business of insuring, underwriting,  
16 or indemnifying the facility, operation, or property; or

17 (3) under a written claim of confidentiality to a government official or  
18 agency by the owner or operator who prepared the audit report or who caused the audit  
19 report to be prepared.

20 (c) Documents consisting of confidential self-evaluation and analysis that are  
21 disclosed under (b)(3) of this section are required to be kept confidential and are not  
22 subject to disclosure under AS 09.25.110 - 09.25.220.

23 **Sec. 09.25.460. Nonprivileged materials.** (a) There is no privilege under  
24 AS 09.25.450 for that part of an audit report that contains the following:

25 (1) objective facts;

26 (2) a document, communication, datum, report, or other information  
27 required by a regulatory agency to be collected, developed, maintained, or reported  
28 under an environmental or health and safety law, under a permit issued under an  
29 environmental or health and safety law, as a requirement for obtaining, maintaining,  
30 or renewing a license, as a requirement under a contract or lease with the state, or as  
31 a requirement under an administrative order or court order or decree;

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

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

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

9 (6) a document, communication, datum, report, or other information  
10 that is independent of the environmental or health and safety audit, whether prepared  
11 or existing before, during, or after the audit; and

12 (7) a document, communication, datum, report, or other information,  
13 including an agreement or order between a regulatory agency and an owner or  
14 operator, regarding a compliance plan or strategy.

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 **Sec. 09.25.465. Exception: disclosure required by court.** (a) A court with  
18 jurisdiction may require disclosure of confidential self-evaluation and analysis  
19 contained in an audit report in a civil proceeding if the court determines, after an in  
20 camera review consistent with the appropriate rules of procedure, that the

21 (1) privilege is asserted for a criminal or fraudulent purpose;

22 (2) information for which the privilege is claimed is evidence of  
23 substantial injury to one or more persons at the site audited or to persons, property, or  
24 the environment offsite;

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

29 (4) audit report was prepared for the purpose of avoiding disclosure of  
30 information required for an investigative, administrative, or judicial proceeding that,  
31 at the time of the report's preparation, was imminent or in progress; or

1 (5) privilege would result in a miscarriage of justice or the denial of  
2 a fair trial to the party challenging the privilege.

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

5 **Sec. 09.25.475. Voluntary disclosure; immunity.** (a) Except as provided by  
6 this section, an owner or operator who makes a voluntary disclosure of a violation of  
7 an environmental or health and safety law is immune from an administrative or civil  
8 penalty for the violation disclosed, for a violation based on the facts disclosed, and for  
9 a violation discovered because of the disclosure that was unknown to the owner or  
10 operator making the disclosure.

11 (b) Immunity is not available under this section if the violation resulted in  
12 substantial injury to one or more persons at the site audited or to persons, property, or  
13 the environment offsite.

14 (c) A disclosure is voluntary for the purposes of this section only if

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

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

19 (3) an investigation of the violation was not initiated or the violation  
20 was not independently detected by an agency with enforcement jurisdiction before the  
21 disclosure was made using certified mail; under this paragraph, the agency has the  
22 burden of proving that an investigation of the violation was initiated or the violation  
23 was detected before receipt of the certified mail;

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

26 (5) the owner or operator making the disclosure initiates, within a  
27 reasonable time, an appropriate effort to achieve compliance, pursues that effort with  
28 due diligence, and corrects or implements a series of measures designed to remedy the  
29 noncompliance within a reasonable time; and

30 (6) the owner or operator making the disclosure cooperates with the  
31 appropriate agency in connection with an investigation of the issues identified in the

1 disclosure and agrees under terms of a confidentiality agreement to disclose to the  
2 agency, on request of the agency, the part of the audit report that describes the  
3 implementation plan or tracking system developed to correct past noncompliance,  
4 improve current compliance, or prevent future noncompliance.

5 (d) To qualify for immunity under this section, the owner or operator making  
6 the disclosure must

7 (1) promptly initiate appropriate efforts to achieve compliance and  
8 remediation and pursue those efforts with due diligence;

9 (2) correct the violation within 90 days or enter into a compliance  
10 agreement with the appropriate agency that provides for completion of corrective and  
11 remedial measures within a reasonable time;

12 (3) implement appropriate measures designed to prevent the recurrence  
13 of the violation; and

14 (4) cooperate with the appropriate agency in connection with an  
15 investigation of the issues identified in the disclosure; an agency may request that the  
16 owner or operator allow the agency to review, under an agreement as described in  
17 AS 09.25.455(b)(3), the relevant portions of the confidential self-evaluation and  
18 analysis as necessary to determine that appropriate corrective actions have been  
19 identified.

20 (e) A disclosure is not voluntary for purposes of this section if it is a  
21 disclosure to a regulatory agency expressly required by an environmental or health and  
22 safety law, a permit, a license, or an enforcement order or decree.

23 (f) Immunity under this section for violation of an environmental law is  
24 available only for a violation that is discovered as a result of information or documents  
25 first produced or obtained during the time period specified in the notice required under  
26 AS 09.25.450(b).

27 (g) During the audit period specified in the notice required under  
28 AS 09.25.450(b), the department may not initiate an inspection, monitoring, or other  
29 investigative activity concerning the audited facility, operation, or property based solely  
30 on the receipt of a notice under AS 09.25.450. The department has the burden of  
31 proving that an inspection, monitoring, or other investigative activity concerning the

1 audited facility, operation, or property initiated after receiving a notice under  
2 AS 09.25.450 was not initiated based solely on receiving the notice.

3 (h) A violation that has been voluntarily disclosed and to which immunity  
4 applies under this section shall be identified by the regulatory agency in its compliance  
5 history report as having been voluntarily disclosed.

6 **Sec. 09.25.480. Exceptions to immunity; mitigation.** (a) There is no  
7 immunity under AS 09.25.475 if a court finds that

8 (1) the owner or operator claiming the immunity has

9 (A) intentionally, knowingly, or recklessly committed or  
10 authorized the violation;

11 (B) within the 36 months preceding the violation, repeatedly or  
12 continuously committed violations that are the same as, or similar to, the  
13 violation for which immunity is sought;

14 (C) not attempted to bring the facility, operation, or property  
15 into compliance and this failure constitutes a pattern of disregard of  
16 environmental or health and safety laws; or

17 (2) the offense was committed intentionally or knowingly by a member  
18 of the owner's or operator's management or an agent of the owner or operator and the  
19 owner's or operator's policies or lack of prevention systems contributed materially to  
20 the occurrence of the violation.

21 (b) An administrative or civil penalty that is imposed on a person for violation  
22 of an environmental or health and safety law when the person has made a voluntary  
23 disclosure under AS 09.25.475(a) but is not granted immunity because of (a) of this  
24 section may, to the extent appropriate and not prohibited by law, be mitigated by

25 (1) the voluntariness of the disclosure;

26 (2) efforts by the disclosing party to conduct environmental or health  
27 and safety audits and to complete any resulting implementation plan or tracking system  
28 for corrective and preventive action;

29 (3) remediation;

30 (4) cooperation with government officials investigating the disclosed  
31 violation;

1 (5) the nature of the violation; and

2 (6) other relevant considerations.

3 **Sec. 09.25.485. Relationship to other recognized privileges.** AS 09.25.450 -  
4 09.25.490 do not limit, waive, or abrogate the scope or nature of a statutory or  
5 common law privilege, including the work product doctrine, the attorney-client  
6 privilege, and any other privilege recognized by a court with appropriate authority in  
7 this state.

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

9 (1) "audit report" means a report that includes each document and  
10 communication, other than those set out in AS 09.25.460, produced from an  
11 environmental or health and safety audit; general components that may be contained  
12 in a completed audit report include

13 (A) a report, prepared by an auditor, monitor, or similar person,  
14 including the scope of the audit, the dates the audit began and ended, the  
15 information gained in the audit, findings, conclusions, recommendations,  
16 exhibits, and appendices;

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

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

22 (2) "confidential self-evaluation and analysis" means the part of an  
23 audit report that consists of memoranda and documents that evaluate or analyze all or  
24 part of the material described in the audit report, including implementation issues or  
25 an audit implementation plan or tracking system to correct past noncompliance,  
26 improve current compliance, or prevent future noncompliance with an environmental  
27 or health and safety law, and that is

28 (A) a voluntary, confidential, critical, internal, and retrospective  
29 review, self-evaluation, or analysis of conduct, practices, and occurrences and  
30 their resulting consequences; and

31 (B) prepared and maintained with the expectation that it will be

1 kept confidential;

2 (3) "department" means the Department of Environmental Conservation,  
3 the Department of Labor, and the Department of Health and Social Services, as  
4 appropriate;

5 (4) "environmental or health and safety audit" means a voluntary,  
6 confidential, critical, internal, and retrospective review, self-evaluation, or analysis of  
7 current or past conduct, practices, and occurrences and their resulting consequences,  
8 including an assessment that is a part of the owner's or operator's compliance  
9 management system, whether or not conducted on a regular basis or in response to a  
10 particular event, by an owner or operator or by an employee or independent contractor  
11 of an owner or operator and is

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

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

16 (5) "environmental or health and safety law" means

17 (A) a federal or state environmental or occupational health and  
18 safety law; or

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

21 (6) "intentionally" has the meaning given in AS 11.81.900;

22 (7) "knowingly" has the meaning given in AS 11.81.900;

23 (8) "owner or operator" means a person who owns or operates a  
24 regulated facility, operation, or property;

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

28 (10) "recklessly" has the meaning given in AS 11.81.900;

29 (11) "regulated facility, operation, or property" means a facility,  
30 operation, or property that is regulated under an environmental or health and safety  
31 law.

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

4 \* **Sec. 3.** APPLICABILITY. The privilege and immunity created by AS 09.25.450 -  
5 09.25.490, added by sec. 2 of this Act, apply to environmental or health and safety audits that  
6 are conducted on or after the effective date of this Act.