

CS FOR SENATE BILL NO. 41(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered: 3/10/97
Referred: Finance

Sponsor(s): SENATORS LEMAN, Pearce, Taylor

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to environmental audits to determine compliance with certain
2 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 and
12 analysis by regulated entities of their compliance with environmental requirements by
13 authorizing certain qualified privileges and immunities related 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 by
 2 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 were not available;
 4 therefore, it is the intent of the legislature to recognize an audit privilege under this Act to
 5 protect the confidentiality of communications related to voluntary internal environmental
 6 audits; however, the legislature does not intend that the parts of an audit report consisting of
 7 confidential self-evaluation and analysis that are privileged under this Act may be used to
 8 shield a person from liability under applicable laws and regulations by blocking access to
 9 relevant facts;

10 (3) the public also has a strong interest in obtaining cost-effective correction
 11 of inadvertent environmental violations; this goal can best be achieved by offering qualified
 12 immunity from administrative and civil penalties to regulated persons who promptly report
 13 known violations of environmental regulations that are uncovered as part of an audit so that
 14 the violations can promptly be corrected and a compliance plan can be negotiated with the
 15 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 laws, whether through voluntary compliance or through enforcement
 20 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 and Violations.**

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

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

1 (2) an administrative proceeding, except for workers' compensation
2 proceedings.

3 (b) With respect to confidential self-evaluation and analysis in an
4 environmental audit, in order to qualify for the privilege under this section and the
5 immunity under AS 09.25.475, at least 15 days before conducting the audit, the owner
6 or operator conducting the audit must give notice by electronic filing that complies
7 with an ordinance or regulation authorized under (j) of this section or by certified mail
8 with return receipt requested to the commissioner's office of the department of the fact
9 that it is planning to commence the audit. The notice must specify the facility,
10 operation, or property or portion of the facility, operation, or property to be audited,
11 the date the audit will begin and end, and the general scope of the audit. The notice
12 may provide notification of more than one scheduled environmental audit at a time.
13 Once initiated, an audit shall be completed within a reasonable time, but no longer
14 than 90 days, unless a longer period of time is agreed upon between the owner or
15 operator and the department. The audit report must be completed in a timely manner.

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

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

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

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

25 (4) a custodian of the audit results.

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

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

1 establishing the applicability of the privilege.

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

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

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

13 (i) This section may not be construed to

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

19 (2) authorize a privilege for uninterrupted or continuous environmental
20 audits.

21 (j) A state agency or municipality may, by regulation or ordinance,
22 respectively, allow the notice required under (b) of this section to be filed by facsimile
23 or other electronic means if the means ensures adequate proof of

24 (1) submittal of the notice by the owner or operator; and

25 (2) receipt by the agency or municipality.

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

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

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

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

5 (B) the owner's or operator's lawyer or the lawyer's
6 representative;

7 (C) an officer or director of the regulated facility, operation, or
8 property;

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

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

11 or

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

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

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

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

20 (C) a lender or potential lender for the facility, operation, or
21 property; or

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

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

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

30 (d) A party to a confidentiality agreement described in (b)(2) of this section
31 who violates the agreement is liable for damages caused by the violation and for other

1 penalties stipulated in the agreement.

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

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 law, under a permit issued under an environmental law, as a
7 requirement for obtaining, maintaining, or renewing a license, as a requirement under
8 a contract or lease with the state, or as a requirement under an administrative order or
9 court order or decree;

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

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

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

17 (5) a document, communication, datum, report, or other information
18 that is independent of the environmental audit, whether prepared or existing before,
19 during, or after the audit; and

20 (6) a document, communication, datum, report, or other information,
21 including an agreement or order between a regulatory agency and an owner or
22 operator, regarding a compliance plan or strategy.

23 (b) The parts of an audit report that consist of information necessary to
24 determine pipeline rates, tariffs, fares, or charges are not privileged and are admissible
25 as evidence and subject to discovery in a proceeding relating to pipeline rates, tariffs,
26 fares, or charges.

27 **Sec. 09.25.465. Exception: disclosure required by court.** (a) A court or
28 administrative hearing officer with jurisdiction may require disclosure of confidential
29 self-evaluation and analysis contained in an audit report in a civil or administrative
30 proceeding if the court or administrative hearing officer determines, after an in camera
31 review consistent with the appropriate rules of procedure, that the

- 1 (1) privilege is asserted for a criminal or fraudulent purpose;
- 2 (2) information for which the privilege is claimed is evidence of
3 substantial injury, or the imminent or present threat of substantial injury, to one or
4 more persons at the site audited or to persons, property, or the environment offsite;
- 5 (3) audit report shows evidence of noncompliance with an
6 environmental law and appropriate efforts to achieve compliance with the law were not
7 promptly initiated and pursued with reasonable diligence after discovery of
8 noncompliance;
- 9 (4) audit report was prepared for the purpose of avoiding disclosure of
10 information required for an investigative, administrative, or judicial proceeding that,
11 at the time of the report's preparation, was imminent or in progress; or
- 12 (5) privilege would result in a miscarriage of justice or the denial of
13 a fair trial to the party challenging the privilege.

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

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

22 (b) Immunity is not available under this section if the violation resulted in, or
23 poses or posed an imminent or present threat of, substantial injury to one or more
24 persons at the site audited or to persons, property, or the environment offsite.

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

- 26 (1) the disclosure is made promptly after knowledge of the information
27 disclosed is obtained by the owner or operator;
- 28 (2) the disclosure is made in writing by certified mail to an agency that
29 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; and

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

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) promptly initiate appropriate efforts to discontinue, abate, or
10 mitigate any conditions or activities causing injury or likely to cause imminent injury
11 to one or more persons at the site audited or to person, property, or the environment
12 offsite;

13 (3) correct the violation within 90 days or enter into a compliance
14 agreement with the appropriate agency that provides for completion of corrective and
15 remedial measures within a reasonable time;

16 (4) implement appropriate measures designed to prevent the recurrence
17 of the violation; and

18 (5) cooperate with the appropriate agency in connection with an
19 investigation of the issues identified in the disclosure; an agency may request that the
20 owner or operator allow the agency to review, under a written claim of confidentiality
21 as described in AS 09.25.455(b)(3), the part of the audit report that describes the
22 implementation plan or tracking system developed to correct past noncompliance,
23 improve current compliance, or prevent future noncompliance.

24 (e) A disclosure is not voluntary for purposes of this section if it is a
25 disclosure to a regulatory agency expressly required by an environmental law, a permit,
26 a license, or an enforcement order or decree.

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

31 (g) During the period between receipt of the audit notice required under

1 AS 09.25.450(b) and the specified end date of the audit, the department may not
 2 initiate an inspection, monitoring, or other investigative activity concerning the audited
 3 facility, operation, or property based on the receipt of a notice under AS 09.25.450.
 4 The department has the burden of proving that an inspection, monitoring, or other
 5 investigative activity concerning the audited facility, operation, or property initiated
 6 after receiving a notice under AS 09.25.450 was not initiated based on receiving the
 7 notice.

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

11 (i) This section may not be construed to prevent a regulatory agency from

12 (1) seeking injunctive relief; or

13 (2) issuing an emergency order in a situation involving an imminent
 14 and substantial danger to public health or welfare or the environment.

15 **Sec. 09.25.480. Exceptions to immunity; mitigation.** (a) There is no
 16 immunity under AS 09.25.475 if a court or administrative hearing officer finds that

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

18 (A) intentionally, knowingly, or recklessly committed or
 19 authorized the violation;

20 (B) within the 36 months preceding the violation, repeatedly or
 21 continuously committed, at the same facility or associated facilities located in
 22 the state, the specific violation or a violation closely related to the violation for
 23 which the immunity is sought; or

24 (C) not attempted to bring the facility, operation, or property
 25 into compliance so as to constitute a pattern of disregard of environmental
 26 laws;

27 (2) the violation was committed intentionally or knowingly by a
 28 member of the owner's or operator's management or an agent of the owner or operator
 29 and the owner's or operator's policies or failure to have in place systems reasonably
 30 designed to prevent the violation contributed materially to the occurrence of the
 31 violation; or

1 (3) the owner or operator, after taking into account the cost of
 2 completing corrective and remedial measures within a reasonable time and
 3 implementing appropriate measures to prevent recurrence of the violation, realized
 4 substantial economic savings in not complying with the requirement for which a
 5 violation is charged; the exception to immunity in this paragraph applies only to that
 6 portion of a penalty that reflects the economic savings of noncompliance after taking
 7 into account the cost of completing the corrective, remedial, and preventive measures
 8 necessary to qualify for immunity.

9 (b) An administrative or civil penalty that is imposed on an owner or operator
 10 for violation of an environmental law when the owner or operator has made a
 11 voluntary disclosure under AS 09.25.475(a) but is not granted immunity because of (a)
 12 of this section may, to the extent appropriate and not prohibited by law, be mitigated
 13 by

14 (1) the good faith actions of the owner or operator in disclosing the
 15 violation;

16 (2) efforts by the owner or operator to conduct environmental audits
 17 and to complete any resulting implementation plan or tracking system for corrective
 18 and preventive action;

19 (3) remediation;

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

22 (5) the nature of the violation; and

23 (6) other relevant considerations.

24 **Sec. 09.25.485. Relationship to other recognized privileges.** AS 09.25.450 -
 25 09.25.490 do not limit, waive, or abrogate the scope or nature of a statutory or
 26 common law privilege, including the work product doctrine, the attorney-client
 27 privilege, and any other privilege recognized by a court with appropriate authority in
 28 this state.

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

30 (1) "audit report" means a report that includes each document and
 31 communication, other than those set out in AS 09.25.460, produced from an

1 environmental audit; general components that may be contained in a completed audit
2 report include

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

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

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

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

28 (2) "confidential self-evaluation and analysis" means the part of an
29 audit report that consists of interviews with current or former employees; field notes
30 and records of observations made by the auditor; findings, opinions, suggestions,
31 conclusions, guidance, notes, drafts, and analyses performed by the auditor;

1 memoranda and documents that evaluate or analyze all or part of the material
2 contained in the audit report, including findings, conclusions, opinions,
3 recommendations, and an audit implementation plan or tracking system to correct past
4 noncompliance, improve current compliance, or prevent future noncompliance with an
5 environmental law, and that is

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

9 (B) prepared and maintained with the expectation that it will be
10 kept confidential;

11 (3) "department" means the Department of Environmental Conservation;

12 (4) "environmental audit" means a voluntary, confidential, critical,
13 internal, and retrospective review, self-evaluation, or analysis of current or past
14 conduct, practices, and occurrences and their resulting consequences, including an
15 assessment that is a part of the owner's or operator's compliance management system,
16 whether or not conducted on a regular basis or in response to a particular event, by an
17 owner or operator or by an employee or independent contractor of an owner or
18 operator and is

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

20 (B) specifically and exclusively designed and undertaken for the
21 purpose of determining compliance with environmental laws or a permit issued
22 under those laws;

23 (5) "environmental law" means

24 (A) a federal or state environmental law implemented by the
25 department; 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 (6) "owner or operator" means a person who owns or operates a
29 regulated facility, operation, or property;

30 (7) "penalty" means an administrative or civil sanction imposed by the
31 state to punish a person for a violation of a statute or rule; the term does not include

1 a technical or remedial provision ordered by a regulatory authority;

2 (8) "regulated facility, operation, or property" means a facility,
3 operation, or property that is regulated under an environmental law.

4 (b) To fully implement the privilege and immunity established under
5 AS 09.25.450 - 09.25.490, the term "environmental law" shall be construed broadly.

6 (c) For purposes of this chapter, unless the context requires otherwise, a person
7 acts

8 (1) "intentionally" with respect to a result described by a provision of
9 law defining a violation when the person's conscious objective is to cause that result;
10 when intentionally causing a particular result is an element of a violation, that intent
11 need not be the person's only objective;

12 (2) "knowingly" with respect to conduct or to a circumstance described
13 by a provision of law defining a violation when the person is aware that the conduct
14 is of that nature or that the circumstance exists; when knowledge of the existence of
15 a particular fact is an element of a violation, that knowledge is established if a person
16 is aware of a substantial probability of its existence, unless the person actually believes
17 it does not exist; a person who is unaware of conduct or a circumstance of which the
18 person would have been aware had that person not been intoxicated acts knowingly
19 with respect to that conduct or circumstance;

20 (3) "recklessly" with respect to a result or to a circumstance described
21 by a provision of law defining a violation when the person is aware of and consciously
22 disregards a substantial and unjustifiable risk that the result will occur or that the
23 circumstance exists; the risk must be of such a nature and degree that disregard of it
24 constitutes a gross deviation from the standard of conduct that a reasonable person
25 would observe in the situation; a person who is unaware of a risk of which the person
26 would have been aware had that person not been intoxicated acts recklessly with
27 respect to the risk.

28 * **Sec. 3. APPLICABILITY.** The privilege and immunity created by AS 09.25.450 -
29 09.25.490, added by sec. 2 of this Act, apply to environmental audits that are conducted on
30 or after the effective date of this Act.