

CHAPTER 455K

ENVIRONMENTAL AUDIT PRIVILEGE AND IMMUNITY

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455K.1 Title.

This chapter shall be known and cited as the “*Environmental Audit Privilege and Immunity Act*”.

98 Acts, ch 1109, §1

455K.2 Definitions.

As used in this chapter, unless the context otherwise requires:

1. “*Department*” means the department of natural resources created under section 455A.2 or its delegated authority.

2. “*Environmental audit*” means a voluntary evaluation of a facility or operation, of an activity at a facility or operation, or of an environmental management system at a facility or operation when the facility, operation, or activity is regulated under state or federal environmental laws, rules, or permit conditions, conducted by an owner or operator, an employee of the owner or operator, or an independent contractor retained by the owner or operator that is designed to identify historical or current noncompliance with environmental laws, rules, ordinances, or permit conditions, discover environmental contamination or hazards, remedy noncompliance or improve compliance with environmental laws, or improve an environmental management system. Once notification is given to the department, an environmental audit shall be completed within a reasonable time not to exceed six months unless an extension is approved by the department based on reasonable grounds.

3. “*Environmental audit report*” means a document or set of documents generated and developed for the primary purpose and in the course of or as a result of conducting an environmental audit. An “*environmental audit report*” includes supporting information which may include, but is not limited to, the report document itself, observations, samples, analytical results, exhibits, findings, opinions, suggestions, recommendations, conclusions, drafts, memoranda, drawings, photographs, computer-generated or electronically recorded information, maps, charts, graphs, surveys, implementation plans, interviews, discussions, correspondence, and communications related to the environmental audit. An “*environmental audit report*” may include any of the following components:

a. An executive summary prepared by the person conducting the environmental audit which may include the scope of the environmental audit, the information gained in the environmental audit, conclusions, recommendations, exhibits, and appendices.

b. Memoranda and documents analyzing portions or all of the report and discussing implementation issues.

c. An implementation plan which addresses correcting past noncompliance, improving current compliance or an environmental management system, or preventing future noncompliance.

d. Periodic updates documenting progress in completing the implementation plan.

4. “*Inquiring party*” means any party appearing before a court or a presiding officer in an administrative proceeding seeking to review or obtain an in camera review of an environmental audit report.

5. “Owner or operator” means the person or entity who caused the environmental audit to be undertaken.

6. “Privilege” means the protections provided in regard to an environmental audit report as provided in this chapter.

98 Acts, ch 1109, §2

Referred to in §455K.3

455K.3 Privilege.

1. Material included in an environmental audit report generated during an environmental audit conducted after July 1, 1998, is privileged and confidential and is not discoverable or admissible as evidence in any civil or administrative proceeding, except as otherwise provided in this chapter. The environmental audit report shall be labeled “ENVIRONMENTAL AUDIT REPORT: PRIVILEGED DOCUMENT”. Failure to label each document within the report does not constitute a waiver of the environmental audit privilege or create a presumption that the privilege does or does not apply.

2. A person shall not be compelled to testify in regard to or produce a document included in an environmental audit report in any of the following circumstances:

a. If the testimony or document discloses any component listed in section 455K.2, subsection 3, that was made as part of the preparation of an environmental audit report and that is addressed in a privileged part of an environmental audit report.

b. If the person is any of the following:

(1) A person who conducted any portion of the environmental audit but did not personally observe the physical events of an environmental violation.

(2) A person to whom the results of the environmental audit report are disclosed under section 455K.4, subsection 2.

(3) A custodian of the environmental audit report.

3. A person who conducts or participates in the preparation of an environmental audit report and who has observed physical events of an environmental violation may testify about those events but shall not be compelled to testify about or produce documents related to the preparation of or any privileged part of an environmental audit or any component listed in section 455K.2, subsection 3.

4. An employee of a state agency or other governmental employee shall not request, review, or otherwise use an environmental audit report during an agency inspection of a regulated facility or operation, or an activity of a regulated facility or operation.

5. A party asserting the privilege under this section has the burden of establishing the applicability of the privilege.

6. The privilege provided in this section is in addition to the privilege provided to assistance programs pursuant to section 455B.484A.

98 Acts, ch 1109, §3

Referred to in §455K.4, 455K.8

455K.4 Waiver of privilege — disclosure.

1. The privilege described in section 455K.3 shall not apply to the extent that the privilege is expressly waived in writing by the owner or operator who prepared the environmental audit report or caused the report to be prepared.

2. Disclosure of an environmental audit report or any other information generated by an environmental audit does not waive the privilege established in section 455K.3 if the disclosure meets any of the following criteria:

a. The disclosure is made to address or correct a matter raised by the environmental audit and the disclosure is made to any of the following:

(1) A person employed by the owner or operator, including temporary and contract employees.

(2) A legal representative of the owner or operator.

(3) An officer or director of the regulated facility or operation or a partner of the owner or operator.

(4) An independent contractor retained by the owner or operator.

b. The disclosure is made under the terms of a confidentiality agreement between any person and the owner or operator of the audited facility or operation.

3. A party to a confidentiality agreement described in subsection 2, paragraph “b”, who violates that agreement is liable for damages caused by the disclosure and for any other penalties stipulated in the confidentiality agreement.

4. Information that is disclosed under subsection 2, paragraph “b”, is confidential and is not subject to disclosure under chapter 22.

5. The protections provided by federal or state law shall be afforded to individuals who disclose information to law enforcement authorities.

6. The provisions of this chapter shall not abrogate the protections provided by federal and state law regarding confidentiality and trade secrets.

98 Acts, ch 1109, §4; 2011 Acts, ch 106, §15, 17

Referred to in §455K.3

455K.5 Required disclosure.

1. A court or a presiding officer in an administrative hearing may require disclosure of a portion of an environmental audit report in a civil or administrative proceeding if the court or presiding officer affirmatively determines, after an in camera review, that any of the following exists:

a. The privilege is asserted for a fraudulent purpose.

b. The portion of the environmental audit report is not subject to the privilege under section 455K.6.

c. The portion of the environmental audit report shows evidence of noncompliance with a state or federal environmental or other law, rule, or permit condition and appropriate efforts to achieve compliance with the law or ordinance were not promptly initiated and pursued with reasonable diligence after discovery of noncompliance.

d. The portion of the environmental audit report shows clear and convincing evidence of substantial actual personal injury, which information is not otherwise available.

e. The portion of the environmental audit report shows a clear and present danger to the public health or the environment.

2. A party seeking disclosure under this section has the burden of proving that subsection 1 applies.

3. A decision of a presiding officer in an administrative hearing under subsection 1 may be directly appealed to the district court without disclosure of the environmental audit report to any person unless so ordered by the court.

4. A determination of a court under this section is subject to interlocutory appeal to an appropriate appellate court.

5. If a court finds that a person claiming privilege under this chapter intentionally claimed the privilege for material not privileged as provided in section 455K.6, the person is subject to a fine not to exceed one thousand dollars.

6. Privilege provided in this chapter does not apply if an owner or operator of the facility or operation has been found in a civil or administrative proceeding to have committed serious violations in this state that constitute a pattern of continuous or repeated violations of environmental laws, administrative rules, or permit conditions, that were due to separate and distinct events giving rise to the violations within the three-year period prior to the date of disclosure.

98 Acts, ch 1109, §5

455K.6 Materials not privileged.

1. The privilege described in this chapter does not apply to any of the following:

a. A document, communication, datum, report, or other information required by a regulatory agency to be collected, developed, retained, or reported under a state or federal environmental law, rule, or permit condition.

b. Information obtained by observation, sampling, or monitoring by a regulatory agency or a regulatory agency’s authorized designee.

c. Information obtained from a source not involved in the preparation of the environmental audit report.

2. This section does not limit the right of a person to agree to conduct an environmental audit and disclose an environmental audit report.

98 Acts, ch 1109, §6

Referred to in §455K.5, 455K.7

455K.7 Review of privileged documents.

1. The privileges created in this chapter shall not apply to criminal investigations or proceedings. An environmental audit report, supporting documents, and testimony relating thereto may be obtained by a prosecutor's subpoena pursuant to the rules of criminal procedure. If an environmental audit report is obtained, reviewed, or used in a criminal investigation or proceeding, the administrative and civil evidentiary privilege established in this chapter is not waived or made inapplicable for any purpose other than for the criminal investigation or proceeding.

2. Notwithstanding the privilege established in this chapter, the department may review information in an environmental audit report, but such review does not waive or make the administrative and civil evidentiary privilege inapplicable to the report. A regulatory agency shall not adopt a rule or impose a condition that circumvents the purpose of this chapter.

3. If information is required to be made available to the public by operation of a specific state or federal law, rule, or permit condition, the governmental authority shall notify the person claiming the privilege of the potential for public disclosure prior to obtaining such information under subsection 1 or 2.

4. If privileged information is disclosed under subsection 2 or 3, on the motion of a party, a court or the presiding officer in an administrative hearing shall suppress evidence offered in any civil or administrative proceeding that arises or is derived from review, disclosure, or use of information obtained under this section if the review, disclosure, or use is not authorized under section 455K.6. A party having received information under subsection 2 or 3 has the burden of proving that the evidence offered did not arise and was not derived from the review of privileged information.

98 Acts, ch 1109, §7

455K.8 Voluntary disclosure of environmental violation — immunity.

1. An owner or operator is eligible for immunity under this section from the time the department receives official notification from the owner or operator of a scheduled environmental audit. An owner or operator is immune from any administrative or civil penalty associated with the information disclosed if the owner or operator makes a prompt voluntary disclosure to the department regarding an environmental violation which is discovered through the environmental audit. The owner or operator creates a rebuttable presumption that the disclosure is voluntary by meeting the criteria provided in subsection 2 at the time of disclosure. To rebut the presumption that a disclosure is voluntary, the department or other party has the burden of proving that the disclosure was not voluntary. Immunity is not provided if the violations of state or federal environmental law, rule, or permit condition are intentional or if the violations of state or federal law, rule, or permit condition resulted in substantial actual injury or imminent and substantial risk of injury to persons, property, or the environment.

2. The disclosure of information is voluntary if all of the following circumstances exist:

a. The disclosure arises out of an environmental audit and relates to privileged information as provided in section 455K.3.

b. The person making the disclosure uses reasonable efforts to pursue compliance and to correct the noncompliance within a reasonable period of time after completion of the environmental audit in accordance with a remediation schedule submitted to and approved by the department. If evidence shows that the noncompliance is due to the failure to obtain a permit, reasonable effort may be demonstrated by the submittal of a complete permit application within a reasonable time. Disclosure of information required to be reported by

state or federal law, rule, or permit condition is not considered to be voluntary disclosure and the immunity provisions in this section are not applicable.

c. Environmental violations are identified in an environmental audit report and disclosed to the department before there is notice of a citizen suit or a legal complaint by a third party.

d. Environmental violations are identified in an environmental audit report and disclosed to the department before the environmental violations are reported by any person not involved in conducting the environmental audit or to whom the environmental audit report was disclosed.

3. If an owner or operator has not provided the department with notification of a scheduled environmental audit prior to performing the audit, a disclosure of information is voluntary if the environmental violations are identified in an environmental audit report and disclosed by certified mail to the proper regulatory agency that has jurisdiction over the disclosed violation prior to the agency's commencement of an investigation.

4. If a person is required to make a disclosure relating to a specific issue under a specific permit condition or under an order issued by the department, the disclosure is not voluntary with respect to that issue.

5. Except as provided in this section, this section does not impair the authority of the proper regulatory agency to require a technical or remedial action or to order injunctive relief.

6. Upon application to the department, the time period within which the disclosed violation is corrected under subsection 2 may be extended if it is not practical to correct the noncompliance within the reasonable period of time initially approved by the department. The department shall not unreasonably withhold the grant of an extension. If the department denies an extension, the department shall provide the requesting party with a written explanation of the reasons for the denial. A request for de novo review of the department's decision may be made to the appropriate court.

7. Immunity provided under this section from administrative or civil penalties does not apply under any of the following circumstances:

a. If an owner or operator of the facility or operation has been found in a civil or administrative proceeding to have committed serious violations in this state that constitute a pattern of continuous or repeated violations of environmental laws, administrative rules, and permit conditions and that were due to separate and distinct events giving rise to the violations within the three-year period prior to the date of disclosure, or if under section 459.604 an owner or operator of a facility or operation is classified as a habitual violator.

b. If a violation of an environmental law, administrative rule, permit condition, settlement agreement, or order on consent, final order, or judicial order results in a substantial economic benefit which gives the violator a clear advantage over its business competitors.

8. In cases where the conditions of a voluntary disclosure are not met but a good faith effort was made to voluntarily disclose and resolve a violation detected in an environmental audit, the state regulatory authorities shall consider the nature and extent of any good faith effort in deciding the appropriate enforcement response and shall consider reducing any administrative or civil penalties based on mitigating factors showing that one or more of the conditions for voluntary disclosure have been met.

9. The immunity provided by this section does not abrogate the responsibility of a person as provided by applicable law to report a violation, to correct the violation, conduct necessary remediation, or respond to third-party actions. This chapter shall not be construed to confer immunity from liability in any private civil action except those actions brought pursuant to section 455B.111.

10. Information required by rule to be submitted to the department as part of a disclosure made pursuant to this section is not privileged information.

98 Acts, ch 1109, §8

455K.9 Other privileges not affected.

This chapter shall not limit, waive, or abrogate the scope or nature of any statutory or common-law privilege, including the work product doctrine and the attorney-client privilege.

98 Acts, ch 1109, §9

455K.10 Environmental auditor training program.

A training program for and standards for certification of environmental auditors shall be developed jointly by the Iowa waste reduction center and the department. The training program shall be administered by the Iowa waste reduction center. The program shall provide training on the proper conduct of an environmental audit; local, state, and federal environmental ordinances, rules, and laws that apply to businesses in this state; and the environmental audit laws in this state. The program shall be made available to small and large business owners and operators, consulting engineers, regulatory personnel, and citizens through the community college system. A fee may be assessed for participation in the program. Upon completion of the training program, program participants may elect to be tested by the department for certification as an environmental auditor for the purposes of this chapter.

98 Acts, ch 1109, §10

455K.11 Summary.

On or before December 1 of each year, the department shall make available a summary of the number of environmental audit notices received, the violations, and the remediation status of the violations reported pursuant to this chapter during the preceding fiscal year.

98 Acts, ch 1109, §11

455K.12 Rulemaking.

The department shall adopt rules pursuant to chapter 17A necessary to administer this chapter.

98 Acts, ch 1109, §12

455K.13 Costs.

The necessary costs incurred by the department under this chapter shall be funded from appropriations made to the department from the general fund of the state.

98 Acts, ch 1109, §13