

House Amendment 8054

Amendment Text

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1 1 Amend [House File 681](#) as follows:
1 2 #1. By striking everything after the enacting
1 3 clause and inserting the following:
1 4 "Section 1. NEW SECTION. 455J.1 TITLE.
1 5 This chapter shall be known and cited as the
1 6 "Environmental Audit Privilege and Immunity Act".
1 7 Sec. 2. NEW SECTION. 455J.2 DEFINITIONS.
1 8 As used in this chapter, unless the context
1 9 otherwise requires:
1 10 1. "Department" means the department of natural
1 11 resources created under section 455A.2.
1 12 2. "Environmental audit" means a voluntary
1 13 evaluation of a facility or operation, of an activity
1 14 at a facility or operation, or of an environmental
1 15 management system at a facility or operation, which is
1 16 regulated under local, state, or federal environmental
1 17 laws, rules, ordinances, or permits, conducted by an
1 18 owner or operator, an employee of the owner or
1 19 operator, or an independent contractor that is
1 20 designed to identify historical or current
1 21 noncompliance, discover environmental contamination or
1 22 hazards, remedy noncompliance or improve compliance
1 23 with environmental laws, or improve an environmental
1 24 management system. Once initiated, an environmental
1 25 audit shall be completed within a reasonable time not
1 26 to exceed six months unless an extension is approved
1 27 by the governmental entity with regulatory authority
1 28 over the regulated facility or operation based on
1 29 reasonable grounds.
1 30 3. "Environmental audit report" means a document
1 31 or set of documents generated as a result of an
1 32 environmental audit. An "environmental audit report"
1 33 includes supporting information which may include, but
1 34 is not limited to, the report document itself,
1 35 observations, samples, analytical results, exhibits,
1 36 findings, opinions, suggestions, recommendations,
1 37 conclusions, drafts, memoranda, drawings, photographs,
1 38 computer-generated or electronically recorded
1 39 information, maps, charts, graphs, surveys,
1 40 implementation plans, interviews, discussions,
1 41 correspondence, and communications related to the
1 42 environmental audit, if the supporting information and
1 43 documents are generated and developed for the primary
1 44 purpose and in the course of or as a result of
1 45 conducting an environmental audit. An "environmental
1 46 audit report" may include any of the following
1 47 components:
1 48 a. A report prepared by the person conducting the
1 49 environmental audit, which may include the scope of
1 50 the environmental audit, the information gained in the
2 1 environmental audit, conclusions, recommendations,
2 2 exhibits, and appendices.
2 3 b. Memoranda and documents analyzing portions or
2 4 all of the report and discussing implementation
2 5 issues.
2 6 c. An implementation plan which addresses
2 7 correcting past noncompliance, improving current

2 8 compliance or an environmental management system, or
2 9 preventing future noncompliance.

2 10 d. Periodic updates documenting progress in
2 11 completing the implementation plan.

2 12 4. "Inquiring party" means any party appearing
2 13 before a court or a presiding officer in an
2 14 administrative proceeding seeking to review or obtain
2 15 an in camera review of an environmental audit report.

2 16 5. "Owner or operator" means the person or entity
2 17 who caused the environmental audit to be undertaken.

2 18 6. "Privilege" means the privilege provided to an
2 19 environmental audit report as provided in this
2 20 chapter.

2 21 Sec. 3. NEW SECTION. 455J.3 PRIVILEGE.

2 22 1. An environmental audit report is privileged and
2 23 confidential and is not discoverable or admissible as
2 24 evidence in any civil or administrative proceeding,
2 25 except as otherwise provided in this chapter. The
2 26 environmental audit report shall be labeled
2 27 "ENVIRONMENTAL AUDIT REPORT: PRIVILEGED DOCUMENT", or
2 28 labeled with words of similar import. Failure to
2 29 label each document does not constitute a waiver of
2 30 the environmental audit privilege or create a
2 31 presumption that the privilege does or does not apply.

2 32 2. A person shall not be compelled to testify or
2 33 produce a document related to an environmental audit
2 34 in any of the following circumstances:

2 35 a. If the testimony or document discloses any
2 36 component listed in section 455J.2, subsection 3, that
2 37 was made as part of the preparation of an
2 38 environmental audit report and that is addressed in a
2 39 privileged part of an environmental audit report.

2 40 b. If the person is any of the following:

2 41 (1) A person who conducted any portion of the
2 42 environmental audit but did not personally observe the
2 43 physical events of an environmental violation.

2 44 (2) A person to whom the results of the
2 45 environmental audit report are disclosed under section
2 46 455J.4, subsection 2.

2 47 (3) A custodian of the environmental audit report.

2 48 3. A person who conducts or participates in the
2 49 preparation of an environmental audit report and who
2 50 has observed physical events of an environmental
3 1 violation may testify about those events but shall not
3 2 be compelled to testify about or produce documents
3 3 related to the preparation of or any privileged part
3 4 of an environmental audit or any component listed in
3 5 section 455J.2, subsection 3.

3 6 4. An employee of a state agency or other
3 7 governmental employee shall not request, review, or
3 8 otherwise use an environmental audit report during an
3 9 agency inspection of a regulated facility or
3 10 operation, or an activity of a regulated facility or
3 11 operation.

3 12 5. A party asserting the privilege under this
3 13 section has the burden of establishing the
3 14 applicability of the privilege.

3 15 6. The privilege provided in this section is in
3 16 addition to the privilege provided to assistance
3 17 programs pursuant to section 455B.484A.

3 18 Sec. 4. NEW SECTION. 455J.4 WAIVER OF PRIVILEGE
3 19 DISCLOSURE.

3 20 1. The privilege described in section 455J.3 shall
3 21 not apply to the extent that the privilege is
3 22 expressly waived by the owner or operator who prepared
3 23 the environmental audit report or caused the report to
3 24 be prepared.

3 25 2. Disclosure of an environmental audit report or
3 26 any information generated by an environmental audit
3 27 does not waive the privilege established in section
3 28 455J.3 if the disclosure meets any of the following
3 29 criteria:

3 30 a. The disclosure is made to address or correct a
3 31 matter raised by the environmental audit and the
3 32 disclosure is made to any of the following:

3 33 (1) A person employed by the owner or operator,
3 34 including temporary and contract employees.

3 35 (2) A legal representative of the owner or
3 36 operator.

3 37 (3) An officer or director of the regulated
3 38 facility or operation or a partner of the owner or
3 39 operator.

3 40 (4) An independent contractor retained by the
3 41 owner or operator.

3 42 b. The disclosure is made under the terms of a
3 43 confidentiality agreement between the owner or
3 44 operator of the audited facility or operation and any
3 45 of the following:

3 46 (1) A partner or potential partner of the owner or
3 47 operator of the facility or operation.

3 48 (2) A transferee or potential transferee of the
3 49 facility or operation.

3 50 (3) A lender or potential lender for the facility
4 1 or operation.

4 2 (4) A governmental official or agency of this
4 3 state.

4 4 (5) A person or entity engaged in the business of
4 5 insuring, underwriting, or indemnifying the facility
4 6 or operation.

4 7 3. A party to a confidentiality agreement
4 8 described in subsection 2, paragraph "b", who violates
4 9 that agreement is liable for damages caused by the
4 10 disclosure and for any other penalties stipulated in
4 11 the confidentiality agreement.

4 12 4. Information that is disclosed under subsection
4 13 2, paragraph "b", subparagraph (4), is confidential
4 14 and is not subject to disclosure under chapter 22. A
4 15 governmental entity, governmental employee, or
4 16 governmental official who discloses information in
4 17 violation of this subsection is subject to any penalty
4 18 provided in chapter 22.

4 19 5. The protections provided by federal or state
4 20 law shall be afforded to individuals who disclose
4 21 information to law enforcement authorities.

4 22 Sec. 5. NEW SECTION. 455J.5 REQUIRED DISCLOSURE.

4 23 1. A court or a presiding officer in an
4 24 administrative hearing may require disclosure of a
4 25 portion of an environmental audit report in a civil or
4 26 administrative proceeding if the court or presiding
4 27 officer affirmatively determines, after an in camera
4 28 review, that any of the following exists:

4 29 a. The privilege is asserted for a fraudulent
4 30 purpose.

4 31 b. The portion of the environmental audit report
4 32 is not subject to the privilege under section 455J.6.

4 33 c. The portion of the environmental audit report
4 34 shows evidence of noncompliance with a local, state,
4 35 or federal environmental or other law, rule,
4 36 ordinance, or permit condition and appropriate efforts
4 37 to achieve compliance with the law or ordinance were
4 38 not promptly initiated and pursued with reasonable
4 39 diligence after discovery of noncompliance.

4 40 2. A party seeking disclosure under this section
4 41 has the burden of proving that subsection 1 applies.

4 42 3. A decision of a presiding officer in an
4 43 administrative hearing under subsection 1 may be
4 44 directly appealed to the district court without
4 45 disclosure of the environmental audit report to any
4 46 person unless so ordered by the court.

4 47 4. A determination of a court under this section
4 48 is subject to interlocutory appeal to an appropriate
4 49 appellate court.

4 50 Sec. 6. NEW SECTION. 455J.6 MATERIALS NOT
5 1 PRIVILEGED.

5 2 1. The privilege described in this chapter does
5 3 not apply to any of the following:

5 4 a. A document, communication, datum, report, or
5 5 other information required by a regulatory agency to
5 6 be collected, developed, retained, or reported under a
5 7 local, state, or federal environmental law, rule,
5 8 ordinance, or permit condition.

5 9 b. Information obtained by observation, sampling,
5 10 or monitoring by a regulatory agency or a regulatory
5 11 agency's authorized designee.

5 12 c. Information obtained from a source not involved
5 13 in the preparation of the environmental audit report.

5 14 2. This section does not limit the right of a
5 15 person to agree to conduct an environmental audit and
5 16 disclose an environmental audit report.

5 17 Sec. 7. NEW SECTION. 455J.7 REVIEW OF PRIVILEGED
5 18 DOCUMENTS.

5 19 1. If an environmental audit report is obtained,
5 20 reviewed, or used in a criminal proceeding, the
5 21 administrative and civil evidentiary privilege
5 22 established in this chapter is not waived or made
5 23 inapplicable for any purpose other than for the
5 24 criminal proceeding.

5 25 2. Notwithstanding the privilege established in
5 26 this chapter, a regulatory agency may review
5 27 information in an environmental audit report that is
5 28 required to be collected, developed, retained, or
5 29 reported under a specific local, state, or federal
5 30 law, rule, ordinance, or permit condition, but such
5 31 review does not waive or make the administrative and
5 32 civil evidentiary privilege inapplicable. A
5 33 regulatory agency shall not adopt a rule or impose a
5 34 condition that circumvents the purpose of this
5 35 chapter.

5 36 3. If information is required to be made available
5 37 to the public by operation of a specific local, state,
5 38 or federal law, rule, ordinance, or permit condition,
5 39 the governmental authority shall notify the person
5 40 claiming the privilege of the potential for public
5 41 disclosure prior to obtaining such information under
5 42 subsection 1 or 2.

5 43 4. If privileged information is disclosed under
5 44 subsection 2 or 3, on the motion of a party, a court
5 45 or the presiding officer in an administrative hearing
5 46 shall suppress evidence offered in any civil or
5 47 administrative proceeding that arises or is derived
5 48 from review, disclosure, or use of information
5 49 obtained under this section if the review, disclosure,
5 50 or use is not authorized under section 455J.6. A
6 1 party having received information under subsection 2
6 2 or 3 has the burden of proving that the evidence
6 3 offered did not arise and was not derived from the
6 4 review of privileged information.

6 5 Sec. 8. NEW SECTION. 455J.8 VOLUNTARY DISCLOSURE
6 6 OF ENVIRONMENTAL VIOLATION IMMUNITY.

6 7 1. An owner or operator is eligible for immunity
6 8 under this section from the time the department

6 9 receives official notification from the owner or
6 10 operator of a scheduled environmental audit. An owner
6 11 or operator is immune from any administrative or civil
6 12 penalty associated with the issues disclosed if the
6 13 owner or operator makes a prompt voluntary disclosure
6 14 to the department regarding an environmental violation
6 15 which is discovered through the environmental audit.
6 16 The owner or operator shall provide a timetable for
6 17 submitting a remediation schedule to the department
6 18 and information supporting the claim that the
6 19 disclosure is voluntary at the time that the
6 20 disclosure is made to the department. The owner or
6 21 operator creates a rebuttable presumption that the
6 22 disclosure is voluntary by providing such information
6 23 at the time of disclosure. To rebut the presumption
6 24 that a disclosure is voluntary, the department or
6 25 other party has the burden of proving that the
6 26 disclosure was not voluntary. Immunity is not
6 27 provided if the violations of local, state, or federal
6 28 environmental law, rule, ordinance, or permit
6 29 condition are intentional or if the violations of
6 30 local, state, or federal law, rule, ordinance, or
6 31 permit condition resulted in substantial actual injury
6 32 or imminent and substantial risk of injury to persons,
6 33 property, or the environment.

6 34 2. The disclosure of information is voluntary if
6 35 all of the following circumstances exist:

6 36 a. The disclosure arises out of an environmental
6 37 audit and relates to privileged information as
6 38 provided in section 455J.3.

6 39 b. The person making the disclosure uses
6 40 reasonable efforts to pursue compliance and corrects
6 41 the noncompliance within a reasonable period of time
6 42 after completion of the environmental audit in
6 43 accordance with a remediation schedule approved by the
6 44 department. If evidence shows that the noncompliance
6 45 is due to the failure to obtain a permit, reasonable
6 46 effort may be demonstrated by the submittal of a
6 47 complete permit application within a reasonable time.
6 48 Disclosure of information required to be reported by
6 49 local, state, or federal law, rule, ordinance, or
6 50 permit condition is not considered to be voluntary
7 1 disclosure and the immunity provisions in this section
7 2 are not applicable.

7 3 c. Environmental violations are identified in an
7 4 environmental audit report and disclosed before there
7 5 is notice of a citizen suit or a legal complaint by a
7 6 third party.

7 7 d. Environmental violations are identified in an
7 8 environmental audit report and disclosed before the
7 9 environmental violations are reported by any person
7 10 not involved in conducting the environmental audit or
7 11 to whom the environmental audit report was disclosed.

7 12 3. If an owner or operator has not provided the
7 13 department with notification of a scheduled
7 14 environmental audit prior to performing the audit, a
7 15 disclosure of information is voluntary if the
7 16 environmental violations are identified in an
7 17 environmental audit report and disclosed by certified
7 18 mail to the proper regulatory agency that has
7 19 jurisdiction over the disclosed violation prior to the
7 20 agency's commencement of an investigation.

7 21 4. If a person is required to make a disclosure
7 22 relating to a specific issue under a specific permit
7 23 condition or under an order issued by the department,
7 24 the disclosure is not voluntary with respect to that
7 25 issue.

7 26 5. Except as provided in this section, this
7 27 section does not impair the authority of the proper
7 28 regulatory agency to require a technical or remedial
7 29 action or to order injunctive relief.

7 30 6. Upon application to the department, the time
7 31 period within which a noncompliance item is corrected
7 32 under subsection 2 may be extended if it is not
7 33 practical to correct the noncompliance within the
7 34 reasonable period of time initially approved by the
7 35 department. The department shall not unreasonably
7 36 withhold the grant of an extension. If the department
7 37 denies an extension, the department shall provide the
7 38 requesting party with a written explanation of the
7 39 reasons for the denial. A request for de novo review
7 40 of the department's decision may be made to the
7 41 appropriate court.

7 42 7. Immunity provided under this section from
7 43 administrative or civil penalties does not apply under
7 44 any of the following circumstances:

7 45 a. If an owner or operator of the facility or
7 46 operation has been found in a civil or administrative
7 47 proceeding to have committed serious violations in
7 48 this state that constitute a pattern of continuous or
7 49 repeated violations of environmental laws,
7 50 administrative rules, permit conditions, settlement
8 1 agreements, or orders on consent, final orders, or
8 2 judicial orders and that were due to separate and
8 3 distinct events giving rise to the violations within
8 4 the three-year period prior to the date of disclosure,
8 5 or if under another provision of law an owner or
8 6 operator of a facility or operation is subject to
8 7 classification as a repeat or habitual violator.

8 8 b. If a violation of an environmental law,
8 9 administrative rule, permit condition, settlement
8 10 agreement, or order on consent, final order, or
8 11 judicial order results in a substantial economic
8 12 benefit which gives the violator a clear advantage
8 13 over its business competitors.

8 14 8. In cases where the conditions of a voluntary
8 15 disclosure are not met but a good faith effort was
8 16 made to voluntarily disclose and resolve a violation
8 17 detected in an environmental audit, the state and
8 18 local regulatory authorities shall consider the nature
8 19 and extent of any good faith effort in deciding the
8 20 appropriate enforcement response and shall consider
8 21 reducing any administrative or civil penalties based
8 22 on mitigating factors showing that one or more of the
8 23 conditions for voluntary disclosure have been met.

8 24 9. The immunity provided by this section does not
8 25 abrogate the responsibility of a person as provided by
8 26 applicable law to correct the violation, conduct
8 27 necessary remediation, or respond to third-party
8 28 actions.

8 29 Sec. 9. NEW SECTION. 455J.9 ABROGATION OF OTHER
8 30 PRIVILEGES.

8 31 This chapter shall not limit, waive, or abrogate
8 32 the scope or nature of any statutory or common-law
8 33 privilege, including the work product doctrine and the
8 34 attorney-client privilege.

8 35 Sec. 10. NEW SECTION. 455J.10 ENVIRONMENTAL
8 36 AUDITOR TRAINING PROGRAM.

8 37 A training program for and standards for
8 38 certification of environmental auditors shall be
8 39 developed jointly by the Iowa waste reduction center
8 40 and the department. The training program shall be
8 41 administered by the Iowa waste reduction center. The
8 42 program shall provide training on the proper conduct

8 43 of an environmental audit; local, state, and federal
8 44 environmental ordinances, rules, and laws that apply
8 45 to businesses in this state; and the environmental
8 46 audit laws in this state. The program shall be made
8 47 available to small and large business owners and
8 48 operators, consulting engineers, regulatory personnel,
8 49 and citizens through the community college system. A
8 50 fee may be assessed for participation in the program.
9 1 Upon completion of the training program, program
9 2 participants may elect to be tested by the department
9 3 for certification as an environmental auditor for the
9 4 purposes of this chapter.

9 5 Sec. 11. NEW SECTION. 455J.11 SUMMARY.

9 6 On or before December 1 of each year, the
9 7 department shall make available a summary of the
9 8 number of environmental audit notices received, the
9 9 violations, and the remediation status of the
9 10 violations reported pursuant to this chapter during
9 11 the preceding fiscal year.

9 12 Sec. 12. NEW SECTION. 455J.12 RULEMAKING.

9 13 The department may adopt rules pursuant to chapter
9 14 17A necessary to administer this chapter.

9 15 Sec. 13. NEW SECTION. 455J.13 COSTS.

9 16 The necessary costs incurred by the department
9 17 under this chapter shall be funded from appropriations
9 18 made to the department from the general fund of the
9 19 state."

9 20 #2. Title page, by striking lines 1 and 2 and
9 21 inserting the following: "An Act creating an
9 22 environmental audit privilege and immunity, and an
9 23 environmental auditor training program, and providing
9 24 penalties."

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9 28 COMMITTEE ON ENVIRONMENTAL

9 29 PROTECTION

9 30 HAHN of Muscatine, Chairperson

9 31 HF 681.210 77

9 32 tm/jl/28