

S- 3/22/95 Nat. Res.

MAR 14 1995

Place On Calendar

HOUSE FILE 420

BY COMMITTEE ON ENVIRONMENTAL PROTECTION

(SUCCESSOR TO HSB 191)

Passed House, ^(P.884) Date 3/22/95 Passed Senate, Date _____
 Vote: Ayes 97 Nays 0 Vote: Ayes _____ Nays _____
 Approved _____

A BILL FOR

1 An Act creating an environmental audit privilege and providing
2 penalties.

3 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

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HF 420

1 Section 1. NEW SECTION. 455H.1 TITLE.

2 This chapter shall be known and cited as the "Environmental
3 Audit Privilege and Immunity Act".

4 Sec. 2. NEW SECTION. 455H.2 FINDINGS AND DECLARATIONS.

5 The general assembly finds and declares that protection of
6 the environment is enhanced by the public's voluntary
7 compliance with environmental laws and that the public will
8 benefit from incentives to voluntarily identify and remedy
9 environmental compliance issues. It is further declared that
10 limited expansion of the protection against disclosure and
11 prosecution will encourage voluntary compliance and improve
12 environmental quality. The provisions of this chapter will
13 not inhibit the exercise of regulatory authority by those
14 persons entrusted with protecting the environment. Therefore,
15 an environmental audit privilege is provided to protect the
16 confidentiality of communication relating to voluntary
17 environmental audits and limited immunity is provided to
18 improve compliance with environmental laws.

19 Sec. 3. NEW SECTION. 455H.3 DEFINITIONS.

20 As used in this chapter:

21 1. "Department" means the department of natural resources.

22 2. "Environmental audit" means a voluntary, internal
23 evaluation of one or more facilities, processes, or activities
24 regulated under local, state, or federal environmental laws or
25 of a management system related to the facility, process, or
26 activity, that is designed to identify and prevent
27 noncompliance and improve compliance with local, state, or
28 federal environmental laws. An environmental audit may be
29 conducted by the owner or operator, by an employee of the
30 owner or operator, by an officer or director of the facility
31 or operation, by an independent contractor hired by the owner
32 or operator, or by the owner's or operator's attorney.

33 An environmental audit includes the environmental audit
34 report which is a set of documents containing information
35 generated and collected in the course of conducting an

1 environmental audit. The report includes, but is not limited
2 to, the report document itself, any supporting documents, file
3 notes and records of observations, samples, analytical
4 results, exhibits, findings, opinions, suggestions,
5 recommendations, conclusions, drafts, memoranda, drawings,
6 photographs, computer-generated or electronically recorded
7 information, maps, charts, graphs and surveys, implementation
8 plans, interviews, discussions, correspondence, and
9 communications related to the environmental audit, if the
10 information is collected and developed for the primary purpose
11 of conducting the environmental audit. An environmental audit
12 report may have any or all of the following components:

13 a. A report prepared by the auditor, which may include the
14 scope of the environmental audit, the information gained in
15 the environmental audit, conclusions, and recommendations,
16 together with exhibits and appendices.

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

19 c. An implementation plan that addresses correcting past
20 noncompliance, improving current compliance, or preventing
21 future noncompliance.

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

24 3. "Owner" or "operator" means the person or entity who
25 prepared or caused the environmental audit to be undertaken.
26 "Owner or operator" does not include a prospective purchaser
27 who caused the environmental audit to be undertaken.

28 Sec. 4. NEW SECTION. 455H.4 PRIVILEGE.

29 1. An environmental audit shall be privileged and shall
30 not be discoverable or admissible as evidence in any legal
31 action in any civil, criminal, or administrative proceeding,
32 or in response to a regulatory inspection or inquiry, except
33 as otherwise provided in this chapter.

34 2. A person who voluntarily conducts an environmental
35 audit, an officer or employee of the person conducting the

1 environmental audit, or an independent contractor hired by the
2 person to conduct the environmental audit shall not be
3 questioned or examined as to the environmental audit without
4 the consent of the person, or unless ordered to do so by a
5 court of record or administrative tribunal. This subsection
6 does not apply if the environmental audit is subject to an
7 exception under section 455H.7.

8 3. The privilege exists as a rebuttable presumption. A
9 party seeking disclosure of privileged material has the burden
10 to overcome the rebuttable presumption.

11 4. Failure to comply with review, disclosure, or use
12 prohibitions in this chapter shall be the basis for
13 suppression of any evidence arising or derived from the
14 unauthorized review, disclosure, or use. The party failing to
15 comply with this chapter shall have the burden of proving that
16 the proffered evidence did not arise and was not derived from
17 the unauthorized activity.

18 Sec. 5. NEW SECTION. 455H.5 WAIVER OF PRIVILEGE --
19 DISCLOSURE -- ORDER.

20 1. The owner or operator may waive the privilege under
21 section 455H.4. The privilege cannot be waived except by or
22 with the consent of the owner or operator.

23 2. The environmental audit may be disclosed under any of
24 the following circumstances without waiving the privilege
25 under section 455H.4:

26 a. Results of an environmental audit or information
27 generated by the environmental audit may be disclosed to any
28 person employed by the owner or operator of the audited
29 facility or operation, any legal representative of the owner
30 or operator, or any independent contractor retained by the
31 owner or operator to address an issue or issues raised by the
32 environmental audit.

33 b. Under the terms of a confidentiality agreement between
34 the owner or operator of the facility or operation audited and
35 a potential purchaser of the operation or facility audited.

1 c. Under the terms of a confidentiality agreement between
2 governmental officials and the owner or operator of the
3 facility or operation audited.

4 d. To a lender.

5 e. To the United States environmental protection agency
6 upon the demand of the agency.

7 3. The existence of an environmental audit is subject to
8 disclosure in a civil, criminal, or administrative proceeding.
9 The party in possession of the environmental audit may assert
10 the privilege. The party in possession shall not be required
11 to provide the inquiring party with a copy of the
12 environmental audit.

13 4. The inquiring party may file, with the appropriate
14 court or administrative tribunal, a petition requesting an in
15 camera review on whether the environmental audit or portions
16 of the environmental audit are privileged or subject to
17 disclosure under this chapter. The inquiring party's failure
18 to file a petition under this subsection shall waive the
19 party's argument that the environmental audit is not
20 privileged.

21 5. The court or administrative tribunal shall issue an
22 order scheduling an in camera review, within forty-five days
23 of the filing of the petition.

24 6. After the in camera review, the court or
25 administrative tribunal shall issue an order directing whether
26 the information in the environmental audit is subject to
27 disclosure.

28 a. The order may require disclosure of material for which
29 the privilege is asserted, if the court or administrative
30 tribunal determines that the privilege is asserted for a
31 fraudulent purpose, the material is not subject to the
32 privilege, or the material, even if subject to the privilege,
33 shows evidence of noncompliance with local, state, or federal
34 environmental laws and appropriate efforts to achieve
35 compliance with local, state, or federal environmental laws

1 were not initiated and pursued with reasonable diligence upon
2 discovery of noncompliance, shows that violations of local,
3 state, or federal environmental laws were intentional, or
4 shows that violations of local, state, or federal
5 environmental laws resulted in substantial harm to the public
6 health or the environment. The court or administrative
7 tribunal may compel disclosure of only those portions of a
8 report relevant to the issue in dispute.

9 b. The order may restrict the distribution and review of
10 the environmental audit or parts of the environmental audit to
11 protect against unnecessary disclosure.

12 7. The parties may at any time stipulate to entry of an
13 order directing that specific information contained in an
14 environmental audit is or is not subject to the privilege
15 under section 455H.4.

16 Sec. 6. NEW SECTION. 455H.6 VIOLATION.

17 If a person, party, public entity, public employee, or
18 public official divulges or disseminates all or any part of
19 the information contained in an environmental audit in
20 violation of this chapter or of an order issued by a court or
21 administrative tribunal under section 455H.5, the person,
22 party, public entity, public employee, or public official is
23 liable for any damages caused by the divulgence or
24 dissemination of the information and incurred by the person
25 for whom the environmental audit was prepared. A violation of
26 this chapter shall also result in a civil penalty not to
27 exceed ten thousand dollars payable to the aggrieved party.

28 A person who violates this section shall be guilty of a
29 simple misdemeanor and may be found in contempt of a court by
30 a court of record.

31 If the environmental audit otherwise meets the requirements
32 of this chapter, a disclosure or dissemination in violation of
33 this chapter or of an order issued by a court or
34 administrative tribunal under section 455H.5 shall not
35 abrogate the privilege under section 455H.4.

1 This section shall not affect provisions providing
2 employees protection under the following federal provisions,
3 42 U.S.C. § 5851, 42 U.S.C. § 300j-9(i), 42 U.S.C. § 9610, 33
4 U.S.C. § 1367, 15 U.S.C. § 2622, 42 U.S.C. § 6971, and 42
5 U.S.C. § 7622, which provide protection against discriminatory
6 actions taken by employers against employees who report
7 environmental noncompliance.

8 Sec. 7. NEW SECTION. 455H.7 EXCEPTIONS.

9 The privilege under section 455H.4 shall not extend to any
10 of the following:

11 1. Documents, communications, data, reports, or other
12 information required to be collected, developed, maintained,
13 reported, or otherwise made available to a regulatory agency
14 pursuant to local, state, or federal environmental laws or
15 regulations. However, the privilege shall extend to any
16 observations, findings, opinions, suggestions, or conclusions
17 derived from the above by the person conducting the
18 environmental audit.

19 2. Information obtained by observation, sampling, or
20 monitoring by any regulatory agency.

21 3. Information obtained from a source independent of the
22 environmental audit.

23 Sec. 8. NEW SECTION. 455H.8 VOLUNTARY DISCLOSURE.

24 1. A person who makes a voluntary disclosure of an
25 environmental violation to the department is immune from any
26 administrative or civil penalty associated with the issues
27 disclosed and is immune from any criminal penalties for
28 negligent acts associated with the issues disclosed. The
29 person shall provide information supporting the claim that the
30 disclosure is voluntary at the time that the disclosure is
31 made to the department. The person creates a rebuttable
32 presumption that the disclosure is voluntary. To rebut the
33 presumption that a disclosure is voluntary, the department or
34 other party has the burden of proving that the disclosure was
35 not voluntary.

1 2. The disclosure of information is voluntary if both of
2 the following circumstances apply:

3 a. The disclosure arises out of an environmental audit and
4 relates to the privileged information.

5 b. The person making the disclosure uses reasonable
6 efforts to pursue compliance and corrects the noncompliance
7 within a reasonable period of time after completion of the
8 environmental audit. Where the evidence shows the
9 noncompliance is the failure to obtain a permit, reasonable
10 effort may be demonstrated by the submittal of a complete
11 permit application within a reasonable time. Disclosure of
12 information required to be reported by local, state, or
13 federal law is considered to be voluntary disclosure and the
14 immunity provisions in this section are applicable.

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

19 4. Except as provided in this section, this section does
20 not affect the authority of the department to require any
21 action associated with the information disclosed in any
22 voluntary disclosure of an environmental violation.

23 5. Upon application to the department, the time period
24 within which a noncompliance item is corrected under
25 subsection 2 may be extended if it is not practical to correct
26 the noncompliance within a two-year period. The grant of an
27 extension by the department shall not be unreasonably
28 withheld. If the department denies an extension, the
29 department shall provide the requesting party with a written
30 explanation of the reasons for the denial. A request for de
31 novo review of the department's decision may be made to the
32 appropriate court.

33 Sec. 9. NEW SECTION. 455H.9 ABROGATION OF OTHER
34 PRIVILEGES.

35 This chapter shall not limit, waive, or abrogate the scope

1 or nature of any statutory or common law privilege, including
2 the work product doctrine, the attorney client privilege, and
3 the self-critical analysis privilege.

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EXPLANATION

5 This bill creates the "Environmental Audit Privilege Act",
6 which protects disclosure of environmental audits and provides
7 immunity from penalties for actions which voluntarily disclose
8 the existence of an environmental violation. The bill finds
9 that the protection of the environment is enhanced by the
10 public's voluntary compliance with environmental laws and the
11 benefit to the public from incentives to voluntarily identify
12 and remedy environmental compliance issues.

13 The bill provides that an environmental audit is privileged
14 and not discoverable as evidence in any legal action.
15 Environmental audit is defined as a voluntary internal
16 evaluation designed to identify and prevent noncompliance with
17 local, state, or federal environmental laws and includes the
18 environmental audit report which contains documents and
19 information generated and collected in the course of
20 conducting an environmental audit. The audit privilege exists
21 as a rebuttable presumption. Failure to comply with the
22 review, disclosure, and use prohibitions in the bill is
23 considered the basis for suppression of any evidence arising
24 from or derived from the unauthorized review, disclosure, or
25 use of information.

26 The bill provides that the owner or operator may waive the
27 environmental audit privilege. It provides for disclosure of
28 the audit in limited circumstances without waiving the
29 privilege. A person who wishes to obtain audit information
30 may file a petition for in camera review. The court or
31 administrative tribunal is required to schedule an in camera
32 review within 45 days. The court or administrative tribunal
33 will issue an order directing whether the audit or portions of
34 the audit is subject to disclosure. The bill provides that an
35 audit may be disclosed if the privilege is asserted for a

1 fraudulent purpose, if the material is not subject to the
2 privilege, if appropriate efforts to achieve compliance with
3 local, state, or federal environmental laws were not initiated
4 and pursued with reasonable diligence, if violations were
5 intentional, or if violations resulted in substantial harm to
6 the public health or the environment.

7 The bill provides that any person or any party, public
8 entity, employee, or official who divulges or disseminates
9 information in violation of an order is liable for damages,
10 subject to a civil penalty of up to \$10,000, is guilty of a
11 simple misdemeanor, and may be found in contempt of court.
12 The bill does not change employees' rights to disclose
13 violations without violating the chapter under federal
14 "whistleblower" provisions.

15 The bill allows for limited immunity for a voluntary
16 disclosure of an environmental violation by a person to the
17 department of natural resources. A person who voluntarily
18 discloses a violation is immune from administrative and civil
19 penalties and criminal penalties for negligence that are
20 associated with the issues disclosed.

21 Voluntary disclosure is limited to disclosure arising out
22 of an audit and the person makes reasonable efforts to pursue
23 compliance and correct the noncompliance within a reasonable
24 period of time after completion of the audit. A disclosure
25 which is required under a specific permit condition or under
26 an order issued by the department of natural resources is not
27 considered to be voluntary. The bill allows for the
28 department to issue a compliance extension. The bill does not
29 limit, waive, or abrogate any common-law privilege, including
30 the work product doctrine, attorney-client privilege, and the
31 self-critical analysis privilege.

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Pants - Chair
Bradley
Masher

HSB 191

ENVIRONMENTAL PROTECTION
Sponsored by
SF/HC
HOUSE FILE 452
BY (PROPOSED COMMITTEE ON
ENVIRONMENTAL PROTECTION
BILL BY CHAIRPERSON
GREINER)

Passed House, Date _____ Passed Senate, Date _____
Vote: Ayes _____ Nays _____ Vote: Ayes _____ Nays _____
Approved _____

A BILL FOR

1 An Act creating an environmental audit privilege and providing
2 penalties.

3 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

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1 Section ~~1.~~ NEW SECTION. 455H.1 TITLE.

2 This chapter shall be known and cited as the "Environmental
3 Audit Privilege and Immunity Act".

4 Sec. 2. NEW SECTION. 455H.2 FINDINGS AND DECLARATIONS.

5 The general assembly finds and declares that protection of
6 the environment is enhanced by the public's voluntary
7 compliance with environmental laws and that the public will
8 benefit from incentives to voluntarily identify and remedy
9 environmental compliance issues. It is further declared that
10 limited expansion of the protection against disclosure and
11 prosecution will encourage voluntary compliance and improve
12 environmental quality. The provisions of this chapter will
13 not inhibit the exercise of regulatory authority by those
14 persons entrusted with protecting the environment. Therefore,
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16 confidentiality of communication relating to voluntary
17 environmental audits and limited immunity is provided to
18 improve compliance with environmental laws.

19 Sec. 3. NEW SECTION. 455H.3 DEFINITIONS.

20 As used in this chapter:

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23 evaluation of one or more facilities, processes, or activities
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25 of a management system related to the facility, process, or
26 activity, that is designed to identify and prevent
27 noncompliance and improve compliance with local, state, or
28 federal environmental laws. An environmental audit may be
29 conducted by the owner or operator, by an employee of the
30 owner or operator, by an officer or director of the facility
31 or operation, by an independent contractor hired by the owner
32 or operator, or by the owner's or operator's attorney.

33 An environmental audit includes the environmental audit
34 report which is a set of documents containing information
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1 environmental audit. The report includes, but is not limited
2 to, the report document itself, any supporting documents, file
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10 information is collected and developed for the primary purpose
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12 report may have any or all of the following components:

13 a. A report prepared by the auditor, which may include the
14 scope of the environmental audit, the information gained in
15 the environmental audit, conclusions, and recommendations,
16 together with exhibits and appendices.

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18 the report and discussing implementation issues.

19 c. An implementation plan that addresses correcting past
20 noncompliance, improving current compliance, or preventing
21 future noncompliance.

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

24 3. "Owner" or "operator" means the person or entity who
25 prepared or caused the environmental audit to be undertaken.
26 "Owner or operator" does not include a prospective purchaser
27 who caused the environmental audit to be undertaken.

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29 1. An environmental audit shall be privileged and shall
30 not be discoverable or admissible as evidence in any legal
31 action in any civil, criminal, or administrative proceeding,
32 or in response to a regulatory inspection or inquiry, except
33 as otherwise provided in this chapter.

34 2. A person who voluntarily conducts an environmental
35 audit, an officer or employee of the person conducting the

1 environmental audit, or an independent contractor hired by the
2 person to conduct the environmental audit shall not be
3 questioned or examined as to the environmental audit without
4 the consent of the person, or unless ordered to do so by a
5 court of record. This subsection does not apply if the
6 environmental audit is subject to an exception under section
7 455H.7.

8 3. The privilege exists as a rebuttable presumption. A
9 party seeking disclosure of privileged material has the burden
10 to overcome the rebuttable presumption.

11 4. Failure to comply with review, disclosure, or use
12 prohibitions in this chapter shall be the basis for
13 suppression of any evidence arising or derived from the
14 unauthorized review, disclosure, or use. The party failing to
15 comply with this chapter shall have the burden of proving that
16 the proffered evidence did not arise and was not derived from
17 the unauthorized activity.

18 Sec. 5. NEW SECTION. 455H.5 WAIVER OF PRIVILEGE --
19 DISCLOSURE -- ORDER.

20 1. The owner or operator may waive the privilege under
21 section 455H.4. The privilege cannot be waived except by or
22 with the consent of the owner or operator.

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24 the following circumstances without waiving the privilege
25 under section 455H.4:

26 a. Results of an environmental audit or information
27 generated by the environmental audit may be disclosed to any
28 person employed by the environmental owner or operator of the
29 audited facility or operation, any legal representative of the
30 owner or operator, or any independent contractor retained by
31 the owner or operator to address an issue or issues raised by
32 the environmental audit.

33 b. Under the terms of a confidentiality agreement between
34 the owner or operator of the facility or operation audited and
35 a potential purchaser of the operation or facility audited.

1 c. Under the terms of a confidentiality agreement between
2 governmental officials and the owner or operator of the
3 facility or operation audited.

4 d. To a lender.

5 e. To the United States environmental protection agency
6 upon the demand of the agency.

7 3. The existence of an environmental audit is subject to
8 disclosure in a civil, criminal, or administrative proceeding.
9 The party in possession of the environmental audit may assert
10 the privilege. The party in possession shall not be required
11 to provide the inquiring party with a copy of the
12 environmental audit.

13 4. The inquiring party may file, with the appropriate
14 court, a petition requesting an in camera review on whether
15 the environmental audit or portions of the environmental audit
16 are privileged or subject to disclosure under this chapter.
17 The inquiring party's failure to file a petition under this
18 subsection shall waive the party's argument that the
19 environmental audit is not privileged.

20 5. The court shall issue an order scheduling an in camera
21 review, within forty-five days of the filing of the petition.

22 6. After the in camera review, the court shall issue an
23 order directing whether the information in the environmental
24 audit is subject to disclosure.

25 a. The order may require disclosure of material for which
26 the privilege is asserted, if the court determines that the
27 privilege is asserted for a fraudulent purpose, the material
28 is not subject to the privilege, or the material, even if
29 subject to the privilege, shows evidence of noncompliance with
30 local, state, or federal environmental laws and appropriate
31 efforts to achieve compliance with local, state, or federal
32 environmental laws were not initiated and pursued with
33 reasonable diligence upon discovery of noncompliance. The
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35 relevant to the issue in dispute.

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2 the environmental audit or parts of the environmental audit to
3 protect against unnecessary disclosure.

4 7. The parties may at any time stipulate to entry of an
5 order directing that specific information contained in an
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8 Sec. 6. NEW SECTION. 455H.6 VIOLATION.

9 If a person, party, public entity, public employee, or
10 public official divulges or disseminates all or any part of
11 the information contained in an environmental audit in
12 violation of this chapter or of an order issued by a court
13 under section 455H.5, the person, party, public entity, public
14 employee, or public official is liable for any damages caused
15 by the divulgence or dissemination of the information and
16 incurred by the person for whom the environmental audit was
17 prepared. A violation of this chapter shall also result in a
18 civil penalty not to exceed ten thousand dollars payable to
19 the aggrieved party.

20 A person who violates this section shall be guilty of a
21 simple misdemeanor and may be found in contempt of a court by
22 a court of record.

23 If the environmental audit otherwise meets the requirements
24 of this chapter, a disclosure or dissemination in violation of
25 this chapter or of an order issued by a court under section
26 455H.5 shall not abrogate the privilege under section 455H.4.

27 This section shall not affect provisions providing
28 employees protection under the following federal provisions,
29 42 U.S.C. § 5851, 42 U.S.C. § 300j-9(i), 42 U.S.C. § 9610, 33
30 U.S.C. § 1367, 15 U.S.C. § 2622, 42 U.S.C. § 6971, and 42
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32 actions taken by employers against employees who report
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9 environmental audit.

10 2. Information obtained by observation, sampling, or
11 monitoring by any regulatory agency.

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13 environmental audit.

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15 1. A person who makes a voluntary disclosure of an
16 environmental violation to the department is immune from any
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26 not voluntary.

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33 environmental audit. Where the evidence shows the
34 noncompliance is the failure to obtain a permit, reasonable
35 effort may be demonstrated by the submittal of a complete

1 permit application within a reasonable time. Disclosure of
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4 immunity provisions in this section are applicable.

5 3. If a person is required to make a disclosure relating
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8 voluntary with respect to that issue.

9 4. Except as provided in this section, this section does
10 not affect the authority of the department to require any
11 action associated with the information disclosed in any
12 voluntary disclosure of an environmental violation.

13 5. Upon application to the department, the time period
14 within which a noncompliance item is corrected under
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16 the noncompliance within a two-year period. The grant of an
17 extension by the department shall not be unreasonably
18 withheld. If the department denies an extension, the
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30 violations without violating the chapter under federal
31 "whistleblower" provisions.

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33 disclosure of an environmental violation by a person to the
34 department of natural resources. A person who voluntarily
35 discloses a violation is immune from administrative and civil

1 penalties and criminal penalties for negligence that are
2 associated with the issues disclosed.

3 Voluntary disclosure is limited to disclosure arising out
4 of an audit and the person makes reasonable efforts to pursue
5 compliance and correct the noncompliance within a reasonable
6 period of time after completion of the audit. A disclosure
7 which is required under a specific permit condition or under
8 an order issued by the department of natural resources is not
9 considered to be voluntary. The bill allows for the
10 department to issue a compliance extension. The bill does not
11 limit, waive, or abrogate any common-law privilege, including
12 the work product doctrine, attorney-client privilege, and the
13 self-critical analysis privilege.

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