

# House Study Bill 191

## Conference Committee Text

PAG LIN

1 1 Section 1. NEW SECTION. 455H.1 TITLE.  
1 2 This chapter shall be known and cited as the "Environmental  
1 3 Audit Privilege and Immunity Act".  
1 4 Sec. 2. NEW SECTION. 455H.2 FINDINGS AND DECLARATIONS.  
1 5 The general assembly finds and declares that protection of  
1 6 the environment is enhanced by the public's voluntary  
1 7 compliance with environmental laws and that the public will  
1 8 benefit from incentives to voluntarily identify and remedy  
1 9 environmental compliance issues. It is further declared that  
1 10 limited expansion of the protection against disclosure and  
1 11 prosecution will encourage voluntary compliance and improve  
1 12 environmental quality. The provisions of this chapter will  
1 13 not inhibit the exercise of regulatory authority by those  
1 14 persons entrusted with protecting the environment. Therefore,  
1 15 an environmental audit privilege is provided to protect the  
1 16 confidentiality of communication relating to voluntary  
1 17 environmental audits and limited immunity is provided to  
1 18 improve compliance with environmental laws.  
1 19 Sec. 3. NEW SECTION. 455H.3 DEFINITIONS.  
1 20 As used in this chapter:  
1 21 1. "Department" means the department of natural resources.  
1 22 2. "Environmental audit" means a voluntary, internal  
1 23 evaluation of one or more facilities, processes, or activities  
1 24 regulated under local, state, or federal environmental laws or  
1 25 of a management system related to the facility, process, or  
1 26 activity, that is designed to identify and prevent  
1 27 noncompliance and improve compliance with local, state, or  
1 28 federal environmental laws. An environmental audit may be  
1 29 conducted by the owner or operator, by an employee of the  
1 30 owner or operator, by an officer or director of the facility  
1 31 or operation, by an independent contractor hired by the owner  
1 32 or operator, or by the owner's or operator's attorney.  
1 33 An environmental audit includes the environmental audit  
1 34 report which is a set of documents containing information  
1 35 generated and collected in the course of conducting an  
2 1 environmental audit. The report includes, but is not limited  
2 2 to, the report document itself, any supporting documents, file  
2 3 notes and records of observations, samples, analytical  
2 4 results, exhibits, findings, opinions, suggestions,  
2 5 recommendations, conclusions, drafts, memoranda, drawings,  
2 6 photographs, computer-generated or electronically recorded  
2 7 information, maps, charts, graphs and surveys, implementation  
2 8 plans, interviews, discussions, correspondence, and  
2 9 communications related to the environmental audit, if the  
2 10 information is collected and developed for the primary purpose  
2 11 of conducting the environmental audit. An environmental audit  
2 12 report may have any or all of the following components:  
2 13 a. A report prepared by the auditor, which may include the  
2 14 scope of the environmental audit, the information gained in  
2 15 the environmental audit, conclusions, and recommendations,  
2 16 together with exhibits and appendices.  
2 17 b. Memoranda and documents analyzing portions or all of  
2 18 the report and discussing implementation issues.  
2 19 c. An implementation plan that addresses correcting past  
2 20 noncompliance, improving current compliance, or preventing  
2 21 future noncompliance.

2 22 d. Periodic updates documenting progress in completing the  
2 23 implementation plan.

2 24 3. "Owner" or "operator" means the person or entity who  
2 25 prepared or caused the environmental audit to be undertaken.  
2 26 "Owner or operator" does not include a prospective purchaser  
2 27 who caused the environmental audit to be undertaken.

2 28 Sec. 4. NEW SECTION. 455H.4 PRIVILEGE.

2 29 1. An environmental audit shall be privileged and shall  
2 30 not be discoverable or admissible as evidence in any legal  
2 31 action in any civil, criminal, or administrative proceeding,  
2 32 or in response to a regulatory inspection or inquiry, except  
2 33 as otherwise provided in this chapter.

2 34 2. A person who voluntarily conducts an environmental  
2 35 audit, an officer or employee of the person conducting the  
3 1 environmental audit, or an independent contractor hired by the  
3 2 person to conduct the environmental audit shall not be  
3 3 questioned or examined as to the environmental audit without  
3 4 the consent of the person, or unless ordered to do so by a  
3 5 court of record. This subsection does not apply if the  
3 6 environmental audit is subject to an exception under section  
3 7 455H.7.

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

3 11 4. Failure to comply with review, disclosure, or use  
3 12 prohibitions in this chapter shall be the basis for  
3 13 suppression of any evidence arising or derived from the  
3 14 unauthorized review, disclosure, or use. The party failing to  
3 15 comply with this chapter shall have the burden of proving that  
3 16 the proffered evidence did not arise and was not derived from  
3 17 the unauthorized activity.

3 18 Sec. 5. NEW SECTION. 455H.5 WAIVER OF PRIVILEGE &ndash;  
3 19 DISCLOSURE &ndash; ORDER.

3 20 1. The owner or operator may waive the privilege under  
3 21 section 455H.4. The privilege cannot be waived except by or  
3 22 with the consent of the owner or operator.

3 23 2. The environmental audit may be disclosed under any of  
3 24 the following circumstances without waiving the privilege  
3 25 under section 455H.4:

3 26 a. Results of an environmental audit or information  
3 27 generated by the environmental audit may be disclosed to any  
3 28 person employed by the environmental owner or operator of the  
3 29 audited facility or operation, any legal representative of the  
3 30 owner or operator, or any independent contractor retained by  
3 31 the owner or operator to address an issue or issues raised by  
3 32 the environmental audit.

3 33 b. Under the terms of a confidentiality agreement between  
3 34 the owner or operator of the facility or operation audited and  
3 35 a potential purchaser of the operation or facility audited.

4 1 c. Under the terms of a confidentiality agreement between  
4 2 governmental officials and the owner or operator of the  
4 3 facility or operation audited.

4 4 d. To a lender.

4 5 e. To the United States environmental protection agency  
4 6 upon the demand of the agency.

4 7 3. The existence of an environmental audit is subject to  
4 8 disclosure in a civil, criminal, or administrative proceeding.  
4 9 The party in possession of the environmental audit may assert  
4 10 the privilege. The party in possession shall not be required  
4 11 to provide the inquiring party with a copy of the  
4 12 environmental audit.

4 13 4. The inquiring party may file, with the appropriate  
4 14 court, a petition requesting an in camera review on whether  
4 15 the environmental audit or portions of the environmental audit  
4 16 are privileged or subject to disclosure under this chapter.  
4 17 The inquiring party's failure to file a petition under this  
4 18 subsection shall waive the party's argument that the

4 19 environmental audit is not privileged.

4 20 5. The court shall issue an order scheduling an in camera  
4 21 review, within forty-five days of the filing of the petition.

4 22 6. After the in camera review, the court shall issue an  
4 23 order directing whether the information in the environmental  
4 24 audit is subject to disclosure.

4 25 a. The order may require disclosure of material for which  
4 26 the privilege is asserted, if the court determines that the  
4 27 privilege is asserted for a fraudulent purpose, the material  
4 28 is not subject to the privilege, or the material, even if  
4 29 subject to the privilege, shows evidence of noncompliance with  
4 30 local, state, or federal environmental laws and appropriate  
4 31 efforts to achieve compliance with local, state, or federal  
4 32 environmental laws were not initiated and pursued with  
4 33 reasonable diligence upon discovery of noncompliance. The  
4 34 court may compel disclosure of only those portions of a report  
4 35 relevant to the issue in dispute.

5 1 b. The order may restrict the distribution and review of  
5 2 the environmental audit or parts of the environmental audit to  
5 3 protect against unnecessary disclosure.

5 4 7. The parties may at any time stipulate to entry of an  
5 5 order directing that specific information contained in an  
5 6 environmental audit is or is not subject to the privilege  
5 7 under section 455H.4.

5 8 Sec. 6. NEW SECTION. 455H.6 VIOLATION.

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

5 20 A person who violates this section shall be guilty of a  
5 21 simple misdemeanor and may be found in contempt of a court by  
5 22 a court of record.

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

5 27 This section shall not affect provisions providing  
5 28 employees protection under the following federal provisions,  
5 29 42 U.S.C. } 5851, 42 U.S.C. } 300j-9(i), 42 U.S.C. } 9610, 33  
5 30 U.S.C. } 1367, 15 U.S.C. } 2622, 42 U.S.C. } 6971, and 42  
5 31 U.S.C. } 7622, which provide protection against discriminatory  
5 32 actions taken by employers against employees who report  
5 33 environmental noncompliance.

5 34 Sec. 7. NEW SECTION. 455H.7 EXCEPTIONS.

5 35 The privilege under section 455H.4 shall not extend to any  
6 1 of the following:

6 2 1. Documents, communications, data, reports, or other  
6 3 information required to be collected, developed, maintained,  
6 4 reported, or otherwise made available to a regulatory agency  
6 5 pursuant to local, state, or federal environmental laws or  
6 6 regulations. However, the privilege shall extend to any  
6 7 observations, findings, opinions, suggestions, or conclusions  
6 8 derived from the above by the person conducting the  
6 9 environmental audit.

6 10 2. Information obtained by observation, sampling, or  
6 11 monitoring by any regulatory agency.

6 12 3. Information obtained from a source independent of the  
6 13 environmental audit.

6 14 Sec. 8. NEW SECTION. 455H.8 VOLUNTARY DISCLOSURE.

6 15 1. A person who makes a voluntary disclosure of an

6 16 environmental violation to the department is immune from any  
6 17 administrative or civil penalty associated with the issues  
6 18 disclosed and is immune from any criminal penalties for  
6 19 negligent acts associated with the issues disclosed. The  
6 20 person shall provide information supporting the claim that the  
6 21 disclosure is voluntary at the time that the disclosure is  
6 22 made to the department. The person creates a rebuttable  
6 23 presumption that the disclosure is voluntary. To rebut the  
6 24 presumption that a disclosure is voluntary, the department or  
6 25 other party has the burden of proving that the disclosure was  
6 26 not voluntary.

6 27 2. The disclosure of information is voluntary if both of  
6 28 the following circumstances apply:

6 29 a. The disclosure arises out of an environmental audit.

6 30 b. The person making the disclosure uses reasonable  
6 31 efforts to pursue compliance and corrects the noncompliance  
6 32 within a reasonable period of time after completion of the  
6 33 environmental audit. Where the evidence shows the  
6 34 noncompliance is the failure to obtain a permit, reasonable  
6 35 effort may be demonstrated by the submittal of a complete

7 1 permit application within a reasonable time. Disclosure of  
7 2 information required to be reported by local, state, or  
7 3 federal law is considered to be voluntary disclosure and the  
7 4 immunity provisions in this section are applicable.

7 5 3. If a person is required to make a disclosure relating  
7 6 to a specific issue under a specific permit condition or under  
7 7 an order issued by the department, the disclosure is not  
7 8 voluntary with respect to that issue.

7 9 4. Except as provided in this section, this section does  
7 10 not affect the authority of the department to require any  
7 11 action associated with the information disclosed in any  
7 12 voluntary disclosure of an environmental violation.

7 13 5. Upon application to the department, the time period  
7 14 within which a noncompliance item is corrected under  
7 15 subsection 2 may be extended if it is not practical to correct  
7 16 the noncompliance within a two-year period. The grant of an  
7 17 extension by the department shall not be unreasonably  
7 18 withheld. If the department denies an extension, the  
7 19 department shall provide the requesting party with a written  
7 20 explanation of the reasons for the denial. A request for de  
7 21 novo review of the department's decision may be made to the  
7 22 appropriate court.

7 23 Sec. 9. NEW SECTION. 455H.9 ABROGATION OF OTHER  
7 24 PRIVILEGES.

7 25 This chapter shall not limit, waive, or abrogate the scope  
7 26 or nature of any statutory or common law privilege, including  
7 27 the work product doctrine, the attorney client privilege, and  
7 28 the self-critical analysis privilege.

7 29 EXPLANATION

7 30 This bill creates the "Environmental Audit Privilege Act",  
7 31 which protects disclosure of environmental audits and provides  
7 32 immunity from penalties for actions which voluntarily disclose  
7 33 the existence of an environmental violation. The bill finds  
7 34 that the protection of the environment is enhanced by the  
7 35 public's voluntary compliance with environmental laws and the  
8 1 benefit to the public from incentives to voluntarily identify  
8 2 and remedy environmental compliance issues.

8 3 The bill provides that an environmental audit is privileged  
8 4 and not discoverable as evidence in any legal action.

8 5 Environmental audit is defined as a voluntary internal  
8 6 evaluation designed to identify and prevent noncompliance with  
8 7 local, state, or federal environmental laws and includes the  
8 8 environmental audit report which contains documents and  
8 9 information generated and collected in the course of  
8 10 conducting an environmental audit. The audit privilege exists  
8 11 as a rebuttable presumption. Failure to comply with the  
8 12 review, disclosure, and use of prohibitions in the bill is

8 13 considered the basis for suppression of any evidence arising  
8 14 from or derived from the unauthorized review, disclosure, or  
8 15 use of information.

8 16 The bill provides that the owner or operator may waive the  
8 17 environmental audit privilege. It provides for disclosure of  
8 18 the audit in limited circumstances without waiving the  
8 19 privilege. A person who wishes to obtain audit information  
8 20 may file a petition for in camera review. The court is  
8 21 required to schedule an in camera review within 45 days. The  
8 22 court will issue an order directing whether the audit or  
8 23 portions of the audit is subject to disclosure.

8 24 The bill provides that any person or any party, public  
8 25 entity, employee, or official who divulges or disseminates  
8 26 information in violation of an order is liable for damages,  
8 27 subject to a civil penalty of up to \$10,000, is guilty of a  
8 28 simple misdemeanor, and may be found in contempt of court.  
8 29 The bill does not change employees' rights to disclose  
8 30 violations without violating the chapter under federal  
8 31 "whistleblower" provisions.

8 32 The bill allows for limited immunity for a voluntary  
8 33 disclosure of an environmental violation by a person to the  
8 34 department of natural resources. A person who voluntarily  
8 35 discloses a violation is immune from administrative and civil  
9 1 penalties and criminal penalties for negligence that are  
9 2 associated with the issues disclosed.

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

9 14 LSB 1968HC 76

9 15 js/jj/8