

FEB 12 1997
ENVIRONMENTAL PROTECTION

HOUSE FILE 216
BY BRADLEY and RANTS

WITHDRAWN

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

3/4/98 (p. 475)

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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WITHDRAWN

HF 216

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 an 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 may include, but is not
2 limited to, the report document itself, any supporting
3 documents, file notes and records of observations, samples,
4 analytical results, exhibits, findings, opinions, suggestions,
5 recommendations, conclusions, drafts, memoranda, drawings,
6 photographs, computer-generated or electronically recorded
7 information, maps, charts, graphs, 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, recommendations,
16 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. "Inquiring party" means any party appearing before a
25 court or administrative tribunal.

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

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

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

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

11 3. A violation of the 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. A party failing to
15 comply with this chapter shall have the burden of proving that
16 the proffered evidence did not derive from the unauthorized
17 activity.

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

20 1. An 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 of the owner or operator by the owner or
5 operator.

6 e. To the United States environmental protection agency
7 upon the demand of the agency by the owner or operator.

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

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

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

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

29 a. The order may require disclosure of information for
30 which the privilege is asserted if the court or administrative
31 tribunal determines any of the following:

32 (1) The privilege is asserted for a fraudulent purpose.

33 (2) The material is not subject to the privilege.

34 (3) The material, even if subject to the privilege, shows
35 evidence of noncompliance with local, state, or federal

1 environmental laws and appropriate efforts to achieve
2 compliance with local, state, or federal environmental laws
3 were not initiated and pursued with reasonable diligence upon
4 discovery of noncompliance.

5 (4) The material, even if subject to the privilege, shows
6 that violations of local, state, or federal environmental laws
7 were intentional, or shows that violations of local, state, or
8 federal environmental laws resulted in substantial harm to the
9 public health or the environment.

10 The court or administrative tribunal may compel disclosure
11 of only those portions of a report relevant to the issue in
12 dispute.

13 b. The order may restrict the distribution and review of
14 the environmental audit or parts of the environmental audit to
15 protect against unnecessary disclosure.

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

20 Sec. 6. NEW SECTION. 455H.6 EXCEPTIONS.

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

23 1. Documents, communications, data, reports, or other
24 information required to be collected, developed, maintained,
25 reported, or otherwise made available to a regulatory agency
26 pursuant to local, state, or federal environmental laws or
27 regulations. However, the privilege shall extend to any
28 observations, findings, opinions, suggestions, or conclusions
29 derived from the above by the person conducting the
30 environmental audit.

31 2. Information obtained from observation, sampling, or
32 monitoring by any regulatory agency.

33 3. Information obtained from a source independent of the
34 environmental audit.

35 Sec. 7. NEW SECTION. 455H.7 VIOLATIONS.

1 1. If a person, party, public entity, public employee, or
2 public official divulges or disseminates all or any part of
3 the information contained in an environmental audit in
4 violation of this chapter or violates an order issued by a
5 court or administrative tribunal under section 455H.5, the
6 person, party, public entity, public employee, or public
7 official is liable for actual damages caused by the divulgence
8 or dissemination of the information and incurred by the owner
9 or operator for whom the environmental audit was prepared. A
10 violation of this chapter shall also subject the violator to
11 punitive damages of not more than ten thousand dollars.

12 2. A person who violates an order rendered pursuant to
13 section 455H.5 shall be guilty of a simple misdemeanor and may
14 be found in contempt of court by a court of record.

15 3. If the environmental audit meets the requirements of
16 this chapter, a disclosure or dissemination in violation of
17 this chapter or of an order issued by a court or
18 administrative tribunal under section 455H.5 shall not
19 abrogate the privilege under section 455H.4.

20 4. This section shall not affect the enforceability of any
21 of the following federal provisions providing protection
22 against discriminatory actions taken by employers against
23 employees who report environmental noncompliance: 42 U.S.C. §
24 5851; 42 U.S.C. § 300j-9(i); 42 U.S.C. § 9610; 33 U.S.C. §
25 1367; 15 U.S.C. § 2622; 42 U.S.C. § 6971; and 42 U.S.C. §
26 7622.

27 Sec. 8. NEW SECTION. 455H.8 VOLUNTARY DISCLOSURE OF
28 ENVIRONMENTAL VIOLATION -- IMMUNITY.

29 1. An owner or operator who makes a voluntary disclosure
30 of an environmental violation, which is revealed as a result
31 of an environmental audit, to the department is immune from
32 any administrative or civil penalty associated with the issues
33 disclosed and is immune from any criminal penalties for
34 negligent acts associated with the issues disclosed. The
35 owner or operator shall provide information supporting the

1 claim that the disclosure is voluntary at the time that the
2 disclosure is made to the department. The owner or operator
3 creates a rebuttable presumption that the disclosure is
4 voluntary by providing such information at the time of
5 disclosure. To rebut the presumption that a disclosure is
6 voluntary, the department or other party has the burden of
7 proving that the disclosure was not voluntary.

8 2. The disclosure of information is voluntary if both of
9 the following circumstances exist:

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

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

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

26 4. Except as provided in this section, this section does
27 not affect the authority of the department to require any
28 action associated with the information disclosed in any
29 voluntary disclosure of an environmental violation.

30 5. Upon application to the department, the time period
31 within which a noncompliance item is corrected under
32 subsection 2 may be extended if it is not practical to correct
33 the noncompliance within a two-year period. The department
34 shall not unreasonably withhold the grant of an extension. If
35 the department denies an extension, the department shall

1 provide the requesting party with a written explanation of the
2 reasons for the denial. A request for de novo review of the
3 department's decision may be made to the appropriate court.

4 Sec. 9. NEW SECTION. 455H.9 ABROGATION OF OTHER
5 PRIVILEGES.

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

10 EXPLANATION

11 This bill creates the "Environmental Audit Privilege and
12 Immunity Act", which protects disclosure of environmental
13 audits and provides immunity from penalties for actions which
14 voluntarily disclose the existence of an environmental
15 violation. The bill finds that the protection of the
16 environment is enhanced by the public's voluntary compliance
17 with environmental laws and that the public benefits from
18 incentives to voluntarily identify and remedy environmental
19 compliance issues.

20 The bill provides that an environmental audit is privileged
21 and not discoverable as evidence in any legal action.
22 Environmental audit is defined as a voluntary internal
23 evaluation designed to identify and prevent noncompliance with
24 local, state, or federal environmental laws and includes the
25 environmental audit report which contains documents and
26 information generated and collected in the course of
27 conducting an environmental audit. A violation of the review,
28 disclosure, or use prohibitions in the bill is considered the
29 basis for suppression of any evidence arising from or derived
30 from the unauthorized review, disclosure, or use of
31 information.

32 The bill provides that an owner or operator may waive the
33 environmental audit privilege. It provides for disclosure of
34 the audit in limited circumstances without waiving the
35 privilege. A person who wishes to obtain audit information

1 may file a petition for in camera review. The court or
2 administrative tribunal is required to schedule an in camera
3 review within 45 days. The court or administrative tribunal
4 shall issue an order directing whether the audit or portions
5 of the audit are subject to disclosure. The bill provides
6 that an audit may be disclosed if the privilege is asserted
7 for a fraudulent purpose, if the material is not subject to
8 the privilege, if appropriate efforts to achieve compliance
9 with local, state, or federal environmental laws were not
10 initiated and pursued with reasonable diligence, if violations
11 were intentional, or if violations resulted in substantial
12 harm to the public health or the environment.

13 The bill provides that any person, party, public entity,
14 employee, or official who divulges or disseminates information
15 in violation of the privilege or an order is liable for actual
16 damages and is subject to punitive damages of up to \$10,000.
17 A person who violates an order rendered under the Act is
18 guilty of a simple misdemeanor and may be found in contempt of
19 court. The bill does not change employees' rights to disclose
20 violations under federal "whistleblower" provisions.

21 The bill allows for limited immunity for a voluntary
22 disclosure of an environmental violation by an owner or
23 operator to the department of natural resources. An owner or
24 operator who voluntarily discloses a violation is immune from
25 administrative and civil penalties and criminal penalties for
26 negligence that are associated with the issues disclosed.

27 Voluntary disclosure is limited to disclosure arising out
28 of an audit and to instances when the owner or operator makes
29 reasonable efforts to pursue compliance and correct the
30 noncompliance within a reasonable period of time after
31 completion of the audit. A disclosure which is required under
32 a specific permit condition or under an order issued by the
33 department of natural resources is not considered to be
34 voluntary. The bill allows for the department to issue a
35 compliance extension. The bill does not limit, waive, or

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

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