



## 1995 SENATE BILL 185

May 10, 1995 - Introduced by Senator BURKE. Referred to Committee on Environment and Energy.

1 **AN ACT to create** 144.994 and 905.20 of the statutes; **relating to:** creating a  
2 privilege for environmental audits and immunity for disclosure of violations of  
3 environmental laws.

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### *Analysis by the Legislative Reference Bureau*

Under this bill, an owner or operator of an activity, procedure or facility who discloses a violation of an environmental law is granted immunity from the imposition of a forfeiture related to that violation. The immunity is granted only for violations discovered from an environmental audit and only if the disclosure is made promptly after the owner or operator learns of the violation, the owner or operator makes a good faith effort to correct the violation and the owner or operator cooperates in any investigation resulting from the disclosure.

The bill creates a privilege for any environmental audit that an owner or operator of an activity, procedure or facility voluntarily performs. The privilege allows the owner or operator to prevent the disclosure of the contents of an environmental audit, and of any implementation plan developed in response to an environmental audit. Under the bill, the privilege does not apply if a court of record determines that the environmental audit shows that there is probable cause to believe that the owner or operator committed a criminal violation of an environmental law. The bill also provides that the privilege does not apply if the owner or operator fails to promptly disclose any violation discovered during an environmental audit, fails to make a good faith effort to correct the violation or fails to cooperate in any investigation resulting from the disclosure.

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*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

4 **SECTION 1.** 144.994 of the statutes is created to read:

1           **144.994 Immunity for disclosures. (1) DEFINITION.** In this section,  
2 “environmental audit” has the meaning given in s. 905.20 (1).

3           **(2) DISCLOSURE IMMUNITY.** An owner or operator of an activity, procedure or  
4 facility who discloses to the department a violation of this chapter, ch. 147, 159 or 162  
5 or s. 146.20 shall be immune from the imposition of a forfeiture related to that  
6 violation if all of the following apply:

7           (a) The disclosure is made promptly after the owner or operator of the activity,  
8 procedure or facility knew or should have known of the violation, based on  
9 information obtained during an environmental audit.

10           (b) The owner or operator of the activity, procedure or facility makes a good faith  
11 effort to timely correct the violation.

12           (c) The owner or operator of the activity, procedure or facility cooperates with  
13 the department in any investigation that results from the disclosure.

14           **(3) EXCEPTIONS.** A forfeiture may be imposed notwithstanding sub. (2) if any  
15 of the following applies:

16           (a) The information related to the violation disclosed under sub. (2) is required  
17 as part of a periodic report or to renew or obtain a license or permit under this  
18 chapter, ch. 147, 159 or 162 or s. 146.20.

19           (b) The violation was committed intentionally by an officer or employe of the  
20 owner or operator of the activity, procedure or facility acting within the scope of his  
21 or her employment.

22           (c) The violation results in a significant and immediate threat to public health  
23 or the environment.

24           **(4) BURDEN OF PROOF.** When the department commences an enforcement action  
25 for a violation under this chapter, ch. 147, 159 or 162 or s. 146.20, the person

1 asserting immunity under sub. (2) has the burden of establishing a prima facie case  
2 that the immunity applies. If the person establishes a prima facie case that the  
3 immunity applies, the department has the burden of proving by a preponderance of  
4 the evidence that a forfeiture may be imposed because one of the exceptions under  
5 sub. (3) applies.

6 **SECTION 2.** 905.20 of the statutes is created to read:

7 **905.20 Environmental audit privilege. (1) DEFINITION.** In this section,  
8 “environmental audit” means an evaluation of the activities, procedures or facilities  
9 subject to regulation under ch. 144, 147, 159 or 162 or s. 146.20 that meets all of the  
10 following criteria:

11 (a) Is conducted by or at the request of the owner or operator of the activity,  
12 procedure or facility on his or her own initiative.

13 (b) Is not required to be undertaken in an enforcement action under ch. 144,  
14 147, 159 or 162 or s. 146.20.

15 (c) Is undertaken for any of the following purposes:

16 1. To benefit the owner or operator of the activity, procedure or facility.

17 2. To identify, document or comply with ch. 144, 147, 159 or 162 or s. 146.20.

18 3. To prevent noncompliance with ch. 144, 147, 159 or 162 or s. 146.20.

19 **(2) GENERAL RULE OF PRIVILEGE.** An owner or operator of an activity, procedure  
20 or facility has a privilege to refuse to disclose and to prevent any other person from  
21 disclosing any document or record, stored in any format, prepared as part of an  
22 environmental audit. This privilege applies to any implementation plan developed  
23 in response to the environmental audit to attain compliance with ch. 144, 147, 159  
24 or 162 or s. 146.20. This privilege may be claimed in any civil or criminal action and

1 in any administrative proceeding, including a contested case, as defined in s. 227.01  
2 (3).

3 **(3) WHO MAY CLAIM THE PRIVILEGE.** The privilege may be claimed by the owner  
4 or operator of the activity, procedure or facility. The authority of the owner or  
5 operator of the activity, procedure or facility to claim the privilege under this  
6 subsection is presumed without evidence to the contrary.

7 **(4) EXCEPTIONS.** The privilege does not apply if a court of record, after an in  
8 camera review of any document, record or implementation plan related to the  
9 environmental audit, determines any of the following:

10 (a) That the owner or operator of the activity, procedure or facility who is  
11 seeking the privilege failed to show all of the following:

12 1. That the disclosure to the department of natural resources of any violation  
13 of ch. 144, 147, 159 or 162 or s. 146.20 was made promptly after the owner or operator  
14 knew or should have known of the violation, based on information obtained during  
15 the environmental audit.

16 2. That the owner or operator made a good faith effort to timely correct a  
17 violation of ch. 144, 147, 159 or 162 or s. 146.20 that became known from information  
18 obtained during the environmental audit.

19 3. That the owner or operator cooperated with the department of natural  
20 resources in any investigation that resulted from the disclosure of a violation of ch.  
21 144, 147, 159 or 162 or s. 146.20 that became known from information obtained  
22 during the environmental audit.

23 (b) That the person seeking access to the document, record or implementation  
24 plan showed that the document, record or implementation plan provides information  
25 about a violation of ch. 144, 147, 159 or 162 or s. 146.20 and that the violation was

1 committed intentionally by an officer or employe of the owner or operator of the  
2 activity, procedure or facility acting within the scope of the officer's or employe's  
3 employment.

4 (c) That the environmental audit shows that there is probable cause to believe  
5 that the owner or operator of the activity, procedure or facility has committed a  
6 criminal offense in violation of ch. 144, 147, 159 or 162 or s. 146.20.

7 **(5) TIME LIMIT OF PRIVILEGE.** There is no privilege for the document, record or  
8 implementation plan related to an environmental audit in the process of being  
9 prepared on December 31, 2006.

10 **SECTION 3. Initial applicability.**

11 (1) This act first applies to documents, records and implementation plans  
12 created on the effective date of this subsection in preparing for or responding to an  
13 environmental audit.

14 (END)