

1999 ASSEMBLY BILL 356

May 24, 1999 – Introduced by Representatives DUFF, ZIEGELBAUER, KEDZIE, JENSEN, COGGS, AINSWORTH, KLUSMAN, BRANDEMUEHL, VRAKAS, M. LEHMAN, MUSSER, STONE, SYKORA, PETROWSKI, ALBERS, GROTHMAN, GOETSCH, RHOADES, SUDER, KESTELL and JESKEWITZ, cosponsored by Senators WELCH, ROESSLER, SCHULTZ, DARLING, PANZER and FARROW. Referred to Committee on Environment.

1 **AN ACT to create** 299.94 and 905.20 of the statutes; **relating to:** creating a
2 privilege for environmental audits, providing immunity for disclosures related
3 to environmental audits and providing a penalty.

Analysis by the Legislative Reference Bureau

This bill creates an immunity from the imposition of a civil or criminal penalty in cases involving potential violations of an environmental requirement. The immunity applies if a person voluntarily discloses the information related to an actual or potential violation within 45 days after the person knew of the actual or potential violation, based on information obtained in an environmental audit. In addition, the immunity applies only if the person makes a good faith effort to achieve compliance, corrects the potential violation, cooperates with the department of natural resources (DNR) in any investigation related to the disclosure and notifies DNR of the date when the environmental audit will begin. The immunity does not apply in certain situations, including when the information is required to be disclosed under a permit, license or approval condition or under an order issued by DNR.

The bill provides that immunity does not apply to criminal penalties if the owner or operator of the site or facility recklessly or knowingly committed the criminal act. The bill allows DNR to mitigate any civil penalties when immunity does not apply if the person made a good faith, voluntary effort to disclose and resolve the violation.

The bill also establishes an environmental audit privilege, restricting the disclosure of any information obtained as part of an environmental evaluation of a

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site or facility. The privilege applies to audits that are conducted at the request of the owner or operator of the site or facility and that are not required under a permit, license or approval condition or under an order issued by DNR. The bill provides that the privilege is not waived by disclosure of the contents of an environmental audit to certain groups, including directors and shareholders of the business entity that owns or operates the site or facility, state or federal officials under the terms of a specific agreement or DNR if the audit was voluntarily disclosed and conditions are met to provide immunity from penalties. Under the bill, a court may determine that the privilege does not apply if the privilege is asserted for fraudulent purposes, if timely action is not taken to respond to any environmental noncompliance found in the audit or if the owner or operator of a site or facility knew of an environmental violation disclosed during the audit.

The bill requires DNR to submit a report to the appropriate standing committees of the legislature within five years after the bill becomes law evaluating how the law has encouraged environmental audits and resulted in reduced environmental problems.

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

1 **SECTION 1.** 299.94 of the statutes is created to read:

2 **299.94 Immunity for disclosures. (1) DEFINITIONS.** In this section:

3 (a) “Environmental audit” has the meaning given in s. 905.20 (1) (a).

4 (b) “Environmental requirement” has the meaning given in s. 905.20 (1) (b).

5 **(2) DISCLOSURE IMMUNITY.** (a) A person who voluntarily discloses information
6 relating to an actual or potential violation of an environmental requirement to the
7 department shall be immune from the imposition of a civil or criminal penalty that
8 could be imposed for the violation if all of the following apply:

9 1. The voluntary disclosure is made within 45 days after the person knew, on
10 the basis of information obtained during an environmental audit, that an actual or
11 potential violation occurred.

12 2. The person making the disclosure initiates an appropriate and good faith
13 effort to achieve compliance with the environmental requirements, pursues

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1 compliance with due diligence and promptly corrects the noncompliance after
2 discovery of the violation. If evidence shows that the noncompliance is the failure
3 to obtain a license, permit or other approval condition, an appropriate and good faith
4 effort to achieve compliance may be demonstrated by the submittal of a complete
5 license, permit or other approval condition application within a reasonable time.

6 3. The person cooperates with any reasonable request by the department in any
7 investigation that results from the disclosure.

8 4. The environmental audit occurs before the person becomes aware that he or
9 she is under investigation by a regulatory or enforcement agency for actual or
10 potential violations of environmental requirements.

11 5. Before beginning an environmental audit, the person that requested the
12 environmental audit notified the department in writing of the date on which the
13 environmental audit would begin, the site or facility or activity or management
14 system related to a site or facility to be audited and the general scope of the
15 environmental audit. The department may not reveal to any person that the
16 department has received a notice under this subdivision or the contents of any notice
17 received under this subdivision.

18 6. At the time that the voluntary disclosure is made to the department, the
19 person making that disclosure provides the department with information showing
20 that the conditions specified in subds. 1., 2., 4. and 5. have been satisfied.

21 (b) If the person who voluntarily discloses information under par. (a) is a
22 governmental unit, as defined in s. 939.648 (1), or a business entity, the immunity
23 under this subsection applies to a director, officer, official, shareholder, trustee and
24 managing employe, as defined in s. 49.498 (1) (e), of that person and to an employe
25 of that person if the employe consents in writing to the disclosure.

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

3 (a) The information disclosed under sub. (2) is required to be reported under
4 a specific permit, license or approval condition or under an order issued by the
5 department.

6 (b) The violation resulted in serious harm or in imminent and substantial
7 endangerment to human health or the environment.

8 (c) A court or administrative law judge finds that, within 3 years before making
9 the disclosure, the person making the disclosure has knowingly committed a
10 criminal act or committed serious violations that constitute a pattern of continuous
11 or repeated violations of environmental requirements, settlement agreements,
12 consent orders or judicial orders that were due to separate and distinct events giving
13 rise to the violations. In determining whether a person has a pattern of continuous
14 or repeated violations under this paragraph, the trier of fact shall base the decision
15 on the compliance history of the specific facility involved in the disclosure.

16 (d) The violation resulted in a substantial economic benefit that gave the
17 violator a clear advantage over its business competitors.

18 (e) The violation is of an administrative or judicial order.

19 **(3m)** DEPARTMENTAL RESPONSE. If the conditions of a voluntary disclosure under
20 sub. (2) (a) are not met but a good faith effort was made to disclose and resolve
21 voluntarily a violation detected in an environmental audit, the department shall
22 consider the nature and extent of any good faith effort in deciding the appropriate
23 enforcement response and shall mitigate any civil penalties based on a showing that
24 one or more of the conditions under sub. (2) (a) were met.

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1 **(4) CRIMINAL PENALTIES.** Immunity provided for in this section does not apply
2 to any criminal penalties if the owner or operator of a site or facility recklessly or
3 knowingly committed the criminal act.

4 **(5) BURDEN OF PROOF.** When the department commences an enforcement action
5 against any person covered under sub. (2) for a violation of an environmental
6 requirement based in whole or in part on information contained in an environmental
7 audit and disclosed to the department, the disclosure shall be presumed to be
8 voluntary. The person claiming that a disclosure is voluntary shall provide the
9 supporting information required under sub. (2) (a), including information showing
10 that an appropriate and good faith effort to achieve compliance has been undertaken
11 with due diligence and that action was promptly taken to achieve compliance in the
12 period of time since the date of the disclosure. The department has the burden of
13 proving by a preponderance of the evidence that a penalty may be imposed because
14 the disclosure was not voluntary, because any of the conditions under sub. (2) (a) were
15 not met or because one of the exceptions under sub. (3) applies.

16 **(6)** Within 5 years after the effective date of this subsection [revisor inserts
17 date], the department shall submit a report to the appropriate standing committees
18 of the legislature, in the manner provided under s. 13.172 (3), evaluating whether
19 this section and s. 905.20 have been effective in encouraging the use of
20 environmental audits and in identifying and correcting environmental problems and
21 conditions.

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

23 **905.20 Environmental audit privilege. (1) DEFINITIONS.** In this section:

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1 (a) “Environmental audit” means an evaluation of a site or facility or of an
2 activity or management system related to a site or facility, if the evaluation meets
3 all of the following criteria:

4 1. Is conducted by or at the request of the owner or operator of the site or facility.

5 2. Is not required under a specific permit, license or approval condition or under
6 an order issued by the department of natural resources.

7 3. Is undertaken for the purpose of identifying, documenting and improving
8 compliance with environmental requirements, to identify an environmental hazard,
9 contamination or other adverse environmental condition, or to improve an
10 environmental management system or process.

11 4. Is completed within a reasonable time after beginning the evaluation, but
12 not to exceed 6 months after the notification under sub. (2) (b) is sent, unless an
13 extension is granted by the department of natural resources.

14 (am) “Environmental audit report” means a document or record or a set of
15 documents or records, each labeled at the time of creation of the document or record,
16 “environmental audit report: privileged document” and created as the result of an
17 environmental audit and includes supporting information and an implementation
18 plan that addresses, as appropriate, correcting past noncompliance with
19 environmental requirements, improving current compliance, improving an
20 environmental management system and preventing future noncompliance.

21 (b) “Environmental requirement” means a federal, state or local environmental
22 law, including any rule, regulation, ordinance, permit, license, approval or special
23 order issued under those laws. State environmental laws include chs. 160 and 280
24 to 299 and s. 166.20.

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1 (c) “Supporting information” means any collection of data or material in any
2 format, including field notes, records of observations, findings, opinions,
3 suggestions, conclusions, drafts, memoranda, reports, drawings, photographs and
4 computer-generated or electronically recorded data, maps, charts, graphs and
5 surveys, if that collection of data or material was created or prepared for the primary
6 purpose of and in the course of or as a result of an environmental audit.

7 **(2) GENERAL RULE OF PRIVILEGE.** (a) An owner or operator of a site or facility has
8 a privilege to refuse to disclose and to prevent any other person from disclosing any
9 environmental audit report related to the owner’s or operator’s site or facility. This
10 privilege is in addition to any other privilege provided under this chapter. This
11 privilege may be claimed in any civil action or administrative proceeding, including
12 a contested case, as defined in s. 227.01 (3).

13 (b) Before beginning an environmental audit, the person requesting the
14 environmental audit shall notify the department of natural resources in writing of
15 the date on which the environmental audit will begin, the site or facility or activity
16 or management system related to a site or facility to be audited and the general scope
17 of the environmental audit. The department of natural resources may not reveal to
18 any person that the department has received a notice under this paragraph or the
19 contents of any notice received under this paragraph.

20 (c) Disclosure of any part of an environmental audit report to any of the
21 following does not waive the privilege under this section:

22 1. An employe, agent, successor, assignee, director or shareholder of the owner
23 or operator of the site or facility.

24 2. An attorney of the owner or operator of the site or facility.

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1 3. An independent contractor retained by the owner or operator of the site or
2 facility to review an issue raised as a result of the environmental audit.

3 4. A partner or lender of the owner or operator of the site or facility or a person
4 whom the owner or operator is currently negotiating with regarding partnership,
5 transfer of ownership or lending of money.

6 5. A state or federal official or employe under the terms of an agreement
7 between a state or federal agency and the owner or operator of the site or facility.

8 6. The department of natural resources if the disclosure meets the conditions
9 under s. 299.94 (2) (a).

10 **(3) WHO MAY CLAIM THE PRIVILEGE.** (a) The privilege may be claimed by the
11 owner or operator of the site or facility. If the owner or operator of the site or facility
12 is a governmental unit, as defined in s. 939.648 (1), or a business, the privilege may
13 be claimed by a director, officer, official, shareholder, trustee or managing employe,
14 as defined in s. 49.498 (1) (e), or by any other employe. The authority to claim the
15 privilege under this paragraph is presumed without evidence to the contrary.

16 (b) Any person who may otherwise claim a privilege under par. (a) retains the
17 right to claim the privilege in any civil or administrative proceeding,
18 notwithstanding the use of an environmental audit in any proceeding under sub. (4)
19 (c) 1., in which the privilege does not apply.

20 **(4) EXCEPTIONS.** (a) The privilege does not apply if a court of record, after an
21 in camera review of the environmental audit report and a statement listing any
22 activities undertaken as a result of the environmental audit to achieve compliance
23 with environmental requirements, determines that the person seeking access to the
24 environmental audit report proves by a preponderance of the evidence any of the
25 following:

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- 1 1. That the privilege is asserted for a fraudulent purpose.
- 2 2. That the owner or operator of the site or facility failed to take the appropriate
3 action that would result in compliance being achieved within a reasonable time after
4 any noncompliance was discovered as the result of an environmental audit, but not
5 exceeding 3 years after the discovery. The department of natural resources may
6 extend the time to achieve compliance beyond the 3-year limit in an order scheduling
7 compliance if the department determines that acceptable progress is being made in
8 achieving compliance.
- 9 3. That the environmental audit report provides information about a site or
10 facility that constitutes a violation of an environmental requirement and that the
11 violation was committed with knowledge by an owner or operator of the site or facility
12 that the site or facility violated an environmental requirement.
- 13 (b) The privilege does not apply to any of the following:
- 14 1. Documents, communication, data, reports or other information required to
15 be made available or reported to a regulatory or enforcement agency or any other
16 person by statute, rule, ordinance, permit, license, approval, order or consent
17 agreement, or as otherwise provided by law.
- 18 2. Information obtained by the observation, sampling or monitoring conducted
19 by a state or federal agency that regulates or enforces compliance with federal
20 environmental requirements.
- 21 3. Information legally obtained from a source independent of an environmental
22 audit.
- 23 (c) The privilege does not apply in any of the following:
- 24 1. An action for contribution or indemnity under an insurance contract.
- 25 2. A criminal investigation.

