

1999 DRAFTING REQUEST

Bill

Received: **11/17/98**

Received By: **nelsorp1**

Wanted: **As time permits**

Identical to LRB:

For: **Marc Duff (608) 266-1190**

By/Representing: **Marsha**

This file may be shown to any legislator: **NO**

Drafter: **nelsorp1**

May Contact:

Alt. Drafters:

Subject: **Courts - immunity liability
Courts - miscellaneous**

Extra Copies:

Pre Topic:

No specific pre topic given

Topic:

Environmental audits

Instructions:

See 97s0689

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	nelsorp1 12/8/98	chanaman 12/30/98		_____			
/P1			lpaasch 01/6/99	_____	lrb_docadmin 01/6/99		
/1	nelsorp1 01/8/99	jgeller 01/10/99	hhagen 01/12/99	_____	lrb_docadmin 01/12/99		
/2	nelsorp1 02/26/99	chanaman 02/26/99	martykr 02/26/99	_____	lrb_docadmin 02/26/99	lrb_docadmin 04/1/99	

FE Sent For:

<END>

↪ Not Needed

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See 97s0689

2/26 Call from Fassbender, w/ permission of Duff's office, some minor changes

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FE Sent For:		<i>cmH 2/26 /2</i>	<i>dm 2/26</i>	<i>ds dm 2/26</i>			<END>

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Extra Copies: ✓ CT

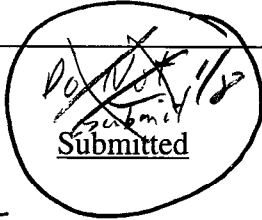
Topic:

Environmental audits ✓

Instructions:

See 97s0689

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1?	nelsorp1	CMM 1/1 12/10 1/1 12/30 JLG	1/6	1/6 L.P. IS			
FE Sent For:		1, CMM 1/8	1/12	1/12 <END>			



State of Wisconsin
1999 - 2000 LEGISLATURE

LRB-0895/2

RPV
cmh
jlg

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

1

AN ACT ...; relating to: ~~PPP~~

NO
A

gen
scat

Analysis by the Legislative Reference Bureau

Waserfrank

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

2

(END)

CMM

**ASSEMBLY SUBSTITUTE AMENDMENT 2,
TO 1997 ASSEMBLY BILL 235**

May 5, 1998 - Offered by Representative DUFF.

new text
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.

(insert An L) ->

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

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

5 **299.94 Immunity for disclosures.** (1) DEFINITIONS. In this section:

6 (a) "Environmental audit" has the meaning given in s. 905.20 (1) (a).

7 (b) "Environmental requirement" has the meaning given in s. 905.20 (1) (b).

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

county / city / town village

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

4 2. The person making the disclosure initiates an appropriate and good faith
5 effort to achieve compliance, pursues compliance with due diligence and promptly
6 corrects the noncompliance or condition after discovery of the violation. If evidence
7 shows that the noncompliance is the failure to obtain a permit, an appropriate and
8 good faith effort to achieve compliance may be demonstrated by the submittal of a
9 complete permit application within a reasonable time.

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

12 4. The environmental audit occurs before the person is made aware that he or
13 she is under investigation by a regulatory agency for actual or potential violations
14 of environmental requirements.

15 5. ^{Before}~~After~~ beginning an environmental audit, the person that requested the
16 environmental audit notified the department in writing of the date on which the
17 environmental audit would begin, the site or facility or activity or management
18 system related to a site or facility to be audited and the general scope of the
19 environmental audit. The department may not reveal to any person that the
20 department has received a notice under this subdivision[✓] or the contents of any notice
21 received under this subdivision.

22 6. At the time that the voluntary disclosure is made to the department, the
23 person making that disclosure provides the department with information showing
24 that the conditions specified in this paragraph[✓] have been satisfied.

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

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

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

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

13 (c) Within 3 years before the disclosure, the person making the disclosure has
14 been found by a court or administrative law judge to have knowingly committed a
15 criminal act or committed serious violations that constitute a pattern of continuous
16 or repeated violations of environmental requirements, settlement agreements,
17 consent orders or judicial orders that were due to separate and distinct events giving
18 rise to the violations. In determining whether a person has a pattern of continuous
19 or repeated violations under this paragraph, the trier of fact shall base the decision
20 on the compliance history of the specific facility involved in the disclosure.

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

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

24 (3m) DEPARTMENTAL RESPONSE. If the conditions of a voluntary disclosure under
25 sub. (2) (a) are not met but a good faith effort was made to voluntarily disclose and

1 resolve ^{voluntarily} a violation detected in an environmental audit, the department shall
 2 consider the nature and extent of any good faith effort in deciding the appropriate
 3 enforcement response and shall mitigate any civil penalties based on a showing that
 4 one or more of the conditions under sub. (2) (a) were met.

5 (4) CRIMINAL PENALTIES. Immunity provided for in this section does not apply
 6 to any criminal penalties if the owner or operator of a site or facility recklessly or
 7 knowingly committed ^{the} a criminal act.

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

20 SECTION 2. 905.20 ^X of the statutes is created to read:

21 **905.20 Environmental audit privilege.** (1) DEFINITIONS. In this section:

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

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

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

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

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

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

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

21 (c) “Supporting information” means any collection of data or material in any
22 format, including field notes, records of observations, findings, opinions,
23 suggestions, conclusions, drafts, memoranda, reports, drawings, photographs and
24 computer generated or electronically recorded data, maps, charts, graphs and

1 surveys, if that ^{collection of} data or material was created or prepared for the primary purpose ^{of} and
2 in the course of or as a result of an environmental audit.

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

9 (b) ^{Before} ~~Priority~~ beginning an environmental audit, the person that requested the
10 environmental audit shall notify the department of natural resources in writing of
11 the date on which the environmental audit will begin, the site or facility or activity
12 or management system related to a site or facility to be audited and the general scope
13 of the environmental audit. The department of natural resources may not reveal to
14 any person that the department has received a notice under this [✓] paragraph or the
15 contents of any notice received under this [✓] paragraph.

16 (c) Disclosure of any part of an environmental audit report to any of the
17 following does not waive the privilege under this [✓] section:

18 1. An employe, agent, successor, assignee, director or shareholder [✓] of the owner
19 or operator of the site or facility.

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

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

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

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

3 6. The department of natural resources if the disclosure meets the conditions
4 under s. 299.94^X (2) (a).[✓]

5 (3) WHO MAY CLAIM THE PRIVILEGE. (a) The privilege may be claimed by the
6 owner or operator of the site or facility. If the owner or operator of the site or facility
7 is a governmental unit, as defined in s. 939.648[✓] (1), or a business^X ~~entity~~, the privilege
8 may be claimed by a director, officer, official, shareholder, trustee or managing
9 employe, as defined in s. 49.498[✓] (1) (e), or by any other employe. The authority to
10 claim the privilege under this paragraph[✓] is presumed without evidence to the
11 contrary.

12 (b) Any person who may otherwise claim a privilege under par. (a)[✓] retains the
13 right to claim the privilege in any civil or administrative proceeding,
14 notwithstanding the use of an environmental audit in any proceeding under sub. (4)

15 (c) 1.,[✓] in which the privilege does not apply.[✓]

16 (4) EXCEPTIONS. (a) The privilege does not apply if a court of record, after an
17 in camera[✓] review of the environmental audit report, including a statement listing
18 any activities undertaken as a result of the environmental audit to achieve
19 compliance with environmental requirements, determines that the person seeking
20 access to the environmental audit report proves by a preponderance of the evidence
21 any of the following:

22 1. That the privilege is asserted for a fraudulent purpose.

23 2. That the owner or operator of the site or facility failed to take the appropriate
24 responses necessary to achieve compliance within a reasonable time after any
25 noncompliance was discovered as the result of an environmental audit, but not

1 exceeding 3 years after the discovery. The department of natural resources may
2 extend the time to achieve compliance beyond the 3-year limit in an order scheduling
3 compliance if the department determines that acceptable progress is being made in
4 achieving compliance.

5 3. That the environmental audit report provides information about a site or
6 facility that constitutes a violation of an environmental requirement and that the
7 violation was committed with knowledge by an owner or operator of the site or facility
8 that the site or facility violated an environmental requirement.

9 (b) The privilege does not apply to any of the following:

10 1. Documents, communication, data, reports or other information required to
11 be made available or reported to a regulatory agency or any other person by statute,
12 rule, ordinance, permit, license, approval, order or consent agreement, or as
13 otherwise provided by law.

14 2. Information obtained by the observation, sampling or monitoring conducted
15 by a state or federal agency that regulates compliance with federal environmental
16 requirements.

17 3. Information legally obtained from a source independent of an environmental
18 audit.

19 (c) The privilege does not apply in any of the following:

20 1. An action for contribution or indemnity under an insurance contract.

21 2. A criminal investigation.

22 (5) PENALTIES. A person who uses this section to commit fraud may be fined not
23 more than \$25,000.

24 **SECTION 3. Nonstatutory provisions.**

five stat. ✓

1 (1) Within ~~5~~ years after the effective date of this subsection, the department of
2 natural resources shall submit a report to the appropriate standing committees of
3 the legislature, in the manner provided under section 13.172 (3) ✓ of the statutes,
4 evaluating whether sections 299.94 ✓ and 905.20 ✓ of the statutes, as created by this act,
5 have been effective in encouraging the use of environmental audits and in identifying
6 and correcting environmental problems and conditions.

7 **SECTION 4. Initial applicability.**

8 (1) This act first applies to environmental audits completed on the effective
9 date of this subsection.

10 **SECTION 5. Effective date.**

11 (1) This act takes effect on July 1, 1999. *2000 ✓*

12 (END) ✓



1997 ASSEMBLY BILL 235

April 3, 1997 - Introduced by Representatives DUFF, ZIEGELBAUER, GREEN, HASENOHRL, JENSEN, FREESE, VRAKAS, ALBERS, HARS DORF, AINSWORTH, MUSSER, M. LEHMAN, POWERS, HAHN, BRANDEMUEHL and GROTHMAN, cosponsored by Senators PANZER, HUELSMAN, FARROW, SCHULTZ and BUETTNER. Referred to Committee on Environment.

Insert ANL

achieve compliance

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 the potential violation promptly after the person knew of the 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 correct the potential violation, and cooperates with the department of natural resources (DNR) in any investigation related to the disclosure. The immunity does not apply in certain situations, including when the information is required to be disclosed under a permit or order issued by DNR.

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

an actual or

Insert A-1

Insert A-2

under an

within 45 days

actual or

under an license or approval condition

license or approval condition

ASSEMBLY BILL 235

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.

✓
Insert
A-3

(END OF INSERT)

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) If all of the following apply, a person who
6 voluntarily discloses to the department information relating to a potential violation
7 of an environmental requirement to the department shall be immune from the
8 imposition of a civil or criminal penalty which could be imposed for the violation if
9 all of the following apply:

10 1. The disclosure is made promptly after the person knew, on the basis of
11 information obtained during an environmental audit, that a potential violation
12 occurred.

13 2. The person makes a good faith effort to timely correct the potential violation.

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

16 (b) If the person who voluntarily discloses information under par. (a) is a
17 governmental unit, as defined in s. 939.648 (1), or a business entity, the immunity
18 under this subsection applies to a director, officer, official, shareholder, trustee and

Insert A-1: and notifies
of the person notified DNR of the
date when the environmental audit
~~will~~ ^{will} begin and if the environmental
audit begins before the person
becomes aware that an investigation
of a potential environmental violation
has begun.
(END OF INSERT)

Insert A-2:
If 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~~ disclose the violation
and resolve the violation.
(END OF INSERT)

Insert A-3:
If 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
~~effective~~ the law has encouraged
environmental audits and resulted
in reduced environmental problems.
(END OF INSERT)



RCT
~

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

- 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

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:

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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^w pursues compliance with due diligence and promptly

↳ should it say ^(compliance) with what?

what condition?

DNR issues license, permits & other approvals - the regulator might want

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

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

this seems odd. should it be "becomes aware"?

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

would this include DOJ, the police?

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

I don't see how they can show compliance with subd. 3 at the time they make disclosure

17 6. At the time that the voluntary disclosure is made to the department, the
18 person making that disclosure provides the department with information showing
19 that the conditions specified in this paragraph have been satisfied.

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

I can't imagine the circumstances under which a court would make a determination about a pattern of product except in the very case involving a violation + a defendant raising this statute as a defense. This would make more sense to me if changed as indicated

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

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

Since this uses a broader description, the use of "permit" alone in par. (a) 2. might limit par. (a) 2. more than requester would want

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

(c) Within 3 years before the disclosure, the person making the disclosure has been found by a court or administrative law judge ^{finds that} to have knowingly committed a criminal act or committed serious violations that constitute a pattern of continuous or repeated violations of environmental requirements, settlement agreements, consent orders or judicial orders that were due to separate and distinct events giving rise to the violations. In determining whether a person has a pattern of continuous or repeated violations under this paragraph, the trier of fact shall base the decision on the compliance history of the specific facility involved in the disclosure.

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

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

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

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

17 **905.20 Environmental audit privilege.** (1) **DEFINITIONS.** In this section:

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

- 21 1. Is conducted by or at the request of the owner or operator of the site or facility.
- 22 2. Is not required under a specific permit, license or approval condition or under
23 an order issued by the department of natural resources.
- 24 3. Is undertaken for the purpose of identifying, documenting and improving
25 compliance with environmental requirements, to identify an environmental hazard,

1 contamination or other adverse environmental condition, or to improve an
2 environmental management system or process.

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

6 (am) “Environmental audit report” means a document or record or a set of
7 documents or records, each labeled at the time of creation of the document or record,
8 “environmental audit report: privileged document” and created as the result of an
9 environmental audit and includes supporting information and an implementation
10 plan that addresses, as appropriate, correcting past noncompliance, improving
11 current compliance, improving an environmental management system and
12 preventing future noncompliance.

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

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

23 (2) GENERAL RULE OF PRIVILEGE. (a) An owner or operator of a site or facility has
24 a privilege to refuse to disclose and to prevent any other person from disclosing any
25 environmental audit report related to the owner’s or operator’s site or facility. This

with
environment
requirement?

1 privilege is in addition to any other privilege provided under this chapter. This
2 privilege may be claimed in any civil action or administrative proceeding, including
3 a contested case, as defined in s. 227.01 (3).

*shouldn't be past tense,
↓
should it?*

4 (b) Before beginning an environmental audit, the person that requested the
5 environmental audit shall notify the department of natural resources in writing of
6 the date on which the environmental audit will begin, the site or facility or activity
7 or management system related to a site or facility to be audited and the general scope
8 of the environmental audit. The department of natural resources may not reveal to
9 any person that the department has received a notice under this paragraph or the
10 contents of any notice received under this paragraph.

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

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

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

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

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

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

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

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

7 (b) Any person who may otherwise claim a privilege under par. (a) retains the
 8 right to claim the privilege in any civil or administrative proceeding,
 9 notwithstanding the use of an environmental audit in any proceeding under sub. (4)

10 (c) 1., in which the privilege does not apply.

11 (4) EXCEPTIONS. (a) The privilege does not apply if a court of record, after an
 12 in camera review of the environmental audit report, including a statement listing
 13 any activities undertaken as a result of the environmental audit to achieve
 14 compliance with environmental requirements, determines that the person seeking
 15 access to the environmental audit report proves by a preponderance of the evidence
 16 any of the following:

- 17 1. That the privilege is asserted for a fraudulent purpose.
- 18 2. That the owner or operator of the site or facility failed to take the appropriate
 19 responses necessary to achieve compliance within a reasonable time after any
 20 noncompliance was discovered as the result of an environmental audit, but not
 21 exceeding 3 years after the discovery. The department of natural resources may
 22 extend the time to achieve compliance beyond the 3-year limit in an order scheduling
 23 compliance if the department determines that acceptable progress is being made in
 24 achieving compliance.

I'm not sure that would really be part of the report, perhaps it should say "and a rather than", including"

failed to act within a reasonable time or failed to take action that would result in compliance being achieved in a reasonable time

1,

1 3. That the environmental audit report provides information about a site or
2 facility that constitutes a violation of an environmental requirement and that the
3 violation was committed with knowledge by an owner or operator of the site or facility
4 that the site or facility violated an environmental requirement.

5 (b) The privilege does not apply to any of the following:

6 1. Documents, communication, data, reports or other information required to
7 be made available or reported to a regulatory agency or any other person by statute,
8 rule, ordinance, permit, license, approval, order or consent agreement, or as
9 otherwise provided by law.

10 2. Information obtained by the observation, sampling or monitoring conducted
11 by a state or federal agency that regulates compliance with federal environmental
12 requirements.

13 3. Information legally obtained from a source independent of an environmental
14 audit.

15 (c) The privilege does not apply in any of the following:

16 1. An action for contribution or indemnity under an insurance contract.

17 2. A criminal investigation.

18 (5) PENALTIES. A person who uses this section to commit fraud may be fined not
19 more than \$25,000.

20 **SECTION 3. Nonstatutory provisions.**

21 (1) Within 5 years after the effective date of this subsection, the department of
22 natural resources shall submit a report to the appropriate standing committees of
23 the legislature, in the manner provided under section 13.172 (3) of the statutes,
24 evaluating whether sections 299.94 and 905.20 of the statutes, as created by this act,

This is too long for a nonstat, isn't it?

1 have been effective in encouraging the use of environmental audits and in identifying
2 and correcting environmental problems and conditions.

3 **SECTION 4. Initial applicability.**

4 (1) This act first applies to environmental audits completed on the effective
5 date of this subsection.

6 **SECTION 5. Effective date.**

7 (1) This act takes effect on July 1, 2000.

8 (END)



State of Wisconsin
1999 - 2000 LEGISLATURE

LRB-0895/P1
RPN:cmh&jlg:lp

D-Note

stays

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

refer cat.

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

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 compliance with due diligence and promptly

(1) corrects the noncompliance ~~of conditions~~ after discovery of the violation. If evidence
 (2) shows that the noncompliance is the failure to obtain a ^{license, or other approval} permit, an appropriate and ^{condition}
 3 good faith effort to achieve compliance may be demonstrated by the submittal of a
 4 complete permit application within a reasonable time.

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

(7) 4. The environmental audit occurs before the person ^{becomes} ~~is made~~ aware that he or
 (8) she is under investigation by a regulatory ^{or enforcement} agency for actual or potential violations
 9 of environmental requirements.

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

17 6. At the time that the voluntary disclosure is made to the department, the
 18 person making that disclosure ⁹¹ provides the department with information showing
 (19) that the ^{subds. (subdivisions) 1, 2, 4, and 5. ✓} conditions specified in ~~this paragraph~~ have been satisfied.

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

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) Within 3 years before the disclosure, the person making the disclosure has,
9 been found by a court or administrative law judge ^{finds that} ~~to have~~ 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.

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 → Add from p. 9, line 20 to p. 10, line 2 ✓ ←
SECTION 2. 905.20 of the statutes is created to read:

17 **905.20 Environmental audit privilege.** (1) DEFINITIONS. In this section:

18 (a) "Environmental audit" means an evaluation of a site or facility or of an
19 activity or management system related to a site or facility, if the evaluation meets
20 all of the following criteria:

- 21 1. Is conducted by or at the request of the owner or operator of the site or facility.
- 22 2. Is not required under a specific permit, license or approval condition or under
23 an order issued by the department of natural resources.
- 24 3. Is undertaken for the purpose of identifying, documenting and improving
25 compliance with environmental requirements, to identify an environmental hazard,

1 contamination or other adverse environmental condition, or to improve an
2 environmental management system or process.

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

6 (am) “Environmental audit report” means a document or record or a set of
7 documents or records, each labeled at the time of creation of the document or record,
8 “environmental audit report: privileged document” and created as the result of an
9 environmental audit and includes supporting information and an implementation
10 plan that addresses, as appropriate, correcting past noncompliance ^{with environmental requirements} improving
11 current compliance, improving an environmental management system and
12 preventing future noncompliance.

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

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

23 (2) GENERAL RULE OF PRIVILEGE. (a) An owner or operator of a site or facility has
24 a privilege to refuse to disclose and to prevent any other person from disclosing any
25 environmental audit report related to the owner’s or operator’s site or facility. This

1 privilege is in addition to any other privilege provided under this chapter. This
2 privilege may be claimed in any civil action or administrative proceeding, including
3 a contested case, as defined in s. 227.01 (3).

④ (b) Before beginning an environmental audit, the person ^{requesting} ~~that requested~~ the
5 environmental audit shall notify the department of natural resources in writing of
6 the date on which the environmental audit will begin, the site or facility or activity
7 or management system related to a site or facility to be audited and the general scope
8 of the environmental audit. The department of natural resources may not reveal to
9 any person that the department has received a notice under this paragraph or the
10 contents of any notice received under this paragraph.

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

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

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

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

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

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

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

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

7 (b) Any person who may otherwise claim a privilege under par. (a) retains the
8 right to claim the privilege in any civil or administrative proceeding,
9 notwithstanding the use of an environmental audit in any proceeding under sub. (4)

10 (c) 1., in which the privilege does not apply.

11 (4) EXCEPTIONS. (a) The privilege does not apply if a court of record, after an
12 in camera review of the environmental audit report, ^{and} ~~including~~ a statement listing
13 any activities undertaken as a result of the environmental audit to achieve
14 compliance with environmental requirements, determines that the person seeking
15 access to the environmental audit report proves by a preponderance of the evidence
16 any of the following:

17 1. That the privilege is asserted for a fraudulent purpose.

18 2. That the owner or operator of the site or facility failed to take the appropriate
19 ~~responses necessary to achieve~~ ^{action that would result in} compliance ^{being achieved} within a reasonable time after any
20 noncompliance was discovered as the result of an environmental audit, but not
21 exceeding 3 years after the discovery. The department of natural resources may
22 extend the time to achieve compliance beyond the 3-year limit in an order scheduling
23 compliance if the department determines that acceptable progress is being made in
24 achieving compliance.

move
1 have been effective in encouraging the use of environmental audits and in identifying
↑ 2 and correcting environmental problems and conditions.

3 **SECTION ~~4~~. Initial applicability.**

4 (1) This act first applies to environmental audits completed on the effective
5 date of this subsection.

6 **SECTION ~~5~~. Effective date.**

7 (1) This act takes effect on July 1, 2000.


8 (END)

D-note
↓

emj + jg

D-Note.

I made some minor changes to clarify the language without changing the intent. ~~The one change that~~
Please review s. 299.94(3)(c) ^Δ to ^Δ ^Δ make sure my language changes did not affect the intent.



**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-0895/1dn
RPN:cmh&jlg:hmh

Tuesday, January 12, 1999

I made some minor changes to clarify the language without changing the intent. Please review s. 299.94 (3) (c) to make sure my language changes did not affect the intent.

Robert P. Nelson
Senior Legislative Attorney
267-7511



D-Note

1999 BILL

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.

regen cat.

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

BILL

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

BILL

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 permit) ^{or other approval condition} application within a reasonable time. ^{license}

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.

BILL**SECTION 1**

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 the person making the
9 disclosure has, ^{making ~~the~~} within 3 years before the disclosure, knowingly committed a criminal
10 act or committed serious violations that constitute a pattern of continuous or
11 repeated violations of environmental requirements, settlement agreements, consent
12 orders or judicial orders that were due to separate and distinct events giving rise to
13 the violations. In determining whether a person has a pattern of continuous or
14 repeated violations under this paragraph, the trier of fact shall base the decision on
15 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.

BILL

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.

BILL

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.

BILL**SECTION 2**

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:

BILL

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.

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-0895/1dn
RPN:cmh&jlg:hmh

Tuesday, January 12, 1999

s. 299.94(2)(a) 2. and (3)(c)

I made some minor changes to ~~clarify the language without changing the intent.~~
Please review s. 299.94(3)(c) to make sure my language changes did not affect the
intent.

at the request of Bob Fassbender,
with your permission

Robert P. Nelson
Senior Legislative Attorney
267-7511

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-0895/2dn
RPN:cmh&jlg:km

February 26, 1999

I made some minor changes to s. 299.94 (2) (a) 2. and (3) (c) at the request of Bob Fassbender, with your permission.

Robert P. Nelson
Senior Legislative Attorney
Phone: (608) 267-7511

**SUBMITTAL
FORM**

**LEGISLATIVE REFERENCE BUREAU
Legal Section Telephone: 266-3561
5th Floor, 100 N. Hamilton Street**

The attached draft is submitted for your inspection. Please check each part carefully, proofread each word, and **sign** on the appropriate line(s) below.

Date: 2/26/99

To: Representative Duff

Relating to LRB drafting number: LRB-0895

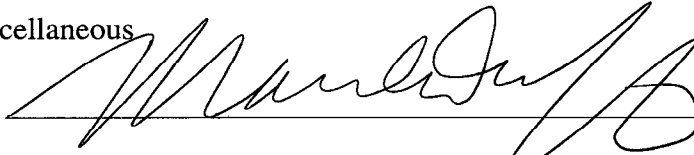
Topic

Environmental audits

Subject(s)

Courts - immunity liability, Courts - miscellaneous

1. **JACKET** the draft for introduction



in the **Senate** _____ or the **Assembly** _____ (check only one). Only the requester under whose name the

drafting request is entered in the LRB's drafting records may authorize the draft to be submitted. Please

allow one day for the preparation of the required copies.

2. **REDRAFT.** See the changes indicated or attached _____.

A revised draft will be submitted for your approval with changes incorporated.

3. Obtain **FISCAL ESTIMATE NOW**, prior to introduction _____.

If the analysis indicates that a fiscal estimate is required because the proposal makes an appropriation or

increases or decreases existing appropriations or state or general local government fiscal liability or

revenues, you have the option to request the fiscal estimate prior to introduction. If you choose to

introduce the proposal without the fiscal estimate, the fiscal estimate will be requested automatically upon

introduction. It takes about 10 days to obtain a fiscal estimate. Requesting the fiscal estimate prior to

introduction retains your flexibility for possible redrafting of the proposal.

If you have any questions regarding the above procedures, please call 266-3561. If you have any questions

relating to the attached draft, please feel free to call me.

Robert P. Nelson, Senior Legislative Attorney
Telephone: (608) 267-7511