

MAINE STATE LEGISLATURE

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118th MAINE LEGISLATURE

FIRST REGULAR SESSION-1997

Legislative Document

No. 1104

H.P. 816

House of Representatives, February 18, 1997

**An Act to Create an Evidentiary Privilege for Environmental Audits and
Provide for Qualified Disclosure.**

Reference to the Committee on Natural Resources suggested and ordered printed.

A handwritten signature in cursive script that reads "Joseph W. Mayo".

JOSEPH W. MAYO, Clerk

Presented by Representative WATERHOUSE of Bridgton.
Cosponsored by Senator CAREY of Kennebec and
Representatives: KERR of Old Orchard Beach, MURPHY of Kennebunk.

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Be it enacted by the People of the State of Maine as follows:

Sec. 1. 38 MRSA §343-G is enacted to read:

§343-G. Environmental audit privilege and qualified disclosure

1. Definitions. As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. "Environmental audit" means a voluntary and internal evaluation, review or assessment of one or more facilities or activities any activity at one or more facilities, regulated under this Title, or of management systems related to the facilities or activities, that is designed to identify and prevent noncompliance or to improve compliance with this Title and the rules adopted under this Title. An environmental audit may be conducted by the owner or operator of the facility or activity or by the owner's or operator's employees or by independent contractors.

B. "Environmental audit report" means a set of documents prepared as a result of an environmental audit. In order to facilitate identification, each document in the set must be labeled "Environmental Audit Report: Privileged Document" or with words to that effect. Failure either to label a document or to label it precisely as recommended does not constitute a waiver of the audit privilege and does not create any presumption that the privilege does not apply. An environmental audit report includes all notes, drafts, memoranda, drawings, photographs, computer-generated or electronically recorded information, maps, charts, graphs or surveys or any other information pertaining to observations, findings, opinions, suggestions or conclusions, if the supporting information is collected or developed for the primary purpose and in the course of an environmental audit. An environmental audit report, when completed, may include the following general component parts:

(1) A report prepared by the auditor, which may include the scope of the audit, the information gained in the audit, conclusions and recommendations, together with exhibits and appendices;

(2) Memoranda and documents analyzing portions or all of the audit report or discussing implementation issues; and

2 (3) An implementation plan or tracking system that
4 addresses correcting past noncompliance, improving
 current compliance and preventing future noncompliance.

6 C. "Compliance management system" means a voluntary
 compliance assurance program having at least the following
8 elements:

10 (1) An environmental policy requiring conduct of
 operations in compliance with environmental
12 requirements;

14 (2) Incentives to encourage employees to ensure
 compliance and report violations to senior management;

16 (3) A clear designation of responsibility for
 compliance for each facility or activity;

18 (4) Adequate resources dedicated to compliance
20 assurance activities;

22 (5) Training for employees with responsibilities
24 related to compliance operations;

26 (6) Systematically implemented procedures for bringing
 about compliance at each facility or activity;

28 (7) Regular specific facility or activity reviews of
30 compliance;

32 (8) Auditing of compliance by qualified personnel who
 are independent from those who manage facilities or
34 activities;

36 (9) A mechanism to ensure prompt action to correct
 noncompliance and address the underlying cause;

38 (10) A mechanism for disciplining employees who
40 intentionally or negligently contribute to the
 commission of violations;

42 (11) Effective management oversight of compliance and
44 efforts to correct violations; and

46 (12) A regular management review of compliance
 performance and management systems to identify needed
48 improvements.

50 D. "Intentionally and willfully violating or disregarding
 the law" means conduct that includes both intentional and

2 willful acts and intentional and willful disregard of the
3 law. A pattern of continuous or repeated violations may be
4 considered in determining whether a person or entity has
5 intentionally and willfully disregarded the law.

6 2. Privilege; waivers. The extent of the environmental
7 audit report privilege is governed by this subsection.

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10 A. An environmental audit report is privileged, is not
11 subject to discovery and is not admissible as evidence in
12 any civil, criminal or administrative proceeding, except as
13 otherwise provided in this section.

14 B. If all or part of an environmental audit report is
15 subject to the privilege established in paragraph A, the
16 person who conducted the audit and anyone to whom the audit
17 results were disclosed, unless the disclosure constituted a
18 waiver of the privilege under paragraph C, may not be
19 compelled to testify regarding any matter that was the
20 subject of the audit and that is addressed in a privileged
21 part of the environmental audit report.

22
23 C. The privilege established in paragraph A does not apply
24 if it is waived by the owner or operator of a facility or an
25 activity at which an environmental audit was conducted and
26 who prepared or caused to be prepared the environmental
27 audit report as a result of the audit.

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29 D. Disclosure of the environmental audit report or any
30 information generated by the environmental audit under the
31 following circumstances does not waive the privilege in
32 paragraph A:

33
34 (1) The environmental audit report and information
35 generated by the environmental audit may be disclosed
36 to any person employed by the owner or operator of the
37 audited facility, any legal representative of the owner
38 or operator or any independent contractor retained by
39 the owner or operator to address an issue or issues
40 raised by the environmental audit;

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42 (2) Disclosure made under the terms of a
43 confidentiality agreement between the entity or person
44 for whom the environmental audit report was prepared or
45 the owner or operator of the facility or activity
46 audited and a partner or potential partner, a
47 transferee or potential transferee of or a lender or
48 potential lender for the business, facility or activity
49 audited; or

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51 (3) Disclosure made under the terms of a
52 confidentiality agreement between government officials

2 and the entity or person for whom the environmental
3 audit report was prepared or the owner or operator of
4 the facility or activity audited.

5 3. Review of environmental audit report. This subsection
6 provides the exclusive procedure for the review of environmental
7 audit reports.

8 A. State law enforcement authorities may request disclosure
9 of an environmental audit report by written request or
10 subpoena. A written request for disclosure of an
11 environmental audit report under this paragraph may be sent
12 by certified mail.

13 (1) Within 60 days after receipt of a request or
14 subpoena, the person asserting the privilege may file
15 with the Superior Court for the county in which the
16 facility or activity is located and serve upon the
17 requesting state law enforcement authority a petition
18 requesting an in camera review to determine whether the
19 environmental audit report or portions of the report
20 are privileged under this section or subject to
21 disclosure. Failure of the person asserting the
22 privilege to file the petition waives the privilege as
23 to that person.

24 (2) The person asserting the privilege in response to
25 a request or subpoena for disclosure under this
26 paragraph shall provide a copy of the environmental
27 audit report to the court and shall also include in the
28 request for an in camera review all of the following:

29 (a) The year the environmental audit report was
30 prepared;

31 (b) The identity of the entity conducting the
32 audit;

33 (c) The name and location of the audited facility
34 or activities; and

35 (d) A brief description of the portion or
36 portions of the environmental audit report for
37 which privilege is claimed.

38 (3) Upon the filing of a petition under subparagraph
39 (1), the court shall issue an order scheduling, within
40 45 days after the filing of the petition, an in camera
41 hearing to determine whether the environmental audit

2 report or portions of that report are privileged or
3 subject to disclosure under this section.

4 (4) The court after an in camera review may require
5 disclosure of material for which the privilege is
6 asserted, if the court determines that:

7 (a) The privilege is asserted for a fraudulent
8 purpose;

9 (b) The material is not subject to the privilege;
10 or

11 (c) Even if subject to the privilege, the
12 material shows evidence of noncompliance with
13 state, federal, regional or local environmental
14 law, rules, regulations, ordinances or orders and
15 the owner or operator failed to undertake
16 appropriate corrective action or eliminate any
17 violation of law identified during the
18 environmental audit within a reasonable time.

19 B. State law enforcement authorities may seize an
20 environmental audit report for which a privilege is asserted
21 under subsection 2, paragraph A, pursuant to a lawful search
22 warrant. The State shall immediately place the
23 environmental audit report under seal and shall also
24 immediately file it with the court that authorized the
25 search warrant. Unless the court orders disclosure under
26 subparagraph (4) or the privilege has been waived, the State
27 may not inspect, review or disclose the contents of the
28 environmental audit report.

29 (1) Within 60 days after seizure of the environmental
30 audit report, the person asserting the privilege may
31 file with the court a petition requesting an in camera
32 review to determine whether the environmental audit
33 report or portions of the report are privileged under
34 this section or subject to disclosure. Failure of the
35 person asserting the privilege to file such a petition
36 waives the privilege as to that person.

37 (2) The person asserting the privilege in response to
38 a request for disclosure under this paragraph shall
39 include in the request for an in camera review all of
40 the following:

41 (a) The year the environmental audit report was
42 prepared;

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(b) The identity of the entity conducting the audit;

(c) The name and location of the audited facility or activity; and

(d) A brief description of the portion or portions of the environmental audit report for which privilege is claimed.

(3) Upon the filing of a petition under subparagraph (1), the court shall issue an order scheduling, within 45 days after the filing of the petition, an in camera review to determine whether the environmental audit report or portions of the report are privileged or subject to disclosure under this section.

(4) The court after an in camera review may require disclosure of material for which the privilege is asserted, if the court determines that:

(a) The privilege is asserted for a fraudulent purpose;

(b) The material is not subject to the privilege; or

(c) Even if subject to the privilege, the material shows evidence of noncompliance with state, federal, regional or local environmental law, rules, regulations, ordinances or orders and the owner or operator failed to undertake appropriate corrective action or eliminate any violation of law identified during the environmental audit within a reasonable time.

C. In any proceeding not covered by paragraph A or B, a court after an in camera review consistent with rules of civil or criminal procedure may require disclosure of the material for which the privilege is asserted, if the court determines that:

(1) The privilege is asserted for a fraudulent purpose;

(2) The material is not subject to the privilege; or

(3) Even if subject to the privilege, the material shows evidence of noncompliance with state, federal, regional or local environmental law, rules, regulations, ordinances or orders and the owner or

operator failed to undertake appropriate corrective action or eliminate any violation of law identified during the environmental audit within a reasonable time.

D. If a person discloses or disseminates all or any part of the information contained in an environmental audit report in violation of this section or knowingly discloses or disseminates all or any part of the information contained in an environmental audit report that was provided to the party in violation of this section, that person is guilty of a Class E crime for which, notwithstanding Title 17-A, section 1301, subsection 1-A, the maximum fine is \$25,000. The court may also sanction the person through contempt proceedings and may order other relief as appropriate.

E. A person asserting the privilege described in subsection 2, paragraph A has the burden of demonstrating to the court, ex parte, a prima facie basis for the applicability of the privilege. If there is evidence presented by the person seeking disclosure of the environmental audit report of noncompliance by the person asserting the privilege with the laws under this Title, or the federal, regional or local counterpart or extension of those laws, the evidence must include a showing that, to the extent the noncompliance was identified by the environmental audit, appropriate efforts to achieve compliance were promptly initiated and pursued with reasonable diligence. The person seeking disclosure has the ultimate burden of persuasion that the privilege does not apply and disclosure is appropriate.

F. Failure to comply with the review, disclosure or use prohibitions of this section may be the basis in any civil, criminal or administrative proceeding for suppression of any evidence arising or derived from the unauthorized review, disclosure or use. A person allegedly failing to comply with this subsection has the burden of proving that proffered evidence did not arise and was not derived from the unauthorized activity.

G. The persons may at any time stipulate to an entry or an order directing that specific information contained in an environmental audit report is or is not subject to the privilege provided under subsection 2, paragraph A.

H. Upon making a disclosure determination under paragraphs A, B and C, the court may compel the disclosure of only those portions of an environmental audit report relevant to issues in dispute in the proceeding.

2 4. Limitations of privilege. The privilege described in
subsubsection 2, paragraph A does not extend to:

4 A. Documents, communications, data, reports or other
6 information required to be collected, developed, maintained
8 or reported to a regulatory agency pursuant to this Title or
other federal, state or local law, rule, ordinance,
regulation, permit or order;

10 B. Information obtained by observation, sampling or
12 monitoring by any regulatory agency; or

14 C. Information obtained from a source independent of the
environmental audit.

16 5. Scope of other privileges. Nothing in this section
18 limits, waives or abrogates the scope or nature of any statutory
20 or common law privilege, including the "work product doctrine"
and the attorney-client privilege.

22 6. Qualifying disclosure. If any person or entity,
24 consistent with the requirements of subsection 4, paragraph B,
26 makes a qualifying disclosure of a violation of this Title or the
federal, regional or local counterpart or extension of those
laws, there is a rebuttable presumption that the person is immune
from any administrative, civil or criminal penalties for the
violation disclosed.

28 A. For the purposes of this subsection, a qualifying
30 disclosure is one:

32 (1) Made promptly after knowledge of the information
34 disclosed is obtained by the person or entity;

36 (2) Made to an agency having regulatory authority with
regard to the violation disclosed;

38 (3) Arising out of either a voluntary environmental
40 audit or the operation of a compliance management
system;

42 (4) For which the person or entity making the
44 disclosure initiates the appropriate effort to achieve
compliance, pursues compliance with due diligence and
corrects the noncompliance within a reasonable time; and

46 (5) In which the person or entity making the
48 disclosure cooperates with the appropriate agency in
connection with an investigation of the issues
50 identified in the disclosure.

2 B. If the disclosing person or entity has a compliance
4 management system and the disclosure arises out of the
6 operation of that system, the disclosure does not qualify
8 for purposes of this subsection if it is a report to a
 regulatory authority of monitoring that is required to be
 reported by a specific monitoring and reporting condition of
 an enforcement order or decree.

10 C. If the disclosure does not arise out of the operation of
12 a compliance management system but is the result of a
14 voluntary environmental audit, the otherwise qualifying
16 disclosure does not qualify for purposes of this subsection
 if it is a report to a regulatory authority of monitoring
 results that are required to be reported by a specific
 permit term or an enforcement order or decree.

18 D. The presumption recognized in this subsection may be
20 rebutted and civil penalties may be imposed if, and to the
 extent that, any of the following are established:

22 (1) That the disclosure did not qualify within the
24 meaning of this subsection;

26 (2) That the violation was committed intentionally and
 willfully by the person or entity making the disclosure;

28 (3) That the violation was not fully corrected in a
30 diligent manner;

32 (4) That significant environmental harm or a
34 significant adverse public health effect was caused by
 the violation; or

36 (5) That the person or entity making the disclosure
38 realized significant economic advantage from the
 violation, after taking into account the cost of
 remedying the noncompliance.

40 E. The presumption recognized in this subsection may be
42 rebutted and criminal penalties may be imposed against a
44 disclosing person or entity satisfying all of the conditions
 of paragraph A only in the following circumstances.

46 (1) Criminal sanctions may be sought against the
48 person only when the person committed or aided or
 abetted the commission of the disclosed violation
 intentionally and willfully.

