

104TH CONGRESS
1ST SESSION

S. 582

To amend title 28, United States Code, to provide that certain voluntary disclosures of violations of Federal laws made pursuant to an environmental audit shall not be subject to discovery or admitted into evidence during a Federal judicial or administrative proceeding, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 21 (legislative day, MARCH 16), 1995

Mr. HATFIELD (for himself and Mr. BROWN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend title 28, United States Code, to provide that certain voluntary disclosures of violations of Federal laws made pursuant to an environmental audit shall not be subject to discovery or admitted into evidence during a Federal judicial or administrative proceeding, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Voluntary Environ-
5 mental Audit Protection Act”.

1 **SEC. 2. VOLUNTARY SELF-EVALUATION PROTECTION.**

2 (a) IN GENERAL.—Part VI of title 28, United States
3 Code, is amended by adding at the end the following new
4 chapter:

5 **“CHAPTER 179—VOLUNTARY SELF-**
6 **EVALUATION PROTECTION**

“Sec.

“3801. Admissibility of environmental audit reports.

“3802. Testimony.

“3803. Disclosure to a Federal agency.

“3804. Definitions.

7 **“§ 3801. Admissibility of environmental audit reports**

8 “(a) GENERAL RULE.—

9 “(1) IN GENERAL.—Except as provided in para-
10 graphs (2) and (3), an environmental audit report
11 prepared in good faith by a person or government
12 entity related to, and essentially constituting a part
13 of, an environmental audit shall not be subject to
14 discovery and shall not be admitted into evidence in
15 any civil or criminal action or administrative pro-
16 ceeding before a Federal court or agency or under
17 Federal law.

18 “(2) EXCLUSIONS.—Paragraph (1) shall not
19 apply to—

20 “(A) any document, communication, data,
21 report, or other information required to be col-
22 lected, developed, maintained, or reported to a

1 regulatory agency pursuant to a covered Fed-
2 eral law;

3 “(B) information obtained by observation,
4 sampling, or monitoring by any regulatory
5 agency; or

6 “(C) information obtained from a source
7 independent of the environmental audit.

8 “(3) INAPPLICABILITY.—Paragraph (1) shall
9 not apply to an environmental audit report, if—

10 “(A) the owner or operator of the facility
11 that initiated the environmental audit expressly
12 waives the right of the person or government
13 entity to exclude from the evidence or proceed-
14 ing material subject to this section;

15 “(B) after an in camera hearing, the ap-
16 propriate Federal court determines that—

17 “(i) the environmental audit report
18 provides evidence of noncompliance with a
19 covered Federal law; and

20 “(ii) appropriate efforts to achieve
21 compliance were not promptly initiated and
22 pursued with reasonable diligence; or

23 “(C) the person or government entity is as-
24serting the applicability of the exclusion under
25 this subsection for a fraudulent purpose.

1 “(b) DETERMINATION OF APPLICABILITY.—The ap-
2 propriate Federal court shall conduct an in camera review
3 of the report or portion of the report to determine the
4 applicability of subsection (a) to an environmental audit
5 report or portion of a report.

6 “(c) BURDENS OF PROOF.—

7 “(1) IN GENERAL.—Except as provided in para-
8 graph (2), a party invoking the protection of sub-
9 section (a)(1) shall have the burden of proving the
10 applicability of such subsection including, if there is
11 evidence of noncompliance with an applicable envi-
12 ronmental law, the burden of proving a prima facie
13 case that appropriate efforts to achieve compliance
14 were promptly initiated and pursued with reasonable
15 diligence.

16 “(2) WAIVER AND FRAUD.—A party seeking
17 discovery under subparagraph (A) or (C) of sub-
18 section (b)(3) shall have the burden of proving the
19 existence of a waiver, or that subsection (a)(1) has
20 been invoked for a fraudulent purpose.

21 “(d) EFFECT ON OTHER RULES.—Nothing in this
22 Act shall limit, waive, or abrogate the scope or nature of
23 any statutory or common law rule regarding discovery or
24 admissibility of evidence, including the attorney-client
25 privilege and the work product doctrine.

1 **“§ 3802. Testimony**

2 “Notwithstanding any other provision of law, a per-
3 son or government entity, including any officer or em-
4 ployee of the person or government entity, that performs
5 an environmental audit may not be required to give testi-
6 mony in a Federal court or an administrative proceeding
7 of a Federal agency without the consent of the person or
8 government entity concerning the environmental audit, in-
9 cluding the environmental audit report with respect to
10 which section 3801(a) applies.

11 **“§ 3803. Disclosure to a Federal agency**

12 “(a) IN GENERAL.—The disclosure of information re-
13 lating to a covered Federal law to the appropriate official
14 of a Federal agency or State agency responsible for admin-
15 istering a covered Federal law shall be considered to be
16 a voluntary disclosure subject to the protections provided
17 under section 3801, section 3802, and this section if—

18 “(1) the disclosure of the information arises out
19 of an environmental audit;

20 “(2) the disclosure is made promptly after the
21 person or government entity that initiates the audit
22 receives knowledge of the information referred to in
23 paragraph (1);

24 “(3) the person or government entity that initi-
25 ates the audit initiates an action to address the is-
26 sues identified in the disclosure—

1 “(A) within a reasonable period of time
2 after receiving knowledge of the information;
3 and

4 “(B) within a period of time that is ade-
5 quate to achieve compliance with the require-
6 ments of the covered Federal law that is the
7 subject of the action (including submitting an
8 application for an applicable permit); and

9 “(4) the person or government entity that
10 makes the disclosure provides any further relevant
11 information requested, as a result of the disclosure,
12 by the appropriate official of the Federal agency re-
13 sponsible for administering the covered Federal law.

14 “(b) INVOLUNTARY DISCLOSURES.—For the pur-
15 poses of this chapter, a disclosure of information to an
16 appropriate official of a Federal agency shall not be con-
17 sidered to be a voluntary disclosure described in subsection
18 (a) if the person or government entity making the disclo-
19 sure has been found by a Federal or State court to have
20 committed repeated violations of Federal or State laws,
21 or orders on consent, related to environmental quality, due
22 to separate and distinct events giving rise to the violations,
23 during the 3-year period prior to the date of the disclo-
24 sure.

1 “(c) PRESUMPTION OF APPLICABILITY.—If a person
2 or government entity makes a disclosure, other than a dis-
3 closure referred to in subsection (b), of a violation of a
4 covered Federal law to an appropriate official of a Federal
5 agency responsible for administering the covered Federal
6 law—

7 “(1) there shall be a presumption that the dis-
8 closure is a voluntary disclosure described in sub-
9 section (a), if the person or government entity pro-
10 vides information supporting a claim that the infor-
11 mation is such a voluntary disclosure at the time the
12 person or government entity makes the disclosure;
13 and

14 “(2) unless the presumption is rebutted, the
15 person or government entity shall be immune from
16 any administrative, civil, or criminal penalty for the
17 violation.

18 “(d) REBUTTAL OF PRESUMPTION.—

19 “(1) IN GENERAL.—The head of a Federal
20 agency described in subsection (c) shall have the
21 burden of rebutting a presumption established under
22 such subsection. If the head of the Federal agency
23 fails to rebut the presumption—

24 “(A) the head of the Federal agency may
25 not assess an administrative penalty against a

1 person or government entity described in sub-
2 section (c) with respect to the violation of the
3 person or government entity and may not issue
4 a cease and desist order for the violation; and

5 “(B) a Federal court may not assess a civil
6 or criminal fine against the person or govern-
7 ment entity for the violation.

8 “(2) FINAL AGENCY ACTION.—A decision made
9 by the head of the Federal agency under this sub-
10 section shall constitute a final agency action.

11 “(e) STATUTORY CONSTRUCTION.—Except as ex-
12 pressly provided in this section, nothing in this section is
13 intended to affect the authority of a Federal agency re-
14 sponsible for administering a covered Federal law to carry
15 out any requirement of the law associated with informa-
16 tion disclosed in a voluntary disclosure described in sub-
17 section (a).

18 **“§ 3804. Definitions**

19 “As used in this chapter:

20 “(1) COVERED FEDERAL LAW.—The term ‘cov-
21 ered Federal law’—

22 “(A) means—

23 “(i) the Federal Insecticide, Fun-
24 gicide, and Rodenticide Act (7 U.S.C. 136
25 et seq.);

1 “(ii) the Toxic Substances Control Act
2 (15 U.S.C. 2601 et seq.);

3 “(iii) the Federal Water Pollution
4 Control Act (33 U.S.C. 1251 et seq.);

5 “(iv) the Oil Pollution Act of 1990
6 (33 U.S.C. 2701 et seq.);

7 “(v) title XIV of the Public Health
8 Service Act (commonly known as the ‘Safe
9 Drinking Water Act’) (42 U.S.C. 300f et
10 seq.);

11 “(vi) the Noise Control Act of 1972
12 (42 U.S.C. 4901 et seq.);

13 “(vii) the Solid Waste Disposal Act
14 (42 U.S.C. 6901 et seq.);

15 “(viii) the Clean Air Act (42 U.S.C.
16 7401 et seq.);

17 “(ix) the Comprehensive Environ-
18 mental Response, Compensation, and Li-
19 ability Act of 1980 (42 U.S.C. 9601 et
20 seq.);

21 “(x) the Emergency Planning and
22 Community Right-To-Know Act of 1986
23 (42 U.S.C. 11001 et seq.); and

24 “(xi) the Pollution Prevention Act of
25 1990 (42 U.S.C. 13101 et seq.);

1 “(B) includes any regulation issued under
2 a law listed in subparagraph (A); and

3 “(C) includes the terms and conditions of
4 any permit issued under a law listed in sub-
5 paragraph (A).

6 “(2) ENVIRONMENTAL AUDIT.—The term ‘envi-
7 ronmental audit’ means a voluntary and internal as-
8 sessment, evaluation, investigation or review of a fa-
9 cility that is—

10 “(A) initiated by a person or government
11 entity;

12 “(B) carried out by the employees of the
13 person or government entity, or a consultant
14 employed by the person or government entity,
15 for the express purpose of carrying out the as-
16 sessment, evaluation, investigation, or review;
17 and

18 “(C) carried out to determine whether the
19 person or government entity is in compliance
20 with a covered Federal law.

21 “(3) ENVIRONMENTAL AUDIT REPORT.—The
22 term ‘environmental audit report’ means any re-
23 ports, findings, opinions, field notes, records of ob-
24 servations, suggestions, conclusions, drafts, memo-
25 randa, drawings, computer generated or electroni-

1 cally recorded information, maps, charts, graphs,
2 surveys, or other communications associated with an
3 environmental audit.

4 “(4) FEDERAL AGENCY.—The term ‘Federal
5 agency’ has the meaning provided the term ‘agency’
6 under section 551 of title 5.

7 “(5) GOVERNMENT ENTITY.—The term ‘gov-
8 ernment entity’ means a unit of State or local gov-
9 ernment.”.

10 (b) TECHNICAL AMENDMENT.—The analysis for part
11 VI of title 28, United States Code, is amended by adding
12 at the end the following:

“179. Voluntary Self-Evaluation Protection 3801”.

13 **SEC. 3. APPLICABILITY.**

14 This Act and the amendment made by this Act shall
15 apply to each Federal civil or criminal action or adminis-
16 trative proceeding that is commenced after the date of en-
17 actment of this Act.

