

1 INTRODUCTION BY ORR Grosfield ^{House} BILL NO. 412

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HARP

2
3
4 A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING LIMITED PROTECTION TO AN OWNER OR
5 OPERATOR OF A FACILITY THAT VOLUNTARILY DISCLOSES A VIOLATION OF AN ENVIRONMENTAL
6 LAW; AND PROVIDING FOR A VOLUNTARY ENVIRONMENTAL SELF-EVALUATION AND REPORT AND AN
7 EVIDENTIARY PRIVILEGE FOR THE REPORT."

8
9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

10
11 NEW SECTION. Section 1. Purpose. The legislature finds that protection of the environment rests
12 principally on the public's voluntary compliance with environmental laws and that the public will benefit
13 from incentives to identify and remedy environmental compliance issues. The legislature also finds that
14 limited expansion of the protection against disclosure of voluntary self-evaluations of environmental
15 compliance and against fines and penalties will encourage voluntary activities and will improve
16 environmental quality. The legislature further finds that [sections 1 through 7] will not inhibit the exercise
17 of the regulatory authority by those entrusted with protecting Montana's environment.

18
19 NEW SECTION. Section 2. Definitions. As used in [sections 1 through 7], the following definitions
20 apply:

21 (1) "Environmental law" means a law, administrative rule, permit condition, license, or local
22 regulation or ordinance designed to protect, enhance, or restore the environment and natural resources in
23 the environment.

24 (2) "Environmental self-evaluation" means a voluntary self-evaluation of a facility or operation
25 regulated under environmental laws or of management systems related to the facility or operation, the
26 purpose of which is to identify and prevent noncompliance and to improve compliance with environmental
27 laws. An environmental self-evaluation may be conducted by the owner or operator of the facility or
28 operation, by a parent company of the owner or operator of the facility or operation, by an employee or
29 agent of the owner, operator, or parent company, or by one or more independent contractors.

30 (3) "Environmental self-evaluation report" means a report that is labeled "Environmental

1 Self-Evaluation Report: Privileged Document", or the equivalent, and that is prepared as a result of an
2 environmental self-evaluation. An environmental self-evaluation report may contain materials collected or
3 developed for the primary purpose and in the course of an environmental self-evaluation, including but not
4 limited to field notes and records of observations, findings, opinions, suggestions, conclusions, drafts,
5 memorandums, drawings, photographs, computer-generated or electronically recorded information, maps,
6 charts, graphs, and surveys. It may also include the following:

7 (a) a report that is prepared by the person or entity conducting the environmental self-evaluation
8 and that states the scope of the environmental self-evaluation, the information obtained, and conclusions
9 and recommendations, together with exhibits and appendices;

10 (b) memorandums and documents analyzing portions or all of the environmental self-evaluation
11 report and discussing implementation issues; and

12 (c) an implementation plan that addresses corrective action for noncompliance, improving current
13 compliance, and preventing future noncompliance.

14 (4) "Voluntarily disclosed violation" means a disclosure:

15 (a) of a violation, the knowledge of which arises out of an environmental self-evaluation;

16 (b) that is made promptly after the disclosing person or entity obtains knowledge of the violation;

17 (c) that is made to the agency that has regulatory authority with regard to the violation disclosed;

18 (d) in which the person or entity making the disclosure initiates action to resolve in a reasonably
19 diligent manner;

20 (e) in which the person or entity making the disclosure cooperates with the appropriate agency in
21 connection with investigation of the issues identified in the disclosure; and

22 (f) that is not otherwise required by law to be reported to a regulatory authority.

23

24 **NEW SECTION. Section 3. Limited privilege for voluntary self-evaluations.** (1) Subject to the
25 limitations described in [section 4], an environmental self-evaluation report is privileged and is not
26 discoverable or admissible as evidence in a civil, criminal, or administrative proceeding.

27 (2) Unless disclosure constituted a waiver of the privilege under [section 4(4)], a person ~~who~~ or
28 entity that conducted an environmental self-evaluation or to whom the results were disclosed cannot be
29 compelled to testify regarding any matter that was the subject of the environmental self-evaluation and that
30 is addressed in the environmental self-evaluation report.

1 NEW SECTION. **Section 4. Limitations on privilege for environmental self-evaluation.** (1) The
2 privilege granted by [section 3] does not apply to the extent that it is waived by the owner or operator of
3 a facility or operation at which an environmental self-evaluation was conducted.

4 (2) Disclosure of the environmental self-evaluation report or any information generated by the
5 environmental self-evaluation under the following circumstances does not constitute a waiver of the
6 privilege granted by [section 3]:

7 (a) disclosure to:

8 (i) an employee of the owner or operator of the facility or operation evaluated;

9 (ii) an employee of a parent company of the owner or operator of the facility or operation
10 evaluated;

11 (iii) an agent or legal representative of the owner, operator, or parent company; or

12 (iv) an independent contractor retained by the owner, operator, or parent company to address an
13 issue or issues raised by the environmental self-evaluation;

14 (b) disclosure made under the terms of a confidentiality agreement between the owner or operator
15 and a potential purchaser of the facility or operation; or

16 (c) disclosure made under the terms of a confidentiality agreement between governmental officials
17 and the owner or operator.

18 (3) In a civil, criminal, or administrative proceeding, a court or administrative tribunal of record,
19 after an in camera review consistent with the Montana Rules of Civil Procedure, shall require disclosure of
20 material for which the privilege described in [section 3] is asserted if the court or administrative tribunal
21 determines that:

22 (a) the privilege is asserted for a fraudulent purpose;

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

24 (c) even if subject to the privilege, the material shows evidence of noncompliance with
25 environmental laws and shows that appropriate efforts to achieve compliance with the laws were not
26 promptly initiated and pursued with reasonable diligence upon discovery of noncompliance.

27 (4) A party asserting the privilege granted by [section 3] has the burden of demonstrating the
28 applicability of the privilege, including necessary proof that appropriate efforts to achieve compliance were
29 promptly initiated and pursued with reasonable diligence. However, a party seeking disclosure under
30 subsection (3)(a) has the burden of proving that the privilege is asserted for a fraudulent purpose. In a

1 criminal proceeding, the state has the burden of proving the reasons for disclosure set forth in subsection
2 (3)(b).

3 (5) If, based on information obtained from a source independent of an environmental self-evaluation
4 report, the state has probable cause to believe that a criminal offense has been committed under an
5 environmental law, the state may obtain an environmental self-evaluation report pursuant to a search
6 warrant, criminal subpoena, or discovery, as allowed by the law governing criminal procedure. The state
7 shall immediately place the report under seal and may not review or disclose the contents of the report.
8 Within 30 days after the state obtains the report, the owner or operator that prepared the report or caused
9 it to be prepared may file with the appropriate court or administrative tribunal a petition asserting the
10 privilege granted by [section 3] and requesting an in camera review of the report. Failure by the owner or
11 operator to file the petition waives the privilege. The court or administrative tribunal shall issue an order
12 scheduling an in camera review within 45 days of the filing of the petition. The purpose of the review is
13 to determine whether the environmental self-evaluation report or portions of it are privileged or subject to
14 disclosure. The order must allow the state's attorneys to remove the seal from and to review the
15 environmental self-evaluation report. The order must place appropriate limitations on distribution and
16 review of the report to protect against unnecessary disclosure. A state attorney may consult with
17 enforcement agencies regarding the contents of the report as necessary to prepare for the in camera
18 review. However, the information used in preparation for the in camera review may not be used in any
19 investigation or legal proceeding and must otherwise be kept confidential unless and until the information
20 is required to be disclosed.

21 (6) Failure to comply with the review, disclosure, or use prohibitions of this section is grounds for
22 suppression, in a civil, criminal, or administrative proceeding, of any evidence arising or derived from
23 unauthorized review, disclosure, or use. A party who fails to comply with this section has the burden of
24 proving that proffered evidence did not arise from and was not derived from unauthorized activity.

25 (7) The parties may at any time stipulate to entry of an order directing that specific information
26 contained in an environmental self-evaluation report is or is not subject to the privilege granted by [section
27 3].

28 (8) In making a disclosure determination, the court or administrative tribunal may compel the
29 disclosure only of those portions of an environmental self-evaluation report that are relevant to issues in
30 dispute in the proceeding.

1 **NEW SECTION. Section 5. Exceptions to the environmental self-evaluation privilege.** The privilege
2 granted by [section 3] does not extend to:

3 (1) documents, communications, data, reports, or other information required to be collected,
4 developed, maintained, or reported to a regulatory agency pursuant to environmental laws;

5 (2) information obtained by observation, sampling, or monitoring by a regulatory agency; or

6 (3) information obtained from a source independent of the environmental self-evaluation.
7

8 **NEW SECTION. Section 6. Preservation of other privileges.** [Sections 1 through 7] do not limit,
9 waive, or abrogate the scope or nature of any statutory or common-law privilege, including, without
10 limitation, the work product doctrine and the attorney-client privilege.
11

12 **NEW SECTION. Section 7. Limited protection for voluntary disclosures of violation.** A civil,
13 criminal, or administrative fine or other penalty may not be imposed by a court or administrative tribunal
14 for a voluntarily disclosed violation of an environmental law unless:

15 (1) the violation was intentionally and willfully committed by the person or entity making the
16 disclosure;

17 (2) action to correct the violation was not initiated within a reasonable period of time; or

18 (3) the violation resulted in significant environmental harm or a significant threat to public health.
19

-END-

1 HOUSE BILL NO. 412

2 INTRODUCED BY ORR, GROSFIELD, RYAN, HARP, FORRESTER

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4 A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING LIMITED PROTECTION TO AN OWNER OR
5 OPERATOR OF A FACILITY THAT VOLUNTARILY DISCLOSES A VIOLATION OF AN ENVIRONMENTAL
6 LAW; ~~AND~~ PROVIDING FOR A VOLUNTARY ENVIRONMENTAL SELF-EVALUATION AND REPORT AND AN
7 EVIDENTIARY PRIVILEGE FOR THE REPORT; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE, AN
8 APPLICABILITY DATE, AND A TERMINATION DATE."

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12 NEW SECTION. Section 1. Purpose. The legislature finds that protection of the environment rests
13 principally on the public's voluntary compliance with environmental laws and that the public will benefit
14 from incentives to VOLUNTARILY identify and remedy environmental ~~compliance issues~~ VIOLATIONS. The
15 legislature also finds that limited expansion of the protection against disclosure of voluntary self-evaluations
16 of environmental compliance and against fines and penalties will encourage voluntary activities and will
17 improve environmental quality. The legislature further finds that [sections 1 through 7] ~~will~~ ARE not
18 INTENDED TO inhibit OR BE A SUBSTITUTE FOR the exercise of the regulatory authority by those
19 AGENCIES entrusted with protecting Montana's environment.

20
21 NEW SECTION. Section 2. Definitions. As used in [sections 1 through 7], the following definitions
22 apply:

23 (1) "Environmental law" means a STATE law, administrative rule, permit condition, license, or local
24 regulation or ordinance designed to protect, enhance, or restore the environment and natural resources in
25 the environment.

26 (2) "Environmental self-evaluation" means a voluntary self-evaluation, NOT OTHERWISE REQUIRED
27 BY LAW OR REGULATORY ACTION, of a facility or operation regulated under environmental laws or of
28 management systems related to the facility or operation, the PRIMARY purpose of which is to identify and
29 prevent noncompliance ON A LONG-TERM BASIS and to improve compliance with environmental laws.
30 An environmental self-evaluation may be conducted by the owner or operator of the facility or operation,

1 by a parent company of the owner or operator of the facility or operation, by an employee or agent of the
2 owner, operator, or parent company, or by one or more independent contractors.

3 (3) "Environmental self-evaluation report" means a report that is labeled "Environmental
4 Self-Evaluation Report: ~~Privileged Document~~", or the equivalent, and that is prepared as a result of an
5 environmental self-evaluation. An environmental self-evaluation report ~~may~~ MUST contain materials
6 collected or developed for the primary purpose OF and in the course of CONDUCTING an environmental
7 self-evaluation, ~~including~~. THESE MATERIALS MAY INCLUDE but ARE not limited to field notes and records
8 of observations, findings, opinions, suggestions, conclusions, drafts, memorandums, drawings,
9 photographs, computer-generated or electronically recorded information, maps, charts, graphs, and surveys.
10 It may also include the following:

11 ~~(a) a report that is prepared by the person or entity conducting the environmental self-evaluation~~
12 ~~and that states the scope of the environmental self-evaluation, the information obtained, and conclusions~~
13 ~~and recommendations, together with exhibits and appendices;~~

14 ~~(b) memorandums and documents analyzing portions or all of the environmental self-evaluation~~
15 ~~report and discussing implementation issues; and~~

16 ~~(c) an implementation plan that addresses corrective action for noncompliance, improving current~~
17 ~~compliance, and preventing future noncompliance.~~ ALL ENVIRONMENTAL SELF-EVALUATION REPORTS

18 MUST:

19 (A) INCLUDE THE DATE OR DATES ON WHICH THE ENVIRONMENTAL SELF-EVALUATION WAS
20 CONDUCTED; AND

21 (B) IDENTIFY PROPOSED CORRECTIVE ACTIONS TO RESOLVE IDENTIFIED NONCOMPLIANCE
22 ISSUES IN ACCORDANCE WITH APPLICABLE ENVIRONMENTAL LAWS.

23 (4) "Voluntarily disclosed violation" means a disclosure:

24 (a) of a violation, the knowledge of which arises ~~out~~ BECAUSE of an environmental self-evaluation;

25 (b) that is made promptly after the disclosing person or entity obtains knowledge of the violation;

26 (c) that is made to the agency that has regulatory authority with regard to the violation disclosed;

27 (d) in which the person or entity making the disclosure initiates action to resolve THE VIOLATION
28 in a ~~reasonably~~ diligent manner AND CORRECTS THE VIOLATION ACCORDING TO THE COMPLIANCE
29 PLAN APPROVED BY THE REGULATORY AGENCY;

30 (e) in which the person or entity making the disclosure cooperates with the appropriate agency in

1 connection with investigation AND RESOLUTION of the issues identified in the disclosure; and

2 (f) that is not otherwise required by law, PERMIT, ORDER, OR RULE to be reported to a regulatory
3 authority.

4
5 **NEW SECTION. Section 3. Limited privilege for voluntary self-evaluations.** (1) Subject to the
6 limitations described in [section 4], an environmental self-evaluation report is privileged and is not
7 discoverable or admissible as evidence in a civil, criminal, or administrative proceeding.

8 (2) Unless disclosure constituted a waiver of the privilege under [section 4(4)], a person ~~who~~ or
9 entity that conducted an environmental self-evaluation OR PREPARED AN ENVIRONMENTAL
10 SELF-EVALUATION REPORT or ANY PERSON OR ENTITY to whom the results were disclosed cannot be
11 compelled to testify regarding ~~any matter that was the subject of~~ the environmental self-evaluation ~~and~~
12 REPORT OR ANY MATTER that is addressed in the environmental self-evaluation report.

13
14 **NEW SECTION. Section 4. Limitations on privilege for environmental self-evaluation.** (1) The
15 privilege granted by [section 3] does not apply to the extent that it is waived by the owner or operator of
16 a facility or operation at which an environmental self-evaluation was conducted.

17 (2) Disclosure of the environmental self-evaluation report or any information generated by
18 BECAUSE OF the environmental self-evaluation under the following circumstances does not constitute a
19 waiver of the privilege granted by [section 3]:

20 (a) disclosure to:

21 (i) an employee of the owner or operator of the facility or operation evaluated;

22 (ii) an employee of a parent company of the owner or operator of the facility or operation
23 evaluated;

24 (iii) an agent or legal representative of the owner, operator, or parent company; or

25 (iv) an independent contractor retained by the owner, operator, or parent company to address an
26 issue or issues ~~raised~~ IDENTIFIED by the environmental self-evaluation REPORT;

27 (b) disclosure made under the terms of a confidentiality agreement between the owner or operator
28 and a potential purchaser of the facility or operation; or

29 (c) disclosure made under the terms of a LAWFUL confidentiality agreement between governmental
30 officials and the owner or operator.

1 (3) In a civil, criminal, or administrative proceeding, a court or administrative tribunal of record,
 2 after an in camera review consistent with the Montana Rules of Civil Procedure, shall require disclosure of
 3 ~~material~~ THE REPORT for which the privilege described in [section 3] is asserted if the court or
 4 administrative tribunal determines that:

5 (a) the privilege is asserted for a fraudulent purpose;

6 (B) THE ENVIRONMENTAL SELF-EVALUATION REPORT WAS PREPARED TO AVOID DISCLOSURE
 7 OF INFORMATION:

8 (I) IN AN INVESTIGATION OR IN AN ADMINISTRATIVE OR JUDICIAL PROCEEDING THAT WAS
 9 UNDER WAY OR IMMINENT; OR

10 (II) FOR WHICH THE PERSON OR ENTITY HAD BEEN PROVIDED WRITTEN NOTIFICATION THAT
 11 AN INVESTIGATION INTO A SPECIFIC VIOLATION HAD BEEN INITIATED;

12 ~~(b)(C)~~ the ~~material~~ REPORT is not subject to the privilege; ~~or~~

13 ~~(c)(D)~~ even if subject to the privilege, the ~~material~~ REPORT shows evidence of noncompliance with
 14 environmental laws and shows that appropriate efforts to achieve compliance with the ENVIRONMENTAL
 15 laws were not promptly initiated and pursued TO COMPLETION with reasonable diligence upon discovery
 16 of noncompliance; OR

17 (E) INFORMATION CONTAINED IN THE ENVIRONMENTAL SELF-EVALUATION REPORT
 18 DEMONSTRATES A CLEAR, PRESENT, AND SUBSTANTIAL IMPENDING DANGER TO THE PUBLIC HEALTH
 19 OR TO THE ENVIRONMENT IN AREAS OUTSIDE THE FACILITY PROPERTY.

20 (4) A party asserting the privilege granted by [section 3] has the burden of demonstrating the
 21 applicability of the privilege, including necessary proof that appropriate efforts to achieve compliance were
 22 promptly initiated and pursued with reasonable diligence TOWARD COMPLETION. However, a party,
 23 INCLUDING THE STATE IN A CRIMINAL PROCEEDING, seeking disclosure under subsection (3)(a), (3)(B),
 24 (3)(C), OR (3)(E) has the burden of ~~proving that the privilege is asserted for a fraudulent purpose. In a~~
 25 ~~criminal proceeding, the state has the burden of proving the reasons for disclosure set forth in subsection~~
 26 ~~(3)(b)~~ PROOF.

27 (5) If, based on information obtained from a source independent of an environmental self-evaluation
 28 report, the state has probable cause to believe that a criminal offense has been committed under an
 29 environmental law, the state may obtain an environmental self-evaluation report pursuant to a search
 30 warrant, criminal subpoena, or discovery, as allowed by the law governing criminal procedure. The state

1 shall immediately place the report under seal ~~and~~, may not review or disclose the contents of the report,
 2 AND SHALL NOTIFY THE OWNER OR OPERATOR OF ITS POSSESSION OF THE REPORT. Within 30 days
 3 after the state ~~obtains the report~~ PROVIDES NOTICE, the owner or operator that prepared the report or
 4 caused it to be prepared may file with the appropriate court or administrative tribunal a petition asserting
 5 the privilege granted by [section 3] and requesting an in camera review of the report. Failure by the owner
 6 or operator to file the petition waives the privilege. The court or administrative tribunal shall issue an order
 7 scheduling an in camera review within 45 days of the filing of the petition. The purpose of the review is
 8 to determine whether the environmental self-evaluation report or portions of it are privileged or subject to
 9 disclosure. The order must allow the state's attorneys to remove the seal from and to review the
 10 environmental self-evaluation report. The order must place appropriate limitations on distribution and
 11 review of the report to protect against unnecessary disclosure. A state attorney may consult with
 12 enforcement agencies regarding the contents of the report as necessary to prepare for the in camera
 13 review. However, the information used in preparation for the in camera review may not be used in any
 14 investigation or legal proceeding and must otherwise be kept confidential unless and until the information
 15 is required to be disclosed.

16 (6) Failure to comply with the review, disclosure, or use prohibitions of this section is grounds for
 17 EXCLUSION OR suppression, in a civil, criminal, or administrative proceeding, of any evidence arising or
 18 derived from unauthorized review, disclosure, or use. A party who fails to comply with this section has
 19 the burden of proving that proffered evidence did not arise from and was not derived from unauthorized
 20 activity.

21 (7) The parties may at any time stipulate to entry of an order directing that ~~specific information~~
 22 ~~contained in~~ ALL OR A PORTION OF an environmental self-evaluation report is or is not subject to the
 23 privilege granted by [section 3].

24 (8) In making a disclosure determination, the court or administrative tribunal may compel the
 25 disclosure only of those portions of an environmental self-evaluation report that are NOT PRIVILEGED AND
 26 ARE relevant to issues in dispute in the proceeding.

27
 28 NEW SECTION. Section 5. Exceptions to the environmental self-evaluation privilege. The privilege
 29 granted by [section 3] does not extend to:

30 (1) documents, communications, data, reports, or other information required to be collected,

1 developed, maintained, or reported to a regulatory agency pursuant to environmental laws;

2 (2) information obtained by observation, sampling, or monitoring by a regulatory agency, EXCEPT
3 TO THE EXTENT DERIVED FROM A VOLUNTARY DISCLOSURE; ~~or~~

4 (3) information obtained BY A REGULATORY AGENCY from a source independent of the
5 environmental self-evaluation OR FROM A VOLUNTARY DISCLOSURE;

6 (4) DOCUMENTS EXISTING PRIOR TO THE COMMENCEMENT OF THE ENVIRONMENTAL
7 SELF-EVALUATION AND INDEPENDENT OF THE ENVIRONMENTAL SELF-EVALUATION; OR

8 (5) ANY INFORMATION NOT PRIVILEGED, PURSUANT TO [SECTION 3] OR OTHERWISE, THAT
9 IS DEVELOPED OR MAINTAINED IN THE COURSE OF REGULARLY CONDUCTED BUSINESS ACTIVITY OR
10 REGULAR PRACTICE.

11
12 **NEW SECTION. Section 6. Preservation of other privileges.** [Sections 1 through 7] do not limit,
13 **EXPAND,** waive, or abrogate the scope or nature of any statutory or common-law privilege, including,
14 without limitation, the work product doctrine and the attorney-client privilege.

15
16 **NEW SECTION. Section 7. Limited protection for voluntary disclosures of violation.** (1) A civil,
17 criminal, or administrative fine or other penalty may not be imposed by a court or administrative tribunal
18 for a voluntarily disclosed violation of an environmental law unless:

19 ~~(A)~~ (A) the violation was intentionally and willfully committed by the person or entity making the
20 disclosure;

21 ~~(B)~~ (B) action to correct the violation was not initiated within a reasonable period of time; or

22 ~~(C)~~ (C) the violation resulted in significant environmental harm or a significant threat to public health.
23 **HARM TO THE PUBLIC HEALTH OR TO THE ENVIRONMENT.**

24 (2) THE PERSON OR ENTITY SHALL PROVIDE INFORMATION IN WRITING SUPPORTING ITS
25 CLAIM THAT THE DISCLOSURE IS VOLUNTARY AT THE TIME THAT THE DISCLOSURE IS MADE TO THE
26 REGULATORY AUTHORITY.

27 (3) THE ELIMINATION OF CIVIL, CRIMINAL, OR ADMINISTRATIVE PENALTIES UNDER THIS
28 SECTION DOES NOT APPLY IF A PERSON OR ENTITY HAS BEEN FOUND BY A COURT OR AN
29 ADMINISTRATIVE TRIBUNAL TO HAVE COMMITTED SERIOUS VIOLATIONS THAT CONSTITUTE A
30 PATTERN OF CONTINUOUS OR REPEATED VIOLATIONS OF ENVIRONMENTAL LAWS, RULES, PERMIT

1 CONDITIONS, SETTLEMENT AGREEMENTS, OR ORDERS ON CONSENT AND THAT WERE BECAUSE OF
 2 SEPARATE AND DISTINCT EVENTS GIVING RISE TO THE VIOLATIONS WITHIN THE 3-YEAR PERIOD
 3 PRIOR TO THE DATE OF DISCLOSURE.

4
 5 NEW SECTION. SECTION 8. APPLICABILITY. [THIS ACT] APPLIES TO:

6 (1) ONLY THOSE ENVIRONMENTAL SELF-EVALUATIONS THAT RESULT IN ENVIRONMENTAL
 7 SELF-EVALUATION REPORTS;

8 (2) VOLUNTARILY DISCLOSED VIOLATIONS THAT ARE DISCLOSED AFTER [THE EFFECTIVE
 9 DATE OF THIS ACT]; AND

10 (3) ALL LEGAL ACTIONS AND ADMINISTRATIVE ACTIONS COMMENCED ON OR AFTER [THE
 11 EFFECTIVE DATE OF THIS ACT].

12
 13 NEW SECTION. SECTION 9. EFFECTIVE DATE. [THIS ACT] IS EFFECTIVE ON PASSAGE AND
 14 APPROVAL.

15
 16 NEW SECTION. SECTION 10. TERMINATION. [THIS ACT] TERMINATES JUNE 30, 2001.

17 -END-

1 HOUSE BILL NO. 412

2 INTRODUCED BY ORR, GROSFIELD, RYAN, HARP, FORRESTER

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4 A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING LIMITED PROTECTION TO AN OWNER OR
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8 APPLICABILITY DATE, AND A TERMINATION DATE."

9

10 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

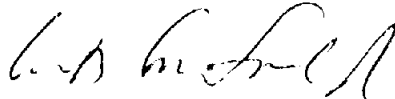
THERE ARE NO CHANGES IN THIS BILL AND IT WILL NOT BE REPRINTED. PLEASE REFER TO SECOND READING COPY (YELLOW) FOR COMPLETE TEXT.

SENATE STANDING COMMITTEE REPORT

Page 1 of 5
March 25, 1995

MR. PRESIDENT:

We, your committee on Natural Resources having had under consideration HB 412 (third reading copy -- blue), respectfully report that HB 412 be amended as follows and as so amended be concurred in.

Signed: 
Senator Lorents Grosfield, Chair

That such amendments read:

1. Page 1, line 24.

Strike: "and"

Insert: "or"

2. Page 2, lines 3 through 22.

Strike: the second "report" on line 3 through "LAWS." on line 22

Insert: "set of documents that are prepared as a result of an environmental self-evaluation. All documents that are part of an environmental self-evaluation report must contain the date or dates on which the environmental self-evaluation was conducted. An environmental self-evaluation report must:

(a) contain materials that were collected or developed for the primary purpose of and in the course of conducting an environmental self-evaluation and that may include but are not limited to field notes and records of observations, findings, opinions, suggestions, conclusions, drafts, memorandums, drawings, photographs, computer-generated or electronically recorded information, maps, charts, graphs, and surveys;

(b) state the scope of the environmental self-evaluation, the information obtained, and conclusions and recommendations with a reference to supporting data or supporting information that is to be generated or that has already been generated for purpose of the report;

(c) identify proposed actions to resolve identified violations in accordance with applicable environmental laws; and

(d) indicate identified violations that have been resolved or indicate that a plan has been implemented to resolve the violations in accordance with applicable environmental laws."


3. Page 2, line 28 and 29.

Strike: "CORRECTS" on line 28 through "AGENCY" on line 29

Insert: "submits to the appropriate regulatory agency, in writing, the following information:

(i) the date of the self-evaluation that identified the violations;

(ii) a description of the violation, including all data


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Senator Carrying Bill

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pertinent to the determination that a violation existed;
(iii) the action being undertaken to correct the violation;
(iv) an estimated timetable for correcting the violation;

and

(v) a commitment to diligent resolution of the violation"

4. Page 3, line 1.

Strike: "issues"

Insert: "violations"

Following: "disclosure"

Insert: "pursuant to applicable environmental laws"

5. Page 3, line 8.

Strike: "(4)"

6. Page 3, line 10.

Following: "ENTITY"

Insert: "identified in [section 4(2)]"

7. Page 3, line 12.

Strike: "REPORT OR ANY MATTER that is addressed in"

Insert: "or"

8. Page 3, line 16.

Following: "conducted"

Insert: "or to the extent that the owner or operator consents to
disclosure"

9. Page 3, line 27.

Following: "operator"

Insert: "or the owner's or operator's agent"

10. Page 3, line 28.

Following: "purchaser"

Insert: "or the purchaser's agent"

11. Page 4, line 1.

Strike: "tribunal"

Insert: "body"

12. Page 4, line 4.

Strike: "tribunal"

Insert: "body"

13. Page 4, line 15.

Strike: "TO COMPLETION"

Insert: "to resolve the violation in compliance with applicable
environmental laws"

14. Page 4, line 21.

Strike: "necessary proof"

Insert: "prima facie evidence"

15. Page 4, line 22.

Following: "COMPLETION"

Insert: "and including a commitment that completion will be
accomplished in accordance with applicable environmental
laws"

16. Page 5, line 4.

Following: "prepared"

Insert: "or the state's attorneys"

Strike: "tribunal"

Insert: "body"

17. Page 5, line 5.

Strike: "Failure"

Insert: "Unless the state files a petition, failure"

18. Page 5, line 6.

Strike: "tribunal"

Insert: "body"

Following: "shall"

Insert: "immediately"

19. Page 5, line 24.

Strike: "tribunal"

Insert: "body"

20. Page 6, line 5.

Strike: "OR"

Insert: ", except to the extent derived"

21. Page 6, line 7.

Following: the second "SELF-EVALUATION"

Insert: "report"

Strike: "OR"

22. Page 6, line 10.

Strike: "."

Insert: ";

23. Page 6.

Following: line 10

Insert: "(6) information contained in the environmental self-
evaluation report that is relevant in a civil action for
alleged damage to real property or to tangible personal

property in areas outside of the facility property provided that the causes of action asserted are not for alleged violations of environmental laws and that only that portion of the report may be disclosed that is relevant to the action; or

(7) information contained in the environmental self-evaluation report that is relevant in a civil action for alleged personal injury provided that the causes of action asserted are not for alleged violations of environmental laws and that only that portion of the report may be disclosed that is relevant to that action."

24. Page 6, line 17.

Following: "be"

Insert: "sought or"

Strike: "tribunal"

Insert: "body"

25. Page 6, line 18.

Following: "law"

Insert: ", except for a violation of Title 82, chapter 4, part 1 or 2, first made known only by the entity conducting the environmental self-evaluation,"

26. Page 6, line 21.

Strike: "was not initiated within a reasonable period of time"

Insert: "does not meet the requirements of [section 2(4)(d)]"

27. Page 6, lines 22 and 23.

Strike: "significant" on line 22 through "ENVIRONMENT" on line 23

Insert: "a clear, substantial, and immediate threat of actual harm to the public health or to the environment"

28. Page 6, line 26.

Following: "AUTHORITY"

Insert: "or within a reasonable time after disclosure is made.

All information submitted to a regulatory agency regarding a voluntarily disclosed violation is public information"

29. Page 6, line 29.

Strike: "TRIBUNAL"

Insert: "body"

Strike: "SERIOUS"

30. Page 7, line 1.

Following: "CONSENT"

Insert: ", that when taken together are serious,"

31. Page 7, lines 5 through 11.

Strike: "[THIS" on line 5 through "ACT]." on line 11.

Insert: "(1) The evidentiary privilege created by [this act] applies to environmental self-evaluation reports that are prepared as a result of environmental self-evaluations after [the effective date of this act] and before [the termination date of this act].

(2) The limited protection for voluntary disclosures created by [this act] applies to voluntary disclosures that are made during the period beginning on [the effective date of this act] and ending on [the termination date of this act].

(3) [This act] applies to all legal actions and administrative actions commenced on or after [the effective date of this act].

(4) Environmental self-evaluation reports that are privileged under [this act] and voluntary disclosures that are protected under [this act] must remain privileged and protected after [the termination date of this act]."

-END-

SENATE COMMITTEE OF THE WHOLE AMENDMENT

March 25, 1995 4:15 pm

Mr. Chairman: I move to amend HB 412 (third reading copy -- blue).

ADOPT *U.U.*

REJECT

Signed: *[Signature]*

Senator Grosfield

That such amendments read:

1. Page 1, line 23 and 24.
Following: "condition," on line 23
Insert: "or"
Following: "license" on line 23
Strike: ", " through "ordinance" on line 24

-END-

[Signature]
Amd. Coord.

HB 412
SENATE



FREE CONFERENCE COMMITTEE

on HB 412

Report No. 1, April 12, 1995

Page 1 of 3

Mr. Speaker and Mr. President:

We, your Free Conference Committee met and considered **HB 412** and recommend as follows:

1. Page 4, line 3.

Strike: ", criminal,"

2. Page 4, line 30.

Strike: ", criminal,"

3. Page 5, lines 24 and 25.

Strike: ", INCLUDING" on line 24 through "PROCEEDING," on line 25

4. Page 5, line 28 through page 6, line 17.

Strike: subsection (5) in its entirety

Renumber: subsequent subsections

5. Page 6, line 19.

Strike: ", criminal,"

6. Page 7, lines 27 and 28.

Following: "civil" on line 27

Strike: ", " on line 27 through "criminal," on line 28

7. Page 8, line 14.

Strike: ", CRIMINAL,"

8. Page 3.

Following: line 11

Insert: "(4) "In camera review" means a hearing or review in a courtroom, hearing room, or chambers to which only the parties are admitted. The purpose of the review is to determine whether the environmental self-evaluation report or portions of it are privileged or subject to disclosure. To allow the parties to prepare for the in camera review, the court or administrative body shall issue an order allowing, as necessary, the parties to review the environmental self-evaluation report. The order must place appropriate limits on review of the report to protect against unnecessary disclosure. The information used in

ADOPT

REJECT

HB 412
FCCR#1
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preparation for the in camera review may not be used in any investigation or legal proceeding and must otherwise be kept confidential unless and until the information is required to be disclosed. After the hearing or review, the content of the oral evidence and other evidence, the content of the statements of the judge and counsel at the hearing or review, and any transcript of the hearing or review must be sealed and not considered a public record unless and until its contents are disclosed by a court or administrative law judge having jurisdiction over the matter."

9. Page 3, lines 21 and 22.

Following: "VIOLATION"

Strike: ", INCLUDING" on line 21 through "EXISTED" on line 22

Insert: "or possible violation that incorporates all information contained in an environmental self-evaluation report relevant to the identification of a violation or possible violation, including but not limited to field notes, records, findings, conclusions, memorandums, drawings, photographs, computer-generated or electronically recorded information, maps, charts, graphs, surveys, and laboratory analyses"

10. Page 8, lines 19 and 20.

Strike: "WERE BECAUSE OF" on line 19

Insert: "resulted from".

Strike: "GIVING" on line 19 through "VIOLATIONS" on line 20

Insert: "occurring"

We recommend that the amendments considered above to House Bill No. 412 be acceded to by the Senate.

And this FREE Conference Committee report be adopted.

For the House:

Rep. Orr

Chair

Rep. Tash

Rep. Shea

For the Senate:

Sen. Grosfield

Chair

Sen. Forrester

Sen. Harp

1 HOUSE BILL NO. 412

2 INTRODUCED BY ORR, GROSFIELD, RYAN, HARP, FORRESTER

3
4 A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING LIMITED PROTECTION TO AN OWNER OR
5 OPERATOR OF A FACILITY THAT VOLUNTARILY DISCLOSES A VIOLATION OF AN ENVIRONMENTAL
6 LAW; ~~AND~~ PROVIDING FOR A VOLUNTARY ENVIRONMENTAL SELF-EVALUATION AND REPORT AND AN
7 EVIDENTIARY PRIVILEGE FOR THE REPORT; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE, AN
8 APPLICABILITY DATE, AND A TERMINATION DATE."

9
10 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

11
12 NEW SECTION. Section 1. Purpose. The legislature finds that protection of the environment rests
13 principally on the public's voluntary compliance with environmental laws and that the public will benefit
14 from incentives to VOLUNTARILY identify and remedy environmental ~~compliance issues~~ VIOLATIONS. The
15 legislature also finds that limited expansion of the protection against disclosure of voluntary self-evaluations
16 of environmental compliance and against fines and penalties will encourage voluntary activities and will
17 improve environmental quality. The legislature further finds that [sections 1 through 7] ~~will~~ ARE not
18 INTENDED TO inhibit OR BE A SUBSTITUTE FOR the exercise of the regulatory authority by those
19 AGENCIES entrusted with protecting Montana's environment.

20
21 NEW SECTION. Section 2. Definitions. As used in [sections 1 through 7], the following definitions
22 apply:

23 (1) "Environmental law" means a STATE law, administrative rule, permit condition, OR license, ~~or~~
24 ~~local regulation or ordinance~~ designed to protect, enhance, or restore the environment ~~and~~ OR natural
25 resources in the environment.

26 (2) "Environmental self-evaluation" means a voluntary self-evaluation, NOT OTHERWISE REQUIRED
27 BY LAW OR REGULATORY ACTION, of a facility or operation regulated under environmental laws or of
28 management systems related to the facility or operation, the PRIMARY purpose of which is to identify and
29 prevent noncompliance ON A LONG-TERM BASIS and to improve compliance with environmental laws.
30 An environmental self-evaluation may be conducted by the owner or operator of the facility or operation,

1 by a parent company of the owner or operator of the facility or operation, by an employee or agent of the
2 owner, operator, or parent company, or by one or more independent contractors.

3 (3) "Environmental self-evaluation report" means a ~~report that is labeled "Environmental~~
4 ~~Self-Evaluation Report: Privileged Document", or the equivalent, and that is prepared as a result of an~~
5 ~~environmental self-evaluation. An environmental self-evaluation report may MUST contain materials~~
6 ~~collected or developed for the primary purpose OF and in the course of CONDUCTING an environmental~~
7 ~~self-evaluation, including, THESE MATERIALS MAY INCLUDE but ARE not limited to field notes and records~~
8 ~~of observations, findings, opinions, suggestions, conclusions, drafts, memorandums, drawings,~~
9 ~~photographs, computer-generated or electronically recorded information, maps, charts, graphs, and surveys.~~
10 It may also include the following:

11 (a) ~~a report that is prepared by the person or entity conducting the environmental self-evaluation~~
12 ~~and that states the scope of the environmental self-evaluation, the information obtained, and conclusions~~
13 ~~and recommendations, together with exhibits and appendices;~~

14 (b) ~~memorandums and documents analyzing portions or all of the environmental self-evaluation~~
15 ~~report and discussing implementation issues; and~~

16 (c) ~~an implementation plan that addresses corrective action for noncompliance, improving current~~
17 ~~compliance, and preventing future noncompliance. ALL ENVIRONMENTAL SELF-EVALUATION REPORTS~~
18 ~~MUST:~~

19 ~~(A) INCLUDE THE DATE OR DATES ON WHICH THE ENVIRONMENTAL SELF-EVALUATION WAS~~
20 ~~CONDUCTED; AND~~

21 ~~(B) IDENTIFY PROPOSED CORRECTIVE ACTIONS TO RESOLVE IDENTIFIED NONCOMPLIANCE~~
22 ~~ISSUES IN ACCORDANCE WITH APPLICABLE ENVIRONMENTAL LAWS. SET OF DOCUMENTS THAT ARE~~
23 ~~PREPARED AS A RESULT OF AN ENVIRONMENTAL SELF-EVALUATION. ALL DOCUMENTS THAT ARE~~
24 ~~PART OF AN ENVIRONMENTAL SELF-EVALUATION REPORT MUST CONTAIN THE DATE OR DATES ON~~
25 ~~WHICH THE ENVIRONMENTAL SELF-EVALUATION WAS CONDUCTED. AN ENVIRONMENTAL~~
26 ~~SELF-EVALUATION REPORT MUST:~~

27 ~~(A) CONTAIN MATERIALS THAT WERE COLLECTED OR DEVELOPED FOR THE PRIMARY~~
28 ~~PURPOSE OF AND IN THE COURSE OF CONDUCTING AN ENVIRONMENTAL SELF-EVALUATION AND~~
29 ~~THAT MAY INCLUDE BUT ARE NOT LIMITED TO FIELD NOTES AND RECORDS OF OBSERVATIONS,~~
30 ~~FINDINGS, OPINIONS, SUGGESTIONS, CONCLUSIONS, DRAFTS, MEMORANDUMS, DRAWINGS,~~

1 PHOTOGRAPHS, COMPUTER-GENERATED OR ELECTRONICALLY RECORDED INFORMATION, MAPS,
 2 CHARTS, GRAPHS, AND SURVEYS;

3 (B) STATE THE SCOPE OF THE ENVIRONMENTAL SELF-EVALUATION, THE INFORMATION
 4 OBTAINED, AND CONCLUSIONS AND RECOMMENDATIONS WITH A REFERENCE TO SUPPORTING DATA
 5 OR SUPPORTING INFORMATION THAT IS TO BE GENERATED OR THAT HAS ALREADY BEEN GENERATED
 6 FOR PURPOSE OF THE REPORT;

7 (C) IDENTIFY PROPOSED ACTIONS TO RESOLVE IDENTIFIED VIOLATIONS IN ACCORDANCE
 8 WITH APPLICABLE ENVIRONMENTAL LAWS; AND

9 (D) INDICATE IDENTIFIED VIOLATIONS THAT HAVE BEEN RESOLVED OR INDICATE THAT A
 10 PLAN HAS BEEN IMPLEMENTED TO RESOLVE THE VIOLATIONS IN ACCORDANCE WITH APPLICABLE
 11 ENVIRONMENTAL LAWS.

12 (4) "Voluntarily disclosed violation" means a disclosure:

13 (a) of a violation, the knowledge of which arises ~~out~~ BECAUSE of an environmental self-evaluation;

14 (b) that is made promptly after the disclosing person or entity obtains knowledge of the violation;

15 (c) that is made to the agency that has regulatory authority with regard to the violation disclosed;

16 (d) in which the person or entity making the disclosure initiates action to resolve THE VIOLATION
 17 in a ~~reasonably~~ diligent manner ~~AND CORRECTS THE VIOLATION ACCORDING TO THE COMPLIANCE~~
 18 ~~PLAN APPROVED BY THE REGULATORY AGENCY~~ SUBMITS TO THE APPROPRIATE REGULATORY
 19 AGENCY, IN WRITING, THE FOLLOWING INFORMATION:

20 (I) THE DATE OF THE SELF-EVALUATION THAT IDENTIFIED THE VIOLATIONS;

21 (II) A DESCRIPTION OF THE VIOLATION, INCLUDING ALL DATA PERTINENT TO THE
 22 DETERMINATION THAT A VIOLATION EXISTED;

23 (III) THE ACTION BEING UNDERTAKEN TO CORRECT THE VIOLATION;

24 (IV) AN ESTIMATED TIMETABLE FOR CORRECTING THE VIOLATION; AND

25 (V) A COMMITMENT TO DILIGENT RESOLUTION OF THE VIOLATION;

26 (e) in which the person or entity making the disclosure cooperates with the appropriate agency in
 27 connection with investigation AND RESOLUTION of the ~~issues~~ VIOLATIONS identified in the disclosure
 28 PURSUANT TO APPLICABLE ENVIRONMENTAL LAWS; and

29 (f) that is not otherwise required by law, PERMIT, ORDER, OR RULE to be reported to a regulatory
 30 authority.

1 NEW SECTION. Section 3. Limited privilege for voluntary self-evaluations. (1) Subject to the
 2 limitations described in [section 4], an environmental self-evaluation report is privileged and is not
 3 discoverable or admissible as evidence in a civil, criminal, or administrative proceeding.

4 (2) Unless disclosure constituted a waiver of the privilege under [section 4(4)], a person ~~who~~ or
 5 entity that conducted an environmental self-evaluation OR PREPARED AN ENVIRONMENTAL
 6 SELF-EVALUATION REPORT or ANY PERSON OR ENTITY IDENTIFIED IN [SECTION 4(2)] to whom the
 7 results were disclosed cannot be compelled to testify regarding ~~any matter that was the subject of the~~
 8 environmental self-evaluation and REPORT OR ANY MATTER ~~that is addressed in~~ OR the environmental
 9 self-evaluation report.

10
 11 NEW SECTION. Section 4. Limitations on privilege for environmental self-evaluation. (1) The
 12 privilege granted by [section 3] does not apply to the extent that it is waived by the owner or operator of
 13 a facility or operation at which an environmental self-evaluation was conducted OR TO THE EXTENT THAT
 14 THE OWNER OR OPERATOR CONSENTS TO DISCLOSURE.

15 (2) Disclosure of the environmental self-evaluation report or any information generated ~~by~~
 16 BECAUSE OF the environmental self-evaluation under the following circumstances does not constitute a
 17 waiver of the privilege granted by [section 3]:

18 (a) disclosure to:

19 (i) an employee of the owner or operator of the facility or operation evaluated;

20 (ii) an employee of a parent company of the owner or operator of the facility or operation
 21 evaluated;

22 (iii) an agent or legal representative of the owner, operator, or parent company; or

23 (iv) an independent contractor retained by the owner, operator, or parent company to address an
 24 issue or issues ~~raised~~ IDENTIFIED by the environmental self-evaluation REPORT;

25 (b) disclosure made under the terms of a confidentiality agreement between the owner or operator
 26 OR THE OWNER'S OR OPERATOR'S AGENT and a potential purchaser OR THE PURCHASER'S AGENT of
 27 the facility or operation; or

28 (c) disclosure made under the terms of a LAWFUL confidentiality agreement between governmental
 29 officials and the owner or operator.

30 (3) In a civil, criminal, or administrative proceeding, a court or administrative ~~tribunal~~ BODY of

1 record, after an in camera review consistent with the Montana Rules of Civil Procedure, shall require
 2 disclosure of ~~material~~ THE REPORT for which the privilege described in [section 3] is asserted if the court
 3 or administrative ~~tribunal~~ BODY determines that:

4 (a) the privilege is asserted for a fraudulent purpose;

5 (B) THE ENVIRONMENTAL SELF-EVALUATION REPORT WAS PREPARED TO AVOID DISCLOSURE
 6 OF INFORMATION:

7 (I) IN AN INVESTIGATION OR IN AN ADMINISTRATIVE OR JUDICIAL PROCEEDING THAT WAS
 8 UNDER WAY OR IMMINENT; OR

9 (II) FOR WHICH THE PERSON OR ENTITY HAD BEEN PROVIDED WRITTEN NOTIFICATION THAT
 10 AN INVESTIGATION INTO A SPECIFIC VIOLATION HAD BEEN INITIATED;

11 ~~(b)(C)~~ the ~~material~~ REPORT is not subject to the privilege; or

12 ~~(c)(D)~~ even if subject to the privilege, the ~~material~~ REPORT shows evidence of noncompliance with
 13 environmental laws and shows that appropriate efforts to achieve compliance with the ENVIRONMENTAL
 14 laws were not promptly initiated and pursued ~~TO COMPLETION~~ TO RESOLVE THE VIOLATION IN
 15 COMPLIANCE WITH APPLICABLE ENVIRONMENTAL LAWS with reasonable diligence upon discovery of
 16 noncompliance; OR

17 (E) INFORMATION CONTAINED IN THE ENVIRONMENTAL SELF-EVALUATION REPORT
 18 DEMONSTRATES A CLEAR, PRESENT, AND SUBSTANTIAL IMPENDING DANGER TO THE PUBLIC HEALTH
 19 OR TO THE ENVIRONMENT IN AREAS OUTSIDE THE FACILITY PROPERTY.

20 (4) A party asserting the privilege granted by [section 3] has the burden of demonstrating the
 21 applicability of the privilege, including ~~necessary proof~~ PRIMA FACIE EVIDENCE that appropriate efforts to
 22 achieve compliance were promptly initiated and pursued with reasonable diligence TOWARD COMPLETION
 23 AND INCLUDING A COMMITMENT THAT COMPLETION WILL BE ACCOMPLISHED IN ACCORDANCE WITH
 24 APPLICABLE ENVIRONMENTAL LAWS. However, a party, INCLUDING THE STATE IN A CRIMINAL
 25 PROCEEDING, seeking disclosure under subsection (3)(a), (3)(B), (3)(C), OR (3)(E) has the burden of ~~proving~~
 26 ~~that the privilege is asserted for a fraudulent purpose. In a criminal proceeding, the state has the burden~~
 27 ~~of proving the reasons for disclosure set forth in subsection (3)(b)~~ PROOF.

28 (5) If, based on information obtained from a source independent of an environmental self-evaluation
 29 report, the state has probable cause to believe that a criminal offense has been committed under an
 30 environmental law, the state may obtain an environmental self-evaluation report pursuant to a search

1 warrant, criminal subpoena, or discovery, as allowed by the law governing criminal procedure. The state
 2 shall immediately place the report under seal ~~and~~ may not review or disclose the contents of the report,
 3 AND SHALL NOTIFY THE OWNER OR OPERATOR OF ITS POSSESSION OF THE REPORT. Within 30 days
 4 after the state ~~obtains the report~~ PROVIDES NOTICE, the owner or operator that prepared the report or
 5 caused it to be prepared OR THE STATE'S ATTORNEYS may file with the appropriate court or
 6 administrative ~~tribunal~~ BODY a petition asserting the privilege granted by [section 3] and requesting an in
 7 camera review of the report. ~~Failure~~ UNLESS THE STATE FILES A PETITION, FAILURE by the owner or
 8 operator to file the petition waives the privilege. The court or administrative ~~tribunal~~ BODY shall
 9 IMMEDIATELY issue an order scheduling an in camera review within 45 days of the filing of the petition.
 10 The purpose of the review is to determine whether the environmental self-evaluation report or portions of
 11 it are privileged or subject to disclosure. The order must allow the state's attorneys to remove the seal from
 12 and to review the environmental self-evaluation report. The order must place appropriate limitations on
 13 distribution and review of the report to protect against unnecessary disclosure. A state attorney may
 14 consult with enforcement agencies regarding the contents of the report as necessary to prepare for the in
 15 camera review. However, the information used in preparation for the in camera review may not be used
 16 in any investigation or legal proceeding and must otherwise be kept confidential unless and until the
 17 information is required to be disclosed.

18 (6) Failure to comply with the review, disclosure, or use prohibitions of this section is grounds for
 19 EXCLUSION OR suppression, in a civil, criminal, or administrative proceeding, of any evidence arising or
 20 derived from unauthorized review, disclosure, or use. A party who fails to comply with this section has
 21 the burden of proving that proffered evidence did not arise from and was not derived from unauthorized
 22 activity.

23 (7) The parties may at any time stipulate to entry of an order directing that ~~specific information~~
 24 ~~contained in~~ ALL OR A PORTION OF an environmental self-evaluation report is or is not subject to the
 25 privilege granted by [section 3].

26 (8) In making a disclosure determination, the court or administrative ~~tribunal~~ BODY may compel
 27 the disclosure only of those portions of an environmental self-evaluation report that are NOT PRIVILEGED
 28 AND ARE relevant to issues in dispute in the proceeding.

29
 30 NEW SECTION. Section 5. Exceptions to the environmental self-evaluation privilege. The privilege

1 granted by [section 3] does not extend to:

2 (1) documents, communications, data, reports, or other information required to be collected,
3 developed, maintained, or reported to a regulatory agency pursuant to environmental laws;

4 (2) information obtained by observation, sampling, or monitoring by a regulatory agency, EXCEPT
5 TO THE EXTENT DERIVED FROM A VOLUNTARY DISCLOSURE; ~~or~~

6 (3) information obtained BY A REGULATORY AGENCY from a source independent of the
7 environmental self-evaluation ~~OR, EXCEPT TO THE EXTENT DERIVED FROM A VOLUNTARY DISCLOSURE;~~

8 (4) DOCUMENTS EXISTING PRIOR TO THE COMMENCEMENT OF THE ENVIRONMENTAL
9 SELF-EVALUATION AND INDEPENDENT OF THE ENVIRONMENTAL SELF-EVALUATION REPORT; OR

10 (5) ANY INFORMATION NOT PRIVILEGED, PURSUANT TO [SECTION 3] OR OTHERWISE, THAT
11 IS DEVELOPED OR MAINTAINED IN THE COURSE OF REGULARLY CONDUCTED BUSINESS ACTIVITY OR
12 REGULAR PRACTICE;

13 (6) INFORMATION CONTAINED IN THE ENVIRONMENTAL SELF-EVALUATION REPORT THAT IS
14 RELEVANT IN A CIVIL ACTION FOR ALLEGED DAMAGE TO REAL PROPERTY OR TO TANGIBLE PERSONAL
15 PROPERTY IN AREAS OUTSIDE OF THE FACILITY PROPERTY PROVIDED THAT THE CAUSES OF ACTION
16 ASSERTED ARE NOT FOR ALLEGED VIOLATIONS OF ENVIRONMENTAL LAWS AND THAT ONLY THAT
17 PORTION OF THE REPORT MAY BE DISCLOSED THAT IS RELEVANT TO THE ACTION; OR

18 (7) INFORMATION CONTAINED IN THE ENVIRONMENTAL SELF-EVALUATION REPORT THAT IS
19 RELEVANT IN A CIVIL ACTION FOR ALLEGED PERSONAL INJURY PROVIDED THAT THE CAUSES OF
20 ACTION ASSERTED ARE NOT FOR ALLEGED VIOLATIONS OF ENVIRONMENTAL LAWS AND THAT ONLY
21 THAT PORTION OF THE REPORT MAY BE DISCLOSED THAT IS RELEVANT TO THAT ACTION.

22

23 NEW SECTION. Section 6. Preservation of other privileges. [Sections 1 through 7] do not limit,
24 EXPAND, waive, or abrogate the scope or nature of any statutory or common-law privilege, including,
25 without limitation, the work product doctrine and the attorney-client privilege.

26

27 NEW SECTION. Section 7. Limited protection for voluntary disclosures of violation. (1) A civil,
28 criminal, or administrative fine or other penalty may not be SOUGHT OR imposed by a court or
29 administrative ~~tribunal~~ BODY for a voluntarily disclosed violation of an environmental law, EXCEPT FOR A
30 VIOLATION OF TITLE 82, CHAPTER 4, PART 1 OR 2, FIRST MADE KNOWN ONLY BY THE ENTITY

1 CONDUCTING THE ENVIRONMENTAL SELF-EVALUATION, unless:

2 ~~(1)(A)~~ the violation was intentionally and willfully committed by the person or entity making the
3 disclosure;

4 ~~(2)(B)~~ action to correct the violation ~~was not initiated within a reasonable period of time~~ DOES NOT
5 MEET THE REQUIREMENTS OF [SECTION 2(4)(D)]; or

6 ~~(3)(C)~~ the violation resulted in ~~significant environmental harm or a significant threat to public health.~~
7 HARM TO THE PUBLIC HEALTH OR TO THE ENVIRONMENT A CLEAR, SUBSTANTIAL, AND IMMEDIATE
8 THREAT OF ACTUAL HARM TO THE PUBLIC HEALTH OR TO THE ENVIRONMENT.

9 (2) THE PERSON OR ENTITY SHALL PROVIDE INFORMATION IN WRITING SUPPORTING ITS
10 CLAIM THAT THE DISCLOSURE IS VOLUNTARY AT THE TIME THAT THE DISCLOSURE IS MADE TO THE
11 REGULATORY AUTHORITY OR WITHIN A REASONABLE TIME AFTER DISCLOSURE IS MADE. ALL
12 INFORMATION SUBMITTED TO A REGULATORY AGENCY REGARDING A VOLUNTARILY DISCLOSED
13 VIOLATION IS PUBLIC INFORMATION.

14 (3) THE ELIMINATION OF CIVIL, CRIMINAL, OR ADMINISTRATIVE PENALTIES UNDER THIS
15 SECTION DOES NOT APPLY IF A PERSON OR ENTITY HAS BEEN FOUND BY A COURT OR AN
16 ADMINISTRATIVE TRIBUNAL BODY TO HAVE COMMITTED SERIOUS VIOLATIONS THAT CONSTITUTE
17 A PATTERN OF CONTINUOUS OR REPEATED VIOLATIONS OF ENVIRONMENTAL LAWS, RULES, PERMIT
18 CONDITIONS, SETTLEMENT AGREEMENTS, OR ORDERS ON CONSENT, THAT WHEN TAKEN TOGETHER
19 ARE SERIOUS, AND THAT WERE BECAUSE OF SEPARATE AND DISTINCT EVENTS GIVING RISE TO THE
20 VIOLATIONS WITHIN THE 3-YEAR PERIOD PRIOR TO THE DATE OF DISCLOSURE.

21
22 NEW SECTION. SECTION 8. APPLICABILITY. [THIS ACT] APPLIES TO:

23 ~~(1) ONLY THOSE ENVIRONMENTAL SELF-EVALUATIONS THAT RESULT IN ENVIRONMENTAL~~
24 ~~SELF-EVALUATION REPORTS;~~

25 ~~(2) VOLUNTARILY DISCLOSED VIOLATIONS THAT ARE DISCLOSED AFTER [THE EFFECTIVE~~
26 ~~DATE OF THIS ACT]; AND~~

27 ~~(3) ALL LEGAL ACTIONS AND ADMINISTRATIVE ACTIONS COMMENCED ON OR AFTER [THE~~
28 ~~EFFECTIVE DATE OF THIS ACT]. (1) THE EVIDENTIARY PRIVILEGE CREATED BY [THIS ACT] APPLIES~~
29 ~~TO ENVIRONMENTAL SELF-EVALUATION REPORTS THAT ARE PREPARED AS A RESULT OF~~
30 ~~ENVIRONMENTAL SELF-EVALUATIONS AFTER [THE EFFECTIVE DATE OF THIS ACT] AND BEFORE [THE~~

1 TERMINATION DATE OF THIS ACT].

2 (2) THE LIMITED PROTECTION FOR VOLUNTARY DISCLOSURES CREATED BY [THIS ACT]
3 APPLIES TO VOLUNTARY DISCLOSURES THAT ARE MADE DURING THE PERIOD BEGINNING ON [THE
4 EFFECTIVE DATE OF THIS ACT] AND ENDING ON [THE TERMINATION DATE OF THIS ACT].

5 (3) [THIS ACT] APPLIES TO ALL LEGAL ACTIONS AND ADMINISTRATIVE ACTIONS COMMENCED
6 ON OR AFTER [THE EFFECTIVE DATE OF THIS ACT].

7 (4) ENVIRONMENTAL SELF-EVALUATION REPORTS THAT ARE PRIVILEGED UNDER [THIS ACT]
8 AND VOLUNTARY DISCLOSURES THAT ARE PROTECTED UNDER [THIS ACT] MUST REMAIN PRIVILEGED
9 AND PROTECTED AFTER [THE TERMINATION DATE OF THIS ACT].

10

11 NEW SECTION. SECTION 9. EFFECTIVE DATE. [THIS ACT] IS EFFECTIVE ON PASSAGE AND
12 APPROVAL.

13

14 NEW SECTION. SECTION 10. TERMINATION. [THIS ACT] TERMINATES JUNE 30, 2001.

15

-END-