

105TH CONGRESS
1ST SESSION

H. R. 1884

To establish limited privileges and immunities for certain information relating to compliance with environmental laws, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JUNE 12, 1997

Mr. HEFLEY introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committees on Commerce, Transportation and Infrastructure, Agriculture, and Resources, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To establish limited privileges and immunities for certain information relating to compliance with environmental laws, 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 Self-Evaluation Act”.

6 **SEC. 2. DEFINITIONS.**

7 As used in this Act:

1 (1) FEDERAL AGENCY.—The term “Federal
2 agency” means any agency (as defined in section
3 551 of title 5, United States Code) and any agency
4 or instrumentality of an Indian tribe, with authority
5 to administer or enforce any environmental law.

6 (2) STATE AGENCY.—The term “State agency”
7 means any agency or instrumentality of the execu-
8 tive branch of a State or local government with au-
9 thority to administer or enforce any environmental
10 law. The term also includes any agency or instru-
11 mentality of 2 or more States or local governments,
12 whether or not the localities are in different States.

13 (3) ENVIRONMENTAL LAW.—The term “envi-
14 ronmental law” means—

15 (A) each of the following Federal laws—

16 (i) the Federal Insecticide, Fungicide,
17 and Rodenticide Act (7 U.S.C. 136 et
18 seq.);

19 (ii) the Toxic Substances Control Act
20 (15 U.S.C. 2601 et seq.);

21 (iii) the Federal Water Pollution Con-
22 trol Act (33 U.S.C. 1251 et seq.);

23 (iv) the Safe Drinking Water Act
24 (title XIV of the Public Health Service
25 Act; 42 U.S.C. 300f and following);

1 (v) the Solid Waste Disposal Act (42
2 U.S.C. 6901 et seq.);

3 (vi) the Clean Air Act (42 U.S.C.
4 7401 et seq.);

5 (vii) the Comprehensive Environ-
6 mental Response, Compensation, and Li-
7 ability Act of 1980 (42 U.S.C. 9601 et
8 seq.);

9 (viii) the Emergency Planning and
10 Community Right-To-Know Act of 1986
11 (42 U.S.C. 11001 et seq.);

12 (ix) the Oil Pollution Act of 1980 (33
13 U.S.C. 2701 et seq.);

14 (x) the Noise Control Act of 1982 (42
15 U.S.C. 4901 et seq.);

16 (xi) the Pollution Prevention Act of
17 1990 (42 U.S.C. 13101 et seq.);

18 (xii) the Endangered Species Act (16
19 U.S.C. 1531 et seq.);

20 (xiii) the Surface Mining Control and
21 Reclamation Act (30 U.S.C. 1201);

22 (xiv) the Rivers and Harbors Act (33
23 U.S.C. 401–465);

24 (xv) the Hazardous Materials Trans-
25 portation Act (49 U.S.C. 1801–1813); and

1 (xvi) any other statute enacted after
2 the effective date of this Act that address-
3 es the same or similar subject matter; and

4 (B) any legal requirement in effect in a
5 State under a program delegated to the State
6 under a law listed in subparagraph (A) or
7 which the State is authorized to operate in lieu
8 of a Federal program under a law listed in sub-
9 paragraph (A).

10 Such term includes any regulation or other require-
11 ment issued under a law in subparagraph (A) or (B)
12 and the terms and conditions of any permit issued
13 under any such law.

14 (4) VOLUNTARY ENVIRONMENTAL SELF-EVAL-
15 UATION.—The term “voluntary environmental self-
16 evaluation” means a periodic and objective review or
17 investigation by an entity of such entity’s facility op-
18 erations and practices related to meeting environ-
19 mental requirements.

20 (5) ENVIRONMENTAL COMPLIANCE MANAGE-
21 MENT SYSTEM.—The term “environmental compli-
22 ance management system” means an entity’s sys-
23 tematic efforts (other than a voluntary environ-
24 mental self-evaluation), appropriate to the size and

1 nature of its business, to prevent, detect, and correct
2 violations through all of the following:

3 (A) Compliance policies, standards, and
4 procedures that identify how employees and
5 agents are to meet the requirements of laws,
6 regulations, permits, and other sources of au-
7 thority for environmental requirements.

8 (B) Assignment of overall responsibility for
9 overseeing compliance with policies, standards,
10 procedures, and assignment of specific respon-
11 sibility for assuring compliance at each facility
12 or operation.

13 (C) Mechanisms for systematically assur-
14 ing that compliance policies, standards, and
15 procedures are being carried out, including
16 monitoring systems reasonably designed to de-
17 tect and correct violations, and a means for em-
18 ployees or agents to report violations of envi-
19 ronmental requirements without fear of retalia-
20 tion.

21 (D) Efforts to communicate effectively the
22 entity's standards and procedures to all employ-
23 ees and other agents.

24 (E) Appropriate incentives to managers
25 and employees to perform in accordance with

1 the compliance policies, standards, and proce-
2 dures, including consistent enforcement through
3 appropriate disciplinary mechanisms.

4 (F) Procedures for the prompt and appro-
5 priate correction of any violations, and any nec-
6 essary modifications to the entity's program to
7 prevent future violations.

8 (6) VOLUNTARY ENVIRONMENTAL SELF-EVAL-
9 UATION REPORT.—(A) The term “voluntary environ-
10 mental self-evaluation report” means documents pre-
11 pared as a result of a voluntary environmental self-
12 evaluation. An environmental self-evaluation report
13 shall include any field notes, drafts, memoranda,
14 drawings, photographs, computer software or stored
15 information or electronically recorded information,
16 maps, charts, graphs, surveys, analyses (including
17 laboratory results, instrument readings, and field
18 analyses), or any other information pertaining to ob-
19 servations, findings, opinions, suggestions, or conclu-
20 sions, if such supporting information is collected or
21 developed for the primary purpose and in the course
22 of the self-evaluation.

23 (B) The report may include, but is neither lim-
24 ited to nor required to contain, the following general
25 component parts:

1 (i) A document prepared by the auditor or
2 evaluator, which may describe the scope of the
3 evaluation, the information learned, conclusions
4 and recommendations, and exhibits and appen-
5 dices.

6 (ii) An analysis of a portion or all of the
7 self-evaluation or issues arising therefrom.

8 (iii) An implementation plan or tracking
9 system that addresses actions taken or to be
10 taken by the entity as a result of the self-eval-
11 uation.

12 (7) CIVIL PROCEEDINGS.—The term “civil pro-
13 ceeding” includes any administrative or civil judicial
14 proceeding, including those for suspension, or listing.

15 (8) ENTITY.—The term “entity” means any
16 partnership, association, or corporation regulated
17 under an environmental law, including any officer,
18 agent, or employee thereof.

19 (9) PERSON.—The term “person” includes an
20 individual, corporation, partnership, association,
21 State, municipality, political subdivision of a State
22 and the United States, as well as any agency, instru-
23 mentality, officer, agent, or employee thereof.

24 (10) STATE.—The term “State” means a State,
25 the District of Columbia, the Commonwealth of

1 Puerto Rico, the Virgin Islands, Guam, American
2 Samoa, and includes the Commonwealth of the
3 Northern Mariana Islands.

4 **SEC. 3. NONDISCLOSURE PRIVILEGE.**

5 (a) IN GENERAL.—No information contained in any
6 voluntary environmental self-evaluation report, and no tes-
7 timony relating to a voluntary environmental self-evalua-
8 tion shall be admissible evidence in any Federal or State
9 administrative or judicial proceeding under any environ-
10 mental law or subject to discovery in any such proceeding,
11 except as otherwise provided in this section.

12 (b) INFORMATION NOT SUBJECT TO PRIVILEGE.—
13 The privilege under subsection (a) shall not apply to—

14 (1) any information required to be developed,
15 maintained, or reported pursuant to any environ-
16 mental law; or

17 (2) information with respect to an entity's spe-
18 cific intentional or willful violation of an environ-
19 mental law.

20 (c) WAIVER.—Any entity entitled to a privilege of
21 nondisclosure under subsection (a) may waive such privi-
22 lege by means of an express written statement specifically
23 describing the information to which such waiver applies.
24 No disclosure of information pursuant to a confidentiality
25 agreement in a business or financial transaction shall be

1 considered to be an express written statement waiving the
2 privileges under this section.

3 (d) IN CAMERA HEARING.—Whenever any person
4 seeks to obtain any information described in subsection
5 (a) from any other entity for use in any administrative
6 or judicial proceeding, if such other entity refuses to dis-
7 close the information on the basis of a privilege under sub-
8 section (a), the person seeking disclosure may request an
9 administrative law judge (in the case of an administrative
10 proceeding) or the court (in the case of any civil or crimi-
11 nal proceeding) to convene an in camera proceeding to de-
12 termine the application of the privilege. The administra-
13 tive law judge or the court shall initiate such a proceeding
14 and require disclosure of such information to the court
15 under seal for purposes of making such determination. In
16 any such hearing, the entity asserting the privilege shall
17 have the burden of asserting a prima facie basis for the
18 privilege and the person seeking disclosure shall have the
19 burden of persuasion that the privilege should not apply.

20 (e) CIVIL PROCEEDINGS.—The privilege under sub-
21 section (a) shall not apply in any civil proceeding if the
22 administrative law judge (in the case of an administrative
23 proceeding) or the court (in the case of a judicial proceed-
24 ing) determines, in an in camera proceeding under sub-
25 section (d), that—

1 (1) the report, finding, opinion, or other docu-
2 ment or communication or testimony indicates non-
3 compliance with an environmental law by such en-
4 tity, and such entity failed to initiate efforts to
5 achieve compliance with the law within a reasonable
6 period of time in a manner consistent with applica-
7 ble provisions of law;

8 (2) such entity is asserting the applicability of
9 the privilege under this section for a fraudulent pur-
10 pose; or

11 (3) the report was prepared for the purpose of
12 avoiding disclosure of information required for a
13 then pending or imminent specific investigative, ad-
14 ministrative, or judicial proceeding of which the en-
15 tity had actual or constructive knowledge.

16 Whenever an administrative law judge or a court has ruled
17 under this subsection that on the applicability of the privi-
18 lege to any report, finding, opinion, or other document or
19 communication or testimony of any entity, such entity or
20 such person, as the case may be, may appeal such ruling
21 to the appropriate United States district court (in the case
22 of an administrative law judge) or to the appropriate court
23 of appeals (in the case of a ruling by a court) and such
24 court shall review such ruling and issue a decision on the
25 appeal within 30 days after the filing of the appeal.

1 (f) CRIMINAL PROCEEDINGS.—The privilege under
2 subsection (a) shall not apply in any criminal proceeding
3 brought by a Federal or State agency if the court, in an
4 in camera hearing, makes any determination referred to
5 in subsection (e). A law enforcement official, having prob-
6 able cause (based upon information obtained from a
7 source independent of a voluntary environmental self-eval-
8 uation report) to believe that a criminal offense has been
9 committed under any of the covered environmental laws
10 and that the report constitutes evidence of such offense,
11 may obtain the report pursuant to a lawful search and
12 seizure. However, upon taking possession of the report,
13 the law enforcement official shall immediately place it
14 under seal and shall not review, disclose or otherwise use
15 the contents of the report in any way, unless the person
16 or entity for whom the report was prepared expressly
17 waives its protected status pursuant to subsection (c) or
18 the court determines that the report is subject to dislo-
19 sure in an in camera hearing under subsection (d). During
20 any such hearing, the court shall permit the agency to re-
21 view, but not to disclose or use the information for pur-
22 poses of any investigation or proceeding.

1 **SEC. 4. IMMUNITY FOR CERTAIN VOLUNTARY DISCLO-**
2 **SURES.**

3 (a) IN GENERAL.—Whenever any entity has disclosed
4 to the Federal or State agency administering any environ-
5 mental law information relating to the violation by such
6 entity of such environmental law as a result of a voluntary
7 environmental self-evaluation performed by such entity or
8 an environmental compliance management system used by
9 such entity, such entity shall be immune from prosecution
10 in any Federal or State administrative, civil, or criminal
11 proceeding regarding such violation (other than a criminal
12 proceeding for conduct involving specific intent to violate
13 the law), and the information disclosed shall not be admis-
14 sible in any court or administrative proceeding, if—

15 (1) such entity (or officer, employee, or agent)
16 ensures that the disclosure is made promptly after
17 receiving knowledge of the information;

18 (2) such entity (or officer, employee, or agent)
19 initiates efforts to achieve compliance in a manner
20 consistent with applicable provisions of law of which
21 the entity had actual constructive knowledge;

22 (3) such entity (or officer, employee, or agent)
23 is not asserting the applicability of the immunity
24 under this section for a fraudulent purpose;

25 (4) such information is not disclosed for the
26 purpose of avoiding penalties in an investigative, ad-

1 ministrative, or judicial proceeding that, at the time
2 of disclosure, was imminent or in progress; and

3 (5) such entity (or officer, employee, or agent)
4 discloses such other information relating to the vio-
5 lation as the agency concerned reasonably requests,
6 other than information subject to a nondisclosure
7 privilege under section 3 or under any other author-
8 ity of law.

9 (b) EXCLUSIONS.—The immunity under subsection
10 (a) shall not apply to an entity if the violation concerned
11 is part of a pattern of significant violations (counting any
12 multiday occurrence stemming from the same cause as a
13 single violation) that has occurred within the past 3 years
14 at the same facility or at different facilities under the com-
15 mon control of an entity whose senior management had
16 actual knowledge of the violations and failed to take timely
17 corrective action. For purposes of this section, a violation
18 is any violation of an environmental law identified in a
19 judicial or administrative order, consent agreement or
20 order, conviction, or plea agreement.

21 (c) PROCEDURE.—

22 (1) PRESUMPTION.—Whenever an entity volun-
23 tarily discloses to a Federal or State agency infor-
24 mation relating to the violation by such entity of an
25 environmental law, if such information was obtained

1 as a result of a voluntary environmental self-evalua-
2 tion, or from an environmental compliance manage-
3 ment system, the entity shall be presumed to be en-
4 titled to immunity under this section with respect to
5 such violation if the entity provides information sup-
6 porting a claim that the entity is qualified for such
7 immunity at the time the entity makes the disclo-
8 sure. Such presumption shall be conclusive unless
9 challenged by the agency within 60 days of the dis-
10 closure.

11 (2) JUDICIAL DETERMINATION.—An entity may
12 request the appropriate United States district court
13 for a determination regarding whether or not the im-
14 munity under subsection (a) is applicable to such en-
15 tity with respect to any violation.

16 **SEC. 5. SAVINGS CLAUSE.**

17 (a) AUTHORITY TO ISSUE CERTAIN ORDERS.—Noth-
18 ing in this Act shall be construed to affect the authority
19 of a Federal or State agency responsible for administering
20 an environmental law to issue a cease and desist order
21 or to seek a temporary restraining order or injunction for
22 any violation of an environmental law.

23 (b) STATE PRIVILEGES AND IMMUNITIES.—Nothing
24 in this Act shall be construed to limit any privilege against
25 disclosure in effect under State law. Nothing in this Act

1 shall be construed to limit any immunity available to any
2 person under State law.

3 **SEC. 6. EFFECTIVE DATE.**

4 This Act shall take effect with respect to civil and
5 criminal proceedings commenced after the enactment of
6 this Act.

