COMMITTEE ON BORDER SECURITY, FEDERALISM AND STATES SOVEREIGNTY

SENATE AMENDMENTS TO H.B. 2199

(Reference to House engrossed bill)

1 Strike everything after the enacting clause and insert:
2 "Section 1. Title 49, Arizona Revised Statutes, is amended by adding
3 chapter 10, to read:
4 CHAPTER 10
5 ENVIRONMENTAL AUDIT PRIVILEGE
6 ARTICLE 1. GENERAL PROVISIONS
7 49-1401. Definitions
8 IN THIS CHAPTER, UNLESS THE CONTEXT OTHERWISE REQUIRES:
9 1. "ACTUAL HARM" MEANS DAMAGE, LOSS OR INJURY.
10 2. "AUDIT REPORT" MEANS AN AUDIT REPORT PRESCRIBED BY SECTION 49-1402.
11 3. "ENVIRONMENTAL LAW" MEANS A FEDERAL, STATE OR LOCAL LAW, RULE,
12 REGULATION OR ORDINANCE, OR A PERMIT ISSUED UNDER A FEDERAL, STATE OR LOCAL
13 LAW, RULE, REGULATION OR ORDINANCE, RELATING TO PROTECTION OF THE
14 ENVIRONMENT.
15 4. "ORGANIZATION" MEANS A COMPANY, CORPORATION, POLITICAL SUBDIVISION,
16 FIRM, ENTERPRISE OR INSTITUTION, OR ANY PART OR COMBINATION THEREOF, WHETHER
17 INCORPORATED OR NOT, PUBLIC OR PRIVATE, THAT HAS ITS OWN FUNCTIONS AND
18 ADMINISTRATION. FOR ORGANIZATIONS WITH MORE THAN ONE OPERATING UNIT, A SINGLE
19 OPERATING UNIT MAY BE DEFINED AS AN ORGANIZATION.
20 5. "PERSON" HAS THE SAME MEANING PRESCRIBED IN SECTION 49-201.
21 6. "REGULATED FACILITY OR OPERATION" MEANS A FACILITY OR OPERATION
22 THAT IS REGULATED UNDER AN ENVIRONMENTAL LAW.
23 49-1402. Audit report; contents
24 A. AN AUDIT REPORT SHALL INCLUDE EACH DOCUMENT AND COMMUNICATION,
25 OTHER THAN THOSE SET FORTH IN SECTION 49-1406, THAT IS CREATED FOR AN
26 ENVIRONMENTAL AUDIT TO EVALUATE COMPLIANCE WITH ENVIRONMENTAL LAWS.
27 B. AN AUDIT REPORT MAY INCLUDE THE FOLLOWING:
28 1. A REPORT PREPARED BY AN AUDITOR, CONSULTANT, MONITOR OR OTHER
29 SIMILAR PERSON, WHICH MAY INCLUDE:

(a) A DESCRIPTION OF THE SCOPE OF THE AUDIT.

(b) THE INFORMATION GAINED IN THE AUDIT AND FINDINGS, CONCLUSIONS AND RECOMMENDATIONS.

(c) EXHIBITS AND APPENDICES.

2. MEMORANDA AND DOCUMENTS ANALYZING ALL OR A PORTION OF THE MATERIALS DESCRIBED BY SUBSECTION C, PARAGRAPH 1 OF THIS SECTION OR DISCUSSING IMPLEMENTATION ISSUES.

3. AN IMPLEMENTATION PLAN OR TRACKING SYSTEM TO CORRECT PAST NONCOMPLIANCE, IMPROVE CURRENT COMPLIANCE OR PREVENT FUTURE NONCOMPLIANCE.

C. THE TYPES OF EXHIBITS AND APPENDICES THAT MAY BE CONTAINED IN AN AUDIT REPORT INCLUDE SUPPORTING INFORMATION THAT IS COLLECTED OR DEVELOPED FOR THE PRIMARY PURPOSE OF AND GATHERED IN THE COURSE OF AN ENVIRONMENTAL AUDIT, INCLUDING:

1. INTERVIEWS WITH CURRENT OR FORMER EMPLOYEES.

2. FIELD NOTES AND RECORDS OF OBSERVATIONS.

3. FINDINGS, OPINIONS, SUGGESTIONS, CONCLUSIONS, GUIDANCE, NOTES, DRAFTS AND MEMORANDA.

4. LEGAL ANALYSES.

5. DRAWINGS.

6. PHOTOGRAPHS.

7. LABORATORY ANALYSES AND OTHER ANALYTICAL DATA.

8. COMPUTER GENERATED OR ELECTRONICALLY RECORDED INFORMATION.

9. MAPS, CHARTS, GRAPHS AND SURVEYS.

10. OTHER COMMUNICATIONS ASSOCIATED WITH AN ENVIRONMENTAL AUDIT.

D. TO FACILITATE IDENTIFICATION, EACH DOCUMENT IN AN AUDIT REPORT SHOULD BE LABELED "COMPLIANCE REPORT: PRIVILEGED DOCUMENT" OR LABELED WITH WORDS OF SIMILAR IMPORT. THE FAILURE TO LABEL A DOCUMENT DOES NOT CONSTITUTE A WAIVER OF THE AUDIT PRIVILEGE OR CREATE A PRESUMPTION THAT THE PRIVILEGE DOES OR DOES NOT APPLY.

E. ONCE INITIATED, AN AUDIT SHALL BE COMPLETED WITHIN A REASONABLE TIME NOT TO EXCEED SIX MONTHS UNLESS AN EXTENSION IS BASED ON REASONABLE GROUNDS.

1 49-1403. Privilege
2 A. EXCEPT AS PROVIDED IN SECTIONS 49-1404, 49-1405 AND 49-1406, ANY
3 PART OF AN AUDIT REPORT IS PRIVILEGED AND IS NOT ADMISSIBLE AS EVIDENCE OR
4 SUBJECT TO DISCOVERY IN ANY OF THE FOLLOWING:
5 1. A CIVIL ACTION, WHETHER LEGAL OR EQUITABLE.
6 2. AN ADMINISTRATIVE PROCEEDING.
7 B. WHEN CALLED OR SUBPOENAED AS A WITNESS, A PERSON CANNOT BE
8 COMPELLED TO TESTIFY OR PRODUCE A DOCUMENT RELATED TO AN AUDIT IF BOTH OF THE
9 FOLLOWING APPLY:
10 1. THE TESTIMONY OR DOCUMENT DISCLOSES ANY PRIVILEGED PART OF AN AUDIT
11 REPORT OR ANY ITEM LISTED IN SECTION 49-1402.
12 2. FOR THE PURPOSES OF THIS SUBSECTION ONLY, THE PERSON IS:
13 (a) A PERSON WHO CONDUCTED ANY PORTION OF THE AUDIT BUT WHO DID NOT
14 PERSONALLY OBSERVE THE PHYSICAL EVENTS.
15 (b) A PERSON TO WHOM THE AUDIT RESULTS ARE DISCLOSED UNDER SECTION 49-
16 1404, SUBSECTION B.
17 (c) A CUSTODIAN OF THE AUDIT RESULTS.
18 C. A PERSON WHO CONDUCTS OR PARTICIPATES IN THE PREPARATION OF AN
19 ENVIRONMENTAL AUDIT AND WHO HAS ACTUALLY OBSERVED PHYSICAL EVENTS OF
20 VIOLATION MAY TESTIFY REGARDING THOSE EVENTS BUT MAY NOT BE COMPELLED TO
21 TESTIFY ABOUT OR PRODUCE DOCUMENTS RELATED TO ANY PRIVILEGED PART OF AN AUDIT
22 OR ANY ITEM LISTED IN SECTION 49-1402.
23 D. A STATE AGENCY EMPLOYEE MAY NOT REQUEST, REVIEW OR OTHERWISE USE AN
24 AUDIT REPORT DURING AN AGENCY INSPECTION OF A REGULATED FACILITY OR OPERATION
25 OR AN ACTIVITY OF A REGULATED FACILITY OR OPERATION.
26 E. A PARTY ASSERTING THE PRIVILEGE PRESCRIBED IN THIS SECTION HAS THE
27 BURDEN OF ESTABLISHING THE APPLICABILITY OF THE PRIVILEGE.

1 49-1404. Exception; waiver; violation; classification
2 A. THE PRIVILEGE PRESCRIBED IN SECTION 49-1403 DOES NOT APPLY TO THE
3 EXTENT THE PRIVILEGE IS EXPRESSLY WAIVED BY THE OWNER OR OPERATOR WHO
4 PREPARED THE AUDIT REPORT OR CAUSED THE REPORT TO BE PREPARED.
5 B. DISCLOSURE OF AN AUDIT REPORT OR ANY INFORMATION GENERATED BY AN
6 ENVIRONMENTAL AUDIT DOES NOT WAIVE THE PRIVILEGE ESTABLISHED BY SECTION
7 49-1403, IF THE DISCLOSURE COMPLIES WITH ANY OF THE FOLLOWING:
8 1. IS MADE TO ADDRESS OR CORRECT A MATTER RAISED BY THE ENVIRONMENTAL
9 AUDIT AND IS MADE ONLY TO:
10 (a) A PERSON EMPLOYED BY THE OWNER OR OPERATOR, INCLUDING TEMPORARY
11 AND CONTRACT EMPLOYEES.
12 (b) A LEGAL REPRESENTATIVE OF THE OWNER OR OPERATOR.
13 (c) AN OFFICER OR DIRECTOR OF THE REGULATED FACILITY OR OPERATION OR A
14 PARTNER OF THE OWNER OR OPERATOR.
15 (d) AN INDEPENDENT CONTRACTOR RETAINED BY THE OWNER OR OPERATOR,
16 INCLUDING ITS INDEPENDENT EXTERNAL AUDITORS.
17 2. IS MADE UNDER THE TERMS OF A CONFIDENTIALITY AGREEMENT BETWEEN THE
18 PERSON FOR WHOM THE AUDIT REPORT WAS PREPARED OR THE OWNER OR OPERATOR OF THE
19 AUDITED FACILITY OR OPERATION AND ANY OF THE FOLLOWING:
20 (a) A PARTNER OR POTENTIAL PARTNER OF THE OWNER OR OPERATOR OF THE
21 REGULATED FACILITY OR OPERATION.
22 (b) A TRANSFEREE OR POTENTIAL TRANSFEREE OF THE REGULATED FACILITY OR
23 OPERATION.
24 (c) A LENDER OR POTENTIAL LENDER FOR THE REGULATED FACILITY OR
25 OPERATION.
26 (d) A GOVERNMENTAL OFFICIAL OF A STATE.
27 (e) A PERSON OR ENTITY ENGAGED IN THE BUSINESS OF INSURING,
28 UNDERWRITING OR INDEMNIFYING THE FACILITY OR OPERATION.
29 3. IS MADE UNDER A CLAIM OF CONFIDENTIALITY TO A GOVERNMENTAL OFFICIAL
30 OR AGENCY BY THE PERSON FOR WHOM THE AUDIT REPORT WAS PREPARED OR BY THE
31 OWNER OR OPERATOR.

C. A PARTY TO A CONFIDENTIALITY AGREEMENT DESCRIBED IN SUBSECTION B, PARAGRAPH 2 OF THIS SECTION WHO VIOLATES THAT AGREEMENT IS LIABLE FOR DAMAGES CAUSED BY THE DISCLOSURE AND FOR ANY OTHER PENALTIES PRESCRIBED IN THE CONFIDENTIALITY AGREEMENT.

D. INFORMATION THAT IS DISCLOSED UNDER SUBSECTION B, PARAGRAPH 3 OF THIS SECTION IS CONFIDENTIAL AND IS NOT SUBJECT TO DISCLOSURE. AN ENTITY, EMPLOYEE OR OFFICIAL OF THIS STATE WHO DISCLOSES INFORMATION IN VIOLATION OF THIS SUBSECTION IS GUILTY OF A CLASS 1 MISDEMEANOR. IT IS AN AFFIRMATIVE DEFENSE TO THE CLERICAL DISSEMINATION OF A PRIVILEGED AUDIT REPORT THAT THE REPORT WAS NOT CLEARLY LABELED "COMPLIANCE REPORT: PRIVILEGED DOCUMENT" OR LABELED WITH WORDS OF SIMILAR IMPORT AS PRESCRIBED BY SECTION 49-1402. THE LACK OF LABELING MAY NOT BE RAISED AS A DEFENSE IF THE ENTITY, EMPLOYEE OR OFFICIAL KNEW OR HAD REASON TO KNOW THAT THE DOCUMENT WAS A PRIVILEGED AUDIT REPORT.

E. THIS SECTION SHALL NOT BE CONSTRUED TO CIRCUMVENT THE PROTECTIONS PROVIDED BY FEDERAL OR STATE LAW FOR INDIVIDUALS WHO DISCLOSE INFORMATION TO LAW ENFORCEMENT AUTHORITIES.

49-1405. Exception; disclosure required by court or administrative hearing official

A. A COURT OR ADMINISTRATIVE HEARING OFFICIAL WITH COMPETENT JURISDICTION MAY REQUIRE DISCLOSURE OF A PORTION OF AN AUDIT REPORT IN A CIVIL OR ADMINISTRATIVE PROCEEDING IF THE COURT OR ADMINISTRATIVE HEARING OFFICIAL DETERMINES AFTER AN IN CAMERA REVIEW CONSISTENT WITH THE APPROPRIATE RULES OF PROCEDURE THAT ANY OF THE FOLLOWING APPLIES:

1. THE PRIVILEGE IS ASSERTED FOR A FRAUDULENT PURPOSE.

2. THE PORTION OF THE AUDIT REPORT IS NOT SUBJECT TO THE PRIVILEGE UNDER SECTION 49-1406.

3. THE PORTION OF THE AUDIT REPORT SHOWS EVIDENCE OF NONCOMPLIANCE WITH AN ENVIRONMENTAL LAW AND APPROPRIATE EFFORTS TO ACHIEVE COMPLIANCE WITH THE LAW WERE NOT PROMPTLY INITIATED AND PURSUED WITH REASONABLE DILIGENCE AFTER THE DISCOVERY OF THE NONCOMPLIANCE.

B. A PARTY SEEKING DISCLOSURE UNDER THIS SECTION HAS THE BURDEN OF PROVING THAT SUBSECTION A OF THIS SECTION APPLIES.

C. NOTWITHSTANDING ANY OTHER LAW, A DISCLOSURE DECISION OF AN ADMINISTRATIVE HEARING OFFICIAL UNDER SUBSECTION A OF THIS SECTION IS DIRECTLY APPEALABLE TO A COURT OF COMPETENT JURISDICTION WITHOUT DISCLOSURE OF THE AUDIT REPORT TO ANY PERSON UNLESS SO ORDERED BY THE COURT.

D. A PERSON CLAIMING THE PRIVILEGE TO AVOID THE REQUESTED DISCLOSURE OF MATERIALS IS SUBJECT TO SANCTIONS AS PRESCRIBED BY THE ARIZONA RULES OF CIVIL PROCEDURE OR TO A FINE NOT TO EXCEED TEN THOUSAND DOLLARS IF THE COURT FINDS, CONSISTENT WITH FUNDAMENTAL DUE PROCESS, THAT THE PERSON INTENTIONALLY OR KNOWINGLY CLAIMED THE PRIVILEGE FOR NONPRIVILEGED MATERIALS AS PRESCRIBED BY SECTION 49-1406.

E. A COURT DETERMINATION UNDER THIS SECTION IS SUBJECT TO INTERLOCUTORY APPEAL TO AN APPROPRIATE APPELLATE COURT.

49-1406. Nonprivileged materials

A. THE PRIVILEGE DESCRIBED IN THIS CHAPTER DOES NOT APPLY TO:

1. A DOCUMENT, COMMUNICATION, DATUM OR REPORT OR OTHER INFORMATION REQUIRED BY A REGULATORY AGENCY TO BE COLLECTED, DEVELOPED, MAINTAINED OR REPORTED UNDER AN ENVIRONMENTAL LAW.

2. INFORMATION OBTAINED BY OBSERVATION, SAMPLING OR MONITORING BY A REGULATORY AGENCY.

3. INFORMATION OBTAINED FROM A SOURCE NOT INVOLVED IN THE PREPARATION OF THE ENVIRONMENTAL AUDIT REPORT.

B. THIS SECTION DOES NOT LIMIT THE RIGHT OF A PERSON TO AGREE TO CONDUCT AND DISCLOSE AN AUDIT REPORT.

49-1407. Review of privileged document by governmental authority

A. IF AN AUDIT REPORT IS OBTAINED, REVIEWED OR USED IN A CRIMINAL PROCEEDING, THE ADMINISTRATIVE OR CIVIL EVIDENTIARY PRIVILEGE ESTABLISHED BY THIS CHAPTER IS NOT WAIVED OR ELIMINATED FOR ANY OTHER PURPOSE.

B. NOTWITHSTANDING THE PRIVILEGE ESTABLISHED BY THIS CHAPTER, A REGULATORY AGENCY MAY REVIEW INFORMATION IN AN AUDIT REPORT THAT IS REQUIRED

TO BE AVAILABLE UNDER A SPECIFIC STATE OR FEDERAL LAW, BUT THAT REVIEW DOES NOT WAIVE OR ELIMINATE THE ADMINISTRATIVE OR CIVIL EVIDENTIARY PRIVILEGE EXCEPT FOR MATERIALS PRESCRIBED IN SECTION 49-1406.

C. IF INFORMATION IS REQUIRED TO BE AVAILABLE TO THE PUBLIC BY OPERATION OF A SPECIFIC STATE OR FEDERAL LAW, THE GOVERNMENTAL AUTHORITY SHALL NOTIFY THE PERSON CLAIMING THE PRIVILEGE OF THE POTENTIAL FOR PUBLIC DISCLOSURE BEFORE OBTAINING THAT INFORMATION PURSUANT TO SUBSECTION A OR B OF THIS SECTION.

D. IF PRIVILEGED INFORMATION IS DISCLOSED UNDER SUBSECTION B OR C OF THIS SECTION, ON THE MOTION OF A PARTY, A COURT OR THE APPROPRIATE ADMINISTRATIVE OFFICIAL SHALL SUPPRESS EVIDENCE OFFERED IN ANY CIVIL OR ADMINISTRATIVE PROCEEDING THAT ARISES OR IS DERIVED FROM REVIEW, DISCLOSURE OR USE OF INFORMATION OBTAINED UNDER THIS SECTION IF THE REVIEW, DISCLOSURE, OR USE IS NOT AUTHORIZED UNDER SECTION 49-1406. A PARTY THAT HAS RECEIVED INFORMATION UNDER SUBSECTION B OR C OF THIS SECTION HAS THE BURDEN OF PROVING THAT THE EVIDENCE OFFERED DID NOT ARISE AND WAS NOT DERIVED FROM THE REVIEW OF PRIVILEGED INFORMATION.

49-1408. Construction; no immunity

NOTHING IN THIS ARTICLE SHALL BE CONSTRUED TO PROVIDE CIVIL OR CRIMINAL IMMUNITY TO A PERSON OR ORGANIZATION."

Amend title to conform

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