

107TH CONGRESS  
1ST SESSION

# H. R. 352

To establish certain privileges and immunities for information disclosed as part of a voluntary self-evaluation of compliance with environmental requirements, relating to compliance with environmental laws, and for other purposes.

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## IN THE HOUSE OF REPRESENTATIVES

JANUARY 31, 2001

Mr. HEFLEY introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committees on Energy and 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

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## A BILL

To establish certain privileges and immunities for information disclosed as part of a voluntary self-evaluation of compliance with environmental requirements, 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”.

1 **SEC. 2. DEFINITIONS.**

2 As used in this Act:

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

7 (2) STATE AGENCY.—The term “State agency”  
8 means any agency or instrumentality of the execu-  
9 tive branch of a State or local government with au-  
10 thority to administer or enforce any environmental  
11 law.

12 (3) ENVIRONMENTAL LAW.—The term “envi-  
13 ronmental law” means the following:

14 (A) Each of the following Federal laws:

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

18 (ii) The Toxic Substances Control Act  
19 (15 U.S.C. 2601 et seq.).

20 (iii) The Federal Water Pollution  
21 Control Act (33 U.S.C. 1251 et seq.).

22 (iv) The Safe Drinking Water Act (42  
23 U.S.C. 300f et seq.).

24 (v) The solid Waste Disposal Act (42  
25 U.S.C. 6901 et seq.).

1 (vi) The Clean Air Act (42 U.S.C.  
2 7401 et seq.).

3 (vii) The Comprehensive Environ-  
4 mental Response, Compensation, and Li-  
5 ability Act of 1980 (42 U.S.C. 9601 et  
6 seq.).

7 (viii) The Emergency Planning and  
8 Community Right-To-Know Act of 1986  
9 (42 U.S.C. 11001 et seq.).

10 (ix) The Oil Pollution Act of 1980 (33  
11 U.S.C. 2701 et seq.).

12 (x) The Noise Control Act of 1982  
13 (42 U.S.C. 4901 et seq.).

14 (xi) The Pollution Prevention Act of  
15 1990 (42 U.S.C. 13101 et seq.).

16 (xii) The Endangered Species Act (16  
17 U.S.C. 1531 et seq.).

18 (xiii) The Surface Mining Control and  
19 Reclamation Act (30 U.S.C. 1201).

20 (xiv) The Rivers and Harbors Act (33  
21 U.S.C. 401–465).

22 (xv) The Hazardous Materials Trans-  
23 portation Act (49 U.S.C. 1801–1813).

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

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 by  
17                  regulated entities of facility operations and practices  
18                  related to meeting environmental requirements. Such  
19                  term shall not include an environmental compliance  
20                  management system.

21                  (5) ENVIRONMENTAL COMPLIANCE MANAGE-  
22                  MENT SYSTEM.—The term “environmental compli-  
23                  ance management system” encompasses the regu-  
24                  lated entity’s systematic efforts, appropriate to the

1 size and nature of its business, to prevent, detect,  
2 and correct 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 responsi-  
11 bility for assuring compliance at each facility or  
12 operation.

13 (C) Mechanisms for systematically assur-  
14 ing that compliance policies, standards, and  
15 procedures are being carried out, including  
16 monitoring and auditing systems reasonably de-  
17 signed to detect and correct violations, periodic  
18 evaluation of the overall performance of the  
19 compliance management system, and a means  
20 for employees or agents to report violations of  
21 environmental requirements without fear of re-  
22 taliation.

23 (D) Efforts to communicate effectively the  
24 regulated entity's standards and procedures to  
25 all employees and other agents.

1           (E) Appropriate incentives to managers  
2           and employees to perform in accordance with  
3           the compliance policies, standards, and proce-  
4           dures, including consistent enforcement through  
5           appropriate disciplinary mechanisms.

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

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

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

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

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

11 (iii) An implementation plan or tracking  
12 system that addresses actions taken or to be  
13 taken by the owner or operator of the facility  
14 as a result of the self-evaluation.

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

18 (8) REGULATED ENTITY.—The term “regulated  
19 entity” means an entity, including a Federal, State,  
20 or municipal agency or facility, regulated under an  
21 environmental law.

22 **SEC. 3. NONDISCLOSURE PRIVILEGE.**

23 (a) IN GENERAL.—No information contained in any  
24 voluntary environmental self-evaluation report, and no tes-  
25 timony relating to a voluntary environmental self-evalua-

1 tion shall be admissible evidence in any Federal or State  
2 administrative or judicial proceeding under any environ-  
3 mental law or subject to discovery in any such proceeding,  
4 except as otherwise provided in this section.

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

7 (1) any information required to be developed,  
8 maintained, or reported pursuant to any environ-  
9 mental law; or

10 (2) information with respect to a regulated enti-  
11 ty's specific intentional or willful violation of an en-  
12 vironmental law.

13 (c) WAIVER.—Any entity entitled to a privilege of  
14 nondisclosure under subsection (a) may waive such privi-  
15 lege by means of an express written statement specifically  
16 describing the information to which such waiver applies.  
17 No disclosure of information pursuant to a confidentiality  
18 agreement in a business or financial transaction shall be  
19 considered to be an express written statement waiving the  
20 privileges under this section.

21 (d) IN CAMERA HEARING.—Whenever any person  
22 seeks to obtain any information described in subsection  
23 (a) from any other entity for use in any administrative  
24 or judicial proceeding, if such other entity refuses to dis-  
25 close the information on the basis of a privilege under sub-

1 section (a), the person seeking disclosure may request an  
2 administrative law judge (in the case of an administrative  
3 proceeding) or the court (in the case of any civil or crimi-  
4 nal proceeding) to convene an in camera proceeding to de-  
5 termine the application of the privilege. The administra-  
6 tive law judge or the court shall initiate such a proceeding  
7 and require disclosure of such information to the court  
8 under seal for purposes of making such determination. In  
9 any such hearing, the entity asserting the privilege shall  
10 have the burden of asserting a prima facie basis for the  
11 privilege and the person seeking disclosure shall have the  
12 burden of persuasion that the privilege should not apply.

13 (e) CIVIL PROCEEDINGS.—The privilege under sub-  
14 section (a) shall not apply in any civil proceeding if the  
15 administrative law judge (in the case of an administrative  
16 proceeding) or the court (in the case of a judicial pro-  
17 ceeding) determines, in an in camera proceeding under  
18 subsection (d), that—

19 (1) the report, finding, opinion, or other docu-  
20 ment or communication or testimony indicates non-  
21 compliance with an environmental law by such enti-  
22 ty, and such entity failed to initiate efforts to  
23 achieve compliance with the law within a reasonable  
24 period of time in a manner consistent with applica-  
25 ble provisions of law;

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

4           (3) the report was prepared for the purpose of  
5           avoiding disclosure of information required for a  
6           then pending or imminent specific investigative, ad-  
7           ministrative, or judicial proceeding of which the reg-  
8           ulated entity had knowledge.

9 Whenever an administrative law judge or a court has ruled  
10 under this subsection that the privilege does or does not  
11 apply to any report, finding, opinion, or other document  
12 or communication or testimony of any entity, such entity  
13 may appeal such ruling to the appropriate United States  
14 district court (in the case of an administrative law judge)  
15 or to the appropriate court of appeals (in the case of a  
16 ruling by a court) and such court shall review such ruling  
17 and issue a decision on the appeal within 30 days after  
18 the filing of the appeal.

19           (f) CRIMINAL PROCEEDINGS.—The privilege under  
20 subsection (a) shall not apply in any criminal proceeding  
21 if the court, in an in camera hearing, makes any deter-  
22 mination referred to in subsection (e). A law enforcement  
23 official, having probable cause (based upon information  
24 obtained from a source independent of a voluntary envi-  
25 ronmental self-evaluation report) to believe that a criminal

1 offense has been committed under any of the covered envi-  
2 ronmental laws and that the report constitutes evidence  
3 of such offense, may obtain the report pursuant to a lawful  
4 search and seizure. However, upon taking possession of  
5 the report, the law enforcement official shall immediately  
6 place it under seal and shall not review, disclose, or other-  
7 wise use the contents of the report in any way, unless the  
8 person or entity for whom the report was prepared ex-  
9 pressly waives its protected status pursuant to subsection  
10 (c) or the court determines that the report is subject to  
11 disclosure in an in camera hearing under subsection (d).  
12 During any such hearing, the court shall permit the agen-  
13 cy to review, but not to disclose or use the information  
14 for purposes of any investigation or proceeding.

15 **SEC. 4. IMMUNITY FOR CERTAIN VOLUNTARY DISCLO-**  
16 **SURES.**

17 (a) IN GENERAL.—Whenever any entity has disclosed  
18 to the Federal or State agency administering any environ-  
19 mental law information relating to the violation by such  
20 entity of such environmental law as a result of a voluntary  
21 environmental self-evaluation performed by such entity or  
22 an environmental compliance management system used by  
23 such entity, such entity and officers, employees, and  
24 agents of such entity shall be immune from prosecution  
25 in any Federal or State administrative, civil, or criminal

1 proceeding regarding such violation (other than a criminal  
2 proceeding for conduct involving specific intent to violate  
3 the law), and the information disclosed shall not be admis-  
4 sible in any court or administrative proceeding, if—

5           (1) such entity (or officer, employee, or agent)  
6           ensures that the disclosure is made promptly after  
7           receiving knowledge of the information;

8           (2) such entity (or officer, employee, or agent)  
9           initiates efforts to achieve compliance in a manner  
10          consistent with applicable provisions of law;

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

14          (4) such information is not disclosed for the  
15          purpose of avoiding penalties in an investigative, ad-  
16          ministrative, or judicial proceeding that, at the time  
17          of disclosure, was imminent or in progress; and

18          (5) such entity (or officer, employee, or agent)  
19          discloses such other information relating to the vio-  
20          lation as the agency concerned reasonably requests,  
21          other than information subject to a nondisclosure  
22          privilege under section 3 or under any other author-  
23          ity of law.

24          (b) EXCLUSIONS.—The immunity under subsection  
25 (a) shall not apply to an entity if the violation concerned

1 is part of a pattern of significant violations (counting any  
2 multiday occurrence stemming from the same cause as a  
3 single violation) that has occurred within the past 3 years  
4 at the same facility or at different facilities under the com-  
5 mon control of a regulated entity whose senior manage-  
6 ment had actual knowledge of the violations and failed to  
7 take timely corrective action. For purposes of this section,  
8 a violation is any violation of an environmental law identi-  
9 fied in a judicial or administrative order, consent agree-  
10 ment or order, conviction, or plea agreement.

11 (c) PROCEDURE.—

12 (1) PRESUMPTION.—Whenever a regulated enti-  
13 ty voluntarily discloses to a Federal or State agency  
14 information relating to the violation by such entity  
15 of an environmental law, if such information was ob-  
16 tained as a result of a voluntary environmental self-  
17 evaluation, or from an environmental compliance  
18 management system, the entity shall be presumed to  
19 be entitled to immunity under this section with re-  
20 spect to such violation if the entity provides informa-  
21 tion supporting a claim that the entity is qualified  
22 for such immunity at the time the entity makes the  
23 disclosure. Such presumption shall be conclusive un-  
24 less challenged by the agency within 60 days of the  
25 disclosure.

1           (2) JUDICIAL DETERMINATION.—An entity may  
2           request the appropriate United States district court  
3           for a determination regarding whether or not the im-  
4           munity under subsection (a) is applicable to such en-  
5           tity (or officer or employee or agent) with respect to  
6           any violation.

7   **SEC. 5. SAVINGS CLAUSE.**

8           (a) AUTHORITY TO ISSUE CERTAIN ORDERS.—Noth-  
9           ing in this Act shall be construed to affect the authority  
10          of a Federal or State agency responsible for administering  
11          an environmental law to issue a cease and desist order  
12          or to seek a temporary restraining order or injunction for  
13          any violation of an environmental law.

14          (b) STATE PRIVILEGES AND IMMUNITIES.—Nothing  
15          in this Act shall be construed to limit any privilege against  
16          disclosure in effect under State law. Nothing in this Act  
17          shall be construed to limit any immunity available to any  
18          person under State law.

19   **SEC. 6. EFFECTIVE DATE.**

20          This Act shall take effect with respect to civil and  
21          criminal proceedings commenced after the enactment of  
22          this Act.

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