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HOUSE BILL NO. 2768

Offered January 20, 1997

A BILL to amend and reenact § 10.1-1198 of the Code of Virginia, relating to voluntary environmental assessments.

Patrons—Phillips, Abbitt, Armstrong, Brickley, Connally, Cooper, Cranwell, Crittenden, Croshaw, Darner, DeBoer, Deeds, Dillard, Grayson, Hull, Keating, Lovelace, Mims, Moore, Moran, Moss, Murphy, Plum, Puller, Shuler, Spruill, Stump, Tate, Van Landingham, Van Yahres and Woodrum

Referred to Committee on Conservation and Natural Resources

Be it enacted by the General Assembly of Virginia:

1. That § 10.1-1198 of the Code of Virginia is amended and reenacted as follows:

§ 10.1-1198. Voluntary environmental assessment privilege.

A. For purposes of this chapter, unless the context requires a different meaning:

"Environmental assessment" means a voluntary evaluation of activities or facilities or of management systems related to such activities or facilities that is designed to identify noncompliance with environmental laws and regulations, promote compliance with environmental laws and regulations, or identify opportunities for improved efficiency or pollution prevention *and includes a plan for prompt implementation of corrective action for any identified noncompliance.* An environmental assessment may be conducted by the owner or operator of a facility or ~~an independent contractor at the request of the owner or operator~~ *a certified engineer or other person similarly trained to perform environmental assessments. The owner or operator shall provide notice to the Department of the beginning and anticipated completion dates for the assessment.*

"Document" means information ~~collected~~, generated or developed *primarily for the purpose of and in* the course of, or resulting from, an environmental assessment, including but not limited to field notes, records of observation, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, videotape, computer-generated or electronically recorded information, maps, charts, graphs and surveys. "Document" does not mean information generated or developed before the commencement of a voluntary environmental assessment showing noncompliance with environmental laws or regulations or demonstrating a clear, imminent and substantial danger to the public health or environment.

B. No person involved in the preparation of or in possession of a document shall be compelled to disclose such document or information about its contents, or the details of its preparation. Such a document, portion of a document or information is not admissible without the written consent of the owner or operator in an administrative or judicial proceeding and need not be produced as a result of an information request of the Department or other agency of the Commonwealth or political subdivision. This privilege does not extend to a document, portion of a document or information that demonstrates a clear, imminent and substantial danger to the public health or the environment or to a document or a portion of a document required by law or prepared independently of the voluntary environmental assessment process. This privilege does not apply to a document or portion of a document collected, generated or developed in bad faith, nor does it alter, limit, waive or abrogate any other statutory or common law privilege, *nor does it apply when there has been a failure to promptly correct any noncompliance discovered during a voluntary environmental assessment.*

C. A person or entity asserting a voluntary environmental assessment privilege has the burden of proving a prima facie case as to the privilege. A party seeking disclosure of a document, portion of a document, or information has the burden of proving the applicability of an exception in subsection B to the voluntary environmental assessment privilege. Upon a showing, based upon independent knowledge, by any party to: (i) an informal fact-finding proceeding held pursuant to § 9-6.14:11 at which a hearing officer is present; (ii) a formal hearing pursuant to § 9-6.14:12; or (iii) a judicial proceeding that probable cause exists to believe that an exception listed in subsection B to the voluntary environmental assessment privilege is applicable to all or a portion of a document or information, the hearing officer or court may have access to the relevant portion of such document or information for the purposes of an in camera review only to determine whether such exception is applicable. The court or hearing examiner may have access to the relevant portion of a document under such conditions as may be necessary to protect its confidentiality. A moving party who obtains access to the document or information may not divulge any information from the document or other information except as specifically allowed by the hearing examiner or the court.

INTRODUCED

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