SB

199

HOUSE COMMITTEE REPORT

(11)
Date Referred to Committee: May 2, 1996 FURTHER REFERRALS:

Date of Committee Action: _____

The FINANCE Committee considered: CSSB 199(FIN)

CS FOR SENATE BILL NO. 199(FIN) ENVIRONMENTAL & HEALTH/SAFETY AUDITS

"An Act relating to environmental audits and health and safety audits to determine compliance with certain laws, permits, and regulations."

recommends it be replaced with the following committee substitute _____ [ ] the same title [ ] a new title

[ ] additional referral to _____ Committee
[ ] attached amendment(s)

ADOPTS: _____ Letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal note(s) _____ [ ] fiscal note(s) _____

[ ] zero fiscal note(s) _____ [ ] zero fiscal note(s) _____

SIGNING WITH RECOMMENDATIONS	DP	DNP	NR	AM
Died in committee				

CHAIR'S SIGNATURE _____ _____

FISCAL NOTE

No. 4

Bill Version: CSSB 199(RES)

(S) Publish Date: 3-12-96

STATE OF ALASKA

1996 LEGISLATIVE SESSION

Bill

Revision Date: Original

Dept Affected: Military & Veterans Affairs

Title: An Act relating to environmental audits and health and safety audits to determine compliance with...

BRU: Alaska National Guard

Component: Office of the Commissioner

Sponsor: Senator(s) Leman, Pearce

Requestor:

Component Serial No. 414

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY97	FY98	FY99	FY00	FY01	FY02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGE IN REVENUES ( )	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY96) cost: $ none

POSITIONS

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Carol Carroll, Director — Phone: 465-4730

Division: Administrative Services — Date: 23-Jan-96

Approved by Commissioner: Carol Carroll — Date: 23-Jan-96

Agency: Military & Veterans Affairs

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No. 5

FISCAL NOTE

Bill Version CS SB 199(RES)

STATE OF ALASKA
1996 LEGISLATIVE SESSION

(S) Publish Date: 3-12-96

Revision Date:
Title: Environmental Audits
Sponsor: Senator Leman
Requester: Senate Resources

Dept. Affected: Fish and Game
BRU: Habitat and Restoration
Component: Stream and Refuge
COMPONENT SERIAL NO. 2099

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 100	FY 01	FY 02
PERSONAL SERVICES	60.0	60.0	60.0	60.0	60.0	60.0
TRAVEL	2.0	2.0	2.0	2.0	2.0	2.0
CONTRACTUAL	4.0	4.0	4.0	4.0	4.0	4.0
SUPPLIES	0.5	0.5	0.5	0.5	0.5	0.5
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	66.5	66.5	66.5	66.5	66.5	66.5
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	66.5	66.5	66.5	66.5	66.5	66.5
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other						
TOTAL	66.5	66.5	66.5	66.5	66.5	66.5

Estimate of any current year (FY96) cost: 0

POSITIONS

FULL-TIME	1	1	1	1	1	1
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Because of its broad definition of information that is privileged, SB199 would require a new habitat biologist to be assigned to monitor operations that are regulated by the Habitat and Restoration Division. The additional staff is need to detect violations and to allow the state to develop is own independent information to ensure compliance with its Title 16 laws and regulations.

Prepared By: Janet Kowalski
Division: Habitat and Restoration Division
Phone: 465-4105
Date: 3/7/96

Approved by Commissioner:
Agency:
Date: 3-8-96

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No. 6

FISCAL NOTE Bill Version: CS SB 199 (FIN)

STATE OF ALASKA

BI (S) Publish Date: 4-3-96

1996 LEGISLATIVE SESSION

Revision Date: 19-Mar-96 | Dept Affected: Natural Resources

Title: An Act relating to environmental audits and health and safety audits to determine compliance with | BRU: Management and Administration

Component: Commissioner's Office

Sponsor: Senator(s) Leman, Pearce

Requestor: Senate Finance | Component Serial No.: 433

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY97	FY98	FY99	FY00	FY01	FY02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL	40.0					
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	40.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGE IN REVENUES ( )	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	40.0					
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	40.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY96) cost: $ none

POSITIONS

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

There is a potential impact on the Division of Forestry, Agriculture, Lands and the State Pipeline Coordinator's Office. To determine whether what we do with our leases, permits, and contracts will fall under this bill we will be contracting with a third party.

Prepared by: Nico Bus, Acting Director | Phone: 465-2406

Division: Support Services | Date: 19-Mar-96

Approved by Commissioner: | Date: 19-Mar-96

Agency: Natural Resources

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FISCAL NOTE

No. 1

STATE OF ALASKA
1996 LEGISLATIVE SESSION

Bill Version: CSSB 199(FIN)

(S) Publish Date: 4-3-96

Revision Date: 3/12/96 | Dept. Affected: DOT&PF

Title: "An Act relating to environmental audits and health and safety audits" | RU: AIA FIA

Appellate Procedure 202 and 51[illegible] | Component: Administration

Sponsor: Senators Leman, Pearce

Requester: [illegible] | COMPONENT SERIAL NO. 613 619

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGE IN REVENUES						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTAA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY96) cost: $ 0.0

POSITIONS

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Nate Johnson/Loren Rasmussen, P.E. Acting Director | Phone: 465-2960

Division: Engineering and Operations [illegible] | Date: 3/13/96

Approved by: [signature] | Date: 3/13/96

Joseph L. Perkins, Commissioner

Agency: Department of Transportation and Public Facilities

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FISCAL NOTE

No. 8

Bill Version: CS SB 199 (FIN)

(S) Publish Date: 4-3-96

STATE OF ALASKA
1996 LEGISLATIVE SESSION

Revision Date: 12-Mar-96
Title: Environmental and health and safety audits

Department Affected: Environmental Conservation
BRU: Department-wide
Component: Department-wide

Sponsor: Senator Leman
Requestor: Senate Finance

COMPONENT SERIAL NO. 633

Expenditures/Revenues: (Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	39.0	7.8	7.8	7.8	7.8	7.8
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND&STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS,CLAIMS	0.0	0.0	0.0	0.0	0.0	0.0
MISCELLANEOUS	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	39.0	7.8	7.8	7.8	7.8	7.8
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGE IN REVENUES ( )	0.0	0.0	0.0	0.0	0.0	0.0
FUND SOURCE						
1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	39.0	7.8	7.8	7.8	7.8	7.8
1005 GF/Program Receipt	0.0	0.0	0.0	0.0	0.0	0.0
1006 GF/MHTAA	0.0	0.0	0.0	0.0	0.0	0.0
Other	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	39.0	7.8	7.8	7.8	7.8	7.8

Estimate of any current year (FY96) cost: $ 0.0

POSITIONS:						
FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary.)

The CS creates a privilege for audit reports and provides immunity for any violations of environmental or health and safety laws. However, it does not specify which laws are covered. Any audit information the department now receives voluntarily would have to be a requirement of a permit, compliance agreement or similar document, otherwise that information would be privileged and not accessible to the agency.

This fiscal note represents an RSA with Law for legal services to delineate the legal scope of the bill and assist with renegotiating permits and contract terms.

Prepared by: Janice Adair
Division: Director, Division of Environmental Health
Phone: 269-7645
Date: 3/18/96

Approved by Commissioner: K. Hoffman
Agency: Department of Environmental Conservation
Date: 3-19-96

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FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. HCS CSSB199 (RES)

Revision Date: 05/03/96
Title: Environmental and Health/Safety Audits
Sponsor: Sen. Leman
Requester:

Dept. Affected: Alaska Court System
BRU: Trial Courts
Component:
COMPONENT SERIAL NO. 798

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES	17.7	17.7	17.7	17.7	17.7	17.7
TRAVEL						
CONTRACTUAL	80.0	80.0	80.0	80.0	80.0	80.0
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	97.7	97.7	97.7	97.7	97.7	97.7
CAPITAL EXPENDITURES						
CHANGE IN REVENUES (						

Fund Source (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	97.7	97.7	97.7	97.7	97.7	97.7
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other						
TOTAL	97.7	97.7	97.7	97.7	97.7	97.7

Estimate of any current year (FY 96) cost: None

Positions

Full-Time						
Part-Time	1.0	1.0	1.0	1.0	1.0	1.0
Temporary						

ANALYSIS: (Attach a separate page if necessary)

See attached fiscal analysis.

Prepared by: C. S. Christensen III, Staff Counsel
Phone: 264-8228
Agency: Alaska Court System
Date: 05/03/96

Approved by: Arthur H. Snowden, II, Administrative Director
Date: 05/03/96
Agency: Alaska Court System

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ALaska Court System
Fiscal Analysis
HCS CSSB 199 (RES)
Revised 05/03/96

HCS CSSB 199 (RES) creates a privilege from disclosure in certain court proceedings for information contained in an environmental audit. If a person or entity asserts the privilege, the opposing party would need to request an in-camera review of the information, in order to determine if the information is not privileged and must be disclosed.

An in-camera review of this nature can be extremely time consuming; many environmental audits (a term broadly defined in the legislation) are composed of tens of thousands of pages of documents. Cases in which an in-camera review is requested will require large amounts of time for pretrial proceedings. According to the Department of Law, it is currently representing the Department of Environmental Conservation in 45 cases involving contaminated property. These are complex cases in which an environmental audit was probably performed. Law estimates that it will take an average of 50 hours to litigate the privilege issue in those cases in which a privilege is asserted. In addition, due to the complexity of the legislation and the ambiguity of its provisions, Law anticipates substantial litigation and appeals, particularly regarding the privilege. Law has also advised that in some cases, the court system will need to retain scientific and technical experts to assist in evaluating audit reports.

The Department of Law has estimated a need for two additional attorneys to handle the increased litigation and appeals resulting from passage of HCS CSSB 199 (RES), largely from the creation of the privilege, as well as $75,000 for outside counsel to handle in-camera matters in criminal cases. DEC has also projected the need for additional attorney resources. Note that many privilege cases not involving state agencies will also be litigated, such as cases in which the plaintiff is a private citizen or a municipality. Accordingly, the court system will see far more cases than the cases which involve LAW, DEC, and other state entities. This fiscal note reflects contractual costs for a discovery master to handle the in-camera review of documents, as well as the greater clerical costs associated with cases involving extremely large amounts of documents.

Alaska Court System
Fiscal Analysis
HCS CSSB199 (RES)

Personal Services

Position	Salary	Benefits	Total
Records Clerk, range 10A, Anchorage, PPT, 6 months	$12,006	$5,738	$17,744

Contractual

Discovery master for 1,000 hours at $75 an hour.	75,000
Fees of experts to assist discovery master in technical and scientific matters	5,000
Total Contractual	80,000

Total Estimated Cost	597,744

FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. HCSCSSB 199(RES)

Revision Date: 5/3/96
Title: "...relating to environmental audits and health and safety audits to determine compliance with certain laws;permits..."
Sponsor: Senator Leman
Requester: House Rules Committee

Dept. Affected: Department of Law
BRU: Criminal Division, Civil Division
Component: Criminal Division: General Legal Services
Environmental Law
COMPONENT SERIAL NO. 2085,2087 2092

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES	652.2	652.2	652.2	652.2	652.2	652.2
TRAVEL	30.0	30.0	30.0	30.0	30.0	30.0
CONTRACTUAL	2,254.3	2,254.3	2,254.3	2,254.3	2,254.3	2,254.3
SUPPLIES	18.6	18.6	18.6	18.6	18.6	18.6
EQUIPMENT	52.1	6.0	6.0	6.0	6.0	6.0
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	3,007.2	2,961.1	2,961.1	2,961.1	2,961.1	2,961.1
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	1,192.2	1,176.0	1,176.0	1,176.0	1,176.0	1,176.0
1005 GF/Program Receipts						
1007 I/A Receipts	418.7	411.9	411.9	411.9	411.9	411.9
Other I/A Oil HZ	1,396.3	1,373.2	1,373.2	1,373.2	1,373.2	1,373.2
TOTAL	3,007.2	2,961.1	2,961.1	2,961.1	2,961.1	2,961.1

Estimate of any current year (FY96) cost: $ 0.0

POSITIONS

FULL-TIME	9.0	9.0	9.0	9.0	9.0	9.0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

The bill amends AS 09.25 and AS 12.45 by adding several new sections which, with respect to environmental laws, would create (1) a new evidentiary privilege that applies in criminal, civil, and administrative cases; and (2) immunity from civil and administrative penalties. During testimony on the bill industry representatives testified that once the bill took effect they would immediately initiate many audites covering a wide area of activities where violations may be occurring. This will have the effect of depriving the public and the state of important information about environmental problems that would otherwise lead to remedial actions being taken.

Section 09.25.490(a)(3) defines environmental laws to include federal, state, and municipal environmental laws. Under section 09.25.490(b), the term "environmental law" is to be broadly construed.

Prepared by: Richard L. Pegues, Director — Phone: 465-3672
Division: Administrative Services Division — Date: 5/3/96
Approved by Commissioner: Bruce M. Botelho, Attorney General — Date: 5/3/96
Agency: Department of Law

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(Rev. 10/94; 95 and 96 OMB)

Section 09.25.490(a)(2) defines the term "environmental audit" as the voluntary, internal, review or assessment of compliance with environmental laws. Under the bill, an audit may be conducted randomly, regularly, or in response to a particular event. Audits may be conducted by owners or operators of a regulated facility or activity or by their employees or independent contractors.

The bill broadly defines the term "audit report" in section 09.25.490(a)(1) to include any document or communication associated in any way with an audit, as well as the resulting corrective action plan.

The Proposed Audit Privilege

Under section 09.25.450(a), a party may not discover or use audit reports, including the underlying information gathered or generated during the audit, in civil actions, criminal proceedings, or administrative proceedings, except for workers' compensation proceedings. However, under section 09.25.450(c), a person who conducts or participates in an audit may testify regarding events he or she observed during the audit, but may not testify about or produce documents relating to the audit itself. Under section 09.25.450(d), regulators may neither request,

review, nor use an audit report during an inspection. Under section 09.25.450(e), all documents in the audit report must be labeled.

The privilege may be waived by following the mechanisms established in section 09.25.455, including written waivers and confidentiality agreements. Under section 09.25.455(e), disclosure by any other means or under any other circumstances does not waive the privilege.

Under section 09.25.465, certain materials are nonprivileged. These include documents and information required to be gathered under an environmental law or permit, under a license, or under a contract with the state. Information gathered by a regulatory agency or provided by a person not involved in the audit is also nonprivileged. There are a number of other exceptions for information gathered independent of the audit.

The Proposed Immunities

Under section 09.25.475, a person who voluntarily discloses the violation of an environmental law is immune from administrative and civil penalties. The bill establishes a

number of conditions that must be met to immunize the violation. Immunity is not available for violations that resulted in substantial personal injury onsite or substantial personal, property, or environmental injury offsite. For persons that do not qualify for immunity, the bill authorizes mitigation of penalties.

Fiscal Consequences

• Increased attorney time in negotiating, drafting, and reviewing permits, contracts, leases, regulations, and other documents to ensure that adequate compliance information is being gathered and maintained to meet the state's regulatory and proprietary responsibilities. Each year, there are several hundred state permits, contracts, and leases that require attorney review and negotiation, necessitating three additional attorneys.

• Increased attorney time in negotiating, drafting, and reviewing confidentiality agreements and in advising state agencies on issues relating to privileged information and public records. This is important because, under section 09.25.455(c), the state and its employees will be liable for damages or

stipulated penalties for the breach of any agreement. Additionally, we would expect to see litigation over the interpretation of confidentiality agreements. Based upon an anticipated 20 confidentiality agreements each year, each one of which would require a minimum of 40 hours to negotiate and review, the Department of Law will require one-half an attorney per year. The anticipated litigation over the confidentiality agreements would require an additional one-half attorney.

• Due to the breadth of the privilege and the lack of any standards or requirement that the audit be performed by an independent, properly trained and qualified auditor, the provision that an owner or operator, employee, or independent contractor may "in response to a particular event" initiate an audit will likely invite abuse and create a safe harbor for violators. Increased investigative efforts and attorney time will be necessary to overcome assertions of privilege and immunity. We cannot determine the fiscal impact of this eventuality, but it could be substantial.

• Due to the complexity of the bill and the ambiguity of its provisions, we anticipate substantial litigation and

appeals, particularly over the privilege. Concerns regarding violations of constitutional requirements relating to victims' rights to access information, equal protection, and due process have been raised. Currently, the Department is representing DEC in 45 contested cases involving contaminated property. We are also representing DNR and DOTPF in about 15 additional contested cases involving environmental issues and contaminated property. These are complex cases where an environmental audit or site assessment would most likely have been performed. If the privilege is asserted in a contested case, we would estimate that it will take 50 hours to litigate the privilege issue. In some cases, substantially greater attorney resources will be needed. The Department will be require an additional two attorney positions to handle the increased litigation. In addition to attorney time, we will require a significant increase in assistance from experts for investigative and contaminated property assessments. These costs can be estimated to range from $5,000 to $100,000 per case, and will average $35,000 to $50,000 per case. The total increased costs each year are an estimated $2,100,000. For cases involving large scale environmental damages, these costs will be significantly higher.

• The privilege established by the bill will result in information that is currently available being withheld from not

only the State, but also from private individuals. There is an in-camera review mechanism in the bill for people who want access to "privileged" information to ask a court to grant it. However, the mechanism creates a Catch-22 situation for both the people asking for access to the information and for the court, since neither would have sufficient facts on which to act. This is completely opposite from current law which allows a person who controls documents (and thus knows all about them) to ask a court to protect them from discovery. Not only will the bill's treatment of the court's review of privileged information create confusion, it will result in more litigation and it will take a lot of court time to make sense of it all. In some cases, the court system will be required to hire scientific and technical experts to assist the judge or discovery master conducting the in camera review in evaluating the audit reports and documents claimed to be privileged.

• Because the bill does not provide an exception to the privilege for evidence that is otherwise impossible to obtain or that cannot be obtained without undue hardship, there will be cases, including cases filed by the State to recover the State's costs in cleaning up contaminated sites, that the State will be unable to litigate without great expense, if at all. The cost to

the Department of Environmental Conservation in unrecovered cleanup costs could be several million dollars over time.

• In cases where the State or a state agency is named as a defendant due to its environmental responsibilities as a land owner or property manager, there will be increased investigative costs to gather evidence relating to contaminated sites and to the apportionment of liability for cleanup and restoration costs. If it becomes difficult to accurately and fairly allocate liability due to the site assessments or audits being privileged, then the state will likely end up paying a greater share of the cleanup and restoration costs. There will be a substantial increased cost to the General Fund similar to the amount the State is paying in the Toksook Bay case ($1.1 million).

• The state may also end up buying the liability and cost of cleanup for land the State condemns for capital improvement projects, where the condemnee has hidden contamination under a privileged environmental assessment.

• While the Senate Finance Committee amended CSSB 199 (RES) to create an exception to the privilege in proceedings relating to pipeline rates, tariffs, fares, or charges, there is

no assurance that the exception will not result in litigation. This is because, first, the creation of an exception for only one type of proceeding raises an equal protection issue; and second, the pipeline audits are often used for more than just tariff issues, creating confusion over what information may actually be disclosed for what purposes.

While the bill tries to exempt the tariff cases, it may not be completely effective. Besides jeopardizing the entire tariff system, if the carriers succeed in claiming an audit privilege for all or part of an audit, the State will have to conduct its own audits, which can cost from several hundred thousand to millions of dollars per audit. The audits used in the 1995 Taps tariff case, for example, cost approximately $25.05 million. The case itself is worth around $85 million to the State. Discovery disputes and litigation over the audit privilege would allow the Alyeska Pipeline Company to hamper the State's ability to depose Alyeska employees about the facts of a tariff case by making them part of the audit team. This maneuver would also have the effect of prohibiting those employees from ever reporting any violations unless they wanted to face lawsuits for damages. Under certain federal laws, whistleblowers will retain protection, but under this law, they will lose it, resulting in more confusion.

• Since the Criminal Division has only one environmental prosecutor on staff and the Division's caseload priorities preclude reassignment of his duties to other prosecutors, if the environmental prosecutor is conflicted out of a case due to his review of privileged information, then it will be necessary to retain outside counsel to conduct the in camera review so that the state prosecutor can handle the prosecution. Outside counsel will be required on approximately 20 occasions, at 25 hours each to conduct the in camera reviews, at a rate of $150 per hour. Total outside counsel costs of $75,000 will be required each year.

• The audit privilege and immunity may jeopardize federal approval of various state-run programs, such as the Underground Injection Control program under the Alaska Oil and Gas Conservation Commission; and the Drinking Water, Solid Waste, and Air Quality programs in the Department of Environmental Conservation. The state programs must be at least as stringent and effective as the federal programs. We would expect increased attorney time to answer legal questions regarding the impact of the bill on the delegated programs. It is also possible that the federal agencies may initiate efforts to withdraw approval of the state programs, necessitating attorney time for negotiations and possibly litigation, and possibly removing environmental

regulatory authority from state officials in Alaska to federal officials in Seattle and Washington, D.C.

• The creation of a sweeping state evidentiary privilege that has no counterpart in federal law will require attorneys to consider whether a federal remedy is available and preferable to a state remedy; and will result in confusion, arguments, and litigation over how to treat evidence that is privileged under state law but not federal law.

Because the grants of privilege and immunity provided by the bill are so broad there will be significant increased cost to the State in terms of litigation, investigation, cleanup and remediation costs, lost oil and gas revenues, and lost federal funds in respect to noncompliance with environmental requirements, as shown in the summary below.

HCSCSSB 199 (RES) COST SUMMARY

1. Negotiating and reviewing permits, contracts, leases and regulations

Personnel: 3 attorneys, 1.5 clerical support
Aggregate attorney rate (Attorney IV/Attorney III) from the Department of Law's annualized cost rate schedule = $126,000 per attorney position, plus $5,000 per attorney for travel, and $6,500 per position for new position equipment.
Fund source: General Legal Services = 35 percent GF, 15 percent IAR; Environmental Law = 50 percent I/A Oil HZ

Line Items:	Personal Services	326.1
	Travel	15.0
	Contractual	39.7
	Supplies	9.3
	Equipment	22.8
	Total	412.9

PFTs = 4.5

2. Negotiating and litigating confidentiality agreements

Personnel: 1 attorney, 0.5 clerical support
Annualized cost per above explanation = $126,000 plus travel and equipment
Fund source: General Legal Services = 100 percent GF

Line Items:	Personal Services	108.7
	Travel	5.0
	Contractual	13.2
	Supplies	3.1
	Equipment	9.8
	Total	139.8

PFTs = 1.5

3. Litigation and appeals over the privilege

Personnel: 2 attorneys, 1 clerical support
Annualized cost per attorney ($126,000) as shown in paragraph 1 above
Fund source: General Legal Services = 35 percent GF, 15 percent IAR; Environmental Law = 50 percent I/A Oil HZ

Line Items:	Personal Services	217.4
	Travel	10.0
	Contractual	2,126.4
	Supplies	6.2
	Equipment	19.5
	Total	2,379.6

PFTs = 3.0

4. Criminal Division in camera reviews.

Outside counsel to avoid conflict between in camera reviews and criminal prosecution $75,000 per annum.
Fund source: Criminal Division = 100 percent GF

Senate Bill 199

Environmental Self-Audit Legislation

by Senator Loren Leman / Updated: May 3, 1996

Senate Bill 199 is designed to increase compliance with environmental laws by encouraging regulated entities to conduct voluntary audits of operations and programs, identify violations, and take corrective action.

As the budgets of regulatory agencies are reduced both at the federal and state level, the importance of encouraging a system of self-policing becomes even more important. SB 199 creates incentives for voluntary compliance by offering limited immunity for violations that are discovered through a self-audit, provided that the noncompliance is unintentional, promptly reported, and promptly corrected.

In addition, SB 199 establishes a qualified privilege for the reports generated from voluntary self-audits, which prevents these documents from being used as a "road map to prosecution" by government officials, or from being used by hostile third parties.

17 states have now adopted laws providing for some form of privilege and/or immunity to encourage environmental self-auditing. Legislatures in two other states, Ohio and South Carolina, have recently approved self-audit incentive bills which are expected to be signed into law by their respective governors. Several other states have seen similar bills approved by at least one house of the legislature, and legislation has been introduced in both houses of Congress which would apply these principles at the federal level. On May 21, the U.S. Senate Judiciary Committee will hold its first hearing on the subject of self-audit incentive laws.

Although self-auditing legislation has grown ever more popular across the nation, SB 199 has been criticized by some environmental lobbyists, trial lawyers, and representatives of the Knowles Administration. Some of the arguments raised against SB 199 are rooted in a basic misunderstanding of the legislation. But other arguments stem from a genuine philosophical disagreement on how regulators and the regulated community ought to interact with one another.

Responses to these objections can be found on the attached pages. In many cases, these objections have been lifted verbatim from testimony given before committees in the House and Senate.

SB 199 -- Environmental Self-Audit Bill

by Senator Loren Leman

What does SB 199 do?

- Helps protect Alaska's environment by encouraging companies to conduct voluntary audits of their operations in an effort to find & fix areas of non-compliance with environmental law.

How does SB 199 promote self-auditing?

- SB 199 creates two incentives to encourage self-auditing:

  1) **Immunity** -- if a company conducts an audit and discovers unintentional violations, promptly reports these violations, and takes corrective action, it will be granted immunity from penalties.

  2) **Privilege** -- a qualified privilege is extended to audit reports to ensure that companies acting in good faith will not have their compliance audits used against them in legal actions. By its very nature, an audit report can be a self-incriminating document: it discovers problems, identifies what personnel or management systems are responsible for the problem, and recommends a course of corrective action. Businesses should be encouraged to produce these self-critical reports, and not be penalized for it.

How do these incentives encourage self-auditing?

- Companies will be encouraged to invest time and money in self-auditing, knowing that they will not be penalized for unintentional violations that are discovered and corrected, and knowing that the self-critical audit report will not be used to punish them.

Have other states enacted self-audit incentive legislation?

- Yes. 17 states have self-audit statutes that grant privilege and/or immunity as incentives. The legislatures of two other states, Ohio and South Carolina, have approved self-audit incentive bills which are expected to be signed into law shortly. Legislatures in virtually all other states have similar measures under consideration.

Will "bad actors" be able to use this bill to avoid punishment?

- No. The bill provides safeguards to prevent abuses. No immunity is allowed when:

  1) Violation is knowingly committed.

  2) Violation causes substantial off-site harm or on-site injury.

  3) Violation is discovered through means other than a voluntary self-audit.

  4) Violation is not reported promptly after discovery.

  5) Violation is not corrected within a reasonable time.

  6) Person or entity seeking immunity has a history of repeated violations that were not corrected.

Will the self-audit privilege allow bad actors to shield information?

- No. The privilege does not apply to any information already required to be maintained or reported to a regulatory agency as part of a law, regulation, permit, contract, or lease agreement.

- Privilege cannot be claimed for information that is already maintained or developed as part of ordinary business practice.

- Privilege cannot be claimed for information that a regulatory agency obtains through its own sampling, monitoring or observation.

- Privilege can be overcome if a judge determines that it is asserted for a fraudulent purpose, or that the audit was prepared for the purpose of avoiding disclosure of information needed for an ongoing or imminent investigation.

Anchorage
International
Airport

MEMORANDUM

State of Alaska, Department of Transportation & Public Facilities

To: Sam Kito III, P.E.
Legislative Liaison

Date: May 3, 1996

Telephone: 200-2404

From: Christine E. Klein
Environmental Manager

Subject: Senate Bill 199, Airport
Fiscal Note Information

Due to short notice and immediate need for information to prepare a fiscal note on SB 199 costs, I am sending this directly to you. SB 199 allows environmental audits to be "privileged documents" inaccessible to landowners, regulators, and others. This provides protection from regulators and landowners such as airports' who may wish to use the documents to require responsible party cleanup or enforcement. Potentially hundreds of tenants statewide could use this privilege and refuse landowner access to environmental information. Airports as industrial facilities need access to tenant audits because as landowner the airport is–and has been held liable for environmental non-compliance and associated costs often due to tenant activities.

SB 199 Costs: Without contractual or landowner protection, the costs as well as liabilities of SB 199 to airports will be substantial. Below are recent cases of costs incurred at Anchorage International Airport (ANC) alone, due to a lack of tenant information or access to environmental reports. The costs are contractual and do not include state employee time or resources.

Over $470,047, and extensive time was spent during 1993 and '94 cleaning up a site that a tenant refused to provide information on, and then abandoned at ANC. Emergency action was required due to potential enforcement actions of $25,000, or more per day. Had test results, material inventories, or environmental assessment documents been provided, up to $400,000, of the cost could have been saved in site cleanup and waste disposal. The site materials had to be treated as hazardous waste site under the Federal Resource Conservation and Recovery Act (RCRA) due to lack of records. This was a standard size lot with common aviation activities. Two state airport environmental employees were kept busy full time for over three months on this project.

ANC has spent over $1,000,000, in removal and cleanup of approximately 200 small underground storage tanks around Lake Hood in 1992 and '93. Had fuel releases been prevented by tenant operators or releases reported, this money, time, and resources could have been saved. The limited information that was available for this particular project, reduced the total cost substantially. However, at the same time there are many other remaining tanks suspected on the airport which tenant owners have not yet provided information on regarding their permitting, registration, monitoring, and assessment data.

Mark Air is another tenant case where past activities have resulted in contamination being left at many airports statewide. Cleanup estimates are yet unknown due to the lack of available and past records.

Recommendation: SB 199 should be changed to allow landowners' access to tenant environmental documents through public lease agreements or contracts already in place.

SB 199 -- Responses to Common Arguments

Argument: "The privilege [in SB 199]... creates a secret. It withholds information from the public and from the regulatory agency. And it has the real potential to increase public suspicion about the activities and motivations of the company. We believe that this would actually decrease cooperation." *[testimony from the Department of Environmental Conservation (DEC), January 31, 1996.]*

Response: There is nothing unprecedented about "secrets", at least when a public interest is served by maintaining confidentiality. For example, Alaska has a statute (AS 18.23.030) which establishes a privilege for the proceedings and records of physician peer review panels. These are kept "secret" under the rationale that it serves a public health interest. The peer review panels encourage an honest dialogue among physicians about their performance and the effectiveness of certain patient treatments. Such frank discussions are valuable in helping the medical profession improve patient treatment. But the honesty and frankness of these proceedings would be jeopardized if the physicians involved believed that their comments and findings could be subject to discovery in a medical malpractice suit. Consequently, Alaska and virtually every other state in the country have passed laws establishing privilege for these peer review groups.

There are other examples which clearly recognize that confidentiality is sometimes necessary to advance a public interest. On March 29, the Knowles Administration issued a press release announcing that the state and Marathon Oil Company had reached an out-of-court settlement for $5 million, pertaining to disputed amounts owed by Marathon under the Net Income Tax Act from 1988 to 1990. The press release states that "Both sides are *bound by a confidentiality agreement that precludes further discussion of the issues with third parties.*" [emphasis added] This suggests that the Knowles Administration is keeping "secrets" from the public. We presume that, if asked to defend this, the Administration would argue that the *public interest* in securing $5 million for the state treasury justifies the confidentiality provision.

There are other privileges in current law, such as attorney-client privilege and the work product doctrine, which recognize there are circumstances in which confidentiality serves a legitimate public interest. The premise of SB 199 is that the public's interest is served by increasing compliance with environmental laws. The self-audit privilege provides an incentive to conduct compliance audits, by removing the fear that the audit report will be used as a "road map to prosecution".

Argument: "The real beneficiaries [of SB 199] will be the midnight dumpers; the fly-by-night operators who prey on one community after another; the companies that engage in fraud and submit false reports to the government; the

companies that know they have violations and don't correct them..." *[testimony of the Department of Law, House Resources Committee, April 24, 1996]*

Response: Aside from the utter lack of nuance, this dark rhetoric betrays a fundamental misunderstanding of the intent and substance of self-audit incentive legislation. SB 199 is similar to self-audit laws already on the books in 17 other states, and there have not been horror stories about "bad actors" attempting to use these bills as some kind of "shield" against prosecution.

- New Hampshire has a law similar to the Alaskan bill, and Governor Stephen Merrill has informed the EPA that his administration is very pleased with their statute. As the former Attorney General of New Hampshire, Gov. Merrill is well aware of the importance of prosecuting "bad actors". The Governor flatly rejects the argument that privilege laws undermine efforts to punish bad actors.

- The House and Senate Resources Committee both heard testimony from John Riley, Director of Litigation for the Texas Natural Resources Conservation Commission (TNRCC). Mr. Riley testified that his department has been very pleased with the effects of Texas' self-audit law, noting that companies have discovered and corrected violations through self-audits that would not have been detected using normal agency inspection procedures.

- The Director of Michigan's Department of Environmental Quality, Richard Harding, is looking forward to implementing Michigan's newly-passed self-audit law. In a letter to the EPA, Harding stated "We anticipate our enforcement capability will increase as we are able to focus staff resources away from firms that are attempting to voluntarily comply and direct them to the 'bad actors' that need to feel the full force of the law."

SB 199 does <u>not</u> "replace" existing tools used by regulatory agencies to promote compliance, e.g., inspections, reporting requirements, monitoring, maintenance of records, etc. But is <u>does</u> encourage companies to engage in "self-policing", in recognition of the fact that agencies will never be able to adequately monitor more than a tiny percent of regulated entities under their jurisdiction.

Furthermore, the privilege and immunity provisions in SB 199 are tightly drawn so that "bad actors" will not get any breaks. For example, the self-audit privilege cannot be used to protect information that is already required to be collected, maintained, developed, or reported under an environmental law, or that is required as part of a license or contract agreement with the state. Privilege does not apply to information that is developed in the course of normal business activities, and it doesn't apply to information that an agency obtains through its own observation, sampling, or monitoring. Privilege can be overcome if a judge rules

that it has been asserted for a fraudulent purpose, or if an audit reveals evidence of noncompliance that was not promptly corrected.

Likewise, numerous conditions must be met in order to qualify for immunity:

- the violation must have been detected through a voluntary environmental audit.
- the regulated entity must have provided advance notice of intent to perform the audit in order to qualify for immunity for any violations that are discovered.
- upon discovery, the violation must be promptly disclosed via certified mail, and the non-compliance must be corrected within a reasonable time.
- the violations disclosed must not have resulted in substantial off-site environmental harm or substantial injury to persons on-site.
- disclosed violations must not have been independently detected or already the subject of an investigation before the voluntary disclosure was received.
- the person making the disclosure must not have knowingly committed the violations, and must not have a history of repeated violations.
- the regulated entity must release (upon request) to the appropriate regulatory agency the portion of the audit report dealing with compliance plans and/or corrective action, and must work with the agency to address these issues.

Argument: "How the audits are done, who may conduct them, and the scope of the audit report remains problematic... The proposed committee substitute allows the audit to be done by an employee, even if that employee has no ability to carry out the audit recommendations. The audit must be done by someone who not only knows what they are doing, how the facility does or should operate, and what the rules are, but also by someone who can, or who is working under the specific direction of the person who can, commit the company to whatever corrective action may be necessary." *[statement from DEC, 03-08-96]*

Response: Because of the varying types of businesses covered by SB 199, it is possible that self-audits of smaller businesses might be performed by the owner or operator. On the other hand, it is likely that a larger business will delegate an employee or contractor to perform the task. The procedures will vary depending on the size, complexity, and type of operation. Accordingly, SB 199 provides for flexibility in this area.

The concern that the audit should be performed by someone who "knows what they are doing" is very curious. Businesses are already required to file taxes,

permit reports, and other complicated paperwork with government regulators. There is no requirement that these tasks be performed by someone "competent", but businesses ordinarily make sure these tasks are performed by qualified personnel, just so the job isn't messed up.

The same dynamic works with SB 199. For a business to ensure that it benefits from the immunity and the privilege provisions in SB 199, a process must be followed: advance notice of the audit, accurate identification of problems, prompt disclosure of noncompliance via certified mail, cooperation with regulators to correct any problems, etc. It is inconceivable that a business would assign such a task to, say, a part-time intern. Such poor management would place in jeopardy any benefits that would have otherwise been available under the bill.

There are textbooks and a sizable amount of literature that describe the self-auditing process for businesses. This is not an untested or ill-defined concept. Nevertheless, SB 199 provides guidance on what types of documents would ordinarily be included in an audit report, including: a description of the scope of the report, information gained from the audit, findings, conclusions, recommendations, exhibits, and appendices. Supporting information might include interviews with current or former employees, field notes and records of observations, laboratory analyses, legal analyses, photographs, and computer-generated information. Once again, the specific components of the audit report will vary from business to business, depending on the size and nature of the operations.

Argument: "...in Alaska as in most states, federal environmental laws are implemented largely through federally-approved state programs. By impairing a state's ability to enforce its own programs, this legislation would have the effect of impairing the enforcement of federal law." *[letter to Rep. Joe Green from U.S. Attorney Robert Bundy, April 19, 1996]*

Response: Clearly, the assertion that SB 199 would "impair a state's ability to enforce its own programs" is subjective. Many regulated entities not currently in compliance will never be detected using traditional enforcement mechanisms. There will never be enough regulators or inspections to accomplish the job.

What is needed is a supplemental mechanism to encourage self-policing. All the traditional enforcement mechanisms--with their limited reach--will remain intact. This bill creates the incentive for voluntary compliance, providing good actors an opportunity to scrutinize operations without fear of negative repercussions. This does not "impair" but rather *enhances* a state's ability to accomplish the *real purpose* of its programs, which is to protect the public by securing the *highest possible rate of compliance* with the law. We must measure the success of environmental programs *not* by the number of lawsuits or fines handed

out, but rather by the percentage of regulated entities that are *complying* with the law.

Argument: "Available information indicates that, as a matter of good business practice, an increasing number of firms are performing audits without any audit privilege. Surveys also indicate that strong environmental enforcement has served as a major incentive for companies to self-audit, as well as to comply with the law." *[letter to Rep. Green from U.S. Attorney Robert Bundy, April 19, 1996]*

Response: Certainly many companies are already performing audits. But available evidence indicates that *more* companies will conduct audits if privilege and immunity incentives are enacted into law. Many of the Alaska companies and trade groups supporting SB 199 currently perform self-audits, but they recognize the benefits SB 199 will provide in encouraging other companies.

Last year Price Waterhouse conducted a survey of 369 companies nationwide, representing 14 different manufacturing and service sectors of the economy, to gather information on self-auditing practices.

75 percent of companies now perform some form of self-auditing, but two-thirds of those companies stated they would expand such programs if penalties were eliminated for problems that the companies themselves identified, reported, and corrected. In addition, 20 percent of the companies that do not perform audits stated that they feared the audit information could somehow be used against the company.

This fear is unfortunately validated by the experiences of companies that are performing audits: 25 percent reported that outside third parties had attempted to obtain their audit data, and 15 percent reported that these attempts were successful. An additional 12 percent said that disclosed audit reports had been used for enforcement purposes against them.

Clearly, many companies question why they should go above and beyond what the law requires by conducting expensive self-audits, only to discover problems that will lead to penalties and other punitive actions. These perceptions constitute a reality effectively addressed by SB 199. Critics refuse to acknowledge that this problem exists.

Argument: "The attorney-client privilege and work product doctrine already protect from disclosure certain materials that bear upon litigation, and courts and legislatures consistently have rejected efforts to extend those protections beyond their well-established boundaries. There is no demonstrated need for a new and much broader evidentiary privilege for environmental audits." *[letter to Rep. Joe Green from U.S. Attorney Robert Bundy, April 19, 1996]*

Response: By observing that other privileges exist under the law, the author of the letter makes a useful point. There *are* precedents for establishing privilege for certain kinds of information, at least when a public interest is served. The public interest of maximum compliance with environmental laws justifies the self-audit privilege.

As the writer of the letter observes, existing legal privileges *are* confined to defined areas, e.g., physician peer review panels, attorney-client relationship, etc. That is precisely why they are *not* especially useful for protecting environmental self-audit reports. For example, the attorney-client privilege would require the involvement of an attorney in all aspects of the audit. This would have the effect of raising the audit costs, and would exclude many small businesses who could not afford this legal counsel. Furthermore, an attorney-written audit report is likely to be a sanitized document that omits frank descriptions of how problems were created, which employees were responsible, and how to bring the entity into compliance.

The value of privilege in encouraging more companies to self-audit is demonstrated in the Price Waterhouse survey previously cited. But privilege is also needed to improve the quality of self-audits that are already being performed. If auditors do not fear that reports will be disclosed, they will be at liberty to write frank assessments of problems, rather than using oblique language.

Textbooks on self-auditing are replete with warnings against using language that is too specific or descriptive because of the possibility that the report might be disclosed to hostile parties. One such textbook cautions, "The possibility that audit reports could become public or be disclosed to potentially adverse parties should also shape the language auditors use in their reports. It is usually unwise and unnecessary to opine in an audit report that a given activity or condition is 'illegal' or a 'violation.'" (*Environmental, Health, and Safety Auditing Handbook* by Lee Harrison, Copyright 1995, p. 295).

I believe that audit reports should be frank documents that get straight to the heart of the problem, as opposed to using vague and ambiguous language. Protecting audit reports through privilege will encourage honesty and candor.

Supporters of Senate Bill 199...

- Alaska Forest Association
- Alaska Miners Association
- Alaska Municipal League
- Alaska Oil & Gas Association
- Alaska Rural Electric Cooperative Association
- Alaska Support Industry Alliance
- Alaska State Chamber of Commerce
- Alyeska Pipeline Service Company
- Council of Alaska Producers

Distributed by Senator Loren Leman

SENATOR LOREN LEMAN

Northwest Anchorage

716 W 4th Ave, Ste 540, Anchorage AK 99501 258-8189 Session: State Capitol, Juneau AK 99801 465-2095

May 3, 1996

The Honorable Bruce M. Botelho
Office of the Attorney General
Department of Law
PO Box 110300
Juneau, Alaska 99811-0300

Dear Mr. Botelho:

This afternoon I received the Department of Law's fiscal note for Senate Bill 199, which projects this legislation will cost the Department approximately $3 *million* annually.

In reviewing the justification narrative, it is clear to me that your analysis stems from invalid assumptions on the practical effects of this bill.

I am disappointed that in the many hours I have spent discussing SB 199 with you, Marie Sansone, and other members of your department, I have been unsuccessful in conveying the intent and the substance of this legislation. Instead of resulting in more bureaucracy, this bill will streamline government by creating a more effective and less expensive way for securing compliance with environmental laws.

I am also disappointed that you have waited until five days before the end of the session to produce a definitive fiscal estimate -- one that is exponentially larger than the fiscal notes from other departments.

Senate Bill 199 was introduced on the first day of the session. Most departments issued fiscal notes by the end of January. In March, the Senate Finance Committee requested the Department of Law's fiscal analysis. On March 20, you issued an indefinite fiscal note which stated "it is not possible to determine the eventual increased cost to the state...".

On March 27 the Senate Finance Committee reported SB 199 with three positive fiscal notes: $39,000 from the Department of Environmental Conservation, $40,000 from the Department of Natural Resources, and $66,000 from the Department of Fish and Game.

In April the House Resources Committee requested your fiscal analysis. On April 17, you once again presented an indefinite fiscal note, saying again that it was "not possible" to determine the costs.

Now, more than two weeks later, you have presented an elaborate, 13-page fiscal note, complete with projections for new staffing requirements, contracting costs, supplies, travel expenses, etc.

Your fiscal note is based on the assumption that a massive increase in attorney time will be necessary due to new litigation and legal work resulting from enactment of SB 199.

However, other states that have enacted bills similar to SB 199 have reached remarkably different conclusions:

- Colorado passed a bill granting privilege and immunity to encourage self-audits. Its legislature concluded that the act could be "implemented within existing appropriations, and therefore no separate appropriation of state moneys is necessary to carry out the purposes of this act."

- The self-audit law in Texas has been in force for nearly a year. The fiscal analysis for the Texas bill projected zero cost. The Director of Litigation for the Texas Natural Resources Conservation Commission (TNRCC), John Riley, has stated that his department--with 100,000 regulated entities under its jurisdiction--has covered the costs of implementation without any special appropriations. He also reports he is not aware of a *single instance* in which the Texas Attorney General's office has had to enter into litigation to dispute a fraudulently asserted self-audit privilege.

- The Governor and former Attorney General of New Hampshire, Stephen Merrill, has strongly disputed claims that New Hampshire's self-audit law will "encourage litigation". In a March 15, 1996, letter to the EPA, Governor Merrill makes a worthy point: "While any new law may be tested in court, we cannot be deterred in our efforts to accomplish serious regulatory reform because of threats of suit. This bill is specifically designed to foster cooperation among the business community, regulators, lawmakers and environmental interest groups. I will assure that the law has an opportunity to succeed in New Hampshire and that we continue our path toward making government more business friendly."

A total of 17 states now have self-audit incentive laws on the books. These statutes have not generated a tiny fraction of the additional legal work that you predict will result in Alaska.

The notion that your Department will have to hire nine additional personnel--six attorneys and three support staffers--is nonsensical. I note for comparison that your Criminal Division currently has only *one* environmental prosecutor on staff, and there is a total complement of only *six* attorneys in your Civil Division's environmental section.

I am forced to conclude that this is just another artless attempt by the Administration to inject its bias into the process of fiscal analysis. Although others are doing this, I am surprised that you would allow it. I urge you to rethink your position.

Sincerely,

Loren Leman

Loren Leman
Chairman, Senate Resources Committee

cc: Rep. Mark Hanley
Rep. Richard Foster

What Alaskans are Saying about Senate Bill 199...

"The environmental self-audit is an idea proposed by Sens. Loren Leman and Drue Pearce. It is based on similar laws that now exist in 14 other states, including Oregon, which is not exactly a state that lets its industries 'rape and run'. What's mystifying, however, is the hostility to the bill being shown by the Knowles Administration, particularly the Departments of Law and Environmental Conservation... DEC's worry is that unscrupulous operators would misuse the new law as a kind of 'shield' against enforcement. These are legitimate concerns and ones that the Senate Resources Committee... has taken steps to deal with. However, the department still remains opposed to the legislation. We don't really understand why. If these laws have been abused in other states, DEC would have good grounds for its concern. But they haven't been abused, according to what the legislature's research staff has been able to find out."

-- Tim Bradner, Alaska Journal of Commerce

"This legislation provides businesses with an opportunity to conduct self-audits in an effort to assure they are in compliance with environmental, health and safety laws. We believe this creates an incentive for businesses who find they have inadvertently been out of compliance with a law or regulation to voluntarily correct their actions and strive to operate in the acceptable manner."

-- Pamela LaBolle, Alaska State Chamber of Commerce

"... the Council strongly supports the concepts of privilege and immunity embodied in SB 199. This is an excellent way to promote and encourage voluntary compliance with environmental and health and safety laws and regulations."

-- David Rogers, Council of Alaska Producers

"This legislation... encourages greater utilization of self-audits by providing immunity and ensuring confidentiality... SB 199 moves health, safety and environmental compliance in a positive direction through its encouragement of self-auditing."

-- Ken Donajkowski, Alaska Oil and Gas Association

"We support the efforts of your committee in seeking to pass legislation that promotes good environmental stewardship."

-- Norma Calvert, Marathon Oil Company

"The timber industry and the Association support the concept of environmental and safety self-audits, as embodied in... Senate Bill 199. The concepts developed in CSSB 199 (RES) are not untried. Other states, notably Texas, have implemented environmental self-audits with a good measure of success. While it may require a shift of emphasis for some of our agencies, similar laws can work equally well in Alaska."

-- Jack Phelps, Alaska Forest Association

"... this bill will help foster an atmosphere that is conducive to open communication and help remove a structural impediment that now exists to open communication. The energies of the people from both the State and industry working on an issue will be focused to solve actual problems, rather than guarding their respective legal options."

-- Steven Borell, Alaska Miners Association

Distributed by Senator Loren Leman

Why should we encourage self-auditing?

Lessons from the Price Waterhouse Survey

In February 1995, Price Waterhouse surveyed **369 companies** nationwide, representing 14 different manufacturing and service sectors of the economy, for the purpose of gathering information on the practice of environmental audits.

(Survey was sponsored by the Compliance Management and Policy Group, which includes members such as AT&T, General Electric, American Petroleum Institute, Browning-Ferris Industries, etc.)

Significant findings:

- **75 percent** of companies say they currently conduct self-audits.
- **Two-thirds** of the companies now conducting environmental self-audits say they "would expand such programs if penalties were eliminated for problems that the companies themselves identified, reported, and corrected."
- Among companies *not* performing audits, **20 percent** "fear that audit information could somehow be used against the company."
- Among companies now conducting audits, **25 percent** report that outside parties have attempted to obtain audit data, and these third parties succeeded in obtaining this information from **15 percent** of the companies.
- Among companies currently performing audits, **12 percent** said audit results had been used for enforcement purposes against them.
- **70 percent** of companies conducting audits stated that "audits have significantly improved the company's regulatory compliance" and **50 percent** stated that auditing "improved employee awareness, diligence, and compliance with company policies and procedures."

Distributed by Senator Loren Leman

NEWS

from Sen. Loren Leman

ENVIRONMENTAL SELF-AUDIT BILL RECEIVES FIRST HEARING IN SENATE COMMITTEE

Juneau -- The Senate Resources Committee concluded its first hearing yesterday evening on environmental self-audit legislation introduced by Sen. Loren Leman (R-Anchorage).

"After hearing several hours of testimony on this bill, it is clear that everybody supports the concept of companies performing their own audits and correcting any problems that are found," stated Leman, who serves as Chairman of the Resources Committee. "What remain to be worked out are the details. Over the next few weeks, we will be conferring closely with both business representatives and the Knowles Administration to craft a bill that is workable for all parties."

Fourteen states have adopted laws similar to Sen. Leman's legislation, known as the Environmental/Health and Safety Self-Audit Bill (SB 199). The committee heard from experts in Texas and Oklahoma who testified regarding the effectiveness of self-audit laws that are already on the books in those states. The witnesses recounted examples where company-sponsored audits found problems that government regulators would not have discovered in the course of their normal inspection procedures.

"It is becoming apparent that government regulators will never have sufficient money or personnel to guarantee compliance using traditional enforcement techniques," noted Sen. Leman. "We have to move to a system of 'self-policing' where there are incentives for businesses to search for problems in their operations, report any violations discovered to government regulators, and take prompt corrective action."

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For Immediate Release:
Thursday, February 1, 1996

Contact:
Mike Pauley / 907-465-2095

•••• Radio actualities on SB 199 are available by calling 1-800-478-6540.

716 W 4th Ave, Ste 320, Anchorage AK 99501 258-8189 Senate State Capitol, Juneau AK 99801 465-2095

NEWS

from Sen. Loren Leman

LEMAN INTRODUCES BILL TO PROMOTE COMPLIANCE WITH ENVIRONMENTAL LAWS

Juneau -- As the Nineteenth Alaska State Legislature convened for its second session today, Sen. Loren Leman (R-Anchorage) announced that he has introduced legislation to create new incentives for businesses to comply with complex environmental regulations.

"We have strong laws to protect the environment, as well as workers' health and safety, but it's critical that we form a partnership between government and business to increase compliance with these rules," stated Leman, who serves as Chairman of the Senate Resources Committee and Vice Chairman of the Health, Education, and Social Services Committee. "Our goal is to encourage businesses to perform their own internal audits, in an effort to identify areas of noncompliance and take corrective measures, without fear of government reprisals."

Sen. Leman's bill, the Environmental, Health, and Safety Self-Audit Legislation (SB 199), creates incentives for companies to voluntarily report instances of non-compliance to government regulators and take corrective action, through the granting of limited immunity from administrative, civil, and criminal penalties for violations that are self-disclosed. The legislation also protects businesses from having self-audit information used against them in court, unless a given business has used the bill's self-audit privilege fraudulently or is not acting in good faith.

"This bill includes safeguards to ensure that 'bad actors' are not cut any breaks, but it will create an atmosphere that protects businesses that are making a sincere attempt to comply with laws and regulations that are extremely complex," Leman noted. "A company that discovers an area of regulatory noncompliance should be able to report the violation promptly, take corrective action, and work with state regulators to ensure the problem never occurs again. This process can and should occur without fear of the kind of lengthy disciplinary action that ruins businesses and kills jobs for Alaskans."

Fourteen other states have passed legislation allowing environmental, health, and safety self-audit privileges, while similar legislation has been introduced in 11 other states. States which have self-audit privilege laws on the books include Oregon, Colorado, Idaho, Utah, and Wyoming. "This idea is a win-win proposition," commented Sen. Leman. "It helps the state, it helps business, and Alaskans come out the real winners."

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For Immediate Release:
Monday, January 8, 1996

Contact:
Mike Pauley / 907-465-2095

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★STATE★
CHAMBER
OF COMMERCE

TESTIMONY ON CSSB 199

Thank you for the opportunity to provide testimony on Committee Substitute for Senate Bill 199, regarding environmental, health and safety self-audits for businesses.

My name is Pamela LaBolle, and I am President of the Alaska State Chamber of Commerce. The State Chamber represents approximately 700 member businesses statewide which provide jobs to nearly 70,000 employees. Our network of representation also includes the 6000 business members of the local Chambers of Commerce throughout Alaska. As the Voice of Business, ASCC's mission is to create a climate in our state that is conducive to a strong private sector economy.

I am here today to speak in support of CSSB 199. This legislation provides businesses with an opportunity to conduct self-audits in an effort to assure they are in compliance with environmental, health and safety laws. We believe this creates an incentive for businesses who find they have inadvertently been out of compliance with a law or regulation to voluntarily correct their actions and strive to operate in the acceptable and prescribed manner.

The issues of disclosure of privileged information and the presumption of immunity are important ones. When voluntarily disclosing evidence of a self-incriminating nature, businesses need some assurance that the evidence they provide does not place them in a position of jeopardy. Although the State may have agreed not to prosecute on compliance issues discovered through self-audit, businesses would be loath to put themselves in a position to be sued by a third party, such as a special interest group. We hope the Rules of Procedure that govern criminal and civil cases provide the necessary safeguards for self-auditing businesses.

We believe that government should strive to be supportive of business activity, with an attitude of partnership rather than that of a watchdog. SB 199 brings us closer to the more user-friendly regulatory environment the State Chamber has been advocating. Therefore, we urge the committee's support of CSSB 199.

Alaska Forest Association, Inc.

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KETCHIKAN, ALASKA 99901-6688
Phone 907-225-3114
FAX 907-225-3620

Testimony of Jack E. Phelps, Executive Director
In support of CSSB 199(RES)
Offered to the Senate Finance Committee
March 26, 1996

Mr. Chairman, members of the committee:

My name is Jack Phelps and I am Executive Director of the Alaska Forest Association. The timber industry and the Association support the concept of environmental and safety self-audits, as embodied in the Resources Committee substitute for Senate Bill 199. The Association believes that the true purpose of environmental laws is to protect the environment, and of safety laws to protect people. Their purpose is not to levy fines nor to provide a source of income and jobs for bureaucrats. Self-audits promote this true purpose.

Too often, companies, especially smaller companies, can ill afford to contact agencies regarding known or suspected problems. They fear the result of such contacts will be crippling fines or the discovery of new, unsuspected problems which could put them out of business. With the self-audit concept, companies will be given new incentive to work towards compliance and the assurance that agencies will truly be available to help them get there without the threat of bankruptcy.

The concepts developed in CSSB 199(RES) are not untried. Other states, notably Texas, have implemented environmental self-audits with a good measure of success. While it may require a shift of emphasis for some of our agencies, similar laws can work equally well in Alaska.

The AFA appreciates the 19th Legislature's efforts to develop practical efficiencies in areas of government interaction with private industry. CSSB 199(RES) is a prime example of those efforts. The AFA also appreciates the willingness of the Resources Committee to work with timber and mining companies to ensure the present bill reflects their needs in the real world. Please pass CSSB 199(RES) on for consideration by the full Senate as quickly as possible.

DAVID E. ROGERS
ATTORNEY AND COUNSELOR AT LAW

211 Fourth Street, Suite 108
P.O. Box 33932
Juneau, Alaska 99803
907-586-807 Fax 907-586-097

April 22, 1996

Representative Joe Green
Co-Chairman
House Resources Committee
Capitol Building, Room 124
Juneau, Alaska 99801-1182

Dear Rep. Green:

I am writing this letter on behalf of the Council of Alaska Producers. The Council is a non-profit Alaska corporation whose members are essentially all of the major mining companies that are actively exploring, developing and operating in Alaska. We have carefully reviewed and discussed CS for SB 139 (FIN) and urge its passage.

The Council strongly supports responsible, cost effective incentive programs to encourage voluntary compliance with environmental or health and safety laws. We believe that the "self-audit" approach contained in the current CS - which includes appropriate privilege and immunity provisions with exceptions for bad guys and repeat offenders - is a well balanced plan that will make a difference.

We hope you will agree with our assessment and pass a reasonable version of the legislation out of committee at your earliest convenience.

Yours truly,

David E. Rogers

APR 10 19..6

ALASKA MINERS ASSOCIATION, INC.

501 W. Northern Lights Blvd., Suite 203, Anchorage, Alaska 99503 FAX (907) 276-7997 Telephone (907) 276-0347

March 8, 1996

Honorable Loren Leman
Chairman, Resources Committee
Alaska State Senate
Capitol Building
Juneau, AK 99801

RE: CSSB-199(FIN), Relating to Environmental Audits

Dear Senator Leman,

The Alaska Miners Association wishes to go on record in support of CSSB-199(FIN). This bill involving voluntary self audits is a very good and positive step for the State, for industry and for the public.

For the State and industry, this bill will help foster an atmosphere that is conducive to open communication and help remove a structural impediment that now exists to open communication. It will allow the State and industry to better work together to solve the real problems. Too many laws, both federal and state, force the State to operate as a "police patrol" in dealing with industry. When this is the case, industry must be constantly watching for the legal/suit/liability potential in everything it says and does. This bill will help to remove a portion of the built-in structural forces that cause this contentious relationship.

For the public, this bill will mean that problems will be handled better, and if there are real problems, these will become known. The energies of the people from both the State and industry working on an issue will be focused to solve actual problems, rather than guarding their respective legal options.

Thank you for this opportunity to comment. If there is any way we can help move this bill to passage and signing into law please contact me.

Sincerely,

Steven C. Borell, P.E.
Executive Director

HOUSE COMMITTEE REPORT

(7)

Date Referred to Committee: May 2, 1996

FURTHER REFERRALS: Finance

Date of Committee Action: _____

The LABOR AND COMMERCE Committee considered: waived CSSB 199(FIN)

CS FOR SENATE BILL NO. 199(FIN) ENVIRONMENTAL & HEALTH/SAFETY AUDITS

"An Act relating to environmental audits and health and safety audits to determine compliance with certain laws, permits, and regulations."

re[illegible]mends it be replaced [ ] the same title
with the following committee substitute _____ [ ] a new title

[ ] additional referral to _____ Committee
[ ] attached amendment(s)

ADOPTS: _____ Letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal note(s) _____ [ ] fiscal note(s) _____

[ ] zero fiscal note(s) _____ [ ] zero fiscal note(s) _____

SIGNING WITH RECOMMENDATIONS	DP	DNP	NR	AM

CHAIR'S SIGNATURE _____ _____

(9)

HOUSE COMMITTEE REPORT

2/2/96

Date Referred to Committee: April 12, 1996

FURTHER REFERRALS: Labor and Commerce
Finance

Date of Committee Action: 5-1-96

The RESOURCES Committee considered: CSSB 199(FIN)

CS FOR SENATE BILL NO. 199(FIN) ENVIRONMENTAL & HEALTH/SAFETY AUDITS

"An Act relating to environmental audits and health and safety audits to determine compliance with certain laws, permits, and regulations."

recommends it be replaced with the following committee substitute HCS CSSB 199 (RES) [4 the same title] [ ] a new title

[ ] additional referral to _____ Committee
[ ] attached amendment(s)

ADOPTS: _____ Letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

[ ] fiscal note(s) _____ (3)

[ ] zero fiscal note(s) _____ (2)

APPROVES PREVIOUS: (Dept/Date)

[4] Senate fiscal note(s) DEC 4-3-96 DNR 4-3-96 F+G 3-12-96

[4] Senate zero fiscal note(s) DOT 4-3-96 DMVA 3-12-96

SIGNING WITH RECOMMENDATIONS	DP	DNP	NR	AM
Nicholia		X		X
Long			X	
Williams			X	
Green			✓	
Kott			✓	
Ogan	✓			
Austerman			✓	
	(1)		(5)	(1)

CO
CHAIR'S SIGNATURE _____
Green

(907) 586-4004

Douglas Kemp Mertz

Attorney at Law
319 Seward Street
Juneau, Alaska 99801
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fax (907) 586-4141

May 3, 1996

Rep. Mark Hanley, Co-Chair
Rep. Richard Foster, Co-Chair
House Finance Committee
Alaska Legislature
State Capitol
Juneau, Alaska 99811

Re: SB 199 (Privileges and Immunities for Environmental Offenses)

Dear Representatives Hanley and Foster:

Yesterday the House waived all remaining referrals on this bill except for the referral to your committee. On behalf of the Prince William Sound Regional Citizens Advisory Council (RCAC), I would like to present you with a copy of the testimony which RCAC intended to deliver to the Labor & Commerce Committee.

The RCAC is extremely concerned that this bill, which has major ramifications for the Council and the communities and organizations which it represents, may not receive a full hearing and adequate consideration. We are prepared to assist the committee to a full understanding of the problems associated with this bill.

Also attached is a copy of a side-by-side analysis of the bill and the recently promulgated EPA policy on environmental audits and immunities, which RCAC believes to be a far preferable and more sensible approach.

Sincerely,

Douglas K. Mertz

Regional Citizens' Advisory Council / "Citizens promoting environmentally safe operation of the Alyeska terminal and associated tankers."

In Anchorage: 750 W. 2nd Ave., Suite 100 / Anchorage, Alaska 99501-2168 / (907) 272-2222 / FAX (907) 272-4521
In Valdez: 124 Fairbanks Dr. / P.O. Box 1049 / Valdez, Alaska 99686 / (907) 835-5957 / FAX (907) 835-5926

April 16, 1996

Representative Pete Kott, Chairman
House Labor & Commerce Committee
Alaska State Legislature

Re: SB 199, Environmental and Health/Safety Self-Audits

Dear Rep. Kott and Members of the Committee:

The Regional Citizens' Advisory Council of Prince William Sound (RCAC) is an independent non-profit corporation whose mission is to promote environmentally safe operation of the Alyeska terminal and associated tankers. The work of the RCAC is guided by its contract with the Alyeska Pipeline Service Company and the Oil Pollution Act of 1990. RCAC is certified as an alternative council under Section 5002 under the Oil Pollution Act of 1990.

RCAC's 18 member organizations are communities and boroughs impacted by the 1989 Exxon Valdez Oil Spill, as well as commercial fishing, aquaculture, Native, recreation, tourism and environmental representatives.

We appreciate the opportunity to comment on SB 199. We do support the bill's fundamental goal: to foster greater compliance with environmental, health and safety requirements through a cooperative approach that encourages regulated entities to find and correct problems, themselves. In its current form, SB 199 would not accomplish that goal. Indeed, as now written, it would invite abuse, generate more public distrust and cynicism, and widen the chasm between regulators and the entities they are charged with overseeing.

We recommend the following changes:

• Eliminate the self-audit privilege. This provision would create a shield that is far too broad and interferes with the public's right to know. The privilege apparently was included as an incentive to encourage regulated entities to conduct self-audits. But the EPA found in the course of developing its own policy on self-audits, that such a golden carrot is not necessary. Other incentives – chiefly, immunity from punitive penalties for violations discovered through a self-audit – are sufficient to encourage self-auditing.

We suggest instead that the regulatory agency agree to not request or use an environmental audit report to initiate a civil or criminal prosecution of a self-disclosed violation. This is the provision used by the EPA in its policy and it

makes much more sense. It ensures both fairness to the regulated entity and appropriate protections to the public.

• Add more precision to the language of the standards. As written, the bill is very vague. For example, disclosure of a violation must occur "promptly." The EPA policy requires disclosure within 10 days. There are numerous other instances in the bill where standards are vague and open to broad interpretation.

• Narrow the immunity so that violators are not allowed to keep any economic benefit derived from the violation. The immunity for self-disclosed violations should extend only to the punitive portions of enforcement sanctions. This provides a measure of fairness to competitors who have complied with environmental regulations, by eliminating any economic advantage of non-compliance.

• Eliminate the language, which now creates a safe haven for violators, by tightening the conditions and requirements for immunity:

- the violator should not be able to disclose a violation and invoke immunity after notice of a citizens' suit or whistle blower complaint;

- the violator should not be able to disclose a violation and invoke immunity if the violation imminently and substantially endangered the public or the environment (the bill now forecloses immunity only if the violation caused actual substantial injuries);

- the violator should not be able to create a permanent safe haven by announcing repeated or continuous self-audits or by announcing an audit after it has reason to believe a violation may have occurred;

- disclosure of a violation should not shield the violator from prosecutions for other violations based on the disclosed facts, or which are discovered because of the disclosed facts. The bill as currently written would lead to more litigation and would effectively shield a violator from future investigations and prosecutions, even for violations not voluntarily disclosed.

Thank you for the opportunity to comment. We would be willing to work with you to ensure that this legislation ultimately achieves its goals, with an appropriate balance of fairness to those who are regulated, and to the public served by regulatory oversight.

Sincerely,

H.E. Stanley

for Louis "Tex" Edwards, President

cc: RCAC Board of Directors
Meg Sudduth, Alyeska Pipeline Service Co.

Douglas K. Mertz for Prince William Sound RCAC *March 19, 1996*

Comparison of Senate Bill 199 and U.S. EPA's Policy on Self-Disclosure and Corrections of Violations

SB 199	EPA POLICY
Regulatory Area: All federal and state environmental, health & safety laws and regulations, and local ordinances implementing those laws. Requires scope to be construed "broadly".	***Regulatory Area:*** Federal environmental laws administered by EPA.
Audit Privilege: *Applies in:* All civil, criminal, and administrative proceedings, including private lawsuits.	***Audit Privilege:*** *Applies in:* EPA investigations.
Extent of privilege: Applies to reports, data collected for reports, interviews, field notes, analyses, memoranda, communications associated with the audit, photos, corrective implementation plans and future preventative plans. Includes prohibition on testimony from persons who participated in the audit or are aware of the results. No right of third parties, e.g., the public, to audit information on violations or corrective action.	*Extent of privilege:* EPA will not request or use an environmental audit report to initiate a civil or criminal investigation, but if it has independent reason to believe a violation has occurred, EPA may seek any relevant information identifying violations or determining liability or extent of harm. If information from an audit is obtained and no other privilege applies, the information appears to be available to the public
Penalties for divulging audit information: Persons who divulge privileged information are liable for damages and penalties stipulated in a confidentiality agreement.	*Penalties for divulging audit information:* No provision.
Exceptions to the privilege: Information required to be collected by law or by a permit; information gathered directly by a government agency;	*Exceptions to the privilege:* Not directly addressed, but it is implicit that the same exceptions apply as in SB 199, since that information is by definition not

information gathered from another source which is not part of audit process.

Self-disclosure Immunity

Voluntary disclosure of violations (meeting the requirements below) gives immunity from all civil, criminal, and administrative penalties. The immunity extends to the violation which is disclosed and to any violation based on the facts disclosed or which is discovered because of the disclosed facts. Violators which meet some but not all of the requirements (e.g., voluntariness of disclosure, audit efforts, remediation efforts, cooperation) may have their penalties mitigated by the court or deciding administrative official.

Requirements for immunity:

The disclosure must arise out of facts discovered during an environmental audit. Notice of the audit must be given to the agency before it begins, with anticipated end date and scope.

Disclosure must occur "promptly" after it is known, in writing to the agency.

There must not already be an agency investigation underway or the violation already independently detected.

part of the audit report.

Self-disclosure Immunity

Voluntary disclosure of violations (meeting the requirements below) gives immunity from punitive (so-called "gravity-based") penalties, but not to penalties intended to remove the defendant's economic gain from non-compliance. If the violator meets some but not all of the requirements below, EPA will reduce punitive penalties by 75%. EPA will not recommend criminal prosecution for self-disclosed violations which meet the requirements below.

Requirements for immunity:

The violation must be discovered through an audit or similar systematic practice, and EPA may require the regulated entity to disclose publicly how it exercises due diligence to prevent, detect, and correct violations. (But if the violation was discovered outside of an audit or similar practice, while meeting the other requirements set out here, the violator still receives a reduction in the punitive portion of the penalty of 75% .)

Disclosure must occur within ten days of discovery, in writing to EPA.

Disclosure must occur before commencement of a federal, state, or local inspection or investigation or information request and before notice of a citizens suit or third party complaint or report of the violation by a "whistleblower", and before

	"imminent discovery" of the violation by a regulatory agency.
The section on self-disclosure immunities does not contain an exception for information required to be disclosed by law or permit, as in the audit privilege section; but the disclosure must be pursuant to a "voluntary" audit, so it likely would not be available to legally mandated disclosures.	The identification of the violation must be voluntary, i.e., not through legally mandated monitoring or sampling requirements.
The disclosing party must, "within a reasonable time", "initiate an appropriate effort" to achieve compliance, pursue it with "due diligence", and correct or "implement measures designed to remedy non-compliance" "within a reasonable time".	The regulated entity must within 60 days (unless more time is requested in writing) correct the violation; and take appropriate measures (as determined by EPA) to remedy any environmental or human harm due to the violation. EPA may require a publicly available written agreement on compliance and remedial measures. The regulated entity must agree to take steps to prevent recurrence.
The violation must not have caused substantial injury to persons on the site or to persons, property, or the environment off-site.	The violation must not have resulted in serious actual harm or presented an imminent and substantial endangerment to human health or the environment, or violated the specific terms of a judicial or administrative order or consent agreement.
The regulated entity must cooperate with the investigating agency and agree to disclose to the agency that part of the audit that describes the implementation plan to correct the violation and prevent recurrence.	The regulated entity must cooperate as requested by EPA in providing information to determine if this policy is applicable, including providing all requested documents and access to employees and assistance in investigating the violation, related noncompliance problems, and environmental consequences.
The violation must not have been committed "knowingly" by the person disclosing it ("person" in state law includes businesses	Before it recommends criminal prosecution for self-disclosed crimes, EPA must not find management philosophy or practices that

and corporations as well as natural persons); or "recklessly" when substantial injury resulted; or "intentionally or knowingly" by a member of management, when the business has no systems in place to prevent such violations; or "recklessly" by management when company policies contributed to the occurrence and there were substantial injuries.

concealed or condoned environmental violations; or that high level corporate officials had "conscious involvement" or "willful blindness" to the violations. (EPA reserves the right to recommend criminal prosecution for criminal acts of individual managers or employees.)

There must not have been repeated violations of the same or similar nature "an unreasonable number of times" or continuously; and there cannot have been a lack of attempt to bring the facility or operation into compliance, so as to constitute a pattern of disregard of the law, i.e., a series of violations within a three-year period at the same facility or operation.

There must not have been repeated or closely related violations within the last three years at the same facility; or a pattern of violations by the facility's parent organization within the last five years.

UMMH SCHEIBEN KORYNTA HUETTL, INC

ARCHITECTURE • ENGINEERING • LAND SURVEYING • PLANNING

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FACSIMILE TRANSMITTAL

TO Rep. Mark Hanley

DATE May 3, 1996

CO Alaska State Legislature

SUBJ HCS CSSB199 (Version Z)

DEPT House of Representatives

FAX 907-465-2418

WO#

NO OF PAGES (including this transmittal) 1

If all pages not received please notify sender

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COMMENTS

As you know, the Alliance is very supportive of passage of CSSB199, the environmental audit bill. Voluntary self audits would serve the interests of everyone: the industries performing the audits, the regulatory agencies and, most important of all, the public and our environment. The benefits that CSSB199 will create for the vast majority of law abiding businesses that have to deal with environmental regulations should outweigh ADEC's concerns that it might be used nefariously by a few. I hope that passage of this legislation has yours and all of the majorities support. Thank you

SIGNATURE Dan Rowley, Chairman

Department Environmental Committee of The Alliance

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U.S. Department of Justice

United States Attorney
District of Alaska at Anchorage

Federal Building & U.S. Courthouse
222 West 7th Avenue, #9, Room 253
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Commercial: (907) 271-5071
Fax Number: (907) 271-3224

May 3, 1996

Representative Mark Hanley
State of Alaska
State Capitol
Juneau, Alaska 99811

Representative Richard Foster
State of Alaska
State Capitol
Juneau, Alaska 99811

Co-Chairs, House Finance Committee

Re: HCS CSSB 199(RES)

Dear Representatives Hanley and Foster:

I am writing to again express my serious concerns about HCS CSSB 199(RES) which would establish an evidentiary privilege for environmental audits and create immunity for violators in certain circumstances.

I have written Senator Leman, Representative Green, Representative Austerman and Representative Williams about my concerns, and I understand those letters are part of the record in the House Resources Committee. I will not repeat the concerns I raised in them. Suffice it to say that my 25 years experience as a litigator in the courts of Alaska, including prosecuting and defending environmental actions, tells me that HCS CSSB 199(RES) will shield illegal, including criminal, misconduct; interfere with law enforcement; conceal information vital to public health and safety from the public and from enforcement authorities; create an atmosphere of distrust between regulators and regulated entities; and conflict with public policies of openness and corporate accountability.

More importantly for the Finance Committee's concerns, HCS CSSB 199(RES) bills will also result in costly litigation and squander limited enforcement resources. Right now, the State of Alaska's ability to enforce important environmental laws is limited indeed. I understand only one Assistant Attorney General is assigned to

prosecution of criminal environmental violations. This Bill would spread the legal resources of the State even thinner, because it invites whole new layers of pretrial litigation that present almost insurmountable obstacles to enforcement.

For example, the environmental auditing field is new and there are no national standards, no certification requirements for auditors, and no consistent definitions. This state of affairs provides an incentive for would-be violators to claim that normal day-to-day business practices constitute "audits" and to include all sorts of data in such a report to avoid enforcement. One need only refer to the definition of "audit report," proposed as Section 09.25.490(a)(1), to get a flavor of the breadth of information that can be forever hidden from the view of public enforcement officials or affected citizens. HCS CSSB 199(RES) creates a privilege for "audit reports," which does not appear to be limited to legitimate and objective environmental audits performed by professionals, but instead could easily be interpreted to include even the most casual survey of a facility for environmental problems.

Litigation over whether the privilege was properly invoked would provide violators with numerous opportunities to delay enforcement, to force the government and the courts to expend their limited resources on needless litigation, and to frustrate legitimate efforts to pursue violators of the law. This bill would also impair environmental enforcement by tying up such actions in disputes over its vaguely defined terms, such as the meaning of "efforts to achieve compliance" and "promptly initiated and pursued with reasonable diligence." See, proposed Sec. 09.25.460. These disputes would be decided in a series of in camera hearings that would vastly increase the litigation cost to be borne by the Alaskan public. Because the privilege would presumptively apply, even to those who did not disclose and correct a violation, the cost of prosecuting such bad actors would increase greatly.

If a document were ultimately determined to be privileged, law enforcers could expect motions to exclude other evidence as "fruit of the poisonous tree," as well as motions to exclude prosecutors who may have become "tainted" by their exposure to privileged evidence. It appears that the privilege would apply to bar the use of evidence even against rogue employees who are engaged in criminal conduct against company policy. Environmental enforcement under this bill would be seriously hampered, the cost of prosecution would soar and voluntary compliance could be expected to deteriorate proportionately.

Finally, an audit privilege would be susceptible to costly abuse by unscrupulous entities. While the most regulated entities voluntarily comply with the environmental laws, there are some who would take advantage of an evidentiary privilege to shield all kinds of evidence of wrongdoing from authorities. It has been my experience in prosecuting environmental cases that many of the defendants in environmental criminal enforcement actions have defrauded or lied to the government as well as violated the environmental laws. People who would lie about other aspects of their business or environmental practices could be expected to falsely label documents as part of an "audit report" as well to claim a privilege. Even if law enforcement authorities were eventually able to obtain the use of such documents, it would only be after much wasted time and expense.

Thank you for this opportunity to comment on a bill that will decrease protection of the environment and increase dramatically the costs of protection of the environment.

Very truly yours,

ROBERT C. BUNDY
United States Attorney

RCB:kjn

U.S. Department of Justice

United States Attorney
District of Alaska at Anchorage

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April 19, 1996

Representative Joe Green
Chairman, House Resources Committee
State of Alaska
State Capitol
Juneau, Alaska 99801-1182

Re: Senate Bill 199; An Act relating to environmental audits and health and safety audits to determine compliance with certain laws, permits, and regulations.

Dear Representative Green:

I am writing to express my serious concerns about legislation such as Senate Bill 199, which would establish an evidentiary privilege for environmental audits and create immunity for violators in certain circumstances. While I normally do not comment on pending state legislation, this legislation implicates significant federal interests. First, in Alaska as in most states, federal environmental laws are implemented largely through federally-approved state programs. By impairing a state's ability to enforce its own programs, this legislation would have the effect of impairing the enforcement of federal law. State privilege laws, some of which even include penalties against government officials who make disclosures of privileged information, would make it more difficult for the states to refer matters for federal enforcement. Second, defendants may attempt to raise state privileges in federal proceedings. While we believe these privileges would not apply, at a minimum, valuable resources would be wasted in litigation. Thus, there are strong reasons for federal law enforcement officials to be concerned about state legislation that would create a new evidentiary privilege or immunity.

I agree with Attorney General Reno's view that, properly implemented, environmental audits and other self-policing activities are useful tools of responsible businesses. Like the Attorney General, however, I am strongly opposed to legislation that would create a new privilege establishing a legal right to conceal from the public and from public officials a new class of secret information -- information relating to environmental

violations and to potential risks to public health and the environment. Equally radical would be the enactment of a new immunity law that would protect environmental violators from enforcement, and I share her opposition to new immunity provisions, as well.

The attorney-client privilege and work product doctrine already protect from disclosure certain materials that bear upon litigation, and courts and legislatures consistently have rejected efforts to extend those protections beyond their well-established boundaries. There is no demonstrated need for a new and much broader evidentiary privilege for environmental audits. Available information indicates that, as a matter of good business practice, an increasing number of firms are performing audits without any audit privilege. Surveys also indicate that strong environmental enforcement has served as a major incentive for companies to self-audit, as well as to comply with the law.

An evidentiary privilege for audits would impede law enforcement by allowing facts that are important to the protection of public health and the environment to be hidden from public view and from government officials; thus, it would inhibit the operation of the very engine that drives audit efforts. Both compliance with the law and corporate accountability are more likely to occur within the context of openness than in secrecy. In addition, a privilege would inhibit and even prevent employees or businesses that violate the law from coming forward to report their employers' transgressions, thereby cutting off a very valuable source of information needed for the protection of the public.

Moreover, a privilege statute would mire enforcement efforts in a tangle of litigation over the applicability and reach of the privilege and the scope of exemptions. Critical terms in the statute are broad or ill-defined, and there are no established definitions or standards for environmental audits. This added litigation would consume scarce judicial, prosecutorial and investigative resources. Underlying health and environmental problems could be left uncorrected and the public unprotected during the resulting delays.

An environmental audit privilege also would be highly susceptible to abuse. Many of our criminal cases involve defendants who make false statements to government officials to conceal their environmental violations, and it would be an easy matter for these defendants to label ordinary internal

communications after-the-fact as "audits" or "self-evaluations" and assert false claims of privilege simply to delay an investigation. They could use the privilege even to shield continuing violations and ongoing criminal conduct. The public would be justifiably upset if the government were prevented from obtaining information about a violation that led to widespread damage or serious injury because of a claim of audit privilege.

The creation of immunity for those who under certain circumstances "voluntarily" disclose their violations to the government would be equally unwise, having the potential to allow serious environmental violators to escape responsibility for their wrongdoing when, after the fact and after the damage has been done, they come forward and disclose their actions. An immunity provision would have the perverse effect of actively discouraging proactive environmental management, since companies and individuals could immunize themselves retroactively even after causing serious harm simply by initiating action to correct problems only prospectively. This is unconscionable in an area of law designed to protect the health and safety of the public, especially where the violations at issue may have endangered the public or resulted in long-term environmental harm. It would place law-abiding companies at a competitive disadvantage and is unparalleled in any other enforcement context.

Finally, as a positive alternative to the proposed legislation, a number of policies and a wide range of programs have been developed and implemented at the federal level to encourage and promote voluntary environmental auditing and compliance, without the need for a deleterious audit privilege or the unnecessary granting of blanket immunity. For example, the United States Environmental Protection Agency recently adopted and published a broad and comprehensive new policy on incentives for self-policing (including environmental auditing) to address exactly the concerns that have driven the proposed legislation here. The Department endorses and supports that policy, which is consistent with existing policies within the Department that already require that prosecutors take into account self-auditing, self-evaluation and voluntary disclosure as important mitigating factors in the exercise of criminal prosecutorial discretion. The Department further supports the use of the EPA policy, in conjunction with other applicable policies, in the settlement of civil environmental enforcement actions.

Taken together, the policies of both EPA and the Justice Department contain the right mix of strong enforcement for

wrongdoers and leniency for good actors to ensure continued protection of the public and of the nation's environment. I would be happy to arrange for representatives from EPA and the Department to share with you ways in which these policies and programs could be adapted for use in this state.

With all of these points in mind, it is clear that legislation of the type proposed is both anti-environment and anti-law enforcement. Without a demonstrated need for its enactment, it would disrupt law enforcement efforts, prolong litigation, place an enormous burden upon public resources, conceal truth, frustrate efforts to protect public health and the environment, and provide violators with an unfair economic advantage over their law-abiding competitors.

Yours truly,

ROBERT C. BUNDY
United States Attorney

RCB:kjm

cc: Senator Loren Leman

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April 29, 1996

Senator Loren Leman
State of Alaska
State Capitol
Juneau, Alaska 99801

Re: CSSB 1999(FIN), April 23, 1996 Work Draft

Dear Senator Leman:

Thank you for your letter of April 23, 1996, responding to the points I made in my April 19, 1996, letter to Representative Joe Green regarding CSSB 199(FIN), April 23, 1996 Work Draft (hereinafter "SB 199").

I do not doubt your personal stake in environmental protection, nor the sincerity of your aims in introducing and pressing for the passage of SB 199. Your experience as an engineer made lead you to conclude that SB 199's incentives to encourage environmental self-auditing are worth the cost to enforcement programs. I do not question the sincerity of your beliefs. However, my 25 years of litigation experience, in the course of which I both prosecuted and defended environmental cases, causes me to stand by my conclusion that the <u>effect</u> of many of the provisions of SB 199 are both anti-environment and anti-enforcement.

You questioned whether SB 199's immunity provisions can reasonably be described as "radical" in light of the EPA's self-reporting policy. However, examination of the EPA policy reveals striking differences between it and SB 199:

> 1. The EPA policy creates no new evidentiary privilege. SB 199's provisions allow environmental violators to hide even serious, long-standing violations forever from public view. SB 199's creation of a corporate Fifth Amendment privilege, a notion uniformly rejected by every court that has considered the matter in our country's history, can be hardly be described as anything less than radical.

2. As opposed to SB 199, EPA's policy does not create a legal entitlement for violators to dodge enforcement. The EPA policy is simply written notice of a long-standing policy (which I understand is consistent with Alaska Department of Law policies) that provides incentives for companies to self-report and correct, while allowing enforcers the flexibility to deal with the myriad factual situations which are encountered in the real world.

These differences are of critical importance. This is illustrated by the fact that EPA's self-reporting incentives are uniformly praised by enforcers such as the National District Attorneys Association (NDAA) and the National Association of Attorneys General (NAAG), while bills with privilege and immunity provisions like SB 199's are opposed by these same enforcers. NDAA and NAAG are nationwide organizations that reflect the views of those working directly in enforcement of environmental health and safety laws throughout the country. The reason NDAA and NAAG take this position: SB 199-type legislation provides a legal entitlement for violators to hide evidence of their actions and avoid answering for their behavior, while the EPA approach gives valuable incentives for self-audits, but retains flexibility to adjust the enforcement response to particular circumstances. The NDAA and NAAG can hardly be described as anti-business, yet these groups understand the realities of the enforcement of environmental and health and safety laws.

You stated our concerns about secrecy are misplaced, because the privilege provisions of the bill do not protect reports that are required to be made to an agency by law or regulation, nor do they preclude the testimony of a "whistleblower". However, that does not address a number of situations frequently encountered in environmental enforcement actions:

1. The situation, as recently encountered in a prosecution in this office, when a regulated company provides false reports;

2. A situation in which important evidence is contained in internal documents which are not a part of required reporting; and

3. A situation in which documents are required to corroborate the testimony of the "whistleblower," whose credibility will certainly be vigorously attacked by the defense.

Just a few examples of information that agencies routinely use in enforcement proceedings that will be denied them if a self-audit privilege is enacted in Alaska, include: (1) internal memos, particularly reports of lower level employees on the scene; (2) ship logs; (3) equipment repair records; (4) shift reports; (5) computer information; and (6) instrument readings. All of these documents may be protected simply by providing regular notice to a regulating agency that audits are commencing; the notice may allow for an audit to go on for any length of time and cover virtually any subject, operation or facility. Virtually any document can easily be hidden under the guise of an appendix to a "health and safety audit," even if the information is not gathered by the company for the primary purpose of aiding the audit. Moreover, without information about the "privileged" documents, enforcement agencies will be crippled in any effort to overcome a claim of privilege.

Finally, you asked that the Department of Justice and the EPA become constructively involved in encouraging self-audits. They are. It has been a long-standing policy of the Department of Justice and the EPA to encouraged self-audits. It is well known that companies that self-audit, report and correct can expect substantial benefits in any potential enforcement action. As you point out, EPA has a written policy of rewarding self-reporting with lenient treatment. So does the Justice Department. Since July, 1991, the Department of Justice has followed a guidance memorandum for prosecutors in situations that might include self-reporting, cooperation, auditing and correction of violations in various combinations. The basic message of the guidance is that good faith efforts by a violator should be among the factors taken into account in prosecutorial decision-making. Such efforts could, and often do, have a mitigating effect sufficient to convince prosecutors that a case should not be brought criminally and that civil penalties be substantially reduced or foregone altogether. Indeed, these policies have had the desired effect of increasing self-auditing. In a 1992 Arthur D. Little survey of Fortune 100 companies, 80 percent of the respondents planned to <u>expand</u> the scope of their audit programs in the near future.

I hope you will consider the above in the spirit of our common goal of increasing compliance with important environmental and health and safety laws in order to protect the public health and Alaska's priceless environmental resources. Thank you for this opportunity to comment.

Very truly yours,

ROBERT C. BUNDY
United States Attorney

RCB:kjn

cc: Representative Joe Green