SB

199

Testimony of Ken Donajkowski, Alaska Oil & Gas Association

Senate Bill 199 -- Environmental, Health and Safety Self-Audit Legislation

Senate Finance Committee Hearing -- March 27, 1996

The Alaska Oil and Gas Association (AOGA) is a trade association whose 19 member companies account for the majority of oil and gas exploration, production, transportation, refining and marketing activities in Alaska.

1. The Alaska Oil and Gas Association supports the intent of SB 199. The majority of our members currently conduct self-audits as a means of ensuring compliance and see value in this legislation. Over the past 25 years or so, health, safety and environmental regulations have become increasingly complex. Not incidentally, interpretation of these regulations has become correspondingly difficult. In response to this, self-auditing identifies areas of inadvertent non-compliance, and leads to subsequent corrective action. We encourage others in all industries to utilize self-auditing, not just to ensure compliance but to generally improve health, safety and environmental performance. This legislation also encourages greater utilization of self-audits by providing immunity and ensuring confidentiality.

2. Immunity from penalties should be offered as an incentive for companies to identify, disclose, correct and prevent the reoccurence of non-compliant behavior. Self-auditing, to be effective should be undertaken without fear of consequences from regulatory agencies and without concern for final outcome. Providing immunity from penalties for deficiencies that are discovered through self-auditing and subsequently disclosed recognizes earnest efforts by companies to comply as opposed to penalizing them for such efforts. Immunity should not, however, extend to those who would knowingly and willfully commit violations and subsequently audit in order to shield themselves from just and appropriate consequences.

3. Privilege further protects companies from inappropriate and unnecessary repercussions, of disclosing audit results to agencies (e.g. third party action). Privilege also ensures that the auditing process is not compromised. The issue is not one of "secrecy" it is a matter of being able to conduct candid interviews with personnel. To remain effective, it is necessary to preserve the integrity of the audit process and maintain the trust and cooperation of employees. Traditiional legal privileges limit the flexibility that is important to the self auditing process. For example, attorney-client privilege does not provide for open, internal communication of audit results with employees. However, as with immunity there are

reasonable limits tc the application of privilege. Privilege should protect the products of an audit, such as the audit report, auditor working papers, and action plans; privilege should not be a vehicle to hide the underlying facts.

4. SB 199 moves health, safety and environmental compliance in a positive direction through its encouragement of self-auditing. We are hopeful that a bill based on the intent of SB 199 can be passed and to that end we are participating in encouraging discussions with ADEC, the bill's sponsor and will be meeting with State OSHA, as well.

5. Looking for deficiencies, identifying them, disclosing them to the appropriate agencies, and correcting them is what self-auditing is about. It is an important tool for voluntary compliance. Without privilege and immunity, voluntary self-audits can put a company at a competitive disadvantage relative to companies that do not audit. With privilege and immunity the state is saying self-auditing is in the best interest of the state as well as industry.

FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. HCS CSSB 199 (RES)

Revision Date:
Title: Environmental and health and safety audits

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

Sponsor: Senator Leman
Requestor: House Resources

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	131.0	131.0	131.0	131.0	131.0	131.0
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	**194.0**	**194.0**	**194.0**	**194.0**	**194.0**	**194.0**
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						
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	78.6	78.6	78.6	78.6	78.6	78.6
1005 GF/Program Receipt	0.0	0.0	0.0	0.0	0.0	0.0
1006 GF/MHTIA	0.0	0.0	0.0	0.0	0.0	0.0
Other Oil H2 Response Fund	115.4	115.4	115.4	115.4	115.4	115.4
TOTAL	194.0	194.0	194.0	194.0	194.0	194.0

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.)

See Attached

Prepared by: Janice Adair
Division: Director, Division of Environmental Health
Phone: 269-7645
Date: 5/3/96

Approved by Commissioner:
Agency: Department of Environmental Conservation
Date: 5/3/96

PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE
For further distribution information, call the Governor's Legislative Office

Fiscal Analysis for HCS CSSB 199 (RES)

This fiscal note will pay for one and one-half full time attorneys in the Department of Law, at $126.0 each plus $5,000 in travel. It presumes the bulk of the legal work will revolve around oil-related programs. We have not included any estimate on potential additional cleanup costs that the state would have to bear however we believe that is a likely outcome as explained below.

This bill creates a privilege for audit reports and provides immunity for any violations of environmental laws. The privilege means that all documentation created as a part of a compliance audit is kept secret and not accessible by the courts, the legislature, the agency or the public - even if the public had been harmed by the actions or inactions of the company that had performed the audit.. Any audit information the department now receives voluntarily would have to be a requirement of a permit, compliance agreement or similar document. If the permittee voluntarily provides the department with any of the information from the audit, they can require the department sign a confidentiality agreement, and not disclose the information.

The Department of Law may, on behalf of DEC, ask a judge to review the privileged information if the state can prove that the privilege is being asserted fraudulently. Because the burden of proof would be on the department, and because we would not have seen the audit documentation, it will be very difficult to meet this requirement. We are advised that the attorney who represents us in the in-camera review may not be the same attorney who represents the department in the case. When the case is a criminal matter, we would have to hire outside counsel as there is only one environmental prosecutor on staff.

Fiscal considerations include increased attorney time in negotiating, drafting and reviewing permits, regulations and other documents to ensure adequate compliance documentation is required. Each year there are several hundred permits that are issued. We would also need to renegotiate existing permits and compliance agreements.

We would also rely on the Department of Law to negotiate, draft and review confidentiality agreements and seek their advice on issues relating to privileged information since DEC employees will be liable for damages or penalties for any breach of confidentiality.

We also rely on the Department of Law for assistance with contaminated site remediation, and audits are often requested to help apportion responsibility between parties. To the extent that the audits cannot be used to do this, and there is no other mechanism to show responsibility, the state would see increased state cleanup costs.

FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. HCS CSSB 199(RES)

Revision Date:
Title: Environmental & Health/Safety Audits
Sponsor: Senator Leman
Requestor: House Resources

Department Affected: Labor
BRU: Labor Standards & Safety
Component: Occupational Safety and Health
COMPONENT SERIAL NO. 970

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	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						
CHANGE IN REVENUE FUND SOURCE #						

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY96) impact: $ None

ANALYSIS: (Attach a separate page if necessary)
The current version of CSSB 199 as passed out of the House Resources Committee would result in a zero fiscal note for this department because language relating to health and safety audits was removed from the bill. This fiscal note is subject to change if health and safety audits are put back into the bill at any point. There would then be a positive fiscal note.

Prepared by: Alan W. Dwyer, Director
Division: Labor Standards and Safety
Phone: 269-4914
Date: 5/3/96

Approved by Commissioner: for Tom Cashen, Commissioner
Agency: Department of Labor
Date: 5/3/96

PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE
For further distribution information call the Governor's Legislative Office

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.

Richard I. Pegues

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

PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE
For further distribution information, call the Governor's Legislative Office

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 ($1.2 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

FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. HCS CSSB199 (RES)

Revision Date:
Dept. Affected: Alaska Court System
Title: Environmental and Health/Safety Audits
BRU: Trial Courts
Component:
Sponsor: Sen. Leman
Requestor:
COMPONENT SERIAL NO. 768

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	*	*	*	*	*	*
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

Fund Source (Thousands of Dollars)

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

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

Positions

Full-Time						
Part-Time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

See attached analysis.

Prepared by: C. S. Christensen III, Staff Counsel
Phone: 264-8228
Agency: Alaska Court System
Date: 05/01/96

Approved by: Arthur H. Snowden, II, Administrative Director
Date: 05/01/96
Agency: Alaska Court System

PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE

11:47 AM
Rev 1/96

Alaska Court System
Fiscal Analysis
HCS CSSB 199 (RES)

HCS CSSB 199 (RES) creates a privilege from disclosure in certain court proceedings for information contained in an environmental audit. A person or entity asserting the privilege is entitled to an in camera review of the information, in order to determine if the information is privileged or 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 required will require large amounts of time for pre-trial proceedings.

It is impossible at this time to estimate the number of cases involving audits which may arise each year, and the complexity of the resulting in camera proceedings. Accordingly, the court system may need to return to the legislature for funding at a later date if the legislation results in a significant increase in judicial and clerical time spent on these cases.

Free, Confidential Consulting Service

You can prevent injuries and illnesses in your workplace by taking advantage of the

Offered by:
State of Alaska
Department of Labor
Occupational Safety & Health
Division of Labor Standards & Safety

This material and Safety and Health Consultation Services are provided free of charge to owners, proprietors, and managers of small businesses by the State of Alaska, Department of Labor under a program funded largely by the Occupational Safety and Health Administration (OSHA), an agency of the U.S. Department of Labor.

State of Alaska
Department of Labor
Occupational Safety & Health
Div. of Labor Standards & Safety

3301 Eagle Street
P.O. Box 107022
Anchorage, Alaska 99510-7022
Phone (907) 264-2599

THE SEAL OF THE STATE OF ALASKA

Consultation Services

Toll Free Msg.: 1-800-656-4972
Direct: (907)269-4955

Place Stamp Here

Consultative Assistance

Chief, Consultation & Training
3301 Eagle Street
P.O. Box 107022
Anchorage, Alaska 99510-7022

A major indicator of business success is ROI (Return on Investment). The higher your ROI, the better. Everyone will agree that taxes are high and most everyone will agree that there is little ROI when it comes to taxes.

In these days of shortage of good news, consider the Alaska Department of Labor Standards & Safety consultative assistance program, paid for by your tax dollars, that offers you a chance to reduce costs and increase your company's ROI.

Our free, confidential, consulting service is conducted by the Alaska Department of Labor's Division of Labor Standards & Safety for the business community of the State of Alaska. The purpose of the program is to promote health and safety, and to advise industry management of existing or potential health or safety problems before they cost you time, money, injuries, or fatalities.

Please invest a few minutes in reading this brochure, then feel free to call us if we can help.

Sincerely,

Chief, Consultation & Training

How it Works

If you would like an experienced OSH safety or health professional to come to your plant or office for a no-charge consultation and inspection service, simply write or call the Anchorage office and make some of your tax dollars return and work for you. The consultant will meet with you, go through your facility, point out and explain potential problems, and recommend practical and economical solutions where possible. The consultant will provide you with a written report containing findings and recommendations referenced to the proper OSH standards. Remember, this is strictly a confidential, no-charge service. It is specifically designed to advise you of any existing or potential health or safety problems to reduce your occupational accidents and illnesses and thereby reduce your costs. Your only obligation is to correct situations that would result in serious injury or illness. If an imminent danger is detected you would be required to immediately correct the problem, but these types of situations are highly unlikely.

Voluntary Compliance

The Alaska Occupational Safety and Health Act requires that each employer shall furnish his employees with a safe and healthful working environment. By using this free service you can come into voluntary compliance and avoid or reduce the potential for any fine, should you be inspected by OSH enforcement in the future. In addition, you may reduce the cost of your Worker's Compensation insurance by reducing your potential for occupational accidents and illnesses, which also enhances morale and efficiency.

FOR MORE INFORMATION, CLIP OFF ATTACHED PORTION AND MAIL.

DATE.

TO: Chief, Consultation & Training

FROM: _____ COMPANY NAME

_____ ADDRESS

_____ TELEPHONE NO

_____ CITY _____ STATE _____ ZIP

Please call me at your earliest to discuss your free confidential consulting service.

_____ NAME

_____ POSITION

Alaska Environmental Lobby, Inc.
P.O. Box 22151 Juneau, Alaska 99802
Phone: 907-463-3366
Fax: 907-463-3312

AEL OPPOSES CSSB 199

The Alaska Environmental Lobby supports compliance with environmental regulations. Internal audits for compliance with environmental or safety regulations and permits are desirable and should be encouraged. Audits make good business since and good public policy. But, establishing a new legal privilege the makes information from self audits secret, and gives immunity from civil and criminal penalties for corporations that are non-compliant with regulations (gaining an economic advantage over competitors) is bad policy.

Under the guise of encouraging compliance, **this legislation provides secrecy for violators.**

Environmental crimes, like most white collar crimes are proved through documents provided by the responsible party. If the cloak of privilege were thrown around these records and documents, effective enforcement of many federal and state laws would be impossible. (US Supreme Court in *Braswell v. US*, 108 S. Ct. 2284, 1988)

Audits should not be privileged

A 1992 Arthur Andersen survey of cooperate general counsels found the 60% of the corporations surveyed had performed an environmental compliance audit within a two year period. Businesses conduct audits without privilege or immunity because internal review makes good business sense.

By definition privilege invites secrecy. Violators could claim as "audit material" information needed to establish responsibility for a problem. This secret could protect one corporation who is in violation, while leaving the problem to be resolved by other networked companies or the government. When there are lease agreements between owners of facilities and operators, or multiple lease holders, who is responsible for the immediate remedy of the problem? The public and regulators will lose information about their corporate neighbors, that may directly affect them.

Immunity from civil, criminal and administrative penalties is poor public policy.

Noncompliance can often result in economic gain, and it should not be tolerated. If a violation results in an economic advantage over a non-violator, attempts should be made to recover the economic gain. Additionally, penalties and fines for violations, may be the only tool that regulators have to encourage compliance. If the fine/penalty is so small that it is cheaper to never comply, but, instead just pay the penalty, the regulation is mute.

Companies have a duty to know and obey the law.

No individual would be excused if they claimed that during civil or criminal activities they were ignorant of their violations. Every individual is responsible for knowing the law and complying with it. Corporations should be too.

If its not broke, what are we trying to fix?

There is NO valid example in Alaska where, after voluntarily revealing to regulators, a violation, that the regulated corporation, was unfairly and arbitrarily penalized. Although cases from Texas, Louisiana, and federal agencies were all cited, they do not demonstrate a problem here in Alaska.

A 1994 **survey of cases in all 50 states** conducted by the National Association of Attorneys General found **only one civil case and two criminal prosecution** that were based on information gathered from voluntary environmental audit.

4/3/96

9-LS1312\O
Lauterbach
4/23/96

HOUSE CS FOR CS FOR SENATE BILL NO. 199( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATORS LEMAN, Pearce

A BILL

FOR AN ACT ENTITLED

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

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* **Section 1.** AS 09.25 is amended by adding new sections to read:

ARTICLE 5. PRIVILEGES AND IMMUNITIES
RELATED TO DISCLOSURE OF CERTAIN SELF-AUDITS.

Sec. 09.25.450. AUDIT REPORT PRIVILEGE. (a) Except as provided in AS 09.25.455 - 09.25.475, an audit report is privileged and is not admissible as evidence or subject to discovery in

(1) a civil action, whether legal or equitable;

(2) a criminal proceeding; or

(3) an administrative proceeding, except for workers' compensation proceedings.

(b) A person, when called or subpoenaed as a witness, may not be compelled

to testify or produce a document related to an environmental or health and safety audit if

(1) the testimony or document discloses an item listed in AS 09.25.490(a)(1) that was made as part of the preparation of an environmental or health and safety audit report and that is addressed in a privileged part of an audit report; and

(2) for purposes of this subsection only, the person is a

(A) person who conducted all or a portion of the audit but did not personally observe or participate in the relevant instances or events being reviewed for compliance;

(B) person to whom the audit results are disclosed under AS 09.25.455(b); or

(C) custodian of the audit results.

(c) A person who conducts or participates in the preparation of an environmental or health and safety audit and who has actually observed or participated in instances or events being reviewed for compliance may testify about those instances or events but may not be compelled to testify about or produce documents related to the preparation of or a privileged part of an environmental or health and safety audit or an item listed in AS 09.25.490(a)(1).

(d) A regulatory agency and an employee of a regulatory agency may not request, review, or otherwise use an audit report that is privileged under (a) of this section during an agency inspection of a regulated facility, operation, or property or an activity of a regulated facility, operation, or property.

(e) To facilitate identification, each document in an audit report shall be labeled "COMPLIANCE REPORT: PRIVILEGED DOCUMENT," or labeled with words of similar import.

(f) A party asserting the privilege described in this section has the burden of establishing the applicability of the privilege.

(g) This section may not be construed to

(1) prevent a regulatory agency from issuing an emergency order, seeking injunctive relief, independently obtaining relevant facts, conducting necessary

inspections or taking other appropriate action regarding implementation and enforcement of an applicable environmental or health and safety law, except as otherwise provided in AS 09.25.475; or

(2) authorize a privilege for uninterrupted or continuous environmental or health and safety audits.

Sec. 09.25.455. EXCEPTION: WAIVER. (a) The privilege in AS 09.25.450 does not apply to the extent the privilege is expressly waived in writing by the owner or operator who prepared the audit report or caused the report to be prepared.

(b) Disclosure of an audit report or information generated by an environmental or health and safety audit does not waive the privilege established by AS 09.25.450 if the disclosure is made

(1) to address or correct a matter raised by the environmental or health and safety audit and is made only to

(A) a person employed by the owner or operator, including temporary and contract employees;

(B) a legal representative of the owner or operator;

(C) an officer or director of the regulated facility, operation, or property;

(D) a partner of the owner or operator; or

(E) an independent contractor retained by the owner or operator;

(2) under the terms of a confidentiality agreement between the person for whom the audit report was prepared or the owner or operator of the audited facility, operation, or property and a

(A) partner or potential partner of the owner or operator of the facility, operation, or property;

(B) transferee or potential transferee of the facility, operation, or property;

(C) lender or potential lender for the facility, operation, or property;

(D) government official or a state or federal agency; or

(E) person or entity engaged in the business of insuring,

underwriting, or indemnifying the facility, operation, or property; or

(3) under a claim of confidentiality to a government official or agency by the person for whom the audit report was prepared or by the owner or operator.

(c) A party to a confidentiality agreement described in (b)(2) of this section who violates that agreement is liable for damages caused by the disclosure and for other penalties stipulated in the confidentiality agreement.

(d) Information that is disclosed under (b)(3) of this section is confidential and is not subject to disclosure under AS 09.25.110 - 09.25.125.

(e) Disclosure of a portion of an audit report after waiver of the privilege under (a) of this section, after disclosure under (b) of this section, or through any other means may not be construed to waive the privilege established under AS 09.25.450 for any other part of the audit report.

Sec. 09.25.460. EXCEPTION: DISCLOSURE REQUIRED BY COURT OR ADMINISTRATIVE HEARINGS OFFICIAL. (a) A court or administrative hearing official with competent jurisdiction may require disclosure of a portion of an audit report in a civil, criminal, or administrative proceeding if the court or administrative hearing official determines, after an in camera review consistent with the appropriate rules of procedure, that the

(1) privilege is asserted for a fraudulent purpose;

(2) portion of the audit report is not subject to the privilege under AS 09.25.465;

(3) portion of the audit report shows evidence of noncompliance with an environmental or health and safety law and appropriate efforts to achieve compliance with the law were not promptly initiated and pursued with reasonable diligence after discovery of noncompliance; or

(4) audit report was prepared for the purpose of avoiding disclosure of information required for an investigative, administrative, or judicial proceeding that, at the time of the report's preparation, was imminent or in progress.

(b) A party seeking disclosure under this section has the burden of proving that (a) of this section applies.

Sec. 09.25.465. NONPRIVILEGED MATERIALS. (a) The privilege under

AS 09.25.450 does not apply to that part of an audit report that contains

(1) a document, communication, datum, report, or other information required by a regulatory agency to be collected, developed, maintained, or reported under an environmental or health and safety law, under a permit issued under an environmental or health and safety law, as a requirement for obtaining, maintaining, or renewing a license, or as a requirement under a contract or lease with the state;

(2) information that a regulatory agency obtains by observation, sampling, or monitoring;

(3) information that a regulatory agency obtains from a source that was not involved in compiling, preparing, or conducting the environmental or health and safety audit report;

(4) a document, communication, datum, report, or other information collected, developed, or maintained in the course of a regularly conducted business activity or regular practice other than an environmental or health and safety audit;

(5) a document existing before the commencement of, and independent of, the environmental or health and safety audit; or

(6) a document prepared after the completion of, and independent of, the environmental or health and safety audit.

(b) An audit report is not privileged and is admissible as evidence and subject to discovery in a proceeding relating to pipeline rates, tariffs, fares, or charges.

(c) This section does not limit the right of a person to agree to conduct and disclose an audit report.

Sec. 09.25.475. VOLUNTARY DISCLOSURE; IMMUNITY. (a) Except as provided by this section, a person who makes a voluntary disclosure of a violation of an environmental or health and safety law is immune from an administrative, civil, or criminal penalty for the violation disclosed. for a violation based on the facts disclosed, and for a violation discovered because of the disclosure that was unknown to the person making the disclosure.

(b) A disclosure is voluntary for the purposes of this section only if

(1) the disclosure was made promptly after knowledge of the information disclosed is obtained by the person;

(2) the disclosure was made in writing by certified mail to an agency that has regulatory authority with regard to the violation disclosed;

(3) an investigation of the violation was not initiated or the violation was not independently detected by an agency with enforcement jurisdiction before the disclosure was made using certified mail; under this paragraph, the agency has the burden of proving that an investigation of the violation was initiated or the violation was detected before receipt of the certified mail;

(4) the disclosure arises out of a voluntary environmental or health and safety audit;

(5) the person who makes the disclosure initiates, within a reasonable time, an appropriate effort to achieve compliance, pursues that effort with due diligence, and corrects or implements a series of measures designed to remedy the noncompliance within a reasonable time;

(6) the person making the disclosure cooperates with the appropriate agency in connection with an investigation of the issues identified in the disclosure and agrees under terms of a confidentiality agreement to disclose to the agency, on request of the agency, the part of the audit report that describes the implementation plan or tracking system developed to correct past noncompliance, improve current compliance, or prevent future noncompliance; and

(7) the violation did not result in substantial injury to one or more persons at the site or substantial off-site harm to persons, property, or the environment.

(c) A disclosure is not voluntary for purposes of this section if it is a report to a regulatory agency required solely by a specific condition of an enforcement order or decree.

(d) The immunity established by (a) of this section does not apply and an administrative, civil, or [criminal penalty] may be imposed under applicable law if the

(1) person who made the disclosure knowingly committed the disclosed violation;

(2) person who made the disclosure recklessly committed or was responsible for the commission of the disclosed violation and the violation resulted in substantial injury to one or more persons at the site or substantial off-site harm to

persons, property, or the environment;

(3) offense was committed intentionally or knowingly by a member of the person's management or an agent of the person and the person's policies or lack of prevention systems contributed materially to the occurrence of the violation; or

(4) offense was committed recklessly by a member of the person's management or an agent of the person, the person's policies or lack of prevention systems contributed materially to the occurrence of the violation, and the violation resulted in substantial injury to one or more persons at the site or substantial off-site harm to persons, property, or the environment.

(e) A penalty that is imposed on a person for violation of an environmental or health and safety law when the person has made a voluntary disclosure under (a) of this section but is not granted immunity because of (d) of this section may, to the extent appropriate and not prohibited by law, be mitigated by

(1) the voluntariness of the disclosure;

(2) efforts by the disclosing party to conduct environmental or health and safety audits;

(3) remediation;

(4) cooperation with government officials investigating the disclosed violation;

(5) the nature of the violation; and

(6) other relevant considerations.

(f) In order to receive immunity under this section, a facility conducting an environmental or health and safety audit must give notice by certified mail to an appropriate regulatory agency of the fact that it is planning to commence the audit. The notice must specify the facility or portion of the facility to be audited, the date the audit will begin and end, and the general scope of the audit. Immunity under this section is available only for violations that are revealed through or discovered as a result of information and documents first produced or obtained during the time period specified in the notice. The notice may provide notification of more than one scheduled environmental or health and safety audit at a time. Once initiated, an audit shall be completed within the time period specified in the notice unless [an extension

is approved by the governmental entity with regulatory authority over the regulated facility, operation, or property based on reasonable grounds.]

(g) A regulatory agency may not initiate an inspection, monitoring, or other investigative activity based solely on the receipt of a notice under (f) of this section. The agency has the burden of proving that an inspection, monitoring, or other investigative activity initiated after receipt of a notice under (f) of this section was not initiated based solely on the receipt of the notice.

(h) The immunity under this section does not apply if a court or administrative law judge finds that the person claiming the immunity has,[on or after the effective date of this Act,]

(1) repeated an unreasonable number of times or continuously committed violations that are the same as, or similar to, the violation for which immunity is sought under this section; and

(2) not attempted to bring the facility, operation, or property into compliance, so as to constitute a pattern of disregard of environmental or health and safety laws;[in order to be considered a pattern, the person must have committed a series of violations that were due to separate and distinct events within a three-year period at the same facility, operation, or property.]

(i) A violation that has been voluntarily disclosed and to which immunity applies must be identified in a compliance history report as being voluntarily disclosed.

(j) A person is not immune under this section if the disclosure is in a proceeding relating to pipeline rates, tariffs, fares, or charges.

(k) A person may not be required to waive immunity as a condition of a compliance plan or similar agreement.

Sec. 09.25.485. RELATIONSHIP TO OTHER RECOGNIZED PRIVILEGES. AS 09.25.450 - 09.25.490 do not limit, waive, or abrogate the scope or nature of a statutory or common law privilege, including the work product doctrine, the attorney-client privilege, and any other privilege recognized by a court with appropriate authority in this state.

Sec. 09.25.490. DEFINITIONS. (a) In AS 09.25.450 - 09.25.490,

(1) "audit report" means a report that includes each document and

communication, other than those set out in AS 09.25.465, produced from an environmental or health and safety audit; general components that may be contained in a completed audit report include

(A) a report, prepared by an auditor, monitor, or similar person, that may include a description of the scope of the audit, the information gained in the audit, findings, conclusions, recommendations, exhibits, and appendices; the types of exhibits and appendices that may be contained in an audit report include supporting information that is collected or developed for the primary purpose of and in the course of an environmental or health and safety audit, including

(i) interviews with current or former employees;

(ii) field notes and records of observations;

(iii) findings, opinions, suggestions, conclusions, guidance, notes, drafts, and memoranda;

(iv) legal analyses;

(v) drawings;

(vi) photographs;

(vii) laboratory analyses and other analytical data;

(viii) computer generated or electronically recorded information;

(ix) maps, charts, graphs, and surveys; and

(x) other communications associated with an environmental or health and safety audit;

(B) memoranda and documents analyzing all or a portion of the materials described in (A) of this paragraph or discussing implementation issues; and

(C) an implementation plan or tracking system to correct past noncompliance, improve current compliance, or prevent future noncompliance; however, "audit report" does not include formal communications or agreements between an owner or operator and the appropriate agency regarding a compliance implementation plan or strategy;

(2) "environmental or health and safety audit" means a voluntary, confidential, and documented evaluation, review, or assessment of current or past compliance with environmental or health and safety laws or a permit issued under those laws conducted randomly, regularly, spontaneously, or in response to a particular event by an owner or operator, an employee of the owner or operator, or an independent contractor of

(A) a regulated facility, operation, or property; or

(B) an activity at a regulated facility, operation, or property;

(3) "environmental or health and safety law" means

(A) a federal or state environmental or occupational health and safety law; or

(B) a rule, regulation, or municipal ordinance adopted in conjunction with or to implement a law described by (A) of this paragraph;

(4) "intentionally" has the meaning given in AS 11.81.900;

(5) "knowingly" has the meaning given in AS 11.81.900;

(6) "owner or operator" means a person who owns or operates a regulated facility, operation, or property;

(7) "penalty" means an administrative, civil, or criminal sanction imposed by the state to punish a person for a violation of a statute or rule; the term does not include a technical or remedial provision ordered by a regulatory authority;

(8) "recklessly" has the meaning given in AS 11.81.900;

(9) "regulated facility, operation, or property" means a facility, operation, or property that is regulated under an environmental or health and safety law.

(b) To fully implement the privilege and immunity established under AS 09.25.450 - 09.25.490, the term "environmental or health and safety law" shall be construed broadly.

* **Sec. 2.** AS 12.45 is amended by adding a new section to read:

Sec. 12.45.052. PRIVILEGE RELATING TO CERTAIN SELF-AUDITS. An audit report based on an environmental or health and safety audit is privileged under AS 09.25.450 - 09.25.490.

* Sec. 3. APPLICABILITY. The privilege created by AS 09.25.450 - 09.25.490, added by sec. 1 of this Act, applies to environmental or health and safety audits that are conducted on or after the effective date of this Act.

PROPOSED AMENDMENT

HOUSE CS FOR CS FOR SENATE BILL 199

(Work Draft 9-LS1312\U)

Page 2

Line 30: between "environmental" and "audit", insert or health and safety

Page 3

Line 3: between "environmental" and "audit", insert or health and safety

Line 13: between "environmental" and "audit", insert or health and safety

Line 17: between "environmental" and "audit", insert or health and safety

Line 31: between "environmental" and "law", insert or health and safety

Page 4

Line 3: before "audits", insert or health and safety

Line 8: before "audit", insert or health and safety

Line 10: between "environmental" and "audit", insert or health and safety

Page 5

Line 21: between "environmental" and "law", insert or health and safety

Page 6

Line 2: on both references to "environmental law", insert or health and safety between "environmental" and "law"

Line 8: between "environmental" and "audit", insert or health and safety

Line 11: between "environmental" and "audit", insert or health and safety

Line 13: between "environmental" and "audit", insert or health and safety

Line 15: between "environmental" and "audit", insert or health and safety

Line 25: between "environmental" and "law", insert or health and safety

Page 7

Line 8: between "environmental" and "audit", insert or health and safety

Page 8

Line 10: between "environmental" and "law", insert or health and safety

Line 14: between "environmental" and "audits", insert or health and safety

Line 21: between "environmental" and "audit", insert or health and safety

Line 27: between "environmental" and "audit", insert or health and safety

Page 9

Line 12: between "environmental" and "laws", insert or health and safety

Line 27: between "environmental" and "audit", insert or health and safety

Page 10

Line 3: between "environmental" and "audit", insert or health and safety

Line 16: between "environmental" and "audit", insert or health and safety

Line 25: between "environmental" and "audit", insert or health and safety

Page 11

Line 2: between "environmental" and "laws", insert or health and safety

Line 4: between "environmental" and "law", insert or health and safety

Line 5: between "environmental" and "law", insert or occupational health and safety

Line 17: between "environmental" and "law", insert or health and safety

Line 19: between "environmental" and "law", insert or health and safety

Lines 20-22: delete all text

Line 24: between "environmental" and "audits", insert or health and safety

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

TONY KNOWLES, GOVERNOR

PLEASE REPLY TO:

☐ *1031 WEST 4TH AVENUE, SUITE 200*
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 269-5100
FAX: (907) 276-3697

☐ *KEY BANK BUILDING*
100 CUSHMAN ST., SUITE 400
FAIRBANKS, ALASKA 99701-4679
PHONE: (907) 451-2811
FAX: (907) 451-2846

☒ *P.O. BOX 110300-DIMOND COURT HOUSE*
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 465-6735

April 26, 1996

Honorable Joe Green
Chairman, House Resources Committee
State of Alaska
State Capitol, Room 24
Juneau, Alaska 99801-1182

Re: CSSB 199(FIN)
Environmental and Health and
Safety Audits

Dear Representative Green:

Thank-you for allowing me to submit written testimony on CSSB 199(FIN), the audit privilege and immunity bill. In reviewing my notes from the April 24, 1996, House Resources Committee hearing on CSSB 199(FIN), I discovered that there was only one other point that I had not covered in the time allowed, and that relates to the fact that the State already has in place a number of programs that rely upon self-audits or reviews to achieve compliance.

For example, the Joint Pipeline Office regulates the Trans-Alaska Pipeline System largely on the basis of internal audits. The Department of Environmental Conservation regulates seafood safety using the "Hazards Analysis Critical Control Point" method, which relies upon self-review to protect food safety. Another example is the voluntary compliance program in the Alaska Occupational Safety and Health Division, in which the Division, in accordance with federal guidelines, works with employers to achieve compliance before enforcement inspections. These programs operate very differently from CSSB 199(FIN), and the agencies have expressed concerns that the bill, if enacted, would undermine their success.

Also enclosed is a copy of the United States Environmental Protection Agency's Final Audit Policy, 60 Fed. Reg. 66,706 (1995). The various compliance programs in the state agencies and the federal environmental audit policy provide alternatives to the proposed privilege and immunities.

Please let us know if we can be of further assistance.

Sincerely,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Marie Sansone
Marie Sansone
Assistant Attorney General

Enclosure

cc: Senator Loren Leman
Pat Pourchot, Legislative Director
Janice Adair, DEC
Laurie Otto, AGO
Deborah Behr, AGO
Chrystal Smith, AGO

LEGISLATIVE REFERENCE LIBRARY

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3808
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 400
Juneau, Alaska 99801-2105

Copies of minutes listed below were originally included in this file. The minutes are available on the legislative computer database. In order to save space copies of minutes have not been left in the files.

Mary Pagenkopf

House Resources
4-24-96
SB 199

ENVIRONMENTAL PROTECTION AGENCY

[FRL-5400-1]

Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final Policy Statement.

SUMMARY: The Environmental Protection Agency (EPA) today issues its final policy to enhance protection of human health and the environment by encouraging regulated entities to voluntarily discover, and disclose and correct violations of environmental requirements. Incentives include eliminating or substantially reducing the gravity component of civil penalties and not recommending cases for criminal prosecution where specified conditions are met, to those who voluntarily self-disclose and promptly correct violations. The policy also restates EPA's long-standing practice of not requesting voluntary audit reports to trigger enforcement investigations. This policy was developed in close consultation with the U.S. Department of Justice, states, public interest groups and the regulated community, and will be applied uniformly by the Agency's enforcement programs.

DATES: This policy is effective January 22, 1996.

FOR FURTHER INFORMATION CONTACT: Additional documentation relating to the development of this policy is contained in the environmental auditing public docket. Documents from the docket may be obtained by calling (202) 260-7548, requesting an index to docket #C-94-01, and faxing document requests to (202) 260-4400. Hours of operation are 8 a.m. to 5:30 p.m., Monday through Friday, except legal holidays. Additional contacts are Robert Fentress or Brian Riedel, at (202) 564-4187.

SUPPLEMENTARY INFORMATION:

I. Explanation of Policy

A. Introduction

The Environmental Protection Agency today issues its final policy to enhance protection of human health and the environment by encouraging regulated entities to discover voluntarily, disclose, correct and prevent violations of federal environmental law. Effective 30 days from today, where violations are found through voluntary environmental audits or efforts that reflect a regulated entity's due diligence, and are promptly disclosed and expeditiously corrected, EPA will not seek gravity-based (i.e., non-economic benefit) penalties and will generally not recommend criminal prosecution against the regulated entity. EPA will reduce gravity-based penalties by 75% for violations that are voluntarily discovered, and are promptly disclosed and corrected, even if not found through a formal audit or due diligence. Finally, the policy restates EPA's long-held policy and practice to refrain from routine requests for environmental audit reports.

The policy includes important safeguards to deter irresponsible behavior and protect the public and environment. For example, in addition to prompt disclosure and expeditious correction, the policy requires companies to act to prevent recurrence of the violation and to remedy any environmental harm which may have occurred. Repeated violations or those which result in actual harm or may present imminent and substantial endangerment are not eligible for relief under this policy, and companies will not be allowed to gain an economic advantage over their competitors by delaying their investment in compliance. Corporations remain criminally liable for violations that result from conscious disregard of their obligations under the law, and individuals are liable for criminal misconduct.

The issuance of this policy concludes EPA's eighteen-month public evaluation of the optimum way to encourage voluntary self-policing while preserving fair and effective enforcement. The incentives, conditions and exceptions announced today reflect thoughtful suggestions from the Department of Justice, state attorneys general and local prosecutors, state environmental agencies, the regulated community, and public interest organizations. EPA believes that it has found a balanced and responsible approach, and will conduct a study within three years to determine the effectiveness of this policy.

B. Public Process

One of the Environmental Protection Agency's most important responsibilities is ensuring compliance with federal laws that protect public health and safeguard the environment. Effective deterrence requires inspecting, bringing penalty actions and securing compliance and remediation of harm. But EPA realizes that achieving compliance also requires the cooperation of thousands of businesses and other regulated entities subject to these requirements. Accordingly, in May of 1994, the Administrator asked the Office of Enforcement and Compliance Assurance (OECA) to determine whether additional incentives were needed to encourage voluntary disclosure and correction of violations uncovered during environmental audits.

EPA began its evaluation with a two-day public meeting in July of 1994, in Washington, D.C., followed by a two-day meeting in San Francisco on January 19, 1995 with stakeholders from industry, trade groups, state environmental commissioners and attorneys general, district attorneys, public interest organizations and professional environmental auditors. The Agency also established and maintained a public docket of testimony presented at these meetings and all comment and correspondence submitted to EPA by outside parties on this issue.

In addition to considering opinion and information from stakeholders, the Agency examined other federal and state policies related to self-policing, self-disclosure and correction. The Agency also considered relevant surveys on auditing practices in the private sector. EPA completed the first stage of this effort with the announcement of an interim policy on April 3 of this year, which defined conditions under which EPA would reduce civil penalties and not recommend criminal prosecution for companies that audited, disclosed, and corrected violations.

Interested parties were asked to submit comment on the interim policy by June 30 of this year (60 FR 16875), and EPA received over 300 responses from a wide variety of private and public organizations. (Comments on the interim audit policy are contained in the Auditing Policy Docket, hereinafter, "Docket".) Further, the American Bar Association SONREEL Subcommittee hosted five days of dialogue with representatives from the regulated industry, states and public interest organizations in June and September of this year, which identified options for strengthening the interim policy. The changes to the interim policy announced today reflect insight gained through comments submitted to EPA, the ABA dialogue, and the Agency's practical experience implementing the interim policy.

C. Purpose

This policy is designed to encourage greater compliance with laws and regulations that protect human health and the environment. It promotes a higher standard of self-policing by waiving gravity-based penalties for

violations that are promptly disclosed and corrected, and which were discovered through voluntary audits or compliance management systems that demonstrate due diligence. To further promote compliance, the policy reduces gravity-based penalties by 75% for any violation voluntarily discovered and promptly disclosed and corrected, even if not found through an audit or compliance management system.

EPA's enforcement program provides a strong incentive for responsible behavior by imposing stiff sanctions for noncompliance. Enforcement has contributed to the dramatic expansion of environmental auditing measured in numerous recent surveys. For example, more than 90% of the corporate respondents to a 1995 Price-Waterhouse survey who conduct audits said that one of the reasons they did so was to find and correct violations before they were found by government inspectors. (A copy of the Price-Waterhouse survey is contained in the Docket as document VIII–A–76.)

At the same time, because government resources are limited, maximum compliance cannot be achieved without active efforts by the regulated community to police themselves. More than half of the respondents to the same 1995 Price-Waterhouse survey said that they would expand environmental auditing in exchange for reduced penalties for violations discovered and corrected. While many companies already audit or have compliance management programs, EPA believes that the incentives offered in this policy will improve the frequency and quality of these self-monitoring efforts.

D. Incentives for Self-Policing

Section C of EPA's policy identifies the major incentives that EPA will provide to encourage self-policing, self-disclosure, and prompt self-correction. These include not seeking gravity-based civil penalties or reducing them by 75%, declining to recommend criminal prosecution for regulated entities that self-police, and refraining from routine requests for audits. (As noted in Section C of the policy, EPA has refrained from making routine requests for audit reports since issuance of its 1986 policy on environmental auditing.)

1. Eliminating Gravity-Based Penalties

Under Section C(1) of the policy, EPA will not seek gravity-based penalties for violations found through auditing that are promptly disclosed and corrected. Gravity-based penalties will also be waived for violations found through any documented procedure for self-policing, where the company can show that it has a compliance management program that meets the criteria for due diligence in Section B of the policy.

Gravity-based penalties (defined in Section B of the policy) generally reflect the seriousness of the violator's behavior. EPA has elected to waive such penalties for violations discovered through due diligence or environmental audits, recognizing that these voluntary efforts play a critical role in protecting human health and the environment by identifying, correcting and ultimately preventing violations. All of the conditions set forth in Section D, which include prompt disclosure and expeditious correction, must be satisfied for gravity-based penalties to be waived.

As in the interim policy, EPA reserves the right to collect any economic benefit that may have been realized as a result of noncompliance, even where companies meet all other conditions of the policy. Economic benefit may be waived, however, where the Agency determines that it is insignificant.

After considering public comment, EPA has decided to retain the discretion to recover economic benefit for two reasons. First, it provides an incentive to comply on time. Taxpayers expect to pay interest or a penalty fee if their tax payments are late; the same principle should apply to corporations that have delayed their investment in compliance. Second, it is fair because it protects responsible companies from being undercut by their noncomplying competitors, thereby preserving a level playing field. The concept of recovering economic benefit was supported in public comments by many stakeholders, including industry representatives (see, *e.g.*, Docket, II–F–39, II–F–28, and II–F–18).

2. 75% Reduction of Gravity

The policy appropriately limits the complete waiver of gravity-based civil penalties to companies that meet the higher standard of environmental auditing or systematic compliance management. However, to provide additional encouragement for the kind of self-policing that benefits the public, gravity-based penalties will be reduced by 75% for a violation that is voluntarily discovered, promptly disclosed and expeditiously corrected, even if it was not found through an environmental audit and the company cannot document due diligence. EPA expects that this will encourage companies to come forward and work with the Agency to resolve environmental problems and begin to develop an effective compliance management program.

Gravity-based penalties will be reduced 75% only where the company meets all conditions in Sections D(2) through D(9). EPA has eliminated language from the interim policy indicating that penalties may be reduced "up to" 75% where "most" conditions are met, because the Agency believes that all of the conditions in D(2) through D(9) are reasonable and essential to achieving compliance. This change also responds to requests for greater clarity and predictability.

3. No Recommendations for Criminal Prosecution

EPA has never recommended criminal prosecution of a regulated entity based on voluntary disclosure of violations discovered through audits and disclosed to the government before an investigation was already under way. Thus, EPA will not recommend criminal prosecution for a regulated entity that uncovers violations through environmental audits or due diligence, promptly discloses and expeditiously corrects those violations, and meets all other conditions of Section D of the policy.

This policy is limited to good actors, and therefore has important limitations. It will not apply, for example, where corporate officials are consciously involved in or willfully blind to violations, or conceal or condone noncompliance. Since the regulated entity must satisfy all of the conditions of Section D of the policy, violations that caused serious harm or which may pose imminent and substantial endangerment to human health or the environment are not covered by this policy. Finally, EPA reserves the right to recommend prosecution for the criminal conduct of any culpable individual.

Even where all of the conditions of this policy are not met, however, it is important to remember that EPA may decline to recommend prosecution of a company or individual for many other reasons under other Agency enforcement policies. For example, the Agency may decline to recommend prosecution where there is no significant harm or culpability and the individual or corporate defendant has cooperated fully.

Where a company has met the conditions for avoiding a recommendation for criminal prosecution under this policy, it will not face any civil liability for gravity-based penalties. That is because the same conditions for discovery, disclosure, and correction apply in both cases. This represents a clarification of the interim policy, not a substantive change.

4. No Routine Requests for Audits

EPA is reaffirming its policy, in effect since 1986, to refrain from routine requests for audits. Eighteen months of public testimony and debate have produced no evidence that the Agency has deviated, or should deviate, from this policy.

If the Agency has independent evidence of a violation, it may seek information needed to establish the extent and nature of the problem and the degree of culpability. In general, however, an audit which results in prompt correction clearly will reduce liability, not expand it. Furthermore, a review of the criminal docket did not reveal a single criminal prosecution for violations discovered as a result of an audit self-disclosed to the government.

E. Conditions

Section D describes the nine conditions that a regulated entity must meet in order for the Agency not to seek (or to reduce) gravity-based penalties under the policy. As explained in the Summary above, regulated entities that meet all nine conditions will not face gravity-based civil penalties, and will generally not have to fear criminal prosecution. Where the regulated entity meets all of the conditions except the first (D(1)), EPA will reduce gravity-based penalties by 75%.

1. Discovery of the Violation Through an Environmental Audit or Due Diligence

Under Section D(1), the violation must have been discovered through either (a) an environmental audit that is systematic, objective, and periodic as defined in the 1986 audit policy, or (b) a documented, systematic procedure or practice which reflects the regulated entity's due diligence in preventing, detecting, and correcting violations. The interim policy provided full credit for any violation found through "voluntary self-evaluation," even if the evaluation did not constitute an audit. In order to receive full credit under the final policy, any self-evaluation that is not an audit must be part of a "due diligence" program. Both "environmental audit" and "due diligence" are defined in Section B of the policy.

Where the violation is discovered through a "systematic procedure or practice" which is not an audit, the regulated entity will be asked to document how its program reflects the criteria for due diligence as defined in Section B of the policy. These criteria, which are adapted from existing codes of practice such as the 1991 Criminal Sentencing Guidelines, were fully discussed during the ABA dialogue. The criteria are flexible enough to accommodate different types and sizes of businesses. The Agency recognizes that a variety of compliance management programs may develop under the due diligence criteria, and will use its review under this policy to determine whether basic criteria have been met.

Compliance management programs which train and motivate production staff to prevent, detect and correct violations on a daily basis are a valuable complement to periodic auditing. The policy is responsive to recommendations received during public comment and from the ABA dialogue to give compliance management efforts which meet the criteria for due diligence the same penalty reduction offered for environmental audits. (See, *e.g.*, II–F–39, II–E–18, and II–G–18 in the Docket.)

EPA may require as a condition of penalty mitigation that a description of the regulated entity's due diligence efforts be made publicly available. The Agency added this provision in response to suggestions from environmental groups, and believes that the availability of such information will allow the public to judge the adequacy of compliance management systems, lead to enhanced compliance, and foster greater public trust in the integrity of compliance management systems.

2. Voluntary Discovery and Prompt Disclosure

Under Section D(2) of the final policy, the violation must have been identified voluntarily, and not through a monitoring, sampling, or auditing procedure that is required by statute, regulation, permit, judicial or administrative order, or consent agreement. Section D(4) requires that disclosure of the violation be prompt and in writing. To avoid confusion and respond to state requests for greater clarity, disclosures under this policy should be made to EPA. The Agency will work closely with states in implementing the policy.

The requirement that discovery of the violation be voluntary is consistent with proposed federal and state bills which would reward those discoveries that the regulated entity can legitimately attribute to its own voluntary efforts.

The policy gives three specific examples of discovery that would not be voluntary, and therefore would not be eligible for penalty mitigation: emissions violations detected through a required continuous emissions monitor, violations of NPDES discharge limits found through prescribed monitoring, and violations discovered through a compliance audit required to be performed by the terms of a consent order or settlement agreement.

The final policy generally applies to any violation that is voluntarily discovered, regardless of whether the violation is required to be reported. This definition responds to comments pointing out that reporting requirements are extensive, and that excluding them from the policy's scope would severely limit the incentive for self-policing (see, *e.g.*, II–C–48 in the Docket).

The Agency wishes to emphasize that the integrity of federal environmental law depends upon timely and accurate reporting. The public relies on timely and accurate reports from the regulated community, not only to measure compliance but to evaluate health or environmental risk and gauge progress in reducing pollutant loadings. EPA expects the policy to encourage the kind of vigorous self-policing that will serve these objectives, and not to provide an excuse for delayed reporting. Where violations of reporting requirements are voluntarily discovered, they must be promptly reported (as discussed below). Where a failure to report results in imminent and substantial endangerment or serious harm, that violation is not covered under this policy (see Condition D(8)). The policy also requires the regulated entity to prevent recurrence of the violation, to ensure that noncompliance with reporting requirements is not repeated. EPA will closely scrutinize the effect of the policy in furthering the public interest in timely and accurate reports from the regulated community.

Under Section D(4), disclosure of the violation should be made within 10 days of its discovery, and in writing to EPA. Where a statute or regulation requires reporting be made in less than 10 days, disclosure should be made within the time limit established by law. Where reporting within ten days is not practical because the violation is complex and compliance cannot be determined within that period, the Agency may accept later disclosures if the circumstances do not present a serious threat and the regulated entity meets its burden of showing that the additional time was needed to determine compliance status.

This condition recognizes that it is critical for EPA to get timely reporting of violations in order that it might have clear notice of the violations and the opportunity to respond if necessary, as well as an accurate picture of a given facility's compliance record. Prompt disclosure is also evidence of the regulated entity's good faith in wanting

to achieve or return to compliance as soon as possible.

In the final policy, the Agency has added the words, "or may have occurred," to the sentence, "The regulated entity fully discloses that a specific violation has occurred, or may have occurred * * *." This change, which was made in response to comments received, clarifies that where an entity has some doubt about the existence of a violation, the recommended course is for it to disclose and allow the regulatory authorities to make a definitive determination.

In general, the Freedom of Information Act will govern the Agency's release of disclosures made pursuant to this policy. EPA will, independently of FOIA, make publicly available any compliance agreements reached under the policy (see Section H of the policy), as well as descriptions of due diligence programs submitted under Section D.1 of the Policy. Any material claimed to be Confidential Business Information will be treated in accordance with EPA regulations at 40 C.F.R. Part 2.

3. Discovery and Disclosure Independent of Government or Third Party Plaintiff

Under Section D(3), in order to be "voluntary", the violation must be identified and disclosed by the regulated entity prior to: the commencement of a federal state or local agency inspection, investigation, or information request; notice of a citizen suit; legal complaint by a third party; the reporting of the violation to EPA by a "whistleblower" employee; and imminent discovery of the violation by a regulatory agency.

This condition means that regulated entities must have taken the initiative to find violations and promptly report them, rather than reacting to knowledge of a pending enforcement action or third-party complaint. This concept was reflected in the interim policy and in federal and state penalty immunity laws and did not prove controversial in the public comment process.

4. Correction and Remediation

Section D(5) ensures that, in order to receive the penalty mitigation benefits available under the policy, the regulated entity not only voluntarily discovers and promptly discloses a violation, but expeditiously corrects it, remedies any harm caused by that violation (including responding to any spill and carrying out any removal or remedial action required by law), and expeditiously certifies in writing to appropriate state, local and EPA authorities that violations have been corrected. It also enables EPA to ensure that the regulated entity will be publicly accountable for its commitments through binding written agreements, orders or consent decrees where necessary.

The final policy requires the violation to be corrected within 60 days, or that the regulated entity provide written notice where violations may take longer to correct. EPA recognizes that some violations can and should be corrected immediately, while others (*e.g.*, where capital expenditures are involved), may take longer than 60 days to correct. In all cases, the regulated entity will be expected to do its utmost to achieve or return to compliance as expeditiously as possible.

Where correction of the violation depends upon issuance of a permit which has been applied for but not issued by federal or state authorities, the Agency will, where appropriate, make reasonable efforts to secure timely review of the permit.

5. Prevent Recurrence

Under Section D(6), the regulated entity must agree to take steps to prevent a recurrence of the violation, including but not limited to improvements to its environmental auditing or due diligence efforts. The final policy makes clear that the preventive steps may include improvements to a regulated entity's environmental auditing or due diligence efforts to prevent recurrence of the violation.

In the interim policy, the Agency required that the entity implement appropriate measures to prevent a recurrence of the violation, a requirement that operates prospectively. However, a separate condition in the interim policy also required that the violation not indicate "a failure to take appropriate steps to avoid repeat or recurring violations"—a requirement that operates retrospectively. In the interest of both clarity and fairness, the Agency has decided for purposes of this condition to keep the focus prospective and thus to require only that steps be taken to prevent recurrence of the violation after it has been disclosed.

6. No Repeat Violations

In response to requests from commenters (*see, e.g.*, II–F–39 and II–G–18 in the Docket), EPA has established "bright lines" to determine when previous violations will bar a regulated entity from obtaining relief under this policy. These will help protect the public and responsible companies by ensuring that penalties are not waived for repeat offenders. Under condition D(7), the same or closely-related violation must not have occurred previously within the past three years at the same facility, or be part of a pattern of violations on the regulated entity's part over the past five years. This provides companies with a continuing incentive to prevent violations, without being unfair to regulated entities responsible for managing hundreds of facilities. It would be unreasonable to provide unlimited amnesty for repeated violations of the same requirement.

The term "violation" includes any violation subject to a federal or state civil judicial or administrative order, consent agreement, conviction or plea agreement. Recognizing that minor violations are sometimes settled without a formal action in court, the term also covers any act or omission for which the regulated entity has received a penalty reduction in the past. Together, these conditions identify situations in which the regulated community has had clear notice of its noncompliance and an opportunity to correct.

7. Other Violations Excluded

Section D(8) makes clear that penalty reductions are not available under this policy for violations that resulted in serious actual harm or which may have presented an imminent and substantial endangerment to public health or the environment. Such events indicate a serious failure (or absence) of a self-policing program, which should be designed to prevent such risks, and it would seriously undermine deterrence to waive penalties for such violations. These exceptions are responsive to suggestions from public interest organizations, as well as other commenters. (See, *e.g.*, II–F–39 and II–G–18 in the Docket.)

The final policy also excludes penalty reductions for violations of the specific terms of any order, consent agreement, or plea agreement. (See, II–E–60 in the Docket.) Once a consent agreement has been negotiated, there is little incentive to comply if there are no sanctions for violating its specific requirements. The exclusion in this section applies to violations of the terms of any response, removal or remedial action covered by a written agreement.

8. Cooperation

Under Section D(9), the regulated entity must cooperate as required by EPA and provide information necessary to determine the applicability of the policy. This condition is largely unchanged from the interim policy. In the final policy, however, the Agency has added that "cooperation" includes

assistance in determining the facts of any related violations suggested by the disclosure, as well as of the disclosed violation itself. This was added to allow the agency to obtain information about any violations indicated by the disclosure, even where the violation is not initially identified by the regulated entity.

F. Opposition to Privilege

The Agency remains firmly opposed to the establishment of a statutory evidentiary privilege for environmental audits for the following reasons:

1. Privilege, by definition, invites secrecy, instead of the openness needed to build public trust in industry's ability to self-police. American law reflects the high value that the public places on fair access to the facts. The Supreme Court, for example, has said of privileges that, "[w]hatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States* v. *Nixon*, 418 U.S. 683 (1974). Federal courts have unanimously refused to recognize a privilege for environmental audits in the context of government investigations. See, *e.g.*, *United States* v. *Dexter*, 132 F.R.D. 8, 9–10 (D.Conn. 1990) (application of a privilege "would effectively impede [EPA's] ability to enforce the Clean Water Act, and would be contrary to stated public policy.")

2. Eighteen months have failed to produce any evidence that a privilege is needed. Public testimony on the interim policy confirmed that EPA rarely uses audit reports as evidence. Furthermore, surveys demonstrate that environmental auditing has expanded rapidly over the past decade without the stimulus of a privilege. Most recently, the 1995 Price Waterhouse survey found that those few large or mid-sized companies that do not audit generally do not perceive any need to; concern about confidentiality ranked as one of the least important factors in their decisions.

3. A privilege would invite defendants to claim as "audit" material almost any evidence the government needed to establish a violation or determine who was responsible. For example, most audit privilege bills under consideration in federal and state legislatures would arguably protect factual information—such as health studies or contaminated sediment data—and not just the conclusions of the auditors. While the government might have access to required monitoring data under the law, as some industry commenters have suggested, a privilege of that nature would cloak underlying facts needed to determine whether such data were accurate.

4. An audit privilege would breed litigation, as both parties struggled to determine what material fell within its scope. The problem is compounded by the lack of any clear national standard for audits. The "*in camera*" (i.e., non-public) proceedings used to resolve these disputes under some statutory schemes would result in a series of time-consuming, expensive mini-trials.

5. The Agency's policy eliminates the need for any privilege as against the government, by reducing civil penalties and criminal liability for those companies that audit, disclose and correct violations. The 1995 Price Waterhouse survey indicated that companies would expand their auditing programs in exchange for the kind of incentives that EPA provides in its policy.

6. Finally, audit privileges are strongly opposed by the law enforcement community, including the National District Attorneys Association, as well as by public interest groups. (See, *e.g.*, Docket, II–C–21, II–C–28, II–C–52, IV–G–10, II–C–25, II–C–33, II–C–52, II–C–48, and II–G–13 through II–G–24.)

G. Effect on States

The final policy reflects EPA's desire to develop fair and effective incentives for self-policing that will have practical value to states that share responsibility for enforcing federal environmental laws. To that end, the Agency has consulted closely with state officials in developing this policy, through a series of special meetings and conference calls in addition to the extensive opportunity for public comment. As a result, EPA believes its final policy is grounded in common-sense principles that should prove useful in the development of state programs and policies.

As always, states are encouraged to experiment with different approaches that do not jeopardize the fundamental national interest in assuring that violations of federal law do not threaten the public health or the environment, or make it profitable not to comply. The Agency remains opposed to state legislation that does not include these basic protections, and reserves its right to bring independent action against regulated entities for violations of federal law that threaten human health or the environment, reflect criminal conduct or repeated noncompliance, or allow one company to make a substantial profit at the expense of its law-abiding competitors. Where a state has obtained appropriate sanctions needed to deter such misconduct, there is no need for EPA action.

H. Scope of Policy

EPA has developed this document as a policy to guide settlement actions. EPA employees will be expected to follow this policy, and the Agency will take steps to assure national consistency in application. For example, the Agency will make public any compliance agreements reached under this policy, in order to provide the regulated community with fair notice of decisions and greater accountability to affected communities. Many in the regulated community recommended that the Agency convert the policy into a regulation because they felt it might ensure greater consistency and predictability. While EPA is taking steps to ensure consistency and predictability and believes that it will be successful, the Agency will consider this issue and will provide notice if it determines that a rulemaking is appropriate.

II. Statement of Policy: Incentives for Self-Policing

Discovery, Disclosure, Correction and Prevention

A. Purpose

This policy is designed to enhance protection of human health and the environment by encouraging regulated entities to voluntarily discover, disclose, correct and prevent violations of federal environmental requirements.

B. Definitions

For purposes of this policy, the following definitions apply:

"Environmental Audit" has the definition given to it in EPA's 1986 audit policy on environmental auditing, i.e., "a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements."

"Due Diligence" encompasses the regulated entity's systematic efforts, appropriate to the size and nature of its business, to prevent, detect and correct violations through all of the following:

(a) Compliance policies, standards and procedures that identify how employees and agents are to meet the requirements of laws, regulations, permits and other sources of authority for environmental requirements;

(b) Assignment of overall responsibility for overseeing compliance with policies, standards, and procedures, and assignment of specific responsibility for assuring compliance at each facility or operation;

(c) Mechanisms for systematically assuring that compliance policies, standards and procedures are being carried out, including monitoring and auditing systems reasonably designed to detect and correct violations, periodic evaluation of the overall performance of the compliance management system, and a means for employees or agents to report violations of environmental requirements without fear of retaliation;

(d) Efforts to communicate effectively the regulated entity's standards and procedures to all employees and other agents;

(e) Appropriate incentives to managers and employees to perform in accordance with the compliance policies, standards and procedures, including consistent enforcement through appropriate disciplinary mechanisms; and

(f) Procedures for the prompt and appropriate correction of any violations, and any necessary modifications to the regulated entity's program to prevent future violations.

"Environmental audit report" means the analysis, conclusions, and recommendations resulting from an environmental audit, but does not include data obtained in, or testimonial evidence concerning, the environmental audit.

"Gravity-based penalties" are that portion of a penalty over and above the economic benefit., i.e., the punitive portion of the penalty, rather than that portion representing a defendant's economic gain from non-compliance. (For further discussion of this concept, see "A Framework for Statute-Specific Approaches to Penalty Assessments", #GM–22, 1980, U.S. EPA General Enforcement Policy Compendium).

"Regulated entity" means any entity, including a federal, state or municipal agency or facility, regulated under federal environmental laws.

C. Incentives for Self-Policing

1. No Gravity-Based Penalties

Where the regulated entity establishes that it satisfies all of the conditions of Section D of the policy, EPA will not seek gravity-based penalties for violations of federal environmental requirements.

2. Reduction of Gravity-Based Penalties by 75%

EPA will reduce gravity-based penalties for violations of federal environmental requirements by 75% so long as the regulated entity satisfies all of the conditions of Section D(2) through D(9) below.

3. No Criminal Recommendations

(a) EPA will not recommend to the Department of Justice or other prosecuting authority that criminal charges be brought against a regulated entity where EPA determines that all of the conditions in Section D are satisfied, so long as the violation does not demonstrate or involve:

(i) a prevalent management philosophy or practice that concealed or condoned environmental violations; or

(ii) high-level corporate officials' or managers' conscious involvement in, or willful blindness to, the violations.

(b) Whether or not EPA refers the regulated entity for criminal prosecution under this section, the Agency reserves the right to recommend prosecution for the criminal acts of individual managers or employees under existing policies guiding the exercise of enforcement discretion.

4. No Routine Request for Audits

EPA will not request or use an environmental audit report to initiate a civil or criminal investigation of the entity. For example, EPA will not request an environmental audit report in routine inspections. If the Agency has independent reason to believe that a violation has occurred, however, EPA may seek any information relevant to identifying violations or determining liability or extent of harm.

D. Conditions

1. Systematic Discovery

The violation was discovered through:

(a) an environmental audit; or

(b) an objective, documented, systematic procedure or practice reflecting the regulated entity's due diligence in preventing, detecting, and correcting violations. The regulated entity must provide accurate and complete documentation to the Agency as to how it exercises due diligence to prevent, detect and correct violations according to the criteria for due diligence outlined in Section B. EPA may require as a condition of penalty mitigation that a description of the regulated entity's due diligence efforts be made publicly available.

2. Voluntary Discovery

The violation was identified voluntarily, and not through a legally mandated monitoring or sampling requirement prescribed by statute, regulation, permit, judicial or administrative order, or consent agreement. For example, the policy does not apply to:

(a) emissions violations detected through a continuous emissions monitor (or alternative monitor established in a permit) where any such monitoring is required;

(b) violations of National Pollutant Discharge Elimination System (NPDES) discharge limits detected through required sampling or monitoring;

(c) violations discovered through a compliance audit required to be performed by the terms of a consent order or settlement agreement.

3. Prompt Disclosure

The regulated entity fully discloses a specific violation within 10 days (or such shorter period provided by law) after it has discovered that the violation has occurred, or may have occurred, in writing to EPA;

4. Discovery and Disclosure Independent of Government or Third Party Plaintiff

The violation must also be identified and disclosed by the regulated entity prior to:

(a) the commencement of a federal, state or local agency inspection or investigation, or the issuance by such agency of an information request to the regulated entity;

(b) notice of a citizen suit;

(c) the filing of a complaint by a third party;

(d) the reporting of the violation to EPA (or other government agency) by a "whistleblower" employee, rather than by one authorized to speak on behalf of the regulated entity; or

(e) imminent discovery of the violation by a regulatory agency;

5. Correction and Remediation

The regulated entity corrects the violation within 60 days, certifies in writing that violations have been corrected, and takes appropriate measures as determined by EPA to remedy any environmental or human harm due to the violation. If more than 60 days will be needed to correct the violation(s), the regulated entity must so notify EPA in writing before the 60-day period has passed. Where appropriate, EPA may require that to satisfy conditions 5 and 6, a regulated entity enter into a publicly available written agreement, administrative consent order or judicial consent decree, particularly where compliance or remedial measures are complex or a lengthy schedule for attaining and maintaining compliance or remediating harm is required;

6. Prevent Recurrence

The regulated entity agrees in writing to take steps to prevent a recurrence of the violation, which may include improvements to its environmental auditing or due diligence efforts;

7. No Repeat Violations

The specific violation (or closely related violation) has not occurred previously within the past three years at the same facility, or is not part of a pattern of federal, state or local violations by the facility's parent organization (if any), which have occurred within the past five years. For the purposes of this section, a violation is:

(a) any violation of federal, state or local environmental law identified in a judicial or administrative order, consent agreement or order, complaint, or notice of violation, conviction or plea agreement; or

(b) any act or omission for which the regulated entity has previously received penalty mitigation from EPA or a state or local agency.

8. Other Violations Excluded

The violation is not one which (i) resulted in serious actual harm, or may have presented an imminent and substantial endangerment to, human health or the environment, or (ii) violates the specific terms of any judicial or administrative order, or consent agreement.

9. Cooperation

The regulated entity cooperates as requested by EPA and provides such information as is necessary and requested by EPA to determine applicability of this policy. Cooperation includes, at a minimum, providing all requested documents and access to employees and assistance in investigating the violation, any noncompliance problems related to the disclosure, and any environmental consequences related to the violations.

E. Economic Benefit

EPA will retain its full discretion to recover any economic benefit gained as a result of noncompliance to preserve a "level playing field" in which violators do not gain a competitive advantage over regulated entities that do comply. EPA may forgive the entire penalty for violations which meet conditions 1 through 9 in section D and, in the Agency's opinion, do not merit any penalty due to the insignificant amount of any economic benefit.

F. Effect on State Law, Regulation or Policy

EPA will work closely with states to encourage their adoption of policies that reflect the incentives and conditions outlined in this policy. EPA remains firmly opposed to statutory environmental audit privileges that shield evidence of environmental violations and undermine the public's right to know, as well as to blanket immunities for violations that reflect criminal conduct, present serious threats or actual harm to health and the environment, allow noncomplying companies to gain an economic advantage over their competitors, or reflect a repeated failure to comply with federal law. EPA will work with states to address any provisions of state audit privilege or immunity laws that are inconsistent with this policy, and which may prevent a timely and appropriate response to significant environmental violations. The Agency reserves its right to take necessary actions to protect public health or the environment by enforcing against any violations of federal law.

G. Applicability

(1) This policy applies to the assessment of penalties for any violations under all of the federal environmental statutes that EPA administers, and supersedes any inconsistent provisions in media-specific penalty or enforcement policies and EPA's 1986 Environmental Auditing Policy Statement.

(2) To the extent that existing EPA enforcement policies are not inconsistent, they will continue to apply in conjunction with this policy. However, a regulated entity that has received penalty mitigation for satisfying specific conditions under this policy may not receive additional penalty mitigation for satisfying the same or similar conditions under other policies for the same violation(s), nor will this policy apply to violations which have received penalty mitigation under other policies.

(3) This policy sets forth factors for consideration that will guide the Agency in the exercise of its prosecutorial discretion. It states the Agency's views as to the proper allocation of its enforcement resources. The policy is not final agency action, and is intended as guidance. It does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties.

(4) This policy should be used whenever applicable in settlement negotiations for both administrative and civil judicial enforcement actions. It is not intended for use in pleading, at hearing or at trial. The policy may be applied at EPA's discretion to the settlement of administrative and judicial enforcement actions instituted prior to, but not yet resolved, as of the effective date of this policy.

H. Public Accountability

(1) Within 3 years of the effective date of this policy, EPA will complete a study of the effectiveness of the policy in encouraging:

(a) changes in compliance behavior within the regulated community, including improved compliance rates;

(b) prompt disclosure and correction of violations, including timely and accurate compliance with reporting requirements;

(c) corporate compliance programs that are successful in preventing violations, improving environmental performance, and promoting public disclosure;

(d) consistency among state programs that provide incentives for voluntary compliance.

EPA will make the study available to the public.

(2) EPA will make publicly available the terms and conditions of any compliance agreement reached under this policy, including the nature of the violation, the remedy, and the schedule for returning to compliance.

I. Effective Date

This policy is effective January 22, 1996.

Dated: December 18, 1995.

Steven A. Herman,

Assistant Administrator for Enforcement and Compliance Assurance.

[FR Doc. 95-31146 Filed 12-21-95; 8:45 am]

BILLING CODE 6560-50-P

TONY KNOWLES, GOVERNOR

PLEASE REPLY TO:

☒ 1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 269-5100
FAX: (907) 276-3697

☐ KEY BANK BUILDING
100 CUSHMAN ST., SUITE 400
FAIRBANKS, ALASKA 99701-4679
PHONE: (907) 451-2811
FAX: (907) 451-2846

☐ P.O. BOX 110300-DIMOND COURT HOUS
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 465-6735

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

OUR FAX NO.: (907) 258-4978

FAX TRANSMITTAL LETTER

*****

The information contained in this fax is confidential and/or privileged. This fax is intended to be reviewed initially by only the individual named below. If the reader of this transmittal page is not the intended recipient or a representative of the intended recipient, you are hereby notified that any review, dissemination or copying of this fax or the information contained herein is prohibited. If you have received this fax in error, please immediately notify the sender by telephone and return this fax to the sender at the above address. Thank you.

*****

DATE: April 25, 1996 TIME: 3:20 p.m.

PLEASE DELIVER THE FOLLOWING PAGES TO:

NAME: Honorable Joe Green

LOCATION: House Of Representatives

FAX NUMBER: 1-907-465-4316

TOTAL NUMBER OF PAGES 5 INCLUDES THIS COVER LETTER.

REMARKS: _____

FROM: *Toby N. Steinberger*
Assistant Attorney General, Governmental Affairs
Attorney General's Office, Anchorage

IF YOU DO NOT RECEIVE ALL PAGES, please call: *Annette Brown at (907)269-5136*

Thank you -- have a nice day!

TONY KNOWLES, GOVERNOR

PLEASE REPLY TO:

☑ 1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907)269-5100
FAX: (907)276-3697

☐ KEY BANK BUILDING
100 CUSHMAN ST., SUITE 400
FAIRBANKS, ALASKA 99701-4679
PHONE: (907)451-2811
FAX: (907)451-2846

☐ P.O. BOX 110300-DIMOND COURTHOUSE
JUNEAU, ALASKA 99811-0300
PHONE: (907)465-3600
FAX: (907)465-6735

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

April 25, 1996

VIA FACSIMILE AND MAIL

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

Re: CSSB 199(FIN); An Act relating to environmental audits and health and safety audits to determine compliance with certain laws, permits, and regulations.

Dear Representative Green:

Yesterday, I testified before the House Resources Committee regarding CSSB 199(FIN). During my testimony, you requested that I submit a summary of my testimony in a letter because of time constraints.

As I explained in my testimony, I am concerned that CSSB 199(FIN) may compromise or even jeopardize Alaska's federally approved and federally funded OSHA program.

In order to understand how this bill may affect Alaska's OSHA program, it is important to understand the relationship between Alaska's OSHA program and the federal OSHA program.

In the mid-1970's, the U.S. Congress enacted the Occupational Safety and Health Act ("OSHA"). 29 U.S.C. § 650. Congress gave the U.S. Department of Labor the power to promulgate workplace safety standards. Congress also gave the U.S. Department of Labor the right to enter workplaces and conduct inspections. 29 U.S.C. § 657. In 29 U.S.C. § 657, Congress gave the U.S. Department of Labor the authority to subpoena persons and documents when it conducts inspections.

In the Occupational Safety and Health Act, Congress also provided that the U.S. Department of Labor could approve a state OSHA plan so long as the state OSHA plan was as effective as federal OSHA. 29 U.S.C. § 667. There are about 26 federally approved state plans.

In 29 C.F.R. § 1952.240, the U.S. Department of Labor approved Alaska's state plan because it is as effective as the federal program. AS 18.60.030(5). Consequently, the U.S. Department of Labor oversees Alaska's state OSHA program and substantially funds the program.

CSSB 199(FIN), in my opinion, will make our state OSHA program less effective than the federal OSHA program in two ways.

First, CSSB 199(FIN) creates a privilege for "audits." The federal OSHA program has no such privilege. Currently, when the Alaska Department of Labor conducts its investigation, it, like the U.S. Department of Labor, can subpoena documents from an employer. AS 18.60.083. This bill will prevent the Alaska Department of Labor from subpoenaing audit information that the U.S. Department of Labor can subpoena. Documents, such as audits, can provide very important evidence, particularly in cases where an employer has willfully violated an OSHA regulation. AS 18.60.095(a). It is very difficult to prove an employer's state of mind; often the Alaska Department of Labor must weigh the employer's word against an employee's word. Under CSSB 199(FIN), the Department would not be able to obtain audit information which might demonstrate that the employer knew of the violation and knowingly chose not to correct the violation. In contrast, the U.S. Department of Labor could obtain this information during its inspection.

Second, CSSB 199(FIN) provides immunity in certain situations. The U.S. Department of Labor does not provide employers with immunity. Consequently, the U.S. Department of Labor could bring OSHA citations against employers, that the Alaska Department of Labor could not bring.

Of all of the states that have passed bills similar to CSSB 199(FIN), I am only aware of one state that has expanded the audit privilege/immunity beyond environmental audits. To my knowledge, only Texas has expanded the audit privilege/immunity to "health and safety audits." Texas does not have a federally approved state OSHA plan. Consequently, the U.S. Department of Labor conducts workplace safety inspections in Texas. Federal OSHA enforcement would not be affected by the Texas law.

Alaska would be the first state, which has a federally approved OSHA state plan, that passed a law expanding the audit

privilege/immunity to workplace safety inspections. Attached is a letter from the U.S. Department of Labor indicating that CSSB 199(FIN) may jeopardize Alaska's OSHA plan.

Very truly yours,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Toby N. Steinberger
Assistant Attorney General

Enclosure

TNS:akb

cc: Senator Loren Leman
Honorable Commissioner Tom Cashen
Department of Labor
Patrick Pourchot, Legislative Director
Office of the Governor
Deborah Behr, Assistant Attorney General
Legislation & Regulations Section
Department of Law
Marie Sansone, Assistant Attorney General
Department of Law
Chrystal Smith, Legal Administrator
Department of Law

U.S. Department of Labor

Occupational Safety and Health Administration
1111 Third Avenue, Suite 715
Seattle, Washington 98101-3212

Telephone: (206) 553-5930
FAX: (206) 553-6499

Reply to the Attention of: STP 1-1/jrs

April 23, 1996

The Honorable Tom Cashen, Commissioner
Alaska Department of Labor
P.O. Box 21149
Juneau, AK 99802-1149

Dear Commissioner Cashen:

Per your request we have performed a preliminary review of Alaska Senate Bill 199 regarding privileges and immunities related to disclosure of certain self-audits. Based on this review, it appears that the Bill, as written, would substantially impact current enforcement of the state's occupational safety and health laws. It is our opinion that the provisions of the Bill would materially change the burden of proof for safety and health standards violations classified as willful, making it much more difficult to sustain a willful violation.

We might concur in a provision to disallow the state from citing retroactively violations that an employer finds, himself, in the course of an internal audit (a policy we believe might actually be in the interest of safety); but this legislation attempts to hold an employer immune and create a new privilege disallowing the state to use the employer's business records as evidence of knowing or intentional wrong doing when the state finds subsequent violations, a sort of corporate right against self-incrimination. We believe that, if enacted into law, this legislation could leave the Alaska occupational safety and health program in a situation in which it could be reasonably argued that the program is less effective than the federal program and subject to plan withdrawal proceedings.

Again, please be aware that this assessment is preliminary. We would be pleased to provide an in-depth review and legal analysis if you so desire; however, such an analysis would require significantly more time to complete.

Sincerely,

Richard S. Terrill
Acting Regional Administrator

Alaska Forest Association, Inc.

111 STEDMAN SUITE 200
KETCHIKAN, ALASKA 99901-6599
Phone 907-225-5114
FAX 907-225-5920

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.

SENATOR LOREN LEMAN

Northwest Anchorage

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

April 23, 1996

Mr. Robert C. Bundy
United States Attorney
District of Alaska at Anchorage
Federal Building & U.S. Courthouse
222 West 7th Avenue, #9, Room 253
Anchorage, Alaska 99513-7567

Dear Mr. Bundy:

I am responding to your April 19 letter to Rep. Joe Green regarding Senate Bill 199, legislation I introduced to create incentives for regulated entities to conduct environmental, health and safety self-audits. Your letter disappointed me in that it misstates both the intent and the substance of the legislation.

SB 199 is neither "anti-environment" or "anti-law enforcement", as you charge. Instead, it will have just the opposite effect. I speak from my 22 years in Alaska as a consulting civil/environmental engineer. I have helped many clients respond to environmental challenges. Additionally, I have worked as a commercial fisherman for most of my life. I have a personal stake in environmental protection.

Many of your arguments mirror objections the Knowles Administration has already raised, and to which we have already responded in other forums. I will not revisit those issues here. However, original issues you have raised deserve commen

First, you describe the immunity provision as "radical", but then praise the EPA's new immunity policy which was finalized in December 1995. The two are not in conflict. There are certainly differences between SB 199 and the EPA approach, and for various reasons we believe our approach is superior. However, the similarities far outweigh the differences. To say that you "endorse and support" the EPA policy while condemning SB 199 as "radical" only betrays your unsupported bias against the approach that many states are taking.

Under EPA's new policy, the agency will not seek any gravity-based penalties for violations that are discovered through a self-audit and promptly reported to the agency. Just like SB 199, the EPA attaches many conditions to the benefit: the violations reported must not have resulted in serious harm to the environment, repeat offenders are excluded, the regulated entity must correct the problem and take steps to prevent future recurrence, etc.

However, the immunity provision in SB 199 is actually *stricter* in some respects. For example, immunity is available only if a business first provides notification to the agency of its intent to conduct an audit. The EPA policy has no such requirement. In addition, EPA offers a 75% reduction in penalties even if the reported violations were not discovered through a self-audit. In contrast, immunity in SB 199 is allowed *only* for violations that arise from a self-audit. Given these realities it is nonsensical to praise EPA's policy while labeling SB 199 as "radical".

Your second point is that the audit privilege would "[allow] facts that are important to the protection of public health and the environment to be hidden from public view and from government officials." However, SB 199 provides in Section 09.25.465 that any document,

communication, datum, report or other information that must be maintained or reported as part of an existing law, regulation, or permit requirement is *not* covered by the self-audit privilege. Furthermore, privilege *cannot* be claimed for information that a regulatory agency obtains through its own monitoring or sampling, nor does the privilege apply if the regulatory agency obtains information from a third party or a "whistleblower".

These restrictions on the privilege beg the following question: what is the information that agencies routinely use in enforcement proceedings that will be denied to them if a self-audit privilege is enacted in Alaska? I have never received a satisfactory answer to this question. In fact, objections like yours have been aired in 16 other states which have passed audit privilege laws, and each state found these arguments wanting.

You may also be aware that there are now 10 other states where self-audit privilege and/or immunity bills have been approved by at least one house of the legislature. A bill has been introduced in Congress as well. Our Congressman Don Young is one of six original cosponsors of the federal legislation.

Clearly, self-audit privilege and immunity legislation is an idea that is gaining popularity. Rather than resisting this trend, the Department of Justice and the Environmental Protection Agency ought to become constructively involved in these efforts. However, a prerequisite to constructive involvement is that federal agency leaders must rid themselves of the mindset that "Washington knows best" on every issue.

Sincerely,

Loren A. Leman

Loren Leman
Chairman, Senate Resources Committee

cc: Representative Joe Green

Headquarters:
217 ' ɔtreet, Suite 201
Juneau, Alaska 99801
(907) 586-2323 FAX 463-5515

ALASKA
STATE
CHAMBER
OF COMMERCE

House CS for

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.

House CS for

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
Anchorage, Alaska 99513-7567

Commercial: (907) 271-5071
Fax Number: (907) 271-3224

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

Alaska Oil and Gas Association

AOGA

121 W. Fireweed Lane, Suite 207
Anchorage, Alaska 99503-2035
Phone: (907)272-1481 Direct: (907)272-7424 Fax: (907)279-8114
L. A. (Ardie) Gray, Public Affairs Manager

MEMO

VIA FACSIMILE - 12 Pages including cover

April 19, 1996

To: Mike Pauley

From: Ardie Gray

Subject: AOGA Recommended Amendments to CSSB 199

Mike:

Attached are draft AOGA recommended changes to CSSB 199. We wanted to get these changes to you today, however, they're still in draft form. We'd like to have Monday for review and finalize the changes on Tuesday morning. If you can't wait, please consider these amendments in draft form. (FYI: We sent the changes to ADEC and AkOSHA and asked for their input by Monday also.)

CONGRATULATIONS on getting Municipal League endorsement.

Please call with comments.

Thanks.

Attachment

DRAFT

Alaska Oil and Gas Association Recommended Changes to CSSB 199(FIN)

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

BE IT ENACTED BY THE STATE OF ALASKA:

* Section 1. AS 09.25 is amended by adding new sections to read:

ARTICLE 5. PRIVILEGES AND IMMUNITIES
RELATED TO DISCLOSURE OF CERTAIN SELF-AUDITS.

Sec. 09.25.4XX LEGISLATIVE FINDINGS AND INTENT:

NO X

(a) The Legislature finds and intends that:

(1) As environmental, health and safety regulations evolve, performance based standards are replacing the traditional command and control approach to regulation.

(2) This shift is expected to save both the state and regulated entities money and lead to the integration of environmental protections, workplace safety, and normal operating procedures for regulated facilities and operations

(3) In order to foster a partnership between the public and private sectors and promote such integration, it is the intent of the Legislature to establish a responsible incentive program to encourage voluntary, critical self-evaluation for compliance with certain environmental or health and safety requirements by authorizing certain qualified privileges and immunities

(4) The public has a strong interest in encouraging routine self-review of environmental or health and safety business practices and procedures. This can best be achieved by preserving the free flow of this type of information.

(5) Communication related to self-audits include the type of information whose flow would be curtailed if privilege were not available.

(6) Therefore, an audit privilege is recognized to protect the confidentiality of communications relating to voluntary internal environmental, health and safety audits.

DRAFT

NO X

(7) It is not intended that privileged audit reports be used to shield a person from liability under applicable laws and regulations by blocking access to relevant facts.

(8) The public also has a strong interest in obtaining cost-effective correction of inadvertent environmental, health and safety violations.

(9) This goal can best be achieved by offering qualified immunity from enforcement of administrative, and civil penalties for those regulated entities that promptly report any known violation of environmental, health, and safety regulations uncovered as part of the audit, and promptly correct the violations or negotiate a corrective action plan with the appropriate government agency.

Sec. 09.25.450. AUDIT REPORT PRIVILEGE.

(a) Except as provided in AS 09.25.455 - 09.25.475, an audit report is privileged and is not admissible as evidence or subject to discovery in

(1) a civil action, whether legal or equitable;

(2) a criminal proceeding; or

(3) an administrative proceeding, except for workers' compensation proceedings.

(b) A person, when called or subpoenaed as a witness, may not be compelled to testify or produce a document related to an environmental or health and safety audit if

(1) the testimony or document discloses an item listed in AS 09.25.490 (a)(1) that was made as part of the preparation of an environmental or health and safety audit report and that is addressed in a privileged part of an audit report; and

(2) for purposes of this subsection only, the person is a

(A) person who conducted all or a portion of the audit but did not personally observe or participate in the relevant instances or events being reviewed for compliance;

(B) person to whom the audit results are disclosed under AS 09.25.455 (b); or

(C) custodian of the audit results.

(c) A person who conducts or participates in the preparation of an environmental or health and safety audit and who has actually observed or participated in instances or events being reviewed for compliance may

DRAFT

testify about those instances or events but may not be compelled to testify about or produce documents related to the preparation of or a privileged part of an environmental or health and safety audit or an item listed in AS 09.25.490 (a)(1).

(d) A regulatory agency and an employee of a regulatory agency may not request, review, or otherwise use an audit report that is privileged under (a) of this section during an agency inspection of a regulated facility or operation or an activity of a regulated facility or operation.

(e) To facilitate identification, each document in an audit report shall be labeled "COMPLIANCE REPORT: PRIVILEGED DOCUMENT," or labeled with words of similar import.

(f) A party asserting the privilege described in this section has the burden of establishing the applicability of the privilege.

YES ✓ (g) Nothing in this section shall be construed to

(1) prevent a regulatory agency from issuing emergency orders under ____, seeking injunctive relief, independently obtaining relevant facts, conducting necessary inspections or taking other appropriate action regarding implementation and enforcement of applicable environmental or health and safety laws, except as otherwise provided in AS 9.25.475;

(2) authorize a privilege for uninterrupted or continuous environmental or health and safety audits.

Sec. 09.25.455. EXCEPTION: WAIVER.

(a) The privilege in AS 09.25.450 does not apply to the extent the privilege is expressly waived in writing by the owner or operator who prepared the audit report or caused the report to be prepared.

(b) Disclosure of an audit report or information generated by an environmental or health and safety audit does not waive the privilege established by AS 09.25.450 if the disclosure is made

(1) to address or correct a matter raised by the environmental or health and safety audit and is made only to

(A) a person employed by the owner or operator, including temporary and contract employees;

(B) a legal representative of the owner or operator;

(C) an officer or director of the regulated facility or operation or a partner of the owner or operator; or

DRAFT

(D) an independent contractor retained by the owner or operator;

(2) under the terms of a confidentiality agreement between the person for whom the audit report was prepared or the owner or operator of the audited facility or operation and a

YES ✓

(A) partner or potential partner of the owner or operator of the property, facility or operation;

(B) transferee or potential transferee of the property, facility or operation;

(C) lender or potential lender for the property, facility or operation;

(D) government official or a state or federal agency; or

(E) person or entity engaged in the business of insuring, underwriting, or indemnifying the owner or operator of the property, facility or operation; or

(3) under a claim of confidentiality to a government official or agency by the person for whom the audit report was prepared or by the owner or operator.

(c) A party to a confidentiality agreement described in (b)(2) of this section who violates that agreement is liable for damages caused by the disclosure and for other penalties stipulated in the confidentiality agreement.

(d) Information that is disclosed under (b)(3) of this section is confidential and is not subject to disclosure under AS 09.25.110 - 09.25.125.

(e) Disclosure of a portion of an audit report after waiver of the privilege under (a) of this section, after disclosure under (b) of this section, or through any other means may not be construed to waive the privilege established under AS 09.25.450 for any other part of the audit report.

Sec. 09.25.465. NONPRIVILEGED MATERIALS.

(a) The privilege under AS 09.25.450 does not apply to that part of an audit report that contains

(1) a document, communication, datum, report, or other information required by a regulatory agency to be collected, developed, maintained, or reported under an environmental or health and safety law, under a permit issued under an environmental or health and safety law, as a requirement for obtaining, maintaining,

DRAFT

YES ✓ or renewing a license, or as a requirement under a lease or contract with the state;

(2) information that a regulatory agency obtains by observation, sampling, or monitoring; or

YES ✓ (3) information that a regulatory agency obtains from a source that was not involved in the compilation, [OR] preparation, or conduct of the environmental or health and safety audit report.

YES ✓ (4) Documents, communications, data, reports, or other information developed or maintained in the course of any regularly conducted business activity or regular practice other than an environmental or health and safety audit, ~~even if such information:~~

NO X (A) was reviewed by the auditor

(B) formed a basis in whole or in part for the environmental audit report; or

(C) was incorporated into the environmental or health and safety audit report.

(b) An audit report is not privileged and is admissible as evidence and subject to discovery in a proceeding relating to pipeline rates, tariffs, fares, or charges.

YES, but have proposed diff. wording ✓ (c) An audit is not privileged if commenced by an owner or operator after learning of or receiving an official notice of impending inspection or investigation by a government agency.

(d) This section does not limit the right of [A PERSON] an owner or operator to agree to conduct and disclose an audit report. X NO

Sec. 09.25.475. VOLUNTARY DISCLOSURE; IMMUNITY.

NO X (a) Except as provided by this section, [A PERSON] an owner or operator who makes a voluntary disclosure of a violation of an environmental or health and safety law [IS] and their directors, officers, and employees are immune from an administrative or civil [, OR CRIMINAL] penalty for the violation disclosed, for a violation based on the facts disclosed, [AND] or for a violation discovered because of the disclosure that was unknown to the [PERSON] owner or operator making the disclosure.

NO X (b) A disclosure is voluntary for the purposes of this section only if

(1) the disclosure was made promptly after the owner's or operator's knowledge [OF THE INFORMATION DISCLOSED IS OBTAINED BY THE PERSON] of potential non-compliance;

DRAFT

NO X ? (2) the disclosure was made in writing by certified mail or hand-delivered to a representative of an agency that has regulatory authority with regard to the violation disclosed;

NO X (3) an investigation of the potential non-compliance [VIOLATION] was not initiated or the potential non-compliance [VIOLATION] was not independently detected by an agency with enforcement jurisdiction before the disclosure was made using certified mail or hand-delivery to a representative of an agency; under this paragraph, the agency has the burden of proving that an investigation of the potential non-compliance [VIOLATION] was initiated or the potential non-compliance [VIOLATION] was detected before receipt of the certified mail or hand-delivered notification;

(4) the disclosure arises out of a voluntary environmental or health and safety audit;

NO X (5) the [PERSON] owner or operator who makes the disclosure initiates, within a reasonable time, an appropriate effort to achieve compliance, pursues that effort with due diligence, and corrects or implements a series of measures designed to remedy the noncompliance within a reasonable time;

NO X (6) the [PERSON] owner or operator making the disclosure cooperates with the appropriate agency in connection with an investigation of the potential non-compliance issues identified in the disclosure and agrees under terms of a confidentiality agreement to disclose to the agency, on request of the agency, the part of the audit report that describes the implementation plan or tracking system developed to correct past noncompliance, improve current compliance, or prevent future noncompliance; and

(7) the violation did not result in substantial injury to one or more persons at the site or substantial off-site harm to persons, property, or the environment.

(c) A disclosure is not voluntary for purposes of this section if it is a report to a regulatory agency required solely by a specific condition of an enforcement order or decree.

NO X (d) The appropriate regulatory agency may adopt regulations restricting privilege or immunity under AS 9.25.475-490 only if essential to prevent revocation of state primacy over a federally delegated program in circumstances where formal revocation proceedings have begun and will be complete prior to the next regularly scheduled session of the Alaska Legislature. Regulations restricting privilege or immunity under AS 9.25.475-490 may not exceed minimum federal requirements to maintain

DRAFT

NO X | primacy and must be confined to the specific issues of concern relative to retention of state primacy.

NO X | [THE IMMUNITY ESTABLISHED BY (A) OF THIS SECTION DOES NOT APPLY AND AN ADMINISTRATIVE, CIVIL, OR CRIMINAL PENALTY MAY BE IMPOSED UNDER APPLICABLE LAW IF THE

(1) PERSON WHO MADE THE DISCLOSURE KNOWINGLY COMMITTED THE DISCLOSED VIOLATION;

(2) PERSON WHO MADE THE DISCLOSURE RECKLESSLY COMMITTED OR WAS RESPONSIBLE FOR THE COMMISSION OF THE DISCLOSED VIOLATION AND THE VIOLATION RESULTED IN SUBSTANTIAL INJURY TO ONE OR MORE PERSONS AT THE SITE OR SUBSTANTIAL OFF-SITE HARM TO PERSONS, PROPERTY, OR THE ENVIRONMENT;

(3) OFFENSE WAS COMMITTED INTENTIONALLY OR KNOWINGLY BY A MEMBER OF THE PERSON'S MANAGEMENT OR AN AGENT OF THE PERSON AND THE PERSON'S POLICIES OR LACK OF PREVENTION SYSTEMS CONTRIBUTED MATERIALLY TO THE OCCURRENCE OF THE VIOLATION; OR

(4) OFFENSE WAS COMMITTED RECKLESSLY BY A MEMBER OF THE PERSON'S MANAGEMENT OR AN AGENT OF THE PERSON, THE PERSON'S POLICIES OR LACK OF PREVENTION SYSTEMS CONTRIBUTED MATERIALLY TO THE OCCURRENCE OF THE VIOLATION, AND THE VIOLATION RESULTED IN SUBSTANTIAL INJURY TO ONE OR MORE PERSONS AT THE SITE OR SUBSTANTIAL OFF-SITE HARM TO PERSONS, PROPERTY, OR THE ENVIRONMENT.]

NO X | (e) A penalty that is imposed on [A PERSON] an owner or operator for violation of an environmental or health and safety law when the [PERSON] owner or operator has made a voluntary disclosure under [(a) OF] this section but is not granted immunity [BECAUSE OF (d) OF] under this section may, to the extent appropriate and not prohibited by law, be mitigated by

(1) the voluntariness of the disclosure;

(2) efforts by the disclosing party to conduct environmental or health and safety audits;

(3) remediation;

(4) cooperation with government officials investigating the disclosed violation; and

DRAFT

YES ✓ 1

(5) nature of violation

(6) other relevant considerations.

NO X

[(f) IN ORDER TO RECEIVE IMMUNITY UNDER THIS SECTION, A FACILITY CONDUCTING AN ENVIRONMENTAL OR HEALTH AND SAFETY AUDIT MUST GIVE NOTICE BY CERTIFIED MAIL TO AN APPROPRIATE REGULATORY AGENCY OF THE FACT THAT IT IS PLANNING TO COMMENCE THE AUDIT. THE NOTICE MUST SPECIFY THE FACILITY OR PORTION OF THE FACILITY TO BE AUDITED, THE DATE THE AUDIT WILL BEGIN AND END, AND THE GENERAL SCOPE OF THE AUDIT. IMMUNITY UNDER THIS SECTION IS AVAILABLE ONLY FOR INFORMATION AND DOCUMENTS FIRST PRODUCED OR OBTAINED DURING THE TIME PERIOD SPECIFIED IN THE NOTICE. THE NOTICE MAY PROVIDE NOTIFICATION OF MORE THAN ONE SCHEDULED ENVIRONMENTAL OR HEALTH AND SAFETY AUDIT AT A TIME. ONCE INITIATED, AN AUDIT SHALL BE COMPLETED WITHIN THE TIME PERIOD SPECIFIED IN THE NOTICE UNLESS AN EXTENSION IS APPROVED BY THE GOVERNMENTAL ENTITY WITH REGULATORY AUTHORITY OVER THE REGULATED FACILITY OR OPERATION BASED ON REASONABLE GROUNDS.

(g) A REGULATORY AGENCY MAY NOT INITIATE AN INSPECTION, MONITORING, OR OTHER INVESTIGATIVE ACTIVITY BASED SOLELY ON THE RECEIPT OF A NOTICE UNDER (F) OF THIS SECTION. THE AGENCY HAS THE BURDEN OF PROVING THAT AN INSPECTION, MONITORING, OR OTHER INVESTIGATIVE ACTIVITY INITIATED AFTER RECEIPT OF A NOTICE UNDER (F) OF THIS SECTION WAS NOT INITIATED BASED SOLELY ON THE RECEIPT OF THE NOTICE.]

(h) The immunity under this section does not apply if a court or administrative law judge finds that the person claiming the immunity has, on or after the effective date of this Act,

(1) repeated an unreasonable number of times or continuously committed violations that are the same as, or similar to, the violation for which immunity is sought under this section; and

(2) not attempted to bring the facility or operation into compliance, so as to constitute a pattern of disregard of environmental or health and safety laws; In order to be considered a pattern, the person must have committed a series of violations that were due to separate and distinct events within a three-year period at the same facility or operation.

(i) A violation that has been voluntarily disclosed and to which immunity applies must be identified in a compliance history report as being voluntarily disclosed.

DRAFT

(j) A person is not immune under this section if the disclosure is in a proceeding relating to pipeline rates, tariffs, fares, or charges.

YES (k) A person may not be required to waive immunity as a condition of a compliance plan or similar agreement.

NO X (l) The appropriate agency shall not pursue a criminal penalty because the owner or operator is immune from administrative or civil penalties under this section.

Sec. 09.25.485. RELATIONSHIP TO OTHER RECOGNIZED PRIVILEGES.

AS 09.25.450 - 09.25.49[illegible] do not limit, waive, or abrogate the scope or nature of a statutory or common law privilege, including the work product doctrine, the attorney- client privilege, and any other privilege recognized by a court with appropriate authority in this state.

NO X **Sec. 09.25.4XX. AUDITOR CERTIFICATION**

(a) The appropriate regulatory agency may adopt reasonable regulations to establish a voluntary auditor certification program. No agency may require environmental or health and safety audits to be conducted by certified auditors.

Sec. 09.25.490. DEFINITIONS.

(a) In AS 09.25.450 - 09.25.490,

(1) "audit report" means a report that includes each document and communication, other than those set out in AS 09.25.465, produced from an environmental or health and safety audit; general components that may be contained in a completed audit report include

(A) a report, prepared by an auditor, monitor, or similar person, that may include a description of the scope of the audit, the information gained in the audit, findings, conclusions, recommendations, exhibits, and appendices; the types of exhibits and appendices that may be contained in an audit report include supporting information that is collected or developed for the primary purpose of and in the course of an environmental or health and safety audit, including

(i) interviews with current or former employees;

(ii) field notes and records of observations;

(iii) findings, opinions, suggestions, conclusions, guidance, notes, drafts, and memoranda;

DRAFT

(iv) legal analyses;

(v) drawings;

(vi photographs;

(vii) laboratory analyses and other analytical data;

(viii) computer generated or electronically recorded information;

(ix) maps, charts, graphs, and surveys; and

(x) other communications associated with an environmental or health and safety audit;

(B) memoranda and documents analyzing all or a portion of the materials described in (A) of this paragraph or discussing implementation issues; and

(C) an implementation plan or tracking system to correct past noncompliance, improve current compliance, or prevent future noncompliance;

YES ✓

(D) The term "audit report" under this section does not include formal communications or agreements between an owner or operator and the appropriate agency regarding a compliance implementation plan or strategy.

YES, but have proposed different wording ✓

(2) "environmental or health and safety audit" means a confidential, critical, voluntary, internal and retrospective review, evaluation or analysis of current or past conduct, practices and occurrences and the resulting consequences, including assessments that are a part of the owner or operator's compliance management system, that is conducted in the expectation that it would be confidential and specifically and exclusively designed and undertaken for the purposes of determining compliance with environmental or health and safety laws or a permit issued under those laws conducted randomly, regularly or in response to a particular event by an owner or operator, an employee of the owner or operator, or an independent contractor of the owner or operator. [VOLUNTARY EVALUATION, REVIEW, OR ASSESSMENT OF COMPLIANCE WITH ENVIRONMENTAL OR HEALTH AND SAFETY LAWS OR A PERMIT ISSUED UNDER THOSE LAWS CONDUCTED RANDOMLY, REGULARLY, SPONTANEOUSLY, OR IN RESPONSE TO A PARTICULAR EVENT BY AN OWNER OR OPERATOR, AN EMPLOYEE OF THE OWNER OR OPERATOR, OR AN INDEPENDENT CONTRACTOR OF

DRAFT

(A) A REGULATED FACILITY OR OPERATION; OR

(B) AN ACTIVITY AT A REGULATED FACILITY OR OPERATION;]

(3) "environmental or health and safety law" means

(A) a federal or state environmental or occupational health and safety law; or

(B) a rule, regulation, or municipal ordinance adopted in conjunction with or to implement a law described by (A) of this paragraph;

NO X [(4) "INTENTIONALLY" HAS THE MEANING GIVEN IN AS 11.81.900 ;

(5) "KNOWINGLY" HAS THE MEANING GIVEN IN AS 11.81.900 ;]

(6) "owner or operator" means a person who owns or operates a regulated facility or operation;

NO X (7) "penalty" means an administrative, or civil [, OR CRIMINAL] sanction imposed by the state to punish a person for a violation of a statute or rule; the term does not include a technical or remedial provision ordered by a regulatory authority;

NO X [(8) "RECKLESSLY" HAS THE MEANING GIVEN IN AS 11.81.900 ;]

(9) "regulated facility or operation" means a facility or operation that is regulated under an environmental or health and safety law.

YES ✓ (b) To fully implement the privilege and immunity established under AS 09.25.450 - 09.25.490, the term "environmental or health and safety law" and shall be construed broadly.

DAVID E. ROGERS
ATTORNEY AND COUNSELOR AT LAW

211 Fourth Street, Suite 108
P.O. Box 33932
Juneau, Alaska 99803
(907) 586-1107 Fax: (907) 586-1097

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 199 (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

FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. CSSB 199 FIN

Revision Date: 4/17/96
Title: "...relating to environmental audits and health and safety audits..."
Sponsor: Senator Leman
Requester: House Resources Committee

Dept. Affected: Department of Law
BRU: Criminal Division/Civil Division
Component: Criminal Division/General Legal Services
Oil, Gas & Mining, Environmental Law
COMPONENT SERIAL NO. 2085, 2087, 2091, 2092

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	*****	*****	*****	*****	*****	*****
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

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

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

POSITIONS

FULL-TIME	*****	*****	****	*****	*****	*****
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This bill amends AS 09.25 and AS 12.45 by adding several new sections which, with respect to environmental and health and safety laws, would create (1) a new evidentiary privilege; and (2) immunity from criminal, civil, and administrative penalties.

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

Section 09.25.490 (a) (2) defines the term "environmental or health and safety audit" as the voluntary review or assessment of compliance with environmental or health and safety laws. Under the bill, an audit may be conducted randomly, regularly, spontaneously 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.

Richard L. Peques

Prepared by: Richard I. Peques, Director
Division: Administrative Services Division
Phone: 465-3672
Date: 4/17/96

Richard L. Peques /FOR/

Approved by Commissioner: Bruce M. Botelho, Attorney General
Agency: Department of Law
Date: 4/17/96

PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE
For further distribution information, call the Governor's Legislative Office

FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. CSSB 199 (FIN)

ANALYSIS CONTINUATION:

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 or health and safety 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.

The Proposed Immunities

Under section 09.25.475, a person who voluntarily discloses the violation of an environmental or health or safety law is immune from penalties. The bill establishes a number of conditions that must be met to immunize the violation. Immunity

FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. CSSB 199 (FIN)

ANALYSIS CONTINUATION:

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, and other documents to ensure that adequate compliance information is being gathered and maintained to meet the state's regulatory and proprietary responsibilities.

* 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 any breach of the agreements.

* Increased attorneys' fees and costs to litigate and appeal issues relating to the applicability of the privilege and immunities.

* The provision that an owner or operator, employee, or independent contractor may "spontaneously" or "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 in this context.

* Since 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 may be cases, including civil cost recovery actions, that the state will be unable to litigate successfully without great expense, if at all.

* While the Senate Finance Committee amended CSSB 199 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.

FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. CSSB 199 (FIN)

ANALYSIS CONTINUATION:

The state currently uses carrier audits for compliance with occupational health and safety laws to supply facts in the TAPS Tariff cases. Under the bill, if the carriers succeed in claiming an audit privilege, the state will have to conduct its own audits, which can cost from several hundred thousand to several million dollars per audit. The audits used in the 1995 TAPS tariff case, for example, cost approximately $25.05 million. Discovery disputes and litigation over the audit privilege would allow 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 an audit team. Both the privilege and immunity provisions could result in the state not being able to recover imprudent expenditures by Alyeska in the tariff cases, and in the Joint Pipeline Office not able to effectively regulate the pipeline.

For example, if this bill had been in effect prior to the state's 1995 TAPS tariff case it would have jeopardized the whole case. In the '95 case, the state is objecting to at least $330 million worth of imprudent expenditures by the TAPS carriers (and this cost is continuing to grow). The case is worth one-quarter of this amount to the state in lost taxes and royalties; or $82 million and rising.

* Increased investigative costs to gather evidence relating to contaminated sites and 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.

* Since the Criminal Division only has 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 prosecute the case.

* The audit privilege and immunity may jeopardize federal approval of various state-run programs, such as the

FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. CSSB 199 (FIN)

ANALYSIS CONTINUATION:

Alaska Occupational Safety and Health program. The state program must be at least as stringent as the federal program. The state occupational safety and health program, for example, includes mandatory administrative penalties, as required by federal law. 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. Other state programs that may be affected include the Underground Injection Control program under the Alaska Oil and Gas Conservation Commission; the Drinking Water, Solid Waste, and Air Quality programs in the Department of Environmental Conservation; and the medical assistance (Medicaid and Medicare) programs in the Department of Health and Social Services.

* The creation of a sweeping state evidentiary privilege that has no counterpart in federal law will require that attorneys 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 it is not possible to determine the eventual increased cost to the state in terms of litigation, investigation, remediation, lost oil and gas revenues, and lost federal funds in respect to noncompliance with environmental and safety and health requirements.

To: The Honorable Joe Green
The Honorable Bill Williams
Co-Chairmen, House Resources Committee

MEMORANDUM

From: Janice Adair
Department of Environmental Conservation

Subject: CSSB199(Fin)

Date: April 16, 1996

This memo summarizes the department's concerns with CSSB 199(Fin). I've also included some information for the committee's consideration, including a proposed substitute the department prepared several weeks ago.

DEC's concerns with CSSB199(Fin) are:

1) The definition of "environmental or health and safety law" is not clear. There are many laws which may be considered "environmental" or "health and safety" related, which may or may not be within the scope of this bill.

The more traditional environmental programs within DEC, such as air, water quality and contaminated sites would certainly be expected to fall within the scope of CSSB 199(Fin). What is less clear for our agency is how it would impact other programs within DEC whose primary thrust is to protect public health. Drinking water is one example. Others would include those environmental sanitation laws found in Titles 3, 17, and 18 of the Alaska Statutes. These rules govern seafood processing, the processing of other food commodities, and the sanitation of public facilities in order to protect the health and safety of the consuming public.

This lack of clarity is the basis for our fiscal note as we anticipate the Department of Law and the courts will ultimately make this determination.

2) How the audits are done, who may conduct them, and the scope of the audit report are all problematic.

Environmental audits are still a relatively new management tool typically undertaken by only the more sophisticated companies. We've recognized this and are working with industry sectors on auditing standards and practices.

The Honorable Joe Green
The Honorable Bill Williams

Even though we realize there are no generally accepted standards for audits, at the same time the department does not want to adopt regulations setting out how audits should be done. Instead, we feel we need to work with companies or industry sectors in a cooperative manner to jointly develop the guidelines for audits. This becomes even more critical if there is to be a privilege associated with the audit, immunity for violations, or if the audits begin to take the place of state inspections as proposed by the bill's sponsor. The audit must be a credible exercise.

The legislation allows audits to be done by anyone. We feel the audit must be done by someone who not only knows what they are doing, but how the facility does or should operate as well as what the rules are for that operation. In addition, an audit by definition may be random or spontaneous - in other words, it does not have to be well planned.

The definition of "audit report" is extremely broad, and includes the corrective action plan. In order to receive immunity, a facility has to voluntarily disclose any violations discovered as part of the audit. To be considered voluntary, the disclosure has to be made promptly, the violation must be corrected, and the facility must cooperate with us in connection with "an investigation of the issues identified in the disclosure." We interpret this to mean working on the corrective action plan.

But, under the privilege section, we cannot ask for the audit. Therefore, we cannot ask for the corrective action plan. It may be disclosed to us, but it is then confidential. The report of the violation is not confidential. We remain concerned that this will undercut any public's confidence with the facility and the agency that the correction is being adequately addressed.

3) By the terms of the legislation, the privilege is not limited to a critical self-analysis of <u>past</u> actions. A facility operator can undertake an audit, find that a certain course of action might result in environmental damage, go ahead and take that course of action, yet benefit from the privilege. This differs significantly from how the federal courts have defined the critical self-analysis privilege. Ms. Sansone from the Department of Law will likely brief the Resources Committee on <u>Reichhold Chemicals v. Textron</u>[1], a 1994 U.S. District Court decision dealing with this issue.

The court found that the critical self-analysis privilege is a "qualified privilege for *retroactive* analyses of past conduct, practices and occurrences, and the resulting environmental consequences."

---

[1]This is the case that established a four part test for determining if the critical self-analysis privilege was applicable. The four criteria were 1) the information must result from a critical self-analysis undertaken by the party seeking protection; 2) the public must have a strong interest in preserving the free flow of the type of information sough; 3) the information must be the type whose flow would be curtailed if discovery was allows; and 4) the information must have been prepared with the expectation it would be kept confidential and it has in fact been kept confidential.

(emphasis added). In the court's decision, it stated that the evaluations of the potential environmental risks of a proposed course of action made in advance of the decision to adopt that course of action are not protected by a privilege. It noted that where a facility had prior knowledge of the harm that would or could result from a course of action yet deliberately chose to act is "highly relevant in a negligence action and should ordinarily be discoverable. However, retrospective analysis is generally not relevant."

4) We believe protecting criminal actions through the privilege or through immunity is bad public policy.

The bill seems to recognize that criminal actions should not be protected in that it states, among other stipulations, the immunity doesn't apply if the person intentionally or knowingly committed or was responsible for the action that led to the violation. Therefore, it seems to recognize that those elements generally looked for in a criminal case, that is, a certain state of mind, would exclude a person from the benefits of immunity.

This contradicts other sections of the bill. In the first section that establishes the privilege, it states that the privilege applies in criminal proceedings. Therefore, the audit would not be discoverable, even if it would demonstrate criminal intent. In the section that establishes the immunity, it states this is also available for criminal penalties. It goes on, as I've stated above, then to seemingly exclude those elements looked for to determine criminal action.

4) We also believe that establishing a privilege for environmental audits is unnecessary.

We agree that immunity from civil penalties or administrative actions under certain circumstances may make sense. It is in fact what DEC does, and you'll find some information enclosed on our "Pit Stop" program. However, we think a privilege which creates a secret only serves to increase the public's skepticism of both industries operating in Alaska and how the agency deals with them. The question of whether or not the critical self-analysis privilege should apply is best decided by the courts which can take the specifics of each case into account.

A state-established privilege would do nothing to protect industries from potential action on the part of federal agencies, like the EPA. In fact, it is probable that such a privilege would lead to increased federal enforcement as EPA seeks to uncover what cannot be obtained by the state.

5) EPA has already testified that this legislation could negatively impact the state's ability to retain its delegation for federal programs such as the Clean Air program. This is further supported by the enclosed article from the publication Inside EPA dated March 15, 1996.

In order for the state to receive program delegation, the state must have the ability to enforce

the provisions of the program. Losing delegation would result not only in the loss of funding for a variety of programs delegated from EPA but would also result in increased federal enforcement and dual requirements (state and federal) that the regulated public would be required to meet.

7) The legislation states that a disclosure is not voluntary if it is required solely by a specific provision of an enforcement order or decree.

As has been stated in other hearings on the bill, we believe that information required to be provided under leases, contracts, permits, statutes and regulations must also be included.

Please don't hesitate to contact me if we can be of any assistance to you.

Enclosures:

1) 2-29-96 Amendment to SB 199 offered by DEC
2) Pit Stop Brochure
3) Inside EPA article, March 15, 1996

DRAFT -- February 29, 1996
PREPARED AT THE REQUEST OF DEC

A M E N D M E N T

OFFERED IN THE SENATE

TO: SB 199

Page 1, line 1, to Page 11, line 23:

Delete all material.

Insert new language to read:

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

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*Section 1. LEGISLATIVE INTENT. As environmental regulation evolves, performance based standards are replacing the traditional command and control approach to regulation. This shift is expected to save both the state and regulated entities money, and lead to the integration of environmental protection and normal operating procedures for regulated facilities and

operations. In order to promote such integration, it is the intent of the legislature to encourage critical self-evaluation for compliance with environmental requirements by providing immunity from administrative enforcement and civil penalties for those regulated entities that self-audit, voluntarily and promptly report any violation of environmental regulations uncovered as part of the audit, and promptly correct the violations or negotiate a corrective action plan with the Department of Environmental Conservation.

*Sec. 2. AS 46.03 is amended by adding a new section to read:

Sec. 46.03.766. ENVIRONMENTAL COMPLIANCE AUDIT. An environmental compliance audit is a systematic, documented, periodic, and objective review conducted by the owner or operator of a regulated facility or operation and related to meeting the requirements of AS 46.03, AS 46.04, AS 46.09, AS 46.14, or of a regulation, a lawful order of the department, or permit, approval, or acceptance, or term or condition of a permit, approval, or acceptance issued under this chapter, AS 46.04, AS 46.09, or AS 46.14. An environmental compliance audit must be conducted within a defined period of time, and have a specified beginning and end point.

*Sec. 3. AS 46.03 is amended by adding a new section to read:

Sec. 46.03.767. STANDARDS FOR CONDUCTING AUDITS. (a) The department shall make available guidelines containing standards for conducting environmental compliance audits. The standards may be designed for industry groups or categories of operational activities, and must be based upon United States Environmental Protection Agency standards or other comparable recognized standards.

(b) The department shall assist owners and operators of regulated facilities or operations in developing specific guidelines for conducting an environmental compliance audit of their facility or operation. Guidelines developed under this subsection shall contain standards for the auditor's training and qualifications. An owner or operator that develops specific guidelines under this subsection may submit the guidelines to the department for approval.

(c) The owner or operator of a regulated facility or operation is not required to meet the standards made available under (a) or approved under (b) of this section; however, an owner or operator that follows the standards made available under (a) or approved under (b) of this section shall be presumed to

have conducted a qualified environmental compliance audit for purposes of immunity from civil penalties and administrative enforcement under AS 46.03.768.

*Sec. 4. AS 46.03 is amended by adding a new section to read:

Sec. 46.03.768. Immunity. (a) Except as provided in (c) of this section, the owner or operator of a regulated facility or operation is immune from civil penalties under AS 46.03.760(e) and administrative enforcement under AS 46.03.850 if the owner or operator

(1) notifies the department in writing of the owner or operator's intent to undertake a qualified environmental compliance audit as described in AS 46.03.766, and provides the department a written description how the audit will be conducted, who will conduct the audit, and when the audit will begin and end;

(2) undertakes and completes a qualified environmental compliance audit;

(3) promptly, but any event, no than 10 days after discovery of a violation through the audit, reports to the department the violation of this chapter, 46.04, 46.09, or 46.14, or of a regulation, a lawful order of the department, or permit,

approval, or acceptance, or term or condition of a permit, approval, or acceptance issued under this chapter, AS 46.04, AS 46.09, or AS 46.14;

(4) promptly, but in any event, no later than 60 days after completion of the audit, unless a longer period of time is negotiated with the department and established in an agreed-upon corrective action plan, corrects the violation discovered through the audit and implements measures to prevent its recurrence.

(b) For purposes of receiving immunity from administrative enforcement or civil penalties, an owner or operator that conducts an audit but does not follow standards recognized under AS 46.03.767(a) or approved by the department under AS 46.03.767(b) shall demonstrate that it conducted a qualified environmental compliance audit by demonstrating that the procedures it followed are comparable in scope, objectivity, and reliability to those recognized under AS 46.03.767(a) or approved under AS 46.03.767(b).

(c) Immunity from civil penalties is not available when the department is required in writing by the United States Environmental Protection Agency to seek civil penalties for the violation for purposes of maintaining primacy over a federally delegated program, or when the violation causes injury to the

public health or the environment or presents an imminent threat of serious injury to the public health or the environment.

*Sec. 5. AS 46.03 is amended to read:

Sec. AS 46.03.769. AUDIT REPORTS. Upon request of the department, the owner or operator of a regulated facility or operation seeking immunity under AS 46.03.768 shall make the audit report prepared in connection with the environmental compliance audit available to the department for review. If the owner or operator discloses the audit report or any part of the audit report to the department, except for any report or part of any report that may be kept confidential under another provision of law, the report or part of the report disclosed is a public record.

*Sec. 6. AS 46.03.760(e) is amended to read

(e) A person who violates or causes or permits to be violated a provision of AS 46.03.250 - 46.03.314, AS 46.14, or a regulation, a lawful order of the department, or a permit, approval, or acceptance, or term or condition of a permit, approval, or acceptance issued under AS 46.03.250 - 46.03.314 or AS 46.14 is liable, in a civil action, to the state for a sum to be assessed by the court of not less than $500 nor more than $100,000 for the initial violation, nor more than $10,000 for

each day after that on which the violation continues, and that shall reflect, when applicable,

(1) reasonable compensation in the nature of liquidated damages for any adverse environmental effects caused by the violation, that shall be determined by the court according to the toxicity, degradability and dispersal characteristics of the substance discharged, the sensitivity of the receiving environment, and the degree to which the discharge degrades existing environmental quality; for a violation relating to AS 46.14, the court, in making its determination under this paragraph, shall also consider the degree to which the discharge causes harm to persons or property; this paragraph may not be construed to limit the right of parties other than the state to recover for personal injuries or damage to their property;

(2) reasonable costs incurred by the state in detection, investigation, and attempted correction of the violation;

(3) the economic savings realized by the person in not complying with the requirement for which a violation is charged; and

(e) <u>except as immunized under AS 46.03.768,</u> the need for an enhanced civil penalty to deter future noncompliance.

*Sec. 7. AS 46.03.850(a) is amended to read:

(a) Except as immunized under AS 46.03.768, when [WHEN], in the opinion of the department, a person is violating or is about to violate a provision of this chapter, AS 46.04, or AS 46.14, or a regulation or lawful order of the department, or a permit or certificate, or a term or condition of a permit or certificate issued by the department under this chapter, AS 46.04, AS 46.14, the department may notify the person of its determination by personal service or certified mail. The determination and notice do not constitute an order under AS 46.03.820.

*Sec. 8. APPLICABILITY. The immunity created in AS 46.03.768 by sec. 2 of this Act applies to qualified environmental compliance audits conducted on or after the effective date of this Act.

PIT STOP! HIGHLIGHTS:

- Voluntary program- it's your choice to participate.
- Customized technical assistance to meet your business's specific waste management needs in a non enforcement manner.
- Free waste management and reduction training.
- Free, on-site environmental consultation to assist your business with waste management, reduction and disposal concerns.
- Potential disposal cost savings
- Positive recognition and rewards for your waste management and waste reduction efforts.

These are just a few of the benefits being offered to your business at no charge. By participating in the ***PIT STOP!*** program you will gain valuable information to help protect our environment and reduce costs.

WHY MANAGE MY WASTES?

The automotive service industry understands the importance of meeting customer needs and operating efficient businesses. Properly managing used oil, batteries, solvents and other hazardous and solid wastes helps keep our communities clean and reduces business operating costs.

The Alaska Department of Environmental Conservation has teamed up with the automotive industry to provide a voluntary program to help automotive service shops reduce, recycle and properly manage solid and hazardous wastes. This program promotes a cooperative approach to addressing waste management questions and concerns.

HOW AN ON-SITE VISIT WORKS

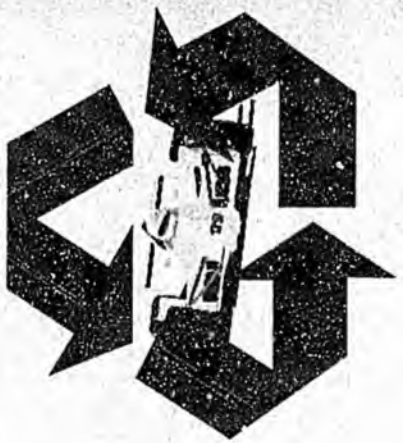
On-site consultations will be scheduled in advance and conducted only at the request of shop owner/operators. These visits enable site specific waste management information to be presented at individual shops.

During the visit, a checklist will be used to document information concerning waste reduction, recycling and environmental management. The checklist will include a "To Do" section identifying areas where shops can make environmental improvements. Proactive pollution prevention efforts will also be documented.

Shops participating in ***PIT STOP!*** will receive as much assistance as they need to help them achieve compliance and waste reduction goals.

For more information, please contact:
Lisa Rozmyn, ADEC *Compliance Assistance Office*
555 Cordova Street, Anchorage, Alaska 99501
Phone (907) 269-7581 or (800) 510-ADEC
Fax (907) 269-7600
email *LRozmyn@envircon.state.ak.us*

clip and mail in an envelope or send by fax (907) 269-7600



TO: Lisa Rozmyn, ADEC Compliance Assistance Office
555 Corodova Street
Anchorage, AK 99501

FROM: _____ (company name & contact) _____ (telephone/fax)

_____ (address)

☐ Yes! I would be interested in attending a training session.

☐ Yes! I would like to receive and on-site visit.

☐ Yes! Please call me about a specific waste management/reduction/recycling issues.

***Pit Stop!* A Voluntary Program to help you!**

Alaska Department of
Environmental Conservation

What is the Compliance Assistance Office?

The Compliance Assistance Office provides technical ***support*** to help businesses and communities comply with federal or state environmental regulations and reduce waste throughout the state.

Our success is based, in part, on coordinated efforts with other programs within the DEC, communities, and Alaska businesses.

COMPLIANCE ASSISTANCE OFFICE

For more information, please contact:
Compliance Assistance Office • 555 Cordova Street •
Anchorage, Alaska 99501
Phone (907) 269-7586 or (800) 510-ADEC
Fax 907-269-7600 • email *CompAsst@envircon.state.ak.us*

Alaska Department of Environmental Conservation
Compliance Assistance Office
555 Cordova Street
Anchorage, Alaska 99501

printed on recycled paper

COMPLIANCE ASSISTANCE OFFICE

TO:

Alaska Department of
Environmental Conservation

Pit Stop!

A Voluntary Waste Management Assistance and Education Program for the Automotive Repair Industry

If your business is interested in:

- Saving Money
- Getting Enforcement-Free Waste Management Assistance
- Reducing Solid & Hazardous Wastes
- Receiving Positive Recognition for Environmental Effort

For more information, please contact:
Lisa Rozmyn, ADEC *Compliance Assistance Office*
555 Cordova Street, Anchorage, Alaska 99501
Phone (907) 269-7581 or (800) 510-ADEC
Fax (907) 269-7600
email *LRozmyn@envircon.state.ak.us*

Inside E.P.A. Weekly report

An Inside Washington Publication

An exclusive report on the U.S. Environmental Protection Agency

Vol. 17, No. 11 - March 15, 1996

Key policy call forthcoming

EPA CONSIDERS BLOCKING AIR PERMIT DELEGATION TO STATES WITH AUDIT LAWS

A number of EPA regional offices are considering revisiting their decisions to approve Clean Air Act operating permit programs in states which have broad audit protection and immunity laws out of concern that these laws would jeopardize program implementation, EPA sources say.

Momentum on this issue is being spurred by a recent Region X decision in which the regional office cited Idaho's state immunity law as a cause for disapproving the state's permit program, and now a number of regional offices are trying to determine whether other state programs should be held to the same standard. EPA sources say the

continued on page 6

NEW STATE CLEAN WATER PACKAGE DRAWS FIRE FROM SOME OFFICIALS

Staffers for the nation's governors have assembled a new draft package of Clean Water Act proposals which is already raising concerns among both state and local representatives who claim the package abandons several of the key provisions embraced in the House Clean Water Act reauthorization bill.

The draft package, reprinted following this story, is intended to put forth a unified state position on Clean Water Act reauthorization and serve as a lobbying tool in future legislative discussions. But some sources are questioning the need for a new states' package since the Senate is not likely to take action on Clean Water Act legislation this year.

In 1994, the states put together a package of Clean Water Act amendments which were later used as a framework

continued on page 8

LAST-MINUTE SENATE TALKS CONSIDER DEAL TO BOOST EPA FUNDING FOR '96

Key senators March 13 launched last minute talks in search of a bipartisan deal to boost EPA's funding levels in a fiscal year 1996 funding bill. The talks followed postponement of action on a Democratic amendment to add over $700 million to EPA's budget.

Even if the Senate does reach agreement, sources warned that the Senate bill is quite different from the House bill, and several sources say Congress may extend the current continuing resolution for two weeks in order to give the two chambers time to hammer out a compromise bill. The Senate also added to the bill funding for key Clinton education programs, which some sources say may make the president more likely to sign the bill even if the environ-

continued on page 14

EXISTING CONTROLS WILL NARROW APPLICABILITY OF MAJOR AIR TOXICS RULE

Regulated facilities will be allowed to install new major air emission units at existing sites without triggering a controversial air toxics rule so long as any new emissions are regulated by other existing controls, according to a Feb. 26 draft rule obtained by *Inside EPA*.

Moreover, the draft explains that the rule, which is being promulgated under section 112(g) of the Clean Air Act, will only apply to the construction and reconstruction of emission units and will not add any control requirements for plant modifications. Industry sources are praising the draft rule, arguing that it will address significant environmental threats without imposing the kinds of operational restrictions that were inherent in a 1994 proposal.

continued on next page

INSIDE

agency is scurrying to craft a national policy that will guide future permit approval decisions.

Over the last two years EPA engaged in a process to revamp its 1986 environmental audit policy in an attempt to promote self-audits and improve compliance. In December, EPA issued its a final policy which allows companies to qualify for significant penalty mitigation in cases where they voluntarily discovered an environmental violation through an audit and disclosed that violation to EPA. In the final policy, however, EPA rejected industry's call for the establishment of an absolute or qualified "privilege" for audits, which would prevent audit documents from being used as evidence against a company in a legal proceeding.

While EPA has been in its own deliberative process, a number of states around the country have taken action to pass state laws that establish a privilege for audits and provide certain levels of immunity for the regulated community. At the time that the agency's policy was finalized, EPA stated that it had significant concerns with certain state laws and emphasized that it would take actions that were necessary to ensure that these laws did not compromise human health or the environment.

EPA's Region X office took the most aggressive action on this issue to date when it announced on Oct. 27 that it was disapproving Idaho's interim Title V air operating permit program. The region's primary concern was Idaho's audit privilege and immunity law which EPA says would grant a state immunity from civil or criminal liability for any violations voluntarily disclosed by the source to the state. At the time of disapproval, EPA stated that it had concerns with the law's privilege component, since it "could be misused to shield bad actors," but added that it did not present the kind of threat that would force EPA to disapprove the entire program. However, with regards to Idaho's immunity provision, EPA said that the state law would "impermissably interfere with Idaho's enforcement requirements" under Title V. As a result of this finding, EPA said that final approval would be conditioned on the state either changing its immunity law or demonstrating why the program would not undercut the state's enforcement authority.

Subsequent to this action and the finalization of the agency's audit policy, a number of EPA headquarters and regional sources say that regional offices are now considering revisiting some of the Title V decisions that have been made on programs that exist in states with privilege or immunity laws. According to one regional attorney, this is a "live issue" that is spurring considerable debate in a number of regional offices. A second regional source says his office is now looking at a particular state law in an attempt to determine whether it is inconsistent with EPA's policy, and if so, the office will consider taking action to affect change in that state.

Region I appears to be on the verge of taking just such an action with regards to New Hampshire, which is in the final stages of enacting an aggressive privilege bill. On February 27, Regional Administrator John DeVillars sent a letter to Gov. Stephen Merrill (R) expressing the agency's strident opposition to the state's legislation and warns that, as presently drafted, "the bill may seriously compromise the state's ability to enforce against violations of federal environmental law delegated to the state for implementation." As a remedy, DeVillars calls on the state to amend the legislation to reflect that it will "not apply to federally delegated programs with more stringent federal requirements." In addition to New Hampshire, EPA officials recently highlighted this issue with Texas during discussions over the state's Title V program and agency sources say the issue may be raised with as many as 10 other states in the coming months. An EPA official notes, however, that concerns over a number of these laws can probably be resolved through negotiations.

EPA sources explain that Title V has become the "flashpoint" in this dispute because it is the only major media program that has not already been broadly delegated to states. EPA and industry sources have noted in the past that it was unlikely that EPA would pull an already delegated program from a state on account of these laws. However, a number of sources add that Title V offers a unique opportunity to tackle this issue since it is being widely delegated. Because of its timeliness, one EPA source stresses that Title V will provide the "battleground" on which disputes with state law will be fought.

Although aware that this was a simmering issue, EPA sources say that talks within headquarters have only recently begun on how to handle this issue on a national basis. One agency source points out that it is a "very tricky" issue, but adds that a number of people within the agency feel that a national policy is needed. A regional source agrees that a national strategy is needed and faults the office of enforcement for "exerting no leadership on this issue" thus far. An EPA source says that a national policy is being developed and will have to be finalized soon since a final decision on Idaho's program will have to be made in the next couple of months.

A source within the air program says that this issue is being primarily driven by the enforcement office and has not been widely discussed among those who develop permit policy within the air office.

SUBSCRIPTIONS:
703-416-8500 or
Toll-free 800-424-9068

NEWS OFFICE
703-416-8536

FAX: 703-416-8543

To order environmental documents, call (703) 416-8507

Managing Editor: Don Bilson
Associate Editors: Tony Kreindler, Leigh Smith, Paul Singer

Production: Justin Goudreau, Wendy Tull, Alexandra Tzoumas, Melissa Dole

Inside EPA is published every Friday by Inside Washington Publishers, P.O. Box 7167, Ben Franklin Station, Washington, D.C. 20044. Subscription rates: $920/yr in U.S. and Canada: $950/yr elsewhere (air mail).

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

Supporters of Senate Bill 199...

- Alaska Forest Association
- Alaska Miners Association
- 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

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

THE NEW PARADIGM IN ENVIRONMENTAL ENFORCEMENT:

Environmental Audit Privilege and Immunity Legislation

by

R. Kinnan Golemon
and
Laura D. Wolf

BROWN McCARROLL & OAKS HARTLINE, L.L.P. ■ 1400 Franklin Plaza ■ 111 Congress Avenue ■ Austin, Texas 78701 ■ (512) 472-5456

ABOUT THE AUTHORS

R. Kinnan Golemon is a prominent expert in the field of Environmental Law with over 30 years of experience as either an engineer or attorney engaged in issues associated with environmental regulatory compliance. He is a Partner in the Austin office of the Texas-based law firm of Brown McCarroll & Oaks Hartline, L.L.P. In the 1995 Texas Legislature, Mr. Golemon and his Partner, Ms. Lisa Anderson, were the primary business proponents actively supporting the passage of H.B. 2473, The Texas Environmental Health and Safety Audit Privilege and Immunity Act. He serves as General Counsel for the Texas Chemical Council, the association representing over 100 chemical manufacturers doing business within Texas. He also is the Immediate Past Chairman of the American Bar Association's Section of Natural Resources, Energy and environmental Law (SONREEL) and he played a significant role in that entity's sponsorship of the facilitated dialogue sessions that resulted in significant changes in the U.S. Environmental Protection Agency Final Policy Statement relating to "Incentives for Self-Policing".

Laura D. Wolf is an Associate with the Austin office of the Texas-based law firm of Brown McCarroll & Oaks Hartline, L.L.P. where her practice is primarily devoted to the representation of regulated entities in the field of Environmental Law. She received her B.A. in Psychology from Smith College in 1986 and her J.D. from the University of Texas School of Law in 1991.

I. INTRODUCTION

In the last few years one of the more common controversies to arise out of the environmental regulatory context is the debate over whether regulated entities that conduct environmental audits should be provided an evidentiary privilege and penalty immunity relief for voluntarily discovered, promptly reported and corrected violations. This article will provide an insight into why the establishment of such a privilege for environmental audits and provision of penalty immunity will benefit the environment as well as the regulators and members of the regulated community, *i.e.*, business and governmental entities that must comply with environmental regulatory requirements.

First, it is necessary to describe what is meant by an environmental audit. The U.S. Environmental Protection Agency ("EPA") has defined environmental auditing as a "systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements".[1] As the result of an audit, a written report is typically presented to management to enable them to determine where their compliance problems are and how to correct them. Audits may be conducted internally, by the regulated entity's employees, or by outside contractors hired for that purpose. Clearly, the primary function of an environmental audit is to alert the regulated entity to compliance issues so that they may be corrected. Whether regulated entities intend compliance with environmental regulations out of civic responsibility or out of fear of penalties is immaterial; the fact is that if regulated entities have regular systems in place to ensure compliance and to promptly correct noncompliance, the environment and the surrounding community benefit. Likewise, governmental resources can better be directed at those regulated entities that do not make the effort and expenditures to

---

[1] "Incentives for Self-Policing", EPA Final Policy Statement, 60 Fed. Reg. 66706, 66710 (December 22, 1995).

routinely and systematically monitor, expeditiously report and promptly correct noncompliance events.

II. EVIDENTIARY PRIVILEGE

The issue of an evidentiary privilege for these audits has arisen out of both the perception of many regulated entities, and the reality for a few regulated entities, that audits which they conduct of their own facilities may be used against them by regulators in enforcement actions or by third parties in private lawsuits, despite the fact that the regulated entity discovered the regulatory violation during an audit and has mechanisms in place to promptly report and correct the noncompliance. In other words, a regulated entity may be reluctant to conduct an environmental audit because of fears as to the way in which the audit will be used by others and it may therefore forego an opportunity to enhance its own program of environmental compliance. However, if applicable legal and regulatory mechanisms are in place that provide incentives and encouragement for the regulated entity to conduct such an audit, and to correct any problems it finds as a result, then the regulated entity's environmental compliance is more likely to be improved, and so, it can be assumed, will be the environment of the surrounding community.

A. Against the Privilege for Environmental Audits

The notion of an evidentiary privilege in favor of environmental audits has sparked a vigorous debate in the last several years. Among the arguments against an evidentiary privilege is that it runs counter to the spirit and intention of modern environmental laws, which promote and require public disclosure.[2] This argument assumes that regulatory agencies and private parties are entitled to be able to obtain the results of internal environmental audits so that the

[2] See, *e.g.*, Ronald, David. "The Case Against an Environmental Audit Privilege". National Environmental Law Journal, September 1994.

environment and public health can be better protected. The concept espoused in this argument is that corporations and other regulated entities have vested interests in veiling their environmental audits in secrecy, but that true environmental protections cannot be achieved unless all internal environmental investigations are made open to the public, and, better yet, that the most protective environmental audits are those that are conducted with input from both regulators and members of the public.[3]

The U.S. Department of Justice ("DOJ") and EPA have made similar arguments in their opposition to an evidentiary privilege for audits. In EPA's view, a statutory privilege "... could be used to shield evidence of violations of federal environmental law as well as criminal misconduct, deny the public its right to know useful information affecting its health and the environment, drive up litigation costs, and create an atmosphere of distrust between regulators, industry and local communities."[4] EPA's Final Policy Statement on Incentives for Self-Policing, issued on December 18, 1995, reiterates EPA's long-standing opposition to evidentiary privileges for audits. In fact, although EPA's policy states that it will not request audits to initiate environmental investigations, if EPA has "independent reason to believe" that a violation has occurred, the Agency makes clear that it has the authority to seek "any information", possibly including an audit report, relevant to identifying violations or determining liability or extent of harm.[5] "Independent reason to believe" that a violation has occurred is not a significant threshold to meet in order for EPA to request an audit report which may lead them to other violations, even as those violations are being addressed by the facility.

---

[3] See, *i.e.*, Lewis, Sanford. Moving Forward Toward Environmental Excellence: Corporate Environmental Audits and the Public's Right to Know. The Good Neighbor Project for Sustainable Industries, February 1, 1995.

[4] "Incentives for Self-Policing" EPA Fact Sheet, December 18, 1995, p. 2.

[5] 60 Fed. Reg. 66706, 66711 (December 22, 1995).

EPA's Assistant Administrator for the Office of Enforcement and Compliance Assurance, Mr. Steve Herman, in a February 21, 1996, letter to Michigan State Representative John Freeman discussing proposed Michigan legislation, articulates EPA's position regarding evidentiary privileges for audits. Mr. Herman asserts that Michigan's proposed evidentiary privilege "... could hamstring investigations of criminal behavior, interfere even with routine enforcement actions, and compromise the public's right to know."

Mr. Herman, in his letter to Representative Freeman, raises the issue of whether state evidentiary privileges can apply to federal environmental programs administered in the state. This tactic is being used in other states as well; for example, the State of Texas, which adopted an evidentiary privilege for audits in 1995, is currently seeking delegation of the National Pollutant Discharge Elimination System ("NPDES") program under the federal Clean Water Act and the Title V operating permits program under the federal Clean Air Act. EPA apparently is delaying the approval of Texas' programs, in part, because of concerns over Texas' audit privilege legislation.[6] In keeping with its longstanding tradition, EPA seems of the view that if it cannot impose its policy directly, it can attempt to impose it by refusing to allow states to implement their own programs under federal environmental laws.

DOJ supports EPA's position and advocates against an evidentiary privilege for environmental audits. "The approach taken in state laws and proposed federal legislation of creating evidentiary privileges for polluters that perform environmental audits or providing statutory immunity for violations by such polluters conceals environmental hazards from the

[6] "Federal regulators concerned about Texas environmental law", Austin American-Statesman, February 28, 1996 stating that the Deputy Administrator of EPA, Fred Hansen, said "the [Texas] law could be an obstacle for a state plan to administer the key program under the Federal Clean Air Act" [Title V operating permits].

public and public authorities, impairs enforcement, and shields misconduct. Therefore, the Department will continue vigorously to oppose such legislation."[7]

EPA's and DOJ's fear about the effects of evidentiary privileges for audits are unfounded. Their arguments are myths being used to oppose a sensible concept and should be exposed as such.

B. IN FAVOR OF AN ENVIRONMENTAL AUDIT PRIVILEGE

1. Myth 1: An evidentiary privilege for environmental audits will shield criminal misconduct.

First, EPA and DOJ believe that evidentiary privileges may shield criminal misconduct. This position apparently arises out of the fact that most privilege statutes include an immunity from prosecution for violations discovered and corrected as a result of audits. In fact, most audit privilege policies limit any privilege and/or immunity to a situation in which a voluntary audit has uncovered a violation and the violation is promptly and effectively corrected. Many such statutes expressly provide that a privilege or immunity is not available in instances of criminal misconduct. For example, the Texas legislation excludes from the immunity provisions, those actions that are intentional or knowing violations or reckless violations that result in substantial injury to persons on-site or in substantial harm to persons or property off-site or to the environment.[8] The Texas law also limits its immunity provision to those violations that are reported to the appropriate state agency.[9]

---

[7] January 31, 1996 letter from Lois J. Schiffer, Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice to Steven Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency.

[8] Texas Environmental, Health and Safety Audit Privilege Act, 74th Leg., R.S., Ch. 219 § 10(b)(7), 1995 Tex.Sess.Law Serv. 1963 (Vernon).

[9] Id. at § 10(b)(1).

2. **Myth 2: A privilege will hide serious environmental impacts.**

EPA and DOJ apparently also believe that privilege and immunity statutes will block discovery of, and remedies for, serious environmental impacts. Audit privilege legislation enacted by the various states requires that the violations which are uncovered be corrected promptly. This requirement will, in and of itself, reduce the chances of serious environmental harm occurring, because the auditing facility has an additional incentive to correct the violation and remedy any harm. Further, privilege laws do not undo the obligation which companies have under a variety of federal, state and local laws to remedy any environmental damages. If a state or federal law requires that a spill of a hazardous chemical be cleaned up and any contamination of soil or water be remediated, the existence of an evidentiary privilege for the audit that uncovers the past occurrence of the spill does not change the remediation obligation under law. Certainly the privilege does not alter any liability that an auditing facility has to third parties who may be harmed by that entity's environmental violations. The privilege typically means that, in certain particular circumstances, plaintiffs' lawyers cannot obtain audits and use them as client development devices. In circumstances where there is independent evidence of harm to a third party -- in situations of legitimate liability -- the fact that a privileged audit exists will neither relieve the perpetrator of liability nor relieve the third party of its burden to prove that there has been environmental harm caused by the defendant's actions.

3. **Myth 3: A privilege prevents the public from having information about their own community.**

The argument that a privilege undercuts the public's right to know of the environmental issues in their community ignores the facts that there are legitimate limitations on the right-to-know concept and that state and federal environmental laws already provide for many mandated public disclosures. The Emergency Planning and Community Right-to-Know Act

("EPCRA") is based upon the very principle that the public does have a right to know if there are hazardous chemicals in their communities.[10] This same statute is the source of the annual Toxic Release Inventory ("TRI"), a report which regulated entities must file every year describing the disposition of any hazardous chemical or substance which has been on their property during that year. Other environmental statutes and regulations require regular reporting of monitoring results from a regulated entity's activities, such as discharge monitoring reports under the federal Clean Water Act. The existence of these self-reporting requirements eases the way for regulators bringing enforcement actions and for private parties to bring citizen suits or toxic tort suits. In any case, there is already a plethora of environmental reporting required by law that likely would not be subject to any audit privilege.

For those regulated entities who conduct environmental audits, in addition to the mandated reporting described above, the presence in the public domain of more information may lead to more allegations of violations, more enforcement actions and more lawsuits, even though those regulated entities are the very ones who, by conducting the audit in the first place, are attempting to attain better compliance. The regulated entities who do not conduct audits may give the appearance of having better environmental compliance, but that may be the result of the fact that failing to look for violations will always lead to a failure to discover violations. After more than twenty-five years of experience with environmental regulatory programs, it is evident that the "bad actors" often appear to be "good guys" when in fact they have failed to undertake the extra effort to discover and correct situations of noncompliance.

4. **Myth 4: Auditing entities have no need to worry about how audits will be used if they are publicly available.**

---

[10] 42 U.S.C.A. §§ 11001 to 11050.

Though it is true that environmental audits have been used against regulated entities in only a few cases, the perception held by these entities is what motivates their actions as to whether to proceed with audit programs. A survey of various industries regarding environmental audits found that in the chemical industry (an industry that has certainly benefited from a commitment to auditing), the reason most often cited for not conducting environmental audits was the fear of resulting information being used against the company.[11] The perception that audit results will be used by regulators, prosecutors, and plaintiffs' attorneys has caused regulated entities who otherwise could benefit from conducting audits to either refrain from doing so or attempt to use other means to prevent disclosure of findings of violations. For instance, many regulated entities try to protect their audits by using the attorney-client or work product privileges, with the disadvantages and limitations inherent in those privileges. Other entities have decided to write the audit report in such sanitized language that the report does not clearly set forth the discovered violations for those who have the ultimate responsibility of addressing the problems found. These various responses by regulated entities all make sense from a liability perspective, but they do not advance the public policy goal of encouraging regulated entities to diligently seek out their noncompliant activities and correct them.

III. PENALTY IMMUNITY

In addition to an evidentiary privilege, a companion issue in providing incentives for voluntary compliance is the concept of immunity from penalties for companies who promptly report and correct environmental violations. Some states have adopted penalty immunity without

[11] See, Price Waterhouse, L.L.P., The Voluntary Environmental Audit Survey of U.S. Business, March 1995.

the audit privilege; others have embraced both as related elements in their attempts to encourage regulated entities to investigate, report and correct any violations.

EPA, while it objects to the notion of an evidentiary privilege, has accepted the idea of partial immunity from penalty for reporting and correcting violations.

A. EPA ENVIRONMENTAL SELF-POLICING POLICY

In EPA's Final Policy Statement, issued on December 18, 1995[12], and supported by DOJ, EPA offers to not seek (or reduce) gravity-based (i.e. non-economic benefit) penalties for those facilities that discover violations through voluntary environmental audits or efforts which reflect a regulated entity's due diligence to prevent, detect and correct violations, provided that the company satisfies all of EPA's nine conditions.

EPA will eliminate all of the gravity-based portions of any penalty for violations that are found through auditing, if the violations are promptly disclosed and corrected. If the company demonstrates that it has a compliance management system that meets EPA's criteria for "due diligence", the gravity-based portion of the penalty will also be waived. EPA, however, expressly reserves the right to collect "any economic benefit" that may have accrued to the company as a result of the delay in its compliance.[13] [The "economic benefit of noncompliance" concept for quantification of penalty amounts is an agency developed theorem that is the subject of substantial debate.]

Even if the company does not perform an environmental audit and cannot demonstrate that it has a compliance management system qualifying as due diligence, EPA will

---

[12] "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violation" 60 Fed. Reg. 66706, December 22, 1995.

[13] 60 Fed. Reg. 66706, 66712 (December 22, 1995).

waive 75% of the gravity-based portion of the penalty if the violation is voluntarily discovered, promptly disclosed and expeditiously corrected and EPA's conditions are met.[14]

EPA will not recommend for criminal prosecution a regulated entity that has voluntarily discovered violations through an audit and has voluntarily disclosed these violations to the government. This immunity from criminal prosecution does not apply where corporate officials are consciously involved or willfully blind to violations or conceal or condone noncompliance.[15]

The conditions that facilities must meet in order to qualify for the immunities described above are:

1. Discovery of the violation through an environmental audit or " an objective, documented, systematic procedure or practice reflecting due diligence" (even if this condition is not met, the company may still be eligible for a 75% reduction in the gravity-based penalty).[16]

2. Voluntary discovery and prompt disclosure to EPA. This condition applies to any violation that is voluntarily discovered, even if the violation is required to be reported under another law or regulation. The immunity does not apply, however, to a violation which is discovered through a required mechanism such as emissions monitoring required by statute or regulation. Such violations are not "voluntarily" discovered.[17]

---

[14] 60 Fed. Reg. 66706, 66711 (December 22, 1995).

[15] Id.

[16] 60 Fed. Reg. 66706, 66711 (December 22, 1995).

[17] 60 Fed. Reg. 66706, 66711 (December 22, 1995).

3. The disclosure "made to EPA" must be within 10 days of discovery of the violation.[18]

4. Discovery and disclosure must be made by the entity independently (i.e. prior to commencement of any regulatory agency inspection; information request; citizen suit notice; legal complaint by third party; whistleblower employee report; or imminent discovery by a regulatory agency.)[19]

5. Expeditious correction and remediation. The violation must be corrected within 60 days or the facility must provide written notice to EPA that the violation will take longer than 60 days to correct.[20]

6. Prevention of recurrence. The facility must take steps to prevent recurrence of the same violation in the future.[21]

7. No repeat violations. The same or a closely-related violation must not have occurred previously within the past three years at the same facility, or be part of a pattern of violations over the past five years at other facilities owned by the same entity.[22]

8. Exclusion of some violations. Penalty immunity is not available for violations of specific terms of an order or consent agreement. Immunity is also not available

---

[18] Id.

[19] Id.

[20] Id.

[21] Id.

[22] 60 Fed. Reg. 66706, 66712 (December 22, 1995).

for violations that result in serious actual harm or an imminent and substantial endangerment to public health or the environment.[23]

9. Cooperation. The facility must cooperate with EPA, including possible assistance in determining the facts surrounding the disclosed violation and any related violations that may be suggested by the disclosure.[24]

EPA's policy is quite lenient in some respects. It essentially permits a company that accidentally or otherwise discovers violation to reduce their penalty by 75% through prompt disclosure and correction. The policy is broader in this respect than many similar policies adopted by states. The Texas statute, for example, provides immunity only for violations discovered as a result of environmental audits, and the company must have notified the state in advance of its intention to conduct an audit before the immunity will apply.[25]

The EPA policy also continues to suffer from several shortcomings. For instance, the policy does not apply "where corporate officials are consciously involved in or willfully blind to violations or conceal or condone compliance."[26] Thus, culpability of corporate officials is left wide open to interpretation, since reasonable people can differ over what condoning non-compliance means or what sequence of events constitutes "willfully blind to violations."

B. Shortcomings of EPA Environmental Self-Policing Policy

---

[23] 60 Fed. Reg. 66706, 66712 (December 22, 1995).

[24] Id.

[25] Texas Environmental, Health and Safety Audit Privilege Act, 74th Leg., R.S., Ch. 219 § 10(g) 1995 Tex.Sess.Law Serv. 1963 (Vernon).

[26] 60 Fed. Reg. 66706, 66711 (December 22, 1995).

EPA uses the breadth of its policy as an argument that no evidentiary privilege for environmental audits is necessary. To the contrary, a company is not adequately protected by the penalty immunity alone.

EPA's waiver of penalties and commitment not to seek disclosure of audits as an enforcement tool does not prevent a company from being subject to enforcement at the state or local level or to third party lawsuits by prosecutors and plaintiffs' lawyers who inevitably will seek to obtain an audit to use as a litigation guide. The agency has also cleverly disguised its intent as to how environmental audit reports will be treated under the new self-policing policy. The certainty provided by EPA is that invitation of environmental investigations will not be premised upon requests for audits.[27] However, if EPA has "independent reason to believe" that a violation has occurred -- EPA also makes clear that authority to seek "any information" relevant to finding violations.[28] What constitutes "independent reason to believe" is left to the reader's imagination! Is it a citizen complaint? What about allegations made by a disgruntled or recently discharged employee? Or, better yet, an EPA employee being aware of a violation of a minor recordkeeping requirement certainly meets this low threshold for requesting an environmental audit. Likewise, as DOJ has clearly stated once it has received information that a regulated entity has committed violations of environmental law, "the Department seeks all relevant information, including audit reports."[29]

---

[27] 60 Fed. Reg. 667056, 66711 (December 22, 1995).

[28] Id.

[29] January 31, 1996 letter from Lois J. Schiffer, Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice to Steven Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency.

EPA's policy is one step toward a full realization that environmental protection must rely on voluntary compliance, and it is a good step. Unfortunately, however, EPA has steadfastly refused to take the next logical step that would move environmental protection into a new realm of compliance, supporting an evidentiary privilege for environmental audits and full penalty immunity for those acting in good faith to promptly report and correct noncompliant situations. Only when both steps are taken together will we have in place positive incentives that generate the sort of "ownership" of environmental issues by the upper management level of all regulated entities of all sizes and types to take aggressive and affirmative steps to protect the environment.

IV. CURRENT STATUS OF STATE LEGISLATION

This public policy goal and the obvious advantage of a privilege and penalty immunities in achieving that goal are such that fourteen (14) states have enacted some type of privilege legislation. (The states are Arkansas, Colorado, Idaho, Illinois, Indiana, Kansas, Kentucky, Minnesota, Mississippi, Oregon, Texas, Utah, Virginia, and Wyoming.) Penalty immunity of some type is provided for in the legislation in eight (8) of these states (Colorado, Idaho, Kansas, Minnesota, Mississippi, Texas, Virginia and Wyoming). In Michigan, a bill establishing a privilege and providing penalty immunity has passed both the House and Senate and is awaiting presentation to the Governor, who has previously indicated his approval. Likewise, the New Hampshire Legislature has passed a bill containing both privilege and immunity provisions that has been sent to the Governor. The South Dakota Legislature has recently passed a bill providing only penalty immunity which is also awaiting signature by the Governor. Nine (9) other states, including Arizona, California, Iowa, North Carolina, Oklahoma, New Jersey, Ohio, Tennessee, and South Carolina, are considering legislation, which has already passed one branch of the

Legislature, establishing either environmental audit privilege or penalty immunity provisions, or both. Of these nine (9) states, all of these bills contain privilege provisions, except California where a separate bill on that topic is still pending. Various other states, *e.g.*, Alaska, Delaware, Florida, and Pennsylvania also have legislation pending that relates to the subject of establishing these incentives for voluntary discovery and prompt reporting and corrective action of environmental noncompliance events.

V. CONCLUSION

Environmental regulations are pervasive, voluminous and highly technical. Perfect compliance with them is a near-impossibility, and the chances of achieving high levels of compliance decrease with ever-increasing levels of complexity in the regulatory requirements. Given the expansive applicability of environmental requirements to virtually every business and governmental entity and the shortage of resources within federal and state governments, regulatory agencies are finding it increasingly difficult to adequately monitor compliance. Private citizens also lack the resources, as well as the knowledge, to regularly monitor the compliance of a complex industrial facility or major municipality whose operations are governed by highly technical environmental regulations. Typically, most citizens and some regulators do not become aware of a compliance problem until it is too late and the environment, or worse, human health, is affected. As societal attitudes have changed and developed in the past twenty-five years, the entity with the greatest resources, the greatest knowledge, and ultimately, the greatest interest in assuring compliance has become the regulated entity itself. Therefore, it only makes sense that the most effective tool toward environmental protection is the ability of the regulated entity to discover and correct its environmental compliance problems, before they become serious issues for the entire community. However, if the regulated entity legitimately fears that its very attempt to be a good citizen will result in lawsuits and enforcement actions over violations that might

otherwise never have come to light, it will naturally be reluctant to conduct thorough audits. This result shortchanges our citizenry and the environment.

Typically, environmental audit privileges are not absolute. They do not usually protect the underlying facts, and a regulated entity will lose the privilege if it is determined to have claimed it fraudulently. Through public education it is possible that some of the opposition to the environmental audit privilege can be eliminated. People should be assured that the privilege will not apply to those who claim it fraudulently, to information which is required to be reported under some other law, to deliberate violations of the law or in situations of imminent and substantial endangerment to the environment and human health. In other words, the issues about which most people are likely to be concerned are likely not to be covered by the privilege. On the other hand, the granting of the privilege, provides those regulated entities that are genuinely striving toward environmental compliance a tool to use in achieving compliance in the most effective way possible, without fear that that tool will be used to punish them for discovering, reporting and correcting their own violations.

Audit privileges and penalty immunities are, nevertheless, an incentive for regulated entities to conduct environmental audits. These audits promote candid, effective discussions within regulated entities as to the causes of, and solutions to, environmental noncompliance. By removing the incentive to hide noncompliance, the regulated entity can actually address the problem in the most constructive way possible and government can be assured that more entities will be encouraged to address their compliance status forthrightly.

Environmental regulation has for the last twenty-five years focused on the "command and control" model. As a result, we have developed an extremely complicated regulatory scheme, while government at all levels lacks the resources necessary to ensure compliance by all members of the regulated community. Thus, the model for environmental regulation has become outdated

and needs to change. The move to an environmental regulation model that focuses on and encourages voluntary compliance is the key to further rational regulation to protect environmental values. It is in the best interest of any regulated entity to be a good corporate citizen, and to the extent that an entity is free to investigate itself without the fear of providing a "road map to prosecution" or the imposition of monetary penalties for its good behavior that entity will be better able to attain compliance with the regulations and to ensure environmental protection. In addition, our regulatory agencies will be able to direct their limited enforcement resources at those among the regulated community that do not strive to be good citizens.

Alaska Forest Association, Inc.

111 STEDMAN SUITE 200
KETCHIKAN, ALASKA 99901-6699
Phone 907-225-5114
FAX 907-225-5920

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.

APR 10 1996

ALASKA MINERS ASSOCIATION, INC.

501 W. Northern Lights Blvd., Suite 203, Anchorage, Alaska 99503 FAX: (907) 278-7997 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 its dealing with industry. When this is the case, industry will and 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

Senate Bill 199

Environmental, Health and Safety Self-Audit Legislation

- distributed by Senator Loren Leman -

Senate Bill 199 is designed to increase compliance with environmental, health and safety 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 promptly reported and corrected.

In addition, SB 199 establishes a privilege for the information gathered from a voluntary self-audit report, which prevents this information 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. 9 other states have seen similar legislation approved thus far by at least one house of the legislature. In addition, legislation has been introduced in Congress which would apply these principles at the federal level.

Although self-auditing legislation has grown ever more popular across the nation, SB 199 has been criticized by some environmental lobbyists, labor union leaders, 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 the Senate Resources and Senate Finance Committees, or from publications.

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 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 that exist under current law, such as the attorney-client privilege and the work product doctrine, which recognize that 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, health and safety 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: "... SB 199 would make workplaces more dangerous for employees by allowing companies to inspect or audit themselves for health,

safety, or environmental concerns." *[Newsletter of Local 71, Public Employees Union, March 13, 1996]*

"SB 199 is a dangerous bill. It puts the 'fox in the henhouse' when it comes to workplace safety." *[Local 71 Business Manager Don Valesko, same newsletter]*

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

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 or health and safety law, or which is required as part of a license or contract agreement with the state.

Likewise, there are several conditions that must be met in order to qualify for immunity:

- the violation must have been detected through a voluntary environmental or health and safety 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 to the appropriate regulatory agency 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 harm or substantial injury to persons on-site.

- the violations disclosed must not have been independently detected or already the subject of an investigation before the voluntary disclosure was received by the agency.

- the person making the disclosure must not have committed the violations knowingly or recklessly, 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 regulatory agency to address these issues.

The above are just some of the conditions and caveats that apply to the immunity provision. It is designed to benefit those regulated entities who have unintentionally violated the law, but who have acted as good citizens by voluntarily reporting and correcting the problems.

Argument: "The definition of 'environmental or health and safety law' has not been clarified. ... there are many laws which may be considered 'environmental' or 'health and safety' related. We are aware that other agencies have a similar concern -- are they included in this bill or not? We believe that clarity on this issue is important." *[Statement of DEC Representative, 03-08-96]*

Response: SB 199 defines "environmental or health and safety laws" as meaning federal and state statutes dealing with the environment, and occupational health and safety. It also includes rules, regulations, and municipal ordinances adopted to implement these laws. The bill also has an additional subsection which states: "To fully implement the privilege..., the term 'environmental or health and safety law' *shall be construed broadly.*" [emphasis added] By the plain language of the bill, then, the definition is meant to be *broad and inclusive.* All statutes which can reasonably be identified as concerned with environmental protection, or occupational health and safety, are included.

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: These concerns are puzzling. Due to the varying sizes of the businesses that will be covered by SB 199, it is possible that self-audits of smaller businesses might be performed personally by the owner or operator. On the other hand, it is equally likely that a larger corporation would delegate an

employee or contractor to perform the task. The procedures will vary from business to business depending on the size, complexity, and type of operations. 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 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. In order for a business to ensure that it benefits from the immunity provisions in SB 199, a process must be followed: advance notice of the audit, 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 which 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: "We believe protecting criminal actions through the privilege or through immunity is bad public policy." *[DEC Statement, 03-08-96]*

Response: this objection is premised on the belief that it would be sufficient to apply the audit privilege and the immunity provision to administrative and civil proceedings only.

However, the inclusion of privilege and immunity for criminal proceedings is necessary because the standard of intent for determining criminal conduct in the area of environmental law is unusually low.

Consider the opinion of Kevin Gaynor, a former enforcement attorney with the Environmental Protection Agency and the Department of Justice, now serving as an environmental law attorney with the Washington, D.C. firm of Vinson & Elkins:

"Today, industry and individuals face a pervasive regulatory scheme governing environmental compliance, which in breadth and complexity now exceeds requirements under the Internal Revenue Code. At the same time violators of environmental regulations... are seeing an increasing criminalization of their conduct. This criminalizing occurs with little predictability as to when a violation will be prosecuted criminally rather than civilly or administratively. Central to this increased criminalization and directly responsible for this lack of predictability is the low, general intent standard in the various environmental statutes as construed by the courts. This standard is lower and more easily provable than the specific intent standard...

"Under this very low standard, any activity that technically violates the complex and often arcane requirements for handling pollutants and wastes can be criminally prosecuted. The low standard is particularly troubling in view of.... the government's continuing inability to clearly distinguish criminal from civil violations." *[Environmental Reporter, 03-10-95, p. 2206]*

If the self-audit privilege and related immunity provisions were applied to civil and administrative proceedings only, but not to criminal proceedings, it would create an enormous incentive for regulatory agencies to pursue a criminal prosecution as the only available option. There is abundant evidence that criminal cases are already being pursued when an administrative or civil proceeding is more appropriate. Amending the legislation in the manner suggested by critics will only exacerbate this problem.

However, SB 199 does contain provisions, described ealier in this document, to ensure that "bad actors" will not benefit from this legislation.

Argument: SB 199 is not needed in Alaska. Unlike other states, the regulatory agencies and the regulated community in Alaska enjoy a cooperative relationship. SB 199 is trying to fix something that isn't broken.

Response: Actually, the "regulated community" in Alaska does *not* sense that everything is just fine with the way environmental and health or safety regulations are enforced. That is why SB 199 has been endorsed by the Alaska Oil and Gas Association, the Alaska State Chamber of Commerce, the Alaska Forest Association, and the Council of Alaskan Producers, among others.

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) 277-7222 / FAX (907) 277-4323
☐ In Valdez: 154 Fairbanks Dr. / P.O. Box 3089 / Valdez, Alaska 99686 / (907) 835-5957 / FAX (907) 835-5926

April 16, 1996

Representative Joe Green, Co-Chair
Representative Bill Williams, Co-Chair
House Resources Committee
Alaska State Legislature

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

Dear Reps. Green, Williams 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.

Official Business

COMMITTEE: HOUSE RESOURCES

DATE: April 23, 24 1996

SIGN-IN

Subject of meeting: SB 199, ENVIRONMENTAL & HEALTH/SAFETY AUDITS

PLEASE PRINT!

NAME	ADDRESS (MAILING) & (ZIP)	PHONE	REPRESENTING	DO YOU WANT TO TESTIFY?
Bob Bundy				
Janice Adair	555 Cordova Anchorage 99501	269 7645	DEC	yes
Doug Mertz	319 Seward, Jnu	586-4004	Prince William Sound RCAC	yes
Nancy Weller	PO Box 110660	465-3355	Division of Medical Assistance	yes
Kirsten Tinglum	1130 W. 6th Ave Anchorage 9950	276-4331	AK. Asso. Trial Lawyers	YES
Robert Rundy	222 W. 7th Ave #253, Anchorage 99513	271-5071	U.S. Attorney	yes
Marie Sansone	AG's Office, Civil Div.-Jnu	465-6726	AGO	yes
Nancy Weller	Po. Box 110660	465-3355	Division of Medical Assistance	yes
Sara Hannan	PO Box 22151	463-3366	AEL	yes
Mike Pauley	State Capitol Room 115	465-2095	Sen. Leman	YES

Official Business

COMMITTEE:

HOUSE RESOURCES COMMITTEE
4:00 p.m. MEETING

DATE: APRIL 24, 1996

SIGN-IN

Subject of meeting:

SB 199, ENVIRONMENTAL & HEALTH SAFETY AUDITS

PLEASE PRINT!

NAME	ADDRESS (MAILING) & (ZIP)	PHONE	REPRESENTING	DO YOU WANT TO TESTIFY?
NANCY WELLER	~~DHS~~ PO Box 110600 JUNO	465-3355	Division of Medical Assist	yes
Marie SANSONE	AGO MS 0300; Civil Div. - Jnu	465-6726	LAW	yes
Will let her written Testimony I am LaBille	217 Second St #201 Jno	586-2323	AK State Chamber	yes
mike Lawley			Sen Lemmons aide	yes

9-LS1312\U
Lauterbach
4/30/96

HOUSE CS FOR CS FOR SENATE BILL NO. 199( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATORS LEMAN, Pearce

A BILL

FOR AN ACT ENTITLED

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

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* **Section 1.** FINDINGS; INTENT. The legislature finds and intends as follows:

(1) as environmental regulations evolve, performance-based standards will increasingly replace the traditional command-and-control approach of state regulatory practices; this shift is expected to save money for both the state and regulated entities and to lead to the integration of environmental protections and normal operating procedures for regulated facilities and operations; in order to foster a partnership between the public and private sectors and promote this integration, it is the intent of the legislature to establish under this Act a responsible incentive program to encourage voluntary, critical self-evaluation by regulated entities of their compliance with environmental requirements by authorizing certain qualified privileges and immunities relating to those self-evaluations;

(2) the public has a strong interest in encouraging routine self-review of

environmental business practices and procedures; this encouragement can best be achieved by preserving the free flow of information; the free flow of the kind of information that is generated by self-audits would be curtailed if a privilege for the audits was not available; therefore, it is the intent of the legislature to recognize an audit privilege under this Act in order to protect the confidentiality of communications relating to voluntary internal environmental audits; however, the legislature does not intend that audit reports privileged under this Act may be used to shield a person from liability under applicable laws and regulations by blocking access to relevant facts;

(3) the public also has a strong interest in obtaining cost-effective correction of inadvertent environmental violations; this goal can best be achieved by offering qualified immunity from administrative and civil penalties to regulated entities that promptly report known violations of environmental regulations that are uncovered as part of an audit so that the violations can promptly be corrected and a corrective action plan can be negotiated with the appropriate governmental regulatory agency;

(4) an effective enforcement program is also necessary to protect the public health and welfare and the environment; the legislature intends that the audit privilege and the immunities established in this Act should be applied in a manner that promotes compliance with environmental laws, whether through voluntary compliance or through enforcement efforts.

* **Sec. 2.** AS 09.25 is amended by adding new sections to read:

ARTICLE 5. PRIVILEGES AND IMMUNITIES RELATED TO DISCLOSURE OF CERTAIN SELF-AUDITS.

Sec. 09.25.450. AUDIT REPORT PRIVILEGE. (a) Except as provided in AS 09.25.455 - 09.25.475, an audit report is privileged and is not admissible as evidence or subject to discovery in

(1) a civil action, whether legal or equitable; or

(2) an administrative proceeding, except for workers' compensation proceedings.

(b) A person, when called or subpoenaed as a witness, may not be compelled to testify or produce a document related to an environmental audit if

(1) the audit report is privileged under (a) of this section and is

inadmissible in the same proceeding;

(2) the testimony or document discloses an item listed in AS 09.25.490(a)(1) that was made as part of the preparation of an environmental audit report and that is addressed in a privileged part of an audit report; and

(3) for purposes of this subsection only, the person is a

(A) person who conducted all or a portion of the audit but did not personally observe or participate in the relevant instances or events being reviewed for compliance;

(B) person to whom the audit results are disclosed under AS 09.25.455(b); or

(C) custodian of the audit results.

(c) A person who conducts or participates in the preparation of an environmental audit and who has actually observed or participated in instances or events being reviewed for compliance may testify about those instances or events in any proceeding but may not, in a proceeding covered by (a) of this section, be compelled to testify about or produce documents related to the preparation of or a privileged part of an environmental audit or an item listed in AS 09.25.490(a)(1).

(d) A regulatory agency and an employee of a regulatory agency may not request, review, or otherwise use an audit report that is privileged under (a) of this section during an agency inspection of a regulated facility, operation, or property or an activity of a regulated facility, operation, or property.

(e) To facilitate identification, each document in an audit report shall be labeled "COMPLIANCE REPORT: PRIVILEGED DOCUMENT," or labeled with words of similar import.

(f) A party asserting the privilege described in this section has the burden of establishing the applicability of the privilege.

(g) This section may not be construed to

(1) prevent a regulatory agency from issuing an emergency order, seeking injunctive relief, independently obtaining relevant facts, conducting necessary inspections or taking other appropriate action regarding implementation and enforcement of an applicable environmental law, except as otherwise provided in

AS 09.25.475; or

(2) authorize a privilege for uninterrupted or continuous environmental audits.

Sec. 09.25.455. EXCEPTION: WAIVER. (a) The privilege in AS 09.25.450 does not apply to the extent the privilege is expressly waived in writing by the owner or operator who prepared the audit report or caused the report to be prepared.

(b) Disclosure of an audit report or information generated by an environmental audit does not waive the privilege established by AS 09.25.450 if the disclosure is made

(1) to address or correct a matter raised by the environmental audit and is made only to

(A) a person employed by the owner or operator, including temporary and contract employees;

(B) a legal representative of the owner or operator;

(C) an officer or director of the regulated facility, operation, or property;

(D) a partner of the owner or operator; or

(E) an independent contractor retained by the owner or operator;

(2) under the terms of a confidentiality agreement between the person for whom the audit report was prepared or the owner or operator of the audited facility, operation, or property and a

(A) partner or potential partner of the owner or operator of the facility, operation, or property;

(B) transferee or potential transferee of the facility, operation, or property;

(C) lender or potential lender for the facility, operation, or property;

(D) government official or a state or federal agency; or

(E) person or entity engaged in the business of insuring, underwriting, or indemnifying the facility, operation, or property; or

(3) under a claim of confidentiality to a government official or agency

by the person for whom the audit report was prepared or by the owner or operator.

(c) A party to a confidentiality agreement described in (b)(2) of this section who violates that agreement is liable for damages caused by the disclosure and for other penalties stipulated in the confidentiality agreement.

(d) Information that is disclosed under (b)(3) of this section is confidential and is not subject to disclosure under AS 09.25.110 - 09.25.125.

(e) Disclosure of a portion of an audit report after waiver of the privilege under (a) of this section, after disclosure under (b) of this section, or through any other means may not be construed to waive the privilege established under AS 09.25.450 for any other part of the audit report.

Sec. 09.25.460. EXCEPTION: DISCLOSURE REQUIRED BY COURT OR ADMINISTRATIVE HEARINGS OFFICIAL. (a) A court or administrative hearing official with competent jurisdiction may require disclosure of a portion of an audit report in a civil or administrative proceeding if the court or administrative hearing official determines, after an in camera review consistent with the appropriate rules of procedure, that the

(1) privilege is asserted for a fraudulent purpose;

(2) portion of the audit report is not subject to the privilege under AS 09.25.465;

(3) portion of the audit report shows evidence of noncompliance with an environmental law and appropriate efforts to achieve compliance with the law were not promptly initiated and pursued with reasonable diligence after discovery of noncompliance; or

(4) audit report was prepared for the purpose of avoiding disclosure of information required for an investigative, administrative, or judicial proceeding that, at the time of the report's preparation, was imminent or in progress.

(b) A party seeking disclosure under this section has the burden of proving that (a) of this section applies.

Sec. 09.25.465. NONPRIVILEGED MATERIALS. (a) The privilege under AS 09.25.450 does not apply to that part of an audit report that contains

(1) a document, communication, datum, report, or other information

required by a regulatory agency to be collected, developed, maintained, or reported under an environmental law, under a permit issued under an environmental law, as a requirement for obtaining, maintaining, or renewing a license, or as a requirement under a contract or lease with the state;

(2) information that a regulatory agency obtains by observation, sampling, or monitoring;

(3) information that a regulatory agency obtains from a source that was not involved in compiling, preparing, or conducting the environmental audit report;

(4) a document, communication, datum, report, or other information collected, developed, or maintained in the course of a regularly conducted business activity or regular practice other than an environmental audit;

(5) a document existing before the commencement of, and independent of, the environmental audit; or

(6) a document prepared after the completion of, and independent of, the environmental audit.

(b) An audit report is not privileged and is admissible as evidence and subject to discovery in a proceeding relating to pipeline rates, tariffs, fares, or charges.

(c) An audit report is not privileged and is admissible as evidence and subject to discovery if the report was commenced after the owner or operator knew of an impending inspection or investigation by a regulatory agency.

(d) This section does not limit the right of a person to agree to conduct and disclose an audit report.

Sec. 09.25.475. VOLUNTARY DISCLOSURE; IMMUNITY. (a) Except as provided by this section, a person who makes a voluntary disclosure of a violation of an environmental law is immune from an administrative or civil penalty for the violation disclosed, for a violation based on the facts disclosed, and for a violation discovered because of the disclosure that was unknown to the person making the disclosure.

(b) A disclosure is voluntary for the purposes of this section only if

(1) the disclosure was made promptly after knowledge of the information disclosed is obtained by the person;

(2) the disclosure was made in writing by certified mail to an agency that has regulatory authority with regard to the violation disclosed;

(3) an investigation of the violation was not initiated or the violation was not independently detected by an agency with enforcement jurisdiction before the disclosure was made using certified mail; under this paragraph, the agency has the burden of proving that an investigation of the violation was initiated or the violation was detected before receipt of the certified mail;

(4) the disclosure arises out of a voluntary environmental audit;

(5) the person who makes the disclosure initiates, within a reasonable time, an appropriate effort to achieve compliance, pursues that effort with due diligence, and corrects or implements a series of measures designed to remedy the noncompliance within a reasonable time;

(6) the person making the disclosure cooperates with the appropriate agency in connection with an investigation of the issues identified in the disclosure and agrees under terms of a confidentiality agreement to disclose to the agency, on request of the agency, the part of the audit report that describes the implementation plan or tracking system developed to correct past noncompliance, improve current compliance, or prevent future noncompliance; and

(7) the violation did not result in substantial injury to one or more persons at the site or substantial off-site harm to persons, property, or the environment.

(c) A disclosure is not voluntary for purposes of this section if it is a report to a regulatory agency required solely by a specific condition of an enforcement order or decree.

(d) The immunity established by (a) of this section does not apply and an administrative or civil penalty may be imposed under applicable law if the

(1) person who made the disclosure knowingly committed the disclosed violation;

(2) person who made the disclosure recklessly committed or was responsible for the commission of the disclosed violation and the violation resulted in substantial injury to one or more persons at the site or substantial off-site harm to persons, property, or the environment;

(3) offense was committed intentionally or knowingly by a member of the person's management or an agent of the person and the person's policies or lack of prevention systems contributed materially to the occurrence of the violation; or

(4) offense was committed recklessly by a member of the person's management or an agent of the person, the person's policies or lack of prevention systems contributed materially to the occurrence of the violation, and the violation resulted in substantial injury to one or more persons at the site or substantial off-site harm to persons, property, or the environment.

(e) An administrative or civil penalty that is imposed on a person for violation of an environmental law when the person has made a voluntary disclosure under (a) of this section but is not granted immunity because of (d) of this section may, to the extent appropriate and not prohibited by law, be mitigated by

(1) the voluntariness of the disclosure;

(2) efforts by the disclosing party to conduct environmental audits;

(3) remediation;

(4) cooperation with government officials investigating the disclosed violation;

(5) the nature of the violation; and

(6) other relevant considerations.

(f) In order to receive immunity under this section, a facility conducting an environmental audit must give notice by certified mail to an appropriate regulatory agency of the fact that it is planning to commence the audit. The notice must specify the facility or portion of the facility to be audited, the date the audit will begin and end, and the general scope of the audit. Immunity under this section is available only for violations that are revealed through or discovered as a result of information and documents first produced or obtained during the time period specified in the notice. The notice may provide notification of more than one scheduled environmental audit at a time. Once initiated, an audit shall be completed within the time period specified in the notice except that the audit period may be extended once for up to 60 days if the facility gives notice of the extension and its duration to the appropriate regulatory agency by certified mail before the original time period expires.

(g) A regulatory agency may not initiate an inspection, monitoring, or other investigative activity based solely on the receipt of a notice under (f) of this section. The agency has the burden of proving that an inspection, monitoring, or other investigative activity initiated after receipt of a notice under (f) of this section was not initiated based solely on the receipt of the notice.

(h) The immunity under this section does not apply if a court or administrative law judge finds that the person claiming the immunity has

(1) repeated an unreasonable number of times or continuously committed violations that are the same as, or similar to, the violation for which immunity is sought under this section; and

(2) not attempted to bring the facility, operation, or property into compliance, so as to constitute a pattern of disregard of environmental laws.

(i) A violation that has been voluntarily disclosed and to which immunity applies must be identified in a compliance history report as being voluntarily disclosed.

(j) A person is not immune under this section if the disclosure is in a proceeding relating to pipeline rates, tariffs, fares, or charges.

(k) A person may not be required to waive immunity as a condition of a compliance plan or similar agreement.

Sec. 09.25.485. RELATIONSHIP TO OTHER RECOGNIZED PRIVILEGES. AS 09.25.450 - 09.25.490 do not limit, waive, or abrogate the scope or nature of a statutory or common law privilege, including the work product doctrine, the attorney-client privilege, and any other privilege recognized by a court with appropriate authority in this state.

Sec. 09.25.490. DEFINITIONS. (a) In AS 09.25.450 - 09.25.490,

(1) "audit report" means a report that includes each document and communication, other than those set out in AS 09.25.465, produced from an environmental audit; general components that may be contained in a completed audit report include

(A) a report, prepared by an auditor, monitor, or similar person, that may include a description of the scope of the audit, the information gained in the audit, findings, conclusions, recommendations, exhibits, and appendices;

the types of exhibits and appendices that may be contained in an audit report include supporting information that is collected or developed for the primary purpose of and in the course of an environmental audit, including

(i) interviews with current or former employees;

(ii) field notes and records of observations;

(iii) findings, opinions, suggestions, conclusions, guidance, notes, drafts, and memoranda;

(iv) legal analyses;

(v) drawings;

(vi) photographs;

(vii) laboratory analyses and other analytical data;

(viii) computer generated or electronically recorded information;

(ix) maps, charts, graphs, and surveys; and

(x) other communications associated with an environmental audit;

(B) memoranda and documents analyzing all or a portion of the materials described in (A) of this paragraph or discussing implementation issues; and

(C) an implementation plan or tracking system to correct past noncompliance, improve current compliance, or prevent future noncompliance; however, "audit report" does not include formal communications or agreements between an owner or operator and the appropriate agency regarding a compliance implementation plan or strategy;

(2) "environmental audit" means a voluntary, confidential, critical, internal, and retrospective review, evaluation, or analysis of current or past conduct, practices, and occurrences and their resulting consequences, including an assessment that is a part of the owner's or operator's compliance management system, that is conducted randomly, regularly, or in response to a particular event by an owner or operator or by an employee or independent contractor of an owner or operator and is

(A) conducted in the expectation that it will be confidential; and

(B) specifically and exclusively designed and undertaken for the purpose of determining compliance with environmental laws or a permit issued under those laws;

(3) "environmental law" means

(A) a federal or state environmental law; or

(B) a rule, regulation, or municipal ordinance adopted in conjunction with or to implement a law described by (A) of this paragraph;

(4) "intentionally" has the meaning given in AS 11.81.900;

(5) "knowingly" has the meaning given in AS 11.81.900;

(6) "owner or operator" means a person who owns or operates a regulated facility, operation, or property;

(7) "penalty" means an administrative or civil sanction imposed by the state to punish a person for a violation of a statute or rule; the term does not include a technical or remedial provision ordered by a regulatory authority;

(8) "recklessly" has the meaning given in AS 11.81.900;

(9) "regulated facility, operation, or property" means a facility, operation, or property that is regulated under an environmental law.

(b) To fully implement the privilege and immunity established under AS 09.25.450 - 09.25.490, the term "environmental law" shall be construed broadly. However, the term "environmental law" may not be construed so broadly as to include a law governing occupational health and safety, and the term "environmental audit" may not be construed to include a health and safety audit.

* **Sec. 3.** APPLICABILITY. The privilege created by AS 09.25.450 - 09.25.490, added by sec. 2 of this Act, applies to environmental audits that are conducted on or after the effective date of this Act.

April 24, 1996
House Resources Committee
CSSB 199(FIN)

Comments of Assistant Attorney General
Marie Sansone

Thank-you Mr. Chairman. My name is Marie Sansone, Assistant Attorney General in the Civil Division, Natural Resources Section, Juneau.

The Department of Law has many concerns with CSSB 199(FIN). These concerns primarily arise out of the breadth and scope of the bill.

OVERVIEW OF MAJOR CONCERNS

Definition of "Environmental or Health and Safety Law"

First, the bill affects many laws. Under section 09.25.490(a)(3), the bill defines the term "environmental law" to include all federal and state environmental laws, and all municipal ordinances passed in conjunction with or to implement those laws. This would include not only the environmental programs in the Department of Environmental Conservation (DEC), but programs in the Department of Natural Resources, including forestry and mine reclamation; the Alaska Oil and Gas Conservation Commission, including regulation of oil and gas drilling and production and underground injection control; and Department of Fish and Game, including certain aspects of habitat protection.

The bill defines the term "health and safety law" in section 490(a)(3) to include all federal and state occupational health and safety laws, including any municipal ordinances passed in conjunction with or to implement these laws. This definition goes beyond the federal and state Occupational Safety and Health Acts, and includes all health and safety laws the come into play in an occupational setting. Because many laws are either considered occupational health and safety laws or are based upon such laws -- including the laws relating to workers' compensation, professional and occupational licensing, licensing

and certification of health care providers, and the medical assistance programs -- we have very serious concerns about scope of the bill.

CSSB 199(FIN) does not tell us which laws or programs are affected, but rather, in section 490(b), directs that the term "environmental or health and safety law" is to be broadly construed. Given the breadth of the definition, it is impossible to predict with any certainty the full impacts of the bill.

Definition of "Environmental or Health and Safety Audit"

Under section 09.225.490(a)(2), an audit may be performed at any time, by any person employed by or under contract with a regulated entity. CSSB 199(FIN) does not provide any assurances that the audit will be performed by an auditor who is independent, unbiased, and free from influence or conflict of interest. The bill does not require that the auditor have appropriate qualifications, experience, or training to conduct the type of audit being performed, nor does the bill provide any standards to guide the performance of the audit. Moreover, the bill does not require the individual initiating the audit have the authority to do so, nor does it address the question of whether that individual has the authority to bind the entity to take the actions necessary to correct the violations uncovered during the audit.

Definition of "Audit Report"

Under section 490(a)(1), the term "audit report" is broadly defined to include not only the report, but also all the underlying evidence -- interviews, field notes, records of observations, data, lab analyses, photos, maps, surveys, and so forth; all "other communications and documents associated with an environmental or health and safety audit"; and the implementation plan or tracking system developed to correct or prevent violations. With the exception of the implementation plan or tracking system under the immunity provisions of the bill, all this information becomes privileged by virtue of being associated with an audit.

Privilege and Immunity Provisions

CSSB 199(FIN) has two parts: It creates (1) the audit privilege; and (2) immunities from administrative, civil, and criminal penalties. The immunity provisions contain a number of limitations, such as the requirement that a regulated entity undertaking an audit give advance notice of the audit, complete the audit, and correct or initiate measures to correct the violations uncovered during the audit. The Department of Law is concerned that the limitations are poorly drafted, and will result in confusion and litigation. But, at least there are some limitations.

With respect to the privilege provisions of the bill, there really are no limitations. A person can claim the privilege without giving advance notice of the audit, without completing the audit, and without correcting the violations.

This causes us serious concern because, under section 09.25.450(a), the privilege can be asserted in all types of proceedings, not just enforcement actions. The privilege could be asserted in cases between private parties, as well as cases in which the state or municipalities are parties. It could be asserted by both plaintiffs and defendants. It applies in all types of civil cases, whether they are seeking monetary or equitable relief; all criminal cases; and all administrative proceedings, except for workers' compensation proceedings. The privilege applies to the State not only in its regulatory role, but also as a land owner and property manager. Evidence relating to environmental practices is vital in cases involving contaminated property and property valuation, such as condemnation proceedings.

When we take into account (1) the broad definition of environmental and health and safety laws; (2) the fact that anybody can conduct an audit at any time, and the audit doesn't have to result in corrective action; and (3) that the audit report includes any communication or document associated with the audit or the implementation plan or tracking system; the privilege created in CSSB 199(FIN) is so broad that it will operate like a vacuum cleaner to sweep up all evidence related to any health or safety problems or environmental problems.

BACKGROUND INFORMATION ON PRIVILEGES

To help explain why the Department of Law is so concerned with the audit privilege created in this bill, I would like to present some basic background information on "privileges" and other means of protecting sensitive information from disclosure.

Privileges

What is a "privilege"? The word "privileged" is not the same as the word "confidential." It is often possible to access and use confidential information, although this has to be done in a manner that protects the confidential information from further disclosure. Privileged information, however, cannot be accessed and cannot be used.

In the law, the concepts relating to privileges are very old. The concepts have been developed and refined by the courts, literally, over hundreds of years.

There are two ways evidence is privileged. First, evidence may be "privileged from disclosure." This means that even if a person is entitled to claim a privilege, that person may not be compelled to disclose the privileged information to any other person. It also means that the person claiming the privilege can prevent any other person from disclosing the information. If information is privileged from disclosure, you can't gain access to that information; you can't find out about that information.

Second, evidence is "privileged from use." This means that if the information is privileged, you can't use it in court. Even if all the parties in the courtroom know what the privileged information is, if the person entitled to claim the privilege hasn't waived the privilege, you can't use the information to prove your claim or to defend yourself.

Most of our evidence rules are designed to bring out in the open information that is important in determining the truth. We often describe litigation as a "truth-seeking" process; in cases where the facts are in dispute, the purpose of the

litigation is to find out what really happened. This aspect of litigation is reflected in the witness' oath, when the witness swears to tell "the truth, the whole truth, and nothing but the truth."

Privileges, however, conceal the truth. Privileges are differ from most rules of evidence because they are designed to keep information away from the people who need the information to make a decision. Privileges keep information away from the judge, away from the jury, away from the parties who might have used the information in their case, and away from the legislature. Privileges keep the "whole truth" away from decision-makers.

Privileges protect important information. Privileges are not used to protect trivial information. Privileges protect "probative" evidence -- evidence that would have helped prove a claim or a defense. Privileges protect "prejudicial" evidence -- evidence that if it had come to light, would have helped to disprove a claim or a defense.

So, if privileges conceal information that's important in making a decision that's correct, that's fair and just, why do we have privileges? When the courts or the legislature create a privilege, what they're saying is that -- even though this evidence is important; even though it would help a judge or jury decide a case; even though justice may not be served because the parties and the judge and jury do not have access to the whole truth -- it's more important to keep the evidence secret, because to do so furthers an important societal goal.

Usually that goal is to foster communications within an important relationship. For example, the husband-wife privilege fosters communications within a marriage and strengthens the marital relationship; the attorney-client privilege fosters candid disclosures so that the client can obtain sound legal advice and representation; the doctor-patient privilege fosters candid communications, allowing the patient to obtain appropriate treatment.

Privileges have certain characteristics. First, privileges are very narrow, because they keep important evidence away from the people who need that information to make correct

and just decisions. Second, privileges typically only protect communications, not the underlying evidence -- not the facts, documents, or tangible things that are important to deciding an issue. Third, there are usually exceptions to privileges. The exceptions are designed to promote fairness and prevent abuses of the privilege. For example, when a patient sues a doctor for malpractice, the doctor-patient privilege relating to the medical care in question ceases to exist. Fourth, privileges are often "qualified," meaning they can be overcome if a party cannot obtain the evidence any other way or only after great hardship and expense. This is important in circumstances where it becomes impossible to obtain evidence, such as when witnesses die or become unavailable, or when evidence is destroyed, or when tests cannot be repeated due to changed circumstances. Finally, privileges are usually waived by disclosure. A person claiming a privilege must intend to keep the information confidential and, in fact, keep it confidential. Once a person voluntarily discloses privileged information, he cannot later re-claim the privilege and restore it.

I mention these characteristics because they are traditional and because they are important in achieving just and fair and correct results. The audit privilege in CSSB 199(FIN) has none of these characteristics: (1) The audit privilege is broad, not narrow; (2) the audit privilege protects not only the self-evaluative communications, but all the underlying facts, documents, and tangible evidence; (3) there are no exceptions to the audit privilege;[1] (4) the audit privilege is an absolute, not

---

[1] The April 23, 1996 workdraft provides several exceptions to the privilege in section 09.25.460: the privilege is asserted for a fraudulent purpose; the information is non-privileged; the report shows evidence of violations and reasonable efforts were not made to correct the violations; and the audit report was prepared for purposes of avoiding disclosure of information for an investigative, administrative, or judicial proceeding that at the time of the audit's report was imminent or in progress.

The party seeking disclosure under these exceptions has the burden of proving they apply. It is extremely difficult to prove the elements of fraud, or other intentional misconduct, as required by this provision. As we previously stated in the

a qualified, privilege; and (5) disclosure does not waive the privilege. As I'll discuss, the audit privilege, because it is so broad, and because it does not share the characteristics of traditional privileges, will cause major problems in all kinds of cases, for all types of litigants, private and public, plaintiff and defendant.

There's one last point on privileges. We already have two privileges on the books that protect certain types of sensitive information that is generated during an audit. First, both the statutes and the evidence rules recognize a privilege for trade secrets. Second, the attorney-client privilege is often asserted in connection with audits.

Exclusionary Rules

There are certain types of information that is not privileges, but it is excluded from evidence. One example is evidence of "subsequent remedial measures." Under Evidence Rule 407, if, after an accident or event, a person takes measures that

---

Senate hearings, it will be virtually impossible for a litigant to prove an exception applies without full access to the information that is claimed to be privileged. Therefore, these exceptions are largely meaningless.

Even if we could muster the facts necessary to make a good faith assertion that an exception applies, the in camera procedure proposed in the bill creates a severe burden for the Criminal Division. As mentioned in our fiscal note, if the prosecutor is conflicted out of a case due to his review of privileged information, it will be necessary to retain outside counsel to prosecute the case. Moreover, the defendant will likely move to suppress evidence subsequently gathered by the state as "fruit of the poisonous tree," evidence gathered only because the state first learned of privileged information. Finally, the in camera proceeding will require the trial judge to spend extraordinary amounts of time in pretrial proceedings, sorting through the evidence before the case has been presented. The in camera proceedings contemplated in the bill would essentially be pre-trial mini-trials.

would have made the accident or event less likely to have occurred, a party cannot use evidence of those measures to prove negligence or culpable conduct. Similarly, under Rule 409, evidence concerning the payment or offer to pay medical expenses after an accident is not admissible to prove liability for the accident. Under Rule 408, settlement offers and settlements are excluded from evidence. These evidence rules are designed to encourage people to make repairs, to assist injured persons, and to resolve their disputes amicably.

Sometimes evidence is excluded by virtue of procedural rules, particularly in criminal proceedings. For example, defendants frequently file motions to suppress evidence on the grounds of improper searches and seizures. These types of rules are usually premised on curbing the abuse of power.

Protected Information

Under Rule 26(c) of the Civil Rules of Procedure, any party can obtain any court order necessary to protect against "annoyance, embarrassment, oppression, or undue burden or expense." The protective orders are tailored to the case at hand, and can include a variety of provisions such as orders that discovery or disclosure not be had; that discovery can be conducted, but only under certain circumstances; that only certain methods of discovery can be used; limiting the persons who can be present at a deposition; sealing depositions; protecting confidential research, development, or commercial information; and so on. In addition, litigants can assert the "work product doctrine" to protect their trial preparation materials, including audit reports, when these are prepared in anticipation of litigation.

Conclusion

There are many ways on the books already, in the Alaska Statutes and the Alaska Court Rules, to protect sensitive information, including the types of sensitive information that might be contained in audit reports. The audit privilege is not necessary. It lacks the characteristics of traditional privileges, characteristics that evolved over long periods of

time, to further the truth-seeking process, and to lead to fair and just results.

BACKGROUND INFORMATION ON THE AUDIT PRIVILEGE

A privilege is a very special way to treat information; and to create a new privilege is an extraordinary step that requires careful thought and study. So, how did the concept for the audit privilege come about?

CSSB 199(FIN) is patterned after a bill that passed in the State of Texas last year. It is one of a number of bills in the lower 48 concerning environmental audits. Oregon passed the first such legislation in 1993, in connection with a bill making the knowing violations of Oregon's air quality, water quality, and hazardous waste laws punishable as felony offenses and expanding the number of environmental crimes punishable as misdemeanors. Oregon's audit privilege legislation, then, was part and parcel of a compromise reached to increase the authorized severity of the penalties for environmental crimes. Oregon State Bar, Oregon Environmental & Natural Resources Law News (Aug. 1993).

Based upon a Westlaw review of audit legislation, the Texas bill appears to be the only bill that includes health and safety audits. It is one of the broadest bills, and poorly drafted. Apparently, it never received adequate review during the legislative process. The sponsor has removed several troubling provisions from the Texas bill in CSSB 199(FIN). However, the bill still has major problems.

The concept for the audit privilege in the Texas legislation and the other states grew out of a privilege created by the courts, called the "self-evaluative privilege" or the "critical self-analysis privilege." The legal schclars generally agree that this privilege was first recognized by the courts in 1970 in a case called Bredice v. Doctor's Hospital, Inc., 50 F.R.D. 249 (D.C.C. 1970), aff'd without opin., 479 F.2d 920 (1973). In the Bredice case, a patient died in a hospital. After the patient's death, the hospital held meetings in which the professional staff evaluated the patient's care and treatment. The deceased patient's estate sued the hospital for

medical malpractice, and sought discovery of any staff meetings in which the patient's treatment or death had been discussed. The court declined to allow discovery, finding that the retrospective review of patient care was valuable in improving the quality of health care available to the public, but that physicians would not be willing to candidly critique the actions of their colleagues if such reviews were subject to discovery and use as evidence in subsequent malpractice cases.

After Bredice, a number of courts followed the decision in medical malpractice cases, some experimented with extending it to other contexts, and some rejected it, even in the medical peer review context. Today, nearly all the states have enacted a statutory privilege that protects medical peer review communications. Alaska established a medical peer review privilege in AS 18.23.030. This is a very narrow privilege, and carefully crafted.

In general, the courts have rejected the self-critical analysis privilege in environmental cases. There is one recent exception, Reichhold Chemicals, Inc. v. Textron, Inc., 157 F.R.D. 522 (N.D. Fla. 1994). The courts have also generally rejected the self-critical analysis privilege in the context of public health and safety laws and in the context of a grand jury's power to subpoena evidence for purpose of investigating violations. See, e.g., cases discussed in Reichhold, 157 F.R.D. at 525-26.

In the Ninth Circuit, which includes Alaska, the federal appeals court has held that the self-critical analysis privilege, if it exists, does not protect routine internal corporate review of matters relating to safety concerns. See Dowling v. American Hawaii Cruises, Inc., 971 P.2d 423 (9th Cir. 1992). The court observed that corporations already have many incentives to conduct routine safety reviews, including the desire to avoid liability for unsafe conditions and the desire to avoid developing a reputation for having unsafe premises. The court also found that there would be no point to gathering information about safety hazards in the workplace and then keeping that information secret. Id. at 426. Nonetheless, while the court did not create a self-critical analysis privilege in Dowling, the court did not foreclose the possibility that it might recognize the privilege in appropriate circumstances. The Dowling court describes the criteria that must be met to claim a

self-critical analysis privilege. And, in fact, the Reichhold case relies upon Dowling to establish a self-critical analysis for environmental records in a private party lawsuit over a contaminated site.

The audit privilege proposed in CSSB 199(FIN), however, does not have the same characteristics or limitations as described in the Reichhold and Dowling cases. In federal court, the federal law of evidence applies in federal question cases and mixed cases that include federal and state law claims. Under Rule 501 of the Federal Rules of Evidence, the state law regarding privilege applies in a diversity case. Adoption of a state law audit privilege such as CSSB 199(FIN) that differs from the privilege described in Dowling would likely result in conflicting rules of evidence and practical difficulties in gathering and presenting evidence in federal court.

Another development in this area of the law is the adoption in December 1995 of EPA's Final Policy Statement on environmental audits. 60 Fed. Reg. 66,706 (1995). The EPA policy was developed after extensive debate and comment by many affected industries and corporate attorneys. It applies only to the laws implemented by EPA, which makes it easy to determine the policy's scope and effect. It allows full or partial offsets of administrative and civil penalties, providing certain conditions are met. The EPA policy also provides that under certain circumstances, there will be no referral for criminal prosecution. The EPA policy does not recognize an audit privilege, as the penalty offsets and non-referral policy are deemed adequate incentives to self-audit.

THE AUDIT PRIVILEGE HAS BEEN HEAVILY CRITICIZED

The audit privilege and immunity legislation -- both at the state and federal levels -- has come under heavy criticism from the law enforcement community. The United States Department of Justice and the Unites States Attorney strongly oppose the creation of statutory privileges for audit reports. The National District Attorneys Association, consisting of state and local prosecutors, opposes this type of legislation, as do many state Attorneys General. The reasons for the opposition are as follows:

First, the audit privilege is contrary to long-standing principles that privileges are narrowly construed and that there should be broad discovery. These principles seek to provide a level playing field and to provide parties the information they need to resolve disputes. In addition, there are already a number of mechanisms on the books that parties can use to protect sensitive information from disclosure.

Second, a broad privilege and immunity bill, if not carefully drafted, will end up promoting secrecy and fraud. It will create safe havens for polluters and remiss employers who are able to conceal evidence of their violations and frustrate enforcement efforts by dragging out proceedings through motion practice, in camera review mini-trials, and appeals.

Third, additional incentives to audit are unnecessary. Businesses already have many incentives: by conducting audits and making necessary corrections, they avoid enforcement actions and penalties; they reduce their tort liability exposure; they enjoy reduced insurance premiums; they reduce the money and productivity lost to on-the-job accidents; they are able to attract customers who want to know that the premises or products are clean and safe; they are able to take income tax deductions and credits for their repairs and improvements; their property is more marketable and valuable; they enjoy good relationships with the regulators; and they are good neighbors to their communities. It is simply not necessary to offer business and industry an additional incentive to audit.

Fourth, the audit privilege and immunity legislation gives bad actors an unfair economic advantage. For the most part, businesses and industries that engage in environmental crime or that intentionally violate labor safety standards do so for one reason, and that is to save money and increase their profits. Under the audit privilege and immunity legislation, the bad actors -- and it would be naive to think that they do not exist -- will have another means at their disposal to delay or avoid investing in compliance. They will be able to conceal evidence of their violations through the privilege; manipulate evidence to enjoy immunity; and frustrate and delay such investigations and enforcement actions as might be brought.

Fifth, the fact that many laws and permits today

require reporting does not mean that enforcement agencies and litigants do not need access to other evidence. Required reporting is not adequate when you take into account the class of violators that the enforcement agencies are concerned with: the violators who keep two sets of books, the true set and the set they submit to the government; the violators who falsify their reports; the violators who turn their pollution control equipment on to take their required readings and then turn it off; the violators who discharge their wastewater at night and take their samples during the day; the violators who switch sampling sites and methods to get good results. The companies who engage in fraud submit records alright; they submit false records. And these are the bad actors who will assert the audit privilege to conceal the true records.

Sixth, CSSB 199(FIN) authorizes the disclosure of certain information, including the implementation plan or tracking system, to state agencies under confidentiality agreements. Through these confidentiality agreements, the agencies will be reviewing and negotiating in secret about compliance, violations, necessary corrective actions, and cost recovery and damage assessments. The secret discussion and resolution of matters that normally would enjoy some degree of public participation and review can be expected, at a minimum, to result in mistrust of the regulatory agencies, and at the worst, to embroil the the agencies in controversy and allegations of collusion and coverup. Meaningful oversight of agency action -- whether by the public, the Ombudsman, Legislative Audit, or the Legislature itself -- will be difficult.

CONCLUSION

The state already has laws, policies, and practices that encourage audits, voluntary disclosure, and remedial measures. The Department of Environmental Conservation (DEC) has described its practices of working with businesses and individuals to correct and prevent problems. The pollution prevention program is available to assist businesses in developing auditing programs and preventive measures. In addition, DEC regulates the seafood processing industry through the "hazard analysis critical control point" or HACCP method. When the United States Food and Drug Administration (FDA) adopted

the federal HACCP regulations in 1994, the FDA acclaimed the DEC regulations as national model. See 59 Fed. Reg. 4142 (1994). The state's HACCP regulations place primary responsibility upon seafood processing industry to demonstrate that food safety hazards are identified, understood, prevented, and corrected. This approach requires candor and cooperation between DEC and the industry. An audit privilege that promotes secrecy and creates mistrust may undermine this program.

The Department of Labor has likewise presented testimony concerning its voluntary compliance program. This program conforms with federal requirements, and allows employers to defer enforcement inspections while they work together with the Department to correct deficiencies.

The Joint Pipeline Office (JPO), consisting of representatives from six state and five federal agencies, oversees the Trans-Alaska Pipeline System. In regulating the pipeline, the JPO relies heavily on safety audits performed by the Alyeska Pipeline Service Company. While these audits have detected numerous electric code violations, the JPO has worked cooperatively with Alyeska to promptly correct the violations. Penalties have not been assessed. In 1994, the JPO receive the national "Hammer Award" for innovative efforts in making government work better.

The Department of Law and DEC have used environmental audits in resolving environmental and public health problems. For example, during an inspection of the Kake Tribal Corporation's Point Macartney logging camp in 1993, DEC observed numerous violations. Previous enforcement efforts, over the course of many years, had failed to bring the camp into compliance. In an effort to achieve compliance and put into place measures to prevent future violations, the Kake Tribal Corporation, DEC, and Department of Law negotiated a compliance order by consent that called for the Kake Tribal Corporation to undertake a comprehensive assessment or audit of its facility, undertake remedial measures, and implement preventive measures in each area of concern. The DEC provided technical assistance throughout the process. In at least one instance, the Corporation reported and cleaned up a contaminated beach that the regulators had not discovered during their inspections. In other instances, the Corporation exceeded technical requirements,

provided hazmat training to employees beyond that required in the compliance order, and worked with the City of Kake to improve its spill response capabilities. The compliance order also required the payment of a civil assessment, representing compensatory damages and cost recovery. The Kake Tribal Corporation went on to play an instrumental role in organizing and presenting the Southeast ANSCA Presidents Association 1995 Environmental Compliance Conference, designed to promote cooperation among the regulators and regulated community in achieving environmental compliance.

Not one single instance has been presented where an Alaska state agency has used an audit report to initiate an enforcement action. It would be truly ironic to pass a law that purports to offer incentives to business to self-audit, when not only is there is no demonstrated need for that law, but when that law will undermine the efforts already underway in Alaska to encourage voluntary compliance, including innovative efforts that have received national recognition.

The real beneficiaries of this bill will not be the "moms and pops"; nor the businesses and industries that are good neighbors in their communities. The real beneficiaries 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 -- this bill gives people who break the law another set of tools to hide their illegal conduct.

Recently, there are indications that the audit privilege and immunity legislation is not working in other states. The deputy attorney general for the State of Colorado, one of the first states to pass privilege and immunity legislation, stated at an environmental auditing meeting on January 20, 1995, that after the bills had passed in Oregon and Colorado, there was no significant increase in voluntary disclosure or compliance. See M.A. Mazza, The New Evidentiary Privilege for Environmental Audit Reports, 23 Ecology Law Quarterly 79, 136 (1996). A number of states have rejected the privilege and immunity legislation, either in their legislatures or by their governors. In light of the publication of EPA's Final Audit Policy, the pending federal audit privilege and

immunity bill, which has been heavily criticized, is also considered unlikely to pass. The Tennessee Attorney General opined that the audit privilege and immunity legislation proposed in his state would probably be found unconstitutional, in violation of the separation of powers doctrine, and in violation of due process and equal protection rights. Op. Tenn. Att'y Gen. No. 95-028 (Apr. 4, 1995).

Further, the EPA, in the Final Audit Policy, warns that it will closely scrutinize federally-delegated programs to determine if the privilege and immunity would interfere with required program elements. 60 Fed. Reg. 66710 (1995). A memorandum dated April 5, 1996 from EPA headquarters to the regional counsel for EPA Region X, which includes Alaska, provides that where state audit privilege and immunity legislation "deprives the state of adequate enforcement authority [in the Title V air quality control permit programs], it must be amended before final Title V approval can be granted." The federal Occupational Health and Safety Administration in a memorandum dated April 23, 1996 to the Alaska Department of Labor also raises serious questions about the impact of CSSB 199(FIN) on Alaska's state-run program. In short, there are indications that the audit privilege and immunity legislation is creating problems.

But the most serious problems will take time to become visible. Because the audit privilege operates as an incentive to conceal information, it will take a while before the full adverse effects come to light. But they will come to light. There will be industries and companies that break the law; that do not meet the most basic health and safety and environmental standards, whether they do so intentionally to gain profits, or whether they do so because they are reckless or simply negligent. There will be accidents; illness; pollution; and property damage. When victims go to find out what happened to them and why, they won't be able to do so. And that's when we'll know the true effects of this bill.

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
Anchorage, Alaska 99513-7567

Commercial: (907) 271-5071
Fax Number: (907) 271-3224

APR 25 199

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 of 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

U.S. Department of Labor

Occupational Safety and Health Administration
1111 Third Avenue, Suite 715
Seattle, Washington 98101-3212

Telephone: (206) 553-5930
FAX: (206) 553-6499

Reply to the Attention of: STP 1-1/jrs

April 23, 1996

The Honorable Tom Cashen, Commissioner
Alaska Department of Labor
P.O. Box 21149
Juneau, AK 99802-1149

Dear Commissioner Cashen:

Per your request we have performed a preliminary review of Alaska Senate Bill 199 regarding privileges and immunities related to disclosure of certain self-audits. Based on this review, it appears that the Bill, as written, would substantially impact current enforcement of the state's occupational safety and health laws. It is our opinion that the provisions of the Bill would materially change the burden of proof for safety and health standards violations classified as willful, making it much more difficult to sustain a willful violation.

We might concur in a provision to disallow the state from citing retroactively violations that an employer finds, himself, in the course of an internal audit (a policy we believe might actually be in the interest of safety); but this legislation attempts to hold an employer immune and create a new privilege disallowing the state to use the employer's business records as evidence of knowing or intentional wrong doing when the state finds subsequent violations, a sort of corporate right against self-incrimination. We believe that, if enacted into law, this legislation could leave the Alaska occupational safety and health program in a situation in which it could be reasonably argued that the program is less effective than the federal program and subject to plan withdrawal proceedings.

Again, please be aware that this assessment is preliminary. We would be pleased to provide an in-depth review and legal analysis if you so desire; however, such an analysis would require significantly more time to complete.

Sincerely,

Richard S. Terrill
Acting Regional Administrator

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

TONY KNOWLES, GOVERNOR

PLEASE REPLY TO:

☑ 1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907)269-5100
FAX (907)276-3697

☐ KEY BANK BUILDING
100 CUSHMAN ST., SUITE 400
FAIRBANKS, ALASKA 99701-4679
PHONE (907)451-2811
FAX (907)451-2846

☐ P.O. BOX 110300-DIMOND COURT HOUSE
JUNEAU, ALASKA 99811-0300
PHONE (907)465-3600
FAX (907)465-6735

APR 29 199

April 25, 1996

VIA FACSIMILE AND MAIL

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

Re: CSSB 199(FIN); An Act relating to environmental audits and health and safety audits to determine compliance with certain laws, permits, and regulations.

Dear Representative Green:

Yesterday, I testified before the House Resources Committee regarding CSSB 199(FIN). During my testimony, you requested that I submit a summary of my testimony in a letter because of time constraints.

As I explained in my testimony, I am concerned that CSSB 199(FIN) may compromise or even jeopardize Alaska's federally approved and federally funded OSHA program.

In order to understand how this bill may affect Alaska's OSHA program, it is important to understand the relationship between Alaska's OSHA program and the federal OSHA program.

In the mid-1970's, the U.S. Congress enacted the Occupational Safety and Health Act ("OSHA"). 29 U.S.C. § 650. Congress gave the U.S. Department of Labor the power to promulgate workplace safety standards. Congress also gave the U.S. Department of Labor the right to enter workplaces and conduct inspections. 29 U.S.C. § 657. In 29 U.S.C. § 657, Congress gave the U.S. Department of Labor the authority to subpoena persons and documents when it conducts inspections.

In the Occupational Safety and Health Act, Congress also provided that the U.S. Department of Labor could approve a state OSHA plan so long as the state OSHA plan was **as effective as** federal OSHA. 29 U.S.C. § 667. There are about 26 federally approved state plans.

In 29 C.F.R. § 1952.240, the U.S. Department of Labor approved Alaska's state plan because it is as effective as the federal program. AS 18.60.030(5). Consequently, the U.S. Department of Labor oversees Alaska's state OSHA program and substantially funds the program.

CSSB 199(FIN), in my opinion, will make our state OSHA program less effective than the federal OSHA program in two ways.

First, CSSB 199(FIN) creates a privilege for "audits." The federal OSHA program has no such privilege. Currently, when the Alaska Department of Labor conducts its investigation, it, like the U.S. Department of Labor, can subpoena documents from an employer. AS 18.60.083. This bill will prevent the Alaska Department of Labor from subpoenaing audit information that the U.S. Department of Labor can subpoena. Documents, such as audits, can provide very important evidence, particularly in cases where an employer has willfully violated an OSHA regulation. AS 18.60.095(a). It is very difficult to prove an employer's state of mind; often the Alaska Department of Labor must weigh the employer's word against an employee's word. Under CSSB 199(FIN), the Department would not be able to obtain audit information which might demonstrate that the employer knew of the violation and knowingly chose not to correct the violation. In contrast, the U.S. Department of Labor could obtain this information during its inspection.

Second, CSSB 199(FIN) provides immunity in certain situations. The U.S. Department of Labor does not provide employers with immunity. Consequently, the U.S. Department of Labor could bring OSHA citations against employers, that the Alaska Department of Labor could not bring.

Of all of the states that have passed bills similar to CSSB 199(FIN), I am only aware of one state that has expanded the audit privilege/immunity beyond environmental audits. To my knowledge, only Texas has expanded the audit privilege/immunity to "health and safety audits." Texas does not have a federally approved state OSHA plan. Consequently, the U.S. Department of Labor conducts workplace safety inspections in Texas. Federal OSHA enforcement would not be affected by the Texas law.

Alaska would be the first state, which has a federally approved OSHA state plan, that passed a law expanding the audit

privilege/immunity to workplace safety inspections. Attached is a letter from the U.S. Department of Labor indicating that CSSB 199(FIN) may jeopardize Alaska's OSHA plan.

Very truly yours,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Toby N. Steinberger
Toby N. Steinberger
Assistant Attorney General

Enclosure

TNS:akb

cc: Senator Loren Leman
Honorable Commissioner Tom Cashen
Department of Labor
Patrick Pourchot, Legislative Director
Office of the Governor
Deborah Behr, Assistant Attorney General
Legislation & Regulations Section
Department of Law
Marie Sansone, Assistant Attorney General
Department of Law
Chrystal Smith, Legal Administrator
Department of Law

U.S. Department of Labor

Occupational Safety and Health Administration
1111 Third Avenue, Suite 715
Seattle, Washington 98101-3212

Telephone: (206) 553-5930
FAX: (206) 553-6499

Reply to the Attention of: STP 1-1/jrs

April 23, 1996

The Honorable Tom Cashen, Commissioner
Alaska Department of Labor
P.O. Box 21149
Juneau, AK 99802-1149

Dear Commissioner Cashen:

Per your request we have performed a preliminary review of Alaska Senate Bill 199 regarding privileges and immunities related to disclosure of certain self-audits. Based on this review, it appears that the Bill, as written, would substantially impact current enforcement of the state's occupational safety and health laws. It is our opinion that the provisions of the Bill would materially change the burden of proof for safety and health standards violations classified as willful, making it much more difficult to sustain a willful violation.

We might concur in a provision to disallow the state from citing retroactively violations that an employer finds, himself, in the course of an internal audit (a policy we believe might actually be in the interest of safety); but this legislation attempts to hold an employer immune and create a new privilege disallowing the state to use the employer's business records as evidence of knowing or intentional wrong doing when the state finds subsequent violations, a sort of corporate right against self-incrimination. We believe that, if enacted into law, this legislation could leave the Alaska occupational safety and health program in a situation in which it could be reasonably argued that the program is less effective than the federal program and subject to plan withdrawal proceedings.

Again, please be aware that this assessment is preliminary. We would be pleased to provide an in-depth review and legal analysis if you so desire; however, such an analysis would require significantly more time to complete.

Sincerely,

Richard S. Terrill
Acting Regional Administrator

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
Anchorage, Alaska 99513-7567

Commercial: (907) 271-5071
Fax Number: (907) 271-3224

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 effect 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. Morever, 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:kjm

cc: Representative Joe Green

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
Anchorage, Alaska 99513-7567

Commercial: (907) 271-5071
Fax Number: (907) 271-3224

April 29, 1996

Representative Alan Austerman
Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

Re: CSSB 199(FIN), April 23, 1996 Work Draft

Dear Representative Austerman:

I appreciate the opportunity to have testified before the House Resources Committee on CSSB 199(FIN), April 23, 1996 Work Draft (hereafter "SB 199"). During my testimony you asked an important question: Would SB 199 make it more or less difficult for the four seafood processors in your district to operate in compliance with the environmental laws?

I think SB 199 would have little effect on responsible processors. Already, companies operating seafood processing plants have a tremendous incentive to audit their environmental practices and correct any violations they find. The EPA and the U.S. Department of Justice have instituted policies providing substantial incentives for self-auditing and correction. EPA incentives include eliminating or substantially reducing the gravity component of civil penalties, and not recommending cases for criminal prosecution where specified conditions are met, to those who voluntarily self-disclose and promptly correct violations. In addition, the policy restates EPA's long-standing practice of not requesting voluntary audit reports to trigger enforcement investigations. EPA policy was developed in close consultation with the U.S. Department of Justice, States agencies, public interest groups and the regulated community and has been applied uniformly by the agency's enforcement programs.

The Department of Justice has issued a guidance memorandum for prosecutors in situations that might include self-reporting, cooperation, auditing and corrections to 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 often have

a mitigating effect sufficient to convince prosecutors that a case should not be brought.

The bottom line is, because of incentives already in place, self-audits are already conducted by a large and ever-increasing number of businesses, including seafood processors. SB 199 would not change that.

What SB 199 would change, however, is that it would create almost insurmountable difficulties in discovering and proceeding against processors that operate in a violation of important water, air quality, health or safety standards. Under the rubric of "health and safety audit," a violator would be able to cloak many of its operating documents from the scrutiny of reglators and the public. Without access to this important evidence, enforcement agencies and the public would be unable to establish the nature of the violation. Thus, even a serious, intentional, knowing or reckless violation would be immune from civil or criminal penalties for subjecting the community to potential or actual harm, even for continuous violations over a number of years.

The end result is simply that the conscientious processor, which takes the necessary steps to ensure an environmentally sound operation, will lose a competetive advantage to the unscrupulous operator who uses the immunity and secrecy provisions of SB 199 to avoid good faith compliance with the environmental laws.

Very truly yours,

ROBERT C. BUNDY
United States Attorney

RCB:kjm

cc: Representative Joe Green
Senator Loren Leman

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
Anchorage, Alaska 99513-7567

Commercial: (907) 271-5071
Fax Number: (907) 271-3224

April 29, 1996

Representative Bill Williams
State Capitol
Juneau, Alaska 99801-1182

Re: CSSB 199(FIN), April 23, 1996 Work Draft

Dear Representative Williams:

I appreciate the opportunity to have testified before the House Natural Resources Committee on CSSB 199(FIN); April 23, 1996 Work Draft (hereafter "SB 199"). During the course of my testimony, you asked an important question: Should we be punitive or corrective?

I believe your question implies that SB 199 encompasses a "corrective" approach, while current practices are "punitive." In fact, current practices are primarily corrective, while at the same time retaining the flexibility to apply punitive measures when those are necessary. SB 199, on the other hand, removes flexibility and increases the possibility that the worst violators will avoid detection or, if detected, avoid punishment for their unlawful actions. Thus, for many violators, SB 199 will be neither corrective nor punitive.

Current policies provide strong incentive for businesses to audit themselves and correct environmental, health and safety problems. It has long been the policy of both state and federal prosecutors to take a business's efforts to discover and correct problems into account in making enforcement decisions. Such decisions include whether to press criminal charges or file for civil penalties at all, and, if so, whether to seek nominal or substantial penalties. EPA and the U.S. Department of Justice have formal, written policies providing that self-examination and correction are important considerations in prosecutorial decision-making. These policies are well known in business communities. In 1992, Arthur D. Little's survey of Fortune 100 companies, reflected 80 per cent of the respondents plan to <u>expand</u> the scope of their audit programs in the near future. This survey was taken long before bills such as S.B. 199 were on the horizon. That is why SB 199 not needed.

There is no doubt that current policies of State of Alaska and federal agencies are successfully utilizing the corrective approach, without sacrificing their ability to deal with chronic or trustworthy violators.

Very truly yours,

ROBERT C. BUNDY
United Sates Attorney

RCB:kjm

cc: Representative Joe Green
Senator Loren Leman

SB 141

Bill grants polluters a loophole

By STEVE RINEHART
Daily News reporter

Polluters could esc[illegible] the law if they blew the whistle on themselves under a bill that has passed the state Senate and is moving toward passage in the final days of the Legislature.


Leman

Senate Resources Committee Chairman Loren Leman, the bill's main sponsor, described it as an effort to improve voluntary compliance with state environmental, health and safety laws. Companies that don't know whether they are obeying or breaking pollution laws are afraid to investigate, he said.

"They are afraid of what they might find," he said. The measure offers an incentive to companies to clean up their operations.

But the state attorney general's office and environmental regulators said it would cripple enforcement and give polluters a free ride.

Please see Back Page, **POLLUTE**

POLLUTE: Bill gives companies escape clause

Continued from Page A-1

"People who are out to cheat are the main beneficiaries," assistant attorney general Marie Sansone said at a House Resources subcommittee hearing on Monday. "This gives them a whole new way to hide."

The bill was still being amended on Monday. The version under consideration would allow companies to initiate what are called environmental audits, largely without fear of being prosecuted if they found themselves breaking the law.

A company could not use an audit to dodge a live investigation. It would have to begin its own review before government regulators found the violation themselves. It would have to report its findings promptly. And the company would have to work with authorities to correct the problem.

Prosecutors, the state Department of Environmental Conservation and environmental groups said companies could use the audits to keep damaging information out of court and out of public sight.

U.S. Attorney Robert Bundy, in a letter to Leman on Monday, warned that the bill would "allow violators to hide even serious, long-standing violations forever from public view." Prosecutors would be unable to gather key evidence, such as computer data and internal company reports, he said.

The Prince William Sound Regional Citizens Advisory Council, a watchdog group set up after the Exxon Valdez oil spill, said the bill gives polluters too much protection. It would invite abuse, the council said.

Sara Hannon, of the Alaska Environmental Lobby, said the measure is too broad and that even its sponsors cannot point to specific problems it would solve.

Leman said he did not have any particular examples of businesses that need the bill's protection. He said major industrial firms, such as BP or Arco Alaska Inc., employ experts to keep them within the law. But many small firms — such as fish processors, service stations or laundries — do not, and would benefit from his bill, he said.

Hannon disagreed, noting that similar bills across the country are being pushed by big business.

The New York Times reported recently that 18 states have passed environmental audit bills since 1993, many at the urging of the paper, chemical and waste-disposal industries. Leman said two more legislatures approved such measures this week, bringing the total to 20. Congress is considering a similar bill.

The Alaska Oil and Gas Association, a petroleum industry trade group, is supporting Leman's bill. Its representative, Mike Abbott, said companies should follow environmental laws, if for no other reason than because it makes good business sense, he said.

He said some are probably not. Like Leman, he said companies are afraid of getting into legal trouble if they find and document their own violations. He did not have any specific examples, either.