

SB

199



SENATOR LOREN LEMAN

Northwest Anchorage

716 W 4th Ave, Suite 520, Anchorage, AK 99501 (907) 258-8189 Session: State Capitol, Juneau, AK 99801 (907) 465-2095

SPONSOR STATEMENT

Senate Bill 199: Environmental and Health and Safety Self-Audits

I introduced SB 199 to promote voluntary compliance with existing environmental laws through self-evaluation. This legislation forges a relationship between regulators and private business that is less adversarial and more cooperative. It proposes that government should not measure its regulatory success by the number of court cases or disciplinary actions leveled against private companies. Success should, instead, be measured by environmental improvement through compliance with standards.

State and federal agencies are beginning to recognize that self-auditing makes sense. Governments are not able to fund inspectors to check on all businesses. The EPA has its "Common Sense Initiative", OSHA has its STAR program and even the Governor's Safety Advisory Council is looking at a program called Volunteers in Partnership.

However, many of these programs want self-reporting, but offer no protection for companies which voluntarily report a violation and correct that violation.

During my years as a consulting engineer, I've seen instances in which a law such as SB 199 could help businesses become partners in improving our environment. As an Executive Committee member of the Energy Council, I have heard the testimony of other energy producing states about the benefits of similar self-audit laws.

Government should view businesses as partners with the mutual interest of protecting our environment. But, because of the complexity of environmental and health and safety laws, many businesses are unwittingly in danger of being out of compliance with regulations.

Having the freedom to conduct internal audits for the purpose of correcting violations found will provide an incentive for Alaskans to be even better corporate citizens. It will enable businesses, especially smaller ones, to take a hard look at operations without fear of agency reprisal.

**SECTIONAL ANALYSIS FOR
Senate Bill 199: Environmental and Health and Safety Self-Audits**

Prepared by: Annette Kreitzer, Staff to
Sponsor, SENATOR LOREN LEMAN

Section 1:

Adds a new section to the Code of Civil Procedure, Chapter 25: Evidence, Presumptions, Public Records and Privileges.

Sec. 09.25.450 creates the Audit Report Privilege.

- Self-Audit reports are not admissible as evidence, nor are they subject to discovery in civil, criminal or administrative proceedings.
- Environmental and Health and Safety Self-Audits cannot be obtained by a state agency.
- Self-Audits must be identified as privileged. They are to be labeled. Failure to label the report does not constitute a waiver of the audit privilege.
- A person claiming that the self-audit privilege applies has to make the basic case.

Sec. 09.25.455 sets out the conditions or Exceptions for Waiver of the privilege.

- Privilege can be waived.
- Disclosing information in the Audit Report so that the problem can be corrected is NOT a waiver of the privilege.
- No one who receives the information under these conditions and signs a confidentiality agreement with the owner/operator can release the information (Class B misdemeanor).
- Gives added protection to the clerk-typist who has no reason to know the document is privileged and disseminates the report inadvertently.

**Sec. 09.25.460 and 09.25.465 EXCEPTION: DISCLOSURE
REQUIRED BY COURT OR ADMINISTRATIVE HEARINGS OFFICIAL
and NONPRIVILEGED MATERIALS**

These sections set out the tests for claiming the privilege and identify nonprivileged materials.

The privilege does not apply if:

- the privilege is asserted for a fraudulent purpose;
- a portion of the report is actually information required by a regulatory agency to be reported under state or federal law;
- an agency acquired the information on its own;
- the information was obtained from someone not involved in preparing the audit report; or
- a portion of the audit shows the company did not act promptly to correct a violation it discovered.

The court may impose sanctions if a person claimed the privilege for nonprivileged materials.

Sec. 09.25.470. COURT REVIEW AND DISCLOSURE.

This section sets out the procedures for the court to follow when a state agency wants to obtain an audit prepared under this legislation.

Sec. 09.25.475. VOLUNTARY DISCLOSURE; IMMUNITY

Grants limited immunity from an administrative, civil or criminal penalty for a violation disclosed IF the violation is corrected within a reasonable time. The violation cannot have resulted in injury to anyone at the site, or in substantial off-site harm to persons, property or the environment.

Immunity does not apply if:

- the violation was knowingly committed;
- people were hurt; or
- the violation was committed recklessly by any agent of the owner/operator.

To receive immunity, a facility conducting a self-audit must give notice to the appropriate regulatory agency that it is going to begin an audit. The notice must include:

- facility or portion of facility to be audited;
- time audit is to begin; and
- general scope of the audit.

Audit must be completed within six months, unless the regulatory agency approves an extension.

Bad actors are not protected. Immunity does not apply if:

- person repeatedly or continuously commits serious violations; and
- does not attempt to bring the operation into compliance.

Sec. 09.25.480. CIRCUMVENTION BY REGULATION PROHIBITED.

Purpose of this Act cannot be circumvented by regulations or conditions imposed by regulatory agencies.

Sec. 09.25.485. RELATIONSHIP TO OTHER RECOGNIZED PRIVILEGES.

This act has no effect on existing privileges under state law such as attorney-client, public officials' or reporters' privileges.

Sec. 09.25.490. DEFINITIONS

Section 2. Adds Self-Audit privilege to Code of Criminal Procedure.

Section 3. Amends Alaska Rules of Appellate Procedure

Section 4. Privilege applies to audits conducted on or after the effective date of the Act.

FISCAL NOTES FOR SB 199 WILL BE
FORTHCOMING FROM DEPARTMENTS AFTER
INITIAL HEARING AND BEFORE BILL IS
DISCHARGED FROM COMMITTEE.

(January 30, 1996)

FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. SB 199

Revision Date: _____
 Title: An Act relating to environmental audits
and health and safety audits ...
 Sponsor: Senators Leman and Pearce
 Requestor: _____

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

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	44.0	44.0	44.0	44.0	44.0	44.0
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	44.0	44.0	44.0	44.0	44.0	44.0

CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
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CHANGE IN REVENUES	0.0	0.0	0.0	0.0	0.0	0.0
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FUND SOURCE

1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF March	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	26.0	26.0	26.0	26.0	26.0	26.0
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
1052 Oil Resp	18.0	18.0	18.0	18.0	18.0	18.0
TOTAL	44.0	44.0	44.0	44.0	44.0	44.0

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.)

The bill makes Audit Reports privileged; such reports may not be disclosed except by court order. The bill, as written, is so broad that the department would have difficulty enforcing or ensuring statutory and regulatory compliance. The department would incur additional contractual costs with the Department of Law for legal assistance to determine what documents for which privilege is asserted are, in fact, privileged.

Prepared by: Larry Jones *Darius Joly*
 Division: Director, Division of Administrative Services

Phone: 465-5010
 Date: 1/29/96

Approved by Commissioner: *[Signature]*
 Agency: Department of Environmental Conservation

Date: 1/29/96

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Request: 1/29/96 CS

FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. SB 199

Revision Date: 1/31/96 Dept. Affected: DOT&PF
 Title: An Act relating to environmental audits and health and safety audits...Appellate Procedure 202, ...and 611 BRU: AIA; FIA
 Sponsor: Senator Leman Component: Administration
 Requester: Governor's Legislative Office COMPONENT SERIAL NO. 613:619

Expenditures/Revenues (Thousands of Dollars)

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

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()	0.0	0.0	0.0	0.0	0.0	0.0
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1008 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

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

POSITIONS

FULL-TIME	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)

Senate Bill 199 may result in tort liability if the existing language is left in place. The majority of airports are owned and managed by the Department of Transportation and Public Facilities, and Senate Bill 199, as written, would limit the amount of information that could be legally obtained from tenants who conduct voluntary environmental audits on leased parcels of land. Since the Department of Transportation and Public Facilities is responsible for environmental impacts caused by tenant activities, it is recommended that Senate Bill 199, Section 09.25.465 "Nonprivileged Materials" be amended to add: "materials required in public lease agreements, permits, and licenses"

Prepared by: Loren Rasmussen, P.E. Phone: 465-3900
 Acting Director
 Division: Engineering and Operations Date: 1/31/96
 Approved by: *Joseph L. DeLeon* Date: 1/31/96
 Commissioner
 Agency: Department of Transportation and Public Facilities

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Registered in the CS 1/31/96 file part 2/10/96

FISCAL NOTE

STATE OF ALASKA

BILL NO. SB199

1996 LEGISLATIVE SESSION

Revision Date: Original Dept Affected: Military & Veterans Affairs
 Title: An Act relating to environmental audits and health and safety audits to determine compliance with... BRU: Alaska National Guard
 Sponsor: Senator(s) Leman, Pearce Component: Office of the Commissioner
 Requestor: _____ Component Serial No. 414

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

FUND SOURCE	(Thousands of Dollars)					
	FY97	FY98	FY99	FY00	FY01	FY02
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

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

POSITIONS	FY97	FY98	FY99	FY00	FY01	FY02
FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Carol Carroll, Director Phone: 465-4730
 Division: Administrative Services Date: 23-Jan-96
 Approved by Commissioner: *Carol Carroll* Date: 23-Jan-96
 Agency: Military & Veterans Affairs

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FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. SB199

Revision Date: Original Dept Affected: Natural Resources
 Title: An Act relating to environmental audits and BRU: Management and Administration
health and safety audits to determine compliance with... Component: Commissioner's Office
 Sponsor: Senator(s) Leman, Pearce
 Requestor: _____ Component Serial No. 423

Expenditures/Revenues (Thousands of Dollars)

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

FUND SOURCE (Thousands of Dollars)

	FY97	FY98	FY99	FY00	FY01	FY02
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL						

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

POSITIONS

	FY97	FY98	FY99	FY00	FY01	FY02
FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

* There will be a fiscal impact associated with implementation of this legislation, however it cannot be determined at this time.

Prepared by: Nico Bus, Acting Director Phone: 465-2406
 Division: Support Services Date: 31-Jan-96
 Approved by Commissioner: [Signature] Date: 31-Jan-96
 Agency: Natural Resources

FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. CSSB 199(RES)

Revision Date: _____ Dept. Affected: Fish and Game
 Title: Environmental Audits BRU: Habitat and Restoration
 Component: Stream and Refuge
 Sponsor: Senator Leman
 Requester: Senate Resources COMPONENT SERIAL NO. 2099

Expenditures/Revenues (Thousands of Dollars)

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

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

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

Estimate of any current year (FY96) cost: \$ 0

POSITIONS

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

ANALYSIS: (Attach a separate page if necessary)

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

Prepared by: Janet Kowalski Phone: 465-4105
 Division: Habitat and Restoration Division Date: 5/8/96
 Approved by Commissioner: [Signature] Date: 2-2-96
 Agency: _____

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**SENATE COMMITTEE REF RT
First Committee of Referral**

DATE: 2/2/96

FURTHER: Finance

Date of 5-Day Notice: 1-18-96
(in accordance with Uniform Rule 23)

DATE TURNED
..INTO OFFICE: 3-12-96

The Resources Committee considered SB 199

"An Act relating to environmental audits and health and safety audits."

and recommends:

- be replaced with CS SB 199 (RES)
- adopt previous CS ()
- attached amendment(s)
- adopt Letter of Intent by _____ Committee
- further referral to the _____ Committee

Senate Bill:

same title
 new title

House Bill:

same title
 technical title
 new: SCR _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	NR	DNP	AM
<i>Robert L. Taylor</i>	✓	<i>James Hoff</i>	✓		
<i>James Woodcock</i>	✓				
<i>Richard Hatfield</i>	✓				
CHAIR: <i>Steven A. Rosen</i>	✓				

NEW FISCAL NOTE(S):

Department Date Zero Fiscal

DE's Department with	2/2/96		4.40
DE/PC	3/3/96	✓	
DNR/Commissioner's Office	3/1/96	✓	
DEUR	2/2/96	✓	
DE RE (C4010)	3/1/96		6.5

PREVIOUS FISCAL NOTE(S):*

Department Date Zero Fiscal

APPROPRIATION -- no fiscal note

*include fiscal notes accompanying Governor's bill

Summary of Changes -- CS for Senate Bill 199, Version "F"

Environmental, Health and Safety Self-Audit Legislation

March 11, 1996

Note: line & page references in brackets refer to CSSB 199 (RES), draft 9-LS1312C, dated 02/22/96.

Section 09.25.450 AUDIT REPORT PRIVILEGE

1) In Section 09.25.450(b)(2)(A) the legislation provides that "a person who conducted a portion of the audit but did not personally observe the relevant physical events" may not be compelled to testify about or produce documents protected by the self-audit privilege.

Version F gives more precise meaning to this clause, clarifying that the protection applies to a person who prepared all or a portion of the audit.

The term "physical events" was criticized as being too vague. The new version changes this term to instances or events being reviewed for compliance.

Likewise, it has been suggested that the phrase "did not personally observe" is vague in meaning. The new version changes this language to "did not personally observe or participate in..." [Page 2, lines 7-8]

2) The language in Section 09.25.450(c) has been changed to maintain consistency with the changes described above: "who has actually observed or participated in instances or events being reviewed for compliance may testify about those instances or events..." [Page 2, lines 13-14]

3) Section 09.25.450(d) provides that "An employee of a state agency may not request, review," etc., an audit report during inspections. This language has been changed to "A regulatory agency and an employee of a regulatory agency may not request, review...", etc.

The substantive change is dropping the word "state", which broadens the scope of the provision. The applicability of this provision and other parts of the bill to federal regulators has yet to be determined by the courts, but the sponsor does not wish to preclude any such potential applications through delimitative language in the bill. [Page 2, line 17]

Section 09.25.455 EXCEPTION: WAIVER

1) Section 09.25.455(a) provides that the audit privilege does not apply if it is "expressly waived by the owner or operator who prepared the audit..." In order to clarify the meaning of this clause, the new CS adds the words in writing, e.g., "expressly waived in writing by the owner or operator..." This will diminish the possibility that a verbal communication might be misconstrued as a waiver of privilege. [Page 2, line 26]

2) A new subsection (e) is added to 09.25.455 as follows: "(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."

Several federal courts have established a 4-part test to help determine claims of self-critical analysis privilege. One of the tests requires that information for which privilege is claimed must have been kept confidential. The new subsection clarifies that a disclosure of part of an audit report does not jeopardize the privilege for all the report. [Page 3, line 27]

Section 09.25.465 NONPRIVILEGED MATERIALS

1) The language in Section 09.25.465(a) has been supplemented for purposes of clarity. New sentence reads "The privilege under AS 09.25.450 does not apply to that part of an audit report which contains" [Page 3, lines 26-27]

2) In Section 09.25.465(a)(1), the words "federal or state" have been dropped from both references to "federal and state environmental or health and safety law". The definition of "environmental or health and safety law" in Section 09.25.490 already defines this term as including both federal and state statutes, so the use of the words in this section is redundant. [Page 3, lines 30-31]

3) Section 09.25.465(a)(1) also adds language clarifying that information that must be maintained or reported to receive a license or to enter into a lease agreement with a government entity is not considered privileged information.

New paragraph reads as follows: " (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 with the state;" [Page 3, lines 28-31]

4) Section 09.25.465(a)(2) provides that "information obtained by observation, sampling, or monitoring by a regulatory agency" is not considered privileged material. However, confusion exists on the point of whether the phrase "by a regulatory agency" modifies just the word "monitoring" or also "observation" and "sampling".

In order to clarify this, the new CS rewords the sentence as follows: "information that a regulatory agency obtains by observation, sampling or monitoring;" [Page 4, lines 1-2]

5) The wording of Section 09.25.465(a)(3) has been amended as follows: "information that a regulatory agency obtains from a source that was not involved in the compilation or preparation of the environmental or health and safety audit report."

The words "that a regulatory agency obtains" are added to make this sentence consistent with the changes cited above to 09.25.465(a)(2).

The addition of "compilation" clarifies the intent of this section, which is that even persons involved in an audit report in a tangential sense (e.g., clerical staff who copied the documents) are considered to have been "involved" in the audit's preparation. Consequently, information obtained from such persons would not fall under the definition of nonprivileged materials contained in this section. [Page 4, lines 3-4]

Section 09.25.475 VOLUNTARY DISCLOSURE; IMMUNITY

1) New language is added to Section 09.25.475(a). The revised text is as follows: "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."

The new language is added to address the concern that information contained in a voluntary disclosure might reveal violations that were not identified as such in the disclosure report. It is not clear in the original language of the bill that owners and operators would be granted immunity for such violations, and this could create a disincentive for voluntary disclosure. Furthermore, this concern could lead some owners or operators to initiate a separate legal review after the completion of an audit report and before disclosure is made to the appropriate regulatory agency. The resulting delay is not in the public interest. It is the intent of the sponsor to encourage the prompt reporting of violations and related facts. [Page 4, lines 7-10]

2) New language has been added to Section 09.25.475(b)(3); revised paragraph reads as follows: " (3) an investigation of the violation was not independently detected by an agency with enforcement jurisdiction before 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;"

This change was made to tighten the requirements that an agency would have to meet in order to argue that immunity does not apply on the grounds the violation was independently detected or already under investigation. The agency would be required to present dated documents or some other convincing evidence to demonstrate its case. [Page 4, lines 16-18]

3) Section 09.25.475(b)(5) has been amended; new wording is as follows: " (5) the person who makes the disclosure initiates, within a reasonable amount of 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;"

This change was made to address concern that bringing an entity into compliance or correcting the results of previous noncompliance can occasionally be a lengthy process. The change in wording recognizes this reality. [Page 4, lines 21-23]

4) Section 09.25.475(b)(6) has been amended. New wording as follows: " (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."

The new language addresses concerns about the audit report privilege applying even to the portion of the audit dealing with compliance efforts. Administration representatives argued that it was unreasonable to require an entity to "cooperate with the appropriate agency" on the efforts to achieve compliance, but then deny the regulatory agency access to the compliance plan.

The new language in paragraph (6) provides that the compliance portion of the self-audit, which is defined in Section 09.25.490(a)(1)(C), may be requested by a regulatory agency. If it is requested, the regulated entity is required to disclose such information as a condition for claiming immunity. However, such disclosure will be made only under terms of a confidentiality agreement, which means the information disclosed is still considered privileged and cannot be disclosed to third parties. [Page 4, lines 24-26]

5) In Section 09.25.475(b)(7), the word substantial is added before "injury" for consistency purposes. New paragraph reads: "(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." [Page 4, line 27]

6) The wording of Section 09.25.475(d)(1) has been changed. The phrases "intentionally or" and "or was responsible for the commission of" have been deleted. Revised paragraph reads as follows: "(1) person who made the disclosure knowingly committed the disclosed violation;"

These revisions were required because the meaning of "intentionally" and "was responsible for" is subjective. A person could "intentionally" undertake a certain action while being unaware that the action violated regulations. Likewise, an owner or operator could be deemed to be "responsible for" virtually everything that happens under his or her watch. The sponsor believes this exception to the immunity provision is very broad and might work against the intent of the bill. [Page 5, lines 3-4]

7) The word substantial is added before "off-site harm" in Section 09.25.475(d)(2). This change is made for consistency purposes, similar to the change described in #5 above. [Page 5, line 7]

8) In Section 09.25.475(d)(4), the word substantial is added again before "off-site harm", for purposes of consistency. [Page 5, line 15]

9) Technical changes have been made to Section 09.25.475(e): the words "factors such as" have been deleted before the 1-5 list of mitigating factors. [Page 5, line 20]

10) A new paragraph (g) has been added to 09.25.475 which reads as follows: "(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."

This language addresses concerns that the self-audit notice, which is required in order to be eligible for immunity, might serve to provoke an investigation that would otherwise not have occurred. If such an investigation were to discover violations before the regulated entity is able to complete an audit report, the immunity provisions would not be applicable. This creates a disincentive for self-auditing and is counter to the intent of the sponsor.

The new section (g) expressly prohibits the initiation of an investigation based solely on the receipt of a self-audit notice. The sponsor recognizes that investigations may occur at the same time a self-audit is being performed, because of a regular inspections schedule or because information was received from a source not involved in the audit report. In such circumstances, however, the regulatory agency has the burden of proving

that the investigation was initiated for valid reasons and not as a result of receiving a self-audit notice. [Page 6, line 8]

11) The wording of Section 09.25.475(g)(1) has been amended as follows: "repeated an unreasonable number of times or continuously committed [serious] violations that are the same as, or similar to, the violation for which immunity is sought under this section; and..."

The phrase "unreasonable number of times" modifies the word "repeated", which is too vague (repeated can mean, at a minimum, twice). In addition the word "serious" (before "violations") is deleted because it is too vague. Instead, the revised text denies immunity when the violations disclosed are the same or similar to violations that have already been an issue previously and have been a repeated problem for the regulated entity. [Page 6, line 11]

Section 09.25.480 CIRCUMVENTION BY REGULATION PROHIBITED

1) The entirety of Section 09.25.480 is deleted. The circumvention of statutes by means of regulation is already prohibited under AS 44.62.030. [Page 6, lines 19-21]

Section 09.25.485 RELATIONSHIP TO OTHER RECOGNIZED PRIVILEGES

1) A clarifying amendment has been made to this section. Revised wording is as follows: "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." [Page 6, lines 22-25]

Section 09.25.490 DEFINITIONS

1) The definition of "environmental or health and safety audit" has been changed in Section 09.25.490(a)(2). Revised definition: "environmental or health and safety audit" means a voluntary [systematic] 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..." [remainder of definition unchanged]

The substantive change is the deletion of "systematic" and its replacement with randomly, regularly, spontaneously, or in response to a particular event.

One accepted definition of "systematic" is "purposefully regular", which might be construed as meaning periodic, and thus have the effect of excluding audits that are done on the spur of the moment or which are not part of a regularly-scheduled plan. It is the intent of the sponsor to encourage non-regular audits that may be initiated because a problem is suspected. The existing language might create an incentive to delay investigation until the next regularly scheduled audit. Such a delay is not in the public interest. [Page 7, lines 25-28]

9-LS1312\F
Lauterbach
3/9/96

CS FOR SENATE BILL NO. 199(RES)
IN THE LEGISLATURE OF THE STATE OF ALASKA
NINETEENTH LEGISLATURE - SECOND SESSION

BY THE SENATE RESOURCES COMMITTEE

Offered:
Referred:

Sponsor(s): SENATORS LEMAN, Pearce

A BILL

FOR AN ACT ENTITLED

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

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

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

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

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

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

11 (2) a criminal proceeding; or

12 (3) an administrative proceeding.

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

1 if

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

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

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

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

12 (C) custodian of the audit results.

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

19 (d) A regulatory agency and an employee of a regulatory agency may not
20 request, review, or otherwise use an audit report during an agency inspection of a
21 regulated facility or operation or an activity of a regulated facility or operation.

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

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

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

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

1 if the disclosure is made

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

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

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

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

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

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

14 (A) partner or potential partner of the owner or operator of the
15 facility or operation;

16 (B) transferee or potential transferee of the facility or operation;

17 (C) lender or potential lender for the facility or operation;

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

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

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

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

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

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

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

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

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

10 (3) information that a regulatory agency obtains from a source that was
11 not involved in the compilation or preparation of the environmental or health and
12 safety audit report.

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

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

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

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

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

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

31 (4) the disclosure arises out of a voluntary environmental or health and

1 safety audit:

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

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

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

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

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

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

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

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

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

1 harm to persons, property, or the environment.

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

6 (1) the voluntariness of the disclosure;

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

9 (3) remediation;

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

12 (5) other relevant considerations.

13 (f) In order to receive immunity under this section, a facility conducting an
14 environmental or health and safety audit must give notice by certified mail to an
15 appropriate regulatory agency of the fact that it is planning to commence the audit.
16 The notice must specify the facility or portion of the facility to be audited, the date the
17 audit will begin and end, and the general scope of the audit. Immunity under this
18 section is available only for information and documents first produced or obtained
19 during the time period specified in the notice. The notice may provide notification of
20 more than one scheduled environmental or health and safety audit at a time. Once
21 initiated, an audit shall be completed within the time period specified in the notice
22 unless an extension is approved by the governmental entity with regulatory authority
23 over the regulated facility or operation based on reasonable grounds.

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

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

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

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

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

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

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

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

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

28 (i) interviews with current or former employees;

29 (ii) field notes and records of observations;

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

- 1 (iv) legal analyses;
- 2 (v) drawings;
- 3 (vi) photographs;
- 4 (vii) laboratory analyses and other analytical data;
- 5 (viii) computer generated or electronically recorded
- 6 information;
- 7 (ix) maps, charts, graphs, and surveys; and
- 8 (x) other communications associated with an
- 9 environmental or health and safety audit;
- 10 (B) memoranda and documents analyzing all or a portion of the
- 11 materials described in (A) of this paragraph or discussing implementation
- 12 issues; and
- 13 (C) an implementation plan or tracking system to correct past
- 14 noncompliance, improve current compliance, or prevent future noncompliance;
- 15 (2) "environmental or health and safety audit" means a voluntary
- 16 evaluation, review, or assessment of compliance with environmental or health and
- 17 safety laws or a permit issued under those laws conducted randomly, regularly,
- 18 spontaneously, or in response to a particular event by an owner or operator, an
- 19 employee of the owner or operator, or an independent contractor of
- 20 (A) a regulated facility or operation; or
- 21 (B) an activity at a regulated facility or operation;
- 22 (3) "environmental or health and safety law" means
- 23 (A) a federal or state environmental or occupational health and
- 24 safety law; or
- 25 (B) a rule, regulation, or municipal ordinance adopted in
- 26 conjunction with or to implement a law described by (A) of this paragraph;
- 27 (4) "intentionally" has the meaning given in AS 11.81.900;
- 28 (5) "knowingly" has the meaning given in AS 11.81.900;
- 29 (6) "owner or operator" means a person who owns or operates a
- 30 regulated facility or operation;
- 31 (7) "penalty" means an administrative, civil, or criminal sanction

1 imposed by the state to punish a person for a violation of a statute or rule; the term
2 does not include a technical or remedial provision ordered by a regulatory authority;

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

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

6 (b) To fully implement the privilege established under AS 09.25.450 -
7 09.25.490, the term "environmental or health and safety law" shall be construed
8 broadly.

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

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

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




Alaska State Legislature

Official Business

State Capitol
Juneau AK 99801

MEMO

TO: Terri Lauterbach
Legal Services
via fax: X2029 this page only

FROM: Annette Kreitzer, Aide to
Senate Resources Committee 
PHONE: X4907

DATE: March 11, 1996

RE: Senate CS for SB 199(RES)

Please prepare a FINAL Senate Resources CS for SB 199 with the following change.

1. Page 1, Line 12:

Following "an administrative proceeding" Insert:

except for workers' compensation proceedings.

Please deliver the FINAL to Senator Loren Leman's office, Room 115 of the Capital. No other changes were adopted by the committee. Call if you have questions.

STATE OF ALASKA

DEPARTMENT OF LABOR

OFFICE OF THE COMMISSIONER

LLR 1-4
X LLR 1-1
TONY KNOWLES, GOVERNOR

X SB 199

P.O. BOX 21149
JUNEAU, ALASKA 99802-1149
PHONE: (907) 465-2700
FAX: (907) 465-2784

March 5, 1996

The Honorable Loren Leman
Alaska State Legislature
Alaska State Capitol, Room 115
Juneau, AK 99801-1182

Dear Senator Leman:

In response to your memo of March 4, 1996, regarding CS for Senate Bill No. 199, the Department of Labor offers the following comments.

CS for SB 199(RES) could adversely affect the enforcement activities of the department's Occupational Safety and Health (OSH) section by restricting inspector access to documents relevant to an employer's compliance with OSH regulations. AS 18.60.083 provides for the right of entry and inspection, and allows an inspector to inspect and investigate places of employment and to question employers, owners and employees. Papers and records are routinely reviewed. CS for SB 199(RES) would prohibit OSH from using or reviewing audit reports during inspections. Audit reports are defined broadly in CS for SB 199(RES), and includes information commonly reviewed during an inspection.

CS for SB 199(RES) defines non-privileged documents as documents "required by a regulatory agency" to be maintained. While OSH requires "audits" only in certain regulations (i.e., Process Safety Management), information found in audits not specifically required by regulation can establish employer knowledge of an unsafe condition and can be the basis for a willful citation. If this information were to be considered a part of an audit report, it could be withheld from an inspector.

Employers would be immune from penalties if they voluntarily disclosed an audit report. AS 18.60.095 establishes penalties for violations of OSH standards and makes no provisions for immunity from penalties. Penalties may be reduced for mitigating factors, as provided for in the OSH compliance manual.

The Honorable Loren Leman

-2-

March 5, 1996

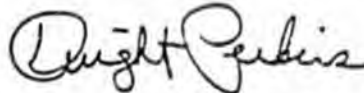
Ultimately, this bill would jeopardize Alaska's Occupational Safety and Health requirement to be "at least as effective as" the federal OSHA program.

Regarding Workers' Compensation, the department proposes the following change to Section 1, line 12, of CS for SB 199(RES):

(3) an administrative proceeding, except for workers' compensation proceedings. *see key 1/17/96 - v. 000000000*

Enclosed is a copy of a letter from Richard Terrill, Acting Regional Administrator, USDOL, OSHA, in which he expresses Region X's concerns regarding CS for SB 199(RES). Thank you for the opportunity to comment on this bill.

Sincerely,



Dwight Perkins
Special Assistant to
the Commissioner

Enclosure

cc: Al Dwyer, Director, LS&S
Paul Grossi, Director, WC

U. S. DEPARTMENT OF LABOR

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



RECEIVED
Department of Labor

Refer to: FSO/snd
Alaska SIC (potential)

MAR 04 1996

Office of the Commissioner

February 28, 1996

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

Dear Commissioner Cashen:

My staff was asked by the AKOSH Anchorage office to review and provide comment regarding proposed legislation known as Alaska Senate Bill No. 199. Your staff in Anchorage provided an initial analysis of the Bill with "program effects" to the Alaska 18(b) program.

Should this Bill be passed by the Alaska Legislature and signed by the Governor, we are in basic agreement with the analysis and conclusion as prepared by the AKOSH Anchorage office concerning potential effect of the Bill to the Alaska occupational safety and health program. It appears the term "audit report," as currently written, may impact Alaska's ability to: (1) conduct (in some cases) thorough investigations, and (2) assist in establishing willful violations. Additionally, the Bill provides immunity from penalties in certain situations.

I appreciate the opportunity to provide input and to be kept informed as to potential changes and impacts regarding the Alaska safety and health program. If there are questions with respect to the above comments, or if you feel additional input is necessary, please let me know.

Sincerely,

A handwritten signature in cursive script, appearing to read "Richard S. Terrill".

Richard S. Terrill
Acting Regional Administrator

cc: Al Dwyer, Director
Barry Noll, Area Director
Jeff Carpenter, Industrial Hygienist
Duane Houck, Asst. Chief of Consultation



SENATOR LOREN LEMAN

Northwest Anchorage

716 W 4th Ave, Suite 520, Anchorage, AK 99501 (907) 258 8189 Session: State Capitol Building, Anchorage, AK 99501 (907) 465-2095

F A X M E M O R A N D U M

TO: DWIGHT PERKINS, DEPT. OF LABOR
FROM: MIKE PAULEY ^{JTP} OFFICE OF SEN. LEMAN
DATE: MARCH 4, 1996
RE: ADDITIONAL INFO. ON SELF-AUDIT BILL.
PAGES: 3 (INCLUDING COVER MEMO)

As a follow-up to the information that was faxed to you on March 1, the following is a concise, 2-page summary which explains the changes that were made in the CS for Senate Bill 199.

The text references in this briefing memo refer to the page & line numbers of the original bill. If you don't already have a copy and would like one, please let us know and we will fax one to you promptly.

Again, Sen. Leman would very much appreciate any written comments you might have on this legislation prior to the hearing on the afternoon of March 6. Thank you for your consideration.

4/6/96

9-LS1312/C
Lauterbach
2/22/96

CS FOR SENATE BILL NO. 199(RES)
IN THE LEGISLATURE OF THE STATE OF ALASKA
NINETEENTH LEGISLATURE - SECOND SESSION

BY THE SENATE RESOURCES COMMITTEE

Offered:
Referred:

Sponsor(s): SENATORS LEMAN, Pearce

A BILL

FOR AN ACT ENTITLED

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

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

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

5 ARTICLE 5. PRIVILEGES AND IMMUNITIES

6 RELATED TO DISCLOSURE OF CERTAIN SELF-AUDITS.

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

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

11 (2) a criminal proceeding; or

12 (3) an administrative proceeding.

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

1 if

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

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

7 (A) person who conducted a portion of the audit but did not
8 personally observe the relevant physical events;

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

11 (C) custodian of the audit results.

12 (c) A person who conducts or participates in the preparation of an
13 environmental or health and safety audit and who has actually observed physical events
14 of violation may testify about those events but may not be compelled to testify about
15 or produce documents related to the preparation of or a privileged part of an
16 environmental or health and safety audit or an item listed in AS 09.25.490(a)(1).

17 (d) An employee of a state agency may not request, review, or otherwise use
18 an audit report during an agency inspection of a regulated facility or operation or an
19 activity of a regulated facility or operation.

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

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

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

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

31 (1) to address or correct a matter raised by the environmental or health

1 and safety audit and is made only to

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

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

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

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

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

12 (A) partner or potential partner of the owner or operator of the
13 facility or operation;

14 (B) transferee or potential transferee of the facility or operation;

15 (C) lender or potential lender for the facility or operation;

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

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

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

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

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

26 Sec. 09.25.465. **NONPRIVILEGED MATERIALS.** (a) The privilege under
27 AS 09.25.450 does not apply to

28 (1) a document, communication, datum, report, or other information
29 required by a regulatory agency to be collected, developed, maintained, or reported
30 under a federal or state environmental or health and safety law or under a permit
31 issued under a federal or state environmental or health and safety law;

1 (2) information obtained by observation, sampling, or monitoring by
2 a regulatory agency; or

3 (3) information obtained from a source not involved in the preparation
4 of the environmental or health and safety audit report.

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

7 Sec. 09.25.475. VOLUNTARY DISCLOSURE; IMMUNITY. (a) Except as
8 provided by this section, a person who makes a voluntary disclosure of a violation of
9 an environmental or health and safety law is immune from an administrative, civil, or
10 criminal penalty for the violation disclosed.

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

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

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

16 (3) an investigation of the violation was not initiated or the violation
17 was not independently detected by an agency with enforcement jurisdiction before the
18 disclosure was made using certified mail;

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

21 (5) the person who makes the disclosure initiates an appropriate effort
22 to achieve compliance, pursues that effort with due diligence, and corrects the
23 noncompliance within a reasonable time;

24 (6) the person making the disclosure cooperates with the appropriate
25 agency in connection with an investigation of the issues identified in the disclosure;
26 and

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

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

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

3 (1) person who made the disclosure intentionally or knowingly
4 committed or was responsible for the commission of the disclosed violation;

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

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

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

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

21 (1) the voluntariness of the disclosure;

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

24 (3) remediation;

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

27 (5) other relevant considerations.

28 (f) In order to receive immunity under this section, a facility conducting an
29 environmental or health and safety audit must give notice by certified mail to an
30 appropriate regulatory agency of the fact that it is planning to commence the audit.
31 The notice must specify the facility or portion of the facility to be audited, the date the

1 audit will begin and end, and the general scope of the audit. Immunity under this
2 section is available only for information and documents first produced or obtained
3 during the time period specified in the notice. The notice may provide notification of
4 more than one scheduled environmental or health and safety audit at a time. Once
5 initiated, an audit shall be completed within the time period specified in the notice
6 unless an extension is approved by the governmental entity with regulatory authority
7 over the regulated facility or operation based on reasonable grounds.

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

11 (1) repeated or continuously committed serious violations; and

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

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

19 **Sec. 09.25.480. CIRCUMVENTION BY REGULATION PROHIBITED.** A
20 regulatory agency may not adopt a regulation or impose a condition that circumvents
21 the purpose of AS 09.25.450 - 09.25.490.

22 **Sec. 09.25.485. RELATIONSHIP TO OTHER RECOGNIZED PRIVILEGES.**
23 AS 09.25.450 - 09.25.490 do not limit, waive, or abrogate the scope or nature of a
24 statutory or common law privilege, including the work product doctrine and the
25 attorney-client privilege.

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

27 (1) "audit report" means a report that includes each document and
28 communication, other than those set out in AS 09.25.165, produced from an
29 environmental or health and safety audit; general components that may be contained
30 in a completed audit report include

31 (A) a report, prepared by an auditor, monitor, or similar person,

1 that may include a description of the scope of the audit, the information gained
2 in the audit, findings, conclusions, recommendations, exhibits, and appendices;
3 the types of exhibits and appendices that may be contained in an audit report
4 include supporting information that is collected or developed for the primary
5 purpose of and in the course of an environmental or health and safety audit,
6 including

7 (i) interviews with current or former employees;

8 (ii) field notes and records of observations;

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

11 (iv) legal analyses;

12 (v) drawings;

13 (vi) photographs;

14 (vii) laboratory analyses and other analytical data;

15 (viii) computer generated or electronically recorded
16 information;

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

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

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

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

25 (2) "environmental or health and safety audit" means a systematic
26 voluntary evaluation, review, or assessment of compliance with environmental or
27 health and safety laws or a permit issued under those laws conducted by an owner or
28 operator, an employee of the owner or operator, or an independent contractor of

29 (A) a regulated facility or operation; or

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

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

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

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

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

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

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

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

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

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

15 (b) To fully implement the privilege established under AS 09.25.450 -
16 09.25.490, the term "environmental or health and safety law" shall be construed
17 broadly.

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

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

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

Summary of Changes -- CS for Senate Bill 199
Environmental, Health and Safety Self-Audit Legislation

Note: all text references refer to the original bill.

1) Labeling of documents in self-audit report.

Removed language which stated that "failure to label a document" does not constitute a waiver of audit privilege. Thus, privilege is not guaranteed if an entity fails to label self-audit documents with words such as "COMPLIANCE REPORT: PRIVILEGED DOCUMENT". [Page 2, lines 23 through 25]

2) Penalties for illegal disclosure of privileged information.

The penalty provision for state employees who disclose privileged information from a self-audit report has been removed from the bill. This change means that existing state law under AS 11.56.860 will govern such cases of illegal disclosure. AS 11.56.860 provides that the misuse of confidential information by public servants is a Class A misdemeanor. [Page 3, lines 28-30]

3) Defense in court for disclosing privileged information.

The original version of SB 199 provided that an employee charged with disclosing privileged information could use as an affirmative defense in court the fact that the documents were not labeled "COMPLIANCE REPORT: PRIVILEGED DOCUMENT". Since the CS no longer guarantees privilege for documents not properly labeled (as described above in #2), this language relating to affirmative defense has also been removed, for purposes of consistency. [Page 3, line 31 & Page 4, lines 1-4]

4) Disclosure of privileged information required by court or by administrative hearings official.

The CS removes all language in Section 09.25.460 of the original bill, which relates to the circumstances and procedures under which a court or administrative hearings official might require the disclosure of self-audit data that is otherwise privileged. Accordingly, the existing civil and criminal Rules of Procedure will govern in such situations. [Page 4, lines 5-29]

5) Clarifying definition of nonprivileged materials.

The CS adds to the list of nonprivileged materials any documents or other information which must be reported or maintained as part of a permit under federal or state environmental, health, or safety laws. In the original bill, data from permits is considered to be nonprivileged information by implication, but the CS makes it specific. [Page 5, lines 1-3]

(6) Court review and disclosure of privileged information.

All language in Section 09.25.470 has been removed. This section dealt with procedures for disclosure of privileged information in cases where a criminal offense is suspected. The change means that the existing Alaska Rules of Criminal Procedure will apply in such cases. [Page 5, lines 10-31 & page 6, lines 1-22]

(7) Presumption of immunity.

Language in subsection (f) under Section 09.25.475 has been removed. This subsection dealt with questions of burden of proof, and the standards the state would be required to meet in civil and criminal cases to argue that immunity should be denied to an entity which claims it on the grounds of voluntary disclosure of a self-audit.

At the initial hearing on SB 199 (01-31-96), a representative of the Department of Law's Criminal Division claimed that the standards required in subsection (f) created an "intolerable burden" for the state in these cases. The effect of removing subsection (f) is that the existing Rules of Procedure in criminal and civil cases will govern the situations described in subsection (f). [Page 8, lines 13-20]

(8) Use of certified mail required as condition for immunity.

In order to receive immunity for reported violations, an entity must disclose its intention to conduct a self-audit by certified mail. This language was added to address concerns that entities might claim that a self-audit notice was "lost in the mail", but still claim immunity for any violations that were voluntarily disclosed. [Page 8, line 22]

(9) Tightening notice requirements for self-audits.

Language has been added to subsection (g) of Section 09.25.475 which clarifies that, in order to receive immunity, a self-audit notice must specify an exact beginning date and an exact ending date. In contrast, the original bill required the notice to include the "anticipated time the audit will begin" and required that it be completed within "a reasonable amount of time not to exceed six months". [Page 8, lines 21-29]

(10) Technical change relating to Rules of Appellate Procedures.

Section 3 clarified that Sec. 09.25.460 of the original bill had the effect of amending the Alaska Rules of Appellate Procedure.

Since the CS removes Sec. 09.25.460 from the bill, the language in Section 3 is therefore unnecessary, and has also been removed. [Page 11, lines 13-20]

**INFORMATION PAPER FOR:
Environmental and Health and Safety Self-Audit Legislation
Introduced by: Senator Loren Leman
(CS for Senate Bill 199)**

BACKGROUND

- *Shrinking budgets encouraging federal and state lawmakers to look for more efficient uses of resources
- *14 states have passed legislation creating an environmental, health and safety self-evaluation privilege
- *11 other states have introduced similar measures (as of 9/24/95)

PURPOSE

- *Encourage companies and governmental entities to conduct voluntary self-audits ensuring compliance with environmental, health and safety laws.
- *Ensure that violations are brought quickly into compliance.
- *Promotes internal operations review without fear of prosecution or penalties for CORRECTED problems.
- *Encourages development of preventive strategies to avoid future compliance problems.
- *Legislation has safeguards to prevent misuse of immunity benefit gained from voluntary disclosure.

SUMMARY OF LEGISLATION

- What regulators, legislators, concerned citizens and business are after is COMPLIANCE with increasingly complex laws.
- Audits can be useful for businesses to determine if their practices conform to all applicable regulations.
- Because audits are to discover not only IF violations have inadvertently occurred, but also what management systems led to the violation, sensitive personnel information is frequently included in audits. This bill offers protection from discovery for information compiled during the voluntary audit and from such information being used against the company in court.
- Most violations voluntarily reported to a regulatory agency could not be used as grounds for penalizing an entity for the violation IF the disclosure is made promptly and the entity makes efforts to cooperate with the agency to correct the violation.
- Disclosure is not voluntary if the person making the disclosure acted with intent or knowingly regarding the commission of the violation, or if the person's reckless disregard resulted in off-site harm.

ISSUES RELATING TO PRIVILEGE

Ordinarily rules of evidence promote the ascertainment of truth. Another group of rules, however, permit the exclusion of evidence founded in the desire to protect an interest or relationship. The term "privilege" is used broadly to describe such rules of exclusion.

Section 1 grants a privilege from admissibility and discovery to audit reports developed according to the bill. The privilege applies to civil, criminal and administrative proceedings.

The privilege DOES NOT APPLY to:
documents, reports, etc. required by the state to be reported under federal or state law, OR
information obtained independent of the audit process.

Waiver of Privilege:

-Voluntary disclosure of an audit to the state does not waive the privilege if it is made under the terms of a confidentiality agreement between the owner/operator or the person for whom the report was prepared and the state or if the audit is submitted to the state under a claim of confidentiality.

-NO agency employee may request, review, or otherwise use an audit report during an agency inspection of the facility. A party who violates the terms of a confidentiality agreement will be liable for damages caused as a result of the disclosure.

Immunity:

-The Sec. 09.25.475 immunity is an immunity from an administrative, civil, or criminal penalty for the violation disclosed. This immunity does not extend to injunctive relief, compliance or technical recommendations.

SECTIONAL ANALYSIS FOR
CS for Senate Bill 199: Environmental and Health and Safety Self-Audits

Prepared by: Mike Pauley, Staff to
Sponsor, SENATOR LOREN LEMAN

Section 1:

Adds a new section to the Code of Civil Procedure, Chapter 25: Evidence, Presumptions, Public Records and Privileges.

Sec. 09.25.450 creates the Audit Report Privilege. Self-Audit reports are not admissible as evidence, nor are they subject to discovery in civil, criminal or administrative proceedings.

Those involved in the audit report storage, preparation, or disclosure can't testify about portions of the audit report. If they witness a physical event of violation, however, they can testify about that event, but can't testify or produce documents related to a privileged part of an audit. (List is contained in Sec. 09.25.490(a)(1).)

Environmental and Health and Safety Self-Audits cannot be obtained by a state agency.

Self-Audits must be identified as privileged. They are to be labeled: "Compliance Report: Privileged Document" or something similar.

A person claiming that the privilege applies to a self-audit has to make the basic case that the privilege applies.

Sec. 09.25.455 sets out the conditions or Exceptions for Waiver of the privilege. If the person who had the Audit Report prepared wants to waive the privilege he/she can. However, disclosing information in the Audit Report to employees, contractors, or company lawyers so that the problem can be corrected is NOT a waiver of the privilege. Anyone who receives the information under these conditions and signs a confidentiality agreement with the owner/operator can't release the information.

Sec. 09.25.465 NONPRIVILEGED MATERIALS

This section identifies nonprivileged materials. The privilege does not apply to:

information required by a regulatory agency to be reported under state or federal law; or

information acquired by an agency through its own monitoring or observation; or
information obtained from someone not involved in preparing the audit report.

Sec. 09.25.475. VOLUNTARY DISCLOSURE; IMMUNITY

Grants limited immunity from an administrative, civil or criminal penalty for a violation disclosed IF the violation was corrected within a reasonable time. The violation cannot have resulted in injury to anyone at the site, or in substantial off-site harm to persons, property or the environment.

Immunity does not apply if the violation was knowingly committed; if people were hurt; or if the violation was committed recklessly by any agent of the owner/operator.

Penalties assessed under this section may be mitigated by the cooperation of the owner/operator.

If a person makes a voluntary disclosure and then a civil, administrative or criminal enforcement action is brought against him, he has the burden of establishing that the disclosure was voluntary. The state agency then has the burden of rebutting this.

To receive immunity, a facility conducting a self-audit must give notice (by certified mail) to the appropriate regulatory agency that it is going to begin an audit. The notice must include:

- facility or portion of facility to be audited
- date audit is to begin and end
- general scope of the audit

Audit must be completed within the time period specified in the notice unless the regulatory agency approves an extension.

Bad actors are not protected. Immunity does not apply if:
person repeatedly or continuously commits serious violations; and
does not attempt to bring the operation into compliance

Sec. 09.25.480. CIRCUMVENTION BY REGULATION PROHIBITED.

Purpose of this act cannot be circumvented by regulations or conditions imposed by regulatory agencies.

Sec. 09.25.485. RELATIONSHIP TO OTHER RECOGNIZED PRIVILEGES.

This act has no effect on existing privileges under state law such as attorney-client privilege; or public officials' or reporters' privileges.

Sec. 09.25.490. DEFINITIONS

Section 2. Adds Self-Audit privilege to Code of Criminal Procedure.

Section 3. Amends Alaska Rules of Appellate Procedure

Section 4. Privilege applies to audits conducted on or after the effective date of the Act.



Alaska Environmental Lobby, Inc.

P.O. Box 22151 Juneau, Alaska 99802

Phone: 907-463-3366

Fax: 907-463-3312

CS for SB 199 Environmental Audits

The Alaska Environmental Lobby supports efforts by industry to comply with environmental regulations. We support the enhancement of relationships between industry and regulatory agencies. However, all legislation which affects our state's environmental regulations must seek to protect the health and safety of Alaskan citizens and the environmental integrity of our state.

In order to make this piece of legislation an effective document, AEL respectfully suggests a few changes:

- *Environmental audits should not be privileged.* Privilege, by definition, invites secrecy, instead of the openness needed to build public trust in industry's ability to self-police. Furthermore, a privilege would invite defendants to claim as "audit" material evidence DEC needed to establish a violation or determine who was responsible.
- *Noncompliance which results in economic gain should not be tolerated.* To prevent polluters from having an economic advantage over non-polluters, DEC should seek to recover such economic gain.

To qualify for immunity, a self-audit must meet a number of additional requirements:

- It must occur before notice of a citizen suit, the filing of a complaint by a third party, and before the reporting of a violation to DEC by a "whistleblower" employee.
- The responsible party must correct any violation discovered under the self-audit within 60 days, certify in writing that corrections have been made, and take appropriate measures to remedy any environmental or human harm due to the violation.
- A violation discovered by a self-audit must not have presented an imminent and substantial endangerment to public health or the environment.
- The regulated entity must agree in writing to take steps to prevent a recurrence of any violation discovered under the self-audit.
- Any violation discovered in a self-audit must not have occurred previously within the past three years at the same facility.

drafted 3/6/96

ALASKA CENTER FOR THE ENVIRONMENT • ALASKA CHAPTER SIERRA CLUB • ALASKA FRIENDS OF THE EARTH
 ANCHORAGE AUDUBON SOCIETY • BOULDER AUDUBON SOCIETY • CLEAN AIR COALITION • DENALI CITIZENS COUNCIL
 DENALI CLUB SIERRA CLUB • JUNEAU AUDUBON SOCIETY • JUNEAU CLUB SIERRA CLUB
 KACHEMAK BAY CONSERVATION SOCIETY • KENAI PENINSULA AUDUBON SOCIETY • KING CANGERS AND RAYBERS
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Headquarters:
217 2nd Street, Suite 201
Juneau, Alaska 99801
(907) 586-2323 FAX 463-5515



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.



Official Business

COMMITTEE:

SENATE RESOURCES

DATE: 1/31/96

SIGN-IN

Subject of meeting:

SB 199 Environmental & Health/Safety Standards

PLEASE PRINT!

NAME

ADDRESS (MAILING) & (ZIP)

PHONE

REPRESENTING

DO YOU WANT TO TESTIFY?

L ETmer Lindstrom		465-3030	DHSS	Y
L Steve Torok		588-7619	EPA	-
L JANICE ADAIR		209 7645	DEC	
L R. Sutcliffe		269. 6372	LAW	Y
L Marie Sansone		465-6726	Law	Y
Paul Grossi		465-2790	DOL	Y
Kenneth Culbert		274-3715	Manhattan 166	Y



LEGISLATIVE INFORMATION OFFICE
119 N. CUSHMAN, SUITE 101
FAIRBANKS, AK 99701
452-4448

FEB 05 1996

DATE: 2/1/96

Please accept the enclosed original(s) of written
testimony for the

Senate Resources (SB 199) teleconference scheduled on

1/31/96. A copy of this testimony was

transmitted to your committee via fax.

Thank you,



ALASKA STATE LEGISLATURE

PLEASE ENTER INTO THE RECORD MY TESTIMONY TO THE SENATE RESOURCES
COMMITTEE NAME

COMMITTEE ON SB 199 DATED 1-31-96
BILL/SUBJECT

SB 199 SHOULD BE AMENDED TO CLEARLY EXCLUDE ALL DIVISIONS, OR CONTRACTORS AND OTHER FACILITIES, REGULATED BY THE DEPARTMENT OF HEALTH AND SOCIAL SERVICES. THE PRESENT LANGUAGE, WHILE CLEARLY INTENDED TO TREAT "ENVIRONMENTAL" CONCERNS, DOES NOT CLEARLY INDICATE THAT "HEALTH AND SAFETY" REFERS TO OCCUPATIONAL HEALTH AND SAFETY.

IT WOULD BE A BIG MISTAKE TO PROVIDE D.H.S.S. WITH A MEANS TO EVADE ACCOUNTABILITY, AS IN THE CASE OF ITS D.F.Y.S., BECAUSE "NONCOMPLIANCE" IN THIS INSTANCE CAN BE EXPECTED TO BE INJURIOUS TO PEOPLE, WHERE THERE IS TOO MUCH IMMUNITY ALREADY.

SIGNED SCOTT T. CAUDER
TESTIFIER

REPRESENTING (OPTIONAL)
P.O. 75011 FBKS AK, 99707
ADDRESS/PHONE NUMBER



1122

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, Washington 98101

ENVIRONMENTAL PROTECTION AGENCY

[FRL-]

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 30 days after publication.

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) 564-2280.

5066

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 Fed.Reg 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 thirty days from today.

Dated:

Steven A. Herman
Assistant Administrator for
Enforcement and Compliance
Assurance



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, Washington 98101

**TESTIMONY OF STEVEN A. TOROK
SENIOR REPRESENTATIVE
U.S. ENVIRONMENTAL PROTECTION AGENCY REGION 10
BEFORE THE ALASKA SENATE RESOURCES COMMITTEE
ON SB 199 THAT DEALS WITH ENVIRONMENTAL AUDITS
JANUARY 31, 1996**

Thank you Mr. Chairman. My name is Steven Torok, representing the U.S. Environmental Protection Agency, Region 10. While EPA has not completed a thorough review of SB 199, I would like to provide the Committee with some general information regarding self-audits.

It is evident that the State of Alaska and EPA share the same goal of achieving the cooperation of regulated entities to obtain compliance with environmental laws. The critical question is how to achieve that goal without shielding environmentally irresponsible behavior or increasing environmental litigation. Because the vast majority of regulated entities comply with environmental laws, the focus of our enforcement efforts is on violators, not compliers.

I would like to briefly review EPA's policies on environmental audits, voluntary environmental self-policing, and self-disclosures, then discuss some data on self-auditing.

In May 1994, the Administrator of EPA called for a review of EPA's policies on self-auditing and voluntary disclosures to determine whether additional incentives were necessary to encourage voluntary disclosure and correction of violations discovered during environmental audits and self-evaluations. In July of 1994, EPA held a major two-day meeting in Washington, D.C., attended by over 400 interested parties who gave oral comments on these issues. In addition to considering the oral comments, EPA has reviewed over 80 written comments that have been submitted to the environmental auditing policy docket. In January 1995, EPA held a focus group meeting in San Francisco with key stakeholders from industry, trade groups, state environmental agencies, State Attorneys General offices, district attorneys offices, environmental and public interest groups, and professional environmental auditing groups.

This major undertaking reflects the seriousness with which EPA views the subject of environmental self-auditing. One of EPA's most important responsibilities is obtaining compliance with the laws that protect public health and safeguard the environment. This goal can only be achieved with the voluntary

cooperation of businesses and other regulated entities subject to those requirements.

EPA's extensive study of the environmental audit issue resulted in the promulgation last April of an interim policy which contained incentives to encourage environmentally responsible behavior from regulated entities. After reviewing and considering all the comments, EPA issued a final policy on January 22, 1996, (copy provided). This policy is a good example of a common sense approach to environmental protection. It is a well balanced one that provides predictable incentives, but does not limit enforcement, in appropriate circumstances, or the public's right to know about environmental problems.

The EPA policy applies when a regulated entity undertakes a voluntary environmental audit or self-evaluation. The policy provides three incentives to conduct environmental audits or self-evaluations and to disclose violations that may be discovered during them.

First, EPA will completely eliminate punitive penalties for companies or public entities that voluntarily identify, disclose and correct violations. EPA will also reduce punitive penalties by up to 75% for regulated entities that meet most, but not all of the conditions of the policy. EPA believes that this ability to partially reduce penalties when penalty elimination is not appropriate is preferable to an all or nothing approach.

Second, EPA will not recommend to the Department of Justice (DOJ) that criminal charges be brought against a company acting in good faith to identify, disclose, and correct violations, so long as no serious actual harm has occurred. Under the federal system, DOJ has the ultimate authority on criminal prosecutions, however EPA recommendations carry significant weight.

Third, EPA will not request voluntary environmental audit reports to trigger or initiate enforcement investigations. This policy, which has been EPA's policy and practice since 1986, will alleviate fears that an audit report will invite investigations that would not otherwise occur. EPA may, however, request audit report information if violations have been identified by other means.

In summary, EPA through its April 1995 interim and now its January, 1996 final policy has struck a balance between the encouragement of good behavior and the loss of regulatory discretion. The policy allows EPA to exercise its enforcement discretion in those cases where environmental violations must be addressed by the severity of criminal sanctions. EPA will also be able to assess penalties where the violator has realized an economic benefit as a result of the violation, since EPA believes that even a company that inadvertently violates an environmental law should not gain a business advantage over companies that comply with the same laws. In addition, the final policy allows

EPA to reduce penalties where only portions of the policy's conditions apply, if full elimination of the penalties is not appropriate. Moreover, the policy affords EPA the opportunity to obtain relevant facts that may be contained in an audit report when an independent basis exists for the investigation, and those facts are critical to the fact-finding effort.

Several independent studies support EPA's policy goals and conclusions. For example, an Arthur Anderson survey of corporate general counsels in 1992 revealed that nearly 60% of corporations surveyed have had a compliance audit performed between 1989 and 1991, and another nearly 4% before 1989, while only less than 38% of corporations surveyed had never undertaken a formal compliance audit. This shows that a majority of corporations have already found it to their advantage to conduct compliance audits. Of those corporations conducting audits, only 16% of the general counsels reported that they altered their procedures for conducting audits because of concerns that the violations they find could be used against them, while the overwhelming majority expressed no such concerns.

Voluntary cooperation by regulated entities is also exemplified in a study of the Investor Responsibility Research Center (IRRC). In its 1994 Corporate Environmental Profiles Directory, the IRRC surveyed more than 249 companies, in 75 of the 86 standard industry groups, concerning their methods of environmental management. The study found a large amount of voluntary compliance through various programs. For example:

- 83% of the companies surveyed have established written environmental practices;
- 33% subscribe to codes of conduct;
- 53% have a board of director's committee that addresses environmental issues;
- 85% have established audit programs;
- 72% have audited their domestic facilities within the last two years.

The preliminary results from an EPA internal survey on the use of information from voluntary self-disclosures and voluntarily performed environmental audits supports EPA's policy goals and show that in general even prior to its April, 1995 interim policy, EPA did not initiate enforcement actions on the basis of voluntarily self-disclosed information. EPA Regional Offices reported that of the over 4,600 enforcement actions taken during fiscal years 1993 and 1994, only approximately 1% were initiated on the basis of voluntarily self-disclosed information and in nearly 65% of those the penalty was either eliminated or mitigated for self-disclosure; in the remaining, the disclosing entity was provided a lower level of enforcement. To summarize, both the independent surveys and the internal survey support EPA final policy.

To EPA's and the Department of Justice's knowledge, the federal government has never initiated a criminal enforcement case based upon a voluntarily submitted environmental audit.

Closer to home here in Alaska, the Department of Environmental Conservation enjoys the reputation in Region 10 as an agency that concentrates its efforts on working with the regulated entities to solve the problem, not in pursuing penalties. EPA is not aware of any instance where ADEC has used a voluntary self-audit to pursue anything more than solving the problem.

In Oregon and other audit privilege states, the existence of an environmental audit privilege has not led to any increase in environmental auditing or voluntary compliance in those states. Moreover, the in camera process complicates investigations and criminal prosecutions because the government must establish by a preponderance of the evidence that one of the exceptions would apply to the audit information sought. Furthermore, if an audit report is deemed privileged in an in camera proceeding, the prosecutor would then have the burden of proving that other evidence used to prosecute the violator was not tainted (i.e., not the "fruit of the poisonous tree") by the evidence deemed privileged.

EPA opposes the creation and adoption of new statutory environmental evidentiary privileges or immunity and feels such incentives should instead be structured in policy. This position is supported by the facts that such privilege has not been shown to result in any significant increase in voluntary auditing or compliance; it promotes secrecy by allowing companies to withhold important evidence from law enforcement agencies and the local public thus denying the "public's right to know" useful information affecting its health and environment; and create or aggravate an atmosphere of distrust between regulators, industry and local communities. The issues associated with the privileges and subsequent litigation create serious resource drains on government and private litigators. Such statutes encourages litigation over the scope of the privilege that further burden our already overtaxed judicial system. As stated by the U.S. Supreme Court in a number of opinions, privileges are impediments to the search for truth and should not be created lightly, nor construed broadly.

In closing, I urge that you thoroughly consider other alternatives for encouraging voluntary compliance through self-audits. EPA has considered many of the issues facing this committee. I hope you will consider the merits of EPA's final policy on voluntary environmental self-policing and self-disclosure, which was adopted only after much fact-finding and consideration of the views of hundreds of stakeholders across the country. EPA recognizes the states as important partners in federal enforcement and that it is desirable to create a climate in which states can be innovative. However, we hope Alaska will

not enact audit privilege/immunity legislation which constrains its ability to effectively carry out the provisions of delegated federal programs or impede its progress towards adoption of currently non-delegated programs. As we enter the next generation of environmental protection, let not the pendulum swing too far.

If the Legislature decides that legislation is the best way to provide incentives for self-audits, then EPA is available to work with the Committee on such legislation. Thank for the opportunity to testify. (Provided copies of State of South Dakota and State of New Jersey voluntary environmental audit legislation)

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February 15, 1996

Honorable Loren Leman
Chairman, Senate Resources Comm.
Alaska Senate
State Capitol, Room 113
Juneau, Alaska 99801

Re: SB 199 - Audit Privilege and
Immunity

Dear Senator Leman:

Thank-you for the opportunity to present the Department of Law's concerns with respect to Senate Bill 199, relating to environmental and health and safety audits. As you requested at the hearing on the bill on January 31, 1996, this letter will summarize my testimony on behalf of the Civil Division. My testimony consisted of background information on the audit privilege, various concerns and legal problems noted by the Civil Division, and observations regarding the potential impact of the bill on compliance and enforcement.

INTRODUCTION

Senate Bill 199 is modeled after Texas legislation. The "audit privilege" proposed in SB 199 derives from an evidentiary privilege that is recognized in a number of jurisdictions, and known as the "self-critical analysis" or "self-evaluative" privilege. It is generally thought that this privilege was first judicially recognized 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 patient care and treatment. The deceased patient's estate commenced a medical malpractice case

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against the hospital, 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 evaluations were subject to discovery and use as evidence in subsequent malpractice cases.

After Bredice, a number of other courts followed the decision and created a self-critical analysis privilege in other contexts and a number rejected the Bredice approach, even in the medical peer review context. Today, nearly all the states have enacted a statutory privilege that protects medical peer review communications. Alaska has established a medical peer review privilege, and it is found in AS 18.23.030. This is a very narrow privilege, and it is instructive to compare it to the proposed audit privilege.

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), a copy of which was provided to the Senate Resources Committee. The courts have also generally rejected the self-critical analysis privilege in the context of public health, safety, and welfare laws and in the context of a grand jury's power to subpoena evidence for purposes of investigating violations. See, e.g., cases discussed in Reichhold, 157 F.R.D. at 525-26.

Except for the medical peer review privilege under AS 18.23.030, Alaska law does not recognize a self-critical analysis privilege. With respect to environmental or health and safety audits, a party presently may be able to assert the attorney-client privilege and the work product doctrine to protect communications and documents from discovery or use in evidence. Another mechanism that is sometimes used to protect the information generated during an audit is Evidence Rule 407, which excludes from introduction into evidence for purposes of proving negligence or culpable conduct, evidence of measures that after an event, which if they had been taken before the event, would have made the event less likely to occur.

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), a copy of which was provided to the committee. While the Ninth Circuit did not establish a self-critical analysis privilege in Dowling, the Ninth Circuit did not foreclose the possibility that it might recognize the privilege in appropriate circumstances. The Dowling case describes the criteria that must be met to claim a self-critical analysis privilege. And, in fact, the Reichhold case relies on Dowling to establish a self-critical analysis for environmental records in a private contribution lawsuit for a contaminated site cleanup. 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 self-critical analysis privilege that differs from the privilege as described in Dowling, would likely result in conflicting rules of evidence and practical difficulties in gathering and presenting evidence.

Senate Bill 199 is based on a Texas statute creating an audit privilege and immunity from penalties for certain violations detected during environmental and health or safety self-audits. Legislation of this nature began to develop in the early nineties in Oregon and Colorado. Similar bills have been introduced in other states -- 14 have been enacted into law, a number are still pending in state legislatures, a number have been defeated in state legislatures, and a number have been vetoed. There are also pending federal bills.

Virtually no one disagrees with the policies of these bills, which are to encourage voluntary self-auditing and correction of violations. However, the audit privilege and immunity bills have received vigorous and nearly unanimous opposition from federal and state enforcement agencies. The United States Attorney General opposes the creation of a statutory audit privilege; the National District Attorneys Association vigorously opposes this type of legislation, as do many state attorneys general. The United States Environmental Protection Agency

recently adopted a new policy opposing in most circumstances the creation of a statutory audit privilege. See 60 Fed. Reg. 66,706 (1995).

The basis for this opposition has been that a statutory audit privilege is unnecessary; that if it is not carefully drafted, it will create safe havens for polluters and promote fraud; that it will divest state enforcement officials of enforcement discretion in charging, prosecuting, and making sentencing recommendations and misplace that discretion in the judges who are called upon review and weigh issues that would normally be weighed by state attorneys and enforcement agencies; that secrecy creates mistrust of the regulating agencies and the regulated entities; and that, since the regulated entities undertake candid audits to avoid accidents and liability, the fear of the possibility of disclosure does not inhibit auditing. In the forums where the audit privilege has been debated, some industries have supported the audit privilege and immunity legislation, while others have supported the concept of providing industry incentives to audit, but not necessarily through privileges and immunities. The Department of Law previously provided committee staff with a volume of materials containing examples of these arguments.

In general, the debate over the audit privilege and immunity legislation in other forums has been divisive, with industry characterizing regulatory agencies as overzealous; and with regulatory agencies emphasizing corporate fraud and corruption. The audit privilege legislation tends to reflect this adversarial tension. An adversarial relationship is built into the legal framework, and will likely carry through and affect subsequent conduct.

I. BREADTH OF THE PROPOSED PRIVILEGE

A. Definition of "Environmental or Health and Safety Law." [Page 10, lines 22-26, and page 11, lines 6-8.]

Senate Bill 199 applies to cases involving federal and state environmental laws, and related municipal laws. The bill does not specify the particular environmental laws to which it applies. There are many state environmental laws, under the

jurisdiction of many agencies. The Department of Environmental Conservation has the authority to enforce many of these laws. But, the Department of Natural Resources also enforces environmental laws, such as the Forest Practices Act, and regulates mining and mine reclamation. The Alaska Oil and Gas Conservation Commission in the Department of Administration regulates oil and gas drilling to address safety and to prevent and control land and water contamination. The Joint Pipeline Office oversees the TransAlaska Pipeline with respect to environmental and safety matters. The Department of Fish and Game has jurisdiction over habitat protection, which may be construed as an environmental program. The Department of Public Safety enforces certain laws relating to hazardous materials.

Similarly, there are a number of occupational health and safety laws. In addition to the Occupational Health and Safety Act, the Workers' Compensation Act is an occupational health and safety law. The Department of Health and Social Services (DHSS) regulates health facilities and operations. The basis for the DHSS regulation turns in some cases on whether facilities are in compliance with OSHA, and whether they are staffed by individuals with certain professional and occupational licenses. The professional and occupational licensing statutes, many of which fall under the jurisdiction of the Division of Occupational Licensing in the Department of Commerce and Economic Development, could also be construed as occupational health and safety laws.

By its plain language, then, the bill then covers a wide array of laws that fall under the jurisdiction of many agencies.

B. Environmental or Health and Safety Audits. [Page 10, lines 16-21].

Under the bill, environmental audits may be conducted by owners or operators, employees, or independent contractors. This definition overlooks a critical issue. For corporate or nonnatural entities, the question of who has the authority to initiate the audit and who has the authority to commit the funds and undertake the recommended corrective actions is vitally important. Under the bill as drafted, the privilege attaches even though the person who initiates the audit may have no authority to bind the corporation

or entity, or no financial or management wherewithal to carry through with the corrective actions. As a matter of practice in the Department of Law, a defendant's ability to carry out audit recommendations is an important consideration in deciding whether an audit and corrective action program justify reducing or foregoing penalties and assessments.

C. Definition of Audit Report. [Page 9, line 17, to Page 10, line 15.]

Under the proposed definition, an audit report is essentially any document or communication of any nature generated before, during, and after the audit, if it relates in any way to the audit and the resulting corrective actions. There is nothing in the law concerning evidentiary privileges, not even the attorney-client privilege, that approaches the proposed privilege in scope. We are concerned that there is little or no justification for creating a privilege that covers raw data, or documentary evidence such as photographs, surveys, and maps.

We are also concerned that there is little or no justification for creating a privilege for the implementation plan or the corrective tracking system. There would be no point in charting a course of action on how to improve health and safety and environmental conditions, and then keeping that information secret. In many cases, the regulatory agencies will be involved in the corrective actions, either in providing technical advice or in issuing required permits or authorizations necessary to undertake the corrective actions.

Similarly, there is no justification for keeping the report confidential insofar as it relates to issues concerning conduct after completion of the report. The report would be essential evidence of any intentional misconduct or negligence occurring after the audit, and parties should have access to that information in any type of dispute that raises these issues. Both the Dowling and Reichhold cases recognized that the distinction between pre-accident and post-accident analysis is "vital" and allow access to pre-accident analysis.

Finally, the courts that have recognized a self-critical analysis privilege have carved out exceptions for circumstances where there is "exceptional necessity" or "extraordinary hardship." These exceptions include circumstances where witnesses die or become unavailable, where evidence is destroyed or missing, and where it is impossible to otherwise obtain the evidence.

D. Labeling. [Page 2, lines 21-25.]

Under the bill, all materials are supposed to be marked, but there is no consequence to not marking them. Since the audit report covers all types of materials, most of which would not have any different appearance from non-privileged materials, there would be no way to physically distinguish privileged materials from the non-privileged materials that the agencies have in their public files. This is of concern because of the consequences that can attach if privileged information is disclosed, such as the damages and criminal penalties. Under this provision, anyone can mark a document; under the privilege provisions, the document can be marked at any time, either before or after the audit.

E. Conclusion.

Even if there are policy reasons that would support an evidentiary and disclosure privilege, those policy reasons do not support extending the privilege this far. The definitions combined with the substantive provisions of the bill invite abuse and fraud; and will keep secret information that is essential to the protection of the public health, safety, and welfare.

II. THE PROPOSED AUDIT PRIVILEGE [Page 1, line 8, to Page 2, line 27.]

The privilege, as drafted in the Texas legislation, applies to virtually all types of proceedings, not just enforcement cases. Except as specified in the bill, parties will be unable to obtain the audit report either for purposes of discovery or evidence.

The privilege can be asserted by private parties or public litigants. It would apply in cases where the State is bringing the case; in cases where the State has been sued; and in cases strictly between private parties.

It applies to civil litigation of any nature, seeking any type of remedy. For example, it applies to negligence and intentional torts; contracts; property; construction law; labor law; and statutory claims, such as injunctive proceedings and cost recovery actions. The State would thus be affected in both its proprietary and regulatory capacity. For example, the Department of Transportation and Public Safety (DOTPF) presently may discover and present evidence of audits in its condemnation proceedings to establish property valuation. In addition, DOTPF owns and manages the majority of airports in the state, with hundreds of industrial leaseholders and tenants using lands at airports and elsewhere. As a landowner, DOTPF airports have a strong interest in obtaining environmental audits and related documents because DOTPF has liability for the damages and cleanup costs associated with tenant violations. Audits may be relevant in proceedings relating to Mental Health Lands Trust properties, University lands, Alaska Railroad properties, state hatchery management contracts, and Department of Natural Resources leases, easements, and right-of-way agreements.

The privilege applies in criminal proceedings at all stages, charging, trial, and sentencing.

It would also apply to any type of administrative proceeding; for example, compliance orders, administrative penalties; revocation of facility licenses, permits, and certificates; revocation of professional and occupational licenses and certificates; lease termination; and contract debarment. It would also apply in tariff and tax cases, where the State may have reason to question the inclusion of costs relating to the correction of deficiencies in operating expenses for tariff increases or tax write-offs.

As drafted, the potential for impact is enormous. To create a new privilege that could be invoked in so many different types of proceedings would require careful study and review. By

contrast, the evidentiary privileges that are in effect are narrow, have evolved over long periods of time, and have been refined through judicial interpretation.

A broad privilege is contrary to established practice and policy relating to civil discovery. To encourage settlement of disputes and provide a level playing field, the Civil Rules of Procedure provide for broad and liberal discovery. Civil Rule 26(b) allows discovery of any matter that is relevant to the subject matter of the dispute, including any evidence that is reasonably calculated to lead to discovery of admissible evidence. If a party asserts a privilege, or if a party desires a protective order to protect against the disclosure of evidence that is subject to discovery, Civil Rule 26(b)(5) and (c) provides procedural mechanisms and standards to allow that protection.

III. LANGUAGE AND DRAFTING

The Department of Law is concerned that many provisions of the bill are cumbersome, confusing, and ambiguous. The bill would graft substantive problems and poor drafting from Texas legislation onto Alaska law, resulting in costly litigation and delay in resolving disputes.

For example, the bill contains provisions creating certain civil procedures, either through limited waivers or judicial review, to be followed to obtain information that is claimed to be privileged. In section 450(f), page 2, lines 26-27, the bill provides that the person asserting the privilege has the burden of proving that it applies. Because the definitions are so broad, a person claiming the privilege could assert and prove that practically any document or communication is privileged. Under section 460(a), page 4, lines 6-17, the burden then shifts to the person seeking discovery to prove that the privilege is asserted for a fraudulent purpose; that it falls within a category of documents that is not privileged; or that the report shows evidence of noncompliance and that appropriate and timely corrective actions were not initiated after the report. Particularly with respect to the latter two exceptions, it would be impossible to meet the burden of proof required to overcome the privilege without access to the privileged material in the first place.

Another concern is with section 465(a), beginning on page 4, line 30, the list of nonprivileged material. First, the provision providing an exception for materials required to be gathered under environmental and health and safety laws should be clarified to refer to materials required to be gathered under a permit, license, approval, or other authorization and under judicial and administrative orders.

Second, this subsection should provide for public contracts and licenses, including contracts and agreements regarding property (for example, state leases and easement and right-of-way agreements) and public grant agreements. This provision is a major concern for the Department of Transportation and Public Facilities, especially in regard to airports. The majority of airports in the state are owned by DOTPF and managed under contractual arrangements. This would also be a concern for the Department of Natural Resources, in its proprietary role as the manager of state lands. Similarly, it would be a concern for the University of Alaska, the Mental Health Land Trust, and the Alaska Railroad with their property holdings. While the bill in another section contains an exception for agreements to treat materials as nonprivileged, the omission of public contracts, licenses, and agreements in the section of nonprivileged material seriously weakens the State's bargaining position in arriving at agreements to treat materials as nonprivileged.

V. IMMUNITY

The Criminal Division of Department of Law will separately address its concerns with the immunity provisions. The Civil Division has several concerns related to the proposed immunity from penalty provisions. First, there are many penalty provisions associated with environmental and health and safety laws scattered throughout the Alaska Statutes, and they vary considerably in content and detail. Some statutes, such as the Occupational Safety and Health Act (OSHA), provide for mandatory penalties, and in at least one instance, for a mandatory minimum penalty. See AS 18.60.095. The proposed legislation may conflict with these penalty provisions or, if it would supersede these

penalty provisions, may conflict with federal requirements for a state-run program.

The Department of Environmental Conservation (DEC) does not have administrative penalty authority, and therefore, the immunity provisions would not affect DEC's administrative enforcement remedies, which consist of compliance orders. Similarly, Title 46 does not authorize the courts to assess civil penalties for violations of the environmental laws under DEC's jurisdiction, except with respect violations of the air quality control and hazardous waste laws. AS 46.03.760(e)(4).

In contrast, violations of the pollution control provisions of the Alaska Oil and Gas Conservation Act, enforced by the Alaska Oil and Gas Conservation Commission, are subject to administrative, civil, and criminal penalties, and would be affected by the legislation. See AS 31.05.150. One element of the Commission's program, underground injection control, is subject to federal oversight and federal requirements. In order to obtain EPA approval to carry out certain permitting and regulation of underground waste disposal, the Commission had to assure the EPA that the program would comply with a number of standards, including those concerning inspection, monitoring, reporting, civil penalties, and other enforcement measures, as well as public participation. Senate Bill 199 may affect compliance with those standards.

VI. IMPACTS ON STATE EMPLOYEES

Scattered throughout the bill are various provisions that would make it difficult for state employees to perform their jobs. First, as to penalties and damages, we believe these are unnecessary. State employees are required to obey and uphold the law. When they act outside the scope of their authority or intentionally violate the law, they are subject to disciplinary action and personal liability. Second, in performing their jobs, inspectors request and review a variety of information. Invariably they will encounter situations where they will be unable to adequately perform their jobs if they are prevented from requesting and reviewing information. The provision that agencies may not circumvent the law is likewise unnecessary. Agencies are creatures

of statute and are required to conduct their operations within the parameters established by their authorizing statutes. Moreover, under the Administrative Procedures Act, agency regulations must be within the scope of the agency's authority and consistent with the law. See AS 44.62.020; 44.62.030 Finally, with respect to judicial sanctions, the courts already have procedures in place for sanctions and contempt proceedings. In short, these provisions are unnecessary.

But of greater concern is that the practical effect of these provisions will be to chill appropriate and effective regulatory oversight and effective public property, contract, and grant administration. As a practical matter, state agencies and employees are often involved in all facets of designing, conducting, and reviewing audits and carrying out the recommended corrective actions and accident and pollution prevention projects. Legislation that casts state agencies and employees in an adversarial, hostile, and negative role, and that inhibits the free and open exchange of information, will decrease the effectiveness of the technical assistance offered by the agencies and decrease the effectiveness and timeliness of the corrective actions and preventive measures recommended by the audits.

CONCLUSION

Just as the bill portrays state agencies and employees in a negative light, many of the exceptions in the bill that are designed to ferret out repeat offenders and bad actors emphasize the very worst conduct on the part of regulated entities. An adversarial tension is built right into the framework of the legislation. In basing the bill on conflict, the provisions of the bill operate to defeat the purposes of the bill, which are to encourage voluntary self-auditing and to improve compliance. And, in attempting to exclude the worst offenders from enjoying the incentives provided by the bill, the bill fails to address the entities most in need of comprehensive audits, corrective action, and accident and pollution prevention measures.

We have two important examples of how regulated entities have worked with the state agencies in conducting audits and undertaking corrective and preventive measures. First, during an

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inspection at the Kake Tribal Corporation's Point Macartney logging camp in 1993, the Department of Environmental Conservation observed numerous violations of the environmental and public health laws. Previous enforcement efforts had failed to bring the camp into compliance. In an effort to achieve compliance and institute measures to prevent future violations, the Kake Tribal Corporation, Department of Environmental Conservation, 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 corrective and remedial measures, and implement preventive measures in each area of concern. The Department of Environmental Conservation 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 detected during their investigation. In other instances, the Corporation exceeded technical requirements, provided hazmat training to employees beyond that required in the compliance order, and worked with the community 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 ANCSA Presidents Association 1995 Environmental Compliance Conference, designed to promote cooperation among the regulators and regulated community in achieving environmental compliance.

A second example is provided by the Joint Pipeline Office, consisting of representatives from six states and five federal agencies, which oversees the Trans-Alaska Pipeline System. In regulating the pipeline, the JPO relies heavily on safety audits performed by 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 received the national "Hammer Award" for innovative efforts in making government work better.

These are positive models upon which any audit legislation should build. The Texas legislation, which is based upon an adversarial relationship between the regulators and the

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regulated community and which contains serious deficiencies, does not match the successful Alaskan models. The framework for any audit legislation should be based upon what has worked in our state.

Sincerely,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: *Marie Sansone*
Marie Sansone
Assistant Attorney General

MS:prm

cc: Bruce M. Botelho, Attorney General
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11-20-95

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MEMORANDUM

November 15, 1995

SUBJECT: Audit Privilege (Work Order No. 9-LS1312A)

TO: Senator Loren Leman
Attn: Annette Kreitzer

FROM: Terri Lauterbach *Terri Lauterbach*
Legislative Counsel

Enclosed is a draft based on the Texas law you submitted concerning a self-audit privilege. Except for reorganization to make the definitional sections conform to the Alaska Legislature's drafting requirements, I have followed the Texas law closely. However, the substantive provisions raise the following questions:

(1) Sec. 09.25.455(e): I do not know what is meant by a "clerical dissemination" as opposed to other types of dissemination.

(2) Sec. 09.25.465(b): I do not understand what this subsection is intended to do, nor why it includes the phrase "this section does not limit."

(3) Sec. 09.25.470(g) - (j): I do not understand these subsections. For instance, the burden of proof in subsection (g) is different from Sec. 09.25.450(f), seemingly an internal contradiction. The blanket suppression of evidence in subsection (g) doesn't seem to allow for the other exceptions in the bill where disclosure would be allowed. Subsection (i) seems to allow disclosure even when the rest of the bill does not. Clarifications are needed, but I need some policy direction here.

Sec. 09.25.475(b)(7), (d)(2) and (d)(4): Please review the wording in these paragraphs as to the use of "substantial" in regards to injuries and on-site or off-site harm. I'm not sure if the Texas choices are intentional or the result of inconsistent drafting.

Please let me know if I can be of further assistance on this matter.

TML:glc
95-443.gic
Enclosure



February 1995
Vol. 20, No. 2

Environmental Audits: Incentive to Comply With or Avoid Regulation?

By
Larry Morandi
Senior Fellow
and
Sebastien Pascal
Law Student

One of the greatest weaknesses in environmental regulation is enforcing discharge permits. Strapped for sufficient funds, state agencies spend more time on developing permit conditions than they do on enforcing compliance with those conditions. Violations of wastewater discharge, air quality, and hazardous substances emission standards often go undetected unless litigation is filed by aggrieved parties. Seldom are the fines in environmental legislation assessed at the authorized levels because the regulatory agencies lack the staff resources to document their case against a responsible party. The penalty provisions of environmental statutes thus become the starting point for negotiated settlements of permit violations rather than a deterrent to prevent the pollution from occurring.

In an effort to reduce the often adversarial relationship between regulatory agencies and industrial dischargers, state legislatures are now considering voluntary self-audits of company efforts to comply with permit conditions. The intent of such legislation is to provide the regulated community with incentives to comply with permit conditions and to remove some of the enforcement burden placed on state agencies. This state legislative report examines legislation enacted during the past two sessions to promote environmental audits and discusses the concerns raised by enforcement officials and environmental interest groups in moving away from a strictly regulatory regimen.

State legislatures are considering voluntary self-audits of company efforts to comply with permit conditions.

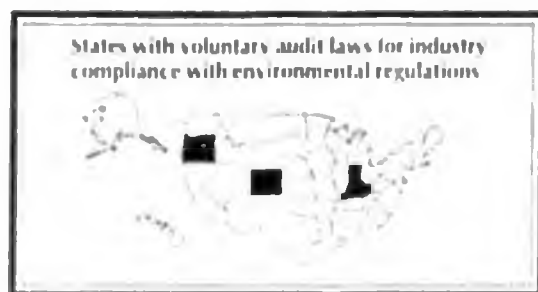
Legislative Intent

Four states—Colorado, Indiana, Kentucky, and Oregon—have enacted legislation that encourages industry to conduct voluntary audits of efforts to comply with environmental regulations. The fundamental difference between this legislation and earlier efforts to promote voluntary environmental compliance is that the new statutes grant the information developed through

the audit a privilege against disclosure to a regulatory agency or to the public. A company that conducts an environmental audit is, in essence, granted immunity from prosecution for violating the terms of a permit so long as it proceeds with diligence to correct the discharge causing the violation.

Previous state legislation had encouraged the use of environmental audits without granting the information a privileged status. California's 1986 Environmental Quality Assessment Act noted in the statement of legislative findings and declarations that

Environmental assessments can encourage voluntary compliance with both the letter and the spirit of the law as well as encourage cost-effective process improvements. By reducing potential liability, assessments can reduce the long-term costs of hazardous substance management. In addition, the use of assessments can help to build public confidence that hazardous substances are being managed in an increasingly safe manner. The use of independent environmental assessments is an important emerging feature of specific state hazardous substance management programs (Cal. Health & Safety Code, 25570(b)(2)).



Colorado, a state that revamped its environmental audit legislation significantly in 1993, had also encouraged voluntary environmental audits by regulated industries. In the civil penalties section of its air quality statute, for example, "the existence and scope of a regularized and comprehensive environmental compliance program or an environmental audit program" is listed as a mitigating factor in determining the amount of civil penalty by the Department of Health (Colo. Rev. Stat., 25-7-422(2)(b)(ii)).

Oregon's statement of legislative intent of its environmental audit legislation suggests the new thinking in providing incentives to comply with environmental regulations:

In order to encourage owners and operators of facilities and persons...both to conduct voluntary internal environmental audits of their compliance programs and management systems and to assess and improve compliance with such statutes, an environmental audit privilege is recognized to protect the confidentiality of communications relating to such voluntary internal environmental audits (Ore. Rev. Stat. 468.063(1)).

The next section of this state legislative report examines in detail the environmental audit provisions of recent legislation in four states. Each statute follows the intent expressed by the Oregon legislature.

Colorado

Although not the first state to enact voluntary audit privilege legislation, Colorado's 1993 Senate Bill 119 has gained the most national attention. The legislation provides two main

tives for regulated industries to conduct voluntary environmental audits: (1) information contained in an audit report is granted evidentiary privilege and does not have to be released to a regulatory agency or to the public; and (2) if a company chooses to disclose privileged audit information that indicates a violation of environmental law, the company cannot be assessed fines or penalties if it completes compliance actions within two years of disclosure.

Senate Bill 139 defines "voluntary self-evaluation" to mean "a self-initiated assessment, audit or review, not otherwise expressly required by environmental law, that is prepared by any person or entity...to determine whether such person or entity is in compliance with environmental laws" (Colo. Rev. Stat., 13-25-126.5(2)(e)). It specifically states that "an environmental audit report is privileged and is not admissible in any legal action or administrative proceeding and is not subject to any discovery pursuant to the rules of civil procedure, criminal procedure, or administrative procedure..." (Colo. Rev. Stat., 13-25-126.5(3)). It then qualifies the privilege by making it inapplicable where:

Colorado laws provide incentives for regulated industry to conduct environmental audits.

- the party has not begun compliance actions to remedy the violation within a reasonable period of time;
- a court determines that there are compelling reasons to disclose the information;
- the privilege is being used for fraudulent purposes or to avoid an investigation; or
- the information contained in the report demonstrates a clear, present and immediate danger to the public health or the environment outside of the regulated facility.

The statute also stipulates certain types of information that do not qualify for the privilege. These include:

- documents required to be prepared or to be made available to a regulatory agency pursuant to environmental laws;
- information obtained by a regulatory agency during the normal course of monitoring for environmental compliance;
- information obtained through an independent source;
- documents prepared before initiating an environmental audit or prepared after an audit and not part of the audit.

The initial part of Colorado's legislation is similar to that enacted in Indiana, Kentucky and Oregon. The second and more controversial part is unique to Colorado. Senate Bill 139 further establishes a "rebuttable presumption" that environmental audit information disclosed to the Colorado Department of Health (the environmental regulatory agency) "is voluntary and therefore the person or entity is immune from any administrative and civil penalties

associated with the issues disclosed and is immune from any criminal penalties for negligent acts associated with the issues disclosed." (Colo. Rev. Stat., 25-1-114.5(4)) To be considered voluntary, a disclosure must arise out of a voluntary self-evaluation and be made promptly to the department after knowledge of a violation has occurred, and the party must correct the noncompliance no later than two years after disclosure. Immunity against fines or penalties will not be granted if the party has committed serious violations of environmental law that represent a pattern of continuous violations within three years of the date of disclosure.

An attorney with the Colorado Association of Commerce and Industry who helped draft the legislation believes that companies will avail themselves of the disclosure option to gain immunity from fines: "You always run the risk if you haven't reported that they, the department, may come in, inspect and find that you were out of compliance at a certain point in time and retroactively try to assess fines and penalties."

The primary impetus for Colorado's 1994 legislation—it had failed in previous sessions—was the assessment of a large fine against Coors Brewing Company by the Colorado Department of Health. Coors spent \$1 million in conducting a voluntary environmental audit of volatile organic compound (VOC) emissions—principally ethanol—released by the evaporation of beer spilled during brewing. The audit indicated that Coors was violating VOC emission standards and, according to a Coors spokesman, "revealed information about VOC emissions previously unknown to major brewers and state and federal regulators" that could be used to set more effective standards. The audit results were presented to the Colorado Department of Health, which initially assessed a \$1.05 million fine against the company for the violation. The amount was subsequently reduced to \$237,000 in February 1994 as part of a negotiated settlement that included emission reductions. Colorado's legislation, especially the immunity provisions, was designed to ensure that voluntary compliance actions like those undertaken by Coors would not be discouraged in the future.

Indiana

Indiana also passed its environmental audit statute in 1994. Public Law 16-1994 defines "environmental audit" to mean "a voluntary, an internal, and a comprehensive evaluation of a facility or an activity at a facility...that is designed to identify and prevent noncompliance with laws and improve compliance with laws." (Ind. Code Ann., 13-10-3-1) It stipulates that "an environmental audit report is privileged and is not admissible as evidence in a civil, a criminal, or an administrative legal action." (Ind. Code Ann., 13-10-3-3) It denies the privilege in civil, administrative or criminal proceedings where its use is for a fraudulent purpose or the material contained in the audit shows noncompliance with environmental law—and the person claiming the privilege did not promptly initiate and pursue appropriate efforts to achieve compliance with reasonable diligence." (Ind. Code Ann., 13-10-3-4) It exempts from the privilege the same types of information contained in the Colorado law.

Indiana law stipulates that "an environmental audit report is privileged."

Kentucky

Legislation enacted in Kentucky during the 1994 session—Chapter 430—mirrors Indiana's law. It defines "environmental audit" to be "a voluntary, internal, and comprehensive evaluation of one or more facilities or an activity at one or more facilities...that is designed to identify and prevent noncompliance and to improve compliance with statutory or regulatory requirements." (Ky. Rev. Stat. Ann., 224.01-040(1)(a)) It creates "an environmental audit privilege...to protect the confidentiality of communications relating to voluntary internal environmental audits." (Ky. Rev. Stat. Ann., 224.01-040(2)) The privilege precludes an environmental audit report from being "admissible as evidence in any legal action in any civil, criminal, or administrative proceeding." (Ky. Rev. Stat. Ann., 224.01-040(3)) An exception to the privilege is where a court determines that "the material shows evidence of noncompliance...and appropriate efforts to achieve compliance were not promptly initiated and pursued with reasonable diligence." (Ky. Rev. Stat. Ann., (224.01-040(4)(c)(3) and 224.01-040(4)(d)(3)) The privilege likewise does not extend to the same types of information delineated in the Colorado and Indiana laws.

In Kentucky, privilege does not extend where there is evidence of noncompliance.

Oregon

While similar to the evidentiary privilege provisions in Colorado, Indiana and Kentucky, Oregon's environmental audit language was part of a more comprehensive environmental enforcement statute adopted in 1993. Section 20 of the Environmental Crimes Act of 1993 (Chapter 422, 1993 Oregon Laws), states that "an environmental audit report shall be privileged and shall not be admissible as evidence in any legal action in any civil, criminal or administrative proceeding." (Ore. Rev. Stat., 46B.963(2)) It defines an "environmental audit" in a similar manner, and provides for the same exceptions from the audit privilege, as the provisions contained in the other three state statutes.

Oregon enacted a more comprehensive environmental enforcement law.

Environmental and Regulatory Response

The U.S. Environmental Protection Agency (EPA) has questioned the enforceability of state environmental audit privilege laws. The agency's acting regional administrator in Denver advised the governor in April that "Colorado's proposed immunity amounts to a significant departure from and weakening of the federal enforcement scheme" and may result in the agency withdrawing enforcement authority of delegated federal environmental programs to the state. Environmental groups and labor unions representing oil refinery and sewage plant operators in Colorado contend that the statute allows a company to insulate itself from fines and penalties simply by acknowledging that a self-audit has shown that the company violated environmental laws. A spokesman for the Land and Water Fund of the Rockies contends that the privilege makes it "much more difficult for private lawsuits to be used to determine whether or not a company has violated the law."

EPA announced on September 9 that it had established focus groups to discuss whether the federal agency's policy should allow information contained in environmental audits to be

protected from disclosure. It also is analyzing the environmental audit laws in the four states that have enacted them and surveying the 46 other states to determine how they handle environmental audits. EPA wants to "encourage self-correction through the use of environmental audits...[but] does not want to shield from prosecution those who violate the law." The agency's focus group recommendations are not expected until later this year.

Industry Response

Regulated industries have been more concerned with "reducing penalties for those companies that voluntarily report infractions" than with "whether audits should be protected from enforcement actions." According to some industry sources, current EPA policy offers no incentives to conduct voluntary audits and report violations of regulations; what is needed is "enforcement certainty, which would entail the agency setting up a scheme to lessen penalties for self-reported violations." To accommodate industry concerns about pursuing environmental audits, EPA may consider policies that offer limited privilege (whereby voluntary audit results would be protected from third-party suits but not from federal government litigation), and establishment of "excellence threshold criteria that a company would have to meet to be eligible for a penalty mitigation program."

Legal Problems Raised by State Audit Privilege Acts

The National Association of Attorneys General has identified several potential legal problems raised by state audit privilege legislation. These include:

- Precluding concerned citizens and state legislators who were not party to an enforcement action against a polluter from seeing the privileged material.
- Limiting to a judge, rather than to a jury, determinations of whether the audit privilege was being used for fraudulent purposes or whether appropriate actions were being pursued to correct the noncompliance.
- Requiring state agencies to demonstrate probable cause that a violation had occurred before having access to information in an audit report.

State attorneys general fear that implementing an environmental audit privilege will drive up litigation costs and decrease effective enforcement of environmental regulations. Environmental enforcement "could become mired in motions to quash subpoenas, to suppress evidence, and to compel discovery." The attorneys general argue instead for "alternative approaches, such as audit policies developed through open dialogue with affected parties, negotiated audit agreements, and more comprehensive compliance incentive programs" as means to promote greater cooperation between the regulated industry and regulatory agencies.

Conclusion

EPA and state regulators must coordinate their environmental audit policies because of the large number of environmental programs that the federal government has delegated to the states for enforcement. If the two sides differ significantly, states risk having "primacy"—administrative authority over program implementation—revoked by EPA. The federal agency advises caution to other states pursuing the privileged environmental audit approach until it revises its policy. Regardless of the outcome, both state and federal agencies support additional incentives for regulated industries to voluntarily assess their compliance with environmental laws and to design the most cost-effective means of achieving that objective.

State Legislative Reports

- "When Health Care Is Not Enough: Support Services for Pregnant Women and Infants"
(Vol. 19, No. 8) (ISBN 1-55516-226-6) June 1994
- "Superfund and Economic Development"
(Vol. 19, No. 9) (ISBN 1-55516-227-4) July 1994
- "Electric Vehicles: Promise and Reality"
(Vol. 19, No. 10) (ISBN 1-55516-381-5) July 1994
- "Clean Air Act Mandates: Funding, Business Opportunities and Economic Development"
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- "The Revised Model Accreditation Plan for Asbestos"
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- "Supporting Families"
(Vol. 19, No. 13) (ISBN 1-55516-378-5) August 1994
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- "Risk Assessment: A Glance at the Non-Technical Aspects"
(Vol. 19, No. 18) (ISBN 1-55516-386-6) November 1994
- "Equity and Funding of School Facilities: Are States at Risk?"
(Vol. 20, No. 1) (ISBN 1-55516-388-2) February 1995
- "Environmental Audits: Incentive to Comply With or Avoid Regulation?"
(Vol. 20, No. 2) (ISBN 1-55516-388-2) February 1995

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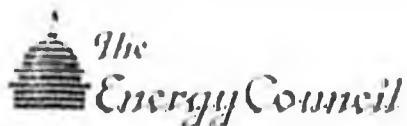
STATE LEGISLATIVE REPORT



STATE LEGISLATIVE REPORT

COMMISSION ON THE STATE LEGISLATURE





Honorable J. E. "Buster" Brown
Texas Senate
Chairman

Honorable Samuel B. Nunez, Jr.
Louisiana Senate President
Vice Chairman

Lori Cameron
Executive Director

122 West Carpenter Freeway
Suite 525
Irving, Texas 75039
Phone: 214-717-8105
Fax: 214-717-6107

Policy Statement of the Energy Council on Environmental Audits

Proposed By
Texas Representative Warren Chisum

Background

Fourteen states have passed legislation creating an environmental, health and safety self-evaluation privilege and at least eleven other states have introduced similar measures. The primary purpose of such legislation is to encourage companies and governmental entities to conduct voluntary self-audits ensuring compliance with environmental, health and safety laws and that violations of the law are brought quickly into compliance.

The audit privilege promotes internal review of operations without fear of prosecution or penalties for corrected problems. It also encourages the development of preventive strategies to avoid future compliance problems. Safeguards built into the legislation prevent companies from misusing the audit privilege or immunity gained from voluntary disclosure.

Federal regulatory agencies have been reluctant to support state audit privileges, creating a conflict of law for companies and government entities wishing to avail themselves of the provisions of state law.

Recommendation

The Energy Council recommends that state legislatures consider adopting legislation to provide an environmental, health and safety self-audit privilege relating to voluntary internal audits, as well as administrative, civil and criminal immunities from the enforcement of laws and regulations which have been discovered to have been violated (where such violations have been voluntarily disclosed to appropriate agencies and corrective measures taken). The Energy Council further recommends that the United States Congress enact legislation to provide similar federal protection or, at a minimum, to require federal enforcement authorities to recognize and abide by the terms of state self-audit privileges and immunities.

Disposition

This policy statement, adopted unanimously by the Energy Council on September 24, 1995, shall be distributed to the President of the United States, the Majority Leader of the U.S. Senate, the Speaker of the U.S. House of Representatives, as well as the congressional delegations, the governors, and legislative leadership of the Energy Council's member states.

ENVIRONMENTAL SELF-AUDIT LEGISLATION

Senate Bill 199 - Senator Loren Leman, Sponsor

Benefits:

- * Encourages compliance with environmental and health and safety laws, and allows entities to become more pro-active in their environmental policies.**
- * Allows businesses to conduct audits and self-report violations without fear of fines and penalties.**
- * Small businesses and state agencies will benefit from being able to put their limited funds into compliance, rather than penalties.**
- * Businesses will have an incentive to seek advice from regulatory agencies regarding the problems they've disclosed.**
- * Encourages companies to develop preventive environmental policies.**
- * "Bad actors" are not protected. As written, the bill includes safeguards to prevent companies or state agencies from misusing the audit privilege or the immunity gained from voluntary disclosure.**




Alaska State Legislature

Session:
State Capitol
Juneau AK 99801-1182

Interim:
716 W 4th Avenue
Anchorage AK 99501-2133

MEMO

TO: Sara Hannan, Alaska Environmental Lobby
via fax: 463-3312

FROM: Annette Kreitzer, Aide to
Senator Loren Leman 

DATE: January 30, 1996

RE: SB 199

YOU REQUESTED INFORMATION ON SB 199, Environmental and Health & Safety Self-Audits.

I'm faxing to you:

Sponsor Statement	1 page
Sectional Analysis	2 pages
Energy Council Statement	1 page
"Benefits" Paper	1 page

Please call me if you need any further information.



Alaska State Legislature

Session:
State Capitol
Juneau AK 99801-1182

Interim:
716 W 4th Avenue
Anchorage AK 99501-2133

MEMO

TO: Marilyn Leland/PWSRCAC
via fax: 277-4523

FROM: Annette Kreitzer, Aide to
Senator Loren Leman 

DATE: January 30, 1996

RE: SB 199

YOU REQUESTED INFORMATION ON SB 199, Environmental and Health & Safety Self-Audits.

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Alaska State Legislature

Session:
State Capitol
Juneau AK 99801-1182

Interim:
716 W 4th Avenue
Anchorage AK 99501-2133

MEMO

TO: Steve Torok, Senior Representative
U.S. EPA
via fax: 586-7015

FROM: Annette Kreitzer, Aide to
Senator Loren Lemun

DATE: January 30, 1996

RE: SB 199

YOU REQUESTED INFORMATION ON SB 199, Environmental and Health & Safety Self-Audits.

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Alaska State Legislature

Session:
State Capitol
Juneau AK 99801-1182

Interim:
716 W 4th Avenue
Anchorage AK 99501-2133

MEMO

TO: Stephanie Galeraith
Anchorage Attorney's office
via fax: 343-4550

FROM: Annette Kreitzer, Aide to
Senator Loren Leman

DATE: January 30, 1996

RE: SB 199

YOU REQUESTED INFORMATION ON SB 199, Environmental and Health & Safety Self-Audits.

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Alaska State Legislature

Session:
State Capitol
Juneau AK 99801-1182

Interim:
716 W 4th Avenue
Anchorage AK 99501-2133

MEMO

TO: Jennifer Lloyd/Department of Corrections
via fax: 3390

FROM: Annette Kreitzer, Aide to 
Senator Loren Lemar

DATE: January 30, 1996

RE: SB 199

YOU REQUESTED INFORMATION ON SB 199, Environmental and Health & Safety
Self-Audits.

I'm faxing to you:

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Alaska State Legislature

Session:
State Capitol
Juneau AK 99801-1182

Interim:
716 W 4th Avenue
Anchorage AK 99501-2133

MEMO

TO: Anthony Williams/Echo Bay
via fax: 463-5740

FROM: Annette Kreitzer, Aide to
Senator Loren Lemman

DATE: January 30, 1996

RE: SB 199

YOU REQUESTED INFORMATION ON SB 199, Environmental and Health & Safety Self-Audits.

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Alaska State Legislature

Session:
State Capitol
Juneau AK 99801-1182

Interim:
716 W 4th Avenue
Anchorage AK 99501-2133

MEMO

TO: David Rogers, Esq.
via fax: 586-1097

FROM: Annette Kreitzer, Aide to
Senator Loren Leman

DATE: January 30, 1996

RE: SB 199

A handwritten signature in blue ink, appearing to be "AK", is written over the "FROM:" line.

YOU REQUESTED INFORMATION ON SB 199, Environmental and Health & Safety Self-Audits.

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- * Encourages companies to develop preventive environmental policies.
- * "Bad actors" are not protected. As written, the bill includes safeguards to prevent companies or state agencies from misusing the audit privilege or the immunity gained from voluntary disclosure.

State Legislation on Audit Privilege

Legislation Passed in 1993

Oregon: Provides privilege from disclosure to voluntary environmental audits for determining compliance with state, federal, or local environmental laws, unless waived. Provides for in-camera review. Disclosure may be sought if privilege is asserted fraudulently, is not subject to the privilege, or shows evidence of noncompliance. To avoid losing privilege because of noncompliance, efforts to achieve compliance must be initiated promptly. *Or. Rev. Stat. §468.963.*

Legislation Passed in 1994

Colorado: Provides a privilege for voluntary disclosure of internal audits to determine compliance with state environmental laws and regulations. "limited expansion of protection against disclosure." Privilege may be waived by owner or operator of facility. Provides for in-camera review. A report may be disclosed if the court determines information contained in report presents a present and impending danger to public health or environment. Provides penalty immunity for reported violations identified in self-audit promptly reported and corrected within specific period. *Colo. Rev. Stat. §73-25-126.5 (1994).*

Illinois: Provides a privilege from disclosure for voluntary internal evaluations for determining compliance with state, federal, or local environmental laws, regulations, permits, or orders, unless waived. Provides for in-camera review, and in addition to the court, the Pollution Control Board may require disclosure. Disclosure may be sought if privilege is asserted fraudulently, not subject to the privilege, or shows evidence of noncompliance. To avoid losing privilege because of noncompliance, efforts to achieve compliance must be initiated promptly. *Ill. Pub. Act. 88-0690.*

Indiana: Specifies voluntary environmental audit reports are privileged and not admissible as evidence unless waived. Provides for in-camera review for civil, administrative, or criminal proceedings. Privilege lost if efforts to achieve compliance are not promptly pursued with reasonable diligence, are asserted for fraudulent purposes, or are not subject to privilege. Party asserting the privilege has burden of proving privilege. *Ind. Code §13-10 (1994).*

Kentucky: Voluntary environmental audit reports are privileged unless waived expressly by owner or by application. Provides for a private review. If court determines privilege is for fraudulent purposes, not subject to privilege, or efforts to achieve compliance were not promptly initiated, privilege is lost. Court may compel only portions of the report relevant to the issues in dispute. *Ky. Rev. Stat. Ann. §226.01-040.*

Legislation Passed in 1995

Arkansas: Declares protection of the environment is enhanced by voluntary compliance and limited protection against disclosure. Voluntary audit reports will encourage compliance. Provides for in-camera review, in civil, administrative, or criminal proceeding the court may require disclosure if determined privilege was asserted fraudulently; material is not subject to privilege; appropriate efforts to achieve compliance were not initiated promptly. *1995 Ark. Act 150.*

Idaho: Grants audit privilege for voluntary environmental audits. Provides immunity from administrative, civil, and criminal violation when voluntarily disclosed and compliance efforts taken to correct violation. Privilege is lost in cases of fraud. *1995 Idaho Sess. Laws 359.*

Kansas: Establishes audit privilege for voluntary environmental compliance audits. Provides immunity from or lesser penalties in administrative, civil, or criminal violations under certain circumstances. Privilege is waived if asserted fraudulently or if party asserting privilege has not implemented a management system to assure compliance. Provides for in-camera review. *1995 Kan. Sess. Laws.*

Mississippi: Specifies voluntary environmental self-evaluation reports are privileged and not admissible in civil, criminal, or administrative proceedings, unless waived; are asserted for fraudulent purposes; or appropriate efforts to achieve compliance were not achieved within a reasonable amount of time. Privilege is lost if material demonstrates a hazard or endangerment to the environment and public health. Provides for in-camera review. Persons asserting privilege have burden of proving privilege. Provides de minimis penalties for voluntary disclosure. *1995 Miss. Laws Chap. 627.*

Utah: Grants audit privilege for information obtained through voluntary environmental audits. Provides privilege for civil proceedings, none for criminal violations. Privilege is waived in fraudulent claims or if material demonstrates danger to public health, or the environment. Provides for in-camera review; prohibits compelling witness to testify; provides penalties for unlawful disclosure. Rebuttable presumption against penalties for qualifying disclosure. *1995 Utah Laws 304.*

Virginia: Grants audit privilege for information generated from voluntary environmental assessment, provides immunity from administrative or civil penalties. Privilege does not extend to criminal proceedings; material which demonstrates clear and imminent substantial danger to public health or environment; or fraudulently claimed. Party seeking disclosure has the burden of proof. *1995 Va. Acts 564.*

Wyoming: Grants audit privilege for voluntary environmental audits for determining compliance with the Wyoming Environmental Quality Act and declares specific information confidential; limits civil penalties for voluntary disclosure of violation if disclosed within 60 days of completed audit and facility has no prior violations at the time or a pattern of repeated violations. Provides for in-camera review. In civil, administrative, or criminal proceeding, the court may require disclosure if determined privilege was asserted fraudulently; material is not subject to privilege; appropriate efforts to achieve compliance were not initiated promptly; or information demonstrated substantial threat to public health and the environment. *1995 Wyo. Sess. Laws 56.*

Legislation Introduced in 1995

Arizona: S.B. 1290, passed both houses, transmitted to governor, vetoed.

California: A.B. 856, introduced in House, referred to Natural Resources Committee.

Florida: S.B. 944, introduced in Senate, referred to committees. S.B. 934, introduced in Senate, referred to committees. H.B. 709, introduced in House, referred to committees. H.B. 707, introduced in House, referred to committees.

Georgia: S.B. 244, passed Senate, introduced in

House Natural Resources and Environment Committee (died).

Hawaii: H.B. 390, introduced in House (died). S.B. 1304, introduced in Senate (died).

Idaho: S.B. 1142, passed in both houses, governor signed March 23, effective July 1 (Sections 1-2). December 31, 1997 (Section 3).

Iowa: H.S.B. 191 = H.F. 420, passed in House, sent to Senate Natural Resources (died).

Kansas: S.B. 76, passed both houses, signed by governor April 22.

Maryland: H.B. 785, introduced in House, received unfavorable report in Environmental Matters Committee (died). S.B. 685, introduced in Senate, withdrawn March 20.

Massachusetts: H.B. 3426, introduced in House, referred to Joint Committee.

Minnesota: S.F. 1314, introduced in Senate. H.F. 1479, introduced in House.

Mississippi: H.B. 1476, introduced in House, ruled improper (died). S.B. 3079, passed Senate, introduced in House, passed as amended. Signed by governor April 7, effective July 1.

Missouri: H.B. 338, introduced in House. Hearing held. S.B. 350, introduced in Senate. Hearing held. S.B. 363, introduced in Senate. Hearing held.

Montana: H.B. 412, introduced in House. Referred to Senate and reported as amended. House adopted. Died in Senate.

Nebraska: L.B. 731, introduced and referred to the Natural Resources Committee.

New Hampshire: H.B. 275, introduced in House, referred back to committee, voted, postponed action this year.

New Jersey: A.B. 2521/S.B. 1797, introduced in Senate and Assembly.

New Mexico: H.B. 800, introduced in House, died after referral.

Oklahoma: H.B. 1388, introduced in House, died in Senate Energy Committee.

Rhode Island: S.B. 853, introduced in Senate, referred to Judiciary Committee.

South Carolina: S.B. 15, introduced in Senate.

Tennessee: S.B. 1135, introduced in Senate.

Texas: H.B. 2473, introduced in House, reported favorably from Committee on Environmental Regulation.

Utah: S.J.R. 6, passed. S.B. 84 passed, signed by governor, effective May 1.

Virginia: H.B. 1845, passed, enrolled, signed by governor, effective February 1 (Chapter 514).

West Virginia: H.B. 2424, introduced in House, died in House Judiciary.

Possible Legislation in 1995

Alabama: Legislation a possibility.

Delaware: House is working on bill.

Louisiana: Lobby group drafting language and seeking sponsor.

Michigan: Forming a group to explore legislation anticipated in 1995.

North Carolina: Bill is under development, expected soon.

Ohio: Redrafted 1994 bill to be introduced.

Pennsylvania: Under consideration, expect passage in 1995.

—Patricia E. O'Toole, legal assistant, Petition Case Information current as of April 22.

tion of the policy is to be left to the "discretion of EPA and is not subject to review by any court." The agency does not want to have to litigate how the policy should be applied.

If implemented fairly, the new policy will remove some of the disincentives that at present exist to full implementation of environmental auditing programs. It is specific recognition of the importance of providing incentives for self-policing in the regulated community. The work group and public meeting processes that EPA utilized in developing the policy appear to have educated many in the agency (including its regions) and at Justice on the importance of such incentives.

Several limitations in the policy effort are evident, however. First it is not only a policy, but one which strongly emphasizes that agency offices are free "to act at variance with the guidance" in specific cases. The more cynical will suggest that EPA regional offices will circumvent it if they are not subject to judicial review. The efforts of some industry groups to push federal audit privilege and immunity legislation reflect this concern. It will be extremely important for the agency to develop an oversight process that will ensure fair and consistent application across all regions. Right now, the policy does not adequately address this concern.

Second, the civil penalty policy has a major exception for what it calls "criminal conduct." Because virtually all of the federal environmental statutes have felony and misdemeanor criminal provisions that require minimal proof of criminal intent (i.e., proof only of general intent or negligence), a very high percentage of federal environmental violations can theoretically be charged as crimes. Although a company may now be able to avoid actual criminal prosecution by meeting the seven conditions for civil penalty mitigation, theoretically almost any violation can be considered "criminal conduct" and still be the subject of substantial civil penalties as a result. This needs clarification so that such penalties are imposed only in egregious cases: those where there has been intentional misconduct, willful disregard of the law, or the creation of a knowing endangerment.

Third, it is Justice, not EPA, that makes final criminal prosecutorial decisions. DOI needs to publish its own guidance clarifying when

01/31/96 LEGISLATIVE TELECONFERENCE NETWORK SYSTEM LTN1150
15:28:21 PARTICIPANT LIST (ALL PARTICIPANTS) BY:ANC
TCN:60207 SCHEDULED FOR:01/31/96 15:30 TO 17:00 FOR:ANC
PUBLIC HEARING SENATE RESOURCES
LOCATION: ANCHORAGE
SB 199 MR. JEFF CARPENTER DEPT. OF LABOR TESTIFY

01/31/96 LEGISLATIVE TELECONFERENCE NETWORK SYSTEM LTN1150
15:44:39 PARTICIPANT LIST (ALL PARTICIPANTS) BY:FBX
TCN:60207 SCHEDULED FOR:01/31/96 15:30 TO 17:00 FOR:FBX
PUBLIC HEARING SENATE RESOURCES
LOCATION: FAIRBANKS
SB 199 MR. SCOTT CALDER TESTIFY

03/06/96 LEGISLATIVE TELECONFERENCE NETWORK SYSTEM LTN1150
15:33:11 PARTICIPANT LIST (ALL PARTICIPANTS) BY:ANC
TCN:60473 SCHEDULED FOR:03/06/96 15:30 TO 17:00 FOR:ANC
PUBLIC HEARING SENATE RESOURCES

LOCATION: ANCHORAGE
SB 199 } 199 ② PAUL GROSSI DIV WORKERS COMPTESTIFY
SB 199 } ③ KEN DONAJKOWSKI AOGA TESTIFY
SB 199 } ① JEFF CARPENTER TESTIFY
~~SB 199 KEN BOYD TESTIFY~~