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HOUSE COMMITTEE REPORT

(7)
Date Referred to Committee: March 24, 1997

FURTHER REFERRALS:

Finance

Date of Committee Action: 4/9/97

The JUDICIARY Committee considered:

CSSB 41(FIN)

CS FOR SENATE BILL NO. 41(FIN)

ENVIRONMENTAL AUDITS

“An Act relating to environmental audits to determine compliance with certain laws, permits, and regulations.”

recommends it be replaced with the following committee substitute HCS CSSB 41 (JUD) the same title a new title

additional referral to _____ Committee
 attached amendment(s)

ADOPTS: _____ Letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept)

APPROVES PREVIOUS: (Dept/Date)

fiscal note(s) _____

fiscal note(s) DEPT. - LAW, COURTS

zero fiscal note(s) _____

zero fiscal note(s) HCS LABOR

SIGNING WITH RECOMMENDATIONS		DP	DNP	NR	AM
<i>Tom W. ...</i>	CRIFT			✓	
<i>...</i>	MURPHY	✓			
<i>...</i>	GREEN	✓			
<i>Jeanette James</i>	JAMES	✓			
<i>...</i>	BUNDE	✓			
<i>...</i>	BERKOWITZ			✓	

CHAIR'S SIGNATURE *[Signature]*

FISCAL NOTE

No. 5

STATE OF ALASKA
1997 LEGISLATIVE SESSION

Bill Version: CSSB 41(JUD)

(S) Publish Date: 3/13/97

Revision Date: _____ Dept. Affected: Health and Social Services
 Title: Relating to environmental audits to determine compliance with certain laws, permits, and regulations. BRU: Medical Assistance
 Sponsor: Leman Component: Medicaid Facilities
 Requestor: Senate Judiciary COMPONENT SERIAL NO. 230
 See also (SN#): _____

Expenditures/Revenues:

(Thousands of Dollars)

OPERATING	FY98	FY99	FY00	FY01	FY02	FY03
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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CHANGES IN REVENUES ()						
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FUND SOURCE

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (please specify)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of any current year (FY97) cost: \$0.0

ANALYSIS: (Attach a separate page if necessary)

The Judiciary Committee Substitute for SB 41 eliminates any reference to health and safety or the Department of Health and Social Services, so there is no longer any potential impact on the Medicaid Program.

[Handwritten initials]
3/11/97

Prepared by: Nancy Weller
 Division: Medical Assistance

Phone: 465-3355
 Date: 03/10/97

Approved by Commissioner: Karen Perdue, Commissioner
 Agency: Department of Health & Social Services

Date: 3/10/97

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FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

No. 7
Bill Verson: CSSB 41 (FIN)
(S) Publish Date: 3-18-97

Revision Date: _____ Dept. Affected: Department of Law
Title: ...relating to environmental audits to determine BRU: Civil Division
compliance with certain laws, permits... Component: Environmental Law
Sponsor: Senator Leman
Requester: Senate Finance Committee COMPONENT SERIAL NO. 2092

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES	71.7	71.7	71.7	35.9	35.9	35.9
TRAVEL	4.3	4.3	4.3	2.1	2.1	2.1
CONTRACTUAL	44.0	44.0	44.0	25.3	25.3	25.3
SUPPLIES	1.4	1.4	1.4	0.7	0.7	0.7
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	121.3	121.3	121.3	64.0	64.0	64.0

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	121.3	121.3	121.3	64.0	64.0	64.0
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	121.3	121.3	121.3	64.0	64.0	64.0

Estimate of any current year (FY97) cost: \$ 0.0

POSITIONS

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

ANALYSIS: (Attach a separate page if necessary)

This bill creates a new evidentiary privilege that allows environmental audits to be kept confidential in civil and administrative (not criminal) cases. It also grants immunity from civil and administrative penalties for people who voluntarily disclose a violation of an environmental law or who disclose information that leads to the disclosure of a violation of an environmental law. "Environmental law" is defined to include federal, state, and municipal laws and is to be broadly construed.

Audit Privilege. To be privileged, the audits must be voluntary, confidential, internal, and retrospective. Information required to be reported under a law, permit, contract or lease, or information gathered independently of the audit are not covered. In addition, if the state can prove that one of the bill's exceptions apply, then a court may require disclosure.

Immunity. A person who voluntarily discloses a violation of an environmental law, or who discloses information

Prepared by: Joan Kasson *Joan M. Kasson*
Division: Administrative Services Division
Approved by Commissioner: Bruce M. Botelho, Attorney General *Bruce Botelho for*
Agency: Department of Law

Phone: 465-5370
Date: 3/17/97
Date: 3/17/97

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ANALYSIS CONTINUATION:

that leads to the discovery of a violation, would be immune from administrative or civil penalties. The violation must be corrected within 90 days, or pursuant to a compliance agreement that allows for correction within a reasonable time, for immunity to apply. Immunity is not available for violations that result in substantial personal injury on site, or substantial personal, property, or environmental injury offsite. The term "substantial" is not defined. This bill allows for the mitigation of penalties for people who do not qualify for immunity.

It is not possible to accurately quantify the increased costs to litigate the audit privilege and immunity provisions in this bill, in part because of the uncertainty about the types of proceedings to which the provisions would apply. Nevertheless, we have identified what we believe to be the minimum responsible level of resources necessary to contend with the anticipated assertions of privilege and immunity. These are the equivalent of two-thirds of a full-time attorney, and contractual funding for expert witnesses during the first three years of implementation. Once precedents are established, we expect these costs to be reduced.

General Legal Issues Resulting in Fiscal Impact

This is a new area of law, and there will be litigation and appeals related to the new privilege. An agency may have to defend the exercise of legitimate regulatory functions against a claim that the agency is improperly using privileged (confidential) information. Because the bill provides for some exceptions, there will also be litigation over what exceptions apply.

We also anticipate that additional legal assistance will be required for the affected agencies to negotiate, draft and review permits, contracts, leases, regulations and other documents to ensure that adequate compliance information is being gathered and maintained to meet the state's regulatory and proprietary responsibilities. The agencies will also require advice about what information is privileged and about public records requirements.

Section 2 of the bill in AS 09.25.460(a), deletes language that would have allowed the state to obtain objective facts even if they were contained in self audits. This change will result in a fiscal impact on the department due to the necessity for expert witnesses to gather and analyze factual information. Allowing objective facts to be withheld under the privilege will greatly complicate all cases involving self audits, and is a dramatic departure from current law. The Finance CS did remove language concerning the state's ability to obtain audit information in pipeline tariff cases. This change will decrease the department's cost estimate by \$75,000.

Agency-Specific Issues Resulting in Fiscal Impact

We have identified below some of the anticipated impacts on specific departments that lead us to conclude that our estimate of attorney resources is conservative. We noted in our original fiscal note on SB 41 that many of these impacts could be mitigated by limiting the number of departmental programs that are either explicitly or implicitly covered by the bill. With the elimination of the health and safety provisions from SB 41, the department's cost projections have declined by approximately one-third; however, other provisions referring to regulatory agencies remain ambiguous.

FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. CSSB 41 (FIN)

ANALYSIS CONTINUATION:

Department of Environmental Conservation

The bill could impact state-run programs in DEC that require federal approval, for instance Drinking Water and Air Quality. Protecting the state's primacy in these programs will require increased attorney time. We will propose amendments to mitigate the impact (which stems from both the privilege and immunity sections of the bill).

Other Agencies (DNR, DOTPF, Alaska Oil and Gas Conservation Commission)

The bill could jeopardize federal approval of programs like the AOGCC's Underground Injection Control program (the UIC program in Texas has been threatened because of that state's audit law). Protecting the state's interest by retaining primacy in this program will require increased attorney time. Any agency involved in protecting the state's interest in contaminated sites cases require additional attorney and outside expert time.

SUMMARY OF COSTS

The full-time equivalent cost estimate is based on the department's standard attorney cost schedule (\$127,000) and includes clerical support, communications, space, supplies, data processing, and other normal overhead expenses. Case specific travel and expert witness costs are included separately.

FY98 - FY00

Approximately 973 hours @ \$87/hour (2/3 FTE attorney)	\$84.7
Direct case travel	\$3.3
Expert witnesses	\$33.3
Total Costs	\$121.3

FY01 - FY03

Approximately 487 hours @ \$87/hour	\$42.4
Direct case travel	\$1.7
Expert witnesses	\$20.0
Total Costs	\$64.0

FISCAL NOTE

No. 8
 Bill Verson: SSB 41 (FIN)
 (S) Publish Date: 3-18-97

STATE OF ALASKA
 1997 LEGISLATIVE SESSION

Revision Date: 03/17/97
 Title: Environmental & Health Safety Audits
 Sponsor: Sens. Loman, Pearce & Taylor
 Requestor: _____

Dept. Affected: Alaska Court System
 BRU: Trial Courts
 Component: _____
 COMPONENT SERIAL NO. 788

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES	5.3	5.3	5.3	5.3	5.3	5.3
TRAVEL						
CONTRACTUAL	30.6	30.6	30.6	30.6	30.6	30.6
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	35.9	35.9	35.9	35.9	35.9	35.9
CAPITAL EXPENDITURES						
CHANGE IN REVENUES (

Fund Source (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	35.9	35.9	35.9	35.9	35.9	35.9
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other						
TOTAL	35.9	35.9	35.9	35.9	35.9	35.9

Estimate of any current year (FY 97) cost: None

Positions

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

ANALYSIS: (Attach a separate page if necessary)

See attached analysis.

Prepared by: C. S. Christensen III, Staff Counsel *CSC* Phone: 264-8228
 Agency: Alaska Court System Date: 03/17/97

Approved by: Stephanie J. Cole, Acting Administrative Director *SJ Cole* Date: 03/17/97
 Agency: Alaska Court System

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Alaska Court System
Fiscal Analysis
CSSB 41 (FIN)

CSSB 41 (FIN) creates a privilege from disclosure and use in evidence for information contained in an environmental audit in certain civil actions or administrative proceedings. If a person or entity asserts the privilege, the opposing party would need to request an in-camera review of the information, in order to determine if the information is not privileged and must be disclosed.

An in-camera review of this nature can be extremely time consuming; many environmental audits (a term broadly defined in the legislation) are composed of tens of thousands of pages of documents. Cases in which an in-camera review is requested will require large amounts of time for pretrial proceedings. According to the Department of Law, the privilege could be litigated in approximately three to six cases involving contaminated property each year. These are complex cases in which an environmental audit was probably performed. Law estimates that it will take an average of 50 hours to litigate the privilege issue in those contamination cases in which a privilege is asserted. Contaminated property cases are but one example; the privilege can be expected to be claimed in a handful of contested DEC permit cases, as well as in other cases. Law has also advised that in some cases, the court system will need to retain scientific and technical experts to assist in evaluating audit reports.

Due to the complexity of the legislation and the ambiguity of several of its provisions, Law anticipates substantial litigation and appeals resulting from passage of CSSB 41 (FIN), particularly regarding the privilege. It has also indicated a need for additional attorney resources to handle the state involvement in the litigation and appeals. Note, however, that many privilege cases not involving the state will also be litigated, such as cases in which the plaintiff is a private citizen, an environmental organization, or a municipality. Accordingly, the court system will actually see far more cases than the cases which impact Law and DEC. This fiscal note reflects contractual costs for a discovery master to handle the in-camera review of documents, as well as the greater clerical costs associated with cases involving extremely large amounts of documents. It does not reflect costs for increased litigation and appeals resulting from the complexity and ambiguity of the bill.

Alaska Court System
Fiscal Analysis
CSSB 41 (FIN)

Personal Services

<u>Position</u>	<u>Salary</u>	<u>Benefits</u>	<u>Total</u>
Records Clerk, range 10A, Anchorage, PFT, 2 months	\$4,210	\$1,086	\$5,296

Contractual

Discovery master for 375 hours at \$76 an hour. 28,125

Fees of experts to assist discovery master in technical and scientific matters 2,500

Total Contractual 30,625

Total Estimated Cost 335,920

FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

No. 9
Bill Version: CSSB 41 (FIN)
(S) Publish Date: 3-18-97

Revision Date: _____
Title: Environmental & health/safety audits
Sponsor: Senator Leman
Requestor: Senate JUD

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

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
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						
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CHANGE IN REVENUE						
FUND SOURCE #						

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate current year (FY97) impact: \$ None

ANALYSIS: (Attach a separate page if necessary)

Since the Department of Labor was removed from this bill, there will be no fiscal impact.

Prepared by: Alan W. Dwyer, Director *Alan W. Dwyer* Phone: 465-4855
Division: Labor, Standards & Safety Date: 3/7/97
Approved by Commissioner: Tom Cashen, Commissioner *Tom Cashen*
Agency: Department of Labor Date: 3/7/97

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FISCAL NOTE

No. 8Bill Version: CSSB 41 (FIN)(S) Publish Date: 3-18-97

STATE OF ALASKA

1997 LEGISLATIVE SESSION

Revision Date: 03/17/97Title: Environmental & Health Safety AuditsDept. Affected: Alaska Court SystemBRU: Trial Courts

Component: _____

Sponsor: Sens. Leman, Pearce & Taylor

Requestor: _____

COMPONENT SERIAL NO. 768

Expenditures/Revenues

(Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES	5.3	5.3	5.3	5.3	5.3	5.3
TRAVEL						
CONTRACTUAL	30.6	30.6	30.6	30.6	30.6	30.6
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	35.8	35.8	35.9	35.9	35.9	35.8

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES (
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Fund Sources

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	35.9	35.9	35.9	35.9	35.9	35.9
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other						
TOTAL	35.9	35.9	35.9	35.9	35.9	35.9

Estimate of any current year (FY 97) cost: None

Positions

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

ANALYSIS: (Attach a separate page if necessary)

See attached analysis.

Prepared by: C. S. Christensen III, Staff CounselAgency: Alaska Court SystemPhone: 264-8228Date: 03/17/97Approved by: Stephanie J. Cole, Acting Administrative DirectorAgency: Alaska Court SystemDate: 03/17/97

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Rev 1/97

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Alaska Court System
Fiscal Analysis
CSSB 41 (FIN)

CSSB 41 (FIN) creates a privilege from disclosure and use in evidence for information contained in an environmental audit in certain civil actions or administrative proceedings. If a person or entity asserts the privilege, the opposing party would need to request an in-camera review of the information, in order to determine if the information is not privileged and must be disclosed.

An in-camera review of this nature can be extremely time consuming; many environmental audits (a term broadly defined in the legislation) are composed of tens of thousands of pages of documents. Cases in which an in-camera review is requested will require large amounts of time for pretrial proceedings. According to the Department of Law, the privilege could be litigated in approximately three to six cases involving contaminated property each year. These are complex cases in which an environmental audit was probably performed. Law estimates that it will take an average of 50 hours to litigate the privilege issue in those contamination cases in which a privilege is asserted. Contaminated property cases are but one example; the privilege can be expected to be claimed in a handful of contested DEC permit cases, as well as in other cases. Law has also advised that in some cases, the court system will need to retain scientific and technical experts to assist in evaluating audit reports.

Due to the complexity of the legislation and the ambiguity of several of its provisions, Law anticipates substantial litigation and appeals resulting from passage of CSSB 41 (FIN), particularly regarding the privilege. It has also indicated a need for additional attorney resources to handle the state involvement in the litigation and appeals. Note, however, that many privilege cases not involving the state will also be litigated, such as cases in which the plaintiff is a private citizen, an environmental organization, or a municipality. Accordingly, the court system will actually see far more cases than the cases which impact Law and DEC. This fiscal note reflects contractual costs for a discovery master to handle the in-camera review of documents, as well as the greater clerical costs associated with cases involving extremely large amounts of documents. It does not reflect costs for increased litigation and appeals resulting from the complexity and ambiguity of the bill.

Alaska Court System
Fiscal Analysis
CSSB 41 (FIN)

Personal Services

<u>Position</u>	<u>Salary</u>	<u>Benefits</u>	<u>Total</u>
Records Clerk, range 10A, Anchorage, PFT, 2 months	\$4,210	\$1,085	\$5,295

Contractual

Discovery master for 375 hours at \$75 an hour. 28,125

Fees of experts to assist discovery master in technical and scientific matters 2,500

Total Contractual 30,625

Total Estimated Cost \$35,920

FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. SB 41

Revision Date:

Dept. Affected: Alaska Court System

Title: Environmental & Health Safety Audits

BRU: Trial Courts

Component:

Sponsor: Sens. Leman, Pearce & Taylor

Requestor: Judiciary

COMPONENT SERIAL NO. 768

Expenditures/Revenues

(Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES	7.9	7.9	7.9	7.9	7.9	7.9
TRAVEL						
CONTRACTUAL	40.0	40.0	40.0	40.0	40.0	40.0
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	47.9	47.9	47.9	47.9	47.9	47.9

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	47.9	47.9	47.9	47.9	47.9	47.9
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other						
TOTAL	47.9	47.9	47.9	47.9	47.9	47.9

Estimate of any current year (FY 97) cost: None

Positions

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

ANALYSIS: (Attach a separate page if necessary)

See attached analysis.

Prepared by: C. S. Christensen III, Staff Counsel

Agency: Alaska Court System

Phone: 264-8228

Date: 02/24/97

Approved by: Arthur H. Snowden, II, Administrative Director

Agency: Alaska Court System

Date: 02/24/97

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Alaska Court System
Fiscal Analysis
CSSB 41 (L&C)

CSSB 41 (L&C) creates a privilege from disclosure and use in evidence for information contained in an environmental audit in certain civil actions or administrative proceedings. If a person or entity asserts the privilege, the opposing party would need to request an in-camera review of the information, in order to determine if the information is not privileged and must be disclosed.

An in-camera review of this nature can be extremely time consuming; many environmental audits (a term broadly defined in the legislation) are composed of tens of thousands of pages of documents. Cases in which an in-camera review is requested will require large amounts of time for pretrial proceedings. According to the Department of Law, the privilege could be litigated in approximately three to six cases involving contaminated property each year. These are complex cases in which an environmental audit was probably performed. Law estimates that it will take an average of 50 hours to litigate the privilege issue in those contamination cases in which a privilege is asserted. Contaminated property cases are but one example; the privilege can be expected to be claimed in a handful of contested DEC permit cases, as well as potentially large number of cases involving OSHA and DHSS. In addition, due to the complexity of the legislation and the ambiguity of several of its provisions, Law anticipates substantial litigation and appeals, particularly regarding the privilege. Law has also advised that in some cases, the court system will need to retain scientific and technical experts to assist in evaluating audit reports.

The Department of Law has estimated a need for one additional attorney to handle the increased litigation and appeals resulting from passage of CSSB 41 (L&C), about half of which will result from the creation of the privilege. Note that many privilege cases not involving state agencies will also be litigated, such as cases in which the plaintiff is a private citizen or a municipality. Accordingly, the court system will see far more cases than the cases which involve Law, DEC, and other state entities such as OSHA and DHSS. This fiscal note reflects contractual costs for a discovery master to handle the in-camera review of documents, as well as the greater clerical costs associated with cases involving extremely large amounts of documents.



Alaska State Legislature

Please enter into the record my testimony to the House Judiciary
committee name
 committee on SB 41 (as amended) , dated April 9, 1997
bill/subject

I note that the sponsor of this bill, in his statement on it, states: "Environmental Auditing has become increasingly popular in the past two decades. In the U.S., 20 states have enacted self-audit laws similar to SB 41" While I am sure that the preceding statement is true, I DO NOT believe that it is sufficient reason for Alaska to follow in the lead of those other states.

I believe that SB 41 gives too much power to industry, to conceal activities that THE PUBLIC HAS A RIGHT TO KNOW. Just as we would not sign and mail off a blank check, leaving it to the recipient to fill in the correct amount, we should NEVER give up the right of the public, acting through the agency of the state, to properly regulate industry.

I am sure that the sponsors of this bill are sincere in their belief that it is a good idea, is justified, and will improve the present situation as regards the behavior of industry, I believe that this bill, if enacted, would give industry much too much power, and that power would have been taken from the public, which is the proper seat of all legal power in our country and our state, acting, of course, through it's properly constituted legal institutions.

I urge that you vote to kill this bill; give it a quick, merciful, and painless death. I believe that the only way that it could be amended in a way that would make it compatible with the ideals on which our country was founded would be as follows: Substitute, for lines 4 through 14, and all the text on the following pages, the following language:

THE STATE, BEARING IN MIND IT'S RESPONSIBILITY TO ALL OF IT'S CITIZENS, SHALL MAKE EVERY POSSIBLE EFFORT TO FULLY ENFORCE ALL OF THE LAWS AND REGULATIONS ON THE BOOKS AT THIS TIME, AND IN THE FUTURE, WITHOUT ANY PREFERENCES OR EXCEPTIONS.

Signed: Gerald R. Brookman Janet E. Brookman
 Testifier (Gerald R. Brookman)

Myself, as an individual, and my wife, Janet E. Brookman

Representing (Optional)

715 Muir Avenue, Kenai, Alaska 99611

Address

907-283-9329 (FAX: 907-283-7180)

Phone No.

STATE OF ALASKA

TONY KNOWLES, GOVERNOR

RECEIVED

APR 14 1997

DEPT. OF ENVIRONMENTAL CONSERVATION

DIVISION OF ENVIRONMENTAL HEALTH

DIRECTOR'S OFFICE

555 CORDOVA STREET

ANCHORAGE, ALASKA 99501

<http://www.state.ak.us/dec/home.htm>

Telephone: (907) 269-7644

Fax: (907) 269-7654

E-mail: jadair@envircon.state.ak.us

April 10, 1997

The Honorable Jeanette James
Alaska House of Representatives
Room 102, Capitol Building
Juneau, AK 99801

Dear Representative James:

During my testimony before the House Judiciary Committee on April 7, 1997, on the environmental self-audit bill, CSSB 41(FIN), I overlooked the legal basis for the "stipulated penalties" that are included in certain Department of Environmental Conservation (DEC) compliance orders by consent. I wanted to take this opportunity to clarify the record. (It's always good to have your attorney in the audience!)

As we discussed during the hearing, a compliance order by consent (COBC) may require that the permittee (referred to as the "respondent" in the COBC) pay a stipulated sum as a penalty or damages. Or, it may provide that if the respondent fails to come into compliance by a certain date, the respondent must pay a stipulated sum for each day thereafter until the respondent achieves compliance. In a compliance order by consent, the respondent agrees to be bound by the terms and conditions of the order, including any terms and conditions regarding payments to the state.

While the statutes do not specifically provide for stipulated penalties in these types of administrative orders, a number of statutes authorize DEC to recover, through actions brought in state court, the state's costs in responding to violations as well as certain damages (as opposed to penalties). For example, under AS 46.03.760(a), DEC may bring a civil action to recover a sum that represents:

- (1) liquidated damages for environmental harm;
- (2) the state's reasonable costs incurred in detecting, investigating, and attempting to correct the violation; and
- (3) the economic savings realized by the owner or operator because of their noncompliance.

As I also mentioned at the hearing, under AS 46.03.760(e), DEC may also recover a civil penalty for violations of the state's hazardous waste and air pollution control laws. We also have authority for penalties for certain large oil spills under AS 46.03.759. Finally, AS 46.03.822 provides another

The Honorable Jeannette James

Page 2

April 10, 1997

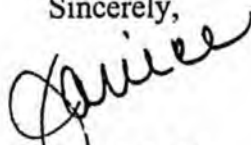
example: in cases involving releases of hazardous substances, DEC may recover damages and the state's costs of response, containment, removal, and remedial action.

These and other statutes containing similar provisions provide DEC with the necessary legal authority to include "stipulated penalties" in compliance orders by consent. By entering into a compliance order by consent, DEC and the respondent avoid the necessity of litigation to resolve questions about payments to the state for damages and response costs and, in some limited cases, penalties. The amounts are agreed upon and spelled out in the COBC, with considerable savings in time and money for everyone involved.

Please accept my apologies for any confusion my testimony may have caused. As you know, you can do certain things so many times that the specific unpinnings are no longer a question in your mind. Please don't hesitate to get in touch with me if I can provide you with any other information.

By the way, I don't know if Barbara mentioned anything, but we had a great time in House Resources on HB 144, the pesticide fee bill. She really set the tone (I'll let her tell you about that), and I think I can honestly say a good time was had by all. Quite a statement for a legislative hearing! Thanks again for introducing that bill for us. It moved out of Resources and I hope the Finance Committee will be just as amenable to the concept.

Sincerely,



Janice Adair
Director

JA/id (j:\eh\director\james.wpd)

cc: The Honorable Joe Green, Chairman
House Judiciary Committee

Alaska Oil and Gas Association



121 West Fireweed Lane, Suite 207
Anchorage, Alaska 99503-2035
Phone: (907) 272-1481 Fax: (907) 279-8114

April 16, 1997

Fax #: 1-907-465-4316

The Honorable Joseph Green
Alaska State House of Representatives
State Capitol, Room 118
Juneau, AK 99801-1182

HCS CSSB 41, Environmental Audits

Dear Representative Green:

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

AOGA understands that HCS CSSB 41 (Environmental Self-Audit legislation) will soon be before the House of Representatives for a vote. AOGA supports the intent of environmental self-audit legislation and believes HCS CSSB 41 moves environmental compliance in a positive direction through its encouragement of self-auditing.

The majority of AOGA members currently conduct self-audits as a means of ensuring compliance and see value in this legislation which encourages greater utilization of self-audits by providing qualified immunity and privilege.

Self-auditing is an important tool for voluntary compliance. By enacting legislation which provides privilege and immunity for self-audits, the state is saying voluntary compliance with environmental laws and regulations is in the best interest of the state as well as industry. We encourage your support of HCS CSSB 41.

Sincerely,

A handwritten signature in cursive script, appearing to read 'L. A. Gray', is written over the typed name and title.

L. A. GRAY
Public Affairs Manager

Valdez Office

P.O. Box 108, Valdez, AK 99686
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April 16, 1997

Senator Loren Leman
State Capitol
Juneau, AK 99801
FAX: (907) 465-3810

RE: Proposed amendments to SB 41 to minimize its adverse impacts on whistleblowers

Dear Senator Leman,

I am writing to respond to your letter to Representative Therriault regarding "SB 41 and 'whistleblower' laws" (dated April 15, 1997). Your letter suggests that you did not intend SB 41 to have a chilling effect on employees concerned about environmental violations or adversely impact their ability to receive a full and fair hearing in a whistleblower complaint.

The Alaska Forum appreciates this clarification of your intent. Nevertheless, we believe the bill itself still remains unclear on this point. For several reasons, the Alaska Forum hopes you will consider clarifying your intent in the language of the bill.

First, the Alaska Whistleblower Act (AS 39.90.10C) applies only to public employees. Private sector employees receive no protections under this statute. That is why the vast majority of private sector whistleblowers -- such as the long list of TAPS whistleblowers and the more recent case involving a Doyon Drilling employee -- must turn to federal law for remedies for harassment and retaliation for speaking the truth. The unfortunate reality in Alaska is that private sector whistleblowers receive little meaningful protection under current state law. Without additional clarification, SB 41 will only add to this problem.

Second, Section 09.25.450(a)(2) [page 3, line 2-3, draft 0-LS0299L] could be interpreted to mean that the only exception to the bill's privilege provisions are in "worker's compensation proceedings." There is ample legal precedent for lawyers to argue about, and courts to conclude, that because whistleblower proceedings are not explicitly listed as an exception in this section they therefore are included under the bill's privilege provisions. More generally, in any whistleblower case based upon diversity jurisdiction in federal court, lawyers could effectively argue that state law governs the applicability of any asserted privilege.

Letter to Senator Leman on SB 41
April 16, 1997

Page 2 of 3

Third, Section 09.25.460(a)(3) says that no privilege exists for "a source that was **not** involved in compiling, preparing, or conducting the environmental audit report" (emphasis added). You suggest that this section thus provides protection for whistleblowers as one potential "source" of information. Unfortunately, this ignores the reality that whistleblowers often learn of violations during activities that could, if this bill is enacted, fall under the rubric of an audit report. Evidence of the violation disclosed by the whistleblower, and for which disclosure the whistleblower subsequently experienced retaliation and harassment, would be privileged evidence. While this concern may seem paranoid to you and not based on recent experience in other states, experience with whistleblower proceedings gives us great cause for concern that this section would make it much more difficult to receive a full and fair hearing in a whistleblower complaint.

Finally, and most importantly, Section 1 (page 1) is silent on the issue of legislative intent as it relates to whistleblowers. Again, unless the language of the bill itself is clear that the legislature does not intend to adversely impact whistleblowers then lawyers will have plenty of room to argue, and courts to conclude, that whistleblower proceedings are not exempt from the privilege provisions of SB 41.

The Alaska Forum urges you to make your intent -- that SB 41 not adversely impact whistleblowers -- clear in the language of SB 41 itself. To this end, we propose the following two amendments to SB 41:

Amendment 1 -- Section 1. "FINDINGS: INTENT."
(to be inserted immediately following line 15, page 2)

(4) the public also has a strong interest in ensuring that concerned employees who disclose violations of environmental laws or regulations do not experience harassment, retaliation, discrimination or other reprisals for making such disclosures; the legislature intends that the audit privilege established in this Act should in no way curtail the ability of concerned employees to discover or introduce evidence in any administrative or judicial proceeding alleging harassment, retaliation, discrimination or other reprisals;

Amendment 2 -- Section 09.25.450(a)(2)
(to be inserted immediately before the final "." on page 2, line 2)

, employment discrimination proceedings or whistleblower proceedings.

I hope you will consider making these two amendments to SB 41 before you send the bill to Governor Knowles. These amendments will make it clear that you and the legislature did not intend SB 41 to adversely impact whistleblower rights.

Letter to Senator Leman on SB 41
April 16, 1997

Page 3 of 3

If you have any questions or need clarification, please call me at (907)835-4731, or Mike Riley, program director, at (206)628-9464.

Sincerely,



Stan Stephens
President

cc: Representative Ethan Berkowitz, FAX: (907)465-2137
Representative Eric Croft, FAX: (907)465-4419
Representative John Davics, FAX: (907)465-3519
Representative Kim Elton, FAX: (907)465-2108
Representative Joe Green, FAX: (907)465-4316
Representative Ben Grussendorf, FAX: (907)465-2278
Representative Mark Hanley, FAX: (907)465-2418
Representative Reggie Joule, FAX: (907)465-4586
Representative Allen J., FAX: (907)465-6651
Representative Gene Kubina, FAX: (907)465-3799
Representative Carl Moses, FAX: (907)465-3445
Representative Irene Nicholia, FAX: (907)465-2197
Representative Gene Therriault, FAX: (907)465-3884

Senator Al Adams, FAX: (907)465-4821
Senator Jim Duncan, FAX: (907)465-4748
Senator Johnny Ellis, FAX: (907)465-2529
Senator Lyman Hoffman, FAX: (907)465-4523
Senator Georgianna Lincoln, FAX: (907)465-2652
Senator Druc Pearce, FAX: (907)465-3872
Senator Bert Sharp, FAX: (907)465-2070
Senator Robin Taylor, FAX: (907)465-3922

Tony Knowles, Governor, FAX: (907)465-3532
Michele Brown, Commissioner, Department of Environmental, FAX: (907)465-5070
Janice Adair, ADEC Legislative Liaison, FAX: (907)269-7654
Marilyn Heiman, Special Staff Assistant to the Governor, FAX: (907)465-3532

HOUSE CS FOR CS FOR SENATE BILL NO. 41(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:

Referred:

Sponsor(s): SENATORS LEMAN, Pearce, Taylor

A BILL

FOR AN ACT ENTITLED

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

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

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

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

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

1 environmental business practices and procedures; this encouragement can best be achieved by
 2 preserving the free flow of information; the free flow of the kind of information that is
 3 generated by self-audits would be curtailed if a privilege for the audits were not available;
 4 therefore, it is the intent of the legislature to recognize an audit privilege under this Act to
 5 protect the confidentiality of communications related to voluntary internal environmental
 6 audits; however, the legislature does not intend that the parts of an audit report consisting of
 7 confidential self-evaluation and analysis that are privileged under this Act may be used to
 8 shield a person from liability under applicable laws and regulations by blocking access to
 9 underlying facts;

10 (3) the public also has a strong interest in obtaining cost-effective correction
 11 of inadvertent environmental violations; this goal can best be achieved by offering qualified
 12 immunity from administrative and civil penalties to regulated persons who promptly report
 13 known violations of environmental regulations that are uncovered as part of an audit so that
 14 the violations can promptly be corrected and a compliance plan can be negotiated with the
 15 appropriate government agency;

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

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

22 **Article 5. Privileges and Immunities**

23 **Related to Disclosure of Certain Self-Audits and Violations.**

24 **Sec. 09.25.450. Audit report privilege.** (a) Except as provided in
 25 AS 09.25.460, an owner or operator who prepares an audit report or causes an audit
 26 report to be prepared has a privilege to refuse to disclose, and to prevent another
 27 person from disclosing, the parts of the report that consist of confidential self-
 28 evaluation and analysis of the owner's or operator's compliance with environmental
 29 laws. Except as provided in AS 09.25.455 - 09.25.480, the privileged information is
 30 not admissible as evidence or subject to discovery in

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

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

3 (b) With respect to confidential self-evaluation and analysis in an
4 environmental audit, in order to qualify for the privilege under this section and the
5 immunity under AS 09.25.475, at least 15 days before conducting the audit, the owner
6 or operator conducting the audit must give notice by electronic filing that complies
7 with an ordinance or regulation authorized under (j) of this section or by certified mail
8 with return receipt requested to the commissioner's office of the department, and, when
9 the audit includes an assessment of compliance with a municipality's ordinances, to
10 the municipal clerk, of the fact that it is planning to commence the audit. The notice
11 must specify the facility, operation, or property or portion of the facility, operation, or
12 property to be audited, the date the audit will begin and end, and the general scope of
13 the audit. The notice may provide notification of more than one scheduled
14 environmental audit at a time. Once initiated, an audit shall be completed within a
15 reasonable time, but no longer than 90 days, unless a longer period of time is agreed
16 upon between the owner or operator and the department or the municipality, as
17 appropriate. The audit report must be completed in a timely manner.

18 (c) The following persons may claim the privilege available under (a) of this
19 section:

20 (1) the owner or operator who prepared the audit report or caused the
21 audit report to be prepared;

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

25 (3) a person to whom confidential self-evaluation or analysis is
26 disclosed under AS 09.25.455(b); or

27 (4) a custodian of the audit results.

28 (d) A person who conducts or participates in the preparation of an audit report
29 and who actually observed or participated in conditions or events being reviewed for
30 compliance may testify about those conditions or events but may not, in a proceeding
31 covered by (a) of this section, be compelled to testify about or produce documents

1 consisting of confidential self-evaluation and analysis.

2 (e) A person claiming the privilege described in this section has the burden of
3 establishing the applicability of the privilege.

4 (f) To facilitate identification, each document in an audit report that contains
5 confidential self-evaluation or analysis shall be labeled "AUDIT REPORT:
6 PRIVILEGED DOCUMENT."

7 (g) A government agency or its employees or agents may not, as a condition
8 of a permit, license, or approval issued under an environmental law, require an owner
9 or operator to waive the privilege available under this section.

10 (h) Except when the privilege is waived under AS 09.25.455(a) or disclosure
11 is made under AS 09.25.455(b)(3) or 09.25.475 or 09.25.480, neither a government
12 agency nor its employees or agents may review or otherwise use the part of an audit
13 report consisting of confidential self-evaluation or analysis during an inspection of a
14 regulated facility, operation, or property or an activity of a regulated facility, operation,
15 or property.

16 (i) This section may not be construed to

17 (1) prevent a government agency from issuing an emergency order,
18 seeking injunctive relief, independently obtaining relevant facts, conducting necessary
19 inspections, or taking other appropriate action regarding implementation and
20 enforcement of an applicable environmental law, except as otherwise provided in
21 AS 09.25.475; or

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

24 (j) The department or municipality may, by regulation or ordinance,
25 respectively, allow the notice required under (b) of this section to be filed by facsimile
26 or other electronic means if the means ensures adequate proof of

27 (1) submittal of the notice by the owner or operator; and

28 (2) receipt by the department or municipality.

29 (k) There is no privilege under this section for documents or communications
30 in a criminal proceeding.

31 **Sec. 09.25.455. Waiver and disclosure.** (a) The privilege in AS 09.25.450

1 does not apply to the extent the privilege is expressly waived in writing by the owner
2 or operator who prepared the audit report or caused the report to be prepared.

3 (b) Disclosure of the part of an audit report or information consisting of
4 confidential self-evaluation or analysis does not waive the privilege established by
5 AS 09.25.450 if the disclosure is made

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

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

10 (B) the owner's or operator's lawyer or the lawyer's
11 representative;

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

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

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

16 or

17 (F) the principal of the independent contractor who conducted
18 an audit on the principal's behalf;

19 (2) under the terms of a confidentiality agreement between the owner
20 or operator who prepared the audit report or caused the audit report to be prepared and

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

23 (B) a transferee or potential transferee of an interest in the
24 facility, operation, or property;

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

27 (D) a person engaged in the business of insuring, underwriting,
28 or indemnifying the facility, operation, or property; or

29 (E) a person who, along with the person who prepared the audit
30 report or caused the audit report to be prepared, also is an owner or operator
31 of part or all of the facility, operation, or property; or

1 (3) under a written claim of confidentiality to a government official or
2 agency by the owner or operator who prepared the audit report or who caused the audit
3 report to be prepared.

4 (c) Documents consisting of confidential self-evaluation and analysis that are
5 disclosed under (b)(3) of this section are required to be kept confidential and are not
6 subject to disclosure under AS 09.25.110 - 09.25.220.

7 (d) A party to a confidentiality agreement described in (b)(2) of this section
8 who violates the agreement is liable for damages caused by the violation and for other
9 penalties stipulated in the agreement.

10 **Sec. 09.25.460. Nonprivileged materials.** (a) There is no privilege under
11 AS 09.25.450 for that part of an audit report that contains the following:

12 (1) a document, communication, datum, report, or other information
13 required by a government agency to be collected, developed, maintained, or reported
14 under an environmental law, under a permit issued under an environmental law, as a
15 requirement for obtaining, maintaining, or renewing a license, as a requirement under
16 a contract or lease with the state or a municipality, or as a requirement under an
17 administrative order or court order or decree;

18 (2) information that a government agency obtains by observation,
19 sampling, or monitoring;

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

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

26 (5) a document, communication, datum, report, or other information
27 that is independent of the environmental audit, whether prepared or existing before,
28 during, or after the audit; and

29 (6) a document, communication, datum, report, or other information,
30 including an agreement or order between a government agency and an owner or
31 operator, regarding a compliance plan or strategy.

1 (b) An audit report is not privileged and is admissible as evidence and subject
 2 to discovery and use in a proceeding relating to pipeline rates, tariffs, fares, or charges.
 3 The owner or operator who prepared the audit report or caused the report to be
 4 prepared is entitled to a protective order in a proceeding relating to pipeline rates,
 5 tariffs, fares, or charges to maintain the confidentiality of the audit from discovery,
 6 use, or admission in evidence in other types of proceedings. Discovery, use, or
 7 admission in evidence in a proceeding relating to pipeline rates, tariffs, fares, or
 8 charges is not considered to have waived the privilege for any other purpose.

9 **Sec. 09.25.465. Exception: disclosure required by court.** (a) A court or
 10 administrative hearing officer with jurisdiction may require disclosure of confidential
 11 self-evaluation and analysis contained in an audit report in a civil or administrative
 12 proceeding if the court or administrative hearing officer determines, after an in camera
 13 review consistent with the appropriate rules of procedure, that the

14 (1) privilege is asserted for a criminal or fraudulent purpose;

15 (2) information for which the privilege is claimed is evidence of
 16 substantial injury, or the imminent or present threat of substantial injury, to one or
 17 more persons at the site audited or to persons, property, or the environment offsite or
 18 is evidence of the causes and circumstances leading to such injury or the imminent or
 19 present threat of such injury;

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

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

27 (5) privilege would result in a miscarriage of justice or the denial of
 28 a fair trial to the party challenging the privilege.

29 (b) A party seeking an in camera review as provided under (a) of this section
 30 shall provide to the court or administrative hearing officer a factual basis adequate to
 31 support a good faith belief by a reasonable person that the documents or

1 communications for which disclosure is sought are likely to reveal evidence to
2 establish that an exception in (a) of this section applies.

3 (c) A party seeking disclosure of confidential self-evaluation and analysis
4 during an in camera review under this section has the burden of proving that an
5 exception in (a) of this section applies.

6 **Sec. 09.25.475. Voluntary disclosure; immunity.** (a) Except as provided by
7 this section, an owner or operator who makes a voluntary disclosure of a violation of
8 an environmental law, or of circumstances, conditions, or occurrences that constitute
9 or may constitute such a violation, is immune from an administrative or civil penalty
10 for the violation disclosed, for a violation based on the facts disclosed, and for a
11 violation discovered because of the disclosure that was unknown to the owner or
12 operator making the disclosure.

13 (b) Immunity is not available under this section if the violation resulted in, or
14 poses or posed an imminent or present threat of, substantial injury to one or more
15 persons at the site audited or to persons, property, or the environment offsite.

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

17 (1) the disclosure is made promptly after knowledge of the information
18 disclosed is obtained by the owner or operator;

19 (2) the disclosure is made in writing by certified mail to the department
20 or a municipality with enforcement jurisdiction with regard to the violation disclosed;

21 (3) an investigation of the violation was not initiated or the violation
22 was not independently detected by the department or a municipality with enforcement
23 jurisdiction before the disclosure was made using certified mail; under this paragraph,
24 the department or municipality has the burden of proving that an investigation of the
25 violation was initiated or the violation was detected before receipt of the certified mail;
26 and

27 (4) the disclosure arises out of a voluntary environmental audit.

28 (d) To qualify for immunity under this section, the owner or operator making
29 the disclosure must

30 (1) promptly initiate appropriate efforts to achieve compliance and
31 remediation and pursue those efforts with due diligence;

1 (2) promptly initiate appropriate efforts to discontinue, abate, or
2 mitigate any conditions or activities causing injury or likely to cause imminent injury
3 to one or more persons at the site audited or to person, property, or the environment
4 offsite;

5 (3) correct the violation within 90 days or enter into a compliance
6 agreement with the department or the municipality, as appropriate, that provides for
7 completion of corrective and remedial measures within a reasonable time;

8 (4) implement appropriate measures designed to prevent the recurrence
9 of the violation; and

10 (5) cooperate with the department or municipality, as appropriate, in
11 connection with an investigation of the issues identified in the disclosure; the
12 department or municipality may request that the owner or operator allow the
13 department or municipality to review, under a written claim of confidentiality as
14 described in AS 09.25.455(b)(3), the part of the audit report that describes the
15 implementation plan or tracking system developed to correct past noncompliance,
16 improve current compliance, or prevent future noncompliance.

17 (e) A disclosure is not voluntary for purposes of this section if it is a
18 disclosure to the department or municipality expressly required by an environmental
19 law, a permit, a license, or an enforcement order or decree.

20 (f) Immunity under this section for violation of an environmental law is
21 available only for a violation that is discovered as a result of information or documents
22 first produced or obtained during the time period specified in the notice required under
23 AS 09.25.450(b).

24 (g) During the period between receipt of the audit notice required under
25 AS 09.25.450(b) and the specified end date of the audit, the department or
26 municipality may not initiate an inspection, monitoring, or other investigative activity
27 concerning the audited facility, operation, or property based on the receipt of a notice
28 under AS 09.25.450. The department or municipality has the burden of proving that
29 an inspection, monitoring, or other investigative activity concerning the audited facility,
30 operation, or property initiated after receiving a notice under AS 09.25.450 was not
31 initiated based on receiving the notice.

1 (h) A violation that has been voluntarily disclosed and to which immunity
2 applies under this section shall be identified by the department or municipality in its
3 compliance history report as having been voluntarily disclosed.

4 (i) This section may not be construed to prevent the department or
5 municipality from

6 (1) seeking injunctive relief; or

7 (2) issuing an emergency order in a situation involving an imminent
8 and substantial danger to public health or welfare or the environment.

9 **Sec. 09.25.480. Exceptions to immunity; mitigation.** (a) There is no
10 immunity under AS 09.25.475 if a court or administrative hearing officer finds that

11 (1) the owner or operator claiming the immunity has

12 (A) intentionally, knowingly, or recklessly committed or
13 authorized the violation;

14 (B) within the 36 months preceding the violation, committed,
15 at the same facility or associated facilities located in the state, a pattern of
16 violations that are the same as or closely related to the violation for which the
17 immunity is sought; or

18 (C) not attempted to bring the facility, operation, or property
19 into compliance so as to constitute a pattern of disregard of environmental
20 laws;

21 (2) the violation was authorized or committed intentionally, knowingly,
22 or recklessly by a member of the owner's or operator's management and the owner's
23 or operator's policies contributed materially to the occurrence of the violation; or

24 (3) the owner or operator, after taking into account the cost of
25 completing corrective and remedial measures within a reasonable time and
26 implementing appropriate measures to prevent recurrence of the violation, realized
27 substantial economic savings in not complying with the requirement for which a
28 violation is charged; the exception to immunity in this paragraph applies only to that
29 portion of a penalty that reflects the economic savings of noncompliance after taking
30 into account the cost of completing the corrective, remedial, and preventive measures
31 necessary to qualify for immunity.

1 (b) There is no immunity under AS 09.25.475 from an administrative or civil
2 penalty for the violation of an administrative or court order or for violation of a term
3 or condition of an administrative or court order.

4 (c) An administrative or civil penalty that is imposed on an owner or operator
5 for violation of an environmental law when the owner or operator has made a
6 voluntary disclosure under AS 09.25.475(a) but is not granted immunity because of (a)
7 of this section may, to the extent appropriate and not prohibited by law, be mitigated
8 by

9 (1) the good faith actions of the owner or operator in disclosing the
10 violation;

11 (2) efforts by the owner or operator to conduct environmental audits
12 and to complete any resulting implementation plan or tracking system for corrective
13 and preventive action;

14 (3) remediation;

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

17 (5) the nature of the violation; and

18 (6) other relevant considerations.

19 **Sec. 09.25.485. Relationship to other recognized privileges.** AS 09.25.450 -
20 09.25.490 do not limit, waive, or abrogate the scope or nature of a statutory or
21 common law privilege, including the work product doctrine, the attorney-client
22 privilege, and any other privilege recognized by a court with appropriate authority in
23 this state.

24 **Sec. 09.25.490. Definitions.** (a) In AS 09.25.450 - 09.25.490,

25 (1) "audit report" means a report that includes each document and
26 communication, other than those set out in AS 09.25.460, produced from an
27 environmental audit; general components that may be contained in a completed audit
28 report include

29 (A) a report, prepared by an auditor, monitor, or similar person,
30 including the scope of the audit, the dates the audit began and ended, the
31 information gained in the audit, findings, conclusions, recommendations,

1 exhibits, and appendices; the types of exhibits and appendices that may be
 2 contained in an audit report include supporting information that is collected or
 3 developed for the primary purpose and in the course of an environment audit,
 4 including

- 5 (i) interviews with current or former employees;
- 6 (ii) field notes and records of observations;
- 7 (iii) findings, opinions, suggestions, conclusions,
 8 guidance, notes, drafts, and memoranda;
- 9 (iv) legal analyses;
- 10 (v) drawings;
- 11 (vi) photographs;
- 12 (vii) laboratory analyses and other analytical data;
- 13 (viii) computer generated or electronically recorded
 14 information;
- 15 (ix) maps, charts, graphs, and surveys; and
- 16 (x) other communications and documents associated with
 17 an environmental audit;

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

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

23 (2) "confidential self-evaluation and analysis" means the part of an
 24 audit report that consists of interviews with current or former employees conducted by
 25 the auditor; field notes and records of observations made by the auditor; findings,
 26 opinions, suggestions, conclusions, guidance, notes, drafts, and analyses performed by
 27 the auditor; memoranda and documents that evaluate or analyze all or part of the
 28 material contained in the audit report, including findings, conclusions, opinions,
 29 recommendations made by the auditor, and an audit implementation plan or tracking
 30 system to correct past noncompliance, improve current compliance, or prevent future
 31 noncompliance with an environmental law, and that is

1 (A) a voluntary, confidential, critical, internal, and retrospective
2 review, self-evaluation, or analysis of conduct, practices, and occurrences and
3 their resulting consequences; and

4 (B) prepared and maintained with the expectation that it will be
5 kept confidential;

6 (3) "department" means the Department of Environmental Conservation;

7 (4) "environmental audit" means a voluntary audit that an owner or
8 operator of a regulated facility, operation, or property conducts or causes to be
9 conducted, whether or not on a regular basis or in response to a particular event, that
10 is specifically designed and undertaken to assess compliance with environmental laws
11 or a permit, license, or approval issued under those laws, including an assessment that
12 is part of the owner's or operator's compliance management system and that is a

13 (A) systematic, objective, and periodic review of the facility,
14 operation, or property related to meeting the requirements of environmental
15 laws or a permit, license, or approval issued under those laws; or

16 (B) documented, systematic procedure or practice that reflects
17 the owner's or operator's due diligence in preventing, detecting, and correcting
18 violations of environmental laws or a permit, license, or approval issued under
19 those laws at the facility, operation, or property;

20 (5) "environmental law" means

21 (A) a federal or state environmental law implemented by the
22 department; or

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

25 (6) "operator" means a person or persons who direct, control, or
26 supervise all or part of a regulated facility, operation, or property;

27 (7) "owner" means a person or persons with a proprietary or possessory
28 interest in a regulated facility, operation, or property;

29 (8) "penalty" means an administrative or civil sanction imposed by the
30 state or a municipality to punish a person for a violation of a statute, rule, regulation,
31 or ordinance; the term does not include a technical or remedial provision ordered by

1 a government agency, nor an administrative or civil sanction relating to pipeline rates,
2 tariffs, fares, or charges;

3 (9) "regulated facility, operation, or property" means a facility,
4 operation, or property that is regulated under an environmental law.

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

7 (c) For purposes of this chapter, unless the context requires otherwise, a person
8 acts

9 (1) "intentionally" with respect to a result described by a provision of
10 law defining a violation when the person's conscious objective is to cause that result;
11 when intentionally causing a particular result is an element of a violation, that intent
12 need not be the person's only objective;

13 (2) "knowingly" with respect to conduct or to a circumstance described
14 by a provision of law defining a violation when the person is aware that the conduct
15 is of that nature or that the circumstance exists; when knowledge of the existence of
16 a particular fact is an element of a violation, that knowledge is established if a person
17 is aware of a substantial probability of its existence, unless the person actually believes
18 it does not exist; a person who is unaware of conduct or a circumstance of which the
19 person would have been aware had that person not been intoxicated acts knowingly
20 with respect to that conduct or circumstance;

21 (3) "recklessly" with respect to a result or to a circumstance described
22 by a provision of law defining a violation when the person is aware of and consciously
23 disregards a substantial and unjustifiable risk that the result will occur or that the
24 circumstance exists; the risk must be of such a nature and degree that disregard of it
25 constitutes a gross deviation from the standard of conduct that a reasonable person
26 would observe in the situation; a person who is unaware of a risk of which the person
27 would have been aware had that person not been intoxicated acts recklessly with
28 respect to the risk.

29 * Sec. 3. APPLICABILITY. The privilege and immunity created by AS 09.25.450 -
30 09.25.490, added by sec. 2 of this Act, apply to environmental audits that are conducted on
31 or after the effective date of this Act.

A M E N D M E N T #9

OFFERED IN THE HOUSE

TO: CSSB 41(FIN)

*fails
4/9/97*

Page 7, line 27:

Following: "for the violation disclosed"

Delete the comma and insert "or"

Page 7, lines ~~27~~³⁰ - ~~29~~³²: - *Page 8, line 1*

Following: "based on the facts disclosed"

Delete: ", and for a violation discovered because of
a disclosure that was unknown to the owner or
operator making the disclosure"

Reasons: This amendment is proposed to address a concern raised by the U.S. Environmental Protection Agency that the language in the bill may lead to disputes over whether subsequently discovered violations are "fruit of the poisonous tree." If the last clause is read literally, it could potentially immunize violations years after and well beyond the scope of any disclosure. With an earlier amendment that added the language "or of circumstances, conditions, or occurrences that constitute or may constitute a such a violation," it is clear that an owner or operator may obtain immunity for violations that are disclosed and for violations that are based upon the facts disclosed, regardless of whether the owner or operator knows that the facts disclosed would constitute a violation. The last clause is at the very least redundant to the previous amendment and at worst, a potential source of conflict and litigation over whether subsequently discovered violations are immunized by virtue of an earlier disclosure.

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A M E N D M E N T

Amend #15

OFFERED IN THE HOUSE

BY REPRESENTATIVE CROFT

TO: CSSB 41(FIN)

sunset

Fails

1 Page 14, following line 7:

2 Insert new bill sections to read:

3 **** Sec. 3.** Section 1 of this Act and AS 09.25.450, 09.25.455, 09.25.460, 09.25.465,
4 09.25.475, 09.25.480, 09.25.485, and 09.25.490, enacted by sec. 2 of this Act, are repealed
5 three years after the effective date of this Act.

6 *** Sec. 4. TRANSITIONAL PROVISION.** Notwithstanding sec. 3 of this Act,

7 (1) the privileged information in an audit report that was completed before
8 three years after the effective date of this Act retains its privileged nature after that date to
9 the same extent as if the statutes repealed in sec. 3 of this Act had not been repealed; and

10 (2) the immunity applicable to voluntary disclosures under AS 09.25.475,
11 enacted by sec. 2 of this Act, remains in effect for a voluntary disclosure made before three
12 years after the effective date of this Act to the same extent that the immunity applied before
13 AS 09.25.475 was repealed."

14 Renumber the following bill section accordingly.

15 Page 14, line 10, following "Act":

16 Insert "and before the repeal of AS 09.25.450 - 09.25.490 under sec. 3 of this Act."

Alaska State Legislature



House of Representatives
House Judiciary Committee

State Capitol, Room 120
Juneau, Alaska 99801-1182
(907) 465-4990

MEMORANDUM

Date: April 9, 1997

To: Terri Lauterbach, Legislative Legal Services
Fax: 465-2029

From: Lisa Kirsch, House Judiciary Committee
Fax: 465-4316

Re: SB 41 with amendments

We passed SB 41 out of committee today with four amendments:
Amendment numbers 3A, 12a, 13 and 14 (attached).
We adopted draft 0-LS0299\K as our working document.

This bill is a priority according to Madam Speaker--final version
ASAP please.
Thanks for your help.

AMENDMENT #3A

4/9/97
adopted

OFFERED IN THE HOUSE

TO: CSSB 41 (FIN)

Page 7, after line 23:

Insert a new subsection (b) to read:

"(b) A party seeking an in camera review as provided under (a) of this section shall provide to the court or administrative hearing officer a factual basis adequate to support a good faith belief by a reasonable person that the documents or communications for which disclosure is sought are likely to reveal evidence to establish that an exception in (a) of this section applies."

Renumber subsections accordingly.

Page 7, line 24:

Reword subsection as follows:

(c) A party seeking disclosure of confidential self-evaluation and analysis during an in camera review under this section has the burden of proving that an exception in (a) of this section applies.

AMENDMENT #12a

OFFERED IN THE HOUSE

TO: CSSB 41 (FIN)

*Adopted - no vote
4/9/97 no obj.*

Page 4, line 11:

Following "AS 09.25.455(b)"

Insert: "(3) or AS 09.25.475 -- 09.25.480"

A M E N D M E N T

#13

*Adopted
no objection*

OFFERED IN THE HOUSE

TO: CSSB 41(FIN)

Page 4, following line 27:

Insert a new subsection (k) to read: "(k) There is no privilege under this section for documents or communications in a criminal proceeding."

Reasons: This proposed amendment responds to concerns raised in the United States Attorney's letter that the bill could be construed to apply to criminal proceedings. Page 6 of the letter recommends that the bill explicitly exclude criminal proceedings. The proposed wording is similar to that used in Rule 503(d)(7) of the Alaska Rules of Evidence, relating to the physician-patient privilege: "There is no privilege under this rule . . . for physician-patient communications in a criminal proceeding."

A M E N D M E N T #14

OFFERED IN THE HOUSE

TO: CSSB 41(FIN)

*Adopted - No obj.
4/9/97*

Page 7, line 14:

Following "the environment offsite"

Insert: ", or evidence of the causes and
circumstances leading to such injury or
imminent or present threat of such injury"

Reasons: This proposed amendment responds to the concerns raised on page 2, footnote 1, of the United States Attorney's letter, that the scope of the exception to the privilege for evidence of substantial injury.

HOUSE CS FOR CS FOR SENATE BILL NO. 41()
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTIETH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): SENATORS LEMAN, Pearce, Taylor

A BILL

FOR AN ACT ENTITLED

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

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

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

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

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

1 environmental business practices and procedures; this encouragement can best be achieved by
2 preserving the free flow of information; the free flow of the kind of information that is
3 generated by self-audits would be curtailed if a privilege for the audits were not available;
4 therefore, it is the intent of the legislature to recognize an audit privilege under this Act to
5 protect the confidentiality of communications related to voluntary internal environmental
6 audits; however, the legislature does not intend that the parts of an audit report consisting of
7 confidential self-evaluation and analysis that are privileged under this Act may be used to
8 shield a person from liability under applicable laws and regulations by blocking access to
9 underlying facts;

10 (3) the public also has a strong interest in obtaining cost-effective correction
11 of inadvertent environmental violations; this goal can best be achieved by offering qualified
12 immunity from administrative and civil penalties to regulated persons who promptly report
13 known violations of environmental regulations that are uncovered as part of an audit so that
14 the violations can promptly be corrected and a compliance plan can be negotiated with the
15 appropriate government agency;

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

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

22 **Article 5. Privileges and Immunities**

23 **Related to Disclosure of Certain Self-Audits and Violations.**

24 **Sec. 09.25.450. Audit report privilege.** (a) Except as provided in
25 AS 09.25.460, an owner or operator who prepares an audit report or causes an audit
26 report to be prepared has a privilege to refuse to disclose, and to prevent another
27 person from disclosing, the parts of the report that consist of confidential self-
28 evaluation and analysis of the owner's or operator's compliance with environmental
29 laws. Except as provided in AS 09.25.455 - 09.25.480, the privileged information is
30 not admissible as evidence or subject to discovery in

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

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

3 (b) With respect to confidential self-evaluation and analysis in an
4 environmental audit, in order to qualify for the privilege under this section and the
5 immunity under AS 09.25.475, at least 15 days before conducting the audit, the owner
6 or operator conducting the audit must give notice by electronic filing that complies
7 with an ordinance or regulation authorized under (j) of this section or by certified mail
8 with return receipt requested to the commissioner's office of the department, and, when
9 the audit includes an assessment of compliance with a municipality's ordinances, to
10 the municipal clerk, of the fact that it is planning to commence the audit. The notice
11 must specify the facility, operation, or property or portion of the facility, operation, or
12 property to be audited, the date the audit will begin and end, and the general scope of
13 the audit. The notice may provide notification of more than one scheduled
14 environmental audit at a time. Once initiated, an audit shall be completed within a
15 reasonable time, but no longer than 90 days, unless a longer period of time is agreed
16 upon between the owner or operator and the department or the municipality, as
17 appropriate. The audit report must be completed in a timely manner.

18 (c) The following persons may claim the privilege available under (a) of this
19 section:

20 (1) the owner or operator who prepared the audit report or caused the
21 audit report to be prepared;

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

25 (3) a person to whom confidential self-evaluation or analysis is
26 disclosed under AS 09.25.455(b); or

27 (4) a custodian of the audit results.

28 (d) A person who conducts or participates in the preparation of an audit report
29 and who actually observed or participated in conditions or events being reviewed for
30 compliance may testify about those conditions or events but may not, in a proceeding
31 covered by (a) of this section, be compelled to testify about or produce documents

1 consisting of confidential self-evaluation and analysis.

2 (e) A person claiming the privilege described in this section has the burden of
3 establishing the applicability of the privilege.

4 (f) To facilitate identification, each document in an audit report that contains
5 confidential self-evaluation or analysis shall be labeled "AUDIT REPORT:
6 PRIVILEGED DOCUMENT."

7 (g) A government agency or its employees or agents may not, as a condition
8 of a permit, license, or approval issued under an environmental law, require an owner
9 or operator to waive the privilege available under this section.

10 (h) Except when the privilege is waived under AS 09.25.455(a) or disclosure
11 is made under AS 09.25.455(b), ^{→ "(3) or AS 09.25.475 - 09.25.480"} neither a government agency nor its employees or
12 agents may review or otherwise use the part of an audit report consisting of
13 confidential self-evaluation or analysis during an inspection of a regulated facility,
14 operation, or property or an activity of a regulated facility, operation, or property.

15 (i) This section may not be construed to

16 (1) prevent a government agency from issuing an emergency order,
17 seeking injunctive relief, independently obtaining relevant facts, conducting necessary
18 inspections, or taking other appropriate action regarding implementation and
19 enforcement of an applicable environmental law, except as otherwise provided in
20 AS 09.25.475; or

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

23 (j) The department or municipality may, by regulation or ordinance,
24 respectively, allow the notice required under (b) of this section to be filed by facsimile
25 or other electronic means if the means ensures adequate proof of

26 (1) submittal of the notice by the owner or operator; and

27 (2) receipt by the department or municipality.

28 **Sec. 09.25.455. Waiver and disclosure.** (a) The privilege in AS 09.25.450
29 does not apply to the extent the privilege is expressly waived in writing by the owner
30 or operator who prepared the audit report or caused the report to be prepared.

31 (b) Disclosure of the part of an audit report or information consisting of

1 confidential self-evaluation or analysis does not waive the privilege established by
2 AS 09.25.450 if the disclosure is made

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

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

7 (B) the owner's or operator's lawyer or the lawyer's
8 representative;

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

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

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

13 or

14 (F) the principal of the independent contractor who conducted
15 an audit on the principal's behalf;

16 (2) under the terms of a confidentiality agreement between the owner
17 or operator who prepared the audit report or caused the audit report to be prepared and

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

20 (B) a transferee or potential transferee of an interest in the
21 facility, operation, or property;

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

24 (D) a person engaged in the business of insuring, underwriting,
25 or indemnifying the facility, operation, or property; or

26 (E) a person who, along with the person who prepared the audit
27 report or caused the audit report to be prepared, also is an owner or operator
28 of part or all of the facility, operation, or property; or

29 (3) under a written claim of confidentiality to a government official or
30 agency by the owner or operator who prepared the audit report or who caused the audit
31 report to be prepared.

1 (c) Documents consisting of confidential self-evaluation and analysis that are
2 disclosed under (b)(3) of this section are required to be kept confidential and are not
3 subject to disclosure under AS 09.25.110 - 09.25.220.

4 (d) A party to a confidentiality agreement described in (b)(2) of this section
5 who violates the agreement is liable for damages caused by the violation and for other
6 penalties stipulated in the agreement.

7 **Sec. 09.25.460. Nonprivileged materials.** (a) There is no privilege under
8 AS 09.25.450 for that part of an audit report that contains the following:

9 (1) a document, communication, datum, report, or other information
10 required by a government agency to be collected, developed, maintained, or reported
11 under an environmental law, under a permit issued under an environmental law, as a
12 requirement for obtaining, maintaining, or renewing a license, as a requirement under
13 a contract or lease with the state or a municipality, or as a requirement under an
14 administrative order or court order or decree;

15 (2) information that a government agency obtains by observation,
16 sampling, or monitoring;

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

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

23 (5) a document, communication, datum, report, or other information
24 that is independent of the environmental audit, whether prepared or existing before,
25 during, or after the audit; and

26 (6) a document, communication, datum, report, or other information,
27 including an agreement or order between a government agency and an owner or
28 operator, regarding a compliance plan or strategy.

29 (b) An audit report is not privileged and is admissible as evidence and subject
30 to discovery and use in a proceeding relating to pipeline rates, tariffs, fares, or charges.
31 The owner or operator who prepared the audit report or caused the report to be

1 prepared is entitled to a protective order in a proceeding relating to pipeline rates,
 2 tariffs, fares, or charges to maintain the confidentiality of the audit from discovery,
 3 use, or admission in evidence in other types of proceedings. Discovery, use, or
 4 admission in evidence in a proceeding relating to pipeline rates, tariffs, fares, or
 5 charges is not considered to have waived the privilege for any other purpose.

6 **Sec. 09.25.465. Exception: disclosure required by court.** (a) A court or
 7 administrative hearing officer with jurisdiction may require disclosure of confidential
 8 self-evaluation and analysis contained in an audit report in a civil or administrative
 9 proceeding if the court or administrative hearing officer determines, after an in camera
 10 review consistent with the appropriate rules of procedure, that the

11 (1) privilege is asserted for a criminal or fraudulent purpose;

12 (2) information for which the privilege is claimed is evidence of
 13 substantial injury, or the imminent or present threat of substantial injury, to one or
 14 more persons at the site audited or to persons, property, or the environment offsite;

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

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

22 (5) privilege would result in a miscarriage of justice or the denial of
 23 a fair trial to the party challenging the privilege.

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

26 **Sec. 09.25.475. Voluntary disclosure; immunity.** (a) Except as provided by
 27 this section, an owner or operator who makes a voluntary disclosure of a violation of
 28 an environmental law, or of circumstances, conditions, or occurrences that constitute
 29 or may constitute such a violation, is immune from an administrative or civil penalty
 30 for the violation disclosed, for a violation based on the facts disclosed, and for a
 31 violation discovered because of the disclosure that was unknown to the owner or

Amend

→ (14)

1 operator making the disclosure.

2 (b) Immunity is not available under this section if the violation resulted in, or
3 poses or posed an imminent or present threat of, substantial injury to one or more
4 persons at the site audited or to persons, property, or the environment offsite.

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

6 (1) the disclosure is made promptly after knowledge of the information
7 disclosed is obtained by the owner or operator;

8 (2) the disclosure is made in writing by certified mail to the department
9 or a municipality with enforcement jurisdiction with regard to the violation disclosed;

10 (3) an investigation of the violation was not initiated or the violation
11 was not independently detected by the department or a municipality with enforcement
12 jurisdiction before the disclosure was made using certified mail; under this paragraph,
13 the department or municipality has the burden of proving that an investigation of the
14 violation was initiated or the violation was detected before receipt of the certified mail;
15 and

16 (4) the disclosure arises out of a voluntary environmental audit.

17 (d) To qualify for immunity under this section, the owner or operator making
18 the disclosure must

19 (1) promptly initiate appropriate efforts to achieve compliance and
20 remediation and pursue those efforts with due diligence;

21 (2) promptly initiate appropriate efforts to discontinue, abate, or
22 mitigate any conditions or activities causing injury or likely to cause imminent injury
23 to one or more persons at the site audited or to person, property, or the environment
24 offsite;

25 (3) correct the violation within 90 days or enter into a compliance
26 agreement with the department or the municipality, as appropriate, that provides for
27 completion of corrective and remedial measures within a reasonable time;

28 (4) implement appropriate measures designed to prevent the recurrence
29 of the violation; and

30 (5) cooperate with the department or municipality, as appropriate, in
31 connection with an investigation of the issues identified in the disclosure; the

1 department or municipality may request that the owner or operator allow the
2 department or municipality to review, under a written claim of confidentiality as
3 described in AS 09.25.455(b)(3), the part of the audit report that describes the
4 implementation plan or tracking system developed to correct past noncompliance,
5 improve current compliance, or prevent future noncompliance.

6 (e) A disclosure is not voluntary for purposes of this section if it is a
7 disclosure to the department or municipality expressly required by an environmental
8 law, a permit, a license, or an enforcement order or decree.

9 (f) Immunity under this section for violation of an environmental law is
10 available only for a violation that is discovered as a result of information or documents
11 first produced or obtained during the time period specified in the notice required under
12 AS 09.25.450(b).

13 (g) During the period between receipt of the audit notice required under
14 AS 09.25.450(b) and the specified end date of the audit, the department or
15 municipality may not initiate an inspection, monitoring, or other investigative activity
16 concerning the audited facility, operation, or property based on the receipt of a notice
17 under AS 09.25.450. The department or municipality has the burden of proving that
18 an inspection, monitoring, or other investigative activity concerning the audited facility,
19 operation, or property initiated after receiving a notice under AS 09.25.450 was not
20 initiated based on receiving the notice.

21 (h) A violation that has been voluntarily disclosed and to which immunity
22 applies under this section shall be identified by the department or municipality in its
23 compliance history report as having been voluntarily disclosed.

24 (i) This section may not be construed to prevent the department or
25 municipality from

26 (1) seeking injunctive relief; or

27 (2) issuing an emergency order in a situation involving an imminent
28 and substantial danger to public health or welfare or the environment.

29 **Sec. 09.25.480. Exceptions to immunity; mitigation.** (a) There is no
30 immunity under AS 09.25.475 if a court or administrative hearing officer finds that

31 (1) the owner or operator claiming the immunity has

1 (A) intentionally, knowingly, or recklessly committed or
2 authorized the violation;

3 (B) within the 36 months preceding the violation, committed,
4 at the same facility or associated facilities located in the state, a pattern of
5 violations that are the same as or closely related to the violation for which the
6 immunity is sought; or

7 (C) not attempted to bring the facility, operation, or property
8 into compliance so as to constitute a pattern of disregard of environmental
9 laws;

10 (2) the violation was authorized or committed intentionally, knowingly,
11 or recklessly by a member of the owner's or operator's management and the owner's
12 or operator's policies contributed materially to the occurrence of the violation; or

13 (3) the owner or operator, after taking into account the cost of
14 completing corrective and remedial measures within a reasonable time and
15 implementing appropriate measures to prevent recurrence of the violation, realized
16 substantial economic savings in not complying with the requirement for which a
17 violation is charged; the exception to immunity in this paragraph applies only to that
18 portion of a penalty that reflects the economic savings of noncompliance after taking
19 into account the cost of completing the corrective, remedial, and preventive measures
20 necessary to qualify for immunity.

21 (b) There is no immunity under AS 09.25.475 from an administrative or civil
22 penalty for the violation of an administrative or court order or for violation of a term
23 or condition of an administrative or court order.

24 (c) An administrative or civil penalty that is imposed on an owner or operator
25 for violation of an environmental law when the owner or operator has made a
26 voluntary disclosure under AS 09.25.475(a) but is not granted immunity because of (a)
27 of this section may, to the extent appropriate and not prohibited by law, be mitigated
28 by

29 (1) the good faith actions of the owner or operator in disclosing the
30 violation;

31 (2) efforts by the owner or operator to conduct environmental audits

1 and to complete any resulting implementation plan or tracking system for corrective
2 and preventive action;

3 (3) remediation;

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

6 (5) the nature of the violation; and

7 (6) other relevant considerations.

8 **Sec. 09.25.485. Relationship to other recognized privileges.** AS 09.25.450 -
9 09.25.490 do not limit, waive, or abrogate the scope or nature of a statutory or
10 common law privilege, including the work product doctrine, the attorney-client
11 privilege, and any other privilege recognized by a court with appropriate authority in
12 this state.

13 **Sec. 09.25.490. Definitions.** (a) In AS 09.25.450 - 09.25.490,

14 (1) "audit report" means a report that includes each document and
15 communication, other than those set out in AS 09.25.460, produced from an
16 environmental audit; general components that may be contained in a completed audit
17 report include

18 (A) a report, prepared by an auditor, monitor, or similar person,
19 including the scope of the audit, the dates the audit began and ended, the
20 information gained in the audit, findings, conclusions, recommendations,
21 exhibits, and appendices; the types of exhibits and appendices that may be
22 contained in an audit report include supporting information that is collected or
23 developed for the primary purpose and in the course of an environment audit,
24 including

25 (i) interviews with current or former employees;

26 (ii) field notes and records of observations;

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

29 (iv) legal analyses;

30 (v) drawings;

31 (vi) photographs;

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delete

(vii) laboratory analyses and other analytical data;
(viii) computer generated or electronically recorded information;
(ix) maps, charts, graphs, and surveys; and
(x) other communications and documents associated with an environmental audit;

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

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

(2) "confidential self-evaluation and analysis" means the part of an audit report that consists of (interviews with current or former employees conducted by the auditor; field notes and records of observations made by the auditor); findings, opinions, suggestions, conclusions, guidance, notes, drafts, and analyses performed by the auditor; memoranda and documents that evaluate or analyze all or part of the material contained in the audit report, including findings, conclusions, opinions, recommendations made by the auditor, and an audit implementation plan or tracking system to correct past noncompliance, improve current compliance, or prevent future noncompliance with an environmental law, and that is

(A) a voluntary, confidential, critical, internal, and retrospective review, self-evaluation, or analysis of conduct, practices, and occurrences and their resulting consequences; and

(B) prepared and maintained with the expectation that it will be kept confidential;

(3) "department" means the Department of Environmental Conservation;

(4) "environmental audit" means a voluntary audit that an owner or operator of a regulated facility, operation, or property conducts or causes to be conducted, whether or not on a regular basis or in response to a particular event, that is specifically designed and undertaken to assess compliance with environmental laws or a permit, license, or approval issued under those laws, including an assessment that

1 is part of the owner's or operator's compliance management system and that is a

2 (A) systematic, objective, and periodic review of the facility,
3 operation, or property related to meeting the requirements of environmental
4 laws or a permit, license, or approval issued under those laws; or

5 (B) documented, systematic procedure or practice that reflects
6 the owner's or operator's due diligence in preventing, detecting, and correcting
7 violations of environmental laws or a permit, license, or approval issued under
8 those laws at the facility, operation, or property;

9 (5) "environmental law" means

10 (A) a federal or state environmental law implemented by the
11 department; or

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

14 (6) "operator" means a person or persons who direct, control, or
15 supervise all or part of a regulated facility, operation, or property;

16 (7) "owner" means a person or persons with a proprietary or possessory
17 interest in a regulated facility, operation, or property;

18 (8) "penalty" means an administrative or civil sanction imposed by the
19 state or a municipality to punish a person for a violation of a statute, rule, regulation,
20 or ordinance; the term does not include a technical or remedial provision ordered by
21 a government agency, nor an administrative or civil sanction relating to pipeline rates,
22 tariffs, fares, or charges;

23 (9) "regulated facility, operation, or property" means a facility,
24 operation, or property that is regulated under an environmental law.

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

27 (c) For purposes of this chapter, unless the context requires otherwise, a person
28 acts

29 (1) "intentionally" with respect to a result described by a provision of
30 law defining a violation when the person's conscious objective is to cause that result;
31 when intentionally causing a particular result is an element of a violation, that intent

1 need not be the person's only objective;

2 (2) "knowingly" with respect to conduct or to a circumstance described
3 by a provision of law defining a violation when the person is aware that the conduct
4 is of that nature or that the circumstance exists; when knowledge of the existence of
5 a particular fact is an element of a violation, that knowledge is established if a person
6 is aware of a substantial probability of its existence, unless the person actually believes
7 it does not exist; a person who is unaware of conduct or a circumstance of which the
8 person would have been aware had that person not been intoxicated acts knowingly
9 with respect to that conduct or circumstance;

10 (3) "recklessly" with respect to a result or to a circumstance described
11 by a provision of law defining a violation when the person is aware of and consciously
12 disregards a substantial and unjustifiable risk that the result will occur or that the
13 circumstance exists; the risk must be of such a nature and degree that disregard of it
14 constitutes a gross deviation from the standard of conduct that a reasonable person
15 would observe in the situation; a person who is unaware of a risk of which the person
16 would have been aware had that person not been intoxicated acts recklessly with
17 respect to the risk.

18 * Sec. 3. APPLICABILITY. The privilege and immunity created by AS 09.25.450 -
19 09.25.490, added by sec. 2 of this Act, apply to environmental audits that are conducted on
20 or after the effective date of this Act.

A M E N D M E N T

OFFERED IN THE HOUSE

TO: CSSB 41(FIN)

Page 4, line 9:

Following "made under AS 09.25.455(b)"

Insert: "or AS 09.25.475 -- 09.25.480"

Reasons: This proposed amendment responds to a concern raised on pages 8-9 of the United States Attorney's letter, regarding use of privileged information during followup inspections. It would clarify that DEC or a municipality may review and use information already disclosed to DEC or the municipality for purposes of immunity or mitigation of penalties under AS 09.25.475 - 09.25.480 during an inspection.

A M E N D M E N T

OFFERED IN THE HOUSE

TO: CSSB 41 (FIN)

Page 4, following line 25:

Insert a new subsection (k) to read: "(k) There is no privilege under this section for documents or communications in a criminal proceeding."

Reasons: This proposed amendment responds to concerns raised in the United States Attorney's letter that the bill could be construed to apply to criminal proceedings. Page 6 of the letter recommends that the bill explicitly exclude criminal proceedings. The proposed wording is similar to that used in Rule 503(d)(7) of the Alaska Rules of Evidence, relating to the physician-patient privilege: "There is no privilege under this rule . . . for physician-patient communications in a criminal proceeding."

A M E N D M E N T

OFFERED IN THE HOUSE

TO: CSSB 41 (FIN)

Page 7, line 11:

Following "the environment offsite"

Insert: ", or evidence of the causes and
circumstances leading to such injury or
imminent or present threat of such injury"

Reasons: This proposed amendment responds to the concerns raised on page 2, footnote 1, of the United States Attorney's letter, that the scope of the exception to the privilege for evidence of substantial injury.

A M E N D M E N T

OFFERED IN THE HOUSE

TO: CSSB 41 (FIN)

Page 12, lines 6-7:

Following: "that consists of":

Delete: "interviews with current or former employees;
field notes and records of observations made
by the auditor;"

Reasons: This proposed amendment responds to concerns raised on page 7 of the United States Attorney's letter that the self-audit privilege can be used to shield evidence of violations, as well as the thought processes of the auditor.

Somson

- 1) priv waived.
"ref to §§
follow up exceptions
- 2) No priv. in crim.
- 3) Add (exception threat of injury)
get to causes of injury
- 4) Def. "control self and
auditors work prod"

Amendment #1 #3

- The language at Sec. 09.25.465 (b) which Amendment #1 proposes to delete has been well-tested in other states. Similar to the Alaska bill, the majority of states with self-audit privilege laws place on the party seeking disclosure the "burden of proof" for showing fraudulent behaviour or one of the other exceptions to the privilege.
- The "burden of proof" clause in the Texas self-audit law is identical to the language in SB 41. Yet there is no evidence companies in Texas have used the audit privilege in an attempt to "shield" information from regulators. The Director of Litigation for the Texas Natural Resources Conservation Commission has stated that TNRCC enforcement attorneys have not encountered a *single case* in which an audit privilege has been invoked in an attempt to shield information required for legal proceedings against a company.
- If a self-audit privilege is to be meaningful, it ought not be something that is overcome lightly. As with the attorney-client privilege, the purpose of a self-audit privilege is to protect the "free flow of information" which would otherwise not occur if confidentiality were not assured. Another example is the privilege in Alaska statutes for the proceedings of physician review organizations (AS 18.23.030). The law recognizes that physicians will be reluctant to offer honest appraisals of existing medical practices or the performance of other medical personnel, absent an assurance that their comments will not be used as evidence in litigation. Thus, a public health interest is served by allowing physicians the liberty to freely discuss such matters. The privilege envisioned in SB 41 serves a similar purpose: the public interest in a clean environment is served by allowing companies to undertake self-critical examinations of their compliance practices.
- Because of a unique feature in SB 41, it is especially important that privilege should not be overcome lightly. If enacted, SB 41 will be the only self-audit law in the country which requires advance notice (15 days) to the state prior to commencing an audit. Without the advance notice, there is no privilege (or immunity). Since these advance notices to DEC are not considered privileged, this information is available to the public. Any company choosing to do an audit under the terms of this bill will have to disclose when the audit will begin, when it will end, what part of the facility will be audited, as well as the scope of the audit. While the sponsor believes this notice requirement serves a valid public interest, it is also true that it opens the door for considerable mischief from third party groups. There is a very long and sad history of anti-development groups in Alaska utilizing the court system in every conceivable manner to stop logging, mining, oil and gas development, expansion of tourist opportunities, and other economic development. It is part of a concerted effort to delay projects and drive up the costs of doing business. It is not only possible but likely that extremist preservationist groups will use the courts to challenge the legitimacy of every audit that occurs. This would be difficult for such groups to do in other states, because there would be no way of knowing when or where an audit is being conducted. Under the Alaska law, all that information will be available on a regular basis. Therefore, the only way to discourage frivolous or ideologically-motivated lawsuits is to structure SB 41 so that privilege cannot be overcome unless it is clearly demonstrated that the privilege is claimed for an illegitimate purpose.

Amendment #9

- The sponsor believes Amendment #9 is a solution in search of a problem that does not exist. The language proposed for deletion at Section 09.25.475(a) was very intentionally added to this legislation last year (the old Senate Bill 199) through an amendment adopted in committee. It is designed to address a scenario in which an owner or operator discloses a violation which leads to the agency discovering another violation of which the owner or operator was unaware, and which would not have been discovered in the first place if the company had not made the disclosure.
- A hypothetical example, based off circumstances in an actual disclosure from the state of Texas: a company manufacturing polyolephins conducts an audit and finds that certain hazardous wastes were not labeled properly. As a result of this disclosure, state regulators also discover that hazardous wastes were not stored in the correct type of drums. The business was unaware that their storage practices did not conform with regulations, but in the process of reporting the labeling problem, they are left open to fines and penalties for the newly discovered problem.
- The concern that a company could be immunized for violations "years after and well beyond the scope of any disclosure" is not persuasive. The section of the bill which grants immunity begins with the caveat, "Except as provided by this section..." If we look at the "exceptions" to the immunity, we see that immunity is only available for voluntary disclosures, and voluntary disclosures are defined as those which "arise" from an audit and which were not independently detected by an agency. In enforcing the provisions of this law, the Department of Environmental Conservation is really in the "catbird seat" insofar as the department can determine whether or not the owner or operator seeking immunity has met the required conditions. If the department decides that the entity seeking immunity is not eligible, then they are not eligible. The regulated entity's only recourse at this juncture is an expensive legal challenge with little chance of success.

Amendment # (10?)

- Because of the broad variance in the size and complexity of audit reports, it is not prudent to define a specific time limit for when noncompliance should be disclosed. An audit of a small timber operation in southeast Alaska would likely take only a few days for observations and monitoring, a few days to prepare the report, and a few days for the management to review the document and prepare a disclosure. In this scenario, a 10-day limit is not unreasonable. On the other hand, if British Petroleum were to undertake an audit of its entire North Slope operations, such a review would likely take months. In fact, SB 41 provides that audits can take up to 90 days to complete and even longer if special permission is received. An audit report that takes two or three months to complete is not going to be a small affair -- previous committees have heard testimony that some audit reports are several thousand pages long. An audit report of this magnitude is not reviewed or digested quickly. Larger companies will rely on legal counsel to review the audit report and prepare the actual disclosure of potential violations. This legal review might occur simultaneously or after company management has reviewed the report. In any event, it can easily take longer than 10 days to complete the process.
- Leaving "promptly" undefined gives DEC the administrative discretion to apply this standard differently, depending on the size of the facility and the scope of the audit report. A "one size fits all" approach is not necessarily the best tool.
- Two corporate attorneys have told the sponsor that, absent a definition of promptly, the tendency of most businesses will be to interpret the term very conservatively, rather than risk jeopardizing the immunity benefit on a technicality.
- The sponsor recently obtained 4 samples of disclosures from corporations in the state of Texas; a review of these documents indicate considerable variance in the disclosure time, probably due to the varying complexity of the reports. The shortest time period for disclosure was two days; the longest was 50 days.

A M E N D M E N T #15

OFFERED IN THE HOUSE

TO: CSSB 41 (FIN)

Page 12, lines 13-14:

Following: "that consists of":

Delete: "interviews with current or former employees;
field notes and records of observations made
by the auditor;"

Reasons: This proposed amendment responds to concerns raised on page 7 of the United States Attorney's letter that the self-audit privilege can be used to shield evidence of violations, as well as the thought processes of the auditor.

A M E N D M E N T #12

OFFERED IN THE HOUSE

TO: CSSB 41 (FIN)

Page 4, line 11:

Following "made under AS 09.25.455(b)"

Insert: "or AS 09.25.475 -- 09.25.480"

Reasons: This proposed amendment responds to a concern raised on pages 8-9 of the United States Attorney's letter, regarding use of privileged information during followup inspections. It would clarify that DEC or a municipality may review and use information already disclosed to DEC or the municipality for purposes of immunity or mitigation of penalties under AS 09.25.475 - 09.25.480 during an inspection.

AMENDMENT

#11

whistleblower protection

OFFERED IN THE HOUSE

BY REPRESENTATIVE BERKOWITZ

TJ: CSSB 41(FIN)

+3 = 6 in version "K"

1 Page 7, line 3, following "court":

2 Insert ", hearing officer, or arbitrator"

3 Page 7, following line 15:

4 Insert a new paragraph to read:

5 "(4) audit report contains evidence that is relevant to a claim by an employee
6 of the owner or operator that the employee's compensation, the employee's terms,
7 conditions, or privileges of employment, or decisions about the employee's
8 opportunities for promotions, pay increases, or changes of duties were adversely
9 affected by the employee's participation in the audit;"

10 Renumber the following paragraphs accordingly.

11 Page 7, following line 20:

12 Insert a new subsection to read:

13 "(b) An arbitrator may require disclosure of confidential self-evaluation and
14 analysis contained in an audit report in an employee grievance proceeding if the
15 arbitrator determines, after an in camera review consistent with the appropriate rules
16 of procedure, that the audit report contains evidence that is relevant to a claim by an
17 employee of the owner or operator that the employee's compensation, the employee's
18 terms, conditions, or privileges of employment, or decisions about the employee's
19 opportunities for promotions, pay increases, or changes of duties were adversely
20 affected by the employee's participation in the audit."

21 Reletter the following subsection accordingly.

1 Page 7, line 22, following "(a)":

2 Insert "or (b)"

3 Page 7, following line 22:

4 Insert a new subsection to read:

5 "(d) In this section, "employee" includes a former employee."

1 Page 7, line 22, following "(a)":

2 Insert "or (b)"

3 Page 7, following line 22:

4 Insert a new subsection to read:

5 "(d) In this section, "employee" includes a former employee."

4/9/97

H Version

AMENDMENT #10

Withdrawn

OFFERED IN THE HOUSE

BY REPRESENTATIVE BERKOWITZ

TO: CSSB 41(FIN)

1 Page 4, line 4, following ".":

2 Insert "The audit report must indicate in writing the date on which it was completed."

3 Page 7, line 14:

4 Delete "promptly"

5 Page 7, lines 14 - 15:

6 Delete "after discovery of the noncompliance"

7 Insert "within the time limits applicable under AS 09.25.475(d)"

8 Page 8, line 3:

9 Delete "promptly after knowledge of the information disclosed is obtained by the
10 owner or operator"

11 Insert "within 10 days after the audit report containing the disclosed information was
12 completed"

13 Page 8, line 15:

14 Delete "promptly"

15 Insert "within 10 days after the audit report was completed."

16 Page 8, line 17:

17 Delete "promptly"

18 Insert "within 10 days after the audit report was completed."

19 Page 8, line 21, following "days":

1 Insert "after the audit report was completed"

CS FOR SENATE BILL NO. 41(FIN)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY THE SENATE FINANCE COMMITTEE

Offered: 3/18/97

Referred: Rules

Sponsor(s): SENATORS LEMAN, Pearce, Taylor

A BILL

FOR AN ACT ENTITLED

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

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

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

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

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

1 environmental business practices and procedures; this encouragement can best be achieved by
 2 preserving the free flow of information; the free flow of the kind of information that is
 3 generated by self-audits would be curtailed if a privilege for the audits were not available;
 4 therefore, it is the intent of the legislature to recognize an audit privilege under this Act to
 5 protect the confidentiality of communications related to voluntary internal environmental
 6 audits; however, the legislature does not intend that the parts of an audit report consisting of
 7 confidential self-evaluation and analysis that are privileged under this Act may be used to
 8 shield a person from liability under applicable laws and regulations by blocking access to
 9 relevant facts;

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

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

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

22 **Article 5. Privileges and Immunities**

23 **Related to Disclosure of Certain Self-Audits and Violations.**

24 **Sec. 09.25.450. Audit report privilege.** (a) Except as provided in
 25 AS 09.25.460, an owner or operator who prepares an audit report or causes an audit
 26 report to be prepared has a privilege to refuse to disclose, and to prevent another
 27 person from disclosing, the parts of the report that consist of confidential self-
 28 evaluation and analysis of the owner's or operator's compliance with environmental
 29 laws. Except as provided in AS 09.25.455 - 09.25.480, the privileged information is
 30 not admissible as evidence or subject to discovery in

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

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

3 (b) With respect to confidential self-evaluation and analysis in an
4 environmental audit, in order to qualify for the privilege under this section and the
5 immunity under AS 09.25.475, at least 15 days before conducting the audit, the owner
6 or operator conducting the audit must give notice by electronic filing that complies
7 with an ordinance or regulation authorized under (j) of this section or by certified mail
8 with return receipt requested to the commissioner's office of the department of the fact
9 that it is planning to commence the audit. The notice must specify the facility,
10 operation, or property or portion of the facility, operation, or property to be audited,
11 the date the audit will begin and end, and the general scope of the audit. The notice
12 may provide notification of more than one scheduled environmental audit at a time.
13 Once initiated, an audit shall be completed within a reasonable time, but no longer
14 than 90 days, unless a longer period of time is agreed upon between the owner or
15 operator and the department. The audit report must be completed in a timely manner.

16 (c) The following persons may claim the privilege available under (a) of this
17 section:

18 (1) the owner or operator who prepared the audit report or caused the
19 audit report to be prepared;

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

23 (3) a person to whom confidential self-evaluation or analysis is
24 disclosed under AS 09.25.455(b); or

25 (4) a custodian of the audit results.

26 (d) A person who conducts or participates in the preparation of an audit report
27 and who actually observed or participated in conditions or events being reviewed for
28 compliance may testify about those conditions or events but may not, in a proceeding
29 covered by (a) of this section, be compelled to testify about or produce documents
30 consisting of confidential self-evaluation and analysis.

31 (e) A person claiming the privilege described in this section has the burden of

1 establishing the applicability of the privilege.

2 (f) To facilitate identification, each document in an audit report that contains
3 confidential self-evaluation or analysis shall be labeled "AUDIT REPORT:
4 PRIVILEGED DOCUMENT."

5 (g) A government agency or its employees or agents may not, as a condition
6 of a permit, license, or approval issued under an environmental law, require an owner
7 or operator to waive the privilege available under this section.

8 (h) Except when the privilege is waived under AS 09.25.455(a) or disclosure
9 is made under AS 09.25.455(b), neither an agency nor its employees or agents may
10 review or otherwise use the part of an audit report consisting of confidential self-
11 evaluation or analysis during an inspection of a regulated facility, operation, or
12 property or an activity of a regulated facility, operation, or property.

13 (i) This section may not be construed to

14 (1) prevent a regulatory agency from issuing an emergency order,
15 seeking injunctive relief, independently obtaining relevant facts, conducting necessary
16 inspections, or taking other appropriate action regarding implementation and
17 enforcement of an applicable environmental law, except as otherwise provided in
18 AS 09.25.475; or

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

21 (j) A state agency or municipality may, by regulation or ordinance,
22 respectively, allow the notice required under (b) of this section to be filed by facsimile
23 or other electronic means if the means ensures adequate proof of

24 (1) submittal of the notice by the owner or operator; and

25 (2) receipt by the agency or municipality.

26 **Sec. 09.25.455. Waiver and disclosure.** (a) The privilege in AS 09.25.450
27 does not apply to the extent the privilege is expressly waived in writing by the owner
28 or operator who prepared the audit report or caused the report to be prepared.

29 (b) Disclosure of the part of an audit report or information consisting of
30 confidential self-evaluation or analysis does not waive the privilege established by
31 AS 09.25.450 if the disclosure is made

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

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

5 (B) the owner's or operator's lawyer or the lawyer's
6 representative;

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

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

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

11 or

12 (F) the principal of the independent contractor who conducted
13 an audit on the principal's behalf;

14 (2) under the terms of a confidentiality agreement between the owner
15 or operator who prepared the audit report or caused the audit report to be prepared and

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

18 (B) a transferee or potential transferee of an interest in the
19 facility, operation, or property;

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

22 (D) a person engaged in the business of insuring, underwriting,
23 or indemnifying the facility, operation, or property; or

24 (E) a person who, along with the person who prepared the audit
25 report or caused the audit report to be prepared, also is an owner or operator
26 of part or all of the facility, operation, or property; or

27 (3) under a written claim of confidentiality to a government official or
28 agency by the owner or operator who prepared the audit report or who caused the audit
29 report to be prepared.

30 (c) Documents consisting of confidential self-evaluation and analysis that are
31 disclosed under (b)(3) of this section are required to be kept confidential and are not

1 subject to disclosure under AS 09.25.110 - 09.25.220.

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

5 **Sec. 09.25.460. Nonprivileged materials.** (a) There is no privilege under
6 AS 09.25.450 for that part of an audit report that contains the following:

7 (1) a document, communication, datum, report, or other information
8 required by a regulatory agency to be collected, developed, maintained, or reported
9 under an environmental law, under a permit issued under an environmental law, as a
10 requirement for obtaining, maintaining, or renewing a license, as a requirement under
11 a contract or lease with the state, or as a requirement under an administrative order or
12 court order or decree;

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

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

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

20 (5) a document, communication, datum, report, or other information
21 that is independent of the environmental audit, whether prepared or existing before,
22 during, or after the audit; and

23 (6) a document, communication, datum, report, or other information,
24 including an agreement or order between a regulatory agency and an owner or
25 operator, regarding a compliance plan or strategy.

26 (b) An audit report is not privileged and is admissible as evidence and subject
27 to discovery and use in a proceeding relating to pipeline rates, tariffs, fares, or charges.
28 The owner or operator who prepared the audit report or caused the report to be
29 prepared is entitled to a protective order in a proceeding relating to pipeline rates,
30 tariffs, fares, or charges to maintain the confidentiality of the audit from discovery,
31 use, or admission in evidence in other types of proceedings. Discovery, use, or

1 admission in evidence in a proceeding relating to pipeline rates, tariffs, fares, or
2 charges is not considered to have waived the privilege for any other purpose.

3 **Sec. 09.25.465. Exception: disclosure required by court.** (a) A court or
4 administrative hearing officer with jurisdiction may require disclosure of confidential
5 self-evaluation and analysis contained in an audit report in a civil or administrative
6 proceeding if the court or administrative hearing officer determines, after an in camera
7 review consistent with the appropriate rules of procedure, that the

8 (1) privilege is asserted for a criminal or fraudulent purpose;

9 (2) information for which the privilege is claimed is evidence of
10 substantial injury, or the imminent or present threat of substantial injury, to one or
11 more persons at the site audited or to persons, property, or the environment offsite;

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

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

19 (5) privilege would result in a miscarriage of justice or the denial of
20 a fair trial to the party challenging the privilege.

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

23 **Sec. 09.25.475. Voluntary disclosure; immunity.** (a) Except as provided by
24 this section, an owner or operator who makes a voluntary disclosure of a violation of
25 an environmental law, or of circumstances, conditions, or occurrences that constitute
26 or may constitute such a violation, is immune from an administrative or civil penalty
27 for the violation disclosed, for a violation based on the facts disclosed, and for a
28 violation discovered because of the disclosure that was unknown to the owner or
29 operator making the disclosure.

30 (b) Immunity is not available under this section if the violation resulted in, or
31 poses or posed an imminent or present threat of, substantial injury to one or more

1 persons at the site audited or to persons, property, or the environment offsite.

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

3 (1) the disclosure is made promptly after knowledge of the information
4 disclosed is obtained by the owner or operator;

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

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

12 (4) the disclosure arises out of a voluntary environmental audit.

13 (d) To qualify for immunity under this section, the owner or operator making
14 the disclosure must

15 (1) promptly initiate appropriate efforts to achieve compliance and
16 remediation and pursue those efforts with due diligence;

17 (2) promptly initiate appropriate efforts to discontinue, abate, or
18 mitigate any conditions or activities causing injury or likely to cause imminent injury
19 to one or more persons at the site audited or to person, property, or the environment
20 offsite;

21 (3) correct the violation within 90 days or enter into a compliance
22 agreement with the appropriate agency that provides for completion of corrective and
23 remedial measures within a reasonable time;

24 (4) implement appropriate measures designed to prevent the recurrence
25 of the violation; and

26 (5) cooperate with the appropriate agency in connection with an
27 investigation of the issues identified in the disclosure; an agency may request that the
28 owner or operator allow the agency to review, under a written claim of confidentiality
29 as described in AS 09.25.455(b)(3), the part of the audit report that describes the
30 implementation plan or tracking system developed to correct past noncompliance,
31 improve current compliance, or prevent future noncompliance.

1 (e) A disclosure is not voluntary for purposes of this section if it is a
2 disclosure to a regulatory agency expressly required by an environmental law, a permit,
3 a license, or an enforcement order or decree.

4 (f) Immunity under this section for violation of an environmental law is
5 available only for a violation that is discovered as a result of information or documents
6 first produced or obtained during the time period specified in the notice required under
7 AS 09.25.450(b).

8 (g) During the period between receipt of the audit notice required under
9 AS 09.25.450(b) and the specified end date of the audit, the department may not
10 initiate an inspection, monitoring, or other investigative activity concerning the audited
11 facility, operation, or property based on the receipt of a notice under AS 09.25.450.
12 The department has the burden of proving that an inspection, monitoring, or other
13 investigative activity concerning the audited facility, operation, or property initiated
14 after receiving a notice under AS 09.25.450 was not initiated based on receiving the
15 notice.

16 (h) A violation that has been voluntarily disclosed and to which immunity
17 applies under this section shall be identified by the regulatory agency in its compliance
18 history report as having been voluntarily disclosed.

19 (i) This section may not be construed to prevent a regulatory agency from

20 (1) seeking injunctive relief; or

21 (2) issuing an emergency order in a situation involving an imminent
22 and substantial danger to public health or welfare or the environment.

23 **Sec. 09.25.480. Exceptions to immunity; mitigation.** (a) There is no
24 immunity under AS 09.25.475 if a court or administrative hearing officer finds that

25 (1) the owner or operator claiming the immunity has

26 (A) intentionally, knowingly, or recklessly committed or
27 authorized the violation;

28 (B) within the 36 months preceding the violation, repeatedly or
29 continuously committed, at the same facility or associated facilities located in
30 the state, the specific violation or a violation closely related to the violation for
31 which the immunity is sought; or

1 (C) not attempted to bring the facility, operation, or property
2 into compliance so as to constitute a pattern of disregard of environmental
3 laws;

4 (2) the violation was committed intentionally or knowingly by a
5 member of the owner's or operator's management or an agent of the owner or operator
6 and the owner's or operator's policies or failure to have in place systems reasonably
7 designed to prevent the violation contributed materially to the occurrence of the
8 violation; or

9 (3) the owner or operator, after taking into account the cost of
10 completing corrective and remedial measures within a reasonable time and
11 implementing appropriate measures to prevent recurrence of the violation, realized
12 substantial economic savings in not complying with the requirement for which a
13 violation is charged; the exception to immunity in this paragraph applies only to that
14 portion of a penalty that reflects the economic savings of noncompliance after taking
15 into account the cost of completing the corrective, remedial, and preventive measures
16 necessary to qualify for immunity.

17 (b) An administrative or civil penalty that is imposed on an owner or operator
18 for violation of an environmental law when the owner or operator has made a
19 voluntary disclosure under AS 09.25.475(a) but is not granted immunity because of (a)
20 of this section may, to the extent appropriate and not prohibited by law, be mitigated
21 by

22 (1) the good faith actions of the owner or operator in disclosing the
23 violation;

24 (2) efforts by the owner or operator to conduct environmental audits
25 and to complete any resulting implementation plan or tracking system for corrective
26 and preventive action;

27 (3) remediation;

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

30 (5) the nature of the violation; and

31 (6) other relevant considerations.

1 **Sec. 09.25.485. Relationship to other recognized privileges.** AS 09.25.450 -
2 09.25.490 do not limit, waive, or abrogate the scope or nature of a statutory or
3 common law privilege, including the work product doctrine, the attorney-client
4 privilege, and any other privilege recognized by a court with appropriate authority in
5 this state.

6 **Sec. 09.25.490. Definitions.** (a) In AS 09.25.450 - 09.25.490,

7 (1) "audit report" means a report that includes each document and
8 communication, other than those set out in AS 09.25.460, produced from an
9 environmental audit; general components that may be contained in a completed audit
10 report include

11 (A) a report, prepared by an auditor, monitor, or similar person,
12 including the scope of the audit, the dates the audit began and ended, the
13 information gained in the audit, findings, conclusions, recommendations,
14 exhibits, and appendices; the types of exhibits and appendices that may be
15 contained in an audit report include supporting information that is collected or
16 developed for the primary purpose and in the course of an environment audit,
17 including

18 (i) interviews with current or former employees;

19 (ii) field notes and records of observations;

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

22 (iv) legal analyses;

23 (v) drawings;

24 (vi) photographs;

25 (vii) laboratory analyses and other analytical data;

26 (viii) computer generated or electronically recorded
27 information;

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

29 (x) other communications and documents associated with
30 an environmental audit;

31 (B) memoranda and documents analyzing all or a portion of the

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materials described in (A) of this paragraph or discussing implementation issues; and

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

(2) "confidential self-evaluation and analysis" means the part of an audit report that consists of interviews with current or former employees; field notes and records of observations made by the auditor; findings, opinions, suggestions, conclusions, guidance, notes, drafts, and analyses performed by the auditor; memoranda and documents that evaluate or analyze all or part of the material contained in the audit report, including findings, conclusions, opinions, recommendations, and an audit implementation plan or tracking system to correct past noncompliance, improve current compliance, or prevent future noncompliance with an environmental law, and that is

(A) a voluntary, confidential, critical, internal, and retrospective review, self-evaluation, or analysis of conduct, practices, and occurrences and their resulting consequences; and

(B) prepared and maintained with the expectation that it will be kept confidential;

(3) "department" means the Department of Environmental Conservation;

(4) "environmental audit" means a voluntary, confidential, critical, internal, and retrospective review, self-evaluation, or analysis of current or past conduct, practices, and occurrences and their resulting consequences, including an assessment that is a part of the owner's or operator's compliance management system, whether or not conducted on a regular basis or in response to a particular event, by an owner or operator or by an employee or independent contractor of an owner or operator and is

(A) conducted in the expectation that it will be confidential; and

(B) specifically and exclusively designed and undertaken for the purpose of determining compliance with environmental laws or a permit issued under those laws;

(5) "environmental law" means

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(A) a federal or state environmental law implemented by the department; or

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

(6) "operator" means a person or persons who direct, control, or supervise all or part of a regulated facility, operation, or property;

(7) "owner" means a person or persons with a proprietary or possessory interest in a regulated facility, operation, or property;

(8) "penalty" means an administrative or civil sanction imposed by the state to punish a person for a violation of a statute or rule; the term does not include a technical or remedial provision ordered by a regulatory authority, nor an administrative or civil sanction relating to pipeline rates, tariffs, fares, or charges;

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

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

(c) For purposes of this chapter, unless the context requires otherwise, a person acts

(1) "intentionally" with respect to a result described by a provision of law defining a violation when the person's conscious objective is to cause that result; when intentionally causing a particular result is an element of a violation, that intent need not be the person's only objective;

(2) "knowingly" with respect to conduct or to a circumstance described by a provision of law defining a violation when the person is aware that the conduct is of that nature or that the circumstance exists; when knowledge of the existence of a particular fact is an element of a violation, that knowledge is established if a person is aware of a substantial probability of its existence, unless the person actually believes it does not exist; a person who is unaware of conduct or a circumstance of which the person would have been aware had that person not been intoxicated acts knowingly with respect to that conduct or circumstance;

(3) "recklessly" with respect to a result or to a circumstance described

1 by a provision of law defining a violation when the person is aware of and consciously
2 disregards a substantial and unjustifiable risk that the result will occur or that the
3 circumstance exists; the risk must be of such a nature and degree that disregard of it
4 constitutes a gross deviation from the standard of conduct that a reasonable person
5 would observe in the situation; a person who is unaware of a risk of which the person
6 would have been aware had that person not been intoxicated acts recklessly with
7 respect to the risk.

8 * **Sec. 3. APPLICABILITY.** The privilege and immunity created by AS 09.25.450 -
9 09.25.490, added by sec. 2 of this Act, apply to environmental audits that are conducted on
10 or after the effective date of this Act.

SB 41 - Envo's Audit

EB
Awards

R - Promptly "

Small audit - 2, 3 days

2, 3 days to gen. report

Reas. 2 day review - then disclose
of Alyaska - audit takes months
90 day limit in bill

Thousands of pages
mymt. gets it - needs > 10 days
to review

Award 4 - no deletions

Why should we encourage self-auditing?

Lessons from the Price Waterhouse Survey

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

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

Significant findings:

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

DAVID E. ROGERS
ATTORNEY AND COUNSELOR AT LAW

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

April 2, 1997

Representative Joe Green
Chairman, House Judiciary Committee
Capitol Building, Room 118
Juneau, Alaska 99801

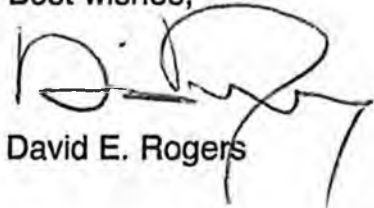
Dear Rep. Green:

I am writing this letter on behalf of the Council of Alaska Producers in support of CSSB 41 and to request expeditious processing by the House Judiciary Committee.

This bill, the product of nearly two years of careful scrutiny and debate, is in good shape. Senator Leman and staff member Mike Pauley have worked tirelessly and responsibly on this legislation and the current CS for SB 41 responds to most of the Administration's major concerns. Final discussions to resolve remaining issues are underway. I am optimistic that these questions also will be settled in the near future.

Please schedule a hearing at your earliest convenience. This bill's time has come. Thanks, Mr. Chairman. As always, I truly appreciate your strong support for Alaska's growing mining industry.

Best wishes,



David E. Rogers



Resource Development Council for Alaska, Inc.

121 West Fireweed Lane, Suite 250, Anchorage, Alaska 99503-2035
(907) 276-0700 Fax: (907) 276-3887 e-mail: rdc@aonline.com

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- Congressman Don Young
- Governor Tony Knowles

April 4, 1997

Representative Joe Green, Chairman
House Judiciary Committee
Juneau, AK 99801

Dear Representative Green:

The Resource Development Council urges your support of CSSB 41, environmental and health/safety audits and requests a hearing on this important piece of legislation.

RDC believes CSSB 41 is a move in the right direction in securing full compliance with environmental laws and regulations. It will encourage greater utilization of self-audits by providing immunity and privilege. CSSB 41 has come a long way from its original draft and has gained broad support from the private sector.

Thank you for giving RDC the opportunity to comment on this legislation, which deserves your support.

Sincerely,

RESOURCE DEVELOPMENT COUNCIL
for Alaska, Inc.

Becky Gay
RDC Executive Director



Resource Development Council for Alaska, Inc.

121 West Fireweed Lane, Suite 250, Anchorage, Alaska 99503-2035
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Congressman Don Young
Governor Tony Knowles

March 28, 1997

Senator Loren Leman
Alaska State Senate
Juneau, AK 99801

APR 02 1997

Dear Senator Leman:

I am happy to report the Executive Committee of the Resource Development Council unanimously passed a motion supporting CSSB 41, environmental and health/safety audits.

RDC appreciates your efforts to work in a cooperative manner to develop legislation that achieves the goals of industry, the administration and the legislature. CSHB 41 has come a long ways from its original draft and has gained broad support from the private sector.

RDC appreciates your hard work and leadership effort to advance CSSB 41. This bill is a move in the right direction in securing full compliance with environmental laws and regulations. It will encourage greater utilization of self-audits by providing immunity and privilege.

Let us know how we can help you move forward with this important piece of legislation.

Sincerely,

RESOURCE DEVELOPMENT COUNCIL
for Alaska, Inc.

Scott Thorson
RDC President 1996-97

cc: Alaska Legislature



ALASKA MINERS ASSOCIATION, INC.

501 W. Northern Lights Blvd., Suite 203, Anchorage, Alaska 99503 FAX: (907) 278-7997 Telephone: (907) 276-0347

March 18, 1997

Honorable Tim Kelly
Chairman, Senate Rules Committee
Capitol Building
Juneau, AK 99801

RE: SB-41, Relating to Environmental Self-Audits

Dear Senator Kelly,

The Alaska Miners Association wishes to go on record in support of Senate Bill 41. This bill involving voluntary self audits is a positive step for the State, for industry and for the public.

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

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

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

Sincerely,

Steven C. Borell, P.E.
Executive Director

cc: Senator Loren Leman

Beyond Regulatory Cat and Mouse



ILLUSTRATION © JANE HOFFSTETTER (DETAIL)

A limited evidentiary privilege, enforcement waivers, and required corrective action make Minnesota's environmental audit privilege legislation congenial to both the regulated and the environment.

When Governor Carlson signed H.F. 1479 into law in May, 1995, Minnesota again established its credentials as a leader on environmental and business issues. The new Minnesota Environmental Improvement Pilot Program (EIP) was the culmination of months of work by dedicated government regulators, business leaders, environmentalists, and other concerned citizens. This is a pro-business, pro-environment law.

Since Oregon passed the first environmental audit privilege legislation in 1993¹, 13 more states have followed suit.² Generally, these legislative developments have taken one of two forms: an evidentiary privilege or an enforcement waiver. Minnesota's approach is a marriage of the two approaches with the introduction of a third: government notice. Minnesota recognizes

BY WILLIAM H.
KOCH

the benefits of a limited evidentiary privilege, as well as the advantages of providing enforcement incentives to encourage environmental auditing. EIP leapfrogs ahead of efforts in other states.

ENVIRONMENTAL AUDITING

Not mandated by any federal or state environmental law, environmental auditing has quietly become more and more common. It is now readily acknowledged that progressive companies should perform environmental audits aimed at uncovering past incidents of potential noncompliance, as well as identifying opportunities to achieve greater efficiency and environmental protection. Administrative, civil, and criminal actions have become commonplace,³ and business leaders who might at one time have shrugged off environmental concerns are now actively promoting environmental agendas. But there has never been an

"[A] facility need not conduct an exhaustive review of every practice to gain the protections of the program."



accepted, workable definition of an environmental audit for business leaders to use and understand.

The new law, like its counterparts throughout the country, tackles this problem by announcing its own definition of an environmental audit. Such an audit "means a systematic, documented, and objective review by a regulated entity of one or more facility operations and practices related to compliance with one or more environmental requirements and, if deficiencies are found, a plan for corrective action."⁴ This is a broad definition, and it must be to account for the broad protections provided under the new law. The law's proponents intended to encourage an open discussion of environmental matters within a business that was "doing the right thing" by conducting environmental audits. To accomplish this end, the definition of "audit," as a legal and practical matter, had to be broad.

Importantly, an audit under this legislation may be of "one or more facility operations" pursuant to "one or more environmental requirements." Thus, a facility need not conduct an exhaustive review of every practice to gain the protections of the program. As was stated repeatedly throughout the legislative process, and as intended by the Legislature, a company is protected for what it does. The greater the breadth of an audit, the more protection a company will enjoy. But the company retains the flexibility to determine the scope of the audit. It is the company that decides how much to invest in an audit in order to gain the corresponding level of protection.

AUDITING TO WHAT END

While the overall goal of the new law is to encourage companies to critically evaluate their environmental practices to ensure compliance with the myriad environmental laws, there are many complementary goals. Voluntary auditing will achieve environmental compliance at a lower overall cost. Preventing environmental harm is more beneficial than punishing environmental wrongdoing. Increasingly scarce state resources mandate a more efficient use of public funds to protect the state's natural resources and environment. A renewed partnership between business and the government will enhance overall efforts to protect the environment, and will lead to a rejuvenated business climate in the state. And there needs to be a mechanism to reward "good actors." Each of these goals is furthered by the new law.

There can be little dispute that voluntary auditing leads to improved compliance. While it is extremely difficult, if even possible, for a business to be in compliance with every federal, state, and local environmental regulation at all times, it is possible for that same business to be ever-vigilant. Through education and incentives, the government must encourage businesses to take a proactive approach to environmental protection. Years of an enforcement-only mentality have not achieved the desired level of compliance. Instead of being perceived as focusing only on the egregious violator and severely punishing that company or individual, the government has been seen as indiscriminately prosecuting environmental offenses — whether administratively, civilly or criminally. Some applaud this broad-brushed approach to environmental enforcement, but the result has been to dissuade people from spending the money to uncover potential areas of non-compliance. Rather than encouraging compliance, an

enforcement-only posture threatens to push environmental vigilance under the corporate rug.

This realization is due, in part, to the fact that the government cannot be every place at all times. Even if that were wise public policy, such an all-encompassing presence is impossible. As officials of the Minnesota Pollution Control Agency (MPCA) readily admitted at a seminar sponsored by the Minnesota Environmental Initiative (MEI) in October 1994, only about 2 percent of Minnesota businesses are randomly inspected every year. That means 98 percent of the business community is not evaluated in any given year. Stated differently, it may be 50 years before a company may have to face up to its environmental record. Such odds mitigate against a company taking an aggressive position with respect to environmental compliance. A simple risk-based assessment would indicate a company might be better off waiting for the hypothetical environmental inspection than spending actual dollars preparing for such a possibility. Even the best-intentioned business must make the payroll.

Government cannot, and should not, do it all. The age of boundless government energy has given way to practical financial limits. Through the new environmental auditing law, Minnesota has placed much of the economic oversight cost on business. Now, those people who understand their businesses best can focus on areas of particular concern. The state will no longer need to become an expert at every business and identify environmental risks peculiar to each industry. As Chuck Williams, chair of the MPCA Board, said in a letter to the editor of *City Business*, the new law "provides MPCA with one more tool to partner with business . . . [the MPCA] strives for positive, proactive relationships with business . . ."⁵ The regulators recognize the benefits of cooperation with the regulated industry, as do businesses. This law continues the state's tradition of working with business to identify areas where a common ground can be found.

Almost everyone would agree that "good actors" should be treated differently than "bad actors." Those people and businesses that are taking a close look at their environmental compliance, and even considering ways of implementing pollution prevention techniques, should not have the same risk of an enforcement action as an entity that ignores its environmental stewardship. This was one of several issues that was shared in common by environmentalists, business leaders, regulators, and others who participated in an MPCA task force charged with developing that agency's internal policy on environmental audits. The new law recognizes this desired distinction.

ENVIRONMENTAL AUDITING MECHANISM

As stated above, 14 states have passed environmental audit privilege legislation in the last two years. Some of the laws were initiated by business organizations, others were the result of negotiations between regulated parties and the government. Few, if any, had the broad-based participation, or support, that Minnesota's legislation enjoyed.⁶ The new law provides an appropriate "carrot and stick" approach to environmental compliance.

The law protects "regulated entities" that conduct environmental audits.⁷ The state, which by definition includes local units of government, will defer and then waive all administrative, civil and criminal enforcement

"The new law provides certainty in exchange for environmental vigilance. And it encourages the use of limited resources to protect the environment rather than to engage in costly litigation."

actions against a company that completes an audit, reports possible deficiencies to the MPCA in summary fashion, and commits to remedy the possible areas of noncompliance within 90 days or some other amount of time negotiated with the MPCA." Additionally, major facilities must prepare pollution prevention (P²) plans and submit progress reports pursuant to Minn. Stat. §§115.07-.09;⁹ other businesses must "examine" P² opportunities. All audit-related documents will be privileged as to third parties. The state can only gain access to these documents in accordance with the MPCA's internal policy on environmental auditing, which was adopted by the MPCA Board on January 25, 1997.¹⁰ The law also directs the MPCA to develop a "green star" emblem that businesses can display for up to two years following their successful participation in the EIP. The new law provides certainty in exchange for environmental vigilance. And it encourages the use of limited resources to protect the environment rather than to engage in costly litigation.

The law has limited, but important, exceptions. A company is not protected if: (1) less than one year has elapsed since the initiation of an environmental enforcement action against the company resulting in a penalty; (2) there has been a knowing criminal violation by the company; (3) less than one year has elapsed since the company resolved the same non-compliance identified in the audit; or (4) the violation resulted in serious harm. Also, the MPCA retains the power to seek an injunction to stop activities causing an imminent threat to public health or the environment. While the exceptions are important, and necessary to ensure the MPCA's protection of Minnesota's environment and residents, they do not negate the unique benefits of the EIP.

Even if one of the limited exceptions applies, the MPCA is required to consider a regulated entity's good faith efforts to comply. In assessing a regulated entity's efforts, the MPCA must consider a number of factors: the corrective action taken upon discovery of a violation; the care exercised to ensure compliance with environmental regulations; whether or not significant economic benefit was realized by the regulated entity due to the noncompliance; the history of compliance prior to implementation of the audit or self-evaluation; efforts to achieve compliance since completion of the audit or self-evaluation; and whether or not the regulated entity has undertaken to implement P² opportunities. After this analysis, the MPCA can decide to take no enforcement action, even if an exception otherwise exists. It is, therefore, important that a regulated entity consider its overall approach to environmental compliance, even if it fears the unlikely possibility that one of the enumerated exceptions applies.

For the first time, Minnesota has created a statutory privilege for environmental audits. There is no need to depend upon developing common law concepts, although those are still available.¹¹ The state will not



seek the audit or related documents except in very narrow cases, and there is a blanket privilege over the audit and related materials as to third parties. Unlike legislation in other states, which require an after-the-fact analysis by a judge to determine if a company remedied any noncompliance in an appropriate manner, Minnesota's privilege is absolute for those that meet the requirements of EIP. Therefore, a regulated entity can, for the first time, freely discuss a potential environmental violation and ways in which to fix the problem. The entity will not be writing a road map for prosecutors, nor will it hang itself with the documentary rope it develops. Attention will be paid to addressing the problem, as opposed to minimizing the risk of a later lawsuit. Through the EIP, a regulated entity gains both flexibility and certainty. And the environment benefits.

The state has surrendered its right to seek production of an audit and related materials except in limited situations as identified in the MPCA environmental auditing policy adopted on January 24, 1995. Once an audit report has been submitted to the MPCA, all supporting documents are privileged if the regulated entity has met the EIP requirements. (This means, as a practical matter, that a regulated entity should promptly prepare its audit report to be submitted to the MPCA. If the state discovers noncompliance before the audit report is submitted and before the privilege is triggered, then the protections of the EIP do not apply.)¹² The only express exception to this policy is if the MPCA "reasonably believes that there is probable cause that a violation of the criminal law has been or is being committed and that such materials are evidence of the commission of a gross misdemeanor or felony."¹³ Otherwise, the only way in which the MPCA will obtain this privileged information is if a third party, such as a disgruntled former employee, releases the information to the MPCA. According to the MPCA it "cannot ignore information furnished to it by any source, including present or former regulated entity employees who choose to file complaints."¹⁴ Nonetheless, the state has voluntarily agreed to limit its ability to seek this information.

RESPONSE OF ENVIRONMENTAL AGENCIES

While the EPA is against environmental audit privileges in general, it has had favorable comments about Minnesota's approach. In its April 3, 1995, "Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy," the EPA said it "will scrutinize enforcement more closely in states with audit privilege and/or penalty immunity laws."¹⁵ This interim policy, which the EPA had hoped to finalize by the end of October 1995,¹⁶ was the "shot across the bow" of the states clamoring to enact legislation aimed at encouraging environmental auditing. The federal government feared the states were proceeding too quickly, with insufficient consideration given to the long-term consequences of such legislation. Earlier

"While the state cannot take any adverse action against a regulated party based upon disclosures that satisfy the EIP, the fact that information is disclosed to regulators is important."



federal threats of possible "over-filing" — a practice where the EPA steps in and begins an enforcement action due to inadequate action by a state with delegated enforcement authority — had been uniformly ignored as being impractical and unwise.

In contrast to the harsh words for other states, the EPA has responded favorably to Minnesota's approach. Eric Schaeffer, deputy director of the EPA's Office of Enforcement and Compliance Assurance, told the *Environmental Reporter* that "the [EPA] supports an approach to this issue taken by the Minnesota legislature . . ."¹⁷ The EPA supports Minnesota's new law because, unlike any of the other laws enacted across the country, Minnesota's requires that the environmental regulators be informed of potential violations. While the state cannot take any adverse action against a regulated party based upon disclosures that satisfy the EIP, the fact that information is disclosed to regulators is important. In other states, the information is hidden to the world; only by accident would someone learn an audit existed and then, only after a legal battle, would the regulators have the opportunity to see the information.

The MPCA is still working to meet the expectations of this new law. With the input of various business organizations, the MPCA has developed some of the self-evaluation forms. As of October 31, 1995, only one company had submitted an audit report under the EIP, and it was limited to water issues. But there had been more than 50 calls to the MPC's⁴ regarding the new program at this writing. Once the MPCA develops all of the self-evaluation forms, these callers will have something with which to work. In the meantime, businesses and other regulated entities can conduct their own environmental audits, preferably with the assistance of counsel in order to maximize all privileges. The MPCA is prepared to work closely with regulated parties interested in the EIP.

While Minnesota should be proud of passing this historical legislation, this new law must be used in order that it prove beneficial. The law has a sunset date. The MPCA is directed to submit a report to the Legislature by January 15, 1999, so the Legislature can assess the effectiveness of the EIP.¹⁸ The more the program is used to identify areas of environmental improvement, the more likely it will be renewed. If, however, the law is not used, it will likely be terminated. It is in the best interest of the regulated community to understand this new law and take advantage of its incentives and protections. It is also in the best interest of the environment. □

NOTES

1 Oregon Revised Statutes §468.963 (1993).

2 The states that have enacted environmental audit privilege legislation include: Arkansas, Colorado, Idaho, Illinois, Indiana, Kansas, Kentucky, Minnesota, Mississippi, Oregon, Texas, Utah, Virginia, and Wyoming.

3 For instance, in 1993, the EPA announced that 2,110 enforcement actions had been brought — 140 criminal cases, 1,164 administrative penalty action, 338 civil cases, and 18 actions to enforce consent decrees. *Chemical Regulation Reporter*, December 10, 1993, at 1643-1644.

4 H.F. 1479, § 9, subd. 4. In addition to covering environmental audits, the new law provides identical protections and

incentives for "self-evaluations." This provision will assist smaller businesses, which might not be able to afford an outside consultant or which would rather complete the environmental review itself. H.F. 1479, § 9, subd. 11.

5 *City Business*, August 4, 1995, at 9.

6 *The vote in the Senate was 64-0; in the House, 128-1.*

7 *Regulated entities include small and large businesses, as well as public agencies.* H.F. 1479, § 9, subd. 10.

8 *This "performance schedule" is a negotiated time line with the MPCA. The MPCA is required to consider multiple factors when considering the reasonableness of a performance schedule.* See H.F. 1479, § 12.

9 H. F. 1479, § 9, subd. 8.

10 This internal policy of the MPCA was expressly incorporated into the EIP through § 15, subd. 1, of H.F. 149.

11 Attorneys would be wise to continue to work with clients in a manner consistent with the attorney-client privilege and the attorney work product doctrine. Also, careful consideration should be given to the applicability of the self-evaluative privilege, originally developed in the medical malpractice situation, but possibly applicable to environmental audits. See, e.g., *Reichhold Chemicals Chemical, Inc., 1994 U.S. Dist. LEXIS 13806 (N.D. Fla. Sept. 20, 1994).*

12 H.F. 1479, § 13, subd. 5. *The new law strikes a balance in favor of timely disclosure to ensure the greatest protection.*

13 "Policy on Environmental Auditing," MPCA, January 24, 1995, at 4.

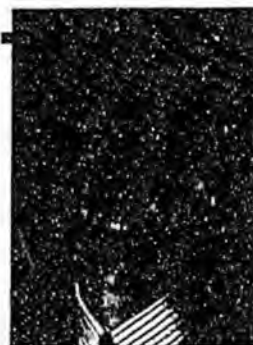
14 *Id.*, at 9.

15 60 *Federal Register* 16875-79 (April 3, 1995). See also the Department of Justice's (DOJ) 1991 *Organizational Sentencing Guidelines*; the 1986 EPA *Audit Policy*; the 1991 DOJ "Factors in Decisions on Criminal Prosecutions of Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator" policy; the 1993 *Draft Corporate Sentencing Guidelines for Environmental Violations*; and the 1994 EPA "The Exercise of Investigative Discretion" memorandum.

16 *Chemical Regulation Reporter*, September 15, 1995 at 617.

17 *Chemical Regulation Reporter*, April 21, 1995.

18 H.F. 1479, § 20.



William H. Koch is an attorney at Leonard, Street and Deinard. Bill focuses his practice on environmental litigation and corporate compliance issues and was one of the primary architects of the new law.



NFIB/Alaska Key Vote

Vote Yes on Senate Bill 41

Environmental Audits

The Alaska Chapter of the National Federation of Independent Business has 4,400 members, making it the largest small-business advocacy group in the state. NFIB represents the entire spectrum of independent businesses, from one person "cottage" operations to quite substantial enterprises.

This bill allows a company who voluntarily audits their business for environmental compliance to be immune from penalty for regulatory violations that are discovered, promptly reported and corrected.

As companies are increasingly subject to new and complicated compliance regulations, the self audit procedure presents a workable solution to identifying problem areas and achieving compliance without fear of penalties for violations. This procedure does not allow a company to continue with non-compliance once a problem is identified. The program would be an encouragement for self-review and compliance.

NFIB/Alaska asks for support of SB 41.

Submitted by Thyes Shaub, NFIB Lobbyist

**ALASKA OIL AND GAS ASSOCIATION
POSITION ON
SB 41, ENVIRONMENTAL AND HEALTH & SAFETY SELF-AUDITS**

The Alaska Oil and Gas Association (AOGA) is a trade association whose 18 member companies account for the majority of oil and gas exploration, production, transportation, refining and marketing activities in Alaska.

AOGA supports the intent of SB 41. The majority of our members currently conduct self-audits as a means of ensuring compliance and see value in this legislation. Over the past 25 years health, safety and environmental regulations have become increasingly complex. Not incidentally, interpretation of these regulations has become correspondingly difficult. In response to this, self-auditing identifies areas of inadvertent non-compliance, and leads to subsequent corrective action. We encourage others in all industries to utilize self-auditing, not just to ensure compliance but to generally improve health, safety and environmental performance. This legislation also encourages greater utilization of self-audits by providing immunity and ensuring confidentiality.

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

Privilege further protects companies from inappropriate and unnecessary repercussions of disclosing audit results to agencies (e. g. third party action). Privilege also ensures that the auditing process is not compromised. The issue is not one of "secrecy" it is a matter of being able to conduct candid interviews with personnel. To remain effective, it is necessary to preserve the integrity of the audit process and maintain the trust and cooperation of employees. Traditional legal privileges limit the flexibility that is important to the self auditing process. For example, attorney-client privilege does not provide for open, internal communication of audit results with employees. However, as with immunity there are reasonable limits to the application of privilege. Privilege should protect the products of an audit, such as the audit report, auditor working papers, and action plans. Privilege should not be a vehicle to hide the underlying facts.

SB 41 moves health, safety and environmental compliance in a positive direction through its encouragement of self-auditing. We are hopeful that legislation based on the intent of SB 41 can be passed and to that end we would be happy to work with the Department of Environmental Conservation, the Department of Law, State OSHA and the bill's sponsor on this legislation.

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

Headquarters:
217 2nd Street, Suite 201
Juneau, Alaska 99801
(907) 586-2323 FAX 463-5515



March 19, 1997

Senator Loren Leman
State Capitol Room 113
Juneau, Alaska 99801

Dear Senator Leman:

Today Senate Bill 41, Environmental and Health/Safety Audits, will be on the Senate Floor for your consideration. We would appreciate your support of this legislation.

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 without fear of penalty and strive to operate in the acceptable and prescribed manner. This law would not allow continued non-compliance once a problem has been identified.

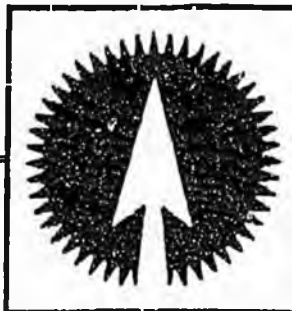
We believe that government should be supportive of business activity wherever possible, and SB 41 fosters the attitude of partnership we believe government and business should strive to attain.

Thank you for your consideration of our position.

Sincerely,

A handwritten signature in cursive script that reads "Pam La Bolle".

Pamela La Bolle
President



**Testimony of Jack E. Phelps, Executive Director
In support of SB 41
Offered to the Senate Labor & Commerce Committee
January 30, 1997**

Mr. Chairman, members of the committee:

My name is Jack Phelps and I am Executive Director of the Alaska Forest Association, the forest products industry trade group for Alaska. The timber industry and the Association support the concept of environmental and safety self audits, now embodied in Senate Bill 41.

The Association believes that environmental laws do not exist to provide job security and a source of income for bureaucrats. Their purpose is not to maintain the flow of federal dollars to the state. Rather, their true purpose is to protect the environment. Likewise, the true purpose of safety laws is to protect people. Self audits promote these true purposes. It is the legislature's responsibility to ensure that environmental and safety laws do not overreach these purposes and become unnecessary impediments to economic development. SB 41 is a good step in that direction.

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

The concepts developed in SB 41 are not untried. 20 other states, notably Texas, have implemented environmental self audits with a good measure of success. While it may require a shift of emphasis for some state agencies, similar laws can work equally well in Alaska.

The AFA appreciates the 20th Legislature's commitment to developing practical efficiencies in government's interaction with private industry. SB 41 is a prime example of those efforts. The AFA also appreciates the sponsor's willingness to work with companies in Alaska's resource development industries to ensure the present bill reflects their needs in the real world. Please move SB 41 out of committee today so that the Judiciary Committee can consider it as soon as possible.

Thank you for the opportunity to testify on this important piece of legislation.

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 Parker Drilling Company

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**THE ALLIANCE**

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March 19, 1997

Senator Loren Leman
 Chairman, Senate Labor and Commerce Committee
 Alaska State Legislature
 State Capitol (MS3100)
 Juneau, Alaska 99801-1182

RE: Alliance Position - Senate Bill # 41.

Dear Senator Leman:

The Alaska Support Industry Alliance (Alliance) is a trade association representing over 300 members engaged in business within the oil, gas and mining industries. Our mission is to foster and promote the safe and environmentally sound development of natural resources, and to enhance and stimulate the business climate for our members.

The Alliance supports the intent of SB 41. This proposed legislation moves health, safety and environmental compliance in a positive direction through its encouragement of self-auditing. Further, the bill's concept is clear -- enhance regulatory compliance through incentives while reducing government and costs.

We are hopeful that legislation based on the intent of SB 41 can be passed and to that end we would be happy to work with you, the Department of Environmental Conservation, the Department of Law, and State OSHA.

Sincerely,

John Wheatley
 Vice President, Policy

Alaska Support Industry Alliance

...for responsible development of Alaska's Oil, Gas & Mineral Resources



**THE ALASKA CHAPTER
OF THE
INTERNATIONAL
ASSOCIATION OF
DRILLING CONTRACTORS**

Mailing Address: P.O. Box 240845
Anchorage, Alaska 99524-0845

**VIA FACSIMILE
(907) 465-2070**

March 6, 1997

The Honorable Bert Sharp
Co-Chair, Senate Finance Committee
Alaska State Legislature
State Capitol
Juneau, Alaska 99801

Dear Senator Sharp:

SB 41, "An Act relating to environmental audits and health and safety audits to determine compliance with certain laws, permits and regulations," was passed out of the Senate Judiciary Committee on March 5, 1997, and now awaits a hearing before the Senate Finance Committee. I am writing today to encourage you to schedule SB 41 for a hearing in the Senate Finance Committee at the earliest possible date.

As I mentioned when we met in Juneau earlier this year, passage of "self-audit" legislation this session is critical to the members of the Alaska Chapter of the International Association of Drilling Contractors ("IADC"), and we feel that, as introduced and amended, this bill represents a good start toward the goal of developing a responsible, cost-effective incentive program that encourages voluntary compliance with environmental laws.

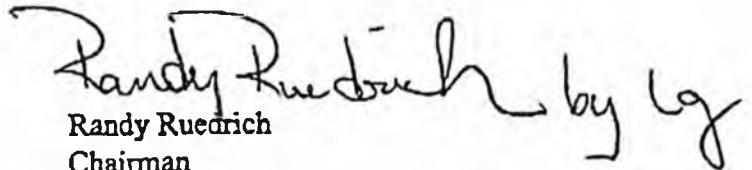
An increasingly common and salutary feature of the operator-drilling contractor relationship in Alaska involves the exchange of information between an independent contractor and its principal. SB 41 creates a privilege for voluntary environmental self-audits and establishes a qualified immunity for conditions that are discovered and reported in the course of those audits. The extension of this privilege and immunity to our industry, which was accomplished by the amendments adopted by the Senate Judiciary Committee at the request of the sponsor, will enable operators and drilling contractors to more readily share the results of self-evaluative reviews without having to worry that an enforcement agency or other litigant will use the results of such inquiries against them. For this reason, we believe that SB 41 would be extremely beneficial in that it would allow us to concentrate on the reduction of remaining deficiencies, rather than focusing on the legal nuances of protecting audits and restricting the sharing of those audits with other entities in the workplace.

The Honorable Bert Sharp
3/6/97 IADC letter, page 2

I am available to meet with you at your convenience to discuss this legislation, and I am prepared to travel to Juneau to appear before the Senate Finance Committee and testify in support of the bill. I look forward to working with you and the members of the Finance Committee on this legislation.

Thank you again for your continued support.

Sincerely,

A handwritten signature in cursive script that reads "Randy Ruedrich by lg". The signature is written in black ink and is positioned to the right of the typed name.

Randy Ruedrich
Chairman
IADC, Alaska Chapter
(907) 563-5530 x-18

bcc: Senator Loren Leman



Alaska Hotel & Motel Association

P.O. Box 104900 • Anchorage, AK 99510 • (907) 272-1229 • FAX (907) 278-4111
Representing Alaska's Finest Hotels, Motels and Inns

MAR 08 1997

Senator Loren Leman
Alaska State Senate
State Capitol
Juneau, AK 99801

March 4, 1997

Dear Senator Leman:

I am writing on behalf of the Alaska Hotel & Motel Association in support of your efforts on SB 41. As we discussed in our meeting last month, our membership includes nearly 90 of the largest lodging properties in the state, employing over 6,000 Alaska residents.

It is our opinion, that the proposed legislation makes sense as it would serve to shift the responsibility of monitoring environmental and health and safety regulation compliance onto the individual organization, where it belongs. Essentially this legislation would turn individual organizations into their own compliance gatekeepers, providing for a window of immunity where prompt and appropriate corrective action was identified and executed.

We as an industry continually work to partner with the State of Alaska, to identifying solutions for budgetary decreases and revenue opportunities. This legislation would not only serve to enhance compliance procedures and non-compliance resolution, it would, by its own definition, reduce the costs of the current "command and control" approach to environmental and health and safety regulation compliance. We applaud such an effort as it will ultimately result in heightened, proactive compliance at a reduced cost.

If there are measures we can take within our industry to support this legislation please do not hesitate to call on me. We will do what we can to assist you in your efforts.

Yours Sincerely,

Frank Rose
Chairman

Alaska Hotel & Motel Association





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 -- SB 41

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

Senate Bill 41 establishes two incentives for businesses and other regulated entities to conduct voluntary self-audits of internal operations, in an effort to secure full compliance with environmental laws and regulations.

The first incentive is limited immunity. Entities that conduct voluntary self-audits will be immune from civil and administrative penalties for violations discovered, provided several conditions are met. The instances of noncompliance must be discovered through a self-audit, and reported promptly to the appropriate regulatory agency. The regulated entity must take action to correct the identified problem and prevent its future recurrence. Immunity is not available for violations causing substantial off-site damage or serious on-site injury. In addition, no immunity is available for violations that are knowingly committed or that result from recklessness. Immunity can be denied to regulated entities with a history of similar violations, or a pattern of disregard for environmental laws.

The second incentive is qualified privilege. Certain portions of the reports generated from voluntary self-audits will be considered privileged and therefore not admissible as evidence or subject to discovery in civil or administrative proceedings. This provision recognizes that the evaluative portion of an audit report is, by its very nature, self-incriminating: it discovers problems, identifies what personnel or management deficiencies are responsible, and recommends corrective action. Studies show that many businesses opt not to perform audits out of fear that the resulting reports will be used by agencies or hostile third parties as a "road map to prosecution". As with the immunity benefit, the privilege has limitations. Privilege can be overcome if asserted for a fraudulent purpose, or if the regulated entity has failed to take required actions to correct areas of noncompliance.

As the budgets of regulatory agencies are reduced at both the federal and state level, the importance of encouraging self-policing becomes ever more important. Senate Bill 41 creates incentives for companies and individuals acting in good faith to police themselves and maintain full compliance with highly complex regulations. This in turn allows government regulators to focus increasingly scarce resources toward investigating and prosecuting the small minority of genuinely "bad actors".

Environmental auditing has become increasingly popular in the past two decades. More than 1,000 of the world's largest companies have self-audit programs in place. In the U.S., 20 states have enacted self-audit laws similar to SB 41, offering privilege and/or immunity benefits to participating businesses, individuals, and municipalities.

Sectional Analysis -- CS for SB 41 (FIN)

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

Prepared by: Mike Pauley, Staff to Sponsor SENATOR LOREN LEMAN
Last updated: Tuesday, March 18, 1997

Section 1: Statement of legislative findings and intent.

- Performance-based standards are increasingly replacing the traditional command-and-control approach of enforcing environmental regulations; this shift will lead to the integration of environmental protections with normal operating procedures.
- The legislature intends to foster this integration by creating a responsible incentive program that will encourage voluntary, critical self-evaluations by regulated entities.
- The public has a strong interest in promoting routine self-audits by regulated entities. This can best be achieved by recognizing a qualified privilege that will help preserve the free flow of information generated by self-audits. Additionally, self-auditing can be encouraged by extending limited immunity to those entities which voluntarily report and correct regulatory noncompliance.

Section 2: Establishes privileges and immunities for certain self-audits.

Sec. 09.25.450 Establishes a qualified audit report privilege.

- The parts of an audit report consisting of confidential self-evaluation and analysis of compliance with environmental laws are privileged. These privileged materials are generally not admissible as evidence or subject to discovery in civil or administrative proceedings.
- To qualify for the privilege under this section, as well as the limited immunity under Section 09.25.475, regulated entities must provide 15 days advance notice to the department before commencing a self-audit. The audit must be completed within 30 days unless a longer period of time is negotiated.
- The person claiming the audit privilege has the burden of proving its applicability.
- All audit report documents containing confidential self-evaluation and analysis must be labeled "AUDIT REPORT: PRIVILEGED DOCUMENT".
- Regulatory agencies and their employees cannot require an owner or operator to waive privilege as a condition of a permit, license, or approval.
- Regulatory agencies and their employees generally may not review or use the parts of an audit report consisting of confidential self-evaluation and analysis during an inspection of a regulated facility, operation, or property.

- This section does not prevent a regulatory agency from conducting necessary inspections, taking appropriate enforcement actions, etc., except as provided in AS 09.25.475.
- No privilege is authorized for uninterrupted or continuous environmental audits.

Sec. 09.25.455 **Establishes an exception to the privilege through the use of waivers.**

- The audit privilege can be waived in writing by the owner or operator who prepared the audit report or caused it to be prepared.
- Disclosure of the part of an audit report consisting of confidential self-evaluation and analysis does not cause the privilege to be waived if the disclosure is made to an employee, contractor, lawyer, or other person involved in addressing or correcting any matter raised in the audit.
- Disclosure does not cause the privilege to be waived if it is made under terms of a confidentiality agreement with an insurer or underwriter, a partner or potential partner, a lender or potential lender, etc.
- Disclosure does not cause the privilege to be waived if it is made under terms of a written claim of confidentiality with a government agency or official.

Sec. 09.25.460 **Describes materials not protected by privilege.**

- Privilege does not apply to documents or other information required by an agency to be reported or maintained as part of an existing environmental law.
- Privilege does not apply to information a regulatory agency obtains from its own observation or monitoring, or from a party not involved in preparing the audit report.
- Privilege does not apply to documents or information that are independent of the audit; nor does privilege apply to documents or information developed or maintained in the course of a regularly conducted business activity.

Sec. 09.25.465 **Establishes an exception to the privilege through disclosure required by a court or an administrative hearing officer.**

- A court or administrative hearing officer may conduct an *in camera* review of audit report documents for which privilege is claimed. Disclosure can be required if it is determined that the privilege is asserted for a criminal or fraudulent purpose, or if the audit report reveals evidence of noncompliance which was not corrected promptly.
- Disclosure may also be required if the information for which privilege is claimed constitutes evidence of a substantial injury to one of more persons at the site audited, or to persons, property, or the environment offsite.

- Disclosure may be required if the privilege would result in a miscarriage of justice or the denial of a fair trial to the party challenging the privilege.
- The party seeking disclosure has the burden of proving that the exception to the privilege is appropriate in a given case.

Sec. 09.25.475 Establishes limited immunity for voluntarily reported violations.

- An entity voluntarily disclosing violations identified through a self-audit will be immune from civil and administrative penalties, provided that action is promptly taken to correct the noncompliance and prevent its future recurrence. Noncompliance must be corrected within 90 days unless a longer period of time is provided for in a compliance agreement.
- Disclosure of noncompliance must be reported in writing by certified mail to the appropriate regulatory agency. Disclosure must occur promptly after discovery of the noncompliance.
- Immunity is not available for violations independently detected by an agency prior to disclosure.
- Immunity is not available for violations resulting in substantial injury at the site audited or to persons, property, or the environment offsite.
- Agencies may not initiate an inspection or other investigative activity based solely on the receipt of an audit notice.

Sec. 09.25.480 Exceptions to Immunity & Mitigation of Penalties

- Immunity under 09.25.475 is not available if a court finds that the owner or operator claiming immunity has intentionally, knowingly, or recklessly committed or authorized the violation.
- Immunity is not available if the owner or operator has in the previous 36 months repeatedly or continuously committed the same or similar violations as those for which immunity is sought; neither is immunity available for an owner or operator who has failed to achieve compliance and that failure constitutes a pattern of disregard for environmental laws.
- Penalties for violations that are voluntarily reported but which are not eligible for immunity may nevertheless be mitigated by attempts at remediation, cooperation with government officials investigating the disclosed violation, the nature of the violation, and other relevant considerations.

Sec. 09.25.485 Relationship to other recognized privileges.

- This section clarifies that the act has no effect in limiting or abrogating any other existing privilege in statute or common law, such as the work product doctrine or attorney-client privilege.

Sec. 09.25.490 Definition of terms.

- "audit report" is a report that includes documents and communications produced from an environmental audit, including an implementation plan or tracking system to correct past noncompliance and prevent future noncompliance.
- "environmental audit" means a voluntary, confidential, critical, internal, and retrospective review, self-evaluation, or analysis of current or past conduct, practices, and occurrences and their resulting consequences, including an assessment that is part of the owner's or operator's compliance management system. The review must be undertaken exclusively for the purpose of determining compliance with environmental laws.
- "confidential self-evaluation and analysis" means the part of an audit report that consists of memoranda and documents that evaluate or analyze all or part of the material described in the audit report, including implementation issues or an audit implementation plan or tracking system to correct past noncompliance, improve current compliance, or prevent future noncompliance with environmental laws.

Section 3: Applicability.

- Clarifies that the privilege and immunity created in Section 2 of the act apply only to audits conducted on or after the effective date.

A L A S K A



April 5, 1997

Representative Joe Green, Chairman
House Judiciary Committee
State Capitol
Juneau, AK 99801-1182

Subject: Support for SB 41 - Environmental Self-Audits

Dear Representative Green,

The Alaska Chapter of the National Federation of Independent Business has 4,500 members, making it the largest small-business advocacy group in the state. Each year the NFIB polls its diverse membership on a variety of issues. The federation uses the poll results to form its legislative agenda.

The 1997 NFIB State ballot included the following question regarding environmental audits:

Should the Alaska legislature adopt a procedure to allow a business to conduct a private self-audit of its compliance with environmental law and take corrective actions to address problems without fines or penalties?

The results were 80 percent in favor, 10 percent opposed, and 10 percent undecided.

Proponents of environmental self audits feel that the procedure would encourage regulated businesses to evaluate their compliance with environmental regulations and to correct problems internally, without fear of facing sanction from the state. The policy would encourage prompt, voluntary compliance and clean-up.

As companies are increasingly subject to new and complicated compliance regulations, the self audit procedure presents a workable solution to identifying problem areas and achieving compliance without fear of penalties for violations. This procedure does not allow a company to continue with non-compliance once a problem is identified. The program would be an encouragement for self-review and compliance.

Sincerely,

A handwritten signature in black ink, appearing to read 'Thyges Shaub', written over a horizontal line.

Thyges Shaub



ALASKA MINERS ASSOCIATION, INC.

501 W. Northern Lights Blvd., Suite 203, Anchorage, Alaska 99503 FAX (907) 278-7997 Telephone (907) 276-0347

April 1, 1997

Honorable ~~Jack Green~~
Chairman, House Judiciary Committee
Capitol Building
Juneau, AK 99801

RE: SB-41, Relating to Environmental Self-Audits

Dear Representative Green,

The Alaska Miners Association wishes to go on record in support of Senate Bill 41. This bill involving voluntary self audits is a positive step for the State, for industry and for the public.

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

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

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

Sincerely,

Steven C. Borell, P.E.
Executive Director

cc: Senator Loren Leman

IV. CONCLUSION.

The superior court's orders compelling release of Keith Revelle's employment evaluation and the Blue Ribbon Panel report are AFFIRMED. The superior court's order refusing to quash the disputed depositions is REVERSED.



**CENTRAL CONSTRUCTION COMPANY,
Manson Construction & Engineering
Company, Osberg Construction Compa-
ny and Ghemm Company, Inc., a joint
venture, Petitioners,**

v.

**The HOME INDEMNITY
COMPANY, Respondent.**

No. S-3486.

Supreme Court of Alaska.

June 8, 1990.

Rehearing Granted and Opinion
Amended July 2, 1990.

After settling claim arising from death of two workers on a state highway construction project, insurer brought suit against the state and contractor joint venture, claiming there was no coverage under the policy and that it should be reimbursed for its entire loss. The Superior Court, Third Judicial District, Anchorage, Karen L. Hunt, J., denied motion by joint venture to compel discovery, and joint venture petitioned for review. The Supreme Court,

place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development or commercial information not be disclosed or be

Compton, J., held that: (1) services sought by client from an attorney in aid of any crime or bad-faith breach of a duty are not protected by the attorney-client privilege; (2) before an in camera review to determine applicability of "crime-fraud" exception, judge should require showing of factual basis adequate to support a good-faith belief by reasonable person that such review may reveal evidence to establish that the exception applies; and (3) insurer's belated reservation of rights letter and its actions after letter was sent were sufficient to compel conclusion that in camera review of insurer's claims file might reveal evidence to establish crime-fraud exception applied to materials in the file.

Reversed.

1. Witnesses ⇨201(2)

Services sought by client from an attorney in aid of any crime or bad-faith breach of a duty are not protected by the attorney-client privilege. Rules of Evid., Rule 503(d)(1).

2. Witnesses ⇨223

Before engaging in an in camera review to determine applicability of the "crime or fraud" exception to attorney-client privilege, judge should require showing of a factual basis adequate to support a good-faith belief by a reasonable person that in camera review of the materials may reveal evidence to establish that the exception applies; once showing is made, decision whether to engage in an in camera review rests in sound discretion of court. Rules of Evid., Rule 503(d)(1).

disclosed only by a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

3. Pretrial Procedure ⇨411

Insured which sought discovery of insurer's claim file adequately presented a factual basis to support good-faith belief by a reasonable person that in camera review of the materials might reveal evidence to establish that "crime-fraud" exception to attorney-client privilege applied to materials in file; insurer's belated reservation of rights letter and its actions after letter was sent were sufficient evidence of bad faith breach of duty to compel conclusion that in camera review was justified.

Michael C. Geraghty, Staley, DeLisio, Cook & Sherry, Inc., Anchorage, R. Jack Stephenson and Ian Rodihan, *pro hac vice*, Seattle, Wash., for petitioners.

Robert J. Dickson and Jerome H. Juday, Atkinson, Conway & Gagnon, Anchorage, for respondent.

Before MATTHEWS, C.J., and RABINOWITZ, BURKE, COMPTON and MOORE, JJ.

OPINION

COMPTON, Justice.

This petition arises out of a dispute between The Home Indemnity Company (Home) and CMOG¹ over the handling of an insurance claim. CMOG sought discovery of certain documents from Home in connection with CMOG's counterclaim. Home refused to fully comply with CMOG's discovery request, asserting that the documents fall within the attorney-client privilege.

The superior court denied CMOG's motion to compel discovery. It held that CMOG must make a *prima facie* showing that Home committed civil fraud before CMOG could overcome Home's claim of privilege.

CMOG petitioned for review, Appellate Rule 402(a), arguing that (1) a *prima facie* showing of every element of civil fraud is

1. CMOG is a joint venture comprised of Central Construction Co., Manson Construction & Engineering Co., Osberg Construction Co., and GHEMM Construction Co. There is some ques-

unnecessary under the relevant law to overcome Home's claim of privilege, and (2) at the least, the superior court should have conducted an *in camera* hearing to determine the propriety of Home's claim of privilege.

We granted the petition, Appellate Rule 402(b), and reverse the decision of the superior court.

I. STATEMENT OF THE CASE

In 1977 two workers, Robert Moloso and his son Joseph, were killed by a rockslide on a state highway construction project in Valdez. The Molosos' estates filed suit against the state alleging various theories for recovery. The state tendered the defense of the claim to its contractual indemnitor, CMOG, which in turn tendered the defense of the claim to Home. CMOG had a \$1 million primary coverage policy with Home and a \$3 million dollar excess coverage policy with the Mission Insurance Group (Mission).

Following trials, appeals and reversals in *Moloso v. State*, 644 P.2d 205 (Alaska 1982) (Moloso I) and *Moloso v. State*, 693 P.2d 836 (Alaska 1985) (Moloso II), the Moloso estates prevailed, obtaining a judgment eventually satisfied for \$2.3 million. Prior to the Moloso estates obtaining the settlement money, however, Mission became insolvent and was unable to pay any part of the judgment. Home paid the entire judgment in response to demands from the Moloso estates and the state.

Home filed suit against the state and CMOG, among others, claiming that there was no coverage under the policy and therefore it should be reimbursed its entire loss. Alternatively, Home sought reimbursement of the amount it paid in excess of \$1 million, in addition to subrogation claims against other parties Home considered to be liable.

In response to Home's suit, CMOG asserted that Home was acting in bad faith

as to whether Ferrante Construction Co. is a member of this joint venture. The issue, however, is not material for purposes of this appeal.

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by denying coverage. To support this assertion, CMOG sought discovery of Home's entire claims file. Included in Home's response to the discovery request was an appendix identifying documents withheld on the basis of attorney-client or work product privileges. CMOG filed a motion to compel discovery or, at the least, to have the court or a special master conduct an *in camera* inspection of the documents to determine the propriety of the privileges claimed. Home opposed this motion.

A special master was appointed who, after extensive briefing and a hearing, issued a recommendation that CMOG's motion to compel be denied. The master found that: (1) CMOG's unsupported contention that Home's privilege claims may be invalid is not sufficient to require an *in camera* review of the documents; (2) Home has the right to prepare for and maintain a coverage action against CMOG and the assertion of privileges is therefore fully available to Home; (3) because there is an adversarial relationship with respect to the coverage issue, the "joint client" exception to privilege assertions is not applicable; (4) *United Serv. Auto. Ass'n v. Werley*, 526 P.2d 28 (Alaska 1974), which explicitly left open the question whether the "crime or tort" or "crime or fraud" parameters of the exception to the attorney-client privilege is applicable in Alaska, *id.* at 32 n. 12, is no longer relevant because Alaska Evidence Rule 503(d)(1)² adopted the narrower "crime or fraud" exception; (5) because CMOG did not plead or allege fraud, CMOG's motion to compel should be denied without prejudice; (6) even if CMOG were allowed to amend its pleadings, it failed to meet its burden of proving a *prima facie* case of fraud against Home; and (7) CMOG's briefing of the work product exception was insufficient as it did not show that CMOG is "unable without undue hardship to obtain the substantial equivalent of the materials by other means" as required by Alaska Civil Rule 26(b)(3).

2. Alaska Evidence Rule 503(d)(1) provides:

(d) There is no privilege under this rule:

(1) *Furtherance of Crime or Fraud.* If the services of the lawyer were sought, obtained

The superior court adopted the analysis and recommendation of the special master. Additionally, the superior court granted Home a protective order and directed CMOG to amend its answer and counterclaim to include assertions of fraud. CMOG petitioned for review.

II. DISCUSSION

Subsequent to our grant of CMOG's petition for review, the superior court granted CMOG's motion for summary judgment on other grounds, ruling that Home was estopped to deny coverage for the loss at issue. As a result of this ruling, the issue before us may be technically moot. Nevertheless, because of the recurring nature and importance of the issue, we address it. *See Hayes v. Charney*, 693 P.2d 831, 834 (Alaska 1985) (mootness determination ultimately left to discretion of the court); *State v. Thompson*, 612 P.2d 1015, 1016 (Alaska 1980) (recurring nature of problem is valid justification for reviewing technically moot issue).

A. SCOPE OF THE TERM "FRAUD" FOR PURPOSES OF THE CRIME OR FRAUD EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE.

CMOG argues that the superior court erred in relying on the special master's conclusion that *Werley* is no longer good law. CMOG points out that *Munn v. Bristol Bay Hous. Auth.*, 777 P.2d 188 (Alaska 1989), reaffirmed the validity of *Werley*, *id.* at 195.

Additionally, CMOG asserts that neither *Munn* nor *Werley* defined "civil fraud" in as stringent a manner as the superior court in this case. CMOG argues that "fraud," as the term is used in Alaska Evidence Rule 503(d)(1), is defined broadly. CMOG asserts that *Munn* supports the proposition that fraud includes situations where there is a "bad faith purpose" for a party's actions. *See id.* CMOG cites the Evidence Rules commentary in support of its view

or used to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud,....

that the court should focus on Home's intentional or reckless disregard of CMOG's rights. The commentary to Alaska Rule of Evidence 503(d)(1) cites 8 J. Wigmore, Evidence § 2298 (J. McNaughton rev. 1961) for the proposition that the attorney-client privilege "does not extend to advice in aid of future wrongdoing."

CMOG is correct in its statement that neither *Munn* nor *Werley* defined "civil fraud" in as stringent a manner as the superior court or Home suggests. The adoption of Alaska Evidence Rule 503(d)(1) is not indicative of this court's intent to use a narrow "crime or fraud" standard.

[1] We do not now, nor have we ever deemed it permissible for a client to use the attorney-client privilege to exclude from discovery "advice in aid of future wrongdoing." See Commentary to Alaska Rule of Evidence 503(d)(1); see also 8 J. Wigmore, Evidence § 2298 (J. McNaughton rev. 1961); *Munn*, 777 P.2d at 194; *Werley*, 526 P.2d at 32. Consequently, we decline to accept Home's argument that "crime or fraud" should be narrowly defined, and hold that services sought by a client from an attorney in aid of any crime or a *bad faith breach* of a duty are not protected by the attorney-client privilege. See, e.g., *Werley*, 526 P.2d at 33 ("[w]hen an insurer through its attorney engages in a bad faith attempt to defeat . . . the rightful claim of its insured, invocation of the attorney-client privilege for communications pertaining to such bad faith dealing seems clearly inappropriate") (footnote omitted). "Acts constituting fraud are as broad and as varied as the human mind can invent. Deception and deceit in any form universally connote fraud. Public policy demands that the 'fraud' exception to the attorney-client privilege . . . be given the broadest interpretation." *In re Callan*, 122 N.J.Super. 479, 300 A.2d 868, 877 (Ch.Div.1973), *aff'd*, 126 N.J.Super. 103, 312 A.2d 881 (App.Div. 1973), *rev'd on other grounds*, 66 N.J. 401, 331 A.2d 612 (1975) (interpreting New Jersey Evidence Rule 26 which is substantially equivalent to Alaska Evidence Rule 503(d)(1)).

The policy of promoting the administration of justice would not be well served by permitting services sought in aid of misconduct to be cloaked in the attorney-client privilege. See *id.* at 878; *Fellerman v. Bradley*, 99 N.J. 493, 493 A.2d 1239, 1245 (1985). See also 8 J. Wigmore, Evidence § 2298 at 577 (J. McNaughton rev. 1961) (the attorney-client privilege should not "protect a deliberate plan to defy the law and oust another person of his rights, whatever the precise nature of those rights may be"); E. Cleary, McCormick on Evidence § 95 at 229 (3d ed. 1984) ("it would be a perversion of the privilege to extend it to the client who seeks advice to aid him in carrying out an illegal or fraudulent scheme").

B. IN CAMERA REVIEW.

The next question is whether the "crime or fraud" showing must be made with evidence entirely independent of the communications at issue. In answering this question we must examine the role of *in camera* inspections in determining the validity of a claimed privilege.

A balance must be reached between allowing *in camera* review based on a party's unsupported assertions that the "crime or fraud" exception applies, and requiring a party to meet the same quantum of proof for *in camera* inspections as would ultimately be necessary to overcome the privilege. This balance is struck by requiring a lesser evidentiary showing for allowing *in camera* inspection than is required ultimately to overcome the privilege.

[2] In *United States v. Zolin*, — U.S. —, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989), the Supreme Court was faced with much the same issue as that presented to us. The Supreme Court struck a balance between too much judicial inquiry, which "would force disclosure of the thing the privilege was meant to protect," and "a complete abandonment of judicial control [which] would lead to intolerable abuses." *Id.* 109 S.Ct. at 2630 quoting *United States v. Reynolds*, 345 U.S. 1, 8, 73 S.Ct. 528, 532, 97 L.Ed. 727 (1953). The Court stated:

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Before engaging in *in camera* review to determine the applicability of the crime-fraud exception, "the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person," ... that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.

Id. 109 S.Ct. at 2631 (citation omitted).

The Court further stated:

Once that showing is made, the decision whether to engage in *in camera* review rests in the sound discretion of the district court. The court should make that decision in light of the facts and circumstances of the particular case, including, among other things, the volume of materials the district court has been asked to review, the relevant importance to the case of the alleged privileged information, and the likelihood that the evidence produced through *in camera* review, together with other available evidence then before the court, will establish that the crime-fraud exception does apply. The district court is also free to defer its *in camera* review if it concludes that additional evidence in support of the crime-fraud exception may be available that is *not* allegedly privileged, and that production of the additional evidence will not unduly disrupt or delay the proceedings.

Id.

[3] We think the balance struck by the Supreme Court is a prudent one, and thus adopt it for use by our courts. Whether an *in camera* inspection is the proper method in this case to determine if CMOG can make a *prima facie* case of bad faith on Home's part is another question.

3. The exclusion reads:

This insurance does not apply:

(b)(1) if the insured is an architect, engineer or surveyor, to bodily injury or property damage arising out of professional services performed by such insured, including

(i) the preparation or approval of maps, drawings, opinions, reports, surveys, change orders, designs or specifications, and

(ii) supervisory, inspection or engineering services;

First, Home knew of the exclusion in the policy from the beginning.³ Prior to deciding whether to accept the tender of defense, Home's own territorial supervisor stated that she "did not recognize any coverage defenses...."

CMOG asserts that it "relaxed its vigil" once the tender was accepted by Home. CMOG states that it had no idea Home was considering a coverage defense until after *Moloso I*, at which time Home sent CMOG a reservation of rights letter.

Home justified the time lapse between accepting the tender and sending the reservation of rights letter by implying that it did not become aware of the possible applicability of exclusion (b) until August 12, 1982. CMOG, however, cites to the record to show that Home was considering the coverage issue prior to August 12, 1982. The record includes correspondence, dated June 29, 1982 through July 28, 1982, which discuss the coverage issue and concludes that a reservation of rights letter should be sent immediately.

CMOG promptly rejected Home's reservation of rights, a position with which Home's own claims manager agreed. Home never responded to CMOG's rejection.

It was at this point, CMOG asserts, that the conflict of interest began. CMOG asserts that it was deliberately kept in the dark about the litigation so that Home could exercise sole control over the process. If Home lost it would assert a coverage defense. CMOG argues that this fall-back position gave Home confidence that it need not accept a reasonable settlement because it could always assert a coverage defense. As a result, CMOG asserts that Home

(2) if the indemnitee of the insured is an architect, engineer or surveyor, to the liability of the indemnitee, his agents or employees, arising out of

(i) the preparation or approval of maps, drawings, opinions, reports, surveys, change orders, designs or specifications, or

(ii) the giving of or the failure to give directions or instructions by the indemnitee, his agents or employees, provided such giving or failure to give is the primary cause of the bodily injury or property damage; ...

"substantially understated the fair settlement value of the case," thus passing up opportunities for settlement and acting adversely to CMOG's interest. If true, this would, in our view, constitute a bad faith breach of Home's duty to defend the suit in the best interest of the insured.

Home contends that the fact that it waited so long to bring the coverage action is not evidence of fraud, because the time period was necessary to present a "united front" in defense of the claims. Additionally, according to Home, the admittedly "late reservation of rights" letter is not evidence of fraud, because (1) it is not clear that a letter would be required in order for Home to assert a coverage defense, and (2) if Home had really wanted to defraud CMOG, it would have relied on the letter in refusing to pay the Moloso judgment.

Home additionally asserts that the settlement negotiations do not offer evidence of fraud chiefly because the Molosos "never once offered or even implied that they would settle for an amount within The Home's policy limits." Home also asserts that its purported "failure to communicate" with CMOG about developments concern-

ing the case is not evidence of fraud because Home did communicate with the attorney for the state and had no reason to believe that the attorney would not also report to CMOG.

We conclude that CMOG has adequately presented a factual basis to "support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies." *Zolin*, 109 S.Ct. at 2631. Home's seemingly belated reservation of rights letter and its actions after the letter was sent are sufficient to compel this conclusion. At the least, CMOG should have been kept informed about the status of the case and any ongoing negotiations so that it could protect its interests.

The decision of the superior court is REVERSED.



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Alaska Environmental Lobby, Inc.

P.O. Box 22151 Juneau, Alaska 99802

907-463-3366

Twentieth Legislature - First Session

CS for SB 41 (Fin): "An Act relating to environmental audits to determine compliance with certain laws, permits and regulations."

While the Alaska Environmental Lobby whole-heartedly supports industry's efforts towards voluntarily compliance with environmental regulations, we strongly oppose CSSB 41. Achieving compliance with regulations will require industry and government to work together. However, the broad language of CSSB 41 cripples our ability to enforce protection of Alaska's environment and public welfare. This legislation greatly obstructs efforts to find the balance between incentives for responsible monitoring and effective enforcement of regulations. And while the removal of the language in the original bill that referenced health and safety laws can be commended, most of the environmental laws that are affected by this bill directly impact public protection. The Alaska Environmental Lobby opposes CSSB 41 because:

- This is a bill of secrecy. It would keep information vital to the public's health and safety and environmental protection hidden from review by the agencies we depend upon to enforce our environmental laws and from the legal system we depend upon to remedy violations of these laws. It limits employees' right to know. It will have a chilling effect on employees' ability to defend their right to speak the truth about workplace activities without fear of reprisal. It limits the right to know of property owners near to potentially polluting industries. This bill allows secrecy to replace corporate responsibility and accountability.
- This is a bill of amnesty to industries that conceal or condone noncompliance. Immunity from civil and administrative penalties is bad public policy and effectively rewards non-compliance. Non-compliance can often result in economic gain. If a violation results in an economic gain over a non-violator, attempts should be made to recover the economic gain. Additionally, penalties and fines are the main tools that regulators have to encourage compliance. This bill lets crimes go unpunished and encourages violators to profit at the expense of law-abiding competitors.

OVER

ALASKA CENTER FOR THE ENVIRONMENT • ALASKA CHAPTER, SIERRA CLUB • ALASKA FRIENDS OF THE EARTH
ANCHORAGE AUDUBON SOCIETY • ARCTIC AUDUBON SOCIETY • CLEAN AIR COALITION • DENALI CITIZENS' COUNCIL
DENALI GROUP, SIERRA CLUB • JUNEAU AUDUBON SOCIETY • JUNEAU GROUP, SIERRA CLUB
KACHEMAK BAY CONSERVATION SOCIETY • KENAI PENINSULA AUDUBON SOCIETY • KNIK CANOERS AND KAYAKERS
KNIK GROUP, SIERRA CLUB • KODIAK AUDUBON SOCIETY • LYNN CANAL CONSERVATION • NORTHERN ALASKA ENVIRONMENTAL CENTER
PRINCE WILLIAM SOUND CONSERVATION ALLIANCE • SITKA CONSERVATION SOCIETY • SOUTHEAST ALASKA CONSERVATION COUNCIL



• This is a full-employment bill for attorneys. This bill will create more confusion, litigation and expense regarding the enforcement of regulations. The fact that the Alaska Department of Law has proposed over a dozen amendments to this bill to help clarify its language is ample evidence of its ambiguity. Many questionable aspects of this bill will only be answered during litigation. The "construed broadly" language in the definitions will pull in all manner of federal, state and municipal laws.

Environmental regulations are passed out of necessity: industry has a less than admirable record of self-regulating. The public's health and safety must continue to be protected, particularly in today's heated competitive climate when industry is more likely to cut corners for economic advantage. The Alaska Environmental Lobby suggests that the intent of CSSB 41 could be met by the Alaska Department of Environmental Conservation adopting a self-policing policy similar to EPA's that would provide clear incentives through leniency for self-disclosure and corrections without the unnecessary privilege and immunity provisions contained in this bill.

Susan E. Schrader

Susan E. Schrader, Executive Director

4/7/97



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

In Anchorage: 750 W. 2nd Ave., Suite 100 / Anchorage, Alaska 99501-2168 / (907) 277-7222 / FAX (907) 277-4523
 In Valdez: 154 Fairbanks Dr. / P.O. Box 3089 / Valdez, Alaska 99686 / (907) 835-5957 / FAX (907) 835-5926

April 7, 1997

To: House Judiciary Committee:

Rep. Joe Green, Chairman Rep. Con Bunde
Rep. Jeannette James Rep. Brian Porter
Rep. Norman Rokeberg Rep. Ethan Berkowitz
Rep. Eric Croft

Re: SB 41- Environmental self-audits

The Regional Citizens' Advisory Council of Prince William Sound (RCAC) is an independent non-profit corporation whose mission is to promote environmentally safe operation of the Alyeska terminal and associated tankers. RCAC's 18 member organizations are communities and boroughs impacted by the 1989 Exxon Valdez Oil Spill, as well as commercial fishing, aquaculture, Native, recreation, tourism and environmental representatives.

We appreciate the opportunity to comment on SB 41. We do support the bill's fundamental goal: to foster greater compliance with environmental requirements through a cooperative approach that encourages regulated entities to find and correct problems, themselves. We believe that fundamental goal can be met, while still protecting the public's right to know and the government's responsibility to enforce.

We support the provision in SB 41 that ensures regulators will not use the self-audit to *initiate* litigation for a self-disclosed offense. Nor do we oppose the protection from punitive penalties for violations discovered through a self-audit. However, the bill in its current form goes too far by granting blanket immunity from legitimate litigation for self-disclosed offenses. It is primarily this aspect of SB 41 that we oppose.

As we and others noted last year, the blanket immunity is neither necessary as an incentive, nor in the public interest.

We suggest instead that the bill prohibit agencies from initiating civil or administrative litigation based *solely* on an environmental audit report. This is the provision used by the EPA in its policy and it makes much more sense.

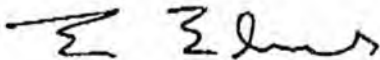
It ensures both fairness to the regulated entity and appropriate protections to the public.

We suggest additional changes to improve the bill:

- Add more precision to the language of the standards. As written, the bill is very vague. For example, disclosure of a violation must occur "promptly." The EPA policy requires disclosure within 10 days. There are numerous other instances in the bill where standards are vague and open to broad interpretation.
- Eliminate the language, which now creates a safe haven for violators, by tightening the conditions and requirements for immunity:
 - the violator should not be able to create a permanent safe haven by announcing repeated or continuous self-audits or by announcing an audit after it has reason to believe a violation may have occurred;
 - disclosure of a violation should not shield the violator from prosecutions for other violations based on the disclosed facts, or which are discovered because of the disclosed facts. The bill as currently written would lead to more litigation and would effectively shield a violator from future investigations and prosecutions, even for violations not voluntarily disclosed.

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

Sincerely,



Tex Edwards, President

cc: Sen. Georgianna Lincoln Sen. Jerry Mackie Sen. John Torgerson
Sen. Jerry Ward Rep. ~~Gene Kilduff~~ Rep. Mark Hultgren
Rep. Alan Austerman Rep. Gail Phillips Rep. Gary Davis
Governor Tony Knowles
RCAC Board of Directors Paul Richards, Alyeska Pipeline Service Co.



COOK • INLET • KEEPER

April 7, 1997

Governor Tony Knowles
State Capitol Building
P.O. Box 110001
Juneau, Alaska 99811-0001

Re: Senate Bill 41

Dear Governor Knowles:

I am writing to urge you to protect the public's right-to-know about pollution and worker safety issues by rejecting Senate Bill 41.

At the most basic level, S.B. 41 is a cloak for industry to conceal important information about accident safety assessments, certain emissions test data, on- and off-site pollution and other health and safety problems at a facility. A 1995 study by Arthur D. Little found that nearly 90% of U.S. corporations conduct environmental audits as part of normal business practices. Thus, *responsible businesses already incorporate environmental audits into their everyday practices, because it makes good business sense.* As one commentator noted, environmental audit privileges are "like replacing a brand new car because it has a flat tire:" in short, legal privileges are an extreme response to a non-issue.

Throughout the history of the common law, courts and legislatures have been loath to expand the sphere of evidentiary privileges. The United States Supreme Court has often cited the proposition that "the public . . . has a right to every man's evidence,"¹ and in the case involving President Nixon's tapes, it ruled that privileges and other exclusionary rules "are not lightly created nor expansively construed, for they are in derogation of the search for the truth."² If the Supreme Court refused to create a new privilege for the President of the United States, it's ludicrous to extend such privileges to polluters.

Another criticism of audit privileges is that they will increase confusion and stimulate increased litigation, particularly for corporate "bad actors" set on maximizing profit at the expense of health and environmental safeguards. For example, Waste Management, Inc.

¹ *United States v. Bryan*, 339 U.S. 323, 331 (1950).

² *United States v. Nixon*, 418 U.S. 683, 710 (1974).

Governor Knowles Letter

Page 1

(WMX) has been a primary advocate for audit privileges nationally, and after Ohio passed an audit bill, WMX promptly moved to quash information to Ohio citizens concerned about a hazardous landfill in their neighborhood. This is but one example, but it demonstrates an important point: deep-pocketed corporations can and will use audit privileges to frustrate the public's legitimate right-to-know about hazards in their communities.

Finally, S.B. 41 would waive all civil penalties for self-disclosed violations. This provision would remove any incentive - other than corporate morality - for businesses to comply with environmental regulations, and would set a horrible public policy precedent. Imagine if every speeder in the state could simply admit to the officer that he or she had been speeding in order to escape liability. If anything, violators should be held to pay the economic benefit realized as a result of the self-disclosed violation, in which case they would not be at a competitive advantage vis. their competitors who have chosen to comply with applicable safeguards.

The attorney-client and attorney workproduct exclusions are two longstanding privileges which already safeguard businesses during self-critical analyses. Furthermore, the Environmental Protection Agency embarked on an exhaustive stakeholder process to consider the audit privilege issue, and decidedly rejected all legal privileges for self-reported violations.

S.B. 41 is yet another attempt to wrest power from citizens and vest it in corporate managers charged with maximizing returns for shareholders and others. It will not improve environmental compliance. Please help stop this dangerous trend and reject S.B. 41.

Very truly yours,

COPY

Robert W. Shavelson
Executive Director

COUNCIL OF ALASKA PRODUCERS

Position on SB 41 Environmental Self-Audits

The Council of Alaska Producers strongly supports CSSB 41. This bill is the product of nearly two years of careful scrutiny and debate. It establishes a rational framework for encouraging Alaska business - large and small - to conduct regular self-audits of their environmental operations and policies and correct any problems discovered through this process.


We believe that the carefully balanced combination of qualified privilege for the audit work product and qualified immunity for properly disclosed violations will greatly benefit the people of this state by improving environmental practices and fostering a cooperative, common sense approach to environmental protection.

We do not agree with critics that this legislation will allow industry to get away with something. There are many safeguards built into SB 41 that prevent the use of audits to hide facts or otherwise shield bad guys from appropriate penalties. However, while the bill is generally acceptable in its current form we are willing to continue to work with all interested parties to resolve remaining concerns.

We'd like to thank and congratulate Senator Leman and staff member Mike Pauley for promoting this modern approach to environmental regulation and for their tireless efforts to facilitate reasonable compromise on the issues. We'd also like to compliment the Knowles Administration for its willingness to work with the Sponsor and others to reach a reasonable compromise.

This bill's time has come. We urge passage this session.

Dated this 7TH day of April, 1997.



By: David E. Rogers
For: The Council of Alaska Producers



**THE ALASKA CHAPTER
OF THE
INTERNATIONAL
ASSOCIATION OF
DRILLING CONTRACTORS**

Mailing Address: P.O. Box 240845
Anchorage, Alaska 99524-0845

HAND DELIVERED

March 20, 1997

The Honorable Joe Green
Chair, House Judiciary Committee
Alaska State Legislature
State Capitol
Juneau, Alaska 99801

Re: Hearing Schedule for SB 41, "An Act relating to environmental audits to determine compliance with certain laws, permits and regulations"

Dear Representative Green:

SB 41, "An Act relating to environmental audits to determine compliance with certain laws, permits and regulations," passed the Senate yesterday by a vote of 16 to 3. The bill will be before the full Senate again for reconsideration on Friday, March 21, 1997, and, assuming the bill passes, it will be ready for transmission to the House that afternoon. I have written to Speaker Phillips requesting that the first House referral be to the Judiciary Committee. Today, Kyle Parker also met with Mike Heatwole on my behalf to request the same referral. I understand from Kyle that the Speaker has agreed that your committee will receive the bill on Monday. Therefore, I am writing today to encourage you to schedule SB 41 for an immediate hearing in the House Judiciary Committee pending passage and referral.

As I mentioned when we met in Juneau earlier this month, passage of "self-audit" legislation this session is critical to the members of the Alaska Chapter of the International Association of Drilling Contractors ("IADC"), and we feel that, as introduced and amended in the Senate, this bill represents a good start toward the goal of developing a responsible, cost-effective incentive program that encourages voluntary compliance with environmental laws.

An increasingly common and salutary feature of the operator-drilling contractor relationship in Alaska involves the exchange of information between an independent contractor and its principal. SB 41 creates a privilege for voluntary environmental self-audits and establishes a qualified immunity for conditions that are discovered and reported in the course of those audits. The extension of this privilege and immunity to our industry, which was accomplished by the amendments adopted by the Senate Finance

Committee at the request of the sponsor, will enable operators and drilling contractors to more readily share the results of self-evaluative reviews without having to worry that an enforcement agency or other litigant will use the results of such audits against them. For this reason, we believe that SB 41 would be extremely beneficial in that it would allow us to concentrate on the reduction of remaining deficiencies, rather than focusing on the legal nuances of protecting audits and restricting the sharing of those audits with other entities in the workplace.

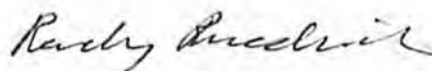
As I mentioned above, passage of "self-audit" legislation this session is critical to the members of the Alaska Chapter of the IADC. The drilling contractors in Alaska are in the process of re-negotiating our contracts with BPXA and ARCO; and, a new responsibility the operators have asked that we assume requires us to develop and implement our own health, safety and environmental programs. This is a responsibility we are happy to take on; however, in order for this new approach to work effectively, we will need to be able to review the implementation of our individual programs and share the results of those reviews with the operators and other oilfield contractors with whom we work. The operators and other oilfield contractors, in turn, will need to share their reviews with us. The privilege and immunity created by SB 41 will simplify this sharing of information.

Several drilling rigs operating on the slope already are working under these re-negotiated contracts -- I guess one might say that we have put the cart before the horse by completing these contracts prior to implementation of "self-audit" legislation. But, as you know, in the increasingly competitive, world-wide economy in which Alaska's oil industry must compete, we cannot always wait for government to lead the way when it comes to identifying better ways of doing business. In fact, in this instance, we are hopeful that government will take our lead and recognize that state law must be changed immediately to reflect the new realities of the workplace.

I am available to meet with you at your convenience to discuss this legislation, and I am prepared to travel to Juneau to appear before the House Judiciary Committee and testify in support of the bill. I look forward to working with you and the members of the Judiciary Committee on this legislation. Again, because this legislation is so critical to the industry, I hope that you will be able to make time in the Judiciary Committee's schedule to hear the bill immediately following your return from the Easter holiday.

Thank you again for your continued support, and I look forward to seeing you soon.

Sincerely,



Randy Ruedrich, Chairman
IADC, Alaska Chapter
(907) 563-5530 x-18

Kirsty

DRAFT

March 24, 1997

Randy Ruedrich, Chairman
IADC, Alaska Chapter
P.O. Box 240845
Anchorage, AK 99524-0845

Randy,

The Judiciary calendar is set for the next week and because of the four day weekend over Easter, we will not be able to get much done until the week of April 1st. We have a couple of priority bills which are controversial - seems they all have been for the past month - which means the week of April 7th and we will schedule it that week. We suffer from the age old problem of Senate wanting heard but they are gone so much that they can't get around to the House Bills -- strange it is this way every year.

Sincerely,

Joseph P. Green
State Representative
District 10

- Burden of proof amend
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in camera under
in camera forensic showing
in camera

articulate exactly what
you have to do
level playing field

auditor recommended

More showing

they direct - commission of crime
P.F. showing of
then - in camera review
- release
- no

Janice Adair

didn't like P.F. evidence

**U.S. Department of Justice***United States Attorney
District of Alaska at Anchorage**Federal Building & U.S. Courthouse
222 West 7th Avenue, #9, Room 253
Anchorage, Alaska 99513-7567**(907) 271-5071
FAX (907) 271-3224*

April 4, 1997

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

Re: Senate Bill No. 41; An Act Relating to
Environmental Audits to Determine Compliance
with Certain Laws, Permits, and Regulations

Dear Representative Green:

Last year I wrote you and other members of the House Resources Committee, and testified before that Committee, about my serious concerns over legislation which would establish an evidentiary privilege for environmental audits and create immunity for violators in certain circumstances. CSSB 199, the environmental audits bill considered by the legislature last year was not enacted into law. This year another environmental audit bill has passed the senate and has been referred to your Committee in the House: Senate Bill No. 41. While many of the provisions of former CSSB 199 which I considered problematic have been modified in SB 41, I believe the audit privilege and immunity bill provisions of SB 41 are nonetheless undesirable because: (1) there is no demonstrated need for these provisions; (2) the provisions impede enforcement efforts by allowing facts important to protection of public health and the environment to be hidden from public view and government officials; and (3) the

SHEILA
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provisions will mire civil and administrative enforcement efforts in a tangle of litigation.

1. The bill is not needed.

As the United States Supreme Court has recognized, environmental laws, like other laws designed to protect public health and safety, were created to regulate activities that "...touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self protection." United States v. Dotterweich, 310 U.S. 277. Since the public is powerless to protect itself from the effect of environmental violations, the law forces individuals and corporations who are responsible for non-compliance to remedy the situation in the face of criminal prosecution, or, often more likely, administrative or civil proceedings filed by government agencies or injured persons. The potential for such proceedings sends a powerful message that violation of environmental laws creates a duty to remedy the harm caused. An audit privilege would undercut this message by taking the extraordinary step of creating an evidentiary privilege that will have significance only where the duty to remedy has been violated. The public justifiably would be upset if the government were prevented from obtaining audit information regarding a violation that has led to death or serious bodily injury. An even greater disservice would be done to those injured or the survivors of those killed.¹

¹Note that under Sec. 09.25.465(a)(a), a court may order the disclosure, after a non-public, in camera review, of "evidence of substantial injury." The scope of that exception is ambiguous at best: it may be read to allow disclosure only of direct evidence of the fact that an injury has occurred or is threatened, not the causes and circumstances leading up to the injury. Certainly the violators' lawyers will so argue. As discussed more fully below, this is one of the

A number of policies and a wide range of programs have been developed and implemented at the federal level to encourage and promote voluntary environmental auditing and compliance, without the need for a deleterious audit privilege or the unnecessary granting of blanket immunity. For example, the United States Environmental Protection Agency (EPA) adopted and published a broad and comprehensive policy on incentives for self-policing (including environmental auditing) to address exactly the concerns that have driven the proposed legislation here. (A copy of the January, 1997, EPA Audit Policy Update showing the success of the EPA self-policing policy is attached.) That policy is consistent with enforcement policies already existing within the Department of Justice. EPA also has developed a series of compliance assistance policies and initiatives to assist small businesses, particularly in creating and implementing self-evaluation programs. While audit privilege legislation, such as SB 41, is directed mainly at benefiting larger companies that already have self-examination and compliance programs in place, or can afford to install them, the needs of small businesses in this area are better met through targeted efforts and direct assistance. The EPA is ready, willing and able to meet with government and business people in Alaska to explore the ways these policies and programs can be best adapted for use here.

The express purpose of SB 41 is to encourage businesses of all sizes to conduct audits so as to identify and correct improper practices and remedy any environmental harm that those practices may have caused. Section 1 of the bill specifically makes the

many provisions of SB 41 that will operate to keep any enforcers and injured persons mired in expensive and time-consuming litigation.

finding that self-audits "would be curtailed if a privilege for the audits were not available." However, that finding does not square with available research. A Price Waterhouse survey on the subject, often cited by proponents of the audit privilege and immunity bills, actually supports the proposition that privilege and immunity bills are not needed. Seventy-five per cent (75%) of those surveyed already conducted environmental self-audits. Of those, over ninety per cent (90%) specified the audits were being performed for good business or proactive reasons. Of the twenty-five per cent (25%) which do not audit, the primary reason given by the companies was that their processes and products are perceived as having insignificant impact on the environment. An audit privilege bill would not change that.

Moreover, recently a research group headed by a professor of accounting at the Business School at the University of Texas conducted a study designed to evaluate claims such as SB 41's finding that audits would be curtailed unless a statutory privilege were available. Birendra K. Mishra, D. Paul Newman and Christopher H. Stinson, "Environmental Regulations and Incentives for Compliance Audits" to be published in the Journal of Accounting and Public Policy (Summer, 1997). The authors of the study conclude that "the regulator's right to access [of company records] unambiguously increases the incentive for the firm to conduct a compliance audit....The argument that the right to access [by regulators] decreases the firm's audit incentives due to the possibility of self-incrimination, and therefore that laws restricting that access will increase the incentives of the firm to conduct compliance audits...is not consistent with our analysis....As a result, the recent legislative initiatives in several states that protect environmental compliance audit reports as confidential business information, may be

unnecessary or even counterproductive.”

Indeed, the experience of other states has shown that audit privilege and immunity bills are undesirable. Idaho's governor, Phil Batt (Rep.), has announced that he will let that state's audit legislation expire under its “sunset” provision because the bill has produced no tangible benefits. The States of Utah and Texas are revisiting their audit privilege laws, in each case in response to criticism from EPA that the laws prevent those states from fulfilling their enforcement obligations under federally delegated environmental programs. The Governor of New York, George E. Pataki (Rep.), recently announced that he will oppose any attempts to enact audit privilege and immunity legislation in that State.

In sum, significant incentives are already present for responsible operators to perform environmental self-audits and correct observed problems. Analysis and experience have shown that audit privilege and immunity bills actually may decrease existing incentives.

2. SB 41 will impede law enforcement efforts.

Unlike last year's bill, SB 41 appears to apply only to civil or administrative actions, not criminal prosecutions. However, a close reading of the basic audit privilege, Section 09.25.450, reveals that the apparent inapplicability of the audit privilege to criminal proceedings is not so clear. Section 09.25.450(a)'s two sentences can be read entirely independently of one another. This could mean that under the first

sentence an owner or operator could refuse to disclose, and prevent another from disclosing, the contents of an audit even when the information is sought pursuant to a grand jury subpoena in a criminal case. While under the second sentence, such information may be admissible in a criminal proceeding, it may be obtainable in the first instance only in one of the ways specified under Section 09.25.460 (i.e., from a "source that was not involved in...the audit report"). Even then, though, it appears under the first sentence that the owner-operator arguably still could prevent even such an independent source from disclosing the information to the extent that it was part of the "Confidential Self-Evaluation and Analysis" (as broadly defined in Section 09.25.490(2)) portion of the report. Thus, it appears that the exception for criminal violations may be more apparent than real.

If the drafters intended that the audit privilege not be used to block access to information in a criminal context, it is unclear why this bill does not explicitly say so. As opposed to SB 41's ambiguous provisions, audit privilege and immunity legislation in other states has been made specifically inapplicable to criminal matters. Ambiguity like this will only provide a way for those wishing to hide their criminality to delay and obscure legitimate investigations of environmental crimes.

Perhaps most importantly, even an explicit exclusion from criminal prosecution would not solve a fundamental problem with the bill. The fact is that at the beginning of an enforcement action it often is difficult to foretell whether the matter ultimately will proceed along an administrative, civil or criminal path. That determination is not made until authorities have a full picture of a violation—precisely the kind of

understanding that SB 41 would obstruct. Many criminal cases are identified from what began as administrative or civil actions; as the government or private litigants develop evidence, the criminal nature of the violation becomes clear. Thus, the privilege applicable to civil and administrative actions has the effect of also shielding information about criminal conduct.

A major criticism of last year's bill, CSSB 199, was that it would allow environmental violators, under the guise of an environmental audit to shield the evidence of violations, as well as the thought processes and conclusions of the auditors. In Section 09.25.450(a), SB 41 appears to limit the privilege to thought processes rather than underlying facts found in an audit. In particular, the privilege applies only to "the parts of the report that consists of confidential self-evaluation and analysis." **HOWEVER, THIS APPARENT LIMITATION DOES NOT REALLY EXIST.** What subsection(a) seems to give, the definition section (Section 09.25.490) takes away. There, "Confidential Self-evaluation and Analysis" is defined very broadly to include facts, as well as analysis, since the definition includes "interviews with current or former employees, sealed notes and records of observations made by the auditor..."

3. SB 41 Will Produce Significant Wasteful Litigation.

It would be a poor lawyer indeed who could not use SB 41 to prevent persons legitimately seeking redress for actual injury or governmental agencies attempting to enforce environmental laws from obtaining important relevant information. The provisions of this bill that will be subject to endless litigation are almost too numerous

to mention. As stated above, even in criminal grand jury proceedings, it can be expected that lawyers for environmental violators will be able to prevent the discovery of important evidence of their client's violations or at least delay it for substantial periods.

Another example is found in Section 9.25.450(d), which relates to a person who actually observed or was involved in a violation and thereafter participated in an audit concerning that violation. The privilege would extend to the person's knowledge about the audit, but not to his/her information from prior observations or involvement. In practice, this would set up a huge hurdle for injured parties or state regulators. Generally, the two sources of information could not be neatly separated. It would be malpractice for defendants' lawyers not to raise this whenever an employee falls into the dual role, leading to extensive and otherwise unnecessary litigation. Moreover, this provision would be subject to great abuse. Unscrupulous companies would be able to use this to shield company employees who are witnesses to or commit violations and wrongdoing; they simply assign those employees/witnesses to auditing and seal them under the privilege. To gain access, the government would have to litigate under Subsection 09.25.450(d).

Another example of the opportunities for violators to block important environmental enforcement efforts is found in Section 09.25.450(h). This subsection prevents the use of information disclosed in an audit to conduct a follow-up inspection, presumably to determine if the facility is now complying with the law and to protect public health and safety. This provision is particularly outrageous. Would the

government be faced with endless hearings to determine whether the inspectors were tainted with information from a disclosed audit? This may be another of the land mines scattered throughout the bill that can be used to generate litigation and tie enforcement efforts in knots.


Still, another example is found in Section 9.25.450(i), which provides that the privilege is not supposed to interfere with the state regulator's issuance of emergency orders. The problem, of course, is that the information critical to a decision on whether an emergency exists may be well be buried under a claim of privilege. In other words, SB 41 will keep from the public and their officials sufficient information to protect the public from immediate threats to health and the environment.

Under Section 09.25.450(b), the burden is on the government to demonstrate (in an *in camera* hearing) that one of the specified exceptions to the privilege applies. However, as a practical matter, the government rarely, if ever, could establish that any of the five exceptions apply unless it had access to the audit (supporting documents, interviews, etc., as well as the report itself). Does the government get such access without a *prima facie* demonstration that an exception applies? In other words, is the hearing automatic in every case upon an application by the government? Should the bill pass, would the State seek such a hearing in most cases simply to determine whether any of the grounds for disclosure applied? Since the holding of an *in camera* hearing would expose the attorney^s and all other persons who participated in the hearing to the taint flowing from access to some or all of the reported issues, the State could be forced to "double staff" every matter that was the subject of such a hearing

or to protect its ability to proceed without the audit in the event that the Court were denied the access sought in the hearing. This could amount to an enormous drain upon Alaska's enforcement resources, which are already stretched almost pathetically thin. With all the hurdles posed for enforcers and injured persons in SB 41, potential harm well could become real, and actual harm could greatly worsen, while enforcers painstakingly attempt to work their way through the provisions of SB 41 before reaching facts of the violation hidden behind a claim of privilege.

In sum, potent incentives already exist for self-examination and correction of environmental violations. SB 41, while purportedly designed to encourage these activities, will only allow the most unscrupulous to avoid or interminably delay accountability for their actions at the expense of public environmental health. Accordingly, I urge you and your committee to reject this bill.

Very truly yours,


ROBERT C. BUNDY
United States Attorney

RCB:kjm

Attachment

United States
Environmental Protection
Agency

Enforcement and
Compliance Assurance
(2201)

EPA 300-N-87-001
January 1997



Audit Policy Update

FROM THE ASSISTANT ADMINISTRATOR:

Voluntary auditing programs play an important role in helping companies meet their obligations to comply with environmental law. EPA's Audit Policy, effective in January of 1996, encourages self-policing by cutting penalties for any violations that are discovered, disclosed and corrected through voluntary audits or compliance management programs. Nor will EPA recommend criminal prosecution of regulated entities in these circumstances, although individuals remain liable for their own criminal conduct. The policy includes safeguards to protect the public and the environment, excluding violations that may result in serious harm or risk, reflect repeated noncompliance or criminal conduct, or allow a company to realize a significant economic gain from its noncompliance. (See page 4 for a more complete summary).

So far, 105 companies have disclosed violations under the policy proving that environmental auditing can be encouraged without blanket amnesties or audit privileges that would excuse serious misconduct, frustrate enforcement, encourage secrecy, boost litigation, and/or lead to public distrust. This newsletter is the second in a series of updates on implementation of EPA's audit policy, and includes information on settlements, interpretive guidance, and similar state policies. A complete copy of the audit policy and copies of settlements discussed below can be obtained by calling (202) 260-7548 or faxing (202) 260-4400 and referencing docket number C-94-01. For more information, call Brian Riedel, editor of *Audit Policy Update*, at (202) 564-4187.

Steve Herman, Assistant Administrator
Office of Enforcement and Compliance Assurance

105 Companies Disclose Violations Under Audit Policy

To date, 105 companies have disclosed environmental violations at more than 350 facilities under the EPA interim and final Audit/Self-Policing Policies. Among these disclosures, EPA has already settled cases/matters with 40 companies and 48 facilities, and has agreed to waive all penalties in most of these cases.

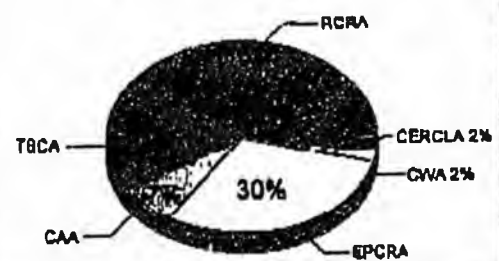
Three recent settlements are featured in this month's issue.

Companies Receiving Audit Policy Relief:

Acadia Polymers, Irongate, VA
Alyeska Pipeline, Prudhoe Bay, AK (2 facilities)
Austin Sculpture, Pharr, TX
Auto Trim, Inc., Brownsville, TX
Baldwin Piano & Organ, Trumann, AR
Bortec Industrial Inc., El Paso, TX
BP Exploration & Oil, Inc., Port Angeles, WA
CBNEX, Laurel, MT
Clearwater Co., Pittsburgh, PA
Coilcraft, Inc., El Paso, TX
Cook Composites & Polymers, N. Kansas City, MO
General Electric Corp., Waterford, NY

Gobar Systems, Inc., Brownsville, TX
Goulston Technologies, Inc., Monroe, NC
Hasbro, Inc., El Paso, TX
Invacare, Inc., McAllen, TX
Kingsford Products, Louisville, KY
Koch Refining Co., Corpus Christi, TX
Lambda Electronics, Inc., McAllen, TX
Magnetek, Inc., Brownsville, TX
Microfoam Corp., Utica, NY
Midwestern Machinery, Minneapolis, MN
Minolta Co., Ramsey, NJ
Nelson Company, Stephenville, TX
O'Neill Industries, Philadelphia, PA
Outboard Marine Corp., El Paso, TX
Ozark-Mahoning Co., Tulsa, OK
Shure Brothers, Inc., El Paso, TX
Siemens Electromechanical Co., El Paso, TX
Simplot Dairy Products, Nampa, ID
Sunbeam-Oster Co., Bay Springs, MS
Sunbeam-Oster Co., Coushatta, LA
Sunbeam-Oster Co., Hattiesburg, MS
Sunbeam-Oster Co., McMinnville, TN
Sunbeam-Oster Co., Neosho, MO (2 facilities)
Sunbeam-Oster Co., Shubata, MS
Sunbeam-Oster Co., Waynesboro, MS
Transportation Electronics, El Paso, TX
TRW Vehicle Safety Systems, McAllen, TX
TRW Automotive Products Remfg., McAllen, TX
Teccor Electronics, Inc., Brownsville, TX
Thomson Saginaw Ball Screw, Saginaw, MI
Unocal Corp., Cook Inlet, AK
Vastar Resources, Inc., La Plata County, CO
Wells Manufacturing Co., McAllen, TX
Zeneca, Inc., Wilmington, DE

Breakdown of Settlements by Type



GE: Curbing Methanol Emissions from Storage Tanks

General Electric, Inc. voluntarily discovered, disclosed and corrected violations of the Clean Air Act (CAA) at its silicone manufacturing facility in Waterford, New York. The violations resulted from a lack of proper pollution control equipment on two methanol storage tanks. Methanol fumes are a hazardous air pollutant that contributes to smog and can cause serious health problems. EPA and the Department of Justice agreed to waive the substantial "gravity-based" component of the penalty, which reduced the actual penalty in the case to \$60,684, reflecting the amount of economic benefit the company gained from noncompliance.

DOJ APPLAUDS GE SETTLEMENT

"This is a great example of what happens when companies examine their facilities, identify problems, fix them, and let the public know. It illustrates this Administration's commitment to provide incentives for those who perform prompt and responsible environmental audits."

Lois Schiffer, Assistant Attorney General
Environmental and Natural Resources Division
Department of Justice

VASTAR: Cutting CO Emissions

Vastar Resources Inc., a natural gas production company, voluntarily discovered, disclosed and corrected Clean Air Act (CAA) violations involving lack of proper pollution control equipment to limit the emission of carbon monoxide (CO) at facilities located on the Southern Ute Indian Reservation in La Plata County, Colorado. High levels of CO can cause serious health problems — especially for young children, elderly and those with heart and respiratory ailments. However, EPA does not believe that CO levels were that high in this case. The company disclosed the violations after it took over operation of the facility from another company and conducted a compliance audit. The company then quickly brought itself into compliance by installing the proper control equipment, which will reduce CO emissions by 3,700 tons or 80% per year. Because the company met all of the conditions of the Audit Policy, the gravity-based penalty of several hundred thousand dollars was waived. Under the settlement, the company's penalty was limited to \$137,949, which represents the economic benefit the company gained from not initially installing the proper equipment.

CENEX: Helping Prevent Manufacture of Unsafe Chemicals

CENEX, Inc., a Montana company, disclosed and corrected its failure to file reports under the Inventory Update Rule (IUR) of the Toxic Substances Control Act (TSCA). The IUR requires manufacturers of chemicals listed on EPA's TSCA Inventory to report current data on production volume, plant site and site-limited status. This data forms the basis for distinguishing which chemicals must undergo a review for health and environmental effects. Under the Audit Policy, EPA mitigated \$318,750 which represents 75% of the unadjusted gravity-based penalty, resulting in a total penalty of \$106,250.

OZARK-MAHONING: Cleaning Up & Reporting Spill of Ferric Sulfate & Hydrofluoric Acid

Penalties were completely waived under the Audit Policy for the Ozark-Mahoning Company which voluntarily discovered, disclosed and corrected CERCLA and NPDES reporting violations at its Tulsa, Oklahoma facility. The company had failed to report to the National Response Center a spill of two CERCLA hazardous substances, ferric sulfate and hydrofluoric acid, in violation of CERCLA 103(a). The company promptly remediated the spill area and state authorities verified proper remediation.

In other violations, the company incorrectly reported pH values under its NPDES permit on four occasions. High acidity (pH) levels in waters can have a profoundly harmful effect on water quality and ecosystems. Accurate reporting of pH levels is critical for monitoring and maintaining water quality and ecosystems. Because the company met all of the Policy conditions and did not gain economically from the CERCLA and NPDES violations, the penalties were reduced to zero. Ordinarily the penalties for these types would have been approximately \$8,250 for the CERCLA violation and \$40,000 (\$10,000 maximum for each) for the four NPDES violations.

PRAISE for EPA'S POLICY

"It is an excellent policy which worked as intended in our case. Compliance with the terms of the policy results in penalty elimination or mitigation. This encourages proactive environmentally responsible behavior by companies trying to do the right thing in terms of complying with our nations environmental laws."

Peter J. Plaitzer
President, Midwestern Machinery Co., Inc

"It [The Audit Policy] worked quite well for us."

Rosa Delgado
Warehouse Manager, Austin Sculpture

Audit/Disclosure Can Affect Decision to Prosecute

At least three companies have not been charged with an environmental crime due to their voluntary disclosure of violations uncovered in an audit or internal investigation and their cooperation in the investigation and prosecution of subsidiary corporations or culpable individuals. While EPA has not formally invoked the 1995 Audit Policy in these cases, the decision not to charge them criminally stemmed from the same considerations now expressly set forth in the Audit Policy.

For example, in one such case, on February 7, 1996, the United States Department of Justice announced that Chiquita Brand, International was not prosecuted due to its voluntary disclosure that its subsidiary, John Morrell and Company, had illegally dumped slaughterhouse waste into the Big Sioux River in Sioux Falls, South Dakota for years and had deliberately submitted false discharge monitoring reports to conceal its crimes. John Morrell and Company and several of Morrell's corporate officials now stand convicted of conspiracy and various Clean Water Act felonies, but the government declined to prosecute Chiquita, citing the parent company's voluntary disclosure and cooperation as the prime factors. The Office of Criminal Enforcement, Forensics, and Training is establishing a process whereby criminal enforcement consideration of the Audit Policy will be made by a committee at the headquarters level. For questions regarding application of the Audit Policy in the criminal context, contact Michael Penders at (202) 564-2480.

Florida and California Adopt Policies Similar to Audit Policy

U.S. EPA Regional Administrator John H. Hankinson, Jr., in a letter dated September 26, 1996, applauded the state of Florida for adopting a policy modeled on EPA's. Mr. Hankinson reassured Virginia Wettrill, Secretary of the Florida Department of Environmental Protection (DEP) that, "EPA would cooperate closely with Florida by eliminating duplicative reporting or burdensome paperwork." Hankinson said, "[W]e see no need for any additional administrative or bureaucratic processes that may burden Florida's ability to carry out its environmental programs."

"I am very pleased the EPA is working with the Department to streamline the procedure and reduce the amount of paperwork required of regulated interests who desire to take advantage of EPA's and DEP's self-audit policies. This determination by EPA is a significant addition to the incentives we have identified for regulated interests to establish a self-audit program. The policy is good for business and good for the environment and offers an excellent opportunity for EPA, DEP and regulated interests to work in partnership toward mutually beneficial goals."

Virginia B. Wettrill
Secretary, Florida DEP

Audit Policy Interpretive Guidance Released

The Agency's Audit Policy Quick Response Team (QRT) has completed work on the Audit Policy Interpretive Guidance which addresses 16 issues arising under the Policy. The Guidance, covers such issues as:

- When Repeat Violations Bar Penalty Mitigation
- When a Violation "May Have Been Discovered"
- Discovery of Violations Under CAA Title V Permit Applications
- Discovery of Violations During Audits Required by Settlements

The Interpretive Guidance is in the Audit Policy Docket and available on the OECA Home Page at:

<http://es.inel.gov/oece/papolid.html>

The QRT was formed to expeditiously, fairly, and consistently resolve nationally significant issues involving application of the Audit Policy in specific cases. Each major media enforcement program, the Department of Justice and EPA Regions are represented on the QRT, which is chaired by the Office of Regulatory Enforcement within EPA's Office of Enforcement and Compliance Assurance (OECA). For more information on the Guidance, call Gary Jones at (202) 564-4002.

A copy of the letter is available in the Audit Policy Docket. For further information about the Florida DEP Directive on Incentives for Self-Evaluation, contact Molly Palmer at (206) 553-6521. The California EPA also has recently adopted an audit policy similar to the U.S. EPA Audit Policy. For further information about the Cal EPA Policy on Incentives for Self-Evaluation, contact Gerald Johnston at (916) 322-7310.

Settled Audit Policy Case/Matter Documents Contained in Audit Policy Docket

The Audit Policy Docket contains document related to cases and matters settled under the Audit Policy to date. Examples of documents include disclosure letters, EPA responses, Consent Agreements and Consent Orders, and letters of intent not to enforce. In addition, the Docket contains hundreds of other documents, such as the new Interpretive Guidance, and comments and letters related to the Policy and environmental auditing. The Docket is accessible by calling (202) 260-7548 or faxing (202) 260-4400 and referencing docket number C-94-01.

Other Self-Disclosure Programs

The EPA Audit Policy is but one example of how compliance incentives have encouraged companies to disclose and correct violations without providing blanket amnesties. Other

examples include the TSCA Compliance Audit Program (CAP) and EPA Region 7's Subpart 000 (Clean Air Act, testing and reporting) Voluntary Compliance Program. Under CAP, about 125 companies disclosed approximately 11,000 "substantial risk" TSCA section 8(e) reports in exchange for reduced penalties and an overall penalty cap of \$1 million per company. Under the Subpart 000 program, 52 nonmetallic mineral processing companies in Missouri self-disclosed violations of air emission (NSPS) reporting and/or testing requirements in exchange for dramatically reduced penalties. In both programs, participants paid the economic benefit they gained from noncompliance. For more information about the TSCA CAP, call Caroline Ahearn at (202) 564-4163, or about the subpart 000 program, call Becky Dolph, at (913) 551-7281.

Summary of Audit Policy


Voluntary audit programs play an important role in helping companies meet their obligation to comply with environmental laws. EPA's audit policy, effective in January of 1996, will greatly reduce and sometimes eliminate penalties for companies that discover, disclose and correct violations through voluntary audits or compliance management programs, while including safeguards to protect the public and the environment from the most serious violations.

The Policy requires companies to:
promptly disclose and correct violations,
prevent recurrence of the violation, and
remedy any environmental harm.

The Policy excludes:
repeated violations,
violations that result in serious actual harm, and
violations that may present an imminent and
substantial endangerment.

Corporations remain criminally liable for violations resulting from willful or conscious avoidance of their legal duties, and individuals remain liable for criminal wrongdoing. EPA retains discretion to recover the economic benefit gained as a result of noncompliance, so that companies will not be able to obtain an economic advantage over their competitors by delaying investment in compliance. Companies that do not discover violations through an audit or CMS, yet meet all of the other Policy conditions, will receive 75% mitigation of gravity-based penalties.

The Final Audit/Self-Policing policy was published in the *Federal Register* on December 22, 1996 (60 FR 66706). It took effect on January 22, 1996. For further information, contact the Audit Policy Docket or call 202-564-4187.



WHO TO CALL:

Regulated entities that wish to take advantage of the Policy should fax or send a written disclosure to the appropriate EPA Regional contact listed below. Note that the written disclosure must be made within 10 days of the violation's discovery:

Region 1 (CT, ME, MA, NH, RI, VT), Sam Silverman:
617-565-3441 (telephones) / 1141 (fax)

Region 2 (NJ, NY, PR, VT), John Wilk:
212-637-4059/4035

Region 3 (DE, DC, MD, PA, VA, WV), Janet Viniski:
215-566-2999/2905

Region 4 (AL, FL, GA, KY, MS, NC, SC, TN), Bill Anderson: 404-562-9655/9663

Region 5 (IL, IN, MI, MN, OH, WI), Tinka Hyde:
312-886-9296/353-1120

Region 6 (AR, LA, NM, OK, TX), Barbara Greenfield:
214-665-2210/7446

Region 7 (IA, KS, MO, NE), Becky Dolph:
913-551-7281/7925

Region 8 (CO, MT, ND, SD, UT, WY), Michael Risner:
303-312-6890/6953

Region 9 (AZ, CA, HI, NV), Leslie Guinan:
415-744-1339

Region 10 (AK, ID, OR, WA), Jackson Fox:
206-553-1073/0163

UNIVERSITY OF ALASKA FAIRBANKS



Risk Management Department

1000 University Avenue

PO Box 758140

Fairbanks, Alaska 99775-8140 • (907) 474-5497 • FAX (907) 474-5489

FAXED TO: 907-465-4316

**ATTN: Representative Joe Green, Chairman
House Judiciary Committee**

15 April 1997

Ms. Annette Kreitzer
Aide to Senator Loren Leman
Juneau, Alaska 998801

Re: Senate Bill 39: Reporting of Hazardous Substances

The University of Alaska Risk Management Department and Hazardous Materials Department, fully supports the newly proposed version of Senate Bill 39.

The deleting of wastes from the Bill and the removal of any reference to the Fire Marshal's placarding program are major steps in the direction of making this a useable and also user friendly law.

Even though this law will not apply to UAF, we appreciate your allowing us to comment and provide input to the process.

Thank you.

Sincerely,

Joe S. Adams II
Director



Alaska State Legislature

Please enter into the record my testimony to the HOUSE JUDICIARY
committee name

committee on Senate Bill 41, dated April 7th, 1997
bill/subject

(NOTE: The Bill is CS FOR SENATE BILL NO. 41(FIN), the version I have is SB0041D)

While I appreciate the good intentions of the sponsors of this bill, I believe that it would remove public oversight of industry, and assume that industry would never cut corners on it's environmental responsibilities in order to increase profits. While I am sure that most people in private industry are conscientious and want to do the right thing, this bill would give up entirely too much in the way of state authority to ensure the public's health and safety and the proper protection of our natural environment. Just as a bank teller would not push a pile of money out in front of a customer, and tell him or her, "here, we trust you, count out the amount of cash that will cover the check you just gave me", the state should not give up it's authority to enforce laws and regulations over industry.

I do not believe that there is any way to amend this bill to make it any better, except to substitute, for lines 4 through 14, and all of the text on pages 2 through 14, the following language:

THE STATE, BEARING IN MIND IT'S RESPONSIBILITY TO ALL OF THE CITIZENS OF THE STATE, SHALL MAKE EVERY EFFORT TO FULLY ENFORCE ALL OF THE LAWS AND REGULATIONS ON THE BOOKS AT THIS TIME, AND IN THE FUTURE, WITHOUT ANY PREFERENCE, OR EXCEPTIONS.

Sincerely,

Gerald R. Brookman
715 Muir Avenue
Kenai, Alaska 99611-8816

Signed: Gerald R. Brookman *Janet E. Brookman*

Testifier

Myself, as an individual, and my wife, Janet E. Brookman

Representing (Optional)

715 Muir Avenue, Kenai, Alaska 99611

Address

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March 5, 1997

Via Facsimile and US Mail

Senator Robin Taylor, Chair
Senate Judiciary Committee
State Capitol
Juneau, AK 99801

Senators Drue Pearce and Bert Sharp, Co-Chairs
Senate Finance Committee
State Capitol
Juneau, AK 99801

RE: SB 41 -- Environmental, Health and Safety Self-Audits

Dear Senators Taylor, Pearce and Sharp,

The purpose of this letter is to supplement the comments on SB 41 the Alaska Forum for Environmental Responsibility submitted to the Senate Judiciary Committee on February 24 (a copy is enclosed). In particular, this letter expands on our concerns about the bill's detrimental effects on whistleblowers in Alaska. Contrary to Senator's Leman's assertion on January 24, we believe that SB 41 provides no protection for whistleblowers.

Fundamentally, companies doing self-critical analysis only have shareholders and government regulators acting to motivate corporate behavior. Shareholders have never been recognized as bearers of the public interest. The government often relies upon whistleblowers to learn of violations of environmental regulations, violations that the vast majority of whistleblowers first disclose to the company through internal reporting mechanisms. Those mechanisms often generate internal investigations, investigations which would be deemed self-audits under SB 41. If an audit containing the protected disclosure is designated as privileged, a whistleblower who is discharged or otherwise retaliated against for raising concerns about worker safety, public health or environmental violations will be denied access to important documentation showing that he raised the concern and the company's reaction. In any case

Alaska Forum Comments on SB 41
March 5, 1997

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brought under state law, or based upon diversity jurisdiction in federal court, state law would govern the applicability of any asserted privilege.

If SB 41 becomes law, a company acting in bad faith would have twice the opportunity to cover its tracks. Not only could the substantive issue of the environmental violation be hidden, the person disclosing the problem could be disposed of (terminated) without consequence to his employer because the employee would be unable to prove that he raised the concern if the company only addresses the concern within the context of a privileged audit report.

Contrary to Senator Leman's assertion to the Judiciary Committee on February 24, his proposed Section 2, 09.25.460(a)(4) (version SB 41 offered on 1/31/97), does not offer any whistleblower protection because it only offers exemption from privilege to information that is independent of an audit. It will not take long for companies to know what rock to put the dirty laundry under. Few if any employees would be willing to raise concerns about environmental or safety violations if the result of the disclosure is retaliation with exoneration of the employer's reprisals because of a statutory privilege to hide information.

There is no reason to believe that companies will act honestly and candidly to prevent future accidents only if they can hide internal audits. Incentives to encourage honest and candid actions can be instituted without resorting to secrecy. For instance, leniency could be granted for voluntary disclosure of violations within a reasonably short time period after learning of the violation and for meaningful corrective action taken shortly after discovering the violation. This is the essence of US EPA's policy on self-audits, which grants leniency if voluntary disclosure occurs within ten days and corrective action within sixty days without secrecy. See *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations*, 60 Fed. Reg. 66.706 (1995). Such an approach would encourage, rather than discourage, whistleblowing because the company would benefit from finding and correcting violations as quickly as possible.

Secrecy regarding environmental or safety violations will not protect the public interest. Secrecy only serves to provide a greater screen of protection for those companies which are already ignoring the law as a means of enhancing profit, without any statutory guarantee privilege for self-audits. As David Ronald, Arizona Assistant Attorney General put it, "Only businesses with something to hide would benefit from a law that turns data gathered from environmental audits into secret information" (Statement to US EPA; July 27, 1995). The recent story of the Doyon Drilling employee at the Endicott oil field clearly illustrates this fact (see enclosure), as do the many cases of concerned pipeline employees silenced by Alyeska.

In summary, SB 41 is bad public policy. First, SB 41 replaces corporate responsibility and accountability with secrecy. The US Supreme Court has recognized that secrecy fundamentally undermines enforcement of laws designed to protect the public interest: "The greater portion of evidence of wrongdoing by an organization or its representatives is usually found in the official records and documents of that organization. Were the cloak of privilege to be thrown around these records and documents, effective enforcement of many federal and state laws would be impossible" (*Braswell v. US*, 108 S. Ct. 2284 [1988]). Second, rather than

Alaska Forum Comments on SB 41
March 5, 1997

Page 3

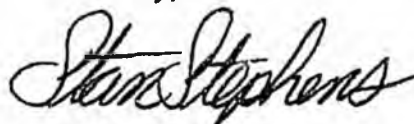
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providing incentives for compliance through leniency, SB 41 effectively rewards noncompliance by providing immunity from all civil and administrative penalties. Finally, SB 41 will greatly reduce the already limited ability of conscientious workers to defend their right to speak the truth in the workplace without fear of reprisals.

As the Alaska Forum told the Senate Judiciary Committee last month, the Alaska Forum opposes SB 41. SB 41 sends a clear and chilling message to conscientious workers: remain silent. The essence of our message is this: To leniency for self-discovery and self-disclosure, we say "Yes!" But to secrecy and worker silence we say "No!"

If you have any further questions, please call Mike Riley, Program Director, at (206)628-9464.

Sincerely,



Stan Stephens
President

enclosures: -- "Testimony on SB 41 before the Senate Judiciary Committee February 24, 1997," Alaska Forum
-- "Poisoning the Well: Whistleblower Disclosures of Illegal Hazardous Waste Disposal on Alaska's North Slope, Executive Summary," Alaska Forum, January 1997.
-- "Partnering Will Not Remove Poison from the Well," Stan Stephens, *Anchorage Daily News*, 2/6/97

cc: Senator Loren Leman, Fax: 465-3810
Senator Mike Miller, Fax: 465-3883
Senator Sean Parnell, Fax: 465-2278
Senator Johnny Ellis, Fax: 465-2529
Senator Dave Donley, Fax: 465-6595
Senator Randy Phillips, Fax: 465-4979
Senator John Torgerson, Fax: 465-4779
Senator Al Adams, Fax: 465-4821
Senator Jim Duncan, Fax: 465-4748
Senator Lyman Hoffman, Fax: 465-4523
Senator Georgianna Lincoln, Fax: 465-2652

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E-mail: afersea@accessone.com

<http://www.accessone.com/~afersea>

TESTIMONY ON SB 41
before the Senate Judiciary Committee
February 24, 1997

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

Thank you for this opportunity to testify today on SB 41. My name is Riki Ott. I am the Vice-President and co-founder of the Alaska Forum for Environmental Responsibility, a citizen's organization based in Valdez.

The Alaska Forum's mission is to hold industry and government accountable to the laws designed to protect worker safety, public health and the environment in Alaska. One way we achieve our mission is by protecting the rights of conscientious workers to speak the truth about activities that threaten worker safety public health and the environment without fear of reprisals. Why? Because we believe that conscientious workers are the first line of defense against environmental degradation and threats to worker safety and public health in Alaska.

The Alaska Forum supports the fundamental goal of SB 41: to foster compliance with worker safety, public health and environmental laws by providing incentives for regulated entities to voluntarily find, disclose and correct violations of these laws. But SB 41, as written, will not achieve this goal. We oppose SB 41 for two reasons.

First, SB 41 is bad public policy. I want to emphasize two criticisms of this bill already made by others here today:

- **SB 41 replaces corporate responsibility and accountability with secrecy.**

SB 41 would keep information vital to the protection of worker safety, public health and the environment hidden from review by the agencies we depend upon to enforce the law and the legal system we depend upon to remedy violations of the law. It would limit the right to know of private property owners near polluting industries. And it would limit the public's ability to learn the truth about corporate behavior.

*Alaska Forum's Testimony on SB 41
February 24, 1997*

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- **Rather than providing incentives for compliance, SB 41 effectively rewards noncompliance by providing immunity from all civil and administrative penalties.**

Penalties and fines are the primary tools that regulators have to foster compliance. Leniency in determining penalties and fines for self-discovered and immediately reported violations makes sense -- it provides a clear incentive to comply. But SB 41 goes much farther. The bill's vague language and broad definitions eliminates civil and administrative penalties for all violations which are self-discovered and "promptly" self-disclosed to the appropriate state agency.

The second reason the Alaska Forum opposes SB 41 is because the bill will greatly reduce the already limited ability of workers to defend their right to speak the truth in the workplace without fear of reprisals. Over the last several years, the Alaska Forum has worked with dozens of concerned workers who have taken great personal and professional risks to speak the truth. These courageous individuals are hardworking, taxpaying Alaskans who, like you and I, are concerned about their home and their children's futures. Unfortunately, far too many lose their jobs, even their careers, because their employer do not want regulators or the public to hear the truth.

SB 41 would take away one of the primary legal tools a concerned employee has to defend herself from reprisals by her employer. That tool is access, through discovery, to a wide range of internal company documents for use in administrative and civil proceedings against an employer. It is often precisely these internal documents -- many of which would fall under SB 41's definition of a self-audit -- that are essential to prove an employer unfairly and illegally retaliated against an employee. Losing access to these documents would cripple the already weak protections for blowing the whistle under Alaska law. SB 41 sends a clear message to conscientious workers: remain silent.

A recent case in point is the story of a worker who blew the whistle on illegal waste disposal practices at the Endicott oil field. Doyon Drilling, a BP contractor at Endicott, instructed its workers to violate environmental regulations by putting toxic materials into the drilling wastes that were re-injected as a part of routine drilling operations. These secret and potentially damaging practices continued for at least two years and perhaps as long as five years. Doyon's response to the worker's disclosure was to dismiss as "jokes" death threats against he and his family by co-workers, shutdown his rig, lay him off and then eliminate his position.

Had the conscientious worker not spoken the truth, these violations would be continuing to this day. And had this worker not been able to force Doyon to disclose the findings of what SB 41 would call a self-audit, he might have lost his whistleblower case against Doyon. Not only would he have sacrificed his twenty-two year career in the oil industry but he, his wife and his children would have been ruined financially. Such an outcome would have sent a clear and chilling message to other conscientious workers: silence is your only option.

*Alaska Forum's Testimony on SB 41
February 24, 1997*

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Finally, self-audits make good business sense -- they improve the bottom-line by identifying and correcting compliance and other problems early. That is why many companies across the nation and in Alaska already conduct self-audits without laws that grant them immunity and privilege. This is true even in Alaska: as the Alaska Oil and Gas Association's January 1997 position paper on SB 41 points out, the majority of its members already "conduct self-audits as a means of ensuring compliance" without SB 41. Why then does Alaska need the secrecy of SB 41?

If the Legislature is serious about fostering self-discovery and voluntary disclosure and correction of violations of worker safety, public health and environmental laws, SB 41 is not the answer. A better approach would be a very simple bill that provides clear incentives through leniency for self disclosure and correction, that narrowly and explicitly defines the time window within which self-disclosure must occur (US EPA's policy uses 10 days), and contains no secrecy provisions.

The Alaska Forum opposes SB 41. The essence of our message is this: To leniency for self-discovery and self-disclosure, we say "Yes!" But to secrecy and worker silence we say "No!"

Thank you.

Headquarters:
217 2nd Street, Suite 201
Juneau, Alaska 99801
(907) 586-2323 FAX 463-5515



April 7, 1997

Representative Joe Green
Chairman, House Judiciary Committee
Alaska State Legislature
State Capitol
Juneau, AK 99801

Re: SB 41, Environmental Self-Audit

Dear Representative Green:

We are writing to you today in support of Senate Bill 41, the Environmental Self-Audit legislation.

Senate Bill 41 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 without fear of penalty and strive to operate in the acceptable and prescribed manner. This law would not allow continued non-compliance once a problem has been identified.

We believe that, wherever possible, government should be supportive of business activity, and SB 41 fosters an attitude of partnership we believe government and business should strive to attain. We urge your support of this legislation.

Sincerely,

A handwritten signature in cursive script that reads "Pam La Bolle".

Pamela La Bolle
President

A M E N D M E N T #3

OFFERED IN THE HOUSE

TO: CSSB 41(FIN)

Page 7, lines 21-22:

Following: "under this section":

Delete all material.

Insert: "shall provide to the court or administrative hearing officer a factual basis adequate to support a good faith belief by a reasonable person that the documents or communications for which disclosure is sought are likely to reveal evidence to establish that an exception in (a) of this section applies."

h:\wp\bills\41except.wpd

A M E N D M E N T #4

OFFERED IN THE HOUSE

TO: CSSB 41(FIN)

Page 10, following line 16:

Insert a new subsection (b) to read:

"(b) There is no immunity under AS 09.25.475 from administrative or civil penalties for the violation of an administrative or court order or a term or condition of an administrative or court order."

Renumber subsections accordingly.

Reasons: This proposal is consistent with EPA's "Statement of Principles -- Effect of State Audit Immunity/Privilege Laws on Enforcement Authority for Federal Programs," dated February 14, 1997, which provides that EPA will review state legislation to determine whether a state has retained the ability to recover civil penalties for violations of judicial or administrative orders.

h:\wp\bill\41aoco.wpd

A M E N D M E N T #5

OFFERED IN THE HOUSE

TO: CSSB 41(FIN)

Page 2, line 9:

Delete: "relevant"

Insert: "underlying"

h:\wp\bills\41facts.wpd

A M E N D M E N T

#6

OFFERED IN THE HOUSE

TO: CSSB 41 (FIN)

Page 12, line 6:

Following "former employees":

Insert: "conducted by the auditor"

Page 12, line 11:

Following "recommendations":

Insert: "made by the auditor"

Reasons: This proposed amendment will help clarify that it is the auditor's work product that is protected by the privilege.

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A M E N D M E N T #7

OFFERED IN THE HOUSE

TO: CSSB 41(FIN)

Page 2, line 15:

Following "appropriate":

Delete: "governmental regulatory"

Insert: "government"

Reasons: Consistency with terminology used in the bill.

Page 3, line 8:

Following "the department":

Insert: "and, where the audit includes an assessment of compliance with a municipality's ordinances, to the municipal clerk,"

Reasons: This bill defines the term "environmental law" to include municipal ordinances adopted in conjunction with or to implement a federal or state environmental law implemented by the Department of Environmental Conservation (DEC). In proposed AS 09.25.450(b) on page 3, lines 3-15, the bill provides that notice of an audit be given to DEC. This proposed amendment would provide municipalities with notice of an audit.

Page 3, line 15:

Following "the department":

Insert: "or the municipality, as appropriate"

Reasons: Where an audit includes an assessment of compliance with municipal ordinances, the owner or operator conducting the audit should negotiate any extensions of time for the duration of the audit with the municipality.

Page 4, line 9:

Following "neither":

Delete: "an"

Insert: "a government"

Reasons: This provision does not specify the type of agency, but appears to be directed to inspections by government agencies.

Page 4, line 14:

Following "prevent a"

Delete: "regulatory"

Insert: "government"

Reasons: A government agency, including the Departments of Natural Resources, Fish and Game, or Transportation and Public Facilities, or a municipality may need to issue cease and desist

orders or take other action where a lessee or contractor is in breach of a state or municipal lease agreement or contract by failing to comply with environmental laws. This amendment would provide that proposed AS 09.25.450 (which establishes the self-audit privilege) should not be construed to prevent affected state agencies and municipalities from taking appropriate action to ensure that property and contractual obligations are met.

Page 4, line 21:

At the beginning of the subsection:

Delete: "A state agency"

Insert: "The department"

Reasons: Under proposed AS 09.25.450(b), DEC is the only state agency that receives the notice.

Page 4, line 25:

Following "receipt by the":

Delete: "agency"

Insert: "department"

Reasons: Same as above. The DEC is the only state agency that receives the notice.

Page 6, line 8:

Following: "required by a"

Delete: "regulatory"

Insert: "government"

Reasons: *This wording is more appropriate where the information is required to be reported under a lease or contract.*

Page 6, line 11:

Following "with the state":

Insert: "or a municipality"

Reasons: *Information required to be reported under municipal contracts or leases should not be privileged.*

Page 6, line 13:

Following: "information that a"

Delete: "regulatory"

Insert: "government"

Reasons: *A government agency may obtain information by observation, sampling, or monitoring when it is acting as a land owner or manager or overseeing a contract. This information should also be nonprivileged.*

Page 6, line 15:

Following: "information that a"

Delete: "regulatory"

Insert: "government"

Reasons: Same reasoning as previously proposed amendment.

Page 6, line 24:

Following: "between a"

Delete: "regulatory"

Insert: "government"

Reasons: Same reasoning as previously proposed amendment.

Page 8, lines 5-6:

Following "an agency":

Delete: "that has regulatory authority"

Insert: "the department or a municipality with
enforcement jurisdiction"

Reasons: Only DEC and municipalities are affected by the immunity provisions.

Page 8, line 8:

Following "detected by":

Delete: "an agency"

Insert: "the department or a municipality"

Reasons: *Same reasons as the previous proposed amendment.*

Page 8, line 9:

Following "under this paragraph, the":

Delete: "agency"

Insert: "department or municipality"

Reasons: *Same reasons as the previously proposed amendment.*

Page 8, line 22:

Following "agreement with the":

Delete: "appropriate agency"

Insert: "department or the municipality, as
appropriate"

Reasons: *Same reasons as the previously proposed amendment.*

Page 8, line 26:

Following "cooperate with the":

Delete: "appropriate agency"

Insert: "department or municipality, as appropriate,"

Reasons: *Same reasons as the previously proposed amendment.*

Page 8, line 27:

Following "disclosure;":

Delete: "an agency"

Insert: "the department or municipality"

Reasons: *Same reasons as the previously proposed amendment.*

Page 9, line 9:

Following "the department"

Insert: "or municipality"

Reasons: *Same reasons as the previously proposed amendment.*

Page 9, line 12:

Following "The department"

Insert: "or municipality"

Reasons: *Same reasons as the previously proposed amendment.*

Page 9, line 17:

Following "identified by the"

Delete: "regulatory agency"

Insert: "the department or municipality"

Reasons: *Same reasons as the previously proposed amendment.*

Page 9, line 19:

Following "to prevent":

Delete: "a regulatory agency"

Insert: "the department or a municipality"

Reasons: *Same reasons as the previously proposed amendment.*

Page 13, line 10:

Following "state":

Insert: "or a municipality"

Reasons: *A penalty may be imposed under municipal ordinance.*

Page 13, line 11:

Following "ordered by a":

Delete: "regulatory authority"

Insert: "government agency"

Reasons: A technical or remedial provision could be ordered pursuant to regulatory enforcement or pursuant to enforcement of a lease or contract provision.

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A M E N D M E N T #8

OFFERED IN THE HOUSE

TO: CSSB 41 (FIN)

Page 12, lines 20-30:

Delete all material and insert:

"(4) 'environmental audit' means a voluntary audit that an owner or operator of a regulated facility, operation, or property conducts or causes to be conducted, whether or not on a regular basis or in response to a particular event, that is specifically designed and undertaken to assess compliance with environmental laws or a permit, license, or approval issued under those laws, including an assessment that is part of the owner or operator's compliance management system; and that is a

(A) systematic, objective, and periodic review of the facility, operation, or property related to meeting the requirements of environmental laws or a permit, license, or approval issued under those laws; or

(B) documented, systematic procedure or practice that reflects the owner or operator's due diligence in preventing, detecting, and correcting violations of

environmental laws or a permit, license, or approval issued under those laws at the facility, operation, or property."

Reasons: The definition of "environmental audit" in CSSB 41 (FIN) repeats the definition of "confidential self-evaluation and analysis," the part of the audit report that is privileged. The "audit," however, is an assessment of whether the owner or operator is in compliance with environmental requirements or whether the owner or operator's compliance management system is in place, functioning, and effective. The proposed amendment retains the portions of the definition in CSSB 41 (FIN) that define an audit and deletes the portions that are contained in the definition of "confidential self-evaluation and analysis." The "audit" will lead to the preparation of the "audit report," part of which is privileged as "confidential self-evaluation and analysis."

The proposed amendment also adds two subparagraphs, (A) and (B), components of the definition of "audit" in the U.S. Environmental Protection Agency's Final Policy Statement on Incentives for Self-Policing, 60 Fed. Reg. 66706, 66708, 66710 (1995). The definition of an audit as a systematic procedure or practice, or as a management tool involving an audit plan or protocol, is also found in the International Standardization Organization (ISO) 14010 Guidelines for Environmental Management System Auditing, the British Standards Institute BS7750 Environmental Audit Requirements, and International Chamber of Commerce position paper on environmental auditing. See Lawrence B. Cahill, Environmental Audits 25-27, 33 (7th ed. 1996).

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AMENDMENT #9

OFFERED IN THE HOUSE

TO: CSSB 41(FIN)

Page 7, line 27:

Following: "for the violation disclosed"

Delete the comma and insert "or"

Page 7, lines 27 - 29:

Following: "based on the facts disclosed"

Delete: ", and for a violation discovered because of
a disclosure that was unknown to the owner or
operator making the disclosure"

Reasons: This amendment is proposed to address a concern raised by the U.S. Environmental Protection Agency that the language in the bill may lead to disputes over whether subsequently discovered violations are "fruit of the poisonous tree." If the last clause is read literally, it could potentially immunize violations years after and well beyond the scope of any disclosure. With an earlier amendment that added the language "or of circumstances, conditions, or occurrences that constitute or may constitute a such a violation," it is clear that an owner or operator may obtain immunity for violations that are disclosed and for violations that are based upon the facts disclosed, regardless of whether the owner or operator knows that the facts disclosed would constitute a violation. The last clause is at the very least redundant to the previous amendment and at worst, a potential source of conflict and litigation over whether subsequently discovered violations are immunized by virtue of an earlier disclosure.

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