

**SB**

**41**

SFIN

FILE

# SENATE FINANCE COMMITTEE REPORT

REPORTED OUT OF

SFC 3-14-97

DATE: 3/10/97

FURTHER:

DATE TURNED

IN TO OFFICE: 3-17-97

Finance Committee considered

SENATE BILL NO. 41

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

and recommends:

be replaced with CS SB 41 (FIN)

adopt previous CS ( )

attached amendment(s)

adopt Letter of Intent by \_\_\_\_\_ Committee

further referral to the \_\_\_\_\_ Committee

**Senate Bill:**

- same title
- new title
- House Bill:**
- same title
- technical change
- new: SCR# \_\_\_\_\_

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	NR	DNP	AM
<i>Robert Powell</i> <i>Irma Pearce</i>	<input checked="" type="checkbox"/>	<i>RM &amp; CFO</i>	<input checked="" type="checkbox"/>		
Co-Chair: <i>Pat Whitty</i>	<input checked="" type="checkbox"/>	Co-Chair: _____			
Co-Chair: _____		Co-Chair: _____			

**NEW FISCAL NOTE(S):**

Department                      Date    Zero    Fiscal

Dept. Law	3/17/97		X
Dept. Labor	3/7/97	X	
Court System (forthcoming)	3/17/97		X

**PREVIOUS FISCAL NOTE(S):\***

Department                      Date    Zero    Fiscal

DHSS (#5)	3/10/97	X	

APPROPRIATION -- no fiscal note

\*include fiscal notes accompanying Governor's bill

# FISCAL NOTE

REPORT New  
SFC 3-14-97  
BILL NO. CSSB 41 (FIN)

**STATE OF ALASKA  
1997 LEGISLATIVE SESSION**

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						
<b>TOTAL OPERATING</b>	<b>121.3</b>	<b>121.3</b>	<b>121.3</b>	<b>64.0</b>	<b>64.0</b>	<b>64.0</b>

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						
<b>TOTAL</b>	<b>121.3</b>	<b>121.3</b>	<b>121.3</b>	<b>64.0</b>	<b>64.0</b>	<b>64.0</b>

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

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

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	<u>\$121.3</u>

FY01 - FY03

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

# FISCAL NOTE

No. 6

**STATE OF ALASKA**  
**1997 LEGISLATIVE SESSION**

Bill Version: CSSB 41 (JUD)

(S) Publish Date: 3-14-97

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

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	119.0	119.0	119.0	100.3	100.3	100.3
SUPPLIES	1.4	1.4	1.4	0.7	0.7	0.7
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>196.3</b>	<b>196.3</b>	<b>196.3</b>	<b>139.0</b>	<b>139.0</b>	<b>139.0</b>

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

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

FUND SOURCE	(Thousands of Dollars)					
1002 Federal Receipts						
1003 GF Match						
1004 GF	196.3	196.3	196.3	139.0	139.0	139.0
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
<b>TOTAL</b>	<b>196.3</b>	<b>196.3</b>	<b>196.3</b>	<b>139.0</b>	<b>139.0</b>	<b>139.0</b>

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

**POSITIONS**

FULL-TIME						
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:	<u>Joan Kasson</u>	Phone: <u>485-5370</u>
Division:	<u>Administrative Services Division</u>	Date: <u>3/10/97</u>
Approved by Commissioner:	<u>Bruce M. Botelho, Attorney General</u>	Date: <u>3/10/97</u>
Agency:	<u>Department of Law</u>	

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

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.

**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.

The Judiciary Committee Substitute amends Section 2 of the bill in AS 09.25.460(a), by deleting language that would have allowed the state to obtain objective facts even if they were contained in self audits, and in (b) by amending language that would have assured the state the right to obtain all audit information in pipeline tariff cases. These changes will result in a fiscal impact on the department, and specifically will require more expert witness time to assist us in tariff cases. 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 new language on tariff cases creates further confusion over what information would be deemed "necessary to determine rates, tariffs, fares, or charges." The two sections in conjunction with each other will require additional expert witness time to determine if information in self audits is privileged or covered by an exception.

STATE OF ALASKA  
1997 LEGISLATIVE SESSION

BILL NO. CSSB 41 (JUD) \*4

ANALYSIS CONTINUATION:

If information that could impact the tariff appears to have been withheld under the privilege it could cost the state millions to reconstruct the facts involved. For example, in the 1995 pipeline tariff case, one critical self audit cost the oil carriers \$9.8 million.

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.

Many audits are performed on the Trans-Alaska Pipeline. This bill will require additional time for DNR and the Joint Pipeline Office to determine if information in these audits is privileged or covered by an exception.

**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	\$108.3
<b>Total Costs</b>	<b>\$196.3</b>

FY01 - FY03

Approximately 487 hours @ \$87/hour	\$42.4
Direct case travel	\$1.7
Expert witnesses	\$95.0
<b>Total Costs</b>	<b>\$139.0</b>

**FISCAL NOTE**

No. 5

STATE OF ALASKA  
1997 LEGISLATIVE SESSION

Bill Version: CSSB 4(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						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

<b>CHANGES IN REVENUES</b> ( )						
--------------------------------	--	--	--	--	--	--

**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Mtch						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (please specify)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

**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.

Prepared by: Nancy Weller  
 Division: Medical Assistance  
 Approved by Commissioner: Karen Perdue, Commissioner  
 Agency: Department of Health & Social Services

Phone: 465-3355  
 Date: 03/10/97  
 Date: 3/10/97

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

# FISCAL NOTE

No. 1

Bill Version: CSB 41 (L&C)

(S) Publish Date: 2/12/97

**STATE OF ALASKA**  
**1997 LEGISLATIVE SESSION**

Revision Date: \_\_\_\_\_ Dept. Affected: Department of Law  
 Title: ...relating to environmental audits and health and BRU: Civil Division  
safety audits to determine compliance with certain laws, permits... Component: Environmental Law  
 Sponsor: Senator Leman  
 Requester: Senate Labor and Commerce 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	107.5	107.5	107.5	53.8	53.8	53.8
TRAVEL	6.4	6.4	6.4	3.2	3.2	3.2
CONTRACTUAL	66.0	66.0	66.0	38.0	38.0	38.0
SUPPLIES	2.1	2.1	2.1	1.1	1.1	1.1
EQUIPMENT	6.5					
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>188.5</b>	<b>182.0</b>	<b>182.0</b>	<b>96.0</b>	<b>96.0</b>	<b>96.0</b>

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

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

**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	188.5	182.0	182.0	96.0	96.0	96.0
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
<b>TOTAL</b>	<b>188.5</b>	<b>182.0</b>	<b>182.0</b>	<b>96.0</b>	<b>96.0</b>	<b>96.0</b>

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

**POSITIONS**

FULL-TIME	1.0	1.0	1.0			
PART-TIME				1.0	1.0	1.0
TEMPORARY						

**ANALYSIS:** (Attach a separate page if necessary)

This bill creates a new evidentiary privilege that allows environmental and occupational health and safety 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 or health and safety law or who disclose information that leads to the disclosure of a violation of an environmental health and safety law. "Environmental and health and safety 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. Objective facts, 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.

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: 2/11/97  
 Date: 2/11/97

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

ANALYSIS CONTINUATION:

Immunity. A person who voluntarily discloses a violation of an environmental or health and safety law, or who discloses information 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 initiation 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 one full-time attorney and contractual 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.

**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 note that many of these impacts can be mitigated by limiting the number of departmental programs that are either explicitly or implicitly covered by the bill. We would be pleased to furnish appropriate amendatory language.

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).

Department of Labor

In addition to the general concerns discussed above, the threat of the federal government to withdraw the state's exclusive safety and health inspection and enforcement jurisdiction (18(e)) will require

FISCAL NOTE

STATE OF ALASKA  
1997 LEGISLATIVE SESSION

BILL NO. CSSB 41 (L&C)

ANALYSIS CONTINUATION:

attorney time to protect the interests of the state and of Alaskan workers and businesses.

Department of Health and Social Services

Attorney time will be required to deal with the potential evidentiary disputes in cases involving health care licensing and certification, provider fraud, and Medicaid rate setting.

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.

Many audits are performed on the Trans-Alaska Pipeline. This bill will require additional time for DNR and the Joint Pipeline Office to determine if information in these audits is privileged or covered by an exception.

**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, one-time equipment purchases, and expert witness costs are included separately.

FY98 - FY00

1 FTE attorney	\$127.0
Direct case travel	\$5.0
One-time equipment (FY98 only)	\$6.5
Expert witnesses	\$50.0
Total Costs	<u>\$188.5</u>

FY01 - FY03

1/2 FTE attorney	\$63.5
Direct case travel	\$2.5
Expert witnesses	\$30.0
Total Costs	<u>\$96.0</u>

# FISCAL NOTE

REPORTED OUT OF  
5-17-97

STATE OF ALASKA  
1997 LEGISLATIVE SESSION

BILL NO. **CSSB 41 (FIN)**

Revision Date: 03/17/97  
Title: Environmental & Health Safety Audits

Dept. Affected: Alaska Court System  
BRU: Trial Courts  
Component: \_\_\_\_\_

Sponsor: Sens. Lemmon, Pearce & Taylor  
Requestor: \_\_\_\_\_

COMPONENT SERIAL NO. 709

**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						
<b>TOTAL OPERATING</b>	<b>35.9</b>	<b>35.9</b>	<b>35.9</b>	<b>35.9</b>	<b>35.9</b>	<b>35.9</b>

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

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

**Fund Source**

(Thousands of Dollars)

1002 Total 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						
<b>TOTAL</b>	<b>35.9</b>	<b>35.9</b>	<b>35.9</b>	<b>35.9</b>	<b>35.9</b>	<b>35.9</b>

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: 03/17/97

Approved by: Stephanie J. Cole, Acting Administrative Director  
Agency: Alaska Court System

Date: 03/17/97

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

**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, PPT, 2 months	\$4,210	\$1,086	\$5,296

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 335,920

# FISCAL NOTE

STATE OF ALASKA  
1997 LEGISLATIVE SESSION

BILL NO. CSSB 41 (JUD)

Revision Date: 03/11/97  
Title: Environmental & Health Safety Audits

Dept. Affected: Alaska Court System  
BRU: Trial Courts

Sponsor: Sens. Leman, Pearce & Taylor  
Requestor: Judiciary

Component: \_\_\_\_\_  
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						
----------------------	--	--	--	--	--	--

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

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 H. alth						
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: 03/11/97

Approved by: Stephanie J. Cole, Acting Administrative Director  
Agency: Alaska Court System

Date: 03/11/97

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

**Alaska Court System**  
**Fiscal Analysis**  
**CSSB 41 (JUD)**

CSSB 41 (JUD) 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 other cases such as pipeline tariff cases. The latter, in particular, can be expected to generate massive amounts of technical documentation for review. 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 (JUD), 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 (JUD)**

**Personal Services**

<u>Position</u>	<u>Salary</u>	<u>Benefits</u>	<u>Total</u>
Recrds Clerk, range 10A, Anchorage, PPT, 3 months	\$6,315	\$1,627	\$7,942

**Contractual**

Discovery master for 500 hours at \$75 an hour. 37,500

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

Total Contractual 40,000

Total Estimated Cost \$47,942

# FISCAL NOTE

No. 4  
Bill Version: CSSB41(LAC)  
(S) Publish Date: 3/10/97

STATE OF ALASKA  
1997 LEGISLATIVE SESSION

Revision Date: \_\_\_\_\_ Dept. Affected: Alaska Court System  
Title: Environmental & Health Safety Audits BRU: Trial Courts  
Sponsor: Sens. Leman, Pearce & Taylor Component: \_\_\_\_\_  
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						
<b>TOTAL OPERATING</b>	<b>47.9</b>	<b>47.9</b>	<b>47.9</b>	<b>47.9</b>	<b>47.9</b>	<b>47.9</b>

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

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

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						
<b>TOTAL</b>	<b>47.9</b>	<b>47.9</b>	<b>47.9</b>	<b>47.9</b>	<b>47.9</b>	<b>47.9</b>

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: 264-3228  
Date: 02/24/97

Approved by: Arthur H. Snowden, II, Administrative Director  
Agency: Alaska Court System

Date: 02/24/97

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.

02/24/37 10:53

19072848292

ADMIN ACCOUNTING

0003

Alaska Court System

Fiscal Analysis

SB 41

Personal Services

<u>Position</u>	<u>Salary</u>	<u>Benefits</u>	<u>Total</u>
Records Clerk, range 10A, Anchorage, PPT, 9 months	\$6,315	\$1,627	\$7,942

Contractual

Discovery master for 500 hours at \$75 an hour. 37,500

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

**Total Contractual** 40,000

**Total Estimated Cost** \$47,942

STATE OF ALASKA  
1997 LEGISLATIVE SESSION

FISCAL NOTE

REPORTED OUT OF  
3-14-97

Bill Version: Pre No. 5  
CS SB 4 (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						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

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

CHANGES IN REVENUES ( )						
-------------------------	--	--	--	--	--	--

FUND SOURCE

(Thousands of Dollars)

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

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.

*[Signature]*  
3/10/97

Prepared by: Nancy Weller  
Division: Medical Assistance  
Approved by Commissioner: Karen Perdue, Commissioner  
Agency: Department of Health & Social Services

Phone: 465-3355  
Date: 03/10/97  
Date: 3/10/97

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

# FISCAL NOTE

No. 2  
 Bill Version: CS SB 41(L&C)  
 (S) Publish Date: 2/12/97

**STATE OF ALASKA**  
**1997 LEGISLATIVE SESSION**

Revision Date: \_\_\_\_\_  
 Title: Relating to environmental audits and health and safety audits  
 Sponsor: Leman  
 Requestor: Senate Labor and Commerce

Dept. Affected: Health and Social Services  
 BRU: Medical Assistance  
 Component: Medicaid Facilities  
 COMPONENT SERIAL NO. 230  
 See also (SN#): 229

**Expenditures/Revenues:** (Thousands of Dollars)

OPERATING	FY98	FY99	FY00	FY01	FY02	FY03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>						

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

<b>CHANGES IN REVENUES</b>						
----------------------------	--	--	--	--	--	--

**FUND SOURCE** (Thousands of Dollars)

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

**POSITIONS:**

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of any current year (FY97) cost: \_\_\_\_\_

**ANALYSIS:** (Attach a separate page if necessary)

It is not possible to quantify the lost revenues and increased program costs to the Medicaid and General Relief Medical Assistance Programs due to the passage of SB 41. SB 41 has the potential to disrupt the functions of the Medicaid Rate Advisory Commission, Health Facility Certification and Licensing, Audit, Surveillance and Utilization Review functions because the provisions of this bill would allow health care providers to conceal information necessary to complete functions mandated under Federal and State laws designed to assure accurate payments, detection and prevention of fraud and program abuse, and protection of the health and safety of Alaskan residents in receiving health care. The Department of Health and Social Services believes that to protect the significant investment of public funds in medical assistance programs, and to guarantee the health and safety of Alaskans who receive care in health care facilities, that all references to "health and safety" should be deleted from the bill.

Prepared by: Nancy Weller  
 Division: Medical Assistance  
 Approved by Commissioner: Karen Perdue  
 Agency: Department of Health & Social Services

Phone: 465-3355  
 Date: 01/15/97  
 Date: 1/21/97

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

The language in SB 41 is very broad in granting immunity from administrative or civil penalties for self disclosed violations of laws. The language would appear to limit the ability of the DMA in imposing and enforcing provider sanctions; at the very least, it would raise the level of the state's requirements in proving intent to commit fraud on the part of the provider. Additionally, this bill could require extensive intervention by the state's attorneys in the event that the DMA notifies a provider of intent to sanction a provider under the provisions of Article 11 of 7 AAC. The state is required by federal law to have a system of provider sanctions in place for Medicaid, as well as exclude any provider from Medicaid participation who has been so excluded by other federal programs, and notify our federal counterparts of actions against providers.

The Health Facility Licensing and Certification (HFL&C) section of the division, operates under both state and federal laws and regulations to certify health facilities as meeting quality standards required for participation in the Medicare and Medicaid Programs, and state licensing standards. These functions are accomplished by unannounced on-site visits to facilities for the purposes of observation of care, review of medical records, all facility records, policy and procedures, interviews with staff and family members, inspections of the physical plant and patient care equipment, etc. The procedures for monitoring compliance, notification of deficiencies, corrective action plans, are very specific and are quite accelerated if patients are in jeopardy. The OBRA 87 nursing home quality standards are quite stringent and have only been recently implemented nationwide under federal rules. HFL&C is also required to investigate complaints and reports of harm, maintaining a 24-hour complaint hot line. The section is gravely concerned that provisions of this bill could hamper their ability to carry out their mandated functions, including negative actions against facilities (decertification process) which, in extreme cases, can shut down facilities. The role of HFL&C is critical in maintaining patient quality care standards that guarantee safe health care to Alaskans in hospitals, nursing homes, home health agencies, rural health clinics, therapy centers, end stage renal disease centers, ambulatory surgery centers, and federally qualified health centers.

The language of the bill is written in such a way as to allow health care providers to identify almost anything that could be construed as a "self-audit" for the purposes of ensuring compliance, as being non-disclosable. In effect, HFL&C would be unable to completely fulfill their obligations under Alaska Statute, and under our agreement with HCFA; in addition, there would be conflicts in what facilities are obligated to make available to HFL&C, and what they could withhold.

For example, there is a State Licensure requirement found at 7 AAC 12.860, entitled **RISK MANAGEMENT** which applies to most health facilities licensed, which requires each facility to have provisions for monitoring, evaluating, and correcting care practices which may negatively affect patients or residents. The only way to adequately assess compliance with that requirement, is to review what problems the facility has identified, and determine if they took corrective action, or simply ignored the problem. Examples of how HFL&C would be unable to fulfill their obligations under Federal Regulations, and hence would jeopardize Federal funding, include:

CLIA - 42 CFR 493.1701 - 1701 Quality Assurance

Home Health Agencies - 42 CFR 484.52 Evaluation of the Agency's Program

Acute Care Hospitals - 42 CFR 482.21 Quality Assurance

Outpatient Physical Therapist/Speech Therapist - 42 CFR 405.176 Program Evaluation

Rural Health Clinics - 42 CFR 481.11 Program Evaluation

There are numerous similar requirements, which we believe, under the current language of the bill, facilities could say was non-disclosable. Many of these requirements state that the facility must maintain records. We review the records to ensure compliance. Under the current language of the bill, if the facility says it maintains these records as their way of ensuring they meet health and safety requirements, they could be non-disclosable.

As a matter of course, we do not use quality assurance records and other documentation as the sole basis for determining compliance. As stated, an exception would be if the facility knew about a problem, and either didn't fix it, or didn't check to see that it stayed fixed and the problem remained. In addition to compliance determinations, HFC&L evaluates a facility's culpability when determining sanctions. If a facility knows about a problem, and doesn't correct it, their culpability is greater than if they didn't know about the problem, or were in the process of taking corrective actions.

In addition to concerns about access to information, and how broad the bill's language is, we have concerns about the ramifications to staff who may disclose problems in a facility. For example, on virtually any given survey, staff at some point notify the surveyors of concerns. This information is helpful in identifying problems or potential problems which may ultimately result in patient harm. The goal is to protect patients, more than it is to find deficiencies.

The Medicaid Rate Advisory Committee, charged with setting rates for health care facilities paid By Medicaid and General Relief Medical, have the following concerns about SB 41:

Environmental audits and Health and Safety audits are not well defined in this bill. The bill states that Environmental and Health and Safety law shall be construed broadly. The lack of a solid definition combined with the language which construes Environmental and Health and Safety law broadly gives rise to a number of serious concerns. Areas where these audits may be misconstrued or interpreted as other audits and which would adversely impact the department include, but is not limited to, economy and efficiency audits, certifications and financial audits. Language included in the bill does not appear to be in the best interest of the state's Medical Assistance rate setting process. Our specific concerns regarding the language of SB 41 are as follows:

- The department is required by Federal law (the Boren Amendment) to prepare findings which identify costs which must be incurred by economically and efficiently operated health facilities providing services in accordance with state and federal care standards. We have been advised by the Attorney General's office that we should promulgate regulations which would ensure our access to economy and efficiency audits and studies performed by facilities, in order to fully comply with federal law. The passage of this bill could eliminate the department's access to such audits and seriously impact our findings process.
- Could these "Self Audits" be construed to include certification performed by private certification organizations such as JCAHO? If so, the department would need access to this information to ensure

payment for services rendered is appropriate. For example, the department would not want to pay a provider for neonatal intensive care if the facility was not certified to offer these services, or for costs that are not necessary in accordance with state and federal guidelines.

- Could these "Self Audits" be construed to include financial statement audits? In order to provide for a more efficient audit process, the department currently requires copies of financial statement audits to be submitted as a part of our facility cost reporting package.
- Since language in the bill prevents an employee of a state agency from requesting, reviewing or otherwise using one of the audit reports, We would strongly suggest language included which specifically exempts economy and efficiency audits, financial audits and certifications performed by private certification organizations such as JCAHO.

The department's safety officer commented under state administrative OSHA law, our department is expected to comply with OSHA regulations and is treated as if we were a private employer when it appears there has been non-compliance. Therefore, the positive features of this legislation which apply to private employers would also apply to DH&SS. It is not within the spirit of our preventive-oriented safety program to conceal safety or environmental information which had been discovered during internal audits. For instance, director safety designees will perform annual audits of each DH&SS facility and operation. Information from the audits will be recorded on safety inspection checklists. Director designees are encouraged to identify problem areas. Completed reports will be sent to the Safety and Risk Officer along with a report of corrective actions and a timetable for completion of each identified item. These are the type of reports an OSHA enforcement officer could ask to see if he/she were to perform an on-site safety inspection. If he/she were to cite us for an item identified on our internal inspection checklist which we had not corrected, this could hurt us in the future should the citation be argued before the Safety and Health Review Board. OSHA could use the report to show that the employer was aware of the problem and did not correct it. This is one of the elements they must prove to satisfy their "prima facie" case before the board.

Under this legislation, it appears as though we would have the opportunity to regard our internal audits as "privileged" and refuse to show them to an OSHA representative. Therefore, it could be more difficult for OSHA to successfully argue their position before the OSH Board in the case of a disputed citation. This is a pretty minor feature and its normally better to be completely up front with regulatory agencies regarding desired information.

# FISCAL NOTE

REPORTED OUT OF  
3-14-97

**STATE OF ALASKA**  
**1997 LEGISLATIVE SESSION**

**BILL NO. CSSB 41 (JUD)**

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						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

CAPITAL						
---------	--	--	--	--	--	--

CHANGE IN REVENUE FUND SOURCE #						
------------------------------------	--	--	--	--	--	--

**FUNDING:** (Thousands of Dollars)

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

**POSITIONS:**

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of 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: Aian W. Dwyer, Director *Aian 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

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

# FISCAL NOTE

No. 3

**STATE OF ALASKA**  
**1997 LEGISLATIVE SESSION**

**BILL NO.** Bill Version: CSSB 41(L&C)

(S) Publish Date: 2/12/97

Revision Date: \_\_\_\_\_  
Title: Environmental & health/safety audits

Department Affected: Labor  
BRU: Labor Standards & Safety  
Component: \_\_\_\_\_

Sponsor: Senator Leman  
Requestor: Senate L&C

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						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL</b>						
----------------	--	--	--	--	--	--

<b>CHANGE IN REVENUE</b>	<b>(55.8)</b>	<b>(55.8)</b>	<b>(55.8)</b>	<b>(55.8)</b>	<b>(55.8)</b>	<b>(55.8)</b>
<b>FUND SOURCE #</b>	<b>1004</b>	<b>1004</b>	<b>1004</b>	<b>1004</b>	<b>1004</b>	<b>1004</b>

**FUNDING:**

(Thousands of Dollars)

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

**POSITIONS:**

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY97) impact: \$ None

**ANALYSIS:** (Attach a separate page if necessary)

We believe CSSB 41 will cause federal OSHA to revoke our 18(e) certification. Since the process of de-certification will take some time, there will be a transition period where AKOSH will be required to comply with this legislation. Our strategy will be to turn all cases in which an employer claims privilege or immunity over to federal OSHA as we do not have adequate resources to handle the extensive investigations and attorney fees required to fully comply with this bill. This would result in a loss of unrestricted revenues as indicated on page two.

Prepared by: Alan W. Dwyer, Director *Alan W. Dwyer* Phone: 465-4855  
Division: Labor, Standards & Safety Date: 2/11/97

Approved by Commissioner: Tom Cashen, Commissioner *Tom Cashen*  
Agency: Department of Labor Date: 2/11/97

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

If AKOSH were forced to pursue each case, significant expenses would be incurred. We could anticipate general fund expenditures as follows (no federal funds can be spent on these activities):

- 1) One new PFT Admin Clerk II will be required to document safety audits reported by employers and monitor the time frames allowed under CSSB 41.
- 2) Approximately 1,875 hours of work from existing Occupational Safety Compliance Officers will be required to provide facts and findings for the attorney. Each case will require approximately 75 hours to conduct the investigation, above and beyond the time required to perform the inspection, reducing the effectiveness of our OSH program by removing almost one FTE from our regular enforcement activities.
- 3) The Assistant Attorney General assigned to LS&S will work approximately 75 hours per case, reviewing files, preparing affidavits from employees, taking depositions, preparing briefs, conducting hearings, and representing the division in court. This also includes travel to areas outside of Anchorage.

Although it is impossible to determine the exact percentage, we have based these estimates on the assumption that 10 percent of employers will claim privilege and immunity when confronted with a request for their safety audit or a citation is issued. This percentage could go as high as 90%. Should CSSB 41 pass, the Department of Labor will lose their 18(e) certification which gives the State of Alaska exclusive inspection authority.

In FY96 AKOSH collected \$558.0 in unrestricted revenue generated by fines imposed on employers for violations of safety and health issues. If this bill is passed, it is estimated these revenues would be reduced by at least 10% due to the reduction of fines that AKOSH would be able to collect.

<b>Line 71000 - Personal Services</b>	<b>103.3</b>
1 PFT Admin Clerk II	
Salary	23.0
Benefits	11.2
Occupational Safety Compliance Officers	
(75 hrs/case, 25 cases per year, \$36.80/hr)	
Salary	50.2
Benefits	18.9
<b>Line 72000 - Travel</b>	<b>6.0</b>
Occupational Safety Compliance Officers	6.0
<b>Line 73000 - Contractual Services</b>	<b>194.3</b>
Professional Services - Attorney fees	187.5
(75 hrs/case, 25 cases per year, \$100.00/hr)	
- Attorney travel	6.0
Base phone & long distance charges	0.6
DP Chargeback	0.2
<b>Line 74000 - Commodities</b>	<b>1.0</b>
Office Supplies	1.0
<b>Line 75000 - Equipment</b>	<b>5.0</b>
Computer equipment & office furniture (FY98 One-time)	5.0
<b>TOTAL</b>	<b>309.6</b>

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

**IN THE LEGISLATURE OF THE STATE OF ALASKA**

**TWENTIETH LEGISLATURE - FIRST SESSION**

**BY THE SENATE JUDICIARY COMMITTEE**

**Offered: 3/10/97**

**Referred: Finance**

**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; or

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

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

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

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

1 penalties stipulated in the agreement.

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

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

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

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

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

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

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

23 (b) The parts of an audit report that consist of information necessary to  
24 determine pipeline rates, tariffs, fares, or charges are not privileged and are admissible  
25 as evidence and subject to discovery in a proceeding relating to pipeline rates, tariffs,  
26 fares, or charges.

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

- 1 (1) privilege is asserted for a criminal or fraudulent purpose;
- 2 (2) information for which the privilege is claimed is evidence of
- 3 substantial injury, or the imminent or present threat of substantial injury, to one or
- 4 more persons at the site audited or to persons, property, or the environment offsite;
- 5 (3) audit report shows evidence of noncompliance with an
- 6 environmental law and appropriate efforts to achieve compliance with the law were not
- 7 promptly initiated and pursued with reasonable diligence after discovery of
- 8 noncompliance;
- 9 (4) audit report was prepared for the purpose of avoiding disclosure of
- 10 information required for an investigative, administrative, or judicial proceeding that,
- 11 at the time of the report's preparation, was imminent or in progress; or
- 12 (5) privilege would result in a miscarriage of justice or the denial of
- 13 a fair trial to the party challenging the privilege.

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

15 (a) of this section applies.

16 **Sec. 09.25.475. Voluntary disclosure; immunity.** (a) Except as provided by

17 this section, an owner or operator who makes a voluntary disclosure of a violation of

18 an environmental law is immune from an administrative or civil penalty for the

19 violation disclosed, for a violation based on the facts disclosed, and for a violation

20 discovered because of the disclosure that was unknown to the owner or operator

21 making the disclosure.

22 (b) Immunity is not available under this section if the violation resulted in, or

23 poses or posed an imminent or present threat of, substantial injury to one or more

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

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

- 26 (1) the disclosure is made promptly after knowledge of the information
- 27 disclosed is obtained by the owner or operator;
- 28 (2) the disclosure is made in writing by certified mail to an agency that
- 29 has regulatory authority with regard to the violation disclosed;
- 30 (3) an investigation of the violation was not initiated or the violation
- 31 was not independently detected by an agency with enforcement jurisdiction before the

1 disclosure was made using certified mail; under this paragraph, the agency has the  
2 burden of proving that an investigation of the violation was initiated or the violation  
3 was detected before receipt of the certified mail; and

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

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

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

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

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

16 (4) implement appropriate measures designed to prevent the recurrence  
17 of the violation; and

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

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

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

31 (g) During the period between receipt of the audit notice required under

1 AS 09.25.450(b) and the specified end date of the audit, the department may not  
2 initiate an inspection, monitoring, or other investigative activity concerning the audited  
3 facility, operation, or property based on the receipt of a notice under AS 09.25.450.  
4 The department has the burden of proving that an inspection, monitoring, or other  
5 investigative activity concerning the audited facility, operation, or property initiated  
6 after receiving a notice under AS 09.25.450 was not initiated based on receiving the  
7 notice.

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

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

12 (1) seeking injunctive relief; or

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

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

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

18 (A) intentionally, knowingly, or recklessly committed or  
19 authorized the violation;

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

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

27 (2) the violation was committed intentionally or knowingly by a  
28 member of the owner's or operator's management or an agent of the owner or operator  
29 and the owner's or operator's policies or failure to have in place systems reasonably  
30 designed to prevent the violation contributed materially to the occurrence of the  
31 violation; or

1                   (3) the owner or operator, after taking into account the cost of  
2 completing corrective and remedial measures within a reasonable time and  
3 implementing appropriate measures to prevent recurrence of the violation, realized  
4 substantial economic savings in not complying with the requirement for which a  
5 violation is charged; the exception to immunity in this paragraph applies only to that  
6 portion of a penalty that reflects the economic savings of noncompliance after taking  
7 into account the cost of completing the corrective, remedial, and preventive measures  
8 necessary to qualify for immunity.

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

14                   (1) the good faith actions of the owner or operator in disclosing the  
15 violation;

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

19                   (3) remediation;

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

22                   (5) the nature of the violation; and

23                   (6) other relevant considerations.

24                   **Sec. 09.25.485. Relationship to other recognized privileges.** AS 09.25.450 -  
25 09.25.490 do not limit, waive, or abrogate the scope or nature of a statutory or  
26 common law privilege, including the work product doctrine, the attorney-client  
27 privilege, and any other privilege recognized by a court with appropriate authority in  
28 this state.

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

30                   (1) "audit report" means a report that includes each document and  
31 communication, other than those set out in AS 09.25.460, produced from an

1 environmental audit; general components that may be contained in a completed audit  
2 report include

3 (A) a report, prepared by an auditor, monitor, or similar person,  
4 including the scope of the audit, the dates the audit began and ended, the  
5 information gained in the audit, findings, conclusions, recommendations,  
6 exhibits, and appendices; the types of exhibits and appendices that may be  
7 contained in an audit report include supporting information that is collected or  
8 developed for the primary purpose and in the course of an environment audit,  
9 including

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

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

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

28 (2) "confidential self-evaluation and analysis" means the part of an  
29 audit report that consists of interviews with current or former employees; field notes  
30 and records of observations made by the auditor; findings, opinions, suggestions,  
31 conclusions, guidance, notes, drafts, and analyses performed by the auditor;

1 memoranda and documents that evaluate or analyze all or part of the material  
2 contained in the audit report, including findings, conclusions, opinions,  
3 recommendations, and an audit implementation plan or tracking system to correct past  
4 noncompliance, improve current compliance, or prevent future noncompliance with an  
5 environmental law, and that is

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

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

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

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

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

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

23 (5) "environmental law" means

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

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

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

30 (7) "penalty" means an administrative or civil sanction imposed by the  
31 state to punish a person for a violation of a statute or rule; the term does not include

1 a technical or remedial provision ordered by a regulatory authority;

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

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

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

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

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

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

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

A M E N D M E N T

SENATE FINANCE  
COMMITTEE

Amendment Number: 1  
Bill Number: CSSB 41 JUD  
Sponsor: \_\_\_\_\_ Date: 3-10-97  
Logged In By: H. Sepulveda

OFFERED IN THE SENATE

TO: CSSB 41 (JUD)

Page 7, lines 16-21:

Reword subsection (a) as follows:

(a) Except as provided by this section, an owner or operator who makes a voluntary disclosure of a violation of an environmental law, or of facts that constitute or may constitute such a violation, is immune from an administrative or civil penalty for the violation disclosed, for a violation based on the facts disclosed, and for a violation discovered because of the disclosure that was unknown to the owner or operator making the disclosure.

**Rationale:** Because the legislation contains a number of exceptions to the immunity, the owner or operator making a disclosure cannot know with absolute certainty at the time of disclosure whether the owner or operator will qualify for immunity. If a regulatory agency chooses to deny immunity based on one of the exceptions identified in the bill, the owner or operator might choose to contest this decision. From a legal standpoint, the owner's or operator's appeal might be compromised by the existence of a signed document (the voluntary disclosure) which essentially constitutes a "guilty plea" to one or more violations. Because of this uncertainty, there may be a reluctance to submit voluntary disclosures, at least if the disclosure must include an admission that would undermine future legal options.

The sponsor is aware that in at least one other state with a self-audit privilege/immunity law (Texas) the owners or operators making voluntary disclosures typically do not "plead guilty" to violations. Instead, the disclosures reveal a set of facts or circumstances which the auditor finds "may constitute potential noncompliance" with state laws or regulations. (The language cited is just an example; the semantics of each disclosure vary, but there is a general pattern to use qualifying language so that the voluntary disclosure is not, in the strictest sense, a self-indicting document).

A M E N D M E N T

SENATE FINANCE  
COMMITTEE

Amendment Number: 2  
Bill Number: CSSB 41 (JUD)  
Sponsor: \_\_\_\_\_ Date: 3-10-97  
Logged In By: H. J. Spindler

OFFERED IN THE SENATE

TO: CSSB 41 (JUD)

Page 5, line 23:

Delete the last "or" appearing in this line.

Page 5, after line 23:

Insert new letter (E) under Sec. 09.25.455(b)(2) as follows:

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

**Rationale:** Section 09.25.455 (b)(2) describes the parties to whom privileged documents in an audit report can be disclosed under terms of a confidentiality agreement. Under the existing language, privileged documents can be disclosed by the owner or operator to a partner or potential partner, a transferee or potential transferee, a lender or potential lender, or to a person engaged in the business of insuring or underwriting the facility, operation, or property that is the subject of the audit report.

Concern has been expressed by affected industries that the existing language may not cover all the possible disclosures that would be necessary in the normal course of business. For example, the sponsor is aware that many Alaska companies hold interests in certain North Slope production facilities. The "operator" of the facility might be ARCO or BP, for example, but there are other companies with an ownership stake. These partial owners would not necessarily be defined as "partners" under 09.25.455(b)(2)(A), yet there could be valid reasons for disclosing portions of an audit report to these companies. The suggested language makes it clear that privileged audit report documents can be disclosed to any one of several companies that might share ownership or operating responsibilities for a regulated facility, operation, or property.

AMENDMENT

SENATE FINANCE  
COMMITTEE

Amendment Number: 3  
Bill Number: CSSB 41 (JUD)  
Sponsor: \_\_\_\_\_ Date: 3-10-97  
Logged In By: Py. Sepulveda

OFFERED IN THE SENATE

TO: CSSB 41 (JUD)

Page 12, lines 28-29:

Revise definition of "owner or operator" as follows:

(8) "owner or operator" means a person, who owns or operates a regulated facility, operation, or property, including a person who, as an independent contractor, performs services at or in connection with a regulated facility, operation or property. However, within the context of this definition, independent contractor shall not be construed to include a contractor retained for the exclusive or primary purpose of conducting a compliance audit at the regulated facility, operation, or property;

**Rationale:** this amendment is designed to address the unique needs of independent contractors in Alaska, such as drilling contractors, who perform services at a regulated facility which is owned and operated by another entity, such as an oil and gas producer. The independent contractor may choose to conduct an environmental audit for its own purposes, or because a contract requires it. However, the independent contractor is not in a strict sense the "owner or operator" of the facility, operation, or property. The contractor is merely located at the facility, operation or property and is providing services thereat. Accordingly, it is possible that drilling contractors and other independent contractors would not be construed by a court as falling within the bill's definition of "owner or operator".

The "owner or operator" definition in SB 41 is crucial, because only an "owner or operator" can claim the privilege under Sec. 09.25.450 or seek immunity for noncompliance reported under Sec. 09.25.475. The proposed language would make it clear that an independent contractor can claim the privilege under SB 41, and also be eligible for limited immunity on any occasions when the contractor (as opposed to the client) is held accountable for noncompliance discovered in the audit report.

The proposed language also includes a caveat that "independent contractor" does not include contractors who are primarily in the business of conducting compliance audits. These entities are obviously in a different category than a drilling contractor which performs audits as an ancillary function, not as a primary business activity. This exclusion language is necessary in order to prevent confusion. Audit reports produced by professional auditing firms are clearly the property of the owner or operator who paid for the audit to be conducted. This language clarifies that the auditing firm, as an independent contractor, cannot claim or waive the privilege in a manner contrary to the interests of the owner or operator who paid for the audit report to be done.

A M E N D M E N T

SENATE FINANCE  
COMMITTEE

Amendment Number: 4  
Bill Number: CSSB 41 (Sub)  
Sponsor: \_\_\_\_\_ Date: 3-10-97  
Logged In By: J. E. [Signature]

OFFERED IN THE SENATE

TO: CSSB 41 (JUD)

Page 9, lines 27-31:

Delete all text of paragraph (2):

[ (2) THE VIOLATION WAS COMMITTED INTENTIONALLY OR KNOWINGLY BY A MEMBER OF THE OWNER'S OR OPERATOR'S MANAGEMENT OR AN AGENT OF THE OWNER OR OPERATOR AND THE OWNER'S OR OPERATOR'S POLICIES OR FAILURE TO HAVE IN PLACE SYSTEMS REASONABLY DESIGNED TO PREVENT THE VIOLATION CONTRIBUTED MATERIALLY TO THE OCCURRENCE OF THE VIOLATION; OR ]

**Rationale:** Paragraph (2) under Sec. 09.25.480(a) provides that a court may deny immunity to an owner or operator for a voluntarily disclosed violation, if an "agent" of the owner or operator committed the reported violation "knowingly" or "intentionally" and if the court determines that the owner or operator "contributed materially" to the violation by failing to have systems in place to prevent the violation.

There is unanimous agreement that immunity should be denied if an owner or operator commits a violation knowingly or intentionally. In fact, the bill addresses this scenario under Sec. 09.25.480(a)(1)(A) [page 9, lines 9-10]. However, there is no similar consensus on the usefulness of paragraph (2). The term "agent" might be broadly construed by the courts to include any employee, or independent contractors, of the owner or operator. Also, there is uncertainty about what "systems" could exist which would prevent a "knowing" or "intentional" violation. Inadvertent and unintentional violations can often be prevented by education program and proper supervision by management. However, it is less clear how an owner or operator would prevent an unscrupulous employee or contractor from deliberately committing a violation. If a company, in the process of conducting a self-audit, discovers that one of its contractors is violating a regulation, the company wants to be able to report the violation without jeopardizing immunity.

Certainly one of the goals of SB 41 is to encourage owners and operators to conduct self-assessments and to disclose all instances of noncompliance -- including those in which a rogue employee or contractor might be to blame. However, the language in paragraph (2) might cause an owner or operator to be punished for such a disclosure. This would constitute a disincentive to self-report these violations, which runs counter to the intent of the legislation.

A M E N D M E N T

SENATE FINANCE  
COMMITTEE

Amendment Number: 5  
Bill Number: CSSB 41 (JUD)  
Sponsor: \_\_\_\_\_ Date: 3-10-97  
Logged In By: Ray Spurland

OFFERED IN THE SENATE

TO: CSSB 41 (JUD)

Page 9, lines 20-23:

Reword Sec. 09.25.480(a)(1)(B) as follows:

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

**Rationale:** The purpose of Sec. 09.25.480(a)(1)(B) is to deny immunity to "repeat violators". Owners or operators who are habitual offenders of the same or similar environmental laws will not receive any immunity from penalties.

However, some of the larger industries in Alaska have facilities that are owned by the same "parent" company, but which serve different functions and are under completely separate management teams. For example, an oil and gas company might own a refinery on the Kenai Peninsula and also a production facility on the North Slope. An international mining company might own a gold mine in Southeast, and also a coal mine in the Interior. A seafood company might own a salmon cannery in Petersburg, and an oyster processing facility in Unalaska. In each of these hypothetical cases, the facilities serve different purposes and have distinct on-site management teams which function independent of each other. The proposed amendment seeks to clarify that an owner or operator will not necessarily be classified a "repeat violator" if that owner or operator voluntarily reports a violation which may also have been reported two years earlier by a separately-managed facility located hundreds of miles away, but which is owned by the same parent company.

AMENDMENT

SENATE FINANCE  
COMMITTEE

Amendment Number: 6  
Bill Number: CSSB 41 (JUD)  
Sponsor: \_\_\_\_\_ Date: 3/11/97  
Logged In By: Boltane

OFFERED IN THE SENATE

TO: CSSB 41(JUD)

Page 6, lines 23-26:

Delete all material.

Insert: "(b) An audit report is not privileged and is admissible as evidence and subject to discovery and use in a proceeding relating to pipeline rates, tariffs, fares, or charges. The owner or operator who prepared the audit report or caused the report to be prepared shall be entitled to a protective order in a proceeding relating to pipeline rates, tariffs, fares, or charges to maintain the confidentiality of the audit from discovery, use, or admission in evidence in other types of proceedings. Discovery, use, or admission in evidence in a proceeding relating to pipeline rates, tariffs, fares, or charges shall not be deemed to have waived the privilege for any other purpose."

Page 13, line 1:

Following: "regulatory authority"

Insert: ", nor any administrative or civil sanction relating to pipeline rates, tariffs, fares, or charges"

Reasons: The first amendment makes it clear that the state can have its experts review self-audit information in tariff cases. Without the proposed changes, there could be an argument that the state could only get discovery and use the information in evidence, but that the state could not have the information analyzed by experts. Experts are necessary in tariff cases and routinely used. Experts would be under the same duty to hold the documents confidential, so there would be no disclosure of the information, other than in tariff cases. The amendment to the definition of penalty makes it clear that any administrative or civil sanctions in tariff proceedings are not subject to the immunity created in proposed AS 09.25.475.

## AMENDMENT

OFFERED IN THE SENATE

TO: CSSB 41 (JUD)

SENATE FINANCE  
COMMITTEE

Amendment Number: 7

Bill Number: CSSB 41 (JUD)

Sponsor: \_\_\_\_\_ Date: 3/12/97

Logged In By: J. Soltani

Page 7, lines 16-21:

Reword subsection (a) as follows:

(a) Except as provided by this section, an owner or operator who makes a voluntary disclosure of a violation of an environmental law, or of circumstances, conditions, or occurrences that constitute or may constitute such a violation, is immune from an administrative or civil penalty for the violation disclosed, for a violation based on the facts disclosed, and for a violation discovered because of the disclosure that was unknown to the owner or operator making the disclosure.

**Rationale:** Because the legislation contains a number of exceptions to the immunity, the owner or operator making a disclosure cannot know with absolute certainty at the time of disclosure whether the owner or operator will qualify for immunity. If a regulatory agency chooses to deny immunity based on one of the exceptions identified in the bill, the owner or operator might choose to contest this decision. From a legal standpoint, the owner's or operator's appeal might be compromised by the existence of a signed document (the voluntary disclosure) which essentially constitutes a "guilty plea" to one or more violations. Because of this uncertainty, there may be a reluctance to submit voluntary disclosures, at least if the disclosure must include an admission that would undermine future legal options.

The sponsor is aware that in at least one other state with a self-audit privilege/immunity law (Texas) the owners or operators making voluntary disclosures typically do not "plead guilty" to violations. Instead, the disclosures reveal a set of facts or circumstances which the auditor finds "may constitute potential noncompliance" with state laws or regulations. (The language cited is just an example; the semantics of each disclosure vary, but there is a general pattern to use qualifying language so that the voluntary disclosure is not, in the strictest sense, a self-indicting document).

Moved by Pearce  
Parrell objected  
Pearce Withdrawn

SB 41

Amendment

By Adams

On page 7, delete lines 14 and 15 and replace with the following:

(b) A party claiming the privilege has the burden of establishing that the documents or communications claimed to be privileged do not come within the exceptions listed in (a) (1)-(4) of this section.

(c) A party seeking disclosure under (a) (5) of this section has the burden of establishing the exception applies.

SENATE FINANCE  
COMMITTEE  
Amendment Number: 8  
Bill Number: SB 41  
Sponsor: \_\_\_\_\_ Date: 3/13/97  
Logged In By: J. Beltari

SB 41

A M E N D M E N T

Not offered

by ADAMS  
SENATE FINANCE  
COMMITTEE

Amendment Number: 9

Bill Number: SB 41

Sponsor: \_\_\_\_\_ Date: 3/15/97

Logged In By: Jeff Goltari

OFFERED IN THE SENATE

TO: CSSB 41 (JUD)

Page 4, line 9:

Following "neither":

Delete: "an"

Insert: "a government"

} bill does not specify  
what type of agency  
could be public or private;  
"government" (e.g., DNR  
inspection of state lease) or  
"regulatory."

Page 4, line 14:

Following "prevent a"

Delete: "regulatory"

Insert: "government"

} DNR, DOTPF, ADFG, etc.,  
may need to seek  
injunctive relief for  
properties owned or  
managed by the state.

Page 4, line 21:

At the beginning of the subsection:

Delete: "A state agency"

Insert: "The department"

} DEC is the only  
state agency that  
gets the notice  
under .450(b)

Page 4, line 25:

Following "receipt by the":

Delete: "agency"

Insert: "department"

DEC is the only  
state agency that  
gets the notice  
under .450(b)

Page 6, line 5:

Following: "required by a"

Delete: "regulatory"

Insert: "government"

this wording is more  
appropriate where  
the information is  
required under a lease  
or contract

Page 6, line 8:

Following "with the state":

Insert: "or a municipality"

information required  
to be reported under  
municipal contracts or  
leases should not be  
privileged

Page 6, line 10:

Following: "information that a"

Delete: "regulatory"

Insert: "government"

this exclusion - info.  
obtained by observation  
sampling & monitoring  
should also apply  
when an agency is  
acting in a proprietary  
capacity - e.g.,  
DNR collects samples  
on state lease tract.

Page 6, line 12:

Following: "information that a"

Delete: "regulatory"

Insert: "government"

} same reasoning  
as previous  
proposed  
amendment

Page 6, line 21:

Following: "between a"

Delete: "regulatory"

Insert: "government"

} same reasoning  
as previous  
proposal

Page 7, lines 28-29:

Following "an agency":

Delete: "that has regulatory authority"

Insert: "the department or a municipality with  
enforcement jurisdiction"

} only DEC &  
municipalities  
are affected  
by immunity  
provisions

Page 7, line 31:

Following "detected by":

Delete: "an agency"

Insert: "the department or a municipality"

} same  
reasoning as  
previous  
proposal

Page 8, line 1:

Following "under this paragraph, the":

Delete: "agency"

Insert: "department or municipality"

} same as  
previous  
proposal

Page 8, line 14:

Following "agreement with the":

Delete: "appropriate agency"

Insert: "department or the municipality, as  
appropriate"

} same

Page 8, line 18:

Following "cooperate with the":

Delete: "appropriate agency"

Insert: "department or municipality, as appropriate,"

} same

Page 8, line 19:

Following "disclosure;":

Delete: "an agency"

Insert: "the department or municipality"

} same

Page 9, line 1:

Following "the department"

Insert: "or municipality"

} same

Page 9, line 4:

Following "The department"

Insert: "or municipality"

} same

Page 9, line 9:

Following "identified by the"

Delete: "regulatory agency"

Insert: "the department or municipality"

} same

Page 9, line 11:

Following "to prevent":

Delete: "a regulatory agency"

Insert: "the department or a municipality"

} same

Page 12, line 31:

Following "state":

Insert: "or a municipality"

} penalty may  
be imposed  
under  
municipal  
ordinance

Page 13, line 1:

Following "ordered by a":

Delete: "regulatory authority"

Insert: "government agency"

h:\wp\billis\41agency.wpd

} consistency in  
terminology;  
remedial provision  
could be ordered  
pursuant to reg.  
enforcement or  
enforcement of  
contract or lease  
provision

AMENDMENT

SENATE FINANCE  
COMMITTEE

Amendment Number: 10  
Bill Number: CSSB 41 (JUD)  
Sponsor: Panel Date: 3-14-97  
Logged In By: DJ

OFFERED IN THE SENATE

TO: CSSB 41 (JUD)

Page 12, lines 28-29:

Delete all material.

Insert two new definitions as follows:

(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:

Renumber all definitions accordingly.

**Rationale:** The state's environmental laws impose liability upon owners and operators. The proposed definition is consistent with the state's Title V program, AS 46.14.990(18) and (19).

(3) "ambient air quality standard" means a standard, other than an emission standard, adopted under AS 46.14.010, 46.14.140, 46.14.400(f), or 42 U.S.C. 7409 (Clean Air Act, sec. 109);

(4) "commissioner" means the commissioner of environmental conservation;

(5) "construct" or "construction" means to fabricate, erect, or install, or to make a physical change, that would result in emissions;

(6) "construction permit" means a permit under AS 46.14.130(a), including all relevant exhibits, addendums, transmittal letters, compliance schedules, administrative orders, emergency orders, and court orders;

(7) "contaminant outlet" includes exhaust stacks, flares, vents, and other openings in a facility from which an air contaminant could be emitted;

(8) "department" means the Department of Environmental Conservation.

(9) "emission" means a release of one or more air contaminants to the atmosphere;

(10) "emission limitation" and "emission standard" mean a requirement established by the department or the federal administrator, other than an ambient air quality standard, that limits the quantity, rate, or concentration of emission of an air contaminant, including a requirement relating to the operation or maintenance of a source to ensure sustained emission reduction, and design, equipment, work practice, or operational standard adopted under this chapter or 42 U.S.C. 7401 — 7671q (Clean Air Act);

(11) "facility" means

(A) one or more structures, buildings, installations, or properties that are contiguous or adjacent and are owned or operated by the same person or by persons under common control; and

(i) upon which a source or sources are located; or

(ii) that is a source of emissions associated with tank vessel loading and unloading, consistent with 42 U.S.C. 7401 — 7671q (Clean Air Act) and regulations adopted under those sections; or

(B) a vessel

(i) that is anchored or otherwise permanently or temporarily stationed within a locale;

(ii) upon which a source or sources are located, not including sources engaged in propulsion of the vessel; and

(iii) that is used for an industrial process, excluding a tank vessel in the trade of transporting cargo; in this provision, "industrial process" means the extraction of raw material or the physical or chemical transformation of raw material in either composition or character;

(12) "federal administrator" means the administrator of the United States Environmental Protection Agency;

(13) "fugitive emissions" means emissions of an air contaminant that could not reasonably be emitted from a contaminant outlet;

(14) "hazardous air contaminant" means a pollutant listed in or under 42 U.S.C. 7412(b) (Clean Air Act, sec. 112(b));

(15) "local air quality control program" means a program authorized under AS 46.14.400 to implement some or all of the provisions of this chapter;

(16) "modification" or "modify" means to make a change or a series of changes in operation, or any physical change or addition to a facility or source, that increases the actual emissions of an air contaminant;

(17) "operating permit" means a permit under AS 46.14.130(b), including all relevant exhibits, addendums, transmittal letters, compliance schedules, administrative orders, emergency orders, and court orders;

(18) "operator" means a person or persons who direct, control, or supervise a facility or source that has the potential to emit an air contaminant to the atmosphere;

(19) "owner" means a person or persons with a proprietary or possessory interest in a facility or source that has the potential to emit an air contaminant to the atmosphere;

511  
 ( :  
 Un  
 anc  
 the  
 ( :  
 nan  
 of a  
 of p  
 of tl  
 such  
 com  
 (A  
 (B  
 Air /  
 (2:  
 such  
 fixed  
 (2:  
 (A  
 stanc  
 (B)  
 (C)  
 (D)  
 (i)  
 (ii)  
 or  
 (iii)  
 (E)  
 (24)  
 (A)  
 (B)  
 (C)  
 (25)  
 cause,  
 (26)  
 propel  
 tank s  
 unload  
 (A)  
 (B)  
 (27)  
 Revis  
 (26) and  
 bered in  
 were rec  
 Article  
 1. Adm  
 2. Appr  
 3. Watc  
 4. Gene