SB

41

FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. SB 41

Revision Date:
Dept. Affected: Alaska Court System
Title: Environmental & Health Safety Audits
BRU: Trial Courts
Component:
Sponsor: Sens. Loman, Pearce & Taylor
Requestor: Judiciary
COMPONENT SERIAL NO. 768

Expenditures/Revenues (Thousands of Dollars)

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

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

Positions

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

ANALYSIS: (Attach a separate page if necessary)

See attached analysis.

Prepared by: C. S. Christensen III, Staff Counsel
Agency: Alaska Court System
Phone: 264-8228
Date: 02/24/97

Approved by: Arthur H. Snowden, II, Administrative Director BY
Agency: Alaska Court System
Date: 02/24/97

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

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

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

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

Alaska Court System
Fiscal Analysis
SB 41

Personal Services

Position	Salary	Benefits	Total
Records 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. 1

Bill Version: CSSB 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 to determine compliance with certain laws, permits...
Sponsor: Senator Leman
Requester: Senate Labor and Commerce Committee

Dept. Affected: Department of Law
BRU: Civil Division
Component: Environmental Law
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						
TOTAL OPERATING	188.5	182.0	182.0	96.0	96.0	96.0
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						
TOTAL	188.5	182.0	182.0	96.0	96.0	96.0

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
Division: Administrative Services Division
Phone: 465-5370
Date: 2/11/97

Approved by Commissioner: Bruce M. Botelho, Attorney General
Agency: Department of Law
Date: 2/11/97

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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 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 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

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	$188.5

FY01 - FY03	
1/2 FTE attorney	$63.5
Direct case travel	$2.5
Expert witnesses	$30.0
Total Costs	$96.0

FISCAL NOTE

No. 2

Bill Version: CSSB 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						
TOTAL OPERATING						
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)						
TOTAL						

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 Facilty 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

Phone: 465-3355

Division: Medical Assistance

Date: 01/15/97

Approved by Commissioner: Karen Perdue, Commissioner

Date: 1/21/97

Agency: Department of Health & Social Services

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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 HFC&L, 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 HFC&L 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 Generals 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

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

Sponsor: Senator Leman
Requestor: Senate L&C

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

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
CHANGE IN REVENUE	(55.8)	(55.8)	(55.8)	(55.8)	(55.8)	(55.8)
FUND SOURCE #	1004	1004	1004	1004	1004	1004

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (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 — Phone: 465-4855
Division: Labor, Standards & Safety — Date: 2/11/97

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

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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.

Line 71000 - Personal Services		**103.3**
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
Line 72000 - Travel		**6.0**
Occupational Safety Compliance Officers		6.0
Line 73000 - Contractual Services		**194.3**
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
Line 74000 - Commodities		**1.0**
Office Supplies		1.0
Line 75000 - Equipment		**5.0**
Computer equipment & office furniture (FY98 One-time)		5.0
TOTAL		**309.6**

FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. HCS CSSB 41 (JUD)

Revision Date: 04/14/97
Title: Environmental & Health Safety Audits
Sponsor: Sens. Leman, Pearce & Taylor
Requestor:

Dept. Affected: Alaska Court System
BRU: Trial Courts
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						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	•	•	•	•	•	•
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

Fund Source (Thousands of Dollars)

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

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

Positions

Full-Time						
Part-Time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

See attached analysis.

Prepared by: C. S. Christensen III, Staff Counsel
Agency: Alaska Court System
Phone: 264-8228
Date: 04/14/97

Approved by: Stephanie J. Cole, Acting Administrative Director
Agency: Alaska Court System
Date: 04/14/97

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Alaska Court System
Fiscal Analysis
HCS CSSB 41 (JUD)

HCS 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 are composed of tens of thousands of pages of documents. Cases in which an in-camera review is requested may require large amounts of time for pretrial proceedings. However, according to the Department of Law, the latest version of SB 41 can be expected to simplify the privilege process compared with earlier versions of the bill, and privilege cases may not show up in court for three to five years following enactment. Accordingly, this note does not speculate on costs. Should there be an impact, however, the court system may need to return to the legislature for funding.

Note 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.

FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. CSSB 41(JUD)

Revision Date:
Title: Relating to environmental audits to determine compliance with certain laws, permits, and regulations.
Sponsor: Leman
Requestor: Senate Judiciary

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

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY98	FY99	FY00	FY01	FY02	FY03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
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)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

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

ANALYSIS: (Attach a separate page if necessary)

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

Prepared by: Nancy Weller
Division: Medical Assistance
Phone: 465-3355
Date: 03/10/97

Approved by Commissioner: Karen Perdue, Commissioner
Agency: Department of Health & Social Services
Date: 3/10/97

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March 5, 1997
Via Facsimile and US Mail

Senator Robin Taylor, Chair
Senate Judiciary Committee
State Capitol
Juneau, AK 99801

Senators Drue Pearce and Bert Sharp, Co-Chairs
Senate Finance Committee
State Capitol
Juneau, AK 99801

RE: SB 41 -- Environmental, Health and Safety Self-Audits

Dear Senators Taylor, Pearce and Sharp,

The purpose of this letter is to supplement the comments on SB 41 the Alaska Forum for Environmental Responsibility submitted to the Senate Judiciary Committee on February 24 (a copy is enclosed). In particular, this letter expands on our concerns about the bill's detrimental effects on whistleblowers in Alaska. Contrary to Senator's Leman's assertion on January 24, we believe that SB 41 provides no protection for whistleblowers.

Fundamentally, companies doing self-critical analysis only have shareholders and government regulators acting to motivate corporate behavior. Shareholders have never been recognized as bearers of the public interest. The government often relies upon whistleblowers to learn of violations of environmental regulations, violations that the vast majority of whistleblowers first disclose to the company through internal reporting mechanisms. Those mechanisms often generate internal investigations, investigations which would be deemed self-audits under SB 41. If an audit containing the protected disclosure is designated as privileged, a whistleblower who is discharged or otherwise retaliated against for raising concerns about worker safety, public health or environmental violations will be denied access to important documentation showing that he raised the concern and the company's reaction. In any case brought under state law, or based upon diversity jurisdiction in federal court, state law would govern the applicability of any asserted privilege.

If SB 41 becomes law, a company acting in bad faith would have twice the opportunity to cover its tracks. Not only could the substantive issue of the environmental violation be hidden, the person disclosing the problem could be disposed of (terminated) without consequence to his employer because the employee would be unable to prove that he raised the concern if the company only addresses the concern within the context of a privileged audit report.

Contrary to Senator Leman's assertion to the Judiciary Committee on February 24, his proposed Section 2, 09.25.460(a)(4) (version SB 41 offered on 1/31/97), does not offer any whistleblower protection because it only offers exemption from privilege to information that is independent of an audit. It will not take long for companies to know what rock to put the dirty laundry under. Few if any employees would be willing to raise concerns about environmental or safety violations if the result of the disclosure is retaliation with exoneration of the employer's reprisals because of a statutory privilege to hide information.

There is no reason to believe that companies will act honestly and candidly to prevent future accidents only if they can hide internal audits. Incentives to encourage honest and candid actions can be instituted without resorting to secrecy. For instance, leniency could be granted for voluntary disclosure of violations within a reasonably short time period after learning of the violation and for meaningful corrective action taken shortly after discovering the violation. This is the essence of US EPA's policy on self-audits, which grants leniency if voluntary disclosure occurs within ten days and corrective action within sixty days without secrecy. See Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66.706 (1995). Such an approach would encourage, rather than discourage, whistleblowing because the company would benefit from finding and correcting violations as quickly as possible.

Secrecy regarding environmental or safety violations will not protect the public interest. Secrecy only serves to provide a greater screen of protection for those companies which are already ignoring the law as a means of enhancing profit, without any statutory guarantee privilege for self-audits. As David Ronald, Arizona Assistant Attorney General put it, "Only businesses with something to hide would benefit from a law that turns data gathered from environmental audits into secret information" (Statement to US EPA; July 27, 1995). The recent story of the Doyon Drilling employee at the Endicott oil field clearly illustrates this fact (see enclosure), as do the many cases of concerned pipeline employees silenced by Alyeska.

In summary, SB 41 is bad public policy. First, SB 41 replaces corporate responsibility and accountability with secrecy. The US Supreme Court has recognized that secrecy fundamentally undermines enforcement of laws designed to protect the public interest: "The greater portion of evidence of wrongdoing by an organization or its representatives is usually found in the official records and documents of that organization. Were the cloak of privilege to be thrown around these records and documents, effective enforcement of many federal and state laws would be impossible" (Braswell v. US, 108 S. Ct. 2284 [1988]). Second, rather than providing incentives for compliance through leniency, SB 41 effectively rewards noncompliance by providing immunity from all civil and administrative penalties. Finally, SB 41 will greatly reduce the already limited ability of conscientious workers to defend their right to speak the truth in the workplace without fear of reprisals.

As the Alaska Forum told the Senate Judiciary Committee last month, the Alaska Forum opposes SB 41. SB 41 sends a clear and chilling message to conscientious workers: remain silent. The essence of our message is this: To leniency for self-discovery and self-disclosure, we say "Yes!" But to secrecy and worker silence we say "No!"

If you have any further questions, please call Mike Riley, Program Director, at (206)628-9464.

Sincerely,

Stan Stephens

Stan Stephens
President

enclosures: -- "Testimony on SB 41 before the Senate Judiciary Committee February 24, 1997," Alaska Forum
-- "Poisoning the Well: Whistelblower Disclosures of Illegal Hazardous Waste Disposal on Alaska's North Slope, Executive Summary," Alaska Forum, January 1997.
-- "Partnering Will Not Remove Poison from the Well," Stan Stephens, *Anchorage Daily News*, 2/6/97

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TESTIMONY ON SB 41
before the Senate Judiciary Committee
February 24, 1997

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

Thank you for this opportunity to testify today on SB 41. My name is Riki Ott. I am the Vice-President and co-founder of the Alaska Forum for Environmental Responsibility, a citizen's organization based in Valdez.

The Alaska Forum's mission is to hold industry and government accountable to the laws designed to protect worker safety, public health and the environment in Alaska. One way we achieve our mission is by protecting the rights of conscientious workers to speak the truth about activities that threaten worker safety public health and the environment without fear of reprisals. Why? Because we believe that conscientious workers are the first line of defense against environmental degradation and threats to worker safety and public health in Alaska.

The Alaska Forum supports the fundamental goal of SB 41: to foster compliance with worker safety, public health and environmental laws by providing incentives for regulated entities to voluntarily find, disclose and correct violations of these laws. But SB 41, as written, will not achieve this goal. We oppose SB 41 for two reasons.

First, SB 41 is bad public policy. I want to emphasize two criticisms of this bill already made by others here today:

- **SB 41 replaces corporate responsibility and accountability with secrecy.**

  SB 41 would keep information vital to the protection of worker safety, public health and the environment hidden from review by the agencies we depend upon to enforce the law and the legal system we depend upon to remedy violations of the law. It would limit the right to know of private property owners near polluting industries. And it would limit the public's ability to learn the truth about corporate behavior.

- **Rather than providing incentives for compliance, SB 41 effectively rewards noncompliance by providing immunity from all civil and administrative penalties.**

  Penalties and fines are the primary tools that regulators have to foster compliance. Leniency in determining penalties and fines for self-discovered and immediately reported violations makes sense -- it provides a clear incentive to comply. But SB 41 goes much farther. The bill's vague language and broad definitions eliminates civil and administrative penalties for all violations which are self-discovered and "promptly" self-disclosed to the appropriate state agency.

The second reason the Alaska Forum opposes SB 41 is because the bill will greatly reduce the already limited ability of workers to defend their right to speak the truth in the workplace without fear of reprisals. Over the last several years, the Alaska Forum has worked with dozens of concerned workers who have taken great personal and professional risks to speak the truth. These courageous individuals are hardworking, taxpaying Alaskans who, like you and I, are concerned about their home and their children's futures. Unfortunately, far too many lose their jobs, even their careers, because their employer do not want regulators or the public to hear the truth.

SB 41 would take away one of the primary legal tools a concerned employee has to defend herself from reprisals by her employer. That tool is access, through discovery, to a wide range of internal company documents for use in administrative and civil proceedings against an employer. It is often precisely these internal documents -- many of which would fall under SB 41's definition of a self-audit -- that are essential to prove an employer unfairly and illegally retaliated against an employee. Losing access to these documents would cripple the already weak protections for blowing the whistle under Alaska law. SB 41 sends a clear message to conscientious workers: remain silent.

A recent case in point is the story of a worker who blew the whistle on illegal waste disposal practices at the Endicott oil field. Doyon Drilling, a BP contractor at Endicott, instructed its workers to violate environmental regulations by putting toxic materials into the drilling wastes that were re-injected as a part of routine drilling operations. These secret and potentially damaging practices continued for at least two years and perhaps as long as five years. Doyon's response to the worker's disclosure was to dismiss as "jokes" death threats against he and his family by co-workers, shutdown his rig, lay him off and then eliminate his position.

Had the conscientious worker not spoken the truth, these violations would be continuing to this day. And had this worker not been able to force Doyon to disclose the findings of what SB 41 would call a self-audit, he might have lost his whistelblower case against Doyon. Not only would he have sacrificed his twenty-two year career in the oil industry but he, his wife and his children would have been ruined financially. Such an outcome to would have sent a clear and chilling message to other conscientious workers: silence is your only option.

Finally, self-audits make good business sense -- they improve the bottom-line by identifying and correcting compliance and other problems early. That is why many companies across the nation and in Alaska already conduct self-audits without laws that grant them immunity and privilege. This is true even in Alaska: as the Alaska Oil and Gas Association's January 1997 position paper on SB 41 points out, the majority of its members already "conduct self-audits as a means of ensuring compliance" without SB 41. Why then does Alaska need the secrecy of SB 41?

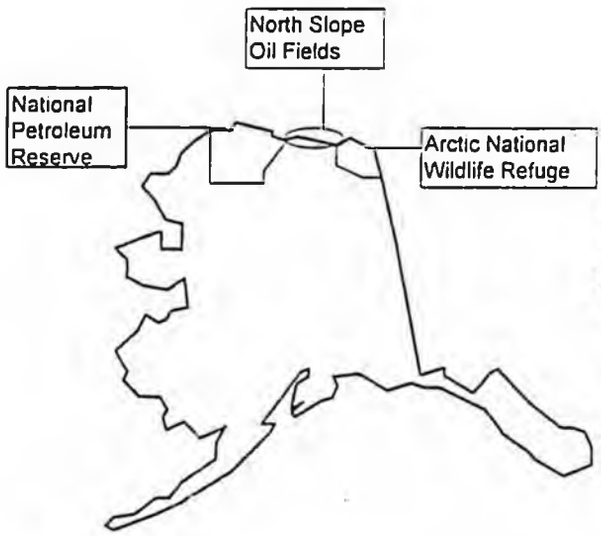
If the Legislature is serious about fostering self-discovery and voluntary disclosure and correction of violations of worker safety, public health and environmental laws, SB 41 is not the answer. A better approach would be a very simple bill that provides clear incentives through leniency for self disclosure and correction. that narrowly and explicitly defines the time window within which self-disclosure must occur (US EPA's policy uses 10 days), and contains no secrecy provisions.

The Alaska Forum opposes SB 41. The essence of our message is this: To leniency for self-discovery and self disclosure. we say "Yes!" But to secrecy and worker silence we say "No!"

Thank you.

Poisoning the Well

Whistleblower Disclosures of Illegal Hazardous Waste Disposal on Alaska's North Slope



EXECUTIVE SUMMARY

ALASKA FORUM FOR ENVIRONMENTAL RESPONSIBILITY

JANUARY 1997

EXECUTIVE SUMMARY

One year has passed since the *Anchorage Daily News* reported the existence of a whistleblower who disclosed illegal hazardous waste injections into North Slope oil wells by Doyon Drilling Services., Ltd. The incidents took place at the Endicott oil field, which is operated by British Petroleum (BP).

This report provides the first detailed account of the illegal and environmentally destructive practices at Endicott. It also discusses the relevance of these illegal practices to the public debate over opening the Arctic National Wildlife Refuge or the National Petroleum Reserve in Alaska to oil development.

The breadth of violations, retaliatory acts against a whistleblower, and an on-going criminal investigation suggest that improper disposal of solvents and other toxic materials may be standard operating procedure on the North Slope. The incidents at Endicott also suggest a failure of regulatory oversight by state and federal agencies charged with enforcing environmental laws on the North Slope.

NORTH SLOPE UNDERGROUND INJECTION WELLS: DESCRIPTION AND REGULATORY STRUCTURE

Underground injection wells are regulated by the Environmental Protection Agency (EPA). Injection wells can be divided into Class I wells and Class II wells. In Alaska, the Alaska Oil and Gas Conservation Commission (AOGCC) has signed a memorandum of agreement with EPA to oversee the Class II well program.

Class I wells are for disposal of industrial hazardous materials. Class I wells also exist for the injection of non-hazardous fluids near drinking water reserves. According to the EPA, Class I wells have a steel casing surrounded by cement that extends to the bottom of the well, and the well is subject to sophisticated and continuous monitoring.

Class II wells are specific to the oil and gas industry. In a Class II production well, fluids may be injected into the "annulus" surrounding the well bore. The annulus leads to a perforated area at the bottom of the well, which allows the fluids to disperse out horizontally into the stratum.

The general rule regarding Class II wells is that nothing may be injected back down the well that has not originated from the well. Thus, Class II fluids are generally mud and water. Additives are allowed to change mud viscosity or provide freeze protection.

THE ENDICOTT OIL FIELD

The Endicott oil field is the third largest of the seven main North Slope oil fields and is 57 percent owned by BP. BP Exploration, Alaska (BPXA) is the main developer of oil resources in the field. Endicott does not have wells capable of handling Class I industrial wastewater fluids. Endicott does have a Class II disposal well, designated as "P-18." Acceptable wastes injected into this well include crude oil, condensate from crude oil lines, well treatment fluids, and produced water (water that is pumped up along with crude).

IMPROPER WASTE DISPOSAL AT BP'S P-18 DISPOSAL WELL

Despite key differences between Class I and Class II wells, the first of two separate but related incidents at Endicott indicates that BPXA managers and staff did not have a firm grasp of the distinction. This apparent "confusion" was fostered by a lack of record-keeping and lax regulatory oversight. Despite its assurances to the contrary, evidence suggests that BPXA and/or its contractors had, in fact, been disposing of Class I industrial wastes down Class II wells for at least two years, and possibly up to five years.

AOGCC summarized the P-18 incident as a misrouting of industrial wastewater to the P-18 well for a period of at least 18 months from 1993 to 1995. The summary relied exclusively on BPXA information and concluded that all injected materials were non-hazardous. Independent verification of this conclusion was not possible because consistent and accurate records, regular reporting and independent audits were not kept by BPXA nor apparently required by AOGCC.

A WHISTLEBLOWER AT DOYON 15

Doyon Ltd., is an Athabascan native corporation based in Fairbanks. Doyon's subsidiary, Doyon Drilling, Inc., J.V., operates five large-scale, mobile drilling rigs on the North Slope. Doyon Drilling provides drilling services for the Endicott field under a contract with BPXA.

The whistleblower (hereinafter referred to as "WB" [1]) began employment with Doyon Drilling on July 5, 1993 as a rockwasher on Doyon 15. WB received training in rockwashing, sampling, and annular injection as well as descriptions of regulatory guidelines on which materials can and cannot be injected down an oil well. WB has a total of 22 years experience in Alaska's oil industry.

"No one lives on the North Slope anyway."

On January 16, 1995, working on the swing shift, WB received orders to mix some 23 to 26, 55-gallon barrels of rig and shop waste into his rockwashing unit for disposal via annular injection into well 1-23. The wastes consisted of used oil, solvents, paints, paint thinners, hydraulic fluid,

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[1] The whistleblower's (WB's) identity is being withheld to protect him from further retaliatory acts and blacklisting in the oil industry. In addition, the identities of WB's coworkers at Doyon 15, some of whom may still face criminal indictment and penalties, are being withheld to protect an on-going grand jury investigation.

and glycol. WB refused to dispose of the waste because he recognized that environmental laws and BPXA's annular injection permit prohibited disposal of the waste in that manner. WB was subsequently berated by co-workers for his refusal and told that the improper disposal was of no consequence because "no one lives on the North Slope anyway."

From January to August 1995, WB continued to receive orders to dispose of non-Class II waste down Class II wells. WB refused to dispose of these wastes; other crew members did so instead. During this same period, WB also received repeated and increasingly aggressive threats to his safety and the safety of his children.

On several occasions between February and August 1995, WB informed Doyon management about the violations at Doyon 15 and that they had been on-going for five years. The managers initially acknowledged that the practice was wrong and suggested that they would "take care of it." They later informed WB that BPXA had okayed Doyon's injection of wastes. When Doyon's Personnel Department consulted with these same manager, they were told that the practices were proper. On August 31, WB informed BPXA managers of the improper practices at Doyon 15.

By early September, threats by co-workers to WB had intensified to include direct threats to his life. WB asked to go home a day early but was told by managers that the threats to him and his family were only jokes. Doyon's Personnel Department advised him that he needed a doctor's order before he could leave the rig early. If he left, such an act would be considered a voluntary quit. WB finally asked for paid leave from Doyon 15. This request was denied and he took vacation time instead so he would not have to return to the rig.

<u>BPXA issues report on Doyon 15 waste handling practices</u>

On September 25, 1995, BPXA completed an investigation of Doyon 15 waste handling practices. The investigation made these findings:

- Used oil, solvents, glycol, paint thinners and possible Chevron 325 stoddard solvent [a material listed as hazardous under the Resource Conservation and Recovery Act (RCRA)] were disposed of via annular injection from 1993 to August 1995.
- Doyon 15 crew members understood the practice to be waste disposal not freeze protection. The practice only occurred at night.
- BPXA and Doyon maintained inadequate documentation of injected materials.
- BPXA personnel claimed they were not aware of the improper disposal practices.

Shortly after AOGCC began an investigation into the violations in February 1996, EPA requested AOGCC suspend its investigation until EPA had completed its own criminal investigation. WB later testified before a federal grand jury. Other Doyon 15 crew members pled the Fifth Amendment and refused to give testimony to the grand jury. The federal criminal investigation is still on-going; no indictments have been brought to date.

In March 1996, Doyon 15 was shut down and all rig employees were laid off. When Doyon 15 recommenced operations in September 1996, the rockwashing unit remained closed because AOGCC had suspended annular injections on Endicott. WB's position was permanently eliminated by Doyon.

WB files and wins a complaint with U.S. Department of Labor.

In October 1995, WB filed a whistleblower complaint against Doyon Drilling. The complaint alleged threats and harassment as retaliation for his "protected activities" and requested an end to these adverse activities, damages, and attorneys fees.

The complaint was investigated by the Department of Labor's Wage and Hour Division, Seattle. The Department's investigator found WB to be a highly credible individual who understood the disposal was illegal and tried to correct the problem through his management. He further concluded that Doyon management largely ignored WB's concerns, that WB was harassed and intimidated by his co-workers, and that management did little to stop the harassment.

In August 1996, USDOL issued its decision: WB had made protected disclosures under the "environmental Acts" and had suffered resulting retaliation. The decision ordered that Doyon restore back pay and benefits to WB and offer him comparable employment. A cash settlement could replace back pay and reinstatement. Doyon was also ordered to cover WB's legal fees.

Doyon appealed the USDOL decision. WB subsequently settled his complaint with Doyon in December 1996. The terms of the settlement are confidential.

IMPLICATIONS FOR OIL DEVELOPMENT OF THE ARCTIC NATIONAL WILDLIFE REFUGE AND THE NATIONAL PETROLEUM RESERVE IN ALASKA

Since The *Exxon Valdez* disaster, the oil industry has portrayed itself as utilizing the latest technologies to minimize the impact of its operations. This public relations effort has emphasized the industry's environmental responsibility towards the North Slope environment. The incidents at the Endicott oil field suggest that the oil industry has presented the public and Congress with a one-sided, self-serving presentation of its practices.

In 1995, Congress held hearings regarding Arctic Refuge oil development. Alaska's congressional delegation offered the oil companies and their contractors a liberal opportunity to demonstrate their progressive environmental practices. Alaska's Senator Murkowski, chairman of the Senate Energy and Natural Resources Committee, invited Doyon to testify in July 1995. At the same time as WB was fighting to have Doyon take his concerns seriously, Doyon's general manager Randy Ruedrich testified about how improvements in drilling technology allow Arctic oil development in an environmentally sound manner. Ruedrich made no mention of hazardous waste disposal. Similar statements were made by representatives of ARCO, BP and Alaska's Division of Oil and Gas.

The incidents at the Endicott oil field suggest that a close examination of oil industry practices should precede any future development of the Arctic National Wildlife Refuge (ANWR) and/or the National Petroleum Reserve in Alaska (NPRA).

CONCLUSION

The incidents of illegal injections of Class I hazardous wastes into Class II oil and gas wells on Endicott oil field may well be isolated events. However, the frequency of the practices at P-18 and Doyon 15, as well as the length of time (18 months for P-18 and up to five years for Doyon 15) suggest that injections of hazardous waste into oil wells may be widespread on the North Slope.

BPXA took the responsible course of action when it became aware of the P-18 and Doyon 15 practices. However, the incidents also underscore BPXA's failure to maintain records of underground waste injections and its failure to ensure that its contractors adhered to the letter of the law.

The Endicott oil field incidents also demonstrate a failure on the part of the regulatory agencies to effectively police the oil and gas industry on the North Slope. The regulatory agencies did not take the incidents seriously until after a whistleblower came forward -- despite retaliation by his co-workers and management and ultimately sacrificing his 22 year career -- to disclose illegal practices. Had an irresponsible operator chosen to conduct a less thorough investigation, or swept the incidents under the rug, the likelihood of substantial regulatory agency involvement is by no means certain. Indeed, the fact that the criminal investigation is still underway a year later suggests there may be far more to the incidents than the regulatory agencies initially suspected. Hopefully, the results of this investigation will demonstrate government's renewed interest in policing environmental practices on the North Slope.

The evidence suggests that the oil industry has not, in fact, proven environmentally responsible development of the North Slope. As the incidents at Endicott oil field show, illegal dumping of hazardous wastes occurred because of negligent and willful human failures, and a company's deliberate refusal to take the word of a concerned worker seriously. Clearly, a close examination of oil industry practices should precede any future development of ANWR and/or NPRA.

NOTE TO THE READER:

This report is based primarily on information obtained by Freedom of Information Act requests submitted to the US Department of Labor and public records disclosure requests submitted to the Alaska Oil and Gas Conservation Commission. The complete, documented text of this report is available for $5.00 from the Alaska Forum for Environmental Responsibility or free on the world wide web:

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Anchorage Daily News

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VOL. LII, NO. 37

ANCHORAGE, ALASKA, THURSDAY, FEBRUARY 6, 1997 ★

FINAL
EDITION

Partnering will not remove poison from the wel

By STAN STEPHENS

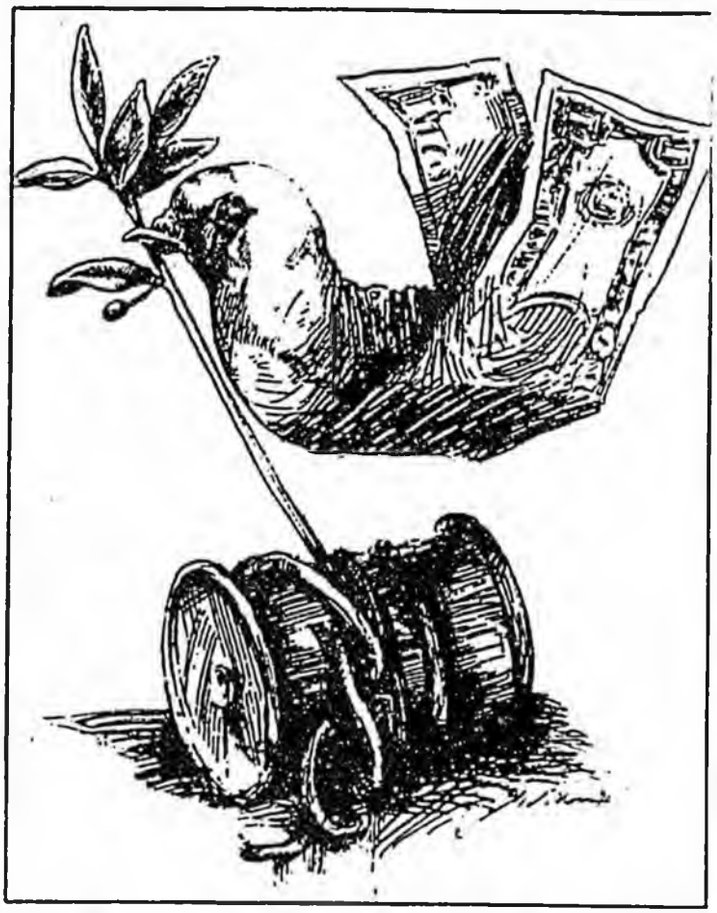
Last week, the Alaska Forum for Environmental Responsibility published "Poisoning the Well," a report about illegal waste disposal practices at British Petroleum's Endicott oil field on the North Slope. The report summarizes the story of a courageous whistleblower who refused to collaborate in the illegal and environmentally destructive practices.

Doyon Drilling, a BP Exploration (Alaska) contractor at Endicott, instructed its workers to violate environmental regulations by putting toxic materials into the drilling wastes that were re-injected as a part of routine drilling operations. These secret and potentially damaging practices continued for at least two years and perhaps as long as five years.

This story surfaced briefly in the press in January 1996. Then, like so many other whistle-blower stories, it was forgotten. The Alaska Forum reviewed the record and discovered that although BP eventually investigated the incidents responsibly, the illegal practices never would have come to light if the whistle-blower had not stood up to peer pressure. He endured death threats from coworkers and sacrificed his 22-year career to do the right thing.

These events call into question the partnership that Gov. Tony Knowles has worked so hard to form between the oil industry and the State of Alaska. While the relationship between the oil industry and the residents of Alaska is at the highest level of openness that I can remember, the partnership still has a long way to go.

Everyone acknowledges the importance of oil to Alaska's economy. A government-industry partnership is not only good business but is necessary for the healthy development of Alaska's oil industry. But "Poisoning the Well" tells the story of naked pursuit of profit at the expense of the environment.



As documented in the report, toxic wastes were illegally injected into oil wells to save Doyon and BP $1,000 to $1,500 per barrel of waste. One of the whistle-blower's fellow employees told him the improper disposal had been ongoing for five years and was of no consequence because "no one lives on the North Slope anyway." That's the last kind of statement one would expect to hear from a

subsidiary of an Alaska Native corporation.

Even as these events unfolded, Sen. Frank Murkowski heralded Endicott as a shining example of environmentally safe development. At the same time that the company was ignoring the whistle-blower's concerns, Doyon's general manager proclaimed to Congress in July 1995 that "environmental protection is an equally critical part of daily operations" on the North Slope.

BP says the Endicott pollution problems were isolated events. However, the volume and length of time of these illegal waste disposal practices suggest that environmentally degrading practices on the North Slope may be widespread. For a period of up to five years, 1990 to 1995, thousands of gallons of used glycol, paints, solvents, and other toxins were illegally re-injected at Endicott.

Where were the government regulators who were supposed to be ensuring environmentally safe operations? The record indicates that the U.S. Environmental Protection Agency and the Alaska Oil and Gas Conservation Commission did not take the first of two incidents seriously until after a whistleblower came forward to disclose the illegal practices.

After more than a year of glacially paced criminal investigations, government officials have not yet held Doyon accountable nor specified firm corrective actions. It remains unclear what has been done to prevent future illegal practices.

Our state's leaders in Juneau and Washington, D.C., argue that a new "partnership" with Alaska's oil industry means we can "do it right" on the North Slope. But the evidence from Endicott is typical of the problems in the North Slope oil delivery system that should keep us all concerned.

Credible government-industry partnerships require mutual trust. Events like those at Endicott undermine the public's trust in an environmentally responsible partnership on the North Slope. And the public will remain skeptical until Doyon is held accountable.

Contrary to a massive public relations campaign and the lobbying efforts of Alaska's congressional delegation, "Poisoning the Well" suggests that the oil industry has not yet proven environmentally responsible development on the North Slope. At Endicott "a supposed model of environmentally friendly development" illegal dumping of hazardous wastes occurred because of negligent and willful human failures.

Clearly, a close examination of oil industry practices and government oversight of the North Slope, the trans-Alaska oil pipeline and the marine transportation must precede any future development of the Arctic National Wildlife Refuge and/or the National Petroleum Reserve-Alaska. Development of those areas should not proceed until it is clear that practices such as Doyon's have ended and that strong government oversight is in place.

Alaska needs a true and honest partnership designed for the betterment of the oil industry and the State of Alaska. Top-flight industry practices and strong government oversight for the protection of this great land must take precedence over political moves designed for profit alone.

❑ Stan Stephens is the president of the Alaska Forum for Environmental Responsibility. "Poisoning the Well" can be obtained from the Alaska Forum at Box 188, Valdez, AK 99686, (907) 835-5460, or downloaded from the World Wide Web at http://www.accessone.com/~afersea.

0-LS0299\F
Lauterbach
3/7/97

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:
Referred:

Sponsor(s): SENATORS LEMAN, Pearce, Taylor

A BILL

FOR AN ACT ENTITLED

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

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

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

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

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

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

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

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

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

Article 5. Privileges and Immunities Related to Disclosure of Certain Self-Audits and Violations.

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

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

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

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

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

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

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

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

(4) a custodian of the audit results.

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

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

establishing the applicability of the privilege.

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

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

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

(i) This section may not be construed to

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

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

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

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

(2) receipt by the agency or municipality.

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

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

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

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

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

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

(D) a partner of the owner or operator;

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

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

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

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

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

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

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

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

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

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

penalties stipulated in the agreement.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) an investigation of the violation was not initiated or the violation was not independently detected by an agency with enforcement jurisdiction before the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) seeking injunctive relief; or

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

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

(1) the owner or operator claiming the immunity has

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

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

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

(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

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

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

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

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

(3) remediation;

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

(5) the nature of the violation; and

(6) other relevant considerations.

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

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

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

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

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

(i) interviews with current or former employees;

(ii) field notes and records of observations;

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

(iv) legal analyses;

(v) drawings;

(vi) photographs;

(vii) laboratory analyses and other analytical data;

(viii) computer generated or electronically recorded information;

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

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

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

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

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

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

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

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

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

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

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

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

(5) "environmental law" means

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

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

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

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

a technical or remedial provision ordered by a regulatory authority;

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

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

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

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

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

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

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

FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. CSSB 41 (JUD)

Revision Date:
Title: ...relating to environmental audits to determine compliance with certain laws, permits...
Sponsor: Senator Leman
Requester: Senate Judiciary Committee

Dept. Affected: Department of Law
BRU: Civil Division
Component: Environmental Law

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	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						
TOTAL OPERATING	196.3	196.3	196.3	139.0	139.0	139.0
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						
TOTAL	196.3	196.3	196.3	139.0	139.0	139.0

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: Joan Kasson — Phone: 465-5370
Division: Administrative Services Division — Date: 3/10/97

Approved by Commissioner: Bruce M. Botelho, Attorney General — Date: 3/10/97
Agency: Department of Law

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ANALYSIS CONTINUATION:

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

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

General Legal Issues Resulting in Fiscal Impact

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

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

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)

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
Total Costs	$196.3
FY01 - FY03	
Approximately 487 hours @ $87/hour	$42.4
Direct case travel	$1.7
Expert witnesses	$95.0
Total Costs	$139.0

SENATE COMMITTEE REPORT

DATE: 1/31/97

FURTHER: Finance

DATE TURNED IN TO OFFICE: 3/10/97

Judiciary 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 _____ (JUD)

[ ] 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*
Sean Parnell	✓	Ogg Elis		X	
Mike Miller	✓				
Pearce	✓				
CHAIR: Loren Leman	✓	*CHAIR:*			

NEW FISCAL NOTE(S):

Department	Date	Zero	Fiscal
FNFC			

PREVIOUS FISCAL NOTE(S):*

Department	Date	Zero	Fiscal

[ ] **APPROPRIATION -- no fiscal note**

***include fiscal notes accompanying Governor's bill**

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
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Juneau, Alaska 99801-2105

MEMORANDUM March 8, 1997

SUBJECT: Environmental Audits (Draft CSSB 41(JUD), "F" version)

TO: Senator Robin Taylor, Chair
Senate Judiciary Committee
Attn: Laura Chase

FROM: Terri Lauterbach
Legislative Counsel

Enclosed is a draft CS for SB 41. As requested by your staff, the CS is in draft form so that you can review changes that may have been necessary in the large number of amendments passed by the committee.

Amendment #6: I have changed the word "disclosure" to "violation" for grammatical consistency. If you want to keep the word "disclosure", an alternative way to resolve the inconsistency would be to rewrite the amendment as follows:

> (d) A party to a confidentiality agreement described in (b)(2) of this section who violates that agreement **by disclosing confidential material** is liable for damages caused by the disclosure and for. . . (etc.)

Amendment #9: I placed the language at a different place in the sentence so that I could avoid the use of "such" as a referent. Based on the description of the purpose of the amendment, I also added the past tense "posed" to language added at page 7, line 13 of the L&C CS.

Amendment #10: In light of this amendment, do you want to add "or administrative hearing officer" after "court" in Sec. 09.25.485?

Amendment #14: "Page 8, lines 20 - 22" appears to be the wrong location. I have, instead, deleted page 8, lines 27 - 31.

Amendment #16: For grammatical clarity, I reworded the amendment slightly.

Amendment #18: To provide for a complete thought, I have left in the phrase "contributed materially to the occurrence of the violation." The explanation of the amendment indicated to me that only "lack of prevention systems" should have been deleted.

Amendment #19: To clarify the ambiguity of "after," I have used the phrase "after taking into account the cost of" in two places. Otherwise, the word "after" could have been construed to mean that the savings had to have occurred after **the point in time** that the corrective measures were made. Wouldn't the savings have accrued during the time of noncompliance?

Amendment #20: I have placed this material as a new subsection (j) in AS 09.25.450 since it relates specifically to that section. I have also added a reference to this new material in AS 09.25.450(b). The use of the word "municipality" in this amendment makes me wonder if "the commissioner's office of the department" in (b) is proper. Are the notices always to be sent to DEC, not the municipality? If so, why should a municipality be able to approve electronic filing? If not, then there need to be additional changes to reflect the role of municipalities in receiving notices. There might also be other places in the bill where "department" is too narrow, For instance, how about AS 09.25.475(g), where inspections during the audit period are prohibited? This subsection currently refers only to DEC. What about municipal inspections? I recommend reviewing all uses of the word "department" in the bill to ensure that they are correct and do not inappropriately leave out municipalities.

Amendment #21: In light of Amendment #25, I have deleted "health or safety" twice in this amendment.

Amendment #24: The language at the end of paragraph (3) was garbled. I added what seemed to be missing by using language from AS 11.81.900(a)(3), which was cited as the source for the definitions in this amendment.

Amendment #25 and #26: To fully implement these two amendments, which narrow the scope of the bill to cover only environmental laws and define "department" to be the Department of Environmental Conservation, I have clarified the definition of "environmental law" in AS 09.25.490 so that the first part of the definition refers to laws implemented by the DEC. If you have in mind other "environmental" laws, such as those that may be enforced by DNR or Fish and Game, then this issue and the use of the word "department" throughout the bill may need further study.

Amendment #35: There is some redundancy added by this amendment, but I have not made any changes. If you want some, just let me know.

TML:glc
97-146.glc
Enclosure

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March 5, 1997
Via Facsimile and US Mail

Senator Robin Taylor, Chair
Senate Judiciary Committee
State Capitol
Juneau, AK 99801

Senators Drue Pearce and Bert Sharp, Co-Chairs
Senate Finance Committee
State Capitol
Juneau, AK 99801

RE: SB 41 -- Environmental, Health and Safety Self-Audits

Dear Senators Taylor, Pearce and Sharp,

The purpose of this letter is to supplement the comments on SB 41 the Alaska Forum for Environmental Responsibility submitted to the Senate Judiciary Committee on February 24 (a copy is enclosed). In particular, this letter expands on our concerns about the bill's detrimental effects on whistleblowers in Alaska. Contrary to Senator's Leman's assertion on January 24, we believe that SB 41 provides no protection for whistleblowers.

Fundamentally, companies doing self-critical analysis only have shareholders and government regulators acting to motivate corporate behavior. Shareholders have never been recognized as bearers of the public interest. The government often relies upon whistleblowers to learn of violations of environmental regulations, violations that the vast majority of whistleblowers first disclose to the company through internal reporting mechanisms. Those mechanisms often generate internal investigations, investigations which would be deemed self-audits under SB 41. If an audit containing the protected disclosure is designated as privileged, a whistleblower who is discharged or otherwise retaliated against for raising concerns about worker safety, public health or environmental violations will be denied access to important documentation showing that he raised the concern and the company's reaction. In any case brought under state law, or based upon diversity jurisdiction in federal court, state law would govern the applicability of any asserted privilege.

If SB 41 becomes law, a company acting in bad faith would have twice the opportunity to cover its tracks. Not only could the substantive issue of the environmental violation be hidden, the person disclosing the problem could be disposed of (terminated) without consequence to his employer because the employee would be unable to prove that he raised the concern if the company only addresses the concern within the context of a privileged audit report.

Contrary to Senator Leman's assertion to the Judiciary Committee on February 24, his proposed Section 2, 09.25.460(a)(4) (version SB 41 offered on 1/31/97), does not offer any whistleblower protection because it only offers exemption from privilege to information that is independent of an audit. It will not take long for companies to know what rock to put the dirty laundry under. Few if any employees would be willing to raise concerns about environmental or safety violations if the result of the disclosure is retaliation with exoneration of the employer's reprisals because of a statutory privilege to hide information.

There is no reason to believe that companies will act honestly and candidly to prevent future accidents only if they can hide internal audits. Incentives to encourage honest and candid actions can be instituted without resorting to secrecy. For instance, leniency could be granted for voluntary disclosure of violations within a reasonably short time period after learning of the violation and for meaningful corrective action taken shortly after discovering the violation. This is the essence of US EPA's policy on self-audits, which grants leniency if voluntary disclosure occurs within ten days and corrective action within sixty days without secrecy. See Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66.706 (1995). Such an approach would encourage, rather than discourage, whistleblowing because the company would benefit from finding and correcting violations as quickly as possible.

Secrecy regarding environmental or safety violations will not protect the public interest. Secrecy only serves to provide a greater screen of protection for those companies which are already ignoring the law as a means of enhancing profit, without any statutory guarantee privilege for self-audits. As David Ronald, Arizona Assistant Attorney General put it, "Only businesses with something to hide would benefit from a law that turns data gathered from environmental audits into secret information" (Statement to US EPA; July 27, 1995). The recent story of the Doyon Drilling employee at the Endicott oil field clearly illustrates this fact (see enclosure), as do the many cases of concerned pipeline employees silenced by Alyeska.

In summary, SB 41 is bad public policy. First, SB 41 replaces corporate responsibility and accountability with secrecy. The US Supreme Court has recognized that secrecy fundamentally undermines enforcement of laws designed to protect the public interest: "The greater portion of evidence of wrongdoing by an organization or its representatives is usually found in the official records and documents of that organization. Were the cloak of privilege to be thrown around these records and documents, effective enforcement of many federal and state laws would be impossible" (Braswell v. US, 108 S. Ct. 2284 [1988]). Second, rather than providing incentives for compliance through leniency, SB 41 effectively rewards noncompliance by providing immunity from all civil and administrative penalties. Finally, SB 41 will greatly reduce the already limited ability of conscientious workers to defend their right to speak the truth in the workplace without fear of reprisals.

As the Alaska Forum told the Senate Judiciary Committee last month, the Alaska Forum opposes SB 41. SB 41 sends a clear and chilling message to conscientious workers: remain silent. The essence of our message is this: To leniency for self-discovery and self-disclosure, we say "Yes!" But to secrecy and worker silence we say "No!"

If you have any further questions, please call Mike Riley, Program Director, at (206)628-9464.

Sincerely,

Stan Stephens

Stan Stephens
President

enclosures: -- "Testimony on SB 41 before the Senate Judiciary Committee February 24, 1997," Alaska Forum
-- "Poisoning the Well: Whistelblower Disclosures of Illegal Hazardous Waste Disposal on Alaska's North Slope, Executive Summary," Alaska Forum, January 1997.
-- "Partnering Will Not Remove Poison from the Well," Stan Stephens, *Anchorage Daily News*, 2/6/97

cc: Senator Loren Leman, Fax: 465-3810
Senator Mike Miller, Fax: 465-3883
Senator Sean Parnell, Fax: 465-2278
Senator Johnny Ellis, Fax: 465-2529
Senator Dave Donley, Fax: 465-6595
Senator Randy Phillips, Fax: 465-4979
Senator John Torgerson, Fax: 465-4779
Senator Al Adams, Fax: 465-4821
Senator Jim Duncan, Fax: 465-4748
Senator Lyman Hoffman, Fax: 465-4523
Senator Georgianna Lincoln, Fax: 465-2652

Senator Leman's Amendment Package
CSSB 41 (L&C)
Revised: 2/26/97

M/[illegible] 1-24; deleting 7;

Ellis - [illegible] to 7;

1-24 panel { M/ Miller – Obj. Ellis – rhrecnd. 7;
M/Miller – Amend 8 – Obj./Ellis

AMENDMENT #1

OFFERED IN THE SENATE

TO: CSSB 41(L&C)

Page 3, line 7:

Following "certified mail":

Insert: "with return receipt requested"

Page 3 line 7:

Following "to the":

Insert: "commissioner's office of the"

Reasons: The certified mail receipt will establish that the owner or operator mailed the notice. The return receipt card will establish that the department received the notice. To avoid confusion and misplaced notices, the bill should provide a specific location where the notice is to be mailed.

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AMENDMENT #2

OFFERED IN THE SENATE

TO: CSSB 41 (L&C)

Page 3, lines 12-13:

Change wording as follows:

> Once initiated, an audit shall be completed within a reasonable time, but no longer than 90 days [30 DAYS] unless a longer period of time is agreed upon between the owner or operator and the department.

Rationale: Affected industries have commented that a 30 day limit is often not an adequate amount of time to complete a facility audit.

AMENDMENT #3

OFFERED IN THE SENATE

TO: CSSB 41 (L&C)

Page 3, lines 30-31:

Change wording as follows:

> A person claiming the privilege described in this section has the burden of establishing [PROVING] the applicability of the privilege.

Rationale: Affected industries have concerns about what would be entailed in "proving" the applicability of a privilege. The privilege established under 09.25.450 is a carefully defined statutory privilege. It is one which a regulated entity is entitled to, provided it meets all the relevant conditions. In addition, the sponsor has been advised by the Dept. of Law that a popular general reference book on evidence law (Wigmore's Treatise on Evidence) uses the phrase "establishment of privilege", so that the term "establish" can be appropriately used in this context.

AMENDMENT #4

OFFERED IN THE SENATE

TO: CSSB 41 (L&C)

Page 4, lines 23-27:

In subsection (b), delete the word "only":

> (b) Disclosure of the part of an audit report or information consisting of confidential self-evaluation or analysis does not waive the privilege established by AS 09.25.450 if the disclosure is made [ONLY]
>
> (1) to address or correct a matter raised by the environmental or health and safety audit and is made [ONLY] to....

Rationale: the word "only" unnecessarily limits disclosure, e.g., there are other valid reasons for disclosing parts of the audit report beyond addressing or correcting violations raised in the audit report.

AMENDMENT #5

OFFERED IN THE SENATE

TO: CSSB 41 (L&C)

Page 4, line 30:

Delete all material.

Insert: "(B) the owner or operator's lawyer or the lawyer's representative;"

Reasons: The CSSB 41 (L&C) allows privileged material to be disclosed to "a legal representative of the owner or operator" without waiving the privilege. The term "legal representative" could encompass a wide variety of legal relationships, including a power of attorney. The existing provision appears to refer to disclosures made to a lawyer. If so, to prevent potential abuses of the privilege, proposed subparagraph (B) should be amended to refer to a lawyer or the lawyer's representative (e.g., the lawyer's paralegal, secretary, investigator, or expert consultant).

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AMENDMENT #6

OFFERED IN THE SENATE

TO: CSSB 41 (L&C)

Page 5, after line 22:

Add a new subsection (d) as follows:

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

Rationale: this liability language was present in SB 41 as introduced, but appears to have been inadvertently left out of the committee substitute (L&C).

AMENDMENT #7

OFFERED IN THE SENATE

TO: CSSB 41 (L&C)

Page 5, line 25:

Delete the reference to "objective facts" in 09.25.460 (a):

(a) There is no privilege under AS 09.25.450 for that part of an audit report that contains the following:
[(1) OBJECTIVE FACTS;]

Rationale: There is agreement that audit reports should not be used to shield the underlying facts. The legislative findings of SB 41 state, "the legislature does not intend that the parts of an audit report... that are privileged under this Act may be used to shield a person from liability under applicable laws and regulations by blocking access to relevant facts" [page 2, lines 7-10]. However, the placement of "objective facts" in the context of 09.25.460(a)(1) has the unintentional effect of severely undermining the privilege incentive, because it declares that privilege does not apply to any part of an audit report that contains objective facts. Of course, references to objective facts will naturally be found throughout all parts of a typical audit report. The existing language, if left unchanged, would encourage auditors to avoid any references to objective facts in the self-evaluation and analysis portion of the audit report. This would adversely affect the quality and usefulness of these reports as tools for bringing a regulated entity into full compliance.

AMENDMENT #8

OFFERED IN THE SENATE

TO: CSSB 41 (L&C)

Page 6, lines 15-16:

Reword subsection (b) as follows:

> The parts of an audit report that consist of information necessary to determine pipeline rates, tariffs, fares, or charges are not privileged and are admissible as evidence and subject to discovery in a proceeding relating to pipeline rates, tariffs, fares, or charges. [AN AUDIT REPORT IS NOT PRIVILEGED AND IS ADMISSIBLE AS EVIDENCE AND SUBJECT TO DISCOVERY IN A PROCEEDING RELATING TO PIPELINE RATES, TARIFFS, FARES, OR CHARGES.]

Rationale: Under the existing wording, a regulated entity can not claim privilege for any part of an audit report in a proceeding that relates to pipeline rates, tariffs, fares, or charges. The new language states that only those parts of an audit report that are necessary to assist in determining rates, tariffs, fares or charges are nonprivileged.

AMENDMENT #9

TO: CSSB 41 (L&C)

OFFERED IN THE SENATE

Page 6, line 24:

Following "offsite":

Insert: "or the imminent or present threat of such injury"

Page 7, line 13:

Following "offsite":

Insert: ", or if the violation poses an imminent or present threat of such injury"

Reasons: CSSB 41(L&C) provides exceptions to the self-audit privilege and immunity when a violation causes "substantial injury to one or more persons at the site audited or to persons, property, or the environment offsite." The regulatory laws that seek to protect the public health and environment also seek to abate, correct, and prevent conditions that present an immediate threat of substantial injuries; for example, there are laws that regulate hazardous substances to prevent explosions, chlorine gas releases, the contamination of public water supply systems, and large oil spills. When a violation presents an imminent or present threat of substantial injury to the public health or the environment, a state agency or municipality may require access to privileged information for purposes of issuing emergency orders or seeking injunctive relief. A penalty may be appropriate if the violation posed a serious risk of substantial injury to the

public health or the environment.

With respect to federally-delegated programs, a state agency's inability to access privileged information or to seek penalties in circumstances where a violation substantially endangers the public health or the environment may result in the denial or withdrawal of federal approval. See, e.g., EPA, "Clean Air Act Final Interim Approval of the Operating Permits Program," 62 Fed. Reg. 1387, 1397 (1997) (To obtain final approval of Michigan's title V permit program, the Michigan Attorney General must certify that the state's audit privilege and immunity law does not affect "Michigan's authority to bring suit to restrain any person from engaging in any activity in violation of a permit that is presenting an imminent and substantial endangerment.").

The proposed amendments would help to ensure that regulatory agencies could pursue appropriate remedies when a violation substantially endangers the public health or the environment.

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Continued Need for Rule

ATF continues to believe that these regulations help to avoid accidental explosions on the premises of special fireworks plants.

Nature of Complaints Received

ATF has received no complaints about the regulating from members of the fireworks industry, and believe the regulations should remain in place.

Complexity of the Rule

The requirements were determined to be the minimum necessary to improve the safe storage of special fireworks.

Conflicting, Duplicative or Overlapping Federal Rules

None of the requirements of the regulation conflict, duplicate, or overlap other Federal rules.

Changes in Area Affected by Rule

The Regulatory Flexibility Act requires an agency to review all affected rules within ten years of the publication of the final rule. This is the first such review of final rule, T.D. ATF-293, since the effective date of March 7, 1990. ATF is unaware of any changes in the fireworks industry having a significant impact on the effectiveness of these regulations.

Public Participation

One of ATF's primary missions is protection of the public. To successfully accomplish this goal, we are requesting comments on the following questions concerning the amended regulations stemming from T.D. ATF-293:

(1) Have any of the changes in the regulations issued in T.D. ATF-293 caused any unnecessary burdens on business activities or practices?

(2) How could the existing regulations be altered to assure the same security, protection, and traceability of explosive materials, while further reducing expenses to industry members?

(3) Are there any areas of the explosives regulations which need strengthening? Are there any areas of the amendments contained in T.D. ATF-293 that need more stringent regulation?

(4) Are there any areas contained in the regulations issued in T.D. ATF-293 that need to be relaxed, rethought, or rewritten?

(5) Have there been any changes in the industry which would necessitate changes in these regulations?

Written comments must be received within the 90-day comment period. ATF will not recognize any material as confidential. Any materials submitted may be disclosed to the public. Any material which the transmitter considers to be confidential or inappropriate for disclosure should not be included in the suggestion. The name of the person submitting the suggestion is not exempt from disclosure.

Drafting Information

The author of this document is Mark D. Waller, Firearms and Explosives Regulatory Division, Bureau of Alcohol, Tobacco and Firearms.

List of Subjects in 27 CFR Part 55

Administrative practice and procedure, Authority delegations, Customs duties and inspection, Explosives, Hazardous materials, Imports, Penalties, Reporting and recordkeeping requirements, Safety, Security measures, Seizures and forfeitures, Transportation, and Warehouses.

Signed: November 27, 1996.

John W. Magaw,

Director.

Approved: December 16, 1996.

John P. Simpson,

Deputy Assistant Secretary, Regulatory, Tariff and Trade Enforcement.

[FR Doc. 97-593 Filed 1-9-97; 8:45 am]

BILLING CODE 4810-31-U

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 70

[MI001; FRL-5674-1]

Clean Air Act Final Interim Approval of the Operating Permits Program; Michigan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final interim approval.

SUMMARY: The EPA is promulgating interim approval of the operating permits program submitted by the State of Michigan for the purpose of complying with Federal requirements for an approvable State program to issue operating permits to all major stationary sources, and to certain other sources.

EFFECTIVE DATE: February 10, 1997.

ADDRESSES: Copies of the State's submittal and other supporting information used in developing the final interim approval are available for inspection during normal business hours at the following location: EPA Region 5, Air and Radiation Division (AR-18J), 77 West Jackson Boulevard, Chicago, Illinois 60604.

FOR FURTHER INFORMATION CONTACT: Beth Valenziano, Permits and Grants Section (AR-18J), EPA, 77 West Jackson Boulevard, Chicago, Illinois 60604. (312) 886-2703. E-mail address: valenziano.beth@epamail.epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background and Purpose

Title V of the Clean Air Act Amendments of 1990 (title V), and the implementing regulations at 40 Code of Federal Regulations (CFR) part 70 require that States develop and submit operating permits programs to EPA by November 15, 1993, and that EPA act to approve or disapprove each program within 1 year after receiving the submittal. The EPA's program review occurs pursuant to section 502 of the Clean Air Act (Act) and the part 70 regulations, which together outline criteria for approval or disapproval. Where a program substantially, but not fully, meets the requirements of part 70, EPA may grant the program interim approval for a period of up to 2 years. If EPA has not fully approved a program by 2 years after the November 15, 1993 date, or by the expiration of the interim approval period, it must establish and implement a Federal program.

On June 24, 1996, EPA proposed interim approval of the operating permits program for the State of Michigan. See 61 FR 32391. The EPA received public comment from five organizations on the proposal and compiled a Technical Support Document (TSD) responding to the comments and briefly describing and clarifying aspects of the operating permits program. In this document EPA is taking final action to promulgate interim approval of the operating permits program for the State of Michigan.

II. Final Action and Implications

A. Analysis of State Submission and Response to Public Comments

The EPA received comments on a total of 12 topics from five organizations. The EPA's response to these comments as developed for the response to comments TSD is included in this section.

1. Indian Country

The EPA proposed that the interim approval of Michigan's operating permits program shall not extend to any sources of air pollution on Indian lands, including lands within the exterior boundaries of any Indian reservation in the State of Michigan. MDEQ commented that Michigan's part 70 authority should extend to some lands within the exterior boundaries of Indian reservations, and identifies a specific

source on an Indian reservation that the State believes is within its jurisdiction. MDEQ states that it intends to develop legal arguments to support its determination that lands within the exterior boundaries of reservations that have been sold for non-tribal uses are within the State's jurisdiction. MDEQ also states that it expects such sources to submit operating permit applications in accordance with the State regulations.

Because Michigan has not demonstrated the legal authority to regulate sources in Indian country, including sources on non-Indian owned fee lands within the exterior boundaries of Indian reservations, the final interim approval of Michigan's part 70 program does not extend to such sources. However, EPA will carefully consider any evaluation Michigan submits in the future regarding State authority over such sources. The EPA retains the authority to issue part 71 permits to all sources in Indian country until such time as EPA approves a part 70 program. Part 71 application submittal deadlines for Indian country are established in 40 CFR 71.4(b) and 40 CFR 71.5(a)(1), and will be no later than November 15, 1998. Any sources located in Indian country required to submit applications earlier than this date will be notified in accordance with the requirements of part 71. The EPA takes no position on the State seeking voluntary compliance with State permitting requirements in Indian country.

2. Delegation of State Program to Local Governments

The proposed interim approval of Michigan's part 70 program confirmed the State's authority to delegate the program to certain county governments, such as Wayne County. MDEQ asked EPA to clarify whether a delegation would require a part 70 program revision, and what the timing and content of any required program revision would be.

Title V of the Act and the part 70 regulations specify the elements of a State operating permits program. In addition to the criteria for the permit themselves, these elements address various program infrastructure and administration issues. Examples include the adequacy of the agency's legal authorities and staffing. Thus, the delegation of the program authorities to another agency would by its nature entail revision of the State's part 70 program.

40 CFR 70.4(i) requires that program revisions be approved by EPA before they become finally effective. However, EPA is developing a program revision process that will meet the requirements of 40 CFR 70.4(i) while also providing continuity as States modify and update their programs. Although the details of this process have yet to be established, this process will focus on ongoing cooperation between the State and EPA, with real-time evaluation of program revision efforts. The EPA will work with Michigan as this process is developed so that any program revision, including any delegation of the State program to a local agency, can take advantage of this approach.

The content of a revised part 70 program submittal to EPA would depend on the nature and scope of the actual delegation. The information provided to EPA should address the changes and additions that the delegation makes to the program that has already been approved by EPA. The State should review the program submittal requirements in 40 CFR 70.4 and determine what elements are necessary to address the delegation. For example, the submittal of State regulations would not be necessary if they are not revised; however, the adoption of any local regulations necessary for the delegation should be included in the submittal. Similarly, a revised legal opinion from the Attorney General would likely be needed to verify that the local agency has the authority to carry out its part 70 program responsibilities established by the delegation. The EPA will provide Michigan additional guidance as necessary to address the program revision requirements for any particular State delegation to a local agency.

3. Definition of Potential to Emit

As a condition of full approval, EPA proposed that Michigan must revise its definition of "potential to emit" to require that limits on potential to emit be federally enforceable. Two commenters noted that a recent court case (*Clean Air Implementation Project v. EPA*, no. 96–1224 (D.C. Cir. June 28, 1996)) vacated the federally enforceable requirement from the 40 CFR 70.2 definition of potential to emit. Both commenters stated that this issue should be removed from Michigan's list of interim approval issues. The EPA agrees with the commenters, and has removed this issue as a condition of full approval. The EPA intends to develop a rulemaking to address the enforceability requirements on potential to emit limits for the title V program, the New Source Review program, and the section 112 toxics program.

4. Research and Development (R&D) Activities

In the proposed interim approval of Michigan's part 70 program, EPA acknowledged the State's regulatory provision that allows R&D activities on the same contiguous site as manufacturing activities to be treated as a separate source for purposes of determining operating permit program applicability. Although EPA believes that R&D should be treated as having its own industrial grouping for purposes of determining major source status, EPA stated in the Michigan proposal that separate treatment will not exempt R&D facilities in all cases. This is because some R&D activities may be individually major, or because they may be a support facility that makes significant contributions to the product of a collocated major facility. One commenter noted the R&D discussions in the part 70 supplemental proposal preamble (60 FR 45556–45558), and asked EPA to clarify whether EPA maintains its position in the supplemental proposal regarding the applicability of the support facility test in the R&D context.

As discussed in the supplemental proposal preamble, EPA believes that R&D activities should not generally be considered support facilities to collocated industrial facilities, since the support provided is directed towards development of new processes or products and not to current production. However, if an activity does contribute to the ongoing product produced or service rendered at a facility in more than a de minimis manner, those activities should be considered part of the source for applicability purposes.

5. Exemptions From Major Source Determinations

The EPA proposed as a condition of full approval that Michigan must remove its exemptions of certain small activities from determining major source status. Two commenters objected to this interim approval issue. One commenter stated that there is no express regulatory requirement mandating that insignificant activities be considered in major source determinations under title V. The commenter also believes the inclusion of such activities is inconsistent with EPA's July 10, 1995 guidance memorandum entitled "White Paper for Streamlined Development of Part 70 Permit Applications".

Neither the applicability requirements in 40 CFR 70.3 nor the "major source" definition in 40 CFR 70.2 provide any exemptions for insignificant activities in determining major source status. The

concept of insignificant activities originates under 40 CFR 70.5(c), and only establishes reduced title V permit application requirements for activities defined as insignificant. 40 CFR 70.5(c) does not modify the title V applicability provisions, and specifically states that "an application may not omit information needed to determine the applicability of, or to impose, any applicable requirement." In addition, the White Paper provides guidance on the permit application requirements for insignificant activities; it does not address major source applicability considerations.

One commenter expressed concern that counting insignificant activities in major source determinations would be very burdensome. The commenter was also concerned that the use of engineering judgement in determining emissions from insignificant activities does not provide sources sufficient certainty and protection from lawsuits. The EPA does not agree that the calculation of emissions from insignificant activities need be a burdensome and resource intensive task. As discussed in the proposed interim approval of Michigan's part 70 program, EPA expects that such emissions would only be examined in those cases where the insignificant activity emissions might impact whether the source is major. In addition, sources and permitting authorities have significant discretion in determining the rigor of analysis necessary for calculating insignificant activity emissions. Such analysis may not even need to be performed on a source by source basis, and could instead establish a general emission level for a particular insignificant activity that can be used for all sources. For example, a permitting authority could determine that sources may assume 1,000 pounds of emissions from a particular insignificant activity. With respect to the commenter's concerns about protection from lawsuits, EPA sees no distinction between the emissions calculations for significant activities and insignificant activities. For example, a source with a potential to emit that is just under a title V applicability threshold should do what is necessary to ensure that the source indeed is not subject to the operating permits program, as additional emissions from either significant or insignificant activities could make the source major.

Another commenter stated that Michigan's rule is consistent with the actual application of major source determinations made throughout the country, and commented that other States are not including insignificant activities in determining applicability. The commenter also stated that there is no EPA guidance for determining emissions from such activities. The EPA is unaware of any other approved part 70 program that has regulatory exclusions for insignificant activities in determining a source's potential to emit. If EPA determines that a State's part 70 program is not being administered in accordance with part 70, EPA has the authority under 40 CFR 70.10 to require the State to correct the deficiencies. In addition, EPA has the authority to pursue enforcement actions against sources for violations of the Act, including the requirement to obtain a title V permit. With respect to the lack of EPA guidance for determining insignificant activity emissions, EPA generally issues emissions factor guidance on a source category basis. The EPA will consider developing guidance for any particular insignificant activities of concern that are not addressed in current guidance.

6. Certification of Compliance

The EPA proposed a condition for full approval requiring Michigan to adopt statutory or regulatory authority that ensures permit applications include a certification of compliance and a statement of the methods used for determining compliance. MDEQ commented that it will work with EPA to resolve this issue during the interim approval period. The EPA also agrees to work with MDEQ to resolve this issue, and would like to clarify that this is a condition of full approval because it is not clear that the underlying State requirements legally obligate sources to include the compliance certification requirements in their permit applications.[1]

Another commenter commented that Michigan's program does require applications to include compliance certifications, and states that this issue should be deleted. The following analysis addresses the commenter's arguments.

40 CFR 70.5(c)(9)(i) and (iv) require permit applications to include a statement of compliance for all applicable requirements. This statement must be certified by a responsible official in accordance with 40 CFR 70.5(d). Although Michigan's statute and regulations require applications to include a certification by a responsible official, they do not require applications to include a certified statement of compliance for all applicable requirements.

40 CFR 70.5(c)(9)(ii) requires the compliance certification to include a statement of the methods used for determining compliance. Although section 324.5507(1)(f)(ix) of Michigan's Natural Resources and Environmental Protection Act (NREPA) requires applications to include proposed compliance method information, the State provision does not associate this compliance method information to compliance certification requirements. The compliance certification provisions must therefore include a statement of the methods used for determining compliance. Of course, this does not preclude Michigan from expanding the scope of its current application requirement to serve this purpose if the State provides a means by which a source can certify that it made its compliance determination using its proposed compliance determination method.

40 CFR 70.5(c)(9)(iii) requires applications to include a schedule for submission of compliance certifications at least annually or more frequently if specified by the underlying requirement or the permitting authority. The EPA agrees that section 324.5507(1)(d) of NREPA satisfies this requirement and is clarifying in the final condition of full approval that this provision is not an issue.

7. Definition of Emergency

The EPA proposed as a condition of full approval that Michigan revise its definition of emergency in section 324.5527(1) of NREPA to ensure that the State's definition is not broader than that provided by 40 CFR 70.6(g)(1). Two commenters disagreed with this condition of full approval. Both commenters stated that the Michigan definition is not broader, and only clarifies what could be considered "sudden and reasonably unforeseeable events". The EPA has reevaluated this issue and agrees with the commenters that the State definition of emergency meets the requirements of 40 CFR 70.6(g).

The additional language in the State definition of emergency includes the following as events that could be considered an emergency: "war, strike, riot, catastrophe, or other condition as to which negligence on the part of the person was not the proximate cause". These situations are eligible for the affirmative defense only if they meet all the provisions of 40 CFR 70.6(g). Specifically, such events must arise from sudden and reasonably unforeseeable events beyond the control

[1] Despite this regulatory deficiency, the State application forms do include the compliance certification requirements.

of the source; require immediate corrective action to restore normal operation; and not include noncompliance to the extent caused by improperly designed equipment, lack of preventative maintenance, careless or improper operation, or operator error. Further, the emergency defense only applies to exceedances of technology based emission limitations that are due to unavoidable increases in emissions attributable to the emergency. These provisions are important qualifications, because the specific State examples would not qualify as emergencies in all situations. For example, exceedances at a source due to increased production would not qualify as an emergency even if the increase is due to additional demand caused by a strike at another source. Similarly, an exceedance at the source involved in a strike may not qualify as an emergency if the strike was not reasonably unforeseeable, or if the exceedance was not an unavoidable increase attributable to the strike. The EPA believes that the additional Michigan events are properly qualified because the State definition includes all of the requirements of 40 CFR 70.6(g). Therefore, EPA is removing this issue as a condition of full approval.

8. Source Category Limited Interim Approval

In its program submittal, the State of Michigan requested source category limited (SCL) interim approval of its 4 year permit issuance schedule. In the proposed interim approval notice for Michigan, EPA acknowledged Michigan's 4 year schedule as part of the State's permit fee sufficiency demonstration. However, EPA could only propose in the alternative the State's request for SCL interim approval because Michigan's regulations currently require a 3 year permit issuance schedule. MDEQ requested that EPA clarify the State's obligations for submitting a program revision once the 4 year schedule is incorporated into the State's regulations.

The EPA proposed SCL interim approval in the alternative so that a program revision would have been unnecessary if Michigan had been able to finalize and submit its rule revisions prior to this final action on Michigan's part 70 program. Because the State has not yet submitted the regulatory revision that would change the State permit issuance schedule from 3 to 4 years, this final action on Michigan's part 70 program fully approves the 3 year schedule contained in the current State regulations.

Once Michigan finalizes its 4 year issuance schedule, the State will be obligated to submit a part 70 program revision to EPA for SCL interim approval. Although 40 CFR 70.4(i) requires that program revisions be approved by EPA before they become finally effective, EPA expects that it will be able to quickly process Michigan's request for SCL interim approval. If the final 4 year schedule is identical to the draft rule that EPA proposed for SCL interim approval, EPA will be able to finalize SCL interim approval without having to repropose the action. If there are changes to the schedule, EPA would still be able to expedite the SCL interim approval through a direct final action. As discussed above in section II.A.2., EPA is also developing a program revision process that may help expedite the program revision process for this situation.

9. Startup, Shutdown, and Malfunction (SSM) Provisions

The EPA proposed as a condition of full approval that Michigan revise its SSM provisions to be consistent with the emergency defense provisions in 40 CFR 70.6(g), or adopt an enforcement discretion approach consistent with the Act. Two commenters expressed concern with this interim approval issue. MDEQ disagreed that the SSM rules affect the State's ability to enforce the requirements of title V, but agreed to work with EPA to address the issue during the interim approval period. The EPA believes it is important that MDEQ and EPA work together during the interim approval period, and commits to working with MDEQ to address this and other interim approval issues.

Another commenter stated that EPA's consideration of Michigan's SSM rules is too inflexible, as the SSM rules provide an affirmative defense only in narrowly defined and highly prescriptive circumstances. The commenter also believes that EPA overlooked the potential for environmental benefits resulting from the SSM requirements to use good air pollution control practices and implement preventative maintenance and malfunction abatement plans. Irrespective of the control and work practice provisions that Michigan's SSM rules require for sources to be eligible for the affirmative defense, EPA has no authority under its part 70 rules to approve an affirmative defense that is less stringent than that contained in 40 CFR 70.6(g). The commenter extolled the benefits of the safeguards contained in Michigan's SSM rules, but did not offer anything to counter EPA's finding that these rules are broader than 40 CFR 70.6(g) and are therefore inconsistent with the federal rule. As discussed in the Michigan proposal, however, EPA could also consider an enforcement discretion approach as a means for resolving this interim approval issue. Such an approach would allow Michigan to retain the specific SSM provisions that may provide environmental benefit.

The EPA would also like to clarify that the Michigan SSM regulations do not affect EPA's enforcement capabilities under the Act during the two year interim approval period. The EPA reserves the right to pursue enforcement of applicable requirements, in accordance with EPA's enforcement discretion policy, notwithstanding the existence of the State's SSM regulations. Similarly, the Michigan rules do not affect citizen suit rights under section 304 of the Act. The interim approval of Michigan's part 70 program establishes the mechanism for the State to issue federally enforceable part 70 permits; EPA will continue to implement the operating permits program in accordance with Title V of the Act and the implementing Federal regulations.

10. Environmental Audit Privilege and Immunity Law

The EPA proposed several conditions for full approval based on the enforcement deficiencies created by Michigan's Environmental Audit Privilege and Immunity Law (audit law), part 148 of NREPA. Four commenters disagreed with EPA's position that Michigan's audit law adversely affects Michigan's ability to comply with the enforcement requirements of part 70.[2]

MDEQ generally commented that Michigan's law does not affect the State's ability to enforce the requirements of title V. The Michigan State Senator sponsoring the bill that became Michigan's audit law also commented that the law does not adversely affect Michigan's authority to assure compliance with and enforce permits. Both commenters stated that regulated entities remain fully liable for any damages they cause, and self reporting data, agency inspections, and other information required by law is not privileged and remains available to the State and the public. However, both commenters supported the interim approval of Michigan's part 70 program, as it will allow the program to be implemented while EPA and MDEQ resolve these issues during the interim approval period.

For the reasons outlined in the Michigan proposal and as further discussed below, EPA remains

[2] One commenter also submitted comments on a fifth commenter's behalf.

concerned that Michigan's audit law affects the State's ability to meet the enforcement requirements of part 70. The EPA recognizes that Michigan may have a different interpretation of the provisions in the audit law, and has provided as an alternative condition for full approval that the State need only submit a revised title V Attorney General's opinion that addresses EPA's concerns and certifies that Michigan's operating permits program meets the part 70 requirements in light of the audit law. The EPA believes that a new Attorney General's opinion would be appropriate, as the Attorney General's opinion in the original program submittal to EPA was developed prior to the passage of the State audit law. The EPA appreciates Michigan's willingness to work with EPA during the interim approval period to resolve these issues.

The EPA also received extensive adverse comments from two law firms that represent nationwide trade organizations and industries. The following subsections address the issues raised by these commenters.[3]

a. Effect of the Michigan audit law on Michigan's enforcement authority.

The commenters stated that nothing in the Act or part 70 prohibits a State from establishing a new protection for audits, expanding existing privileges, providing an additional affirmative defense, or determining that criminal or civil prosecution is inappropriate in certain defined situations, such as those specified in the Michigan audit law.

The EPA disagrees. Section 502(b)(5)(E) of the Act lays out the minimum enforcement authorities which Congress required a State to have in order to secure Federal approval to implement and enforce a title V operating permits program. That section requires, as a condition of Federal approval, that a State have adequate authority to issue permits and assure compliance; to terminate or revoke such permits for cause; and to enforce permits, permit fee requirements and the requirement to obtain a permit, including authority to recover civil penalties in a maximum amount of not less than $10,000 per day for each violation and to provide appropriate criminal penalties. The part 70 implementing regulations, at 40 CFR 70.11, elaborate upon those authorities. Part 70 requires a State to have authority to issue emergency orders and seek injunctive relief (40 CFR 70.11(a) (1) and (2)), to assess civil and criminal penalties in a maximum amount of not less than $10,000 per day per violation (40 CFR 70.11(a)(3)), and to assess appropriate penalties (40 CFR 70.11(c)). Although neither title V nor part 70 expressly prohibits State audit privilege and/or immunity laws, the analysis in the proposed interim approval of Michigan's program shows how EPA believes the Michigan audit law interferes with Michigan's general enforcement authority and its civil penalty authority as required in title V and the part 70 implementing regulations so as to preclude full approval of Michigan's operating permits program.[4] For example, as EPA explained in the Michigan proposal, the immunity provisions of the Michigan audit law alter and in fact eliminate the State's authority to recover *any* civil penalties under the circumstances identified in the State law. *See* 61 FR 32394–32395. Moreover, the privilege provisions of the Michigan audit law prevent the State from obtaining potentially important information on whether a civil or criminal violation occurred or has been corrected. If the State, by virtue of such laws, surrenders its ability to thoroughly investigate potential violations or its discretion to assess appropriate penalties in the face of violations, then the State's fundamental enforcement authority is significantly compromised. The EPA believes that this is the case with the Michigan audit law.

In a similar vein, the commenters argue that the State of Michigan has the general authorities enumerated in section 502(b)(5)(E) and 40 CFR 70.11 to enforce permits, permit fee requirements and the requirement to obtain a permit and to recover civil and criminal penalties in a maximum amount of not less than $10,000 per day of violation, and that nothing in the text of section 502(b)(5)(E) of the Act or the part 70 regulations authorizes EPA to consider the effect of State laws of general applicability on a State's title V civil and criminal enforcement authorities. The commenters further argue that the logical corollary of EPA's proposed action with respect to the Michigan audit law is that *every* State procedural and evidentiary rule must be evaluated and amended whenever EPA believes that it could in some fashion, directly or indirectly, interfere with environmental enforcement.

Laws of general applicability are an appropriate subject for EPA review as is evident from the language of the part 70 regulations themselves. The regulations require that a State applying for a title V operating permits program include copies of "all applicable State or local statutes and regulations including those governing State administrative procedures that either authorize the part 70 program *or restrict its implementation*." 40 CFR 70.4(b)(2) (emphasis added). The regulations also require a legal opinion from the State Attorney General asserting that the laws of the State provide adequate authority to carry out "all aspects of the program." 40 CFR 70.4(b)(3). It is certainly EPA's expectation that, in issuing such a legal opinion, the Attorney General is certifying that no State laws, even laws of general applicability or laws of evidence, interfere with the State's authority to administer and enforce the title V program. *See* 59 FR 47105, 47108 (September 14, 1994) (requiring Oregon to revise or clarify meaning of criminal statute appearing to limit criminal liability of corporations as a condition of full title V approval); 59 FR 61820, 61825 (December 2, 1994) (accepting Oregon Attorney General's opinion regarding effect of statute).[5]

Both commenters also argued that the Michigan audit law does not interfere with the enforcement requirements of title V because it is qualified in a number of important respects. The commenters note that the Michigan audit law does not offer protection from disclosure for information obtained by observation, sampling, or monitoring by any regulatory agency; machinery and equipment maintenance records; information legally obtained independent of the environmental audit; and information required by law to be collected, developed, reported or otherwise made available to a government agency. *See* section

[3] These commenters also commented on various EPA documents, including the memorandum entitled "Effect of Audit Immunity/Privilege Laws on States' Ability to Enforce Title V Requirements", April 5, 1996, and the policy entitled "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations", December 22, 1995. These comments are addressed to the extent that they are relevant to EPA's action on Michigan's title V operating permits program.

[4] In addition, part 70 does not provide for any affirmative defenses beyond that provided by the emergency defense provisions in 40 CFR 70.6(g). See subpart II.A.9. of this notice regarding Michigan's affirmative defense for startups, shutdowns, and malfunctions.

[5] One commenter argues that section 116 of the Act bars EPA from seeking to preempt State audit privilege and/or immunity laws. Section 116 states that, subject to limited exceptions, nothing in the Act shall preclude or deny the right of any State to adopt or enforce emissions standards or limitations or requirements respecting the control or abatement of air pollution "except where such emission standard or limitation is less stringent than required by the Clean Air Act." Such an interpretation would mean that EPA had no authority to disapprove any State enforcement provisions as a condition of title V approval. Section 502(b)(5)(E), which requires EPA to promulgate minimum enforcement authorities required for approval of a State title V program, clearly belies such an argument.

14802(3), part 148 of NREPA. The commenters state that the privilege is further limited because it only applies to an environmental audit report as defined in the Michigan audit law. In addition, the commenters state that the immunity provisions in the Michigan audit law are limited by the provisions in section 14809 of NREPA, which, among other things, require the source to promptly disclose violations, make a good faith effort to achieve compliance, pursue compliance with due diligence, and promptly correct the noncompliance.

The EPA noted in the proposed interim approval of Michigan's program that, although the Michigan audit law appears to contain several exemptions from the otherwise broad scope of the privilege protection, EPA is unable to determine the extent to which the exemptions limit the application of the privilege. In other words, the extent to which evidence of violations of title V permits and permit program requirements would be exempted from the privilege provisions of the Michigan audit law is not clear. For example, the Michigan audit law appears to provide privilege protection for a source that determines through an environmental audit that it is operating without a title V permit. This violation appears eligible for the privilege because part 70 does not have any source notification requirements prior to the submittal of the permit application that would exclude this violation from the privilege provisions. The EPA does not agree with the commenters' assertion that the privilege is further limited by the definition of an environmental audit report. The Michigan audit law broadly defines such a report to include any documents created as a result of an environmental audit, such as supporting information and implementation plans that address correcting violations and improving current compliance. In addition, the Michigan audit law's exemptions from privilege protection do not appear to apply to the penalty immunity in section 14809, part 148 of NREPA. Therefore, it appears that any violation discovered during an environmental audit, regardless of whether it is eligible for the privilege, is eligible for the immunity as provided in section 14809. Despite the limitations on the scope of the State's immunity provisions imposed by the requirement that disclosure be "voluntary", EPA believes that application of the immunity provisions is so broad that it potentially could apply to any title V violation. Because the privilege and immunity exemptions could apply to title V requirements, EPA must therefore infer that there could be violations at a title V source discovered through an environmental audit that would be entitled to the privilege or immunity provided by the Michigan audit law. The EPA again notes that Michigan may have a different interpretation of its audit law, in which case an Attorney General's opinion may help to resolve these interim approval issues.

The commenters also take issue with EPA's interpretation of the title V and part 70 requirements for enforcement authority, as evidenced in the April 5, 1996 memorandum entitled "Effect of Audit Immunity/Privilege Laws on States' Ability to Enforce Title V Requirements" (hereinafter, the "April 5 Title V Memorandum") and the proposed interim approval of Michigan's part 70 program. The commenters argue that EPA's interpretation and application of the title V enforcement requirements improperly interferes with the States' role as independent sovereigns, improperly divests States of their primary responsibility for implementing and enforcing the Act, and conflicts with the Clinton Administration's stated policy to allow States to experiment with alternative approaches to achieve environmental protection. The commenters further argue that the determination of the Michigan legislature that criminal or civil penalties are inappropriate under the circumstances set forth in the Michigan audit law is within the statutory boundaries and flexibility provided by the Act. The commenters continue that the immunity provisions of the Michigan audit law reflect the Michigan legislature's judgment as to the "appropriate" penalty for companies that voluntarily disclose and correct instances of environmental noncompliance and reflect a reasonable allocation of the State's enforcement resources.

The EPA agrees that, in enacting the Act, Congress believed that States and local governments should have the primary responsibility for controlling air pollution at its source. *See* Section 101(a)(3) of the Act. The EPA also agrees with the commenters that the States are to be given broad flexibility to select alternative means to achieve the minimum Federal requirements established in the Act by Congress and by EPA in the part 70 regulations, and fully supports State experimentation to achieve greater compliance with environmental laws. Such flexibility and experimentation, however, must be, as the commenters acknowledge, *within* the bounds of the statutes enacted by Congress and the implementing regulations promulgated by EPA. It cannot cancel out the requirement that States must meet some minimum Federal requirements as a condition of Federal approval of their programs.

In the case of the operating permits program, those minimum Federal requirements are set forth in title V and the part 70 regulations. It is these requirements that EPA is insisting that the State of Michigan meet as a condition of full approval of its title V program. In short, EPA does not believe that the Michigan title V program is within the statutory boundaries established by Congress or the flexibility provided by the Act because the Michigan audit law would limit the enforcement authority Congress and EPA required States to have as a condition of Federal approval.

Moreover, the commenters' argument that the Michigan audit law governs areas of law traditionally committed to States in their role as independent sovereigns—if taken to its logical conclusion—would mean that a State could not be required to have any civil or criminal penalty authority to get approval for a title V program. It is an argument that goes to the validity of section 502(b)(5)(E) and 40 CFR 70.11 themselves and therefore is untimely in this context. As stated above, Congress through title V, and EPA through the part 70 implementing regulations, required States to satisfy certain minimum requirements for enforcement authority as a condition of Federal approval of a Clean Air Act operating permits program. By conditioning full approval of the Michigan title V program on changes to the Michigan audit law or a demonstration by the State satisfactory to EPA that the Michigan audit law does not interfere with the enforcement requirements of title V, EPA is simply seeking to assure that Michigan has the required enforcement authorities before receiving Federal approval of its program. *Cf. Commonwealth of Virginia* v. *Browner*, 80 F.3d 869, 880 (4th Cir. 1996) (in rejecting Virginia's argument that requiring the State to change its judicial standing rules as a condition of title V approval violated State's sovereignty, the Court stated: "Even assuming *arguendo* the accuracy of Virginia's assertion that its standing rules are within the core of its sovereignty, we find no constitutional violation because federal law 'may, indeed, be designed to induce state action in areas that would otherwise be beyond Congress' regulatory authority.'" *citing FERC* v. *Mississippi*, 456 U.S. 742, 766 (1982)).

The commenters also assert that EPA's use of its title V program approval authority to "force" States to modify their audit privilege and/or immunity legislation is contrary to Congress' general expression of intent against the automatic use of audit reports for enforcement of the Act, as expressed in the Joint Explanatory Statement of the Conference Committee Report for the 1990 Amendments, S. Conf. Rep. 101–952, 101st Cong. 2d Sess. 335, 348 (Oct. 26, 1990), *reprinted in* Legislative History at 941–42, 955, 1798. The commenters further assert that Michigan's decision to provide qualified audit immunity is consistent with that Congressional intent.

As an initial matter, EPA disagrees that it is using the title V approval process to "force" States to modify their audit legislation. Instead, as stated above, EPA is simply analyzing to what extent the audit privilege and/or immunity laws of a particular State compromise the enforcement authorities required by Congress in title V and interpreted by EPA through the part 70 regulations, as a condition of Federal approval of the State's operating permits program.

With respect to the issue of Congress' intent, the language from the Conference Report cited by the commenters does not clearly express a desire that audit reports not be used for enforcement of the Act requirements. Rather, the text expresses some general support for the concept of auditing and a desire that the *criminal penalties* of section 113(c) "should not be applied in a situation where a person, acting in good faith, promptly reports the results of an audit and promptly acts to correct any deviation. Knowledge gained by an individual solely in conducting an audit or while attempting to correct deficiencies identified in an audit or the audit report should not *ordinarily* form the basis for intent which results in criminal penalties." (emphasis added). The legislative history merely indicates that the circumstances involving violations discovered through an audit report and voluntarily disclosed by the company will generally not meet the requirements for criminal liability. Importantly, Congress did not in any way suggest that a company which self-disclosed violations discovered through an environmental audit should be immune from civil penalties. In any case, when Congress amended the Act in 1990, there were no audit privilege and/or immunity laws on the books in any State. Any legislative history on auditing and enforcement from that period must be read in light of that reality. EPA does not believe Congress intended that the growth of environmental auditing—in itself a laudable goal fully supported by EPA—comes at the expense of the enforcement of environmental laws.[6] If Congress had wished to give special status to self-disclosed violations detected during an environmental compliance audit or to prohibit the use for general enforcement purposes of audits conducted under the Act and EPA approved programs, Congress could have done so in the language of the 1990 amendments. If anything, the legislative history of the Act is evidence of Congress' intent that such incentives for audits should be a basis for the exercise of prosecutorial discretion, and not a legislative grant of immunity or protection from disclosure.

The commenters also argue that Congress intended to vest the States with discretion in enforcing title V permit requirements and that the part 70 regulations merely provide that penalties assessed under a title V program must be "appropriate" to the violation. Nothing requires a State to obtain a penalty for every violation or prohibits a State from rewarding good actors who identify, disclose and correct violations, the commenters continue.

The EPA agrees that a State is not required to collect a penalty for every violation or is precluded from using its discretion to reward companies that conduct environmental audits and disclose and correct any violations discovered through such an audit. The EPA disagrees, however, that the only inquiry for title V approval is whether a State has authority to assess "appropriate" penalties. The part 70 regulations first state that civil and criminal fines must be recoverable "in a maximum amount of *not less than $10,000 per day per violation.*" 40 CFR 70.11(a)(3)(i)–(iii) (emphasis added).[7] Section 70.11(c) then provides that "[a] civil penalty or criminal fine assessed, sought, or agreed upon by the permitting authority under paragraph (a)(3) of this section shall be appropriate *to the violation.*" (emphasis added). By interpreting title V and part 70 to require only that States have authority to assess "appropriate" penalties, the commenters are reading out of the regulations the independent requirement that States have the authority to assess civil and criminal penalties of an amount not less than $10,000 per day per violation. Read together, 40 CFR 70.11(a)(3) and 70.11(c) require that a State have authority to assess a civil or criminal penalty of up to $10,000 per day per violation and that, in addition, the penalty assessed in any particular case be "appropriate" to the violation at issue. Thus, EPA agrees with the commenters that it is within Michigan's discretion not to impose the statutory maximum penalty for violations as to which a lesser penalty is appropriate or to determine that criminal or civil prosecution is inappropriate under the facts and circumstances of a particular case so long as the State has the *authority* to assess penalties for each day of violation. The legislative history cited by the commenters in support of their position is, in fact, consistent with EPA's position on this issue. *See* Legislative History at 5815 ("states are not going to be required to impose these minimum fines of $10,000 for permit violations. Instead, the bill is revised to make clear that states shall ensure that they have the *authority* to impose this. It is not mandated, it is authority.") (emphasis added).

Several commenters stated that section 113(e) of the Act only sets forth penalty factors that EPA or a Federal court must consider in imposing civil penalties for noncompliance with the Act, that section 113(e) has no bearing on EPA's authority to approve or disapprove State title V programs, and that nothing in section 113, title V or part 70 authorizes EPA to condition approval of a State's title V permit program on the State's ability to consider penalty factors comparable to those set out in section 113(e). The commenters further assert that, although section 113(e) is inapplicable, section 113(a) authorizes EPA in certain defined circumstances to take appropriate action, namely, filing an action against a facility where EPA believes the State's response was inadequate. This back-up

[6] That distinction is also reflected in EPA's Self-Disclosure policy, which offers significant incentives for businesses to audit and self-disclose violations, while at the same time retaining safeguards to ensure the protection of public health and the environment.

[7] One commenter appears to assert that a State need only have the authority to assess "appropriate" criminal penalties. In doing so, the commenter ignores the clear language of the part 70 regulations. Section 502(b)(5)(E) requires States to have authority to "recover civil penalties in a maximum amount of not less than $10,000 per day for each violation, and provide appropriate criminal penalties." In promulgating part 70, EPA determined that to provide "appropriate criminal penalties" for purposes of title V approval, a State must have authority to issue criminal penalties in a maximum amount of not less than $10,000 per day per violation. *See* 40 CFR 70.11(a)(3)(ii) and (iii). If the commenter believes that the enforcement authorities enumerated in the part 70 regulations, including the requirement for criminal penalty authority of up to $10,000 per day per violation, are excessive or in any way inconsistent with the statutory authorities, the commenter should have challenged the part 70 regulations at the time of promulgation in 1992.

authority, and not wholesale invalidation of a State's title V permits program, the commenters continue, is EPA's tool for ensuring to its own satisfaction that State audit legislation does not allow egregious Act violations to go unsanctioned. In any event, one commenter asserts that the Michigan audit law does take into account a violator's full compliance history in establishing the disclosure and immunity provisions.

The EPA agrees that the purpose of section 113(e) is, as the commenters assert, to set forth factors which EPA and the Federal courts must consider in assessing civil penalties under the Act. The EPA believes, however, that the section 113(e) factors can also serve as guidance in determining what civil penalty authority is minimally necessary in a State title V program.

In order for a State to have the authority to assess penalties that are "appropriate" to the violation in any particular case as required by 40 CFR 70.11(c), a State must have, in addition to the authority to assess a penalty of at least $10,000 per day per violation, the authority to consider mitigating or aggravating factors. In enacting section 113(e), Congress set forth factors it believed EPA and Federal judicial and administrative courts should consider in determining an appropriate penalty under the specific facts and circumstances before it. Although EPA believes that the factors enumerated by Congress in section 113(e) are the most fundamental, EPA believes that States may consider other factors as well. To the extent that a State has surrendered its ability to consider factors such as those set forth in section 113(e), EPA believes that a State does not have adequate authority, on a case-by-case basis, to collect penalties that are "appropriate" to the violation, as required by 40 CFR 70.11(c).

Industry commenters argue that since the section 113(e) factors do not apply to State programs, it must follow that Congress did not prescribe factors a State must apply in assessing "appropriate" penalties under title V, and that a State must therefore be given full approval as long as it possesses "appropriate" enforcement authority. As explained above, the question for EPA at the program approval stage is not how the State will exercise its enforcement discretion to assess penalties in any particular case. Rather, it is whether the State has sufficient authority to assess appropriate penalties in every case. Before granting full approval to a title V program, EPA must ensure, first, that the State has the general authority to assess penalties up to the amounts specified in section 70.11. The EPA must also ensure that the State has authority to consider factors, similar to those in section 113(e), such that the penalty actually assessed in any case may be appropriate to the violation. Because the immunity provisions of the Michigan audit law preclude the State from considering the factors set forth in section 113(e) or any other factors in determining an "appropriate" penalty in cases in which the source has disclosed and corrected violations discovered in an environmental audit, EPA believes that Michigan lacks this authority. The EPA also disagrees with the commenters' assertion that EPA's sole remedy where EPA believes a State does not have adequate enforcement authority is to take its own enforcement actions to address violations in that State. Although EPA does file Federal actions where the State fails to take enforcement action or where State action is inadequate to address a particular violation, before approving a State title V program EPA must also ensure that the State has demonstrated the capacity to administer and fully enforce the program as required by law and regulation. If Federal action were the only remedy for situations in which a State does not possess adequate enforcement authority, there would have been no need for Congress to direct EPA to promulgate rules setting forth minimum enforcement requirements for Federal approval of a State operating permits program. *See* 59 FR 61825 (rejecting similar comment in acting on Oregon's title V program).

Finally, regardless of one commenter's assertion that the Michigan audit law does take into account a violator's full compliance history in establishing the disclosure and immunity provisions, it is EPA's position that the Michigan audit law nonetheless prevents consideration of other critical factors in determining appropriate civil penalties, including but not limited to serious harm or risk of harm to the public or the environment, and substantial economic benefit to the violator. To the extent the Michigan audit law prevents consideration of mitigating or aggravating factors, EPA believes that Michigan has surrendered its authority to assess appropriate penalties as required by section 502(b)(5)(E) of the Act and 40 CFR 70.11.

The commenters stated that EPA's approach on State audit privilege and/or immunity laws is bad policy and not supported by empirical evidence. The commenters expressed strong support for environmental auditing as a means of obtaining compliance with increasingly complex environmental requirements. These commenters argue that EPA's reaction against such audit statutes is a "knee-jerk" reaction that ignores the potentially huge benefits that these laws offer. EPA has wrongly concluded, the commenters continue, that the existence of a limited and qualified affirmative defense to penalties for violations discovered through environmental audits and protection for information in audit reports weakens Michigan's authority to enforce the law or to ensure compliance, and that the evidence to date in other States with such laws shows in fact that audit privilege and/or immunity legislation encourages self-correction and increased compliance. At the same time, the commenters argue, EPA has not cited to any specific instance in which the Michigan audit law or some other State audit privilege and/or immunity law has compromised or inhibited enforcement of the Act or a title V permit program.

The EPA has expressed strong support for incentives which encourage responsible companies to audit to prevent noncompliance and to disclose and correct any violations that do occur. *See, e.g.*, EPA's Self-Disclosure Policy. The issue involved in this Federal Register action, however, is not whether environmental auditing is good or bad policy. Rather, the issue is whether the Michigan audit law, in offering privilege and immunity to companies conducting environmental audits, so deprives the State of its authority to take enforcement action for violations of title V requirements such that the State does not have the necessary authority required for full title V approval.

Moreover, EPA believes that it is premature at this point to expect significant empirical evidence to document whether environmental audit privilege and/or immunity laws enhance or impede environmental compliance. Most of the State audit statutes are little more than one year old and only a few States have issued permits under approved title V programs. In any event, EPA is aware of several on-going environmental enforcement actions in certain States with audit privilege and/or immunity laws in which the audit privilege appears to be interfering with prosecutors' efforts to obtain and utilize certain evidence.[8]

[8] The confidentiality prerequisites that attach to all on-going enforcement actions, however, prevent the Agency from revealing additional details at this time.

The commenters go on to argue that the reasoning set forth in the April 5 Title V Memorandum and the proposed interim approval of Michigan's program could have far-reaching and unintended effects on the relationship between EPA and States in the implementation of the Act and other environmental laws such as approvals of State Implementation Plans and State programs under the Clean Water Act and Resource Conservation and Recovery Act.

The EPA agrees that the rationale behind the April 5 Title V Memorandum and EPA's action on the Michigan title V program has implications for other Federal programs delegated to the States. Because of that, the Agency has for some months been analyzing the effects of State audit privilege and/or immunity laws on enforcement authorities under the Clean Water Act, the Resource Conservation and Recovery Act, and other statutes. The rationale behind the April 5 Title V Memorandum and EPA's action on the Michigan title V program as it relates to the Michigan audit law, however, is dictated not by political or policy considerations, but rather by statutes and regulations that were finalized after public notice and comment.

The commenters also stated that EPA's proposed interim approval of Michigan's program based on the Michigan audit law is inconsistent with existing EPA and Department of Justice (DOJ) enforcement policies, which reflect the appropriateness of limiting enforcement discretion. The commenters point to "Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator," DOJ, July 1, 1991; "The Exercise of Investigative Discretion", EPA, January 12, 1994; "Policy on Flexible State Enforcement Responses to Small Community Violations" EPA, November 1995 ("EPA Policy on Small Communities"); "Policy on Compliance Incentives for Small Businesses," EPA, May 1996; and EPA's Self-Disclosure Policy.

There is an important distinction between the policies cited by the commenters, which adopt an "enforcement discretion" approach, and the Michigan audit law.[9] The EPA and DOJ have announced policies guiding the exercise of their enforcement discretion under certain narrowly defined circumstances, while preserving the underlying statutory and regulatory authority.[10] State audit privilege and/or immunity laws, such as the Michigan audit law, by contrast, constrain enforcement discretion as a matter of law, impermissibly surrendering the underlying statutory and regulatory enforcement authorities required for Federal approval of the State programs.

Both commenters stated that EPA's proposed action on the Michigan program is inconsistent with several previous title V approvals where audit privilege and/or immunity legislation has not posed a bar to full approval. As examples of previous title V approvals which the commenters believe are inconsistent with EPA's proposed action on the Michigan program, as it relates to the Michigan audit law, the commenters cite to EPA's action on the Oregon, Kansas and Colorado title V programs. Relying on the recent Ninth Circuit decision in *Western States Petroleum Association* v. *EPA*, 87 F.3d 280 (9th Cir 1996) ("WSPA"), the commenters state that, where EPA is departing from a prior course of action, more is required of the Agency than conclusory statements concerning the potential impact of the Michigan audit law on the State's title V enforcement authority. Instead, the commenters argue that EPA must provide a basis for deviating from its earlier approaches in Oregon, Kansas and Colorado.

As an initial matter, EPA notes its action on Michigan's title V program is consistent with its action on the Texas title V program, 61 FR 32693, 32696–32699 (June 25, 1996) (final interim approval), and the Idaho title V program, 61 FR 64622–64635 (December 6, 1996) (final interim approval). Moreover, EPA has notified the States of Ohio, Arizona, and Florida that audit privilege and/or immunity laws that these States have enacted or are contemplating enacting could interfere with the enforcement requirements of title V and part 70.

With respect to the three programs cited by the commenters as inconsistent with EPA's proposed action on the Michigan program, EPA is still in the process of reviewing the audit privilege and/or immunity statutes in Oregon, Kansas and Colorado and their effects on the title V enforcement requirements in those States in order to determine whether EPA acted inconsistently in approving those programs. If EPA determines that it acted inconsistently, EPA intends to take appropriate action to follow the *WSPA* Court's mandate that EPA act consistently or explain any departures.

Finally, one commenter challenges the April 5 Title V Memorandum itself arguing that the guidance document imposes requirements on EPA approval of a State operating permits program in addition to those required by section 502(b)(5)(E) of the Act and the part 70 rules. Because the April 5 Title V Memorandum sets additional substantive and binding standards for approval of State title V operating permits programs not included in the part 70 regulations, the commenter continues, the guidance is a rule disguised as guidance and must be promulgated in accordance with the Administrative Procedures Act. This requires, among other things, public notice and comment.

The EPA disagrees. The April 5 Title V Memorandum does not, as the commenters assert, "purport to change fundamentally the requirements in section 70.11 by adding provisions that (1) effectively prohibit a state from adopting an audit protection or immunity law and (2) impose at least four new penalty criteria." Rather, the guidance simply recounts and reiterates existing statutory and regulatory requirements for enforcement authority under the title V program and shows how audit privilege and/or immunity laws may prevent a State from meeting those requirements. It creates no new "substantive and binding standards" for approval of title V programs, and therefore is not subject to notice and comment rulemaking of the Administrative Procedures Act.[11]

[9] In addition, the criminal enforcement policies noted by the commenters are irrelevant, as Michigan's audit law does not create deficiencies in the State's part 70 criminal enforcement penalty authority.

[10] Although the EPA Policy on Small Communities does encourage States to provide small communities an incentive to request compliance assistance by waiving all or part of a penalty under certain circumstances, it does not provide an unqualified waiver of civil penalties. The policy directs States to assess a small community's good faith and compliance status before granting any relief from penalties and identifies a number of factors that a State should consider in determining whether relief from civil penalties is appropriate in the particular circumstances. In addition, EPA's Policy on Small Communities directs a State to consider the seriousness of the violation. *See* EPA's Policy on Small Community Violations, page 4. Although the policy does not direct the State to consider economic benefit in determining the appropriate enforcement response, the policy is available only to those small communities that are financially unable to satisfy all applicable environmental mandates without the State's compliance assistance.

[11] One commenter also stated that EPA expressly recognized in its earlier approval of the Oregon title V program that EPA would have to use rulemaking to modify its part 70 rules before EPA could prohibit States from adopting audit privilege and/or immunity laws. The commenter misstates the Agency's position. As an initial matter, the Oregon audit statute, Oregon Revised Statute 468.963, contains only an audit privilege and does not contain an immunity provision. In proposing interim approval of the Oregon title V program, EPA

Continued

Moreover, in explaining why the Michigan audit law precludes full approval, EPA is relying on the requirements of title V and part 70 themselves, and not the April 5 Title V Memorandum. Finally, EPA's application of the title V and part 70 enforcement requirements to the specific circumstances before EPA in the case of the Michigan audit law is subject to notice and comment rulemaking.[12]

b. Additional concerns regarding the effect of the privilege provisions of the Michigan audit law on the State's enforcement authority. Both commenters disagreed with EPA's position that the Michigan audit law contains a privilege for environmental audit reports which impermissibly interferes with the enforcement requirements of title V and part 70. The commenters note that the Michigan audit law does not prohibit the State from gaining access to underlying data not prepared for or during the audit. One commenter states that EPA is directly linking title V enforcement authority to State evidentiary rules, and that every State procedural and evidentiary rule must therefore be evaluated and amended whenever it interferes with environmental enforcement. The commenters continue that EPA has singled out audit privilege laws while not taking issue with State attorney-client privilege provisions.

As discussed in the proposed interim approval of Michigan's part 70 program, EPA believes that the Michigan audit law prevents the State from requiring an owner or operator to produce an environmental audit report under the State's general information gathering authority. Although a source must voluntarily disclose the relevant portions of the audit report in order to obtain immunity from civil penalties, an owner or operator can hold as privileged audit reports containing information on violations in the hopes that the violations will not otherwise come to the attention of the State agency. Further, a source can rely on the privilege provisions to avoid disclosing criminal violations, as the Michigan audit law does not provide immunity for disclosed criminal violations (other than for negligent acts or omissions). Similarly, a facility could elect to disclose the fact of a violation under the immunity provisions, but not the related evidence of whether the violation was knowing or intentional. Although EPA agrees that the Michigan audit law does not preclude access to information that is not part of an environmental audit report, EPA remains concerned that the data that led the source to conduct the environmental audit may by itself be insufficient to demonstrate either compliance or noncompliance with an applicable requirement. Furthermore, there may not be any documented information or event which caused a source to conduct an environmental audit. In such a situation, all information regarding a potential violation would exist only in the environmental audit report. The EPA therefore believes that the Michigan audit law so interferes with the State's information gathering authority as to prevent the State from obtaining appropriate civil and criminal penalties and assuring compliance with the Act, as required by section 502(b)(5)(E) of the Act and 40 CFR 70.11.

As discussed previously in this notice, EPA agrees with the commenters that State procedural and evidentiary rules are an appropriate subject for EPA review, as provided by 40 CFR 70.4(b)(2) and 40 CFR 70.4(b)(3). However, EPA does not agree with the commenters that the attorney-client privilege and the privilege provisions in the Michigan audit law are analogous. The attorney-client privilege merely prevents an attorney from revealing information disclosed by a client in a confidential communication made for the purpose of obtaining legal advice. It does not preclude the enforcement authority from obtaining the information from the source by any legal means. On the other hand, the privilege created by the Michigan audit law completely prevents an enforcement authority from obtaining any information labeled as an environmental audit report.

One commenter also stated that adequate title V enforcement authority cannot depend on access to voluntarily prepared audit reports. If such were the case, the commenter reasoned, State regulators would necessarily lack adequate enforcement authority over those entities that do not conduct audits voluntarily.

The EPA agrees that access to voluntarily prepared audit reports is not *per se* a prerequisite for adequate enforcement authority for title V approval. However, such access is important if the report exists and it contains information on violations or whether violations have been promptly corrected. The lack of such access can adversely affect the adequacy of enforcement authority.

One commenter also stated that State audit protection legislation does not inhibit whistle blowers but instead merely prohibits unauthorized disclosure of an audit report because whistle blowers are free to disclose any "non audit" information to support their allegations without fear of violating the laws.

As an initial matter, EPA notes that this concern is irrelevant in EPA's action on Michigan's title V program. To EPA's knowledge, neither the Michigan audit law nor any other provision of Michigan law specifically restricts the information that a whistle blower may disclose to a State agency, and EPA therefore did not raise this as a concern in proposing action on Michigan's title V program.

The commenter appears to be responding to an issue discussed in the April 5 Title V Memorandum. In that memorandum, EPA expressed concern with State audit privilege and/or immunity statutes that impose special sanctions upon persons who disclose privileged information. *See* April 5 Title V Memorandum, pp. 5–6. Although irrelevant to action on Michigan's title V program, EPA believes, as stated in the guidance, that the Act provision

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stated it was in the process of developing a national position regarding EPA approval of environmental programs in States which have environmental audit privileges, and that therefore, it proposed to take no action on the Oregon audit provision in the context of the Oregon title V approval. EPA noted, moreover, that it might consider such a privilege grounds for withdrawing program approval under 40 CFR 70.10(c) in the future if EPA later determined that the Oregon audit provision interferes with Oregon's enforcement responsibilities under title V and part 70. 59 FR 47105, 47106 (September 14, 1994). During the public comment period on EPA's proposal, one commenter stated that EPA's suggestion that a State audit privilege could be grounds for interim approval or withdrawal was bad policy and that Oregon's audit privilege statute was consistent with the Act. In addition to responding to the merits of the comment, EPA stated that the commenter's concerns were premature because, as the commenter acknowledged, EPA had not proposed to take any action on Oregon's environmental audit privilege statute in the context of final interim approval of the Oregon program. EPA further stated that any such concerns about EPA's position on the Oregon audit privilege statute would be properly made if EPA later proposed to withdraw Oregon's title V approval based on Oregon's audit privilege or if EPA "revised part 70 to prohibit environmental audit provisions such as Oregon's." 59 61820, 61824 (December 2, 1994). EPA did not say in that Federal Register notice that a rulemaking would be required in order for the Agency to disapprove a title V program in a State with an environmental audit privilege and/or immunity statute.

[12] EPA also disagrees with one commenter's assertion that the Congressional review provisions of Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996, P.L. 104–121 (SBREFA), requires EPA to submit the April 5 Title V Guidance Memorandum to Congress. EPA does not believe that April 5 Title V Memorandum is subject to Congressional review under SBREFA because it is not a rule and it does not substantially affect the rights or obligations of a nonagency party. Even if the Memorandum were subject to review, EPA has not relied on that Memorandum as a ba. for this action. Therefore, any procedural defect with respect to the April 5 Title V Memorandum would be irrelevant to the legal sufficiency of this action.

which gives explicit protection to whistle blowers makes no distinctions with respect to the source of the information relied upon by the whistle blower. The EPA believes that it is inconsistent with section 322 of the Act for States to remove audit reports from the universe of information which employees may rely upon in reporting violations to local or State authorities.

c. Summary. The EPA continues to believe that the privilege and immunity provisions of the Michigan audit law impermissibly interfere with the enforcement authorities required for full title V approval. Accordingly, Michigan must narrow the applicability of the privilege provided in section 14802, part 148 of NREPA, and narrow the applicability of the immunity provided by section 14809, part 148 of NREPA, to ensure that the State title V program has the authority to: assure compliance with part 70 permits and the requirements of the operating permits program [40 CFR 70.4(b)(3)(i)]; enforce permits and the requirement to obtain a permit [40 CFR 70.4(b)(3)(vii)]; and meet the general enforcement authority requirements of 40 CFR 70.11(a) and (c), as addressed above. In addition, the State must submit a revised title V Attorney General's opinion that addresses EPA's concerns in subpart II.A.10. above and in subpart II.A.2.i. of the proposed interim approval of Michigan's program [61 FR 32391–32398], in which the Attorney General certifies that the revised part 148 does not affect Michigan's ability to meet the enforcement requirements of 40 CFR 70.4(b)(3)(i), 40 CFR 70.4(b)(3)(vii), 40 CFR 70.11(a), and 40 CFR 70.11(c).

Alternatively, the State may submit a revised title V Attorney General's opinion certifying that the current part 148 does not affect the enforcement requirements of 40 CFR 70.4(b)(3)(i), 40 CFR 70.4(b)(3)(vii), 40 CFR 70.11(a), and 40 CFR 70.11(c). Such an opinion must also specifically address why EPA's interim approval provision requiring revisions to the currently enacted law is not valid. Finally, Michigan must also submit a supplemental Attorney General's opinion certifying that all other title V authorities that may be affected by part 148 are met, including but not limited to: Michigan's authority to bring suit to restrain any person from engaging in any activity in violation of a permit that is presenting an imminent and substantial endangerment [40 CFR 70.11(a)(1)]; Michigan's authority to seek injunctive relief to enjoin any violation of any program requirement, including permit conditions [40 CFR 70.11(a)(2)]; Michigan's authority to recover criminal fines [40 CFR 70.11(a)(3)(ii) and (iii), and 40 CFR 70.11(c)]; and the requirement that the burden of proof for establishing civil and criminal violations is no greater than the burden of proof required under the Act [40 CFR 70.11(b)]. The supplemental Attorney General's opinion must specifically address these requirements in light of the provisions contained in the State's audit law. Although EPA does not believe that the Michigan audit law affects any title V requirements other than the ones specifically identified in this action, a supplemental Attorney General's opinion is appropriate because Michigan's current part 70 Attorney General's opinion was written before the existence of the Michigan audit law.

11. Additional State Comments

MDEQ noted that it is pursuing changes to Michigan's operating permit regulations to address the interim approval issues pertaining to the definition of "schedule of compliance", the definition of "stationary source", and the applicability requirements for nonmajor solid waste incineration units. The EPA has reviewed Michigan's proposed rules revision package, and submitted comments to MDEQ during the package's public comment period.

MDEQ also acknowledged the condition for full approval that requires removal of section 5534 of NREPA. MDEQ agrees to pursue an amendment to NREPA to remove section 5534.

B. Final Action

1. Interim Approval

The EPA is promulgating interim approval of the Michigan operating permits program received by EPA on May 18, 1995, July 20, 1995, October 6, 1995, November 7, 1995, and January 8, 1996. The scope of Michigan's part 70 program approved in this notice applies to all part 70 sources within Michigan, except for any sources of air pollution in Indian country. The State must make the following changes to receive full approval:

a. Revise the definition of "schedule of compliance" in R 336.1119(a) to provide that the schedule of compliance for sources that are not in compliance shall resemble and be at least as stringent as that contained in any judicial consent decree or administrative order to which the source is subject. This provision is required by 40 CFR 70.5(c)(8)(iii)(C).

b. Revise the definition of "stationary source" in R 336.1119(q) to provide that the definition includes all of the process and process equipment which are located at one or more *contiguous or* adjacent properties. The emphasized phrase is not currently included in the State regulation. This provision is required in the definition of "major source" in 40 CFR 70.2.

c. Revise R 336.1211(1) to provide that nonmajor solid waste incineration units required to obtain a permit pursuant to section 129(e) of the Act are subject to the title V permits program. The permitting deferral for nonmajor section 111 sources in 40 CFR 70.3(b) does not apply to solid waste incineration units required to obtain a permit pursuant to section 129(e) of the Act.

d. Revise R 336.1212(1) to delete the exemption of certain activities from determining major source status. Part 70 and other relevant Act programs do not provide for such exemptions from major source determinations. This interim approval issue does not apply to the State's use of R 336.1212(1) as an insignificant activities list pursuant to 40 CFR 70.5(c).

e. Revise the State statutes or regulations, as appropriate, to require that permit applications include a certification of compliance with all applicable requirements and a statement of the methods used for determining compliance, as specified in 40 CFR 70.5(c)(9) (i), (ii), and (iv).

f. Remove the provisions of section 324.5534 of NREPA, which provide for exemptions from penalties or fines for violations caused by an act of God, war, strike, riot, catastrophe, or other condition as to which negligence or willful misconduct was not the proximate cause. Title V does not provide for such broad penalty and fine exemptions.

g. Revise R 336.1913 and R 336.1914 to be consistent with the affirmative defense provisions in 40 CFR 70.6(g). Alternatively, adopt an enforcement discretion approach consistent with the Act. These State regulations provide an affirmative defense that is broader than that provided by 40 CFR 70.6(g). They are also inconsistent with agency enforcement discretion permissible under the Act. These regulations, therefore, affect the State's ability to enforce permits and assure compliance with all applicable requirements and the requirements of part 70 [40 CFR 70.4(b)(3)(i) and 70.4(b)(3)(vii)]. For the same reasons, they also affect the State's general enforcement authority under 40 CFR 70.11.

h. Address all of the following issues relating to the State's audit privilege and immunity law, part 148 of NREPA. These conditions are proposed interim approval issues to the extent that they affect the State's title V operating

permits program and the requirements of part 70.

i. Narrow the applicability of the privilege provided in section 14802, part 148 of NREPA, and narrow the applicability of the immunity provided by section 14809, part 148 of NREPA, to ensure that the State title V program has the authority to: assure compliance with part 70 permits and the requirements of the operating permits program [40 CFR 70.4(b)(3)(i)]; enforce permits and the requirement to obtain a permit [40 CFR 70.4(b)(3)(vii)]; and meet the general enforcement authority requirements of 40 CFR 70.11 (a) and (c) as addressed in subpart II.A.10. of this notice.

ii. Submit a revised title V Attorney General's opinion that addresses EPA's concerns in subpart II.A.10. above and in subpart II.A.2.i. of the proposed interim approval of Michigan's program [61 FR 32391–32398], and certifies that the revised part 148 does not affect Michigan's ability to meet the enforcement requirements of 40 CFR 70.4(b)(3)(i), 40 CFR 70.4(b)(3)(vii), 40 CFR 70.11(a), and 40 CFR 70.11(c).

iii. In lieu of subparts i. and ii. above, submit a revised title V Attorney General's opinion certifying that the current part 148 does not affect the enforcement requirements of 40 CFR 70.4(b)(3)(i), 40 CFR 70.4(b)(3)(vii), 40 CFR 70.11(a), and 40 CFR 70.11(c). The Attorney General's opinion must also specifically address why EPA's interim approval provision requiring revisions to the currently enacted law is not valid.

iv. Submit a supplemental Attorney General's opinion certifying that all other title V authorities that may be affected by part 148 are met, including but not limited to: Michigan's authority to bring suit to restrain any person from engaging in any activity in violation of a permit that is presenting an imminent and substantial endangerment [40 CFR 70.11(a)(1)]; Michigan's authority to seek injunctive relief to enjoin any violation of any program requirement, including permit conditions [40 CFR 70.11(a)(2)]; Michigan's authority to recover criminal fines [40 CFR 70.11(a)(3) (ii) and (iii), and 40 CFR 70.11(c)]; and the requirement that the burden of proof for establishing civil and criminal violations is no greater than the burden of proof required under the Act [40 CFR 70.11(b)]. The supplemental Attorney General's opinion must specifically address these requirements in light of the provisions contained in the State's privilege and immunity law.

This interim approval extends until February 10, 1999. During this interim approval period, Michigan is protected from sanctions for failure to have a program, and EPA is not obligated to promulgate, administer, and enforce a Federal operating permits program for the State. Permits issued under a program with interim approval have full standing with respect to part 70, and the 1-year time period for submittal of permit applications by subject sources begins upon the effective date of this interim approval, as does the 3-year time period for processing the initial permit applications.

If the State of Michigan fails to submit a complete corrective program for full approval by August 10, 1998, EPA will start an 18-month clock for mandatory sanctions. If the State of Michigan then fails to submit a corrective program that EPA finds complete before the expiration of that 18-month period, EPA will be required to apply one of the sanctions in section 179(b) of the Act, which will remain in effect until EPA determines that Michigan has corrected the deficiency by submitting a complete corrective program. Moreover, if the Administrator finds a lack of good faith on the part of the State of Michigan, both sanctions under section 179(b) will apply after the expiration of the 18-month period until the Administrator determines that Michigan has come into compliance. In any case, if, 6 months after application of the first sanction, Michigan still has not submitted a corrective program that EPA has found complete, a second sanction will be required.

If EPA disapproves the State of Michigan's complete corrective program, EPA will be required to apply one of the section 179(b) sanctions on the date 18 months after the effective date of the disapproval, unless prior to that date Michigan has submitted a revised program and EPA has determined that it corrected the deficiencies that prompted the disapproval. Moreover, if the Administrator finds a lack of good faith on the part of Michigan, both sanctions under section 179(b) shall apply after the expiration of the 18-month period until the Administrator determines that the State has come into compliance. In all cases, if, 6 months after EPA applies the first sanction, Michigan has not submitted a revised program that EPA has determined corrects the deficiencies, a second sanction is required.

In addition, discretionary sanctions may be applied where warranted any time after the expiration of an interim approval period if the State has not timely submitted a complete corrective program or EPA has disapproved its submitted corrective program. Moreover, if EPA has not granted full approval to Michigan's program by the expiration of this interim approval because that expiration occurs after November 15, 1995, EPA must promulgate, administer and enforce a Federal permits program for the State of Michigan upon expiration of interim approval.

2. Other Actions

Requirements for approval, specified in 40 CFR 70.4(b), encompass section 112(l)(5) requirements for approval of a program for delegation of section 112 standards as promulgated by EPA as they apply to part 70 sources. Section 112(l)(5) requires that the State's program contain adequate authorities, adequate resources for implementation, and an expeditious compliance schedule, which are also requirements under part 70. Therefore, EPA is promulgating approval under section 112(l)(5) and 40 CFR part 63.91 of the State's program for receiving delegation of section 112 standards that are unchanged from Federal standards as promulgated. This program for delegations only applies to sources covered by the part 70 program.

The EPA is also promulgating approval of Michigan's preconstruction permitting program found in Part 2 of Michigan's Air Pollution Control Rules (R 336.1201–336.1299) under the authority of title V and part 70 solely for the purpose of implementing section 112(g) to the extent necessary during the transition period between promulgation of the Federal section 112(g) rule and adoption of any necessary State rules to implement EPA's section 112(g) regulations. However, since the approval is for the single purpose of providing a mechanism to implement section 112(g) during the transition period, the approval itself will be without effect if EPA decides in the final section 112(g) rule that sources are not subject to the requirements of the rule until State regulations are adopted. Although section 112(l) generally provides authority for approval of State air programs to implement section 112(g), title V and section 112(g) provide authority for this limited approval because of the direct linkage between the implementation of section 112(g) and title V. The scope of this approval is narrowly limited to section 112(g) and does not confer or imply approval for purposes of any other provision under the Act, for example, section 110. The duration of this approval is limited to 18 months following promulgation by EPA of section 112(g) regulations, to provide Michigan adequate time for the State to

adopt regulations consistent with the Federal requirements.

III. Administrative Requirements

A. Official File

Copies of the State's submittal and other information relied upon for the final interim approval, including public comments on the proposal received and reviewed by EPA, are maintained in the official file at the EPA Regional Office. The file is an organized and complete record of all the information submitted to, or otherwise considered by, EPA in the development of this final interim approval. The official file is available for public inspection at the location listed under the **ADDRESSES** section of this document.

B. Executive Order 12866

The Office of Management and Budget has exempted this action from Executive Order 12866 review.

C. Regulatory Flexibility Act

The EPA's actions under section 502 of the Act do not create any new requirements, but simply address operating permits programs submitted to satisfy the requirements of 40 CFR part 70. Because this action does not impose any new requirements, it does not have a significant impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act of 1995

Under section 202 of the Unfunded Mandates Reform Act of 1995, signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate, or to the private sector, of $100 million or more. Under section 205, EPA must select the most cost effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule. EPA has determined that the final interim approval action promulgated today does not include a Federal mandate that may result in estimated costs of $100 million or more to State, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves pre-existing requirements under State or local law, and imposes no new Federal requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

Under 5 U.S.C. 801(a)(1)(A) as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office prior to publication of the rule in today's **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 70

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Operating permits, Reporting and recordkeeping requirements.

Dated: December 27, 1996.

Valdas V. Adamkus,

Regional Administrator.

Part 70, title 40 of the Code of Federal Regulations is amended as follows:

PART 70—[AMENDED]

1. The authority citation for part 70 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

2. Appendix A to part 70 is amended by adding the entry for Michigan in alphabetical order to read as follows:

Appendix A to Part—70—Approval Status of State and Local Operating Permits Programs

* * * * *

Michigan

(a) Department of Environmental Quality: received on May 16, 1995, July 20, 1995, October 6, 1995, November 7, 1995, and January 8, 1996; interim approval effective on February 10, 1997; interim approval expires February 10, 1999.

(b) (Reserved)

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[FR Doc. 97–643 Filed 1–9–97; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

45 CFR Part 1311

RIN 0970–AB56

Head Start Program

AGENCY: Administration on Children, Youth and Families (ACYF), Administration for Children and Families (ACF), Health and Human Services (HHS).

ACTION: Final rule.

SUMMARY: The Administration on Children, Youth and Families is issuing this final rule to implement a new statutory provision authorizing the Secretary to create a Head Start Fellows Program for staff in local Head Start programs or other individuals working in the field of child development, child care, early childhood education, health, and family services.

EFFECTIVE DATE: February 10, 1997.

FOR FURTHER INFORMATION CONTACT: Dennis Gray, Head Start Bureau, Administration on Children, Youth and Families, P.O. Box 1182, Washington, D.C. 20013; (202) 205–8404.

SUPPLEMENTARY INFORMATION:

I. Program Purpose

Public Law 103–252, the Human Services Amendments of 1994, amended the Head Start Act to authorize the creation of a Head Start Fellows Program (HSFP), which will support professional development of individuals working in Head Start or related programs.

The Head Start Bureau is pleased with the opportunity to develop the HSFP. The Bureau anticipates that the HSFP will provide Head Start Fellows with a unique opportunity to be exposed to activities, issues, resources, and new approaches through placements that will include national and regional Head Start offices, academia, and other public or private nonprofit entities and organizations concerned with services to children and families. The Head Start Bureau will benefit from the valuable perspectives brought by the Fellows currently working in Head Start and other programs across America to the national policy making process.

II. Summary of the Final Rule

The authority for this final rule is section 1150 of Public Law 103–252, the Human Services Amendments of 1994 (the Act) which added section 648A(d) to the Head Start Act (42 U.S.C. 9843). Section 648A(d) authorizes the Secretary to establish a program of Head Start Fellowships. Section 648A(d)(6) authorizes the Secretary to make expenditures not to exceed $1,000,000 for any fiscal year for stipends and other reasonable expenses for the Fellows Program. Additional authority is found in section 648A(d)(8), which mandates that the Secretary promulgate regulations to carry out section 648A(d).

The Act specifies:

- To whom Fellowships may be competitively awarded;

AMENDMENT #10

OFFERED IN THE SENATE

To: CSSB 41(L&C)

Page 6, line 17:

Following "court":

Insert "or administrative hearing officer"

Page 6, line 19:

Following "civil":

Insert "or administrative"

Page 6, line 19:

Following "court":

Insert "or administrative hearing officer"

Page 9, line 7:

Following "court":

Insert "or administrative hearing officer"

Reasons: CSSB 41(L&C) will affect areas that are subject to administrative proceedings, including administrative hearings on permit decisions. Hearing officers have expertise in the areas that are subject to this law and are familiar with the facts of the cases before them. If a hearing officer is unable to rule on questions involving the exceptions to the privilege or immunity, the administrative proceedings may have to come to a halt while the parties go to court to litigate whether the exceptions apply. This will likely result in delays in completion of the administrative proceedings and in increased costs associated with the court proceedings.

AMENDMENT #11

OFFERED IN THE SENATE

To: CSSB 41(L&C)

Page 7, line 16:

Following "obtained by the":

Delete: "person"

Insert: "owner or operator"

Page 9, line 21:

Following "imposed on":

Delete: "a person"

Insert: "an owner or operator"

Page 9, line 22:

Following "when the":

Delete: "person"

Insert: "owner or operator"

Page 9, line 26:

Following "efforts by the":

Delete: "disclosing party"

Insert: "owner or operator"

Reasons: Grammatical clarification; consistency in terminology.

AMENDMENT #12

OFFERED IN THE SENATE

TO: CSSB 41 (L&C)

Page 7, line 26 through page 8, lines 4:

Delete all material.

Page 8, lines 14 - 19:

Reword paragraph as follows:

(4) cooperate with the appropriate agency in connection with an investigation of the issues identified in the disclosure; an agency may request that the owner or operator allow the agency to review, under an agreement as described in AS 09.25.455(b)(3), the <u>part of the audit report that describes the implementation plan or tracking system developed to correct past noncompliance, improve current compliance, or prevent future noncompliance</u> [RELEVANT PORTIONS OF THE CONFIDENTIAL SELF-EVALUATION AND ANALYSIS AS NECESSARY TO DETERMINE THAT APPROPRIATE CORRECTIVE ACTIONS HAVE BEEN IDENTIFIED].

Rationale: Paragraphs (c)(5) and (c)(6) under Section 09.25.475 merely repeat the provisions in paragraphs (d)(1), (d)(2), (d)(3), and (d)(4) under the same section. The sponsor recommends these paragraphs be deleted.

However, the sponsor believes some of the language in paragraph (c)(6) -- relating to which parts of an audit report must be disclosed to a regulatory agency -- is more precise than the existing language in paragraph (d)(4). Accordingly sponsor recommends this language be substituted in paragraph (d)(4), as shown above.

AMENDMENT #13

OFFERED IN THE SENATE

TO: CSSB 41 (L&C)

Page 8, after line 8:

Add a new paragraph (d) (2) as follows:

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

AMENDMENT #14

OFFERED IN THE SENATE

TO: CSSB 41 (L&C)

Page 8, lines 20-22; Page 9, lines 1-2:

Reword subsection (g) as follows:

(g) During the period between receipt of the audit notice required under AS 09.25.450(b) and the specified end date of the audit [AUDIT PERIOD SPECIFIED IN THE NOTICE REQUIRED UNDER AS 09.25.450(b)], the department may not initiate an inspection, monitoring, or other investigative activity concerning the audited facility, operation, or property based [SOLELY] on the receipt of a notice under AS 09.25.450. The department has the burden of proving that an inspection, monitoring, or other investigative activity concerning the audited facility, operation, or property initiated after receiving a notice under AS 09.25.450 was not initiated based [SOLELY] on receiving the notice.

Rationale: The intent of subsection (g) is to address a concern on the part of the regulated community that notification of intent to conduct an audit might provoke an agency to launch an inspection or other investigative activity which would otherwise not have occurred. However, the existing language only precludes an inspection during the audit period -- after the audit has begun. The bill requires 15 days advance notice before an audit is commenced, leaving a two-week period in which the agency would not be covered by the restrictions in AS 09.25.475(g).

The word "solely" is deleted because it creates ambiguity. It implies that receipt of an audit notice could serve as grounds for launching an inspection or investigation, provided that the agency could identify at least one other rationale. The audit notice requirement is necessary in order to guage the effectiveness of the self-auditing incentive program. However, the sponsor does not intend for the notice requirement to be a discincentive to conduct self-audits, which it could be if the language in AS 09.25.475 (g) is not sufficiently clear.

AMENDMENT #15

OFFERED IN THE SENATE

TO: CSSB 41 (L&C)

Page 9, after line 5:

Insert new subsection:

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

(1) seeking injunctive relief; or

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

Rationale: This language addresses two issues the Environmental Protection Agency believes must be addressed in state self-audit laws if the state is to retain authority to administer state-delegated programs such as the Title V of the Clean Air Act and the Safe Drinking Water Act. Similar language can be found under the privilege section of the bill, at 09.25.450(i). This amendment will make the legislation consistent by applying these exceptions to both the privilege and immunity sections of the bill.

AMENDMENT #16

OFFERED IN THE SENATE

TO: CSSB 41 (L&C)

Page 9, lines 11-13:

Amend 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 located in the state, the specific violation or closely related violation for which immunity is sought; or [VIOLATIONS THAT ARE THE SAME AS, OR SIMILAR TO, THE VIOLATION FOR WHICH THE IMMUNITY IS SOUGHT;]

Rationale: Many industries that do business in Alaska have facilities in other states. The existing language makes it possible that a facility could be denied immunity if voluntarily disclosed violations are the same or similar to violations that were committed by a different facility under different management in a different state. It is not the intent of the sponsor to limit immunity in this way.

The word "or" is added at the end of the new proposed language to clarify that AS 09.25.480(a)(1) (A) - (C) provide alternative grounds to deny immunity.

A M E N D M E N T #17

OFFERED IN THE SENATE

To: CSSB 41(L&C)

Page 9, line 15:

Following "into compliance and":

Delete: "and this failure"

Insert: "so as to constitute"

Reasons: Grammatical clarification.

AMENDMENT #18

OFFERED IN THE SENATE

TO: CSSB 41 (L&C)

Page 9, lines 17-20:

Reword paragraph (a)(2) as follows:

> (2) the violation [OFFENSE] 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 such violations [LACK OF PREVENTION SYSTEMS CONTRIBUTED MATERIALLY TO THE OCCURRENCE OF THE VIOLATION.]

Rationale: The term "violation" replaces "offense", because in Alaska law civil violations are referred to as "violations", not "offenses".

The reference to "lack of prevention systems" is recommended for deletion because of confusion over its meaning.

AMENDMENT #19

OFFERED IN THE SENATE

TO: CSSB 41(L&C)

Page 9, following line 20:

Insert a new paragraph to read:

"(3) the owner or operator, after completing corrective and remedial measures within a reasonable time and implementing appropriate measures to prevent recurrence of the violation, realized substantial economic savings in not complying with the requirement for which a violation is charged. The exception to immunity in this paragraph applies only to that portion of a penalty that reflects the economic savings of noncompliance after completing the corrective, remedial, and preventive measures necessary to qualify for immunity."

Reasons: The proposed amendment seeks to maintain a "level playing field" in which violators do not gain substantial economic advantages over their competitors. Under this proposal, an owner or operator who otherwise qualifies for immunity will not receive immunity from that portion of a penalty that reflects the economic savings of noncompliance after completing the corrective, remedial, and preventive measures necessary to qualify for immunity. This proposal is somewhat similar to the provision in the U.S. Environmental Protection Agency's Final Audit Policy, 60 Fed. Reg. 66,706, 66,712 (1995), relating to the treatment of economic benefit, under which EPA retains full discretion to recover economic benefit gained as a result of noncompliance.

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AMENDMENT #20

OFFERED IN THE SENATE

TO: CSSB 41(L&C)

Page 10, following line 7:

Insert a new section to read:

"**Sec. 09.25.487. Electronic filing.** A state agency or municipality may, by regulation or ordinance respectively, allow the notices specified in AS 09.25.450(b) to be filed by facsimile or other electronic means, provided such means assure adequate proof of submittal of the notice by the owner or operator and adequate proof of receipt by the agency or municipality."

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AMENDMENT #21

OFFERED IN THE SENATE

TO: CSSB 41 (L&C)

Page 10, lines 13-16:

Add new language to 09.25.490 (a)(1)(A) as follows:

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

(i) interviews with current or former employees;
(ii) field note and records of observations;
(iii) findings, opinions, suggestions, conclusions, guidance, notes, drafts, and memoranda;
(iv) legal analyses;
(v) drawings;
(vi) photographs;
(vii) laboratory analyses and other analytical data;
(viii) computer generated or electronically recorded information;
(ix) maps, charts, graphs, and surveys; and
(x) other communications and documents associated with an environmental or health and safety audit;

Rationale: The new text above was included in SB 41 as introduced, but was inadvertently deleted when the L&C committee substitute was prepared. This list of possible components of an audit report provides appropriate guidance to government officials, the courts, and those planning to initiate a self-audit program. The clarity of the audit report definition is not enhanced by deleting this language.

AMENDMENT #22

OFFERED IN THE SENATE

TO: CSSB 41 (L&C)

Page 10, lines 22-27:

Add new language to definition of "confidential self-evaluation and analysis" as follows:

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

Rationale: the only portions of the audit report that enjoy privilege are those which consist of "confidential self-evaluation and analysis". Consequently, the definition of this term is very important. The new language proposed above adds clarity to the definition by ensuring that many sensitive documents in the audit report, such as employee interviews, are covered by the privilege.

AMENDMENT #23

OFFERED IN THE SENATE

TO: CSSB 41 (L&C)

Page 11, line 2:

Delete the words "Department of Health and Social Services":

(3) "depa.tment" means the Department of Environmental Conservation, the Department of Labor, [AND THE DEPARTMENT OF HEALTH AND SOCIAL SERVICES,] as appropriate;

AMENDMENT #24

OFFERED IN THE SENATE

TO: CSSB 41(L&C)

Page 11, line 21:

Delete all material.

Page 11, line 22:

Delete all material.

Page 11, line 28:

Delete all material.

Re-number definitions accordingly.

Page 12, following line 3:

Add a new subsection as follows:

"(c) For purposes of this chapter, unless the context requires otherwise,

(1) a person acts "intentionally" with respect to a result described by a provision of law defining a violation

when the person's conscious objective is to cause that result; when intentionally causing a particular result is an element of a violation, that intent need not be the person's only objective;

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

(3) a person acts "recklessly" with respect to a result or to a circumstance described by a provision of law defining a violation when the person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that disregard

of it constitutes a gross deviation from the standard of conduct that a reasonable person would have been aware had that person not been intoxicated acts recklessly with respect to the risk."

Reasons: The privilege and immunity established in CSSB 41 (L&C) only applies in civil and administrative cases. Defining the terms "intentionally," "knowingly," and "recklessly" by referring to Title 11, the criminal laws, creates an ambiguity in the bill. In the proposed amendment, the contents of the definition are identical to the ones referenced in the bill, except the word "offense" is changed to "violation."

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NOTES TO DECISIONS

Stated in Neitzel v. State, 655 P.2d 325 (Alaska Ct. App. 1982).
Cited in Brown v. State, 739 P.2d 182 (Alaska Ct. App. 1987); Cole v. State, 828 P.2d 175 (Alaska Ct. App. 1992).

Article 6. Definitions.

Section
900. Definitions

Sec. 11.81.900. Definitions. (a) For purposes of this title, unless the context requires otherwise,

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

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

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

(4) a person acts with "criminal negligence" with respect to a result or to a circumstance described by a provision of law defining an offense when the person fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

(b) In this title, unless otherwise specified or unless the context requires otherwise,

(1) "affirmative defense" means that

(A) some evidence must be admitted which places in issue the defense; and

(B) the defendant has the burden of establishing the defense by a preponderance of the evidence;

(2) "benefit" means a present or future gain or advantage to the beneficiary or to a third person pursuant to the desire or consent of the beneficiary;

(3) "building", in addition to its usual meaning, includes any propelled vehicle or structure adapted for overnight accommodation of persons or for carrying on business; when a building consists of separate units, including apartment units, offices, or rented rooms, each unit is considered a separate building;

(4) "cannabis" has the meaning ascribed to it in AS 11.71.900(10), (11), and (14);

(5) "conduct" means an act or omission and its accompanying mental state;

(6) "controlled substance" has the meaning ascribed to it in AS 11.71.900(4);

(7) "correctional facility" means premises, or a portion of premises, used for the confinement of persons under official detention;

passed w/ amend.
Senator Ellis
objecting

Amendments Proposed by the Administration

CSSB41

Revised 2/26/97

STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DEPT. OF ENVIRONMENTAL CONSERVATION

DIVISION OF ENVIRONMENTAL HEALTH
DIRECTOR'S OFFICE
555 CORDOVA STREET
ANCHORAGE, ALASKA 99501
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Telephone: (907) 269-7644
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February 26, 1997

The Honorable Robin Taylor
Chairman, Senate Judiciary Committee
Alaska State Senate
Capitol Building
Juneau, AK 99801

Dear Senator Taylor:

According to what we understood your instructions to be regarding amendments to SB 41, the audit privilege and immunity bill, enclosed you will find the Administration's amendments that will not be offered by the bill's sponsor. In addition, we have had the opportunity to review the amendments being offered by the sponsor, and have only a few comments we'd like to share on those.

We believe it is possible to have a bill such as this that can still pass muster with EPA and not threaten delegation of state *environmental* programs. Our amendments are all offered with that balance in mind. You'll find recent correspondence from the EPA on this subject enclosed.

Also enclosed you will find 12 amendments as follows (please note they are not numbered sequentially):

Amendment #1 would delete the references to "health and safety" throughout the legislation. Amendment #2 is a companion and would delete both the Department of Labor and the Department of Health and Social Services from the bill. We believe that the record is clear on the need to limit this bill to DEC.

Amendment #7A would establish the burden of proof necessary for a person seeking disclosure of an audit report.

Amendment #9 modifies an amendment of the sponsor (#12) and seeks simply to correct a

drafting error. Page 8, line 16 of the bill references "under an agreement described in AS 09.25.455(b)(3). That section, which is on page 5, lines 17-19, does not require an "agreement" but rather a "claim of confidentiality."

Amendment #15 is a conforming amendment between the privilege provision and the immunity provision The sponsor's amendment #18 also deals with this section but does not make this conforming amendment.

Amendment #16 adds a provision that immunity is not available for any disclosure of an audit in a proceeding relating to pipeline tariffs. There is already a similar provision in the privilege section, and prior to the Labor and Commerce CS, this language was also found in the immunity section. It appears to have been inadvertently left out.

Amendment #17A adds a provision to protect primacy of the state's programs that have been delegated from the federal government. We believe this language will only work for environmental programs however.

Amendment #21 would repeal the provision that the laws covered by this bill be construed broadly.

Amendment #22 would move the term "objective facts" to a different line so its clear that to the extent objective facts are included within that portion of the audit report that is privileged, the privilege would still apply. The sponsor's amendment #7 would delete the altogether. Testimony from industry has been that they support excluding the underlying or objective facts from the privilege.

We believe Amendment #23 makes clear the intent of this section.

Amendment #24 changes current language that is somewhat awkward with language that we believe more closely reflects the intent of the section.

Amendment #25 amends language in the definition of the confidential self-analysis to be more user friendly. The sponsor's amendment #22 also amends this definition, and we do not support his amended version as presented. We have agreed that generally this definition needs more work, and committed to doing so but did want to provide the committee with our initial thoughts on ways to improve it.

Regarding the sponsor's amendments, we have concerns with only two, his #7 and #8. We have previously touched on #7 which would delete the reference to the objective facts being outside the privilege. Regarding #8, it seeks to amend the section relating to privilege and pipeline tariff cases. Attorneys in the Department of Law who handle these cases will provide the committee with the background on this concern.

We would like to thank the sponsor for being open to our concerns with this legislation, and his willingness to work with us.

Sincerely,

Janice Adair
Director & Legislative Liaison

Enclosures

cc: The Honorable Loren Leman (w/encl)
The Honorable Drue Pearce (w/encl)
The Honorable Mike Miller (w/encl)
The Honorable Sean Parnell (w/encl)
The Honorable Johnny Ellis (w/encl)
Pat Pourchot, Office of the Governor (w/encl)

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

Reply To
Attn of: ORC-158

Michele Brown, Commissioner
Alaska Department of Environmental Conservation
410 Willoughby Avenue, Suite 105
Juneau, Alaska 99801-1795

Dear Commissioner Brown:

Thank you for requesting comments on the draft Alaska legislation regarding environmental audits. In general, EPA supports environmental self-auditing, but opposes audit privilege, which invites secrecy, instead of the openness needed to build public trust in industry's ability to self-police. EPA believes that audit privilege greatly complicates criminal and civil discovery, and frustrates public access to information. These are among the reasons that audit privileges are strongly opposed by U.S. Attorneys, the National District Attorneys' Association representing the Nation's local prosecutors, and a bipartisan coalition of state's attorney general. We urge you to take these law enforcement issues into consideration. Additionally, Governor Philip Batt of Idaho recently announced that he intends to let that state's audit privilege/immunity law lapse when the sunset provision runs at the end of 1997.

While EPA supports penalty mitigation as an incentive for voluntary disclosure and correction of violations, EPA also believes that strong enforcement is important to encouraging voluntary compliance. One component of a strong enforcement program is maintaining penalty authority for serious violations, such as those that may pose an imminent and substantial endangerment or actual harm to public health or the environment. To immunize such conduct discourages companies from making the investments in pollution control necessary to prevent such egregious violations. The result is a lowered standard of care and reduced protection of public health and the environment.

In addition to these policy concerns, before EPA can approve a state program, the Agency must determine that the state meets the minimum requirements under the law. In some cases, audit privilege can deprive the state of federally required authority. For your reference, we are enclosing national guidance on this

issue for the Title V program for operating permits under the Clean Air Act, as well as a more recent EPA "Statement of Principles" regarding the effect of State audit immunity/privilege laws on enforcement authority for all delegable federal programs. You should also be aware that through January, 1997, EPA has received and is reviewing petitions to revoke state authority to administer programs in Colorado, Idaho, Michigan, Ohio, and Texas as a result of enactment of audit privilege/immunity laws in those states.

EPA has serious concerns with regard to S.B. 41, currently under consideration in Alaska. As explained above, EPA is opposed to the establishment of an audit privilege. S.B. 41 contains a provision for privilege for environmental audits. Although the privilege would extend only to conclusions and analysis found in audit reports, EPA is concerned that the privilege not indirectly shield prior criminal conduct. This might be the case if independent evidence of probable cause is required to obtain access to an audit report in the context of a criminal proceeding. In addition, it is not clear that law enforcement agencies have an opportunity to see an audit report in a civil proceeding, even for the purpose of determining whether one of the exceptions applies.

As to the immunity provisions, although the bill would withhold immunity for violations resulting in substantial injury, the bill would potentially provide immunity for economic benefit, violations of consent orders, and violations resulting in imminent and substantial endangerment to human health or the environment. Language in the bill might also be construed to provide immunity for some repeat violations. EPA is also concerned with the breadth of violations potentially covered, as the bill would extend immunity not only to violations actually disclosed, but also to violations based on the facts disclosed, and for violations discovered because of the disclosure that were unknown to the owner or operator making the disclosure. This could potentially extend immunity to undisclosed violations that are later discovered by the state.

As an alternative to audit legislation, EPA supports efforts by state environmental agencies, such as Pennsylvania and Florida, to develop penalty mitigation policies with criteria for self audits that are consistent with EPA's. EPA's policy is working well to encourage environmental auditing and voluntary compliance without the adverse consequences to law enforcement and the public's right-to-know of a privilege and immunity statute. We have attached a copy of our most recent EPA policy update for your reference. Please contact us again if you have

any questions.

Sincerely,

Chuck Findley

Chuck Findley
Deputy Regional Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C 20460

FEB 14 1997

MEMORANDUM

SUBJECT: Statement of Principles
Effect of State Audit Immunity/Privilege Laws
On Enforcement Authority for Federal Programs

TO: Regional Administrators

FROM: Steven A. Herman
Assistant Administrator, OECA

Robert Perciasepe
Assistant Administrator, OPPE

Mary Nichols
Assistant Administrator, OAR

Timothy Fields
Acting Assistant Administrator, OSWER

Under federal law, states must have adequate authority to enforce the requirements of any federal programs they are authorized to administer. Some state audit immunity/privilege laws place restrictions on the ability of states to obtain penalties and injunctive relief for violations of federal program requirements, or to obtain information that may be needed to determine compliance status. This statement of principles reflects EPA's orientation to approving new state programs or program modifications in the face of state audit laws that restrict state enforcement and information gathering authority. While such state laws may raise questions about other federal program requirements, this statement is limited to the question of when enforcement and information gathering authority may be considered adequate for the purpose of approving or delegating programs in states with audit privilege or immunity laws.

I. Audit Immunity Laws

Federal law and regulation requires states to have authority to obtain injunctive relief, and civil and criminal penalties for any violation of program requirements. In determining whether to authorize or approve a program or program modification in a state with an audit immunity law, EPA must consider whether the state's enforcement authority meets federal program requirements. To maintain such authority while at the same time providing incentives for self-policing in appropriate circumstances, states should rely on policies rather than enact statutory immunities for any violations. However, in determining whether these requirements are met in states with laws pertaining to voluntary auditing, EPA will be particularly concerned, among other factors, with whether the state has the ability to:

1) Obtain immediate and complete injunctive relief;

2) Recover civil penalties for:

i) significant economic benefit;

ii) repeat violations and violations of judicial or administrative orders;

iii) serious harm;

iv) activities that may present imminent & substantial endangerment.

3) Obtain criminal fines/sanctions for wilful and knowing violations of federal law, and in addition for violations that result from gross negligence under the Clean Water Act.

The presumption is that each of these authorities must be present at a minimum before the state's enforcement authority may be considered adequate. However, other factors in the statute may eliminate or so narrow the scope of penalty immunity to the point where EPA's concerns are met. For example:

1) The immunity provided by the statute may be limited to minor violations and contain other restrictions that sharply limit its applicability to federal programs.

2) The statute may include explicit provisions that make it inapplicable to federal programs.

II. Audit Privilege Laws

Adequate civil and criminal enforcement authority means that the state must have the ability to obtain information needed to identify noncompliance and criminal conduct. In

determining whether to authorize or approve a program or program modification in a state with an audit privilege law, EPA expects the state to:

1) retain information gathering authority it is required to have under the specific requirements of regulations governing authorized or delegated programs;

2) avoid making the privilege applicable to criminal investigations, grand jury proceedings, and prosecutions, or exempted evidence of criminal conduct from the scope of privilege;

3) preserve the right of the public to obtain information about noncompliance, report violations and bring enforcement actions for violations of federal environmental law. For example, sanctions for whistleblowers or state laws that prevent citizens from obtaining information about noncompliance to which they are entitled under federal law appear to be inconsistent with this requirement.

III. Applicability of Principles

It is important for EPA to clearly communicate its position to states and to interpret the requirements for enforcement authority consistently. Accordingly, these principles will be applied in reviewing whether enforcement authority is adequate under the following programs:

1) National Pollutant Discharge Elimination System (NPDES), Pretreatment and Wetlands programs under the Clean Water Act;

2) Public Water Supply Systems and Underground Injection Control programs under the Safe Drinking Water Act;

3) Hazardous Waste (Subtitle C) and Underground Storage Tank (Subtitle I) programs under the Resource Conservation Recovery Act;

4) Title V, New Source Performance Standards, National Emission Standards for Hazardous Air Pollutants, and New Source Review Programs under the Clean Air Act.

These principles are subject to three important qualifications:

1) While these principles will be consistently applied in reviewing state enforcement authority under federal programs, state laws vary in their detail. It will be important to scrutinize the provisions of such statutes closely in determining whether enforcement authority is provided.

2) Many provisions of state law may be ambiguous, and it will generally be important to obtain an opinion from the state Attorney General regarding the meaning of the state law

and the effect of the state's law on its enforcement authority as it is outlined in these principles. Depending on its conclusions, EPA may determine that the Attorney General's opinion is sufficient to establish that the state has the required enforcement authority.

3) These principles are broadly applicable to the requirements for penalty and information gathering authority for each of the programs cited above. To the extent that different or more specific requirements for enforcement authority may be found in federal law or regulations, EPA will take these into account in conducting its review of state programs. In addition, this memorandum does not address other issues that could be raised by state audit laws, such as the scope of public participation or the availability to the public of information within the state's possession.

IV. Next Steps

Regional offices should, in consultation with OECA and national program offices, develop a state-by-state plan to work with states to remedy any problems identified pursuant to application of these principles. As a first step, regions should contact state attorneys general for an opinion regarding the effect of any audit privilege or immunity law on enforcement authority as discussed in these principles.

AMENDMENT #1 25

OFFERED IN THE SENATE

TO: CSSB 41(L&C)

Page 1, line 1:

Following "environmental audits":

Delete "and health and safety audits"

Page 1, line 5:

Following "environmental":

Delete "and health and safety"

Page 1, line 8:

Following "environmental":

Delete "and health and safety"

Page 1, line 13:

Following "environmental":

Delete "and health and safety"

Page 2, line 2:

Following "environmental":

Delete "and health and safety"

Page 2, line 7:

Following "environmental":

Delete "and health and safety"

Page 2, line 12:

Following "environmental":

Delete "and health and safety"

Page 2, line 14:

Following "environmental":

Delete "and health and safety"

Page 2, line 20:

Following "environmental":

Delete "and health and safety"

Page 2, line 30:

Delete "or health and safety"

Page 4, line 16:

Following "environmental":

Delete "or health and safety"

Page 4, line 19:

Delete "or health and safety"

Page 4, lines 26 - 27:

Following "environmental":

Delete "or health and safety"

Page 5, line 28:

Following "environmental":

Delete "or health and safety"

Page 5, line 29:

Following "environmental":

Delete "or health and safety"

Page 6, lines 4 - 5:

Following "environmental":

Delete "or health and safety"

Page 6, line 8:

Following "environmental":

Delete "or health and safety"

Page 6, line 10:

Following "environmental":

Delete "or health and safety"

Page 6, line 26:

Following "environmental":

Delete "or health and safety"

Page 7, line 7:

Following "environmental":

Delete "or health and safety"

Page 7, lines 24 - 25:

Following "environmental":

Delete "or health and safety"

Page 8, lines 21 - 22:

Following "environmental":

Delete "or health and safety"

Page 9, line 16:

Following "environmental":

Delete "or health and safety"

Page 9, line 22:

Following "environmental":

Delete "or health and safety"

Page 9, lines 26 - 27:

Following "environmental":

Delete "or health and safety"

Page 10, line 11:

Following "environmental":

Delete "or health and safety"

Page 10, line 27:

Delete "or health and safety"

Page 11, lines 2 - 4:

Following "Conservation":

Delete ", the Department of Labor, and the Department of Health and Social Services, as appropriate"

Page 11, line 5:

Following "environmental":

Delete "or health and safety"

Page 11, line 14:

Following "environmental":

Delete "or health and safety"

Page 11, line 16:

Following "environmental":

Delete "or health and safety"

Page 11, lines 17 - 18:

Following "environmental":

Delete "or occupational health and safety"

Page 11, line 30:

Following "environmental"

Delete "or health and safety"

Page 12, line 2:

Following "environmental":

Delete "or health and safety"

Page 12, line 5:

Following "environmental":

Delete "or health and safety"

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#26 No Objection

A M E N D M E N T

OFFERED IN THE SENATE

TO: CSSB 41(L&C)

Page 11, lines 2-4:

Following "Environmental Conservation":

Delete: ", the Department of Labor, ~~and the Department of Health and Social Services, as appropriate~~"

Miller – Object

Amend – favor Senator Ellis in favor

AMENDMENT #374

OFFERED IN THE SENATE

TO: CSSB 41(L&C)

Page 7, lines 3-4:

Following "under":

Delete all material.

Insert: "(a)(1) - (a)(4) of this section has the burden of establishing a prima facie case that the exception applies.

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

Reasons: In most cases, the facts needed to prove exceptions (a)(1) - (a)(4) to the self-audit privilege will be peculiarly within the knowledge and control of the owner or operator who conducted the audit. Without access to the privileged information, the party seeking disclosure may find it virtually impossible to establish that the privileged information falls within an exception.

Under these circumstances, the United States Supreme Court has held that "The ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary." United States v. New York, New Haven & Hartford Railroad Co., 355 U.S. 253, 256 n.5 (1957). In the Railroad Company case, the General Accounting Office determined that it had been overcharged in 1944, when the railroad carriers had supplied the Government with longer rail cars than were ordered. A special wartime measure allowed the carriers to charge the prices applicable to the size of rail cars, if the carriers could

not supply the sizes ordered. The General Accounting Office, however, had no means of determining whether the charges fell within the wartime exception, because the information needed to make that determination was peculiarly within the knowledge of the carriers. The Court therefore held the carriers had the burden of proving that its wartime charges were computed at lawful and authorized rates.

Similarly, the Ninth Circuit Court of Appeals wrote that "It is well settled that in the interest of fairness the burden of proof ordinarily resting upon one party as to a disputed issue may shift to his adversary when the true facts relating to the disputed issue lie peculiarly within the knowledge of the latter." United States v. Hayes, 369 F.2d 671, 676 (9th Cir. 1966).

The Alaska Supreme Court also follows this approach. In Sloan v. Jefferson, 758 P.2d 81, 83 (Alaska 1988), the court recognized that the burden of proof generally falls upon the party asserting a fact, particularly where that party controls the evidence bearing upon that fact.

As a general rule of law, "The burden of proof and the burden of evidence may be imposed on the party best able to sustain it; so, the party having peculiar knowledge of facts, or control of evidence, relating to an issue, may have the burden of proof or evidence, particularly in the case of a negative averment." 31A C.J.S. *Evidence* § 129 at 265 (1996). For example, a party who claims his case does not come within an exception usually has the burden of proof on that issue, particularly where that party has knowledge or control of the evidence that would show the case does not come within the exception. See id. §§ 123 at 260, 129 at 266.

An example of a legislative enactment requiring the disclosure of privileged information upon a showing of special need may be found in AS 18.23.030(b), relating to the medical peer review privilege. There, the legislature authorized the disclosure of confidential information to a health care provider who claims that the denial of access to the information is unreasonable or to a plaintiff who claims that the information provided to the review organization was false.

The proposed amendment to CSSB 41(L&C) recognizes that the party claiming the self-audit privilege will be in the best position to prove that the information claimed to be privileged does not fall within an exception to the privilege. However, it also strikes a balance between the party seeking disclosure and the party claiming the privilege by requiring the party seeking disclosure to establish a prima facie case that the exception applies before shifting the burden of proof to the party claiming the privilege. This proposal is consistent with the court decisions concerning the burden of proof.

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Sen. Leman NO OBJECTION. No Objection

A M E N D M E N T #28

OFFERED IN THE SENATE

TO: CSSB 41 (L&C)

Page 8, line 16:

Following "under":

Delete: "an agreement"

Insert: "a written claim of confidentiality"

Reasons: Paragraphs (c)(5) and (c)(6) are redundant to paragraph (d)(4). This appears to be a drafting error.

In CSSB 41 (L&C), under proposed AS 09.25.455(b)(3), an owner or operator may disclose privileged information to a government official or agency pursuant to a written claim of confidentiality. Under proposed AS 09.25.455(b)(3), privileged documents disclosed in this manner are required to be kept confidential and are not subject to the Alaska public records statute. SB 41 originally provided for confidentiality agreements between owners and operators and a government official or a state or federal agency. The CS deleted this provision. The language in the CS on page 8 referring to confidentiality agreements appears to be a drafting error and should be replaced with language relating to the procedures allowing for written claims of confidentiality.

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AMENDMENT #15 29

OFFERED IN THE SENATE

TO: CSSB 41(L&C)

Page 9, line 17:

Following "knowingly":

Insert: "or recklessly"

Reasons: Parallels AS 09.25.480(a)(1)(A).

AMENDMENT

#1629

Pearce, Miller, Sewell, Taylor - NO
Ellis - YES

OFFERED IN THE SENATE

TO: CSSB 41(L&C)

Page 9, line 21:

Insert a new subsection as follows and renumber all subsections accordingly:

"(b) There is no immunity under AS 09.25.475 if the disclosure is in a proceeding relating to pipeline rates, tariffs, fares or procedures."

Reasons: This provision was included in SB 41, page 9, lines 22-23, and appears to have been inadvertently deleted in CSSB 41(L&C). The proceedings involving pipeline rates, tariffs, fares, and procedures rely heavily on environmental and health and safety audits, and this exception is necessary to avoid jeopardizing current proceedings and incurring substantial costs in preparing state audits and lost revenues.

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STATE OF ALASKA

TONY KNOWLES, GOVERNOR

PLEASE REPLY TO:

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DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

March 20, 1996

Senator Rick Halford
Alaska State Senate
Juneau, Alaska 99801

Re: CSSB 199

Dear Mr. Chairman and Senate Finance Members:

Thank you for allowing me to testify today on SB 199. Because of the poor connection I thought it might help to send my comments. I did not follow them verbatim in my testimony, but they contain essentially the same information. Thank you again for your consideration.

Sincerely,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Elizabeth J. Kerttula
Elizabeth J. Kerttula
Assistant Attorney General

enc.

cc. Senator Loren Leman w/enc.

MARCH 20, 1996
SENATE FINANCE
CSSB 1996(RES)
COMMENTS OF ASSISTANT ATTORNEY GENERAL
ELIZABETH J. KERTTULA

Thank you Mr. Chairman. My name is Beth Kerttula, and I am an Assistant Attorney General in the Civil Division, Oil and Gas Section. Thank you for allowing me to testify by teleconference, I will try to be brief.

While the Department of Law appreciates the changes in the CS to SB 199; if enacted, SB 199 will have serious consequences on the state's TAPS (Trans Alaska Pipeline System) Tariff cases (which are filed before both the Federal Energy Regulatory Commission (FERC) and the Alaska Public Utility Commission (APUC)). While our concerns have been mentioned previously, we did not have financial information on the cost of certain audits until last week. Therefore, we felt it important to bring the information to this committee's attention.

Under Alaska's royalty and production tax statutes, the state effectively pays for one quarter of the tariff (which includes the costs of running the pipeline in its calculation) through reduced revenues. The state has the right to challenge imprudent costs under the TAPS Settlement Agreement between the state and the carriers. In the 1995 case, the costs that are being challenged as imprudent, and not properly included in the tariff, amount to about $330 million dollars, with the state's share around $82 million (and rising as the challenged costs continue to accrue). If SB 199 had been in effect prior to the 1995 case it would have impacted the state's ability to bring the case. With the bill's privilege and immunity sections the state would probably not have been able to use information, at least before the APUC, from audits performed by Alyeska Pipeline Service Company (Alyeska), the carriers, or their contractors. Currently, the state uses these audits in its tariff cases. In the 1995 tariff case, our estimate is that it cost around $25 million dollars to conduct these types of audits. If this bill is enacted the state will not have access to this type of information under state law, and the state would have to bear the burden of the cost of obtaining the information.

The state has a right to object to imprudent costs under the TAPS Settlement. This bill would complicate that system. The state could commission its own audits of the pipeline, but it is questionable why Alaskans should have to bear the burden of the cost for something they do not control.

The tariff cases will be in jeopardy if this legislation becomes law. I appreciate the opportunity to let the committee know these concerns. Thank you.

TOTAL P.03

AMENDMENT #17A 30

Withdrawn by Senator Ellis (Question of Constitutional Conflict)

OFFERED IN THE SENATE

TO: CSSB 41(L&C)

Page 10, following line 2:

Insert a new section to read:

"Sec. 09.25.482. Inconsistencies with federal requirements. (a) When a state program requires federal approval or involves the expenditure of federal money or federal assistance, and there is a conflict between a provision of this chapter and a federal statute, regulation, or requirement, then, after completing the procedures in (b) of this section, the federal statute, regulation, or requirement shall prevail and the self-audit privilege and immunity created in this chapter are limited accordingly.

(b) Upon final written notice from the chief executive officer of a federal agency that a provision of this chapter is in conflict with a federal statute, regulation, or requirement and that federal approval, federal money, or federal assistance will be denied or withdrawn as a result of the conflict, the chief executive officer of the state agency in receipt of the notice shall immediately notify the

revisor of statutes that the self-audit privilege and immunity created by this chapter is limited, so that a revisor's note to that effect may be published in the Alaska Statutes. The chief executive officer of the state agency shall also immediately cause public notice of the limitation to be given and widely distributed and provide written notice of the limitation to all owners and operators submitting notices to the state agency under AS 09.25.450(b)."

Reasons: Where the state has assumed primacy for a federally-delegated program, such as the Title V air quality operating permits program, an audit privilege and immunity statute may create a concern over whether the state's enforcement authority has been compromised. For example, in other states, the U.S. Environmental Protection Agency has only granted interim approval to the state's program or where a program is already approved, is reviewing the state program to determine whether action should be taken to modify the approval. See 62 Fed. Reg. 1387, 1395 (1997). The language in the proposed amendment is similar to the provision in the state procurement code, AS 36.30.890. A similar provision is also found in the Alaska Surface Mining Control and Reclamation Act, AS 27.21.960.

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The fifth 1996 amendment, effective July 1, 1996, made a section reference substitution in paragraph (b)(30).

Effective date of 1992 amendment. — Under § 28, ch. 31, SLA 1992, the amendment to (b)(15) of this section made by § 9, ch. 31, SLA 1992, takes effect on the earlier of July 1, 1993 or the date established by resolution of the Alaska State Pension Investment Board for the transfer to it of securities and assets of the relevant retirement systems.

Editor's notes. — Under § 58(a), ch. 66, SLA 1991, as amended by § 37, ch. 5, FSSLA 1994 and § 2, ch. 1, SSSLA 1994, this section, as it read prior to the 1995 amendment, took effect December 16, 1994.

Opinions of attorney general. — The exception in paragraph (b)(1) for grants applies where: 1) the legislature makes an appropriation to a specific program for a specific purpose; 2) the appropriation is for a donative purpose that would more traditionally be characterized as a grant (rather than the purchase of services or supplies); and 3) the nature of the program, known to the legislature, makes application of the procurement code difficult or unreasonable. Mar. 23, 1988 Op. Att'y Gen.

The State Procurement Code does not apply to decisions of the Department of Fish and Game (DF&G) concerning allocation to private nonprofit hatcheries of federal funds granted to the state in connection with the U.S./Canada Pacific Salmon Treaty, since the transaction that occurs when DF&G selects and allocates federal grant money to private nonprofit hatchery projects is not contractual under the State Procurement Code. Apr. 13, 1988 Op. Att'y Gen.

The Department of Transportation and Public Facilities (DOT/PF) is not required to make the Procurement Code a condition of a Transfer of Responsibility Agreement (TORA). DOT/PF has discretion to negotiate for the inclusion of all or portions of the code in a TORA. June 10, 1988 Op. Att'y Gen.

The Procurement Code does not apply to contract negotiations of the Alaska Marine Highway System (AMHS) with the Port of Bellingham to provide terminal services at Bellingham for the AMHS. However, the AMHS may contract for these services with the Port of Bellingham. Aug. 16, 1989 Op. Att'y Gen.

Although the procurement code mentions the expenditure of money, the procurement code must be read to cover cases where instead of money some other type of valuable consideration is provided by the state in exchange for a good or service. Apr. 17, 1991 Op. Att'y Gen.

Sec. 36.30.860. Supplementary general principles of law applicable. Unless displaced by the particular provisions of this chapter, the principles of law and equity, including AS 45.01 — AS 45.09, AS 45.12, and 45.14 (Uniform Commercial Code), the law merchant, and law relative to capacity to contract, agency, fraud, misrepresentation, duress, coercion, mistake, or bankruptcy shall supplement the provisions of this chapter. (§ 2 ch 106 SLA 1986)

Revisor's notes. — In 1993, under § 13, ch. 34, SLA 1993 and § 128, ch. 35, SLA 1993 the citation to the Uniform Commercial Code was revised.

Sec. 36.30.870. Adoption of regulations. (a) Regulations under this chapter shall be adopted in accordance with AS 44.62 (Administrative Procedure Act).

(b) Regulations under this chapter applicable to procurements of construction or procurements for or disposal of property of the state equipment fleet shall be adopted by the commissioner of administration only after consultation with the commissioner of transportation and public facilities. (§ 2 ch 106 SLA 1986)

Sec. 36.30.880. Requirement of good faith. All parties involved in the negotiation, performance, or administration of state contracts shall act in good faith. (§ 2 ch 106 SLA 1986)

Sec. 36.30.890. Federal assistance. If a procurement involves the expenditure of federal funds or federal assistance and there is a conflict between a provision of this chapter or a regulation adopted under a provision of this chapter and a federal statute, regulation, policy, or requirement, the federal statute, regulation, policy, or requirement shall prevail. (§ 2 ch 106 SLA 1986)

Sec. 36.30.900. Product preferences. [Repealed, § 48 ch 137 SLA 1996.]

Sec. 36.30.910. Purchases through general services administration. Notwithstanding any other provision of this chapter, purchasing through the general services administration or from federal supply schedules of the general services administration may be made without competitive sealed bidding, competitive sealed proposals, or other

(2) if the state is diligently prosecuting a civil action in a state or federal court to require compliance with the provisions of this chapter or a regulation adopted or an order or permit issued under this chapter; however, any person may intervene in that civil action as a matter of right.

(d) A person may commence an action under this section only in the judicial district in which the surface coal mining operation is located.

(e) Nothing in this section restricts any right that a person or class of persons may have under statute or common law to seek enforcement of any of the provisions of this chapter and the regulations adopted under it, or to seek any other relief, including relief against the commissioner.

(f) A person who is injured or whose property is damaged by the violation by a permittee of a regulation adopted or an order or permit issued under this chapter may bring an action for damages, including reasonable attorney fees and expert witness fees, only in the judicial district in which the permittee's operation is located. Nothing in this subsection affects the rights established by or limits imposed under AS 23.30.

(g) In an action under this section, the commissioner may intervene as a matter of right. (§ 1 ch 29 SLA 1982)

Revisor's notes. — Formerly AS 41.45.950. Renumbered in 1983.

Sec. 27.21.960. Inconsistencies with federal act. (a) A provision of this chapter that is inconsistent with the provisions of the Surface Mining Control and Reclamation Act of 1977 as determined by the Secretary of the United States Department of the Interior under 30 U.S.C. 1255(b) is invalid from the date of the secretary's determination.

(b) If a provision of the Surface Mining Control and Reclamation Act of 1977 or of the regulations promulgated under that Act by the Secretary of the United States Department of the Interior is deleted, amended, set aside, enjoined, or declared invalid by Congress, the secretary, or in a final, unappealable judgment of a court of competent jurisdiction, then the commissioner shall review the changes made and make an appropriate recommendation as to whether changes in this chapter or the regulations adopted under it should be made. (§ 1 ch 29 SLA 1982)

Revisor's notes. — Formerly AS 41.45.960. Renumbered in 1983.

Sec. 27.21.970. Relationship to other laws. (a) Nothing in this chapter abrogates or modifies the power of a state agency to enforce laws and regulations within its jurisdiction, except as specifically stated in this chapter and regulations adopted under it. The commissioner shall coordinate permitting procedures to prevent unnecessary duplication in permit review.

(b) Surface coal mining operations for coal which has been or is conveyed out of federal ownership must meet the requirements of this chapter. (§ 1 ch 29 SLA 1982)

Revisor's notes. — Formerly AS 41.45.970. Renumbered in 1983.

Editor's notes. — Section 2, ch. 29, SLA 1982, purported to add a subsection (c). Section 7 of ch. 29 provided that the amendment take effect on the effective date of a version of Senate Bill No. 84; however, Senate Bill No. 84 did not pass the House of Representatives, and consequently, the amendment made by § 2 of ch. 29 never took effect.

Sec. 27.21.975. Severability. If any provision of this chapter or the applicability of it to any person or circumstances is held invalid, the remainder of this chapter and the application of that provision to other persons or circumstances is not affected. (§ 1 ch 29 SLA 1982)

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AMENDMENT #21A

OFFERED IN THE SENATE

TO: CSSB 41(L&C)

Page 12, lines 1-3:

Delete all material.

Reasons: The provision that requires the term "environmental and health and safety laws" to be broadly construed introduces a great deal of uncertainty as to the scope of the bill. In addition to encompassing a wide variety of federal and state laws, the term "environmental and health and safety laws" includes municipal ordinances. The bill should be carefully reviewed for impacts on municipal laws and programs.

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AMENDMENT #2232

Amendment fails with Senator Ellis in favor.

OFFERED IN THE SENATE

TO: CSSB 41(L&C)

Page 5, line 24:

Following "AS 09.24.450 for":

Insert: "objective facts and"

Page 5, line 25:

Delete all material.

Renumber all subsections accordingly.

Reasons: In the cases that recognize a self-evaluative privilege, "objective facts" are not privileged. See Reichhold Chemicals v. Textron, Inc., 157 F.R.D. 522, 526 (N.D. Fla. 1994).

AMENDMENT #23 33

Object: Miller
Motion fails with
Senator Ellis
in favor

OFFERED IN THE SENATE

To: CSSB 41 (L&C)

Page 6, line 23:

At the beginning of line 23

Insert: "a violation that caused"

Reason: This amendment will allow the State not only to obtain evidence of injuries, which it can independently obtain (i.e. medical reports of injured person), but also will allow the State access to evidence to prove that the operator/owner violated the cited statute or regulation which led to the substantial injury.

A M E N D M E N T #24 34

Sponsor has no objection - No objection - Amendment passed

OFFERED IN THE SENATE

TO: CSSB 41(L&C)

Page 9, line 25:

Delete all material and insert:

"(1) the good faith actions of the owner or operator in disclosing a violation;"

Reasons: The bill authorizes the mitigation of penalties depending on the "voluntariness" of a "voluntary disclosure." This wording is awkward and redundant. It appears to be addressed to the owner or operator's good faith in disclosing a violation to the enforcement agency.

AMENDMENT #~~25~~ 35

Sponsor has no objection; however wants to know how it is different from this

OFFERED IN THE SENATE

TO: CSSB 41(L&C)

Page 10, line 24:

Following "part of the material":

Delete: "described"

Insert: "contained"

Page 10, line 24:

Following "including":

Delete: "implementation issues or"

Insert: "findings, conclusions, opinions, recommendations, and"

Reasons: The self-audit privilege seeks to protect the parts of the audit report that evaluate or analyze a facility, operation, or property. The term "implementation issues" is somewhat confusing. The proposed amendment tries to clarify that the privileged part of the audit report consists of memoranda and documents evaluating or analyzing the information contained in the audit report, including memoranda and documents containing findings, conclusions, opinions, recommendations, and the audit implementation plan or tracking system.

SENATOR LOREN LEMAN

Northwest Anchorage

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

Sponsor Statement -- SB 41

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

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

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

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

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

Environmental and health and safety auditing has become increasingly popular in the past two decades. More than 1,000 of the world's largest companies have self-audit programs in place. In the U.S., 18 states have enacted self-audit laws similar to SB 41, offering privilege and/or immunity benefits to participating businesses, individuals, and municipalities.

Why should we encourage self-auditing?

Lessons from the Price Waterhouse Survey

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

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

Significant findings:

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

Distributed by Senator Loren Leman

Sectional Analysis -- CS for SB 41 (L&C)

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

Prepared by: Mike Pauley, Staff to Sponsor SENATOR LOREN LEMAN
Last updated: Friday, February 21, 1997

Section 1: Statement of legislative findings and intent.

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

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

Sec. 09.25.450 **Establishes a qualified audit report privilege.**

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

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

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

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

Sec. 09.25.460 Describes materials not protected by privilege.

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

Sec. 09.25.465 Establishes an exception to the privilege through disclosure required by the courts.

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

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

Sec. 09.25.475 Establishes limited immunity for voluntarily reported violations.

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

Sec. 09.25.480 Exceptions to Immunity & Mitigation of Penalties

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

Sec. 09.25.485 Relationship to other recognized privileges.

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

Sec. 09.25.590 **Definition of terms.**

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

Section 3: Applicability.

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

SENATE COMMITTEE REPORT
First Committee of Referral

DATE: 1/13/97

FURTHER: (Judiciary)
Finance

Date of 5-Day Notice: 1-16-97
(in accordance with Uniform Rule 23)

DATE TURNED IN TO OFFICE: 1-31-97

Labor and Commerce 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 (LTC ~~SB~~)

[ ] adopt **previous** ____ CS ____ (____)

[ ] attached amendment(s)

[ ] adopt Letter of Intent by ____ Committee

[ ] further referral to the ____ Committee

Senate Bill:
[✓] same title
[ ] new title

House Bill:
[ ] same title
[ ] technical title
[ ] new: SCR ____

SIGNING DO PASS	*DP*	*OTHER RECOMMENDATIONS*	*NR*	*DNP*	*AM*
Mike Miller	✓				
		✓			
CHAIR:	✓	*CHAIR:*			

NEW FISCAL NOTE(S):

Department	Date	Zero	Fiscal

PREVIOUS FISCAL NOTE(S):*

Department	Date	Zero	Fiscal

[ ] **APPROPRIATION -- no fiscal note**

***include fiscal notes accompanying Governor's bill**

Previous Committee Report(s)

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

February 13, 1997

TONY KNOWLES, GOVERNOR

PLEASE REPLY TO:

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☒ *P.O. BOX 110300-DIMOND COURT HOUSE*
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Honorable Loren Leman
Chair of Senate Labor and Commerce Committee
Alaska State Legislature
State Capitol - Room 113
Juneau, AK 99801-1182

Re: CSSB 41 (L&C): DHSS functions involving access to health and safety audits

Dear Senator Leman:

This letter is to address the legal concerns raised by the application of CSSB 41 (L&C) to Department of Health and Social Services (DHSS) functions. CSSB 41 (L&C) reportedly is based on legislation originally designed to address environmental audit circumstances, not necessarily the circumstances in which audits are reviewed by the staff within the DHSS. First, it is difficult to estimate the difficulties that this bill will pose for DHSS because the language of the bill does not clearly establish what audits it is intended to cover. A lack of clarity in the design and language of the bill will most certainly make it necessary to litigate challenges to access of audit materials in order to resolve differences. Consequently, DHSS may have to engage in legal battles over access to the audit information that is presently available without dispute, including financial audits and quality assurance program reports.

Only environmental audits require advance notice to the department in order for the privilege to be invoked. Consequently, it does not appear that a health and safety audit would require this advance notice to a department in order to invoke the privilege and immunity. A hospital or care facility will claim an audit of operations to be related to health and safety. This may give rise to disputes about whether critical information need be turned over to public health officials or agency personnel charged with the monitoring of hospitals and long-term care facilities.

Because proposed AS 09.25.490(b) states that the audit privilege is to be construed broadly, there is a great risk it will be widely invoked, even if it does not clearly apply to the circumstances. If DHSS is included as a department that cannot reach internal audits, there is likely to be health and safety information concealed from the public that could result in injury or loss of life.

Health Facilities Licensing and Certification

The Health Facilities Licensing and Certification function of DHSS could be seriously compromised. Federal regulations require that agency to make certain that each facility has a quality assurance program in place and to assess the effectiveness of the program. Our state health facility licensing laws require that hospitals have effective risk management programs in place. Consequently, it is the self evaluations and analyses that must be reviewed by the regulating agency in order to assess the effectiveness of the programs.

While these self-evaluations and analyses may be construed under AS 09.25.460 as "information required to be . . . reported under a[n] . . health or safety law or as a requirement for . . .maintaining . . . a license," the language used in this exception does not make it clear whether a facility would have to reveal the information. Additionally, the provision that directs the court to interpret the privilege broadly may produce a contrary result. Without having access to the analyses and whether those analyses have resulted in appropriate corrections, the licensing agency will not be able to provide the review of the facility that is required under federal law. Furthermore, the health and safety of patients and employees may be affected.

Specific examples may better illustrate the problems imposed upon health facilities licensing and certification staff by this bill. For instance, in one nursing home, health facility surveyors found that five of eight of the residents had had significant weight loss; one resident's weight loss was so dramatic that the patient was close to death. It was determined that the residents were not receiving adequate nutrition because they were not being given enough food. DHSS had to examine the internal procedures and practices of the facility to determine that, even though patients were weighed regularly, no practices were in place for a staff review of resident weights in order to enable the staff to detect problematic trends in weight loss among the residents. DHSS staff must be able to evaluate internal assessment tools in order to assure safety for residents in these facilities.

In another case, water temperatures at a facility were dangerously high. Even though this problem was known to some staff, there was no internal procedure in place to assure that appropriate action was taken. In this facility, while reports were reviewed by the members of the facility risk management committee, no discussion or action was proposed in response. The facility survey team had to review the internal procedures in order to provide direction to the facility to bring practices into compliance. [In one health care facility last year, a resident died of secondary infections caused by being scalded in a bath.] Patient and resident care will be directly affected if the law allows facilities to conceal the analyses that result from their internal reviews because defective internal audit processes may go undetected.

Other problems include encountering barriers to gaining access to the internal quality assurance reports that federal regulations require the certification agency to review. For example, for laboratory certification purposes, all quality assurance records for a laboratory must be made

available to the agency for a period of two years. Renal dialysis center certification requires that the agency have access to the required quality assurance reviews that assess the condition of the physical environment of the center; the agency must also be able to review records concerning monitoring of staff exposure to chemical germicides under standards set by OSHA. The state agency would not be able to complete the reviews required under federal law if CSSB 41 (L&C) limits access to these internal assessments.

Medicaid Fraud

Medicaid is a federally delegated program. In exchange for federal financial participation, the states agree to comply with various federal statutory and regulatory requirements embodied in the state Medicaid plan. Alaska is required to exclude, suspend sanction, refuse payment to, or recoup payment from any Medicaid provider committing "fraud" or "abuse" as defined by 42 C.F.R. § 455.2. "Abuse" includes provider practices that are inconsistent with sound fiscal, business, or medical practices, and result in an unnecessary cost to the Medicaid program. To prevent, detect, and sanction such abuse, Medicaid regulations and provider agreements require providers to disclose their fiscal, business and medical practices. The privilege provided by CSSB 41 (L&C) is inconsistent with the Medicaid requirements.

In addition, a state Medicaid plan must provide for an agreement between the Medicaid agency and each provider or organization furnishing services under the plan in which the provider or organization agrees to (1) keep any record necessary to disclose the extent of services to provider furnishes to recipients and (2) on request furnish this information to the Medicaid agency or state Medicaid Fraud Control Unit. 42 C.F.R. § 431.107. This requirement for provider disclosure of business transactions, which is part of a Medicaid provider agreement, appears to contradict the proposed Section 09.25.450 (g): "A government agency or its employees or agents may not, as a condition of a permit, license, or approval issued under an environmental law, require an owner or operator to waive the privilege available under the section." Even though this provision specifies "environmental law," we anticipate some litigation over the application of this provision to DHSS functions if DHSS is included as a department affected by this bill.

Medicaid Rate Advisory Commission

The Medicaid Rate Advisory Commission (MRAC) staff establishes Medicaid payment rates for hospitals, nursing homes and other health care facilities, based on each facility's reported historic costs of providing care to patients. Alaska health care facilities received over $135 million in Medicaid payments in fiscal year 1996. The MRAC staff conducts audits of facility-reported costs to ensure that the information used to establish each facility's Medicaid payment rate is accurate.

As part of the audit process and the rate setting function, the MRAC staff must determine whether a facility is providing health care services in an economic and efficient manner.

Federal and state law require the MRAC staff to make this determination to confirm that the state is receiving fair value for its Medicaid payments and also to establish a relationship between such payments and facility costs. 42 U.S.C. § 1396a(a)(13)(A) and AS 47.07.070.

CSSB 41 (L&C) could interfere with the MRAC staff's ability to obtain vital information pertaining to a health care facility's financial and operational performance, resulting in higher than warranted Medicaid payments. Under the audit privilege, a facility might be able to shield from the MRAC staff information relating to the facility's financial or operational inefficiencies. As proposed, AS 09.25.450(a) will prevent the state from obtaining an entity's internal audit reports that consist of an "analysis of the owner's or operator's compliance with . . . health and safety laws." With DHSS included as a department whose functions are affected by this law and with the broad construction language in the bill, CSSB 41 (L&C) could prevent the state from obtaining information directly relevant to a facility's Medicaid payment rate: financial and operational information prepared by the facility relating to the reasonableness of health care costs paid for by the Medicaid program.

Proposed Amendments

The most straightforward amendment that would remedy the problems that CSSB 41 (L&C) imposes on DHSS, would be to remove the term "health and safety" [audits] where it appears to define the type of audit subject to privilege under this bill and to remove DHSS from the definition of "department."

As an alternative, some clarity could be obtained by amending proposed AS 09.25.460 by adding subsections (a)(8) and (9): "There is no privilege under AS 09.25.450 for that part of an audit report that contains the following:

> (8) the quality assurance reports and analyses of health care facilities and resident nursing facilities that are licensed or certified by the Department of Health and Social Services; and
>
> (9) financial, business and operational audits of providers of medical services under Medicaid, or of care facilities required to be licensed by the state."

However, even with the alternative amendments, additional clarifications would need to be made to avoid unnecessary litigation.

Summary

In summary, if information about the effectiveness of internal evaluation tools is made available to the state agency that regulates hospitals and health care facilities, the result is that these

facilities receive assistance in recognizing problem areas; health care delivery to our citizens is improved. DHSS does not have an enforcement function that requires the assessment of monetary penalties, as do some other agencies. (The likely financial impact to a facility might be recoupment of Medicaid or grant funds that have been paid by the state for a service that was not provided or a change in the Medicaid reimbursement rate to reflect reasonable and efficient operations.) Actions to remove the licensure or certification of needed health care facilities are generally not initiated until after compliance efforts fail.

On the other hand, if information that is essential to determine the effectiveness of the internal evaluation tools of health care facilities may be withheld from the agency, the state will not be able to effectively perform its federal certification function or state licensing functions and Medicaid programs may be in jeopardy. In addition, health care facility problems will more likely go undetected until the circumstances cause serious patient injury or death.

Sincerely,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Kristen F. Bomengen
Kristen F. Bomengen
Assistant Attorney General

KFB:ebc

cc: Members, Senate Labor and Commerce Committee
Hon. Robin Taylor, Senate
Members, Senate Judiciary Committee
Pat Pourchot, Legislative Director
Bruce Botelho, Attorney General
Hon. Karen Perdue, Commissioner, Department of Health and Social Services
Chrystal Smith, Legal Administrator
Deborah Behr, Assistant Attorney General
Janice Adair, Director, Div. of Environmental Health,
Department of Environmental Conservation

THE ALASKA CHAPTER
OF THE
INTERNATIONAL
ASSOCIATION OF
DRILLING CONTRACTORS

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

VIA FACSIMILE
(907) 465-3922

February 12, 1997

The Honorable Robin Taylor
Senate Majority Leader and Chairman, Judiciary Committee
Alaska State Legislature
State Capitol
Juneau, Alaska 99801

Dear Senator Taylor:

SB 41, "An Act relating to environmental audits and health and safety audits to determine compliance with certain laws, permits and regulations," was passed out of the Senate Labor and Commerce Committee on January 30, 1997, and now awaits a hearing before the Senate Judiciary Committee. I am writing to encourage you to schedule SB 41 for a hearing at the earliest possible date.

As I mentioned when we met in your offices earlier this session, the International Association of Drilling Contractors ("IADC") believes that the "self-audit" concept is one that deserves your serious consideration, and we feel that, as introduced and amended in the Labor and Commerce Committee, this bill represents a good start toward the goal of developing a responsible, cost-effective incentive program that encourages voluntary compliance with health, safety and environmental laws.

Since I met with you in Juneau, we have spent a considerable amount of time reviewing the amended version of the bill and, as you requested, we have prepared several amendments which we believe further the goal of promoting voluntary corrective action and increased compliance, while reducing the expenditure of resources -- private and public -- on unproductive regulatory command-and-control and associated litigation to compel compliance.

One concern the IADC has with the current version of the bill relates to situations where a drilling contractor causes a health and safety and environmental audit to be prepared of the drilling contractor's operations. The bill allows disclosure of audit reports in certain circumstances without waiving the privilege. However, we are concerned that the bill may not cover an exchange between an independent contractor and its principal, a practice which is becoming an increasingly common and salutary feature

of the operator-drilling contractor relationship in Alaska. The new "self-audit" privilege should be made expressly applicable to these disclosures. This will enable operators and drilling contractors to engage in aggressive self-evaluation and to work closely together to identify remaining opportunities to improve their performance.

We have developed suggested amendments for this purpose, as well as other proposed amendments which we believe generally strengthen the bill. I am available to meet with you at your convenience to discuss our proposed changes, and I am prepared to travel to Juneau to appear before the Judiciary Committee and testify in support of the bill.

I look forward to working with you and the members of the Judiciary Committee on this legislation. Thank you again for your continued support.

Sincerely,

Randy Ruedrich

Randy Ruedrich

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

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

**VIA FACSIMILE
(907) 465-3922**

February 12, 1997

The Honorable Robin Taylor
Senate Majority Leader and Chairman, Judiciary Committee
Alaska State Legislature
State Capitol
Juneau, Alaska 99801

Dear Senator Taylor:

I am writing again to encourage you to schedule SB 41, "An Act relating to environmental audits and health and safety audits to determine compliance with certain laws, permits and regulations," for an immediate hearing in the Judiciary Committee.

As I mentioned when we met in your offices last month, passage of "self-audit" legislation this session is critical to the members of the Alaska Chapter of the International Association of Drilling Contractors ("IADC"). An increasingly common and salutary feature of the operator-drilling contractor relationship in Alaska involves the exchange of information between an independent contractor and its principal. If the provisions of SB 41 are extended to cover the contractor-operator relationship as we propose, the privilege for voluntary health, safety and environmental self-audits, as well as the qualified immunity for conditions that are discovered and reported in the course of those audits, will enable operators and drilling contractors to more readily share the results of those self-evaluative reviews without having to worry that an enforcement agency or other litigant will use the results of such inquiries against them. For this reason, we believe that SB 41, if modified as we suggest, would be extremely beneficial in that it would allow us to concentrate on the reduction of remaining deficiencies, rather than focusing on the legal nuances of protecting audits and restricting the sharing of those audits with other entities in the workplace.

We have spent a considerable amount of time reviewing the amended version of the bill, and, as you requested, we have prepared several amendments which we believe further the goal of promoting voluntary corrective action and increased compliance, while reducing the expenditure of resources -- private and public -- on unproductive regulatory command-and-control and associated litigation to compel compliance. I have attached the four proposed amendments we would like the Judiciary Committee to consider when

it hears SB 41. Included with the proposed amendments is a brief statement of our reasoning for each of the suggested changes. If you have any questions regarding these proposed amendments, or the bill itself, please give me a call.

I plan to travel to Juneau to participate in the Judiciary Committee's hearings on SB 41. Please let me know when you will be able to hear the bill. I look forward to seeing you soon.

Sincerely,

Randy Ruedrich

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

Attachments (two pages)

AMENDMENT 1

Page 5, line 16: Delete the word "or" and insert new section 09.25.455(b)(2)(E) reading as follows:

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

Page 11, line 22: Revise section 09.25.490(a)(8) to read as follows:

"(8) 'owner or operator' means a person who owns or operates a regulated facility, operation or property, *including without limitation, a person who, as an independent contractor, performs services at or in connection with a regulated facility, operation or property.*"

COMMENT: This amendment would enable an independent contractor, such as a drilling contractor, who performs services at a regulated facility owned and operated by another entity, such as an oil and gas operator, to disclose its EHS audit to the facility owner/operator under a confidentiality agreement, and vice versa, without either party thereby waiving the privilege for its audit report. The amendment will enable contracting parties to make reciprocal disclosures of their EHS reports so as to assure themselves of each other's EHS compliance, without vitiating the privilege. This would promote the self-auditing that the legislation seeks to encourage.

AMENDMENT 2

Page 5, line 25, delete subsection 09.25.460(a)(1) and renumber accordingly.

COMMENT: Under section 09.25.460(a)(1), there is no privilege for any part of an audit report that contains "objective facts." Inevitably, however, an EHS audit must develop, discuss and evaluate "objective facts" in order to detect and correct EHS violations. For example, if an EHS audit led the owner/operator to discover an unauthorized discharge to the environment, that would be an "objective fact" which would need to be discussed and evaluated in the report. Under the current language of the bill, this "objective fact" would appear to be unprivileged and subject to discovery and admissible against the owner/operator, even if it is discussed in the context of self-evaluation and analysis. Unless deleted, the "objective facts" exception would largely nullify the privilege established in section 09.25.450.

AMENDMENT 3

Page 7, line 6, revise section 09.25.475(a) to read as follows:

"(a) Except as provided by this section, an owner or operator who makes a voluntary disclosure of a violation of an environmental or health and safety law, *or of facts that constitute or may constitute such violation,* is immune from an administrative or civil penalty for the violation disclosed, ..."

COMMENT: The current language requires the owner or operator to disclose a "violation" of an EHS law, i.e., to admit that a violation has occurred at the time of making the disclosure. To make such an admission would be problematic because a disclosing party cannot be certain at the time of disclosure that it will qualify for immunity. For example, there would be no immunity if a court subsequently found a failure to adequately mitigate the violation under section 09.25.480. This uncertainty may chill the self-audit and disclosure process. The proposed amendment would create the desired incentive for an owner or operator to make full disclosure, without having also to admit that the facts disclosed constitute an EHS violation.

AMENDMENT 4

Page 9, line 17: Revise section 09.25.480(a)(2) to read as follows:

"(2) the offense 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 *its failure to have in place systems reasonably designed to prevent such offenses*~~lack of prevention systems~~ contributed materially to the occurrence of the violation."

COMMENT: If a company's manager or agent knowingly or intentionally commits an EHS violation, it is axiomatic that there was a "lack of prevention systems." The bill language would effectively make a company an absolute guarantor that its management and agents will not intentionally or knowingly violate EHS laws. This is not realistic, especially where the violations are willful. The amended language requires a company to have in place internal systems and procedures that are reasonably capable of preventing a manger or agent from knowingly violating the law, while recognizing that it is impossible always to anticipate or control the actions of a rogue employee.

Regional Citizens' Advisory Council / "Citizens promoting environmentally safe operation of the Alyeska terminal and associated tankers."
☑ In Anchorage: 750 W. 2nd Ave., Suite 100 / Anchorage, Alaska 99501-2168 / (907) 277-7222 / FAX (907) 277-4523
☐ In Valdez: 154 Fairbanks Dr. / P.O. Box 3089 / Valdez, Alaska 99686 / (907) 835-5957 / FAX (907) 835-5926

Feb. 21, 1997

Senator Loren Leman
Senator Robin Taylor, Chairman
Senate Judiciary Committee
Alaska State Legislature

Re: SB 41 - Environmental self-audits

Dear Senators Leman and Taylor:

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

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

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

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

We suggest instead that the bill prohibit agencies from initiating civil or administration litigation based *solely* on an environmental audit report. This is the provision used by the EPA in its policy and it makes much more sense. It ensures both fairness to the regulated entity and appropriate protections to the public.

We suggest additional changes to improve the bill:

• Add more precision to the language of the standards. As written, the bill is very vague. For example, disclosure of a violation must occur

PUBLIC COMMENT

"promptly." The EPA policy requires disclosure within 10 days. There are numerous other instances in the bill where standards are vague and open to broad interpretation.

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

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

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

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

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

Sincerely,

Louis "Tex" Edwards, President

cc: Senator Drue Pearce
Senator Sean Parnell
Senator Georgianna Lincoln
Senator John Torgerson
Rep. Gene Kubina
Rep. Alan Austerman
Rep. Gary Davis
RCAC Board of Directors
Paul Richards, Alyeska Pipeline Service Co.
Senator Mike Miller
Senator Johnny Ellis
Senator Jerry Mackie
Senator Jerry Ward
Rep. Mark Hodgins
Rep. Gail Phillips
Governor Tony Knowles

Alaska Environmental Lobby, Inc.

P.O. Box 22151 Juneau, Alaska 99802

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SB 41: Twentieth Legislature

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

While the Alaska Environmental Lobby whole-heartedly supports industry's efforts towards voluntarily compliance with environmental and health/safety regulations, we strongly oppose SB 41. Achieving compliance with regulations will require industry and government to work together. However, the broad language of SB 41 cripples our ability to enforce protection of Alaska's environment and public welfare. This legislation greatly obstructs efforts to find the balance between incentives for responsible monitoring and effective enforcement of regulations. The Alaska Environmental Lobby opposes SB 41 because:

- This is a bill of secrecy. It would keep information vital to the public's health and safety hidden from review by the agencies we depend upon to enforce our health and safety laws and from the legal system we depend upon to remedy violations of these laws. It limits employees' right to know. It limits the right to know of property owners near to potentially polluting industries. This bill allows secrecy to replace corporate responsibility and accountability.

- This is a bill of amnesty to industries that conceal or condone noncompliance. Immunity from civil and administrative penalties is bad public policy and effectively rewards non-compliance. Non-compliance can often result in economic gain. If a violation results in an economic gain over a non-violator, attempts should be made to recover the economic gain. Additionally, penalties and fines are the main tools that regulators have to encourage compliance. This bill lets crimes go unpunished and encourages violators to profit at the expense of law-abiding competitors.

- This is a full-employment bill for attorneys. This bill will create more confusion, litigation and expense regarding the enforcement of regulations. Many questionable aspects of this bill will only be answered during litigation. The "construed broadly" language in the definitions will pull in all manner of federal, state, and municipal laws.

Environmental and health/safety regulations are passed out of necessity: industry has a less than admirable record of self-regulating. The public's health and safety must continue to be protected, particularly in today's heated competitive climate when industry is more likely to cut corners for economic advantage.

2/24/97

Susan E. Schrader,
Executive Director

ADDITIONAL INFORMATION FOR SB41

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TESTIMONY ON SB 41
before the Senate Judiciary Committee
February 24, 1997

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

Thank you for this opportunity to testify today on SB 41. My name is Riki Ott. I am the Vice-President and co-founder of the Alaska Forum for Environmental Responsibility, a citizen's organization based in Valdez.

The Alaska Forum's mission is to hold industry and government accountable to the laws designed to protect worker safety, public health and the environment in Alaska. One way we achieve our mission is by protecting the rights of conscientious workers to speak the truth about activities that threaten worker safety public health and the environment without fear of reprisals. Why? Because we believe that conscientious workers are the first line of defense against environmental degradation and threats to worker safety and public health in Alaska.

The Alaska Forum supports the fundamental goal of SB 41: to foster compliance with worker safety, public health and environmental laws by providing incentives for regulated entities to voluntarily find, disclose and correct violations of these laws. But SB 41, as written, will not achieve this goal. We oppose SB 41 for two reasons.

First, SB 41 is bad public policy. I want to emphasize two criticisms of this bill already made by others here today:

- **SB 41 replaces corporate responsibility and accountability with secrecy.**

  SB 41 would keep information vital to the protection of worker safety, public health and the environment hidden from review by the agencies we depend upon to enforce the law and the legal system we depend upon to remedy violations of the law. It would limit the right to know of private property owners near polluting industries. And it would limit the public's ability to learn the truth about corporate behavior.

- **Rather than providing incentives for compliance, SB 41 effectively rewards noncompliance by providing immunity from all civil and administrative penalties.**

  Penalties and fines are the primary tools that regulators have to foster compliance. Leniency in determining penalties and fines for self-discovered and immediately reported violations makes sense -- it provides a clear incentive to comply. But SB 41 goes much farther. The bill's vague language and broad definitions eliminates civil and administrative penalties for all violations which are self-discovered and "promptly" self-disclosed to the appropriate state agency.

The second reason the Alaska Forum opposes SB 41 is because the bill will greatly reduce the already limited ability of workers to defend their right to speak the truth in the workplace without fear of reprisals. Over the last several years, the Alaska Forum has worked with dozens of concerned workers who have taken great personal and professional risks to speak the truth. These courageous individuals are hardworking, taxpaying Alaskans who, like you and I, are concerned about their home and their children's futures. Unfortunately, far too many lose their jobs, even their careers, because their employer do not want regulators or the public to hear the truth.

SB 41 would take away one of the primary legal tools a concerned employee has to defend herself from reprisals by her employer. That tool is access, through discovery, to a wide range of internal company documents for use in administrative and civil proceedings against an employer. It is often precisely these internal documents -- many of which would fall under SB 41's definition of a self-audit -- that are essential to prove an employer unfairly and illegally retaliated against an employee. Losing access to these documents would cripple the already weak protections for blowing the whistle under Alaska law. SB 41 sends a clear message to conscientious workers: remain silent.

A recent case in point is the story of a worker who blew the whistle on illegal waste disposal practices at the Endicott oil field. Doyon Drilling, a BP contractor at Endicott, instructed its workers to violate environmental regulations by putting toxic materials into the drilling wastes that were re-injected as a part of routine drilling operations. These secret and potentially damaging practices continued for at least two years and perhaps as long as five years. Doyon's response to the worker's disclosure was to dismiss as "jokes" death threats against he and his family by co-workers, shutdown his rig, lay him off and then eliminate his position.

Had the conscientious worker not spoken the truth, these violations would be continuing to this day. And had this worker not been able to force Doyon to disclose the findings of what SB 41 would call a self-audit, he might have lost his whistelblower case against Doyon. Not only would he have sacrificed his twenty-two year career in the oil industry but he, his wife and his children would have been ruined financially. Such an outcome to would have sent a clear and chilling message to other conscientious workers: silence is your only option.

Finally, self-audits make good business sense -- they improve the bottom-line by identifying and correcting compliance and other problems early. That is why many companies across the nation and in Alaska already conduct self-audits without laws that grant them immunity and privilege. This is true even in Alaska: as the Alaska Oil and Gas Association's January 1997 position paper on SB 41 points out, the majority of its members already "conduct self-audits as a means of ensuring compliance" without SB 41. Why then does Alaska need the secrecy of SB 41?

If the Legislature is serious about fostering self-discovery and voluntary disclosure and correction of violations of worker safety, public health and environmental laws, SB 41 is not the answer. A better approach would be a very simple bill that provides clear incentives through leniency for self disclosure and correction, that narrowly and explicitly defines the time window within which self-disclosure must occur (US EPA's policy uses 10 days), and contains no secrecy provisions.

The Alaska Forum opposes SB 41. The essence of our message is this: To leniency for self-discovery and self-disclosure, we say "Yes!" But to secrecy and worker silence we say "No!"

Thank you.

TESTIMONY OF RANDY RUEDRICH, CHAIRMAN OF THE ALASKA CHAPTER OF THE INTERNATIONAL ASSOCIATION OF DRILLING CONTRACTORS BEFORE THE SENATE JUDICIARY COMMITTEE ON SENATE BILL NO. 41

Good afternoon Mr. Chairman. My name is Randy Ruedrich, and I am pleased to appear here today in my capacity as Chairman of the Alaska Chapter of the International Association of Drilling Contractors ("IADC") to testify in support of SB 41, a bill to establish a new privilege for voluntary health, safety and environmental self-audits, and a qualified immunity for conditions that are discovered and reported in the course of these audits.

The IADC believes that the "self-audit" concept, as embodied in SB 41, is one that deserves favorable consideration from the Legislature this session; and we feel that, as introduced and amended by the Labor and Commerce Committee, this bill represents a good start toward the goal of developing a responsible, cost-effective incentive program that encourages continued improvements in industries' record of compliance with health, safety and environmental laws.

Since the bill was passed from the Labor and Commerce Committee, we have spent a considerable amount of time reviewing the amended version of the bill, and we have prepared several amendments which we believe further the goal of promoting voluntary corrective action and increased compliance, while reducing the expenditure of resources -- public and private -- on unproductive regulatory command-and-control and associated litigation to compel compliance.

One concern the IADC has with the current version of the bill relates to situations where a drilling contractor causes a health and safety and environmental audit to be prepared of the drilling contractor's operations. The bill allows disclosure of audit reports in certain circumstances without waiving the privilege. However, we are concerned that

the bill may not cover an exchange between persons who jointly operate a facility, i.e., persons who are responsible for different areas, operations or processes at a facility. For example, the bill language may not cover an independent contractor's disclosure of an audit of its own operations at a shared facility to the overall owner or operator of the facility. This deficiency would discourage a practice which otherwise is becoming an increasingly common and salutary feature of the drilling operator-drilling contractor relationship in Alaska. The new "self audit" privilege should be made expressly applicable to these disclosures. This will enable operators and drilling contractors to engage in aggressive self-evaluation and to work closely together to identify remaining opportunities to improve their performance.

It should be emphasized that in Alaska, owners of drilling rigs have been focusing on improving their health and safety records for nearly three decades. When I testified before the Senate labor and Commerce Committee last month, I shared with the Committee some statistics which demonstrate the improvements our industry has made in the area of worker safety. I would like to recite these numbers again for you here today because, first, we are very proud of our accomplishments in th. area; but more importantly, these numbers are solid evidence of our industry's continuing commitment to provide the safest possible workplace for our employees.

In the mid-1970's, the industry typically experienced approximately 25 lost time accidents per 100 man years worked. In the early 1980's, the number of lost time accidents had been reduced to the upper teens per 100 man years. By 1988, we were seeing less than ten lost time accidents per 100 man years. With our industry's continuing effort to improve the workplace, and to train people to operate safely and take an active role in eliminating hazards in the workplace, in 1996, Alaska drilling contractors experienced less than two lost time accidents per 100 man years worked.

Our industry has made similar strides on the environmental side. During the 1970's and early 1980's, rigs discharged over 1000 barrels of fluids per day to the surface

environment. In the late 1980's, all drilling rigs were converted to closed systems, and the industry ceased using surface reserve pits thereby resulting in significant reduction in the amount of fluids discharged to the surface. During the 1990's, carefully developed fluid transfer policies were established; and, as an example of the progress made in a few short years, my company, Doyon Drilling, spilled on average less than a quart of fluids per day in 1996 while handling approximately four million gallons of fluid per day.

With that degree of progress, we have seen may policies and practices evolve -- including the practice of developing and implementing health, safety and environmental plans in a highly integrated manner. It is our intent to continue to improve. But there are artificial risks associated with any company's or industry's decision to engage in health and safety or environmental auditing or its operations. Alaska's businesses need to be able to conduct intensive and searching inquiries into their practices, operations and policies -- provided that they are also committed to correcting any deficiency they may find -- without having to worry that an enforcement agency or other litigant will use the results of such inquiries against them.

For this reason we find SB 41 extremely beneficial in that it allows us to concentrate on the reduction of the remaining deficiencies in the system, rather than focusing on the legal nuances of protecting audits and restricting the sharing of those with other entities in the workplace. Health and safety and environmental protection will be enhanced by this legislation. This bill would require a company to correct any deficiencies that might be discovered in order to preserve the audit privilege, and creates strong incentives for making sure that adequate internal policies are in place to ensure compliance.

We have developed suggested amendments which address our specific concerns with the bill, as well as other proposed amendments which we believe generally strengthen the bill. The four amendments we propose should be included in the bill packet given to each member of the Committee by staff. Included with the proposed amendments is a brief statement of our reasoning for each of the suggested changes. If the Committee has any

questions regarding these proposed amendments, or the bill itself, I would be happy to address them at this time.

THE FOLLOWING PAGES
WERE TREATED AS A UNIT
IN THE ORIGINAL FILE

DEPARTMENT OF LABOR CONCERNS REGARDING:

CSSB 41 ENVIRONMENTAL/HEALTH AND
SAFETY AUDITS

INDEX

REFERENCE DOCUMENTS

1. Two fax cover sheets and copy of U.S. House of Representatives bill 1047, Federal Self Audit Bill.

2. Fax cover sheet and Federal Law 29 USC Section 667, State Jurisdiction and Plans.

3. Fax cover sheet and copy of US 29 CFR Part 1906, Consultation Agreements.

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DIV. OF LABOR STANDARDS & SAFETY

DEPARTMENT OF LABOR

FROM: TOBY N. STEINBERGER

ASSISTANT ATTORNEY GENERAL

NUMBER OF PAGES INCLUDING THIS SHEET: 13

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104TH CONGRESS
1ST SESSION

H. R. 1047

To provide under Federal law a limited privilege from disclosure of certain information acquired pursuant to a voluntary environmental self-evaluation and, if such information is voluntarily disclosed, for limited immunity from penalties.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 24, 1995

Mr. HEFLEY (for himself, Mr. HYDE, Mr. SCHAEFER, Mr. CRAPO, Mr. ALLARD, Mr. DELAY, and Mr. YOUNG of Alaska) introduced the following bill; which was referred to the Committee on the Judiciary and, in addition, to the Committees on Commerce, Transportation and Infrastructure, and Agriculture, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To provide under Federal law a limited privilege from disclosure of certain information acquired pursuant to a voluntary environmental self-evaluation and, if such information is voluntarily disclosed, for limited immunity from penalties.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Voluntary Environmental Self-Evaluation Act".

SEC. 2. FINDINGS.

Congress finds that—

(1) enhanced and efficient protection of public health and welfare under Federal environmental laws depends principally on voluntary compliance by the general public, rather than enforcement;

(2) both a limited privilege from disclosure and a limited expansion of the protection of members of the general public who voluntarily disclose information as a result of a voluntary environmental self-evaluation is necessary to encourage voluntary compliance with Federal environmental laws and to protect public health and welfare; and

(3) the protection referred to in paragraph (2) will not inhibit the carrying out of regulatory authority that is mandatory under Federal environmental laws by officials who are entrusted with the duty of protecting the environment of the United States.

SEC. 3. DEFINITIONS.

As used in this Act:

(1) ADMINISTRATOR.—The term "Administrator" means the Administrator of the Environmental Protection Agency.

(2) ENTITY.—The term "entity" means a unit of State or local government.

(3) FEDERAL AGENCY.—The term "Federal agency" has the meaning provided the term "agency" under section 551 of title 5, United States Code.

(4) FEDERAL ENVIRONMENTAL LAW.—The term "Federal environmental law"—

(A) means—

(i) the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136 et seq.);

(ii) the Toxic Substances Control Act (15 U.S.C. 2601 et seq.);

(iii) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.);

(iv) title XIV of the Public Health Service Act (commonly known as the "Safe Drinking Water Act") (42 U.S.C. 300f et seq.);

(v) the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.);

(vi) the Clean Air Act (42 U.S.C. 7401 et seq.);

(vii) the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.);

(viii) the Emergency Planning and Community Right-To-Know Act of 1986 (42 U.S.C. 11001 et seq.):

(ix) the Oil Pollution Act of 1990 (33 U.S.C. 2701 et seq.):

(x) the Noise Control Act of 1982 (42 U.S.C. 4901 et seq.); and

(xi) the Pollution Prevention Act of 1990 (42 U.S.C. 13101 et seq.):

(B) includes any regulation issued under a law listed in subparagraph (A); and

(C) includes the terms and conditions of any permit issued under a law listed in subparagraph (A).

(5) VOLUNTARY DISCLOSURE.—The term "voluntary disclosure" means the disclosure of information related to a voluntary environmental self-evaluation with respect to which the protections provided under this Act apply.

(6) VOLUNTARY ENVIRONMENTAL SELF-EVALUATION.—The term "voluntary environmental self-evaluation" means an assessment, audit, investigation or review that is—

(A) initiated by a person or entity:

(B) carried out by the person or entity, or a consultant employed by the person or entity, for the express purpose of carrying out the assessment, audit, or review; and

(C) carried out to determine whether the person or entity is in compliance with Federal environmental laws (including any permit issued under a Federal environmental law).

SEC. 4. ADMISSIBILITY OF REPORTS, FINDINGS, OPINIONS, OR OTHER COMMUNICATIONS.

(a) IN GENERAL.—Subject to subsection (b) and notwithstanding any other provision of law, a report, finding, opinion, or other communication of a person or entity related to, and essentially constituting a part of, a voluntary environmental self-evaluation that is made in good faith shall not be admissible evidence in any legal action or administrative procedure under Federal law and shall not be subject to any discovery procedure under Federal law, unless—

(1) the person or entity that initiated the self-evaluation expressly waives the right of the person or entity to exclude from the evidence or procedure material subject to this section; or

(2) after an in camera hearing, the appropriate Federal court determines that—

(A)(i) the report, finding, opinion, or other communication indicates noncompliance with a Federal environmental law; and

(ii) the person or entity failed to initiate efforts to achieve compliance with the law within a period of time that is reasonable and that is adequate to achieve compliance (including submitting an appropriate permit application);

(B) compelling circumstances—

(i) make it necessary to admit the environmental audit report, finding, opinion, or other communication into evidence; or

(ii) necessitate that the environmental audit report, finding, opinion, or other communication be subject to discovery procedures;

(C) the person or entity is asserting the applicability of the exclusion under this subsection for a fraudulent purpose; or

(D) the environmental audit report, finding, opinion, or other communication was prepared for the purpose of avoiding disclosure of information required for an investigative, administrative, or judicial proceeding that, at the

time of preparation, was imminent or in progress.

(b) EXCLUSIONS.—Subsection (a) shall not apply to—

(1) a document or other information required to be developed, maintained, or reported pursuant to a Federal environmental law;

(2) a document or other information required to be available to a Federal agency or a State agency designated to carry out a regulatory activity pursuant to a Federal environmental law;

(3) information obtained by a Federal agency or State agency referred to in paragraph (2) through observation, sampling, or monitoring; or

(4) information obtained by a Federal agency or State agency referred to in paragraph (2) through an independent source.

SEC. 5. TESTIMONY.

Notwithstanding any other provision of law, a person or entity, including any officer or employee of the person or entity, that performs a voluntary environmental self-evaluation may not be required to give testimony in a Federal court or an administrative proceeding of a Federal agency without the consent of the person or entity concerning the voluntary environmental self-evaluation, in-

eluding an environmental audit report, finding, opinion, or other communication with respect to which section 3(a) applies.

SEC. 6. DISCLOSURES.

(a) IN GENERAL.—The disclosure of information relating to a Federal environmental law to the appropriate official of a Federal or State agency responsible for administering a Federal environmental law shall be considered to be a voluntary disclosure if—

(1) the disclosure of information arises out of a voluntary environmental self-evaluation;

(2) the person or entity that initiates the self-evaluation—

(A) ensures that the disclosure is made promptly after receiving knowledge of the information referred to in paragraph (1); and

(B) initiates an action to address the issues identified in the disclosure—

(i) within a reasonable period of time after receiving knowledge of the information; and

(ii) within a period of time that is adequate to achieve compliance with the requirements of the Federal environmental law that is the subject of the action (in-

cluding submitting an application for an applicable permit); and

(3) the person or entity that makes the disclosure provides any further relevant information requested, as a result of the disclosure, by the appropriate official of the Federal or State agency responsible for administering the Federal environmental law.

(b) INVOLUNTARY DISCLOSURES.—For the purposes of this Act, a disclosure of information to an appropriate official of a Federal or State agency responsible for administering a Federal environmental law shall not be considered to be a voluntary disclosure if the person or government entity making the disclosure has been found by a Federal or State court to have committed a pattern of significant violations of Federal or State laws, or orders on consent, related to environmental quality, due to separate and distinct events giving rise to the violations, during the 3-year period prior to the date of disclosure.

(c) PRESUMPTION OF APPLICABILITY.—If a person or entity makes a disclosure other than a disclosure referred to in subsection (b) of a violation of a Federal environmental law to an appropriate official of a Federal or State agency responsible for administering the Federal environmental law—

(1) there shall be a presumption that the disclosure is a voluntary disclosure, if the person or entity provides information supporting a claim that the information is a voluntary disclosure at the time the person or entity makes the disclosure; and

(2) until such time as the presumption is rebutted, the person or entity shall be immune from any administrative, civil, or criminal penalty for the violation.

(d) REBUTTAL OF PRESUMPTION.—

(1) IN GENERAL.—The head of a Federal or State agency described in subsection (c) shall have the burden of rebutting a presumption established under such subsection. If the head of the Federal or State agency fails to rebut the presumption pursuant to this subsection—

(A) the head of the Federal or State agency may not assess an administrative penalty against a person or entity described in subsection (c) with respect to the violation by the person or entity and may not issue a cease and desist order for the violation; and

(B) no Federal or State court may assess a civil penalty or criminal negligence penalty against the person or entity for the violation.

(2) REBUTTAL.—In order to rebut a presumption referred to in subsection (c), the appropriate official of a Federal or State agency responsible for administering the Federal environmental law that is the subject of a violation referred to in such subsection shall be required to demonstrate, on the basis of the factors described in subsection (a), and to the satisfaction of the head of the Federal or State agency, that the disclosure is not a voluntary disclosure. If the disclosure is made directly to the head of the Federal or State agency, the head of the Federal or State agency shall apply the factors described in subsection (a) in rebutting the presumption. A decision made by the head of the Federal agency under this paragraph shall constitute a final agency action.

(e) STATUTORY CONSTRUCTION.—Except as expressly provided in this section, nothing in this section is intended to affect the authority of a Federal or State agency responsible for administering a Federal environmental law to carry out any requirement of the law associated with information disclosed in a voluntary disclosure.

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DIV. OF LABOR STANDARDS & SAFETY

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2

FROM: TOBY N. STEINBERGER

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in the government for civil penalties under this chapter enforceable in an administrative agency where there is no jury trial. Atlas Roofing Co., Inc. v. Occupation Safety and Health Review Commission, 1977, 97 S.Ct. 1261, 430 U.S. 442, 51 L.Ed.2d 464.

Procedures of the Commission in issuing citations and imposing penalties do not violate U.S.C.A.Const. Amend. 7. Penn-Dixie Steel Corp. v. Occupational Safety and Health Review Commission, C.A.7, 1977, 553 F.2d 1078.

Provision of this section permitting assessment of civil penalty of up to $1,000 for each nonserious violation of this chapter does not impose criminal penalty and jury trial is not required under U.S.C.A.Const. Amend. 6 in order to impose such penalty. Mohawk Excavating, Inc. v. Occupational Safety and Health Review Commission, C.A.2, 1977, 549 F.2d 859.

Proceeding looking to imposition of sanction for violation of regulations promulgated under authority of this chapter is not an action at common law within meaning of U.S.C.A.Const. Amend. 7 and, hence, no jury trial right arises. Clarkson Const. Co. v. Occupational Safety and Health Review Commission, C.A.10, 1976, 531 F.2d 451.

Civil penalty provisions of this chapter were neither inconsistent with jury trial guaranty in criminal cases under U.S.C.A.Const. Amend. 6 nor were they inconsistent with jury trial guaranty in civil cases under U.S.C.A.Const. Amend. 7. Bloomfield Mechanical Contracting, Inc. v. Occupational Safety and Health Review Commission, C.A.3, 1975, 519 F.2d 1257.

The "civil penalties" provided for violations of this chapter are regulatory rather than punitive notwithstanding contention that penalties are criminal in nature and thus entitle an employer to such rights as trial by jury, proof beyond a reasonable doubt, and confrontation of witnesses. Beall Const. Co. v. Occupational Safety and Health Review Commission, C.A.8, 1974, 507 F.2d 1041.

13. Questions considered

Court of Appeals has jurisdiction to consider constitutionality of this chapter when appeal is taken pursuant to provision of this section permitting assessment of civil penalty of not more than $10,000 for each violation. Mohawk Excavating, Inc. v. Occupational Safety and Health Review Commission, C.A.2, 1977, 549 F.2d 859.

24. Interest

Penalty imposed under this chapter does not fall outside general rule proscribing prejudgment interest on penalties. Marshall v. Painting by C.D.C., Inc., D.C.N.Y.1980, 497 F.Supp. 653.

25. Admissibility of evidence

Administrative law judge did not improperly exclude evidence that employer was being harassed by Secretary of Labor's alleged selective enforcement of this chapter on ground that such evidence went to reasonableness of proposed penalties, since Secretary's enforcement actions were not relevant to the abatement dates or penalty assessments. Turner Communications Corp. v. Occupational Safety and Health Review Commission, C.A.5, 1980, 612 F.2d 941.

President of pipe-laying company was not only individual whose state of mind would be relevant in determining whether corporation violated this chapter by willfully failing to shore or slope trench prior to cave-in resulting in death of workman, and corporation could be found guilty based on acts, conduct and inferentially the states of mind of superintendent, foreman and backhoe operator, all of whom had been given authority. U.S. v. Dye Const. Co., C.A.Colo.1975, 510 F.2d 78.

26. Sufficiency of evidence—Generally

Whether the Secretary's proof is adequate to meet burden placed upon him in proving serious violation of this chapter must necessarily rest in good discretion of the Commission as trier of facts, and must necessarily vary with facts of each case and indeed with capabilities and range of proof in each case. Usery v. Hermitage Concrete Pipe Co., C.A.6, 1978, 584 F.2d 127.

27. —— Miscellaneous cases

Evidence that employer had failed to install protective barriers on dies which were in use and had failed to install an adequate barrier on the die which caused the accident in question sustained determination that the employer's violation was wilful. A. Schonbek & Co., Inc. v. Donovan, C.A.2, 1981, 646 F.2d 799.

28. Findings

Fact that administrative law judge did not expressly indicate finding that employer knew or could have known, with the exercise of reasonable diligence, of hazardous practice was not a fatal flaw to finding of serious violation of this chapter, where his opinion indicated that he believed employer should have known of the practice. Austin Bldg. Co. v. Occupational Safety and Health Review Commission, C.A.10, 1981, 647 F.2d 1063.

Findings of Administrative Law Judge, who should have indicated evidentiary basis for his conclusion that possible accumulation of excess fumes and smoke due to inadequate ventilation in employee's work space created substantial probability of death or serious physical injury to him, and that employer with reasonable diligence could have known of violation, but who made no such findings and simply concluded that violation was serious, did not comport with minimum requirements of Administrative Procedure Act, section 551 et seq. and 701 et seq. of Title 5, and thus were inadequate to sustain charges that employer was in serious violation of regulations governing ventilation and exposure of welders to fluoride compounds. Bethlehem Steel Corp. v. Occupational Safety and Health Review Commission, C.A.3, 1979, 607 F.2d 1069.

Exoneration of employer by Commission of nonliability of the employer based on ground that no evidence indicated that employer was on notice of its truck driver's lack of common sense and judgment in operating boom on truck near high voltage lines and that there was no notice to employer that driver would choose such obviously dangerous position from which to attempt to unload could not be sustained in absence of any factual finding as to employer's safety program which was the crux of case. Brennan v. Butler Lime & Cement Co., C.A.7, 1975, 520 F.2d 1011.

§ 667. State jurisdiction and plans

(a) Assertion of State standards in absence of applicable Federal standards

Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.

(b) Submission of State plan for development and enforcement of State standards to preempt applicable Federal standards

Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health

standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

(c) Conditions for approval of plan

The Secretary shall approve the plan submitted by a State under subsection (b) of this section, or any modification thereof, if such plan in his judgment—

(1) designates a State agency or agencies as the agency or agencies responsible for administering the plan throughout the State,

(2) provides for the development and enforcement of safety and health standards relating to one or more safety or health issues, which standards (and the enforcement of which standards) are or will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under section 655 of this title which relate to the same issues, and which standards, when applicable to products which are distributed or used in interstate commerce, are required by compelling local conditions and do not unduly burden interstate commerce,

(3) provides for a right of entry and inspection of all workplaces subject to this chapter which is at least as effective as that provided in section 657 of this title, and includes a prohibition on advance notice of inspections,

(4) contains satisfactory assurances that such agency or agencies have or will have the legal authority and qualified personnel necessary for the enforcement of such standards,

(5) gives satisfactory assurances that such State will devote adequate funds to the administration and enforcement of such standards,

(6) contains satisfactory assurances that such State will, to the extent permitted by its law, establish and maintain an effective and comprehensive occupational safety and health program applicable to all employees of public agencies of the State and its political subdivisions, which program is as effective as the standards contained in an approved plan,

(7) requires employers in the State to make reports to the Secretary in the same manner and to the same extent as if the plan were not in effect, and

(8) provides that the State agency will make such reports to the Secretary in such form and containing such information, as the Secretary shall from time to time require.

(d) Rejection of plan; notice and opportunity for hearing

If the Secretary rejects a plan submitted under subsection (b) of this section, he shall afford the State submitting the plan due notice and opportunity for a hearing before so doing.

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ubmitted under subsection (b) of this submitting the plan due notice and doing.

(e) Discretion of Secretary to exercise authority over comparable standards subsequent to approval of State plan; duration; retention of jurisdiction by Secretary upon determination of enforcement of plan by State

After the Secretary approves a State plan submitted under subsection (b) of this section, he may, but shall not be required to, exercise his authority under sections 657, 658, 659, 662, and 666 of this title with respect to comparable standards promulgated under section 655 of this title, for the period specified in the next sentence. The Secretary may exercise the authority referred to above until he determines, on the basis of actual operations under the State plan, that the criteria set forth in subsection (c) of this section are being applied, but he shall not make such determination for at least three years after the plan's approval under subsection (c) of this section. Upon making the determination referred to in the preceding sentence, the provisions of sections 654(a)(2), 657 (except for the purpose of carrying out subsection (f) of this section), 658, 659, 662, and 666 of this title, and standards promulgated under section 655 of this title, shall not apply with respect to any occupational safety or health issues covered under the plan, but the Secretary may retain jurisdiction under the above provisions in any proceeding commenced under section 658 or 659 of this title before the date of determination.

(f) Continuing evaluation by Secretary of State enforcement of approved plan; withdrawal of approval of plan by Secretary; grounds; procedure; conditions for retention of jurisdiction by State

The Secretary shall, on the basis of reports submitted by the State agency and his own inspections make a continuing evaluation of the manner in which each State having a plan approved under this section is carrying out such plan. Whenever the Secretary finds, after affording due notice and opportunity for a hearing, that in the administration of the State plan there is a failure to comply substantially with any provision of the State plan (or any assurance contained therein), he shall notify the State agency of his withdrawal of approval of such plan and upon receipt of such notice such plan shall cease to be in effect, but the State may retain jurisdiction in any case commenced before the withdrawal of the plan in order to enforce standards under the plan whenever the issues involved do not relate to the reasons for the withdrawal of the plan.

(g) Judicial review of Secretary's withdrawal of approval or rejection of plan; jurisdiction; venue; procedure; appropriate relief; finality of judgment

The State may obtain a review of a decision of the Secretary withdrawing approval of or rejecting its plan by the United States court of appeals for the circuit in which the State is located by filing in such court within thirty days following receipt of notice of such decision a petition to modify or set aside in whole or in part the action of the Secretary. A copy of such petition shall forthwith be served upon the Secretary, and thereupon the Secretary shall certify and file in the court the record upon which the decision complained of was issued as provided in section 2112 of Title 28. Unless the court finds that the Secretary's decision in rejecting a proposed State plan or withdrawing his approval of such a plan is not supported by substantial evidence the court shall affirm the Secretary's decision. The judgment of the court shall be subject to review by the Supreme Court of

the United States upon certiorari or certification as provided in section 1254 of Title 28.

(h) Temporary enforcement of State standards

The Secretary may enter into an agreement with a State under which the State will be permitted to continue to enforce one or more occupational health and safety standards in effect in such State until final action is taken by the Secretary with respect to a plan submitted by a State under subsection (b) of this section, or two years from December 29, 1970, whichever is earlier.

(Pub.L. 91-596, § 18, Dec. 29, 1970, 84 Stat. 1608.)

Historical Note

References in Text. This chapter, referred to in subsec. (a), was in the original "this Act", meaning Pub.L. 91-596, Dec. 29, 1970, 84 Stat. 1590, as amended. For complete classification of this Act to the Code, see Short Title note set out under section 651 of this title and Tables volume.

Codification. Section 666 of this title, referred to in subsec. (c), was in the original section 17 of Pub.L. 91-596. Subsecs. (a) to (g) and (i) to (l) of such section 17 are classified to section 666 of this title. Subsec. (h) of such section 17 amended section 1114 of Title 18, Crimes and Criminal Procedure, and enacted note set out thereunder.

Effective Date. Section effective 120 days after Dec. 29, 1970, see section 34 of Pub.L. 91-596, set out as a note under section 651 of this title.

Legislative History. For legislative history and purpose of Pub.L. 91-596, see 1970 U.S. Code Cong. and Adm.News, p. 5177.

Cross References

Grants to States for administration and enforcement of programs contained in approved State plans, see section 672 of this title.
Loans by Secretary of Agriculture to assist farmers or ranchers in compliance with standards under an approved State plan, see section 1942 of Title 7, Agriculture.

West's Federal Forms

Enforcement and review of decisions and orders of administrative agencies, see § 851 et seq.
Supreme Court—
Jurisdiction on certificate, see § 321 et seq.
Jurisdiction on writ of certiorari, see § 221 et seq.

West's Federal Practice Manual

Coverage, government employees, state and local, see § 10407.
State plans, see § 10420.

Code of Federal Regulations

Approved state plans for enforcement of state standards, see 29 CFR 1952.1 et seq.
Procedures for—
Evaluation and monitoring of approved state plans, see 29 CFR 1954.1 et seq.
State agreements, see 29 CFR 1901.1 et seq.
Withdrawal of approval of state plans, see 29 CFR 1955.1 et seq.
State plans for development and enforcement of state standards—
Generally, see 29 CFR 1902.1 et seq.
Applicability to state and local government employees in states without approved private employee plans, see 29 CFR 1956.1 et seq.
Changes in, see 29 CFR 1953.1 et seq.

3

STATE OF ALASKA - DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
1031 W. 4th Ave., Ste. 200
Anchorage, Alaska 99501

FAX TRANSMITTAL SHEET

OUR FAX NUMBER (907) 258-4978

DATE: February 21, 1996 TIME: 1:21PM

TO: Al Dwyer FROM: Toby Steinberger
Attorney General's Office

COMPANY: Labor Standards & Safety

FAX #: 269-4915

NUMBER OF PAGES INCLUDING COVER SHEET 4

REMARKS: 29 CFR Ch. XVII (7-1-95 Edition) Part 1908 pp. 57, 63-64. Re: HB 199

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and that a party is entitled to summary decision. The hearing examiner may deny such motion whenever the moving party denies access to information by means of discovery to a party opposing the motion.

(d) Affidavits shall set forth such facts as would be admissible in evidence in a proceeding subject to 5 U.S.C. 556 and 557 and shall show affirmatively that the affiant is competent to testify to the matters stated therein. When a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of his pleading; his response must set forth specific facts showing that there is a genuine issue of fact for the hearing.

(e) Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the hearing examiner may deny the motion for summary decision or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

(f) The denial of all or any part of a motion for summary decision by the hearing examiner shall not be subject to interlocutory appeal to the Assistant Secretary unless the hearing examiner certifies in writing (1) that the ruling involves an important question of law or policy as to which there is substantial ground for difference of opinion, and (2) that an immediate appeal from the ruling may materially advance the ultimate termination of the proceeding. The allowance of such an interlocutory appeal shall not stay the proceeding before the hearing examiner unless the Assistant Secretary shall so order.

§ 1905.41 Summary decision.

(a) *No genuine issue of material fact.* (1) Where no genuine issue of a material fact is found to have been raised, the hearing examiner may issue an initial decision to become final 20 days after service thereof, unless, within such period of time any party has filed written exceptions to the decision. If any timely exception is filed, the hearing examiner shall fix a time for filing any objections to the exception and any supporting reasons. Thereafter, the Assistant Secretary, after consideration of the exceptions and any supporting briefs filed therewith and of any objections to the exceptions and any supporting reasons, may issue a final decision.

(2) An initial decision and a final decision made under this paragraph shall include a statement of:

(i) Findings and conclusions, and the reasons or bases therefor, on all issues presented; and

(ii) The terms and conditions of the rule or order made.

(3) A copy of an initial decision and a final decision under this paragraph shall be served on each party.

(b) *Hearings on issues of fact.* Where a genuine material question of fact is raised, the hearing examiner shall, and in any other case he may, set the case for an evidentiary hearing in accordance with subpart C of this part.

Subpart E—Effect of Initial Decisions

§ 1905.60 Effect of appeal of a hearing examiner's decision.

A hearing examiner's decision under this part shall not be operative pending a decision on appeal by the Assistant Secretary.

§ 1905.61 Finality for purposes of judicial review.

Only a decision by the Assistant Secretary shall be deemed final agency action for purposes of judicial review. A decision by a hearing examiner which becomes final for lack of appeal is not deemed final agency action for purposes of 5 U.S.C. 704.

PART 1906—ADMINISTRATION WITNESSES AND DOCUMENTS IN PRIVATE LITIGATION (RESERVED)

PART 1908—CONSULTATION AGREEMENTS

Sec.
1908.1 Purpose and scope.
1908.2 Definitions.
1908.3 Eligibility and funding.
1908.4 Offsite consultation.
1908.5 Requests and scheduling for onsite consultation.
1908.6 Conduct of a visit.
1908.7 Relationship to enforcement.
1908.8 Consultant specifications.
1908.9 Monitoring and evaluation.
1908.10 Cooperative Agreements.
1908.11 Exclusions.

AUTHORITY: Secs. 7, 21, Occupational Safety and Health Act of 1970 (29 U.S.C. 656, 670); Secretary of Labor's Order No. 9–83 (48 FR 35736).

SOURCE: 49 FR 25091, June 19, 1984, unless otherwise noted.

§ 1908.1 Purpose and scope.

(a) This part contains requirements for Cooperative Agreements between States and the Federal Occupational Safety and Health Administration under sections 7(c)(1) and 21(c) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.) under which OSHA will utilize State personnel to provide consultative services to employers. The service will be made available at no cost to employers to assist them in establishing effective occupational safety and health programs for providing employment and places of employment which are safe and healthful. The overall goal is to prevent the occurrence of injuries and illnesses which may result from exposure to hazardous workplace conditions and from hazardous work practices. The principal assistance will be provided at the employer's worksite, but offsite assistance may also be provided by telephone and correspondence, and at locations other than the employer's worksite, such as the consultation project offices. At the worksite, the consultant will, within the scope of the employer's request, evaluate the employer's program for providing employment and a place of employment which is safe and healthful, as well as identify specific hazards in the workplace, and will provide appropriate advice and assistance in establishing or improving the employer's safety and health program and in correcting any hazardous conditions identified.

(b) Assistance may include education and training of the employer, the employer's supervisors, and the employer's other employees as needed to make the employer self-sufficient in ensuring safe and healthful work and working

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ant must immediately notify the affected employees and the appropriate OSHA enforcement authority and provide the relevant information.

(2) An employer must also take the necessary action in accordance with the plan developed under §1908.6(a)(5) to eliminate or control employee exposure to any identified serious hazard. In order to demonstrate that the necessary action is being taken, an employer may be required to submit periodic reports, permit a followup visit, or take similar action.

(3) An employer may request, and the consultation manager may grant, an extension of the time frame established for correction of a serious hazard when the employer demonstrates having made a good faith effort to correct the hazard within the established time frame; shows evidence that correction has not been completed because of factors beyond the employer's reasonable control; and shows evidence that the employer is taking all available interim steps to safeguard the employees against the hazard during the correction period.

(4) If the employer fails to take the action necessary to correct a serious hazard within the established time frame or any extensions thereof, the consultation manager shall immediately notify the appropriate OSHA enforcement authority and provide the relevant information. The OSHA enforcement authority will make a determination, based on a review of the facts, whether enforcement activity is warranted.

(5) After correction of all serious hazards, the employer shall notify the consultation manager by written confirmation of the correction of the hazards, unless correction of the serious hazards is verified by direct observation by the consultant.

(g) *Written report.* A written report shall be prepared for each visit which results in substantive findings or recommendations, and shall be sent to the employer. The timing and format of the report shall be approved by the Assistant Secretary. The report shall restate the employer's request and describe the working conditions examined by the consultant; shall, within the scope of the request, evaluate the

employer's program for ensuring safe and healthful employment and provide recommendations for making such programs effective; shall identify specific hazards and describe their nature, including reference to applicable standards or codes; shall identify the seriousness of the hazards; and, to the extent possible, shall include suggested means or approaches to their correction. Additional sources of assistance shall also be indicated, if known, including the possible need to procure specific engineering consultation, medical advice and assistance, and other appropriate items. The report shall also include reference to the completion dates for the situations described in §1908.6(f) (1) and (2).

(h) *Confidentiality.* The consultant shall preserve the confidentiality of information obtained as the result of a consultative visit which contains or might reveal a trade secret of the employer.

(Approved by the Office of Management and Budget under control number 1218–0110)

[60 FR 35091, June 19, 1994, as amended at 54 FR 24333, June 7, 1989]

§ 1908.7 Relationship to enforcement.

(a) *Independence.* (1) Consultative activity by a State shall be conducted independently of any OSHA enforcement activity.

(2) The consultative activity shall have its own identifiable managerial staff. In States with Plans approved under section 18 of the Act, this staff will be separate from the managing of compliance inspections and scheduling.

(3) The identity of employers requesting onsite consultation, as well as the file of the consultant's visit, shall not be forwarded or provided to OSHA for use in any compliance inspection or scheduling activity, except as provided for in §1908.6(f) (1) and (4) and §1908.7(b)(4).

(b) *Effect upon scheduling.* (1) An onsite consultative visit already in progress will have priority over OSHA compliance inspections except as provided in §1908.7(b)(2). The consultant and the employer shall notify the compliance officer of the visit in progress and request delay of the inspection until after the visit is completed. An onsite consultative visit shall be considered in progress in relation to the working conditions, hazards, or situations covered by the request from the beginning of the opening conference through the end of the closing conference; except that for periods which exceed 30 days from the initiation of the opening conference, the RA may determine that the inspection will proceed. For working conditions, hazards, or situations not covered by the request, the onsite consultative visit shall be considered in progress only while the consultant is at the place of employment.

(2) The consultant shall terminate an onsite consultative visit already in progress where one of the following kinds of OSHA compliance inspections is about to take place:

(i) Imminent danger investigations;

(ii) Fatality/catastrophe investigations;

(iii) Complaint investigations;

(iv) Other critical inspections as determined by the Assistant Secretary.

(3) An onsite consultation visit may not take place while an OSHA enforcement inspection is in progress at the establishment. An enforcement inspection shall be deemed "in progress" from the time a compliance officer initially seeks entry to the workplace to the end of the closing conference. An enforcement inspection will also be considered "in progress" in cases where entry is refused, until such times as: the inspection is conducted; the RA determines that a warrant to require entry to the workplace will not be sought; or the RA determines that allowing a consultative visit to proceed is in the best interest of employee safety and health. An onsite consultative visit shall not take place subsequent to an OSHA enforcement inspection until a determination has been made that no citation will be issued, or if a citation is issued, onsite consultation shall only take place with regard to those citation items which have become final orders.

(4) When an employer requests and undergoes a consultative visit at an establishment covering all conditions and operations in the place of employment related to occupational safety and health; corrects all hazards that have been identified during the course

of the consultative visit within established time frames, and posts notice of their correction when such is completed; demonstrates to the consultant that certain core elements of an effective safety and health program are in effect, and that the remaining elements of an effective safety and health program will be implemented within a reasonable, established time frame; and agrees to request a consultative visit if major changes in working conditions or work processes occur which may introduce new hazards, the employer may, upon request, be exempt from a general schedule OSHA enforcement inspection for a period of one year from the end of the closing conference of the consultative visit. Between the time of election to participate in the process required to qualify for the exemption and the completion of the process, the employer must post a notice of such participation.

(5) When an employer requests consideration for an inspection exemption under §1908.7(b)(4), the provisions of §1908.6 (e)(7), (f)(3) and (f)(5) shall apply to other-than-serious hazards as well as serious hazards.

(c) *Effect upon enforcement.* (1) The advice of the consultant and the consultant's written report will not be binding on a compliance officer in a subsequent enforcement inspection. In a subsequent inspection, a compliance officer is not precluded from finding hazardous conditions, or violations of standards, rules or regulations, for which citations would be issued and penalties proposed.

(2) The hazard identification and correction assistance given by a State consultant, or the failure of a consultant to point out a specific hazard, or other possible errors or omissions by the consultant, shall not be binding upon a compliance officer and need not affect the regular conduct of a compliance inspection or preclude the finding of alleged violations and the issuance of citations, or constitute a defense to any enforcement action.

(3) In the event of a subsequent inspection, the employer is not required to inform the compliance officer of the prior visit. The employer is not required to provide a copy of the State consultant's written report to the compliance officer, except to the extent that disclosure of information contained in such a written report is required by 29 CFR 1910.20.

(4) If, however, the employer chooses to provide a copy of the consultant's report to a compliance officer, it may be used as a factor in determining the extent to which an inspection is required and as a factor in determining proposed penalties. When, during the course of a compliance inspection, an OSHA compliance officer identifies the existence of serious hazards previously identified as a result of a consultative visit, the Area Director shall have authority to assess minimum penalties if the employer is in good faith complying with the recommendations of a consultant after such consultative visit.

(Approved by the Office of Management and Budget under control number 1218–0110)

[49 FR 25094, June 19, 1984, as amended at 54 FR 21333, June 7, 1989]

§ 1908.8 Consultant specifications.

(a) *Number.* (1) The number of consultant positions which will be funded under a Cooperative Agreement pursuant to this part for the purpose of providing consultation to private sector employers will be determined by the Assistant Secretary on the basis of program performance, demand for services, industrial mix, resources available, and the recommendation of the RA, and may be adjusted periodically.

(2) States shall make efforts to utilize consultants with the safety and health expertise necessary to properly meet the demand for consultation by the various industries within a State. The RA will determine and negotiate a reasonable balance with the State on an annual basis.

(b) *Qualifications.* (1) All consultants utilized under Cooperative Agreements pursuant to this part shall be employees of the State, qualified under State requirements for employment in occupational safety and health. They must demonstrate adequate education and experience to satisfy the RA before assignment to work under an Agreement, and annually thereafter, that they meet the requirements set out in §1908.8(b)(3), and that they have the ability to perform satisfactorily pursu-

INDEX

FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. CSSB 41

Revision Date:
Title: Environmental & health/safety audits

Sponsor: Senator Leman
Requestor: Senate L&C

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

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
CHANGE IN REVENUE	(55.8)	(55.8)	(55.8)	(55.8)	(55.8)	(55.8)
FUND SOURCE #	1004	1004	1004	1004	1004	1004

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (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 — Phone: 465-4855
Division: Labor, Standards & Safety — Date: 2/11/97

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

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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.

Line 71000 - Personal Services		**103.3**
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
Line 72000 - Travel		**6.0**
Occupational Safety Compliance Officers		6.0
Line 73000 - Contractual Services		**194.3**
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
Line 74000 - Commodities		**1.0**
Office Supplies		1.0
Line 75000 - Equipment		**5.0**
Computer equipment & office furniture (FY98 One-time)		5.0
TOTAL		**309.6**

U.S. Department of Labor

Assistant Secretary for
Occupational Safety and Health
Washington, D.C. 20210

Initials	INFO	ACT
Comm	✓	
Deputy	✓	
Sp Ass't	✓	
Adm Asst		
Ex. Sec'y		
ASD		
ESD		
LRA		
[illegible]	✓	
WC Y		
[illegible]	✓	

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3

Tom Cashen, Commissioner
Alaska Department of Labor
Post Office Box 21149
Juneau, Alaska 99802-1149

Dear Commissioner Cashen:

Per your request, I am writing this letter concerning Alaska Senate Bill 41 regarding privileges and immunities related to disclosure of certain self-audits. CS SB 41

As you are aware, Acting Regional Administrator Richard Terrill sent you a letter on January 27 concerning the impact of this bill on the Federally-approved Alaska occupational safety and health State plan. I wish to reaffirm that the Occupational Safety and Health Administration (OSHA) strongly opposes grants of privileges and immunities of the kind contained in this bill. OSHA's position on this issue is clearly set forth in former Assistant Secretary Joseph Dear's November, 1995 testimony before a U.S. Senate committee concerning a comparable Federal bill which was never enacted. Under the Federal Occupational Safety and Health Act (the Act), OSHA has access to *all* employer records which pertain to the safety and health of employees, including records created by employer self-audits. No system of employer privileges and immunities such as in SB 41 has ever been applicable under the Act, and Federal court decisions make it clear that a self-audit privilege is not consistent with section 8 of the Act. To my knowledge, no other plan State has ever implemented a self-audit privilege.

OSHA is concerned about several major features of this bill that would adversely affect the Alaska State plan. The bill would create an evidentiary privilege enabling employers to withhold information usually relied upon by both Federal and State safety and health investigators in cases involving alleged willful violations as well as other circumstances. By requiring Alaska to go to court to get the most basic information currently obtainable under both State and Federal law, yet not allowing the State access to evidence to show the court that this information is needed, the bill creates a "catch 22" dilemma for the State. SB 41 would also create a testimonial privilege constraining personnel with the Alaska State plan (AKOSH) from interviewing persons concerning information related to a self-audit, or from compelling persons to testify in court or at a hearing concerning the audit report. Further, under SB 41 employers would receive immunity from a civil penalty for a violation voluntarily disclosed to AKOSH.

For these reasons, the employer privileges and immunities proposed in Alaska Senate Bill 41 would greatly limit Alaska's authority to investigate accidents and illnesses in the workplace, document their causes, and enforce job safety and health standards. This bill would thus significantly damage the credibility and effectiveness of Alaska's enforcement program. As you know, Congress has required the States with OSHA-approved State plans to maintain an

occupational safety and health program which is at least as effective as the Federal. Enactment of such a provision by the State would seriously undermine the continued approvability of Alaska's 18(e) occupational safety and health program, and may result in the withdrawal of Federal approval and funding for the Alaska program.

Sincerely,

Greg Watchman
Acting Assistant Secretary

cc: Richard S. Terrill, Acting Regional Administrator

MEMORANDUM

STATE OF ALASKA
DEPARTMENT OF LABOR
Labor Standards & Safety Division

TO: Dwight L. Perkins
Special Assistant to the Commissioner

DATE: February 12, 1997

FILE: CSSB41

PHONE: 465-4855

4

FROM: Alan W. Dwyer
Director

SUBJECT: DOL Concerns with CSSB41

The following are concerns LS&S have regarding the subject bill:

General Concerns:

It is our opinion that (1) Alaskan businesses have nothing to gain by the passage of Senate Labor & Commerce CSSB41 and (2) CSSB41 will undermine the Alaska Occupational Safety & Health (AKOSH) Enforcement program by limiting the department's access to employer safety audits and by obstructing the department in its mission to penalize employers who disregard safety rules.

This bill could cause the federal government to withdraw our exclusive safety and health inspection and enforcement jurisdiction, known as "18(e) certification".[1] In order to receive an 18(e) certification, the state must meet certain requirements, one of which is that its enforcement must be as effective as Federal OSHA's enforcement. If CSSB41 passes, our enforcement will no longer be as effective as Federal OSHA's enforcement since federal law does not give employers an audit privilege or grant employers immunity from citations. When an 18(e) certificated state is no longer as effective as Federal OSHA, Federal OSHA can withdraw the 18(e) certification and even withdraw enforcement funding.

It's important to realize the many years of hard work it took the department to finally receive its 18(e) certification in 1984. This was quite an accomplishment. We were the third state to receive it out of the fourteen who have it. We would hate to see Alaska be the first state to lose it.

We believe that Federal OSHA would not withdraw funding, at least at first. It's more likely that it will be forced, in cases where employers take advantage of the bill, to ignore or revoke AKOSH's 18(e) certification and take over individual cases. Consequently, we would no longer have exclusive jurisdiction and Federal OSHA and AKOSH would exercise concurrent jurisdiction in Alaska. Employers who assert the audit privilege or claim immunity will be dealing with Federal OSHA rather than AKOSH, and Federal OSHA would disregard our audit privilege and immunity law. There is no way to predict at what point Federal OSHA would withdraw our enforcement funding.

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[1] This would not affect maritime worker safety or federal employee safety which have always been federal jurisdiction.

I think that most people would agree that Alaskan businesses would, if given a choice, choose AKOSH over Federal OSHA. AKOSH is set up to deal with local concerns. Our inspectors, administrators, and board members are all Alaskans. If an employer wants to fight (contest) a citation, the Alaska Occupational Safety & Health Review Board holds a hearing. The Alaska Occupational Safety & Health Review Board consists of a representative from the Alaska public, Alaska industry and Alaska labor. The three board members meet with a hearing officer, who is also an Alaskan, to hear testimony and make a decision. Our Alaska court would hear an appeal from the Board's decision if the employer was dissatisfied with the decision. In contrast, if Federal OSHA were to conduct an investigation and issue a citation, the employer's contest of the citation would be decided by an administrative law judge from Seattle. If the employer was dissatisfied with the administrative law judge's decision, the federal OSHA Review Commission in Washington D.C. would hear the appeal and any further review would be by the federal court.

Privilege Concerns:

The audit privilege will prevent OSHA officers from gathering evidence to support citations, delay investigations, and may prevent the department from issuing citations within 180 days of the discovery of the violations, as required under AS 18.60.091(c). In addition, AKOSH is mandated by a written contract with Federal OSHA to operate its enforcement program according to strict federal guidelines which are monitored by the Federal OSHA on a quarterly basis. In order for AKOSH to comply with the contract, it must issue citations by following federal procedures.

Under federal and state OSHA law, there are four different categories for citations: Willful, Repeat, Serious and Other-than-Serious. Each type requires proof of certain facts which we may not be able to obtain if an employer asserts the audit privilege. For example, to prove a serious citation, we have to prove that the employer knew or should have known of the violation. To prove a willful citation, we have to prove that the employer intentionally or recklessly disregarded an OSHA safety standard. To prove a repeat, we need to prove that the employer at least once previously violated a standard.

Often an employer relies on the expertise of its employees or a third party to collect data and analyze the data. The proposed bill makes the audit analysis privileged and confidential. An example of how this privilege could impede or prevent a hazard from being corrected, is when we receive an employee complaint that a crane has not been inspected in many years and has possible structural damage. After arriving at the scene, our inspector requests all paperwork on the equipment so that we could see the raw data and analysis by a qualified person to determine the structural integrity of the crane. The employer claims privilege because it has properly submitted its intention to perform a safety audit on the crane and has completed it within the proper time frame.

We would go to court for permission to view and use the confidential analysis. This could take a considerable amount of time which would be costly for the department and for the employer. Each party would have to file briefs and put on evidence at an evidentiary hearing. The court may or may not allow us to use the audit. All this takes time and the court may not issue a decision for many weeks. This will delay our investigation and our issuance of a citation.

As stated above, without proof of the safety hazard and of the employer's prior knowledge we cannot require the employer to correct the violation and write a "willful" or even possibly a "serious" citation. We would not be able to use the employer's analysis to require immediate abatement but would have to hire a qualified person to conduct the analysis for us, which may take time and leave employees exposed to a hazard. Federal OSHA has no such obstacle to its enforcement program.

Therefore, in the interest of worker safety, court costs and time requirements, AKOSH would turn the case over to the Federal OSHA at the point where the employer claims privilege.

Immunity Concerns:

Continuing with the case above, if they voluntarily gave us the safety audit and we were able to prove employer knowledge and we issued a "serious" citation, we could not pursue a violation if the employer asserted immunity. This will be another violation of our contract with Federal OSHA since federal law requires that we pursue enforcement for a serious violation. Similarly, if we wanted to assert a repeat violation as required under our contract with Federal OSHA, we could not issue a repeat violation if the employer only once previously violated a regulation; under the bill, an employer would lose immunity only if it "repeatedly or continuously" violated a regulation. In order to assert a willful citation, we would have to litigate in court whether the employer is no longer immune from a citation.

Another concern with the immunity portion of the bill is that AKOSH would be prevented from issuing citations in cases where we discover hazards in an audit which is voluntarily disclosed to us, but the employer was unaware of those hazards. This encourages sloppy audits when an employer is not accountable for hazards its audit has overlooked. Issuing citations is the only means AKOSH has to ensure hazards are corrected.

An additional concern is that an employer will give notice of an audit whenever it begins work at a temporary facility, such as a construction site or an asbestos removal site, thereby making the employer immune from citations. Under CSSB41, the employer will have 90 days to correct violations and will likely have left the site by the expiration of the 90 days. In contrast, Federal OSHA would require immediate abatement if the violation presented an immediate hazard to the employee's health.

Summary:

The purpose of the Department of Labor is to foster and promote the welfare of the wage earners of the state, improve their working conditions and advance their opportunities for profitable employment. We feel that while the intention of this bill is to enhance the safety of the worker, in reality it will tie the hands of the agency charged with protecting the worker from the few dishonest and unscrupulous employers who would hide behind the protection that this bill provides. While most employers realize that safety is good business, unfortunately there are many that do not. AKOSH is there to protect the workers from those who would put them at risk.

Allowing immunity from citations and making safety audits privileged documents would encourage the unscrupulous employer to disregard safety rules. It would result in the federal government revoking our hard won 18(e) certification. This would allow Federal OSHA to conduct inspections in Alaska whenever an employer asserts the privilege or claims immunity. Federal OSHA and the federal courts will not apply the audit privilege or the immunity provision in CSSB41. Consequently, Alaskan businesses will not gain anything from CSSB41.

EXPLANATION OF CHANGES TO SB 41:

GENERAL COMMENTS:

Mike Pauley and I were directed by the Sponsor to work with representatives of the departments affected by the bill to try to come to consensus on various points. We have very productive discussions with the Departments of Law and Environmental Conservation. However, the draft provided by those departments left out health and safety laws, while the Committee Substitute retains the original purview of SB 41, and includes health and safety laws.

There are two other areas where the sponsor indicated he would prefer work continue in the Judiciary committee:

a) Trigger to make the immunity unavailable if a federally delegated program requires imposition of a penalty for a violation. The sponsor has directed that the language proposed by the departments be left out of the CS, but he intends to continue to work with the departments and the Senate Judiciary Committee on the problem of federally delegated programs and the effect of SB 41.

b) The definition of the term "commence" when used in conjunction with "commencing an audit". This phrase needs to be clearly defined and understood and is also within the purview of the Senate Judiciary Committee.

Of the four amendments provided by the International Association of Drilling Contractors, one was incorporated. One was deemed within the purview of the Senate Judiciary Committee and two were deemed unnecessary after inclusion of language from the departments' proposal.

<u>Section 1: Findings: Intent:</u>

Proposal:	Environmental Law
CSSB41:	Environmental, Health & Safety
Proposal:	"confidential self-evaluation and analysis"
CSSB41:	accepted
Proposal:	"persons" for "entities"
CSSB 41:	accepted
Proposal:	"compliance plan" for "corrective action plan"
CSSB 41:	accepted

Section 2:

<u>Sec. 09.25.450 Audit Report Privilege:</u>

(a)

Proposal:	Change title to reflect only environmental privilege
CSSB 41:	Not accepted
Proposal:	Makes clear that its the owner/operator who prepares an audit report who has the privilege. Begin to change focus from the "audit report" to the information which is privileged
CSSB 41:	Accepted

WORK DRAFT WORK DRAFT WORK DRAFT

0-LS0299\E
Lauterbach
1/30/97

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CS FOR SENATE BILL NO. 41(L&C)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY THE SENATE LABOR AND COMMERCE COMMITTEE

Offered:
Referred:

Sponsor(s): SENATORS LEMAN, Pearce, Taylor

A BILL

FOR AN ACT ENTITLED

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

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

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

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

(2) the public has a strong interest in encouraging routine self-review of environmental and health and safety business practices and procedures; this encouragement can best be achieved by preserving the free flow of information; the free flow of the kind of information that is generated by self-audits would be curtailed if a privilege for the audits were not available; therefore, it is the intent of the legislature to recognize an audit privilege under this Act to protect the confidentiality of communications related to voluntary internal environmental and health and safety audits; however, the legislature does not intend that the parts of an audit report consisting of confidential self-evaluation and analysis that are privileged under this Act may be used to shield a person from liability under applicable laws and regulations by blocking access to relevant facts;

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

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

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

Article 5. Privileges and Immunities Related to Disclosure of Certain Self-Audits and Violations.

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

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

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

(b) With respect to confidential self-evaluation and analysis in an environmental audit, in order to qualify for the privilege under this section and the immunity under AS 09.25.475, at least 15 days before conducting the audit, the owner or operator conducting the audit must give notice by certified mail to the department of the fact that it is planning to commence the audit. The notice must specify the facility, operation, or property or portion of the facility, operation, or property to be audited, the date the audit will begin and end, and the general scope of the audit. The notice may provide notification of more than one scheduled environmental audit at a time. Once initiated, an audit shall be completed within 30 days unless a longer period of time is agreed upon between the owner or operator and the department. The audit report must be completed in a timely manner.

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

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

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

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

(4) a custodian of the audit results.

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

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

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

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

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

(i) This section may not be construed to

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

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

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

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

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

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

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

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

property;

(D) a partner of the owner or operator;

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

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

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

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

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

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

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

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

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

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

(1) objective facts;

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

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

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

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

(6) a document, communication, datum, report, or other information that is independent of the environmental or health and safety audit, whether prepared or existing before, during, or after the audit; and

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

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

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

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

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

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

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

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

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

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

(b) Immunity is not available under this section if the violation resulted in substantial injury to one or more persons at the site audited or to persons, property, or the environment offsite.

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

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

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

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

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

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

(6) the owner or operator making the disclosure cooperates with the appropriate agency in connection with an investigation of the issues identified in the

disclosure and agrees under terms of a confidentiality agreement to disclose to the agency, on request of the agency, the part of the audit report that describes the implementation plan or tracking system developed to correct past noncompliance, improve current compliance, or prevent future noncompliance.

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

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

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

(3) implement appropriate measures designed to prevent the recurrence of the violation; and

(4) cooperate with the appropriate agency in connection with an investigation of the issues identified in the disclosure; an agency may request that the owner or operator allow the agency to review, under an agreement as described in AS 09.25.455(b)(3), the relevant portions of the confidential self-evaluation and analysis as necessary to determine that appropriate corrective actions have been identified.

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

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

(g) During the audit period specified in the notice required under AS 09.25.450(b), the department may not initiate an inspection, monitoring, or other investigative activity concerning the audited facility, operation, or property based solely on the receipt of a notice under AS 09.25.450. The department has the burden of proving that an inspection, monitoring, or other investigative activity concerning the

audited facility, operation, or property initiated after receiving a notice under AS 09.25.450 was not initiated based solely on receiving the notice.

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

Sec. 09.25.480. Exceptions to immunity; mitigation. (a) There is no immunity under AS 09.25.475 if a court finds that

(1) the owner or operator claiming the immunity has

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

(B) within the 36 months preceding the violation, repeatedly or continuously committed violations that are the same as, or similar to, the violation for which immunity is sought;

(C) not attempted to bring the facility, operation, or property into compliance and this failure constitutes a pattern of disregard of environmental or health and safety laws; or

(2) the offense 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 lack of prevention systems contributed materially to the occurrence of the violation.

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

(1) the voluntariness of the disclosure;

(2) efforts by the disclosing party to conduct environmental or health and safety audits and to complete any resulting implementation plan or tracking system for corrective and preventive action;

(3) remediation;

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

(5) the nature of the violation; and

(6) other relevant considerations.

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

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

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

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

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

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

(2) "confidential self-evaluation and analysis" means the part of an audit report that consists of memoranda and documents that evaluate or analyze all or part of the material described in the audit report, including implementation issues or an audit implementation plan or tracking system to correct past noncompliance, improve current compliance, or prevent future noncompliance with an environmental or health and safety law, and that is

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

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

kept confidential;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

construed broadly.

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

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

TONY KNOWLES, GOVERNOR

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January 23, 1997

Honorable Loren Leman
Chairman, Senate Labor and Commerce Committee
State of Alaska
State Capitol
Juneau, Alaska 99801-1182

Re: Senate Bill No. 41; An Act relating to environmental audits and health and safety audits to determine compliance with certain laws, permits, and regulations.

Dear Senator Leman:

I have reviewed Senate Bill 41 and I am concerned that it may compromise or even jeopardize Alaska's federally approved and federally funded OSHA program. In order to understand how this bill may affect Alaska's OSHA program, it is important to understand the relationship between Alaska's OSHA program and the federal OSHA program.

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

In the Occupational Safety and Health Act, Congress also provided that the U.S. Department of Labor could approve a state enforcement OSHA plan so long as the state OSHA plan was <u>as effective as</u> federal OSHA. 29 U.S.C. § 667. There are about 25 federally approved state enforcement plans.

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

Senate Bill 41, in my opinion, will make our state OSHA program less effective than the federal OSHA program in two ways.

First, Senate Bill 41 creates a privilege for "audits." The federal OSHA program has no such privilege. Currently, when the Alaska Department of Labor conducts its investigation, it, like the U.S. Department of Labor, can subpoena documents from an employer. AS 18.60.083. This bill will prevent the Alaska Department of Labor from subpoenaing audit information that the U.S. Department of Labor can subpoena. Documents, such as audits, can provide very important evidence, particularly in cases where an employer has willfully violated an OSHA regulation. AS 18.60.095(a). It is very difficult to prove an employer's state of mind; often the Alaska Department of Labor must weigh the employer's word against an employee's word. Under Senate Bill 41, the Department would not be able to obtain audit information which might demonstrate that the employer knew of the violation and knowingly chose not to correct the violation. In contrast, the U.S. Department of Labor could obtain this information during its inspection.

Second, Senate Bill 41 provides immunity in certain situations. The U.S. Department of Labor does not provide employers with immunity. Consequently, the U.S. Department of Labor could bring OSHA citations against employers, that the Alaska Department of Labor could not bring.

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

Alaska would be the first state, which has a federally approved OSHA state plan, that passed a law expanding the audit privilege/immunity to workplace safety inspections.

Very truly yours,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Toby N. Steinberger
Assistant Attorney General

Enclosure

TNS:akb

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

U. S. DEPARTMENT OF LABOR

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

Initials	INFO	ACT
Comm	✓	
Deputy	✓	✓
Sp Asst	✓	
Adm Asst		
Ex. Sec'y		
ASD		
ESD		
LRA		✓
[illegible]	✓	
WG		✓
[illegible]	✓	

January 27, 1997

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

Dear Commissioner Cashen:

Per your request, we have performed a preliminary review of Alaska Senate Bill 41 regarding privileges and immunities related to disclosure of certain self-audits.

Alaska Senate Bill 41 would impose very substantial limitations upon Alaska's authority to investigate accidents and illnesses in the workplace, to document the causes of those accidents and illnesses, and to administer a program of fair and effective enforcement. One of the most basic responsibilities Congress placed upon states which elect to maintain their own, federally-approved occupational safety and health plan is to provide standards, and a system for the enforcement of those standards, which are "at least as effective as" the standards and enforcement program implemented by federal OSHA.

No system of employer privileges and immunities comparable to the one envisioned in SB 41 has ever been applicable under the federal Occupational Safety and Health Act, and indeed, federal court decisions make it clear that a self-audit privilege would be inconsistent with section 8 of that Act. Nor, to my knowledge, has any other state with a federally-approved OSHA plan ever implemented such a privilege.

SB 41 would create an evidentiary privilege enabling employers to withhold information customarily relied upon by safety and health investigators, federal and state, not only in cases involving alleged willful violations but many other routine circumstances as well. OSHA standards and regulations dealing with chemical process safety, confined spaces, workplace respiratory hazards, occupational noise, and a wide variety of other hazards all involve some degree of self-policing by the employer, documentation of which would be largely unavailable outside the company if SB 41 were enacted. Investigation of OSHA cases involving such diverse issues as multi-employer work site responsibilities, the general duty clause, and whistleblower protection cases would be impeded.

In summary, the employer privileges and immunities proposed in this bill would significantly impair the credibility and effectiveness of Alaska OSHA's enforcement program. Because an effective enforcement program is a statutory mandate for all state plans, enactment of such a provision by the state would seriously undermine the continued approvability of the Alaska OSHA program, and may result in a recommendation to the Assistant Secretary that federal approval and funding for the Alaska program be withdrawn.

Sincerely,

Richard S. Terrill
Acting Regional Administrator

cc: Paula White, Director, Federal-State Operations.
Frank Strasheim, Deputy Assistant Secretary

U.S. DEPARTMENT OF LABOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20210

Mr. Dwight Perkins
State of Alaska

cc: Dwight
Pouchot
Dwyer

VIA FAX (907) 465-2784

Attached, per our discussion, are recent statements setting out the U.S. Labor Department's position on self-audit privileges. Please forward to Ms. Steinberger as soon as possible.

9

Robert W. Swain
Counsel for Legal Advice

U.S. DEPARTMENT OF LABOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20210

Toby N. Steinberger
Assistant Attorney General
Office of the Attorney General
State of Alaska
1031 West 4th Ave.
Anchorage, AK 99501

VIA FAX (907) 276-3697

Dear Ms. Steinberger:

Attached are copies of two relatively recent statements of position by the U.S. Department of Labor regarding evidentiary privileges for employer self-audit reports.

The first statement is an excerpt from Senate testimony opposing federal enactment of an employer self-audit privelege; the bill referred to in the testimony was never enacted. The second is a more detailed discussion of the Labor Department's findings in response to an industry-sponsored proposal for administrative recognition of such a privilege. I believe the Department's strong opposition to these proposals speaks for itself.

Sincerely,

Robert W. Sivain
Counsel for Legal Advice

10A

STATEMENT OF JOSEPH A. DEAR
ASSISTANT SECRETARY OF LABOR
FOR OCCUPATIONAL SAFETY AND HEALTH
BEFORE THE
COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

NOVEMBER 29, 1995

Madam Chairman and Members of the Committee:

Thank you for this opportunity to discuss S. 1423, the Occupational Safety and Health Reform and Reinvention Act. I am pleased to appear before you today to present the Administration's views on this legislation.

Before addressing S. 1423 I would like to provide a brief update on OSHA's current reinvention activities. During my appearance before the Committee last June I described in some detail the tremendous difference that OSHA has made to millions of America's working families--the large reduction in workplace fatalities, the positive impact of standards such as those for trenching, lead and cotton dust, and the effectiveness of OSHA's inspections in reducing injury rates. I also noted that in spite of these accomplishments, OSHA's work was far from done. Fatalities still occur at a rate of 17 workers a day, and another 16,000 workers are injured on the job every day.

Finally, I told you about the major reforms taking place within the New OSHA to reinvent the way we do business--changing

scale statutory scheme, this concept should be explored further through pilot programs. For example, the State of Virginia is testing a consultant certification process in which state personnel will accompany the private consultant during the workplace visit to verify the consultant's knowledge and skills. The results of this and other similar initiatives should be reviewed and the necessary monitoring and quality control mechanisms must be in place before decisions are made as to whether third-party certification should be used on a broader scale.

"Exemplary" Safety and Health Records

Section 4 also allows exemptions for employers who have an "exemplary" safety and health record (fewer lost workdays than the applicable industry average) and a safety and health program (including procedures for assessing and correcting hazards, employee participation, and employee training). While the bill's sponsors are to be applauded for recognizing the importance and effectiveness of safety and health programs, a broad-scale exemption is not warranted in these circumstances. Instead, such programs should be promoted through penalty reductions, through incentive programs such as Maine 200 and Focused Inspections in Construction, and through the development of a Safety and Health Program Standard.

In addition, an employer with a distinctly average safety record should not be deemed "exemplary" or rewarded with an exemption from scheduled inspections on that basis alone. This is a particular problem in high-hazard industries where injury rates are excessive across the board. For example, it would be unwise to exempt meatpacking employers with average safety records, because their industry "average" is *five times* the national average.

In fact, the use of an employer's injury data as a primary or exclusive basis for enforcement relief poses problems in and of itself. First, as OSHA learned first-hand in the 1980s, such a practice encourages some employers to falsify their records. (The bill allows OSHA to conduct random audits to guard against this problem, but would only allow the agency to audit an employer's *records*, not actual working conditions.) Second, it ignores hazards that pose long-term health risks to workers. While an employer's injury data is relevant to assessing the need for an OSHA inspection, it would be unwise to use it as the sole or primary basis for an inspection exemption.

OSHA Access to Employer Self-Audit Records

S. 1423 would also prohibit OSHA access to an employer's self-audit records unless a worker was killed or injured on the job. (The bill includes another exception--allowing OSHA access

when the employer has not corrected the hazards identified in the self-audit--but it would be impossible for OSHA to know whether this was the case without first having access to the records.) This provision does not represent an appropriate balance between an employer's desire for confidentiality and OSHA's need to determine whether employers were aware of serious hazards prior to an inspection. Moreover, this provision could be read to deny OSHA access to a host of records required by the agency's own standards and regulations, including exposure monitoring, process hazard evaluation reports, hearing conservation tests, and other similar records.

Reasonable access to employer self-audit records is essential to the Department's health and safety efforts. In some cases, this information will be critical to OSHA for enforcement purposes. More significantly, at a time when promising initiatives are underway at OSHA to evaluate and reward efforts by employers to improve employee health and safety, OSHA would be completely unable to assess the effectiveness or good faith of employer-initiated safety programs without access to underlying documentation. Finally, allowing employers to refuse to disclose their health and safety records will, for some employers, remove the incentive to take prompt and effective action to eliminate any hazards disclosed by these in-house reports.

In practice, an employer's self-audit records are not used against employers who have made good faith efforts to protect their workers. As a result, this provision would only protect employers who have identified hazards and consciously failed to correct them.

Section 5. Employer Defenses

Employer Knowledge

Current law prevents OSHA from issuing citations for *serious* violations unless the employer knew or "*could*" have known of the violation. Section 5 of S. 1423 would prevent OSHA from issuing a citation for *any* violation unless the employer "knew, or with reasonable diligence *would* have known" of the violation.

Although the impact of these changes is not altogether clear, they appear to be intended to increase the agency's burden of proving violations of the Act or OSHA standards. The agency's ability to protect workers could well be compromised as a result.

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SEP 11 1996

Mr. Frank White
Vice President
Organization Resources Counselors, Inc.
1910 Sunderland Place, NW
Washington, D.C. 20036

Dear Mr. White:

Thank you for your letter to Secretary Reich concerning voluntary safety and health audits under the Occupational Safety and Health Act (the Act). Secretary Reich has asked me to respond. I appreciate Organization Resource Counselors' (ORC) interest in this issue. ORC's expertise in occupational safety and health issues is well-established, and its views merit careful consideration.

Your letter takes issue with the Department of Labor's (the Department) practices regarding access to employer safety and health audits in Occupational Safety and Health Administration (OSHA) inspections. You state that the Department has not provided clear guidance as to the circumstances in which OSHA will seek disclosure of employer audits. You ask that the Department declare that it will not seek audit documents from an employer in conjunction with any inspection or investigation under the Act. You assert that, with a few narrow exceptions, there are no federal requirements that an employer conduct a safety or heath audit. Your concern is that the possibility that audit results could be reviewed by the government may cause employers to refrain from conducting audits or may inhibit candor in the audit, undermining its usefulness. You explain employers may fear that audit reports would provide evidence of willful violations of the Act that, if disclosed to the government, could lead to assessment of large fines. Because audits are an important component of an effective safety and health program, you believe it is important that the Department not create a disincentive to voluntary audits.

The Department shares your view that employer safety and health programs are fundamental to our effort to protect safety and health in the workplace, and that self-audits are an important part of an effective program. We strongly believe, however, that barring

OSHA access to audit results would gravely impair the agency's ability to enforce the Act and to draw appropriate distinctions between employers with effective and ineffective programs.

Such a policy is not necessary to encourage use of audits. Employers derive many benefits from effective safety and health programs that provide for audits, including reduced absenteeism, lower workers' compensation premiums and payments for medical treatment and disability, and favorable treatment from OSHA. Employers with effective programs have fewer and less serious hazards and thereby face reduced exposure to OSHA citations and penalties as a result. Moreover, employers found to have effective programs are eligible for limited scope inspections (in construction) and substantial penalty reductions for violations found in recognition of their good faith efforts. The concern that employers acting in good faith to respond to audit findings would be charged with willful violations rests on a misunderstanding of the relevant legal standards.

A Ban on Access to Employer Information Would Impede Enforcement

1. ORC broadly defines a self-audit as "any internal or external review of safety and health conditions or performance conducted by or on behalf of an employer" (p.2). This definition is broad enough to include almost any information that an employer has developed or obtained that is relevant to compliance with its OSH Act obligations; the definition would include information obtained or analyses performed for the purpose of identifying hazards present in the workplace that are regulated by OSHA, determining the measures the employer will take to address the hazard and comply with its OSH Act obligations, and assessing the adequacy of those measures. A policy barring OSHA from access to this kind of information would gravely impair the agency's ability to enforce the Act.

The policy you suggest would allow OSHA to conduct inspections only by means such as visual observation of workplace conditions and the compliance officer's own physical monitoring efforts. Visual observation can be an effective technique for assessing compliance with certain requirements, particularly narrow specification requirements prescribing readily detectable physical measures within a reasonably small area. In many other situations, however, review of employer records and consideration of the employer's own analyses and understanding of the situation are essential to an effective inspection.

This is particularly the case with requirements such as those that mandate the employer establish a program to address a hazard, or take measures to prepare for hazards that occur intermittently or change over time, or provide training to employees, or execute a continuing course of conduct, or take appropriate protective measures based on its own

assessment of hazards its workers face. As you know, there are many such requirements; new OSHA standards tend to be written in such performance terms, rather than as narrow specification requirements.

For example, consider the general respiratory protection standard. That standard requires the employer to provide a respirator "when such equipment is necessary to protect the health of the employee"; the employer is to select respirators "which are applicable and suitable for the purpose intended" and is to anticipate and plan for "possible emergency and routine uses". The employer is to establish a respiratory protective program and is to assure that respirators are " regularly cleaned and disinfected" and that the user of any respirator is "properly instructed in its selection, use and maintenance" (29 CFR 1910.134).

An effective inspection for compliance with these requirements must consider information the employer has compiled concerning workplace safety and health conditions and performance. The compliance officer may need to review information concerning the toxic substances employees are or may be exposed to over the course of their work and the sufficiency of engineering controls to limit the exposure. The compliance officer may also need to review records concerning the system the employer has established for maintenance of respirators, and the steps the employer has taken to train respirator users. Placing employer information of this kind off limits would imperil the credibility of the inspection.

2. The premise for ORC's position is that the review of safety and health conditions and performance in the workplace is purely optional with the employer. It is argued that OSHA must not seek access to the information in these reviews, because if the agency does, employers will stop conducting them. ORC's position against disclosure, as we understand it, does not include audits that are required by OSHA standards. ORC asserts, however, that with a few narrow exceptions, there are no federal requirements for audits.

This position, we respectfully suggest, misapprehends the scope and degree of existing requirements that employers conduct audits as ORC defines that term. Employers in the construction industry are subject to a comprehensive audit requirement. They must institute a safety and health program that provides for "frequent and regular inspections" of job sites by competent persons to assure compliance with the OSHA construction standards (29 CFR 1926.20(b)). There is no comprehensive requirement for general industry employers to conduct audits, but there are many audit requirements in individual standards, including fundamental generic standards. The confined spaces standard, for example, requires employers to evaluate whether their workplace includes confined spaces, to establish a written program if employees will be required to enter confined spaces, to monitor and record conditions for each entry, and to review annually the

program and the entries conducted and make necessary modifications (29 CFR 1910.146). The lockout/tagout standard requires employers to develop energy control procedures for servicing and maintenance and to conduct periodic inspections to ensure that the procedures and the requirements of the standard are followed (29 CFR 1910.147(c)). The process safety management standard requires comprehensive process hazard analyses, mechanical integrity inspections, incident investigations, and compliance audits (29 CFR 1910.119). The hazardous waste standard includes similar requirements (29 CFR 1910.120).

The general personal protective equipment (PPE) standard requires employers to conduct an assessment of the hazards employees are likely to be exposed to, to select appropriate PPE based on the assessment, to train employees, and to assure that employees have understood the training (29 CFR 1910.132). There is to be daily inspection and periodic testing of electrical PPE (29 CFR 1910.137(b)). The general respirator standard requires employers to establish written procedures governing selection and use, to select respirators based on a hazard assessment, to maintain appropriate surveillance of work area conditions and degree of employee exposure or stress, and to conduct regular inspection and evaluation to determine the continued effectiveness of the program, including inspections of all respirators before and after each use (29 CFR 1910.134(b), (f)). Many narrower hazard-specific standards also require employers to assess workplace conditions or inspect for compliance with requirements. See, e.g., 29 CFR 1910.272(g)(1) (grain handling).

Health standards issued by OSHA under Section 6(b) of the Act commonly contain similar provisions. The lead standard, for example, requires employers to conduct monitoring to evaluate employee exposures to airborne lead, to develop a written compliance plan to reduce exposures to the permissible level, and to revise and update the plan semi-annually (29 CFR 1910.1025(d), (e)). See also 29 CFR 1910.95(c) (hearing conservation).

Where obligations such as these are involved, an inspection would be impossible if OSHA were barred from access to employer reviews of workplace conditions or performance, because the obligation is to conduct such a review. The scope and number of such requirements suggests that it would be no easy task to disentangle those parts of a comprehensive review that are voluntary from those that are not. But even where an OSHA standard includes no explicit obligation to review workplace conditions or performance to facilitate compliance with the standard, the employer is obligated to comply with the standard itself, and the steps the employer has taken to assure compliance are highly relevant to enforcement of the Act. The courts have stressed that the OSH Act does not impose absolute liability on employers for noncompliance with a standard, but that it does require diligent efforts to comply, see *Horne Plumbing &*

Heating Company v. Occupational Safety and Health Review Commission, 528 F.2d 564 (1976).

The OSH Review Commission has held that, to prove a violation of the Act, the Secretary must show not only that a violative condition exists, but that the employer had actual or constructive knowledge of the condition, see *CF&T Available Concrete Pumping*, 15 BNA OSHC 2195, 1991-93 CCH OSHD ¶29,945 (No. 90-329, 1993). The Secretary must show that the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition, *Ibid.* The state of the employer's knowledge and the diligence of the methods it has employed to find and prevent violations are therefore of central importance to investigation and enforcement of the requirements of the Act. Employer reviews of safety and health conditions or practices that are relevant to compliance with a standard have a direct bearing on whether the employer has met its obligations. A policy barring OSHA from access to information of this kind would undermine enforcement of the Act.

Access to information of this kind is also essential to classification of violations and calculation of penalties. Under Section 17(j) of the Act, a penalty must be based in part on the employer's good faith. OSHA has interpreted good faith as referring to the employer's establishment of an effective safety and health program, which includes audits. Existing guidelines in the *Field Inspection Reference Manual* (*FIRM*) authorize a reduction of 25% in the penalty for employers who have implemented such programs. See *FIRM* page IV-14 at C.2.I.(5)(b). As discussed below, OSHA is in the process of establishing initiatives, referred to as the New OSHA, that will substantially increase the discount for superior and outstanding programs.

In short, the policy you suggest would severely impair OSHA's ability to enforce the Act. The policy would undermine the agency's ability to inquire into the existence of violative conditions, to establish employer knowledge, to classify violations found, and to assess penalties.

The New OSHA

Several of the initiatives announced in the May 1995 National Performance Review report, *The New OSHA*, depend on the agency's acquiring a thorough understanding of the employer's worksite safety and health program, including the employer's evaluation of safety and health hazards present and the steps the employer takes to address them. The policy ORC proposes would preclude OSHA's obtaining this information.

As you know, the central concept of the New OSHA initiatives is that OSHA should emphasize the state of the employer's safety and health program, rather than simply inspecting for compliance with individual standards. Although many employers have a safety and health program, the programs vary dramatically in scope and effectiveness. OSHA has prepared, with help from ORC and others, the Program Evaluation Profile ("PEP"), which is presently undergoing field testing. The PEP analyzes employer programs on fifteen factors, and assigns a numerical score for each factor. Some of the important factors include comprehensive worksite survey and hazard analysis, regular site inspection, employee hazard reporting system and response, accident and "near-miss" investigation, and injury and illness data analysis, all of which require an audit as ORC uses that term. OSHA must be able to review information concerning the employer's performance on these factors for the New OSHA initiatives to work.

OSHA's intention is that employers who score well on the PEP will obtain important benefits, including large reductions in penalties for serious violations, and elimination of penalties for other-than-serious violations. The New OSHA demonstrates an alternative means of recognizing and rewarding employer safety and health efforts that is superior or outstanding. The audit access ban ORC proposes would shield all programs, good, bad, or indifferent from inquiry. Even records of known hazardous conditions would be off limits to OSHA. The audit access ban would prevent OSHA from understanding the state of the employer's efforts and from treating employers with superior or outstanding programs differently from employers with ineffective, developmental or basic programs. The new OSHA approach, on the other hand, allows a detailed assessment of employers' health and safety performance. Employers who have done a good job receive favorable treatment, while poor performance can be identified and remedied.

An Access Ban Is Unnecessary

An employer derives many significant benefits from an effective safety and health program that provides for self-audits. These benefits arise both within and outside the ambit of the OSH Act. Employers who conduct effective self-audits receive substantial advantages in OSH Act inspections compared with those who do not. We therefore do not agree that an audit access ban is necessary to induce employers to conduct audits.

An effective self-audit procedure, as part of a comprehensive safety and health program, should reduce employee injuries and illnesses, saving the employer costs resulting from absenteeism, workers' compensation and other insurance payments. An effective program may help reduce employee turnover and improve productivity. In terms of the OSH Act, the principal consequence of an effective audit program is a reduction in the number and severity of hazards, leading to a corresponding reduction in citations and penalties in the event of an inspection. A conscientious program should be particularly effective in eliminating high gravity serious, willful, repeated, and failure to abate violations, which carry by far the heaviest penalties.

In view of all these benefits, we find it difficult to believe that companies will stop implementing comprehensive safety and health programs or conducting audits if OSHA retains its present policy. Moreover, even if OSHA were to adopt a policy against inquiry into audit information, that policy would not make such information truly confidential. Occupational health audits would generally be subject to the records access rule, which guarantees a right of access to employees (29 CFR 1910.20). If employees are represented by a union, employer information about workplace safety and health must be disclosed upon request to the union, as an incident to the company's duty to bargain in good faith about safety and health issues, see *NLRB v. American National Can Company, Foster-Forbes Glass Division*, 924 F.2d 518, 524 (4th Cir. 1991).

Finally, such information would apparently not be protected from disclosure in private tort litigation. The courts have generally rejected claims to withhold information of this kind in discovery under a "self-evaluative privilege." The Ninth Circuit addressed the issue in *Dowling v. American Hawaii Cruises*, 971 F.2d 423 (9th Cir. 1992). The court stated that voluntary audits are rarely curtailed because they may be subject to discovery in litigation. Noting that companies typically conduct such audits to avoid litigation resulting from unsafe working conditions, the court found ironic the claim that such candid assessments will be inhibited by the fear that they could later be used as a weapon in the hypothetical litigation they are intended to prevent.

In short, employers who conduct effective audits derive many advantages, including advantages in the event of an OSHA inspection, from the practice. They have no need of the shield against access that you suggest, which in any event could not make the audits truly confidential. We are nonetheless concerned by your statements that some employers perceive a disincentive to perform self-audits from OSHA's policies. In order to address this perception, it may help to describe relevant elements of OSHA's citation policy and the case law under the Act.

The purpose of self-audits is to find hazardous conditions and remedy them. If a self-audit discloses a condition that is a violation of the OSH Act, presumably the employer

will take action to correct the problem. In the event the employer permanently remedies the condition before an OSHA inspection takes place (and before the occurrence of an accident or other event triggering an inspection), including taking appropriate steps to prevent a recurrence of the violation, OSHA's practice is not to issue a citation, even though the violation may have existed within the six month statute of limitations period. If the violation has been permanently corrected on the employer's own initiative without the need for action or intervention by OSHA, the agency sees no need to spend its own limited enforcement resources addressing the problem. Further, as noted, evidence that the employer is finding and fixing problems on its own will weigh heavily in the employer's favor for purposes of good faith.

If, on the other hand, an employer has identified a violative condition in an audit and has failed to abate it, and the OSHA inspection finds the violation, a citation may issue. Even here, however, good faith efforts made in response to the audit will benefit the employer. If the employer has responded promptly to the audit and believes in good faith, although erroneously, that it has resolved the problem and come into compliance with the OSHA standard, that would tend to negate willfulness. The Review Commission has frequently held that an employer's reasonable good faith belief that its actions comply with a standard is inconsistent with willfulness, although the actions were in fact incomplete and do not fully remedy the hazard, see *Calang Corp.*, 14 BNA OSHC 1789, 1987-90 CCH OSHD ¶29,080 (No. 85-319, 1990). In short, the concerns you have expressed that conscientious employers who conduct audits would expose themselves to willful citations are based on a misunderstanding of the case law and the Secretary's citation policy.

Of course, if the employer has simply ignored the audit finding of a hazardous condition, the employer will get no credit for the audit. Such an employer could benefit from a policy barring access to audit information. We see no reason, however, for rewarding an audit program that takes no action to remedy identified hazards. We expect, however, that there are few employers in this category. Responsible employers who react conscientiously to audit findings will benefit themselves and their workers.

We would be pleased to meet with you to discuss the issues addressed in this letter, should you consider such a meeting useful.

Sincerely,

Joseph A. Dear
Assistant Secretary

OSCAHRogers/8/21/96/219-8031
cc:Miles/Donnelly/Buchanan/Rogers/CCU/SOL/Chron

U. S. DEPARTMENT OF LABOR

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

January 23, 1997

12

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

Dear Commissioner Cashen:

Per your request we have performed a preliminary review of Alaska Senate Bill 41 regarding privileges and immunities related to disclosure of certain self-audits. Although our review found some differences when compared to last session's Senate Bill 199, it appears that SB 41 will still substantially impact enforcement of the state's occupational safety and health laws.

As I have stated before, we might have little objection to a provision disallowing the state from citing retroactively violations that an employer finds, himself, in the course of an internal audit. This legislation, however, creates a number of legal obstacles which the state would have to overcome before it can obtain the employer's safety and health audit records as evidence of knowing or intentional wrongdoing when the state finds subsequent violations. It appears that SB 41 would materially change the burden of proof for safety and health standards violations classified as willful, thereby making it much more difficult for the state to establish and sustain a willful violation. If, when enacted into law, SB 41 has this effect, it could reasonably be argued that the Alaska occupational safety and health program is less effective than the federal program.

Please be aware that this assessment is preliminary. We would be pleased to provide a more in-depth review and legal analysis if you so desire.

Sincerely,

Richard S. Terrill
Acting Regional Administrator

cc: Al Dwyer, Director

SUMMARY OF SUBSTANTIVE DIFFERENCES BETWEEN SB199 AND SB 41

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1. SB 41 contains a Findings and Intent section that SB 199 didn't. It introduces the rationale and purpose of the Bill, describing it as a "responsible incentive program." However, responsible (and OSHA sanctioned) incentive programs are already available, in the case of the Consultation Program, or soon to be available, under VPP/SHARP. This section justifies the confidentiality of audits by stating that audits are more likely to be performed if access to them is restricted. The statement that the Bill "...does not intend...to shield a person from liability..." is ludicrous; that appears to be the primary purpose of the Bill. Paragraph 4 of this section states that an effective enforcement program is also necessary to promote compliance. However, this Bill threatens that very enforcement program.

2. Criminal references contained in SB 199 have been removed from SB 41.
AKOSH Impact: Positive. This change allows us to pursue criminal willful citations without the cloak of audit privilege.

3. Section 09.25.465, Nonprivileged materials. A new paragraph (c) has been added which says that audit reports are not privileged and are subject to discovery if the audit was started after the owner knew an inspection was impending.
AKOSH Impact: Uncertain. This could benefit us in fatalities, multiple hospitalizations, or other major incidents where an employer knows we will be investigating. But it could hinder us in other inspections. See 5 below. Proving an employer knew an inspection was impending would be very difficult.

4. Section 09.25.475, Voluntary disclosure; immunity. In paragraph (f), if an audit will continue beyond the completion date specified in the initial audit notice, SB 41 allows the audit to be extended once for up to 60 days if the regulatory agency is notified before the original time period expires. Under 199, the regulatory agency could approve or deny audit extension requests.
AKOSH Impact: Negative. AKOSH would have no control over audit extensions, but only one could be granted for no more than 60 days. However, there is nothing to prohibit an employer from starting a new audit if the initial work was not completed by the end of the 60 day extension.

5. Section 09.25.490, Definitions. (a) (2) "environmental or health and safety audit" definition has changed. The new language came from AOGA's rewrite of SB 199. The general meaning of the definition appears to be the same as it was in SB 199, but the language is tighter. Audits are now defined to be for the specific and exclusive purpose of determining compliance.
AKOSH Impact: Negative. As defined in both SB 41 and SB 199, an audit can be conducted in response to a particular event. AKOSH may also conduct an enforcement inspection in response to a particular event, such as an accident. If an employer can claim that they didn't know an inspection was going to happen, the information pertaining to that accident could become part of the privileged audit report. This might include in-plant instrument readings at the time of the accident, which could document the concentration of a hazardous chemical. Small scale releases of chemicals or other incidents which might not get media attention may still be brought to our attention by employees or the public. In these cases, an employer could reasonably claim they didn't know an AKOSH inspection was going to take place, and their audit would not be subject to the Nonprivileged materials provisions in 09.25.465(c).

LEGISLATIVE REQUEST

14

TO: LS&S, W.C.
January 13, 1997

DATE OF REQUEST:

DUE DATE: Jan. 20,1997

RECEIVED
JAN 13 1997
Admin Services-DOL

Subject	Items Requested		
House Bill:	Position Paper:		
Senate Bill: SB 41	Bill Analysis:	XXXX	
Other:	Fiscal Note:	XXXX	
	Enrolled Bill Report:		

Comments LS&S, this is essentially the same bill as (sb199) last year. I would like to know exactly what other state sponsered plans are doing if anything regarding this, also I would like to know what the concerns would be from the feds regarding this issue.

W.C.; Paul in section 2 of the bill page 2 line 28 it states except for workers compensation proceedings, please check and let me know if this takes care of W.C. concerns

Thank you,
Dwight Perkins
Legislative Liaison

cc: Commissioner
Deputy Commissioner
Budget Analyst, ASD

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SENATE BILL NO. 41

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY SENATOR LEMAN

Introduced:
Referred:

A BILL

FOR AN ACT ENTITLED

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

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

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

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

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

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

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

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

Article 5. Privileges and Immunities Related to Disclosure of Certain Self-Audits.

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

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

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

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

if

(1) the audit report is privileged under (a) of this section and is inadmissible in the same proceeding;

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

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

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

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

(C) custodian of the audit results.

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

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

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

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

(g) This section may not be construed to

(1) prevent a regulatory agency from issuing an emergency order,

seeking injunctive relief, independently obtaining relevant facts, conducting necessary inspections, or taking other appropriate action regarding implementation and enforcement of an applicable environmental or health and safety law, except as otherwise provided in AS 09.25.475; or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sec. 09.25.460. Exception: disclosure required by court or administrative hearing officer. (a) A court or administrative hearing officer with competent jurisdiction may require disclosure of a portion of an audit report in a civil or administrative proceeding if the court or administrative hearing officer determines, after an in camera review consistent with the appropriate rules of procedure, that the

(1) privilege is asserted for a fraudulent purpose;

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

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

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

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

Sec. 09.25.465. Nonprivileged materials. (a) The privilege under

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) the voluntariness of the disclosure;

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

(3) remediation;

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

(5) the nature of the violation; and

(6) other relevant considerations.

(f) In order to receive immunity under this section, a facility conducting an environmental or health and safety audit must give notice by certified mail to an appropriate regulatory agency of the fact that it is planning to commence the audit. The notice must specify the facility or portion of the facility to be audited, the date the audit will begin and end, and the general scope of the audit. Immunity under this section is available only for violations that are revealed through or discovered as a result of information and documents first produced or obtained during the time period

specified in the notice. The notice may provide notification of more than one scheduled environmental or health and safety audit at a time. Once initiated, an audit shall be completed within the time period specified in the notice except that the audit period may be extended once for up to 60 days if the facility gives notice of the extension and its duration to the appropriate regulatory agency by certified mail before the original time period expires.

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

(h) The immunity under this section does not apply if a court or administrative law judge finds that the person claiming the immunity has

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

(2) not attempted to bring the facility, operation, or property into compliance, so as to constitute a pattern of disregard of environmental or health and safety laws.

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

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

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

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

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

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

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

(i) interviews with current or former employees;

(ii) field notes and records of observations;

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

(iv) legal analyses;

(v) drawings;

(vi) photographs;

(vii) laboratory analyses and other analytical data;

(viii) computer generated or electronically recorded information;

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

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

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

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

compliance implementation plan or strategy;

(2) "environmental or health and safety audit" means a voluntary, confidential, critical, internal, and retrospective review, evaluation, or analysis of current or past conduct, practices, and occurrences and their resulting consequences, including an assessment that is a part of the owner's or operator's compliance management system, that is conducted randomly, regularly, or in response to a particular event by an owner or operator or by an employee or independent contractor of an owner or operator and is

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

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

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

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

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

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

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

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

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

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

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

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

* **Sec. 3.** AS 12.45 is amended by adding a new section to read:

Sec. 12.45.052. Privilege relating to certain self-audits. An audit report based on an environmental or health and safety audit is privileged to the extent provided under AS 09.25.450 - 09.25.490.

* **Sec. 4.** APPLICABILITY. The privilege created by AS 09.25.450 - 09.25.490, added by sec. 2 of this Act, applies to environmental or health and safety audits that are conducted on or after the effective date of this Act.

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