

SB

41

FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. CSSB 41 (FIN)

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

Expenditures/Revenues

(Thousands of Dollars)

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

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE

(Thousands of Dollars)

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

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

POSITIONS

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

ANALYSIS: (Attach a separate page if necessary)

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

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

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

Prepared by:	Joan Kasson <i>Joan M. Kasson</i>	Phone:	465-5370
Division:	Administrative Services Division	Date:	3/17/97
Approved by Commissioner:	Bruce M. Botelho, Attorney General <i>Bruce Botelho for</i>	Date:	3/17/97
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.

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

Agency-Specific Issues Resulting in Fiscal Impact

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

FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

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ANALYSIS CONTINUATION:

Department of Environmental Conservation

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

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

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

SUMMARY OF COSTS

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

FY98 - FY00

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

FY01 - FY03

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



ALASKA MINERS ASSOCIATION, INC.

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

March 18, 1997

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

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

Dear Senator Kelly,

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

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

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

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

Sincerely,

Steven C. Borell, P.E.
Executive Director

cc: Senator Loren Leman



SENATOR LOREN LEMAN

Northwest Anchorage

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

Sponsor Statement -- SB 41

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

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

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

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

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

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

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

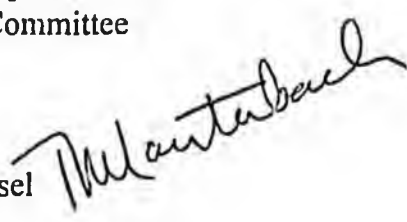
MEMORANDUM

March 14, 1997

SUBJECT: Environmental Audits (CSSB 41(FIN))

TO: Senator Bert Sharp, Co-Chair
Senate Finance Committee
Attn: Peggy

FROM: Terri Lauterbach
Legislative Counsel



Enclosed is the Finance CS for SB 41.

With regard to the instructions in amendment number 2, I did not delete the "or" on page 5, line 23, of the Judiciary CS because that "or" is needed to apply to the list of (A) - (E). I did, however, delete the "or" on page 5, line 21, of the Judiciary CS because it was no longer needed after the addition of (E).

I have made slight changes in the wording of amendment number 6 relating to the use of "shall be" and "shall not be deemed" in order to conform the amendment to the drafting style of the Alaska Statutes.

If any of these changes is not acceptable, please let me know, and I will gladly prepare a new CS.

TML:glc
97-178.glc

Enclosure

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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 *TLauterbach*
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.

Senator Robin Taylor, Chair
March 8, 1997
Page 2

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