M E M O R A N D U M

TO: **LARRY STEVENS @ SEN. HALFORD'S OFFICE**

FROM: **MIKE PAULEY @ SEN. LEMAN'S OFFICE**

DATE: **29 MARCH 1996**

RE: **CS FOR SB 199 (FIN)**

I've reviewed the new CS for SB 199 and I believe Terri Lauterbach makes a legitimate point in arguing that the privilege exception for pipeline proceedings is applied inconsistently.

I believe the best way to resolve this inconsistency and yet still accomplish the purpose of the conceptual amendment would be to add the pipeline exception clause to a different section, namely Section 09.25.465 [see page 4, "NONPRIVILEGED MATERIALS"].

Here are the specific changes that we would recommend; page & line references refer to work draft 9-LS1312K:

1) Page 1, line 8: delete "and (g) of this section"

2) Page 2, lines 20 - 22: add clarifying language such that subsection (d) reads "A regulatory agency and an employee of a regulatory agency may not request, review, or otherwise use an audit report <u>that is privileged under (a) of this section</u> during an agency inspection of a regulated facility or operation or an activity of a regulated facility or operation."

3) Page 2, lines 28-29: delete subsection (g).

4) Page 4, line16: add a new subsection before (b) which states: <u>"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."</u>

3/29/96

Larry -

Attached is final CSSB 199 (Fix) with an accompanying memo from Legal Services. I have highlighted and paperclipped changes as incorporated within the bill.

Please advise whether the final is acceptable.

Thank You,
Kathy
2618

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 29, 1996

SUBJECT: CSSB 199(FIN) (K version)

TO: Senator Steve Frank, Co-Chair
Senator Rick Halford, Co-Chair
Senate Finance Committee

FROM: Terri Lauterbach
Legislative Counsel

Enclosed is the CS you requested for SB 199 with the additions you faxed over.

Is it the committee's intent to provide an exception for pipeline proceedings only with respect to admissibility of evidence and for discovery purposes but to still disallow the compelling of testimony about the audit report in a pipeline proceeding and to disallow the use of these reports during agency inspections even if the inspection relates to a pipeline proceeding?

This question arises because the faxed language amends only subsection (a) of AS 09.25.450 but leaves subsections (b) and (d) unamended. Is this intentional or an oversight?

TML:glc
96-201.glc

Enclosure

CS FOR SENATE BILL NO. 199(FIN)

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - SECOND SESSION

BY THE SENATE FINANCE COMMITTEE

Offered:
Referred:

Sponsor(s): SENATORS LEMAN, Pearce

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. 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 and (g) of this section, an audit report is privileged and is not admissible as evidence or subject to discovery in

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

(2) a criminal proceeding; or

(3) 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 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

(2) 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 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 during an agency inspection of a regulated facility or operation or an activity of a regulated facility or operation.

(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) 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. 09.25.455. 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 or operation or a partner of the owner or operator; or

(D) 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 or operation and a

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

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

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

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

(E) person or entity engaged in the business of insuring, underwriting, or indemnifying the facility or operation; 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 any other means may not be construed to waive the privilege established under AS 09.25.450 for any other part of the audit report.

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 with the state;

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

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

(b) 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, civil, or criminal penalty for the violation disclosed, for a violation based on the facts disclosed, and for a violation discovered because of the disclosure that was unknown to the person making the disclosure.

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

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

(2) the disclosure was 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 who makes 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, civil, or criminal penalty may be imposed under applicable law if the

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

(2) 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) 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) 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) A 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; and

(5) 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 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 unless an extension is approved by the governmental entity with regulatory authority over the regulated facility or operation based on reasonable grounds.

(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, on or after the effective date of this Act,

(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 or operation into compliance, so as to constitute a pattern of disregard of environmental or health and safety laws; in order to be considered a pattern, the person must have committed a series of violations that were due to separate and distinct events within a three-year period at the same facility or operation.

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

(j) A person is not immune under this section if the disclosure is in a proceeding relating to pipeline rates, tariffs, fares, or charges.

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;

(2) "environmental or health and safety audit" means a voluntary evaluation, review, or assessment of compliance with environmental or health and safety laws or a permit issued under those laws conducted randomly, regularly, spontaneously, or in response to a particular event by an owner or operator, an employee of the owner or operator, or an independent contractor of

(A) a regulated facility or operation; or

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

(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 or operation;

(7) "penalty" means an administrative, civil, or criminal 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 or operation" means a facility or operation that is regulated under an environmental or health and safety law.

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

* Sec. 2. 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 under AS 09.25.450 - 09.25.490.

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

MAR 13 1996

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

MEMORANDUM

TO: Senator Rick Halford, Chairman
Senate Finance Committee

FROM: Senator Loren Leman, Sponsor

DATE: March 12, 1996

RE: Scheduling SB 199 -- Environmental Self-Audit Bill

Please schedule at your earliest convenience, SB 199, Environmental, Health and Safety Self-Audit bill, for a hearing in the Senate Finance Committee.

This reform bill establishes limited privilege and immunity protections as incentives for companies to perform self-audits for determining compliance with environmental and health and safety laws.

Attached is some background information on SB 199. It was reported out of Senate Resources Committee on March 11 with 4 "do pass" recommendations.

NEWS

from Sen. Loren Leman

LEMAN INTRODUCES BILL TO PROMOTE COMPLIANCE WITH ENVIRONMENTAL LAWS

Juneau -- As the Nineteenth Alaska State Legislature convened for its second session today, Sen. Loren Leman (R-Anchorage) announced that he has introduced legislation to create new incentives for businesses to comply with complex environmental regulations.

"We have strong laws to protect the environment, as well as workers' health and safety, but it's critical that we form a partnership between government and business to increase compliance with these rules," stated Leman, who serves as Chairman of the Senate Resources Committee and Vice Chairman of the Health, Education, and Social Services Committee. "Our goal is to encourage businesses to perform their own internal audits, in an effort to identify areas of noncompliance and take corrective measures, without fear of government reprisals."

Sen. Leman's bill, the Environmental, Health, and Safety Self-Audit Legislation (SB 199), creates incentives for companies to voluntarily report instances of non-compliance to government regulators and take corrective action, through the granting of limited immunity from administrative, civil, and criminal penalties for violations that are self-disclosed. The legislation also protects businesses from having self-audit information used against them in court, unless a given business has used the bill's self-audit privilege fraudulently or is not acting in good faith.

"This bill includes safeguards to ensure that 'bad actors' are not cut any breaks, but it will create an atmosphere that protects businesses that are making a sincere attempt to comply with laws and regulations that are extremely complex," Leman noted. "A company that discovers an area of regulatory noncompliance should be able to report the violation promptly, take corrective action, and work with state regulators to ensure the problem never occurs again. This process can and should occur without fear of the kind of lengthy disciplinary action that ruins businesses and kills jobs for Alaskans."

Fourteen other states have passed legislation allowing environmental, health, and safety self-audit privileges, while similar legislation has been introduced in 11 other states. States which have self-audit privilege laws on the books include Oregon, Colorado, Idaho, Utah, and Wyoming. "This idea is a win-win proposition," commented Sen. Leman. "It helps the state, it helps business, and Alaskans come out the real winners."

###

For Immediate Release:
Monday, January 8, 1996

Contact:
Mike Pauley / 907-465-2095

716 W. 4th Ave., Ste 520, Anchorage AK 99501 258-8189 Session: State Capitol, Juneau AK 99801 465-2095

ENVIRONMENTAL SELF-AUDIT LEGISLATION

Senate Bill 199 - Senator Loren Leman, Sponsor

Benefits:

* Encourages compliance with environmental and health and safety laws, and allows entities to become more pro-active in their environmental policies.

*Allows businesses to conduct audits and self-report violations without fear of fines and penalties.

*Small businesses and state agencies will benefit from being able to put their limited funds into compliance, rather than penalties.

*Businesses will have an incentive to seek advice from regulatory agencies regarding the problems they've disclosed.

*Encourages companies to develop preventive environmental policies.

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

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

BACKGROUND

*Shrinking budgets encouraging federal and state lawmakers to look for more efficient uses of resources

*14 states have passed legislation creating an environmental, health and safety self-evaluation privilege

*11 other states have introduced similar measures (as of 9/24/95)

PURPOSE

*Encourage companies and governmental entities to conduct voluntary self-audits ensuring compliance with environmental, health and safety laws.

*Ensure that violations are brought quickly into compliance.

*Promotes internal operations review without fear of prosecution or penalties for CORRECTED problems.

*Encourages development of preventive strategies to avoid future compliance problems.

*Legislation has safeguards to prevent misuse of immunity benefit gained from voluntary disclosure.

SUMMARY OF LEGISLATION

-What regulators, legislators, concerned citizens and business are after is COMPLIANCE with increasingly complex laws.

-Audits can be useful for businesses to determine if their practices conform to all applicable regulations.

-Because audits are to discover not only IF violations have inadvertently occurred, but also what management systems led to the violation, sensitive personnel information is frequently included in audits. This bill offers protection from discovery for information compiled during the voluntary audit and from such information being used against the company in court.

-Most violations voluntarily reported to a regulatory agency could not be used as grounds for penalizing an entity for the violation IF the disclosure is made promptly and the entity makes efforts to cooperate with the agency to correct the violation.

-Disclosure is not voluntary if the person making the disclosure acted with intent or knowingly regarding the commission of the violation, or if the person's reckless disregard resulted in off-site harm.

ISSUES RELATING TO PRIVILEGE

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

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

The privilege DOES NOT APPLY to:

documents, reports, etc. required by the state to be reported under federal or state law, OR

information obtained independent of the audit process.

Waiver of Privilege:

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

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

Immunity:

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

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

Environmental, Health and Safety Self-Audit Legislation

March 11, 1996

Note: line & page references in brackets refer to CSSB 199 (RES), draft 9-LS1312\C, dated 02/22/96.

Section 09.25.450 AUDIT REPORT PRIVILEGE

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

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

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

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

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

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

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

Section 09.25.455 EXCEPTION: WAIVER

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

2) A new subsection (e) is added to 09.25.455 as follows: " (e) Disclosure of a portion of an audit report after waiver of the privilege under (a) of this section, after

disclosure under (b) of this section, or through any other means may not be construed to waive the privilege established under AS 09.25.450 for any other part of the audit report."

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

Section 09.25.465 NONPRIVILEGED MATERIALS

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

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

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

New paragraph reads as follows: " (1) a document, communication, datum, report, or other information required by a regulatory agency to be collected, developed, maintained, or reported under an environmental or health and safety law, under a permit issued under an environmental or health and safety law, as a requirement for obtaining, maintaining, or renewing a license, or as a requirement under a contract with the state;" [Page 3, lines 28-31]

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

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

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

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

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

Section 09.25.475 VOLUNTARY DISCLOSURE; IMMUNITY

1) New language is added to Section 09.25.475(a). The revised text is as follows: "Except as provided by this section, a person who makes a voluntary disclosure of a violation of an environmental or health and safety law is immune from an administrative, civil, or criminal penalty for the violation disclosed, for a violation based on the facts disclosed, and for a violation discovered because of the disclosure that was unknown to the person making the disclosure."

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

2) New language has been added to Section 09.25.475(b)(3); revised paragraph reads as follows: " (3) an investigation of the violation was not independently detected by an agency with enforcement jurisdiction before disclosure was made using certified mail; under this paragraph, the agency has the burden of proving that an investigation of the violation was initiated or the violation was detected before receipt of the certified mail;"

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

3) Section 09.25.475(b)(5) has been amended; new wording is as follows: " (5) the person who makes the disclosure initiates, within a reasonable amount of time, an appropriate effort to achieve compliance, pursues that effort with due diligence, and corrects or implements a series of measures designed to remedy the noncompliance within a reasonable time;"

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

4) Section 09.25.475(b)(6) has been amended. New wording as follows: " (6) the person making the disclosure cooperates with the appropriate agency in connection with an investigation of the issues identified in the disclosure and agrees under terms of a confidentiality agreement to disclose to the agency, on request of the agency, the part of the audit report that describes the implementation plan or tracking system developed to correct past noncompliance, improve current compliance, or prevent future noncompliance;"

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

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

5) In Section 09.25.475(b)(7), the word substantial is added before "injury" for consistency purposes. New paragraph reads: " (7) the violation did not result in substantial injury to one or more persons at the site or substantial off-site harm to persons, property, or the environment." [Page 4, line 27]

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

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

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

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

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

10) A new paragraph (g) has been added to 09.25.475 which reads as follows: " (g) a regulatory agency may not initiate an inspection, monitoring, or other investigative activity based solely on the receipt of a notice under (f) of this section. The agency has the burden of proving that an inspection, monitoring, or other investigative activity initiated after receipt of a notice under (f) of this section was not initiated based solely on the receipt of the notice."

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

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

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

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

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

Section 09.25.480 CIRCUMVENTION BY REGULATION PROHIBITED

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

Section 09.25.485 RELATIONSHIP TO OTHER RECOGNIZED PRIVILEGES

1) A clarifying amendment has been made to this section. Revised wording is as follows: "AS 09.25.450 - 09.25.490 do not limit, waive, or abrogate the scope or nature of a statutory or common law privilege, including the work product doctrine, the attorney-client privilege, and any other privilege recognized by a court with appropriate authority in this state." [Page 6, lines 22-25]

Section 09.25.490 DEFINITIONS

1) The definition of "environmental or health and safety audit" has been changed in Section 09.25.490(a)(2). Revised definition: "'environmental or health and safety audit' means a voluntary [systematic] evaluation, review, or assessment of compliance with environmental or health and safety laws or a permit issued under those laws conducted randomly, regularly, spontaneously, or in response to a particular event by an owner or operator, an employee of the owner or operator, or an independent contractor of..." [remainder of definition unchanged]

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

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

3/21/96 SFC

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

TONY KNOWLES, GOVERNOR

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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. Kertula
Elizabeth J. Kertula
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 5330 million dollars, with the state's share around 582 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.

3-21-96
DOLabor

LLR 1-4
X LLR 1-1
X SB 199

STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DEPARTMENT OF LABOR

OFFICE OF THE COMMISSIONER

P.O. BOX 21149
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March 5, 1996

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

Dear Senator Leman:

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

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

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

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

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

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

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

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

Sincerely,

Dwight Perkins
Special Assistant to
the Commissioner

Enclosure

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

SENATOR LOREN LEMAN

Northwest Anchorage

716 W 4th Ave, Suite 320, Anchorage, AK 99501 (907) 258 8189 Senate: State Capitol, Juneau, AK 99801 (907) 465-2095

FAX MEMORANDUM

TO: DWIGHT PERKINS, DEPT. OF LABOR

FROM: MIKE PAULEY, OFFICE OF SEN. LEMAN

DATE: MARCH 4, 1996

RE: ADDITIONAL INFO. ON SELF-AUDIT BILL

PAGES: 3 (INCLUDING COVER MEMO)

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

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

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

U. S. DEPARTMENT OF LABOR

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

Refer to: FSO/snd
Alaska SIC (potential)

February 28, 1996

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

Dear Commissioner Cashen:

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

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

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

Sincerely,

Richard S. Terrill
Acting Regional Administrator

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

3/21/96
SFC

Alaska Environmental Lobby, Inc.
P.O. Box 22151 Juneau, Alaska 99802
Phone: 907-463-3366
Fax: 907-463-3312

CS for SB 199
Environmental Audits

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

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

- ***Environmental audits should not be privileged.*** Privilege, by definition, invites secrecy, instead of the openness needed to build public trust in industry's ability to self-police. Furthermore, a privilege would invite defendants to claim as "audit" material evidence DEC needed to establish a violation or determine who was responsible.

- ***Noncompliance which results in economic gain should not be tolerated.*** To prevent polluters from having an economic advantage over non-polluters, DEC should seek to recover such economic gain.

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

- It must occur before notice of a citizen suit, the filing of a complaint by a third party, and before the reporting of a violation to DEC by a "whistleblower" employee.

- The responsible party must correct any violation discovered under the self-audit within 60 days, certify in writing that corrections have been made, and take appropriate measures to remedy any environmental or human harm due to the violation.

- A violation discovered by a self-audit must not have presented an imminent and substantial endangerment to public health or the environment.

- The regulated entity must agree in writing to take steps to prevent a recurrence of any violation discovered under the self-audit.

- Any violation discovered in a self-audit must not have occurred previously within the past three years at the same facility.

3/4/96

MEMORANDUM

To: The Honorable Rick Halford
Chairman, Senate Finance Committee

From: Janice Adair
Department of Environmental Conservation

Subject: Proposed CS for SB 199

Date: March 22, 1996

Thank you for the opportunity to address the Department's concern with CSSB 199(Res) before the Senate Finance Committee earlier this week. Thank you too for allowing both Beth Kertula and I to participate by telephone.

I see that the bill is showing on your committee's schedule on Tuesday, March 26. Unfortunately, I will not be available on that day. Marie Sansone with the Department of Law has offered her assistance with any questions you might have for DEC. I'll check with your office on Wednesday to see if there is any additional information you need from us.

This memo includes a summary of our testimony. It also transmits an article from a publication entitled "Inside EPA" on the potential impacts of this kind of legislation on program delegation. I received this just yesterday, and thought it would be of interest to the committee.

DEC's concerns with this legislation are:

1) The definition of "environment or health and safety law" has not been clarified. There are many laws which may be considered "environmental" or "health and safety" related, and which may or may not be within the scope of this bill is unknown.

The more traditional environmental programs within DEC, such as air, water quality and contaminated sites would certainly be expected to fall within the scope of SB 199. What is less clear for our agency is how it would impact other programs within DEC whose primary thrust is to protect public health. Drinking water is one example. Others would include those environmental sanitation laws found in Titles 3, 17, and 18 of the Alaska Statutes. These rules govern seafood processing, the processing of other food commodities, and the sanitation of public facilities in order to protect the health and safety of the consuming public.

This lack of clarity is the basis for our fiscal note as we anticipate the Department of Law or the courts will have to answer the question.

2) How the audits are done, who may conduct them, and the scope of the audit report remains problematic.

As has been recognized, environmental audits are still a relatively new management tool typically undertaken by only the more sophisticated companies. We've recognized this as well, and we are working with industry sectors on auditing standards and practices.

Even though we realize there are no generally accepted standards for audits, at the same time the department does not want to adopt regulations setting out how audits should be done. Instead, we feel we need to work with companies or industry sectors in a cooperative manner to jointly develop the guidelines for audits. This becomes even more critical if there is to be an immunity associated with the audit or if the audits begin to take the place of state inspections. It must be a credible exercise.

The legislation allows audits to be done by anyone. We feel the audit must be done by someone who not only knows what they are doing, how the facility does or should operate, and what the rules are for that operation.

The definition of "audit report" is extremely broad, and includes the corrective action plan. In order to receive immunity, a facility has to voluntarily disclose any violations discovered as part of the audit. To be considered voluntary, the disclosure has to be made promptly, the violation must be corrected, and the facility must cooperate with us in connection with "an investigation of the issues identified in the disclosure." We interpret this to mean working on the corrective action plan.

But, under the privilege section, we cannot ask for the audit. Therefore, we cannot ask for the corrective action plan. It may be disclosed to us, but it is then confidential. The report of the violation is not confidential. We remain concerned that this will undercut any public's confidence with the facility and the agency that the correction is being adequately addressed.

3) The bill differs from how the federal courts have defined the critical self-analysis privilege. Ms. Sansone from the Department of Law gave the Resources Committee a copy of Reichhold Chemicals v. Textron[1], a 1994 U.S. District Court decision on this issue.

A very important part of the court's findings was not really addressed before the committee. That is, the court found that the critical self-analysis privilege is a "qualified privilege for *retroactive* analyses of past conduct, practices and occurrences, and the resulting environmental consequences." (emphasis added). In the court's decision, it stated that the evaluations of the potential environmental risks of a proposed course of action made in advance of the decision to adopt that course of action are not protected by a privilege. It noted that where a facility had prior knowledge of the harm that would or could result from a course of action yet deliberately chose to act is "highly relevant in a

---

[1]This is the case that established a four part test for determining if the critical self-analysis privilege was applicable. The four criteria were 1) the information must result from a critical self-analysis undertaken by the party seeking protection; 2) the public must have a strong interest in preserving the free flow of the type of information sough, 3) the information must be the type whose flow would be curtailed if discovery was allows; and 4) the information must have been prepared with the expectation it would be kept confidential and it has in fact been kept confidential.

negligence action and should ordinarily be discoverable. However, retrospective analysis is generally not relevant."

By the terms of the legislation, the privilege is not limited to a critical self-analysis of past actions. A facility operator could undertake an audit, find that a certain course of action might result in environmental damage, go ahead and take that course of action, yet benefit from the privilege.

4) We believe protecting criminal actions through the privilege or through immunity is bad public policy.

The bill seems to recognize that criminal actions should not be protected in that it says, among other stipulations, the immunity doesn't apply if the person intentionally or knowingly committed or was responsible for the action that led to the violation. Therefore, it seems to recognize that those elements generally looked for in a criminal case, that is, a certain state of mind, would exclude a person from the benefits of immunity.

This contradicts other sections of the bill. In the first section that establishes the privilege, it states that the privilege applies in criminal proceedings. Therefore, the audit would not be discoverable, even if it would demonstrate criminal intent. In the section that establishes the immunity, it states this is also available for criminal penalties. It goes on, as I've stated above, then to seemingly exclude those elements looked for to determine criminal action.

4) We also believe that establishing a privilege for environmental audits is unnecessary.

We agree that immunity from civil penalties or administrative actions under certain circumstances may make sense. It is in fact what DEC does. However, we think a privilege which creates a secret only serves to increase the public's skepticism of both industries operating in Alaska and how the agency deals with them. The question of whether or not the critical self-analysis privilege should apply is best decided by the courts which can take the specifics of each case into account.

A state-established privilege would do nothing to protect industries from potential action on the part of federal agencies, like the EPA. In fact, it is probable that such a privilege would lead to increased federal enforcement.

5) EPA has already testified that this legislation could negatively impact the state's ability to retain its delegation for federal programs such as the Clean Air program. This is further supported by the attached article from the publication Inside EPA dated March 15, 1996.

In order for the state to receive program delegation, the state must have the ability to enforce the provisions of the program. Losing delegation would result not only in the loss of funding for a

variety of programs delegated from EPA but would also result in increased federal enforcement and dual requirements (state and federal) that the regulated public would be required to meet.

7) The legislation states that a disclosure is not voluntary if it is required solely by a specific provision of an enforcement order or decree.

As has been previously [illegible] before the committee, we believe that leases, contracts, permits, statutes and regulations must also be included.

Please don't hesitate to contact me if this raises any questions for you, or if we can be of any assistance to you.

Inside E.P.A. Weekly report

An Inside Washington Publication

An exclusive report on the U.S. Environmental Protection Agency

Vol. 17, No. 11 - March 15, 1996

Key policy call forthcoming

EPA CONSIDERS BLOCKING AIR PERMIT DELEGATION TO STATES WITH AUDIT LAWS

A number of EPA regional offices are considering revisiting their decisions to approve Clean Air Act operating permit programs in states which have broad audit protection and immunity laws out of concern that these laws would jeopardize program implementation, EPA sources say.

Momentum on this issue is being spurred by a recent Region X decision in which the regional office cited Idaho's state immunity law as a cause for disapproving the state's permit program, and now a number of regional offices are trying to determine whether other state programs should be held to the same standard. EPA sources say the

continued on page 6

NEW STATE CLEAN WATER PACKAGE DRAWS FIRE FROM SOME OFFICIALS

Staffers for the nation's governors have assembled a new draft package of Clean Water Act proposals which is already raising concerns among both state and local representatives who claim the package abandons several of the key provisions embraced in the House Clean Water Act reauthorization bill.

The draft package, reprinted following this story, is intended to put forth a unified state position on Clean Water Act reauthorization and serve as a lobbying tool in future legislative discussions. But some sources are questioning the need for a new states' package since the Senate is not likely to take action on Clean Water Act legislation this year.

In 1994, the states put together a package of Clean Water Act amendments which were later used as a framework

continued on page 8

LAST-MINUTE SENATE TALKS CONSIDER DEAL TO BOOST EPA FUNDING FOR '96

Key senators March 13 launched last minute talks in search of a bipartisan deal to boost EPA's funding levels in a fiscal year 1996 funding bill. The talks followed postponement of action on a Democratic amendment to add over $700 million to EPA's budget.

Even if the Senate does reach agreement, sources warned that the Senate bill is quite different from the House bill, and several sources say Congress may extend the current continuing resolution for two weeks in order to give the two chambers time to hammer out a compromise bill. The Senate also added to the bill funding for key Clinton education programs, which some sources say may make the president more likely to sign the bill even if the environ-

continued on page 14

EXISTING CONTROLS WILL NARROW APPLICABILITY OF MAJOR AIR TOXICS RULE

Regulated facilities will be allowed to install new major air emission units at existing sites without triggering a controversial air toxics rule so long as any new emissions are regulated by other existing controls, according to a Feb. 26 draft rule obtained by *Inside EPA*.

Moreover, the draft explains that the rule, which is being promulgated under section 112(g) of the Clean Air Act, will only apply to the construction and reconstruction of emission units and will not add any control requirements for plant modifications. Industry sources are praising the draft rule, arguing that it will address significant environmental threats without imposing the kinds of operational restrictions that were inherent in a 1994 proposal.

continued on next page

INSIDE

STATE AUDIT LAWS MAY BLOCK AIR PERMIT DELEGATIONS . . . begins page one

agency is scurrying to craft a national policy that will guide future permit approval decisions.

Over the last two years EPA engaged in a process to revamp its 1986 environmental audit policy in an attempt to promote self-audits and improve compliance. In December, EPA issued its a final policy which allows companies to qualify for significant penalty mitigation in cases where they voluntarily discovered an environmental violation through an audit and disclosed that violation to EPA. In the final policy, however, EPA rejected industry's call for the establishment of an absolute or qualified "privilege" for audits, which would prevent audit documents from being used as evidence against a company in a legal proceeding.

While EPA has been in its own deliberative process, a number of states around the country have taken action to pass state laws that establish a privilege for audits and provide certain levels of immunity for the regulated community. At the time that the agency's policy was finalized, EPA stated that it had significant concerns with certain state laws and emphasized that it would take actions that were necessary to ensure that these laws did not compromise human health or the environment.

EPA's Region X office took the most aggressive action on this issue to date when it announced on Oct. 27 that it was disapproving Idaho's interim Title V air operating permit program. The region's primary concern was Idaho's audit privilege and immunity law which EPA says would grant a state immunity from civil or criminal liability for any violations voluntarily disclosed by the source to the state. At the time of disapproval, EPA stated that it had concerns with the law's privilege component, since it "could be misused to shield bad actors," but added that it did not present the kind of threat that would force EPA to disapprove the entire program. However, with regards to Idaho's immunity provision, EPA said that the state law would "impermissably interfere with Idaho's enforcement requirements" under Title V. As a result of this finding, EPA said that final approval would be conditioned on the state either changing its immunity law or demonstrating why the program would not undercut the state's enforcement authority.

Subsequent to this action and the finalization of the agency's audit policy, a number of EPA headquarters and regional sources say that regional offices are now considering revisiting some of the Title V decisions that have been made on programs that exist in states with privilege or immunity laws. According to one regional attorney, this is a "live issue" that is spurring considerable debate in a number of regional offices. A second regional source says his office is now looking at a particular state law in an attempt to determine whether it is inconsistent with EPA's policy, and if so, the office will consider taking action to affect change in that state.

Region I appears to be on the verge of taking just such an action with regards to New Hampshire, which is in the final stages of enacting an aggressive privilege bill. On February 27, Regional Administrator John DeVillars sent a letter to Gov. Stephen Merrill (R) expressing the agency's strident opposition to the state's legislation and warns that, as presently drafted, "the bill may seriously compromise the state's ability to enforce against violations of federal environmental law delegated to the state for implementation." As a remedy, DeVillars calls on the state to amend the legislation to reflect that it will "not apply to federally delegated programs with more stringent federal requirements." In addition to New Hampshire, EPA officials recently highlighted this issue with Texas during discussions over the state's Title V program and agency sources say the issue may be raised with as many as 10 other states in the coming months. An EPA official notes, however, that concerns over a number of these laws can probably be resolved through negotiations.

EPA sources explain that Title V has become the "flashpoint" in this dispute because it is the only major media program that has not already been broadly delegated to states. EPA and industry sources have noted in the past that it was unlikely that EPA would pull an already delegated program from a state on account of these laws. However, a number of sources add that Title V offers a unique opportunity to tackle this issue since it is being widely delegated. Because of its timeliness, one EPA source stresses that Title V will provide the "battleground" on which disputes with state law will be fought.

Although aware that this was a simmering issue, EPA sources say that talks within headquarters have only recently begun on how to handle this issue on a national basis. One agency source points out that it is a "very tricky" issue, but adds that a number of people within the agency feel that a national policy is needed. A regional source agrees that a national strategy is needed and faults the office of enforcement for "exerting no leadership on this issue" thus far. An EPA source says that a national policy is being developed and will have to be finalized soon since a final decision on Idaho's program will have to be made in the next couple of months.

A source within the air program says that this issue is being primarily driven by the enforcement office and has not been widely discussed among those who develop permit policy within the air office.

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Alaska State Senate

Senate Finance Committee

Official Business

Mail Stop 3100
State Capitol
Juneau, Alaska 99801-1182

MEMORANDUM

TO: Senator Drue Pearce, President
Alaska State Senate

FROM: Senator Rick Halford, Co-Chair
Senate Finance Committee

DATE: February 1, 1996

SUBJECT: Fiscal Note(s) WITHOUT a Finance Committee Referral

A positive fiscal note has been issued by the Department of Environmental Conservation for SB 199, which was referred to the Senate Resources Committee.

Please add a referral to the Senate Finance Committee.

Thank you.

Attachment(s)

cc: Senator Mike Miller, Chairman
Senate Rules Committee
Attn: Mary Gore

RH/ls

FISCAL NOTE

STATE OF ALASKA
BILL NO. SB 199

1996 LEGISLATIVE SESSION

Revision Date:
Department Affected: Environmental Conservation
Title: An Act relating to environmental audits and health and safety audits ...
BRU: Department-wide
Sponsor: Senators Leman and Pearce
Component: Department-wide
Requestor:

COMPONENT SERIAL NO. 633

Expenditures/Revenues: (Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	44.0	44.0	44.0	44.0	44.0	44.0
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND&STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS,CLAIMS	0.0	0.0	0.0	0.0	0.0	0.0
MISCELLANEOUS	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	44.0	44.0	44.0	44.0	44.0	44.0
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGE IN REVENUES ( )	0.0	0.0	0.0	0.0	0.0	0.0
FUND SOURCE						
1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	26.0	26.0	26.0	26.0	26.0	26.0
1005 GF/Program Receipt	0.0	0.0	0.0	0.0	0.0	0.0
1006 GF/MHTAA	0.0	0.0	0.0	0.0	0.0	0.0
1007 I/A Rcpts	18.0	18.0	18.0	18.0	18.0	18.0
TOTAL	44.0	44.0	44.0	44.0	44.0	44.0

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

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

ANALYSIS: (Attach a separate page if necessary.)

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

Prepared by: Larry Jones
Phone: 465-5010
Division: Director, Division of Administrative Services
Date: 1/29/96

Approved by Commissioner:
Agency: Department of Environmental Conservation
Date: 1/29/96

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BILL: SB 199 SHORT TITLE: ENVIRONMENTAL & HEALTH/SAFETY AUDITS
BILL VERSION:
SPONSOR(S): SENATOR(S) LEMAN,Pearce

CURRENT STATUS: (S) RES STATUS DATE: 01/08/96

TITLE: "An Act relating to environmental audits and health and safety audits to determine compliance with certain laws, permits, and regulations; and amending Alaska Rules of Appellate Procedure 202, 402, 602, 603, 610, and 611."

01/05/96	2058	(S)	PREFILE RELEASED - 1/5/96
01/08/96	2058	(S)	READ THE FIRST TIME - REFERRAL(S)
01/08/96	2058	(S)	RESOURCES

STATE OF ALASKA

MAR 20 1996

TONY KNOWLES, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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March 20, 1996

The Honorable Rick Halford
Co-Chairman, Senate Finance Committee
Alaska State Legislature
State Capitol, Room 508
Juneau, Alaska 99801-1182

Re: SB 139
Audit Privilege and Immunities

Dear Senator Halford:

Pursuant to your request during the Senate Finance Committee hearing on SB 139 on March 20, 1996, please find enclosed a copy of the United States Environmental Protection Agency's Final Policy Statement on environmental audits, which became effective January 22, 1996. Also enclosed is a copy of an EPA Fact Sheet on the Final Policy Statement.

Sincerely,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Marie Sansone
Marie Sansone
Assistant Attorney General

MS:prm

Enclosures

cc: Senator Loren Leman
Pat Pourchot, Legislative Director
Janice Adair, DEC
Deborah Behr, AGO
Chrystal Smith, AGO

INCENTIVES FOR SELF-POLICING
EPA FACT SHEET

Background, Scope and Timetable

- EPA's final policy on incentives for self-evaluation and self-disclosure of violations represents a refinement of the March, 1995 Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy Statement, which offered regulated entities powerful new incentives to discover, disclose and correct violations of environmental law.

- The policy is the culmination of an 18-month process to reassess the Agency's incentives to encourage voluntary disclosure and correction of violations. That process began in July of 1994 with a two-day public meeting and included a series of meetings ("dialogues") with stakeholders hosted by the American Bar Association's SONREEL Subcommittee.

- Under the final policy, the Agency will protect public health and the enviro ment by reducing civil penalties and not recommending criminal prosecution for regulated entities that voluntarily discover, disclose and correct violations.

- The final policy applies to violations under all of the environmental laws that EPA administers, and will be applied uniformly across EPA's enforcement programs and Regions.

- The policy takes effect on January 22, 1996, but at the discretion of EPA may be applied to cases that meet all of the conditions of the policy and have not yet been settled.

- EPA will study the results of the policy within three years and make that study available to the public.

Incentives for Due Diligence, Disclosure and Correction

- Under the final policy, where violations are found through voluntary environmental audits or efforts that reflect a regulated entity's due diligence (i.e., systematic efforts to prevent, detect and correct violations, as defined in the policy), and all of the policy's conditions are met (see discussion of safeguards), EPA will not seek gravity-based penalties and will generally not recommend criminal prosecution against the company if the violation results from the unauthorized criminal conduct of an employee.

- Where violations are discovered by means other than environmental audits or due diligence efforts, but are promptly disclosed and expeditiously corrected, EPA will reduce gravity-based penalties by 75% provided that all of the other conditions of the policy are met.

- EPA retains its discretion to recover economic benefit gained as a result of noncompliance, so that companies won't be able to obtain an economic advantage over their competitors by delaying their investment in compliance.

- The final policy also restates EPA's practice of not routinely requesting environmental audit reports.

Safeguards to Protect the Public

- In addition to prompt disclosure and correction, the policy requires companies to prevent recurrence of the violation and to remedy any environmental harm.

- Repeated violations or those which may have presented an imminent and substantial endangerment or resulted in serious actual harm are excluded from the policy's coverage.

- Corporations remain criminally liable for violations resulting from conscious disregard of their legal duties, and individuals remain liable for criminal wrongdoing.

- The policy contains two provisions ensuring public access to information. First, EPA may require as a condition of penalty mitigation that a description of the regulated entity's due diligence efforts be made publicly available. And second, where EPA requires that a regulated entity enter into a written agreement, administrative consent order or judicial consent decree to satisfy the policy's conditions, those agreements will be made publicly available.

A Positive Alternative to Audit Privilege

- EPA remains firmly opposed to the establishment of a statutory evidentiary privilege for environmental audits, or blanket immunities for irresponsible conduct.

- The final policy is a positive alternative to privileges that could be used to shield evidence of violations of federal environmental law as well as criminal misconduct, deny the public its right to know useful information affecting its health and the environment, drive up litigation costs, and create an atmosphere of distrust between regulators, industry and local communities.

- The policy eliminates the need for any privilege as against the government, by eliminating or reducing civil penalties and lessening the liklihood of criminal prosecution for those companies that audit, disclose and correct violations and meet the other conditions of the policy.

ENVIRONMENTAL PROTECTION AGENCY

[FRL-5400-1]

Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final Policy Statement.

SUMMARY: The Environmental Protection Agency (EPA) today issues its final policy to enhance protection of human health and the environment by encouraging regulated entities to voluntarily discover, and disclose and correct violations of environmental requirements. Incentives include eliminating or substantially reducing the gravity component of civil penalties and not recommending cases for criminal prosecution where specified conditions are met, to those who voluntarily self-disclose and promptly correct violations. The policy also restates EPA's long-standing practice of not requesting voluntary audit reports to trigger enforcement investigations. This policy was developed in close consultation with the U.S. Department of Justice, states, public interest groups and the regulated community, and will be applied uniformly by the Agency's enforcement programs.

DATES: This policy is effective January 22, 1996.

FOR FURTHER INFORMATION CONTACT: Additional documentation relating to the development of this policy is contained in the environmental auditing public docket. Documents from the docket may be obtained by calling (202) 260-7548, requesting an index to docket (C-94-01), and faxing document requests to (202) 260-4400. Hours of operation are 8 a.m. to 5:30 p.m., Monday through Friday, except legal holidays. Additional contacts are Robert Fentress or Brian Riedel, at (202) 564-4187.

SUPPLEMENTARY INFORMATION:

I. Explanation of Policy

A. Introduction

The Environmental Protection Agency today issues its final policy to enhance protection of human health and the environment by encouraging regulated entities to discover voluntarily, disclose, correct and prevent violations of federal environmental law. Effective 30 days from today, where violations are found through voluntary environmental audits or efforts that reflect a regulated entity's due diligence, and are promptly disclosed and expeditiously corrected, EPA will not seek gravity-based (i.e., non-economic benefit) penalties and will generally not recommend criminal prosecution against the regulated entity. EPA will reduce gravity-based penalties by 75% for violations that are voluntarily discovered, and are promptly disclosed and corrected, even if not found through a formal audit or due diligence. Finally, the policy restates EPA's long-held policy and practice to refrain from routine requests for environmental audit reports.

The policy includes important safeguards to deter irresponsible behavior and protect the public and environment. For example, in addition to prompt disclosure and expeditious correction, the policy requires companies to act to prevent recurrence of the violation and to remedy any environmental harm which may have occurred. Repeated violations or those which result in actual harm or may present imminent and substantial endangerment are not eligible for relief under this policy, and companies will not be allowed to gain an economic advantage over their competitors by delaying their investment in compliance. Corporations remain criminally liable for violations that result from conscious disregard of their obligations under the law, and individuals are liable for criminal misconduct.

The issuance of this policy concludes EPA's eighteen-month public evaluation of the optimum way to encourage voluntary self-policing while preserving fair and effective enforcement. The incentives, conditions and exceptions announced today reflect thoughtful suggestions from the Department of Justice, state attorneys general and local prosecutors, state environmental agencies, the regulated community, and public interest organizations. EPA believes that it has found a balanced and responsible approach, and will conduct a study within three years to determine the effectiveness of this policy.

B. Public Process

One of the Environmental Protection Agency's most important responsibilities is ensuring compliance with federal laws that protect public health and safeguard the environment. Effective deterrence requires inspecting, bringing penalty actions and securing compliance and remediation of harm. But EPA realizes that achieving compliance also requires the cooperation of thousands of businesses and other regulated entities subject to these requirements. Accordingly, in May of 1994, the Administrator asked the Office of Enforcement and Compliance Assurance (OECA) to determine whether additional incentives were needed to encourage voluntary disclosure and correction of violations uncovered during environmental audits.

EPA began its evaluation with a two-day public meeting in July of 1994, in Washington, D.C., followed by a two-day meeting in San Francisco on January 19, 1995 with stakeholders from industry, trade groups, state environmental commissioners and attorneys general, district attorneys, public interest organizations and professional environmental auditors. The Agency also established and maintained a public docket of testimony presented at these meetings and all comment and correspondence submitted to EPA by outside parties on this issue.

In addition to considering opinion and information from stakeholders, the Agency examined other federal and state policies related to self-policing, self-disclosure and correction. The Agency also considered relevant surveys on auditing practices in the private sector. EPA completed the first stage of this effort with the announcement of an interim policy on April 3 of this year, which defined conditions under which EPA would reduce civil penalties and not recommend criminal prosecution for companies that audited, disclosed, and corrected violations.

Interested parties were asked to submit comment on the interim policy by June 30 of this year (60 FR 16875), and EPA received over 300 responses from a wide variety of private and public organizations. (Comments on the interim audit policy are contained in the Auditing Policy Docket, hereinafter, "Docket".) Further, the American Bar Association SONREEL Subcommittee hosted five days of dialogue with representatives from the regulated industry, states and public interest organizations in June and September of this year, which identified options for strengthening the interim policy. The changes to the interim policy announced today reflect insight gained through comments submitted to EPA, the ABA dialogue, and the Agency's practical experience implementing the interim policy.

C. Purpose

This policy is designed to encourage greater compliance with laws and regulations that protect human health and the environment. It promotes a higher standard of self-policing by waiving gravity-based penalties for

violations that are promptly disclosed and corrected, and which were discovered through voluntary audits or compliance management systems that demonstrate due diligence. To further promote compliance, the policy reduces gravity-based penalties by 75% for any violation voluntarily discovered and promptly disclosed and corrected, even if not found through an audit or compliance management system.

EPA's enforcement program provides a strong incentive for responsible behavior by imposing stiff sanctions for noncompliance. Enforcement has contributed to the dramatic expansion of environmental auditing measured in numerous recent surveys. For example, more than 90% of the corporate respondents to a 1995 Price-Waterhouse survey who conduct audits said that one of the reasons they did so was to find and correct violations before they were found by government inspectors. [A copy of the Price-Waterhouse survey is contained in the Docket as document VIII-A-76.]

At the same time, because government resources are limited, maximum compliance cannot be achieved without active efforts by the regulated community to police themselves. More than half of the respondents to the same 1995 Price-Waterhouse survey said that they would expand environmental auditing in exchange for reduced penalties for violations discovered and corrected. While many companies already audit or have compliance management programs, EPA believes that the incentives offered in this policy will improve the frequency and quality of these self-monitoring efforts.

3. Incentives for Self-Policing

Section C of EPA's policy identifies the major incentives that EPA will provide to encourage self-policing, self-disclosure, and prompt self-correction. These include not seeking gravity-based civil penalties or reducing them by 75%, declining to recommend criminal prosecution for regulated entities that self-police, and refraining from routine requests for audits. [As noted in Section C of the policy, EPA has refrained from making routine requests for audit reports since issuance of its 1986 policy on environmental auditing.]

1. Eliminating Gravity Based Penalties

Under Section C(1) of the policy, EPA will not seek gravity based penalties for violations found through auditing that are promptly disclosed and corrected. Gravity-based penalties will also be waived for violations found through any [illegible] prior policy for self-policing [illegible] to show that it has a compliance management program that meets the criteria for due diligence in Section B of the policy.

Gravity-based penalties (defined in Section B of the policy) generally reflect the seriousness of the violator's behavior. EPA has elected to waive such penalties for violations discovered through due diligence or environmental audits, recognizing that these voluntary efforts play a critical role in protecting human health and the environment by identifying, correcting and ultimately preventing violations. All of the conditions set forth in Section D, which include prompt disclosure and expeditious correction, must be satisfied for gravity-based penalties to be waived.

As in the interim policy, EPA reserves the right to collect any economic benefit that may have been realized as a result of noncompliance, even where companies meet all other conditions of the policy. Economic benefit may be waived, however, where the Agency determines that it is insignificant.

After considering public comment, EPA has decided to retain the discretion to recover economic benefit for two reasons. First, it provides an incentive to comply on time. Taxpayers expect to pay interest or a penalty fee if their tax payments are late; the same principle should apply to corporations that have delayed their investment in compliance. Second, it is fair because it protects responsible companies from being undercut by their noncomplying competitors, thereby preserving a level playing field. The concept of recovering economic benefit was supported in public comments by many stakeholders, including industry representatives (see, e.g., Docket, II-F-19, II-F-28, and II-F-18).

2. 75% Reduction of Gravity

The policy appropriately limits the complete waiver of gravity-based civil penalties to companies that meet the higher standard of environmental auditing or systematic compliance management. However, to provide additional encouragement for the kind of self-policing that benefits the public, gravity-based penalties will be reduced by 75% for a violation that is voluntarily discovered, promptly disclosed and expeditiously corrected, even if it was not found through an environmental audit and the company cannot document due diligence. EPA expects that this will encourage companies to come forward and work with the Agency to resolve environmental problems and begin to develop an effective compliance management program.

Gravity-based penalties will be reduced 75% only where the company meets all conditions in Sections D(2) through D(9). EPA has eliminated language from the interim policy indicating that penalties may be reduced "up to" 75% where "most" conditions are met, because the Agency believes that all of the conditions in D(2) through D(9) are reasonable and essential to achieving compliance. This change also responds to requests for greater clarity and predictability.

3. No Recommendations for Criminal Prosecution

EPA has never recommended criminal prosecution of a regulated entity based on voluntary disclosure of violations discovered through audits and disclosed to the government before an investigation was already under way. Thus, EPA will not recommend criminal prosecution for a regulated entity that uncovers violations through environmental audits or due diligence, promptly discloses and expeditiously corrects those violations, and meets all other conditions of Section D of the policy.

This policy is limited to good actors, and therefore has important limitations: it will not apply, for example, where corporate officials are consciously involved in or willfully blind to violations, or conceal or condone noncompliance. Since the regulated entity must satisfy all of the conditions of Section D of the policy, violations that caused serious harm or which may pose imminent and substantial endangerment to human health or the environment are not covered by this policy. Finally, EPA reserves the right to recommend prosecution for the criminal conduct of any culpable individual.

Even where all of the conditions of this policy are not met, however, it is important to remember that EPA may decline to recommend prosecution of a company or individual for many other reasons under other Agency enforcement policies. For example, the Agency may decline to recommend prosecution where there is no significant harm or culpability and the individual or corporate defendant has cooperated fully.

Where a company has met the conditions for avoiding a recommendation for criminal prosecution under this policy, it will not face any civil liability for gravity-based penalties. That is because the same conditions for discovery, disclosure, and correction apply in both cases. This represents a clarification of the interim policy, not a substantive change.

4. No Routine Requests for Audits

EPA is reaffirming its policy, in effect since 1986, to refrain from routine requests for audits. Eighteen months of public testimony and debate have produced no evidence that the Agency has deviated, or should deviate, from this policy.

If the Agency has independent evidence of a violation, it may seek information needed to establish the extent and nature of the problem and the degree of culpability. In general, however, an audit which results in prompt correction clearly will reduce liability, not expand it. Furthermore, a review of the criminal docket did not reveal a single criminal prosecution for violations discovered as a result of an audit self-disclosed to the government.

E. Conditions

Section D describes the nine conditions that a regulated entity must meet in order for the Agency not to seek (or to reduce) gravity-based penalties under the policy. As explained in the Summary above, regulated entities that meet all nine conditions will not face gravity-based civil penalties, and will generally not have to fear criminal prosecution. Where the regulated entity meets all of the conditions except the first (D(1)), EPA will reduce gravity-based penalties by 75%.

1. Discovery of the Violation Through an Environmental Audit or Due Diligence

Under Section D(1), the violation must have been discovered through either (a) an environmental audit that is systematic, objective, and periodic as defined in the 1986 audit policy, or (b) a documented, systematic procedure or practice which reflects the regulated entity's due diligence in preventing, detecting, and correcting violations. The interim policy provided full credit for any violation found through "voluntary self-evaluation," even if the evaluation did not constitute an audit. In order to receive full credit under the final policy, any self-evaluation that is not an audit must be part of a "due diligence" program. Both "environmental audit" and "due diligence" are defined in Section B of the policy.

Where the violation is discovered through a "systematic procedure or practice" which is not an audit, the regulated entity will be asked to document how its program reflects the criteria for due diligence as defined in Section B of the policy. These criteria, which are adapted from existing codes of practice such as the 1991 Criminal Sentencing Guidelines, were fully discussed during the ABA dialogue. The criteria are flexible enough to accommodate different types and sizes of businesses. The Agency recognizes that a variety of compliance management programs may develop under the due diligence criteria, and will use its review under this policy to determine whether basic criteria have been met.

Compliance management programs which train and motivate production staff to prevent, detect and correct violations on a daily basis are a valuable complement to periodic auditing. The policy is responsive to recommendations received during public comment and from the ABA dialogue to give compliance management efforts which meet the criteria for due diligence the same penalty reduction offered for environmental audits. (See, *e.g.*, II-F-39, II-E-18, and II-G-18 in the Docket.)

EPA may require as a condition of penalty mitigation that a description of the regulated entity's due diligence efforts be made publicly available. The Agency added this provision in response to suggestions from environmental groups, and believes that the availability of such information will allow the public to judge the adequacy of compliance management systems, lead to enhanced compliance, and foster greater public trust in the integrity of compliance management systems.

2. Voluntary Discovery and Prompt Disclosure

Under Section D(2) of the final policy, the violation must have been identified voluntarily, and not through a monitoring, sampling, or auditing procedure that is required by statute, regulation, permit, judicial or administrative order, or consent agreement. Section D(4) requires that disclosure of the violation be prompt and in writing. To avoid confusion and respond to state requests for greater clarity, disclosures under this policy should be made to EPA. The Agency will work closely with states in implementing the policy.

The requirement that discovery of the violation be voluntary is consistent with proposed federal and state bills which would reward those discoveries that the regulated entity can legitimately attribute to its own voluntary efforts.

The policy gives three specific examples of discovery that would not be voluntary, and therefore would not be eligible for penalty mitigation: emissions violations detected through a required continuous emissions monitor, violations of SPDES discharge limits found through prescribed monitoring, and violations discovered through a compliance audit required to be performed by the terms of a consent order or settlement agreement.

The final policy generally applies to any violation that is voluntarily discovered, regardless of whether the violation is required to be reported. This definition responds to comments pointing out that reporting requirements are extensive, and that excluding them from the policy's scope would severely limit the incentive for self-policing (see, *e.g.*, II-C-48 in the Docket).

The Agency wishes to emphasize that the integrity of federal environmental law depends upon timely and accurate reporting. The public relies on timely and accurate reports from the regulated community, not only to measure compliance but to evaluate health or environmental risk and gauge progress in reducing pollutant loadings. EPA expects the policy to encourage the kind of vigorous self-policing that will serve these objectives, and not to provide an excuse for delayed reporting. Where violations of reporting requirements are voluntarily discovered, they must be promptly reported (as discussed below). Where a failure to report results in imminent and substantial endangerment or serious harm, that violation is not covered under this policy (see Condition D(8)). The policy also requires the regulated entity to prevent recurrence of the violation, to ensure that noncompliance with reporting requirements is not repeated. EPA will closely scrutinize the effect of the policy in furthering the public interest in timely and accurate reports from the regulated community.

Under Section D(4), disclosure of the violation should be made within 10 days of its discovery, and in writing to EPA. Where a statute or regulation requires reporting be made in less than 10 days, disclosure should be made within the time limit established by law. Where reporting within ten days is not practical because the violation is complex and compliance cannot be determined within that period, the Agency may accept later disclosures if the circumstances do not present a serious threat and the regulated entity meets its burden of showing that the additional time was needed to determine compliance status.

This condition recognizes that it is critical for EPA to get timely reporting of violations in order that it might have clear notice of the violations and the opportunity to respond if necessary, as well as an accurate picture of a given facility's compliance record. Prompt disclosure is also evidence of the regulated entity's good faith in wanting

to achieve or return to compliance as soon as possible.

In the final policy, the Agency has added the words, "or may have occurred," to the sentence, "The regulated entity fully discloses that a specific violation has occurred, or may have occurred * * *." This change, which was made in response to comments received, clarifies that where an entity has some doubt about the existence of a violation, the recommended course is for it to disclose and allow the regulatory authorities to make a definitive determination.

In general, the Freedom of Information Act will govern the Agency's release of disclosures made pursuant to this policy. EPA will, independently of FOIA, make publicly available any compliance agreements reached under the policy (see Section II of the policy), as well as descriptions of due diligence programs submitted under Section D.1 of the Policy. Any material claimed to be Confidential Business Information will be treated in accordance with EPA regulations at 40 C.F.R. Part 2.

3. Discovery and Disclosure Independent of Government or Third Party Plaintiff

Under Section D(3), in order to be "voluntary", the violation must be identified and disclosed by the regulated entity prior to: the commencement of a federal state or local agency inspection, investigation, or information request; notice of a citizen suit; legal complaint by a third party; the reporting of the violation to EPA by a "whistleblower" employee; and imminent discovery of the violation by a regulatory agency.

This condition means that regulated entities must have taken the initiative to find violations and promptly report them, rather than reacting to knowledge of a pending enforcement action or third-party complaint. This concept was reflected in the interim policy and in federal and state penalty immunity laws and did not prove controversial in the public comment process.

4. Correction and Remediation

Section D(5) ensures that, in order to receive the penalty mitigation benefits available under the policy, the regulated entity not only voluntarily discovers and promptly discloses a violation, but expeditiously corrects it, remedies any harm caused by that violation [illegible] and carrying out any removal or remedial action required by law), and expeditiously certifies in writing to appropriate state, local and EPA authorities that violations have been corrected. It also enables EPA to ensure that the regulated entity will be publicly accountable for its commitments through binding written agreements, orders or consent decrees where necessary.

The final policy requires the violation to be corrected within 60 days, or that the regulated entity provide written notice where violations may take longer to correct. EPA recognizes that some violations can and should be corrected immediately, while others (e.g., where capital expenditures are involved), may take longer than 60 days to correct. In all cases, the regulated entity will be expected to do its utmost to achieve or return to compliance as expeditiously as possible.

Where correction of the violation depends upon issuance of a permit which has been applied for but not issued by federal or state authorities, the Agency will, where appropriate, make reasonable efforts to secure timely review of the permit.

5. Prevent Recurrence

Under Section D(6), the regulated entity must agree to take steps to prevent a recurrence of the violation, including but not limited to improvements to its environmental auditing or due diligence efforts. The final policy makes clear that the preventive steps may include improvements to a regulated entity's environmental auditing or due diligence efforts to prevent recurrence of the violation.

In the interim policy, the Agency required that the entity implement appropriate measures to prevent a recurrence of the violation, a requirement that operates prospectively. However, a separate condition in the interim policy also required that the violation not indicate "a failure to take appropriate steps to avoid repeat or recurring violations"—a requirement that operates retrospectively. In the interest of both clarity and fairness, the Agency has decided for purposes of this condition to keep the focus prospective and thus to require only that steps be taken to prevent recurrence of the violation after it has been disclosed.

6. No Repeat Violations

In response to requests from commenters (see, e.g., II-F-19 and II-G-18 in the Docket), EPA has established "bright lines" to determine when previous violations will bar a regulated entity from obtaining relief under this policy. These will help protect the public and responsible companies by ensuring that penalties are not reduced for repeat offenders. Under condition D(7), the same or closely-related violation must not have occurred previously within the past three years at the same facility, or be part of a pattern of violations on the regulated entity's part over the past five years. This provides companies with a continuing incentive to prevent violations, without being unfair to regulated entities responsible for managing hundreds of facilities. It would be unreasonable to provide unlimited amnesty for repeated violations of the same requirement.

The term "violation" includes any violation subject to a federal or state civil judicial or administrative order, consent agreement, conviction or plea agreement. Recognizing that minor violations are sometimes settled without a formal action in court, the term also covers any act or omission for which the regulated entity has received a penalty reduction in the past. Together, these conditions identify situations in which the regulated community has had clear notice of its noncompliance and an opportunity to correct.

7. Other Violations Excluded

Section D(8) makes clear that penalty reductions are not available under this policy for violations that resulted in serious actual harm or which may have presented an imminent and substantial endangerment to public health or the environment. Such events indicate a serious failure (or absence) of a self-policing program, which should be designed to prevent such risks, and it would seriously undermine deterrence to waive penalties for such violations. These exceptions are responsive to suggestions from public interest organizations, as well as other commenters. (See, e.g., II-F-19 and II-G-18 in the Docket.)

The final policy also excludes penalty reductions for violations of the specific terms of any order, consent agreement, or plea agreement. (See, II-E-60 in the Docket.) Once a consent agreement has been negotiated, there is little incentive to comply if there are no sanctions for violating its specific requirements. The exclusion in this section applies to violations of the terms of any response, removal or remedial action covered by a written agreement.

8. Cooperation

Under Section D(9), the regulated entity must cooperate as required by EPA and provide information necessary to determine the applicability of the policy. This condition is largely unchanged from the interim policy. In the final policy, however, the Agency has added that "cooperation" includes

assistance in determining the facts of any related violations suggested by the disclosure, as well as of the disclosed violation itself. This was added to allow the agency to obtain information about any violations indicated by the disclosure, even where the violation is not initially identified by the regulated entity.

F. Opposition to Privilege

The Agency remains firmly opposed to the establishment of a statutory evidentiary privilege for environmental audits for the following reasons:

1. Privilege, by definition, invites secrecy, instead of the openness needed to build public trust in industry's ability to self-police. American law reflects the high value that the public places on fair access to the facts. The Supreme Court, for example, has said of privileges that, "[w]hatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States* v. *Nixon*, 418 U.S. 683 (1974). Federal courts have unanimously refused to recognize a privilege for environmental audits in the context of government investigations. *See, e.g., United States* v. *Dexter*, 132 F.R.D. 8, 9–10 (D.Conn. 1990) (application of a privilege "would effectively impede [EPA's] ability to enforce the Clean Water Act, and would be contrary to stated public policy.")

2. Eighteen months have failed to produce any evidence that a privilege is needed. Public testimony on the interim policy confirmed that EPA rarely uses audit reports as evidence. Furthermore, surveys demonstrate that environmental auditing has expanded rapidly over the past decade without the stimulus of a privilege. Most recently, the 1995 Price Waterhouse survey found that those few large or mid-sized companies that do not audit generally do not perceive any need to; concern about confidentiality ranked as one of the least important factors in their decisions.

3. A privilege would invite defendants to claim as "audit" material almost any evidence the government needed to establish a violation or determine who was responsible. For example, most audit privilege bills under consideration in federal and state legislatures would arguably protect factual information—such as health studies or contaminated sediment data—and not just the conclusions of the auditors. While the government might have access to required monitoring data under the law, [illegible] of that nature would [illegible] underlying facts needed to determine whether such data were accurate.

4. An audit privilege would breed litigation, as both parties struggled to determine what material fell within its scope. The problem is compounded by the lack of any clear national standard for audits. The "*in camera*" (i.e., non-public) proceedings used to resolve these disputes under some statutory schemes would result in a series of time-consuming, expensive mini-trials.

5. The Agency's policy eliminates the need for any privilege as against the government, by reducing civil penalties and criminal liability for those companies that audit, disclose and correct violations. The 1995 Price Waterhouse survey indicated that companies would expand their auditing programs in exchange for the kind of incentives that EPA provides in its policy.

6. Finally, audit privileges are strongly opposed by the law enforcement community, including the National District Attorneys Association, as well as by public interest groups. (*See, e.g.*, Docket, II-C-21, II-C-28, II-C-52, IV-G-10, II-C-25, II-C-33, II-C-52, II-C-48, and II-G-13 through II-G-24.)

G. Effect on States

The final policy reflects EPA's desire to develop fair and effective incentives for self-policing that will have practical value to states that share responsibility for enforcing federal environmental laws. To that end, the Agency has consulted closely with state officials in developing this policy, through a series of special meetings and conference calls in addition to the extensive opportunity for public comment. As a result, EPA believes its final policy is grounded in common-sense principles that should prove useful in the development of state programs and policies.

As always, states are encouraged to experiment with different approaches that do not jeopardize the fundamental national interest in assuring that violations of federal law do not threaten the public health or the environment, or make it profitable not to comply. The Agency remains opposed to state legislation that does not include these basic protections, and reserves its right to bring independent action against regulated entities for violations of federal law that threaten human health or the environment, reflect criminal conduct or repeated noncompliance, or allow one company to make a substantial profit at the expense of its law-abiding competitors. Where a state has obtained appropriate sanctions needed to deter such misconduct, there is no need for EPA action.

H. Scope of Policy

EPA has developed this document as a policy to guide settlement actions. EPA employees will be expected to follow this policy, and the Agency will take steps to assure national consistency in application. For example, the Agency will make public any compliance agreements reached under this policy, in order to provide the regulated community with fair notice of decisions and greater accountability to affected communities. Many in the regulated community recommended that the Agency convert the policy into a regulation because they felt it might ensure greater consistency and predictability. While EPA is taking steps to ensure consistency and predictability and believes that it will be successful, the Agency will consider this issue and will provide notice if it determines that a rulemaking is appropriate.

II. Statement of Policy: Incentives for Self-Policing

Discovery, Disclosure, Correction and Prevention

A. Purpose

This policy is designed to enhance protection of human health and the environment by encouraging regulated entities to voluntarily discover, disclose, correct and prevent violations of federal environmental requirements.

B. Definitions

For purposes of this policy, the following definitions apply:

"Environmental Audit" has the definition given to it in EPA's 1986 audit policy on environmental auditing, i.e., "a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements."

"Due Diligence" encompasses the regulated entity's systematic efforts, appropriate to the size and nature of its business, to prevent, detect and correct violations through all of the following:

(a) Compliance policies, standards and procedures that identify how employees and agents are to meet the requirements of laws, regulations, permits and other sources of authority for environmental requirements.

(b) Assignment of overall responsibility for overseeing compliance with policies, standards, and procedures, and assignment of specific responsibility for assuring compliance at each facility or operation.

(c) Mechanisms for systematically assuring that compliance policies, standards and procedures are being carried out, including monitoring and auditing systems reasonably designed to detect and correct violations, periodic evaluation of the overall performance of the compliance management system, and a means for employees or agents to report violations of environmental requirements without fear of retaliation;

(d) Efforts to communicate effectively the regulated entity's standards and procedures to all employees and other agents;

(e) Appropriate incentives to managers and employees to perform in accordance with the compliance policies, standards and procedures, including consistent enforcement through appropriate disciplinary mechanisms; and

(f) Procedures for the prompt and appropriate correction of any violations, and any necessary modifications to the regulated entity's program to prevent future violations.

"Environmental audit report" means the analysis, conclusions, and recommendations resulting from an environmental audit, but does not include data obtained in, or testimonial evidence concerning, the environmental audit.

"Gravity-based penalties" are that portion of a penalty over and above the economic benefit, i.e., the punitive portion of the penalty, rather than that portion representing a defendant's economic gain from non-compliance. (For further discussion of this concept, see "A Framework for Statute-Specific Approaches to Penalty Assessments", #GM-22, 1980, U.S. EPA General Enforcement Policy Compendium).

"Regulated entity" means any entity, including a federal, state or municipal agency or facility, regulated under federal environmental laws.

C. Incentives for Self-Policing

1. No Gravity-Based Penalties

Where the regulated entity establishes that it satisfies all of the conditions of Section D of the policy, EPA will not seek gravity-based penalties for violations of federal environmental requirements.

2. Reduction of Gravity-Based Penalties by 75%

EPA will reduce gravity-based penalties for violations of federal environmental requirements by 75% so long as the regulated entity satisfies all of the conditions of Section D(1) through D(9) below.

3. No Criminal Recommendations

(a) EPA will not recommend to the Department of Justice or other prosecuting authority that criminal charges be brought against a regulated entity where EPA determines that all of the conditions in Section D are satisfied, so long as the violation does not demonstrate or involve:

(i) a prevalent management philosophy or practice that concealed or condoned environmental violations; or

(ii) high-level corporate officials' or managers' conscious involvement in, or willful blindness to, the violations.

(b) Whether or not EPA refers the regulated entity for criminal prosecution under this section, the Agency reserves the right to recommend prosecution for the criminal acts of individual managers or employees under existing policies guiding the exercise of enforcement discretion.

4. No Routine Request for Audits

EPA will not request or use an environmental audit report to initiate a civil or criminal investigation of the entity. For example, EPA will not request an environmental audit report in routine inspections. If the Agency has independent reason to believe that a violation has occurred, however, EPA may seek any information relevant to identifying violations or determining liability or extent of harm.

D. Conditions

1. Systematic Discovery

The violation was discovered through:

(a) an environmental audit, or

(b) an objective, documented, systematic procedure or practice reflecting the regulated entity's due diligence in preventing, detecting, and correcting violations. The regulated entity must provide accurate and complete documentation to the Agency as to how it exercises due diligence to prevent, detect and correct violations according to the criteria for due diligence outlined in Section B. EPA may require as a condition of penalty mitigation that a description of the regulated entity's due diligence efforts be made publicly available.

2. Voluntary Discovery

The violation was identified voluntarily, and not through a legally mandated monitoring or sampling requirement prescribed by statute, regulation, permit, judicial or administrative order, or consent agreement. For example, the policy does not apply to:

(a) emissions violations detected through a continuous emissions monitor (or alternative monitor established in a permit) where any such monitoring is required;

(b) violations of National Pollutant Discharge Elimination System (NPDES) discharge limits detected through required sampling or monitoring;

(c) violations discovered through a compliance audit required to be performed by the terms of a consent order or settlement agreement.

3. Prompt Disclosure

The regulated entity fully discloses a specific violation within 10 days (or such shorter period provided by law) after it has discovered that the violation has occurred, or may have occurred, in writing to EPA.

4. Discovery and Disclosure Independent of Government or Third Party Plaintiff

The violation must also be identified and disclosed by the regulated entity prior to:

(a) the commencement of a federal, state or local agency inspection or investigation, or the issuance by such agency of an information request to the regulated entity;

(b) notice of a citizen suit;

(c) the filing of a complaint by a third party;

(d) the reporting of the violation to EPA (or other government agency) by a "whistleblower" employee, rather than by one authorized to speak on behalf of the regulated entity; or

(e) imminent discovery of the violation by a regulatory agency.

5. Correction and Remediation

The regulated entity corrects the violation within 60 days, certifies in writing that violations have been corrected, and takes appropriate measures as determined by EPA to remedy any environmental or human harm due to the violation. If more than 60 days will be needed to correct the violation(s), the regulated entity must so notify EPA in writing before the 60-day period has passed. Where appropriate, EPA may require that to satisfy conditions 5 and 6, a regulated entity enter into a publicly available written agreement, administrative consent order or judicial consent decree, particularly where compliance or remedial measures are complex or a lengthy schedule for attaining and maintaining compliance or remediating harm is required;

6. Prevent Recurrence

The regulated entity agrees in writing to take steps to prevent a recurrence of the violation, which may include improvements to its environmental auditing or due diligence efforts.

7. No Repeat Violations

The specific violation (or closely related violation) has not occurred previously within the past three years at the same facility, or is not part of a pattern of federal, state or local violations by the facility's parent organization (if any), which have occurred within the past five years. For the purposes of this section, a violation is:

(a) any violation of federal, state or local environmental law identified in a judicial or administrative order, consent agreement or order, complaint, or notice of violation, conviction or plea agreement; or

(b) any act or omission for which the regulated entity has previously received penalty mitigation from EPA or a state or local agency.

8. Other Violations Excluded

The violation is not one which (i) resulted in serious actual harm, or may have presented an imminent and substantial endangerment to, human health or the environment, or (ii) violates the specific terms of any judicial or administrative order, or consent agreement.

9. Cooperation

The regulated entity cooperates as requested by EPA and provides such information as is necessary and requested by EPA to determine applicability of this policy. Cooperation includes, at a minimum, providing all requested documents and access to employees and assistance in investigating the violation, any noncompliance problems related to the disclosure, and any environmental consequences related to the violations.

E. Economic Benefit

EPA will retain its full discretion to recover any economic benefit gained as a result of noncompliance to preserve a "level playing field" in which violators do not gain a competitive advantage over regulated entities that do comply. EPA may forgive the entire penalty for violations which meet conditions 1 through 9 in section D and, in the Agency's opinion, do not merit any penalty due to the insignificant amount of any economic benefit.

F. Effect on State Law, Regulation or Policy

EPA will work closely with states to encourage their adoption of policies that reflect the incentives and conditions outlined in this policy. EPA remains firmly opposed to statutory environmental audit privileges that shield evidence of environmental violations and undermine the public's right to know, as well as to blanket immunities for violations that reflect criminal conduct, present serious threats or actual harm to health and the environment, allow noncomplying companies to gain an economic advantage over their competitors, or reflect a repeated failure to comply with federal law. EPA will work with states to address any provisions of state audit privilege or immunity laws that are inconsistent with this policy, and which may prevent a timely and appropriate response to significant environmental violations. The Agency reserves its right to take necessary actions to protect public health or the environment by enforcing against any violations of federal law.

G. Applicability

(1) This policy applies to the assessment of penalties for any violations under all of the federal environmental statutes that EPA administers, and supersedes any inconsistent provisions in media-specific penalty or enforcement policies and EPA's 1986 Environmental Auditing Policy Statement.

(2) To the extent that existing EPA enforcement policies are not inconsistent, they will continue to apply in conjunction with this policy. However, a regulated entity that has received penalty mitigation for satisfying specific conditions under this policy may not receive additional penalty mitigation for satisfying the same or similar conditions under other policies for the same violation(s), nor will this policy apply to violations which have received penalty mitigation under other policies.

(3) This policy sets forth factors for consideration that will guide the Agency in the exercise of its prosecutorial discretion. It states the Agency's views as to the proper allocation of its enforcement resources. The policy is not final agency action, and is intended as guidance. It does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties.

(4) This policy should be used whenever applicable in settlement negotiations for both administrative and civil judicial enforcement actions. It is not intended for use in pleading, at hearing or at trial. The policy may be applied at EPA's discretion to the settlement of administrative and judicial enforcement actions instituted prior to, but not yet resolved, as of the effective date of this policy.

H. Public Accountability

(1) Within 3 years of the effective date of this policy, EPA will complete a study of the effectiveness of the policy in encouraging:

(a) changes in compliance behavior within the regulated community, including improved compliance rates;

(b) prompt disclosure and correction of violations, including timely and accurate compliance with reporting requirements;

(c) corporate compliance programs that are successful in preventing violations, improving environmental performance, and promoting public disclosure;

(d) consistency among state programs that provide incentives for voluntary compliance.

EPA will make the study available to the public.

(2) EPA will make publicly available the terms and conditions of any compliance agreement reached under this policy, including the nature of the violation, the remedy, and the schedule for returning to compliance.

I. Effective Date

This policy is effective January 22, 1996.

Dated: December 18, 1995

Steven A. Herman,

Assistant Administrator for Enforcement and Compliance Assurance.

[FR Doc. 95-31146 Filed 12-21-95; 8:45 am]

BILLING CODE [illegible]

2/1/96

Senate Finance Committee

To: Larry Stevens

From: ~~Rose Sturgis~~ Jerry

Date: 1 February 96

Subject: Bill Number: SB 199 Version: _____

Fiscal Note WITHOUT a Senate Finance Committee Referral

Title: Environmental & Health Safety Audits

Referrals: _____

Sponsor(s): Sen. Leman and Pearce

Department: Environmental Conservation

BRU: _____

Component: _____

Comments: _____

SENATE COMMITTEE REPORT
First Committee of Referral

DATE: 2/2/96

FURTHER: (Finance)

Date of 5-Day Notice: 1-15-96
(in accordance with Uniform Rule 23)

DATE TURNED INTO OFFICE: 3-12-96

The Resources Committee considered SB 199

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

Ø +FN'S

and recommends:

Senate Bill:

[ ] be replaced with ____ CS SB 199 (RES) [ ] same title [✓] new title

House Bill:

[ ] adopt previous ____ CS ____ ( ) [ ] same title [ ] technical title [ ] new: SCR*____

[ ] attached amendment(s)

[ ] adopt Letter of Intent by ____ Committee

[ ] further referral to the ____ Committee

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

NEW FISCAL NOTE(S):

Department	Date	Zero	Fiscal
DEC: Department wide	2/14/96		$440
DNR/LE	2/6/96	✓	
DNR/Commissioner's Office	2/6/96	✓	indeterminate
Law	2/13/96	✓	
DEC (revised)	2/16/96		$665

SB 1 CS

PREVIOUS FISCAL NOTE(S):*

Department	Date	Zero	Fiscal

[ ] APPROPRIATION -- no fiscal note

*Include fiscal notes accompanying Governor's bill

SB 199 -- Witnesses Before the Senate Resources Committee

Adair, Janice	DEC	1-31-96
Davenport, Jerry	MAPCO Petroleum	1-31-96
Kreitzer, Annette	Aide, Sen. Leman	1-31-96
Riley, John	Texas Nat. Resource Cons. Com.	1-31-96
Sansone, Marie	Assist. Attorney General	1-31-96
Sutcliffe, Ron	Assist. Attorney General	1-31-96
Torok, Steve	U.S. EPA, Senior Rep.	1-31-96

BILL: SB 199 SHORT TITLE: ENVIRONMENTAL & HEALTH/SAFETY AUDITS
BILL VERSION:
SPONSOR(S): SENATOR(S) LEMAN,Pearce

CURRENT STATUS: (S) FIN STATUS DATE: 03/12/96

HEARING:(S) FIN MAR 26 09:00 AM SENATE FINANCE 532

TITLE: "An Act relating to environmental audits and health and safety audits to determine compliance with certain laws, permits, and regulations; and amending Alaska Rules of Appellate Procedure 202, 402, 602, 603, 610, and 611."

01/05/96	2058	(S)	PREFILE RELEASED - 1/5/96
01/08/96	2058	(S)	READ THE FIRST TIME - REFERRAL(S)
01/08/96	2058	(S)	RESOURCES
01/31/96		(S)	MINUTE(RES)
02/02/96	2287	(S)	FIN REFERRAL ADDED
03/12/96	2708	(S)	RES RPT CS 4DP 1NR NEW TITLE
03/12/96	2708	(S)	FISCAL NOTES TO SB & CS (DEC, F&G)
03/12/96	2708	(S)	INDETERMINATE FISCAL NOTE (DNR)
03/12/96	2708	(S)	ZERO FISCAL NOTES TO SB & CS (DOT, MVA)
03/12/96	2708	(S)	REFERRED TO FINANCE
03/20/96		(S)	FIN AT 09:00 AM SENATE FINANCE 532
03/26/96		(S)	FIN AT 09:00 AM SENATE FINANCE 532

SENATE RESOURCES COMMITTEE
January 31, 1996
3:40 P.M.

SRES 1/31/96
SB 199 ENVIRONMENTAL & HEALTH/SAFETY AUDITS

CHAIRMAN LEMAN called the Senate Resources Committee meeting to order at 3:40 p.m. and announced SB 199 to be up for consideration He said that SB 199 was inspired by his attendance at an Energy Council meeting where he found that 14 other states have already done this and a number of others are contemplating it.

Although the EPA originally resisted this idea, it is changing its philosophy from the approach that government alone is responsible for forcing people to act certain ways to encouraging people to act in ways to meet our environmental laws. He said many programs want self-reporting, but they don't offer sufficient protection for companies who voluntarily report a violation and then correct it. SB 199 goes a long way to address that.

The key thought behind this bill is that government should view business as a partner with a mutual interest of protecting our environment. In many cases, because of the complexities of our environmental and health/safety laws, a lot of businesses may unwittingly be violating. Correcting that behavior through a self-audit approach before it causes a problem gets us closer to accomplishing our objectives.

Number 80

ANNETTE KREITZER, Legislative Aide to Senator Leman, said she thought it was important to point out that "privileged materials" as defined in this bill does not apply to documents, communications, reports, or information required by a regulatory agency to be collected under a federal or state environmental health and safety law. The privilege would not apply to information obtained by observation, sampling, or monitoring by a regulatory agency or information obtained from a source not involved in the preparation of an environmental health and safety audit report.

The voluntary disclosure and immunity clause on page six grants limited immunity from administrative, civil, or criminal penalty for a violation that's disclosed, if the violation is corrected within a reasonable time. The violation cannot have resulted in injury to anyone at the site or in substantial off-site harm to persons, property or the environment. The immunity does not apply, if the violation was knowingly committed, if people were hurt, or if the violation was committed recklessly by any agent of the owner or operator. To receive immunity a facility that conducts a self-audit has to give notice to the regulatory agency that it's going to. The notice has to include the facility or the portion of the facility to be audited, the time the audit has to be done, and a general scope of the audit. A company cannot be in continuous state of self-audit. The audits must be complete no later than six months from the start of the audit, unless the regulatory agency agrees to an extension.

Immunity does not apply if a person repeatedly or continuously commits serious violations and does not attempt to bring the operation into compliance.

MS. KREITZER then briefly reviewed for the committee the individual sections.

Number 175

SENATOR TAYLOR asked for a practical example of how this would apply. MS. KREITZER replied that in other states, for example, if you miss a reporting requirement, and you voluntarily disclose that, you are not assessed a penalty.

SENATOR LEMAN noted that the whole concept of self-auditing started around 1977, but it has become even more important since the Union Carbide accident in Bohpal, India in 1984 where that company recognized that they were better off to go in and identify the things that needed to be changed and made those changes.

Number 209

JOHN RILEY, Director of Litigation, Texas Natural Resource Conservation Commission, said they passed similar legislation effective May 23, 1995. He said this legislation is almost identical to theirs in spirit and in most of the provisions. Approximately 143 entities have availed themselves of the section in law which anticipated applying for immunity should violations be discovered. They haven't necessarily sought the immunity, but they have taken the first step of giving notice of intent.

The types of entities are very different ranging from the University of Texas, municipalities, and industries.

They have received 12 disclosures for immunity and a number of them would not have been discovered through routine record-keeping. None of the disclosures have been for any major contamination. The law is being looked upon as a supplement to their traditional enforcement mechanism, MR. RILEY said.

Workshops he has taught emphasize that the audit and their traditional enforcement are independent of each other. If a violation is found simultaneously, immunity does not apply. He emphasized that the immunity is not from enforcement which mandates certain remedial action or technical requirements.

Number 323

SENATOR LEMAN asked if they could require short-term as well as long-term remedial action. MR. RILEY said that was right.

SENATOR TAYLOR asked him for an example of how a violation would have been treated before the law and how it is treated now. MR. RILEY explained there are some instances, like record-keeping, where entities are much better at investigating themselves than the agency is.

Number 375

SENATOR LINCOLN asked if he had seen a reduction in environmental inspections they would normally go out on or was there a reprioritization of their resources that they now have with self auditing. MR. RILEY said he hadn't seen any, yet, but it is anticipated that at some point their inspections will not have to focus on same entities with the same frequency that they do now. This would happen if they are satisfied that they are getting a sufficient return on their self-policing mechanism.

Number 396

SENATOR LINCOLN asked if disclosures are made public. MR. RILEY clarified that they do not advertise disclosures, but it is proper interpretation of their act that those disclorure letters are public information.

SENATOR LINCOLN asked how their legislation affects the oil industry on self-auditing. MR. RILEY said, generally speaking, he hoped there would be benefit from industry's compliance status. They don't have to fear that documents they generate in the process would be used against them.

Number 442

SENATOR HALFORD asked if he found an entity they were involved in an enforcement action on had used the self-audit provisions in any way as a shield. MR. RILEY said the only shield their law offers is a shield from a monetary penalty.

SENATOR HALFORD asked what was his reaction when they are dealing with an entity they are about to start an investigation of, because of information or complaints, and they get a notice of self-audit at the same time. MR. RILEY said they wouldn't stop a scheduled inspection for a response to a complaint just because they received a notice of intent to audit. They would continue the inspection and see if they meet at the end with the same information. They exercise their discretion if they determine a good effort is made.

SENATOR LEMAN said that the "privilege" applies to the audit itself, not to the underlying facts.

SENATOR TAYLOR said he was troubled by the possibility that the opposite of the bill were true now and that an entity which is self-reporting is subjecting themselves to the full penal aspects of whatever the violation might have been, even though they are the ones who reported it. MR. RILEY said it is not clear whether self-reporting would be given consideration for having made the disclosure.

SENATOR HALFORD said he was concerned with both directions. In "instructions" listed under "guidance" it says, "regional inspectors are cautioned not to schedule inspection based solely upon the receipt of such a notice." (Senator Halford was referring to a TNRCC guidance document available from Senate Resources Staff.)

Number 520

JERRY DAVENPORT, legal counsel for MAPCO Petroleum, said he has had the opportunity to work in Oklahoma with the state agency developing a penalty policy which has elements similar to the immunity provisions in SB 199. Prior to this he worked as the head of the environmental law section of Nature Ways Co. in Texas and was very involved in doing audits.

MR. DAVENPORT explained that typically a company performs an audit, because the law and regulations in the environmental area are extremely complex. Getting the information to the employee to try to comply with the regulations on a facility level basis is a very difficult process. They have other day-to-day concerns than reading the 13,000 pages of federal regulations. Audits are a key tool in determining a facility is complying with all the regulations and helping it to improve its management of the environmental area, as well as correcting any specific violation.

Before a company adopts the position where it will actively go forward and audit its facilities and try to get in compliance, rather than waiting for a regulator to come by and inspect a facility, a number of questions come up. One is if they disclose the audits, will they be penalized for it, and will the audits be used against them by people who oppose their activities.

He said in most cases if an inspection finds compliance problems, most agencies will work with companies and recognize that voluntary efforts are key to maintaining a high level of compliance within a particular state. Of course, this isn't always the case. Penalty policies in some states discourage the types of activities that should be encouraged to maintain a high level of compliance. In all honesty, when they are asked by some companies if they will be penalized for inadvertent violation, they have to say that it could happen, that it could be severe; but, it is far better for a company to seek out its own problems and solve them rather than to wait for the state to find them.

SB 199, MR. DAVENPORT thought, crafted a very careful balance between the carrot for encouraging voluntary audits and self-evaluation and penalties for violations.

TAPE 96-9, SIDE B

Number 590

MR. DAVENPORT clarified that the areas identified under audit are the only areas covered. He informed the committee that Oklahoma adopted a similar policy. In Oklahoma's policy, the term "company" was used in order to mean those typically covered. A large Air Force base was the first to take advantage of the penalty policy. He said that the policy encouraged an early review from the regulating community. In conclusion, Mr. Davenport stated that the audit is a key tool in order for companies and regulated entities to comply with the complicated laws and regulations they face.

CHAIRMAN LEMAN informed Mr. Davenport and Mr. Riley that testimony would be taken from the Department of Law who have expressed

concern regarding the application of the audit privilege. He asked them to stay on line in order to answer possible questions. Both Mr. Davenport and Mr. Riley agreed.

Number 565

[THE TESTIMONY OF JANICE ADAIR IS TRANSCRIBED VERBATIM.]

For the record, my name is **JANICE ADAIR** and I'm here representing DEC today. We certainly agree that an objective, systematic and periodic review of a facilities operation is a very good idea. It's one of the best things the company can do to help comply with state and federal environmental laws. DEC's normal operating procedure is to not take any enforcement action where things are reported to us by a company where they have found a violation. We have never taken enforcement action. I think it's also important to recognize that DEC does not have administrative penalties and we have very limited civil penalties; and Marie Sansone from the Department of Law will talk about that more. I did bring a copy of a project that we're trying to do here with car shops, auto shops which will provide them with technical assistance on doing an audit because that is one of the problems that small companies have; is just even how to do one. There are no standards. And then also provide them with some immunity if violations are found provided they are quickly corrected.

Number 545

We do have concerns with this piece of legislation, however. The privilege that's created creates a secret. It withholds information from the public and from the regulatory agency. And it has the real potential to increase public suspicion about the activities and motivations of the company. We believe that this would actually decrease cooperation. We have found that approaches that are more open and inclusive are much more effective at building good working relationships between the industry and public, between the industry and the agency, and between the agency and the public. So that everyone understands what it is that is going on.

As we read the bill, the audit report which is a very comprehensive definition and includes the corrective action plan that a company would create to correct any violations that they had discovered would be privileged and would not be subject to any kind of disclosure. But the audit report, the documents that make up that audit report, do not have to be labelled in any way. And yet if an employee, a State employee, inadvertently discloses that audit report they are subject to criminal sanctions, a Class B misdemeanor. The department could ask a court to privately review the audit and lift the privilege on any portion of it. But we'd first be able to prove fraud or that the audit would show non-compliance. And we don't know how we would prove that if we had not ever seen the documents that make up the audit report. If there's reasonable cause to believe a criminal offense has occurred, the court can allow a State AG to review the audit. But

any information that AG receives from his or her review - apparently, even if it leads to a lifting of the privilege - can't be used to prosecute the alleged criminal. If they do, if the

agency were to make the decision to go ahead with a criminal prosecution, we believe that we'd have to bring in a new attorney probably, new inspectors from the department. Because we have to prove that any information we use didn't come from the review of that audit. So, practically speaking, we don't think that the audit privilege would ever be lifted.

Information is, as was pointed out, that's required by law to be provided to the department isn't subject to the dis -- to the privilege. But we're not certain if that includes items that are in the permits; where we have a permit stipulation that might make a regulation more specific to a given facility. Nor do we believe it would include any contracts or leases or compliance orders by consent which is a very common agreement that DEC reaches with a lot of the regulated community. The owner or operator can voluntarily disclose to us any of the violations that their audit identifies and receive immunity from criminal, civil, or administrative enforcement actions providing they give us notice. But as we read this, the disclosure is public information but the actions that they take to correct the violation are not. They are covered, they're within the definition of the audit report and would be privileged. So, you would have documentation out there that a violation had been discovered through the disclosure letter, but whatever action the company chose to take to correct it would be - would remain under the audit privilege. We see that as a potential problem.

There are also stipulations about when the disclosure is not voluntary. If it's by enforcement or decree, the immunity doesn't apply if the violation was done intentionally. Here, there is also some standard on injury or harm, but they're different standards. Some it is substantial injury, some is just injury, there's other references to substantial harm and then other references to just harm. So, we're not really certain what has to be proven at what point and time for the immunity. The court can find the immunity doesn't apply if violations are serious, repeated, or continuous, and that the person hasn't taken any actions to correct the violations such that they've created a pattern. And that a pattern is defined as serious violations that are separate and distinct at the same facility. So you have this concept of these continuous violations that then somehow become separate and distinct at the same facility. And we do have, there are operators in this state that will move from facility to facility and create the same violations in different facilities. So you would have, those fly-by-night operators that could potentially receive immunity under this bill.

As I said in the beginning, we do support environmental audits. We think that they're very good and it's one of the reasons that we're doing this, this pit stop program. And if it is as successful as other states have been with it, we plan to expand it to others. But we do have some concerns about the way this bill is drafted.

CHAIRMAN LEMAN summarized Ms. Adair's testimony to mean that she

agreed with the legislation conceptually, but some of the language needs to be tightened in order to agree on the concept of the bill. JANICE ADAIR: We think that our current policy is working very well. So, I think as far as that goes conceptually we are in

agreement. CHAIRMAN LEMAN asked Ms. Adair if she would be willing to work with the committee in order to ensure that the language of the bill is consistent with DEC policy and what the committee wants to accomplish. JANICE ADAIR: If we can do that, we certainly will--yes.

Number 489

SENATOR TAYLOR pointed out that one aspect of SB 199 to which Ms. Adair objected was that a DEC employee could be prosecuted if they leaked the information to someone. Are they prosecuted under the current policy?

JANICE ADAIR: Through the Chair, Senator Taylor, no. We have the presumption that our files are public information. Someone can come in and look in our files. If we have confidential information in our files, what we endeavor to do is mark those and keep them in a different location. Since this document isn't required to be labelled and it is a voluminous definition, it can include a lot of different things and there is no requirement that it be labelled in any way. So, someone could give it to us - a secretary being very efficient, not knowing what it is puts it in the facility file and a few days later someone comes in to look at that facility file and there is the information. And it has then been disclosed, it is inadvertent. But none-the-less, it has been disclosed.

SENATOR TAYLOR said that the industry should be penalized for its inadvertent mistakes, but the agency, DEC, and its employees should not. JANICE ADAIR: Mr. Chairman, Senator Taylor, confidential documents should be labelled confidential.

SENATOR TAYLOR indicated that DEC should be able to take care of that. If an audit were received, isn't there a certain protocol. JANICE ADAIR: If we know that's what it was. We may not know what it is. SENATOR TAYLOR pondered how an employee of DEC could be dealt with if the employee did not like a decision made by DEC and the employee makes calls to various federal agencies. How do we get to that employee if the process specified in SB 199 is objectional? JANICE ADAIR: Mr. Chairman, Senator Taylor, I don't know that you will ever be able to take care of disgruntled employees in any employment situation. But, confidential documents that a company expects to be kept confidential should be submitted in that fashion. The definition of audit in this bill is so broad that we could receive information that was not realized to be part of an audit report. It would just simply go on the file and be available for public review. There was no intent, it's a very different situation than someone who purposely takes it and purposely discloses it; who intentionally does that. It is an inadvertent mistake that causes the document to be disclosed.

SENATOR TAYLOR asked Ms. Adair if she would object to the penal aspect of the bill if the bill specified that confidential documents be labelled as such. JANICE ADAIR: Mr. Chairman,

Senator Taylor, if that was the only thing that was changed in the bill, we would still have concerns with the legislation. SENATOR TAYLOR asked if Ms. Adair would still have concern with that one provision. JANICE ADAIR: We would still have concerns with that provision.

SENATOR TAYLOR did not understand why Ms. Adair would have problems with penalizing an employee who intentional leaked information from properly labelled documents. JANICE ADAIR: That particular section doesn't require that the employee intentionally release it. It just simply says, if it's released.

CHAIRMAN LEMAN noted that there is a section that specifies that if the document is not clearly labelled then it would be an affirmative defense. Chairman Leman agreed with Senator Taylor and Senator Halford. He was interested in hearing from the people in Texas about this issue. Chairman Leman indicated that placing the burden on those submitting the audit to label it would be agreeable with him. JOHN RILEY said that they decline to receive information that is part of an environmental audit. MR. RILEY explained that their legislation requires that before accepting a document, the department would enter into a confidentiality agreement. The confidentiality agreement obligates the submitter to label the documents. In practice, the submitter must label their documents, but this is not provided for in the legislation.

Number 402

CHAIRMAN LEMAN agreed with that method.

SENATOR TAYLOR expressed concern that this legislation would bind the agencies within the State while having no impact on any federal agency to whom the same document could be leaked. He pointed out that he and his office staff receive information of a proprietary nature involving various oil matters in Alaska. He emphasized that he and his employees fall under that sanction: if anyone discloses any of that information, they could be sent to jail. Why should the standard be different for DEC?

CHAIRMAN LEMAN noted that there is a Congressional bill which would change federal law to do this.

SENATOR HALFORD suggested that if the purpose is immunity, then the documents could be sent to DEC sealed and remain so. There is no reason to ever open those documents at DEC. Documents are at DEC in order that the entity can prove that it is working on it. The only time proof would be needed would be in the case of a violation. He stated that perhaps, the best manner in which to deal with this would be by DEC receiving the sealed documents so that the entity can prove they sent the documents if need be.

Number 369

[THE TESTIMONY OF MARIE SANSONE IS TRANSCRIBED VERBATIM.]

My name is MARIE SANSONE, and I've reviewed this bill from primarily the standpoint of its application in civil and

administrative proceedings. My remarks today are of two categories: some are just background information and the other category would be to raise what we view are very serious problems and concerns with the bill. As you noted in your remarks, the audit privilege concept is based on an evidentiary privilege that was first recognized in the early '70s in a case Redice vs. Doctors

Hospital. In that case, a patient had died. After the death of the patient, there was a medical peer review group. The patient's family sought the communications by the medical peer review group to prove medical malpractice. In 1970, the D.C. Circuit Court of Appeals recognized a concept that there should be a privilege for self-critical analysis or self-evaluative analysis where the purpose of that analysis is to prevent future malpractice or future bad conduct. That concept spread and nearly all the state legislatures adopted such a statute and we have one in this State. So we do have a type of limited audit privilege, if you will, in AS 18.23.030. And it may be worth looking at that statute for language or concepts related. It's 18.23.030. After that case, several courts went on to extend the concept of this privilege to other areas of law. Some courts completely rejected the concept even in the area of medical peer review. Other courts modified it. In general, there has never really been among the courts any consensus on what are the proper elements to assert a privilege or to overcome a privilege. The courts have, for the most part, rejected the privilege in environmental cases. There is one recent exception and that is the Reichhold case out of the Federal District Court in Florida. And I've brought copies of that decision with me, because it does set out conditions and criteria that the court considered important in the environmental fields. And that case happened to be a private case among private parties for contribution over a contaminated site. Alaska State law, except for the medical peer review, does not have an audit privilege. We do have the attorney-client privilege, the work-product privilege, and the evidentiary rule that against--that evidence of subsequent, remedial measures are inadmissible. And these evidentiary rules are used to protect audits, at least in part. They are available as a mechanism. There's also a mechanism in the rules of civil procedure for parties to obtain protective orders against disclosure. So, I wanted to leave the committee with the impression that we are not without mechanisms to protect information.

The federal law that would apply to Alaska - there is federal law on the privilege and I've brought that case with me too. In 1992, the Ninth Circuit Dowling vs. American Hawaii Cruises held that there would be no privilege of self-critical analysis for internal corporate reviews of matters related to safety concerns. The Ninth Circuit didn't say that would never happen, but the conditions they establish in their decision do set up a hurdle that would have to be overcome. Interestingly, the Reichhold case which recognized the privilege relies on Dowling. So, the Reichhold court thought it could be done and I think those cases are very worthwhile to look at just in terms of requirements and exceptions that they set out. If the bill were to pass in its present form, the federal law of evidence would apply to any federal cases; but the State legislation would apply to State cases. That could create some odd situations as we just mentioned a few minutes ago in the hearing.

The audit privilege legislation for environmental cases, like what Texas has - the concept for that started to develop in the early '90s in Oregon and Colorado. Similar bills have been introduced in other states, fourteen have passed and a number are pending, some have failed, some have been vetoed, and there are also federal bills. I've provided the committee staff with a notebook that

contains testimony and background on many of these bills both by industry and by enforcement agencies for and against the bills. And that would give anyone who wants to take a look at it an idea of the scope of the discussion.

Number 294

Virtually no one has ever disagreed with the concept that voluntary audits should be encouraged. That under appropriate circumstances, there should be either penalty reductions, good conduct credits, whatever, perhaps no enforcement as a break for a company that's acting in good faith and actually reviewing its behavior and making its corrections. But once you get past that initial agreement over the concepts and policies, there is or has been a lot of debate. And these bills have had vigorous and almost unanimous opposition from the federal and state enforcement agencies. The United States' Attorney General for the Department of Justice has opposed the privilege or an evidentiary privilege established in legislation. The EPA in its new audit policy, while it creates a policy that is designed to encourage audits and offer breaks and incentives for audits opposes state legislation creating the evidentiary privilege. The National District Attorney's Association has vigorously opposed this type of legislation and many state attorneys general have also opposed this type of legislation. Their concerns have been that the bill is actually not necessary to encourage compliance. That unless they're carefully drafted they'll create safe harbors for polluters, promote fraud, that they'll divest state enforcement officials of their discretion, invest that discretion in judges who will not be familiar with the case or the evidence. That the secrecy the bill could create if it's drafted very broadly would create mistrust of the enforcement agencies, regulatory agencies, and the very corporation it's intended to benefit. The corporations are conducting audits to avoid accidents and liability and that the fear of a disclosure requirement would not inhibit those audits. In the jurisdictions where this type of legislation has been debated, some industries have vigorously supported the bills. Other industries have supported the concept of incentives, but not necessarily through a statutory privilege or immunity. In any event, there's been a huge volume of testimony and that can probably tell you I've given it at least five inches worth. And I don't intend to cover all of that. In states where its been debated, it has produced a very adversarial bill. These bills contain within their framework, this adversarial relationship is built right into the bill. And I think if you carefully go through a lot of the exceptions and provisions in the Texas bill, you will see that. One provision will be very broad, the next provision will kind of chisel away, another provision will be broad, the next will chisel away. So, that adversarial nature is built right into the bill.

Number 239

With that background, I want to emphasize a few points. We're very concerned with the breadth of the bill. The definition of environmental or health and safety law is very broad. It is not just DEC and OSHA; there are environmental bills, environmental laws vested in many state agencies and they are scattered

throughout the entire Alaska statutes. DNR has environmental enforcement, regulatory authority. The Alaska Oil & Gas Conservation Commission regulates oil and gas drilling to prevent land and water contamination. And they have, they are participants in the EPA's underground injection control program. The joint pipeline office regulates the Trans-Alaska Pipeline for environmental compliance and safety. Department of Fish and Game has what could be construed as environmental laws. The Department of Public Safety regulates hazardous materials. And I probably omitted many agencies and many environmental laws. So that would be one of our concerns: that it would be improper and incorrect to view this bill as just dealing with DEC enforcement. If that were the intent, it would need to be more narrowly restricted. Or perhaps, that is not the intent, but I think it's important to understand that. Similarly, there are many laws that could be considered occupational and health and safety laws not just OSHA. But worker's compensation would be classified as an occupational and health and safety law. The Department of Health and Social Services regulates and licenses health facilities and operations, not just for patient care type regulations. But in many cases, for occupational, compliance with occupational laws. Professional and occupational licenses are another area that could be construed as a health and safety law. So, again if the intent is that this would just cover OSHA enforcement, the bill as its drafted does not do that.

Number 213

We're also concerned with the definition of environmental or health or safety audits. These audits can be conducted by an owner or operator, an employee, an independent contractor. We don't have a concern so much as to who conducts an audit; but the critical issue in granting immunity or granting a privilege, giving someone a break would be who had the authority to initiate that audit, who had the authority to commit the funds and undertake the corrective action. As the bill is drafted, anyone in a large corporation in any division could initiate an audit. Maybe they would have authority to undertake the correction, maybe they wouldn't. But that is very simply too broad when we're going to give sweeping privileges and immunities. As a practical matter, when the attorney general's office includes an audit requirement in a settlement agreement one of the criteria that we would look at is: does the person or the entity have the wherewithal to actually conduct and complete the audit and undertake the corrections. That would be very important to us to whether or not they should be entitled to any kind of break on whether or not we're going to bring a case, or whether or not we would offset any civil assessment. Related to that, but not the same concern, is there are no standards for audits. There's no licensing for audits and

there's a variety of audits. So that combined with the question of who can undertake one creates potential for abuse we feel.

Number 184

Perhaps the most troubling aspect is the definition of audit report in the bill. And the bill is drafted so broadly that any document or communication of any nature whatsoever that is generated before, during and after the audit, if it can somehow relate to the audit

and the resulting corrective actions is classified as the audit report. In the law of evidence there is nothing, not even the attorney-client privilege that would even approach a privilege of that scope. We don't believe there's justification for creating a privilege for the raw data that might be collected in the audit: the photos, the maps, and so forth. I find it very hard to see that there can be a justification for that. We believe there's no justification for the privilege to apply to the implementation plan or the corrective tracking system. There'd be no point to gather the information and chart a course of corrective action and then keep that information confidential, or at least it doesn't seem like there'd be any point to keeping it confidential. Because if you were undertaking the corrective action that frequently is to provide employee training, obtain appropriate permits. It just doesn't seem to make sense.

The case law that I've provided you, the Dowling and the Reichhold case, recognize that there's no justification for keeping a privilege -- keeping a report confidential for post-audit conduct. So, if a party conducts an audit, the audit finds deficiencies and recommends corrective actions and then lo and behold those aren't undertaken, there's an accident, there's injury; that report should not be confidential as to that post-accident, that post-audit conduct. And that is a principle that is recognized in the federal courts that have recognized an audit privilege. Finally, along with the audit report definition most courts carve out exceptions for evidence where there's exceptional necessity or extraordinary hardship. And those circumstances might be that a witness died or a witness is impossible to locate who was interviewed as part of the audit, that the evidence is destroyed or missing, it is impossible to otherwise obtain the evidence. That kind of exception should be built into those provisions.

We're very concerned with the marking requirement. The report is supposed to be marked, but there are no consequences to not marking them. There are all kinds of materials that could be part of the audit report that would look no different from any other document that might be submitted to DEC or to a regulatory agency. Under the bill, anyone can mark a document. Anyone can mark a document at any time even years after an audit is completed. For the immunity provisions to kick in, there has to be advance notice to the regulatory agency of the audit but not for the privilege. So, apart from the immunity, there's no real starting point to when you can start thinking about the audit and start marking your materials confidential. I guess the point, the conclusion to that is that if the legislature concludes there's policy reasons that would support creating an evidentiary and disclosure privilege, those policy reasons we do not believe would support going this far. We just

think its too broad, that it will invite fraud and abuse. And that we'll be keeping information secret that's actually vital to protecting public health and safety.

Now with respect to the privilege, and I believe this might be a conflict between the way the bill is drafted and the way its being implemented in Texas, but if you look at the very first paragraph of the bill - that privilege applies to any type of litigation, it can, whether it's civil, criminal or administrative. It could be asserted by public or private parties, it could be asserted when

the State is bringing a case. It wouldn't necessarily have to be an enforcement case. It could be asserted if the State has been sued and we're trying to obtain discovery of an audit report in our defense. And it could be asserted between private parties and there's quite a lot of case law where private parties argue about this in terms of contribution over contaminated sites or insurance. So, it is an issue that comes up in private litigation. The way the bill is drafted, again I don't know if this the intent or not, but it applies to any type of dispute: negligence, intentional torts, contract problems, property problems. The State has leases. We have property management contracts. DOT is concerned that it would come up in condemnation cases. The University and Mental Health Lands Trust manage property and this could be asserted in any dispute involving those issues. Now, again that may not be the intent, but that is the effect of the language. Construction law is another area where there could be serious consequences. The State either contracts or gives grants to municipalities for large public works projects. Often there have to be audits in connection with these projects. As far as DEC goes, DEC brings injunctions on occasion to stop continuing violations and civil assessment and cost recovery statutes; it could come up in any of these contexts. It would apply to any type of remedy, not just penalties. It could be damages. It obviously applies to criminal proceedings. In administrative proceedings, that those could be conceivably enforcement. There are other administrative proceedings such as revocations of licenses where professionals or facilities have fallen far below in the accepted standard of conduct. We sometimes litigate over lease terminations in administrative context because the lessees are not maintaining the property. Contract debarment is another type of administrative proceeding. In other words, and I probably haven't mentioned all the types of proceeding, but the State participates in many proceedings. And the privilege applies to all of those. So the potential for the impact of this bill is enormous. To create a new privilege that could be invoked in so many different types of proceedings, would take very careful study and review. The privileges that are in the law that have been in effect, those privileges evolved over a very long periods of time and were refined through the courts and they're very narrow. Civil, for a broad privilege of this nature, it is very contrary to our civil discovery of practice and policy, the laws of civil discovery. We have very broad discovery to promote resolution of disputes and promote a level playing field. Parties in civil litigation are required to disclose any matters that are relevant to the subject matter of the dispute. And that's to encourage settlement and proper resolution of the dispute. When a privilege is asserted under the civil rules, or if a party desires a protective order, there are mechanisms in effect now to achieve

that.

The third point I want to make - we feel that the provisions in many respects are cumbersome, confusing, and would create substantive problems. We feel there are a number of drafting problems that have evolved here just from picking up the bill and trying to impose it on Alaska law. For example, the bill provides the person asserting the privilege has a burden of proving it applies. Well, with the definitions this broad, a party could simply assert and prove just about anything. That is the scope of the definitions. The burden then shifts to the person seeking

discovery or to the State to show that the documents fall in a category that's not protected, or that there's fraud, or that there's been non-compliance.

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Number 001

But as this bill is drafted, it would be logically impossible to do that.

The second problem we see there, again, is the post-report conduct should not be subject to the privilege. That principle is picked up in our medical peer review law and our Reichhold case.

We're concerned with the category of nonprivileged material. As drafted, it refers to materials collected under the law. It doesn't mention permits or other authorizations. They frequently contain detailed requirements. It doesn't reference, although possibly there's later provisions that would cover it, judicial and administrative orders. But, significantly, this section does not provide for public contracts, public grants, to require audits or require this information. While it's true, you can still agree under this bill to exchange that information, I think that the provisions are such that we would lose quite a bit of bargaining leverage to do that.

With respect to immunity, Ron Sutcliffe will discuss that. I do want to point out a few things. The bill provides immunity for administrative penalties. DEC does not have any administrative penalty authority. Therefore, the bill would not have any effect on DEC in this regard. Other agencies do have administrative penalty authority and it would affect them. DEC does not have civil penalty authority, except for air quality and hazardous waste. In all other areas of DEC environmental regulation there is no civil penalty authority. The civil assessments are required to be compensatory for damages and costs and remedial.

Another concern that arises here is that if you look throughout the Alaska statutes, there's penalty provisions throughout them. Some are detailed. Some are simple. They are all very different. The bill as drafted applies to all of those. So, its exact impact would not be known without very careful study.

As a fifth point, we are very concerned with the provisions that impact State employees. In recognizing that there are concerns wit. unauthorized disclosure information, there are still many

provisions in here that cast State employees and State agencies in a very negative light and would actually have a very chilling affect on their ability to do their job. In a similar reverse image, many of the exceptions for the corporations cast corporations in a very adverse light and are designed to ferret-out corporations that are bad actors or midnight dumpers. These types of provisions in the bill set up very adversarial tensions that do not foster good audits. Where we have required audits in environmental enforcements and where they have worked, there's been a great deal of cooperation between the agency and the entity. The agencies have been involved in designing the audit, have monitored the conduct of the audit, have reviewed the conclusions. I do

have several examples of that.

A couple of years ago, we had a very successful compliance sort-of by consent with Kake Tribal Corporation. They had approximately 10-years of violation. Previous enforcement efforts had failed. There had been two criminal convictions, one probation revocation, and numerous notices of violation, but did not produce any results. They had multiple violations in every area, solid waste, hazardous waste, water quality, drinking water, sewage, all around a great deal of problems. The first step of the civil enforcement action was to require and agree with Kake on conducting, we called it an assessment, but it was actually an audit. They did a very thorough job. They reported to us violations we were not aware of, that were very serious.

As part of the settlement, they received a very significant reduction in their civil assessment for this. They also undertook projects that went way beyond any legal requirements.

Another example of where audits are very successful in the State is the joint pipeline office. The joint pipeline office works to audit the pipeline and they have received a national award for the audit structure they use. They have indicated in a communication they have detected 5,000 violations through audits. That's a significant number of violations of health and safety laws. Their response was to correct that and no penalties have been assessed.

These are the models we would want to use in crafting audit policy. Audits that do not create and foster adversarial relationships and that actually do produce compliance and positive relationships between the agencies and the regulating community.

I'll be happy to answer any questions.

Number 127

SENATOR HALFORD said it seemed that they could deal with this whole issue if we just codified the federal privilege in State law and applied it.

MS. SANSONE said that would certainly overcome a lot of our objections and it would not set up a state/federal conflict in the evidence law.

SENATOR LINCOLN asked if there was anything in the bill she did

like and had she attempted to work it out with the sponsor of the bill. MS. SANSONE replied that they had discussed approaches that would preserve the intent that would work. They haven't been able to explore those in depth, yet. They like the concept of audits from the civil standpoint. They have no objections to giving people offsets or reductions, or working with them to give them breaks for audits. We think that's appropriate. I think the immunity section, if you try to apply the immunities, there's many exceptions and you could argue for a long time whether you were in an exception or not. The important thing is that we encourage people to audit. That we get them into compliance and that if there is good conduct, they probably are entitled to some kind of break. Whether that's immunity, whether that's penalty reduction.

The incentives through the immunity provision are aimed at a very narrow group of people for violations that don't result in injury. Corporations or individuals that have violations that result in injury and damages maybe could benefit even more from conducting audits and I think we could agree we should encourage that.

SENATOR HALFORD asked if we codified the federal privilege and its four points, would she have any objections to that applying directly to environmental audits. MS. SANSONE replied that she thought that would be appropriate. She thought including the policy statement that is now in the bill would be good, also.

SENATOR HALFORD asked if in the federal privilege that immunity applied even though injury or death may occur. MS. SANSONE replied that under the federal law that privilege attaches to the prior conduct, the evaluation of the prior conduct. If there's future bad or negligent conduct, it does not apply.

SENATOR HALFORD asked if it attaches to prior conduct that includes injury or death. MS. SANSONE said that is correct.

Number 217

STEVE TOROK, Senior Representative, U.S. EPA, said they had not completed a thorough review of SB 199, but he wanted to make some general comments on the concept. Alaska and EPA share the goal of achieving cooperation of regulated entities to obtain compliance with environmental laws. The critical question is how to achieve that goal without shielding environmentally irresponsible behavior or increasing environmental litigation. The vast majority of regulated entities do comply with environmental law. The focus of their enforcement is, and has been, on the violators, not the compliers.

EPA's policy applies when a regulated entity undertakes a voluntary environmental audit or self-evaluation. It provides three incentives to conduct them and disclose violations that may be discovered during those audits. First, EPA will completely eliminate punitive penalties for companies or public entities that voluntarily identify, disclose, and correct violations. EPA will also reduce punitive based penalties by up-to 75 percent for regulated entities that meet most, but not all, of the conditions.

This ability to partially reduce penalties is preferable to an all

or nothing approach.

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

Third, EPA will not request voluntary environmental audit reports to trigger or initiate enforcement actions. This was in practice since 1986 and its change will alleviate the fears that an audit report will invite investigations that would not otherwise occur. EPA may request audit report information, if violations have been

identified by other means.

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

Several independent studies support EPA's final policy of voluntary cooperation. An Arthur Anderson survey of corporate general counsels in 1992 revealed that nearly 60 percent of the corporations surveyed have had compliance audits performed between 1989 - 1991. Another almost four percent before 1989 had already conducted environmental audits. While only 37 percent of the corporations surveyed had never undertaken a formal compliance audit. This shows that a majority of the corporations have already found it to be to their advantage to conduct compliance audits. Of those corporations conducting audits, only 16 percent of the general counsels reported that they altered their procedures for conducting audits, because of concerns that the violations they find might be used against them. The overwhelming majority expressed no such concern.

Voluntary cooperation by regulated entities is also exemplified in a study of the Investor Responsibility Research Center (IRRC). In its 1994 corporate profiles directory, the IRRC surveyed more than 249 companies covering 75 of the 86 standard industrial groups. The study found a large amount of voluntary compliance through various programs.

Preliminary results from EPA's internal survey on the use of information from voluntary self-disclosures and voluntarily performed environmental audits supports the EPA's policy goals. EPA regional offices reported that of the over 4,600 enforcement actions taken during fiscal years 1993 - 1994, only 62 reported actions, nearly one percent, were initiated on the basis of voluntary self-disclosed information. Of that one percent, 75 percent had penalties that were either reduced or eliminated

completely. To their knowledge, the federal government has never initiated a criminal enforcement case based upon a voluntarily submitted environmental audit.

Alaska enjoys a reputation of a State that exercises enforcement discretion and actually puts its effort towards solving the problem, not putting its effort toward collecting punitive damages.

In other audit privilege states, the existence of an environmental audit privilege has not lead to any increase in voluntary compliance.

The EPA generally opposed the creation and adoption of new statutory and environmental evidentiary privileges. The issue associated with the privileges and subsequent litigation create

serious resource drains on government and private litigators. Such statutes can encourage litigation.

The U.S. Supreme Court has stated in a number of opinions that privileges are impediments to the search for the truth. They should not be created lightly, nor construed broadly.

EPA feels that incentives should be structured in policy rather than establishing a statutory evidentiary privilege or immunity, the later of which could be used to shield evidence of violations from law enforcement officials, deny the public its right to know useful information affecting its health and environment, MR. TOROK stated.

Number 350

If the legislature feels that a statutory provision is necessary to encourage environmental auditing and voluntary compliance, they are prepared to work with them on its development.

Number 373

SENATOR HALFORD asked for clarification on the percentage of companies concerned with enforcement of violations that were discovered through environmental audit. MR. TOROK restated that 60 percent of corporations surveyed had already had a compliance audit performed. Only 16 percent of those had altered their procedures for conducting the audits, because of concerns that the violations they find can be used against them.

SENATOR HALFORD said he thought 16 percent was a significant number.

Number 414

SENATOR HALFORD also stated he thought that SB 199 was specific in avoiding his concern regarding evidence needed in enforcement being tainted by evidence covered under a privilege. He said he thought it was the intent of the sponsor that that wasn't the case.

MR. TOROK said one of the areas they would be concerned about are the immunities and how they would affect delegated federal programs

that the state has already assumed, or is working toward presumption. For example, the Clean Air requirements are for the State to have similar, if not equal, capabilities of collecting penalties. Whether the State decides to collect penalties is up to its discretion. In order for them to grant approval of the program, the State has to have the capability to collect the penalties.

SENATOR HALFORD asked if they were to codify the federal privilege with regard to self critical analysis, that would not be a problem. MR. TOROK said that would address the privilege, but he didn't know if that would address the immunity issue. SENATOR HALFORD agreed, but he thought they were so closely related, that one flows from the other.

Number 430

SENATE RES BASIS -18 - 01/31/96

RON SUTCLIFFE, Assistant Attorney General, said the immunity provision is the issue that concerns the Criminal Division most. They are afraid it may effectively undermine their ability to prosecute serious environmental crime. They believe the "bad actors" would use it to avoid criminal liability.

There were some ambiguities with the way the immunities were written in the bill. In criminal law, MR. SUTCLIFFE said, if there are ambiguities, they are going to be strictly construed against the State.

Starting with section 475, the environmental disclosure is voluntary if it's made promptly and there is no definition of what promptly means.

Also when you make a disclosure and have to send it by certified mail, it's not clear whether the sending of it triggers the notification or the receipt of it does.

Under subsection 5 the person who makes the disclosure has to initiate an appropriate effort, which should be defined. The "due diligence" definition should be tied to some other "due diligence" definition in criminal law.

In subsection 7, they are concerned with the substantial off-site harm and what that means.

On page 7, in subsection (d) (1) - (3) they had problems with the negligence, because it's not clear who would determine negligence.

Under subsection (f) there is no definition for substantial injury which could pose some problems. Also, in subsection f there is presumption language, that the State would have to prove beyond a reasonable doubt, in order to rebut the presumption, and that would be an intolerable burden. There are other standards that are possible, like clear and convincing evidence, that would be easier to use.

Number 481
SENATOR HALFORD asked what standard of evidence they use to

prosecute. MR. SUTCLIFFE answered proof beyond a reasonable doubt in a criminal case. Under subsection (h) there is a way for the State to get around the immunity provisions, if there have been repeated or continuously committed violations. However, there is no definition of a serious violation.

His Division was concerned that there had to be three distinct and separate events in a three year period at the same facility or operation and that might result in them moving around. It would be more appropriate for it to apply to any of the facilities a corporation might own.

Number 524

MR. SUTCLIFFE said one of the problems with the privileges was the that a corporation could appoint everyone at a facility as part of the audit team, so, if these people were subpoenaed later, they

could testify about things that did not happen as a result of the audit. He thought that would lead to a lot of hearings on motions to quash subpoenas.

He said it was clear from the legislation that they could use independently discovered material to prosecute, but they were afraid that would end up in a series of proceedings where they have to prove to the court that they actually discovered it from an independent source.

SENATOR LEMAN said if the audit report were sealed, their job would be easy. MR. SUTCLIFFE answered the way it written now, if they got it from a search warrant, if it were sealed, he wouldn't be able to get it from DEC. Under a search warrant, it's sealed anyway. SENATOR LEMAN clarified that if it were sealed in the first place they wouldn't have to prove to the court that the source of information was other than the audit report. MR. SUTCLIFFE agreed.

SENATOR HALFORD asked in prosecution, do they have to deal with the existing privilege against self-critical analysis. MR. SUTCLIFFE answered that he had never run-up-against it and he had had only one self-critical audit in two years which he declined. SENATOR HALFORD commented that that meant there was some protection, then. MR. SUTCLIFFE said the violation had been discovered by DEC before the disclosure, but it had been remedied, so they exercised discretion. He said when he prosecutes, he does it in front of a jury of 12 people, and he couldn't imagine a jury convicting, if the violation had been remedied.

SENATOR HALFORD asked if the administration has commented on language on page 9, section 09.25.480 Circumvention by Regulation Prohibited. MR. SUTCLIFFE said he didn't know the answer.

SENATOR TAYLOR said he thought this concept was well worth looking into and he commented on an incident that happened in Wrangell when EPA did not exercise their discretion.

TAPE 96-10, SIDE B
Number 500

SENATOR TAYLOR said he got the penalty reduced to $2500, but everybody felt like they were being treated like some sort of criminal. They were subjected to arrogance and insult. That is what prompts legislation such as this. He said that attitude was very frustrating to have to deal with and he applauded all the assistance that has been offered on working out good legislation.

DAVID E. ROGERS
ATTORNEY AND COUNSELOR AT LAW

211 Fourth Street, Suite 108
P.O. Box 33032
Juneau, Alaska 99803
(907) 586-1807 Fax: (907) 586-1007

March 28, 1996

Senator Rick Halford
Chairman
Senate Finance Committee
Capitol Building, Room 518
Juneau, Alaska 99801-1182

Dear Senator Halford:

I am writing this letter on behalf of the Council of Alaska Producers.

We are still reviewing the Senate Resources Committee CS and discussing it with ADEC and other interested parties. However, we did want to let you know that the Council strongly supports the concepts of privilege and immunity embodied in SB 199. This is an excellent way to promote and encourage voluntary compliance with environmental and health and safety laws and regulations.

Yours truly,

David E. Rogers

SB 201

SFIN

FILE

SENATE FINANCE COMMITTEE REPORT

REPORTED OUT OF SFC 4/26/96

DATE: 3/26/96 DATE TURNED INTO OFFICE: 4/26/96

The Finance Committee considered SENATE BILL NO. 201

Relating to the employment of emergency fire-fighting personnel by the commissioner of natural resources.

and recommends:

[ ] be replaced with ____ CS SB 201 (FIN)

[ ] adopt previous ____ CS _____ (____)

[ ] attached amendment(s)

[ ] adopt Letter of Intent by _____ Committee

[ ] further referral to the _____ Committee

Senate Bill:
[ ] same title
[ ] new title

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

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	NR	DNP	AM
	✓		✓		
	✓		✓		
Co-Chair:	✓	Co-Chair:			
Co-Chair:	✓	Co-Chair:			

NEW FISCAL NOTE(S):

Department	Date	Zero	Fiscal
Nat. Resources	4/26/96		250.6

PREVIOUS FISCAL NOTE(S):*

Department	Date	Zero	Fiscal
Public Safety	3/18/96	0	

[ ] APPROPRIATION -- no fiscal note

*Include fiscal notes accompanying Governor's bill

FISCAL NOTE

STATE OF ALASKA — BILL NO. CSSB201(RES)

1996 LEGISLATIVE SESSION

Revision Date: Original — Dept Affected: Natural Resources

Title: An Act relating to the employment of emergency fire-fighting personnel by the commissioner of... — BRU: Resource Development

Component: EFF Non-Emergency

Sponsor: Senator Lincoln

Requestor: Senate Finance — Component Serial No.: TO BE ESTABLISHED

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY97	FY98	FY99	FY00	FY01	FY02
PERSONAL SERVICES	250.0	250.0				
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	250.0	250.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGE IN REVENUES ( )	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
1061 CIP Receipts **	250.0	250.0				
TOTAL	250.0	250.0	0.0	0.0	0.0	0.0

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

POSITIONS

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

ANALYSIS: (Attach a separate page if necessary)

This bill provides hiring authority to DNR to utilize EFF for fire suppression, hazard reduction, fire prevention, habitat restoration or improvement and other related activities in emergency and nonemergency circumstances under AS 41.15.030. The Bureau of Land Management, National Park Service, U.S. Fish and Wildlife Service, and the U.S. Forest Service have identified prescribed burning projects which require approximately 300 days of work for trained fire fighting crews. This work cannot be effectively or efficiently conducted without a trained workforce. Funding will be provided by the agency(s) requesting fire management work other than wildland fire suppression. In FY95 the Division received approval through the capital budget to receive and expend up to $500.0 in federal receipts to supply Emergency Fire Fighting crews to federal agencies on a reimbursable basis.

**(Reference: SLA94, CH4, Sec 10, Pg 10, Ln 23).

A separate component will be set up to account for these contractual activities apart from emergency fire suppression funded through state general funds.

Prepared by: Tom Boutin, Director — Phone: 465-3379

Division: Forestry — Date: 26-Apr-96

Approved by Commissioner — Date: 26-Apr-96

Agency: Natural Resources

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

(SB201.XLS Rev 4/26/96) For further distribution information call the Governor's Legislative Office

FISCAL NOTE

No. 2

STATE OF ALASKA
BILL
Bill Version: SB 201
(S) Publish Date: 3-25-96

1996 LEGISLATIVE SESSION

Revision Date: March 18, 1996
Dept. Affected: Public Safety
Title: An Act Relating to the employment of fire-fighting personnel
BRU: Fire Prevention
Component: Fire Prevention Operations
Sponsor: Senator Lincoln
Requestor: S. RES
COMPONENT SERIAL NO. 0494

EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)

OPERATING	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
CHANGE IN REVENUES ( ) Revenue Code	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program						
1006 GF/MHTIA						
Other						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

Estimate of current year (FY 96) impact: $ -0-

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

Passage of this bill will allow the commissioner of the Department of Natural Resources to more fully utilize personnel under departmental control. The public good will be more fully served by passage of this proposal in that a body of trained personnel will be made immediately available for use in non-fire emergencies.

Prepared By: Kenneth H. Lea, Deputy Fire Marshal
Phone: 465-5522
Division: Fire Prevention
Date: March 18, 1996

Approved by Commissioner: [signature]
Date: 3/11/96
Agency: Ronald L. Otte, Department of Public Safety

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

Sen. Sharp moved adopted

9-LS1474\K
Luckhaupt
4/26/96

Sen. Rieger moved w/o objection rep out w/ind. recs. 4F/N 4/26/96

CS FOR SENATE BILL NO. 201( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATOR LINCOLN

A BILL

FOR AN ACT ENTITLED

"An Act relating to the employment of emergency fire-fighting personnel by the commissioner of natural resources."

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

* Section 1. AS 39.25.110(19) is amended to read:

(19) emergency fire-fighting personnel [FIRE FIGHTERS] employed by the Department of Natural Resources for a fire emergency or for fire prevention and related activities conducted under AS 41.15.030;

* Sec. 2. AS 41.15.030(b) is amended to read:

(b) The commissioner may hire emergency fire-fighting personnel, and shall establish classifications and rates of pay for the emergency fire-fighting personnel consistent with the compensation paid by other fire-fighting agencies. The commissioner may adjust the classifications and rates based on findings of the federal Bureau of Land Management for Alaska. The commissioner may assign emergency fire-fighting personnel to conduct fire suppression, hazard reduction, fire

New Text Underlined [DELETED TEXT BRACKETED]

prevention, habitat restoration or improvement, and other related activities in emergency and nonemergency circumstances. The assignment of emergency fire-fighting personnel to nonemergency activities may not be used to replace permanent or seasonal state employees. The commissioner may not use appropriations from state funds for emergency fire-fighting personnel engaged in nonemergency activities under this section.

* Sec. 3. AS 41.15.210 is amended to read:

Sec. 41.15.210. FIRE SUPPRESSION FUND. A fire suppression fund is established in the state treasury for the use of the department. The fund shall be used for actual expenses incurred in the suppression of fires. The fund may not be used

(1) for capital expenditures; or

(2) to fund nonemergency activities of emergency fire-fighting personnel under AS 41.15.030.

SENATE FINANCE COMMITTEE REPORT

REPORTED OUT OF 4/26/96

DATE: 3/26/96 DATE TURNED INTO OFFICE: 4/26/96

The Finance Committee considered SENATE BILL NO. 201

Relating to the employment of emergency fire-fighting personnel by the commissioner of natural resources.

and recommends:

[ ] be replaced with ____ CS SB 201 (FIN)

[ ] adopt previous ____ CS _____ (____)

[ ] attached amendment(s)

[ ] adopt Letter of Intent by _____ Committee

[ ] further referral to the _____ Committee

Senate Bill:
[ ] same title
[ ] new title

House Bill:
[ ] same title
[ ] technical change
[ ] new: SCR*_____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	NR	DNP	AM
	✓		✓		
	✓		✓		
Co-Chair:	✓	Co-Chair:			
Co-Chair:	✓	Co-Chair:			

NEW FISCAL NOTE(S):

Department	Date	Zero	Fiscal
Nat. Resources	4/26/96		250.6

PREVIOUS FISCAL NOTE(S):*

Department	Date	Zero	Fiscal
Public Safety	3/18/96	Ø	

[ ] APPROPRIATION -- no fiscal note

*Include fiscal notes accompanying Governor's bill

ALASKA STATE LEGISLATURE

Senator Georgianna Lincoln

State Capitol
Juneau, Alaska 99801-1182
(907) 465-1732
Fax (907) 465-2652

Committees:
Resources
Transportation
Legislative Council

Minority Caucus Chair

Budget Subcommittees
Natural Resources
Corrections

DISTRICT R

March 27, 1996

MEMORANDUM

TO: Senator Rick Halford
Senator Steve Frank
Co-Chairs, Senate Finance Committee

FROM: Senator Georgianna Lincoln

SUBJECT: **Request for Senate Finance Committee Waiver- Senate Bill 201, "an Act relating to the employment of emergency fire-fighting personnel"**

I am requesting the Senate Finance Committee waive Senate Bill 201 from committee.

This legislation will have no fiscal impact on the state's budget in FY 97.

In FY 95, the Department of Natural Resources received approval through the capital budget to receive and expend up to $500,000 in federal receipts for emergency fire fighing crews to do prevention work for federal agencies on a reimbursable basis.

For FY 97, there are projects totaling $250,000 which will be available for completion. The fiscal note for Senate Bill 201 simply notes the availability of these funds as CIP Receipts (SLA 94, Ch.4, Sec. 10, page 10, Line 23).

Attached is a packet containing the sponsor statement, sectional analysis and fiscal note from the Department and letters of support for the legislation.

Thank you for your consideration of this request.

GL:pt
attachment

ALASKA STATE LEGISLATURE

Senator Georgianna Lincoln

State Capitol
[illegible]
(907) 465-3732
Fax (907) 465-[illegible]

DISTRICT R

Committees:
Resources
Transportation
Legislative Council
Minority Caucus Chair
Budget Subcommittees
Natural Resources
Corrections

SPONSOR STATEMENT
Senate Bill 201

An Act relating to the employment of emergency fire-fighting personnel by the Commissioner of Natural Resources.

Senate Bill 201 has been introduced to provide the Department of Natural Resources with the authority to utilize emergency fire fighting employees for fire management, fire suppression and fire prevention activities by adding a new subsection to AS 41.15.030.

Existing law (AS 41.15.030) authorizes the commissioner to hire emergency fire fighting personnel but does not expressly authorize their use for fire prevention, hazard reduction or other related activities. Senate Bill 201 would clarify that emergency fire fighting personnel could be employed by the Department of Natural Resources in non-emergency circumstances to construct and maintain fire breaks and trails, remove brush and timber deadfall, conduct prescribed burns, improve wildlife habitat (e.g. moose browse).

Enactment of the bill into law also will ensure that the Department of Natural Resources may take advantage of existing federal money for non-emergency state fire prevention projects.

In FY 95, the Division of Forestry received approval to receive and expend up to $500,000 in federal receipts to supply emergency fire fighting crews to federal agencies on a reimbursable basis. Presently, of the available federal money, the Department of Natural Resources has identified projects totaling $250,000. The Bureau of Land Management, the National Park Service, the U. S. Fish and Wildlife Service and the U. S. Forest Service are ready to begin fire prevention projects which require approximately 300 days of work for these emergency fire fighting crews.

Senate Bill 201 would enable these federal dollars to be utilized by already trained fire fighting crews for these projects.

Many of these emergency fire fighting crews live in rural/bush Alaska. Job opportunities are limited in these communities. The legislation allows for increased flexibility for using the trained emergency fire fighter crews in rural/bush Alaska to fulfill the manpower-intensive prevention projects.

Basic fire prevention projects, such as clearing brush around villages could be performed prior to an emergency situation. During years when fire fighting jobs are not available, enactment of this legislation would help to stabilize Alaska's economy in various regions by providing off-season employment.

In conclusion, Senate Bill 201 will result in a considerable savings to the state while providing a substantial economic benefit to smaller Alaska communities.

SECTIONAL ANALYSIS
Senate Bill 201

An Act relating to the employment of emergency fire fighting personnel by the commissioner of natural resources.

Section 1 provides an amendment to clarify that fire fighters employed by the Department of Natural Resources for fire prevention and related acticvities are within the exempt state service.

Section 2 confirms authority in the Commissioner of the Department of Natural Resources to employ emergency fire fighting personnel for a variety of fire management, fire suppression, and fire prevention activities by adding a new subsection to AS 41.15.030. Existing law authorizes the commissioner to hire emergency fire fighting personnel but does not expressly authorize their use for fire prevention, hazard reduction, habitat restoration or other related activities.

Fax Transmittal Memo 7672

To PAULA TERREL
Company SENATOR GEORGIANNA LINCOLN
Location ROOM 510
Fax # 465-2652 Telephone # 465-2847
Comments ORIGINAL TO FOLLOW VIA MAIL

No. of Pages 2 Date 3/8/96 Time 1441
From J.D. KING
Company AFCA
Location ADMIN
Fax # 488-6118 Telephone # 488-3400
Original Will Will Not Be Sent

Alaska Fire Chief's Association

2318 Braddock Road • North Pole, Alaska 99705 • (907) 488-3400 • Fax: (907) 488-6118

Timothy J. Baggett
President

March 8, 1996

Senator Georgianna Lincoln
Attn: Paula Terrel
State Capitol, Room 510
Juneau, AK 99801-1182

Dear Paula,

Please accept this as a letter of support for SB201. It is a great pleasure to support such real common sense legislation. So often details such as fire protection systems usually lack the necessary champion to attract the attention of the legislature. Not only has your support been noticed by the emergency services it is appreciated.

Attached is our resolution 96-03 strongly supporting SB201. If there is anything else we can do to support this or other pending legislation please let us know.

Respectfully,

ALASKA FIRE CHIEFS ASSOCIATION

Timothy Baggett
President

TJB/dk