

ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990
5802 HOUSE JUDICIARY

8672



PRINCE WILLIAM SOUND CONSERVATION ALLIANCE

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Honorable Peter Goll
Alaskan State Legislature
P.O. Box V (MS3100)
Juneau, AK 99811

February 12, 1990

Dear Mr. Goll,

The Prince William Sound Conservation Alliance strongly supports HB 409 and HB 315.

However, we would like to see the following changes made:

Section 1 (6): Delete "consent of the owner." If the owner is in possible violation of DEC statutes and regulations, DEC should have the immediate authority to enter the premises and copy records with or without consent of the owner. It is obviously in the best interests of the polluter to deny DEC access while ying to cleanup the mess. Without DEC's oversight, polluters may attempt cleanup methods that create a worse problem than the original one. DEC must be give stronger powers. We ask that you pass these bills out of the House Judiciary Committee promptly.

Section 2 (14): Change "at reasonable times" to "at any time". Many business operate 24 hours a day. DEC must be able to enter the premises to conduct investigations of either actual or suspected sources of pollution "at any time" including nights, week-ends, and holidays.

Section 2(14) line 23. Change "a pervasively regulated facility" to "a permitted facility." DEC's powers should be equal to or stronger than those of the EPA. Most other states authorize such entry and copying of records for "permitted facilities."

Section 6 (c) (1). Amend the definition of "environmental audit" to include engineering audits. It is important for DEC to know whether a facility was constructed according to plans and what changes have been made such as additions or shutdowns since a facility was constructed.

PWSCA strongly supports these bills as being more equitable to all businesses, while providing a greater degree of enviormental protection through more economic and efficient enforcement. *We particularly support citizen suits, which are permitted under federal legislation.*

Sincerely,

Nancy R. Lethcoe,
Director

*Hayden
reply
add to your
409-315
e/nv*

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: "An Act relating to certain
environmental conservation laws..."
Sponsor: House Resources
Requestor: House Judiciary

Agency Affected: Department of Law
BRU: Legal Services
Components: Operations

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

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

ANALYSIS : (Attach a separate page if necessary)

Please see the attached analysis.

Prepared by: Richard I. Pegues, Director Phone: 465-3672
 Division: Administrative Services Date: February 20, 1990
 Approved by Commissioner: Richard I. Pegues / FOR / Douglas B. Bell, Attorney General Date: February 20, 1990
 Agency: Department of Law

Distribution (by preparer):
 Legislative Finance
 Legislative Sponsor
 Requestor
 Office of Management and Budget
 Impacted Agency(ies)

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSHR 409 (RESOURCES)

The committee substitute for HB 409 changes the state's environmental conservation laws in four important respects.

First, section 1 amends AS 46.03.020(6) to provide that the Department of Environmental Conservation may copy records during a voluntary inspection to investigate either actual or suspected pollution or contamination or to ascertain compliance or noncompliance with AS 46.03, AS 46.04, or AS 46.09. Section 2 adds a new paragraph to AS 46.03.020 that grants to the Department of Environmental Conservation the right to enter and inspect the property or premises of a pervasively regulated facility and copy records to investigate either actual or suspected sources of pollution or contamination or to ascertain compliance or noncompliance with AS 46.03, AS 46.04, or AS 46.09. The bill defines pervasively regulated facility as a facility where activities or operations are or were conducted that affect a significant public interest and that are subject of comprehensive regulations by the Department of Environmental Conservation.

Second, section 4 amends AS 46.03 by adding a new section that establishes a system of administrative penalties for pollution. Under the section, an administrative penalty not to exceed \$25,000 a day for each violation may be assessed against a person who violates or causes or permits to be violated a provision of AS 46.03, AS 46.04, or AS 46.09.

Third, section 5 repeals and reenacts AS 46.03.850 to give the Department of Environmental Conservation the power to issue binding compliance orders, coupled with a formal administrative review/appeal process. Under existing law, the department notifies a person of its determination that a violation exists, or is about to exist, and the person is given time to file a report stating measures have been and are being taken, or are proposed to be taken, to correct or control the conditions outlined in the determination notice. At this time, a compliance order can be issued only after all of these steps have been taken.

Fourth, section 6 would amend AS 46.03 by adding a new section that provides that the commissioner of environmental conservation may require a person to conduct an environmental audit and to prepare and submit an environmental audit report, as part of a judicial or administrative enforcement action.

It is impossible to predict what additional costs, if any, the Department of Law may experience if this bill is adopted. On the one hand, the bill's provisions greatly streamline existing enforcement procedures, thereby reducing attorney resources currently used for litigation and lengthy settlement negotiations. On the other hand, these improved procedures may result in increased enforcement and require additional resources. Nevertheless, to the extent that increased enforcement may outweigh the efficiencies provided by the bill, any resulting cost will be borne by the oil and hazardous substance fund, provided under AS 46.08 and AS 46.09, as well as federal fund sources such as the federal LUST Trust and the federal Superfund.

COMMENTS OF EXXON COMPANY, U.S.A

ON LATEST DRAFT OF CSHB 409

Last week Exxon Company, U.S.A. presented its initial testimony regarding CSHB 409. Since that time, a new draft of the bill has been circulated. Virtually all of the comments incorporated in Exxon's initial testimony are also applicable to the current proposal. Today's testimony is intended to expand upon our original comments in a couple of specific areas and address the alterations in the bill.

The procedures described in this bill would deny all Alaska's citizens (not just oil companies) the most basic due process protections. The bill seeks to impose arbitrary and unilateral procedures in non-emergency situations. The DEC already has more than ample statutory authority to issue any immediate order in an emergency. This bill would allow the exercise of regulatory power justified only in an emergency when there is no emergency.

As we testified last week, the current compliance order statute sets forth a three stage procedure for non-emergency situations. First, the DEC gives the citizen notice of the alleged environmental violations. The citizen then has an opportunity to meet with the department and to attempt to cure the violations. Finally, if the problem cannot be satisfactorily resolved on an informal basis, an administrative hearing is held to determine what

action would be appropriate.

This existing procedure is the appropriate way to deal with non-emergency situations. It is our understanding that this committee has been told that the proposed amendments are necessary to conform Alaska's compliance order procedures to federal law. As a general rule, that is simply not correct.

As you are aware, the federal government has a very wide and complex range of environmental statutes and regulations, many of which provide some type of compliance order authority. Most federal compliance order procedures, however, incorporate a three step notice and opportunity to be heard procedure similar to Alaska's current compliance order statute. The compliance order procedures employed in Part 24 of the EPA regulations on hearings are a good example.

The EPA's three stage process protects citizens' due process rights to reasonable notice and opportunity to be heard before the government takes final action against them. It also reflects common sense. Most alleged environmental violations can be resolved without resort to formal judicial enforcement actions. The procedure proposed in HB 409 threatens Alaskans with an impossible dilemma: either immediately comply with arbitrary compliance orders, or refuse to obey the DEC order at the risk of immediate penalties and force the Department of Law to file a

judicial enforcement action. The current statutory procedures are far preferable to this type of confrontation. For these reasons Exxon strongly recommends that the compliance order procedures not be amended.

The new draft contains an entirely new section on nonconsensual searches of "pervasively regulated facilities." This new section is unnecessary and unreasonable. In 1977, the Alaska Supreme Court held that a similar rule which allowed OSHA inspectors to enter workplaces without a search warrant violated the Alaska Constitution. In 1978, the U.S. Supreme Court held that an OSHA regulation allowing a warrantless search violated the federal constitution.

The language in the latest draft would allow the DEC to enter and search "pervasively regulated facilities," without a warrant. In the absence of an emergency, there is no legal justification for this type of search in the enforcement of environmental laws. The United States Supreme Court has held that certain types of enterprises may be searched without a warrant, but the businesses to which they have applied this rule have been limited to enterprises involving liquor and firearms. The warrantless search provisions are therefore unconstitutional and should be taken out of the bill.

Finally, we have objections to the administrative penalty provisions of the proposed bill. No one has presented any reasonable justification to show that administrative penalties are needed. Section 760 of the present statutes provides more than ample judicial penalties.

If administrative penalties are adopted, they should at the least include the procedural safeguards contained in similar federal statutes. The proposed scheme provides for an assessment notice to be sent out that becomes final in 30 days. A hearing may be requested, but there is no indication of when or whether such a hearing will take place. The safeguards of the Administrative Procedure Act are expressly denied.

Those major federal environmental laws which do provide for administrative penalties also provide for notice and a right to a hearing before the penalty can be imposed. (The Clean Air Act, Federal Insecticide Fungicide and Rodenticide Act (FIFRA), the Solid Waste Disposal Act, the Toxic Substances Control Act, the Clean Water Act, and the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).)

Citizens who deal with the Alaska Department of Environmental Conservation should be afforded the same due process protections by DEC as they are by the federal agencies. These rights include the right to a notice of the assessment, a clear right to a

hearing, comprehensive rules that describe the hearing process, and the requirement that the administrative agency make and prove its case before the citizen is required to bear the burden of suffering any penalty.

In closing, we would like to emphasize that this bill, if adopted, would seriously impact all Alaskan citizens and businesses. Alaskans, like all Americans, are entitled to the basic due process protections when dealing with state administrative agencies and their staff. The proposals included in CSHB 409 would significantly undermine those protections. We continue to believe that the existing statutes fairly address both emergency and non-emergency situations, and therefore recommend that this bill not be enacted into law.

Thank you.

exxn409.com

A M E N D M E N T

OFFERED IN THE HOUSE

BY REP. M.DAVIS

TO:: CSHB 409() (2/5/90)

Page 1, line 8, after "violation":

Insert "; and providing for an effective date"

Page 3, line 28:

Delete "AS 46.03.760"

Insert "AS 46.03.758, 46.03.759, or 46.03.760(a)"

Page 6, after line 27:

Insert a new bill section to read:

"* Sec. 7. This Act takes effect immediately under AS 01.10.070(c)."

CIVIL PENALTIES (ADMINISTRATIVE)

TABLE 13

CIVIL PENALTIES UNDER HAZARDOUS WASTE LAWS

<u>State</u>	<u>Administrative Civil Penalties</u>	<u>Judicial Civil Penalties</u>
Alabama	\$25,000/day (\$250,000 "cap")	\$25,000/day (no "cap")
Alaska	None	\$100,000 plus \$10,000/day
Arizona	None	\$10,000/day
Arkansas	\$25,000/day	None
California	\$10,000/day \$1,000-\$10,000/day (Porter-Cologne Act)	\$10,000/day \$25,000/day (intentional or negligent violation or violation of order) \$25,000-\$20,000-\$15,000-\$10,000- \$5,000/day (Porter-Cologne Act)
Colorado	None	\$25,000/day
Connecticut	\$25,000/day	\$25,000/day
Delaware	"reasonable penalty" (viol. of law, permit, reg.) \$25,000/day (viol. of order)	\$25,000/day
District of Columbia	None	\$25,000/day
Florida	None	\$50,000/day
Georgia	\$25,000/day	None
Hawaii	\$10,000/day	\$10,000/day
Idaho	None	\$10,000/day

Note: Penalty amount shown is the maximum assessment per violation unless otherwise indicated.

Note: States that lack authority to impose administrative civil penalties absent a violator's consent receive a "None" in the administrative penalties column.

Table 13 (continued)

<u>State</u>	<u>Administrative Civil Penalties</u>	<u>Judicial Civil Penalties</u>
Illinois	\$25,000/day	\$25,000/day
Indiana	\$25,000/day	\$25,000/day (plus an additional \$500/hour for violating any emergency order)
Iowa	\$1,000/day	\$10,000/day
Kansas	\$10,000/day	\$10,000/day
Kentucky	None	\$25,000/day
Louisiana	\$25,000/day \$50,000/day (order violation)	\$25,000/day \$50,000/day (order violation)
Maine	None	\$25,000/day
Maryland	\$1,000/day (\$50,000 "cap")	\$10,000/day
Massachusetts	\$1,000/day \$25,000/day (for unauthorized release, handling without license, failure to report)	\$25,000/day
Michigan	None	\$25,000/day
Minnesota	\$10,000 per inspection (regardless of # violations or days; waived if corrected within 30 days of receipt of order)	\$25,000/day
Mississippi	\$25,000/day	None
Missouri	None	\$10,000/day
Montana	None	\$10,000/day
Nebraska	None	\$10,000/day
Nevada	None	\$10,000/day
New Hampshire	None	\$50,000/day

Table 13 (continued)

<u>State</u>	<u>Administrative Civil Penalties</u>	<u>Judicial Civil Penalties</u>
New Jersey	\$25,000 per violation (plus \$2,500/day after receipt of order)	\$25,000/day \$50,000/day (violation of order or failure to pay)
New Mexico	\$10,000/day	\$10,000/day
New York	\$25,000/day \$50,000/day (subs. violation)	\$25,000/day \$50,000/day (subs. violation)
North Carolina	\$10,000/day	None (<u>de novo</u> review of admin. penalty)
North Dakota	None	\$25,000/day
Ohio	None	\$10,000/day
Oklahoma	\$10,000/day (but only for viol. of order)	\$10,000/day
Oregon	\$10,000/day	None
Pennsylvania	\$25,000/day	\$25,000/day
Rhode Island	\$10,000/day	\$10,000/day
South Carolina	\$25,000/day	\$25,000/day
South Dakota	None	\$10,000/day
Tennessee	\$10,000/day	None
Texas	\$10,000/day	\$25,000/day
Utah	None	\$10,000/day
Vermont	None	\$10,000/day
Virginia	None	\$10,000/day
Washington	\$10,000/day	None
West Virginia	None	\$25,000/day
Wisconsin	None	\$25,000/day
Wyoming	None	\$10,000/day

Compliance / Cease and Desist Orders

ENVIRONMENTAL ACTS

LOUISIANA

D. Requirements of compliance orders

Any order issued under this Section shall state with reasonable specificity all of the following:

- (1) The nature of the violation.
- (2) A time limit for compliance.
- (3) That in the event of noncompliance, a civil penalty may be assessed.

E. Civil Penalties.

(1) Any person found to be in violation of any requirement of this Chapter may be liable for a civil penalty, to be assessed by the commission, the secretary, the assistant secretary, or the court of not more than one million dollars or the cost of any cleanup made necessary by such violation and a penalty of not more than twenty-five thousand dollars for each day of violation and may be subject to revocation or suspension of any permit, license, or variance which had been issued to said person. Any person found to be in violation of this Chapter shall be liable for legal interest from the date of the assessment of a civil penalty until paid.

(2) Any person to whom a compliance order or a cease and desist order is issued pursuant to R.S. 30:1073(C) who fails to take corrective action within the time specified in said order shall be liable for a civil penalty to be assessed by the commission, the secretary, the assistant secretary, or the court of not more than fifty thousand dollars for each day of continued violation or noncompliance.

(3) (a) In determining whether or not a civil penalty is to be assessed and in determining the amount of the penalty or the amount agreed upon in compromise, the following factors shall be considered:

- (i) The history of previous violations or repeated noncompliance.
- (ii) The nature and gravity of the violation.
- (iii) The gross revenues generated by the respondent.
- (iv) The degree of culpability, recalcitrance, defiance, or indifference to regulations or orders.
- (v) The monetary benefits realized through noncompliance.

(vi) The degree of risk to human health or property caused by the violation.

(vii) Whether the noncompliance or violation and the surrounding circumstances were immediately reported to the department and whether the violation or noncompliance was concealed or there was an attempt to conceal by the person charged.

(viii) Whether the person charged has failed to mitigate or to make a reasonable attempt to mitigate the damages caused by his noncompliance or violation.

(ix) The costs of bringing and prosecuting an enforcement action, including staff time, equipment use, hearing records, expert assistance, and such other items as the commission finds to be a cost of the action.

(b) The secretary may supplement such criteria by rule. In the event that the order with which the person failed to comply was an emergency cease and desist order, no penalty shall be assessed if it appears, upon later hearing, that said order was issued without reasonable cause.

(4) No penalty shall be assessed without the person charged being given notice and an opportunity for a hearing on such charge. The person charged may waive a hearing on the issue of whether or not a violation has occurred, and his culpability for such violation and any other ultimate issue. When a hearing on the violation is waived, a decision may be rendered upon the uncontested facts.

(5) After submission for a penalty determination at a hearing, the commission, secretary, or assistant secretary shall provide an opportunity for relevant and material public comment relative to any penalty which may be imposed.

ENVIRONMENTAL ACTS

LOUISIANA

C. Compliance orders; emergency cease and desist orders

(1) Upon a determination that a violation of this Chapter is occurring or is about to occur which is endangering or causing damage to public health or the environment, the commission, the secretary, the assistant secretary or an authorized technical secretary may issue an emergency cease and desist order. Upon a finding that the ordered cessation of operations, or any portion thereof, will not completely abate the damages to the environment, in addition to the emergency cease and desist order, affirmative obligations may be imposed on the violator requiring him to take whatever steps deemed necessary to abate the irreparable damage to the environment. The issuance of such an emergency cease and desist order shall not be subject to the limitations and formalities relating to notice and hearings imposed with regard to adjudications under R.S. 49:950 et seq., but shall be subject to all other applicable provisions of law. The emergency cease and desist order shall remain in force until a hearing can be held concerning the situation which prompted the emergency order, but in no event shall such an emergency order remain in force longer than fifteen days.

(2) Upon determining that a violation of any requirement of this Chapter has occurred or is about to occur, notice may be given either by personal service or certified mail, return receipt requested, to the violator of his failure to comply with such requirement or proceed pursuant to Paragraph (3) of this subsection. If such violation extends beyond the thirtieth day after notification, the commission, secretary or assistant secretary shall either issue an order requiring compliance within a specified time period, or the commission shall commence a civil action for appropriate relief, including a temporary or permanent injunction.

(3) Upon determining that a violation of any requirement of this Chapter has occurred or is about to occur, the commission, secretary, the assistant secretary or the authorized representative of the assistant secretary shall either issue an order requiring compliance within a specified time period or the commission or secretary shall commence a civil action for appropriate relief, including a temporary or permanent injunction.

No prior hearing required

CONNECTICUT

Section 22a-7. Cease and desist order, subsequent hearing

The commissioner, whenever he finds after investigation that any person is causing, engaging in or maintaining, or is about to cause, engage in or maintain, any condition or activity which, in his judgment, will result in or is likely to result in imminent and substantial damage to the environment, or to the public health within the jurisdiction of the commissioner under the provisions of chapters 440, 442, 445, 446a, 446c, 446d and 446k or whenever he finds after investigation that there is a violation of the terms and conditions of a permit issued by him that is in his judgment substantial and continuous and it appears prejudicial to the interests of the people of the state to delay action until an opportunity for a hearing can be provided, may, without prior hearing, issue a cease and desist order in writing to such person to discontinue, abate or alleviate such condition or activity. Upon receipt of such order such person shall immediately discontinue, abate or alleviate or shall refrain from causing, engaging in or maintaining such condition or activity. The commissioner shall, within ten days of such order, hold a hearing to provide the person an opportunity to be heard and show that such condition does not exist. Such order shall remain in effect until ten days after the hearing within which time a new decision based on the hearing shall be made.

WATER LAWS

ALABAMA

(k) Whenever the commission has cause to believe that any person is violating any rule or regulation promulgated by the commission, the commission shall cause a prompt investigation to be made in connection therewith. If, upon inspection, the commission discovers a condition which is in violation of the provisions of this chapter, or any rule or regulation promulgated pursuant thereto, it shall be authorized to order such violation to cease and to take such steps necessary to enforce such an order. The said order shall state the items which are in violation and shall provide a reasonable specified time within which the violation must cease. The person responsible shall make the corrections necessary to comply with the requirements of this chapter, or rule or regulation promulgated pursuant thereto, within the time specified in the order. Nothing in this subsection shall be deemed to prevent the commission or the attorney general from prosecuting any violation of this chapter, or any permit, order or rule or regulation promulgated pursuant thereto, notwithstanding that such violation is corrected in accordance with any order.

DELAWARE

§6163. Cease and desist order

The Secretary shall have the power to issue an order to any person violating any rule, or regulation, or permit condition, or lease condition, or provision of this Chapter, to cease and desist from such violation. Any cease and desist order issued pursuant to this section shall expire (1) after 30 days of its issuance, or (2) upon withdrawal of said order by the Secretary, or (3) when the order is superseded by an injunction, whichever occurs first.

COLORADO

25-8-605. Cease and desist orders. If the division determines, with or without hearing, that a violation of any provision of this article or of any order, permit, or control regulation issued or promulgated under authority of this article exists, the division may issue a cease and desist order. Such order shall set forth the provision alleged to be violated, the facts alleged to constitute the violation, and the time by which the acts or practices complained of must be terminated.

ACCESS

ENVIRONMENTAL QUALITY LAWS

HAWAII

(A) To enter upon permittee's or variance holder's premises or premises of a person subject to pretreatment requirements in which an effluent source is located or in which any records are required to be kept under the terms and conditions of the permit or variance or pretreatment requirements;

(B) To inspect any monitoring equipment or method required in the permit or variance or by pretreatment requirements; and

(C) To sample any discharge of pollutants or effluent;

AIR LAWS

WASHINGTON

70.94.200 *Investigation of conditions by control officer or secretary of social and health services or director of health — Entering private, public property.* For the purpose of investigating conditions specific to the control, recovery or release of air contaminants into the atmosphere, a control officer, the department, or their duly authorized representatives, shall have the power to enter at reasonable times upon any private or public property, excepting nonmultiple unit private dwellings housing two families or less. No person shall refuse entry or access to any control officer, the department, or their duly authorized representatives, who requests entry for the purpose of inspection, and who presents appropriate credentials; nor shall any person obstruct, hamper or interfere with any such inspection.

NEW JERSEY

26:2C-9.1

No person shall obstruct, hinder or delay, or interfere with by force or otherwise, the performance by the department or its personnel of any duty under the provisions of this act, or of the act of which this act is amendatory and supplementary, or refuse to permit such personnel to perform their duties by refusing them upon proper identification or presentation of a written order of the department, entrance to any premises at reasonable hours.

VIRGINIA

§10-17.22. *Right of entry.* — Whenever it is necessary for the purposes of this chapter, the Board or any member, agent or employee when duly authorized by the Board may at reasonable times enter any establishment or upon any property, public or private, for the purpose of obtaining information or conducting surveys or investigations.

SOUTH DAKOTA

34A-1-41. Any duly authorized officer, employee, or representative of the department may enter and inspect that part of any property, premise or place in which he has reasonable grounds to believe is the source of air pollution at any reasonable time for the purpose of investigating the air pollution or of ascertaining the state of compliance with this chapter and rules and regulations in force pursuant thereto. No person shall refuse entry or access to any authorized representative of the department who requests entry for the purpose of such investigation, and who presents appropriate credentials; nor shall any person obstruct, hamper or interfere with any such investigation.

VERMONT

§557. *Inspections*

Any duly authorized officer, employee, or representative of the secretary may enter and inspect any property, premise or place on or at which an air contaminant source is located or is being constructed or installed at any reasonable time for the purpose of ascertaining the state of compliance with this chapter and rules in force pursuant thereto. No authorized person shall refuse entry or access to any authorized representative of the secretary who requests entry for purposes of inspection, and who presents appropriate credentials; nor shall any person obstruct, hamper or interfere with the inspection. If requested, the owner or operator of the premises shall receive a report setting forth all facts found which relate to compliance status.

Pennsylvania

§4013.1. Search Warrants. — Whenever an agent or employe of the department, charged with the enforcement of the provisions of this act, has been refused the right to examine any air contamination source, or air pollution control equipment or device, or is refused access to or examination of books, papers and records pertinent to any matter under investigation, such agent or employe may apply for a search warrant to any Commonwealth to issue the same to enable him to have access and examine such property, air contamination source, air pollution control equipment or device, or books, papers and records, as the case may be. It shall be sufficient probable cause to issue a search warrant that the inspection is necessary to properly enforce the provisions of this act.

Rhode Island

§3-23-12. Whenever the director has reason to believe that emission is occurring in excess of that permitted under any rule, regulation or order made hereunder, the director may without hearing conduct tests to determine the emission of air contaminants from premises, buildings or other places belonging to or controlled by any person, or to require such person to provide such information as he may request regarding such emission. The person owning or controlling the premises, building or other place to be tested shall provide the director or his representatives or consultants access during working hours. The director, his representatives or consultants shall be empowered to erect scaffolding provide necessary holes and stack or duct work or such other sampling and test facilities. The director may specify the testing method to be used by qualified personnel in accordance with good professional practice and should such test show that a violation of a rule or regulation made hereunder or any order of the director was occurring the person shall pay in addition to any other regulatory, civil, and/or criminal penalties the entire cost of such test or tests and an additional administrative fine of up to one hundred percent (100%) of said cost of such test or tests. Said costs and fines shall be deposited in the account established in §3-23-12.1.

North Dakota

23-15-05.

1. Any duly authorized officer, employe, or agent of the department may enter and inspect any property, premise, or place on or at which an air contaminant source is located or is being constructed, installed, or established at any reasonable time for the purpose of ascertaining the state of compliance with this chapter and rules and regulations enforced pursuant thereto. If requested, the owner or operator of the premises shall receive a report setting forth all facts found which relate to compliance status.

2. The department may conduct tests and take samples of air contaminants, fuel, process material, and other materials which affect or may affect emission of air contaminants from any source, and shall have the power to have access to and copy any records required by department rules or regulations to be maintained, and to inspect monitoring equipment located on the premises. Upon request of the department the person responsible for the source to be tested shall provide necessary holes in stacks or ducts and such other safe and proper sampling and testing facilities exclusive of instruments and sensing devices as may be necessary for proper determination of the emission of air contaminants. If an authorized representative of the department, during the course of an inspection, obtains a sample of air contaminant, fuel, process material, or other material, he shall issue a receipt for the sample obtained to the owner or operator of, or person responsible for, the source tested.

Nebraska

"(c) For refusing the right of entry and inspection to any authorized departmental representative, for violation of any effluent standards and limitations, filing requirements, monitoring requirements, or water quality standards, for failure to obtain a permit, or for violation of a permit or any permit condition or limitation or any rules, regulations, or orders of the director under the National Pollutant Discharge Elimination System, created by the Clean Water Act, as amended, 33 U.S.C. 1251 et seq. be subject to a civil penalty of not more than five thousand dollars per day, the amount of such penalty to be based on the size of the operation and the degree and extent of the pollution.

Section 51-1508. (1) Any person who violates any of the provisions of the Environmental Protection Act, or who fails to perform any duty imposed by such act shall.

WATER LAWS

ALABAMA

Any member of the commission or its employees or agents, without advance notice and upon presentation of appropriate credentials, may enter any property or any industrial or other establishment at any reasonable time for the purpose of collecting such information, and no owner or official in charge shall refuse to admit such member, employee or agent for any purposes necessary to the discharge of his official duty. Any records, reports or information obtained by any member, employee or agent of the commission from any person shall be subject to the provisions of this subsection concerning confidentiality.

WATER LAWS

INDIANA

13-1-3-6. The department has the right through any authorized agent, to enter at all reasonable times in or upon any private or public property for the purpose of inspecting and investigating conditions relating to the pollution of any water of this state. The department may call upon any state officer, board, department, school, university, or other state institution, and the officers or employees thereof, and receive any assistance necessary to carrying out this chapter.

COLORADO

25-8-306. Authority to enter and inspect premises and records. (1) The division has the power, upon presentation of proper credentials, to enter and inspect at any reasonable time and in a reasonable manner any property, premise, or place for the purpose of investigating any actual, suspected, or potential source of water pollution, or ascertaining compliance or noncompliance with any control regulation or any order promulgated under this article. Such entry is also authorized for the purpose of inspecting and copying records required to be kept concerning any effluent source.

(2) In the making of such inspections, investigations, and determinations, the division, insofar as practicable, may designate as its authorized representatives any qualified personnel of the department of agriculture. The division may also request assistance from any such state or local agency or institution.

(3) If such entry or inspection is denied or not consented to, the division is empowered to and shall obtain, from the district or county court for the judicial district or county in which such property, premise, or place is located, a warrant to enter and inspect any such property, premise, or place prior to entry and inspection. The district and county courts of the state of Colorado are empowered to issue such warrants upon a proper showing of the need for such entry and inspection.

MONTANA

75-5-603. Power to inspect. The authorized representative of the department, upon presentation of his credentials, may at reasonable times enter upon any public or private property to:

(1) investigate conditions relating to pollution of state waters or violations of permit conditions;

(2) have access to and copy any records required under this chapter;

(3) inspect any monitoring equipment or method required under 75-5-602(3), and

(4) sample any effluents which the owner or operator of such source is required to sample under 75-5-602(4).

SOUTH DAKOTA

A-2-45. The secretary shall, at reasonable times, have access to any point of discharge, including an industrial user of a publicly owned treatment works, and copy records, inspect any monitoring equipment or method required under A-2-44, to sample any effluents being discharged into the waters of the state, or assure compliance with the provisions of this chapter.

A-2-46. The secretary may enter, upon presentation of proper credentials, any premises in which a point of discharge, including an industrial user of a publicly owned treatment works, is located in which any records are required to be maintained pursuant to §33A-2-44 are maintained.

RHODE ISLAND

R-12-15. The director shall have full authority to inspect, and make orders regarding and directing all methods, means and devices employed on any steamer or vessel in the waters of the state, or at any installation on land, in receiving, carrying, storing, heating, handling or disposing of any petroleum, gasoline, kerosene, tar, oil, or any product or mixture thereof; and the director may by order establish all rules and regulations to prevent the discharge or escape of any of said substances into the waters of the state.

WASHINGTON

RCW 90.48.355 — Right of entry, access to records, pertinent investigations. The department through its authorized representatives, shall have the power to enter upon any private or public property, including the deck of any ship, at any reasonable time, and the managing agent, master or occupant of such property shall permit such entry for the purpose of ascertaining conditions relating to violations or possible violations of RCW 90.48.315 through 90.48.365, and to have access to any pertinent records relating to such violations, including but not limited to operation and maintenance records and logs; provided, That in connection with the authority granted herein no person shall be required to divulge trade secret processes.

WASHINGTON

WAC 173-201-110 SURVEILLANCE.

A continuing surveillance program, to ascertain whether the regulations, waste disposal permits, orders, and directives promulgated and/or issued by the department are being complied with, will be conducted by the department staff as follows:

- (1) Inspecting treatment and control facilities.
- (2) Monitoring and reporting of waste discharge characteristics.
- (3) Monitoring receiving water quality.

ARKANSAS

82-1905. Persons operating disposal system — Furnishing information and permitting examinations and surveys. — Subdivision 1. FURNISHING INFORMATION. The owner or operator of or any contractor of sewage, industrial wastes, or other wastes to any disposal system or industrial user of a publicly owned treatment system, when requested by the Director, shall furnish to the Department any information which is relevant to the subject of this Act and shall establish and maintain such records, make such reports, install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods), sample such effluents and provide such other information as the Director may reasonably require.

Subdivision 2. EXAMINATION OF BOOKS AND RECORDS. The Department or any authorized employee or agent thereof, may examine and copy any books, papers, records or memoranda pertaining to the operation of a disposal system.

Subdivision 3. ENTRANCE ON PROPERTY. Whenever it shall be necessary for the purpose of this Act, the Department or any authorized member, employee or agent thereof may enter upon any property, public or private, for the purpose of obtaining information or conducting surveys or investigations.

ENVIRONMENTAL AUDITING: DEVELOPING A "PREVENTIVE MEDICINE" APPROACH TO ENVIRONMENTAL COMPLIANCE

Courtney M. Price* and Allen J. Danzig**

I. INTRODUCTION

Achieving and maintaining compliance with the nation's environmental laws and regulations is a primary goal of federal and state regulatory agencies. As environmental regulation has matured, the emphasis has expanded from initial compliance to continuous compliance. Recent major environmental incidents have demonstrated the critical need for companies to reassess their environmental programs¹ and for regulatory agencies to develop new compliance approaches. In developing compliance strategies under the environmental statutes, the United States Environmental Protection Agency (EPA) has found that traditional administrative and judicial enforcement efforts are not always sufficient to achieve a high level of compliance from all regulated entities, including industry, municipalities and federally-owned facilities. This has become particularly apparent under the environmental programs which regulate hazardous wastes and toxic substances. To address this issue, EPA has explored the concept of environmental auditing² as an innova-

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The views expressed in this article are the personal views of the authors. No official support or endorsement by the United States Environmental Protection Agency is intended or implied.

1. See Mays, *Environmental Audits: A New Enforcement Tool*, EPA JOURNAL, June 1985, at 27.

2. Several books have been written to assist corporations in developing environmental audit programs. See e.g., H. BLAKESLEE & T. GRABOWSKI, *A PRACTICAL GUIDE TO PLANT ENVIRONMENTAL AUDITS* (1985); J. GREENO, G. HEDSTROM & M. DIBERTO, *ENVIRONMENTAL AUDITING—FUNDAMENTALS AND TECHNIQUES* (1985); L. HARRISON, *THE MCGRAW HILL ENVIRONMENTAL AUDITING HANDBOOK* (1984); T. TRUITT, D. BERZ, D. WEINBERG, J.B. MOLLOY, G. GOLDMAN, G. PRICE & B. FLORENCE, *ENVIRONMENTAL AUDIT HANDBOOK—BASIC PRINCIPLES OF ENVIRONMENTAL COMPLIANCE AUDITING* (2d ed. 1983).

tive approach to promote increased compliance by the regulated community.

"Environmental auditing is a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements."³ Auditing has been more broadly defined as "an independent appraisal of a corporation's environmental control systems and its environmental assets and liabilities to enable management to make rational decisions relating to environmental matters."⁴ Audits can be used to "verify compliance with environmental requirements; evaluate the effectiveness of environmental management systems already in place; or assess risks from regulated and unregulated material and practices."⁵ Auditing may also be viewed as a quality assurance check by "verifying that management practices are in place, functioning and adequate."⁶

Many corporate auditing programs, which began as a check on compliance status, have evolved into a more comprehensive audit of environmental management control systems to assess environmental risks.⁷ For example, in reviewing a corporate management system for polychlorinated biphenyls (PCBs),⁸ an audit may analyze the system and procedures for handling, storing, marking, cleaning up spills, inspecting, record keeping and annual inventorying. The audit could also look for risks not yet identified.

Audits should not be confused with the compliance monitoring activities required by environmental laws, regulations or permits. Audit programs do not replace the inspection programs of regulatory agencies;⁹ they evaluate direct compliance activities, such as obtaining permits, installing controls, monitoring compliance, reporting violations and keeping records.¹⁰

This Article will describe EPA's efforts to encourage environmental auditing by regulated entities. First, it discusses the evolution of govern-

3. U.S. Envtl. Protection Agency, Interim Environmental Auditing Policy Statement, 50 Fed. Reg. 46,504 (1985).

4. Reed, *Environmental Audits and Confidentiality: Can What You Know Hurt You as Much as What You Don't Know?*, 13 ENVTL. L. REP. (ENVTL. L. INST.) 10,303 (Oct. 1983).

5. Interim Environmental Auditing Policy Statement, *supra* note 3, at 46,504.

6. *Id.*

7. ARTHUR D. LITTLE, INC., CURRENT PRACTICES IN ENVIRONMENTAL AUDITING, REPORT TO U.S. ENVIRONMENTAL PROTECTION AGENCY 1-2 (1984).

8. Polychlorinated biphenyls are defined as "any chemical substance that is limited to the biphenyl molecule that has been chlorinated to varying degrees or any combination of substances which contains such substance." 40 C.F.R. § 761.3 (1985).

9. See Interim Environmental Auditing Policy Statement, *supra* note 3, at 46,504.

10. *Id.*

ment and corporate interest in environmental auditing, including the benefits gained by firms which have instituted auditing programs. The Article then discusses EPA efforts to promote environmental auditing through publication of the Agency's Interim Environmental Auditing Policy Statement¹¹ and the Agency's negotiation of environmental auditing provisions in enforcement case settlement agreements. Finally, the Article discusses the major settlement agreements which contain environmental auditing provisions, and concludes with some recommendations on the appropriate use of environmental auditing in achieving EPA's goal of continuous compliance.

II. EVOLUTION OF CORPORATE ENVIRONMENTAL AUDITING PROGRAMS

Environmental auditing programs were developed for sound business reasons, primarily to assist regulated entities¹² in evaluating compliance and in managing existing and potential pollution control problems, rather than merely reacting to environmental crises.¹³ Much of the impetus for auditing programs has come from a number of recent cases in which the release of chemicals in the environment has caused and continue to cause businesses to incur major costs.¹⁴ A highly toxic cloud of methyl isocyanate released from the Union Carbide plant in Bhopal, India, which claimed about 2000 lives and 200,000 injuries and led to damage claims of billions of dollars, is the most dramatic example of a situation which has caused some companies to reassess their environmental and safety problems.¹⁵ Auditing programs also evolved, in part, from Securities and Exchange Commission (SEC) enforcement case settlements, which required environmental auditing.¹⁶ As a result of these developments, several hundred major corporations in the country have voluntarily developed environmental audit programs.¹⁷ Realizing that they need to encourage a higher level of corporate attention to environ-

11. Interim Environmental Auditing Policy Statement, *supra* note 3, at 46,504.

12. Regulated entities include private firms and public agencies with facilities subject to environmental regulation. Public agencies include federal, state or local agencies, and special purpose organizations such as regional sewage commissions. *Id.* at 46,504 n.1.

13. *Id.* at 46,504.

14. Mays, *supra* note 1, at 27.

15. *Id.* See also Hall, *Environmental Audits—A Corporate Response To Bhopal*, ENVTL. FORUM, Aug. 1985, at 36.

16. See *In re Occidental Petroleum Corp.*, [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶¶ 82,622, 83,356 n.34 (1980); *In re United States Steel Corp.*, [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,319 (1979); SEC v. Allied Chem. Corp., No. 77-0373 (D.D.C. 1977). See also Reed, *supra* note 4, at 10,303-04.

17. Address by Francis Phillips, Deputy Regional Administrator, U.S. Envtl. Protection

mental compliance, the federal government and state regulatory agencies have also taken a strong interest in auditing.

The benefits of environmental auditing are tangible and significant.¹⁸ First, firms face potential civil and criminal liability under state environmental laws and the environmental statutes administered by EPA, such as: the Clean Air Act,¹⁹ the Clean Water Act,²⁰ the Resource Conservation and Recovery Act (RCRA),²¹ the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)²² and the Toxic Substances Control Act (TSCA).²³ The new EPA *Policy on Civil Penalties*, issued February 16, 1984, directs that penalties must, at a minimum, reflect the economic benefit or savings of delayed compliance,

Agency, Region VI, at the Government Institutes, Inc. *Environmental Auditing Course* (Apr. 18, 1985).

18. See generally ARTHUR D. LITTLE, INC., *BENEFITS OF ENVIRONMENTAL AUDITING*, REPORT TO U.S. ENVIRONMENTAL PROTECTION AGENCY (Dec. 1984) [hereinafter *BENEFITS OF ENVIRONMENTAL AUDITING*]; J. GREENO, G. HEDSTROM & M. DiBERTO, *supra* note 2, at 11-21; L. HARRISON, *supra* note 2, at 1-9 to 1-21.

19. 42 U.S.C. §§ 7401-7642 (1982). Clean Air Act § 113(b) provides up to \$25,000 civil penalties per day of violation. CAA § 113(b), 42 U.S.C. § 7413(b). Section 113(c) provides criminal penalties of \$25,000 and jail terms of up to one year for certain knowing violations. *Id.* § 113(c), 42 U.S.C. § 7413(c).

20. 33 U.S.C. §§ 1251-1376 (1982) (minor subsequent amendments have been enacted). Section 309(b) of the Clean Water Act provides up to \$10,000 civil penalties per day of violation, including a permit limitation or condition. CWA § 309(b), 33 U.S.C. § 1319(b) (1982). Section 309(c) provides criminal penalties of \$25,000 and jail terms of up to one year for certain knowing violations. *Id.* § 309(c), 33 U.S.C. § 1319(c) (1982).

21. 42 U.S.C. §§ 6901-6987 (1982). RCRA provides a comprehensive program for the cradle-to-grave management of hazardous wastes. This program covers generators, RCRA § 3002, 42 U.S.C. § 6922 (1982), and transporters, *id.* § 3003, 42 U.S.C. § 6923 (1982), as well as facilities which treat, store or dispose of hazardous waste. *Id.* § 3004, 42 U.S.C. § 6924 (1982). RCRA provides for civil penalties of up to \$25,000 per day. *Id.* § 3008(g), 42 U.S.C. § 6928(g). RCRA criminal penalties include

knowingly transporting any hazardous waste to a facility that does not have a permit; knowingly treating, storing, or disposing of any hazardous waste without a permit or in violation of any material condition of a permit; knowingly making any false material statement in any document filed, maintained, or used to comply with RCRA; and, for any person who has handled or is handling any hazardous waste, knowingly destroying, altering, or concealing any record required by regulations to be maintained.

Id. § 3008(d), 42 U.S.C. § 6928(d) (1982).

22. 42 U.S.C. §§ 9601-9657 (1982). CERCLA creates a fund for cleaning up abandoned hazardous waste sites and imposes strict joint and several liability on persons who arrange for treatment or disposal, or who arranged with a transporter for transportation for treatment or disposal of hazardous substances at such facilities. CERCLA §§ 103-107, 42 U.S.C. §§ 9606-9607 (1982).

23. Section 16(a)(1) of TSCA provides for civil penalties of up to \$25,000 per day of violation of the Act. TSCA § 16(a)(1), 15 U.S.C. § 2615(a)(1) (1982). Section 16(b) provides for criminal penalties of \$25,000 per day of violation, or imprisonment for up to one year, for knowing or willful violations. *Id.* § 16(b), 15 U.S.C. § 2615(b).

as well as the seriousness or gravity of the violation.²⁴ Violators also face potential environmental liability for violations of certain SEC disclosure requirements,²⁵ and tort liability arising from personal injury, property damage or toxic tort claims.²⁶ Indeed, environmental audits may be required in order for a firm to obtain pollution liability insurance.²⁷

Audits may be needed especially where a company wants to purchase, sell, lease or modify facilities. The company must be aware of any real or potential liabilities associated with the transaction to ensure that undisclosed liabilities will not come back to affect future operations.²⁸ The audit will also assist facility managers in understanding and interpreting regulatory requirements and potential liabilities.²⁹ Thus, an environmental audit provides corporate management with assurance that potential problems have been addressed before serious accidents, government enforcement or private lawsuits may result.³⁰

Second, firms can save money by assessing potential environmental violations and risks as well as by making capital spending decisions to correct violations, to reduce risks and to maintain proper operation of treatment systems.³¹ For example, a firm may realize cost savings through process changes which reduce the amount of raw materials needed and which result in less pollution at the end of the manufacturing process.³² Thus, when a corporation must obtain a new National Pollutant Discharge Elimination System (NPDES) permit, it may choose to review not just the basis for the permit, but the entire manufacturing process to determine if cost-effective changes may be needed.³³ A com-

24. See *infra* notes 98-106 and accompanying text for a discussion of the *Policy on Civil Penalties*.

25. See Securities and Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk (1982). SEC regulations require all publicly held companies to disclose the effects of compliance with, and legal proceedings under, federal and state law through public filings to the SEC. Regulation S-K, Item 101(c)(1)(xii), 17 C.F.R. § 229.101(c)(1)(xii) (1985); Instruction 5 to Item 103, 17 C.F.R. § 299.103 (1985). Significant misstatements or omissions could result in criminal or civil liability under the federal securities laws. See L. HARRISON, *supra* note 2, at 2-109 to 2-119.

26. See Garrett, *Compensating Victims of Toxic Substances: Issues Concerning Proposed Legislation*, 13 ENVTL. L. REP. (ENVTL. L. INST.) 10,172 (June 1983).

27. H. BLAKESLEE & T. GRABOWSKI, *supra* note 2, at 5-6.

28. J. GREENO, G. HEDSTROM & M. DIBERTO, *supra* note 2, at 13.

29. *Id.* at 14. See also L. HARRISON, *supra* note 2, at 29.

30. See J. GREENO, G. HEDSTROM & M. DIBERTO, *supra* note 2, at 13-14.

31. BENEFITS OF ENVIRONMENTAL AUDITING, *supra* note 18, at 6-8, 11-14; Friedman, *Managing and Resolving Corporate Environmental Issues*, ENVTL. FORUM, Feb. 1985, at 28-31.

32. Friedman, *supra* note 31, at 31.

33. *Id.*

pany may also effect such savings by implementing similar changes at other company plants.

Third, an environmental auditing program can result in an improved relationship between a firm, regulatory agencies and the public, particularly where audit-discovered violations are identified and corrected within a relatively short period.³⁴ Further, EPA generally bases its enforcement priorities on industries with significant compliance problems.³⁵ Also, in developing an appropriate enforcement response to particular violations, EPA may give some consideration to expeditious, good faith efforts to achieve compliance.³⁶

Finally, regulatory agencies such as EPA obtain significant benefits from environmental auditing programs. These benefits include better assurances of compliance from regulated entities, more efficient use of government inspection and enforcement resources, improved cooperation with companies, better compliance information and useful information about audit systems.³⁷ Thus, environmental auditing can significantly complement the government's efforts to achieve continuous compliance.

While the benefits of auditing programs are significant, regulated entities have perceived some risks in developing such programs. Audit reports may generate information on violations of a pollution control statute which may not be otherwise discovered by a regulatory agency during its normal compliance monitoring activities. Such information could form the basis for an EPA or state enforcement action.³⁸ An audit report can also create potential criminal liability where the government can establish that corporate officials knew of violations.³⁹ Finally, the environmental statutes authorize private citizens to sue violators through "citizen suit" provisions.⁴⁰ Of course, a well-run audit program should expeditiously correct identified violations and other potential liabilities.

34. See H. BLAKESLEE & T. GRABOWSKI, *supra* note 2, at 5; M. WEISS, ISSUES OF CONFIDENTIALITY AND DISCLOSURE IN ENVIRONMENTAL AUDITING, REPORT TO U.S. ENVIRONMENTAL PROTECTION AGENCY 2 (1984).

35. See generally OFFICE OF THE ADM'R, U.S. ENVTL. PROTECTION AGENCY, AGENCY OPERATING GUIDANCE, FY 1986-1987, at 1-2 (discussing the EPA Priority List for Fiscal Year 1986-1987).

36. See U.S. ENVIRONMENTAL PROTECTION AGENCY, A FRAMEWORK FOR STATUTE-SPECIFIC APPROACHES TO PENALTY ASSESSMENTS—IMPLEMENTING EPA'S POLICY ON CIVIL PENALTIES 19-20 (1984) [hereinafter cited as IMPLEMENTING EPA'S POLICY ON CIVIL PENALTIES].

37. BENEFITS OF ENVIRONMENTAL AUDITING, *supra* note 18, at 1.

38. See Reed, *supra* note 4, at 10,304.

39. *Id.*

40. See, e.g., RCRA § 7002, 42 U.S.C. § 6972 (1982). See also Miller, *Private Enforcement of Federal Pollution Control Laws*, pt. 1, 13 ENVTL. L. REP. (ENVTL. L. INST.) 10,309 (Oct. 1983).

There are also risks from the private sector. The audit report may contain trade secrets about the company's production process.⁴¹ Thus, firms may attempt to limit governmental access to such reports, particularly if they contain information not required to be reported under one of the environmental statutes.

To address these concerns, well-informed counsel can assist in structuring an audit system to protect particularly sensitive information through application of the attorney-client privilege and other exceptions to the discovery rules.⁴² Further, in developing an approach to encourage the growth of environmental auditing, EPA has sought to recognize the legitimate concerns of regulated entities while preserving its enforcement prerogatives.

III. DEVELOPMENT OF EPA ENVIRONMENTAL AUDITING POLICY

EPA's interest in environmental auditing evolved from recognition of mutual gains to be derived by the regulated community and the federal government. In view of recent environmental calamities and the increased complexity of environmental regulation, EPA has sought to encourage a higher level of corporate consciousness regarding compliance with environmental laws.⁴³ However, the Agency does not have sufficient resources to enforce these laws against all regulated entities who are in violation, and must consider innovative approaches to make compliance and enforcement programs more efficient. EPA has attempted to preserve its enforcement options while providing sufficient flexibility to give regulated entities an incentive to conduct audits.⁴⁴ Thus, the Agency has addressed concerns about Agency access to and use of audit reports in enforcement actions, as well as the concern for flexibility in corporate design and management of auditing programs.

In developing a policy on environmental auditing, EPA originally considered mandatory auditing programs requiring firms to hire external auditors to certify compliance with permits and other requirements. However, the Agency rejected this concept.⁴⁵ Regulated entities have strongly objected to using audits as an additional regulatory program or requirement.⁴⁶ EPA subsequently considered less structured methods to

41. Reed, *supra* note 4, at 10,304.

42. *See id.* at 10,308.

43. *See Mays, supra* note 1, at 27.

44. *Id.*

45. For a discussion of the evolution of EPA policymaking in environmental auditing, see L. HARRISON, *supra* note 2, at 5-3 to 5-21.

46. *See* OFFICE OF POLICY, PLANNING & EVALUATION, U.S. ENVTL. PROTECTION

encourage achievement of auditing goals, and encouraged auditing through participation in numerous auditing conferences, workshops and seminars sponsored by EPA, states, localities, trade associations and professional organizations.⁴⁷ EPA's policy work in this area culminated in November, 1985, with the publication of the Interim Environmental Auditing Policy Statement.⁴⁸

A. *The Environmental Auditing Policy Statement*

1. Encouraging environmental auditing

The *Environmental Auditing Policy Statement* initially provides that: "It is EPA policy to encourage the use of environmental auditing by regulated entities [including federal facilities] to help achieve and maintain compliance with environmental laws and regulations, as well as to help identify and correct unregulated environmental hazards."⁴⁹ While state and local regulatory agencies have independent jurisdiction over regulated entities, EPA encourages states to adopt the *Environmental Auditing Policy Statement* and approach auditing in a consistent manner.⁵⁰ EPA also encourages regulated entities to adopt sound environmental management practices that improve environmental performance, including programs that ensure the adequacy of internal systems to achieve, maintain and monitor compliance.⁵¹

The policy further states that EPA will not dictate or interfere with the environmental practices of private or public organizations,⁵² and will not prescribe minimum requirements for audit programs. Nonetheless, to provide some guidance to regulated entities which want to develop environmental audits, the policy outlines the common elements of effective audits:

- (1) explicit management support for environmental auditing and commitment to follow-up on audit findings;
- (2) an environmental audit function independent of audited activities;
- (3) adequate team staffing and auditor training;

AGENCY. PUBLIC COMMENTS RECEIVED ON THE EPA INTERIM ENVIRONMENTAL AUDITING POLICY STATEMENT (1986) [hereinafter cited as PUBLIC COMMENTS].

47. Speech by James Edward, U.S. Envtl. Protection Agency, EPA's Environmental Auditing Outlook: Compliance and Enforcement's View, at the Edison Electric Institute (Sept. 27, 1984).

48. Interim Environmental Auditing Policy Statement, *supra* note 1, at 46,505-08.

49. *Id.* at 46,504.

50. *Id.* at 46,506.

51. *Id.* at 46,505.

52. *Id.*

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48. Interim Environmental Auditing Policy Statement, *supra* note 1, at 46.505-08.

49. *Id.* at 46.504.

50. *Id.* at 46.506.

51. *Id.* at 46.505.

52. *Id.*

- (4) explicit audit program objectives, including scope, resources and frequency;
- (5) a process which collects, analyzes, and interprets documents and information on compliance and management effectiveness sufficient to achieve audit objectives;
- (6) specific procedures to promptly prepare candid, clear and appropriate written reports on audit findings, corrective actions and schedules for implementation; and
- (7) quality assurance procedures to assure that the environmental audits are accurate and thorough.⁵³

The policy emphasizes that ultimate responsibility for the environmental performance of the facility lies with top management, and that independent internal or third party auditors should conduct the audit.⁵⁴ Corporate officials have agreed that top management support and responsibility for environmental decisions are critical to successful auditing programs.⁵⁵

2. Agency requests for audit reports

Second, the policy addresses the extent to which EPA may make requests to obtain audit reports. The extent of Agency access to and use of audit information in enforcement has created the greatest concern among regulated entities.⁵⁶ In addressing this issue, EPA has attempted to balance the use of its broad authority to obtain compliance-related information with these concerns.

EPA can obtain audit generated information in several ways. The major environmental statutes authorize EPA to require extensive monitoring, recordkeeping and reporting schemes relating to compliance with these laws.⁵⁷ Pursuant to this authority, EPA has promulgated regula-

53. *Id.* at 46,507.

54. *Id.* at 46,505.

55. See, e.g., Freedman, *Organizing and Managing Effective Corporate Environmental Protection Programs*, ENVTL. FORUM, May 1984, at 40-41. In describing the Occidental Petroleum Corporation's environmental management program, Mr. Freedman states: "Top corporate management now is strongly committed to and involved in the company's environmental management programs, as perhaps best demonstrated by the Board of Directors' [sic] having taken the relatively unusual step of having established an Environment Committee composed of board members." *Id.* at 41.

56. See generally PUBLIC COMMENTS, *supra* note 46.

57. See, e.g., CWA § 308, 33 U.S.C. § 1318 (1982); CAA § 114, 42 U.S.C. § 7414 (1992). In *United States v. Tivian Laboratories, Inc.*, 589 F.2d 49, 55 (1st Cir. 1978), cert. denied, 442 U.S. 942 (1979), the court upheld EPA's broad authority to make information requests under these statutes.

tions on monitoring, recordkeeping and governmental access.⁵⁸ Thus, information which is generated by an audit containing required reporting data, such as a Clean Water Act discharge monitoring report, must be reported to EPA or a state agency although it does not have to be reported as part of the audit.⁵⁹ In addition, EPA has authority to request production of audit files and reports where reasonably related to authorized investigations under several statutory provisions, even if the information is not required to be reported.⁶⁰ The Agency can obtain access to information that is relevant to an authorized enforcement investigation, including information used to prepare audits and the audit reports themselves.⁶¹ Finally, audit reports could be obtained by governmental or private parties through discovery in civil litigation.⁶²

Recognizing that routine Agency requests may have some inhibiting effect on auditing programs, the policy statement provides that "EPA will *not* routinely request environmental audit reports."⁶³ At the same time, EPA maintains its authority to request and receive information in audit reports under the various environmental statutes.⁶⁴ EPA may require such reports where consent decrees contain audit provisions with reporting requirements, where a company's management practices are raised as a defense, or where state of mind is a relevant element of inquiry.⁶⁵ Importantly, the policy recognizes that regulated entities have continuing obligations to monitor, record or report information required under environmental statutes, regulations or permits, and that EPA has access to that information.⁶⁶

Industry commentators on the *Environmental Auditing Policy Statement* felt that EPA did not go far enough to limit its policy on access to audit reports. They also felt that access should be limited to bad faith efforts to conceal evidence of violations or criminal investigations.⁶⁷

58. See, e.g., Clean Water Act—National Pollutant Discharge Elimination System (NPDES) regulations, 40 C.F.R. § 122 (1985).

59. See ENVTL. L. INST., ENVIRONMENTAL AUDIT ISSUE PAPER: DUTIES TO REPORT OR DISCLOSE INFORMATION ON THE ENVIRONMENTAL ASPECTS OF BUSINESS ACTIVITIES, REPORT TO U.S. ENVIRONMENTAL PROTECTION AGENCY 4 (1985).

60. *Id.*

61. See *Mobil Oil Corp. v. EPA*, 13 ENVTL. L. REP. (ENVTL. L. INST.) 20,635 (N.D. Ill. 1982), *aff'd*, 716 F.2d 1187 (7th Cir. 1983); *Public Serv. Co. v. EPA*, 509 F. Supp. 720 (S.D. Ind. 1981), *aff'd*, 682 F.2d 626 (7th Cir. 1982), *cert. denied*, 459 U.S. 1127 (1983).

62. See *Reed*, *supra* note 4, at 10,305.

63. Interim Environmental Auditing Policy Statement, *supra* note 3, at 46,505 (emphasis in original).

64. *Id.*

65. *Id.*

66. *Id.*

67. See PUBLIC COMMENTS, *supra* note 46, comments of GPU Service Corp.

EPA rejected this line-drawing since many Agency legal officials felt that such a limited set of circumstances could appear to offer a defense to those unwilling to provide required or requested information, and thus limit circumstances where EPA would request audit reports.

Nonetheless, with counsel's assistance to set up an audit system, regulated entities can take certain steps to protect audit generated information. While the Federal Rules of Civil Procedure would generally favor disclosure of audit information,⁶⁸ a company may attempt to demonstrate that one of the exceptions to the discovery rules applies.⁶⁹ These include the attorney-client privilege,⁷⁰ the work product doctrine⁷¹ and the privilege for self-evaluative documents.⁷² However, it may not be practical to bring the entire audit process within one of these exceptions given the regulated entity's interest in developing corporate-wide support and technical expertise for an audit program.

3. EPA enforcement response to environmental auditing

Next, the *Environmental Auditing Policy Statement* addresses the impact of environmental audit programs on EPA enforcement response. The Agency examined the extent to which it could reduce the potential disincentives for auditing consistent with maintenance of a strong en-

68. FED. R. CIV. P. 26(b)(1) states:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

69. For a discussion on protecting the confidentiality of environmental audits, see L. HARRISON, *supra* note 2, at 4-3 to 4-15; Reed, *supra* note 4, at 10.305-07.

70. To demonstrate the attorney-client privilege, the following elements must be present: (1) the communication at issue must have been made as part of legal advice given by an attorney; (2) the communication must be between attorney and client; and (3) the communication must be treated in a confidential manner. The privilege can be waived through voluntary disclosure by the holder of the privilege. MCCORMICK ON EVIDENCE §§ 87-97 (E. Cleary 3d ed. 1984).

71. The work product doctrine applies to documents, notes and other tangible things prepared in anticipation of litigation. The protection is generally lifted if the party seeking discovery has substantial need of the materials in the preparation of his case and is unable without undue hardship to obtain the substantial equivalent by other means. See FED. R. CIV. P. 26(b)(3). An attorney's mental impressions, conclusions, opinions or legal theories may be protected whether or not a showing is made. See *Upjohn Co. v. United States*, 449 U.S. 333 (1981).

72. The self-evaluation privilege may be established by showing: (1) an internal review process serves an important public interest; (2) disclosure would cut off candid reviews; and (3) preparation of the reviews is for internal use only. See Reed, *supra* note 4, at 10.306. However, courts have been unwilling to apply the privilege to prevent disclosure to a government agency. See *Federal Trade Comm'n v. TRW, Inc.*, 625 F.2d 207, 210 (D.C. Cir. 1980).

forcement program.⁷³ In other words, where a violator institutes an environmental auditing program, should the government reduce its compliance monitoring or reduce enforcement responses to violations that are either alleged in an enforcement action or discovered by an audit?

As with EPA access to audit reports, the appropriate EPA enforcement response to environmental auditing does not present the Agency with significant legal constraints. The environmental statutes and case law generally allow EPA flexibility in developing enforcement responses to environmental violations. Several courts have held that the duty to find a violation is not mandatory.⁷⁴ Where EPA makes a finding that a violation exists, EPA generally must take some type of formal enforcement action (i.e., either administrative or judicial) under the Clean Water Act,⁷⁵ under the Clean Air Act⁷⁶ or under RCRA.⁷⁷ All statutes authorize EPA to choose the type of formal enforcement response.⁷⁸ In addition, while the environmental statutes provide EPA with authority to obtain substantial penalties,⁷⁹ the law does not mandate that EPA obtain a certain level of penalty or other relief in an enforcement case.⁸⁰

The *Environmental Auditing Policy Statement* provides that "EPA will not promise to forgo inspections, reduce enforcement responses, or offer other such incentives in exchange for implementation of environmental auditing or other sound environmental practice."⁸¹ While audits may complement inspections, they do not provide a substitute for regulatory oversight.⁸² However, the Agency recognizes that, in setting inspec-

73. See ENVTL. L. INST., ENVIRONMENTAL AUDIT ISSUE PAPER: ENFORCEMENT RESPONSE, REPORT TO U.S. ENVIRONMENTAL PROTECTION AGENCY 4 (1985) [hereinafter cited as ENFORCEMENT RESPONSE].

74. *Sierra Club v. Train*, 557 F.2d 485 (5th Cir. 1977); *Caldwell v. Gurley Ref. Co.*, 533 F. Supp. 252 (E.D. Ark. 1982). *Contra* *South Carolina Wildlife Fed'n v. Alexander*, 457 F. Supp. 118 (D.S.C. 1978).

75. See *South Carolina Wildlife Fed'n v. Alexander*, 457 F. Supp. 118, 131 (D.S.C. 1978); *People ex rel. Scott v. Hoffman*, 425 F. Supp. 71, 77 (S.D. Ill. 1977). *But see* *Sierra Club v. Train*, 557 F.2d 485, 490 (5th Cir. 1977).

76. See *Council of Commuter Orgs. v. Metropolitan Transit Auth.*, 633 F.2d 663 (2d Cir. 1982); *Luckie v. Gorsuch*, 13 ENVTL. L. REP. (ENVTL. L. INST.) 20,400 (D. Ariz. 1983); *Conoco, Inc. v. Gardebring*, 503 F. Supp. 49, 51 (N.D. Ill. 1980). *Contra* *Kentucky ex rel. Hancock v. Ruckelshaus*, 497 F.2d 1172, 1177 (6th Cir. 1974), *aff'd on other grounds sub nom. Hancock v. Train*, 426 U.S. 167 (1976); *New England Legal Found. v. Costle*, 475 F. Supp. 425, 436 (D. Conn. 1979), *aff'd in part, rev'd in part*, 612 F.2d 936 (2d Cir. 1980).

77. See *Luckie v. Gorsuch*, 13 ENVTL. L. REP. (ENVTL. L. INST.) 20,400 (D. Ariz. 1983).

78. See ENFORCEMENT RESPONSE, *supra* note 73, at 9-10.

79. See *supra* notes 19-23.

80. See ENFORCEMENT RESPONSE, *supra* note 73, at 9-10.

81. *Interim Environmental Auditing Policy Statement*, *supra* note 3, at 46, 505.

82. *Id.*

tion priorities, "facilities with a good compliance history may be subject to fewer inspections."⁸³

Similarly, EPA states that it will not reduce its enforcement responses or offer other incentives in exchange for auditing.⁸⁴ However, the Agency explains that, in developing a particular enforcement response to violations, "EPA policy is to take into account, on a case-by-case basis, the honest and genuine efforts of regulated entities to avoid and promptly correct environmental problems."⁸⁵ Reasonable efforts to avoid noncompliance, expeditious correction of environmental problems discovered through audits or other means, and implementation of measures that will prevent the recurrence of these problems may be considered by EPA as honest and genuine efforts to assure compliance.⁸⁶

Industry commentators on the *Environmental Auditing Policy Statement* have sought a more definitive statement on the use of discretion in levying penalties where an auditing program exists.⁸⁷ While EPA does not provide such a statement, it has provided additional guidance on enforcement response in related policy statements and has agreed to use some enforcement discretion in negotiating consent decrees with audit provisions.⁸⁸

The *Agencywide Compliance and Enforcement Strategy*⁸⁹ directs EPA to select enforcement responses on a case-by-case basis after considering: (1) the gravity of the violation in terms of environmental impact and effect on EPA's ability to carry out its programs; (2) the reasons why the violation occurred; and (3) the nature of the violator, including its compliance record and the economic benefit it gained as a result of the violation.⁹⁰ Many EPA program-specific enforcement policies further set enforcement priorities for certain categories of violations.⁹¹ For example, under the *RCRA Enforcement Response Policy*, a primary enforcement priority is all Class I groundwater violations.⁹² Further, EPA policy sets categories of violations for which cash penalties must be

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 46.505-06.

87. See PUBLIC COMMENTS, *supra* note 46, comments of GPU Service Corp.

88. For a discussion of environmental audit provisions in EPA consent decrees, see *infra* notes 104-20 and accompanying text.

89. ENVTL. PROTECTION AGENCY, AGENCYWIDE COMPLIANCE AND ENFORCEMENT STRATEGY AND STRATEGY FRAMEWORK FOR EPA COMPLIANCE PROGRAMS (1984).

90. *Id.* at 25.

91. See, e.g., ENVTL. PROTECTION AGENCY, RCRA ENFORCEMENT RESPONSE POLICY 6-14 (1984).

92. Class I violations involve a release or threatened release of hazardous wastes to the

paid.⁹³

EPA has also developed a policy establishing criteria for federal enforcement where initial enforcement of an environmental statute has been delegated to the state.⁹⁴ To generally avoid federal enforcement, states must take "timely and appropriate" enforcement action.⁹⁵ The policy requires initiation of formal legal action by a state within a certain period of time after detection (either through issuance of an administrative order or civil referral), and sets criteria for selecting appropriate state enforcement responses.⁹⁶ Program-specific policies have defined and implemented the "timely and appropriate" concept.⁹⁷

Although it does not explicitly address auditing, EPA's *Policy on Civil Penalties*⁹⁸ also provides some guidance for calculating penalties in administrative and judicial enforcement actions where the violator agrees to perform an activity, such as an audit, as part of a settlement. At a minimum, the penalty must remove the economic benefit for failure to comply⁹⁹ and obtain an additional amount to reflect the seriousness or gravity of the violation.¹⁰⁰ The gravity component of the penalty can be adjusted to reflect the following factors: (1) degree of willfulness; (2) history of noncompliance; (3) ability to pay; and (4) degree of cooperation.¹⁰¹ Statute-specific penalty policies also discuss these adjustment factors.¹⁰² Expedient correction of past compliance problems may result in some mitigation.¹⁰³

Thus, a company's willingness to set up an environmental auditing program as part of a settlement, as well as expedient correction of new

environment, failure to assure groundwater protection, proper post-closure care, or delivery of wastes to a permitted interim status facility. *Id.* at 11.

93. ENFORCEMENT RESPONSE, *supra* note 73, at 11-13.

94. ENVTL. PROTECTION AGENCY, IMPLEMENTING THE STATE/FEDERAL PARTNERSHIP IN ENFORCEMENT AGREEMENTS (1984).

95. *Id.* at 11-14.

96. *Id.* at 11-12.

97. For example, the *RCRA Enforcement Response Policy* requires administrative action or case referral for certain class I violations within 90 days. RCRA ENFORCEMENT RESPONSE POLICY, *supra* note 91, at 6.

98. ENVTL. PROTECTION AGENCY, POLICY ON CIVIL PENALTIES (1984) [hereinafter cited as POLICY ON CIVIL PENALTIES]. A companion EPA policy document issued on the same day provides guidance on how to write penalty assessment guidelines for a particular environmental program. See IMPLEMENTING EPA'S POLICY ON CIVIL PENALTIES, *supra* note 36.

99. IMPLEMENTING EPA'S POLICY ON CIVIL PENALTIES, *supra* note 36, at 2, 6-14.

100. *Id.* at 3-3, 4-16.

101. *Id.* at 16-24.

102. See, e.g., ENVTL. PROTECTION AGENCY, FINAL RCRA CIVIL PENALTY POLICY 16-21 (1984).

103. IMPLEMENTING EPA'S POLICY ON CIVIL PENALTIES, *supra* note 36, at 21.

audit-discovered violations, could show cooperation, potentially allowing partial mitigation of the penalty amount.¹⁰⁴ Such an approach serves the Agency settlement goal of swift resolution of environmental problems.¹⁰⁵ Of course, any adjustment may not reduce the penalty below an amount which is greater than the stated economic benefit by some nontrivial amount.¹⁰⁶

EPA consent decree guidance¹⁰⁷ also recognizes that defendants may agree to take certain actions, above and beyond those necessary to meet statutory requirements, in order to offset a cash penalty, as long as this type of agreement is explicitly noted in the decree.¹⁰⁸ A well developed audit system could produce additional environmental protection by going beyond current monitoring and reporting requirements.¹⁰⁹

The *TSCA Settlement with Conditions Policy*¹¹⁰ appears to allow for some type of mitigation if the remedy includes an audit. This policy provides that EPA may agree to remit a portion of the proposed civil penalty where the violator agrees to take extensive and specific remedial actions.¹¹¹ The remedial actions may be related not only to the violations discovered by the Agency, but also to other current violations which have not yet been discovered,¹¹² e.g., through an audit of other company facilities where similar violations are suspected.

B. Audit Provisions as Remedies in EPA Enforcement Actions

In addition to encouraging voluntary development of auditing programs, EPA has begun to seek audit provisions as remedies in certain administrative and judicial enforcement actions. The idea of using an enforcement action to negotiate an environmental audit is relatively new.¹¹³

Traditional EPA settlement agreements have required correction of specific violations and assessed penalties. Settlements typically include

104. See *id.* at 19. See also ENFORCEMENT RESPONSE, *supra* note 73, at 15.

105. IMPLEMENTING EPA'S POLICY ON CIVIL PENALTIES, *supra* note 36, at 5.

106. *Id.* at 5-6.

107. ENVTL. PROTECTION AGENCY, GUIDANCE FOR DRAFTING JUDICIAL CONSENT DECREES (1983).

108. *Id.* at 18.

109. See ENVTL. L. INST., ENVIRONMENTAL AUDITING ISSUE PAPER: PROVISION IN CONSENT DECREES, REPORT TO U.S. ENVIRONMENTAL PROTECTION AGENCY (1985) [hereinafter cited as PROVISION IN CONSENT DECREES].

110. *TSCA Settlement with Conditions*, in TSCA COMPLIANCE/ENFORCEMENT GUIDANCE MANUAL app. A (1984).

111. *Id.* at app. A-124.

112. *Id.*

113. Mays, *supra* note 1, at 27.

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the following provisions: (1) requiring compliance with applicable statutes or regulations and committing the defendant to a particular remedial course of action by a set date; (2) scheduling a timetable for achieving compliance which requires the greatest degree of remedial action as quickly as possible, including interim dates to allow for Agency monitoring of defendant's progress; (3) monitoring, reporting and sampling provisions; (4) requiring site entry and access and document review; (5) assessing civil penalties for statutory violations; and (6) assessing stipulated penalties for violating the consent decree.¹¹⁴ These settlements may fail to address the lack of a company policy encouraging continuing compliance with environmental laws and regulations, as well as the absence of procedures which would effectively implement such a policy.¹¹⁵

EPA has broad authority to negotiate an audit provision in a consent decree as part of its authority to require self-monitoring as a remedy for violators.¹¹⁶ EPA can obtain remedies not expressly authorized by statute or required under EPA regulations, where the decree's terms do not violate the statute's express prohibitions.¹¹⁷

While EPA consent decree guidance does not explicitly address provisions for environmental audits, the guidance would support an audit as contributing to compliance with applicable statutes and regulations.¹¹⁸ In addition, an audit system can establish a remedial course of action which strengthens the compliance sections of consent decrees by examining a firm's compliance efforts on a continuing basis. Under this guidance, where a firm has a long history of repeated violations, EPA negotiators should consider including more stringent compliance monitoring provisions, particularly provisions requiring more frequent monitoring and testing by the source to ensure continued future compliance.¹¹⁹ Additionally, while EPA enforcement policy encourages remedies which are closely related to the violations at issue, a more extensive management audit may be appropriate if the violations are a result of poor oversight by management.¹²⁰ *The TSCA Settlement With*

114. GUIDANCE FOR DRAFTING JUDICIAL CONSENT DECREES, *supra* note 107, at 10-13, 22-24.

115. See Mays, *supra* note 1, at 27.

116. See, e.g., CWA § 308, 33 U.S.C. § 1318 (1982); CAA § 114, 42 U.S.C. § 7414 (1982). See also PROVISION IN CONSENT DECREES, *supra* note 109, at 4.

117. PROVISION IN CONSENT DECREES, *supra* note 109, at 2. See *United States v. Swift & Co.*, 286 U.S. 106 (1932).

118. See GUIDANCE FOR DRAFTING JUDICIAL CONSENT DECREES, *supra* note 107, at 10.

119. *Id.* at 14.

120. See PROVISION IN CONSENT DECREES, *supra* note 109, at 7.

Conditions Policy also implicitly supports incorporation of audit provisions in consent decrees as a broader remedial action to address undisclosed violations.¹²¹

The *Environmental Audit Policy Statement* states that EPA may propose auditing provisions in consent decrees and in other settlement negotiations where: (1) a systematic pattern of violations can be attributed to the absence of, or poor functioning of, an environmental management system; and (2) the type or nature of violations points to the likelihood of similar violations elsewhere in the facility or other facilities operated by the regulated entity.¹²² Audit provisions in consent decrees can be an efficient and effective use of EPA's enforcement resources. Improvements resulting from an audit could apply throughout a multi-facility company, and raise the level of environmental compliance at all facilities.¹²³ In proposing audits in appropriate settlements, EPA also expects to encourage other regulated entities to develop auditing programs.

IV. EPA USE OF AUDITING IN CONSENT DECREES

EPA has recently negotiated environmental audit provisions in several settlement agreements. Most auditing provisions are contained in administrative settlement agreements under TSCA¹²⁴ and RCRA.¹²⁵ In TSCA cases, EPA has generally negotiated environmental audit provisions for polychlorinated biphenyl (PCB) violations where EPA has suspected similar violations at other company facilities which are not the subject of the immediate enforcement action.¹²⁶ Under TSCA, for facilities with PCBs, the regulated entities generally have no affirmative duty to obtain federal use permits, discharge permits or waste manifests,¹²⁷ so a particular facility within a company may have little contact with the regulatory agency. Other company facilities also may not be familiar with TSCA requirements, and may have TSCA violations. In RCRA cases, EPA has negotiated audit provisions to address inadequate hazardous waste management practices, including monitoring, reporting and

121. See *TSCA Settlement with Conditions*, *supra* note 110, at app. A-124.

122. *Interim Environmental Auditing Policy Statement*, *supra* note 3, at 46,506.

123. See *Mays*, *supra* note 1, at 27.

124. 15 U.S.C. §§ 2601-2629 (1982).

125. 42 U.S.C. §§ 6901-6937 (1982).

126. See, e.g., *In re Owens-Corning Fiberglas Corp.*, No. TSCA-V-C-101 (EPA Reg. V June 8, 1984) (Consent Agreement and Final Order).

127. In addition, unlike statutes which generally regulate individual facilities, TSCA focuses on the testing, pre-manufacturing clearance, and regulation and distribution of individual toxic substances.

records on the disposition of PCB and PCB items at the facility.¹³⁷

The consent agreement and final order in *Crompton* assessed a civil penalty and required the company to take the following actions in a compliance audit: (1) certify to EPA that it had conducted an inventory of PCBs, PCB items, heat transfer systems and hydraulic systems at each of its twenty-eight facilities; (2) submit a written report for each facility specifying the location and quantity of PCBs, PCB items, heat transfer systems and hydraulic systems at each of its twenty-eight facilities; (3) describe the audit at each facility; and (4) within sixty days of the effective date of the consent decree, certify by a responsible corporate official that each facility is in compliance with PCB regulations, including the basis upon which it would certify compliance.¹³⁸

Owens-Corning involved a similar PCB compliance audit for sixty-three facilities¹³⁹ while the audit in *In re Potlatch Corp.* covered forty-eight company facilities.¹⁴⁰ The compliance audits in *EPA v. Chem-Security Systems, Inc.*¹⁴¹ were limited to the facility at issue in the administrative enforcement actions, and required Chem-Security to conduct four quarterly TSCA (PCB) and RCRA compliance audits, and to send the audit reports to EPA.¹⁴²

In *In re Diamond Shamrock Chemical Co.*,¹⁴³ EPA alleged that the company failed to notify EPA of its intention to manufacture a chemical substance not on the TSCA inventory and used for commercial purposes an illegally manufactured substance.¹⁴⁴ The consent agreement and order required the company to perform a TSCA compliance audit of all of its forty-three facilities, to evaluate the TSCA compliance status facilities, and to report TSCA violations discovered at those facilities.¹⁴⁵ In addition to reviewing PCB compliance, the audit required Diamond Shamrock to assess compliance with several other TSCA recordkeeping and

137. *In re Crompton & Knowles*, No. TSCA-PCB-S2-0108, at 3-4 (EPA Reg. II Sept. 17, 1985) (Consent Agreement and Final Order).

138. *Id.* at app. B.

139. *In re Owens-Corning Fiberglas Corp.*, No. TSCA-V-C-101, app. at 6-7 (EPA Reg. V June 8, 1984) (Consent Agreement and Final Order).

140. *In re Potlatch Corp.*, No. TSCA-V-C-137, at 4 (EPA Reg. V Aug. 3, 1983) (Consent Agreement and Final Order).

141. *EPA v. Chem-Security Sys., Inc.*, No. 1085-07-42-2615P (EPA Reg. X Dec. 26, 1985) (Consent Agreement and Final Order).

142. *Id.* at 3-6.

143. Administrative Complaint, *In re Diamond Shamrock Chem. Co.*, No. TSCA-85-H-03 (EPA Headquarters filed Mar. 18, 1985).

144. *Id.* at 1-7.

145. *In re Diamond Shamrock Chem. Co.*, No. TSCA-85-H-03, Audit Agreement (EPA Headquarters June 28, 1985) (Consent Agreement and Final Order).

recordkeeping requirements.¹²⁸

Environmental audit provisions in consent decrees may be as broad or as narrow as the number, scope and severity of a company's violations seem to require.¹²⁹ EPA has generally negotiated two types of audit provisions: compliance audits and management audits. Compliance audits have been used where EPA finds that violations discovered at a facility may be typical of violations at other company facilities,¹³⁰ given the company officials' apparent lack of familiarity with regulatory requirements. In such cases, the companies have agreed to review the compliance status of all corporate facilities to ensure that similar violations do not exist, and to certify to EPA that all facilities are in compliance.¹³¹ Where a firm does not accurately certify compliance, and EPA subsequently discovers violations at the certified facilities, EPA can proceed with a criminal enforcement action based on knowing and willful falsification of reports.¹³²

Management audits have been negotiated where EPA believed that a pattern of violations resulted in large part from a lack of, or poor functioning of, corporate environmental management or operational controls.¹³³ In developing such controls, a company may be required to go beyond a review of facility compliance status and examine its entire environmental management policies, procedures, and organizational structure and programs affecting all company employees and operations.¹³⁴

*In re Owens-Corning Fiberglas Corp.*¹³⁵ and *In re Crompton & Knowles Corp.*¹³⁶ involved TSCA administrative enforcement actions for PCB violations which resulted in settlement agreements involving compliance audit provisions. In *Crompton*, EPA alleged that the company failed to: (1) affix the required PCB warning label transformers; (2) inspect, record and report leaks to EPA; and (3) develop and maintain

128. See, e.g., *In re Chemical Waste Management, Inc.*, Nos. RCRA-09-84-0037, TSCA-09-84-0039 (EPA Reg. IX Nov. 7, 1985) (Consent Agreement and Final Order).

129. Mays, *Environmental Audits: Addressing Root Causes*, CHEM. WEEK, May 29, 1985, at 4. See also Mays, *supra* note 1, at 27.

130. See Mays, *supra* note 129, at 4.

131. See, e.g., *In re Owens-Corning Fiberglas Corp.*, No. TSCA-V-C-101, at 6-7 (EPA Reg. V June 8, 1984) (Consent Agreement and Final Order).

132. See Reed, *supra* note 4, at 10,304.

133. Mays, *supra* note 1, at 27; Mays, *supra* note 129, at 4.

134. Mays, *supra* note 129, at 4.

135. Administrative Complaint, *In re Owens-Corning Fiberglas Corp.*, No. TSCA-V-C-101 (EPA Reg. V filed Feb. 14, 1983).

136. Administrative Complaint, *In re Crompton & Knowles Corp.*, No. TSCA-PCB-82-0108 (EPA Reg. II filed July 29, 1982).

reporting requirements and to report all discovered TSCA violations to EPA.¹⁴⁶

In *In re Union Carbide Corp.*,¹⁴⁷ EPA alleged that Union Carbide manufactured and used for a commercial purpose a chemical substance without the required premanufacturing notice, and thus was not on the TSCA inventory in violation of sections 5 and 15 of TSCA.¹⁴⁸ As part of the settlement agreement, Union Carbide agreed to prepare over the following year: (1) an educational program designed to reemphasize premanufacturing notice compliance, which will be presented to a broad company audience; and (2) subsequent to the completion of such educational program, implement a program of not less than five test inputs to monitor responses for TSCA compliance.¹⁴⁹ Such a program will allow the corporation to assess the compliance capability under actual business conditions by responding to artificially created violations.

EPA has negotiated management environmental audits in several other administrative settlements with Chemical Waste Management, Inc. (CWM). In *In re Chemical Waste Management*¹⁵⁰ (Kettleman Hills facility), EPA alleged that CWM committed numerous RCRA violations including failure to implement an adequate groundwater monitoring system, failure to implement an unsaturated zone monitoring program, failure to develop an adequate closure plan, failure to make substantial modifications to the facility,¹⁵¹ as well as violations of section 15 of TSCA.¹⁵² CWM agreed to perform a compliance and management audit covering all RCRA and TSCA requirements at the facility. The con-

146. *Id.* at 2-5.

147. Administrative Complaint. *In re Union Carbide Corp.*, No. TSCA-85-H-06 (EPA Headquarters filed June 17, 1985).

148. *Id.* at 2.

149. *In re Union Carbide Corp.*, No. TSCA-85-H-06, at 6-7 (EPA Headquarters Feb. 26, 1986) (Consent Agreement and Order). Similar TSCA violations formed the basis for an audit in *In re BASF Wyandotte Corp.*, No. TSCA-V-C-410 (EPA Reg. V filed Apr. 25, 1986) (Consent Agreement and Final Order). The audit required BASF to review 13 facilities and certify that all chemicals required to be listed on the TSCA Chemical Substances Inventory were so listed. *Id.* at 2-3.

150. See *In re Chemical Waste Management, Inc.*, No. RCRA-09-84-0037 (EPA Reg. IX July 3, 1984) (Determination of Violation, Compliance Order and Notice of Right to Request Hearing); *In re Chemical Waste Management, Inc.*, No. RCRA-09-84-0037 (EPA Reg. IX June 6, 1985) (Amended Determination of Violation, Compliance Order and Notice of Right to Request a Hearing).

151. *In re Chemical Waste Management, Inc.*, No. RCRA-09-84-0037, at 5-26 (EPA Reg. IX June 6, 1985) (Amended Determination of Violation, Compliance Order and Notice of Right to Request a Hearing).

152. *In re Chemical Waste Management, Inc.*, No. TSCA-09-84-0009 (EPA Reg. IX filed June 6, 1985) (Administrative Complaint and Notice of Hearing).

sent agreement and final order¹⁵³ included an audit which provided for an independent third party auditor to submit a proposal for the scope of work to EPA to audit waste operations and environmental management systems at the facility and in CWM's corporate environmental management department.¹⁵⁴ Within one year after obtaining a written agreement on the scope of work for the audit, the auditor was required to submit written reports to EPA on RCRA and TSCA compliance. These reports would:

- (1) identify and describe the facility's existing waste management operations, including management systems, policies and prevailing practices;
- (2) evaluate such operations, systems, practices and policies, identifying strengths and weaknesses; and
- (3) identify and describe areas of waste management operations and environmental management systems that could be significantly improved, including personnel training, corporate management and lines of authority, operations and maintenance procedures, interim stabilization, and quality control and assurance.¹⁵⁵

Within ninety days after CWM's receipt of these reports, CWM was required to submit to EPA the portion of the report containing findings and recommendations of the auditor, CWM's evaluation of each option, and specific actions the company would take, as well as a schedule for implementation.¹⁵⁶ The administrative consent agreements in *In re Chemical Waste Management*¹⁵⁷ (Emelle facility) and in *In re Chemical Waste Management*¹⁵⁸ (Vickery facility) involved similar management audit requirements to address RCRA and TSCA violations.

In proposing environmental audit provisions in consent decrees, EPA has addressed concerns on EPA access to audit-generated information and the appropriate EPA response to violations discovered by an audit. Of course, where an audit is conducted pursuant to a settlement agreement, EPA has required greater access to audit data than under a voluntary audit program to ensure compliance with the settlement. EPA

153. *In re Chemical Waste Management, Inc.*, Nos. RCRA-09-84-0037, TSCA-09-84-0009 (EPA Reg. IX Nov. 7, 1985) (Consent Agreement and Final Order) (Kettleman Hills facility).

154. *Id.* at 4-5.

155. *Id.* at 5-7.

156. *Id.*

157. *In re Chemical Waste Management, Inc.*, No. TSCA-84-H-03, at 16-20 (EPA Reg. IV Dec. 19, 1984) (Consent Agreement and Final Order).

158. *In re Chemical Waste Management, Inc.*, Nos. TSCA-V-C-307, RCRA-V-85R-019, at 5-9 (EPA Reg. V Apr. 5, 1985) (Consent Agreement and Final Order).

has generally reserved its right to inspect defendant's facilities to determine the accuracy of compliance verifications and other submittals.¹⁵⁹ In addition, audits may identify and document violations that may otherwise have gone unnoticed by a regulatory agency.¹⁶⁰ In some settlements, reporting of audit-discovered violations has been limited to that necessary to ensure compliance with the terms of the settlement or as otherwise authorized by regulation or statute.¹⁶¹ Some audits have required reporting of all audit-generated violations to EPA.¹⁶²

An audit report may also include information on matters other than the immediate environmental issues, such as the production process, that the company would wish to keep confidential.¹⁶³ In some cases, defendants have been permitted to assert a business confidentiality claim with respect to information submitted in compliance with the settlement.¹⁶⁴ Another settlement specifies that audit-reported information would be treated as confidential by EPA to the extent authorized by the TSCA and RCRA.¹⁶⁵

EPA has assessed penalties in all audit-related settlements for past violations, or those violations which were the subject of the original enforcement action.¹⁶⁶ To encourage environmental auditing in settlement agreements, EPA has been willing to limit somewhat its use of audit reports in prospective enforcement actions. In some settlements, EPA has reserved all enforcement rights regarding prospective violations.¹⁶⁷

Recognizing the significant benefits of continuous compliance at audited facilities, EPA has agreed in certain settlements that the results of an audit would not be used by EPA as direct evidence of violations; how-

159. See, e.g., *In re Owens-Corning Fiberglas Corp.*, No. TSCA-V-C-101, at 7 (EPA Reg. V June 8, 1984) (Consent Agreement and Final Order).

160. See Reed, *supra* note 4, at 10,304.

161. See, e.g., *EPA v. Chem-Security Sys., Inc.*, No. 1085-07-42-2615P (EPA Reg. X Dec. 26, 1985) (Consent Agreement and Final Order); *In re Owens-Corning Fiberglas Corp.*, No. TSCA-V-C-101 (EPA Reg. V June 8, 1984) (Consent Agreement and Final Order).

162. See, e.g., *In re Diamond Shamrock Chem. Corp.*, No. TSCA-85-H-03, Audit Agreement, at 2-3 (EPA Headquarters June 28, 1985) (Consent Agreement and Final Order).

163. See Reed, *supra* note 4, at 10,304.

164. See, e.g., *In re Owens-Corning Fiberglas Corp.*, No. TSCA-V-C-101, at 7 (EPA Reg. V June 8, 1984) (Consent Agreement and Final Order).

165. *In re Chemical Waste Management, Inc.*, Nos. RCRA-09-84-0037, TSCA-09-84-0009, at 7 (EPA Reg. IX Nov. 7, 1985) (Consent Agreement and Final Order) (Kettleman Hills Facility).

166. See, e.g., *In re Chem-Security Sys., Inc.*, No. 1085-07-42-2615P, at 4 (EPA Reg. X Dec. 26, 1985) (Consent Agreement and Final Order).

167. See, e.g., *In re BASF Wyandotte Corp.*, No. TSCA-V-C-410, at 2, 4 (EPA Reg. V filed Apr. 25, 1986) (Consent Agreement and Final Order); *In re Chem-Security Sys., Inc.*, No. 1085-07-42-2615P, at 5-6 (EPA Reg. X Dec. 26, 1985) (Consent Agreement and Final Order).

ever, EPA is not precluded from enforcing against violations discovered independently of the audit.¹⁶⁸ In *In re Chemical Waste Management* (Kettleman Hills facility) EPA allowed a six month grace period after completion of the audit to correct audit-discovered violations with no stipulated penalties, while EPA allowed a six month grace period after the settlement date to discover and remedy violations in *In re Diamond Shamrock Chemicals Co.* After this time period, EPA could enforce against such violations.¹⁶⁹ However, grace periods will probably only be considered where the government will achieve significant compliance benefits from the settlement. Also, a grace period does not preclude EPA from bringing enforcement action to enforce the consent agreement or to seek injunctive relief to abate a condition which may present an imminent and substantial endangerment, or an imminent hazard under TSCA.¹⁷⁰

EPA should be willing to adjust its enforcement response where a company provides more compliance information on its facilities than the Agency would have obtained through its compliance monitoring programs, and where subsequent violations are quickly corrected. This could apply, in particular, where audit-discovered violations involve little or no economic benefit or savings to the violator under agency penalty policy, such as various TSCA reporting and recordkeeping violations. However, where a new violation does involve economic savings, EPA will probably, at a minimum, assess a penalty which reflects such savings, although it may provide some adjustment for the gravity aspect of the violation. To do otherwise would not be fair to the numerous companies within the same industrial category who have paid for the costs of pollution control and would place complying facilities at a competitive disadvantage.

V. CONCLUSION

Environmental auditing will play a growing role in the Nation's efforts to achieve continuous compliance with the environmental laws. EPA has encouraged the use of environmental auditing by regulated entities through its auditing policy and through use of audit provisions in appropriate settlement agreements. Audit programs serve regulated enti-

168. *In re Chemical Waste Management, Inc.*, Nos. RCRA-09-84-0037, TSCA-09-84-0009, at 7 (EPA Reg. IX Nov. 7, 1985) (Consent Agreement and Final Order).

169. *Id.* See also *In re Diamond Shamrock Chem. Corp.*, No. TSCA-85-H-03, Audit Agreement, at 8 (EPA Headquarters June 28, 1985) (Consent Agreement and Final Order).

170. *In re Diamond Shamrock Chem. Co.*, No. TSCA-85-H-03, Audit Agreement, at 8 (EPA Headquarters June 28, 1985) (Consent Agreement and Final Order).

ties' interest in long-term cost savings and improved cooperation with regulatory agencies, while they complement the compliance efforts of regulatory agencies.

In implementing and refining Agency policy on auditing, EPA needs to be aware of the legitimate interest of regulated entities in disclosure of certain audit generated information and in taking enforcement responses which recognize defendants' genuine compliance efforts. EPA should also continue to obtain environmental audit provisions in consent decrees, particularly where a pattern of multi-facility compliance and environmental management problems exists. Moreover, by maintaining a strong enforcement program and penalty deterrent, EPA will encourage new voluntary environmental audit programs.

Comments of Exxon Company, U.S.A.
on CSIB 409
January 31, 1990

Exxon Company, U.S.A. was presented with a copy of CSHB 409 late yesterday afternoon and asked to provide comments by today. The following comments have been prepared within the very limited time available; however substantial further review and public comment is needed. We urge the Committee to not act hastily regarding this legislation, since it will seriously impact all Alaskans.

In general, we believe that existing law provides the Department of Environmental Conservation with ample authority to enforce the State's environmental laws in both emergency and non-emergency situations. Any problems that may be perceived to have existed in the past have been a function of the application of the existing statutes, not the statutes themselves. Therefore, the proposals incorporated in CSHB 409 are not needed.

Addressing more specifically the sections of the bill, the unrestricted search and seizure authority proposed in Section 1 is unnecessary. In addition it is far too broad and violates the constitutional rights of Alaskan citizens and businesses. Existing law gives the Department the authority to obtain search warrants to investigate suspected environmental violations. This bill would dispense with the warrant process altogether, and allow agency staff to enter and search any private home, business, vehicle, or facility and seize information without a search warrant, or even a showing of probable cause. There is simply no factual or legal basis for such unprecedented administrative invasions of privacy. The existing system is adequate to meet the agency's needs, while it protects the constitutional rights of Alaska's citizens.

Concerning Section 3, the existing statutes already provide comprehensive civil penalties and damages, with the superior court assessing the appropriate punishment. Given the strength of existing statutes, we see no need for the administrative proceeding contemplated in Section 3.

An additional comment about Section 3 is appropriate. First, the proposed sub-section (b) would relieve the DEC from the responsibility of complying with the Administrative Procedures Act in administrative penalty proceedings. This is not justified. The APA was passed to guarantee all Alaska citizens and businesses

due process of law in administrative proceedings. The existing statutes expressly apply the APA to DEC hearings. No justification exists to change that sound legislative policy.

It is very difficult to comment upon the "environmental audit" provision proposed in Section 4. No explanation has been given as to what such a procedure would entail, or under what circumstances it would be required. Substantial further work is needed on this item before it is ready for legislative consideration.

Finally, we are concerned with the proposed changes to the compliance order procedures. Exxon strongly believes that this bill would effectively deny fundamental due process rights to Alaskan citizens and businesses.

We recognize the need for quick, effective agency action in environmental emergencies. However, the arbitrary compliance order proceeding proposed in Section 5 is not needed to provide that authority; to the contrary, the existing statutes provide more than ample remedies. DEC already has wide ranging power to issue immediate orders in emergency situations. Similarly, the statutes authorize immediate court injunctions. Thus, this bill does not change or enhance the remedies available in environmental emergencies.

What the bill would do is drastically alter the procedures and protections afforded in non-emergency situations. The existing compliance order statute creates a three-step process for non-emergency situations. First, the DEC notifies the citizen or business that it may have violated an environmental law. Next, the citizen is given an opportunity to remedy the alleged defect. If the DEC staff believes that the citizen's response has not sufficiently remedied the problem, a compliance order hearing is held at which both the citizen and DEC staff are allowed to participate. At that hearing the commissioner determines if any environmental violations still exist, and if so, what type of compliance order would be reasonable and appropriate under the circumstances.

By contrast, the arbitrary compliance order procedure proposed in the bill would deprive citizens and businesses of the most basic due process protections. Compliance orders could be issued effective immediately without any prior notice or opportunity for the citizen to be heard. The citizen would be faced with a virtually impossible situation. He must either comply immediately with whatever order the DEC staff had unilaterally issued, or face civil and criminal prosecution for failure to comply with a compliance order. This is not only grossly unfair and inequitable - it is totally unjustified in non-emergency situations. We feel that the bill denies citizens the due process of law guarantees afforded under both the Alaska and federal constitutions.

In closing, we would like to emphasize that it would be a grave error to characterize CSHB 409 as a bill designed to provide the DEC with new powers in emergency situations. To the contrary, the primary focus of the bill is to drastically change the DEC procedures in effect in non-emergency situations as they apply to all Alaskan citizens and businesses - not just oil companies. To date this bill has received little public attention, yet it will affect all businesses and industries, including timber, mining, fishing, tourism, retail enterprises and ordinary citizens. We firmly believe that the existing statutes afford a fairer way to address these situations, and therefore recommend that this bill not be enacted into law.

Thank you.

An Appeal for Significant Improvement in the Enforcement of
Alaska's Environmental Laws

Recommended Legislative Remedies

submitted by: Sue Libenson, Executive Director
Alaska Center for the Environment

Mike Wenig, Staff Attorney
Trustees for Alaska

Introduction

In the wake of the Exxon Valdez oil spill, Alaska's greatest environmental tragedy, it is anticipated that the legislature will consider numerous approaches to improving public policy with the intent of preventing future spills. Many of these changes will focus on improvements within the Alaska Department of Environmental Conservation (DEC) which has the bulk of the State's responsibility with regards to oil spill prevention and response.

For any of the legislature's potential actions to succeed, however, they must be backed by one underlying factor - improved enforcement. While there are undoubtedly needs for change in spill prevention and response, the Commission must recognize that the current failure of existing regulatory safeguards is largely due to the inability of agencies, including DEC, to properly enforce the law and thereby create an atmosphere which encourages compliance by potential polluters.

The following outlines a package of legislative recommendations for improving the enforcement of Alaska's environmental laws and regulations. The implementation of these measures will ultimately be improved compliance, the ultimate tool in preventing future pollution catastrophes.

Recommendations

- I. Authorize DEC to assess administrative penalties.
- II. Strengthen criminal penalties for violations of pollution laws.
- III. Authorize DEC to make reasonable inspections without first obtaining a warrant.
- IV. Eliminate administrative and judicial "pre-enforcement review" of compliance orders.
- V. Provide for citizen suits to enforce environmental statutes and regulations.
- VI. Provide adequate funding for DEC to fulfill its regulatory

procedure.

Administrative penalties would greatly strengthen DEC's enforcement presence and capability by providing the agency with a relatively quick and efficient means of imposing penalties. The authority to assess administrative penalties is particularly important for the relatively numerous yet small violators, for whom DEC's commencement of lengthy judicial enforcement proceedings is simply not worthwhile. By greatly reducing the resources necessary to levy penalties, an administrative penalty program would provide an enforcement threat that is otherwise not present at all for these small violators.

Administrative penalties are an integral component of the federal environmental enforcement program.² Numerous state agencies also have the authority to assess penalties for violations of state environmental laws.³ Administrative penalties should become an essential component of DEC's enforcement arsenal as well.

Of course, merely having the legal authority to assess penalties is not enough. DEC must also be given the corresponding budgetary resources to hire sufficient technical

² See, e.g., section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g); section 3008(a) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(a); section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 1361(a); section 16(a) of the Toxic Substances Control Act, 15 U.S.C. § 2615(a); and section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9609.

³ For example, see Washington, RCW 90.48.144.

CORRECTION

**THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY**

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Alaska's Environmental Laws

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- V. Provide for citizen suits to enforce environmental statutes and regulations.
- VI. Provide adequate funding for DEC to fulfill its regulatory

mandate.

Discussion of Recommendations

I. DEC SHOULD HAVE THE STATUTORY AUTHORITY TO ASSESS ADMINISTRATIVE PENALTIES

Among the tools that are necessary for DEC to have a credible, forceful, and efficient enforcement program is the authority to assess administrative penalties for violations of the State's environmental laws.

Penalties, generally, are an important enforcement tool because they greatly reduce the economic incentives to violate the State's environmental laws. However, DEC currently has the authority only to issue a compliance order requiring corrective action or to commence a judicial enforcement action for civil or criminal penalties.¹ Like most litigation, however, judicial enforcement actions require the State to commit substantial resources and time and, thus, are used only for the most extreme violators. By themselves, judicial enforcement actions cannot provide a sufficient enforcement threat.

A civil penalty program is thus a necessary tool for a credible enforcement arsenal. Administrative penalties could be assessed through a fair yet far less resource intensive administrative hearing procedure than court proceedings. Decisions by administrative hearing officers would be judicially reviewable on the record, rather than through a cumbersome trial

¹ Two of these three tools, themselves, need to be strengthened, as explained below in sections IV and VI.

procedure.

Administrative penalties would greatly strengthen DEC's enforcement presence and capability by providing the agency with a relatively quick and efficient means of imposing penalties. The authority to assess administrative penalties is particularly important for the relatively numerous yet small violators, for whom DEC's commencement of lengthy judicial enforcement proceedings is simply not worthwhile. By greatly reducing the resources necessary to levy penalties, an administrative penalty program would provide an enforcement threat that is otherwise not present at all for these small violators.

Administrative penalties are an integral component of the federal environmental enforcement program.² Numerous state agencies also have the authority to assess penalties for violations of state environmental laws.³ Administrative penalties should become an essential component of DEC's enforcement arsenal as well.

Of course, merely having the legal authority to assess penalties is not enough. DEC must also be given the corresponding budgetary resources to hire sufficient technical

² See, e.g., section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g); section 3008(a) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(a); section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 1361(a); section 16(a) of the Toxic Substances Control Act, 15 U.S.C. § 2615(a); and section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9609.

³ For example, see Washington, RCW 90.48.144.

staff and permanent hearing officers to make the administrative penalty process work.

II. CRIMINAL PENALTIES FOR VIOLATIONS OF STATE ENVIRONMENTAL LAWS SHOULD BE STRENGTHENED

Stiff criminal sanctions are another essential component of the kind of enforcement program that is necessary to achieve full compliance with the State's environmental laws. The current liability for criminal violations of Alaska's environmental laws is inadequate.

With a few exceptions, negligent and knowing violations of the State's environmental laws are currently only class B and A misdemeanors, respectively. AS 46.03.790(a), (b). Class B misdemeanors are punishable by a fine of not more than \$1000 and by imprisonment for no longer than 90 days; Class A misdemeanors are punishable by a fine of not more than \$5000 and by a maximum of imprisonment for one year. AS 12.55.035(b)(3), (4); 12.55.135(a), (b).

These liabilities stand in stark contrast with criminal liabilities for violations of federal environmental laws. For example, under section 309(c) of the federal Clean Water Act, negligent violations are punishable by either or both maximum fines of \$25,000 per violation and/or one year imprisonment; knowing violations are punishable by either maximum fines of \$50,000 per violation or by three years imprisonment. 33 U.S.C.

§ 1319(c).⁴

Alaska's criminal liabilities should be strengthened by making negligent violations Class A misdemeanors and knowing violations Class C felonies, which are punishable by a maximum fine of \$50,000 per violation and five years' imprisonment. AS 12.55.035((b)(2); 12.55.125(e). In addition, the definition in AS 46.03.900(17) of "persons" who are subject to criminal sanctions should be amended to include "any responsible corporate officer." See Clean Water Act section 309(c)(6), 33 U.S.C. § 1319(c)(6).

The last legislature increased civil penalties for oil polluters (see SB 271) and considered tougher criminal sanctions in the oil pollution context. The legislature should now complete its mission and stiffen criminal sanctions for violations of all State environmental laws.

As to criminal liability for oil spills, in particular, two bills sponsored by the Governor and introduced in the last legislative session should become law. Among other things, HB 315 classifies as Class C felonies, oil spills of 10,000 barrels or more involving a failure to comply with an oil discharge contingency plan or a failure to adequately clean up a discharge of oil. HB 316 expands the penalties that can be levied against a defendant that is an organization by including fines equal to twice the damage or loss caused by the defendant.

⁴ See also, e.g., section 3008(d) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d); section 113(c) of the Clean Air Act, 42 U.S.C. § 7413(c).

III. DEC SHOULD HAVE THE AUTHORITY TO MAKE REASONABLE INSPECTIONS WITHOUT FIRST OBTAINING A WARRANT

The ability to make inspections to determine whether violations of the State's environmental laws are occurring is still another necessary element of a credible enforcement program. Currently, AS 46.03.860 appears to require DEC to obtain a search warrant before it can investigate possible violations. Federal environmental laws, in contrast, contain no such warrant requirement. For example, section 308(a)(B) of the Clean Water Act expressly provides the EPA with a "right of entry" and with authority "at reasonable times" to make inspections and copy relevant records. 33 U.S.C. § 1318(a)(B).^o

Consistent with federal environmental law, AS 46.03.860 should be amended to remove the warrant requirement and thereby improve the DEC's ability to investigate potential violations of the State's environmental laws.

IV. THERE SHOULD BE NO "PRE-ENFORCEMENT REVIEW" OF DEC'S COMPLIANCE ORDERS IN EITHER AN ADMINISTRATIVE ADJUDICATORY HEARING OR JUDICIAL PROCEEDING

A sixth tool that is necessary for a sound, effective State environmental enforcement program is the ability of the enforcing agency to issue compliance orders without cumbersome procedural constraints. DEC does not presently have this ability.

Current State law (AS 46.03.850) provides DEC with the authority to issue compliance orders for known or suspected

^o See also, e.g., section 3007 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6927; and section 114(a) of the Clean Air Act, 42 U.S.C. § 7414(a).

violations of the State's environmental laws, but the required procedures for issuing such orders are so cumbersome as to render the compliance order an infrequently used and thus ineffective enforcement tool.

State law appears to require that, before DEC can issue an order requiring a polluter to comply with an applicable State environmental law, the agency must first notify the polluter of its finding that the polluter is or may be in violation and give the polluter an opportunity to respond to the finding. AS 46.03.850(a), (b).⁶

In addition, although compliance orders become effective upon receipt (AS 46.03.850(c)), it appears that recipients can subsequently contest the order in an adjudicatory hearing that is required to include the extensive procedural steps set out in the Administrative Procedure Act. See AS 44.62. Recipients of a compliance order can also challenge an adverse ruling by a hearing officer in court. AS 44.62.560.

By requiring DEC to defend an order at administrative and, subsequently, judicial hearings, Alaska law imposes substantial resource constraints on the use of the compliance order as an enforcement tool by DEC (and its legal representatives in the Department of Law). These constraints effectively discourage DEC

⁶ AS 46.03.865 allows DEC to sidestep this pre-notification procedure, but only in the extremely narrow circumstances, where DEC has found that there is an "actual or imminent" discharge of either oil, a hazardous substance, or a low level radioactive material.

from invoking this tool, except in extremely rare circumstances.⁷ As a result, the tool has not been used to fulfill its obvious role, as an efficient, relatively quick means for DEC to command compliance with the State's environmental laws and to compel the cleanup of unlawful discharges of harmful pollutants.

As with several of the other enforcement tools discussed above, State law regarding the procedures for issuing compliance orders does not compare with EPA's legal authority to issue orders to compel compliance with federal laws. Federal environmental law generally adheres to the sound policy of not allowing "pre-enforcement review" of EPA's compliance orders. This means that compliance orders which do not also require the recipient to pay an administrative penalty generally can not be challenged in any administrative or judicial proceeding, until and unless EPA commences a judicial proceeding to enforce the order and seeks penalties for violations of the order. At that time, the validity of the order can be questioned by the

⁷ In fact, the right of a recipient to challenge an order in an administrative adjudicatory hearing, by itself, appears sufficient to effectively discourage DEC from issuing compliance orders. DEC's budget does not include sufficient funds for a permanent in-house staff of hearing officers. Thus, when an adjudicatory hearing is requested, DEC must hire hearing officers on a contract basis. The substantial expense of such outside contracting, alone, strongly discourages DEC from issuing compliance orders.

recipient as a defense to EPA's enforcement suit.⁸

As the Second Circuit Court of Appeals recognized, in upholding the principle of no pre-enforcement review of compliance orders issued under the federal Clean Air Act:

To introduce the delay of court review of administrative action taken to ameliorate a potential public health hazard would conflict with Congress' aim to 'accelerate . . . the prevention and control of pollution.' . . . In short, immediate pre-enforcement review of compliance orders . . . would 'serve neither efficiency nor enforcement' of the Clean Air Act.

Asbestec Const. Services, Inc. v. EPA, 849 F.2d 765, 769 (2d Cir. 1988).

Not until DEC's ability to issue compliance orders is as procedurally unencumbered as that of the EPA, will the compliance order become an effective tool in the State's environmental enforcement arsenal.

V. PRIVATE CITIZENS SHOULD HAVE THE AUTHORITY TO ENFORCE THE STATE'S ENVIRONMENTAL LAWS

The final, necessary, and, perhaps, most critical component of a viable, credible State enforcement program is the ability of citizens to act as "private attorneys general" by bringing suits to enforce the State's environmental laws. This ability is nonexistent under current law.

AS 46.03.760 and 46.03.765 provide State courts with authority to compel the payment of civil penalties and to grant

⁸ For example, section 113(h) of CERCLA, 42 U.S.C. § 9613(h) expressly prohibits federal courts from reviewing challenges to compliance orders, except under limited circumstances, including a suit brought by EPA to seek penalties for a violation of the order.

injunctive relief for violations of the State's environmental laws. But AS 46.03.870 provides that the bases for the enforcement actions listed above "inure solely to and are for the benefit of the state. . . ." Similarly, AS 46.03.890 provides that only State officials are authorized to enforce the State's environmental laws.

The ability of private citizens to enforce environmental laws is a critical supplement to government enforcement because resource constraints inevitably prevent governments from taking all the enforcement measures that would otherwise be warranted. Given the DEC's severely limited enforcement resources (even if a separate enforcement unit like the one recommended above were available), citizen suits are necessary to present to the regulated community a forceful and credible message that violations of the State's environmental laws will not be tolerated.

Congress has wisely recognized the value of citizen suits as supplements to governmental enforcement and thus provided citizens with ample authority to enforce the federal environmental laws.⁹ The record of citizens suits to enforce these laws is a strong one. Citizens enforcement actions have proven not to be unreasonable avenues for harassment of industry

⁹ See, e.g., section 505 of the Clean Water Act, 33 U.S.C. § 1365; section 7002 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972, section 304 of the Clean Air Act, 42 U.S.C. § 7604; and section 310 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9659.

or the EPA, but to be valuable means for stopping major violators whom the EPA had not been able to reach.

Full enforcement and, in turn, compliance with the State's environmental laws will simply not be achieved without the ability of citizens as well as the government to enforce those laws.

VI. THE LEGISLATURE SHOULD PROVIDE ADEQUATE FUNDING FOR DEC TO FULFILL ITS LEGAL MANDATE OF PROTECTING THE ENVIRONMENT

A State such as Alaska which relies on a healthy environment for many of its economic mainstays such as tourism and fisheries and yet persistently scrimps on environmental protection will continue to run the risk of environmental and associated economic degradation. Current funding levels for DEC not only preclude effective enforcement, they also result in delayed and inadequately researched permits as well as narrow interpretation of regulations intended to protect the environment. Future funding should provide for sufficient personnel, including attorneys, to provide DEC the ability to more effectively enforce Alaska's environmental laws. A commitment to increased funding would more realistically reflect the immense mandate of environmental protection assumed by DEC and the importance of DEC's success in assuring that there will be a viable environment for Alaska's long term needs. We will be working shortly towards providing the legislature with some recommendations for DEC budget needs.

Report of the Alaska Oil Spill Commission
Executive Summary

SPILL

The Wreck of the Exxon Valdez
Implications for Safe Marine Transportation

January 1990

"What tends to happen is DEC will get dragged into a septic tank argument and it will drain away as many resources as fighting, for instance, the Alyeska ballast water treatment plant. There's a real problem with priorities within DEC."

*Sue Libenson, Executive Director
Alaska Center for the Environment
Alaska Oil Spill Commission
hearing, 9/21/89*

Recommendation 13
Enhanced regulatory strength

- Identify unmet needs and recommend priorities, strategies and obstacles to achieving them;
- Encourage coordination of spill prevention and response programs currently spread among several agencies that cumulatively deserve high priority;
- Make budget and resource allocation recommendations;
- Evaluate programs and recommend elimination of marginal activities;
- Recommend changes based on new technologies and scientific impacts;
- Designate advisory panels, if deemed necessary, including appropriate representation, ex-officio, of appropriate departments of the state and municipalities, regional oil spill authorities, representatives of fishing and environmental groups, and shippers, owners and residential groups on the pipeline route; and
- Issue an annual report and safety assessment. Reports to the governor should include regular statistical and special reports on accidents and near-misses, the status of major risks, the performance of state and federal agencies, and long-term options for improving safety.

The state should expand and exercise its regulatory authority over environmental safety. Measures voluntarily adopted by industry should be backed up by state regulation. Federal technical standards and safety requirements should not preclude more stringent state standards.

The State of Alaska currently does not exercise its full power under the U.S. Constitution to regulate environmental safety. Recent congressional enactments and judicial decisions make it clear that Congress does not intend that states should hesitate to protect local environments with greater stringency than the minimums established under federal law. The state should have the power, for example, to prohibit vessels from entering or departing Alaska ports and waters under unsafe circumstances.

Regulatory effectiveness also should be improved through assessment of administrative and civil penalties to encourage prevention, no preen-

forcement review of compliance orders, environmental audits, stronger criminal penalties, and statutory provision for citizen lawsuits. Private voluntary prevention measures, though commendable, are often ignored as memories fade unless backed up by state regulations.

The state should renew and strengthen its authority to conduct inspections and spill response drills on vessels calling at Alaska ports and marine terminals.

The Valdez tanker fleet, built in the 1970s is approaching obsolescence. Structural weaknesses, technical malfunctions and other equipment problems can be expected to increase in frequency and seriousness.

Inspections and reports, done in cooperation with the Coast Guard or alone, should include examinations for structural integrity and environmental hazards. Inspection duties may be allocated between the harbor administration office proposed in this report and the Department of Environmental Conservation. State authority should include the power to levy substantial summary civil fines for interfering with inspections or failing to cooperate with response drills.

The lack of any quality control or assurance program on tanker operations from Prince William Sound or Cook Inlet allows serious hazards to arise. Coast Guard authorities already perform inspections on tankers calling at Valdez, but state inspection would provide an added measure of safety. In the past, when the state and the Coast Guard both inspected vessels, the two agencies reenforced each other's effectiveness. When the state was stopped from making inspections on the grounds that the activity was exclusively federal, the quality of Coast Guard inspections declined. Inspection by two governments is not needless duplication but needed redundancy, providing a greater measure of safety.

The "two-tier" system of quality control was adopted during construction of the trans-Alaska pipeline. The value of the two-tier system has been reenforced by the National Aeronautics and Space Administration experience with space disasters. The official inquiry into the 1986 Challenger space shuttle explosion found that system capabilities had been stretched to the limit in the winter of 1985-86 to support the flight schedule of the shuttle program. System capabilities for shipping oil from Valdez were similarly stretched to accommodate increasing throughput of the trans-Alaska pipeline to 2.2 million barrels per day without increasing other elements of the system, such as tank storage capacity.

Recommendation 14
Strengthened state inspections

"We are obligated to provide systems which enhance marine transportation safety, and we do it economically."

Jerry Aspland, President, ARCO Marine, Inc.

Alaska Oil Spill Commission hearing, 9/1/89

~~MAAA~~
2nd

6-1741H
Bradley
2/5/90

Original sponsor(s): REP. M.DAVIS, Brown, Koponen, Navarre, Goll, Ulmer, Ellis

1 IN THE HOUSE

2 CS FOR HOUSE BILL NO. 409 ()
3 IN THE LEGISLATURE OF THE STATE OF ALASKA
4 SIXTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the reform of certain environ-
7 mental conservation laws and the administrative
8 penalties for their violation."

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

10 * Section 1. AS 46.03.020(6) is amended to read:

11 (6) at reasonable times enter and inspect with the consent
12 of the owner or occupier any property or premises and copy records to
13 investigate either actual or suspected sources of pollution or con-
14 tamination or to ascertain compliance or noncompliance with this
15 chapter, AS 46.04, or AS 46.09, or a regulation, order of the depart-
16 ment, permit, approval, or acceptance issued under this chapter,
17 AS 46.04, or AS 46.09; the department shall maintain as confidential
18 [A REGULATION WHICH MAY BE ADOPTED UNDER AS 46.03.020 - 46.03.040;]
19 information relating to secret processes or methods of manufacture
20 discovered during the investigation [IS CONFIDENTIAL];

21 * Sec. 2. AS 46.03.020 is amended by adding a new paragraph to read:

22 (14) at reasonable times enter and inspect the property or
23 premises of a pervasively regulated facility and copy records to
24 investigate either actual or suspected sources of pollution or con-
25 tamination or to ascertain compliance or noncompliance with this
26 chapter, AS 46.04, AS 46.09, or with a regulation, order of the de-
27 partment, permit, approval, or certificate issued under this chapter,
28 AS 46.04, or AS 46.09; the department shall maintain information
29 relating to secret processes or methods of manufacture discovered

1 during investigations as confidential; in this paragraph "pervasively
2 regulated facility" means a facility where activities or operations
3 are or were conducted that affect a significant public interest and
4 that are the subject of comprehensive regulation by the department.

5 * Sec. 3. AS 46.03.170(f) is amended to read:

6 (f) A variance or renewal granted under this section may not be
7 construed to prevent or limit the application of the [EMERGENCY]
8 orders of the commissioner issued under AS 46.03.820 and 46.03.850.

9 * Sec. 4. AS 46.03 is amended by adding a new section to read:

10 Sec. 46.03.761. ADMINISTRATIVE PENALTIES FOR POLLUTION. (a)
11 The department may assess an administrative penalty against a person
12 who violates or causes or permits to be violated a provision of this
13 chapter, AS 46.04, or AS 46.09, or a regulation, order of the depart-
14 ment, permit, approval, or certificate issued under this chapter,
15 AS 46.04, or AS 46.09.

16 (b) The department may adopt regulations prescribing the admin-
17 istrative procedures authorized under this section. AS 44.62 does not
18 apply to administrative proceedings conducted or judicial review
19 sought under this section.

20 (c) An administrative penalty assessed under this section may
21 not exceed \$25,000 a day for each violation. Each violation is a
22 separate and distinct offense and where the violation continues from
23 day to day, each day constitutes a separate violation. In determining
24 the amount of a penalty assessed under this section, the department
25 shall consider the effect of the violation on the public health or the
26 environment, a prior history of violations, deterrence of future
27 violations, and other factors that the department considers relevant.

28 (d) The department shall issue an assessment notice to the
29 person against whom the penalty is assessed. An administrative penal-

1 ty assessed under this section becomes final 30 days after issuance of
2 the assessment notice unless an administrative hearing is requested.
3 Failure to request an administrative hearing within 30 days after
4 issuance of the assessment notice constitutes a waiver of the right to
5 an administrative hearing and to judicial review. The person request-
6 ing the administrative hearing has the burden of proof on all issues
7 the person raises at the hearing.

8 (e) After the conclusion of the administrative hearing, the
9 department may modify, rescind, or affirm the administrative penalty.
10 A person against whom an administrative penalty is assessed may obtain
11 judicial review of the administrative penalty by filing a notice of
12 appeal in the superior court within 30 days after the department's
13 issuance of the administrative hearing decision. The court may set
14 aside the administrative penalty only if the administrative record,
15 taken as a whole, does not contain a reasonable basis to support the
16 finding of violation or the amount of penalty assessed by the depart-
17 ment. This subsection provides the sole means for appealing an admin-
18 istrative penalty assessment. The validity, amount, and appropriate-
19 ness of the administrative penalty are not subject to collateral
20 judicial or administrative review.

21 (f) Action by the department under this section does not limit
22 or otherwise affect the authority of the department to enforce this
23 chapter, AS 46.04, or AS 46.09, or to recover damages, restoration
24 expenses, investigation costs, court costs, and attorney fees. A
25 person who pays an administrative penalty assessed under this section
26 may set off the penalty amount paid against a civil penalty subse-
27 quently awarded by a court under AS 46.03.760.

28 (g) The assessment of an administrative penalty under this
29 section does not affect the obligation of a person to comply with this

1 chapter, AS 46.04, AS 46.09, or with a regulation, order of the de-
2 partment, permit, approval, or certificate issued under this chapter,
3 AS 46.04, or AS 46.09.

4 (h) If a person fails or refuses to pay an administrative penal-
5 ty assessed under this section after the penalty has become final or
6 after a court after an administrative appeal brought under this sec-
7 tion has entered a final order in favor of the state, the attorney
8 general may bring an action to collect the penalty and the defendant
9 is liable for

10 (1) the amount of the administrative penalty assessed;

11 (2) interest from the date the department issued the
12 assessment notice under (d) of this section;

13 (3) full reasonable attorney fees and costs incurred by the
14 state in the collection action; and

15 (4) a nonpayment penalty for each quarter year in which the
16 assessment remains unpaid of 20 percent of the assessed administrative
17 penalty.

18 * Sec. 5. AS 46.03.850 is repealed and reenacted to read:

19 Sec. 46.03.850. COMPLIANCE ORDER. (a) When, in the opinion of
20 the department, a person is violating or is about to violate a pro-
21 vision of this chapter, AS 46.04, AS 46.09, or AS 03.05, or of a
22 regulation, order of the department, permit, approval, or certificate
23 issued under this chapter, AS 46.04, AS 46.09, or AS 03.05, or is
24 otherwise endangering or creating the potential of pollution of the
25 surface or subsurface air, land, or water within the jurisdiction of
26 the state, the department may issue a compliance order.

27 (b) The compliance order shall be personally served on or sent
28 by certified mail to the person affected. Service is complete on a
29 corporation upon receipt by an officer of the corporation or by its

1 registered agent and on a partnership on receipt by a partner. The
2 compliance order is effective on receipt. A request for an adminis-
3 trative hearing under (c) of this section does not stay the provisions
4 or deadlines set out in the compliance order.

5 (c) The person affected may request an administrative hearing
6 with 30 days after receipt of the compliance order. Failure to re-
7 quest a hearing within 30 days after receipt of the compliance order
8 constitutes a waiver by the person of the right to an administrative
9 hearing and to judicial review. Within 30 days after receipt of a
10 request for an administrative hearing, the department shall decide
11 whether to hold the hearing. If the department grants the hearing
12 request, the department may limit the scope of the hearing to disputed
13 issues of material fact.

14 (d) After the conclusion of the administrative hearing, the
15 department may modify, rescind, or affirm the compliance order. The
16 affected person may obtain judicial review of the compliance order by
17 filing a notice of appeal in the superior court within 30 days after
18 the department's issuance of the administrative hearing decision. The
19 court may set aside the compliance order only if the administrative
20 record, taken as a whole, does not contain a reasonable basis to
21 support the provisions of the compliance order or the department's
22 decision to issue the compliance order. This subsection provides the
23 sole means for obtaining judicial review of a compliance order. The
24 compliance order is not subject to collateral judicial or administra-
25 tive review.

26 (e) AS 44.62 does not apply to administrative proceedings con-
27 ducted under this section. The person requesting the hearing has the
28 burden of proof on all issues the person raises at the hearing.

29 (f) A compliance order issued under this section is an order of

1 the department for purposes of this chapter, AS 46.04, AS 46.09, and
2 AS 03.05.

3 (g) The attorney general may seek enforcement of a compliance
4 order by bringing an action in superior court. In an action to en-
5 force a compliance order, the attorney general may recover full rea-
6 sonable attorney fees and costs incurred by the state in maintaining
7 the action.

8 * Sec. 6. AS 46.03 is amended by adding a new section to read:

9 Sec. 46.03.861. ENVIRONMENTAL AUDITS. (a) As part of a judi-
10 cial or administrative enforcement action, the commissioner may re-
11 quire a person to conduct an environmental audit and to prepare and
12 submit to the commissioner an environmental audit report.

13 (b) Each environmental audit shall be performed by a qualified
14 independent contractor selected by the person required to conduct the
15 audit. The selection of the independent contractor is subject to the
16 approval of the commissioner.

17 (c) In this section

18 (1) "environmental audit" means a systematic, documented,
19 periodic, and objective review, of a person's operations, practices,
20 and performance related to meeting each applicable environmental
21 standard and requirement, including permit conditions;

22 (2) "environmental audit report" means a written report
23 that candidly and thoroughly presents findings from a review, con-
24 ducted as part of an environmental audit, of a person's environmental
25 operations, practices, and performance.
26
27
28
29

15+

6-1741H
Bradley
1/29/90

Original sponsor(s): REP. M.DAVIS, Brown, Koponen, Navarre, Goll, Ulmer, Ellis

1 IN THE HOUSE

2 CS FOR HOUSE BILL NO. 409 ()
3 IN THE LEGISLATURE OF THE STATE OF ALASKA
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6 For an Act entitled: "An Act relating to the reform of certain environ-
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8 penalties for their violation."

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10 * Section 1. AS 46.03.020(6) is amended to read:

11 (6) at reasonable times enter and inspect [WITH THE CONSENT
12 OF THE OWNER OR OCCUPIER ANY] property or premises and copy records to
13 investigate either actual or suspected sources of pollution or con-
14 tamination or to ascertain compliance or noncompliance with this
15 chapter, AS 46.04, or AS 46.09, or a regulation, order of the depart-
16 ment, permit, approval, or acceptance issued under this chapter,
17 AS 46.04, or AS 46.09 [A REGULATION WHICH MAY BE ADOPTED UNDER AS 46.-
18 03.020 - 46.03.040]; information relating to secret processes or
19 methods of manufacture discovered during investigation is confiden-
20 tial;

21 * Sec. 2. AS 46.03.170(f) is amended to read:

22 (f) A variance or renewal granted under this section may not be
23 construed to prevent or limit the application of the [EMERGENCY]
24 orders of the commissioner issued under AS 46.03.850 [AS 46.03.820].

25 * Sec. 3. AS 46.03 is amended by adding a new section to read:

26 Sec. 46.03.761. ADMINISTRATIVE PENALTIES FOR POLLUTION. (a)
27 The commissioner may, after reasonable notice and opportunity for a
28 hearing, assess an administrative penalty against a person who vio-
29 lates or causes or permits to be violated a provision of this chapter,

1 AS 46.04, or AS 46.09, or a regulation, order of the department,
2 permit, approval, or acceptance issued under this chapter, AS 46.04,
3 or AS 46.09.

4 (b) The commissioner shall adopt regulations prescribing the
5 administrative procedures authorized under this section. AS 44.62
6 does not apply to administrative proceedings conducted or judicial
7 review sought under this section.

8 (c) An administrative penalty assessed under this section may
9 not exceed \$25,000 a day for each violation. Each violation is a
10 separate and distinct offense and where the violation continues from
11 day to day, each day constitutes a separate violation. In determining
12 the amount of a penalty assessed under this section, the commissioner
13 shall consider the effect of the violation on the public health or the
14 environment, a prior history of violations, deterrence, and other
15 factors that the commissioner considers relevant.

16 (d) An administrative penalty assessed under this section be-
17 comes effective 30 days after its issuance unless review is sought or
18 a hearing is requested under regulations of the commissioner.

19 (e) Action by the commissioner under this section does not
20 affect or limit the authority of the commissioner to enforce a pro-
21 vision of this chapter, AS 46.04, or AS 46.09. A person against whom
22 an administrative penalty is assessed under this section may not be
23 assessed civil penalties under AS 46.03.760 for the violation that is
24 the subject of the administrative penalty.

25 (f) An administrative penalty assessed under this section does
26 not affect the obligation of a person to comply with this chapter,
27 AS 46.04, or AS 46.09, or a regulation, order of the department,
28 permit, approval, or acceptance issued under this chapter, AS 46.04,
29 or AS 46.09.

1 (g) A person against whom an administrative penalty is assessed
2 under this section may obtain judicial review of the administrative
3 penalty by the superior court within 30 days after the issuance of the
4 administrative penalty. The court may set aside the administrative
5 penalty assessed under this section only if there is not substantial
6 evidence in the record, taken as a whole, to support the finding of
7 violation or the amount of penalty assessed by the commissioner.

8 (h) If a person fails or refuses to pay an administrative penal-
9 ty assessed under this section after the penalty has become final or
10 after a court in an appeal brought under this section has entered a
11 final order in favor of the state, the commissioner shall request the
12 attorney general to collect the amount assessed. The defendant is
13 liable for

14 (1) the amount of the administrative penalty assessed;

15 (2) interest from the date of the assessment of the admin-
16 istrative penalty;

17 (3) full reasonable attorney fees and costs incurred by the
18 state in the collection action; and

19 (4) a nonpayment penalty for each quarter year in which the
20 assessment remains unpaid of

21 (A) 20 percent of the administrative penalty assessed;

22 and

23 (B) nonpayment penalties that are unpaid at the be-
24 ginning of the quarter.

25 (i) In an action brought under (g) this section, the adminis-
26 trative penalty is final and the validity, amount, and appropriateness
27 of the administrative penalty assessed is not subject to collateral
28 review.

29 * Sec. 4. AS 46.03 is amended by adding a new section to read:

1 Sec. 46.03.861. ENVIRONMENTAL AUDITS. (a) As part of a judi-
2 cial or administrative enforcement action, the commissioner may re-
3 quire a person to conduct an environmental audit and to prepare and
4 submit to the commissioner an environmental audit report.

5 (b) Each environmental audit shall be performed by a qualified
6 independent contractor selected by the person required to conduct the
7 audit. The selection of the independent contractor is subject to the
8 approval of the commissioner.

9 (c) The commissioner shall adopt regulations to implement this
10 section.

11 * Sec. 5. AS 46.03.850 is repealed and reenacted to read:

12 Sec. 46.03.850. COMPLIANCE ORDER. (a) When, in the opinion of
13 the commissioner, a person is violating or is about to violate a pro-
14 vision of this chapter, AS 46.04, or AS 46.09, a regulation or lawful
15 order of the department issued under this chapter, AS 46.04, or
16 AS 46.09, or a term or condition of a permit or certificate issued by
17 the commissioner under this chapter, AS 46.04, or AS 46.09, or a
18 person is causing, engaging in, or maintaining a condition or activity
19 that, in the opinion of the commissioner, presents an imminent or
20 present danger to the health or welfare of the people of the state or
21 would be likely to result in irreversible or irreparable damage to the
22 natural resources or environment, the commissioner may issue a compli-
23 ance order in conformity with the authority of the commissioner and
24 the public policy declared in AS 46.03.010. A copy of the compliance
25 order shall be served personally or sent by certified mail to the
26 person affected. A compliance order is effective upon receipt.

27 (b) The Administrative Procedure Act (AS 44.62) does not apply
28 to the issuance of a compliance order under (a) of this section. A
29 person described in (a) of this section may not seek review of or

1 appeal the compliance order to the superior court until the department

2 (1) seeks to recover response costs, damages, or contribu-
3 tions; or

4 (2) brings an action to enforce the order.

5 (c) The attorney general shall enforce a compliance order.

6 * Sec. 6. AS 46.03.865(b) is amended to read:

7 (b) A person to whom an order is directed shall comply with it
8 immediately, but, except as provided under AS 46.03.850, on applica-
9 tion to the department shall be given a hearing under the Administra-
10 tive Procedure Act (AS 44.62). The [THEREAFTER THE] department may
11 affirm, revoke, or modify the order.

12 * Sec. 7. AS 46.03.820 is repealed.

H B

4 1 1

HOUSE COMMITTEE REPORT

(7)

Date Referred: January 10, 1990

FURTHER REFERRALS:

Date of Committee Action: 2/20/90

The JUDICIARY Committee considered:

HB 411

HOUSE BILL NO. 411

1990 REVISOR'S BILL

"An Act making corrective amendments to the Alaska Statutes as recommended by the revisor of statutes; and providing for an effective date."

RECOMMENDATIONS:

- be replaced with CS (Jud) the same title
- have attached amendment(s) a new title
- do pass
- do not pass
- no recommendation
- individual recommendations
- additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(s):
(Dept)

APPROVES PREVIOUS: _____ (Date/Dept)

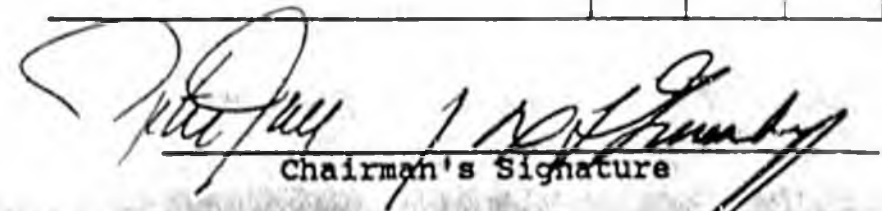
- fiscal impact _____
- zero fiscal note _____
- zero with analysis _____

- fiscal note(s) _____
- zero fiscal note(s) 1/15/90 hAA
- zero fn/analysis _____

SIGNING DO PASS:

SIGNING:
(Check approp. column)

	Do Not Pass	No Rec	Amend



 Chairman's Signature

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION HB 411
PUBLISH DATE _____

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: "An Act making corrective
amendments to the Alaska Statutes..."
Sponsor: Rules Comm. by Leg Council
Requestor: House Judiciary

Affected Agency: Legislative Affairs Agency
BRU: Legislative Council
Components Legal Services

EXPENDITURES/REVENUES: (THOUSANDS OF DOLLARS)

OPERATING	FY91	FY92	FY93	FY94	FY95	FY96
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
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REVENUE	0	0	0	0	0	0
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FUNDING: (THOUSANDS OF DOLLARS)

General Fund	0	0	0	0	0	0
Federal Fund	0	0	0	0	0	0
Other	0	0	0	0	0	0
TOTAL	0	0	0	0	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)

NO FISCAL IMPACT

Prepared By: Pamela Stoops, Director
Division: Administrative Services

Pamela Stoops

Phone: 465-3850
Date: 1/15/90

Approved By: Warren Endicott, Executive Director
Agency: Legislative Affairs Agency

Warren Endicott

Date: 1/15/90

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STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

MEMORANDUM

February 16, 1990

SUBJECT: CSHB 411(Judiciary), 1990 Revisor's Bill

TO: Representative Peter Goll
Representative Max Gruenberg
Co-Chairs, House Judiciary Committee

FROM: David R. Dierdorff
Revisor of Statutes

This memorandum discusses the enclosed committee substitute for the 1990 Revisor's Bill (HB 411), prepared after the subcommittee meeting on February 9. The following sections in CSHB 411(Jud) were not in the bill as introduced: 1, 18, and 20 - 25. In addition, several provisions have been added to the repealer (sec. 35). The Department of Law has reviewed all provisions in CSHB 411(Jud).

To assist in understanding the draft, I have summarized the contents by grouping sections that have similar effects.

Sections that delete or repeal obsolete provisions: Sections 5, 10, 13, 14, 23, 24, 26 - 29, and 31 - 35 delete or repeal provisions that have become obsolete either through the passage of time or other legislative action.

Sections that update obsolete or archaic provisions, or improve the style of the statutes: Sections 1, 3, 8, 9, 12, 15 - 17, 19, and 30 substitute new provisions for provisions that are obsolete, archaic, or otherwise outdated, including improvements in the style of language for purposes of clarity.

Sections that eliminate conflicts with other laws: Sections 4, and 20 - 22 harmonize laws dealing with the same subject. Section 2 conforms the text of a law to its judicial interpretation.

Representative Peter Goll
Page 2
February 16, 1990

Sections that correct errors or oversights: Sections 6, 7, 11, and 18 correct errors or oversights in drafting.

SECTIONAL ANALYSIS

Section 1. This amendment, relating to the proper form for citation of provisions in the Alaska Statutes, reflects the fact that the form actually used for citation of the single digit titles of AS has been, for example, AS 01, AS 02, etc. Until the mid-1970's, the Legislative Drafting Manual gave drafters a choice between AS 1 or AS 01, etc., but for the past fifteen years the double digit form has been the legislative standard. Now that the world of data processing has enveloped us, it is important that we make the use of the double digit citation form official.

Sec. 2. The proposed amendment to AS 12.55.165 incorporates references to provisions enacted after 1982 within the internal reference. In Edwin v. State, 762 P.2d 499 (1988), the Alaska Court of Appeals held that sentences under AS 12.55.125(e)(3), and, by extension, (d)(3), are subject to referral to a three-judge panel under AS 12.55.165. The court read the sentencing statutes as a whole and concluded that the failure to incorporate references to the added provisions was a legislative oversight. The court invoked the doctrine that statutes should be construed "to avoid absurd results." 762 P.2d at 502. See also the November, 1989 Report to the Legislature Examining Court Decisions, page 42.

Sec. 3. This amendment is proposed to ensure that recipients of a Winn Brindle memorial scholarship loan may attend an accredited "school" (as permitted under AS 14.43.300(b)(5)) and are not required to attend a "college" or "university." The amendment should have been made in 1986 when the Winn Brindle memorial scholarship loan program was enacted. The amendment has been reviewed and approved by the Postsecondary Education Commission.

Sec. 4. AS 16.05.900(24) defines "resident" as a person who has maintained a permanent place of abode in the state for 12 consecutive months. Thus, the use of "has been a resident for one year or more" in AS 16.05.400(b) is redundant. The problem dates back to the 1983 amendment, which substituted "one year" for "30 consecutive years."

Representative Peter Goll
Page 3
February 16, 1990

Sec. 5. The material to be deleted relates only to the initial terms of appointees.

Sec. 6. As enacted, a portion of this provision applied to children "between" the ages of four and six. Taken literally, that means it applies only to five-year olds. The legislature obviously intended that children aged four through six be included, and the proposed amendment would make that clear.

Sec. 7. The amendment would correct an erroneous reference in the original enactment.

Sec. 8. The 1978 revision of the criminal code introduced the crime of unsworn falsification. AS 28.35.130, which predates statehood, should have been amended at that time. A conviction for perjury could not be sustained under the circumstances described in AS 28.35.130, but a violator could be prosecuted for unsworn falsification. Thus the proposed substitution of terms.

Sec. 9. As enacted, "cancel" was defined as a noun. The amendment changes the definition to that of a verb, which is consistent with the usage of the term.

Sec. 10. The material to be deleted relates only to the initial terms of appointees.

Sec. 11. The language proposed for deletion adds nothing to the provision and, in any event, is confusing because it is incomplete.

Sec. 12. The amendment to the internal reference picks up two sections of AS 39.20 that need to have these definitions apply to them.

Sec. 13. The material to be deleted relates only to the initial terms of appointees.

Sec. 14. There is no substantive need to retain the reference to "January 1, 1971" in this provision.

Representative Peter Goll
Page 4
February 16, 1990

Sec. 15. The proposed amendment eliminates language that is redundant to AS 42.05.121(b) and rewrites other language to conform to modern drafting style.

Sec. 16. The amendment is proposed to clarify some archaic language.

Sec. 17. The amendment updates the reference to municipalities.

Sec. 18. The amendment, proposed by the APUC, would add language ("to the public for compensation") to AS 42.05.720(4)(F) that appears in each of paragraphs (4)(A) - (E). It is apparent that the omission of the language from (4)(F) was an oversight. The amendment would eliminate a source of confusion and misunderstanding.

Sec. 19. The amendment updates the reference to municipalities.

Secs. 20 - 22. These three sections, together with the repeal of AS 43.05.120 proposed in sec. 35, represent an effort to resolve some inconsistencies and redundancies in four provisions of AS 43.05 relating to criminal penalties. AS 43.05.290, enacted in 1980, was intended to serve as the basic penalty provision for all of the tax laws. When that was enacted, however, three provisions dating from 1945 that contain criminal penalties, AS 43.05.110, 43.05.120, and 43.05.130, were not amended.

In sec. 20, a new section is proposed reenacting the substantive prohibitions of AS 43.05.120, which would be repealed. The new section is located immediately after the two AS sections that it relates to. A violation of AS 43.05.075(1) would be a class A misdemeanor under AS 43.05.290(e), while a violation of AS 43.05.075(2) would be a class A misdemeanor under AS 43.05.290(f). A violation of either with respect to a material matter and with the requisite intent would be a felony under AS 43.05.290(e).

Section 21 amends AS 43.05.110 to delete the language establishing a violation as a misdemeanor (which would be interpreted as a class A misdemeanor under AS 11.81.250(e)). A violation of AS 43.05.110 would be punishable as a class A misdemeanor under AS 43.05.290(e).

Representative Peter Goll
Page 5
February 16, 1990

Section 22 amends AS 43.05.130, which currently provides a penalty of up to \$1,000, but no jail term, for any violation of AS 43.05.010 - 43.05.130, or a regulation adopted under those provisions. This is obviously inconsistent with existing AS 43.05.110 and 43.05.120, and conflicts with AS 43.05.290 as well. The amendment proposes to resolve this by limiting its application to violations that do not amount to violations under AS 43.05.290.

The Departments of Law and Revenue have reviewed these proposals.

Secs. 23 and 24. Following the 1981 repeal of AS 43.55.012(a), the references to adjustment of the gas production tax under AS 43.55.012 that appear in AS 43.55.016(e) and 43.55.020(e) became meaningless. These two bill sections delete the obsolete references.

Sec. 25. The material proposed for deletion is redundant to general provisions in AS 43.15.010.

Secs. 26 - 29. The material to be deleted relates only to the initial terms of appointees.

Sec. 30. The amendment updates an obsolete reference to federal poverty guidelines.

Secs. 31 - 34. The material to be deleted relates only to the initial terms of appointees.

Sec. 35. This section proposes the following obsolete or otherwise unnecessary provisions for repeal:

AS 23.15.520(3) defines "registration fee," a term that does not appear in any provision to which the definition applies.

AS 23.35.150(2) and (4) define "commissioner" and "department" respectively, terms that are defined for all of AS 23 in AS 23.46.010.