ALASKA LEGISLATURE COMMITTEE FILES 1995-1996 8672
8758 HOUSE RESOURCES

CITY OF HOMER
INITIATIVE PETITION

SUMMARY OF THE RESOLUTION TO BE INITIATED

Shall the people of the City of Homer express opposition to the creation of the "Homer Airport Critical Habitat Area" and ask the Alaska Legislature to withdraw or defeat Senate Bill 198.

Signature	Printed Name	Residence Address	Mailing Address	Date
	CHARLES ANDERSON	Box 378	HOMER AK	4-8-96
	RAY EVARTS	601 E PIONEER	HOMER AK	4-8-96
	Donna Ishmael	Box 173	Homer AK	4-9-96
	Bathjann Stuciw	Box 145	Anchor Point	AK 4-9-96
	JOHN H. SEITZ	Box 1199	HOMER	AK 99603 4-9-96
	NORMAN W CORBELL	Box 2778	HOMER	AK 99603 4-9-96
	CECELIA M. CORBELL	Box 2778	Homer	AK 99603 4-9-96
	Addie Klemke	Box 2157	Homer	AK 99603 4-9-96
	Robert Klemke	Box 2157	Homer	AK 99603 4-10-96

CITY OF HOMER
INITIATIVE PETITION

SUMMARY OF THE RESOLUTION TO BE INITIATED

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Signature	Printed Name	Residence Address	Mailing Address	Date
Jay R Tingley	JAY R TINGLEY	349E. BAYVIEW #C	SAME	APR 11 96
Fredam Stout	Fredam Stout	530 Bonanza	Same	4/11/96
Ben G Mitchell	BEN G Mitchell	~~104 E Pioneer~~ 7 mi Ea Rd	~~Homer~~ 104 E PIONEER	4/11/96
Keith H. Higley	Keith H. Higley	Belnap Subdivision	P.O. 2251 Homer AK 99603	4/11/96
Kate Mitchell	Kate Mitchell	7mi E Rd	104 E Pioneer	4/11/96
Sanford Beachy	Sanford Beachy	7355 Rochamark	Box 700	4-11-96
Mike Morawitz	Mike Morawitz	4911 Birch Lane	Box 2701	4-11-96
Denny C. Koth	Denny C. Koth	Bo BEAR CREEK	pTARMIGAN Heights Box 3082	4-11-96
Ruth Longhenry	Ruth Longhenry	39845 Fernwood Drive	Homer	4-11-96

April 2, 1996 page ___

Copy

P.05

CITY OF HOMER
INITIATIVE PETITION

SUMMARY OF THE RESOLUTION TO BE INITIATED

Shall the people of the City of Homer express opposition to the creation of the "Homer Airport Critical Habitat Area" and ask the Alaska Legislature to withdraw or defeat Senate Bill 198.

Signature	Printed Name	Residence Address	Mailing Address	Date
Marsha Korpi	MARSHA KORPI	488 SPRUCEVIEW	BOX 1033, HOMER	4-6-96
T H Keffer	T.H. Keffer	488 Spruceview	Po Box 1033	Homer, AK 4-6-96
Darlene Emery	Darlene Emery	151 Donview	PO 1491	Homer AK 99603
Christina Collinsworth	Christina Collinsworth	380 Bonanza	PO Box 848,	Homer AK 99603 4-8-96
Edith R Frazier	Edith R Frazier	349 Bonanza	Po Box 2226	Homer AK 99603 4-8-96
Laura Dawson	Laura Dawson	c Beachside park #2	Po Box 2226	Homer 4.8.96
Patricia L. Shearer	Patricia L Shearer	3941 Jennifer Place	P.O. Box 836	Homer, 99603
Jennie V. Tanape	JENNIE V. TANAPA	4690 Sabaria Rd		99603
Marden M Hunt	Marden M Hunt	177 Hunt	Po Box 2730	Homer AK

April 1, 1996 page 2

HOMER LIO

APR-12-1996 10:31

Alaska State Legislature

Please enter into the record my testimony to the House Resources committee name committee on SB 198 bill/subject . dated April 24, 1996.

Testimony from Stan Welles - 3 pages
Testimony from Ralph Clendenen - 2 pages

Signed: _____
Testifier

_____
Representing (Optional)

_____
Address

_____
Phone No.

ALASKA AIRCRAFT ENGINEERING
PO Box 1447
Homer, Alaska 99603-1447
phone (907) 235-2200; fax (907) 235-7517

Stan Welles

In opposition to the creation of the "Homer Airport Critical Habitat Area".

I'm used to working with cattle, tourists and aviation. Each are important. Each are needed. Each have a place. But not the same place. And definitely not at the same time.

Holstein bulls and moose have about the same temperament, gentle except when they don't want to be. From a safety and liability point-of-view, we have enough moose per capita now. Conscientiously enhancing the in-town moose brings implicit liability in the case of personal injury or death.

My further opposition sits on three legs:-

a. Wildlife Management
b. Economic Development
c. Aviation Safety

Wildlife management:- The browse in the proposed area is only marginally adequate to support the moose feeding there now.

I understand that a limited hunt is even planned to control the growth of the herd. What is the point of enhancement?

Tourist viewing? Not often during the summer. It's too warm, marginal on food supply and too many people. They head for the hills and the black timber where it's cooler, fewer people and more food. We send our Bed and Breakfast tourists up the North Fork Road.

Economic development:- I own all or a significant part of three businesses; The Wandering Star Bed & Breakfast, Pioneer Building Pizzeria (Homer's largest pizza restaurant) and Alaska Aircraft Engineering. Though tourism is an appreciated part of our Homer economy, I submit that it is private business that pays the bills.

We have considerable sentiment toward a no growth policy.

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For those that must work for their bread and butter, such sentiment represents either irrational or the absence of thought.

For those that have already earned their bread and butter (retired), they want goods and services; a no-growth sentiment is irrational.

For those that are supported by tax payers, is it fair that they should have a voice?

It is important to recognize that businesses that build a product, provide a service or sell either one form the economic foundation of any economy.

If people are attracted to a community, it will grow in either an organized or a haphazard way.

In all the communities I've seen, sensible planning benefited all. The Homer basin has very little area for small business.

Second, the Anchorage paper recently commented about the economic benefit derived by the Anchorage Airport. So it is with Homer. The area proposed for this senseless habitat is critical. It is critical to the marriage of our airport and business growth.

Aviation Safety:-

I've done substantial engineering on the Northrop/Boeing B-2 Flying Wing Bomber, the Boeing 777 and the yet unreleased new Boeing 737 series of aircraft.

I've worked for the Federal Aviation Administration and currently am doing accident investigation of three inflight aircraft breakups in this country and two in Australia.

Bureaucracies typically make very short sighted decisions based on what is politically expedient today rather than based upon principle for tomorrow.

Wildlife enhancement at the Homer airport today jeopardizes our aviation safety tomorrow. We put a great

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deal of effort into design and testing of aircraft and engines for bird strike. But as recent history has shown, we still loose lives to bird strike.

Once you have a bird problem, it's very expensive and messy to eliminate or reduce it. Look at Elmendorf and Lake Hood just for starters.

How is it possible to get past the emotional nonsense of issues like this and emphasize the importance of not putting tourists (passengers), airplanes and birds in the same place at the same time?

SINCERELY,

Stanley W. Welles

House Resources
Re: SB 198

There are many reasons why the State should not create a wildlife critical habitat in the middle of an incorporated, first-class city such as Homer and very especially not on 300 acres that run adjacent to and full length of Homer's commercial airport.

For lack of time, I'll deal with the tip of the iceberg.

I have spoken to the FAA, Federal Airports Division and the National Transportation Safety Board. They told me that even though such a plan could likely cause danger to aircraft, generally, they deal with situations after crashes and loss of life. In effect saying, "Sadly, we can only take action after picking up pieces and bodies." This was demonstrated graphically at Elmendorf recently.

Even if Homer had no commercial airport, there are still no valid reasons for a critical habitat in the middle of a 4000 plus population of a growing city. Moose and bear are already becoming more and more a hazard within the city. Drivers as well as pedestrians are endangered when moose dart across streets. Cars and drivers, hopefully, sustain only some damage. Pedestrians are more vulnerable and could be killed by a driver that has swerved to miss a moose or a car out of control after hitting a moose.

As more moose and bear range from the habitat area in search of feed through Homer yards, the odds increase that an enraged moose or wandering bear will encounter a small child or elderly person with frailties. The possible result of this was flashed over the TV networks where we painfully witnessed a man being stomped to death at the door of the University in Anchorage.

Finally, as our welfare system creates generations of welfare recipients, so will a wildlife habitat area in Homer continue to create generations of moose that will become more and more dependent on government feeding programs (This is not conjecture but fact. Look at our National park feeding programs that still can't keep great numbers of animals from starvation.) Homer can't afford feeding programs and I don't believe the State has the resources to take on that responsibility either, nor should it.

If there is any doubt of how people of Homer feel about this project being pushed upon them with very little representation, listen to them at the polls this fall as they have requested by petition.

Thank you

Ralph J Clendenen

Ralph J Clendenen
231 E Danview Ave
Homer, Alaska 99603

SB

199

Testimony of Ken Donajkowski, Alaska Oil & Gas Association

Senate Bill 199 -- Environmental, Health and Safety Self-Audit Legislation

Senate Finance Committee Hearing -- March 27, 1996

The Alaska Oil and Gas Association (AOGA) is a trade association whose 19 member companies account for the majority of oil and gas exploration, production, transportation, refining and marketing activities in Alaska.

1. The Alaska Oil and Gas Association supports the intent of SB 199. The majority of our members currently conduct self-audits as a means of ensuring compliance and see value in this legislation. Over the past 25 years or so, health, safety and environmental regulations have become increasingly complex. Not incidentally, interpretation of these regulations has become correspondingly difficult. In response to this, self-auditing identifies areas of inadvertent non-compliance, and leads to subsequent corrective action. We encourage others in all industries to utilize self-auditing, not just to ensure compliance but to generally improve health, safety and environmental performance. This legislation also encourages greater utilization of self-audits by providing immunity and ensuring confidentiality.

2. Immunity from penalties should be offered as an incentive for companies to identify, disclose, correct and prevent the reoccurence of non-compliant behavior. Self-auditing, to be effective should be undertaken without fear of consequences from regulatory agencies and without concern for final outcome. Providing immunity from penalties for deficiencies that are discovered through self-auditing and subsequently disclosed recognizes earnest efforts by companies to comply as opposed to penalizing them for such efforts. Immunity should not, however, extend to those who would knowingly and willfully commit violations and subsequently audit in order to shield themselves from just and appropriate consequences.

3. Privilege further protects companies from inappropriate and unnecessary repercussions, of disclosing audit results to agencies (e.g. third party action). Privilege also ensures that the auditing process is not compromised. The issue is not one of "secrecy" it is a matter of being able to conduct candid interviews with personnel. To remain effective, it is necessary to preserve the integrity of the audit process and maintain the trust and cooperation of employees. Traditiional legal privileges limit the flexibility that is important to the self auditing process. For example, attorney-client privilege does not provide for open, internal communication of audit results with employees. However, as with immunity there are

reasonable limits tc the application of privilege. Privilege should protect the products of an audit, such as the audit report, auditor working papers, and action plans; privilege should not be a vehicle to hide the underlying facts.

4. SB 199 moves health, safety and environmental compliance in a positive direction through its encouragement of self-auditing. We are hopeful that a bill based on the intent of SB 199 can be passed and to that end we are participating in encouraging discussions with ADEC, the bill's sponsor and will be meeting with State OSHA, as well.

5. Looking for deficiencies, identifying them, disclosing them to the appropriate agencies, and correcting them is what self-auditing is about. It is an important tool for voluntary compliance. Without privilege and immunity, voluntary self-audits can put a company at a competitive disadvantage relative to companies that do not audit. With privilege and immunity the state is saying self-auditing is in the best interest of the state as well as industry.

FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. HCS CSSB 199 (RES)

Revision Date:
Title: Environmental and health and safety audits

Department Affected: Environmental Conservation
BRU: Department-wide
Component: Department-wide

Sponsor: Senator Leman
Requestor: House Resources

COMPONENT SERIAL NO. 633

Expenditures/Revenues: (Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	131.0	131.0	131.0	131.0	131.0	131.0
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND&STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS,CLAIMS	0.0	0.0	0.0	0.0	0.0	0.0
MISCELLANEOUS	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	**194.0**	**194.0**	**194.0**	**194.0**	**194.0**	**194.0**
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGE IN REVENUES ( )	0.0	0.0	0.0	0.0	0.0	0.0
FUND SOURCE						
1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	78.6	78.6	78.6	78.6	78.6	78.6
1005 GF/Program Receipt	0.0	0.0	0.0	0.0	0.0	0.0
1006 GF/MHTIA	0.0	0.0	0.0	0.0	0.0	0.0
Other Oil H2 Response Fund	115.4	115.4	115.4	115.4	115.4	115.4
TOTAL	194.0	194.0	194.0	194.0	194.0	194.0

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

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary.)

See Attached

Prepared by: Janice Adair
Division: Director, Division of Environmental Health
Phone: 269-7645
Date: 5/3/96

Approved by Commissioner:
Agency: Department of Environmental Conservation
Date: 5/3/96

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Fiscal Analysis for HCS CSSB 199 (RES)

This fiscal note will pay for one and one-half full time attorneys in the Department of Law, at $126.0 each plus $5,000 in travel. It presumes the bulk of the legal work will revolve around oil-related programs. We have not included any estimate on potential additional cleanup costs that the state would have to bear however we believe that is a likely outcome as explained below.

This bill creates a privilege for audit reports and provides immunity for any violations of environmental laws. The privilege means that all documentation created as a part of a compliance audit is kept secret and not accessible by the courts, the legislature, the agency or the public - even if the public had been harmed by the actions or inactions of the company that had performed the audit.. Any audit information the department now receives voluntarily would have to be a requirement of a permit, compliance agreement or similar document. If the permittee voluntarily provides the department with any of the information from the audit, they can require the department sign a confidentiality agreement, and not disclose the information.

The Department of Law may, on behalf of DEC, ask a judge to review the privileged information if the state can prove that the privilege is being asserted fraudulently. Because the burden of proof would be on the department, and because we would not have seen the audit documentation, it will be very difficult to meet this requirement. We are advised that the attorney who represents us in the in-camera review may not be the same attorney who represents the department in the case. When the case is a criminal matter, we would have to hire outside counsel as there is only one environmental prosecutor on staff.

Fiscal considerations include increased attorney time in negotiating, drafting and reviewing permits, regulations and other documents to ensure adequate compliance documentation is required. Each year there are several hundred permits that are issued. We would also need to renegotiate existing permits and compliance agreements.

We would also rely on the Department of Law to negotiate, draft and review confidentiality agreements and seek their advice on issues relating to privileged information since DEC employees will be liable for damages or penalties for any breach of confidentiality.

We also rely on the Department of Law for assistance with contaminated site remediation, and audits are often requested to help apportion responsibility between parties. To the extent that the audits cannot be used to do this, and there is no other mechanism to show responsibility, the state would see increased state cleanup costs.

FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. HCS CSSB 199(RES)

Revision Date:
Title: Environmental & Health/Safety Audits
Sponsor: Senator Leman
Requestor: House Resources

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

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
CHANGE IN REVENUE FUND SOURCE #						

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY96) impact: $ None

ANALYSIS: (Attach a separate page if necessary)
The current version of CSSB 199 as passed out of the House Resources Committee would result in a zero fiscal note for this department because language relating to health and safety audits was removed from the bill. This fiscal note is subject to change if health and safety audits are put back into the bill at any point. There would then be a positive fiscal note.

Prepared by: Alan W. Dwyer, Director
Division: Labor Standards and Safety
Phone: 269-4914
Date: 5/3/96

Approved by Commissioner: for Tom Cashen, Commissioner
Agency: Department of Labor
Date: 5/3/96

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FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. HCSCSSB 199(RES)

Revision Date: 5/3/96
Title: "...relating to environmental audits and health and safety audits to determine compliance with certain laws,permits..."
Sponsor: Senator Leman
Requester: House Rules Committee

Dept. Affected: Department of Law
BRU: Criminal Division, Civil Division
Component: Criminal Division, General Legal Services
Environmental Law
COMPONENT SERIAL NO. 2085,2087 2092

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES	652.2	652.2	652.2	652.2	652.2	652.2
TRAVEL	30.0	30.0	30.0	30.0	30.0	30.0
CONTRACTUAL	2,254.3	2,254.3	2,254.3	2,254.3	2,254.3	2,254.3
SUPPLIES	18.6	18.6	18.6	18.6	18.6	18.6
EQUIPMENT	52.1	6.0	6.0	6.0	6.0	6.0
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	3,007.2	2,961.1	2,961.1	2,961.1	2,961.1	2,961.1
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	1,192.2	1,176.0	1,176.0	1,176.0	1,176.0	1,176.0
1005 GF/Program Receipts						
1007 I/A Receipts	418.7	411.9	411.9	411.9	411.9	411.9
Other I/A Oil HZ	1,396.3	1,373.2	1,373.2	1,373.2	1,373.2	1,373.2
TOTAL	3,007.2	2,961.1	2,961.1	2,961.1	2,961.1	2,961.1

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

POSITIONS

FULL-TIME	9.0	9.0	9.0	9.0	9.0	9.0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

The bill amends AS 09.25 and AS 12.45 by adding several new sections which, with respect to environmental laws, would create (1) a new evidentiary privilege that applies in criminal, civil, and administrative cases; and (2) immunity from civil and administrative penalties. During testimony on the bill industry representatives testified that once the bill took effect they would immediately initiate many audites covering a wide area of activities where violations may be occurring. This will have the effect of depriving the public and the state of important information about environmental problems that would otherwise lead to remedial actions being taken.

Section 09.25.490(a)(3) defines environmental laws to include federal, state, and municipal environmental laws. Under section 09.25.490(b), the term "environmental law" is to be broadly construed.

Richard I. Pegues

Prepared by: Richard I. Pegues, Director — Phone: 465-3672
Division: Administrative Services Division // Richard I. Pegues for BMB — Date: 5/3/96
Approved by Commissioner: Bruce M. Botelho, Attorney General — Date: 5/3/96
Agency: Department of Law

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Section 09.25.490(a)(2) defines the term "environmental audit" as the voluntary, internal, review or assessment of compliance with environmental laws. Under the bill, an audit may be conducted randomly, regularly, or in response to a particular event. Audits may be conducted by owners or operators of a regulated facility or activity or by their employees or independent contractors.

The bill broadly defines the term "audit report" in section 09.25.490(a)(1) to include any document or communication associated in any way with an audit, as well as the resulting corrective action plan.

The Proposed Audit Privilege

Under section 09.25.450(a), a party may not discover or use audit reports, including the underlying information gathered or generated during the audit, in civil actions, criminal proceedings, or administrative proceedings, except for workers' compensation proceedings. However, under section 09.25.450(c), a person who conducts or participates in an audit may testify regarding events he or she observed during the audit, but may not testify about or produce documents relating to the audit itself. Under section 09.25.450(d), regulators may neither request,

review, nor use an audit report during an inspection. Under section 09.25.450(e), all documents in the audit report must be labeled.

The privilege may be waived by following the mechanisms established in section 09.25.455, including written waivers and confidentiality agreements. Under section 09.25.455(e), disclosure by any other means or under any other circumstances does not waive the privilege.

Under section 09.25.465, certain materials are nonprivileged. These include documents and information required to be gathered under an environmental law or permit, under a license, or under a contract with the state. Information gathered by a regulatory agency or provided by a person not involved in the audit is also nonprivileged. There are a number of other exceptions for information gathered independent of the audit.

The Proposed Immunities

Under section 09.25.475, a person who voluntarily discloses the violation of an environmental law is immune from administrative and civil penalties. The bill establishes a

number of conditions that must be met to immunize the violation. Immunity is not available for violations that resulted in substantial personal injury onsite or substantial personal, property, or environmental injury offsite. For persons that do not qualify for immunity, the bill authorizes mitigation of penalties.

Fiscal Consequences

* Increased attorney time in negotiating, drafting, and reviewing permits, contracts, leases, regulations, and other documents to ensure that adequate compliance information is being gathered and maintained to meet the state's regulatory and proprietary responsibilities. Each year, there are several hundred state permits, contracts, and leases that require attorney review and negotiation, necessitating three additional attorneys.

* Increased attorney time in negotiating, drafting, and reviewing confidentiality agreements and in advising state agencies on issues relating to privileged information and public records. This is important because, under section 09.25.455(c), the state and its employees will be liable for damages or

stipulated penalties for the breach of any agreement. Additionally, we would expect to see litigation over the interpretation of confidentiality agreements. Based upon an anticipated 20 confidentiality agreements each year, each one of which would require a minimum of 40 hours to negotiate and review, the Department of Law will require one-half an attorney per year. The anticipated litigation over the confidentiality agreements would require an additional one-half attorney.

* Due to the breadth of the privilege and the lack of any standards or requirement that the audit be performed by an independent, properly trained and qualified auditor, the provision that an owner or operator, employee, or independent contractor may "in response to a particular event" initiate an audit will likely invite abuse and create a safe harbor for violators. Increased investigative efforts and attorney time will be necessary to overcome assertions of privilege and immunity. We cannot determine the fiscal impact of this eventuality, but it could be substantial.

* Due to the complexity of the bill and the ambiguity of its provisions, we anticipate substantial litigation and

appeals, particularly over the privilege. Concerns regarding violations of constitutional requirements relating to victims' rights to access information, equal protection, and due process have been raised. Currently, the Department is representing DEC in 45 contested cases involving contaminated property. We are also representing DNR and DOTPF in about 15 additional contested cases involving environmental issues and contaminated property. These are complex cases where an environmental audit or site assessment would most likely have been performed. If the privilege is asserted in a contested case, we would estimate that it will take 50 hours to litigate the privilege issue. In some cases, substantially greater attorney resources will be needed. The Department will be require an additional two attorney positions to handle the increased litigation. In addition to attorney time, we will require a significant increase in assistance from experts for investigative and contaminated property assessments. These costs can be estimated to range from $5,000 to $100,000 per case, and will average $35,000 to $50,000 per case. The total increased costs each year are an estimated $2,100,000. For cases involving large scale environmental damages, these costs will be significantly higher.

* The privilege established by the bill will result in information that is currently available being withheld from not

only the State, but also from private individuals. There is an in-camera review mechanism in the bill for people who want access to "privileged" information to ask a court to grant it. However, the mechanism creates a Catch-22 situation for both the people asking for access to the information and for the court, since neither would have sufficient facts on which to act. This is completely opposite from current law which allows a person who controls documents (and thus knows all about them) to ask a court to protect them from discovery. Not only will the bill's treatment of the court's review of privileged information create confusion, it will result in more litigation and it will take a lot of court time to make sense of it all. In some cases, the court system will be required to hire scientific and technical experts to assist the judge or discovery master conducting the in camera review in evaluating the audit reports and documents claimed to be privileged.

* Because the bill does not provide an exception to the privilege for evidence that is otherwise impossible to obtain or that cannot be obtained without undue hardship, there will be cases, including cases filed by the State to recover the State's costs in cleaning up contaminated sites, that the State will be unable to litigate without great expense, if at all. The cost to

the Department of Environmental Conservation in unrecovered cleanup costs could be several million dollars over time.

* In cases where the State or a state agency is named as a defendant due to its environmental responsibilities as a land owner or property manager, there will be increased investigative costs to gather evidence relating to contaminated sites and to the apportionment of liability for cleanup and restoration costs. If it becomes difficult to accurately and fairly allocate liability due to the site assessments or audits being privileged, then the state will likely end up paying a greater share of the cleanup and restoration costs. There will be a substantial increased cost to the General Fund similar to the amount the State is paying in the Toksook Bay case ($1.2 million).

* The state may also end up buying the liability and cost of cleanup for land the State condemns for capital improvement projects, where the condemnee has hidden contamination under a privileged environmental assessment.

* While the Senate Finance Committee amended CSSB 199 (RES) to create an exception to the privilege in proceedings relating to pipeline rates, tariffs, fares, or charges, there is

no assurance that the exception will not result in litigation. This is because, first, the creation of an exception for only one type of proceeding raises an equal protection issue; and second, the pipeline audits are often used for more than just tariff issues, creating confusion over what information may actually be disclosed for what purposes.

While the bill tries to exempt the tariff cases, it may not be completely effective. Besides jeopardizing the entire tariff system, if the carriers succeed in claiming an audit privilege for all or part of an audit, the State will have to conduct its own audits, which can cost from several hundred thousand to millions of dollars per audit. The audits used in the 1995 Taps tariff case, for example, cost approximately $25.05 million. The case itself is worth around $85 million to the State. Discovery disputes and litigation over the audit privilege would allow the Alyeska Pipeline Company to hamper the State's ability to depose Alyeska employees about the facts of a tariff case by making them part of the audit team. This maneuver would also have the effect of prohibiting those employees from ever reporting any violations unless they wanted to face lawsuits for damages. Under certain federal laws, whistleblowers will retain protection, but under this law, they will lose it, resulting in more confusion.

* Since the Criminal Division has only one environmental prosecutor on staff and the Division's caseload priorities preclude reassignment of his duties to other prosecutors, if the environmental prosecutor is conflicted out of a case due to his review of privileged information, then it will be necessary to retain outside counsel to conduct the in camera review so that the state prosecutor can handle the prosecution. Outside counsel will be required on approximately 20 occasions, at 25 hours each to conduct the in camera reviews, at a rate of $150 per hour. Total outside counsel costs of $75,000 will be required each year.

* The audit privilege and immunity may jeopardize federal approval of various state-run programs, such as the Underground Injection Control program under the Alaska Oil and Gas Conservation Commission; and the Drinking Water, Solid Waste, and Air Quality programs in the Department of Environmental Conservation. The state programs must be at least as stringent and effective as the federal programs. We would expect increased attorney time to answer legal questions regarding the impact of the bill on the delegated programs. It is also possible that the federal agencies may initiate efforts to withdraw approval of the state programs, necessitating attorney time for negotiations and possibly litigation, and possibly removing environmental

regulatory authority from state officials in Alaska to federal officials in Seattle and Washington, D.C.

* The creation of a sweeping state evidentiary privilege that has no counterpart in federal law will require attorneys to consider whether a federal remedy is available and preferable to a state remedy; and will result in confusion, arguments, and litigation over how to treat evidence that is privileged under state law but not federal law.

Because the grants of privilege and immunity provided by the bill are so broad there will be significant increased cost to the State in terms of litigation, investigation, cleanup and remediation costs, lost oil and gas revenues, and lost federal funds in respect to noncompliance with environmental requirements, as shown in the summary below.

HCSCSSB 199 (RES) COST SUMMARY

1. Negotiating and reviewing permits, contracts, leases and regulations

Personnel: 3 attorneys, 1.5 clerical support
Aggregate attorney rate (Attorney IV/Attorney III) from the Department of Law's annualized cost rate schedule = $126,000 per attorney position, plus $5,000 per attorney for travel, and $6,500 per position for new position equipment.
Fund source: General Legal Services = 35 percent GF, 15 percent IAR; Environmental Law = 50 percent I/A Oil HZ

Line Items:	Personal Services	326.1
	Travel	15.0
	Contractual	39.7
	Supplies	9.3
	Equipment	22.8
	Total	412.9

PFTs = 4.5

2. Negotiating and litigating confidentiality agreements

Personnel: 1 attorney, 0.5 clerical support
Annualized cost per above explanation = $126,000 plus travel and equipment.
Fund source: General Legal Services = 100 percent GF

Line Items:	Personal Services	108.7
	Travel	5.0
	Contractual	13.2
	Supplies	3.1
	Equipment	9.8
	Total	139.8

PFTs = 1.5

3. Litigation and appeals over the privilege

Personnel: 2 attorneys, 1 clerical support
Annualized cost per attorney ($126,000) as shown in paragraph 1. above.
Fund source: General Legal Services = 35 percent GF, 15 percent IAR; Environmental Law = 50 percent I/A Oil HZ.

Line Items:	Personal Services	217.4
	Travel	10.0
	Contractual	2,126.4
	Supplies	6.2
	Equipment	19.5
	Total	2,379.6

PFTs = 3.0

4. Criminal Division in camera reviews.

Outside counsel to avoid conflict between in camera reviews and criminal prosecution $75,000 per annum.
Fund source: Criminal Division = 100 percent GF

FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. HCS CSSB199 (RES)

Revision Date:
Dept. Affected: Alaska Court System
Title: Environmental and Health/Safety Audits
BRU: Trial Courts
Component:
Sponsor: Sen. Leman
Requestor:
COMPONENT SERIAL NO. 768

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	*	*	*	*	*	*
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

Fund Source (Thousands of Dollars)

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

Estimate of any current year (FY 96) cost: None

Positions

Full-Time						
Part-Time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

See attached analysis.

Prepared by: C. S. Christensen III, Staff Counsel
Phone: 264-8228
Agency: Alaska Court System
Date: 05/01/96

Approved by: Arthur H. Snowden, II, Administrative Director
Date: 05/01/96
Agency: Alaska Court System

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

11:47 AM
Rev 1/96

Alaska Court System
Fiscal Analysis
HCS CSSB 199 (RES)

HCS CSSB 199 (RES) creates a privilege from disclosure in certain court proceedings for information contained in an environmental audit. A person or entity asserting the privilege is entitled to an in camera review of the information, in order to determine if the information is privileged or must be disclosed.

An in camera review of this nature can be extremely time consuming; many environmental audits (a term broadly defined in the legislation) are composed of tens of thousands of pages of documents. Cases in which an in camera review is required will require large amounts of time for pre-trial proceedings.

It is impossible at this time to estimate the number of cases involving audits which may arise each year, and the complexity of the resulting in camera proceedings. Accordingly, the court system may need to return to the legislature for funding at a later date if the legislation results in a significant increase in judicial and clerical time spent on these cases.

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Chief, Consultation & Training

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The Alaska Occupational Safety and Health Act requires that each employer shall furnish his employees with a safe and healthful working environment. By using this free service you can come into voluntary compliance and avoid or reduce the potential for any fine, should you be inspected by OSH enforcement in the future. In addition, you may reduce the cost of your Worker's Compensation insurance by reducing your potential for occupational accidents and illnesses, which also enhances morale and efficiency.

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_____ ADDRESS

_____ TELEPHONE NO

_____ CITY _____ STATE _____ ZIP

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_____ NAME

_____ POSITION

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

AEL OPPOSES CSSB 199

The Alaska Environmental Lobby supports compliance with environmental regulations. Internal audits for compliance with environmental or safety regulations and permits are desirable and should be encouraged. Audits make good business since and good public policy. But, establishing a new legal privilege the makes information from self audits secret, and gives immunity from civil and criminal penalties for corporations that are non-compliant with regulations (gaining an economic advantage over competitors) is bad policy.

Under the guise of encouraging compliance, **this legislation provides secrecy for violators.**

Environmental crimes, like most white collar crimes are proved through documents provided by the responsible party. If the cloak of privilege were thrown around these records and documents, effective enforcement of many federal and state laws would be impossible. (US Supreme Court in *Braswell v. US*, 108 S. Ct. 2284, 1988)

Audits should not be privileged

A 1992 Arthur Andersen survey of cooperate general counsels found the 60% of the corporations surveyed had performed an environmental compliance audit within a two year period. Businesses conduct audits without privilege or immunity because internal review makes good business sense.

By definition privilege invites secrecy. Violators could claim as "audit material" information needed to establish responsibility for a problem. This secret could protect one corporation who is in violation, while leaving the problem to be resolved by other networked companies or the government. When there are lease agreements between owners of facilities and operators, or multiple lease holders, who is responsible for the immediate remedy of the problem? The public and regulators will lose information about their corporate neighbors, that may directly affect them.

Immunity from civil, criminal and administrative penalties is poor public policy.

Noncompliance can often result in economic gain, and it should not be tolerated. If a violation results in an economic advantage over a non-violator, attempts should be made to recover the economic gain. Additionally, penalties and fines for violations, may be the only tool that regulators have to encourage compliance. If the fine/penalty is so small that it is cheaper to never comply, but, instead just pay the penalty, the regulation is mute.

Companies have a duty to know and obey the law.

No individual would be excused if they claimed that during civil or criminal activities they were ignorant of their violations. Every individual is responsible for knowing the law and complying with it. Corporations should be too.

If its not broke, what are we trying to fix?

There is NO valid example in Alaska where, after voluntarily revealing to regulators, a violation, that the regulated corporation, was unfairly and arbitrarily penalized. Although cases from Texas, Louisiana, and federal agencies were all cited, they do not demonstrate a problem here in Alaska.

A 1994 **survey of cases in all 50 states** conducted by the National Association of Attorneys General found **only one civil case and two criminal prosecution** that were based on information gathered from voluntary environmental audit.

4/3/96

9-LS1312\O
Lauterbach
4/23/96

HOUSE CS FOR CS FOR SENATE BILL NO. 199( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATORS LEMAN, Pearce

A BILL

FOR AN ACT ENTITLED

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

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

* **Section 1.** AS 09.25 is amended by adding new sections to read:

ARTICLE 5. PRIVILEGES AND IMMUNITIES
RELATED TO DISCLOSURE OF CERTAIN SELF-AUDITS.

Sec. 09.25.450. AUDIT REPORT PRIVILEGE. (a) Except as provided in AS 09.25.455 - 09.25.475, an audit report is privileged and is not admissible as evidence or subject to discovery in

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

(2) a criminal proceeding; or

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

(b) A person, when called or subpoenaed as a witness, may not be compelled

to testify or produce a document related to an environmental or health and safety audit if

(1) the testimony or document discloses an item listed in AS 09.25.490(a)(1) that was made as part of the preparation of an environmental or health and safety audit report and that is addressed in a privileged part of an audit report; and

(2) for purposes of this subsection only, the person is a

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

(B) person to whom the audit results are disclosed under AS 09.25.455(b); or

(C) custodian of the audit results.

(c) A person who conducts or participates in the preparation of an environmental or health and safety audit and who has actually observed or participated in instances or events being reviewed for compliance may testify about those instances or events but may not be compelled to testify about or produce documents related to the preparation of or a privileged part of an environmental or health and safety audit or an item listed in AS 09.25.490(a)(1).

(d) A regulatory agency and an employee of a regulatory agency may not request, review, or otherwise use an audit report that is privileged under (a) of this section during an agency inspection of a regulated facility, operation, or property or an activity of a regulated facility, operation, or property.

(e) To facilitate identification, each document in an audit report shall be labeled "COMPLIANCE REPORT: PRIVILEGED DOCUMENT," or labeled with words of similar import.

(f) A party asserting the privilege described in this section has the burden of establishing the applicability of the privilege.

(g) This section may not be construed to

(1) prevent a regulatory agency from issuing an emergency order, seeking injunctive relief, independently obtaining relevant facts, conducting necessary

inspections or taking other appropriate action regarding implementation and enforcement of an applicable environmental or health and safety law, except as otherwise provided in AS 09.25.475; or

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

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

(b) Disclosure of an audit report or information generated by an environmental or health and safety audit does not waive the privilege established by AS 09.25.450 if the disclosure is made

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

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

(B) a legal representative of the owner or operator;

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

(D) a partner of the owner or operator; or

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

(2) under the terms of a confidentiality agreement between the person for whom the audit report was prepared or the owner or operator of the audited facility, operation, or property and a

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

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

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

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

(E) person or entity engaged in the business of insuring,

underwriting, or indemnifying the facility, operation, or property; or

(3) under a claim of confidentiality to a government official or agency by the person for whom the audit report was prepared or by the owner or operator.

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

(d) Information that is disclosed under (b)(3) of this section is confidential and is not subject to disclosure under AS 09.25.110 - 09.25.125.

(e) Disclosure of a portion of an audit report after waiver of the privilege under (a) of this section, after disclosure under (b) of this section, or through any other means may not be construed to waive the privilege established under AS 09.25.450 for any other part of the audit report.

Sec. 09.25.460. EXCEPTION: DISCLOSURE REQUIRED BY COURT OR ADMINISTRATIVE HEARINGS OFFICIAL. (a) A court or administrative hearing official with competent jurisdiction may require disclosure of a portion of an audit report in a civil, criminal, or administrative proceeding if the court or administrative hearing official determines, after an in camera review consistent with the appropriate rules of procedure, that the

(1) privilege is asserted for a fraudulent purpose;

(2) portion of the audit report is not subject to the privilege under AS 09.25.465;

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

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

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

Sec. 09.25.465. NONPRIVILEGED MATERIALS. (a) The privilege under

AS 09.25.450 does not apply to that part of an audit report that contains

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

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

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

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

(5) a document existing before the commencement of, and independent of, the environmental or health and safety audit; or

(6) a document prepared after the completion of, and independent of, the environmental or health and safety audit.

(b) An audit report is not privileged and is admissible as evidence and subject to discovery in a proceeding relating to pipeline rates, tariffs, fares, or charges.

(c) This section does not limit the right of a person to agree to conduct and disclose an audit report.

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

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

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

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

(3) an investigation of the violation was not initiated or the violation was not independently detected by an agency with enforcement jurisdiction before the disclosure was made using certified mail; under this paragraph, the agency has the burden of proving that an investigation of the violation was initiated or the violation was detected before receipt of the certified mail;

(4) the disclosure arises out of a voluntary environmental or health and safety audit;

(5) the person who makes the disclosure initiates, within a reasonable time, an appropriate effort to achieve compliance, pursues that effort with due diligence, and corrects or implements a series of measures designed to remedy the noncompliance within a reasonable time;

(6) the person making the disclosure cooperates with the appropriate agency in connection with an investigation of the issues identified in the disclosure and agrees under terms of a confidentiality agreement to disclose to the agency, on request of the agency, the part of the audit report that describes the implementation plan or tracking system developed to correct past noncompliance, improve current compliance, or prevent future noncompliance; and

(7) the violation did not result in substantial injury to one or more persons at the site or substantial off-site harm to persons, property, or the environment.

(c) A disclosure is not voluntary for purposes of this section if it is a report to a regulatory agency required solely by a specific condition of an enforcement order or decree.

(d) The immunity established by (a) of this section does not apply and an administrative, civil, or [criminal penalty] may be imposed under applicable law if the

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

(2) person who made the disclosure recklessly committed or was responsible for the commission of the disclosed violation and the violation resulted in substantial injury to one or more persons at the site or substantial off-site harm to

persons, property, or the environment;

(3) offense was committed intentionally or knowingly by a member of the person's management or an agent of the person and the person's policies or lack of prevention systems contributed materially to the occurrence of the violation; or

(4) offense was committed recklessly by a member of the person's management or an agent of the person, the person's policies or lack of prevention systems contributed materially to the occurrence of the violation, and the violation resulted in substantial injury to one or more persons at the site or substantial off-site harm to persons, property, or the environment.

(e) A penalty that is imposed on a person for violation of an environmental or health and safety law when the person has made a voluntary disclosure under (a) of this section but is not granted immunity because of (d) of this section may, to the extent appropriate and not prohibited by law, be mitigated by

(1) the voluntariness of the disclosure;

(2) efforts by the disclosing party to conduct environmental or health and safety audits;

(3) remediation;

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

(5) the nature of the violation; and

(6) other relevant considerations.

(f) In order to receive immunity under this section, a facility conducting an environmental or health and safety audit must give notice by certified mail to an appropriate regulatory agency of the fact that it is planning to commence the audit. The notice must specify the facility or portion of the facility to be audited, the date the audit will begin and end, and the general scope of the audit. Immunity under this section is available only for violations that are revealed through or discovered as a result of information and documents first produced or obtained during the time period specified in the notice. The notice may provide notification of more than one scheduled environmental or health and safety audit at a time. Once initiated, an audit shall be completed within the time period specified in the notice unless [an extension

is approved by the governmental entity with regulatory authority over the regulated facility, operation, or property based on reasonable grounds.]

(g) A regulatory agency may not initiate an inspection, monitoring, or other investigative activity based solely on the receipt of a notice under (f) of this section. The agency has the burden of proving that an inspection, monitoring, or other investigative activity initiated after receipt of a notice under (f) of this section was not initiated based solely on the receipt of the notice.

(h) The immunity under this section does not apply if a court or administrative law judge finds that the person claiming the immunity has,[on or after the effective date of this Act,]

(1) repeated an unreasonable number of times or continuously committed violations that are the same as, or similar to, the violation for which immunity is sought under this section; and

(2) not attempted to bring the facility, operation, or property into compliance, so as to constitute a pattern of disregard of environmental or health and safety laws;[in order to be considered a pattern, the person must have committed a series of violations that were due to separate and distinct events within a three-year period at the same facility, operation, or property.]

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

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

(k) A person may not be required to waive immunity as a condition of a compliance plan or similar agreement.

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

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

(1) "audit report" means a report that includes each document and

communication, other than those set out in AS 09.25.465, produced from an environmental or health and safety audit; general components that may be contained in a completed audit report include

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

(i) interviews with current or former employees;

(ii) field notes and records of observations;

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

(iv) legal analyses;

(v) drawings;

(vi) photographs;

(vii) laboratory analyses and other analytical data;

(viii) computer generated or electronically recorded information;

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

(x) other communications associated with an environmental or health and safety audit;

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

(C) an implementation plan or tracking system to correct past noncompliance, improve current compliance, or prevent future noncompliance; however, "audit report" does not include formal communications or agreements between an owner or operator and the appropriate agency regarding a compliance implementation plan or strategy;

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

(A) a regulated facility, operation, or property; or

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

(3) "environmental or health and safety law" means

(A) a federal or state environmental or occupational health and safety law; or

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

(4) "intentionally" has the meaning given in AS 11.81.900;

(5) "knowingly" has the meaning given in AS 11.81.900;

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

(7) "penalty" means an administrative, civil, or criminal sanction imposed by the state to punish a person for a violation of a statute or rule; the term does not include a technical or remedial provision ordered by a regulatory authority;

(8) "recklessly" has the meaning given in AS 11.81.900;

(9) "regulated facility, operation, or property" means a facility, operation, or property that is regulated under an environmental or health and safety law.

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

* **Sec. 2.** AS 12.45 is amended by adding a new section to read:

Sec. 12.45.052. PRIVILEGE RELATING TO CERTAIN SELF-AUDITS. An audit report based on an environmental or health and safety audit is privileged under AS 09.25.450 - 09.25.490.

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

PROPOSED AMENDMENT

HOUSE CS FOR CS FOR SENATE BILL 199

(Work Draft 9-LS1312\U)

Page 2

Line 30: between "environmental" and "audit", insert or health and safety

Page 3

Line 3: between "environmental" and "audit", insert or health and safety

Line 13: between "environmental" and "audit", insert or health and safety

Line 17: between "environmental" and "audit", insert or health and safety

Line 31: between "environmental" and "law", insert or health and safety

Page 4

Line 3: before "audits", insert or health and safety

Line 8: before "audit", insert or health and safety

Line 10: between "environmental" and "audit", insert or health and safety

Page 5

Line 21: between "environmental" and "law", insert or health and safety

Page 6

Line 2: on both references to "environmental law", insert or health and safety between "environmental" and "law"

Line 8: between "environmental" and "audit", insert or health and safety

Line 11: between "environmental" and "audit", insert or health and safety

Line 13: between "environmental" and "audit", insert or health and safety

Line 15: between "environmental" and "audit", insert or health and safety

Line 25: between "environmental" and "law", insert or health and safety

Page 7

Line 8: between "environmental" and "audit", insert or health and safety

Page 8

Line 10: between "environmental" and "law", insert or health and safety

Line 14: between "environmental" and "audits", insert or health and safety

Line 21: between "environmental" and "audit", insert or health and safety

Line 27: between "environmental" and "audit", insert or health and safety

Page 9

Line 12: between "environmental" and "laws", insert or health and safety

Line 27: between "environmental" and "audit", insert or health and safety

Page 10

Line 3: between "environmental" and "audit", insert or health and safety

Line 16: between "environmental" and "audit", insert or health and safety

Line 25: between "environmental" and "audit", insert or health and safety

Page 11

Line 2: between "environmental" and "laws", insert or health and safety

Line 4: between "environmental" and "law", insert or health and safety

Line 5: between "environmental" and "law", insert or occupational health and safety

Line 17: between "environmental" and "law", insert or health and safety

Line 19: between "environmental" and "law", insert or health and safety

Lines 20-22: delete all text

Line 24: between "environmental" and "audits", insert or health and safety

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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April 26, 1996

Honorable Joe Green
Chairman, House Resources Committee
State of Alaska
State Capitol, Room 24
Juneau, Alaska 99801-1182

Re: CSSB 199(FIN)
Environmental and Health and
Safety Audits

Dear Representative Green:

Thank-you for allowing me to submit written testimony on CSSB 199(FIN), the audit privilege and immunity bill. In reviewing my notes from the April 24, 1996, House Resources Committee hearing on CSSB 199(FIN), I discovered that there was only one other point that I had not covered in the time allowed, and that relates to the fact that the State already has in place a number of programs that rely upon self-audits or reviews to achieve compliance.

For example, the Joint Pipeline Office regulates the Trans-Alaska Pipeline System largely on the basis of internal audits. The Department of Environmental Conservation regulates seafood safety using the "Hazards Analysis Critical Control Point" method, which relies upon self-review to protect food safety. Another example is the voluntary compliance program in the Alaska Occupational Safety and Health Division, in which the Division, in accordance with federal guidelines, works with employers to achieve compliance before enforcement inspections. These programs operate very differently from CSSB 199(FIN), and the agencies have expressed concerns that the bill, if enacted, would undermine their success.

Also enclosed is a copy of the United States Environmental Protection Agency's Final Audit Policy, 60 Fed. Reg. 66,706 (1995). The various compliance programs in the state agencies and the federal environmental audit policy provide alternatives to the proposed privilege and immunities.

Please let us know if we can be of further assistance.

Sincerely,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Marie Sansone
Marie Sansone
Assistant Attorney General

Enclosure

cc: Senator Loren Leman
Pat Pourchot, Legislative Director
Janice Adair, DEC
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Copies of minutes listed below were originally included in this file. The minutes are available on the legislative computer database. In order to save space copies of minutes have not been left in the files.

Mary Pagenkopf

House Resources
4-24-96
SB 199

ENVIRONMENTAL PROTECTION AGENCY

[FRL-5400-1]

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

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final Policy Statement.

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

DATES: This policy is effective January 22, 1996.

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

SUPPLEMENTARY INFORMATION:

I. Explanation of Policy

A. Introduction

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

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

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

B. Public Process

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

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

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

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

C. Purpose

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

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

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

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

D. Incentives for Self-Policing

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

1. Eliminating Gravity-Based Penalties

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

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

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

After considering public comment, EPA has decided to retain the discretion to recover economic benefit for two reasons. First, it provides an incentive to comply on time. Taxpayers expect to pay interest or a penalty fee if their tax payments are late; the same principle should apply to corporations that have delayed their investment in compliance. Second, it is fair because it protects responsible companies from being undercut by their noncomplying competitors, thereby preserving a level playing field. The concept of recovering economic benefit was supported in public comments by many stakeholders, including industry representatives (see, *e.g.*, Docket, II–F–39, II–F–28, and II–F–18).

2. 75% Reduction of Gravity

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

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

3. No Recommendations for Criminal Prosecution

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

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

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

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

4. No Routine Requests for Audits

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

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

E. Conditions

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

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

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

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

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

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

2. Voluntary Discovery and Prompt Disclosure

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

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

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

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

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

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

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

to achieve or return to compliance as soon as possible.

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

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

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

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

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

4. Correction and Remediation

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

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

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

5. Prevent Recurrence

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

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

6. No Repeat Violations

In response to requests from commenters (*see, e.g.*, II–F–39 and II–G–18 in the Docket), EPA has established "bright lines" to determine when previous violations will bar a regulated entity from obtaining relief under this policy. These will help protect the public and responsible companies by ensuring that penalties are not waived for repeat offenders. Under condition D(7), the same or closely-related violation must not have occurred previously within the past three years at the same facility, or be part of a pattern of violations on the regulated entity's part over the past five years. This provides companies with a continuing incentive to prevent violations, without being unfair to regulated entities responsible for managing hundreds of facilities. It would be unreasonable to provide unlimited amnesty for repeated violations of the same requirement.

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

7. Other Violations Excluded

Section D(8) makes clear that penalty reductions are not available under this policy for violations that resulted in serious actual harm or which may have presented an imminent and substantial endangerment to public health or the environment. Such events indicate a serious failure (or absence) of a self-policing program, which should be designed to prevent such risks, and it would seriously undermine deterrence to waive penalties for such violations. These exceptions are responsive to suggestions from public interest organizations, as well as other commenters. (See, *e.g.*, II–F–39 and II–G–18 in the Docket.)

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

8. Cooperation

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

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

F. Opposition to Privilege

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

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

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

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

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

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

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

G. Effect on States

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

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

H. Scope of Policy

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

II. Statement of Policy: Incentives for Self-Policing

Discovery, Disclosure, Correction and Prevention

A. Purpose

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

B. Definitions

For purposes of this policy, the following definitions apply:

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

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

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

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

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

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

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

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

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

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

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

C. Incentives for Self-Policing

1. No Gravity-Based Penalties

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

2. Reduction of Gravity-Based Penalties by 75%

EPA will reduce gravity-based penalties for violations of federal environmental requirements by 75% so long as the regulated entity satisfies all of the conditions of Section D(2) through D(9) below.

3. No Criminal Recommendations

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

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

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

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

4. No Routine Request for Audits

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

D. Conditions

1. Systematic Discovery

The violation was discovered through:

(a) an environmental audit; or

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

2. Voluntary Discovery

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

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

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

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

3. Prompt Disclosure

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

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

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

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

(b) notice of a citizen suit;

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

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

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

5. Correction and Remediation

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

6. Prevent Recurrence

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

7. No Repeat Violations

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

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

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

8. Other Violations Excluded

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

9. Cooperation

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

E. Economic Benefit

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

F. Effect on State Law, Regulation or Policy

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

G. Applicability

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

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

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

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

H. Public Accountability

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

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

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

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

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

EPA will make the study available to the public.

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

I. Effective Date

This policy is effective January 22, 1996.

Dated: December 18, 1995.

Steven A. Herman,

Assistant Administrator for Enforcement and Compliance Assurance.

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

BILLING CODE 6560-50-P

TONY KNOWLES, GOVERNOR

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DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

OUR FAX NO.: (907) 258-4978

FAX TRANSMITTAL LETTER

*****

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*****

DATE: April 25, 1996 TIME: 3:20 p.m.

PLEASE DELIVER THE FOLLOWING PAGES TO:

NAME: Honorable Joe Green

LOCATION: House Of Representatives

FAX NUMBER: 1-907-465-4316

TOTAL NUMBER OF PAGES 5 INCLUDES THIS COVER LETTER.

REMARKS: _____

FROM: *Toby N. Steinberger*
Assistant Attorney General, Governmental Affairs
Attorney General's Office, Anchorage

IF YOU DO NOT RECEIVE ALL PAGES, please call: *Annette Brown at (907)269-5136*

Thank you -- have a nice day!

TONY KNOWLES, GOVERNOR

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DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

April 25, 1996

VIA FACSIMILE AND MAIL

Honorable Joe Green
Chairman, House Resources Committee
State of Alaska
State Capitol
Juneau, Alaska 99801-1182

Re: CSSB 199(FIN); An Act relating to environmental audits and health and safety audits to determine compliance with certain laws, permits, and regulations.

Dear Representative Green:

Yesterday, I testified before the House Resources Committee regarding CSSB 199(FIN). During my testimony, you requested that I submit a summary of my testimony in a letter because of time constraints.

As I explained in my testimony, I am concerned that CSSB 199(FIN) may compromise or even jeopardize Alaska's federally approved and federally funded OSHA program.

In order to understand how this bill may affect Alaska's OSHA program, it is important to understand the relationship between Alaska's OSHA program and the federal OSHA program.

In the mid-1970's, the U.S. Congress enacted the Occupational Safety and Health Act ("OSHA"). 29 U.S.C. § 650. Congress gave the U.S. Department of Labor the power to promulgate workplace safety standards. Congress also gave the U.S. Department of Labor the right to enter workplaces and conduct inspections. 29 U.S.C. § 657. In 29 U.S.C. § 657, Congress gave the U.S. Department of Labor the authority to subpoena persons and documents when it conducts inspections.

In the Occupational Safety and Health Act, Congress also provided that the U.S. Department of Labor could approve a state OSHA plan so long as the state OSHA plan was as effective as federal OSHA. 29 U.S.C. § 667. There are about 26 federally approved state plans.

In 29 C.F.R. § 1952.240, the U.S. Department of Labor approved Alaska's state plan because it is as effective as the federal program. AS 18.60.030(5). Consequently, the U.S. Department of Labor oversees Alaska's state OSHA program and substantially funds the program.

CSSB 199(FIN), in my opinion, will make our state OSHA program less effective than the federal OSHA program in two ways.

First, CSSB 199(FIN) creates a privilege for "audits." The federal OSHA program has no such privilege. Currently, when the Alaska Department of Labor conducts its investigation, it, like the U.S. Department of Labor, can subpoena documents from an employer. AS 18.60.083. This bill will prevent the Alaska Department of Labor from subpoenaing audit information that the U.S. Department of Labor can subpoena. Documents, such as audits, can provide very important evidence, particularly in cases where an employer has willfully violated an OSHA regulation. AS 18.60.095(a). It is very difficult to prove an employer's state of mind; often the Alaska Department of Labor must weigh the employer's word against an employee's word. Under CSSB 199(FIN), the Department would not be able to obtain audit information which might demonstrate that the employer knew of the violation and knowingly chose not to correct the violation. In contrast, the U.S. Department of Labor could obtain this information during its inspection.

Second, CSSB 199(FIN) provides immunity in certain situations. The U.S. Department of Labor does not provide employers with immunity. Consequently, the U.S. Department of Labor could bring OSHA citations against employers, that the Alaska Department of Labor could not bring.

Of all of the states that have passed bills similar to CSSB 199(FIN), I am only aware of one state that has expanded the audit privilege/immunity beyond environmental audits. To my knowledge, only Texas has expanded the audit privilege/immunity to "health and safety audits." Texas does not have a federally approved state OSHA plan. Consequently, the U.S. Department of Labor conducts workplace safety inspections in Texas. Federal OSHA enforcement would not be affected by the Texas law.

Alaska would be the first state, which has a federally approved OSHA state plan, that passed a law expanding the audit

privilege/immunity to workplace safety inspections. Attached is a letter from the U.S. Department of Labor indicating that CSSB 199(FIN) may jeopardize Alaska's OSHA plan.

Very truly yours,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Toby N. Steinberger
Assistant Attorney General

Enclosure

TNS:akb

cc: Senator Loren Leman
Honorable Commissioner Tom Cashen
Department of Labor
Patrick Pourchot, Legislative Director
Office of the Governor
Deborah Behr, Assistant Attorney General
Legislation & Regulations Section
Department of Law
Marie Sansone, Assistant Attorney General
Department of Law
Chrystal Smith, Legal Administrator
Department of Law

U.S. Department of Labor

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

Telephone: (206) 553-5930
FAX: (206) 553-6499

Reply to the Attention of: STP 1-1/jrs

April 23, 1996

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

Dear Commissioner Cashen:

Per your request we have performed a preliminary review of Alaska Senate Bill 199 regarding privileges and immunities related to disclosure of certain self-audits. Based on this review, it appears that the Bill, as written, would substantially impact current enforcement of the state's occupational safety and health laws. It is our opinion that the provisions of the Bill would materially change the burden of proof for safety and health standards violations classified as willful, making it much more difficult to sustain a willful violation.

We might concur in a provision to disallow the state from citing retroactively violations that an employer finds, himself, in the course of an internal audit (a policy we believe might actually be in the interest of safety); but this legislation attempts to hold an employer immune and create a new privilege disallowing the state to use the employer's business records as evidence of knowing or intentional wrong doing when the state finds subsequent violations, a sort of corporate right against self-incrimination. We believe that, if enacted into law, this legislation could leave the Alaska occupational safety and health program in a situation in which it could be reasonably argued that the program is less effective than the federal program and subject to plan withdrawal proceedings.

Again, please be aware that this assessment is preliminary. We would be pleased to provide an in-depth review and legal analysis if you so desire; however, such an analysis would require significantly more time to complete.

Sincerely,

Richard S. Terrill
Acting Regional Administrator

Alaska Forest Association, Inc.

111 STEDMAN SUITE 200
KETCHIKAN, ALASKA 99901-6599
Phone 907-225-5114
FAX 907-225-5920

Testimony of Jack E. Phelps, Executive Director
In support of CSSB 199(RES)
Offered to the Senate Finance Committee
March 26, 1996

Mr. Chairman, members of the committee:

My name is Jack Phelps and I am Executive Director of the Alaska Forest Association. The timber industry and the Association support the concept of environmental and safety self-audits, as embodied in the Resources Committee substitute for Senate Bill 199. The Association believes that the true purpose of environmental laws is to protect the environment, and of safety laws to protect people. Their purpose is not to levy fines nor to provide a source of income and jobs for bureaucrats. Self-audits promote this true purpose.

Too often, companies, especially smaller companies, can ill afford to contact agencies regarding known or suspected problems. They fear the result of such contacts will be crippling fines or the discovery of new, unsuspected problems which could put them out of business. With the self-audit concept, companies will be given new incentive to work towards compliance and the assurance that agencies will truly be available to help them get there without the threat of bankruptcy.

The concepts developed in CSSB 199(RES) are not untried. Other states, notably Texas, have implemented environmental self-audits with a good measure of success. While it may require a shift of emphasis for some of our agencies, similar laws can work equally well in Alaska.

The AFA appreciates the 19th Legislature's efforts to develop practical efficiencies in areas of government interaction with private industry. CSSB 199(RES) is a prime example of those efforts. The AFA also appreciates the willingness of the Resources Committee to work with timber and mining companies to ensure the present bill reflects their needs in the real world. Please pass CSSB 199(RES) on for consideration by the full Senate as quickly as possible.

SENATOR LOREN LEMAN

Northwest Anchorage

716 W 4th Ave, Ste 540, Anchorage AK 99501 258-8189 Session: State Capitol, Juneau AK 99801 465-2095

April 23, 1996

Mr. Robert C. Bundy
United States Attorney
District of Alaska at Anchorage
Federal Building & U.S. Courthouse
222 West 7th Avenue, #9, Room 253
Anchorage, Alaska 99513-7567

Dear Mr. Bundy:

I am responding to your April 19 letter to Rep. Joe Green regarding Senate Bill 199, legislation I introduced to create incentives for regulated entities to conduct environmental, health and safety self-audits. Your letter disappointed me in that it misstates both the intent and the substance of the legislation.

SB 199 is neither "anti-environment" or "anti-law enforcement", as you charge. Instead, it will have just the opposite effect. I speak from my 22 years in Alaska as a consulting civil/environmental engineer. I have helped many clients respond to environmental challenges. Additionally, I have worked as a commercial fisherman for most of my life. I have a personal stake in environmental protection.

Many of your arguments mirror objections the Knowles Administration has already raised, and to which we have already responded in other forums. I will not revisit those issues here. However, original issues you have raised deserve commen

First, you describe the immunity provision as "radical", but then praise the EPA's new immunity policy which was finalized in December 1995. The two are not in conflict. There are certainly differences between SB 199 and the EPA approach, and for various reasons we believe our approach is superior. However, the similarities far outweigh the differences. To say that you "endorse and support" the EPA policy while condemning SB 199 as "radical" only betrays your unsupported bias against the approach that many states are taking.

Under EPA's new policy, the agency will not seek any gravity-based penalties for violations that are discovered through a self-audit and promptly reported to the agency. Just like SB 199, the EPA attaches many conditions to the benefit: the violations reported must not have resulted in serious harm to the environment, repeat offenders are excluded, the regulated entity must correct the problem and take steps to prevent future recurrence, etc.

However, the immunity provision in SB 199 is actually *stricter* in some respects. For example, immunity is available only if a business first provides notification to the agency of its intent to conduct an audit. The EPA policy has no such requirement. In addition, EPA offers a 75% reduction in penalties even if the reported violations were not discovered through a self-audit. In contrast, immunity in SB 199 is allowed *only* for violations that arise from a self-audit. Given these realities it is nonsensical to praise EPA's policy while labeling SB 199 as "radical".

Your second point is that the audit privilege would "[allow] facts that are important to the protection of public health and the environment to be hidden from public view and from government officials." However, SB 199 provides in Section 09.25.465 that any document,

communication, datum, report or other information that must be maintained or reported as part of an existing law, regulation, or permit requirement is *not* covered by the self-audit privilege. Furthermore, privilege *cannot* be claimed for information that a regulatory agency obtains through its own monitoring or sampling, nor does the privilege apply if the regulatory agency obtains information from a third party or a "whistleblower".

These restrictions on the privilege beg the following question: what is the information that agencies routinely use in enforcement proceedings that will be denied to them if a self-audit privilege is enacted in Alaska? I have never received a satisfactory answer to this question. In fact, objections like yours have been aired in 16 other states which have passed audit privilege laws, and each state found these arguments wanting.

You may also be aware that there are now 10 other states where self-audit privilege and/or immunity bills have been approved by at least one house of the legislature. A bill has been introduced in Congress as well. Our Congressman Don Young is one of six original cosponsors of the federal legislation.

Clearly, self-audit privilege and immunity legislation is an idea that is gaining popularity. Rather than resisting this trend, the Department of Justice and the Environmental Protection Agency ought to become constructively involved in these efforts. However, a prerequisite to constructive involvement is that federal agency leaders must rid themselves of the mindset that "Washington knows best" on every issue.

Sincerely,

Loren A. Leman

Loren Leman
Chairman, Senate Resources Committee

cc: Representative Joe Green

Headquarters:
217 ' ɔtreet, Suite 201
Juneau, Alaska 99801
(907) 586-2323 FAX 463-5515

ALASKA
STATE
CHAMBER
OF COMMERCE

House CS for

TESTIMONY ON CSSB 199

Thank you for the opportunity to provide testimony on Committee Substitute for Senate Bill 199, regarding environmental, health and safety self-audits for businesses.

My name is Pamela LaBolle, and I am President of the Alaska State Chamber of Commerce. The State Chamber represents approximately 700 member businesses statewide which provide jobs to nearly 70,000 employees. Our network of representation also includes the 6000 business members of the local Chambers of Commerce throughout Alaska. As the Voice of Business, ASCC's mission is to create a climate in our state that is conducive to a strong private sector economy.

I am here today to speak in support of CSSB 199. This legislation provides businesses with an opportunity to conduct self-audits in an effort to assure they are in compliance with environmental, health and safety laws. We believe this creates an incentive for businesses who find they have inadvertently been out of compliance with a law or regulation to voluntarily correct their actions and strive to operate in the acceptable and prescribed manner.

The issues of disclosure of privileged information and the presumption of immunity are important ones. When voluntarily disclosing evidence of a self-incriminating nature, businesses need some assurance that the evidence they provide does not place them in a position of jeopardy. Although the State may have agreed not to prosecute on compliance issues discovered through self-audit, businesses would be loath to put themselves in a position to be sued by a third party, such as a special interest group. We hope the Rules of Procedure that govern criminal and civil cases provide the necessary safeguards for self-auditing businesses.

We believe that government should strive to be supportive of business activity, with an attitude of partnership rather than that of a watchdog. SB 199 brings us closer to the more user-friendly regulatory environment the State Chamber has been advocating. Therefore, we urge the committee's support of CSSB 199.

House CS for

U.S. Department of Justice

United States Attorney
District of Alaska at Anchorage

Federal Building & U.S. Courthouse
222 West 7th Avenue, #9, Room 253
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Commercial: (907) 271-5071
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April 19, 1996

Representative Joe Green
Chairman, House Resources Committee
State of Alaska
State Capitol
Juneau, Alaska 99801-1182

Re: Senate Bill 199; An Act relating to environmental audits and health and safety audits to determine compliance with certain laws, permits, and regulations.

Dear Representative Green:

I am writing to express my serious concerns about legislation such as Senate Bill 199, which would establish an evidentiary privilege for environmental audits and create immunity for violators in certain circumstances. While I normally do not comment on pending state legislation, this legislation implicates significant federal interests. First, in Alaska as in most states, federal environmental laws are implemented largely through federally-approved state programs. By impairing a state's ability to enforce its own programs, this legislation would have the effect of impairing the enforcement of federal law. State privilege laws, some of which even include penalties against government officials who make disclosures of privileged information, would make it more difficult for the states to refer matters for federal enforcement. Second, defendants may attempt to raise state privileges in federal proceedings. While we believe these privileges would not apply, at a minimum, valuable resources would be wasted in litigation. Thus, there are strong reasons for federal law enforcement officials to be concerned about state legislation that would create a new evidentiary privilege or immunity.

I agree with Attorney General Reno's view that, properly implemented, environmental audits and other self-policing activities are useful tools of responsible businesses. Like the Attorney General, however, I am strongly opposed to legislation that would create a new privilege establishing a legal right to conceal from the public and from public officials a new class of secret information -- information relating to environmental

violations and to potential risks to public health and the environment. Equally radical would be the enactment of a new immunity law that would protect environmental violators from enforcement, and I share her opposition to new immunity provisions, as well.

The attorney-client privilege and work product doctrine already protect from disclosure certain materials that bear upon litigation, and courts and legislatures consistently have rejected efforts to extend those protections beyond their well-established boundaries. There is no demonstrated need for a new and much broader evidentiary privilege for environmental audits. Available information indicates that, as a matter of good business practice, an increasing number of firms are performing audits without any audit privilege. Surveys also indicate that strong environmental enforcement has served as a major incentive for companies to self-audit, as well as to comply with the law.

An evidentiary privilege for audits would impede law enforcement by allowing facts that are important to the protection of public health and the environment to be hidden from public view and from government officials; thus, it would inhibit the operation of the very engine that drives audit efforts. Both compliance with the law and corporate accountability are more likely to occur within the context of openness than in secrecy. In addition, a privilege would inhibit and even prevent employees or businesses that violate the law from coming forward to report their employers' transgressions, thereby cutting off a very valuable source of information needed for the protection of the public.

Moreover, a privilege statute would mire enforcement efforts in a tangle of litigation over the applicability and reach of the privilege and the scope of exemptions. Critical terms in the statute are broad or ill-defined, and there are no established definitions or standards for environmental audits. This added litigation would consume scarce judicial, prosecutorial and investigative resources. Underlying health and environmental problems could be left uncorrected and the public unprotected during the resulting delays.

An environmental audit privilege also would be highly susceptible to abuse. Many of our criminal cases involve defendants who make false statements to government officials to conceal their environmental violations, and it would be an easy matter for these defendants to label ordinary internal

communications after-the-fact as "audits" or "self-evaluations" and assert false claims of privilege simply to delay an investigation. They could use the privilege even to shield continuing violations and ongoing criminal conduct. The public would be justifiably upset if the government were prevented from obtaining information about a violation that led to widespread damage or serious injury because of a claim of audit privilege.

The creation of immunity for those who under certain circumstances "voluntarily" disclose their violations to the government would be equally unwise, having the potential to allow serious environmental violators to escape responsibility for their wrongdoing when, after the fact and after the damage has been done, they come forward and disclose their actions. An immunity provision would have the perverse effect of actively discouraging proactive environmental management, since companies and individuals could immunize themselves retroactively even after causing serious harm simply by initiating action to correct problems only prospectively. This is unconscionable in an area of law designed to protect the health and safety of the public, especially where the violations at issue may have endangered the public or resulted in long-term environmental harm. It would place law-abiding companies at a competitive disadvantage and is unparalleled in any other enforcement context.

Finally, as a positive alternative to the proposed legislation, a number of policies and a wide range of programs have been developed and implemented at the federal level to encourage and promote voluntary environmental auditing and compliance, without the need for a deleterious audit privilege or the unnecessary granting of blanket immunity. For example, the United States Environmental Protection Agency recently adopted and published a broad and comprehensive new policy on incentives for self-policing (including environmental auditing) to address exactly the concerns that have driven the proposed legislation here. The Department endorses and supports that policy, which is consistent with existing policies within the Department that already require that prosecutors take into account self-auditing, self-evaluation and voluntary disclosure as important mitigating factors in the exercise of criminal prosecutorial discretion. The Department further supports the use of the EPA policy, in conjunction with other applicable policies, in the settlement of civil environmental enforcement actions.

Taken together, the policies of both EPA and the Justice Department contain the right mix of strong enforcement for

wrongdoers and leniency for good actors to ensure continued protection of the public and of the nation's environment. I would be happy to arrange for representatives from EPA and the Department to share with you ways in which these policies and programs could be adapted for use in this state.

With all of these points in mind, it is clear that legislation of the type proposed is both anti-environment and anti-law enforcement. Without a demonstrated need for its enactment, it would disrupt law enforcement efforts, prolong litigation, place an enormous burden upon public resources, conceal truth, frustrate efforts to protect public health and the environment, and provide violators with an unfair economic advantage over their law-abiding competitors.

Yours truly,

ROBERT C. BUNDY
United States Attorney

RCB:kjm

cc: Senator Loren Leman

Alaska Oil and Gas Association

AOGA

121 W. Fireweed Lane, Suite 207
Anchorage, Alaska 99503-2035
Phone: (907)272-1481 Direct: (907)272-7424 Fax: (907)279-8114
L. A. (Ardie) Gray, Public Affairs Manager

MEMO

VIA FACSIMILE - 12 Pages including cover

April 19, 1996

To: Mike Pauley

From: Ardie Gray

Subject: AOGA Recommended Amendments to CSSB 199

Mike:

Attached are draft AOGA recommended changes to CSSB 199. We wanted to get these changes to you today, however, they're still in draft form. We'd like to have Monday for review and finalize the changes on Tuesday morning. If you can't wait, please consider these amendments in draft form. (FYI: We sent the changes to ADEC and AkOSHA and asked for their input by Monday also.)

CONGRATULATIONS on getting Municipal League endorsement.

Please call with comments.

Thanks.

Attachment

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Alaska Oil and Gas Association Recommended Changes to CSSB 199(FIN)

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

BE IT ENACTED BY THE STATE OF ALASKA:

* Section 1. AS 09.25 is amended by adding new sections to read:

ARTICLE 5. PRIVILEGES AND IMMUNITIES
RELATED TO DISCLOSURE OF CERTAIN SELF-AUDITS.

Sec. 09.25.4XX LEGISLATIVE FINDINGS AND INTENT:

NO X

(a) The Legislature finds and intends that:

(1) As environmental, health and safety regulations evolve, performance based standards are replacing the traditional command and control approach to regulation.

(2) This shift is expected to save both the state and regulated entities money and lead to the integration of environmental protections, workplace safety, and normal operating procedures for regulated facilities and operations

(3) In order to foster a partnership between the public and private sectors and promote such integration, it is the intent of the Legislature to establish a responsible incentive program to encourage voluntary, critical self-evaluation for compliance with certain environmental or health and safety requirements by authorizing certain qualified privileges and immunities

(4) The public has a strong interest in encouraging routine self-review of environmental or health and safety business practices and procedures. This can best be achieved by preserving the free flow of this type of information.

(5) Communication related to self-audits include the type of information whose flow would be curtailed if privilege were not available.

(6) Therefore, an audit privilege is recognized to protect the confidentiality of communications relating to voluntary internal environmental, health and safety audits.

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NO X

(7) It is not intended that privileged audit reports be used to shield a person from liability under applicable laws and regulations by blocking access to relevant facts.

(8) The public also has a strong interest in obtaining cost-effective correction of inadvertent environmental, health and safety violations.

(9) This goal can best be achieved by offering qualified immunity from enforcement of administrative, and civil penalties for those regulated entities that promptly report any known violation of environmental, health, and safety regulations uncovered as part of the audit, and promptly correct the violations or negotiate a corrective action plan with the appropriate government agency.

Sec. 09.25.450. AUDIT REPORT PRIVILEGE.

(a) Except as provided in AS 09.25.455 - 09.25.475, an audit report is privileged and is not admissible as evidence or subject to discovery in

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

(2) a criminal proceeding; or

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

(b) A person, when called or subpoenaed as a witness, may not be compelled to testify or produce a document related to an environmental or health and safety audit if

(1) the testimony or document discloses an item listed in AS 09.25.490 (a)(1) that was made as part of the preparation of an environmental or health and safety audit report and that is addressed in a privileged part of an audit report; and

(2) for purposes of this subsection only, the person is a

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

(B) person to whom the audit results are disclosed under AS 09.25.455 (b); or

(C) custodian of the audit results.

(c) A person who conducts or participates in the preparation of an environmental or health and safety audit and who has actually observed or participated in instances or events being reviewed for compliance may

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testify about those instances or events but may not be compelled to testify about or produce documents related to the preparation of or a privileged part of an environmental or health and safety audit or an item listed in AS 09.25.490 (a)(1).

(d) A regulatory agency and an employee of a regulatory agency may not request, review, or otherwise use an audit report that is privileged under (a) of this section during an agency inspection of a regulated facility or operation or an activity of a regulated facility or operation.

(e) To facilitate identification, each document in an audit report shall be labeled "COMPLIANCE REPORT: PRIVILEGED DOCUMENT," or labeled with words of similar import.

(f) A party asserting the privilege described in this section has the burden of establishing the applicability of the privilege.

YES ✓ (g) Nothing in this section shall be construed to

(1) prevent a regulatory agency from issuing emergency orders under ____, seeking injunctive relief, independently obtaining relevant facts, conducting necessary inspections or taking other appropriate action regarding implementation and enforcement of applicable environmental or health and safety laws, except as otherwise provided in AS 9.25.475;

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

Sec. 09.25.455. EXCEPTION: WAIVER.

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

(b) Disclosure of an audit report or information generated by an environmental or health and safety audit does not waive the privilege established by AS 09.25.450 if the disclosure is made

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

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

(B) a legal representative of the owner or operator;

(C) an officer or director of the regulated facility or operation or a partner of the owner or operator; or

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

(2) under the terms of a confidentiality agreement between the person for whom the audit report was prepared or the owner or operator of the audited facility or operation and a

YES ✓

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

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

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

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

(E) person or entity engaged in the business of insuring, underwriting, or indemnifying the owner or operator of the property, facility or operation; or

(3) under a claim of confidentiality to a government official or agency by the person for whom the audit report was prepared or by the owner or operator.

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

(d) Information that is disclosed under (b)(3) of this section is confidential and is not subject to disclosure under AS 09.25.110 - 09.25.125.

(e) Disclosure of a portion of an audit report after waiver of the privilege under (a) of this section, after disclosure under (b) of this section, or through any other means may not be construed to waive the privilege established under AS 09.25.450 for any other part of the audit report.

Sec. 09.25.465. NONPRIVILEGED MATERIALS.

(a) The privilege under AS 09.25.450 does not apply to that part of an audit report that contains

(1) a document, communication, datum, report, or other information required by a regulatory agency to be collected, developed, maintained, or reported under an environmental or health and safety law, under a permit issued under an environmental or health and safety law, as a requirement for obtaining, maintaining,

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YES ✓ or renewing a license, or as a requirement under a lease or contract with the state;

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

YES ✓ (3) information that a regulatory agency obtains from a source that was not involved in the compilation, [OR] preparation, or conduct of the environmental or health and safety audit report.

YES ✓ (4) Documents, communications, data, reports, or other information developed or maintained in the course of any regularly conducted business activity or regular practice other than an environmental or health and safety audit, ~~even if such information:~~

NO X (A) was reviewed by the auditor

(B) formed a basis in whole or in part for the environmental audit report; or

(C) was incorporated into the environmental or health and safety audit report.

(b) An audit report is not privileged and is admissible as evidence and subject to discovery in a proceeding relating to pipeline rates, tariffs, fares, or charges.

YES, but have proposed diff. wording ✓ (c) An audit is not privileged if commenced by an owner or operator after learning of or receiving an official notice of impending inspection or investigation by a government agency.

(d) This section does not limit the right of [A PERSON] an owner or operator to agree to conduct and disclose an audit report. X NO

Sec. 09.25.475. VOLUNTARY DISCLOSURE; IMMUNITY.

NO X (a) Except as provided by this section, [A PERSON] an owner or operator who makes a voluntary disclosure of a violation of an environmental or health and safety law [IS] and their directors, officers, and employees are immune from an administrative or civil [, OR CRIMINAL] penalty for the violation disclosed, for a violation based on the facts disclosed, [AND] or for a violation discovered because of the disclosure that was unknown to the [PERSON] owner or operator making the disclosure.

NO X (b) A disclosure is voluntary for the purposes of this section only if

(1) the disclosure was made promptly after the owner's or operator's knowledge [OF THE INFORMATION DISCLOSED IS OBTAINED BY THE PERSON] of potential non-compliance;

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NO X ? (2) the disclosure was made in writing by certified mail or hand-delivered to a representative of an agency that has regulatory authority with regard to the violation disclosed;

NO X (3) an investigation of the potential non-compliance [VIOLATION] was not initiated or the potential non-compliance [VIOLATION] was not independently detected by an agency with enforcement jurisdiction before the disclosure was made using certified mail or hand-delivery to a representative of an agency; under this paragraph, the agency has the burden of proving that an investigation of the potential non-compliance [VIOLATION] was initiated or the potential non-compliance [VIOLATION] was detected before receipt of the certified mail or hand-delivered notification;

(4) the disclosure arises out of a voluntary environmental or health and safety audit;

NO X (5) the [PERSON] owner or operator who makes the disclosure initiates, within a reasonable time, an appropriate effort to achieve compliance, pursues that effort with due diligence, and corrects or implements a series of measures designed to remedy the noncompliance within a reasonable time;

NO X (6) the [PERSON] owner or operator making the disclosure cooperates with the appropriate agency in connection with an investigation of the potential non-compliance issues identified in the disclosure and agrees under terms of a confidentiality agreement to disclose to the agency, on request of the agency, the part of the audit report that describes the implementation plan or tracking system developed to correct past noncompliance, improve current compliance, or prevent future noncompliance; and

(7) the violation did not result in substantial injury to one or more persons at the site or substantial off-site harm to persons, property, or the environment.

(c) A disclosure is not voluntary for purposes of this section if it is a report to a regulatory agency required solely by a specific condition of an enforcement order or decree.

NO X (d) The appropriate regulatory agency may adopt regulations restricting privilege or immunity under AS 9.25.475-490 only if essential to prevent revocation of state primacy over a federally delegated program in circumstances where formal revocation proceedings have begun and will be complete prior to the next regularly scheduled session of the Alaska Legislature. Regulations restricting privilege or immunity under AS 9.25.475-490 may not exceed minimum federal requirements to maintain

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NO X | primacy and must be confined to the specific issues of concern relative to retention of state primacy.

NO X | [THE IMMUNITY ESTABLISHED BY (A) OF THIS SECTION DOES NOT APPLY AND AN ADMINISTRATIVE, CIVIL, OR CRIMINAL PENALTY MAY BE IMPOSED UNDER APPLICABLE LAW IF THE

(1) PERSON WHO MADE THE DISCLOSURE KNOWINGLY COMMITTED THE DISCLOSED VIOLATION;

(2) PERSON WHO MADE THE DISCLOSURE RECKLESSLY COMMITTED OR WAS RESPONSIBLE FOR THE COMMISSION OF THE DISCLOSED VIOLATION AND THE VIOLATION RESULTED IN SUBSTANTIAL INJURY TO ONE OR MORE PERSONS AT THE SITE OR SUBSTANTIAL OFF-SITE HARM TO PERSONS, PROPERTY, OR THE ENVIRONMENT;

(3) OFFENSE WAS COMMITTED INTENTIONALLY OR KNOWINGLY BY A MEMBER OF THE PERSON'S MANAGEMENT OR AN AGENT OF THE PERSON AND THE PERSON'S POLICIES OR LACK OF PREVENTION SYSTEMS CONTRIBUTED MATERIALLY TO THE OCCURRENCE OF THE VIOLATION; OR

(4) OFFENSE WAS COMMITTED RECKLESSLY BY A MEMBER OF THE PERSON'S MANAGEMENT OR AN AGENT OF THE PERSON, THE PERSON'S POLICIES OR LACK OF PREVENTION SYSTEMS CONTRIBUTED MATERIALLY TO THE OCCURRENCE OF THE VIOLATION, AND THE VIOLATION RESULTED IN SUBSTANTIAL INJURY TO ONE OR MORE PERSONS AT THE SITE OR SUBSTANTIAL OFF-SITE HARM TO PERSONS, PROPERTY, OR THE ENVIRONMENT.]

NO X | (e) A penalty that is imposed on [A PERSON] an owner or operator for violation of an environmental or health and safety law when the [PERSON] owner or operator has made a voluntary disclosure under [(a) OF] this section but is not granted immunity [BECAUSE OF (d) OF] under this section may, to the extent appropriate and not prohibited by law, be mitigated by

(1) the voluntariness of the disclosure;

(2) efforts by the disclosing party to conduct environmental or health and safety audits;

(3) remediation;

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

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YES ✓ 1

(5) nature of violation

(6) other relevant considerations.

NO X

[(f) IN ORDER TO RECEIVE IMMUNITY UNDER THIS SECTION, A FACILITY CONDUCTING AN ENVIRONMENTAL OR HEALTH AND SAFETY AUDIT MUST GIVE NOTICE BY CERTIFIED MAIL TO AN APPROPRIATE REGULATORY AGENCY OF THE FACT THAT IT IS PLANNING TO COMMENCE THE AUDIT. THE NOTICE MUST SPECIFY THE FACILITY OR PORTION OF THE FACILITY TO BE AUDITED, THE DATE THE AUDIT WILL BEGIN AND END, AND THE GENERAL SCOPE OF THE AUDIT. IMMUNITY UNDER THIS SECTION IS AVAILABLE ONLY FOR INFORMATION AND DOCUMENTS FIRST PRODUCED OR OBTAINED DURING THE TIME PERIOD SPECIFIED IN THE NOTICE. THE NOTICE MAY PROVIDE NOTIFICATION OF MORE THAN ONE SCHEDULED ENVIRONMENTAL OR HEALTH AND SAFETY AUDIT AT A TIME. ONCE INITIATED, AN AUDIT SHALL BE COMPLETED WITHIN THE TIME PERIOD SPECIFIED IN THE NOTICE UNLESS AN EXTENSION IS APPROVED BY THE GOVERNMENTAL ENTITY WITH REGULATORY AUTHORITY OVER THE REGULATED FACILITY OR OPERATION BASED ON REASONABLE GROUNDS.

(g) A REGULATORY AGENCY MAY NOT INITIATE AN INSPECTION, MONITORING, OR OTHER INVESTIGATIVE ACTIVITY BASED SOLELY ON THE RECEIPT OF A NOTICE UNDER (F) OF THIS SECTION. THE AGENCY HAS THE BURDEN OF PROVING THAT AN INSPECTION, MONITORING, OR OTHER INVESTIGATIVE ACTIVITY INITIATED AFTER RECEIPT OF A NOTICE UNDER (F) OF THIS SECTION WAS NOT INITIATED BASED SOLELY ON THE RECEIPT OF THE NOTICE.]

(h) The immunity under this section does not apply if a court or administrative law judge finds that the person claiming the immunity has, on or after the effective date of this Act,

(1) repeated an unreasonable number of times or continuously committed violations that are the same as, or similar to, the violation for which immunity is sought under this section; and

(2) not attempted to bring the facility or operation into compliance, so as to constitute a pattern of disregard of environmental or health and safety laws; In order to be considered a pattern, the person must have committed a series of violations that were due to separate and distinct events within a three-year period at the same facility or operation.

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

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

YES (k) A person may not be required to waive immunity as a condition of a compliance plan or similar agreement.

NO X (l) The appropriate agency shall not pursue a criminal penalty because the owner or operator is immune from administrative or civil penalties under this section.

Sec. 09.25.485. RELATIONSHIP TO OTHER RECOGNIZED PRIVILEGES.

AS 09.25.450 - 09.25.49[illegible] do not limit, waive, or abrogate the scope or nature of a statutory or common law privilege, including the work product doctrine, the attorney- client privilege, and any other privilege recognized by a court with appropriate authority in this state.

NO X **Sec. 09.25.4XX. AUDITOR CERTIFICATION**

(a) The appropriate regulatory agency may adopt reasonable regulations to establish a voluntary auditor certification program. No agency may require environmental or health and safety audits to be conducted by certified auditors.

Sec. 09.25.490. DEFINITIONS.

(a) In AS 09.25.450 - 09.25.490,

(1) "audit report" means a report that includes each document and communication, other than those set out in AS 09.25.465, produced from an environmental or health and safety audit; general components that may be contained in a completed audit report include

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

(i) interviews with current or former employees;

(ii) field notes and records of observations;

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

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(iv) legal analyses;

(v) drawings;

(vi photographs;

(vii) laboratory analyses and other analytical data;

(viii) computer generated or electronically recorded information;

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

(x) other communications associated with an environmental or health and safety audit;

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

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

YES ✓

(D) The term "audit report" under this section does not include formal communications or agreements between an owner or operator and the appropriate agency regarding a compliance implementation plan or strategy.

YES, but have proposed different wording ✓

(2) "environmental or health and safety audit" means a confidential, critical, voluntary, internal and retrospective review, evaluation or analysis of current or past conduct, practices and occurrences and the resulting consequences, including assessments that are a part of the owner or operator's compliance management system, that is conducted in the expectation that it would be confidential and specifically and exclusively designed and undertaken for the purposes of determining compliance with environmental or health and safety laws or a permit issued under those laws conducted randomly, regularly or in response to a particular event by an owner or operator, an employee of the owner or operator, or an independent contractor of the owner or operator. [VOLUNTARY EVALUATION, REVIEW, OR ASSESSMENT OF COMPLIANCE WITH ENVIRONMENTAL OR HEALTH AND SAFETY LAWS OR A PERMIT ISSUED UNDER THOSE LAWS CONDUCTED RANDOMLY, REGULARLY, SPONTANEOUSLY, OR IN RESPONSE TO A PARTICULAR EVENT BY AN OWNER OR OPERATOR, AN EMPLOYEE OF THE OWNER OR OPERATOR, OR AN INDEPENDENT CONTRACTOR OF

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(A) A REGULATED FACILITY OR OPERATION; OR

(B) AN ACTIVITY AT A REGULATED FACILITY OR OPERATION;]

(3) "environmental or health and safety law" means

(A) a federal or state environmental or occupational health and safety law; or

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

NO X [(4) "INTENTIONALLY" HAS THE MEANING GIVEN IN AS 11.81.900 ;

(5) "KNOWINGLY" HAS THE MEANING GIVEN IN AS 11.81.900 ;]

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

NO X (7) "penalty" means an administrative, or civil [, OR CRIMINAL] sanction imposed by the state to punish a person for a violation of a statute or rule; the term does not include a technical or remedial provision ordered by a regulatory authority;

NO X [(8) "RECKLESSLY" HAS THE MEANING GIVEN IN AS 11.81.900 ;]

(9) "regulated facility or operation" means a facility or operation that is regulated under an environmental or health and safety law.

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

DAVID E. ROGERS
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April 22, 1996

Representative Joe Green
Co-Chairman
House Resources Committee
Capitol Building, Room 124
Juneau, Alaska 99801-1182

Dear Rep. Green:

I am writing this letter on behalf of the Council of Alaska Producers. The Council is a non-profit Alaska corporation whose members are essentially all of the major mining companies that are actively exploring, developing and operating in Alaska. We have carefully reviewed and discussed CS for SB 199 (FIN) and urge its passage.

The Council strongly supports responsible, cost effective incentive programs to encourage voluntary compliance with environmental or health and safety laws. We believe that the "self-audit" approach contained in the current CS - which includes appropriate privilege and immunity provisions with exceptions for bad guys and repeat offenders - is a well balanced plan that will make a difference.

We hope you will agree with our assessment and pass a reasonable version of the legislation out of committee at your earliest convenience.

Yours truly,

David E. Rogers

FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. CSSB 199 FIN

Revision Date: 4/17/96
Title: "...relating to environmental audits and health and safety audits..."
Sponsor: Senator Leman
Requester: House Resources Committee

Dept. Affected: Department of Law
BRU: Criminal Division/Civil Division
Component: Criminal Division/General Legal Services
Oil, Gas & Mining, Environmental Law
COMPONENT SERIAL NO. 2085, 2087, 2091, 2092

Expenditures/Revenues (Thousands of Dollars)

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

FUND SOURCE (Thousands of Dollars)

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

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

POSITIONS

FULL-TIME	*****	*****	****	*****	*****	*****
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This bill amends AS 09.25 and AS 12.45 by adding several new sections which, with respect to environmental and health and safety laws, would create (1) a new evidentiary privilege; and (2) immunity from criminal, civil, and administrative penalties.

Section 09.25.490 (a) (3) defines environmental and health and safety laws to include federal, state, and municipal environmental and "occupational" health and safety laws. Under section 09.25.490 (b), the term "environmental or health and safety law" is to be broadly construed.

Section 09.25.490 (a) (2) defines the term "environmental or health and safety audit" as the voluntary review or assessment of compliance with environmental or health and safety laws. Under the bill, an audit may be conducted randomly, regularly, spontaneously or in response to a particular event. Audits may be conducted by owners or operators of a regulated facility or activity or by their employees or independent contractors.

Richard L. Peques

Prepared by: Richard I. Peques, Director
Division: Administrative Services Division
Phone: 465-3672
Date: 4/17/96

Richard L. Peques /FOR/

Approved by Commissioner: Bruce M. Botelho, Attorney General
Agency: Department of Law
Date: 4/17/96

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FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. CSSB 199 (FIN)

ANALYSIS CONTINUATION:

The bill broadly defines the term "audit report" in section 09.25.490(a)(1) to include any document or communication associated in any way with an audit, as well as the resulting corrective action plan.

The Proposed Audit Privilege

Under section 09.25.450(a), a party may not discover or use audit reports, including the underlying information gathered or generated during the audit, in civil actions, criminal proceedings, or administrative proceedings, except for workers' compensation proceedings. However, under section 09.25.450(c), a person who conducts or participates in an audit may testify regarding events he or she observed during the audit, but may not testify about or produce documents relating to the audit itself. Under section 09.25.450(d), regulators may neither request, review, nor use an audit report during an inspection. Under section 09.25.450(e), all documents in the audit report must be labeled.

The privilege may be waived by following the mechanisms established in section 09.25.455, including written waivers and confidentiality agreements. Under section 09.25.455(e), disclosure by any other means or under any other circumstances does not waive the privilege.

Under section 09.25.465, certain materials are nonprivileged. These include documents and information required to be gathered under an environmental or health and safety law or permit, under a license, or under a contract with the state. Information gathered by a regulatory agency or provided by a person not involved in the audit is also nonprivileged.

The Proposed Immunities

Under section 09.25.475, a person who voluntarily discloses the violation of an environmental or health or safety law is immune from penalties. The bill establishes a number of conditions that must be met to immunize the violation. Immunity