ALASKA LEGISLATURE COMMITTEE FILES 1995-1996 8672
8759 HOUSE RESOURCES

FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. CSSB 199 (FIN)

ANALYSIS CONTINUATION:

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, and other documents to ensure that adequate compliance information is being gathered and maintained to meet the state's regulatory and proprietary responsibilities.

* 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 any breach of the agreements.

* Increased attorneys' fees and costs to litigate and appeal issues relating to the applicability of the privilege and immunities.

* The provision that an owner or operator, employee, or independent contractor may "spontaneously" or "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 in this context.

* Since 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 may be cases, including civil cost recovery actions, that the state will be unable to litigate successfully without great expense, if at all.

* While the Senate Finance Committee amended CSSB 199 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.

FISCAL NOTE

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1996 LEGISLATIVE SESSION

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ANALYSIS CONTINUATION:

The state currently uses carrier audits for compliance with occupational health and safety laws to supply facts in the TAPS Tariff cases. Under the bill, if the carriers succeed in claiming an audit privilege, the state will have to conduct its own audits, which can cost from several hundred thousand to several million dollars per audit. The audits used in the 1995 TAPS tariff case, for example, cost approximately $25.05 million. Discovery disputes and litigation over the audit privilege would allow 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 an audit team. Both the privilege and immunity provisions could result in the state not being able to recover imprudent expenditures by Alyeska in the tariff cases, and in the Joint Pipeline Office not able to effectively regulate the pipeline.

For example, if this bill had been in effect prior to the state's 1995 TAPS tariff case it would have jeopardized the whole case. In the '95 case, the state is objecting to at least $330 million worth of imprudent expenditures by the TAPS carriers (and this cost is continuing to grow). The case is worth one-quarter of this amount to the state in lost taxes and royalties; or $82 million and rising.

* Increased investigative costs to gather evidence relating to contaminated sites and 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.

* Since the Criminal Division only has 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 prosecute the case.

* The audit privilege and immunity may jeopardize federal approval of various state-run programs, such as the

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Alaska Occupational Safety and Health program. The state program must be at least as stringent as the federal program. The state occupational safety and health program, for example, includes mandatory administrative penalties, as required by federal law. 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. Other state programs that may be affected include the Underground Injection Control program under the Alaska Oil and Gas Conservation Commission; the Drinking Water, Solid Waste, and Air Quality programs in the Department of Environmental Conservation; and the medical assistance (Medicaid and Medicare) programs in the Department of Health and Social Services.

* The creation of a sweeping state evidentiary privilege that has no counterpart in federal law will require that attorneys 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.

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Because the grants of privilege and immunity provided by the bill are so broad it is not possible to determine the eventual increased cost to the state in terms of litigation, investigation, remediation, lost oil and gas revenues, and lost federal funds in respect to noncompliance with environmental and safety and health requirements.

To: The Honorable Joe Green
The Honorable Bill Williams
Co-Chairmen, House Resources Committee

MEMORANDUM

From: Janice Adair
Department of Environmental Conservation

Subject: CSSB199(Fin)

Date: April 16, 1996

This memo summarizes the department's concerns with CSSB 199(Fin). I've also included some information for the committee's consideration, including a proposed substitute the department prepared several weeks ago.

DEC's concerns with CSSB199(Fin) are:

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

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

This lack of clarity is the basis for our fiscal note as we anticipate the Department of Law and the courts will ultimately make this determination.

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

Environmental audits are still a relatively new management tool typically undertaken by only the more sophisticated companies. We've recognized this and are working with industry sectors on auditing standards and practices.

The Honorable Joe Green
The Honorable Bill Williams

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

The legislation allows audits to be done by anyone. We feel the audit must be done by someone who not only knows what they are doing, but how the facility does or should operate as well as what the rules are for that operation. In addition, an audit by definition may be random or spontaneous - in other words, it does not have to be well planned.

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

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

3) By the terms of the legislation, the privilege is not limited to a critical self-analysis of <u>past</u> actions. A facility operator can undertake an audit, find that a certain course of action might result in environmental damage, go ahead and take that course of action, yet benefit from the privilege. This differs significantly from how the federal courts have defined the critical self-analysis privilege. Ms. Sansone from the Department of Law will likely brief the Resources Committee on <u>Reichhold Chemicals v. Textron</u>[1], a 1994 U.S. District Court decision dealing with this issue.

The court found that the critical self-analysis privilege is a "qualified privilege for *retroactive* analyses of past conduct, practices and occurrences, and the resulting environmental consequences."

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

(emphasis added). In the court's decision, it stated that the evaluations of the potential environmental risks of a proposed course of action made in advance of the decision to adopt that course of action are not protected by a privilege. It noted that where a facility had prior knowledge of the harm that would or could result from a course of action yet deliberately chose to act is "highly relevant in a negligence action and should ordinarily be discoverable. However, retrospective analysis is generally not relevant."

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

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

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

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

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

A state-established privilege would do nothing to protect industries from potential action on the part of federal agencies, like the EPA. In fact, it is probable that such a privilege would lead to increased federal enforcement as EPA seeks to uncover what cannot be obtained by the state.

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

In order for the state to receive program delegation, the state must have the ability to enforce

the provisions of the program. Losing delegation would result not only in the loss of funding for a variety of programs delegated from EPA but would also result in increased federal enforcement and dual requirements (state and federal) that the regulated public would be required to meet.

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

As has been stated in other hearings on the bill, we believe that information required to be provided under leases, contracts, permits, statutes and regulations must also be included.

Please don't hesitate to contact me if we can be of any assistance to you.

Enclosures:

1) 2-29-96 Amendment to SB 199 offered by DEC
2) Pit Stop Brochure
3) Inside EPA article, March 15, 1996

DRAFT -- February 29, 1996
PREPARED AT THE REQUEST OF DEC

A M E N D M E N T

OFFERED IN THE SENATE

TO: SB 199

Page 1, line 1, to Page 11, line 23:

Delete all material.

Insert new language to read:

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

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

*Section 1. LEGISLATIVE INTENT. As environmental regulation evolves, performance based standards are replacing the traditional command and control approach to regulation. This shift is expected to save both the state and regulated entities money, and lead to the integration of environmental protection and normal operating procedures for regulated facilities and

operations. In order to promote such integration, it is the intent of the legislature to encourage critical self-evaluation for compliance with environmental requirements by providing immunity from administrative enforcement and civil penalties for those regulated entities that self-audit, voluntarily and promptly report any violation of environmental regulations uncovered as part of the audit, and promptly correct the violations or negotiate a corrective action plan with the Department of Environmental Conservation.

*Sec. 2. AS 46.03 is amended by adding a new section to read:

Sec. 46.03.766. ENVIRONMENTAL COMPLIANCE AUDIT. An environmental compliance audit is a systematic, documented, periodic, and objective review conducted by the owner or operator of a regulated facility or operation and related to meeting the requirements of AS 46.03, AS 46.04, AS 46.09, AS 46.14, or of a regulation, a lawful order of the department, or permit, approval, or acceptance, or term or condition of a permit, approval, or acceptance issued under this chapter, AS 46.04, AS 46.09, or AS 46.14. An environmental compliance audit must be conducted within a defined period of time, and have a specified beginning and end point.

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

Sec. 46.03.767. STANDARDS FOR CONDUCTING AUDITS. (a) The department shall make available guidelines containing standards for conducting environmental compliance audits. The standards may be designed for industry groups or categories of operational activities, and must be based upon United States Environmental Protection Agency standards or other comparable recognized standards.

(b) The department shall assist owners and operators of regulated facilities or operations in developing specific guidelines for conducting an environmental compliance audit of their facility or operation. Guidelines developed under this subsection shall contain standards for the auditor's training and qualifications. An owner or operator that develops specific guidelines under this subsection may submit the guidelines to the department for approval.

(c) The owner or operator of a regulated facility or operation is not required to meet the standards made available under (a) or approved under (b) of this section; however, an owner or operator that follows the standards made available under (a) or approved under (b) of this section shall be presumed to

have conducted a qualified environmental compliance audit for purposes of immunity from civil penalties and administrative enforcement under AS 46.03.768.

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

Sec. 46.03.768. Immunity. (a) Except as provided in (c) of this section, the owner or operator of a regulated facility or operation is immune from civil penalties under AS 46.03.760(e) and administrative enforcement under AS 46.03.850 if the owner or operator

(1) notifies the department in writing of the owner or operator's intent to undertake a qualified environmental compliance audit as described in AS 46.03.766, and provides the department a written description how the audit will be conducted, who will conduct the audit, and when the audit will begin and end;

(2) undertakes and completes a qualified environmental compliance audit;

(3) promptly, but any event, no than 10 days after discovery of a violation through the audit, reports to the department the violation of this chapter, 46.04, 46.09, or 46.14, or of a regulation, a lawful order of the department, or permit,

approval, or acceptance, or term or condition of a permit, approval, or acceptance issued under this chapter, AS 46.04, AS 46.09, or AS 46.14;

(4) promptly, but in any event, no later than 60 days after completion of the audit, unless a longer period of time is negotiated with the department and established in an agreed-upon corrective action plan, corrects the violation discovered through the audit and implements measures to prevent its recurrence.

(b) For purposes of receiving immunity from administrative enforcement or civil penalties, an owner or operator that conducts an audit but does not follow standards recognized under AS 46.03.767(a) or approved by the department under AS 46.03.767(b) shall demonstrate that it conducted a qualified environmental compliance audit by demonstrating that the procedures it followed are comparable in scope, objectivity, and reliability to those recognized under AS 46.03.767(a) or approved under AS 46.03.767(b).

(c) Immunity from civil penalties is not available when the department is required in writing by the United States Environmental Protection Agency to seek civil penalties for the violation for purposes of maintaining primacy over a federally delegated program, or when the violation causes injury to the

public health or the environment or presents an imminent threat of serious injury to the public health or the environment.

*Sec. 5. AS 46.03 is amended to read:

Sec. AS 46.03.769. AUDIT REPORTS. Upon request of the department, the owner or operator of a regulated facility or operation seeking immunity under AS 46.03.768 shall make the audit report prepared in connection with the environmental compliance audit available to the department for review. If the owner or operator discloses the audit report or any part of the audit report to the department, except for any report or part of any report that may be kept confidential under another provision of law, the report or part of the report disclosed is a public record.

*Sec. 6. AS 46.03.760(e) is amended to read

(e) A person who violates or causes or permits to be violated a provision of AS 46.03.250 - 46.03.314, AS 46.14, or a regulation, a lawful order of the department, or a permit, approval, or acceptance, or term or condition of a permit, approval, or acceptance issued under AS 46.03.250 - 46.03.314 or AS 46.14 is liable, in a civil action, to the state for a sum to be assessed by the court of not less than $500 nor more than $100,000 for the initial violation, nor more than $10,000 for

each day after that on which the violation continues, and that shall reflect, when applicable,

(1) reasonable compensation in the nature of liquidated damages for any adverse environmental effects caused by the violation, that shall be determined by the court according to the toxicity, degradability and dispersal characteristics of the substance discharged, the sensitivity of the receiving environment, and the degree to which the discharge degrades existing environmental quality; for a violation relating to AS 46.14, the court, in making its determination under this paragraph, shall also consider the degree to which the discharge causes harm to persons or property; this paragraph may not be construed to limit the right of parties other than the state to recover for personal injuries or damage to their property;

(2) reasonable costs incurred by the state in detection, investigation, and attempted correction of the violation;

(3) the economic savings realized by the person in not complying with the requirement for which a violation is charged; and

(e) <u>except as immunized under AS 46.03.768,</u> the need for an enhanced civil penalty to deter future noncompliance.

*Sec. 7. AS 46.03.850(a) is amended to read:

(a) Except as immunized under AS 46.03.768, when [WHEN], in the opinion of the department, a person is violating or is about to violate a provision of this chapter, AS 46.04, or AS 46.14, or a regulation or lawful order of the department, or a permit or certificate, or a term or condition of a permit or certificate issued by the department under this chapter, AS 46.04, AS 46.14, the department may notify the person of its determination by personal service or certified mail. The determination and notice do not constitute an order under AS 46.03.820.

*Sec. 8. APPLICABILITY. The immunity created in AS 46.03.768 by sec. 2 of this Act applies to qualified environmental compliance audits conducted on or after the effective date of this Act.

PIT STOP! HIGHLIGHTS:

- Voluntary program- it's your choice to participate.
- Customized technical assistance to meet your business's specific waste management needs in a non enforcement manner.
- Free waste management and reduction training.
- Free, on-site environmental consultation to assist your business with waste management, reduction and disposal concerns.
- Potential disposal cost savings
- Positive recognition and rewards for your waste management and waste reduction efforts.

These are just a few of the benefits being offered to your business at no charge. By participating in the ***PIT STOP!*** program you will gain valuable information to help protect our environment and reduce costs.

WHY MANAGE MY WASTES?

The automotive service industry understands the importance of meeting customer needs and operating efficient businesses. Properly managing used oil, batteries, solvents and other hazardous and solid wastes helps keep our communities clean and reduces business operating costs.

The Alaska Department of Environmental Conservation has teamed up with the automotive industry to provide a voluntary program to help automotive service shops reduce, recycle and properly manage solid and hazardous wastes. This program promotes a cooperative approach to addressing waste management questions and concerns.

HOW AN ON-SITE VISIT WORKS

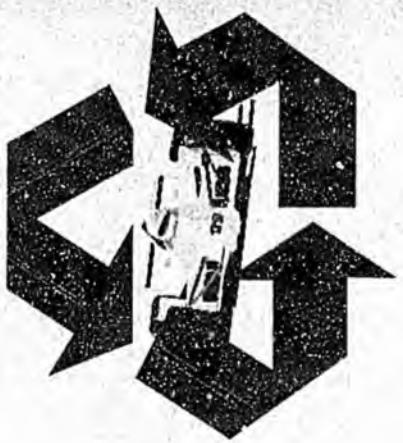
On-site consultations will be scheduled in advance and conducted only at the request of shop owner/operators. These visits enable site specific waste management information to be presented at individual shops.

During the visit, a checklist will be used to document information concerning waste reduction, recycling and environmental management. The checklist will include a "To Do" section identifying areas where shops can make environmental improvements. Proactive pollution prevention efforts will also be documented.

Shops participating in ***PIT STOP!*** will receive as much assistance as they need to help them achieve compliance and waste reduction goals.

For more information, please contact:
Lisa Rozmyn, ADEC *Compliance Assistance Office*
555 Cordova Street, Anchorage, Alaska 99501
Phone (907) 269-7581 or (800) 510-ADEC
Fax (907) 269-7600
email *LRozmyn@envircon.state.ak.us*

clip and mail in an envelope or send by fax (907) 269-7600



TO: Lisa Rozmyn, ADEC Compliance Assistance Office
555 Corodova Street
Anchorage, AK 99501

FROM: _____ (company name & contact) _____ (telephone/fax)

_____ (address)

☐ Yes! I would be interested in attending a training session.

☐ Yes! I would like to receive and on-site visit.

☐ Yes! Please call me about a specific waste management/reduction/recycling issues.

***Pit Stop!* A Voluntary Program to help you!**

Alaska Department of
Environmental Conservation

What is the Compliance Assistance Office?

The Compliance Assistance Office provides technical ***support*** to help businesses and communities comply with federal or state environmental regulations and reduce waste throughout the state.

Our success is based, in part, on coordinated efforts with other programs within the DEC, communities, and Alaska businesses.

COMPLIANCE ASSISTANCE OFFICE

For more information, please contact:
Compliance Assistance Office • 555 Cordova Street •
Anchorage, Alaska 99501
Phone (907) 269-7586 or (800) 510-ADEC
Fax 907-269-7600 • email *CompAsst@envircon.state.ak.us*

Alaska Department of Environmental Conservation
Compliance Assistance Office
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COMPLIANCE ASSISTANCE OFFICE

TO:

Alaska Department of
Environmental Conservation

Pit Stop!

A Voluntary Waste Management Assistance and Education Program for the Automotive Repair Industry

If your business is interested in:

- Saving Money
- Getting Enforcement-Free Waste Management Assistance
- Reducing Solid & Hazardous Wastes
- Receiving Positive Recognition for Environmental Effort

For more information, please contact:
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555 Cordova Street, Anchorage, Alaska 99501
Phone (907) 269-7581 or (800) 510-ADEC
Fax (907) 269-7600
email *LRozmyn@envircon.state.ak.us*

Inside E.P.A. Weekly report

An Inside Washington Publication

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

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

Key policy call forthcoming

EPA CONSIDERS BLOCKING AIR PERMIT DELEGATION TO STATES WITH AUDIT LAWS

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

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

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NEW STATE CLEAN WATER PACKAGE DRAWS FIRE FROM SOME OFFICIALS

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

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

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

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

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

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

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EXISTING CONTROLS WILL NARROW APPLICABILITY OF MAJOR AIR TOXICS RULE

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

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

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INSIDE

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

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

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

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

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

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

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

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

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

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Managing Editor: Don Bilson
Associate Editors: Tony Kreindler, Leigh Smith, Paul Singer

Production: Justin Goudreau, Wendy Tull, Alexandra Tzoumas, Melissa Dole

Inside EPA is published every Friday by Inside Washington Publishers, P.O. Box 7167, Ben Franklin Station, Washington, D.C. 20044. Subscription rates: $920/yr in U.S. and Canada: $950/yr elsewhere (air mail).

Why should we encourage self-auditing?

Lessons from the Price Waterhouse Survey

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

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

Significant findings:

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

Distributed by Senator Loren Leman

Supporters of Senate Bill 199...

- Alaska Forest Association
- Alaska Miners Association
- Alaska Oil & Gas Association
- Alaska Rural Electric Cooperative Association
- Alaska Support Industry Alliance
- Alaska State Chamber of Commerce
- Alyeska Pipeline Service Company
- Council of Alaska Producers

Distributed by Senator Loren Leman

What Alaskans are Saying about Senate Bill 199...

"The environmental self-audit is an idea proposed by Sens. Loren Leman and Drue Pearce. It is based on similar laws that now exist in 14 other states, including Oregon, which is not exactly a state that lets its industries 'rape and run'. What's mystifying, however, is the hostility to the bill being shown by the Knowles Administration, particularly the Departments of Law and Environmental Conservation... DEC's worry is that unscrupulous operators would misuse the new law as a kind of 'shield' against enforcement. These are legitimate concerns and ones that the Senate Resources Committee... has taken steps to deal with. However, the department still remains opposed to the legislation. We don't really understand why. If these laws have been abused in other states, DEC would have good grounds for its concern. But they haven't been abused, according to what the legislature's research staff has been able to find out."

-- Tim Bradner, Alaska Journal of Commerce

"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 manner."

-- Pamela LaBolle, Alaska State Chamber of Commerce

"... the Council strongly supports the concepts of privilege and immunity embodied in SB 199. This is an excellent way to promote and encourage voluntary compliance with environmental and health and safety laws and regulations."

-- David Rogers, Council of Alaska Producers

"This legislation... encourages greater utilization of self-audits by providing immunity and ensuring confidentiality... SB 199 moves health, safety and environmental compliance in a positive direction through its encouragement of self-auditing."

-- Ken Donajkowski, Alaska Oil and Gas Association

The New Paradigm In Environmental Enforcement:

Environmental Audit Privilege and Immunity Legislation

by

R. Kinnan Golemon
and
Laura D. Wolf

BROWN McCARROLL & OAKS HARTLINE, L.L.P. ■ 1400 Franklin Plaza ■ 111 Congress Avenue ■ Austin, Texas 78701 ■ (512) 472-5456

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"We support the efforts of your committee in seeking to pass legislation that promotes good environmental stewardship."

-- Norma Calvert, Marathon Oil Company

"The timber industry and the Association support the concept of environmental and safety self-audits, as embodied in... Senate Bill 199. 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."

-- Jack Phelps, Alaska Forest Association

"... this bill will help foster an atmosphere that is conducive to open communication and help remove a structural impediment that now exists to open communication. The energies of the people from both the State and industry working on an issue will be focused to solve actual problems, rather than guarding their respective legal options."

-- Steven Borell, Alaska Miners Association

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THE NEW PARADIGM IN ENVIRONMENTAL ENFORCEMENT:

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ABOUT THE AUTHORS

R. Kinnan Golemon is a prominent expert in the field of Environmental Law with over 30 years of experience as either an engineer or attorney engaged in issues associated with environmental regulatory compliance. He is a Partner in the Austin office of the Texas-based law firm of Brown McCarroll & Oaks Hartline, L.L.P. In the 1995 Texas Legislature, Mr. Golemon and his Partner, Ms. Lisa Anderson, were the primary business proponents actively supporting the passage of H.B. 2473, The Texas Environmental Health and Safety Audit Privilege and Immunity Act. He serves as General Counsel for the Texas Chemical Council, the association representing over 100 chemical manufacturers doing business within Texas. He also is the Immediate Past Chairman of the American Bar Association's Section of Natural Resources, Energy and environmental Law (SONREEL) and he played a significant role in that entity's sponsorship of the facilitated dialogue sessions that resulted in significant changes in the U.S. Environmental Protection Agency Final Policy Statement relating to "Incentives for Self-Policing".

Laura D. Wolf is an Associate with the Austin office of the Texas-based law firm of Brown McCarroll & Oaks Hartline, L.L.P. where her practice is primarily devoted to the representation of regulated entities in the field of Environmental Law. She received her B.A. in Psychology from Smith College in 1986 and her J.D. from the University of Texas School of Law in 1991.

I. INTRODUCTION

In the last few years one of the more common controversies to arise out of the environmental regulatory context is the debate over whether regulated entities that conduct environmental audits should be provided an evidentiary privilege and penalty immunity relief for voluntarily discovered, promptly reported and corrected violations. This article will provide an insight into why the establishment of such a privilege for environmental audits and provision of penalty immunity will benefit the environment as well as the regulators and members of the regulated community, *i.e.*, business and governmental entities that must comply with environmental regulatory requirements.

First, it is necessary to describe what is meant by an environmental audit. The U.S. Environmental Protection Agency ("EPA") has defined environmental auditing as a "systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements".[1] As the result of an audit, a written report is typically presented to management to enable them to determine where their compliance problems are and how to correct them. Audits may be conducted internally, by the regulated entity's employees, or by outside contractors hired for that purpose. Clearly, the primary function of an environmental audit is to alert the regulated entity to compliance issues so that they may be corrected. Whether regulated entities intend compliance with environmental regulations out of civic responsibility or out of fear of penalties is immaterial; the fact is that if regulated entities have regular systems in place to ensure compliance and to promptly correct noncompliance, the environment and the surrounding community benefit. Likewise, governmental resources can better be directed at those regulated entities that do not make the effort and expenditures to

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[1] "Incentives for Self-Policing", EPA Final Policy Statement, 60 Fed. Reg. 66706, 66710 (December 22, 1995).

routinely and systematically monitor, expeditiously report and promptly correct noncompliance events.

II. EVIDENTIARY PRIVILEGE

The issue of an evidentiary privilege for these audits has arisen out of both the perception of many regulated entities, and the reality for a few regulated entities, that audits which they conduct of their own facilities may be used against them by regulators in enforcement actions or by third parties in private lawsuits, despite the fact that the regulated entity discovered the regulatory violation during an audit and has mechanisms in place to promptly report and correct the noncompliance. In other words, a regulated entity may be reluctant to conduct an environmental audit because of fears as to the way in which the audit will be used by others and it may therefore forego an opportunity to enhance its own program of environmental compliance. However, if applicable legal and regulatory mechanisms are in place that provide incentives and encouragement for the regulated entity to conduct such an audit, and to correct any problems it finds as a result, then the regulated entity's environmental compliance is more likely to be improved, and so, it can be assumed, will be the environment of the surrounding community.

A. Against the Privilege for Environmental Audits

The notion of an evidentiary privilege in favor of environmental audits has sparked a vigorous debate in the last several years. Among the arguments against an evidentiary privilege is that it runs counter to the spirit and intention of modern environmental laws, which promote and require public disclosure.[2] This argument assumes that regulatory agencies and private parties are entitled to be able to obtain the results of internal environmental audits so that the

[2] See, *e.g.*, Ronald, David. "The Case Against an Environmental Audit Privilege". National Environmental Law Journal, September 1994.

environment and public health can be better protected. The concept espoused in this argument is that corporations and other regulated entities have vested interests in veiling their environmental audits in secrecy, but that true environmental protections cannot be achieved unless all internal environmental investigations are made open to the public, and, better yet, that the most protective environmental audits are those that are conducted with input from both regulators and members of the public.[3]

The U.S. Department of Justice ("DOJ") and EPA have made similar arguments in their opposition to an evidentiary privilege for audits. In EPA's view, a statutory privilege "... could be used to shield evidence of violations of federal environmental law as well as criminal misconduct, deny the public its right to know useful information affecting its health and the environment, drive up litigation costs, and create an atmosphere of distrust between regulators, industry and local communities."[4] EPA's Final Policy Statement on Incentives for Self-Policing, issued on December 18, 1995, reiterates EPA's long-standing opposition to evidentiary privileges for audits. In fact, although EPA's policy states that it will not request audits to initiate environmental investigations, if EPA has "independent reason to believe" that a violation has occurred, the Agency makes clear that it has the authority to seek "any information", possibly including an audit report, relevant to identifying violations or determining liability or extent of harm.[5] "Independent reason to believe" that a violation has occurred is not a significant threshold to meet in order for EPA to request an audit report which may lead them to other violations, even as those violations are being addressed by the facility.

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[3] See, *i.e.*, Lewis, Sanford. Moving Forward Toward Environmental Excellence: Corporate Environmental Audits and the Public's Right to Know. The Good Neighbor Project for Sustainable Industries, February 1, 1995.

[4] "Incentives for Self-Policing" EPA Fact Sheet, December 18, 1995, p. 2.

[5] 60 Fed. Reg. 66706, 66711 (December 22, 1995).

EPA's Assistant Administrator for the Office of Enforcement and Compliance Assurance, Mr. Steve Herman, in a February 21, 1996, letter to Michigan State Representative John Freeman discussing proposed Michigan legislation, articulates EPA's position regarding evidentiary privileges for audits. Mr. Herman asserts that Michigan's proposed evidentiary privilege "... could hamstring investigations of criminal behavior, interfere even with routine enforcement actions, and compromise the public's right to know."

Mr. Herman, in his letter to Representative Freeman, raises the issue of whether state evidentiary privileges can apply to federal environmental programs administered in the state. This tactic is being used in other states as well; for example, the State of Texas, which adopted an evidentiary privilege for audits in 1995, is currently seeking delegation of the National Pollutant Discharge Elimination System ("NPDES") program under the federal Clean Water Act and the Title V operating permits program under the federal Clean Air Act. EPA apparently is delaying the approval of Texas' programs, in part, because of concerns over Texas' audit privilege legislation.[6] In keeping with its longstanding tradition, EPA seems of the view that if it cannot impose its policy directly, it can attempt to impose it by refusing to allow states to implement their own programs under federal environmental laws.

DOJ supports EPA's position and advocates against an evidentiary privilege for environmental audits. "The approach taken in state laws and proposed federal legislation of creating evidentiary privileges for polluters that perform environmental audits or providing statutory immunity for violations by such polluters conceals environmental hazards from the

[6] "Federal regulators concerned about Texas environmental law", Austin American-Statesman, February 28, 1996 stating that the Deputy Administrator of EPA, Fred Hansen, said "the [Texas] law could be an obstacle for a state plan to administer the key program under the Federal Clean Air Act" [Title V operating permits].

public and public authorities, impairs enforcement, and shields misconduct. Therefore, the Department will continue vigorously to oppose such legislation."[7]

EPA's and DOJ's fear about the effects of evidentiary privileges for audits are unfounded. Their arguments are myths being used to oppose a sensible concept and should be exposed as such.

B. IN FAVOR OF AN ENVIRONMENTAL AUDIT PRIVILEGE

1. Myth 1: An evidentiary privilege for environmental audits will shield criminal misconduct.

First, EPA and DOJ believe that evidentiary privileges may shield criminal misconduct. This position apparently arises out of the fact that most privilege statutes include an immunity from prosecution for violations discovered and corrected as a result of audits. In fact, most audit privilege policies limit any privilege and/or immunity to a situation in which a voluntary audit has uncovered a violation and the violation is promptly and effectively corrected. Many such statutes expressly provide that a privilege or immunity is not available in instances of criminal misconduct. For example, the Texas legislation excludes from the immunity provisions, those actions that are intentional or knowing violations or reckless violations that result in substantial injury to persons on-site or in substantial harm to persons or property off-site or to the environment.[8] The Texas law also limits its immunity provision to those violations that are reported to the appropriate state agency.[9]

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[7] January 31, 1996 letter from Lois J. Schiffer, Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice to Steven Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency.

[8] Texas Environmental, Health and Safety Audit Privilege Act, 74th Leg., R.S., Ch. 219 § 10(b)(7), 1995 Tex.Sess.Law Serv. 1963 (Vernon).

[9] Id. at § 10(b)(1).

2. **Myth 2: A privilege will hide serious environmental impacts.**

EPA and DOJ apparently also believe that privilege and immunity statutes will block discovery of, and remedies for, serious environmental impacts. Audit privilege legislation enacted by the various states requires that the violations which are uncovered be corrected promptly. This requirement will, in and of itself, reduce the chances of serious environmental harm occurring, because the auditing facility has an additional incentive to correct the violation and remedy any harm. Further, privilege laws do not undo the obligation which companies have under a variety of federal, state and local laws to remedy any environmental damages. If a state or federal law requires that a spill of a hazardous chemical be cleaned up and any contamination of soil or water be remediated, the existence of an evidentiary privilege for the audit that uncovers the past occurrence of the spill does not change the remediation obligation under law. Certainly the privilege does not alter any liability that an auditing facility has to third parties who may be harmed by that entity's environmental violations. The privilege typically means that, in certain particular circumstances, plaintiffs' lawyers cannot obtain audits and use them as client development devices. In circumstances where there is independent evidence of harm to a third party -- in situations of legitimate liability -- the fact that a privileged audit exists will neither relieve the perpetrator of liability nor relieve the third party of its burden to prove that there has been environmental harm caused by the defendant's actions.

3. **Myth 3: A privilege prevents the public from having information about their own community.**

The argument that a privilege undercuts the public's right to know of the environmental issues in their community ignores the facts that there are legitimate limitations on the right-to-know concept and that state and federal environmental laws already provide for many mandated public disclosures. The Emergency Planning and Community Right-to-Know Act

("EPCRA") is based upon the very principle that the public does have a right to know if there are hazardous chemicals in their communities.[10] This same statute is the source of the annual Toxic Release Inventory ("TRI"), a report which regulated entities must file every year describing the disposition of any hazardous chemical or substance which has been on their property during that year. Other environmental statutes and regulations require regular reporting of monitoring results from a regulated entity's activities, such as discharge monitoring reports under the federal Clean Water Act. The existence of these self-reporting requirements eases the way for regulators bringing enforcement actions and for private parties to bring citizen suits or toxic tort suits. In any case, there is already a plethora of environmental reporting required by law that likely would not be subject to any audit privilege.

For those regulated entities who conduct environmental audits, in addition to the mandated reporting described above, the presence in the public domain of more information may lead to more allegations of violations, more enforcement actions and more lawsuits, even though those regulated entities are the very ones who, by conducting the audit in the first place, are attempting to attain better compliance. The regulated entities who do not conduct audits may give the appearance of having better environmental compliance, but that may be the result of the fact that failing to look for violations will always lead to a failure to discover violations. After more than twenty-five years of experience with environmental regulatory programs, it is evident that the "bad actors" often appear to be "good guys" when in fact they have failed to undertake the extra effort to discover and correct situations of noncompliance.

4. **Myth 4: Auditing entities have no need to worry about how audits will be used if they are publicly available.**

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[10] 42 U.S.C.A. §§ 11001 to 11050.

Though it is true that environmental audits have been used against regulated entities in only a few cases, the perception held by these entities is what motivates their actions as to whether to proceed with audit programs. A survey of various industries regarding environmental audits found that in the chemical industry (an industry that has certainly benefited from a commitment to auditing), the reason most often cited for not conducting environmental audits was the fear of resulting information being used against the company.[11] The perception that audit results will be used by regulators, prosecutors, and plaintiffs' attorneys has caused regulated entities who otherwise could benefit from conducting audits to either refrain from doing so or attempt to use other means to prevent disclosure of findings of violations. For instance, many regulated entities try to protect their audits by using the attorney-client or work product privileges, with the disadvantages and limitations inherent in those privileges. Other entities have decided to write the audit report in such sanitized language that the report does not clearly set forth the discovered violations for those who have the ultimate responsibility of addressing the problems found. These various responses by regulated entities all make sense from a liability perspective, but they do not advance the public policy goal of encouraging regulated entities to diligently seek out their noncompliant activities and correct them.

III. PENALTY IMMUNITY

In addition to an evidentiary privilege, a companion issue in providing incentives for voluntary compliance is the concept of immunity from penalties for companies who promptly report and correct environmental violations. Some states have adopted penalty immunity without

[11] See, Price Waterhouse, L.L.P., The Voluntary Environmental Audit Survey of U.S. Business, March 1995.

the audit privilege; others have embraced both as related elements in their attempts to encourage regulated entities to investigate, report and correct any violations.

EPA, while it objects to the notion of an evidentiary privilege, has accepted the idea of partial immunity from penalty for reporting and correcting violations.

A. EPA ENVIRONMENTAL SELF-POLICING POLICY

In EPA's Final Policy Statement, issued on December 18, 1995[12], and supported by DOJ, EPA offers to not seek (or reduce) gravity-based (i.e. non-economic benefit) penalties for those facilities that discover violations through voluntary environmental audits or efforts which reflect a regulated entity's due diligence to prevent, detect and correct violations, provided that the company satisfies all of EPA's nine conditions.

EPA will eliminate all of the gravity-based portions of any penalty for violations that are found through auditing, if the violations are promptly disclosed and corrected. If the company demonstrates that it has a compliance management system that meets EPA's criteria for "due diligence", the gravity-based portion of the penalty will also be waived. EPA, however, expressly reserves the right to collect "any economic benefit" that may have accrued to the company as a result of the delay in its compliance.[13] [The "economic benefit of noncompliance" concept for quantification of penalty amounts is an agency developed theorem that is the subject of substantial debate.]

Even if the company does not perform an environmental audit and cannot demonstrate that it has a compliance management system qualifying as due diligence, EPA will

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[12] "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violation" 60 Fed. Reg. 66706, December 22, 1995.

[13] 60 Fed. Reg. 66706, 66712 (December 22, 1995).

waive 75% of the gravity-based portion of the penalty if the violation is voluntarily discovered, promptly disclosed and expeditiously corrected and EPA's conditions are met.[14]

EPA will not recommend for criminal prosecution a regulated entity that has voluntarily discovered violations through an audit and has voluntarily disclosed these violations to the government. This immunity from criminal prosecution does not apply where corporate officials are consciously involved or willfully blind to violations or conceal or condone noncompliance.[15]

The conditions that facilities must meet in order to qualify for the immunities described above are:

1. Discovery of the violation through an environmental audit or " an objective, documented, systematic procedure or practice reflecting due diligence" (even if this condition is not met, the company may still be eligible for a 75% reduction in the gravity-based penalty).[16]

2. Voluntary discovery and prompt disclosure to EPA. This condition applies to any violation that is voluntarily discovered, even if the violation is required to be reported under another law or regulation. The immunity does not apply, however, to a violation which is discovered through a required mechanism such as emissions monitoring required by statute or regulation. Such violations are not "voluntarily" discovered.[17]

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[14] 60 Fed. Reg. 66706, 66711 (December 22, 1995).

[15] Id.

[16] 60 Fed. Reg. 66706, 66711 (December 22, 1995).

[17] 60 Fed. Reg. 66706, 66711 (December 22, 1995).

3. The disclosure "made to EPA" must be within 10 days of discovery of the violation.[18]

4. Discovery and disclosure must be made by the entity independently (i.e. prior to commencement of any regulatory agency inspection; information request; citizen suit notice; legal complaint by third party; whistleblower employee report; or imminent discovery by a regulatory agency.)[19]

5. Expeditious correction and remediation. The violation must be corrected within 60 days or the facility must provide written notice to EPA that the violation will take longer than 60 days to correct.[20]

6. Prevention of recurrence. The facility must take steps to prevent recurrence of the same violation in the future.[21]

7. No repeat violations. The same or a 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 over the past five years at other facilities owned by the same entity.[22]

8. Exclusion of some violations. Penalty immunity is not available for violations of specific terms of an order or consent agreement. Immunity is also not available

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[18] Id.

[19] Id.

[20] Id.

[21] Id.

[22] 60 Fed. Reg. 66706, 66712 (December 22, 1995).

for violations that result in serious actual harm or an imminent and substantial endangerment to public health or the environment.[23]

9. Cooperation. The facility must cooperate with EPA, including possible assistance in determining the facts surrounding the disclosed violation and any related violations that may be suggested by the disclosure.[24]

EPA's policy is quite lenient in some respects. It essentially permits a company that accidentally or otherwise discovers violation to reduce their penalty by 75% through prompt disclosure and correction. The policy is broader in this respect than many similar policies adopted by states. The Texas statute, for example, provides immunity only for violations discovered as a result of environmental audits, and the company must have notified the state in advance of its intention to conduct an audit before the immunity will apply.[25]

The EPA policy also continues to suffer from several shortcomings. For instance, the policy does not apply "where corporate officials are consciously involved in or willfully blind to violations or conceal or condone compliance."[26] Thus, culpability of corporate officials is left wide open to interpretation, since reasonable people can differ over what condoning non-compliance means or what sequence of events constitutes "willfully blind to violations."

B. Shortcomings of EPA Environmental Self-Policing Policy

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[23] 60 Fed. Reg. 66706, 66712 (December 22, 1995).

[24] Id.

[25] Texas Environmental, Health and Safety Audit Privilege Act, 74th Leg., R.S., Ch. 219 § 10(g) 1995 Tex.Sess.Law Serv. 1963 (Vernon).

[26] 60 Fed. Reg. 66706, 66711 (December 22, 1995).

EPA uses the breadth of its policy as an argument that no evidentiary privilege for environmental audits is necessary. To the contrary, a company is not adequately protected by the penalty immunity alone.

EPA's waiver of penalties and commitment not to seek disclosure of audits as an enforcement tool does not prevent a company from being subject to enforcement at the state or local level or to third party lawsuits by prosecutors and plaintiffs' lawyers who inevitably will seek to obtain an audit to use as a litigation guide. The agency has also cleverly disguised its intent as to how environmental audit reports will be treated under the new self-policing policy. The certainty provided by EPA is that invitation of environmental investigations will not be premised upon requests for audits.[27] However, if EPA has "independent reason to believe" that a violation has occurred -- EPA also makes clear that authority to seek "any information" relevant to finding violations.[28] What constitutes "independent reason to believe" is left to the reader's imagination! Is it a citizen complaint? What about allegations made by a disgruntled or recently discharged employee? Or, better yet, an EPA employee being aware of a violation of a minor recordkeeping requirement certainly meets this low threshold for requesting an environmental audit. Likewise, as DOJ has clearly stated once it has received information that a regulated entity has committed violations of environmental law, "the Department seeks all relevant information, including audit reports."[29]

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[27] 60 Fed. Reg. 667056, 66711 (December 22, 1995).

[28] Id.

[29] January 31, 1996 letter from Lois J. Schiffer, Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice to Steven Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency.

EPA's policy is one step toward a full realization that environmental protection must rely on voluntary compliance, and it is a good step. Unfortunately, however, EPA has steadfastly refused to take the next logical step that would move environmental protection into a new realm of compliance, supporting an evidentiary privilege for environmental audits and full penalty immunity for those acting in good faith to promptly report and correct noncompliant situations. Only when both steps are taken together will we have in place positive incentives that generate the sort of "ownership" of environmental issues by the upper management level of all regulated entities of all sizes and types to take aggressive and affirmative steps to protect the environment.

IV. CURRENT STATUS OF STATE LEGISLATION

This public policy goal and the obvious advantage of a privilege and penalty immunities in achieving that goal are such that fourteen (14) states have enacted some type of privilege legislation. (The states are Arkansas, Colorado, Idaho, Illinois, Indiana, Kansas, Kentucky, Minnesota, Mississippi, Oregon, Texas, Utah, Virginia, and Wyoming.) Penalty immunity of some type is provided for in the legislation in eight (8) of these states (Colorado, Idaho, Kansas, Minnesota, Mississippi, Texas, Virginia and Wyoming). In Michigan, a bill establishing a privilege and providing penalty immunity has passed both the House and Senate and is awaiting presentation to the Governor, who has previously indicated his approval. Likewise, the New Hampshire Legislature has passed a bill containing both privilege and immunity provisions that has been sent to the Governor. The South Dakota Legislature has recently passed a bill providing only penalty immunity which is also awaiting signature by the Governor. Nine (9) other states, including Arizona, California, Iowa, North Carolina, Oklahoma, New Jersey, Ohio, Tennessee, and South Carolina, are considering legislation, which has already passed one branch of the

Legislature, establishing either environmental audit privilege or penalty immunity provisions, or both. Of these nine (9) states, all of these bills contain privilege provisions, except California where a separate bill on that topic is still pending. Various other states, *e.g.*, Alaska, Delaware, Florida, and Pennsylvania also have legislation pending that relates to the subject of establishing these incentives for voluntary discovery and prompt reporting and corrective action of environmental noncompliance events.

V. CONCLUSION

Environmental regulations are pervasive, voluminous and highly technical. Perfect compliance with them is a near-impossibility, and the chances of achieving high levels of compliance decrease with ever-increasing levels of complexity in the regulatory requirements. Given the expansive applicability of environmental requirements to virtually every business and governmental entity and the shortage of resources within federal and state governments, regulatory agencies are finding it increasingly difficult to adequately monitor compliance. Private citizens also lack the resources, as well as the knowledge, to regularly monitor the compliance of a complex industrial facility or major municipality whose operations are governed by highly technical environmental regulations. Typically, most citizens and some regulators do not become aware of a compliance problem until it is too late and the environment, or worse, human health, is affected. As societal attitudes have changed and developed in the past twenty-five years, the entity with the greatest resources, the greatest knowledge, and ultimately, the greatest interest in assuring compliance has become the regulated entity itself. Therefore, it only makes sense that the most effective tool toward environmental protection is the ability of the regulated entity to discover and correct its environmental compliance problems, before they become serious issues for the entire community. However, if the regulated entity legitimately fears that its very attempt to be a good citizen will result in lawsuits and enforcement actions over violations that might

otherwise never have come to light, it will naturally be reluctant to conduct thorough audits. This result shortchanges our citizenry and the environment.

Typically, environmental audit privileges are not absolute. They do not usually protect the underlying facts, and a regulated entity will lose the privilege if it is determined to have claimed it fraudulently. Through public education it is possible that some of the opposition to the environmental audit privilege can be eliminated. People should be assured that the privilege will not apply to those who claim it fraudulently, to information which is required to be reported under some other law, to deliberate violations of the law or in situations of imminent and substantial endangerment to the environment and human health. In other words, the issues about which most people are likely to be concerned are likely not to be covered by the privilege. On the other hand, the granting of the privilege, provides those regulated entities that are genuinely striving toward environmental compliance a tool to use in achieving compliance in the most effective way possible, without fear that that tool will be used to punish them for discovering, reporting and correcting their own violations.

Audit privileges and penalty immunities are, nevertheless, an incentive for regulated entities to conduct environmental audits. These audits promote candid, effective discussions within regulated entities as to the causes of, and solutions to, environmental noncompliance. By removing the incentive to hide noncompliance, the regulated entity can actually address the problem in the most constructive way possible and government can be assured that more entities will be encouraged to address their compliance status forthrightly.

Environmental regulation has for the last twenty-five years focused on the "command and control" model. As a result, we have developed an extremely complicated regulatory scheme, while government at all levels lacks the resources necessary to ensure compliance by all members of the regulated community. Thus, the model for environmental regulation has become outdated

and needs to change. The move to an environmental regulation model that focuses on and encourages voluntary compliance is the key to further rational regulation to protect environmental values. It is in the best interest of any regulated entity to be a good corporate citizen, and to the extent that an entity is free to investigate itself without the fear of providing a "road map to prosecution" or the imposition of monetary penalties for its good behavior that entity will be better able to attain compliance with the regulations and to ensure environmental protection. In addition, our regulatory agencies will be able to direct their limited enforcement resources at those among the regulated community that do not strive to be good citizens.

Alaska Forest Association, Inc.

111 STEDMAN SUITE 200
KETCHIKAN, ALASKA 99901-6699
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.

APR 10 1996

ALASKA MINERS ASSOCIATION, INC.

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

March 8, 1996

Honorable Loren Leman
Chairman, Resources Committee
Alaska State Senate
Capitol Building
Juneau, AK 99801

RE: CSSB-199(FIN), Relating to Environmental Audits

Dear Senator Leman,

The Alaska Miners Association wishes to go on record in support of CSSB-199(FIN). This bill involving voluntary self audits is a very good and positive step for the State, for industry and for the public.

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

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

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

Sincerely,

Steven C. Borell, P.E.
Executive Director

Senate Bill 199

Environmental, Health and Safety Self-Audit Legislation

- distributed by Senator Loren Leman -

Senate Bill 199 is designed to increase compliance with environmental, health and safety laws by encouraging regulated entities to conduct voluntary audits of operations and programs, identify violations, and take corrective action.

As the budgets of regulatory agencies are reduced both at the federal and state level, the importance of encouraging a system of self-policing becomes even more important. SB 199 creates incentives for voluntary compliance by offering limited immunity for violations that are discovered through a self-audit, provided that the noncompliance is promptly reported and corrected.

In addition, SB 199 establishes a privilege for the information gathered from a voluntary self-audit report, which prevents this information from being used as a "road map to prosecution" by government officials, or from being used by hostile third parties.

17 states have now adopted laws providing for some form of privilege and/or immunity to encourage environmental self-auditing. 9 other states have seen similar legislation approved thus far by at least one house of the legislature. In addition, legislation has been introduced in Congress which would apply these principles at the federal level.

Although self-auditing legislation has grown ever more popular across the nation, SB 199 has been criticized by some environmental lobbyists, labor union leaders, and representatives of the Knowles Administration. Some of the arguments raised against SB 199 are rooted in a basic misunderstanding of the legislation. But other arguments stem from a genuine philosophical disagreement on how regulators and the regulated community ought to interact with one another.

Responses to these objections can be found on the attached pages. In many cases, these objections have been lifted verbatim from testimony given before the Senate Resources and Senate Finance Committees, or from publications.

safety, or environmental concerns." *[Newsletter of Local 71, Public Employees Union, March 13, 1996]*

"SB 199 is a dangerous bill. It puts the 'fox in the henhouse' when it comes to workplace safety." *[Local 71 Business Manager Don Valesko, same newsletter]*

Response: SB 199 does not "replace" existing tools used by regulatory agencies to promote compliance, e.g., inspections, reporting requirements, maintenance of records, etc. But it does encourage more companies to engage in "self-policing", in recognition of the fact that regulatory agencies will never be able to adequately monitor more than a tiny percent of the regulated entities under their authority.

The privilege and immunity provisions in SB 199 are tightly drawn so that "bad actors" will not get any breaks.

For example, the self-audit privilege cannot be used to protect information that is already required to be collected, maintained, developed, or reported under an environmental or health and safety law, or which is required as part of a license or contract agreement with the state.

Likewise, there are several conditions that must be met in order to qualify for immunity:

- the violation must have been detected through a voluntary environmental or health and safety audit.

- the regulated entity must have provided advance notice of intent to perform the audit in order to qualify for immunity for any violations that are discovered.

- upon discovery, the violation must be promptly disclosed to the appropriate regulatory agency via certified mail, and the non-compliance must be corrected within a reasonable time.

- the violations disclosed must not have resulted in substantial off-site harm or substantial injury to persons on-site.

- the violations disclosed must not have been independently detected or already the subject of an investigation before the voluntary disclosure was received by the agency.

CORRECTION

THE FOLLOWING DOCUMENT(S)
HAVE BEEN REFILMED TO
ASSURE LEGIBILITY OR PAGINATION

Central Microfilm Services
Departement of Education
State of Alaska

Rev. 5/98

Senate Bill 199

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SB 199 -- Responses to Common Arguments

Argument: "The privilege [in SB 199]... creates a secret. It withholds information from the public and from the regulatory agency. And it has the real potential to increase public suspicion about the activities and motivations of the company. We believe that this would actually decrease cooperation." *[testimony from the Department of Environmental Conservation (DEC), January 31, 1996.]*

Response: There is nothing unprecedented about "secrets", at least when a public interest is served by maintaining confidentiality. For example, Alaska has a statute (AS 18.23.030) which establishes a privilege for the proceedings and records of physician peer review panels. These are kept "secret" under the rationale that it serves a public health interest. The peer review panels encourage an honest dialogue among physicians about their performance and the effectiveness of certain patient treatments. Such frank discussions are valuable in helping the medical profession improve patient treatment. But the honesty and frankness of these proceedings would be jeopardized if the physicians involved believed that their comments and findings could be subject to discovery in a medical malpractice suit. Consequently, Alaska and every other state in the country have passed laws establishing privilege for these peer review groups.

There are other examples which clearly recognize that confidentiality is sometimes necessary to advance a public interest. On March 29, the Knowles Administration issued a press release announcing that the state and Marathon Oil Company had reached an out-of-court settlement for $5 million, pertaining to disputed amounts owed by Marathon under the Net Income Tax Act from 1988 to 1990. The press release states that "Both sides are *bound by a confidentiality agreement that precludes further discussion of the issues with third parties.*" [emphasis added] This suggests that the Knowles Administration is keeping "secrets" from the public. We presume that, if asked to defend this, the Administration would argue that the *public interest* in securing $5 million for the state treasury justifies the confidentiality provision.

There are other privileges that exist under current law, such as the attorney-client privilege and the work product doctrine, which recognize that there are circumstances in which confidentiality serves a legitimate public interest. The premise of SB 199 is that the public's interest is served by increasing compliance with environmental, health and safety laws. The self-audit privilege provides an incentive to conduct compliance audits, by removing the fear that the audit report will be used as a "road map to prosecution".

Argument: "... SB 199 would make workplaces more dangerous for employees by allowing companies to inspect or audit themselves for health,

safety, or environmental concerns." *[Newsletter of Local 71, Public Employees Union, March 13, 1996]*

"SB 199 is a dangerous bill. It puts the 'fox in the henhouse' when it comes to workplace safety." *[Local 71 Business Manager Don Valesko, same newsletter]*

Response: SB 199 does not "replace" existing tools used by regulatory agencies to promote compliance, e.g., inspections, reporting requirements, maintenance of records, etc. But it does encourage more companies to engage in "self-policing", in recognition of the fact that regulatory agencies will never be able to adequately monitor more than a tiny percent of the regulated entities under their authority.

The privilege and immunity provisions in SB 199 are tightly drawn so that "bad actors" will not get any breaks.

For example, the self-audit privilege cannot be used to protect information that is already required to be collected, maintained, developed, or reported under an environmental or health and safety law, or which is required as part of a license or contract agreement with the state.

Likewise, there are several conditions that must be met in order to qualify for immunity:

- the violation must have been detected through a voluntary environmental or health and safety audit.

- the regulated entity must have provided advance notice of intent to perform the audit in order to qualify for immunity for any violations that are discovered.

- upon discovery, the violation must be promptly disclosed to the appropriate regulatory agency via certified mail, and the non-compliance must be corrected within a reasonable time.

- the violations disclosed must not have resulted in substantial off-site harm or substantial injury to persons on-site.

- the violations disclosed must not have been independently detected or already the subject of an investigation before the voluntary disclosure was received by the agency.

- the person making the disclosure must not have committed the violations knowingly or recklessly, and must not have a history of repeated violations.

- the regulated entity must release (upon request) to the appropriate regulatory agency the portion of the audit report dealing with compliance plans and/or corrective action, and must work with the regulatory agency to address these issues.

The above are just some of the conditions and caveats that apply to the immunity provision. It is designed to benefit those regulated entities who have unintentionally violated the law, but who have acted as good citizens by voluntarily reporting and correcting the problems.

Argument: "The definition of 'environmental or health and safety law' has not been clarified. ... there are many laws which may be considered 'environmental' or 'health and safety' related. We are aware that other agencies have a similar concern -- are they included in this bill or not? We believe that clarity on this issue is important." *[Statement of DEC Representative, 03-08-96]*

Response: SB 199 defines "environmental or health and safety laws" as meaning federal and state statutes dealing with the environment, and occupational health and safety. It also includes rules, regulations, and municipal ordinances adopted to implement these laws. The bill also has an additional subsection which states: "To fully implement the privilege..., the term 'environmental or health and safety law' *shall be construed broadly.*" [emphasis added] By the plain language of the bill, then, the definition is meant to be *broad and inclusive.* All statutes which can reasonably be identified as concerned with environmental protection, or occupational health and safety, are included.

Argument: "How the audits are done, who may conduct them, and the scope of the audit report remains problematic... The proposed committee substitute allows the audit to be done by an employee, even if that employee has no ability to carry out the audit recommendations. The audit must be done by someone who not only knows what they are doing, how the facility does or should operate, and what the rules are, but also by someone who can, or who is working under the specific direction of the person who can, commit the company to whatever corrective action may be necessary." *[statement from DEC, 03-08-96]*

Response: These concerns are puzzling. Due to the varying sizes of the businesses that will be covered by SB 199, it is possible that self-audits of smaller businesses might be performed personally by the owner or operator. On the other hand, it is equally likely that a larger corporation would delegate an

employee or contractor to perform the task. The procedures will vary from business to business depending on the size, complexity, and type of operations. Accordingly, SB 199 provides for flexibility in this area.

The concern that the audit should be performed by someone who "knows what they are doing" is very curious. Businesses are already required to file taxes and other complicated paperwork with government regulators. There is no requirement that these tasks be performed by someone "competent", but businesses ordinarily make sure these tasks are performed by qualified personnel, just so the job isn't messed up.

The same dynamic works with SB 199. In order for a business to ensure that it benefits from the immunity provisions in SB 199, a process must be followed: advance notice of the audit, prompt disclosure of noncompliance via certified mail, cooperation with regulators to correct any problems, etc. It is inconceivable that a business would assign such a task to, say, a part-time intern. Such poor management would place in jeopardy any benefits that would have otherwise been available under the bill.

There are textbooks and a sizable amount of literature which describe the self-auditing process for businesses; this is not an untested or ill-defined concept. Nevertheless, SB 199 provides guidance on what types of documents would ordinarily be included in an audit report, including: a description of the scope of the report, information gained from the audit, findings, conclusions, recommendations, exhibits, and appendices. Supporting information might include interviews with current or former employees, field notes and records of observations, laboratory analyses, legal analyses, photographs, and computer-generated information. Once again, the specific components of the audit report will vary from business to business, depending on the size and nature of the operations.

Argument: "We believe protecting criminal actions through the privilege or through immunity is bad public policy." *[DEC Statement, 03-08-96]*

Response: this objection is premised on the belief that it would be sufficient to apply the audit privilege and the immunity provision to administrative and civil proceedings only.

However, the inclusion of privilege and immunity for criminal proceedings is necessary because the standard of intent for determining criminal conduct in the area of environmental law is unusually low.

Consider the opinion of Kevin Gaynor, a former enforcement attorney with the Environmental Protection Agency and the Department of Justice, now serving as an environmental law attorney with the Washington, D.C. firm of Vinson & Elkins:

"Today, industry and individuals face a pervasive regulatory scheme governing environmental compliance, which in breadth and complexity now exceeds requirements under the Internal Revenue Code. At the same time violators of environmental regulations... are seeing an increasing criminalization of their conduct. This criminalizing occurs with little predictability as to when a violation will be prosecuted criminally rather than civilly or administratively. Central to this increased criminalization and directly responsible for this lack of predictability is the low, general intent standard in the various environmental statutes as construed by the courts. This standard is lower and more easily provable than the specific intent standard...

"Under this very low standard, any activity that technically violates the complex and often arcane requirements for handling pollutants and wastes can be criminally prosecuted. The low standard is particularly troubling in view of.... the government's continuing inability to clearly distinguish criminal from civil violations." *[Environmental Reporter, 03-10-95, p. 2206]*

If the self-audit privilege and related immunity provisions were applied to civil and administrative proceedings only, but not to criminal proceedings, it would create an enormous incentive for regulatory agencies to pursue a criminal prosecution as the only available option. There is abundant evidence that criminal cases are already being pursued when an administrative or civil proceeding is more appropriate. Amending the legislation in the manner suggested by critics will only exacerbate this problem.

However, SB 199 does contain provisions, described ealier in this document, to ensure that "bad actors" will not benefit from this legislation.

Argument: SB 199 is not needed in Alaska. Unlike other states, the regulatory agencies and the regulated community in Alaska enjoy a cooperative relationship. SB 199 is trying to fix something that isn't broken.

Response: Actually, the "regulated community" in Alaska does *not* sense that everything is just fine with the way environmental and health or safety regulations are enforced. That is why SB 199 has been endorsed by the Alaska Oil and Gas Association, the Alaska State Chamber of Commerce, the Alaska Forest Association, and the Council of Alaskan Producers, among others.

Regional Citizens' Advisory Council / *"Citizens promoting environmentally safe operation of the Alyeska terminal and associated tankers."*

☑ In Anchorage: 750 W. 2nd Ave., Suite 100 / Anchorage, Alaska 99501-2168 / (907) 277-7222 / FAX (907) 277-4323
☐ In Valdez: 154 Fairbanks Dr. / P.O. Box 3089 / Valdez, Alaska 99686 / (907) 835-5957 / FAX (907) 835-5926

April 16, 1996

Representative Joe Green, Co-Chair
Representative Bill Williams, Co-Chair
House Resources Committee
Alaska State Legislature

Re: SB 199, Environmental and Health/Safety Self-Audits

Dear Reps. Green, Williams and Members of the Committee:

The Regional Citizens' Advisory Council of Prince William Sound (RCAC) is an independent non-profit corporation whose mission is to promote environmentally safe operation of the Alyeska terminal and associated tankers. The work of the RCAC is guided by its contract with the Alyeska Pipeline Service Company and the Oil Pollution Act of 1990. RCAC is certified as an alternative council under Section 5002 under the Oil Pollution Act of 1990.

RCAC's 18 member organizations are communities and boroughs impacted by the 1989 Exxon Valdez Oil Spill, as well as commercial fishing, aquaculture, Native, recreation, tourism and environmental representatives.

We appreciate the opportunity to comment on SB 199. We do support the bill's fundamental goal: to foster greater compliance with environmental, health and safety requirements through a cooperative approach that encourages regulated entities to find and correct problems, themselves. In its current form, SB 199 would not accomplish that goal. Indeed, as now written, it would invite abuse, generate more public distrust and cynicism, and widen the chasm between regulators and the entities they are charged with overseeing.

We recommend the following changes:

• Eliminate the self-audit privilege. This provision would create a shield that is far too broad and interferes with the public's right to know. The privilege apparently was included as an incentive to encourage regulated entities to conduct self-audits. But the EPA found in the course of developing its own policy on self-audits, that such a golden carrot is not necessary. Other incentives – chiefly, immunity from punitive penalties for violations discovered through a self-audit – are sufficient to encourage self-auditing.

We suggest instead that the regulatory agency agree to not request or use an environmental audit report to initiate a civil or criminal prosecution of a self-disclosed violation. This is the provision used by the EPA in its policy and it

makes much more sense. It ensures both fairness to the regulated entity and appropriate protections to the public.

• Add more precision to the language of the standards. As written, the bill is very vague. For example, disclosure of a violation must occur "promptly." The EPA policy requires disclosure within 10 days. There are numerous other instances in the bill where standards are vague and open to broad interpretation.

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

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

- the violator should not be able to disclose a violation and invoke immunity after notice of a citizens' suit or whistle blower complaint;

- the violator should not be able to disclose a violation and invoke immunity if the violation imminently and substantially endangered the public or the environment (the bill now forecloses immunity only if the violation caused actual substantial injuries);

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

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

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

Sincerely,

H E Stanley

For Louis "Tex" Edwards, President

cc: RCAC Board of Directors
Meg Sudduth, Alyeska Pipeline Service Co.

Official Business

COMMITTEE: HOUSE RESOURCES

DATE: April 23, 24 1996

SIGN-IN

Subject of meeting: SB 199, ENVIRONMENTAL & HEALTH/SAFETY AUDITS

PLEASE PRINT!

NAME	ADDRESS (MAILING) & (ZIP)	PHONE	REPRESENTING	DO YOU WANT TO TESTIFY?
Bob Bundy				
Janice Adair	555 Cordova Anchorage 99501	269 7645	DEC	yes
Doug Mertz	319 Seward, Jnu	586-4004	Prince William Sound RCAC	yes
Nancy Weller	PO Box 110660	465-3355	Division of Medical Assistance	yes
Kirsten Tinglum	1130 W. 6th Ave Anchorage 9950	276-4331	AK. Asso. Trial Lawyers	YES
Robert Rundy	222 W. 7th Ave #253, Anchorage 99513	271-5071	U.S. Attorney	yes
Marie Sansone	AG's Office, Civil Div.-Jnu	465-6726	AGO	yes
Nancy Weller	Po. Box 110660	465-3355	Division of Medical Assistance	yes
Sara Hannan	PO Box 22151	463-3366	AEL	yes
Mike Pauley	State Capitol Room 115	465-2095	Sen. Leman	YES

Official Business

COMMITTEE:

HOUSE RESOURCES COMMITTEE
4:00 p.m. MEETING

DATE: APRIL 24, 1996

SIGN-IN

Subject of meeting:

SB 199, ENVIRONMENTAL & HEALTH SAFETY AUDITS

PLEASE PRINT!

NAME	ADDRESS (MAILING) & (ZIP)	PHONE	REPRESENTING	DO YOU WANT TO TESTIFY?
NANCY WELLER	~~DHS~~ PO Box 110600 JUNO	465-3355	Division of Medical Assist	yes
Marie SANSONE	AGO MS 0300; Civil Div. - Jnu	465-6726	LAW	yes
Will let her written Testimony I am LaBille	217 Second St #201 Jno	586-2323	AK State Chamber	yes
mike Lawley			Sen Lemmons aide	yes

9-LS1312\U
Lauterbach
4/30/96

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

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

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

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

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

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

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

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

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

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

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

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

(1) the audit report is privileged under (a) of this section and is

inadmissible in the same proceeding;

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

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

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

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

(C) custodian of the audit results.

(c) A person who conducts or participates in the preparation of an environmental audit and who has actually observed or participated in instances or events being reviewed for compliance may testify about those instances or events in any proceeding but may not, in a proceeding covered by (a) of this section, be compelled to testify about or produce documents related to the preparation of or a privileged part of an environmental 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 law, except as otherwise provided in

AS 09.25.475; or

(2) authorize a privilege for uninterrupted or continuous environmental 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 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 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 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 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 law, under a permit issued under an environmental 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 audit report;

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

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

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

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

(c) An audit report is not privileged and is admissible as evidence and subject to discovery if the report was commenced after the owner or operator knew of an impending inspection or investigation by a regulatory agency.

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

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

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

(1) the disclosure 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 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 or civil 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) An administrative or civil penalty that is imposed on a person for violation of an environmental 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 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 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 audit at a time. Once initiated, an audit shall be completed within the time period specified in the notice except that the audit period may be extended once for up to 60 days if the facility gives notice of the extension and its duration to the appropriate regulatory agency by certified mail before the original time period expires.

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

(h) The immunity under this section does not apply if a court or administrative law judge finds that the person claiming the immunity has

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

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

(i) A violation that has been voluntarily disclosed and to which immunity applies must be identified in a compliance history report as being voluntarily 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 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 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 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 audit" means a voluntary, confidential, critical, internal, and retrospective review, evaluation, or analysis of current or past conduct, practices, and occurrences and their resulting consequences, including an assessment that is a part of the owner's or operator's compliance management system, that is conducted randomly, regularly, or in response to a particular event by an owner or operator or by an employee or independent contractor of an owner or operator and is

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

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

(3) "environmental law" means

(A) a federal or state environmental law; or

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

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

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

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

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

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

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

(b) To fully implement the privilege and immunity established under AS 09.25.450 - 09.25.490, the term "environmental law" shall be construed broadly. However, the term "environmental law" may not be construed so broadly as to include a law governing occupational health and safety, and the term "environmental audit" may not be construed to include a health and safety audit.

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

April 24, 1996
House Resources Committee
CSSB 199(FIN)

Comments of Assistant Attorney General
Marie Sansone

Thank-you Mr. Chairman. My name is Marie Sansone, Assistant Attorney General in the Civil Division, Natural Resources Section, Juneau.

The Department of Law has many concerns with CSSB 199(FIN). These concerns primarily arise out of the breadth and scope of the bill.

OVERVIEW OF MAJOR CONCERNS

Definition of "Environmental or Health and Safety Law"

First, the bill affects many laws. Under section 09.25.490(a)(3), the bill defines the term "environmental law" to include all federal and state environmental laws, and all municipal ordinances passed in conjunction with or to implement those laws. This would include not only the environmental programs in the Department of Environmental Conservation (DEC), but programs in the Department of Natural Resources, including forestry and mine reclamation; the Alaska Oil and Gas Conservation Commission, including regulation of oil and gas drilling and production and underground injection control; and Department of Fish and Game, including certain aspects of habitat protection.

The bill defines the term "health and safety law" in section 490(a)(3) to include all federal and state occupational health and safety laws, including any municipal ordinances passed in conjunction with or to implement these laws. This definition goes beyond the federal and state Occupational Safety and Health Acts, and includes all health and safety laws the come into play in an occupational setting. Because many laws are either considered occupational health and safety laws or are based upon such laws -- including the laws relating to workers' compensation, professional and occupational licensing, licensing

and certification of health care providers, and the medical assistance programs -- we have very serious concerns about scope of the bill.

CSSB 199(FIN) does not tell us which laws or programs are affected, but rather, in section 490(b), directs that the term "environmental or health and safety law" is to be broadly construed. Given the breadth of the definition, it is impossible to predict with any certainty the full impacts of the bill.

Definition of "Environmental or Health and Safety Audit"

Under section 09.225.490(a)(2), an audit may be performed at any time, by any person employed by or under contract with a regulated entity. CSSB 199(FIN) does not provide any assurances that the audit will be performed by an auditor who is independent, unbiased, and free from influence or conflict of interest. The bill does not require that the auditor have appropriate qualifications, experience, or training to conduct the type of audit being performed, nor does the bill provide any standards to guide the performance of the audit. Moreover, the bill does not require the individual initiating the audit have the authority to do so, nor does it address the question of whether that individual has the authority to bind the entity to take the actions necessary to correct the violations uncovered during the audit.

Definition of "Audit Report"

Under section 490(a)(1), the term "audit report" is broadly defined to include not only the report, but also all the underlying evidence -- interviews, field notes, records of observations, data, lab analyses, photos, maps, surveys, and so forth; all "other communications and documents associated with an environmental or health and safety audit"; and the implementation plan or tracking system developed to correct or prevent violations. With the exception of the implementation plan or tracking system under the immunity provisions of the bill, all this information becomes privileged by virtue of being associated with an audit.

Privilege and Immunity Provisions

CSSB 199(FIN) has two parts: It creates (1) the audit privilege; and (2) immunities from administrative, civil, and criminal penalties. The immunity provisions contain a number of limitations, such as the requirement that a regulated entity undertaking an audit give advance notice of the audit, complete the audit, and correct or initiate measures to correct the violations uncovered during the audit. The Department of Law is concerned that the limitations are poorly drafted, and will result in confusion and litigation. But, at least there are some limitations.

With respect to the privilege provisions of the bill, there really are no limitations. A person can claim the privilege without giving advance notice of the audit, without completing the audit, and without correcting the violations.

This causes us serious concern because, under section 09.25.450(a), the privilege can be asserted in all types of proceedings, not just enforcement actions. The privilege could be asserted in cases between private parties, as well as cases in which the state or municipalities are parties. It could be asserted by both plaintiffs and defendants. It applies in all types of civil cases, whether they are seeking monetary or equitable relief; all criminal cases; and all administrative proceedings, except for workers' compensation proceedings. The privilege applies to the State not only in its regulatory role, but also as a land owner and property manager. Evidence relating to environmental practices is vital in cases involving contaminated property and property valuation, such as condemnation proceedings.

When we take into account (1) the broad definition of environmental and health and safety laws; (2) the fact that anybody can conduct an audit at any time, and the audit doesn't have to result in corrective action; and (3) that the audit report includes any communication or document associated with the audit or the implementation plan or tracking system; the privilege created in CSSB 199(FIN) is so broad that it will operate like a vacuum cleaner to sweep up all evidence related to any health or safety problems or environmental problems.

BACKGROUND INFORMATION ON PRIVILEGES

To help explain why the Department of Law is so concerned with the audit privilege created in this bill, I would like to present some basic background information on "privileges" and other means of protecting sensitive information from disclosure.

Privileges

What is a "privilege"? The word "privileged" is not the same as the word "confidential." It is often possible to access and use confidential information, although this has to be done in a manner that protects the confidential information from further disclosure. Privileged information, however, cannot be accessed and cannot be used.

In the law, the concepts relating to privileges are very old. The concepts have been developed and refined by the courts, literally, over hundreds of years.

There are two ways evidence is privileged. First, evidence may be "privileged from disclosure." This means that even if a person is entitled to claim a privilege, that person may not be compelled to disclose the privileged information to any other person. It also means that the person claiming the privilege can prevent any other person from disclosing the information. If information is privileged from disclosure, you can't gain access to that information; you can't find out about that information.

Second, evidence is "privileged from use." This means that if the information is privileged, you can't use it in court. Even if all the parties in the courtroom know what the privileged information is, if the person entitled to claim the privilege hasn't waived the privilege, you can't use the information to prove your claim or to defend yourself.

Most of our evidence rules are designed to bring out in the open information that is important in determining the truth. We often describe litigation as a "truth-seeking" process; in cases where the facts are in dispute, the purpose of the

litigation is to find out what really happened. This aspect of litigation is reflected in the witness' oath, when the witness swears to tell "the truth, the whole truth, and nothing but the truth."

Privileges, however, conceal the truth. Privileges are differ from most rules of evidence because they are designed to keep information away from the people who need the information to make a decision. Privileges keep information away from the judge, away from the jury, away from the parties who might have used the information in their case, and away from the legislature. Privileges keep the "whole truth" away from decision-makers.

Privileges protect important information. Privileges are not used to protect trivial information. Privileges protect "probative" evidence -- evidence that would have helped prove a claim or a defense. Privileges protect "prejudicial" evidence -- evidence that if it had come to light, would have helped to disprove a claim or a defense.

So, if privileges conceal information that's important in making a decision that's correct, that's fair and just, why do we have privileges? When the courts or the legislature create a privilege, what they're saying is that -- even though this evidence is important; even though it would help a judge or jury decide a case; even though justice may not be served because the parties and the judge and jury do not have access to the whole truth -- it's more important to keep the evidence secret, because to do so furthers an important societal goal.

Usually that goal is to foster communications within an important relationship. For example, the husband-wife privilege fosters communications within a marriage and strengthens the marital relationship; the attorney-client privilege fosters candid disclosures so that the client can obtain sound legal advice and representation; the doctor-patient privilege fosters candid communications, allowing the patient to obtain appropriate treatment.

Privileges have certain characteristics. First, privileges are very narrow, because they keep important evidence away from the people who need that information to make correct

and just decisions. Second, privileges typically only protect communications, not the underlying evidence -- not the facts, documents, or tangible things that are important to deciding an issue. Third, there are usually exceptions to privileges. The exceptions are designed to promote fairness and prevent abuses of the privilege. For example, when a patient sues a doctor for malpractice, the doctor-patient privilege relating to the medical care in question ceases to exist. Fourth, privileges are often "qualified," meaning they can be overcome if a party cannot obtain the evidence any other way or only after great hardship and expense. This is important in circumstances where it becomes impossible to obtain evidence, such as when witnesses die or become unavailable, or when evidence is destroyed, or when tests cannot be repeated due to changed circumstances. Finally, privileges are usually waived by disclosure. A person claiming a privilege must intend to keep the information confidential and, in fact, keep it confidential. Once a person voluntarily discloses privileged information, he cannot later re-claim the privilege and restore it.

I mention these characteristics because they are traditional and because they are important in achieving just and fair and correct results. The audit privilege in CSSB 199(FIN) has none of these characteristics: (1) The audit privilege is broad, not narrow; (2) the audit privilege protects not only the self-evaluative communications, but all the underlying facts, documents, and tangible evidence; (3) there are no exceptions to the audit privilege;[1] (4) the audit privilege is an absolute, not

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[1] The April 23, 1996 workdraft provides several exceptions to the privilege in section 09.25.460: the privilege is asserted for a fraudulent purpose; the information is non-privileged; the report shows evidence of violations and reasonable efforts were not made to correct the violations; and the audit report was prepared for purposes of avoiding disclosure of information for an investigative, administrative, or judicial proceeding that at the time of the audit's report was imminent or in progress.

The party seeking disclosure under these exceptions has the burden of proving they apply. It is extremely difficult to prove the elements of fraud, or other intentional misconduct, as required by this provision. As we previously stated in the

a qualified, privilege; and (5) disclosure does not waive the privilege. As I'll discuss, the audit privilege, because it is so broad, and because it does not share the characteristics of traditional privileges, will cause major problems in all kinds of cases, for all types of litigants, private and public, plaintiff and defendant.

There's one last point on privileges. We already have two privileges on the books that protect certain types of sensitive information that is generated during an audit. First, both the statutes and the evidence rules recognize a privilege for trade secrets. Second, the attorney-client privilege is often asserted in connection with audits.

Exclusionary Rules

There are certain types of information that is not privileges, but it is excluded from evidence. One example is evidence of "subsequent remedial measures." Under Evidence Rule 407, if, after an accident or event, a person takes measures that

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Senate hearings, it will be virtually impossible for a litigant to prove an exception applies without full access to the information that is claimed to be privileged. Therefore, these exceptions are largely meaningless.

Even if we could muster the facts necessary to make a good faith assertion that an exception applies, the in camera procedure proposed in the bill creates a severe burden for the Criminal Division. As mentioned in our fiscal note, if the prosecutor is conflicted out of a case due to his review of privileged information, it will be necessary to retain outside counsel to prosecute the case. Moreover, the defendant will likely move to suppress evidence subsequently gathered by the state as "fruit of the poisonous tree," evidence gathered only because the state first learned of privileged information. Finally, the in camera proceeding will require the trial judge to spend extraordinary amounts of time in pretrial proceedings, sorting through the evidence before the case has been presented. The in camera proceedings contemplated in the bill would essentially be pre-trial mini-trials.

would have made the accident or event less likely to have occurred, a party cannot use evidence of those measures to prove negligence or culpable conduct. Similarly, under Rule 409, evidence concerning the payment or offer to pay medical expenses after an accident is not admissible to prove liability for the accident. Under Rule 408, settlement offers and settlements are excluded from evidence. These evidence rules are designed to encourage people to make repairs, to assist injured persons, and to resolve their disputes amicably.

Sometimes evidence is excluded by virtue of procedural rules, particularly in criminal proceedings. For example, defendants frequently file motions to suppress evidence on the grounds of improper searches and seizures. These types of rules are usually premised on curbing the abuse of power.

Protected Information

Under Rule 26(c) of the Civil Rules of Procedure, any party can obtain any court order necessary to protect against "annoyance, embarrassment, oppression, or undue burden or expense." The protective orders are tailored to the case at hand, and can include a variety of provisions such as orders that discovery or disclosure not be had; that discovery can be conducted, but only under certain circumstances; that only certain methods of discovery can be used; limiting the persons who can be present at a deposition; sealing depositions; protecting confidential research, development, or commercial information; and so on. In addition, litigants can assert the "work product doctrine" to protect their trial preparation materials, including audit reports, when these are prepared in anticipation of litigation.

Conclusion

There are many ways on the books already, in the Alaska Statutes and the Alaska Court Rules, to protect sensitive information, including the types of sensitive information that might be contained in audit reports. The audit privilege is not necessary. It lacks the characteristics of traditional privileges, characteristics that evolved over long periods of

time, to further the truth-seeking process, and to lead to fair and just results.

BACKGROUND INFORMATION ON THE AUDIT PRIVILEGE

A privilege is a very special way to treat information; and to create a new privilege is an extraordinary step that requires careful thought and study. So, how did the concept for the audit privilege come about?

CSSB 199(FIN) is patterned after a bill that passed in the State of Texas last year. It is one of a number of bills in the lower 48 concerning environmental audits. Oregon passed the first such legislation in 1993, in connection with a bill making the knowing violations of Oregon's air quality, water quality, and hazardous waste laws punishable as felony offenses and expanding the number of environmental crimes punishable as misdemeanors. Oregon's audit privilege legislation, then, was part and parcel of a compromise reached to increase the authorized severity of the penalties for environmental crimes. Oregon State Bar, Oregon Environmental & Natural Resources Law News (Aug. 1993).

Based upon a Westlaw review of audit legislation, the Texas bill appears to be the only bill that includes health and safety audits. It is one of the broadest bills, and poorly drafted. Apparently, it never received adequate review during the legislative process. The sponsor has removed several troubling provisions from the Texas bill in CSSB 199(FIN). However, the bill still has major problems.

The concept for the audit privilege in the Texas legislation and the other states grew out of a privilege created by the courts, called the "self-evaluative privilege" or the "critical self-analysis privilege." The legal schclars generally agree that this privilege was first recognized by the courts in 1970 in a case called Bredice v. Doctor's Hospital, Inc., 50 F.R.D. 249 (D.C.C. 1970), aff'd without opin., 479 F.2d 920 (1973). In the Bredice case, a patient died in a hospital. After the patient's death, the hospital held meetings in which the professional staff evaluated the patient's care and treatment. The deceased patient's estate sued the hospital for

medical malpractice, and sought discovery of any staff meetings in which the patient's treatment or death had been discussed. The court declined to allow discovery, finding that the retrospective review of patient care was valuable in improving the quality of health care available to the public, but that physicians would not be willing to candidly critique the actions of their colleagues if such reviews were subject to discovery and use as evidence in subsequent malpractice cases.

After Bredice, a number of courts followed the decision in medical malpractice cases, some experimented with extending it to other contexts, and some rejected it, even in the medical peer review context. Today, nearly all the states have enacted a statutory privilege that protects medical peer review communications. Alaska established a medical peer review privilege in AS 18.23.030. This is a very narrow privilege, and carefully crafted.

In general, the courts have rejected the self-critical analysis privilege in environmental cases. There is one recent exception, Reichhold Chemicals, Inc. v. Textron, Inc., 157 F.R.D. 522 (N.D. Fla. 1994). The courts have also generally rejected the self-critical analysis privilege in the context of public health and safety laws and in the context of a grand jury's power to subpoena evidence for purpose of investigating violations. See, e.g., cases discussed in Reichhold, 157 F.R.D. at 525-26.

In the Ninth Circuit, which includes Alaska, the federal appeals court has held that the self-critical analysis privilege, if it exists, does not protect routine internal corporate review of matters relating to safety concerns. See Dowling v. American Hawaii Cruises, Inc., 971 P.2d 423 (9th Cir. 1992). The court observed that corporations already have many incentives to conduct routine safety reviews, including the desire to avoid liability for unsafe conditions and the desire to avoid developing a reputation for having unsafe premises. The court also found that there would be no point to gathering information about safety hazards in the workplace and then keeping that information secret. Id. at 426. Nonetheless, while the court did not create a self-critical analysis privilege in Dowling, the court did not foreclose the possibility that it might recognize the privilege in appropriate circumstances. The Dowling court describes the criteria that must be met to claim a

self-critical analysis privilege. And, in fact, the Reichhold case relies upon Dowling to establish a self-critical analysis for environmental records in a private party lawsuit over a contaminated site.

The audit privilege proposed in CSSB 199(FIN), however, does not have the same characteristics or limitations as described in the Reichhold and Dowling cases. In federal court, the federal law of evidence applies in federal question cases and mixed cases that include federal and state law claims. Under Rule 501 of the Federal Rules of Evidence, the state law regarding privilege applies in a diversity case. Adoption of a state law audit privilege such as CSSB 199(FIN) that differs from the privilege described in Dowling would likely result in conflicting rules of evidence and practical difficulties in gathering and presenting evidence in federal court.

Another development in this area of the law is the adoption in December 1995 of EPA's Final Policy Statement on environmental audits. 60 Fed. Reg. 66,706 (1995). The EPA policy was developed after extensive debate and comment by many affected industries and corporate attorneys. It applies only to the laws implemented by EPA, which makes it easy to determine the policy's scope and effect. It allows full or partial offsets of administrative and civil penalties, providing certain conditions are met. The EPA policy also provides that under certain circumstances, there will be no referral for criminal prosecution. The EPA policy does not recognize an audit privilege, as the penalty offsets and non-referral policy are deemed adequate incentives to self-audit.

THE AUDIT PRIVILEGE HAS BEEN HEAVILY CRITICIZED

The audit privilege and immunity legislation -- both at the state and federal levels -- has come under heavy criticism from the law enforcement community. The United States Department of Justice and the Unites States Attorney strongly oppose the creation of statutory privileges for audit reports. The National District Attorneys Association, consisting of state and local prosecutors, opposes this type of legislation, as do many state Attorneys General. The reasons for the opposition are as follows:

First, the audit privilege is contrary to long-standing principles that privileges are narrowly construed and that there should be broad discovery. These principles seek to provide a level playing field and to provide parties the information they need to resolve disputes. In addition, there are already a number of mechanisms on the books that parties can use to protect sensitive information from disclosure.

Second, a broad privilege and immunity bill, if not carefully drafted, will end up promoting secrecy and fraud. It will create safe havens for polluters and remiss employers who are able to conceal evidence of their violations and frustrate enforcement efforts by dragging out proceedings through motion practice, in camera review mini-trials, and appeals.

Third, additional incentives to audit are unnecessary. Businesses already have many incentives: by conducting audits and making necessary corrections, they avoid enforcement actions and penalties; they reduce their tort liability exposure; they enjoy reduced insurance premiums; they reduce the money and productivity lost to on-the-job accidents; they are able to attract customers who want to know that the premises or products are clean and safe; they are able to take income tax deductions and credits for their repairs and improvements; their property is more marketable and valuable; they enjoy good relationships with the regulators; and they are good neighbors to their communities. It is simply not necessary to offer business and industry an additional incentive to audit.

Fourth, the audit privilege and immunity legislation gives bad actors an unfair economic advantage. For the most part, businesses and industries that engage in environmental crime or that intentionally violate labor safety standards do so for one reason, and that is to save money and increase their profits. Under the audit privilege and immunity legislation, the bad actors -- and it would be naive to think that they do not exist -- will have another means at their disposal to delay or avoid investing in compliance. They will be able to conceal evidence of their violations through the privilege; manipulate evidence to enjoy immunity; and frustrate and delay such investigations and enforcement actions as might be brought.

Fifth, the fact that many laws and permits today

require reporting does not mean that enforcement agencies and litigants do not need access to other evidence. Required reporting is not adequate when you take into account the class of violators that the enforcement agencies are concerned with: the violators who keep two sets of books, the true set and the set they submit to the government; the violators who falsify their reports; the violators who turn their pollution control equipment on to take their required readings and then turn it off; the violators who discharge their wastewater at night and take their samples during the day; the violators who switch sampling sites and methods to get good results. The companies who engage in fraud submit records alright; they submit false records. And these are the bad actors who will assert the audit privilege to conceal the true records.

Sixth, CSSB 199(FIN) authorizes the disclosure of certain information, including the implementation plan or tracking system, to state agencies under confidentiality agreements. Through these confidentiality agreements, the agencies will be reviewing and negotiating in secret about compliance, violations, necessary corrective actions, and cost recovery and damage assessments. The secret discussion and resolution of matters that normally would enjoy some degree of public participation and review can be expected, at a minimum, to result in mistrust of the regulatory agencies, and at the worst, to embroil the the agencies in controversy and allegations of collusion and coverup. Meaningful oversight of agency action -- whether by the public, the Ombudsman, Legislative Audit, or the Legislature itself -- will be difficult.

CONCLUSION

The state already has laws, policies, and practices that encourage audits, voluntary disclosure, and remedial measures. The Department of Environmental Conservation (DEC) has described its practices of working with businesses and individuals to correct and prevent problems. The pollution prevention program is available to assist businesses in developing auditing programs and preventive measures. In addition, DEC regulates the seafood processing industry through the "hazard analysis critical control point" or HACCP method. When the United States Food and Drug Administration (FDA) adopted

the federal HACCP regulations in 1994, the FDA acclaimed the DEC regulations as national model. See 59 Fed. Reg. 4142 (1994). The state's HACCP regulations place primary responsibility upon seafood processing industry to demonstrate that food safety hazards are identified, understood, prevented, and corrected. This approach requires candor and cooperation between DEC and the industry. An audit privilege that promotes secrecy and creates mistrust may undermine this program.

The Department of Labor has likewise presented testimony concerning its voluntary compliance program. This program conforms with federal requirements, and allows employers to defer enforcement inspections while they work together with the Department to correct deficiencies.

The Joint Pipeline Office (JPO), consisting of representatives from six state and five federal agencies, oversees the Trans-Alaska Pipeline System. In regulating the pipeline, the JPO relies heavily on safety audits performed by the Alyeska Pipeline Service Company. While these audits have detected numerous electric code violations, the JPO has worked cooperatively with Alyeska to promptly correct the violations. Penalties have not been assessed. In 1994, the JPO receive the national "Hammer Award" for innovative efforts in making government work better.

The Department of Law and DEC have used environmental audits in resolving environmental and public health problems. For example, during an inspection of the Kake Tribal Corporation's Point Macartney logging camp in 1993, DEC observed numerous violations. Previous enforcement efforts, over the course of many years, had failed to bring the camp into compliance. In an effort to achieve compliance and put into place measures to prevent future violations, the Kake Tribal Corporation, DEC, and Department of Law negotiated a compliance order by consent that called for the Kake Tribal Corporation to undertake a comprehensive assessment or audit of its facility, undertake remedial measures, and implement preventive measures in each area of concern. The DEC provided technical assistance throughout the process. In at least one instance, the Corporation reported and cleaned up a contaminated beach that the regulators had not discovered during their inspections. In other instances, the Corporation exceeded technical requirements,

provided hazmat training to employees beyond that required in the compliance order, and worked with the City of Kake to improve its spill response capabilities. The compliance order also required the payment of a civil assessment, representing compensatory damages and cost recovery. The Kake Tribal Corporation went on to play an instrumental role in organizing and presenting the Southeast ANSCA Presidents Association 1995 Environmental Compliance Conference, designed to promote cooperation among the regulators and regulated community in achieving environmental compliance.

Not one single instance has been presented where an Alaska state agency has used an audit report to initiate an enforcement action. It would be truly ironic to pass a law that purports to offer incentives to business to self-audit, when not only is there is no demonstrated need for that law, but when that law will undermine the efforts already underway in Alaska to encourage voluntary compliance, including innovative efforts that have received national recognition.

The real beneficiaries of this bill will not be the "moms and pops"; nor the businesses and industries that are good neighbors in their communities. The real beneficiaries will be the midnight dumpers; the fly-by-night operators who prey on one community after another; the companies that engage in fraud and submit false reports to the government; the companies that know they have violations and don't correct them -- this bill gives people who break the law another set of tools to hide their illegal conduct.

Recently, there are indications that the audit privilege and immunity legislation is not working in other states. The deputy attorney general for the State of Colorado, one of the first states to pass privilege and immunity legislation, stated at an environmental auditing meeting on January 20, 1995, that after the bills had passed in Oregon and Colorado, there was no significant increase in voluntary disclosure or compliance. See M.A. Mazza, The New Evidentiary Privilege for Environmental Audit Reports, 23 Ecology Law Quarterly 79, 136 (1996). A number of states have rejected the privilege and immunity legislation, either in their legislatures or by their governors. In light of the publication of EPA's Final Audit Policy, the pending federal audit privilege and

immunity bill, which has been heavily criticized, is also considered unlikely to pass. The Tennessee Attorney General opined that the audit privilege and immunity legislation proposed in his state would probably be found unconstitutional, in violation of the separation of powers doctrine, and in violation of due process and equal protection rights. Op. Tenn. Att'y Gen. No. 95-028 (Apr. 4, 1995).

Further, the EPA, in the Final Audit Policy, warns that it will closely scrutinize federally-delegated programs to determine if the privilege and immunity would interfere with required program elements. 60 Fed. Reg. 66710 (1995). A memorandum dated April 5, 1996 from EPA headquarters to the regional counsel for EPA Region X, which includes Alaska, provides that where state audit privilege and immunity legislation "deprives the state of adequate enforcement authority [in the Title V air quality control permit programs], it must be amended before final Title V approval can be granted." The federal Occupational Health and Safety Administration in a memorandum dated April 23, 1996 to the Alaska Department of Labor also raises serious questions about the impact of CSSB 199(FIN) on Alaska's state-run program. In short, there are indications that the audit privilege and immunity legislation is creating problems.

But the most serious problems will take time to become visible. Because the audit privilege operates as an incentive to conceal information, it will take a while before the full adverse effects come to light. But they will come to light. There will be industries and companies that break the law; that do not meet the most basic health and safety and environmental standards, whether they do so intentionally to gain profits, or whether they do so because they are reckless or simply negligent. There will be accidents; illness; pollution; and property damage. When victims go to find out what happened to them and why, they won't be able to do so. And that's when we'll know the true effects of this bill.

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
Anchorage, Alaska 99513-7567

Commercial: (907) 271-5071
Fax Number: (907) 271-3224

APR 25 199

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