ALASKA LEGISLATURE COMMITTEE FILES 1995-1996 8672
8975 SENATE RESOURCES

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

(1) person who made the disclosure intentionally or knowingly committed or was responsible for the commission of 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 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 off-site harm to persons, property, or the environment.

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

(1) the voluntariness of the disclosure;

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

(3) remediation;

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

(5) other relevant considerations.

(f) In order to receive immunity under this section, a facility conducting an environmental or health and safety audit must give notice by certified mail to an appropriate regulatory agency of the fact that it is planning to commence the audit. The notice must specify the facility or portion of the facility to be audited, the date the

audit will begin and end, and the general scope of the audit. Immunity under this section is available only for information and documents first produced or obtained during the time period specified in the notice. The notice may provide notification of more than one scheduled environmental or health and safety audit at a time. Once initiated, an audit shall be completed within the time period specified in the notice unless an extension is approved by the governmental entity with regulatory authority over the regulated facility or operation based on reasonable grounds.

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

(1) repeated or continuously committed serious violations; and

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

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

Sec. 09.25.480. CIRCUMVENTION BY REGULATION PROHIBITED. A regulatory agency may not adopt a regulation or impose a condition that circumvents the purpose of AS 09.25.450 - 09.25.490.

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 and the attorney-client privilege.

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

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

(A) a report, prepared by an auditor, monitor, or similar person,

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

(i) interviews with current or former employees;

(ii) field notes and records of observations;

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

(iv) legal analyses;

(v) drawings;

(vi) photographs;

(vii) laboratory analyses and other analytical data;

(viii) computer generated or electronically recorded information;

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

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

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

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

(2) "environmental or health and safety audit" means a systematic voluntary evaluation, review, or assessment of compliance with environmental or health and safety laws or a permit issued under those laws conducted by an owner or operator, an employee of the owner or operator, or an independent contractor of

(A) a regulated facility or operation; or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Summary of Changes -- CS for Senate Bill 199

Environmental, Health and Safety Self-Audit Legislation

Note: all text references refer to the original bill.

1) Labeling of documents in self-audit report.

Removed language which stated that "failure to label a document" does not constitute a waiver of audit privilege. Thus, privilege is not guaranteed if an entity fails to label self-audit documents with words such as "COMPLIANCE REPORT: PRIVILEGED DOCUMENT". [Page 2, lines 23 through 25]

2) Penalties for illegal disclosure of privileged information.

The penalty provision for state employees who disclose privileged information from a self-audit report has been removed from the bill. This change means that existing state law under AS 11.56.860 will govern such cases of illegal disclosure. AS 11.56.860 provides that the misuse of confidential information by public servants is a Class A misdemeanor. [Page 3, lines 28-30]

3) Defense in court for disclosing privileged information.

The original version of SB 199 provided that an employee charged with disclosing privileged information could use as an affirmative defense in court the fact that the documents were not labeled "COMPLIANCE REPORT: PRIVILEGED DOCUMENT". Since the CS no longer guarantees privilege for documents not properly labeled (as decribed above in #2), this language relating to affirmative defense has also been removed, for purposes of consistency. [Page 3, line 31 & Page 4, lines 1-4]

4) Disclosure of privileged information required by court or by administrative hearings official.

The CS removes all language in Section 09.25.460 of the original bill, which relates to the circumstances and procedures under which a court or administrative hearings official might require the disclosure of self-audit data that is otherwise privileged. Accordingly, the existing civil and criminal Rules of Procedure will govern in such situations. [Page 4, lines 5-29]

5) Clarifying definition of nonprivileged materials.

The CS adds to the list of nonprivileged materials any documents or other information which must be reported or maintained as part of a permit under federal or state environmental, health, or safety laws. In the original bill, data from permits is considered to be nonprivileged information by implication, but the CS makes it specific. [Page 5, lines 1-3]

(6) Court review and disclosure of privileged information.

All language in Section 09.25.470 has been removed. This section dealt with procedures for disclosure of privileged information in cases where a criminal offense is suspected. The change means that the existing Alaska Rules of Criminal Procedure will apply in such cases. [Page 5, lines 10-31 & page 6, lines 1-22]

(7) Presumption of immunity.

Language in subsection (f) under Section 09.25.475 has been removed. This subsection dealt with questions of burden of proof, and the standards the state would be required to meet in civil and criminal cases to argue that immunity should be denied to an entity which claims it on the grounds of voluntary disclosure of a self-audit.

At the initial hearing on SB 199 (01-31-96), a representative of the Department of Law's Criminal Division claimed that the standards required in subsection (f) created an "intolerable burden" for the state in these cases. The effect of removing subsection (f) is that the existing Rules of Procedure in criminal and civil cases will govern the situations described in subsection (f). [Page 8, lines 13-20]

(8) Use of certified mail required as condition for immunity.

In order to receive immunity for reported violations, an entity must disclose its intention to conduct a self-audit by certified mail. This language was added to address concerns that entities might claim that a self-audit notice was "lost in the mail", but still claim immunity for any violations that were voluntarily disclosed. [Page 8, line 22]

(9) Tightening notice requirements for self-audits.

Language has been added to subsection (g) of Section 09.25.475 which clarifies that, in order to receive immunity, a self-audit notice must specify an exact beginning date and an exact ending date. In contrast, the original bill required the notice to include the "anticipated time the audit will begin" and required that it be completed within "a reasonable amount of time not to exceed six months". [Page 8, lines 21-29]

(10) Technical change relating to Rules of Appellate Procedures.

Section 3 clarified that Sec. 09.25.460 of the original bill had the effect of amending the Alaska Rules of Appellate Procedure.

Since the CS removes Sec. 09.25.460 from the bill, the language in Section 3 is therefore unnecessary, and has also been removed. [Page 11, lines 13-20]

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

BACKGROUND

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

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

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

PURPOSE

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

*Ensure that violations are brought quickly into compliance.

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

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

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

SUMMARY OF LEGISLATION

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

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

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

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

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

ISSUES RELATING TO PRIVILEGE

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

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

The privilege DOES NOT APPLY to:

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

information obtained independent of the audit process.

Waiver of Privilege:

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

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

Immunity:

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

SECTIONAL ANALYSIS FOR
CS for Senate Bill 199: Environmental and Health and Safety Self-Audits

Prepared by: Mike Pauley, Staff to
Sponsor, SENATOR LOREN LEMAN

Section 1:

Adds a new section to the Code of Civil Procedure, Chapter 25: Evidence, Presumptions, Public Records and Privileges.

Sec. 09.25.450 creates the **Audit Report Privilege.** Self-Audit reports are not admissible as evidence, nor are they subject to discovery in civil, criminal or administrative proceedings.

Those involved in the audit report storage, preparation, or disclosure can't testify about portions of the audit report. If they witness a physical event of violation, however, they can testify about that event, but can't testify or produce documents related to a privileged part of an audit. (List is contained in Sec. 09.25.490(a)(1).)

Environmental and Health and Safety Self-Audits cannot be obtained by a state agency.

Self-Audits must be identified as privileged. They are to be labeled: "Compliance Report: Privileged Document" or something similar.

A person claiming that the privilege applies to a self-audit has to make the basic case that the privilege applies.

Sec. 09.25.455 sets out the conditions or **Exceptions** for **Waiver** of the privilege. If the person who had the Audit Report prepared wants to waive the privilege he/she can. However, disclosing information in the Audit Report to employees, contractors, or company lawyers so that the problem can be corrected is NOT a waiver of the privilege. Anyone who receives the information under these conditions and signs a confidentiality agreement with the owner/operator can't release the information.

Sec. 09.25.465 NONPRIVILEGED MATERIALS

This section identifies nonprivileged materials. The privilege does not apply to:

information required by a regulatory agency to be reported under state or federal law; or

information acquired by an agency through its own monitoring or observation; or

information obtained from someone not involved in preparing the audit report.

Sec. 09.25.475. VOLUNTARY DISCLOSURE; IMMUNITY

Grants limited immunity from an administrative, civil or criminal penalty for a violation disclosed IF the violation was corrected within a reasonable time. The violation cannot have resulted in injury to anyone at the site, or in substantial off-site harm to persons, property or the environment.

Immunity does not apply if the violation was knowingly committed; if people were hurt; or if the violation was committed recklessly by any agent of the owner/operator.

Penalties assessed under this section may be mitigated by the cooperation of the owner/operator.

If a person makes a voluntary disclosure and then a civil, administrative or criminal enforcement action is brought against him, he has the burden of establishing that the disclosure was voluntary. The state agency then has the burden of rebutting this.

To receive immunity, a facility conducting a self-audit must give notice (by certified mail) to the appropriate regulatory agency that it is going to begin an audit. The notice must include:

facility or portion of facility to be audited
date audit is to begin and end
general scope of the audit

Audit must be completed within the time period specified in the notice unless the regulatory agency approves an extension.

Bad actors are not protected. Immunity does not apply if:

person repeatedly or continuously commits serious violations; and
does not attempt to bring the operation into compliance

Sec. 09.25.480. CIRCUMVENTION BY REGULATION PROHIBITED.

Purpose of this act cannot be circumvented by regulations or conditions imposed by regulatory agencies.

Sec. 09.25.485. RELATIONSHIP TO OTHER RECOGNIZED PRIVILEGES.

This act has no effect on existing privileges under state law such as attorney-client privilege; or public officials' or reporters' privileges.

Sec. 09.25.490. DEFINITIONS

Section 2. Adds Self-Audit privilege to Code of Criminal Procedure.

Section 3. Amends Alaska Rules of Appellate Procedure

Section 4. Privilege applies to audits conducted on or after the effective date of the Act.

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

CS for SB 199
Environmental Audits

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

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

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

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

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

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

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

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

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

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

Headquarters:
217 2nd Street, Suite 201
Juneau, Alaska 99801
(907) 586-2323 FAX 463-5515

ALASKA
STATE
CHAMBER
OF COMMERCE

TESTIMONY ON CSSB 199

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

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

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

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

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

Official Business

COMMITTEE: SENATE RESOURCES

DATE: 3/1//96

Subject of meeting: SB 199 ENVIRONMENTAL & HEALTH SAFETY AUDITS

SIGN-IN

PLEASE PRINT!

NAME	ADDRESS (MAILING) & (ZIP)	PHONE	REPRESENTING	DO YOU WANT TO TESTIFY?
Dwight Perkins	P.O. Box 33922	2700	Dept of Labor	Yes
Mark Ulrich	Box 22151	413 5366	AEL	Yes
Paul Grossi	Dept of Labor	465-2790	D.O.L. Div. W. Comp	available for questions

Official Business

COMMITTEE:
SENATE RESOURCES

DATE: 1/31/96

SIGN-IN

Subject of meeting:
SB 199 Environmental & Health/Safety Standards

PLEASE PRINT!

NAME	ADDRESS (MAILING) & (ZIP)	PHONE	REPRESENTING	DO YOU WANT TO TESTIFY?
Elmer Lindstrom		465-3030	DHSS	Y
Steve Torok		586-7619	EPA	—
JANICE ADAIR		2097645	DEC	
R. Sutcliffe		269.6372	LAW	Y
Marie Sansone		465-6726	Law	Y
Paul Grossi		465-2790	DOL	Y
Tonya Calvert		276-3715	Manatron 66	Y

LEGISLATIVE INFORMATION OFFICE
119 N. CUSHMAN, SUITE 101
FAIRBANKS, AK 99701
452-4448

FEB 05 1996

DATE: 2/1/96

Please accept the enclosed original(s) of written testimony for the

Senate Resources (SB 199) teleconference scheduled on

1/31/96. A copy of this testimony was transmitted to your committee via fax.

Thank you,

ALASKA STATE LEGISLATURE

PLEASE ENTER INTO THE RECORD MY TESTIMONY TO THE SENATE RESOURCES
COMMITTEE NAME

COMMITTEE ON SB 199 DATED 1-31-96
BILL/SUBJECT

SB 199 SHOULD BE AMENDED TO CLEARLY EXCLUDE ALL DIVISIONS, OR CONTRACTORS AND OTHER FACILITIES, REGULATED BY THE DEPARTMENT OF HEALTH AND SOCIAL SERVICES. THE PRESENT LANGUAGE, WHILE CLEARLY INTENDED TO TREAT "ENVIRONMENTAL" CONCERNS, DOES NOT CLEARLY INDICATE THAT "HEALTH AND SAFETY" REFERS TO OCCUPATIONAL HEALTH AND SAFETY.

IT WOULD BE A BIG MISTAKE TO PROVIDE D.H.S.S. WITH A MEANS TO EVADE ACCOUNTABILITY, AS IN THE CASE OF ITS D.F.Y.S., BECAUSE "NONCOMPLIANCE" IN THIS INSTANCE CAN BE EXPECTED TO BE INJURIOUS TO PEOPLE, WHERE THERE IS TOO MUCH IMMUNITY ALREADY.

SIGNED Scott T. Calder
TESTIFIER

REPRESENTING (OPTIONAL)

P.O. 750 11 FBKS AK. 99707
ADDRESS/PHONE NUMBER

1/22

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, Washington 98101

ENVIRONMENTAL PROTECTION AGENCY

[FRL-]

1
INCENTIVES FOR SELF-POLICING:
Discovery, Disclosure, Correction and Prevention of Violations

AGENCY: Environmental Protection Agency (EPA)

ACTION: Final Policy Statement

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

DATES: This policy is effective 30 days after publication.

FOR FURTHER INFORMATION CONTACT: Additional documentation relating to the development of this policy is contained in the environmental auditing public docket. Documents from the docket may be obtained by calling (202) 260-7548, requesting an index to docket #C-94-01, and faxing document requests to (202) 260-4400. Hours of operation are 8 a.m. to 5:30 p.m., Monday through Friday, except legal holidays. Additional contacts are Robert Fentress or Brian Riedel, at (202) 564-2280.

5006

SUPPLEMENTARY INFORMATION:

I. Explanation of Policy

A. Introduction

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

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

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

B. Public Process

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

determine whether additional incentives were needed to encourage voluntary disclosure and correction of violations uncovered during environmental audits.

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

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

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

C. Purpose

This policy is designed to encourage greater compliance with laws and regulations that protect human health and the environment. It promotes a higher standard of self-policing by waiving gravity-based penalties for violations that are promptly disclosed and corrected, and which were discovered through voluntary audits or compliance management systems that demonstrate due diligence. To further promote compliance, the policy reduces gravity-based penalties by 75% for any violation voluntarily discovered and promptly disclosed and corrected, even if not found through an audit or compliance management system.

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

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

D. Incentives for Self-policing

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

1. Eliminating Gravity-Based Penalties

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

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

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

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

many stakeholders, including industry representatives (see, e.g., Docket, II-F-39, II-F-28, and II-F-18).

2. 75% Reduction of Gravity

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

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

3. No Recommendations for Criminal Prosecution

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

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

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

Where a company has met the conditions for avoiding a recommendation for criminal prosecution under this policy, it will not face any civil liability for gravity-based

penalties. That is because the same conditions for discovery, disclosure, and correction apply in both cases. This represents a clarification of the interim policy, not a substantive change.

4. No Routine Requests for Audits

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

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

E. Conditions

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

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

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

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

due diligence criteria, and will use its review under this policy to determine whether basic criteria have been met.

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

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

2. Voluntary Discovery and Prompt Disclosure

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

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

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

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

The Agency wishes to emphasize that the integrity of federal environmental law depends upon timely and accurate reporting. The public relies on timely and accurate reports from the regulated community, not only to measure compliance but to evaluate health or environmental risk and gauge progress in reducing pollutant loadings. EPA

expects the policy to encourage the kind of vigorous self-policing that will serve these objectives, and not to provide an excuse for delayed reporting. Where violations of reporting requirements are voluntarily discovered, they must be promptly reported (as discussed below). Where a failure to report results in imminent and substantial endangerment or serious harm, that violation is not covered under this policy (see Condition D(8)). The policy also requires the regulated entity to prevent recurrence of the violation, to ensure that noncompliance with reporting requirements is not repeated. EPA will closely scrutinize the effect of the policy in furthering the public interest in timely and accurate reports from the regulated community.

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

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

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

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

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

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

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

4. Correction and Remediation

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

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

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

5. Prevent Recurrence

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

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

6. No Repeat Violations

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

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

7. Other Violations Excluded

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

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

8. Cooperation

Under Section D(9), the regulated entity must cooperate as required by EPA and provide information necessary to determine the applicability of the policy. This condition is largely unchanged from the interim policy. In the final policy, however, the Agency has added that "cooperation" includes assistance in determining the facts of any related violations suggested by the disclosure, as well as of the disclosed violation itself. This was added to allow the agency to obtain information about any violations indicated by the disclosure, even where the violation is not initially identified by the regulated entity.

F. Opposition to Privilege

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

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

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

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

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

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

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

G. Effect on States

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

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

H. Scope of Policy

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

II. STATEMENT OF POLICY: INCENTIVES FOR SELF-POLICING Discovery, Disclosure, Correction and Prevention

A. Purpose

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

B. Definitions

For purposes of this policy, the following definitions apply:

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

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

a) Compliance policies, standards and procedures that identify how employees and agents are to meet the requirements of laws, regulations, permits and other sources of authority for environmental requirements;
b) Assignment of overall responsibility for overseeing compliance with policies, standards, and procedures, and assignment of specific responsibility for assuring compliance at each facility or operation;
c) Mechanisms for systematically assuring that compliance policies, standards and procedures are being carried out, including monitoring and auditing systems reasonably designed to detect and correct violations, periodic evaluation of the overall performance of the compliance management system, and a means for employees or agents to report violations of environmental requirements without fear of retaliation;
d) Efforts to communicate effectively the regulated entity's standards and procedures to all employees and other agents;
e) Appropriate incentives to managers and employees to perform in accordance with the compliance policies, standards and procedures, including consistent enforcement through appropriate disciplinary mechanisms; and
f) Procedures for the prompt and appropriate correction of any violations, and any necessary modifications to the regulated entity's program to prevent future violations.

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

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

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

C. Incentives for Self-Policing

1) No Gravity-Based Penalties: Where the regulated entity establishes that it satisfies all of the conditions of Section D of the policy, EPA will not seek gravity-based penalties for violations of federal environmental requirements.

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

3) No Criminal Recommendations:

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

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

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

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

4) No Routine Request for Audits: EPA will not request or use an environmental audit report to initiate a civil or criminal investigation of the entity. For example, EPA will not request an environmental audit report in routine inspections. If the Agency has independent reason to believe that a violation has occurred, however, EPA may seek any information relevant to identifying violations or determining liability or extent of harm.

D. Conditions

1) Systematic Discovery: The violation was discovered through:

a) an environmental audit; or

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

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

a) emissions violations detected through a continuous emissions monitor (or alternative monitor established in a permit) where any such monitoring is required;
b) violations of National Pollutant Discharge Elimination System (NPDES) discharge limits detected through required sampling or monitoring;
c) violations discovered through a compliance audit required to be performed by the terms of a consent order or settlement agreement.

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

4) Discovery and Disclosure Independent of Government or Third Party Plaintiff: The violation must also be identified and disclosed by the regulated entity prior to:

a) the commencement of a federal, state or local agency inspection or investigation, or the issuance by such agency of an information request to the regulated entity;
b) notice of a citizen suit;
c) the filing of a complaint by a third party;
d) the reporting of the violation to EPA (or other government agency) by a "whistleblower" employee, rather than by one authorized to speak on behalf of the regulated entity; or
e) imminent discovery of the violation by a regulatory agency;

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

measures are complex or a lengthy schedule for attaining and maintaining compliance or remediating harm is required;

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

7) No Repeat Violations: The specific violation (or closely related violation) has not occurred previously within the past three years at the same facility, or is not part of a pattern of federal, state or local violations by the facility's parent organization (if any), which have occurred within the past five years. For the purposes of this section, a violation is:

a) any violation of federal, state or local environmental law identified in a judicial or administrative order, consent agreement or order, complaint, or notice of violation, conviction or plea agreement; or
b) any act or omission for which the regulated entity has previously received penalty mitigation from EPA or a state or local agency.

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

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

E. Economic Benefit

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

F. Effect on State Law, Regulation or Policy

EPA will work closely with states to encourage their adoption of policies that reflect the incentives and conditions outlined in this policy. EPA remains firmly opposed to statutory environmental audit privileges that shield evidence of environmental violations and undermine the public's right to know, as well as to blanket immunities for violations that reflect criminal conduct, present serious threats or actual harm to health and the environment, allow noncomplying companies to gain an economic advantage

over their competitors, or reflect a repeated failure to comply with federal law. EPA will work with states to address any provisions of state audit privilege or immunity laws that are inconsistent with this policy, and which may prevent a timely and appropriate response to significant environmental violations. The Agency reserves its right to take necessary actions to protect public health or the environment by enforcing against any violations of federal law.

G. Applicability

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

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

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

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

H. Public Accountability

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

a) changes in compliance behavior within the regulated community, including improved compliance rates;
b) prompt disclosure and correction of violations, including timely and accurate compliance with reporting requirements;
c) corporate compliance programs that are successful in preventing violations, improving environmental performance, and promoting public disclosure;
d) consistency among state programs that provide incentives for voluntary compliance.

EPA will make the study available to the public.

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

I. Effective Date

This policy is effective thirty days from today.

Dated:

_____

Steven A. Herman
Assistant Administrator for
Enforcement and Compliance
Assurance

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, Washington 98101

TESTIMONY OF STEVEN A. TOROK
SENIOR REPRESENTATIVE
U.S.ENVIRONMENTAL PROTECTION AGENCY REGION 10
BEFORE THE ALASKA SENATE RESOURCES COMMITTEE
ON SB 199 THAT DEALS WITH ENVIRONMENTAL AUDITS
JANUARY 31, 1996

Thank you Mr.Chairman. My name is Steven Torok, representing the U.S.Environmental Protection Agency, Region 10. While EPA has not completed a thorough review of SB 199, I would like to provide the Committee with some general information regarding self-audits.

It is evident that the State of Alaska and EPA share the same goal of achieving the cooperation of regulated entities to obtain compliance with environmental laws. The critical question is how to achieve that goal without shielding environmentally irresponsible behavior or increasing environmental litigation. Because the vast majority of regulated entities comply with environmental laws, the focus of our enforcement efforts is on violators, not compliers.

I would like to briefly review EPA's policies on environmental audits, voluntary environmental self-policing, and self-disclosures, then discuss some data on self-auditing.

In May 1994, the Administrator of EPA called for a review of EPA's policies on self-auditing and voluntary disclosures to determine whether additional incentives were necessary to encourage voluntary disclosure and correction of violations discovered during environmental audits and self-evaluations. In July of 1994, EPA held a major two-day meeting in Washington, D.C., attended by over 400 interested parties who gave oral comments on these issues. In addition to considering the oral comments, EPA has reviewed over 80 written comments that have been submitted to the environmental auditing policy docket. In January 1995, EPA held a focus group meeting in San Francisco with key stakeholders from industry, trade groups, state environmental agencies, State Attorneys General offices, district attorneys offices, environmental and public interest groups, and professional environmental auditing groups.

This major undertaking reflects the seriousness with which EPA views the subject of environmental self-auditing. One of EPA's most important responsibilities is obtaining compliance with the laws that protect public health and safeguard the environment. This goal can only be achieved with the voluntary

cooperation of businesses and other regulated entities subject to those requirements.

EPA's extensive study of the environmental audit issue resulted in the promulgation last April of an interim policy which contained incentives to encourage environmentally responsible behavior from regulated entities. After reviewing and considering all the comments, EPA issued a final policy on January 22, 1996, (copy provided). This policy is a good example of a common sense approach to environmental protection. It is a well balanced one that provides predictable incentives, but does not limit enforcement, in appropriate circumstances, or the public's right to know about environmental problems.

The EPA policy applies when a regulated entity undertakes a voluntary environmental audit or self-evaluation. The policy provides three incentives to conduct environmental audits or self-evaluations and to disclose violations that may be discovered during them.

First, EPA will completely eliminate punitive penalties for companies or public entities that voluntarily identify, disclose and correct violations. EPA will also reduce punitive penalties by up to 75% for regulated entities that meet most, but not all of the conditions of the policy. EPA believes that this ability to partially reduce penalties when penalty elimination is not appropriate is preferable to an all or nothing approach.

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

Third, EPA will not request voluntary environmental audit reports to trigger or initiate enforcement investigations. This policy, which has been EPA's policy and practice since 1986, will alleviate fears that an audit report will invite investigations that would not otherwise occur. EPA may, however, request audit report information if violations have been identified by other means.

In summary, EPA through its April 1995 interim and now its January, 1996 final policy has struck a balance between the encouragement of good behavior and the loss of regulatory discretion. The policy allows EPA to exercise its enforcement discretion in those cases where environmental violations must be addressed by the severity of criminal sanctions. EPA will also be able to assess penalties where the violator has realized an economic benefit as a result of the violation, since EPA believes that even a company that inadvertently violates an environmental law should not gain a business advantage over companies that comply with the same laws. In addition, the final policy allows

EPA to reduce penalties where only portions of the policy's conditions apply, if full elimination of the penalties is not appropriate. Moreover, the policy affords EPA the opportunity to obtain relevant facts that may be contained in an audit report when an independent basis exists for the investigation, and those facts are critical to the fact-finding effort.

Several independent studies support EPA's policy goals and conclusions. For example, an Arthur Anderson survey of corporate general counsels in 1992 revealed that nearly 60% of corporations surveyed have had a compliance audit performed between 1989 and 1991, and another nearly 4% before 1989, while only less than 38% of corporations surveyed had never undertaken a formal compliance audit. This shows that a majority of corporations have already found it to their advantage to conduct compliance audits. Of those corporations conducting audits, only 16% of the general counsels reported that they altered their procedures for conducting audits because of concerns that the violations they find could be used against them, while the overwhelming majority expressed no such concerns.

Voluntary cooperation by regulated entities is also exemplified in a study of the Investor Responsibility Research Center (IRRC). In its 1994 Corporate Environmental Profiles Directory, the IRRC surveyed more than 249 companies, in 75 of the 86 standard industry groups, concerning their methods of environmental management. The study found a large amount of voluntary compliance through various programs. For example:

- 83% of the companies surveyed have established written environmental practices;
- 33% subscribe to codes of conduct;
- 53% have a board of director's committee that addresses environmental issues;
- 85% have established audit programs;
- 72% have audited their domestic facilities within the last two years.

The preliminary results from an EPA internal survey on the use of information from voluntary self-disclosures and voluntarily performed environmental audits supports EPA's policy goals and show that in general even prior to its April, 1995 interim policy, EPA did not initiate enforcement actions on the basis of voluntarily self-disclosed information. EPA Regional Offices reported that of the over 4,600 enforcement actions taken during fiscal years 1993 and 1994, only approximately 1% were initiated on the basis of voluntarily self-disclosed information and in nearly 65% of those the penalty was either eliminated or mitigated for self-disclosure; in the remaining, the disclosing entity was provided a lower level of enforcement. To summarize, both the independent surveys and the internal survey support EPA final policy.

To EPA's and the Department of Justice's knowledge, the federal government has never initiated a criminal enforcement case based upon a voluntarily submitted environmental audit.

Closer to home here in Alaska, the Department of Environmental Conservation enjoys the reputation in Region 10 as an agency that concentrates its efforts on working with the regulated entities to solve the problem, not in pursuing penalties. EPA is not aware of any instance where ADEC has used a voluntary self-audit to pursue anything more than solving the problem.

In Oregon and other audit privilege states, the existence of an environmental audit privilege has not led to any increase in environmental auditing or voluntary compliance in those states. Moreover, the in camera process complicates investigations and criminal prosecutions because the government must establish by a preponderance of the evidence that one of the exceptions would apply to the audit information sought. Furthermore, if an audit report is deemed privileged in an in camera proceeding, the prosecutor would then have the burden of proving that other evidence used to prosecute the violator was not tainted (i.e., not the "fruit of the poisonous tree") by the evidence deemed privileged.

EPA opposes the creation and adoption of new statutory environmental evidentiary privileges or immunity and feels such incentives should instead be structured in policy. This position is supported by the facts that such privilege has not been shown to result in any significant increase in voluntary auditing or compliance; it promotes secrecy by allowing companies to withhold important evidence from law enforcement agencies and the local public thus denying the "public's right to know" useful information affecting its health and environment; and create or aggravate an atmosphere of distrust between regulators, industry and local communities. The issues associated with the privileges and subsequent litigation create serious resource drains on government and private litigators. Such statutes encourages litigation over the scope of the privilege that further burden our already overtaxed judicial system. As stated by the U.S. Supreme Court in a number of opinions, privileges are impediments to the search for truth and should no be created lightly, nor construed broadly.

In closing, I urge that you thoroughly consider other alternatives for encouraging voluntary compliance through self-audits. EPA has considered many of the issues facing this committee. I hope you will consider the merits of EPA's final policy on voluntary environmental self-policing and self-disclosure, which was adopted only after much fact-finding and consideration of the views of hundreds of stakeholders across the country. EPA recognizes the states as important partners in federal enforcement and that it is desirable to create a climate in which states can be innovative. However, we hope Alaska will

not enact audit privilege/immunity legislation which constrains its ability to effectively carry out the provisions of delegated federal programs or impede its progress towards adoption of currently non-delegated programs. As we enter the next generation of environmental protection, let not the pendulum swing too far.

If the Legislature decides that legislation is the best way to provide incentives for self-audits, then EPA is available to work with the Committee on such legislation. Thank for the opportunity to testify. (Provided copies of State of South Dakota and State of New Jersey voluntary environmental audit legislation)

STATE OF ALASKA

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OFFICE OF THE ATTORNEY GENERAL

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February 15, 1996

Honorable Loren Leman
Chairman, Senate Resources Comm.
Alaska Senate
State Capitol, Room 113
Juneau, Alaska 99801

Re: SB 199 - Audit Privilege and Immunity

Dear Senator Leman:

Thank-you for the opportunity to present the Department of Law's concerns with respect to Senate Bill 199, relating to environmental and health and safety audits. As you requested at the hearing on the bill on January 31, 1996, this letter will summarize my testimony on behalf of the Civil Division. My testimony consisted of background information on the audit privilege, various concerns and legal problems noted by the Civil Division, and observations regarding the potential impact of the bill on compliance and enforcement.

INTRODUCTION

Senate Bill 199 is modeled after Texas legislation. The "audit privilege" proposed in SB 199 derives from an evidentiary privilege that is recognized in a number of jurisdictions, and known as the "self-critical analysis" or "self-evaluative" privilege. It is generally thought that this privilege was first judicially recognized 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 patient care and treatment. The deceased patient's estate commenced a medical malpractice case

against the hospital, 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 evaluations were subject to discovery and use as evidence in subsequent malpractice cases.

After Bredice, a number of other courts followed the decision and created a self-critical analysis privilege in other contexts and a number rejected the Bredice approach, even in the medical peer review context. Today, nearly all the states have enacted a statutory privilege that protects medical peer review communications. Alaska has established a medical peer review privilege, and it is found in AS 18.23.030. This is a very narrow privilege, and it is instructive to compare it to the proposed audit privilege.

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), a copy of which was provided to the Senate Resources Committee. The courts have also generally rejected the self-critical analysis privilege in the context of public health, safety, and welfare laws and in the context of a grand jury's power to subpoena evidence for purposes of investigating violations. See, e.g., cases discussed in Reichhold, 157 F.R.D. at 525-26.

Except for the medical peer review privilege under AS 18.23.030, Alaska law does not recognize a self-critical analysis privilege. With respect to environmental or health and safety audits, a party presently may be able to assert the attorney-client privilege and the work product doctrine to protect communications and documents from discovery or use in evidence. Another mechanism that is sometimes used to protect the information generated during an audit is Evidence Rule 407, which excludes from introduction into evidence for purposes of proving negligence or culpable conduct, evidence of measures that after an event, which if they had been taken before the event, would have made the event less likely to occur.

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), a copy of which was provided to the committee. While the Ninth Circuit did not establish a self-critical analysis privilege in Dowling, the Ninth Circuit did not foreclose the possibility that it might recognize the privilege in appropriate circumstances. The Dowling case describes the criteria that must be met to claim a self-critical analysis privilege. And, in fact, the Reichhold case relies on Dowling to establish a self-critical analysis for environmental records in a private contribution lawsuit for a contaminated site cleanup. 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 self-critical analysis privilege that differs from the privilege as described in Dowling, would likely result in conflicting rules of evidence and practical difficulties in gathering and presenting evidence.

Senate Bill 199 is based on a Texas statute creating an audit privilege and immunity from penalties for certain violations detected during environmental and health or safety self-audits. Legislation of this nature began to develop in the early nineties in Oregon and Colorado. Similar bills have been introduced in other states -- 14 have been enacted into law, a number are still pending in state legislatures, a number have been defeated in state legislatures, and a number have been vetoed. There are also pending federal bills.

Virtually no one disagrees with the policies of these bills, which are to encourage voluntary self-auditing and correction of violations. However, the audit privilege and immunity bills have received vigorous and nearly unanimous opposition from federal and state enforcement agencies. The United States Attorney General opposes the creation of a statutory audit privilege; the National District Attorneys Association vigorously opposes this type of legislation, as do many state attorneys general. The United States Environmental Protection Agency

recently adopted a new policy opposing in most circumstances the creation of a statutory audit privilege. See 60 Fed. Reg. 66,706 (1995).

The basis for this opposition has been that a statutory audit privilege is unnecessary; that if it is not carefully drafted, it will create safe havens for polluters and promote fraud; that it will divest state enforcement officials of enforcement discretion in charging, prosecuting, and making sentencing recommendations and misplace that discretion in the judges who are called upon review and weigh issues that would normally be weighed by state attorneys and enforcement agencies; that secrecy creates mistrust of the regulating agencies and the regulated entities; and that, since the regulated entities undertake candid audits to avoid accidents and liability, the fear of the possibility of disclosure does not inhibit auditing. In the forums where the audit privilege has been debated, some industries have supported the audit privilege and immunity legislation, while others have supported the concept of providing industry incentives to audit, but not necessarily through privileges and immunities. The Department of Law previously provided committee staff with a volume of materials containing examples of these arguments.

In general, the debate over the audit privilege and immunity legislation in other forums has been divisive, with industry characterizing regulatory agencies as overzealous; and with regulatory agencies emphasizing corporate fraud and corruption. The audit privilege legislation tends to reflect this adversarial tension. An adversarial relationship is built into the legal framework, and will likely carry through and affect subsequent conduct.

I. BREADTH OF THE PROPOSED PRIVILEGE

A. Definition of "Environmental or Health and Safety Law." [Page 10, lines 22-26, and page 11, lines 6-8.]

Senate Bill 199 applies to cases involving federal and state environmental laws, and related municipal laws. The bill does not specify the particular environmental laws to which it applies. There are many state environmental laws, under the

jurisdiction of many agencies. The Department of Environmental Conservation has the authority to enforce many of these laws. But, the Department of Natural Resources also enforces environmental laws, such as the Forest Practices Act, and regulates mining and mine reclamation. The Alaska Oil and Gas Conservation Commission in the Department of Administration regulates oil and gas drilling to address safety and to prevent and control land and water contamination. The Joint Pipeline Office oversees the TransAlaska Pipeline with respect to environmental and safety matters. The Department of Fish and Game has jurisdiction over habitat protection, which may be construed as an environmental program. The Department of Public Safety enforces certain laws relating to hazardous materials.

Similarly, there are a number of occupational health and safety laws. In addition to the Occupational Health and Safety Act, the Workers' Compensation Act is an occupational health and safety law. The Department of Health and Social Services (DHSS) regulates health facilities and operations. The basis for the DHSS regulation turns in some cases on whether facilities are in compliance with OSHA, and whether they are staffed by individuals with certain professional and occupational licenses. The professional and occupational licensing statutes, many of which fall under the jurisdiction of the Division of Occupational Licensing in the Department of Commerce and Economic Development, could also be construed as occupational health and safety laws.

By its plain language, then, the bill then covers a wide array of laws that fall under the jurisdiction of many agencies.

B. <u>Environmental or Health and Safety Audits</u>. [Page 10, lines 16-21].

Under the bill, environmental audits may be conducted by owners or operators, employees, or independent contractors. This definition overlooks a critical issue. For corporate or nonnatural entities, the question of who has the authority to initiate the audit and who has the authority to commit the funds and undertake the recommended corrective actions is vitally important. Under the bill as drafted, the privilege attaches even though the person who initiates the audit may have no authority to bind the corporation

or entity, or no financial or management wherewithal to carry through with the corrective actions. As a matter of practice in the Department of Law, a defendant's ability to carry out audit recommendations is an important consideration in deciding whether an audit and corrective action program justify reducing or foregoing penalties and assessments.

C. **Definition of Audit Report. [Page 9, line 17, to Page 10, line 15.]**

Under the proposed definition, an audit report is essentially any document or communication of any nature generated before, during, and after the audit, if it relates in any way to the audit and the resulting corrective actions. There is nothing in the law concerning evidentiary privileges, not even the attorney-client privilege, that approaches the proposed privilege in scope. We are concerned that there is little or no justification for creating a privilege that covers raw data, or documentary evidence such as photographs, surveys, and maps.

We are also concerned that there is little or no justification for creating a privilege for the implementation plan or the corrective tracking system. There would be no point in charting a course of action on how to improve health and safety and environmental conditions, and then keeping that information secret. In many cases, the regulatory agencies will be involved in the corrective actions, either in providing technical advice or in issuing required permits or authorizations necessary to undertake the corrective actions.

Similarly, there is no justification for keeping the report confidential insofar as it relates to issues concerning conduct after completion of the report. The report would be essential evidence of any intentional misconduct or negligence occurring after the audit, and parties should have access to that information in any type of dispute that raises these issues. Both the Dowling and Reichhold cases recognized that the distinction between pre-accident and post-accident analysis is "vital" and allow access to pre-accident analysis.

Finally, the courts that have recognized a self-critical analysis privilege have carved out exceptions for circumstances where there is "exceptional necessity" or "extraordinary hardship." These exceptions include circumstances where witnesses die or become unavailable, where evidence is destroyed or missing, and where is it impossible to otherwise obtain the evidence.

D. Labeling. [Page 2, lines 21-25.]

Under the bill, all materials are supposed to be marked, but there is no consequence to not marking them. Since the audit report covers all types of materials, most of which would not have any different appearance from non-privileged materials, there would be no way to physically distinguish privileged materials from the non-privileged materials that the agencies have in their public files. This is of concern because of the consequences that can attach if privileged information is disclosed, such as the damages and criminal penalties. Under this provision, anyone can mark a document; under the privilege provisions, the document can be marked at any time, either before or after the audit.

E. Conclusion.

Even if there are policy reasons that would support an evidentiary and disclosure privilege, those policy reasons do not support extending the privilege this far. The definitions combined with the substantive provisions of the bill invite abuse and fraud; and will keep secret information that is essential to the protection of the public health, safety, and welfare.

II. THE PROPOSED AUDIT PRIVILEGE [Page 1, line 8, to Page 2, line 27.]

The privilege, as drafted in the Texas legislation, applies to virtually all types of proceedings, not just enforcement cases. Except as specified in the bill, parties will be unable to obtain the audit report either for purposes of discovery or evidence.

The privilege can be asserted by private parties or public litigants. It would apply in cases where the State is bringing the case; in cases where the State has been sued; and in cases strictly between private parties.

It applies to civil litigation of any nature, seeking any type of remedy. For example, it applies to negligence and intentional torts; contracts; property; construction law; labor law; and statutory claims, such as injunctive proceedings and cost recovery actions. The State would thus be affected in both its proprietary and regulatory capacity. For example, the Department of Transportation and Public Safety (DOTPF) presently may discover and present evidence of audits in its condemnation proceedings to establish property valuation. In addition, DOTPF owns and manages the majority of airports in the state, with hundreds of industrial leaseholders and tenants using lands at airports and elsewhere. As a landowner, DOTPF airports have a strong interest in obtaining environmental audits and related documents because DOTPF has liability for the damages and cleanup costs associated with tenant violations. Audits may be relevant in proceedings relating to Mental Health Lands Trust properties, University lands, Alaska Railroad properties, state hatchery management contracts, and Department of Natural Resources leases, easements, and right-of-way agreements.

The privilege applies in criminal proceedings at all stages, charging, trial, and sentencing.

It would also apply to any type of administrative proceeding; for example, compliance orders, administrative penalties; revocation of facility licenses, permits, and certificates; revocation of professional and occupational licenses and certificates; lease termination; and contract debarment. It would also apply in tariff and tax cases, where the State may have reason to question the inclusion of costs relating to the correction of deficiencies in operating expenses for tariff increases or tax write-offs.

As drafted, the potential for impact is enormous. To create a new privilege that could be invoked in so many different types of proceedings would require careful study and review. By

contrast, the evidentiary privileges that are in effect are narrow, have evolved over long periods of time, and have been refined through judicial interpretation.

A broad privilege is contrary to established practice and policy relating to civil discovery. To encourage settlement of disputes and provide a level playing field, the Civil Rules of Procedure provide for broad and liberal discovery. Civil Rule 26(b) allows discovery of any matter that is relevant to the subject matter of the dispute, including any evidence that is reasonably calculated to lead to discovery of admissible evidence. If a party asserts a privilege, or if a party desires a protective order to protect against the disclosure of evidence that is subject to discovery, Civil Rule 26(b)(5) and (c) provides procedural mechanisms and standards to allow that protection.

III. LANGUAGE AND DRAFTING

The Department of Law is concerned that many provisions of the bill are cumbersome, confusing, and ambiguous. The bill would graft substantive problems and poor drafting from Texas legislation onto Alaska law, resulting in costly litigation and delay in resolving disputes.

For example, the bill contains provisions creating certain civil procedures, either through limited waivers or judicial review, to be followed to obtain information that is claimed to be privileged. In section 450(f), page 2, lines 26-27, the bill provides that the person asserting the privilege has the burden of proving that it applies. Because the definitions are so broad, a person claiming the privilege could assert and prove that practically any document or communication is privileged. Under section 460(a), page 4, lines 6-17, the burden then shifts to the person seeking discovery to prove that the privilege is asserted for a fraudulent purpose; that it falls within a category of documents that is not privileged; or that the report shows evidence of noncompliance and that appropriate and timely corrective actions were not initiated after the report. Particularly with respect to the latter two exceptions, it would be impossible to meet the burden of proof required to overcome the privilege without access to the privileged material in the first place.

Another concern is with section 465(a), beginning on page 4, line 30, the list of nonprivileged material. First, the provision providing an exception for materials required to be gathered under environmental and health and safety laws should be clarified to refer to materials required to be gathered under a permit, license, approval, or other authorization and under judicial and administrative orders.

Second, this subsection should provide for public contracts and licenses, including contracts and agreements regarding property (for example, state leases and easement and right-of-way agreements) and public grant agreements. This provision is a major concern for the Department of Transportation and Public Facilities, especially in regard to airports. The majority of airports in the state are owned by DOTPF and managed under contractual arrangements. This would also be a concern for the Department of Natural Resources, in its proprietary role as the manager of state lands. Similarly, it would be a concern for the University of Alaska, the Mental Health Land Trust, and the Alaska Railroad with their property holdings. While the bill in another section contains an exception for agreements to treat materials as nonprivileged, the omission of public contracts, licenses, and agreements in the section of nonprivileged material seriously weakens the State's bargaining position in arriving at agreements to treat materials as nonprivileged.

V. IMMUNITY

The Criminal Division of Department of Law will separately address its concerns with the immunity provisions. The Civil Division has several concerns related to the proposed immunity from penalty provisions. First, there are many penalty provisions associated with environmental and health and safety laws scattered throughout the Alaska Statutes, and they vary considerably in content and detail. Some statutes, such as the Occupational Safety and Health Act (OSHA), provide for mandatory penalties, and in at least one instance, for a mandatory minimum penalty. See AS 18.60.095. The proposed legislation may conflict with these penalty provisions or, if it would supersede these

penalty provisions, may conflict with federal requirements for a state-run program.

The Department of Environmental Conservation (DEC) does not have administrative penalty authority, and therefore, the immunity provisions would not affect DEC's administrative enforcement remedies, which consist of compliance orders. Similarly, Title 46 does not authorize the courts to assess civil penalties for violations of the environmental laws under DEC's jurisdiction, except with respect violations of the air quality control and hazardous waste laws. AS 46.03.760(e)(4).

In contrast, violations of the pollution control provisions of the Alaska Oil and Gas Conservation Act, enforced by the Alaska Oil and Gas Conservation Commission, are subject to administrative, civil, and criminal penalties, and would be affected by the legislation. See AS 31.05.150. One element of the Commission's program, underground injection control, is subject to federal oversight and federal requirements. In order to obtain EPA approval to carry out certain permitting and regulation of underground waste disposal, the Commission had to assure the EPA that the program would comply with a number of standards, including those concerning inspection, monitoring, reporting, civil penalties, and other enforcement measures, as well as public participation. Senate Bill 199 may affect compliance with those standards.

VI. IMPACTS ON STATE EMPLOYEES

Scattered throughout the bill are various provisions that would make it difficult for state employees to perform their jobs. First, as to penalties and damages, we believe these are unnecessary. State employees are required to obey and uphold the law. When they act outside the scope of their authority or intentionally violate the law, they are subject to disciplinary action and personal liability. Second, in performing their jobs, inspectors request and review a variety of information. Invariably they will encounter situations where they will be unable to adequately perform their jobs if they are prevented from requesting and reviewing information. The provision that agencies may not circumvent the law is likewise unnecessary. Agencies are creatures

of statute and are required to conduct their operations within the parameters established by their authorizing statutes. Moreover, under the Administrative Procedures Act, agency regulations must be within the scope of the agency's authority and consistent with the law. See AS 44.62.020; 44.62.030 Finally, with respect to judicial sanctions, the courts already have procedures in place for sanctions and contempt proceedings. In short, these provisions are unnecessary.

But of greater concern is that the practical effect of these provisions will be to chill appropriate and effective regulatory oversight and effective public property, contract, and grant administration. As a practical matter, state agencies and employees are often involved in all facets of designing, conducting, and reviewing audits and carrying out the recommended corrective actions and accident and pollution prevention projects. Legislation that casts state agencies and employees in an adversarial, hostile, and negative role, and that inhibits the free and open exchange of information, will decrease the effectiveness of the technical assistance offered by the agencies and decrease the effectiveness and timeliness of the corrective actions and preventive measures recommended by the audits.

CONCLUSION

Just as the bill portrays state agencies and employees in a negative light, many of the exceptions in the bill that are designed to ferret out repeat offenders and bad actors emphasize the very worst conduct on the part of regulated entities. An adversarial tension is built right into the framework of the legislation. In basing the bill on conflict, the provisions of the bill operate to defeat the purposes of the bill, which are to encourage voluntary self-auditing and to improve compliance. And, in attempting to exclude the worst offenders from enjoying the incentives provided by the bill, the bill fails to address the entities most in need of comprehensive audits, corrective action, and accident and pollution prevention measures.

We have two important examples of how regulated entities have worked with the state agencies in conducting audits and undertaking corrective and preventive measures. First, during an

inspection at the Kake Tribal Corporation's Point Macartney logging camp in 1993, the Department of Environmental Conservation observed numerous violations of the environmental and public health laws. Previous enforcement efforts had failed to bring the camp into compliance. In an effort to achieve compliance and institute measures to prevent future violations, the Kake Tribal Corporation, Department of Environmental Conservation, 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 corrective and remedial measures, and implement preventive measures in each area of concern. The Department of Environmental Conservation 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 detected during their investigation. In other instances, the Corporation exceeded technical requirements, provided hazmat training to employees beyond that required in the compliance order, and worked with the community 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 ANCSA Presidents Association 1995 Environmental Compliance Conference, designed to promote cooperation among the regulators and regulated community in achieving environmental compliance.

A second example is provided by the Joint Pipeline Office, consisting of representatives from six states and five federal agencies, which oversees the Trans-Alaska Pipeline System. In regulating the pipeline, the JPO relies heavily on safety audits performed by 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 received the national "Hammer Award" for innovative efforts in making government work better.

These are positive models upon which any audit legislation should build. The Texas legislation, which is based upon an adversarial relationship between the regulators and the

regulated community and which contains serious deficiencies, does not match the successful Alaskan models. The framework for any audit legislation should be based upon what has worked in our state.

Sincerely,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Marie Sansone
Marie Sansone
Assistant Attorney General

MS:prm

cc: Bruce M. Botelho, Attorney General
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Legal 11-2041

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MEMORANDUM November 15, 1995

SUBJECT: Audit Privilege (Work Order No. 9-LS1312\A)

TO: Senator Loren Leman
Attn: Annette Kreitzer

FROM: Terri Lauterbach
Legislative Counsel

Enclosed is a draft based on the Texas law you submitted concerning a self-audit privilege. Except for reorganization to make the definitional sections conform to the Alaska Legislature's drafting requirements, I have followed the Texas law closely. However, the substantive provisions raise the following questions:

(1) Sec. 09.25.455(c): I do not know what is meant by a "clerical dissemination" as opposed to other types of dissemination.

(2) Sec. 09.25.465(b): I do not understand what this subsection is intended to do, nor why it includes the phrase "this section does not limit."

(3) Sec. 09.25.470(g) - (j): I do not understand these subsections. For instance, the burden of proof in subsection (g) is different from Sec. 09.25.450(f), seemingly an internal contradiction. The blanket suppression of evidence in subsection (g) doesn't seem to allow for the other exceptions in the bill where disclosure would be allowed. Subsection (i) seems to allow disclosure even when the rest of the bill does not. Clarifications are needed, but I need some policy direction here.

Sec. 09.25.475(b)(7), (d)(2) and (d)(4): Please review the wording in these paragraphs as to the use of "substantial" in regards to injuries and on-site or off-site harm. I'm not sure if the Texas choices are intentional or the result of inconsistent drafting.

Please let me know if I can be of further assistance on this matter.

TML:glc
95-443.glc
Enclosure

NCSL STATE LEGISLATIVE REPORT

February 1995
Vol. 20, No. 2

Environmental Audits: Incentive to Comply With or Avoid Regulation?

By
Larry Morandi
Senior Fellow
and
Sebastien Pascal
Law Student

One of the greatest weaknesses in environmental regulation is enforcing discharge permits. Strapped for sufficient funds, state agencies spend more time on developing permit conditions than they do on enforcing compliance with those conditions. Violations of wastewater discharge, air quality and hazardous substances emission standards often go undetected unless litigation is filed by aggrieved parties. Seldom are the fines in environmental legislation assessed at the authorized levels because the regulatory agencies lack the staff resources to document their case against a responsible party. The penalty provisions of environmental statutes thus become the starting point for negotiated settlements of permit violations rather than a deterrent to prevent the pollution from occurring.

State legislatures are considering voluntary self-audits of company efforts to comply with permit conditions.

In an effort to reduce the often adversarial relationship between regulatory agencies and industrial dischargers, state legislatures are now considering voluntary self-audits of company efforts to comply with permit conditions. The intent of such legislation is to provide the regulated community with incentives to comply with permit conditions and to remove some of the enforcement burden placed on state agencies. This state legislative report examines legislation enacted during the past two sessions to promote environmental audits and discusses the concerns raised by enforcement officials and environmental interest groups in moving away from a strictly regulatory regimen.

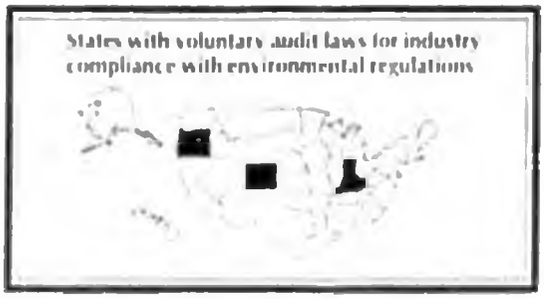
Legislative Intent

Four states—Colorado, Indiana, Kentucky and Oregon—have enacted legislation that encourages industry to conduct voluntary audits of efforts to comply with environmental regulations. The fundamental difference between this legislation and earlier efforts to promote voluntary environmental compliance is that the new statutes grant the information developed through

the audit a privilege against disclosure to a regulatory agency or to the public. A company that conducts an environmental audit is in essence granted immunity from prosecution for violating the terms of a permit so long as it proceeds with diligence to correct the discharge causing the violation.

Previous state legislation had encouraged the use of environmental audits without granting the information a privileged status. California's 1986 Environmental Quality Assessment Act noted in the statement of legislative findings and declarations that

> Environmental assessments can encourage voluntary compliance with both the letter and the spirit of the law as well as encourage cost-effective process improvements. By reducing potential liability, assessments can reduce the long-term costs of hazardous substance management. In addition, the use of assessments can help to build public confidence that hazardous substances are being managed in an increasingly safe manner. The use of independent environmental assessments is an important emerging feature of specific state hazardous substance management programs (Cal. Health & Safety Code, 25570(b)(2)).



Colorado, a state that revamped its environmental audit legislation significantly in 1994, had also encouraged voluntary environmental audits by regulated industries. In the civil penalties section of its air quality statute, for example, "the existence and scope of a regularized and comprehensive environmental compliance program or an environmental audit program" is listed as a mitigating factor in determining the amount of a civil penalty by the Department of Health (Colo. Rev. Stat., 25-7-122.2(b)(III)).

Oregon's statement of legislative intent of its environmental audit legislation suggests the new thinking in providing incentives to comply with environmental regulations:

> In order to encourage owners and operators of facilities and persons...both to conduct voluntary internal environmental audits of their compliance programs and management systems and to assess and improve compliance with such statutes, an environmental audit privilege is recognized to protect the confidentiality of communications relating to such voluntary internal environmental audits (Ore. Rev. Stat., 468.963(1)).

The next section of this state legislative report examines in detail the environmental audit provisions of recent legislation in four states. Each statute follows the intent expressed by the Oregon legislature.

Colorado

Although not the first state to enact voluntary audit privilege legislation, Colorado's 1994 Senate Bill 1 30 has gained the most national attention. The legislation provides two incen-

tives for regulated industries to conduct voluntary environmental audits: (1) information contained in an audit report is granted evidentiary privilege and does not have to be released to a regulatory agency or to the public; and (2) if a company chooses to disclose privileged audit information that indicates a violation of environmental law, the company cannot be assessed fines or penalties if it completes compliance actions within two years of disclosure.

Colorado laws provide incentives for regulated industry to conduct environmental audits.

Senate Bill 139 defines "voluntary self-evaluation" to mean "a self-initiated assessment, audit or review, not otherwise expressly required by environmental law, that is prepared by any person or entity...to determine whether such person or entity is in compliance with environmental laws." (Colo. Rev. Stat., 13-25-126.5(2)(e)) It specifically states that "an environmental audit report is privileged and is not admissible in any legal action or administrative proceeding and is not subject to any discovery pursuant to the rules of civil procedure, criminal procedure, or administrative procedure..."(Colo. Rev. Stat., 13-25-126.5(3)) It then qualifies the privilege by making it inapplicable where:

- the party has not begun compliance actions to remedy the violation within a reasonable period of time;
- a court determines that there are compelling reasons to disclose the information;
- the privilege is being used for fraudulent purposes or to avoid an investigation; or
- the information contained in the report demonstrates a clear, present and immediate danger to the public health or the environment outside of the regulated facility.

The statute also stipulates certain types of information that do not qualify for the privilege. These include:

- documents required to be prepared or to be made available to a regulatory agency pursuant to environmental laws;
- information obtained by a regulatory agency during the normal course of monitoring for environmental compliance;
- information obtained through an independent source;
- documents prepared before initiating an environmental audit or prepared after an audit and not part of the audit.

The initial part of Colorado's legislation is similar to that enacted in Indiana, Kentucky and Oregon. The second and more controversial part is unique to Colorado. Senate Bill 139 further establishes a "rebuttable presumption" that environmental audit information disclosed to the Colorado Department of Health (the environmental regulatory agency) "is voluntary and therefore the person or entity is immune from any administrative and civil penalties

associated with the issues disclosed and is immune from any criminal penalties for negligent acts associated with the issues disclosed." (Colo. Rev. Stat., 25-1-114.5(4)) To be considered voluntary, a disclosure must arise out of a voluntary self-evaluation and be made promptly to the department after knowledge of a violation has occurred, and the party must correct the noncompliance no later than two years after disclosure. Immunity against fines or penalties will not be granted if the party has committed serious violations of environmental law that represent a pattern of continuous violations within three years of the date of disclosure.

An attorney with the Colorado Association of Commerce and Industry who helped draft the legislation believes that companies will avail themselves of the disclosure option to gain immunity from fines: "You always run the risk if you haven't reported that they, the department, may come in, inspect and find that you were out of compliance at a certain point in time and retroactively try to assess fines and penalties."

The primary impetus for Colorado's 1994 legislation—it had failed in previous sessions—was the assessment of a large fine against Coors Brewing Company by the Colorado Department of Health. Coors spent $1 million in conducting a voluntary environmental audit of volatile organic compound (VOC) emissions—principally ethanol—released by the evaporation of beer spilled during brewing. The audit indicated that Coors was violating VOC emission standards and, according to a Coors spokesman, "revealed information about VOC emissions previously unknown to major brewers and state and federal regulators" that could be used to set more effective standards. The audit results were presented to the Colorado Department of Health, which initially assessed a $1.05 million fine against the company for the violation. The amount was subsequently reduced to $237,000 in February 1994 as part of a negotiated settlement that included emission reductions. Colorado's legislation, especially the immunity provisions, was designed to ensure that voluntary compliance actions like those undertaken by Coors would not be discouraged in the future.

Indiana

Indiana law stipulates that "an environmental audit report is privileged."

Indiana also passed its environmental audit statute in 1994. Public Law 16-1994 defines "environmental audit" to mean "a voluntary, an internal, and a comprehensive evaluation of a facility or an activity at a facility...that is designed to identify and prevent noncompliance with laws and improve compliance with laws." (Ind. Code Ann., 13-10-3-1) It stipulates that "an environmental audit report is privileged and is not admissible as evidence in a civil, a criminal, or an administrative legal action." (Ind. Code Ann., 13-10-3-3) It denies the privilege in civil, administrative or criminal proceedings where its use is for a fraudulent purpose or the material contained in the audit shows noncompliance with environmental law and the person claiming the privilege did not promptly initiate and pursue appropriate efforts to achieve compliance with reasonable diligence." (Ind. Code Ann., 13-10-3-4) It exempts from the privilege the same types of information contained in the Colorado law.

Kentucky

Legislation enacted in Kentucky during the 1994 session—Chapter 430—mirrors Indiana's law. It defines "environmental audit" to be "a voluntary, internal, and comprehensive evaluation of one or more facilities or an activity at one or more facilities...that is designed to identify and prevent noncompliance and to improve compliance with statutory or regulatory requirements." (Ky. Rev. Stat. Ann., 224.01-040(1)(a)) It creates "an environmental audit privilege...to protect the confidentiality of communications relating to voluntary internal environmental audits." (Ky. Rev. Stat. Ann., 224.01-040(2)) The privilege precludes an environmental audit report from being "admissible as evidence in any legal action in any civil, criminal, or administrative proceeding." (Ky. Rev. Stat. Ann., 224.01-040(3)) An exception to the privilege is where a court determines that "the material shows evidence of noncompliance...and appropriate efforts to achieve compliance were not promptly initiated and pursued with reasonable diligence." Ky. Rev. Stat. Ann., (224.01-040(4)(c)(3) and 224.01-040(4)(d)(3)) The privilege likewise does not extend to the same types of information delineated in the Colorado and Indiana laws.

In Kentucky, privilege does not extend where there is evidence of noncompliance.

Oregon

While similar to the evidentiary privilege provisions in Colorado, Indiana and Kentucky, Oregon's environmental audit language was part of a more comprehensive environmental enforcement statute adopted in 1993. Section 20 of the Environmental Crimes Act of 1993 (Chapter 422, 1993 Oregon Laws), states that "an environmental audit report shall be privileged and shall not be admissible as evidence in any legal action in any civil, criminal or administrative proceeding." (Ore. Rev. Stat., 468.963(2)) It defines an "environmental audit" in a similar manner, and provides for the same exceptions from the audit privilege, as the provisions contained in the other three state statutes.

Oregon enacted a more comprehensive environmental enforcement law.

Environmental and Regulatory Response

The U.S. Environmental Protection Agency (EPA) has questioned the enforceability of state environmental audit privilege laws. The agency's acting regional administrator in Denver advised the governor in April that "Colorado's proposed immunity amounts to a significant departure from and weakening of the federal enforcement scheme" and may result in the agency withdrawing enforcement authority or delegated federal environmental programs to the state. Environmental groups and labor unions representing oil refinery and sewage plant operators in Colorado contend that the statute allows a company to insulate itself from fines and penalties simply by acknowledging that a self-audit has shown that the company violated environmental laws. A spokesman for the Land and Water Fund of the Rockies contends that the privilege makes it "much more difficult for private lawsuits to be used to determine whether or not a company has violated the law."

EPA announced on September 9 that it had established focus groups to discuss whether the federal agency's policy should allow information contained in environmental audits to be

protected from disclosure. It also is analyzing the environmental audit laws in the four states that have enacted them and surveying the 46 other states to determine how they handle environmental audits. EPA wants to "encourage self-correction through the use of environmental audits...[but] does not want to shield from prosecution those who violate the law." The agency's focus group recommendations are not expected until later this year.

Industry Response

Regulated industries have been more concerned with "reducing penalties for those companies that voluntarily report infractions" than with "whether audits should be protected from enforcement actions." According to some industry sources, current EPA policy offers no incentives to conduct voluntary audits and report violations of regulations; what is needed is "enforcement certainty, which would entail the agency setting up a scheme to lessen penalties for self-reported violations." To accommodate industry concerns about pursuing environmental audits, EPA may consider policies that offer limited privilege (whereby voluntary audit results would be protected from third-party suits but not from federal government litigation), and establishment of "excellence threshold criteria that a company would have to meet to be eligible for a penalty mitigation program."

Legal Problems Raised by State Audit Privilege Acts

The National Association of Attorneys General has identified several potential legal problems raised by state audit privilege legislation. These include:

- Precluding concerned citizens and state legislators who were not party to an enforcement action against a polluter from seeing the privileged material.

- Limiting to a judge, rather than to a jury, determinations of whether the audit privilege was being used for fraudulent purposes or whether appropriate actions were being pursued to correct the noncompliance.

- Requiring state agencies to demonstrate probable cause that a violation had occurred before having access to information in an audit report.

State attorneys general fear that implementing an environmental audit privilege will drive up litigation costs and decrease effective enforcement of environmental regulations. Environmental enforcement "could become mired in motions to quash subpoenas, to suppress evidence, and to compel discovery." The attorneys general argue instead for "alternative approaches, such as audit policies developed through open dialogue with affected parties, negotiated audit agreements, and more comprehensive compliance incentive programs" as means to promote greater cooperation between the regulated industry and regulatory agencies.

Conclusion

EPA and state regulators must coordinate their environmental audit policies because of the large number of environmental programs that the federal government has delegated to the states for enforcement. If the two sides differ significantly, states risk having "primacy"—administrative authority over program implementation—revoked by EPA. The federal agency advises caution to other states pursuing the privileged environmental audit approach until it revises its policy. Regardless of the outcome, both state and federal agencies support additional incentives for regulated industries to voluntarily assess their compliance with environmental laws and to design the most cost-effective means of achieving that objective.

State Legislative Reports

"When Health Care Is Not Enough: Support Services for Pregnant Women and Infants" (Vol. 19, No. 8) (ISBN 1-55516-226-6)	June 1994
"Superfund and Economic Development" (Vol. 19, No. 9) (ISBN 1-55516-227-4)	July 1994
"Electric Vehicles: Promise and Reality" (Vol. 19, No. 10) (ISBN 1-55516-381-5)	July 1994
"Clean Air Act Mandates: Funding, Business Opportunities and Economic Development" (Vol. 19, No. 11) (ISBN 1-55516-380-7)	July 1994
"The Revised Model Accreditation Plan for Asbestos" (Vol. 19, No. 12) (ISBN 1-55516-379-3)	August 1994
"Supporting Families" (Vol. 19, No. 13) (ISBN 1-55516-378-5)	August 1994
"Beyond Superfund: Voluntary Industrial Cleanup" (Vol. 19, No. 14) (ISBN 1-55516-382-3)	September 1994
"Lender and Successor Liability for Hazardous Waste Cleanup" (Vol. 19, No. 15) (ISBN 1-55516-383-1)	September 1994
"Uniform and Reciprocal Motor Carrier Programs under ISTEA" (Vol. 19, No. 16) (ISBN 1-55516-384-X)	October 1994
"Managing Growth in Western Rural Communities" (Vol. 19, No. 17) (ISBN 1-55516-385-8)	October 1994
"Risk Assessment: A Glance at the Non-Technical Aspects" (Vol. 19, No. 18) (ISBN 1-55516-386-6)	November 1994
"Equity and Funding of School Facilities: Are States at Risk?" (Vol. 20, No. 1) (ISBN 1-55516-388-2)	February 1995
"Environmental Audits: Incentive to Comply With or Avoid Regulation?" (Vol. 20, No. 2) (ISBN 1-55516-388-2)	February 1995

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STATE LEGISLATIVE REPORT

The Energy Council

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Honorable Samuel B. Nunez, Jr.
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Policy Statement of the Energy Council on Environmental Audits Proposed By Texas Representative Warren Chisum

Background

Fourteen states have passed legislation creating an environmental, health and safety self-evaluation privilege and at least eleven other states have introduced similar measures. The primary purpose of such legislation is to encourage companies and governmental entities to conduct voluntary self-audits ensuring compliance with environmental, health and safety laws and that violations of the law are brought quickly into compliance.

The audit privilege promotes internal review of operations without fear of prosecution or penalties for corrected problems. It also encourages the development of preventive strategies to avoid future compliance problems. Safeguards built into the legislation prevent companies from misusing the audit privilege or immunity gained from voluntary disclosure.

Federal regulatory agencies have been reluctant to support state audit privileges, creating a conflict of law for companies and government entities wishing to avail themselves of the provisions of state law.

Recommendation

The Energy Council recommends that state legislatures consider adopting legislation to provide an environmental, health and safety self-audit privilege relating to voluntary internal audits, as well as administrative, civil and criminal immunities from the enforcement of laws and regulations which have been discovered to have been violated (where such violations have been voluntarily disclosed to appropriate agencies and corrective measures taken). The Energy Council further recommends that the United States Congress enact legislation to provide similar federal protection or, at a minimum, to require federal enforcement authorities to recognize and abide by the terms of state self-audit privileges and immunities.

Disposition

This policy statement, adopted unanimously by the Energy Council on September 24, 1995, shall be distributed to the President of the United States, the Majority Leader of the U.S. Senate, the Speaker of the U.S. House of Representatives, as well as the congressional delegations, the governors, and legislative leadership of the Energy Council's member states.

ENVIRONMENTAL SELF-AUDIT LEGISLATION

Senate Bill 199 - Senator Loren Leman, Sponsor

Benefits:

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

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

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

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

*Encourages companies to develop preventive environmental policies.

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

Alaska State Legislature

Session:
State Capitol
Juneau AK 99801-1182

Interim:
716 W 4th Avenue
Anchorage AK 99501-2133

MEMO

TO: Sara Hannan, Alaska Environmental Lobby
via fax: 463-3312

FROM: Annette Kreitzer, Aide to
Senator Loren Leman

DATE: January 30, 1996

RE: SB 199

YOU REQUESTED INFORMATION ON SB 199, Environmental and Health & Safety Self-Audits.

I'm faxing to you:

Sponsor Statement	1 page
Sectional Analysis	2 pages
Energy Council Statement	1 page
"Benefits" Paper	1 page

Please call me if you need any further information.

Alaska State Legislature

Session:
State Capitol
Juneau AK 99801-1182

Interim:
716 W 4th Avenue
Anchorage AK 99501-2133

MEMO

TO: Marilyn Leland/PWSRCAC
via fax: 277-4523

FROM: Annette Kreitzer, Aide to
Senator Loren Leman

DATE: January 30, 1996

RE: SB 199

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Alaska State Legislature

Session:
State Capitol
Juneau AK 99801-1182

Interim:
716 W 4th Avenue
Anchorage AK 99501-2133

MEMO

TO: Steve Torok, Senior Representative
U.S. EPA
via fax: 586-7015

FROM: Annette Kreitzer, Aide to
Senator Loren Leman

DATE: January 30, 1996

RE: SB 199

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Alaska State Legislature

Session:
State Capitol
Juneau AK 99801-1182

Interim:
716 W 4th Avenue
Anchorage AK 99501-2133

MEMO

TO: Stephanie Galeraith
Anchorage Attorney's office
via fax: 343-4550

FROM: Annette Kreitzer, Aide to
Senator Loren Leman

DATE: January 30, 1996

RE: SB 199

YOU REQUESTED INFORMATION ON SB 199, Environmental and Health & Safety Self-Audits.

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Alaska State Legislature

Session:
State Capitol
Juneau AK 99801-1182

Interim:
716 W 4th Avenue
Anchorage AK 99501-2133

MEMO

TO: Jennifer Lloyd/Department of Corrections
via fax: 3390

FROM: Annette Kreitzer, Aide to
Senator Loren Leman

DATE: January 30, 1996

RE: SB 199

YOU REQUESTED INFORMATION ON SB 199, Environmental and Health & Safety Self-Audits.

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Alaska State Legislature

Session:
State Capitol
Juneau AK 99801-1182

Interim:
716 W 4th Avenue
Anchorage AK 99501-2133

MEMO

TO: Anthony Williams/Echo Bay
via fax: 463-5740

FROM: Annette Kreitzer, Aide to
Senator Loren Leman

DATE: January 30, 1996

RE: SB 199

YOU REQUESTED INFORMATION ON SB 199, Environmental and Health & Safety Self-Audits.

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Please call me if you need any further information.

Alaska State Legislature

Session:
State Capitol
Juneau AK 99801-1182

Interim:
716 W 4th Avenue
Anchorage AK 99501-2133

MEMO

TO: David Rogers, Esq.
via fax: 586-1097

FROM: Annette Kreitzer, Aide to
Senator Loren Leman

DATE: January 30, 1996

RE: SB 199

YOU REQUESTED INFORMATION ON SB 199, Environmental and Health & Safety Self-Audits.

I'm faxing to you:

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

*Encourages companies to develop preventive environmental policies.

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

State Legislation on Audit Privilege

Legislation Passed in 1993

Oregon: Provides privilege from disclosure to voluntary environmental audits for determining compliance with state, federal, or local environmental laws, unless waived. Provides for in-camera review. Disclosure may be sought if privilege is asserted fraudulently, is not subject to the privilege, or shows evidence of noncompliance. To avoid losing privilege because of noncompliance, efforts to achieve compliance must be initiated promptly. *Or. Rev. Stat.* §468.963.

Legislation Passed in 1994

Colorado: Provides a privilege for voluntary disclosure of internal audits to determine compliance with state environmental laws and regulations, "limited expansion of protection against disclosure." Privilege may be waived by owner or operator of facility. Provides for in-camera review. A report may be disclosed if the court determines information contained in report presents a present and impending danger to public health or environment. Provides penalty immunity for reported violations identified in self-audit promptly reported and corrected within specific period. *Colo. Rev. Stat.* §13-25-126.5 (1994).

Illinois: Provides a privilege from disclosure for voluntary internal evaluations for determining compliance with state, federal, or local environmental laws, regulations, permits, or orders, unless waived. Provides for in-camera review, and in addition to the court, the Pollution Control Board may require disclosure. Disclosure may be sought if privilege is asserted fraudulently, not subject to the privilege, or shows evidence of noncompliance. To avoid losing privilege because of noncompliance, efforts to achieve compliance must be initiated promptly. *Ill. Pub. Act. 88-0690.*

Indiana: Specifies voluntary environmental audit reports are privileged and not admissible as evidence unless waived. Provides for in-camera review for civil, administrative, or criminal proceedings. Privilege lost if efforts to achieve compliance are not promptly pursued with reasonable diligence, are asserted for fraudulent purposes, or are not subject to privilege. Party asserting the privilege has burden of proving privilege. *Ind. Code* §13-10 (1994).

Kentucky: Voluntary environmental audit reports are privileged unless waived expressly by owner or by application. Provides for a private review. If court determines privilege is for fraudulent purposes, not subject to privilege, or efforts to achieve compliance were not promptly initiated, privilege is lost. Court may compel only portions of the report relevant to the issues in dispute. *Ky. Rev. Stat. Ann.* §224.01-040.

Legislation Passed in 1995

Arkansas: Declares protection of the environment is enhanced by voluntary compliance and limited protection against disclosure, voluntary audit reports will encourage compliance. Provides for in-camera review, in civil, administrative, or criminal proceeding the court may require disclosure if determined privilege was: asserted fraudulently; material is not subject to privilege; appropriate efforts to achieve compliance were not initiated promptly. *1995 Ark. Acts 330.*

Idaho: Grants audit privilege for voluntary environmental audits. Provides immunity from administrative, civil, and criminal violation when voluntarily disclosed and compliance efforts taken to correct violation. Privilege is lost in cases of fraud. *1995 Idaho Sess. Laws 359.*

Kansas: Establishes audit privilege for voluntary environmental compliance audits. Provides immunity from or lesser penalties in administrative, civil, or criminal violations under certain circumstances. Privilege is waived if asserted fraudulently or if party asserting privilege has not implemented a management system to assure compliance. Provides for in-camera review. *1995 Kan. Sess. Laws.*

Mississippi: Specifies voluntary environmental self-evaluation reports are privileged and not admissible in civil, criminal, or administrative proceedings, unless waived; are asserted for fraudulent purposes; or appropriate efforts to achieve compliance were not achieved within a reasonable amount of time. Privilege is lost if material demonstrates a hazard or endangerment to the environment and public health. Provides for in-camera review. Persons asserting privilege have burden of proving privilege. Provides *de minimis* penalties for voluntary disclosure. *1995 Miss. Laws Chap. 627*

Utah: Grants audit privilege for information obtained through voluntary environmental audits. Provides privilege for civil proceedings, none for criminal violations. Privilege is waived in fraudulent claims or if material demonstrates danger to public health or the environment. Provides for in-camera review; prohibits compelling witness to testify; provides penalties for unlawful disclosure. Rebuttable presumption against penalties for qualifying disclosures. *1995 Utah Laws 304.*

Virginia: Grants audit privilege for information generated from voluntary environmental assessment, provides immunity from administrative or civil penalties. Privilege does not extend to criminal proceedings; material which demonstrates clear and imminent substantial danger to public health or environment; or fraudulently claimed. Party seeking disclosure has the burden of proof. *1995 Va. Acts 564.*

Wyoming: Grants audit privilege for voluntary environmental audits for determining compliance with the Wyoming Environmental Quality Act and declares specific information confidential; limits civil penalties for voluntary disclosure of violation if disclosed within 60 days of completed audit and facility has no prior violations at the time or a pattern of repeated violations. Provides for in-camera review. In civil, administrative, or criminal proceeding, the court may require disclosure if determined privilege was asserted fraudulently; material is not subject to privilege; appropriate efforts to achieve compliance were not initiated promptly; or information demonstrated substantial threat to public health and the environment. *1995 Wyo. Sess. Laws 58.*

Legislation Introduced in 1995

Arizona: S.B. 1290, passed both houses, transmitted to governor, vetoed.

California: A.B. 856, introduced in House, referred to Natural Resources Committee.

Florida: S.B. 944, introduced in Senate, referred to committees. S.B. 934, introduced in Senate, referred to committees. H.B. 709, introduced in House, referred to committees. H.B. 707, introduced in House, referred to committees.

Georgia: S.B. 244, passed Senate; introduced in

House Natural Resources and Environment Committee (died).

Hawaii: H.B. 390, introduced in House (died). S.B. 1304, introduced in Senate (died).

Idaho: S.B. 1142, passed in both houses, governor signed March 23, effective July 1 (Sections 1-2), December 31, 1997 (Section 3).

Iowa: H.S.B. 191 = H.F. 420, passed in House, sent to Senate Natural Resources (died).

Kansas: S.B. 76, passed both houses, signed by governor April 22.

Maryland: H.B. 785, introduced in House, received unfavorable report in Environmental Matters Committee (died). S.B. 685, introduced in Senate, withdrawn March 20.

Massachusetts: H.B. 3426, introduced in House, referred to Joint Committee.

Minnesota: S.F. 1314, introduced in Senate. H.F. 1479, introduced in House.

Mississippi: H.B. 1476, introduced in House, ruled improper (died). S.B. 3079, passed Senate, introduced in House, passed as amended. Signed by governor April 7, effective July 1.

Missouri: H.B. 338, introduced in House. Hearing held. S.B. 350, introduced in Senate. Hearing held. S.B. 363, introduced in Senate. Hearing held.

Montana: H.B. 412, introduced in House. Referred to Senate and reported as amended. House adopted. Died in Senate.

Nebraska: L.B. 731, introduced and referred to the Natural Resources Committee.

New Hampshire: H.B. 275, introduced in House, referred back to committee, voted, postponed action this year.

New Jersey: A.B. 2521/S.B. 1797, introduced in Senate and Assembly.

New Mexico: H.B. 800, introduced in House, died after referral.

Oklahoma: H.B. 1388, introduced in House, died in Senate Energy Committee.

Rhode Island: S.B. 853, introduced in Senate, referred to Judiciary Committee.

South Carolina: S.B. 15, introduced in Senate.

Tennessee: S.B. 1135, introduced in Senate.

Texas: H.B. 2473, introduced in House, reported favorably from Committee on Environmental Regulation.

Utah: S.J.R. 6, passed. S.B. 84 passed, signed by governor, effective May 1.

Virginia: H.B. 1845, passed, enrolled, signed by governor, effective February 1 (Chapter 514).

West Virginia: H.B. 2494, introduced in House, died in House Judiciary.

Possible Legislation in 1995

Alabama: Legislation a possibility.

Delaware: House is working on bill.

Louisiana: Lobby group drafting language and seeking sponsor.

Michigan: Forming a group to explore legislation anticipated in 1995.

North Carolina: Bill is under development, expected soon.

Ohio: Redrafted 1994 bill to be introduced.

Pennsylvania: Under consideration, expect passage in 1995.

—Patricia E. O'Toole, legal assistant, Perkins Coie. Information current as of April 22.

tion of the policy is to be left to the "discretion of EPA and is not subject to review by any court." The agency does not want to have to litigate how the policy should be applied.

If implemented fairly, the new policy will remove some of the disincentives that at present exist to full implementation of environmental auditing programs. It is specific recognition of the importance of providing incentives for self-policing in the regulated community. The work group and public meeting processes that EPA utilized in developing the policy appear to have educated many in the agency (including its regions) and at Justice on the importance of such incentives.

Several limitations in the policy effort are evident, however. First it is not only a *policy*, but one which strongly emphasizes that agency offices are free "to act at variance with the guidance" in specific cases. The more cynical will suggest that EPA regional offices will circumvent it if they are not subject to judicial review. The efforts of some industry groups to push federal audit privilege and immunity legislation reflect this concern. It will be extremely important for the agency to develop an oversight process that will ensure fair and consistent application across all regions. Right now, the policy does not adequately address this concern.

Second, the civil penalty policy has a major exception for what it calls "criminal conduct." Because virtually all of the federal environmental statutes have felony and misdemeanor criminal provisions that require minimal proof of criminal intent (i.e., proof only of general intent or negligence), a very high percentage of federal environmental violations can theoretically be charged as crimes. Although a company may now be able to avoid actual criminal prosecution by meeting the seven conditions for civil penalty mitigation, theoretically almost any violation can be considered "criminal conduct" and still be the subject of substantial civil penalties as a result. This needs clarification so that such penalties are imposed only in egregious cases: those where there has been intentional misconduct, willful disregard of the law, or the creation of a knowing endangerment.

Third, it is Justice, not EPA, that makes final criminal prosecutorial decisions. DOJ needs to publish its own guidance clarifying when

01/31/96 LEGISLATIVE TELECONFERENCE NETWORK SYSTEM LTN1150

15:28:21 PARTICIPANT LIST (ALL PARTICIPANTS) BY:ANC

TCN:60207 SCHEDULED FOR:01/31/96 15:30 TO 17:00 FOR:ANC

PUBLIC HEARING SENATE RESOURCES

LOCATION:ANCHORAGE

SB 199	MR.	JEFF	CARPENTER	DEPT. OF LABOR	TESTIFY

01/31/96 LEGISLATIVE TELECONFERENCE NETWORK SYSTEM LTN1150

15:44:39 PARTICIPANT LIST (ALL PARTICIPANTS) BY:FBX

TCN:60207 SCHEDULED FOR:01/31/96 15:30 TO 17:00 FOR:FBX

PUBLIC HEARING SENATE RESOURCES

LOCATION:FAIRBANKS

SB 199	MR.	SCOTT	CALDER	TESTIFY

03/06/96 LEGISLATIVE TELECONFERENCE NETWORK SYSTEM LTN1150

15:33:11 PARTICIPANT LIST (ALL PARTICIPANTS) BY:ANC

TCN:60473 SCHEDULED FOR:03/06/96 15:30 TO 17:00 FOR:ANC

PUBLIC HEARING SENATE RESOURCES

LOCATION:ANCHORAGE

SB 199	(2)	PAUL	GROSSI	DIV WORKERS COMP	TESTIFY
SB 199	(3)	KEN	DONAJKOWSKI (Donna Kowse)	AOGA	TESTIFY
SB 199	(1)	JEFF	CARPENTER		TESTIFY
~~SB 112~~		KEN	BOYD		~~TESTIFY~~

199

SB

201

FISCAL NOTE

STATE OF ALASKA **BILL NO. SB201**

1995 LEGISLATIVE SESSION

Revision Date: Original
Dept Affected Natural Resources
Title: An Act relating to the employment of
BRU: Resource Development
emergency fire-fighting personnel by the commissioner of...
Component: Forest Managment & Development
Sponsor: Senator Lincoln
Requestor:
Component Serial No. 435

Expenditures/Revenues (Thousands of Dollars)

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

FUND SOURCE (Thousands of Dollars)

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

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

POSITIONS

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

ANALYSIS: (Attach a separate page if necessary)

This is a zero cost fiscal note for the operating budget. Funding will be provided by the agency(s) requesting fire management work other than wildland fire suppression. This bill would provide DNR authority to hire EFF crews under AS 41.15.030 for fire management work.

In FY95 the Division received approval through the capital budget to receive and expend up to $300.0 in federal receipts to supply Emergency Fire Fighting crews to federal agencies on a reimbursable basis. (Reference: SLA94, SB363, Sec 10, Pg 10, Ln 23). This bill provides hiring authority to DNR to utilize EFF for other fire management work under AS 41.15.030. The Bureau of Land Management, National Park Service, U.S. Fish and Wildlife Service, and the U.S. Forest Service have identified prescribed burning projects which require approximately 300 days of work for trained fire fighting crews. This work cannot be effectively or efficiently conducted without a trained workforce.

Prepared by: Tom Boutin, Director — Phone: 465-3379
Division: Forestry — Date: 31-Jan-96
Approved by Commissioner: — Date: 31-Jan-96
Agency: Natural Resources

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Alaska State Legislature

Official Business

State Capitol
Juneau AK 99801

MEMO

TO: Nancy Quinto, Senate Secretary

FROM: Annette Kreitzer, Aide to
Senate Resources Committee AK

DATE: March 27, 1996

RE: CS SB 201: Fire Fighting Personnel Employment

On March 18, 1996, the Resources Committee adopted a blank committee substitute for SB 201. The motion was by Senator Taylor, and no one objected. The work draft adopted was 9-LS1474\C by Luckhaupt dated 2/10/96. The committee held the bill over to March 25, when questions about fiscal notes were resolved and the bill was passed from committee.

I neglected to properly fill out the committee report and to turn in the committee substitute adopted by the committee. Attached is the committee substitute adopted and moved by the committee. Please correct the record.

Thanks.

CS FOR SENATE BILL NO. 201(RES)

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - SECOND SESSION

BY THE SENATE RESOURCES COMMITTEE

Offered:
Referred:

Sponsor(s): SENATOR LINCOLN

A BILL

FOR AN ACT ENTITLED

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

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

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

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

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

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

prevention, habitat restoration or improvement, and other related activities in emergency and nonemergency circumstances. The assignment of emergency fire-fighting personnel to nonemergency activities may not be used to replace permanent or seasonal state employees.

9-LS1474\C
Luckhaupt
2/10/96

CS FOR SENATE BILL NO. 201( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATOR LINCOLN

A BILL

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prevention, habitat restoration or improvement, and other related activities in emergency and nonemergency circumstances. The assignment of emergency fire-fighting personnel to nonemergency activities may not be used to replace permanent or seasonal state employees.

SENATE COMMITTEE REPORT
First Committee of Referral

DATE: 1/8/96 FURTHER: Finance

Date of 5-Day Notice: 3-12-96
(in accordance with Uniform Rule 23)

DATE TURNED INTO OFFICE: 3-25-96

The Resources Committee considered SENATE BILL NO. 201

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

and recommends:

[ ] be **replaced** with _____ CS _____ (_____)

[ ] adopt **previous** _____ CS _____ (_____)

[ ] attached amendment(s)

[ ] adopt Letter of Intent by _____ Committee

[ ] further referral to the _____ Committee

Senate Bill:
[ ] same title
[ ] new title

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

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

NEW FISCAL NOTE(S):

Department	Date	Zero	Fiscal
DNR	3/22/96		$250
DPS	3/18/96	✓	

PREVIOUS FISCAL NOTE(S):*

Department	Date	Zero	Fiscal

[ ] **APPROPRIATION -- no fiscal note**

***Include fiscal notes accompanying Governor's bill**

FISCAL NOTE

STATE OF ALASKA **BILL NO. SB201**

1996 LEGISLATIVE SESSION

Revision Date: 22-Mar-96 Dept Affected: Natural Resources

Title: An Act relating to the employment of emergency fire-fighting personnel by the commissioner of... BRU: TO BE DETERMINED

Component: New - TO BE ESTABLISHED

Sponsor: Senator Lincoln

Requestor: Senate Resources Component Serial No. TO BE ESTABLISHED

Expenditures/Revenues (Thousands of Dollars)

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

FUND SOURCE (Thousands of Dollars)

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

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

POSITIONS

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

ANALYSIS: (Attach a separate page if necessary)

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

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

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

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

Division: Forestry Date: 22-Mar-96

Approved by Commissioner: Date: 22-Mar-96

Agency: Natural Resources

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STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES

SUPPORT SERVICES DIVISION

400 WILLOUGHBY AVENUE
JUNEAU, ALASKA 99801-1796
PHONE: (907) 465-2406
FAX (907) 465-2492

March 19, 1996

The Honorable Loren Leman
Chairman, Senate Resources Committee
Alaska State Legislature
Room 113, Capitol
Juneau, Alaska

Dear Senator Leman:

I would like to provide the Senate Resource Committee with some additional details on some of the points of discussion that came up during the Senate Resources Committee hearing on SB201 yesterday.

We discussed why fire suppression money cannot be used for programs other than the actual fighting of wildland fire. AS 41.15.010 requires the Department of Natural Resources to protect State, Private and Municipal land from wildland fire commensurate to the value of the resources at risk. Annual suppression expenses can vary dramatically depending on the severity of a fire season. Actual expenditures have been analyzed over a ten year period (excluding the high and low years) and show that $9.5 million is the annual state funds expenditure. The legislature funds the fire program at substantially under that amount. The FY96 appropriation for fire suppression was $3.5 million, which is distinct from the forest management appropriation. By the way of clarification, this is an appropriation out of the General Fund, not the Fire Suppression Fund. Fire suppression funding is used for the fixed costs and actual firefighting on the ground. Use of suppression funding for other programs, such as prescribed burns, would be misappropriation of funds by the agency. DNR has put in place a good system of checks and balances to ensure that only appropriate fire suppression expenditures occur. In addition, both OMB and legislative audit examine the fire suppression component annually.

The idea of a fiscal note which shows the existing federal receipt authority as an expenditure was discussed. We believe that showing this existing spending authority for SB201 would in effect be a double counting of this funding as it already has been appropriated in SLA94, SB363, Sec.10, line23). SB201 enable us to us the village crews for prescribed burns but it does not mandate any funding on its own. We plan to approach the legislature each year with request for these projects when we are made aware of funding from federal or other agencies.

There was discussion of utilizing the authority in SB201 for the expenditure of federal funds only. Limiting the flexibility for this very cost-effective program would put unnecessary

10-JBLH

constraints on state agencies such as the Department of Fish & Game who may have appropriated funding for such projects as controlled burns for habitat improvement. Even if SB201 becomes law, emergency firefighters could only be used for projects for which there has been an appropriation. DNR would only use emergency firefighters where there is an appropriation, the use is allowed by law, and it is cost-effective.

Thank you for giving this your attention. Please let me know of any further questions you may have. DNR strongly supports SB201.

Sincerely,

Nico Bus, Acting Director
Support Services Division

cc: Members of Senate Resource Committee
Tom Boutin
Carol Carroll