

ALASKA LEGISLATURE COMMITTEE FILES 1997-1998 8672

9235 HOUSE JUDICIARY

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HOUSE COMMITTEE REPORT

(7)
Date Referred to Committee: March 24, 1997

FURTHER REFERRALS:

Finance

Date of Committee Action: 4/9/97

The JUDICIARY Committee considered:

CSSB 41(FIN)

CS FOR SENATE BILL NO. 41(FIN)

ENVIRONMENTAL AUDITS

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

recommends it be replaced with the following committee substitute HCS CSSB 41 (JUD) the same title a new title

additional referral to _____ Committee
 attached amendment(s)

ADOPTS: _____ Letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept)

APPROVES PREVIOUS: (Dept/Date)

fiscal note(s) _____

fiscal note(s) DEPT. - LAW, COURTS

zero fiscal note(s) _____

zero fiscal note(s) HCS LABOR

SIGNING WITH RECOMMENDATIONS	DP	DNP	NR	AM
<u>Tom W. ...</u> CRIFT			✓	
<u>...</u> ...	✓			
<u>...</u> GREEN	✓			
<u>Jeanette James</u> JAMES	✓			
<u>...</u> BUNDE	✓			
<u>...</u> BERKOWITZ			✓	

CHAIR'S SIGNATURE [Signature]

FISCAL NOTE

No. 5

STATE OF ALASKA
1997 LEGISLATIVE SESSION

Bill Version: CSSB 41(JUD)

(S) Publish Date: 3/13/97

Revision Date: _____ Dept. Affected: Health and Social Services
 Title: Relating to environmental audits to determine compliance with certain laws, permits, and regulations. BRU: Medical Assistance
 Sponsor: Leman Component: Medicaid Facilities
 Requestor: Senate Judiciary COMPONENT SERIAL NO. 230
 See also (SN#): _____

Expenditures/Revenues:

(Thousands of Dollars)

OPERATING	FY98	FY99	FY00	FY01	FY02	FY03
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						
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CHANGES IN REVENUES ()						
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FUND SOURCE

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (please specify)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of any current year (FY97) cost: \$0.0

ANALYSIS: (Attach a separate page if necessary)

The Judiciary Committee Substitute for SB 41 eliminates any reference to health and safety or the Department of Health and Social Services, so there is no longer any potential impact on the Medicaid Program.

[Handwritten initials]
3/10/97

Prepared by: Nancy Weller
 Division: Medical Assistance

Phone: 465-3355
 Date: 03/10/97

Approved by Commissioner: Karen Perdue, Commissioner
 Agency: Department of Health & Social Services

Date: 3/10/97

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FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

No. 7
Bill Verson: CSSB 41 (FIN)
(S) Publish Date: 3-18-97

Revision Date: _____ Dept. Affected: Department of Law
Title: ...relating to environmental audits to determine BRU: Civil Division
compliance with certain laws, permits... Component: Environmental Law
Sponsor: Senator Leman
Requester: Senate Finance Committee COMPONENT SERIAL NO. 2092

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES	71.7	71.7	71.7	35.9	35.9	35.9
TRAVEL	4.3	4.3	4.3	2.1	2.1	2.1
CONTRACTUAL	44.0	44.0	44.0	25.3	25.3	25.3
SUPPLIES	1.4	1.4	1.4	0.7	0.7	0.7
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	121.3	121.3	121.3	64.0	64.0	64.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	121.3	121.3	121.3	64.0	64.0	64.0
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	121.3	121.3	121.3	64.0	64.0	64.0

Estimate of any current year (FY97) cost: \$ 0.0

POSITIONS

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

ANALYSIS: (Attach a separate page if necessary)

This bill creates a new evidentiary privilege that allows environmental audits to be kept confidential in civil and administrative (not criminal) cases. It also grants immunity from civil and administrative penalties for people who voluntarily disclose a violation of an environmental law or who disclose information that leads to the disclosure of a violation of an environmental law. "Environmental law" is defined to include federal, state, and municipal laws and is to be broadly construed.

Audit Privilege. To be privileged, the audits must be voluntary, confidential, internal, and retrospective. Information required to be reported under a law, permit, contract or lease, or information gathered independently of the audit are not covered. In addition, if the state can prove that one of the bill's exceptions apply, then a court may require disclosure.

Immunity. A person who voluntarily discloses a violation of an environmental law, or who discloses information

Prepared by: Joan Kasson *Joan M. Kasson*
Division: Administrative Services Division
Approved by Commissioner: Bruce M. Botelho, Attorney General *Bruce Botelho for*
Agency: Department of Law

Phone: 465-5370
Date: 3/17/97
Date: 3/17/97

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ANALYSIS CONTINUATION:

that leads to the discovery of a violation, would be immune from administrative or civil penalties. The violation must be corrected within 90 days, or pursuant to a compliance agreement that allows for correction within a reasonable time, for immunity to apply. Immunity is not available for violations that result in substantial personal injury on site, or substantial personal, property, or environmental injury offsite. The term "substantial" is not defined. This bill allows for the mitigation of penalties for people who do not qualify for immunity.

It is not possible to accurately quantify the increased costs to litigate the audit privilege and immunity provisions in this bill, in part because of the uncertainty about the types of proceedings to which the provisions would apply. Nevertheless, we have identified what we believe to be the minimum responsible level of resources necessary to contend with the anticipated assertions of privilege and immunity. These are the equivalent of two-thirds of a full-time attorney, and contractual funding for expert witnesses during the first three years of implementation. Once precedents are established, we expect these costs to be reduced.

General Legal Issues Resulting in Fiscal Impact

This is a new area of law, and there will be litigation and appeals related to the new privilege. An agency may have to defend the exercise of legitimate regulatory functions against a claim that the agency is improperly using privileged (confidential) information. Because the bill provides for some exceptions, there will also be litigation over what exceptions apply.

We also anticipate that additional legal assistance will be required for the affected agencies to negotiate, draft and review permits, contracts, leases, regulations and other documents to ensure that adequate compliance information is being gathered and maintained to meet the state's regulatory and proprietary responsibilities. The agencies will also require advice about what information is privileged and about public records requirements.

Section 2 of the bill in AS 09.25.460(a), deletes language that would have allowed the state to obtain objective facts even if they were contained in self audits. This change will result in a fiscal impact on the department due to the necessity for expert witnesses to gather and analyze factual information. Allowing objective facts to be withheld under the privilege will greatly complicate all cases involving self audits, and is a dramatic departure from current law. The Finance CS did remove language concerning the state's ability to obtain audit information in pipeline tariff cases. This change will decrease the department's cost estimate by \$75,000.

Agency-Specific Issues Resulting in Fiscal Impact

We have identified below some of the anticipated impacts on specific departments that lead us to conclude that our estimate of attorney resources is conservative. We noted in our original fiscal note on SB 41 that many of these impacts could be mitigated by limiting the number of departmental programs that are either explicitly or implicitly covered by the bill. With the elimination of the health and safety provisions from SB 41, the department's cost projections have declined by approximately one-third; however, other provisions referring to regulatory agencies remain ambiguous.

FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. CSSB 41 (FIN)

ANALYSIS CONTINUATION:

Department of Environmental Conservation

The bill could impact state-run programs in DEC that require federal approval, for instance Drinking Water and Air Quality. Protecting the state's primacy in these programs will require increased attorney time. We will propose amendments to mitigate the impact (which stems from both the privilege and immunity sections of the bill).

Other Agencies (DNR, DOTPF, Alaska Oil and Gas Conservation Commission)

The bill could jeopardize federal approval of programs like the AOGCC's Underground Injection Control program (the UIC program in Texas has been threatened because of that state's audit law). Protecting the state's interest by retaining primacy in this program will require increased attorney time. Any agency involved in protecting the state's interest in contaminated sites cases require additional attorney and outside expert time.

SUMMARY OF COSTS

The full-time equivalent cost estimate is based on the department's standard attorney cost schedule (\$127,000) and includes clerical support, communications, space, supplies, data processing, and other normal overhead expenses. Case specific travel and expert witness costs are included separately.

FY98 - FY00

Approximately 973 hours @ \$87/hour (2/3 FTE attorney)	\$84.7
Direct case travel	\$3.3
Expert witnesses	\$33.3
Total Costs	<u>\$121.3</u>

FY01 - FY03

Approximately 487 hours @ \$87/hour	\$42.4
Direct case travel	\$1.7
Expert witnesses	\$20.0
Total Costs	<u>\$64.0</u>

FISCAL NOTE

No. 8
 Bill Verson: SSB 41 (FIN)
 (S) Publish Date: 3-18-97

STATE OF ALASKA
 1997 LEGISLATIVE SESSION

Revision Date: 03/17/97
 Title: Environmental & Health Safety Audits
 Sponsor: Sens. Loman, Pearce & Taylor
 Requestor: _____

Dept. Affected: Alaska Court System
 BRU: Trial Courts
 Component: _____
 COMPONENT SERIAL NO. 788

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES	5.3	5.3	5.3	5.3	5.3	5.3
TRAVEL						
CONTRACTUAL	30.6	30.6	30.6	30.6	30.6	30.6
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	35.9	35.9	35.9	35.9	35.9	35.9
CAPITAL EXPENDITURES						
CHANGE IN REVENUES (

Fund Source (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	35.9	35.9	35.9	35.9	35.9	35.9
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other						
TOTAL	35.9	35.9	35.9	35.9	35.9	35.9

Estimate of any current year (FY 97) cost: None

Positions

Full-Time						
Part-Time	1.0	1.0	1.0	1.0	1.0	1.0
Temporary						

ANALYSIS: (Attach a separate page if necessary)

See attached analysis.

Prepared by: C. S. Christensen III, Staff Counsel *CSC* Phone: 264-8228
 Agency: Alaska Court System Date: 03/17/97

Approved by: Stephanie J. Cole, Acting Administrative Director *SJ Cole* Date: 03/17/97
 Agency: Alaska Court System

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Alaska Court System
Fiscal Analysis
CSSB 41 (FIN)

CSSB 41 (FIN) creates a privilege from disclosure and use in evidence for information contained in an environmental audit in certain civil actions or administrative proceedings. If a person or entity asserts the privilege, the opposing party would need to request an in-camera review of the information, in order to determine if the information is not privileged and must be disclosed.

An in-camera review of this nature can be extremely time consuming; many environmental audits (a term broadly defined in the legislation) are composed of tens of thousands of pages of documents. Cases in which an in-camera review is requested will require large amounts of time for pretrial proceedings. According to the Department of Law, the privilege could be litigated in approximately three to six cases involving contaminated property each year. These are complex cases in which an environmental audit was probably performed. Law estimates that it will take an average of 50 hours to litigate the privilege issue in those contamination cases in which a privilege is asserted. Contaminated property cases are but one example; the privilege can be expected to be claimed in a handful of contested DEC permit cases, as well as in other cases. Law has also advised that in some cases, the court system will need to retain scientific and technical experts to assist in evaluating audit reports.

Due to the complexity of the legislation and the ambiguity of several of its provisions, Law anticipates substantial litigation and appeals resulting from passage of CSSB 41 (FIN), particularly regarding the privilege. It has also indicated a need for additional attorney resources to handle the state involvement in the litigation and appeals. Note, however, that many privilege cases not involving the state will also be litigated, such as cases in which the plaintiff is a private citizen, an environmental organization, or a municipality. Accordingly, the court system will actually see far more cases than the cases which impact Law and DEC. This fiscal note reflects contractual costs for a discovery master to handle the in-camera review of documents, as well as the greater clerical costs associated with cases involving extremely large amounts of documents. It does not reflect costs for increased litigation and appeals resulting from the complexity and ambiguity of the bill.

Alaska Court System
Fiscal Analysis
CSSB 41 (FIN)

Personal Services

<u>Position</u>	<u>Salary</u>	<u>Benefits</u>	<u>Total</u>
Records Clerk, range 10A, Anchorage, PFT, 2 months	\$4,210	\$1,086	\$5,296

Contractual

Discovery master for 375 hours at \$76 an hour.			28,125
Fees of experts to assist discovery master in technical and scientific matters			<u>2,500</u>
Total Contractual			<u>30,625</u>

Total Estimated Cost			<u>\$35,920</u>
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FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

No. 9
Bill Version: CSSB 41 (FIN)
(S) Publish Date: 3-18-97

Revision Date: _____
Title: Environmental & health/safety audits
Sponsor: Senator Leman
Requestor: Senate JUD

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

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
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						
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CHANGE IN REVENUE FUND SOURCE #						
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FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate current year (FY97) impact: \$ None

ANALYSIS: (Attach a separate page if necessary)

Since the Department of Labor was removed from this bill, there will be no fiscal impact.

Prepared by: Alan W. Dwyer, Director *Alan W. Dwyer* Phone: 465-4855
Division: Labor, Standards & Safety Date: 3/7/97
Approved by Commissioner: Tom Cashen, Commissioner *Tom Cashen*
Agency: Department of Labor Date: 3/7/97

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FISCAL NOTE

No. 8Bill Version: CSSB 41 (FIN)(S) Publish Date: 3-18-97

STATE OF ALASKA

1997 LEGISLATIVE SESSION

Revision Date: 03/17/97Title: Environmental & Health Safety AuditsDept. Affected: Alaska Court SystemBRU: Trial Courts

Component: _____

Sponsor: Sens. Leman, Pearce & Taylor

Requestor: _____

COMPONENT SERIAL NO. 768

Expenditures/Revenues

(Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES	5.3	5.3	5.3	5.3	5.3	5.3
TRAVEL						
CONTRACTUAL	30.6	30.6	30.6	30.6	30.6	30.6
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	35.8	35.8	35.9	35.9	35.9	35.8

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES (
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Fund Source

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	35.9	35.9	35.9	35.9	35.9	35.9
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other						
TOTAL	35.9	35.9	35.9	35.9	35.9	35.9

Estimate of any current year (FY 97) cost: None

Positions

Full-Time						
Part-Time	1.0	1.0	1.0	1.0	1.0	1.0
Temporary						

ANALYSIS: (Attach a separate page if necessary)

See attached analysis.

Prepared by: C. S. Christensen III, Staff CounselAgency: Alaska Court SystemPhone: 264-8228Date: 03/17/97Approved by: Stephanie J. Cole, Acting Administrative DirectorAgency: Alaska Court SystemDate: 03/17/97

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Rev 1/97

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Alaska Court System
Fiscal Analysis
CSSB 41 (FIN)

CSSB 41 (FIN) creates a privilege from disclosure and use in evidence for information contained in an environmental audit in certain civil actions or administrative proceedings. If a person or entity asserts the privilege, the opposing party would need to request an in-camera review of the information, in order to determine if the information is not privileged and must be disclosed.

An in-camera review of this nature can be extremely time consuming; many environmental audits (a term broadly defined in the legislation) are composed of tens of thousands of pages of documents. Cases in which an in-camera review is requested will require large amounts of time for pretrial proceedings. According to the Department of Law, the privilege could be litigated in approximately three to six cases involving contaminated property each year. These are complex cases in which an environmental audit was probably performed. Law estimates that it will take an average of 50 hours to litigate the privilege issue in those contamination cases in which a privilege is asserted. Contaminated property cases are but one example; the privilege can be expected to be claimed in a handful of contested DEC permit cases, as well as in other cases. Law has also advised that in some cases, the court system will need to retain scientific and technical experts to assist in evaluating audit reports.

Due to the complexity of the legislation and the ambiguity of several of its provisions, Law anticipates substantial litigation and appeals resulting from passage of CSSB 41 (FIN), particularly regarding the privilege. It has also indicated a need for additional attorney resources to handle the state involvement in the litigation and appeals. Note, however, that many privilege cases not involving the state will also be litigated, such as cases in which the plaintiff is a private citizen, an environmental organization, or a municipality. Accordingly, the court system will actually see far more cases than the cases which impact Law and DEC. This fiscal note reflects contractual costs for a discovery master to handle the in-camera review of documents, as well as the greater clerical costs associated with cases involving extremely large amounts of documents. It does not reflect costs for increased litigation and appeals resulting from the complexity and ambiguity of the bill.

Alaska Court System

Fiscal Analysis

CSSB 41 (FIN)

Personal Services

<u>Position</u>	<u>Salary</u>	<u>Benefits</u>	<u>Total</u>
Records Clerk, range 10A, Anchorage. PFT, 2 months	\$4,210	\$1,085	\$5,295

Contractual

Discovery master for 375 hours at \$75 an hour. 28,125

Fees of experts to assist discovery master in technical and scientific matters 2,500

Total Contractual 30,625

Total Estimated Cost \$35,920

FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. SB 41

Revision Date:

Dept. Affected: Alaska Court System

Title: Environmental & Health Safety Audits

BRU: Trial Courts

Component:

Sponsor: Sens. Leman, Pearce & Taylor

Requestor: Judiciary

COMPONENT SERIAL NO. 768

Expenditures/Revenues

(Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES	7.9	7.9	7.9	7.9	7.9	7.9
TRAVEL						
CONTRACTUAL	40.0	40.0	40.0	40.0	40.0	40.0
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	47.9	47.9	47.9	47.9	47.9	47.9

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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Fund Source

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	47.9	47.9	47.9	47.9	47.9	47.9
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other						
TOTAL	47.9	47.9	47.9	47.9	47.9	47.9

Estimate of any current year (FY 97) cost: None

Positions

Full-Time						
Part-Time	1.0	1.0	1.0	1.0	1.0	1.0
Temporary						

ANALYSIS: (Attach a separate page if necessary)

See attached analysis.

Prepared by: C. S. Christensen III, Staff Counsel

Agency: Alaska Court System

Phone: 264-8228

Date: 02/24/97

Approved by: Arthur H. Snowden, II, Administrative Director

Agency: Alaska Court System

Date: 02/24/97

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Alaska Court System
Fiscal Analysis
CSSB 41 (L&C)

CSSB 41 (L&C) creates a privilege from disclosure and use in evidence for information contained in an environmental audit in certain civil actions or administrative proceedings. If a person or entity asserts the privilege, the opposing party would need to request an in-camera review of the information, in order to determine if the information is not privileged and must be disclosed.

An in-camera review of this nature can be extremely time consuming; many environmental audits (a term broadly defined in the legislation) are composed of tens of thousands of pages of documents. Cases in which an in-camera review is requested will require large amounts of time for pretrial proceedings. According to the Department of Law, the privilege could be litigated in approximately three to six cases involving contaminated property each year. These are complex cases in which an environmental audit was probably performed. Law estimates that it will take an average of 50 hours to litigate the privilege issue in those contamination cases in which a privilege is asserted. Contaminated property cases are but one example; the privilege can be expected to be claimed in a handful of contested DEC permit cases, as well as potentially large number of cases involving OSHA and DHSS. In addition, due to the complexity of the legislation and the ambiguity of several of its provisions, Law anticipates substantial litigation and appeals, particularly regarding the privilege. Law has also advised that in some cases, the court system will need to retain scientific and technical experts to assist in evaluating audit reports.

The Department of Law has estimated a need for one additional attorney to handle the increased litigation and appeals resulting from passage of CSSB 41 (L&C), about half of which will result from the creation of the privilege. Note that many privilege cases not involving state agencies will also be litigated, such as cases in which the plaintiff is a private citizen or a municipality. Accordingly, the court system will see far more cases than the cases which involve Law, DEC, and other state entities such as OSHA and DHSS. This fiscal note reflects contractual costs for a discovery master to handle the in-camera review of documents, as well as the greater clerical costs associated with cases involving extremely large amounts of documents.

Alaska Court System

Fiscal Analysis

SB 41

Personal Services

<u>Position</u>	<u>Salary</u>	<u>Benefits</u>	<u>Total</u>
Records Clerk, range 10A, Anchorage, PPT, 3 months	\$6,315	\$1,627	\$7,942

Contractual

Discovery master for 500 hours at \$75 an hour.		37,500
Fees of experts to assist discovery master in technical and scientific matters		<u>2,500</u>
Total Contractual		<u>40,000</u>
Total Estimated Cost		<u><u>\$47,942</u></u>



Alaska State Legislature

Please enter into the record my testimony to the House Judiciary
committee name
committee on SB 41 (as amended) , dated April 9, 1997
bill/subject

I note that the sponsor of this bill, in his statement on it, states: "Environmental Auditing has become increasingly popular in the past two decades. In the U.S., 20 states have enacted self-audit laws similar to SB 41" While I am sure that the preceding statement is true, I DO NOT believe that it is sufficient reason for Alaska to follow in the lead of those other states.

I believe that SB 41 gives too much power to industry, to conceal activities that THE PUBLIC HAS A RIGHT TO KNOW. Just as we would not sign and mail off a blank check, leaving it to the recipient to fill in the correct amount, we should NEVER give up the right of the public, acting through the agency of the state, to properly regulate industry.

I am sure that the sponsors of this bill are sincere in their belief that it is a good idea, is justified, and will improve the present situation as regards the behavior of industry, I believe that this bill, if enacted, would give industry much too much power, and that power would have been taken from the public, which is the proper seat of all legal power in our country and our state, acting, of course, through it's properly constituted legal institutions.

I urge that you vote to kill this bill; give it a quick, merciful, and painless death. I believe that the only way that it could be amended in a way that would make it compatible with the ideals on which our country was founded would be as follows: Substitute, for lines 4 through 14, and all the text on the following pages, the following language:

THE STATE, BEARING IN MIND IT'S RESPONSIBILITY TO ALL OF IT'S CITIZENS, SHALL MAKE EVERY POSSIBLE EFFORT TO FULLY ENFORCE ALL OF THE LAWS AND REGULATIONS ON THE BOOKS AT THIS TIME, AND IN THE FUTURE, WITHOUT ANY PREFERENCES OR EXCEPTIONS.

Signed: Gerald R. Brookman Janet E. Brookman
Testifier (Gerald R. Brookman)

Myself, as an individual, and my wife. Janet E. Brookman

Representing (Optional)

715 Muir Avenue, Kenai, Alaska 99611

Address

907-283-9329 (FAX: 907-283-7180)

Phone No.

STATE OF ALASKA

TONY KNOWLES, GOVERNOR

RECEIVED

APR 14 1997

DEPT. OF ENVIRONMENTAL CONSERVATION

DIVISION OF ENVIRONMENTAL HEALTH

DIRECTOR'S OFFICE

555 CORDOVA STREET

ANCHORAGE, ALASKA 99501

<http://www.state.ak.us/dec/home.htm>

Telephone: (907) 269-7644

Fax: (907) 269-7654

E-mail: jadair@envircon.state.ak.us

April 10, 1997

The Honorable Jeanette James
Alaska House of Representatives
Room 102, Capitol Building
Juneau, AK 99801

Dear Representative James:

During my testimony before the House Judiciary Committee on April 7, 1997, on the environmental self-audit bill, CSSB 41(FIN), I overlooked the legal basis for the "stipulated penalties" that are included in certain Department of Environmental Conservation (DEC) compliance orders by consent. I wanted to take this opportunity to clarify the record. (It's always good to have your attorney in the audience!)

As we discussed during the hearing, a compliance order by consent (COBC) may require that the permittee (referred to as the "respondent" in the COBC) pay a stipulated sum as a penalty or damages. Or, it may provide that if the respondent fails to come into compliance by a certain date, the respondent must pay a stipulated sum for each day thereafter until the respondent achieves compliance. In a compliance order by consent, the respondent agrees to be bound by the terms and conditions of the order, including any terms and conditions regarding payments to the state.

While the statutes do not specifically provide for stipulated penalties in these types of administrative orders, a number of statutes authorize DEC to recover, through actions brought in state court, the state's costs in responding to violations as well as certain damages (as opposed to penalties). For example, under AS 46.03.760(a), DEC may bring a civil action to recover a sum that represents:

- (1) liquidated damages for environmental harm;
- (2) the state's reasonable costs incurred in detecting, investigating, and attempting to correct the violation; and
- (3) the economic savings realized by the owner or operator because of their noncompliance.

As I also mentioned at the hearing, under AS 46.03.760(e), DEC may also recover a civil penalty for violations of the state's hazardous waste and air pollution control laws. We also have authority for penalties for certain large oil spills under AS 46.03.759. Finally, AS 46.03.822 provides another

The Honorable Jeannette James

Page 2

April 10, 1997

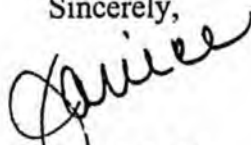
example: in cases involving releases of hazardous substances, DEC may recover damages and the state's costs of response, containment, removal, and remedial action.

These and other statutes containing similar provisions provide DEC with the necessary legal authority to include "stipulated penalties" in compliance orders by consent. By entering into a compliance order by consent, DEC and the respondent avoid the necessity of litigation to resolve questions about payments to the state for damages and response costs and, in some limited cases, penalties. The amounts are agreed upon and spelled out in the COBC, with considerable savings in time and money for everyone involved.

Please accept my apologies for any confusion my testimony may have caused. As you know, you can do certain things so many times that the specific unpinnings are no longer a question in your mind. Please don't hesitate to get in touch with me if I can provide you with any other information.

By the way, I don't know if Barbara mentioned anything, but we had a great time in House Resources on HB 144, the pesticide fee bill. She really set the tone (I'll let her tell you about that), and I think I can honestly say a good time was had by all. Quite a statement for a legislative hearing! Thanks again for introducing that bill for us. It moved out of Resources and I hope the Finance Committee will be just as amenable to the concept.

Sincerely,



Janice Adair
Director

JA/id (j:\eh\director\james.wpd)

cc: The Honorable Joe Green, Chairman
House Judiciary Committee

Alaska Oil and Gas Association



121 West Fireweed Lane, Suite 207
Anchorage, Alaska 99503-2035
Phone: (907) 272-1481 Fax: (907) 279-8114

April 16, 1997

Fax #: 1-907-465-4316

The Honorable Joseph Green
Alaska State House of Representatives
State Capitol, Room 118
Juneau, AK 99801-1182

HCS CSSB 41, Environmental Audits

Dear Representative Green:

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

AOGA understands that HCS CSSB 41 (Environmental Self-Audit legislation) will soon be before the House of Representatives for a vote. AOGA supports the intent of environmental self-audit legislation and believes HCS CSSB 41 moves environmental compliance in a positive direction through its encouragement of self-auditing.

The majority of AOGA members currently conduct self-audits as a means of ensuring compliance and see value in this legislation which encourages greater utilization of self-audits by providing qualified immunity and privilege.

Self-auditing is an important tool for voluntary compliance. By enacting legislation which provides privilege and immunity for self-audits, the state is saying voluntary compliance with environmental laws and regulations is in the best interest of the state as well as industry. We encourage your support of HCS CSSB 41.

Sincerely,

A handwritten signature in cursive script, appearing to read 'L. A. Gray', is written over the typed name and title.

L. A. GRAY
Public Affairs Manager

Valdez Office

P.O. Box 108, Valdez, AK 99686
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April 16, 1997

Senator Loren Lemam
State Capitol
Juneau, AK 99801
FAX: (907) 465-3810

RE: Proposed amendments to SB 41 to minimize its adverse impacts on whistleblowers

Dear Senator Lemam,

I am writing to respond to your letter to Representative Therriault regarding "SB 41 and 'whistleblower' laws" (dated April 15, 1997). Your letter suggests that you did not intend SB 41 to have a chilling effect on employees concerned about environmental violations or adversely impact their ability to receive a full and fair hearing in a whistleblower complaint.

The Alaska Forum appreciates this clarification of your intent. Nevertheless, we believe the bill itself still remains unclear on this point. For several reasons, the Alaska Forum hopes you will consider clarifying your intent in the language of the bill.

First, the Alaska Whistleblower Act (AS 39.90.10C) applies only to public employees. Private sector employees receive no protections under this statute. That is why the vast majority of private sector whistleblowers -- such as the long list of TAPS whistleblowers and the more recent case involving a Doyon Drilling employee -- must turn to federal law for remedies for harassment and retaliation for speaking the truth. The unfortunate reality in Alaska is that private sector whistleblowers receive little meaningful protection under current state law. Without additional clarification, SB 41 will only add to this problem.

Second, Section 09.25.450(a)(2) [*page 3, line 2-3, draft 0-LS0299L*] could be interpreted to mean that the only exception to the bill's privilege provisions are in "worker's compensation proceedings." There is ample legal precedent for lawyers to argue about, and courts to conclude, that because whistleblower proceedings are not explicitly listed as an exception in this section they therefore are included under the bill's privilege provisions. More generally, in any whistleblower case based upon diversity jurisdiction in federal court, lawyers could effectively argue that state law governs the applicability of any asserted privilege.

Letter to Senator Leman on SB 41
April 16, 1997

Page 2 of 3

Third, Section 09.25.460(a)(3) says that no privilege exists for "a source that was **not** involved in compiling, preparing, or conducting the environmental audit report" (emphasis added). You suggest that this section thus provides protection for whistleblowers as one potential "source" of information. Unfortunately, this ignores the reality that whistleblowers often learn of violations during activities that could, if this bill is enacted, fall under the rubric of an audit report. Evidence of the violation disclosed by the whistleblower, and for which disclosure the whistleblower subsequently experienced retaliation and harassment, would be privileged evidence. While this concern may seem paranoid to you and not based on recent experience in other states, experience with whistleblower proceedings gives us great cause for concern that this section would make it much more difficult to receive a full and fair hearing in a whistleblower complaint.

Finally, and most importantly, Section 1 (page 1) is silent on the issue of legislative intent as it relates to whistleblowers. Again, unless the language of the bill itself is clear that the legislature does not intend to adversely impact whistleblowers then lawyers will have plenty of room to argue, and courts to conclude, that whistleblower proceedings are not exempt from the privilege provisions of SB 41.

The Alaska Forum urges you to make your intent -- that SB 41 not adversely impact whistleblowers -- clear in the language of SB 41 itself. To this end, we propose the following two amendments to SB 41:

Amendment 1 -- Section 1. "FINDINGS: INTENT."
(to be inserted immediately following line 15, page 2)

(4) the public also has a strong interest in ensuring that concerned employees who disclose violations of environmental laws or regulations do not experience harassment, retaliation, discrimination or other reprisals for making such disclosures; the legislature intends that the audit privilege established in this Act should in no way curtail the ability of concerned employees to discover or introduce evidence in any administrative or judicial proceeding alleging harassment, retaliation, discrimination or other reprisals;

Amendment 2 -- Section 09.25.450(a)(2)
(to be inserted immediately before the final "." on page 2, line 2)

, employment discrimination proceedings or whistleblower proceedings.

I hope you will consider making these two amendments to SB 41 before you send the bill to Governor Knowles. These amendments will make it clear that you and the legislature did not intend SB 41 to adversely impact whistleblower rights.

Letter to Senator Leman on SB 41
April 16, 1997

Page 3 of 3

If you have any questions or need clarification, please call me at (907)835-4731, or Mike Riley, program director, at (206)628-9464.

Sincerely,



Stan Stephens
President

cc: Representative Ethan Berkowitz, FAX: (907)465-2137
Representative Eric Croft, FAX: (907)465-4419
Representative John Davics, FAX: (907)465-3519
Representative Kim Elton, FAX: (907)465-2108
Representative Joe Green, FAX: (907)465-4316
Representative Ben Grussendorf, FAX: (907)465-2278
Representative Mark Hanley, FAX: (907)465-2418
Representative Reggie Joule, FAX: (907)465-4586
Representative Allen J., FAX: (907)465-6651
Representative Gene Kubina, FAX: (907)465-3799
Representative Carl Moses, FAX: (907)465-3445
Representative Irene Nicholia, FAX: (907)465-2197
Representative Gene Therriault, FAX: (907)465-3884

Senator Al Adams, FAX: (907)465-4821
Senator Jim Duncan, FAX: (907)465-4748
Senator Johnny Ellis, FAX: (907)465-2529
Senator Lyman Hoffman, FAX: (907)465-4523
Senator Georgianna Lincoln, FAX: (907)465-2652
Senator Druc Pearce, FAX: (907)465-3872
Senator Bert Sharp, FAX: (907)465-2070
Senator Robin Taylor, FAX: (907)465-3922

Tony Knowles, Governor, FAX: (907)465-3532
Michele Brown, Commissioner, Department of Environmental, FAX: (907)465-5070
Janice Adair, ADEC Legislative Liaison, FAX: (907)269-7654
Marilyn Heiman, Special Staff Assistant to the Governor, FAX: (907)465-3532

HOUSE CS FOR CS FOR SENATE BILL NO. 41(JUD)
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTIETH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATORS LEMAN, Pearce, Taylor

A BILL

FOR AN ACT ENTITLED

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

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

4 * Section 1. FINDINGS; INTENT. The legislature finds and intends as follows:

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

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

1 environmental business practices and procedures; this encouragement can best be achieved by
 2 preserving the free flow of information; the free flow of the kind of information that is
 3 generated by self-audits would be curtailed if a privilege for the audits were not available;
 4 therefore, it is the intent of the legislature to recognize an audit privilege under this Act to
 5 protect the confidentiality of communications related to voluntary internal environmental
 6 audits; however, the legislature does not intend that the parts of an audit report consisting of
 7 confidential self-evaluation and analysis that are privileged under this Act may be used to
 8 shield a person from liability under applicable laws and regulations by blocking access to
 9 underlying facts;

10 (3) the public also has a strong interest in obtaining cost-effective correction
 11 of inadvertent environmental violations; this goal can best be achieved by offering qualified
 12 immunity from administrative and civil penalties to regulated persons who promptly report
 13 known violations of environmental regulations that are uncovered as part of an audit so that
 14 the violations can promptly be corrected and a compliance plan can be negotiated with the
 15 appropriate government agency;

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

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

22 **Article 5. Privileges and Immunities**

23 **Related to Disclosure of Certain Self-Audits and Violations.**

24 **Sec. 09.25.450. Audit report privilege.** (a) Except as provided in
 25 AS 09.25.460, an owner or operator who prepares an audit report or causes an audit
 26 report to be prepared has a privilege to refuse to disclose, and to prevent another
 27 person from disclosing, the parts of the report that consist of confidential self-
 28 evaluation and analysis of the owner's or operator's compliance with environmental
 29 laws. Except as provided in AS 09.25.455 - 09.25.480, the privileged information is
 30 not admissible as evidence or subject to discovery in

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

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

3 (b) With respect to confidential self-evaluation and analysis in an
4 environmental audit, in order to qualify for the privilege under this section and the
5 immunity under AS 09.25.475, at least 15 days before conducting the audit, the owner
6 or operator conducting the audit must give notice by electronic filing that complies
7 with an ordinance or regulation authorized under (j) of this section or by certified mail
8 with return receipt requested to the commissioner's office of the department, and, when
9 the audit includes an assessment of compliance with a municipality's ordinances, to
10 the municipal clerk, of the fact that it is planning to commence the audit. The notice
11 must specify the facility, operation, or property or portion of the facility, operation, or
12 property to be audited, the date the audit will begin and end, and the general scope of
13 the audit. The notice may provide notification of more than one scheduled
14 environmental audit at a time. Once initiated, an audit shall be completed within a
15 reasonable time, but no longer than 90 days, unless a longer period of time is agreed
16 upon between the owner or operator and the department or the municipality, as
17 appropriate. The audit report must be completed in a timely manner.

18 (c) The following persons may claim the privilege available under (a) of this
19 section:

20 (1) the owner or operator who prepared the audit report or caused the
21 audit report to be prepared;

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

25 (3) a person to whom confidential self-evaluation or analysis is
26 disclosed under AS 09.25.455(b); or

27 (4) a custodian of the audit results.

28 (d) A person who conducts or participates in the preparation of an audit report
29 and who actually observed or participated in conditions or events being reviewed for
30 compliance may testify about those conditions or events but may not, in a proceeding
31 covered by (a) of this section, be compelled to testify about or produce documents

1 consisting of confidential self-evaluation and analysis.

2 (e) A person claiming the privilege described in this section has the burden of
3 establishing the applicability of the privilege.

4 (f) To facilitate identification, each document in an audit report that contains
5 confidential self-evaluation or analysis shall be labeled "AUDIT REPORT:
6 PRIVILEGED DOCUMENT."

7 (g) A government agency or its employees or agents may not, as a condition
8 of a permit, license, or approval issued under an environmental law, require an owner
9 or operator to waive the privilege available under this section.

10 (h) Except when the privilege is waived under AS 09.25.455(a) or disclosure
11 is made under AS 09.25.455(b)(3) or 09.25.475 or 09.25.480, neither a government
12 agency nor its employees or agents may review or otherwise use the part of an audit
13 report consisting of confidential self-evaluation or analysis during an inspection of a
14 regulated facility, operation, or property or an activity of a regulated facility, operation,
15 or property.

16 (i) This section may not be construed to

17 (1) prevent a government agency from issuing an emergency order,
18 seeking injunctive relief, independently obtaining relevant facts, conducting necessary
19 inspections, or taking other appropriate action regarding implementation and
20 enforcement of an applicable environmental law, except as otherwise provided in
21 AS 09.25.475; or

22 (2) authorize a privilege for uninterrupted or continuous environmental
23 audits.

24 (j) The department or municipality may, by regulation or ordinance,
25 respectively, allow the notice required under (b) of this section to be filed by facsimile
26 or other electronic means if the means ensures adequate proof of

27 (1) submittal of the notice by the owner or operator; and

28 (2) receipt by the department or municipality.

29 (k) There is no privilege under this section for documents or communications
30 in a criminal proceeding.

31 **Sec. 09.25.455. Waiver and disclosure.** (a) The privilege in AS 09.25.450

1 does not apply to the extent the privilege is expressly waived in writing by the owner
2 or operator who prepared the audit report or caused the report to be prepared.

3 (b) Disclosure of the part of an audit report or information consisting of
4 confidential self-evaluation or analysis does not waive the privilege established by
5 AS 09.25.450 if the disclosure is made

6 (1) to address or correct a matter raised by the environmental audit and
7 is made to

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

10 (B) the owner's or operator's lawyer or the lawyer's
11 representative;

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

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

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

16 or

17 (F) the principal of the independent contractor who conducted
18 an audit on the principal's behalf;

19 (2) under the terms of a confidentiality agreement between the owner
20 or operator who prepared the audit report or caused the audit report to be prepared and

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

23 (B) a transferee or potential transferee of an interest in the
24 facility, operation, or property;

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

27 (D) a person engaged in the business of insuring, underwriting,
28 or indemnifying the facility, operation, or property; or

29 (E) a person who, along with the person who prepared the audit
30 report or caused the audit report to be prepared, also is an owner or operator
31 of part or all of the facility, operation, or property; or

1 (3) under a written claim of confidentiality to a government official or
2 agency by the owner or operator who prepared the audit report or who caused the audit
3 report to be prepared.

4 (c) Documents consisting of confidential self-evaluation and analysis that are
5 disclosed under (b)(3) of this section are required to be kept confidential and are not
6 subject to disclosure under AS 09.25.110 - 09.25.220.

7 (d) A party to a confidentiality agreement described in (b)(2) of this section
8 who violates the agreement is liable for damages caused by the violation and for other
9 penalties stipulated in the agreement.

10 **Sec. 09.25.460. Nonprivileged materials.** (a) There is no privilege under
11 AS 09.25.450 for that part of an audit report that contains the following:

12 (1) a document, communication, datum, report, or other information
13 required by a government agency to be collected, developed, maintained, or reported
14 under an environmental law, under a permit issued under an environmental law, as a
15 requirement for obtaining, maintaining, or renewing a license, as a requirement under
16 a contract or lease with the state or a municipality, or as a requirement under an
17 administrative order or court order or decree;

18 (2) information that a government agency obtains by observation,
19 sampling, or monitoring;

20 (3) information that a government agency obtains from a source that
21 was not involved in compiling, preparing, or conducting the environmental audit
22 report;

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

26 (5) a document, communication, datum, report, or other information
27 that is independent of the environmental audit, whether prepared or existing before,
28 during, or after the audit; and

29 (6) a document, communication, datum, report, or other information,
30 including an agreement or order between a government agency and an owner or
31 operator, regarding a compliance plan or strategy.

1 (b) An audit report is not privileged and is admissible as evidence and subject
 2 to discovery and use in a proceeding relating to pipeline rates, tariffs, fares, or charges.
 3 The owner or operator who prepared the audit report or caused the report to be
 4 prepared is entitled to a protective order in a proceeding relating to pipeline rates,
 5 tariffs, fares, or charges to maintain the confidentiality of the audit from discovery,
 6 use, or admission in evidence in other types of proceedings. Discovery, use, or
 7 admission in evidence in a proceeding relating to pipeline rates, tariffs, fares, or
 8 charges is not considered to have waived the privilege for any other purpose.

9 **Sec. 09.25.465. Exception: disclosure required by court.** (a) A court or
 10 administrative hearing officer with jurisdiction may require disclosure of confidential
 11 self-evaluation and analysis contained in an audit report in a civil or administrative
 12 proceeding if the court or administrative hearing officer determines, after an in camera
 13 review consistent with the appropriate rules of procedure, that the

14 (1) privilege is asserted for a criminal or fraudulent purpose;

15 (2) information for which the privilege is claimed is evidence of
 16 substantial injury, or the imminent or present threat of substantial injury, to one or
 17 more persons at the site audited or to persons, property, or the environment offsite or
 18 is evidence of the causes and circumstances leading to such injury or the imminent or
 19 present threat of such injury;

20 (3) audit report shows evidence of noncompliance with an
 21 environmental law and appropriate efforts to achieve compliance with the law were not
 22 promptly initiated and pursued with reasonable diligence after discovery of
 23 noncompliance;

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

27 (5) privilege would result in a miscarriage of justice or the denial of
 28 a fair trial to the party challenging the privilege.

29 (b) A party seeking an in camera review as provided under (a) of this section
 30 shall provide to the court or administrative hearing officer a factual basis adequate to
 31 support a good faith belief by a reasonable person that the documents or

1 communications for which disclosure is sought are likely to reveal evidence to
2 establish that an exception in (a) of this section applies.

3 (c) A party seeking disclosure of confidential self-evaluation and analysis
4 during an in camera review under this section has the burden of proving that an
5 exception in (a) of this section applies.

6 **Sec. 09.25.475. Voluntary disclosure; immunity.** (a) Except as provided by
7 this section, an owner or operator who makes a voluntary disclosure of a violation of
8 an environmental law, or of circumstances, conditions, or occurrences that constitute
9 or may constitute such a violation, is immune from an administrative or civil penalty
10 for the violation disclosed, for a violation based on the facts disclosed, and for a
11 violation discovered because of the disclosure that was unknown to the owner or
12 operator making the disclosure.

13 (b) Immunity is not available under this section if the violation resulted in, or
14 poses or posed an imminent or present threat of, substantial injury to one or more
15 persons at the site audited or to persons, property, or the environment offsite.

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

17 (1) the disclosure is made promptly after knowledge of the information
18 disclosed is obtained by the owner or operator;

19 (2) the disclosure is made in writing by certified mail to the department
20 or a municipality with enforcement jurisdiction with regard to the violation disclosed;

21 (3) an investigation of the violation was not initiated or the violation
22 was not independently detected by the department or a municipality with enforcement
23 jurisdiction before the disclosure was made using certified mail; under this paragraph,
24 the department or municipality has the burden of proving that an investigation of the
25 violation was initiated or the violation was detected before receipt of the certified mail;
26 and

27 (4) the disclosure arises out of a voluntary environmental audit.

28 (d) To qualify for immunity under this section, the owner or operator making
29 the disclosure must

30 (1) promptly initiate appropriate efforts to achieve compliance and
31 remediation and pursue those efforts with due diligence;

1 (2) promptly initiate appropriate efforts to discontinue, abate, or
2 mitigate any conditions or activities causing injury or likely to cause imminent injury
3 to one or more persons at the site audited or to person, property, or the environment
4 offsite;

5 (3) correct the violation within 90 days or enter into a compliance
6 agreement with the department or the municipality, as appropriate, that provides for
7 completion of corrective and remedial measures within a reasonable time;

8 (4) implement appropriate measures designed to prevent the recurrence
9 of the violation; and

10 (5) cooperate with the department or municipality, as appropriate, in
11 connection with an investigation of the issues identified in the disclosure; the
12 department or municipality may request that the owner or operator allow the
13 department or municipality to review, under a written claim of confidentiality as
14 described in AS 09.25.455(b)(3), the part of the audit report that describes the
15 implementation plan or tracking system developed to correct past noncompliance,
16 improve current compliance, or prevent future noncompliance.

17 (e) A disclosure is not voluntary for purposes of this section if it is a
18 disclosure to the department or municipality expressly required by an environmental
19 law, a permit, a license, or an enforcement order or decree.

20 (f) Immunity under this section for violation of an environmental law is
21 available only for a violation that is discovered as a result of information or documents
22 first produced or obtained during the time period specified in the notice required under
23 AS 09.25.450(b).

24 (g) During the period between receipt of the audit notice required under
25 AS 09.25.450(b) and the specified end date of the audit, the department or
26 municipality may not initiate an inspection, monitoring, or other investigative activity
27 concerning the audited facility, operation, or property based on the receipt of a notice
28 under AS 09.25.450. The department or municipality has the burden of proving that
29 an inspection, monitoring, or other investigative activity concerning the audited facility,
30 operation, or property initiated after receiving a notice under AS 09.25.450 was not
31 initiated based on receiving the notice.

CORRECTION

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



Rev. 6/98

Central Microfilm Services
Department of Education
State of Alaska

1 (2) promptly initiate appropriate efforts to discontinue, abate, or
2 mitigate any conditions or activities causing injury or likely to cause imminent injury
3 to one or more persons at the site audited or to person, property, or the environment
4 offsite;

5 (3) correct the violation within 90 days or enter into a compliance
6 agreement with the department or the municipality, as appropriate, that provides for
7 completion of corrective and remedial measures within a reasonable time;

8 (4) implement appropriate measures designed to prevent the recurrence
9 of the violation; and

10 (5) cooperate with the department or municipality, as appropriate, in
11 connection with an investigation of the issues identified in the disclosure; the
12 department or municipality may request that the owner or operator allow the
13 department or municipality to review, under a written claim of confidentiality as
14 described in AS 09.25.455(b)(3), the part of the audit report that describes the
15 implementation plan or tracking system developed to correct past noncompliance,
16 improve current compliance, or prevent future noncompliance.

17 (e) A disclosure is not voluntary for purposes of this section if it is a
18 disclosure to the department or municipality expressly required by an environmental
19 law, a permit, a license, or an enforcement order or decree.

20 (f) Immunity under this section for violation of an environmental law is
21 available only for a violation that is discovered as a result of information or documents
22 first produced or obtained during the time period specified in the notice required under
23 AS 09.25.450(b).

24 (g) During the period between receipt of the audit notice required under
25 AS 09.25.450(b) and the specified end date of the audit, the department or
26 municipality may not initiate an inspection, monitoring, or other investigative activity
27 concerning the audited facility, operation, or property based on the receipt of a notice
28 under AS 09.25.450. The department or municipality has the burden of proving that
29 an inspection, monitoring, or other investigative activity concerning the audited facility,
30 operation, or property initiated after receiving a notice under AS 09.25.450 was not
31 initiated based on receiving the notice.

1 (h) A violation that has been voluntarily disclosed and to which immunity
 2 applies under this section shall be identified by the department or municipality in its
 3 compliance history report as having been voluntarily disclosed.

4 (i) This section may not be construed to prevent the department or
 5 municipality from

6 (1) seeking injunctive relief; or

7 (2) issuing an emergency order in a situation involving an imminent
 8 and substantial danger to public health or welfare or the environment.

9 **Sec. 09.25.480. Exceptions to immunity; mitigation.** (a) There is no
 10 immunity under AS 09.25.475 if a court or administrative hearing officer finds that

11 (1) the owner or operator claiming the immunity has

12 (A) intentionally, knowingly, or recklessly committed or
 13 authorized the violation;

14 (B) within the 36 months preceding the violation, committed,
 15 at the same facility or associated facilities located in the state, a pattern of
 16 violations that are the same as or closely related to the violation for which the
 17 immunity is sought; or

18 (C) not attempted to bring the facility, operation, or property
 19 into compliance so as to constitute a pattern of disregard of environmental
 20 laws;

21 (2) the violation was authorized or committed intentionally, knowingly,
 22 or recklessly by a member of the owner's or operator's management and the owner's
 23 or operator's policies contributed materially to the occurrence of the violation; or

24 (3) the owner or operator, after taking into account the cost of
 25 completing corrective and remedial measures within a reasonable time and
 26 implementing appropriate measures to prevent recurrence of the violation, realized
 27 substantial economic savings in not complying with the requirement for which a
 28 violation is charged; the exception to immunity in this paragraph applies only to that
 29 portion of a penalty that reflects the economic savings of noncompliance after taking
 30 into account the cost of completing the corrective, remedial, and preventive measures
 31 necessary to qualify for immunity.

1 (b) There is no immunity under AS 09.25.475 from an administrative or civil
2 penalty for the violation of an administrative or court order or for violation of a term
3 or condition of an administrative or court order.

4 (c) An administrative or civil penalty that is imposed on an owner or operator
5 for violation of an environmental law when the owner or operator has made a
6 voluntary disclosure under AS 09.25.475(a) but is not granted immunity because of (a)
7 of this section may, to the extent appropriate and not prohibited by law, be mitigated
8 by

9 (1) the good faith actions of the owner or operator in disclosing the
10 violation;

11 (2) efforts by the owner or operator to conduct environmental audits
12 and to complete any resulting implementation plan or tracking system for corrective
13 and preventive action;

14 (3) remediation;

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

17 (5) the nature of the violation; and

18 (6) other relevant considerations.

19 **Sec. 09.25.485. Relationship to other recognized privileges.** AS 09.25.450 -
20 09.25.490 do not limit, waive, or abrogate the scope or nature of a statutory or
21 common law privilege, including the work product doctrine, the attorney-client
22 privilege, and any other privilege recognized by a court with appropriate authority in
23 this state.

24 **Sec. 09.25.490. Definitions.** (a) In AS 09.25.450 - 09.25.490,

25 (1) "audit report" means a report that includes each document and
26 communication, other than those set out in AS 09.25.460, produced from an
27 environmental audit; general components that may be contained in a completed audit
28 report include

29 (A) a report, prepared by an auditor, monitor, or similar person,
30 including the scope of the audit, the dates the audit began and ended, the
31 information gained in the audit, findings, conclusions, recommendations,

1 exhibits, and appendices; the types of exhibits and appendices that may be
2 contained in an audit report include supporting information that is collected or
3 developed for the primary purpose and in the course of an environment audit,
4 including

- 5 (i) interviews with current or former employees;
6 (ii) field notes and records of observations;
7 (iii) findings, opinions, suggestions, conclusions,
8 guidance, notes, drafts, and memoranda;
9 (iv) legal analyses;
10 (v) drawings;
11 (vi) photographs;
12 (vii) laboratory analyses and other analytical data;
13 (viii) computer generated or electronically recorded
14 information;
15 (ix) maps, charts, graphs, and surveys; and
16 (x) other communications and documents associated with
17 an environmental audit;

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

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

23 (2) "confidential self-evaluation and analysis" means the part of an
24 audit report that consists of interviews with current or former employees conducted by
25 the auditor; field notes and records of observations made by the auditor; findings,
26 opinions, suggestions, conclusions, guidance, notes, drafts, and analyses performed by
27 the auditor; memoranda and documents that evaluate or analyze all or part of the
28 material contained in the audit report, including findings, conclusions, opinions,
29 recommendations made by the auditor, and an audit implementation plan or tracking
30 system to correct past noncompliance, improve current compliance, or prevent future
31 noncompliance with an environmental law, and that is

1 (A) a voluntary, confidential, critical, internal, and retrospective
2 review, self-evaluation, or analysis of conduct, practices, and occurrences and
3 their resulting consequences; and

4 (B) prepared and maintained with the expectation that it will be
5 kept confidential;

6 (3) "department" means the Department of Environmental Conservation;

7 (4) "environmental audit" means a voluntary audit that an owner or
8 operator of a regulated facility, operation, or property conducts or causes to be
9 conducted, whether or not on a regular basis or in response to a particular event, that
10 is specifically designed and undertaken to assess compliance with environmental laws
11 or a permit, license, or approval issued under those laws, including an assessment that
12 is part of the owner's or operator's compliance management system and that is a

13 (A) systematic, objective, and periodic review of the facility,
14 operation, or property related to meeting the requirements of environmental
15 laws or a permit, license, or approval issued under those laws; or

16 (B) documented, systematic procedure or practice that reflects
17 the owner's or operator's due diligence in preventing, detecting, and correcting
18 violations of environmental laws or a permit, license, or approval issued under
19 those laws at the facility, operation, or property;

20 (5) "environmental law" means

21 (A) a federal or state environmental law implemented by the
22 department; or

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

25 (6) "operator" means a person or persons who direct, control, or
26 supervise all or part of a regulated facility, operation, or property;

27 (7) "owner" means a person or persons with a proprietary or possessory
28 interest in a regulated facility, operation, or property;

29 (8) "penalty" means an administrative or civil sanction imposed by the
30 state or a municipality to punish a person for a violation of a statute, rule, regulation,
31 or ordinance; the term does not include a technical or remedial provision ordered by

1 a government agency, nor an administrative or civil sanction relating to pipeline rates,
2 tariffs, fares, or charges;

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

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

7 (c) For purposes of this chapter, unless the context requires otherwise, a person
8 acts

9 (1) "intentionally" with respect to a result described by a provision of
10 law defining a violation when the person's conscious objective is to cause that result;
11 when intentionally causing a particular result is an element of a violation, that intent
12 need not be the person's only objective;

13 (2) "knowingly" with respect to conduct or to a circumstance described
14 by a provision of law defining a violation when the person is aware that the conduct
15 is of that nature or that the circumstance exists; when knowledge of the existence of
16 a particular fact is an element of a violation, that knowledge is established if a person
17 is aware of a substantial probability of its existence, unless the person actually believes
18 it does not exist; a person who is unaware of conduct or a circumstance of which the
19 person would have been aware had that person not been intoxicated acts knowingly
20 with respect to that conduct or circumstance;

21 (3) "recklessly" with respect to a result or to a circumstance described
22 by a provision of law defining a violation when the person is aware of and consciously
23 disregards a substantial and unjustifiable risk that the result will occur or that the
24 circumstance exists; the risk must be of such a nature and degree that disregard of it
25 constitutes a gross deviation from the standard of conduct that a reasonable person
26 would observe in the situation; a person who is unaware of a risk of which the person
27 would have been aware had that person not been intoxicated acts recklessly with
28 respect to the risk.

29 * Sec. 3. APPLICABILITY. The privilege and immunity created by AS 09.25.450 -
30 09.25.490, added by sec. 2 of this Act, apply to environmental audits that are conducted on
31 or after the effective date of this Act.

A M E N D M E N T #9

OFFERED IN THE HOUSE

TO: CSSB 41(FIN)

*fails
4/9/97*

Page 7, line 27:

Following: "for the violation disclosed"

Delete the comma and insert "or"

Page 7, lines ~~27~~³⁰ - ~~29~~³²: - *Page 8, line 1*

Following: "based on the facts disclosed"

Delete: ", and for a violation discovered because of
a disclosure that was unknown to the owner or
operator making the disclosure"

Reasons: This amendment is proposed to address a concern raised by the U.S. Environmental Protection Agency that the language in the bill may lead to disputes over whether subsequently discovered violations are "fruit of the poisonous tree." If the last clause is read literally, it could potentially immunize violations years after and well beyond the scope of any disclosure. With an earlier amendment that added the language "or of circumstances, conditions, or occurrences that constitute or may constitute a such a violation," it is clear that an owner or operator may obtain immunity for violations that are disclosed and for violations that are based upon the facts disclosed, regardless of whether the owner or operator knows that the facts disclosed would constitute a violation. The last clause is at the very least redundant to the previous amendment and at worst, a potential source of conflict and litigation over whether subsequently discovered violations are immunized by virtue of an earlier disclosure.

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A M E N D M E N T

Amend #15

OFFERED IN THE HOUSE

BY REPRESENTATIVE CROFT

TO: CSSB 41(FIN)

sunset

Fails

1 Page 14, following line 7:

2 Insert new bill sections to read:

3 **** Sec. 3.** Section 1 of this Act and AS 09.25.450, 09.25.455, 09.25.460, 09.25.465,
4 09.25.475, 09.25.480, 09.25.485, and 09.25.490, enacted by sec. 2 of this Act, are repealed
5 three years after the effective date of this Act.

6 *** Sec. 4. TRANSITIONAL PROVISION.** Notwithstanding sec. 3 of this Act,

7 (1) the privileged information in an audit report that was completed before
8 three years after the effective date of this Act retains its privileged nature after that date to
9 the same extent as if the statutes repealed in sec. 3 of this Act had not been repealed; and

10 (2) the immunity applicable to voluntary disclosures under AS 09.25.475,
11 enacted by sec. 2 of this Act, remains in effect for a voluntary disclosure made before three
12 years after the effective date of this Act to the same extent that the immunity applied before
13 AS 09.25.475 was repealed."

14 Renumber the following bill section accordingly.

15 Page 14, line 10, following "Act":

16 Insert "and before the repeal of AS 09.25.450 - 09.25.490 under sec. 3 of this Act."

Alaska State Legislature



House of Representatives
House Judiciary Committee

State Capitol, Room 120
Juneau, Alaska 99801-1182
(907) 465-4990

MEMORANDUM

Date: April 9, 1997

To: Terri Lauterbach, Legislative Legal Services
Fax: 465-2029

From: Lisa Kirsch, House Judiciary Committee
Fax: 465-4316

Re: SB 41 with amendments

We passed SB 41 out of committee today with four amendments:
Amendment numbers 3A, 12a, 13 and 14 (attached).
We adopted draft 0-LS0299\K as our working document.

This bill is a priority according to Madam Speaker--final version
ASAP please.
Thanks for your help.

CORRECTION

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



Rev. 6/98

Central Microfilm Services
Department of Education
State of Alaska

Alaska State Legislature



House of Representatives
House Judiciary Committee

State Capitol, Room 120
Juneau, Alaska 99801-1182
(907) 465-4990

MEMORANDUM

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We adopted draft 0-LS0299\K as our working document.

This bill is a priority according to Madam Speaker--final version
ASAP please.
Thanks for your help.

AMENDMENT #3A

4/9/97
adopted

OFFERED IN THE HOUSE

TO: CSSB 41 (FIN)

Page 7, after line 23:

Insert a new subsection (b) to read:

"(b) A party seeking an in camera review as provided under (a) of this section shall provide to the court or administrative hearing officer a factual basis adequate to support a good faith belief by a reasonable person that the documents or communications for which disclosure is sought are likely to reveal evidence to establish that an exception in (a) of this section applies."

Renumber subsections accordingly.

Page 7, line 24:

Reword subsection as follows:

(c) A party seeking disclosure of confidential self-evaluation and analysis during an in camera review under this section has the burden of proving that an exception in (a) of this section applies.

AMENDMENT #12a

OFFERED IN THE HOUSE

TO: CSSB 41 (FIN)

*Adopted - no vote
no obj.
4/9/97*

Page 4, line 11:

Following "AS 09.25.455(b)"

Insert: "(3) or AS 09.25.475 -- 09.25.480"

A M E N D M E N T

#13

*Adopted
no objection*

OFFERED IN THE HOUSE

TO: CSSB 41(FIN)

Page 4, following line 27:

Insert a new subsection (k) to read: "(k) There is no privilege under this section for documents or communications in a criminal proceeding."

Reasons: This proposed amendment responds to concerns raised in the United States Attorney's letter that the bill could be construed to apply to criminal proceedings. Page 6 of the letter recommends that the bill explicitly exclude criminal proceedings. The proposed wording is similar to that used in Rule 503(d)(7) of the Alaska Rules of Evidence, relating to the physician-patient privilege: "There is no privilege under this rule . . . for physician-patient communications in a criminal proceeding."

A M E N D M E N T #14

OFFERED IN THE HOUSE

TO: CSSB 41(FIN)

*Adopted - No obj.
4/9/97*

Page 7, line 14:

Following "the environment offsite"

Insert: ", or evidence of the causes and
circumstances leading to such injury or
imminent or present threat of such injury"

Reasons: This proposed amendment responds to the concerns raised on page 2, footnote 1, of the United States Attorney's letter, that the scope of the exception to the privilege for evidence of substantial injury.

HOUSE CS FOR CS FOR SENATE BILL NO. 41()
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTIETH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): SENATORS LEMAN, Pearce, Taylor

A BILL

FOR AN ACT ENTITLED

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

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

4 * Section 1. FINDINGS; INTENT. The legislature finds and intends as follows:

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

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

1 environmental business practices and procedures; this encouragement can best be achieved by
2 preserving the free flow of information; the free flow of the kind of information that is
3 generated by self-audits would be curtailed if a privilege for the audits were not available;
4 therefore, it is the intent of the legislature to recognize an audit privilege under this Act to
5 protect the confidentiality of communications related to voluntary internal environmental
6 audits; however, the legislature does not intend that the parts of an audit report consisting of
7 confidential self-evaluation and analysis that are privileged under this Act may be used to
8 shield a person from liability under applicable laws and regulations by blocking access to
9 underlying facts;

10 (3) the public also has a strong interest in obtaining cost-effective correction
11 of inadvertent environmental violations; this goal can best be achieved by offering qualified
12 immunity from administrative and civil penalties to regulated persons who promptly report
13 known violations of environmental regulations that are uncovered as part of an audit so that
14 the violations can promptly be corrected and a compliance plan can be negotiated with the
15 appropriate government agency;

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

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

22 **Article 5. Privileges and Immunities**

23 **Related to Disclosure of Certain Self-Audits and Violations.**

24 **Sec. 09.25.450. Audit report privilege.** (a) Except as provided in
25 AS 09.25.460, an owner or operator who prepares an audit report or causes an audit
26 report to be prepared has a privilege to refuse to disclose, and to prevent another
27 person from disclosing, the parts of the report that consist of confidential self-
28 evaluation and analysis of the owner's or operator's compliance with environmental
29 laws. Except as provided in AS 09.25.455 - 09.25.480, the privileged information is
30 not admissible as evidence or subject to discovery in

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

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

3 (b) With respect to confidential self-evaluation and analysis in an
4 environmental audit, in order to qualify for the privilege under this section and the
5 immunity under AS 09.25.475, at least 15 days before conducting the audit, the owner
6 or operator conducting the audit must give notice by electronic filing that complies
7 with an ordinance or regulation authorized under (j) of this section or by certified mail
8 with return receipt requested to the commissioner's office of the department, and, when
9 the audit includes an assessment of compliance with a municipality's ordinances, to
10 the municipal clerk, of the fact that it is planning to commence the audit. The notice
11 must specify the facility, operation, or property or portion of the facility, operation, or
12 property to be audited, the date the audit will begin and end, and the general scope of
13 the audit. The notice may provide notification of more than one scheduled
14 environmental audit at a time. Once initiated, an audit shall be completed within a
15 reasonable time, but no longer than 90 days, unless a longer period of time is agreed
16 upon between the owner or operator and the department or the municipality, as
17 appropriate. The audit report must be completed in a timely manner.

18 (c) The following persons may claim the privilege available under (a) of this
19 section:

20 (1) the owner or operator who prepared the audit report or caused the
21 audit report to be prepared;

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

25 (3) a person to whom confidential self-evaluation or analysis is
26 disclosed under AS 09.25.455(b); or

27 (4) a custodian of the audit results.

28 (d) A person who conducts or participates in the preparation of an audit report
29 and who actually observed or participated in conditions or events being reviewed for
30 compliance may testify about those conditions or events but may not, in a proceeding
31 covered by (a) of this section, be compelled to testify about or produce documents

1 consisting of confidential self-evaluation and analysis.

2 (e) A person claiming the privilege described in this section has the burden of
3 establishing the applicability of the privilege.

4 (f) To facilitate identification, each document in an audit report that contains
5 confidential self-evaluation or analysis shall be labeled "AUDIT REPORT:
6 PRIVILEGED DOCUMENT."

7 (g) A government agency or its employees or agents may not, as a condition
8 of a permit, license, or approval issued under an environmental law, require an owner
9 or operator to waive the privilege available under this section.

10 (h) Except when the privilege is waived under AS 09.25.455(a) or disclosure
11 is made under AS 09.25.455(b), ^{→ "(3) or AS 09.25.475 - 09.25.480"} neither a government agency nor its employees or
12 agents may review or otherwise use the part of an audit report consisting of
13 confidential self-evaluation or analysis during an inspection of a regulated facility,
14 operation, or property or an activity of a regulated facility, operation, or property.

15 (i) This section may not be construed to

16 (1) prevent a government agency from issuing an emergency order,
17 seeking injunctive relief, independently obtaining relevant facts, conducting necessary
18 inspections, or taking other appropriate action regarding implementation and
19 enforcement of an applicable environmental law, except as otherwise provided in
20 AS 09.25.475; or

21 (2) authorize a privilege for uninterrupted or continuous environmental
22 audits.

23 (j) The department or municipality may, by regulation or ordinance,
24 respectively, allow the notice required under (b) of this section to be filed by facsimile
25 or other electronic means if the means ensures adequate proof of

26 (1) submittal of the notice by the owner or operator; and

27 (2) receipt by the department or municipality.

28 **Sec. 09.25.455. Waiver and disclosure.** (a) The privilege in AS 09.25.450
29 does not apply to the extent the privilege is expressly waived in writing by the owner
30 or operator who prepared the audit report or caused the report to be prepared.

31 (b) Disclosure of the part of an audit report or information consisting of

1 confidential self-evaluation or analysis does not waive the privilege established by
2 AS 09.25.450 if the disclosure is made

3 (1) to address or correct a matter raised by the environmental audit and
4 is made to

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

7 (B) the owner's or operator's lawyer or the lawyer's
8 representative;

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

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

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

13 or

14 (F) the principal of the independent contractor who conducted
15 an audit on the principal's behalf;

16 (2) under the terms of a confidentiality agreement between the owner
17 or operator who prepared the audit report or caused the audit report to be prepared and

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

20 (B) a transferee or potential transferee of an interest in the
21 facility, operation, or property;

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

24 (D) a person engaged in the business of insuring, underwriting,
25 or indemnifying the facility, operation, or property; or

26 (E) a person who, along with the person who prepared the audit
27 report or caused the audit report to be prepared, also is an owner or operator
28 of part or all of the facility, operation, or property; or

29 (3) under a written claim of confidentiality to a government official or
30 agency by the owner or operator who prepared the audit report or who caused the audit
31 report to be prepared.

1 (c) Documents consisting of confidential self-evaluation and analysis that are
2 disclosed under (b)(3) of this section are required to be kept confidential and are not
3 subject to disclosure under AS 09.25.110 - 09.25.220.

4 (d) A party to a confidentiality agreement described in (b)(2) of this section
5 who violates the agreement is liable for damages caused by the violation and for other
6 penalties stipulated in the agreement.

7 **Sec. 09.25.460. Nonprivileged materials.** (a) There is no privilege under
8 AS 09.25.450 for that part of an audit report that contains the following:

9 (1) a document, communication, datum, report, or other information
10 required by a government agency to be collected, developed, maintained, or reported
11 under an environmental law, under a permit issued under an environmental law, as a
12 requirement for obtaining, maintaining, or renewing a license, as a requirement under
13 a contract or lease with the state or a municipality, or as a requirement under an
14 administrative order or court order or decree;

15 (2) information that a government agency obtains by observation,
16 sampling, or monitoring;

17 (3) information that a government agency obtains from a source that
18 was not involved in compiling, preparing, or conducting the environmental audit
19 report;

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

23 (5) a document, communication, datum, report, or other information
24 that is independent of the environmental audit, whether prepared or existing before,
25 during, or after the audit; and

26 (6) a document, communication, datum, report, or other information,
27 including an agreement or order between a government agency and an owner or
28 operator, regarding a compliance plan or strategy.

29 (b) An audit report is not privileged and is admissible as evidence and subject
30 to discovery and use in a proceeding relating to pipeline rates, tariffs, fares, or charges.
31 The owner or operator who prepared the audit report or caused the report to be

1 prepared is entitled to a protective order in a proceeding relating to pipeline rates,
 2 tariffs, fares, or charges to maintain the confidentiality of the audit from discovery,
 3 use, or admission in evidence in other types of proceedings. Discovery, use, or
 4 admission in evidence in a proceeding relating to pipeline rates, tariffs, fares, or
 5 charges is not considered to have waived the privilege for any other purpose.

6 **Sec. 09.25.465. Exception: disclosure required by court.** (a) A court or
 7 administrative hearing officer with jurisdiction may require disclosure of confidential
 8 self-evaluation and analysis contained in an audit report in a civil or administrative
 9 proceeding if the court or administrative hearing officer determines, after an in camera
 10 review consistent with the appropriate rules of procedure, that the

11 (1) privilege is asserted for a criminal or fraudulent purpose;

12 (2) information for which the privilege is claimed is evidence of
 13 substantial injury, or the imminent or present threat of substantial injury, to one or
 14 more persons at the site audited or to persons, property, or the environment offsite;

15 (3) audit report shows evidence of noncompliance with an
 16 environmental law and appropriate efforts to achieve compliance with the law were not
 17 promptly initiated and pursued with reasonable diligence after discovery of
 18 noncompliance;

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

22 (5) privilege would result in a miscarriage of justice or the denial of
 23 a fair trial to the party challenging the privilege.

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

26 **Sec. 09.25.475. Voluntary disclosure; immunity.** (a) Except as provided by
 27 this section, an owner or operator who makes a voluntary disclosure of a violation of
 28 an environmental law, or of circumstances, conditions, or occurrences that constitute
 29 or may constitute such a violation, is immune from an administrative or civil penalty
 30 for the violation disclosed, for a violation based on the facts disclosed, and for a
 31 violation discovered because of the disclosure that was unknown to the owner or

Amend
 → 14

1 operator making the disclosure.

2 (b) Immunity is not available under this section if the violation resulted in, or
3 poses or posed an imminent or present threat of, substantial injury to one or more
4 persons at the site audited or to persons, property, or the environment offsite.

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

6 (1) the disclosure is made promptly after knowledge of the information
7 disclosed is obtained by the owner or operator;

8 (2) the disclosure is made in writing by certified mail to the department
9 or a municipality with enforcement jurisdiction with regard to the violation disclosed;

10 (3) an investigation of the violation was not initiated or the violation
11 was not independently detected by the department or a municipality with enforcement
12 jurisdiction before the disclosure was made using certified mail; under this paragraph,
13 the department or municipality has the burden of proving that an investigation of the
14 violation was initiated or the violation was detected before receipt of the certified mail;
15 and

16 (4) the disclosure arises out of a voluntary environmental audit.

17 (d) To qualify for immunity under this section, the owner or operator making
18 the disclosure must

19 (1) promptly initiate appropriate efforts to achieve compliance and
20 remediation and pursue those efforts with due diligence;

21 (2) promptly initiate appropriate efforts to discontinue, abate, or
22 mitigate any conditions or activities causing injury or likely to cause imminent injury
23 to one or more persons at the site audited or to person, property, or the environment
24 offsite;

25 (3) correct the violation within 90 days or enter into a compliance
26 agreement with the department or the municipality, as appropriate, that provides for
27 completion of corrective and remedial measures within a reasonable time;

28 (4) implement appropriate measures designed to prevent the recurrence
29 of the violation; and

30 (5) cooperate with the department or municipality, as appropriate, in
31 connection with an investigation of the issues identified in the disclosure; the

1 department or municipality may request that the owner or operator allow the
2 department or municipality to review, under a written claim of confidentiality as
3 described in AS 09.25.455(b)(3), the part of the audit report that describes the
4 implementation plan or tracking system developed to correct past noncompliance,
5 improve current compliance, or prevent future noncompliance.

6 (e) A disclosure is not voluntary for purposes of this section if it is a
7 disclosure to the department or municipality expressly required by an environmental
8 law, a permit, a license, or an enforcement order or decree.

9 (f) Immunity under this section for violation of an environmental law is
10 available only for a violation that is discovered as a result of information or documents
11 first produced or obtained during the time period specified in the notice required under
12 AS 09.25.450(b).

13 (g) During the period between receipt of the audit notice required under
14 AS 09.25.450(b) and the specified end date of the audit, the department or
15 municipality may not initiate an inspection, monitoring, or other investigative activity
16 concerning the audited facility, operation, or property based on the receipt of a notice
17 under AS 09.25.450. The department or municipality has the burden of proving that
18 an inspection, monitoring, or other investigative activity concerning the audited facility,
19 operation, or property initiated after receiving a notice under AS 09.25.450 was not
20 initiated based on receiving the notice.

21 (h) A violation that has been voluntarily disclosed and to which immunity
22 applies under this section shall be identified by the department or municipality in its
23 compliance history report as having been voluntarily disclosed.

24 (i) This section may not be construed to prevent the department or
25 municipality from

26 (1) seeking injunctive relief; or

27 (2) issuing an emergency order in a situation involving an imminent
28 and substantial danger to public health or welfare or the environment.

29 **Sec. 09.25.480. Exceptions to immunity; mitigation.** (a) There is no
30 immunity under AS 09.25.475 if a court or administrative hearing officer finds that

31 (1) the owner or operator claiming the immunity has

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(A) intentionally, knowingly, or recklessly committed or authorized the violation;

(B) within the 36 months preceding the violation, committed, at the same facility or associated facilities located in the state, a pattern of violations that are the same as or closely related to the violation for which the immunity is sought; or

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

(2) the violation was authorized or committed intentionally, knowingly, or recklessly by a member of the owner's or operator's management and the owner's or operator's policies contributed materially to the occurrence of the violation; or

(3) the owner or operator, after taking into account the cost of completing corrective and remedial measures within a reasonable time and implementing appropriate measures to prevent recurrence of the violation, realized substantial economic savings in not complying with the requirement for which a violation is charged; the exception to immunity in this paragraph applies only to that portion of a penalty that reflects the economic savings of noncompliance after taking into account the cost of completing the corrective, remedial, and preventive measures necessary to qualify for immunity.

(b) There is no immunity under AS 09.25.475 from an administrative or civil penalty for the violation of an administrative or court order or for violation of a term or condition of an administrative or court order.

(c) An administrative or civil penalty that is imposed on an owner or operator for violation of an environmental law when the owner or operator has made a voluntary disclosure under AS 09.25.475(a) but is not granted immunity because of (a) of this section may, to the extent appropriate and not prohibited by law, be mitigated by

(1) the good faith actions of the owner or operator in disclosing the violation;

(2) efforts by the owner or operator to conduct environmental audits

1 and to complete any resulting implementation plan or tracking system for corrective
2 and preventive action;

3 (3) remediation;

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

6 (5) the nature of the violation; and

7 (6) other relevant considerations.

8 **Sec. 09.25.485. Relationship to other recognized privileges.** AS 09.25.450 -
9 09.25.490 do not limit, waive, or abrogate the scope or nature of a statutory or
10 common law privilege, including the work product doctrine, the attorney-client
11 privilege, and any other privilege recognized by a court with appropriate authority in
12 this state.

13 **Sec. 09.25.490. Definitions.** (a) In AS 09.25.450 - 09.25.490,

14 (1) "audit report" means a report that includes each document and
15 communication, other than those set out in AS 09.25.460, produced from an
16 environmental audit; general components that may be contained in a completed audit
17 report include

18 (A) a report, prepared by an auditor, monitor, or similar person,
19 including the scope of the audit, the dates the audit began and ended, the
20 information gained in the audit, findings, conclusions, recommendations,
21 exhibits, and appendices; the types of exhibits and appendices that may be
22 contained in an audit report include supporting information that is collected or
23 developed for the primary purpose and in the course of an environment audit,
24 including

25 (i) interviews with current or former employees;

26 (ii) field notes and records of observations;

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

29 (iv) legal analyses;

30 (v) drawings;

31 (vi) photographs;

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(vii) laboratory analyses and other analytical data;

(viii) computer generated or electronically recorded information;

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

(x) other communications and documents associated with an environmental audit;

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

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

(2) "confidential self-evaluation and analysis" means the part of an audit report that consists of (interviews with current or former employees conducted by the auditor; field notes and records of observations made by the auditor); findings, opinions, suggestions, conclusions, guidance, notes, drafts, and analyses performed by the auditor; memoranda and documents that evaluate or analyze all or part of the material contained in the audit report, including findings, conclusions, opinions, recommendations made by the auditor, and an audit implementation plan or tracking system to correct past noncompliance, improve current compliance, or prevent future noncompliance with an environmental law, and that is

(A) a voluntary, confidential, critical, internal, and retrospective review, self-evaluation, or analysis of conduct, practices, and occurrences and their resulting consequences; and

(B) prepared and maintained with the expectation that it will be kept confidential;

(3) "department" means the Department of Environmental Conservation;

(4) "environmental audit" means a voluntary audit that an owner or operator of a regulated facility, operation, or property conducts or causes to be conducted, whether or not on a regular basis or in response to a particular event, that is specifically designed and undertaken to assess compliance with environmental laws or a permit, license, or approval issued under those laws, including an assessment that

1 is part of the owner's or operator's compliance management system and that is a

2 (A) systematic, objective, and periodic review of the facility,
3 operation, or property related to meeting the requirements of environmental
4 laws or a permit, license, or approval issued under those laws; or

5 (B) documented, systematic procedure or practice that reflects
6 the owner's or operator's due diligence in preventing, detecting, and correcting
7 violations of environmental laws or a permit, license, or approval issued under
8 those laws at the facility, operation, or property;

9 (5) "environmental law" means

10 (A) a federal or state environmental law implemented by the
11 department; or

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

14 (6) "operator" means a person or persons who direct, control, or
15 supervise all or part of a regulated facility, operation, or property;

16 (7) "owner" means a person or persons with a proprietary or possessory
17 interest in a regulated facility, operation, or property;

18 (8) "penalty" means an administrative or civil sanction imposed by the
19 state or a municipality to punish a person for a violation of a statute, rule, regulation,
20 or ordinance; the term does not include a technical or remedial provision ordered by
21 a government agency, nor an administrative or civil sanction relating to pipeline rates,
22 tariffs, fares, or charges;

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

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

27 (c) For purposes of this chapter, unless the context requires otherwise, a person
28 acts

29 (1) "intentionally" with respect to a result described by a provision of
30 law defining a violation when the person's conscious objective is to cause that result;
31 when intentionally causing a particular result is an element of a violation, that intent

1 need not be the person's only objective;

2 (2) "knowingly" with respect to conduct or to a circumstance described
3 by a provision of law defining a violation when the person is aware that the conduct
4 is of that nature or that the circumstance exists; when knowledge of the existence of
5 a particular fact is an element of a violation, that knowledge is established if a person
6 is aware of a substantial probability of its existence, unless the person actually believes
7 it does not exist; a person who is unaware of conduct or a circumstance of which the
8 person would have been aware had that person not been intoxicated acts knowingly
9 with respect to that conduct or circumstance;

10 (3) "recklessly" with respect to a result or to a circumstance described
11 by a provision of law defining a violation when the person is aware of and consciously
12 disregards a substantial and unjustifiable risk that the result will occur or that the
13 circumstance exists; the risk must be of such a nature and degree that disregard of it
14 constitutes a gross deviation from the standard of conduct that a reasonable person
15 would observe in the situation; a person who is unaware of a risk of which the person
16 would have been aware had that person not been intoxicated acts recklessly with
17 respect to the risk.

18 * Sec. 3. APPLICABILITY. The privilege and immunity created by AS 09.25.450 -
19 09.25.490, added by sec. 2 of this Act, apply to environmental audits that are conducted on
20 or after the effective date of this Act.

A M E N D M E N T

OFFERED IN THE HOUSE

TO: CSSB 41(FIN)

Page 4, line 9:

Following "made under AS 09.25.455(b)"

Insert: "or AS 09.25.475 -- 09.25.480"

Reasons: This proposed amendment responds to a concern raised on pages 8-9 of the United States Attorney's letter, regarding use of privileged information during followup inspections. It would clarify that DEC or a municipality may review and use information already disclosed to DEC or the municipality for purposes of immunity or mitigation of penalties under AS 09.25.475 - 09.25.480 during an inspection.

A M E N D M E N T

OFFERED IN THE HOUSE

TO: CSSB 41 (FIN)

Page 4, following line 25:

Insert a new subsection (k) to read: "(k) There is no privilege under this section for documents or communications in a criminal proceeding."

Reasons: This proposed amendment responds to concerns raised in the United States Attorney's letter that the bill could be construed to apply to criminal proceedings. Page 6 of the letter recommends that the bill explicitly exclude criminal proceedings. The proposed wording is similar to that used in Rule 503(d)(7) of the Alaska Rules of Evidence, relating to the physician-patient privilege: "There is no privilege under this rule . . . for physician-patient communications in a criminal proceeding."

A M E N D M E N T

OFFERED IN THE HOUSE

TO: CSSB 41 (FIN)

Page 7, line 11:

Following "the environment offsite"

Insert: ", or evidence of the causes and
circumstances leading to such injury or
imminent or present threat of such injury"

Reasons: This proposed amendment responds to the concerns raised on page 2, footnote 1, of the United States Attorney's letter, that the scope of the exception to the privilege for evidence of substantial injury.

A M E N D M E N T

OFFERED IN THE HOUSE

TO: CSSB 41 (FIN)

Page 12, lines 6-7:

Following: "that consists of":

Delete: "interviews with current or former employees;
field notes and records of observations made
by the auditor;"

Reasons: This proposed amendment responds to concerns raised on page 7 of the United States Attorney's letter that the self-audit privilege can be used to shield evidence of violations, as well as the thought processes of the auditor.

Somson

- 1) priv waived.
"ref to §§
follow up exceptions
- 2) No priv. in crim.
- 3) Add (exception threat of injury)
get to causes of injury
- 4) Def. "control self and
auditors work prod"

Amendment #1 #3

- The language at Sec. 09.25.465 (b) which Amendment #1 proposes to delete has been well-tested in other states. Similar to the Alaska bill, the majority of states with self-audit privilege laws place on the party seeking disclosure the "burden of proof" for showing fraudulent behaviour or one of the other exceptions to the privilege.
- The "burden of proof" clause in the Texas self-audit law is identical to the language in SB 41. Yet there is no evidence companies in Texas have used the audit privilege in an attempt to "shield" information from regulators. The Director of Litigation for the Texas Natural Resources Conservation Commission has stated that TNRCC enforcement attorneys have not encountered a *single case* in which an audit privilege has been invoked in an attempt to shield information required for legal proceedings against a company.
- If a self-audit privilege is to be meaningful, it ought not be something that is overcome lightly. As with the attorney-client privilege, the purpose of a self-audit privilege is to protect the "free flow of information" which would otherwise not occur if confidentiality were not assured. Another example is the privilege in Alaska statutes for the proceedings of physician review organizations (AS 18.23.030). The law recognizes that physicians will be reluctant to offer honest appraisals of existing medical practices or the performance of other medical personnel, absent an assurance that their comments will not be used as evidence in litigation. Thus, a public health interest is served by allowing physicians the liberty to freely discuss such matters. The privilege envisioned in SB 41 serves a similar purpose: the public interest in a clean environment is served by allowing companies to undertake self-critical examinations of their compliance practices.
- Because of a unique feature in SB 41, it is especially important that privilege should not be overcome lightly. If enacted, SB 41 will be the only self-audit law in the country which requires advance notice (15 days) to the state prior to commencing an audit. Without the advance notice, there is no privilege (or immunity). Since these advance notices to DEC are not considered privileged, this information is available to the public. Any company choosing to do an audit under the terms of this bill will have to disclose when the audit will begin, when it will end, what part of the facility will be audited, as well as the scope of the audit. While the sponsor believes this notice requirement serves a valid public interest, it is also true that it opens the door for considerable mischief from third party groups. There is a very long and sad history of anti-development groups in Alaska utilizing the court system in every conceivable manner to stop logging, mining, oil and gas development, expansion of tourist opportunities, and other economic development. It is part of a concerted effort to delay projects and drive up the costs of doing business. It is not only possible but likely that extremist preservationist groups will use the courts to challenge the legitimacy of every audit that occurs. This would be difficult for such groups to do in other states, because there would be no way of knowing when or where an audit is being conducted. Under the Alaska law, all that information will be available on a regular basis. Therefore, the only way to discourage frivolous or ideologically-motivated lawsuits is to structure SB 41 so that privilege cannot be overcome unless it is clearly demonstrated that the privilege is claimed for an illegitimate purpose.

Amendment #9

- The sponsor believes Amendment #9 is a solution in search of a problem that does not exist. The language proposed for deletion at Section 09.25.475(a) was very intentionally added to this legislation last year (the old Senate Bill 199) through an amendment adopted in committee. It is designed to address a scenario in which an owner or operator discloses a violation which leads to the agency discovering another violation of which the owner or operator was unaware, and which would not have been discovered in the first place if the company had not made the disclosure.
- A hypothetical example, based off circumstances in an actual disclosure from the state of Texas: a company manufacturing polyolephins conducts an audit and finds that certain hazardous wastes were not labeled properly. As a result of this disclosure, state regulators also discover that hazardous wastes were not stored in the correct type of drums. The business was unaware that their storage practices did not conform with regulations, but in the process of reporting the labeling problem, they are left open to fines and penalties for the newly discovered problem.
- The concern that a company could be immunized for violations "years after and well beyond the scope of any disclosure" is not persuasive. The section of the bill which grants immunity begins with the caveat, "Except as provided by this section..." If we look at the "exceptions" to the immunity, we see that immunity is only available for voluntary disclosures, and voluntary disclosures are defined as those which "arise" from an audit and which were not independently detected by an agency. In enforcing the provisions of this law, the Department of Environmental Conservation is really in the "catbird seat" insofar as the department can determine whether or not the owner or operator seeking immunity has met the required conditions. If the department decides that the entity seeking immunity is not eligible, then they are not eligible. The regulated entity's only recourse at this juncture is an expensive legal challenge with little chance of success.

Amendment # (10?)

- Because of the broad variance in the size and complexity of audit reports, it is not prudent to define a specific time limit for when noncompliance should be disclosed. An audit of a small timber operation in southeast Alaska would likely take only a few days for observations and monitoring, a few days to prepare the report, and a few days for the management to review the document and prepare a disclosure. In this scenario, a 10-day limit is not unreasonable. On the other hand, if British Petroleum were to undertake an audit of its entire North Slope operations, such a review would likely take months. In fact, SB 41 provides that audits can take up to 90 days to complete and even longer if special permission is received. An audit report that takes two or three months to complete is not going to be a small affair -- previous committees have heard testimony that some audit reports are several thousand pages long. An audit report of this magnitude is not reviewed or digested quickly. Larger companies will rely on legal counsel to review the audit report and prepare the actual disclosure of potential violations. This legal review might occur simultaneously or after company management has reviewed the report. In any event, it can easily take longer than 10 days to complete the process.
- Leaving "promptly" undefined gives DEC the administrative discretion to apply this standard differently, depending on the size of the facility and the scope of the audit report. A "one size fits all" approach is not necessarily the best tool.
- Two corporate attorneys have told the sponsor that, absent a definition of promptly, the tendency of most businesses will be to interpret the term very conservatively, rather than risk jeopardizing the immunity benefit on a technicality.
- The sponsor recently obtained 4 samples of disclosures from corporations in the state of Texas; a review of these documents indicate considerable variance in the disclosure time, probably due to the varying complexity of the reports. The shortest time period for disclosure was two days; the longest was 50 days.

A M E N D M E N T #15

OFFERED IN THE HOUSE

TO: CSSB 41 (FIN)

Page 12, lines 13-14:

Following: "that consists of":

Delete: "interviews with current or former employees;
field notes and records of observations made
by the auditor;"

Reasons: This proposed amendment responds to concerns raised on page 7 of the United States Attorney's letter that the self-audit privilege can be used to shield evidence of violations, as well as the thought processes of the auditor.

A M E N D M E N T #12

OFFERED IN THE HOUSE

TO: CSSB 41 (FIN)

Page 4, line 11:

Following "made under AS 09.25.455(b)"

Insert: "or AS 09.25.475 -- 09.25.480"

Reasons: This proposed amendment responds to a concern raised on pages 8-9 of the United States Attorney's letter, regarding use of privileged information during followup inspections. It would clarify that DEC or a municipality may review and use information already disclosed to DEC or the municipality for purposes of immunity or mitigation of penalties under AS 09.25.475 - 09.25.480 during an inspection.

AMENDMENT

#11

whistleblower protection

OFFERED IN THE HOUSE

TO: CSSB 41(FIN)

BY REPRESENTATIVE BERKOWITZ

1 Page 7, line 3, following "court":

2 Insert ", hearing officer, or arbitrator"

3 Page 7, following line 15:

4 Insert a new paragraph to read:

5 "(4) audit report contains evidence that is relevant to a claim by an employee
6 of the owner or operator that the employee's compensation, the employee's terms,
7 conditions, or privileges of employment, or decisions about the employee's
8 opportunities for promotions, pay increases, or changes of duties were adversely
9 affected by the employee's participation in the audit;"

10 Renumber the following paragraphs accordingly.

11 Page 7, following line 20:

12 Insert a new subsection to read:

13 "(b) An arbitrator may require disclosure of confidential self-evaluation and
14 analysis contained in an audit report in an employee grievance proceeding if the
15 arbitrator determines, after an in camera review consistent with the appropriate rules
16 of procedure, that the audit report contains evidence that is relevant to a claim by an
17 employee of the owner or operator that the employee's compensation, the employee's
18 terms, conditions, or privileges of employment, or decisions about the employee's
19 opportunities for promotions, pay increases, or changes of duties were adversely
20 affected by the employee's participation in the audit."

21 Reletter the following subsection accordingly.

1 Page 7, line 22, following "(a)":

2 Insert "or (b)"

3 Page 7, following line 22:

4 Insert a new subsection to read:

5 "(d) In this section, "employee" includes a former employee."

CORRECTION

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



Rev. 6/98

Central Microfilm Services
Department of Education
State of Alaska

AMENDMENT

#11

whistleblower protection

OFFERED IN THE HOUSE

BY REPRESENTATIVE BERKOWITZ

TJ: CSSB 41(FIN)

+3 = 6 in version "K"

1 Page 7, line 3, following "court":

2 Insert ", hearing officer, or arbitrator"

3 Page 7, following line 15:

4 Insert a new paragraph to read:

5 "(4) audit report contains evidence that is relevant to a claim by an employee
6 of the owner or operator that the employee's compensation, the employee's terms,
7 conditions, or privileges of employment, or decisions about the employee's
8 opportunities for promotions, pay increases, or changes of duties were adversely
9 affected by the employee's participation in the audit;"

10 Renumber the following paragraphs accordingly.

11 Page 7, following line 20:

12 Insert a new subsection to read:

13 "(b) An arbitrator may require disclosure of confidential self-evaluation and
14 analysis contained in an audit report in an employee grievance proceeding if the
15 arbitrator determines, after an in camera review consistent with the appropriate rules
16 of procedure, that the audit report contains evidence that is relevant to a claim by an
17 employee of the owner or operator that the employee's compensation, the employee's
18 terms, conditions, or privileges of employment, or decisions about the employee's
19 opportunities for promotions, pay increases, or changes of duties were adversely
20 affected by the employee's participation in the audit."

21 Reletter the following subsection accordingly.

1 Page 7, line 22, following "(a)":

2 Insert "or (b)"

3 Page 7, following line 22:

4 Insert a new subsection to read:

5 "(d) In this section, "employee" includes a former employee."

1 Page 7, line 22, following "(a)":

2 Insert "or (b)"

3 Page 7, following line 22:

4 Insert a new subsection to read:

5 "(d) In this section, "employee" includes a former employee."

4/9/97

H Version

AMENDMENT #10

Withdrawn

OFFERED IN THE HOUSE

BY REPRESENTATIVE BERKOWITZ

TO: CSSB 41(FIN)

1 Page 4, line 4, following ".":

2 Insert "The audit report must indicate in writing the date on which it was completed."

3 Page 7, line 14:

4 Delete "promptly"

5 Page 7, lines 14 - 15:

6 Delete "after discovery of the noncompliance"

7 Insert "within the time limits applicable under AS 09.25.475(d)"

8 Page 8, line 3:

9 Delete "promptly after knowledge of the information disclosed is obtained by the
10 owner or operator"

11 Insert "within 10 days after the audit report containing the disclosed information was
12 completed"

13 Page 8, line 15:

14 Delete "promptly"

15 Insert "within 10 days after the audit report was completed."

16 Page 8, line 17:

17 Delete "promptly"

18 Insert "within 10 days after the audit report was completed."

19 Page 8, line 21, following "days":

1 Insert "after the audit report was completed"

CS FOR SENATE BILL NO. 41(FIN)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY THE SENATE FINANCE COMMITTEE

Offered: 3/18/97

Referred: Rules

Sponsor(s): SENATORS LEMAN, Pearce, Taylor

A BILL

FOR AN ACT ENTITLED

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

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

4 * Section 1. FINDINGS; INTENT. The legislature finds and intends as follows:

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

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

1 environmental business practices and procedures; this encouragement can best be achieved by
 2 preserving the free flow of information; the free flow of the kind of information that is
 3 generated by self-audits would be curtailed if a privilege for the audits were not available;
 4 therefore, it is the intent of the legislature to recognize an audit privilege under this Act to
 5 protect the confidentiality of communications related to voluntary internal environmental
 6 audits; however, the legislature does not intend that the parts of an audit report consisting of
 7 confidential self-evaluation and analysis that are privileged under this Act may be used to
 8 shield a person from liability under applicable laws and regulations by blocking access to
 9 relevant facts;

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

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

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

22 **Article 5. Privileges and Immunities**

23 **Related to Disclosure of Certain Self-Audits and Violations.**

24 **Sec. 09.25.450. Audit report privilege.** (a) Except as provided in
 25 AS 09.25.460, an owner or operator who prepares an audit report or causes an audit
 26 report to be prepared has a privilege to refuse to disclose, and to prevent another
 27 person from disclosing, the parts of the report that consist of confidential self-
 28 evaluation and analysis of the owner's or operator's compliance with environmental
 29 laws. Except as provided in AS 09.25.455 - 09.25.480, the privileged information is
 30 not admissible as evidence or subject to discovery in

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

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

3 (b) With respect to confidential self-evaluation and analysis in an
4 environmental audit, in order to qualify for the privilege under this section and the
5 immunity under AS 09.25.475, at least 15 days before conducting the audit, the owner
6 or operator conducting the audit must give notice by electronic filing that complies
7 with an ordinance or regulation authorized under (j) of this section or by certified mail
8 with return receipt requested to the commissioner's office of the department of the fact
9 that it is planning to commence the audit. The notice must specify the facility,
10 operation, or property or portion of the facility, operation, or property to be audited,
11 the date the audit will begin and end, and the general scope of the audit. The notice
12 may provide notification of more than one scheduled environmental audit at a time.
13 Once initiated, an audit shall be completed within a reasonable time, but no longer
14 than 90 days, unless a longer period of time is agreed upon between the owner or
15 operator and the department. The audit report must be completed in a timely manner.

16 (c) The following persons may claim the privilege available under (a) of this
17 section:

18 (1) the owner or operator who prepared the audit report or caused the
19 audit report to be prepared;

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

23 (3) a person to whom confidential self-evaluation or analysis is
24 disclosed under AS 09.25.455(b); or

25 (4) a custodian of the audit results.

26 (d) A person who conducts or participates in the preparation of an audit report
27 and who actually observed or participated in conditions or events being reviewed for
28 compliance may testify about those conditions or events but may not, in a proceeding
29 covered by (a) of this section, be compelled to testify about or produce documents
30 consisting of confidential self-evaluation and analysis.

31 (e) A person claiming the privilege described in this section has the burden of

1 establishing the applicability of the privilege.

2 (f) To facilitate identification, each document in an audit report that contains
3 confidential self-evaluation or analysis shall be labeled "AUDIT REPORT:
4 PRIVILEGED DOCUMENT."

5 (g) A government agency or its employees or agents may not, as a condition
6 of a permit, license, or approval issued under an environmental law, require an owner
7 or operator to waive the privilege available under this section.

8 (h) Except when the privilege is waived under AS 09.25.455(a) or disclosure
9 is made under AS 09.25.455(b), neither an agency nor its employees or agents may
10 review or otherwise use the part of an audit report consisting of confidential self-
11 evaluation or analysis during an inspection of a regulated facility, operation, or
12 property or an activity of a regulated facility, operation, or property.

13 (i) This section may not be construed to

14 (1) prevent a regulatory agency from issuing an emergency order,
15 seeking injunctive relief, independently obtaining relevant facts, conducting necessary
16 inspections, or taking other appropriate action regarding implementation and
17 enforcement of an applicable environmental law, except as otherwise provided in
18 AS 09.25.475; or

19 (2) authorize a privilege for uninterrupted or continuous environmental
20 audits.

21 (j) A state agency or municipality may, by regulation or ordinance,
22 respectively, allow the notice required under (b) of this section to be filed by facsimile
23 or other electronic means if the means ensures adequate proof of

24 (1) submittal of the notice by the owner or operator; and

25 (2) receipt by the agency or municipality.

26 **Sec. 09.25.455. Waiver and disclosure.** (a) The privilege in AS 09.25.450
27 does not apply to the extent the privilege is expressly waived in writing by the owner
28 or operator who prepared the audit report or caused the report to be prepared.

29 (b) Disclosure of the part of an audit report or information consisting of
30 confidential self-evaluation or analysis does not waive the privilege established by
31 AS 09.25.450 if the disclosure is made

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

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

5 (B) the owner's or operator's lawyer or the lawyer's
6 representative;

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

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

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

11 or

12 (F) the principal of the independent contractor who conducted
13 an audit on the principal's behalf;

14 (2) under the terms of a confidentiality agreement between the owner
15 or operator who prepared the audit report or caused the audit report to be prepared and

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

18 (B) a transferee or potential transferee of an interest in the
19 facility, operation, or property;

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

22 (D) a person engaged in the business of insuring, underwriting,
23 or indemnifying the facility, operation, or property; or

24 (E) a person who, along with the person who prepared the audit
25 report or caused the audit report to be prepared, also is an owner or operator
26 of part or all of the facility, operation, or property; or

27 (3) under a written claim of confidentiality to a government official or
28 agency by the owner or operator who prepared the audit report or who caused the audit
29 report to be prepared.

30 (c) Documents consisting of confidential self-evaluation and analysis that are
31 disclosed under (b)(3) of this section are required to be kept confidential and are not