ALASKA LEGISLATURE COMMITTEE FILES 1997-1998 8672
9236 HOUSE JUDICIARY

subject to disclosure under AS 09.25.110 - 09.25.220.

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

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

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

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

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

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

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

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

(b) An audit report is not privileged and is admissible as evidence and subject to discovery and use in a proceeding relating to pipeline rates, tariffs, fares, or charges. The owner or operator who prepared the audit report or caused the report to be prepared is entitled to a protective order in a proceeding relating to pipeline rates, tariffs, fares, or charges to maintain the confidentiality of the audit from discovery, use, or admission in evidence in other types of proceedings. Discovery, use, or

admission in evidence in a proceeding relating to pipeline rates, tariffs, fares, or charges is not considered to have waived the privilege for any other purpose.

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

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

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

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

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

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

#3

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

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

(b) Immunity is not available under this section if the violation resulted in, or poses or posed an imminent or present threat of, substantial injury to one or more

persons at the site audited or to persons, property, or the environment offsite.

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

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

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

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

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

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

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

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

(3) correct the violation within 90 days or enter into a compliance agreement with the appropriate agency that provides for completion of corrective and remedial measures within a reasonable time;

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

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

(e) A disclosure is not voluntary for purposes of this section if it is a disclosure to a regulatory agency expressly required by an environmental law, a permit, a license, or an enforcement order or decree.

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

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

(h) A violation that has been voluntarily disclosed and to which immunity applies under this section shall be identified by the regulatory agency in its compliance history report as having been voluntarily disclosed.

(i) This section may not be construed to prevent a regulatory agency from

(1) seeking injunctive relief; or

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

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

(1) the owner or operator claiming the immunity has

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

(B) within the 36 months preceding the violation, repeatedly or continuously committed, at the same facility or associated facilities located in the state, the specific violation or a violation 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 committed intentionally or knowingly by a member of the owner's or operator's management or an agent of the owner or operator and the owner's or operator's policies or failure to have in place systems reasonably designed to prevent the violation 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) 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 and to complete any resulting implementation plan or tracking system for corrective and preventive action;

(3) remediation;

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

(5) the nature of the violation; and

(6) other relevant considerations.

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

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

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

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

(i) interviews with current or former employees;

(ii) field notes and records of observations;

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

(iv) legal analyses;

(v) drawings;

(vi) photographs;

(vii) laboratory analyses and other analytical data;

(viii) computer generated or electronically recorded information;

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

(x) other communications 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; 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, 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, confidential, critical, internal, and retrospective review, self-evaluation, or analysis of current or past conduct, practices, and occurrences and their resulting consequences, including an assessment that is a part of the owner's or operator's compliance management system, whether or not conducted on a regular basis or in response to a particular event, by an owner or operator or by an employee or independent contractor of an owner or operator and is

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

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

(5) "environmental law" means

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

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

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

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

(8) "penalty" means an administrative or civil sanction imposed by the state to punish a person for a violation of a statute or rule; the term does not include a technical or remedial provision ordered by a regulatory authority, nor an administrative or civil sanction relating to pipeline rates, tariffs, fares, or charges;

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

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

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

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

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

(3) "recklessly" with respect to a result or to a circumstance described

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

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

SB 41 – Enviro Audit

EB Amends

Re: "Promptly"

small audit – 2, 3 days

2, 3 days to gen. report

Res. 2 days review – then discuss

eg Aleyeska – audit takes months

90 day limit in bill

thousands of pages

mgmt. gets it – needs > 10 days to review

Amend 4 – no deletions

Why should we encourage self-auditing?

Lessons from the Price Waterhouse Survey

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

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

Significant findings:

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

Distributed by Senator Loren Leman

DAVID E. ROGERS

ATTORNEY AND COUNSELOR AT LAW

211 Fourth Street, Suite 108
P.O. Box 33932
Juneau, Alaska 99803
(907) 586-1107 Fax: (907) 586-1097

April 2, 1997

Representative Joe Green
Chairman, House Judiciary Committee
Capitol Building, Room 118
Juneau, Alaska 99801

Dear Rep. Green:

I am writing this letter on behalf of the Council of Alaska Producers in support of CSSB 41 and to request expeditious processing by the House Judiciary Committee.

This bill, the product of nearly two years of careful scrutiny and debate, is in good shape. Senator Leman and staff member Mike Pauley have worked tirelessly and responsibly on this legislation and the current CS for SB 41 responds to most of the Administration's major concerns. Final discussions to resolve remaining issues are underway. I am optimistic that these questions also will be settled in the near future.

Please schedule a hearing at your earliest convenience. This bill's time has come. Thanks, Mr. Chairman. As always, I truly appreciate your strong support for Alaska's growing mining industry.

Best wishes,

David E. Rogers

Resource Development Council
for Alaska, Inc.

121 West Fireweed Lane, Suite 250, Anchorage, Alaska 99503-2035
(907) 276-0700 Fax: (907) 276-3887 e-mail: rdc@aonline.com

April 4, 1997

Representative Joe Green, Chairman
House Judiciary Committee
Juneau, AK 99801

Dear Representative Green:

The Resource Development Council urges your support of CSSB 41, environmental and health/safety audits and requests a hearing on this important piece of legislation.

RDC believes CSSB 41 is a move in the right direction in securing full compliance with environmental laws and regulations. It will encourage greater utilization of self-audits by providing immunity and privilege. CSSB 41 has come a long way from its original draft and has gained broad support from the private sector.

Thank you for giving RDC the opportunity to comment on this legislation, which deserves your support.

Sincerely,

RESOURCE DEVELOPMENT COUNCIL
for Alaska, Inc.

Becky Gay
RDC Executive Director

Resource Development Council
for Alaska, Inc.

121 West Fireweed Lane, Suite 250, Anchorage, Alaska 99503-2035
(907) 276-0700 Fax: (907) 276-3887 e-mail: rdc@aonline.com

March 28, 1997

Senator Loren Leman
Alaska State Senate
Juneau, AK 99801

APR 02 1997

Dear Senator Leman:

I am happy to report the Executive Committee of the Resource Development Council unanimously passed a motion supporting CSSB 41, environmental and health/safety audits.

RDC appreciates your efforts to work in a cooperative manner to develop legislation that achieves the goals of industry, the administration and the legislature. CSHB 41 has come a long ways from its original draft and has gained broad support from the private sector.

RDC appreciates your hard work and leadership effort to advance CSSB 41. This bill is a move in the right direction in securing full compliance with environmental laws and regulations. It will encourage greater utilization of self-audits by providing immunity and privilege.

Let us know how we can help you move forward with this important piece of legislation.

Sincerely,

RESOURCE DEVELOPMENT COUNCIL
for Alaska, Inc.

Scott Thorson
RDC President 1996-97

cc: Alaska Legislature

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

March 18, 1997

Honorable Tim Kelly
Chairman, Senate Rules Committee
Capitol Building
Juneau, AK 99801

RE: SB-41, Relating to Environmental Self-Audits

Dear Senator Kelly,

The Alaska Miners Association wishes to go on record in support of Senate Bill 41. This bill involving voluntary self audits is a positive step for the State, for industry and for the public.

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

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

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

Sincerely,

Steven C. Borell, P.E.
Executive Director

cc: Senator Loren Leman

Environmental Auditing:

Beyond Regulatory Cat and Mouse

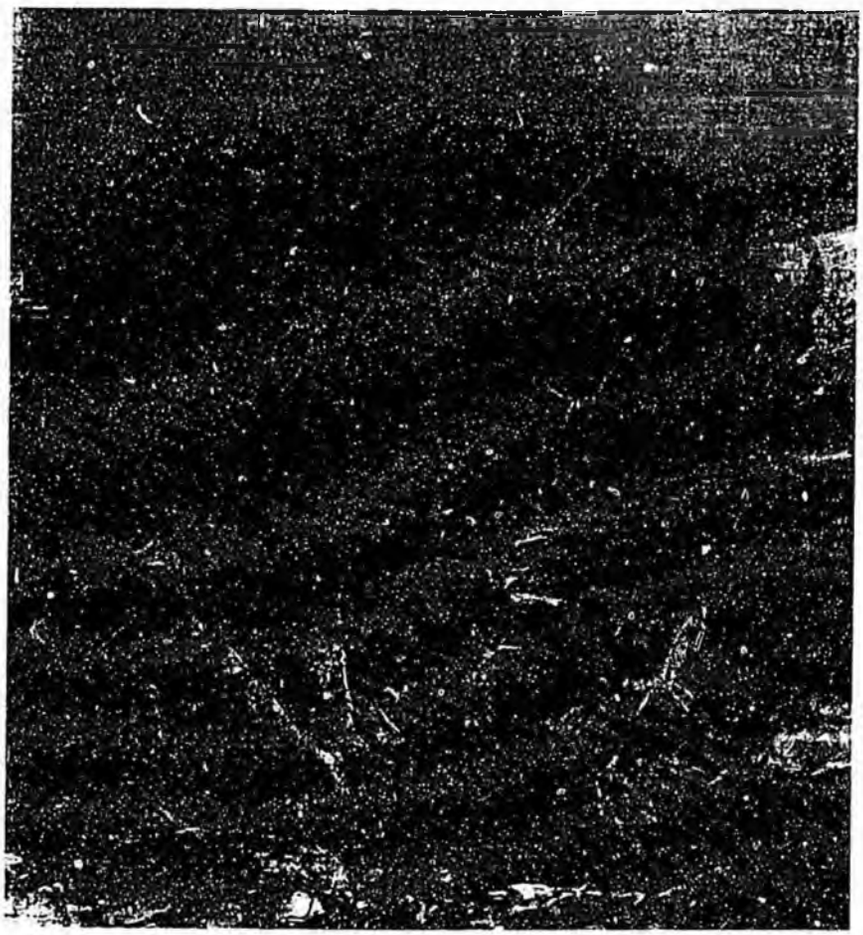


ILLUSTRATION © JANE HOFSTETTER (DETAIL)

A limited evidentiary privilege, enforcement waivers, and required corrective action make Minnesota's environmental audit privilege legislation congenial to both the regulated and the environment.

BY WILLIAM H. KOCH

When Governor Carlson signed H.F. 1479 into law in May, 1995, Minnesota again established its credentials as a leader on environmental and business issues. The new Minnesota Environmental Improvement Pilot Program (EIP) was the culmination of months of work by dedicated government regulators, business leaders, environmentalists, and other concerned citizens. This is a pro-business, pro-environment law.

Since Oregon passed the first environmental audit privilege legislation in 1993[1], 13 more states have followed suit.[2] Generally, these legislative developments have taken one of two forms: an evidentiary privilege or an enforcement waiver. Minnesota's approach is a marriage of the two approaches with the introduction of a third: government notice. Minnesota recognizes the benefits of a limited evidentiary privilege, as well as the advantages of providing enforcement incentives to encourage environmental auditing. EIP leapfrogs ahead of efforts in other states.

ENVIRONMENTAL AUDITING

Not mandated by any federal or state environmental law, environmental auditing has quietly become more and more common. It is now readily acknowledged that progressive companies should perform environmental audits aimed at uncovering past incidents of potential noncompliance, as well as identifying opportunities to achieve greater efficiency and environmental protection. Administrative, civil, and criminal actions have become commonplace,[3] and business leaders who might at one time have shrugged off environmental concerns are now actively promoting environmental agendas. But there has never been an

"[A] facility need not conduct an exhaustive review of every practice to gain the protections of the program."

accepted, workable definition of an environmental audit for business leaders to use and understand.

The new law, like its counterparts throughout the country, tackles this problem by announcing its own definition of an environmental audit. Such an audit "means a systematic, documented, and objective review by a regulated entity of one or more facility operations and practices related to compliance with one or more environmental requirements and, if deficiencies are found, a plan for corrective action."[4] This is a broad definition, and it must be to account for the broad protections provided under the new law. The law's proponents intended to encourage an open discussion of environmental matters within a business that was "doing the right thing" by conducting environmental audits. To accomplish this end, the definition of "audit," as a legal and practical matter, had to be broad.

Importantly, an audit under this legislation may be of "one or more facility operations" pursuant to "one or more environmental requirements." Thus, a facility need not conduct an exhaustive review of every practice to gain the protections of the program. As was stated repeatedly throughout the legislative process, and as intended by the Legislature, a company is protected for what it does. The greater the breadth of an audit, the more protection a company will enjoy. But the company retains the flexibility to determine the scope of the audit. It is the company that decides how much to invest in an audit in order to gain the corresponding level of protection.

Auditing To What End

While the overall goal of the new law is to encourage companies to critically evaluate their environmental practices to ensure compliance with the myriad environmental laws, there are many complementary goals. Voluntary auditing will achieve environmental compliance at a lower overall cost. Preventing environmental harm is more beneficial than punishing environmental wrongdoing. Increasingly scarce state resources mandate a more efficient use of public funds to protect the state's natural resources and environment. A renewed partnership between business and the government will enhance overall efforts to protect the environment, and will lead to a rejuvenated business climate in the state. And there needs to be a mechanism to reward "good actors." Each of these goals is furthered by the new law.

There can be little dispute that voluntary auditing leads to improved compliance. While it is extremely difficult, if even possible, for a business to be in compliance with every federal, state, and local environmental regulation at all times, it is possible for that same business to be ever-vigilant. Through education and incentives, the government must encourage businesses to take a proactive approach to environmental protection. Years of an enforcement-only mentality have not achieved the desired level of compliance. Instead of being perceived as focusing only on the egregious violator and severely punishing that company or individual, the government has been seen as indiscriminately prosecuting environmental offenses — whether administratively, civilly or criminally. Some applaud this broad-brushed approach to environmental enforcement, but the result has been to dissuade people from spending the money to uncover potential areas of noncompliance. Rather than encouraging compliance, an enforcement-only posture threatens to push environmental vigilance under the corporate rug.

This realization is due, in part, to the fact that the government cannot be every place at all times. Even if that were wise public policy, such an all-encompassing presence is impossible. As officials of the Minnesota Pollution Control Agency (MPCA) readily admitted at a seminar sponsored by the Minnesota Environmental Initiative (MEI) in October 1994, only about 2 percent of Minnesota businesses are randomly inspected every year. That means 98 percent of the business community is not evaluated in any given year. Stated differently, it may be 50 years before a company may have to face up to its environmental record. Such odds mitigate against a company taking an aggressive position with respect to environmental compliance. A simple risk-based assessment would indicate a company might be better off waiting for the hypothetical environmental inspection than spending actual dollars preparing for such a possibility. Even the best-intentioned business must make the payroll.

Government cannot, and should not, do it all. The age of boundless government energy has given way to practical financial limits. Through the new environmental auditing law, Minnesota has placed much of the economic oversight cost on business. Now, those people who understand their businesses best can focus on areas of particular concern. The state will no longer need to become an expert at every business and identify environmental risks peculiar to each industry. As Chuck Williams, chair of the MPCA Board, said in a letter to the editor of *City Business*, the new law "provides MPCA with one more tool to partner with business . . . [the MPCA] strives for positive, proactive relationships with business . . ."[5] The regulators recognize the benefits of cooperation with the regulated industry, as do businesses. This law continues the state's tradition of working with business to identify areas where a common ground can be found.

Almost everyone would agree that "good actors" should be treated differently than "bad actors." Those people and businesses that are taking a close look at their environmental compliance, and even considering ways of implementing pollution prevention techniques, should not have the same risk of an enforcement action as an entity that ignores its environmental stewardship. This was one of several issues that was shared in common by environmentalists, business leaders, regulators, and others who participated in an MPCA task force charged with developing that agency's internal policy on environmental audits. The new law recognizes this desired distinction.

Environmental Auditing Mechanism

As stated above, 14 states have passed environmental audit privilege legislation in the last two years. Some of the laws were initiated by business organizations, others were the result of negotiations between regulated parties and the government. Few, if any, had the broad-based participation, or support, that Minnesota's legislation enjoyed.[6] The new law provides an appropriate "carrot and stick" approach to environmental compliance.

The law protects "regulated entities" that conduct environmental audits.[7] The state, which by definition includes local units of government, will defer and then waive all administrative, civil and criminal enforcement

"The new law provides certainty in exchange for environmental vigilance. And it encourages the use of limited resources to protect the environment rather than to engage in costly litigation."

actions against a company that completes an audit, reports possible deficiencies to the MPCA in summary fashion, and commits to remedy the possible areas of noncompliance within 90 days or some other amount of time negotiated with the MPCA.[7] Additionally, major facilities must prepare pollution prevention (P²) plans and submit progress reports pursuant to Minn. Stat. §§115.07-.09;[8] other businesses must "examine" P² opportunities. All audit-related documents will be privileged as to third parties. The state can only gain access to these documents in accordance with the MPCA's internal policy on environmental auditing, which was adopted by the MPCA Board on January 25, 1995.[9] The law also directs the MPCA to develop a "green star" emblem that businesses can display for up to two years following their successful participation in the EIP. The new law provides certainty in exchange for environmental vigilance. And it encourages the use of limited resources to protect the environment rather than to engage in costly litigation.

The law has limited, but important, exceptions. A company is not protected if: (1) less than one year has elapsed since the initiation of an environmental enforcement action against the company resulting in a penalty; (2) there has been a knowing criminal violation by the company; (3) less than one year has elapsed since the company resolved the same noncompliance identified in the audit; or (4) the violation resulted in serious harm. Also, the MPCA retains the power to seek an injunction to stop activities causing an imminent threat to public health or the environment. While the exceptions are important, and necessary to ensure the MPCA's protection of Minnesota's environment and residents, they do not negate the unique benefits of the EIP.

Even if one of the limited exceptions applies, the MPCA is required to consider a regulated entity's good faith efforts to comply. In assessing a regulated entity's efforts, the MPCA must consider a number of factors: the corrective action taken upon discovery of a violation; the care exercised to ensure compliance with environmental regulations; whether or not significant economic benefit was realized by the regulated entity due to the noncompliance; the history of compliance prior to implemention of the audit or self-evaluation; efforts to achieve compliance since completion of the audit or self-evaluation; and whether or not the regulated entity has undertaken to implement P² opportunities. After this analysis, the MPCA can decide to take no enforcement action, even if an exception otherwise exists. It is, therefore, important that a regulated entity consider its overall approach to environmental compliance, even if it fears the unlikely possibility that one of the enumerated exceptions applies.

For the first time, Minnesota has created a statutory privilege for environmental audits. There is no need to depend upon developing common law concepts, although those are still available.[11] The state will not

seek the audit or related documents except in very narrow cases, and there is a blanket privilege over the audit and related materials as to third parties. Unlike legislation in other states, which require an after-the-fact analysis by a judge to determine if a company remedied any noncompliance in an appropriate manner, Minnesota's privilege is absolute for those that meet the requirements of EIP. Therefore, a regulated entity can, for the first time, freely discuss a potential environmental violation and ways in which to fix the problem. The entity will not be writing a road map for prosecutors, nor will it hang itself with the documentary rope it develops. Attention will be paid to addressing the problem, as opposed t o minimizing the risk of a later lawsuit. Through the EIP, a regulated entity gains both flexibility and certainty. And the environment benefits.

The state has surrendered its right to seek production of an audit and related materials except in limited situations as identified in the MPCA environmental auditing policy adopted on January 24, 1995. Once an audit report has been submitted to the MPCA, all supporting documents are privileged if the regulated entity has met the EIP requirements. (This means, as a practical matter, that a regulated entity should promptly prepare its audit report to be submitted to the MPCA. If the state discovers noncompliance before the audit report is submitted and before the privilege is triggered, then the protections of the EIP do not apply.)[12] The only express exception to this policy is if the MPCA "reasonably believes that there is probable cause that a violation of the criminal law has been or is being committed and that such materials are evidence of the commission of a gross misdemeanor or felony."[13] Otherwise, the only way in which the MPCA will obtain this privileged information is if a third party, such as a disgruntled former employee, releases the information to the MPCA. According to the MPCA it "cannot ignore information furnished to it by any source, including present or former regulated entity employees who choose to file complaints."[14] Nonetheless, the state has voluntarily agreed to limit its ability to seek this information.

Response of Environmental Agencies

While the EPA is against environmental audit privileges in general, it has had favorable comments about Minnesota's approach. In its April 3, 1995, "Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy," the EPA said it "will scrutinize enforcement more closely in states with audit privilege and/or penalty immunity laws."[15] This interim policy, which the EPA had hoped to finalize by the end of October 1995,[16] was the "shot across the bow" of the states clamoring to enact legislation aimed at encouraging environmental auditing. The federal government feared the states were proceeding too quickly, with insufficient consideration given to the long-term consequences of such legislation. Earlier

"While the state cannot take any adverse action against a regulated party based upon disclosures that satisfy the EIP, the fact that information is disclosed to regulators is important."

federal threats of possible "over-filing" — a practice where the EPA steps in and begins an enforcement action due to inadequate action by a state with delegated enforcement authority — had been uniformly ignored as being impractical and unwise.

In contrast to the harsh words for other states, the EPA has responded favorably to Minnesota's approach. Eric Schaeffer, deputy director of the EPA's Office of Enforcement and Compliance Assurance, told the *Environmental Reporter* that "the [EPA] supports an approach to this issue taken by the Minnesota legislature . . .."[17] The EPA supports Minnesota's new law because, unlike any of the other laws enacted across the country, Minnesota's requires that the environmental regulators be informed of potential violations. While the state cannot take any adverse action against a regulated party based upon disclosures that satisfy the EIP, the fact that information is disclosed to regulators is important. In other states, the information is hidden to the world; only by accident would someone learn an audit existed and then, only after a legal battle, would the regulators have the opportunity to see the information.

The MPCA is still working to meet the expectations of this new law. With the input of various business organizations, the MPCA has developed some of the self-evaluation forms. As of October 31, 1995, only one company had submitted an audit report under the EIP, and it was limited to water issues. But there had been more than 50 calls to the MPCA[18] regarding the new program at this writing. Once the MPCA develops all of the self-evaluation forms, these callers will have something with which to work. In the meantime, businesses and other regulated entities can conduct their own environmental audits, preferably with the assistance of counsel in order to maximize all privileges. The MPCA is prepared to work closely with regulated parties interested in the EIP.

While Minnesota should be proud of passing this historical legislation, this new law must be used in order that it prove beneficial. The law has a sunset date. The MPCA is directed to submit a report to the Legislature by January 15, 1999, so the Legislature can assess the effectiveness of the EIP.[18] The more the program is used to identify areas of environmental improvement, the more likely it will be renewed. If, however, the law is not used, it will likely be terminated. It is in the best interest of the regulated community to understand this new law and take advantage of its incentives and protections. It is also in the best interest of the environment. □

NOTES

1 Oregon Revised Statutes §468.963 (1993).

2 The states that have enacted environmental audit privilege legislation include: Arkansas, Colorado, Idaho, Illinois, Indiana, Kansas, Kentucky, Minnesota, Mississippi, Oregon, Texas, Utah, Virginia, and Wyoming.

3 For instance, in 1993, the EPA announced that 2,110 enforcement actions had been brought — 140 criminal cases, 1,164 administrative penalty action, 338 civil cases, and 18 actions to enforce consent decrees. Chemical Regulation Reporter, *December 10, 1993, at 1643-1644.*

4 H.F. 1479, § 9, subd. 4. In addition to covering environmental audits, the new law provides identical protections and incentives for "self-evaluations." This provision will assist smaller businesses, which might not be able to afford an outside consultant or which would rather complete the environmental review itself. H.F. 1479, § 9, subd. 11.

5 City Business, *August 4, 1995, at 9.*

6 The vote in the Senate was 64-0; in the House, 128-1.

7 Regulated entities include small and large businesses, as well as public agencies. H.F. *1479, § 9, subd. 10.*

8 This "performance schedule" is a negotiated time line with the MPCA. The MPCA is required to consider multiple factors when considering the reasonableness of a performance schedule. See *H.F. 1479, § 12.*

9 H. F. 1479, § 9, subd. 8.

10 This internal policy of the MPCA was expressly incorporated into the EIP through § 15, subd. 1, of H.F 149.

11 Attorneys would be wise to continue to work with clients in a manner consistent with the attorney-client privilege and the attorney work product doctrine. Also, careful consideration should be given to the applicability of the self-evaluative privilege, originally developed in the medical malpractice situation, but possibly applicable to environmental audits. See, e.g., Reichhold Chemicals Chemical, Inc., *1994 U.S. Dist. LEXIS 13806 (N.D. Fla. Sept. 20, 1994).*

12 H.F. 1479, § 13, subd. 5. The new law strikes a balance in favor of timely disclosure to ensure the greatest protection.

13 "Policy on Environmental Auditing," MPCA, January 24, 1995, at 4.

14 Id., *at 9.*

15 60 Federal Register *16875-79 (April 3, 1995).* See also *the Department of Justice's (DOJ) 1991 Organizational Sentencing Guidelines; the 1986 EPA Audit Policy; the 1991 DOJ "Factors in Decisions on Criminal Prosecutions of Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator" policy; the 1993 Draft Corporate Sentencing Guidelines for Environmental Violations; and the 1994 EPA "The Exercise of Investigative Discretion" memorandum.*

16 Chemical Regulation Reporter, *September 15, 1995 at 617.*

17 Chemical Regulation Reporter, *April 21, 1995.*

18 H.F. 1479, § 20.

William H. Koch is an attorney at Leonard, Street and Deinard. Bill focuses his practice on environmental litigation and corporate compliance issues and was one of the primary architects of the new law.

A L A S K A

NFIB
National Federation of Independent Business

NFIB/Alaska Key Vote

Vote Yes on Senate Bill 41

Environmental Audits

The Alaska Chapter of the National Federation of Independent Business has 4,400 members, making it the largest small-business advocacy group in the state. NFIB represents the entire spectrum of independent businesses, from one person "cottage" operations to quite substantial enterprises.

This bill allows a company who voluntarily audits their business for environmental compliance to be immune from penalty for regulatory violations that are discovered, promptly reported and corrected.

As companies are increasingly subject to new and complicated compliance regulations, the self audit procedure presents a workable solution to identifying problem areas and achieving compliance without fear of penalties for violations. This procedure does not allow a company to continue with non-compliance once a problem is identified. The program would be an encouragement for self-review and compliance.

NFIB/Alaska asks for support of SB 41.

Submitted by Thyes Shaub, NFIB Lobbyist

217 Second Street, Suite 206 . Juneau, AK 99801 . 907-463-5118 . Fax 907-463-5128

ALASKA OIL AND GAS ASSOCIATION
POSITION ON
SB 41, ENVIRONMENTAL AND HEALTH & SAFETY SELF-AUDITS

The Alaska Oil and Gas Association (AOGA) is a trade association whose 18 member companies account for the majority of oil and gas exploration, production, transportation, refining and marketing activities in Alaska.

AOGA supports the intent of SB 41. The majority of our members currently conduct self-audits as a means of ensuring compliance and see value in this legislation. Over the past 25 years health, safety and environmental regulations have become increasingly complex. Not incidentally, interpretation of these regulations has become correspondingly difficult. In response to this, self-auditing identifies areas of inadvertent non-compliance, and leads to subsequent corrective action. We encourage others in all industries to utilize self-auditing, not just to ensure compliance but to generally improve health, safety and environmental performance. This legislation also encourages greater utilization of self-audits by providing immunity and ensuring confidentiality.

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

Privilege further protects companies from inappropriate and unnecessary repercussions of disclosing audit results to agencies (e. g. third party action). Privilege also ensures that the auditing process is not compromised. The issue is not one of "secrecy" it is a matter of being able to conduct candid interviews with personnel. To remain effective, it is necessary to preserve the integrity of the audit process and maintain the trust and cooperation of employees. Traditional legal privileges limit the flexibility that is important to the self auditing process. For example, attorney-client privilege does not provide for open, internal communication of audit results with employees. However, as with immunity there are reasonable limits to the application of privilege. Privilege should protect the products of an audit, such as the audit report, auditor working papers, and action plans. Privilege should not be a vehicle to hide the underlying facts.

SB 41 moves health, safety and environmental compliance in a positive direction through its encouragement of self-auditing. We are hopeful that legislation based on the intent of SB 41 can be passed and to that end we would be happy to work with the Department of Environmental Conservation, the Department of Law, State OSHA and the bill's sponsor on this legislation.

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

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

ALASKA
★STATE★
CHAMBER
OF COMMERCE

March 19, 1997

Senator Loren Leman
State Capitol Room 113
Juneau, Alaska 99801

Dear Senator Leman:

Today Senate Bill 41, Environmental and Health/Safety Audits, will be on the Senate Floor for your consideration. We would appreciate your support of this legislation.

This legislation provides businesses with an opportunity to conduct self-audits in an effort to assure they are in compliance with environmental, health and safety laws. We believe this creates an incentive for businesses who find they have inadvertently been out of compliance with a law or regulation to voluntarily correct their actions without fear of penalty and strive to operate in the acceptable and prescribed manner. This law would not allow continued non-compliance once a problem has been identified.

We believe that government should be supportive of business activity wherever possible, and SB 41 fosters the attitude of partnership we believe government and business should strive to attain.

Thank you for your consideration of our position.

Sincerely,

Pam LaBolle

Pamela La Bolle
President

Alaska Forest Association, Inc.

111 STEDMAN SUITE 200
KETCHIKAN, ALASKA 99901-6599
Phone 907-225-8114
FAX 907-225-5920

Testimony of Jack E. Phelps, Executive Director
In support of SB 41
Offered to the Senate Labor & Commerce Committee
January 30, 1997

Mr. Chairman, members of the committee:

My name is Jack Phelps and I am Executive Director of the Alaska Forest Association, the forest products industry trade group for Alaska. The timber industry and the Association support the concept of environmental and safety self audits, now embodied in Senate Bill 41.

The Association believes that environmental laws do not exist to provide job security and a source of income for bureaucrats. Their purpose is not to maintain the flow of federal dollars to the state. Rather, their true purpose is to protect the environment. Likewise, the true purpose of safety laws is to protect people. Self audits promote these true purposes. It is the legislature's responsibility to ensure that environmental and safety laws do not overreach these purposes and become unnecessary impediments to economic development. SB 41 is a good step in that direction.

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

The concepts developed in SB 41 are not untried. 20 other states, notably Texas, have implemented environmental self audits with a good measure of success. While it may require a shift of emphasis for some state agencies, similar laws can work equally well in Alaska.

The AFA appreciates the 20th Legislature's commitment to developing practical efficiencies in government's interaction with private industry. SB 41 is a prime example of those efforts. The AFA also appreciates the sponsor's willingness to work with companies in Alaska's resource development industries to ensure the present bill reflects their needs in the real world. Please move SB 41 out of committee today so that the Judiciary Committee can consider it as soon as possible.

Thank you for the opportunity to testify on this important piece of legislation.

THE ALLIANCE

4220 'B' Street, Suite 200 • Anchorage, Alaska 99503-5911
Phone (907) 563-2226 • Fax (907) 561-8870

March 19, 1997

Senator Loren Leman
Chairman, Senate Labor and Commerce Committee
Alaska State Legislature
State Capitol (MS3100)
Juneau, Alaska 99801-1182

RE: Alliance Position - Senate Bill # 41.

Dear Senator Leman:

The Alaska Support Industry Alliance (Alliance) is a trade association representing over 300 members engaged in business within the oil, gas and mining industries. Our mission is to foster and promote the safe and environmentally sound development of natural resources, and to enhance and stimulate the business climate for our members.

The Alliance supports the intent of SB 41. This proposed legislation moves health, safety and environmental compliance in a positive direction through its encouragement of self-auditing. Further, the bill's concept is clear -- enhance regulatory compliance through incentives while reducing government and costs.

We are hopeful that legislation based on the intent of SB 41 can be passed and to that end we would be happy to work with you, the Department of Environmental Conservation, the Department of Law, and State OSHA.

Sincerely,

John Wheatley
Vice President, Policy

THE ALASKA CHAPTER
OF THE
INTERNATIONAL
ASSOCIATION OF
DRILLING CONTRACTORS

Mailing Address: P.O. Box 240845
Anchorage, Alaska 99524-0845

VIA FACSIMILE
(907) 465-2070

March 6, 1997

The Honorable Bert Sharp
Co-Chair, Senate Finance Committee
Alaska State Legislature
State Capitol
Juneau, Alaska 99801

Dear Senator Sharp:

SB 41, "An Act relating to environmental audits and health and safety audits to determine compliance with certain laws, permits and regulations," was passed out of the Senate Judiciary Committee on March 5, 1997, and now awaits a hearing before the Senate Finance Committee. I am writing today to encourage you to schedule SB 41 for a hearing in the Senate Finance Committee at the earliest possible date.

As I mentioned when we met in Juneau earlier this year, passage of "self-audit" legislation this session is critical to the members of the Alaska Chapter of the International Association of Drilling Contractors ("IADC"), and we feel that, as introduced and amended, this bill represents a good start toward the goal of developing a responsible, cost-effective incentive program that encourages voluntary compliance with environmental laws.

An increasingly common and salutary feature of the operator-drilling contractor relationship in Alaska involves the exchange of information between an independent contractor and its principal. SB 41 creates a privilege for voluntary environmental self-audits and establishes a qualified immunity for conditions that are discovered and reported in the course of those audits. The extension of this privilege and immunity to our industry, which was accomplished by the amendments adopted by the Senate Judiciary Committee at the request of the sponsor, will enable operators and drilling contractors to more readily share the results of self-evaluative reviews without having to worry that an enforcement agency or other litigant will use the results of such inquiries against them. For this reason, we believe that SB 41 would be extremely beneficial in that it would allow us to concentrate on the reduction of remaining deficiencies, rather than focusing on the legal nuances of protecting audits and restricting the sharing of those audits with other entities in the workplace.

I am available to meet with you at your convenience to discuss this legislation, and I am prepared to travel to Juneau to appear before the Senate Finance Committee and testify in support of the bill. I look forward to working with you and the members of the Finance Committee on this legislation.

Thank you again for your continued support.

Sincerely,

Randy Ruedrich by LG

Randy Ruedrich
Chairman
IADC, Alaska Chapter
(907) 563-5530 x-18

bcc: Senator Loren Leman

Alaska Hotel & Motel Association

P.O. Box 104900 • Anchorage, AK 99510 • (907) 272-1229 • FAX (907) 278-4111
Representing Alaska's Finest Hotels, Motels and Inns

MAR 0 8 1997

Senator Loren Leman
Alaska State Senate
State Capitol
Juneau, AK 99801

March 4, 1997

Dear Senator Leman:

I am writing on behalf of the Alaska Hotel & Motel Association in support of your efforts on SB 41. As we discussed in our meeting last month, our membership includes nearly 90 of the largest lodging properties in the state, employing over 6,000 Alaska residents.

It is our opinion, that the proposed legislation makes sense as it would serve to shift the responsibility of monitoring environmental and health and safety regulation compliance onto the individual organization, where it belongs. Essentially this legislation would turn individual organizations into their own compliance gatekeepers, providing for a window of immunity where prompt and appropriate corrective action was identified and executed.

We as an industry continually work to partner with the State of Alaska, to identifying solutions for budgetary decreases and revenue opportunities. This legislation would not only serve to enhance compliance procedures and non-compliance resolution, it would, by its own definition, reduce the costs of the current "command and control" approach to environmental and health and safety regulation compliance. We applaud such an effort as it will ultimately result in heightened, proactive compliance at a reduced cost.

If there are measures we can take within our industry to support this legislation please do not hesitate to call on me. We will do what we can to assist you in your efforts.

Yours Sincerely,

Frank Rose

Frank Rose
Chairman
Alaska Hotel & Motel Association

Federation Member
American
Hotel & Motel
Association

SENATOR LOREN LEMAN

Northwest Anchorage

716 W 4th Ave, Suite 520, Anchorage, AK 99501 (907) 258-8189 Session: State Capitol, Juneau, AK 99801 (907) 465-2095

Sponsor Statement -- SB 41

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

Senate Bill 41 establishes two incentives for businesses and other regulated entities to conduct voluntary self-audits of internal operations, in an effort to secure full compliance with environmental laws and regulations.

The first incentive is limited immunity. Entities that conduct voluntary self-audits will be immune from civil and administrative penalties for violations discovered, provided several conditions are met. The instances of noncompliance must be discovered through a self-audit, and reported promptly to the appropriate regulatory agency. The regulated entity must take action to correct the identified problem and prevent its future recurrence. Immunity is not available for violations causing substantial off-site damage or serious on-site injury. In addition, no immunity is available for violations that are knowingly committed or that result from recklessness. Immunity can be denied to regulated entities with a history of similar violations, or a pattern of disregard for environmental laws.

The second incentive is qualified privilege. Certain portions of the reports generated from voluntary self-audits will be considered privileged and therefore not admissible as evidence or subject to discovery in civil or administrative proceedings. This provision recognizes that the evaluative portion of an audit report is, by its very nature, self-incriminating: it discovers problems, identifies what personnel or management deficiencies are responsible, and recommends corrective action. Studies show that many businesses opt not to perform audits out of fear that the resulting reports will be used by agencies or hostile third parties as a "road map to prosecution". As with the immunity benefit, the privilege has limitations. Privilege can be overcome if asserted for a fraudulent purpose, or if the regulated entity has failed to take required actions to correct areas of noncompliance.

As the budgets of regulatory agencies are reduced at both the federal and state level, the importance of encouraging self-policing becomes ever more important. Senate Bill 41 creates incentives for companies and individuals acting in good faith to police themselves and maintain full compliance with highly complex regulations. This in turn allows government regulators to focus increasingly scarce resources toward investigating and prosecuting the small minority of genuinely "bad actors".

Environmental auditing has become increasingly popular in the past two decades. More than 1,000 of the world's largest companies have self-audit programs in place. In the U.S., 20 states have enacted self-audit laws similar to SB 41, offering privilege and/or immunity benefits to participating businesses, individuals, and municipalities.

Sectional Analysis -- CS for SB 41 (FIN)

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

Prepared by: Mike Pauley, Staff to Sponsor SENATOR LOREN LEMAN
Last updated: Tuesday, March 18, 1997

Section 1: Statement of legislative findings and intent.

- Performance-based standards are increasingly replacing the traditional command-and-control approach of enforcing environmental regulations; this shift will lead to the integration of environmental protections with normal operating procedures.
- The legislature intends to foster this integration by creating a responsible incentive program that will encourage voluntary, critical self-evaluations by regulated entities.
- The public has a strong interest in promoting routine self-audits by regulated entities. This can best be achieved by recognizing a qualified privilege that will help preserve the free flow of information generated by self-audits. Additionally, self-auditing can be encouraged by extending limited immunity to those entities which voluntarily report and correct regulatory noncompliance.

Section 2: Establishes privileges and immunities for certain self-audits.

Sec. 09.25.450 Establishes a qualified audit report privilege.

- The parts of an audit report consisting of confidential self-evaluation and analysis of compliance with environmental laws are privileged. These privileged materials are generally not admissible as evidence or subject to discovery in civil or administrative proceedings.
- To qualify for the privilege under this section, as well as the limited immunity under Section 09.25.475, regulated entities must provide 15 days advance notice to the department before commencing a self-audit. The audit must be completed within 30 days unless a longer period of time is negotiated.
- The person claiming the audit privilege has the burden of proving its applicability.
- All audit report documents containing confidential self-evaluation and analysis must be labeled "AUDIT REPORT: PRIVILEGED DOCUMENT".
- Regulatory agencies and their employees cannot require an owner or operator to waive privilege as a condition of a permit, license, or approval.
- Regulatory agencies and their employees generally may not review or use the parts of an audit report consisting of confidential self-evaluation and analysis during an inspection of a regulated facility, operation, or property.

- This section does not prevent a regulatory agency from conducting necessary inspections, taking appropriate enforcement actions, etc., except as provided in AS 09.25.475.
- No privilege is authorized for uninterrupted or continuous environmental audits.

Sec. 09.25.455 Establishes an exception to the privilege through the use of waivers.

- The audit privilege can be waived in writing by the owner or operator who prepared the audit report or caused it to be prepared.
- Disclosure of the part of an audit report consisting of confidential self-evaluation and analysis does not cause the privilege to be waived if the disclosure is made to an employee, contractor, lawyer, or other person involved in addressing or correcting any matter raised in the audit.
- Disclosure does not cause the privilege to be waived if it is made under terms of a confidentiality agreement with an insurer or underwriter, a partner or potential partner, a lender or potential lender, etc.
- Disclosure does not cause the privilege to be waived if it is made under terms of a written claim of confidentiality with a government agency or official.

Sec. 09.25.460 Describes materials not protected by privilege.

- Privilege does not apply to documents or other information required by an agency to be reported or maintained as part of an existing environmental law.
- Privilege does not apply to information a regulatory agency obtains from its own observation or monitoring, or from a party not involved in preparing the audit report.
- Privilege does not apply to documents or information that are independent of the audit; nor does privilege apply to documents or information developed or maintained in the course of a regularly conducted business activity.

Sec. 09.25.465 Establishes an exception to the privilege through disclosure required by a court or an administrative hearing officer.

- A court or administrative hearing officer may conduct an *in camera* review of audit report documents for which privilege is claimed. Disclosure can be required if it is determined that the privilege is asserted for a criminal or fraudulent purpose, or if the audit report reveals evidence of noncompliance which was not corrected promptly.
- Disclosure may also be required if the information for which privilege is claimed constitutes evidence of a substantial injury to one of more persons at the site audited, or to persons, property, or the environment offsite.

- Disclosure may be required if the privilege would result in a miscarriage of justice or the denial of a fair trial to the party challenging the privilege.
- The party seeking disclosure has the burden of proving that the exception to the privilege is appropriate in a given case.

Sec. 09.25.475 Establishes limited immunity for voluntarily reported violations.

- An entity voluntarily disclosing violations identified through a self-audit will be immune from civil and administrative penalties, provided that action is promptly taken to correct the noncompliance and prevent its future recurrence. Noncompliance must be corrected within 90 days unless a longer period of time is provided for in a compliance agreement.
- Disclosure of noncompliance must be reported in writing by certified mail to the appropriate regulatory agency. Disclosure must occur promptly after discovery of the noncompliance.
- Immunity is not available for violations independently detected by an agency prior to disclosure.
- Immunity is not available for violations resulting in substantial injury at the site audited or to persons, property, or the environment offsite.
- Agencies may not initiate an inspection or other investigative activity based solely on the receipt of an audit notice.

Sec. 09.25.480 Exceptions to Immunity & Mitigation of Penalties

- Immunity under 09.25.475 is not available if a court finds that the owner or operator claiming immunity has intentionally, knowingly, or recklessly committed or authorized the violation.
- Immunity is not available if the owner or operator has in the previous 36 months repeatedly or continuously committed the same or similar violations as those for which immunity is sought; neither is immunity available for an owner or operator who has failed to achieve compliance and that failure constitutes a pattern of disregard for environmental laws.
- Penalties for violations that are voluntarily reported but which are not eligible for immunity may nevertheless be mitigated by attempts at remediation, cooperation with government officials investigating the disclosed violation, the nature of the violation, and other relevant considerations.

Sec. 09.25.485 Relationship to other recognized privileges.

- This section clarifies that the act has no effect in limiting or abrogating any other existing privilege in statute or common law, such as the work product doctrine or attorney-client privilege.

Sec. 09.25.490 Definition of terms.

- "audit report" is a report that includes documents and communications produced from an environmental audit, including an implementation plan or tracking system to correct past noncompliance and prevent future noncompliance.
- "environmental audit" means a voluntary, confidential, critical, internal, and retrospective review, self-evaluation, or analysis of current or past conduct, practices, and occurrences and their resulting consequences, including an assessment that is part of the owner's or operator's compliance management system. The review must be undertaken exclusively for the purpose of determining compliance with environmental laws.
- "confidential self-evaluation and analysis" means the part of an audit report that consists of memoranda and documents that evaluate or analyze all or part of the material described in the audit report, including implementation issues or an audit implementation plan or tracking system to correct past noncompliance, improve current compliance, or prevent future noncompliance with environmental laws.

Section 3: Applicability.

- Clarifies that the privilege and immunity created in Section 2 of the act apply only to audits conducted on or after the effective date.

A L A S K A

April 5, 1997

Representative Joe Green, Chairman
House Judiciary Committee
State Capitol
Juneau, AK 99801-1182

Subject: **Support for SB 41 - Environmental Self-Audits**

Dear Representative Green,

The Alaska Chapter of the National Federation of Independent Business has 4,500 members, making it the largest small-business advocacy group in the state. Each year the NFIB polls its diverse membership on a variety of issues. The federation uses the poll results to form its legislative agenda.

The 1997 NFIB State ballot included the following question regarding environmental audits:

> **Should the Alaska legislature adopt a procedure to allow a business to conduct a private self-audit of its compliance with environmental law and take corrective actions to address problems without fines or penalties?**

The results were 80 percent in favor, 10 percent opposed, and 10 percent undecided.

Proponents of environmental self audits feel that the procedure would encourage regulated businesses to evaluate their compliance with environmental regulations and to correct problems internally, without fear of facing sanction from the state. The policy would encourage prompt, voluntary compliance and clean-up.

As companies are increasingly subject to new and complicated compliance regulations, the self audit procedure presents a workable solution to identifying problem areas and achieving compliance without fear of penalties for violations. This procedure does not allow a company to continue with non-compliance once a problem is identified. The program would be an encouragement for self-review and compliance.

Sincerely,

Thyes Shaub

217 Second Street, Suite 206 • Juneau, AK 99801 • 907-463-5118 • Fax 907-463-5128

ALASKA MINERS ASSOCIATION, INC.

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

April 1, 1997

Honorable [redacted]
Chairman, House Judiciary Committee
Capitol Building
Juneau, AK 99801

RE: SB-41, Relating to Environmental Self-Audits

Dear Representative Green,

The Alaska Miners Association wishes to go on record in support of Senate Bill 41. This bill involving voluntary self audits is a positive step for the State, for industry and for the public.

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

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

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

Sincerely,

Steven C. Borell, P.E.
Executive Director

cc: Senator Loren Leman

IV. CONCLUSION.

The superior court's orders compelling release of Keith Revelle's employment evaluation and the Blue Ribbon Panel report are AFFIRMED. The superior court's order refusing to quash the disputed depositions is REVERSED.

CENTRAL CONSTRUCTION COMPANY, Manson Construction & Engineering Company, Osberg Construction Company and Ghemm Company, Inc., a joint venture, Petitioners,

v.

The HOME INDEMNITY COMPANY, Respondent.

No. S-3486.

Supreme Court of Alaska.

June 8, 1990.

Rehearing Granted and Opinion Amended July 2, 1990.

After settling claim arising from death of two workers on a state highway construction project, insurer brought suit against the state and contractor joint venture, claiming there was no coverage under the policy and that it should be reimbursed for its entire loss. The Superior Court, Third Judicial District, Anchorage, Karen L. Hunt, J., denied motion by joint venture to compel discovery, and joint venture petitioned for review. The Supreme Court, Compton, J., held that: (1) services sought by client from an attorney in aid of any crime or bad-faith breach of a duty are not protected by the attorney-client privilege; (2) before an in camera review to determine applicability of "crime-fraud" exception, judge should require showing of factual basis adequate to support a good-faith belief by reasonable person that such review may reveal evidence to establish that the exception applies; and (3) insurer's belated reservation of rights letter and its actions after letter was sent were sufficient to compel conclusion that in camera review of insurer's claims file might reveal evidence to establish crime-fraud exception applied to materials in the file.

Reversed.

1. Witnesses ⇐201(2)

Services sought by client from an attorney in aid of any crime or bad-faith breach of a duty are not protected by the attorney-client privilege. Rules of Evid., Rule 503(d)(1).

2. Witnesses ⇐223

Before engaging in an in camera review to determine applicability of the "crime or fraud" exception to attorney-client privilege, judge should require showing of a factual basis adequate to support a good-faith belief by a reasonable person that in camera review of the materials may reveal evidence to establish that the exception applies; once showing is made, decision whether to engage in an in camera review rests in sound discretion of court. Rules of Evid., Rule 503(d)(1).

place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development or commercial information not be disclosed or be disclosed only by a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

3. Pretrial Procedure ⇐411

Insured which sought discovery of insurer's claim file adequately presented a factual basis to support good-faith belief by a reasonable person that in camera review of the materials might reveal evidence to establish that "crime-fraud" exception to attorney-client privilege applied to materials in file; insurer's belated reservation of rights letter and its actions after letter was sent were sufficient evidence of bad faith breach of duty to compel conclusion that in camera review was justified.

Michael C. Geraghty, Staley, DeLisio, Cook & Sherry, Inc., Anchorage, R. Jack Stephenson and Ian Rodihan, *pro hac vice*, Seattle, Wash., for petitioners.

Robert J. Dickson and Jerome H. Juday, Atkinson, Conway & Gagnon, Anchorage, for respondent.

Before MATTHEWS, C.J., and RABINOWITZ, BURKE, COMPTON and MOORE, JJ.

OPINION

COMPTON, Justice.

This petition arises out of a dispute between The Home Indemnity Company (Home) and CMOG [1] over the handling of an insurance claim. CMOG sought discovery of certain documents from Home in connection with CMOG's counterclaim. Home refused to fully comply with CMOG's discovery request, asserting that the documents fall within the attorney-client privilege.

The superior court denied CMOG's motion to compel discovery. It held that CMOG must make a *prima facie* showing that Home committed civil fraud before CMOG could overcome Home's claim of privilege.

CMOG petitioned for review, Appellate Rule 402(a), arguing that (1) a *prima facie* showing of every element of civil fraud is unnecessary under the relevant law to overcome Home's claim of privilege, and (2) at the least, the superior court should have conducted an *in camera* hearing to determine the propriety of Home's claim of privilege.

We granted the petition, Appellate Rule 402(b), and reverse the decision of the superior court.

I. STATEMENT OF THE CASE

In 1977 two workers, Robert Moloso and his son Joseph, were killed by a rockslide on a state highway construction project in Valdez. The Molosos' estates filed suit against the state alleging various theories for recovery. The state tendered the defense of the claim to its contractual indemnitor, CMOG, which in turn tendered the defense of the claim to Home. CMOG had a $1 million primary coverage policy with Home and a $3 million dollar excess coverage policy with the Mission Insurance Group (Mission).

Following trials, appeals and reversals in *Moloso v. State*, 644 P.2d 205 (Alaska 1982) (Moloso I) and *Moloso v. State*, 693 P.2d 836 (Alaska 1985) (Moloso II), the Moloso estates prevailed, obtaining a judgment eventually satisfied for $2.3 million. Prior to the Moloso estates obtaining the settlement money, however, Mission became insolvent and was unable to pay any part of the judgment. Home paid the entire judgment in response to demands from the Moloso estates and the state.

Home filed suit against the state and CMOG, among others, claiming that there was no coverage under the policy and therefore it should be reimbursed its entire loss. Alternatively, Home sought reimbursement of the amount it paid in excess of $1 million, in addition to subrogation claims against other parties Home considered to be liable.

In response to Home's suit, CMOG asserted that Home was acting in bad faith

1. CMOG is a joint venture comprised of Central Construction Co., Manson Construction & Engineering Co., Osberg Construction Co., and GHEMM Construction Co. There is some question as to whether Ferrante Construction Co. is a member of this joint venture. The issue, however, is not material for purposes of this appeal.

by denying coverage. To support this assertion, CMOG sought discovery of Home's entire claims file. Included in Home's response to the discovery request was an appendix identifying documents withheld on the basis of attorney-client or work product privileges. CMOG filed a motion to compel discovery or, at the least, to have the court or a special master conduct an *in camera* inspection of the documents to determine the propriety of the privileges claimed. Home opposed this motion.

A special master was appointed who, after extensive briefing and a hearing, issued a recommendation that CMOG's motion to compel be denied. The master found that: (1) CMOG's unsupported contention that Home's privilege claims may be invalid is not sufficient to require an *in camera* review of the documents; (2) Home has the right to prepare for and maintain a coverage action against CMOG and the assertion of privileges is therefore fully available to Home; (3) because there is an adversarial relationship with respect to the coverage issue, the "joint client" exception to privilege assertions is not applicable; (4) *United Serv. Auto. Ass'n v. Werley*, 526 P.2d 28 (Alaska 1974), which explicitly left open the question whether the "crime or tort" or "crime or fraud" parameters of the exception to the attorney-client privilege is applicable in Alaska, *id.* at 32 n. 12, is no longer relevant because Alaska Evidence Rule 503(d)(1)[2] adopted the narrower "crime or fraud" exception; (5) because CMOG did not plead or allege fraud, CMOG's motion to compel should be denied without prejudice; (6) even if CMOG were allowed to amend its pleadings, it failed to meet its burden of proving a *prima facie* case of fraud against Home; and (7) CMOG's briefing of the work product exception was insufficient as it did not show that CMOG is "unable without undue hardship to obtain the substantial equivalent of the materials by other means" as required by Alaska Civil Rule 26(b)(3).

The superior court adopted the analysis and recommendation of the special master. Additionally, the superior court granted Home a protective order and directed CMOG to amend its answer and counterclaim to include assertions of fraud. CMOG petitioned for review.

II. DISCUSSION

Subsequent to our grant of CMOG's petition for review, the superior court granted CMOG's motion for summary judgment on other grounds, ruling that Home was estopped to deny coverage for the loss at issue. As a result of this ruling, the issue before us may be technically moot. Nevertheless, because of the recurring nature and importance of the issue, we address it. *See Hayes v. Charney*, 693 P.2d 831, 834 (Alaska 1985) (mootness determination ultimately left to discretion of the court); *State v. Thompson*, 612 P.2d 1015, 1016 (Alaska 1980) (recurring nature of problem is valid justification for reviewing technically moot issue).

A. SCOPE OF THE TERM "FRAUD" FOR PURPOSES OF THE CRIME OR FRAUD EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE.

CMOG argues that the superior court erred in relying on the special master's conclusion that *Werley* is no longer good law. CMOG points out that *Munn v. Bristol Bay Hous. Auth.*, 777 P.2d 188 (Alaska 1989), reaffirmed the validity of *Werley*. *Id.* at 195.

Additionally, CMOG asserts that neither *Munn* nor *Werley* defined "civil fraud" in as stringent a manner as the superior court in this case. CMOG argues that "fraud," as the term is used in Alaska Evidence Rule 503(d)(1), is defined broadly. CMOG asserts that *Munn* supports the proposition that fraud includes situations where there is a "bad faith purpose" for a party's actions. *See id.* CMOG cites the Evidence Rules commentary in support of its view

2. Alaska Evidence Rule 503(d)(1) provides:
(d) There is no privilege under this rule:
(1) *Furtherance of Crime or Fraud.* If the services of the lawyer were sought, obtained or used to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud,....

that the court should focus on Home's intentional or reckless disregard of CMOG's rights. The commentary to Alaska Rule of Evidence 503(d)(1) cites 8 J. Wigmore, Evidence § 2298 (J. McNaughton rev. 1961) for the proposition that the attorney-client privilege "does not extend to advice in aid of future wrongdoing."

CMOG is correct in its statement that neither *Munn* nor *Werley* defined "civil fraud" in as stringent a manner as the superior court or Home suggests. The adoption of Alaska Evidence Rule 503(d)(1) is not indicative of this court's intent to use a narrow "crime or fraud" standard.

[1] We do not now, nor have we ever deemed it permissible for a client to use the attorney-client privilege to exclude from discovery "advice in aid of future wrongdoing." *See* Commentary to Alaska Rule of Evidence 503(d)(1); *see also* 8 J. Wigmore, Evidence § 2298 (J. McNaughton rev. 1961); *Munn*, 777 P.2d at 194; *Werley*, 526 P.2d at 32. Consequently, we decline to accept Home's argument that "crime or fraud" should be narrowly defined, and hold that services sought by a client from an attorney in aid of any crime or a *bad faith breach* of a duty are not protected by the attorney-client privilege. *See, e.g., Werley*, 526 P.2d at 33 ("[w]hen an insurer through its attorney engages in a bad faith attempt to defeat ... the rightful claim of its insured, invocation of the attorney-client privilege for communications pertaining to such bad faith dealing seems clearly inappropriate") (footnote omitted). "Acts constituting fraud are as broad and as varied as the human mind can invent. Deception and deceit in any form universally connote fraud. Public policy demands that the 'fraud' exception to the attorney-client privilege ... be given the broadest interpretation." *In re Callan*, 122 N.J.Super. 479, 300 A.2d 868, 877 (Ch.Div.1973), *aff'd*, 126 N.J.Super. 103, 312 A.2d 881 (App.Div. 1973), *rev'd on other grounds*, 66 N.J. 401, 331 A.2d 612 (1975) (interpreting New Jersey Evidence Rule 26 which is substantially equivalent to Alaska Evidence Rule 503(d)(1)).

The policy of promoting the administration of justice would not be well served by permitting services sought in aid of misconduct to be cloaked in the attorney-client privilege. *See id.* at 878; *Fellerman v. Bradley*, 99 N.J. 493, 493 A.2d 1239, 1245 (1985). *See also* 8 J. Wigmore, Evidence § 2298 at 577 (J. McNaughton rev. 1961) (the attorney-client privilege should not "protect a deliberate plan to defy the law and oust another person of his rights, whatever the precise nature of those rights may be"); E. Cleary, McCormick on Evidence § 95 at 229 (3d ed. 1984) ("it would be a perversion of the privilege to extend it to the client who seeks advice to aid him in carrying out an illegal or fraudulent scheme").

B. *IN CAMERA* REVIEW.

The next question is whether the "crime or fraud" showing must be made with evidence entirely independent of the communications at issue. In answering this question we must examine the role of *in camera* inspections in determining the validity of a claimed privilege.

A balance must be reached between allowing *in camera* review based on a party's unsupported assertions that the "crime or fraud" exception applies, and requiring a party to meet the same quantum of proof for *in camera* inspections as would ultimately be necessary to overcome the privilege. This balance is struck by requiring a lesser evidentiary showing for allowing *in camera* inspection than is required ultimately to overcome the privilege.

[2] In *United States v. Zolin*, — U.S. —, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989), the Supreme Court was faced with much the same issue as that presented to us. The Supreme Court struck a balance between too much judicial inquiry, which "would force disclosure of the thing the privilege was meant to protect," and "a complete abandonment of judicial control [which] would lead to intolerable abuses." *Id.* 109 S.Ct. at 2630 *quoting United States v. Reynolds*, 345 U.S. 1, 8, 73 S.Ct. 528, 532, 97 L.Ed. 727 (1953). The Court stated:

> Before engaging in *in camera* review to determine the applicability of the crime-fraud exception, "the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person," ... that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.

Id. 109 S.Ct. at 2631 (citation omitted).

The Court further stated:

> Once that showing is made, the decision whether to engage in *in camera* review rests in the sound discretion of the district court. The court should make that decision in light of the facts and circumstances of the particular case, including, among other things, the volume of materials the district court has been asked to review, the relevant importance to the case of the alleged privileged information, and the likelihood that the evidence produced through *in camera* review, together with other available evidence then before the court, will establish that the crime-fraud exception does apply. The district court is also free to defer its *in camera* review if it concludes that additional evidence in support of the crime-fraud exception may be available that is *not* allegedly privileged, and that production of the additional evidence will not unduly disrupt or delay the proceedings.

Id.

[3] We think the balance struck by the Supreme Court is a prudent one, and thus adopt it for use by our courts. Whether an *in camera* inspection is the proper method in this case to determine if CMOG can make a *prima facie* case of bad faith on Home's part is another question.

First, Home knew of the exclusion in the policy from the beginning.[3] Prior to deciding whether to accept the tender of defense, Home's own territorial supervisor stated that she "did not recognize any coverage defenses...."

CMOG asserts that it "relaxed its vigil" once the tender was accepted by Home. CMOG states that it had no idea Home was considering a coverage defense until after *Moloso I*, at which time Home sent CMOG a reservation of rights letter.

Home justified the time lapse between accepting the tender and sending the reservation of rights letter by implying that it did not become aware of the possible applicability of exclusion (b) until August 12, 1982. CMOG, however, cites to the record to show that Home was considering the coverage issue prior to August 12, 1982. The record includes correspondence, dated June 29, 1982 through July 28, 1982, which discuss the coverage issue and concludes that a reservation of rights letter should be sent immediately.

CMOG promptly rejected Home's reservation of rights, a position with which Home's own claims manager agreed. Home never responded to CMOG's rejection.

It was at this point, CMOG asserts, that the conflict of interest began. CMOG asserts that it was deliberately kept in the dark about the litigation so that Home could exercise sole control over the process. If Home lost it would assert a coverage defense. CMOG argues that this fall-back position gave Home confidence that it need not accept a reasonable settlement because it could always assert a coverage defense. As a result, CMOG asserts that Home

3. The exclusion reads:

> This insurance does not apply:
>
> (b)(1) if the insured is an architect, engineer or surveyor, to bodily injury or property damage arising out of professional services performed by such insured, including
>
> (i) the preparation or approval of maps, drawings, opinions, reports, surveys, change orders, designs or specifications, and
>
> (ii) supervisory, inspection or engineering services;
>
> (2) if the indemnitee of the insured is an architect, engineer or surveyor, to the liability of the indemnitee, his agents or employees, arising out of
>
> (i) the preparation or approval of maps, drawings, opinions, reports, surveys, change orders, designs or specifications, or
>
> (ii) the giving of or the failure to give directions or instructions by the indemnitee, his agents or employees, provided such giving or failure to give is the primary cause of the bodily injury or property damage; ...

"substantially understated the fair settlement value of the case," thus passing up opportunities for settlement and acting adversely to CMOG's interest. If true, this would, in our view, constitute a bad faith breach of Home's duty to defend the suit in the best interest of the insured.

Home contends that the fact that it waited so long to bring the coverage action is not evidence of fraud, because the time period was necessary to present a "united front" in defense of the claims. Additionally, according to Home, the admittedly "late reservation of rights" letter is not evidence of fraud, because (1) it is not clear that a letter would be required in order for Home to assert a coverage defense, and (2) if Home had really wanted to defraud CMOG, it would have relied on the letter in refusing to pay the Moloso judgment.

Home additionally asserts that the settlement negotiations do not offer evidence of fraud chiefly because the Molosos "never once offered or even implied that they would settle for an amount within The Home's policy limits." Home also asserts that its purported "failure to communicate" with CMOG about developments concerning the case is not evidence of fraud because Home did communicate with the attorney for the state and had no reason to believe that the attorney would not also report to CMOG.

We conclude that CMOG has adequately presented a factual basis to "support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies." *Zolin*, 109 S.Ct. at 2631. Home's seemingly belated reservation of rights letter and its actions after the letter was sent are sufficient to compel this conclusion. At the least, CMOG should have been kept informed about the status of the case and any ongoing negotiations so that it could protect its interests.

The decision of the superior court is REVERSED.

Alaska Environmental Lobby, Inc.

P.O. Box 22151 Juneau, Alaska 99802 907-463-3366

Twentieth Legislature - First Session

CS for SB 41 (Fin): "An Act relating to environmental audits to determine compliance with certain laws, permits and regulations."

While the Alaska Environmental Lobby whole-heartedly supports industry's efforts towards voluntarily compliance with environmental regulations, we strongly oppose CSSB 41. Achieving compliance with regulations will require industry and government to work together. However, the broad language of CSSB 41 cripples our ability to enforce protection of Alaska's environment and public welfare. This legislation greatly obstructs efforts to find the balance between incentives for responsible monitoring and effective enforcement of regulations. And while the removal of the language in the original bill that referenced health and safety laws can be commended, most of the environmental laws that are affected by this bill directly impact public protection. The Alaska Environmental Lobby opposes CSSB 41 because:

- This is a bill of secrecy. It would keep information vital to the public's health and safety and environmental protection hidden from review by the agencies we depend upon to enforce our environmental laws and from the legal system we depend upon to remedy violations of these laws. It limits employees' right to know. It will have a chilling effect on employees' ability to defend their right to speak the truth about workplace activities without fear of reprisal. It limits the right to know of property owners near to potentially polluting industries. This bill allows secrecy to replace corporate responsibility and accountability.

- This is a bill of amnesty to industries that conceal or condone noncompliance. Immunity from civil and administrative penalties is bad public policy and effectively rewards non-compliance. Non-compliance can often result in economic gain. If a violation results in an economic gain over a non-violator, attempts should be made to recover the economic gain. Additionally, penalties and fines are the main tools that regulators have to encourage compliance. This bill lets crimes go unpunished and encourages violators to profit at the expense of law-abiding competitors.

OVER

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

☑ In Anchorage: 750 W 2nd Ave., Suite 100 / Anchorage, Alaska 99501-2168 / (907) 277-7222 / FAX (907) 277-4523
☐ In Valdez 154 Fairbanks Dr. / P.O. Box 3089 / Valdez, Alaska 99686 / (907) 835-5957 / FAX (907) 835-5926

April 7, 1997

To: House Judiciary Committee:

Rep. Joe Green, Chairman	Rep. Con Bunde
Rep. Jeannette James	Rep. Brian Porter
Rep. Norman Rokeberg	Rep. Ethan Berkowitz
Rep. Eric Croft	

Re: SB 41- Environmental self-audits

The Regional Citizens' Advisory Council of Prince William Sound (RCAC) is an independent non-profit corporation whose mission is to promote environmentally safe operation of the Alyeska terminal and associated tankers. RCAC's 18 member organizations are communities and boroughs impacted by the 1989 Exxon Valdez Oil Spill, as well as commercial fishing, aquaculture, Native, recreation, tourism and environmental representatives.

We appreciate the opportunity to comment on SB 41. We do support the bill's fundamental goal: to foster greater compliance with environmental requirements through a cooperative approach that encourages regulated entities to find and correct problems, themselves. We believe that fundamental goal can be met, while still protecting the public's right to know and the government's responsibility to enforce.

We support the provision in SB 41 that ensures regulators will not use the self-audit to *initiate* litigation for a self-disclosed offense. Nor do we oppose the protection from punitive penalties for violations discovered through a self-audit. However, the bill in its current form goes too far by granting blanket immunity from legitimate litigation for self-disclosed offenses. It is primarily this aspect of SB 41 that we oppose.

As we and others noted last year, the blanket immunity is neither necessary as an incentive, nor in the public interest.

We suggest instead that the bill prohibit agencies from initiating civil or administrative litigation based *solely* on an environmental audit report. This is the provision used by the EPA in its policy and it makes much more sense.

CORRECTION

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

Alaska Environmental Lobby, Inc.

P.O. Box 22151 Juneau, Alaska 99802 907-463-3366

Twentieth Legislature - First Session

CS for SB 41 (Fin): "An Act relating to environmental audits to determine compliance with certain laws, permits and regulations."

While the Alaska Environmental Lobby whole-heartedly supports industry's efforts towards voluntarily compliance with environmental regulations, we strongly oppose CSSB 41. Achieving compliance with regulations will require industry and government to work together. However, the broad language of CSSB 41 cripples our ability to enforce protection of Alaska's environment and public welfare. This legislation greatly obstructs efforts to find the balance between incentives for responsible monitoring and effective enforcement of regulations. And while the removal of the language in the original bill that referenced health and safety laws can be commended, most of the environmental laws that are affected by this bill directly impact public protection. The Alaska Environmental Lobby opposes CSSB 41 because:

- This is a bill of secrecy. It would keep information vital to the public's health and safety and environmental protection hidden from review by the agencies we depend upon to enforce our environmental laws and from the legal system we depend upon to remedy violations of these laws. It limits employees' right to know. It will have a chilling effect on employees' ability to defend their right to speak the truth about workplace activities without fear of reprisal. It limits the right to know of property owners near to potentially polluting industries. This bill allows secrecy to replace corporate responsibility and accountability.

- This is a bill of amnesty to industries that conceal or condone noncompliance. Immunity from civil and administrative penalties is bad public policy and effectively rewards non-compliance. Non-compliance can often result in economic gain. If a violation results in an economic gain over a non-violator, attempts should be made to recover the economic gain. Additionally, penalties and fines are the main tools that regulators have to encourage compliance. This bill lets crimes go unpunished and encourages violators to profit at the expense of law-abiding competitors.

OVER

- This is a full-employment bill for attorneys. This bill will create more confusion, litigation and expense regarding the enforcement of regulations. The fact that the Alaska Department of Law has proposed over a dozen amendments to this bill to help clarify its language is ample evidence of its ambiguity. Many questionable aspects of this bill will only be answered during litigation. The "construed broadly" language in the definitions will pull in all manner of federal, state and municipal laws.

Environmental regulations are passed out of necessity: industry has a less than admirable record of self-regulating. The public's health and safety must continue to be protected, particularly in today's heated competitive climate when industry is more likely to cut corners for economic advantage. The Alaska Environmental Lobby suggests that the intent of CSSB 41 could be met by the Alaska Department of Environmental Conservation adopting a self-policing policy similar to EPA's that would provide clear incentives through leniency for self-disclosure and corrections without the unnecessary privilege and immunity provisions contained in this bill.

Susan E. Schrader

Susan E. Schrader, Executive Director
4/7/97

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

☑ In Anchorage: 750 W 2nd Ave., Suite 100 / Anchorage, Alaska 99501-2168 / (907) 277-7222 / FAX (907) 277-4523
☐ In Valdez: 154 Fairbanks Dr. / P.O. Box 3089 / Valdez, Alaska 99686 / (907) 835-5957 / FAX (907) 835-5926

April 7, 1997

To: House Judiciary Committee:

Rep. Joe Green, Chairman
Rep. Jeannette James
Rep. Norman Rokeberg
Rep. Eric Croft
Rep. Con Bunde
Rep. Brian Porter
Rep. Ethan Berkowitz

Re: SB 41- Environmental self-audits

The Regional Citizens' Advisory Council of Prince William Sound (RCAC) is an independent non-profit corporation whose mission is to promote environmentally safe operation of the Alyeska terminal and associated tankers. RCAC's 18 member organizations are communities and boroughs impacted by the 1989 Exxon Valdez Oil Spill, as well as commercial fishing, aquaculture, Native, recreation, tourism and environmental representatives.

We appreciate the opportunity to comment on SB 41. We do support the bill's fundamental goal: to foster greater compliance with environmental requirements through a cooperative approach that encourages regulated entities to find and correct problems, themselves. We believe that fundamental goal can be met, while still protecting the public's right to know and the government's responsibility to enforce.

We support the provision in SB 41 that ensures regulators will not use the self-audit to *initiate* litigation for a self-disclosed offense. Nor do we oppose the protection from punitive penalties for violations discovered through a self-audit. However, the bill in its current form goes too far by granting blanket immunity from legitimate litigation for self-disclosed offenses. It is primarily this aspect of SB 41 that we oppose.

As we and others noted last year, the blanket immunity is neither necessary as an incentive, nor in the public interest.

We suggest instead that the bill prohibit agencies from initiating civil or administrative litigation based *solely* on an environmental audit report. This is the provision used by the EPA in its policy and it makes much more sense.

It ensures both fairness to the regulated entity and appropriate protections to the public.

We suggest additional changes to improve the bill:

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

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

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

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

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

Sincerely,

Tex Edwards, President

cc: Sen. Georgianna Lincoln
Sen. Jerry Ward
Rep. Alan Austerman
Governor Tony Knowles
RCAC Board of Directors
Sen. Jerry Mackie
Rep. Gene Kubina
Rep. Gail Phillips
Sen. John Torgerson
Rep. Mark Hudgins
Rep. Gary Davis
Paul Richards, Alyeska Pipeline Service Co.

COOK • INLET • KEEPER

April 7, 1997

Governor Tony Knowles
State Capitol Building
P.O. Box 110001
Juneau, Alaska 99811-0001

Re: Senate Bill 41

Dear Governor Knowles:

I am writing to urge you to protect the public's right-to-know about pollution and worker safety issues by rejecting Senate Bill 41.

At the most basic level, S.B. 41 is a cloak for industry to conceal important information about accident safety assessments, certain emissions test data, on- and off-site pollution and other health and safety problems at a facility. A 1995 study by Arthur D. Little found that nearly 90% of U.S. corporations conduct environmental audits as part of normal business practices. Thus, *responsible businesses already incorporate environmental audits into their everyday practices, because it makes good business sense.* As one commentator noted, environmental audit privileges are "like replacing a brand new car because it has a flat tire:" in short, legal privileges are an extreme response to a non-issue.

Throughout the history of the common law, courts and legislatures have been loath to expand the sphere of evidentiary privileges. The United States Supreme Court has often cited the proposition that "the public . . . has a right to every man's evidence,"[1] and in the case involving President Nixon's tapes, it ruled that privileges and other exclusionary rules "are not lightly created nor expansively construed, for they are in derogation of the search for the truth."[2] If the Supreme Court refused to create a new privilege for the President of the United States, it's ludicrous to extend such privileges to polluters.

Another criticism of audit privileges is that they will increase confusion and stimulate increased litigation, particularly for corporate "bad actors" set on maximizing profit at the expense of health and environmental safeguards. For example, Waste Management, Inc.

---

1 *United States v. Bryan*, 339 U.S. 323, 331 (1950).
2 *United States v. Nixon*, 418 U.S. 683, 710 (1974).

P.O. BOX 3269 • HOMER, ALASKA 99603 • PHONE (907) 235-4068 • FAX (907) 235-4069 • keeper@xyz.net

(WMX) has been a primary advocate for audit privileges nationally, and after Ohio passed an audit bill, WMX promptly moved to quash information to Ohio citizens concerned about a hazardous landfill in their neighborhood. This is but one example, but it demonstrates an important point: deep-pocketed corporations can and will use audit privileges to frustrate the public's legitimate right-to-know about hazards in their communities.

Finally, S.B. 41 would waive all civil penalties for self-disclosed violations. This provision would remove any incentive - other than corporate morality - for businesses to comply with environmental regulations, and would set a horrible public policy precedent. Imagine if every speeder in the state could simply admit to the officer that he or she had been speeding in order to escape liability. If anything, violators should be held to pay the economic benefit realized as a result of the self-disclosed violation, in which case they would not be at a competitive advantage *vis.* their competitors who have chosen to comply with applicable safeguards.

The attorney-client and attorney workproduct exclusions are two longstanding privileges which already safeguard businesses during self-critical analyses. Furthermore, the Environmental Protection Agency embarked on an exhaustive stakeholder process to consider the audit privilege issue, and decidedly rejected all legal privileges for self-reported violations.

S.B. 41 is yet another attempt to wrest power from citizens and vest it in corporate managers charged with maximizing returns for shareholders and others. It will not improve environmental compliance. Please help stop this dangerous trend and reject S.B. 41.

Very truly yours,

Copy

Robert W. Shavelson
Executive Director

COUNCIL OF ALASKA PRODUCERS

Position on SB 41
Environmental Self-Audits

The Council of Alaska Producers strongly supports CSSB 41. This bill is the product of nearly two years of careful scrutiny and debate. It establishes a rational framework for encouraging Alaska business - large and small - to conduct regular self-audits of their environmental operations and policies and correct any problems discovered through this process.

We believe that the carefully balanced combination of qualified privilege for the audit work product and qualified immunity for properly disclosed violations will greatly benefit the people of this state by improving environmental practices and fostering a cooperative, common sense approach to environmental protection.

We do not agree with critics that this legislation will allow industry to get away with something. There are many safeguards built into SB 41 that prevent the use of audits to hide facts or otherwise shield bad guys from appropriate penalties. However, while the bill is generally acceptable in its current form we are willing to continue to work with all interested parties to resolve remaining concerns.

We'd like to thank and congratulate Senator Leman and staff member Mike Pauley for promoting this modern approach to environmental regulation and for their tireless efforts to facilitate reasonable compromise on the issues. We'd aiso like to compliment the Knowles Administration for its willingness to work with the Sponsor and others to reach a reasonable compromise.

This bill's time has come. We urge passage this session.

Dated this 7TH day of April, 1997.

By: David E. Rogers
For: The Council of Alaska Producers

THE ALASKA CHAPTER
OF THE
INTERNATIONAL
ASSOCIATION OF
DRILLING CONTRACTORS

Mailing Address: P.O. Box 240845
Anchorage, Alaska 99524-0845

HAND DELIVERED

March 20, 1997

The Honorable Joe Green
Chair, House Judiciary Committee
Alaska State Legislature
State Capitol
Juneau, Alaska 99801

Re: Hearing Schedule for SB 41, "An Act relating to environmental audits to determine compliance with certain laws, permits and regulations"

Dear Representative Green:

SB 41, "An Act relating to environmental audits to determine compliance with certain laws, permits and regulations," passed the Senate yesterday by a vote of 16 to 3. The bill will be before the full Senate again for reconsideration on Friday, March 21, 1997, and, assuming the bill passes, it will be ready for transmission to the House that afternoon. I have written to Speaker Phillips requesting that the first House referral be to the Judiciary Committee. Today, Kyle Parker also met with Mike Heatwole on my behalf to request the same referral. I understand from Kyle that the Speaker has agreed that your committee will receive the bill on Monday. Therefore, I am writing today to encourage you to schedule SB 41 for an immediate hearing in the House Judiciary Committee pending passage and referral.

As I mentioned when we met in Juneau earlier this month, passage of "self-audit" legislation this session is critical to the members of the Alaska Chapter of the International Association of Drilling Contractors ("IADC"), and we feel that, as introduced and amended in the Senate, this bill represents a good start toward the goal of developing a responsible, cost-effective incentive program that encourages voluntary compliance with environmental laws.

An increasingly common and salutary feature of the operator-drilling contractor relationship in Alaska involves the exchange of information between an independent contractor and its principal. SB 41 creates a privilege for voluntary environmental self-audits and establishes a qualified immunity for conditions that are discovered and reported in the course of those audits. The extension of this privilege and immunity to our industry, which was accomplished by the amendments adopted by the Senate Finance

Committee at the request of the sponsor, will enable operators and drilling contractors to more readily share the results of self-evaluative reviews without having to worry that an enforcement agency or other litigant will use the results of such audits against them. For this reason, we believe that SB 41 would be extremely beneficial in that it would allow us to concentrate on the reduction of remaining deficiencies, rather than focusing on the legal nuances of protecting audits and restricting the sharing of those audits with other entities in the workplace.

As I mentioned above, passage of "self-audit" legislation this session is critical to the members of the Alaska Chapter of the IADC. The drilling contractors in Alaska are in the process of re-negotiating our contracts with BPXA and ARCO; and, a new responsibility the operators have asked that we assume requires us to develop and implement our own health, safety and environmental programs. This is a responsibility we are happy to take on; however, in order for this new approach to work effectively, we will need to be able to review the implementation of our individual programs and share the results of those reviews with the operators and other oilfield contractors with whom we work. The operators and other oilfield contractors, in turn, will need to share their reviews with us. The privilege and immunity created by SB 41 will simplify this sharing of information.

Several drilling rigs operating on the slope already are working under these re-negotiated contracts -- I guess one might say that we have put the cart before the horse by completing these contracts prior to implementation of "self-audit" legislation. But, as you know, in the increasingly competitive, world-wide economy in which Alaska's oil industry must compete, we cannot always wait for government to lead the way when it comes to identifying better ways of doing business. In fact, in this instance, we are hopeful that government will take our lead and recognize that state law must be changed immediately to reflect the new realities of the workplace.

I am available to meet with you at your convenience to discuss this legislation, and I am prepared to travel to Juneau to appear before the House Judiciary Committee and testify in support of the bill. I look forward to working with you and the members of the Judiciary Committee on this legislation. Again, because this legislation is so critical to the industry, I hope that you will be able to make time in the Judiciary Committee's schedule to hear the bill immediately following your return from the Easter holiday.

Thank you again for your continued support, and I look forward to seeing you soon.

Sincerely,

Randy Ruedrich

Randy Ruedrich, Chairman
IADC, Alaska Chapter
(907) 563-5530 x-18

Kuresty

DRAFT

March 24, 1997

Randy Ruedrich, Chairman
IADC, Alaska Chapter
P.O. Box 240845
Anchorage, AK 99524-0845

Randy,

The Judiciary calendar is set for the next week and because of the four day weekend over Easter, we will not be able to get much done until the week of April 1st. We have a couple of priority bills which are controversial - seems they all have been for the past month - which means the week of April 7th and we will schedule it that week. We suffer from the age old problem of Senate wanting heard but they are gone so much that they can't get around to the House Bills -- strange it is this way every year.

Sincerely,

Joseph P. Green
State Representative
District 10

— Burden of proof amend
If passed @ ort amend
in camera under
prima facie showing
in camera

articulate exactly what
you have to do
level playing field

auditor recommended

Make showing

atty client — commission of crime
P.F. showing of
then — in camera review
— release
— no

Janice Adair

didn't like P.F. evidence

U.S. Department of Justice

United States Attorney
District of Alaska at Anchorage

Federal Building & U.S. Courthouse
222 West 7th Avenue, #9, Room 253
Anchorage, Alaska 99513-7567

(907) 271-5071
FAX (907) 271-3224

April 4, 1997

SHELA
2267

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

Re: Senate Bill No. 41; An Act Relating to Environmental Audits to Determine Compliance with Certain Laws, Permits, and Regulations

Dear Representative Green:

Last year I wrote you and other members of the House Resources Committee, and testified before that Committee, about my serious concerns over legislation which would establish an evidentiary privilege for environmental audits and create immunity for violators in certain circumstances. CSSB 199, the environmental audits bill considered by the legislature last year was not enacted into law. This year another environmental audit bill has passed the senate and has been referred to your Committee in the House: Senate Bill No. 41. While many of the provisions of former CSSB 199 which I considered problematic have been modified in SB 41, I believe the audit privilege and immunity bill provisions of SB 41 are nonetheless undesirable because: (1) there is no demonstrated need for these provisions; (2) the provisions impede enforcement efforts by allowing facts important to protection of public health and the environment to be hidden from public view and government officials; and (3) the

provisions will mire civil and administrative enforcement efforts in a tangle of litigation.

1. The bill is not needed.

As the United States Supreme Court has recognized, environmental laws, like other laws designed to protect public health and safety, were created to regulate activities that "...touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self protection." United States v. Dotterweich, 310 U.S. 277. Since the public is powerless to protect itself from the effect of environmental violations, the law forces individuals and corporations who are responsible for non-compliance to remedy the situation in the face of criminal prosecution, or, often more likely, administrative or civil proceedings filed by government agencies or injured persons. The potential for such proceedings sends a powerful message that violation of environmental laws creates a duty to remedy the harm caused. An audit privilege would undercut this message by taking the extraordinary step of creating an evidentiary privilege that will have significance only where the duty to remedy has been violated. The public justifiably would be upset if the government were prevented from obtaining audit information regarding a violation that has led to death or serious bodily injury. An even greater disservice would be done to those injured or the survivors of those killed.[1]

[1]Note that under Sec. 09.25.465(a)(8), a court may order the disclosure, after a non-public, in camera review, of "evidence of substantial injury." The scope of that exception is ambiguous at best: it may be read to allow disclosure only of direct evidence of the fact that an injury has occurred or is threatened, not the causes and circumstances leading up to the injury. Certainly the violators' lawyers will so argue. As discussed more fully below, this is one of the

A number of policies and a wide range of programs have been developed and implemented at the federal level to encourage and promote voluntary environmental auditing and compliance, without the need for a deleterious audit privilege or the unnecessary granting of blanket immunity. For example, the United States Environmental Protection Agency (EPA) adopted and published a broad and comprehensive policy on incentives for self-policing (including environmental auditing) to address exactly the concerns that have driven the proposed legislation here. (A copy of the January, 1997, EPA Audit Policy Update showing the success of the EPA self-policing policy is attached.) That policy is consistent with enforcement policies already existing within the Department of Justice. EPA also has developed a series of compliance assistance policies and initiatives to assist small businesses, particularly in creating and implementing self-evaluation programs. While audit privilege legislation, such as SB 41, is directed mainly at benefiting larger companies that already have self-examination and compliance programs in place, or can afford to install them, the needs of small businesses in this area are better met through targeted efforts and direct assistance. The EPA is ready, willing and able to meet with government and business people in Alaska to explore the ways these policies and programs can be best adapted for use here.

The express purpose of SB 41 is to encourage businesses of all sizes to conduct audits so as to identify and correct improper practices and remedy any environmental harm that those practices may have caused. Section 1 of the bill specifically makes the

---

many provisions of SB 41 that will operate to keep any enforcers and injured persons mired in expensive and time-consuming litigation.

finding that self-audits "would be curtailed if a privilege for the audits were not available." However, that finding does not square with available research. A Price Waterhouse survey on the subject, often cited by proponents of the audit privilege and immunity bills, actually supports the proposition that privilege and immunity bills are not needed. Seventy-five per cent (75%) of those surveyed already conducted environmental self-audits. Of those, over ninety per cent (90%) specified the audits were being performed for good business or proactive reasons. Of the twenty-five per cent (25%) which do not audit, the primary reason given by the companies was that their processes and products are perceived as having insignificant impact on the environment. An audit privilege bill would not change that.

Moreover, recently a research group headed by a professor of accounting at the Business School at the University of Texas conducted a study designed to evaluate claims such as SB 41's finding that audits would be curtailed unless a statutory privilege were available. Birendra K. Mishra, D. Paul Newman and Christopher H. Stinson, "Environmental Regulations and Incentives for Compliance Audits" to be published in the Journal of Accounting and Public Policy (Summer, 1997). The authors of the study conclude that "the regulator's right to access [of company records] unambiguously increases the incentive for the firm to conduct a compliance audit....The argument that the right to access [by regulators] decreases the firm's audit incentives due to the possibility of self-incrimination, and therefore that laws restricting that access will increase the incentives of the firm to conduct compliance audits...is not consistent with our analysis....As a result, the recent legislative initiatives in several states that protect environmental compliance audit reports as confidential business information, may be

unnecessary or even counterproductive."

Indeed, the experience of other states has shown that audit privilege and immunity bills are undesirable. Idaho's governor, Phil Batt (Rep.), has announced that he will let that state's audit legislation expire under its "sunset" provision because the bill has produced no tangible benefits. The States of Utah and Texas are revisiting their audit privilege laws, in each case in response to criticism from EPA that the laws prevent those states from fulfilling their enforcement obligations under federally delegated environmental programs. The Governor of New York, George E. Pataki (Rep.), recently announced that he will oppose any attempts to enact audit privilege and immunity legislation in that State.

In sum, significant incentives are already present for responsible operators to perform environmental self-audits and correct observed problems. Analysis and experience have shown that audit privilege and immunity bills actually may decrease existing incentives.

2. SB 41 will impede law enforcement efforts.

Unlike last year's bill, SB 41 appears to apply only to civil or administrative actions, not criminal prosecutions. However, a close reading of the basic audit privilege, Section 09.25.450, reveals that the apparent inapplicability of the audit privilege to criminal proceedings is not so clear. Section 09.25.450(a)'s two sentences can be read entirely independently of one another. This could mean that under the first

sentence an owner or operator could refuse to disclose, and prevent another from disclosing, the contents of an audit even when the information is sought pursuant to a grand jury subpoena in a criminal case. While under the second sentence, such information may be admissible in a criminal proceeding, it may be obtainable in the first insistence only in one of the ways specified under Section 09.25.460 (i.e., from a "source that was not involved in...the audit report"). Even then, though, it appears under the first sentence that the owner-operator arguably still could prevent even such an independent source from disclosing the information to the extent that it was part of the "Confidential Self-Evaluation and Analysis" (as broadly defined in Section 09.25.490(2)) portion of the report. Thus, it appears that the exception for criminal violations may be more apparent than real.

If the drafters intended that the audit privilege not be used to block access to information in a criminal context, it is unclear why this bill does not explicitly say so. As opposed to SB 41's ambiguous provisions, audit privilege and immunity legislation in other states has been made specifically inapplicable to criminal matters. Ambiguity like this will only provide a way for those wishing to hide their criminality to delay and obsfucate legitimate investigations of environmental crimes.

Perhaps most importantly, even an explicit exclusion from criminal prosecution would not solve a fundamental problem with the bill. The fact is that at the beginning of an enforcement action it often is difficult to foretell whether the matter ultimately will proceed along an administrative, civil or criminal path. That determination is not made until authorities have a full picture of a violation--precisely the kind of

understanding that SB 41 would obstruct. Many criminal cases are identified from what began as administrative or civil actions; as the government or private litigants develop evidence, the criminal nature of the violation becomes clear. Thus, the privilege applicable to civil and administrative actions has the effect of also shielding information about criminal conduct.

A major criticism of last year's bill, CSSB 199, was that it would allow environmental violators, under the guise of an environmental audit to shield the evidence of violations, as well as the thought processes and conclusions of the auditors. In Section 09.25.450(a), SB 41 appears to limit the privilege to thought processes rather than underlying facts found in an audit. In particular, the privilege applies only to "the parts of the report that consists of confidential self-evaluation and analysis." HOWEVER, THIS APPARENT LIMITATION DOES NOT REALLY EXIST. What subsection(a) seems to give, the definition section (Section 09.25.490) takes away. There, "Confidential Self-evaluation and Analysis" is defined very broadly to include facts, as well as analysis, since the definition includes "interviews with current or former employees, sealed notes and records of observations made by the auditor..."

3. SB 41 Will Produce Significant Wasteful Litigation.

It would be a poor lawyer indeed who could not use SB 41 to prevent persons legitimately seeking redress for actual injury or governmental agencies attempting to enforce environmental laws from obtaining important relevant information. The provisions of this bill that will be subject to endless litigation are almost too numerous

to mention. As stated above, even in criminal grand jury proceedings, it can be expected that lawyers for environmental violators will be able to prevent the discovery of important evidence of their client's violations or at least delay it for substantial periods.

Another example is found in Section 9.25.450(d), which relates to a person who actually observed or was involved in a violation and thereafter participated in an audit concerning that violation. The privilege would extend to the person's knowledge about the audit, but not to his/her information from prior observations or involvement. In practice, this would set up a huge hurdle for injured parties or state regulators. Generally, the two sources of information could not be neatly separated. It would be malpractice for defendants' lawyers not to raise this whenever an employee falls into the dual role, leading to extensive and otherwise unnecessary litigation. Moreover, this provision would be subject to great abuse. Unscrupulous companies would be able to use this to shield company employees who are witnesses to or commit violations and wrongdoing: they simply assign those employees/witnesses to auditing and seal them under the privilege. To gain access, the government would have to litigate under Subsection 09.25.450(d).

Another example of the opportunities for violators to block important environmental enforcement efforts is found in Section 09.25.450(h). This subsection prevents the use of information disclosed in an audit to conduct a follow-up inspection, presumably to determine if the facility is now complying with the law and to protect public health and safety. This provision is particularly outrageous. Would the

government be faced with endless hearings to determine whether the inspectors were tainted with information from a disclosed audit? This may be another of the land mines scattered thought the bill that can be used to generate litigation and tie enforcement efforts in knots.

Still, another example is found in Section 9.25.450(i), which provides that the privilege is not supposed to interfere with the state regulator's issuance of emergency orders. The problem, of course, is that the information critical to a decision on whether an emergency exists may be well be buried under a claim of privilege. In other words, SB 41 will keep from the public and their officials sufficient information to protect the public from immediate threats to health and the environment.

Under Section 09.25.450(b), the burden is on the government to demonstrate (in an *in camera* hearing) that one of the specified exceptions to the privilege applies. However, as a practical matter, the government rarely, if ever, could establish that any of the five exceptions apply unless it had access to the audit (supporting documents, interviews, etc., as well as the report itself). Does the government get such access without a *prima facie* demonstration that an exception applies? In other words, is the hearing automatic in every case upon an application by the government? Should the bill pass, would the State seek such a hearing in most cases simply to determine whether any of the grounds for disclosure applied? Since the holding of an *in camera* hearing would expose the attorneys and all other persons who participated in the hearing to the taint flowing from access to some or all of the reported issues, the State could be forced to "double staff" every matter that was the subject of such a hearing

or to protect its ability to proceed without the audit in the event that the Court were denied the access sought in the hearing. This could amount to an enormous drain upon Alaska's enforcement resources, which are already stretched almost pathetically thin. With all the hurdles posed for enforcers and injured persons in SB 41, potential harm well could become real, and actual harm could greatly worsen, while enforcers painstakingly attempt to work their way through the provisions of SB 41 before reaching facts of the violation hidden behind a claim of privilege.

In sum, potent incentives already exist for self-examination and correction of environmental violations. SB 41, while purportedly designed to encourage these activities, will only allow the most unscrupulous to avoid or interminably delay accountability for their actions at the expense of public environmental health. Accordingly, I urge you and your committee to reject this bill.

Very truly yours,

ROBERT C. BUNDY
United States Attorney

RCB:kjm

Attachment

United States Environmental Protection Agency | Enforcement and Compliance Assurance (2201) | EPA 300-N-97-001 January 1997

EPA

Audit Policy Update

FROM THE ASSISTANT ADMINISTRATOR:

Voluntary auditing programs play an important role in helping companies meet their obligations to comply with environmental law. EPA's Audit Policy, effective in January of 1996, encourages self-policing by cutting penalties for any violations that are discovered, disclosed and corrected through voluntary audits or compliance management programs. Nor will EPA recommend criminal prosecution of regulated entities in these circumstances, although individuals remain liable for their own criminal conduct. The policy includes safeguards to protect the public and the environment, excluding violations that may result in serious harm or risk, reflect repeated noncompliance or criminal conduct, or allow a company to realize a significant economic gain from its noncompliance. (See page 4 for a more complete summary).

So far, 105 companies have disclosed violations under of the policy proving that environmental auditing can be encouraged without blanket amnesties or audit privileges that would excuse serious misconduct, frustrate enforcement, encourage secrecy, boost litigation, and/or lead to public distrust. This newsletter is the second in a series of updates on implementation of EPA's audit policy, and includes information on settlements, interpretive guidance, and similar state policies. A complete copy of the audit policy and copies of settlements discussed below can be obtained by calling (202) 260-7548 or faxing (202) 260-4400 and referencing docket number C-94-01. For more information, call Brian Riedel, editor of *Audit Policy Update*, at (202) 564-4187.

Steve Herman, Assistant Administrator
Office of Enforcement and Compliance Assurance

105 Companies Disclose Violations Under Audit Policy

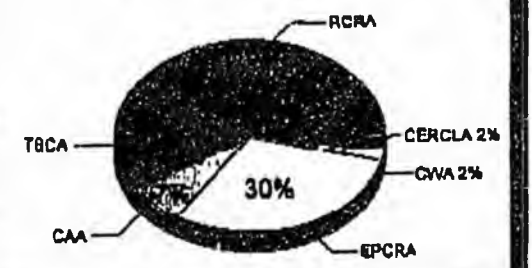
To date, 105 companies have disclosed environmental violations at more than 350 facilities under the EPA interim and final Audit/Self-Policing Policies. Among these disclosures, EPA has already settled cases/matters with 40 companies and 48 facilities, and has agreed to waive all penalties in most of these cases.

Three recent settlements are featured in this month's issue.

Companies Receiving Audit Policy Relief:

Acadia Polymers, Irongate, VA
Alyeska Pipeline, Prudhoe Bay, AK (2 facilities)
Austin Sculpture, Pharr, TX
Auto Trim, Inc., Brownsville, TX
Baldwin Piano & Organ, Trumann, AR
Bortec Industrial Inc., El Paso, TX
BP Exploration & Oil, Inc., Port Angeles, WA
CENEX, Laurel, MT
Clearwater Co., Pittsburgh, PA
Coilcraft, Inc., El Paso, TX
Cook Composites & Polymers, N. Kansas City, MO
General Electric Corp., Waterford, NY
Gobar Systems, Inc., Brownsville, TX
Goulston Technologies, Inc., Monroe, NC
Hasbro, Inc., El Paso, TX
Invacare, Inc., McAllen, TX
Kingsford Products, Louisville, KY
Koch Refining Co., Corpus Christi, TX
Lambda Electronics, Inc., McAllen, TX
Magnetek, Inc., Brownsville, TX
Microfoam Corp., Utica, NY
Midwestern Machinery, Minneapolis, MN
Minolta Co., Ramsey, NJ
Nolan Company, Stephenville, TX
O'Neill Industries, Philadelphia, PA
Outboard Marine Corp., El Paso, TX
Ozark-Mahoning Co., Tulsa, OK
Shure Brothers, Inc., El Paso, TX
Siemens Electromechanical Co., El Paso, TX
Simplot Dairy Products, Nampa, ID
Sunbeam-Oster Co , Bay Springs, MS
Sunbeam-Oster Co., Coushatte, LA
Sunbeam-Oster Co., Hattiesburg, MS
Sunbeam-Oster Co., McMinnville, TN
Sunbeam-Oster Co., Neosho, MO (2 facilities)
Sunbeam-Oster Co., Shubata, MS
Sunbeam-Oster Co., Waynesboro, MS
Transportation Electronics, El Paso, TX
TRW Vehicle Safety Systems, McAllen, TX
TRW Automotive Products Remfg., McAllen, TX
Teccor Electronics, Inc., Brownsville, TX
Thomson Saginaw Ball Screw, Saginaw, MI
Unocal Corp., Cook Inlet, AK
Vastar Resources Inc., La Plata County, CO
Wells Manufacturing Co., McAllen, TX
Zeneca, Inc., Wilmington, DE

Breakdown of Settlements by Type



GE: Curbing Methanol Emissions from Storage Tanks

General Electric, Inc. voluntarily discovered, disclosed and corrected violations of the Clean Air Act (CAA) at its silicone manufacturing facility in Waterford, New York. The violations resulted from a lack of proper pollution control equipment on two methanol storage tanks. Methanol fumes are a hazardous air pollutant that contributes to smog and can cause serious health problems. EPA and the Department of Justice agreed to waive the substantial "gravity-based" component of the penalty, which reduced the actual penalty in the case to $60,684, reflecting the amount of economic benefit the company gained from noncompliance.

DOJ APPLAUDS GE SETTLEMENT

"This is a great example of what happens when companies examine their facilities, identify problems, fix them, and let the public know. It illustrates this Administration's commitment to provide incentives for those who perform prompt and responsible environmental audits."

Lois Schiffer, Assistant Attorney General
Environmental and Natural Resources Division
Department of Justice

VASTAR: Cutting CO Emissions

Vastar Resources Inc., a natural gas production company, voluntarily discovered, disclosed and corrected Clean Air Act (CAA) violations involving lack of proper pollution control equipment to limit the emission of carbon monoxide (CO) at facilities located on the Southern Ute Indian Reservation in La Plata County, Colorado. High levels of CO can cause serious health problems -- especially for young children, elderly and those with heart and respiratory ailments. However, EPA does not believe that CO levels were that high in this case. The company disclosed the violations after it took over operation of the facility from another company and conducted a compliance audit. The company then quickly brought itself into compliance by installing the proper control equipment, which will reduce CO emissions by 3,700 tons or 80% per year. Because the company met all of the conditions of the Audit Policy, the gravity-based penalty of several hundred thousand dollars was waived. Under the settlement, the company's penalty was limited to $137,949, which represents the economic benefit the company gained from not initially installing the proper equipment.

CENEX: Helping Prevent Manufacture of Unsafe Chemicals

CENEX, Inc., a Montana company, disclosed and corrected its failure to file reports under the Inventory Update Rule (IUR) of the Toxic Substances Control Act (TSCA). The IUR requires manufacturers of chemicals listed on EPA's TSCA Inventory to report current data on production volume, plant site and site-limited status. This data forms the basis for distinguishing which chemicals must undergo a review for health and environmental effects. Under the Audit Policy, EPA mitigated $318,750 which represents 75% of the unadjusted gravity-based penalty, resulting in a total penalty of $106,250.

OZARK-MAHONING: Cleaning Up & Reporting Spill of Ferric Sulfate & Hydrofluoric Acid

Penalties were completely waived under the Audit Policy for the Ozark-Mahoning Company which voluntarily discovered, disclosed and corrected CERCLA and NPDES reporting violations at its Tulsa, Oklahoma facility. The company had failed to report to the National Response Center a spill of two CERCLA hazardous substances, ferric sulfate and hydrofluoric acid, in violation of CERCLA 103(a). The company promptly remediated the spill area and state authorities verified proper remediation.

In other violations, the company incorrectly reported pH values under its NPDES permit on four occasions. High acidity (pH) levels in waters can have a profoundly harmful effect on water quality and ecosystems. Accurate reporting of pH levels is critical for monitoring and maintaining water quality and ecosystems. Because the company met all of the Policy conditions and did not gain economically from the CERCLA and NPDES violations, the penalties were reduced to zero. Ordinarily the penalties for these types would have been approximately $8,250 for the CERCLA violation and $40,000 ($10,000 maximum for each) for the four NPDES violations.

PRAISE for EPA'S POLICY

"It is an excellent policy which worked as intended in our case. Compliance with the terms of the policy results in penalty elimination or mitigation. This encourages proactive environmentally responsible behavior by companies trying to do the right thing in terms of complying with our nations environmental laws."

Peter J. Platzer
President, Midwestern Machinery Co., Inc

"It [The Audit Policy] worked quite well for us."

Rora Delgado
Warehouse Manager, Austin Sculpture

Audit/Disclosure Can Affect Decision to Prosecute

At least three companies have not been charged with an environmental crime due to their voluntary disclosure of violations uncovered in an audit or internal investigation and their cooperation in the investigation and prosecution of subsidiary corporations or culpable individuals. While EPA has not formally invoked the 1995 Audit Policy in these cases, the decision not to charge them criminally stemmed from the same considerations now expressly set forth in the Audit Policy.

For example, in one such case, on February 7, 1996, the United States Department of Justice announced that Chiquita Brand, International was not prosecuted due to its voluntary disclosure that its subsidiary, John Morrell and Company, had illegally dumped slaughterhouse waste into the Big Sioux River in Sioux Falls, South Dakota for years and had deliberately submitted false discharge monitoring reports to conceal its crimes. John Morrell and Company and several of Morrell's corporate officials now stand convicted of conspiracy and various Clean Water Act felonies, but the government declined to prosecute Chiquita, citing the parent company's voluntary disclosure and cooperation as the prime factors. The Office of Criminal Enforcement, Forensics, and Training is establishing a process whereby criminal enforcement consideration of the Audit Policy will be made by a committee at the headquarters level. For questions regarding application of the Audit Policy in the criminal context, contact Michael Penders at (202) 564-2480.

Audit Policy Interpretive Guidance Released

✔ The Agency's Audit Policy Quick Response Team (QRT) has completed work on the Audit Policy Interpretive Guidance which addresses 16 issues arising under the Policy. The Guidance, covers such issues as:

- When Repeat Violations Bar Penalty Mitigation
- When a Violation "May Have Been Discovered"
- Discovery of Violations Under CAA Title V Permit Applications
- Discovery of Violations During Audits Required by Settlements

The Interpretive Guidance is in the Audit Policy Docket and available on the OECA Home Page at:

http://es.inel.gov/oeca/epapolguid.html

The QRT was formed to expeditiously, fairly, and consistently resolve nationally significant issues involving application of the Audit Policy in specific cases. Each major media enforcement program, the Department of Justice and EPA Regions are represented on the QRT, which is chaired by the Office of Regulatory Enforcement within EPA's Office of Enforcement and Compliance Assurance (OECA). For more information on the Guidance, call Gary Jonesi at (202) 564-4002.

Florida and California Adopt Policies Similar to Audit Policy

U.S. EPA Regional Administrator John H. Hankinson, Jr., in a letter dated September 26, 1996, applauded the state of Florida for adopting a policy modeled on EPA's. Mr. Hankinson reassured Virginia Wetherell, Secretary of the Florida Department of Environmental Protection (DEP) that, "EPA would cooperate closely with Florida by eliminating duplicative reporting or burdensome paperwork." Hankinson said, "[W]e see no need for any additional administrative or bureaucratic processes that may burden Florida's ability to carry out its environmental programs."

"I am very pleased the EPA is working with the Department to streamline the procedure and reduce the amount of paperwork required of regulated interests who desire to take advantage of EPA's and DEP's self-audit policies. This determination by EPA is a significant addition to the incentives we have identified for regulated interests to establish a self-audit program. The policy is good for business and good for the environment and offers an excellent opportunity for EPA, DEP and regulated interests to work in partnership toward mutually beneficial goals."

Virginia B. Wetherell
Secretary, Florida DEP

A copy of the letter is available in the Audit Policy Docket. For further information about the Florida DEP Directive on Incentives for Self-Evaluation, contact Molly Palmer at (206) 553-6521. The California EPA also has recently adopted an audit policy similar to the U.S. EPA Audit Policy. For further information about the Cal EPA Policy on Incentives for Self-Evaluation, contact Gerald Johnston at (916) 322-7310.

Settled Audit Policy Case/Matter Documents Contained in Audit Policy Docket

The Audit Policy Docket contains document related to cases and matters settled under the Audit Policy to date. Examples of documents include disclosure letters, EPA responses, Consent Agreements and Consent Orders, and letters of intent not to enforce. In addition, the Docket contains hundreds of other documents, such as the new Interpretive Guidance, and comments and letters related to the Policy and environmental auditing. The Docket is accessible by calling (202) 260-7548 or faxing (202) 260-4400 and referencing docket number C-94-01.

Other Self-Disclosure Programs

The EPA Audit Policy is but one example of how compliance incentives have encouraged companies to disclose and correct violations without providing blanket amnesties. Other examples include the **TSCA Compliance Audit Program (CAP)** and **EPA Region 7's Subpart 000 (Clean Air Act, testing and reporting) Voluntary Compliance Program.** Under CAP, about 125 companies disclosed approximately 11,000 "substantial risk" TSCA section 8(e) reports in exchange for reduced penalties and an overall penalty cap of $1 million per company. Under the Subpart 000 program, 52 nonmetallic mineral processing companies in Missouri self-disclosed violations of air emission (NSPS) reporting and/or testing requirements in exchange for dramatically reduced penalties. In both programs, participants paid the economic benefit they gained from noncompliance. For more information about the TSCA CAP, call Caroline Ahearn at (202) 564-4163, or about the subpart 000 program, call Becky Dolph, at (913) 551-7281.

Summary of Audit Policy

Voluntary audit programs play an important role in helping companies meet their obligation to comply with environmental laws. EPA's audit policy, effective in January of 1996, will greatly reduce and sometimes eliminate penalties for companies that discover, disclose and correct violations through voluntary audits or compliance management programs, while including safeguards to protect the public and the environment from the most serious violations.

☞ **The Policy requires companies to:**
promptly disclose and correct violations,
prevent recurrence of the violation, and
remedy any environmental harm.

☞ **The Policy excludes:**
repeated violations,
violations that result in serious actual harm, and
violations that may present an imminent and substantial endangerment.

Corporations remain criminally liable for violations resulting from willful or conscious avoidance of their legal duties, and individuals remain liable for criminal wrongdoing. EPA retains discretion to recover the economic benefit gained as a result of noncompliance, so that companies will not be able to obtain an economic advantage over their competitors by delaying investment in compliance. Companies that do not discover violations through an audit or CMS, yet meet all of the other Policy conditions, will receive 75% mitigation of gravity-based penalties.

The Final Audit/Self-Policing policy was published in the *Federal Register* on December 22, 1996 (60 FR 66706). It took effect on January 22, 1996. For further information, contact the Audit Policy Docket or call 202-564-4187.

WHO TO CALL:

Regulated entities that wish to take advantage of the Policy should fax or send a written disclosure to the appropriate EPA Regional contact listed below. Note that the written disclosure must be made within 10 days of the violation's discovery:

Region 1 (CT,ME,MA,NH,RI,VT), Sam Silverman: 617-565-3441 (telephone) / 1141 (fax)
Region 2 (NJ,NY,PR,VI), John Wilk: 212-637-4059/4035
Region 3 (DE,DC,MD,PA,VA,WV), Janet Vinisko: 215-566-2999/2905
Region 4 (AL,FL,GA,KY,MS,NC,SC,TN), Bill Anderson: 404-562-9655/9663
Region 5 (IL,IN,MI,MN,OH,WI), Tinka Hyde: 312-886-9296/353-1120
Region 6 (AR,LA,NM,OK,TX), Barbara Greenfield: 214-665-2210/7446
Region 7 (IA,KS,MO,NE), Becky Dolph: 913-551-7281/7925
Region 8 (CO,MT,ND,SD,UT,WY), Michael Risner: 303-312-6890/6953
Region 9 (AZ,CA,HI,NV), Leslie Guinan: 415-744-1339
Region 10 (AK,ID,OR,WA), Jackson Fox: 206-553-1073/0163

Audit Policy is published periodically by EPA-OECA to provide information to the public and regulated community regarding developments under the EPA Audit Policy.
Editor: Brian Riedel

UNIVERSITY OF ALASKA FAIRBANKS

Risk Management Department
1000 University Avenue
PO Box 758140
Fairbanks, Alaska 99775-8140 • (907) 474-5497 • FAX (907) 474-5489

FAXED TO: 907-465-4316

ATTN: Representative Joe Green, Chairman
House Judiciary Committee

15 April 1997

Ms. Annette Kreitzer
Aide to Senator Loren Leman
Juneau, Alaska 998801

Re: Senate Bill 39: Reporting of Hazardous Substances

The University of Alaska Risk Management Department and Hazardous Materials Department, fully supports the newly proposed version of Senate Bill 39.

The deleting of wastes from the Bill and the removal of any reference to the Fire Marshal's placarding program are major steps in the direction of making this a useable and also user friendly law.

Even though this law will not apply to UAF, we appreciate your allowing us to comment and provide input to the process.

Thank you.

Sincerely,

Joe S. Adams II
Director

Alaska State Legislature

Please enter into the record my testimony to the HOUSE JUDICIARY committee name

committee on Senate Bill 41 bill/subject, dated April 7th, 1997.

(NOTE: The Bill is CS FOR SENATE BILL NO. 41(FIN), the version I have is SB0041D)

While I appreciate the good intentions of the sponsors of this bill, I believe that it would remove public oversight of industry, and assume that industry would never cut corners on it's environmental responsibilities in order to increase profits. While I am sure that most people in private industry are conscientious and want to do the right thing, this bill would give up entirely too much in the way of state authority to ensure the public's health and safety and the proper protection of our natural environment. Just as a bank teller would not push a pile of money out in front of a customer, and tell him or her, "here, we trust you, count out the amount of cash that will cover the check you just gave me", the state should not give up it's authority to enforce laws and regulations over industry.

I do not believe that there is any way to amend this bill to make it any better, except to substitute, for lines 4 through 14, and all of the text on pages 2 through 14, the following language:

THE STATE, BEARING IN MIND IT'S RESPONSIBILITY TO ALL OF THE CITIZENS OF THE STATE, SHALL MAKE EVERY 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.

Sincerely,

Gerald R. Brookman

Gerald R. Brookman
715 Muir Avenue
Kenai, Alaska 99611-8816

Janet E. Brookman

Signed: Gerald R. Brookman
Testifier

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.

6

Valdez Office
P.O. Box 188, Valdez, AK 99686
Phone: (907) 835-5460/Fax: (907) 835-5410
E-mail: afervdz@alaska.net

Seattle Office
1402 Third Avenue Suite 1215, Seattle, WA 98101
Phone: (206) 628-9464/Fax: (206) 292-0610
E-mail: afersea@accessone.com

http://www.accessone.com/~afersea

March 5, 1997
Via Facsimile and US Mail

Senator Robin Taylor, Chair
Senate Judiciary Committee
State Capitol
Juneau, AK 99801

Senators Drue Pearce and Bert Sharp, Co-Chairs
Senate Finance Committee
State Capitol
Juneau, AK 99801

RE: SB 41 -- Environmental, Health and Safety Self-Audits

Dear Senators Taylor, Pearce and Sharp,

The purpose of this letter is to supplement the comments on SB 41 the Alaska Forum for Environmental Responsibility submitted to the Senate Judiciary Committee on February 24 (a copy is enclosed). In particular, this letter expands on our concerns about the bill's detrimental effects on whistleblowers in Alaska. Contrary to Senator's Leman's assertion on January 24, we believe that SB 41 provides no protection for whistleblowers.

Fundamentally, companies doing self-critical analysis only have shareholders and government regulators acting to motivate corporate behavior. Shareholders have never been recognized as bearers of the public interest. The government often relies upon whistleblowers to learn of violations of environmental regulations, violations that the vast majority of whistleblowers first disclose to the company through internal reporting mechanisms. Those mechanisms often generate internal investigations, investigations which would be deemed self-audits under SB 41. If an audit containing the protected disclosure is designated as privileged, a whistleblower who is discharged or otherwise retaliated against for raising concerns about worker safety, public health or environmental violations will be denied access to important documentation showing that he raised the concern and the company's reaction. In any case

brought under state law, or based upon diversity jurisdiction in federal court, state law would govern the applicability of any asserted privilege.

If SB 41 becomes law, a company acting in bad faith would have twice the opportunity to cover its tracks. Not only could the substantive issue of the environmental violation be hidden, the person disclosing the problem could be disposed of (terminated) without consequence to his employer because the employee would be unable to prove that he raised the concern if the company only addresses the concern within the context of a privileged audit report.

Contrary to Senator Leman's assertion to the Judiciary Committee on February 24, his proposed Section 2, 09.25.460(a)(4) (version SB 41 offered on 1/31/97), does not offer any whistleblower protection because it only offers exemption from privilege to information that is independent of an audit. It will not take long for companies to know what rock to put the dirty laundry under. Few if any employees would be willing to raise concerns about environmental or safety violations if the result of the disclosure is retaliation with exoneration of the employer's reprisals because of a statutory privilege to hide information.

There is no reason to believe that companies will act honestly and candidly to prevent future accidents only if they can hide internal audits. Incentives to encourage honest and candid actions can be instituted without resorting to secrecy. For instance, leniency could be granted for voluntary disclosure of violations within a reasonably short time period after learning of the violation and for meaningful corrective action taken shortly after discovering the violation. This is the essence of US EPA's policy on self-audits, which grants leniency if voluntary disclosure occurs within ten days and corrective action within sixty days without secrecy. See Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66.706 (1995). Such an approach would encourage, rather than discourage, whistleblowing because the company would benefit from finding and correcting violations as quickly as possible.

Secrecy regarding environmental or safety violations will not protect the public interest. Secrecy only serves to provide a greater screen of protection for those companies which are already ignoring the law as a means of enhancing profit, without any statutory guarantee privilege for self-audits. As David Ronald, Arizona Assistant Attorney General put it, "Only businesses with something to hide would benefit from a law that turns data gathered from environmental audits into secret information" (Statement to US EPA; July 27, 1995). The recent story of the Doyon Drilling employee at the Endicott oil field clearly illustrates this fact (see enclosure), as do the many cases of concerned pipeline employees silenced by Alyeska.

In summary, SB 41 is bad public policy. First, SB 41 replaces corporate responsibility and accountability with secrecy. The US Supreme Court has recognized that secrecy fundamentally undermines enforcement of laws designed to protect the public interest: "The greater portion of evidence of wrongdoing by an organization or its representatives is usually found in the official records and documents of that organization. Were the cloak of privilege to be thrown around these records and documents, effective enforcement of many federal and state laws would be impossible" (Braswell v. US, 108 S. Ct. 2284 [1988]). Second, rather than

providing incentives for compliance through leniency, SB 41 effectively rewards noncompliance by providing immunity from all civil and administrative penalties. Finally, SB 41 will greatly reduce the already limited ability of conscientious workers to defend their right to speak the truth in the workplace without fear of reprisals.

As the Alaska Forum told the Senate Judiciary Committee last month, the Alaska Forum opposes SB 41. SB 41 sends a clear and chilling message to conscientious workers: remain silent. The essence of our message is this: To leniency for self-discovery and self-disclosure, we say "Yes!" But to secrecy and worker silence we say "No!"

If you have any further questions, please call Mike Riley, Program Director, at (206)628-9464.

Sincerely,

Stan Stephens

Stan Stephens
President

enclosures: -- "Testimony on SB 41 before the Senate Judiciary Committee February 24, 1997," Alaska Forum
-- "Poisoning the Well: Whistelblower Disclosures of Illegal Hazardous Waste Disposal on Alaska's North Slope, Executive Summary," Alaska Forum, January 1997.
-- "Partnering Will Not Remove Poison from the Well," Stan Stephens, *Anchorage Daily News*, 2/6/97

cc: Senator Loren Leman, Fax: 465-3810
Senator Mike Miller, Fax: 465-3883
Senator Sean Parnell, Fax: 465-2278
Senator Johnny Ellis, Fax: 465-2529
Senator Dave Donley, Fax: 465-6595
Senator Randy Phillips, Fax: 465-4979
Senator John Torgerson, Fax: 465-4779
Senator Al Adams, Fax: 465-4821
Senator Jim Duncan, Fax: 465-4748
Senator Lyman Hoffman, Fax: 465-4523
Senator Georgianna Lincoln, Fax: 465-2652

3

Valdez Office
P.O. Box 188, Valdez, AK 99686
Phone: (907) 835-5460/Fax: (907) 835-5410
E-mail: afervdz@alaska.net

Seattle Office
1402 Third Avenue Suite 1215, Seattle, WA 98101
Phone: (206) 628-9464/Fax: (206) 292-0610
E-mail: afersea@accessone.com

http://www.accessone.com/~afersea

TESTIMONY ON SB 41
before the Senate Judiciary Committee
February 24, 1997

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

Thank you for this opportunity to testify today on SB 41. My name is Riki Ott. I am the Vice-President and co-founder of the Alaska Forum for Environmental Responsibility, a citizen's organization based in Valdez.

The Alaska Forum's mission is to hold industry and government accountable to the laws designed to protect worker safety, public health and the environment in Alaska. One way we achieve our mission is by protecting the rights of conscientious workers to speak the truth about activities that threaten worker safety public health and the environment without fear of reprisals. Why? Because we believe that conscientious workers are the first line of defense against environmental degradation and threats to worker safety and public health in Alaska.

The Alaska Forum supports the fundamental goal of SB 41: to foster compliance with worker safety, public health and environmental laws by providing incentives for regulated entities to voluntarily find, disclose and correct violations of these laws. But SB 41, as written, will not achieve this goal. We oppose SB 41 for two reasons.

First, SB 41 is bad public policy. I want to emphasize two criticisms of this bill already made by others here today:

- **SB 41 replaces corporate responsibility and accountability with secrecy.**

  SB 41 would keep information vital to the protection of worker safety, public health and the environment hidden from review by the agencies we depend upon to enforce the law and the legal system we depend upon to remedy violations of the law. It would limit the right to know of private property owners near polluting industries. And it would limit the public's ability to learn the truth about corporate behavior.

- **Rather than providing incentives for compliance, SB 41 effectively rewards noncompliance by providing immunity from all civil and administrative penalties.**

  Penalties and fines are the primary tools that regulators have to foster compliance. Leniency in determining penalties and fines for self-discovered and immediately reported violations makes sense -- it provides a clear incentive to comply. But SB 41 goes much farther. The bill's vague language and broad definitions eliminates civil and administrative penalties for all violations which are self-discovered and "promptly" self-disclosed to the appropriate state agency.

The second reason the Alaska Forum opposes SB 41 is because the bill will greatly reduce the already limited ability of workers to defend their right to speak the truth in the workplace without fear of reprisals. Over the last several years, the Alaska Forum has worked with dozens of concerned workers who have taken great personal and professional risks to speak the truth. These courageous individuals are hardworking, taxpaying Alaskans who, like you and I, are concerned about their home and their children's futures. Unfortunately, far too many lose their jobs, even their careers, because their employer do not want regulators or the public to hear the truth.

SB 41 would take away one of the primary legal tools a concerned employee has to defend herself from reprisals by her employer. That tool is access, through discovery, to a wide range of internal company documents for use in administrative and civil proceedings against an employer. It is often precisely these internal documents -- many of which would fall under SB 41's definition of a self-audit -- that are essential to prove an employer unfairly and illegally retaliated against an employee. Losing access to these documents would cripple the already weak protections for blowing the whistle under Alaska law. SB 41 sends a clear message to conscientious workers: remain silent.

A recent case in point is the story of a worker who blew the whistle on illegal waste disposal practices at the Endicott oil field. Doyon Drilling, a BP contractor at Endicott, instructed its workers to violate environmental regulations by putting toxic materials into the drilling wastes that were re-injected as a part of routine drilling operations. These secret and potentially damaging practices continued for at least two years and perhaps as long as five years. Doyon's response to the worker's disclosure was to dismiss as "jokes" death threats against he and his family by co-workers, shutdown his rig, lay him off and then eliminate his position.

Had the conscientious worker not spoken the truth, these violations would be continuing to this day. And had this worker not been able to force Doyon to disclose the findings of what SB 41 would call a self-audit, he might have lost his whistelblower case against Doyon. Not only would he have sacrificed his twenty-two year career in the oil industry but he, his wife and his children would have been ruined financially. Such an outcome to would have sent a clear and chilling message to other conscientious workers: silence is your only option.

Finally, self-audits make good business sense -- they improve the bottom-line by identifying and correcting compliance and other problems early. That is why many companies across the nation and in Alaska already conduct self-audits without laws that grant them immunity and privilege. This is true even in Alaska: as the Alaska Oil and Gas Association's January 1997 position paper on SB 41 points out, the majority of its members already "conduct self-audits as a means of ensuring compliance" without SB 41. Why then does Alaska need the secrecy of SB 41?

If the Legislature is serious about fostering self-discovery and voluntary disclosure and correction of violations of worker safety, public health and environmental laws, SB 41 is not the answer. A better approach would be a very simple bill that provides clear incentives through leniency for self disclosure and correction, that narrowly and explicitly defines the time window within which self-disclosure must occur (US EPA's policy uses 10 days), and contains no secrecy provisions.

The Alaska Forum opposes SB 41. The essence of our message is this: To leniency for self-discovery and self-disclosure, we say "Yes!" But to secrecy and worker silence we say "No!"

Thank you.

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

ALASKA
STATE
CHAMBER
OF COMMERCE

April 7, 1997

Representative Joe Green
Chairman, House Judiciary Committee
Alaska State Legislature
State Capitol
Juneau, AK 99801

Re: SB 41, Environmental Self-Audit

Dear Representative Green:

We are writing to you today in support of Senate Bill 41, the Environmental Self-Audit legislation.

Senate Bill 41 provides businesses with an opportunity to conduct self-audits in an effort to assure they are in compliance with environmental, health and safety laws. We believe this creates an incentive for businesses who find they have inadvertently been out of compliance with a law or regulation to voluntarily correct their actions without fear of penalty and strive to operate in the acceptable and prescribed manner. This law would not allow continued non-compliance once a problem has been identified.

We believe that, wherever possible, government should be supportive of business activity, and SB 41 fosters an attitude of partnership we believe government and business should strive to attain. We urge your support of this legislation.

Sincerely,

Pam LaBolle

Pamela La Bolle
President

AMENDMENT #3

OFFERED IN THE HOUSE

TO: CSSB 41(FIN)

Page 7, lines 21-22:

Following: "under this section":

Delete all material.

Insert: "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."

h:\wp\bills\41except.wpd

A M E N D M E N T #4

OFFERED IN THE HOUSE

TO: CSSB 41(FIN)

Page 10, following line 16:

Insert a new subsection (b) to read:

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

Renumber subsections accordingly.

Reasons: This proposal is consistent with EPA's "Statement of Principles -- Effect of State Audit Immunity/Privilege Laws on Enforcement Authority for Federal Programs," dated February 14, 1997, which provides that EPA will review state legislation to determine whether a state has retained the ability to recover civil penalties for violations of judicial or administrative orders.

h:\wp\bills\41aoco.wpd

A M E N D M E N T #5

OFFERED IN THE HOUSE

TO: CSSB 41(FIN)

Page 2, line 9:

Delete: "relevant"

Insert: "underlying"

h:\wp\bills\41facts.wpd

AMENDMENT #6

OFFERED IN THE HOUSE

TO: CSSB 41(FIN)

Page 12, line 6:

Following "former employees":

Insert: "conducted by the auditor"

Page 12, line 11:

Following "recommendations":

Insert: "made by the auditor"

Reasons: This proposed amendment will help clarify that it is the auditor's work product that is protected by the privilege.

h:\wp\bills\41csea.wpd

A M E N D M E N T #7

OFFERED IN THE HOUSE

TO: CSSB 41(FIN)

Page 2, line 15:

Following "appropriate":

Delete: "governmental regulatory"

Insert: "government"

Reasons: Consistency with terminology used in the bill.

Page 3, line 8:

Following "the department":

Insert: "and, where the audit includes an assessment of compliance with a municipality's ordinances, to the municipal clerk,"

Reasons: This bill defines the term "environmental law" to include municipal ordinances adopted in conjunction with or to implement a federal or state environmental law implemented by the Department of Environmental Conservation (DEC). In proposed AS 09.25.450(b) on page 3, lines 3-15, the bill provides that notice of an audit be given to DEC. This proposed amendment would provide municipalities with notice of an audit.

Page 3, line 15:

Following "the department":

Insert: "or the municipality, as appropriate"

Reasons: Where an audit includes an assessment of compliance with municipal ordinances, the owner or operator conducting the audit should negotiate any extensions of time for the duration of the audit with the municipality.

Page 4, line 9:

Following "neither":

Delete: "an"

Insert: "a government"

Reasons: This provision does not specify the type of agency, but appears to be directed to inspections by government agencies.

Page 4, line 14:

Following "prevent a"

Delete: "regulatory"

Insert: "government"

Reasons: A government agency, including the Departments of Natural Resources, Fish and Game, or Transportation and Public Facilities, or a municipality may need to issue cease and desist

orders or take other action where a lessee or contractor is in breach of a state or municipal lease agreement or contract by failing to comply with environmental laws. This amendment would provide that proposed AS 09.25.450 (which establishes the self-audit privilege) should not be construed to prevent affected state agencies and municipalities from taking appropriate action to ensure that property and contractual obligations are met.

Page 4, line 21:

At the beginning of the subsection:

Delete: "A state agency"

Insert: "The department"

Reasons: Under proposed AS 09.25.450(b), DEC is the only state agency that receives the notice.

Page 4, line 25:

Following "receipt by the":

Delete: "agency"

Insert: "department"

Reasons: Same as above. The DEC is the only state agency that receives the notice.

Page 6, line 8:

Following: "required by a"

Delete: "regulatory"

Insert: "government"

<u>Reasons</u>: This wording is more appropriate where the information is required to be reported under a lease or contract.

Page 6, line 11:

Following "with the state":

Insert: "or a municipality"

<u>Reasons</u>: Information required to be reported under municipal contracts or leases should not be privileged.

Page 6, line 13:

Following: "information that a"

Delete: "regulatory"

Insert: "government"

<u>Reasons</u>: A government agency may obtain information by observation, sampling, or monitoring when it is acting as a land owner or manager or overseeing a contract. This information should also be nonprivileged.