

ALASKA LEGISLATURE COMMITTEE FILES 1997-1998 86/2

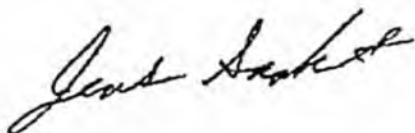
9561 SENATE JUDICIARY

1998

Because the donor technician or surgeon is decided by which transplant agency covers an area, nearly all states have deleted the concept of designating the surgeon or physician (or even agency) to remove a part of a donor's body. Donors are universally allowed to designate a particular recipient if they desire (most don't designate, which allows the tissue or organ to be placed with the most urgent recipient). The amended wording (including "appropriate Alaska organ or tissue bank or") will not have any negative effect.

I hope this is helpful in clarifying current practices. Thank you again for all of your efforts in support of donation, transplantation and the families. Please call me at any time with questions or concerns.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jens Saakvitne".

Jens Saakvitne  
Director

## Life Alaska, Inc.

Tissue Procurement Service  
P. O. Box 230785  
Anchorage, AK 99523  
1-907-562-5433 - 1-800-719-5433  
Fax 1-907-562-5333



February 14, 1997

**ATTN:** The Honorable Senator Robin Taylor  
Chair, Senate Judiciary Committee  
Health Education and Social Services

**FROM:** Fran McNeill  
Family Care Coordinator  
Life Alaska, Inc.

**RE:** Senate Bill 38

My name is Fran McNeill. I am employed by Life Alaska, Inc. as the Family Care Coordinator. I am here today in place of my Director, Jens Saakvitne, who had a medical emergency.

Life Alaska, Inc. supports Senate Bill 38. This bill facilitates the communication of an individual's wishes regarding living wills, do not resuscitate orders, and anatomical gifts. It supports individual autonomy and self-determination and respects the individual's right to make this very personal decision. Furthermore, it ensures that people will have an opportunity to make these choices independent of crisis and would encourage them to discuss their decisions with family members. The family burden is eased by knowing what a loved one wants, and families may approach these decisions knowing that they have honored their loved one's request.

Sincerely,

A handwritten signature in cursive script that reads "Fran McNeill".

Fran McNeill  
Family Care Coordinator

**S B**

**39**

# FISCAL NOTE

STATE OF ALASKA  
**1997 LEGISLATIVE SESSION**

BILL NO.

Senate Bill 39

Revision Date: \_\_\_\_\_  
 Title: An act relating to hazardous chemicals,  
hazardous materials, and hazardous waste  
 Sponsor: Senator Leman  
 Requestor: Senate Resources Judiciary

Department Affected: Environmental  
Conservation  
 BRU: Spill Prevention and Response  
 Component: Prevention and Emergency Response

COMPONENT SERIAL NO. 2064

Expenditures/Revenues:

(Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	0.0	0.0	0.0	0.0	0.0	0.0
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND & STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS, CLAIMS	0.0	0.0	0.0	0.0	0.0	0.0
MISCELLANEOUS	0.0	0.0	0.0	0.0	0.0	0.0
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
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CHANGE IN REVENUES ( )	0.0	0.0	0.0	0.0	0.0	0.0
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**FUND SOURCE**

100 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
100 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
100 GF	0.0	0.0	0.0	0.0	0.0	0.0
100 GF/Program Receipt	0.0	0.0	0.0	0.0	0.0	0.0
100 GF/MHTIA	0.0	0.0	0.0	0.0	0.0	0.0
Other (Response Fund)	0.0	0.0	0.0	0.0	0.0	0.0
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

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

**POSITIONS:**

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0.0	0.0	0.0	0.0	0.0
TEMPORARY	0	0	0	0	0	0

**ANALYSIS:** (Attach a separate page if necessary.)  
 SB 39 amends statutes which authorize local governments to establish a placarding program to require the use of a standard reporting form provided by the State Emergency Response Commission (SERC) and expand the substances that are to be reported.  
 SB 39 requires the Department of Environmental Conservation, at the request of a business or government agency subject to the reporting requirement, to distribute the SERC-approved reporting form and a descriptive summary of reportable chemicals. The Department proposes an amendment to this section of the bill making the municipality responsible for distribution of the reporting form and descriptive summary of reportable chemicals established by the municipality and approved by the SERC.

**Fiscal Analysis**  
 Will the proposed amendment, this legislation will result in no additional cost to the State.

Prepared by: Kurt Fredriksson  
 Division: Spill Prevention and Response

Phone: 455-5250  
 Date: 2/3/97

Approved by Commissioner: [Signature]  
 Agency: Department of Environmental Conservation

Date: 2/3/97

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# FISCAL NOTE

**STATE OF ALASKA**  
**1997 LEGISLATIVE SESSION**

**BILL NO. SB 39**

Revision Date: _____	Dept. Affected: <u>EDUCATION</u>
Title: <u>An Act relating to hazardous chemicals, materials and waste.</u>	BRU: <u>School Finance</u>
Sponsor: <u>Sen. Leman</u>	Component: <u>Educational Facilities Support</u>
Requester: <u>(S)JJD</u>	COMPONENT SERIAL NO. _____ 1957

**Expenditures/Revenues:** (Thousands of Dollars)

OPERATING EXPENDITURES	FY98	FY99	FY00	FY01	FY02	FY03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

<b>CHANGES IN REVENUES</b>						
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**FUNDING:** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
Other:						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of current year (FY97) cost: \$

**POSITIONS:**

FULL-TIME						
PART-TIME						
TEMPORARY						

**ANALYSIS:** (Attach a separate page if necessary)

No fiscal impact.

Prepared by: Mike Morgan, school facilities manager  
 Division: Education Support Services  
 Approved by Commissioner: Shirley J. Holloway, Ph.D.  
 Agency: Department of Education

Phone: 465-1858  
 Date: 1/31/97  
 Date: \_\_\_\_\_

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# FISCAL NOTE

**STATE OF ALASKA**

**BILL NO: SB 39**

**1997 LEGISLATIVE SESSION**

Revision Date: \_\_\_\_\_ Dept. Affected: Public Safety  
 Title: Reporting of Hazardous Substances BRU: Fire Prevention  
 Component: Fire Prevention Operations  
 Sponsor: Senator Leman  
 Requestor: Senate Judiciary COMPONENT SERIAL NO. 0494

**EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)**

OPERATING	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	-0-	-0-	-0-	-0-	-0-	-0-
<b>CAPITAL EXPENDITURES</b>	-0-	-0-	-0-	-0-	-0-	-0-
<b>CHANGE IN REVENUES ( )</b>	<b>(1.1)</b>	<b>(1.1)</b>	<b>(1.1)</b>	<b>(1.1)</b>	<b>(1.1)</b>	<b>(1.1)</b>
<small>Revenue Code</small>						

**FUNDING: (Thousands of Dollars)**

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
<b>TOTAL</b>	-0-	-0-	-0-	-0-	-0-	-0-

Estimate of current year (FY 97) impact: \$ \_\_\_\_\_

**POSITIONS:**

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

**ANALYSIS: (Attach a separate page if necessary.)**

The average fees collected by the placarding program over the last 3 fiscal years was \$1500.00. The average cost of materials to conduct the program was \$400.00.

No economic impact on industry is anticipated in as much as the program is simply being transferred to others and changed to follow federal law.

Prepared By: Chester E Weger Phone: 907-269-5905  
 Division: Fire Prevention Date: 1/21/97  
 Approved by Commissioner: *Ronald L. Otte* Date: 1/31/97  
 Agency: Ronald L. Otte, Dept. of Public Safety

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# FISCAL NOTE

**STATE OF ALASKA**  
**1997 LEGISLATIVE SESSION**

**BILL NO. SB 39**

Revision Date: \_\_\_\_\_ Dept. Affected: Department of Law  
 Title: "An Act relating to hazardous chemicals, hazardous materials, and hazardous waste." BRU: Civil Division  
 Component: General Legal Services  
 Sponsor: Senator Leman  
 Requester: Senate Judiciary Committee COMPONENT SERIAL NO. 2087

**Expenditures/Revenues (Thousands of Dollars)**

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ( )						
------------------------	--	--	--	--	--	--

**FUND SOURCE (Thousands of Dollars)**

FUND SOURCE	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

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

**POSITIONS**

POSITIONS	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

**ANALYSIS:** (Attach a separate page if necessary)

Passage of this legislation will have no fiscal impact on the Department of Law.

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

Phone: 465-5370  
 Date: 2/3/97  
 Date: 2/3/97

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# FISCAL NOTE

STATE OF ALASKA  
1997 LEGISLATIVE SESSION

BILL NO. CSSB 39(JUD)

Revision Date: 14-Feb-97  
 Title: An act relating to hazardous chemicals, hazardous materials, and hazardous waste  
 Sponsor: Senator Leman  
 Requestor: Senate Judiciary

Department Affected: Environmental Conservation  
 BRU: Spill Prevention and Response  
 Component: Prevention and Emergency Response

COMPONENT SERIAL NO. 2064

**Expenditures/Revenues:**

(Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	0.0	0.0	0.0	0.0	0.0	0.0
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND&STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS, CLAIMS	0.0	0.0	0.0	0.0	0.0	0.0
MISCELLANEOUS	0.0	0.0	0.0	0.0	0.0	0.0
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
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CHANGE IN REVENUES ( )	0.0	0.0	0.0	0.0	0.0	0.0
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**FUND SOURCE**

1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipt	0.0	0.0	0.0	0.0	0.0	0.0
1006 GF/MHTIA	0.0	0.0	0.0	0.0	0.0	0.0
Other (Response Fund)	0.0	0.0	0.0	0.0	0.0	0.0
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

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

**POSITIONS:**

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0.0	0.0	0.0	0.0	0.0
TEMPORARY	0	0	0	0	0	0

**ANALYSIS:** (Attach a separate page if necessary.)

This legislation will have no impact on the Department of Environmental Conservation

Prepared by: Kurt Fredriksson  
 Division: Spill Prevention and Response

Phone: 465-5250  
 Date: 2/14/97

Approved by Commissioner:   
 Agency: Department of Environmental Conservation

Date: 2/14/97

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# 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 39

"An Act relating to hazardous chemicals, hazardous materials, and hazardous waste."

\*\*\*\*\*

As we downsize government, and make it more user friendly, we must assess the efficacy of current statutes and regulations. SB 39 consolidates reporting requirements and includes a section that protects the state from strict liability for oil spills or other environmental releases at the REAA schools. It is part of the state's response to the Toksook Bay lawsuit.

Many times state and federal governments ask businesses to report information without a lot of thought about how that information will be used when it is received. That is the case with the "Placarding Statute" under AS 18.70.310.

We need to stop asking business to provide unnecessary information and concentrate on what it is the state needs to know. If communities, businesses and the state are not benefiting from the reporting, the information may not be necessary.

Currently, businesses in Alaska must report virtually the same information about hazardous chemicals, materials and wastes, in four different formats to four different entities. This bill eliminates three formats and one entity.

The bill was crafted with input from industry, fire departments, and the departments of Environmental Conservation, Law and Public Safety, Division of Fire Prevention.

The information to be reported is streamlined to one form which satisfies federal, state and local reporting requirements.

**SECTIONAL ANALYSIS**  
**SB 39: Reporting of Hazardous Substances**

**Section 1:**

This section adds an immunity to Title 9 protecting the state from strict liability for oil spills or other environmental releases at the REAA schools. Without this change, the state and school districts can each be liable for 100% of damages claimed from environmental problems on school sites, even if they are not at fault in any way or bear only a small portion of the fault. This section was added at the request of DEC, DOE, and the Department of Law and approved by the sponsor as part of the state's response to the Toksook Bay lawsuit.

**Section 2:**

Deletes reference to AS 18.70.310 - the placarding program within the state fire marshal's office.

**Section 3:**

Deletes reference to AS 18.70.310 - the placarding program within the state fire marshal's office.

**Section 4:**

Subsection (a) makes the State Emergency Response Commission the agency to approve a form to be used for the reporting of placarding information under a municipal placarding program. This ensures that if the form needs to be changed, this commission can coordinate with all agencies that receive such reports.

**Section 5:**

Subsection (c) refers to the existing MUNICIPAL placarding program. Currently under state or federal law, either a municipality or the SERC may add substances to those already required to be reported. This section ensures a public process for adding or removing substances required to be reported.

Subsection (c)(1) standardizes the substances and their threshold amounts to be reported under a municipal placarding program, and to fire departments and Local Emergency Planning Committees under Emergency Planning and Community Right-to-Know requirements. The "hazard classes" conform to the new classification system passed by Congress in 1993 recognizing the UN Identification system that enables the same classification to be used for national and international shipments of hazardous materials.

Subsection (c)(2) deletes from the municipal placarding program the requirement that businesses report consumer commodities of hazardous materials. These businesses are readily identified by fire departments in Alaska as handling large quantities of consumer commodities. Deleted also is requirement to report compressed gases, which exceeds federal reporting requirements.

**Section 6:**

Deletes reference to the state fire marshal's placarding program under AS 18.70.310.

**Section 7:**

Deletes reference to the Municipality having to obtain placards from the state fire marshal's office. Retains ability for the Municipality to charge fees to compensate for the costs of a Municipal placarding program.

**Section 8:**

Makes the Department of Environmental Conservation the one-stop agency to provide lists of reportable substances under the Municipal placarding, and the federal/state Emergency Planning and Community Right-to-Know laws. DEC would also provide the single form approved by the SERC for these reporting purposes.

**Section 9:**

Subsection (6) makes the Municipal placarding definition of hazardous chemical the same as the definition of hazardous chemical under the Emergency Planning and Community Right-to-Know Act, with the same exceptions as under federal law.

**Section 10:**

Subsection (7) allows the State Emergency Response Commission to add hazardous materials to the Emergency Planning reporting requirements. Removes the exceptions which are not mentioned in federal law, but which are probably covered by the reference in federal law to "substances capable of posing an unreasonable risk".

**Section 11:**

Subsection (8) adds in the DEC definition of hazardous waste and allows the SERC to define additional hazardous wastes to be reported under Emergency Planning and Community Right-to-Know requirements. This is to ensure continuity in definitions and reporting thresholds.

**Section 12:**

Applies strict statutory liability and liability for damages to the amendment in Section 1.

**Section 13:**

Deletes the fire marshal's placarding program (AS 18.70.310).

Deletes responsibilities of the fire marshal under the Municipal placarding program (AS 29.35.530(b)).

Deletes definition of consumer commodity from definitions section of Municipal placarding program (AS 29.35.590(2)).

**Section 14:**

The amendment in Section 1 applies only to future claims, not past claims.

**FACT SHEET FOR SB 69**

**Hazardous Chemical Reporting**

Reduces current requirements to no stricter than federal law.

What businesses face now:

Local Municipal placarding reporting requirements (currently Municipality of Anchorage, Fairbanks, and Kenai Borough)

State Fire Marshal placarding reporting requirements

Emergency Planning and Community Right to Know reporting requirements (EPCRA)

OSHA Hazard Communications Standard (MSDS sheets)

Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)

Businesses, state agencies, etc., are required to report certain hazardous substances to local fire departments, local emergency planning committees, the state fire marshal's office, and to DEC on behalf of the State Emergency Response Commission.

The problem is that all of the above referenced laws have different substances and reporting thresholds. **What SB 39 does:**

a) delete the fire marshal's ineffective placarding program (Division of Fire Prevention supports; division doesn't have the personnel to do this program.) Deleting the program deletes the requirement for business to report to State Fire Marshal.

b) modify substances and amounts currently required to be reported to municipalities to be the same as those required under EPCRA and CERCLA. Leaves door open to municipalities with their own placarding program to add substances to be reported if the municipality feels it is a public safety issue. This is done through a public process. Also the State Emergency Response Commission may add substances, but only after notifying facilities (this is current federal law).

c) Creates one form sent out by DEC to cover:

1) Municipal placarding reporting requirements

2) EPCRA/CERCLA reporting requirements to:

local fire departments

local emergency planning committees (LEPCs)

DEC for the SERC

NOTE: DEC currently sends out Tier II form for the EPCRA/CERCLA reporting.

d) While the bill doesn't specifically state it, the thought is that businesses could move to electronic filing with this one form; those needing the information (usually fire departments and LEPCs (all of this info is public whether on paper format or electronic); could download the info into their computers. Most fire departments and LEPCs received from the state computers and plume modeling software several years ago.

Senator Leman has been a member of Anchorage's Hazardous Materials Commission and is a past member of Anchorage's Local Emergency Planning Committee. He recognizes the morass of reporting requirements and is seeking to streamline the process. Please feel free to call me with questions about this bill - with all of the separate, underlying, interrelated reporting requirements it can be frustrating and confusing.

Annette Kreitzer, Aide to  
Senator Loren Leman

(907) 465-3844 PH  
(907) 465-3810 Fax

(01/15/97)



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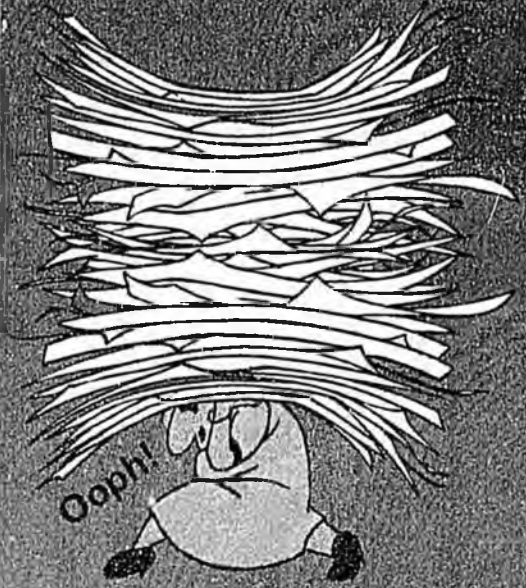
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Federal Standards & Forms

State Standards & Forms

Municipal Standards & Forms

Local Fire District Standards & Forms

SB 39

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1 Standard & 1 Form



**SB**

**41**

# FISCAL NOTE

STATE OF ALASKA  
1997 LEGISLATIVE SESSION

BILL NO. SB 41

Revision Date: \_\_\_\_\_ Dept. Affected: Alaska Court System  
 Title: Environmental & Health Safety Audits BRU: Trial Courts  
 Component: \_\_\_\_\_  
 Sponsor: Sens. Loman, Pearce & Taylor  
 Requestor: Judiciary COMPONENT SERIAL NO. 768

Expenditures/Revenues (Thousands of Dollars)

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

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ( )						
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Fund Source (Thousands of Dollars)

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

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

Positions

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

ANALYSIS: (Attach a separate page if necessary)

See attached analysis.

Prepared by: C. S. Christensen III, Staff Counsel  
 Agency: Alaska Court System

Phone: 264-8228  
 Date: 02/24/97

Approved by: Arthur H. Snowden, II, Administrative Director  
 Agency: Alaska Court System

Date: 02/24/97

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

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

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

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

Alaska Court System  
Fiscal Analysis  
SB 41

Personal Services

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

Contractual

Discovery master for 500 hours at \$75 an hour. 37,500

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

Total Contractual 40,000

Total Estimated Cost \$47,942

# FISCAL NOTE

No. 1

Bill Version: CSB 41 (L&C)

(S) Publish Date: 2/12/97

STATE OF ALASKA  
1997 LEGISLATIVE SESSION

Revision Date: _____	Dept. Affected: <u>Department of Law</u>	_____
Title: <u>...relating to environmental audits and health and safety audits to determine compliance with certain laws, permits...</u>	BRU: <u>Civil Division</u>	_____
Sponsor: <u>Senator Leman</u>	Component: <u>Environmental Law</u>	_____
Requester: <u>Senate Labor and Commerce Committee</u>	COMPONENT SERIAL NO. <u>2092</u>	_____

**Expenditures/Revenues (Thousands of Dollars)**

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES	107.5	107.5	107.5	53.8	53.8	53.8
TRAVEL	6.4	6.4	6.4	3.2	3.2	3.2
CONTRACTUAL	66.0	66.0	66.0	38.0	38.0	38.0
SUPPLIES	2.1	2.1	2.1	1.1	1.1	1.1
EQUIPMENT	6.5					
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>188.5</b>	<b>182.0</b>	<b>182.0</b>	<b>96.0</b>	<b>96.0</b>	<b>96.0</b>

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

FUND SOURCE	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
1002 Federal Receipts						
1003 GF Match						
1004 GF	188.5	182.0	182.0	96.0	96.0	96.0
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
<b>TOTAL</b>	<b>188.5</b>	<b>182.0</b>	<b>182.0</b>	<b>96.0</b>	<b>96.0</b>	<b>96.0</b>

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

**POSITIONS**

POSITIONS	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
FULL-TIME	1.0	1.0	1.0			
PART-TIME				1.0	1.0	1.0
TEMPORARY						

**ANALYSIS:** (Attach a separate page if necessary)

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

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

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

Phone: 465-5370  
 Date: 2/11/97  
 Date: 2/11/97

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ANALYSIS CONTINUATION:

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

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

**General Legal Issues Resulting in Fiscal Impact**

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

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

**Agency-Specific Issues Resulting in Fiscal Impact**

We have identified below some of the anticipated impacts on specific departments that lead us to conclude that our estimate of attorney resources is conservative. We note that many of these impacts can be mitigated by limiting the number of departmental programs that are either explicitly or implicitly covered by the bill. We would be pleased to furnish appropriate amendatory language.

Department of Environmental Conservation

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

Department of Labor

In addition to the general concerns discussed above, the threat of the federal government to withdraw the state's exclusive safety and health inspection and enforcement jurisdiction (18(e)) will require

FISCAL NOTE

STATE OF ALASKA  
1997 LEGISLATIVE SESSION

BILL NO. CSSB 41 (L&C)

ANALYSIS CONTINUATION:

attorney time to protect the interests of the state and of Alaskan workers and businesses.

Department of Health and Social Services

Attorney time will be required to deal with the potential evidentiary disputes in cases involving health care licensing and certification, provider fraud, and Medicaid rate setting.

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

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

Many audits are performed on the Trans-Alaska Pipeline. This bill will require additional time for DNR and the Joint Pipeline Office to determine if information in these audits is privileged or covered by an exception.

**SUMMARY OF COSTS**

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

FY98 - FY00

1 FTE attorney	\$127.0
Direct case travel	\$5.0
One-time equipment (FY98 only)	\$6.5
Expert witnesses	\$50.0
Total Costs	<u>\$188.5</u>

FY01 - FY03

1/2 FTE attorney	\$63.5
Direct case travel	\$2.5
Expert witnesses	\$30.0
Total Costs	<u>\$96.0</u>

FISCAL NOTE

No. 2

Bill Version: CS SB 41(L&C)

(S) Publish Date: 2/12/97

STATE OF ALASKA  
1997 LEGISLATIVE SESSION

Revision Date: \_\_\_\_\_  
Title: Relating to environmental audits and health and safety audits  
Sponsor: Leman  
Requestor: Senate Labor and Commerce

Dept. Affected: Health and Social Services  
BRU: Medical Assistance  
Component: Medicaid Facilities  
COMPONENT SERIAL NO. 230  
See also (SN#): 229

Expenditures/Revenues:

(Thousands of Dollars)

OPERATING	FY98	FY99	FY00	FY01	FY02	FY03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING						

CAPITAL EXPENDITURES						
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CHANGES IN REVENUES ( )						
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FUND SOURCE

(Thousands of Dollars)

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of any current year (FY97) cost: \_\_\_\_\_

ANALYSIS: (Attach a separate page if necessary)

It is not possible to quantify the lost revenues and increased program costs to the Medicaid and General Relief Medical Assistance Programs due to the passage of SB 41. SB 41 has the potential to disrupt the functions of the Medicaid Rate Advisory Commission, Health Facility Certification and Licensing, Audit, Surveillance and Utilization Review functions because the provisions of this bill would allow health care providers to conceal information necessary to complete functions mandated under Federal and State laws designed to assure accurate payments, detection and prevention of fraud and program abuse, and protection of the health and safety of Alaskan residents in receiving health care. The Department of Health and Social Services believes that to protect the significant investment of public funds in medical assistance programs, and to guarantee the health and safety of Alaskans who receive care in health care facilities, that all references to "health and safety" should be deleted from the bill.

Prepared by: Nancy Wellen  
Division: Medical Assistance  
Approved by Commissioner: Karen Perdue, Commissioner  
Agency: Department of Health & Social Services

Phone: 465-3355  
Date: 01/15/97  
Date: 1/21/97

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The language in SB 41 is very broad in granting immunity from administrative or civil penalties for self disclosed violations of laws. The language would appear to limit the ability of the DMA in imposing and enforcing provider sanctions; at the very least, it would raise the level of the state's requirements in proving intent to commit fraud on the part of the provider. Additionally, this bill could require extensive intervention by the state's attorneys in the event that the DMA notifies a provider of intent to sanction a provider under the provisions of Article 11 of 7 AAC. The state is required by federal law to have a system of provider sanctions in place for Medicaid, as well as exclude any provider from Medicaid participation who has been so excluded by other federal programs, and notify our federal counterparts of actions against providers.

The Health Facility Licensing and Certification (HFL&C) section of the division, operates under both state and federal laws and regulations to certify health facilities as meeting quality standards required for participation in the Medicare and Medicaid Programs, and state licensing standards. These functions are accomplished by unannounced on-site visits to facilities for the purposes of observation of care, review of medical records, all facility records, policy and procedures, interviews with staff and family members, inspections of the physical plant and patient care equipment, etc. The procedures for monitoring compliance, notification of deficiencies, corrective action plans, are very specific and are quite accelerated if patients are in jeopardy. The OBRA 87 nursing home quality standards are quite stringent and have only been recently implemented nationwide under federal rules. HFL&C is also required to investigate complaints and reports of harm, maintaining a 24-hour complaint hot line. The section is gravely concerned that provisions of this bill could hamper their ability to carry out their mandated functions, including negative actions against facilities (decertification process) which, in extreme cases, can shut down facilities. The role of HFL&C is critical in maintaining patient quality care standards that guarantee safe health care to Alaskans in hospitals, nursing homes, home health agencies, rural health clinics, therapy centers, end stage renal disease centers, ambulatory surgery centers, and federally qualified health centers.

The language of the bill is written in such a way as to allow health care providers to identify almost anything that could be construed as a "self-audit" for the purposes of ensuring compliance, as being non-disclosable. In effect, HFL&C would be unable to completely fulfill their obligations under Alaska Statute, and under our agreement with HCFA; in addition, there would be conflicts in what facilities are obligated to make available to HFC&L, and what they could withhold.

For example, there is a State Licensure requirement found at 7 AAC 12.860, entitled **RISK MANAGEMENT** which applies to most health facilities licensed, which requires each facility to have provisions for monitoring, evaluating, and correcting care practices which may negatively affect patients or residents. The only way to adequately assess compliance with that requirement, is to review what problems the facility has identified, and determine if they took corrective action, or simply ignored the problem. Examples of how HFC&L would be unable to fulfill their obligations under Federal Regulations, and hence would jeopardize Federal funding, include:

CLIA - 42 CFR 493.1701 - 1701 Quality Assurance

Home Health Agencies - 42 CFR 484.52 Evaluation of the Agency's Program

Acute Care Hospitals - 42 CFR 482.21 Quality Assurance

Outpatient Physical Therapist/Speech Therapist - 42 CFR 405.176 Program Evaluation

Rural Health Clinics - 42 CFR 481.11 Program Evaluation

There are numerous similar requirements, which we believe, under the current language of the bill, facilities could say was non-disclosable. Many of these requirements state that the facility must maintain records. We review the records to ensure compliance. Under the current language of the bill, if the facility says it maintains these records as their way of ensuring they meet health and safety requirements, they could be non-disclosable.

As a matter of course, we do not use quality assurance records and other documentation as the sole basis for determining compliance. As stated, an exception would be if the facility knew about a problem, and either didn't fix it, or didn't check to see that it stayed fixed and the problem remained. In addition to compliance determinations, HFC&L evaluates a facility's culpability when determining sanctions. If a facility knows about a problem, and doesn't correct it, their culpability is greater than if they didn't know about the problem, or were in the process of taking corrective actions.

In addition to concerns about access to information, and how broad the bill's language is, we have concerns about the ramifications to staff who may disclose problems in a facility. For example, on virtually any given survey, staff at some point notify the surveyors of concerns. This information is helpful in identifying problems or potential problems which may ultimately result in patient harm. The goal is to protect patients, more than it is to find deficiencies.

The Medicaid Rate Advisory Committee, charged with setting rates for health care facilities paid By Medicaid and General Relief Medical, have the following concerns about SB 41:

Environmental audits and Health and Safety audits are not well defined in this bill. The bill states that Environmental and Health and Safety law shall be construed broadly. The lack of a solid definition combined with the language which construes Environmental and Health and Safety law broadly gives rise to a number of serious concerns. Areas where these audits may be misconstrued or interpreted as other audits and which would adversely impact the department include, but is not limited to, economy and efficiency audits, certifications and financial audits. Language included in the bill does not appear to be in the best interest of the state's Medical Assistance rate setting process. Our specific concerns regarding the language of SB 41 are as follows:

- The department is required by Federal law (the Boren Amendment) to prepare findings which identify costs which must be incurred by economically and efficiently operated health facilities providing services in accordance with state and federal care standards. We have been advised by the Attorney General's office that we should promulgate regulations which would ensure our access to economy and efficiency audits and studies performed by facilities, in order to fully comply with federal law. The passage of this bill could eliminate the department's access to such audits and seriously impact our findings process.
- Could these "Self Audits" be construed to include certification performed by private certification organizations such as JCAHO? If so, the department would need access to this information to ensure

payment for services rendered is appropriate. For example, the department would not want to pay a provider for neonatal intensive care if the facility was not certified to offer these services, or for costs that are not necessary in accordance with state and federal guidelines.

- Could these "Self Audits" be construed to include financial statement audits? In order to provide for a more efficient audit process, the department currently requires copies of financial statement audits to be submitted as a part of our facility cost reporting package.
- Since language in the bill prevents an employee of a state agency from requesting, reviewing or otherwise using one of the audit reports, We would strongly suggest language included which specifically exempts economy and efficiency audits, financial audits and certifications performed by private certification organizations such as JCAHO.

The department's safety officer commented under state administrative OSHA law, our department is expected to comply with OSHA regulations and is treated as if we were a private employer when it appears there has been non-compliance. Therefore, the positive features of this legislation which apply to private employers would also apply to DH&SS. It is not within the spirit of our preventive-oriented safety program to conceal safety or environmental information which had been discovered during internal audits. For instance, director safety designees will perform annual audits of each DH&SS facility and operation. Information from the audits will be recorded on safety inspection checklists. Director designees are encouraged to identify problem areas. Completed reports will be sent to the Safety and Risk Officer along with a report of corrective actions and a timetable for completion of each identified item. These are the type of reports an OSHA enforcement officer could ask to see if he/she were to perform an on-site safety inspection. If he/she were to cite us for an item identified on our internal inspection checklist which we had not corrected, this could hurt us in the future should the citation be argued before the Safety and Health Review Board. OSHA could use the report to show that the employer was aware of the problem and did not correct it. This is one of the elements they must prove to satisfy their "prima facie" case before the board.

Under this legislation, it appears as though we would have the opportunity to regard our internal audits as "privileged" and refuse to show them to an OSHA representative. Therefore, it could be more difficult for OSHA to successfully argue their position before the OSH Board in the case of a disputed citation. This is a pretty minor feature and its normally better to be completely up front with regulatory agencies regarding desired information.

# FISCAL NOTE

No. 3

STATE OF ALASKA  
1997 LEGISLATIVE SESSION

BILL NO. Bill Version: CSSB41(L&C)  
(S) Publish Date: 2/12/97

Revision Date: \_\_\_\_\_  
Title: Environmental & health/safety audits  
Sponsor: Senator Leman  
Requestor: Senate L&C

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

**EXPENDITURES/REVENUES:** (Thousands of Dollars)

OPERATING	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	0.0	0.0	0.0	0.0	0.0	0.0
<b>CAPITAL</b>						
<b>CHANGE IN REVENUE</b>	(55.8)	(55.8)	(55.8)	(55.8)	(55.8)	(55.8)
<b>FUND SOURCE #</b>	1004	1004	1004	1004	1004	1004

**FUNDING:** (Thousands of Dollars)

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

**POSITIONS:**

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY97) impact: \$ None

**ANALYSIS:** (Attach a separate page if necessary)

We believe CSSB 41 will cause federal OSHA to revoke our 18(e) certification. Since the process of de-certification will take some time, there will be a transition period where AKOSH will be required to comply with this legislation. Our strategy will be to turn all cases in which an employer claims privilege or immunity over to federal OSHA as we do not have adequate resources to handle the extensive investigations and attorney fees required to fully comply with this bill. This would result in a loss of unrestricted revenues as indicated on page two.

Prepared by: Alan W. Dwyer, Director *Alan W. Dwyer* Phone: 465-4855  
 Division: Labor, Standards & Safety Date: 2/11/97  
 Approved by Commissioner: Tom Cashen, Commissioner *Tom Cashen*  
 Agency: Department of Labor Date: 2/11/97

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If AKOSH were forced to pursue each case, significant expenses would be incurred. We could anticipate general fund expenditures as follows (no federal funds can be spent on these activities):

- 1) One new PFT Admin Clerk II will be required to document safety audits reported by employers and monitor the time frames allowed under CSSB 41.
- 2) Approximately 1,875 hours of work from existing Occupational Safety Compliance Officers will be required to provide facts and findings for the attorney. Each case will require approximately 75 hours to conduct the investigation, above and beyond the time required to perform the inspection, reducing the effectiveness of our OSH program by removing almost one FTE from our regular enforcement activities.
- 3) The Assistant Attorney General assigned to LS&S will work approximately 75 hours per case, reviewing files, preparing affidavits from employees, taking depositions, preparing briefs, conducting hearings, and representing the division in court. This also includes travel to areas outside of Anchorage.

Although it is impossible to determine the exact percentage, we have based these estimates on the assumption that 10 percent of employers will claim privilege and immunity when confronted with a request for their safety audit or a citation is issued. This percentage could go as high as 90%. Should CSSB 41 pass, the Department of Labor will lose their 18(e) certification which gives the State of Alaska exclusive inspection authority.

In FY96 AKOSH collected \$558.0 in unrestricted revenue generated by fines imposed on employers for violations of safety and health issues. If this bill is passed, it is estimated these revenues would be reduced by at least 10% due to the reduction of fines that AKOSH would be able to collect.

<b>Line 71000 - Personal Services</b>	<b>103.3</b>
1 PFT Admin Clerk II	
Salary	23.0
Benefits	11.2
Occupational Safety Compliance Officers	
(75 hrs/case, 25 cases per year, \$36.80/hr)	
Salary	50.2
Benefits	18.9
<b>Line 72000 - Travel</b>	<b>6.0</b>
Occupational Safety Compliance Officers	6.0
<b>Line 73000 - Contractual Services</b>	<b>194.3</b>
Professional Services - Attorney fees	187.5
(75 hrs/case, 25 cases per year, \$100.00/hr)	
- Attorney travel	6.0
Base phone & long distance charges	0.6
DP Chargeback	0.2
<b>Line 74000 - Commodities</b>	<b>1.0</b>
Office Supplies	1.0
<b>Line 75000 - Equipment</b>	<b>5.0</b>
Computer equipment & office furniture (FY98 One-time)	5.0
<b>TOTAL</b>	<b>309.6</b>

# FISCAL NOTE

STATE OF ALASKA  
1997 LEGISLATIVE SESSION

BILL NO. HCS CSSB 41 (JUD)

Revision Date: 04/14/97 Dept. Affected: Alaska Court System  
 Title: Environmental & Health Safety Audits BRU: Trial Courts  
 Sponsor: Sens. Leman, Paarca & Taylor Component: \_\_\_\_\_  
 Requestor: \_\_\_\_\_ COMPONENT SERIAL NO. 768

Expenditures/Revenues (Thousands of Dollars)

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

Fund Source (Thousands of Dollars)

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

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

Positions

Full-Time						
Part-Time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

See attached analysis.

Prepared by: C. S. Christensen III, Staff Counsel Phone: 264-8228  
 Agency: Alaska Court System Date: 04/14/97  
 Approved by: Stephanie J. Cole, Acting Administrative Director Date: 04/14/97  
 Agency: Alaska Court System

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Alaska Court System  
Fiscal Analysis  
HCS CSSB 41 (JUD)

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

An in-camera review of this nature can be extremely time consuming; many environmental audits are composed of tens of thousands of pages of documents. Cases in which an in-camera review is requested may require large amounts of time for pretrial proceedings. However, according to the Department of Law, the latest version of SB 41 can be expected to simplify the privilege process compared with earlier versions of the bill, and privilege cases may not show up in court for three to five years following enactment. Accordingly, this note does not speculate on costs. Should there be an impact, however, the court system may need to return to the legislature for funding.

Note that many privilege cases not involving the state will also be litigated, such as cases in which the plaintiff is a private citizen, an environmental organization, or a municipality. Accordingly, the court system will actually see far more cases than the cases which impact Law.

# FISCAL NOTE

STATE OF ALASKA  
1997 LEGISLATIVE SESSION

BILL NO. CSSB 41(JUD)

Revision Date: \_\_\_\_\_  
 Title: Relating to environmental audits to determine compliance with certain laws, permits, and regulations.  
 Sponsor: Leman  
 Requestor: Senate Judiciary

Dept. Affected: Health and Social Services  
 BRU: Medical Assistance  
 Component: Medicaid Facilities  
 COMPONENT SERIAL NO. 230  
 See also (SN#): \_\_\_\_\_

**Expenditures/Revenues:**

(Thousands of Dollars)

OPERATING	FY98	FY99	FY00	FY01	FY02	FY03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

CAPITAL EXPENDITURES						
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CHANGES IN REVENUES ( )						
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**FUND SOURCE**

(Thousands of Dollars)

FUND SOURCE	FY98	FY99	FY00	FY01	FY02	FY03
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (please specify)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

**POSITIONS:**

POSITIONS	FY98	FY99	FY00	FY01	FY02	FY03
FULL-TIME						
PART-TIME						
TEMPORARY						

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

**ANALYSIS:** (Attach a separate page if necessary)

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

Prepared by: Nancy Weller *DW*  
 Division: Medical Assistance  
 Approved by Commissioner: Karen Perdue, Commissioner  
 Agency: Department of Health & Social Services

Phone: 465-3355  
 Date: 03/10/97  
 Date: 3/10/97

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March 5, 1997  
*Via Facsimile and US Mail*

RECEIVED MAR 7 1997

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,

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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.

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  
President

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Senator Sean Parnell, Fax: 465-2278  
Senator Johnny Ellis, Fax: 465-2529  
Senator Dave Donley, Fax: 465-6595  
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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!"

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**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.

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.

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- **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 whistleblower 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 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?

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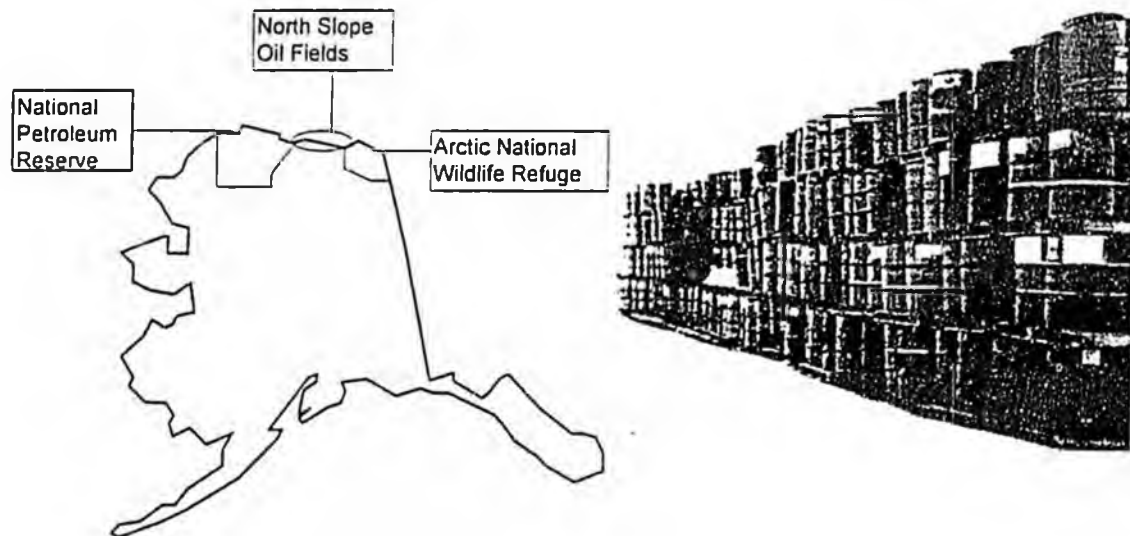
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# Poisoning the Well

Whistleblower Disclosures of Illegal  
Hazardous Waste Disposal on  
Alaska's North Slope



## EXECUTIVE SUMMARY



ALASKA FORUM FOR ENVIRONMENTAL RESPONSIBILITY

JANUARY 1997

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## THE ENDICOTT OIL FIELD

The Endicott oil field is the third largest of the seven main North Slope oil fields and is 57 percent owned by BP. BP Exploration, Alaska (BPXA) is the main developer of oil resources in the field. Endicott does not have wells capable of handling Class I industrial wastewater fluids. Endicott does have a Class II disposal well, designated as "P-18." Acceptable wastes injected into this well include crude oil, condensate from crude oil lines, well treatment fluids, and produced water (water that is pumped up along with crude).

## IMPROPER WASTE DISPOSAL AT BP'S P-18 DISPOSAL WELL

Despite key differences between Class I and Class II wells, the first of two separate but related incidents at Endicott indicates that BPXA managers and staff did not have a firm grasp of the distinction. This apparent "confusion" was fostered by a lack of record-keeping and lax regulatory oversight. Despite its assurances to the contrary, evidence suggests that BPXA and/or its contractors had, in fact, been disposing of Class I industrial wastes down Class II wells for at least two years, and possibly up to five years.

AOGCC summarized the P-18 incident as a misrouting of industrial wastewater to the P-18 well for a period of at least 18 months from 1993 to 1995. The summary relied exclusively on BPXA information and concluded that all injected materials were non-hazardous. Independent verification of this conclusion was not possible because consistent and accurate records, regular reporting and independent audits were not kept by BPXA nor apparently required by AOGCC.

## A WHISTLEBLOWER AT DOYON 15

Doyon Ltd., is an Athabaskan native corporation based in Fairbanks. Doyon's subsidiary, Doyon Drilling, Inc., J.V., operates five large-scale, mobile drilling rigs on the North Slope. Doyon Drilling provides drilling services for the Endicott field under a contract with BPXA.

The whistleblower (hereinafter referred to as "WB"<sup>1</sup>) began employment with Doyon Drilling on July 5, 1993 as a rockwasher on Doyon 15. WB received training in rockwashing, sampling, and annular injection as well as descriptions of regulatory guidelines on which materials can and cannot be injected down an oil well. WB has a total of 22 years experience in Alaska's oil industry.

"No one lives on the North Slope anyway."

On January 16, 1995, working on the swing shift, WB received orders to mix some 23 to 26, 55-gallon barrels of rig and shop waste into his rockwashing unit for disposal via annular injection into well 1-23. The wastes consisted of used oil, solvents, paints, paint thinners, hydraulic fluid,

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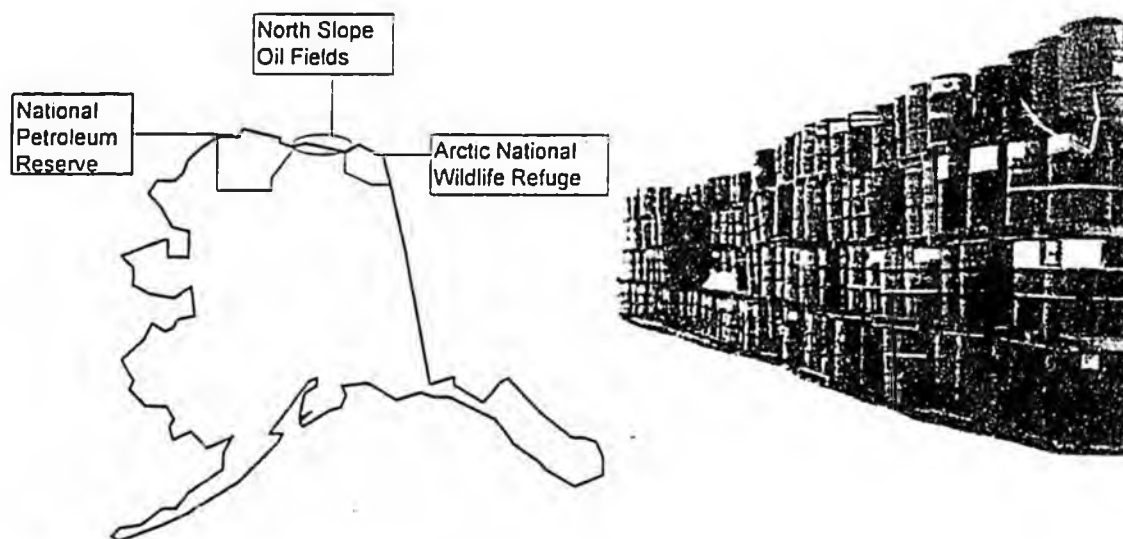
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Whistleblower Disclosures of Illegal  
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## EXECUTIVE SUMMARY



ALASKA FORUM FOR ENVIRONMENTAL RESPONSIBILITY

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## EXECUTIVE SUMMARY

One year has passed since the *Anchorage Daily News* reported the existence of a whistleblower who disclosed illegal hazardous waste injections into North Slope oil wells by Doyon Drilling Services., Ltd. The incidents took place at the Endicott oil field, which is operated by British Petroleum (BP).

This report provides the first detailed account of the illegal and environmentally destructive practices at Endicott. It also discusses the relevance of these illegal practices to the public debate over opening the Arctic National Wildlife Refuge or the National Petroleum Reserve in Alaska to oil development.

The breadth of violations, retaliatory acts against a whistleblower, and an on-going criminal investigation suggest that improper disposal of solvents and other toxic materials may be standard operating procedure on the North Slope. The incidents at Endicott also suggest a failure of regulatory oversight by state and federal agencies charged with enforcing environmental laws on the North Slope.

### **NORTH SLOPE UNDERGROUND INJECTION WELLS: DESCRIPTION AND REGULATORY STRUCTURE**

Underground injection wells are regulated by the Environmental Protection Agency (EPA). Injection wells can be divided into Class I wells and Class II wells. In Alaska, the Alaska Oil and Gas Conservation Commission (AOGCC) has signed a memorandum of agreement with EPA to oversee the Class II well program.

Class I wells are for disposal of industrial hazardous materials. Class I wells also exist for the injection of non-hazardous fluids near drinking water reserves. According to the EPA, Class I wells have a steel casing surrounded by cement that extends to the bottom of the well, and the well is subject to sophisticated and continuous monitoring.

Class II wells are specific to the oil and gas industry. In a Class II production well, fluids may be injected into the "annulus" surrounding the well bore. The annulus leads to a perforated area at the bottom of the well, which allows the fluids to disperse out horizontally into the stratum.

The general rule regarding Class II wells is that nothing may be injected back down the well that has not originated from the well. Thus, Class II fluids are generally mud and water. Additives are allowed to change mud viscosity or provide freeze protection.

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and glycol. WB refused to dispose of the waste because he recognized that environmental laws and BPXA's annular injection permit prohibited disposal of the waste in that manner. WB was subsequently berated by co-workers for his refusal and told that the improper disposal was of no consequence because "no one lives on the North Slope anyway."

From January to August 1995, WB continued to receive orders to dispose of non-Class II waste down Class II wells. WB refused to dispose of these wastes; other crew members did so instead. During this same period, WB also received repeated and increasingly aggressive threats to his safety and the safety of his children.

On several occasions between February and August 1995, WB informed Doyon management about the violations at Doyon 15 and that they had been on-going for five years. The managers initially acknowledged that the practice was wrong and suggested that they would "take care of it." They later informed WB that BPXA had okayed Doyon's injection of wastes. When Doyon's Personnel Department consulted with these same manager, they were told that the practices were proper. On August 31, WB informed BPXA managers of the improper practices at Doyon 15.

By early September, threats by co-workers to WB had intensified to include direct threats to his life. WB asked to go home a day early but was told by managers that the threats to him and his family were only jokes. Doyon's Personnel Department advised him that he needed a doctor's order before he could leave the rig early. If he left, such an act would be considered a voluntary quit. WB finally asked for paid leave from Doyon 15. This request was denied and he took vacation time instead so he would not have to return to the rig.

#### BPXA issues report on Doyon 15 waste handling practices

On September 25, 1995, BPXA completed an investigation of Doyon 15 waste handling practices. The investigation made these findings:

- Used oil, solvents, glycol, paint thinners and possible Chevron 325 stoddard solvent [a material listed as hazardous under the Resource Conservation and Recovery Act (RCRA)] were disposed of via annular injection from 1993 to August 1995.
- Doyon 15 crew members understood the practice to be waste disposal not freeze protection. The practice only occurred at night.
- BPXA and Doyon maintained inadequate documentation of injected materials.
- BPXA personnel claimed they were not aware of the improper disposal practices.

Shortly after AOGCC began an investigation into the violations in February 1996, EPA requested AOGCC suspend its investigation until EPA had completed its own criminal investigation. WB later testified before a federal grand jury. Other Doyon 15 crew members pled the Fifth Amendment and refused to give testimony to the grand jury. The federal criminal investigation is still on-going; no indictments have been brought to date.

In March 1996, Doyon 15 was shut down and all rig employees were laid off. When Doyon 15 recommenced operations in September 1996, the rockwashing unit remained closed because AOGCC had suspended annular injections on Endicott. WB's position was permanently eliminated by Doyon.

WB files and wins a complaint with U.S. Department of Labor.

In October 1995, WB filed a whistleblower complaint against Doyon Drilling. The complaint alleged threats and harassment as retaliation for his "protected activities" and requested an end to these adverse activities, damages, and attorneys fees.

The complaint was investigated by the Department of Labor's Wage and Hour Division, Seattle. The Department's investigator found WB to be a highly credible individual who understood the disposal was illegal and tried to correct the problem through his management. He further concluded that Doyon management largely ignored WB's concerns, that WB was harassed and intimidated by his co-workers, and that management did little to stop the harassment.

In August 1996, USDOL issued its decision: WB had made protected disclosures under the "environmental Acts" and had suffered resulting retaliation. The decision ordered that Doyon restore back pay and benefits to WB and offer him comparable employment. A cash settlement could replace back pay and reinstatement. Doyon was also ordered to cover WB's legal fees.

Doyon appealed the USDOL decision. WB subsequently settled his complaint with Doyon in December 1996. The terms of the settlement are confidential.

**IMPLICATIONS FOR OIL DEVELOPMENT OF THE ARCTIC NATIONAL WILDLIFE REFUGE AND THE NATIONAL PETROLEUM RESERVE IN ALASKA**

Since The *Exxon Valdez* disaster, the oil industry has portrayed itself as utilizing the latest technologies to minimize the impact of its operations. This public relations effort has emphasized the industry's environmental responsibility towards the North Slope environment. The incidents at the Endicott oil field suggest that the oil industry has presented the public and Congress with a one-sided, self-serving presentation of its practices.

In 1995, Congress held hearings regarding Arctic Refuge oil development. Alaska's congressional delegation offered the oil companies and their contractors a liberal opportunity to demonstrate their progressive environmental practices. Alaska's Senator Murkowski, chairman of the Senate Energy and Natural Resources Committee, invited Doyon to testify in July 1995. At the same time as WB was fighting to have Doyon take his concerns seriously, Doyon's general manager Randy Ruedrich testified about how improvements in drilling technology allow Arctic oil development in an environmentally sound manner. Ruedrich made no mention of hazardous waste disposal. Similar statements were made by representatives of ARCO, BP and Alaska's Division of Oil and Gas.

The incidents at the Endicott oil field suggest that a close examination of oil industry practices should precede any future development of the Arctic National Wildlife Refuge (ANWR) and/or the National Petroleum Reserve in Alaska (NPRA).

## CONCLUSION

The incidents of illegal injections of Class I hazardous wastes into Class II oil and gas wells on Endicott oil field may well be isolated events. However, the frequency of the practices at P-18 and Doyon 15, as well as the length of time (18 months for P-18 and up to five years for Doyon 15) suggest that injections of hazardous waste into oil wells may be widespread on the North Slope.

BPXA took the responsible course of action when it became aware of the P-18 and Doyon 15 practices. However, the incidents also underscore BPXA's failure to maintain records of underground waste injections and its failure to ensure that its contractors adhered to the letter of the law.

The Endicott oil field incidents also demonstrate a failure on the part of the regulatory agencies to effectively police the oil and gas industry on the North Slope. The regulatory agencies did not take the incidents seriously until after a whistleblower came forward -- despite retaliation by his co-workers and management and ultimately sacrificing his 22 year career -- to disclose illegal practices. Had an irresponsible operator chosen to conduct a less thorough investigation, or swept the incidents under the rug, the likelihood of substantial regulatory agency involvement is by no means certain. Indeed, the fact that the criminal investigation is still underway a year later suggests there may be far more to the incidents than the regulatory agencies initially suspected. Hopefully, the results of this investigation will demonstrate government's renewed interest in policing environmental practices on the North Slope.

The evidence suggests that the oil industry has not, in fact, proven environmentally responsible development of the North Slope. As the incidents at Endicott oil field show, illegal dumping of hazardous wastes occurred because of negligent and willful human failures, and a company's deliberate refusal to take the word of a concerned worker seriously. Clearly, a close examination of oil industry practices should precede any future development of ANWR and/or NPRA.

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### NOTE TO THE READER:

This report is based primarily on information obtained by Freedom of Information Act requests submitted to the US Department of Labor and public records disclosure requests submitted to the Alaska Oil and Gas Conservation Commission. The complete, documented text of this report is available for \$5.00 from the Alaska Forum for Environmental Responsibility or free on the world wide web:

P.O. Box 188, Valdez, AK 99686  
Phone:(907)835-5460/Fax:(907)835-5410  
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<http://www.accessone.com/~aferse>

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# Anchorage Daily News

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FORUM / LETTERS

Anchorage Daily News

## Partnering will not remove poison from the well

By STAN STEPHENS

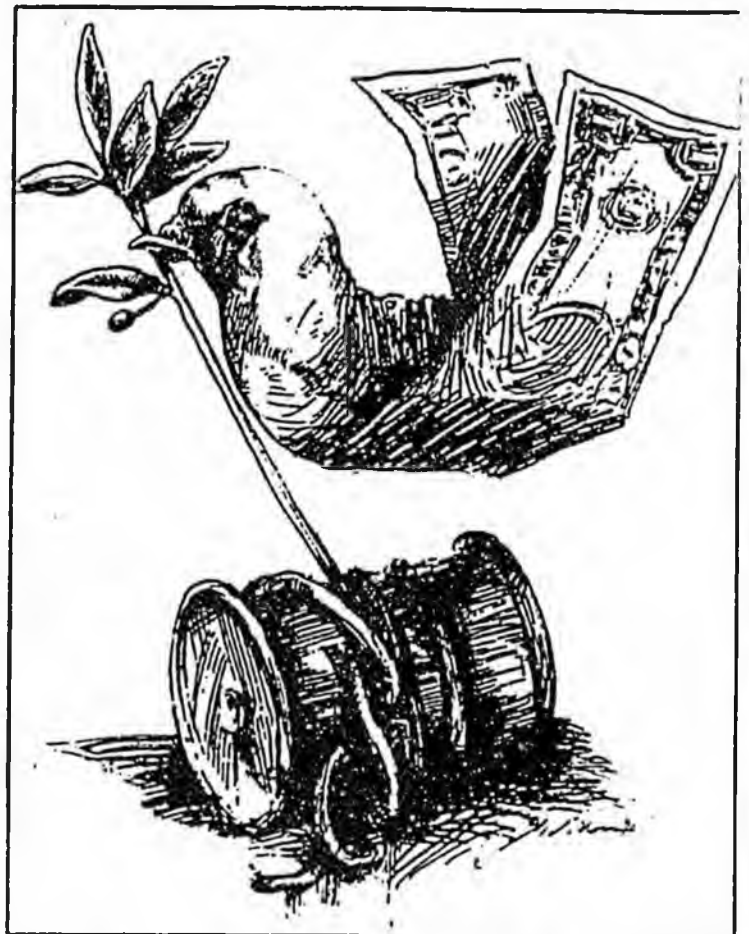
Last week, the Alaska Forum for Environmental Responsibility published "Poisoning the Well," a report about illegal waste disposal practices at British Petroleum's Endicott oil field on the North Slope. The report summarizes the story of a courageous whistleblower who refused to collaborate in the illegal and environmentally destructive practices.

Doyon Drilling, a BP Exploration (Alaska) 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.

This story surfaced briefly in the press in January 1996. Then, like so many other whistle-blower stories, it was forgotten. The Alaska Forum reviewed the record and discovered that although BP eventually investigated the incidents responsibly, the illegal practices never would have come to light if the whistle-blower had not stood up to peer pressure. He endured death threats from co-workers and sacrificed his 22-year career to do the right thing.

These events call into question the partnership that Gov. Tony Knowles has worked so hard to form between the oil industry and the State of Alaska. While the relationship between the oil industry and the residents of Alaska is at the highest level of openness that I can remember, the partnership still has a long way to go.

Everyone acknowledges the importance of oil to Alaska's economy. A government-indus-



try partnership is not only good business but is necessary for the healthy development of Alaska's oil industry. But "Poisoning the Well" tells the story of naked pursuit of profit at the expense of the environment.

As documented in the report, toxic wastes were illegally injected into oil wells to save Doyon and BP \$1,000 to \$1,500 per barrel of waste. One of the whistle-blower's fellow employees told him the improper disposal had been ongoing for five years and was of no consequence because "no one lives on the North Slope anyway." That's the last kind of statement one would expect to hear from a

subsidiary of an Alaska Native corporation.

Even as these events unfolded, Sen. Frank Murkowski heralded Endicott as a shining example of environmentally safe development. At the same time that the company was ignoring the whistle-blower's concerns, Doyon's general manager proclaimed to Congress in July 1995 that "environmental protection is an equally critical part of daily operations" on the North Slope.

BP says the Endicott pollution problems were isolated events. However, the volume and length of time of these illegal waste disposal practices suggest that environmentally degrading practices on the North Slope may be widespread. For a period of up to five years, 1990 to 1995, thousands of gallons of used glycol, paints, solvents, and other toxins were illegally re-injected at Endicott.

Where were the government regulators who were supposed to be ensuring environmentally safe operations? The record indicates that the U.S. Environmental Protection Agency and the Alaska Oil and Gas Conservation Commission did not take the first of two incidents seriously until after a whistle-blower came forward to disclose the illegal practices.

After more than a year of glacially paced criminal investigations, government officials have not yet held Doyon accountable nor specified firm corrective actions. It remains unclear what has been done to prevent future illegal practices.

Our state's leaders in Juneau and Washington, D.C., argue that a new "partnership" with Alaska's oil industry means we can "do it right" on the North Slope. But the evidence from Endicott is typical of the problems in the North Slope oil delivery system that

should keep us all concerned.

Credible government-industry partnerships require mutual trust. Events like those at Endicott undermine the public's trust in an environmentally responsible partnership on the North Slope. And the public will remain skeptical until Doyon is held accountable.

Contrary to a massive public relations campaign and the lobbying efforts of Alaska's congressional delegation, "Poisoning the Well" suggests that the oil industry has not yet proven environmentally responsible development on the North Slope. At Endicott "a supposed model of environmentally friendly development" illegal dumping of hazardous wastes occurred because of negligent and willful human failures.

Clearly, a close examination of oil industry practices and government oversight of the North Slope, the trans-Alaska oil pipeline and the marine transportation must precede any future development of the Arctic National Wildlife Refuge and/or the National Petroleum Reserve-Alaska. Development of those areas should not proceed until it is clear that practices such as Doyon's have ended and that strong government oversight is in place.

Alaska needs a true and honest partnership designed for the betterment of the oil industry and the State of Alaska. Top-flight industry practices and strong government oversight for the protection of this great land must take precedence over political moves designed for profit alone.

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□ Stan Stephens is the president of the Alaska Forum for Environmental Responsibility. "Poisoning the Well" can be obtained from the Alaska Forum at Box 188, Valdez, AK 99686, (907) 835-5460, or downloaded from the World Wide Web at <http://www.accessone.com/~afersea>.

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0-LS0299AF  
Lauterbach  
3/7/97

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

BY THE SENATE JUDICIARY COMMITTEE

Offered:  
Referred:

Sponsor(s): SENATORS LEMAN, Pearce, Taylor

A BILL

FOR AN ACT ENTITLED

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

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

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

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

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

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

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

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

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

22 **Article 5. Privileges and Immunities**

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

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

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

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

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

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

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

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

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

25 (4) a custodian of the audit results.

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

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

1 establishing the applicability of the privilege.

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

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

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

13 (i) This section may not be construed to

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

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

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

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

25 (2) receipt by the agency or municipality.

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

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

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

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

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

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

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

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

11 or

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

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

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

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

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

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

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

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

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

1 penalties stipulated in the agreement.

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

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

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

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

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

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

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

23 (b) The parts of an audit report that consist of information necessary to  
24 determine pipeline rates, tariffs, fares, or charges are not privileged and are admissible  
25 as evidence and subject to discovery in a proceeding relating to pipeline rates, tariffs,  
26 fares, or charges.

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

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

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

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

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

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

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

16 **Sec. 09.25.475. Voluntary disclosure; immunity.** (a) Except as provided by  
17 this section, an owner or operator who makes a voluntary disclosure of a violation of  
18 an environmental law is immune from an administrative or civil penalty for the  
19 violation disclosed, for a violation based on the facts disclosed, and for a violation  
20 discovered because of the disclosure that was unknown to the owner or operator  
21 making the disclosure.

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

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

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

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

30 (3) an investigation of the violation was not initiated or the violation  
31 was not independently detected by an agency with enforcement jurisdiction before the

1 disclosure was made using certified mail; under this paragraph, the agency has the  
2 burden of proving that an investigation of the violation was initiated or the violation  
3 was detected before receipt of the certified mail; and

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

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

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

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

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

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

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

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

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

31 (g) During the period between receipt of the audit notice required under

1 AS 09.25.450(b) and the specified end date of the audit, the department may not  
2 initiate an inspection, monitoring, or other investigative activity concerning the audited  
3 facility, operation, or property based on the receipt of a notice under AS 09.25.450.  
4 The department has the burden of proving that an inspection, monitoring, or other  
5 investigative activity concerning the audited facility, operation, or property initiated  
6 after receiving a notice under AS 09.25.450 was not initiated based on receiving the  
7 notice.

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

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

12 (1) seeking injunctive relief; or

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

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

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

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

20 (B) within the 36 months preceding the violation, repeatedly or  
21 continuously committed, at the same facility or associated facilities located in  
22 the state, the specific violation or a violation closely related to the violation for  
23 which the immunity is sought; or

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

27 (2) the violation was committed intentionally or knowingly by a  
28 member of the owner's or operator's management or an agent of the owner or operator  
29 and the owner's or operator's policies or failure to have in place systems reasonably  
30 designed to prevent the violation contributed materially to the occurrence of the  
31 violation; or

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

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

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

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

19 (3) remediation;

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

22 (5) the nature of the violation; and

23 (6) other relevant considerations.

24 **Sec. 09.25.485. Relationship to other recognized privileges.** AS 09.25.450 -  
25 09.25.490 do not limit, waive, or abrogate the scope or nature of a statutory or  
26 common law privilege, including the work product doctrine, the attorney-client  
27 privilege, and any other privilege recognized by a court with appropriate authority in  
28 this state.

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

30 (1) "audit report" means a report that includes each document and  
31 communication, other than those set out in AS 09.25.460, produced from an

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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;

1 memoranda and documents that evaluate or analyze all or part of the material  
2 contained in the audit report, including findings, conclusions, opinions,  
3 recommendations, and an audit implementation plan or tracking system to correct past  
4 noncompliance, improve current compliance, or prevent future noncompliance with an  
5 environmental law, and that is

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

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

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

12 (4) "environmental audit" means a voluntary, confidential, critical,  
13 internal, and retrospective review, self-evaluation, or analysis of current or past  
14 conduct, practices, and occurrences and their resulting consequences, including an  
15 assessment that is a part of the owner's or operator's compliance management system,  
16 whether or not conducted on a regular basis or in response to a particular event, by an  
17 owner or operator or by an employee or independent contractor of an owner or  
18 operator and is

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

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

23 (5) "environmental law" means

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

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

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

30 (7) "penalty" means an administrative or civil sanction imposed by the  
31 state to punish a person for a violation of a statute or rule; the term does not include

1 a technical or remedial provision ordered by a regulatory authority;

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

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

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

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

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

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

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

# FISCAL NOTE

STATE OF ALASKA  
1997 LEGISLATIVE SESSION

BILL NO. CSSB 41 (JUD)

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

**Expenditures/Revenues** (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES	71.7	71.7	71.7	35.9	35.9	35.9
TRAVEL	4.3	4.3	4.3	2.1	2.1	2.1
CONTRACTUAL	119.0	119.0	119.0	100.3	100.3	100.3
SUPPLIES	1.4	1.4	1.4	0.7	0.7	0.7
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>196.3</b>	<b>196.3</b>	<b>196.3</b>	<b>139.0</b>	<b>139.0</b>	<b>139.0</b>

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES ( )						
------------------------	--	--	--	--	--	--

**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	196.3	196.3	196.3	139.0	139.0	139.0
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
<b>TOTAL</b>	<b>196.3</b>	<b>196.3</b>	<b>196.3</b>	<b>139.0</b>	<b>139.0</b>	<b>139.0</b>

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

**POSITIONS**

FULL-TIME						
PART-TIME						
TEMPORARY						

**ANALYSIS:** (Attach a separate page if necessary)

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

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

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

Prepared by: Joan Kasson *Joan Kasson* Phone: 465-5370  
 Division: Administrative Services Division Date: 3/10/97  
 Approved by Commissioner: Bruce M. Botelho, Attorney General *Bruce M. Botelho* Date: 3/10/97  
 Agency: Department of Law

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ANALYSIS CONTINUATION:

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

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

**General Legal Issues Resulting in Fiscal Impact**

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

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

**Agency-Specific Issues Resulting in Fiscal Impact**

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

The Judiciary Committee Substitute amends Section 2 of the bill in AS 09.25.460(a), by deleting language that would have allowed the state to obtain objective facts even if they were contained in self audits, and in (b) by amending language that would have assured the state the right to obtain all audit information in pipeline tariff cases. These changes will result in a fiscal impact on the department, and specifically will require more expert witness time to assist us in tariff cases. Allowing objective facts to be withheld under the privilege will greatly complicate all cases involving self audits, and is a dramatic departure from current law. The new language on tariff cases creates further confusion over what information would be deemed "necessary to determine rates, tariffs, fares, or charges." The two sections in conjunction with each other will require additional expert witness time to determine if information in self audits is privileged or covered by an exception.

FISCAL NOTE

STATE OF ALASKA  
1997 LEGISLATIVE SESSION

BILL NO. CSSB 41 (JUD)

ANALYSIS CONTINUATION:

If information that could impact the tariff appears to have been withheld under the privilege it could cost the state millions to reconstruct the facts involved. For example, in the 1995 pipeline tariff case, one critical self audit cost the oil carriers \$9.8 million.

Department of Environmental Conservation

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

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

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

Many audits are performed on the Trans-Alaska Pipeline. This bill will require additional time for DNR and the Joint Pipeline Office to determine if information in these audits is privileged or covered by an exception.

**SUMMARY OF COSTS**

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

FY98 - FY00

Approximately 973 hours @ \$87/hour (2/3 FTE attorney)	\$84.7
Direct case travel	\$3.3
Expert witnesses	\$108.3
Total Costs	<u>\$196.3</u>

FY01 - FY03

Approximately 487 hours @ \$87/hour	\$42.4
Direct case travel	\$1.7
Expert witnesses	\$95.0
Total Costs	<u>\$139.0</u>

# SENATE COMMITTEE REPORT

DATE: 1/31/97

FURTHER: Finance

DATE TURNED  
IN TO OFFICE: 3/10/97

Judiciary Committee considered      SENATE BILL NO. 41

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

and recommends:

- be replaced with CS. SB 41 (JUD)
- adopt previous CS \_\_\_\_\_
- attached amendment(s)
- adopt Letter of Intent by \_\_\_\_\_ Committee
- further referral to the \_\_\_\_\_ Committee

- Senate Bill:
- same title
  - new title
- House Bill:
- same title
  - technical change
  - new: SCR# \_\_\_\_\_

SIGNING DO. PASS	DP	OTHER RECOMMENDATIONS*	NR	DNP	AM
<i>Sean Parnell</i>	<input checked="" type="checkbox"/>	<i>[Signature]</i>		<input checked="" type="checkbox"/>	
<i>Mike Miller</i>	<input checked="" type="checkbox"/>	<i>[Signature]</i>			
<i>George</i>	<input checked="" type="checkbox"/>	<i>[Signature]</i>			
CHAIR: <i>[Signature]</i>	<input checked="" type="checkbox"/>	CHAIR:			

**NEW FISCAL NOTE(S):**

Department	Date	Zero	Fiscal
<i>FNFC</i>			

**PREVIOUS FISCAL NOTE(S):\***

Department	Date	Zero	Fiscal

APPROPRIATION -- no fiscal note

\*include fiscal notes accompanying Governor's bill

# LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES  
LEGISLATIVE AFFAIRS AGENCY  
STATE OF ALASKA

(907) 465-3867 or 465-2450  
FAX (907) 465-2029  
Mail Stop 3101

130 Seward Street, Suite 409  
Juneau, Alaska 99601-2105

## MEMORANDUM

March 8, 1997

**SUBJECT:** Environmental Audits (Draft CSSB 41(JUD), "F" version)

**TO:** Senator Robin Taylor, Chair  
Senate Judiciary Committee  
Attn: Laura Chase

**FROM:** Terri Lauterbach *TLauterbach*  
Legislative Counsel

Enclosed is a draft CS for SB 41. As requested by your staff, the CS is in draft form so that you can review changes that may have been necessary in the large number of amendments passed by the committee.

Amendment #6: I have changed the word "disclosure" to "violation" for grammatical consistency. If you want to keep the word "disclosure", an alternative way to resolve the inconsistency would be to rewrite the amendment as follows:

(d) A party to a confidentiality agreement described in (b)(2) of this section who violates that agreement by **disclosing confidential material** is liable for damages caused by the disclosure and for. . . (etc.)

Amendment #9: I placed the language at a different place in the sentence so that I could avoid the use of "such" as a referent. Based on the description of the purpose of the amendment, I also added the past tense "posed" to language added at page 7, line 13 of the L&C CS.

Amendment #10: In light of this amendment, do you want to add "or administrative hearing officer" after "court" in Sec. 09.25.485?

Amendment #14: "Page 8, lines 20 - 22" appears to be the wrong location. I have, instead, deleted page 8, lines 27 - 31.

Senator Robin Taylor, Chair  
March 8, 1997  
Page 2

Amendment #16: For grammatical clarity, I reworded the amendment slightly.

Amendment #18: To provide for a complete thought, I have left in the phrase "contributed materially to the occurrence of the violation." The explanation of the amendment indicated to me that only "lack of prevention systems" should have been deleted.

Amendment #19: To clarify the ambiguity of "after," I have used the phrase "after taking into account the cost of" in two places. Otherwise, the word "after" could have been construed to mean that the savings had to have occurred after **the point in time** that the corrective measures were made. Wouldn't the savings have accrued during the time of noncompliance?

Amendment #20: I have placed this material as a new subsection (j) in AS 09.25.450 since it relates specifically to that section. I have also added a reference to this new material in AS 09.25.450(b). The use of the word "municipality" in this amendment makes me wonder if "the commissioner's office of the department" in (b) is proper. Are the notices always to be sent to DEC, not the municipality? If so, why should a municipality be able to approve electronic filing? If not, then there need to be additional changes to reflect the role of municipalities in receiving notices. There might also be other places in the bill where "department" is too narrow. For instance, how about AS 09.25.475(g), where inspections during the audit period are prohibited? This subsection currently refers only to DEC. What about municipal inspections? I recommend reviewing all uses of the word "department" in the bill to ensure that they are correct and do not inappropriately leave out municipalities.

Amendment #21: In light of Amendment #25, I have deleted "health or safety" twice in this amendment.

Amendment #24: The language at the end of paragraph (3) was garbled. I added what seemed to be missing by using language from AS 11.81.900(a)(3), which was cited as the source for the definitions in this amendment.

Amendment #25 and #26: To fully implement these two amendments, which narrow the scope of the bill to cover only environmental laws and define "department" to be the Department of Environmental Conservation, I have clarified the definition of "environmental law" in AS 09.25.490 so that the first part of the definition refers to laws implemented by the DEC. If you have in mind other "environmental" laws, such as those that may be enforced by DNR or Fish and Game, then this issue and the use of the word "department" throughout the bill may need further study.

Amendment #35: There is some redundancy added by this amendment, but I have not made any changes. If you want some, just let me know.

TML:glc  
97-146.glc  
Enclosure

Valdez Office

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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.

*Alaska Forum Comments on SB 41*  
*March 5, 1997*

Page 2

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.

*Alaska Forum Comments on SB 41*  
*March 5, 1997*

Page 3

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  
President

enclosures: -- "Testimony on SB 41 before the Senate Judiciary Committee February 24, 1997," Alaska Forum  
-- "Poisoning the Well: Whistleblower 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

Senator Leman's Amendment Package  
CSSB 41 (L&C)  
Revised: 2/26/97

M/Proctor 1-24 deleting 7:5

Ellis - inserts in 7:5

1-24  
passed

{ M/ Miller - Caj. Ellis - Amend. 7 :  
M/ Miller - Amend 8 - Caj./Ellis

AMENDMENT #1

OFFERED IN THE SENATE

TO: CSSB 41(L&C)

Page 3, line 7:

Following "certified mail":

Insert: "with return receipt requested"

Page 3 line 7:

Following "to the":

Insert: "commissioner's office of the"

Reasons: The certified mail receipt will establish that the owner or operator mailed the notice. The return receipt card will establish that the department received the notice. To avoid confusion and misplaced notices, the bill should provide a specific location where the notice is to be mailed.

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AMENDMENT # 2

OFFERED IN THE SENATE

TO: CSSB 41 (L&C)

Page 3, lines 12-13:

Change wording as follows:

Once initiated, an audit shall be completed within a reasonable time, but no longer than 90 days [30 DAYS] unless a longer period of time is agreed upon between the owner or operator and the department.

**Rationale:** Affected industries have commented that a 30 day limit is often not an adequate amount of time to complete a facility audit.

## AMENDMENT #3

OFFERED IN THE SENATE

TO: CSSB 41 (L&C)

Page 3, lines 30-31:

Change wording as follows:

A person claiming the privilege described in this section has the burden of establishing [PROVING] the applicability of the privilege.

**Rationale:** Affected industries have concerns about what would be entailed in "proving" the applicability of a privilege. The privilege established under 09.25.450 is a carefully defined statutory privilege. It is one which a regulated entity is entitled to, provided it meets all the relevant conditions. In addition, the sponsor has been advised by the Dept. of Law that a popular general reference book on evidence law (Wigmore's Treatise on Evidence) uses the phrase "establishment of privilege", so that the term "establish" can be appropriately used in this context.

AMENDMENT #4

OFFERED IN THE SENATE

TO: CSSB 41 (L&C)

Page 4, lines 23-27:

In subsection (b), delete the word "only":

(b) Disclosure of the part of an audit report or information consisting of confidential self-evaluation or analysis does not waive the privilege established by AS 09.25.450 if the disclosure is made [ONLY]  
(1) to address or correct a matter raised by the environmental or health and safety audit and is made [ONLY] to....

**Rationale:** the word "only" unnecessarily limits disclosure, e.g., there are other valid reasons for disclosing parts of the audit report beyond addressing or correcting violations raised in the audit report.

A M E N D M E N T

#5

OFFERED IN THE SENATE

TO: CSSB 41 (L&C)

Page 4, line 30:

Delete all material.

Insert: "(B) the owner or operator's lawyer or the  
lawyer's representative;"

Reasons: The CSSB 41 (L&C) allows privileged material to be disclosed to "a legal representative of the owner or operator" without waiving the privilege. The term "legal representative" could encompass a wide variety of legal relationships, including a power of attorney. The existing provision appears to refer to disclosures made to a lawyer. If so, to prevent potential abuses of the privilege, proposed subparagraph (B) should be amended to refer to a lawyer or the lawyer's representative (e.g., the lawyer's paralegal, secretary, investigator, or expert consultant).

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AMENDMENT # 6

OFFERED IN THE SENATE

TO: CSSB 41 (L&C)

Page 5, after line 22:

Add a new subsection (d) as follows:

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

**Rationale:** this liability language was present in SB 41 as introduced, but appears to have been inadvertently left out of the committee substitute (L&C).

AMENDMENT #7

OFFERED IN THE SENATE

TO: CSSB 41 (L&C)

Page 5, line 25:

Delete the reference to "objective facts" in 09.25.460 (a):

- (a) There is no privilege under AS 09.25.450 for that part of an audit report that contains the following:  
[ (1) OBJECTIVE FACTS; ]

**Rationale:** There is agreement that audit reports should not be used to shield the underlying facts. The legislative findings of SB 41 state, "the legislature does not intend that the parts of an audit report... that are privileged under this Act may be used to shield a person from liability under applicable laws and regulations by blocking access to relevant facts" [page 2, lines 7-10]. However, the placement of "objective facts" in the context of 09.25.460(a)(1) has the unintentional effect of severely undermining the privilege incentive, because it declares that privilege does not apply to any part of an audit report that contains objective facts. Of course, references to objective facts will naturally be found throughout all parts of a typical audit report. The existing language, if left unchanged, would encourage auditors to avoid any references to objective facts in the self-evaluation and analysis portion of the audit report. This would adversely affect the quality and usefulness of these reports as tools for bringing a regulated entity into full compliance.

AMENDMENT #8

OFFERED IN THE SENATE

TO: CSSB 41 (L&C)

Page 6, lines 15-16:

Reword subsection (b) as follows:

The parts of an audit report that consist of information necessary to determine pipeline rates, tariffs, fares, or charges are not privileged and are admissible as evidence and subject to discovery in a proceeding relating to pipeline rates, tariffs, fares, or charges. [AN AUDIT REPORT IS NOT PRIVILEGED AND IS ADMISSIBLE AS EVIDENCE AND SUBJECT TO DISCOVERY IN A PROCEEDING RELATING TO PIPELINE RATES, TARIFFS, FARES, OR CHARGES.]

**Rationale:** Under the existing wording, a regulated entity can not claim privilege for any part of an audit report in a proceeding that relates to pipeline rates, tariffs, fares, or charges. The new language states that only those parts of an audit report that are necessary to assist in determining rates, tariffs, fares or charges are nonprivileged.