ALASKA LEGISLATURE COMMITTEE FILES 1997-1998 8672
9562 SENATE JUDICIARY

AMENDMENT #9

TO: CSSB 41 (L&C)

OFFERED IN THE SENATE

Page 6, line 24:

Following "offsite":

Insert: "or the imminent or present threat of such injury"

Page 7, line 13:

Following "offsite":

Insert: ", or if the violation poses an imminent or present threat of such injury"

Reasons: CSSB 41(L&C) provides exceptions to the self-audit privilege and immunity when a violation causes "substantial injury to one or more persons at the site audited or to persons, property, or the environment offsite." The regulatory laws that seek to protect the public health and environment also seek to abate, correct, and prevent conditions that present an immediate threat of substantial injuries; for example, there are laws that regulate hazardous substances to prevent explosions, chlorine gas releases, the contamination of public water supply systems, and large oil spills. When a violation presents an imminent or present threat of substantial injury to the public health or the environment, a state agency or municipality may require access to privileged information for purposes of issuing emergency orders or seeking injunctive relief. A penalty may be appropriate if the violation posed a serious risk of substantial injury to the

public health or the environment.

With respect to federally-delegated programs, a state agency's inability to access privileged information or to seek penalties in circumstances where a violation substantially endangers the public health or the environment may result in the denial or withdrawal of federal approval. See, e.g., EPA, "Clean Air Act Final Interim Approval of the Operating Permits Program," 62 Fed. Reg. 1387, 1397 (1997) (To obtain final approval of Michigan's title V permit program, the Michigan Attorney General must certify that the state's audit privilege and immunity law does not affect "Michigan's authority to bring suit to restrain any person from engaging in any activity in violation of a permit that is presenting an imminent and substantial endangerment.").

The proposed amendments would help to ensure that regulatory agencies could pursue appropriate remedies when a violation substantially endangers the public health or the environment.

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Continued Need for Rule

ATF continues to believe that these regulations help to avoid accidental explosions on the premises of special fireworks plants.

Nature of Complaints Received

ATF has received no complaints about the regulating from members of the fireworks industry, and believe the regulations should remain in place.

Complexity of the Rule

The requirements were determined to be the minimum necessary to improve the safe storage of special fireworks.

Conflicting, Duplicative or Overlapping Federal Rules

None of the requirements of the regulation conflict, duplicate, or overlap other Federal rules.

Changes in Area Affected by Rule

The Regulatory Flexibility Act requires an agency to review all affected rules within ten years of the publication of the final rule. This is the first such review of final rule, T.D. ATF-293, since the effective date of March 7, 1990. ATF is unaware of any changes in the fireworks industry having a significant impact on the effectiveness of these regulations.

Public Participation

One of ATF's primary missions is protection of the public. To successfully accomplish this goal, we are requesting comments on the following questions concerning the amended regulations stemming from T.D. ATF-293:

(1) Have any of the changes in the regulations issued in T.D. ATF-293 caused any unnecessary burdens on business activities or practices?

(2) How could the existing regulations be altered to assure the same security, protection, and traceability of explosive materials, while further reducing expenses to industry members?

(3) Are there any areas of the explosives regulations which need strengthening? Are there any areas of the amendments contained in T.D. ATF-293 that need more stringent regulation?

(4) Are there any areas contained in the regulations issued in T.D. ATF-293 that need to be relaxed, rethought, or rewritten?

(5) Have there been any changes in the industry which would necessitate changes in these regulations?

Written comments must be received within the 90-day comment period. ATF will not recognize any material as confidential. Any materials submitted may be disclosed to the public. Any material which the transmitter considers to be confidential or inappropriate for disclosure should not be included in the suggestion. The name of the person submitting the suggestion is not exempt from disclosure.

Drafting Information

The author of this document is Mark D. Waller, Firearms and Explosives Regulatory Division, Bureau of Alcohol, Tobacco and Firearms.

List of Subjects in 27 CFR Part 55

Administrative practice and procedure, Authority delegations, Customs duties and inspection, Explosives, Hazardous materials, Imports, Penalties, Reporting and recordkeeping requirements, Safety, Security measures, Seizures and forfeitures, Transportation, and Warehouses.

Signed: November 27, 1996.

John W. Magaw,

Director.

Approved: December 16, 1996.

John P. Simpson,

Deputy Assistant Secretary, Regulatory, Tariff and Trade Enforcement.

[FR Doc. 97-593 Filed 1-9-97; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 70

[MI001; FRL-5674-1]

Clean Air Act Final Interim Approval of the Operating Permits Program; Michigan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final interim approval.

SUMMARY: The EPA is promulgating interim approval of the operating permits program submitted by the State of Michigan for the purpose of complying with Federal requirements for an approvable State program to issue operating permits to all major stationary sources, and to certain other sources.

EFFECTIVE DATE: February 10, 1997.

ADDRESSES: Copies of the State's submittal and other supporting information used in developing the final interim approval are available for inspection during normal business hours at the following location: EPA Region 5, Air and Radiation Division (AR-18J), 77 West Jackson Boulevard, Chicago, Illinois 60604.

FOR FURTHER INFORMATION CONTACT: Beth Valenziano, Permits and Grants Section (AR-18J), EPA, 77 West Jackson Boulevard, Chicago, Illinois 60604. (312) 886-2703. E-mail address: valenziano.beth@epamail.epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background and Purpose

Title V of the Clean Air Act Amendments of 1990 (title V), and the implementing regulations at 40 Code of Federal Regulations (CFR) part 70 require that States develop and submit operating permits programs to EPA by November 15, 1993, and that EPA act to approve or disapprove each program within 1 year after receiving the submittal. The EPA's program review occurs pursuant to section 502 of the Clean Air Act (Act) and the part 70 regulations, which together outline criteria for approval or disapproval. Where a program substantially, but not fully, meets the requirements of part 70, EPA may grant the program interim approval for a period of up to 2 years. If EPA has not fully approved a program by 2 years after the November 15, 1993 date, or by the expiration of the interim approval period, it must establish and implement a Federal program.

On June 24, 1996, EPA proposed interim approval of the operating permits program for the State of Michigan. See 61 FR 32391. The EPA received public comment from five organizations on the proposal and compiled a Technical Support Document (TSD) responding to the comments and briefly describing and clarifying aspects of the operating permits program. In this document EPA is taking final action to promulgate interim approval of the operating permits program for the State of Michigan.

II. Final Action and Implications

A. Analysis of State Submission and Response to Public Comments

The EPA received comments on a total of 12 topics from five organizations. The EPA's response to these comments as developed for the response to comments TSD is included in this section.

1. Indian Country

The EPA proposed that the interim approval of Michigan's operating permits program shall not extend to any sources of air pollution on Indian lands, including lands within the exterior boundaries of any Indian reservation in the State of Michigan. MDEQ commented that Michigan's part 70 authority should extend to some lands within the exterior boundaries of Indian reservations, and identifies a specific

source on an Indian reservation that the State believes is within its jurisdiction. MDEQ states that it intends to develop legal arguments to support its determination that lands within the exterior boundaries of reservations that have been sold for non-tribal uses are within the State's jurisdiction. MDEQ also states that it expects such sources to submit operating permit applications in accordance with the State regulations.

Because Michigan has not demonstrated the legal authority to regulate sources in Indian country, including sources on non-Indian owned fee lands within the exterior boundaries of Indian reservations, the final interim approval of Michigan's part 70 program does not extend to such sources. However, EPA will carefully consider any evaluation Michigan submits in the future regarding State authority over such sources. The EPA retains the authority to issue part 71 permits to all sources in Indian country until such time as EPA approves a part 70 program. Part 71 application submittal deadlines for Indian country are established in 40 CFR 71.4(b) and 40 CFR 71.5(a)(1), and will be no later than November 15, 1998. Any sources located in Indian country required to submit applications earlier than this date will be notified in accordance with the requirements of part 71. The EPA takes no position on the State seeking voluntary compliance with State permitting requirements in Indian country.

2. Delegation of State Program to Local Governments

The proposed interim approval of Michigan's part 70 program confirmed the State's authority to delegate the program to certain county governments, such as Wayne County. MDEQ asked EPA to clarify whether a delegation would require a part 70 program revision, and what the timing and content of any required program revision would be.

Title V of the Act and the part 70 regulations specify the elements of a State operating permits program. In addition to the criteria for the permit themselves, these elements address various program infrastructure and administration issues. Examples include the adequacy of the agency's legal authorities and staffing. Thus, the delegation of the program authorities to another agency would by its nature entail revision of the State's part 70 program.

40 CFR 70.4(i) requires that program revisions be approved by EPA before they become finally effective. However, EPA is developing a program revision process that will meet the requirements of 40 CFR 70.4(i) while also providing continuity as States modify and update their programs. Although the details of this process have yet to be established, this process will focus on ongoing cooperation between the State and EPA, with real-time evaluation of program revision efforts. The EPA will work with Michigan as this process is developed so that any program revision, including any delegation of the State program to a local agency, can take advantage of this approach.

The content of a revised part 70 program submittal to EPA would depend on the nature and scope of the actual delegation. The information provided to EPA should address the changes and additions that the delegation makes to the program that has already been approved by EPA. The State should review the program submittal requirements in 40 CFR 70.4 and determine what elements are necessary to address the delegation. For example, the submittal of State regulations would not be necessary if they are not revised; however, the adoption of any local regulations necessary for the delegation should be included in the submittal. Similarly, a revised legal opinion from the Attorney General would likely be needed to verify that the local agency has the authority to carry out its part 70 program responsibilities established by the delegation. The EPA will provide Michigan additional guidance as necessary to address the program revision requirements for any particular State delegation to a local agency.

3. Definition of Potential to Emit

As a condition of full approval, EPA proposed that Michigan must revise its definition of "potential to emit" to require that limits on potential to emit be federally enforceable. Two commenters noted that a recent court case (*Clean Air Implementation Project v. EPA*, no. 96–1224 (D.C. Cir. June 28, 1996)) vacated the federally enforceable requirement from the 40 CFR 70.2 definition of potential to emit. Both commenters stated that this issue should be removed from Michigan's list of interim approval issues. The EPA agrees with the commenters, and has removed this issue as a condition of full approval. The EPA intends to develop a rulemaking to address the enforceability requirements on potential to emit limits for the title V program, the New Source Review program, and the section 112 toxics program.

4. Research and Development (R&D) Activities

In the proposed interim approval of Michigan's part 70 program, EPA acknowledged the State's regulatory provision that allows R&D activities on the same contiguous site as manufacturing activities to be treated as a separate source for purposes of determining operating permit program applicability. Although EPA believes that R&D should be treated as having its own industrial grouping for purposes of determining major source status, EPA stated in the Michigan proposal that separate treatment will not exempt R&D facilities in all cases. This is because some R&D activities may be individually major, or because they may be a support facility that makes significant contributions to the product of a collocated major facility. One commenter noted the R&D discussions in the part 70 supplemental proposal preamble (60 FR 45556–45558), and asked EPA to clarify whether EPA maintains its position in the supplemental proposal regarding the applicability of the support facility test in the R&D context.

As discussed in the supplemental proposal preamble, EPA believes that R&D activities should not generally be considered support facilities to collocated industrial facilities, since the support provided is directed towards development of new processes or products and not to current production. However, if an activity does contribute to the ongoing product produced or service rendered at a facility in more than a de minimis manner, those activities should be considered part of the source for applicability purposes.

5. Exemptions From Major Source Determinations

The EPA proposed as a condition of full approval that Michigan must remove its exemptions of certain small activities from determining major source status. Two commenters objected to this interim approval issue. One commenter stated that there is no express regulatory requirement mandating that insignificant activities be considered in major source determinations under title V. The commenter also believes the inclusion of such activities is inconsistent with EPA's July 10, 1995 guidance memorandum entitled "White Paper for Streamlined Development of Part 70 Permit Applications".

Neither the applicability requirements in 40 CFR 70.3 nor the "major source" definition in 40 CFR 70.2 provide any exemptions for insignificant activities in determining major source status. The

concept of insignificant activities originates under 40 CFR 70.5(c), and only establishes reduced title V permit application requirements for activities defined as insignificant. 40 CFR 70.5(c) does not modify the title V applicability provisions, and specifically states that "an application may not omit information needed to determine the applicability of, or to impose, any applicable requirement." In addition, the White Paper provides guidance on the permit application requirements for insignificant activities; it does not address major source applicability considerations.

One commenter expressed concern that counting insignificant activities in major source determinations would be very burdensome. The commenter was also concerned that the use of engineering judgement in determining emissions from insignificant activities does not provide sources sufficient certainty and protection from lawsuits. The EPA does not agree that the calculation of emissions from insignificant activities need be a burdensome and resource intensive task. As discussed in the proposed interim approval of Michigan's part 70 program, EPA expects that such emissions would only be examined in those cases where the insignificant activity emissions might impact whether the source is major. In addition, sources and permitting authorities have significant discretion in determining the rigor of analysis necessary for calculating insignificant activity emissions. Such analysis may not even need to be performed on a source by source basis, and could instead establish a general emission level for a particular insignificant activity that can be used for all sources. For example, a permitting authority could determine that sources may assume 1,000 pounds of emissions from a particular insignificant activity. With respect to the commenter's concerns about protection from lawsuits, EPA sees no distinction between the emissions calculations for significant activities and insignificant activities. For example, a source with a potential to emit that is just under a title V applicability threshold should do what is necessary to ensure that the source indeed is not subject to the operating permits program, as additional emissions from either significant or insignificant activities could make the source major.

Another commenter stated that Michigan's rule is consistent with the actual application of major source determinations made throughout the country, and commented that other States are not including insignificant activities in determining applicability. The commenter also stated that there is no EPA guidance for determining emissions from such activities. The EPA is unaware of any other approved part 70 program that has regulatory exclusions for insignificant activities in determining a source's potential to emit. If EPA determines that a State's part 70 program is not being administered in accordance with part 70, EPA has the authority under 40 CFR 70.10 to require the State to correct the deficiencies. In addition, EPA has the authority to pursue enforcement actions against sources for violations of the Act, including the requirement to obtain a title V permit. With respect to the lack of EPA guidance for determining insignificant activity emissions, EPA generally issues emissions factor guidance on a source category basis. The EPA will consider developing guidance for any particular insignificant activities of concern that are not addressed in current guidance.

6. Certification of Compliance

The EPA proposed a condition for full approval requiring Michigan to adopt statutory or regulatory authority that ensures permit applications include a certification of compliance and a statement of the methods used for determining compliance. MDEQ commented that it will work with EPA to resolve this issue during the interim approval period. The EPA also agrees to work with MDEQ to resolve this issue, and would like to clarify that this is a condition of full approval because it is not clear that the underlying State requirements legally obligate sources to include the compliance certification requirements in their permit applications.[1]

Another commenter commented that Michigan's program does require applications to include compliance certifications, and states that this issue should be deleted. The following analysis addresses the commenter's arguments.

40 CFR 70.5(c)(9)(i) and (iv) require permit applications to include a statement of compliance for all applicable requirements. This statement must be certified by a responsible official in accordance with 40 CFR 70.5(d). Although Michigan's statute and regulations require applications to include a certification by a responsible official, they do not require applications to include a certified statement of compliance for all applicable requirements.

40 CFR 70.5(c)(9)(ii) requires the compliance certification to include a statement of the methods used for determining compliance. Although section 324.5507(1)(f)(ix) of Michigan's Natural Resources and Environmental Protection Act (NREPA) requires applications to include proposed compliance method information, the State provision does not associate this compliance method information to compliance certification requirements. The compliance certification provisions must therefore include a statement of the methods used for determining compliance. Of course, this does not preclude Michigan from expanding the scope of its current application requirement to serve this purpose if the State provides a means by which a source can certify that it made its compliance determination using its proposed compliance determination method.

40 CFR 70.5(c)(9)(iii) requires applications to include a schedule for submission of compliance certifications at least annually or more frequently if specified by the underlying requirement or the permitting authority. The EPA agrees that section 324.5507(1)(d) of NREPA satisfies this requirement and is clarifying in the final condition of full approval that this provision is not an issue.

7. Definition of Emergency

The EPA proposed as a condition of full approval that Michigan revise its definition of emergency in section 324.5527(1) of NREPA to ensure that the State's definition is not broader than that provided by 40 CFR 70.6(g)(1). Two commenters disagreed with this condition of full approval. Both commenters stated that the Michigan definition is not broader, and only clarifies what could be considered "sudden and reasonably unforeseeable events". The EPA has reevaluated this issue and agrees with the commenters that the State definition of emergency meets the requirements of 40 CFR 70.6(g).

The additional language in the State definition of emergency includes the following as events that could be considered an emergency: "war, strike, riot, catastrophe, or other condition as to which negligence on the part of the person was not the proximate cause". These situations are eligible for the affirmative defense only if they meet all the provisions of 40 CFR 70.6(g). Specifically, such events must arise from sudden and reasonably unforeseeable events beyond the control

[1] Despite this regulatory deficiency, the State application forms do include the compliance certification requirements.

of the source; require immediate corrective action to restore normal operation; and not include noncompliance to the extent caused by improperly designed equipment, lack of preventative maintenance, careless or improper operation, or operator error. Further, the emergency defense only applies to exceedances of technology based emission limitations that are due to unavoidable increases in emissions attributable to the emergency. These provisions are important qualifications, because the specific State examples would not qualify as emergencies in all situations. For example, exceedances at a source due to increased production would not qualify as an emergency even if the increase is due to additional demand caused by a strike at another source. Similarly, an exceedance at the source involved in a strike may not qualify as an emergency if the strike was not reasonably unforeseeable, or if the exceedance was not an unavoidable increase attributable to the strike. The EPA believes that the additional Michigan events are properly qualified because the State definition includes all of the requirements of 40 CFR 70.6(g). Therefore, EPA is removing this issue as a condition of full approval.

8. Source Category Limited Interim Approval

In its program submittal, the State of Michigan requested source category limited (SCL) interim approval of its 4 year permit issuance schedule. In the proposed interim approval notice for Michigan, EPA acknowledged Michigan's 4 year schedule as part of the State's permit fee sufficiency demonstration. However, EPA could only propose in the alternative the State's request for SCL interim approval because Michigan's regulations currently require a 3 year permit issuance schedule. MDEQ requested that EPA clarify the State's obligations for submitting a program revision once the 4 year schedule is incorporated into the State's regulations.

The EPA proposed SCL interim approval in the alternative so that a program revision would have been unnecessary if Michigan had been able to finalize and submit its rule revisions prior to this final action on Michigan's part 70 program. Because the State has not yet submitted the regulatory revision that would change the State permit issuance schedule from 3 to 4 years, this final action on Michigan's part 70 program fully approves the 3 year schedule contained in the current State regulations.

Once Michigan finalizes its 4 year issuance schedule, the State will be obligated to submit a part 70 program revision to EPA for SCL interim approval. Although 40 CFR 70.4(i) requires that program revisions be approved by EPA before they become finally effective, EPA expects that it will be able to quickly process Michigan's request for SCL interim approval. If the final 4 year schedule is identical to the draft rule that EPA proposed for SCL interim approval, EPA will be able to finalize SCL interim approval without having to repropose the action. If there are changes to the schedule, EPA would still be able to expedite the SCL interim approval through a direct final action. As discussed above in section II.A.2., EPA is also developing a program revision process that may help expedite the program revision process for this situation.

9. Startup, Shutdown, and Malfunction (SSM) Provisions

The EPA proposed as a condition of full approval that Michigan revise its SSM provisions to be consistent with the emergency defense provisions in 40 CFR 70.6(g), or adopt an enforcement discretion approach consistent with the Act. Two commenters expressed concern with this interim approval issue. MDEQ disagreed that the SSM rules affect the State's ability to enforce the requirements of title V, but agreed to work with EPA to address the issue during the interim approval period. The EPA believes it is important that MDEQ and EPA work together during the interim approval period, and commits to working with MDEQ to address this and other interim approval issues.

Another commenter stated that EPA's consideration of Michigan's SSM rules is too inflexible, as the SSM rules provide an affirmative defense only in narrowly defined and highly prescriptive circumstances. The commenter also believes that EPA overlooked the potential for environmental benefits resulting from the SSM requirements to use good air pollution control practices and implement preventative maintenance and malfunction abatement plans. Irrespective of the control and work practice provisions that Michigan's SSM rules require for sources to be eligible for the affirmative defense, EPA has no authority under its part 70 rules to approve an affirmative defense that is less stringent than that contained in 40 CFR 70.6(g). The commenter extolled the benefits of the safeguards contained in Michigan's SSM rules, but did not offer anything to counter EPA's finding that these rules are broader than 40 CFR 70.6(g) and are therefore inconsistent with the federal rule. As discussed in the Michigan proposal, however, EPA could also consider an enforcement discretion approach as a means for resolving this interim approval issue. Such an approach would allow Michigan to retain the specific SSM provisions that may provide environmental benefit.

The EPA would also like to clarify that the Michigan SSM regulations do not affect EPA's enforcement capabilities under the Act during the two year interim approval period. The EPA reserves the right to pursue enforcement of applicable requirements, in accordance with EPA's enforcement discretion policy, notwithstanding the existence of the State's SSM regulations. Similarly, the Michigan rules do not affect citizen suit rights under section 304 of the Act. The interim approval of Michigan's part 70 program establishes the mechanism for the State to issue federally enforceable part 70 permits; EPA will continue to implement the operating permits program in accordance with Title V of the Act and the implementing Federal regulations.

10. Environmental Audit Privilege and Immunity Law

The EPA proposed several conditions for full approval based on the enforcement deficiencies created by Michigan's Environmental Audit Privilege and Immunity Law (audit law), part 148 of NREPA. Four commenters disagreed with EPA's position that Michigan's audit law adversely affects Michigan's ability to comply with the enforcement requirements of part 70.[2]

MDEQ generally commented that Michigan's law does not affect the State's ability to enforce the requirements of title V. The Michigan State Senator sponsoring the bill that became Michigan's audit law also commented that the law does not adversely affect Michigan's authority to assure compliance with and enforce permits. Both commenters stated that regulated entities remain fully liable for any damages they cause, and self reporting data, agency inspections, and other information required by law is not privileged and remains available to the State and the public. However, both commenters supported the interim approval of Michigan's part 70 program, as it will allow the program to be implemented while EPA and MDEQ resolve these issues during the interim approval period.

For the reasons outlined in the Michigan proposal and as further discussed below, EPA remains

[2] One commenter also submitted comments on a fifth commenter's behalf.

concerned that Michigan's audit law affects the State's ability to meet the enforcement requirements of part 70. The EPA recognizes that Michigan may have a different interpretation of the provisions in the audit law, and has provided as an alternative condition for full approval that the State need only submit a revised title V Attorney General's opinion that addresses EPA's concerns and certifies that Michigan's operating permits program meets the part 70 requirements in light of the audit law. The EPA believes that a new Attorney General's opinion would be appropriate, as the Attorney General's opinion in the original program submittal to EPA was developed prior to the passage of the State audit law. The EPA appreciates Michigan's willingness to work with EPA during the interim approval period to resolve these issues.

The EPA also received extensive adverse comments from two law firms that represent nationwide trade organizations and industries. The following subsections address the issues raised by these commenters.[3]

a. Effect of the Michigan audit law on Michigan's enforcement authority.

The commenters stated that nothing in the Act or part 70 prohibits a State from establishing a new protection for audits, expanding existing privileges, providing an additional affirmative defense, or determining that criminal or civil prosecution is inappropriate in certain defined situations, such as those specified in the Michigan audit law.

The EPA disagrees. Section 502(b)(5)(E) of the Act lays out the minimum enforcement authorities which Congress required a State to have in order to secure Federal approval to implement and enforce a title V operating permits program. That section requires, as a condition of Federal approval, that a State have adequate authority to issue permits and assure compliance; to terminate or revoke such permits for cause; and to enforce permits, permit fee requirements and the requirement to obtain a permit, including authority to recover civil penalties in a maximum amount of not less than $10,000 per day for each violation and to provide appropriate criminal penalties. The part 70 implementing regulations, at 40 CFR 70.11, elaborate upon those authorities. Part 70 requires a State to have authority to issue emergency orders and seek injunctive relief (40 CFR 70.11(a) (1) and (2)), to assess civil and criminal penalties in a maximum amount of not less than $10,000 per day per violation (40 CFR 70.11(a)(3)), and to assess appropriate penalties (40 CFR 70.11(c)). Although neither title V nor part 70 expressly prohibits State audit privilege and/or immunity laws, the analysis in the proposed interim approval of Michigan's program shows how EPA believes the Michigan audit law interferes with Michigan's general enforcement authority and its civil penalty authority as required in title V and the part 70 implementing regulations so as to preclude full approval of Michigan's operating permits program.[4] For example, as EPA explained in the Michigan proposal, the immunity provisions of the Michigan audit law alter and in fact eliminate the State's authority to recover *any* civil penalties under the circumstances identified in the State law. *See* 61 FR 32394–32395. Moreover, the privilege provisions of the Michigan audit law prevent the State from obtaining potentially important information on whether a civil or criminal violation occurred or has been corrected. If the State, by virtue of such laws, surrenders its ability to thoroughly investigate potential violations or its discretion to assess appropriate penalties in the face of violations, then the State's fundamental enforcement authority is significantly compromised. The EPA believes that this is the case with the Michigan audit law.

In a similar vein, the commenters argue that the State of Michigan has the general authorities enumerated in section 502(b)(5)(E) and 40 CFR 70.11 to enforce permits, permit fee requirements and the requirement to obtain a permit and to recover civil and criminal penalties in a maximum amount of not less than $10,000 per day of violation, and that nothing in the text of section 502(b)(5)(E) of the Act or the part 70 regulations authorizes EPA to consider the effect of State laws of general applicability on a State's title V civil and criminal enforcement authorities. The commenters further argue that the logical corollary of EPA's proposed action with respect to the Michigan audit law is that *every* State procedural and evidentiary rule must be evaluated and amended whenever EPA believes that it could in some fashion, directly or indirectly, interfere with environmental enforcement.

Laws of general applicability are an appropriate subject for EPA review as is evident from the language of the part 70 regulations themselves. The regulations require that a State applying for a title V operating permits program include copies of "all applicable State or local statutes and regulations including those governing State administrative procedures that either authorize the part 70 program *or restrict its implementation*." 40 CFR 70.4(b)(2) (emphasis added). The regulations also require a legal opinion from the State Attorney General asserting that the laws of the State provide adequate authority to carry out "all aspects of the program." 40 CFR 70.4(b)(3). It is certainly EPA's expectation that, in issuing such a legal opinion, the Attorney General is certifying that no State laws, even laws of general applicability or laws of evidence, interfere with the State's authority to administer and enforce the title V program. *See* 59 FR 47105, 47108 (September 14, 1994) (requiring Oregon to revise or clarify meaning of criminal statute appearing to limit criminal liability of corporations as a condition of full title V approval); 59 FR 61820, 61825 (December 2, 1994) (accepting Oregon Attorney General's opinion regarding effect of statute).[5]

Both commenters also argued that the Michigan audit law does not interfere with the enforcement requirements of title V because it is qualified in a number of important respects. The commenters note that the Michigan audit law does not offer protection from disclosure for information obtained by observation, sampling, or monitoring by any regulatory agency; machinery and equipment maintenance records; information legally obtained independent of the environmental audit; and information required by law to be collected, developed, reported or otherwise made available to a government agency. *See* section

[3] These commenters also commented on various EPA documents, including the memorandum entitled "Effect of Audit Immunity/Privilege Laws on States' Ability to Enforce Title V Requirements", April 5, 1996, and the policy entitled "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations", December 22, 1995. These comments are addressed to the extent that they are relevant to EPA's action on Michigan's title V operating permits program.

[4] In addition, part 70 does not provide for any affirmative defenses beyond that provided by the emergency defense provisions in 40 CFR 70.6(g). See subpart II.A.9. of this notice regarding Michigan's affirmative defense for startups, shutdowns, and malfunctions.

[5] One commenter argues that section 116 of the Act bars EPA from seeking to preempt State audit privilege and/or immunity laws. Section 116 states that, subject to limited exceptions, nothing in the Act shall preclude or deny the right of any State to adopt or enforce emissions standards or limitations or requirements respecting the control or abatement of air pollution "except where such emission standard or limitation is less stringent than required by the Clean Air Act." Such an interpretation would mean that EPA had no authority to disapprove any State enforcement provisions as a condition of title V approval. Section 502(b)(5)(E), which requires EPA to promulgate minimum enforcement authorities required for approval of a State title V program, clearly belies such an argument.

14802(3), part 148 of NREPA. The commenters state that the privilege is further limited because it only applies to an environmental audit report as defined in the Michigan audit law. In addition, the commenters state that the immunity provisions in the Michigan audit law are limited by the provisions in section 14809 of NREPA, which, among other things, require the source to promptly disclose violations, make a good faith effort to achieve compliance, pursue compliance with due diligence, and promptly correct the noncompliance.

The EPA noted in the proposed interim approval of Michigan's program that, although the Michigan audit law appears to contain several exemptions from the otherwise broad scope of the privilege protection, EPA is unable to determine the extent to which the exemptions limit the application of the privilege. In other words, the extent to which evidence of violations of title V permits and permit program requirements would be exempted from the privilege provisions of the Michigan audit law is not clear. For example, the Michigan audit law appears to provide privilege protection for a source that determines through an environmental audit that it is operating without a title V permit. This violation appears eligible for the privilege because part 70 does not have any source notification requirements prior to the submittal of the permit application that would exclude this violation from the privilege provisions. The EPA does not agree with the commenters' assertion that the privilege is further limited by the definition of an environmental audit report. The Michigan audit law broadly defines such a report to include any documents created as a result of an environmental audit, such as supporting information and implementation plans that address correcting violations and improving current compliance. In addition, the Michigan audit law's exemptions from privilege protection do not appear to apply to the penalty immunity in section 14809, part 148 of NREPA. Therefore, it appears that any violation discovered during an environmental audit, regardless of whether it is eligible for the privilege, is eligible for the immunity as provided in section 14809. Despite the limitations on the scope of the State's immunity provisions imposed by the requirement that disclosure be "voluntary", EPA believes that application of the immunity provisions is so broad that it potentially could apply to any title V violation. Because the privilege and immunity exemptions could apply to title V requirements, EPA must therefore infer that there could be violations at a title V source discovered through an environmental audit that would be entitled to the privilege or immunity provided by the Michigan audit law. The EPA again notes that Michigan may have a different interpretation of its audit law, in which case an Attorney General's opinion may help to resolve these interim approval issues.

The commenters also take issue with EPA's interpretation of the title V and part 70 requirements for enforcement authority, as evidenced in the April 5, 1996 memorandum entitled "Effect of Audit Immunity/Privilege Laws on States' Ability to Enforce Title V Requirements" (hereinafter, the "April 5 Title V Memorandum") and the proposed interim approval of Michigan's part 70 program. The commenters argue that EPA's interpretation and application of the title V enforcement requirements improperly interferes with the States' role as independent sovereigns, improperly divests States of their primary responsibility for implementing and enforcing the Act, and conflicts with the Clinton Administration's stated policy to allow States to experiment with alternative approaches to achieve environmental protection. The commenters further argue that the determination of the Michigan legislature that criminal or civil penalties are inappropriate under the circumstances set forth in the Michigan audit law is within the statutory boundaries and flexibility provided by the Act. The commenters continue that the immunity provisions of the Michigan audit law reflect the Michigan legislature's judgment as to the "appropriate" penalty for companies that voluntarily disclose and correct instances of environmental noncompliance and reflect a reasonable allocation of the State's enforcement resources.

The EPA agrees that, in enacting the Act, Congress believed that States and local governments should have the primary responsibility for controlling air pollution at its source. *See* Section 101(a)(3) of the Act. The EPA also agrees with the commenters that the States are to be given broad flexibility to select alternative means to achieve the minimum Federal requirements established in the Act by Congress and by EPA in the part 70 regulations, and fully supports State experimentation to achieve greater compliance with environmental laws. Such flexibility and experimentation, however, must be, as the commenters acknowledge, *within* the bounds of the statutes enacted by Congress and the implementing regulations promulgated by EPA. It cannot cancel out the requirement that States must meet some minimum Federal requirements as a condition of Federal approval of their programs.

In the case of the operating permits program, those minimum Federal requirements are set forth in title V and the part 70 regulations. It is these requirements that EPA is insisting that the State of Michigan meet as a condition of full approval of its title V program. In short, EPA does not believe that the Michigan title V program is within the statutory boundaries established by Congress or the flexibility provided by the Act because the Michigan audit law would limit the enforcement authority Congress and EPA required States to have as a condition of Federal approval.

Moreover, the commenters' argument that the Michigan audit law governs areas of law traditionally committed to States in their role as independent sovereigns—if taken to its logical conclusion—would mean that a State could not be required to have any civil or criminal penalty authority to get approval for a title V program. It is an argument that goes to the validity of section 502(b)(5)(E) and 40 CFR 70.11 themselves and therefore is untimely in this context. As stated above, Congress through title V, and EPA through the part 70 implementing regulations, required States to satisfy certain minimum requirements for enforcement authority as a condition of Federal approval of a Clean Air Act operating permits program. By conditioning full approval of the Michigan title V program on changes to the Michigan audit law or a demonstration by the State satisfactory to EPA that the Michigan audit law does not interfere with the enforcement requirements of title V, EPA is simply seeking to assure that Michigan has the required enforcement authorities before receiving Federal approval of its program. *Cf. Commonwealth of Virginia* v. *Browner*, 80 F.3d 869, 880 (4th Cir. 1996) (in rejecting Virginia's argument that requiring the State to change its judicial standing rules as a condition of title V approval violated State's sovereignty, the Court stated: "Even assuming *arguendo* the accuracy of Virginia's assertion that its standing rules are within the core of its sovereignty, we find no constitutional violation because federal law 'may, indeed, be designed to induce state action in areas that would otherwise be beyond Congress' regulatory authority.'" *citing FERC* v. *Mississippi*, 456 U.S. 742, 766 (1982)).

The commenters also assert that EPA's use of its title V program approval authority to "force" States to modify their audit privilege and/or immunity legislation is contrary to Congress' general expression of intent against the automatic use of audit reports for enforcement of the Act, as expressed in the Joint Explanatory Statement of the Conference Committee Report for the 1990 Amendments, S. Conf. Rep. 101–952, 101st Cong. 2d Sess. 335, 348 (Oct. 26, 1990), *reprinted in* Legislative History at 941–42, 955, 1798. The commenters further assert that Michigan's decision to provide qualified audit immunity is consistent with that Congressional intent.

As an initial matter, EPA disagrees that it is using the title V approval process to "force" States to modify their audit legislation. Instead, as stated above, EPA is simply analyzing to what extent the audit privilege and/or immunity laws of a particular State compromise the enforcement authorities required by Congress in title V and interpreted by EPA through the part 70 regulations, as a condition of Federal approval of the State's operating permits program.

With respect to the issue of Congress' intent, the language from the Conference Report cited by the commenters does not clearly express a desire that audit reports not be used for enforcement of the Act requirements. Rather, the text expresses some general support for the concept of auditing and a desire that the *criminal penalties* of section 113(c) "should not be applied in a situation where a person, acting in good faith, promptly reports the results of an audit and promptly acts to correct any deviation. Knowledge gained by an individual solely in conducting an audit or while attempting to correct deficiencies identified in an audit or the audit report should not *ordinarily* form the basis for intent which results in criminal penalties." (emphasis added). The legislative history merely indicates that the circumstances involving violations discovered through an audit report and voluntarily disclosed by the company will generally not meet the requirements for criminal liability. Importantly, Congress did not in any way suggest that a company which self-disclosed violations discovered through an environmental audit should be immune from civil penalties. In any case, when Congress amended the Act in 1990, there were no audit privilege and/or immunity laws on the books in any State. Any legislative history on auditing and enforcement from that period must be read in light of that reality. EPA does not believe Congress intended that the growth of environmental auditing—in itself a laudable goal fully supported by EPA—comes at the expense of the enforcement of environmental laws.[6] If Congress had wished to give special status to self-disclosed violations detected during an environmental compliance audit or to prohibit the use for general enforcement purposes of audits conducted under the Act and EPA approved programs, Congress could have done so in the language of the 1990 amendments. If anything, the legislative history of the Act is evidence of Congress' intent that such incentives for audits should be a basis for the exercise of prosecutorial discretion, and not a legislative grant of immunity or protection from disclosure.

The commenters also argue that Congress intended to vest the States with discretion in enforcing title V permit requirements and that the part 70 regulations merely provide that penalties assessed under a title V program must be "appropriate" to the violation. Nothing requires a State to obtain a penalty for every violation or prohibits a State from rewarding good actors who identify, disclose and correct violations, the commenters continue.

The EPA agrees that a State is not required to collect a penalty for every violation or is precluded from using its discretion to reward companies that conduct environmental audits and disclose and correct any violations discovered through such an audit. The EPA disagrees, however, that the only inquiry for title V approval is whether a State has authority to assess "appropriate" penalties. The part 70 regulations first state that civil and criminal fines must be recoverable "in a maximum amount of *not less than $10,000 per day per violation.*" 40 CFR 70.11(a)(3)(i)–(iii) (emphasis added).[7] Section 70.11(c) then provides that "[a] civil penalty or criminal fine assessed, sought, or agreed upon by the permitting authority under paragraph (a)(3) of this section shall be appropriate *to the violation.*" (emphasis added). By interpreting title V and part 70 to require only that States have authority to assess "appropriate" penalties, the commenters are reading out of the regulations the independent requirement that States have the authority to assess civil and criminal penalties of an amount not less than $10,000 per day per violation. Read together, 40 CFR 70.11(a)(3) and 70.11(c) require that a State have authority to assess a civil or criminal penalty of up to $10,000 per day per violation and that, in addition, the penalty assessed in any particular case be "appropriate" to the violation at issue. Thus, EPA agrees with the commenters that it is within Michigan's discretion not to impose the statutory maximum penalty for violations as to which a lesser penalty is appropriate or to determine that criminal or civil prosecution is inappropriate under the facts and circumstances of a particular case so long as the State has the *authority* to assess penalties for each day of violation. The legislative history cited by the commenters in support of their position is, in fact, consistent with EPA's position on this issue. *See* Legislative History at 5815 ("states are not going to be required to impose these minimum fines of $10,000 for permit violations. Instead, the bill is revised to make clear that states shall ensure that they have the *authority* to impose this. It is not mandated, it is authority.") (emphasis added).

Several commenters stated that section 113(e) of the Act only sets forth penalty factors that EPA or a Federal court must consider in imposing civil penalties for noncompliance with the Act, that section 113(e) has no bearing on EPA's authority to approve or disapprove State title V programs, and that nothing in section 113, title V or part 70 authorizes EPA to condition approval of a State's title V permit program on the State's ability to consider penalty factors comparable to those set out in section 113(e). The commenters further assert that, although section 113(e) is inapplicable, section 113(a) authorizes EPA in certain defined circumstances to take appropriate action, namely, filing an action against a facility where EPA believes the State's response was inadequate. This back-up

[6] That distinction is also reflected in EPA's Self-Disclosure policy, which offers significant incentives for businesses to audit and self-disclose violations, while at the same time retaining safeguards to ensure the protection of public health and the environment.

[7] One commenter appears to assert that a State need only have the authority to assess "appropriate" criminal penalties. In doing so, the commenter ignores the clear language of the part 70 regulations. Section 502(b)(5)(E) requires States to have authority to "recover civil penalties in a maximum amount of not less than $10,000 per day for each violation, and provide appropriate criminal penalties." In promulgating part 70, EPA determined that to provide "appropriate criminal penalties" for purposes of title V approval, a State must have authority to issue criminal penalties in a maximum amount of not less than $10,000 per day per violation. *See* 40 CFR 70.11(a)(3)(ii) and (iii). If the commenter believes that the enforcement authorities enumerated in the part 70 regulations, including the requirement for criminal penalty authority of up to $10,000 per day per violation, are excessive or in any way inconsistent with the statutory authorities, the commenter should have challenged the part 70 regulations at the time of promulgation in 1992.

authority, and not wholesale invalidation of a State's title V permits program, the commenters continue, is EPA's tool for ensuring to its own satisfaction that State audit legislation does not allow egregious Act violations to go unsanctioned. In any event, one commenter asserts that the Michigan audit law does take into account a violator's full compliance history in establishing the disclosure and immunity provisions.

The EPA agrees that the purpose of section 113(e) is, as the commenters assert, to set forth factors which EPA and the Federal courts must consider in assessing civil penalties under the Act. The EPA believes, however, that the section 113(e) factors can also serve as guidance in determining what civil penalty authority is minimally necessary in a State title V program.

In order for a State to have the authority to assess penalties that are "appropriate" to the violation in any particular case as required by 40 CFR 70.11(c), a State must have, in addition to the authority to assess a penalty of at least $10,000 per day per violation, the authority to consider mitigating or aggravating factors. In enacting section 113(e), Congress set forth factors it believed EPA and Federal judicial and administrative courts should consider in determining an appropriate penalty under the specific facts and circumstances before it. Although EPA believes that the factors enumerated by Congress in section 113(e) are the most fundamental, EPA believes that States may consider other factors as well. To the extent that a State has surrendered its ability to consider factors such as those set forth in section 113(e), EPA believes that a State does not have adequate authority, on a case-by-case basis, to collect penalties that are "appropriate" to the violation, as required by 40 CFR 70.11(c).

Industry commenters argue that since the section 113(e) factors do not apply to State programs, it must follow that Congress did not prescribe factors a State must apply in assessing "appropriate" penalties under title V, and that a State must therefore be given full approval as long as it possesses "appropriate" enforcement authority. As explained above, the question for EPA at the program approval stage is not how the State will exercise its enforcement discretion to assess penalties in any particular case. Rather, it is whether the State has sufficient authority to assess appropriate penalties in every case. Before granting full approval to a title V program, EPA must ensure, first, that the State has the general authority to assess penalties up to the amounts specified in section 70.11. The EPA must also ensure that the State has authority to consider factors, similar to those in section 113(e), such that the penalty actually assessed in any case may be appropriate to the violation. Because the immunity provisions of the Michigan audit law preclude the State from considering the factors set forth in section 113(e) or any other factors in determining an "appropriate" penalty in cases in which the source has disclosed and corrected violations discovered in an environmental audit, EPA believes that Michigan lacks this authority. The EPA also disagrees with the commenters' assertion that EPA's sole remedy where EPA believes a State does not have adequate enforcement authority is to take its own enforcement actions to address violations in that State. Although EPA does file Federal actions where the State fails to take enforcement action or where State action is inadequate to address a particular violation, before approving a State title V program EPA must also ensure that the State has demonstrated the capacity to administer and fully enforce the program as required by law and regulation. If Federal action were the only remedy for situations in which a State does not possess adequate enforcement authority, there would have been no need for Congress to direct EPA to promulgate rules setting forth minimum enforcement requirements for Federal approval of a State operating permits program. *See* 59 FR 61825 (rejecting similar comment in acting on Oregon's title V program).

Finally, regardless of one commenter's assertion that the Michigan audit law does take into account a violator's full compliance history in establishing the disclosure and immunity provisions, it is EPA's position that the Michigan audit law nonetheless prevents consideration of other critical factors in determining appropriate civil penalties, including but not limited to serious harm or risk of harm to the public or the environment, and substantial economic benefit to the violator. To the extent the Michigan audit law prevents consideration of mitigating or aggravating factors, EPA believes that Michigan has surrendered its authority to assess appropriate penalties as required by section 502(b)(5)(E) of the Act and 40 CFR 70.11.

The commenters stated that EPA's approach on State audit privilege and/or immunity laws is bad policy and not supported by empirical evidence. The commenters expressed strong support for environmental auditing as a means of obtaining compliance with increasingly complex environmental requirements. These commenters argue that EPA's reaction against such audit statutes is a "knee-jerk" reaction that ignores the potentially huge benefits that these laws offer. EPA has wrongly concluded, the commenters continue, that the existence of a limited and qualified affirmative defense to penalties for violations discovered through environmental audits and protection for information in audit reports weakens Michigan's authority to enforce the law or to ensure compliance, and that the evidence to date in other States with such laws shows in fact that audit privilege and/or immunity legislation encourages self-correction and increased compliance. At the same time, the commenters argue, EPA has not cited to any specific instance in which the Michigan audit law or some other State audit privilege and/or immunity law has compromised or inhibited enforcement of the Act or a title V permit program.

The EPA has expressed strong support for incentives which encourage responsible companies to audit to prevent noncompliance and to disclose and correct any violations that do occur. *See, e.g.*, EPA's Self-Disclosure Policy. The issue involved in this Federal Register action, however, is not whether environmental auditing is good or bad policy. Rather, the issue is whether the Michigan audit law, in offering privilege and immunity to companies conducting environmental audits, so deprives the State of its authority to take enforcement action for violations of title V requirements such that the State does not have the necessary authority required for full title V approval.

Moreover, EPA believes that it is premature at this point to expect significant empirical evidence to document whether environmental audit privilege and/or immunity laws enhance or impede environmental compliance. Most of the State audit statutes are little more than one year old and only a few States have issued permits under approved title V programs. In any event, EPA is aware of several on-going environmental enforcement actions in certain States with audit privilege and/or immunity laws in which the audit privilege appears to be interfering with prosecutors' efforts to obtain and utilize certain evidence.[8]

[8] The confidentiality prerequisites that attach to all on-going enforcement actions, however, prevent the Agency from revealing additional details at this time.

The commenters go on to argue that the reasoning set forth in the April 5 Title V Memorandum and the proposed interim approval of Michigan's program could have far-reaching and unintended effects on the relationship between EPA and States in the implementation of the Act and other environmental laws such as approvals of State Implementation Plans and State programs under the Clean Water Act and Resource Conservation and Recovery Act.

The EPA agrees that the rationale behind the April 5 Title V Memorandum and EPA's action on the Michigan title V program has implications for other Federal programs delegated to the States. Because of that, the Agency has for some months been analyzing the effects of State audit privilege and/or immunity laws on enforcement authorities under the Clean Water Act, the Resource Conservation and Recovery Act, and other statutes. The rationale behind the April 5 Title V Memorandum and EPA's action on the Michigan title V program as it relates to the Michigan audit law, however, is dictated not by political or policy considerations, but rather by statutes and regulations that were finalized after public notice and comment.

The commenters also stated that EPA's proposed interim approval of Michigan's program based on the Michigan audit law is inconsistent with existing EPA and Department of Justice (DOJ) enforcement policies, which reflect the appropriateness of limiting enforcement discretion. The commenters point to "Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator," DOJ, July 1, 1991; "The Exercise of Investigative Discretion", EPA, January 12, 1994; "Policy on Flexible State Enforcement Responses to Small Community Violations" EPA, November 1995 ("EPA Policy on Small Communities"); "Policy on Compliance Incentives for Small Businesses," EPA, May 1996; and EPA's Self-Disclosure Policy.

There is an important distinction between the policies cited by the commenters, which adopt an "enforcement discretion" approach, and the Michigan audit law.[9] The EPA and DOJ have announced policies guiding the exercise of their enforcement discretion under certain narrowly defined circumstances, while preserving the underlying statutory and regulatory authority.[10] State audit privilege and/or immunity laws, such as the Michigan audit law, by contrast, constrain enforcement discretion as a matter of law, impermissibly surrendering the underlying statutory and regulatory enforcement authorities required for Federal approval of the State programs.

Both commenters stated that EPA's proposed action on the Michigan program is inconsistent with several previous title V approvals where audit privilege and/or immunity legislation has not posed a bar to full approval. As examples of previous title V approvals which the commenters believe are inconsistent with EPA's proposed action on the Michigan program, as it relates to the Michigan audit law, the commenters cite to EPA's action on the Oregon, Kansas and Colorado title V programs. Relying on the recent Ninth Circuit decision in *Western States Petroleum Association* v. *EPA*, 87 F.3d 280 (9th Cir 1996) ("WSPA"), the commenters state that, where EPA is departing from a prior course of action, more is required of the Agency than conclusory statements concerning the potential impact of the Michigan audit law on the State's title V enforcement authority. Instead, the commenters argue that EPA must provide a basis for deviating from its earlier approaches in Oregon, Kansas and Colorado.

As an initial matter, EPA notes its action on Michigan's title V program is consistent with its action on the Texas title V program, 61 FR 32693, 32696–32699 (June 25, 1996) (final interim approval), and the Idaho title V program, 61 FR 64622–64635 (December 6, 1996) (final interim approval). Moreover, EPA has notified the States of Ohio, Arizona, and Florida that audit privilege and/or immunity laws that these States have enacted or are contemplating enacting could interfere with the enforcement requirements of title V and part 70.

With respect to the three programs cited by the commenters as inconsistent with EPA's proposed action on the Michigan program, EPA is still in the process of reviewing the audit privilege and/or immunity statutes in Oregon, Kansas and Colorado and their effects on the title V enforcement requirements in those States in order to determine whether EPA acted inconsistently in approving those programs. If EPA determines that it acted inconsistently, EPA intends to take appropriate action to follow the *WSPA* Court's mandate that EPA act consistently or explain any departures.

Finally, one commenter challenges the April 5 Title V Memorandum itself arguing that the guidance document imposes requirements on EPA approval of a State operating permits program in addition to those required by section 502(b)(5)(E) of the Act and the part 70 rules. Because the April 5 Title V Memorandum sets additional substantive and binding standards for approval of State title V operating permits programs not included in the part 70 regulations, the commenter continues, the guidance is a rule disguised as guidance and must be promulgated in accordance with the Administrative Procedures Act. This requires, among other things, public notice and comment.

The EPA disagrees. The April 5 Title V Memorandum does not, as the commenters assert, "purport to change fundamentally the requirements in section 70.11 by adding provisions that (1) effectively prohibit a state from adopting an audit protection or immunity law and (2) impose at least four new penalty criteria." Rather, the guidance simply recounts and reiterates existing statutory and regulatory requirements for enforcement authority under the title V program and shows how audit privilege and/or immunity laws may prevent a State from meeting those requirements. It creates no new "substantive and binding standards" for approval of title V programs, and therefore is not subject to notice and comment rulemaking of the Administrative Procedures Act.[11]

[9] In addition, the criminal enforcement policies noted by the commenters are irrelevant, as Michigan's audit law does not create deficiencies in the State's part 70 criminal enforcement penalty authority.

[10] Although the EPA Policy on Small Communities does encourage States to provide small communities an incentive to request compliance assistance by waiving all or part of a penalty under certain circumstances, it does not provide an unqualified waiver of civil penalties. The policy directs States to assess a small community's good faith and compliance status before granting any relief from penalties and identifies a number of factors that a State should consider in determining whether relief from civil penalties is appropriate in the particular circumstances. In addition, EPA's Policy on Small Communities directs a State to consider the seriousness of the violation. *See* EPA's Policy on Small Community Violations, page 4. Although the policy does not direct the State to consider economic benefit in determining the appropriate enforcement response, the policy is available only to those small communities that are financially unable to satisfy all applicable environmental mandates without the State's compliance assistance.

[11] One commenter also stated that EPA expressly recognized in its earlier approval of the Oregon title V program that EPA would have to use rulemaking to modify its part 70 rules before EPA could prohibit States from adopting audit privilege and/or immunity laws. The commenter misstates the Agency's position. As an initial matter, the Oregon audit statute, Oregon Revised Statute 468.963, contains only an audit privilege and does not contain an immunity provision. In proposing interim approval of the Oregon title V program, EPA

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Moreover, in explaining why the Michigan audit law precludes full approval, EPA is relying on the requirements of title V and part 70 themselves, and not the April 5 Title V Memorandum. Finally, EPA's application of the title V and part 70 enforcement requirements to the specific circumstances before EPA in the case of the Michigan audit law is subject to notice and comment rulemaking.[12]

b. Additional concerns regarding the effect of the privilege provisions of the Michigan audit law on the State's enforcement authority. Both commenters disagreed with EPA's position that the Michigan audit law contains a privilege for environmental audit reports which impermissibly interferes with the enforcement requirements of title V and part 70. The commenters note that the Michigan audit law does not prohibit the State from gaining access to underlying data not prepared for or during the audit. One commenter states that EPA is directly linking title V enforcement authority to State evidentiary rules, and that every State procedural and evidentiary rule must therefore be evaluated and amended whenever it interferes with environmental enforcement. The commenters continue that EPA has singled out audit privilege laws while not taking issue with State attorney-client privilege provisions.

As discussed in the proposed interim approval of Michigan's part 70 program, EPA believes that the Michigan audit law prevents the State from requiring an owner or operator to produce an environmental audit report under the State's general information gathering authority. Although a source must voluntarily disclose the relevant portions of the audit report in order to obtain immunity from civil penalties, an owner or operator can hold as privileged audit reports containing information on violations in the hopes that the violations will not otherwise come to the attention of the State agency. Further, a source can rely on the privilege provisions to avoid disclosing criminal violations, as the Michigan audit law does not provide immunity for disclosed criminal violations (other than for negligent acts or omissions). Similarly, a facility could elect to disclose the fact of a violation under the immunity provisions, but not the related evidence of whether the violation was knowing or intentional. Although EPA agrees that the Michigan audit law does not preclude access to information that is not part of an environmental audit report, EPA remains concerned that the data that led the source to conduct the environmental audit may by itself be insufficient to demonstrate either compliance or noncompliance with an applicable requirement. Furthermore, there may not be any documented information or event which caused a source to conduct an environmental audit. In such a situation, all information regarding a potential violation would exist only in the environmental audit report. The EPA therefore believes that the Michigan audit law so interferes with the State's information gathering authority as to prevent the State from obtaining appropriate civil and criminal penalties and assuring compliance with the Act, as required by section 502(b)(5)(E) of the Act and 40 CFR 70.11.

As discussed previously in this notice, EPA agrees with the commenters that State procedural and evidentiary rules are an appropriate subject for EPA review, as provided by 40 CFR 70.4(b)(2) and 40 CFR 70.4(b)(3). However, EPA does not agree with the commenters that the attorney-client privilege and the privilege provisions in the Michigan audit law are analogous. The attorney-client privilege merely prevents an attorney from revealing information disclosed by a client in a confidential communication made for the purpose of obtaining legal advice. It does not preclude the enforcement authority from obtaining the information from the source by any legal means. On the other hand, the privilege created by the Michigan audit law completely prevents an enforcement authority from obtaining any information labeled as an environmental audit report.

One commenter also stated that adequate title V enforcement authority cannot depend on access to voluntarily prepared audit reports. If such were the case, the commenter reasoned, State regulators would necessarily lack adequate enforcement authority over those entities that do not conduct audits voluntarily.

The EPA agrees that access to voluntarily prepared audit reports is not *per se* a prerequisite for adequate enforcement authority for title V approval. However, such access is important if the report exists and it contains information on violations or whether violations have been promptly corrected. The lack of such access can adversely affect the adequacy of enforcement authority.

One commenter also stated that State audit protection legislation does not inhibit whistle blowers but instead merely prohibits unauthorized disclosure of an audit report because whistle blowers are free to disclose any "non audit" information to support their allegations without fear of violating the laws.

As an initial matter, EPA notes that this concern is irrelevant in EPA's action on Michigan's title V program. To EPA's knowledge, neither the Michigan audit law nor any other provision of Michigan law specifically restricts the information that a whistle blower may disclose to a State agency, and EPA therefore did not raise this as a concern in proposing action on Michigan's title V program.

The commenter appears to be responding to an issue discussed in the April 5 Title V Memorandum. In that memorandum, EPA expressed concern with State audit privilege and/or immunity statutes that impose special sanctions upon persons who disclose privileged information. *See* April 5 Title V Memorandum, pp. 5–6. Although irrelevant to action on Michigan's title V program, EPA believes, as stated in the guidance, that the Act provision

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stated it was in the process of developing a national position regarding EPA approval of environmental programs in States which have environmental audit privileges, and that therefore, it proposed to take no action on the Oregon audit provision in the context of the Oregon title V approval. EPA noted, moreover, that it might consider such a privilege grounds for withdrawing program approval under 40 CFR 70.10(c) in the future if EPA later determined that the Oregon audit provision interferes with Oregon's enforcement responsibilities under title V and part 70. 59 FR 47105, 47106 (September 14, 1994). During the public comment period on EPA's proposal, one commenter stated that EPA's suggestion that a State audit privilege could be grounds for interim approval or withdrawal was bad policy and that Oregon's audit privilege statute was consistent with the Act. In addition to responding to the merits of the comment, EPA stated that the commenter's concerns were premature because, as the commenter acknowledged, EPA had not proposed to take any action on Oregon's environmental audit privilege statute in the context of final interim approval of the Oregon program. EPA further stated that any such concerns about EPA's position on the Oregon audit privilege statute would be properly made if EPA later proposed to withdraw Oregon's title V approval based on Oregon's audit privilege or if EPA "revised part 70 to prohibit environmental audit provisions such as Oregon's." 59 61820, 61824 (December 2, 1994). EPA did not say in that Federal Register notice that a rulemaking would be required in order for the Agency to disapprove a title V program in a State with an environmental audit privilege and/or immunity statute.

[12] EPA also disagrees with one commenter's assertion that the Congressional review provisions of Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996, P.L. 104–121 (SBREFA), requires EPA to submit the April 5 Title V Guidance Memorandum to Congress. EPA does not believe that April 5 Title V Memorandum is subject to Congressional review under SBREFA because it is not a rule and it does not substantially affect the rights or obligations of a nonagency party. Even if the Memorandum were subject to review, EPA has not relied on that Memorandum as a ba. for this action. Therefore, any procedural defect with respect to the April 5 Title V Memorandum would be irrelevant to the legal sufficiency of this action.

which gives explicit protection to whistle blowers makes no distinctions with respect to the source of the information relied upon by the whistle blower. The EPA believes that it is inconsistent with section 322 of the Act for States to remove audit reports from the universe of information which employees may rely upon in reporting violations to local or State authorities.

c. Summary. The EPA continues to believe that the privilege and immunity provisions of the Michigan audit law impermissibly interfere with the enforcement authorities required for full title V approval. Accordingly, Michigan must narrow the applicability of the privilege provided in section 14802, part 148 of NREPA, and narrow the applicability of the immunity provided by section 14809, part 148 of NREPA, to ensure that the State title V program has the authority to: assure compliance with part 70 permits and the requirements of the operating permits program [40 CFR 70.4(b)(3)(i)]; enforce permits and the requirement to obtain a permit [40 CFR 70.4(b)(3)(vii)]; and meet the general enforcement authority requirements of 40 CFR 70.11(a) and (c), as addressed above. In addition, the State must submit a revised title V Attorney General's opinion that addresses EPA's concerns in subpart II.A.10. above and in subpart II.A.2.i. of the proposed interim approval of Michigan's program [61 FR 32391–32398], in which the Attorney General certifies that the revised part 148 does not affect Michigan's ability to meet the enforcement requirements of 40 CFR 70.4(b)(3)(i), 40 CFR 70.4(b)(3)(vii), 40 CFR 70.11(a), and 40 CFR 70.11(c).

Alternatively, the State may submit a revised title V Attorney General's opinion certifying that the current part 148 does not affect the enforcement requirements of 40 CFR 70.4(b)(3)(i), 40 CFR 70.4(b)(3)(vii), 40 CFR 70.11(a), and 40 CFR 70.11(c). Such an opinion must also specifically address why EPA's interim approval provision requiring revisions to the currently enacted law is not valid. Finally, Michigan must also submit a supplemental Attorney General's opinion certifying that all other title V authorities that may be affected by part 148 are met, including but not limited to: Michigan's authority to bring suit to restrain any person from engaging in any activity in violation of a permit that is presenting an imminent and substantial endangerment [40 CFR 70.11(a)(1)]; Michigan's authority to seek injunctive relief to enjoin any violation of any program requirement, including permit conditions [40 CFR 70.11(a)(2)]; Michigan's authority to recover criminal fines [40 CFR 70.11(a)(3)(ii) and (iii), and 40 CFR 70.11(c)]; and the requirement that the burden of proof for establishing civil and criminal violations is no greater than the burden of proof required under the Act [40 CFR 70.11(b)]. The supplemental Attorney General's opinion must specifically address these requirements in light of the provisions contained in the State's audit law. Although EPA does not believe that the Michigan audit law affects any title V requirements other than the ones specifically identified in this action, a supplemental Attorney General's opinion is appropriate because Michigan's current part 70 Attorney General's opinion was written before the existence of the Michigan audit law.

11. Additional State Comments

MDEQ noted that it is pursuing changes to Michigan's operating permit regulations to address the interim approval issues pertaining to the definition of "schedule of compliance", the definition of "stationary source", and the applicability requirements for nonmajor solid waste incineration units. The EPA has reviewed Michigan's proposed rules revision package, and submitted comments to MDEQ during the package's public comment period.

MDEQ also acknowledged the condition for full approval that requires removal of section 5534 of NREPA. MDEQ agrees to pursue an amendment to NREPA to remove section 5534.

B. Final Action

1. Interim Approval

The EPA is promulgating interim approval of the Michigan operating permits program received by EPA on May 18, 1995, July 20, 1995, October 6, 1995, November 7, 1995, and January 8, 1996. The scope of Michigan's part 70 program approved in this notice applies to all part 70 sources within Michigan, except for any sources of air pollution in Indian country. The State must make the following changes to receive full approval:

a. Revise the definition of "schedule of compliance" in R 336.1119(a) to provide that the schedule of compliance for sources that are not in compliance shall resemble and be at least as stringent as that contained in any judicial consent decree or administrative order to which the source is subject. This provision is required by 40 CFR 70.5(c)(8)(iii)(C).

b. Revise the definition of "stationary source" in R 336.1119(q) to provide that the definition includes all of the process and process equipment which are located at one or more *contiguous or* adjacent properties. The emphasized phrase is not currently included in the State regulation. This provision is required in the definition of "major source" in 40 CFR 70.2.

c. Revise R 336.1211(1) to provide that nonmajor solid waste incineration units required to obtain a permit pursuant to section 129(e) of the Act are subject to the title V permits program. The permitting deferral for nonmajor section 111 sources in 40 CFR 70.3(b) does not apply to solid waste incineration units required to obtain a permit pursuant to section 129(e) of the Act.

d. Revise R 336.1212(1) to delete the exemption of certain activities from determining major source status. Part 70 and other relevant Act programs do not provide for such exemptions from major source determinations. This interim approval issue does not apply to the State's use of R 336.1212(1) as an insignificant activities list pursuant to 40 CFR 70.5(c).

e. Revise the State statutes or regulations, as appropriate, to require that permit applications include a certification of compliance with all applicable requirements and a statement of the methods used for determining compliance, as specified in 40 CFR 70.5(c)(9) (i), (ii), and (iv).

f. Remove the provisions of section 324.5534 of NREPA, which provide for exemptions from penalties or fines for violations caused by an act of God, war, strike, riot, catastrophe, or other condition as to which negligence or willful misconduct was not the proximate cause. Title V does not provide for such broad penalty and fine exemptions.

g. Revise R 336.1913 and R 336.1914 to be consistent with the affirmative defense provisions in 40 CFR 70.6(g). Alternatively, adopt an enforcement discretion approach consistent with the Act. These State regulations provide an affirmative defense that is broader than that provided by 40 CFR 70.6(g). They are also inconsistent with agency enforcement discretion permissible under the Act. These regulations, therefore, affect the State's ability to enforce permits and assure compliance with all applicable requirements and the requirements of part 70 [40 CFR 70.4(b)(3)(i) and 70.4(b)(3)(vii)]. For the same reasons, they also affect the State's general enforcement authority under 40 CFR 70.11.

h. Address all of the following issues relating to the State's audit privilege and immunity law, part 148 of NREPA. These conditions are proposed interim approval issues to the extent that they affect the State's title V operating

permits program and the requirements of part 70.

i. Narrow the applicability of the privilege provided in section 14802, part 148 of NREPA, and narrow the applicability of the immunity provided by section 14809, part 148 of NREPA, to ensure that the State title V program has the authority to: assure compliance with part 70 permits and the requirements of the operating permits program [40 CFR 70.4(b)(3)(i)]; enforce permits and the requirement to obtain a permit [40 CFR 70.4(b)(3)(vii)]; and meet the general enforcement authority requirements of 40 CFR 70.11 (a) and (c) as addressed in subpart II.A.10. of this notice.

ii. Submit a revised title V Attorney General's opinion that addresses EPA's concerns in subpart II.A.10. above and in subpart II.A.2.i. of the proposed interim approval of Michigan's program [61 FR 32391–32398], and certifies that the revised part 148 does not affect Michigan's ability to meet the enforcement requirements of 40 CFR 70.4(b)(3)(i), 40 CFR 70.4(b)(3)(vii), 40 CFR 70.11(a), and 40 CFR 70.11(c).

iii. In lieu of subparts i. and ii. above, submit a revised title V Attorney General's opinion certifying that the current part 148 does not affect the enforcement requirements of 40 CFR 70.4(b)(3)(i), 40 CFR 70.4(b)(3)(vii), 40 CFR 70.11(a), and 40 CFR 70.11(c). The Attorney General's opinion must also specifically address why EPA's interim approval provision requiring revisions to the currently enacted law is not valid.

iv. Submit a supplemental Attorney General's opinion certifying that all other title V authorities that may be affected by part 148 are met, including but not limited to: Michigan's authority to bring suit to restrain any person from engaging in any activity in violation of a permit that is presenting an imminent and substantial endangerment [40 CFR 70.11(a)(1)]; Michigan's authority to seek injunctive relief to enjoin any violation of any program requirement, including permit conditions [40 CFR 70.11(a)(2)]; Michigan's authority to recover criminal fines [40 CFR 70.11(a)(3) (ii) and (iii), and 40 CFR 70.11(c)]; and the requirement that the burden of proof for establishing civil and criminal violations is no greater than the burden of proof required under the Act [40 CFR 70.11(b)]. The supplemental Attorney General's opinion must specifically address these requirements in light of the provisions contained in the State's privilege and immunity law.

This interim approval extends until February 10, 1999. During this interim approval period, Michigan is protected from sanctions for failure to have a program, and EPA is not obligated to promulgate, administer, and enforce a Federal operating permits program for the State. Permits issued under a program with interim approval have full standing with respect to part 70, and the 1-year time period for submittal of permit applications by subject sources begins upon the effective date of this interim approval, as does the 3-year time period for processing the initial permit applications.

If the State of Michigan fails to submit a complete corrective program for full approval by August 10, 1998, EPA will start an 18-month clock for mandatory sanctions. If the State of Michigan then fails to submit a corrective program that EPA finds complete before the expiration of that 18-month period, EPA will be required to apply one of the sanctions in section 179(b) of the Act, which will remain in effect until EPA determines that Michigan has corrected the deficiency by submitting a complete corrective program. Moreover, if the Administrator finds a lack of good faith on the part of the State of Michigan, both sanctions under section 179(b) will apply after the expiration of the 18-month period until the Administrator determines that Michigan has come into compliance. In any case, if, 6 months after application of the first sanction, Michigan still has not submitted a corrective program that EPA has found complete, a second sanction will be required.

If EPA disapproves the State of Michigan's complete corrective program, EPA will be required to apply one of the section 179(b) sanctions on the date 18 months after the effective date of the disapproval, unless prior to that date Michigan has submitted a revised program and EPA has determined that it corrected the deficiencies that prompted the disapproval. Moreover, if the Administrator finds a lack of good faith on the part of Michigan, both sanctions under section 179(b) shall apply after the expiration of the 18-month period until the Administrator determines that the State has come into compliance. In all cases, if, 6 months after EPA applies the first sanction, Michigan has not submitted a revised program that EPA has determined corrects the deficiencies, a second sanction is required.

In addition, discretionary sanctions may be applied where warranted any time after the expiration of an interim approval period if the State has not timely submitted a complete corrective program or EPA has disapproved its submitted corrective program. Moreover, if EPA has not granted full approval to Michigan's program by the expiration of this interim approval because that expiration occurs after November 15, 1995, EPA must promulgate, administer and enforce a Federal permits program for the State of Michigan upon expiration of interim approval.

2. Other Actions

Requirements for approval, specified in 40 CFR 70.4(b), encompass section 112(l)(5) requirements for approval of a program for delegation of section 112 standards as promulgated by EPA as they apply to part 70 sources. Section 112(l)(5) requires that the State's program contain adequate authorities, adequate resources for implementation, and an expeditious compliance schedule, which are also requirements under part 70. Therefore, EPA is promulgating approval under section 112(l)(5) and 40 CFR part 63.91 of the State's program for receiving delegation of section 112 standards that are unchanged from Federal standards as promulgated. This program for delegations only applies to sources covered by the part 70 program.

The EPA is also promulgating approval of Michigan's preconstruction permitting program found in Part 2 of Michigan's Air Pollution Control Rules (R 336.1201–336.1299) under the authority of title V and part 70 solely for the purpose of implementing section 112(g) to the extent necessary during the transition period between promulgation of the Federal section 112(g) rule and adoption of any necessary State rules to implement EPA's section 112(g) regulations. However, since the approval is for the single purpose of providing a mechanism to implement section 112(g) during the transition period, the approval itself will be without effect if EPA decides in the final section 112(g) rule that sources are not subject to the requirements of the rule until State regulations are adopted. Although section 112(l) generally provides authority for approval of State air programs to implement section 112(g), title V and section 112(g) provide authority for this limited approval because of the direct linkage between the implementation of section 112(g) and title V. The scope of this approval is narrowly limited to section 112(g) and does not confer or imply approval for purposes of any other provision under the Act, for example, section 110. The duration of this approval is limited to 18 months following promulgation by EPA of section 112(g) regulations, to provide Michigan adequate time for the State to

adopt regulations consistent with the Federal requirements.

III. Administrative Requirements

A. Official File

Copies of the State's submittal and other information relied upon for the final interim approval, including public comments on the proposal received and reviewed by EPA, are maintained in the official file at the EPA Regional Office. The file is an organized and complete record of all the information submitted to, or otherwise considered by, EPA in the development of this final interim approval. The official file is available for public inspection at the location listed under the **ADDRESSES** section of this document.

B. Executive Order 12866

The Office of Management and Budget has exempted this action from Executive Order 12866 review.

C. Regulatory Flexibility Act

The EPA's actions under section 502 of the Act do not create any new requirements, but simply address operating permits programs submitted to satisfy the requirements of 40 CFR part 70. Because this action does not impose any new requirements, it does not have a significant impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act of 1995

Under section 202 of the Unfunded Mandates Reform Act of 1995, signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate, or to the private sector, of $100 million or more. Under section 205, EPA must select the most cost effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule. EPA has determined that the final interim approval action promulgated today does not include a Federal mandate that may result in estimated costs of $100 million or more to State, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves pre-existing requirements under State or local law, and imposes no new Federal requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

Under 5 U.S.C. 801(a)(1)(A) as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office prior to publication of the rule in today's **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 70

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Operating permits, Reporting and recordkeeping requirements.

Dated: December 27, 1996.

Valdas V. Adamkus,

Regional Administrator.

Part 70, title 40 of the Code of Federal Regulations is amended as follows:

PART 70—[AMENDED]

1. The authority citation for part 70 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

2. Appendix A to part 70 is amended by adding the entry for Michigan in alphabetical order to read as follows:

Appendix A to Part—70—Approval Status of State and Local Operating Permits Programs

* * * * *

Michigan

(a) Department of Environmental Quality: received on May 16, 1995, July 20, 1995, October 6, 1995, November 7, 1995, and January 8, 1996; interim approval effective on February 10, 1997; interim approval expires February 10, 1999.

(b) (Reserved)

* * * * *

[FR Doc. 97–643 Filed 1–9–97; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

45 CFR Part 1311

RIN 0970–AB56

Head Start Program

AGENCY: Administration on Children, Youth and Families (ACYF), Administration for Children and Families (ACF), Health and Human Services (HHS).

ACTION: Final rule.

SUMMARY: The Administration on Children, Youth and Families is issuing this final rule to implement a new statutory provision authorizing the Secretary to create a Head Start Fellows Program for staff in local Head Start programs or other individuals working in the field of child development, child care, early childhood education, health, and family services.

EFFECTIVE DATE: February 10, 1997.

FOR FURTHER INFORMATION CONTACT: Dennis Gray, Head Start Bureau, Administration on Children, Youth and Families, P.O. Box 1182, Washington, D.C. 20013; (202) 205–8404.

SUPPLEMENTARY INFORMATION:

I. Program Purpose

Public Law 103–252, the Human Services Amendments of 1994, amended the Head Start Act to authorize the creation of a Head Start Fellows Program (HSFP), which will support professional development of individuals working in Head Start or related programs.

The Head Start Bureau is pleased with the opportunity to develop the HSFP. The Bureau anticipates that the HSFP will provide Head Start Fellows with a unique opportunity to be exposed to activities, issues, resources, and new approaches through placements that will include national and regional Head Start offices, academia, and other public or private nonprofit entities and organizations concerned with services to children and families. The Head Start Bureau will benefit from the valuable perspectives brought by the Fellows currently working in Head Start and other programs across America to the national policy making process.

II. Summary of the Final Rule

The authority for this final rule is section 1150 of Public Law 103–252, the Human Services Amendments of 1994 (the Act) which added section 648A(d) to the Head Start Act (42 U.S.C. 9843). Section 648A(d) authorizes the Secretary to establish a program of Head Start Fellowships. Section 648A(d)(6) authorizes the Secretary to make expenditures not to exceed $1,000,000 for any fiscal year for stipends and other reasonable expenses for the Fellows Program. Additional authority is found in section 648A(d)(8), which mandates that the Secretary promulgate regulations to carry out section 648A(d).

The Act specifies:

- To whom Fellowships may be competitively awarded;

AMENDMENT #10

OFFERED IN THE SENATE

To: CSSB 41(L&C)

Page 6, line 17:

Following "court":

Insert "or administrative hearing officer"

Page 6, line 19:

Following "civil":

Insert "or administrative"

Page 6, line 19:

Following "court":

Insert "or administrative hearing officer"

Page 9, line 7:

Following "court":

Insert "or administrative hearing officer"

Reasons: CSSB 41(L&C) will affect areas that are subject to administrative proceedings, including administrative hearings on permit decisions. Hearing officers have expertise in the areas that are subject to this law and are familiar with the facts of the cases before them. If a hearing officer is unable to rule on questions involving the exceptions to the privilege or immunity, the administrative proceedings may have to come to a halt while the parties go to court to litigate whether the exceptions apply. This will likely result in delays in completion of the administrative proceedings and in increased costs associated with the court proceedings.

AMENDMENT #11

OFFERED IN THE SENATE

To: CSSB 41(L&C)

Page 7, line 16:

Following "obtained by the":

Delete: "person"

Insert: "owner or operator"

Page 9, line 21:

Following "imposed on":

Delete: "a person"

Insert: "an owner or operator"

Page 9, line 22:

Following "when the":

Delete: "person"

Insert: "owner or operator"

Page 9, line 26:

Following "efforts by the":

Delete: "disclosing party"

Insert: "owner or operator"

Reasons: Grammatical clarification; consistency in terminology.

AMENDMENT #12

OFFERED IN THE SENATE

TO: CSSB 41 (L&C)

Page 7, line 26 through page 8, lines 4:

Delete all material.

Page 8, lines 14 - 19:

Reword paragraph as follows:

(4) cooperate with the appropriate agency in connection with an investigation of the issues identified in the disclosure; an agency may request that the owner or operator allow the agency to review, under an agreement as described in AS 09.25.455(b)(3), the <u>part of the audit report that describes the implementation plan or tracking system developed to correct past noncompliance, improve current compliance, or prevent future noncompliance</u> [RELEVANT PORTIONS OF THE CONFIDENTIAL SELF-EVALUATION AND ANALYSIS AS NECESSARY TO DETERMINE THAT APPROPRIATE CORRECTIVE ACTIONS HAVE BEEN IDENTIFIED].

Rationale: Paragraphs (c)(5) and (c)(6) under Section 09.25.475 merely repeat the provisions in paragraphs (d)(1), (d)(2), (d)(3), and (d)(4) under the same section. The sponsor recommends these paragraphs be deleted.

However, the sponsor believes some of the language in paragraph (c)(6) -- relating to which parts of an audit report must be disclosed to a regulatory agency -- is more precise than the existing language in paragraph (d)(4). Accordingly sponsor recommends this language be substituted in paragraph (d)(4), as shown above.

AMENDMENT #13

OFFERED IN THE SENATE

TO: CSSB 41 (L&C)

Page 8, after line 8:

Add a new paragraph (d) (2) as follows:

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

AMENDMENT #14

OFFERED IN THE SENATE

TO: CSSB 41 (L&C)

Page 8, lines 20-22; Page 9, lines 1-2:

Reword subsection (g) as follows:

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

Rationale: The intent of subsection (g) is to address a concern on the part of the regulated community that notification of intent to conduct an audit might provoke an agency to launch an inspection or other investigative activity which would otherwise not have occurred. However, the existing language only precludes an inspection during the audit period -- after the audit has begun. The bill requires 15 days advance notice before an audit is commenced, leaving a two-week period in which the agency would not be covered by the restrictions in AS 09.25.475(g).

The word "solely" is deleted because it creates ambiguity. It implies that receipt of an audit notice could serve as grounds for launching an inspection or investigation, provided that the agency could identify at least one other rationale. The audit notice requirement is necessary in order to guage the effectiveness of the self-auditing incentive program. However, the sponsor does not intend for the notice requirement to be a discincentive to conduct self-audits, which it could be if the language in AS 09.25.475 (g) is not sufficiently clear.

AMENDMENT #15

OFFERED IN THE SENATE

TO: CSSB 41 (L&C)

Page 9, after line 5:

Insert new subsection:

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

(1) seeking injunctive relief; or

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

Rationale: This language addresses two issues the Environmental Protection Agency believes must be addressed in state self-audit laws if the state is to retain authority to administer state-delegated programs such as the Title V of the Clean Air Act and the Safe Drinking Water Act. Similar language can be found under the privilege section of the bill, at 09.25.450(i). This amendment will make the legislation consistent by applying these exceptions to both the privilege and immunity sections of the bill.

AMENDMENT #16

OFFERED IN THE SENATE

TO: CSSB 41 (L&C)

Page 9, lines 11-13:

Amend 09.25.480(a)(1)(B) as follows:

(B) within the 36 months preceding the violation, repeatedly or continuously committed, at the same facility or associated facilities located in the state, the specific violation or closely related violation for which immunity is sought; or [VIOLATIONS THAT ARE THE SAME AS, OR SIMILAR TO, THE VIOLATION FOR WHICH THE IMMUNITY IS SOUGHT;]

Rationale: Many industries that do business in Alaska have facilities in other states. The existing language makes it possible that a facility could be denied immunity if voluntarily disclosed violations are the same or similar to violations that were committed by a different facility under different management in a different state. It is not the intent of the sponsor to limit immunity in this way.

The word "or" is added at the end of the new proposed language to clarify that AS 09.25.480(a)(1) (A) - (C) provide alternative grounds to deny immunity.

A M E N D M E N T #17

OFFERED IN THE SENATE

To: CSSB 41(L&C)

Page 9, line 15:

Following "into compliance and":

Delete: "and this failure"

Insert: "so as to constitute"

Reasons: Grammatical clarification.

AMENDMENT #18

OFFERED IN THE SENATE

TO: CSSB 41 (L&C)

Page 9, lines 17-20:

Reword paragraph (a)(2) as follows:

> (2) the violation [OFFENSE] was committed intentionally or knowingly by a member of the owner's or operator's management or an agent of the owner or operator and the owner's or operator's policies or failure to have in place systems reasonably designed to prevent such violations [LACK OF PREVENTION SYSTEMS CONTRIBUTED MATERIALLY TO THE OCCURRENCE OF THE VIOLATION.]

Rationale: The term "violation" replaces "offense", because in Alaska law civil violations are referred to as "violations", not "offenses".

The reference to "lack of prevention systems" is recommended for deletion because of confusion over its meaning.

AMENDMENT #19

OFFERED IN THE SENATE

TO: CSSB 41(L&C)

Page 9, following line 20:

Insert a new paragraph to read:

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

Reasons: The proposed amendment seeks to maintain a "level playing field" in which violators do not gain substantial economic advantages over their competitors. Under this proposal, an owner or operator who otherwise qualifies for immunity will not receive immunity from that portion of a penalty that reflects the economic savings of noncompliance after completing the corrective, remedial, and preventive measures necessary to qualify for immunity. This proposal is somewhat similar to the provision in the U.S. Environmental Protection Agency's Final Audit Policy, 60 Fed. Reg. 66,706, 66,712 (1995), relating to the treatment of economic benefit, under which EPA retains full discretion to recover economic benefit gained as a result of noncompliance.

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AMENDMENT #20

OFFERED IN THE SENATE

TO: CSSB 41(L&C)

Page 10, following line 7:

Insert a new section to read:

"**Sec. 09.25.487. Electronic filing.** A state agency or municipality may, by regulation or ordinance respectively, allow the notices specified in AS 09.25.450(b) to be filed by facsimile or other electronic means, provided such means assure adequate proof of submittal of the notice by the owner or operator and adequate proof of receipt by the agency or municipality."

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AMENDMENT #21

OFFERED IN THE SENATE

TO: CSSB 41 (L&C)

Page 10, lines 13-16:

Add new language to 09.25.490 (a)(1)(A) as follows:

(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 of and in the course of an environmental or health and safety audit, including

(i) interviews with current or former employees;
(ii) field note 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 or health and safety audit;

Rationale: The new text above was included in SB 41 as introduced, but was inadvertently deleted when the L&C committee substitute was prepared. This list of possible components of an audit report provides appropriate guidance to government officials, the courts, and those planning to initiate a self-audit program. The clarity of the audit report definition is not enhanced by deleting this language.

AMENDMENT #22

OFFERED IN THE SENATE

TO: CSSB 41 (L&C)

Page 10, lines 22-27:

Add new language to definition of "confidential self-evaluation and analysis" as follows:

(2) "confidential self-evaluation and analysis" means the part of an audit report that consists of <u>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;</u> memoranda and documents that evaluate or analyze all or part of the material described in the audit report, including implementation issues or an audit implementation plan or tracking system to correct past noncompliance, improve current compliance, or prevent future noncompliance with an environmental or health and safety law, and that is...

Rationale: the only portions of the audit report that enjoy privilege are those which consist of "confidential self-evaluation and analysis". Consequently, the definition of this term is very important. The new language proposed above adds clarity to the definition by ensuring that many sensitive documents in the audit report, such as employee interviews, are covered by the privilege.

AMENDMENT #23

OFFERED IN THE SENATE

TO: CSSB 41 (L&C)

Page 11, line 2:

Delete the words "Department of Health and Social Services":

(3) "depa.tment" means the Department of Environmental Conservation, the Department of Labor, [AND THE DEPARTMENT OF HEALTH AND SOCIAL SERVICES,] as appropriate;

AMENDMENT #24

OFFERED IN THE SENATE

TO: CSSB 41(L&C)

Page 11, line 21:

Delete all material.

Page 11, line 22:

Delete all material.

Page 11, line 28:

Delete all material.

Re-number definitions accordingly.

Page 12, following line 3:

Add a new subsection as follows:

"(c) For purposes of this chapter, unless the context requires otherwise,

(1) a person acts "intentionally" with respect to a result described by a provision of law defining a violation

when the person's conscious objective is to cause that result; when intentionally causing a particular result is an element of a violation, that intent need not be the person's only objective;

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

(3) a person acts "recklessly" with respect to a result or to a circumstance described by a provision of law defining a violation when the person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that disregard

of it constitutes a gross deviation from the standard of conduct that a reasonable person would have been aware had that person not been intoxicated acts recklessly with respect to the risk."

Reasons: The privilege and immunity established in CSSB 41 (L&C) only applies in civil and administrative cases. Defining the terms "intentionally," "knowingly," and "recklessly" by referring to Title 11, the criminal laws, creates an ambiguity in the bill. In the proposed amendment, the contents of the definition are identical to the ones referenced in the bill, except the word "offense" is changed to "violation."

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NOTES TO DECISIONS

Stated in Neitzel v. State, 655 P.2d 325 (Alaska Ct. App. 1982).
Cited in Brown v. State, 739 P.2d 182 (Alaska Ct. App. 1987); Cole v. State, 828 P.2d 175 (Alaska Ct. App. 1992).

Article 6. Definitions.

Section
900. Definitions

Sec. 11.81.900. Definitions. (a) For purposes of this title, unless the context requires otherwise,

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

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

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

(4) a person acts with "criminal negligence" with respect to a result or to a circumstance described by a provision of law defining an offense when the person fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

(b) In this title, unless otherwise specified or unless the context requires otherwise,

(1) "affirmative defense" means that

(A) some evidence must be admitted which places in issue the defense; and

(B) the defendant has the burden of establishing the defense by a preponderance of the evidence;

(2) "benefit" means a present or future gain or advantage to the beneficiary or to a third person pursuant to the desire or consent of the beneficiary;

(3) "building", in addition to its usual meaning, includes any propelled vehicle or structure adapted for overnight accommodation of persons or for carrying on business; when a building consists of separate units, including apartment units, offices, or rented rooms, each unit is considered a separate building;

(4) "cannabis" has the meaning ascribed to it in AS 11.71.900(10), (11), and (14);

(5) "conduct" means an act or omission and its accompanying mental state;

(6) "controlled substance" has the meaning ascribed to it in AS 11.71.900(4);

(7) "correctional facility" means premises, or a portion of premises, used for the confinement of persons under official detention;

passed w/ amend.
Senator Ellis
objecting

Amendments Proposed by the Administration

CSSB41

Revised 2/26/97

STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DEPT. OF ENVIRONMENTAL CONSERVATION

DIVISION OF ENVIRONMENTAL HEALTH
DIRECTOR'S OFFICE
555 CORDOVA STREET
ANCHORAGE, ALASKA 99501
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February 26, 1997

The Honorable Robin Taylor
Chairman, Senate Judiciary Committee
Alaska State Senate
Capitol Building
Juneau, AK 99801

Dear Senator Taylor:

According to what we understood your instructions to be regarding amendments to SB 41, the audit privilege and immunity bill, enclosed you will find the Administration's amendments that will not be offered by the bill's sponsor. In addition, we have had the opportunity to review the amendments being offered by the sponsor, and have only a few comments we'd like to share on those.

We believe it is possible to have a bill such as this that can still pass muster with EPA and not threaten delegation of state *environmental* programs. Our amendments are all offered with that balance in mind. You'll find recent correspondence from the EPA on this subject enclosed.

Also enclosed you will find 12 amendments as follows (please note they are not numbered sequentially):

Amendment #1 would delete the references to "health and safety" throughout the legislation. Amendment #2 is a companion and would delete both the Department of Labor and the Department of Health and Social Services from the bill. We believe that the record is clear on the need to limit this bill to DEC.

Amendment #7A would establish the burden of proof necessary for a person seeking disclosure of an audit report.

Amendment #9 modifies an amendment of the sponsor (#12) and seeks simply to correct a

drafting error. Page 8, line 16 of the bill references "under an agreement described in AS 09.25.455(b)(3). That section, which is on page 5, lines 17-19, does not require an "agreement" but rather a "claim of confidentiality."

Amendment #15 is a conforming amendment between the privilege provision and the immunity provision The sponsor's amendment #18 also deals with this section but does not make this conforming amendment.

Amendment #16 adds a provision that immunity is not available for any disclosure of an audit in a proceeding relating to pipeline tariffs. There is already a similar provision in the privilege section, and prior to the Labor and Commerce CS, this language was also found in the immunity section. It appears to have been inadvertently left out.

Amendment #17A adds a provision to protect primacy of the state's programs that have been delegated from the federal government. We believe this language will only work for environmental programs however.

Amendment #21 would repeal the provision that the laws covered by this bill be construed broadly.

Amendment #22 would move the term "objective facts" to a different line so its clear that to the extent objective facts are included within that portion of the audit report that is privileged, the privilege would still apply. The sponsor's amendment #7 would delete the altogether. Testimony from industry has been that they support excluding the underlying or objective facts from the privilege.

We believe Amendment #23 makes clear the intent of this section.

Amendment #24 changes current language that is somewhat awkward with language that we believe more closely reflects the intent of the section.

Amendment #25 amends language in the definition of the confidential self-analysis to be more user friendly. The sponsor's amendment #22 also amends this definition, and we do not support his amended version as presented. We have agreed that generally this definition needs more work, and committed to doing so but did want to provide the committee with our initial thoughts on ways to improve it.

Regarding the sponsor's amendments, we have concerns with only two, his #7 and #8. We have previously touched on #7 which would delete the reference to the objective facts being outside the privilege. Regarding #8, it seeks to amend the section relating to privilege and pipeline tariff cases. Attorneys in the Department of Law who handle these cases will provide the committee with the background on this concern.

We would like to thank the sponsor for being open to our concerns with this legislation, and his willingness to work with us.

Sincerely,

Janice Adair
Director & Legislative Liaison

Enclosures

cc: The Honorable Loren Leman (w/encl)
The Honorable Drue Pearce (w/encl)
The Honorable Mike Miller (w/encl)
The Honorable Sean Parnell (w/encl)
The Honorable Johnny Ellis (w/encl)
Pat Pourchot, Office of the Governor (w/encl)

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

Reply To
Attn of: ORC-158

Michele Brown, Commissioner
Alaska Department of Environmental Conservation
410 Willoughby Avenue, Suite 105
Juneau, Alaska 99801-1795

Dear Commissioner Brown:

Thank you for requesting comments on the draft Alaska legislation regarding environmental audits. In general, EPA supports environmental self-auditing, but opposes audit privilege, which invites secrecy, instead of the openness needed to build public trust in industry's ability to self-police. EPA believes that audit privilege greatly complicates criminal and civil discovery, and frustrates public access to information. These are among the reasons that audit privileges are strongly opposed by U.S. Attorneys, the National District Attorneys' Association representing the Nation's local prosecutors, and a bipartisan coalition of state's attorney general. We urge you to take these law enforcement issues into consideration. Additionally, Governor Philip Batt of Idaho recently announced that he intends to let that state's audit privilege/immunity law lapse when the sunset provision runs at the end of 1997.

While EPA supports penalty mitigation as an incentive for voluntary disclosure and correction of violations, EPA also believes that strong enforcement is important to encouraging voluntary compliance. One component of a strong enforcement program is maintaining penalty authority for serious violations, such as those that may pose an imminent and substantial endangerment or actual harm to public health or the environment. To immunize such conduct discourages companies from making the investments in pollution control necessary to prevent such egregious violations. The result is a lowered standard of care and reduced protection of public health and the environment.

In addition to these policy concerns, before EPA can approve a state program, the Agency must determine that the state meets the minimum requirements under the law. In some cases, audit privilege can deprive the state of federally required authority. For your reference, we are enclosing national guidance on this

issue for the Title V program for operating permits under the Clean Air Act, as well as a more recent EPA "Statement of Principles" regarding the effect of State audit immunity/privilege laws on enforcement authority for all delegable federal programs. You should also be aware that through January, 1997, EPA has received and is reviewing petitions to revoke state authority to administer programs in Colorado, Idaho, Michigan, Ohio, and Texas as a result of enactment of audit privilege/immunity laws in those states.

EPA has serious concerns with regard to S.B. 41, currently under consideration in Alaska. As explained above, EPA is opposed to the establishment of an audit privilege. S.B. 41 contains a provision for privilege for environmental audits. Although the privilege would extend only to conclusions and analysis found in audit reports, EPA is concerned that the privilege not indirectly shield prior criminal conduct. This might be the case if independent evidence of probable cause is required to obtain access to an audit report in the context of a criminal proceeding. In addition, it is not clear that law enforcement agencies have an opportunity to see an audit report in a civil proceeding, even for the purpose of determining whether one of the exceptions applies.

As to the immunity provisions, although the bill would withhold immunity for violations resulting in substantial injury, the bill would potentially provide immunity for economic benefit, violations of consent orders, and violations resulting in imminent and substantial endangerment to human health or the environment. Language in the bill might also be construed to provide immunity for some repeat violations. EPA is also concerned with the breadth of violations potentially covered, as the bill would extend immunity not only to violations actually disclosed, but also to violations based on the facts disclosed, and for violations discovered because of the disclosure that were unknown to the owner or operator making the disclosure. This could potentially extend immunity to undisclosed violations that are later discovered by the state.

As an alternative to audit legislation, EPA supports efforts by state environmental agencies, such as Pennsylvania and Florida, to develop penalty mitigation policies with criteria for self audits that are consistent with EPA's. EPA's policy is working well to encourage environmental auditing and voluntary compliance without the adverse consequences to law enforcement and the public's right-to-know of a privilege and immunity statute. We have attached a copy of our most recent EPA policy update for your reference. Please contact us again if you have

any questions.

Sincerely,

Chuck Findley

Chuck Findley
Deputy Regional Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C 20460

FEB 14 1997

MEMORANDUM

SUBJECT: Statement of Principles
Effect of State Audit Immunity/Privilege Laws
On Enforcement Authority for Federal Programs

TO: Regional Administrators

FROM: Steven A. Herman
Assistant Administrator, OECA

Robert Perciasepe
Assistant Administrator, OPPE

Mary Nichols
Assistant Administrator, OAR

Timothy Fields
Acting Assistant Administrator, OSWER

Under federal law, states must have adequate authority to enforce the requirements of any federal programs they are authorized to administer. Some state audit immunity/privilege laws place restrictions on the ability of states to obtain penalties and injunctive relief for violations of federal program requirements, or to obtain information that may be needed to determine compliance status. This statement of principles reflects EPA's orientation to approving new state programs or program modifications in the face of state audit laws that restrict state enforcement and information gathering authority. While such state laws may raise questions about other federal program requirements, this statement is limited to the question of when enforcement and information gathering authority may be considered adequate for the purpose of approving or delegating programs in states with audit privilege or immunity laws.

I. Audit Immunity Laws

Federal law and regulation requires states to have authority to obtain injunctive relief, and civil and criminal penalties for any violation of program requirements. In determining whether to authorize or approve a program or program modification in a state with an audit immunity law, EPA must consider whether the state's enforcement authority meets federal program requirements. To maintain such authority while at the same time providing incentives for self-policing in appropriate circumstances, states should rely on policies rather than enact statutory immunities for any violations. However, in determining whether these requirements are met in states with laws pertaining to voluntary auditing, EPA will be particularly concerned, among other factors, with whether the state has the ability to:

1) Obtain immediate and complete injunctive relief;

2) Recover civil penalties for:

i) significant economic benefit;

ii) repeat violations and violations of judicial or administrative orders;

iii) serious harm;

iv) activities that may present imminent & substantial endangerment.

3) Obtain criminal fines/sanctions for wilful and knowing violations of federal law, and in addition for violations that result from gross negligence under the Clean Water Act.

The presumption is that each of these authorities must be present at a minimum before the state's enforcement authority may be considered adequate. However, other factors in the statute may eliminate or so narrow the scope of penalty immunity to the point where EPA's concerns are met. For example:

1) The immunity provided by the statute may be limited to minor violations and contain other restrictions that sharply limit its applicability to federal programs.

2) The statute may include explicit provisions that make it inapplicable to federal programs.

II. Audit Privilege Laws

Adequate civil and criminal enforcement authority means that the state must have the ability to obtain information needed to identify noncompliance and criminal conduct. In

determining whether to authorize or approve a program or program modification in a state with an audit privilege law, EPA expects the state to:

1) retain information gathering authority it is required to have under the specific requirements of regulations governing authorized or delegated programs;

2) avoid making the privilege applicable to criminal investigations, grand jury proceedings, and prosecutions, or exempted evidence of criminal conduct from the scope of privilege;

3) preserve the right of the public to obtain information about noncompliance, report violations and bring enforcement actions for violations of federal environmental law. For example, sanctions for whistleblowers or state laws that prevent citizens from obtaining information about noncompliance to which they are entitled under federal law appear to be inconsistent with this requirement.

III. Applicability of Principles

It is important for EPA to clearly communicate its position to states and to interpret the requirements for enforcement authority consistently. Accordingly, these principles will be applied in reviewing whether enforcement authority is adequate under the following programs:

1) National Pollutant Discharge Elimination System (NPDES), Pretreatment and Wetlands programs under the Clean Water Act;

2) Public Water Supply Systems and Underground Injection Control programs under the Safe Drinking Water Act;

3) Hazardous Waste (Subtitle C) and Underground Storage Tank (Subtitle I) programs under the Resource Conservation Recovery Act;

4) Title V, New Source Performance Standards, National Emission Standards for Hazardous Air Pollutants, and New Source Review Programs under the Clean Air Act.

These principles are subject to three important qualifications:

1) While these principles will be consistently applied in reviewing state enforcement authority under federal programs, state laws vary in their detail. It will be important to scrutinize the provisions of such statutes closely in determining whether enforcement authority is provided.

2) Many provisions of state law may be ambiguous, and it will generally be important to obtain an opinion from the state Attorney General regarding the meaning of the state law

and the effect of the state's law on its enforcement authority as it is outlined in these principles. Depending on its conclusions, EPA may determine that the Attorney General's opinion is sufficient to establish that the state has the required enforcement authority.

3) These principles are broadly applicable to the requirements for penalty and information gathering authority for each of the programs cited above. To the extent that different or more specific requirements for enforcement authority may be found in federal law or regulations, EPA will take these into account in conducting its review of state programs. In addition, this memorandum does not address other issues that could be raised by state audit laws, such as the scope of public participation or the availability to the public of information within the state's possession.

IV. Next Steps

Regional offices should, in consultation with OECA and national program offices, develop a state-by-state plan to work with states to remedy any problems identified pursuant to application of these principles. As a first step, regions should contact state attorneys general for an opinion regarding the effect of any audit privilege or immunity law on enforcement authority as discussed in these principles.

AMENDMENT #1 25

OFFERED IN THE SENATE

TO: CSSB 41(L&C)

Page 1, line 1:

Following "environmental audits":

Delete "and health and safety audits"

Page 1, line 5:

Following "environmental":

Delete "and health and safety"

Page 1, line 8:

Following "environmental":

Delete "and health and safety"

Page 1, line 13:

Following "environmental":

Delete "and health and safety"

Page 2, line 2:

Following "environmental":

Delete "and health and safety"

Page 2, line 7:

Following "environmental":

Delete "and health and safety"

Page 2, line 12:

Following "environmental":

Delete "and health and safety"

Page 2, line 14:

Following "environmental":

Delete "and health and safety"

Page 2, line 20:

Following "environmental":

Delete "and health and safety"

Page 2, line 30:

Delete "or health and safety"

Page 4, line 16:

Following "environmental":

Delete "or health and safety"

Page 4, line 19:

Delete "or health and safety"

Page 4, lines 26 - 27:

Following "environmental":

Delete "or health and safety"

Page 5, line 28:

Following "environmental":

Delete "or health and safety"

Page 5, line 29:

Following "environmental":

Delete "or health and safety"

Page 6, lines 4 - 5:

Following "environmental":

Delete "or health and safety"

Page 6, line 8:

Following "environmental":

Delete "or health and safety"

Page 6, line 10:

Following "environmental":

Delete "or health and safety"

Page 6, line 26:

Following "environmental":

Delete "or health and safety"

Page 7, line 7:

Following "environmental":

Delete "or health and safety"

Page 7, lines 24 - 25:

Following "environmental":

Delete "or health and safety"

Page 8, lines 21 - 22:

Following "environmental":

Delete "or health and safety"

Page 9, line 16:

Following "environmental":

Delete "or health and safety"

Page 9, line 22:

Following "environmental":

Delete "or health and safety"

Page 9, lines 26 - 27:

Following "environmental":

Delete "or health and safety"

Page 10, line 11:

Following "environmental":

Delete "or health and safety"

Page 10, line 27:

Delete "or health and safety"

Page 11, lines 2 - 4:

Following "Conservation":

Delete ", the Department of Labor, and the Department of Health and Social Services, as appropriate"

Page 11, line 5:

Following "environmental":

Delete "or health and safety"

Page 11, line 14:

Following "environmental":

Delete "or health and safety"

Page 11, line 16:

Following "environmental":

Delete "or health and safety"

Page 11, lines 17 - 18:

Following "environmental":

Delete "or occupational health and safety"

Page 11, line 30:

Following "environmental"

Delete "or health and safety"

Page 12, line 2:

Following "environmental":

Delete "or health and safety"

Page 12, line 5:

Following "environmental":

Delete "or health and safety"

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#26 No Objection

A M E N D M E N T

OFFERED IN THE SENATE

TO: CSSB 41(L&C)

Page 11, lines 2-4:

Following "Environmental Conservation":

Delete: ", the Department of Labor, ~~and the Department of Health and Social Services, as appropriate~~"

Miller – Object

Amend – favor Senator Ellis in favor

AMENDMENT #374

OFFERED IN THE SENATE

TO: CSSB 41(L&C)

Page 7, lines 3-4:

Following "under":

Delete all material.

Insert: "(a)(1) - (a)(4) of this section has the burden of establishing a prima facie case that the exception applies.

(c) A party seeking disclosure under (a)(5) of this section has the burden of establishing that the exception applies."

Reasons: In most cases, the facts needed to prove exceptions (a)(1) - (a)(4) to the self-audit privilege will be peculiarly within the knowledge and control of the owner or operator who conducted the audit. Without access to the privileged information, the party seeking disclosure may find it virtually impossible to establish that the privileged information falls within an exception.

Under these circumstances, the United States Supreme Court has held that "The ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary." United States v. New York, New Haven & Hartford Railroad Co., 355 U.S. 253, 256 n.5 (1957). In the Railroad Company case, the General Accounting Office determined that it had been overcharged in 1944, when the railroad carriers had supplied the Government with longer rail cars than were ordered. A special wartime measure allowed the carriers to charge the prices applicable to the size of rail cars, if the carriers could

not supply the sizes ordered. The General Accounting Office, however, had no means of determining whether the charges fell within the wartime exception, because the information needed to make that determination was peculiarly within the knowledge of the carriers. The Court therefore held the carriers had the burden of proving that its wartime charges were computed at lawful and authorized rates.

Similarly, the Ninth Circuit Court of Appeals wrote that "It is well settled that in the interest of fairness the burden of proof ordinarily resting upon one party as to a disputed issue may shift to his adversary when the true facts relating to the disputed issue lie peculiarly within the knowledge of the latter." United States v. Hayes, 369 F.2d 671, 676 (9th Cir. 1966).

The Alaska Supreme Court also follows this approach. In Sloan v. Jefferson, 758 P.2d 81, 83 (Alaska 1988), the court recognized that the burden of proof generally falls upon the party asserting a fact, particularly where that party controls the evidence bearing upon that fact.

As a general rule of law, "The burden of proof and the burden of evidence may be imposed on the party best able to sustain it; so, the party having peculiar knowledge of facts, or control of evidence, relating to an issue, may have the burden of proof or evidence, particularly in the case of a negative averment." 31A C.J.S. *Evidence* § 129 at 265 (1996). For example, a party who claims his case does not come within an exception usually has the burden of proof on that issue, particularly where that party has knowledge or control of the evidence that would show the case does not come within the exception. See id. §§ 123 at 260, 129 at 266.

An example of a legislative enactment requiring the disclosure of privileged information upon a showing of special need may be found in AS 18.23.030(b), relating to the medical peer review privilege. There, the legislature authorized the disclosure of confidential information to a health care provider who claims that the denial of access to the information is unreasonable or to a plaintiff who claims that the information provided to the review organization was false.

The proposed amendment to CSSB 41(L&C) recognizes that the party claiming the self-audit privilege will be in the best position to prove that the information claimed to be privileged does not fall within an exception to the privilege. However, it also strikes a balance between the party seeking disclosure and the party claiming the privilege by requiring the party seeking disclosure to establish a prima facie case that the exception applies before shifting the burden of proof to the party claiming the privilege. This proposal is consistent with the court decisions concerning the burden of proof.

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Sen. Leman NO OBJECTION. No Objection

A M E N D M E N T #28

OFFERED IN THE SENATE

TO: CSSB 41 (L&C)

Page 8, line 16:

Following "under":

Delete: "an agreement"

Insert: "a written claim of confidentiality"

Reasons: Paragraphs (c)(5) and (c)(6) are redundant to paragraph (d)(4). This appears to be a drafting error.

In CSSB 41 (L&C), under proposed AS 09.25.455(b)(3), an owner or operator may disclose privileged information to a government official or agency pursuant to a written claim of confidentiality. Under proposed AS 09.25.455(b)(3), privileged documents disclosed in this manner are required to be kept confidential and are not subject to the Alaska public records statute. SB 41 originally provided for confidentiality agreements between owners and operators and a government official or a state or federal agency. The CS deleted this provision. The language in the CS on page 8 referring to confidentiality agreements appears to be a drafting error and should be replaced with language relating to the procedures allowing for written claims of confidentiality.

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AMENDMENT #15 29

OFFERED IN THE SENATE

TO: CSSB 41(L&C)

Page 9, line 17:

Following "knowingly":

Insert: "or recklessly"

Reasons: Parallels AS 09.25.480(a)(1)(A).

AMENDMENT

#1629

Pearce, Miller, Sewell, Taylor - NO
Ellis - YES

OFFERED IN THE SENATE

TO: CSSB 41(L&C)

Page 9, line 21:

Insert a new subsection as follows and renumber all subsections accordingly:

"(b) There is no immunity under AS 09.25.475 if the disclosure is in a proceeding relating to pipeline rates, tariffs, fares or procedures."

Reasons: This provision was included in SB 41, page 9, lines 22-23, and appears to have been inadvertently deleted in CSSB 41(L&C). The proceedings involving pipeline rates, tariffs, fares, and procedures rely heavily on environmental and health and safety audits, and this exception is necessary to avoid jeopardizing current proceedings and incurring substantial costs in preparing state audits and lost revenues.

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STATE OF ALASKA

TONY KNOWLES, GOVERNOR

PLEASE REPLY TO:

☐ 1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 269-5100
FAX: (907) 276-3697

☐ KEY BANK BUILDING
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PHONE: (907) 451-2811
FAX: (907) 451-2846

☐ P.O. BOX 110300-DIMOND COURT HOUSE
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 465-6735

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

March 20, 1996

Senator Rick Halford
Alaska State Senate
Juneau, Alaska 99801

Re: CSSB 199

Dear Mr. Chairman and Senate Finance Members:

Thank you for allowing me to testify today on SB 199. Because of the poor connection I thought it might help to send my comments. I did not follow them verbatim in my testimony, but they contain essentially the same information. Thank you again for your consideration.

Sincerely,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Elizabeth J. Kerttula
Elizabeth J. Kerttula
Assistant Attorney General

enc.

cc. Senator Loren Leman w/enc.

MARCH 20, 1996
SENATE FINANCE
CSSB 1996(RES)
COMMENTS OF ASSISTANT ATTORNEY GENERAL
ELIZABETH J. KERTTULA

Thank you Mr. Chairman. My name is Beth Kerttula, and I am an Assistant Attorney General in the Civil Division, Oil and Gas Section. Thank you for allowing me to testify by teleconference, I will try to be brief.

While the Department of Law appreciates the changes in the CS to SB 199; if enacted, SB 199 will have serious consequences on the state's TAPS (Trans Alaska Pipeline System) Tariff cases (which are filed before both the Federal Energy Regulatory Commission (FERC) and the Alaska Public Utility Commission (APUC)). While our concerns have been mentioned previously, we did not have financial information on the cost of certain audits until last week. Therefore, we felt it important to bring the information to this committee's attention.

Under Alaska's royalty and production tax statutes, the state effectively pays for one quarter of the tariff (which includes the costs of running the pipeline in its calculation) through reduced revenues. The state has the right to challenge imprudent costs under the TAPS Settlement Agreement between the state and the carriers. In the 1995 case, the costs that are being challenged as imprudent, and not properly included in the tariff, amount to about $330 million dollars, with the state's share around $82 million (and rising as the challenged costs continue to accrue). If SB 199 had been in effect prior to the 1995 case it would have impacted the state's ability to bring the case. With the bill's privilege and immunity sections the state would probably not have been able to use information, at least before the APUC, from audits performed by Alyeska Pipeline Service Company (Alyeska), the carriers, or their contractors. Currently, the state uses these audits in its tariff cases. In the 1995 tariff case, our estimate is that it cost around $25 million dollars to conduct these types of audits. If this bill is enacted the state will not have access to this type of information under state law, and the state would have to bear the burden of the cost of obtaining the information.

The state has a right to object to imprudent costs under the TAPS Settlement. This bill would complicate that system. The state could commission its own audits of the pipeline, but it is questionable why Alaskans should have to bear the burden of the cost for something they do not control.

The tariff cases will be in jeopardy if this legislation becomes law. I appreciate the opportunity to let the committee know these concerns. Thank you.

TOTAL P.03

AMENDMENT #17A 30

Withdrawn by Senator Ellis (Question of Constitutional Conflict)

OFFERED IN THE SENATE

TO: CSSB 41(L&C)

Page 10, following line 2:

Insert a new section to read:

"Sec. 09.25.482. Inconsistencies with federal requirements. (a) When a state program requires federal approval or involves the expenditure of federal money or federal assistance, and there is a conflict between a provision of this chapter and a federal statute, regulation, or requirement, then, after completing the procedures in (b) of this section, the federal statute, regulation, or requirement shall prevail and the self-audit privilege and immunity created in this chapter are limited accordingly.

(b) Upon final written notice from the chief executive officer of a federal agency that a provision of this chapter is in conflict with a federal statute, regulation, or requirement and that federal approval, federal money, or federal assistance will be denied or withdrawn as a result of the conflict, the chief executive officer of the state agency in receipt of the notice shall immediately notify the

revisor of statutes that the self-audit privilege and immunity created by this chapter is limited, so that a revisor's note to that effect may be published in the Alaska Statutes. The chief executive officer of the state agency shall also immediately cause public notice of the limitation to be given and widely distributed and provide written notice of the limitation to all owners and operators submitting notices to the state agency under AS 09.25.450(b)."

Reasons: Where the state has assumed primacy for a federally-delegated program, such as the Title V air quality operating permits program, an audit privilege and immunity statute may create a concern over whether the state's enforcement authority has been compromised. For example, in other states, the U.S. Environmental Protection Agency has only granted interim approval to the state's program or where a program is already approved, is reviewing the state program to determine whether action should be taken to modify the approval. See 62 Fed. Reg. 1387, 1395 (1997). The language in the proposed amendment is similar to the provision in the state procurement code, AS 36.30.890. A similar provision is also found in the Alaska Surface Mining Control and Reclamation Act, AS 27.21.960.

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The fifth 1996 amendment, effective July 1, 1996, made a section reference substitution in paragraph (b)(30).

Effective date of 1992 amendment. — Under § 28, ch. 31, SLA 1992, the amendment to (b)(15) of this section made by § 9, ch. 31, SLA 1992, takes effect on the earlier of July 1, 1993 or the date established by resolution of the Alaska State Pension Investment Board for the transfer to it of securities and assets of the relevant retirement systems.

Editor's notes. — Under § 58(a), ch. 66, SLA 1991, as amended by § 37, ch. 5, FSSLA 1994 and § 2, ch. 1, SSSLA 1994, this section, as it read prior to the 1995 amendment, took effect December 16, 1994.

Opinions of attorney general. — The exception in paragraph (b)(1) for grants applies where: 1) the legislature makes an appropriation to a specific program for a specific purpose; 2) the appropriation is for a donative purpose that would more traditionally be characterized as a grant (rather than the purchase of services or supplies); and 3) the nature of the program, known to the legislature, makes application of the procurement code difficult or unreasonable. Mar. 23, 1988 Op. Att'y Gen.

The State Procurement Code does not apply to decisions of the Department of Fish and Game (DF&G) concerning allocation to private nonprofit hatcheries of federal funds granted to the state in connection with the U.S./Canada Pacific Salmon Treaty, since the transaction that occurs when DF&G selects and allocates federal grant money to private nonprofit hatchery projects is not contractual under the State Procurement Code. Apr. 13, 1988 Op. Att'y Gen.

The Department of Transportation and Public Facilities (DOT/PF) is not required to make the Procurement Code a condition of a Transfer of Responsibility Agreement (TORA). DOT/PF has discretion to negotiate for the inclusion of all or portions of the code in a TORA. June 10, 1988 Op. Att'y Gen.

The Procurement Code does not apply to contract negotiations of the Alaska Marine Highway System (AMHS) with the Port of Bellingham to provide terminal services at Bellingham for the AMHS. However, the AMHS may contract for these services with the Port of Bellingham. Aug. 16, 1989 Op. Att'y Gen.

Although the procurement code mentions the expenditure of money, the procurement code must be read to cover cases where instead of money some other type of valuable consideration is provided by the state in exchange for a good or service. Apr. 17, 1991 Op. Att'y Gen.

Sec. 36.30.860. Supplementary general principles of law applicable. Unless displaced by the particular provisions of this chapter, the principles of law and equity, including AS 45.01 — AS 45.09, AS 45.12, and 45.14 (Uniform Commercial Code), the law merchant, and law relative to capacity to contract, agency, fraud, misrepresentation, duress, coercion, mistake, or bankruptcy shall supplement the provisions of this chapter. (§ 2 ch 106 SLA 1986)

Revisor's notes. — In 1993, under § 13, ch. 34, SLA 1993 and § 128, ch. 35, SLA 1993 the citation to the Uniform Commercial Code was revised.

Sec. 36.30.870. Adoption of regulations. (a) Regulations under this chapter shall be adopted in accordance with AS 44.62 (Administrative Procedure Act).

(b) Regulations under this chapter applicable to procurements of construction or procurements for or disposal of property of the state equipment fleet shall be adopted by the commissioner of administration only after consultation with the commissioner of transportation and public facilities. (§ 2 ch 106 SLA 1986)

Sec. 36.30.880. Requirement of good faith. All parties involved in the negotiation, performance, or administration of state contracts shall act in good faith. (§ 2 ch 106 SLA 1986)

Sec. 36.30.890. Federal assistance. If a procurement involves the expenditure of federal funds or federal assistance and there is a conflict between a provision of this chapter or a regulation adopted under a provision of this chapter and a federal statute, regulation, policy, or requirement, the federal statute, regulation, policy, or requirement shall prevail. (§ 2 ch 106 SLA 1986)

Sec. 36.30.900. Product preferences. [Repealed, § 48 ch 137 SLA 1996.]

Sec. 36.30.910. Purchases through general services administration. Notwithstanding any other provision of this chapter, purchasing through the general services administration or from federal supply schedules of the general services administration may be made without competitive sealed bidding, competitive sealed proposals, or other

(2) if the state is diligently prosecuting a civil action in a state or federal court to require compliance with the provisions of this chapter or a regulation adopted or an order or permit issued under this chapter; however, any person may intervene in that civil action as a matter of right.

(d) A person may commence an action under this section only in the judicial district in which the surface coal mining operation is located.

(e) Nothing in this section restricts any right that a person or class of persons may have under statute or common law to seek enforcement of any of the provisions of this chapter and the regulations adopted under it, or to seek any other relief, including relief against the commissioner.

(f) A person who is injured or whose property is damaged by the violation by a permittee of a regulation adopted or an order or permit issued under this chapter may bring an action for damages, including reasonable attorney fees and expert witness fees, only in the judicial district in which the permittee's operation is located. Nothing in this subsection affects the rights established by or limits imposed under AS 23.30.

(g) In an action under this section, the commissioner may intervene as a matter of right. (§ 1 ch 29 SLA 1982)

Revisor's notes. — Formerly AS 41.45.950. Renumbered in 1983.

Sec. 27.21.960. Inconsistencies with federal act. (a) A provision of this chapter that is inconsistent with the provisions of the Surface Mining Control and Reclamation Act of 1977 as determined by the Secretary of the United States Department of the Interior under 30 U.S.C. 1255(b) is invalid from the date of the secretary's determination.

(b) If a provision of the Surface Mining Control and Reclamation Act of 1977 or of the regulations promulgated under that Act by the Secretary of the United States Department of the Interior is deleted, amended, set aside, enjoined, or declared invalid by Congress, the secretary, or in a final, unappealable judgment of a court of competent jurisdiction, then the commissioner shall review the changes made and make an appropriate recommendation as to whether changes in this chapter or the regulations adopted under it should be made. (§ 1 ch 29 SLA 1982)

Revisor's notes. — Formerly AS 41.45.960. Renumbered in 1983.

Sec. 27.21.970. Relationship to other laws. (a) Nothing in this chapter abrogates or modifies the power of a state agency to enforce laws and regulations within its jurisdiction, except as specifically stated in this chapter and regulations adopted under it. The commissioner shall coordinate permitting procedures to prevent unnecessary duplication in permit review.

(b) Surface coal mining operations for coal which has been or is conveyed out of federal ownership must meet the requirements of this chapter. (§ 1 ch 29 SLA 1982)

Revisor's notes. — Formerly AS 41.45.970. Renumbered in 1983.

Editor's notes. — Section 2, ch. 29, SLA 1982, purported to add a subsection (c). Section 7 of ch. 29 provided that the amendment take effect on the effective date of a version of Senate Bill No. 84; however, Senate Bill No. 84 did not pass the House of Representatives, and consequently, the amendment made by § 2 of ch. 29 never took effect.

Sec. 27.21.975. Severability. If any provision of this chapter or the applicability of it to any person or circumstances is held invalid, the remainder of this chapter and the application of that provision to other persons or circumstances is not affected. (§ 1 ch 29 SLA 1982)

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AMENDMENT #21A

OFFERED IN THE SENATE

TO: CSSB 41(L&C)

Page 12, lines 1-3:

Delete all material.

Reasons: The provision that requires the term "environmental and health and safety laws" to be broadly construed introduces a great deal of uncertainty as to the scope of the bill. In addition to encompassing a wide variety of federal and state laws, the term "environmental and health and safety laws" includes municipal ordinances. The bill should be carefully reviewed for impacts on municipal laws and programs.

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AMENDMENT #2232

Amendment fails with Senator Ellis in favor.

OFFERED IN THE SENATE

TO: CSSB 41(L&C)

Page 5, line 24:

Following "AS 09.24.450 for":

Insert: "objective facts and"

Page 5, line 25:

Delete all material.

Renumber all subsections accordingly.

Reasons: In the cases that recognize a self-evaluative privilege, "objective facts" are not privileged. See Reichhold Chemicals v. Textron, Inc., 157 F.R.D. 522, 526 (N.D. Fla. 1994).

AMENDMENT #23 33

Object: Miller
Motion fails with
Senator Ellis
in favor

OFFERED IN THE SENATE

To: CSSB 41 (L&C)

Page 6, line 23:

At the beginning of line 23

Insert: "a violation that caused"

Reason: This amendment will allow the State not only to obtain evidence of injuries, which it can independently obtain (i.e. medical reports of injured person), but also will allow the State access to evidence to prove that the operator/owner violated the cited statute or regulation which led to the substantial injury.

A M E N D M E N T #24 34

Sponsor has no objection - No objection - Amendment passed

OFFERED IN THE SENATE

TO: CSSB 41(L&C)

Page 9, line 25:

Delete all material and insert:

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

Reasons: The bill authorizes the mitigation of penalties depending on the "voluntariness" of a "voluntary disclosure." This wording is awkward and redundant. It appears to be addressed to the owner or operator's good faith in disclosing a violation to the enforcement agency.

AMENDMENT #~~25~~ 35

Sponsor has no objection; however wants to know how it is different from this

OFFERED IN THE SENATE

TO: CSSB 41(L&C)

Page 10, line 24:

Following "part of the material":

Delete: "described"

Insert: "contained"

Page 10, line 24:

Following "including":

Delete: "implementation issues or"

Insert: "findings, conclusions, opinions, recommendations, and"

Reasons: The self-audit privilege seeks to protect the parts of the audit report that evaluate or analyze a facility, operation, or property. The term "implementation issues" is somewhat confusing. The proposed amendment tries to clarify that the privileged part of the audit report consists of memoranda and documents evaluating or analyzing the information contained in the audit report, including memoranda and documents containing findings, conclusions, opinions, recommendations, and the audit implementation plan or tracking system.

SENATOR LOREN LEMAN

Northwest Anchorage

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

Sponsor Statement -- SB 41

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

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

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

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

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

Environmental and health and safety auditing has become increasingly popular in the past two decades. More than 1,000 of the world's largest companies have self-audit programs in place. In the U.S., 18 states have enacted self-audit laws similar to SB 41, offering privilege and/or immunity benefits to participating businesses, individuals, and municipalities.

Why should we encourage self-auditing?

Lessons from the Price Waterhouse Survey

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

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

Significant findings:

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

Distributed by Senator Loren Leman

Sectional Analysis -- CS for SB 41 (L&C)

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

Prepared by: Mike Pauley, Staff to Sponsor SENATOR LOREN LEMAN
Last updated: Friday, February 21, 1997

Section 1: Statement of legislative findings and intent.

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

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

Sec. 09.25.450 **Establishes a qualified audit report privilege.**

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

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

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

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

Sec. 09.25.460 Describes materials not protected by privilege.

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

Sec. 09.25.465 Establishes an exception to the privilege through disclosure required by the courts.

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

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

Sec. 09.25.475 Establishes limited immunity for voluntarily reported violations.

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

Sec. 09.25.480 Exceptions to Immunity & Mitigation of Penalties

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

Sec. 09.25.485 Relationship to other recognized privileges.

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

Sec. 09.25.590 **Definition of terms.**

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

Section 3: Applicability.

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

SENATE COMMITTEE REPORT
First Committee of Referral

DATE: 1/13/97

FURTHER: (Judiciary)
Finance

Date of 5-Day Notice: 1-16-97
(in accordance with Uniform Rule 23)

DATE TURNED IN TO OFFICE: 1-31-97

Labor and Commerce 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 (LTC ~~SB~~)

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

[ ] attached amendment(s)

[ ] adopt Letter of Intent by ____ Committee

[ ] further referral to the ____ Committee

Senate Bill:
[✓] same title
[ ] new title

House Bill:
[ ] same title
[ ] technical title
[ ] new: SCR ____

SIGNING DO PASS	*DP*	*OTHER RECOMMENDATIONS*	*NR*	*DNP*	*AM*
Mike Miller	✓				
		✓			
CHAIR:	✓	*CHAIR:*			

NEW FISCAL NOTE(S):

Department	Date	Zero	Fiscal

PREVIOUS FISCAL NOTE(S):*

Department	Date	Zero	Fiscal

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

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

Previous Committee Report(s)

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

February 13, 1997

TONY KNOWLES, GOVERNOR

PLEASE REPLY TO:

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Honorable Loren Leman
Chair of Senate Labor and Commerce Committee
Alaska State Legislature
State Capitol - Room 113
Juneau, AK 99801-1182

Re: CSSB 41 (L&C): DHSS functions involving access to health and safety audits

Dear Senator Leman:

This letter is to address the legal concerns raised by the application of CSSB 41 (L&C) to Department of Health and Social Services (DHSS) functions. CSSB 41 (L&C) reportedly is based on legislation originally designed to address environmental audit circumstances, not necessarily the circumstances in which audits are reviewed by the staff within the DHSS. First, it is difficult to estimate the difficulties that this bill will pose for DHSS because the language of the bill does not clearly establish what audits it is intended to cover. A lack of clarity in the design and language of the bill will most certainly make it necessary to litigate challenges to access of audit materials in order to resolve differences. Consequently, DHSS may have to engage in legal battles over access to the audit information that is presently available without dispute, including financial audits and quality assurance program reports.

Only environmental audits require advance notice to the department in order for the privilege to be invoked. Consequently, it does not appear that a health and safety audit would require this advance notice to a department in order to invoke the privilege and immunity. A hospital or care facility will claim an audit of operations to be related to health and safety. This may give rise to disputes about whether critical information need be turned over to public health officials or agency personnel charged with the monitoring of hospitals and long-term care facilities.

Because proposed AS 09.25.490(b) states that the audit privilege is to be construed broadly, there is a great risk it will be widely invoked, even if it does not clearly apply to the circumstances. If DHSS is included as a department that cannot reach internal audits, there is likely to be health and safety information concealed from the public that could result in injury or loss of life.

Health Facilities Licensing and Certification

The Health Facilities Licensing and Certification function of DHSS could be seriously compromised. Federal regulations require that agency to make certain that each facility has a quality assurance program in place and to assess the effectiveness of the program. Our state health facility licensing laws require that hospitals have effective risk management programs in place. Consequently, it is the self evaluations and analyses that must be reviewed by the regulating agency in order to assess the effectiveness of the programs.

While these self-evaluations and analyses may be construed under AS 09.25.460 as "information required to be . . . reported under a[n] . . health or safety law or as a requirement for . . .maintaining . . . a license," the language used in this exception does not make it clear whether a facility would have to reveal the information. Additionally, the provision that directs the court to interpret the privilege broadly may produce a contrary result. Without having access to the analyses and whether those analyses have resulted in appropriate corrections, the licensing agency will not be able to provide the review of the facility that is required under federal law. Furthermore, the health and safety of patients and employees may be affected.

Specific examples may better illustrate the problems imposed upon health facilities licensing and certification staff by this bill. For instance, in one nursing home, health facility surveyors found that five of eight of the residents had had significant weight loss; one resident's weight loss was so dramatic that the patient was close to death. It was determined that the residents were not receiving adequate nutrition because they were not being given enough food. DHSS had to examine the internal procedures and practices of the facility to determine that, even though patients were weighed regularly, no practices were in place for a staff review of resident weights in order to enable the staff to detect problematic trends in weight loss among the residents. DHSS staff must be able to evaluate internal assessment tools in order to assure safety for residents in these facilities.

In another case, water temperatures at a facility were dangerously high. Even though this problem was known to some staff, there was no internal procedure in place to assure that appropriate action was taken. In this facility, while reports were reviewed by the members of the facility risk management committee, no discussion or action was proposed in response. The facility survey team had to review the internal procedures in order to provide direction to the facility to bring practices into compliance. [In one health care facility last year, a resident died of secondary infections caused by being scalded in a bath.] Patient and resident care will be directly affected if the law allows facilities to conceal the analyses that result from their internal reviews because defective internal audit processes may go undetected.

Other problems include encountering barriers to gaining access to the internal quality assurance reports that federal regulations require the certification agency to review. For example, for laboratory certification purposes, all quality assurance records for a laboratory must be made

available to the agency for a period of two years. Renal dialysis center certification requires that the agency have access to the required quality assurance reviews that assess the condition of the physical environment of the center; the agency must also be able to review records concerning monitoring of staff exposure to chemical germicides under standards set by OSHA. The state agency would not be able to complete the reviews required under federal law if CSSB 41 (L&C) limits access to these internal assessments.

Medicaid Fraud

Medicaid is a federally delegated program. In exchange for federal financial participation, the states agree to comply with various federal statutory and regulatory requirements embodied in the state Medicaid plan. Alaska is required to exclude, suspend sanction, refuse payment to, or recoup payment from any Medicaid provider committing "fraud" or "abuse" as defined by 42 C.F.R. § 455.2. "Abuse" includes provider practices that are inconsistent with sound fiscal, business, or medical practices, and result in an unnecessary cost to the Medicaid program. To prevent, detect, and sanction such abuse, Medicaid regulations and provider agreements require providers to disclose their fiscal, business and medical practices. The privilege provided by CSSB 41 (L&C) is inconsistent with the Medicaid requirements.

In addition, a state Medicaid plan must provide for an agreement between the Medicaid agency and each provider or organization furnishing services under the plan in which the provider or organization agrees to (1) keep any record necessary to disclose the extent of services to provider furnishes to recipients and (2) on request furnish this information to the Medicaid agency or state Medicaid Fraud Control Unit. 42 C.F.R. § 431.107. This requirement for provider disclosure of business transactions, which is part of a Medicaid provider agreement, appears to contradict the proposed Section 09.25.450 (g): "A government agency or its employees or agents may not, as a condition of a permit, license, or approval issued under an environmental law, require an owner or operator to waive the privilege available under the section." Even though this provision specifies "environmental law," we anticipate some litigation over the application of this provision to DHSS functions if DHSS is included as a department affected by this bill.

Medicaid Rate Advisory Commission

The Medicaid Rate Advisory Commission (MRAC) staff establishes Medicaid payment rates for hospitals, nursing homes and other health care facilities, based on each facility's reported historic costs of providing care to patients. Alaska health care facilities received over $135 million in Medicaid payments in fiscal year 1996. The MRAC staff conducts audits of facility-reported costs to ensure that the information used to establish each facility's Medicaid payment rate is accurate.

As part of the audit process and the rate setting function, the MRAC staff must determine whether a facility is providing health care services in an economic and efficient manner.

Federal and state law require the MRAC staff to make this determination to confirm that the state is receiving fair value for its Medicaid payments and also to establish a relationship between such payments and facility costs. 42 U.S.C. § 1396a(a)(13)(A) and AS 47.07.070.

CSSB 41 (L&C) could interfere with the MRAC staff's ability to obtain vital information pertaining to a health care facility's financial and operational performance, resulting in higher than warranted Medicaid payments. Under the audit privilege, a facility might be able to shield from the MRAC staff information relating to the facility's financial or operational inefficiencies. As proposed, AS 09.25.450(a) will prevent the state from obtaining an entity's internal audit reports that consist of an "analysis of the owner's or operator's compliance with . . . health and safety laws." With DHSS included as a department whose functions are affected by this law and with the broad construction language in the bill, CSSB 41 (L&C) could prevent the state from obtaining information directly relevant to a facility's Medicaid payment rate: financial and operational information prepared by the facility relating to the reasonableness of health care costs paid for by the Medicaid program.

Proposed Amendments

The most straightforward amendment that would remedy the problems that CSSB 41 (L&C) imposes on DHSS, would be to remove the term "health and safety" [audits] where it appears to define the type of audit subject to privilege under this bill and to remove DHSS from the definition of "department."

As an alternative, some clarity could be obtained by amending proposed AS 09.25.460 by adding subsections (a)(8) and (9): "There is no privilege under AS 09.25.450 for that part of an audit report that contains the following:

> (8) the quality assurance reports and analyses of health care facilities and resident nursing facilities that are licensed or certified by the Department of Health and Social Services; and
>
> (9) financial, business and operational audits of providers of medical services under Medicaid, or of care facilities required to be licensed by the state."

However, even with the alternative amendments, additional clarifications would need to be made to avoid unnecessary litigation.

Summary

In summary, if information about the effectiveness of internal evaluation tools is made available to the state agency that regulates hospitals and health care facilities, the result is that these

facilities receive assistance in recognizing problem areas; health care delivery to our citizens is improved. DHSS does not have an enforcement function that requires the assessment of monetary penalties, as do some other agencies. (The likely financial impact to a facility might be recoupment of Medicaid or grant funds that have been paid by the state for a service that was not provided or a change in the Medicaid reimbursement rate to reflect reasonable and efficient operations.) Actions to remove the licensure or certification of needed health care facilities are generally not initiated until after compliance efforts fail.

On the other hand, if information that is essential to determine the effectiveness of the internal evaluation tools of health care facilities may be withheld from the agency, the state will not be able to effectively perform its federal certification function or state licensing functions and Medicaid programs may be in jeopardy. In addition, health care facility problems will more likely go undetected until the circumstances cause serious patient injury or death.

Sincerely,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Kristen F. Bomengen
Kristen F. Bomengen
Assistant Attorney General

KFB:ebc

cc: Members, Senate Labor and Commerce Committee
Hon. Robin Taylor, Senate
Members, Senate Judiciary Committee
Pat Pourchot, Legislative Director
Bruce Botelho, Attorney General
Hon. Karen Perdue, Commissioner, Department of Health and Social Services
Chrystal Smith, Legal Administrator
Deborah Behr, Assistant Attorney General
Janice Adair, Director, Div. of Environmental Health,
Department of Environmental Conservation

THE ALASKA CHAPTER
OF THE
INTERNATIONAL
ASSOCIATION OF
DRILLING CONTRACTORS

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

VIA FACSIMILE
(907) 465-3922

February 12, 1997

The Honorable Robin Taylor
Senate Majority Leader and Chairman, Judiciary Committee
Alaska State Legislature
State Capitol
Juneau, Alaska 99801

Dear Senator Taylor:

SB 41, "An Act relating to environmental audits and health and safety audits to determine compliance with certain laws, permits and regulations," was passed out of the Senate Labor and Commerce Committee on January 30, 1997, and now awaits a hearing before the Senate Judiciary Committee. I am writing to encourage you to schedule SB 41 for a hearing at the earliest possible date.

As I mentioned when we met in your offices earlier this session, the International Association of Drilling Contractors ("IADC") believes that the "self-audit" concept is one that deserves your serious consideration, and we feel that, as introduced and amended in the Labor and Commerce Committee, this bill represents a good start toward the goal of developing a responsible, cost-effective incentive program that encourages voluntary compliance with health, safety and environmental laws.

Since I met with you in Juneau, we have spent a considerable amount of time reviewing the amended version of the bill and, as you requested, we have prepared several amendments which we believe further the goal of promoting voluntary corrective action and increased compliance, while reducing the expenditure of resources -- private and public -- on unproductive regulatory command-and-control and associated litigation to compel compliance.

One concern the IADC has with the current version of the bill relates to situations where a drilling contractor causes a health and safety and environmental audit to be prepared of the drilling contractor's operations. The bill allows disclosure of audit reports in certain circumstances without waiving the privilege. However, we are concerned that the bill may not cover an exchange between an independent contractor and its principal, a practice which is becoming an increasingly common and salutary feature

of the operator-drilling contractor relationship in Alaska. The new "self-audit" privilege should be made expressly applicable to these disclosures. This will enable operators and drilling contractors to engage in aggressive self-evaluation and to work closely together to identify remaining opportunities to improve their performance.

We have developed suggested amendments for this purpose, as well as other proposed amendments which we believe generally strengthen the bill. I am available to meet with you at your convenience to discuss our proposed changes, and I am prepared to travel to Juneau to appear before the Judiciary Committee and testify in support of the bill.

I look forward to working with you and the members of the Judiciary Committee on this legislation. Thank you again for your continued support.

Sincerely,

Randy Ruedrich

Randy Ruedrich

**THE ALASKA CHAPTER
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February 12, 1997

The Honorable Robin Taylor
Senate Majority Leader and Chairman, Judiciary Committee
Alaska State Legislature
State Capitol
Juneau, Alaska 99801

Dear Senator Taylor:

I am writing again to encourage you to schedule SB 41, "An Act relating to environmental audits and health and safety audits to determine compliance with certain laws, permits and regulations," for an immediate hearing in the Judiciary Committee.

As I mentioned when we met in your offices last month, passage of "self-audit" legislation this session is critical to the members of the Alaska Chapter of the International Association of Drilling Contractors ("IADC"). An increasingly common and salutary feature of the operator-drilling contractor relationship in Alaska involves the exchange of information between an independent contractor and its principal. If the provisions of SB 41 are extended to cover the contractor-operator relationship as we propose, the privilege for voluntary health, safety and environmental self-audits, as well as the qualified immunity for conditions that are discovered and reported in the course of those audits, will enable operators and drilling contractors to more readily share the results of those self-evaluative reviews without having to worry that an enforcement agency or other litigant will use the results of such inquiries against them. For this reason, we believe that SB 41, if modified as we suggest, would be extremely beneficial in that it would allow us to concentrate on the reduction of remaining deficiencies, rather than focusing on the legal nuances of protecting audits and restricting the sharing of those audits with other entities in the workplace.

We have spent a considerable amount of time reviewing the amended version of the bill, and, as you requested, we have prepared several amendments which we believe further the goal of promoting voluntary corrective action and increased compliance, while reducing the expenditure of resources -- private and public -- on unproductive regulatory command-and-control and associated litigation to compel compliance. I have attached the four proposed amendments we would like the Judiciary Committee to consider when

it hears SB 41. Included with the proposed amendments is a brief statement of our reasoning for each of the suggested changes. If you have any questions regarding these proposed amendments, or the bill itself, please give me a call.

I plan to travel to Juneau to participate in the Judiciary Committee's hearings on SB 41. Please let me know when you will be able to hear the bill. I look forward to seeing you soon.

Sincerely,

Randy Ruedrich

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

Attachments (two pages)

AMENDMENT 1

Page 5, line 16: Delete the word "or" and insert new section 09.25.455(b)(2)(E) reading as follows:

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

Page 11, line 22: Revise section 09.25.490(a)(8) to read as follows:

"(8) 'owner or operator' means a person who owns or operates a regulated facility, operation or property, *including without limitation, a person who, as an independent contractor, performs services at or in connection with a regulated facility, operation or property.*"

COMMENT: This amendment would enable an independent contractor, such as a drilling contractor, who performs services at a regulated facility owned and operated by another entity, such as an oil and gas operator, to disclose its EHS audit to the facility owner/operator under a confidentiality agreement, and vice versa, without either party thereby waiving the privilege for its audit report. The amendment will enable contracting parties to make reciprocal disclosures of their EHS reports so as to assure themselves of each other's EHS compliance, without vitiating the privilege. This would promote the self-auditing that the legislation seeks to encourage.

AMENDMENT 2

Page 5, line 25, delete subsection 09.25.460(a)(1) and renumber accordingly.

COMMENT: Under section 09.25.460(a)(1), there is no privilege for any part of an audit report that contains "objective facts." Inevitably, however, an EHS audit must develop, discuss and evaluate "objective facts" in order to detect and correct EHS violations. For example, if an EHS audit led the owner/operator to discover an unauthorized discharge to the environment, that would be an "objective fact" which would need to be discussed and evaluated in the report. Under the current language of the bill, this "objective fact" would appear to be unprivileged and subject to discovery and admissible against the owner/operator, even if it is discussed in the context of self-evaluation and analysis. Unless deleted, the "objective facts" exception would largely nullify the privilege established in section 09.25.450.

AMENDMENT 3

Page 7, line 6, revise section 09.25.475(a) to read as follows:

"(a) Except as provided by this section, an owner or operator who makes a voluntary disclosure of a violation of an environmental or health and safety law, *or of facts that constitute or may constitute such violation,* is immune from an administrative or civil penalty for the violation disclosed, ..."

COMMENT: The current language requires the owner or operator to disclose a "violation" of an EHS law, i.e., to admit that a violation has occurred at the time of making the disclosure. To make such an admission would be problematic because a disclosing party cannot be certain at the time of disclosure that it will qualify for immunity. For example, there would be no immunity if a court subsequently found a failure to adequately mitigate the violation under section 09.25.480. This uncertainty may chill the self-audit and disclosure process. The proposed amendment would create the desired incentive for an owner or operator to make full disclosure, without having also to admit that the facts disclosed constitute an EHS violation.

AMENDMENT 4

Page 9, line 17: Revise section 09.25.480(a)(2) to read as follows:

"(2) the offense was committed intentionally or knowingly by a member of the owner's or operator's management or an agent of the owner or operator and the owner's or operator's policies or *its failure to have in place systems reasonably designed to prevent such offenses*~~lack of prevention systems~~ contributed materially to the occurrence of the violation."

COMMENT: If a company's manager or agent knowingly or intentionally commits an EHS violation, it is axiomatic that there was a "lack of prevention systems." The bill language would effectively make a company an absolute guarantor that its management and agents will not intentionally or knowingly violate EHS laws. This is not realistic, especially where the violations are willful. The amended language requires a company to have in place internal systems and procedures that are reasonably capable of preventing a manger or agent from knowingly violating the law, while recognizing that it is impossible always to anticipate or control the actions of a rogue employee.