ALASKA LEGISLATURE COMMITTEE FILES 1997-1998 8672
9563 SENATE JUDICIARY

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Regional Citizens' Advisory Council / "Citizens promoting environmentally safe operation of the Alyeska terminal and associated tankers."
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Feb. 21, 1997

Senator Loren Leman
Senator Robin Taylor, Chairman
Senate Judiciary Committee
Alaska State Legislature

Re: SB 41 - Environmental self-audits

Dear Senators Leman and Taylor:

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

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

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

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

We suggest instead that the bill prohibit agencies from initiating civil or administration litigation based *solely* on an environmental audit report. This is the provision used by the EPA in its policy and it makes much more sense. It ensures both fairness to the regulated entity and appropriate protections to the public.

We suggest additional changes to improve the bill:

• Add more precision to the language of the standards. As written, the bill is very vague. For example, disclosure of a violation must occur

PUBLIC COMMENT

"promptly." The EPA policy requires disclosure within 10 days. There are numerous other instances in the bill where standards are vague and open to broad interpretation.

• Narrow the immunity so that violators are not allowed to keep any economic benefit derived from the violation. The immunity for self-disclosed violations should extend only to the punitive portions of enforcement sanctions. This provides a measure of fairness to competitors who have complied with environmental regulations, by eliminating any economic advantage of non-compliance.

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

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

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

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

Sincerely,

Louis "Tex" Edwards, President

cc: Senator Drue Pearce
Senator Sean Parnell
Senator Georgianna Lincoln
Senator John Torgerson
Rep. Gene Kubina
Rep. Alan Austerman
Rep. Gary Davis
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Paul Richards, Alyeska Pipeline Service Co.
Senator Mike Miller
Senator Johnny Ellis
Senator Jerry Mackie
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Rep. Gail Phillips
Governor Tony Knowles

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SB 41: Twentieth Legislature

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

While the Alaska Environmental Lobby whole-heartedly supports industry's efforts towards voluntarily compliance with environmental and health/safety regulations, we strongly oppose SB 41. Achieving compliance with regulations will require industry and government to work together. However, the broad language of SB 41 cripples our ability to enforce protection of Alaska's environment and public welfare. This legislation greatly obstructs efforts to find the balance between incentives for responsible monitoring and effective enforcement of regulations. The Alaska Environmental Lobby opposes SB 41 because:

- This is a bill of secrecy. It would keep information vital to the public's health and safety hidden from review by the agencies we depend upon to enforce our health and safety laws and from the legal system we depend upon to remedy violations of these laws. It limits employees' right to know. It limits the right to know of property owners near to potentially polluting industries. This bill allows secrecy to replace corporate responsibility and accountability.

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

- This is a full-employment bill for attorneys. This bill will create more confusion, litigation and expense regarding the enforcement of regulations. Many questionable aspects of this bill will only be answered during litigation. The "construed broadly" language in the definitions will pull in all manner of federal, state, and municipal laws.

Environmental and health/safety regulations are passed out of necessity: industry has a less than admirable record of self-regulating. The public's health and safety must continue to be protected, particularly in today's heated competitive climate when industry is more likely to cut corners for economic advantage.

2/24/97

Susan E. Schrader,
Executive Director

ADDITIONAL INFORMATION FOR SB41

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you.

TESTIMONY OF RANDY RUEDRICH, CHAIRMAN OF THE ALASKA CHAPTER OF THE INTERNATIONAL ASSOCIATION OF DRILLING CONTRACTORS BEFORE THE SENATE JUDICIARY COMMITTEE ON SENATE BILL NO. 41

Good afternoon Mr. Chairman. My name is Randy Ruedrich, and I am pleased to appear here today in my capacity as Chairman of the Alaska Chapter of the International Association of Drilling Contractors ("IADC") to testify in support of SB 41, a bill to establish a new privilege for voluntary health, safety and environmental self-audits, and a qualified immunity for conditions that are discovered and reported in the course of these audits.

The IADC believes that the "self-audit" concept, as embodied in SB 41, is one that deserves favorable consideration from the Legislature this session; and we feel that, as introduced and amended by the Labor and Commerce Committee, this bill represents a good start toward the goal of developing a responsible, cost-effective incentive program that encourages continued improvements in industries' record of compliance with health, safety and environmental laws.

Since the bill was passed from the Labor and Commerce Committee, we have spent a considerable amount of time reviewing the amended version of the bill, and 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 -- public and private -- 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 persons who jointly operate a facility, i.e., persons who are responsible for different areas, operations or processes at a facility. For example, the bill language may not cover an independent contractor's disclosure of an audit of its own operations at a shared facility to the overall owner or operator of the facility. This deficiency would discourage a practice which otherwise is becoming an increasingly common and salutary feature of the drilling 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.

It should be emphasized that in Alaska, owners of drilling rigs have been focusing on improving their health and safety records for nearly three decades. When I testified before the Senate labor and Commerce Committee last month, I shared with the Committee some statistics which demonstrate the improvements our industry has made in the area of worker safety. I would like to recite these numbers again for you here today because, first, we are very proud of our accomplishments in th. area; but more importantly, these numbers are solid evidence of our industry's continuing commitment to provide the safest possible workplace for our employees.

In the mid-1970's, the industry typically experienced approximately 25 lost time accidents per 100 man years worked. In the early 1980's, the number of lost time accidents had been reduced to the upper teens per 100 man years. By 1988, we were seeing less than ten lost time accidents per 100 man years. With our industry's continuing effort to improve the workplace, and to train people to operate safely and take an active role in eliminating hazards in the workplace, in 1996, Alaska drilling contractors experienced less than two lost time accidents per 100 man years worked.

Our industry has made similar strides on the environmental side. During the 1970's and early 1980's, rigs discharged over 1000 barrels of fluids per day to the surface

environment. In the late 1980's, all drilling rigs were converted to closed systems, and the industry ceased using surface reserve pits thereby resulting in significant reduction in the amount of fluids discharged to the surface. During the 1990's, carefully developed fluid transfer policies were established; and, as an example of the progress made in a few short years, my company, Doyon Drilling, spilled on average less than a quart of fluids per day in 1996 while handling approximately four million gallons of fluid per day.

With that degree of progress, we have seen may policies and practices evolve -- including the practice of developing and implementing health, safety and environmental plans in a highly integrated manner. It is our intent to continue to improve. But there are artificial risks associated with any company's or industry's decision to engage in health and safety or environmental auditing or its operations. Alaska's businesses need to be able to conduct intensive and searching inquiries into their practices, operations and policies -- provided that they are also committed to correcting any deficiency they may find -- without having to worry that an enforcement agency or other litigant will use the results of such inquiries against them.

For this reason we find SB 41 extremely beneficial in that it allows us to concentrate on the reduction of the remaining deficiencies in the system, rather than focusing on the legal nuances of protecting audits and restricting the sharing of those with other entities in the workplace. Health and safety and environmental protection will be enhanced by this legislation. This bill would require a company to correct any deficiencies that might be discovered in order to preserve the audit privilege, and creates strong incentives for making sure that adequate internal policies are in place to ensure compliance.

We have developed suggested amendments which address our specific concerns with the bill, as well as other proposed amendments which we believe generally strengthen the bill. The four amendments we propose should be included in the bill packet given to each member of the Committee by staff. Included with the proposed amendments is a brief statement of our reasoning for each of the suggested changes. If the Committee has any

questions regarding these proposed amendments, or the bill itself, I would be happy to address them at this time.

THE FOLLOWING PAGES
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IN THE ORIGINAL FILE

DEPARTMENT OF LABOR CONCERNS REGARDING:

CSSB 41 ENVIRONMENTAL/HEALTH AND
SAFETY AUDITS

INDEX

REFERENCE DOCUMENTS

1. Two fax cover sheets and copy of U.S. House of Representatives bill 1047, Federal Self Audit Bill.

2. Fax cover sheet and Federal Law 29 USC Section 667, State Jurisdiction and Plans.

3. Fax cover sheet and copy of US 29 CFR Part 1906, Consultation Agreements.

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DIV. OF LABOR STANDARDS & SAFETY

DEPARTMENT OF LABOR

FROM: TOBY N. STEINBERGER

ASSISTANT ATTORNEY GENERAL

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104TH CONGRESS
1ST SESSION

H. R. 1047

To provide under Federal law a limited privilege from disclosure of certain information acquired pursuant to a voluntary environmental self-evaluation and, if such information is voluntarily disclosed, for limited immunity from penalties.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 24, 1995

Mr. HEFLEY (for himself, Mr. HYDE, Mr. SCHAEFER, Mr. CRAPO, Mr. ALLARD, Mr. DELAY, and Mr. YOUNG of Alaska) introduced the following bill; which was referred to the Committee on the Judiciary and, in addition, to the Committees on Commerce, Transportation and Infrastructure, and Agriculture, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To provide under Federal law a limited privilege from disclosure of certain information acquired pursuant to a voluntary environmental self-evaluation and, if such information is voluntarily disclosed, for limited immunity from penalties.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Voluntary Environmental Self-Evaluation Act".

SEC. 2. FINDINGS.

Congress finds that—

(1) enhanced and efficient protection of public health and welfare under Federal environmental laws depends principally on voluntary compliance by the general public, rather than enforcement;

(2) both a limited privilege from disclosure and a limited expansion of the protection of members of the general public who voluntarily disclose information as a result of a voluntary environmental self-evaluation is necessary to encourage voluntary compliance with Federal environmental laws and to protect public health and welfare; and

(3) the protection referred to in paragraph (2) will not inhibit the carrying out of regulatory authority that is mandatory under Federal environmental laws by officials who are entrusted with the duty of protecting the environment of the United States.

SEC. 3. DEFINITIONS.

As used in this Act:

(1) ADMINISTRATOR.—The term "Administrator" means the Administrator of the Environmental Protection Agency.

(2) ENTITY.—The term "entity" means a unit of State or local government.

(3) FEDERAL AGENCY.—The term "Federal agency" has the meaning provided the term "agency" under section 551 of title 5, United States Code.

(4) FEDERAL ENVIRONMENTAL LAW.—The term "Federal environmental law"—

(A) means—

(i) the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136 et seq.);

(ii) the Toxic Substances Control Act (15 U.S.C. 2601 et seq.);

(iii) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.);

(iv) title XIV of the Public Health Service Act (commonly known as the "Safe Drinking Water Act") (42 U.S.C. 300f et seq.);

(v) the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.);

(vi) the Clean Air Act (42 U.S.C. 7401 et seq.);

(vii) the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.);

(viii) the Emergency Planning and Community Right-To-Know Act of 1986 (42 U.S.C. 11001 et seq.):

(ix) the Oil Pollution Act of 1990 (33 U.S.C. 2701 et seq.):

(x) the Noise Control Act of 1982 (42 U.S.C. 4901 et seq.); and

(xi) the Pollution Prevention Act of 1990 (42 U.S.C. 13101 et seq.):

(B) includes any regulation issued under a law listed in subparagraph (A); and

(C) includes the terms and conditions of any permit issued under a law listed in subparagraph (A).

(5) VOLUNTARY DISCLOSURE.—The term "voluntary disclosure" means the disclosure of information related to a voluntary environmental self-evaluation with respect to which the protections provided under this Act apply.

(6) VOLUNTARY ENVIRONMENTAL SELF-EVALUATION.—The term "voluntary environmental self-evaluation" means an assessment, audit, investigation or review that is—

(A) initiated by a person or entity:

(B) carried out by the person or entity, or a consultant employed by the person or entity, for the express purpose of carrying out the assessment, audit, or review; and

(C) carried out to determine whether the person or entity is in compliance with Federal environmental laws (including any permit issued under a Federal environmental law).

SEC. 4. ADMISSIBILITY OF REPORTS, FINDINGS, OPINIONS, OR OTHER COMMUNICATIONS.

(a) IN GENERAL.—Subject to subsection (b) and notwithstanding any other provision of law, a report, finding, opinion, or other communication of a person or entity related to, and essentially constituting a part of, a voluntary environmental self-evaluation that is made in good faith shall not be admissible evidence in any legal action or administrative procedure under Federal law and shall not be subject to any discovery procedure under Federal law, unless—

(1) the person or entity that initiated the self-evaluation expressly waives the right of the person or entity to exclude from the evidence or procedure material subject to this section; or

(2) after an in camera hearing, the appropriate Federal court determines that—

(A)(i) the report, finding, opinion, or other communication indicates noncompliance with a Federal environmental law; and

(ii) the person or entity failed to initiate efforts to achieve compliance with the law within a period of time that is reasonable and that is adequate to achieve compliance (including submitting an appropriate permit application);

(B) compelling circumstances—

(i) make it necessary to admit the environmental audit report, finding, opinion, or other communication into evidence; or

(ii) necessitate that the environmental audit report, finding, opinion, or other communication be subject to discovery procedures;

(C) the person or entity is asserting the applicability of the exclusion under this subsection for a fraudulent purpose; or

(D) the environmental audit report, finding, opinion, or other communication was prepared for the purpose of avoiding disclosure of information required for an investigative, administrative, or judicial proceeding that, at the

time of preparation, was imminent or in progress.

(b) EXCLUSIONS.—Subsection (a) shall not apply to—

(1) a document or other information required to be developed, maintained, or reported pursuant to a Federal environmental law;

(2) a document or other information required to be available to a Federal agency or a State agency designated to carry out a regulatory activity pursuant to a Federal environmental law;

(3) information obtained by a Federal agency or State agency referred to in paragraph (2) through observation, sampling, or monitoring; or

(4) information obtained by a Federal agency or State agency referred to in paragraph (2) through an independent source.

SEC. 5. TESTIMONY.

Notwithstanding any other provision of law, a person or entity, including any officer or employee of the person or entity, that performs a voluntary environmental self-evaluation may not be required to give testimony in a Federal court or an administrative proceeding of a Federal agency without the consent of the person or entity concerning the voluntary environmental self-evaluation, in-

eluding an environmental audit report, finding, opinion, or other communication with respect to which section 3(a) applies.

SEC. 6. DISCLOSURES.

(a) IN GENERAL.—The disclosure of information relating to a Federal environmental law to the appropriate official of a Federal or State agency responsible for administering a Federal environmental law shall be considered to be a voluntary disclosure if—

(1) the disclosure of information arises out of a voluntary environmental self-evaluation;

(2) the person or entity that initiates the self-evaluation—

(A) ensures that the disclosure is made promptly after receiving knowledge of the information referred to in paragraph (1); and

(B) initiates an action to address the issues identified in the disclosure—

(i) within a reasonable period of time after receiving knowledge of the information; and

(ii) within a period of time that is adequate to achieve compliance with the requirements of the Federal environmental law that is the subject of the action (in-

cluding submitting an application for an applicable permit); and

(3) the person or entity that makes the disclosure provides any further relevant information requested, as a result of the disclosure, by the appropriate official of the Federal or State agency responsible for administering the Federal environmental law.

(b) INVOLUNTARY DISCLOSURES.—For the purposes of this Act, a disclosure of information to an appropriate official of a Federal or State agency responsible for administering a Federal environmental law shall not be considered to be a voluntary disclosure if the person or government entity making the disclosure has been found by a Federal or State court to have committed a pattern of significant violations of Federal or State laws, or orders on consent, related to environmental quality, due to separate and distinct events giving rise to the violations, during the 3-year period prior to the date of disclosure.

(c) PRESUMPTION OF APPLICABILITY.—If a person or entity makes a disclosure other than a disclosure referred to in subsection (b) of a violation of a Federal environmental law to an appropriate official of a Federal or State agency responsible for administering the Federal environmental law—

(1) there shall be a presumption that the disclosure is a voluntary disclosure, if the person or entity provides information supporting a claim that the information is a voluntary disclosure at the time the person or entity makes the disclosure; and

(2) until such time as the presumption is rebutted, the person or entity shall be immune from any administrative, civil, or criminal penalty for the violation.

(d) REBUTTAL OF PRESUMPTION.—

(1) IN GENERAL.—The head of a Federal or State agency described in subsection (c) shall have the burden of rebutting a presumption established under such subsection. If the head of the Federal or State agency fails to rebut the presumption pursuant to this subsection—

(A) the head of the Federal or State agency may not assess an administrative penalty against a person or entity described in subsection (c) with respect to the violation by the person or entity and may not issue a cease and desist order for the violation; and

(B) no Federal or State court may assess a civil penalty or criminal negligence penalty against the person or entity for the violation.

(2) REBUTTAL.—In order to rebut a presumption referred to in subsection (c), the appropriate official of a Federal or State agency responsible for administering the Federal environmental law that is the subject of a violation referred to in such subsection shall be required to demonstrate, on the basis of the factors described in subsection (a), and to the satisfaction of the head of the Federal or State agency, that the disclosure is not a voluntary disclosure. If the disclosure is made directly to the head of the Federal or State agency, the head of the Federal or State agency shall apply the factors described in subsection (a) in rebutting the presumption. A decision made by the head of the Federal agency under this paragraph shall constitute a final agency action.

(e) STATUTORY CONSTRUCTION.—Except as expressly provided in this section, nothing in this section is intended to affect the authority of a Federal or State agency responsible for administering a Federal environmental law to carry out any requirement of the law associated with information disclosed in a voluntary disclosure.

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DEPARTMENT OF LABOR

2

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in the government for civil penalties under this chapter enforceable in an administrative agency where there is no jury trial. Atlas Roofing Co., Inc. v. Occupation Safety and Health Review Commission, 1977, 97 S.Ct. 1261, 430 U.S. 442, 51 L.Ed.2d 464.

Procedures of the Commission in issuing citations and imposing penalties do not violate U.S.C.A.Const. Amend. 7. Penn-Dixie Steel Corp. v. Occupational Safety and Health Review Commission, C.A.7, 1977, 553 F.2d 1078.

Provision of this section permitting assessment of civil penalty of up to $1,000 for each nonserious violation of this chapter does not impose criminal penalty and jury trial is not required under U.S.C.A.Const. Amend. 6 in order to impose such penalty. Mohawk Excavating, Inc. v. Occupational Safety and Health Review Commission, C.A.2, 1977, 549 F.2d 859.

Proceeding looking to imposition of sanction for violation of regulations promulgated under authority of this chapter is not an action at common law within meaning of U.S.C.A.Const. Amend. 7 and, hence, no jury trial right arises. Clarkson Const. Co. v. Occupational Safety and Health Review Commission, C.A.10, 1976, 531 F.2d 451.

Civil penalty provisions of this chapter were neither inconsistent with jury trial guaranty in criminal cases under U.S.C.A.Const. Amend. 6 nor were they inconsistent with jury trial guaranty in civil cases under U.S.C.A.Const. Amend. 7. Bloomfield Mechanical Contracting, Inc. v. Occupational Safety and Health Review Commission, C.A.3, 1975, 519 F.2d 1257.

The "civil penalties" provided for violations of this chapter are regulatory rather than punitive notwithstanding contention that penalties are criminal in nature and thus entitle an employer to such rights as trial by jury, proof beyond a reasonable doubt, and confrontation of witnesses. Beall Const. Co. v. Occupational Safety and Health Review Commission, C.A.8, 1974, 507 F.2d 1041.

13. Questions considered

Court of Appeals has jurisdiction to consider constitutionality of this chapter when appeal is taken pursuant to provision of this section permitting assessment of civil penalty of not more than $10,000 for each violation. Mohawk Excavating, Inc. v. Occupational Safety and Health Review Commission, C.A.2, 1977, 549 F.2d 859.

24. Interest

Penalty imposed under this chapter does not fall outside general rule proscribing prejudgment interest on penalties. Marshall v. Painting by C.D.C., Inc., D.C.N.Y.1980, 497 F.Supp. 653.

25. Admissibility of evidence

Administrative law judge did not improperly exclude evidence that employer was being harassed by Secretary of Labor's alleged selective enforcement of this chapter on ground that such evidence went to reasonableness of proposed penalties, since Secretary's enforcement actions were not relevant to the abatement dates or penalty assessments. Turner Communications Corp. v. Occupational Safety and Health Review Commission, C.A.5, 1980, 612 F.2d 941.

President of pipe-laying company was not only individual whose state of mind would be relevant in determining whether corporation violated this chapter by willfully failing to shore or slope trench prior to cave-in resulting in death of workman, and corporation could be found guilty based on acts, conduct and inferentially the states of mind of superintendent, foreman and backhoe operator, all of whom had been given authority. U.S. v. Dye Const. Co., C.A.Colo.1975, 510 F.2d 78.

26. Sufficiency of evidence—Generally

Whether the Secretary's proof is adequate to meet burden placed upon him in proving serious violation of this chapter must necessarily rest in good discretion of the Commission as trier of facts, and must necessarily vary with facts of each case and indeed with capabilities and range of proof in each case. Usery v. Hermitage Concrete Pipe Co., C.A.6, 1978, 584 F.2d 127.

27. —— Miscellaneous cases

Evidence that employer had failed to install protective barriers on dies which were in use and had failed to install an adequate barrier on the die which caused the accident in question sustained determination that the employer's violation was wilful. A. Schonbek & Co., Inc. v. Donovan, C.A.2, 1981, 646 F.2d 799.

28. Findings

Fact that administrative law judge did not expressly indicate finding that employer knew or could have known, with the exercise of reasonable diligence, of hazardous practice was not a fatal flaw to finding of serious violation of this chapter, where his opinion indicated that he believed employer should have known of the practice. Austin Bldg. Co. v. Occupational Safety and Health Review Commission, C.A.10, 1981, 647 F.2d 1063.

Findings of Administrative Law Judge, who should have indicated evidentiary basis for his conclusion that possible accumulation of excess fumes and smoke due to inadequate ventilation in employee's work space created substantial probability of death or serious physical injury to him, and that employer with reasonable diligence could have known of violation, but who made no such findings and simply concluded that violation was serious, did not comport with minimum requirements of Administrative Procedure Act, section 551 et seq. and 701 et seq. of Title 5, and thus were inadequate to sustain charges that employer was in serious violation of regulations governing ventilation and exposure of welders to fluoride compounds. Bethlehem Steel Corp. v. Occupational Safety and Health Review Commission, C.A.3, 1979, 607 F.2d 1069.

Exoneration of employer by Commission of nonliability of the employer based on ground that no evidence indicated that employer was on notice of its truck driver's lack of common sense and judgment in operating boom on truck near high voltage lines and that there was no notice to employer that driver would choose such obviously dangerous position from which to attempt to unload could not be sustained in absence of any factual finding as to employer's safety program which was the crux of case. Brennan v. Butler Lime & Cement Co., C.A.7, 1975, 520 F.2d 1011.

§ 667. State jurisdiction and plans

(a) Assertion of State standards in absence of applicable Federal standards

Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.

(b) Submission of State plan for development and enforcement of State standards to preempt applicable Federal standards

Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health

standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

(c) Conditions for approval of plan

The Secretary shall approve the plan submitted by a State under subsection (b) of this section, or any modification thereof, if such plan in his judgment—

(1) designates a State agency or agencies as the agency or agencies responsible for administering the plan throughout the State,

(2) provides for the development and enforcement of safety and health standards relating to one or more safety or health issues, which standards (and the enforcement of which standards) are or will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under section 655 of this title which relate to the same issues, and which standards, when applicable to products which are distributed or used in interstate commerce, are required by compelling local conditions and do not unduly burden interstate commerce,

(3) provides for a right of entry and inspection of all workplaces subject to this chapter which is at least as effective as that provided in section 657 of this title, and includes a prohibition on advance notice of inspections,

(4) contains satisfactory assurances that such agency or agencies have or will have the legal authority and qualified personnel necessary for the enforcement of such standards,

(5) gives satisfactory assurances that such State will devote adequate funds to the administration and enforcement of such standards,

(6) contains satisfactory assurances that such State will, to the extent permitted by its law, establish and maintain an effective and comprehensive occupational safety and health program applicable to all employees of public agencies of the State and its political subdivisions, which program is as effective as the standards contained in an approved plan,

(7) requires employers in the State to make reports to the Secretary in the same manner and to the same extent as if the plan were not in effect, and

(8) provides that the State agency will make such reports to the Secretary in such form and containing such information, as the Secretary shall from time to time require.

(d) Rejection of plan; notice and opportunity for hearing

If the Secretary rejects a plan submitted under subsection (b) of this section, he shall afford the State submitting the plan due notice and opportunity for a hearing before so doing.

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ubmitted under subsection (b) of this submitting the plan due notice and doing.

(e) Discretion of Secretary to exercise authority over comparable standards subsequent to approval of State plan; duration; retention of jurisdiction by Secretary upon determination of enforcement of plan by State

After the Secretary approves a State plan submitted under subsection (b) of this section, he may, but shall not be required to, exercise his authority under sections 657, 658, 659, 662, and 666 of this title with respect to comparable standards promulgated under section 655 of this title, for the period specified in the next sentence. The Secretary may exercise the authority referred to above until he determines, on the basis of actual operations under the State plan, that the criteria set forth in subsection (c) of this section are being applied, but he shall not make such determination for at least three years after the plan's approval under subsection (c) of this section. Upon making the determination referred to in the preceding sentence, the provisions of sections 654(a)(2), 657 (except for the purpose of carrying out subsection (f) of this section), 658, 659, 662, and 666 of this title, and standards promulgated under section 655 of this title, shall not apply with respect to any occupational safety or health issues covered under the plan, but the Secretary may retain jurisdiction under the above provisions in any proceeding commenced under section 658 or 659 of this title before the date of determination.

(f) Continuing evaluation by Secretary of State enforcement of approved plan; withdrawal of approval of plan by Secretary; grounds; procedure; conditions for retention of jurisdiction by State

The Secretary shall, on the basis of reports submitted by the State agency and his own inspections make a continuing evaluation of the manner in which each State having a plan approved under this section is carrying out such plan. Whenever the Secretary finds, after affording due notice and opportunity for a hearing, that in the administration of the State plan there is a failure to comply substantially with any provision of the State plan (or any assurance contained therein), he shall notify the State agency of his withdrawal of approval of such plan and upon receipt of such notice such plan shall cease to be in effect, but the State may retain jurisdiction in any case commenced before the withdrawal of the plan in order to enforce standards under the plan whenever the issues involved do not relate to the reasons for the withdrawal of the plan.

(g) Judicial review of Secretary's withdrawal of approval or rejection of plan; jurisdiction; venue; procedure; appropriate relief; finality of judgment

The State may obtain a review of a decision of the Secretary withdrawing approval of or rejecting its plan by the United States court of appeals for the circuit in which the State is located by filing in such court within thirty days following receipt of notice of such decision a petition to modify or set aside in whole or in part the action of the Secretary. A copy of such petition shall forthwith be served upon the Secretary, and thereupon the Secretary shall certify and file in the court the record upon which the decision complained of was issued as provided in section 2112 of Title 28. Unless the court finds that the Secretary's decision in rejecting a proposed State plan or withdrawing his approval of such a plan is not supported by substantial evidence the court shall affirm the Secretary's decision. The judgment of the court shall be subject to review by the Supreme Court of

the United States upon certiorari or certification as provided in section 1254 of Title 28.

(h) Temporary enforcement of State standards

The Secretary may enter into an agreement with a State under which the State will be permitted to continue to enforce one or more occupational health and safety standards in effect in such State until final action is taken by the Secretary with respect to a plan submitted by a State under subsection (b) of this section, or two years from December 29, 1970, whichever is earlier.

(Pub.L. 91-596, § 18, Dec. 29, 1970, 84 Stat. 1608.)

Historical Note

References in Text. This chapter, referred to in subsec. (a), was in the original "this Act", meaning Pub.L. 91-596, Dec. 29, 1970, 84 Stat. 1590, as amended. For complete classification of this Act to the Code, see Short Title note set out under section 651 of this title and Tables volume.

Codification. Section 666 of this title, referred to in subsec. (c), was in the original section 17 of Pub.L. 91-596. Subsecs. (a) to (g) and (i) to (l) of such section 17 are classified to section 666 of this title. Subsec. (h) of such section 17 amended section 1114 of Title 18, Crimes and Criminal Procedure, and enacted note set out thereunder.

Effective Date. Section effective 120 days after Dec. 29, 1970, see section 34 of Pub.L. 91-596, set out as a note under section 651 of this title.

Legislative History. For legislative history and purpose of Pub.L. 91-596, see 1970 U.S. Code Cong. and Adm.News, p. 5177.

Cross References

Grants to States for administration and enforcement of programs contained in approved State plans, see section 672 of this title.
Loans by Secretary of Agriculture to assist farmers or ranchers in compliance with standards under an approved State plan, see section 1942 of Title 7, Agriculture.

West's Federal Forms

Enforcement and review of decisions and orders of administrative agencies, see § 851 et seq.
Supreme Court—
Jurisdiction on certificate, see § 321 et seq.
Jurisdiction on writ of certiorari, see § 221 et seq.

West's Federal Practice Manual

Coverage, government employees, state and local, see § 10407.
State plans, see § 10420.

Code of Federal Regulations

Approved state plans for enforcement of state standards, see 29 CFR 1952.1 et seq.
Procedures for—
Evaluation and monitoring of approved state plans, see 29 CFR 1954.1 et seq.
State agreements, see 29 CFR 1901.1 et seq.
Withdrawal of approval of state plans, see 29 CFR 1955.1 et seq.
State plans for development and enforcement of state standards—
Generally, see 29 CFR 1902.1 et seq.
Applicability to state and local government employees in states without approved private employee plans, see 29 CFR 1956.1 et seq.
Changes in, see 29 CFR 1953.1 et seq.

3

STATE OF ALASKA - DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
1031 W. 4th Ave., Ste. 200
Anchorage, Alaska 99501

FAX TRANSMITTAL SHEET

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DATE: February 21, 1996 TIME: 1:21PM

TO: Al Dwyer FROM: Toby Steinberger
Attorney General's Office

COMPANY: Labor Standards & Safety

FAX #: 269-4915

NUMBER OF PAGES INCLUDING COVER SHEET 4

REMARKS: 29 CFR Ch. XVII (7-1-95 Edition) Part 1908 pp. 57, 63-64. Re: HB 199

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and that a party is entitled to summary decision. The hearing examiner may deny such motion whenever the moving party denies access to information by means of discovery to a party opposing the motion.

(d) Affidavits shall set forth such facts as would be admissible in evidence in a proceeding subject to 5 U.S.C. 556 and 557 and shall show affirmatively that the affiant is competent to testify to the matters stated therein. When a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of his pleading; his response must set forth specific facts showing that there is a genuine issue of fact for the hearing.

(e) Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the hearing examiner may deny the motion for summary decision or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

(f) The denial of all or any part of a motion for summary decision by the hearing examiner shall not be subject to interlocutory appeal to the Assistant Secretary unless the hearing examiner certifies in writing (1) that the ruling involves an important question of law or policy as to which there is substantial ground for difference of opinion, and (2) that an immediate appeal from the ruling may materially advance the ultimate termination of the proceeding. The allowance of such an interlocutory appeal shall not stay the proceeding before the hearing examiner unless the Assistant Secretary shall so order.

§ 1905.41 Summary decision.

(a) *No genuine issue of material fact.* (1) Where no genuine issue of a material fact is found to have been raised, the hearing examiner may issue an initial decision to become final 20 days after service thereof, unless, within such period of time any party has filed written exceptions to the decision. If any timely exception is filed, the hearing examiner shall fix a time for filing any objections to the exception and any supporting reasons. Thereafter, the Assistant Secretary, after consideration of the exceptions and any supporting briefs filed therewith and of any objections to the exceptions and any supporting reasons, may issue a final decision.

(2) An initial decision and a final decision made under this paragraph shall include a statement of:

(i) Findings and conclusions, and the reasons or bases therefor, on all issues presented; and

(ii) The terms and conditions of the rule or order made.

(3) A copy of an initial decision and a final decision under this paragraph shall be served on each party.

(b) *Hearings on issues of fact.* Where a genuine material question of fact is raised, the hearing examiner shall, and in any other case he may, set the case for an evidentiary hearing in accordance with subpart C of this part.

Subpart E—Effect of Initial Decisions

§ 1905.60 Effect of appeal of a hearing examiner's decision.

A hearing examiner's decision under this part shall not be operative pending a decision on appeal by the Assistant Secretary.

§ 1905.61 Finality for purposes of judicial review.

Only a decision by the Assistant Secretary shall be deemed final agency action for purposes of judicial review. A decision by a hearing examiner which becomes final for lack of appeal is not deemed final agency action for purposes of 5 U.S.C. 704.

PART 1906—ADMINISTRATION WITNESSES AND DOCUMENTS IN PRIVATE LITIGATION (RESERVED)

PART 1908—CONSULTATION AGREEMENTS

Sec.
1908.1 Purpose and scope.
1908.2 Definitions.
1908.3 Eligibility and funding.
1908.4 Offsite consultation.
1908.5 Requests and scheduling for onsite consultation.
1908.6 Conduct of a visit.
1908.7 Relationship to enforcement.
1908.8 Consultant specifications.
1908.9 Monitoring and evaluation.
1908.10 Cooperative Agreements.
1908.11 Exclusions.

AUTHORITY: Secs. 7, 21, Occupational Safety and Health Act of 1970 (29 U.S.C. 656, 670); Secretary of Labor's Order No. 9–83 (48 FR 35736).

SOURCE: 49 FR 25091, June 19, 1984, unless otherwise noted.

§ 1908.1 Purpose and scope.

(a) This part contains requirements for Cooperative Agreements between States and the Federal Occupational Safety and Health Administration under sections 7(c)(1) and 21(c) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.) under which OSHA will utilize State personnel to provide consultative services to employers. The service will be made available at no cost to employers to assist them in establishing effective occupational safety and health programs for providing employment and places of employment which are safe and healthful. The overall goal is to prevent the occurrence of injuries and illnesses which may result from exposure to hazardous workplace conditions and from hazardous work practices. The principal assistance will be provided at the employer's worksite, but offsite assistance may also be provided by telephone and correspondence, and at locations other than the employer's worksite, such as the consultation project offices. At the worksite, the consultant will, within the scope of the employer's request, evaluate the employer's program for providing employment and a place of employment which is safe and healthful, as well as identify specific hazards in the workplace, and will provide appropriate advice and assistance in establishing or improving the employer's safety and health program and in correcting any hazardous conditions identified.

(b) Assistance may include education and training of the employer, the employer's supervisors, and the employer's other employees as needed to make the employer self-sufficient in ensuring safe and healthful work and working

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ant must immediately notify the affected employees and the appropriate OSHA enforcement authority and provide the relevant information.

(2) An employer must also take the necessary action in accordance with the plan developed under §1908.6(a)(5) to eliminate or control employee exposure to any identified serious hazard. In order to demonstrate that the necessary action is being taken, an employer may be required to submit periodic reports, permit a followup visit, or take similar action.

(3) An employer may request, and the consultation manager may grant, an extension of the time frame established for correction of a serious hazard when the employer demonstrates having made a good faith effort to correct the hazard within the established time frame; shows evidence that correction has not been completed because of factors beyond the employer's reasonable control; and shows evidence that the employer is taking all available interim steps to safeguard the employees against the hazard during the correction period.

(4) If the employer fails to take the action necessary to correct a serious hazard within the established time frame or any extensions thereof, the consultation manager shall immediately notify the appropriate OSHA enforcement authority and provide the relevant information. The OSHA enforcement authority will make a determination, based on a review of the facts, whether enforcement activity is warranted.

(5) After correction of all serious hazards, the employer shall notify the consultation manager by written confirmation of the correction of the hazards, unless correction of the serious hazards is verified by direct observation by the consultant.

(g) *Written report.* A written report shall be prepared for each visit which results in substantive findings or recommendations, and shall be sent to the employer. The timing and format of the report shall be approved by the Assistant Secretary. The report shall restate the employer's request and describe the working conditions examined by the consultant; shall, within the scope of the request, evaluate the

employer's program for ensuring safe and healthful employment and provide recommendations for making such programs effective; shall identify specific hazards and describe their nature, including reference to applicable standards or codes; shall identify the seriousness of the hazards; and, to the extent possible, shall include suggested means or approaches to their correction. Additional sources of assistance shall also be indicated, if known, including the possible need to procure specific engineering consultation, medical advice and assistance, and other appropriate items. The report shall also include reference to the completion dates for the situations described in §1908.6(f) (1) and (2).

(h) *Confidentiality.* The consultant shall preserve the confidentiality of information obtained as the result of a consultative visit which contains or might reveal a trade secret of the employer.

(Approved by the Office of Management and Budget under control number 1218–0110)

[60 FR 35091, June 19, 1994, as amended at 54 FR 24333, June 7, 1989]

§ 1908.7 Relationship to enforcement.

(a) *Independence.* (1) Consultative activity by a State shall be conducted independently of any OSHA enforcement activity.

(2) The consultative activity shall have its own identifiable managerial staff. In States with Plans approved under section 18 of the Act, this staff will be separate from the managing of compliance inspections and scheduling.

(3) The identity of employers requesting onsite consultation, as well as the file of the consultant's visit, shall not be forwarded or provided to OSHA for use in any compliance inspection or scheduling activity, except as provided for in §1908.6(f) (1) and (4) and §1908.7(b)(4).

(b) *Effect upon scheduling.* (1) An onsite consultative visit already in progress will have priority over OSHA compliance inspections except as provided in §1908.7(b)(2). The consultant and the employer shall notify the compliance officer of the visit in progress and request delay of the inspection until after the visit is completed. An onsite consultative visit shall be considered in progress in relation to the working conditions, hazards, or situations covered by the request from the beginning of the opening conference through the end of the closing conference; except that for periods which exceed 30 days from the initiation of the opening conference, the RA may determine that the inspection will proceed. For working conditions, hazards, or situations not covered by the request, the onsite consultative visit shall be considered in progress only while the consultant is at the place of employment.

(2) The consultant shall terminate an onsite consultative visit already in progress where one of the following kinds of OSHA compliance inspections is about to take place:

(i) Imminent danger investigations;

(ii) Fatality/catastrophe investigations;

(iii) Complaint investigations;

(iv) Other critical inspections as determined by the Assistant Secretary.

(3) An onsite consultation visit may not take place while an OSHA enforcement inspection is in progress at the establishment. An enforcement inspection shall be deemed "in progress" from the time a compliance officer initially seeks entry to the workplace to the end of the closing conference. An enforcement inspection will also be considered "in progress" in cases where entry is refused, until such times as: the inspection is conducted; the RA determines that a warrant to require entry to the workplace will not be sought; or the RA determines that allowing a consultative visit to proceed is in the best interest of employee safety and health. An onsite consultative visit shall not take place subsequent to an OSHA enforcement inspection until a determination has been made that no citation will be issued, or if a citation is issued, onsite consultation shall only take place with regard to those citation items which have become final orders.

(4) When an employer requests and undergoes a consultative visit at an establishment covering all conditions and operations in the place of employment related to occupational safety and health; corrects all hazards that have been identified during the course

of the consultative visit within established time frames, and posts notice of their correction when such is completed; demonstrates to the consultant that certain core elements of an effective safety and health program are in effect, and that the remaining elements of an effective safety and health program will be implemented within a reasonable, established time frame; and agrees to request a consultative visit if major changes in working conditions or work processes occur which may introduce new hazards, the employer may, upon request, be exempt from a general schedule OSHA enforcement inspection for a period of one year from the end of the closing conference of the consultative visit. Between the time of election to participate in the process required to qualify for the exemption and the completion of the process, the employer must post a notice of such participation.

(5) When an employer requests consideration for an inspection exemption under §1908.7(b)(4), the provisions of §1908.6 (e)(7), (f)(3) and (f)(5) shall apply to other-than-serious hazards as well as serious hazards.

(c) *Effect upon enforcement.* (1) The advice of the consultant and the consultant's written report will not be binding on a compliance officer in a subsequent enforcement inspection. In a subsequent inspection, a compliance officer is not precluded from finding hazardous conditions, or violations of standards, rules or regulations, for which citations would be issued and penalties proposed.

(2) The hazard identification and correction assistance given by a State consultant, or the failure of a consultant to point out a specific hazard, or other possible errors or omissions by the consultant, shall not be binding upon a compliance officer and need not affect the regular conduct of a compliance inspection or preclude the finding of alleged violations and the issuance of citations, or constitute a defense to any enforcement action.

(3) In the event of a subsequent inspection, the employer is not required to inform the compliance officer of the prior visit. The employer is not required to provide a copy of the State consultant's written report to the compliance officer, except to the extent that disclosure of information contained in such a written report is required by 29 CFR 1910.20.

(4) If, however, the employer chooses to provide a copy of the consultant's report to a compliance officer, it may be used as a factor in determining the extent to which an inspection is required and as a factor in determining proposed penalties. When, during the course of a compliance inspection, an OSHA compliance officer identifies the existence of serious hazards previously identified as a result of a consultative visit, the Area Director shall have authority to assess minimum penalties if the employer is in good faith complying with the recommendations of a consultant after such consultative visit.

(Approved by the Office of Management and Budget under control number 1218–0110)

[49 FR 25094, June 19, 1984, as amended at 54 FR 21333, June 7, 1989]

§ 1908.8 Consultant specifications.

(a) *Number.* (1) The number of consultant positions which will be funded under a Cooperative Agreement pursuant to this part for the purpose of providing consultation to private sector employers will be determined by the Assistant Secretary on the basis of program performance, demand for services, industrial mix, resources available, and the recommendation of the RA, and may be adjusted periodically.

(2) States shall make efforts to utilize consultants with the safety and health expertise necessary to properly meet the demand for consultation by the various industries within a State. The RA will determine and negotiate a reasonable balance with the State on an annual basis.

(b) *Qualifications.* (1) All consultants utilized under Cooperative Agreements pursuant to this part shall be employees of the State, qualified under State requirements for employment in occupational safety and health. They must demonstrate adequate education and experience to satisfy the RA before assignment to work under an Agreement, and annually thereafter, that they meet the requirements set out in §1908.8(b)(3), and that they have the ability to perform satisfactorily pursu-

INDEX

1. CSSB 41, Fiscal Note
2. ~~CSSB 41 Bill Analysis~~
3. Letter from Acting Assistant Secretary, US Department of Labor re: CSSB 41.
4. Memo from Director LS&S, DOL re: DOL Concerns with CSSB 41.
5. General comments re: "Explanations of Changes To SB 41" from Senator Leman's staff.
6. CSSB 41
7. Letter from AG's office re: SB 41
8. Letter from Richard Terril, Acting Regional Administrator, US DOL re; SB 41.
9. Two cover letters from Robert Swain, Council for Legal Advice, USDOL re: USDOL's position on self-audit privileges.
10. Assistant Secretary of Labor's statement on the need for OSHA access to self-audit reports.
11. Letter from Joe Dear, Asst. Secretary, USDOL to ORC Inc.re:USDOL's position on access to self-audits.
12. Letter from USDOL re: SB 41
13. Summary of substantive differences between SB 199 & SB 41
14. Legislative Request from Dwight Perkins.
15. SB 41

FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. CSSB 41

Revision Date:
Title: Environmental & health/safety audits

Sponsor: Senator Leman
Requestor: Senate L&C

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

EXPENDITURES/REVENUES: (Thousands of Dollars)

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

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY97) impact: $ None

ANALYSIS: (Attach a separate page if necessary)

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

Prepared by: Alan W. Dwyer, Director — Phone: 465-4855
Division: Labor, Standards & Safety — Date: 2/11/97

Approved by Commissioner: Tom Cashen, Commissioner
Agency: Department of Labor — Date: 2/11/97

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

1) One new PFT Admin Clerk II will be required to document safety audits reported by employers and monitor the time frames allowed under CSSB 41.

2) Approximately 1,875 hours of work from existing Occupational Safety Compliance Officers will be required to provide facts and findings for the attorney. Each case will require approximately 75 hours to conduct the investigation, above and beyond the time required to perform the inspection, reducing the effectiveness of our OSH program by removing almost one FTE from our regular enforcement activities.

3) The Assistant Attorney General assigned to LS&S will work approximately 75 hours per case, reviewing files, preparing affidavits from employees, taking depositions, preparing briefs, conducting hearings, and representing the division in court. This also includes travel to areas outside of Anchorage.

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

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

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

U.S. Department of Labor

Assistant Secretary for
Occupational Safety and Health
Washington, D.C. 20210

Initials	INFO	ACT
Comm	✓	
Deputy	✓	
Sp Ass*	✓	
Adm Asst		
Ex. Sec'y		
ASD		
ESD		
LRA		
[illegible]	✓	
VYC		
[illegible]	✓	

FEB 14 1997

RECEIVED

FEB 14 1997

Tom Cashen, Commissioner
Alaska Department of Labor
Post Office Box 21149
Juneau, Alaska 99802-1149

3

Dear Commissioner Cashen:

Per your request, I am writing this letter concerning Alaska Senate Bill 41 regarding privileges and immunities related to disclosure of certain self-audits. CS SB 41

As you are aware, Acting Regional Administrator Richard Terrill sent you a letter on January 27 concerning the impact of this bill on the Federally-approved Alaska occupational safety and health State plan. I wish to reaffirm that the Occupational Safety and Health Administration (OSHA) strongly opposes grants of privileges and immunities of the kind contained in this bill. OSHA's position on this issue is clearly set forth in former Assistant Secretary Joseph Dear's November, 1995 testimony before a U.S. Senate committee concerning a comparable Federal bill which was never enacted. Under the Federal Occupational Safety and Health Act (the Act), OSHA has access to *all* employer records which pertain to the safety and health of employees, including records created by employer self-audits. No system of employer privileges and immunities such as in SB 41 has ever been applicable under the Act, and Federal court decisions make it clear that a self-audit privilege is not consistent with section 8 of the Act. To my knowledge, no other plan State has ever implemented a self-audit privilege.

OSHA is concerned about several major features of this bill that would adversely affect the Alaska State plan. The bill would create an evidentiary privilege enabling employers to withhold information usually relied upon by both Federal and State safety and health investigators in cases involving alleged willful violations as well as other circumstances. By requiring Alaska to go to court to get the most basic information currently obtainable under both State and Federal law, yet not allowing the State access to evidence to show the court that this information is needed, the bill creates a "catch 22" dilemma for the State. SB 41 would also create a testimonial privilege constraining personnel with the Alaska State plan (AKOSH) from interviewing persons concerning information related to a self-audit, or from compelling persons to testify in court or at a hearing concerning the audit report. Further, under SB 41 employers would receive immunity from a civil penalty for a violation voluntarily disclosed to AKOSH.

For these reasons, the employer privileges and immunities proposed in Alaska Senate Bill 41 would greatly limit Alaska's authority to investigate accidents and illnesses in the workplace, document their causes, and enforce job safety and health standards. This bill would thus significantly damage the credibility and effectiveness of Alaska's enforcement program. As you know, Congress has required the States with OSHA-approved State plans to maintain an

MEMORANDUM

STATE OF ALASKA
DEPARTMENT OF LABOR
Labor Standards & Safety Division

TO: Dwight L. Perkins
Special Assistant to the Commissioner

DATE: February 12, 1997

FILE: CSSB41

PHONE: 465-4855

4

FROM: Alan W. Dwyer
Director

SUBJECT: DOL Concerns with CSSB41

The following are concerns LS&S have regarding the subject bill:

General Concerns:

It is our opinion that (1) Alaskan businesses have nothing to gain by the passage of Senate Labor & Commerce CSSB41 and (2) CSSB41 will undermine the Alaska Occupational Safety & Health (AKOSH) Enforcement program by limiting the department's access to employer safety audits and by obstructing the department in its mission to penalize employers who disregard safety rules.

This bill could cause the federal government to withdraw our exclusive safety and health inspection and enforcement jurisdiction, known as "18(e) certification".[1] In order to receive an 18(e) certification, the state must meet certain requirements, one of which is that its enforcement must be as effective as Federal OSHA's enforcement. If CSSB41 passes, our enforcement will no longer be as effective as Federal OSHA's enforcement since federal law does not give employers an audit privilege or grant employers immunity from citations. When an 18(e) certificated state is no longer as effective as Federal OSHA, Federal OSHA can withdraw the 18(e) certification and even withdraw enforcement funding.

It's important to realize the many years of hard work it took the department to finally receive its 18(e) certification in 1984. This was quite an accomplishment. We were the third state to receive it out of the fourteen who have it. We would hate to see Alaska be the first state to lose it.

We believe that Federal OSHA would not withdraw funding, at least at first. It's more likely that it will be forced, in cases where employers take advantage of the bill, to ignore or revoke AKOSH's 18(e) certification and take over individual cases. Consequently, we would no longer have exclusive jurisdiction and Federal OSHA and AKOSH would exercise concurrent jurisdiction in Alaska. Employers who assert the audit privilege or claim immunity will be dealing with Federal OSHA rather than AKOSH, and Federal OSHA would disregard our audit privilege and immunity law. There is no way to predict at what point Federal OSHA would withdraw our enforcement funding.

---

[1] This would not affect maritime worker safety or federal employee safety which have always been federal jurisdiction.

CORRECTION

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

U.S. Department of Labor

Assistant Secretary for
Occupational Safety and Health
Washington, D.C. 20210

Initials	INFO	ACT
Comm	✓	
Deputy	✓	
Sp Ass't	✓	
Adm Asst		
Ex. Sec'y		
ASD		
ESD		
LRA		
[illegible]	✓	
WC Y		
[illegible]	✓	

FEB 14 1997

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For these reasons, the employer privileges and immunities proposed in Alaska Senate Bill 41 would greatly limit Alaska's authority to investigate accidents and illnesses in the workplace, document their causes, and enforce job safety and health standards. This bill would thus significantly damage the credibility and effectiveness of Alaska's enforcement program. As you know, Congress has required the States with OSHA-approved State plans to maintain an

occupational safety and health program which is at least as effective as the Federal. Enactment of such a provision by the State would seriously undermine the continued approvability of Alaska's 18(e) occupational safety and health program, and may result in the withdrawal of Federal approval and funding for the Alaska program.

Sincerely,

Greg Watchman
Acting Assistant Secretary

cc: Richard S. Terrill, Acting Regional Administrator

MEMORANDUM

STATE OF ALASKA
DEPARTMENT OF LABOR
Labor Standards & Safety Division

TO: Dwight L. Perkins
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It's important to realize the many years of hard work it took the department to finally receive its 18(e) certification in 1984. This was quite an accomplishment. We were the third state to receive it out of the fourteen who have it. We would hate to see Alaska be the first state to lose it.

We believe that Federal OSHA would not withdraw funding, at least at first. It's more likely that it will be forced, in cases where employers take advantage of the bill, to ignore or revoke AKOSH's 18(e) certification and take over individual cases. Consequently, we would no longer have exclusive jurisdiction and Federal OSHA and AKOSH would exercise concurrent jurisdiction in Alaska. Employers who assert the audit privilege or claim immunity will be dealing with Federal OSHA rather than AKOSH, and Federal OSHA would disregard our audit privilege and immunity law. There is no way to predict at what point Federal OSHA would withdraw our enforcement funding.

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I think that most people would agree that Alaskan businesses would, if given a choice, choose AKOSH over Federal OSHA. AKOSH is set up to deal with local concerns. Our inspectors, administrators, and board members are all Alaskans. If an employer wants to fight (contest) a citation, the Alaska Occupational Safety & Health Review Board holds a hearing. The Alaska Occupational Safety & Health Review Board consists of a representative from the Alaska public, Alaska industry and Alaska labor. The three board members meet with a hearing officer, who is also an Alaskan, to hear testimony and make a decision. Our Alaska court would hear an appeal from the Board's decision if the employer was dissatisfied with the decision. In contrast, if Federal OSHA were to conduct an investigation and issue a citation, the employer's contest of the citation would be decided by an administrative law judge from Seattle. If the employer was dissatisfied with the administrative law judge's decision, the federal OSHA Review Commission in Washington D.C. would hear the appeal and any further review would be by the federal court.

Privilege Concerns:

The audit privilege will prevent OSHA officers from gathering evidence to support citations, delay investigations, and may prevent the department from issuing citations within 180 days of the discovery of the violations, as required under AS 18.60.091(c). In addition, AKOSH is mandated by a written contract with Federal OSHA to operate its enforcement program according to strict federal guidelines which are monitored by the Federal OSHA on a quarterly basis. In order for AKOSH to comply with the contract, it must issue citations by following federal procedures.

Under federal and state OSHA law, there are four different categories for citations: Willful, Repeat, Serious and Other-than-Serious. Each type requires proof of certain facts which we may not be able to obtain if an employer asserts the audit privilege. For example, to prove a serious citation, we have to prove that the employer knew or should have known of the violation. To prove a willful citation, we have to prove that the employer intentionally or recklessly disregarded an OSHA safety standard. To prove a repeat, we need to prove that the employer at least once previously violated a standard.

Often an employer relies on the expertise of its employees or a third party to collect data and analyze the data. The proposed bill makes the audit analysis privileged and confidential. An example of how this privilege could impede or prevent a hazard from being corrected, is when we receive an employee complaint that a crane has not been inspected in many years and has possible structural damage. After arriving at the scene, our inspector requests all paperwork on the equipment so that we could see the raw data and analysis by a qualified person to determine the structural integrity of the crane. The employer claims privilege because it has properly submitted its intention to perform a safety audit on the crane and has completed it within the proper time frame.

We would go to court for permission to view and use the confidential analysis. This could take a considerable amount of time which would be costly for the department and for the employer. Each party would have to file briefs and put on evidence at an evidentiary hearing. The court may or may not allow us to use the audit. All this takes time and the court may not issue a decision for many weeks. This will delay our investigation and our issuance of a citation.

As stated above, without proof of the safety hazard and of the employer's prior knowledge we cannot require the employer to correct the violation and write a "willful" or even possibly a "serious" citation. We would not be able to use the employer's analysis to require immediate abatement but would have to hire a qualified person to conduct the analysis for us, which may take time and leave employees exposed to a hazard. Federal OSHA has no such obstacle to its enforcement program.

Therefore, in the interest of worker safety, court costs and time requirements, AKOSH would turn the case over to the Federal OSHA at the point where the employer claims privilege.

Immunity Concerns:

Continuing with the case above, if they voluntarily gave us the safety audit and we were able to prove employer knowledge and we issued a "serious" citation, we could not pursue a violation if the employer asserted immunity. This will be another violation of our contract with Federal OSHA since federal law requires that we pursue enforcement for a serious violation. Similarly, if we wanted to assert a repeat violation as required under our contract with Federal OSHA, we could not issue a repeat violation if the employer only once previously violated a regulation; under the bill, an employer would lose immunity only if it "repeatedly or continuously" violated a regulation. In order to assert a willful citation, we would have to litigate in court whether the employer is no longer immune from a citation.

Another concern with the immunity portion of the bill is that AKOSH would be prevented from issuing citations in cases where we discover hazards in an audit which is voluntarily disclosed to us, but the employer was unaware of those hazards. This encourages sloppy audits when an employer is not accountable for hazards its audit has overlooked. Issuing citations is the only means AKOSH has to ensure hazards are corrected.

An additional concern is that an employer will give notice of an audit whenever it begins work at a temporary facility, such as a construction site or an asbestos removal site, thereby making the employer immune from citations. Under CSSB41, the employer will have 90 days to correct violations and will likely have left the site by the expiration of the 90 days. In contrast, Federal OSHA would require immediate abatement if the violation presented an immediate hazard to the employee's health.

Summary:

The purpose of the Department of Labor is to foster and promote the welfare of the wage earners of the state, improve their working conditions and advance their opportunities for profitable employment. We feel that while the intention of this bill is to enhance the safety of the worker, in reality it will tie the hands of the agency charged with protecting the worker from the few dishonest and unscrupulous employers who would hide behind the protection that this bill provides. While most employers realize that safety is good business, unfortunately there are many that do not. AKOSH is there to protect the workers from those who would put them at risk.

Allowing immunity from citations and making safety audits privileged documents would encourage the unscrupulous employer to disregard safety rules. It would result in the federal government revoking our hard won 18(e) certification. This would allow Federal OSHA to conduct inspections in Alaska whenever an employer asserts the privilege or claims immunity. Federal OSHA and the federal courts will not apply the audit privilege or the immunity provision in CSSB41. Consequently, Alaskan businesses will not gain anything from CSSB41.

EXPLANATION OF CHANGES TO SB 41:

GENERAL COMMENTS:

Mike Pauley and I were directed by the Sponsor to work with representatives of the departments affected by the bill to try to come to consensus on various points. We have very productive discussions with the Departments of Law and Environmental Conservation. However, the draft provided by those departments left out health and safety laws, while the Committee Substitute retains the original purview of SB 41, and includes health and safety laws.

There are two other areas where the sponsor indicated he would prefer work continue in the Judiciary committee:

a) Trigger to make the immunity unavailable if a federally delegated program requires imposition of a penalty for a violation. The sponsor has directed that the language proposed by the departments be left out of the CS, but he intends to continue to work with the departments and the Senate Judiciary Committee on the problem of federally delegated programs and the effect of SB 41.

b) The definition of the term "commence" when used in conjunction with "commencing an audit". This phrase needs to be clearly defined and understood and is also within the purview of the Senate Judiciary Committee.

Of the four amendments provided by the International Association of Drilling Contractors, one was incorporated. One was deemed within the purview of the Senate Judiciary Committee and two were deemed unnecessary after inclusion of language from the departments' proposal.

<u>Section 1: Findings: Intent:</u>

Proposal:	Environmental Law
CSSB41:	Environmental, Health & Safety
Proposal:	"confidential self-evaluation and analysis"
CSSB41:	accepted
Proposal:	"persons" for "entities"
CSSB 41:	accepted
Proposal:	"compliance plan" for "corrective action plan"
CSSB 41:	accepted

Section 2:

<u>Sec. 09.25.450 Audit Report Privilege:</u>

(a)

Proposal:	Change title to reflect only environmental privilege
CSSB 41:	Not accepted
Proposal:	Makes clear that its the owner/operator who prepares an audit report who has the privilege. Begin to change focus from the "audit report" to the information which is privileged
CSSB 41:	Accepted

WORK DRAFT WORK DRAFT WORK DRAFT

0-LS0299\E
Lauterbach
1/30/97

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CS FOR SENATE BILL NO. 41(L&C)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY THE SENATE LABOR AND COMMERCE COMMITTEE

Offered:
Referred:

Sponsor(s): SENATORS LEMAN, Pearce, Taylor

A BILL

FOR AN ACT ENTITLED

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

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

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

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

(2) the public has a strong interest in encouraging routine self-review of environmental and health and safety business practices and procedures; this encouragement can best be achieved by preserving the free flow of information; the free flow of the kind of information that is generated by self-audits would be curtailed if a privilege for the audits were not available; therefore, it is the intent of the legislature to recognize an audit privilege under this Act to protect the confidentiality of communications related to voluntary internal environmental and health and safety audits; however, the legislature does not intend that the parts of an audit report consisting of confidential self-evaluation and analysis that are privileged under this Act may be used to shield a person from liability under applicable laws and regulations by blocking access to relevant facts;

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

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

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

Article 5. Privileges and Immunities Related to Disclosure of Certain Self-Audits and Violations.

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

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

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

(b) With respect to confidential self-evaluation and analysis in an environmental audit, in order to qualify for the privilege under this section and the immunity under AS 09.25.475, at least 15 days before conducting the audit, the owner or operator conducting the audit must give notice by certified mail to the department of the fact that it is planning to commence the audit. The notice must specify the facility, operation, or property or portion of the facility, operation, or property to be audited, the date the audit will begin and end, and the general scope of the audit. The notice may provide notification of more than one scheduled environmental audit at a time. Once initiated, an audit shall be completed within 30 days unless a longer period of time is agreed upon between the owner or operator and the department. The audit report must be completed in a timely manner.

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

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

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

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

(4) a custodian of the audit results.

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

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

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

(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 this section.

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

(i) This section may not be construed to

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

(2) authorize a privilege for uninterrupted or continuous environmental or health and safety audits.

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

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

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

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

(B) a legal representative of the owner or operator;

(C) an officer or director of the regulated facility, operation, or

property;

(D) a partner of the owner or operator;

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

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

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

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

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

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

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

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

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

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

(1) objective facts;

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

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

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

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

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

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

(b) An audit report is not privileged and is admissible as evidence and subject to discovery in a proceeding relating to pipeline rates, tariffs, fares, or charges.

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

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

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

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

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

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

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

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

(b) Immunity is not available under this section if the violation resulted in substantial injury to one or more persons at the site audited or to persons, property, or the environment offsite.

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

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

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

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

(4) the disclosure arises out of a voluntary environmental or health and safety audit;

(5) the owner or operator making the disclosure initiates, within a reasonable time, an appropriate effort to achieve compliance, pursues that effort with due diligence, and corrects or implements a series of measures designed to remedy the noncompliance within a reasonable time; and

(6) the owner or operator making the disclosure cooperates with the appropriate agency in connection with an investigation of the issues identified in the

disclosure and agrees under terms of a confidentiality agreement to disclose to the agency, on request of the agency, the part of the audit report that describes the implementation plan or tracking system developed to correct past noncompliance, improve current compliance, or prevent future noncompliance.

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

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

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

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

(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 relevant portions of the confidential self-evaluation and analysis as necessary to determine that appropriate corrective actions have been identified.

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

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

(g) During the 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.

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

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

(1) the owner or operator claiming the immunity has

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

(B) within the 36 months preceding the violation, repeatedly or continuously committed violations that are the same as, or similar to, the violation for which immunity is sought;

(C) not attempted to bring the facility, operation, or property into compliance and this failure constitutes a pattern of disregard of environmental or health and safety laws; or

(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 lack of prevention systems contributed materially to the occurrence of the violation.

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

(1) the voluntariness of the disclosure;

(2) efforts by the disclosing party to conduct environmental or health and safety audits and to complete any resulting implementation plan or tracking system for corrective and preventive action;

(3) remediation;

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

(5) the nature of the violation; and

(6) other relevant considerations.

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

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

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

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

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

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

(2) "confidential self-evaluation and analysis" means the part of an audit report that consists of 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

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

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

kept confidential;

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

(4) "environmental 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 a part of the owner's or operator's compliance management system, whether or not conducted on a regular basis or in response to a particular event, by an owner or operator or by an employee or independent contractor of an owner or operator and is

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

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

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

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

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

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

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

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

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

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

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

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

construed broadly.

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

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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
100 CUSHMAN ST., SUITE 400
FAIRBANKS, ALASKA 99701-4679
PHONE (907) 451-2811
FAX (907) 451-2846

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

January 23, 1997

Honorable Loren Leman
Chairman, Senate Labor and Commerce Committee
State of Alaska
State Capitol
Juneau, Alaska 99801-1182

Re: Senate Bill No. 41; An Act relating to environmental audits and health and safety audits to determine compliance with certain laws, permits, and regulations.

Dear Senator Leman:

I have reviewed Senate Bill 41 and I am concerned that it may compromise or even jeopardize Alaska's federally approved and federally funded OSHA program. In order to understand how this bill may affect Alaska's OSHA program, it is important to understand the relationship between Alaska's OSHA program and the federal OSHA program.

In the mid-1970's, the U.S. Congress enacted the Occupational Safety and Health Act ("OSHA"). 29 U.S.C. § 650. Congress gave the U.S. Department of Labor the power to promulgate workplace safety standards. Congress also gave the U.S. Department of Labor the right to enter workplaces and conduct inspections. 29 U.S.C. § 657. In 29 U.S.C. § 657, Congress gave the U.S. Department of Labor the authority to subpoena persons and documents when it conducts inspections.

In the Occupational Safety and Health Act, Congress also provided that the U.S. Department of Labor could approve a state enforcement OSHA plan so long as the state OSHA plan was <u>as effective as</u> federal OSHA. 29 U.S.C. § 667. There are about 25 federally approved state enforcement plans.

Alaska would be the first state, which has a federally approved OSHA state plan, that passed a law expanding the audit privilege/immunity to workplace safety inspections.

Very truly yours,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Toby N. Steinberger
Assistant Attorney General

Enclosure

TNS:akb

cc: Honorable Commissioner Tom Cashen
Department of Labor
Patrick Pourchot, Legislative Director
Office of the Governor
Dwight Perkins, Special Assistant
Department of Labor
Deborah Behr, Assistant Attorney General
Legislation & Regulations Section
Department of Law
Marie Sansone, Assistant Attorney General
Department of Law
Chrystal Smith, Legal Administrator
Department of Law

CORRECTION

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

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

TONY KNOWLES, GOVERNOR

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January 23, 1997

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In the mid-1970's, the U.S. Congress enacted the Occupational Safety and Health Act ("OSHA"). 29 U.S.C. § 650. Congress gave the U.S. Department of Labor the power to promulgate workplace safety standards. Congress also gave the U.S. Department of Labor the right to enter workplaces and conduct inspections. 29 U.S.C. § 657. In 29 U.S.C. § 657, Congress gave the U.S. Department of Labor the authority to subpoena persons and documents when it conducts inspections.

In the Occupational Safety and Health Act, Congress also provided that the U.S. Department of Labor could approve a state enforcement OSHA plan so long as the state OSHA plan was <u>as effective as</u> federal OSHA. 29 U.S.C. § 667. There are about 25 federally approved state enforcement plans.

In 29 C.F.R. § 1952.240, the U.S. Department of Labor approved Alaska's state plan because it is as effective as the federal program. AS 18.60.030(5). Consequently, the U.S. Department of Labor oversees Alaska's state OSHA program and substantially funds the program.

Senate Bill 41, in my opinion, will make our state OSHA program less effective than the federal OSHA program in two ways.

First, Senate Bill 41 creates a privilege for "audits." The federal OSHA program has no such privilege. Currently, when the Alaska Department of Labor conducts its investigation, it, like the U.S. Department of Labor, can subpoena documents from an employer. AS 18.60.083. This bill will prevent the Alaska Department of Labor from subpoenaing audit information that the U.S. Department of Labor can subpoena. Documents, such as audits, can provide very important evidence, particularly in cases where an employer has willfully violated an OSHA regulation. AS 18.60.095(a). It is very difficult to prove an employer's state of mind; often the Alaska Department of Labor must weigh the employer's word against an employee's word. Under Senate Bill 41, the Department would not be able to obtain audit information which might demonstrate that the employer knew of the violation and knowingly chose not to correct the violation. In contrast, the U.S. Department of Labor could obtain this information during its inspection.

Second, Senate Bill 41 provides immunity in certain situations. The U.S. Department of Labor does not provide employers with immunity. Consequently, the U.S. Department of Labor could bring OSHA citations against employers, that the Alaska Department of Labor could not bring.

I am only aware of one state that has expanded the audit privilege/immunity beyond environmental audits. To my knowledge, only Texas has expanded the audit privilege/immunity to "health and safety audits." Texas does not have a federally approved state enforcement OSHA plan. Consequently, the U.S. Department of Labor conducts workplace safety inspections in Texas. Federal OSHA enforcement would not be affected by the Texas law.

Alaska would be the first state, which has a federally approved OSHA state plan, that passed a law expanding the audit privilege/immunity to workplace safety inspections.

Very truly yours,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Toby N. Steinberger
Assistant Attorney General

Enclosure

TNS:akb

cc: Honorable Commissioner Tom Cashen
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Deborah Behr, Assistant Attorney General
Legislation & Regulations Section
Department of Law
Marie Sansone, Assistant Attorney General
Department of Law
Chrystal Smith, Legal Administrator
Department of Law

U. S. DEPARTMENT OF LABOR

Occupational Safety & Health Administration
1111 Third Avenue, Suite 715
Seattle, Washington 98101-3212

Initials	INFO	ACT
Comm	✓	
Deputy	✓	✓
Sp Asst	✓	
Adm Asst		
Ex. Sec'y		
ASD		
ESD		
LRA		✓
[illegible]	✓	
WG		✓
[illegible]	✓	

January 27, 1997

The Honorable Tom Cashen
Commissioner, Alaska Department of Labor
P.O. Box 21149
Juneau, Alaska 99802-1149

Dear Commissioner Cashen:

Per your request, we have performed a preliminary review of Alaska Senate Bill 41 regarding privileges and immunities related to disclosure of certain self-audits.

Alaska Senate Bill 41 would impose very substantial limitations upon Alaska's authority to investigate accidents and illnesses in the workplace, to document the causes of those accidents and illnesses, and to administer a program of fair and effective enforcement. One of the most basic responsibilities Congress placed upon states which elect to maintain their own, federally-approved occupational safety and health plan is to provide standards, and a system for the enforcement of those standards, which are "at least as effective as" the standards and enforcement program implemented by federal OSHA.

No system of employer privileges and immunities comparable to the one envisioned in SB 41 has ever been applicable under the federal Occupational Safety and Health Act, and indeed, federal court decisions make it clear that a self-audit privilege would be inconsistent with section 8 of that Act. Nor, to my knowledge, has any other state with a federally-approved OSHA plan ever implemented such a privilege.

SB 41 would create an evidentiary privilege enabling employers to withhold information customarily relied upon by safety and health investigators, federal and state, not only in cases involving alleged willful violations but many other routine circumstances as well. OSHA standards and regulations dealing with chemical process safety, confined spaces, workplace respiratory hazards, occupational noise, and a wide variety of other hazards all involve some degree of self-policing by the employer, documentation of which would be largely unavailable outside the company if SB 41 were enacted. Investigation of OSHA cases involving such diverse issues as multi-employer work site responsibilities, the general duty clause, and whistleblower protection cases would be impeded.

In summary, the employer privileges and immunities proposed in this bill would significantly impair the credibility and effectiveness of Alaska OSHA's enforcement program. Because an effective enforcement program is a statutory mandate for all state plans, enactment of such a provision by the state would seriously undermine the continued approvability of the Alaska OSHA program, and may result in a recommendation to the Assistant Secretary that federal approval and funding for the Alaska program be withdrawn.

Sincerely,

Richard S. Terrill
Acting Regional Administrator

cc: Paula White, Director, Federal-State Operations.
Frank Strasheim, Deputy Assistant Secretary

U.S. DEPARTMENT OF LABOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20210

Mr. Dwight Perkins
State of Alaska

cc: Dwight
Pouchot
Dwyer

VIA FAX (907) 465-2784

Attached, per our discussion, are recent statements setting out the U.S. Labor Department's position on self-audit privileges. Please forward to Ms. Steinberger as soon as possible.

9

Robert W. Swain
Counsel for Legal Advice

U.S. DEPARTMENT OF LABOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20210

Toby N. Steinberger
Assistant Attorney General
Office of the Attorney General
State of Alaska
1031 West 4th Ave.
Anchorage, AK 99501

VIA FAX (907) 276-3697

Dear Ms. Steinberger:

Attached are copies of two relatively recent statements of position by the U.S. Department of Labor regarding evidentiary privileges for employer self-audit reports.

The first statement is an excerpt from Senate testimony opposing federal enactment of an employer self-audit privelege; the bill referred to in the testimony was never enacted. The second is a more detailed discussion of the Labor Department's findings in response to an industry-sponsored proposal for administrative recognition of such a privilege. I believe the Department's strong opposition to these proposals speaks for itself.

Sincerely,

Robert W. Sivain
Counsel for Legal Advice

10A

STATEMENT OF JOSEPH A. DEAR
ASSISTANT SECRETARY OF LABOR
FOR OCCUPATIONAL SAFETY AND HEALTH
BEFORE THE
COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

NOVEMBER 29, 1995

Madam Chairman and Members of the Committee:

Thank you for this opportunity to discuss S. 1423, the Occupational Safety and Health Reform and Reinvention Act. I am pleased to appear before you today to present the Administration's views on this legislation.

Before addressing S. 1423 I would like to provide a brief update on OSHA's current reinvention activities. During my appearance before the Committee last June I described in some detail the tremendous difference that OSHA has made to millions of America's working families--the large reduction in workplace fatalities, the positive impact of standards such as those for trenching, lead and cotton dust, and the effectiveness of OSHA's inspections in reducing injury rates. I also noted that in spite of these accomplishments, OSHA's work was far from done. Fatalities still occur at a rate of 17 workers a day, and another 16,000 workers are injured on the job every day.

Finally, I told you about the major reforms taking place within the New OSHA to reinvent the way we do business--changing

scale statutory scheme, this concept should be explored further through pilot programs. For example, the State of Virginia is testing a consultant certification process in which state personnel will accompany the private consultant during the workplace visit to verify the consultant's knowledge and skills. The results of this and other similar initiatives should be reviewed and the necessary monitoring and quality control mechanisms must be in place before decisions are made as to whether third-party certification should be used on a broader scale.

"Exemplary" Safety and Health Records

Section 4 also allows exemptions for employers who have an "exemplary" safety and health record (fewer lost workdays than the applicable industry average) and a safety and health program (including procedures for assessing and correcting hazards, employee participation, and employee training). While the bill's sponsors are to be applauded for recognizing the importance and effectiveness of safety and health programs, a broad-scale exemption is not warranted in these circumstances. Instead, such programs should be promoted through penalty reductions, through incentive programs such as Maine 200 and Focused Inspections in Construction, and through the development of a Safety and Health Program Standard.

In addition, an employer with a distinctly average safety record should not be deemed "exemplary" or rewarded with an exemption from scheduled inspections on that basis alone. This is a particular problem in high-hazard industries where injury rates are excessive across the board. For example, it would be unwise to exempt meatpacking employers with average safety records, because their industry "average" is *five times* the national average.

In fact, the use of an employer's injury data as a primary or exclusive basis for enforcement relief poses problems in and of itself. First, as OSHA learned first-hand in the 1980s, such a practice encourages some employers to falsify their records. (The bill allows OSHA to conduct random audits to guard against this problem, but would only allow the agency to audit an employer's *records*, not actual working conditions.) Second, it ignores hazards that pose long-term health risks to workers. While an employer's injury data is relevant to assessing the need for an OSHA inspection, it would be unwise to use it as the sole or primary basis for an inspection exemption.

OSHA Access to Employer Self-Audit Records

S. 1423 would also prohibit OSHA access to an employer's self-audit records unless a worker was killed or injured on the job. (The bill includes another exception--allowing OSHA access

when the employer has not corrected the hazards identified in the self-audit--but it would be impossible for OSHA to know whether this was the case without first having access to the records.) This provision does not represent an appropriate balance between an employer's desire for confidentiality and OSHA's need to determine whether employers were aware of serious hazards prior to an inspection. Moreover, this provision could be read to deny OSHA access to a host of records required by the agency's own standards and regulations, including exposure monitoring, process hazard evaluation reports, hearing conservation tests, and other similar records.

Reasonable access to employer self-audit records is essential to the Department's health and safety efforts. In some cases, this information will be critical to OSHA for enforcement purposes. More significantly, at a time when promising initiatives are underway at OSHA to evaluate and reward efforts by employers to improve employee health and safety, OSHA would be completely unable to assess the effectiveness or good faith of employer-initiated safety programs without access to underlying documentation. Finally, allowing employers to refuse to disclose their health and safety records will, for some employers, remove the incentive to take prompt and effective action to eliminate any hazards disclosed by these in-house reports.

In practice, an employer's self-audit records are not used against employers who have made good faith efforts to protect their workers. As a result, this provision would only protect employers who have identified hazards and consciously failed to correct them.

Section 5. Employer Defenses

Employer Knowledge

Current law prevents OSHA from issuing citations for *serious* violations unless the employer knew or "*could*" have known of the violation. Section 5 of S. 1423 would prevent OSHA from issuing a citation for *any* violation unless the employer "knew, or with reasonable diligence *would* have known" of the violation.

Although the impact of these changes is not altogether clear, they appear to be intended to increase the agency's burden of proving violations of the Act or OSHA standards. The agency's ability to protect workers could well be compromised as a result.

11

SEP 11 1996

Mr. Frank White
Vice President
Organization Resources Counselors, Inc.
1910 Sunderland Place, NW
Washington, D.C. 20036

Dear Mr. White:

Thank you for your letter to Secretary Reich concerning voluntary safety and health audits under the Occupational Safety and Health Act (the Act). Secretary Reich has asked me to respond. I appreciate Organization Resource Counselors' (ORC) interest in this issue. ORC's expertise in occupational safety and health issues is well-established, and its views merit careful consideration.

Your letter takes issue with the Department of Labor's (the Department) practices regarding access to employer safety and health audits in Occupational Safety and Health Administration (OSHA) inspections. You state that the Department has not provided clear guidance as to the circumstances in which OSHA will seek disclosure of employer audits. You ask that the Department declare that it will not seek audit documents from an employer in conjunction with any inspection or investigation under the Act. You assert that, with a few narrow exceptions, there are no federal requirements that an employer conduct a safety or heath audit. Your concern is that the possibility that audit results could be reviewed by the government may cause employers to refrain from conducting audits or may inhibit candor in the audit, undermining its usefulness. You explain employers may fear that audit reports would provide evidence of willful violations of the Act that, if disclosed to the government, could lead to assessment of large fines. Because audits are an important component of an effective safety and health program, you believe it is important that the Department not create a disincentive to voluntary audits.

The Department shares your view that employer safety and health programs are fundamental to our effort to protect safety and health in the workplace, and that self-audits are an important part of an effective program. We strongly believe, however, that barring

OSHA access to audit results would gravely impair the agency's ability to enforce the Act and to draw appropriate distinctions between employers with effective and ineffective programs.

Such a policy is not necessary to encourage use of audits. Employers derive many benefits from effective safety and health programs that provide for audits, including reduced absenteeism, lower workers' compensation premiums and payments for medical treatment and disability, and favorable treatment from OSHA. Employers with effective programs have fewer and less serious hazards and thereby face reduced exposure to OSHA citations and penalties as a result. Moreover, employers found to have effective programs are eligible for limited scope inspections (in construction) and substantial penalty reductions for violations found in recognition of their good faith efforts. The concern that employers acting in good faith to respond to audit findings would be charged with willful violations rests on a misunderstanding of the relevant legal standards.

A Ban on Access to Employer Information Would Impede Enforcement

1. ORC broadly defines a self-audit as "any internal or external review of safety and health conditions or performance conducted by or on behalf of an employer" (p.2). This definition is broad enough to include almost any information that an employer has developed or obtained that is relevant to compliance with its OSH Act obligations; the definition would include information obtained or analyses performed for the purpose of identifying hazards present in the workplace that are regulated by OSHA, determining the measures the employer will take to address the hazard and comply with its OSH Act obligations, and assessing the adequacy of those measures. A policy barring OSHA from access to this kind of information would gravely impair the agency's ability to enforce the Act.

The policy you suggest would allow OSHA to conduct inspections only by means such as visual observation of workplace conditions and the compliance officer's own physical monitoring efforts. Visual observation can be an effective technique for assessing compliance with certain requirements, particularly narrow specification requirements prescribing readily detectable physical measures within a reasonably small area. In many other situations, however, review of employer records and consideration of the employer's own analyses and understanding of the situation are essential to an effective inspection.

This is particularly the case with requirements such as those that mandate the employer establish a program to address a hazard, or take measures to prepare for hazards that occur intermittently or change over time, or provide training to employees, or execute a continuing course of conduct, or take appropriate protective measures based on its own

assessment of hazards its workers face. As you know, there are many such requirements; new OSHA standards tend to be written in such performance terms, rather than as narrow specification requirements.

For example, consider the general respiratory protection standard. That standard requires the employer to provide a respirator "when such equipment is necessary to protect the health of the employee"; the employer is to select respirators "which are applicable and suitable for the purpose intended" and is to anticipate and plan for "possible emergency and routine uses". The employer is to establish a respiratory protective program and is to assure that respirators are " regularly cleaned and disinfected" and that the user of any respirator is "properly instructed in its selection, use and maintenance" (29 CFR 1910.134).

An effective inspection for compliance with these requirements must consider information the employer has compiled concerning workplace safety and health conditions and performance. The compliance officer may need to review information concerning the toxic substances employees are or may be exposed to over the course of their work and the sufficiency of engineering controls to limit the exposure. The compliance officer may also need to review records concerning the system the employer has established for maintenance of respirators, and the steps the employer has taken to train respirator users. Placing employer information of this kind off limits would imperil the credibility of the inspection.

2. The premise for ORC's position is that the review of safety and health conditions and performance in the workplace is purely optional with the employer. It is argued that OSHA must not seek access to the information in these reviews, because if the agency does, employers will stop conducting them. ORC's position against disclosure, as we understand it, does not include audits that are required by OSHA standards. ORC asserts, however, that with a few narrow exceptions, there are no federal requirements for audits.

This position, we respectfully suggest, misapprehends the scope and degree of existing requirements that employers conduct audits as ORC defines that term. Employers in the construction industry are subject to a comprehensive audit requirement. They must institute a safety and health program that provides for "frequent and regular inspections" of job sites by competent persons to assure compliance with the OSHA construction standards (29 CFR 1926.20(b)). There is no comprehensive requirement for general industry employers to conduct audits, but there are many audit requirements in individual standards, including fundamental generic standards. The confined spaces standard, for example, requires employers to evaluate whether their workplace includes confined spaces, to establish a written program if employees will be required to enter confined spaces, to monitor and record conditions for each entry, and to review annually the

program and the entries conducted and make necessary modifications (29 CFR 1910.146). The lockout/tagout standard requires employers to develop energy control procedures for servicing and maintenance and to conduct periodic inspections to ensure that the procedures and the requirements of the standard are followed (29 CFR 1910.147(c)). The process safety management standard requires comprehensive process hazard analyses, mechanical integrity inspections, incident investigations, and compliance audits (29 CFR 1910.119). The hazardous waste standard includes similar requirements (29 CFR 1910.120).

The general personal protective equipment (PPE) standard requires employers to conduct an assessment of the hazards employees are likely to be exposed to, to select appropriate PPE based on the assessment, to train employees, and to assure that employees have understood the training (29 CFR 1910.132). There is to be daily inspection and periodic testing of electrical PPE (29 CFR 1910.137(b)). The general respirator standard requires employers to establish written procedures governing selection and use, to select respirators based on a hazard assessment, to maintain appropriate surveillance of work area conditions and degree of employee exposure or stress, and to conduct regular inspection and evaluation to determine the continued effectiveness of the program, including inspections of all respirators before and after each use (29 CFR 1910.134(b), (f)). Many narrower hazard-specific standards also require employers to assess workplace conditions or inspect for compliance with requirements. See, e.g., 29 CFR 1910.272(g)(1) (grain handling).

Health standards issued by OSHA under Section 6(b) of the Act commonly contain similar provisions. The lead standard, for example, requires employers to conduct monitoring to evaluate employee exposures to airborne lead, to develop a written compliance plan to reduce exposures to the permissible level, and to revise and update the plan semi-annually (29 CFR 1910.1025(d), (e)). See also 29 CFR 1910.95(c) (hearing conservation).

Where obligations such as these are involved, an inspection would be impossible if OSHA were barred from access to employer reviews of workplace conditions or performance, because the obligation is to conduct such a review. The scope and number of such requirements suggests that it would be no easy task to disentangle those parts of a comprehensive review that are voluntary from those that are not. But even where an OSHA standard includes no explicit obligation to review workplace conditions or performance to facilitate compliance with the standard, the employer is obligated to comply with the standard itself, and the steps the employer has taken to assure compliance are highly relevant to enforcement of the Act. The courts have stressed that the OSH Act does not impose absolute liability on employers for noncompliance with a standard, but that it does require diligent efforts to comply, see *Horne Plumbing &*

Heating Company v. Occupational Safety and Health Review Commission, 528 F.2d 564 (1976).

The OSH Review Commission has held that, to prove a violation of the Act, the Secretary must show not only that a violative condition exists, but that the employer had actual or constructive knowledge of the condition, see *CF&T Available Concrete Pumping*, 15 BNA OSHC 2195, 1991-93 CCH OSHD ¶29,945 (No. 90-329, 1993). The Secretary must show that the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition, *Ibid.* The state of the employer's knowledge and the diligence of the methods it has employed to find and prevent violations are therefore of central importance to investigation and enforcement of the requirements of the Act. Employer reviews of safety and health conditions or practices that are relevant to compliance with a standard have a direct bearing on whether the employer has met its obligations. A policy barring OSHA from access to information of this kind would undermine enforcement of the Act.

Access to information of this kind is also essential to classification of violations and calculation of penalties. Under Section 17(j) of the Act, a penalty must be based in part on the employer's good faith. OSHA has interpreted good faith as referring to the employer's establishment of an effective safety and health program, which includes audits. Existing guidelines in the *Field Inspection Reference Manual* (*FIRM*) authorize a reduction of 25% in the penalty for employers who have implemented such programs. See *FIRM* page IV-14 at C.2.I.(5)(b). As discussed below, OSHA is in the process of establishing initiatives, referred to as the New OSHA, that will substantially increase the discount for superior and outstanding programs.

In short, the policy you suggest would severely impair OSHA's ability to enforce the Act. The policy would undermine the agency's ability to inquire into the existence of violative conditions, to establish employer knowledge, to classify violations found, and to assess penalties.

The New OSHA

Several of the initiatives announced in the May 1995 National Performance Review report, *The New OSHA*, depend on the agency's acquiring a thorough understanding of the employer's worksite safety and health program, including the employer's evaluation of safety and health hazards present and the steps the employer takes to address them. The policy ORC proposes would preclude OSHA's obtaining this information.

As you know, the central concept of the New OSHA initiatives is that OSHA should emphasize the state of the employer's safety and health program, rather than simply inspecting for compliance with individual standards. Although many employers have a safety and health program, the programs vary dramatically in scope and effectiveness. OSHA has prepared, with help from ORC and others, the Program Evaluation Profile ("PEP"), which is presently undergoing field testing. The PEP analyzes employer programs on fifteen factors, and assigns a numerical score for each factor. Some of the important factors include comprehensive worksite survey and hazard analysis, regular site inspection, employee hazard reporting system and response, accident and "near-miss" investigation, and injury and illness data analysis, all of which require an audit as ORC uses that term. OSHA must be able to review information concerning the employer's performance on these factors for the New OSHA initiatives to work.

OSHA's intention is that employers who score well on the PEP will obtain important benefits, including large reductions in penalties for serious violations, and elimination of penalties for other-than-serious violations. The New OSHA demonstrates an alternative means of recognizing and rewarding employer safety and health efforts that is superior or outstanding. The audit access ban ORC proposes would shield all programs, good, bad, or indifferent from inquiry. Even records of known hazardous conditions would be off limits to OSHA. The audit access ban would prevent OSHA from understanding the state of the employer's efforts and from treating employers with superior or outstanding programs differently from employers with ineffective, developmental or basic programs. The new OSHA approach, on the other hand, allows a detailed assessment of employers' health and safety performance. Employers who have done a good job receive favorable treatment, while poor performance can be identified and remedied.

An Access Ban Is Unnecessary

An employer derives many significant benefits from an effective safety and health program that provides for self-audits. These benefits arise both within and outside the ambit of the OSH Act. Employers who conduct effective self-audits receive substantial advantages in OSH Act inspections compared with those who do not. We therefore do not agree that an audit access ban is necessary to induce employers to conduct audits.

An effective self-audit procedure, as part of a comprehensive safety and health program, should reduce employee injuries and illnesses, saving the employer costs resulting from absenteeism, workers' compensation and other insurance payments. An effective program may help reduce employee turnover and improve productivity. In terms of the OSH Act, the principal consequence of an effective audit program is a reduction in the number and severity of hazards, leading to a corresponding reduction in citations and penalties in the event of an inspection. A conscientious program should be particularly effective in eliminating high gravity serious, willful, repeated, and failure to abate violations, which carry by far the heaviest penalties.

In view of all these benefits, we find it difficult to believe that companies will stop implementing comprehensive safety and health programs or conducting audits if OSHA retains its present policy. Moreover, even if OSHA were to adopt a policy against inquiry into audit information, that policy would not make such information truly confidential. Occupational health audits would generally be subject to the records access rule, which guarantees a right of access to employees (29 CFR 1910.20). If employees are represented by a union, employer information about workplace safety and health must be disclosed upon request to the union, as an incident to the company's duty to bargain in good faith about safety and health issues, see *NLRB v. American National Can Company, Foster-Forbes Glass Division*, 924 F.2d 518, 524 (4th Cir. 1991).

Finally, such information would apparently not be protected from disclosure in private tort litigation. The courts have generally rejected claims to withhold information of this kind in discovery under a "self-evaluative privilege." The Ninth Circuit addressed the issue in *Dowling v. American Hawaii Cruises*, 971 F.2d 423 (9th Cir. 1992). The court stated that voluntary audits are rarely curtailed because they may be subject to discovery in litigation. Noting that companies typically conduct such audits to avoid litigation resulting from unsafe working conditions, the court found ironic the claim that such candid assessments will be inhibited by the fear that they could later be used as a weapon in the hypothetical litigation they are intended to prevent.

In short, employers who conduct effective audits derive many advantages, including advantages in the event of an OSHA inspection, from the practice. They have no need of the shield against access that you suggest, which in any event could not make the audits truly confidential. We are nonetheless concerned by your statements that some employers perceive a disincentive to perform self-audits from OSHA's policies. In order to address this perception, it may help to describe relevant elements of OSHA's citation policy and the case law under the Act.

The purpose of self-audits is to find hazardous conditions and remedy them. If a self-audit discloses a condition that is a violation of the OSH Act, presumably the employer

will take action to correct the problem. In the event the employer permanently remedies the condition before an OSHA inspection takes place (and before the occurrence of an accident or other event triggering an inspection), including taking appropriate steps to prevent a recurrence of the violation, OSHA's practice is not to issue a citation, even though the violation may have existed within the six month statute of limitations period. If the violation has been permanently corrected on the employer's own initiative without the need for action or intervention by OSHA, the agency sees no need to spend its own limited enforcement resources addressing the problem. Further, as noted, evidence that the employer is finding and fixing problems on its own will weigh heavily in the employer's favor for purposes of good faith.

If, on the other hand, an employer has identified a violative condition in an audit and has failed to abate it, and the OSHA inspection finds the violation, a citation may issue. Even here, however, good faith efforts made in response to the audit will benefit the employer. If the employer has responded promptly to the audit and believes in good faith, although erroneously, that it has resolved the problem and come into compliance with the OSHA standard, that would tend to negate willfulness. The Review Commission has frequently held that an employer's reasonable good faith belief that its actions comply with a standard is inconsistent with willfulness, although the actions were in fact incomplete and do not fully remedy the hazard, see *Calang Corp.*, 14 BNA OSHC 1789, 1987-90 CCH OSHD ¶29,080 (No. 85-319, 1990). In short, the concerns you have expressed that conscientious employers who conduct audits would expose themselves to willful citations are based on a misunderstanding of the case law and the Secretary's citation policy.

Of course, if the employer has simply ignored the audit finding of a hazardous condition, the employer will get no credit for the audit. Such an employer could benefit from a policy barring access to audit information. We see no reason, however, for rewarding an audit program that takes no action to remedy identified hazards. We expect, however, that there are few employers in this category. Responsible employers who react conscientiously to audit findings will benefit themselves and their workers.

We would be pleased to meet with you to discuss the issues addressed in this letter, should you consider such a meeting useful.

Sincerely,

Joseph A. Dear
Assistant Secretary

OSCAHRogers/8/21/96/219-8031
cc:Miles/Donnelly/Buchanan/Rogers/CCU/SOL/Chron

U. S. DEPARTMENT OF LABOR

Occupational Safety & Health Administration
1111 Third Avenue, Suite 715
Seattle, Washington 98101-3212

January 23, 1997

12

The Honorable Tom Cashen
Commissioner, Alaska Department of Labor
P.O. Box 21149
Juneau, AK 99802-1149

Dear Commissioner Cashen:

Per your request we have performed a preliminary review of Alaska Senate Bill 41 regarding privileges and immunities related to disclosure of certain self-audits. Although our review found some differences when compared to last session's Senate Bill 199, it appears that SB 41 will still substantially impact enforcement of the state's occupational safety and health laws.

As I have stated before, we might have little objection to a provision disallowing the state from citing retroactively violations that an employer finds, himself, in the course of an internal audit. This legislation, however, creates a number of legal obstacles which the state would have to overcome before it can obtain the employer's safety and health audit records as evidence of knowing or intentional wrongdoing when the state finds subsequent violations. It appears that SB 41 would materially change the burden of proof for safety and health standards violations classified as willful, thereby making it much more difficult for the state to establish and sustain a willful violation. If, when enacted into law, SB 41 has this effect, it could reasonably be argued that the Alaska occupational safety and health program is less effective than the federal program.

Please be aware that this assessment is preliminary. We would be pleased to provide a more in-depth review and legal analysis if you so desire.

Sincerely,

Richard S. Terrill
Acting Regional Administrator

cc: Al Dwyer, Director

SUMMARY OF SUBSTANTIVE DIFFERENCES BETWEEN SB199 AND SB 41

13

1. SB 41 contains a Findings and Intent section that SB 199 didn't. It introduces the rationale and purpose of the Bill, describing it as a "responsible incentive program." However, responsible (and OSHA sanctioned) incentive programs are already available, in the case of the Consultation Program, or soon to be available, under VPP/SHARP. This section justifies the confidentiality of audits by stating that audits are more likely to be performed if access to them is restricted. The statement that the Bill "...does not intend...to shield a person from liability..." is ludicrous; that appears to be the primary purpose of the Bill. Paragraph 4 of this section states that an effective enforcement program is also necessary to promote compliance. However, this Bill threatens that very enforcement program.

2. Criminal references contained in SB 199 have been removed from SB 41.
AKOSH Impact: Positive. This change allows us to pursue criminal willful citations without the cloak of audit privilege.

3. Section 09.25.465, Nonprivileged materials. A new paragraph (c) has been added which says that audit reports are not privileged and are subject to discovery if the audit was started after the owner knew an inspection was impending.
AKOSH Impact: Uncertain. This could benefit us in fatalities, multiple hospitalizations, or other major incidents where an employer knows we will be investigating. But it could hinder us in other inspections. See 5 below. Proving an employer knew an inspection was impending would be very difficult.

4. Section 09.25.475, Voluntary disclosure; immunity. In paragraph (f), if an audit will continue beyond the completion date specified in the initial audit notice, SB 41 allows the audit to be extended once for up to 60 days if the regulatory agency is notified before the original time period expires. Under 199, the regulatory agency could approve or deny audit extension requests.
AKOSH Impact: Negative. AKOSH would have no control over audit extensions, but only one could be granted for no more than 60 days. However, there is nothing to prohibit an employer from starting a new audit if the initial work was not completed by the end of the 60 day extension.

5. Section 09.25.490, Definitions. (a) (2) "environmental or health and safety audit" definition has changed. The new language came from AOGA's rewrite of SB 199. The general meaning of the definition appears to be the same as it was in SB 199, but the language is tighter. Audits are now defined to be for the specific and exclusive purpose of determining compliance.
AKOSH Impact: Negative. As defined in both SB 41 and SB 199, an audit can be conducted in response to a particular event. AKOSH may also conduct an enforcement inspection in response to a particular event, such as an accident. If an employer can claim that they didn't know an inspection was going to happen, the information pertaining to that accident could become part of the privileged audit report. This might include in-plant instrument readings at the time of the accident, which could document the concentration of a hazardous chemical. Small scale releases of chemicals or other incidents which might not get media attention may still be brought to our attention by employees or the public. In these cases, an employer could reasonably claim they didn't know an AKOSH inspection was going to take place, and their audit would not be subject to the Nonprivileged materials provisions in 09.25.465(c).

LEGISLATIVE REQUEST

14

TO: LS&S, W.C.
January 13, 1997

DATE OF REQUEST:

DUE DATE: Jan. 20,1997

RECEIVED
JAN 13 1997
Admin Services-DOL

Subject	Items Requested		
House Bill:	Position Paper:		
Senate Bill: SB 41	Bill Analysis:	XXXX	
Other:	Fiscal Note:	XXXX	
	Enrolled Bill Report:		

Comments LS&S, this is essentially the same bill as (sb199) last year. I would like to know exactly what other state sponsered plans are doing if anything regarding this, also I would like to know what the concerns would be from the feds regarding this issue.

W.C.; Paul in section 2 of the bill page 2 line 28 it states except for workers compensation proceedings, please check and let me know if this takes care of W.C. concerns

Thank you,
Dwight Perkins
Legislative Liaison

cc: Commissioner
Deputy Commissioner
Budget Analyst, ASD

15

SENATE BILL NO. 41

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY SENATOR LEMAN

Introduced:
Referred:

A BILL

FOR AN ACT ENTITLED

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

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

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

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

if

(1) the audit report is privileged under (a) of this section and is inadmissible in the same proceeding;

(2) the testimony or document discloses an item listed in AS 09.25.490(a)(1) that was made as part of the preparation of an environmental or health and safety audit report and that is addressed in a privileged part of an audit report; and

(3) for purposes of this subsection only, the person is a

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

(B) person to whom the audit results are disclosed under AS 09.25.455(b); or

(C) custodian of the audit results.

(c) A person who conducts or participates in the preparation of an environmental or health and safety audit and who has actually observed or participated in instances or events being reviewed for compliance may testify about those instances or events but may not, in a proceeding covered by (a) of this section, be compelled to testify about or produce documents related to the preparation of or a privileged part of an environmental or health and safety audit or an item listed in AS 09.25.490(a)(1).

(d) A regulatory agency and an employee of a regulatory agency may not request, review, or otherwise use an audit report that is privileged under (a) of this section during an agency inspection of a regulated facility, operation, or property or an activity of a regulated facility, operation, or property.

(e) To facilitate identification, each document in an audit report shall be labeled "COMPLIANCE REPORT: PRIVILEGED DOCUMENT," or labeled with words of similar import.

(f) A party asserting the privilege described in this section has the burden of establishing the applicability of the privilege.

(g) This section may not be construed to

(1) prevent a regulatory agency from issuing an emergency order,