HB

68

THE FOLLOWING DOCUMENT HAS

NOT BEEN FILMED BUT IS

AVAILABLE IN THE ORIGINAL

FILE

SUMMARY REPORT

COMPREHENSIVE INVENTORY REPORT
(DRAFT No. 2)
POTENTIAL WASTE DISPOSAL SITES
AND OTHER REPORTS / COMPLAINTS
KENAI PENINSULA , ALASKA

Prepared for

ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION
POST OFFICE BOX 0
3220 HOSPITAL DRIVE
JUNEAU, ALASKA 99811-1800

FEBRUARY 1989

Prepared by

HARDING LAWSON ASSOCIATES
601 EAST 57th PLACE
ANCHORAGE, ALASKA 99518
(907) 563-8102

HB 68

Municipality of Anchorage

Municipal Health & Human Services Commission
825 "L" Street
P.O. Box 196650 • Anchorage, Alaska 99519-6650

Tom Fink,
Mayor

Telephone
(907) 343-4674

March 8, 1989

Representative Peter Goll, Co-Chairman
House Judiciary Committee
P.O. Box V
Juneau, Alaska 99811

Subject: HB 68

Dear Representative Goll,

The Municipal Health & Human Services Commission strongly supports House Bill 68, "an act relating to liability for the release or threatened release of a hazardous substance and to recovery of state costs for an oil or hazardous substance release."

In the past, persons or corporations responsible for oil or hazardous substance spills have been able to avoid paying the clean-up cost due to the vagueness in the state statues concerning liability. This bill will help to solve this problem and make it easier for the state to recover the costs associated with the clean-up of an oil or hazardous substance spill.

One area in the bill which needs to be strengthened involves relief from liability as a result of an act of God. Although earthquakes are an act of God, it makes sense to take reasonable precautions against injuries and damage which may occur during such events. As a result, this exemption should not be granted in cases where damage occurs to storage tanks or other containers which are not designed to withstand at least a 6.7 seismic event (Richter Scale). Similarly, damage to storage facilities, which are located in a floodplain, should not be exempt from liability.

Please let us know how we can be of further assistance in promoting the passage of this important piece of legislation.

Sincerely,

Linda Langston lsk

Linda Langston, Chair
Municipal Health & Human Services Commission

cc: Mayor Tom Fink
Bert Hall, Director, Department of Health & Human Services
Bill Faulkner, Chairman, Municipal Assembly
Governor Steve Cowper
Representative Max Gruenberg

STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPT. OF ENVIRONMENTAL CONSERVATION

OFFICE OF THE COMMISSIONER
PO BOX O, JUNEAU, ALASKA 99811-1800 (907) 465-2600

March 3, 1989

Representative Peter Goll
PO Box V
Juneau, AK 99811

Dear Representative Goll:

I am writing to request that the House Judiciary Committee schedule HB 68 for hearing at your earliest convenience. This bill, introduced by the Rules Committee at the request of the Governor, would tighten standards for liability to ensure that hazardous substances spills are cleaned up by the parties responsible for them. I have enclosed a copy of the bill and of our position paper.

Thank you very much for your consideration.

Sincerely,

Dennis D. Kelso
Commissioner

STATE OF ALASKA

DEPT. OF ENVIRONMENTAL CONSERVATION

STEVE COWPER, GOVERNOR

POSITION PAPER

HB 68

CONTACT: AMY D. KYLE
465-2600

JANUARY 23, 1989

Title

An Act relating to liability for the release or threatened release of a hazardous substance and to recovery of state costs for an oil or hazardous substance release; and providing for an effecvtive date.

Effect of the Bill

In Sections 1 and 2, the bill would make the state = requirements for liability for releases of hazardous substances explict. The current statute refers to a "person owning or having control over a hazardous substance . . . " as being strictly liable for a release of that substance. The bill would explicitly expand the coverage of this provision to include other parties that have responsibility for hazardous substances. This includes:

- Those who generate hazardous wastes;

- Those who have control over sites where hazardous substances are released;

- Those who transport hazardous wastes in cases where the transporter also selects the disposal method.

These parties are currently liable under common law, but the proposed statute would clarify this liability and reduce the need for litigation. This is necessary to ensure that the key parties who manage hazardous substances are liable if the substances are released.

In Section 3, the bill would enable the state to file a lien against assets of a responsible party to recover its costs for cleanup of oil and hazardous waste sites, in cases where the responsible party declares bankruptcy. At present, the Department must first secure a judgement through the court and then participate in a bankruptcy proceeding. The bill would not supercede the claims of secured creditors such as mortgage-holders.

Department Position

The bill was introduced at the request of the Governor. The Department strongly supports the bill and feels that it is necessary to provide appropriate tools to ensure that hazardous substance releases may be responded to properly. The first two sections of the law incorporate provisions similar to those in the federal "Superfund" law into state law. The third section would implement a recommendation made to the states by the U.S. Supreme Court.

The people of the state are discovering increasing numbers of problems from improper management of hazardous substances. It is imperative that parties who manage these materials take care to keep them out of the state's waters and lands. This will only happen if all the parties who manage hazardous materials are fully responsible for proper management.

This bill would allow the department to ensure that the party responsible for an action such as dumping barrels of hazardous materials on private property or for abandoning a contaminated site and then transferring title, can be held liable. This will provide a powerful incentive for proper management.

Fiscal Effect

There will be no additional costs resulting from this bill. The legislation would reduce State expenditures for cleanup over the long-term, as responsible parties will be footing a greater share of the cleanup bill. The Department has prepared a zero fiscal note.

Dennis D. Kelso, Commissioner

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: HB 68
PUBLISH DATE: 1/9/89

FISCAL NOTE

REQUEST:

Revision Date:
Agency Affected: DEC
Title: An Act relating to the liability for the release or threatened release of hazardous substance
BRU: Environmental Quality
Sponsor: Rules Committee
Requestor: House Resources
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS: None

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Passage of the bill would reduce the demand on the State for funds for cleanup of hazardous substance releases

Prepared by: Amy D. Kyle
Phone: 465-2600
Division: Commissioner's Office
Date: 23 Jan 1989

Approved by Commissioner:
Date: January 23, 1989
Agency: Environmental Conservation

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

SUMMARY OF PROVISIONS OF HB 68

AN ACT RELATING TO LIABILITY FOR THE RELEASE OR THREATENED RELEASE OF A HAZARDOUS SUBSTANCE

House Bill 68 has two major provisions:

* It makes persons who generate hazardous wastes liable for any improper release of these wastes.

* It allows the state to recover costs for cleanup of hazardous substance releases in cases when parties responsible for the releases declare bankruptcy by filing a lien.

HB 68 combines provisions of two bills that were passed by the House last year. One bill had been introduced by Rep. Davis; the other was introduced at the request of the Governor.

Under current law, a person who owns or has control over a hazardous substance is clearly liable for a release of that substance. The liability of parties who may attempt to escape liability by abandoning, selling or transferring a facility is not clearly stated. The bill would clearly establish the liability of the following entities:

* The owner or operator of the facility from which the release occurred;

* A person who abandons a facility at which a release occurred during the time the person owned or controled the facility;

* A person who owns a hazardous substance at the time it is delivered to the facility from which a release occurs;

* A person who owns a hazardous waste and arranges for its disposal;

* A person who transports a hazardous waste to a disposal site, if that person arranged for the disposal method.

A person may be relieved from liability if the release is caused by a negligent third party or in the event of an act of God or war. There is also an "innocent landowner" provision which relieves liability in cases where a person took steps to ascertain the status of a property and did not identify a spill and in cases of involuntary acquisition of property such as through inheritance.

The second part of the bill (Section 3) gives the state the ability to file a lien against assets of a bankrupt party for the costs of cleanup of a hazardous substance spill. This provision is identical to the one passed by the House last year. The lien would not displace the claim of a secured creditor, but would fall after it.

STATE OF ALASKA

DEPT. OF ENVIRONMENTAL CONSERVATION

STEVE COWPER, GOVERNOR

POSITION PAPER

CSHB 68 (Res)

CONTACT: AMY D. KYLE
465-2600

March 16, 1989

Title

An Act relating to liability for the release or threatened release of a hazardous substance and to recovery of state costs for an oil or hazardous substance release; liability for response action contractors; and providing for an effective date.

Effect of the Bill

The purpose of the bill is to strengthen the State's ability to obtain cleanup of hazardous substance spill sites. It will rectify a gap in the statutes that bears upon the State's ability to ensure that industrial development is properly managed.

Sections 1 of the bill would make the state's requirements for liability for releases of hazardous substances explicit. The current statute refers to a "person owning or having control over a hazardous substance . . . " as being strictly liable for a release of that substance. The bill would explicitly expand the coverage of this provision to include other parties that have responsibility for hazardous substances. These include:

- Those who generate hazardous wastes;

- Those who have control over sites where hazardous substances are released;

- Those who transport hazardous wastes in cases where the transporter also selects the disposal method.

These parties are currently liable under common law, but the proposed statute would clarify this liability and reduce the need

for litigation. This is necessary to ensure that the key parties who manage hazardous substances are liable if the substances are released.

An amendment added in House Resources explicitly clarifies that petroleum transporters are not liable for spills of substances after they have been transferred.

Defenses for liability are included for third party acts, acts of war, innocent landowners, and certain other cases.

Section 2 establishes provides that response action contractors who are called upon to respond to a spill are liable for actions caused by their own negligence.

Section 3 of the bill incorporates releases into the atmosphere.

Sections 4 and 5 include definitions.

Section 6 of the bill would enable the state to file a lien against assets of a responsible party to recover its costs for cleanup of oil and hazardous waste sites, in cases where the responsible party declares bankruptcy. At present, the Department must first secure a judgement through the court and then participate in a bankruptcy proceeding. The bill would not supercede the claims of secured creditors such as mortgage-holders.

Department Position

The bill was introduced at the request of the Governor. The Department strongly supports the bill and feels that it is necessary to provide appropriate tools to ensure that hazardous substance releases may be responded to properly. The first two sections of the law incorporate provisions similar to the liability provisions of the federal "Superfund" law into state law. The third section would implement a recommendation made to the states by the U.S. Supreme Court.

The people of the state are discovering increasing numbers of problems from improper management of hazardous substances. It is imperative that parties who manage these materials take care to keep them out of the state's waters and lands. This will only happen if all the parties who manage hazardous materials are fully responsible for proper management.

This bill would allow the department to ensure that the party responsible for an action such as dumping barrels of hazardous materials on private property or for abandoning a contaminated site and then transferring title, can be held liable. This will provide a powerful incentive for proper management.

Fiscal Effect

There will be no additional costs resulting from this bill. The legislation would reduce State expenditures for cleanup over the long-term, as responsible parties will be footing a greater share of the cleanup bill. The Department has prepared a zero fiscal note.

Dennis D. Kelso, Commissioner

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION : HB 68
PUBLISH DATE : 1/9/89

FISCAL NOTE

REQUEST:

Revision Date: _____ Agency Affected : DEC

Title : An Act relating to the liability for the release or threatened release of hazardous substance

BRU : Environmental Quality

Sponsor : Rules Committee

Requestor House Resources

Components : _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS: None

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Passage of the bill would reduce the demand on the State for funds for cleanup of hazardous substance releases

Prepared by : Amy D. Kyle Phone : 465-2600

Division : Commissioner's Office Date : 23 Jan 1989

Approved by Commissioner : Amy D. Kyle Date : January 23, 1989

Agency : Environmental Conservation

Distribution (by preparer) :

Legislative Finance
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HB 68 combines provisions of two bills that were passed by the House last year. One bill had been introduced by Rep. Davis; the other was introduced at the request of the Governor.

Under current law, a person who owns or has control over a hazardous substance is clearly liable for a release of that substance. The liability of parties who may attempt to escape liability by abandoning, selling or transferring a facility is not clearly codified in law. The bill would clearly establish the liability of the following entities:

* The owner or operator of the facility from which the release occurred;

* A person who abandons a facility at which a release occurred during the time the person owned or controlled the facility;

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A person may be relieved from liability if the release is caused by a negligent third party or in the event of an act of God or war. There is also an "innocent landowner" provision which relieves liability in cases where a person took steps to ascertain the status of a property and did not identify a spill and in cases of involuntary acquisition of property such as through inheritance.

The second part of the bill (Section 3) gives the state the ability to file a lien against assets of a bankrupt party for the costs of

cleanup of a hazardous substance spill. This provision is identical to the one passed by the House last year. The lien would not displace the claim of a secured creditor, but would fall after it.

MEMORANDUM (Brief Communications) State of Alaska

TO:	Name: Rep. Peter Goll	Dept./Div./Sect.: House of Representatives		Mail Stop: Cap 122
FROM:	Name: Lynn Kent	Dept./Div./Sect.: Dept. of Env. Cons.	Phone: 4630	Mail Stop:
SUBJ:	Oil Contaminated Sites		Date: 3/20	

- I spoke with your legal assistance today to provide the info you requested of the Department last Friday regarding HB 68. Attached is a list of Leaking Underground Storage Tank (LUST) spills currently being addressed by the Department.

Lynn

Hearing today

This is for my Bill file HB68 / show to Hayden Asst & copy for members files

02-001C (Rev. 8/85)

March 20, 1989

LUST TRUST ALASKA/EPA COOPERATIVE AGREEMENT

Priority Listing

LUST TRUST FUNDING ESTIMATES FOR 1989 SPILL COSTS

STATE LEAD

	SPILL NAME	EST. COST	IDENTIFICATION NO.	STATUS
1.	Kotzebue	$250,000	87-3-2-0-344-1	
2.	Peters Creek-Anchorage	150,000	88-2-1-0-007-1	
3.	Anchor Point-Kenai	100,000	87-2-3-0-274-1	
4.	Harolds Air Service-Galena	45,000	87-3-1-0-274-2	
5.	Lucky Sourdough-Fairbanks	20,000	87-3-5-0-274-5	
6.	Interior #1-Bettles	20,000	87-3-1-0-306-1	
7.	Kim's Service Station	75,000	88-2-1-0-034-1	
8.	Dresser Atlas Inc.-Nikiski	25,000	86-2-3-0-140-1	
9.	Sterling Hwy. Mi.81	25,000	86-2-3-0-122-03	
10.	Jonesville Union-Wasilla	10,000	87-2-2-0-274-8	
11.	Mountainview Dr./Buss St.	25,000	88-2-1-0-272-2	

1989 - RESPONSIBLE PARTY SPILL LIST (RP)

	SPILL NAME	IDENTIFICATION NO.	STATUS
1.	Toppers #2	88-2-1-0-116-1	Former State Lead
2.	Fisher Fuel - Wasilla	87-2-2-0-274-7	Former State Lead
3.	Stage Stop - North Pole	87-3-5-0-274-3	Former State Lead
4.	Irons Subdivision - Kenai	87-2-3-0-274-6	Former State Lead
5.	Corps of Eng. - Chena Lakes	88-3-5-0-132-1	
6.	Ft. Wainwright	88-3-5-0-132-2	
7.	Ft. Greeley	88-3-3-0-132-1	
8.	Toppers #8-No. Lights - Seward	87-2-1-0-274-1	
9.	AK. R.R. Fairbanks	87-3-5-0-274-11	
10.	Eielson AFB	87-3-5-0-289-1	
11.	Fairbanks Gen. Mail Facility	88-3-5-0-083-1	
12.	Russells Union	88-3-5-0-295-1	
13.	Toppers #15	88-2-1-0-183-1	
14.	Chevron-Boniface & N. Lights	88-2-1-0-049-1	
15.	Olsen Tesoro #2	87-2-1-0-362-1	
16.	Petro Products	87-2-1-0-223-1	
17.	Toppers #7	87-2-1-0-362-2	
18.	Unocal #4581, 7th & C	87-2-1-0-316-2	
19.	Unocal #5057, Intrntl. Airport	87-2-1-0-343-1	
20.	Unocal #4652, 15th & C	87-2-1-0-343-1	
21.	Unocal #5773, Old Glenn Hwy	88-2-1-0-179-1	
22.	Unocal #2730, Spenard Road	87-2-1-0-345-1	
23.	Unocal #5580, 5th & Gambell	87-2-1-0-343-2	
24.	Eagle River 7-11 Service	88-2-1-0-194-1	
25.	Texaco 3404 Spenard Road	88-2-1-0-238-1	
26.	Texaco 1006 W. 5th Ave.	88-2-1-0-232-1	
27.	Butler Aviation - AFSC #4	88-2-1-0-232-2	
28.	8th & I	88-2-1-0-236-1	
29.	Bettles - FAA #2	87-3-5-0-274-1	
30.	NSAF - Galena	88-3-4-0-272-1	
31.	MUS - Fairbanks	88-3-5-0-274-2	
32.	SBS - Wasilla	88-2-2-0-315-5	
33.	Chevron Wasilla, Parks Hwy	88-2-2-0-315-4	
34.	Elmendorf AFB	88-2-1-0-315-3	
35.	USCG Kodiak Support Center	88-2-5-0-315-2	
36.	Ft. Richardson	88-2-1-0-315-1	
37.	Galco, 10010 Old Seward Hwy	88-2-1-0-280-1	
38.	SBS Eagle River	88-2-1-0-280-2	
39.	Firestone Northern Lights	88-2-1-0-305-2	
40.	Robo Car Wash, Northern Lights	88-2-1-0-305-3	
41.	UNOCAL #503, Bluff Road	88-2-1-0-343-5	
42.	Ed's Palmer	87-2-8-0-315-4	
43.	Chevron #1518, Benson/New Seward	88-2-1-0-305-1	
44.	Chevron, Cache Crk, Trappers Crk	88-2-2-0-315-6	
45.	Jim's Texaco, Fbks	89-3-5-0-017-1	

LUST TRUST

1989 - RESPONSIBLE PARTY SPILL LIST (RP)

SPILL NAME	IDENTIFICATION NO.	STATUS
46. Univ. Car Care, Fbks	89-3-5-0-017-2	
47. Sterling Chevron	89-2-3-0-031-1	
48. Texaco- Arctic & Tudor	89-2-1-0-046-1	
49. Garretts Tesoro	89-2-1-0-010-1	
50. Firestone - 7th Ave	88-2-1-0-350-2	
51. Chevron - Taylor St	88-2-1-0-350-1	
52. ADOT/PF Thompson Pass	89-2-4-0-046-1	
53. ADAK Power Plant	89-2-1-0-067-1	

rplist.doc

OIL SPILL/DISCHARGE MATTERS - ANCHORAGE

State v. Block: Action in federal district court against U.S. Forest Service seeking cleanup of an oil spill from former cannery site on Evans Island in Chenega Bay.

State v. Tesoro Alaska Petroleum, et al.: Action in state superior court for cleanup, penalties and damages from underground oil spill at gasoline station in Peters Creek.

State v. Breeden: Action in superior court for damages (will be followed by action for cleanup and penalties) for gasoline contamination of water well at Independence Mine Visitor's Center at Hatcher Pass.

State v. Aoyagi Maru: Investigation proceeding and Complaint to be filed for damages and penalties for marine spill from grounded vessel at Lost Harbor near Dutch Harbor.

State v. M/T Thompson Pass: Investigation proceeding and Complaint to be filed for damages and penalties for oil spill from tanker while loading at Trans-Alaska Pipeline System (TAPS) terminal in Valdez.

State v. Chil Bo San: Investigation proceeding and Complaint for damages and penalties to be filed for marine spill from grounded vessel near Spray Cape, Unalaska Island.

AMOCO (Nikiski): Disposal of petroleum waste products and drilling muds to unlined pits. Compliance Order being negotiated for cleanup and groundwater assessment.

Texaco Station (Anchor Point): Extensive groundwater contamination has forced some residents to seek alternate water supply. Contamination resulted from leaking fuel delivery system; also, possible surface spill. Cost of cleanup may exceed $500,000.00. Investigation proceeding.

Coastal Drilling (Soldotna): Unpermitted dumping site for drill muds, solvents, oils, equipment, etc. Investigation proceeding.

Ridgeway Service Station (Kenai): Leaking fuel delivery system polluted groundwater, wells, in residential subdivision. Several residents put in new wells. Compliance Order being negotiated for cleanup.

Tesoro Refinery (Nikiski): Tesoro estimates they have spilled and/or leaked 400,000 to 750,000 gallons of petroleum product

into the soil and water around the refinery. The contamination has migrated onto neighboring property, polluting neighboring wells. Cleanup is underway; will be ongoing for years to come.

Union Oil v. State -- DEC denied Union's permit application for six unlined pits for disposal of drill muds. DEC's decision was upheld by administrative hearing officer. DEC to undertake enforcement for proper disposal of the pit contents.

State v. Union Oil -- Litigation over a seventh unpermitted, unlined drill mud disposal site. Substantial site testing underway.

State v. All Alaska -- Investigation proceeding and Complaint to be filed for damages and penalties from oil spill from fish processing vessel at St. Paul Island.

State v. Glacier Bay -- Complaint for damages and penalties to be filed for marine oil spill from tanker in Kenai.

State v. M/V Swallow -- Investigation proceeding and Complaint for damages and penalties to be filed for marine spill from grounded vessel near Dutch Harbor.

State v. Cove Leader -- Investigation proceeding and complaint for damages and penalties to be filed for marine spill from tanker in Valdez.

Unocal Service Stations (Anchorage) -- Three sites are being investigated for oil contamination from leaking underground storage tanks. Compliance orders under negotiation for each site.

Kim's Service Station (Anchorage) -- Oil contamination from leaking underground storage tanks.

Topper's Service Stations (Anchorage) -- Four sites are being investigated for oil contamination from leaking underground storage tanks. Compliance orders under negotiation for each site.

Chevron Service Station (Anchorage) -- Oil contamination from leaking underground storage tanks. Compliance orders under negotiation.

7-Eleven Service Station (Eagle River) -- Oil contamination from leaking underground storage tanks. Compliance order signed and clean up proceeding.

Amoco Platform Anna -- Investigation proceeding and Complaint for damages and penalties to be filed for marine spill from off shore drilling pad.

Union Oil Gravel Pit (Kenai) -- Discharge of condensate and other oil waste. Compliance order under negotation.

Ft. Richardson -- Investigation proceeding on leaking underground storage tanks.

Sterling Chevron Station -- Leaking underground storage tank. Criminal complaint filed. Complaint to be filed for cleanup and civil penalties.

Chevron Bulk Plant (Valdez) -- Soil and groundwater contamination from refined petroleum products. Investigation proceeding.

HAZARDOUS SUBSTANCE SPILL/DISCHARGE MATTERS - ANCHORAGE

Tesoro Refinery Hazardous Waste (Nikiski): Hazardous waste deposited in unlined pits at refinery in 1970's and possibly early 1980's. Waste has leached into the groundwater. Tesoro has applied to EPA for permit to leave the waste in the ground. Tesoro required to do groundwater monitoring, possibly groundwater remediation.

Union Chemical Fertilizer Plant: Soil and perhaps groundwater at plant contaminated with ammonia. UNOCAL has agreed to determine extent of contamination.

Norgetown Dry Cleaners (Anchorage): Substantial solvent discharge into sewer line resulting in major groundwater contamination. Investigation proceeding and Complaint to be filed.

McGahan Subdivision (Kenai): Tetrachloroethylene contamination in public water system. Investigation proceeding.

Alyeska Basin Subdivision: Tetrachoroethylene contamination of public water system. Complaint to be filed.

M & M Enterprises (Anchorage): Compliance Order under negotiation for PCB and lead contamination.

HAZARDOUS SUBSTANCE SPILL/DISCHARGE MATTERS - ANCHORAGE

Tesoro Refinery Hazardous Waste (Nikiski): Hazardous waste deposited in unlined pits at refinery in 1970's and possibly early 1980's. Waste has leached into the groundwater. Tesoro has applied to EPA for permit to leave the waste in the ground. Tesoro required to do groundwater monitoring, possibly groundwater remediation.

Union Chemical Fertilizer Plant: Soil and perhaps groundwater at plant contaminated with ammonia. UNOCAL has agreed to determine extent of contamination.

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OIL AND HAZARDOUS SUBSTANCE CONTAMINATION CASES REFERRED TO DEPARTMENT OF LAW -- NORTHERN REGION

OIL SPILLS

Case name	Work Management No	Description
1. Fairbanks Municipal Utilities Systems	665-89-0061	Contamination of city water supply wells from past fuel spills and leaking tanks.
2. USAF Eielson AFB	665-88-0170	54 individual contaminated sites have been identified at Eielson. Several are fuel-related and at least six have documented floating fuel layers on the ground water.
3. MAPCO North Pole Refinery	665-86-0239	Estimated 250,000 gallons spilled. Clean-up underway.
4. Alaska Railroad	665-89-0053	Four feet of floating product on groundwater in Fairbanks freight yard.
5. City of Kotzebue	665-89-0036	Clean-up underway of long-term fuel contamination problem.
6. United States Post Office, Fairbanks Airport Facility	665-89-0025	Leaking gas tank has released lens of product currently floating on ground water.
7. Stage Stop Gas Station	665-88-0145	Contaminated soils and groundwater at abandoned gas station.
8. Bettles Lodge	665-89-0009	2 separate fuel contamination problems, at Lodge and at FAA Building.
9. Lucky Sourdough Gas Station	665-89-0037	Contamination at abandoned gas station.
10. Delta Tank Farm	665-89-0089	Leaking petroleum storage tanks owned by Alaska Gold near Nome. State is attempting to exert enforcement leverage through oil spill contingency plan and through environmental audit under 665-87-0002.

11.	Unalakleet Spill	665-89-0012	Recent oil spill. State and Native corporation hope to negotiate in clean-up effort.

NON-OIL HAZARDOUS SUBSTANCES

1.	Forward Alaska, DNR, Deadhorse Tract 75 & 76	665-89-0068	Multiple spills on leased tracts adjacent to NANA Reservoir at Deadhorse.
2.	Deadhorse Hotel Pad	665-89-0058	Contamination of gravel pad and adjacent tundra.
3.	Alaska Gold/ Steadman Field	665-87-0002	Negotiated containment and clean-up of mercury and arsenic contamination. First stage of clean-up is complete.
4.	Nome Barrel Dump	665-88-0024	Clean-up underway of site with numerous abandoned barrels containing hazardous substances.
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8.	Citigold Mining	665-89-0088	Leaking inner liner indicates possible cyanide discharge from Ester Dome heap leach mining operation.

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TO: JOHN McDONAGH

FROM: GARY AMENDOLA

SUBJECT: Oil Pollution and Hazardous Substance Cases - Juneau

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If you need more info, please let me know.

OIL SPILL/DISCHARGE MATTERS - ANCHORAGE

State v. Block: Action in federal district court against U.S. Forest Service seeking cleanup of an oil spill from former cannery site on Evans Island in Chenega Bay.

State v. Tesoro Alaska Petroleum, et al.: Action in state superior court for cleanup, penalties and damages from underground oil spill at gasoline station in Peters Creek.

State v. Breeden: Action in superior court for damages (will be followed by action for cleanup and penalties) for gasoline contamination of water well at Independence Mine Visitor's Center at Hatcher Pass.

State v. Aoyagi Maru: Investigation proceeding and Complaint to be filed for damages and penalties for marine spill from grounded vessel at Lost Harbor near Dutch Harbor.

State v. M/T Thompson Pass: Investigation proceeding and Complaint to be filed for damages and penalties for oil spill from tanker while loading at Trans-Alaska Pipeline System (TAPS) terminal in Valdez.

State v. Chil Bo San: Investigation proceeding and Complaint for damages and penalties to be filed for marine spill from grounded vessel near Spray Cape, Unalaska Island.

AMOCO (Nikiski): Disposal of petroleum waste products and drilling muds to unlined pits. Compliance Order being negotiated for cleanup and groundwater assessment.

Texaco Station (Anchor Point): Extensive groundwater contamination has forced some residents to seek alternate water supply. Contamination resulted from leaking fuel delivery system; also, possible surface spill. Cost of cleanup may exceed $500,000.00. Investigation proceeding.

Coastal Drilling (Soldotna): Unpermitted dumping site for drill muds, solvents, oils, equipment, etc. Investigation proceeding.

Ridgeway Service Station (Kenai): Leaking fuel delivery system polluted groundwater, wells, in residential subdivision. Several residents put in new wells. Compliance Order being negotiated for cleanup.

Tesoro Refinery (Nikiski): Tesoro estimates they have spilled and/or leaked 400,000 to 750,000 gallons of petroleum product

into the soil and water around the refinery. The contamination has migrated onto neighboring property, polluting neighboring wells. Cleanup is underway; will be ongoing for years to come.

Union Oil v. State -- DEC denied Union's permit application for six unlined pits for disposal of drill muds. DEC's decision was upheld by administrative hearing officer. DEC to undertake enforcement for proper disposal of the pit contents.

State v. Union Oil -- Litigation over a seventh unpermitted, unlined drill mud disposal site. Substantial site testing underway.

State v. All Alaska -- Investigation proceeding and Complaint to be filed for damages and penalties from oil spill from fish processing vessel at St. Paul Island.

State v. Glacier Bay -- Complaint for damages and penalties to be filed for marine oil spill from tanker in Kenai.

State v. M/V Swallow -- Investigation proceeding and Complaint for damages and penalties to be filed for marine spill from grounded vessel near Dutch Harbor.

State v. Cove Leader -- Investigation proceeding and complaint for damages and penalties to be filed for marine spill from tanker in Valdez.

Unocal Service Stations (Anchorage) -- Three sites are being investigated for oil contamination from leaking underground storage tanks. Compliance orders under negotiation for each site.

Kim's Service Station (Anchorage) -- Oil contamination from leaking underground storage tanks.

Topper's Service Stations (Anchorage) -- Four sites are being investigated for oil contamination from leaking underground storage tanks. Compliance orders under negotiation for each site.

Chevron Service Station (Anchorage) -- Oil contamination from leaking underground storage tanks. Compliance orders under negotiation.

7-Eleven Service Station (Eagle River) -- Oil contamination from leaking underground storage tanks. Compliance order signed and clean up proceeding.

Amoco Platform Anna -- Investigation proceeding and Complaint for damages and penalties to be filed for marine spill from off shore drilling pad.

Union Oil Gravel Pit (Kenai) -- Discharge of condensate and other oil waste. Compliance order under negotation.

Ft. Richardson -- Investigation proceeding on leaking underground storage tanks.

Sterling Chevron Station -- Leaking underground storage tank. Criminal complaint filed. Complaint to be filed for cleanup and civil penalties.

Chevron Bulk Plant (Valdez) -- Soil and groundwater contamination from refined petroleum products. Investigation proceeding.

OIL AND HAZARDOUS SUBSTANCE CONTAMINATION CASES REFERRED TO DEPARTMENT OF LAW -- NORTHERN REGION

OIL SPILLS

Case name	Work Management No	Description
1. Fairbanks Municipal Utilities Systems	665-89-0061	Contamination of city water supply wells from past fuel spills and leaking tanks.
2. USAF Eielson AFB	665-88-0170	54 individual contaminated sites have been identified at Eielson. Several are fuel-related and at least six have documented floating fuel layers on the ground water.
3. MAPCO North Pole Refinery	665-86-0239	Estimated 250,000 gallons spilled. Clean-up underway.
4. Alaska Railroad	665-89-0053	Four feet of floating product on groundwater in Fairbanks freight yard.
5. City of Kotzebue	665-89-0036	Clean-up underway of long-term fuel contamination problem.
6. United States Post Office, Fairbanks Airport Facility	665-89-0025	Leaking gas tank has released lens of product currently floating on ground water.
7. Stage Stop Gas Station	665-88-0145	Contaminated soils and groundwater at abandoned gas station.
8. Bettles Lodge	665-89-0009	2 separate fuel contamination problems, at Lodge and at FAA Building.
9. Lucky Sourdough Gas Station	665-89-0037	Contamination at abandoned gas station.
10. Delta Tank Farm	665-89-0089	Leaking petroleum storage tanks owned by Alaska Gold near Nome. State is attempting to exert enforcement leverage through oil spill contingency plan and through environmental audit under 665-87-0002.

11.	Unalakleet Spill	665-89-0012	Recent oil spill. State and Native corporation hope to negotiate in clean-up effort.

NON-OIL HAZARDOUS SUBSTANCES

1.	Forward Alaska, DNR, Deadhorse Tract 75 & 76	665-89-0068	Multiple spills on leased tracts adjacent to NANA Reservoir at Deadhorse.
2.	Deadhorse Hotel Pad	665-89-0058	Contamination of gravel pad and adjacent tundra.
3.	Alaska Gold/ Steadman Field	665-87-0002	Negotiated containment and clean-up of mercury and arsenic contamination. First stage of clean-up is complete.
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20 years of drilling

Prudhoe Bay — An environmental gem or lurking problem?

By PATTI EPLER
Daily News reporter

Related stories

PRUDHOE BAY — The midnight sun is hazy red above a silvery skyline that stretches forever across the horizon. In the softening light, Prudhoe Bay is at peace.

Towering oil rigs are still at work, pumping black crude from deep within the earth. From a distance, they seem in harmony with the greens and browns of an arctic summer.

Suddenly, the vista is twisted by fire — flames shoot from huge pipes as natural gas, pressurized by the ages, escapes skyward, burning. The flares slowly subside, leaving clouds of black smoke to hang in the cool June air until, finally, a fog creeps in and hides the changing scene.

Nearly two decades after North America's largest oil field began production, Prudhoe Bay is still somewhat of an environmental puzzle. Is it possible to extract one resource from within the earth while leaving an equally valuable one mostly intact on its surface?

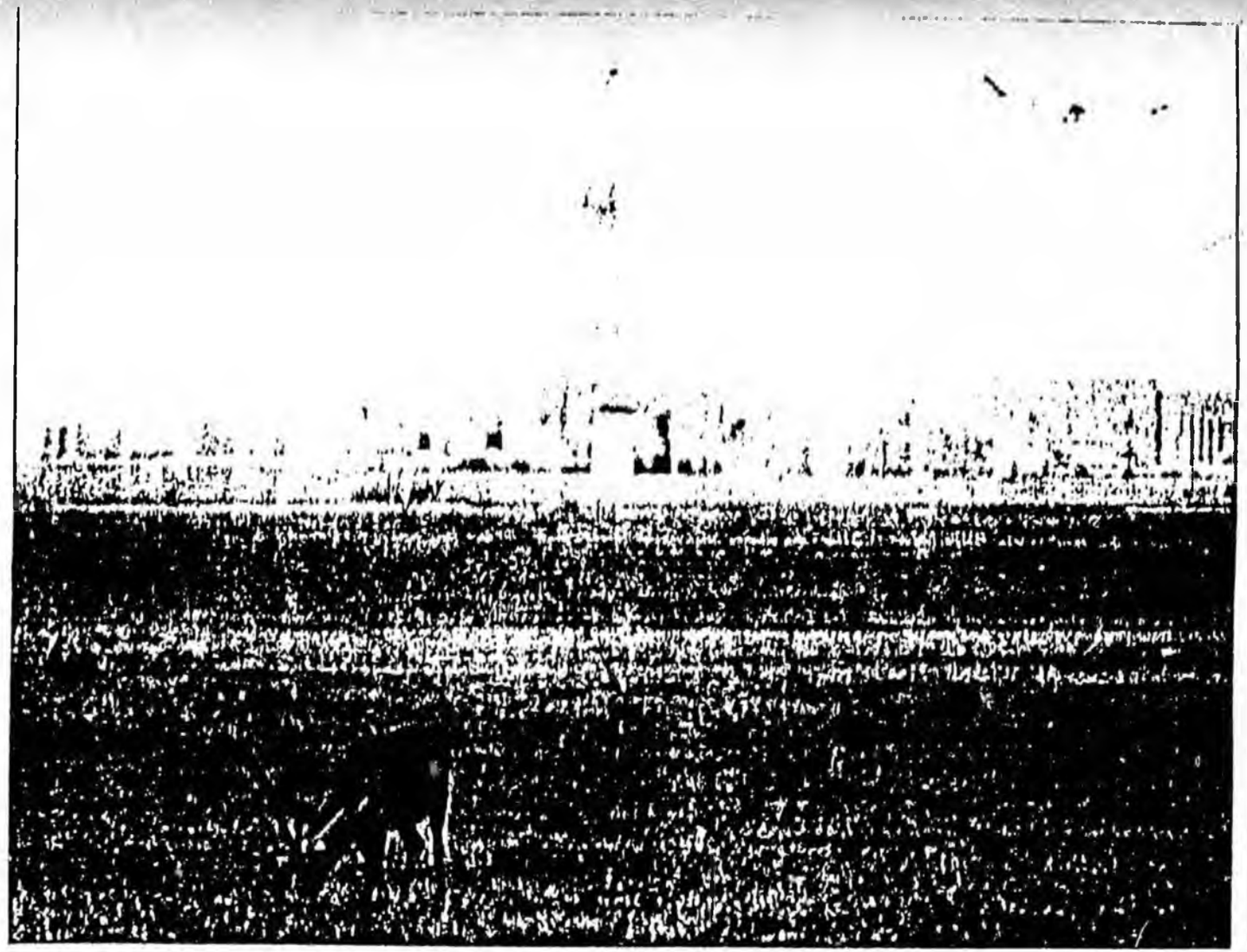
The question is being asked with more urgency these days, as congress wrestles with whether to allow oil development in a part of Alaska still relatively untouched — the coastal plain of the Arctic National Wildlife Refuge.

Some say the North Slope fields are environmental marvels, direct evidence that oil production leaves little lasting mark on the arctic ecosystem.

Environmental groups, who believe any intrusion on ANWR is unacceptable, say that's not true. "Contrary to oil industry claims," says a new report by the pro-environment Alaska Coalition, "pollution problems plague the oil and gas development that has taken place in Alaska's arctic region."

Who's right? A week of touring North Slope oil fields, numerous interviews and the review of dozens of technical reports indicate that the answer, predictably, lies somewhere between.

See Page A 8 PRUDHOE



Anchorage Daily News/Article file

One question being asked now is what effect further arctic development will have on the caribou herds and other arctic wildlife.

Deadhorse gives industry black eye

By PATTI EPLER
Daily News reporter

DEADHORSE — The state will likely pay tens of thousands of dollars to clean up leaking drums of oily waste abandoned on a gravel pad here, state environmental officials say.

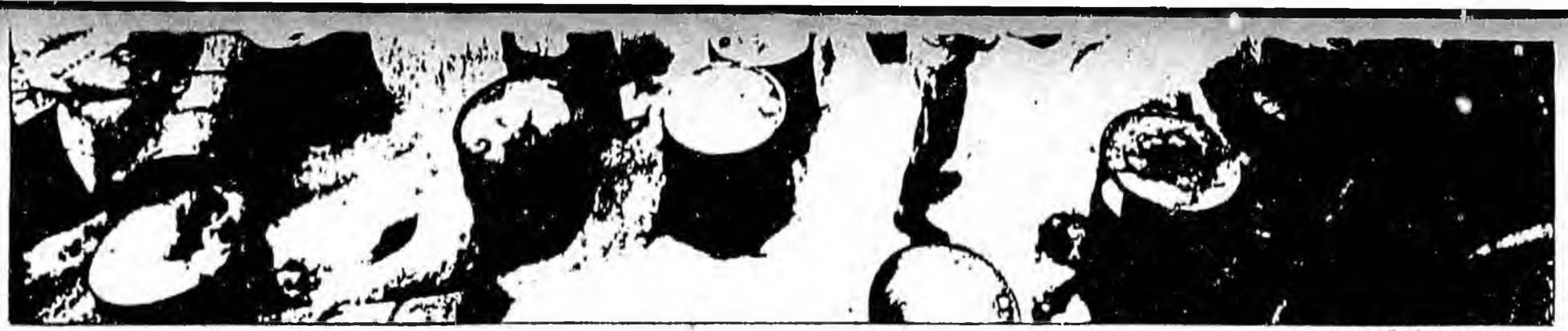
Several weeks ago, the Alaska Department of Environmental Conservation discovered more than 500 drums of petroleum liquids on a pad leased to Child's Equipment Services, a company that had filed for protection from creditors in U.S. Bankruptcy Court.

Since then, DEC has found several more dump sites in this haphazard community on the edge of the Prudhoe Bay oil fields. The public burden is likely to grow as an economic slump in Alaska's oil patch squeezes service companies off the Slope, their messes conveniently left behind.

Deadhorse is giving the oil industry an environmental black eye, and at a most inopportune time. Oil companies are struggling to convince Congress to allow development in the Arctic National Wildlife Refuge east of here. But environmentalists have found much anti-development ammunition in the mess that is Deadhorse.

The Child's pad is a prime example. It appears that the barrels, as well as tons of

See Page A 8, DEADHORSE



Anchorage Daily News photo by [illegible]

DEC investigator Rich Cormack takes photos of dumped construction debris at a pad leased by Child's Equipment Services, a company that has filed for protection under bankruptcy laws.

DEADHORSE: Prudhoe Bay staging area gives the oil industry black eye

Continued from Page A-1

scrap metal, old wood, tires and other junk, came from a variety of sources. DEC talked to a number of companies that had once used the pad, but no one would accept responsibility, said Rich Cormack, a DEC field officer on the North Slope.

When officials contacted Child's, which had leased the gravel pad from the state, they found the company in Bankruptcy Court and unable to pay for the cleanup, he said.

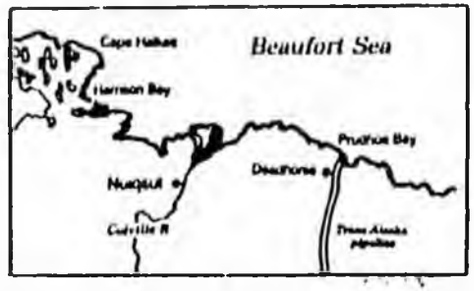
The state has a $25,000 certificate of deposit posted by Child's when the company leased the tract, but Jerry Brossia of the state Department of Natural Resources said it is rare for the state to actually draw against such bonds. In fact, he said, in the five years he has been with DNR, the state has not cashed a single leaseholder's bond to pay for a problem.

Even if the money were claimed, Brossia said, it would go to the state's general fund and would need legislative approval before it could be earmarked for cleanup of the Child's pad.

So, it looks like the state of Alaska will foot the bill. Cormack estimated it will cost $20,000 initially, just to stop the leaking and do the first phase of cleanup. DEC already has put containment booms around the site and shoveled out an area of the pad to slow runoff onto the tundra.

Deadhorse is a more difficult environmental problem than the oil fields themselves. The major oil companies, which operate the fields, keep a tight rein on contractors working in them, but Deadhorse is a patchwork of gravel pads leased in the mid-1970s by the state.

Individual leaseholders hauled in gravel — much of it purchased from the state — and built their own pads along a road that runs from the airport to the oil fields. The pads are three to 60 acres, with troughs between them. Various lease stipulations and restrictions are aimed at keeping the pads clean and orderly, Brossia said.



DNR and other regulatory agencies conduct annual inspections to make sure companies comply with the rules. This year, mindful of the economic slump, DNR is stepping up inspections and trying to work with companies that might otherwise walk away, Brossia said.

"About three out of four pads are disgusting for one reason or another," Cormack said.

On a day in early June, just around the corner from the Child's pad, water drained from large mounds of oily snow on a pad leased by Kodiak Oil Field Haulers. The water flowed down one trough and toward the Saganavirktok River.

It happens year after year, said Brad Fristoe, who heads DEC's North Slope office, because the company cleans its oily trucks outside and just pushes the contaminated snow to one side. The company should have an indoor shop so the oily waste could be contained, drummed up and sent to a waste facility, he said.

But all that involves considerable expense, Fristoe said, so the oil flows to the tundra again and again.

Jim Taylor, president of Kodiak Oil Field Haulers, declined to discuss the waste problem, except to say it has been resolved.

DEC hasn't taken legal action against the company, Fristoe said, because it costs too much money and manpower to prosecute such cases.

"The department's philosophy is to work with the companies rather than take them to court," Fristoe said.

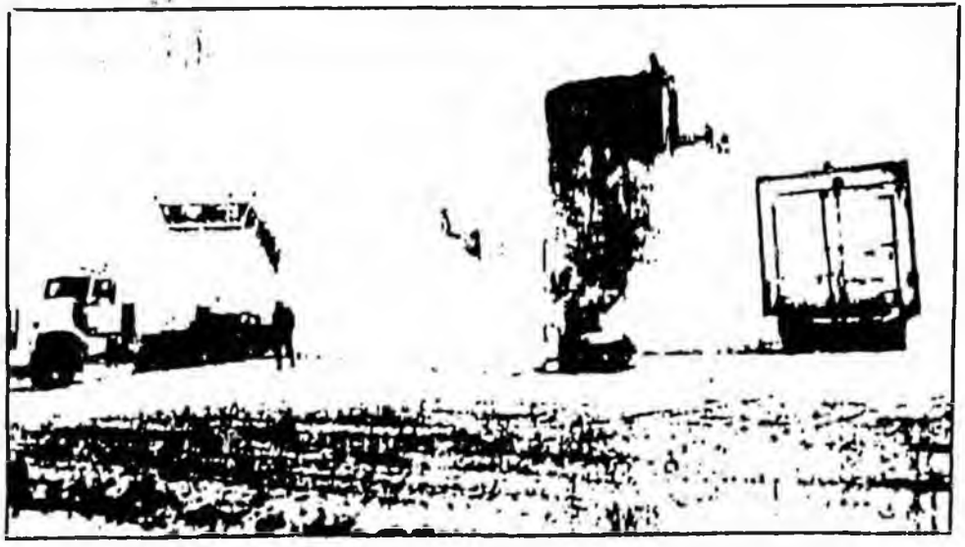
For example, he said, several years ago DEC spent [illegible] man hours putting together a case against a North Slope salvage company that had dumped 15,000 drums on the tundra just off one of the pads. The case took years to move through the courts. The defendants were convicted on criminal charges and ordered to perform community service, rather than to pay fines or go to jail.

In the end, the major oil companies that originally owned the barrels of waste spent more than $1 million to complete the cleanup the salvage company had been paid to perform.

DEC and oil industry officials agree that a Deadhorse-type staging center must not be allowed to happen again, especially in an area like ANWR.

About six years ago, when ARCO Alaska Inc. developed its Kuparuk River field to the west of Prudhoe Bay, the service area was designed much differently. Called the Kuparuk Industrial Center, it has a single large gravel pad, with a central housing facility shared by all companies. Service companies lease shop space from the borough.

"Everybody is evolving and learning as we go along," said Ben Odom, senior vice president of operations for ARCO Alaska. "This time we do it better. You won't see another Deadhorse the next place we go."



At ARCO drilling site #6, a large vessel is steam cleaned while waste water runs off the pad.

PRUDHOE: After 20 years of drilling, area remains environmental puzzle

Continued from Page A-1

"I'd be hesitant to say one way or the other," said Brad Fristoe, an environmental engineer who heads the Alaska Department of Environmental Conservation's North Slope office. "There are things up there that have been impacted that are going to take a long time to recover. But (the area) still produces a lot of the things that it used to and still supports caribou populations and waterfowl populations. The long term effects haven't really been determined."

Upcoming congressional hearings will focus on the environmental consequences of developing ANWR's coastal plain, about 100 miles east of Prudhoe Bay. The oil industry's record in the Arctic promises to be central to the debate. Pro-development interests wave pictures of caribou frolicking in front of oil rigs, while conservationists display photos of huge pits of oily black waste on fire.

No one knows yet what effects the development of Prudhoe Bay will have 50 or 100 years from now. Prudhoe Bay began in the late 1960s, without the benefit of today's knowledge of the Arctic and before most of the country's environmental laws were in force. Government watchdog agencies began regular field inspections only four years ago; before that, they monitored development from offices in Anchorage, Fairbanks and Seattle.

It's obvious that development has improved with new technology and greater experience by industry and environmental regulators. It's also clear that increasing oversight by state and federal agencies has brought about more sound environmental practices. Lawsuits by conservation groups also have forced government agencies to enforce previously ignored environmental rules.

Regulatory officials say they now have a good understanding of problems at North Slope fields. They say they have learned many things that will help guide environmentally sound development at ANWR.

For the most part, state and federal officials believe that oil development in Alaska's Arctic can proceed with minimal environmental harm — as long as there are tough controls, careful planning and enough money for regulatory agencies to do their jobs.

Chief among the concerns is the way oil companies dispose of hundreds of millions of gallons of oily waste. Officials also question whether the air is being polluted by the massive turbines that run production facilities, and what effect expanding oil field development is having on fish and wildlife.

OILY WASTES

By far the most serious environmental problem identified by watchdog agencies involves hundreds of huge pits that hold hundreds of millions of gallons of toxic waste produced during the drilling of oil wells. Some of the pits, especially those built in the early years of Prudhoe Bay, are thousands of feet long.

The pits sometimes leak, allowing poisonous heavy metals and hydrocarbons to seep onto the tundra. In addition, oil companies can legally discharge millions of gallons of water from the pits onto roads or the tundra directly — if the water meets standards set out in state permits.

State and federal officials worry that enough pollutants could accumulate in the tundra to kill plants and destroy important waterfowl habitat or work their way into the food chain.

The structures are called reserve pits. Mostly they contain drilling muds and cuttings. Muds are basically clay mixed with chemicals. They are used to control pressure in wells, preventing blowouts and making drilling easier. Cuttings are chips of rock.

But sometimes the pits also contain crude oil, water produced along with the crude, rig wastewater and contaminated snow.

Tests of the pits show a wide range of contaminants, including arsenic, cadmium, chromium, lead, benzene, toluene, napthalene and paraformaldehyde. While these can be highly toxic in large concentrations, environmental officials say the biggest problem is salt, which is present in high levels and kills plants.

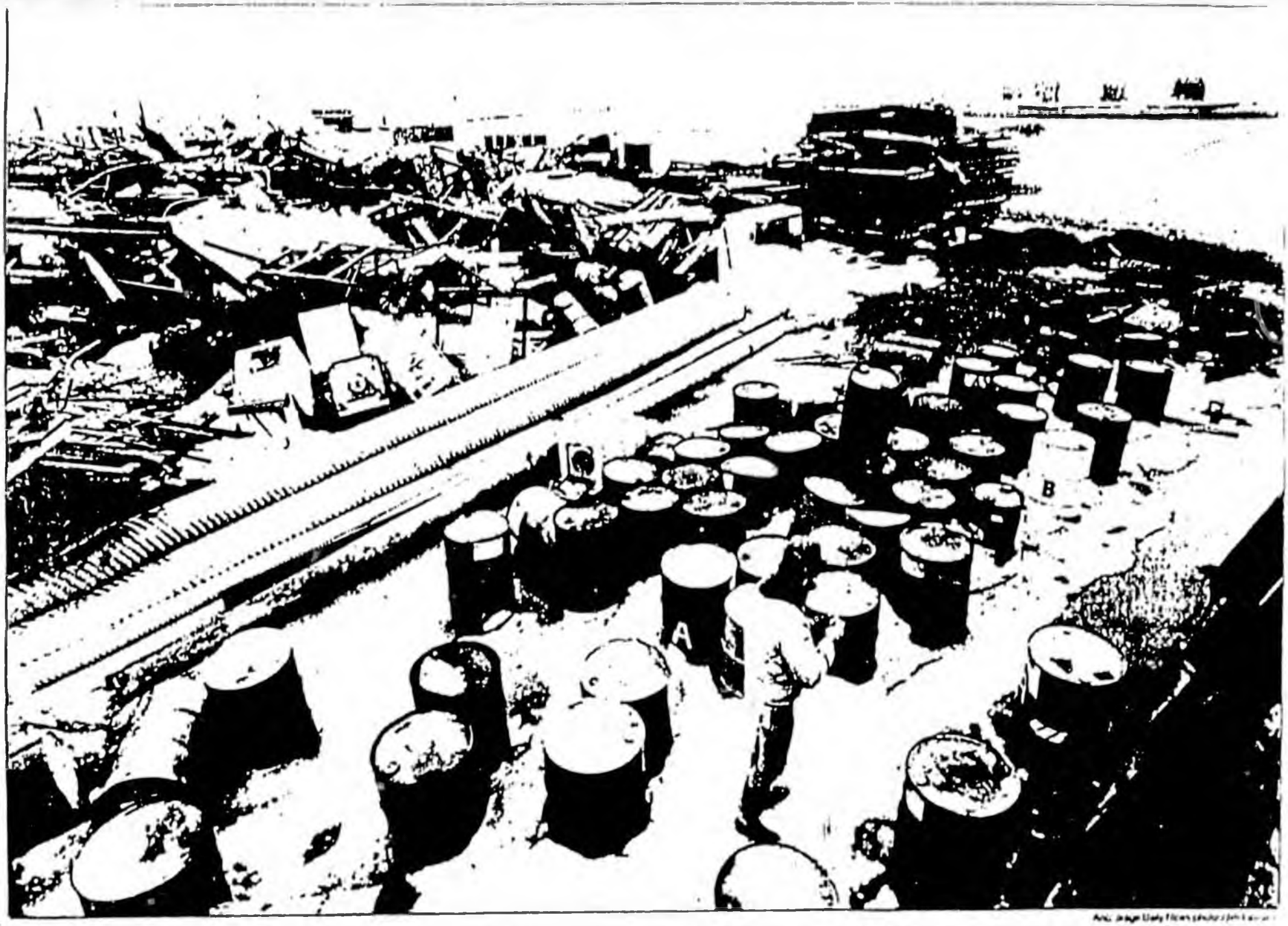
The contents of many pits have accidentally leaked through the gravel walls or spilled over the top in summer as accumulated snow melts. In 1985, the contents of one pit poured through a breach in a dike into a nearby lake used for drinking water.

Steve Taylor, head of the environmental division of Standard Alaska Production Co., acknowledges that reserve pit construction has not been adequate to prevent leaking. He said new state regulations requiring stricter control over the pits will force North Slope operators to improve or close many pits. Standard is looking for ways to insert impermeable liners into the walls of the pits.

Oil companies are allowed to reduce the contents of the pits in several ways. Some used muds are pumped back into nearby wells through "annular injection," a process by which muds are pumped into the part of the well that doesn't carry oil. In 1986, more

See Page A-9, PRUDHOE

See Page A 8, PRUDHOE



DEC investigator Rich Cormack takes photos of dumped construction debris at a pad leased by Child's Equipment Services, a company that has filed for protection under bankruptcy laws.

DEADHORSE: Prudhoe Bay staging area gives the oil industry black eye

DUE FOR A CLEANING IN DEADHORSE

Anchorage Daily News photo by [illegible]

Rich Cormack of the Department of Environmental Conservation takes photos of barrels of oily waste at a gravel pad.

Oil companies prepare for visitors

By PATTI EPLER
Daily News reporter

Deadhorse, the eclectic operations base for North Slope oil-field service companies, is getting a "long overdue" housecleaning this week.

The belated spring cleaning is being spurred in part, oil industry officials admit, because dozens of congressmen and other VIPs will soon be dropping by.

The congressional delegations will begin arriving late next week on fact-finding missions to help them decide whether the coastal plain of the Arctic National Wildlife Refuge, a hundred miles to the east, should be opened to oil development.

Today is a free day at the dump, compliments of the North Slope Borough. And officials were expecting record-breaking crowds, thanks to strong suggestions from Alaska's two largest oil producers that companies who want to continue doing business with them take advantage of the borough's generosity.

The special offer is just one part of an overall effort to spruce up the Slope. The oil industry wants to prove to Congress that it can operate arctic oil fields in an environmentally sound fashion.

The community of Deadhorse is actually a collection of gravel pads that in 20 years has spread out along a road leading from the airport to the Prudhoe Bay oil field. Piles of scrap metal, rusted equipment and other debris —

See Back Page, DEADHORSE

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STEVE COWPER, GOVERNOR

REPLY TO:

☑ 1031 W 4th AVENUE
SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 276-3550

☐ 1st NATIONAL CENTER
100 CUSHMAN ST.
SUITE 400
FAIRBANKS, ALASKA 99701
PHONE: (907) 452-1568

☐ POUCH K - STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

Our Telecopier No. (907) 276-3697
Panafax PX 100

TELECOPIER TRANSMITTAL LETTER

PLEASE DELIVER THE FOLLOWING PAGES TO:

NAME: Rep. Peter Goll

LOCATION: State Legislature, Juneau
* Attn: Hayden Kayden

TELECOPIER NUMBER: 465-3760

TOTAL NUMBER OF PAGES 8 INCLUDING COVER LETTER.

REMARKS: attached are lists of oil + hazardous substance wastes currently pending in the HAZ0 on Medical Film DEC

DATE: 3/20 TIME:

FROM: Michele Brown, AAG
AGO - ANCHORAGE

RE: SUBJECT/FILE NUMBER: HK 68

IF YOU DO NOT RECEIVE ALL THE PAGES OR HAVE ANY PROBLEMS, PLEASE CALL: Kathryn Kolduyen AT (907) 276-3550.

THANK YOU - HAVE A NICE DAY!

03-C5L-M

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Plaintiff,

vs.

TESORO ALASKA PETROLEUM COMPANY, PETRO PRODUCTS, INC., and ROBERT E. SANDEN individually and d/b/a SANDEN FUEL COMPANY,

Defendants.

Case No. 3AN 86-14457 CIV.

AFFIDAVIT OF DR. MICHAEL WATSON

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

I, Michael Watson, being first duly sworn on oath, depose and state:

1. I am employed by the United States Environmental Protection Agency (EPA), as Regional Toxicologist for Region X which includes the State of Alaska. My primary function is to serve as Regional technical expert in the evaluation of the health and environmental effects of chemical contaminants. I obtained a Bachelor of Science in Zoology from the University of Idaho in 1962, and a Master of Science in 1965 (experimental embryology) and Ph.D. in 1969 (zoology, specializing in marine toxin pharmacology) from the University of Hawaii. From 1969 to 1974, I was employed as Research Toxicologist with the EPA-

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ANCHORAGE, ALASKA 99501
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EXHIBIT B
PAGE 1 of 18

sponsored Idaho Epidemiologic Studies Program. During that time I conducted research into the effects of pesticides on public health and the environment. From 1975 to 1976 I was a Visiting Colleague in Physiology at the University of Hawaii School of Medicine, sponsored by a National Institutes of Health Postdoctoral Fellowship.

2. Since joining EPA in 1974, I have served as Pesticide Accident Officer and Consumer Safety Officer within the Pesticides and Toxic Substances Branch, in addition to my duties as technical expert in toxicology. My title was changed to Toxicologist in 1980, when that classification was officially made available within government service. I have published 14 articles in peer-reviewed journals, including Mutation Research, Clinical Pharmacology and Therapeutics, Toxicon and Archives of Environmental Health. Although my degrees are all in Zoology, I have been board certified in Toxicology by the American Board of Toxicology since 1984. I am a member of several professional societies, including the Society of Toxicology, International Society on Toxinology, and the American Chemical Society. In 1984 and again in 1987 I was elected as Councilor for the Pacific and Northwest Association of Toxicologists. I also serve as an external reviewer for papers submitted to the international journal, Aquatic Toxicology.

3. As Regional Toxicologist, I have had considerable experience in reviewing contamination episodes involving groundwater and drinking water. I routinely review the findings of our

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Superfund program, for example, relative to contaminants in drinking water, and I perform the major technical toxicologic review for all correspondence subsequently sent to the public informing them as to what this all might indicate in terms of risk. I also review drinking water contaminant episodes for various other programs in EPA such as Drinking Water, Pesticides, and Toxic Substances. I also advise other state and federal agencies, physicians, poison control centers, and the public at large, on matters relating to toxicology and risks from chemical contamination.

4. I have reviewed the attached ground-water data from samples taken from the Peters Creek area near Anchorage, Alaska. My conclusions as to health risk are as follows:

A. First, the levels of benzene, toluene and xylene in a large number of the contaminated samples are extraordinarily high. Some of the levels for benzene in particular are among the highest that I have ever encountered in water samples in my nineteen year career in environmental toxicology.

B. Although toluene and the various isomers of xylene also occur quite frequently along with benzene in many of these samples, sometimes at extremely high levels, it is the presence and the relative frequency of benzene which poses the greatest concern. This is because benzene is unequivocally a human carcinogen. It is ranked as a human carcinogen by both the EPA and the International Agency for Research on Cancer (IARC), which is the guiding body for worldwide risk assessment in

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carcinogenesis. This classification is based on several sets of strong scientific information, derived both from extensive animal studies and from epidemiologic observations upon humans exposed to benzene in the workplace. The evidence for this conclusion includes several studies of increased incidence of acute myelogenous and monocytic leukemia in occupationally exposed humans, as well as the increased incidence of tumors and leukemia in mice and rats exposed by both inhalation and ingestion. In further support of its carcinogenicity, benzene has been shown to cause significant increases in chromosomal aberrations in bone marrow cells and peripheral lymphocytes in workers exposed to the material. It has also induced chromosomal aberrations in bone marrow cells from mice, rats, and rabbits, and has been found positive in the mouse micronucleus test. All of these findings implicate mutagenic activity and serve to strengthen even more so the aforementioned findings regarding human and animal carcinogenicity. Noncarcinogenic effects of benzene exposure in humans include other problems with the blood forming organs such as myelocytic anemia and thrombocytopenia (decreased numbers of blood-forming cells and blood platelets).

C. EPA's predictive models for cancer risk assessment are admittedly conservative. Using our current risk and exposure models, EPA generally regards any chemical exposure situation which is predicted to result in an increased cancer risk of no greater than one in one million (1×10^{-6}) to be acceptable. Under certain circumstances, acceptable

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allowable increased predicted cancer risk from a chemical exposure might be expanded to one in one hundred thousand (1×10^{-5}) or less, but this is usually the exception rather than the rule.

D. Because benzene is a carcinogen, EPA's Drinking Water Programs have proposed a Maximum Contaminant Level Goal (MCLG) of zero, that is, no parts per billion, (ppb) for drinking water. Because this goal is realistically unattainable in many situations, EPA has set a final Maximum Contaminant Level (MCL, based on technological and economic feasibility) of 5 parts per billion. Using EPA's current risk assessment procedure for carcinogenesis, the level of benezene in drinking water which should result in an increased cancer risk of 1×10^{-5} is 10 ppb. Decreasing this by tenfold to 1 ppb would obviously result in a tenfold less excess of lifetime cancer risk of 1×10^{-6}. Thus, although EPA's cancer risk assessment procedure is admittedly a conservative one, about 10 ppb is a reasonable upper limit for benzene in drinking water in a typical risk or exposure assessment which EPA might undertake or evaluate.

E. The maximum level of benzene in any of the Peter's Creek drinking water samples (Linton residence, 7-21-86, page 5 of attachment) which I have reviewed thus far is 40,000 parts per billion, which is obviously four thousand times in excess of what EPA would consider even the upper margin of a "safe" level for drinking water, and eight thousand fold greater than the EPA Drinking Water Maximum Contaminant Level. Even the tenth highest drinking water sample (Nichols residence, 4-29-87,

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page 7 of attachment), is in terms of benzene, 18,500 parts per billion, or practically two thousand times the "safe" quantities outlined above. It is three thousand, seven hundred times higher than the recommended drinking water MCL. The risk posed by these levels of benzene is a major one in terms of predicted excess cancer risk. In my professional opinion, water contaminated with this level of benzene should not be used for any purposes whatsoever.

G. In the highly contaminated samples, benzene usually makes up only about 30 or 40 percent of the observed contamination, the remainder being due to high concentrations of toluene and the xylenes. In the most contaminated Linton sample the sum of the various xylene isomers in this sample is 16,100 ppb. The EPA lifetime health advisory for xylene in drinking water is 400 ppb. In the same sample, toluene is found at 57,000 ppb, which, like for benzene, is the highest level of toluene in drinking water or groundwater which I have ever seen. This can be compared with the EPA lifetime drinking water health advisory for toluene at 2,420 ppb. Toluene and xylene are not known to be carcinogenic in either human or animal systems. However, little is known about possible synergistic effects resulting from multiple and long-term exposure to these chemicals. Cancer and blood-related problems aside, exposure to benzene, xylenes, and toluene at sufficient concentrations--either singly or in combination--can affect the central nervous system and cause respiratory failure, circulatory collapse and death. Xylene and toluene in

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sufficiently high concentrations can produce central nervous system dysfunction.

H. On another level, significant exposure to petroleum products such as gasoline can sensitize the heart muscle to the effects of adrenaline-like endogenous compounds which are naturally present in the body. This can lead to problems with heart muscle contractility, and can severely compromise cardiac function in sensitive individuals.

I. In addition to the health risks discussed above, there is an additional risk of being exposed to these volatile compounds, especially benzene, in the household as a consequence of such activities as showering, cooking, operating a dishwasher, and so forth. EPA has recently investigated the effects of using heated, contaminated water in these typical household situations, and has found that the overall inhalation of such volatile compounds during normal household uses carries with it an additional health risk approximately equivalent to that of drinking the water alone. This is especially pertinent in cold climates, or during periods where influx of outdoor air is at a minimum. The presence of a human carcinogen such as benzene, let alone the other organics mentioned, can thus pose more risk to a person than first meets the eye, because of this increased exposure via inhalation of vapors as a consequence of these other routine household uses of water.

5. Based on the above observations and my evaluation of all the sampling data made available to me, it is my opinion

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that the quantities of benzene, xylene and toluene found to b present in the Peters Creek ground water are unaccept able because they endanger human health and th environment.

Further your affiant saith naught.

Dated 5-11-88

Michael Watson

Michael Watson, Ph.D.

SUBSCRIBED AND SWORN TO before me this 11th day o MAY, 1988.

Notary Public, State of Washingto
My commission expires: 12-7-90

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Representative Peter Goll

March 17, 1989

Testimony CS for House Bill No. 68
Section AS 46.03.823
"An act limiting the liability of hazardous substance response action contractors; and providing for an effective date."

By Anita M. Burke
Representing the Alaska Hazardous Waste Action Coalition

The Alaska Hazardous Waste Action Coalition, a coalition of seven consulting and cleanup firms who frequently perform as response action contractors, is supportive of the proposed committee substitute HB 68, AS 46.03.823. Removing RACs from the strict liability provisions of AS 56.03.822 aligns with prevailing federal law and is a step in the right direction of creating a litigation free environment that responsible RACs can work in. The term "responsible RACs" is important because the risks need to be made reasonable so that the state's cleanup efforts will be performed by firms who have the staff, experience and financial resources to do the best possible job.

We are generally in favor of the intent of the proposed committee substitute and recommend the passage of this segment of the legislation by the committee, although we will express some concern over the specific wording of the Subsections AS 46.03.823, Sections b and e.

While we agree with the intent of these sections, it is our feeling that the language does not reflect the intent of the legislation. It is our understanding that Section b (page 6, line 1) provides for the insurance that responsible parties that are involved directly in the implementation of response actions can claim limited liability for their response activities but not be limited in liability for their role as a responsible party. We agree with this intent but feel that the language is somewhat confusing. We recommend that the committee consider clarifying the language of this section.

Section e of AS 46.03.823, (page 6, line 12) is intended to restrict response action contractors from deviating significantly from an approved work plan for on-site response activities and any contract with the Department of Environmental Conservation. If a RAC deviates without additional approvals, the RAC looses his limited liability coverage. It is difficult to fully accept this section without a further definition of "approval by the department" and situations or occurances that signify a "deviation" from the plan. Further clarifying language in this section is needed to outline the language's full impact.

As stated earlier, we are generally supportive of this section of CS HB 68. We encourage the committee to consider our suggestions for minor clarifications.

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: HB 68
PUBLISH DATE: HOUSE 1/9/89

FISCAL NOTE

REQUEST:

Revision Date:
Title: An act relating to liability for release of a hazardous substance.
Sponsor: Rules Committee
Requestor: Governor

Agency Affected: DEC
BRU: Environmental Quality
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS: none

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

The bill will enhance the State's ability to recover costs for cleanup of hazardous substance spills.

Prepared by: Amy D. Kyle
Division: Commissioner's Office
Phone: 465-2600
Date: 14 November 1988

Approved by Commissioner:
Agency:
Date: November 15, 1988

Distribution (by preparer):
Legislative Finance
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No. 2

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: HB 68
PUBLISH DATE: HOUSE 1/9/89

FISCAL NOTE

REQUEST:

Revision Date:
Title: Hazardous Substance Release

Agency Affected: Natural Resources
BRU: Petroleum Management

Sponsor: Rules Committee
Requestor: Governor Cowper

Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This bill does not affect the Department of Natural Resources.

Prepared by: Carol Wilson
Division: Commissioner's Office
Phone: 465-2400
Date: 11/23/88

Approved by Commissioner: Lenny Gorsuch
Agency: Natural Resources
Date: 11-28-88

Distribution (by preparer):
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Office of Management and Budget
Impacted Agency(ies)

MEMORANDUM OF LAW

Issue: Is joint and several liability imposed absolutely by the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA)? If not, what rules of law are to be applied in determining the existence of joint and several liablity under CERLA?

Conclusion: Joint and several liabilty is not imposed absolutely by CERCLA; instead common law rules of law are applied and if two or more parties independently cause a single harm as to which there is a reasonable basis of apportionment, then each is held liable only for the portion of harm that it caused.

It is clear that CERCLA does not impose joint and several liablity in all instances. The only federal circuit court opinion, which has considered this issue was U.S. v. Monsanto, 858 F.2d 160 (4th Cir. 1988); there the court held at 171

> "While CERCLA does not mandate the imposition of joint and several liability it permits it in cases of indivisible harm." See, Shore Realty, 759 F.2d at 1042 n.13; United States v. Chem-Dyne, 572 F.Supp. 802, 810-11 (S.D. Ohio, 1983).

The court in Monsanto observed that a proposed provision which would have absolutely imposed joint and several liability was eliminated from CERCLA before it was enacted by Congress. The Monsanto court then stated, at 171-2, the applicable rules of law to be:

> Under common law rules, when two or more persons act independently to cause a single harm for which there is a reasonable basis of apportionment according to the contribution of each, each is held liable only for the portion of harm that he causes. Edmonds v. Campagnie Generale Transatlantique, 443 U.S. 256, 260 n.8, 99 s.Ct. 2753, 2756 n.8, 61 L.Ed.2d 521 (1979). When such persons cause a single and indivisible harm, however, they are held liable jointly and severally for the entire harm. Id. (citing Restatement (Second) of Torts §433A (1965)). We think these principles, as reflected in the Restatement (Second) of Torts, represent the correct and uniform federal rules applicable to CERCLA cases.
>
> Section 433A of the Restatement provides:
>
> (1) Damages for harm are to be apportioned among two or more causes where

(a) there are distinct harms, or

(b) there is a reasonable basis for determining the contribution of each cause to a single harm.

(2) Damages for any other harm cannot be apportioned among two or more causes.

Restatement (Second) of Torts §433A (1965).

In Monsanto, the court also confirmed that the defendants bear the burden of establishing a reasonable basis for apportionment; and that depending on the circumstances, volumetric apportionment may be reasonable. Id. at 172.

It has been suggested that the federal courts have uniformly rejected the notion that liability to the government should be apportioned based on the amount of waste contributded. Such is not the case. For example, the court in Monsanto, Id. at 172, discusses the absence of any proof by the defendants that the harm was divisible and then states:

"Under other circumstances proportionate volumes of hazardous substances may well be probative of contributory harm." (footnote omitted)

U.S. v. Chem-Dyne, 572 F.Supp. 802 has been cited as holding that joint and several liability is appropriate for most cleanup cases because wastes have been commingled and it is difficult to establish "a reasonable basis for division according to the contribution of each." Such a holding was not found in the case.

Instead, the court in Chem-Dyne held that the issue was whether the harm was divisible or indivisible. The court observed that the mixing of wastes raises a question as to the divisibility of the harm and that volumetric apportionment may not be appopriate if unlike hazardous substances are mixed.

The Monsanto case discusses and analyzes the Chem-Dyne decision and other district court cases dealing with the joint and several issue.

The Monsanto decision has not been overruled in any reported decision.

exclude a./
adopt fed pattern of where liable in what circumstances

Ray Plummer
3-21-89

Alaska State Legislature

House of Representatives
House Judiciary Committee

P O Box V
State Capitol
Juneau, Alaska 99811
(907) 465-4990

M E M O R A N D U M

TO: Madeleine R. Levy, Assistant Attorney General
Department of Law

FROM: Hayden Kaden, Co-Counsel HK
House Judiciary Committee

RE: Question arising from committee hearing on HB 68, release of hazardous substances.

DATE: March 20, 1989

Please advise the House Judiciary Committee of the standard of liability which is required by, or used under, the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).

Thank you very much for your assistance.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STEVE COWPER, GOVERNOR

REPLY TO:

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March 21, 1989

Hayden Kaden
Committee Co-counsel
House Judiciary Committee
P.O. Box V
Juneau, Alaska 99811

Re: CSHB 68

Dear Mr. Kaden:

You have asked this office for a very brief analysis of the standard of liability which has been imposed on parties who generate, transport, treat, store or dispose of hazardous substances, or own land where disposal has occurred, under the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §9601, et seq (CERCLA) after which CSHB 68 is modeled.

First, the courts have uniformly ruled that CERCLA establishes strict liability for the classes of persons referred to above, subject only to the defenses set forth in section 107(b) of CERCLA. Essentially the same defenses to the strict liability of CSHB 68 are set forth in proposed section AS.46.03.822(b). As the federal Court of Appeals for the Second Circuit explained in the leading case of New York v Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985), "Congress intended that responsible parties be held strictly liable, even though an explicit provision for strict liability was not included . . . [CERCLA] provides that 'liability' under CERCLA 'shall be construed to be the standard of liability under Section 311 of the Clean Water Act, which courts have held to be strict liability, . . . and which Congress understood to impose such liability.'" Under strict liability, parties are liable without regard to negligence unless they come within the specified defenses.

Second, federal courts have reached the consensus position that CERCLA imposes joint and several liability for hazardous wastes cleanups unless the defendant meets its burden of proving that the harm is divisible and that there is a reasonable basis for apportionment of costs and damages. For example, in the seminal case of U.S. v. Chem-Dyne, 572 F. Supp. 802, 810-11 (S.D. Ohio 1983), the federal district court held

that joint and several liability is appropriate for most cleanup cases because wastes have been commingled and it is difficult to establish "a reasonable basis for division according to the contribution of each." The Chem-Dyne facility contained 608,000 pounds of hazardous material received from 289 separate generators and transporters.

In other words, where mixing of wastes results in one single harm to the environment, all contributors to that harm are "held liable jointly and severally for the entire harm." U.S. v. Monsanto, 858 F.2d 160, 172 (4th Cir. 1988). (A copy of the relevant portion of the brief filed by the federal government in Monsanto is attached for your convenience.) Courts have uniformly rejected the notion that liability to the government should be apportioned based on the amount of waste contributed by ea h defendant. Monsanto, 858 F.2d at 172.

However, once joint and several liability to the government has been established, liable parties may seek reimbursement from each other in accordance with each party's relative contribution to the site. As the Monsanto court put it, "making the government whole for response costs was the primary consideration [of CERCLA] . . ." but "the defendants still have the right to sue responsible parties for contribution and in that action they may assert both legal and equitable theories of cost allocation." 858 F.2d at 173 (fn omitted).

The 1986 amendments to CERCLA specifically provide for an action for contribution among responsible parties (although courts had previously held that a right of contribution among responsible parties was implied under the joint and several liability scheme of CERCLA.) See section 113(f) of CERCLA, 42 U.S.C. §9613(f), and attachment at pp. 39-42. If you require further assistance from us, please do not hesitate to ask.

Very truly yours,

DOUGLAS B. BAILY
ATTORNEY GENERAL

By:
Madeleine R. Levy
Assistant Attorney General

MRL:jem

Enc.

INDEX

CITATIONS

Cases:

out an additional, and potentially enormous exception, for landlord-tenant contracts.

The landowners next contend (Br 16) that they only intended to rent a warehouse building on the site, not the entire Bluff Road site. But even if it were true that they intended to rent only part of the site, the activities of SCRDI were still "in connection with" a contractual relationship with the landowners. In any event, the landowners admittedly became aware of the disposal of hazardous wastes outside the warehouse in late 1977, yet continued to rent the property on a month-to-month basis. There can be no question that the continued disposal of wastes at Bluff Road after 1977 was "in connection with" a contractual relationship with the landowners.

Furthermore, a Section 107(b) defense is unavailable because the landowners have never attempted to show a critical element of such a defense: that they "took precautions against foreseeable acts or omissions" of the party they claim is responsible. Such a showing would be impossible in this case since, (1) in renting the property to a chemical company in 1972 the landowners did not take the simple precaution of insisting on lease terms to assure that the property was not used improperly so as to create a hazardous situation; (2) the landowners never

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19/ (...continued)
that he undertook "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice * * *." This definition confirms that contracts conveying interests in land, such as leases, fall within the statute unless the narrow terms of the exception apply.

inspected the property in over eight years; and (3) even after learning of the enormous environmental hazard which had developed on their property in 1977, they did not institute ejectment proceedings, or even insist on new lease terms that might have remedied the situation or at least prevented the accumulation of additional waste. Instead, they continued to renew the existing month-to-month lease which apparently contained no protections whatsoever. As the landowners cannot hope to show that they "took precautions against foreseeable acts or omissions," the Section 107(b)(3) defense is unavailable to them. See Shore Realty, 759 F.2d at 1049.

III

JOINT AND SEVERAL LIABILITY WAS APPROPRIATE BECAUSE THE UNDISPUTED FACTS SHOWED THAT THE HARM AT THE SITE WAS INDIVISIBLE; THE DISTRICT COURT PROPERLY REJECTED ARBITRARY METHODS OF COST APPORTIONMENT AS A WAY TO "DIVIDE" THE HARM

The courts have uniformly agreed that although the phrase "joint and several liability" does not appear on CERCLA's face, Congress intended that the doctrine be applied in appropriate circumstances. "[T]he legislative history evinces the intent that the scope of liability under CERCLA, 42 U.S.C. § 9607, be determined from traditional and evolving principles of common law * * *." United States v. Chem-Dyne Corp., 572 F. Supp. 802, 808 (S.D. Ohio 1983). The courts have found that those principles support joint and several liability for defendants made liable by Section 107(a) where the harm or threat of harm to which the government had to respond was "indivis-

ible."[20] Chem-Dyne, 572 F. Supp. at 810; see also Ottati, 630 F. Supp. 1395-1396, State of Idaho v. Bunker Hill Co., 635 F. Supp. 665, 676-677 (D.Idaho 1986); United States v. Conservation Chemical Co., 589 F. Supp. 59, 63 (W.D. Mo. 198.); United States v. Medley, 25 EPC 1315, 1318 (D.S.C. 1986). Furthermore, where defendants liable under Section 107 seek to limit the scope of their liability on the ground that the entire harm is capable of apportionment, the burden of proof of apportionment is on those defendants. Chem-Dyne, 572 F. Supp. at 810; Wade, 577 F. Supp. at 1338-1339; Bunker Hill, 635 F. Supp. at 677; Ottati, 630 F. Supp. at 1396; Conservation Chemical, 589 F. Supp. at 63; see also Restatement (Second) of Torts § 433B (1965).

The district court adopted the analysis of the seminal Chem-Dyne decision.[21] The court concluded (2/23/84 order at 15; JA) that, "based on undisputed facts, the harm at the Bluff Road site was indivisible."

> There were thousands of corroded, leaking drums at the site not segregated by source or waste type. Unknown, incompatible materials commingled to cause fires, fumes, and explosions. Because of the constant

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[20] It is settled that Congress intended the courts to apply a uniform federal rule of joint and several liability under Section 107(a), rather than apply the law of the forum state. Chem-Dyne, 572 F. Supp. at 809; Wade, 577 F. Supp. at 1338; Colorado v. ASARCO, 22 ERC 1927, 1928 (D.Colo. 1985); see 126 Cong. Rec. H11787 (Dec. 3, 1980), 1 Leg. Hist. at 778 ("the bill will encourage the further development of a Federal common law in this area") (remarks of Rep. Florio); see also, S. Rep. 96-848 at 11, 1 Leg. Hist. at 318.

[21] As noted infra at 42, Congress has recently affirmed that Chem-Dyne properly sets out the rules governing joint and several liability under CERCLA.

> threat of further fires, explosions, and other reactions, all of the materials at the site were, if not actually oozing out, in danger of being released. Thus, while all of the substances at the site contributed synergistically to the threatening condition at the site, it is impossible to ascertain the degree of relative contribution of each substance.

Neither the generators (Br 20-21) nor the landowners (Br 13-14) contest that Chem-Dyne sets out the proper test for joint and several liability. Nor do they contest the district court's characterization of the site as one where it was "impossible to ascertain the degree of relative contribution . each substance." The generators merely protest the rejection of their argument that "'there may be a means of roughly apportioning the costs of cleanup among responsible parties by calculating their relative volumetric contributions from shipping documents'" (Br 22, quoting order at 15), while the landowners protest the imposition of joint and several liability on assertedly "innocent" parties (Br 14). These arguments are without merit.

A. Under the common law, the harm at a site like Bluff Road would not be divided among defendants on the basis of volume of waste sent to the site. -- The generators begin with a faulty reading of the common law of joint and several liability, and in particular the Restatement (Second) of Torts. Under Restatement Section 433A, joint and several liability does not apply where there are distinct harms, or where "there is a reasonable basis for determining the contribution of each cause to a single harm" (emphasis added). The Restatement explains what a "reasonable

basis" for dividing a harm among defendants is by means of an example:

> [W]here the cattle of two or more owners trespass upon the plaintiff's land and destroy his crop, the aggregate harm is a lost crop, but it may nevertheless be apportioned among the owners of the cattle, on the basis of the number owned by each, and the reasonable assumption that the respective harm done is proportionate to that number.

2 Restatement (Second) of Torts 436 (1965) (emphasis added).

Similarly, in the case of two factories which pollute a stream, the injury may be apportioned among the factory owners on the basis of the quantity of pollution discharged by each. Id. While the generators cite this example (Br 21), they fail to see that it too is based on the assumption that the respective harm done by each factory is proportionate to the quantity of pollution discharged. This is made clear by the example set forth to illustrate this point, which involves two factories which discharge the same pollutant (oil) into a stream, thereby depriving a landowner of the use of the water. Id. at 437. In that case the harm is proportionate to the amount of oil each defendant contributed to the stream. However, the Restatement cautions that if the oil had ignited and burned down the landowner's barn, or if it had poisoned his cattle, the harm could no longer be logically apportioned between the two factories. Id. at 441, illustrations 14 & 15.

Clearly, the generators presented no "reasonable basis" for determining the contribution of each to the harm at Bluff Road, where many different hazardous wastes have leaked and

combined, leading to fires, fumes and explosions. The situation at Bluff Road is not analogous to the Restatement illustration of two factories discharging the same pollutant which renders a stream unusable; it is instead analogous to (and even less "divisible" than) oil which catches fire and burns the barn.

The courts have recognized that traditional and evolving principles of common law do not permit dividing the harm at a waste site such as Bluff Road on the basis of how much waste each generator sent to the site. The Chem-Dyne court noted that "the volume of waste of a particular generator is not an accurate predictor of the risk associated with the waste because the toxicity or migratory potential of a particular hazardous substance generally varies independently with the volume of the waste." 572 F. Supp. at 811. In Medley, 25 ERC at 1319, the court granted summary judgment on joint and several liability, finding that "[t]he mixing of various hazardous substance [sic] in the lagoons is indivisible and the environmental harm presented by the Medley Farm site cannot be rationally or reasonably apportioned among waste generators, site owners and site operators in this case."22/ As the district court here

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22/ Medley reaffirms that summary judgment on the issue of indivisibility of injury is appropriate where the undisputed facts show that wastes have spilled and commingled, as at Bluff Road. The generators do not dispute that the issue of divisibility of harm may be resolved on motions for summary judgment. Indeed, the caselaw affirms that divisibility is an issue of law. See, Richardson v. Volkswagenwerk, A.G., 552 F. Supp. 73, 83-84 (W.D.Mo. 1982); Azure v. City of Billings, 596 P.2d 460, 471 (Mont. 1979); Restatement (Second) of Torts § 434(1)(b).

noted (order at 16 n.8; JA), cases decided under state law and other federal statutes also make clear that arbitrary methods of apportionment such as generators suggest here do not render an injury "divisible" for purposes of joint and several liability. See, In the Matter of the Complaint of Berkeley Curtis Bay Co., 557 F. Supp. 335, 339 (S.D.N.Y. 1983); City of Perth Amboy v. Madison Industries, Inc., 13 ENVTL.L.REP. (ENVTL.L.INST.) 20554, 20555 (N.J. Super. App. Div. 1983); State Department of Environmental Protection v. Ventron Corp., 182 N.J. Super. 210, 440 A.2d 455, 461 (1981), modified in part on other grounds, 94 N.J. 473, 468 A.2d 150 (1983).

B. The 1986 Amendments to CERCLA confirm that factors such as the volume of waste sent to a site are relevent only in contribution actions, and may not be used to undercut joint and several liability.-- In enacting the recent Superfund Amendments and Reauthorization Act of 1986 (SARA), 100 Stat. 1613, Congress reconfirmed that joint and several liability applies whenever an injury is indivisible, and that contribution is then available as a mechanism for applying equitable apportionment factors. The amendments add an explicit contribution provision, new Section 113(f), 42 U.S.C. 9613(f).23/ The legislative history makes

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23/ Even before SARA, the courts had held that contribution among responsible parties was an integral part of the joint and several liability scheme of CERCLA. See, e.g., Colorado v. ASARCO, 22 ERC at 1927-1934; Wehner v. Syntex Agribusiness, Inc., 616 F. Supp. 27, 31 (E.D. Mo. 1985); Chem-Dyne, 572 F. Supp. at 807 n.3. These courts relied on Section 107(e)(2), 42 U.S.C. 9607(e)(2), and legislative history indicating that a right of contribution was intended. SARA simply made this right more explicit.

clear that Congress intends factors such as waste volume to be considered in contribution actions, not in the determination of liability. The Report of the House Judiciary Committee explains that the new section on contribution was intended "to ratify current judicial decisions that the courts may use their equitable powers to apportion the costs of clean-up among the various responsible parties involved with the site." H.R. Rep. 99-253, 99th Cong., 1st Sess., Part 3 at 18 (1985). The Committee made clear that, "after all questions of liability and remedy have been resolved, courts may consider any criteria relevant to determining whether there should be an apportionment" (Id. at 19 (emphasis supplied)). Apportionment criteria suggested by the committee for use in contribution actions included "the amount of hazardous substances involved," as well as degree of toxicity, degree of involvement by the parties, and equitable factors (Id.). It is clear from this discussion that factors such as waste volume belong in contribution actions, and not in the determination of joint and several liability.24/

24/ To avoid confusion between an "apportionment" of a divisible injury (which has significance for joint and several liability) and an "apportionment" of costs in contribution (which has none), Congress carefully chose the word "allocate" rather that "apportion" for new Section 113(f). Senator Stafford explained (131 Cong. Rec. S12021 (daily ed. Sept. 24, 1985)):

> The amendment does not diminish the liability of any person under CERCLA nor does it suggest that anything other than the standard of liability which has been held by the courts to apply, continue to be applied. Indeed, as originally drafted, the Senator's amendment contained the word "apportion" for which we agreed to substitute "allocate" in order to avoid any possible confusion on this point.

Significantly, Congress rejected efforts to add a mandatory apportionment scheme that would have prevented joint and several liability on the basis of considerations like waste volume. Senator Mitchell explained (131 Cong. Rec. S11586 (daily ed. Sept. 17, 1985)):

> One proposed change to this law is a mandatory apportionment scheme under which the burden of proof would fall on the Government to establish the portion of the harm for which each party is responsible, and apportion the cleanup costs accordingly. While this may have a surface appeal, the impacts of such a change on the Superfund Enforcement Program would be far-reaching.

The Senator explained that a mandatory apportionment scheme "would delay cleanups and increase costs." Id.

Rather than enact a mandatory apportionment scheme, Congress determined to deal with the problem of the "small contributor" by adding Section 122(g), 42 U.S.C. 9622(g). This section directs the President to exercise enforcement discretion to determine whether defendants responsible for "minimal" amounts of waste by reference to relative volume and hazardousness could be included in early settlements. This amendment reinforces the point that waste volume is not a factor which affects joint and several liability, but instead affects a responsible party's ability to limit its monetary exposure by early settlement. Congressman Dingell explained that new Section 122 was fashioned "to facilitate settlement negotiations to expedite effective site cleanup by private parties while maintaining the liability standard of the 1980 act as it has been interpreted by the

federal courts." 132 Cong. Rec. H9563 (daily ed. Oct. 8, 1986). The Congressman pointed out that Chem-Dyne "correctly expresses congressional intent" in this regard (Id.).25/ Thus, Congress has dealt with the issue of small-quantity generators, not by shift- ing the burden of proof of indivisibility to the government, as the generators recommend (Br 26-27), but by encouraging early settlements with such generators.

The legislative history of SARA thus illuminates and confirms Congress' original intent in enacting CERCLA,26/ and confirms as well the correctness of the district court's holding that evidence as to the volume of waste the generators sent to the site would relate only to the allocation of costs in a contribution action, not to the issue of joint and several liability.

C. The fact that government agencies sent wastes to Bluff Road does not make joint and several liability inappro-

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25/ As the primary sponsor of SARA in the House, Congressman Dingell's statements are entitled to substantial weight in interpreting that legislation. Federal Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 564 (1976). Congressman Eckart, who also played a significant role in drafting SARA, noted as well that SARA "maintains the strict, joint and several standards of current law as enumerated in the leading case, United States v. Chemdyne Corporation." 132 Cong. Rec. H9624 (daily ed. Oct. 8, 1986).

26/ The courts have recognized the appropriateness of looking to the legislative history of SARA where it confirms or clarifies congressional intent behind CERCLA. See Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986); Lone Pine Steering Comm. v. EPA, 777 F.2d 882, 888 (3rd Cir. 1985); J.V. Peters & Co. v. EPA, 767 F.2d 263, 265 (6th Cir. 1985); see generally Bell v. New Jersey, 461 U.S. 773, 784-785 (1983) cert. denied 106 S.Ct. 1970 (1986); United States v. Waste Industries, Inc., 734 F.2d 159, 166 (4th Cir. 1984).

priate against these defendants. -- The generators argue (Br 22-25) that joint and several liability is inappropriate because both the State and agencies of the federal government dealt with SCRDI. The generators argue that an "apportionment" should have been made between plaintiffs and defendants as part of the government's case in chief. That approach, however, is inconsistent with the clear congressional intent to have liability issues resolved first, and apportionment issues resolved later in contribution actions.

As noted in the preceeding section, Congress in enacting SARA reaffirmed that contribution rights are important as a means of achieving equitable allocations among responsible parties, but must not interfere with EPA's ability to achieve rapid recovery of Superfund costs through early determinations of liability. As noted by Senator Stafford, "the theory underlying Superfund's liability scheme was, and is, that the Government should obtain the full costs of cleanup from those it targets for enforcement, and leave remaining costs to be recovered in private contribution actions * * *." 132 Cong. Rec. S14903 (daily ed. Oct. 3, 1986).

The principle that contribution issues should be deferred to avoid interference with the governments' case in chief is no less applicable where agencies of the governments are alleged to be liable parties themselves. As noted in the Report of the House Energy and Commerce Committee, H.R. Rep. 99-253, 99th Cong., 1st Sess., Part 1 at 79-80 (1986)(emphasis added):

site, the court set out rules to govern Phase Two apportionment. Keeping in mind that "contribution is a remedy that developed in equity," the court ruled that "the effect of settlements upon non-settling parties should be determined in accordance with the 1977 Uniform Comparative Fault Act * * *." 628 F.Supp. at 401-402.[27] The bifurcation of proceedings in Conservation Chemical shows that issues of apportionment among the parties, including government agencies, as well as issues related to the effect of settlements, must be resolved after a determination of the original defendants' joint and several liability.[28] The case demonstrates that the generators' arguments regarding the role of government agencies as generators are not properly raised at this

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[27] Although not pertinent to the issues of this case, we note that the Conservation Chemical court erred in looking to the Uniform Comparative Fault Act, rather that the Uniform Contribution Among Tortfeasors Act, for contribution rules. "Fault" is irrelevant under CERCLA, and Section 113 of CERCLA, added in 1986, appropriately follows the Contribution Among Tortfeasors approach. In any event, adoption of comparative fault principles would not affect the necessity of imposing joint and several liability, since "[t]he feasibility of apportioning fault on a comparative basis does not render an indivisible injury 'divisible' for purposes of the joint and several liability rule." Coney v. J.L.G. Industries, Inc., 73 Ill. 337, 454 N.E.2d 197, 205 (1983).

[28] The generators' reliance on United States v. Shell Oil Co., 605 F. Supp. 1064, 1083 (D.Colo. 1985), is equally strained. The court there drew an analogy to a comparative negligence case in the course of agreeing with the government that the Army did not have to be joined as a defendant, since it was already a plaintiff. The court was discussing joinder, not liability, and in no way indicated that apportionment issues should precede the contribution phase of a case.

> This Section [granting an exlicit right of contribution] does not affect the right of the United States to maintain a cause of action for cost recovery under Section 107 or injunctive relief under Section 106, whether or not the U.S. was an owner or operator of a facility or a generator of waste at the site.

See also H.R. Rep. 99-253, part 3 at 20. These passages show that the possible liability status of some federal agency in some other role does not convert an action brought by the United States as trustee of the Superfund into an action for contribution, where the United States is merely an additional party whose share of costs must be sorted out with that of all others at the same time. This result is also compelled by the frequently expressed principle that Congress intends Superfund liability to assure rapid cost recovery and replenishment of the fund. See, e.g., Dedham Water Company, 805 F.2d at 1081-1082 (CERCLA provides for rapid cost recovery "because the resources of the Fund alone are simply insufficient to provide an adequate remedy to the national problem of hazardous waste disposal"). If the judgment below is upheld, the funds recovered from defendants will go into the Superfund, and be available for further remediation at the Bluff Road site or other hazardous waste sites. If defendants later were to prove the elements of Section 107(a) against government agencies, money for the equitably allocated share of those agencies would be paid from their budgets or from general revenues -- not rebated from the Superfund. The two types of recovery are different in kind, and are determined in different phases of the litigation.

The Restatement passage relied upon by the generators (Br 23) is clearly inapposite. That illustration, like the earlier illustrations cited by the generators (see supra at) involves harm that is reasonably divisable on the basis of volume, because each defendant, as well as the plaintiff, discharged an identical substance (water) which caused an identical injury (flooding). Here, the injury was indivisible, and apportionment questions among defendants and plaintiffs must be resolved in the context of any later contribution action.

The generators' reliance (Br 24) on United States v. Conservation Chemical Co., 628 F. Supp. 391 (W.D.Mo. 1985), is curious, since that case supports the very points we make here. In Conservation Chemical, the United States sued four generators and the owner and operator of the site. These parties filed claims against scores of other generators, and alleged that agencies of the United States were responsible for some of the wastes at the site. See Conservation Chemical, 619 F. Supp at 181, 237 n.26. The district court bifurcated proceedings so that liability would be decided first, and apportionment among the parties later. Id. at 229 ("the plaintiff is entitled to receive full relief in Phase One from the original defendants if the original defendants are found jointly and severally liable * * * the method of apportionment must await determination in Phase Two of these proceedings * * *"). See also, 628 F. Supp. at 393. After the United States reached a settlement agreement with the original four generators wherein they agreed to clean up the

time -- they present issues that will only become relevant in a later contribution action.[22/]

D. The landowners are jointly and severally liable. -- Unlike the generators, the landowners do not attempt to show that the harm at the site is divisible. They merely rely on their purported status as "innocent" parties (Br 14). But as we showed supra at 29, CERCLA is a strict liability statute, and the landowners were hardly innocent in any event. Having stood idly by for years while an environmental problem of staggering proportions developed on their land, they cannot hope to avoid joint and several liability by arguing that they bear no responsibility for the harm at the site.

IV

THE DECISION BELOW DOES NOT VIOLATE CONSTITUTIONAL PRINCIPLES OF SEPARATION OF POWERS

The generators' separation of powers argument was not raised before the district court. The rule in this Court is that "[q]uestions not raised and properly preserved in the trial forum will not be noticed on appeal, in the absence of exceptional circumstances." United States v. One 1971 Mercedes Benz 2-Door Coupe, 542 F.2d 912, 915 (4th Cir. 1976); United States v. Chesapeake & Ohio Ry. Co., 215 F.2d 213 (4th Cir. 1954). The generators suggest no exceptional circumstances, hence, their belated separation of powers challenge should be disregarded.

22/ In any event, the State and the federal agency generators have agreed to reimburse the Superfund (2/23/84 order at 5; JA).

House Research Report

JOINT AND SEVERAL LIABILITY

ABOLITION OR MODIFICATION AS OF

JULY 1987

ALABAMA

Contributory no changes

ALASKA

1986 - any defendant less than 50 % at fault cannot be held jointly liable for more than two times the percentage of fault.

✓ **ARIZONA**

1987 - Abolished except for:

1. intentional torts
2. hazardous waste

ARKANSAS

No changes

CALIFORNIA

1986 - Abolished for non-economic damages (Prop. 51).

COLORADO

1986 - Total abolition
1987 - Except in cases in which the defendants:

1. acted in concert
2. conspired to commit a wrongful act.

CONNECTICUT

1986 - Total abolition except where the defendants share of judgment is uncollectable.
1987 - Except for economic damages.

DELAWARE

No changes

FLORIDA

1986 - Abolished except for:

1. cases less than $25,000 worth of total damages
2. intentional torts
3. fault free plaintiffs
4. land sale practices
5. pollution control cases
6. security transactions
7. anti-trust
8. RICO Act cases

GEORGIA

1987 - Abolished, however, a jury may specify particular damages and award a jury verdict severally.

HAWAII

1986 - Abolished in non-economic damages cases except for:

1. a defendant is more than 25 % at fault
2. intentional torts
3. environmental pollution
4. toxic cases
5. aircraft accidents
6. strict liability cases
7. product liability cases
8. motor vehicle accidents

IDAHO

1987 - Abolished except for:

1. intentional torts
2. hazardous wastes

ILLINOIS

1986 - Abolished except for:

1. defendants more than 25 % at fault
2. medical expenses
3. medical malpractice cases
4. environmental cases

INDIANA

1984 - Total abolition

IOWA

1984 - Limited the doctrine so it would not apply to defendants found to bear less than 50 percent of total fault assigned to all parties, leaving them liable for their several amount. Iowa 1984 Act. Secs. 668.1-668.3, 619.17.

KANSAS

1978 - Abolished case law. Brown v. Keill, 580 P.2d 867 (Kan. 1978)

KENTUCKY

No changes

LOUISIANA

1987 - Abolished to the extent that a less than 20 percent defendant would not be responsible for more than 50 percent of the damages awarded.

MAINE

No changes

MARYLAND

Contributory - No changes

MASSACHUSETTS

No changes

MICHIGAN

1986 - The doctrine is fully applicable if the plaintiff is fault free. If a plaintiff is attributed with any degree of fault the doctrine applies as follows:

1. a defendant is severally liable for the degree of fault the court or jury assessed; and
2. there is joint liability for the degree of fault the unpaid portion at the same percentage of fault assessed.

MINNESOTA

No changes

MISSISSIPPI

No changes

MISSOURI

1987 - If the defendant is less at fault than the plaintiff, the defendant is limited to two times the level of fault assessed.

MONTANA

1987 - Abolished except for:

1. defendants more than 50 % at fault

NEBRASKA

No changes

NEVADA

1987 - Abolished except for:

1. product liability cases
2. toxic wastes
3. intentional torts
4. cases in which defendants acted in concert

NEW HAMPSHIRE

1981 - Abolished the doctrine in favor of several liability. N.H. Rev Stat. Ann. Sec. 507.7-a.

NEW JERSEY

No changes

NEW MEXICO

1981 - Abolished by case law. Abolition with exceptions.

1987 - Abolished except for:

1. intentional torts
2. situations not found in the main text of the legislation and "having sound basis in public policy"
3. among defendants who have a relationship imposing vicarious liability
4. defendants held strictly liable for the manufacture and sale of a defective product

NEW YORK

1986 - Abolished in non-economic damages cases except for:

1. a defendant who is more than 50 % at fault
2. administrative hearings
3. in workers' compensation cases which implead third parties
4. intentional torts
5. toxic torts
6. product liability cases where the responsibility cannot be joined to the action
7. construction cases
8. contract cases
9. motor vehicle cases

NORTH CAROLINA

Contributory no changes

NORTH DAKOTA

1987 - Abolished except for:

1. intentional torts
2. cases in which defendants acted in concert

OHIO

1980 - Total abolition (Ohio Rev Code)

OKLAHOMA

1978 and 1981 - Case law which limits the rule to cases where damages cannot be apportioned or when plaintiff is not at fault.

OREGON

1987 - Limits the doctrine to defendants who are 15 percent or more responsible. The doctrine applies in full in pollution, hazardous waste and radioactive waste cases.

PENNSYLVANIA

No changes

RHODE ISLAND

No changes

SOUTH CAROLINA

Contributory no changes

SOUTH DAKOTA

1987 - Limited joint for those who are 50 % or less responsible for a wrongful action. Defendants pay no more than twice their percentage of fault.

TENNESSEE

Contributory - No changes

1987 - In order to be held jointly liable, a defendant's percentage of responsibly must reach certain thresholds:

1. In negligence and malpractice cases.
   a. "Texas Rule" - defendant's percentage of responsibility must be greater than the plaintiff's; and
   b. 21 % threshold - defendant's percentage of responsibility must be greater than 20 %.
2. In products liability cases a defendants must reach the 21 % threshold.
3. Where the plaintiff is fault free the defendant must reach a 11 % threshold.
4. There is no tore hold for defendants in pollution injury cases and toxic torts.

UTAH

1986 - Total abolition.

VERMONT

1981 - Abolished the doctrine in favor of several liability. Vt. Stat. Ann. Tit. 12, Sec. 1036.

VIRGINIA

Contributory no changes

WASHINGTON

1986 - Abolished except for:

1. fault free plaintiff
2. defendants acted in concert
3. hazardous waste
4. business torts
5. manufacturing of generic products

WEST VIRGINIA

1980 - Abolition except in cases were defendants are more than 25 % at fault.

WISCONSIN

No changes

WYOMING

1986 - Total abolition

Alaska Environmental Lobby, Inc.

P.O. Box 22151 Juneau, Alaska 99802 907-586-2345

HB 68 STRICT LIABILITY FOR HAZARDOUS SUBSTANCE RELEASE

Alaska's financial burden of cleaning up hazardous substances is just emerging. DEC will soon publish their inventory on 200 known and new sites documented on the Kenai Peninsula alone. There are an estimated 500 sites statewide awaiting solutions.

HB 68 would strengthen Alaska statutes that determine responsibility for hazardous substance release. Current statutes do not clearly attach liability to anyone except the person who owns or operates the facility at the time of release. This allows past operators, generators, and transporters of the waste to escape responsibility. The State and local communities can no longer be expected to shoulder the enormous costs resulting from another's neglect. For example, the Peters Creek clean up will cost the public 1.2 million dollars. This bill would directly connect the responsible parties to the cost of the cleanup of a release. This would be a powerful incentive to handle and dispose of hazardous substances properly.

The bill is modeled after the federal Comprehensive Environmental Response Compensation and Liability Act (CERCLA), which is the law that created the federal Superfund in 1980. This legislation will allow the same laws used in federal court to be applied to state courts.

The Alaska Environmental Lobby strongly supports the proposed legislation. This is an important step toward developing public health safeguards and laws necessary for active prevention and alleviating the State's monetary burden.

Issue paper prepared by Lenore Seppington 1/25/89

STEVE COWPER
GOVERNOR

CE
14868

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

January 9, 1989

The Honorable Sam Cotten
Speaker of the House
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Representative Cotten:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to liability for the release or threatened release of a hazardous substance and to recovery of State costs incurred in containing or cleaning up of an oil or hazardous substance spill.

This bill is necessary to clarify who is potentially liable for the damages that might occur, and the expenses that might be incurred, because of the release or threatened release of a hazardous substance. The bill is also necessary to provide the State with an added opportunity to recover the costs associated with responding to the release of oil or a hazardous substance.

Section 1 of the bill repeals and reenacts existing AS 46.03.822, which, in its current form, does not provide the specificity necessary to identify all the potential responsible persons who are liable for the release or threatened release of a hazardous substance. Reenacted AS 46.03.822(a) would identify those persons as follows:

(1) the owner and person controlling the substance at the time of the release or threatened release;

(2) the owner and operator of a facility or vessel from which the release occurred or was threatened; if a facility or vessel is abandoned, the owner, operator and any other person controlling activities on the facility or vessel just before abandonment;

(3) the owner or operator of a facility or vessel from which the release occurred or was threatened, at the time the substance was received by the facility or vessel;

(4) the owner of the substance who arranges for disposal, treatment, or transport for disposal or treatment by a third party, if a release occurs or was threatened at a facility or incineration vessel that contained the substance and was owned or operated by that third party; and

(5) a person who transported or accepted the substance for transport to the place from which the release occurred or was threatened, if in fact the person chose that place.

Reenacted AS 46.03.822(b) would provide relief from strict liability for a person who proves by clear and convincing evidence that an incident was caused by an act of war, by an act of God, or intentional or negligent conduct by certain third parties. The relief from strict liability for an act of God or for the intentional or negligent conduct of certain third parties must be premised upon the fact that the person, within a reasonable time, discovers the release or the threatened release and begins to contain and clean it up.

Reenacted AS 46.03.822(c) would clarify that the relief from strict liability for the intentional or negligent conduct of a third party is also limited by factors relating to the way a facility is acquired, including (1) that the person did not know and had no reason to know that the facility had a hazardous substance disposed on, in, or at it; (2) that a government entity acquired the facility by escheat, eminent domain, or another involuntary type of transfer; or (3) that the facility was acquired by inheritance or bequest.

Reenacted AS 46.03.822(d) would establish the standards by which a person can, under subsec. (c), be considered to have had "no reason to know."

Reenacted AS 46.03.822(e) would provide that the liability of a previous owner or operator of a facility is not lessened if that owner or operator is otherwise liable and if that owner or operator transfers ownership without disclosing the fact of a release or threatened release. Such a person may not obtain relief from strict liability under this section.

Reenacted AS 46.03.822(f) would clarify that the liability of a person who causes or contributes to a release or a threatened release is not affected by AS 46.03.822. Such a person is liable in any event.

Reenacted AS 46.03.822(g) would provide that a person otherwise liable may not transfer liability by agreement. However, this subsection makes clear that persons who are liable under AS 46.03.822 may be insured or indemnified, and may enforce such agreements against other persons.

Section 2 of the bill amends AS 46.03.826 by broadly defining the term "facility," and defines the terms "natural resources" and "vessel."

Section 3 of the bill is needed because of cases in which parties responsible for oil or hazardous substance spills have declared bankruptcy or left the state. The State could be left to remove the hazard with little hope of recovering the costs. The cleanup of such discharges can be enormously expensive.

Section 3 adds a new section to AS 46.08, the chapter on oil and hazardous substance releases. New AS 46.08.075(a) creates a lien in favor of the State whenever money from the oil and hazardous substance release response fund or any other State fund is used to respond to, contain, clean up, or mitigate an oil or hazardous substance spill, or is used to respond to a substantial threat of such a spill. The lien would be effective against all property of the persons liable for the spill.

New AS 46.08.075(b) would identify the method for enforcing the lien against real property, including a requirement of recording the certificate of lien and giving notice to the liable party and to anyone else with an interest in the property.

New AS 46.08.075(c) would require the commissioner of the Department of Environmental Conservation to certify that a lien has been reduced or satisfied if payments are made on the liable party's obligation.

New AS 46.08.075(d) would permit the owner of property against which such a lien has been asserted, to seek a court order removing it. The lien may be released by the court, to the extent of the person's ownership interest in it, if that person can show that he or she is not liable for the State's costs in an oil or hazardous substance cleanup or in responding to a threat of such a spill.

In an era when hazardous substances are an increasing part of our environment, and when the State must safeguard the money available to it for protecting the public health, I believe that this bill would give us important tools to respond to both. I urge your support of it.

Sincerely,

Steve Cowper
Governor

Original sponsor: Rules/Governor

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 68 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to liability for the release or threatened release of a hazardous substance; recovery of state costs for an oil or hazardous substance release; liability of response action contractors; and providing for an effective date."

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

* Section 1. AS 40.17.110(b) is amended by adding a new paragraph to read:

(60) a certificate relating to a lien under AS 46.08.075.

* Sec. 2. AS 46.03.822 is repealed and reenacted to read:

Sec. 46.03.822. STRICT LIABILITY FOR THE RELEASE OF HAZARDOUS SUBSTANCES. (a) Notwithstanding any other provision or rule of law and subject only to the defenses set out in (b) of this section, the following persons are strictly liable, jointly and severally, for damages to persons or property, whether public or private, including damage to the natural resources of the state or a municipality, and for the costs of response, containment, removal, or remedial action incurred by the state or a municipality, resulting from an unpermitted release of a hazardous substance or, with respect to response costs, the substantial threat of an unpermitted release of a hazardous substance:

(1) the owner of, and the person having control over, the hazardous substance at the time of the release or threatened release;

(2) the owner, and the operator, of the facility or vessel

from which the release occurred or was threatened to occur;

(3) in the case of an abandoned facility or vessel, the owner, the operator, and any other person who controlled activities at the facility or on the vessel immediately before the abandonment;

(4) a person who owned or operated the facility or vessel from which the release occurred or was threatened to occur at the time the hazardous substance was received by the facility or vessel;

(5) a person who owned, controlled, or possessed the hazardous substance and who arranged for disposal, storage, or treatment of the substance by another party or entity, or arranged with a transporter to transport the substance for disposal, storage, or treatment by another party or entity, if the release occurred or was threatened to occur at a facility or vessel that contained the substance and that was owned or operated by any other party or entity; and

(6) a person who transported the hazardous substance, or accepted the hazardous substance for transport, to the facility or vessel from which the release occurred or was threatened to occur, if the person selected the facility or vessel.

(b) In an action to recover damages or costs, a person otherwise liable under this section is relieved from strict liability if the person proves

(1) that the release or threatened release of the hazardous substance to which the damages relate occurred solely as a result of

(A) an act of war;

(B) except as provided under AS 46.03.823(c), an intentional or negligent act or omission of a third party, other than a party or its agents in privity of contract with, or employed by, the person, and that the person

(i) exercised due care with respect to the

hazardous substance; and

(ii) took reasonable precautions against the act or omission of the third party and against the consequences of the act or omission; or

(C) an act of God; and

(2) in relation to (1)(B) or (C) of this subsection, that the person, within a reasonable period of time after the act occurred,

(A) discovered the release or threatened release of the hazardous substance; and

(B) began operations to contain and clean up the hazardous substance.

(c) For purposes of (b)(1)(B) of this section, a third party or an agent of a third party is in privity of contract with the person who is otherwise liable, if the third party or its agent and the person are parties to a land contract, deed, or other instrument transferring title or possession of the real property on which the facility in question is located, unless that property was acquired by the person after the disposal or placement of the hazardous substance on, in, or at the facility, and the person establishes that the person has satisfied the requirements of (b)(1)(B) of this section and establishes that

(1) at the time the person acquired the facility the person did not know and had no reason to know that a hazardous substance that is the subject of the release or threatened release was disposed of on, in, or at the facility; or

(2) the person is a governmental entity that acquired the facility by escheat, or through another involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.

(d) To establish that a person had no reason to know that the hazardous substance was disposed of on, in, or at the facility, as provided in (c)(1) of this section, the person must have undertaken, at the time of acquisition, all reasonable inquiries into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. For purposes of this subsection a court shall take into account all relevant facts, including

(1) any specialized knowledge or experience the person has;

(2) the relationship of the purchase price to the value of the property if it were uncontaminated;

(3) commonly known or reasonably ascertainable information about the property;

(4) the obviousness of the presence or likely presence of contamination at the property; and

(5) the ability to detect contamination by appropriate inspection.

(e) This section does not diminish the liability of a person who previously owned or operated a facility or vessel and who would otherwise be liable. If the person obtained actual knowledge of the release or threatened release of a hazardous substance at the facility or vessel and subsequently transferred ownership to another without disclosing that knowledge, the person is liable under (a)(2) of this section, and a defense under (b)(1)(B) of this section is not available to the person.

(f) This section does not diminish the liability of a person who, by an act or omission, caused or contributed to the release or threatened release of a hazardous substance that is the subject of the action relating to the facility or vessel.

(g) An indemnification, hold harmless, or similar agreement, or conveyance of any nature is not effective to transfer liability under this section from the owner or operator of a facility or vessel or from a person who might be liable for a release or substantial threat of a release under this section. This subsection does not bar an agreement to insure, hold harmless, or indemnify a party to the agreement for liability under this section. This subsection does not bar a cause of action that an owner, operator, or other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against another person.

(h) The state or a municipality is not liable under this section for costs or damages as a result of actions taken in response to an emergency created by a release or threatened release of a hazardous substance generated by or from a facility or vessel owned by another person unless the actions taken by the state or municipality constitute gross negligence or intentional misconduct.

* Sec. 3. AS 46.03 is amended by adding a new section to read:

Sec. 46.03.823. HAZARDOUS SUBSTANCE RESPONSE ACTION CONTRACTORS. (a) A person who is a response action contractor with respect to a release or threatened release of a hazardous substance is not civilly liable for injuries, costs, damages, expenses, or other liability that results from the release or threatened release unless the release or threatened release is caused by an act or omission of the response action contractor that is negligent or grossly negligent or constitutes intentional misconduct. To show negligence by a response action contractor, a claimant must show that the acts or omissions of the contractor under the response action contract were not in accordance with generally accepted professional standards and practices at the time the response action services were performed.

(b) The liability limitation under (a) of this section does not apply to a response action contractor who would otherwise be strictly liable under any other provision of state or federal law.

(c) The defense provided in AS 46.03.822(b)(1)(B) is not available to a potentially liable person with respect to costs or damages caused by an act or omission of a response action contractor.

(d) Except as provided in (c) of this section, this section does not affect the liability under this chapter or under any other state law of a person other than a response action contractor.

(e) This section does not affect the liability of a response action contractor that may arise from the response action contractor's failure to comply with the terms or conditions of a response action contract or a remedial action plan if one has been approved by the department.

(f) This section does not affect the liability of an employer who is a response action contractor with respect to an employee of the employer under any provision of law, including a law related to workers' compensation.

(g) In this section,

(1) "response action" means an action taken in connection with the mitigation or cleanup of a hazardous substance release or threatened release, including investigation, evaluation, plan development, mapping and surveying, engineering, design and construction, removal, and equipment provision;

(2) "response action contract" means a written contract or agreement to provide response action with respect to a release or threatened release of a hazardous substance, entered into by a person with

(A) the department; or

(B) another person who has entered into an agreement with the department that provides for response action subject to the department's oversight and control;

(3) "response action contractor" means

(A) a person who enters into a response action contract with respect to a release or threatened release of a hazardous substance and who is carrying out the contract; and

(B) a person who is retained or hired by and is under the control of a person described in (A) of this paragraph to provide services related to the response action contract.

* Sec. 4. AS 46.03.826(3) is amended to read:

(3) "having control over a hazardous substance" means producing, handling, storing, transporting, or refining a hazardous substance for commercial purposes immediately before entry of the hazardous substance <u>into the atmosphere or</u> in or upon the water, surface, or subsurface land of the state, and specifically includes bailees and carriers of a hazardous substance;

* Sec. 5. AS 46.03.826(4) is amended to read:

(4) "hazardous substance" means

(A) an element or compound which, when it enters <u>into the atmosphere or</u> in or upon the water or surface or subsurface land of the state, presents an imminent and substantial danger to the public health or welfare, including but not limited to fish, animals, vegetation, or any part of the natural habitat in which they are found; [OR]

(B) oil; <u>or</u>

<u>(C) a substance defined as a hazardous substance under 42 U.S.C. 9601(14);</u>

* Sec. 6. AS 46.03.826 is amended by adding new paragraphs to read:

(8) "facility" includes a

(A) building, structure, installation, equipment, well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, aircraft, or pipe or pipeline, including a pipe into a sewer or publicly-owned treatment works;

(B) site or area at which a hazardous substance has been deposited, stored, disposed of, placed, or otherwise located;

(9) "natural resources" means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the state or a municipality;

(10) "vessel" means every description of watercraft or other artificial contrivance that is used, or is capable of being used, as a means of transportation on water, or that carries hazardous substances for the purpose of incineration of the hazardous substances.

* Sec. 7. AS 46.08 is amended by adding a new section to read:

Sec. 46.08.075. LIENS AGAINST PROPERTY AS SECURITY FOR STATE EXPENDITURES. (a) The state has a lien for expenditures by the state from the oil and hazardous substance release response fund or from any other state fund, for the costs of response, containment, removal, or remedial action resulting from an oil or hazardous substance spill, or, with respect to response, costs, the substantial threat of a release of oil or a hazardous substance against all property owned by a person who is determined by the commissioner to be liable for the expenditures under this chapter, AS 46.03, AS 46.04, 42 U.S.C. 9607, or other state or federal law. The lien includes interest, at the maximum rate allowable under AS 45.45.010(a), from the date of the

expenditures. The state may file an action in a court of competent jurisdiction in order to foreclose on the lien.

(b) A lien established under this section against real property is not effective until

(1) a certificate of lien is recorded in the district recorder's office for the district in which the property is located, describing the property and stating the amount of the lien, the name of the owner as grantor, and, if known, the name of the person causing the oil or hazardous substance release; and

(2) the commissioner sends a copy of the certificate of lien by certified mail return receipt requested, or actually delivers a copy of the certificate of lien, to the persons described in (1) of this subsection and to all other persons of record holding an interest in the property.

(c) When any amount with respect to which a lien has been recorded under this section has been paid or reduced, the commissioner shall, upon request of the property owner, issue a certificate discharging or partially releasing the lien. That certificate may be recorded in the office in which the certificate of lien was recorded.

(d) A person with an ownership interest in property against which a lien is recorded may bring an action in a court of competent jurisdiction to require that the lien be released. The lien may be released to the extent of that person's ownership interest if the court finds that the person is not liable for the expenses incurred by the state in connection with the costs of response, containment, removal, or remedial action resulting from the oil or hazardous substance release or threat of release of oil or a hazardous substance.

* Sec. 8. This Act takes effect immediately under AS 01.10.070(c).

A M E N D M E N T

OFFERED IN THE HOUSE

TO: CSHB 68(Resources)

Page 9, line 18, before "in the office":

Insert "by the property owner"

A M E N D M E N T

OFFERED IN THE HOUSE

TO: CSHB 68(Resources)

Page 1, after line 11:

Insert a new bill section to read:

"* Section 1. AS 40.17.110(b) is amended by adding a new paragraph to read:

(60) a certificate relating to a lien under AS 46.08.075."

Page 1, line 12:

Delete "Section 1"

Insert "Sec. 2"

Renumber the following bill sections accordingly.

A M E N D M E N T

OFFERED IN THE HOUSE

TO: CSHB 68(Resources)

Page 5, line 22, after "unless":

Insert

"(1)"

Page 5, line 25, after "misconduct":

Insert new material to read:

"; or

(2) before taking the response action, the person was strictly liable under state law with respect to the release or threatened release"

Page 5, line 25, after ".":

Insert "(b)"

Page 6, lines 1 - 6:

Delete all material.

A M E N D M E N T

OFFERED IN THE HOUSE

TO: CSHB 68(Res)

Page 9, line 18, after ".", insert:

"A lien recorded under this section is considered paid or reduced if the property owner posts a bond with the commissioner in a form and amount acceptable to the commissioner. The commissioner may not require the amount of the bond to be greater than the value of the property against which the lien has been recorded or the amount of the lien, whichever is less."

A M E N D M E N T

OFFERED IN THE HOUSE

TO: CSHB 68(Resources)

Page 7, line 27:

Delete "or"

Insert "[OR]"

Page 7, line 28, after "oil;":

Insert

"or

(C) a substance defined as a hazardous substance under 42 U.S.C. 9601(14);"

go0399hHi ✓
Lauterbach

A M E N D M E N T

OFFERED IN THE HOUSE

TO: CSHB 68(Resources)

Page 2, line 11:

Delete "another"

Insert "any other"

3/23/89

go0399hHj ✓
Lauterbach

A M E N D M E N T

OFFERED IN THE HOUSE

TO: CSHB 68(Resources)

Page 6, line 16, after "plan":

Insert "if one has been"

3/23/89

A M E N D M E N T

OFFERED IN THE HOUSE

TO: CSHB 68(Resources)

Page 5, line 22, after "unless":

Insert

"(1)"

Page 5, line 25, after "misconduct":

Insert new material to read:

"; or

(2) if the person had not taken the response action, the person would be strictly liable under state law with respect to the release or threatened release"

Page 5, line 25, after ".":

Insert "(b)"

Page 6, lines 1 - 6:

Delete all material.

A M E N D M E N T

OFFERED IN THE HOUSE

TO: CSHB 68(Resources)

Page 9, line 18, after ".", insert:

"A lien recorded under this section is considered paid if the property owner posts a bond with the commissioner in a form acceptable to the commissioner in the amount of the lien."

HOUSE COMMITTEE REPORT

(9)
Date Referred: January 9, 1989 FURTHER REFERRALS: JUDICIARY

Date of Committee Action: 3-2-89

The RESOURCES Committee recommends that:

HOUSE BILL NO. 68 [RELEASE OF HAZARDOUS SUBSTANCES]
"An Act relating to liability for the release or threatened release of a hazardous substance and to recovery of state costs for an oil or hazardous substance release; and providing for an effective date."

[✓] be replaced with CS HB 68 (RES) [ ] the same title [✓] a new title

[ ] have attached amendment(s)

[✓] do pass
[ ] do not pass
[ ] no recommendation
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(s):
[ ] fiscal impact
[ ] zero fiscal note
[ ] zero with analysis

APPROVES PREVIOUS:
[ ] fiscal note(s) published:
_____
[X] zero fiscal notes(s) published:
_____

SIGNING DO PASS:

SIGNING OTHER THAN DO PASS:
(Do Not Pass, No Recommendation, Amend)
No-Re

Chairman's signature

Department of Transportation and Public Facilities

POSITION PAPER

BILL NO: HB 68 APPROVED: Mike A. Hale

TITLE: An Act relating to liability for the release or threatened release of a hazardous substance ... DATE: February 28, 1989

The department supports this legislation for it clarifies that responsibility for the cost of cleanup and disposal of illegally released fuel and toxic substances should be borne by the party or parties responsible. To the extent that the party responsible for releases of toxic substances can be identified, this legislation is beneficial.

However, such legislation is likely to increase the unlawful practice of surreptitious dumping of toxic materials. In recent months, the department has experienced three incidents where unknown parties have illegally and intentionally deposited toxic materials on highway or airport properties. As such dumping is very difficult to trace, particularly if the substance in question is common, determination of responsibility is difficult. There is the prospect that we will experience an increase in the cost of disposal of illegally and intentionally deposited materials on state highway and airport properties. However, as these costs are speculative no fiscal impact is shown.

Internally, the department is faced with the need for additional training and employee awareness of the consequences of improper handling of what are fairly common materials at maintenance shops (e.g, fuel, solvents, waste oil, battery acid, anti-freeze, etc.). A specific budget request has already been made for this training effort and we therefore have not shown an additional fiscal impact relative to this legislation.

With regard to the application of liability on property acquired through eminent domain the department supports the provision for relief of strict liability subject to the requirement that the acquiring agency take special precautions to avoid buying properties with

For more information contact Catherine McHugh - 465-3900

obvious problems. The department has already implemented appropriate right-of-way acquisition procedures to address this issue. For example, we now require that staff examine the historic pattern of land use, observe for artifacts that may suggest past dumping, and if necessary conduct on-site testing for toxic substances prior to acquisition. If contaminated property cannot be avoided, the determination of fair market value is adjusted to take into account the associated clean-up costs.

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: HB 68
PUBLISH DATE:

REQUEST: **FISCAL NOTE**

Revision Date:
Title: An Act relating to liability for the release or threatened release of a hazardous substance...
Sponsor: Rules Committee by R. of Governor
Requestor: House Resources

Agency Affected: DOT&PF
BRU: Engineering & Operations Standards
Components:

EXPENDITURES/REVENUES: (THOUSANDS OF DOLLARS)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTURAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (THOUSANDS OF DOLLARS)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

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

ANALYSIS: This legislation clarifies that the responsibility for the cost of cleanup and disposal of illegally released fuel and toxic substances is borne by the party or parties responsible, and under certain circumstances relieves third parties from liability when they have no knowledge and took appropriate steps to avoid such problems

Prepared by: Jeffery C. Ottesen
Division: Engineering and Operations Standards
Phone: 465-2951
Date: Feb. 28, 1989

Approved by Commissioner: [signature]
Date: 2/28/89
Agency: Department of Transportation and Public Facilities

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

KENAI PENINSULA BOROUGH

144 N. BINKLEY • SOLDOTNA, ALASKA 99669
PHONE (907) 262-4441

DON GILMAN
MAYOR

POSITION PAPER
HB 68 - Hazardous Substance Clean-up Liability

The administration of the Kenai Peninsula Borough supports HB 68. We believe this bill will provide the necessary incentive for proper disposal of hazardous wastes, by attaching clear responsibility to generators and transporters of wastes as well as owners and operators of disposal sites.

The Fifteenth Legislature appropriated $955,000 in 1988 for identification and clean-up of hazardous waste sites on the Kenai Peninsula. A comprehensive inventory was done to determine the extent of the hazardous waste problem. The first draft includes approximately 200 sites with others still being explored. A few of these are in varying stages of clean-up, others have just been identified.

In many cases the parties responsible for the release of hazardous substances are either bankrupt or no longer in business. Because current law does not allow for the attachment of liability to generators, other than those who own or operate the facility at the time of release, the original owner or producer may escape responsibility for clean-up. In many of these instances, the state or local governments have to bear that cost and responsibility. Of the new sites identified in the inventory, at least three large sites have no responsible party to pay the cost of clean-up, which will begin next summer. The state will pay between $1,000,000 and $2,000,000 for those three projects alone.

A specific example of the problem with liability can be found with the Sterling Special Waste Site on the Kenai Peninsula. The site was originally permitted by DEC as a special waste site for the disposal of drilling muds and other special wastes. The land is owned by the Peninsula Borough and was leased by a private company who contracted with producers of special wastes for disposal. The site was not well managed and eventually the company filed bankruptcy

and abandoned it. The borough was then left responsible for clean-up and closure of the site because clear responsibility and liability could not be attached to those companies who generated the waste. That project has so far cost the state and borough taxpayers $1,108,922 with anticipated future costs of at least $134,000 for a water monitoring plan.

In order to deal with the increasing occurrences of hazardous waste problems in Alaska, and to ensure proper disposal of future wastes, it is critical that the Sixteenth Alaska State Legislature pass this bill.

HOUSE COMMITTEE REPORT

(7)
Date Referred: March 6, 1989 FURTHER REFERRALS:

Date of Committee Action: 3/30/89

The JUDICIARY Committee considered: HB 68

HOUSE BILL NO. 68 [RELEASE OF HAZARDOUS SUBSTANCES]
"An Act relating to liability for the release or threatened release of a hazardous substance and to recovery of state costs for an oil or hazardous substance release; and providing for an effective date."

RECOMMENDATIONS:
[ ] be replaced with CSHB68(Jud) [ ] the same title [ ] a new title
[ ] have attached amendment(s)
[ ] do pass
[ ] do not pass
[ ] no recommendation
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(s): (Dept)
[ ] fiscal impact _____
[ ] zero fiscal note _____
[ ] zero with analysis _____

APPROVES PREVIOUS: (Date/Dept)
[ ] fiscal note(s) _____
[ ] zero fiscal note(s) _____
[ ] zero fn/analysis _____

SIGNING DO PASS:

SIGNING: (Check approp. column)

	Do Not Pass	No Rec	Amend

Chairman's signature

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STEVE COWPER, GOVERNOR

REPLY TO:

☑ *1031 W 4th AVENUE*
SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 276-3550

☐ *1st NATIONAL CENTER*
100 CUSHMAN ST.
SUITE 400
FAIRBANKS, ALASKA 99701-4679

☐ *P.O. BOX K—STATE CAPITOL*
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600

January 24, 1989

The Honorable Curt Menard
Alaska State Legislature
House of Representatives
P.O. Box V
Juneau, Alaska 99811

Re: HB 68 and Ballot Measure No. 2
Our File No. 661-89-0302

Dear Representative Menard:

You have asked for our opinion on whether HB 68, which concerns strict and joint and several liability for hazardous substances releases, would conflict with the intent of Ballot Measure No. 2 adopted by the voters during the most recent general election. You have also made a generic inquiry regarding legislative repeal or amendment of laws enacted by initiative.

The short answer to your first question is no. The summary response to your second inquiry is that an initiative may not be repealed by the legislature for a period of two years after its effective date, but it may be amended at any time. Our analysis follows.

First, Ballot Measure No. 2 effected two very specific and discrete changes in the manner in which liability and damages for traditional personal injury torts will be assessed: it limits a party's liability to its actual percentage of fault and it repeals a statutory right of contribution among two or more persons who were jointly and severally liable for the tort. 1/ Ballot Measure No. 2 did not expressly repeal any other statutory provision concerning strict and joint and several liability. Most pointedly, it is silent on the strict and joint and several liability provisions of AS 46.03.758(e) and other statutes set forth in AS. 46.03 and AS 46.04 concerning oil and hazardous substance releases. For this reason, we do not believe that HB 68 would infringe upon Ballot Measure No. 2.

1/ The precise language of Ballot Measure No. 2 amends a portion of AS 09.17.080(d) and repeals AS 09.16.

Furthermore, the intent of the voters in approving Ballot Measure No. 2 can be ascertained from the arguments made in support of the initiative. In Re Lance W., 694 P. 2d 744, 753 (Cal. 1985). See also Carman v. Alford, 644 P. 2d 192 (Cal. 1982) (election materials helpful in discerning voters' intent); Los Angeles County Transp. Comm. v. Richmond, 643 P. 2d 941 (Cal. 1982) (ambiguities in initiative resolved by referring to arguments in support). In this case, that it a relatively easy task.

The attached advertisement paid for by the coalition supporting Ballot Measure No. 2 unequivocally states that:

> Ballot Measure No. 2 will have no impact on Alaska's environmental protection laws.

(emphasis in original). See Attachment 1. In addition, the coalition supporting Ballot Measure No. 2 explicitly agreed with legislative counsel that it would have no affect on state environmental laws. Id. This advertisement is direct evidence of the voters' intent not to affect the liability provisions, including strict and joint and several liability, of state environmental laws. Enactment of HB 68, amending the provisions of AS. 46.03.822, will thus not violate the intent of the voters in approving Ballot Measure No. 2.

As to your second question, section 6 of article XI of the state constitution provides that the legislature may amend a law enacted by initiative, but may not repeal the initiative within two years of its effective date. "[T]he legislature has broad powers to amend an initiative." Warren v. Thomas, 568 P.2d 400, 402 (Alaska 1977)(fn. omitted). There could be a point at which amendment and repeal tend to converge where, for example, "the legislature has exceeded that broad power by passing an amendment which so vitiates the initiative as to 'constitute its repeal'". Supra, 568 P.2d at 402 (citation omitted). 2/ The passage of HB 68, however, does not raise this spectre.

"[A]n amendment of an act operates as a repeal of its provisions to the extent that they are materially changed by, and

---

2/ The Alaska Supreme Court has reserved judgment on the precise question of when an amendment might constitute a repeal of an initiative. Warren v. Thomas, supra, 568 P. 2d at 404.

rendered repugnant to, the amendatory act." Id. (citation omitted). Nothing in HB 68 is repugnant to Ballot Measure No. 2. Nothing in Ballot Measure No. 2 is materially changed by HB 68. Ballot Measure No. 2 simply did not address the liability provisions of environmental laws, which is precisely what HB 68 does. Since the subject matter of HB 68 was not even contemplated in the adoption of Ballot Measure No. 2, it can hardly be said to materially change or be repugnant to the ballot measure.

We hope that this adequately responds to your questions. Please feel free to contact us for further information.

Very truly yours,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By: Madeleine R. Levy
Assistant Attorney General

MRL:jem

Attachment

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM January 18, 1989

SUBJECT: HB 68 and repeal or amendment of an initiative (HB 68)

TO: Representative Curt Menard, Co-chair
House Resources Committee

FROM: Terri Lauterbach
Legislative Counsel

You have asked whether HB 68's amendment of AS 46.03.822(a) to provide for joint and several liability for the release or threatened release of a hazardous substance violates constitutional restrictions on amendment and repeal of initiatives. You have also asked for a general discussion of the extent to which the legislature may amend or repeal a law that has been enacted by initiative.

With regard to HB 68, it is my opinion that its amendment of AS 46.03.822(a) to provide for joint and several liability for damages described by that section does not violate constitutional restrictions on amendment and repeal of initiatives. It has the effect of amending Initiative 87-02 in a permissibly narrow way.

The constitutional provision governing this question is sec. 6, art. XI, Constitution of the State of Alaska, which provides:

> SECTION 6. ENACTMENT. If a majority of the votes cast on the proposition favor its adoption, the initiated measure is enacted. If a majority of the votes cast on the proposition favor the rejection of an act referred, it is rejected. The lieutenant governor shall certify the election returns. An initiated law becomes effective ninety days after certification, is not subject to veto, and may not be repealed by the legislature within two years of its effective date. It may be amended at any time. An act rejected by referendum is void thirty

> days after certification. Additional procedures for the initiative and referendum may be prescribed by law. (Emphasis added.)

The Alaska Supreme Court has addressed the question whether a law may be amended and has shown a tendency to approve amendments quite broadly. Thus a reduction in penalties in an initiated law was approved in Warren v. Thomas, 568 P.2d 400 (Alaska 1977). And, in Warren v. Boucher, 543 P.2d 731 (Alaska 1975), the Alaska Supreme Court acknowledged that the power to amend an initiative was an explicit "check or balance" against the initiative process.

Furthermore, an Attorney General's opinion concluded that the legislature could alter or delete an initiative's requirement that the capital site contain no less than 100 square miles of state land as well as the requirement that the site selected be more than 30 miles from either Anchorage or Fairbanks. Op. Att'y Gen., August 19, 975.

In my view, the Constitution asks the legislature to give deference to the wishes of the people as expressed in an initiative, at the same time recognizing that an initiative may present policy problems that the legislature may need to resolve. Because the people may not themselves address the difficulties in a particular initiative by amending it but rather must vote it up or down, the constitution permits the legislature to amend it at any time.

The Thomas court suggested that there could be situations in which an amendment so vitiates an act passed by initiative that it constitutes its repeal. In my opinion, that issue is not raised by the amendment in HB 68. The amendment in HB 68 changes the initiative's general rule of several liability with respect to only a limited type of tort action. In being so narrow, the amendment could not be said to vitiate the initiative.

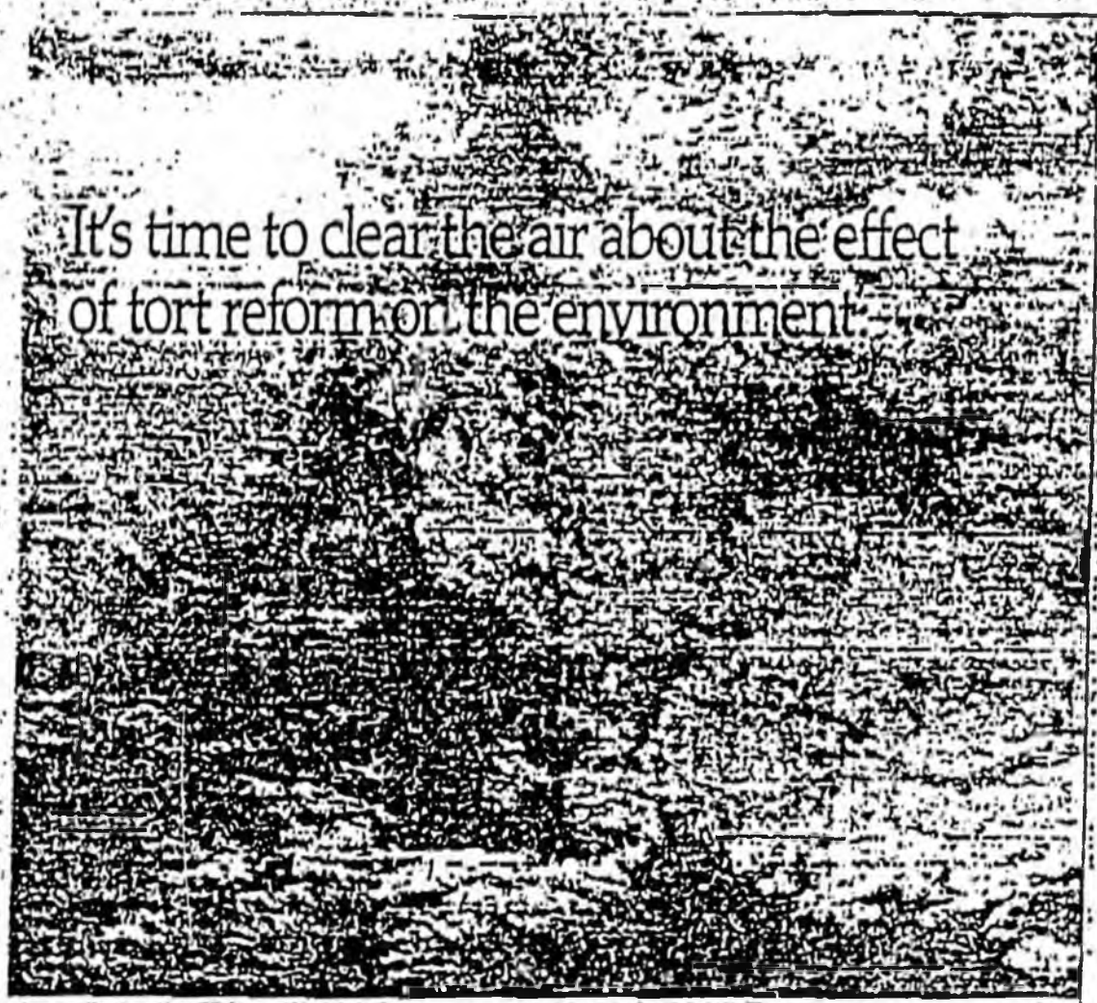
In discussing HB 68, I hope the general parameters of legislative power to amend or repeal an initiative have been clear. The legislature may amend an initiative at any time as long as that amendment does not change the law passed by the initiative so much that it amounts to a repeal of that law. The legislature may repeal an initiative within two years of its effective date.

I hope this discussion is helpful to you. If I may be of further assistance, please let me know.

TL:gc
WKG5/105

C4 Anchorage Daily News Friday, November 4, 1988

It's time to clear the air about the effect of tort reform on the environment.



Trial lawyers opposed to Ballot Measure No. 2 would have you believe that this measure poses a threat to our environment. They maintain that if this measure passes, polluters will escape paying for the environmental damage they cause. That's simply not true.

According to the legislature's own independent lawyer, Ballot Measure No. 2 will have *no impact* on Alaska's environmental protection laws. Similarly, it will have *no impact* on federal environmental protection laws.

The truth of the matter is that since 1986, 39 states have passed some form of tort reform. And on November 8th, it will be your turn to set the record straight.

Ballot Measure No. 2 will make Alaska's liability law more equitable. At the same time it will protect the right of the victim to receive compensation from those who are responsible.

These are the facts. Don't allow a lot of legal double-talk to cloud the issue.

VOTE FOR #2 ON NOV. 8

Support tort reform.
Vote for Ballot Measure No. 2 on November 8th.

ATTACHMENT 1
PAGE 1 OF 1 PAGES

Sec. 46.03.826. Definitions. In AS 46.03.822 – 46.03.828

(1) "act of God" means an act of nature which is unforeseeable in kind or degree;

(2) "economic benefit" means a benefit measurable in economic terms, including but not limited to the gathering, catching, or killing of food or other items utilized in a subsistence economy and their replacement cost;

(3) "having control over a hazardous substance" means producing, handling, storing, transporting, or refining a hazardous substance for commercial purposes immediately before entry of the hazardous substance in or upon the water, surface, or subsurface land of the state, and specifically includes bailees and carriers of a hazardous substance;

(4) "hazardous substance" means

(A) an element or compound which, when it enters in or upon the water or surface or subsurface land of the state, presents an imminent and substantial danger to the public health or welfare, including but not limited to fish, animals, vegetation, or any part of the natural habitat in which they are found; or

(B) oil;

(5) "oil" means a derivative of a liquid hydrocarbon and includes crude oil, lubricating oil, sludge, oil refuse or another petroleum-related product or by-product;

(6) "subsistence economy" means an economy which utilizes on a regular basis an item which is owned in common by the people of the state, or the United States, including but not limited to fish, game, fur bearing animals, birds, timber or any part of the natural habitat for noncommercial purposes;

(7) "water, surface or subsurface land of the state" means all water, surface or subsurface land within the territorial limits of the State of Alaska. (§ 1 ch 122 SLA 1972; am § 22 ch 7 SLA 1986)

Revisor's notes. — Reorganized in 1986 to alphabetize the defined terms.

Effect of amendments. — The 1986 amendment in paragraph (3) deleted "owning or" at the beginning of the paragraph and made minor punctuation changes.

Sec. 46.03.828. Other rights of action not affected. The provisions of AS 46.03.822 — 46.03.828 do not abridge or alter a right of action or remedy under another statute, in equity, or at common law. However, an award of damages to a person or the state on a cause of action for an injury under AS 46.03.822 bars recovery in an action by another person or the state on the same cause of action for the same injury. (§ 1 ch 122 SLA 1972)

cation. The submission of an application or the scheduling of a hearing does not stay the operation of the department's order issued under (a) of this section.

(d) After a hearing the department may affirm, modify or set aside the order. An order affirmed, modified or set aside after hearing is subject to judicial review as provided in AS 44.62.560. The order is not stayed pending judicial review unless the commissioner so directs. If an order is not immediately complied with, the attorney general, upon request of the commissioner, shall seek enforcement of the order.

(e) The department may adopt additional regulations prescribing the procedure to be followed in the issuance of emergency orders. (§ 3 ch 120 SLA 1971)

Sec. 46.03.822. Strict liability for the discharge of hazardous substances. To the extent not otherwise preempted by federal law, a person owning or having control over a hazardous substance which enters in or upon the waters, surface or subsurface lands of the state is strictly liable, without regard to fault, for the damages to persons or property, public or private, caused by the entry. In an action to recover damages, the person is relieved from strict liability, without regard to fault, if the person can prove

(1) that the hazardous substance to which the damages relate entered in or upon the water, surface or subsurface land of the state solely as a result of

(A) an act of war,

(B) an intentional act or a negligent act of a third party, other than a party or its employees in privity of contract with, or employed by, the person,

(C) negligence on the part of the United States government or the State of Alaska, or

(D) an act of God; and

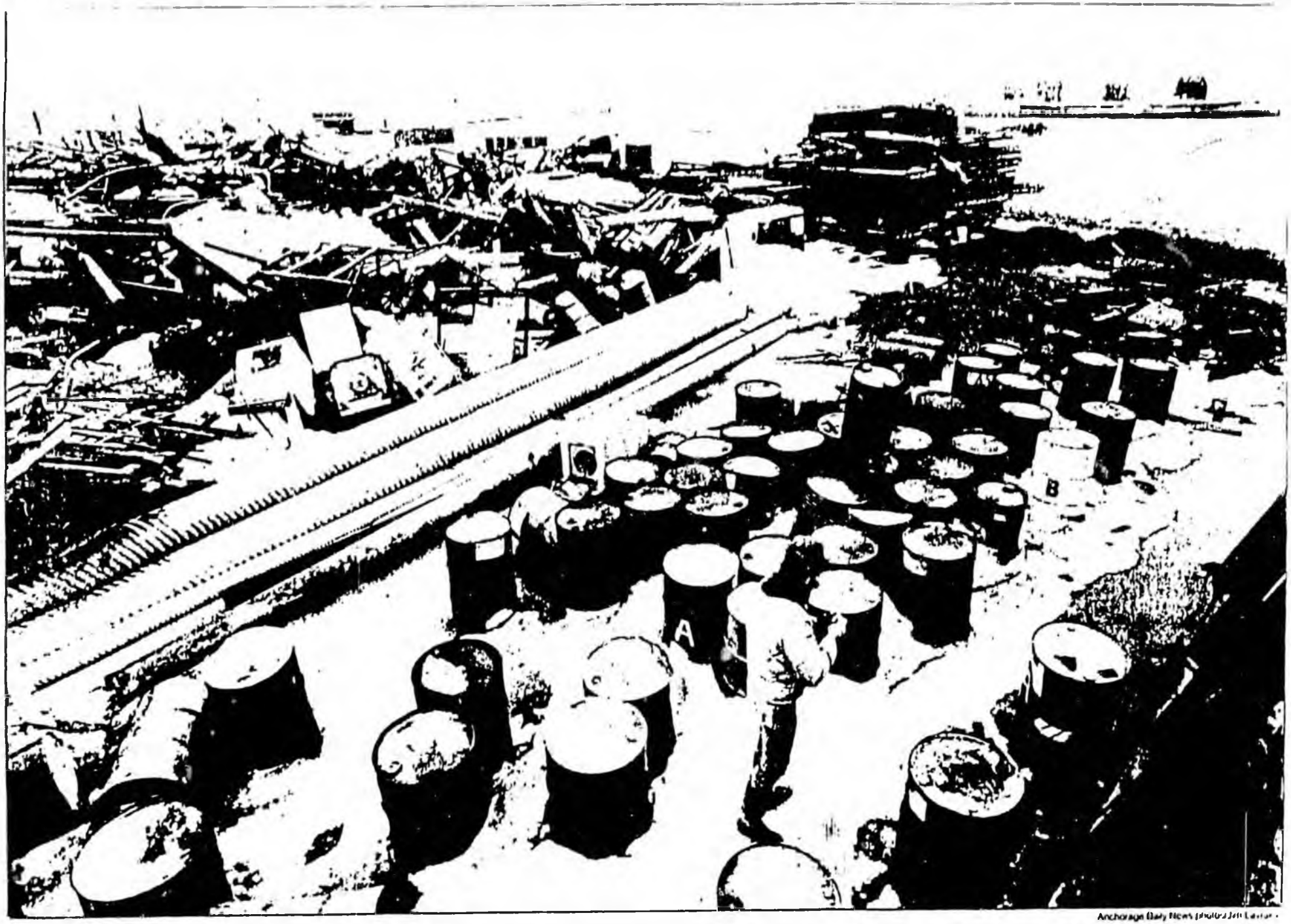
(2) in relation to (1)(B), (C) or (D) of this section, that the person discovered the entry of the hazardous substance in or upon the waters, surface or subsurface land of the state and began operations to contain and clean up the hazardous substance within a reasonable period of time. (§ 1 ch 122 SLA 1972; am § 13 ch 220 SLA 1976)

Cross references. — For provision that actions brought under this section may be brought directly against insurers or other persons providing evidence of financial responsibility, see AS 16.04.040(e).

Sec. 46.03.824. Damages. Damages include but are not limited to injury to or loss of persons or property, real or personal, loss of income, loss of the means of producing income, or the loss of an economic benefit. (§ 1 ch 122 SLA 1972)

...development is having on fish and wildlife ... wastewater and contaminated snow

See Page A 8, PRUDHOE



Anchorage Daily News photo/Jon Lasser

DEC investigator Rich Cormack takes photos of dumped construction debris at a pad leased by Child's Equipment Services, a company that has filed for protection under bankruptcy laws.

DEADHORSE: Prudhoe Bay staging area gives the oil industry black eye

STATE OF ALASKA

DEPT. OF ENVIRONMENTAL CONSERVATION

STEVE COWPER, GOVERNOR

POSITION PAPER

HB 68

CONTACT: AMY D. KYLE
465-2600

JANUARY 23, 1989

Title

An Act relating to liability for the release or threatened release of a hazardous substance and to recovery of state costs for an oil or hazardous substance release; and providing for an effecvtive date.

Effect of the Bill

In Sections 1 and 2, the bill would make the state's requirements for liability for releases of hazardous substances explict. The current statute refers to a "person owning or having control over a hazardous substance . . . " as being strictly liable for a release of that substance. The bill would explicitly expand the coverage of this provision to include other parties that have responsibility for hazardous substances. This includes:

- Those who generate hazardous wastes;

- Those who have control over sites where hazardous substances are released;

- Those who transport hazardous wastes in cases where the transporter also selects the disposal method.

These parties are currently liable under common law, but the proposed statute would clarify this liability and reduce the need for litigation. This is necessary to ensure that the key parties who manage hazardous substances are liable if the substances are released.

In Section 3, the bill would enable the state to file a lien against assets of a responsible party to recover its costs for cleanup of oil and hazardous waste sites, in cases where the responsible party declares bankruptcy. At present, the Department must first secure a judgement through the court and then participate in a bankruptcy proceeding. The bill would not supercede the claims of secured creditors such as mortgage-holders.

Department Position

The bill was introduced at the request of the Governor. The Department strongly supports the bill and feels that it is necessary to provide appropriate tools to ensure that hazardous substance releases may be responded to properly. The first two sections of the law incorporate provisions similar to those in the federal "Superfund" law into state law. The third section would implement a recommendation made to the states by the U.S. Supreme Court.

The people of the state are discovering increasing numbers of problems from improper management of hazardous substances. It is imperative that parties who manage these materials take care to keep them out of the state's waters and lands. This will only happen if all the parties who manage hazardous materials are fully responsible for proper management.

This bill would allow the department to ensure that the party responsible for an action such as dumping barrels of hazardous materials on private property or for abandoning a contaminated site and then transferring title, can be held liable. This will provide a powerful incentive for proper management.

Fiscal Effect

There will be no additional costs resulting from this bill. The legislation would reduce State expenditures for cleanup over the long-term, as responsible parties will be footing a greater share of the cleanup bill. The Department has prepared a zero fiscal note.

Dennis D. Kelso, Commissioner

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: HB 68
PUBLISH DATE: 1/9/89

FISCAL NOTE

REQUEST:

Revision Date: _____ Agency Affected: DEC

Title: An Act relating to the liability for the release or threatened release of hazardous substance

BRU: Environmental Quality

Sponsor: Rules Committee

Requestor: House Resources

Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS: None

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Passage of the bill would reduce the demand on the State for funds for cleanup of hazardous substance releases

Prepared by: Amy D. Kyle
Phone: 465-2600
Division: Commissioner's Office
Date: 23 Jan 1989

Approved by Commissioner: [signature]
Date: January 23, 1989
Agency: Environmental Conservation

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

SUMMARY OF PROVISIONS OF HB 68

AN ACT RELATING TO LIABILITY FOR THE RELEASE OR THREATENED RELEASE OF A HAZARDOUS SUBSTANCE

House Bill 68 has two major provisions:

* It makes persons who generate hazardous wastes liable for any improper release of these wastes.

* It allows the state to recover costs for cleanup of hazardous substance releases in cases when parties responsible for the releases declare bankruptcy by filing a lien.

HB 68 combines provisions of two bills that were passed by the House last year. One bill had been introduced by Rep. Davis; the other was introduced at the request of the Governor.

Under current law, a person who owns or has control over a hazardous substance is clearly liable for a release of that substance. The liability of parties who may attempt to escape liability by abandoning, selling or transferring a facility is not clearly stated. The bill would clearly establish the liability of the following entities:

* The owner or operator of the facility from which the release occurred;

* A person who abandons a facility at which a release occurred during the time the person owned or controled the facility;

* A person who owns a hazardous substance at the time it is delivered to the facility from which a release occurs;

* A person who owns a hazardous waste and arranges for its disposal;

* A person who transports a hazardous waste to a disposal site, if that person arranged for the disposal method.

A person may be relieved from liability if the release is caused by a negligent third party or in the event of an act of God or war. There is also an "innocent landowner" provision which relieves liability in cases where a person took steps to ascertain the status of a property and did not identify a spill and in cases of involuntary acquisition of property such as through inheritance.

The second part of the bill (Section 3) gives the state the ability to file a lien against assets of a bankrupt party for the costs of cleanup of a hazardous substance spill. This provision is identical to the one passed by the House last year. The lien would not displace the claim of a secured creditor, but would fall after it.