

HB

68



*Department of Transportation  
and Public Facilities*

# POSITION PAPER

BILL NO: HB 68

APPROVED: M. L. A. H. J.

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: Agency Affected: DOT&PF  
Title: An Act relating to liability for the release or threatened release of a hazardous substance... BRU: Engineering & Operations Standards  
Sponsor: Rules Committee by R. of Governor Components:  
Requestor: House Resources

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
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REVENUE	0	0	0	0	0	0
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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  
Approved by Commissioner: M-k A. Hg  
Agency: Department of Transportation and Public Facilities

Phone: 465-2951  
Date: Feb. 28, 1989

Date: 2/28/89

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



# 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 Sappington 1/25/89

ALASKA CENTER FOR THE ENVIRONMENT • ALASKA CHAPTER, SIERRA CLUB • JUNEAU GROUP, SIERRA CLUB • SITKA GROUP, SIERRA CLUB  
KNIK GROUP, SIERRA CLUB • DENALI GROUP, SIERRA CLUB • ANCHORAGE AUDUBON SOCIETY • ARCTIC AUDUBON SOCIETY  
DENALI CITIZENS' COUNCIL • ALASKA FRIENDS OF THE EARTH • JUNEAU AUDUBON SOCIETY • KACHEMAK BAY CONSERVATION SOCIETY  
KENAI PENINSULA AUDUBON SOCIETY • KODIAK AUDUBON SOCIETY • LIQUOR CANAL CONSERVATION • ALASKA WILDLIFE ALLIANCE  
SITKA CONSERVATION SOCIETY • NORTHERN ALASKA ENVIRONMENTAL CENTER • SOUTHEAST ALASKA CONSERVATION COUNCIL  
KNIK KANOERS AND KAYAKERS

STEVE COWPER  
GOVERNOR



STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

CC  
HB68

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.

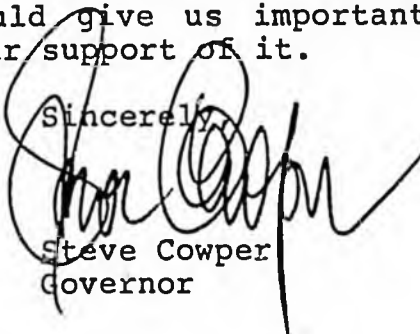
New AS 46.08.075(b) would identify the method for enforcing the lien against real property, including a requirement of recording the certificate of lien and giving notice to the liable party and to anyone else with an interest in the property.

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

### FISCAL NOTE

**REQUEST:**

Revision Date: \_\_\_\_\_ Agency Affected: Natural Resources  
 Title: Hazardous Substance Release BRU: Petroleum Management  
 Sponsor: Rules Committee Components: \_\_\_\_\_  
 Requestor: Governor Cowper

**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-
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REVENUE						
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**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 Phone: 465-2400  
 Division: Commissioner's Office Date: 11/28/88

Approved by Commissioner: Lennis Gorseuch Date: 11-28-88  
 Agency: Natural Resources

**Distribution (by preparer):**

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

# 20 years of drilling

## Prudhoe Bay — An environmental gem or lurking problem?

By PATTIEPLER

Daily News reporter

First of two parts

**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?

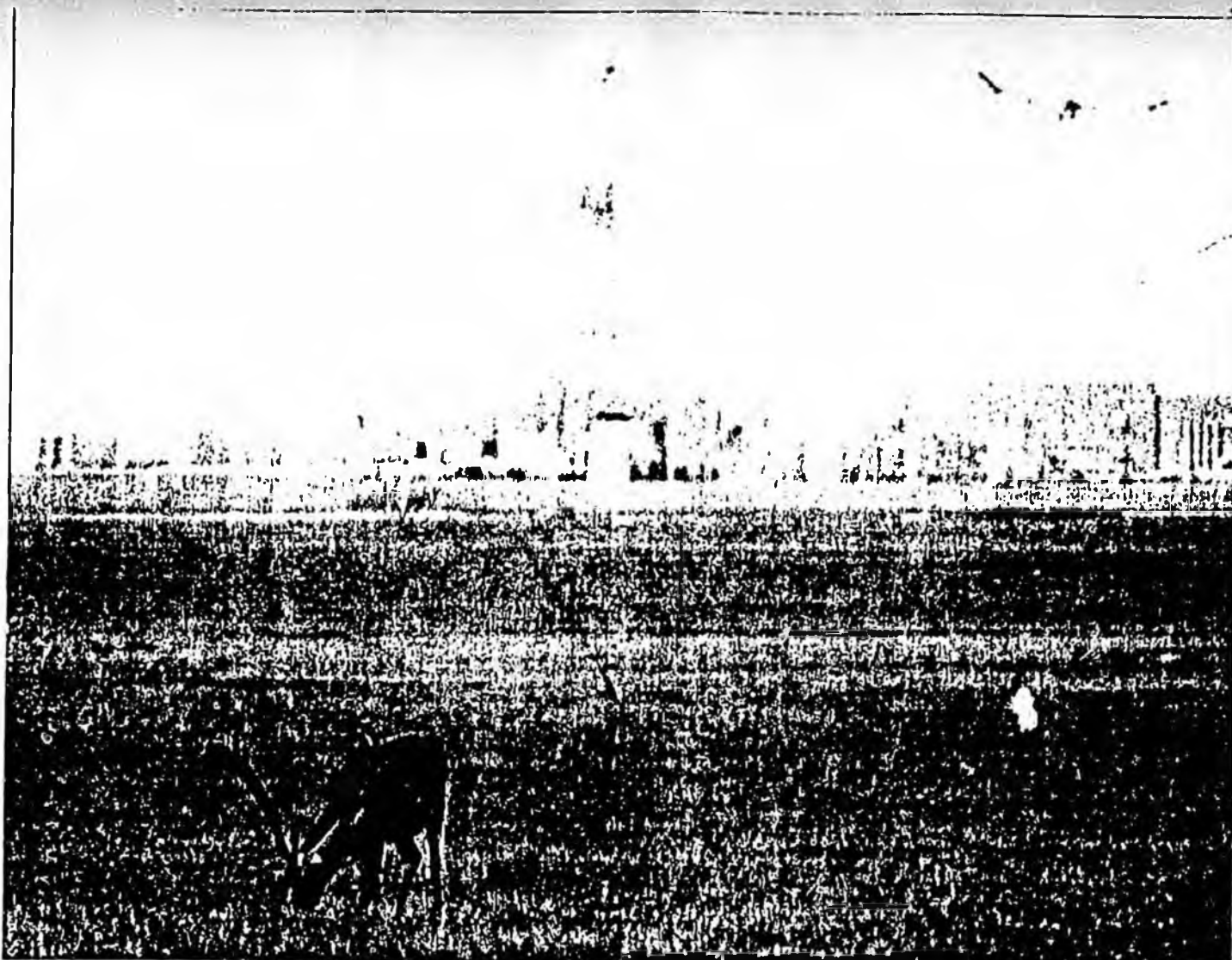
The question is being asked with more urgency these days, as congress wrestles with whether to allow oil development in a part of Alaska still relatively untouched — the coastal plain of the Arctic National Wildlife Refuge.

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

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Anchorage Daily News/Eric Hill

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 PATTIEPLER

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

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Anchorage Daily News photo by Rich Cormack

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.

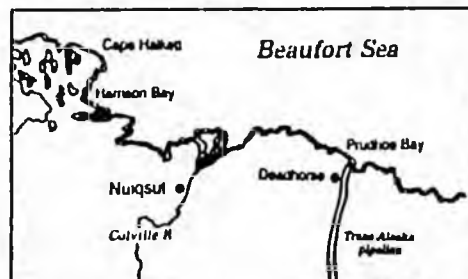
The state has a \$25,000 certificate of deposit posted by Child's when the company leased the tract, but Jerry Brossia of the state Department of Natural Resources said it is rare for the state to actually draw against such bonds. In fact, he said, in the five years he has been with DNR, the state has 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 Kodlak Oil Field Haulers. The water flowed down one trough and toward the Naganaviktok 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 Kodlak 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.

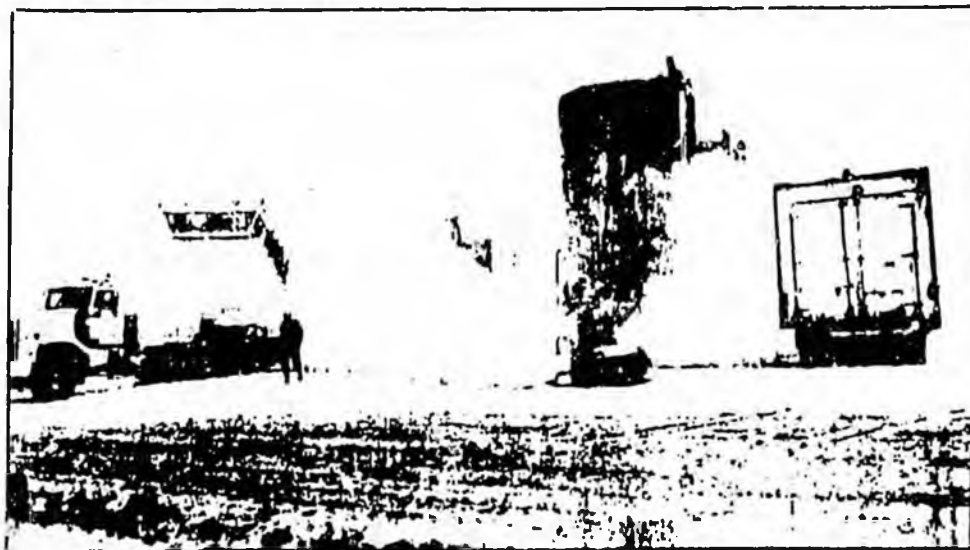
For example, he said, several years ago DEC spent 300 man-hours putting together a case against a North Slope salvage company that had dumped 15,000 drums on the tundra just off one of the pads. The case took years to move through the courts. The defendant were convicted on criminal charges and ordered 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. "The next 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 area is being polluted by the massive tanks 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, naphthalene 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-2 PRUDHOE



before that the monitored development development is having on fish and wildlife.

on, water pollution, wastewater and contaminated snow.

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Anchorage Daily News photo/Jim LaFolks

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 file photograph LAVRAKAS

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" house-cleaning this week.

The belated spring cleaning is being spurred in part, oil industry officials admit, because dozens of congressmen and other V.I.'s 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

# 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.



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

ATTACHMENT 1 OF 1 PAGES

go0399hH  
Lauterbach  
3/2/89

Original sponsor: Rules/Governor

IN THE HOUSE

BY THE RESOURCES COMMITTEE

CS FOR HOUSE BILL NO. 58 (Resources)

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 of 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 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

*add (2)  
ref to 2, 3 and  
rest re-numbered  
correctly*

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 another 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, except that this paragraph does not apply to the transport of uncontaminated crude or refined oil.

(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 *[by clear and convincing evidence] infer preponderance of evidence*

(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 *[employee]* 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

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

4 (C) an act of God; and

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

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

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

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

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

25 (2) the person is a governmental entity that acquired the  
26 facility by escheat, or through another involuntary transfer or acqui-  
27 sition, or through the exercise of eminent domain authority by pur-  
28 chase or condemnation; or

29 (3) the person acquired the facility by inheritance or

bequest.

1  
2 (d) To establish that a person had no reason to know that the  
3 hazardous substance was disposed of on, in, or at the facility, as  
4 provided in (c)(1) of this section, the person must have undertaken,  
5 at the time of acquisition, all appropriate inquiries into the previ-  
6 ous ownership and uses of the property consistent with good commercial  
7 or customary practice in an effort to minimize liability. For pur-  
8 poses of this subsection a court shall take into account

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

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

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

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

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

18 (e) This section does not diminish the liability of a person who  
19 previously owned or operated a facility or vessel and who would other-  
20 wise be liable. If the person obtained actual knowledge of the re-  
21 lease or threatened release of a hazardous substance at the facility  
22 or vessel and subsequently transferred ownership to another without  
23 disclosing that knowledge, the person is liable under (a)(2) of this  
24 section, and a defense under (b)(1)(B) of this section is not avail-  
25 able to the person.

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

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

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

17 \* Sec. 2. AS 46.03 is amended by adding a new section to read:

18 Sec. 46.03.823. HAZARDOUS SUBSTANCE RESPONSE ACTION CONTRACTORS.

19 (a) A person who is a response action contractor with respect to a  
20 release or threatened release of a hazardous substance is not civilly  
21 liable for injuries, costs, damages, expenses, or other liability that  
22 results from the release or threatened release unless the release or  
23 threatened release is caused by an act or omission of the response  
24 action contractor that is negligent, grossly negligent, or intention-  
25 al. To show negligence by a response action contractor, a claimant  
26 must show that the acts or omissions of the contractor under the  
27 response action contract were not in accordance with generally  
28 accepted professional standards and practices at the time the response  
29 action services were performed.

1 (b) The liability limitation under (a) of this section does not  
2 apply to a response action contractor who would otherwise be strictly  
3 liable under AS 46.03.822(a) or any other provision of this chapter or  
4 state law had the response action contractor not carried out response  
5 actions with respect to the release or threatened release of a hazard-  
6 ous substance.

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

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

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

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

21 (g) In this section,

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

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

with

1 (A) the department; or

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

5 (3) "response action contractor" means

6 (A) a person who enters into a response action con-  
7 tract with respect to a release or threatened release of a haz-  
8 arduous substance and who is carrying out the contract; and

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

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

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

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

20 (4) "hazardous substance" means

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

27 (B) oil;

28 \* Sec. 5. AS 46.03.826 is amended by adding new paragraphs to read:

1 (8) "facility" includes a

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

7 (B) site or area at which a hazardous substance has  
8 been deposited, stored, disposed of, placed, or otherwise locat-  
9 ed;

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

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

18 \* Sec. 6. AS 46.08 is amended by adding a new section to read:

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

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

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

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

10 (2) the commissioner sends a copy of the certificate of  
11 lien, by certified mail, to the persons described in (1) of this  
12 subsection and to all other persons of record holding an interest in  
13 the property.

14 (c) When any amount with respect to which a lien has been re-  
15 corded under this section has been paid or reduced, the commissioner  
16 shall, upon request of the property owner, issue a certificate dis-  
17 charging or partially releasing the lien. That certificate may be  
18 recorded in the office in which the certificate of lien was recorded.

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

27 \* Sec. 7. This Act takes effect immediately under AS 01.10.070(c).  
28  
29

# STATE OF ALASKA

STEVE COWPER, GOVERNOR

## DEPT. OF ENVIRONMENTAL CONSERVATION

### 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 effective 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 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. 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

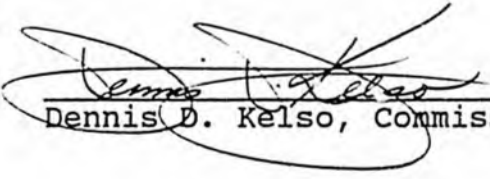
The bill was introduced at the request of the Governor. The Department strongly supports the bill and feels that it is necessary to provide appropriate tools to ensure that hazardous substance releases may be responded to properly. The first two sections of the law incorporate provisions similar to those 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

## FISCAL NOTE

**REQUEST**

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

**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						
<b>TOTAL OPERATING</b>	0	0	0	0	0	0

CAPITAL	0	0	0	0	0	0
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REVENUE	0	0	0	0	0	0
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**FUNDING: (Thousands of Dollars)**

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
<b>TOTAL</b>						

**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 controlled 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.

§ 46.03.820

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§ 46.03.822

WATER, AIR, ENERGY, ETC.

§ 46.03.824

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 or other persons providing evidence of financial responsibility, see AS 46.04.040(e).  
that actions brought under this section may be brought directly against insurers

**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)

**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 "owning or" at the beginning of the paragraph and made minor punctuation changes.

**Effect of amendments.** — The 1986 amendment in paragraph (3) deleted

**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)

# 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: \_\_\_\_\_
- [  ] zero fiscal notes(s) published: \_\_\_\_\_

SIGNING DO PASS:

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

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Chairman's signature

Original sponsor: Rules/Governor

1 IN THE HOUSE

BY THE RESOURCES COMMITTEE

2 CS FOR HOUSE BILL NO. 68 (Resources)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

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

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

12 \* Section 1. AS 46.03.822 is repealed and reenacted to read:

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

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

26 (2) the owner, and the operator, of the facility or vessel  
27 from which the release occurred or was threatened to occur;

28 (3) in the case of an abandoned facility or vessel, the  
29 owner, the operator, and any other person who controlled activities at

1 the facility or on the vessel immediately before the abandonment;

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

5 (5) a person who owned, controlled, or possessed the haz-  
6 ardous substance and who arranged for disposal, storage, or treatment  
7 of the substance by another party or entity, or arranged with a trans-  
8 porter to transport the substance for disposal, storage, or treatment  
9 by another party or entity, if the release occurred or was threatened  
10 to occur at a facility or vessel that contained the substance and that  
11 was owned or operated by another party or entity; and

12 (6) a person who transported the hazardous substance, or  
13 accepted the hazardous substance for transport, to the facility or  
14 vessel from which the release occurred or was threatened to occur, if  
15 the person selected the facility or vessel, except that this paragraph  
16 does not apply to the transport of uncontaminated crude or refined  
17 oil.

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

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

23 (A) an act of war;

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

28 (i) exercised due care with respect to the haz-  
29 ardous substance; and

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

4 (C) an act of God; and

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

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

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

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

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

25 (2) the person is a governmental entity that acquired the  
26 facility by escheat, or through another involuntary transfer or acqui-  
27 sition, or through the exercise of eminent domain authority by pur-  
28 chase or condemnation; or

29 (3) the person acquired the facility by inheritance or

1 bequest.

2 (d) To establish that a person had no reason to know that the  
3 hazardous substance was disposed of on, in, or at the facility, as  
4 provided in (c)(1) of this section, the person must have undertaken,  
5 at the time of acquisition, all appropriate inquiries into the previ-  
6 ous ownership and uses of the property consistent with good commercial  
7 or customary practice in an effort to minimize liability. For pur-  
8 poses of this subsection a court shall take into account

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

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

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

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

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

18 (e) This section does not diminish the liability of a person who  
19 previously owned or operated a facility or vessel and who would other-  
20 wise be liable. If the person obtained actual knowledge of the re-  
21 lease or threatened release of a hazardous substance at the facility  
22 or vessel and subsequently transferred ownership to another without  
23 disclosing that knowledge, the person is liable under (a)(2) of this  
24 section, and a defense under (b)(1)(B) of this section is not avail-  
25 able to the person.

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

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

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

17 \* Sec. 2. AS 46.03 is amended by adding a new section to read:

18 Sec. 46.03.8.3. HAZARDOUS SUBSTANCE RESPONSE ACTION CONTRACTORS.

19 (a) A person who is a response action contractor with respect to a  
20 release or threatened release of a hazardous substance is not civilly  
21 liable for injuries, costs, damages, expenses, or other liability that  
22 results from the release or threatened release unless the release or  
23 threatened release is caused by an act or omission of the response  
24 action contractor that is negligent or grossly negligent or consti-  
25 tutes intentional misconduct. To show negligence by a response action  
26 contractor, claimant must show that the acts or omissions of the  
27 contractor under the response action contract were not in accordance  
28 with generally accepted professional standards and practices at the  
29 time the response action services were performed.

1 (b) The liability limitation under (a) of this section does not  
2 apply to a response action contractor who would otherwise be strictly  
3 liable under AS 46.03.822(a) or any other provision of this chapter or  
4 state law had the response action contractor not carried out response  
5 actions with respect to the release or threatened release of a hazard-  
6 ous substance.

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

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

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

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

21 (g) In this section,

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

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

1 with

2 (A) the department; or

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

6 (3) "response action contractor" means

7 (A) a person who enters into a response action con-  
8 tract with respect to a release or threatened release of a haz-  
9 ardous substance and who is carrying out the contract; and

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

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

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

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

21 (4) "hazardous substance" means

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

28 (B) oil;

29 \* Sec. 5. AS 46.03.826 is amended by adding new paragraphs to read:

1 (8) "facility" includes a

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

7 (B) site or area at which a hazardous substance has  
8 been deposited, stored, disposed of, placed, or otherwise locat-  
9 ed;

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

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

18 \* Sec. 6. AS 46.08 is amended by adding a new section to read:

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

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

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

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

10 (2) the commissioner sends a copy of the certificate of  
11 lien, by certified mail, to the persons described in (1) of this  
12 subsection and to all other persons of record holding an interest in  
13 the property.

14 (c) When any amount with respect to which a lien has been re-  
15 corded under this section has been paid or reduced, the commissioner  
16 shall, upon request of the property owner, issue a certificate dis-  
17 charging or partially releasing the lien. That certificate may be  
18 recorded in the office in which the certificate of lien was recorded.

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

27 \* Sec. 7. This Act takes effect immediately under AS 01.10.070(c).  
28  
29

# 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) 485-3600

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. <sup>1/</sup> 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.

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

The Honorable Curt Menard

January 24, 1989

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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 effect 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

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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.

The Honorable Curt Menard

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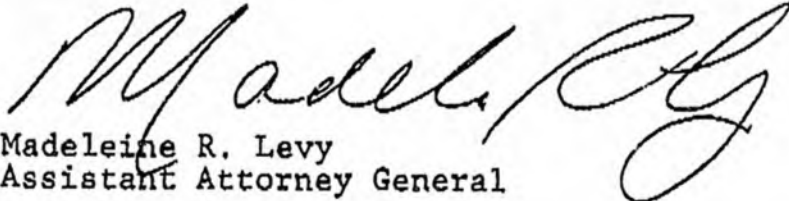
rendered repugnant to, the amendatory act." Id. (citation omitted). Nothing in HB 68 is repugnant to Ballot Measure No. 2. Nothing in Ballot Measure No. 2 is materially changed by HB 68. Ballot Measure No. 2 simply did not address the liability provisions of environmental laws, which is precisely what 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

POUCH Y STATE CAPITOL  
JUNEAU ALASKA 99811  
907 465 3800

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 *TL*  
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

Representative Curt Menard  
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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, 1975.

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.

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

TL:gc  
WKG5/105



## **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.