

ALASKA LEGISLATURE COMMITTEE BILL FILES - 1987 - 1988 8879

HB 389, HB 390 356

HB

389

**HOUSE COMMITTEE REPORT**

(11)

Date referred: 3/24/88

FURTHER REFERRALS:

DATE: 4/8/88

The Finance Committee has considered HB 389

"An Act relating to recovery of state costs for oil and hazardous substance releases; and providing for an effective date."

**RECOMMENDS:**

replace with CS HB 389 (Jud.)  the same title  
 attached amendment(s)  a new title

- 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  same as previous fiscal note published \_\_\_\_\_
- zero fiscal note  same as previous zero fiscal note published 2/1/88
- zero with analysis

**SIGNING DO PASS:**

*[Handwritten signatures]*

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**SIGNING OTHER RECOMMENDATIONS:**

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*[Handwritten signature]*  
Chairman's signature

STATE OF ALASKA  
1988 LEGISLATIVE SESSION

BILL VERSION: HB 389  
PUBLISH DATE: HOUSE 2/1/88

FISCAL NOTE

REQUEST:

Revision Date: 29 January 1988  
Title: An Act Relating to Oil and  
Hazardous Substance Cleanup Costs  
Sponsor: Governor  
Requestor: House Resources

Agency Affected: DEC, Dept. of Law  
BRU: DEC/Environmental Quality  
Components: \_\_\_\_\_

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
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: None

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

The bill will not increase state expenditures. Over the long run, it will likely decrease state expenditures for spill cleanup.

Prepared by: Amy D. Kyle  
Division: Commissioner's Office

Phone: 465-2600  
Date: 29 January 1988

Approved by Commissioner: Amy D. Kyle / for  
Agency: Department of Environmental Conservation

Date: \_\_\_\_\_

Distribution (by preparer):

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

Original sponsors: Rules/Governor

1 IN THE HOUSE BY THE JUDICIARY COMMITTEE  
2 CS FOR HOUSE BILL NO. 389 (Judiciary)  
3 IN THE LEGISLATURE OF THE STATE OF ALASKA  
4 FIFTEENTH LEGISLATURE - SECOND SESSION  
5 A BILL

6 For an Act entitled: "An Act relating to recovery of state costs for oil  
7 and hazardous substance releases; and providing for  
8 an effective date."

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

10 \* Section 1. AS 46.08 is amended by adding a new section to read:

11 Sec. 46.08.075. LIENS AGAINST PROPERTY AS SECURITY FOR STATE  
12 EXPENDITURES. (a) The state has a lien for expenditures by the state  
13 from the oil and hazardous substance release response fund or from any  
14 other state fund, for the containment, cleanup, or mitigation of oil  
15 or hazardous substance spills, against all property owned by a person  
16 who is determined by the commissioner to be liable for the expendi-  
17 tures under this chapter, AS 46.03, AS 46.04, 42 U.S.C. 9607, or other  
18 state or federal law. The lien includes interest, at the maximum rate  
19 allowable under AS 45.45.010(a), from the date of the expenditures.

20 (b) A lien established under this section against real property  
21 is not effective unless

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

27 (2) the commissioner sends a copy of the certificate by  
28 certified mail to the persons described in (1) of this subsection and  
29 to all other persons of record holding an interest in the property.

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

6           (d) A person with an ownership interest in property against  
7           which a lien is recorded may bring an action in the superior court to  
8           require that the lien be released. The lien shall be released if the  
9           court finds that the owner of the property is not liable for the costs  
10          of the state in connection with containment, cleanup, or mitigation of  
11          the oil or hazardous substance release.

12        \* Sec. 2. This Act takes effect immediately under AS 01.10.070(c).

Original sponsors: Rules/Governor

1 IN THE HOUSE BY THE JUDICIARY COMMITTEE  
2 CS FOR HOUSE BILL NO. 389 (Judiciary)  
3 IN THE LEGISLATURE OF THE STATE OF ALASKA  
4 FIFTEENTH LEGISLATURE - SECOND SESSION  
5 A BILL.

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STATE OF ALASKA  
1988 LEGISLATIVE SESSION

BILL VERSION: HB 389  
PUBLISH DATE: HOUSE 2/1/88

FISCAL NOTE

REQUEST:

Revision Date: 29 January 1988  
Title: An Act Relating to Oil and  
Hazardous Substance Cleanup Costs  
Sponsor: Governor  
Requestor: House Resources

Agency Affected: DEC, Dept. of Law  
BRU: DEC/Environmental Quality  
Components: \_\_\_\_\_

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
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: None

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

The bill will not increase state expenditures. Over the long run, it will likely decrease state expenditures for spill cleanup.

Prepared by: Amy D. Kyle  
Division: Commissioner's Office

Phone: 465-2600  
Date: 29 January 1988

Approved by Commissioner: *Amy D. Kyle*  
Agency: Department of Environmental Conservation

Date: \_\_\_\_\_

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

# STATE OF ALASKA

DEPT. OF ENVIRONMENTAL CONSERVATION

STEVE COWPER, GOVERNOR

POSITION PAPER  
CS HB 389 (Judiciary)

CONTACT: AMY D. KYLE  
465-2600

April 6, 1988

## Title

An act relating to recovery of state costs for oil and hazardous substance releases; and providing for an effective date

## Effect of the bill

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 the bankruptcy proceeding.

## Department Position

The bill was introduced at the request of the Governor upon the recommendation of the Department of Law. The Department supports the bill. The bill was amended in the Judiciary Committee to provide that the state be allowed to obtain a lien, but not a priority lien. The rationale for the change was that a state claim should not supercede pre-existing secured claims. Even with this change, the bill will still provide the state with an enhanced capacity to recover costs.

The state is seeing increasing numbers of cases where entities that are responsible for improper waste disposal declare bankruptcy. In such cases, the state would have to foot the bill for necessary site cleanup costs. This bill would help the state recover such costs in a bankruptcy proceeding. Similar legislation has been adopted by several other states and recommended by the U.S. Supreme Court.

## Fiscal Effect

There will be no additional costs associated with this bill. The legislation should reduce State expenditures for cleanup over the long term. The Department has provided a zero fiscal note.

  
Dennis D. Kelso, Commissioner



# Alaska State Legislature

Representative Mike Davis

District 19

P.O. Box V  
Juneau, Alaska 99811  
(907) 456-4930/4941

Interim Office:  
P.O. Box 81435  
Fairbanks, Alaska 99708  
(907) 456-8161

## MEMORANDUM

To: Rep. Al Adams, Chair House Finance Committee

From: Rep. Davis *Mike Davis*

Date: March 25, 1988

Re: HB 389

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I would like to request that you schedule HB 389, An act relating to recovery of state costs for oil and hazardous substance releases. HB 389 gives the state the ability to recover its costs for clean up of oil and hazardous waste sites in cases where the responsible party declares bankruptcy.

The original bill gave the state a priority lien. The House Judiciary committee amended the bill to give the department the ability to file a lien in sequence with other secured creditors.

Presently, the Department has to go to court to secure a judgment to recover costs which is extremely time consuming. If this bill were passed, an immediate right to file a lien without first having to secure judgement.

**SUPREME COURT OF THE UNITED STATES**

No. 83-1020

**OHIO, PETITIONER v. WILLIAM LEE KOVACS, DBA  
B & W ENTERPRISES, ET AL.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT**

[January 9, 1985]

**JUSTICE O'CONNOR, concurring.**

I join the Court's opinion and agree with its holding that the cleanup order has been reduced to a monetary obligation dischargeable as a "claim" under §727 of the Bankruptcy Code. I write separately to address the petitioner's concern that the Court's action will impede States in enforcing their environmental laws.

To say that Kovacs' obligation in these circumstances is a claim dischargeable in bankruptcy does not wholly excuse the obligation or leave the State without any recourse against Kovacs' assets to enforce the order. Because "Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law," *Butner v. United States*, 440 U. S. 48, 54 (1979), the classification of Ohio's interest as either a lien on the property itself, a perfected security interest, or merely an unsecured claim depends on Ohio law. That classification—a question not before us—generally determines the priority of the State's claim to the assets of the estate relative to other creditors. Cf. 11 U. S. C. § 545 (trustee may avoid statutory liens only in specified circumstances). Thus, a State may protect its interest in the enforcement of its environmental laws by giving cleanup judgments the status of statutory liens or secured claims.

The Court's holding that the cleanup order was a "claim" within the meaning of § 101(4) also avoids potentially adverse

consequences for a State's enforcement of its order when the debtor is a corporation, rather than an individual. In a Chapter 7 proceeding under the Bankruptcy Code, a corporate debtor transfers its property to a trustee for distribution among the creditors who hold cognizable claims, and then generally dissolves under state law. Because the corporation usually ceases to exist, it has no postbankruptcy earnings that could be utilized by the State to fulfill the cleanup order. The State's only recourse in such a situation may well be its "claim" to the prebankruptcy assets.

For both these reasons, the Court's holding today cannot be viewed as hostile to state enforcement of environmental laws.

RECEIVED  
Department of Law.

JAN 18 1985

MA 7 15 19 10 11 12 1 1 2 3 4 5 6 P3

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U. S. 321, 337.

## SUPREME COURT OF THE UNITED STATES

### Syllabus

OHIO *v.* KOVACS, DBA B & W ENTERPRISES ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE SIXTH CIRCUIT

No. 83-1020. Argued October 10, 1984—Decided January 9, 1985

Petitioner State of Ohio obtained an injunction in state court ordering respondent and other defendants to clean up a hazardous waste disposal site. When the injunction was not complied with, the State obtained the appointment in state court of a receiver, who was directed to take possession of the defendants' property and other assets and to implement the injunction. The receiver took possession of the site but had not completed his tasks when respondent filed a personal bankruptcy petition. Seeking to require part of respondent's postbankruptcy income to be applied to the receiver's unfinished tasks, the State filed a motion in state court to discover respondent's income and assets. At respondent's request, the Bankruptcy Court stayed these proceedings. The State then filed a complaint in the Bankruptcy Court seeking a declaration that respondent's obligation under the state injunction was not dischargeable in bankruptcy because it was not a "debt" or "liability on a claim" within the meaning of the Bankruptcy Code. For bankruptcy purposes, a debt is a liability on a claim. Section 101(4)(B) of the Bankruptcy Code in pertinent part defines a claim as the "right to an equitable remedy for breach of performance if such breach gives rise to a right of payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured." The Bankruptcy Court ruled against the State, as did the District Court. The Court of Appeals affirmed, holding that the State essentially sought from respondent only a monetary payment and that such a required payment was a liability on a claim that was dischargeable under the Bankruptcy Code.

*Held:*

1. The fact that the Army Corps of Engineers, using funds recovered from those concerns that generated the wastes in question, has removed

## Syllabus

the wastes from the site does not render the case moot. The State still has a stake in the outcome of the case based on its claim that the removal of the wastes did not satisfy all of respondent's obligation to clean up the site since the ground remains permeated with toxic materials that must be removed to avoid further pollution. P. 3.

2. Respondent's obligation under the injunction is a "debt" or "liability on a claim" subject to discharge under the Bankruptcy Code. Contrary to the State's contention, there is no indication in the language of § 101(4)(B) that the right to performance cannot be a claim unless it arises from a contractual arrangement. Moreover, it is apparent that Congress desired a broad definition of a "claim" and knew how to limit the application of a provision to contracts when it desired to do so. Where it is clear that what the receiver wanted from respondent after bankruptcy was the money to defray cleanup costs, the Court of Appeals did not err in concluding that the cleanup order had been converted into an obligation to pay money, an obligation that was dischargeable in bankruptcy. Pp. 3-9.

717 F. 2d 984, affirmed.

WHITE, J., delivered the opinion for a unanimous Court. O'CONNOR, J., filed a concurring opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

## SUPREME COURT OF THE UNITED STATES

No. 83-1020

OHIO *v.* WILLIAM LEE KOVACS, DBA B & W  
ENTERPRISES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT

[January 9, 1985]

JUSTICE WHITE delivered the opinion of the Court.

Petitioner State of Ohio obtained an injunction ordering respondent William Kovacs to clean up a hazardous waste site. A receiver was subsequently appointed. Still later, Kovacs filed a petition for bankruptcy. The question before us is whether, in the circumstances present here, Kovacs' obligation under the injunction is a "debt" or "liability on a claim" subject to discharge under the Bankruptcy Code.

### I

Kovacs was the chief executive officer and stockholder of Chem-Dyne Corp., which with other business entities operated an industrial and hazardous waste disposal site in Hamilton, Ohio. In 1976, the State sued Kovacs and the business entities in state court for polluting public waters, maintaining a nuisance, and causing fish kills, all in violation of state environmental laws. In 1979, both in his individual capacity and on behalf of Chem-Dyne, Kovacs signed a stipulation and judgment entry settling the lawsuit. Among other things, the stipulation enjoined the defendants from causing further pollution of the air or public waters, forbade bringing additional industrial wastes onto the site, required the defendants to remove specified wastes from the property, and ordered the payment of \$75,000 to compensate the State for injury to wildlife.

Kovacs and the other defendants failed to comply with their obligations under the injunction. The State then obtained the appointment in state court of a receiver, who was directed to take possession of all property and other assets of Kovacs and the corporate defendants and to implement the judgment entry by cleaning up the Chem-Dyne site. The receiver took possession of the site but had not completed his tasks when Kovacs filed a personal bankruptcy petition.<sup>1</sup>

Seeking to develop a basis for requiring part of Kovacs' postbankruptcy income to be applied to the unfinished task of the receivership, the State then filed a motion in state court to discover Kovacs' current income and assets. Kovacs requested that the Bankruptcy Court stay those proceedings, which it did.<sup>2</sup> The State also filed a complaint in the Bankruptcy Court seeking a declaration that Kovacs' obligation under the stipulation and judgment order to clean up the Chem-Dyne site was not dischargeable in bankruptcy because it was not a "debt," a liability on a "claim," within the meaning of the Bankruptcy Code. In addition, the complaint sought an injunction against the bankruptcy trustee to re-

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<sup>1</sup> Kovacs originally filed a reorganization petition under Chapter 11 of the Bankruptcy Code, 11 U. S. C. § 1101 *et seq.*, but converted the petition to a liquidation bankruptcy under Chapter 7. See 11 U. S. C. § 1112.

<sup>2</sup> The Bankruptcy Court held that the requested hearing was an effort to collect money from Kovacs in violation of the automatic stay provision. See 11 U. S. C. § 362. It entered a specific stay as well. The District Court affirmed, ruling that Ohio was trying to enforce a judgment obtained before filing of the bankruptcy petition. The Court of Appeals for the Sixth Circuit also found the hearing barred. *In re Kovacs*, 681 F. 2d 454 (1982). In that court's view, while § 362(b) allowed governmental units to continue to enforce police powers through mandatory injunctions, it denied them the power to collect money in their enforcement efforts. Because of the later filing by Ohio of a complaint to declare that Kovacs' obligations were not claims under bankruptcy, we granted certiorari, vacated the judgment of the Court of Appeals, and remanded to that court to consider whether the dispute over the stay was moot. 459 U. S. 1167 (1983). As far as we are advised, the Court of Appeals has taken no action on the remand.

strain him from pursuing any action to recover assets of Kovacs in the hands of the receiver. The Bankruptcy Court ruled against Ohio, *In re Kovacs*, 29 B. R. 816 (SD Ohio 1982), as did the District Court. The Court of Appeals for the sixth circuit affirmed, holding that Ohio essentially sought from Kovacs only a monetary payment and that such a required payment was a liability on a claim that was dischargeable under the bankruptcy statute. *In re Kovacs*, 717 F. 2d 984 (1983). We granted certiorari to determine the dischargeability of Kovacs' obligation under the affirmative injunction entered against him. 465 U. S. (1983).

## II

Kovacs alleges that the Army Corps of Engineers, using funds recovered from those concerns that generated the wastes, has removed all industrial wastes from the site and that if he has an obligation to pay those expenses, the obligation is owed to the United States, not the State. Kovacs urges that the case is therefore moot. The State argues that the case is not moot because the removal of the barrels and wastes from the surface did not satisfy all of Kovacs' obligations to clean up the site; it is said that the ground itself remains permeated with toxic materials that must be removed if further pollution of the public waters is to be avoided. We perceive nothing feigned or frivolous about the State's submission. *Sibron v. New York*, 392 U. S. 40, 57 (1968). The State surely has a stake in the outcome of this case, *United States Parole Comm'n v. Geraghty*, 445 U. S. 388, 397 (1980), which in our view is not moot. We proceed to the merits.

## III

Except for the nine kinds of debts saved from discharge by 11 U. S. C. § 523(a), a discharge in bankruptcy discharges the debtor from all debts that arose before bankruptcy. § 727(b). It is not claimed here that Kovacs' obligation under the injunction fell within any of the categories of debts ex-

cepted from discharge by § 523. Rather, the State submits that the obligation to clean up the Chem-Dyne site is not a debt at all within the meaning of the bankruptcy law.

For bankruptcy purposes, a debt is a liability on a claim. § 101(11). A claim is defined by § 101(4) as follows:

“(4) ‘claim’ means—

“(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

“(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.”

The provision at issue here is § 101(4)(B). For the purposes of that section, there is little doubt that the State had the right to an equitable remedy under state law and that the right has been reduced to judgment in the form of an injunction ordering the cleanup. The State argues, however, that the injunction it has secured is not a claim against Kovacs for bankruptcy purposes because (1) Kovacs' default was a breach of the statute, not a breach of an ordinary commercial contract which concededly would give rise to a claim; and (2) Kovacs' breach of his obligation under the injunction did not give rise to a right to payment within the meaning of § 101(4)(B). We are not persuaded by either submission.

There is no indication in the language of the statute that the right to performance cannot be a claim unless it arises from a contractual arrangement. The State resorted to the courts to enforce its environmental laws against Kovacs and secured a negative order to cease polluting, an affirmative order to clean up the site, and an order to pay a sum of money to recompense the State for damage done to the fish population. Each order was one to remedy an alleged breach of

Ohio law; and if Kovacs' obligation to pay \$75,000 to the State is a debt dischargeable in bankruptcy, which the State freely concedes, it makes little sense to to assert that because the cleanup order was entered to remedy a statutory violation, it cannot likewise constitute a claim for bankruptcy purposes. Furthermore, it is apparent that Congress desired a broad definition of a "claim"<sup>3</sup> and knew how to limit the application of a provision to contracts when it desired to do so.<sup>4</sup> Other provisions cited by Ohio refute, rather than support, its strained interpretation.<sup>5</sup>

The courts below also found little substance in the submission that the cleanup obligation did not give rise to a right to payment that renders the order dischargeable under § 727. The definition of "claim" in H. R. 8200 as originally drafted would have deemed a right to an equitable remedy for breach of performance a claim even if it did not give rise to a right to payment.<sup>6</sup> The initial Senate definition of claim was narrower,<sup>7</sup> and a compromise version, § 101(4), was finally adopted. In that version, the key phrases "equitable remedy," "breach of performance," and "right to payment" are not defined. See 11 U. S. C. § 101. Nor are the differences between the successive versions explained. The legislative

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<sup>3</sup>H. R. Rep. No. 95-595, p. 309 (1977); S. Rep. No. 95-989, p. 21 (1978). See 2 R. Levin & K. Klee, *Collier on Bankruptcy* ¶ 101-.04, 101-16.4 (15th ed. 1984).

<sup>4</sup>See 11 U. S. C. § 365 (assumption or rejection of executory contracts and leases).

<sup>5</sup>Congress created exemptions from discharge for claims involving penalties and forfeitures owed to a governmental unit, 11 U. S. C. § 523(a)(7), and for claims involving embezzlement and larceny. § 523(a)(4). If a bankruptcy debtor has committed larceny or embezzlement, giving rise to a remedy of either damages or equitable restitution under state law, the resulting liability for breach of an obligation created by law is clearly a claim which is non-dischargeable in bankruptcy.

<sup>6</sup>H. R. 8200, 95th Cong., 1st Sess., 309-310 (House Committee print 1977), as reported September 8, 1977.

<sup>7</sup>See S. 2266, 95th Cong., 1st Sess., 299 (1977), as introduced October 31, 1977.

history offers only a statement by the sponsors of the Bankruptcy Reform Act with respect to the scope of the provision:

“Section 101(4)(B) . . . is intended to cause the liquidation or estimation of contingent rights of payment for which there may be an alternative equitable remedy with the result that the equitable remedy will be susceptible to being discharged in bankruptcy. For example, in some States, a judgment for specific performance may be satisfied by an alternative right to payment in the event performance is refused; in that event, the creditor entitled to specific performance would have a “claim” for purposes of a proceeding under title 11.”<sup>1</sup>

We think the rulings of the courts below were wholly consistent with the statute and its legislative history, sparse as it is. The Bankruptcy Court ruled as follows, *In re Kovacs*, 29 B. R., at 816:

“There is no suggestion by plaintiff that defendant can render performance under the affirmative obligation other than by the payment of money. We therefore conclude that plaintiff has a claim against defendant within the meaning of 11 U. S. C. § 101(4), and that defendant owes plaintiff a debt within the meaning of 11 U. S. C. § 101(11). Furthermore, we have concluded that that debt is dischargeable.”<sup>2</sup>

<sup>1</sup> 124 Cong. Rec. 32393 (1978) (remarks of Rep. Edwards); see also *id.*, at 33992 (remarks of Sen. DeConcini).

<sup>2</sup> More fully stated, the Bankruptcy Court's observations were:

“What is at stake in the present motion is whether defendant's bankruptcy will discharge the affirmative obligation imposed upon him by the Judgment Entry, that he remove and dispose of all industrial and/or other wastes at the subject premises. If plaintiff is successful here, it would be able to levy on defendant's wages, the action prevented by our Prior Decision, after defendant's bankruptcy case is closed and/or the stay of 11 U. S. C. § 362 as interpreted by our Prior Decision is no longer in force. The parties have crystallized the issue here in simple fashion, plaintiff stoutly insisting that the just identified affirmative obligation is not a monetary obligation, while defendant says that it is. The problem arises, of

The District Court affirmed, primarily because it was bound by and saw no error in the Court of Appeals' prior opinion holding that the State was seeking no more than a money judgment as an alternative to requiring Kovacs personally to perform the obligations imposed by the injunction. To hold otherwise, the District Court explained, "would subvert Congress' clear intention to give debtors a fresh start." App. JA-16. The Court of Appeals also affirmed, rejecting the State's insistence that it had no right to, and was not attempting to enforce, an alternative right to payment:

"Ohio does not suggest that Kovacs is capable of personally cleaning up the environmental damage he may have caused. Ohio claims there is no alternative right to payment, but when Kovacs failed to perform, state law gave a state receiver total control over all Kovacs' assets. Ohio later used state law to try and discover Kovacs' post-petition income and employment status in an apparent attempt to levy on his future earnings. In reality, the only type of performance in which Ohio is now interested is a money payment to effectuate the Chem-Dyne cleanup."

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course, because it is not stated as a monetary obligation. Essentially for this reason plaintiff argues that it is not a monetary obligation. Yet plaintiff in discussing the background for the Judgment Entry says that it expected that defendant would generate sufficient funds in his ongoing business to pay for the clean-up. Moreover, we take judicial notice that plaintiff sought discovery with respect to defendant's earnings, the matter dealt with in our Prior Decision, for the purpose of levying upon his wages, a technique which has no application other than in the enforcement of a money judgment. There is no suggestion by plaintiff that defendant can render performance under the affirmative obligation other than by the payment of money. We therefore conclude that plaintiff has a claim against defendant within the meaning of 11 U. S. C. § 101(4), and that defendant owes plaintiff a debt within the meaning of 11 U. S. C. § 101(11). Furthermore, we have concluded that that debt is dischargeable." 29 B. R., at 818.

"The impact of its attempt to realize upon Kovacs' income or property cannot be concealed by legerdemain or linguistic gymnastics. Kovacs cannot personally clean up the waste he wrongfully released into Ohio waters. He cannot perform the affirmative obligations properly imposed upon him by the State court except by paying money or transferring over his own financial resources. The State of Ohio has acknowledged this by its steadfast pursuit of payment as an alternative to personal performance." 717 F. 2d, at 987-988.

As we understand it, the Court of Appeals held that, in the circumstances, the cleanup duty had been reduced to a monetary obligation.

We do not disturb this judgment. The injunction surely obliged Kovacs to clean up the site. But when he failed to do so, rather than prosecute Kovacs under the environmental laws or bring civil or criminal contempt proceedings, the State secured the appointment of a receiver, who was ordered to take possession of all of Kovacs' nonexempt assets as well as the assets of the corporate defendants and to comply with the injunction entered against Kovacs. As wise as this course may have been, it dispossessed Kovacs, removed his authority over the site, and divested him of assets that might have been used by him to clean up the property. Furthermore, when the bankruptcy trustee sought to recover Kovacs' assets from the receiver, the latter sought an injunction against such action. Although Kovacs had been ordered to "cooperate" with the receiver, he was disabled by the receivership from personally taking charge of and carrying out the removal of wastes from the property. What the receiver wanted from Kovacs after bankruptcy was the money to defray cleanup costs. At oral argument in this Court, the State's counsel conceded that after the receiver was appointed, the only performance sought from Kovacs was the payment of money. Tr. of Oral Arg. 19-20. Had Kovacs furnished the necessary funds, either before or after bank-

ruptcy, there seems little doubt that the receiver and the State would have been satisfied. On the facts before it, and with the receiver in control of the site,<sup>10</sup> we cannot fault the Court of Appeals for concluding that the cleanup order had been converted into an obligation to pay money, an obligation that was dischargeable in bankruptcy.<sup>11</sup>

#### IV

It is well to emphasize what we have not decided. First, we do not suggest that Kovacs' discharge will shield him from prosecution for having violated the environmental laws of Ohio or for criminal contempt for not performing his obligations under the injunction prior to bankruptcy. Second, had a fine or monetary penalty for violation of state law been imposed on Kovacs prior to bankruptcy, § 523(a)(7) forecloses any suggestion that his obligation to pay the fine or penalty would be discharged in bankruptcy. Third, we do not address what the legal consequences would have been had Kovacs taken bankruptcy before a receiver had been appointed and a trustee had been designated with the usual

<sup>10</sup>We were advised at oral argument that the receiver at that time was still in possession of the site, although he was contemplating terminating the receivership. Tr. of Oral Arg. 4, 56-57. We were also advised that it was difficult to tell exactly who owned the property at 500 Ford Boulevard and that although the trustee did not formally abandon the property, he did not seek to take possession of it. *Id.*, at 55, 58.

<sup>11</sup>The State relies on *Penn Terra, Ltd. v. Department of Environmental Resources*, 733 F. 2d 267 (CA3 1984). There, the Court of Appeals for the Third Circuit held that the automatic stay provision of 11 U. S. C. § 362 did not apply to the State's seeking an injunction against a bankrupt to require compliance with the environmental laws. This was held to be an effort to enforce the police power statutes of the State, not a suit to enforce a money judgment. But in that case, there had been no appointment of a receiver who had the duty to comply with the state law and who was seeking money from the bankrupt. The automatic stay provision does not apply to suits to enforce the regulatory statutes of the State, but the enforcement of such a judgment by seeking money from the bankrupt—what the Court of Appeals for the Sixth Circuit concluded was involved in this case—is another matter.

duties of a bankruptcy trustee.<sup>12</sup> Fourth, we do not hold that the injunction against bringing further toxic wastes on the premises or against any conduct that will contribute to the pollution of the site or the State's waters is dischargeable in bankruptcy; we here address, as did the Court of Appeals, only the affirmative duty to clean up the site and the duty to pay money to that end. Finally, we do not question that anyone in possession of the site—whether it is Kovacs or another in the event the receivership is liquidated and the trustee abandons the property, or a vendee from the receiver or the bankruptcy trustee—must comply with the environmental laws of the State of Ohio. Plainly, that person or

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<sup>12</sup>The commencement of a case under the Bankruptcy Act creates an estate which, with limited exceptions, consists of all of the debtor's property wherever located. 11 U. S. C. § 541. The trustee, who is to be appointed promptly in Chapter 7 cases, is charged with the duty of collecting and reducing the property of the estate and is to be accountable for all of such property. 11 U. S. C. § 704. A custodian of the debtor's property appointed before commencement of the case is required to deliver the debtor's property in his custody to the trustee, unless the bankruptcy court concludes that the interest of creditors would be better served by permitting the custodian to continue in possession and control of the property. 11 U. S. C. § 543. After notice and hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate. 11 U. S. C. § 554. Such abandonment is to the person having the possessory interest in the property. S. Rep. No. 95-989, p. 92 (1978). Property that is scheduled but not administered is deemed abandoned. 11 U. S. C. § 554(c). Had no receiver been appointed prior to Kovacs' bankruptcy, the trustee would have been charged with the duty of collecting Kovacs' nonexempt property and administering it. If the site at issue were Kovacs' property, the trustee would shortly determine whether it was of value to the estate. If the property was worth more than the costs of bringing it into compliance with state law, the trustee would undoubtedly sell it for its net value, and the buyer would clean up the property, in which event whatever obligation Kovacs might have had to clean up the property would have been satisfied. If the property were worth less than the cost of cleanup, the trustee would likely abandon it to its prior owner, who would have to comply with the state environmental law to the extent of his or its ability.

firm may not maintain a nuisance, pollute the waters of the State, or refuse to remove the source of such conditions. As the case comes to us, however, Kovacs has been dispossessed and the State seeks to enforce his cleanup obligation by a money judgment.

The judgment of the Court of Appeals is

*Affirmed.*

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water by the department of health and environment or the federal environmental protection agency under the authority of the Safe Drinking Water Act. All such tests shall be paid for by such county. [Acts 1983, ch. 423, § 8.]

**Compiler's Notes.** Concerning the Safe Drinking Water Act referred to in subsection (b), the federal act by that name is compiled in U.S.C. in various sections throughout titles 5, 21, and 42, and the Tennessee act of the same

name is codified in part 7, chapter 13 of this title.

**Section to Section References.** This section is referred to in § 68-46-210.

**68-46-209. Liens on property.** — (a) Whenever a hazardous substance site is placed on the list of hazardous substance sites pursuant to § 68-46-206(e), or whenever the commissioner otherwise begins to expend money for investigation, identification, containment or clean up of a particular site under this part, the commissioner may file a notice with the office of the register of deeds of the county in which the property lies.

(b) Within one (1) year after the completion of a project to contain or clean up the hazardous substance at a particular site under this part, the commissioner shall itemize the money so expended and shall file a statement thereof in the office of the register of deeds of the county in which the property lies, together with notarized appraisals by an independent appraiser of the value of the property before and after the clean up work performed at the site, if the money so expended shall result in a significant increase in property values. Such statement shall constitute a lien upon such land. The lien shall not exceed the amount determined by the appraisal to be the increase in the market value of the property as a result of the clean up work.

(c) If the property owner is aggrieved by the amount of the lien filed under subsection (a), the property owner may cause another appraisal to be performed by an independent appraiser and may submit the matter to the chancery court of the county in which the property is located to determine the appropriate amount of the lien. A decision of that court may be appealed according to the Tennessee Rules of Appellate Procedure.

(d) The lien provided in this section shall be entered in the records of the register of deeds of the county in which the property lies. Such statements shall constitute a lien upon such property as of the date the notice is filed pursuant to subsection (a), and shall have priority as a lien second only to tax liens. Such a lien shall be satisfied to the extent of the value of the consideration received at the time of transfer of ownership, and if the lien is not fully satisfied at the time of transfer, it shall remain a lien on the property until it is fully satisfied.

(e) A form of notice substantially as follows is sufficient to comply with subsection (a):

**NOTICE OF LIEN UNDER  
HAZARDOUS WASTE MANAGEMENT ACT OF 1983**

Name of titleholder(s) .....  
Property address .....  
Description of property subject to possible lien sufficient to identify  
such property .....

Legislative Reference Library  
P.O. Box 7 - State Capitol  
Nashville, Tennessee 37243

Date, signature, and address of the Commissioner or his authorized designee .....

The register of deeds shall note the date and time of filing, and an appropriate registration number, and shall record the notice in the lien book in the office of the register.

(f) The effective date of all prior liens claimed under this chapter shall be unaffected by the 1986 amendment to this section if a notice is filed in accordance with subsection (a) of this section on or before December 31, 1986, which notice shall set forth, in addition to the information required by subsection (e) hereof, the claimed effective date of the lien if earlier than the date of the filing of the notice. After December 31, 1986, all claimed liens shall be effective as of the date the notice is filed pursuant to subsection (a). [Acts 1983, ch. 423, § 9; 1986, ch. 528, § 1.]

Compiler's Notes. Acts 1986, ch. 528, § 1, added (a), (e), and (f) and amended (d).

**68-46-210. Responsible waste disposal incentive fund.** — (a) There is created a special agency account in the general fund to be known as the "responsible waste disposal incentive fund."

(b) There is appropriated to the responsible waste disposal incentive fund the sum of five hundred thousand dollars (\$500,000) for fiscal year 1983-1984 and there shall be appropriated the sum of one million five hundred thousand dollars (\$1,500,000) for fiscal year 1984-1985.

(c) Interest accruing on investments and deposits of such fund shall be returned to it and remain a part of such fund.

(d) Any unencumbered and any unexpended balance of this fund remaining at the end of any fiscal year shall not revert to the general fund, but shall be carried forward until expended in accordance with the provisions of this section.

(e)(1) The board shall promulgate rules and regulations in accordance with the provisions of the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, to establish eligibility requirements for a local government to receive the money deposited in the responsible waste disposal incentive fund.

(2) At a minimum, for a local government to be eligible to receive such funds, the commercial facility must be located within the jurisdiction of such local government, such facility must have a permit to operate pursuant to the provisions of § 68-46-108, such facility must be constructed and operational and the following standards must be met:

(A) The facility is multi-purpose with both land disposal capability and facilities for advanced technology, high-temperature thermal treatment;

(B) The facility has a minimum design capacity to operate for twenty (20) years;

(C) The facility is operated pursuant to the provisions of part 1 of this chapter; and

(D) The local government with jurisdiction over the facility does not have any zoning requirement, subdivision regulation, ordinance, regulation or

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## R.S. 30:1149.6

## MINERALS, OIL, AND GAS

compel cleanup or containment consistent with regulations and guidelines established by the secretary.

E. (1) When a site has been declared an abandoned hazardous waste site, the secretary is authorized to undertake the physical control, containment and cleanup, or closure of the abandoned hazardous waste site and may retain personnel for these purposes who shall operate under his direction.

(2) In all cases in which the secretary proposes to treat, store, or dispose of hazardous wastes at the abandoned hazardous waste site, he shall prepare a closure plan setting forth how the site will be closed. The secretary shall provide an opportunity for the public to submit comments about the plan. The secretary shall provide adequate notice to the public of any public hearings on the closure plan by placing a notice in the general circulation newspaper of the parish in which the hearing is to be held. If the secretary determines that immediate action is required to secure the site or dispose of any waste in order to protect the health or safety of persons affected by the site or its contents or to protect the environment, he may take such action prior to submission of the plan and may subsequently submit a plan detailing emergency actions taken and those actions which he will be taking in the future.

(3) The secretary shall have authority to implement the closure plan and to take all actions including erecting fences, signs, gates, levees, and monitoring devices as are reasonably necessary to secure the site and prevent unauthorized or inadvertent entry.

F. (1) The secretary, by recording the declaration of abandonment in the mortgage records of the parish where the property is located, may create a lien against property declared to be abandoned to the extent of the expenditures by the state necessary to remedy the problem or to the extent of the appraised value after said expenditures, whichever is less. The secretary may provide in the declaration that the lien is limited to certain portions of property declared to be abandoned and may provide that a lien shall not be recorded against property of a person that the commission finds was in no way responsible for the spill or accident causing the damage requiring the expenditure of money from the fund. The filing of a sworn statement of the amount expended perfects the lien retroactively to the date of the recordation of the declaration. 7

(2) Subsequent to a declaration of abandonment, a person whose property has been declared to be abandoned and against which a lien has been created thereby may apply to the secretary or file an action in the district court to require that the clerk erase the lien from the records if the secretary or the court finds that the spill was in no way caused by any action or negligence on the part of the person who is the owner of the property subject to the lien or may file an action to have the debt reduced to the appraised value of the property. ✓

Added by Acts 1984, No. 674, § 1.

§ 1149.7. Hazardous Waste Assessment Report; requirements; submission

A. The secretary is hereby authorized and mandated to develop a comprehensive evaluation of hazardous waste in Louisiana, and to issue such evaluation in the form of a report as provided for herein. The office of solid and hazardous waste shall assist the secretary in the development and on-going update of the report.

B. Prior to January 31, 1986, the secretary shall present a report as authorized in Subsection A of this Section to the Senate and House Natural Resources Committees. The report shall, at a minimum, provide the following information:

- (1) An inventory of the known hazardous waste sites in Louisiana, including:
  - (a) The types of wastes as determined by the secretary to be present in the waste sites.
  - (b) An estimate of the amount of each type of waste in a waste site as may be reasonably determined by the secretary.

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## 21E § 12

## OFFICERS OF THE COMMONWEALTH

## Code of Massachusetts Regulations

Department of environmental quality engineering,

Availability of public records to general public, see 310 CMR 3.10.

When trade secrets may be disclosed by department, see 310 CMR 3.21.

## § 13. Judgment; interest; lien on property of persons liable

Any liability to the commonwealth under this chapter shall constitute a debt to the commonwealth. Any such debt, together with interest thereon at the rate of twelve per cent per annum from the date such debt becomes due, shall constitute a lien ~~on~~ all property owned by persons liable under this chapter when a statement of claim naming such persons is recorded or filed. ~~If the site described in such statement comprises real property, the statement shall be recorded in each registry of deeds in the commonwealth and shall also be registered in each registry district in which any person named in such statement of claim holds record title to registered land as shown on the current index of registered land owners in such district. The land court certificate number of each such owner shall be noted on the statement when presented for recording and each assistant recorder, upon receipt of such statement, shall note such statement on the owner's certificate of title. In the case of personal property, whether tangible or intangible, the statement shall be filed in accordance with the provisions of section 9-401 of chapter one hundred and six. Any lien recorded, registered or filed pursuant to this section shall have priority over any encumbrance theretofore recorded, registered or filed with respect to any site, other than real property the greater part of which is devoted to single or multi-family housing, described in such statement of claim, but as to all other real property shall be subject to encumbrances or other interests recorded, registered or filed prior to the record, registration or filing of such statement, and as to all other personal property shall be subject to the priority rules of said chapter one hundred and six. Such lien, other than a lien on real property the greater part of which is devoted to single or multi-family housing, shall continue in force with respect to any particular real or personal property until a release of the lien signed by the commissioner is recorded, registered or filed in the place where the statement of claim as to such property affected by the lien was recorded, registered or filed. In addition to discretionary releases of liens, the commissioner shall forthwith issue such a release in any case where the debt for which such lien attached, together with interest and costs thereon, has been paid or legally abated. This section shall not apply to any property, real or personal, tangible or intangible, any money, fees, charges, revenues or otherwise, owned, payable to or by, held in trust by or for, or otherwise owned, operated or managed by the Massachusetts Municipal Wholesale Electric Company established pursuant to chapter seven hundred and seventy-five of the acts of nineteen hundred and seventy-five, Massachusetts municipal light departments organized under chapter one hundred and sixty-four or any other special law, or with respect to any property real or personal whatsoever of municipal light departments administered pursuant to chapters forty-four and one hundred and sixty-four A. Notwithstanding the foregoing, the aforesaid Massachusetts Municipal Wholesale Electric Company and Municipal Light Departments shall use their authority as provided by applicable statutes to assess, contain, or remove any such oil or hazardous material release for which they are responsible under chapter twenty-one E.~~

Added by St.1983, c. 7, § 5. Amended by St.1983, c. 573, § 3.

1983 Amendment. St.1983, c. 573, § 3, an emergency act, approved Dec. 15, 1983, and by § 4 made effective as of March 24, 1983, in the second sentence, substituted "owned by" for "and rights to property, real and personal, presently owned or after acquired, of the", substituted "when" for "if" and "naming such persons is recorded or filed" for "describing the property subject to the lien and signed by the commission-

er, is filed within ninety days after the incurrence of costs and expenses"; rewrote the third sentence, which prior thereto read: "In the case of real property, the statement shall be filed in accepted and recorded by the appropriate registry of deeds."; inserted the fourth sentence designated the former first and second sentences of the second paragraph as the sixth and seventh

pollution or contamination or emergency results from the joint negligence or other actions of two or more persons, firms or corporations, each shall be liable to the others for a pro rata share of the costs of containing, and removing or otherwise mitigating the effects of the same and for all damage caused thereby.

(b) No person, firm or corporation which renders assistance or advice in mitigating or attempting to mitigate the effects of an actual or threatened discharge of oil or petroleum or chemical liquids or solid, liquid or gaseous products or hazardous materials or which assists in preventing, cleaning-up or disposing of any such discharge shall be held liable, notwithstanding any other provision of law, for civil damages as a result of any act or omission by him in rendering such assistance or advice, except acts or omissions amounting to gross negligence or wilful or wanton misconduct, unless he is compensated for such assistance or advice for more than actual expenses. For the purpose of this subsection, "discharge" means spillage, uncontrolled loss, seepage or filtration and "hazardous materials" means any material or substance designated as such by any state or federal law or regulation.

(c) The immunity provided in this section shall not apply to (1) any person, firm or corporation responsible for such discharge, or under a duty to mitigate the effects of such discharge, (2) any agency or instrumentality of such person, firm or corporation or (3) negligence in the operation of a motor vehicle.

(1969, P.A. 765, S. 5; 1971, P.A. 872, S. 105; P.A. 79-605, S. 6, 17; P.A. 83-374, S. 1, 2; P.A. 86-239, S. 12, 14.)

History: 1971 act replaced reference to water resources commission in Subsec. (b) with reference to environmental protection commissioner; P.A. 79-605 clarified provisions by adding references to containment or mitigation of pollutants, to "solid, liquid or gaseous" products, to hazardous wastes, etc.; Sec. 23-54ff transferred to Sec. 22a-452 in 1983; P.A. 83-374 replaced existing provisions re liability of persons, firms and corporations assisting in cleaning up or disposing of discharges with new provisions and defined "discharge" and "hazardous material" and added Subsec. (c), excluding from the immunities provided those responsible for the discharge or those who are negligent in the operation of a motor vehicle; P.A. 86-239 amended Subsec. (a) by authorizing municipalities to be reimbursed for clean-up expenses.

**Sec. 22a-452a. State lien against real estate as security for amounts paid to clean up hazardous waste.** (a) On and after June 3, 1985, any amount paid by the commissioner of environmental protection pursuant to subsection (b) of section 22a-451 to contain and remove or mitigate the effects of a spill shall be a lien against the real estate of the person causing such spill in accordance with the provisions of this section.

(b) A lien pursuant to this section shall not be effective unless (1) a certificate of lien is filed in the land records of each town in which the real estate is located, describing the real estate, the amount of the lien, the name of the owner as grantor and the name of the person causing the spill, if known, and (2) the commissioner mails a copy of the certificate to such persons and to all other persons of record holding an interest in such real estate over which the commissioner's lien is entitled to priority.

(c) Such lien shall take precedence over all transfers and encumbrances recorded on or after June 3, 1985, in any manner affecting such interest in such real estate or any part of it on which the spill occurred or from which the spill emanated, or real estate which has been included, within the preceding three years, in the property description of such real estate and is contiguous to such real estate. This subsection shall not apply to real estate which consists exclusively of residential real estate, including but not limited to, residential units in any common interest community, as defined in section 47-202.

(d) In the case of all other real estate, including real estate which consists exclusively of residential real estate, including but not limited to, residential units in any common interest community, as defined in section 47-202, the lien shall take precedence over any transfer or encumbrance recorded after the commissioner files with the town clerk notice of intent to file a lien on the land records in the town in which the real estate is located.

(e) When any amount with respect to which a lien has been recorded under the provisions of this section has been paid or reduced, the commissioner, upon request of any interested party, shall issue a certificate discharging or partially discharging such lien, which certificate may be recorded in the same office in which the lien was recorded. Any action for reduction or discharge of such lien or any appeal therefrom shall be in accordance with the provisions of sections 49-35a to 49-35c, inclusive, except that the forms prescribed in section 49-35a shall be modified as the court deems appropriate. Any action for the foreclosure of such lien shall be brought by the attorney general in the name of the state in the superior court for the judicial district in which the property subject to such lien is situated, or, if such property is located in two or more judicial districts, in the superior court for any one such judicial district, and the court may limit the time for redemption or order the sale of such property or make such other or further decree as it judges equitable.

(P.A. 84-535, S. 2; P.A. 85-443, S. 2, 5.)

History: P.A. 85-443 divided section into Subsecs. and amended Subsec. (a) to apply section to amounts paid after June 3, 1985, instead of October 1, 1984; inserted new provisions as Subsec. (b) to require filing of the lien in the town clerk's office; amended Subsec. (c) to give the lien precedence over transfers and encumbrances to property on which the spill occurred or emanated from three years prior to the spill except residential real estate; inserted new provisions as Subsec. (d) to give the lien precedence over all transfers after filing, and amended Subsec. (e) to authorize the commissioner to issue a certificate partially discharging the lien.

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**Sec. 22a-452b. Exemption.** Notwithstanding any provision of the general statutes, a mortgagee who acquires title to real estate by virtue of a foreclosure or tender of a deed in lieu of foreclosure, shall not be liable for any assessment, fine or other costs imposed by the state for any spill upon such real estate beyond the value of such real estate, provided such spill occurred prior to the date of acquisition of title to such real estate by such mortgagee.

(P.A. 85-443, S. 3, 5.)

**Sec. 22a-452c. Definition of spill.** For the purposes of sections 22a-452a and 22a-452b, "spill" means the discharge, spillage, uncontrolled loss, seepage or filtration of oil or petroleum or chemical liquids or solid, liquid or gaseous products or hazardous waste.

(P.A. 85-443, S. 1, 5.)

**Sec. 22a-453. (Formerly Sec. 25-54gg). Coordination of activities with other agencies. Contracts for services.** The commissioner shall represent the state in its relations with the federal government and with any municipality and with any regional or interstate authority in all matters relating to oil or petroleum or chemical liquids or solid, liquid or gaseous products or hazardous wastes pollution or contamination or emergency resulting from the discharge, spillage, uncontrolled loss, seepage or filtration of such substance or material or waste. Said commissioner may enter into agreements with the federal government, such municipalities or authorities, to coordinate supervisory activities and, subject to adequate appropriations, share reasonable costs. The



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R.S. 30:1149.6

MINERALS, OIL, AND GAS

compel cleanup or containment consistent with regulations and guidelines established by the secretary.

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(2) In all cases in which the secretary proposes to treat, store, or dispose of hazardous wastes at the abandoned hazardous waste site, he shall prepare a closure plan setting forth how the site will be closed. The secretary shall provide an opportunity for the public to submit comments about the plan. The secretary shall provide adequate notice to the public of any public hearings on the closure plan by placing a notice in the general circulation newspaper of the parish in which the hearing is to be held. If the secretary determines that immediate action is required to secure the site or dispose of any waste in order to protect the health or safety of persons affected by the site or its contents or to protect the environment, he may take such action prior to submission of the plan and may subsequently submit a plan detailing emergency actions taken and those actions which he will be taking in the future.

(3) The secretary shall have authority to implement the closure plan and to take all actions including erecting fences, signs, gates, levees, and monitoring devices as are reasonably necessary to secure the site and prevent unauthorized or inadvertent entry.

F. (1) The secretary, by recording the declaration of abandonment in the mortgage records of the parish where the property is located, may create a lien against property declared to be abandoned to the extent of the expenditures by the state necessary to remedy the problem or to the extent of the appraised value after said expenditures, whichever is less. The secretary may provide in the declaration that the lien is limited to certain portions of property declared to be abandoned and may provide that a lien shall not be recorded against property of a person that the commission finds was in no way responsible for the spill or accident causing the damage requiring the expenditure of money from the fund. The filing of a sworn statement of the amount expended perfects the lien retroactively to the date of the recordation of the declaration.

(2) Subsequent to a declaration of abandonment, a person whose property has been declared to be abandoned and against which a lien has been created thereby may apply to the secretary or file an action in the district court to require that the clerk erase the lien from the records if the secretary or the court finds that the spill was in no way caused by any action or negligence on the part of the person who is the owner of the property subject to the lien or may file an action to have the debt reduced to the appraised value of the property.

Added by Acts 1984, No. 674, § 1.

§ 1149.7. Hazardous Waste Assessment Report; requirements; submission

A. The secretary is hereby authorized and mandated to develop a comprehensive evaluation of hazardous waste in Louisiana, and to issue such evaluation in the form of a report as provided for herein. The office of solid and hazardous waste shall assist the secretary in the development and on-going update of the report.

B. Prior to January 31, 1986, the secretary shall present a report as authorized in Subsection A of this Section to the Senate and House Natural Resources Committees. The report shall, at a minimum, provide the following information:

- (1) An inventory of the known hazardous waste sites in Louisiana, including:
  - (a) The types of wastes as determined by the secretary to be present in the waste sites.
  - (b) An estimate of the amount of each type of waste in a waste site as may be reasonably determined by the secretary.

STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

January 22, 1988

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

Dear Representative Grussendorf:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to recovery of state costs incurred in containing or cleaning up oil and hazardous substance spills.

This bill is needed because of cases where parties responsible for oil and hazardous substance spills have declared bankruptcy or left the state. The state is left to remove the hazard with little hope of recovering the costs. Clean-up of such discharges can be enormously expensive, running into the millions of dollars on large spills.

Once a state has undertaken that expense, it can seek to recover its costs against the liable party, but if that party has declared bankruptcy or fled, the state might not be able to obtain repayment from the liable party's remaining assets. The U.S. Supreme Court has ruled that in this situation the responsible party's liability to the state is a debt that can be discharged through bankruptcy like any other debt. Ohio v. Kovacs, 469 U.S. 274 (1985).

But the court also noted that a state could protect itself from the effects of a liable party's bankruptcy by enacting a law giving the state a priority lien on the liable party's assets for the state's costs in remedying a hazardous substance problem. This bill is intended to implement the supreme court's suggestion. Many states already have statutes such as this (e.g., Massachusetts [M.G.L.A. c. 21E, sec. 13]; Connecticut [Conn. Genl. Stats. 22a-452a]; Tennessee [T.C.A. 68-46-209]; Louisiana [LSA-RS 30:1149.6]).

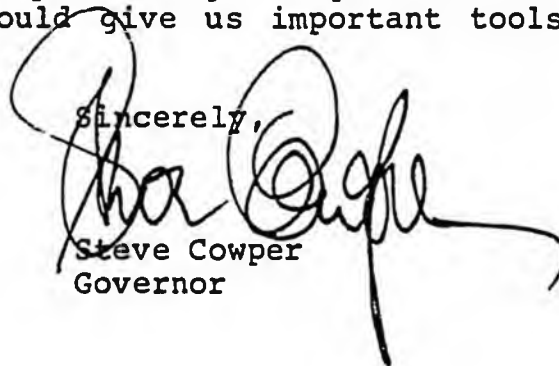
The bill adds a new section to AS 46.08, the chapter on oil and hazardous substance releases. Subsection (a) creates a lien in favor of the state whenever money from the oil and hazardous substance release response fund or any other state fund is used to contain, clean up, or mitigate an oil or hazardous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

Subsection (b) states the mechanics of 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. Subsection (c) contains the important provision that a lien established under the new section takes priority over other liens (except those existing before this bill takes effect), and states the exception for residential real property. As to residential real property, subsec. (d) states that this lien does not have an automatic priority, but only takes precedence over liens filed later. That provision is intended to avoid difficulties with the residential mortgage market, in which lenders might be reluctant to lend for home mortgages if such a mortgage could become secondary to a state lien because of an intervening hazardous substance incident.

Subsection (e) requires 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. Subsection (f) permits the owner of property against which such a lien has been asserted to seek a court order removing it. The lien will be released if that person can show that he or she is not liable for the state's costs in a hazardous substance cleanup.

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. I urge your support of it.

Sincerely,

A handwritten signature in black ink, appearing to read "Steve Cowper", written over the typed name and title.

Steve Cowper  
Governor

1 IN THE HOUSE

BY THE RULES COMMITTEE BY  
REQUEST OF THE GOVERNOR

2

HOUSE BILL NO. 389

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

FIFTEENTH LEGISLATURE - SECOND SESSION

5

A BILL

6

For an Act entitled: "An Act relating to recovery of state costs for oil  
and hazardous substance releases; and providing for  
an effective date."

7

8

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

10 \* Section 1. AS 46.08 is amended by adding a new section to read:

11

Sec. 46.08.075. LIENS AGAINST PROPERTY AS SECURITY FOR STATE

12

EXPENDITURES. (a) The state has a lien for expenditures by the state

13

from the oil and hazardous substance release response fund (AS 46.08.-

14

010) or from any other state fund, for the containment, cleanup, or

15

mitigation of oil or hazardous substance spills, against all property

16

owned by a person who is determined by the commissioner to be liable

17

for the expenditures under this chapter, AS 46.03, 46.04, or 46.08,

18

42 U.S.C. sec. 9607, or other state or federal law. The lien includes

19

interest, at the maximum rate allowable under AS 45.45.010(a), from

20

the date of the expenditures.

21

(b) A lien established under this section against real property

22

is not effective unless (1) a certificate of lien is recorded in the

23

district recorder's office for the district in which the property is

24

located, describing the property and stating the amount of the lien,

25

the name of the owner as grantor, and, if known, the name of the

26

person causing the oil or hazardous substance release; and (2) the

27

commissioner mails a copy of the certificate to the persons described

28

in (1) of this subsection and to all other persons of record holding

29

an interest in the property.

1           (c) A lien established under this section is superior to a  
2 transfer, mortgage, attachment, claim, demand, or other encumbrance  
3 established on or after the effective date of this Act, in any manner  
4 affecting the property. This subsection does not apply to real prop-  
5 erty that consists exclusively of residential real property. The  
6 commissioner may adopt regulations defining "residential real proper-  
7 ty" for the purposes of this section.

8           (d) For property consisting exclusively of residential real  
9 property, a lien established under this section is superior to a  
10 transfer, mortgage, attachment, claim, demand, or other encumbrance on  
11 that property recorded after a certificate of lien is recorded under  
12 this section on that property.

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

18           (f) A person with an ownership interest in property against  
19 which a lien is recorded may bring an action in the superior court to  
20 require that the lien be released. The lien must be released if the  
21 court finds that the owner of the property is not liable for the costs  
22 of the state in connection with containment, cleanup, or mitigation of  
23 the oil or hazardous substance release.

24 \* Sec. 2. This Act takes effect immediately under AS 01.10.070(c).

HB

390

# HOUSE COMMITTEE REPORT

(11)

Date referred: 2/26/88

FURTHER REFERRALS:

DATE: 3-9-88

The Finance Committee has considered HB 390

"An Act establishing the Alaska Science and Technology Foundation; relating to the membership of the science and engineering advisory commission; and providing for an effective date."

**RECOMMENDS:**

- replace with CS HB 390 (FIN)  the same title
- attached amendment(s)  a new title
- 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 3/2/88  same as previous fiscal note published 1/22/88
- zero fiscal note  same as previous zero fiscal note published \_\_\_\_\_
- zero with analysis

**SIGNING DO PASS:**

**SIGNING OTHER RECOMMENDATIONS:**

Adams Al Adams

Goll Peter Goll

Boyer Marcel Boyer

Brown Fay Brown

Davis Alvin Davis

Frank John Frank

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Burchot Ray Burchot No rec.

Larson Donald Larson No rec.

Swack Clarence Swack NO REC

Rieger Steve Rieger No Recommendation

Wallis Key Wallis --

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Al Adams  
Chairman's signature

**STATE OF ALASKA  
1988 LEGISLATIVE SESSION**

BILL VERSION: CS HB 390 (FIN)  
PUBLISH DATE: HOUSE 1/22/88

**FISCAL NOTE**

**REQUEST:**

Revision Date: \_\_\_\_\_  
Title: AK Science & Technology  
Foundation  
Sponsor: Rules  
Requestor: Governor

Agency Affected: Revenue  
BRU: \_\_\_\_\_  
Components: \_\_\_\_\_

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

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES		176.4	223.0	308.0	318.0	328.3
TRAVEL		29.0	57.0	82.0	82.0	82.0
CONTRACTUAL		46.0	41.5	41.5	41.5	41.5
SUPPLIES		5.0	5.0	5.0	5.0	5.0
EQUIPMENT		11.8	3.0	6.5	1.5	1.5
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>-0-</b>	<b>268.2</b>	<b>329.5</b>	<b>443.0</b>	<b>448.0</b>	<b>458.3</b>

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

**FUNDING: (Thousands of Dollars)**

GENERAL FUND						
FEDERAL FUNDS						
OTHER	-0-	268.2	329.5	443.0	448.0	458.3
<b>TOTAL</b>						

**POSITIONS:**

FULL-TIME		3	4	6	6	6
PART-TIME						
TEMPORARY						

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

This analysis shows funding required for staff, travel for Board of Directors and staff, contractual, supply and equipment requirements for start-up and operation of Alaska Science and Technology Foundation.

Prepared by: Henry Cole, Sr. Science Advisor Phone: 465-3568  
Division: Office of the Governor Date: 1/21/88

Approved by Commissioner: Hugh Malone Date: January 21, 1988  
Agency: Revenue

**Distribution (by preparer):**

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

FISCAL NOTE

REQUEST:

Revision Date: \_\_\_\_\_  
Title: Establishing the Alaska Science  
and Technology Foundation  
Sponsor: \_\_\_\_\_  
Requestor: \_\_\_\_\_

Agency Affected: Alaska Permanent Fund  
Corporation  
BRU: \_\_\_\_\_  
Components: Alaska Permanent Fund  
Corporation

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES		9.0	9.0	9.0	9.0	9.0
TRAVEL		3.0	3.0	3.0	3.0	3.0
CONTRACTUAL		87.0	87.0	87.0	87.0	87.0
SUPPLIES		1.0	1.0	1.0	1.0	1.0
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		100.0	100.0	100.0	100.0	100.0

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER		100.0	100.0	100.0	100.0	100.0
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Computed at the rate of 10 basis points per \$1000 of funds invested.  
(Note: Costs above for FY 90-93 do not account for inflation.)  
These costs are based on CSHB 390 (HESS) WITH attached Amendment No. 1.

Prepared by: Alaska Permanent Fund Corporation Phone: 465-2047  
Division: \_\_\_\_\_ Date: 3/2/88

Approved by Commissioner: David A. Rose Date: 3/2/88  
Agency: Alaska Permanent Fund Corporation

Distribution (by preparer):

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

Page 2 of 2  
 Fiscal Note  
 (Establishing the Alaska Science and Technology Foundation)

This bill establishes the Alaska Science and Technology Foundation as a fund to be invested by the Alaska Permanent Fund Corporation.

Passage of this bill would require the addition of part-time accounting support to the Alaska Permanent Fund Corporation for investments, accounting and financial reporting; bank custody fees; audit fees; investment management fees; and travel to report to the Science and Technology Foundation Board of Trustees.

FY 89 costs:	<u>Pers.</u> <u>Svcs.</u>	<u>Travel</u>	<u>Contr.</u>	<u>Suppl.</u>
Part-time Accounting	9.0			
Bank Custody, Audit, & Management Fees			87.0	
Investment Officer Travel		3.0		
Miscellaneous Supplies				<u>1.0</u>
<u>TOTAL</u> <u>\$100.0:</u>	\$ 9.0	3.0	87.0	1.0

Original Sponsor: Rules/Governor

1 IN THE HOUSE

BY THE FINANCE COMMITTEE

2 CS FOR HOUSE BILL NO. 390 (Finance)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act establishing the Alaska Science and Technolo-  
7 gy Foundation; relating to the membership of the  
8 science and engineering advisory commission; and  
9 providing for an effective date."

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

11 \* Section 1. AS 37 is amended by adding a new chapter to read:

12 CHAPTER 17. ALASKA SCIENCE AND TECHNOLOGY FOUNDATION.

13 Sec. 37.17.010. FOUNDATION ESTABLISHED. (a) The Alaska Science  
14 and Technology Foundation is established as a public corporation in  
15 the Department of Revenue.

16 (b) The purpose of the foundation is to promote and enhance  
17 through basic and applied research: economic development and techno-  
18 logical innovation in Alaska; public health; and sustained growth and  
19 development of Alaskan scientific and engineering capabilities.

20 Sec. 37.17.020. ENDOWMENT ESTABLISHED; INVESTMENT. (a) In  
21 order to support the foundation, the Alaska science and technology  
22 endowment is established, consisting of money appropriated to the  
23 Alaska Permanent Fund Corporation for the benefit of the foundation.

24 (b) The endowment shall be held and invested by the Alaska  
25 Permanent Fund Corporation as part of the principal of the Alaska  
26 permanent fund, subject to AS 37.13.120; however, net income from the  
27 endowment shall be distributed under this chapter. Net income from  
28 the endowment may not be included in the computation of net income  
29 available for distribution under AS 37.13.140.

1           Sec. 37.17.030. ENDOWMENT INCOME; EXPENSES; GRANTS. (a) Upon  
2 application of the foundation's board of directors or its authorized  
3 representative, the Alaska Permanent Fund Corporation shall pay to the  
4 foundation a portion or all of the income then accrued from the endow-  
5 ment. The net annual realized capital gains of the endowment may be  
6 equally divided between the income and the principal of the endowment.  
7 The distribution of the income and realized capital gains of the  
8 endowment is subject to AS 37.07.

9           (b) In addition to endowment income, the foundation may receive  
10 gifts, grants, and other aid. The foundation may accumulate income,  
11 gifts, grants, and other aid from any one year and distribute them in  
12 a later year.

13           (c) The administrative expenses of the foundation are subject to  
14 AS 37.07 and shall be paid from the income of the endowment.

15           (d) The board of directors shall distribute the income of the  
16 endowment through competitive grants under this chapter. The board  
17 may disburse money that is received by the foundation for special or  
18 general purposes.

19           (e) Subject to AS 37.07, the board of directors may pay into the  
20 principal of the endowment any part of the endowment income. Money  
21 paid to the principal under this subsection may not later be withdrawn  
22 by the board of directors.

23           Sec. 37.17.040. BOARD OF DIRECTORS. (a) The foundation is  
24 governed and administered by a board of directors appointed by the  
25 governor to serve staggered terms of four years. A member serves on  
26 the board until a successor qualifies and is appointed. A member of  
27 the board of directors may be removed from the board by the governor  
28 for cause.

29           (b) The board of directors is composed of nine members, as

1 follows:

2 (1) two members must be scientists or engineers residing in  
3 Alaska who are recognized contributors in the science or engineering  
4 fields, one of whom is employed by the University of Alaska;

5 (2) two members must be scientists or engineers residing  
6 outside Alaska who are recognized contributors in the science or  
7 engineering fields;

8 (3) four members of the public, at least two of whom have  
9 recognized expertise or experience in resource development, manufac-  
10 turing, finance, or public health;

11 (4) one member who is employed by a department or agency of  
12 the state, other than the University of Alaska.

13 Sec. 37.17.050. ELECTION OF OFFICERS. The board of directors  
14 shall elect a chairperson and a secretary from its members, each to  
15 serve for a term not to exceed two years.

16 Sec. 37.17.060. QUORUM. A majority of the board constitutes a  
17 quorum for the transaction of business.

18 Sec. 37.17.070. MEETINGS AND REIMBURSEMENT FOR EXPENSES. The  
19 board shall meet at least twice a year. Additional meetings may be  
20 called at the discretion of the chairperson. Board members are enti-  
21 tled to per diem and travel expenses authorized for boards and com-  
22 missions under AS 39.20.180. Board members not employed by the state  
23 or the University of Alaska receive an honorarium of \$400 for each day  
24 spent on official business of the board, not to exceed a total of 30  
25 days per annum.

26 Sec. 37.17.080. STAFF. The board of directors shall employ and  
27 determine the salary of an executive director, subject to AS 37.07.  
28 The executive director serves at the pleasure of the board. The  
29 executive director may, with approval of the board, select and employ

1 additional staff as necessary. An employee of the foundation, includ-  
2 ing the executive director, may not be a member of the board. The  
3 executive director and the other employees of the foundation are in  
4 the exempt service under AS 39.25.110.

5 Sec. 37.17.090. GRANT PROCEDURES, LIMITATION, AND REQUIREMENTS.

6 (a) The board of directors shall provide adequate and appropriate  
7 notice of all solicitations for grant proposals at least once a year.  
8 The board shall give preference, consistent with the purposes of this  
9 chapter, to soliciting proposals for research projects that are rea-  
10 sonably expected to use or enhance research capabilities for basic and  
11 applied research in the state. The board may actively solicit per-  
12 sons, organizations, or institutions to apply for general or specific  
13 grants.

14 (b) Grant proposals must be submitted for impartial and competi-  
15 tive peer review for scientific and technical validity by a panel of  
16 recognized experts appointed by the board of directors. Members of a  
17 peer review panel are entitled to per diem and travel expenses author-  
18 ized under AS 39.20.180. The identity of members of a peer review  
19 panel is confidential until final action is taken by the board on the  
20 grant proposal. The board shall consider the recommendations of the  
21 panel in deciding whether to award a grant. The board may exempt  
22 grants of \$5,000 or less from peer review.

23 (c) Grant awards by the board must be consistent with the policy  
24 and research priorities identified by the Alaska Science and Engineer-  
25 ing Advisory Commission.

26 (d) Not less than 50 percent of the endowment income that is  
27 distributed as grants by the foundation in a fiscal year must be for  
28 grants of \$100,000 or less, exclusive of other funding.

29 (e) The board of directors shall, as a condition of a grant, and

1 as necessary, set the maximum percentage of a grant award that may be  
2 expended by a grantee to pay for overhead costs of the grantee's proj-  
3 ect.

4 (f) The board shall require from each grant recipient periodic  
5 reports and a final report. The board shall disseminate to the  
6 scientific community and to the public, on a regular basis, the re-  
7 sults of research sponsored by the foundation. Proprietary reports  
8 and other information voluntarily filed with the board or critical to  
9 patent applications may be kept confidential if the person providing  
10 the information so requests and the board finds that it is in the best  
11 interest of the state. Information developed under a grant awarded by  
12 the board is public information unless the applicant requests and the  
13 board grants confidentiality prior to the award of the grant. Dis-  
14 semination of sponsored research must be in a form of greatest utility  
15 to the scientific community and the general public and may include  
16 technological transfer or applications information for promising  
17 results.

18 (g) As a condition of all grants awarded under this chapter, the  
19 board of directors shall require that a fair and reasonable percentage  
20 of all income, if any, from royalties, licenses, and patents produced  
21 as a result of the grant be paid into the principal of the endowment,  
22 subject to AS 37.07.

23 (h) In awarding a grant under this chapter, the board of direc-  
24 tors shall give preference to an applicant who is an Alaska resident,  
25 association, organization, or institution. If the board determines  
26 that an Alaskan applicant does not have the expertise or capability to  
27 satisfactorily perform the grant research without assistance from an  
28 out-of-state person or institution, the board may award a grant,  
29 jointly, to the Alaskan applicant and an approved out-of-state person

1 or institution. If a grant is awarded to an out-of-state person or  
2 institution, the board may require that the out-of-state grantee  
3 associate with an Alaska scientific or technical organization while  
4 performing the grant research. In all cases, a grant may be awarded  
5 only if the board determines that the research to be performed will  
6 further the purposes of the foundation under AS 37.17.010(b).

7 (i) A grant may include money to obtain equipment. The equip-  
8 ment is the property of the foundation. At the termination of the  
9 grant, the equipment shall be disposed of at the discretion of the  
10 board.

11 (j) The board of directors shall provide a written report of its  
12 activities and finances to the governor and the legislature no later  
13 than January 30 each year.

14 Sec. 37.17.100. CONFLICT OF INTEREST. (a) Members of the board  
15 of directors are subject to AS 39.52 (Alaska Executive Branch Ethics  
16 Act).

17 (b) The board of directors shall adopt a written policy, in  
18 addition to the requirements of AS 39.52, to address potential con-  
19 flicts of interest of its members and members of a peer review panel.

20 Sec. 37.17.110. REGULATIONS. The board of directors may adopt  
21 regulations to implement this chapter.

22 \* Sec. 2. AS 39.25.110 is amended by adding a new paragraph to read:

23 (25) the executive director and staff of the Alaska Science  
24 and Technology Foundation (AS 37.17.010).

25 \* Sec. 3. AS 44.19.257(a) is amended to read:

26 (a) The commission is composed of eight [SEVEN] members ap-  
27 pointed by the governor as follows:

28 (1) one member is to be appointed from individuals from the  
29 academic institutions in [OF] the state with expertise in areas of

1 research relating to the state, including the physical, biological,  
2 health, environmental, social, and behavioral sciences;

3 (2) one member is to be appointed from individuals who are  
4 engaged in activities furthering the welfare of the human and physical  
5 environment and who have expertise in areas of research relating to  
6 the state, including the physical, biological, health, environmental,  
7 social, and behavioral sciences;

8 (3) one member is to be appointed from state departments  
9 with research needs;

10 (4) one member is to be appointed from individuals familiar  
11 with the state and representative of the needs and interests of pri-  
12 vate industry;

13 (5) one member is to be appointed from individuals with  
14 experience in national and international research programs;

15 (6) one member is to be appointed from the general public;

16 [AND]

17 (7) the executive director of the Alaska Science and Tech-  
18 nology Foundation established under AS 37.17; and

19 (8) the senior science advisor in the governor's office,  
20 who serves as chairperson [CHAIRMAN] and director of the commission.

21 \* Sec. 4. AS 44.19.259 is amended to read:

22 Sec. 44.19.259. TERM OF MEMBERS OF THE COMMISSION. Members of  
23 the commission, other than the senior science advisor and the execu-  
24 tive director of the Alaska Science and Technology Foundation, serve  
25 staggered terms of four years and until a successor qualifies and is  
26 appointed.

27 \* Sec. 5. This Act takes effect immediately under AS 01.10.070(c).  
28  
29

A M E N D M E N T

Offered in the HOUSE

By Rieger

TO: CSHB 390(FIN)

Page 4, after line 7:

Insert "The board shall give preference, consistent with the purposes of this act, to soliciting proposals for research projects that are reasonably expected to use or enhance research capabilities for basic and applied research in the state."

adopted  
3/8/88

go0038hL  
Utermohle  
3/7/88

Original Sponsor: Rules/Governor

[ ] DELETED  
LANGUAGE

NEW LANGUAGE

1 IN THE HOUSE

BY THE FINANCE COMMITTEE

2 CS FOR HOUSE BILL NO. 390 (Finance)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act establishing the Alaska Science and Technolo-  
7 gy Foundation; relating to the membership of the  
8 science and engineering advisory commission; and  
9 providing for an effective date."

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

11 \* Section 1. AS 37 is amended by adding a new chapter to read:

12 CHAPTER 17. ALASKA SCIENCE AND TECHNOLOGY FOUNDATION.

13 Sec. 37.17.010. FOUNDATION ESTABLISHED. (a) The Alaska Science  
14 and Technology Foundation is established as a public corporation in  
15 the Department of Revenue.

16 (b) The purpose of the foundation is to promote and enhance  
17 through basic and applied research: economic development and techno-  
18 logical innovation in Alaska; public health; and sustained growth and  
19 development of Alaskan scientific and engineering capabilities.

20 Sec. 37.17.020. ENDOWMENT ESTABLISHED; INVESTMENT. (a) In  
21 order to support the foundation, the Alaska science and technology  
22 endowment is established, consisting of money appropriated to the  
23 Alaska Permanent Fund Corporation for the benefit of the foundation.

24 [ For the purposes of investment of the endowment, the AK Perm Fund Corp. is subject to  
25 (b) The endowment shall be held and invested by the Alaska  
26 AS 37.13.120, except that amounts approp. for purposes of the endowment do not become a  
27 Permanent Fund Corporation as part of the principal of the Alaska  
28 part of the principal of the AK perm. fund, & the endowment income must be distributed  
29 permanent fund, subject to AS 37.13.120; however, net income from the  
endowment shall be distributed under this chapter. Net income from  
the endowment may not be included in the computation of net income  
available for distribution under AS 37.13.140.

1           Sec. 37.17.030. ENDOWMENT INCOME; EXPENSES; GRANTS. (a) Upon  
2 application of the foundation's board of directors or its authorized  
3 representative, the Alaska Permanent Fund Corporation shall pay to the  
4 foundation a portion or all of the income then accrued from the endow-  
5 ment. The net annual realized capital gains of the endowment <sup>[shall]</sup> may be  
6 equally divided between the income and the principal of the endowment.  
7 The distribution of the income and realized capital gains of the  
8 endowment is subject to AS 37.07.

9           (b) In addition to endowment income, the foundation may receive  
10 gifts, grants, and other aid. The foundation may accumulate income,  
11 gifts, grants, and other aid from any one year and distribute them in  
12 a later year.

13           (c) The administrative expenses of the foundation are subject to  
14 <sup>[The EXEC. Budget Act + must]</sup> AS 37.07 and shall be paid from the income of the endowment.

15           (d) The board of directors shall distribute the income of the  
16 endowment through competitive grants <sup>[in accordance with]</sup> under this chapter. The board  
17 may disburse money that is received by the foundation for special or  
18 general purposes.

19           (e) Subject to AS 37.07, the board of directors may pay into the  
20 principal of the endowment any part of the endowment income. Money  
21 paid to the principal under this subsection may not later be withdrawn  
22 by the board of directors.

23           Sec. 37.17.040. BOARD OF DIRECTORS. (a) The foundation is  
24 governed and administered <sup>[in accordance w/this chapter]</sup> by a board of directors appointed by the  
25 <sup>[+ confirmed by the legislature]</sup> governor to serve staggered terms of four years. A member serves on  
26 the board until a successor qualifies and is appointed. A member of  
27 the board of directors may be removed from the board by the governor  
28 for cause.

29           (b) The board of directors is composed of nine members, as

1 follows:

2 (1) two members must be scientists or engineers residing in  
3 Alaska who are recognized contributors in the science or engineering  
4 fields, one of whom is employed by the University of Alaska;

5 (2) two <sup>[non-voting]</sup> members must be scientists or engineers residing  
6 outside Alaska who are recognized contributors in the science or  
7 engineering fields;

8 (3) four members of the public, at least two of whom have  
9 recognized expertise or experience in resource development, manufac-  
10 turing, finance, or public health;

11 (4) one member who is employed by a department or agency of  
12 the state, other than the University of Alaska.

13 Sec. 37.17.050. ELECTION OF OFFICERS. The board of directors  
14 shall elect a chairperson and a secretary from its members, each to  
15 serve for a term not to exceed two years.

16 Sec. 37.17.060. QUORUM. A majority of the board constitutes a  
17 quorum for the transaction of business.

18 Sec. 37.17.070. MEETINGS AND REIMBURSEMENT FOR EXPENSES. The  
19 board shall meet at least twice a year. Additional meetings may be  
20 called at the discretion of the chairperson. Board members are enti-  
21 tled to per diem and travel expenses authorized for boards and com-  
22 missions under AS 39.20.180. Board members not employed by the state  
23 or the University of Alaska receive an honorarium of \$400 for each day  
24 spent on official business of the board, not to exceed a total of 30  
25 days per annum.

26 Sec. 37.17.080. STAFF. The board of directors shall employ and  
27 determine the salary of an executive director, subject to AS 37.07.A <sup>[The</sup>  
28 <sup>Exec Budget Act]</sup> The executive director serves at the pleasure of the board. The  
29 executive director may, with approval of the board, select and employ

1 additional staff as necessary. <sup>[no]</sup> An employee of the foundation, includ-  
2 ing the executive director, may not be a member of the board. The  
3 executive director and the other employees of the foundation are in  
4 the exempt service under AS 39.25.110.

5 Sec. 37.17.090. GRANT PROCEDURES, LIMITATION, AND REQUIREMENTS.

6 (a) The board of directors shall provide adequate and appropriate  
7 notice of all solicitations for grant proposals at least once a year.  
8 The board may actively solicit persons, organizations, or institutions  
9 to apply for general or specific grants.

10 (b) Grant proposals must be submitted for impartial and compet-  
11 itive peer review for scientific and technical validity by a panel of  
12 recognized experts appointed by the board of directors. Members of a  
13 peer review panel are entitled to per diem and travel expenses autho-  
14 riized under AS 39.20.180. The identity of members of a peer review  
15 panel is confidential until final action is taken by the board on the  
16 grant proposal. The board shall consider the recommendations of the  
17 panel in deciding whether to award a grant. The board may exempt  
18 grants of \$5,000 or less from peer review.

19 <sup>[In making its grant awards, the board shall take into consideration]</sup>  
20 (c) Grant awards by the board must be consistent with the policy  
21 and research priorities identified by the Alaska Science and Engineer-  
22 ing Advisory Commission.

23 (d) Not less than 50 percent of the endowment income that is  
24 distributed as grants by the foundation in a fiscal year must be for  
25 grants of \$100,000 or less, exclusive of other funding.

26 (e) The board of directors shall, as a condition of a grant, and  
27 as necessary, set the maximum percentage of a grant award that may be  
28 expended by a grantee to pay for overhead costs of the grantee's proj-  
29 ect.

(f) The board shall require from each grant recipient periodic

1 reports and a final report. The board shall disseminate to the  
2 scientific community and to the public, on a regular basis, the re-  
3 sults of research sponsored by the foundation. Proprietary reports  
4 and other information voluntarily filed with the board or critical to  
5 patent applications may be kept confidential if the person providing  
6 the information so requests and <sup>[it is considered necessary</sup> the board finds that it is in the best  
7 <sup>by the board.]</sup> interest of the state. Information developed under a grant awarded by  
8 the board is public information unless the applicant requests and the  
9 board grants confidentiality prior to the award of the grant. Dis-  
10 semination of sponsored research must be in a form of greatest utility  
11 to the scientific community and the general public and may include  
12 technological transfer or applications information for promising  
13 results.

14 (g) As a condition of all grants awarded under this chapter, the  
15 board of directors shall <sup>[MAY]</sup> require that a fair and reasonable percentage  
16 of all income, if any, from royalties, licenses, and patents produced  
17 as a result of the grant be paid into the principal of the endowment,  
18 subject to AS 37.07.

19 (h) In awarding a grant under this chapter, the board of direc-  
20 tors shall give preference to an applicant who is an Alaska resident,  
21 association, organization, or institution. If the board determines  
22 that an Alaskan applicant does not have the expertise or capability to  
23 satisfactorily perform the grant research without assistance from an  
24 out-of-state person or institution, the board may award a grant,  
25 jointly, to the Alaskan applicant and an approved out-of-state person  
26 or institution. If a grant is awarded to an out-of-state person or  
27 institution, the board may require that the out-of-state grantee  
28 associate with an Alaska scientific or technical organization while  
29 performing the grant research. In all cases, a grant may be awarded

1 only if the board determines that the research to be performed will  
2 further the purposes of the foundation under AS 37.17.010(b).

3 (i) A grant may include money to obtain equipment. The equip-  
4 ment is the property of the foundation. At the termination of the  
5 grant, the equipment shall be disposed of at the discretion of the  
6 board.

7 (j) The board of directors shall provide a written report of its  
8 activities and finances to the governor and the legislature no later  
9 than January 30 each year.

10 Sec. 37.17.100. CONFLICT OF INTEREST. (a) Members of the board  
11 of directors are subject to AS 39.52 (Alaska Executive Branch Ethics  
12 Act).

13 (b) The board of directors shall adopt a written policy, in  
14 addition to the requirements of AS 39.52, to address potential con-  
15 flicts of interest of its members and members of a peer review panel.

16 Sec. 37.17.110. REGULATIONS. The board of directors may adopt  
17 regulations to implement this chapter.

18 \* Sec. 2. AS 39.25.110 is amended by adding a new paragraph to read:

19 (25) the executive director and staff of the Alaska Science  
20 and Technology Foundation (AS 37.17.010).

21 \* Sec. 3. AS 44.19.257(a) is amended to read:

22 (a) The commission is composed of eight [SEVEN] members ap-  
23 pointed by the governor as follows:

24 (1) one member is to be appointed from individuals from the  
25 academic institutions in [OF] the state with expertise in areas of  
26 research relating to the state, including the physical, biological,  
27 health, environmental, social, and behavioral sciences;

28 (2) one member is to be appointed from individuals who are  
29 engaged in activities furthering the welfare of the human and physical

1 environment and who have expertise in areas of research relating to  
2 the state, including the physical, biological, health, environmental,  
3 social, and behavioral sciences;

4 (3) one member is to be appointed from state departments  
5 with research needs;

6 (4) one member is to be appointed from individuals familiar  
7 with the state and representative of the needs and interests of pri-  
8 vate industry;

9 (5) one member is to be appointed from individuals with  
10 experience in national and international research programs;

11 (6) one member is to be appointed from the general public;

12 [AND]

13 (7) the executive director of the Alaska Science and Tech-  
14 nology Foundation established under AS 37.17; and

15 (8) the senior science advisor in the governor's office,  
16 who serves as chairperson [CHAIRMAN] and director of the commission.

17 \* Sec. 4. AS 44.19.259 is amended to read:

18 Sec. 44.19.259. TERM OF MEMBERS OF THE COMMISSION. Members of  
19 the commission, other than the senior science advisor and the execu-  
20 tive director of the Alaska Science and Technology Foundation, serve  
21 staggered terms of four years and until a successor qualifies and is  
22 appointed.

23 \* Sec. 5. This Act takes effect immediately under AS 01.10.070(c).

**STATE OF ALASKA  
1988 LEGISLATIVE SESSION**

BILL VERSION: CS HB-390 (FIN)  
PUBLISH DATE: HOUSE 1/22/88

**FISCAL NOTE**

**REQUEST:**

Revision Date: \_\_\_\_\_  
Title: AK Science & Technology  
Foundation  
Sponsor: Rules  
Requestor: Governor

Agency Affected: Revenue  
BRU: \_\_\_\_\_  
Components: \_\_\_\_\_

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

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES		176.4	223.0	308.0	318.0	328.3
TRAVEL		29.0	57.0	82.0	82.0	82.0
CONTRACTUAL		46.0	41.5	41.5	41.5	41.5
SUPPLIES		5.0	5.0	5.0	5.0	5.0
EQUIPMENT		11.8	3.0	6.5	1.5	1.5
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>-0-</b>	<b>268.2</b>	<b>329.5</b>	<b>443.0</b>	<b>448.0</b>	<b>458.3</b>

CAPITAL						
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REVENUE						
---------	--	--	--	--	--	--

**FUNDING: (Thousands of Dollars)**

GENERAL FUND						
FEDERAL FUNDS						
OTHER	-0-	268.2	329.5	443.0	448.0	458.3
<b>TOTAL</b>						

**POSITIONS:**

FULL-TIME		3	4	6	6	6
PART-TIME						
TEMPORARY						

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

This analysis shows funding required for staff, travel for Board of Directors and staff, contractual, supply and equipment requirements for start-up and operation of Alaska Science and Technology Foundation.

Prepared by: Henry Cole, Sr. Science Advisor Phone: 465-3568  
Division: Office of the Governor Date: 1/21/88

Approved by Commissioner: Hugh Malone Date: January 21, 1988  
Agency: Revenue

**Distribution (by preparer):**

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

not acted on  
motion to  
amdt.

A M E N D M E N T

Offered in the HOUSE

By Rieger

TO: CSHB 390 (<sup>Fin</sup>HESS)

Page 4, after line <sup>7</sup>~~6~~:

\* considered w/ papers & set

Insert "The board shall give preference/~~to~~ soliciting proposals for research projects that are reasonably expected to <sup>use</sup> ~~use or~~ enhance research capabilities for basic and applied research in the state."

CS HOUSE BILL 390 (HESS)

AMENDMENT NO. 1

Page 1, lines 24-28: Delete and replace with:

(b) The endowment will be held and invested by the Alaska Permanent Fund Corporation as part of the principal of the Alaska permanent fund, subject to AS 37.13.120; however, net income from the endowment will be distributed in accordance with this chapter. Net income from the endowment is not included in the computation of net income available for distribution under AS 37.13.140.

Page 2, line 4: Insert between "annual" and "capital" the word "realized" so that the phrase reads:

"net annual realized capital gains"

CS HOUSE BILL 390 (HESS)

AMENDMENT NO. 2

Page 2, line 4: Delete "shall" and insert "may"

Page 2, line 5: Add the following:

The transfer of the realized capital gains to the principal  
is subject to the Executive Budget Act.

Page 2, line 18: Add after "income":

, subject to the Executive Budget Act.

Page 5, line 11: Add after "endowment":

, subject to the Executive Budget Act.

CS HOUSE BILL 390 (HESS)

AMENDMENT NO. 3

Page 3, line 4: Delete "nonvoting"

CS HB 390 (Hess)  
Amendment No. 4

by Brown

Page 5, line 9

delete "may"  
insert "shall"

Page 5, line 10

after the word "income", insert  
", if any,"

FRANK

delete: lines 16-18

add: Grant awards by the Board shall be consistent with the policy and research priorities identified by the Alaska Science and Engineering Advisory Commission.

3/3/88

QUESTIONS AND ANSWERS ABOUT  
THE ALASKA SCIENCE AND ENGINEERING FOUNDATION

1) What is the Alaska Science and Engineering Foundation?

The Foundation is an agency to fund Alaskan projects and programs of a scientific and technical nature whose results will be economically or scientifically useful to the state.

2) What are the goals of the Science Foundation?

The goals are to use the tools of basic and applied research to promote: economic development and technological innovation, public health and the sustained growth of science and engineering capability in the state.

3) How important is the Foundation to Alaska's future?

Science and technology will be a key driving force for future economic development in the State of Alaska. Over the past 50 years, the research and development expenditures in the United States have been responsible for 30 to 50% of the improvements in society. There is no more important single task in Alaska than to convert our economy from one based upon natural resources and their erratic

cycles to one of significant value added to our resources and broad economic diversity.

4. Why should the State of Alaska be involved with research and development activities? Is the private sector not capable of selecting and providing this necessary effort?

Investment in research and development is risky under any circumstances, so most businesses make such investments only if there is a good probability of an adequate return. Of course, the possibility that technology may create entirely new forms of wealth and provide a large payoff constitutes an even greater incentive. Because most small firms have little funding available for research, government assistance in funding research and development is necessary in order to spread the risk while insuring that necessary research gets done.

More than most other states, Alaska is deficient in income from sources other than raw natural resources. On a national scale, Alaska firms rank lowest in terms of their expenditures of research and development dollars. Applying technology to our natural resources to produce "value added" products or new forms of manufacturing is therefore likely to be the most direct way to improve our economic development.

Finally, special consideration must be given to the future citizens of Alaska, and to the establishment of programs for their benefit. Government traditionally assumes this responsibility, and through forward-looking research programs can provide the data bases and knowledge which are prerequisites for the formation of future businesses and areas of economic growth.

- 5) What economic benefits to Alaska can reasonably be expected from the State's investment in the Foundation?

All of the evidence at the level of the firm, the industry, and the general economy indicates that the contribution of research and development (R&D) to economic growth and productivity is positive, significant and high.

The current consensus among professionals who have studied national R&D issues is that the average gross social rate of return on R&D expenditures lies between 30 percent and 50 percent. (In this context, the "average gross social rate of return" includes the profits of the innovator plus any profits which accrue to imitators or which can be directly attributed to the use of the innovation.) Typically, one-third to two-thirds of this return is captured by the investor, with the remainder accruing to other beneficiaries. By focusing its research grants on Alaskan problems, and Alaskan scientists and researchers, the

Foundation can maximize the in-state capture of these benefits.

R&D investments are of course inherently risky. There is a great deal of variation in R&D rates of return, both across projects and for given projects over time. There are no guarantees of success. Still, while a downside loss potential exists (i.e., the amount of R&D investments), the upside potential, potentially much greater, is worth reaching for.

- 6) Does the need for a long-term commitment and funding mean no immediate returns are foreseeable for funded projects?

No. Many practical and useful technical projects of rapid return will be funded by this foundation.

- 7) What are some examples of programs that might be funded?

Research into the enhanced recovery of oil and utilization of natural gas.

The chemistry of the drying and stabilization of coal in order to raise its heating value from 7200 BTU/lb to 11,000 BTU/lb and thus increase its marketability.

The determination of the maximum sustainable yield of bottomfish and other fisheries in Alaska waters.

The investigation of causes of seasonal affective disorder in the Arctic climate and its relationship to injury and suicide.

Seed capital for engineering and development of a recirculating salmon hatchery in western Alaska.

Research on the genetic differences between pen reared salmon and the wild stock.

8) Who will be eligible to apply for funding?

All Alaskan residents, businesses, organization, institutions, state or private universities shall be given primary consideration for funding. When no Alaskan group or individual is capable of doing the work, whether through lack of personnel or equipment, they are encouraged to enter into a joint venture with a group from outside the state. In cases where there is no one in the state capable of addressing a problem, outside scientists and engineers would be encouraged to apply.

- 9) Why is it important that the foundation be financed through an endowment rather than annual appropriations?

A long-term, serious commitment to science and technology at a suitable level of funding will achieve the maximum effectiveness for the state's science dollar. In technical business, projects only come to fruition after several years. Many scientific projects, particularly those in renewable resources, require studies which must be sustained in an uninterrupted fashion through time. No satisfactory answer is available unless a long-term research commitment is assured.

- 10) About how much money will be available for research support?

An endowment of \$100 million housed in the Permanent Fund will produce an annual basis from \$6 to \$8 million dollars. This is not an excessive amount for research but can be the basis of a long-term commitment.

- 11) How does the organization of this foundation compare with well-known examples such as the National Science Foundation or the Ford Foundation?

Aside from differences in their stated objectives, the Alaskan Foundation will have many features similar to other

foundations: a nine member board of directors comprised of four scientists or engineers, two of whom are from outside the state, plus four public members and one member of a state agency. Technical review will be performed by an advisory panel of technical experts selected from within and outside the state. The daily operation of the Foundation will be guided by an executive director and staff.

12. Why should the board of the Alaska Science and Technology Foundation include members from outside Alaska?

Because Alaska has a relatively small population of scientists and engineers, much of the knowledge and critically useful expertise about Alaska resides in the lower 48 and in other countries. If we are serious about producing the best science that we can -- and attracting to Alaska the best talent that we can -- the Foundation will need to include in its board outstanding representatives of the national scientific community. This link will be critical in establishing the Foundation as a credible and meaningful scientific institution on a national scale. From another perspective, it also will provide a measure of protection against undue parochialism in the pursuit of the Foundation's goals (a perceived flaw in some previous research funding efforts in Alaska). Additionally, an organic link with outside scientists and agencies (such as the National Science Foundation, the National Institute of Health, et

al.) will enhance the Foundation's opportunities for participating in joint programs and federal funding.

Because the Foundation's proposed enabling legislation (HB 390) specifically provides that Foundation-sponsored research shall focus on Alaskan problems, with preference given to Alaska's applicants, there is little question that the benefits of Foundation-sponsored research will accrue primarily to Alaskans.

13) Have other states established science and engineering foundations?

Yes. Forty-three other states have spent a total of \$700 million to establish research parks, incubator programs, small grant programs or other mechanisms to assist the link up of technology with economic development. The top seven states have spent \$350 million for this purpose. Alaska has spent nothing.

STATE OF ALASKA  
THE LEGISLATURE

POUCH Y STATE CAPITOL  
JUNEAU ALASKA 99811  
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

February 23, 1988

SUBJECT:           Constitutionality of resident preference  
                  measures in HB 390 (Establishing the Alaska  
                  Science and Technology Foundation)

TO:                Representative Johnny Ellis  
                  Co-chairman, House HESS Committee

FROM:             Teresa B. Cramer *IBC*  
                  Legislative Counsel

You have asked for an opinion concerning whether the provision of HB 390 which requires that the board of directors of the Alaska Science and Technology Foundation give preference to state residents in making grant awards pose constitutional problems.

The bill provides that the foundation is a state agency funded by legislative appropriations. The purpose of the foundation is to encourage basic and applied research in Alaska by making grants to fund the research project. The board of directors is required to give preference to an applicant who is an Alaska resident, association, organization, or institution when awarding grants. If a state applicant lacks the expertise or capability to perform the research without assistance from a nonresident, the board may jointly award the grant to the resident and a nonresident.

In my opinion, the resident preference portions of HB 390 may be subject to challenge under the state equal protection clause, Art. I, sec. 1 of the state constitution.

The state supreme court has adopted a sliding scale for determining whether legislation violates the equal protection clause, depending on the importance of the individual right that is infringed. Alaska Pacific Assur. Co. v. Brown, 687 P.2d 264 (Alaska 1984). The court looks first to the nature of the interest. In HB 390,

Representative Johnny Ellis  
Page 2  
February 23, 1988

nonresidents are placed at a substantial disadvantage in applying for grants to perform research. This right is akin to the right to employment, which has been held a substantial right, requiring that the state demonstrate greater justification for the discrimination and establish that the means used to achieve its goals fit closely with the ends that the legislation seeks to accomplish.

In Sec. 37.17.010(b), set out in sec. 1 of the bill, the purpose of the foundation is given as

to promote and enhance economic development, technological innovation and capability, and public health in Alaska through basic and applied research.

Economic development is a justifiable state interest. However, the tie between encouraging economic development and restricting the research to achieve it to state residents is less clear. To survive a challenge under the equal protection clause the state would have to demonstrate that state residents as a group were substantially better able to accomplish this goal than nonresidents. The court has held in Lyndon Transport v. State, 532 P.2d 700, 711 (Alaska 1975) that

[a] discrimination between residents and nonresidents based solely on the object of assisting the one class over the other economically cannot be upheld under either the federal privileges and immunities or the equal protection clauses.

The justification for preferring residents cannot be based on providing residents jobs at the expense of nonresidents.

HB 390 might also be subject to challenge under the federal privileges and immunities clause, Art. IV, sec. 2 of the federal constitution. That clause applies to "fundamental rights" and protects "citizens" and not corporations and therefore might not apply to all potential plaintiffs. If the court held that the right to compete for grants was an employment right, the clause would clearly apply. Francis v. Robison, 713 P.2d 259 (Alaska 1986). The analysis under the clause would be similar to analysis under the state equal protection clause. The state would have to demonstrate that the reason for the discrimination against nonresidents was to remedy a problem that was causing social ills and that nonresidents were a "peculiar source of the

Representative Johnny Ellis

Page 3

February 23, 1988

evil." The preference imposed would have to be shown to be closely tied to solving the problem.

If I may be of further assistance, please advise.

TBC:bb  
wkb3/019

STATE OF ALASKA  
THE LEGISLATURE

POUCH Y STATE CAPITOL  
JUNEAU ALASKA 99811  
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

February 24, 1988

SUBJECT: CSHB 390 (HESS), an Act establishing the  
Alaska Science and Technology Foundation

TO: Representative Johnny Ellis

FROM: George Utermohle *GU*  
Legislative Counsel

This memorandum is in regards to CSHB 390 (HESS).

I. Legislative Confirmation of Board Members.

CSHB 390 (HESS) contains a provision for the legislative confirmation of members of the board of directors of the Alaska Science and Technology Foundation.

The power of the legislature to confirm appointments made by the Governor is set out in Article III, section 26 of the Alaska State Constitution:

SECTION 26. When a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and may be removed as provided by law. They shall be citizens of the United States. The board or commission may appoint a principal executive officer when authorized by law, but the appointment shall be subject to the approval of the governor. (emphasis added)

The Alaska Supreme Court has narrowly construed this provision of the constitution and has found that the legislature has only those powers to confirm the governor's appointments as provided for by the constitution. Bradner v. Hammond, 553 P.2d 1 (Alaska 1976). If a board is not at the head of a principal department, a regulatory agency, or a quasi-judicial agency, the legislature has no authority to confirm the members of the board.

Representative Johnny Ellis  
Page 2  
February 24, 1988

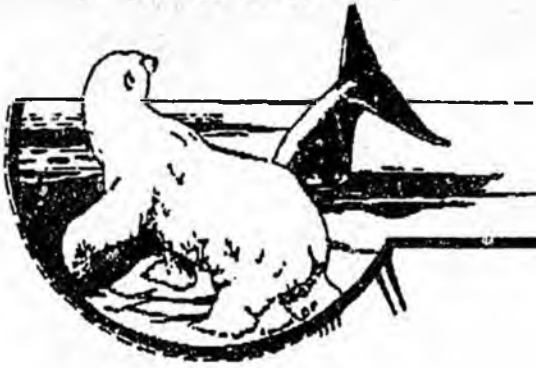
The board of directors of the Alaska Science and Technology Foundation does not fall into any of the categories subject to confirmation. The board is not at the head of a principal department like the Board of Education. The board is not a regulatory agency like the Alaska Public Utilities Commission. The board is not a quasi-judicial agency like the Commercial Fisheries Entry Commission. Thus the legislature does not have the authority to subject the governor's appointments to the board to legislative confirmation.

## II. Dedication of Funds.

In section 1 of the bill, Sec. 37.17.090(g) provides that, if the foundation so decides, the grantee must pay to the principal of the endowment a portion of all income from royalties, licenses, and patents produced as the result of a grant made by the foundation. There is not any constitutional bar to the foundation requiring that a grant recipient return a portion of the money that they make as a result of a grant from the foundation. However, requiring the money to be deposited into the principal of the endowment is at odds with the prohibition against dedicated funds, Art. IX, sec. 7, of the Alaska Constitution. Any money that the foundation would receive under conditions attached to a grant would fall into the category of program receipts. Program receipts are subject to the prohibition against dedicated funds. (1982 Opinion of the Attorney General, March 4, 1982) Thus the constitution must be amended to allow the dedication of this money to the endowment or the money must be deposited into the general fund for appropriation by the legislature.

If I can provide you with further assistance on these issues, please contact me.

GU:gc  
wkg2/04



# UIC-NARL

TELECONFERENCE ON H.B. 390 & 391; 2-23-88  
TESTIMONY BY DALE. B. STOTTS, PROJECT COORDINATOR UIC/NARL

On behalf of the Ukpeagvik Inupiat Corporation, through its President, Ronald H. Brower, Sr., I am pleased to express UIC's support for the enactment of H.B. 390 & 391.

As the present operator, and soon to be owner of the former Naval Arctic Research Laboratory, UIC is very encouraged by legislation to establish an Alaska Science and Technology Foundation, along with the funding mechanism provided by an endowment to the Foundation.

Governor Cowper and state legislators that support these two bills should be comended. The vital role of science and technology in Alaska's growth and development is yet to emerge at the level this great land and its citizens deserve.

We recommend that the Foundation develop a close association with the Arctic Research Commission and the National Science Foundation. Tremendous amounts of time and resources have gone towards the reorganization of the national interest in arctic research and science, and any duplication of effort would constitute a poor investment of tax payer monies.

(907) 852-7800, Pouch UIC/NARL, Barrow, Alaska 99723  
Ukpeagvik Industrial Center / National Arctic Research Laboratory  
(Formerly: Naval Arctic Research Laboratory)

TELECONFERENCE ON H. B. 390 & 391  
2-23-88  
Page 2.

As an organization with some expertise in providing logistical support to government, education, industry, and science and research, we recommend that the Foundation carefully weigh regional differences in cost of project support. This would be helpful when establishing the maximum percentage of a grant award that may be expended to pay for overhead costs of a grantee's project.

In the fall of 1987, I provided to the Governor's Science Advisor's office, information on logistic support capabilities of the UIC/NARL facilities. It is our understanding that three (3) regional arctic research centers will be designated in the near future. Should this come to pass, we urge the Foundation to consider the vital role that logistic support plays in the conduct of field research, whether it be in the arctic or subarctic areas.

Passage of H.B. 390 & 391 has far reaching implications for the benefit of the Alaskan economy, health, and well being of its residents. UIC stands in full support of this legislation.

Thank you.

Original Sponsor: Rules/Governor

1 IN THE HOUSE  
2  
3 CS FOR HOUSE BILL NO. 390 (HESS)  
4 IN THE LEGISLATURE OF THE STATE OF ALASKA  
5 FIFTEENTH LEGISLATURE - SECOND SESSION  
6 A BILL  
7 For an Act entitled: "An Act establishing the Alaska Science and Technolo-  
8 gy Foundation; relating to the membership of the  
9 science and engineering advisory commission; and  
10 providing for an effective date."  
11 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:  
12 \* Section 1. AS 37 is amended by adding a new chapter to read:  
13 CHAPTER 17. ALASKA SCIENCE AND TECHNOLOGY FOUNDATION.  
14 Sec. 37.17.010. FOUNDATION ESTABLISHED. (a) The Alaska Science  
15 and Technology Foundation is established as a public corporation in  
16 the Department of Revenue.  
17 (b) The purpose of the foundation is to promote and enhance  
18 through basic and applied research; economic development and techno-  
19 logical innovation in Alaska; public health; and sustained growth and  
20 development of Alaskan scientific and engineering capabilities.  
21 Sec. 37.17.020. ENDOWMENT ESTABLISHED; INVESTMENT. (a) In  
22 order to support the foundation, the Alaska science and technology  
23 endowment is established, consisting of money appropriated to the  
24 Alaska Permanent Fund Corporation for the benefit of the foundation.  
25 (b) For the purposes of investment of the endowment, the Alaska  
26 Permanent Fund Corporation is subject to AS 37.13.120, except that  
27 amounts appropriated for purposes of the endowment do not become a  
28 part of the principal of the Alaska permanent fund, and the endowment  
29 income must be distributed in accordance with this chapter.  
30 Sec. 37.17.030. ENDOWMENT INCOME; EXPENSES; GRANTS. (a) Upon

1 application of the foundation's board of directors or its authorized  
2 representative, the Alaska Permanent Fund Corporation shall pay to the  
3 foundation a portion or all of the income then accrued from the endow-  
4 ment. The net annual capital gains of the endowment shall be equally  
5 divided between the income and the principal of the endowment.

6 (b) In addition to endowment income, the foundation may receive  
7 gifts, grants, and other aid. The foundation may accumulate income,  
8 gifts, grants, and other aid from any one year and distribute them in  
9 a later year.

10 (c) The administrative expenses of the foundation are subject to  
11 the Executive Budget Act and must be paid from the income of the  
12 endowment.

13 (d) The board of directors shall distribute the income of the  
14 endowment through competitive grants in accordance with this chapter.  
15 The board may disburse money that is received by the foundation for  
16 special or general purposes.

17 (e) The board of directors may pay into the principal of the  
18 endowment any part of the endowment income. Money paid to the princi-  
19 pal under this subsection may not later be withdrawn by the board of  
20 directors.

21 Sec. 37.17.040. BOARD OF DIRECTORS. (a) The foundation is  
22 governed and administered in accordance with this chapter by a board  
23 of directors appointed by the governor and confirmed by the legisla-  
24 ture to serve staggered terms of four years. A member serves on the  
25 board until a successor qualifies and is appointed. A member of the  
26 board of directors may be removed from the board by the governor for  
27 cause.

28 (b) The board of directors is composed of nine members, as fol-  
29 lows:

1           (1) two members must be scientists or engineers residing in  
2 Alaska who are recognized contributors in the science or engineering  
3 fields, one of whom is employed by the University of Alaska;

4           (2) two nonvoting members must be scientists or engineers  
5 residing outside Alaska who are recognized contributors in the science  
6 or engineering fields;

7           (3) four members of the public, at least two of whom have  
8 recognized expertise or experience in resource development, manufac-  
9 turing, finance, or public health;

10           (4) one member who is employed by a department or agency of  
11 the state, except for the University of Alaska.

12           Sec. 37.17.050. ELECTION OF OFFICERS. The board of directors  
13 shall elect a chairperson and a secretary from its members, each to  
14 serve for a term not to exceed two years.

15           Sec. 37.17.060. QUORUM. A majority of the board constitutes a  
16 quorum for the transaction of business.

17           Sec. 37.17.070. MEETINGS AND REIMBURSEMENT FOR EXPENSES. The  
18 board shall meet at least twice a year. Additional meetings may be  
19 called at the discretion of the chairperson. Board members are enti-  
20 tled to per diem and travel expenses authorized for boards and com-  
21 missions under AS 39.20.180. Board members not employed by the state  
22 or the University of Alaska receive an honorarium of \$400 for each day  
23 spent on official business of the board, not to exceed a total of 30  
24 days per annum.

25           Sec. 37.17.080. STAFF. The board of directors shall employ and  
26 determine the salary of an executive director, subject to the Execu-  
27 tive Budget Act. The executive director serves at the pleasure of the  
28 board. The executive director may, with approval of the board, select  
29 and employ additional staff as necessary. No employee of the