

SCOMM

62:27



Alaska Environmental Lobby, Inc.

P.O. Box 22151 Juneau, Alaska 99802

907-586-2345

AEL ISSUE PAPER HB 68 STRICT LIABILITY FOR HAZARDOUS SUBSTANCES

The Alaska Environmental Lobby strongly supports HB 68 for the following reasons:

This bill will save public money at no additional cost to the State by recovering public costs of containing or cleaning up hazardous substance spills. Currently the State and local communities often must bear the financial burden of clean up costs. Passage of the bill would reduce the demand of the State for funds for the cleanup of hazardous substances.

The bill insures the recovery of public money by granting the State an immediate right to file a lien on an equal basis with other creditors when a party responsible for improper waste disposal declares bankruptcy.

The bill promotes the responsible disposal of hazardous substances through a more clearly defined liability than that found within the current law.

The responsible disposal of hazardous wastes protects the public health, the environment, and the economy of the State.

Becky Achten
3-17-89

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

SENATE COMMITTEE REPORT

FURTHER

JUD

4/8/89

DATE TURNED INTO OFFICE _____

Mr. President:

OIL & GAS

Committee considered CSHB 68 (JUD) am

liability for the release or threatened release of a hazardous substance; recovery of state costs for an oil or hazardous substance release; liability of response action contractors; efd and recommended

☒ replace with S CS Oil + Gas) ☒ same title
☐ or adopt _____ CS _____) ☐ new title
☐ attached amendment(s) and ☐ technical title change (HB only)
☐ _____ letter of intent adopted

☐ do pass

☐ do not pass

☒ no recommendation

☐ individual recommendations

☐ further referral to _____

FISCAL NOTE(S) ☐ zero ☐ fiscal impact ☐ appropriation no FN
☐ new ☐ updated ☐ previous
☐ same as previous fiscal note(s) published _____

MEMBERS SIGNING DO PASS

Twin Kelly

OTHER RECOMMENDATIONS

Rick Halford NO REC
Ed Adams NO REC
W. Kelly NO REC

Steve Rance - No Rec
 Chairman signature and recommendation

☐ Committee Backup attached

STATE OF ALASKA

DEPT. OF ENVIRONMENTAL CONSERVATION

STEVE COWPER, GOVERNOR

POSITION PAPER

CSHB 68 (JUD)am

April 11, 1989

Title

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

Effect of the Bill

The purpose of the bill is to strengthen the State's ability to obtain cleanup of hazardous substance spills.

Section 1 of the bill includes a technical amendment regarding bonding.

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

- Those who generate hazardous wastes;
- Those who have control over sites where hazardous substances are released;
- Those who transport hazardous wastes in cases where the transporter also selects the disposal method.

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

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

Section 3 establishes provides that response action contractors who are called upon to response to a spill are liable for actions

caused by their own negligence.

Sections 4, 5 and 6 include definitions.

Section 7 of the bill would enable the state to file a lien against assets of a responsible party to recover its costs for cleanup of oil and hazardous waste sites, in cases where the responsible party declares bankruptcy. At present, the Department must first secure a judgement through the court and then participate in a bankruptcy proceeding. The bill would not supercede the claims of secured creditors such as mortgage-holders.

Department Position

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

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

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

Fiscal Effect

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


Dennis D. Kelso, Commissioner

STATE OF ALASKA
1989 LEGISLATIVE SESSION

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

FISCAL NOTE

REQUEST:

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

EXPENDITURES/REVENUES: (Thousands of Dollars)

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

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS: None

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

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

Prepared by: Amy D. Kyle Phone: 465-2600
Division: Commissioner's Office Date: 23 Jan 1989
Approved by Commissioner: [Signature] Date: January 23, 1989
Agency: Environmental Conservation

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

STATE OF ALASKA THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

MEMORANDUM

January 18, 1989

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

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

FROM: Terri Lauterbach *TL*
Legislative Counsel

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

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

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

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

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

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

Furthermore, an Attorney General's opinion concluded that the legislature could alter or delete an initiative's requirement that the capital site contain no less than 100 square miles of state land as well as the requirement that the site selected be more than 30 miles from either Anchorage or Fairbanks. Op. Att'y Gen., August 19, 1975.

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

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

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

Representative Curt Menard
Page 3
January 18, 1989

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

TL:gc
WKG5/105

Alaska State Legislature

Senator Drue Pearce, Chair
Senator Tim Kelly
Senator Rick Halford
Senator Paul Fischer
Senator Al Adams



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(907) 561 2038

SENATE SPECIAL COMMITTEE ON OIL AND GAS

To: Members of the Senate Special
Committee on Oil and Gas

From: Committee staff

Re: HB 68, Sectional analysis

Date: April 11, 1989

Section 1. Adds a lien for the state's expenses associated with cleanup and containment as a document eligible for recording.

Section 2.

AS 46.03.822. Strict Liability for the Release of Hazardous Substances

This section repeals and reenacts existing AS. 46.03.822 to expand and specifically identify all the potential responsible parties who are liable for the release or threatened release of a hazardous substance. Those identified are:

- 1) the owner and person controlling the substance at the time of the release or threatened release;
- 2) the owner and operator of a facility or vessel from which the release occurred or was threatened;
- 3) if a facility or vessel is abandoned, the owner, operator and any other person controlling activities on the facility or vessel just before abandonment;
- 4) the owner or operator of a facility or vessel from which the release occurred or was threatened, at the time the substance was received by the facility or vessel;

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

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

Reenacted AS 46.03.822(b) would provide relief from strict liability for a person who proves that the damage solely resulted from: 1) an act of war; 2) an intentional or negligent act or omission of a third party, provided that it is not a response action contractor or a party or agent in privity of contract with that person, and further requires that the party to be relieved from responsibility, took reasonable precautions against the third party act or omission; 3) an act of God; and that the party, in the case of a third party act or omission, or act of God, discovered within a reasonable time the release or threatened release and began operations to contain and cleanup the hazardous substance.

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

Reenacted AS 46.03.822 (d) would establish the standards by which a person can, under subsec. (c) be considered to have reason to know.

Reenacted AS 46.03.822(e) would provide that the liability of a previous owner or operator is not lessened if that owner or operator is otherwise liable and if that owner or operator transfers ownership without disclosing the fact of a release or threatened release.

Reenacted AS 46.822.(f) would clarify that the liability of a person who causes or contributes to a release or a threatened release is liable in any event.

AS. 46.03.822(g) provides that a person otherwise liable may not transfer liability by agreement. However, these persons may be insured or indemnified and may enforce such agreements.

Section 3. amends As 46.03, Environmental Conservation, by adding a new section.

AS 46.03.823.(a) relieves a person who is a response action contractor from liability unless the release or threatened release

is caused by an act or omission of the response contractor that is negligent or grossly negligent or constitutes intentional misconduct. This liability limitation does not apply if the response contractor would be strictly liable under any other provision of state or federal law.

A person who is liable under 46.03.822 cannot claim that the response action contractor is a third party liable for the release or threatened release. This section does not relieve response action contractors from liability under other state or federal laws or other liabilities which may arise from terms and conditions of a contract or remedial action plan.

Section 4. AS 46.03.826(3) amends the definition of "having the control over a hazardous substance" to include an emission into the atmosphere.

Section 5. AS 46.03.826(4) amends the definition of "hazardous substance" to include an element or compound when it enters the atmosphere.

Section 6. AS 46.08.075. is amended by adding a new section to allow liens by the state for costs associated with expenditures from the oil and hazardous substance release response fund or from any other state fund for clean-up, containment, removal or remedial action resulting from an oil or hazardous substance spill or threat of a spill.

This section also identifies the method for enforcing the lien and would require the commissioner of the DEC to certify that the lien has been reduced or satisfied if payment's are made on the liable party's obligation.

The commissioner may reduce, discharge or partially release a lien if a bond or other security is posted. The bond or security shall include an amount sufficient to cover the cost of execution, collection or foreclosure.

A person against whom a lien has been recorded can seek a court order to remove it. The lien can be released if the person can show that he is not liable for the state's costs in the cleanup or in responding to a threat of a spill.

MEMORANDUM

State of Alaska

DEPARTMENT OF LAW

TO:

The Honorable Dennis Kalso
Commissioner
Department of Environmental
Conservation
P.O. Box 0

DATE:

November 2, 1988

FILE NO:

661-89-0172

TELEPHONE NO:

THRU:

Juneau, Alaska 99811-1800

SUBJECT:

276-3550

Implications of Proposed
Ballot Measure No. 2

FROM:

Madeleine R. Levy
Assistant Attorney General
Natural Resources - Anchorage

CONFIDENTIAL - ATTORNEY CLIENT PRIVILEGE

You have requested our opinion on the implications of proposed ballot measure number 2, the "tort reform" initiative, for oil and hazardous substances spill claims. In a nutshell, our conclusion is that the initiative should not affect recovery of damages, penalties, and costs for oil and hazardous substances releases.

The official ballot language describes the proposed initiative as follows:

This initiative changes the way damages can be collected from parties to lawsuits who share fault for injury to persons or property. The law now says that a party more than half responsible could be liable for the total judgment. Parties may collect from each other amounts paid over their share. Parties less than half responsible pay only up to twice their fault.

The initiative would make each party liable only for damages equal to his or her share of fault, and repeal the law concerning reimbursement from other parties.

Shall this initiative become law?

YES []

NO []

The actual text of the amendment proposed by the initiative specifically amends two statutes. The first is AS 09.17.080(d) which provides for apportionment of damages in personal injury and property damage cases. The second is AS 09.16, which provides for contribution among joint tortfeasors. 1/

Ballot measure number 2 would limit any party's liability to its actual percentage of fault and would expressly repeal contradictory provisions in AS 09.17.080(d). It would

1/ Enacted by the legislature as Section 1 of Ch. 139, SLA 1986, AS 09.17.080 was part of a statutory package to put a lid on classic tort liability. The statutory package has several components. It limits noneconomic damages for personal injury to \$500,000.00. AS 09.17.010. It specifies that the burden of proof for imposing punitive damages is "clear and convincing" evidence. AS 09.17.020. It limits the liability of certain non-profit and public bodies. AS 09.17.030. It provides for calculation and payment of future economic damages as well as special verdicts itemizing various damages. AS 09.17.040. It authorizes diminution of recovery in the case of contributory fault and certain collateral benefits. AS 09.17.060-09.17.070.

AS 09.17.080 provides that the trier of fact must first find the percentage of the total fault attributable to each party. The court will then enter judgment against each liable party on the basis of joint and several liability.

except that a party who is allocated less than 50 percent of the total fault allocated to all the parties may not be jointly liable for more than twice the percentage of fault allocated to that party.

"Fault" includes acts or omissions that are negligent or reckless as well as acts that subject a person to strict tort liability. AS 09.17.900.

The joint tortfeasors act, adopted in 1970, provides a right of contribution among two or more persons who are jointly or severally liable in tort for the same injury.

also expressly repeal AS 09.16.010, et seq., the "Contribution Among Joint Tortfeasors Act." See Full Text of Proposed Amendment by Ballot Initiative Number 2, attached as Appendix A.

Ballot measure number 2 (henceforth "the initiative") does not expressly repeal any other statutory provision concerning joint and several liability. Specifically, the initiative is silent on joint and several liability authorized by AS 46.03.758(a) or civil liability which could be imposed pursuant to AS 46.03 and AS 46.04 for oil and hazardous substance releases. Therefore, the initiative could only affect liability under these statutes if a court were to conclude that the initiative has repealed them by implication. We agree with the attached September 7, 1988 memorandum from the Legislative Affairs Agency that there is no implied repeal of these statutes. See Appendix B.

As the Legislative Affairs memo points out, repeal by implication is not favored. This is because "subsequent legislation is not presumed to repeal the existing law in the absence of expressed intent." 1A Sutherland Statutory Construction § 23.09 (4th ed). The Alaska Supreme Court has uniformly held that "the implied repeal of an act is disfavored and will be limited to that which is necessary to carry out the intent of the legislature." Warren v. Thomas, 568 P.2d 400, 403 (Alaska 1977) (citations omitted); see also Peter v. State, 531 P.2d 1263, 1268 (Alaska 1975). The same analysis should be applied to an initiative: implied repeal by initiative will be disfavored and should be limited to that which is necessary to carry out the intent of the voters.

Clearly, the voters, if they approve the initiative, will be expressing their intent to repeal only those two statutes which are specifically mentioned in the actual text of the amendment proposed by the initiative. Implied repeal of any other statutes will not be presumed. This is particularly true where there is not an irreconcilable conflict between the express intent of the initiative and other statutes. Peter v. State, supra, 531 P.2d at 1268. "Where a reasonable construction of a statute [or initiative] can be adopted which realizes the [voter's] intent and avoids conflict or inconsistency with another statute this should be done." Hafiling v. Inlandboatmen's Union, 585 P.2d 870, 875 (Alaska 1978) (quotation and footnote omitted). Moreover, the mere fact that there may be an inconsistency between the initiative and other statutes does not mean that a repeal of the other statutes will be implied. "[I]f the inconsistency between the two enactments is not fatal to the

The Honorable Dennis Kalso

November 2, 1988

Page 4

operation of either, the two may stand together and there will be no implied repeal." Id., 585 P.2d at 876 n.20 (citations omitted).

As the Legislative Affairs memo acknowledges, there is no irreconcilable conflict between the initiative and the anti-pollution laws set forth in AS 46.03 and AS 46.08. The former adopts a generic limit on recovery in garden variety tort claims while the latter authorize recovery of damages, penalties and costs only in the instance of unpermitted oil and hazardous substances spills. As statutes promoting and protecting the conservation of natural resources and preventing their destruction, AS 46.03 and AS 46.08 shall be liberally interpreted to achieve their stated ends. Kanai Pen. Fisherman's Co-op Ass'n. v. State, 628 P.2d 897, 903 (Alaska 1981). Implied repeal of these statutes by a generic initiative which, on its face, is silent on anti-pollution laws, will not be assumed.

If you have further questions, please do not hesitate to contact us.

MRL:jem

MEMORANDUM

State of Alaska

DEPARTMENT OF LAW

TO: The Honorable Dennis Kelso
Commissioner
Department of Environmental
Conservation
P.O. Box 0
THRU: Juneau, Alaska 99811-1800

DATE: November 4, 1988
FILE NO: 661-89-0172
TELEPHONE NO:
SUBJECT: 276-3550

Implications of Proposed
Ballot Measure No. 2

FROM: Madeleine R. Levy *ML*
Assistant Attorney General
Natural Resources - Anchorage

CONFIDENTIAL - ATTORNEY CLIENT PRIVILEGE

This is an addendum to my November 2, 1988 opinion regarding the implications of proposed ballot measure number 2, the "tort reform" initiative. That opinion concluded that the proposed ballot measure would not affect recovery of damages, penalties and costs for oil and hazardous substances releases currently available under AS 46.03 and AS 46.04 because the ballot measure does not effect an implied repeal of those statutes. Additional support for that proposition has recently appeared in the form of an advertisement paid for by the supporters of the initiative.

As stated in my earlier memo on this subject, the intent of the voters is key to determining whether repeal by implication will be found. Hafling v. Inlandboatmen's Union, 585 P.2d 870, 875 (Alaska 1978); Peter v State, 531 P.2d 1263, 1268 (Alaska 1975). The intent of the voters may be ascertained from arguments made in support of the initiative. In re Lance W., 694 P.2d 744, 753 (Cal. 1985). See also Carman v Alford, 644 P.2d 192 (Cal. 1982) (election materials helpful in discerning voters intent); Los Angeles County Transp. Comm. v. Richmond, 643 P.2d 941 (Cal. 1982) (ambiguities in initiative resolved by referring to arguments in support as well as contemporaneous construction by the legislature).

The attached advertisement paid for by the coalition supporting the initiative unequivocally states that "Ballot Measure No. 2 will have no impact on Alaska's environmental protection laws." (emphasis in original). See attachment 1. Furthermore, the coalition supporting the initiative has explicitly adopted the Legislative Affairs Agency interpretation that the initiative will not effect a repeal or modification of the provisions of AS 46.03 and AS 46.04. Id. In short, the

The Honorable Dennis Kelso

November 4, 1988
Page 2

advertisement will be direct evidence of the voters' intent not to disturb the manner in which damages, penalties and costs for oil and hazardous substances releases may be recovered.

If you have any questions, please feel free to contact me.

CC: Ron Lorensen
Mike Frank
Bill Mallow

11. Unalakleet Spill 665-89-0012

Recent oil spill. State and Native corporation hope to negotiate in clean-up effort.

NON-OIL HAZARDOUS SUBSTANCES

- | | | | |
|----|--|-------------|---|
| 1. | Forward Alaska,
DNR, Deadhorse
Tract 75 & 76 | 665-89-0068 | Multiple spills on leased tracts adjacent to NANA Reservoir at Deadhorse. |
| 2. | Deadhorse Hotel Pad | 665-89-0058 | Contamination of gravel pad and adjacent tundra. |
| 3. | Alaska Gold/
Steadman Field | 665-87-0002 | Negotiated containment and clean-up of mercury and arsenic contamination. First stage of clean-up is complete. |
| 4. | Nome Barrel Dump | 665-88-0024 | Clean-up underway of site with numerous abandoned barrels containing hazardous substances. |
| 5. | Halliburton
Services | 665-88-0037 | Hazardous substance contamination at Deadhorse site operated by oil field service company. Clean-up is in sampling and analysis stage. |
| 6. | Lease Tract 54
(Childs Pad) | 665-87-0204 | Hazardous substance discharges on abandoned Deadhorse Tract. DEC and oil companies are attempting to resolve outstanding clean-up issues. |
| 7. | Tri-Con Mining | 665-89-0117 | Suspected cyanide discharge from Ester Dome heap leach mining operation. Enforcement is at preliminary site assessment stage. |
| 8. | Citigold Mining | 665-89-0088 | Leaking inner liner indicates possible cyanide discharge from Ester Dome heap leach mining operation. |

The above cases have been referred by the Department of Environmental Conservation to the Attorney General's Office for assistance in enforcement actions. The Attorney General's Office is also assisting the Department of Natural Resources on several other Deadhorse lease tract problems, involving oil and hazardous substance contamination. In addition to the Forward Alaska tract, there are problems with the Childs Tract (Tract 54, work management #665-89-0021) and the Newco Tract (Tract 57, work management #665-89-0104).

OIL SPILL/DISCHARGE MATTERS - ANCHORAGE

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

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

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

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

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

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

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

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

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

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

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

HAZARDOUS SUBSTANCE SPILL/DISCHARGE MATTERS - ANCHORAGE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MEMORANDUM

State of Alaska

DEPARTMENT OF LAW

TO: The Honorable Dennis Kelso
Commissioner
Department of Environmental
Conservation
P.O. Box 0
THRU: Juneau, Alaska 99811-1800

DATE: November 4, 1988
FILE NO: 661-89-0172
TELEPHONE NO:
SUBJECT: 276-3550

Implications of Proposed
Ballot Measure No. 2

FROM: Madeleine R. Levy
Assistant Attorney General
Natural Resources - Anchorage

CONFIDENTIAL - ATTORNEY CLIENT PRIVILEGE

This is an addendum to my November 2, 1988 opinion regarding the implications of proposed ballot measure number 2, the "tort reform" initiative. That opinion concluded that the proposed ballot measure would not affect recovery of damages, penalties and costs for oil and hazardous substances releases currently available under AS 46.03 and AS 46.04 because the ballot measure does not effect an implied repeal of those statutes. Additional support for that proposition has recently appeared in the form of an advertisement paid for by the supporters of the initiative.

As stated in my earlier memo on this subject, the intent of the voters is key to determining whether repeal by implication will be found. Hafling v. Inlandboatmen's Union, 585 P.2d 870, 875 (Alaska 1978); Peter v State, 531 P.2d 1263, 1268 (Alaska 1975). The intent of the voters may be ascertained from arguments made in support of the initiative. In re Lance W., 694 P.2d 744, 753 (Cal. 1985). See also Carman v Alford, 644 P.2d 192 (Cal. 1982) (election materials helpful in discerning voters intent); Los Angeles County Transp. Comm. v. Richmond, 643 P.2d 941 (Cal. 1982) (ambiguities in initiative resolved by referring to arguments in support as well as contemporaneous construction by the legislature).

The attached advertisement paid for by the coalition supporting the initiative unequivocally states that "Ballot Measure No. 2 will have no impact on Alaska's environmental protection laws." (emphasis in original). See attachment 1. Furthermore, the coalition supporting the initiative has explicitly adopted the Legislative Affairs Agency interpretation that the initiative will not effect a repeal or modification of the provisions of AS 46.03 and AS 46.04. Id. In short, the

The Honorable Dennis Kelso

November 4, 1988
Page 2

advertisement will be direct evidence of the voters' intent not to disturb the manner in which damages, penalties and costs for oil and hazardous substances releases may be recovered.

If you have any questions, please feel free to contact me.

CC: Ron Lorensen
Mike Frank
Bill Mellow

March 21, 1989

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

RECEIVED

MAR 23 1989

DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

Re: CSHB 68

Dear Mr. Kaden:

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

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

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

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

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

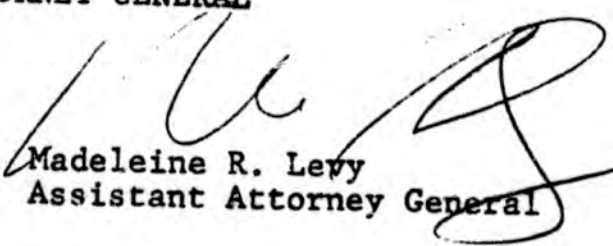
However, once joint and several liability to the government has been established, liable parties may seek reimbursement from each other in accordance with each party's relative contribution to the site. As the Monsanto court put it, "making the government whole for response costs was the primary consideration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

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

Very truly yours,

DOUGLAS B. BAILY
ATTORNEY GENERAL

By:


Madeleine R. Levy
Assistant Attorney General

MRL:jem

Enc.

bcc: John McDonagh
Gary Amendola
✓Amy Kyle

INDEX

	Page
Issues Presented -----	1
Statement -----	2
A. Nature of case -----	3
B. Factual Background -----	3
C. Procedural History -----	4
Summary of Argument -----	8
Argument -----	11
I. Summary judgment was proper against the generators because the undisputed facts showed that hazardous wastes of the type they shipped were found at the site; the generators failed to present a genuine dispute of fact as to whether all of their wastes had been removed from the site prior to the cleanup -----	15
A. Once defendants are shown to be liable parties under Section 107(a), an additional showing of causation is not required -----	15
B. Section 107(a) only requires that the government show that a generator shipped its waste to a site, and that hazardous substances of the same type as shipped by the generator are present at the time of cleanup -----	16
C. Section 107(a) requires only that the government show there was a release or threatened release of "a" hazardous substance, not "the" hazardous substance shipped by the generator -----	19
II. Summary judgment was proper against the landowners, since the undisputed facts showed that they owned the land at all relevant times, and could not make out a defense under Section 107(b) -----	26
A. Section 107(a)(2) imposes strict liability on landowners, and does not require a showing that the owner participated in disposal activities -----	28
B. The landowners cannot state a defense under Section 107(b) -----	29
III. Joint and several liability was appropriate because the undisputed facts showed that the harm at the site was indivisible; the district court properly rejected arbitrary methods of cost apportionment as a way to "divide" the harm -----	31
	24

A. Under the common law, the harm at a site like Bluff Road would not be divided among defendants on the basis of volume of waste sent to the site -----	36
B. The 1986 Amendments to CERCLA confirm that factors such as the volume of waste sent to a site are relevant only in contribution actions, and may not be used to undercut joint and several liability -----	39
C. The fact that government agencies sent wastes to Bluff Road does not make joint and several liability inappropriate against these defendants -----	42
D. The landowners are jointly and severally liable -----	46
IV. The decision below does not violate constitutional principles of separation of powers -----	47
V. CERCLA is not unconstitutionally retroactive -----	51
A. Turner Elkhorn governs this case -----	54
B. CERCLA is not a bill of attainder -----	59
C. CERCLA is not an ex post facto law -----	60
D. The generator's proposed "alternate interpretations" of CERCLA are inconsistent with congressional intent -----	61
VI. The United States was entitled to prejudgment interest -----	62
A. Prejudgment interest is an integral element of the costs that Congress intended to be recovered under CERCLA as enacted in 1980 -----	63
B. In any event, the 1986 amendments to CERCLA, which expressly provide for prejudgment interest, apply to this pending cases -----	67
Conclusion -----	70

CITATIONS

Cases:

<u>Anderson v. Liberty Lobby, Inc.</u> , 106 S. Ct. 2505 -----	23, 24
<u>Andrus v. Glover Construction Co.</u> , 446 U.S. 608 -----	31
<u>Azure v. City of Billings</u> , 596 P.2d 460 -----	38
<u>Bell v. New Jersey</u> , 461 U.S. 773 -----	42
<u>Board of Governors v. Agnew</u> , 329 U.S. 441 -----	60
<u>Bradley v. Richmond School Board</u> , 416 U.S. 696 -----	3, 68
<u>Brandon Township v. Jerome Builders, Inc.</u> , 80 Mich. App. 180 -----	28
<u>Brink v. Dalesio</u> , 667 F.2d 420 -----	66
<u>Campbell v. United States</u> , 365 U.S. 85 -----	22

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

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

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

19/ (...continued)

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

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

III

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

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

ible."^{20/} Chem-Dyne, 572 F. Supp. at 810; see also Ottati, 630 F. Supp. 1395-1396, State of Idaho v. Bunker Hill Co., 635 F. Supp. 665, 676-677 (D.Idaho 1986); United States v. Conservation Chemical Co., 589 F. Supp. 59, 63 (W.D. Mo. 1984); United States v. Medley, 25 ERC 1315, 1318 (D.S.C. 1986). Furthermore, where defendants liable under Section 107 seek to limit the scope of their liability on the ground that the entire harm is capable of apportionment, the burden of proof of apportionment is on those defendants. Chem-Dyne, 572 F. Supp. at 810; Wade, 577 F. Supp. at 1338-1339; Bunker Hill, 635 F. Supp. at 677; Ottati, 630 F. Supp. at 1396; Conservation Chemical, 589 F. Supp. at 63; see also Restatement (Second) of Torts § 433B (1965).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

time -- they present issues that will only become relevant in a later contribution action.^{29/}

D. The landowners are jointly and severally liable. --

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

IV

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

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

^{29/} In any event, the State and the federal agency generators have agreed to reimburse the Superfund (2/23/84 order at 5; JA).

11. Unalakleet Spill 665-89-0012

Recent oil spill. State and Native corporation hope to negotiate in clean-up effort.

NON-OIL HAZARDOUS SUBSTANCES

- | | | | |
|----|--|-------------|---|
| 1. | Forward Alaska,
DNR, Deadhorse
Tract 75 & 76 | 665-89-0068 | Multiple spills on leased tracts adjacent to NANA Reservoir at Deadhorse. |
| 2. | Deadhorse Hotel Pad | 665-89-0058 | Contamination of gravel pad and adjacent tundra. |
| 3. | Alaska Gold/
Steadman Field | 665-87-0002 | Negotiated containment and clean-up of mercury and arsenic contamination. First stage of clean-up is complete. |
| 4. | Nome Barrel Dump | 665-88-0024 | Clean-up underway of site with numerous abandoned barrels containing hazardous substances. |
| 5. | Halliburton
Services | 665-88-0037 | Hazardous substance contamination at Deadhorse site operated by oil field service company. Clean-up is in sampling and analysis stage. |
| 6. | Lease Tract 54
(Childs Pad) | 665-87-0204 | Hazardous substance discharges on abandoned Deadhorse Tract. DEC and oil companies are attempting to resolve outstanding clean-up issues. |
| 7. | Tri-Con Mining | 665-89-0117 | Suspected cyanide discharge from Ester Dome heap leach mining operation. Enforcement is at preliminary site assessment stage. |
| 8. | Citigold Mining | 665-89-0088 | Leaking inner liner indicates possible cyanide discharge from Ester Dome heap leach mining operation. |

The above cases have been referred by the Department of Environmental Conservation to the Attorney General's Office for assistance in enforcement actions. The Attorney General's Office is also assisting the Department of Natural Resources on several other Deadhorse lease tract problems, involving oil and hazardous substance contamination. In addition to the Forward Alaska tract, there are problems with the Childs Tract (Tract 54, work management #665-89-0021) and the Newco Tract (Tract 57, work management #665-89-0104).

OIL SPILL/DISCHARGE MATTERS - ANCHORAGE

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

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

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

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

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

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

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

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

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

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

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

HAZARDOUS SUBSTANCE SPILL/DISCHARGE MATTERS - ANCHORAGE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

cc
HB68

January 9, 1989

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

Dear Representative Cotten:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

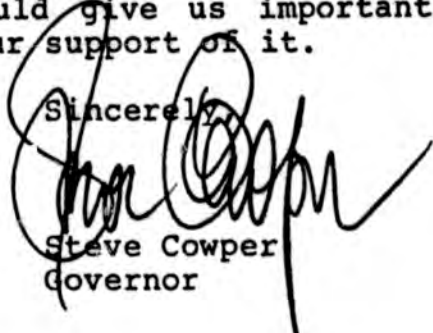
New AS 46.08.075(b) would identify the method for enforcing the lien against real property, including a requirement of recording the certificate of lien and giving notice to the liable party and to anyone else with an interest in the property.

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

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

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

Sincerely,



Steve Cowper
Governor

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

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

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

The truth of the matter is that since 1986, 39 states have passed

some form of tort reform. And on November 8th, it will be your turn to set the record straight.

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

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



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