

ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672
5737 HOUSE JUDICIARY

PURPOSE AND SCOPE OF THE REPORT

PURPOSE

In accordance with Title 24 and 44 of the Alaska Statutes (sunset legislation), an examination of the activities of the Alaska State Board of Parole for the past four years was conducted to determine if the Board has been operating in an effective and efficient manner.

Legislative intent requires consideration of this report during legislative oversight hearings to determine whether the Alaska State Board of Parole should be reestablished. The law now specifies that the Board will terminate June 30, 1989, and have one year from that date to conclude its affairs.

SCOPE

The major areas of our examination were program evaluation, administrative functions, and board proceedings. We reviewed and evaluated the following:

1. Applicable statutes and regulations.
2. Discussions with Board members and staff.
3. Tests of records maintained in conjunction with review of statistics reported by the Board.
4. Complaints filed with the Attorney General's Office, the Ombudsman's Office, the Human Rights Commission, and the Equal Employment Opportunity Office.
5. Memos related to Board meetings.
6. Discussions with the Attorney General's Office.

ORGANIZATION AND FUNCTION

Article III, Section 21, of the Alaska Constitution states that a parole system shall be established by law. AS 33.16 is the law that establishes the Alaska State Board of Parole and its authority. The Board consists of five part-time members who are appointed by the Governor and serve without salary, although travel costs and per diem are provided. The Board has an administrative staff which currently consists of an Executive Director, Parole Board Officer, and two clerical personnel.

The Board basically conducts two types of hearings: release hearings and revocation hearings. By statute, an inmate may not be considered for parole release until a statutory minimum time in prison has been satisfied. Upon application, an eligible inmate will be considered for parole and appear before the Board. The Board will consider the case in view of certain criteria (e.g., institutional behavior, release plans, past record, recommendations, etc.). A parole decision will either release an inmate on parole, continue the case for future consideration, or deny parole. The Board is also responsible for setting parole conditions and supervising prisoners released on parole.

When it has been determined that a parolee has violated a law or condition of parole, the Board will hold a revocation hearing to decide upon the course of action to take in the case. The Board may choose to revoke the violator's parole and return the parolee to prison, whereby no credit is allowed against the sentence for time served on parole; parole may be revoked and the parolee reparaoled without time credited against the sentence for prior time on parole; or no action may be taken. The Board has the authority to establish terms and conditions of parole. Enforcement is accomplished through revocation proceedings.

In each parole release case, the Board weighs the benefits of granting parole release against the inherent risks involved. The benefits of parole embrace opportunities for successful community life and reduced monetary and social costs which follow successful parole release cases. The risks involve additional social and monetary costs that will result from parole violations.

The Board receives General Fund appropriations to support its operations. The Board's primary expenditures are for personal services relating to the administrative staff and travel associated with the various Board meetings and hearings.

REPORT CONCLUSION

Report Conclusion

Article III, Section 21, of the Alaska Constitution requires the establishment of a parole system. The current system comprises a parole release program administered by the Alaska State Board of Parole. We found no viable alternative to the present system at this time; therefore, in our opinion, the Board should continue to administer the parole release program.

The parole decision process requires a great deal of dedication, time, and effort on the part of the uncompensated Board members. We commend the members for their service in what is oftentimes a complex and difficult job.

ANALYSIS OF PUBLIC NEED

Limited Analysis

The following analyses of board activities relate to the public need factors defined in the "sunset" law. These analyses are not intended to be comprehensive, but address those areas we were able to cover within the scope of our review.

- I. The extent to which the board, commission, or program has operated in the public interest.
 - A. Revised statutes and regulations have clarified procedures and guidelines for both the public and parolees/inmates.
 - B. Rights of parolees/inmates are scrupulously maintained.

- II. The extent to which the operation of the board, commission, or agency program has been impeded or enhanced by existing statutes, procedures, and practices which it has adopted, and any other matter, including budgetary, resource, and personnel matters.
 - A. The Board has identified specific objectives and has maintained proper information for performance evaluation.
 - B. The Attorney General's Office took nearly three years to review the draft parole guidelines, but the final document should be published in December of 1988.

- III. The extent to which the board, commission, or agency has recommended statutory changes which are generally of benefit to the public interest.

Statutes were completely revised by Chapter 88, SLA85.

- IV. The extent to which the board, commission, or agency has encouraged interested persons to report to it concerning the effect of its regulations and decisions on the effectiveness of service, economy of service, and availability of service which it has provided.

The Board actively solicits input from interested persons and groups as well as receiving information from public comments to the Department of Corrections.

- V. The extent to which the board, commission, or agency has encouraged public participation in the making of its regulations and decisions.

Public participation has been limited to the legislative hearings which resulted in the revision of the parole statutes.

- VI. The efficiency with which public inquires or complaints regarding the activities of the board, commission, or agency filed with it, with the department to which a board or commission is administratively assigned, or with the Office of the Ombudsman have been processed and resolved.

- A. Twenty cases were opened by the Ombudsman's Office since the last audit. Nine cases were declined, three discontinued, and the Ombudsman advised the inmate/parolee on proper procedures in six cases. Of two fully investigated cases, an error was found in an agency booklet concerning pardons (subsequently withdrawn for correction) and a parole revocation was found to be justified.
- B. Complaints filed directly with the Department or the Board are handled as requests for rehearings or special hearings.

- VII. The extent to which a board or commission which regulated entry into an occupation or profession has presented qualified applicants to serve the public.

The Parole Board does not regulate an occupation or profession.

- VIII. The extent to which state personnel practice, including affirmative action requirements, have been complied with by the board, commission, or agency to its own activities and the area or activity or interest.

All hires and Board appointments complied with appropriate regulations.

- IX. The extent to which statutory, regulatory, budgeting, or other changes are necessary to enable the agency, board, or commission to better serve the interests of the public and to comply with the factors enumerated in this subsection.

Additional staff may be necessary if the workload increases at the present rate (see Appendix A).

APPENDIX

APPENDIX A

ALASKA STATE BOARD OF PAROLE

WORKLOADS

<u>Work Activity</u>	<u>1982</u>	<u>1983</u>	<u>1984</u>	<u>1985</u>	<u>1986</u>	<u>1987</u>
Parole Hearings	166	238	244	231	233	210
Mandatory Parole Revocation Hearings	7	26	37	40	57	128
Preliminary Revocation Hearings	26	32	26	31	67	75
Arrest Warrants Issued	27	45	41	88	86	151
Supplemental Mandatory Conditions Set	26	N/A	141	179	373	515
Emergency Conditional Commutation Release	none	104	107	174	350	0
Consider Non-Award of HB 106 Good Time	none	0	0	0	144	303
TOTAL	<u>252</u>	<u>445</u>	<u>596</u>	<u>743</u>	<u>1,310</u>	<u>1,382</u>

STATE OF ALASKA

DEPARTMENT OF CORRECTIONS

STEVE COWPER, GOVERNOR

REPLY TO:

P.O. BOX 7
JUNEAU, ALASKA 99811-2000
PHONE (907) 465-3378

DEC 21 1988

December 15, 1988

Randy S. Welker
Legislative Auditor
Division of Legislative Audit
P.O. Box W
Juneau, Alaska 99811-3300

RE: Parole Board
Preliminary Audit Report

Dear Mr. Welker:

Thank you for the copy of the preliminary audit report on the Alaska Parole Board and for the opportunity to respond to the report.

We agree with the report conclusion and the analysis of public need. I would suggest several minor changes as noted below.

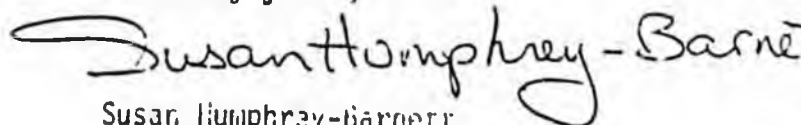
The last phrase of the 3rd sentence in the first paragraph on page 3 should be amended to read "although travel costs, compensation and per diem are provided."

The last sentence in the first paragraph on page 3 needs to reflect an administrative staff of Executive Director, Parole Administrator, Parole Board Officer, and one clerical personnel.

Finally, clarification needs to be provided on Appendix A attached to the report. In an attempt to keep the chart simple, the Parole Board did not provide the numbers of "other work activity" included in the totals for each year. In retrospect that was a mistake. A corrected appendix is attached for your information including the additional line with the accurate numbers for each of the years.

Please contact me or Parole Board Executive Director Sam Trivette if you need additional information.

Sincerely yours,



Susan Humphrey-Barnett
Commissioner

HB

68

THE FOLLOWING DOCUMENT HAS
NOT BEEN FILMED BUT IS
AVAILABLE IN THE ORIGINAL
FILE

SUMMARY REPORT

COMPREHENSIVE INVENTORY REPORT (DRAFT No. 2)

POTENTIAL WASTE DISPOSAL SITES AND OTHER REPORTS / COMPLAINTS KENAI PENINSULA , ALASKA

Prepared for

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

FEBRUARY 1989

Prepared by



HARDING LAWSON ASSOCIATES

601 EAST 57th PLACE
ANCHORAGE, ALASKA 99518

(907) 563-8102



Tom Fink,
Mayor

Municipality of Anchorage

Municipal Health & Human Services Commission

825 "L" Street

P.O. Box 196650 • Anchorage, Alaska 99519-6650



Telephone
(907) 343-4674

HB 68

March 8, 1989

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

Subject: **HB 68**

Dear Representative Goll,

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

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

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

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

Sincerely,

Linda Langston

Linda Langston, Chair
Municipal Health & Human Services Commission

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

STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPT. OF ENVIRONMENTAL CONSERVATION

OFFICE OF THE COMMISSIONER
PO BOX 0, JUNEAU, ALASKA 99811-1800

(907) 465-2600

March 3, 1989

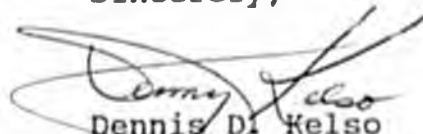
Representative Peter Goll
PO Box V
Juneau, AK 99811

Dear Representative Goll:

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

Thank you very much for your consideration.

Sincerely,



Dennis D. Kelso
Commissioner

STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPT. OF ENVIRONMENTAL CONSERVATION

POSITION PAPER

HB 68

CONTACT: AMY D. KYLE
465-2600

JANUARY 23, 1989

Title

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

Effect of the Bill

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

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

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

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

Department Position


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

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

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

Fiscal Effect

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


Dennis D. Kelso, Commissioner

FISCAL NOTE

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

EXPENDITURES/REVENUES: (Thousands of Dollars)

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

CAPITAL	0	0	0	0	0	0
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REVENUE	0	0	0	0	0	0
---------	---	---	---	---	---	---

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 Contamination

Distribution (by preparer):

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

SUMMARY OF PROVISIONS OF HB 68

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

House Bill 68 has two major provisions:

- * It makes persons who generate hazardous wastes liable for any improper release of these wastes.
- * It allows the state to recover costs for cleanup of hazardous substance releases in cases when parties responsible for the releases declare bankruptcy by filing a lien.

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

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

- * The owner or operator of the facility from which the release occurred;
- * A person who abandons a facility at which a release occurred during the time the person owned or controlled the facility;
- * A person who owns a hazardous substance at the time it is delivered to the facility from which a release occurs;
- * A person who owns a hazardous waste and arranges for its disposal;
- * A person who transports a hazardous waste to a disposal site, if that person arranged for the disposal method.

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

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

STATE OF ALASKA

DEPT. OF ENVIRONMENTAL CONSERVATION

STEVE COWPER, GOVERNOR

POSITION PAPER

CSHB 68 (Res)

CONTACT: AMY D. KYLE
465-2600

March 16, 1989

Title

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

Effect of the Bill

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

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

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

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

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

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

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

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

Section 3 of the bill incorporates releases into the atmosphere.

Sections 4 and 5 include definitions.

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

Department Position

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

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

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

Fiscal Effect

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


Dennis D. Kelso, Commissioner

FISCAL NOTE

REQUEST:

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 Title: An Act relating to the liability for BRU: Environmental Quality
the release or threatened release of hazardous substance
 Sponsor: Rules Committee Components: _____
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EXPENDITURES/REVENUES: (Thousands of Dollars)

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

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS: None

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

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

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

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

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

SUMMARY OF PROVISIONS OF HB 68

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

House Bill 68 has two major provisions:

- * It makes persons who generate hazardous wastes liable for any improper release of these wastes.
- * It allows the state to recover costs for cleanup of hazardous substance releases in cases when parties responsible for the releases declare bankruptcy by filing a lien.

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

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

- * The owner or operator of the facility from which the release occurred;
- * A person who abandons a facility at which a release occurred during the time the person owned or controlled the facility;
- * A person who owns a hazardous substance at the time it is delivered to the facility from which a release occurs;
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A person may be relieved from liability if the release is caused by a negligent third party or in the event of an act of God or war. There is also an "innocent landowner" provision which relieves liability in cases where a person took steps to ascertain the status of a property and did not identify a spill and in cases of involuntary acquisition of property such as through inheritance.

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

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

MEMORANDUM (Brief Communications)

State of Alaska

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

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

Lynn

Heads toony
This is for my Bill
file
HB 68

show to
Hayden
just copy for
members
files

March 20, 1989

LUST TRUST ALASKA/EPA COOPERATIVE AGREEMENT

Priority Listing

LUST TRUST FUNDING ESTIMATES FOR 1989 SPILL COSTS

STATE LEAD

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

1989 - RESPONSIBLE PARTY SPILL LIST (RP)

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

LUST TRUST

1989 - RESPONSIBLE PARTY SPILL LIST (RP)

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

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20 years of drilling

Prudhoe Bay — An environmental gem or lurking problem?

By PATTIEPLER
Daily News reporter

Continued on page 11

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

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

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

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

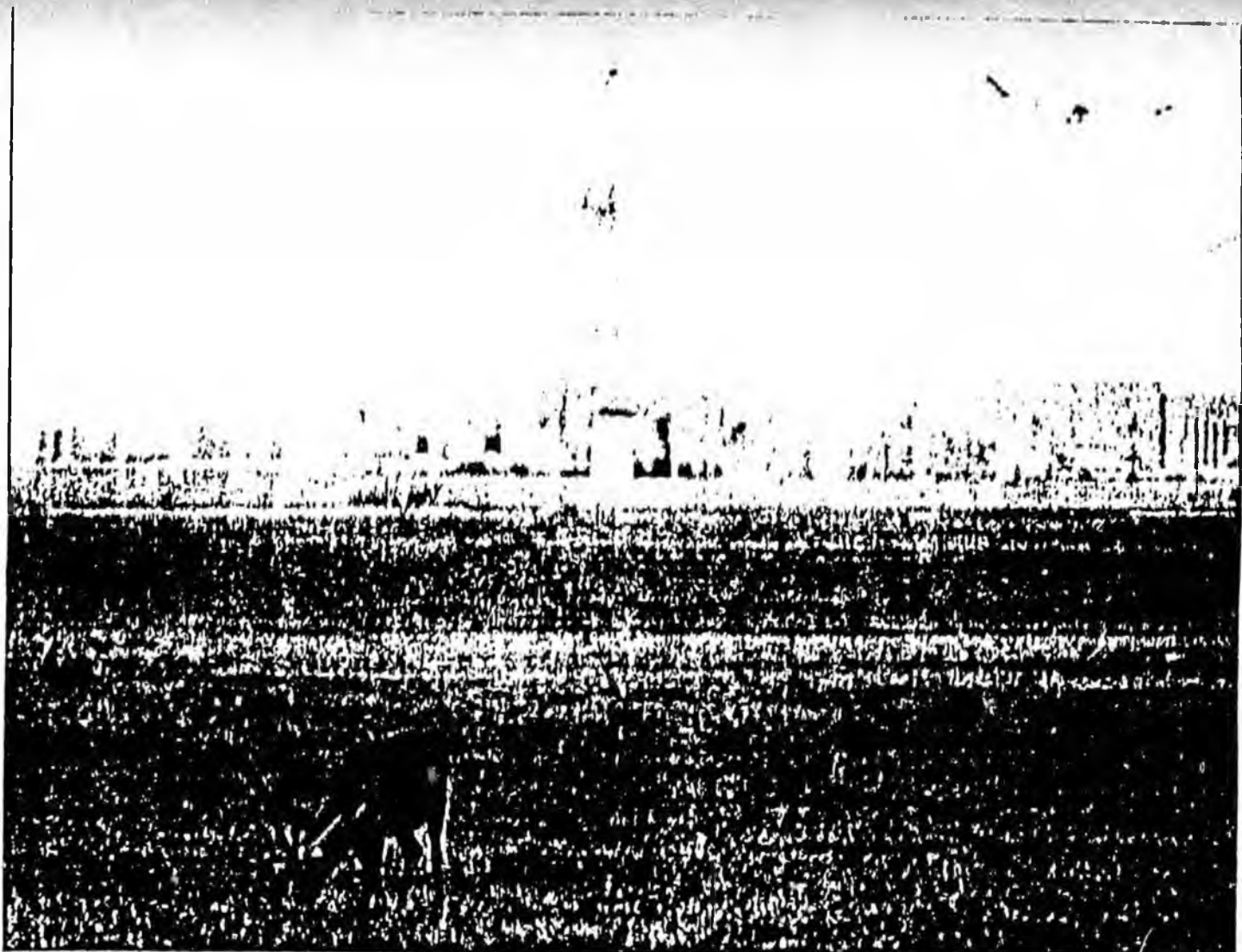
The question is being asked with more urgency these days, as congress wrestles with whether to allow oil development in a part of Alaska still relatively untouched — the coastal plain of the Arctic National Wildlife Refuge.

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

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

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

See Page A 8, PRUDHOE



Anchorage Daily News/Arctic 11a

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

Deadhorse gives industry black eye

By PATTIEPLER
Daily News reporter

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

Several weeks ago, the Alaska Department of Environmental Conservation discovered more than 500 drums of petroleum liquids on a pad leased to Child's Equipment

Services, a company that had filed for protection from creditors in U.S. Bankruptcy Court.

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

Deadhorse is giving the oil industry an

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

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

See Page A 8, DEADHORSE



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

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

Continued from Page A-1

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

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

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

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

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

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

Individual leaseholders hauled in gravel — much of it purchased from the state — and built their own pads along a road that runs from the airport to the oil fields. The pads are three to 60 acres, with troughs between



them. Various lease stipulations and restrictions are aimed at keeping the pads clean and orderly, Brossia said.

DNR and other regulatory agencies conduct annual inspections to make sure companies comply with the rules. This year,

mindful of the economic slump, DNR is stepping up inspections and trying to work with companies that might otherwise walk away, Brossia said.

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

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

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

contained, drummed up and sent to a waste facility, he said.

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

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

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

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

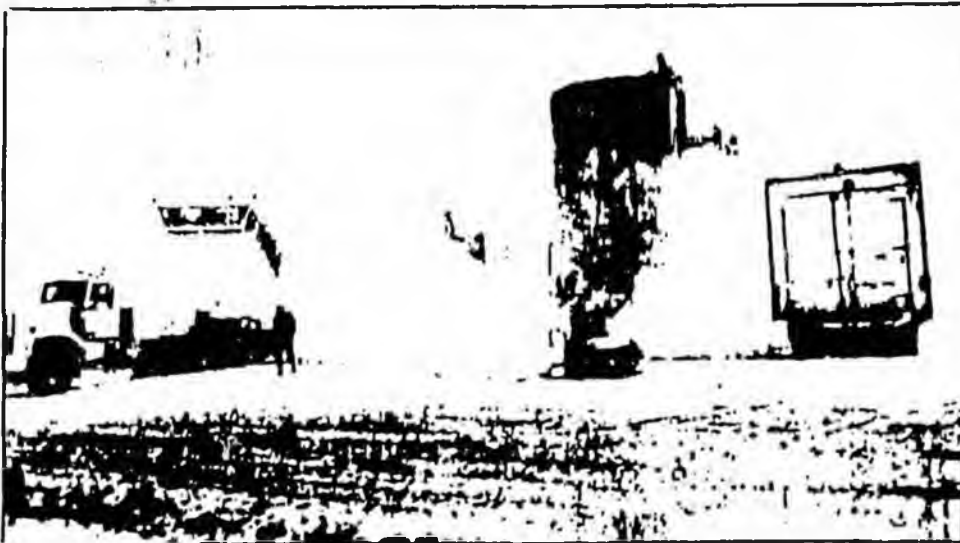
For example, he said, several years ago DEC spent 300 man hours putting together a case against a North Slope salvage company that had dumped 15,000 drums on the tundra just off one of the pads. The case took years to move through the courts. The defendant, who was convicted on criminal charges and ordered to perform community service, rather than to pay fines or go to jail.

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

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

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

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



At ARCO drilling site #8, a large vessel is steam cleaned while waste water runs off the pad.

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

Continued from Page A-1

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

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

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

from offices in Anchorage, Fairbanks and Seattle.

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

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

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

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

OILY WASTES

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

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

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

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

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

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

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

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

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

See Page A 9, PRUDHOE





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

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

DUE FOR A CLEANING IN DEADHORSE



Anchorage Daily News file photo. COURTESY

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

Oil companies prepare for visitors

By PATTI EPLER
Daily News reporter

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

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

The congressional delegations will begin arriving late next week on fact-

finding missions to help them decide whether the coastal plain of the Arctic National Wildlife Refuge, a hundred miles to the east, should be opened to oil development.

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

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

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

See Back Page, DEADHORSE

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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STEVE COMPER, GOVERNOR

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
DEPARTMENT OF ENVIRONMENTAL)
CONSERVATION,)
Plaintiff,)
vs.)
TESORO ALASKA PETROLEUM COMPANY,)
PETRO PRODUCTS, INC., and)
ROBERT E. SANDEN individually)
and d/b/a SANDEN FUEL COMPANY,)
Defendants.)

Case No. 3AN 86-14457 CIV.

AFFIDAVIT OF DR. MICHAEL WATSON

STATE OF ALASKA)
THIRD JUDICIAL DISTRICT) ss.

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

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

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

7 2. Since joining EPA in 1974, I have served as Pesti-
 8 cide Accident Officer and Consumer Safety Officer within the
 9 Pesticides and Toxic Substances Branch, in addition to my duties
 10 as technical expert in toxicology. My title was changed to
 11 Toxicologist in 1980, when that classification was officially
 12 made available within government service. I have published 14
 13 articles in peer-reviewed journals, including Mutation Research,
 14 Clinical Pharmacology and Therapeutics, Toxicon and Archives of
 15 Environmental Health. Although my degrees are all in Zoology, I
 16 have been board certified in Toxicology by the American Board of
 17 Toxicology since 1984. I am a member of several professional
 18 societies, including the Society of Toxicology, International
 19 Society on Toxinology, and the American Chemical Society. In
 20 1984 and again in 1987 I was elected as Councilor for the Pacific
 21 and Northwest Association of Toxicologists. I also serve as an
 22 external reviewer for papers submitted to the international jour-
 23 nal, Aquatic Toxicology.

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

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

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

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

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

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

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

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

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

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

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

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

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1 sufficiently high concentrations can produce central nervous
2 system dysfunction.

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

9 I. In addition to the health risks discussed
10 above, there is an additional risk of being exposed to these
11 volatile compounds, especially benzene, in the household as a
12 consequence of such activities as showering,
13 cooking, operating a dishwasher, and so forth. EPA has recently
14 investigated the effects of using heated, contaminated water in
15 these typical household situations, and has found that the over-
16 all inhalation of such volatile compounds during normal household
17 uses carries with it an additional health risk approximately
18 equivalent to that of drinking the water alone. This is especi-
19 ally pertinent in cold climates, or during periods where influx
20 of outdoor air is at a minimum. The presence of a human carcino-
21 gen such as benzene, let alone the other organics mentioned, can
22 thus pose more risk to a person than first meets the eye, because
23 of this increased exposure via inhalation of vapors as a conse-
24 quence of these other routine household uses of water.

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

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

Further your affiant saith naught.

Dated 5-11-88

Michael Watson
Michael Watson, Ph.D.

SUBSCRIBED AND SWORN TO before me this 11th day of May, 1988.

Valerie D. Dodson
Notary Public, State of Washington
My commission expires: 12-7-90

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Representative Peter Goll

March 17, 1989

Testimony CS for House Bill No. 68
Section AS 46.03.823

"An act limiting the liability of hazardous substance response action contractors; and providing for an effective date."

By Anita M. Burke

Representing the Alaska Hazardous Waste Action Coalition

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

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

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

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

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

al

FISCAL NOTE

REQUEST:

Revision Date: _____ Agency Affected: DEC
 Title: An act relating to liability for release of a hazardous substance. BRU: Environmental Quality
 Sponsor: Rules Committee Components: _____
 Requestor: Governor

EXPENDITURES/REVENUES: (Thousands of Dollars)

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

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS: none

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

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

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

Phone: 465-2600
Date: 14 November 1988

Approved by Commissioner: *[Signature]*
Agency: _____

Date: November 15, 1988

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

FISCAL NOTE

REQUEST:

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

EXPENDITURES/REVENUES: (Thousands of Dollars)

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

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

This bill does not affect the Department of Natural Resources.

Prepared by: Carol Wilson Phone: 465-2400
 Division: Commissioner's Office Date: 11/23/88
 Approved by Commissioner: Lenn Goren Date: 11-28-88
 Agency: Natural Resources

Distribution (by preparer):

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11560
FROM RWH
11/11/82
RC

MEMORANDUM OF LAW

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

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

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

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

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

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

Section 433A of the Restatement provides:

(1) Damages for harm are to be apportioned among two or more causes where

(a) there are distinct harms, or

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

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

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

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

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

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

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

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

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

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

exclude oil
adopt Fed pattern
of whose liability in
what circumstances

Ray Plummer
3-21-89

Alaska State Legislature

House of Representatives House Judiciary Committee

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

M E M O R A N D U M

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

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

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

DATE: March 20, 1989

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

Thank you very much for your assistance.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

March 21, 1989

STEVE COWPER, GOVERNOR

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

Re: CSHB 68

Dear Mr. Kaden:

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

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

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

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

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

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CITATIONS

Cases:

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<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. Caletio</u> , 667 P.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. 198.); United States v. Medley, 25 EPC 1315, 1318 (D.S.C. 1986). Furthermore, where defendants liable under Section 107 seek to limit the scope of their liability on the ground that the entire harm is capable of apportionment, the burden of proof of apportionment is on those defendants. Chem-Dyne, 572 F. Supp. at 810; Wade, 577 F. Supp. at 1338-1339; Bunker Hill, 635 F. Supp. at 677; Ottati, 630 F. Supp. at 1396; Conservation Chemical, 589 F. Supp. at 63; see also Restatement (Second) of Torts § 433B (1965).

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

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

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

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

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

^{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.

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

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).

House Research Report

JOINT AND SEVERAL LIABILITY

ABOLITION OR MODIFICATION AS OF

JULY 1987

ALABAMA

Contributory no changes

ALASKA

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

✓ ARIZONA

1987 - Abolished except for:

1. intentional torts
2. hazardous waste

ARKANSAS

No changes

CALIFORNIA

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

COLORADO

1986 - Total abolition

1987 - Except in cases in which the defendants:

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

CONNECTICUT

1986 - Total abolition except where the defendants share of judgment is uncollectable.

1987 - Except for economic damages.

DELAWARE

No changes

✓FLORIDA

1986 - Abolished except for:

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

GEORGIA

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

✓HAWAII

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

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

✓IDAHO

1987 - Abolished except for:

1. intentional torts
2. hazardous wastes

✓ILLINOIS

1986 - Abolished except for:

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

INDIANA

1984 - Total abolition

IOWA

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

KANSAS

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

KENTUCKY

No changes

LOUISIANA

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

MAINE

No changes

MARYLAND

Contributory - No changes

MASSACHUSETTS

No changes

MICHIGAN

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

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

MINNESOTA

No changes

MISSISSIPPI

No changes

MISSOURI

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

MONTANA

1987 - Abolished except for:

1. defendants more than 50 % at fault