ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672
6361 SENATE JUDICIARY

765

Alaska Environmental Lobby, Inc.

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

AEL ISSUE PAPER
HB 68 STRICT LIABILITY FOR HAZARDOUS SUBSTANCES

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

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

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

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

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

Becky Achten
3-17-89

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y, STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

M E M O R A N D U M May 4, 1989

SUBJECT: Miscellaneous Comments
SCS CSHB 68(Judiciary)

TO: Senator Jan Faiks, Chair
Senate Judiciary Committee

FROM: Terri Lauterbach
Legislative Counsel

Enclosed is a new draft of SCS CSHB 68(Judiciary).

As Tam Cook explained to Chris Christensen yesterday, the time constraints under which this draft was prepared did not allow us to review the draft with the thoroughness we would have liked to exercise.

In addition to time constraints, we were under directions from Chris to avoid making changes in the federal language and assistant AG language submitted for the draft.

Within these constraints, we were able to make some improvements in the draft with Chris' consent. However, we continue to have reservations in the following areas, among others:

(1) Page 2, lines 1 - 5: The placement of the phrase "other than domestic sewage" is awkward at best, and ambiguous at worst.

(2) Subsection (j) on pages 5 - 6: Whether this subsection provides all the essential provisions needed for a contribution action is an open question, particularly in light of the fact that the recent initiative repealed our contribution statutes.

(3) Definition of "owner or operator": The phrase used on page 1, line 27, is "owner and operator." The defined term should be the phrase that is actually

used. Or is it your intent that a person be both the owner and operator before liability attaches? We suggest using "owner or operator" on page 1, line 27.

(4) We are uncertain whether the extent of retroactivity provided in sec. 8 of the draft is consistent with due process requirements.

(5) We are uncertain whether the use of federal language in the definitions and elsewhere achieves a coherent objective within the overall scheme of the bill, which includes language other than federal language. We are not suggesting that more federal language be used, only that you carefully review the federal definitions to see if they accomplish your objectives in the context of this draft.

(6) I have deleted a personal pronoun and some uses of "which" and "such," in the submitted language, in keeping with the plain English requirements of our drafting manual. However, there remain several other types of language that we would not ordinarily use in a bill draft.

Given our reservations as listed, we cannot guarantee that the enclosed draft reflects a cohesive set of sections with workably clear language.

Please let me know if I can be of further assistance.

TL:gc
WKG10/048

Enclosure

MARY MORDAUNT

CS HB 68 (Judiciary)

page 5, line 17, add new subsection as follows:

(i) In an action to recover damages or costs, a court shall determine if a rational basis exists for apportionment of the harm and shall apportion the damages or costs accordingly.

STATE OF ALASKA

DEPT. OF ENVIRONMENTAL CONSERVATION

STEVE COWPER, GOVERNOR

POSITION PAPER

CSHB 68 (Oil and Gas)

April 14, 1989

Title

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

Effect of the Bill

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

Section 1 of the bill includes a technical amendment regarding filing of liens.

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

- Those who generate hazardous wastes;

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

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

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

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

The Oil and Gas Committee added an amendment that would clarify that transporters of refined petroleum products are not liable as

transporters under the terms of the bill.

Section 3 establishes provides that response action contractors who are called upon to response to a spill are liable for actions caused by their own negligence.

Sections 4, 5 and 6 include definitions.

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

Department Position

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

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

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

Fiscal Effect

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

Dennis D. Kelso, Commissioner

HB 68

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Inc. (CA4) 822 F2d
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cert den (US) 98 L Ed

§ 9607. Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date. Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, ~~shall be liable for~~ ; this paragraph does not apply to the transport of petroleum oil.

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 104(i) [42 USCS § 9604(i)].

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of the Internal Revenue Code of 1954 [26 USCS §§ 9501 et seq.]. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

(b) Defenses. There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the

Terri, the change reflects the amendment made in the Oil & Gas CS

Chris 4523

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM January 26, 1989

SUBJECT: Delegation of legislative authority
(Work Order No. 6-0661)

TO: Representative Max Gruenberg
Co-Chairman, House Judiciary Committee

FROM: Richard A. Bradley
Legislative Counsel

Mark Handley has asked that we comment on the question presented by the adoption of federal law or regulations by reference in state statutes. An example of this is found in a Governor's bill: HB 70. Sec. 3 of the bill provides that the department "shall pay for prescribed drugs under AS 47.07.030(b) in accordance with 42 C.F.R. 447.331 -- 447.334.

Perhaps the best argument for not incorporating Federal references, particularly to regulations but also to laws, is that the Federal authorities may change the Federal laws. If they do, the references are either disregarded ("we know what was intended by the law") or they cripple the law.

A good case can be made that such an adoption is unconstitutional as a delegation of legislative authority. Whether it is, or not, may be unimportant because we believe that it is done frequently and necessarily in many areas where state officers operate under Federal regulations that have a habit of changing frequently.

But the solution to the problem presented in HB 70 can be easily addressed quite constitutionally by granting the commissioner of health and social services the authority to adopt by regulation whatever formula the state wants-- as, for example, by saying that the department "shall pay for prescribed drugs under AS 47.07.030(b) under regulations adopted by the commissioner in conformity with applicable federal regulations." The regulatory framework permits rapid amendment of the regulations and yet a state officer with

expertise in the area is monitoring the developments and is able to keep the law current.

If federal laws or regulations are amended in a fashion unacceptable to state officers, the assistance of the legislature can be requested.

If I may be of further assistance, please advise.

RAB:kb:gc
wkk1/075

STATE OF ALASKA
THE LEGISLATURE

POUCH V STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM January 18, 1989

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

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

FROM: Terri Lauterbach TML
Legislative Counsel

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

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

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

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

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

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

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

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

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

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

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

TL:gc
WKG5/105

January 24, 1989

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

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

Dear Representative Menard:

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

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

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

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

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

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

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

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

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

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

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

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

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

Very truly yours,

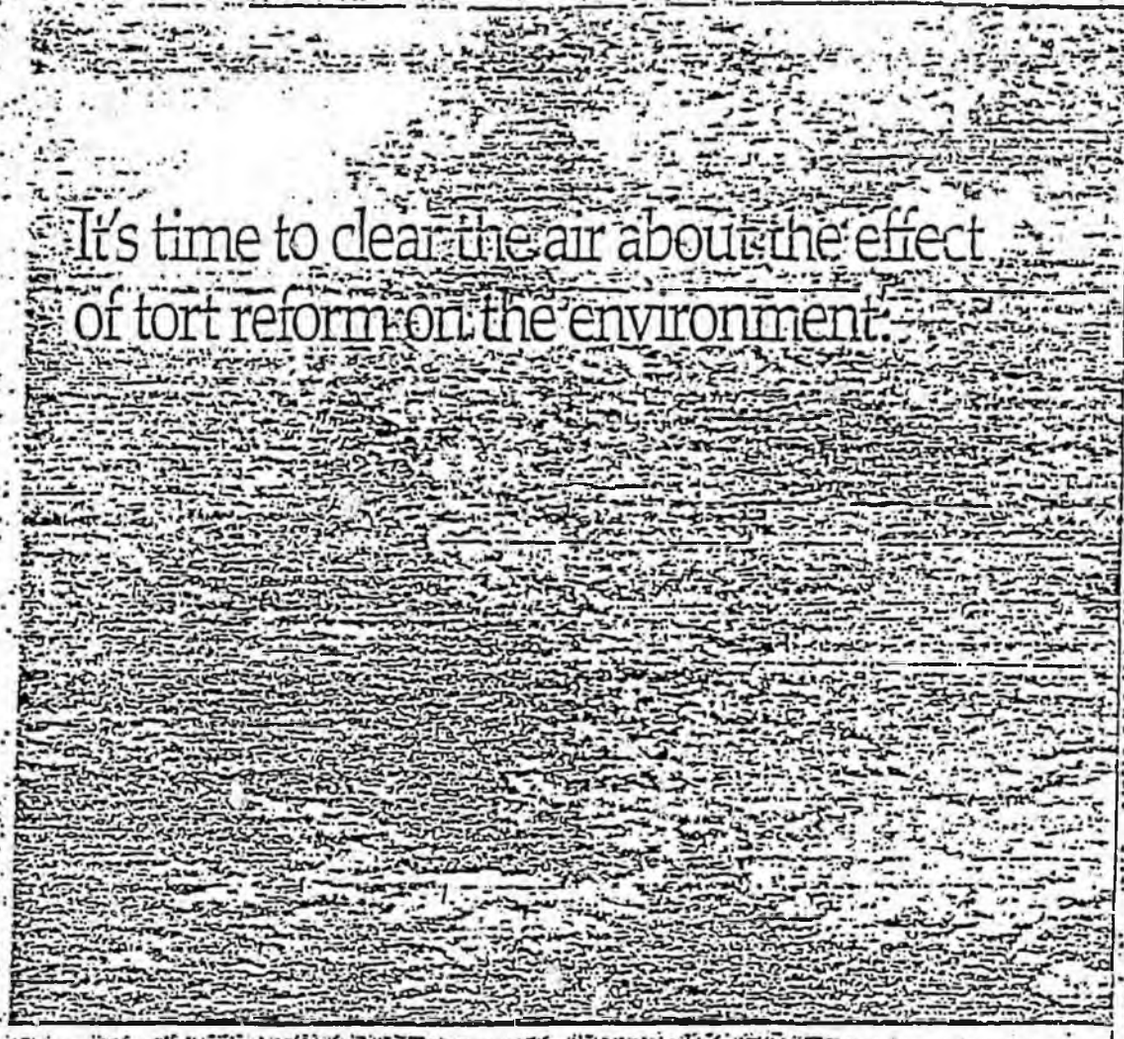
GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By: Madeleine R. Levy
Assistant Attorney General

MRL:jem

Attachment

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



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

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

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

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

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

VOTE FOR #2 ON NOV. 8

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

Paid for by Citizens' Coalition for Tort Reform, PO Box [illegible], Anchorage, Alaska [illegible] David McGuire, M.D., Chairman.

ATTACHMENT 1
PAGE 1 OF 1 PAGES.

MEMORANDUM State of Alaska

DEPARTMENT OF LAW

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

DATE: November 2, 1988

FILE NO: 661-89-0172

TELEPHONE NO:

SUBJECT: 276-3550

Implications of Proposed Ballot Measure No. 2

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

CONFIDENTIAL - ATTORNEY CLIENT PRIVILEGE

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

The official ballot language describes the proposed initiative as follows:

> This initiative changes the way damages can be collected from parties to lawsuits who share fault for injury to persons or property. The law now says that a party more than half responsible could be liable for the total judgment. Parties may collect from each other amounts paid over their share. Parties less than half responsible pay only up to twice their fault.
>
> The initiative would make each party liable only for damages equal to his or her share of fault, and repeal the law concerning reimbursement from other parties.
>
> Shall this initiative become law?
>
> YES [ ]
>
> NO [ ]

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

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

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1/ Enacted by the legislature as Section 1 of Ch. 139, SLA 1986, AS 09.17.080 was part of a statutory package to put a lid on classic tort liability. The statutory package has several components. It limits noneconomic damages for personal injury to $500,000.00. AS 09.17.010. It specifies that the burden of proof for imposing punitive damages is "clear and convincing" evidence. AS 09.17.020. It limits the liability of certain non-profit and public bodies. AS 09.17.050. It provides for calculation and payment of future economic damages as well as special verdicts itemizing various damages. AS 09.17.040. It authorizes diminution of recovery in the case of contributory fault and certain collateral benefits. AS 09.17.060-09.17.070.

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

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

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

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

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

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

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

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

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

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

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

MRL:jem

BALLOT MEASURE NO. 2

Initiative No. 87TOR2
Civil Liability

BALLOT LANGUAGE

(As it will appear on the November 8, 1988, General Election Ballot)

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

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

Shall this initiative become law?

YES ☐

NO ☐

LEGISLATIVE AFFAIRS AGENCY SUMMARY

This measure will affect lawsuits in which two or more persons are at fault.

The new law would tell the court to enter judgment against each person at fault, but only in an amount that represents that person's share of the fault.

Existing law now tells the court to enter judgment against each person at fault in an amount equal to the total liability of all persons at fault. Those at fault are required to share the total cost of the fault. The measure repeals that law.

The measure applies to suits based on acts occurring after its effective date.

FULL TEXT OF PROPOSED AMENDMENT

What follows is the actual text of the amendment to Title 9 of the Alaska Statutes proposed by the initiative which would become law if the measure is passed by the voters. Capitalized words appearing in brackets are those in the current law which would be deleted. Words that are underlined would be added to the current law.

"Section 1. AS 09.17.080(d) is amended to read:

(d)The court shall enter judgment against each party liable on the basis of [JOINT AND] several liability [, EXCEPT THAT A PARTY WHO IS ALLOCATED LESS THAN 50 PERCENT OF THE TOTAL FAULT ALLOCATED TO ALL THE PARTIES MAY NOT BE JOINTLY LIABLE FOR MORE THAN TWICE THE PERCENTAGE OF FAULT ALLOCATED TO THAT PARTY] in accordance with that party's percentage of fault.

"Sec. 2. AS 09.16 is repealed.

"Sec. 3. Underlined material in this Act indicates text that is being added to the law, and bracketed material in capital letters in this act indicates deletions from the law.

"Sec. 4. Sections 1-2 of this Act apply to all causes of action accruing after the effective date of this Act.

"Sec. 5. If any provision of this Act, or the application thereof to any person or circumstances is held invalid, the remainder of this Act and the application to other persons or circumstances shall not be affected thereby.

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH V STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

October 24, 1988

Lonni Levy
Office of the Attorney General
State of Alaska
1031 West 4th Avenue, Suite 200
Anchorage, Alaska 99501

Dear Ms. Levy,

Enclosed is the memorandum concerning the effect of the "tort reform" initiative on certain environmental protection statutes that you requested.

The release of this memorandum has been approved by Senator Jan Faiks, for whom the memorandum was prepared.

Sincerely,

George Utermohle

George Utermohle
Legislative Counsel

Enclosure

GU:gc
WKG4/012

M E M O R A N D U M September 7, 1988

SUBJECT: Tort reform initiative
(Work Order No. 6-0079)

TO: Senator Jan Faiks

FROM: Michael F. Ford
Legislative Counsel

Assuming the ballot initiative repealing joint liability under AS 09.17.080(d) passes, you have asked if this will also affect the joint liability for discharges of oil or other pollutants under AS 46.03, or the liability for clean-up or containment of oil or hazardous substances under AS 46.08.070. As explained in this memo, I do not believe that passage of the initiative will affect the joint and several liability provided for under AS 46.03.758(e) or other civil liability imposed under AS 46.03 or AS 46.08.

Passage of the initiative would amend AS 09.17.080(d) and eliminate joint liability under that law. The initiative does not directly amend any other civil penalty or reflect an intent to repeal or amend civil liability established under other statutes. Absent a specific intent to repeal or amend, the question becomes will the passage of the initiative result in amendment by implication? A statute can certainly be amended by implication, but generally only when the statute falls into one of two categories. First, when there is irreconcilable conflict between two laws, then the later act constitutes implied repeal to the extent of the conflict. Second, if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will similarly repeal the earlier act. Peter v. State, 531 P.2d 1263 (AK 1975).

Concerning the first category, there is not an irreconcilable conflict between the AS 09.17.080(d) and the pollution laws, particularly when comparing these laws in the context of their respective chapters. The AS 09.17 pro-

vision is a general limitation on civil liability, imposed in tort cases. The AS 46.03 and AS 46.08 provisions only apply to civil suits brought for illegal oil or other hazardous pollution. These environmental provisions are narrow public interest statutes, clearly distinguishable from the tort limitations imposed under AS 09.17.

Given the distinctions between AS 09.17 and AS 46.03 and 08, it is also difficult to argue that the second category of repeal by implication applies. There is no indication that the tort reform act was intended to address the natural resource protection policies outlined in AS 46.03 and 08, or that the tort reforms were intended as a substitute for the civil penalties contained in those chapters. Therefore amendment of AS 09.17.080(d) by initiative will not amend these provisions by implication. This same reasoning applies to regulations adopted under the environmental statutes. Unless the limitation on tort liability irreconcilably conflicts with the regulations, or is intended as a substitute, passage of the initiative will have no affect on these regulations.

Federal law in the area of hazardous pollution is contained in 46 U.S.C. 9601 - 9657. While the federal law does not preempt the states from imposing additional liability, a person who receives compensation under federal law is precluded from recovering compensation for the same damages under state law. See 46 U.S.C. 9614(b). Under federal law, "hazardous substance" does not include petroleum or natural gas, unless specifically designated as a hazardous substance by the administrator of the Environmental Protection Agency. See 46 U.S.C. 9601(14).

If you have further questions please contact me.

MFF:gc
WKG3:090

March 21, 1989

RECEIVED
MAR 23 1989
DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

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.

bcc: John McDonagh
Gary Amendola
Amy Kyle

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

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

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

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

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

III

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

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

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

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

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

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

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

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

Neither the generators (Br 20-21) nor the landowners (Br 13-14) contest that Chem-Dyne sets out the proper test for joint and several liability. Nor do they contest the district court's characterization of the site as one where it was "impossible to ascertain the degree of relative contribution 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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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).

Alaska State Legislature

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

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SENATE SPECIAL COMMITTEE ON OIL AND GAS

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

From: Committee staff

Re: HB 68, Sectional analysis

Date: April 11, 1989

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

Section 2.

AS 46.03.822. Strict Liability for the Release of Hazardous Substances

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

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

2) the owner and operator of a facility or vessel form which the release occurred or was threatened;

3) if a facility or vessel is abandoned, the owner, operator and any other person controlling activities on the facility or vessel just before abandonment;

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

OIG SECTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STEVE COWPER
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

May 2, 1989

The Honorable Jan Faiks
Alaska State Senator
P.O. Box V
Juneau, AK 99811

Dear Senator Faiks:

I am writing to reaffirm my support for HB 68, which is scheduled for hearing in the Senate Judiciary Committee today.

I prepared this legislation to ensure that parties responsible for managing hazardous substances are held accountable for spills. The people of the state must be assured that they will not have to absorb the costs of cleanup from hazardous substance spills. The State needs to create maximum incentives for parties that manage hazardous substances to avoid spills. It is particularly important to close loopholes that allow liability for hazardous substances to be shifted to operators who may have insufficient resources to perform cleanup.

This bill would establish a standard of liability to accomplish these purposes. This bill is essential to the State's overall environmental protection program.

The proposed Committee Substitute and other objections raised by your office to HB 68 have been discussed with the Attorney General's Office, and we feel they do not present a significant problem. We urge that you pass out the bill as it was reported out of the Oil and Gas Committee on April 14.

I hope that you will report this bill out of your committee today.

Sincerely,

Steve Cowper
Governor

transporters under the terms of the bill.

Section 3 establishes provides that response action contractors who are called upon to response to a spill are liable for actions caused by their own negligence.

Sections 4, 5 and 6 include definitions.

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

Department Position

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

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

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

Fiscal Effect

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

Dennis D. Kelso, Commissioner

Alaska Environmental Lobby, Inc.

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

AEL ISSUE PAPER
HB 68 STRICT LIABILITY FOR HAZARDOUS SUBSTANCES

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

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

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

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

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

Becky Achten
3-17-89

April 25, 1989
DSPNW

Senator Jan Faiks
Mr. Chris Christensen

Re: Section 3 of House Bill 68

As suggested by Mr. Christensen, I am writing a few comments regarding House Bill 68. My name is William Pyle, I am an Alaska resident and I am writing on behalf of 7 Alaska firms who have joined together to form the Alaska Hazardous Waste Action Coalition. Each of the firms is actively involved in the investigation, evaluation, plan development, mapping and surveying, engineering, design and construction, removal, or equipment provision in response to hazardous or toxic waste spills and leaks. We strongly support Section 3 of House Bill 68 (HB68) which deals with response action contractors. However, there are 2 changes in the wording of Section 3 which we wish to recommend in order to clarify and strengthen the legislation.

A. Page 5, Section 3, Subparagraph (a), line 24 of HB68 says "...is negligent or grossly negligent or ..." in reference to determining liability of response action contractors. Our group suggests that the words "...negligent or ..." be deleted so that the phrase would read "...is grossly negligent or ...". Our reasons for this change are described below.

1. The present wording of Subparagraph (a), Section 3 is based on language from the Federal Superfund Amendment and Reauthorization Act of 1986 (SARA).

The federal act includes indemnification provisions referring to response action contractors being held harmless and indemnified against any liability "...for negligence arising out of the contractor's performance in carrying out response action contracts under this title unless such liability was caused by conduct of the contractor which was grossly negligent or which constituted intentional misconduct".

The federal wording does refer to "negligence" but specifies "grossly negligent or which constituted intentional misconduct". HB68 does not provide indemnification of the response action contractor and is not equivalent to the SARA legislation as presently written.

2. We also believe that a response action contractor's services must be judged under the standards of professional practice in existence at the time the services were provided. Standards of practice in hazardous waste work are changing rapidly. We believe that work done by a response action contractor should be evaluated on the basis of professional standards of practice prevailing at the time the work is done. In some cases, litigation may not start for several years, after work has been done. We do not think that newer, possibly more rigid stands should be used to judge work done under earlier standards of practice. This is particularly important because litigation may not be initiated until several years after the work has been done.

3. HB68 holds the state and municipalities to a standard of "...gross negligence or intentional misconduct" (Subparagraph (h) of Section 2, beginning on line 11 of Page 5). We do not think it is reasonable for the state and municipalities to be held at a different standard than the response action contractors they may employ.

B. Page 6, Subparagraph (b), line 1. This states that liability referred to in Subparagraph (a) "...does not apply to a response action contractor who would otherwise be strictly liable under any other provisions of state or federal law". We believe tht the ADEC's intent on this was to assure that a responsible party (who should be strictly liable) cannot avoid responsibility by performing response action services. We believe that Subparagraph (b) is far too broad because there may (probably) be a lot of state or federal laws that could be interpreted to hold response action contractors in strict liability, regardless of the intent of HB68. We recommend that the phrase "...under any other provisions of state or federal law ..." be deleted from Subparagraph (b), line 3, and that the phrase be replaced by "...as an owner, operator, or generator of the hazardous substance ...", to be added after the word "liable" on line 3.

489-14 / CJM

SUMMARY OF PROPOSED CHANGES TO SCS CSHB 68 (JUD)
WORK DRAFT DATED 5/1/89

1. Joint and several liability/ contribution issues

Amend Section 2 as follows:

a. add new subsection (i)--see attachment no. 1

b. add new subsection (j):

A person may seek contribution from any other person who is liable or potentially liable under subsection (a), during or following any civil action under subsection (a). Such claims shall be brought in accordance with the Alaska Rules of Civil Procedure, and shall be governed by state law. In resolving contribution claims, the court may allocate damages and costs among liable parties using such equitable factors as the court determines are approporiate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under subsection (a).

2. Liable persons

Amend Section 6 to add new subsection, in alphabetical order on p.8 :

insert "owner and operator definition" contained in CERCLA section 101 (20) (A), attached as attachment 2.

3. Additional relief from liability

Amend Section 2 to add new subsections (3)-(5) to subsection (c) on page 3:

(3) the person acquired the facility by inheritance or bequest;

(4) [insert Sealaska amendment after checking language and statutory cites]; or

(5) the state acquired the facility under P.L. 85-508 (" he Statehood Act").

ADD NEW LANGUAGE TO LIABILITY PROVISIONS, section 2

Page 1, line 19, after "strictly" add:

"jointly and severally"

Page 1, line 28, after "facility" add:

"or vessel"

Page 2, line 3-4, delete "incineration"

Page 2, line 7, delete "incineration"

4. Definitions

a. Amend Section 6 to add the following on page 7, line 27 after the word "works":

", but does not include any consumer product in consumer use"

b. Add definition of "release" in section 6 on page 8 as follows:

[insert attachment 3]

c. Add definition of "transport" in section 6 on page 8 as follows:

[insert attachment 4]

5. no action necessary

6. Chris to draft whistleblower provision using HB 91 but eliminating restriction to public employers

7. Retroactive clause

Add a new section 9 at end of bill:

[insert attachment 5]

8. Residential sewage disposal

Amend section 2 on Page 2, line 3, after "person", add:

", other than domestic sewage,"

9. No change necessary as discussed.

10. No change necessary as discussed.

A M E N D M E N T

TO: SCS CSHB 68 (Oil & Gas)

Page 1, Line 18, after "section,":

Insert "and the exception set out in (i) of this section"

Page 5, after line 17:

Insert a new subsection to read:

"(i) In an action to recover damages and costs, a person otherwise jointly and severally liable under this section is relieved of joint liability and is liable severally for damages and costs attributable to that person if the person proves that

(1) the harm caused by the release or threatened release is divisible; and

(2) there is a reasonable basis for apportionment of costs and damages to that person."

ATTACHMENT 1

Solid Waste Disposal Act [42 U.S.C.A. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. § 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317 (a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C.A. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas)[;].

(15) *The term* "navigable waters" or "navigable waters of the United States" means the waters of the United States, including the territorial seas[;].

►I.H. Indian Tribes
SARA § 101(a)

(16) *The term* "natural resources" means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone established by the Magnuson Fishery Conservation and Management Act [16 U.S.C.A. § 1801 et seq.]) any State or local government, [or] any foreign government, *any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe*[;].◄

(17) *The term* "offshore facility" means any facility of any kind located in, on, or under, any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel[;].

(18) *The term* "onshore facility" means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land or nonnavigable waters within the United States[;].

(19) *The term* "otherwise subject to the jurisdiction of the United States" means subject to the jurisdiction of the United States by virtue of United States citizenship, United States vessel documentation or numbering, or as provided by international agreement to which the United States is a party[;].

►II.B. Liability Limits
SARA § 101(b)

(20)(A) *The term* "owner or operator" ... ans (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any abandoned facility, any person who owned, operated, or otherwise controlled activities at such facility immediately prior to such abandonment [(iv) *in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand.* Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility[;].

(B) [i]*In* the case of a hazardous substance which has been accepted for transportation by a common or contract carrier and except as provided in section 9607(a)(3) or (4) of this title, (i) the term "owner or operator" shall mean such common carrier or other bona fide for hire carrier acting as an independent contractor during such transportation, (ii) the shipper of such hazardous substance shall not be considered to have caused or contributed to any release during such transportation which resulted solely from circumstances or conditions beyond his control[;].

(C) [i]*In* the case of a hazardous substance which has been delivered by a common or contract carrier to a disposal or treatment facility and except as provided in section 9607(a)(3) or (4) of this title (i) the term "owner or operator" shall not include such common or contract carrier, and (ii) such common or contract carrier shall not be considered to have caused or contributed to any release at such disposal or treatment facility resulting from circumstances or conditions beyond its control[;].

(D) The term "owner or operator" does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607.◄

(21) *The term* "person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body[;].

►I.A. Scope of Superfund
SARA § 101(c)

(22) *The term* "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment *(including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant)*, but excludes (A) any release which results in exposure to persons soley within a workplace, with respect to a claim which such persons may assert against the employer of such persons, (B) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine, (C) release of source, byproduct, or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954 [42 U.S.C.A. § 2011 et seq.], if such release is subject to requirements with respect to financial protection established by the Nuclear [illegible] under section

ATTACHMENT 2

Solid Waste Disposal Act [42 U.S.C.A. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. § 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317 (a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C.A. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas)[;].

(15) *The term* "navigable waters" or "navigable waters of the United States" means the waters of the United States, including the territorial seas[;].

►I.H. Indian Tribes
SARA § 101(a)

(16) *The term* "natural resources" means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone established by the Magnuson Fishery Conservation and Management Act [16 U.S.C.A. § 1801 et seq.]) any State or local government, [or] any foreign government, *any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe*[;].◄

(17) *The term* "offshore facility" means any facility of any kind located in, on, or under, any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel[;].

(18) *The term* "onshore facility" means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land or nonnavigable waters within the United States[;].

(19) *The term* "otherwise subject to the jurisdiction of the United States" means subject to the jurisdiction of the United States by virtue of United States citizenship, United States vessel documentation or numbering, or as provided by international agreement to which the United States is a party[;].

►II.B. Liability Limits
SARA § 101(b)

(20)(A) *The term* "owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and [(iii) in the case of any abandoned facility, any person who owned, operated, or otherwise controlled activities at such facility immediately prior to such abandonment.] *(iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand.* Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility[;].

(B) [i]*I*n the case of a hazardous substance which has been accepted for transportation by a common or contract carrier and except as provided in section 9607(a)(3) or (4) of this title, (i) the term "owner or operator" shall mean such common carrier or other bona fide for hire carrier acting as an independent contractor during such transportation, (ii) the shipper of such hazardous substance shall not be considered to have caused or contributed to any release during such transportation which resulted solely from circumstances or conditions beyond his control[;].

(C) [i]*I*n the case of a hazardous substance which has been delivered by a common or contract carrier to a disposal or treatment facility and except as provided in section 9607(a)(3) or (4) of this title (i) the term "owner or operator" shall not include such common or contract carrier, and (ii) such common or contract carrier shall not be considered to have caused or contributed to any release at such disposal or treatment facility resulting from circumstances or conditions beyond its control[;].

(D) The term "owner or operator" does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this chapter in the same manner and to the same extent, both procedurally-and substantively,-as any nongovernmental entity, including liability under section 9607.◄

(21) *The term* "person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body[;].

►I.A. Scope of Superfund
SARA § 101(c)

(22) *The term* "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment *(including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant)*, but excludes (A) any release which results in exposure to persons soley within a workplace, with respect to a claim which such persons may assert against the employer of such persons, (B) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine, (C) release of source, by-product, or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954 [42 U.S.C.A. § 2011 et seq.] if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under section

ATTACHMENT 3

170 of such Act [42 U.S.C.A. § 2210], or for the purposes of section 9604 of this title or any other response action, any release of source byproduct, or special nuclear material from any processing site designated under section 7912(a)(1) or 7942(a) of this title, and (D) the normal application of fertilizer[;]. ◄

(23) *The terms* "remove" or "removal" means[] the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief Act of 1974 [42 U.S.C.A. § 5121 et seq.][:].

►I.F. Cleanup Standards
SARA § 101(d)

(24) *The terms* "remedy" or "remedial action" means[] those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances or contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or [welfare. The term does not include offsite transport of hazardous substances, or the storage, treatment, destruction, or secure disposition offsite of such hazardous substances or contaminated materials unless the President determines that such actions (A) are more cost-effective than other remedial actions, (B) will create new capacity to manage, in compliance with subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.], hazardous substances in addition to those located at the affected facility, or (C) are necessary to protect public health or welfare or the environment from a present or potential risk which may be created by further exposure to the continued presence of such substances or materials;] *welfare, the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.* ◄

►I.C. Federal/State Cost Sharing
SARA § 101(e)

(25) *The terms* "respond" or "response" means[] remove, removal, remedy, and remedial action[;], *all such terms (including the terms "removal" and "remedial action") include enforcement activities related thereto.* ◄

(26) *The terms* "transport" or "transportation" means the movement of a hazardous substance by any mode, including pipeline (as defined in the Pipeline Safety Act), and in the case of a hazardous substance which has been accepted for transportation by a common or contract carrier, the term "transport" or "transportation" shall include any stoppage in transit which is temporary, incidental to the transportation movement, and at the ordinary operating convenience of a common or contract carrier, and any such stoppage shall be considered as a continuity of movement and not as the storage of a hazardous substance[;].

(27) *The terms* "United States" and "State" include the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Marianas, and any other territory or possession over which the United States has jurisdiction[:].

(28) *The term* "vessel" means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water[:].

(29) *The terms* "disposal", "hazardous waste", and "treatment" shall have the meaning provided in section 1004 of the Solid Waste Disposal Act [42 U.S.C.A. § 6903][:].

(30) *The terms* "territorial sea" and "contiguous zone" shall have the meaning provided in section 1362 of Title 33.

(31) *The term* "national contingency plan" means the national contingency plan published under section 1321(c) of Title 33 or revised pursuant to section 9605 of this title[; and].

(32) *The terms* "liable" or "liability" under this subchapter shall be construed to be the standard of liability which obtains under section 1321 of Title 33.

(33) The term "pollutant or contaminant" shall include, but not be limited to, any element, substance, compound, or mixture, including disease-causing agents, which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring, except that the term "pollutant or contaminant" shall not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous

170 of such Act [42 U.S.C.A. § 2210], or, for the purposes of section 9604 of this title or any other response action, any release of source byproduct, or special nuclear material from any processing site designated under section 7912(a)(1) or 7942(a) of this title, and (D) the normal application of fertilizer[;]. ◄

(23) *The terms* "remove" or "removal" means the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief Act of 1974 [42 U.S.C.A. § 5121 et seq.][;].

►I.F. Cleanup Standards
SARA § 101(d)

(24) *The terms* "remedy" or "remedial action" means those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances or contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or [welfare. The term does not include offsite transport of hazardous substances, or the storage, treatment, destruction, or secure disposition offsite of such hazardous substances or contaminated materials unless the President determines that such actions (A) are more cost-effective than other remedial actions, (B) will create new capacity to manage, in compliance with subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.], hazardous substances in addition to those located at the affected facility, or (C) are necessary to protect public health or welfare or the environment from a present or potential risk which may be created by further exposure to the continued presence of such substances or materials;] *welfare; the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.* ◄

►I.C. Federal/State Cost Sharing
SARA § 101(a)

(25) *The terms* "respond" or "response" means remove, removal, remedy, and remedial action[;], *all such terms (including the terms "removal" and "remedial action") include enforcement activities related thereto.* ◄

(26) *The terms* "transport" or "transportation" means the movement of a hazardous substance by any mode, including pipeline ~~as defined in the Pipeline Safety Act~~, and in the case of a hazardous substance which has been accepted for transportation by a common or contract carrier, the term "transport" or "transportation" shall include any stoppage in transit which is temporary, incidental to the transportation movement, and at the ordinary operating convenience of a common or contract carrier, and any such stoppage shall be considered as a continuity of movement and not as the storage of a hazardous substance[;].

(27) *The terms* "United States" and "State" include the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Marianas, and any other territory or possession over which the United States has jurisdiction[;].

(28) *The term* "vessel" means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water[;].

(29) *The terms* "disposal", "hazardous waste", and "treatment" shall have the meaning provided in section 1004 of the Solid Waste Disposal Act [42 U.S.C.A. § 6903][;].

(30) *The terms* "territorial sea" and "contiguous zone" shall have the meaning provided in section 1362 of Title 33.

(31) *The term* "national contingency plan" means the national contingency plan published under section 1321(c) of Title 33 or revised pursuant to section 9605 of this title[; and].

(32) *The terms* "liable" or "liability" under this subchapter shall be construed to be the standard of liability which obtains under section 1321 of Title 33.

(33) The term "pollutant or contaminant" shall include, but not be limited to, any element, substance, compound, or mixture, including disease-causing agents, which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring, except that the term "pollutant or contaminant" shall not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous

ATTACHMENT 4

Insert a new bill section to read:

"* Sec. 7. AS 46.03.822, as amended by sec. 1 of this Act, applies to releases and substantial threats of releases that occurred before the effective date of this Act, and to that extent, AS 46.03.822, as amended by sec. 1 of this Act, is retroactive in its effect. However, AS 46.03.822, as amended by sec. 1 of this Act, does not apply to an action in which final judgment no longer subject to appeal has been entered before the effective date of this Act."

Renumber the following bill section accordingly.

ATTACHMENT 5

HOGE AND LEKISCH
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
437 "E" STREET, SUITE 500 · ANCHORAGE, ALASKA 99501-2366
(907) 276-1726
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JOHN W. COLVER
DAVID W. RIDENOUR

TELECOPY COVER SHEET

HOGE AND LEKISCH
Telecopier Number: 907-258-2426 (automatic)

* *

No. of Pages (including cover page) 4 Date: April 28, 1989

MESSAGE TO: Charles S. Christensen III (465-4923)

MESSAGE FROM: Peggy Rawitz
Hoge and Lekisch

WE ARE USING A PANAFAX 920

IF THERE ARE ANY PROBLEMS, PLEASE CALL US AS SOON AS POSSIBLE AT:

907-276-1726

MESSAGE:

At your request, I am sending comments on the joint and several liability provisions of HB 68.

COMMENTS ON JOINT AND SEVERAL LIABILITY
PROVISIONS OF HB 68

House Bill 68 is modeled on the federal "Superfund" laws, the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601, et seq., and the Superfund Amendments and Reauthorization Act of 1986 (SARA).

A provision imposing joint and several liability upon persons handling hazardous substances has been inserted into HB 68. No comparable provision exists in CERCLA and SARA. This has created great concern among parties who may be exposed to joint and several liability for the following reasons:

1. Mandatory joint and several liability may produce inequitable and unintended results in some cases.

2. Joint and several liability developed as a common law standard applicable to multiple-generator hazardous waste sites. It is not an appropriate standard to apply to the release of a single hazardous substance which is not a waste.

In U.S. v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983), the court examined the legislative history of CERCLA. The term "joint and several liability" was intentionally deleted from CERCLA "to avoid a mandatory legislative standard applicable in all situations which might produce inequitable results in some cases." 572 F. Supp. at 808. The term was omitted

> . . . in order to have the scope of liability determined under common law principles, where a court performing a case by case evaluation of the complex factual scenarios associated with multiple-generator waste cites will assess the propriety of applying joint and several liability on an individual basis.

572 F. Supp. at 808 (Emphasis added).

The court wished to preserve the availability of the common law apportionment standard where the harm is divisible. Restatement (Second) of Torts §§ 433A, 881 (1976). Where two or more persons cause a single and indivisible harm, as in a multiple-generator waste site, the common law calls for joint and several liability. Restatement (Second) of Torts § 875. Where two or more persons are liable under CERCLA § 9607, and one of the defendants seeks to limit his liability on the ground that the harm is capable of apportionment, the burden of proof as to apportionment is upon each defendant. Restatement (Second) of

Torts § 433B. The Chem-Dyne court concluded that these common law rules "clearly enumerate the analysis to be undertaken when applying [CERCLA] and are most likely to advance the legislative policies and objectives of the Act." 572 F. Supp. at 810.

The concept of joint and several liability received further attention in U.S. v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988). The defendants in this case were the owner of a hazardous waste facility and a group of hazardous waste generators. The Monsanto court noted "that the approach taken in Chem-Dyne was subsequently confirmed as correct by Congress in its consideration of SARA's contribution provisions." 858 F.2d at 171 n.23. The Monsanto defendants were found to be jointly and severally liable because, under the Restatement rule, they had failed to sustain their burden of establishing a reasonable basis for apportioning liability. 858 F. Supp. at 172. This is not surprising since this case involved a multiple-generator waste site.

The concern raised by HB 68 is that unconditional joint and several liability will be imposed in inappropriate situations. First, HB 68 is not limited to multiple-generator waste sites. Where multiple generators have all dumped wastes at a disposal site, they have each contributed to the harm in a similar manner. Since it is technologically impossible to apportion such harm, it is deemed indivisible and brought under the joint and several liability umbrella. This situation should be contrasted with a case where a hazardous substance passes through a chain of custody until an accidental release or disposal occurs. HB 68 would impose joint and several liability on a person in the chain of custody, without regard to such factors as the care exercised by the person, the length of time during which the person was responsible for the hazardous substance, the person's role with regard to the hazardous substance (e.g. broker, investor, jobber, common carrier vs. manufacturer, waste generator, disposer, or consumer).

Second, the concept of joint and several liability is a harsh one and should be applied sparingly in only the most compelling circumstances, such as the disposal of hazardous wastes. However, HB 68 encompasses not only hazardous wastes, but any substance which may have adverse environmental impacts. This includes useful substances in the stream of commerce as well as wastes which have no economic value or use. One of the main purposes of CERCLA and SARA, and of HB 68 as well, is to discourage the irresponsible disposal of wastes. It is not necessary to discourage the irresponsible disposal of valuable substances in the stream of commerce because the marketplace will dictate that these substances are handled responsibly.

Finally, Alaska tort law does not favor joint and several liability because of the widely-held perception that it

is unfair. This is evidenced by the Tort Reform Act of 1986 (AS 09.17.080) and the 1987 Initiative Proposal No. 2. The rationale behind this trend away from joint and several liability is that liability should bear some relationship to degree of fault. HB 68 provides for strict liability without regard to fault. To engraft joint and several liability onto this strict liability scheme is patently unfair and is fundamentally inconsistent with current state law. The burden of joint and several strict liability is so onerous that it is likely to have a chilling effect, especially on smaller businesses whose connection with hazardous substances is incidental.

In conclusion, it appears that an adequate framework for joint and several liability has evolved in Congress and the federal courts. Rather than creating a new framework which will not work because it is overbroad, inappropriate and unfair, the original federal model should be emulated.

MJR/ms
114/MEM4-28.049/ms

STATE OF ALASKA
THE LEGISLATURE

POUCH V STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M May 1, 1989

SUBJECT: Awkward federal language
SCS CSHB 68(Judiciary)

TO: Senator Jan Faiks, Chair
Senate Judiciary Committee

FROM: Terri Lauterbach TL
Legislative Counsel

Enclosed is a new draft of SCS CSHB 68(Judiciary). As requested by Chris, paragraphs (1) - (4) of section 2 of the bill track the federal language he sent me, except for the addition of "other than refined oil" in paragraph (4).

Paragraphs (1) - (4) cannot be set out as separate paragraphs because the final phrase of paragraph (4) of the federal language applies to all four paragraphs. That language is: "from which there is a release, or a threatened release that causes the incurrence of response costs, of a hazardous substance." In the federal law, this phrase appears as part of paragraph (4), but, as you know, Alaska drafting requirements do not allow a phrase that applies to an entire list to be put in the last paragraph of the list if the list is set out as separate paragraphs.

Therefore, in order to track the federal language, as requested, the special paragraph indentations have been removed from section 2 of the bill.

Please let me know if I can be of further assistance on this matter.

TL:gc
WKG10/021

Enclosure

HB 68

§ 9607. Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date. Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substance for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, ~~shall be liable for~~ ; this paragraph does not apply to the transport of ... refined oil.

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 104(i) [42 USCS § 9604(i)].

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of the Internal Revenue Code of 1954 [26 USCS §§ 9501 et seq.]. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

(b) Defenses. There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the

Toni, the change reflects the amendment made in the Oil & Gas CS

Chi 4523

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d 659, 17 ELR 20663.

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WD Mo) 619 F Supp 162,
proceeding (CA8) 770 F2d
229, 15 ELR 20774, on
28 F Supp 391, 17 ELR
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l. & Tel. Co. v Chateaugay
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Submitted by ARECA to Senate Judiciary Committee

April 27, 1989

PROPOSED AMENDMENT TO SCS CSHB 68 (O&G)

Page 3, line 12 change: the period to a semicoln and add "or

(3) in relation to (a)(5) of this section, that the person exercised due care in arranging for disposal, storage, or treatment of the substance by another party or entity or in arranging with a transporter to transport the substance for disposal, storage, or treatment by another party or entity."

SENATE CS FOR CS FOR HOUSE BILL NO. 68 (Judiciary)

Section-by-Section Analysis

Section 1: Section 1 amends the existing recordation statutes to provide that liens for state expenditures from the oil and hazardous substance release response fund may be recorded.

Section 2: Section 2 repeals and reenacts existing AS 46.03.822. Reenacted AS 46.03.822 identifies certain categories of responsible parties that may be held strictly jointly and severally liable for hazardous substance releases. These categories are:

(1) The person who owned or controlled the hazardous substance at the time of the release (hazardous substance owner).

(2) The present owner of the spill site (present site owner).

(3) The person who owned the site at the time the spill occurred (past site owner).

(4) The person who arranged for disposal of the hazardous substance (arranger).

(5) The person who transports the hazardous substance to a site the person selects (transporter). Note: This transporter liability provision excludes transporters of refined oil.

Reenacted AS 46.03.822 also provides specific exemptions to the imposition of joint and several liability. Joint and several liability does not apply where the spill resulted from

(1) an act of war

(2) an act of an independent third party, or

(3) an act of God.

The Sec. 2 exceptions also provide exclusions for certain categories of innocent landowners. The exceptions provide that a person is not liable as spill site owner if the person acquired the site after the spill and the person is:

(1) an innocent purchaser of the site;

(2) a governmental body that acquired the site through an involuntary transfer or condemnation;

(3) a Native corporation that acquired the site under ANCSA;

(4) a person that acquired the site through inheritance or bequest; or

(5) a state entity that acquired the site under the Statehood Act.

Section 2 also provides that joint and several liability will not apply if the person proves (1) that the harm caused by the spill

is divisible, and (2) that there is a reasonable basis for apportioning the costs and damages.

Section 2 also provides that a person may seek contribution from other liable persons. In a lawsuit for contribution, the court would apportion damages and costs based upon fault and equity considerations.

Section 3: Section 3 provides a limitation on liability for hazardous substance response action contractors. The section exempts a response action contractor from liability unless the contractor's actions were negligent, or grossly negligent, or constituted intentional misconduct.

Sections 4, 5, and 6: Sections 4, 5, and 6 amend the definition provisions of AS 46.03.826. The amended definitions conform the bill's liability provisions (Section 2) to those of the federal act (CERCLA). The most important definitions are:

"Hazardous Substance": The definition includes oil as a hazardous substance.

"Facility": The definition excludes consumer products. CERCLA definition is similar.

"Owner and operator": For abandoned sites, the definition includes the person who previously owned the site. However, the definition excludes persons who have same equitable interests but do not participate in active management of a site or vessel. The CERCLA definition is similar.

"Release": The definition excludes the exposures which are covered by workers' comp. The definition also excludes exhaust emissions. The CERCLA definition is similar.

"Transport": The definition includes movement through a pipeline. The CERCLA definition is similar.

Section 7: Section 7 provides the state with a lien for response costs resulting from a hazardous substance release.

Section 8: Section 8 provides that the liability provisions contained in amended AS 46.03.822 are retroactive.

Section 9: Section 9 provides that the act takes effect immediately.

A M E N D M E N T

TO: SCS CSHB 68 (Oil & Gas)

Page 1, Line 18, after "section,":

Insert "and the exception set out in (i) of this section"

Page 5, after line 17:

Insert a new subsection to read:

"(i) In an action to recover damages and costs, a person otherwise jointly and severally liable under this section is relieved of joint liability and is liable severally for damages and costs attributable to that person if the person proves that

(1) the harm caused by the release or threatened release is divisible; and

(2) there is a reasonable basis for apportionment of costs and damages to that person."

SCSCSHA

Proposed Amendment to SCS CSHB 68 (O&G)

On Page 3, Line 26, delete "or".

On Page 4, Line 1, delete ".", and insert in lieu thereof "; or".

On Page 4, after Line 1, insert a new paragraph to read : "(3) the person is a corporation organized under 43 U.S.C. 1601-1628 (Alaska Native Claims Settlement Act) that acquired the facility under that Act."

Proposed Amendment to SCS CSHB '68 (O&G)

SCS CSHB 68 amends the current state statute imposing strict liability for the release of a hazardous substance. The bill establishes two defenses to the strict liability standard.

One defense would apply where a person otherwise liable under the Act proves that a third party, other than one in privity of contract with the person, caused the release and that the person exercised due care and took reasonable precautions with respect to the substance.

The second defense would apply where, even though a person may be in privity of contract with a third party, the property was acquired by the person after the release and the person establishes satisfaction of the due care and reasonable precaution requirements and establishes either that 1) at the time of the acquisition the person did not know and had no reason to know about the release, or that 2) the person is a government entity who involuntarily acquired the land.

The attached, proposed amendment to SCS CSHB 68 would treat Native Corporations in the same manner as a government entity who acquired land by involuntary transfer. In other words, if this proposed amendment is adopted, a Native Corporation, like a government entity, would not have to establish as a matter of fact that it did not know and had no reason to know that a hazardous substance was

released on ANCSA land prior to acquisition by a Native Corporation to escape liability under the Act. On the other hand, the Corporation, like any other person or government entity otherwise liable under the Act, would have to prove it exercised due care with respect to the hazardous substance and took reasonable precautions against third party acts or omissions to escape liability under the Act.

Although Native Corporations, in a strict sense, did not involuntarily acquire lands under the Alaska Native Claims Settlement Act, they selected vast areas of land from limited choices in a relatively short period of time. So, while the ANCSA selections were not truly involuntary in nature, they should be distinguished from and treated differently than other private sector acquisitions involving discreet business decisions.

PREPARED BY THE DEPARTMENT OF LAW

SENATE CS FOR CS FOR HOUSE BILL NO. 68 (Judiciary)

Section-by-Section Analysis

Section 1: Section 1 amends the existing recordation statutes to provide that liens for state expenditures from the oil and hazardous substance release response fund may be recorded.

Section 2: Section 2 repeals and reenacts existing AS 46.03.822. Reenacted AS 46.03.822 identifies certain categories of responsible parties that may be held strictly jointly and severally liable for hazardous substance releases. These categories are:

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(2) The present owner of the spill site (present site owner).

(3) The person who owned the site at the time the spill occurred (past site owner).

(4) The person who arranged for disposal of the hazardous substance (arranger).

(5) The person who transports the hazardous substance to a site the person selects (transporter). Note: This transporter liability provision excludes transporters of refined oil.

Reenacted AS 46.03.822 also provides specific exemptions to the imposition of joint and several liability. Joint and several liability does not apply where the spill resulted from

(1) an act of war
(2) an act of an independent third party, or
(3) an act of God.

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(1) an innocent purchaser of the site;
(2) a governmental body that acquired the site through an involuntary transfer or condemnation;
(3) a Native corporation that acquired the site under ANCSA;
(4) a person that acquired the site through inheritance or bequest; or
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Section 2 also provides that a person may seek contribution from other liable persons. In a lawsuit for contribution, the court would apportion damages and costs based upon fault and equity considerations.

Section 3: Section 3 provides a limitation on liability for hazardous substance response action contractors. The section exempts a response action contractor from liability unless the contractor's actions were negligent, or grossly negligent, or constituted intentional misconduct.

Sections 4, 5, and 6: Sections 4, 5, and 6 amend the definition provisions of AS 46.03.826. The amended definitions conform the bill's liability provisions (Section 2) to those of the federal act (CERCLA). The most important definitions are:

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Section 7: Section 7 provides the state with a lien for response costs resulting from a hazardous substance release.

Section 8: Section 8 provides that the liability provisions contained in amended AS 46.03.822 are retroactive.

Section 9: Section 9 provides that the act takes effect immediately.

Earl Billingsley

PROPOSED AMENDMENT TO SCS CSHB 68 (O&G)

1.A. Page 7, line 27, delete subparagraph (B) and replace with:

(B) oil, except "hazardous substance" does not include refined petroleum products; or

go0399hP·
Lauterbach
4/26/89

Original sponsor: Rules/Governor

IN THE HOUSE BY THE JUDICIARY COMMITTEE

SENATE CS FOR CS FOR HOUSE BILL NO. 68 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SESSION

A BILL

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

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

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

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

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

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

(1) the owner and operator of the vessel or facility from which the release or threatened release occurred;

deleted language not included

(2) a person who, at the time of disposal of the hazardous substance, owned or operated the facility at which the hazardous substance was disposed of and the release or threatened release occurred at that facility;

(3) a person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of a hazardous substance owned or possessed by the person or by any other party or entity, at any facility owned or operated by another party or entity and containing hazardous substances, and the release or threatened release occurred during transport, disposal, or treatment;

(4) a person who accepted the hazardous substance for transport to disposal or treatment facilities or sites selected by the person, from which there was a release or threatened release of the hazardous substance that caused response costs to be incurred.

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

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

(A) an act of war;

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

(i) exercised due care with respect to the hazardous substance; and

(ii) took reasonable precautions against the act

or omission of the third party and against the consequences of the act or omission; or

(C) an act of God; and

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

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

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

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

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

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

(d) To establish that a person had no reason to know that the hazardous substance was disposed of on, in, or at the facility, as

provided in (c)(1) of this section, the person must have undertaken, at the time of acquisition, all reasonable inquiries into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. For purposes of this subsection a court shall take into account all relevant facts, including

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

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

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

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

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

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

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

(g) An indemnification, hold harmless, or similar agreement, or conveyance of any nature is not effective to transfer liability under

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

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

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

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

(b) The liability limitation under (a) of this section does not apply to a response action contractor who would otherwise be strictly

liable under any other provision of state or federal law.

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

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

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

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

(g) In this section,

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

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

(A) the department; or

(B) another person who has entered into an agreement with the department that provides for response action subject to

the department's oversight and control;

(3) "response action contractor" means

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

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

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

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

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

(4) "hazardous substance" means

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

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

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

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

(8) "facility" includes a

(A) building, structure, installation, equipment,

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

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

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

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

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

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

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

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

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

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

(d) The commissioner may, in the commissioner's discretion, reduce, discharge or partially release a lien under this section if a bond, or other security, in a form and an amount satisfactory to the commissioner is posted. The bond or other security must include an amount sufficient to cover the cost of execution, collection, or foreclosure, including attorney fees. A reduction, discharge, or partial release may not be granted under this subsection if it would be contrary to the public interest. When a lien is reduced, discharged, or partially released under this subsection, the commissioner shall, at the request of the property owner, issue a certificate to that effect.

(e) A person with an ownership interest in property against

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

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