IN THE SUPREME COURT OF THE STATE OF ALASKA

Williams Alaska Petroleum, Inc. and The Williams Companies, Appellants, v. State of Alaska, Flint Hills Resources, LLC, and Flint Hills Resources Alaska, LLC, Appellees.	)	Supreme Court No. **S-17772**

Trial Court Case No. **4FA-14-01544 CI**

APPEAL FROM THE SUPERIOR COURT
FOURTH JUDICIAL DISTRICT AT FAIRBANKS
THE HONORABLE WARREN MATTHEWS

OPENING BRIEF OF APPELLEE THE STATE OF ALASKA

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ALASKA STATUTES:

AS 46.03.710. Pollution prohibited

A person may not pollute or add to the pollution of the air, land, subsurface land, or water of the state.

AS 46.03.745. Hazardous substance release

Except for a controlled release, the reporting of which is the subject of an agreement with the commissioner under AS 46.09.010(b), a person may not cause or permit the release of a hazardous substance as defined in AS 46.09.900.

AS 46.03.760. Civil action for pollution; damages

(a) A person who violates or causes or permits to be violated a provision of this chapter other than AS 46.03.250--46.03.313, or a provision of AS 46.04 or AS 46.09, or a regulation, a lawful order of the department, or a permit, approval, or acceptance, or term or condition of a permit, approval, or acceptance issued under this chapter or AS 46.04 or AS 46.09 is liable, in a civil action, to the state for a sum to be assessed by the court of not less than $500 nor more than $100,000 for the initial violation, nor more than $5,000 for each day after that on which the violation continues, and that shall reflect, when applicable,

> (1) reasonable compensation in the nature of liquidated damages for any adverse environmental effects caused by the violation, which shall be determined by the court according to the toxicity, degradability, and dispersal characteristics of the substance discharged, the sensitivity of the receiving environment, and the degree to which the discharge degrades existing environmental quality;
>
> (2) reasonable costs incurred by the state in detection, investigation, and attempted correction of the violation;
>
> (3) the economic savings realized by the person in not complying with the requirement for which a violation is charged.

(b) Except as determined by the court under (e)(4) of this section, actions under this section may not be used for punitive purposes, and sums assessed by the court must be compensatory and remedial in nature.

(c) The court, upon motion of the department or upon its own motion, may defer assessment of all or part of that portion of the sum imposed upon a person under (a)(3) of this section conditioned upon the person complying, within the shortest feasible time, with the requirement for which a violation is shown.

(d) In addition to liability under (a) - (c) of this section, a person who violates or causes or permits to be violated a provision of AS 46.03.740 - 46.03.750 is liable to the state, in a civil action brought under AS 46.03.822, for the full amount of actual damages caused to the state by the violation, including

(1) direct and indirect costs associated with the abatement, containment, or removal of the pollutant;

(2) restoration of the environment to its former state;

(3) amounts paid as grants under AS 29.60.510 - 29.60.599 and as emergency first response advances and reimbursements under AS 46.08.070(c); and

(4) all incidental administrative costs.

(e) A person who violates or causes or permits to be violated a provision of AS 46.03.250--46.03.313, 46.03.460--46.03.475, AS 46.14, or a regulation, a lawful order of the department, or a permit, approval, or acceptance, or term or condition of a permit, approval, or acceptance issued under AS 46.03.250--46.03.313, 46.03.460--46.03.475, AS 46.14, or under the program authorized by AS 46.03.020(12), is liable, in a civil action, to the state for a sum to be assessed by the court of not less than $500 nor more than $100,000 for the initial violation, nor more than $10,000 for each day after that on which the violation continues, and that shall reflect, when applicable,

(1) reasonable compensation in the nature of liquidated damages for any adverse environmental effects caused by the violation, that shall be determined by the court according to the toxicity, degradability and dispersal characteristics of the substance discharged, the sensitivity of the receiving environment, and the degree to which the discharge degrades existing environmental quality; for a violation relating to AS 46.14, the court, in making its determination under this paragraph, shall also consider the degree to which the discharge causes harm to persons or property; for a violation of AS 46.03.463, the court, in making its determination under this paragraph, shall also consider the volume of the graywater, sewage, or other wastewater discharged; this paragraph may not be construed to limit the right of parties other than the state to recover for personal injuries or damage to their property;

(2) reasonable costs incurred by the state in detection, investigation, and attempted correction of the violation;

(3) the economic savings realized by the person in not complying with the requirement for which a violation is charged; and

(4) the need for an enhanced civil penalty to deter future noncompliance.

(f) An owner, agent, employee, or operator of a commercial passenger vessel, as defined in AS 43.52.295, who falsifies a registration or report required by AS 46.03.460 or 46.03.475 or who violates or causes or permits to be violated a provision of AS 46.03.250--46.03.314, 46.03.460--46.03.490, AS 46.14, or a regulation, a lawful order of

the department, or a permit, approval, or acceptance, or term or condition of a permit, approval, or acceptance issued under AS 46.03.250--46.03.314, 46.03.460--46.03.490, or AS 46.14 is liable, in a civil action, to the state for a sum to be assessed by the court of not less than $5,000 nor more than $100,000 for the initial violation, nor more than $10,000 for each day after that on which the violation continues, and that shall reflect, when applicable,

(1) reasonable compensation in the nature of liquidated damages for any adverse environmental effects caused by the violation, that shall be determined by the court according to the toxicity, degradability, and dispersal characteristics of the substance discharged, the sensitivity of the receiving environment, and the degree to which the discharge degrades existing environmental quality; for a violation relating to AS 46.14, the court, in making its determination under this paragraph, shall also consider the degree to which the discharge causes harm to persons or property; this paragraph may not be construed to limit the right of parties other than the state to recover for personal injuries or damage to their property;

(2) reasonable costs incurred by the state in detection, investigation, and attempted correction of the violation;

(3) the economic savings realized by the person in not complying with the requirement for which a violation is charged; and

(4) the need for an enhanced civil penalty to deter future noncompliance.

(g) As used in this section, "economic savings" means that sum which a person would be required to expend for the planning, acquisition, siting, construction, installation and operation of facilities necessary to effect compliance with the standard violated.

AS 46.03.765. Injunctions

The superior court has jurisdiction to enjoin a violation of this chapter, AS 46.04, AS 46.09, AS 46.14, or of a regulation, a lawful order of the department, or permit, approval, or acceptance, or term or condition of a permit, approval, or acceptance issued under this chapter, AS 46.04, AS 46.09, or AS 46.14. In actions brought under this section, temporary or preliminary relief may be obtained upon a showing of an imminent threat of continued violation, and probable success on the merits, without the necessity of demonstrating physical irreparable harm. The balance of equities in actions under this section may affect the timing of compliance, but not the necessity of compliance within a reasonable period of time.

AS 46.03.780. Liability for restoration

(a) A person who violates a provision of this chapter, AS 46.04, AS 46.09, or AS 46.14, or who fails to perform a duty imposed by this chapter, AS 46.04, AS 46.09, or AS 46.14,

or violates or disregards an order, permit, or other determination of the department made under the provisions of this chapter, AS 46.04, AS 46.09, or AS 46.14, respectively, and thereby causes the death of fish, animals, or vegetation or otherwise injures or degrades the environment of the state is liable to the state for damages.

(b) Liability for damages under (a) of this section includes an amount equal to the sum of money required to restock injured land or waters, to replenish a damaged or degraded resource, or to otherwise restore the environment of the state to its condition before the injury.

(c) Damages under (a) of this section shall be recovered by the attorney general on behalf of the state.

AS 46.03.822. 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 exceptions set out in (i) and (m) of this section, the exception set out in AS 09.65.240, and the limitation on liability provided under AS 46.03.825, the following persons are strictly liable, jointly and severally, for damages, for the costs of response, containment, removal, or remedial action incurred by the state, a municipality, or a village, and for the additional costs of a function or service, including administrative expenses for the incremental costs of providing the function or service, that are incurred by the state, a municipality, or a village, and the costs of projects or activities that are delayed or lost because of the efforts of the state, the municipality, or the village, resulting from an unpermitted release of a hazardous substance or, with respect to response costs, the substantial threat of an unpermitted release of a hazardous substance:

(1) the owner of, and the person having control over, the hazardous substance at the time of the release or threatened release; this paragraph does not apply to a consumer product in consumer use;

(2) the owner and the operator of a vessel or facility, from which there is a release, or a threatened release that causes the incurrence of response costs, of a hazardous substance;

(3) any person who, at the time of disposal of any hazardous substance, owned or operated any facility or vessel at which the hazardous substances were disposed of, from which there is a release, or a threatened release that causes the incurrence of response costs, of a hazardous substance;

(4) 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 the person, other than domestic sewage, or by any other party or entity, at any facility or vessel owned or operated by another party or entity and containing hazardous substances, from which there

is a release, or a threatened release that causes the incurrence of response costs, of a hazardous substance;

(5) any person who accepts or accepted any hazardous substances, other than refined oil, for transport to disposal or treatment facilities, vessels or sites selected by the person, from which there is a release, or a threatened release that causes the incurrence of response costs, of a hazardous substance.

(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) and 46.03.825(d), 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;

(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;

(3) Repealed by SLA 2018, ch. 112, § 4, eff. Jan. 15, 2019;

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

(5) the person is a state governmental entity and the state acquired the facility under Public Law 85-508 (Alaska Statehood Act).

(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) and (l) of this section, the person must have undertaken, at the time of voluntary 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, a municipality, a village, a person who acts as a volunteer and is engaged in a response action under the direction of the federal or state on-scene coordinator, and a vessel of opportunity engaged in a response action under the direction of the federal or state on-scene coordinator are 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, the municipality, the village, the volunteer, or the vessel constitute gross negligence or intentional misconduct.

(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.

(j) A person may seek contribution from any other person who is liable under (a) of this section during or after a civil action under (a) of this section or after the issuance of a potential liability determination by the department. Actions under this subsection shall be brought under the Alaska Rules of Civil Procedure and are governed by state law. In resolving claims for contribution under this section, the court may allocate damages and costs among liable parties using equitable factors determined to be appropriate by the court. This subsection does not diminish the right of a person to bring an action for contribution in the absence of a civil action under (a) of this section.

(k) A unit of state or local government that acquired ownership or control of a vessel or facility through bankruptcy, foreclosure, deed in lieu of foreclosure, tax delinquency proceeding, abandonment, escheat, the exercise of eminent domain authority by purchase or condemnation, or circumstances in which the governmental unit involuntarily acquired title by virtue of its function as a sovereign is not liable as an owner or operator under this section unless the governmental unit has caused or contributed to the release or threatened release of a hazardous substance at or from the facility or vessel, in which case, the governmental unit is subject to liability under this section in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity. A hazardous substance release shall be determined to have occurred as provided in this section. For purposes of this subsection, "caused or contributed to the release or threatened release of a hazardous substance"

(1) does not include the failure to prevent the passive leaching or migration at or from a facility or vessel of a hazardous substance in the air, land, or water that had first been released to the environment by a person other than the governmental unit that acquired the facility or vessel;

(2) does not include the exercise or failure to exercise regulatory or enforcement authority;

(3) after the ownership or control of the facility or vessel has been acquired by the governmental unit, includes

(A) the spilling, leaking, pumping, pouring, emptying, injecting, escaping, or dumping of a hazardous substance from barrels, tanks, containers, or other closed receptacles; or

(B) the abandonment or discarding of barrels, tanks, containers, or other closed receptacles containing a hazardous substance.

(l) For purposes of determining liability in an action to recover damages or costs under this section, a person who acquires a facility and who, upon discovering a release or threatened release on, in, or at the facility that occurred before acquisition of the facility, who had no reason to know that a hazardous substance was disposed of on, in, or at the facility, and who, upon discovering the release or threatened release, acted in accordance with (b)(2) of this section to begin operations to contain and clean up the hazardous substance, may not be held liable under this section unless the person has caused or contributed to the release or threatened release of the hazardous substance, in which case, the person is subject to liability under this section in the same manner as any other person. For purposes of this subsection, "caused or contributed to the release or threatened release of the hazardous substance"

(1) does not include the failure to prevent the passive leaching or migration at or from a facility of a hazardous substance in the air, land, or water that had first been released into the environment by a person other than the person that acquired the facility;

(2) after the ownership or control of the facility has been acquired by the person includes

(A) the spilling, leaking, pumping, pouring, emptying, injecting, escaping, or dumping of a hazardous substance from barrels, tanks, containers, or other closed receptacles; or

(B) the abandonment or discarding of barrels, tanks, containers, or other closed receptacles containing a hazardous substance.

(m) A Native corporation that acquired land under 43 U.S.C. 1601 et seq. (Alaska Native Claims Settlement Act) is not liable under this section for a release or threatened release of a hazardous substance on the land unless the Native corporation, by an act or omission, caused or contributed to the release or threatened release of the hazardous substance.

(n) In this section,

(1) "damages" has the meaning given in AS 46.03.824 and includes damage to persons or to public or private property, damage to the natural resources of the state or a municipality, and damage caused by acts or omissions of a response action contractor for which the response action contractor is not liable under AS 46.03.823 or 46.03.825;

(2) "Native corporation" has the meaning given in 43 U.S.C. 1602(m);

(3) “potential liability determination” means an administrative determination issued by the department notifying a person of the person's potential liability under (a) of this section as the result of the release or threatened release of hazardous substances and includes a

(A) letter notifying the person that the person is a potentially responsible party;

(B) notice to a person of state interest in a release or threatened release of a hazardous substance;

(C) request to the person for site characterization or cleanup;

(D) notice of violation; and

(E) similar notification by the department of a person's potential liability under this section.

AS 46.03.824. Damages

Damages include but are not limited to injury to or loss of persons or property, real or personal, loss of income, loss of the means of producing income, or the loss of an economic benefit.

AS 46.03.826. Definitions for AS 46.03.822-46.03.828

In AS 46.03.822 - 46.03.828,

…

(5) “hazardous substance” means

(A) an element or compound which, when it enters into the atmosphere or 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;

(B) oil; or

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

(6) “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;

(7) “oil” means a derivative of a liquid hydrocarbon and includes crude oil, lubricating oil, sludge, oil refuse or another petroleum-related product or by-product;

…

AS 46.03.900. Definitions

In this chapter,

…

(20) "pollution" means the contamination or altering of waters, land, or subsurface land of the state in a manner which creates a nuisance or makes waters, land, or subsurface land unclean, or noxious, or impure, or unfit so that they are actually or potentially harmful or detrimental or injurious to public health, safety, or welfare, to domestic, commercial, industrial, or recreational use, or to livestock, wild animals, bird, fish, or other aquatic life;

…

ALASKA REGULATIONS:

18 AAC 75.310. Scope and duration of initial response actions.

(a) Immediately after receiving notice from a person or after otherwise becoming aware of a discharge or release of a hazardous substance to land or waters of the state, a responsible person shall, as required by 18 AAC 75.315, immediately contain and control the discharge or release and seek approval of cleanup and disposal plans to be used for that release. After obtaining approval of cleanup and disposal plans, the responsible person shall perform a cleanup of the discharge or release and dispose of the contaminated material in accordance with those plans.

(b) The department under AS 46.04.020(a), or the commissioner under AS 46.09.020(a), will waive the requirements of (a) of this section if the department or commissioner as appropriate

(1) determines, in consultation with appropriate agencies as provided in AS 46.04.020(a)(1) or AS 46.09.020(a)(1), that containment or cleanup of the discharge or release is technically not feasible; or

(2) determines that the containment or cleanup effort would result in a greater threat to human health, safety, or welfare, or in greater damage to the environment than the discharge or release itself.

(c) Unless relieved under (b) of this section, a responsible person shall immediately begin the initial response actions required by 18 AAC 75.315 and continue until

(1) the department, using the factors set out in 18 AAC 75.315, determines that

(A) the lowest practicable level of contamination has been achieved;

(B) any imminent and substantial threat to human health, safety, or welfare, or to the environment is abated; and

(C) additional action, including site cleanup under 18 AAC 75.325 - 18 AAC 75.390, is not required; or

(2) the department determines, on its own or at the request of a responsible person, that the source of the contamination has abated and that cleanup of residual soil and groundwater contamination should proceed under 18 AAC 75.325 - 18 AAC 75.396.

18 AAC 75.325. Site cleanup rules: purpose, applicability, and general provisions.

(a) The requirements of 18 AAC 75.325 - 18 AAC 75.390 are referred to in this chapter as the "site cleanup rules." The site cleanup rules establish administrative processes and standards to determine the necessity for and degree of cleanup required to protect human health, safety, and welfare, and the environment at a site where a hazardous substance is located.

(b) The site cleanup rules apply to

(1) a sudden or recent discharge or release of a hazardous substance, if the department determines under 18 AAC 75.310 that application of the site cleanup rules is necessary; or

(2) a release of a hazardous substance caused by past activities.

(c) The site cleanup rules do not apply to

(1) a release from an underground storage tank (UST) subject to AS 46.03.365 - AS 46.03.450 and 18 AAC 78, except as made applicable expressly by 18 AAC 78; or

(2) an oil and gas reserve pit closure and permitted solid waste storage or disposal facility regulated under 18 AAC 60, 18 AAC 62, or 42 U.S.C. 6901 - 6992k (Solid Waste Disposal Act, as amended by the Resource Conservation Recovery Act).

(d) A responsible person shall investigate, contain, and perform a cleanup of a discharge or release of a hazardous substance unless

(1) the department makes a written determination that a discharge or release does not pose a threat to human health, safety, or welfare, or to the environment and requires no cleanup action according to the information available at the time of the determination; or

(2) the department issues an order under AS 46.04.020(c), or the commissioner issues an order under AS 46.09.020(c) that the responsible person cease cleanup activities.

(e) A person who is not a responsible person and who undertakes a cleanup activity at a site that is subject to the site cleanup rules shall comply with those provisions of the site cleanup rules that are applicable to the particular cleanup activity undertaken.

(f) A responsible person shall

(1) to the maximum extent practicable,

(A) use permanent remedies;

(B) recover free product in a manner that

(i) minimizes the spread of contamination into an uncontaminated area by using containment, recovery, and disposal techniques appropriate to site conditions;

(ii) avoids additional discharge; and

(iii) disposes of the recovered free product in compliance with applicable local, state, and federal requirements;

(C) complete cleanup in a period of time that the department determines to be protective of human health, safety, and welfare, and of the environment;

(D) prevent, eliminate, or minimize potential adverse impacts to human health, safety, and welfare, and to the environment, onsite and offsite, from any hazardous substance remaining at the site; and

(E) evaluate and perform a cleanup of surface soil staining attributable to a hazardous substance;

(2) meet the applicable cleanup levels determined under 18 AAC 75.340 - 18 AAC 75.350; and

(3) provide for long-term care and management of a site as required under the site cleanup rules, including proper operation and maintenance of

(A) cleanup techniques and equipment;

(B) monitoring wells and equipment, if required; and

(C) institutional controls, if required under 18 AAC 75.375.

(g) If using method two or method three for determining the applicable soil cleanup levels as described in 18 AAC 75.340 and 18 AAC 75.341, or if applying the groundwater cleanup levels at Table C in 18 AAC 75.345, a responsible person shall ensure that, after completing site cleanup, the risk from hazardous substances does not exceed a cumulative carcinogenic risk standard of 1 in 100,000 across all exposure pathways and does not exceed a cumulative noncarcinogenic risk standard at a hazard index of one, reported to one significant figure, across all exposure pathways. Instructions for determining cumulative risk are provided in the department's Procedures for Calculating Cumulative Risk, dated February 1, 2018, and adopted by reference.

(h) If proposing an alternative cleanup level for soil or groundwater, based on a site-specific risk assessment under method four in 18 AAC 75.340(f) or under the provisions of 18 AAC 75.345(b)(2), a responsible person shall ensure that the risk from hazardous

substances does not exceed the cumulative carcinogenic risk standard of 1 in 100,000 across all exposure pathways and does not exceed the cumulative noncarcinogenic risk standard at a hazard index of one, reported to one significant figure, across all exposure pathways. Instructions for determining cumulative risk are provided in the department's Procedures for Calculating Cumulative Risk, adopted by reference in (g) of this section.

(i) A responsible person, owner, or operator shall obtain approval before disposing of soil or groundwater from a site

(1) that is subject to the site cleanup rules; or

(2) for which a written determination from the department has been made under 18 AAC 75.380(d)(1) that allows contamination to remain at the site above method two soil cleanup levels under 18 AAC 75.340(a)(2) or groundwater cleanup levels listed in Table C in 18 AAC 75.345(b).

(j) The department will seek public participation regarding activities conducted under the site cleanup rules, using methods that the department determines to be appropriate for seeking public participation.

(k) If a discharge, release, or planned cleanup affects an anadromous fish-bearing stream or lake or an area designated under AS 16.20, activities under the site cleanup rules are subject to coordination with appropriate resource agencies, including the Department of Fish and Game under AS 16.05.871(a) or AS 16.20.

18 AAC 75.335. Site characterization.

(a) Before proceeding with site cleanup under the site cleanup rules, a responsible person shall characterize the extent of hazardous substance contamination at the site.

(b) A responsible person shall submit a site characterization work plan to the department for approval before beginning site characterization work. The department will approve the site characterization work plan if the work plan is

(1) prepared by a qualified environmental professional; and

(2) designed, to the maximum extent practicable, to

(A) determine if a discharge or release of a hazardous substance has occurred;

(B) identify each hazardous substance at the site, including the concentration and extent of contamination; this information must be sufficient to determine cleanup options;

(C) identify site characteristics or conditions that could result in ongoing site contamination, including the potential for leaching of in-situ contamination and the presence of leaking barrels, drums, tanks, or other containers;

(D) evaluate the potential threat to human health, safety, and welfare, and to the environment from site contamination;

(E) identify any interim removal action necessary under 18 AAC 75.330;

(F) locate sources of known site contamination, including a description of potential releases into soil, sediment, groundwater, or surface water;

(G) evaluate the size of the contaminated area, including the concentration and extent of any soil, sediment, groundwater, or surface water contamination;

(H) identify the vertical depth to groundwater and the horizontal distance to nearby wells, surface water, and water supply intakes;

(I) evaluate the potential for surface water runoff from the site and the potential for surface water or sediment contamination; and

(J) identify the soil type and determine if the soil is a continuing source of groundwater contamination.

(c) After completing site characterization work, the responsible person shall submit to the department for approval a site characterization report that

(1) is prepared by a qualified environmental professional;

(2) sets out the information obtained from activities performed in accordance with a site characterization work plan;

(3) sets out the results of sampling and analysis;

(4) demonstrates that the inspections, sampling, and analysis performed adequately characterized the extent of hazardous substance contamination; and

(5) proposes cleanup techniques for the site.

(d) The department will approve the report submitted under (c) of this section if the department determines that the work described in the report and the cleanup techniques proposed are protective of human health, safety, and welfare, and of the environment. The department will, as part of its approval, modify proposed cleanup techniques or require additional cleanup techniques for the site as the department determines to be necessary to protect human health, safety, and welfare, and the environment.

18 AAC 75.345. Groundwater and surface water cleanup levels.

(a) Except as otherwise provided in this section, cleanup of a discharge or release of a hazardous substance to groundwater or surface water must meet the requirements of this section.

(b) Contaminated groundwater must meet

(1) the cleanup levels in Table C if the current use or the reasonably expected potential future use of the groundwater, determined under 18 AAC 75.350, is a drinking water source;

TABLE C. GROUNDWATER CLEANUP LEVELS

…

Notes to Table C:

1 "CAS Number" means the Chemical Abstract Service (CAS) registry number uniquely assigned to chemicals by the American Chemical Society and recorded in the CAS Registry System.

2 The "Human Health" exposure pathway is the cumulative exposure pathway through dermal contact, ingestion, and inhalation of volatile compounds from hazardous substances in the water.

3 Where one or more toxicological values were unavailable, toxicity values from surrogate compounds or other sources were used as presented in Table 6 from the Procedures for Calculating Cleanup Levels, adopted by reference in 18 AAC 75.340.

4 This level is set at the compound's solubility concentration using the equations set out in the Procedures for Calculating Cleanup Levels, adopted by reference in 18 AAC 75.340. The solubility value is listed first, followed by the human health risk-based cleanup level in parentheses. The human health risk-based cleanup level assumptions do not take free product into consideration. In accordance with 18 AAC 75.325(f), free product must be recovered to the maximum extent practicable. Contaminant concentrations above the solubility value trigger the need to assess the practicability of product recovery; if the department determines product recovery is impracticable, the risk-based cleanup level may be applied as long as the cumulative risk standards are met.

5 Due to the prevalence of naturally occurring arsenic throughout the state, arsenic at a site will be considered background arsenic unless anthropogenic contribution from a source, activity, or mobilization by means of another introduced contaminant is known or suspected.

6 Due to the prevalence of naturally occurring chromium III throughout the state, sample results reported for total chromium detected at a site will be considered background chromium III unless anthropogenic contribution of chromium III or VI from a source, activity, or mobilization by means of another introduced contaminant is known or suspected.

7 The lead cleanup level is taken from EPA's action level for lead in water.

8 This cleanup level is for 2,3,7,8-Tetrachlorodibenzo-p-Dioxin (TCDD) only; all cleanup levels for polychlorinated dibenzo-p-dioxin (PCDD) and polychlorinated dibenzofuran (PCDF) congeners must be determined on a site-specific basis using the TCDD toxicity equivalent (TEQ) approach described in the Procedures for Calculating Cumulative Risk, adopted by reference in 18 AAC 75.325.

(2) an approved cleanup level based on an approved site-specific risk assessment conducted under the Risk Assessment Procedures Manual, adopted by reference in 18 AAC 75.340;

(3) an alternative cleanup level for a hazardous substance not listed under (1) of this subsection proposed by the responsible party and approved by the department, using the procedures set out in the department's risk Assessment Procedures Manual, adopted by reference in 18 AAC 75.340, unless the responsible person demonstrates that an alternative cleanup level is not necessary to ensure protection of human health, safety, and welfare, and of the environment; or

(4) an alternative cleanup level for a hazardous substance not listed under (1) of this subsection set by the department using the procedures set out in the department's Risk Assessment Procedures Manual, adopted by reference in 18 AAC 75.340,

(c) The department will set a more stringent cleanup level than the applicable level under (b) of this section, if the department determines that a more stringent cleanup level is necessary to ensure protection of human health, safety, or welfare, or of the environment, and based on actual onsite and actual or likely offsite uses of the groundwater that are likely to be affected by the hazardous substance. In making a determination under this subsection, the department may consider

(1) the risks to current or potential future users of the groundwater as a drinking water source, as determined under 18 AAC 75.350;

(2) the presence of sensitive subpopulations who respond biologically to lower levels of exposure to a hazardous substance;

(3) the groundwater use classifications other than for drinking water, as set out under 18 AAC 70.020(a)(1)(A) and 18 AAC 70.050(2);

(4) the primary or secondary maximum contaminant levels in 18 AAC 80.300 for actual or likely drinking water supplies;

(5) a health advisory value developed by EPA's Office of Water; and

(6) the cleanup level in this section for groundwater contaminated with petroleum; the contamination may not exceed, for each petroleum hydrocarbon range applicable, including the gasoline range, the diesel range, and the reidual range,

(A) a threshold odor number (TON) of 1 for odor, as measured by Method 2150B, Standard Methods for the Examination of Water and Wastewater, 22nd edition, American Public Health Association (2012), adopted by reference; or

(B) a flavor threshold number (FT) of 1 for flavor, as measured by Method 2160B, Standard Methods for the Examination of Water and Wastewater, adopted by reference in (A) of this paragraph.

(d) Where the department determines that toxicity information is insufficient to establish a cleanup level for a hazardous substance or a pollutant that ensures protection of human health, safety, and welfare, and of the environment, the department may require a responsible person to provide an alternative source of drinking water for the affected parties or implement other institutional controls under 18 AAC 75.375 until a cleanup level is established under (b)(2), (3), or (4) of this section.

(e) Toxic substances in sediment may not cause, and may not be reasonably expected to cause, a toxic or other deleterious effect on aquatic life, except as authorized under 18 AAC 70. For purposes of this subsection, "toxic substances" has the meaning given in 18 AAC 70.990.

(f) The point of compliance where groundwater cleanup levels must be attained is throughout the site from each point extending vertically from the uppermost level of the zone of saturation to the lowest possible depth that could potentially be affected by the discharge or release of a hazardous substance, unless the department approves an alternative point of compliance as part of the cleanup action under 18 AAC 75.360. For the department to approve an alternative point of compliance under this subsection, the

(1) alternative point of compliance must be within the existing groundwater contamination plume; and

(2) cleanup levels established in (b) and (c) of this section must be met at the property boundary in an area where the current use or reasonably expected potential future use of groundwater in the neighboring property is determined to be a source of drinking water, unless a responsible person

(A) demonstrates that attainment of the applicable groundwater cleanup levels is not practicable; and

(B) provides an alternative source of water for affected persons.

(g) Groundwater that is closely connected hydrologically to nearby surface water may not cause a violation of the water quality standards in 18 AAC 70 for surface water or sediment. The department will, in consultation with local, state, and federal officials and the public, establish points of compliance with this subsection, taking into account

(1) groundwater travel time and distance from sources of hazardous substances to surface water;

(2) the contribution of the groundwater to the chemical and physical quantity and quality of the surface water;

(3) organisms living in or dependent upon the groundwater to surface water ecosystems;

(4) climatic, tidal, or seasonal variations;

(5) feasibility of attaining applicable water quality standards to support the designated uses of the surface water;

(6) presence of sediment contamination; and

(7) if conducted for the site, the conclusions of a site-specific risk assessment conducted under the Risk Assessment Procedures Manual, adopted by reference in 18 AAC 75.340.

(h) If the groundwater point of compliance is established at or near a property boundary or if groundwater is closely connected hydrologically to a surface waterbody, the department will, if the department determines that sentinel monitoring is necessary to ensure protection of human health, safety, or welfare, or the environment, require a responsible person to develop sentinel monitoring wells that monitor for any hazardous substances likely to migrate to the applicable point of compliance at concentrations that exceed the cleanup levels.

(i) The department will require long-term monitoring if the department determines that monitoring is necessary to ensure protection of human health, safety, or welfare, or of the environment, and if groundwater, surface water, soil, or sediment contains residual concentrations of a hazardous substance that exceed the applicable cleanup levels. If long-term monitoring is required under this subsection, a responsible person shall submit a plan and schedule for monitoring as part of the requirements for cleanup operations under 18 AAC 75.360. Unless otherwise approved by the department, a responsible person shall conduct monitoring quarterly for at least one year to establish the concentration trend. The department will evaluate the monitoring program yearly. If the monitoring indicates that the concentration trend

(1) is increasing, the department will require additional follow-up monitoring and assess the need for additional cleanup; or

(2) is stable or decreasing, and that hazardous substance migration is not occurring, the department will decrease or discontinue the monitoring frequency and locations, if the responsible person demonstrates that continued monitoring is not necessary to ensure protection of human health, safety, and welfare, and of the environment.

(j) The department will require groundwater, surface water, soil, or sediment monitoring to estimate contaminant flux rates and to address potential bioaccumulation of each hazardous substance at the site, if the department determines that monitoring is necessary to ensure protection of human health, safety, or welfare, or of the environment. If

monitoring is required under this subsection, a responsible person shall submit a plan and schedule for monitoring as part of the cleanup operation requirements under 18 AAC 75.360.

(k) Groundwater monitoring wells must be installed, developed, and decommissioned in accordance with an approved method that is protective of human health, safety, and welfare, and of the environment.

(l) For a cleanup conducted under (b)(1) of this section, a chemical that is detected at one-tenth or more of the Table C value must be included when calculating cumulative risk under 18 AAC 75.325(g).

18 AAC 75.910. Cost recovery.

(a) In order to implement the provisions of AS 46.03.760(d), 46.03.822, AS 46.04.010, and AS 46.08.070, the department will complete and maintain documentation to support its response actions and to form the basis for cost recovery.

(b) Each person who is liable under AS 46.03.760, 46.03.822, AS 46.04.020, or AS 46.09.020 is liable for response costs that the department or this state incurs. Response costs are costs reasonably attributable to the site or incident and may include costs of direct activities, support costs of direct activities, and interest charges for delayed payments. Response costs include the costs of direct investigation, containment and cleanup, removal, and remedial actions associated with an incident or site undertaken by the department or its contractors, as well as the costs of oversight by the department of those activities involving an incident or site undertaken by a person other than the department. Response costs include legal costs incurred by the department concerning a site or incident, and include potential responsible party searches, obtaining site access, causal investigations, cleanup orders and agreements, cost recovery actions, and enforcement actions.

(c) The department will charge an hourly rate based on direct staff costs plus support costs. The department will on a fiscal year basis use the following formula for computing hourly personnel rates by job class:

> (1) Hourly Rate = DSC + DSC(AICR), where DSC means direct staff costs described in (2) of this subsection and AICR means the agency indirect cost rate described in (3) of this subsection;
>
> (2) direct staff costs (DSC) are the average cost of hours worked per job class directly on an incident or site, including salaries, retirement plan benefits, health care benefits, and leave and holiday benefits required by law to be paid to, or on behalf of employees; direct staff costs do not include costs associated with responding to a public records request, preparing or reviewing invoices or answering questions pertaining to invoices, responding to governor, media, or legislative requests for information, responding to public inquiries concerning the

site or incident with the exception of inquiries during a large response, internal or external training presentations or case studies, prospective purchaser agreements, policy or regulatory interpretation or discussion, or activities completed for training purposes;

(3) agency indirect costs are the costs of facilities, communications, personnel, fiscal, and other statewide and agency-wide services that are not directly attributable to a project; the agency indirect cost rate (AICR) used is the agency indirect rate expressed as a percentage, approved by the United States Environmental Protection Agency acting as the department's federal cognizant agency, or by a successor federal cognizant agency, for each fiscal year.

(d) The department will assign a unique code to each incident or site for purposes of tracking all state costs incurred. When the department requests payment of response costs it will provide an itemized statement documenting the costs incurred. The department will bill a liable party for response costs on a periodic basis as costs are incurred.

(e) The department will charge interest on past due costs incurred as the result of a release or threatened release. Interest for costs incurred in a calendar year accrues at a rate equal to three percentage points above the 12th Federal Reserve District discount rate in effect on January 2 of the year in which the cost is incurred. Unless otherwise agreed by the department and the responsible party, interest begins to accrue on the date a cost is billed. The department may agree to waive interest if payment of the costs is made not later than 60 days after the billing date for the costs.

(f) A person receiving a cost recovery invoice may seek informal review of a disputed invoice by contacting the commissioner's designee not later than 30 days after receiving an invoice. Failure to pay invoices presented by the department may result in the department filing cost recovery liens under AS 46.08.075 and referring the matter to the attorney general for collection of response costs, interest, and legal costs.

(g) In consultation with the Department of Law, the department will consider a person's ability to pay response costs if payment of the costs would cause an undue financial hardship to the person. The department may allow for payment of response costs over time. The department may reduce the amount of response costs to be paid by a person by the amount that would create an undue financial hardship. In order to establish an undue financial hardship, the person must provide and authorize release of sufficient financial information to the department to clearly demonstrate that, in the determination of the department, payment of the response costs would deprive the person of ordinary and necessary assets or cause the person to be unable to pay for ordinary and necessary business expenses or ordinary and necessary living expenses. Under AS 40.25.120, the department will maintain non-public financial information as confidential to the extent the information qualifies as confidential business information, trade secrets, or confidential personal information.

(h) In this section, unless the context requires otherwise,

(1) “costs”

(A) means any money expended by the department in response to a release or threatened release of oil or a hazardous substance; in this subparagraph, “hazardous substance,” “oil,” and “release” have the meanings given in AS 46.03.826;

(B) includes the cost of response personnel, response equipment, necessary support services, additional supplies, overhead, contractors, travel-related expenses, oversight, administrative support, and legal services;

(2) “incident” means a release or discharge of oil or a hazardous substance from a facility or vessel or the substantial threat of a release or discharge of oil or a hazardous substance from a facility or vessel; in this paragraph, “facility,” “hazardous substance,” “oil,” “release,” and “vessel” have the meanings given in AS 46.03.826;

(3) “site” means a contaminated site or leaking underground storage tank site subject to the site cleanup rules under 18 AAC 75.325 - 18 AAC 75.390 or to site assessment and corrective action under 18 AAC 78.

ALASKA CONSTITUTIONAL PROVISIONS:

AK Const. Art. 1, § 7. Due Process

No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.

AK Const. Art. 1, § 18. Eminent Domain

Private property shall not be taken or damaged for public use without just compensation.

AK Const. Art. 8, § 2. General Authority

The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.

FEDERAL STATUTES:

42 U.S.C. § 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—

(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 9604(i) of this title.

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 Title 26. 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 evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

…

42 U.S.C. § 9613. Civil proceedings

…

(f) Contribution

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. 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 section 9606 of this title or section 9607 of this title.

(2) Settlement

A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does

not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(3) Persons not party to settlement

(A) If the United States or a State has obtained less than complete relief from a person who has resolved its liability to the United States or the State in an administrative or judicially approved settlement, the United States or the State may bring an action against any person who has not so resolved its liability.

(B) A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2).

(C) In any action under this paragraph, the rights of any person who has resolved its liability to the United States or a State shall be subordinate to the rights of the United States or the State. Any contribution action brought under this paragraph shall be governed by Federal law.

…

PARTIES

The appellants are Williams Alaska Petroleum, Inc. and The Williams Companies, Inc. (collectively, "Williams"). The State of Alaska is an appellee, as are Flint Hills Resources, LLC and Flint Hills Resources Alaska, LLC (collectively, "Flint Hills").[1]

INTRODUCTION

Williams operated the North Pole refinery from 1977 to 2004. From the start—as the trial court found—it released oil and oil waste into the environment in a "virtually continuous" stream. [Exc. 2158] And from 1985 on, this stream of waste included the industrial solvent sulfolane, which Williams spilled on the ground and leaked from its corroded sumps and derelict wastewater lagoons. Williams does not dispute any of this.

There is now a shifting, three-and-a-half-mile-long, 300-foot-deep plume of sulfolane in the groundwater under the City of North Pole extending far beyond the refinery that will persist for an indefinite time. Williams no longer disputes this either.

Instead of disputing these basic facts, Williams argues that none of this is a problem. That is, that the people of North Pole should happily drink Williams's toxic industrial solvents and accept lower property values. Or it argues that somebody else should solve the problem. That is, the State, the City, and Flint Hills. Or it argues that those who *have* been solving the problem—while Williams continually denies any responsibility for the mess it created—have chosen the wrong solution by extending the City's piped water system to provide clean water to residents.

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[1] Although the Court's caption lists the City of North Pole as an appellee, the City's case was deconsolidated and was not part of the decision on appeal. [Exc. 2018-24]

In a meticulous 184-page decision after a lengthy and wide-ranging trial, the trial court correctly put an end to a decade of Williams's denial and evasion, holding Williams liable for the damage it caused and requiring it to participate in the problem-solving going forward. This Court should affirm the trial court's decision in its entirety.

ISSUES PRESENTED[2]

1. "*Hazardous substances*." Williams released oily wastewater and products containing sulfolane, a solvent with toxic effects on mammals and other organisms. Did the trial court err in finding that Williams released hazardous substances?

2. *Response costs*. Alaska Statute 46.03.822 makes responsible parties like Williams strictly liable for damages from hazardous substance spills, including response costs. Did the trial court err in ordering damages for the cost of providing clean water in areas affected by the sulfolane plume, including by extending the piped water system?

3. *Equitable allocation*. Did the trial court abuse its discretion in allocating 75% of responsibility for damages to Williams, which released most of the sulfolane; 25% to Flint Hills, which released some sulfolane; 0% to the State, which released no sulfolane; and 0% to the City of North Pole, which Williams failed to join as a party?

4. *Civil assessments*. Although most properties will now have clean water from the piped water system, there is still a large, persistent, migrating plume of sulfolane in the groundwater. Did the trial court err in awarding statutory assessments under AS 46.03.760(a) to compensate for this lasting environmental harm?

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[2] The State does not brief the contractual issues because they concern only the companies' responsibilities to each other, not their liability to the State.

5. *Injunctive relief*. Did the trial court err in ordering Williams to comply with its regulatory duties as a responsible party, after it refused to do so for over a decade?

6. *Declaratory relief*. Did the trial court err in declaring Williams responsible for PFAS contamination at the refinery, when the evidence showed it was the source?

7. *Primary jurisdiction*. Did the trial court abuse its discretion in denying Williams's belated motion to refer the State's onsite PFAS claims to the Department of Environmental Conservation (DEC) after years of active litigation?

8. *Due process*. Does holding Williams liable for the damages it caused with its violations of environmental laws offend Williams's right to due process?

9. *Takings*. Does requiring Williams to pay money damages for its violations of environmental laws effect an unconstitutional "taking" of Williams's property?

STATEMENT OF THE CASE

I. Williams operated the North Pole Refinery until 2004 and contaminated the soil and groundwater with hazardous substances.

During its ownership of the North Pole refinery from 1977 to 2004, Williams spilled and released petroleum products and hazardous substances including—as relevant here, sulfolane and per- and polyfuoroalkyl substances (PFAS). [Exc. 2189-98] Sulfolane is an industrial solvent that Williams began using in 1985. [Tr.[3] 1001-03] PFAS are chemicals contained in Williams's fire-fighting foams. [Tr. 2331-35, 2340]

Williams released sulfolane and PFAS by spilling them directly on the ground and by leaking them from its faulty wastewater system. [Exc. 2189-98] It spilled pure

[3] Unless otherwise specified, "Tr." refers to the trial transcript.

sulfolane and products containing it, [Tr. 513-28, 2388-89, 2418-19, 2458, 1978, 1004; Exc. 2617-56, 2687-94] and sent sulfolane-laden wastewater into its wastewater system despite manufacturer warnings. [Tr. 1046-48, 1973-75, 1896; Exc. 2662-63] It directed wastewater to corroded sumps [Tr. 1088-97, 1962-67, 2392-93, 1083-85, 1107] and used a "decommissioned" lagoon with holes in the liner to store wastewater with very high sulfolane concentrations. [Tr. 1953-56, 1010-14, 1867-71, 1023-61, 2428, 1864, 1890, 1900-03; Exc. 2610-11, 2547-48, 2662-63, 2680, 2685, 2553, 2601] Williams similarly spilled PFAS-containing foams on the ground and directed them into this faulty wastewater system. [Tr. 2331-46, 2368-70]

The State did not "allow" Williams to engage in these sloppy practices. [At. Br. 6] DEC does not issue permits authorizing facilities to spill and leak their waste chemicals into the ground. [Tr. 222-28] Over the years, DEC expressed concern and engaged with Williams about spill prevention and remediation at the refinery, including by securing a compliance order in 1986. [Tr. 515-17, 2414-15; Exc. 2508-17, 5-6] A 1987 audit observed that Williams's spill records were incomplete and unreliable. [R. 39235-338] And the U.S. Environmental Protection Agency (EPA) identified further concerns resulting in further orders, including a finding that Williams was operating as an illegal treatment, storage and disposal facility. [Exc. 2518-83; R. 38975-9066] In a required community briefing, Williams represented to the public that its monitoring wells would ensure that its contamination stayed within the refinery boundary. [Exc. 2599]

Williams detected high concentrations of sulfolane in the refinery's groundwater as early as 1996, but did not tell DEC. [Tr. 1121-25] Williams first reported groundwater

sulfolane to DEC in 2001, while working on a facility-wide corrective action plan. [Exc. 10, 18, 2657-61; Tr. 1124-25] A Williams employee and a DEC employee had an email exchange about sulfolane, but that was not retroactive permission to spill sulfolane nor an authorization to leave it in the ground. [Exc. 19-25] Sulfolane was relatively uncommon and unfamiliar to DEC, [Exc. 13-18, 2681; Tr. 1935-36] and DEC directed Williams to identify the sulfolane sources. [Tr. 2394; Exc. 23] Unable to locate the sources that winter, Williams asked for permission to reduce the testing frequency. [Exc. 19-25; Tr. 2876-78] DEC conditionally agreed, but by summer of 2002, without meeting the conditions, Williams stopped the testing entirely. [Exc. 22, 3023; Tr. 2958-59, 2630]

In 2004, Flint Hills bought the refinery from Williams. [Exc. 41, 272] DEC tasked Flint Hills with the same investigation: find the sources of the sulfolane contamination. [Exc. 179] DEC also told Flint Hills it would be adopting sulfolane cleanup levels based on Canadian guidelines. [*Id*.] A "cleanup level" is the concentration to which a medium (e.g., groundwater) must be cleaned up to ensure protection of human health, safety, or welfare, or of the environment, taking into account the actual uses likely to be affected.[4] Here, DEC thought the sulfolane was confined to the refinery site, where the groundwater was not used for drinking. [Tr. 281, 4024; R. 38912] In 2006, DEC set a groundwater cleanup level for sulfolane at the refinery of 350 parts per billion (ppb). [Exc. 3018-20] During this time, Flint Hills employed environmental consultants who recommended installing more monitoring wells. [Exc. 3021-82; Tr. 1488-97, 1506, 1711-14]

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4 *See* 18 AAC 75.345(c).

II. Lawsuits began after the industrial solvent sulfolane was discovered in private drinking water wells near the refinery in 2009.

In October 2009, Flint Hills determined that sulfolane had migrated off the refinery property. [Tr. 1506-07, 1619, 176] Sulfolane is highly soluble in water, does not readily attach to soils, and does not biodegrade in the conditions of this aquifer. [Tr. 998-1000, 631] After more sampling, it became apparent that sulfolane had spread miles beyond the refinery and contaminated hundreds of residents' wells. [Tr. 1507-08; Exc. 201] The people of North Pole were rightly upset. [Tr. 180-82, 442-59]

Flint Hills immediately provided alternative water to affected citizens and coordinated with state and city officials to address the newly discovered issue. [Tr. 1506-09, 449-50, 183] Flint Hills installed new wells when sulfolane was found in the City of North Pole's public drinking water wells. [Tr. 448-49, 1505-06] And Flint Hills undertook challenging work to characterize the extent of the contamination. [Tr. 183-85] Investigation ultimately revealed an expanding plume of sulfolane that is two miles wide, three-and-a-half miles long, and over 300 feet deep. [Tr. 1471-72, 1230; Exc. 3343]

Litigation between Williams and Flint Hills began in 2010 when resident James West sued the companies and they cross-claimed against each other, disputing their respective liabilities for the sulfolane under the refinery sales agreement. [Exc. 2148-49]

In May 2010, DEC advised Williams that as a former owner, it remained liable for hazardous substance contamination and that DEC expected Williams to participate in addressing it. [Tr. 1775-77; Exc. 3111] But Williams did not get involved in the efforts to study the plume and provide alternative water. [Tr. 185, 450, 2631] DEC repeatedly

accessed the State's "Oil and Hazardous Substance Release Prevention and Response Fund" to pay for response activities. [Tr. 186-222; Exc. 201, 3112-16, 3197, 3219] But when DEC sent Williams invoices, Williams did not pay them. [Tr. 1779-87, 1824]

The discovery of sulfolane off the refinery property prompted DEC to critically review the groundwater cleanup level that it had set for the refinery in 2006. [Tr. 177-80, 208-09] That level had been set using limited toxicity information and assuming the sulfolane was contained to the refinery, where the groundwater was not used for drinking. [Tr. 281-83, 943, 2810-11, 4024] DEC arranged for further assessments, engaged with the EPA and the Agency for Toxic Substances and Disease Registry, [Tr. 278-79, 755-69; Exc. 3083-3106, 3117-89] and conditionally approved new levels. [Exc. 3201-10; Tr. 877, 242-45] But DEC ultimately decided to await the results of long-term studies by the National Toxicology Program before setting a safe drinking-water level because DEC wants to be confident and because the EPA strongly encouraged DEC to wait for long-term studies. [Tr. 967, 987; Exc. 3248-49, 3224] Some residents felt they had gotten sick from sulfolane, but because the North Pole population is small, it is hard to determine cause and effect. [Tr. 446, 486-87, 813, 347-48, 393-94; Exc. 3232, 3267]

Williams never meaningfully engaged with DEC: it did not perform a site-specific risk assessment, propose a cleanup level, participate when levels were under review, or comment on studies prepared by Flint Hills. [Tr. 2631-33, 2776, 4096-97, 4105-13] In 2013, DEC warned Williams that it would need to be prepared to accept the results of the remedial process if it failed to participate. [Exc. 3216-17; Tr. 4111-13]

III. In 2020, after years of litigation and a lengthy trial, the superior court held Williams liable for contaminating the groundwater in the North Pole area.

In March 2014, the State brought this lawsuit against Williams and Flint Hills seeking damages and declaratory and injunctive relief holding them liable for the contamination under state law, and the companies filed cross- and counter-claims. [Exc. 757, 800-25, 855-73, 1241] The City brought its own lawsuit in late 2014, which was consolidated with the State's. [Exc. 1017, 2149-51] The West case—now involving only claims between the companies—was also consolidated. [Exc. 1915] The State approached the companies about exploring extending the City's piped water system to provide clean water in the impacted area. [Tr. 428, 1572-73; 11/17/2016 hearing Tr. at 5-6] In February 2017, the State, Flint Hills, and the City entered into a settlement under which Flint Hills and the State agreed to fund the piped water extension. [Exc. 1903-14]

But Williams continued to deny any liability and opted to vigorously litigate, and the three consolidated cases proceeded through discovery toward a trial that was repeatedly delayed. [Exc. 2151-57] In June 2019, the trial court deconsolidated the cases to avoid the unwieldy jury "mega trial" that would have been necessary due to the City's jury demand and its distinct claims. [Exc. 2018-24, 2155-56, 3386-3403] The court also referred the State's claims about newly discovered PFAS contamination off the refinery property to DEC under the primary jurisdiction doctrine. [Exc. 2026]

In October 2019, the trial court held a 16-day bench trial on the State's case, hearing from 28 witnesses—including 10 experts—and accepting many volumes of exhibits. [R. 33940-78375] And in January 2020, the court issued a detailed 184-page

decision resolving the State's claims and the companies' cross-claims. [Exc. 2132-2315] The court concluded that Williams was strictly liable for the sulfolane as hazardous substance releases under AS 46.03.822(a). [Exc. 2137] The court ordered damages for response costs, including the cost of the piped water system, as well as civil assessments under AS 46.03.760(a) to compensate for the sulfolane remaining in the groundwater. [Exc. 2136-39] The court equitably allocated the sulfolane liability between Williams and Flint Hills, assigning Williams 75% of the responsibility. [Exc. 2139] The court held Williams liable for the PFAS contamination at the refinery site. [Exc. 2139] And the court enjoined Williams's continuing failure to abide by its duties as a responsible party. [Exc. 2296-97] Williams filed post-trial motions renewing various unsuccessful arguments, which the trial court denied. [Exc. 2324-31] Williams appeals.

STANDARDS OF REVIEW

In a bench trial, "the judge is the trier of fact," and this Court reviews factual findings for clear error, because "[i]t is the function of the trial court, not of this court, to judge witnesses' credibility and to weigh conflicting evidence."[5] The Court likewise reviews damages awards for clear error, recognizing that "the fact-finder necessarily has some latitude in determining the amount of damages."[6] Clear error exists only when this Court has "a definite and firm conviction that a mistake has been made."[7] The Court

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5 *See Burton v. Fountainhead Dev., Inc*., 393 P.3d 387, 392 (Alaska 2017) (quoting *Lentine v. State*, 282 P.3d 369, 375-76 (Alaska 2012)).

6 *Id*.

7 *Rausch v. Devine*, 80 P.3d 733, 737 (Alaska 2003).

reviews the trial court's equitable allocation of costs under AS 46.03.822(j) for abuse of discretion.[8] The Court applies its independent judgment to questions of law.[9]

ARGUMENT

I. The trial court did not err in finding that the sulfolane and oily waste that Williams released were "hazardous substances" under AS 46.03.826(5).

Alaska law prohibits the unpermitted release of a "hazardous substance" and imposes strict liability for such releases.[10] A "hazardous substance" is defined as:

> (a) an element or compound which, when it enters into the atmosphere or 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;
>
> (b) oil; or
>
> (c) a substance defined as a hazardous substance under [CERCLA].[11]

This definition presents a question about the classification of a substance in general, not a question about the harm caused by a specific release.[12] It asks whether a substance falls into the category of unsafe substances that must be handled with care. The trial court correctly found that the substances Williams released—which included pure sulfolane

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8 *See Clement v. Fulton*, 110 P.3d 927, 930 (Alaska 2005) (reviewing a different type of equitable allocation for abuse of discretion); *Trinity Indus., Inc. v. Greenlease Holding Co*., 903 F.3d 333, 356 (3d Cir. 2018) (stating that analogous CERCLA allocations are reviewed for abuse of discretion).

9 *State v. Schmidt*, 323 P.3d 647, 655 (Alaska 2014).

10 AS 46.03.745; AS 46.03.822.

11 AS 46.03.826(5).

12 *See also* AS 46.03.826(4) (defining "having control over a hazardous substance" to mean handling a substance *before* it is released).

and sulfolane-laden oily wastewater and petroleum products—fell within this "hazardous" category for three independently sufficient reasons. [Exc. 2272-84]

A. Sulfolane falls under (a) as "an imminent and substantial danger."

1. Ample evidence at trial showed that sulfolane is dangerous.

Nowhere in its brief does Williams counter the core evidence showing that sulfolane—a manufactured industrial solvent—is dangerous. As witnesses explained, studies demonstrate that it harms mammals. [Tr. 709-69; Exc. 2495-97, 3086-3106] In a 1977 study, it caused convulsions, vomiting, and death in squirrel monkeys and fierce aggression in dogs, along with decreased white blood cells in guinea pigs and rats. [Tr. 722-23] Squirrel monkeys were most susceptible, raising concerns for humans. [Tr. 723-24] Later studies found decreased white blood cell counts in rats and guinea pigs; impacts on the blood, kidney, and liver systems; and increased fetal absorption and deformation. [Tr. 728] Japanese government studies observed changes to blood chemistry and liver and kidney function in rats, as well as reproductive impacts like stillbirths. [Tr. 737-741] A 2001 study found that rats had decreased white blood cell counts after drinking water containing sulfolane. [Tr. 747-48] A 2001 Canadian report identified adverse effects on plants, earthworms, and aquatic species. [Tr. 742-45] More recent studies observed adverse effects on zebra fish as well as toxicity to bacteria. [Tr. 749-55, 612-15]

In incorporating this evidence into its findings, the trial court did not "improperly rely" on testimony of State witnesses that did not recite subsection (a)'s legalese. [At. Br. 40-41] No rule of evidence says that witness testimony "must be excluded" and cannot be used to support a factual finding if it does not use particular words from a statutory

definition. [At. Br. 41] Other than baselessly asserting that the testimony should have been excluded altogether, Williams does not counter it by citing contrary evidence or explaining why the studies do not show that sulfolane is dangerous. [At. Br. 40-41] And as the fact finder, "[i]t is the trial court's function, and not that of a reviewing court, to judge the credibility of witnesses and to weigh conflicting evidence."[13]

Williams mentions that the researchers exposed their lab animals to sulfolane concentrations much higher than those detected in the wells of North Pole residents *thirty years after* Williams's releases. [At. Br. 8] But the trial court correctly held that "there is no support in the law" for the argument that "whether a substance is hazardous should turn on its concentrations in the environment after decades of dilution." [Exc. 2277] Williams does not explicitly renew this backwards argument on appeal, and this apparent concession is well taken because an "element or compound" like sulfolane is either "hazardous"—and must not be released without a permit in the first place—or it is not. [Tr. 811-12] This status does not depend on the concentration or quantity released, much less does it retroactively disappear through dilution *after* the release. The weight of CERCLA caselaw agrees.[14] Any other rule would create perverse incentives for failing to report spills in the hope that liability would evaporate as chemicals dilute. In any event, Williams's releases included *pure sulfolane*, [Exc. 2618-56; Tr. 2389, 2458] and

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13 *Hurd v. Henley*, 478 P.3d 208, 213 (Alaska 2020).

14 *See, e.g., Johnson v. James Langley Operating Co.*, 226 F.3d 957, 962 (8th Cir. 2000); *A&W Smelter & Refiners, Inc. v. Clinton*, 146 F.3d 1107, 1110 (9th Cir. 1998); *United Sates v. Alcan Aluminum Corp.*, 990 F.2d 711, 720 (2nd Cir. 1993); *City of New York v. Exxon Corp*., 744 F. Supp. 474, 483 (S.D.N.Y. 1990).

detections in the refinery groundwater were as high as 2,700,000 ppb. [Tr. 1121-23]

Although classifying a compound as "hazardous" does not depend on its concentration, the fact that some authorities have set screening levels or advisories for different concentrations of sulfolane further supports the finding that it is hazardous. [Exc. 2275-76, 2280-81, 3117-3189, 3086-3106; R. 36872-998; Tr. 771-77] If the substance were benign, there would be no need for any such levels.[15] Williams objects to looking at other authorities' levels, but—as the trial court noted—even using the more permissive ones, "[s]ulfolane's toxicity is on par with, or even greater than, about half of the chemicals that DEC has already identified as hazardous substances." [At. Br. 41; Exc. 2279] In other words, sulfolane is considered a concern at lower levels than many other hazardous substances. [Tr. 771-781] Although DEC has not yet set a default "cleanup level" for sulfolane,[16] nothing in the definition of "hazardous substance" requires this.[17]

Williams's own documents further support finding sulfolane to be hazardous: its emergency medical care protocol listed "life threats" including "[c]ardiac arrhythmias, respiratory failure, pulmonary edema, paralysis, brain damage, liver damage, lung tissue and stomach tissue damage." [Exc. 2279, 2682-84; Tr. 794-97] Williams listed sulfolane in a 2001 emergency and hazardous chemical inventory, [Exc. 2665-66; Tr. 518-20] and certified that it presents "Immediate (acute)" and "Delayed (chronic)" hazards. [Exc.

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15 The action levels Williams says are "entirely fictitious" [At. Br. 41-42 n. 21] are documented in the record. [R. 38841 (Texas .49 ppb); Exc. 3103 (Canadian 90 ppb)]

16 *See* 18 AAC 75.345 (tables of default groundwater cleanup levels).

17 AS 46.03.826(5).

2677] Williams documented sulfolane's toxicity to bacteria. [Tr. 1102-03, 1864, 2428] Williams handled sulfolane as RCRA hazardous waste. [Exc. 2624, 2635, 2643; Tr. 2922-23, 508-511, 547-48] And Williams and DEC's Emergency Spill Response Program treated spills of sulfolane and products containing it as hazardous substance releases. [Tr. 509-12, 547-48, 1921-22, 1934-35] This evidence not only supports the trial court's findings, but also belies Williams's feigned innocence—the suggestion that it had no idea that it should not release sulfolane into the environment. [At. Br. 39-40]

Indeed, a Williams witness testified that a manufacturer's material safety data sheet typically addresses "the proper disposal of the material." [Tr. 2345] The sulfolane data sheet warns that sulfolane poses potential reproductive toxicity effects and may damage the unborn child, and that it may be hazardous and should not be disposed into sewers or allowed to contaminate ponds, waterways, or ditches. [Tr. 784-94]

On top of all of this, Williams admitted that sulfolane is hazardous earlier in this case. [Exc. 793, 2106] The trial court properly treated these as "evidentiary admissions"—that is, not conclusive, but relevant.[18] [Exc. 2225-26, 2273-74]

Williams's brief does not even point to conflicting evidence on these factual issues, much less anything that would render the trial court's findings clearly erroneous.[19]

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[18] *See Brigman v. State*, 64 P.3d 152, 166 (Alaska App. 2003); 29A Am. Jur. 2d Evidence § 769; *Nature and effect*, 2 McCormick On Evid. § 254 (8th ed.).

[19] *See State, DHSS, OCS v. Zander B.*, 474 P.3d 1153, 1171 (Alaska 2020) ("Conflicting evidence is generally insufficient to overturn a fact finding, and we will not reweigh evidence if the record supports the court's finding.") (citation omitted).

2. The trial court correctly interpreted and applied the statute.

Instead of attacking the trial court's subsection (a) finding based on the facts, Williams attacks it based on the law, arguing that the court read the statute too broadly by interpreting it to cover "potential" harm and impacts that "take time to develop," and by requiring only "a reasonable medical concern about the public health." [At. Br. 31-35] But the court's elaboration on subsection (a) was neither wrong nor dispositive here.

The trial court correctly cited *Berg v. Popham*'s recognition that the legislature intended for Alaska law to impose broader liability than CERCLA.[20] [Exc. 2277] In Williams's view, the court "erroneously reasoned" that subsection (a) "was enacted to broaden the CERCLA list when the exact opposite is true." [At. Br. 34-35] But although subsection (a) predated subsection (c)—the CERCLA definition—that does not mean subsection (a) sets a "higher bar for establishing liability" than CERCLA. The trial court merely rejected that unsupported position, which Williams took below. [Exc. 2276]

Williams argues that the word "imminent" means that a substance cannot be hazardous if its impacts "take time to develop." [At. Br. 32] But this would mean that—for example—a substance that causes birth defects or cancer would not be hazardous. The trial court cogently reasoned that "requiring manifestations of disease to be near-term could not in good faith have been intended." [Exc. 2114] "Imminent" thus means that the "threat of harm must be present," not that harm must occur immediately. [Exc. 2113]

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[20] *See* 113 P.3d 604, 612 (Alaska 2005) (discussing differences; for example, "section .822's sponsors noted that, while CERCLA was the model for section .822 generally, CERCLA is directed only at 'wastes,' while section .822 was 'drafted in such a way that all harmful substances are treated the same.'").

Williams cites *Meghrig v. KFC Western* for the proposition that in RCRA, the word "imminent" refers only to harm that "threatens to occur immediately." [At. Br. 32] But *Meghrig* does not support Williams when read in context. RCRA allows citizen suits only to prevent "imminent" harm from a spill, and the court concluded—quite reasonably—that a *past* harm cannot be "imminent."[21] The court did not discuss what kinds of harmful effects are "imminent" for purposes of categorizing a *substance itself*—as opposed to a particular spill—as threatening to the public health.

Williams further argues that subsection (a)'s use of "presents"—as in, "*presents* an imminent and substantial danger"—requires "that a danger *actually* exists" and thus cannot encompass "potential harm." [At. Br. 33 (emphasis in original)] But there is no daylight between "potential harm" and "actual danger" because "danger" is itself a *risk* of harm, not a *guaranteed* harm.[22] If the legislature meant to exclude "potential harm," it would have just said "*harms* the public health or welfare," not used the word "danger."

This Court did not hold, in *Stock v. State*,[23] that "liability for *potential* harm threatens to deprive a defendant of the constitutional right to fair notice," nor does that case require the Court to backdoor a mens rea element into this civil strict liability framework. [At. Br. 33] The Court in *Stock* discussed the need for criminal laws to "give

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21 516 U.S. 479, 484-86 (1996).

22 *Cf. Ethyl Corp. v. Envtl. Prot. Agency*, 541 F.2d 1, 13 (1976) ("When one is endangered, harm is threatened . . . [a] statute allowing for regulation in the face of danger is, necessarily, a precautionary statute. . . . the very existence of such precautionary legislation would seem to demand that regulatory action precede, and, optimally, prevent, the perceived threat.").

23 526 P.2d 3, 10-11 (Alaska 1974).

adequate notice to the ordinary citizen as to what acts are prohibited," and held that to convict a defendant of committing "pollution" by making waters "potentially harmful," the State had to "prove that the threatened injury was foreseeable to a reasonable man in the position of the defendant at the time of the act or omission."[24] Williams seems to ask the Court to read a similar "foreseeability" standard into the definition of "hazardous substance." [At. Br. 33] But *Stock* concerned *criminal* penalties and—although the Court has extended its reasoning to "serious civil penalties"—this case involves not *penalties*, but compensatory damages.[25] It asks not whether Williams should be *punished*, but rather who should pay the costs of Williams's releases: Williams, or the public.[26]

Even putting aside this important distinction, Alaska's environmental statutes already give adequate notice to those who use industrial chemicals like sulfolane that they should not release them into the environment without permits.[27] An operator unsure of whether a novel chemical that is not yet listed as "hazardous" by name in regulation is dangerous enough to satisfy subsection (a) can—and should—simply err on the side of not releasing it without a permit.[28] And even if the "foreseeability" standard from *Stock*

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24 *Id*. at 9.

25 *See* AS 46.03.822 (authorizing damages for "the costs of response, containment, removal, or remedial action"); AS 46.03.760 (authorizing civil assessments that reflect "reasonable compensation in the nature of liquidated damages" and that "may not be used for punitive purposes" absent additional findings not made here).

26 *See infra* at 48.

27 *See* AS 46.03.100, .710, .745.

28 This context does not involve the exercise of constitutional rights like speech, so no concern about overbreadth or chilling effects is present. *See Stock*, 526 P.2d at 9.

were imported into subsection (a), it would be satisfied because Williams should have known—and indeed, *actually knew*—that it should not release sulfolane. As the trial court correctly found, Williams's own documents and testimony show this. [Exc. 2274, 2618-56, 2682-84, 2664-66, 2677; Tr. 1921-23, 2364-65, 794-97]

Similarly, even if Williams were correct that the trial court did not read subsection (a) strictly enough, that also would not require reversal because the court's findings would satisfy a stricter standard. As the trial court found, "[a]t a minimum, sulfolane exposure can reduce white blood cell counts; at a maximum sulfolane exposure can cause death." [Exc. 2279; Tr. 808, 782] Williams does not argue that this factual finding was clearly erroneous. And these identified harms are serious enough to pose an "imminent and substantial danger" even under Williams's statutory interpretation, which requires a threat that would "put a reasonable man 'to his instant defense.'" [At. Br. 32]

What's more, Williams's arguments address only the "public health" aspect of subsection (a), but the trial court also found—correctly—that sulfolane threatens "public welfare" and the environment, which are broader concepts. [Exc. 2230-32] Williams has waived any challenge to these findings by failing to adequately brief it. [At. Br. 44 n.22] Because Williams has failed to show that the court's findings are clear error or do not satisfy subsection (a), the Court should affirm the ruling that sulfolane is hazardous—rendering Williams strictly liable—without even considering subsections (b) and (c).

B. Williams's releases were also "oil" under (b).

In applying subsection (b), the trial court did not mistakenly conclude that *sulfolane* is "oil"—rather, it correctly concluded that Williams's *releases* were "oil."

[Exc. 2282-83] As the court found, most of the sulfolane contamination resulted from Williams's releases of oily wastewater and petroleum products and byproducts that contained—among other things—sulfolane. [Exc. 2189-98, 2233] Williams is strictly liable under AS 46.03.822 for damages "resulting from an unpermitted release of a hazardous substance" because the oily wastewater and petroleum products that Williams released straightforwardly meet the definition of "oil."[29]

C. Sulfolane also falls under (c) due to federal regulation.

Although the Court need not even reach the issue given the subsection (a) and (b) findings, the trial court likewise did not err in finding—as a third alternative—that sulfolane is hazardous under subsection (c), which includes "hazardous wastes" under RCRA.[30] [Exc. 2283-84] The court correctly recognized that RCRA hazardous wastes include more than just "listed" wastes, and correctly observed that Williams managed sulfolane as a RCRA waste and that the EPA treated sulfolane as such in responding to contamination at another refinery.[31] [Exc. 2233-34, 2922-23, 1939, 3371; Tr. 2641] This supports the court's subsection (c) finding which—though unnecessary—further supports the ultimate conclusion that sulfolane is a hazardous substance.

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[29] AS 46.03.826(7) ("a derivative of a liquid hydrocarbon and includes crude oil, lubricating oil, sludge, oil refuse or another petroleum-related product or by-product").

[30] Subsection (c) includes "a substance defined as a hazardous substance under 42 U.S.C. 9601(14)," which includes "any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act . . .," a provision added by RCRA, which authorizes regulations on "criteria for identifying the characteristics of hazardous waste, and for listing hazardous waste." 42 U.S.C. § 6921(a).

[31] Indeed, EPA's contractor here said the contamination in North Pole should be addressed and the sulfolane removed from the aquifer. [Exc. 3377]

D. The trial court did not err in deferring to DEC's determination that sulfolane is hazardous, nor was deference essential here.

The ultimate conclusion that sulfolane is hazardous is also supported by DEC's decision to use the State's response fund for "Oil and *Hazardous Substance* Releases" to respond to the sulfolane issue.[32] [Tr. 185-206; Exc. 201, 3112-16, 3197, 3219] DEC's funding memoranda do not, as Williams asserts, "apply a different standard." [At. Br. 37] The applicable "hazardous substance" definition is identical in relevant respects.[33] And to authorize using the fund to "contain, clean up, and take other necessary action," DEC necessarily had to decide *both* that sulfolane is "hazardous" in general *and* that the specific releases here posed "an imminent and substantial threat," further supporting the applicability of AS 46.03.826(5)(a)'s "imminent and substantial danger" language.[34]

Williams confuses the issue by speaking as if the trial court deferred to the agency's *interpretation* of these statutes, when in reality the court just deferred to the agency's *application* of these statutes—that is, its finding that sulfolane is hazardous. [At. Br. 37-38] The court correctly recognized that this is the kind of technical judgment within the DEC's area of environmental expertise that should carry some persuasive weight with the court, as it would in an administrative appeal.[35] [Exc. 2274-75]

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[32] *See* AS 46.08.005-080 (establishing the "Release Prevention and Response Fund" within the chapter entitled "Oil and Hazardous Substance Releases."

[33] *Compare* AS 46.03.826(5) *with* AS 46.08.900(6).

[34] AS 46.08.040(a)(1)(A). [Tr. 385]

[35] *Cf. Native Vill. of Elim v. State*, 990 P.2d 1, 11 (Alaska 1999) (holding that an agency's identification of fish stocks was accorded "considerable deference," noting issues "clouded by scientific uncertainty"); *Protect Our Communities Found. v. Jewell*, 825 F.3d 571, 578 (9th Cir. 2016) ("[D]eference is particularly appropriate when a court

Deference does not "require[] a finding in favor of Williams" on the theory that DEC earlier found sulfolane *not* to be hazardous, because DEC *never* found sulfolane not to be hazardous. [At. Br. 39-40] A single DEC employee said in a single 2002 email exchange with Williams that sulfolane was not "considered [a] regulated contaminant[] at this time due to the lack of EPA reviewed toxicity data." [Exc. 19, 22-23] This was not even a finding by *this employee* that sulfolane is not "hazardous," much less a finding by the agency.[36] [Tr. 374-75] Rather, the employee's use of the word "regulated" was ambiguous, imprecise, and context-specific, and reflected DEC's unfamiliarity with this uncommon substance. [Tr. 225-26, 294-97, 374-77, 392, 1934-36; Exc. 13-18, 2494]

Finally, even if deference to DEC were error, it would be harmless because the trial court did not stop there. [Exc. 2276] Instead, the court made pages of its own detailed findings. [Exc. 2276-84] Because Williams barely disputes the evidence—much less shows clear error—the Court should affirm the "hazardous substance" findings.

II. The trial court did not err in ordering strict liability damages under AS 46.03.822 for response costs, including the piped water system.

Alaska Statute 46.03.822(a) makes owners and operators like Williams and Flint Hills "strictly liable, jointly and severally" for a list of damages "resulting from an

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is reviewing 'issues of fact,' 'where analysis of the relevant documents requires a high level of technical expertise.'") (quoting *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1206 (9th Cir. 2004)); *United States v. Alpine Land & Reservoir Co*., 887 F.2d 207, 213 (9th Cir. 1989) ("Deference to an agency's technical expertise and experience is particularly warranted with respect to questions involving engineering and scientific matters.").

[36] Nor are DEC employees' *internal* emails discussing the agency's uncertainty about sulfolane an agency "finding" that sulfolane is not hazardous. [Exc. 13-18, 20-21]

unpermitted release of a hazardous substance," including "the costs of response, containment, removal, or remedial action incurred by the state." The trial court held Williams liable under this statute "for the estimated costs of the piped water system, $72,228,154, as an appropriate response cost." [Exc. 2293] Williams believes this was error because, in its view, providing Alaskans with a permanent source of clean water was a "costly overreaction" to the shifting three-mile plume of industrial chemicals Williams put in their groundwater. [At. Br. 44] But Williams invents a heightened threshold for recovery that has no basis in the statute. [*Id*. at 44-51] The trial court's findings were sufficient to support damages under AS 46.03.822 and not clear error.

A. AS 46.03.822 makes responsible parties—not the public—pay for the consequences of hazardous substance spills, including response costs.

Every version of AS 46.03.822—which was originally enacted in 1972—"has subjected polluters of either private or public property to joint and several strict liability."[37] "[T]he legislature's primary intent in enacting these provisions" was "to hold responsible parties strictly liable for all provable spill-related harms."[38] Although some very remote damages claims may fail,[39] many types of damages are recoverable.[40] The

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37 *Fed. Deposit Ins. Corp. v. Laidlaw Transit*, 21 P.3d 344, 347–48 (Alaska 2001).

38 *Kodiak Island Borough v. Exxon Corp*., 991 P.2d 757, 765 (Alaska 1999).

39 *Cf. In re Exxon Valdez*, 270 F.3d 1215, 1253 (9th Cir. 2001) ("As we held in *Benefiel v. Exxon Corp*. the requirement of proximate cause bars remote and speculative claims. There we held that Californians who claimed that their gasoline cost more as a result of the Exxon Valdez oil spill were barred from recovery because of 'the remote and derivative damages' they claimed and lack of proximate cause as a matter of law.").

40 E.g., the Court affirmed damages on the theory that the Exxon Valdez spill resulted in cleanup efforts that compromised archeological site confidentiality, causing

Court has interpreted the statute to "encompass a broad range of potential recovery,"[41] observing that the scope of damages "was remarkably broad from the outset," and that subsequent amendments effected a "progressive expansion of compensable harms" to "clarify and confirm the broad scope of the original provisions."[42]

In 1989, using CERCLA as a pattern,[43] the legislature amended AS 46.03.822 to "strengthen the State's ability to obtain cleanup of hazardous substance spill sites,"[44] with the "basic premise" being "that the responsible parties, not the general public" should pay for spill response.[45] While Alaska's statute "was modeled on CERCLA generally, it was revised in the months following the Exxon Valdez catastrophe," so "its scope would be broader."[46] Among other changes, the 1989 amendments added the language explicitly authorizing damages for "the cost of response, containment, removal, or remedial action" by the State, which "made clear that the public could recover the *full costs* of responses for spills."[47] The Court has interpreted AS 46.03.822's language identifying these "specific compensable costs" as "exemplary and inclusive, not definitive or exclusive."[48]

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vandalism fears. *Chenega Corp. v. Exxon Corp*., 991 P.2d 769, 798 (Alaska 1999).

41 *Kodiak Island Borough*, 991 P.2d at 765.

42 *Id*. at 764.

43 *See Oakly Enters., LLC v. NPI, LLC*, 354 P.3d 1073, 1079 n.20 (Alaska 2015) (recognizing that "[t]his is Alaska's analog" to CERCLA).

44 *Laidlaw Transit,* 21 P.3d at 347.

45 *Kodiak Island Borough*, 991 P.2d at 762.

46 *Berg*, 113 P.3d at 609.

47 *Kodiak Island Borough*, 991 P.2d at 762 (emphasis added).

48 *Id*. at 765.

Nothing in the text or history of AS 46.03.822 supports requiring the State to prove—as a threshold to recovery—that its response costs were both "necessary" and "the most cost-effective remedy" for the problem, as Williams argues. [At. Br. 44-50]

B. The spill response and contaminated sites regulations do not create extra thresholds to recovery of response costs.

Since nothing in AS 46.03.822 supports Williams's asserted limits, Williams relies on DEC regulations instead, and complains that the trial court made its findings "[w]ithout tying its conclusions to DEC regulations." [At. Br. 44-50] But the only regulation addressing what response costs DEC can recover—18 AAC 75.910—defines them broadly and inclusively,[49] consistent with the broad interpretation of AS 46.03.822 described above. Response costs include "any money expended by the department in response to a release or threatened release of oil or a hazardous substance" and need only be "reasonably attributable to the site"—in other words, related to the hazardous substance release.[50]

DEC's contaminated sites regulations do not create extra hurdles to recovery of AS 46.03.822 damages. For one thing, Williams mis-cites them as commands to DEC,[51] when in reality they are commands to responsible parties like Williams to report, contain,

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49 *See* 18 AAC 75.910(b) & (h)(1).

50 *Id.* Williams misinterprets "[r]easonably attributable to the site" as meaning a remedy limited by its interpretation of "reasonableness." [At. Br. 50]

51 For example, Williams says "[t]he Site Cleanup Rules require DEC to 'prevent, eliminate, or minimize potential adverse impacts to human health, safety, and welfare, and to the environment, onsite and offsite, from any hazardous substance remaining at the site,'" but this requirement applies to "a responsible person," not to DEC. [At. Br. 49]

characterize, and clean up spills with DEC oversight.[52] The State can recover its response costs irrespective of the costs incurred by responsible parties (and can do so even if the ultimate decision is not to clean up the site). For another thing, unlike in CERCLA, nothing in AS 46.03.822 supports limiting damage awards based on these regulations.

Williams's cited CERCLA cases are thus inapposite. [At. Br. 46-48] *Matter of Bell Petroleum Services*—which disallowed certain EPA response costs as unnecessary—was decided under CERCLA provisions that have no analog in AS 46.03.822.[53] So was *Regional Airport Authority of Louisville*.[54] [At. Br. 48] CERCLA allows recovery of response costs that are "not inconsistent with the national contingency plan,"[55] which is a set of CERCLA-mandated regulations to guide responses.[56] CERCLA instructs a court to reduce EPA's costs if it finds, after a deferential and limited administrative review,[57] "that the selection of the response action was arbitrary and capricious or otherwise not in accordance with law."[58] CERCLA thus explicitly incorporates regulations and an

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52 *See* 18 AAC 75.310-.396.

53 *See Matter of Bell Petroleum Servs., Inc*., 3 F.3d 889, 904-08 (5th Cir. 1993) (applying CERCLA's administrative review provision and requirement that EPA response costs be "not inconsistent with the national contingency plan").

54 *See Reg'l Airport Auth. of Louisville v. LFG, LLC*, 460 F.3d 697, 703-09 (6th Cir. 2006) (applying CERCLA's requirements that a private party's response costs be "necessary" and "consistent with the national contingency plan" to be recoverable).

55 42 U.S.C. § 9607(a)(4)(A); James T. O'Reilly, *Non-consistency of response costs with the National Contingency Plan*, 1 Superfund & Brownfields Cleanup § 14:1.

56 *See* 42 U.S.C. § 9605; 40 C.F.R. Part 300.

57 42 U.S.C. § 9613(k).

58 42 U.S.C. § 9613(j). Courts defer to the EPA's judgment. *See United States v. Ne. Pharm. & Chem. Co*., 810 F.2d 726, 748 (8th Cir. 1986).

administrative review into its cost-recovery provisions, which AS 46.03.822 does not do.

Williams argues that "[a] sulfolane cleanup level was essential to proving liability for response costs" because the regulatory duties of responsible parties "make a cleanup level the baseline by which specific response costs are measured as 'necessary' or unnecessary to protect the public from a substance." [At. Br. 45] But this is not even correct under CERCLA, let alone supported by anything in AS 46.03.822.[59] Williams similarly relies on the regulatory duties of responsible parties to argue that the State had to prove that the piped water system "was the most cost-effective remedy." [At. Br. 49-50] But again, these regulations are not referenced in AS 46.03.822, nor does anything in the statute require the State to prove that its costs were "necessary" and "the most cost-effective remedy."[60] Requiring this would contravene legislative intent by foisting costs on the public unless the State can satisfy essentially a "strict scrutiny" standard. CERCLA places no such burden on the government, nor should this Court.[61] To the

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[59] *See United States v. Alcan Aluminum Corp.*, 755 F. Supp. 531, 539 (N.D.N.Y. 1991) (rejecting the position that a release must "violate some applicable State or Federal standard imposing a threshold quantity or concentration requirement" in order to "have caused (and justified) the incurrence of response costs").

[60] Williams cites a regulation defining "practicable" and faults state witnesses for not applying it, but the statute does not use this word or reference this regulation. [At. Br. 49]

[61] CERCLA "imposes no obligation on the United States to minimize its response costs for the benefit of responsible parties who are liable for the costs." *United States v. Am. Cyanamid Co.*, 786 F. Supp. 152, 161 (D.R.I. 1992). CERCLA requires only private plaintiffs—not the government—to prove response costs are "necessary," *see* 42 U.S.C. § 9607(a)(4)(A) & (B), and even then, uses that word in a "more elastic" sense than normal. *See Trinity Indus., Inc.*, 903 F.3d at 352 & n.10 (a cost is "necessary" if there is "some nexus between [it] and an actual effort to respond to environmental contamination"). EPA's choice of remedy is subject to deference. *See United States v. Hardage*, 982 F.2d 1436, 1442 (10th Cir. 1992); *see also* James T. O'Reilly, *Judicially*

extent that there is uncertainty about the best response to a hazardous substance spill, the costs of that uncertainty should be borne by the polluters, not the public.

DEC has not yet finalized a sulfolane cleanup level because there is no human or chronic toxicity data and the EPA has strongly encouraged DEC to wait for long-term studies. [Tr. 178, 303-05, 987, 959, 967, 2561; Exc. 3224] If Williams felt it needed a cleanup level to comply with its duties under the regulations it cites, it could have proposed one.[62] Likewise, if Williams felt that an alternative remedy or "more targeted approach" would have been satisfactory, it could have proposed one. [At. Br. 47] Williams's refusal to engage in the regulatory process to address the contamination puts it in a poor position to now raise regulation-based objections to DEC's response. [Exc. 2238-40, 3216-17] But regardless of Williams's engagement (or lack thereof) in the regulatory process, the regulations it cites simply do not constrain AS 46.03.822 recovery.

C. The trial court did not clearly err in awarding damages for the piped water system and other costs of providing alternative water.

The trial court's findings were more than sufficient to support AS 46.03.822 damages for the piped water system. As a cost incurred in response to the releases, it is recoverable under the statute's plain language. And although nothing in the statute's text requires that a response cost be "reasonable" or "necessary," the court's findings satisfy any such implicit requirements that might exist. The court found the project "reasonable

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rejected defense claims, 1 Superfund & Brownfields Cleanup § 15:9.

62 *See* 18 AAC 75.345(b)(3) (allowing a responsible party to propose an alternative cleanup level for a substance not listed in the cleanup tables).

and not arbitrary or capricious," rejecting Williams's argument that the system was too expensive and finding both that it "was a reasonable response to the contamination of the aquifer and that the costs of its construction were also reasonable." [Exc. 2250, 2289-90]

These findings are not clearly erroneous. The trial court heard evidence about why DEC pursued a piped water system over other options. [Tr. 2643-44, 428-30] The system provided a more permanent solution to the long-term problem facing North Pole residents, which is a persistent three-mile plume of industrial chemicals migrating in their groundwater. [Tr. 493] Williams argues that the cost was not worthwhile because nobody proved that residents suffered negative health effects. [At. Br. 46] But Williams itself hooked up to City water after polluting the refinery groundwater. [R. 34805, 38912] And the statute does not require the State to experiment on its citizens by waiting for them to get sick from a dangerous chemical with unknown long-term effects before taking action.

Although Williams tried to convince the trial court that "[t]he State pursued the piped water project for ulterior purposes," the court was unpersuaded. [At. Br. 47-48] Williams asks this Court to reweigh the same evidence, but weighing conflicting evidence and assessing witness credibility is the trial court's province.[63] And even if Williams's evidence were credited—and the standard from its preferred CERCLA case applied—costs would still be recoverable because "the threat to public health or the environment was the predicate for acting."[64] Williams presented no evidence that North

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63 *Burton*, 393 P.3d at 392.

64 *Reg'l Airport Auth. of Louisville*, 460 F.3d at 706.

Pole's piped water system would have been expanded if not for Williams's releases.

Williams similarly challenges as "unnecessary" some of the other costs of providing alternative water, but these challenges fail for similar reasons. [At. Br. 51-52] All of these costs were incurred as a result of the hazardous substance releases—and Williams does not argue otherwise—so Williams is strictly liable for them under AS 46.03.822 even if they were overprotective, which they were not.

Because the record supports the factual findings, which more than satisfy the statute, this Court should affirm the damages for the piped water system and other water.

III. The trial court did not abuse its discretion in equitably allocating 75% of responsibility for the response costs to Williams under AS 46.03.822(j).

Williams does not argue that it can escape joint and several liability for the full amount of AS 46.03.822 damages through apportionment.[65] Instead, Williams challenges the trial court's equitable allocation under AS 46.03.822(j). [At. Br. 54-63] That provision—similar to one in CERCLA[66]—permits liable parties to bring contribution claims against each other and "recover from each other on the basis of equitable factors that the superior court determines are appropriate to the case."[67] In resolving such claims, courts consider multiple factors such as, for example, the share of the waste a party spilled.[68] The trial court has broad discretion in choosing what factors to apply and

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65 *See* AS 46.03.822(i); *Oakly Enters.*, 354 P.3d at 1079 (explaining the requirements for apportionment of divisible damages).

66 *Compare* AS 46.03.822(j) *with* 42 U.S.C. § 9613(f).

67 *Oakly Enters.*, 354 P.3d at 1080.

68 *See id*. at 1077 n.6 (explaining the "Gore factors").

making its allocation, and Williams fails to show any abuse of it here.[69] The trial court found that Williams released 90 percent of the sulfolane plume, and appropriately allocated Williams most of the responsibility for it. [Exc. 2215-16, 2306-09, 2243]

A. The trial court was not required to allocate responsibility to the State.

Although DNR owned the land and was thus a potentially responsible party under AS 46.03.822(a), that does not mean the trial court was *required* to allocate responsibility to the State under .822(j). [At. Br. 58-59] The court found that "[n]o persuasive evidence was presented" to support any such allocation because "[t]he State as landowner was not responsible for the release or spread of sulfolane or PFAS or at fault in any way." [Exc. 2244] As Williams acknowledged below, a "dominant" allocation factor is how much of the costs are attributable to the waste for which the party is directly responsible, meaning "a potentially responsible party's equitable share may end up being zero." [Tr. 141] Because the State released zero sulfolane, a zero allocation is eminently justified.

Although it was *DNR's* landowner status that made the State a potentially responsible party, Williams argues for an allocation based on *DEC's* actions. [At. Br. 58] But even if DEC's actions as a regulator could be imputed to DNR as a landowner,

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[69] *See id*. at 1082-83 (upholding trial court's equitable allocation); *Litgo New Jersey Inc. v. Comm'r New Jersey Dep't of Env't Prot*., 725 F.3d 369, 387 (3d Cir. 2013) (CERCLA's contribution provision "affords district courts tremendous discretion"); *MPM Silicones, LLC v. Union Carbide Corp*., 966 F.3d 200, 236 (2d Cir. 2020) (CERCLA "does not require district courts to consider or give weight to any particular allocation factor, but rather permits the court to determine which factors are most relevant to a given case"); *Env't Transp. Sys., Inc. v. ENSCO, Inc*., 969 F.2d 503, 509 (7th Cir. 1992) ("[I]n any given case, a court may consider several factors, a few factors, or only one determining factor . . . depending on the totality of circumstances presented . . . .").

Williams shows no abuse of discretion by the trial court. Williams claims DEC "caused" sulfolane to migrate off the refinery by allowing Flint Hills to turn off the pumping system in 2017. [*Id*.] But a regulatory agency's attempts to triage its remedial responses to the problems created by others are not a *cause* of those problems. Regardless, "the sulfolane plume [had] left the sulfolane barn" by 2014, so turning off the pumping system three years later did not significantly affect the plume. [Exc. 2179, 2494; Tr. 1149, 1218-19, 2654-55] And because Williams refused to participate in the administrative process, it is in no position to complain about the solution the participants reached.[70]

Williams also argues that the State should be equitably estopped from recovering damages because Williams reasonably relied on DEC's "repeated written affirmations that sulfolane was not regulated and could be left in the ground." [At. Br. 58] But the trial court correctly held that allowing equitable estoppel as a defense to .822(a) liability would be contrary to the statute's strict joint and several liability framework. [Exc. 1995-96] None of the cases Williams cites undermine this conclusion.[71] [At. Br. 58-59]

The trial court allowed Williams to "assert equitable factors in its claims for contribution," but the evidence did not support its attempts to blame DEC.[72] [Exc. 1995-

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70 *See supra* at 6-7.

71 Neither *Tufco, Inc. v. Pac. Env't Corp*., 113 P.3d 668, 671 (Alaska 2005) nor *Fields v. Kodiak City Council*, 628 P.2d 927,931 n.3 (Alaska 1981) involved a strict liability statute. And although *United States v. Moore*, 703 F. Supp. 460, 462 (E.D. Va. 1988) allowed an equitable estoppel defense in a CERCLA case, the "weight of recent case authority nationwide [holds] that traditional equitable defenses to liability are not available to defendants in CERCLA cost recovery actions." *California Dep't of Toxic Substances Control v. Alco Pac., Inc*., 217 F. Supp. 2d 1028, 1039-40 (C.D. Cal. 2002).

72 The trial court did not "ignore" any of Williams's arguments. [At. Br. 58]

96] Williams cannot logically have "relied" on the DEC emails it cites when releasing sulfolane years before. [At. Br. 58] And the Court will search the record in vain for any instruction from DEC to Williams that sulfolane should be "left in the ground." [*Id*.] Williams had no permit to release sulfolane. [Exc. 2200; Tr. 224, 1921] When Williams notified DEC of sulfolane spills, Williams had to clean them up. [Tr. 499-512, 1904-22; Exc. 2226-27, 2618-56] When Williams finally told DEC it found sulfolane in the groundwater six years after discovering it, DEC told Williams to monitor it and identify the sources. [Tr. 1121-25, 419; Exc. 19-25, 2168] But Williams prematurely stopped doing so, exhibiting "a lack of cooperation and failure to comply." [Exc. 2236, 3023; Tr. 2959] And Williams never completed its corrective action plan before selling the refinery. [Exc. 178] Williams conceivably could have requested DEC approval to leave sulfolane in the ground, but its work never progressed to that point.[73]

The DEC emails that Williams takes out of context are not an approval to leave sulfolane in the ground—they reveal merely that DEC was initially uncertain how to handle sulfolane given the lack of EPA-reviewed toxicity data, and that it instructed

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Williams proposed findings and conclusions of law totaled nearly 400 pages. [R. 28946-29361] Civil Rule 52 does not require the court in a bench trial to make explicit findings on every question "so long as the record clearly indicates that the court considered the matter and resolved each critical factual dispute." *Timothy W. v. Julia M.*, 403 P.3d 1095, 1108 (Alaska 2017) (quoting *Crittell v. Bingo*, 36 P.3d 634, 639 (Alaska 2001)).

[73] *See* 18 AAC 75.325(d), 18 AAC 75.340(f), (h), 18 AAC 75.345(b)(2), (3). Even if Williams had requested and received such approval, that would not have ended its responsibility. [Tr. 230-32] A "no cleanup" written determination under 18 AAC 75.325(d) is based on the information available at the time, and can change based on future information.

Williams to do monitoring that Williams failed to do.[74] [At. Br. 58] DEC cannot, and does not, know everything about every new chemical that comes into circulation. [Tr. 294-95] The evolution in DEC's regulatory response here made sense: the agency prescribed monitoring and investigation when it believed the sulfolane to be contained to an industrial site where the groundwater was not used for drinking, but became very concerned and required more action when sulfolane was discovered in drinking wells where it endangered residents.[75] [Exc. 3111; Tr. 176-215, 426-30, 2800] The agency did not *cause* the sulfolane problem by not *preventing* it from happening, any more than the police cause a car crash by not pulling over a drunk driver before a collision. The trial court did not abuse its broad discretion in not allocating responsibility to the State.

B. The trial court was not required to allocate responsibility to the City.

Williams's attempt to shift blame to the City also fails because AS 46.03.822(j) is a way for responsible parties to bring contribution claims against each other, not to evade their joint and several liability by pointing fingers at empty chairs. [At. Br. 60-63]

The proper place for Williams's arguments is an .822(j) contribution claim against the City, but Williams never brought one in this case. When the State sued Williams and Flint Hills, they counterclaimed against the State and each other for contribution under .822(j). [Exc. 757-877] But Williams never brought a third-party complaint against the City for contribution in the State's case, as it should have done if it wanted the City to

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74 *See supra* at 4-5.

75 *See supra* at 5-7.

share liability for the State's claims. Williams brought an .822(j) claim against the City only in *the City's* case, and only belatedly, leading the court to reject it as untimely. [Exc. 1931-38] Without an .822(j) claim against the City, the court could not have ordered the City to pay a share of the State's damages, even if the cases had remained consolidated.[76]

With no power to award damages against the City, allocating responsibility to the City under .822(j) would simply reduce Williams's liability, leaving the State without a full recovery on its .822(a) claims. This would be contrary to .822's strict joint and several liability scheme and the intent "that the public could recover the full costs of responses for spills."[77] *Laidlaw* does not suggest that a court can allocate fault to an "absentee polluter" that could have been joined, destroying joint and several liability and leaving the State without a full recovery. [At. Br. 61-62] *Laidlaw* concerned *private* causes of action under .822(a), and the Court said that even a *private* plaintiff "should recover jointly and severally" if that plaintiff is "innocent" such that it "ultimately would not be liable for contribution," as was true for the State here.[78] [Exc. 2244]

Williams's cited CERCLA cases likewise do not support what it asks.[79] [At. Br.

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[76] Moreover, Williams waived any objection to deconsolidation of the cases by not raising it at the time. [*See* Exc. 3386-3403]

[77] *Kodiak Island Borough*, 991 P.2d at 762. Even under Alaska's tort scheme—which was reformed to *abrogate* joint and several liability*, see Petrolane Inc. v. Robles*, 154 P.3d 1014, 1019 (Alaska 2007) (explaining Alaska's tort reform)—Williams's attempt to shift blame to the City would fail because Williams could have sued the City as a co-defendant, but did not. *See* AS 09.17.080(a)(2) & (c) (allowing allocation of fault and apportionment of damages to a non-party responsible for the harm unless "the parties had a sufficient opportunity to join that person in the action but chose not to").

[78] *Laidlaw Transit*, 21 P.3d at 350.

[79] *United States v. Consolidation Coal Co*. did not compare "a nonparty's" role in its

61-62] *Trinity Industries v. Greenlease Holding Co*. explains that CERCLA's analogs to .822(a) and .822(j) provide two "distinct" remedies, and the remedy the State pursued here authorizes "complete cost recovery under a joint and several liability theory."[80] A responsible party like Williams facing such liability can use the other remedy (the analog to .822(j)) to sue others for contribution, but that is a way to *redistribute* liability among present parties, not to *evaporate* joint and several liability by blaming absent parties.[81]

Williams's inability to try to blame the City for the sulfolane contamination in the context of the State's case was thus Williams's own fault, not the trial court's.

C. The trial court was not required to reduce Williams's share on the basis that sulfolane "was not regulated" during its tenure.

Although a trial court may, as Williams notes, "reduce a party's share if no rules or laws prohibited the practices at the time," a court is not *required* to. [At. Br. 56-57] In any event, it is simply not true that "no rules or laws" prohibited Williams from releasing sulfolane and oily wastewater from leaky sumps and lagoons. [*Id*.] Even setting aside whether sulfolane itself was "regulated," Williams had no permit to release it, employed poor practices that violated many laws at the time, and "had the ability to control" the

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equitable allocation as Williams mis-reports; the entity mentioned in Williams's quote was a third-party defendant (along with 63 others). 345 F.3d 409, 412 (6th Cir. 2003). And in *FMC Corp. v. Aero Industries* the court *rejected* an argument that "costs should have been allocated to nonparties." 998 F.2d 842, 846-47 (10th Cir. 1993).

80 903 F.3d at 348.

81 That is why in CERCLA contribution actions, courts allocate "orphan shares" (those of unknown or insolvent parties) among the parties present, but not shares of parties who could have been sued for contribution but were not. *See id*. at 347 n.6.

cause of the contamination.[82] [At. Br. 56] None of this "require[d] reducing Williams's culpability," particularly given the trial court's broad discretion here. [*Id*.]

D. The trial court did not consider impermissible factors.

Finally, the trial court did not abuse its broad discretion or "penaliz[e] Williams for defending itself" by considering Williams's "recalcitrance and refusal to assist" when making its allocation. [At. Br. 57-58; Exc. 2309] The parties' cooperation with regulators is a factor often considered by courts in this context.[83] Williams identifies no clear error in the trial court's findings that despite being notified by DEC in 2010 that it was a responsible party, Williams refused to meaningfully participate. [Exc. 2237-40] A party may be "within its rights" to refuse to act until ordered by a court, but its choices can still weigh against it in equity. Williams's cited cases do not say otherwise.[84] [At. Br. 57-58]

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82 *See infra* at 46-47, AS 46.03.100, .710, .740, .745; .04.020; .09.020; 18 AAC 75.

83 *See Oakly Enters.*, 354 P.3d at 1077 n.6 (listing the "Gore factors"); *ASARCO LLC v. Atl. Richfield Co., LLC*, 975 F.3d 859, 870 (9th Cir. 2020) (affirming application of the "degree of cooperation" Gore factor); *Consolidation Coal Co*., 345 F.3d at 415 (affirming the doubling of a party's share due to its "persistent, pervasive and unjustified" lack of cooperation); *Cent. Maine Power, Co. v. F.J. O'Connor Co*., 838 F. Supp. 641, 646 (D. Me. 1993) ("The degree of cooperation with government officials to prevent any harm to the public health or the environment is very important in the contribution analysis.").

84 None of Williams's cited cases involved equitable allocation at all. *Louisiana Pac. Corp. v. Beazer Materials & Services, Inc*. dealt with an allegation that the EPA retaliated against a responsible party by purposely increasing costs. 842 F. Supp. 1243, 1256 (E.D. Cal. 1994). *McGinnes Indus. Maintenance Corp. v. Phoenix Insurance Co*. (for which Williams cites the dissent) considered whether a notice letter from the EPA counted as a "suit" under an insurance policy. 477 S.W.3d 786, 801 (Tex. 2015). And *Bordenkircher v. Hayes* was a criminal case about plea negotiations where the court found no due process violation. 434 U.S. 357, 365 (1978).

IV. The trial court did not err in ordering civil assessments under AS 46.03.760(a) to compensate for the sulfolane plume in the groundwater.

Alaska Statute 46.03.760(a) makes Williams liable for civil assessments of up to $5,000 per day for its violations of various environmental statutes, including those about hazardous substances, pollution, and waste disposal. This liability is not punitive, but "compensatory and remedial in nature,"[85] and can reflect "compensation in the nature of liquidated damages" for "any adverse environmental effects caused by the violation."[86]

The trial court ordered assessments of $500/day as natural resource damages for the sulfolane plume remaining in the groundwater. [Exc. 2295-96] Although the State had sought relief under overlapping theories, the court carefully avoided awarding duplicative damages. [Exc. 2293-94] It recognized that the piped water system "provides somewhat the functional equivalent of the clean water sources that the public had before," but is not a complete remedy because the plume may migrate beyond the system, and the public has lost the "right" to "have access to uncontaminated groundwater." [*Id*.]

Williams protests that "no such right exists under Alaska law," and that even if it did, the State could not assert it. [At. Br. 52-54] But under the Alaska Constitution, groundwater is a natural resource held in trust by the State for the people's common use.[87] Williams degraded that public resource by introducing its industrial wastewater,

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85 AS 46.03.760(b).

86 AS 46.03.760(a)(1).

87 *See Kanuk ex rel. Kanuk v. State, Dep't of Nat. Res*., 335 P.3d 1088, 1099-1100 (Alaska 2014) (explaining Alaska's public trust doctrine).

and the State may recover damages for this harm as the public trustee.[88]

Williams asserts that the trial court failed to consider "the degree to which the discharge degrades existing environmental quality." [At. Br. 53] But the court made extensive findings about exactly how the aquifer has been degraded—specifically, by the introduction of a persistent, migrating, three-and-a-half-mile-long, 300-foot-deep plume of sulfolane lowering the quality of billions of gallons of groundwater. [Exc. 2137, 2162-65, 2185-88, 2234-36, 3377; Tr. 1471-72, 2033, 220-22, 631, 812-13, 447-59, 4116]

Williams insists—based on a regulatory definition of "contaminated groundwater"[89]—that there can be no "contamination," and therefore no harm, without a sulfolane cleanup level. [At. Br. 53] But a cleanup level is not a free pass to pollute the groundwater up to a certain level. The regulatory definition Williams cites applies in only one place, where it serves only one function: to relay that groundwater exceeding a specified cleanup level must be cleaned.[90] This does not mean that "contamination" can never exist without a cleanup level, much less is it relevant to recovery under AS 46.03.760(a), which does not even use the word "contamination." The plume is an "adverse environmental effect" under AS 46.03.760(a): Williams does not challenge the factual findings that sulfolane "lowers the quality, purity, and desirability of the water,"

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88 *Cf. Chenega Corp. v. Exxon Corp.*, 991 P.2d 769, 794 (Alaska 1999) (allowing recovery of non-economic damages for intrinsic values of a pristine natural resource).

89 18 AAC 75.990(22) ("'contaminated groundwater' means groundwater containing a concentration of a hazardous substance that exceeds the applicable cleanup level determined under the site cleanup rules").

90 The term "contaminated groundwater" is used only once in the relevant chapter, in the introductory language of the groundwater cleanup standards in 18 AAC 75.345(b).

[Exc. 2235; Tr. 222, 447, 4116] and that the plume has impacted property values and development, must be disclosed on real estate transactions, and has led the City to restrict groundwater access. [Exc. 2235, 2230-32; Tr. 221-22, 442-59]

Although this harm to a public trust resource may be difficult to value in dollars, that does not mean that Williams owes no compensation for it. As the trial court observed, liquidated damages can be "a device for affording compensation for wrongs where the actual damages are imprecise or difficult to measure." [Exc. 2296] The court heard how much it would cost to restore the aquifer to its natural condition or to buy an equivalent volume of replacement water, but it chose instead to award a much smaller sum to avoid duplicative recovery. [Exc. 2293; Tr. 2013-35, 2052-55, 1520; R. 28618]

Williams claims that the assessments were improperly "punitive" because they were calculated over the "entire time Williams lawfully used sulfolane at the refinery." [At. Br. 54] But although Williams's sulfolane *use* may have been "lawful," its sulfolane *releases* never were.[91] And those releases began in 1985: Williams does not challenge the finding that the refinery released "oil and oil waste" in a "virtually continuous, but uneven stream" from its start, meaning that it began releasing sulfolane as soon as it began using it. [Exc. 2158, 2162, 2192, 2199] Tying the compensation for the plume to the length of time sulfolane was used (and released) at the refinery was appropriate because the long timeframe correlates with the plume's large size.

Williams argues that it should have been allowed to blame the City for the

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91 *See infra* at 3-4, 46-47.

sulfolane as a defense to liability under AS 46.03.760. [At. Br. 62-63] But an April 2012 order in prior litigation between Williams and Flint Hills established that the refinery was the sole source of sulfolane in the plume up to that date.[92] [Exc. 3191-92] Any contribution by the City to the plume beyond that date "would be 'speculative to non-existent,'" as the trial court concluded in rejecting Williams's belated contribution claim against the City, and thus would not have impacted AS 46.03.760 damages. [Exc. 3287]

In the end, "deciding the amount of compensatory damages is the job of the finder of fact" that is reviewed for clear error, and a fact-finder "necessarily has some latitude in determining the amount of damages to award."[93] There was no clear error here.

V. The trial court's injunctive relief was proper under AS 46.03.765.

The trial court determined that Williams' releases and refusal to participate in the cleanup process are violations of environmental statutes and regulations, and the court enjoined the continuing violations under AS 46.03.765. [Exc. 2318-19, 2296-97] Without addressing AS 46.03.765, Williams argues that irreparable harm or injury was a required element that the State failed to prove. [At. Br. 63] But "[w]here a statute specifically authorizes injunctive relief"—like AS 46.03.765 does—"the plaintiff need not show either irreparable injury or lack of an adequate remedy at law."[94]

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92 The trial court granted partial summary judgment against Williams on whether the refinery was the only source of the plume, and Williams did not challenge that ruling on appeal. [Exc. 3191-92, 1870-87] Williams is thus collaterally estopped from relitigating the issue. *See Rude v. Cook Inlet Region, Inc*., 322 P.3d 853, 858 (Alaska 2014).

93 *Burton v. Fountainhead Dev., Inc*., 393 P.3d 387, 393 (Alaska 2017).

94 *LeDoux v. Kodiak Island Borough*, 827 P.2d 1121, 1123 (Alaska 1992) (quoting *Carroll v. El Dorado Estates Div. No. 2 Ass'n, Inc.,* 680 P.2d 1158, 1160 (Alaska 1984)).

Williams argues that portions of the injunctive relief are impermissibly vague "obey the law" mandates. [At. Br. 64] But ordering Williams to come into compliance—without directing every step—is appropriate because the duration of the contamination is indefinite and Williams' violations are longstanding and serious.[95] Site contamination characterization and remediation is an iterative process that can span decades.[96] The site clean-up rules—which the judgment refers to—are specific enough to put Williams on notice of what it must do,[97] as is illustrated by post-judgment events: after the injunction issued, Williams managed to twice submit—and gain approval of—monitoring and characterization plans. [At. Br. 65, n.30; Exc. 2332-33] Before, when DEC directed Williams to undertake specific tasks, Williams refused. [Exc. 2241, 2237-40]

Williams's cases about "obey the law" injunctions are distinguishable. [At. Br. 64] In *Cook Inlet Fisherman's Fund v. State*, the court appropriately denied an injunction that would have required the Department of Fish and Game "to follow the [Board of

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Moreover, the contamination is irreparable injury, because "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." *Idaho Conservation League v. Atlanta Gold Corp.*, 879 F.Supp.2d 1148, 1158 (D. Idaho 2012).

95 *See Idaho Conservation League*, 879 F. Supp. 2d at 1158, 1164 (ordering mining company into compliance without directing specific steps was appropriate considering company's history of attempting to delay compliance and the continual, longstanding nature of violations, explaining that "such an injunction is not a vague 'obey the law' injunction that would be impermissible under the specificity standards of Rule 65(d)"). DEC asked Williams almost a decade ago to undertake site characterization, feasibility studies, and cleanup plans. [Exc. 3216-17]

96 The refinery is a case in point. Remediation began in the 1970s. [Exc. 2158] Fifty years later, the site has not yet been closed under 18 AAC 75.380.

97 *See* 18 AAC 75.325-75.390.

Fisheries'] management plans" because the plaintiffs had not shown any specific provision the Department had violated and the injunction would have interfered with the Department's management.[98] Here we have the opposite situation: the State proved Williams's violations and the injunction supports—rather than hinders—the expert agency's management. And in *Hughey v. JMS Dev. Corp.* the court vacated an injunction that contained a command that could not be followed, because it required the defendant to stop discharges that occurred naturally every time it rained.[99] Here there is no such impediment to Williams performing the required sampling, monitoring, and reporting.[100]

Williams argues that the injunction is not specific enough because its duties are not confined to the refinery or time-limited. [At. Br. 65] But neither is the sulfolane plume. As Williams concedes elsewhere, "DEC's Rules define a 'site' in terms of the scope of a plume, not by a property boundary." [At. Br. 68 (citing 18 AAC 75.990(115))] And the plume will persist for a long, indeterminate time. [Exc. 2137, 2188] Like any other responsible party, Williams remains responsible at least until site closure.[101]

VI. The trial court's declaratory relief on "PFAS" was appropriate.

The trial court granted the State's request for a declaration that Williams is liable for PFAS releases. [Exc. 2297, 2318-19] Williams does not contest that it released at

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98 357 P.3d 789, 803-04 (Alaska 2015).

99 78 F.3d 1523 (11th Cir. 1996).

100 Preparing aquifer cleanup feasibility studies as DEC requested back in December 2013 is not a vague or impossible task. [Exc. 3216-17] Indeed, Williams itself introduced evidence at trial suggesting approaches for cleaning up the aquifer. [Tr. 3431]

101 *See* 18 AAC 75.380.

least one PFAS compound—PFOS—and that it is hazardous. [At. Br. 66] Instead, Williams objects to the use of the umbrella term "PFAS." [*Id*.] But the judgment is supported by evidence that the refinery is contaminated with multiple PFAS compounds and that Williams—which used such compounds—is their only source. [At. Br. 66; Tr. 2621-22, 830; Exc. 2007, 3303-34 (identifying multiple PFAS compounds by well sample), 1774 (admitting that "releases of sulfolane and perfluorochemicals occurred"); Tr. 2340 (admitting to using products with "perfluoroalkyl substances")] The court found no evidence that Flint Hills released any PFAS compounds into the environment during its tenure, and Williams fails to show that this finding was clear error. [Exc. 2247]

Williams argues that others may contaminate the site with PFAS compounds in the future, and it objects to being declared liable for remediation costs that have yet to occur and that might be unreasonable. [At. Br. 67] But when future response costs are assessed, Williams will have an opportunity to object to the costs[102] and bring contribution claims against other entities it believes should share responsibility under AS 46.03.822(j). It will only be precluded from continuing to deny responsible party status, which is appropriate.

VII. The trial court did not abuse its discretion in declining to refer the State's onsite PFAS claims to DEC under the primary jurisdiction doctrine.

Williams also argues that the trial court should have referred all of the State's PFAS-related claims to DEC instead of ruling on them. [At. Br. 67-69] But "[w]hether to invoke primary jurisdiction is left to the discretion of the superior court because the

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[102] 18 AAC 75.910. [Tr. 1823]

doctrine 'is one of prudence, and not an absolute jurisdictional limitation.'"[103]

The trial court had good reason for referring the State's claims about PFAS off the refinery ("offsite PFAS") to DEC while keeping those about PFAS at the refinery ("onsite PFAS") because the claims arose at different times and were at different stages: it was not until 2018 that DEC sampling revealed that PFAS was migrating from the refinery property. [Exc. 2027-08] By then, discovery had closed and expert-related deadlines had passed. [*Id*.] At the court's suggestion, Williams and the State agreed that the offsite PFAS claims should be referred to DEC for initial consideration. [*Id*.]

But the late-breaking discovery of offsite PFAS was not a reason to refer the pre-existing sulfolane and onsite PFAS claims to DEC, particularly right before trial after five years of active litigation.[104] The trial court concluded that doing so "would be neither orderly nor reasonable" and that Williams's motion seeking this relief was "primarily made for purposes of delay." [Exc. 2101-02] Contrary to Williams's position, it was proper for the court to consider delay in this entirely prudential context.[105] [At. Br. 69]

And although delay alone would have justified denying Williams's motion, the

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[103] *Seybert v. Alsworth*, 367 P.3d 32, 39 (Alaska 2016) (quoting *Matanuska Elec. Ass'n v. Chugach Elec. Ass'n,* 99 P.3d 553, 559 (Alaska 2004)).

[104] Onsite PFAS was a subject of extensive discovery and motion practice. [Exc. 1957-59; R. 6390-91, 26636-42, 26735-37]

[105] *See Astiana v. Hain Celestial Grp*., 783 F.3d 753, 760-61 (9th Cir. 2015) ("[C]ourts must also consider whether invoking primary jurisdiction would needlessly delay the resolution of claims . . . 'efficiency' is the 'deciding factor' in whether to invoke primary jurisdiction . . . primary jurisdiction is not required when a referral to the agency would significantly postpone a ruling that a court is otherwise competent to make . . ." (citations omitted)).

court also accepted as "well taken" the State's opposition, which explained that the onsite claims required no further administrative process. [Exc. 3414-21] The agency long ago determined that Williams is responsible for refinery contamination.[106] The State was forced to go to court because Williams refused to accept this. [Exc. 757, 2137] And the court had already ruled that the State made a prima facie case that Williams released PFAS onsite. [Exc. 1957-58] The later discovery of offsite PFAS did not suddenly make more administrative process necessary on this issue. Nor does the regulatory definition of "site" render DEC unable to parse responses to onsite and offsite PFAS.[107] [At. Br. 68]

VIII. The trial court's judgment does not offend the constitution.

A. Holding polluters liable for the consequences of their pollution—even retroactively—does not offend due process.

Williams argues that requiring it to pay damages violates due process because when it released sulfolane, it did not know that this would later result in liability. [At. Br. 69-73] But Williams's actions were illegal at the time under a straightforward reading of the law. And even if they had not been, retroactive environmental civil liability does not violate due process, as the federal courts have recognized with CERCLA.[108]

First, Williams's argument rests on the false premise that its sulfolane releases

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106 This is why Williams' reliance on *C.G.A. v. State*, 824 P.2d 1364 (Alaska 1992), *Asarco LLC. V. NL Indus., Inc.*, 2013 WL 12177089 (W.D. Mo. Mar. 18, 2013), and *Massachusetts v. Blackstone Valley Elec. Co*., 67 F.3d 981 (1st Cir. 1995) [At. Br. 67-69] is misplaced. DEC already determined Williams is liable. [*See, e.g*., Exc. 3111, 3216-17]

107 *See e.g*., 18 AAC 75.345(c) (consideration of "onsite" and "offsite" uses).

108 *See, e.g., United States v. Ne. Pharm. & Chem. Co. (NEPACCO)*, 810 F.2d 726, 734 (8th Cir. 1986) (rejecting due process challenge to retroactive CERCLA application).

were perfectly legal (and even approved by DEC) during its operation. [At. Br. 69-73] But Williams did not lack "fair notice" that it should not do what it did—that is, leak chemicals and oily wastewater into the ground from faulty sumps and lagoons.[109] [Tr, 2363-71, 574, 1848-55, 1921-23, 1964, 1967-68, 1017-21, 784, 794] A refinery operator of "ordinary intelligence" would know that this could have consequences, and that a novel synthetic industrial chemical like sulfolane might turn out to be "hazardous" even if not yet listed as such, triggering strict liability.[110] Even if it were unclear that sulfolane was "hazardous," the law also prohibited making waters "unclean, or noxious, or impure, or unfit"[111] or discharging *any* liquid or solid waste onto state land without a permit.[112]

Williams never had a permit to release sulfolane,[113] and did not tell DEC until *six years* after it discovered sulfolane in the refinery's groundwater. [Tr. 222-24, 1921, 1121-25; Exc. 19-25] Although DEC was then unsure exactly how to respond, that does not

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109 *See supra* at 3-4, 13-14, 17-18.

110 A Williams witness agreed that the "key rule" and the "regulatory requirement of running a refinery" "is not to have any releases to air, water, or soil without a permit to do so from a regulatory agency." [Tr. 2364-65]

111 *See* AS 46.03.710 (prohibiting pollution); AS 46.03.900(20) (defining pollution). As in *Stock v. State*, whatever the "outer boundaries" of the term "pollution" may be, putting industrial solvents into drinking water falls within it. *See* 526 P.2d 3, 9 (Alaska 1974) ("Whatever may be the outer boundaries of conduct prohibited by [the pollution statutes], it is beyond dispute that the emptying of a lagoon of raw sewage into a stream running through residential areas comes within the definition of the term 'pollution'").

112 *See* AS 46.03.100(a) (prohibiting waste disposal without prior authorization).

113 Williams argued below that the fact that DEC may set a cleanup level means that "there is a level of a hazardous substance that has been 'released' but yet is allowed or permitted under the law." [R. 28830-31] But a cleanup level is just a *remedial* tool, not a retroactive "permit" that makes an unauthorized release legal. [Tr. 238-39]

mean DEC *authorized* the releases—on the contrary, most of the releases had *already occurred*, and Williams was preparing a corrective action plan precisely because its poor practices had violated a host of laws. [Exc. 3-25, 2657-61, 2518-83; R. 38975-39066] Although DEC's after-the-fact *response* to the releases evolved—from instructions to find the sulfolane source (which Williams did not follow) to instructions to help with remediation once sulfolane was discovered in offsite drinking water (which Williams also did not follow)—this evolution was not a "change in the law." And Williams could not have somehow "relied" on DEC's response when releasing sulfolane years beforehand. [At. Br. 74-75] The releases were illegal *when they occurred*. [Tr. 1921-23, 222-24]

Second, even assuming Williams's false premise were true—meaning that its sulfolane releases were legal when they occurred—its argument would still fail because retroactive liability does not violate due process in this context. As the U.S. Supreme Court has explained, "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations," even if the effect "is to impose a new duty or liability based on past acts."[114] The Court upheld a retroactive requirement that mine operators compensate former coal miners for black lung disease, because it was rational for Congress to "to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor."[115] Using similar reasoning, federal courts

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114 *Usery v. Turner Elkhorn Mining Co*., 428 U.S. 1, 16 (1976); *see also U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 17 (1977) (explaining that due process "generally does not prohibit retrospective civil legislation, unless the consequences are particularly 'harsh and oppressive.'").

115 *Usery*, 428 U.S. at 18; *see also Commonwealth Edison Co. v. United States*, 271

have upheld the retroactive application of CERCLA to impose civil liability for cleanup costs even on actors whose waste disposal methods were not illegal at the time.[116]

Because due process allows retroactive environmental liability even for conduct that was not illegal at the time, "I didn't know it was hazardous" is no defense, nor do the "fair notice" cases that Williams cites apply. [At. Br. 70-72] Those cases concern civil or criminal *punishment*, whereas this case is about compensatory liability.[117] [*Id*.] The laws applied here operate remedially to spread costs among responsible parties, not to punish them.[118] The legislature may rationally make those who profited from activities creating an environmental problem pay for it, rather than letting the cost fall on the public.[119]

B. There was no unconstitutional "taking" of Williams's property.

Williams's takings argument fails for similar reasons. [At. Br. 73-75] The liability imposed here is not actually retroactive,[120] and even if it were, this Court should follow

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F.3d 1327, 1344 (Fed. Cir. 2001) (observing that "on more than ten occasions, the Supreme Court has rejected challenges to economic legislation based on the Due Process Clause of the Fifth Amendment" and collecting cases).

116 *See NEPACCO*, 810 F.2d at 734; *United States v. Monsanto Co*., 858 F.2d 160, 174 (4th Cir. 1988); *United States v. Alcan Aluminum Corp*., 315 F.3d 179, 188-90 (2d Cir. 2003); *United States v. Dico, Inc*., 266 F.3d 864, 879-80 (8th Cir. 2001); *Franklin Cnty. Convention Facilities Auth. v. Am. Premier Underwriters*, 240 F.3d 534, 550-53 (6th Cir. 2001); *United States v. Olin Corp*., 107 F.3d 1506, 1512 (11th Cir. 1997).

117 *See supra* at 16-17, 22-23, 37.

118 *Cf. Monsanto Co*., 858 F.2d at 174-75 (explaining that "CERCLA operates remedially" and "does not exact punishment").

119 *Cf. NEPACCO*, 810 F.2d at 734 ("Congress acted in a rational manner in imposing liability for the cost of cleaning up such sites upon those parties who created and profited from the sites and upon the chemical industry as a whole").

120 As explained above, there was no "change in the law." *See supra* at 45-47.

the federal courts, which have consistently rejected the analogous position that retroactive CERCLA liability effects an unconstitutional taking.[121]

Williams relies on the U.S. Supreme Court plurality opinion in *Eastern Enterprises v. Apfel* saying that a law can effect a taking "if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability."[122] [At. Br. 73-74] But five justices there *rejected* the idea that an obligation to pay money could *ever* be a taking,[123] and federal courts have since continued to find CERCLA not to effect a taking.[124] Nor does *Koontz v. St. Johns River* help Williams because—as Williams notes—its rule requires "an identified property interest" like a land parcel.[125] [At. Br. 73] Williams points to the refinery, but Williams has no interest in that land that could be burdened or "taken" by holding it liable for its past conduct.[126] [At. Br. 74] And Williams

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121 *See, e.g., Alcan Aluminum Corp.,* 315 F.3d at 190; *NEPACCO,* 810 F.2d at 734; *United States v. Iron Mountain Mines, Inc.*, 812 F. Supp. 1528, 1545-46 (E.D. Cal. 1992).

122 524 U.S. 498, 528-29 (1998).

123 *See id.* at 540 (Kennedy, J., concurring) & 554 (Stevens, Souter, Ginbsurg, and Breyer, JJ. dissenting); *Commonwealth Edison Co.*, 271 F.3d at 1339 ("[F]ive justices of the Supreme Court in *Eastern Enterprises* agreed that regulatory actions requiring the payment of money are not takings.").

124 *See, e.g.*, *Alcan Aluminum Corp*., 315 F.3d at 190; *Dico,* 266 F.3d at 880; *Commonwealth Edison*, 271 F.3d at 1340; *Franklin Cty. Convention Facilities Auth.*, 240 F.3d at 553; *United States v. Vertac Chem. Corp*., 364 F. Supp. 2d 941, 965 (E.D. Ark. 2005); *United States v. Manzo*, 182 F. Supp. 2d 385, 408 (D.N.J. 2000).

125 570 U.S. 595, 613 (2013).

126 In *Koontz*, "the monetary obligation burdened petitioner's ownership of a specific parcel of land," making the case resemble "cases holding that the government must pay just compensation when it takes a lien—a right to receive money that is secured by a particular piece of property." *Id*. at 613.

mentions only one of several elements of a "regulatory taking"—i.e., "reasonable investment-backed expectations."[127] [At. Br. 74-75] Williams could not have had such expectations here, especially since its releases were illegal when they occurred.

At bottom, the aim of the takings clause is to prevent the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[128] Here, "fairness and justice" dictate that the burden of the sulfolane plume should be borne by those who created it with their profit-making activities, *not* by "the public as a whole."[129] Although the Alaska Constitution may be more protective than its federal counterpart, neither constitution recognizes a "property right" to contaminate your neighbors' drinking water wells with impunity.[130]

CONCLUSION

For these reasons, the Court should affirm the judgment below in all respects.

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127 *See Lingle v. Chevron U.S.A. Inc*., 544 U.S. 528, 537-39 (2005) (federal regulatory takings law); *R & Y, Inc. v. Mun. of Anchorage*, 34 P.3d 289, 293 (Alaska 2001) (Alaska regulatory takings law); *State Dept. of Nat. Res. v. Arctic Slope Reg'l Corp*., 834 P.2d 134, 139 (Alaska 1991) (applying "reasonable investment-backed expectation" factor).

128 *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see also R & Y, Inc.*, 34 P.3d at 297 (The "reconciling principle" is "whether the challenged regulatory action unfairly allocates the burden of preserving the public welfare to a particular landowner.").

129 *Armstrong*, 364 U.S. at 49; *cf. Combined Properties/Greenbriar Ltd. P'ship v. Morrow*, 58 F. Supp. 2d 675, 681 (E.D. Va. 1999) ("[I]t is not unfair to hold parties liable for the consequences of their actions, especially when those actions affect the environment, in which all members of the community share.").

130 Indeed, such a property right would likely conflict with other parts of the Alaska Constitution on natural resources. *Cf. Vanek v. State, Bd. of Fisheries*, 193 P.3d 283, 290 (Alaska 2008) (reasoning that if limited entry permits were property for takings purpose, that would violate the common use and no exclusive right of fishery provisions).