In the Supreme Court of the State of Alaska

Williams Alaska Petroleum, Inc. and The Williams Companies, Inc.,	)	Supreme Court No. S-17772
Appellants,	)	Superior Court No. 4FA-14-01544CI
v.	)	
State of Alaska, Attorney General's Office, Flint Hills Resources, LLC, Flint Hills Resources Alaska, LLC, and City of North Pole,	)	Date: March 1, 2021
Appellees.	)	

APPEAL FROM THE SUPERIOR COURT FOR THE STATE OF ALASKA, FOURTH JUDICIAL DISTRICT, THE HONORABLE WARREN W. MATTHEWS

APPELLANTS' OPENING BRIEF

David H. Shoup (AK 8711106)
TINDALL BENNETT & SHOUP, P.C.
508 West 2d Avenue, 3d Floor
Anchorage, AK 99501
Tel.: 907.278.8533
Email: shoup@tindall-law.com

Tristan L. Duncan (MO 39525)
Mathew L. Larsen (MO 60168; CA 227810)
SHOOK, HARDY & BACON L.L.P.
2555 Grand Blvd.
Kansas City, MO 64108
Tel.: 816.474.6550
Email: tlduncan@shb.com
Email: mlarsen@shb.com

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By Sarah E. Anderson

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AUTHORITIES PRINCIPALLY RELIED ON

AS 46.09.020(b). Containment and cleanup of a released hazardous substance.

The commissioner shall develop guidelines prescribing general procedures and methods to be used in the containment and cleanup of a hazardous substance. The guidelines shall be consistent with the national contingency plan revised and republished under 42 U.S.C. 9605.

AS 46.09.070. Regulations.

The commissioner shall periodically review the minimum quantities of hazardous substances established under federal law and may adopt regulations establishing minimum quantities of substances for all or any portion of the substances to which this chapter otherwise applies. The commissioner shall adopt only those regulations that are expressly required to implement the specific purposes of this chapter.

18 AAC 75.315(d). Initial response actions.

If the department determines that the lowest practicable level of contamination has been achieved under this section, a responsible person is not required to perform additional containment or cleanup. The department will base a determination under this section on the most current and complete information available to the department. The department will require a responsible person to perform additional containment or cleanup if subsequent information indicates that

> (1) the level of contamination that remains does not protect human health, safety, or welfare, or the environment; or
>
> (2) the information the department relied upon was invalid, incomplete, or fraudulent.

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

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.

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 concentrations 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 run-off 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 for 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 characterize 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(a). Groundwater and surface water cleanup levels.

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.

18 AAC 75.345(b)(1). Groundwater and surface water cleanup levels.

(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;

18 AAC 75.910(b) and (c)(2). 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)(2)] . . . 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.

18 AAC 75.990(17). Definitions

"cleanup" means efforts to mitigate environmental damage or a threat to human health, safety, or welfare resulting from a hazardous substance, and includes removal of a hazardous substance from the environment, restoration, and other measures that are necessary to mitigate or avoid further threat to human health, safety, or welfare, or to the environment;

18 AAC 75.990(18). Definitions

"cleanup level" means the concentration of a hazardous substance that may be present within a specified medium and under specified exposure conditions without posing a threat to human health, safety, or welfare, or to the environment;

18 AAC 75.990(22). Definitions

"contaminated groundwater" means groundwater containing a concentration of a hazardous substance that exceeds the applicable cleanup level determined under the site cleanup rules;

18 AAC 75.990(93). Definitions

"practicable" means capable of being designed, constructed, and implemented in a reliable and cost-effective manner, taking into consideration existing technology, site location, and logistics in light of overall project purposes; "practicable" does not include an alternative if the incremental cost of the alternative is substantial and disproportionate to the incremental degree of protection provided by the alternative as compared to another lower cost alternative;

18 AAC 75.990(115). Definitions

"site" means an area that is contaminated, including areas contaminated by the migration of hazardous substances from a source area, regardless of property ownership;

§ 46.03.826(5) and (7). Definitions for 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);

* * *

(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 46.03.822(a). Liability for the release of hazardous substances

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.

AS 46.03.822(g). Liability for the release of hazardous substances.

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.

AS 46.03.822(j). Liability for the release of hazardous substances.

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.

AS 46.03.900(20). Definitions

(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;

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.

Alaska Civil Rule 65(d). Form and Scope of Injunction or Restraining Order.

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

U.S. Constitution, Amendment 5

"No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

US. Constitution, Amendment 14

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law."

Article I, Sections 7 and 18 of the Alaska Constitution

§ 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.

§ 18. Eminent Domain
Private property shall not be taken or damaged for public use without just compensation.

JURISDICTIONAL STATEMENT

Williams Alaska Petroleum, Inc. and The Williams Companies, Inc. (collectively "Williams") timely appeal from the trial court's Rule 54(b) Final Judgment, which included an express determination that there was no just reason for delay and direction to enter partial judgment. This Court has jurisdiction. App. R. 202(a); AS 22.05.010.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Erroneous Contract Interpretations

1. Under the parties' refinery Sale and Purchase Agreement ("Agreement"), is Flint Hills required to indemnify Williams for all liability relating to sulfolane?

2. Did the trial court err when it ignored this Court's decision in *Flint Hills Resources Alaska, LLC v. Williams Alaska Petroleum, Inc.*, 377 P.3d 959 (Alaska 2016) and failed to apply the Environmental Damages Cap?

3. Did the trial court err in failing to credit Williams' insurance proceeds toward the Environmental Damages Cap?

4. Did the trial court err in mischaracterizing money damages as an equitable remedy to avoid the Agreement's Exclusivity of Remedies (§ 10.5) provision?

B. Erroneous Liability Determinations

1. Did the trial court misinterpret AS 46.03.826(5) and err in concluding that sulfolane was a "hazardous substance"?

2. Did the trial court err in deferring to the Alaska Department of Environmental Conservation's ("DEC") alleged conclusion that sulfolane was a "hazardous substance"

under AS 46.03.826(5) when DEC, in making that conclusion, had not interpreted or applied the statute?

C. Erroneous Damages Determinations

1. Did the trial court err in awarding response costs, including a $72 million piped water system, that were unnecessary, impracticable, and unreasonable?

2. Should the Court follow *Matter of Bell Petroleum Services*, 3 F.3d 889 (5th Cir. 1993), and/or *Regional Airport Authority of Louisville v. LFG, LLC*, 460 F.3d 697 (6th Cir. 2006), and hold the costs of the new, municipal piped water system are "unnecessary" and/or pursued for ulterior purposes?

3. Did the trial court err in awarding natural resource damages under the Civil Assessment statute, AS 46.03.760?

D. Erroneous AS 46.03.822(j) "Equitable Allocations" Determinations

1. In making the AS 46.03.822(j) allocation, did the trial court err in ignoring AS 46.03.822(g), the parties' Agreement, and its own legal conclusion that the Agreement's Contribution Clause bars any recovery by Flint Hills for sulfolane liability?

2. Was it error to allocate 75% of sulfolane response costs to Williams, 25% to Flint Hills, and zero to the State and City of North Pole, thus (1) ignoring the State's stipulation of liability and its role in allowing sulfolane to remain in the ground; (2) failing to equitably estop the State from recovering millions of dollars in costs although Williams justifiably relied on the State's guidance when it left sulfolane in the ground; and (3) failing

to apply Williams' laches defense against Flint Hills, all of which demonstrate Williams' conduct is less culpable?

3. Did the trial court err by deconsolidating the *City* and *Flint Hills* cases from the State's case, and/or refusing to even consider the City's contributions to the sulfolane plume in the AS 46.03.822(j) phase of the litigation?

E. Erroneous Injunctive and Declaratory Relief Determinations

1. Did the trial court err in imposing injunctive relief?

2. Does the injunction lack the specificity Rule 65(d) requires?

3. Are the declaratory and injunctive relief provisions invalid because they are (1) not supported by the evidence, (2) overbroad and improper "obey the law" injunctions under Rule 65(d) because they lack the required specificity, and (3) impermissible because adequate remedies at law exist?

F. Erroneous Primary Jurisdiction Determinations

1. Did the trial court err in remanding only part of the "PFOS" and "PFOA" claims under the doctrine of primary jurisdiction?

G. Erroneous Constitutional Law Interpretations

1. Did the State deprive Williams of fair notice and due process by foisting massive retroactive liability on Williams for unregulated sulfolane releases, which the State allowed to remain in the ground when Williams operated the refinery?

2. Does the Judgment requiring Williams to pay over $80 million to fund a public works project constitute an unconstitutional regulatory taking when sulfolane presents no harm to public health and the project addresses issues unrelated to sulfolane?

STATUTORY AND REGULATORY BACKGROUND

In 1972, the Legislature passed the Environmental Conservation Act to "conserve, improve, and protect" the state's natural resources "in order to enhance the health, safety, and welfare of the people of the state." AS 46.03.010. The act included AS 46.03.822(a), which imposes liability for "unpermitted releases" of "hazardous substances."

The Hazardous Substance Release Control Act of 1986 governs DEC's role in addressing releases of hazardous substances. AS 46.09.010, *et seq.* (the "Release Act"). It provides that DEC "shall develop guidelines prescribing general procedures and methods to be used in the containment and cleanup of a hazardous substance." AS 46.09.020(b). It also directs DEC to "periodically review the minimum quantities of hazardous substances established under federal law" and permits DEC to "adopt regulations establishing minimum quantities of substances" deemed hazardous. AS 46.09.070. As mandated by these laws, DEC promulgated "Site Cleanup Rules" in 18 AAC 75.325-75.390 that "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."[1] 18 AAC 75.325 (emphasis added). DEC

[1] The "Site" includes areas "contaminated by the migration of hazardous substances from a source area, regardless of property ownership." 18 AAC 75.990(115).

utilizes a detailed process to assess the risks posed by a substance. *See* 18 AAC 75.345(b)(2)-(4); *The Risk Assessment Procedures Manual* at 2-3, 62 (Feb. 1, 2018), *available at* https://dec.alaska.gov/spar/csp/guidance-forms/ (search by title). DEC sets a "cleanup level" for the substance which reflects "the concentration of a hazardous substance that ***may be present . . . without posing a threat*** to human health, safety, or welfare, or to the environment." 18 AAC 75.990(18) (emphasis added). Any concentration below that level is not considered harmful and need not be cleaned up. The Site Cleanup Rules list the cleanup levels for dozens of substances that may exist in groundwater. *See* 18 AAC 75.345. In Table C, the rule provides limits that apply to hazardous substances if the groundwater is a source of drinking water. *Id.* 75.345(b).

Sulfolane has never been treated as a hazardous substance under these rules. Sulfolane has never appeared on Table C's list of hazardous substances. DEC has not determined a "minimum quantity" of the substance above which sulfolane is unsafe. AS 46.09.070.

STATEMENT OF THE CASE

In 2001, Williams discovered sulfolane in groundwater monitoring wells at its refinery in North Pole. [Exc. 7-12]. It informed DEC and asked whether to include sulfolane in the 2002 Site Characterization and Corrective Action Plan (the "Site Plan"). [Exc. 17-19, 22-23]. Only "hazardous substances" must be addressed in a Site Plan. 18 AAC 75.335(a); (b)(2)(A), (B), (D); (d). DEC repeatedly told Williams that sulfolane was not regulated, need not be included in the Site Plan, and could remain in the ground. Dec.

¶¶ 21, 114 [Exc. 2142, 2176]; [Tr. Trial 3580:10-15] [Exc. 2437]; [Exc. 14-15, 17-19, 22-23, 29-30, 32, 762-63, 2034-35]; [Tr. Trial 2929:2-2930:12] [Exc. 2414-15]. While Williams operated the refinery, it reasonably relied on the State's repeated written affirmations that sulfolane was not regulated and could be left in the ground. Dec. ¶¶ 21, 114 [Exc. 2142, 2176]; [Exc. 19, 22-23, 762-63, 2034-35].

When Flint Hills sought to purchase the refinery in 2004, Williams disclosed the sulfolane to Flint Hills, which engaged in extensive environmental due diligence. [Exc. 7-12, 26-31, 39-40, 83]; [R. 058599, 058602-03]; [R. 086809]; [Tr. Trial 2779:21-2881:2, 2883:18-2886:21]. During that process, Flint Hills had access to the Site Plan, which discussed contaminants found at the refinery and the numerous measures taken to "prevent subsurface off-site contaminant migration." [Exc. 27]. The Site Plan also discussed the use of monitoring wells throughout the property, including wells located near the refinery boundaries and used to "assess[] groundwater contaminant migration" outside of the refinery property. [Exc. 28]. The Site Plan cover letter expressly referenced sulfolane found in these monitoring wells. [Exc. 29-30]. Some of the wells at which sulfolane had been detected in 2001 are located near the refinery boundary. [Exc. 2126 (color image at 2127)].

The parties' Agreement carefully assigned certain environmental liabilities inherent in operating a decades-old refinery. [Exc. 41]. Flint Hills agreed to indemnify Williams "with respect to" sulfolane, and both parties agreed that the comprehensive indemnification provisions would be the exclusive mechanism for allocating environmental liabilities. [Exc. 77, 81] (§ 10.2(b)(v)(C), § 10.5). The Disclosure Schedule

assigning liabilities to Flint Hills lists sulfolane contamination, including any sulfolane found "outside the [monitoring well] locations" that might migrate with the groundwater. [Exc. 83]. The parties also set a $32 million cap on any future environmental liability owed by either party to the other. [Exc. 46-47] (§ 1.1); [Exc. 81] (§ 10.4(b)).

In October 2004, after Flint Hills purchased the refinery, DEC informed Flint Hills that sulfolane would now be regulated and unilaterally announced a groundwater cleanup level of 350 parts per billion (ppb) would apply to sulfolane at the refinery going forward. [Exc. 178-79]; Dec. ¶ 114 [Exc. 2176]. As early as September 2004, Flint Hills learned sulfolane may have migrated offsite, but it took no steps to address this migration. [Exc. 177]; *Flint Hills,* 377 P.3d at 972; [Exc. 730, 738, 753]; [Tr. Trial 3105:6-12] [Exc. 2417]; Dec. ¶¶ 278-81 [Exc. 2206]; [Tr. Trial 3249:5-3250:20, 3331:13-3334:22, 3336:6-3337:12] [Exc. 2423-30]; [R. 060901-03]. "In 2006 DEC notified Flint Hills [a second time] that it considered sulfolane to be a regulated contaminant in accordance with 18 AAC 75.325(g)." Dec. ¶ 26 [Exc. 2142]. But again, Flint Hills did nothing to contain the sulfolane onsite. *Id.* ¶ 26 [Exc. 2142-43]. In 2006, both Shannon & Wilson (an environmental contractor for both Williams and Flint Hills) and DEC told Flint Hills to install more wells "to confirm that sulfolane is not leaving the refinery property." [Exc. 181-83]; Dec. ¶ 26 [Exc. 2142-43]. Yet Flint Hills again did nothing for approximately seven years. [Exc. 2038-39]; [Tr. Trial 3249:5-3250:20, 3331-34, 3336:6-3337:12]; [Exc. 2423-30]; [R. 060901-03]; [Exc. 185]. Flint Hills' own consultant agrees that the offsite sulfolane issue "might have been averted had the actions [Shannon & Wilson]

recommended [in 2006] been taken." [Exc. 186].

When sulfolane was discovered in the North Pole area groundwater in 2009, DEC commissioned studies regarding whether the water was safe to drink. Dec. ¶ 29 [Exc. 2143]; [Exc. 197, 624]. In 2010, the Alaska Department of Health and Social Services ("DHSS") stated publicly: "***[w]e can say there's no evidence suggesting that the levels of sulfolane in the North Pole wells are dangerous to people.***" [Exc. 198] (emphasis added). Then in 2012, DHSS followed up with a study that found no likely adverse health effects from (1) drinking water with detectable levels of sulfolane, (2) using water containing sulfolane for most household activities, (3) eating edible plants grown with water containing sulfolane, or (4) inadvertently ingesting soil containing sulfolane. [Exc. 625-27]. DHSS found no evidence of an increase in cancer rates or birth defects in the North Pole area compared with the rest of the state. [*Id.*]. According to DHSS, the sulfolane concentrations that produced toxic effects in laboratory animals were ***hundreds*** of times greater than the concentrations found in the North Pole area groundwater. [Exc. 198].[2]

After setting the sulfolane cleanup level at 350 ppb in 2004, and notwithstanding the "no harm" conclusions of the DHHS studies it commissioned after 2009, DEC adopted a cleanup level of 14 ppb in November 2013, which Flint Hills appealed. Dec. ¶¶ 88, 91 [Exc. 2161, 2170-71]; [R. 059524-89]. In April 2014—just one month ***after*** the State filed this action—DEC's commissioner vacated the 14 ppb cleanup level as arbitrary and lacking

[2] In 2019, DHSS assured the public that the doses used in sulfolane toxicity studies are "***thousands of times higher*** than the sulfolane doses that residents of North Pole could be exposed to through contaminated drinking water." [Exc. 2010] (emphasis added).

a scientific foundation. Dec. ¶ 91 [Exc. 2171]; [Exc. 781-85].

In late 2014, DEC announced it hired a "Blue Ribbon Panel" of independent toxicology experts (Toxicology Excellence for Risk Assessment) (the "Panel") to determine the level of sulfolane safe for human consumption based upon peer-reviewed science. [Exc. 949-50]; Dec. ¶¶ 154-55 [Exc. 2184]; [Exc. 969-73]; [Tr. Trial 311:18-22, 802:1-803:10, 2692:5:-2693:1, 2696:10-2697:2, 2727:7-23, 913:12-915:14]. In December 2014, the Panel made recommendations, which, if adopted by DEC, would set a sulfolane cleanup level of 362 ppb, *i.e.*, deeming anything below that amount safe for human consumption. Dec. ¶ 156 [Exc. 2184]; [Exc. 955-1015]. Not a single drinking well in North Pole exceeded this level.[3] DEC acknowledged that "setting a cleanup level of 362 [ppb] would essentially cause the plume to disappear" and "nothing" would "happen offsite basically because it would all be under the cleanup level." [Tr. Trial 243:10-244:17] [Exc. 2501-02].[4]

The low toxicity of sulfolane should have been good news to DEC, but it refused to adopt the Panel's recommended cleanup level because it feared a public backlash and an inability to prove any damages in this litigation. [Exc. 953-54]; [Exc. 1060-61]. When

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[3] Sulfolane was ***never*** detected in over half the North Pole wells tested [Tr. Trial 3717:2-3719:6] [Exc. 2462-64], and if DEC had adopted the cleanup level recommended by the Panel, ***only one*** private well would have exceeded that level. [R. 071535-654, 059929]. Moreover, it is a ***non-drinking*** well and would not require remediation. [Tr. Trial 3719:7-13] [Exc. 2464]; [*Id.* 2062:8-16] [Exc. 2385]; [*Id.* 3716:14-3718:17] [Exc. 2461-63]; [Exc. 2008 (color image at Exc. 2009)].

[4] DEC admitted it had the ability to set a cleanup level both before and at trial. [Tr. Trial 931:4-10; 933:3-13; 963:11-964:8; 966:19-967:3, 2534:6-11, 2605:16 ("We [DEC] could set a cleanup level today")].

sulfolane was discovered in North Pole area wells, DEC had no scientific basis for concluding the sulfolane concentrations in those wells posed ***any*** threat to public health. Nonetheless, and contrary to DHSS's and the Panel's findings, it continuously warned residents to avoid drinking well water. [Exc. 951-53, 197-200, 1911-14]; [R. 059663-64]. Notwithstanding the Panel's recommendations, an internal DEC memo stated: "If we go back to the community and tell them the 'safe' level is now 10 times higher . . . , we run a great risk of creating a very high level of public outrage and mistrust of DEC." [Exc. 953]; [Exc. 1060-61].

By the time the Panel reported its scientific findings, the State had confused the public with its mixed messaging that despite the safe levels of sulfolane and ***"no evidence" of any "danger[] to people,"*** residents should avoid drinking the water, sowing doubt and distrust of the water. [Exc. 198, 953, 1060-61]. By this time, the residents also preferred the taste of the alternative water, which avoided a host of other, ***non-sulfolane related issues*** (*e.g.*, septic, sulfur, iron, etc.) with area water. [Exc. 2499]; [Tr. Trial 3594:3-3596:23] [Exc. 2440-41]. So, rather than adopt the standards proposed by the Panel and suffer political embarrassment by acknowledging the water had been safe all along, DEC refused to set a cleanup level at all, notwithstanding its Commissioner's 2014 directive to set a scientifically-supportable cleanup level, as required by DEC's regulations. *See, e.g.*, 18 AAC 75.345(b); [Exc. 784-85].

Meanwhile, litigation had arisen among the parties in three actions.[5] In 2016, this Court addressed key issues between Flint Hills and Williams relating to the sulfolane releases. *Flint Hills, supra*. This Court noted that Flint Hills bought the refinery "pursuant to a contract that contained detailed terms regarding environmental liabilities, indemnification, and damages caps," and that the "parties bargained for ***all environmental liabilities*** to be subject to a damages cap." *Flint Hills*, 377 P.3d at 962, 976 (emphasis added); *see also id.* at 974-76. The Court observed that DEC did not regulate sulfolane when Williams owned the refinery and affirmed the trial court's holding that after DEC told Flint Hills sulfolane would be regulated, Flint Hills engaged in "unconscionable" delay in addressing sulfolane issues. *Id.* at 963, 967, 972-73. This Court also affirmed dismissal of Flint Hills' equitable claims because it had "an adequate legal remedy." *Id.* at 974.

Following remand, the State settled with the City and Flint Hills in a manner that allowed them to save face and collaborate in this litigation to attempt to foist the bill for their own missteps on Williams. [Exc. 1903-08]. The 2017 settlement also permits Flint Hills to (1) turn off the pumping system so that up to ***400 ppb of sulfolane may migrate***

[5] In 2010, a North Pole resident, James West, sued Williams and Flint Hills alleging sulfolane contamination of the groundwater in the North Pole aquifer. The trial court (Judge McConahy) dismissed the plaintiff's medical monitoring claim as too speculative [Exc. 518-24], and the parties later settled his remaining claims. The litigation continued with respect to the cross-claims and counterclaims between Williams and Flint Hills (the "*Flint Hills*" case). In March 2014, the State of Alaska brought this action against Williams, Flint Hills Resources Alaska, LLC, and Flint Hills Resources, LLC (the "*State*" case). [Exc. 757-76]. Eight months later, the City of North Pole filed a similar action against the same defendants (the "*City*" case). [Exc. 2149]. Williams and Flint Hills asserted cross-claims and counterclaims in the *State* and *City* cases.

off the refinery site, (2) exercise veto power over the State's and City's litigation decisions, and (3) pocket money the State and City recover from Williams. [Exc. 1904-11].

Soon after remand, the court consolidated the *Flint Hills* case for all purposes with actions filed by the State and the City. [Exc. 1017-18, 1915-16 (Judge Blankenship)]. Over Williams' objection, in 2019, the court (Justice Matthews) deconsolidated the cases. [Exc. 2018-25]. After a bench trial in the *State* case, the court issued a 184-page decision and entered Final Judgment against Williams and in favor of the State and Flint Hills on some claims. During the trial, the court purported to give preclusive effect to this Court's "ultimate findings of fact" in the *Flint Hills* decision. [Tr. Trial 4135:6-10] [Exc. 2492]. The court quoted this Court's opinion that "Flint Hills reasonably should have concluded 'long before May 10, 2008,' that sulfolane had migrated beyond the sampling disclosed in the Agreement." [Tr. Trial 4135:11-16 (quoting *Flint Hills*, 377 P.3d at 973)] [Exc. 2492]. Yet, the court ignored this Court's prior conclusions and its core reasoning, which, if followed, should have led to judgment in favor of Williams.

SUMMARY OF ARGUMENT

Given the parties' unambiguous Agreement, the lack of sulfolane regulation during Williams' operations of the refinery, and Flint Hills' delay in addressing sulfolane after it became regulated, there was no expectation that litigation following this Court's *Flint Hills* opinion would result in (1) an upending of the same contract applied in *Flint Hills*, (2) a decades, after-the-fact effort by DEC to regulate sulfolane as a hazardous substance, (3) Flint Hills' unreasonable delay being swept under the rug, and (4) tens of millions of dollars

of liability against Williams to fund a municipal piped water system, the necessity of which cannot be justified under DEC's own rules. But that's exactly what happened.

The Judgment should be reversed for three primary reasons. *First*, the trial court misinterpreted the Agreement, which requires Flint Hills to indemnify Williams "with respect to" sulfolane, wherever it is found. *Second*, as DEC correctly concluded during Williams' refinery operations, sulfolane is not a "hazardous substance" under AS 46.03.826(5). And *third*, because the sulfolane levels at issue are too low to be unsafe to public health or the environment, the costs awarded were unnecessary and pursued for ulterior purposes. If allowed to stand, such retroactive, unanticipated massive liability would be unconstitutional as applied to Williams.

These three core reasons for reversal are supported by sound public policies—the very policies the legislature itself devised and balanced to best serve the public interest, but which the court disregarded. If affirmed, the Judgment will serve to deter future investment in Alaska by individuals and companies, which may be hesitant to do business in a state that will not enforce the agreed division of risk by sophisticated parties. And the State's ability to attract new businesses, especially in highly-regulated industries, further depends on the good faith of its regulatory entities, respect for peer-reviewed science, and the willingness of its courts to correct regulatory overreach. The opposite occurred here when the regulators disregarded science and their own rules in favor of speculation and misleading messaging. This, in turn, undermined the rule of law.

Rather than correctly interpret the contract and the related statutes and regulations, the trial court ultimately defeated the parties' Agreement and legislative intent by favoring its own preferred policies, which are not found in any statute or legislative history. [R. 028292-95]. While further reversible errors are addressed below, these core reasons alone require reversal of the trial court's Judgment.

STANDARDS OF REVIEW

The Court applies *de novo* review to questions of law, which in this appeal include: (1) interpretation of the Agreement[6]; (2) interpretation of relevant statutes and regulations[7]; (3) identification of the correct legal standards for damages[8]; (4) allocation and contribution to a damages award[9]; (5) application of the doctrine of primary jurisdiction[10]; and (6) interpretations of the federal and state constitutions.[11] Similarly, when reviewing injunctive and declaratory relief, this Court examines legal questions *de novo*.[12]

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[6] *See Estate of Polushkin ex rel. Polushkin v. Maw*, 170 P.3d 162, 167 (Alaska 2007).
[7] *See Noey v. Dep't of Env't Conservation*, 737 P.2d 796, 800 (Alaska 1987).
[8] *See Sanders v. Sanders*, 902 P.2d 310, 315, 317 (Alaska 1995) (while factual findings are set aside "only if clearly erroneous," damages are first reviewed *de novo* to determine if the trial court applied the correct legal standards for damages recovery).
[9] *Oakly Enters., LLC v. NPI, LLC*, 354 P.3d 1073, 1078 (Alaska 2015) (noting that the "decision to allocate and apply contribution to a damage award involves the interpretation and application of a statute" and "[q]uestions regarding the interpretation and application of a statute are questions of law to which we apply our independent judgment" (citations and internal quotation marks omitted)).
[10] *Matanuska Elec. Ass'n v. Chucagh Elec. Ass'n*, 152 P.3d 460, 465 (Alaska 2007).
[11] *Dennis O. v. Stephanie O.*, 393 P.3d 401, 405-06 (Alaska 2017).
[12] *City of Kenai v. Friends of Recreation Ctr., Inc.*, 129 P.3d 452, 455 (Alaska 2006); *Ostrow v. Higgins*, 722 P.2d 936, 939-40 (Alaska 1986).

ARGUMENT

I. The Agreement requires Judgment in Williams' favor.

A. Flint Hills agreed to pay for future sulfolane liability.

The allocation of risk plays a major role in every complex commercial transaction. Allocating environmental liabilities is particularly important because they "most likely will arise years down the road when the parties' recollections about what was intended is no longer clear and when the costs of any environmental obligations may be significant." § 9:6.10 Modern Corporation Checklist, "Allocating environmental risks among the parties" (Nov. 2020). Typically, these terms are "aggressively negotiated by both parties" to "provide certainty and limits to the remedies that parties have for claims arising in the future from the transaction at hand." D. Hull Youngblood, Jr., *7 Deadly Sins of Contract Drafting: Constructive Interpretation and Interpretative Construction*, 34 Corp. Couns. Rev. 155, 169 (2015). Williams and Flint Hills agreed to comprehensive, detailed, and interwoven provisions intended to allocate environmental risks between the parties, including risks arising from sulfolane.

1. Flint Hills assumed Environmental Liabilities.

Section 2.3 of the Agreement lists the liabilities retained by Williams after the sale. [Exc. 61] (§ 2.3(e)(xvii)). It expressly ***excludes*** "Environmental Liabilities set forth on the Disclosure Schedule,"[13] which are instead assumed by Flint Hills. *Id.* Sulfolane is listed on the Disclosure Schedule. Titled "Known Environmental Matters," the Disclosure Schedule

[13] The Disclosure Schedule contains numerous sections unrelated to this appeal. For purposes of this brief, "Disclosure Schedule" refers specifically to Schedule 10.2(a)(iv).

lists "[a]ny and all costs of clean-up, monitoring, corrective actions and compliance with regulations" incurred post-closing "with respect to contamination specifically identified in the referenced figures, table and text described below." [Exc. 83]. The third item on the list references a table "from Kathleen McCullom entitled . . . Sulfolane Data (July 2001 – September 2001) for North Pole Refinery," which reflects information regarding sulfolane found in monitoring wells near the property boundary on the refinery site. [*Id.*]; [Exc. 40].

Liability relating to sulfolane constitutes "Environmental Liability," which the Agreement defines as

> [L]iabilities, . . . [and] Damages . . . ***known or unknown, disclosed or undisclosed***, . . . existing at any time, . . . arising directly or indirectly out of . . . release, . . . of Hazardous Materials on, in, under, or about the Real Property or the . . . groundwater thereof . . . .

[Exc. 48] (§ 1.1) (emphasis added). Read together, the above provisions establish that Williams does not retain liability relating to sulfolane releases[14] that occurred on, under, or about the refinery, regardless of whether the extent of the sulfolane was known on the date Flint Hills purchased the refinery and whether the sulfolane had migrated off the refinery property at the time of the Agreement. Thus, any liability for these releases belongs to Flint Hills, not Williams. [Exc. 48].

2. Flint Hills agreed to indemnify Williams for sulfolane in § 10.2(b).

The parties also relied on the Disclosure Schedule to define their respective indemnity obligations under Article X. Flint Hills agreed to indemnify for categories of

[14] The term "Hazardous Materials" broadly includes "chemical[s]" and "chemical substance[s]." [Exc. 50] (§ 1.1).

future environmental matters—defined as "Environmental Claims"—disclosed in the Agreement. [Exc. 77] (§ 10.2(b)(v)). Among other "Known Environmental Matters," Flint Hills agreed to indemnify Williams from "any and all Damages incurred by [Williams] in connection with or arising or resulting from . . . any and all costs of cleanup, monitoring, corrective actions and compliance with regulations" incurred post-closing "***with respect to the matters set forth on [the Disclosure Schedule]***." [*Id.*] (§ 10.2(b)(v)(C)) (emphasis added). Thus, Flint Hills must indemnify Williams for all Environmental Claims relating to the matters on the Disclosure Schedule, including sulfolane.

3. Williams' indemnity obligation excludes sulfolane in § 10.2(a).

Williams' obligation to indemnify Flint Hills for Environmental Claims is "covered exclusively by the provisions of Section 10.2(a)(iv)." [Exc. 75] (§ 10.2(a)(iii)(C)). Although Williams is required to indemnify Flint Hills from all Damages incurred by Flint Hills "in connection with or arising or resulting from" certain listed "environmental matters," [Exc. 75] (§ 10.2(a)(iv)), Williams is ***not*** required to indemnify for costs relating "to the matters set forth" on the Disclosure Schedule, which includes sulfolane. [*Id.*] (§ 10.2(a)(iv)(A)(i); § 10.2(a)(iii) (". . . Seller shall have ***no duty to indemnify*** under this Section 10.2(a)(iii)(A) with respect to Buyer's obligations under Section[] . . . 10.2(b)(v)(C)"). Thus, again, sulfolane is expressly excluded from Williams' liabilities.

Moreover, even if a type of contamination occurred during Williams' operation of the refinery (like sulfolane), Williams has no obligation to indemnify Flint Hills if Flint Hills contributed to the same type of contamination during its tenure as operator. [*Id.*]

(§ 10.2(a)(iv)); [Exc. 60] (§ 2.3(e)(vi)). It is undisputed that Flint Hills contributed sulfolane to the plume and failed to prevent preexisting sulfolane from migrating offsite during the time it operated the refinery. Dec. ¶¶ 8, 730 [Exc. 2138-39, 2305]. Therefore, the trial court correctly concluded that the Agreement did not permit Flint Hills to recover indemnity from Williams for sulfolane. *Id.*

B. The trial court erred in holding Flint Hills was not required to indemnify Williams for all sulfolane contamination.

Flint Hills must indemnify Williams for all costs "with respect to" sulfolane contamination. The Agreement requires Flint Hills to indemnify Williams from Damages incurred "in connection with or arising or resulting from" the "costs of cleanup, monitoring, corrective actions and compliance with regulations . . . with respect to the matters set forth on the [Disclosure Schedule]." [Exc. 77] (§ 10.2(b)(v)(C)). The "matters set forth" on the Disclosure Schedule include sulfolane contamination relating to the refinery. Thus, Flint Hills must indemnify Williams for all costs relating to sulfolane contamination, including all costs sought from Williams in this action. Although the court correctly recognized that Flint Hills has an obligation to indemnify Williams with respect to ***some*** costs of sulfolane contamination, it erred in concluding this obligation ended at the refinery's boundary. Applying a distinction not found in the Agreement, the court determined the Agreement did not require Flint Hills to indemnify Williams for costs relating to sulfolane located offsite in 2004. This was error.

1. The indemnity provision makes no offsite/onsite distinction.

The trial court relied on the Disclosure Schedule's statement that Flint Hills "has

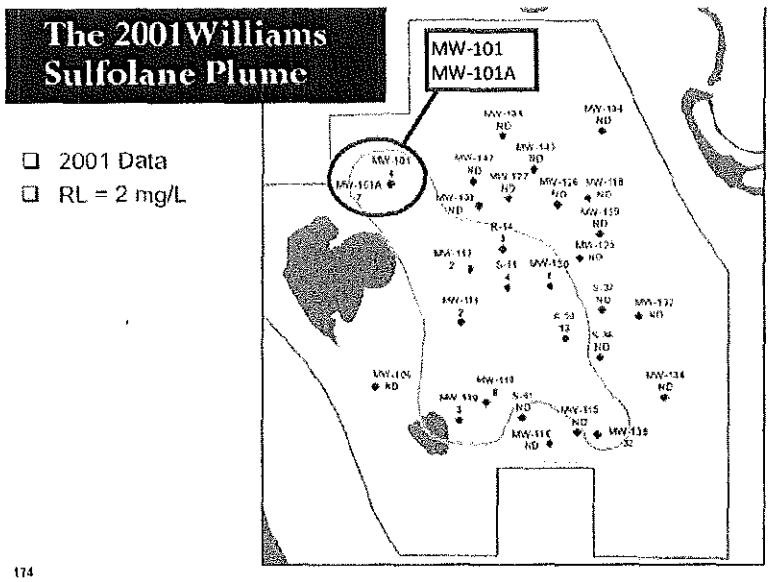
agreed to assume full responsibility for all existing, known contamination ***at the Real Property*** specifically identified in the referenced figures, tables and text described below." Dec. ¶ 565 [Exc. 2261] (emphasis added). Although this sentence makes clear that Flint Hills assumes "full responsibility" for all "existing, known contamination" at the site, the provision does not disclaim responsibility for offsite contamination. Instead, the offsite contamination is encompassed within § 10.2(b)(iv)(C), which requires Flint Hills to indemnify Williams not just ***for*** the matters disclosed on the Disclosure Schedule, but for all costs "***with respect to*** the matters set forth" on the Disclosure Schedule.

The phrase "with respect to" is a synonym for "relating to" and "in connection with." *With Respect To*, Oxford English Dictionary, presented by Oxford Lexico online at https://www.lexico.com/en/definition/with_respect_to (last visited Feb. 25, 2021). Here, there is no dispute the Disclosure Schedule includes sulfolane contamination detected in monitoring wells on the refinery site. The trial court necessarily found the offsite sulfolane originated at the site or it could not have held Williams or Flint Hills liable for it. *E.g.*, Dec. ¶¶ 3, 132, 283, 469 [Exc. 2137, 2179, 2207, 2243]. Sulfolane that migrated beyond the refinery boundaries is ***related to or connected with*** the disclosed, onsite sulfolane. By assuming responsibility for costs "with respect to the matters" listed on the Disclosure Schedule, Flint Hills agreed to indemnify Williams for the offsite sulfolane, which related to the sulfolane specifically included on the Disclosure Schedule. The next sentence of the Disclosure Schedule reinforces this conclusion:

> Although the figures, tables, and text described below contain data representing contaminant concentrations at discrete locations and times, the

> Buyer further understands that the data is representative of site conditions and can be used to support reasonable conclusions about present contaminant concentrations at the locations sampled and contaminant contours ***outside those locations***.

[Exc. 83]. Far from limiting Flint Hills' indemnity obligation to areas of known sulfolane contamination at the refinery site, Flint Hills expressly acknowledged the sulfolane contamination for which it is liable is ***not*** limited to the listed monitoring wells but exists "outside those locations." Nor did the parties limit Flint Hills' indemnity obligation to the refinery site. Indeed, some of the monitoring wells at which sulfolane was detected in 2001 are near the refinery's boundary. For example, monitoring wells 101 and 101A are very close to the property line as shown below [Exc. 2126 (color image at 2127)] and the Site Plan repeatedly references the risks of contaminants migrating offsite.



The parties must have known that sulfolane existing "outside" the monitoring well locations could migrate with the groundwater beyond the property boundary. *See* [Exc. 54] (§ 1.1) (defining "Release" to include any "migrating . . . of a substance . . . , including the

movement . . . of any materials through . . . ground water").

In fact, the trial court found that "[i]t was reasonable to conclude at the time of the [A]greement's execution that the sulfolane contamination existed beyond the contours of what was disclosed." Dec. ¶ 575 [Exc. 2263]. It is irrelevant that the parties did not ***know*** sulfolane had crossed the refinery borders. Offsite migration was a ***known possibility***. If the parties did not intend Flint Hills' indemnity obligation to apply to offsite sulfolane, they could and should have said so in the Agreement. Instead, they allocated all "known or unknown" liabilities flowing from the disclosed sulfolane to Flint Hills. [Exc. 48] (§ 1.1); [Exc. 75-76], *infra* at B.3., p. 22-24. The court ignored the parties' agreed definitions when it concluded Williams unambiguously retained liability for unknown, undisclosed matters, but not for known and disclosed matters.[15] Dec. ¶ 726 [Exc. 2304]. The court erred in failing to enforce the Agreement.

2. The trial court improperly relied on extrinsic evidence.

In distinguishing between onsite and offsite sulfolane contamination, the trial court relied on testimony of the parties' alleged intent when they entered into the 2004 Agreement. The trial court should not have considered this evidence.

Texas law controls the interpretation of the Agreement. [Exc. 82]; Dec. ¶ 720 [Exc. 2303]. The trial court correctly recognized that under Texas law, evidence of the parties' intentions is inadmissible in construing an unambiguous contract. Dec. ¶¶ 722-23 [Exc. 2303]. The court may consider evidence of the surrounding circumstances (*e.g.*, the fact

[15] *See, supra*, at I.A.1.

that the parties were sophisticated entities), but "[o]nly where a contract is ambiguous may a court consider the parties' interpretation and admit extraneous evidence to determine the true meaning of the instrument." *URI, Inc. v. Kleberg Cnty.*, 543 S.W.3d 755, 764-65 (Tex. 2018) (citation and internal quotation marks omitted).

Although it determined the Agreement is unambiguous, *see* Dec. ¶ 726 [Exc. 2304], the trial court still erroneously admitted and relied on extrinsic evidence to construe it. [Tr. Trial 2231:25-2233:17]. The court cited extensively to testimony on the parties' alleged intent to limit Flint Hills' obligations to sulfolane that remained onsite at the time of closing and to impose on Williams the responsibility for contamination that was offsite at closing. *Id.* ¶¶ 561-72 [Exc. 2259-63]. This alleged intent is documented nowhere in the text of the Agreement itself, and the court erred in relying on this extrinsic evidence to alter the unambiguous agreement.

The Agreement's integration clause also precludes reliance on extrinsic evidence. It provides that the Agreement, including exhibits and schedules, "constitutes the entire agreement between the Parties . . . , and supersedes any prior understandings, agreements and representations among the Parties . . . , written or oral." [Exc. 82] (§ 11.4). Any suggestion that the parties intended to limit Flint Hills' indemnification obligations to onsite sulfolane contamination is irrelevant where, as here, the alleged "understanding" was not documented in the written Agreement.

3. The trial court misinterpreted § 10.2(a)(iv).

The trial court's ruling is partly based on a misreading of § 10.2(a)(iv), which

outlines Williams' obligations to indemnify Flint Hills. The court held subsection (A) of that provision applies only to "onsite" conditions and subsection (B) applies to "offsite" conditions. Dec. ¶¶ 580-84 [Exc. 2264-66]. Based on this alleged distinction, it concluded that, because subsection (A) ***excludes*** the matters on the Disclosure Schedule but subsection (B) does not, then the Disclosure Schedule must apply only to onsite obligations. But the court's fundamental premise was wrong—subsection (A) plainly applies to ***both*** onsite and offsite Environmental Conditions. Therefore, subsection (A)'s ***exclusion*** of sulfolane from Williams' indemnity obligations includes offsite sulfolane.

In fact, subsection (A) expressly ***includes*** offsite conditions. It requires Williams to indemnify Flint Hills from certain Environmental Conditions "at, on or under or ***arising, emanating, or flowing from*** any of the Assets or from the property underlying the Real Property." [Exc. 75-76] (emphasis added). The emphasized language encompasses conditions that originated onsite but caused Environmental Conditions outside the refinery boundaries. Indeed, the clause would be unnecessary if the provision were limited to Environmental Conditions occurring "at, on or under" the property itself.

Further, the use of the defined term, "Environmental Conditions," in subsection (A) establishes that the provision addresses offsite obligations. The Agreement defines "Environmental Condition" to mean, "any condition existing on, at or ***originating from***, each property included within the Assets which constitutes, . . . a Release on, at or ***from such property*** of any Hazardous Materials . . . ." [Exc. 47] (§ 1.1) (emphasis added). The terms "originating from" and "from such property" are meaningless unless "Environmental

Condition" includes offsite conditions resulting from onsite releases.

Finally, § 10.2(a)(iv)(D) refers to disposing hazardous materials at an "offsite location," which demonstrates that the parties knew how to distinguish between onsite and offsite Environmental Conditions. They did not make this distinction in describing ***Williams***' indemnity obligations under § 10.2(a)(iv)(A), and they did not differentiate between onsite and offsite conditions in drafting ***Flint Hills'*** indemnity obligations under § 10.2(b)(iv)(C) and the Disclosure Schedule. Flint Hills, not Williams, is responsible for all costs "with respect to" sulfolane contamination, no matter where the contamination occurs. Therefore, the trial court erred in denying Williams' claim for indemnification.[16]

C. The Agreement bars Flint Hills' statutory contribution claim.

The trial court granted Flint Hills' request for AS 46.03.822(j) contribution from Williams. But Flint Hills contractually forfeited any right to this type of statutory relief.

In section 10.5, titled "Exclusivity of Remedies," the Agreement states that, with limited exceptions not applicable here [Exc. 81], the indemnity provisions in Article 10 provide the "sole and exclusive remedy" for the parties for "any and all Actions or Damages arising out of [the] Agreement." [*Id.*]. This provision ensures the parties cannot circumvent the carefully crafted indemnification provisions by pursuing the same damages under a different legal theory. Courts routinely enforce provisions like § 10.5 and exclude

[16] In addition to the damages it was ordered to pay the State, Williams also incurred over $600,000 during the State's sulfolane investigation to which it is entitled to indemnity from Flint Hills. [Tr. Trial 4063:8-24] [Exc. 2478]; [R. 034449-682]; [Tr. Trial 4073:17-24, 4074:3-4075:1, 4077:22-4078:9, 4089:16-4090:25] [Exc. 2481-85, 2488-89]; [R. 060970-1180].

other remedies sought by contracting parties. *See, e.g., Alvogen Grp. Holdings v. Bayer Pharma AG*, 176 A.D.3d 551, 551 (N.Y. App. Div. 2019) (affirming dismissal of rescission claim where purchase agreement made indemnification provisions the "sole and exclusive remedy" for all matters related to the agreement).

Flint Hills' statutory-contribution claims seek "Damages arising out of the Agreement," and thus fall within § 10.5. "Damages" are defined broadly to include

> all damages . . . , losses . . . , Liabilities, . . . amounts paid in settlement, . . . remediation costs and expenses, natural resource damages, . . . assessments, . . . costs of burdens associated with performing injunctive relief, other costs (including reasonable fees and expenses of attorneys and consultants) of investigation, . . . in connection with any Action,[17] . . . whether known or unknown, . . . whether or not resulting from third-party claims, strict liability claims, ***including those under Environmental Laws***.

[Exc. 80] (§ 10.3(d)) (emphasis added). Thus, "Damages" expressly includes losses incurred in connection with environmental laws like AS 46.03.822. The court ordered Williams to pay $52,564,318 as its allocated share of the response costs incurred by Flint Hills, including the amount paid for the piped water system as part of its settlement with the State. These constitute "amounts paid in settlement," "remediation costs and expenses," and/or "costs resulting from . . . strict liability claims." Thus, they are "Damages" as defined by the Agreement. Flint Hills' request for contribution under .822(j) constitutes a claim for "Damages" arising out of the Agreement and is barred by § 10.5.

The trial court erroneously concluded Flint Hills' contribution claim falls within an

[17] "Actions" are "any. . . litigation, investigation, or similar . . . proceeding." [Exc. 42] (§ 1.1).

exception to § 10.5 that permits the parties to pursue "any equitable relief, including injunctive relief or specific performance to which any Party . . . may be entitled." Dec. ¶¶ 595, 716 [Exc. 2268, 2302]. Although .822(j) allows a court to "allocate damages and costs among liable parties using equitable ***factors***," this does not change the fact that Flint Hills sought ***money damages*** from Williams, not "equitable relief." (Emphasis added). Indeed, in *Flint Hills*, the Court affirmed the dismissal of Flint Hills' claims for equitable relief because Flint Hills had an "adequate legal remedy." 377 P. 3d at 974. This "legal remedy" included Flint Hills' request that Williams "contribute to Flint Hills' damages under AS 46.03.822," which the Court characterized as a "legal claim[]." *Id.*

By failing to properly construe § 10.5 and granting Flint Hills' request for contribution under .822(j), the trial court allowed Flint Hills to achieve an end-run around the court's own ruling that Flint Hills is not entitled to indemnification for sulfolane under the Agreement. Flint Hills asserted two separate claims for relief from Williams stemming from ***the same pre-closing sulfolane releases***: (1) indemnification under § 10.2(a) of the Agreement, and (2) statutory contribution under .822(j). The court properly determined Flint Hills is not entitled to indemnity because it contributed to sulfolane contamination during its operation of the refinery. Dec. ¶¶ 8, 730 [Exc. 2138-39, 2305]. But, by awarding contribution, the court improperly gave Flint Hills the identical relief it sought—and was correctly denied—on its indemnity claim, *i.e.*, reimbursement for damages relating to sulfolane releases. The parties included § 10.5 to prevent either party from seeking relief outside of the carefully negotiated provisions of Article X. The court's failure to enforce

the limits as agreed by the parties was erroneous and should be reversed.

D. The trial court erred in awarding damages over the Environmental Cap and failing to credit insurance toward the Cap.

The trial court erred by awarding damages to Flint Hills that exceed The Environmental Cap of the Agreement (the "Cap"). The Cap provides that neither Williams nor Flint Hills must pay the other more than $32,000,000 for Environmental Claims. [Exc. 46-47] (§ 1.1); [Exc. 81] (§ 10.4(b)).

> [T]he maximum amount of indemnifiable Damages which may be recovered by [Flint Hills] from [Williams] . . . arising out of, . . . the matters enumerated in Section 10.2(a) . . . shall be the Environmental Cap with respect to any and all Environmental Claims . . . .

[Exc. 81]. The contribution damages awarded to Flint Hills are "indemnifiable Damages" and relate to "Environmental Claims." Flint Hills sought the same damages in *Flint Hills* and conceded they are "Environmental Claims." 377 P.3d at 975. The claims also address Environmental Conditions "arising, emanating, or flowing from" the Assets. [Exc. 75-76].

In *Flint Hills*, Flint Hills purported to seek reimbursement for "retained liabilities" under § 2.3, which does not reference the Cap. 377 P.3d at 974-76. This Court rejected Flint Hills' contention that the Cap applied only to Williams' indemnity obligations in Article X, concluding, "the parties bargained for ***all environmental liabilities*** to be subject to a damages cap." *Id.* at 976 (emphasis added); *see also id.* at 974.

Failing to follow *Flint Hills*, the trial court required Williams to pay Damages far exceeding the Cap, holding the Cap does not apply to statutory contribution. However, the Cap sets forth the "maximum amount of indemnifiable Damages" Flint Hills may recover

"arising out of, resulting, from or incident to" environmental matters. It is not limited to Damages ***awarded in contract***. The Agreement requires only that the damages be of the type that may be subject to indemnification. The statutory damages awarded are the same Damages Flint Hills sought in its failed indemnity claim.

The trial court's refusal to enforce the Cap for "public policy" reasons was also erroneous. The court stated the Cap would discourage parties from taking active steps to address pollution. Dec. ¶ 764 [Exc. 2311]. This reasoning defies logic. It assumes a party will be reluctant to incur cleanup costs out of fear that costs may eventually exceed an indemnity cap. But such a party is more likely to incur costs with a cap because at least some of those costs will be reimbursed. At a minimum, the indemnified party is no worse off than a party having no indemnity agreement to begin with. And, if the Cap were impermissible simply because of a ***potential*** to discourage cleanup, then all indemnity agreements would be impermissible: indemnity with or without a cap allocates potential liabilities, and the party who incurs indemnified costs always does so at the risk its contract interpretation is incorrect. Moreover, Section .822(g) expressly reflects the legislature's policy ***in favor of*** allocating liability by agreement. AS 46.03.822(g) (section .822 "***does not bar*** an agreement to insure, hold harmless, or indemnify a party to the agreement for liability" (emphasis added)). Section .822(g) permits private parties to allocate environmental liabilities as they see fit; yet, the court defeated this legislative intent for a public policy not recognized by the legislature.

Enforcing the Cap would advance public policy because it provides certainty as to

which party will ultimately be responsible for environmental costs, thus motivating that party to actively engage promptly. It also recognizes the right of contracting parties to allocate environmental responsibilities to avoid future conflicts and to plan ahead.

Because Flint Hills received $44 million from the insurance policy that Williams paid for, Williams already satisfied any indemnity obligations up to the Cap. *See* Dec. ¶¶ 606-08, 759 [Exc. 2270, 2310]; [Exc. 79] (§ 10.3(b)). The Agreement required Williams to purchase an Environmental Insurance Policy to fund liabilities for Environmental Claims. The sulfolane liabilities are Environmental Claims and are subject to this insurance. Section 10.3(b)—titled "Reduction of Damages"—states: "To the extent any Damages of an Indemnified Party [here, Flint Hills] are reduced by receipt of payment under insurance policies . . . such payments . . . shall be ***credited*** against any such [indemnifiable] Damages." [Exc. 79]. For that reason, a plain reading of the Agreement shows the $44 million in insurance money satisfies the Cap on indemnifiable Damages, and Williams owes nothing more to Flint Hills. *Alyeska Pipeline Serv. Co. v. H.C. Price Co.*, 694 P.2d 782, 787 (Alaska 1985) ("It is irrelevant that Alyeska did not make payments directly to Everette, but instead paid ALPAC in the form of insurance premiums. The point is that the payments were made by Alyeska."); *see also In re La. World Exposition, Inc.*, 832 F.2d 1391, 1400 (5th Cir. 1987) (same). Thus, the trial court erred by awarding damages above the $32 million cap and by failing to credit Williams' insurance money toward the Cap. Had it done so, the award would have been reduced to $0.

II. The trial court misinterpreted the statutory definition of "hazardous substance."

A party may be liable under AS 46.03.822 only if it has released a "hazardous substance." DEC has never listed sulfolane as a hazardous substance in Table C, nor has it treated the substance as a hazardous substance under its rules, even though the legislature has mandated that hazardous substances must be cleaned up in strict accordance with rules promulgated under this mandate. *See supra* at 4-5. A substance is "hazardous" for purposes of .822 if it is:

> (A) an element . . . which, when it enters . . . in or upon the water . . . , ***presents an imminent and substantial danger to the public health*** or welfare, including but not limited to [the environment]; (B) oil; or (C) a substance defined as a hazardous substance under [CERCLA,] 42 U.S.C. 9601(14).

AS 46.03.826(5) (emphasis added). The trial court improperly concluded sulfolane fell within ***all three categories***, *i.e.*, AS 46.03.826(5)(A), (B) and (C), when it actually fits within ***none***. Compounding this error, the trial court also relied on anecdotal evidence calling sulfolane a "hazardous substance" without reference to the definition in AS 46.03.826(5) or any inquiry into whether it fell within one of the categories listed above. Because the court did not properly conclude that sulfolane met the definition of a hazardous substance under the relevant statute, its finding of liability under .822 should be reversed.

A. The trial court's ruling on .826(5)(A) rests on its facially incorrect and novel interpretation of "imminent and substantial danger."

On the State and City's motion for partial summary judgment, Judge Blankenship held that, to prevail on its strict liability claim, the State must prove sulfolane is a

"hazardous substance" by showing with expert evidence that sulfolane presents an "imminent and substantial danger." [Exc. 1963-65]. He concluded the meaning of "imminent and substantial danger" cannot be premised on an "equivocal possibility of harm" because a mere potential for harm "wholly ignores the applicable statutory language." [Exc. 1963-64]. Judge Blankenship correctly excluded the only evidence the State offered on this point, *i.e.*, the affidavit of its employee, Dr. Ted Wu, which "wholly ignore[d] the applicable statutory language of AS 46.03.826(5)(A) and thus fail[ed] to set forth an expert opinion showing that the substances at issue present a danger and that the danger present is imminent and substantial." [*Id.*].

However, on the eve of trial, the trial court (Justice Matthews) departed from these legal rulings and proposed a new interpretation of "imminent and substantial danger" that had never been adopted by any court, applied by DEC, or advocated by any party during five years of litigation. *See* Dec. ¶ 84 [Exc. 2157] (quoting Sept. 26, 2019 memo); *id.* ¶ 628 [Exc. 2276]. The trial court *sua sponte* concluded that "imminent and substantial danger to public health" meant only a "reasonable medical concern about the public health." Dec. ¶ 84 [Exc. 2157] (quoting Sept. 26, 2019 memo); *id.* ¶ 628 [Exc. 2276]. The court then erroneously applied the standard in its Decision, holding that "[s]ulfolane presents a reasonable medical concern as to public health." Dec. ¶ 397 [Exc. 2230]; ¶ 634 [Exc. 2278].

1. The plain language of the statute does not support the trial court's interpretation of "imminent and substantial danger."

In interpreting a statute, courts begin with the text. *City of Kenai*, 129 P.3d at 459.

This Court will "presume that the legislature intended every word, sentence, or provision of a statute to have some purpose, force, and effect, and that no words or provisions are superfluous." *Kodiak Island Borough v. Exxon Corp.*, 991 P.2d 757, 761 (Alaska 1999) (internal quotation marks and citation omitted). The role of the court is to ***interpret*** the terms of the statute, not to ***add*** to or ***modify*** them. *See Municipality of Anchorage v. Suzuki*, 41 P.3d 147, 151 & n.2 (Alaska 2002).

The trial court noted that the statute requires an "imminent" danger, but it construed the term to mean that "the threat of harm must be present, although the potential impacts may never develop or may take time to develop." Dec. ¶ 84 [Exc. 2157]. This definition is the ***opposite*** of "imminent," which denotes an occurrence that is: (1) "on the point of happening"; (2) "about to materialize"; and (3) "threatening to occur immediately." Black's Law Dictionary 393 (6th ed. 1990); Ballentine's Law Dictionary 583 (3d ed. 1969); Black's Law Dictionary 898 (11th ed. 2019).

Thus, "imminent danger" means "an appearance of threatened and impending injury" that would put a reasonable man "to his instant defense." Black's Law Dictionary 393 (6th ed. 1990). Applying the similar "imminent and substantial endangerment" requirement in the Resource Conservation and Recovery Act ("RCRA"), the U.S. Supreme Court held, "An endangerment can only be 'imminent' if it 'threaten[s] to occur immediately.'" *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 485 (1996) (citing Webster's New Int'l Dictionary of English Lang. 1245 (2d ed. 1934)). The trial court's conclusion that it "may take time" for "imminent" harm to develop contradicts these definitions.

Further, under the statute, a "hazardous substance" "***presents*** an imminent and substantial danger to the public health." AS 46.03.826(5)(A) (emphasis added). The word "presents" requires that a danger ***actually*** exists. But the trial court required only that the substance pose a ***possible*** danger and characterized a substance as hazardous even if "the potential impacts may never develop." Dec. ¶ 84 [Exc. 2157]. Unlike RCRA, which has a broad "may present" (potentiality) standard for citizen injunctive relief suits, *see* 42 U.S.C. § 6972(a)(1)(B), Alaska did not adopt that language or standard.

Moreover, the trial court's interpretation conflicts with *Stock v. State*, 526 P.2d 3 (Alaska 1974), which holds that imposing environmental liability for ***potential*** harm threatens to deprive a defendant of the constitutional right to fair notice. In *Stock*, this Court construed the "pollution" definition in AS 46.03.900(15), which includes acts that made waters "potentially harmful" to public health or the environment. *Id.* at 10-11. The Court held the broad "potential harm" standard must be given a "narrowing construction" to be constitutional.[18] *Id.* at 11. It found the standard to "prohibit[] acts which a ***reasonable person would foresee*** as creating a ***substantial risk*** of making water ***actually injurious***." *Id.* at 10 (emphasis added). If constitutional fair notice requires the Court to narrowly construe a statute that expressly references "potential harm," then the Court should not insert a "potential harm" standard into a statute that ***does not even contain*** the term.

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[18] Under the canon of constitutional avoidance, where a statute has two possible interpretations, and it would be unconstitutional under one interpretation and valid under the other, the Court has a "plain duty" to adopt the interpretation that "will save the Act" from unconstitutionality. *Estate of Kim*, 295 P.3d 380, 388 (Alaska 2013).

The trial court wrongly construed a "substantial danger to the public health" to require only the existence of "a reasonable medical concern about the public health." Dec. ¶ 84 [Exc. 2157]. The phrase does not appear in any Alaska opinion, statute, or regulation. Instead, the court derived this standard from two, decades-old federal cases interpreting statutes with significantly different language: *Reserve Mining Co. v. EPA*, 514 F.2d 492 (8th Cir. 1975), and *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976). [Exc. 2110-12]. Both courts construed the term "endangering," which they held "connotes a lesser risk of harm than the phrase 'imminent and substantial endangerment to the health of persons'" used by Congress elsewhere. *Reserve Mining*, 514 F.2d at 528; *see Ethyl*, 541 F.2d at 20 n.36.

Thus, the only cases the trial court relied on for its "reasonable medical concern" standard recognize the standard ***would not apply*** to statutes like .826(5)(A) that require "imminent and substantial danger." [R. 028279-312] (demonstrating that the court's eve of trial, proposed interpretation of "imminent and substantial danger" was not supported by Alaska law, nor by the old federal case law cited by the trial court).

2. The trial court misstated legislative history.

The trial court compounded its error by asserting that its broad "reasonable medical concern" and "potential" harm standard is consistent with legislative history. Dec. ¶ 630 [Exc. 2276]. The court claimed that subsection (A) of AS 46.03.826(5) was enacted to "expand[] hazardous substances to include . . . chemicals that are not listed in CERCLA." [*Id.*]. However, the Legislature enacted the narrow "imminent and substantial danger" definition in subsection (A) ***first***. *See* 1972 Alaska Sess. Laws ch. 122 § 1. It was not until

years later that it added the categorical reference to CERCLA hazardous substances in subsection (C). 1989 Alaska Sess. Laws ch. 39 § 5. Thus, the trial court erroneously reasoned that subsection (A) was enacted to broaden the CERCLA list when the exact opposite is true. The "reasonable medical concern" standard finds no support in the statutory text or the legislative history.

B. Sulfolane is not "oil."

Under AS 46.03.822, "oil" is defined as "a derivative of a liquid hydrocarbon and includes crude oil, lubricating oil, sludge, oil refuse or another petroleum-related product or by-product." AS 46.03.826(7). The court found that because gasoline that "Williams produced, and at times spilled at the refinery" contained both sulfolane and oil, this somehow converted the sulfolane into a "petroleum-related by-product." Dec. ¶ 655 [Exc. 2283] (quoting AS 46.03.826(7)) (alteration omitted). But as the State conceded, a "by-product" is something that is "produced" in an industrial process. [R. 028728]. Sulfolane is not "produced" in the refining process. It is a tool in that process, "used as a solvent for purifying hydrocarbon mixtures." [Exc. 628]; *Flint Hills*, 377 P.3d at 963; [Tr. Trial 1001:23-1003:23] [Exc. 2380-82]. Sulfolane is not oil and has never been regulated as such by DEC.

C. CERCLA does not list sulfolane as a "hazardous substance."

Under subsection (C) of AS 46.03.826(5), a substance is a "hazardous substance" if it is "defined as a hazardous substance under [CERCLA,] 42 U.S.C. 9601(14)." Sulfolane is ***not*** included on the CERCLA list. *See* 40 C.F.R. § 302.4.

While that should have ended any claim that sulfolane is hazardous under subsection (C), the court noted the CERCLA list includes any "hazardous waste" under RCRA. Dec. ¶¶ 656-58 [Exc. 2283-84]. But as the court acknowledged, "[s]ulfolane is not a 'listed waste' under RCRA" either. *Id.* ¶ 425 [Exc. 2233] (citing 40 CFR §§ 261.31-33). Undeterred, the court cited a 1985 consent order concerning a Chevron refinery in Puerto Rico that, according to the court, "identifie[d] sulfolane as a hazardous waste" under RCRA. *Id.* ¶ 657 [Exc. 2283-84]. But in that order relating to an unrelated refinery, the parties merely stipulated that sulfolane is a "hazardous waste" and agreed to treat it as a constituent of concern for purposes of remediation. [R. 036642-814]. That third-party stipulation cannot bind Williams and does not establish that sulfolane is a hazardous waste under RCRA or a "hazardous substance" under subsection (C).

D. The trial court largely based its ruling on evidence untethered to the relevant statutory definition of "hazardous substance."

The trial court sought to buttress its flawed interpretation of AS 46.03.826 by relying heavily on evidence ***unrelated to the statute***. Dec. at 34-36 [Exc. 2165-67].

1. The court erroneously deferred to DEC statements made in the context of a different statute after Williams sold the refinery.

The trial court found that DEC had "determined that the sulfolane releases were releases of a hazardous substance" and concluded these "findings are entitled to judicial deference." Dec. ¶ 90 [Exc. 2165]. But DEC made no such finding in the context of AS 46.03.826(5), and any such finding would not be entitled to deference in any event.

a. DEC did not find sulfolane presents an "imminent and substantial danger" for purposes of AS 46.03.826(5).

As evidence of DEC's alleged "finding," the court cited only to DEC memoranda requesting withdrawal of money from the Oil and Hazardous Substance Release Response Account to address sulfolane. Dec. ¶ 90 [Exc. 2165-66]. This account was established by a different statute, AS 46.08.010(a)(2). On five occasions, DEC reported to the governor that it had withdrawn funds from the account to address sulfolane in North Pole. Dec. ¶ 391 (citing [Tr. Trial 185:14-18] [Exc. 2361]) [Exc. 2228]; [R. 034903-05, 034906-08, 034909-10, 034911-14, 034915-22]); Dec. ¶ 392-96 [Exc. 2229-30]. Each time, it conclusorily stated the statutory requirement for withdrawing the funds had been met. *Id.* These memoranda do not cite or interpret AS 46.03.826(5) or contain the data-driven analysis expected when DEC finds a substance to be hazardous. They also apply a different standard—"imminent and substantial ***threat***," not "imminent and substantial ***danger***." AS 46.08.040(a)(1)(A). As shown above, a mere "threat" is not sufficient to establish an actual "danger" under AS 46.03.826(5)(A). The court cannot defer to an agency's interpretation of a statute that the agency did not interpret in the first instance.

b. Even had they pertained to .826(5)(A), DEC's funding memoranda are not entitled to deference.

Kisor v. Wilkie, 139 S. Ct. 2400 (2019), and *Totemoff v. State*, 905 P.2d 954 (Alaska 1995), further preclude any deference to DEC's rote recitation in the memoranda that sulfolane presents an "imminent and substantial threat." *First*, in *Kisor*, the Supreme Court cautioned that a court may only look to an agency's interpretation if the statute is

ambiguous. 139 S. Ct. at 2415. Here, the statute is not ambiguous.

Second, to receive deference, a regulatory interpretation "must be the agency's 'authoritative' or 'official position,' rather than any mere ad hoc statement not reflecting the agency's views." *Id.* at 2416. For example, in the only deference case cited by the trial court, *Native Village of Elim v. State*, 990 P.2d 1 (Alaska 1999), the Court deferred to regulations the Board of Fisheries promulgated through the required Administrative Procedure Act ("APA") process. Here, DEC held no hearings, provided no opportunities for notice and comment, and gave no indication it was adopting a formal position.[19]

Finally, courts should not defer to a new agency interpretation if that position "creates 'unfair surprise' to regulated parties." *Kisor*, 139 S. Ct. at 2417-18. This is especially true where the agency adopts a "*post hoc* rationalizatio[n]" in litigation "to 'defend past agency action against attack.'" *Id.* at 2417 (citation omitted); *see Totemoff*, 905 P.2d at 967 ("Positions on interpretations of statutes adopted by agencies during litigation which contradict earlier regulations are not owed deference by courts."). The

[19] The court's reliance on the memoranda shines light on DEC's failure to conduct a formal administrative review of sulfolane. It did not apply procedural safeguards or make any on-the-record (and reviewable) determinations as required by its regulations and the APA. *See, e.g.*, AS 44.62.210 (providing for public proceedings in which "each interested person" has the right "to present statements, arguments, and contentions" on a proposed regulation); AS 44.62.215 (requiring written record of public comments on a proposed regulation); 18 AAC 75.325(j) ("The department will seek public participation regarding activities conducted under the site cleanup rules . . . ."). Thus, DEC has no properly promulgated position that sulfolane is "hazardous" that could be entitled to deference. Further, ***unlike sulfolane, the State established a cleanup level for two "PFAS" substances, PFOS and PFOA***, in 2016 during the pendency of this litigation. [Tr. Trial 955:23-956:10, 2536:10-2537:23, 815:9-816:2, 963:11-964:8, 966:19-967:3, 960:18-24]; 18 AAC 345(b)(1) (Table C).

State never told Williams it believed sulfolane to be a hazardous substance within the meaning of AS 46.03.826 until it filed its complaint in this case. Indeed, when Williams operated the refinery, the State repeatedly told Williams in writing that sulfolane was ***not*** regulated and need not be included in the Site Plan. Dec. ¶¶ 21, 114 [Exc. 2142, 2176]; [Exc. 17-19, 22-23, 762-63, 2034-35]. As the trial court recognized, "the State took the position that sulfolane was not regulated within the sense of it being a hazardous substance." [Tr. Trial 3580:10-15] [Exc. 2437]; *see* Dec. ¶¶ 21, 114 [Exc. 2142, 2176] (finding sulfolane was not a regulated contaminant when Williams operated the refinery). Internally, DEC recognized that sulfolane "may not be considered a hazardous substance" because it did "not fall under 18 AAC 75 regulations" and it had "low (or no) toxicity in soil and groundwater." [Exc. 14-17, 19-20, 29-30]. Thus, the only time it addressed the issue during Williams' operations of the refinery, DEC determined sulfolane ***was not*** a "hazardous substance" for purposes of .826(5), which is why DEC allowed Williams to leave the sulfolane in the ground. [Tr. Trial 3086:14-20] [Exc. 2416]. DEC's new, litigation-driven position is precisely the type of "unfair surprise" *Kisor* and *Totemoff* prohibit.[20]

Because the 2001-2003 finding that sulfolane was not hazardous cannot be

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[20] *See also Ind. Dep't of Natural Res. v. Whitetail Bluff, LLC*, 25 N.E.3d 218, 227 (Ct. App. Ind. 2015) (finding there was "compelling argument that [Indiana's Department of Natural Resources'] '***change in position would essentially result in revocation of a business practice after the company has already expended substantial resources in reasonable reliance on the authorization***'" by the IDNR in writing to the business owner (bracket and citation omitted and emphasis added)).

changed post hoc vis-à-vis Williams, deference instead requires a finding in favor of Williams. *See Totemoff*, 905 P.2d at 967 ("If any interpretation is owed deference, it is [the agency's earlier interpretation], not the position adopted in a litigation context." (citing *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 142-46 (1976))).

2. The trial court improperly relied on testimony by State witnesses.

In finding that "[s]ulfolane presents an imminent and substantial danger to public health," the trial court cited the testimony of two witnesses: the State's employee, Dr. Wu, and its consultant, Stephanie Buss. Dec. ¶ 415 [Exc. 2232]. Although both "testified that sulfolane is a hazardous substance," *id.* at 36 [Exc. 2167], neither stated that sulfolane "presents an imminent and substantial danger to public health." In testimony the trial court cites for this crucial point, ***Dr. Wu does not say sulfolane presented an imminent and substantial danger to public health.*** When directly asked to opine on whether sulfolane presented an "imminent and substantial danger," Dr. Wu could say only that there was a "concern for adverse effects." [Tr. Trial 809:14-810:6] [Exc. 2370-71]. Similarly, although Ms. Buss testified she believed sulfolane to be a hazardous substance, she based this conclusion only on studies showing that "sulfolane has the ***potential*** to have adverse effects." [Exc. 2495-96] (emphasis added).

Moreover, Dr. Wu and the State were fully aware of the need to expressly address "imminent and substantial danger." The prior judge (Judge Blankenship) excluded Dr. Wu's testimony because he failed to apply the statutory standard. [Exc. 1963-65]. When the trial court later permitted him to testify at trial, Dr. Wu knew the relevant issue—and

the question directly posed by the State's attorney—was whether sulfolane presents an imminent and substantial danger. [Tr. Trial 809:14-19] [Exc. 2370]. The only inference to draw from his failure to answer this question is that Dr. Wu would not and could not testify that sulfolane presents an imminent and substantial danger. At the very least, he has twice declined to take that position under oath. Because the "experts" offered by the State did not even purport to apply the statutory standard to sulfolane, the trial court erred in relying on their testimony. The trial court should have followed earlier rulings, *see supra* at 30-31, that testimony by Dr. Wu or anyone else that did not address the imminent and substantial danger standard must be excluded.

3. The trial court improperly relied on non-Alaska and non-regulatory levels.

The trial court also concluded sulfolane was a "hazardous substance" because sulfolane releases at the refinery exceeded "existing regulatory levels for sulfolane in drinking water" in ***other*** jurisdictions. Dec. at 36 [Exc. 2167]. But the so-called "current regulatory levels" cited by the trial court either (1) are ***not*** regulatory levels at all or (2) they do not apply in Alaska. Therefore, they are all inapplicable under Alaska law. Dec. at 31 [Exc. 2162].[21]

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[21] The trial court cited five alleged "***current*** regulatory levels for sulfolane in drinking water set by other entities as shown by the record." Dec. at 31 [Exc. 2162] (emphasis added). But rather than cite to current out-of-state regulations, the court merely relied upon references in the record to some sort of past "level." The ATSDR level cited by the court is from 2011, *id.* ¶ 142 [Exc. 2181], and was only an "advisory level." *Id.* ¶ 143 [Exc. 2180-81]. The ATSDR expressly stated it was not a regulatory level. [R. 034886]. An EPA "screening" level is ***not*** the level deemed unsafe for human consumption; it is merely a

Footnote continued on next page

Moreover, the trial court compares apples to oranges. It applies the standard for ***drinking water*** to the sulfolane amounts that were released ***into the ground*** at the refinery. Refinery groundwater was not drinking water. Dec. ¶ 441 [Exc. 2236]. It was only after the groundwater migrated outside the refinery boundaries and into area wells that it became "drinking water." By this point, the sulfolane concentrations had decreased dramatically and were nowhere near the ranges cited by the court. *See, e.g.,* [Tr. Trial 3716:14-3719:6] [Exc. 2461-64]; [*Id.* at 3693:3-15] [Exc. 2451]; [*Id.* at 2154:17-23] [Exc. 2388]; [R. 071535-654, 059929].

E. The trial court's remaining reasons for concluding sulfolane is a "hazardous substance" lack merit.

The trial court's "additional grounds" were that (1) Williams allegedly admitted that sulfolane is a hazardous substance; and (2) sulfolane is a "hazardous substance" because it is "pollution" under AS 46.03.760. Dec. at 36 [Exc. 2167] (referring to ¶¶ 378-84, 403-28, 618-23, 644-57). These grounds likewise lack merit. *First*, the court relied on Williams'

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screening standard used by EPA to determine whether additional site investigation is warranted. [Tr. Trial 863:18-864:23] [Exc. 2372-73]. Also, the EPA PPRTV level referenced in the Decision was only a "screening level" mentioned in the 2017 settlement agreement between the State and Flint Hills. Dec. at 31, 40 [Exc. 2162, 2171]. The "Puerto Rico Refinery Site Standards set by EPA" was found in a consent order, limited to a single site, and was merely a stipulated "remediation goal" for that site; it was not a standard promulgated according to any rule-making. [Exc. 1940-41]. It is uncertain what Texas authority supports a 2010 ".49 ppb" level for Texas. Dec. ¶¶ 88, 136 [Exc. 2162, 2180]. State witnesses referenced a much higher Texas standard (475 ppb or 320 ppb), which, if applied here, would have resulted in no damages. [Tr. Trial 330:4-333:3, 2823:21-2824:6]. Similarly, the alleged Canadian "current standard" of 90 ppb is from 2010, and no Canadian authority is cited as support. Dec. ¶¶ 88, 136 [Exc. 2162, 2180]. Therefore, these so-called "current regulatory levels" are entirely fictitious.

answer, a stipulation as to Flint Hills' liability, and decades-old statements by employees calling sulfolane a "hazardous substance" without reference to .826(5)(A). But the interpretation of AS 46.03.826(5)(A) is a legal conclusion regarding the meaning of a statute. Parties cannot be bound by an erroneous lay interpretation of the law. Instead, the Court must interpret the law and declare what the correct meaning is. Therefore, this is a red herring and is not something a party can "admit" at the request of another party. *See, e.g.*, *Disability Rights Council v. Wash. Metro Area Transit Auth.*, 234 F.R.D. 1, 3 (D.D.C. 2006). Moreover, Williams qualified its alleged admission by stating that, when Williams owned the refinery, DEC did not consider "sulfolane to be a hazardous substance under any statute or regulation." [Exc. 793]. Williams also clarified in its amended answer that the meaning of "hazardous substance" under AS 46.03.826(5)(A) was a legal conclusion. [Exc. 1202]. The pretrial stipulation on Flint Hills' liability simply recognized that Flint Hills had settled with the State and admitted partial liability under .822, but Williams continued to maintain that sulfolane was not a "hazardous substance" under .826(5). [Exc. 2351-60].

Second, to the extent the trial court concluded sulfolane is "pollution," that too fails. As shown above, whether sulfolane is a "hazardous substance" rises or falls upon the correct interpretation of AS 46.03.826(5)(A). All the State has ever shown is the mere equivocal possibility of harm at levels that do not exist here. And the trial court made no

attempt to analyze the statutory meaning of "pollution" in AS 46.03.760.[22]

III. The trial court ignored the relevant standards for recovery of "response costs."

As shown above at 8, when sulfolane was discovered in North Pole area wells, DEC had no scientific basis for concluding that sulfolane concentrations in those wells threatened public health. Nonetheless, it began warning residents to avoid drinking well water. Years later, when recommendations provided by DEC's hand-picked panel of experts showed that ***not one drinking well*** in the area contained unsafe levels of sulfolane, DEC declined to adopt a cleanup level. Instead, the State entered into a settlement with Flint Hills requiring construction of a $72 million piped water system for the City that solved many problems having nothing to do with sulfolane or the refinery. In forcing Williams to pay for this costly overreaction, the court failed to properly apply the standards for recovery of response costs. Dec. ¶¶ 678-79, 742 [Exc. 2289-90, 2306].

A. The response costs were not "necessary."

The Site Cleanup Rules require those responsible for contamination to take only those actions "necessary to protect human health, safety, and welfare, and the environment." *See, e.g.*, 18 AAC 75.990(17); 18 AAC 75.335(d); 18 AAC 75.345(b), (c), (h), (i); 18 AAC 75.360; 18 AAC 75.380(d)(1). Indeed, the necessary action ***ends*** at the "initial response action" stage if DEC determines that the "lowest practicable level of contamination" has been achieved. 18 AAC 75.315(d). Although the court conclusorily

[22] The trial court also found that sulfolane presents an imminent and substantial danger to the public welfare. Dec. ¶ 416 [Exc. 2232]. This conclusion fails for all the above reasons why sulfolane is not a hazardous substance in the first instance.

held the piped water system was "necessary to address the contamination at issue," Dec. ¶¶ 742, 678 [Exc. 2306, 2289-90], it offered no basis for this conclusion. None exists.

1. The trial court made no finding that the level of sulfolane in North Pole wells presents harm to human health or the environment.

A sulfolane cleanup level was essential to proving liability for response costs, a point Williams made numerous times during this litigation.[23] Indeed, in 2017, the trial court recognized the need for DEC to set a cleanup level before response costs could be adjudicated,[24] and the State acknowledged a cleanup level was relevant to damages.[25] As DEC witnesses, including Steve Bainbridge, DEC Program Manager for Contaminated Sites, repeatedly admitted at trial, DEC's regulations require it to set a cleanup level and oversee a cleanup to meet that level. [Exc. 2418-22].

Yet after trial, the trial court held a cleanup level is "not a prerequisite to Williams' liability under the environmental laws at issue here." Dec. ¶ 672 [Exc. 2288]. This ignores that the Site Cleanup Rules make a cleanup level the baseline by which specific response costs are measured as "necessary" or unnecessary to protect the public from a substance. Here, there is no cleanup level to establish the amount of sulfolane, if any, that is unsafe for human consumption. Nor did the court fill this regulatory void and make a finding as to the amount that may safely exist in drinking water. Indeed, ***at no point in its 184-page***

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[23] *See, e.g.*, [Tr. Apr. 20, 2017 Hrg. at 92:1 – 94:5] [Exc. 2339-41].

[24] [Tr. Apr. 20, 2017 Hrg. at 60:1-2, 17-18, 61:10-15 (COURT: "***How can you say [a cleanup level is] not relevant to the cleanup cost***?) (emphasis added), 62:23-25 (COURT: "[W]hen I decide what those future costs are, what do I use as far as the cleanup level?")] [Exc. 2335-37].

[25] [Tr. Apr. 20, 2017 Hrg. at 64:6-9] [Exc. 2338].

Decision did the trial court find that sulfolane levels in North Pole area wells threaten human health. Without such a finding, no remedial action of any type is "necessary."

Although the court did not expressly adopt ***any*** standard for determining whether sulfolane levels in drinking water present a threat to human health, it appears—without analysis—to apply a cleanup level of 20 ppb, noting that "233 private wells have contained sulfolane of 20 ppb or more." Dec. ¶ 131 [Exc. 2179]. In the 2017 settlement, Flint Hills agreed to supply alternative water to any property outside of the piped water project area if sulfolane levels in the well exceeded 20 ppb, which is the EPA's regional screening level. *Id.* ¶ 91 [Exc. 2171]. The fact that Flint Hills voluntarily agreed to a "cleanup level" of 20 ppb in the settlement does ***not*** create a standard binding on Williams. Further, a ***screening*** standard is used to determine whether additional investigation is warranted. [Tr. Trial 863:18-864:23] [Exc. 2372-73]. So, EPA's "screening" level is ***not*** the level deemed unsafe for human consumption.

Indeed, as Dr. Wu conceded and DHSS studies have concluded, there is ***no evidence*** the low levels of sulfolane in North Pole area wells have caused adverse health effects. [Tr. Trial 867:1-6] [Exc. 2374]. *See supra* at 8-9. Under similar circumstances, the Fifth Circuit concluded a piped water extension was not "necessary" in *Matter of Bell Petroleum Services*, 3 F.3d 889 (5th Cir. 1993). In *Bell*, EPA offered no analysis as to why it believed the public health was at risk without an alternative water supply in the short term, and the Fifth Circuit found no evidence that short-term exposure to chromium presented a danger to humans. Thus, the court held that a city water system extension was an unnecessary

"waste of money" by EPA. *Id.* at 905.

Even applying the most conservative and arbitrary cleanup level apparently applied by the trial court (20 ppb), the number of wells that arguably present a threat to public health is small. *See supra* at 9 n.3; *infra* at 49-51. The court offered no reason why these few wells could not have been remedied with a more targeted approach. *See, e.g.*, [Tr. Trial 2712:3-11, 3717:2-3719:13, 3722:1-13] [Exc. 2405, 2462-65]. The $72 million piped water system far exceeded what was "necessary" to mitigate any conceivable threat.

2. The State sought a piped water system for unrelated purposes.

The State pursued the piped water project for ulterior purposes—to remedy water quality issues unrelated to sulfolane that make the well water "unpalatable without treatment." [Exc. 2499]. Also, many private wells have other non-sulfolane related contamination problems (*e.g.*, septic, sulfur, iron, etc.). [Exc. 2499]; [Tr. Trial 3594:3-3596:23] [Exc. 2440-41]. Selecting the piped water "remedy" also evaded a public-relations problem that would have occurred if DEC had been required to backtrack on its prior guidance on sulfolane. When the Panel recommended a cleanup level of 362 ppb, an employee of DEC's Drinking Water Program warned of "public outrage," noting that:

> For five years DEC and HSS have been telling the people of North Pole that the best science available set an action level of between 14 and 25 ppb. . . . If we go back to the community and tell them that the "safe" level is now 10 times higher (140 ppb or more), we run a great risk of creating a very high level of public outrage and mistrust of DEC.

[Exc. 953]; *see supra* at 9-10. Thus, instead of setting a cleanup level that would not have required a cleanup of any North Pole wells, the State agreed to an unnecessary and

massively expensive piped water system to save face with the public. [Exc. 1060-61].

The Sixth Circuit rejected a similar scheme in *Regional Airport Authority of Louisville v. LFG, LLC*, 460 F.3d 697 (6th Cir. 2006). There, an airport authority built new runways on a site previously used for heavy industrial purposes. *Id.* at 700. The Authority sought to recover alleged "response costs" from a prior landowner that was admittedly responsible for lead contamination on the property. The Sixth Circuit held there was "no evidence in the record demonstrating the need for a CERCLA-quality cleanup prior to constructing the runway." *Id.* at 704. The lead concentrations were lower than the level deemed acceptable by EPA, and the Authority did not remediate the soil any deeper than was necessary to construct the runways. The court concluded the "'response costs' and the runway construction costs were one and the same." *Id.* at 705.

Thus, "allowing the Authority to recoup its 'response costs' would be tantamount to a reimbursement of its runway construction costs." *Id.* It reasoned that requiring "former occupants to assume liability for cleanup costs going beyond the level necessary to make the property safe for industrial use would be to provide an unwarranted windfall to the beneficiary of the cleanup." *Id.* (citation omitted); *see also City of Moses Lake v. United States*, 458 F. Supp. 2d 1198, 1218 (E.D. Wash. 2006); *Southfund Partners III v. Sears*, 57 F. Supp. 2d 1369, 1372 (N.D. Ga. 1999). Because the piped water system here was likewise not necessary but instead implemented for purposes unrelated to alleged sulfolane contamination, Williams should not bear the costs of that system.

B. The piped water system was not cost-effective.

The trial court ordered Williams to pay for a $72 million piped water system without considering whether there were lower-cost remedies that would be equally effective. The 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." 18 AAC 75.325(f)(1)(D). But this must occur only "to the maximum extent ***practicable.***" *Id.* (emphasis added). A "practicable" remedy means

> capable of being . . . constructed, in a . . . ***cost-effective*** manner . . . ; "practicable" does ***not*** include an alternative ***if the incremental cost of the alternative is substantial and disproportionate to the incremental degree of protection provided by the alternative as compared to another lower cost alternative.***

18 AAC 75.990(93) (emphasis added). This requirement follows corresponding federal regulations. *See* AS 46.09.020(b) (requiring DEC to develop cleanup guidelines that are consistent with the national contingency plan"); *see also* 40 C.F.R. § 300.430(e) and (f) (requiring national contingency plan remedies to be cost-effective).

Neither the State nor Flint Hills offered any evidence that the piped water system was the most cost-effective remedy. Indeed, the State's witnesses conceded DEC had failed even to consider practicability in choosing its preferred remedy. [Tr. Trial 409:22-410:17] [Exc. 2364-65]; [*Id.* at 2069:13-21] [Exc. 2386]; [*Id.* at 2078:18-23] [Exc. 2387]. The court also ignored the issue. If the court had conducted this required inquiry, it could not have found the piped water system to be the most cost-effective remedy.

Even using the cleanup level apparently applied by the trial court (20 ppb), the cost of the piped water system is exorbitant when compared to the relatively small number of properties affected by sulfolane. [Tr. Trial 3717:2-3718:17] [Exc. 2462-63]; Dec. ¶ 131 [Exc. 2179]. Only 86 private wells met that standard in recent years, with the numbers decreasing over time. Dec. ¶¶ 131, 133 [Exc. 2179]; [Tr. Trial 2154:17-23] [Exc. 2388]; [R. 071535-654]. This results in an average price tag of over ***$837,000 per affected well.*** The State and Flint Hills offered no evidence suggesting the value of the affected properties or the lack of other acceptable (and less costly) remedies warranted this enormous investment.

Instead, the trial court noted that "[t]he total cost of restoring the aquifer to its pre-existing condition . . . is approximately $78 million." Dec. ¶ 687 [Exc. 2293]. But that "total cost" was ***the cost to remove all sulfolane from the aquifer***. The court did not find it was necessary to remove all sulfolane from the aquifer to reduce the sulfolane concentrations below 20 ppb in a few dozen area wells. The only way this would be necessary would be if the court applied a *de facto* cleanup level of zero, *i.e.*, if it concluded that ***no*** level of sulfolane in the aquifer is safe. DEC has never adopted this drastic position for any substance listed in Table C, and there was no evidence to justify it here.

C. The piped water system was not a "reasonable" remedy.

"Response costs are costs reasonably attributable to the site." 18 AAC 75.910(b). Without tying its conclusions to DEC regulations, the trial court repeatedly made the bare statement that the piped water system was a "reasonable" remedy. Dec. ¶¶ 429, 522, 538-

40, 678-80, 687 [Exc. 2234, 2250, 2254-55, 2289-90, 2293]. Citing the conclusions of DEC's project manager, the court found that a piped water system is a "common strategy at large-scale contaminated sites to provide a permanent long-term clean water solution to impacted residents." *Id.* ¶ 523 [Exc. 2251]. But bare conclusions that a strategy is commonly used in other sites or that a piped water extension is the "***best*** long term permanent solution" here, *id.* ¶ 524 [Exc. 2251] (emphasis added), does not mean it was a ***reasonable*** solution under DEC's rules. It was not reasonable to evade the rules' mandate for setting a cleanup level and to require Williams to pay for piped water without finding that the sulfolane levels in area wells threatened public health. Further, even assuming a cleanup level of 20 ppb, it was not reasonable to order Williams to pay over $800,000 per affected well to build infrastructure to serve a much wider area when the wells could have been remedied at a much lower cost.

D. The trial court erred in requiring Williams to pay for the new City wells and other types of alternative water.

Requiring Williams to reimburse Flint Hills for the costs of installing new wells for the City was also unnecessary. When Flint Hills decided to install new supply wells, there were only trace amounts of sulfolane in the raw well water. [Exc. 220-21]; [Tr. Trial 1637:4-16] [Exc. 2384]. Moreover, after the water was treated by the municipal utility, no sulfolane existed in the treated water distributed to the homes that used the municipal piped water system. [Exc. 221]. Therefore, the *de minimis* amounts of sulfolane in the City's two wells presented no threat to the public health.

The court also erroneously ordered Williams to reimburse Flint Hills for its

expenses in providing alternative water to residents on an interim basis. Dec. ¶¶ 536-37 [Exc. 2253-54]. The vast majority of wells for which Flint Hills sought reimbursement for bottled water either had no detectible levels of sulfolane at all or had safe levels of sulfolane, even based on the arbitrary 20 ppb cleanup level. [Tr. Trial 3690:20-3700:3] [Exc. 2448-58]; [*Id.* at 3717:2-3718:17] [Exc. 2462-63]; [*Id.* at 3693:3-15] [Exc. 2451]. Flint Hills failed to establish that ***any*** kind of alternative water was necessary here.

IV. The trial court erred in awarding damages based on a non-existent, undefined "right to uncontaminated groundwater."

The trial court found that most of the natural resource damages allegedly suffered by the State were "addressed by the provision of alternative water supplies including the piped water system and future monitoring and remediation costs." Dec. ¶ 692 [Exc. 2295]. "[I]mposing damages to return the aquifer to its natural condition ***and*** requiring payment for the piped water system would be an inappropriate double assessment of damages." Dec. ¶ 686 [Exc. 2293] (emphasis in original); *see also id.* ¶ 687 [Exc. 2293]. The court also held that "[m]ost of the relief sought by the State under .760 is also duplicative." Dec. ¶ 688 [Exc. 2293]; *see also id.* ¶ 689 [Exc. 2294] ("Likewise, awarding an additional, similar, or greater sum in total daily assessment designed to reflect the damage to the aquifer would be duplicative, and a windfall . . . .").

However, the court held the piped water system did not compensate the public for losing the ***option*** to choose well water in allegedly contaminated areas. Thus, the court awarded $2,533,125 in "natural resource damages" to the State under the Civil Assessments statute (AS 46.03.760)—not under the statutes applicable to Natural Resource

Damages and Restoration Costs (AS 46.03.822 and AS 46.03.780)—in alleged compensation for the "loss of the right of the public to have access to uncontaminated groundwater." Dec. ¶¶ 39, 692 [Exc. 2145, 2295-96]; [Exc. 2317]. But no such right exists under Alaska law. Even if it did, it is not compensable by liquidated damages under AS 46.03.760.

First, the court cites no authority for the proposition that the public has a fundamental right to uncontaminated groundwater and Williams is unaware of any such authority. *Second*, the court recognized a "right to uncontaminated groundwater" based only on its speculation that "[s]ome people may prefer well water to water provided through a domestic water supply." Dec. ¶ 692 [Exc. 2295]. There is no record evidence to support this assumption. *Third*, the statute requires a specific finding on the "degree to which [Williams' releases of sulfolane] degraded the ***existing*** environmental quality." AS 46.03.760(a)(1) (emphasis added). The trial court made no such finding and could not do so based on the evidence at trial. *Fourth*, the record does not support the trial court's implicit finding that sulfolane "contaminated" the North Pole aquifer. Under DEC's Site Cleanup Rules, "contaminated groundwater" must "contain[] a concentration of a hazardous substance that exceeds the applicable ***cleanup level*** determined under the site cleanup rules." 18 AAC 75.990(22) (emphasis added). Because DEC has not set a cleanup level for sulfolane, sulfolane could not have "contaminated" the groundwater under Alaska law, and no alleged "right to uncontaminated groundwater" was violated. *See also* AS 46.03.760(a)(3) (contemplating that liquidated damages are appropriate only where the

defendant failed to "comply[] with the requirement for which a violation is charged.").

Finally, the court found that "[n]o witness has suggested a methodology" for valuing natural resource damages. Dec. ¶ 692 [Exc. 2295]. That finding should have compelled judgment in Williams' favor because the State failed to carry its burden of proof. Instead, even though the State had not argued for this, the court circumvented the natural resource damages statute to assist the State's lack of proof and resorted to the inapplicable liquidated damages provision under the Civil Assessments statute.

Liquidated damages awarded under the Civil Assessments statute "must be compensatory and remedial in nature" and generally "may not be used for punitive purposes." AS 46.03.760(b). The court erroneously calculated liquated damages over a period of 18.5 years, *i.e.*, the entire time Williams ***lawfully*** used sulfolane at the refinery. DEC ***allowed*** Williams to leave it in the ground the entire time Williams operated the refinery and never once told Williams it was violating the law by doing so. Calculating liquidated damages over this approximate 18.5-year period leads to damages that are punitive. Moreover, as crafted by the court, any "right to uncontaminated groundwater" is held by "the public," not the State. Thus, any denial of that right does not harm the State; it impacts individual residents. Because there is nothing "compensatory" or "remedial" about the liquidated damages awarded, they were improperly granted under .760.

V. The .822(j) allocation should be reversed.

Under AS 46.03.822(a), if two or more parties are responsible for the release of a hazardous substance, the parties are jointly and severally liable for response and

remediation costs incurred by the State. The parties may pursue contribution claims against each other. Where, as here, the harm is not divisible or cannot be reasonably apportioned between the parties, *see* AS 46.03.822(i), they may seek contribution under AS 46.03.822(j). Subsection (j) permits the court to "allocate damages and costs among liable parties using equitable factors determined to be appropriate by the court." *See also Fed. Deposit Ins. Corp. v. Laidlaw Transit, Inc.*, 21 P.3d 344, 350 (Alaska 2001) (where, as here, a party bringing a direct claim under .822(a) is a responsible party, "the court may recast the direct claim as a claim for contribution" under .822(j)). The parties, however, may agree to allocate liability among themselves. AS 46.03.822(g). The court's allocation was erroneous and should be reversed for numerous reasons.

A. The trial court erred in failing to enforce the parties' own allocation.

The court erred in allocating ***any*** responsibility for offsite sulfolane to Williams when ***the parties themselves*** already had allocated full responsibility for sulfolane to Flint Hills under the Agreement. *See* AS 46.03.822(g) (authorizing such agreements). The trial court correctly concluded that the Agreement's Contribution Clause barred any recovery of Damages by Flint Hills. Dec. ¶¶ 8, 730 [Exc. 2138-39, 2305]. Yet, the court circumvented this correct conclusion of law by awarding the very relief its own legal conclusion forbids under the guise of an "equitable" allocation. This was error. *See Riddell v. Edwards*, 76 P.3d 847, 855 (Alaska 2003) ("[A] court must not apply equity to do indirectly 'what the law or its clearly defined policy forbids to be done directly.'" (citations omitted)). The trial court also ignored the parties' allocation to Flint Hills of responsibility

for ***all*** sulfolane and disregarded that the indemnity provisions should govern any allocation of potential environmental liabilities between the parties.

B. The trial court ignored DEC's non-regulation of sulfolane prior to 2004.

A court should consider the care a party exercised "in light of the practices characteristic of the time" and may ***reduce a party's share if no rules or laws prohibited the practices at the time***. *Boeing Co. v. Cascade Corp.*, 207 F.3d 1177, 1187 (9th Cir. 2000); *see also United States v. Consolidation Coal Co.*, 184 F. Supp. 2d 723, 749 (S.D. Ohio 2002) (lower allocation was justified because no rules prohibited disposing of the waste in question), *aff'd in relevant part & vacated in part on other grounds*, 345 F.3d 409 (6th Cir. 2003). A court should also consider which party "knew or should have known" of the contamination and which party "had the ability to control the [cause]" at the time. *Oakly Enters.*, 354 P.3d at 1077; *see Gopher Oil Co. v. Union Oil Co.*, 955 F.2d 519, 527 (8th Cir. 1992). Here, the court failed to compare the relative "culpability" of Williams and Flint Hills given the very different regulatory environments in which each operated the refinery.

The court acknowledged DEC did not regulate sulfolane when Williams operated the refinery, but then it erroneously failed to apply the legal defenses that flow from those findings of fact, which require reducing Williams' culpability. Dec. ¶¶ 21, 24, 26, 114 [Exc. 2142-43, 2176] and *infra* at 58-59. Because sulfolane was regulated after Flint Hills purchased the refinery, it had a duty to report and comply with DEC's directives to treat sulfolane as a regulated substance and to contain it, but Flint Hills "unconscionably" failed

to do so. Dec. ¶¶ 278-81 [Exc. 2206]; [Tr. Trial 3249:5-3250:20] [Exc. 2423-24]; [*Id.* at 3336:6-3337:12] [Exc. 2429-30]; [R. 029019-25]; *Flint Hills*, 377 P.3d at 967, 972-73. In contrast, the non-regulation of sulfolane during Williams' tenure means Williams' conduct was less culpable. Dec. ¶¶ 21, 114 [Exc. 2142, 2176]. Williams kept all ***regulated*** contaminants onsite during its tenure, [Tr. Trial 196:24-197:3] [Exc. 2494]; [Exc. 2029-51], therefore, had sulfolane been regulated then, Williams similarly could have kept it onsite. [Exc. 1, 3-4]; [Tr. Trial 2847:12-24] [Exc. 2406].

C. The trial court erred in penalizing Williams for defending itself.

The trial court's allocation expressly took into account Williams' alleged "recalcitrance" and "refusal to assist" DEC. Dec. ¶¶ 752-55 [Exc. 2309]. This was based on actions that Williams had every right to take. *First*, the court criticized Williams' refusal to provide alternative water, *id.* ¶¶ 454, 748 [Exc. 2238-39, 2308], but the court made no finding that the costs for alternative water were necessary, and Williams was within its rights to challenge the necessity of these actions. *Second*, the court criticized Williams' refusal to indemnify Flint Hills, *id.* ¶¶ 504, 754 [Exc. 2248, 2309], but then ***denied Flint Hills' indemnity claim—ruling for Williams***. *Id.* ¶ 730 [Exc. 2305]. Williams did not violate any regulatory directive, and the court erred in penalizing Williams for failing to take ***voluntary*** actions it had no legal obligation to take. *See La. Pac. Corp. v. Beazer Materials & Servs., Inc.*, 842 F. Supp. 1243, 1253, 1256 (E.D. Cal. 1994) (noting the government may not inflate costs "in retaliation for [a PRP-defendant's] refusal to waive its due process rights" to challenge "potential future costs it considered unwarranted" and

collecting cases); *McGinnes Indus. Maint. Corp. v. Phoenix Ins. Co.*, 477 S.W.3d 786, 800 (Tex. 2015) (recognizing PRP's right "to deny the EPA's accusations and force the EPA to bring suit"); *cf. Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort . . . to penalize a person's reliance on his legal rights is 'patently unconstitutional.'" (citations omitted)). An allocation punishing Williams for exercising its right to defend itself and deny its own liability should be reversed.

D. The trial court erred in failing to allocate responsibility to the State and ignoring Williams' equitable estoppel and laches defenses.

The State admits it is a "liable party under AS 46.03.822(a)" because it owned the refinery land. [Exc. 2106, 36]; Dec. ¶ 83, 472 [Exc. 2157, 2244]. Thus, the court should have allocated some .822(j) responsibility to the State based on that reason and its but-for causal role in allowing the sulfolane to remain in the ground throughout Williams' tenure. *See Laidlaw Transit*, 21 P.3d at 350; [Exc. 7-9, 12, 19, 22, 29, 2034-35]; [Tr. Trial 3086:14-20] [Exc. 2416]; Dec. ¶ 21, 114 [Exc. 2142, 2176]. More recently, in July 2017, the State allowed Flint Hills to turn off the pumping system, causing sulfolane to migrate offsite. [Exc. 1908, 1911]; [Tr. Trial 1410:1-16] [Exc. 2383].

Moreover, the court inexplicably ignored Williams' equitable estoppel defense and reasonable reliance on the State's repeated written affirmations that sulfolane was not regulated and could be left in the ground. Dec. ¶¶ 21, 114; [Exc. 2142, 2176]; [Exc. 19, 22-23, 2034-35]. That defense estops the State from receiving $15 million from Williams for actions the State allowed. *See Tufco, Inc. v. Pac. Env't Corp.*, 113 P.3d 668, 671 (Alaska

2005); *United States v. Moore*, 703 F. Supp. 460, 462 (E.D. Va. 1988); *Fields v. Kodiak City Council*, 628 P.2d 927, 931 n.3 (Alaska 1981) (***estoppel against a governmental entity is "a defense to an enforcement action"*** (emphasis added)). The trial court previously found this defense to be relevant to allocating damages under .822(j). [Exc. 1996-97]. *See, e.g., Southerland v. Granite State Ins. Co.*, 12 F. App'x 712, 716 (10th Cir. 2001) (reversing for failure to apply equitable estoppel).

Williams' laches defense also should have comparatively reduced Williams' responsibility because in *Flint Hills*, the trial court found laches barred Flint Hills' claims for equitable remedies against Williams due to its "unconscionable delay" in addressing sulfolane.[26] [Exc. 946]. The factual findings upon which the court's laches decision was made were affirmed on appeal. [Exc. 730, 746-47, 945-46]; *Flint Hills*, 377 P.3d at 972-73 (affirming "several findings" by the *Flint Hills* trial court that Flint Hills "reasonably should have concluded 'long before May 10, 200[8]' that sulfolane had migrated beyond the sampling disclosed in the Agreement" and concluding "these findings are not clearly erroneous"). Yet in making its .822(j) allocation, the trial court ignored this July 2014 ruling on laches.[27] The trial court's post-trial failure to consider these prior rulings is also inconsistent with the court's own prior statements on the record that these "ultimate

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[26] [Exc. 944-45] ("Williams met its burden regarding the doctrine of laches . . . . The court expressly finds that Flint Hills delayed asserting their equitable claims for an ***unconscionable*** period of time, and this delay ***prejudiced Williams***." (emphasis added)).

[27] Had the cases not been deconsolidated, this laches ruling should have been law of the case; therefore, the trial court's deconsolidation order [Exc. 2018-25] on the eve of trial prejudiced Williams. *See also, infra* at 60-63.

findings of fact on which the statute of limitations is based, as recounted by the Supreme Court of Alaska," were entitled to ***preclusive effect.*** [Tr. Trial 4135:6-16 (quoting *Flint Hills*, 377 P.3d at 973)] [Exc. 2492]. Those findings should have precluded Flint Hills from having any of its liability allocated to Williams.[28]

E. The trial court erred in failing to allocate responsibility to the City.

The City was a significant source of sulfolane.[29] Several allocation factors would have favored a significant allocation of responsibility to the City. For example, the City had long concealed the truth about its effluent discharge location from regulators by submitting inaccurate and misleading permit applications and regulatory reports. [Exc.

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[28] Although the court noted Flint Hills was responsible for "about a two-year delay" in drilling recommended monitoring wells near the refinery boundary, it concluded ***Williams*** had caused a more problematic delay. Dec. ¶ 749 [Exc. 2308]. It stated that "Williams' lab notes indicate very significant quantities of sulfolane in hydrocarbon products in sampling wells as early as 1996." *Id.* However, the "lab notes" are only post-it notes reflecting that sulfolane was found in hydrocarbon byproducts in wells on the refinery property, not in the groundwater itself. [Tr. Trial 2889:12-2894:25] [Exc. 2408-13]; [Tr. Trial 3612:19-3614:14] [Exc. 2442-44]. The court surmised that, if Williams had reported the information on the post-it notes to DEC in 1996, it could have "accelerated" the discovery of offsite sulfolane. Dec. ¶ 749 [Exc. 2308]. But, if Williams' 2001 disclosure of sulfolane in onsite groundwater did not prompt DEC to investigate whether the substance had migrated offsite, discovery of unregulated sulfolane in hydrocarbon byproducts was no more likely to trigger such an investigation. Instead, DEC more likely would have done exactly what it did in 2001—basically nothing.

[29] [Tr. Trial 3442:20–3445:12, 3887:5–3888:5] [Exc. 2433-36, 2470-71]; [R. 032042-49, 032098-116]. The City discharged wastewater effluent containing sulfolane, at times as high as 26,000 ppb, directly to groundwater through a buried pipe, in violation of its permits. [Exc. 2017]; [Tr. Trial 3442:20–3445:12] [Exc. 2435-36]; [R. 032045-47]; [Exc. 2128, (color images at Exc. 2129)]. The City's witnesses conceded its sulfolane releases would feed into the plume. [June 30, 2018 Tr. Hrg. 336:23-337:10] [Exc. 2344-45]; [*Id.* at 836:2-837:14] [Exc. 2346-47]; [Exc. 2130 (color image at Exc. 2131)]; [Exc. 2016-17]. The trial court recognized the City's contribution to the sulfolane plume. [Exc. 2015-17] (FOF 30-32, 48-51).

2014-15]; [R. 032098-116]. These false representations would have supported allocating a greater share of responsibility to the City. *See ASARCO LLC v. Atl. Richfield Co.*, 353 F. Supp. 3d 916, 948 (D. Mont. 2018), *aff'd in relevant part, vacated & remanded in part*, 975 F.3d 859 (9th Cir. 2020).

Despite the extensive evidence of the City's contributions to the sulfolane plume, the trial court entered an order on the eve of trial that deconsolidated the cases and formally eliminated the City from trial. [Exc. 2018-25]. Worse, it precluded Williams from introducing evidence on the City's sulfolane releases. [Tr. Trial 3742:21-3745:4] [Exc. 2466-69]; [*Id.* at 3440:6-3441:24] [Exc. 2431-32]. This preclusion contradicted *Laidlaw*, which suggests courts may consider "absentee . . . polluters" in allocating responsibility under .822(j). 21 P.3d at 349-50; *see also* [R. 028763-71]; [Tr. Trial 3742:3-3745:4] [Exc. 2466-69].

The plain language of .822(j) supports Williams' interpretation. The statute requires the court to "allocate damages and costs among liable parties." AS 46.03.822(j). The statute does not say the court should allocate damages only among those liable parties who are parties ***to the contribution proceeding***. Instead, it uses the term "parties" more broadly, requiring allocation among all parties who are liable for the pollution. This is consistent with federal CERCLA law. *See, e.g.*, *United States v. Consolidation Coal Co.*, 345 F.3d 409, 414 (6th Cir. 2003) ("[A] fair and equitable allocation could only be achieved by comparing [a nonparty's] role as a PRP to other PRPs."); *FMC Corp. v. Aero Indus.*, 998 F.2d 842, 847 (10th Cir. 1993) (holding it appropriate to consider "the liability of

nonparties"); *Trinity Indus. v. Greenlease Holding Co.*, 903 F.3d 333, 346 & n.6 (3d Cir. 2018). It is also consistent with principles of judicial economy and common sense, which dictate that evidence regarding all releases by all known potentially responsible parties should be introduced at the same trial, which was the logic behind the original consolidation order for all three cases.

Here, the "absent third party," *i.e.*, the City, was not "absent" at all—it was a party to the consolidated case until the court deconsolidated it. It was a known contributor, a solvent entity, and is not immune from liability in this case. The court erred by failing to consider the City's substantial contributions to the sulfolane plume, and its resulting allocation is inherently flawed as a result.

Williams was also prejudiced because the court failed to consider the evidence that the City and Williams were similarly situated prior to the regulation of sulfolane. The City has argued that it also reasonably relied on the State with respect to the State's inaction on sulfolane, and Judge Blankenship previously agreed with that point, all of which bolsters Williams' entitlement to a lower allocation. [R. 020482].

At a minimum, Williams was entitled to put on causation evidence to show that certain damages and assessments were not attributable to its releases. The State also asserted claims under AS 46.03.760 and AS 46.03.780, but neither are strict liability statutes; they require proximate causation and findings of reasonable foreseeability. In denying Williams' proffer on the City's contribution, [Tr. Trial 3742:21-3745:4, 3440:6-3441:24] [Exc. 2466-69, 2431-32], the court deprived Williams of relevant causation

evidence and incorrectly said that such evidence would only be relevant if Williams was "arguing that [the City is] the exclusive cause." [Tr. Trial 3441:7-10] [Exc. 2432]. It was error to exclude evidence that the complained of injuries were caused, at least in part, by the City's contributions. *See Cooper v. Thompson*, 353 P.3d 782, 789 (Alaska 2015); *accord Pouzanova v. Morton*, 327 P.3d 865, 869-70 (Alaska 2014) (a defendant may put on evidence of a non-party's conduct to show that the plaintiff's injuries were not "caused by the incident that was the subject of [the plaintiff's] complaint").

VI. The trial court's award of injunctive and declaratory relief should be vacated.

A. The elements for an injunction were not proven.

The State was awarded extremely broad injunctive relief, [Exc. 2318-19] (¶¶ 3(d), (e)), but failed to put on evidence that irreparable injury would result absent injunctive relief. "Equitable injunctive relief is an extraordinary remedy that is appropriate ***only*** where the party requesting relief is likely to otherwise suffer irreparable injury and lacks an adequate remedy at law." *Lee v. Konrad*, 337 P.3d 510, 517 (Alaska 2014) (emphasis added); *see also Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2010) (a litigant seeking a permanent injunction ***must prove*** (1) an irreparable injury; (2) there is no adequate legal remedy; (3) an equitable remedy is warranted considering the parties' balance of hardships; and (4) a permanent injunction would serve the public interest).

Here, the State did not argue that Williams' actions posed irreparable harm, let alone that an injunction was needed. The word irreparable does not even appear in the extensive trial transcript. The record therefore lacks evidence of any irreparable injury, or of any

balance of hardships or public interest to justify permanent injunctive relief. [Exc. 2318-19] (¶¶ 3(d), (e)). Accordingly, the Court should vacate that relief.

B. The injunctive relief also lacks the specificity required by Rule 65(d).

The court essentially ordered Williams to do whatever DEC says. Civil Rule 65(d) prohibits such vague, open-ended requirements in granting injunctive relief. Any order granting an injunction "shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." Civil Rule 65(d). Applying this mandate, this Court and others have vacated injunctions that require parties generally to "obey the law." *See, e.g.*, *Cook Inlet Fisherman's Fund v. State Dep't of Fish & Game*, 357 P.3d 789, 804 (Alaska 2015) ("[A]n injunction simply requiring [the Department] 'to obey the law' lacks the specificity required to convey what management actions it could take without risking contempt."); *see also Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1528, 1531 (11th Cir. 1996).

These injunctions violated Rule 65(d)'s provision that precludes an issuing court from incorporating by reference a "complaint or other document" to determine the acts prohibited or required. It is essential that "an ordinary person reading the court's order should be able to ascertain from the document itself exactly what conduct is proscribed." *Hughey*, 78 F.3d at 1531 (citation omitted). "Broad, non-specific language that merely enjoins a party to obey the law or comply with an agreement . . . does not give the restrained party fair notice of what conduct will risk contempt." *Id.* (quoting *Epstein Family P'ship v. Kmart Corp.*, 13 F.3d 762, 771 (3d Cir. 1994)).

Two paragraphs of the Judgment violate these principles. Paragraph 3(d) is impermissibly vague for at least three reasons. *First*, it identifies no "remediation and cleanup efforts" that Williams must undertake and the Judgment refers to documents that did not yet exist (*i.e.*, to-be-determined DEC directives).[30] *Second*, the injunction's geographic scope to remedy and clean up sulfolane is apparently limitless. It purports to make Williams responsible for "sulfolane groundwater contamination ***beyond the North Pole Refinery property***." [Exc. 2318] (¶ 3(d)). The evidence does not support such a far-flung geographic scope, but neither does Rule 65 permit this ambiguity. *Third*, there is no time limit on Williams' obligations, which exposes Williams to liability for future costs to remedy releases in which it played no part.

Paragraph 3(e) of the Judgment is similarly vague. It broadly purports to make Williams responsible ***forever*** for sulfolane contamination "beyond the Refinery property." Moreover, paragraph 3(e) incorporates all "applicable" Alaska laws, without further guidance or specificity. The only specific regulation cited, *i.e.*, 18 AAC 75, consists of ***60 pages*** of Site Cleanup Rules, and the reference to "other applicable state laws," "DEC requirements," and "approved plans" would implicate hundreds more pages of current and future laws and agency directives outside the Judgment's four corners. Williams cannot even begin to know "exactly what conduct is" required, *Hughey*, 78 F.3d at 1531, by an injunction that requires it broadly to comply with DEC's future directives and Alaska

[30] The trial court's post-***appeal*** injunctive relief imposing, for the first time, specific regulatory activities underscores that the proper regulatory processes ***were not followed before or at trial***. [Exc. 2332-33].

environmental law in general.[31]

C. The trial court erroneously awarded declaratory relief on "PFAS."

Paragraph 3(a) declares Williams to be "strictly, jointly and severally liable for . . . PFAS . . . , including liability for the State's future costs." [Exc. 2318] (¶ 3(a)). However, "PFAS" is not a single substance, but an umbrella term referring to a diverse category of man-made chemicals. Only two chemicals—PFOS and PFOA—were mentioned at trial. Although the Decision limited its "PFAS" findings to PFOS and PFOA, the Judgment is not so limited. Dec. ¶¶ 93, 477 [Exc. 2172, 2245]. Moreover, the State and Flint Hills only presented evidence that Williams used a product that included PFOS. Dec. ¶ 486 [Exc. 2246]; [Exc. 2] (MSDS for 3M product purchased by Williams that includes PFOS, "perfluoroalkyl sulfonate"). They offered no evidence Williams used PFOA or any other "PFAS" substance. Moreover, the Judgment makes Williams liable for "PFAS" contamination occurring after Williams sold the refinery or has ***yet to occur***.

In addition, the trial court's declaratory relief in favor of Flint Hills, [Exc. 2318, 2320-21] (¶¶ 3(a), 7(c), 9), already was rejected because Flint Hills had an adequate remedy at law. [Exc. 1918, 1928-30 (dismissing with prejudice declaratory relief on remand)].

The Judgment states Williams was the sole user of "PFAS" and requires Williams

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[31] The declaratory relief in the final judgment (paragraphs 3(a), 3(b), and 3(d)) should also be reversed because (1) declaratory relief hinges upon Williams being liable to the State, which it is ***not*** for all the above reasons; and (2) paragraphs 3(a), 3(b), and 3(d) of the Judgment, though labeled "declaratory relief," are improper obey-the-law injunctions.

to indemnify Flint Hills for "100% of all ***future*** costs . . . related to PFAS contamination." Dec. ¶ 497 [Exc. 2247-48]. However, these conclusions ignore evidence—including a 2018 presentation by the State that was admitted at trial—showing that ***Flint Hills*** used substantial amounts of "PFAS" in fire-training exercises and in "hot work" at the refinery. [Exc. 1999-2002]; [R. 039472-531]; [Tr. Trial 2619:14-2626:12] [Exc. 2394-401]; [R. 029074-77].[32] Finally, neither the State nor Flint Hills presented ***any*** evidence of future remediation costs with respect to any PFOS or PFOA; therefore, it failed to meet the necessity, cost-effectiveness and reasonableness standards for recovery.

VII. Primary Jurisdiction bars the "PFOS" and "PFOA" claims.

The primary jurisdiction doctrine requires a court to avoid deciding issues that should be decided by a regulatory agency first. *Matanuska Elec. Ass'n, Inc. v. Chucagh Elec. Ass'n*, 99 P.3d 553, 559 (Alaska 2004). In CERCLA litigation, federal courts routinely apply the doctrine to stay or dismiss litigation involving issues that should be first decided by EPA. *See, e.g., Massachusetts v. Blackstone Valley Elec. Co.*, 67 F.3d 981, 991 (1st Cir. 1995); *Asarco LLC v. NL Indus., Inc.*, 2013 WL 12177089, at *4-6 (W.D. Mo. Mar. 18, 2013). CERCLA "assumes that the EPA's determinations are ***to inform later court rulings.***" *Asarco*, 2013 WL 12177089, at *5 (emphasis added). Likewise, Alaska's statutory and regulatory regime clearly anticipates that DEC cleanup levels will ***inform***

[32] The court erred by excluding the Arcadis PFC Report [R. 039472-531], which proved that Flint Hills used "PFAS" onsite. [Tr. Trial. 2378:13-24] [Exc. 2392]. Although many other Arcadis documents were admitted, the court erroneously excluded the Arcadis PFC Report. *See* Alaska R. Evid. 803(23); *Norris v. Gatts*, 738 P.2d 344 (Alaska 1987).

later efforts to recover response costs either through the regulatory process or litigation.

Less than three months before trial, the court remanded "offsite" "PFAS" claims to DEC based on primary jurisdiction. [Exc. 2026-28]. However, the court clarified in a subsequent order that it would ***not*** refer "onsite" "PFAS" claims to DEC. [Exc. 2101-03]. The key basis for severing and remanding the "offsite" "PFAS" contamination claims—that "Williams is actively involved in the State regulatory process concerning PFAS in the North Pole area"—should have required a finding that DEC had primary jurisdiction over all of the "PFAS" claims. DEC's Rules define a "site" in terms of the scope of a plume, not by a property boundary. 18 AAC 75.990(115). Consistent with the definition, DEC approved an Onsite Cleanup Plan that covers contamination ***both on and off the property in the North Pole area*** and requires no further cleanup of "PFAS" on refinery property.[33] Thus, as a part of the ongoing regulatory process, Williams is investigating if "PFAS" releases from the refinery migrated "offsite," or migrated from other sources, which has profound implications on the offsite work Williams performs. The State should treat these two regulatory actions—onsite cleanup (through Flint Hills) and offsite characterization (through Williams)—consistent with the Rules, as one "Site" to which primary jurisdiction applies.[34]

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[33] [Exc. 1909-10] (listing PFOA and PFOS as constituents of concern (COCs) and noting groundwater cleanup level of .4 µg (400 ppt) and stating the cleanup objectives for all COCs except sulfolane will be the Table C cleanup levels and the point of compliance will be the site boundary).

[34] The Williams Companies, Inc. is implicated in the Judgment only over onsite "PFAS" contamination. [Exc. 2320-21] (¶¶ 8, 9).

The only apparent basis offered by the court for this disparate treatment of offsite and onsite "PFAS" was Williams' alleged delay. [Exc. 2101-03]. But the trial court's order does not explain how Williams delayed raising primary jurisdiction as to "PFAS," particularly since the State's 2014 Complaint did not mention "PFAS" [Exc. 757-76], and the entire focus of the three underlying actions for years was sulfolane.

Even more important, "delay" is not an appropriate basis for deciding whether primary agency jurisdiction exists. Primary jurisdiction cannot be waived, and appellate courts may even consider and apply the doctrine *sua sponte* for the first time on appeal. *See C.G.A. v. State*, 824 P.2d 1364, 1369-70 (Alaska 1992); *Astiana v. Hain Celestial Grp.*, 783 F.3d 753, 759 (9th Cir. 2015); *Blackstone*, 67 F.3d at 988-91 (invoking EPA's primary jurisdiction *sua sponte* on appeal).

Moreover, the trial court's post-appeal injunctive relief imposing, for the first time, specific regulatory activities underscores that the proper regulatory processes ***were not followed before the trial began***. [Exc. 2332-33]. Thus, the Judgment on the entirety of the "PFAS" claims should be vacated under the doctrine of primary jurisdiction.

VIII. The trial court's Judgment violates the Due Process and Takings Clauses.

A. Williams did not receive fair notice.

DEC told Williams that sulfolane was not a hazardous substance and not regulated. DEC specifically allowed sulfolane to stay in the ground. The State cannot now, over fifteen years later, pursue an enforcement action, nor can the trial court in that action rewrite .822 and .826(5)(a) and impose over $100 million in liability, without violating the

Due Process and Takings Clause of the U.S. Constitution, as well as Article I, Sections Seven and Eighteen of the Alaska Constitution.[35]

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). In *Fox*, the Supreme Court held the network defendants were denied due process when they were fined for violating the FCC's indecency policy. *Id.* at 258. The Court found the defendants had relied on prior FCC guidance, which allowed the conduct at issue, and the "policy in place at the time of the broadcasts gave no notice" that the FCC's policy had changed and the conduct was then actionable. *Id.* at 254. Although the FCC could change its interpretation of obscenity laws, the Court held it could not retroactively ***apply*** that new interpretation in an enforcement action against defendants who could not have known of the change and relied on the prior guidance.

Similarly, in *Christopher v. SmithKline Beecham Corp.*, the Supreme Court declined to give deference to a new regulatory interpretation offered in the Department of Labor's amicus brief where the plaintiffs invoked the interpretation "to impose potentially massive liability on respondent for conduct that occurred well before that interpretation was announced." 567 U.S. at 156-57. To avoid an "unfair surprise," the Court cautioned

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[35]Judge Blankenship denied Williams' motion for summary judgment on the State's claims, including Williams' constitutional defenses. [Exc. 1949, 1974-78]; [R. 002598-628]. Justice Matthews erroneously adopted these legal conclusions in his Decision. Dec. ¶¶ 71, 790 [Exc. 2153, 2315].

that a new agency interpretation should not be used to impose liability for past actions taken in good faith reliance on prior agency pronouncements. *Id.* at 156-57 (citing *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 295 (1974)).

The fair notice doctrine has been applied in many environmental cases. *See, e.g.*, *Blackstone*, 67 F.3d at 991 (vacating CERCLA summary judgment where regulations did not give fair notice that the chemical at issue was hazardous); *Rollins Env't Servs., Inc. v. U.S. EPA*, 937 F.2d 649, 654 (D.C. Cir. 1991) ("Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule." (citation omitted)). "[W]here [an environmental] regulation is not sufficiently clear to warn a party about what is expected of it—an agency may not deprive a party of property by imposing civil or criminal liability." *Gen. Elec. Co. v. U.S. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995).

This is consistent with Alaska law. This Court held Alaska's "pollution" statute (AS 46.03.710) fails to provide fair notice and creates a risk of arbitrary and capricious enforcement of its civil and criminal penalties. *Stock*, 526 P.2d at 12. Fair notice (1) is required to trigger environmental liability under Alaska law, (2) requires foreseeability, and (3) is judged prospectively. *Id.* at 10. This Court has applied *Stock*'s fair notice requirements in cases, like this one, involving ***civil*** penalties. *See VECO Int'l, Inc. v. Alaska Pub. Offices Comm'n*, 753 P.2d 703, 714 (Alaska 1988) ("People should not be required to guess whether a certain course of conduct is one which is apt to subject them to criminal

or ***serious civil penalties***." (emphasis added)); *Storrs v. State Med. Bd.*, 664 P.2d 547, 549 (Alaska 1983) (discussing the "importance of fair notice and fair enforcement" in assessing "***the constitutionality of a civil statute or regulation***" (emphasis added)); *see also Fox*, 567 U.S. at 253; *Mathews v. Eldridge*, 424 U.S. 319, 332-35 (1976).

To have fair notice in an environmental case, a person must understand whether the substance at issue is hazardous and if a release would create a substantial risk of harm. *Blackstone*, 67 F.3d at 991 (fair notice was lacking when EPA regulations would not allow a reasonable person to answer the question of whether ferric ferrocyanide was a hazardous substance as defined in CERCLA). Williams' lack of fair notice is striking. DEC's actions and communications gave Williams no notice that its conduct created a substantial risk of actual harm.

Williams told DEC that sulfolane had been detected on the property and sought DEC's guidance. DEC repeatedly told Williams that sulfolane was not a regulated hazardous substance, no cleanup action was required, and the sulfolane could be left in the ground. *See* above at 5-6. The trial court's eve-of-trial interpretation of "hazardous substance" for purposes of .822, as well as its companion ruling that sulfolane presents "imminent and substantial danger" under .826(5), were novel and un-foreshadowed issues of first impression. Not only that, it was a reversal of both the DEC position on sulfolane during 2001-2003, as noted above, and the intervening decision of the same court. [Exc. 1961-65]. The trial court even acknowledged that some might disagree with it. [Exc. 2115]. If the State had adopted the trial court's interpretation years earlier, Williams could have

taken action ***then*** to reduce environmental impacts and substantially mitigate damages; moreover, Flint Hills' later contributions and failure to prevent offsite migration could have been reduced.

B. The trial court's order requiring Williams to pay for a new municipal water system constitutes an unconstitutional taking.

When applied retroactively to Williams, the court's interpretation of AS 46.03.826(5)(A) constitutes a taking under the U.S. and Alaska Constitutions. The Supreme Court has recognized that the imposition of retroactive civil liability can be a regulatory taking, particularly when it is linked to an "identified property interest."[36] *E. Enters. v. Apfel*, 524 U.S. 498, 522-23 (1998) (concluding economic regulation may effect a taking where the government seeks "retroactive liability"); *see Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 613-14 (2013) (requiring the additional element of an "identified property interest"). The Alaska Constitution affords more protections than its federal counterpart, so any violation of federal law also violates Alaska law. *Ehrlander v. State, Dep't of Transp. & Pub. Facilities*, 797 P.2d 629, 633 (Alaska 1990). The federal Takings Clause applies even if a court effects the taking. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 713-14 (2010). The Alaska Constitution is similarly phrased. *See* Alaska Const. art. I, § 7. This Court has recognized the concept of judicial takings. *DeLisio v. Alaska Superior Court*, 740 P.2d 437, 443 (Alaska 1987).

In *Eastern Enterprises*, the Supreme Court instructed lower courts to look at "the

[36] [Exc. 36] ("The proposed sale will accomplish several state goals including . . . reducing potential state liability for contamination at the site."); [Exc. 174-76].

economic impact of the regulation, the extent to which the regulation interferes with investment-backed expectations, and the character of the government action." 524 U.S. at 526-27 (citations and internal quotation marks omitted). A taking may occur if a regulation "***imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience***." *Id.* at 528-29 (emphasis added). The Supreme Court noted with disfavor retroactive applications of the law in its Fifth Amendment jurisprudence, particularly where the law "reaches back to impose a liability . . . and the magnitude of that liability raise substantial questions of fairness." *Id.* at 534.

If the trial court's interpretation of Section 46.03.826(5)(A) is given retroactive effect, it would constitute an unconstitutional regulatory taking as applied to Williams. Williams would have to pay $80 million for conduct occurring decades earlier, in defiance of its investment-backed expectations on a specific property—the refinery property—because of a change in law. Moreover, the property taken from Williams would be used by the State to fund a public works project, *i.e.*, the municipal water system, without just compensation to Williams. Therefore, this is precisely the type of case the Supreme Court telegraphed constitutes a regulatory taking. In fact, the trial court's Judgment is more egregious than the judgment in *Eastern Enterprises* because after Williams advised DEC that it detected sulfolane in the refinery groundwater, DEC advised Williams that sulfolane was not regulated as a "hazardous substance" and could remain in the ground. There can be no greater interference with "reasonable investment-backed expectations" than

imposing liability after a change in the law, especially where there was clear reliance on the prior law because of government action. *Meriden Trust & Safe Deposit Co. v. FDIC*, 62 F.3d 449, 454 (2d Cir. 1995) ("Indeed, a paradigmatic regulatory taking occurs when a change in the law results in the immediate impairment of property rights, leaving the property owner no options to avoid the loss.").

DEC expressly advised Williams that sulfolane was not a concern, which shaped Williams' investment-backed expectations under Supreme Court precedent. *Resource Invs., Inc. v. United States*, 85 Fed. Cl. 447, 514 (2009) ("[T]he mere fact that a business operates in even a highly-regulated industry does not mean . . . that the business cannot have reasonable investment-backed expectations."); *Laguna Gatuna v. United States*, 50 Fed. Cl. 336, 347 (2001) (finding a taking because "in light of its 1987 inquiry to the regional counsel for the EPA, [defendant] had no reason not to make substantial investments in its operation"). As such, not only is this new interpretation, if applied retroactively, a violation of the Due Process Clause, but it also violates the Takings Clause.

CONCLUSION

For all the above reasons, the Judgment of the trial court should be reversed with directions to enter judgment in Williams' favor.

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David H. Shoup (AK 8711106)
TINDALL BENNETT & SHOUP, P.C.
508 West 2d Avenue, 3d Floor
Anchorage, AK 99501
Tel.: 907.278.8533
Email: shoup@tindall-law.com

Tristan L. Duncan (MO 39525)
Mathew L. Larsen (MO 60168; CA 227810)
SHOOK, HARDY & BACON L.L.P.
2555 Grand Blvd.
Kansas City, MO 64108
Tel.: 816.474.6550
Email: tlduncan@shb.com
Email: mlarsen@shb.com

Attorneys for Williams Alaska Petroleum, Inc. and The Williams Companies, Inc.

4841-2582-5245