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, Flint Hills Resources, LLC, Flint Hills Resources Alaska, LLC, and City of North Pole,	)	Date: July 19, 2021
Appellees.	)	

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

APPELLANTS' REPLY TO APPELLEES' BRIEFS

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

If the commissioner determines that the containment or cleanup of a hazardous substance undertaken is inadequate, the commissioner may direct the person undertaking the containment or cleanup to cease and may undertake the containment or cleanup directly or by contract.

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.

46.03.765. Injunctions

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

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."

Alaska Constitution Article I, Section 7

§ 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.

Alaska Constitution Article I, Section 18

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

In their opposition briefs, both Flint Hills and the State claim the applicable rules do not apply to them. Flint Hills contends its binding Agreement with Williams is relevant only as a factor in the contribution allocation. Similarly, the State asks the Court to ignore the plain terms of the definition of "hazardous substance" and argues it need not follow its own site cleanup rules when incurring response costs. As demonstrated below, these and other points from the oppositions are meritless, and the judgment should be reversed.

I. The Agreement requires Judgment in Williams' favor.

A. The Court should reject Flint Hills' efforts to avoid the contract.

Implicitly conceding the weakness of its contractual arguments, Flint Hills primarily argues (at 8-11) the Court should ignore the Agreement for three reasons. All are baseless.

First, Flint Hills argues (at 9) that AS 46.03.822**(g)** precludes Williams from "transfer[ring] liability under this section." However, Williams never sought to ***transfer*** first-party liability it may owe to the State.[1] Instead Williams correctly argues the Agreement extinguishes any non-contractual liability to Flint Hills and requires Flint Hills to ***indemnify Williams*** for liability with respect to sulfolane contamination. Section .822(g) expressly ***permits*** "an agreement to insure, hold harmless, or indemnify a party to the agreement for liability under this section." Thus, although private parties cannot evade statutory liability to the State by entering into a contract, the statute recognizes that they may shift liability among one another. *See Smith Land & Improvement Corp. v. Celotex*

[1] Williams discusses (at 15-16) Flint Hills' assumption of liability for sulfolane response costs only to show the Agreement always treated the costs as Flint Hills' responsibility.

Corp., 851 F.2d 86, 89 (3d Cir. 1988) ("[A]greements to indemnify . . . are enforceable between the parties but not against the government."). The indemnitee remains responsible for any environmental liability under the statute, but the indemnitor (Flint Hills) must reimburse the indemnitee (Williams) for amounts due to the State.

Second, Flint Hills wrongly claims without authority (at 10) that .822**(j)** "limit[s]" "the role of [indemnity] agreements." But .822(j) merely provides that "[a] person may seek contribution from any other person who is liable under [.822](a) . . . ." It does not foreclose Williams from enforcing its indemnity rights merely because the indemnitor (Flint Hills) asserts a contribution claim. Nor does .822(j) invalidate a contractual waiver of the right to pursue contribution under the statute. To the contrary, as Flint Hills' authorities recognize, the CERCLA provision on which .822(g) is based reflects "a policy favoring private ordering of ultimate risk distribution," as the parties did here. *Beazer E. Inc. v. Mead Corp*. 412 F.3d 429, 447 (3d Cir. 2005) (citation omitted).

Finally, Flint Hills suggests (at 10) the indemnity agreement is relevant only as "one factor that a court may consider within its section .822(j) equitable allocation analysis." But the allocation issue is distinct from the indemnity claim, which should be addressed on its own merits *de novo*.[2] Flint Hills' authorities (cited at 11 & n. 21) reinforce the separate nature of contribution and indemnity claims and ***do not support*** its assertion that an

[2] As such, review of these contract interpretation issues is *de novo*—not abuse of discretion, as urged by Flint Hills (at 11). However, Williams should prevail under either standard.

indemnity agreement is only relevant as a factor in the contribution allocation.[3]

B. Flint Hills agreed to indemnify Williams for all sulfolane response costs.

1. Flint Hills must indemnify Williams for response costs relating to the matters listed on the Disclosure Schedule.

Sections 10.2(a) and (b) of the Agreement set out the parties' respective indemnity obligations. When read together, these provisions demonstrate the parties' clear intent that Flint Hills bears responsibility for all sulfolane response costs.

Section 10.2(a)(iv) addresses indemnities owed by Williams to Flint Hills relating to environmental matters.[4] Subsections (A) and (B) address liability for "Environmental Conditions." Subsection (A) requires Williams to indemnify Flint Hills for:

> **(A) any Environmental Condition existing prior to the Effective Time, at, on or under or arising, emanating, or flowing from any of the Assets, or from the property underlying the Real Property, whether known or unknown as of the Effective Time, including any loss, property damage, natural resource damage, injury to, or death of any third-party arising therefrom, but excluding (i) any and all costs of cleanup, monitoring, corrective actions and compliance with regulations incurred after the Effective Time with respect to the matters set forth on Section 10.2(a)(iv) of the Disclosure Schedule and (ii)**

This provision broadly covers Damages relating to "any Environmental Condition" existing "at" or "flowing from" the property. But § 10.2(a)(iv)(A) expressly ***excludes*** from Williams' responsibility "any and all costs of cleanup, monitoring, corrective actions and compliance with regulations incurred after the Effective Time ***with respect to the matters***

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[3] In those cases cited by Flint Hills, the courts recognized the indemnity claims were previously resolved. *See Trinity Indus., Inc. v. Greenlease Holding Co.*, 903 F.3d 333, 349-50 (3d Cir. 2018); *Beazer*, 412 F.3d at 449; *Lockheed Martin Corp. v. United States*, 35 F. Supp. 3d 92, 116, 143 (D.D.C. 2014). Here, Williams continues to assert a contractual indemnity claim that should be adjudicated on its own merits.

[4] The trial court correctly held the contribution clause in § 10.2(a)(iv) barred Flint Hills' indemnity claim, and Flint Hills ***does not*** appeal that decision. [Exc. 75] (§ 10.2(a)(iv)).

set forth on [the] Disclosure Schedule." (Emphasis added.)

Because the exclusion in Subsection (A) forecloses any claim that Williams could owe indemnity here, Flint Hills relies on subsection (B) instead. Subsection (A) specifically addresses sulfolane whereas subsection (B) does not. Because the specific trumps the general, (A) controls here. *See City of San Antonio v. Heath & Stich, Inc.*, 567 S.W.2d 56, 60 (Tex. Ct. App. 1978) (citing cases). Moreover, subsection (B) is inapplicable because it requires Williams to indemnify Flint Hills only for:

> **(B) loss, property damage, natural resource damage, injury to, or death of any third-party arising out of or related to any Environmental Condition to the extent (i) not located on the Assets or the property underlying the Real Property and (ii) existing prior to the Effective Time;**

Unlike subsection (A), which addresses Environmental Conditions "***emanating, or flowing from***" the property, subsection (B) applies only to a different and narrower category of Environmental Conditions: those "not located on the Assets or the property." By its terms, (B) applies to Environmental Conditions that were ***never*** located on the refinery property and not those, like sulfolane, that "emanate" or "flow" "from" the property and thus fall within (A). ***The off-property sulfolane is part of the same Environmental Condition that remains on the refinery property and which "flows from" and "emanates from" the property***. Thus, (A)—not (B)—applies, and (A)'s exclusion is fatal to Flint Hills' claim.

Section 10.2**(b)** removes all doubt, placing responsibility on Flint Hills to indemnify Williams for the environmental response costs carved out of Williams' indemnity obligations in § 10.2**(a)**. It requires Flint Hills "to the fullest extent permitted by law" to

> indemnify, defend and hold [Williams] harmless, from and against 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 after the Effective Time ***with respect to the matters set forth on . . . the Disclosure Schedule***.

[Exc. 76-77] (§ 10.2(b)(v)(C)) (emphasis added). As shown below, this includes all costs incurred relating to sulfolane contamination.

2. The Disclosure Schedule includes response costs for the sulfolane contamination at issue here.

Flint Hills concedes (at 15) the Disclosure Schedule addresses sulfolane contamination relating to the refinery, but it argues the Schedule does not address sulfolane that was not on the refinery property when Flint Hills purchased it. This interpretation applies a distinction found nowhere in the Agreement and should be rejected.

The Disclosure Schedule describes the relevant environmental "matters" as:

SCHEDULE 10.2(a)(iv)
KNOWN ENVIRONMENTAL MATTERS

A. Any and all costs of clean-up, monitoring, corrective actions and compliance with regulations incurred after the Effective Time with respect to contamination specifically identified in the referenced figures, tables and text described below. Buyer 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. Therefore, Buyer understands and acknowledges that the levels of Hazardous Materials measured in monitoring wells and contained in the figures, tables and text described below will vary over time, and that Buyer is responsible for such normal variations, as well as any changes in such contamination resulting from Buyer's actions or omissions after the Effective Time. 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.

Flint Hills largely ignores the provision's first sentence, the one that documents the parties' agreement and defines the full scope of Flint Hills' liability. The next three sentences merely state what the "***Buyer***" (Flint Hills) "has agreed to," "understands," and "acknowledges." They do not purport to bind the Seller (Williams). They are recitals that act to limit Flint Hills' defenses, not expand them.

The controlling first sentence provides that Flint Hills must indemnify Williams for "[a]ny and all" response costs "incurred after the Effective Time with respect to contamination specifically identified" in the Disclosure Schedule. The term "specifically identified" modifies "contamination." The sentence ***does not*** impose geographic limits on Flint Hills' liability for "contamination." Nor does it limit Flint Hills' liability to contamination in the precise physical ***locations*** identified in the Disclosure Schedule, as Flint Hills suggests. The sentence requires only that the "contamination" be "specifically identified" on the Disclosure Schedule. Flint Hills cannot dispute that sulfolane contamination originating at the refinery was specifically identified here. Thus, Williams is entitled to indemnity for response costs incurred with respect to that contamination.

Although Flint Hills repeatedly invokes the second sentence, which refers to contamination "at the Real Property," the first sentence of the Disclosure Schedule is ***not*** subject to, or limited in any way by, the second sentence. The second sentence simply makes clear that ***Flint Hills*** "has agreed to assume full responsibility for all existing, known contamination at the Real Property specifically identified" in the Disclosure Schedule. It does not say that ***Williams*** agreed to any geographic limitations on Flint Hills' obligations. Nor does Flint Hills disclaim responsibility for contaminants that originated at the identified properties, "flowed from" the properties and ***were part of*** the same "existing, known contamination" but had migrated from the properties.[5]

[5] As discussed *supra* at 3-6 and at Wms Br. 18-24, the definitional and operative language of Articles II and X make clear that the Disclosure Schedule covers known or unknown

The next two sentences further undermine Flint Hills' argument by making clear that it understood the contaminants' levels and ***locations*** were imprecise and would change over time. Flint Hills acknowledged that the data provided was a snapshot, and that it should extrapolate from the data to develop "reasonable conclusions about present contaminant concentrations at the locations sampled and contaminant contours ***outside those locations***." (Emphasis added). In fact, the court found—in a finding not challenged by Flint Hills—"[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]. Thus, Flint Hills should have known sulfolane contamination existed beyond the locations identified in the Disclosure Schedule—some of which were near the property boundary [Exc. 2127]—and would migrate over time.

The absurdity of Flint Hills' position is that sulfolane contamination from a well located at the southern property boundary could migrate the exact same "reasonable" distance as contamination at a well at the northern boundary, but only the former would be Flint Hills' responsibility, not the latter. Such an arbitrary result would be nonsensical. By accepting responsibility for "any and all" response costs "with respect to" that disclosed contamination, Flint Hills necessarily assumed liability for response costs for ***all*** of the refinery's sulfolane contamination at issue.

Flint Hills also relies (at 15) on the Disclosure Schedule's recital that Flint Hills

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liability for all sulfolane contamination. *See* Sections 2.3(e)(xvii) ("Environmental Liabilities set forth on Section 10.2(a)(iv) of the Disclosure Schedule" are excluded from Williams' liabilities and assumed by Flint Hills), 10.2(a)(iv), and 10.2(b).

"further understands that the data is representative of *site* conditions." This statement regarding Flint Hills' "understand[ing]" does not create a contractual limitation on Williams' indemnity rights clearly established in the first sentence. Further, the undefined term "site" is not limited to the physical boundaries of the properties conveyed in the Agreement. As shown above, the parties used the defined term "Real Property" when they wanted to refer to the conveyed properties, and they did not use the term in this sentence.

When used, as here, in the context of environmental liability, the term "site" denotes an environmental "site," which extends wherever contamination from the same source may exist. The United States Environmental Protection Agency ("EPA") defines "site" as

> that portion of a facility that includes the location of a release (or releases) of hazardous substances and ***wherever hazardous substances have come to be located***. As such, ***the extent of a site is not limited by property boundaries***, and does not include clean areas within a facility's property boundaries.

EPA, "Clarifying the Definition of 'Site' Under the National Priorities List" (emphasis added). Alaska law similarly defines "site" to include the full scope of a contaminant plume without regard to property boundaries. 18 AAC 75.990(115) ("'[S]ite' means an area that is contaminated, including areas contaminated by the migration of hazardous substances from a source area, regardless of property ownership"). Thus, the parties' use of the term "site" in this context ***supports*** the conclusion that Flint Hills' liability for sulfolane contamination ***does not*** end at the property's boundary.

Finally, it makes practical sense that the parties would allocate responsibility for all contamination originating at a single source to a single party. Allocating responsibility to one party would streamline the regulatory process and avoid costly litigation to establish

which molecules of the substance were on-property or off-property at a specific time.[6] Moreover, it is logical for the responsible party to be the buyer (Flint Hills), which controls the property and can make the operational changes often required to remediate contamination. Flint Hills is right about one thing (at 12): words ***do*** matter. Here, the words of the parties' contract unambiguously require Flint Hills to pay response costs for all sulfolane contamination originating at the refinery.

3. Flint Hills ignores the "*with respect to*" language.

Williams is entitled to indemnity for the additional reason that the off-property sulfolane ***relates to*** the on-property sulfolane disclosed in the Disclosure Schedule. Section 10.2(b)(v)(C) requires Flint Hills to indemnify Williams for "any and all" damages incurred "***with respect to the matters*** set forth on . . . the Disclosure Schedule." (Emphasis added). Flint Hills does not dispute that "with respect to" is a synonym for "relating to" or "in connection with." Nor can it deny that the sulfolane that had migrated off the property in 2004 was related to the sulfolane remaining on the property. Thus, Flint Hills' obligations include all sulfolane contamination at issue because it relates to the on-property sulfolane that Flint Hills concedes was disclosed in the Disclosure Schedule.[7]

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[6] The parties clearly sought to avoid the need to distinguish between contaminants years after contamination occurred. *See, e.g.*, [Exc. 75] (§§ 10.2(a)(iii) and (iv)), [Exc. 77] (§§ 10.2(b)(iv)(A), (v)(A), and (v)(B)).

[7] Flint Hills contends (at 18) it has no duty to indemnify Williams for liabilities unless it assumed the liabilities in the Agreement. First, Flint Hills did assume these liabilities. Wms Br. 15-18. Moreover, an indemnitor may have liability to an indemnitee even if the indemnitor itself owes no responsibility to the injured third party. For example, insurers routinely pay proceeds to third parties on behalf of their insureds even though the insurers themselves have assumed no responsibility to the third parties.

4. Extrinsic evidence is irrelevant to interpreting the unambiguous Agreement.

Flint Hills recognizes (at 20 (quoting *URI, Inc. v. Kleberg Cnty.*, 543 S.W.3d 755, 757 (Tex. 2018)) that Texas law forbids a court from considering extrinsic evidence that "adds to, alters, or contradicts" the text of an unambiguous contract. Because the evidence cited by the trial court does precisely that, the court erred. When construing an unambiguous contract, a court may consider "only circumstantial evidence that is objective in nature," *e.g.*, evidence regarding the setting and context of the negotiations. *URI*, 543 S.W.3d at 768. A court may ***not*** rely on evidence of the parties' "subjective intent." *Id.* at 769. Here, the court and Flint Hills cite testimony regarding beliefs of individuals as to the scope of the relevant indemnity provisions. This is not objective evidence of the circumstances in which the Agreement was entered. It is highly subjective evidence that "adds to, alters, [and] contradicts" the Agreement's text. Thus, it should play no role in construing the unambiguous contract.

C. Flint Hills waived any right to statutory contribution.

With limited exceptions, the indemnity provisions of Article X provide the parties' "sole and exclusive remedy" for "any and All Actions or Damages arising out of [the] Agreement." [Exc. 81] (§ 10.5). Flint Hills argues this "Exclusivity of Remedies" provision does not bar its statutory contribution claim because the claim falls within an exception to § 10.5 that permits claims for "equitable relief, including claims for injunctive relief or specific performance." Flint Hills' contention that a $52 million award on a statutory cause of action constitutes "equitable relief" finds no support in the Agreement or Alaska law.

Flint Hills fails to address—much less to distinguish—this Court's ruling in *Flint Hills* that statutory contribution seeks a "legal remedy." *Flint Hills Res. Alaska, LLC v. Williams Alaska Petroleum, Inc.*, 377 P.3d 959, 974 (Alaska 2016). This Court affirmed the dismissal of Flint Hills' equitable claims against Williams for specific performance and declaratory judgment because the claims sought remedies "identical to the ***legal remedies*** Flint Hills sought in its statutory and contractual claims." *Id.* (emphasis added). "Flint Hills' legal claims" included its claim to "compel Williams . . . to contribute to Flint Hills' damages under AS 46.03.822." *Id.* Under this controlling authority, the "equitable relief" exception to § 10.5 cannot apply, and Flint Hills' claim for statutory contribution is barred. Flint Hills nevertheless asks the Court (at 23) to hold that the damages awarded on Flint Hills' statutory contribution claim constitute "equitable relief" because (1) .822(j) requires the court to engage in an "equitable allocation," and (2) the allocation issue is tried to the court, not a jury. Neither supports Flint Hills' claim.

First, Flint Hills relies (at 23) on this Court's statement that "'contribution claims essentially seek to allocate damages **equitably** among those who share responsibility.'" (quoting *Oakly Enters., LLC v. NPI, LLC*, 354 P.3d 1073, 1080 (Alaska 2015)) (emphasis by FH). But § 10.5 excludes only equitable ***relief***. That the court "equitably" ***allocates*** damages among responsible parties does not change the fact that any relief is in the form of money "***damages***," a legal remedy. *Oakly*, 354 P.3d at 1082; *Wooddell v. Int'l Bhd. of Elec. Workers, Local 71*, 502 U.S. 93, 98 (1991) (noting that claims for money damages are "a prototypical example of an action at law"); "Irreparable-Injury Rule," Black's Law

Dictionary (11th ed. 2019) (listing "monetary damages" as example of a "legal remedy").

Second, contrary to Flint Hills' suggestion (at 23), this Court did not hold in *Oakly* that contribution under .822(j) is equitable relief. The Court merely noted in *dicta* that the trial court was "acting within its authority under Alaska law when it made equitable findings in the contribution phase . . . to support its allocation of damages." 354 P.3d at 1082. This statement recognizes that the statute delegates ***to the court*** the authority to make the allocation. AS 46.03.822(j). The statement ***does not*** purport to categorize contribution as an equitable remedy.[8] And even if it had done so, the holding would have been implicitly overruled by the Court's decision the next year in *Flint Hills.*

Flint Hills' reliance on *Trinity* is also misplaced. The agreement in *Trinity* included a "non-waiver of remedies' clause" that expressly ***preserved*** "any rights or remedies which the parties hereto may otherwise have at law or in equity." 903 F.3d at 350. In stark contrast, Flint Hills and Williams specifically agreed that the indemnification provisions would provide the "***sole and exclusive remedy***" for damages arising out of the Agreement.

Under the construction adopted by the trial court and urged by Flint Hills, the "equitable relief" exception to § 10.5 would swallow the rule and upend the parties' expectations. It would permit a party (Flint Hills) that is not entitled to a dollar of indemnity for sulfolane contamination under the Agreement to recover every dollar it seeks under a statutory cause of action, thus circumventing Article X altogether and opening the door to

[8] Flint Hills relies on a footnote in *Oakly* that, without discussion, quotes *Vinson v. Hamilton*, 854 P.2d 733 (Alaska 1993). But *Vinson* distinguished the landlord's equitable eviction action from an action asserting "[c]laims for damages." 854 P.2d at 737.

the very type of uncertainty and shifting of environmental responsibilities the parties sought to avoid. The Court should hold that § 10.5 bars Flint Hills' contribution claim.

D. The trial court erred in failing to apply the Environmental Cap or credit the insurance proceeds toward the Cap.

The plain language of the Agreement and this Court's prior ruling provide that "all environmental liabilities" are subject to the Cap. *Flint Hills*, 377 P.3d at 976 ("[T]he parties bargained for ***all environmental liabilities*** to be subject to a damages cap." (emphasis added)). The Court held the Cap applied to Flint Hills' claim that Williams was liable under § 2.3 of the Agreement because it had retained liability for sulfolane contamination.[9] The Court reasoned that "[t]he damages cap would lose all effect if all environmental damages subject to the cap under Section 10.4 were also exempt from the cap under Section 2.3." *Id*. The result now urged by Flint Hills is equally absurd. Flint Hills should not be permitted to avoid the agreed-upon Cap on environmental liabilities simply by pursuing the ***exact same damages*** under the guise of a contribution claim. Flint Hills offers no reason why the Court should depart from its earlier ruling and permit it to bypass the Cap in this way.

Flint Hills contends (at 27-28) the Environmental Cap applies only to damages awarded as indemnity. Nothing in § 10.4(b) limits the Cap to indemnity payments. Rather, the Cap is "the maximum amount of "***indemnifiable*** Damages" that may be recovered from Williams. [Exc. 81] (§ 10.4(b)) (emphasis added).[10] Flint Hills fails to acknowledge this

[9] Thus, Flint Hills' assertion (at 28 n.62) that the Court's ruling "was made solely in the context of Flint Hills's *contractual claim* for indemnification" is wrong.

[10] Flint Hills does not dispute that the contribution award "aris[es] out of . . . the matters enumerated in Section 10.2(a)" and relates to "Environmental Claims."

requirement and offers no definition of "indemnifiable." In fact, the only logical construction of the term is that the Cap applies to all Damages of the type that ***may be subject to indemnification***, regardless of whether they are awarded on that basis.

Similarly, the court erroneously concluded that "public policy" permitted it to disregard contractual limits on environmental liabilities. Although Flint Hills wrongly argues (at 29-30) that Williams failed to participate in the regulatory process, it does not explain how public policy permits the court to refuse to apply a bargained-for liability Cap.

The insurance proceeds Flint Hills received also reimbursed "indemnifiable Damages," and, more importantly, were subject to the mandatory "credit" in § 10.3(b). Flint Hills' response that those proceeds were not sufficiently "from" Williams simply repeats the faulty analysis of the trial court and pays no mind to *Alyeska Pipeline Serv. Co. v. H.C. Price Co.*, 694 P.2d 782 (Alaska 1985). Even under a joint policy, the rationale of *Alyeska* and the principle that a defendant's insurance proceeds are attributed to the defendant/insured both support applying the insurance proceeds to the Cap.

II. The State evades the plain meaning of "hazardous substance" in AS 46.03.826(5)(A).

A. The Court must first interpret the statute *de novo.*

The State attempts (at 11-14) to recast the issue of whether sulfolane is a "hazardous substance" under AS 46.03.826(5)(A) as a mere fact issue that is reviewed for clear error and can be satisfied by any evidence suggesting that sulfolane may be "dangerous." The "test" proposed by the State is untethered to the definition codified by the Legislature, and the Court should reject the State's invitation to rewrite the statute.

When a statutory definition must be satisfied, the Court must first construe the statute *de novo* to determine its meaning. *See*, *e.g.*, *Adamson v. Municipality of Anchorage*, 333 P.3d 5, 11, 16-22 (Alaska 2014); *Guttchen v. Gabriel*, 49 P.3d 223, 225 (Alaska 2002). The State asks the Court to skip that step, arguing there was no "clear error" because the evidence showed that sulfolane is potentially "dangerous"—which is not the statutory standard. The State simply points to testimony as to what is "dangerous" or "hazardous" in the abstract[11] and ignores the demanding language of .826(5)(A). But in his summary judgment order, Judge Blankenship had it exactly right—***the evidence is framed by the legal standard, not vice versa***—so he correctly struck Mr. Wu's testimony, which "wholly ignored the applicable statutory language of AS 46.03.826(5)(A)." [Exc. 1963-64]. By arguing (at 11) that its witnesses were not required to "recite subsection (a)'s legalese," the State tacitly concedes that none of its witnesses testified to that standard.

B. The State fails to support the trial court's eleventh-hour interpretation of .826(5)(A).

The State does not dispute that the rules of statutory interpretation preclude courts from adding terms to a statute. It also fails to dispute that the court did just that. In a new interpretation of the statute handed down *sua sponte* on the eve of trial, the court added key terms to .826(5)(A)—"reasonable medical concern," "potential" harm, that "takes time to

[11] This testimony (at 11) relates to sulfolane's alleged effect on "mammals" and "organisms" ***other than humans***, but there was no showing of "imminent and substantial danger" from the sulfolane in the wells to non-humans, either. The State's concern for zebra fish rings hollow because its chosen remedy, the piped water system, is targeted only at humans. The settlement permits sulfolane to migrate offsite and remain in the aquifer.

develop"—that are nowhere in the statutory text. Unable to defend the court's failure to interpret the actual statutory language, the State instead offers a series of misdirected arguments. For example, it argues (at 15 (citing *Berg v. Popham,* 113 P.3d 604 (Alaska 2005))) the Legislature intended for Alaska law to impose broader liability than CERCLA. This is inaccurate and irrelevant as to .826(5)(A). This Court in *Berg* did not even discuss .826(5)(A)—which ***predates*** the legislation discussed in *Berg* (Wms Br. 34-35)—and certainly did not suggest that "imminent and substantial danger" can be rewritten to say "reasonable medical concern."

The State also argues (at 15) that .826(5)**(A)** encompasses harm that "take[s] time to develop," because otherwise, a "substance that causes birth defects or cancer would not be hazardous." However, such substances are included as "hazardous substances" by virtue of .826(5)**(C)**, which in contrast to part (A), broadly incorporates those lists of substances defined as "hazardous" under CERCLA and captures substances that may cause slow-developing harms.[12] The more onerous "imminent and substantial danger" requirement in .826(5)**(A)**, ***by its plain terms, does exclude harm that "takes time to develop."***[13]

Further, contrary to the State's assertion (at 10), the Legislature ***did*** focus in

[12] Even for substances that cause "slow developing harms," such substances are only added to the CERCLA list after a thorough toxicology assessment; mere speculative risk of future harm is insufficient. 42 U.S.C. § 9601(14); *cf. TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2211 (2021) ("[T]he mere risk of future harm, standing alone, cannot qualify as concrete harm.").

[13] If DEC truly believed sulfolane presents an "imminent and substantial danger," it would have added sulfolane to Table C under the authority of .826(5)(A). ***To this day, DEC has not determined in APA-compliant proceedings that sulfolane is hazardous*** (Wms Br. 38), a point the State wholly ignores.

subsection (A) on the nature of the "harm caused by a specific release." Regardless of its toxicity, a substance in a laboratory vial poses no "imminent" or "substantial danger" to anyone or anything. Thus, the requirement that the substance present an "imminent and substantial danger" necessarily mandates that (1) the relevant time for the determination is when the alleged "danger" is presented so its "imminen[ce]" may be assessed, and (2) the inquiry should evaluate the danger posed by the specific contamination to determine whether it is "substantial." These statutory requirements cannot be met in a vacuum or without considering the actual contamination being remedied.

Indeed, federal courts assessing liability under environmental statutes typically consider the danger posed by the substance ***when it reaches the public***. *See, e.g.*, *Simsbury-Avon Pres. Soc'y, LLC v. Metacon Gun Club, Inc.,* 575 F.3d 199, 212-15 (2d Cir. 2009*)* (focusing inquiry on whether "anyone is subject to long-term exposure to lead contamination" at site, not whether lead is dangerous in general); *Leese v. Lockheed Martin Corp.*, No. 11-5091 (JBS/AMD), 2014 WL 3925510, at *13-15 (D.N.J. Aug. 12, 2014); *cf. Cnty of Maui, Haw. v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1476-77 (2021) ("time," "distance" and "***the extent to which the pollutant is diluted****"* as it travels are relevant factors in federal regulation of water pollution (emphasis added)).[14]

[14] The State cites (at 12) "[t]he weight of CERCLA case law" as proof that .826(5)(A) generally characterizes certain substances as "hazardous" regardless of the amount. However, the cited cases do not analyze provisions analogous to .826(5)(A). Further, the CERCLA definition of "hazardous substance" involves a risk analysis, including the "dose" at which a substance is deemed hazardous. *See* 42 U.S.C. § 9601(14) (incorporating hazardous substances under other statutes which require toxicity analyses). EPA

Even if .826(5)(A) is a "general classification" that applies to any release, then the State still should have been required to show that ***any*** amount of sulfolane presents such a high degree of danger, *e.g.*, that even a drop of sulfolane presents an imminent and substantial danger. The State failed to make such a showing and cannot dispute that the studies showed no "adverse health effects" from the sulfolane levels present here.[15]

Finally, the State fails to acknowledge (at 16-18) the impact of *Stock v. State*, 526 P.2d 3 (Alaska 1974) on the statutory interpretation issue. Williams cited *Stock* because the canon of constitutional avoidance bars any interpretation of a law that deprives a defendant of fair notice. Thus, the trial court was prohibited from interpreting .826(5)(A) to cover ***potential*** harm because *Stock* held a "potential harm" standard deprives a party of the fair notice required by the Constitution. Wms Br. 33. The State does not address this point at all. Unlike the statute at issue in *Stock*, .826(5)(A) does not even refer to potential harm, and there is no reason to import that constitutionally-flawed standard into the statute.[16]

Accepting the trial court's rewrite of .826(5)(A)—which vaguely refers only to

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guidelines, as well as Alaska law, adhere to the principle that "'[T]he dose makes the poison'; . . . 'Even water, if consumed in large quantities, can be toxic." Federal Judicial Center, Reference Manual on Scientific Evidence 636 (3d ed. 2011).

[15] The State alleges (at 18) that Williams waived any argument as to the "public welfare" prong of .826(5)(A). But Williams argued (at 44 n. 22) that the same interpretation of the phrase "imminent and substantial danger" applies to that prong, and the State points to no record evidence that the sulfolane levels presented such a danger to the public welfare.

[16] The State's argument (at 17 & n.27) that Williams did not have a "permit" to release sulfolane is a red herring. The "permit" issue is not germane to the correct statutory interpretation of "imminent and substantial danger," nor does it establish that sulfolane meets this definition. *See also infra* VIII.

potential harm that need not even develop—would permit DEC or the lower courts to deem ***any*** substance "hazardous" upon a whim. The Court should reverse the trial court's flawed construction and apply the plain meaning of the statute.

C. The State ignores the dispositive points on agency deference.

The State's argument on deference (at 20-21) fails to overcome Williams' opening argument. *First*, the State ignores that deference only becomes relevant ***if*** the statute at issue is ambiguous. *See* Wms Br. 37. There is no ambiguity here. *Second*, the State appears to agree that the commissioner, when accessing the response fund, never interpreted the phrase "imminent or substantial danger." *See id.* If the commissioner failed to apply the relevant statute or term, his technical judgment is irrelevant to the threshold statutory interpretation question. *Finally*, the State is silent on *Kisor* and *Totemoff*, tacitly conceding that the cases control and deference to the funding memos is improper.

D. The State's litigation-driven oil and RCRA arguments are meritless.

Finally, the State recycles (at 18-19) its strained claims that sulfolane (a solvent) [Exc. 628, 2034] is oil and/or a RCRA hazardous waste. It does not dispute that DEC never regulated sulfolane as oil or as a RCRA waste. Although it argues that the court "observed that Williams managed sulfolane as a RCRA waste," it ignores that the court's RCRA conclusion was based on three spill notifications that Williams sent DEC from 2000-2002. [Exc. 2233-34]. DEC already had received these notifications ***before*** DEC repeatedly told

Williams that sulfolane was not regulated. [Exc. 14-15, 19, 22-23, 32].[17] If Williams' notifications established that sulfolane is a RCRA waste and thus a "hazardous substance," then DEC would have regulated sulfolane upon receiving the notifications. But it did not. Likewise, DEC had everything it needed to know prior to 2004 that sulfolane was purportedly "oil." Had DEC truly believed sulfolane was "oil," it would have said so.

III. The "response costs" were not properly awarded.

The State and Flint Hills ***do not dispute*** the following key facts: (1) although it had the necessary scientific information and ability to do so, DEC has not set a cleanup level to establish the amount of sulfolane that is unsafe for human consumption [Exc. 955, 969-73, 1011, 3445-47, 3448, 3451-53]; (2) there is no evidence the low levels of sulfolane in North Pole area wells have caused any adverse health effects [Exc. 197-98, 624-27, 2010, 2374]; (3) the trial court made no finding that the sulfolane levels in those wells pose any threat to human health or the environment, nor did it establish a cleanup level [Exc. 2335-38, 2418-20]; (4) applying the cleanup level (362 ppb) proposed by the Blue Ribbon Panel, no drinking wells in the area contain unsafe levels of sulfolane [Exc. 949, 1011, 2464]; and (5) only 86 private wells contained sulfolane concentrations exceeding 20 ppb (the level referenced by the trial court), resulting in an average cost of over $837,000 per allegedly affected well for the piped water system. Under any standard of review, these facts show that the low levels of sulfolane do not justify a $72 million piped water system. [Exc. 2447,

[17] In fact, because sulfolane was not regulated, Williams had no obligation, under DEC's view, to report these spills (Exc. 3462-63), but had done so voluntarily.

2464-65].

Because the State and Flint Hills cannot point to any evidence that the alleged threat to public health warranted their exorbitant expenditures, they resort to a novel position that they can recover ***any*** response costs that DEC opts to spend or asks others to incur. They offer no authorities that would give DEC such a blank check. Nor do they establish that a private litigant may recover as "response costs" any amount it voluntarily agrees to pay in a settlement. Forcing one party to pay the costs spent by DEC and/or Flint Hills without any objective standard runs counter to Alaska law and public policy.

A. The State is not entitled to recover "any money expended."

Williams established that DEC's regulations require response costs to be necessary, cost-effective, and reasonable. Wms. Br. 44-51. The State largely does not contest these requirements.[18] Instead, it argues (at 25) the requirements do not govern its ability to recover DEC's response costs in this action because (1) DEC is not bound by its own regulations, and (2) .822 does not "support[] limiting damages awards based on these regulations." The State is wrong on both counts.

The State brazenly contends (at 24-25) that DEC's response-cost regulations apply to regulated parties like Williams but not to DEC. On the contrary, an "agency is bound by

[18] The State cursorily claims (at 24 & n.50) that Williams "misinterprets" the requirement that response costs be "reasonably attributable to the site," which demands that costs be incurred in accordance with the Site Cleanup Rules (Wms Br. 44-51). The State rewrites the phrase to merely say and mean "related to the hazardous substance release." It offers no support for its interpretation, which is a reiteration of its meritless claim that it need not follow its own rules and has been given a blank check to recover any cost.

the regulations it promulgates" and "has not acted in the manner required by law if its actions are not in compliance with its own regulations." *Trs. for Alaska, Alaska Ctr. for the Env't v. Gorsuch*, 835 P.2d 1239, 1244 (Alaska 1992). The State also ignores that Alaska law requires DEC to perform a cleanup itself "directly or by contract" if its commissioner "determines that the containment or cleanup of a hazardous substance undertaken is inadequate." AS 46.09.020(c). Although the statute clearly recognizes that DEC itself may incur response costs, neither the statute nor the Site Cleanup Rules exempts DEC from complying with those rules. Instead, the rules mandate a singular set of "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 75.325(a) (emphasis added).

The State again circumvents its own rules when it argues (at 27) "DEC has not yet finalized a sulfolane cleanup level" because "it is wait[ing] for long-term studies." But its own rules require it to adopt a cleanup level based upon ***currently available information*** and to adjust the cleanup level up or down as new information becomes available. *See* 18 AAC 75.325(d)(1), 18 AAC 75.315(d), 18 AAC 75.345; Wms Br. 10, 45; [Exc. 3449-50]. Its own rules do not permit DEC to wait indefinitely, but instead require DEC to set a cleanup level, then adjust later if necessary.

Citing a different regulation,[19] the State argues (at 24) that ***DEC's*** "[r]esponse costs

[19] The State quotes 18 AAC 75.910(b) as the only legal authority cited to support its argument that it may recover ***any*** response costs it incurs. As shown, the regulation cannot

include 'any money expended by the department in response to a release or threatened release of a hazardous substance.'" The State asserts it is entitled to recover ***any and all costs DEC spends*** in connection with the release of a hazardous substance—no matter how unnecessary or unreasonable those costs may be. Because DEC must follow legislative directives and its own regulations, the phrase "any money expended" necessarily is money expended for response actions authorized by statute or regulation. The canons of construction prohibit reading this provision divorced from other relevant statutory and regulatory provisions, which rein in regulatory overreach. The Court should reject the dangerous, limitless standard sought by the State.

The State's attempt (at 25) to distinguish federal authorities cited by Williams also fails. The State argues the cases were decided "under CERCLA provisions that have no analog in AS 46.03.822," *i.e.*, CERCLA's requirement that response costs must be "not inconsistent with the national contingency plan." *Id.* But AS 46.09.020(b) ***specifically requires DEC to develop cleanup guidelines that are consistent with the national contingency plan***. DEC did develop such guidelines, and it is bound by them. Indeed, the State's repeated claim that any limitation on cost recovery must be found only "***in*** AS 46.03.822" ignores that .822 is just one piece of Alaska's statutory regime addressing

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be read so broadly, and DEC cannot in any event simply grant itself a blank check for response costs by promulgating a regulation. The courts must be a check against any such blatant self-dealing, especially when an agency has ulterior motives for the response costs. [Exc. 2365 (Commissioner Hartig acknowledging no DEC-approved practicability study for the sulfolane plume had been done)]; [Exc. 953, 1060, 2499, 2501-02 (ulterior motives testimony)].

hazardous substances. The fact that .822 allows for the recovery of "cost of response, containment, removal, or remedial action" but does not itself contain the standards for how those costs may be incurred does not mean that .822 allows ***any*** cost incurred by the State to be recoverable and that there are no standards for recovery. Other statutes and implementing regulations set those standards.[20] Thus, to argue that the "national contingency plan" limitation in *Bell* has no "analog in AS 46.03.822" is flat wrong ***when that same limitation on DEC is found in AS 46.09.020***.

The parties have cited only one case (*Matter of Bell Petroleum Services, Inc.*, 3 F.3d 889 (5th Cir. 1993)) addressing the costs of a water system. There, the court denied EPA recovery of its costs because the system was unnecessary, inconsistent with the NCP, and a waste of money. Wms Br. 46-47. Like the State, EPA argued cost-recovery standards did not apply to it. The court rejected that position, holding, "[a]cceptance of the EPA's position would effectively prohibit judicial review of EPA's expenditures. In short, we would give the EPA a blank check in conducting response actions." *Bell,* 3 F.3d at 907. That is exactly what the State seeks here, and this Court should similarly deny it.

B. Flint Hills is not entitled to recover its voluntary overpayments.

Flint Hills defends the trial court's award on two patently false premises. *First,* it suggests (at 42 and 44) that the piped water system was the remedy chosen by DEC after a

[20] All pieces of a comprehensive statutory and regulatory scheme must be read together under the "*in pari materia*" canon of construction. *See, e.g.*, *Mat-Su Valley Med. Ctr., LLC v. Bolinder*, 427 P.3d 754, 769 (Alaska 2018). DEC itself tellingly lists AS 46.03.822, AS 46.09.020, and other statutes in the Authority section for its site cleanup rules and cost recovery provisions. *See* 18 AAC 75.325, 18 AAC 75.910.

formal administrative proceeding and that Williams should have participated in that administrative process. And Flint Hills also boldly contends (at 44) that "the specific remedies that Williams disputes," including the piped water system, "were all regulatory directives." These statements are incorrect. The "response costs" sought by Flint Hills were not the result of an administrative proceeding conducted by DEC. That process was abandoned in favor of settlement. Williams cannot "waive" objections to the outcome of a proceeding that did not occur. Instead, Flint Hills and DEC entered into a settlement by which Flint Hills ***voluntarily*** agreed to fund the piped water system on the condition that, *inter alia*, the State would permit Flint Hills to control this litigation and recoup its costs from any award assessed against Williams. Flint Hills cannot recover its costs simply because it agreed to advance costs in hopes of ultimately sticking Williams with the bill.[21]

Second, Flint Hills contends (at 43) the piped water system was "cost-effective." However, it relies only on testimony that the exact system chosen was more cost-effective than ***other piped water systems***. This evidence does nothing to show that other types of "alternative" remedies would have been less cost-effective than a piped water system.

Finally, Williams recognized that following the discovery of sulfolane in North Pole wells, it was reasonable to provide alternative water until the health risks were evaluated.

[21] Administrative proceedings by DEC necessarily would have required DEC to set a sulfolane cleanup level—something it refuses to do. *See e.g.*, Wms Br. 4-5, 38 n.19. Neither DEC nor Flint Hills cite a single case suggesting that, to ***defend against*** the State's cost-recovery action, Williams must first initiate administrative proceedings to propose a cleanup level when DEC itself repeatedly refused to do so.

Once the Panel established there was no risk to the community, the need to provide alternative water ended. The testimony cited by Flint Hills about the reasonableness of providing alternative water (at 43-44 & n.102) relates to the early "interim period" and does not support the tens of millions of dollars spent in subsequent years. The court erred in awarding those costs.

IV. The trial court committed reversible error by awarding damages based on a non-existent, undefined "right to uncontaminated groundwater."

The State mistakenly argues (at 40) that Williams must show "clear error" because the "***amount*** of compensatory damages" is left to the fact-finder. (Emphasis added). But Williams challenges ***the lack of a legal basis*** for the trial court's damages award. It was improper for the trial court to award "natural resource damages" to the State under the Civil Assessment statute (AS 46.03.760). This is a pure issue of law that is reviewed *de novo*.

The State's silence on two important points is telling. *First*, it fails to defend the court's recognition of a brand-new right—the "right to uncontaminated groundwater"—based on nothing more than speculation that some people may prefer well water. This is not a valid basis for recognizing a new "right."[22] *Second*, the State failed to meet its burden of proof because the court found that "[n]o witness has suggested a methodology" for

[22] The State's reliance on *Kanuk ex rel. Kanuk v. State Department of Natural Resources*, 335 P.3d 1088 (Alaska 2014) is misplaced. The trial court created an ***individual*** right to uncontaminated well water based only on the presumed preferences of hypothetical homeowners. It is irrelevant whether the groundwater is held in trust for the people by the State. No such "right" exists. Similarly, *Chenega Corp. v. Exxon Corp.*, 991 P.2d 769 (Alaska 1999) is inapposite because it only addresses the sufficiency of the evidence for lost preservation-use damages. *Id.* at 794-795.

valuing natural resource damages. Dec. ¶ 692 [Exc. 2295].

Further, 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). However, the trial court made no such finding. The State contends (at 38) the lack of "a cleanup level is not a free pass to pollute the groundwater." But this is the State again stating that its agencies need not follow the law. To the contrary, the lack of a cleanup level does not give ***the State*** a free pass to recover without an objective standard.

Further, the definition of "contaminated groundwater" in 18 AAC 75.990, which expressly acknowledges that substances below a cleanup level may be left in the ground, applies to the entirety of the "chapter" of 18 AAC 75. And that chapter, per 18 AAC 75.910, expressly covers claims under 46.03.760(d). Had the State believed allowing sulfolane to remain in the ground during Williams' tenure violated 46.03.760(d), why didn't it say so prior to filing suit? The Court will not find in the record any order, letter, or email from DEC telling Williams it believed the sulfolane in the ground violated .760(d).

V. The Court's allocation to Williams should be overturned.

The State mistakenly claims (at n.69) that the trial court's .822(j) allocation is reviewed for an abuse of discretion based on the Court "up[holding] the trial court's equitable allocation" in *Oakly*. Though the allocation in *Oakly* was affirmed, this Court held that the trial court's decision to allocate and apply contribution to a damage award involves the interpretation of a statute to which it applies its independent judgment *de novo*.

354 P.3d at 1078. Under either standard, however, the allocation here should be reversed.[23]

A. The trial court's improper contract interpretation tainted its allocation.

The trial court did not "properly consider[]" the Agreement (FH Br. 33) because it did not properly construe it. The parties allocated ***all*** responsibility for sulfolane response costs to Flint Hills. They also determined Flint Hills is entitled to ***no*** indemnification for contaminants like sulfolane to which it contributed. Contrary to these provisions, the court allocated the lion's share of responsibility to Williams.[24] Reversal is required.

B. The trial court erred by failing to allocate any liability to the State.

The State conceded it is a liable party under .822(a) and does not meaningfully dispute that it allowed sulfolane to remain in the ground during Williams' tenure. The State allowed Flint Hills to turn off the pump and treat system in 2017, which allows sulfolane to migrate off-property to this day. [Exc. 1908, 1911, 2383]. The State's actions (and inaction) contributed to the contamination as significantly as if the State itself had released the substance.

Without authority, the State tries to distinguish (at 30-31) between its actions as the owner of the land (the Department of Natural Resources ("DNR")) and its actions as the DEC. It suggests that because DNR is not the arm of the State that played the causal role,

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[23] CERCLA allocations were reversed as an abuse of discretion in *e.g.*, *Beazer*, 412 F.3d at 445-449; *NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d 682, 701-03 (7th Cir. 2014); *K.C.1986 Ltd. P'ship v. Reade Mfg.*, 472 F.3d 1009, 1017-18 (8th Cir. 2007).

[24] As detailed in Wms Br. 7-8, 11, 59-60, Flint Hills engaged in unconscionable delay after sulfolane was regulated. *See also* [Exc. 186, 944-46, 2036-37, 2039, 2417, 2492, 3454-58, 3465-66].

the State is absolved of ***any*** liability. This is nonsensical. The responsible party is ***the State*** by whatever acronym it is known.

The State also contends Williams cannot assert equitable estoppel as a defense to .822**(a)** liability. This is irrelevant. As the prior trial court recognized, equitable defenses are applicable during the .822**(j)** phase of the case. [Exc. 1996-97]; *see also, e.g., State of New York v. Almy Bros., Inc.*, 971 F. Supp. 69, 73 (N.D.N.Y. 1997); *Westfarm Assoc. Ltd. P'ship v. Int'l. Fabricare Inst.*, 846 F. Supp. 422, 433-34 (D. Md. 1993).

The State claims (at 32) Williams could not have "relied" on DEC's statements for purposes of equitable estoppel because DEC never told Williams it could leave the sulfolane in the ground. Of course it did. DEC explicitly ***excluded*** sulfolane from the Site Plan because it was not regulated. [Exc. 17-19, 26-29, 178-79, 2034, 2142, 2176, 2414-16, 3436-44]. DEC's instruction to omit sulfolane from the Site Plan constituted the State's tacit permission to leave it in the ground. If removal were required, DEC was duty-bound to say so.[25] Equitable estoppel prevents the inequity of saddling a defendant with liability if it acted in reliance on the plaintiff. The trial court erred by refusing to apply the defense. *Krause v. Matanuska-Susitna Borough*, 229 P.3d 168, 181 (Alaska 2010); *Reliance Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 102 F. App'x 539, 542 (9th Cir. 2004).

[25] The State complains (at 32) that Williams "prematurely stopped" monitoring sulfolane and looking for the sources. But DEC knew the extent of efforts to find the source(s) [Exc. 22, 3459-61], and it allowed that effort to wind down. This does not immunize the State from responsibility for allowing Williams to leave sulfolane in the ground.

C. The trial court erred by *sua sponte* deconsolidating the cases and refusing to allocate responsibility to the City.

Neither Respondent disputes that the City significantly contributed to the sulfolane plume.[26] Instead, they argue the court properly declined to allocate a share to the City because it was not a party. They claim Williams should have sought statutory contribution from the City in the State's case, but this distorts the case's procedural history. Upon learning in discovery that the City violated its EPA permit and contributed sulfolane to the plume, Williams sought leave to assert a counterclaim against the City in the consolidated litigation even before the close of discovery and years before trial, all as permitted by the Rules and .822(j), but the request was denied. [Exc. 1888-1902, 1938]. All parties expected Williams to point to the City during the consolidated trial. [R. 014730, 014735-38, 014770, 015822-23, 015876-77, 025905-26]. A few months before trial, however, the new judge deconsolidated the cases, depriving Williams of its ability to make that argument. Williams objected to the deconsolidation multiple times before, during, and after the trial. [R. 033222-25, 028018-19, 031991-2040, 033227-34], [Exc. 2466-69].

In addition, an "absentee polluter's" causal role can be addressed in an .822(j) proceeding.[27] *Fed. Deposit Ins. Corp. v. Laidlaw Transit, Inc.*, 21 P.3d 344, 349-50 (Alaska

[26] Regarding City contribution, *see, e.g.*, [Exc. 2131, 2344-45, 2433-36, 2470-71].

[27] Flint Hills attempts (at 40) to distinguish *Laidlaw* on the basis that only the named parties in that case ultimately were assigned liability. It cannot deny that the Court recognized the role of ***absentee polluters*** may be addressed in a .822(j) proceeding. The State argues *Laidlaw* is inapplicable because the State is "innocent" and should be treated differently than a private plaintiff. Neither is true. The State stipulated to being a "liable landowner" and provides no authority that it should be treated differently from a private plaintiff. In

2001). This is consistent with CERCLA. *See, e.g., FMC Corp. v. Aero Indus.*, 998 F.2d 842, 847 (10th Cir. 1993); *Trinity*, 903 F.3d at 346 & n.6; *United States v. Consolidation Coal Co.*, 345 F.3d 409, 414 (6th Cir. 2003).[28] The trial court's refusal to consider the City's contributions requires reversal. *See*, *e.g.*, [Exc. 2431-32, 2466-2469, 2471]; [R. 028763-71].

D. The trial court improperly punished Williams for defending itself.

This case is distinguishable from the State's cooperation cases. The State and Flint Hills do not dispute that Williams cooperated in the initial investigation. Nor do they dispute that six years after the refinery's sale, Williams was participating and willing to continue doing so, until the State abruptly stopped investigating and sued. Instead, the State's and Flint Hills' criticism is that Williams did not participate to the ***degree*** that Flint Hills did. But a current landowner always has more immediate obligations to participate. Also, Williams was entitled to stand on its legitimate, good faith defenses—including the contractual indemnity owed by Flint Hills—and not be penalized for having done so.

VI. The trial court record does not support an award of injunctive and declaratory relief, and the Court should reverse the decree.

A. The State fails to support the Judgment's Injunctive Relief.

The State argues (at 40-41) it was not required to prove irreparable harm to obtain

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CERCLA, the government receives no preferential treatment. 42 U.S.C. § 9620(a)(1).

[28] The State's attempt to distinguish *Consolidation Coal* based on the Potentially Responsible Party "PRP" status as a named party misses the point. 345 F.3d at 414 (rejecting argument that not all of the PRPs' shares need to be adjudicated, finding that "a fair and equitable allocation of Neville's share of the response costs . . . can be achieved only if Neville's role as a PRP is compared to that of the other PRPs").

a permanent injunction because AS 46.03.765 authorizes the relief. This is demonstrably wrong. The statute only permits "temporary or preliminary relief" to address ongoing violations of the law. AS 46.03.765. It provides DEC with a tool to stop a polluter from continuing to release contaminants until final relief may be obtained. Here, the court ordered ***permanent injunctive relief*** after trial against an entity that has not owned the refinery for 17 years. [Exc. 2318-19] (¶¶ 3(d), (e)). Thus, irreparable harm must be established, and the State did not even attempt to make this showing.

The State also cites no authority to show the injunction meets Rule 65(d)'s specificity requirements. Unlike the injunction at issue here, the injunction in *Idaho Conservation League v. Atlanta Gold Corp.*, 879 F. Supp. 2d 1148 (D. Idaho 2012) required compliance with a ***specific regulatory permit***, not an entire, expansive regulatory scheme—including regulations and directives not yet issued.[29] *See* 879 F. Supp. 2d at 1165.[30] Thus, the court's "obey the law" injunction should be vacated.

B. The record does not support the court's Declaratory Relief on "PFAS."

The State (at 42-43) provides nothing more than scant evidence regarding "PFAS" generally. That evidence does not change three undisputed facts: (1) the State and Flint Hills only presented evidence at trial that Williams purchased and used a product that

[29] The State's efforts (at 41-42) to distinguish Williams' authorities fail. In both *Cook Inlet Fisherman's Fund v. State Dep't of Fish & Game*, 357 P.3d 789, 804 (Alaska 2015) and *Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1532 n.12 (11th Cir. 1996), the courts expressly held that "obey-the-law" injunctions violated Rule 65(d)'s specificity requirement.

[30] The post-judgment events referenced by the State (at 41) demonstrate that the injunctions provided no specific instructions to Williams and require further orders of the trial court.

included PFOS, not PFOA; (2) Dr. Wu only provided expert opinions on PFOA and PFOS (not "PFAS"-related substances generally); and (3) the Decision limited its "PFAS" findings to PFOS and PFOA. Dec. ¶¶ 477, 486 [Exc. 2245-46]; [Exc. 2]; [Tr. Trial 815:9-816:18, 834:18-841:13]. Thus, there was no basis for the Judgment's broad "PFAS" relief.

VII. Primary Jurisdiction supplies an independent basis for reversal.

The State does not dispute that DEC is engaged in ongoing proceedings regarding "PFAS" both on and off the refinery property.[31] It concedes (at 42) that a "site" is defined in terms of the scope of a plume, not by a property boundary.[32] 18 AAC 75.990(115); [Exc. 3464]. Further, the State fails to identify any basis under DEC's own rules to divide the "site" between "offsite" and "onsite" contamination.[33] Instead, the State claims it would not have been "orderly nor reasonable" for the trial court to remand the "onsite" claims because they were asserted earlier in the litigation than the "offsite" claims. Because it would have been unfair to require Williams to defend against the "offsite" "PFAS" claims

[31] The State suggests (at 43-44 (quoting *Seybert v. Alsworth*, 367 P.3d 32, 39 (Alaska 2016))) the Court should apply an abuse of discretion standard. But *Seybert* did not overrule this Court's prior holding that, because it "present[s] [a] question[] of law," the Court reviews *de novo* the trial court's decision of whether to apply the doctrine of primary jurisdiction. *Matanuska Elec. Ass'n v. Chugach Elec. Ass'n*, 152 P.3d 460, 465 (Alaska 2007). In *Seybert*, consistent with the *Matanuska* standard, this Court recognized that certain cases, like this one, may "require[] the exercise of administrative expertise," *Seybert*, 367 P.3d at 39, because the statutory regime anticipates agency action ***precedes*** court adjudication. Wms Br. 67-68 (collecting cases).

[32] The State's feeble attempt (at 45) to rebut this by citing to 18 AAC 75.345(c) is unavailing. The cited regulation merely allows DEC to "set a more stringent cleanup level" than the level under (b).

[33] Williams agreed to work with DEC through the regulatory process on off-property "PFAS" in part because DEC set a cleanup level for PFOS and PFOA, unlike for sulfolane.

first asserted after the close of discovery, the trial court and the parties agreed those claims should be referred to DEC. But that is no reason for the trial court to decline to refer ***all*** of the interconnected "PFAS" claims. Splitting the claims is neither "orderly" nor "reasonable," and instead causes inefficiency, inconsistency, and prejudicial results.[34]

Although the trial court held that Williams was liable for releasing "hazardous substances" (PFOA and PFOS), the State argued in another court[35] that PFOA and PFOS are ***not*** hazardous substances. [R. 031966 (State Resp. to Compl. ¶ 77)]; *see also* [R. 031949-952, 031956, 031964 (Resps. ¶¶ 4, 8, 10, 25, 66)]. This is precisely the kind of inconsistency that primary jurisdiction is supposed to prevent.

Finally, the State's citation to *Astiana* (at 44 & n.105) regarding the importance of "efficiency"—a term not utilized in Alaska primary jurisdiction cases—to support the court's decision is misleading as the court was not equating "efficiency" with "delay." The Ninth Circuit has used "efficiency" to simply mean a proper (*i.e.*, efficient) coordination of the work of courts and agencies. *See Chabner v. United of Omaha Life Ins. Co.*, 225 F.3d 1042, 1051 (9th Cir. 2000); *see also Kane v. Chobani, LLC*, 645 F. App'x 593, 594 (9th Cir. 2016). "Delay" is inapplicable because the purpose of primary jurisdiction is to delay a judicial proceeding until the regulatory agency finishes its work. *See Massachusetts v. Blackstone Valley Elec. Co.*, 67 F.3d 981, 988-91 (1st Cir. 1995); [Exc. 2339-41].

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[34] The trial court acknowledged claim-splitting concerns. [Exc. 2026-2028].

[35] The State's Answer in the *Gaston* case was filed after trial on March 6, 2020 and is new evidence the court should have considered on the motion to alter and amend. *See* Alaska R. Civ. P. 60; *Dickerson v. Williams*, 956 P.2d 458, 464 (Alaska 1998); *see also* [R. 033131, 033161-171, 031788-790, 031821-840, 031879-880, 031885-887, 031914-945].

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

A. Williams did not receive fair notice.

The State argues (at 45) that Due Process was not violated because sulfolane was regulated under a "straightforward reading of the law." But DEC did not see the reading as "straightforward": it repeatedly told Williams that sulfolane was not regulated as a hazardous substance, was not a "chemical of concern," and had "low toxicity." Wms Br. 5-6, 39; [Exc. 14-15, 17-19, 22-25, 29-30, 32, 2142]. Based on this, the trial court concluded DEC regarded sulfolane as unregulated during Williams' operations—a finding the State does not appeal. Dec. ¶ 114 [Exc. 2176].

The State now tries to rewrite history, arguing that leaving sulfolane in the ground was unlawful all along. The State may be entitled to change its interpretation of the law, but Due Process prohibits DEC from inducing good faith reliance on its prior interpretation and then pulling an about-face years later to impose large, unexpected damages. *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156-58 (2012); *Stock*, 526 P.2d at 12; *Rollins Envtl. Servs., Inc. v. U.S. EPA*, 937 F.2d 649, 654 (D.C. Cir. 1991); *Gen. Elec. Co. v. U.S. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995).

Similarly, the State repeatedly contends (*e.g.* at 46) that "Williams never had a permit to release sulfolane." But sulfolane was unregulated; permits to release sulfolane ***did not exist***. Williams did, however, have permits for all the substances at the refinery that were regulated. Now, decades later, the State asserts that Williams should have had a

permit to dispose of sulfolane as a "waste." But Judge Blankenship correctly concluded sulfolane is not a "waste." [Exc. 1969].

The State next argues (at 45) that "retroactive environmental civil liability does not violate due process." But this expansive, limitless view is unsupported—and unsupportable—for three reasons. *First*, contrary to the State's view, there is no environmental exception to the Due Process Clause. Courts ***repeatedly*** have held that fair notice is required in environmental cases. *See* Wms Br. 71 (collecting cases). The State does not distinguish those cases. Instead, it merely argues, without support, that the Due Process Clause does not apply in any environmental cases because a "polluter" should always be required to pay, even if it did not know it was polluting. Such a rule would swallow the Due Process Clause whole and is not supported by existing law.

Second, the State relies only on stale, decades-old cases.[36] Recent Supreme Court jurisprudence emphasizes the importance of fair notice. This is not a regulatory silence case like many of the cases the State cites. Instead, it involves explicit regulatory guidance that DEC subsequently reversed. In recent years, the Supreme Court has held that this type of governmental switcheroo deprives regulated parties of fair notice and Due Process. The State largely ignores these more recent cases that signal the Supreme Court's willingness to strike down government enforcement actions that impose unanticipated ***civil liability*** as

[36] For instance, *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726 (8th Cir. 1986), *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), and *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1 (1977) are readily distinguishable because they involve the retroactivity of legislation and not an about-face by a regulatory agency that subjects a defendant to liability for conduct the agency previously allowed.

well as penalties and assessments. The State fails to grapple with *Fox Television* and *SmithKline*, which preclude agencies from changing interpretations of regulatory schemes and applying new interpretations to impose retroactive liability. *Fox Television*, 567 U.S. at 253; *SmithKline*, 567 U.S. at 156-58.

The State also ignores the lesson of *Stock*, 526 P.2d at 12, in which this Court expressed concerns that AS 46.03.710, which sets out civil and criminal liability for "pollution," fails to provide fair notice under certain circumstances. The Court instructed regulatory agencies like DEC to promulgate regulations to avoid the constitutional problems inherent in enforcing such vague environmental statutes. The State cites *Stock* only for the proposition that pollution generally is prohibited, ignoring the larger constitutional holding of the case. *Id*. at 9-10. Presciently, the Alaska Supreme Court's decision in *Stock* employed the very reasoning adopted by the United States Supreme Court in its most recent due process and fair notice jurisprudence. *See Fox Television*, 567 U.S. at 253; *SmithKline*, 567 U.S. at 156-58.

Third, and perhaps most importantly, this is not a typical case where an alleged polluter is asked to pay for the cleanup of a hazardous substance that is designated as such by regulators following a data-driven, scientific investigation regarding toxicity. In the typical case, the substance appears on a regulatory list or table, reasonable expectations regarding future environmental liability for the release of the substance are set, and due process is satisfied. But here, the opposite is true. The State fails to cite a single example in which a defendant was held strictly liable for an unregulated substance (1) for which no

cleanup level has been set[37] and no adverse health effects documented, and (2) which was allowed to remain in the ground and to continue to be released into the environment.

The contrast between the State's procedures for addressing sulfolane versus PFOA/PFOS underscores the problem with the State's position. Like sulfolane, PFOA/PFOS was not regulated as a hazardous substance during Williams' operations, but DEC recently set a cleanup level for PFOA/PFOS pursuant to an APA-compliant rulemaking procedure. Because a cleanup level exists, the PFOA/PFOS responses costs are considerably less than those allowed by the court for sulfolane. To this day, no cleanup of PFOA/PFOS off-property has been required because all PFOA/PFOS from the refinery is below the cleanup level. If DEC had set a cleanup level for sulfolane in an APA-compliant proceeding as it did for PFOA/PFOS, it is likely there would have been no damages awarded for the off-property sulfolane since there would have been nothing to clean up: all the sulfolane in the plume would have been under the cleanup level. Accordingly, the Judgment deprives Williams of property without due process.

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

The imposition of retroactive civil liability can be a regulatory taking, particularly if linked to an "identified property interest." *See* Wms Br. 73. The Takings Clause applies even if a court effects the taking. *Id.* The State did not—and could not—refute these points.

[37] Parties have a right to comment prior to an agency's adoption of a cleanup level. Failure to afford a party this right violates due process. S*ee, e.g. Honda Motor Co. v. Oberg*, 512 U.S. 415, 427-30 (1994) (elimination of property protections afforded by "every other State" "raises a presumption that [Oregon's] procedures violate due process").

First, the State claims (at 49) the "five justices [in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998)] rejected the idea that an obligation to pay money could ever be a taking." The Supreme Court itself disagreed with this characterization in *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 613 (2013), explaining that "[a] four-Justice plurality [in *Eastern Enterprises*] concluded that the statute's imposition of retroactive financial liability was so arbitrary that it violated the Takings Clause." The Court added that although Justice Kennedy concurred in the *Eastern Enterprises* result on due process (not takings) grounds, he joined four other Justices to explain that a Takings Clause violation would occur if retroactive government-imposed financial obligations related to an identified property interest. *Id*. Thereafter, in *Koontz*, the Court—now with Justice Kennedy in the majority—clarified the holding of *Eastern Enterprises*, stating that a regulatory taking will be found when "the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property." *Id*. at 614. Recent takings cases, including one from the Court's most recent term, show the Supreme Court's willingness to find a taking, regardless of whether it comes from a "regulation" or "statute, or ordinance, or miscellaneous decree." *See, e.g., Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071-72, (2021).

Second, the State wrongly asserts (at 49) that Williams has no interest in the land. In fact, Williams originally had a leasehold interest then[38] bought the land from the State

[38] Ownership of real estate itself is not required; rather, any property interest is sufficient. *See, e.g., United States v. Sec. Indus. Bank*, 459 U.S. 70, 78 (1982).

as part of the transaction to sell ***both*** the refinery ***and*** land to Flint Hills. [Exc. 174-175, 35-36]. The trial court's order requiring Williams to pay for a municipal water system is directly tied to its previous leasehold interest and fee simple ownership of the refinery land and satisfies *Koontz*.

Lastly, the State contends (at 49) that federal courts "have consistently rejected the analogous position that retroactive CERCLA liability effects an unconstitutional taking." The State's cases are inapposite. Unlike in those cases, DEC expressly told Williams that sulfolane was not a concern, shaping Williams' investment-backed expectations. Other courts have held that informing regulators and obtaining their approval can "shape legitimate expectations" for the takings analysis, including by inducing reliance—which happened here. *Resource Invs., Inc. v. United States*, 85 Fed. Cl. 447, 514-15 (Fed. Cl. 2009); *Laguna Gatuna, Inc. v. United States*, 50 Fed. Cl. 336, 347 (Fed. Cl. 2001).

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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