

The Hon. John A. Sandor
Commissioner, Department of
Environmental Conservation

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Recovery of expenditures
from oil and hazardous
substance release

response

fund

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You have asked whether the Department of Environmental Conservation (DEC) must attempt to recover money expended from the Oil and Hazardous Substance Release Response Fund for containment or cleanup of releases. The answer is yes.

You have also asked whether legislative replacement of the Oil Spill Expense Reserve Account with the Oil and Hazardous Substance Release Response Fund empowered DEC to expend fund monies on containment or cleanup of nonpetroleum products. The answer is yes.

The Oil and Hazardous Substance Release Response Fund (fund) was created in 1986 (sec. 1, ch. 59, SLA 1986). It is designed to provide a readily available source of money for the payment of expenses incurred by DEC in protecting Alaska's environment from the release of oil or hazardous substances (sec. 1, ch. 59, SLA 1986; codified as AS 46.08.005). When creating the fund, legislators instructed DEC as follows:

(a) The commissioner shall seek reimbursement promptly . . . for the cost incurred in the cleanup or containment of oil or a hazardous substance that has been released.

Initially -- in a provision since amended -- legislators also empowered the Department of Law to seek reimbursement for expended fund monies:

(b) The attorney general, at the request of the commissioner, may seek to recover money expended by the department . . . to contain and clean up oil or a hazardous substance

These provisions became law and were codified as AS 46.08.070(a) and (b). They provide the starting point for answering your first inquiry.

Interpretation of a statute begins with examination of

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statutory language, construed in light of its purpose. *Vail v. Coffman Engineers, Inc.*, 778 P.2d 211, 213 (Alaska 1989). Since the purpose of these statutes is to provide DEC with a source of funds, replenishment of the fund is necessary. Accordingly, the purpose of the quoted language must be to permit or require such replenishment.

In its common sense and statutory language, the word "shall" refers to a command, directive, or requirement. *The American Heritage Dictionary Second College Edition* 1125 (1982).

The Alaska Supreme Court agrees and has opined that the word "shall" is mandatory as in the context of a requirement that a board "shall within 30 days . . . set a hearing date." *Summers v. Korobokin Constr.*, ___ P.2d ___, Op. No. 3717 at 6 (Alaska, Jul. 19, 1991).

Further examination of the original statutory language reveals a juxtaposition; "shall" is used in subsection (a), while "may" is used in subsection (b). Use of certain language in one instance and different language in another, similar instance indicates a difference in intent. 2A N. Singer, *Sutherland Statutory Construction* • 57.06 (4th ed. 1984). That is, the legislature must have intended for (a) to be different than (b) and must have intended to convey different meanings.

Ordinary meanings are ascribed to ordinary words. *Foreman v. Anchorage Equal Rights Comm'n*, 779 P.2d 1199, 1201 (Alaska 1989). Ordinarily, "shall" is mandatory while "may" is permissive. 2A N. Singer, *Sutherland Statutory Construction* • 57.03 (4th ed. 1984). Rules of statutory construction therefore lead to the conclusion that subsection (a) imposed a mandatory duty, while subsection (b) empowered a permissive act.

In 1989, subsection (b) was amended. The word "may" was replaced with the words "shall immediately." (Sec. 1, ch. 29, SLA 1989.) Such a deliberate alteration evinces an unequivocal intent to impose a nondiscretionary obligation. These rules of statutory construction therefore lead to the conclusion that both DEC and the Department of Law must now attempt to recover Oil and Hazardous Substance Release Response Fund monies expended for containment or cleanup of releases.

Legislative history may be employed to facilitate statutory construction even when the language seems clear on its face. *Ukpeagvik Inupiat Corp. v. Arctic Slope Regional Corp.*, 517 F. Supp. 1255, 1258 (Alaska 1981). In this case, a cursory review of legislative history supports the conclusion that both DEC's commissioner and the attorney general must seek to recoup fund monies. "Shall immediately" language was added to the law by HB 256 (1989). At the time that language was introduced, its

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sponsor noted that the bill "change[d] the language in the statute from 'may seek' to an affirmative action requiring an immediate recovery of monies for actual expenses." Minutes, Senate Community and Regional Affairs Committee at 14 (remarks of Senator Mike Szymanski, prime sponsor of HB 256) (April 6, 1989). Clearly, legislators wanted to require some effort to recoup fund monies.

Please note, however, that the statute, AS 46.08.070, does not necessarily command litigation. It simply commands the attorney general to "seek to recover" expended monies. Applying the rule that ordinary words are given ordinary meanings, the dictionary is a reasonable place to look for the meaning of "seek." *The American Heritage Dictionary, supra* at 1110, defines "seek" as "to try to locate"; "to endeavor to obtain." Therefore, lacking specific statutory definition, "seeking" recovery must necessarily be construed to mean a reasonable effort that could take into account costs, caseload, and probable chances of success.

Those rules of statutory construction referenced above also provide the answer to your second question. Previously, monies were allocated to an "Oil Spill Expense Reserve Account."

Use of the account was limited to spills which involve oil- or hydrocarbon-based substances. An attorney general's opinion (1985 Inf. Op. Att'y Gen. (Feb. 20; 366-361-85)) confirmed this.

However, as noted in that opinion, the legislature could broaden the statutory language by adding a reference to "hazardous substances." The attorney general opined that if such a reference was made, reserved monies could be used for the clean-up of nonpetroleum-based substances.

A reference to "hazardous substances" was legislatively added in 1986 (secs. 1 and 2, ch. 59, SLA 1986, codified as Title 46, ch. 8 and 9). Representative Davis, primary sponsor of that amending language, expressly noted that one of the bill's main purposes was to expand the class of materials for which monies could be used. Minutes, House Resources Standing Committee at 14-15, Jan. 29, 1986. Accordingly, the Oil and Hazardous Substance Release Response Fund is not subject to the restrictions noted by this office in the above-referenced 1985 opinion.

I hope this answers your questions.

RKR:lmk