The Hon. Harold C. Heinze
Commissioner, Department
of Natural Resources

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Use of TAPS construction
camp pads by YPC

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The Yukon Pacific Corporation (YPC) proposes to construct a liquified natural gas (LNG) pipeline from the North Slope to Valdez. Because YPC's pipeline would roughly parallel the route taken by the Trans Alaska Pipeline System (TAPS) oil line, YPC could utilize certain construction camp pads built by Alyeska for TAPS. This would have the environmental benefit of confining ecosystem-disturbing activities to a limited area. Accordingly, Alaska's Department of Natural Resources (DNR) -- manager of the pads and surrounding lands -- favors reuse of existing pads. YPC is concerned, however, that its use of these pads will render it liable for environmental degradation occasioned by previous users. Given this dilemma, your department sought our opinion on three questions related to YPC's proposed use of TAPS pads.

1. Who is liable for camp pad cleanup if the pads are contaminated?

2. Is an environmental audit required at each site? If so, who pays for it?

3. What is YPC's liability if they reuse one of these sites without first conducting an environmental audit?

In brief, the answers are these: Alyeska and the State of Alaska are liable for any currently existing contamination. YPC is not. An environmental audit is a practical necessity but not a legal requirement. Who pays for an audit is a matter totally open to negotiation. If YPC reuses the camps without an audit or other precautionary measure it will become jointly, severally, and strictly liable for all contamination unless it proves, by a preponderance of the evidence, that its contribution to the problem is divisible.

## ANALYSIS

### I. WHO IS LIABLE?

Strict liability for the release of hazardous substances is established in state law by AS 46.03.822 and in federal law by the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). 1/ Persons made liable by Alaska's law can be categorized as:

1. Hazardous substance owner/operator: the person(s) who owned or controlled the substance at the time it was released into the environment;

2. Present site owner/operator: the person(s) having a propriety interest in, or operational control over, the contaminated site at the time response actions are commenced;

3. Past owner/operator: the person(s) having a propriety interest in, or operational control over, the site at the time hazardous substances were disposed on-site;

4. Arranger: the person(s) who arranged for disposal of the hazardous substance;

5. Transporter: the person(s) who transported the hazardous substance to the site if the site was selected by that person. 1/

These persons are generically called potentially responsible parties (PRP).

CERCLA's reach is probably as broad as AS 46.03.822, but the federal law does not expressly extend liability to hazardous substance owners (category 1 above). *See* 42 U.S.C.S. § 9607(a) (1989). However, the person who generated the substance, the person who owned the substance, and the person who arranged for its disposal are usually one entity. This circumstance allows federal law to reach substance owners under "arranger" liability.

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1/ 42 U.S.C. § 9601 *et seq.* Other federal laws may be applicable, depending upon the nature of contamination (i.e., Toxic Substances Control Act regulates activities involving Polychlorinated biphenyls (PCBs)). For purposes of this memorandum we will assume that CERCLA would be the primary federal law while other federal laws would be treated under CERCLA as applicable, relevant, and appropriate requirements (ARARs).

2/ AS 46.03.822(a)

Furthermore, courts broadly construe the PRP categories. For instance, in *U.S. v. Aceto Agricultural Chem. Corp.*, 872 F.2d 1373 (8th Cir. 1989), companies that supplied technical grade pesticides to a formulator for mixing were held liable as "arrangers for disposal" when the formulator spilled his pesticide product. Accordingly, it is reasonable to assume that liability under federal law is coextensive with liability under state law.

The parties of significance to this case are YPC, the State of Alaska, and Alyeska. Alaska owns the subject realty, Alyeska is the past and present operator and YPC is a prospective operator/lessee who has not yet acquired any interest in, nor conducted any activity on, the pads. 1/ If the pads are contaminated at this time, Alyeska and the state are both potentially responsible. YPC is not.

Alyeska is potentially liable as a past and present operator. *Int'l Clinical Laboratories, Inc. v. Stevens*, 1990 WL 43971, 20 Envtl. L. Rptr. 20560 (E.D.N.Y. 1990) (lessee may be liable as an operator). Alaska is potentially liable as a past and present owner. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S. Ct. 2273, 105 L. Ed. 2d 1 (1989) (States may be liable as PRPs under CERCLA if they own a contaminated site). 1/ YPC does not fit

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3/ Information provided by your department informs us that YPC is not connected, in any way, to operations previously conducted on the sites, to substances used there, or to entities that used those substances. This memorandum is founded on those premises.

4/ There is no question that states may be liable under CERCLA. That law imposes liability on "any person" who falls into the described categories of PRP. 42 U.S.C.S. § 9607(a) (1989). And, it defines "person" to include states. 42 U.S.C.S § 9601(21) (1989).

Alaska law, on the other hand, is not so unequivocal. It levies liability upon "persons", AS 46.03.822(a), but fails to define that term. AS 46.03.826. However, Alaska's law exempts "the state or a municipality" from liability under certain special circumstances. AS 46.03.822(c)(2),(5); (h). Such exemptions would be meaningless unless states were otherwise liable. Legislators are presumed to act meaningfully. *Isakson v. Rickey*, 550 P.2d 359, 364 (Alaska 1976). Therefore, Alaska may expect to be held liable under state law if these pads prove to be contaminated.

The fact that the problem was caused by a lessee is no defense. *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1507 (6th Cir. 1991). Of course the state ultimately has a right of

into any of the PRP categories. Thus, Alaska and Alyeska are potentially jointly and severally liable for cleanup of any contamination now existing on the camp pads. *U.S. v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983) (liability under CERCLA is joint and several). 1/

If YPC elects to use the sites it must lease them from the state. YPC will then confront liability as both an "owner" and an operator. *BCW Associates, Ltd. v. Occidental Chemical Corp.*, 1988 WL 102641 (E.D. Pa. 1988) (lessees may be liable as "owners"). Unless certain prophylactic measures are taken (as discussed below), that liability would extend to pre-existing conditions as well as contamination YPC might create.

II. IS AN AUDIT REQUIRED?

As was discussed in an opinion issued earlier this year (1991 Inf. Op. Att'y Gen. (Mar. 22; 665-91-0115)), phased environmental audits have become a commonplace technique for characterizing environmental conditions extant on a particular parcel at a particular time. Typically, an audit is conducted in phases. A Phase I audit is a basic screen for the possible existence of hazardous substances on the site. It includes a visual inspection of the parcel and a review of records associated with the property. A Phase II audit involves field sampling.

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indemnification by its lessee, Alyeska. *Right-of-Way Lease for the Trans-Alaska Pipeline Between the State of Alaska and Amerada Hess Corp., ARCO Pipe Line Co., Exxon Pipeline Co., Mobil Alaska Pipeline Co., Phillip Petroleum Co., Sohio Pipe Line Co., and Union Alaska Pipeline Co.* §§ 10, 13, 14, 18, 22 and *Stipulation* thereto §§ 2.2, 2.12, 3.9. However, such right does not protect the state from liability to the United States or third parties. *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1459 (9th Cir. 1986).

5/ The *Chem-Dyne* holding was expressly endorsed by the U.S. Congress in H.R. Rep. No. 99-253(I), 99th Cong., 1st Sess. 74 (1986). Joint and several liability is expressly made the standard in state law. AS 46.03.822(i).

Other parties, particularly subcontractors of Alyeska, may be liable. Because some of the pads were owned by the federal government, the United States may also be liable. *FMC Corp. v. U.S. Dep't of Commerce*, 1990 WL 102941, 20 Envtl L. Rptr 21403 (E.D. Pa. 1990), not reported in F. Supp., (federal government may be liable under CERCLA). However, the record is devoid of any facts specifically pointing to other PRP's, so this memorandum does not concern itself with them.

It makes little sense to conduct a Phase I audit in this case because all concerned parties know that the pads were previously used for industrial practices involving hazardous materials (paints, petroleum products, various metals, miscellaneous hydrocarbons, etc.). The only purpose served by reviewing records of past activities would be to circumscribe the universe of contaminants likely to be encountered. Such circumscription might facilitate design of sampling plans and thereby expedite Phase II sampling.

Field sampling (borings, surface water samples, ground penetrating radar, soil vapor surveys, etc.) would be a logical endeavor. Unlike some states, Alaska law does not mandate testing before transacting property interests. 1/ However, we know of no other means for assessing environmental conditions, and an assessment of conditions is requisite to any rational allocation of responsibility among the PRPs. 1/ Thus, auditing environmental conditions is prudent.

III. WHO PAYS FOR THE AUDIT?

This is a matter of negotiation. While this office will not speculate on the strengths and weaknesses of the state's bargaining position, there is one matter that must be addressed at this juncture because it must be understood in order to appreciate what is negotiable and what is not. That is the matter of "innocent land owner" status. In correspondence to YPC, your department suggested that an environmental audit might allow YPC to "escape liability as an innocent third party." Because it would be extremely difficult for YPC to qualify for this status -- commonly called "innocent land owner" -- YPC cannot be expected to contribute funds in the hope of securing such status.

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6/ Compare, for instance, New Jersey's Environmental Cleanup Responsibility Act (ECRA), NJSA 13:1K-6 *et seq.*, which requires owners or operators of "industrial establishments" to assess environmental conditions and clean any existing environmental problems before closing or transferring title to the establishment.

7/ Of course, Alyeska and YPC could arbitrarily divvy up responsibility between themselves without knowing the actual scope of that responsibility. The cost of an audit would be saved, but one party risks accepting more than its fair share of liability. Moreover, the state could not engage in such an arbitrary allocation. While a private entity may choose to accept unlimited risks, the state cannot afford to be so cavalier with public funds.

"Innocent land owner" status is bestowed by AS 46.03.822(b)(1)(B) and 42 U.S.C. § 9607(b)(3). Reduced to its essence, the law holds that any person otherwise liable for a release or threatened release of hazardous substances can avoid liability if that person proves -- by a preponderance of the evidence 1/ -- that the release is solely attributable to a third-party not in privity with the person and that the release occurred despite that person's due diligence and best efforts to avoid or remedy the release.

Assuming that YPC leases the pads from Alaska, or subleases them from Alyeska, YPC will thereafter be in privity with responsible third parties. That will prevent YPC from acquiring innocent land owner status as to future releases. AS 46.03.822(c). However, because YPC is not now in privity with Alyeska or Alaska as to these pads, the element of privity does not bar YPC from now acquiring innocent land owner status for past releases.

The aforementioned elements of due diligence and best remedial efforts do frustrate YPC's chances of achieving "innocent land owner" status as to past releases. To satisfy due diligence requirements, YPC would have to conduct a thorough Phase II sampling of the pads. This is necessary (despite the lack of a legal mandate to do so) because past uses of the site and readily ascertainable information make the likelihood of contamination obvious. AS 46.03.822(d). Add to that YPC's specialized knowledge as a sophisticated investment company and it becomes clear that the diligence due includes field sampling. *See* AS 46.03.822(d). And, if sampling reveals contamination, best remedial efforts require on-the-ground corrective action. AS 46.03.822(b)(2)(B). Thus, "innocent land owner" status is achievable only upon considerable expense. Consequently, attainment of innocent land owner status is not likely to motivate YPC into financing environmental audits.

Nonetheless Alaska, Alyeska, and YPC can be expected to share the cost of audits. Alaska and Alyeska have motivation to contribute because they are already jointly and severally liable for the complete costs of assessment and cleanup at the sites. AS 46.03.822(a); *O'Neil v. Picillo*, 883 F.2d 176 (1st Cir. 1989),

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1/ The "preponderance" standard is expressly established in federal law. 42 U.S.C.S § 9607(b)(3) (1989). Although Alaska's law simply says that the defense must be proved -- and fails to set a standard of proof -- it is well accepted that affirmative defenses must be proved by a preponderance of the evidence. *Clucas v. State*, Op. No. 1147 (Alaska App. July 19, 1991); 1991 WL 132019.

*cert. denied*, 110 S. Ct. 1115 (1990) (liability under CERCLA is strict, joint, and several). In other words, either Alaska or Alyeska could be forced -- by the Environmental Protection Agency or a third person -- to bear the entire cost of an environmental assessment. 1/ YPC has motivation to contribute some portion of the savings it would realize by not having to construct new sites. Accordingly, the cost of an audit would be allocated by negotiation.

IV. WHAT IS YPC's LIABILITY IF NO AUDIT IS CONDUCTED?

Absent an audit, no one will know whether the pads are contaminated. At some time, sooner or later, their condition is likely to be assessed. 1/ If the pads are ultimately found to be clean, no liability arises. If, following YPC's use, the pads turn out to be contaminated, YPC will be liable for all existing contamination unless it can prove that damages are divisible among the PRPs. AS 46.03.822(i); *O'Neil*, 883 F.2d at 178 (damages should be apportioned only if a defendant can demonstrate that the harm is divisible). Such proof would be extremely difficult to make in the absence of an audit, since baseline conditions would not be known.

YPC could limit its liability up-front by purchasing -- from Alaska, Alyeska, and the U.S.-EPA -- covenants not to sue. Nothing in present state or federal law prevents one private party from agreeing not to sue another private party. 1/ An agreement between Alyeska and YPC should be achievable.

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9/ EPA's authority to force assessment can be found in 42 U.S.C.S. §§ 9606, 9607 (1989). Third-parties may sue under various federal citizen suit provisions. *E.g.,* 42 U.S.C.S. § 9659 (1989); 42 U.S.C.S. § 6972 (1989).

10/ As pointed out in the informal opinion of March 22, 1991 (1991 Inf. Op. Att'y Gen. (Mar. 22; 665-91-0115)), audits are now so commonplace that DNR must assume that the environmental condition of these pads will eventually be assessed.

11/ In fact, the right of private parties to buy and sell risks is expressly preserved. AS 46.03.822(g); 42 U.S.C.S. § 9607(e)(1) (1989). *Niecko v. Emro Mktg Co.*, ____ F. Supp. ____, 1991 WL 126378, (D.C.E. Mich. Jul. 2, 1991). While such a covenant may not limit the legal liability of Alyeska, *AM Int'l, Inc. v. Int'l Forging Equip.*, 743 F. Supp. 525 (N.D. Ohio 1990) (tortfeasors may not contract away liability) *but see Jones-Hamilton Co. v. Kop-Coat, Inc.*, 750 F. Supp. 1022 (N.D. Cal. 1990) (*AM Int'l* is not the rule in the Ninth Circuit), it would limit the actual liability because sale of the covenant would provide Alyeska with monies to

No agreement between private persons can be used to prejudice governmental rights of enforcement or cost-recovery. *Jones-Hamilton Co. v. Kop-Coat, Inc.*, 750 F. Supp. 1022 (N.D. Cal. 1990). Consequently, YPC would also have to purchase a covenant not to sue from Alaska and, if possible, the United States. Alaska has inherent power to waive enforcement authority. 1991 Inf. Op. Att'y Gen. (Mar. 22; 665-91-0115); 1984 Inf. Op. Att'y Gen. (Sept. 28; 366-069-85). 1/ Nothing in Alaska's environmental laws negates this inherent sovereign power. 1/ Thus, it would appear possible for the state to issue such a covenant to YPC.

EPA has grappled with this mechanism. 1/ In a guidance document 1/ "premised on the Agency's inherent settlement authority", EPA stated: "[E]ntering into a covenant not to sue with a prospective purchaser of contaminated property, given appropriate environmental safeguards, may result in an environmental benefit through a payment to be applied to clean-up of the site or a commitment to perform response action." 1/ EPA then went on to set minimal criteria for a federally issued covenant not to sue.

> First, EPA will not become involved in purely private commercial transactions. Unless EPA is otherwise

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pay for partial clean-up.

12/ The case of *U.S. v. Bell Petroleum Services, Inc.*, 21 Envtl. L. Rptr. 20374 (W.D. Tex. 1990) held that governments have inherent authority to settle cost recovery claims. There is no reason to suppose that such authority arises only upon expenditure. Thus, a government would have inherent authority to settle cleanup claims before costs are incurred.

13/ Although AS 46.08.070(b) requires efforts to recover monies expended, it does not thwart efforts to avoid those expenditures in the first instance.

14/ In fact, EPA recently sold a covenant not to sue to a bank that wanted to foreclose on contaminated land. 22 Envtl. Rptr. (BNA) Curr. Dvlpmts. 126 (May 17, 1991).

15/ "Guidance on Landowner Liability under Section 107(a)(1) of CERCLA, De Minimis Settlements under Section 122(g)(1)(B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property", OSWER 9835.9 (Jun. 6, 1989).

16/ *Id.* at 27.

involved with the property under consideration, it will not issue a covenant.

Second, in exchange for the covenant EPA must receive substantial benefit not otherwise available. Such benefit might be monetary, might be a cleanup, or might be ephemeral, such as retention of scarce employment opportunities.1/

Third, continued use of the site must not aggravate the spread of contamination. Fourth, persons who will work at the site -- if the covenant issues -- must not be exposed to unreasonable health risks. Fifth, the recipient of the covenant must demonstrate that it is financially capable of fulfilling any obligations it takes on in exchange for the covenant.

EPA's guidance goes on to discuss possible forms the covenant might take. Drafting a covenant should also be guided by CERCLA 1/, by EPA's model 1/ and by previously issued covenants. 1/

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17/ Avoiding massive lay-offs was a primary goal of Michigan and the U.S.-EPA when they issued a covenant not to sue to LOMAC, Inc. for the BOFORS site in Muskegon, Michagan. *See*, *Obtaining a Covenant Not to Sue from the Government -- The Acquisition of a Contaminated Site by an Innocent Purchaser: The BOFORS, Michigan Site, A New Beginning After SARA*, Stewart H. Freeman and Stanley F. Pruss (Apr. 20, 1987), printed in *Hazardous Waste Litigation after the RCRA and CERCLA Amendments of 1987*, Practising Law Institute (Jun. 1987).

18/ CERCLA expressly provides for the issuance of covenants not to sue in certain cases. 42 U.S.C.S. § 9622(f) (1989). The law lists factors to be considered when deciding whether to issue a covenant and how broad to make any such covenant. 42 U.S.C.S. § 9622(f)(4-6) (1989). Because that provision only applies when issuing a covenant to a person who is already a PRP, *U.S. v. Bell Petroleum Services, Inc.*, 21 Envtl. L. Rptr. 20374, it is not binding in the case of YPC. However, the law provides a useful guide.

19/ On July 10, 1987, EPA issued guidance entitled "Covenants Not to Sue Under SARA." *Memorandum from Thomas L. Adams, J. Winston Porter and F. Henry Habicht to Regional Administrators*. Included in that guidance was a model covenant.

20/ The documents prepared for the BOFORS site are reproduced in the referenced text. *See* n. 15.

This office can assist you with negotiations and drafting should you elect to pursue this route.

## V. CONCLUSION

Yukon Pacific Corporation will save construction costs if it employs pre-existing camp pads. Alaska's Department of Natural Resources -- manager of the state-owned pads -- encourages such reuse of impacted areas. Not only will such reuse concentrate environmental impacts, it will bring in money that can be used to offset the state's present liability for any existing contamination. However, DNR (and DEC) wish to ensure that all foreseeable environmental impacts have been considered before any permit or lease agreement is executed. To achieve such assurances, a Phase II environmental audit should be conducted at each site, costs to be shared by Alaska, Alyeska, and YPC according to the pro-rata benefits to be gained by each. As for sites found to be contaminated, DNR might sell YPC a covenant not to sue in exchange for contribution toward clean-up costs.

RKR:lmk