March 22, 1991

The Honorable Richard Foster
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Re: Effect of AS 46.03.822(g) on
hold harmless agreements
WM# 665-91-0115

Dear Representative Foster:

Your office has requested our opinion on the use of hold harmless agreements to facilitate the transfer of potentially contaminated property from the state to rural communities. Specifically, you ask whether 46.03.822(g) bars a rural community from entering into a hold harmless agreement with the state whereby the community waives its legal recourse against the state for any hazardous-substance contamination that may exist on the land transferred to the community. You also ask whether, in the absence of a specific regulation, the Department of Natural Resources ("DNR") may require that an environmental property audit be performed before DNR will accept transfer of land from another state agency.

We conclude as follows:

1. AS 46.03.822(g) does not bar a hold harmless agreement between a rural community and the state. However, such a hold harmless agreement probably would not adequately protect the state from liability under AS 46.03.822(a).

2. DNR may require an environmental property audit as a prerequisite to acceptance of an interagency land transfer.

BACKGROUND

Based upon discussions with your staff and DNR, we understand that the facts are as follows: A rural western Alaska community wishes to obtain title to certain airport

property. The airport property is state land under the control of the Department of Transportation and Public Facilities ("DOT/PF"). For the community to obtain title to the property, DOT/PF must first transfer the property to DNR. DNR could then transfer the property to the community.

As a matter of policy DNR has determined that it will not accept transfer of the property from DOT/PF unless a "phase I" environmental property audit is conducted for the parcel. Apparently, DNR is concerned that the airport property may be contaminated with hazardous substances. 1/

A phase I audit constitutes the most simple and least expensive type of environmental property audit. The phase I audit is a basic screen for the possible existence of hazardous substances on the site. The evaluation includes a visual inspection of the parcel and a review of records associated with the property (e.g. status plats, historical index, aerial photos, etc.). There is no need to conduct a more intensive investigation unless the phase I audit reveals a potential for hazardous substance contamination.

It has become standard business practice to require phased environmental property audits as a prerequisite to commercial land transfers. Lending institutions, commercial purchasers, and others involved in the purchase or sale of possibly contaminated property routinely conduct such audits to minimize their potential liability. DNR's audit requirements are substantially similar to the practices of the private sector. Indeed, DNR informs us that it developed its environmental audit requirements through consultation with lending institutions and others involved in large-scale land transactions.

In large part, the legal liability associated with contaminated property has given rise to environmental property audits and similar preventative practices. The federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), • 107, 42 U.S.C. • 9607, and a similar state law,

---

1/ The likelihood that the property is actually contaminated is unclear. Your office's opinion request indicates that the possibility of contamination is minimal. However, DNR notes that hazardous-substance contamination is relatively common on rural airport property in Alaska. In the absence of an environmental property audit, the actual risk of contamination is difficult to assess.

AS 46.03.822, impose liability upon the following five categories of persons associate with a contaminated site:

(i) Hazardous substance owner: the person who owned or controlled the hazardous substance at the time of the spill;

(ii) Present site owner: the present owner of the contaminated property;

(iii) Past site owner: the person who owned the site at the time the spill occurred;

(iv) Arranger: the person who arranged for disposal of the hazardous substance;

(v) Transporter: the person who transports the hazardous substance to a site the person selects.

42 U.S.C. • 107(a); AS 46.03.822(a). A person who falls into any one of the above categories may be liable for cleanup costs and natural resource damages that result from the contamination. Because one who accepts an ownership interest in a contaminated parcel may become liable as a "present site owner," the laws create a strong incentive for persons to avoid the purchase of contaminated property. Environmental property audits have become routine practice for purchasers who want to avoid entanglement in the hazardous-substance liability net.

In the present case, other concerns also support DNR's decision to require a property audit. DNR points out that the rural community may subsequently transfer the property to private citizens, perhaps for residential use. Absent an environmental property audit, DNR cannot know whether it is inadvertently transferring contaminated property to an Alaskan community and its citizens. Likewise, the community and its citizens have no way of knowing whether the property they receive is contaminated. Given the potential risks contaminated sites pose to the public, it seems to make little legal, economic, or environmental sense for DNR to transfer land without first determining whether the land is contaminated.

LEGAL ANALYSIS

Your opinion request first asks whether the community could enter into a hold harmless agreement with the state wherein the community would waive its right to sue the state if hazardous

substances were later found on the property. Your letter suggests that if AS 46.03.822(g) does not bar a hold harmless agreement, DNR could accept the land from DOT/PF without first performing an environmental property audit to determine whether the property is contaminated.

AS 46.03.822(g) states as follows:

> 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.

By its terms, AS 46.03.822(g) "does not bar an agreement to . . . hold harmless . . . or indemnify a party . . . for liability under [AS 46.03.822]." However, the subsection also provides that "[a] hold harmless . . . or similar agreement . . . is not effective to transfer liability under [AS 46.03.822] from the owner . . . or from a person who might be liable . . . under [AS 46.03.822]."

Hence, AS 46.03.822(g) does not prevent DNR and the community from entering into a hold harmless agreement. If upheld by the courts, the agreement might protect DNR from a lawsuit by the community for liability related to the contaminated property. However, the hold harmless agreement would not protect DNR from lawsuits filed by third parties. For example, the hold harmless agreement would not protect DNR from lawsuits brought by a federal or state regulatory agency under CERCLA • 107(a) or AS 46.03.822(a). 2/ We must therefore conclude that a hold harmless agreement between DNR and the rural community would not adequately protect the state from liability.

2/ CERCLA • 107(e)(1) and (2) contain language virtually identical to AS 46.03.822(g).

Your letter also asks whether DNR may require the environmental property audit absent a specific regulation. In the present case, DNR requires that an environmental property audit be performed before DNR will accept transfer of land from another state agency. In general, an agency must enact "regulations" in accordance with Alaska's Administrative Procedure Act ("APA"), AS 44.62.010-44.62.650. The APA contains a broad definition of "regulation." See AS 44.62.640(3). However, the definition does contain some important limitations. The definition excludes requirements "that [relate] only to the internal management of a state agency." Id. The definition also states as follows:

> [W]hether a regulation, regardless of name, is covered by this chapter depends in part on whether it affects the public or is used by the agency in dealing with the public[.]

DNR's September 14, 1990, draft Environmental Risk Management policy "ERMP") establishes that the environmental property audit requirement constitutes an internal DNR management matter. The requirement relates to DNR's in-house handling and processing of the land transfer. For example, the ERMP defines "phase I environmental audit" as "an evaluation of a parcel, by DLWM personnel, to determine whether . . . there is evidence of . . . hazardous substances . . . on the parcel . . . ." (Emphasis added.) ERMP at 1. The ERMP's procedures place the primary responsibility for conducting phase I audits on DNR staff:

> The adjudicator, or other Natural Resource Officer or Manager with field experience, should inspect the site and conduct a Phase I environmental audit. The purpose of this audit is to answer the question: Is there reason to suspect surface or sub-surface contamination of the subject parcel of state land or the improvements? The adjudicator should review any readily available information.

ERMP at 5 (emphasis added). Because the environmental property audit requirement "relates only to the internal management of a state agency" we conclude that DNR is not required to promulgate the requirement as a regulation. See AS 44.62.640(3).

CONCLUSION

DNR's adoption of the environmental property audit requirement is consistent with standard practices in the private

sector. If properly utilized, the audit process can help minimize the state's potential liability for cleanup costs and damages related to hazardous-substance-contaminated property. In the present case, the audit process can help ensure that subsequent property owners do not become the unwitting recipients of contaminated property.

AS 46.03.822(g) does not bar hold harmless agreements with respect to potentially contaminated property. However, a hold harmless agreement would not protect the state from lawsuits by third parties, nor would the hold harmless agreement protect the state from liability toward those third parties.

DNR's environmental property audit process constitutes an internal agency management practice. For this reason, DNR need not promulgate the requirement as a regulation.

If you have any questions, or if I may be of further assistance, please let me know.

Sincerely,

CHARLES E. COLE
ATTORNEY GENERAL

By:
John A. McDonagh
Assistant Attorney General

JAM:jah
cc: Douglas L. Blankenship, Deputy Attorney General
Frederick L. Smith, Department of Natural Resources, Fairbanks
Gary Gustafson, Department of Natural Resources, Anchorage