

The Honorable John A. Sandor
Commissioner
Department of Environmental
Conservation

October 9, 1991

661-91-0582

269-5100

Coverage of air releases
under AS 46.08.020
("470 Fund")

Breck C. Tostevin
Assistant Attorney General
Natural Resources - Anchorage

You have inquired whether air releases of hazardous substances are covered by the Release Response Fund (known as the "470 Fund"), AS 46.08.050 -- 46.08.900. Such coverage would allow use of Fund monies for air monitoring and would also allow use of air pollution fines as program receipts under the Fund. After consideration of the statutory language, the Fund's purposes, and the relevant legislative history, we conclude that such air releases do fall within the Fund's coverage.

In 1986, the Legislature created the Oil and Hazardous Substance Release Response Fund. In its statement of purpose, the Legislature found "that the release of oil or hazardous substances into the environment presents a real and substantial threat to the public health and welfare, to the environment, and to the economy of the state." AS 46.08.005. The term "release" is specifically defined in the chapter as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment." 46.08.900(9) (emphasis added). The term "emitting . . . into the environment" is on its face broad enough to cover air emissions of hazardous substances.

Remedial environmental statutes are to be construed broadly to effectuate their purposes. First United Methodist Church v. U.S. Gypsum Co., 882 F.2d 862, 867 (4th Cir. 1989); New York v. Shore, 759 F.2d 1032, 1045 (2nd Cir. 1985). The term "release" is one used in federal environmental statutes, most importantly in the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The federal courts have relied on the term "emitting" to cover air-borne releases of a hazardous substance. See, e.g., United States v. Metate Asbestos Corp., 584 F. Supp. 1143 (D. Arizona 1984) (friable asbestos fibers blown from mine tailings a "release" within the meaning of CERCLA).

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You raised the question of whether the definition of the term "hazardous substance" constrains DEC's use of the fund for air-borne releases. We conclude that the statutory definition of "hazardous substance" does not exclude coverage of air-borne releases. "Hazardous substance" is defined in AS 46.08.900(6) as (A) an element or compound that, when it enters into or on the surface or subsurface land or water of the state, presents an imminent and substantial danger to the public health or welfare, or to fish, animals, vegetation, or any part of the natural habitat in which fish, animals, or wildlife may be found; or (B) a substance defined as a hazardous substance under 42 U.S.C. 9601 -- 9657 (Comprehensive Environmental Response, Compensation, and Liability Act of 1980); "hazardous substance" does not include uncontaminated oil or uncontaminated refined oil in an amount of 10 gallons or less.

Thus, a hazardous substance is either identified by reference to EPA's classification of the substance under CERCLA or more generally by the danger threatened by its entry into the surface or subsurface land or water of the state. You inquired whether the reference in AS 46.08.900(6)(B) to entry "into or on the surface or subsurface land or water of the state" excludes the Fund's coverage of air-borne releases.

Our answer has two parts. First, in the case of a CERCLA substance, an air-borne release alone is sufficient to fall within the Fund's definition of release of a hazardous substance. Nothing in CERCLA limits the hazards posed by a release of a hazardous substance to land or water releases and several federal courts have so recognized. See, e.g., United States v. Louisville Edible Oil Products, 926 F.2d 584 (6th Cir. 1991) (air emissions of asbestos under CERCLA); Eagle-Pricher Industries v. United States Env'tl. Protection Agency, 822 F.2d 132, 151 (D.C. Cir. 1987) (air releases of uranium); United States v. Hardage, 761 F. Supp. 1501, 1510-11 (W.D. Okla. 1990) (air releases of several hazardous substances); United States v. Metate Asbestos Corp., 584 F. Supp. 1143 (D. Arizona 1984) (air releases of asbestos).

Second, as your opinion request indicated, unauthorized releases to the air may often present an imminent and substantial danger to public health or welfare, or to fish, animals,

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vegetation, or natural habitat by virtue of the air-borne substance's eventual entry onto land and water of the state. Once a determination is made by DEC that a particular non-CERCLA substance threatens the requisite harm set forth in

AS 46.08.900(6)(B), 1/ its air-borne release would also be covered by the Fund.

AS 46.08.040, which sets forth the purposes of the 470 Fund, bolsters this conclusion. The section provides in pertinent part:

The commissioner may use the money in the fund to

(1) contain, clean up, and take other necessary action, such as monitoring, assessing, investigating, and evaluating the release or threatened release of oil or a hazardous substance that poses an imminent and substantial threat to the public health or welfare, or to the environment.

AS 46.08.040(1) (emphasis added). Thus, once classified as a hazardous substance, appropriate use of money from the Fund centers on whether the substance's release or threatened release to public health or welfare, or the environment "poses an imminent and substantial threat." Id.

Finally, you asked the related question of whether fines and penalties for air violations should be deposited into the Fund.

AS 46.08.020(b) provides that "[m]oney received by the state under (a)(2) or (a)(3) of this section shall be deposited in the general fund and credited to the special account called the oil and hazardous substance release mitigation account." Subsection (a)(3)

1/ A consideration of each unauthorized release used as an example in your letter is beyond the scope of this opinion letter and we do not, therefore, express an opinion on them.

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lists "fines, penalties or damages recovered under this chapter [AS 46.08] or other law for costs incurred by the state as a result of a release or threatened release of oil or a hazardous substance."

AS 46.08.020(a)(3) (emphasis added). Thus, fines, penalties, or damages received by DEC under AS 46.03.822, AS 46.03.760, AS 46.03.790 or other law for a release or threatened release of an air-borne hazardous substance should be deposited to the 470 Fund.

We appreciate the opportunity to advise on this matter.

BCT/jv