IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

#79,80,81,82
90, 91

FLINT HILLS RESOURCES ALASKA, LLC,	)
Plaintiff,	)
vs.	)
WILLIAMS ALASKA PETROLEUM, INC. AND THE WILLIAMS COMPANIES, INC.,	)
Defendants.	)

Case No. 4FA-10-1123CI

Order Regarding Statute of Limitations

I. The Infield Fly Rule, Sophisticated Litigants, and Trial Court Fact Finding Regarding Determinative Statute of Limitation Facts.

The infield fly rule is designed to prevent a team from purposefully dropping a playable pop-up ball in order to gain the opportunity to make a double or even triple play. Statutes of limitations are designed to bar stale claims and recognize that memories fade and witnesses disappear with the passage of time.[1] The former rule baffles casual observers and the latter rule is a disfavored remedy for resolving actions.[2]

[1] *Haakanson v. Wakefield Seafoods, Inc.*, 600 P.2d 1087, 1090 (Alaska 1979), *quoting Byrne v. Ogle*, 488 P.2d 716, 718 (Alaska 1971)(emphasis added). *See also Cameron v. State*, 822 P.2d 1362, 1365 (Alaska 1991).
[2] *See, Vanek v. State of Alaska, Board of Fisheries*, 193 P.3d 283, 288 n.18 (Alaska 2008)(quoting *Fred Meyer of Alaska, Inc. v. Adams*, 963 P.2d 1025, 1027 n. 6 (Alaska 1998).

The infield fly rule is benign on its face. An infield fly is explained in the official baseball rules under rule 2.00 [definitions] and rule 6.05(e) [explaining outs]. The problem with young players, and casual observers, is *when* and *how* it is applied. Professional ball players and umpires know the rule applies only when there are less than two outs and there is a force play at third bases, which means there must be runners on first and second or that the bases are loaded. How the rule is applied is based on the judgment of the umpire that the ball is a fair ball and catchable, in the umpire's opinion, by the infielder. If the umpire deems the ball catchable in this situation he calls "infield fly" and the batter is out regardless of whether the infielder makes the catch. This means there is a no force out and the runners must tag up before advancing.

The infield fly rule is seldom invoked because the situation for its application is limited. Nevertheless professional ballplayers, both defensively and offensively, are aware of the rule and its consequences. It is not obtuse to them.

It bears particular note in this opinion that Flint Hills and Williams are very sophisticated litigants. They bargained long and hard regarding the sale of the North Pole Refinery. The Asset Sale and Purchase Agreement [ASPA] that resulted from such bargaining is a confusing amalgam of the differing interests of the parties but illustrative of the fact that each party was sophisticated in the refinery business and tried as much as possible to shift past and future liability to the other party.

There was plenty of science involved in the operation and sale of the refinery, including an engineering firm, Shannon and Wilson, which worked for both parties when they

operated the refinery. There is plenty of data regarding ground water, sulfolane, and other chemicals at the time of sale. The existence of a variety of such chemicals was explicitly made part of the ASPA.

These parties are not unsophisticated parties unaware of the consequences of the passage of time in barring a claim, but rather sophisticated, savvy, and involved companies who were intensely involved in risk shifting contract issues that included a variety of chemicals, one of which was sulfolane.[3] This point was previously made by the court and reiterated here.[4]

These particular parties are the legal equivalent of big league ball players. As such they know the infield fly rule and when and how it is applied. Thus, in the context of this motion practice regarding the statute of limitations, the court bears in mind the sophisticated and high level involvement by both parties regarding percipient facts and applicable law of the relevant statute of limitations.

One final note needs be stated at the outset. Although motions for summary judgment are the context for the analysis that follows, it must be kept in mind that, regarding questions of fact establishing dates for the purpose of statute of limitation issues, the *trial court* is tasked with making those factual findings, not a jury.[5] Therefore, after a long evidentiary hearing,

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[3] The court is aware that other chemicals, particularly BTEX and LNAPL, were the focus of the most intense concern for both parties. These terms are discussed in Section IV hereafter.

[4] *See* the court's 6 March 2013 Order Regarding Williams' Motion for Partial Summary Judgment Re: Retained Liabilities and Strict Liability Claims Pursuant to AS 46.03.822(a).

[5] *John's Heating Service v. Lamb*, 46 P.3d 1024 (Alaska 2002), citing *Pedersen v. Zielski*, 822 P.2d 903, 907 n. 4 & 908 (Alaska 1991) (Questions concerning the application of the discovery rule that "are genuine issues of material fact ... must be resolved at an evidentiary hearing.")

this court hereafter makes factual findings necessary to establish whether some or all claims are barred. The process of having a trial court decide facts, often hotly contested facts, is the antithesis of the general policy to have disputed issues of fact decided by a jury. Yet it is a gatekeeping function specifically required of the trial court under *John's Heating Service v. Lamb*.[6]

So, returning to the baseball *leit motif*, with less than two outs and runners on at least first and second base, the umpire must exercise his *judgment* whether an infield pop-up is *catchable*. Here the trial court must exercise its judgment to decide disputed facts as to when Flint Hills knew it had claims against Williams or should have discovered it had claims against Williams.

II. Procedural History/Introduction

On 27 January 2010 James West, a North Pole homeowner, filed suit against Flint Hills Resources Alaska, LLC (Flint Hills) and Williams Alaska Petroleum, INC. and the Williams Companies, Inc. (Williams) alleging he suffered damages resulting from sulfolane leaked from the North Pole refinery.[7] On 10 May 2010 Flint Hills filed cross-claims and third party claims against Williams. James West's claims were subsequently settled and he was

[6] 46 P.3d 1024 (Alaska 2002). Scenarios requiring a trial court to make such preliminary gatekeeping decisions exist but are not common. An area of growing litigation that involves such a finding is whether limited immunity precludes claims against state employees or not. This is a legal conclusion that requires independent fact finding by the trial court.
[7] *See* the 27 January 2010 Complaint.

dismissed from the litigation.[8] This court allowed Flint Hills leave to file its second amended complaint on 8 May 2012.

The second amended complaint advances new contract based claims against Williams pursuant to Section 2.3 of the Asset Sale and Purchase Agreement (ASPA).

Several summary judgment motions were filed. The court over the course of the case made the following rulings which were related to whether some, all, or none of the claims asserted by Flint Hills are barred by statute of limitations:

1. The North Pole Refinery is the only source of the sulfolane at issue in this litigation.[9] The sulfolane plume is an "environmental condition" under the ASPA.[10] The sulfolane found to have migrated off site prior to 1 April 2004 is attributable to Williams.[11]

2. Alaska law provides the statute of limitations to be applied to this case.[12] Flint Hills' claims for contractual indemnity did not accrue until Flint Hills first incurred liability or a monetary obligation attributable to the offsite sulfolane contamination.[13] Flint Hills' claim for diminution in value is one of breach of contract and not one of contractual indemnity. Accordingly, the three-year statute of

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[8] *See* the 20 June 2011 Stipulation to Dismiss.
[9] *See* the court's 10 April 2013 Order Regarding Flint Hills' Motion for Partial Summary Judgment Relating to (1) the Source of the Sulfolane Contamination, (II) the Characterization of the Sulfolane Plume as an 'Environmental Condition,' and (III) Sulfolane Off-Site as of April 1, 2004 p 4.
[10] *Id.* at 5.
[11] *Id.* at 6.
[12] *See* the court's 10 April 2012 Order Regarding Statute of Limitations, p 6.
[13] *Id.* at 8.

limitations accrued when Flint Hills had sufficient information to alert it of a potential cause of the refinery's value.[14]

3. Ambiguity exists in portions of the parties' ASPA agreement and the interpretation of those contractual provisions present factual issues to be decided by a jury.[15]

4. Flint Hills' claims are not barred on public policy grounds.[16]

5. The court has declined to find that the Damage Cap applies to Williams' indemnification liability for damages related to the sulfolane contamination.[17]

6. Under *Laidlaw*, Flint Hills is permitted to plead both claims and the court may move from section (a) to section (j) based on the jury's verdict.[18]

7. Whether the offsite sulfolane is a retained liability under the ASPA is a genuine issue of material fact that will be decided by the jury.[19]

8. A three year statute of limitations applies to Flint Hills' retained liability claims.[20]

9. A two years statute of limitations applies to Flint Hills' strict liability claims under section (a).[21]

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[14] *Id.* at 7.
[15] *See* the court's 24 April 2012 Second Order Regarding Parties' Motions for Summary Judgment, pgs 12-13.
[16] *See* the court's 27 April 2012 Order Regarding Public Policy Violation, p 4.
[17] See the court's 8 May 2012 Order Regarding Defendants' Motion for Partial Summary Judgment on Issue of Damage Cap, p 6.
[18] See the court's Order Regarding Williams' Motion for Partial Summary Judgment Re: Strict Liability Claims Under AS 46.03.822(a), p 5.
[19] See the court's 7 March 2013 Order Regarding Williams' Motion for Partial Summary Judgment Re: Retained Liabilities and Strict Liability Claims Pursuant to AS 46.03.822(a), p 6.
[20] *Id.* at 8.

10. Flint Hills' claim for diminution of refinery value is part of Flint Hills' indemnification claim under the ASPA and is governed by the same statute of limitations period as other claims.[22]

11. Equitable relief, including injunctive relief or specific performance, is not subject to the damages cap.[23]

III. Evidentiary Hearing

The hearing was scheduled to resolve factual issues concerning the statute of limitations, including determining when Flint Hills first began paying its obligations related to the off-site sulfolane contamination and when it was put on inquiry notice of its contract claim for diminution of the refinery's value.

The burdens of proof were agreed to by the parties and discussed in two court orders.[24] Since the statute of limitations is an affirmative defense, Williams bore the burden of proof. Williams specifically bore the burden of proving when Flint Hills "discovered, or reasonably should have discovered, all of the elements of its cause of action." Williams presented evidence first. The burden then shifted to Flint Hills to prove that the statute of limitations should not apply by virtue of application of the discovery rule. Williams then presented rebuttal evidence. The court conducted a five day hearing from 8 April 2013 through 12 April 2013.

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[21] *Id.* at 10.
[22] *See* the court's 18 March 2013 Order Regarding Flint Hills' Motion for Summary Judgment on Williams Statute of Limitations Defense, p 6.
[23] *See* the court's 24 March 2013 Order Regarding Motion for Partial Summary Judgment on retained Liabilities Issues Damage Cap), p 7.
[24] *See* the court's 8 March 2013 Order regarding Motion to Set the Burden and Order of Proof in the Evidentiary Hearing Deadlines and 19 March 2013 Order Regarding Motion for Reconsideration.

Williams presented a videotaped deposition of Keri Depalma, live testimony from Kathleen Hook, live testimony from Jon Lindstrom, and a videotaped deposition of Elizabeth Page. Flint Hills presented live testimony from Brain Roos, videotaped deposition exerts of Carl Benson, and live testimony from Elizabeth Page. Extensive exhibits, mostly joint exhibits, were admitted into evidence.

IV. Findings of Fact[25]

Williams and its predecessors owned and operated the North Pole Refinery in North Pole, Alaska from approximately 1977 through 31 March 2004.[26] In 2001, Williams discovered the presence of sulfolane in the groundwater beneath the refinery.[27]

Sulfolane is a manufactured chemical developed in the early 1960's as a solvent. Sulfolane has been used in the refining process at the North Pole Refinery since 1985 and is still used today.[28]

Pursuant to an Asset Sale and Purchase Agreement ("ASPA") effective 1 April 2004, Flint Hills contracted to purchase the North Pole Refinery from its former owner, Williams.

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[25] Both parties filed helpful proposed findings of fact and conclusions of law as directed by the court. The court relied heavily on these filings in navigating the highly technical and scientific facts of the case. The court generally agreed with Williams' factual findings due to some credibility issues on the part of Flint Hills' witnesses which are discussed throughout the order. The court found that Flint Hills' findings focused on their investigation of sulfolane in reference to when it became a regulated containment and not when they knew or should have known that sulfolane was offsite for purposes of filing a claim against Williams.

[26] Plaintiff's Exhibit 219.

[27] Vol. 2, 18:10-19:17 (Lindstrom); 22:9-23:9 (Lindstrom), 33:1-34:18 (Lindstrom), 144:7-19 (Lindstrom), 151:16-153:9 (Lindstrom); DX V.

[28] [Flint Hills' Second Amended Complaint Against Defendants, at 12, Mar. 22, 2012.]

In the agreement Williams, disclosed the presence of sulfolane in the groundwater underneath the refinery.[29]

Under the ASPA, Flint Hills agreed to assume responsibility for "all existing, known contamination at the [refinery] property specifically identified in the referenced figures, tables and texts described" in Schedule 10.2(a)(iv) of the ASPA.[30] One of those "figures, tables and texts" was a one-page document entitled "Williams Alaska Petroleum Sulfolane Data July 2001-September 2001."[31] That document listed sulfolane concentrations at certain wells on the refinery property on specified dates.[32] Thus, Flint Hills knew and understood that there was sulfolane on the refinery property as of 2004, and in fact agreed to take responsibility for the sulfolane that was "existing, known" and disclosed as of that date.

Flint Hills executives involved in the purchase of the refinery, including David Robertson and Allen Lasater, shared Williams's belief that sulfolane was entirely onsite and not offsite at the time of the sale.[33]

Flint Hills first filed its claims against Williams in this case on 10 May 2010.[34] This court allowed Flint Hills leave to file its second amended complaint on 8 May 2012. The second amended complaint advances new contract based claims against Williams pursuant to

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[29] ASPA, Schedule 10.2.
[30] PX 219 at Schedule 10.2(a)(iv).
[31] *Id.*
[32] PX 156.
[33] Robertson Depo. at 126:25-128:16, 131:7-10; Lasater Depo. at 186:6-14; *see also*, Mueller Depo. at 113:18-22, 115:11-15; Prier Depo. at 76:4-18.
[34] [Amended Answer, 5/10/10.]

Section 2.3 of the Asset Sale and Purchase Agreement (ASPA). All of Flint Hills claims are based on Williams' release of sulfolane into the ground underlying the North Pole Refinery.[35]

As damages, Flint Hills seeks recovery of the costs incurred in responding to the sulfolane contamination, and the diminution in value of the North Pole Refinery attributable to the sulfolane contamination both on and off the refinery property.[36]

Among other defenses, Williams asserts that all of Flint Hills' claims are barred by the applicable statutes of limitations.[37]

During the time that Williams owned and operated the refinery, that were two plumes of concentration in the groundwater at the refinery that were of particular concern to the Alaska Department of Environmental Conservation (ADEC). The first was a combination of benzene, toluene, ethyl benzene, and xylenes ("BTEX").[38] The second was a plume of light non-aqueous phase liquid ("LNAPL").[39] Both BTEX and LNAPL were present in the groundwater, as the result of prior releases (for example, spills or leaks) at the time of sale to Flint Hills.

Also during the time that Williams and its predecessors-in-interest owned and operated the refinery, sulfolane was released into the ground underlying the refinery

[35] [Flint Hills' Second Amended Complaint Against Defendants, Mar. 22, 2012.]
[36] [Flint Hills' Second Amended Complaint Against Defendants, Mar. 22, 2012; Ex. H, at Request for Admission No. 234 (Flint Hills' Responses to Williams Alaska's Fourth Requests for Admission, 11/16/11).]
[37] [Williams Alaska Petroleum, Inc.'s Third Amended Answer and Counterclaim, June 1, 2012.]
[38] Vol. 2, 143:22 (Lindstrom), 150:13-151:15 (Lindstrom); DX V at FHR00534991; DX Y at WAPI 0072801. All citations to "Vol." are to the appropriate volume of the transcript of the evidentiary hearing in this case, with "Vol. 1" representing the transcript from the first day of the hearing (on April 8), "Vol. 2" representing the transcripts from the second day of the hearing (on April 9), and so on. In addition, each citation to the transcript will include the name of the testifying witness. All references to "DX" are to the Defendants' Exhibits introduced at the evidentiary hearing.
[39] Vol. 2, 143:14-22 (Lindstrom), 22:9-23:9 (Lindstrom), 144:7-19 (Lindstrom), 151:16-153:9 (Lindstrom); DX V.

property.[40]

In 2001, Shannon & Wilson performed a Contaminant Characterization Study of the refinery property and discovered an unknown chemical in the groundwater at locations north of the refinery previously considered to be free of subsurface contamination. The chemical was later identified as sulfolane.[41] Shannon & Wilson's sampling of the groundwater at that time identified sulfolane at or above the detection limit of 2 mg/L in thirteen wells.[42]

Even though sulfolane was found in the groundwater, Shannon & Wilson did not include it as a contaminant of interest in its June 2002 Site Characterization and Corrective Action Plan because sulfolane was not regulated at that time.[43] In an e-mail in March 2002, Doug Bauer of the Alaska Department of Environmental Conservation ("ADEC") advised that sulfolane was "not considered [a] regulated contaminant at this time."[44] In another e-mail in March 2003, Bauer confirmed that sulfolane was not regulated, declaring, "Sulfolane is not at this time a chemical of concern."[45] No experts directed or recommended Williams to install additional monitoring wells for sulfolane.[46]

ADEC directed Williams to sample for sulfolane at a regular frequency until the

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[40] [Id., at 13 .]
[41] [Ex. V, at 20 (2001 Contaminant Characterization Study, Oct. 2001); Ex. AA (Lindstrom Letter to Roos, 7/2/04); Hook Testimony, Hearing Tr., 4/8/13, at 186: Lindstrom Testimony, Hearing Tr., 4/9/13, at 19 and 33.]
[42] [Ex. U (Sulfolane Data, July - Sept. 2001).]
[43] [Ex. Y (Site Characterization and Corrective Action Plan, at 12-14, June 2002); Ex. Z (Lindstrom ltr to Lasater, 6/5/02).]
[44] [Ex. X (Bauer E-mail to Freeman, 3/1/02).]
[45] [Ex. X (Bauer E-mail to Carnahan, 3/12/03); Lindstrom Testimony, Hearing Tr., 4/9/13, at 36-37, 41.]
[46] [Hook Testimony, Hearing Tr., 4/8/13, at 192.]

source of sulfolane in the groundwater could be established with some confidence.[47] However, Williams ceased monitoring the groundwater for sulfolane after July 2002.[48]

Williams attempted to find the sources of sulfolane in the groundwater at the refinery by performing equipment inspections to detect leaks of sulfolane, reviewing operations procedures in an effort to minimize spills, and developing sulfolane-management plans for turnarounds at the refinery.[49]

Williams never determined any specific source(s) of sulfolane in the groundwater, but Williams did conclude that the sulfolane in the groundwater was due at least in part to historical releases (i.e., spills or leaks during Williams' ownership predating 2002).[50]

Kathleen McCullom Hook, Williams' lead environmental employee at the refinery until the sale in 2004, testified that Williams' efforts to address and find the sources of sulfolane were reasonable in her view.[51] Dr. Lindstrom also believed that it was reasonable to conduct groundwater sampling as a means to identity sources of sulfolane in the groundwater.[52]

Flint Hills assumed ownership and operation of the North Pole Refinery on 1 April 2004. After the transfer of ownership, Flint Hills hired Williams' environmental staff, with the exception of Kathleen Hook, and retained all of the refinery's environmental files.[53]

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[47] DX X; Freeman Depo. at 156:14-157:10, 157:12-21; Vol. 2, 36:1-37:3 (Lindstrom), 160:10-14 (Lindstrom); Vol. 1, 194:9-14 (Hook).
[48] PX 257, page 2; Vol. 3, 14:7-14:20 (Lindstrom).
[49] Vol. 1, 194:9-195:10 (Hook), 196:3-20 (Hook).
[50] Vol. 1, 196:21-197:2 (Hook); Newcomer Depo. at 109:21-11:7.
[51] Vol. 1, 197:7-12 (Hook).
[52] Vol. 2, 160:10-160:19 (Lindstrom).
[53] [Hook Testimony, Hearing Tr., 4/8/13, at 175.]

As everyone is aware of now, the sulfolane released prior to Flint Hills' assumption of ownership of the refinery had migrated far beyond the contours of the sulfolane identified in the disclosure schedule to the ASPA and the plume had already extended off of the refinery property.[54] Any sulfolane found to have migrated off the refinery premises prior to 1 April, 2004, is attributable to Williams' actions and/or inactions in operating the North Pole Refinery.[55]

On 16 June 2004 Flint Hills environmental engineers met with representatives of Shannon & Wilson, which served as Flint Hills' primary contractor for environmental work, and advised that they wanted to "gain a comprehensive understanding of the distribution of subsurface contamination potentially attributable to past activities" at the refinery and to "take appropriate measures to ensure this contamination is remediated or does not pose an environmental or human health risk."[56] On 2 July 2004, in a follow-up letter to that meeting, Shannon & Wilson advised Flint Hills that in 2001 sulfolane had been discovered in the groundwater at locations north of the refinery previously considered to be free of subsurface contamination.[57] On 20 July 2004, Shannon & Wilson submitted a proposal to Flint Hills to conduct a review of the sulfolane data to assess distribution and concentration trends.[58] Based on its review, Shannon & Wilson would "identify areas where the information is not adequate for the purposes of assessing environmental risks, [and] determining the distribution of

[54] [Ex. C, at 7 (Davis Aff.).]
[55] [Order Regarding Flint Hills' Motion for Partial Summary Judgment Relating to (I) the Source of the Sulfolane Contamination, (II) the Characterization of the Sulfolane Plume as an "Environmental Condition," and (III) Sulfolane Off-Site as of April 1, 2004, at 6, Apr. 10, 2012.]
[56] [Ex. AA (McDowell Letter to Roos, 7/2/04); DePalma Depo., at 57.]
[57] [Ex. AA, at 2 (McDowell Letter to Roos, 7/2/04).]
[58] [Ex. AC (McDowell Letter to Hellen, 7/20/04).]

sulfolane and contaminants at the site."[59]

On 29 July 2004, representatives of ADEC met with representatives of Flint Hills to address issues regarding hazardous substances contamination at the North Pole Refinery, and ADEC told Flint Hills that they needed to find the sources of the sulfolane.[60] In a Power Point presentation on 2 September 2004, Shannon & Wilson presented an overview of the contamination issues at the North Pole Refinery.[61]

Flint Hills was aware that groundwater can move contanimants off site.[62] In its presentation, Shannon & Wilson noted that groundwater seeped at an average of 1.3 feet/day and advised that "[g]roundwater represents potential off-site contaminant migration medium."[63] In its Power Point presentation, Shannon & Wilson also concluded that the "[s]ulfolane data suggests fresh hydrocarbon releases have occurred," and it recommended that sulfolane monitoring be resumed to identify its sources.[64]

Sampling done later that month on 10 September 2004 detected sulfolane in a monitoring well in an area north of the refinery where it had not been detected in the previous sampling in October 2001.[65] Shannon & Wilson proposed monthly sampling to determine the

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[59] [Id., at 3.]
[60] [Ex. AK (Bauer Letter to Lasater, 10/19/04).]
[61] [Ex. AG (Power Point Slides); Lindstrom Testimony, Hearing Tr., 4/9/13, at 75.]
[62] In his testimony at the hearing, Jon Lindstrom of Shannon & Wilson testified, "It basically means to say that since groundwater is flowing at the refinery, logic would suggest that that represents a medium that contamination might be able to leave the refinery, could be an offsite migration medium." [Lindstrom Testimony, Hearing Tr., 4/9/13, at 30.] Brian Roos, Flint Hills' Environmental Manager at the time, testified that it was "fairly obvious" in 2004 that groundwater can move contanimants offsite. [Roos Testimony, Hearing Tr., 4/11/13, at 58.]
[63] [Ex. AG, at S&W 57945, S&W 57953 (Power Point Slides).]
[64] [Ex. AG, at S&W 57978, S&W 58979 (Power Point Slides).]
[65] [Lindstrom Testimony, Hearing Tr., 4/9/13, at 45-48; Ex. AE, at S&W 00301-02 (Power Point Slides); Ex. AH (FHR Analytical Report, 9/10/04 sampling results).]

source and fate of the sulfolane.[66] In an e-mail on 30 September 2004 Jon Lindstrom of Shannon & Wilson further advised Flint Hills that sulfolane was essentially non-degradable in the anaerobic conditions of the aquifer under the refinery and that sulfolane is miscible in (mixes with) water and is not retarded in its subsurface migration.[67] In an e-mail two weeks later, Lindstrom opined that sulfolane would behave similarly to propylene glycol and wash away without biodegrading.[68] In other words, sulfolane was not disappearing but was moving with the groundwater from the monitoring locations to other locations downgradient.

On 19 October 2004, in follow-up to his July 2004 meeting with Flint Hills' representatives, Douglas Bauer of ADEC wrote a letter to Flint Hills President Allen Lasater. The purpose of the letter was to "outline the issues (and expectations) associated with" the contamination at the refinery and to "outline a strategy to address them."[69]

Bauer's letter stated:

> **The source(s) of Sulfolane in the ground water at the refinery needs to be determined. The chemical Sulfolane will be considered a regulated contaminant.** The soil cleanup standards will be the 2001 Canadian Association of Petroleum Producers soil quality guidelines, and water cleanup standards will be the 2002 British Columbia Provincial Government's water quality guidelines.[70]

From that letter, Lindstrom understood that sulfolane was now being regulated.[71]

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[66] [Ex. AE, at S&W 00318.]
[67] [Ex. AJ (Lindstrom E-mail to Hellen, Coggeshall, 9/30/04).]
[68] [Ex. 235 (Lindstrom E-mail to Hellen, 10/15/04); Lindstrom Testimony, Hearing Tr., 4/10/13, at 19-20.]
[69] [Ex. AK (Bauer Letter to Lasater, 10/19/04).]
[70] [Id. (emphasis added).]
[71] [Lindstrom Testimony, Hearing Tr., 4/9/13, at 72-73.

Flint Hills did not determine any sulfolane sources in 2005.[72] Accordingly, having found no sources of ongoing sulfolane release, Flint Hills concluded that any sulfolane in the ground was from historical releases, in other words, to releases prior to Flint Hills' assumption of ownership of the refinery.[73]

While Williams had suspended monitoring for sulfolane a year or so prior to Flint Hills' assumption of ownership of the refinery, Flint Hills re-established the sampling because it did not have current data and wanted to find out whether the sulfolane concentrations were consistent with historical data.[74] In another Power Point presentation in January 2005 made to ADEC, Shannon & Wilson advised Flint Hills that a sample from MW-110 ["MW" means monitoring well] taken in September 2004 detected 94 mg/L of sulfolane, more than eleven times greater than the 8 mg/L of sulfolane detected in sampling from that monitoring well in October 2001.[75]

On 9 June 2005 Shannon & Wilson submitted a revised proposal to Flint Hills for well installation and data review activities.[76] The proposal included the installation of "three groundwater monitoring wells along the estimated northern boundary of the dissolved benzene groundwater plume, to serve as sentry wells capable of detecting subsurface contaminant migration off the facility."[77] Shannon & Wilson noted that "[c]ontamination observed at MW-139 may be migrating northwest of that location and may not be adequately

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[72] [Id., at 58.]
[73] [Roos Testimony, Hearing Tr., 4/10/13, at 161-63.]
[74] [Roos Testimony, Hearing Tr., 4/10/13, at 156-57.]
[75] [Ex. AE, at S&W 301-02 (Power Point Slides); Lindstrom Testimony, Hearing Tr., 4/9/13, at 52, 54-55.]
[76] [Ex. AO (McDowell Letter to Freeman, Re: Revised Proposal for Well Installation, Maintenance Activities, and Data Review, 6/9/05); Lindstrom Testimony, Hearing Tr., 4/9/13, at 57-58.]
[77] [Id., at 2.]

monitored by sampling MW-142."[78] As set forth below, such downgradient sulfolane migration was confirmed immediately upon installation of one of the new wells. By e-mail dated 22 June 2005, ADEC informed Shannon & Wilson and Flint Hills that it concurred in the work proposed, including "installation of additional monitoring wells."[79]

In August and September 2005, "Shannon & Wilson installed three groundwater monitoring wells (MW-143, MW-144, and MW-145) along the estimated northern boundary of the dissolved benzene groundwater plume, to serve as sentry wells capable of detecting subsurface contaminant migration off the facility."[80] MW-143 was installed approximately 250 feet northwest of MW-142 to monitor contamination downgradient of MW-139.[81] MW-143 tested positive for sulfolane shortly thereafter.[82]

On 24 January 2006, Doug Bauer of ADEC sent a letter to Flint Hills President Lasater again directing:

> **The source(s) of the Sulfolane in the ground water at the refinery needs to be determined. The chemical Sulfolane will be considered a regulated contaminant** in accordance with 18 AAC 75.325(g) and ADEC's *Cumulative Risk* Guidance adopted by reference. ADEC has determined cleanup standards for Sulfolane and they are based on toxicological information contained in the 2001 Canadian Association of Petroleum Producers soil quality guidelines and the 2002 British Columbia Provincial Government's water quality guidelines.[83]

The letter specified a sulfolane cleanup standard for groundwater of 0.35 milligrams per liter

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[78] [Id.]
[79] [Ex. AP, at 2 (Bauer e-mail to Lindstrom, 6/22/05).]
[80] [Ex. AV, at 2 (Lindstrom Letter to DePalma, Re: Report on Well Installation...., 12/28/05).]
[81] [Id.]
[82] [Lindstrom Testimony, Hearing Tr., 4/9/13, at 80.]
[83] [Ex. AY (Bauer Letter to Lasater, 1/24/06)(emphasis added).]

(mg/L).[84]

Between ADEC's 19 October 2004 letter and its essentially identical letter of 24 January 2006 Flint Hills had not identified the sources of the sulfolane in the groundwater at the refinery.[85]

On 6 April 2006 Shannon & Wilson presented a proposal to implement a groundwater monitoring program and investigate the probable sources of sulfolane.[86] In its proposal, Shannon & Wilson informed Flint Hills that sulfolane was highly soluble in water and "will be highly mobile in the subsurface and will migrate at a similar velocity to the groundwater flow."[87] Shannon & Wilson further advised that "[u]nder the anaerobic groundwater conditions such as those at the North Pole refinery...little or no biodegradation is expected."[88] Given the consistent concentrations of sulfolane found in some of the well samplings, Shannon & Wilson also expressed the opinion that "there may be a sulfolane source providing continuous input" into the groundwater.[89]

Sulfolane near and exceeding the groundwater cleanup level was identified in samples taken in April, May, and June 2006 from MW-143, one of the three monitoring wells installed in August and September 2005.[90] In a memorandum to ADEC and Flint Hills in September

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[84] [Id.; Lindstrom Testimony, Hearing Tr., 4/9/13, at 88.]
[85] [Lindstrom Testimony, Hearing Tr., 4/9/13, at 88-89; Freeman Depo., at 102-03; Page Depo., at 128; Ex. CE, at 20 (Barr Cold Eye Review, Aug. 2008).]
[86] [Ex. BD (Lindstrom Letter to DePalma, Re: Scope of Services to Assess Sulfolane, 4/6/06); Lindstrom Testimony, Hearing Tr., 4/9/13, at 92-93.]
[87] [Ex. BD, at 2.]
[88] [Id.]
[89] [Id.]
[90] [Ex. BL, at 7 and Table 1 (Lindstrom Letter to DePalma, Re: Results of Groundwater Monitoring for Sulfolane, 9/27/06).]

2006, Shannon & Wilson again stated its opinion that the steady state concentrations of sulfolane near or above the ADEC groundwater cleanup level of 0.35 mg/L in several of the wells in the northwest area of the refinery suggest a constant source of sulfolane chronically leaching into the groundwater, as opposed to an acute surface release.[91]

In a draft report sent three weeks later on 27 September 2006, Shannon & Wilson informed Flint Hills of the results of its groundwater monitoring for sulfolane.[92] Noting that sulfolane had been detected above groundwater cleanup levels at the refinery's northernmost monitoring wells, including MW-143 (one of the three new wells), Shannon & Wilson advised that "it would be appropriate to identify the down gradient extent of the sulfolane plume" and recommended installing additional monitoring wells at the refinery property boundary.[93] Lindstrom testified that his recommendation was partly based upon his review of new data and the fact that MW-139, MW-142, and MW-143 showed steady concentrations of sulfolane without hydraulic control, which meant that sulfolane would presumably be migrating down gradient from those locations.[94]

On 24 October 2006 Shannon & Wilson presented the final report of the results of its groundwater monitoring.[95] Once again, Shannon & Wilson advised that sulfolane is highly soluble in water, will be "highly mobile in the subsurface and will migrate at a similar velocity to the groundwater flow," and it expressed its opinion that there was "a sulfolane

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[91] [Ex. BK (Lindstrom Memo to Bauer, DePalma, 9/7/06).]
[92] [Ex. BL (Lindstrom Letter to DePalma, Re: Results of Groundwater Monitoring for Sulfolane, 9/27/06).]
[93] [Lindstrom Testimony, Hearing Tr., 4/9/13, at 119.]
[94] [Lindstrom Testimony, Hearing Tr., 4/10/13, at 99-100.]
[95] [Ex. BO (Lindstrom Letter to DePalma, Re: Results of Groundwater Monitoring for Sulfolane, and Proposed Long-Term Sulfolane Groundwater Monitoring Program, 10/24/06).]

source providing continuous input" near the wells producing consistent sampling concentrations.[96]

While it had been originally believed that the sulfolane was co-extensive with the other known contaminants on the property, the working hypothesis now was that sulfolane was separating from the LNAPL (light non-aqueous phase liquid) hydrocarbons floating on the water table and that was providing the continuous source of the sulfolane.[97] The "logical conclusion" was that the suflolane was migrating further downgradient than the LNAPL plume.[98]

Accordingly, Shannon & Wilson concluded in its October 2006 report:

> **The extent of the subsurface sulfolane contamination has not been determined**, and the sources of this contamination remain poorly defined. We therefore recommend that additional efforts be pursued to assess the sources and distribution of sulfolane at the refinery.[99]

Shannon & Wilson further advised, "We recommend installing one or two monitoring wells at the refinery's property boundary, along the access road to the waste transfer station, to serve as sentry wells to confirm that sulfolane is not leaving the refinery property."[100]

When asked why it was now appropriate to install downgradient monitoring wells when that had not been done before, Lindstrom testified:

> [B]ecause we had not established that we had an exponentially deceasing concentration at any given location at these northern-most wells, **and we had not delineated the downgradient extent of the plume, and we needed to**

[96] [Id., at 2, 4, 8.]
[97] [Lindstrom Testimony, Hearing Tr., 4/9/13, at 89-90, 96.]
[98] [Id., at 107-08, 115-16.]
[99] [Ex. BO, at 9 (Lindstrom Letter to DePalma, 10/24/06)(emphasis added).]
[100] [Id., at 11.] Lindstrom testified that this was "another way of saying" that Flint Hills needed to make sure that sulfolane was not offsite. [Lindstrom Testimony, Hearing Tr., 4/9/13, at 119.]

establish how far it went and whether or not it was leaving the property.
Q: So is the common sense that with the data that had been collected historically and now the finer-grain data you felt it appropriate that we look further downgradient?
A: Yes.[101]

On redirect, Lindstrom provided the "finer-grain" 2006 data underlying Shannon & Wilson's recommendation. The sulfolane level in R-21, the most northerly recovery well, exceeded the regulatory standard of .35 mg/L for the months of April through July 2006. In the three monitoring wells downgradient from R-21, sulfolane exceeded the cleanup standard all four of those months in MW-139, three of the four months in MW-142, and two of the four months in MW-143.[102]

Shannon & Wilson's recommendations were consistent with standard environmental practices. When it is learned that a contaminant is likely to flow with the groundwater, normal protocol in delineating a contaminant plume is to install monitoring wells along an affected property's downgradient boundary to determine whether the contamination is migrating offsite.[103]

On 2 November 2006 ADEC sent Flint Hills a letter concurring with all of the recommendations made by Shannon & Wilson in its October 24 report.[104]

Keri DePalma, a Flint Hills environmental engineer responsible for its groundwater program and the investigation team leader, agreed with Shannon & Wilson's recommendation

[101] [Lindstrom Testimony, Hearing Tr., 4/10/13, at 61 (emphasis added).]
[102] [Id., at 81-84, 94-96; Ex. DH.]
[103] [DePalma Depo., at 30-31, 137.]
[104] [Ex. BP (Bauer Letter to DePalma, 11/2/06); Lindstrom Testimony, Hearing Tr., 4/9/13 at 122.]

for wells at the property boundary as "a necessary addition to the program."[105]

DePalma understood from ADEC's November 2, 2006, letter that it was expecting Flint Hills to implement Shannon & Wilson's recommendations.[106] Nonetheless, despite the monitoring well results, Shannon & Wilson's stated concern that the contamination was migrating, its proposal for new monitoring wells, and ADEC's concurrence in that proposal, Flint Hills did not install any additional monitoring wells for sulfolane until August 2008.[107] In fact, no one at Flint Hills ever discussed with Lindstrom his recommendation that monitoring wells be installed on the property boundary.

In an e-mail to DePalma on 4 December 2006, Lindstrom expressed the "hope" that sulfolane was not leaving the refinery property.[108] On 28 December 2006, he again recommended that new monitoring wells be installed to serve as sentries for offsite sulfolane.[109]

In early 2007 Carl Benson, another environmental engineer with Flint Hills, was assigned DePalma's responsibilities for the groundwater remediation program.[110]

On 12 January 2007 due to DePalma's upcoming departure, Lindstrom sent an e-mail listing the pending environmental projects to her and two other Flint Hills environmental

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[105] [DePalma Depo., at 137-38, 153-54.]
[106] [DePalma Depo., at 144-45.]
[107] [Ex. E, at 4-5, Responses to Request for Admission Nos. 2 and 3 (Flint Hills' Responses to First Requests for Admission, 10/15/10).] In fact, no one at Flint Hills ever discussed with Lindstrom his recommendation that monitoring wells be installed on the property boundary. [Lindstrom Testimony, Hearing Tr., 4/9/13, at 126.] Moreover, based on her testimony at the hearing, it appears that Elizabeth Page never discussed with Lindstrom his October 24, 2006 report. [Page Testimony, Hearing Tr., 4/12/13, at 45.]
[108] [Ex. BR (Lindstrom E-mail to DePalma, 12/4/06).]
[109] [Ex. BX (Lindstrom e-mail to DePalma, 12/28/06); Lindstrom testimony, Hearing Tr., 4/9/13, at 125.]
[110] [Benson Depo., at 14, 16; DePalma Depo., at 123.]

engineers (Carl Benson and Kent Freeman), as well as Flint Hills' environmental, health and safety manager (Bruce Tylock).[111] The list included "[i]nstallation of additional monitoring wells to delineate the northern extent of the sulfolane plume."[112] Lindstrom sent the e-mail to numerous recipients at Flint Hills to make sure it got to Flint Hills' management structure and to make sure that the recommendations were implemented because he felt that they were necessary to meet the requirements of ADEC's 24 January 2006, sulfolane regulatory letter.[113]

DePalma also told Tylock and Freeman that they needed to continue implementing the projects outlined in Lindstrom's January 12 e-mail.[114] She prepared a memo in response to Lindstrom's e-mail intended as a "handover document" to those remaining at Flint Hills, stating that the installation of wells needed to be completed, and that Doug Bauer would like to see it completed before he retired in August 2007.[115] She suggested installing the wells in late spring to get some data to report to Bauer.[116] Lindstrom testified that the wells could have been installed and sampled in May 2007.[117]

While well installation may be more difficult in the winter months in Fairbanks, it can be done.[118] Flint Hills had a routine process for implementing projects on a high priority, and they have done work outside in January when the temperature was minus fifty degrees.[119]

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[111] [Ex. BY (Lindstrom E-mail to Benson, et al., 1/12/07); Lindstrom Testimony, Hearing Tr., 4/9/13, at 128-129.]
[112] [Ex. BY.]
[113] [Lindstrom Testimony, Hearing Tr., 4/9/13, at 126-129.]
[114] [DePalma Depo., at 181.]
[115] [Ex. BZ (DePalma Memo, 1/21/07); DePalma Depo., at 182-83.]
[116] [Ex. BZ.]
[117] [Lindstrom Testimony, Hearing Tr., 4/10/13, at 73.]
[118] [DePalma Depo., at 138.]
[119] [Roos Depo., at 171-73, 175.]

Flint Hills' new environmental consultant, Barr Engineering, who commenced work at the refinery in October 2007, confirmed that the wells could have been promptly installed.[120]

Flint Hills completed installation of the new monitoring wells on the refinery property's boundary on 6 October 2008, almost two years after Lindstrom had recommended they be installed.[121] Barr Engineering characterized the lack of monitoring wells on the property boundary as a "critical data gap."[122]

In early 2007, Elizabeth Page of Reiss Remediation, a sister company of Flint Hills in the Koch Industries family of companies, first started work at the North Pole Refinery to evaluate its groundwater program.[123] In August 2007 Page produced her Initial Assessment of the groundwater program at the refinery.[124] Based on her review of the existing data, she found that there were "likely" multiple sources of sulfolane and that "[t]he portion of the sulfolane plume that exceeds the ADEC protective concentration level (PCL) of 0.35 mg/L appears to be consistent with time."[125] She further concluded that "[t]he portion of the sulfolane plume that exceeds the method detection limit (MDL) approaches the downgradient property boundary."[126]

Williams argues that Page was able to conclude that the sulfolane plume had migrated beyond the existing monitoring well network and that based on her assessment, Page had

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[120] [Sillanpaa Depo., at 82-84 (estimating approximately a two-month period to obtain additional data and install monitoring wells).]
[121] [Sillanpaa Depo., at 122-123; Page Testimony, Hearing Tr., 4/12/13, at 85.]
[122] *Id.*
[123] [Page Depo., at 29-31.]
[124] [Ex. CB (Initial Assessment of Groundwater Program, Aug. 2007.]
[125] [Id.]
[126] [Id.; Ex. 281, (Hand-drawn plume maps by Page, 8/13/07).]

enough information to know that additional investigation into the scope of the sulfolane contamination was needed. At the hearing, however, Page testified that she concluded the sulfolane plume was not migrating and was stable.[127] If, indeed, that was her conclusion, it was not a reasonable one.

The court specifically finds that Page's conclusion that the sulfolane plume was not migrating and stable not credible in light of all the contrary evidence noted above. Shannon & Wilson had specifically and repeatedly advised that sulfolane would not degrade in the anaerobic conditions of the refinery ground, that it would mix with water, and that it would migrate with the groundwater flow. With that information, it was not reasonable to conclude that the sulfolane plume was stable and not moving. At a minimum, the court finds Page – and Flint Hills – were on notice and reasonably should have concluded that there was a likelihood that sulfolane had migrated, and Flint Hills should have promptly installed the monitoring wells as recommended by Shannon & Wilson in October 2006. Indeed, the court finds Flint Hills were on notice that sulfolane was in the ground water as early as 20 July 2004 when Shannon & Wilson submitted a proposal to conduct a review of the sulfolane data and assess its distribution and concentration trends. By the time of the Shannon & Wilson Power Point presentation on 2 September 2004 the court finds Flint Hills knew or reasonably should have discovered that there was a real and ongoing issue regarding sulfolane in the groundwater that required action by Flint Hills.

Instead, however, Page testified that she did not discuss the matter with Lindstrom: "I

[127] [Page Testimony, Hearing Tr., 4/11/13, at 184.]

didn't discuss anything that I recall specifically with Dr. Lindstrom. I came to my own conclusion and just considered their information with all the raw data and came to my own conclusion. I didn't regurgitate his conclusions or Shannon &: Wilson's conclusions."[128] At the hearing, Page admitted that her conclusion was wrong.[129] The court agrees her conclusion was wrong and that it was not reasonable to make that error in the presence of significant data to the contrary and without even involving Lindstrom in the process.

Page's opinion regarding the presence of suflolane and its migration are flawed. As demonstrated by the following admissions made by Page at the hearing, she was wrong because she ignored the expert, Dr. Lindstrom, and made her own decision despite the fact that she did not know nor learn nor investigate the basics with respect to sulfolane at Flint Hills' North Pole Refinery:

- She had no experience working with sulfolane prior to her work at the North Pole Refinery.[130]
- She did not know if sulfolane is found in gasoline produced at the North Pole Refinery, or if it is found in Jet A or Naphtha.[131]
- She had not investigated if benzene and sulfolane acted differently as to mobility in the groundwater at the North Pole Refinery, and she never asked Lindstrom or Barr Engineering about that.[132]

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[128] [Page Testimony, Hearing Tr., 4/12/13, at 47.]
[129] [Page Testimony, Hearing Tr., 4/11/13, at 184.]
[130] [Page Testimony, Hearing Tr., 4/11/13, at 187.
[131] [Id. at 166-167.]
[132] [Id. at 170-171.]

- She did not know the fate of sulfolane in the groundwater at the North Pole Refinery when it leached out of the LNAPL plume.[133]
- She only used 2007 data to draw her sulfolane plume lines in Ex. 281.[134]
- She did no investigation with respect to Lagoon B and was not aware that Lagoon B had been used by Flint Hills in 2004.[135]
- She did not "have any way of knowing" whether the wastewater passing through Lagoons A, B and C contained sulfolane.[136]
- She did not look for sulfolane sources, and she did not trace back the wastewater stream containing sulfolane going to City of North Pole wastewater to identify any possible sources or releases of sulfolane.[137]
- She agreed with Barr Engineering's statement in its August 2008 Cold Eye Review at page 20 [Ex. R] that "to date it appears that little effort has been made to characterize the actual release locations. This is important in determining if the release is historical or on-going, and if additional corrective action is necessary."[138]
- She did not look at product spills at the North Pole Refinery "because there were other people doing that."[139]
- She did not know whether sulfolane separates from the LNAPL plume.[140]

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[133] [Id. at 171.]
[134] [Id. at 172-173.]
[135] [Page testimony, Hearing Tr., 4/12/13, at 28-37.]
[136] [Page Testimony, Hearing Tr., 4/12/13, at 33.]
[137] [Id. at 31, 33-35].
[138] [Page Video Depo., Hearing Tr., 4/10/13, at 125.]
[139] [Page Testimony, Hearing Tr., 4/12/13, at 40.]
[140] [Id. at 44.]

- In 2007 she did not recommend that a monitoring well be placed between monitoring wells 106 and 111 to determine if Lagoon B or some other source was releasing sulfolane into the groundwater.[141]
- Even though Carl Benson indicated to her that the sulfolane level in the stripper effluent stream would fail the ADEC cleanup standard, she did not know or investigate whether the benzene stripper remediation system removed sulfolane from the influent stream or whether it could end up in the unlined south gravel pit.[142]
- Despite ADEC's concurrence with all the recommendations in Shannon & Wilson's 24 October 2006 report, she did not know how many of the recommendations were implemented by Flint Hills in 2007.[143]
- Even though she acknowledged that "[i]t appears that the sulfolane plume has migrated beyond the [then] current monitoring network," she stated "I was comfortable there was [sic] enough wells here for me to feel comfortable that the plume had not gone off-site."[144]
- In reaching her conclusions, she never studied the recovery wells and their rates, nor made her own assessment of whether the recovery rate was sufficient to maintain hydraulic control of the sulfolane in the groundwater, but supposedly relied on Barr Engineering to do that later.[145] Indeed, she testified at her deposition that "what I said

[141] [Id. at 46-47.]
[142] [Id. at 49-53.]
[143] [Id. at 60-61.]
[144] [Id. at 62, 64.]
[145] [Id. at 79-80.]

earlier is that I was not concerned that – I was not concerned as to the hydraulic control; I was just thinking that we had a higher level of sulfolane in this area [around MW-110 and Lagoon B], and it would be beneficial to remove it."[146]

- She could not say whether the recovery wells were maintaining 100% hydraulic control of the sulfolane in the groundwater if the sulfolane was downgradient of all of the refinery recovery wells.[147]

Instead of implementing Shannon & Wilson's recommendation for additional monitoring wells, Page recommended a "cold eye review" from an outside consultant.[148] Flint Hills retained Barr Engineering to conduct the review. Almost half-a-year later, on 18 January 2008, Barr issued a Draft Technical Memorandum in which it found that the northwestern, eastern, and southern boundaries of the sulfolane plume were not well-defined, and it concluded, "It appears that the sulfolane plume has migrated beyond the current monitoring network."[149] Without the benefit of any additional monitoring wells and based on essentially the same information previously available to Shannon & Wilson, Barr was able to conclude that the sulfolane had migrated beyond that disclosed in the ASPA.

In the subsequent draft Cold Eye Review dated August 2008, Barr concluded that the sulfolane plume had migrated beyond the monitoring network "and possibly beyond FHR-Alaska property."[150] Barr further concluded that "[t]o date, it appears that little effort has

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[146] Page Video Depo., Hearing Tr.,, 4/10/13, at 123.]
[147] [Id. at 80-81.]
[148] [Ex. CB, at 2 (Initial Assessment of Groundwater Program, Aug. 2007.]
[149] [Ex. CD, at 14-15 (Barr, Draft Technical Memorandum, 1/18/08).]
[150] [Ex. CE, at 23 (Barr, Cold Eye Review, Aug. 2008).]

been made to characterize the actual release locations."[151] Page agreed with that assessment.[152]

Barr's resulting recommendation for more monitoring wells and the reasons supporting that recommendation were no different than those made by Shannon & Wilson twenty-two months earlier in October 2006. Just as Shannon & Wilson had concluded that monitoring wells were needed at the property boundary because Flint Hills "had not delineated the downgradient extent of the plume," Barr Engineering concluded that monitoring wells were needed on the boundary "[b]ecause there was a data gap between the downgradient network and the property boundary."[153]

MW-148A and MW-148B were the well-pair in which sulfolane was immediately discovered after being installed in October 2008.[154] As demonstrated by Lindstrom during his redirect testimony, those wells were installed on the refinery boundary on a straight line downgradient from MW-139 (downdgradient from Crude Unit 2 and the Sulfolane Extraction Unit) through MW-139 (which detected sulfolane in excess of the .35 mg/L cleanup standard in the April-July 2006 sampling) through MW-142 (which detected sulfolane in excess of the cleanup standard in three of those four months).[155] Moreover, MW-148A and MW-148B were installed near the access road which Shannon & Wilson had recommended as the

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[151] [Id., at 20.]
[152] [Page Depo., at 128; see Freeman Depo., at 107-08, 136-37.]
[153] [Lindstrom Testimony, Hearing Tr., 4/10/13, at 61; Sillanpaa Depo. at 78.]
[154] [Ex. CG, at 20 (Barr, Cold Eye Review - Addendum, Jan. 2009); Lindstrom Testimony, Hearing Tr., 4/10/2013, at 103-04.]
[155] [Lindstrom Testimony, Hearing Tr., 4/10/13, at 101-02.]

location of the monitoring wells it had proposed in October 2006.[156] Alan Sillanpaa of Barr Engineering agreed that "one of the logical locations to put monitoring wells to check for sulfolane on the property boundary is where monitoring wells 148A and 148B were located."[157]

Flint Hills began placing additional monitoring wells on the property boundary in September 2008.[158] Sampling from those wells promptly confirmed that sulfolane had migrated to the downgradient property boundary.[159] The fact that sulfolane had migrated to the property boundary indicated that it was offsite.[160] The two monitoring wells in which sulfolane was found on the refinery's northern property boundary in October 2008, MW-148A and MW-148B, actually were off the refinery property.[161]

Thus, despite the assertions of some Flint Hills' witnesses that they did not know for certain at that time that sulfolane was offsite, Flint Hills indisputably knew that sulfolane was offsite at that point in time, and has so admitted to this court.[162] Upon looking at Ex. DB at the hearing, Page confirmed that the width of the sulfolane plume at monitoring wells 148A and 148B was approximately 1,300 feet wide.[163]

In the January 2009 addendum to its Cold Eye Review, Barr stated that the extent of

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[156] [Ex. BO, at 11 (Lindstrom Letter to DePalma, 1024/06).]
[157] [Sillanpaa Depo. at 103-04.]
[158] [Page Depo., at 130.]
[159] [Ex. CG, at 20 (Barr, Cold Eye Review - Addendum, Jan. 2009).]
[160] [Lindstrom Depo., at 169, 193; LaPlaunt Depo., at 91.]
[161] [Lindstrom testimony, Hearing Tr., 4/10/13, at 104.]
[162] [Flint Hills' Summary of Evidence for Hearing on Statute of Limitations Issue, 4/25/12, at 2 ("FHRA will show at the hearing that it actually discovered that sulfolane had migrated off the refinery property in October of 2008"); Ex. DB (Hand drawn sketches from G. Remple, 10/20/08).]
[163] [Page testimony, Hearing Tr., 4/12/13, at 87-88.]

the plume beyond the refinery property was unknown and that the plume possibly extended off-site.[164] Additional monitoring wells installed off the refinery property in 2009 confirmed once again that the sulfolane had indeed migrated beyond the property boundaries.[165]

In August 2009, Page expressed criticism of Shannon & Wilson's work and blamed them for failing to address the sulfolane and letting it get away and become a problem.[166]

In response, Lindstrom wrote,

> I was glad to speak with you yesterday about our concerns surrounding Shannon & Wilson's environmental services for the refinery. As I said, our scope of services at the refinery has been quite limited since 2005, and has not included periodic comprehensive reviews of the environmental data we collect on a monthly basis as we had suggested. We did conduct some sulfolane sampling in 2006, and subsequently recommended a long-term groundwater monitoring program for sulfolane.
>
> We also recommended installing monitoring wells to define the extent of the sulfolane plume, as well as preparing a groundwater model to help the refinery optimize its recovery system; Douglas Bauer of the ADEC concurred with our recommendations. Unfortunately, our recommendations were not implemented; we believe both the sulfolane and benzene issues the refinery now faces might have been averted had the actions we recommended been taken.[167]

Lindstrom testified that "we would have understood much better the extent, or at least the extent to which it [sulfolane] might have been leaving the [North Pole Refinery] property at that juncture had those wells been installed a little bit earlier."[168]

The court does not find fault, based on this record, with either the work done by

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[164] [Ex. CG, at 20 (Barr, Cold Eye Review - Addendum, Jan. 2009).]
[165] [Ex. 332, (Analytical Results from Pace Analytical showing positive detections of sulfolane offsite of the refinery).]
[166] [Ex. CH (Lindstrom e-mail to Page, 8/28/09).]
[167] [Id.; Lindstrom testimony, Hearing Tr., 4/9/13, at 130-134.]
[168] [Id., at 134.]

Shannon and Wilson or the fact it informed Flint Hills of the not only the presence of suflolane as early as July 2004. Shannon and Wilson even presented this information to the Flint Hills management in a Power Point presentation in September 2004. Flint Hills may criticize the work done by Shannon and Wilson, but the court finds Shannon and Wilson certainly plainly advised Flint Hills of legitimate and serious concerns regarding sulfolane in 2004. The court finds the documentary evidence on this point, as well as the testimony of Linstrom persuasive on this point.

Even if there were any merit to Page's criticism of Shannon & Wilson's work, Flint Hills must nonetheless bear the responsibility for any deficiency in that work since Shannon & Wilson was Flint Hills' agent. If Shannon & Wilson's work was not reasonable, then Flint Hills' effort in investigating the scope of the sulfolane contamination also was not reasonable.

Beginning in 2004 Flint Hills incurred expenses and paid Shannon & Wilson for its work in addressing the sulfolane contamination.[169] Prior to the filing of this lawsuit by James West in January 2010, Flint Hills never notified defendants that there were any issues regarding sulfolane either at the refinery or beyond the refinery property boundary. Prior to that time, Flint Hills did not notify defendants that ADEC had decided to regulate sulfolane, that Flint Hills had discovered sulfolane in an existing monitoring well in September 2004 and in a new monitoring well in the spring of 2006 well beyond the contours of the sulfolane disclosed as part of the ASPA, that Elizabeth Page had concluded in August 2007 that the sulfolane plume approached the downgradient property boundary, that Barr Engineering had

[169] [Exs. AI, AL, AN, AU, BF, BG (Progress Invoices, Nov. 04 to Nov. 06); Lindstrom testimony, Hearing Tr., 4/9/13, at 59, 64, 65, 77, 102, 120.]

concluded in January 2008 that sulfolane had migrated beyond the monitoring network, or that Flint Hills had discovered sulfolane in additional monitoring wells at or beyond the property boundary in the fall of 2008 and the spring of 2009.[170]

As a result of Flint Hills' delay in asserting its claims, the memories of witnesses have faded, and as evidenced by their testimony at the hearing, they were unable in numerous instances to remember important information.

V. Applicable Law

A. Applicable Statutes of Limitations.

Alaska law governs the statute of limitations issues in this case.[171] "The statute of limitations protects the defendant by limiting the time a plaintiff has to respond once the cause of action accrues. The statute of limitations "avoid[s] the injustice which may result from the prosecution of stale claims ... [and] protects[s] against the difficulties caused by lost evidence, faded memories and disappearing witnesses."[172]

1. Contract Claims.

Under AS 09.10.053, claims for breach of contract must be commenced within three years of accrual. Flint Hills' claims for indemnification and for retained liabilities arise under the ASPA and are therefore subject to the three-year statute of limitations under AS

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[170] [Ex. E, at Request for Admission No. 140; Ex. G, at Request for Admission Nos. 221, 222 (re: failure to give ADEC letters to defendants).]

[171] [Order Regarding Defendant's Motion for Summary Judgment on Statute of Limitations and Setting Evidentiary Hearing, at 6, April 10, 2012.]

[172] Haakanson v. Wakefield Seafoods, Inc., 600 P.2d 1087, 1090 (Alaska 1979), *quoting* Byrne v. Ogle, 488 P.2d 716, 718 (Alaska 1971)(emphasis added). See also Cameron v. State, 822 P.2d 1362, 1365 (Alaska 1991).

09.10.053.[173]

2. Statutory Claims.

Under AS 09.10.070(a)(5) claims for a liability created by statute must be commenced within two years of accrual. Flint Hills' claims for strict liability and for contribution under AS 46.03.822(a) and (j) arise under statute and are therefore subject to the two-year statute of limitations under AS 09.10.070(a)(5).[174]

B. The Discovery Rule.

As a general rule, the statute of limitations begins to accrue when a cause of action accrues.[175] The Alaska Supreme Court has recognized a variation on this general rule where an element of a cause of action is not immediately apparent. In that circumstance, the court will apply the "discovery rule" to determine when the claim accrues thereby triggering the running of the statute of limitations.[176]

Four principles govern application of the discovery rule:

First, "a cause of action accrues when a person discovers, or reasonably should have discovered, the existence of all elements essential to the cause of action."[177]

Second, "a person reasonably should know of his cause of action when he has sufficient information to prompt an inquiry into the cause of action, if all of the essential

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[173] [Order Regarding Defendant's Motion for Summary Judgment on Statute of Limitations and Setting Evidentiary Hearing, at 14 (Apr. 10, 2012); Order Regarding Williams' Motion for Partial Summary Judgment Re: Retained Liabilities and Strict Liability Claims Pursuant to AS 46.03.822(a), at 8, March 6, 2013.]
[174] [Order Regarding Williams' Motion for Partial Summary Judgment Re: Retained Liabilities and Strict Liability Claims Pursuant to AS 46.03.822(a), at 10 (March 6, 2013); Order Regarding Flint Hills' Motion for Summary Judgment on Williams' Statute of Limitations Defense, at 10, March 18, 2013.]
[175] Roach v. Caudle, 954 P.2d 1039, 1041 (Alaska 1998).
[176] John's Heating Service v. Lamb, 46 P.3d 1024, 1031 (Alaska 2002).
[177] John's Heating Service v. Lamb, 129 P.3d 919, 923 (Alaska 2006)(emphasis added).

elements of the cause of action may reasonably be discovered within the statutory period at a point when a reasonable time remains within which to file suit."[178] Under this formulation, the statute of limitations begins to run on "the date when a reasonable person has enough information to alert that person that he or she has a potential cause of action or should begin an inquiry to protect his or her rights."[179] In that circumstance, the statute of limitations begins to run from the "inquiry notice date," not the date when the inquiry should have produced knowledge of all elements of the cause of action.[180]

Third, where the plaintiff conducts a reasonable inquiry, but still does not discover all essential elements of his claim when a reasonable time remains to file suit, "the limitations period is tolled until a reasonable person discovers actual knowledge of, or would again be prompted to inquire into, the cause of action."[181] Where a person actually attempts an inquiry but still does not discover all elements of the claim, the issue is whether that inquiry was reasonable, not whether a reasonable inquiry in the abstract would have produced knowledge of the cause of action.[182] "Where there is no attempt, however, there is no choice but to put the question in the abstract."[183]

Fourth, for a cause of action to accrue and the statute of limitations to run, it is not necessary that the plaintiff discover or know the full extent of his damages. "[U]nder the

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[178] Id. at 922-23 (footnote omitted; emphasis added).
[179] Mine Safety Appliances Co. v. Stiles, 756 P.2d 288, 291 (Alaska 1988)(citation omitted).
[180] Cameron v. State, 822 P.2d 1362, 1366 (Alaska 1991).
[181] Id. at 1367 (citation omitted).
[182] Pedersen v. Zielski, 822 P.2d 903, 908 (Alaska 1991).
[183] Id. (footnote omitted).

discovery rule it is irrelevant if the full scope of injury is not known immediately."[184] "[C]ommencement of the statute [of limitations] will not be put off until one learns the full extent of his damages."[185] "There is no requirement that a plaintiff must discover the full extent of her injuries before the statute of limitations begins to run."[186]

VI. Analysis

A. *Contract Claims*

1. Indemnification Claim.

Flint Hills' claim for indemnification accrued when it first had damages or a loss for which indemnification could be claimed.[187]

Flint Hills claims indemnification for two types of Damages as defined in Section 10.3(d) the ASPA: the diminution in the North Pole Refinery's value attributable to the sulfolane contamination and the costs of responding to the contamination. Flint Hills agrees that its claim for indemnification for "Damages" as defined in the ASPA "is a single, unitary indemnification claim, and therefore should have a single, unitary limitations period."[188] "Flint Hills' entitlement to recover damages for diminution of value is not a separate claim.

The diminution damages are simply one type of damage for which Flint Hills is entitled to reimbursement."[189] Thus, Flint Hills' cause of action for indemnification accrued

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[184] Sopko v. Dowell Schlumberger, Inc., 21 P.d 1265, 1272 (Alaska 2001).
[185] Wettanen v. Cowper, 749 P.2d 362, 365 (Alaska 1988)(citation omitted).
[186] Smith v. Thompson, 923 P.2d 101, 106 (Alaska 1996).
[187] [Order Regarding Defendant's Motion for Summary Judgment on Statute of Limitations and Setting Evidentiary Hearing, at 8, 10, April 10, 2012.]
[188] [Ex. CO, at 21 (Flint Hills' Memorandum in Support of Motion for Summary Judgment on Williams' Statute of Limitations Defense, 4/30/12).]
[189] [Id., at 20-21; see also Order Regarding Flint Hills' Motion for Summary Judgment on Williams' Statute of

when it could have first brought a claim based on either of the types of damages it claims pursuant to that cause of action.[190] However, the discovery rule applies where an element of a cause of action is not immediately apparent.

The court must now determine under the discovery rule when Flint Hills discovered, or reasonably should have discovered, the existence of all elements essential to their contract causes of action. The court must also look at whether Flint Hills reasonably should know of its contract causes of action because it had sufficient information to prompt an inquiry into the cause of action.

Williams argues that Flint Hills could have sued on 1 April 2004 when Flint Hills bought the refinery because the contours and concentration of the sulfolane contamination were already greater on 1 April 2004, than was disclosed in the ASPA, and as of that date all elements existed for Flint Hills' indemnification claim. The court finds that while it is true that the elements for a claim existed at this time, Flint Hills did not know that they existed. However, by Flint Hills own admission, they subsequently took upon themselves after the sale to begin to investigate sulfolane levels because when it purchased the refinery, Flint Hills knew that the information disclosed with respect to the sulfolane contamination was "spotty."

Limitations Defense, at 6, 3/18/13.]

[190] Smith v. Thompson, 923 P.2d 101, 106 (Alaska 1996); Wettanen v. Cowper, 749 P.2d 362, 365 (Alaska 1988).

In July 2004 Shannon & Wilson proposed to conduct a data review to identify where the data was not adequate to determine the distribution of sulfolane contamination. The court finds that this is the beginning of steps that should have put Flint Hills on notice that the scope of the contamination was not known and needed investigation. The court also finds that Flint Hills actually incurred costs regarding Shannon & Wilson's work after that date, specifically after the 20 July 2004 proposal.

In September 2004 Shannon & Wilson advised Flint Hills that sulfolane had been detected in samples from a monitoring well in an area north of the refinery where sulfolane had never been detected before. At that point, Flint Hills should have drawn the conclusion that the sulfolane extended beyond the sampling disclosed as part of the ASPA and that it had the basis for an indemnification claim arising from the diminution of the refinery's value.

Later that month, sulfolane was detected in MW-110 at level of 94 mg/L, more than eleven times greater than the 8 mg/L detected from that same monitoring well in 2001.

Both at a meeting held in July 2004 and in a letter dated 19 October 2004, ADEC told Flint Hills that it needed to find the sources of the sulfolane contamination. In its letter, ADEC also told Flint Hills that sulfolane was a regulated contaminant. If it was not already apparent, the meeting and the letter should have put Flint Hills on notice that sulfolane was an issue and that further investigation was needed.

Over the course of the next two years, Shannon & Wilson repeatedly provided Flint Hills with information sufficient to inform it that the refinery had a diminished value as a result of undisclosed sulfolane contamination and that it should conduct an investigation into the scope of that contamination.

Shannon & Wilson repeatedly advised Flint Hills that sulfolane is highly soluble in water,

is highly mobile in the subsurface, and will migrate with the groundwater flow. Shannon & Wilson further advised that sulfolane was unlikely to degrade given the anaerobic conditions of the aquifer underlying the refinery. Coupled with the earlier discoveries in September 2004 that sulfolane had migrated to a new area and that sulfolane was found in much greater concentrations than previously known, Flint Hills should have known at that time that the sulfolane contamination was greater than and had likely migrated beyond what had been disclosed by Williams Alaska as part of the ASPA.

Shannon & Wilson made repeated recommendations for the installation of new monitoring wells based on its expressed concern that the sulfolane extended beyond the existing monitoring network.

Shannon & Wilson also repeatedly expressed the opinion that there was a continuous source of sulfolane into the groundwater, which should have further spurred Flint Hills to investigate the sources and determine the extent of the contamination.

In June 2005, based on its observation that contamination may be migrating northwest, Shannon & Wilson recommended the installation of sentry wells capable of detecting the flow of contaminants off the facility. Later that month, ADEC concurred in that recommendation.

On 24 January 2006, in a repeat of its prior October 2004 letter, ADEC again told Flint Hills that sulfolane was regulated and directed it to find the sources, this time expressly specifying numerical cleanup standards.

In the spring of 2006, sulfolane was found near and above the cleanup level in samples from MW-143, a new monitoring well installed 250 feet northwest, i.e., downgradient of MW-142. Once again, Flint Hills should have known at that point that the sulfolane contamination was more extensive than that which had been disclosed.

On 24 October 2006 Shannon & Wilson recommended the installation of monitoring wells at the refinery's boundary to determine whether sulfolane was leaving the property. A week later, ADEC concurred in that recommendation.

However, rather than installing any new monitoring wells, Flint Hills chose in early 2007 to bring in a new consultant, Elizabeth Page from its sister Koch Industries company, Reiss Remediation. In turn, she chose to engage Barr Engineering to conduct a cold eye review. This passive step resulted in a delay of almost two years in taking active steps to check the extent of the sulfolane. Nevertheless, based on the data then available from the existing wells, both were able to conclude that the sulfolane contamination had migrated substantially beyond the sampling disclosed by Williams Alaska as part of the ASPA and was near or had migrated beyond the property boundary.

Despite all indications that the sulfolane contamination was migrating, Flint Hills did not conduct a reasonable inquiry and did not install any additional monitoring wells until September 2008. Sampling from those wells promptly confirmed that the sulfolane had migrated to the property boundary and beyond.

Based on all the information available to it, including ADEC's directives, the results from the monitoring well sampling, and Shannon & Wilson's reports and recommendations, Flint Hills reasonably should have concluded long before May 10, 2007, that sulfolane had migrated beyond the sampling disclosed as part of the ASPA and off the refinery property. Such information would have supported Flint Hills' claim for diminution of the refinery's value attributable to the sulfolane.

The court is not persuaded that Flint Hills did not have a cause of action, under the ASPA or by statute or otherwise, until ADEC actually listed sulfolane as a regulated chemical. The

concern for sulfolane in the groundwater was present far before the sale was addressed in the ASPA, and a source of ongoing concern by Shannon and Willson and ADEC since July, 2004. The court finds that the actual date of regulation of sulfolane does not trigger the start of any statute of limitations, and is not the date Flint Hills knew or should have known it had a claim against William. The court finds this date to be July 2004.

Even absent actual knowledge, Flint Hills nonetheless possessed sufficient information as early as July 2004, and no later than 24 October 2006, that it should have conducted an inquiry into the extent of the sulfolane contamination, including whether it had migrated offsite from the refinery. Despite that information, Flint Hills failed to heed the advice it was given and failed to conduct a reasonable inquiry into the scope of the sulfolane contamination. Had it done so, it would have discovered the extent of the sulfolane contamination with a reasonable amount of time to file suit before the expiration of the limitations period. Thus, the three-year statute of limitations expired at the latest on 24 October 2009.

Flint Hills did not file its claims against defendants until 10 May 2010, so its claim for indemnification is barred by the three-year statute of limitations based both on its actual notice and its inquiry notice respecting the diminution of value damage element of that claim. Additionally, Flint Hills' indemnification claim would have independently accrued when it incurred a liability or paid money for which it is entitled to indemnification.[191]

Beginning in 2004, more than three years before it filed suit against defendants, Flint Hills incurred expenses in responding to the sulfolane for which it could claim indemnification. At a minimum, Flint Hills incurred and paid substantial invoices from Shannon & Wilson in 2004, 2005, and 2006 for its work in investigating the sulfolane contamination.

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[191] [Order Regarding Defendant's Motion for Summary Judgment on Statute of Limitations and Setting Evidentiary Hearing, at 14, April 10, 2012.]

Based on those damages, the three-year statute of limitations on the indemnification claim would have expired no later than in 2009, before Flint Hills filed suit against defendants on 10 May 2010.

The court therefore finds that Flint Hills' claim for indemnification is barred by the statute of limitations.

2. Retained Liability Claims.

Pursuant to its retained liabilities claim under Section 2.3 of the ASPA, Flint Hills seeks recovery of "Damages" (as defined in the ASPA) resulting from the sulfolane contamination.

As defined in Section 10.3(d) of the ASPA, "Damages" include both the diminution in the North Pole Refinery's value attributable to the contamination and the costs of responding to the sulfolane contamination. For the reasons set forth above, the court finds that Flint Hills' claim for retained liabilities is barred by the three-year statute of limitations.

B. Statutory Claims

1. Strict Liability Claim.

Flint Hills has asserted a strict liability claim against Williams Alaska for statutory damages under AS 46.03.822(a).

Under AS 46.03.822(a), a person who incurs "damages" resulting from an unpermitted release of a hazardous substance may sue the person responsible for the release on a strict liability basis.

Under AS 46.03.822(m)(1), "damages" has the meaning given in AS 46.03.824 and includes "damages to...private property."[192]

Flint Hills filed suit against Williams Alaska on 10 May 2010. Therefore, its claim under

[192] AS 46.03.824 defines damages to include injury to real property.

AS 46.03.822(a) would be barred by the two-year statute of limitations if that claim accrued before 10 May 2008.

As set forth above, Flint Hills' claims based on diminution of the North Pole Refinery value and on the incursion of expenses resulting from the sulfolane contamination all accrued prior to 10 May 2007, more than three years before suit was filed in this case.

Therefore, Flint Hills' claim for strict liability under AS 46.03.822(a) is also barred under the two-year statute of limitations applicable to that claim.

Additionally, since the damages claimed under Flint Hills statutory claims also fall within the ASPA definitions of both "Damages" and "Environmental Liabilities," it follows that those claims would be barred under the applicable two-year statute of limitations for the same reasons the contract claims would be barred under the three-year statute of limitations.

AS 46.03.822(a) includes recovery "for the costs of response, containment, removal, or remedial action," which are the very same costs for which Flint Hills is seeking to recover from Williams under its indemnification and retained liabilities cause of actions.

The definition of "Damages" set forth in ASPA Section 10.3(d) includes "other costs and expenses of any kind or nature whatsoever, whether known or unknown, contingent or vested, matured or unmatured, and whether or not resulting from third-party claims, strict liability claims, including those under Environmental Laws."

Similarly, the definition of "Environmental Liabilities" set forth in ASPA Section 1.1 and used in the exception to retained liabilities with respect to "Environmental Liabilities" set forth in Schedule 10.2(a)(iv) of ASPA Subsection 2.3(e)(xvii) includes "Damages…including without limitation, any and all, costs incurred due to any investigation of the Real Property and/or Assets or any cleanup, remediation, removal or restoration mandated by or pursuant to any applicable

Environmental Laws or agencies enforcing such applicable Environmental Laws."

In addition, AS 46.03.822 applies, inter alia, to "(1) the owner of, and the person having control over, the hazardous substance at the time of the release or threatened release...." Thus, to the extent that Flint Hills asserts that AS 46.03.822 applies to Williams because sulfolane used at the North Pole Refinery constituted a "hazardous substance" and thus forms the basis for its statutory strict liability claim against Williams, it is indisputable that Flint Hills had such knowledge at the time it executed the ASPA on 17 November 2003, and when it took over ownership and operations of the refinery on 1 April 2004.

Thus, Flint Hills' strict liability claim would have been triggered when ADEC first regulated sulfolane on 19 October 2004, with respect to at least sulfolane onsite and for all purposes when ADEC further regulated sulfolane on 24 January 2006, citing a regulatory basis for setting the applicable specific numerical cleanup standards for sulfolane in the groundwater and soil.

Consequently, the limitations periods ran long before Flint Hills filed suit against Williams in 10 May 2010, thereby barring any recovery whatsoever from Williams pursuant to AS 46.03.822(a).

2. Contribution Claim.

AS 46.03.822(j) provides that "[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."

Flint Hills has argued that a claim under section 822(j) does not accrue until the liability referenced in the potential liability determination letters has been "settled." Flint Hills' argument is contradicted by the plain language of the statute, which states that a person may seek

contribution after the "issuance" of a potential liability determination.

Thus, if Flint Hills failed to bring its claim for contribution under AS 46.03.822(j) within two years of receiving a potential liability determination, the claim is barred by the statute of limitations.

Under AS 46.03.822(m)(2),

> potential liability determination means an administrative determination issued by the department notifying a person of the person's potential liability under (a) of this section as the result of the release or threatened release of a hazardous substance and includes a
> (A) a letter notifying the person that the person is a potentially responsible party;
> (B) notice to a person of state interest in a release or threatened release of a hazardous substance;
> (C) request to the person for site characterization or cleanup;
> (D) notice of violation; and
> (E) similar notification by the department of a person's potential liability under this section.

ADEC's letters to Flint Hills of 19 October 2004, and 24 January 2006, both qualify as potential liability determinations. At a minimum, both letters gave clear notice of ADEC's interest in the release of sulfolane, and both letters advised Flint Hills of the need to clean up the sulfolane in accordance with the cited Canadian standards.

Flint Hills has argued that the two letters do not qualify as potential liability determinations because AS 46.03.822(j) was not amended to include reference to such determinations until 2006, but its argument is not well-taken.

Flint Hills is correct in asserting that the statute was not amended to include reference to "potential liability determinations" until 2006.[193] However, the legislature's Act provides that the amendments to AS 46.03.822(j) "apply to liability for the release or threatened release of a hazardous substance that occurred (1) before the effective date of this Act and for which a final

[193] 2006 SLA Ch. 15.

judgment regarding liability was not entered before the effective date of this Act...."[194] The Act took effect immediately on April 27, 2006.[195]

Though the two ADEC letters preceded the effective date of the Act, the passage of the Act nonetheless triggered Flint Hills' right to sue based on those letters, and its claim for contribution under AS 46.03.822(a) accrued as of the effective date of the Act, or 27 April 2006. Therefore, the statute of limitations expired on April 27, 2008.

Additionally, the damages and costs that Flint Hills seeks under its AS 46.03.822(j) action fall within the same ASPA definitions of "Damages" and "Environmental Liabilities" discussed above with respect to Flint Hills' AS 46.03.822(a) action. Thus, the contribution claim would be barred under the two-year statute of limitations just as the contract claim is barred under the three-year limitations period.

Flint Hills is mistaken in its position that the statute of limitation period for an AS 46.03.822(j) contribution action only commences after the completion of an AS 46.03.822(a) strict liability action. Flint Hills cannot extend the limitations period for filing a contribution claim by filing its own claim for strict liability under section 822(a).

Moreover, the operative language in the first sentence provides that "[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...." (Emphasis added.) In this instance, Flint Hills has elected to bring its contribution claim concurrently with a claim under section (a). Flint Hills cannot extend the statute of limitations by taking two shots at the same claim.

Even if the latest date that the three-year contract statute of limitation applicable to the claims that fall within Article X of the ASPA began to run is 24 October 2006, Flint Hills cannot

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[194] 2006 SLA Ch. 15, ' 3.

[195] Id., at ' 4.

extend the statutory limitations period applicable to the strict liability statute. The Alaska Legislature made it clear that AS 46.03.822 does not override contract provisions addressing indemnification and other similar environmentally related obligations. In relevant part, AS 46.03.822(g) provides, "This subsection does not bar an agreement to insure, hold harmless, or indemnify a party to an agreement for liability under this section." Thus, the strict liability statutory provisions cannot be used to extend, toll the running, or abrogate the contract three-year statute of limitation applicable to an agreement containing indemnification or hold harmless provisions. In the instant case, the recovery of any damages and costs with respect to sulfolane at the North Pole arising from AS 46.03.822 are time barred once the applicable three-year statute of limitations runs for the recovery "Damages" and/or "Environmental Liabilities" under Article X of the ASPA.

VII. Conclusion.

The infield fly rule has its origins in the late 19th century. A more modern baseball reference from the early 20th century may be helpful. Tinker, Evers, and Chance were infielders for the Chicago Cubs from 1906 through 1910 and memorialized in a poem by Franklin Adams by the phrase, "Tinker to Evers to Chance," words that in the poem that "are heavy with nothing but trouble." Here the controlling phrase is Williams to Shannon & Wilson to Flint Hills.

The court finds Williams, and its agent, Shannon & Wilson, were aware of sulfolane in the groundwater before the sale to Flint Hills. Flint Hills bargained for a sophisticated indemnity agreement, the APSA, as part of the sale of the refinery. Flint Hills kept Shannon & Wilson on as its agent. Flint Hills knew, or should have discovered, that sulfolane was in the groundwater and moving as early as July 2004 and no later than when Shannon & Wilson made a formal presentation to Flint Hills in September 2004. Flint Hills incurred costs that potentially were

covered by the ASPA from that time and continuing until 4 February 2010 when it sent Williams an indemnification demand. Flint Hills did not file its first claims against Williams until 10 May 2010. Flint Hills filed its second amended complaint on 8 May 2012.[196]

The court, if it were an umpire, would judge the pop-up in this case to be catchable and therefore would declare it an infield fly. But this is not baseball but serious litigation with valuable rights at stake. If the baseball analogy assists in focusing on the fact finding necessary to decide a complex legal issue, then so much the better. If the analogy is misplaced, then at least no harm has been done because the court has made findings of fact and conclusions of law.

Therefore, based on the foregoing facts and authorities, the court finds that all of the claims by Flint Hills against Williams are barred by the several statutes of limitation noted above and therefore all its claims against Williams shall be, and hereby are, dismissed with prejudice.

Williams shall submit a judgment consistent with this order within 20 days of the distribution of this order.

The court notes that it reserved ruling on the following motions until trial: Flint Hills' Motion in Limine No. 4, Motion in Limine No. 6, Motion in Limine No. 7, and Motion in Limine No. 8. The court finds that these motions are now MOOT.

DATED at Fairbanks, Alaska, this 5 day of November, 2013.

Michael P. McConahy
Superior Court Judge

[196] The court would like to reiterate that this case did not even begin with a claim against Williams by Flint Hills. It began with a claim by a North Pole homeowner, James West. Flint Hills and Williams stood shoulder to shoulder in defending the West claim. Once the West claim was concluded the case awkwardly morphed into a case between Flint Hills and Williams. It is unclear when, or even if, Flint Hills would have ever brought a claim against Williams had James West never sued Flint Hills.

I certify that on 11/5/11
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