

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101


State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

March 5, 2018

SUBJECT: Waiver of Strict Liability for Hazardous Substances on ANCSA Lands (SB 202; Work Order No. 30-LS1422\A)

TO: Senator Lyman Hoffman
Attn: Maridon Boario

FROM: Emily Nauman 
Deputy Director

You asked what the difference is between sec. 46.03.822(n), proposed under SB 202, and the exemption provided to a Native corporation provided under AS 46.03.822(c)(3), which is repealed by sec. 4 of the bill.

Section 46.03.822(n), as proposed by SB 202, waives the strict liability under AS 46.03.822 for a Native corporation for the release or threatened release of a hazardous substance occurring on land after that land was granted to the Native corporation under the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.) (ANCSA). The waiver of liability proposed in sec. 46.03.822(n) applies so long as (1) the release or threatened release of a hazardous substance is on ANCSA land; and (2) the hazardous substance was present on the land at the time the land was transferred to the Native corporation.

Under the current law (AS 46.03.822(b)), a person is relieved from liability under AS 46.03.822 if the person proves:

- (1) that the release or threatened release of the hazardous substance to which the damages relate occurred solely as a result of
 - (A) an act of war;
 - (B) except as provided under AS 46.03.823(c) and 46.03.825(d), an intentional or negligent act or omission of a third party, other than a party or its agents in privity of contract with, or employed by, the person, and that the person
 - (i) exercised due care with respect to the hazardous substance; and
 - (ii) took reasonable precautions against the act or omission of the third party and against the consequences of the act or omission; or
 - (C) an act of God; and
- (2) in relation to (1)(B) or (C) of this subsection, that the person, within a reasonable period of time after the act occurred,
 - (A) discovered the release or threatened release of the hazardous substance; and

(B) began operations to contain and clean up the hazardous substance.

Related to the act of a third party under contract with the person potentially liable, AS 46.03.822(c) continues, stating:

For purposes of (b)(1)(B) of this section, a third party or an agent of a third party is in privity of contract with the person who is otherwise liable, if the third party or its agent and the person are parties to a land contract, deed, or other instrument transferring title or possession of the real property on which the facility in question is located, unless that property was acquired by the person after the disposal or placement of the hazardous substance on, in, or at the facility, and the person establishes that the person has satisfied the requirements of (b)(1)(B) of this section and establishes that

...

(3) the person is a corporation organized under 43 U.S.C. 1601 et seq. (Alaska Native Claims Settlement Act) that acquired the facility under those sections;

....

In other words, to be relieved from liability under AS 46.03.822(b) and (c), as currently provided in statute, a Native corporation must prove that (1) the release or threatened release occurred only because of an act of god or war, or the intentional or negligent act or omission of a third party; (2) if the release or threatened release occurred only because of the intentional or negligent act or omission of a third party, the corporation acted with care and took reasonable precautions to prevent the release or threatened release; and (3) that, if the release or threatened release occurred only because of the intentional or negligent act or omission of a third party, within a reasonable time after the act causing the release or threatened release, the corporation discovered the release or threatened release and began to clean up or contain it. The language in AS 46.03.822(c)(3) allows a Native corporation to use the defense in AS 46.03.822(b)(1)(B) related to the actions of a third party or an agent of a third party in contract with the Native corporation if the Native corporation received the land after the hazardous substance was placed on, in, or at a facility.

In summary, while both proposed sec. 46.03.822(n) and existing AS 46.03.822(c)(3) provide a waiver of liability for a Native corporation, the exemption in proposed sec. 43.03.822(n) waives liability in a much broader set of circumstances. I hope this helps to clarify the difference between sec. 46.03.822(n), proposed by SB 202, and the existing exemption under AS 46.03.822(b) and (c). If I may be of further assistance, please advise.