

HOUSE CS FOR CS FOR SENATE BILL NO. 154 (RESOURCES)**IN THE LEGISLATURE OF THE STATE OF ALASKA****SEVENTEENTH LEGISLATURE - SECOND SESSION****BY THE HOUSE RESOURCES COMMITTEE**

Offered: 5/4/92

Referred: Judiciary, Finance

Sponsor(s): SENATOR RODEY

A BILL**FOR AN ACT ENTITLED**

1 "An Act relating to the liability of certain security interest holders arising out of an
2 unpermitted release of a hazardous substance or the substantial threat of an unpermitted
3 release of a hazardous substance, and to liens on the property of certain security interest
4 holders resulting from an oil or hazardous substance spill or the threat of an oil or
5 hazardous substance spill."

6 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

7 * Section 1. AS 40.17.110(b) is amended by adding a new paragraph to read:

8 (61) an environmental risk assessment under AS 46.03.827.

9 * Sec. 2. AS 46.03.826(8) is amended to read:

10 (8) "owner" and "operator"

11 (A) mean

12 (i) in the case of a vessel, any person owning, operating, or
13 chartering by demise, a vessel;

1 (ii) in the case of facility, any person owning or operating the
2 facility;

3 (iii) in the case of an abandoned facility or vessel, any person who
4 owned, operated, or otherwise controlled activities at the facility or vessel
5 immediately before the abandonment; and

6 (iv) in the case of a facility or vessel, title or control of which was
7 conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar
8 means to a unit of the state or a political subdivision of the state, any person who
9 owned, operated, or otherwise controlled the facility or vessel immediately
10 beforehand;

11 (B) do not include a person who, without participating in the management
12 of a vessel or facility, holds indicia of ownership primarily to protect that person's
13 security interest in the vessel or facility and, if required by AS 46.03.827, files the
14 environmental risk assessments required by that section;

15 * Sec. 3. AS 46.03.826 is amended by adding new paragraphs to read:

16 (16) "indicia of ownership" means evidence of interests in real or personal
17 property held as security for a loan or other obligation, including full title to real or personal
18 property acquired through foreclosure or an equivalent procedure, and including a mortgage, deed
19 of trust, assignment, lien, pledge, or other right to or other form of encumbrance against property
20 that is recognized under applicable law as establishing a bona fide security interest;

21 (17) "participating in the management of a vessel or facility" means the actual
22 participation in the management or operational affairs by the person who is the holder of the
23 security interest; in this paragraph, "participating in the management of a vessel or facility"

24 (A) includes exercising

25 (i) decision-making control over the borrower's environmental
26 compliance, to the degree that the security holder has undertaken responsibility for
27 the borrower's actions that result in a release or threatened release;

28 (ii) management level control encompassing the borrower's
29 environmental compliance responsibilities comparable to that of a manager of the
30 borrower's enterprise;

31 (B) does not include

1 (i) the mere capacity or ability to influence, or the unexercised
2 right to control, facility operations;

3 (ii) undertaking or requiring an environmental audit or inspection;

4 (iii) imposing a requirement that the borrower clean up the vessel
5 or facility before or during the term of the security interest;

6 (iv) imposing a requirement of assurance that the vessel or facility
7 remains or is maintained in compliance with all applicable local, state, and federal
8 laws and regulations for the life of the loan or security interest; or

9 (v) periodic or regular monitoring of the borrower's business or
10 financial condition, loan workouts, or other actions that are reasonably necessary
11 for the security holder to adequately maintain the security interest;

12 (18) "primarily to protect a security interest" means that the indicia of ownership
13 in the vessel or facility are held for the purpose of securing payment or performance of a
14 financial obligation, including a mortgage, installment sale, trust receipt transaction, assignment,
15 or other financing arrangement; "primarily to protect a security interest" does not include an
16 ownership interest in property held for investment purposes, or for purposes other than as
17 protection of a security interest.

18 * Sec. 4. AS 46.03 is amended by adding a new section to read:

19 Sec. 46.03.827. ENVIRONMENTAL RISK ASSESSMENTS. (a) In order for a person
20 to qualify for the exclusion under AS 46.03.826(8)(B) from being considered an owner under
21 AS 46.03.822 - 46.03.828 for nonresidential real property in which the person has a qualifying
22 security interest, the person shall prepare and record under AS 40.17 an environmental risk
23 assessment for each of the person's qualifying security interests. An assessment must be
24 recorded within 90 days after the security interest is created.

25 (b) The environmental risk assessment required under (a) of this section shall assess
26 whether the qualifying real property is or has been contaminated by hazardous substances. The
27 assessment shall be based on at least an inquiry into the history and current condition of the
28 qualifying real property and, unless other information indicates the site inspection is not
29 necessary, a physical site inspection for obvious evidence of contamination by hazardous
30 substances. The person preparing and recording the assessment under (a) of this section may
31 otherwise determine the form and content of the assessment.

1 (c) A person preparing and recording an environmental risk assessment under (a) of this
2 section is not liable to another person for damages resulting from the assessment being erroneous
3 if the preparation and recording of the assessment complies with this section.

4 (d) In this section, "qualifying security interest" means a security interest in
5 nonresidential real property if the security interest secures an indebtedness of over \$2,000,000
6 and is created on or after the effective date of this Act.

7 * Sec. 5. AS 46.08.075 is amended by adding new subsections to read:

8 (f) Notwithstanding (a) of this section, if the property subject to the response,
9 containment, removal, or remedial action by the state is owned by a person who, under
10 AS 46.03.826(8)(B), is not considered an owner or operator under AS 46.03.822 - 46.03.828, the
11 state may file a lien against only that property that was subject to the state's action. If the lien
12 is filed, the lien and the person's liability to the state for the state's costs of the action is limited
13 to the difference, if any, in the positive fair market value of the property before the state's action
14 and the fair market value of the property after the conclusion of the state's action, to the extent
15 the difference has resulted directly from the state's action. In this subsection,

16 (1) "action" means response, containment, removal, and remedial action;

17 (2) "person" has the meaning given in AS 46.03.900.

18 (g) The lien imposed by (f) of this section is subject to the rights of a purchaser, holder
19 of a security interest, or judgment lien creditor if the interest of the purchaser, holder, or creditor
20 is perfected under applicable law before notice of the lien imposed by (f) of this section is filed
21 in the appropriate recorder's office under (b) of this section. The purchaser, holder of a security
22 interest, or judgment lien creditor shall be afforded the same protections against the lien imposed
23 by (f) of this section as are afforded under state law to a purchaser, holder of a security interest,
24 or judgment lien creditor against a judgment lien that arises out of an unsecured obligation and
25 that arises at the same time the notice of the lien created under (f) of this section is filed.