

HOUSE BILL NO. 108
IN THE LEGISLATURE OF THE STATE OF ALASKA
EIGHTEENTH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVE B.DAVIS

Introduced: 1/29/93

Referred: House Special Committee on Oil and Gas, Labor & Commerce, Judiciary

A BILL

FOR AN ACT ENTITLED

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

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,
13 or chartering by demise, a vessel;

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

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

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

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

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

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

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

27 (A) includes exercising

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

1 (ii) management level control encompassing the
2 borrower's environmental compliance responsibilities comparable to that
3 of a manager of the borrower's enterprise;

4 (B) does not include

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

7 (ii) undertaking or requiring an environmental audit or
8 inspection;

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

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

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

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

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

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

1 security interest is created.

2 (b) The environmental risk assessment required under (a) of this section must
3 assess whether the qualifying real property is or has been contaminated by hazardous
4 substances. The assessment must be based on at least an inquiry into the history and
5 current condition of the qualifying real property and, unless other information indicates
6 the site inspection is not necessary, a physical site inspection for obvious evidence of
7 contamination by hazardous substances. The person preparing and recording the
8 assessment under (a) of this section may otherwise determine the form and content of
9 the assessment.

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

14 (d) In this section, "qualifying security interest" means a security interest in
15 nonresidential real property if the security interest secures an indebtedness of over
16 \$2,000,000 and is created on or after the effective date of this Act.

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

18 (f) Notwithstanding (a) of this section, if the property subject to the response,
19 containment, removal, or remedial action by the state is owned by a person who, under
20 AS 46.03.826(8)(B), is not considered an owner or operator under AS 46.03.822 -
21 46.03.828, the state may file a lien against only that property that was subject to the
22 state's action. If the lien is filed, the lien and the person's liability to the state for the
23 state's costs of the action are limited to the difference, if any, in the positive fair
24 market value of the property before the state's action and the fair market value of the
25 property after the conclusion of the state's action, to the extent the difference has
26 resulted directly from the state's action. In this subsection,

27 (1) "action" means response, containment, removal, or remedial action;

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

29 (g) The lien imposed by (f) of this section is subject to the rights of a
30 purchaser, holder of a security interest, or judgment lien creditor if the interest of the
31 purchaser, holder, or creditor is perfected under applicable law before notice of the lien

1 imposed by (f) of this section is filed in the appropriate recorder's office under (b) of
2 this section. The purchaser, holder of a security interest, or judgment lien creditor
3 shall be afforded the same protections against the lien imposed by (f) of this section
4 as are afforded under state law to a purchaser, holder of a security interest, or
5 judgment lien creditor against a judgment lien that arises out of an unsecured
6 obligation and that arises at the same time the notice of the lien created under (f) of
7 this section is filed.