

SB

154



Alaska State Legislature

HOUSE OF REPRESENTATIVES

Official Business

State Capitol
Juneau, AK 99801-1182

MEMORANDUM

April 30, 1992

TO: Rep. Ivan, Rep. Lehman and Rep. Carney
(House Resources SB 154 Subcommittee)
FR: David Finkelstein
RE: Proposed Changes to Draft House CS for SB 154

Yesterday, after the Resources Committee meeting, my staff met with Senator Rodey's staff and the banking industry to work out some of the concerns about my draft CS. They came up with some changes which I feel go a long way toward resolving these issues. I've asked Legislative Legal Services to draw up the changes, but I'll describe them to you generally so you are aware of them as soon as possible:

1. Draft CS, Page 3, lines 26-29: change the current language to say that the assessment shall require an inquiry into the history and current condition of the property, but not using the word "reasonable." The reason for the change is to avoid a vague word which tends to invite litigation. Also, change the site inspection requirement to state that site visits shall not be required if other information suggests that they are not necessary, so that rural loans are not so disadvantaged.
2. Page 3, line 31: change \$100,000 to \$250,000. Raising the assessment-triggering amount will help alleviate the concerns of the rural communities and will assure that assessments are not a prohibitively expensive addition to total property transaction costs.
3. Page 4, following line 1: add a new subsection that clarifies that the recording of an assessment does not create a right of action by any third party based on the correctness of the assessment. Also clarify that this new section does not require a borrower to have filed an assessment in the past to be exempted from total liability on previous loans.

If these changes are acceptable to you, I hope we can expedite the process of returning this bill to the Resources Committee without waiting to find a time when we can all meet. Please let me know your thoughts on these proposed changes.

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. CSSB 154 (JUD)

Revision Date: 4/23/92
 Title: Limiting Lender Liability/Oil and Hazardous Substance Releases
 Sponsor: Senator Rodey
 Requestor: _____

Department Affected: Environmental Conservation
 BRU: Spill Prevention and Response
 Component: Contaminated Sites

COMPONENT SERIAL NO. 1 | 4 | 3 | 1

EXPENDITURES/REVENUES:

(Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL						
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REVENUE FUND SOURCE:						
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FUNDING: (Thousands of Dollars)

GENERAL FUND	0.0	0.0	0.0	0.0	0.0	0.0
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary.)

Prepared by: Janice Adair
 Division: Commissioner's Office

Phone: 465-5010
 Date: _____

Approved by Commissioner: Janice Adair for John Sandor
 Agency: Environmental Conservation Date: 4/23/92

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).



Senate

M E M O R A N D U M

DATE: April 13, 1992
TO: Members, House Resources Committee
FROM: Senator Pat Rodey *Pat*
SUBJ: CSSB 154 (JUD) Liability of Security Interest Holders

This bill will be before you on Tuesday, April 14th. It addresses the needs of lenders, both commercial and individual, including those who choose to owner-finance the sale of their homes.

Its intention is to limit the liability of security interest holders (creditors) in certain hazardous contamination clean-up situations. Those situations are where lenders, as innocent third parties who did not initiate or contribute to a contamination, are currently held liable beyond their borrowers for any or all costs of containment or clean-up under our strict liability laws.

Lender liability can exceed the value of the loan or its collateral, and in some cases, place other company or personal assets at risk. Through SB 154, lender liability would be limited, but not eliminated, in certain cases.

Reasons for SB 154 are as follows:

1. To provide lenders with a clearer picture of potential liability so as to more realistically assess loan risk and collateral value.
2. To insure reasonable and consistent credit availability for Alaska business, especially small and mid-sized businesses.

To assist with questions regarding the implications of SB 154, several individuals will be on hand to testify. Ms. Janice Adair will appear for DEC to address regulatory concerns. Mr. Robert Regis, an assistant AG who litigates strict liability

cases for the state, will be available. Both of these individuals have contributed significantly to the current version of the bill. In addition, Mr. Gerard Diemer, Environmental Risk Officer for the National Bank of Alaska will be present.

The need for the provisions of SB 154 are not unique to Alaska. The impact of strict liability laws are being reviewed nationally. The Environmental Protection Agency has regulations pending which would provide some limits to lender liability. Several other states have passed legislation similar to this bill (see Diemer letter attached).

I invite your support of CSSB 154 (JUD) as a measure which fairly addresses an excess in Alaska's strict liability laws. This bill has been crafted to limit, but not eliminate, lender liability.

National Bank of Alaska



Corporate Headquarters P.O. Box 100600 Anchorage, Alaska 99510-0600 (907) 276-1132

January 28, 1992

Senator Patrick Rodey
Alaska State Senate
P. O. Box Z (MS3100)
Juneau, Alaska 99811

Dear Senator Rodey:

I want to ask you for your support of Senate Bill #154 which deals with issues of environmental liability to lenders. Passage of the Bill will facilitate small business commerce in the State of Alaska.

We all wish to live in a clean and healthy environment; however, we have become concerned over attempts to hold lender's liable for the cost of cleaning up a borrower's property.

Lenders already have adequate incentives to encourage their borrowers to engage in environmentally safe practices but lenders are not equipped to police the environmental activities of their borrowers. Imposition of unlimited liability on lenders can be expected to restrict credit to any borrowers where there is environmental risk. A reduction in the availability of credit threatens businesses and their ability to contribute to cleanup of the environment and thereby also frustrates environmental interests.

Banks are now examining property carefully before they foreclose and sometimes walk away from their collateral in order to avoid liability. I have been designated the banks' "Environmental Risk Officer". As such, I review loan requests to assess the level of risk to the bank.

Imposing liability for environmental cleanup costs on lenders is likely to do little to prevent pollution, but may interfere with the availability of credit to even prudent businesses that use hazardous substances such as fish processors, all maritime businesses, trucking, car dealerships, dry cleaners, aviation and service stations to name just a few.

Senator Patrick Rodey
January 28, 1992
Page 2


We recently declined credit to a gift shop in Valdez, not because they used hazardous substances, but because they were next door to a service station. In rural Alaska most communities rely exclusively on petroleum for heat and transportation and to operate all forms of equipment essential to their livelihoods. Existing State environmental laws were modeled after what others have done in the lower 48 and do not consider problems unique to Alaska.

Meanwhile, other states continue to pass legislation similar to Senate Bill #154. In 1991 alone Arizona, Illinois, Indiana, Maine, Maryland, Minnesota, Missouri, Hawaii, Nebraska, Oregon, Texas, West Virginia, Indiana, Montana and New Mexico all passed such legislation.

Again I ask you for your support of Senate Bill #154.

Sincerely,

NATIONAL BANK OF ALASKA


Gerard Diemer
Assistant Vice President
Commercial Credit Services

GD:ld

FACSIMILE

DATE: March 25, 1992
TO: Cliff Davidson
COMPANY:
FACS NO.: 907/465-2864
FROM: Al Haslebacher
COMPANY: Spokane District Farm Credit Council
TOTAL PGS.: 2

SPECIAL INSTRUCTIONS OR COMMENTS:

We wanted you to know the Farm Credit Bank of Spokane supports this legislation and encourage you to give me a call if you would like additional background information.

Thanks.

WE ARE TRANSMITTING FROM AN AUTOMATIC FACSIMILE.
TO TALK TO US: 509/838-9669
TO FACSIMILE TO US: 509/838-9445

THE SPOKANE DISTRICT FARM CREDIT COUNCIL

FARM CREDIT BANKS BUILDING - POST OFFICE BOX 246-05 - SPOKANE, WASHINGTON 99220 • (509) 838-9208

Testimony
on
Senate Bill 154
In the Legislature of the State of Alaska
Before the House Resources Committee
3/25/92
by
Al Haslebacher
President, SDFCC

The Spokane District Farm Credit Council is a trade association representing the legislative interests of cooperative lenders in the Twelfth Farm Credit District. Our members, the Farm Credit Bank of Spokane and the Northwest Farm Credit Services, an agricultural credit association, have over two billion dollars in loans outstanding in our five states of Alaska, Idaho, Montana, Oregon, and Washington. Farm Credit system loans in Alaska cover farms, rural homes, fishing boats, cooperative operations/facilities, and timber.

Lender liability relative to "clean-up" of acquired properties is a growing concern and will eventually tend to restrict mortgage credit unless some reasonableness is returned to CERCLA legislation. Alaska Senate Bill 154 is positive legislation that we support.

If any "tales of horror", relative to acquired properties and the resultant "losses" to the lender, would be helpful to your consideration of the bill, we can provide them. If you need any clarification or elaboration please feel free to call me at (509) 838-9208.

Al Haslebacher
President, SDFCC

Alaska State Legislature



Senate

3111 C. St., Suite 510
Anchorage, Alaska 99503
(907) 561-7618

During Session
P.O. Box V
Juneau, Alaska 99811
(907) 465-3793

SPONSOR SUMMARY

CS Senate Bill 154 (JUD)

CSSB 154 (JUD) is intended to address inequities in strict liability laws where innocent third parties are held liable for unpermitted hazardous substance contamination. Specifically, the bill limits (but does not eliminate) the liability of security interest holders (creditors), and fiduciaries.

Originally intended to address the concerns of the state's commercial lenders, the bill has now been broadened to include individual lenders, including those who owner-finance property.

Section 1 defines circumstances where limited liability is, and is not, applicable.

Section 2 (f) limits a person's property which may be subject to the state's lien for cleanup costs; states that a person's liability is limited to the difference, if any, in the positive fair market value before the state's cleanup action, and FMV after the conclusion of cleanup action.

(g) provides that the state's lien is subject to prior parties' perfected liens.

CSSB 154 (JUD) rectifies shortcomings in the original strict liability laws enacted in 1989, but does not unduly impact on the substance, intent, or effectiveness of those laws.

The bill enjoys the support of DEC. There is a zero fiscal note.

STATE OF ALASKA
1992 LEGISLATIVE SESSION

No. α
Bill Version: CSSB 154 (JUD)
(S) Publish Date: 3-11-92

Revision Date: _____ Department Affected: Environmental Conservation
Title: Lender liability for environmental damage BRU: Spill Prevention and Response
Component: Contaminated Sites
Sponsor: Rodey
Requestor: Rodey

COMPONENT SERIAL NO.

1	4	3	1
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EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS. CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE						
FUND SOURCE:						

FUNDING: (Thousands of Dollars)

GENERAL FUND	0.0	0.0	0.0	0.0	0.0	0.0
FEDERAL FUNDS						
OTHER						
FUND SOURCE:						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary.)

If SB 154 is enacted into law, the number of contaminated sites for which the State would become responsible for cleaning up would be expected to increase. Also, the limitation on cost recovery to that property which was subject to the cleanup would be expected to severely limit DEC's ability to cost recover. However, estimating the first impacts of these expectations is not possible.

Prepared By: Janice Adair Phone: 465-5050
Division: Commissioner's Office Date: January 26, 1992
Approved by Commissioner: Jan A. Davidson
Agency: Environmental Conservation Date: January 27, 1992

Patrick M. Rodey
Senator

Alaska State Legislature



311 C St., Suite 512
Anchorage, Alaska 99503
(907) 561-7618


During Session
PO Box V
Juneau, Alaska 99801
(907) 465-3793

Senate

M E M O R A N D U M

DATE: March 20, 1992

TO: Representative Cliff Davidson
Chairman, House Resources Committee

FROM: Senator Patrick M. Rodey 

SUBJ: Request for Committee Hearing - CSSB 154 (JUD)

I request that CSSB 154 (JUD) be scheduled for a hearing in the House Resources Committee at your earliest convenience. A bill summary is attached. The bill has undergone a great deal of scrutiny in the Senate Resources and Judiciary Committees, and enjoys broad support.

A hearing and favorable recommendation from your committee would go a long way toward refining good public policy under the state's strict liability laws.

Support material and further assistance are available from Tim Benintendi of my staff at 3793.

PMR/tb/memo004

RECEIVED MAR 23 1992



DENALI STATE BANK

119 N. Cushman Street • (907) 450-1400 • FAX (907) 450-2140 • P.O. Box 74568 • Fairbanks, Alaska 99707-4568

March 17, 1992

Representative Davidson
House of Representatives
State Capitol
Juneau, AK 99801-1182

RE: SB154 "An Act Relating to the Liability of Financial Institutions Arising Out of an Unpermitted Release of a Hazardous Substance or the Substantial Threat of an Unpermitted Release of a Hazardous Substance, and to Liens on the Property of Financial Institutions Resulting From an Oil or Hazardous Substance Spill or the Threat of an Oil or Hazardous Substance Spill"

Dear Representative Davidson:

This letter is being written both as President of Denali State Bank and in my current capacity as President of the Alaska Bankers Association.

I am asking you to support SB154 as it has passed the Alaska State Senate. The passage of this bill is vitally important to financial institutions in the State of Alaska and the borrowing customers that we serve. Much effort has been put into this bill by Senator Rodey and his staff, the Department of Environmental Conservation, and the Alaska Bankers Association. I am confident that it will fulfill the needs of all parties concerned.

Your support of this bill will be sincerely appreciated. Please do not hesitate to contact the undersigned if you have any questions.

Sincerely yours,

Gary Roth
President and Chief Executive Officer

GR/bf

RECEIVED

Key Bank of Alaska
A KeyCorp Bank



Post Office Box 100420
Anchorage, Alaska 99510-0420
(907) 562-6100

Don Mogck
Vice President

Direct Line: (907) 564-0448
Fax: (907) 564-0200

March 12, 1992

Representative Cliff Davidson
Alaska State Legislator
State Capital - 108 Capital Building
Juneau, Alaska 99801-1182

Re: SB 154

Dear Representative Davidson:

I represent the Alaska Bankers Association in our efforts to clarify the security interest exemption in the state environmental strict liability law. As a member of the House Resources committee, you will likely be hearing of SB 154 soon. I would like to take this opportunity to briefly outline the problem, and to educate you as to what we feel is a partial solution. I have enclosed a copy of the bill for your reference.

The state strict liability law, AS 46.03.822 - 828, is patterned after the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, aka Superfund). In both state and federal law there was a security interest exemption for lenders and other security holders. Over all the years, because of ambiguities in the in the wording, court cases have eroded the exemption. Lenders have been held to be liable as owners by foreclosing on a property, even though the lender had nothing to do with causing the problem and was only acting to protect a security interest. Courts have gone so far as to suggest that a lender may be liable as an operator if, in the words of the court, " the lender had the capability to influence hazardous waste decisionmaking through financial relationships". Because lenders may be the only deep pocket left after a clean up, they are easy targets for enforcement agencies.

The lending industry is very alarmed at the situation. The law and case decisions greatly increase the risks of lending money. Lenders, in many cases, are unable to lend money into the communities we serve, because of the environmental risks. Not being able to lend is very unsettling to our industry, as this is the primary way we invest in our communities. However, under current law, the risks of lending into a situation with any

Representative Cliff Davidson
Page Two

potential environmental liability, particularly in the case of someone requesting funds to perform a clean up and also in the case of small loans, far outweigh the rewards.

As a partial solution, we have proposed SB 154, legislation that would clarify the security interest exemption. The clarification would allow a lender to hold indicia of ownership, which may include full legal title through foreclosure or equivalent, as long as the lender is holding primarily to protect a security interest, and does not participate in the management of a vessel or facility. Participating in management is also clarified, so that a lender will not risk liability unless there is actual participation in the management or operational affairs.

A second section of the bill addresses the state's lien for clean up and the ability of the state to recover on its lien from a property owner not otherwise liable, to the extent of an increase in the value of the property resulting from the state's clean up.

The Alaska Department of Environmental Conservation and the Office of the Attorney General have considered the bill, and in fact the present draft of the bill is their version. We certainly appreciate their involvement and hope for their continued support of this legislation.

Please call me if you or your staff have any questions regarding the bill. I ask for your support of the bill, as it will be crucial if we are to pass the bill this session.

Thank you.

Sincerely,



Dan Mogck
Vice President

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

(907) 465-2007 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

240 Main Street, Suite 500
Juneau, Alaska 99801-2101

MEMORANDUM

March 9, 1992

SUBJECT: Sectional summary of CSSB 154 ()
(Work Order No. 7-LS0716/Y, 3/4/92)

TO: Senator Pat Rodey
Attn: Tim

FROM: Theresa L. Bannister *TB*
Legislative Counsel

You have requested a sectional summary of the above described bill draft. As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

Section 1. This section amends AS 46.03.826, the section that defines the terms for the sections relating to strict liability for releases (and threatened releases) of hazardous substances. The amendment adds definitions for certain terms that are used in the definition of "owner" and "operator".

Section 2. This section adds provisions to the section that gives the state a lien for its costs of response, containment, removal, or remedial action.

AS 46.08.075(f) limits the property of a person (if the person is not an owner or operator under AS 46.03.826) that the state can file a lien against. The property is limited to property that was subject to the state's response, containment, removal, or remedial action. Limits the lien and the person's liability to the difference between the value of the property before and after the state's action, to the extent the difference results directly from the state's action.

AS 46.08.075(g) makes the state's lien in (f) subject to the rights of certain parties if the parties' interests were perfected before notice of the state's lien was recorded.

Senator Pat Rodey
March 9, 1992
Page 2

Gives the parties the same protections against the state's lien under (f) that they have under state law against judgment liens that arise out of unsecured obligations and that arise at the same time notice of the state's lien was filed.

If I may be of further assistance, please advise.

TLB:pl
92-164.plm

National Bank of Alaska



Corporate Headquarters P.O. Box 100600 Anchorage, Alaska 99510 (907) 276-1132

January 27, 1992

Senator Patrick Rodey
Alaska State Senate
P.O. Box 2 (MS3100)
Juneau, AK 99811

Dear Senator Rodey:

The State Banking Association is supporting Senate Bill #154 which we believe would encourage lending to small business. The reason for our support for this legislation is to facilitate small business commerce in the state of Alaska and to place the blame for environmental problems on the guilty parties. We must be able to make loans to small business without the constant threat of being required to cleanup environmental problems in which we were unaware nor did we contribute to the environmental problem. We believe in a due diligence by the state to protect us from environmental hazards.

We believe in the concept of a clean environment and that Alaska is in much better shape than much of the U.S. We do become extremely skittish when a state leasing official encourages us to make loans on its property and tells us that due to our financial resources, they would require us to cleanup any environmental problems regardless whether the problem was created by the state itself, an adjacent property owner, or a previous ground lessee.

Borrowing in the future will become more difficult if the state anticipates that we pay for everyone's environmental problems. We are encountering more and more cases whereby the marginal environmental risk causes us to decline to make the loan because of unknown future problems which we might encounter. We encourage you to vote for Senate Bill #154 which will go a long way to encourage lenders to lend on real estate and to small business.

Sincerely yours,

A handwritten signature in cursive script that reads "Jan Sieberts".

Jan Sieberts
Senior Vice President

sr



ALASKA CREDIT UNION LEAGUE

SUITE 650, 4000 CREDIT UNION DRIVE
ANCHORAGE, ALASKA 99503-6647
(907) 562-1255

Alaska Credit Union League Statement in Support of CS for SB 154

There are 18 credit unions in Alaska (16 federally chartered, 2 state chartered) and all are members of the Alaska Credit Union League, a trade association dedicated to protecting and serving the interests of Alaska's credit unions and the members who own them.

Some 338,000 Alaskans are currently members of these 18 credit unions. Obviously, credit unions are considered by Alaskans to be among the safest financial institutions in the marketplace.

However, in today's economic climate, the financial services industry and its regulators are very concerned about real estate loan losses. From a lender's standpoint, the factor which creates the greatest potential for loss is not market risk or credit risk but the risk associated with environmental contamination. Under state law, a lender can be held strictly liable for the cost of clean up of contaminated properties- regardless of who contaminated the property. The current owner (which a lender becomes through the foreclosure process) is financially responsible for clean up and damages.

There is no way to guarantee that during the term of the loan the property value will not be impaired by contamination. If the individual owner is not financially capable of cleaning up a property, the state can file a lien superior to a pre-existing lenders lien. This situation has curtailed and eliminated sources of credit for real estate lending (this includes business loans secured by real estate, home equity loans and loans for the improvement and purchase of homes).

In fact, Alaska USA Federal Credit Union discontinued granting real estate loans in October of 1989 because of losses and potential losses incurred or threatened under the strict liability provisions of state law. Prior to that time, the credit union granted \$50 million in real estate loans each year. It is the position of the Alaska Credit Union League that the availability of credit for real estate related purposes is an essential part of the Alaska economy.





ALASKA CREDIT UNION LEAGUE

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(907) 562-1255

Currently, prudent lending requires not only the traditional appraisal, title insurance, etc. but also site assessment for the detection of environmental contamination. If through the site assessment contamination is discovered, then the law requires it to be reported. If the contaminated real estate is ever to have economic value, it must be cleaned up. It makes good environmental sense to encourage lending because the lender as a third party must do site assessments and has great incentive (loss of loan and collateral) to do thorough assessments to identify contaminated or potentially contaminated properties that might otherwise go undetected and unreported for years.

The changes to existing law proposed by CS of SB 154 encourage the more active involvement of financial institutions in real estate lending by limiting (not eliminating) liability of financial institutions that have acquired contaminated facilities or vessels through foreclosure or trust agreements. We believe it is in the best interest of the environment, the economy, and the people of the State of Alaska that SB 154 become law this session.



7-LS0716W
Bannister
5/11/92

HOUSE CS FOR CS FOR SENATE BILL NO. 154 (JUDICIARY)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

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 decision-making control over

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

28 (ii) all or substantially all of the operational affairs of the
29 borrower's enterprise, other than environmental compliance;

30 (B) does not include

31 (i) the mere capacity or ability to influence, or the unexercised

- 1 right to control, facility operations;
- 2 (ii) undertaking or requiring an environmental audit or inspection;
- 3 (iii) imposing a requirement that the borrower clean up the vessel
- 4 or facility before or during the term of the security interest;
- 5 (iv) imposing a requirement of assurance that the vessel or facility
- 6 remains or is maintained in compliance with all applicable local, state, and federal
- 7 laws and regulations for the life of the loan or security interest; or
- 8 (v) periodic or regular monitoring of the borrower's business or
- 9 financial condition, loan workouts, or other actions that are reasonably necessary
- 10 for the security holder to adequately maintain the security interest;
- 11 (18) "primarily to protect a security interest" means that the indicia of ownership
- 12 in the vessel or facility are held for the purpose of securing payment or performance of a
- 13 financial obligation, including a mortgage, installment sale, trust receipt transaction, assignment,
- 14 or other financing arrangement; "primarily to protect a security interest" does not include an
- 15 ownership interest in property held for investment purposes, or for purposes other than as
- 16 protection of a security interest.

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

18 Sec. 46.03.827. ENVIRONMENTAL RISK ASSESSMENTS. (a) In order for a person

19 to qualify for the exclusion under AS 46.03.826(8)(B) from being considered an owner under

20 AS 46.03.822 - 46.03.828 for nonresidential real property in which the person has a qualifying

21 security interest, the person shall

22 (1) prepare and record under AS 40.17 an environmental risk assessment for each

23 of the person's qualifying security interests; and

24 (2) record under AS 40.17 all environmental risk assessments prepared by the

25 person on or after the effective date of this Act for nonresidential real property.

26 (b) In order for a person to qualify under (a) of this section, an environmental risk

27 assessment under (a) of this section must be recorded within 90 days after the assessment is

28 completed.

29 (c) A person preparing and recording an environmental risk assessment under (a) of this

30 section is not liable to another person for damages resulting from the assessment being erroneous

31 if the preparation and recording of the assessment complies with this section.

1 (d) In this section,

2 (1) "environmental risk assessment" means an assessment

3 (A) that assesses whether real property is or has been contaminated by
4 hazardous substances;

5 (B) that is based on at least an inquiry into the history and current
6 condition of the real property and, unless other information indicates the site inspection
7 is not necessary, a physical site inspection for obvious evidence of contamination by
8 hazardous substances; and

9 (C) whose form and content are otherwise determined by the person
10 preparing and recording the assessment;

11 (2) "qualifying security interest" means a security interest in nonresidential real
12 property if the security interest secures an indebtedness of over \$500,000 and is created on or
13 after the effective date of this Act.

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

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

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

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

26 (g) The lien imposed by (f) of this section is subject to the rights of a purchaser, holder
27 of a security interest, or judgment lien creditor if the interest of the purchaser, holder, or creditor
28 is perfected under applicable law before notice of the lien imposed by (f) of this section is filed
29 in the appropriate recorder's office under (b) of this section. The purchaser, holder of a security
30 interest, or judgment lien creditor shall be afforded the same protections against the lien imposed
31 by (f) of this section as are afforded under state law to a purchaser, holder of a security interest,

- 1 or judgment lien creditor against a judgment lien that arises out of an unsecured obligation and
- 2 that arises at the same time the notice of the lien created under (f) of this section is filed.