SB

154

SEVENTEENTH LEGISLATURE
SENATE JUDICIARY COMMITTEE BILL FILE

Bill Number: S/S 4
Abbreviated Title: Exempt Certain Tenders re Haz Mat

Sponsor: _____ Original Received: May 11, 1991
Written Request to Schedule Rcv'd: _____ From: _____
Sponser's Statement Rcv'd: _____ From: _____
Sectional Analysis Rqst'd: _____ From: _____
Sectional Analysis Received: _____
Fiscal Note (Original)
Rqst'd Of: _____ Rcv'd From: _____ Date: _____
Rqst'd Of: _____ Rcv'd From: _____ Date: _____
Rqst'd Of: _____ Rcv'd From: _____ Date: _____
Fiscal Note (C.S.)
Rqst'd Of: _____ Rcv'd From: DEC Date: 3-18-91
Rqst'd Of: _____ Rcv'd From: _____ Date: _____
Rqst'd Of: _____ Rcv'd From: _____ Date: _____
Five Day Notice Given: Sen Rec'd 6 Notice of Hearings Given: _____
Committees of Referral: First: _____ Second: _____ Third: _____
LAA Contact: _____ To Senate Secretary: _____

COMMITTEE ACTION

DATE:

_____ _____
_____ _____
_____ _____
_____ _____
_____ _____
_____ _____
_____ _____
_____ _____
_____ _____
_____ _____
_____ _____
_____ _____
_____ _____

PERSONS TO BE NOTIFIED OF HEARING

1. Sponsor
2. Agency
3. _____
4. _____
5. _____
6. Leslie Ellis 563-3766
7. _____
8. _____
9. _____
10. _____

SENATE COMMITTEE REPORT

DATE: 5/8/91 FURTHER:

DATE TURNED INTO OFFICE: 3/10/92

Judiciary Committee considered SENATE BILL NO. 154

"An Act relating to liability for environmental damage and to liens arising from environmental damage."

and recommended:

[✓] replace with ✓ CS SB 154 (JUD) [ ] same title
[ ] or adopt _____ CS _____ [✓] new title
[ ] technical title change (HB only)

[ ] attached amendment(s)
[ ] _____ letter of intent adopted

[✓] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] further referral to _____

ATTACHES NEW FISCAL NOTE(S): Dept/Date:

[ ] fiscal note(s) _____

[ ] zero fiscal note(s) _____

[ ] appropriation-no fiscal note

APPROVES PREVIOUS: Dept/Date:

[ ] fiscal note(s) _____

[ ] zero fiscal note(s) _____
DEC/Spill Prev & Resp / 1/26/92
DEC/Envir Quality / 3/15/91

[ ] Governor's bill w/fiscal note

SIGNING DO PASS:

OTHER RECOMMENDATIONS:

Rick Halford do pass
Chair: Signature and Recommendation

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. CSSB 154 (Res)

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

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 fiscal 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: Dan A Sumner

Agency: Environmental Conservation **Date:** January 27, 1992

Distribution (by preparer): Leg. Fin. Legislative Secretary Supervisor OMB/SOS Supervisor, & Impacted Agency(ies).

Rev 10/7/91

Page ___ of ___

Fiscal Note

SB 154

Section 1 of SB 154 was amended by the Senate Judiciary Committee to define owner and operator as anyone holding a security interest in a property as opposed to only financial institution.

Section 2 was amended to limit the property of a person 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. And it also limits the lien and the person's liability to the difference between the value of the property before and after the state's action. Additionally, the state's lien cannot preempt established rights of liens already in place.

Patrick M. Rodey
Senator

Alaska State Legislature

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

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

Senate

M E M O R A N D U M

DATE: January 17, 1992

TO: Senator Rick Halford, Chairman
Senate Judiciary Committee

FROM: Senator Patrick M. Rodey Pat

SUBJ: Request for hearing on CSSB 154 (RES)

I respectfully request that CSSB 154 (RES) be scheduled in the Senate Judiciary Committee. The bill seeks to limit the liability of financial institutions and fiduciaries as innocent third parties in cases of environmental contamination. Currently, lending institutions which foreclose on property that is contaminated are liable for the cost of clean-up, even if they in no way caused or contributed to the contamination.

Likewise, the trust divisions of banking institutions should not be required to pay for a c. ean-up of property which it merely holds in trust for beneficiaries of estates and trust funds. Under present law, this is the case.

To summarize, this bill does the following:

SECTION 1: References a new section, AS 46.03.825, which defines the circumstances under which financial institutions are exempted from liability.

SECTION 2: Adds that new section, and stipulates exemption from liability for damages or costs of contamination that:

1) the institution acquires through foreclosure;

2) the institution holds as a lessor under a credit agreement;

3) is subject to the financial oversight of the institution under a credit agreement, IF the institution doesn't exercise managerial control;

4) the institution acquires in a fiduciary capacity.

This section also provides for the reimbursement to the state by the institution for any clean-up activity, considered a benefit, up to the fair market value of the property.

"Financial institution" as defined, means: 1) a bank, credit union, or savings association, if the deposits are insured by FDIC, or another U.S. agency, or by an agency of the state; 2) a trust company owned by a bank, or which is subject to regulation by the U.S. Controller of the Currency.

SECTION 3: Limits the value of the state's lien to the value of the affected facility or vessel, and not "all property" (any other assets).

SECTION 4: Adds a new section which protects lienholders who have perfected their liens prior to the imposition of state liens.

SECTION 5: Repeals the provision for those with ownership interest, to bring action for release of that portion of the lien consistent with their ownership interest.

SECTION 6: Provides for protection from liability on property in situations referenced in section 2, 1 - 4, above.

I would appreciate a hearing at the earliest possible opportunity. Support material will be forthcoming. Please contact Tim Benintendi of my staff with any questions.

PMR/tb/memo004

Patrick M. Rodey
Senator

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

Senate Bill 154

CSSB 154 (RES) relates to the strict liability provisions enacted into the state's environmental laws in the spring of 1939. The bill which the state legislature enacted then, HB 68, was patterned after the strict liability provisions of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the law that established the SUPERFUND.

Just as the Congress and EPA are now re-thinking whether the strict liability provisions of federal law should be applied to the lending industry, so should the state be looking at the impact upon local lenders and fiduciary agents, and the availability of credit in Alaska.

The bill seeks to limit, not eliminate, the strict liability of financial institutions and fiduciaries as innocent third parties in cases of environmental contamination. Currently, lending institutions which foreclose on property that is contaminated are strictly liable for the cost of clean-up, even if they in no way caused or contributed to the contamination.

Likewise, the trust divisions of banking institutions should not be required to pay for a clean-up of property which it merely holds in trust for beneficiaries of estates and trust funds. Under present law, this is the case.

CSSB 154 (RES) deals with strict liability under AS46.03.822 (a), and does not effect liability for negligence. To summarize, the bill does the following:

SECTION 1: References a new section, AS 46.03.825, which defines the circumstances under which financial institutions are exempted from strict liability.

SECTION 2: Adds that the new section, and stipulates exemption from strict liability for damages or costs of contamination that:

1) the institution acquires through foreclosure;

2) the institution holds as a lessor under a credit agreement;

3) is subject to the financial oversight of the institution under a credit agreement, IF the institution doesn't exercise managerial control;

4) the institution acquires in a fiduciary capacity.

SECTION 3: Limits the value of the state's lien to the value of the affected facility or vessel, and not "all property" (any other assets).

SECTION 4: Adds a new section which protects lienholders who have perfected their liens prior to the imposition of state liens.

SECTION 5: Repeals the provision for those with ownership interest, to bring action for release of that portion of the lien consistent with their ownership interest.

SECTION 6: Makes it clear that the exemption from strict liability applies to contamination releases or threatened releases occuring after the effective date of the act, even if the property was acquired or held before the effective date of the act.

CSSB 154 (RES) is intended, in part, to avoid severely restricting access to credit in the Alaskan economy. Other potential for adverse economic impact exists which this bill is designed to address.

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

P.O. Box Y, Juneau, Alaska 99811
(907) 465-3867 or 465-2450
FAX (907) 465-2029

Deliveries to: 240 Main Street
Court Plaza, Room 500
Mail Stop 3101

MEMORANDUM January 22, 1992

SUBJECT: Sectional summary of CSSB 154(Resources)

TO: Senator Pat Rodey
Attn: Tim

FROM: Theresa L. Bannister TB
Legislative Counsel

You have requested a sectional summary of the above described bill. 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 46.03.822, the section that creates strict liability for releases (and threatened releases) of hazardous substances. The amendment makes AS 46.03.822 subject to the new section (created in bill sec. 2) that exempts certain financial institutions from strict liability with regard to certain property.

Section 2. This section exempts certain qualifying financial institutions from the strict liability provisions of AS 46.03.822 - 46.03.828. Subsection (a) contains the exemption and ties the exemption to certain listed types of facilities and vessels held by the institution. These types of property include property acquired through foreclosure. Subsection (b) creates an exception to the exemption and allows the state to require the institution to reimburse the state for certain benefits received by the institution resulting from state response, containment, removal, or remedial action. Limits the reimbursement to the fair market value of the facility or vessel involved. Subsection (c) describes the financial institutions that qualify for the exemption.

Section 3. This section amends the section that gives the state a lien for its costs of response, containment, removal, or remedial action. The amendment limits the property against which the state has a lien to a facility or vessel that is owned by the liable person and that is subject to the action.

Section 4. This section makes the state's lien subject to the rights of certain parties if the parties' interests were perfected before notice of the state's lien was recorded.

Sectional Analysis

Gives the parties the same protections against the state's lien 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.

Section 5. This section repeals AS 46.08.075(e). That subsection authorizes a person with an ownership interest in property against which a state lien is recorded under AS 46.08.075 to ask a court to release the lien, and gives the court guidelines for releasing the lien.

Section 6. This section states that facilities and vessels are covered by proposed sec. 46.03.825 (bill sec. 2) even if they were acquired or held by, or subject to the financial control or financial oversight of, a financial institution before the effective date of the Act.

If I may be of further assistance, please advise.

TLB:gc
92-046.glc

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

P.O. Box Y, Juneau, Alaska 99811
(907) 465-3867 or 465-2450
FAX (907) 465-2029

Deliveries to: 240 Main Street
Court Plaza, Room 500
Mail Stop 3101

MEMORANDUM May 1, 1991

SUBJECT: Sectional summary of CSSB 154(Res)
(Work Order No. 7-LS0716\G, 4-23-91)

TO: Senator Pat Rodey
Attn: Tim

FROM: Theresa L. Bannister TB
Legislative Counsel

You have requested a sectional summary of the above described bill. 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 46.03.822, the section that creates strict liability for releases (and threatened releases) of hazardous substances. The amendment makes AS 46.03.822 subject to the new section (created in bill sec. 2) that exempts certain financial institutions from strict liability with regard to certain property.

Section 2. This section exempts certain qualifying financial institutions from the strict liability provisions of AS 46.03.822 - 46.03.828. Subsection (a) contains the exemption and ties the exemption to certain listed types of facilities and vessels held by the institution. These types of property include property acquired through foreclosure. Subsection (b) creates an exception to the exemption and allows the state to require the institution to reimburse the state for certain benefits received by the institution resulting from state response, containment, removal, or remedial action. Limits the reimbursement to the fair market value of the facility or vessel involved. Subsection (c) describes the financial institutions that qualify for the exemption.

Section 3. This section amends the section that gives the state a lien for its costs of response, containment, removal, or remedial action. The amendment limits the property against which the state has a lien to a facility or vessel that is owned by the liable person and that is subject to the action.

Section 4. This section makes the state's lien subject to the rights of certain parties if the parties' interests were perfected before notice of the state's lien was recorded. Gives the parties the same protections against the state's lien 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.

Section 5. This section repeals AS 46.08.075(e). That subsection authorizes a person with an ownership interest in property against which a state lien is recorded under AS 46.08.075 to ask a court to release the lien, and gives the court guidelines for releasing the lien.

Section 6. This section states that facilities and vessels are covered by proposed sec. 46.03.825 (bill sec. 2) even if they were acquired or held by, or subject to the financial control or financial oversight of, a financial institution before the effective date of the Act.

If I may be of further assistance, please advise.

TLB:pl:gc
91-326.plm

SENATE COMMITTEE REPORT

FIRST COMMITTEE OF REFERR

DATE: 3/1/91 FURTHER: Judiciary

Date of 5-Day Notice: 3/4/91
(in accordance with Uniform Rule 23)

DATE TURNED INTO OFFICE: 3/7/91

Resources Committee considered SB 154

Liability for environmental damage and to liens arising from environmental damage.

and recommended: S it be replaced with

[✓] replace with _____ CS SB 154 Res [ ] same title [✓] new title

and report it back as follows

[ ] attached amendment(s)

[ ] _____ letter of intent adopted

[ ] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] further referral to _____

Ø/FN

ATTACHES NEW FISCAL NOTE(S):

Dept/Date	Dept/Date
[ ] fiscal note(s) _____	[✓] zero fiscal note(s) _____
_____	~~Revenue~~ FN DEC 3/18/91
_____	_____
_____	_____

[ ] appropriation-no fiscal note [ ] Governor's bill w/fiscal note

SIGNING **DO PASS**:

OTHER RECOMMENDATIONS:

NO REC

Chair: Signature and Recommendation

7-LS0716\V
Bannister
2/27/92

CS FOR SENATE BILL NO. 154 ( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATOR RODEY

A BILL

FOR AN ACT ENTITLED

"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."

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

* Section 1. AS 46.03.826 is amended by adding new paragraphs to read:

(16) "financial institution" means

(A) a bank, credit union, or savings association if the deposits of the bank, credit union, or savings association are insured in whole or in part by the Federal Deposit Insurance Corporation, by another agency of the United States, or by an agency of the state;

(B) a trust company that is owned in whole or in part by a bank or that is subject to regulation by the United States Comptroller of the Currency;

(17) "indicia of ownership" means, with regard to financial institutions, evidence

of interests held by the financial institution in real or personal property as security for a loan or other obligation, including full title to real or personal property acquired through foreclosure or an equivalent procedure, and including a mortgage, deed of trust, assignment, lien, pledge, or other right to or other form of encumbrance against property that is recognized under applicable law as establishing a bona fide security interest;

(18) "participating in the management of a vessel or facility" means with regard to financial institutions the actual participation in the management or operational affairs by the financial institution that is the holder of the security interest; in this paragraph, "participating in the management of a vessel or facility"

(A) includes exercising

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

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

(B) does not include

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

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

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

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

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

(19) "primarily to protect a security interest" means, with regard to financial institutions, that the indicia of ownership in the vessel or facility are held for the purpose of

securing payment or performance of a financial obligation, including a mortgage, installment sale, trust receipt transaction, assignment, or other financing arrangement; with regard to financial institutions, "primarily to protect a security interest" does not include an ownership interest in property held for investment purposes, or for purposes other than as protection of a security interest.

* Sec. 2. AS 46.08.075 is amended by adding new subsections to read:

(f) Notwithstanding (a) of this section, if the property subject to the response, containment, removal, or remedial action by the state is owned by a financial institution that is not an owner or operator under AS 46.03.826(8)(B), the state may file a lien against only that property that was subject to the state's response, containment, removal, or remedial action. The lien and the financial institution's obligation to the state for the state's costs of response, containment, removal, and remedial action are satisfied by the payment of the net gain, if any, in the fair market value of the property that has resulted directly from the state's response, containment, removal, or remedial action and that is realized by the financial institution at the time of sale.

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

(h) In this section, "financial institution" has the meaning given in AS 46.03.826.

Department of Transportation and Public Facilities

POSITION PAPER

BILL NO: SB 154 APPROVED:

TITLE: Liability for Environmental Damage/Liens DATE: February 24, 1992

Committee Substitute for Senate Bill 154[1] (as introduced by Senator Rodey in Senate Judiciary Committee on January 30, 1992) would limit the liability for environmental cleanup costs that might be incurred by lenders with security interests in contaminated property under the present strict liability for hazardous release law. DOT&PF has numerous circumstances where this bill could increase our liability as a potentially responsible party and thus expose the state general and airport revenue funds to expensive claims.

These exposures consist of the following types of circumstances:

- On lands leased to private parties for business purposes where the enterprise incurs a mortgage for business development costs and a release contaminates the property in question.
- On rights-of-way adjacent to private lands developed with borrowed funds where a release contaminates across property boundaries.
- In state harbors where a vessel releases contamination into public waters and/or tidelands.

[1] While the Committee Substitute for this bill was not officially introduced at the previous committee meeting, it was clear from the committee's discussion on January 30, 1992 that Senator Rodey would offer the CS when a quorum was present. Consequently, we have focused our comments on the work draft (7-LS0716\P Bannister 1/29/92) distributed at that meeting.

For Further Information contact Katy McHugh at 465-3900.

While concerned for the increased financial risk this bill places on public funds, we are fully cognizant of the problems the current circumstances place on financial lenders. Under current law, if a lender forecloses on a property which secured a loan, and that property has been contaminated, their "deep pocket" can be fully exposed to whatever cleanup costs may arise regardless of any involvement in the decisions or actions which contributed to the problem. Thus the lender's risk on the loan may far exceed the actual loan amount.

We believe that relief for the banking and investment industry needs to be balanced with the added risk such relief places on other public and private parties. In some cases the additional risk is simply passed on to the municipal or state governments who may foreclose on the property for unpaid tax or lease payments. Thus it is important that limited liability only apply when lenders are in fact "innocent" having neither participated in any decision leading to the release nor having failed to inform authorities when they have knowledge of wrongdoing which has or could result in a release.

We would endorse a bill which contained the following basic provisions:

- Bank and financial institutions could invoke limited liability (essentially the remaining balance of the loan) when:
  1) they do not participate in or direct the decisions, actions or inaction which caused the hazardous release or threatened release, and;
  2) they do not fail to promptly inform appropriate authorities when they have knowledge of the borrower's violation of any and all laws governing the use, storage, handling and disposal of materials which can cause contamination when released.

- Once invoked, such limited liability would require that they divest themselves of all further property rights in the original investment.

- The bill should not affect rights and obligations of parties, including financial institutions, under leases or other contracts.

We do not believe the language found in Section 2 (p.2, line 29) adequately protects other parties. The lender could actively participate in a decision which leads to the release or threatened release in a single business meeting. Thus we believe the language in this section should be changed by removing the word "continual": "...if the institution does not exercise actual, and direct ~~and continual~~ managerial control..."

We further recommend that the lender be held strictly liable for failure to act on the knowledge of any activity that relates to a release or threatened release. It is in the

public interest to prevent releases, and if they occur to take timely action. Under the current language of this bill, it appears that lenders could receive immunity even though they were knowledgeable about improper actions or actual releases, thus greatly aggravating the problem.

Finally, we believe it important that the construction of this statute not impinge upon the contractual right of parties. We would recommend that the bill be amended to modify AS 46.03.828 as follows:

> Sec 46.03.828. Other rights of action not affected. The provisions of AS 46.03.822 - AS 46.03.828 do not abridge or alter a right of action or remedy under a contract or lease, another statute, in equity, or at common law.

We have not prepared a fiscal note for this bill because the effects are highly speculative and incalculable. However, if passed in it's current form there would undoubtedly be some greater financial liability to which the state becomes exposed and this liability would have the effect of causing the involuntary expenditure of state funds to an unknown amount.

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.

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

National Bank of Alaska

Corporate Headquarters P.O. Box 100720 Anchorage, Alaska 99510-0600 (907) 276-1132

January 27, 1992

Senator Rick Halford
Alaska State Senate
P.O. Box Z (MS3100)
Juneau, AK 99811

Dear Senator Halford:

The State Banking Association is supporting Senate Bill #154. The reason for our support for this legislation is to facilitate small business commerce in the state of Alaska. That is, 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 strong 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,

Jan Sieberts
Senior Vice President

sr

Support Letters

DENALI STATE BANK
119 N. Cushman Street • (907) 456-1400 • FAX (907) 456-2140 • P.O. Box 74588 • Fairbanks, Alaska 99707-4588

January 27, 1992

Senator Pat Rodey
c/o Alaska State Legislature

FAX # 463-3144

RE: CS for Senate Bill #154 (Resources)

Dear Senator Rodey:

As current President of the Alaska Bankers Association, I wish to thank you for sponsoring the above referenced bill. Lender Responsibility as a Potentially Responsible Party (PRP) came about as a result of court decisions, not as the intent of original legislation concerning these matters. Sponsors of this legislation in the United State Congress were shocked to find that courts were interpreting the legislation in a manner that made lien holders or fiduciaries responsible for environmental cleanup. In several cases the court held that by virtue of having a security interest in real estate, the financial institution as mortgagee was liable as a PRP for the entire cost of environmental cleanup. In June of 1991, the Federal Environmental Protection Agency (EPA) offered proposed changes to existing EPA Regulations for public comment and later in 1991, adopted these proposed changes. The new regulations extended relief to lien holders and fiduciaries as PRPs and now hold financial institutions liable only if they were actually managing the business or holding title when the environmental contamination occurred.

It is imperative that the State of Alaska closely follow new EPA regulations and SB154 accomplishes that purpose. Financial institution lenders are now currently reviewing all new real estate loans much more closely and performing various phases of environmental assessments on properties to limit lending on properties containing environmental hazards. However, this does not cover the problem of contaminated properties previously pledged as collateral or properties that may become contaminated after the closing of the loan. Banks have very little control over either of these two situations. As an industry, I believe that we have accepted the fact that if a property becomes contaminated and requires cleanup, the financial institution may have to "walk away" from it's loan and suffer a financial loss up to the outstanding balance of the loan. However, to remain as sound financial institutions, we cannot expose ourself to unknown and unlimited liability assessed against banks as lien holders or fiduciaries as these amounts become the discretion of the EPA or DEC and obviously may be far in excess of the bank's capital. For a bank with $10,000,000 in capital to fail simply because they become a PRP in a $20,000,000 environmental cleanup as mortgagee and thus subject to the "Deep Pocket" syndrome does not make sense at all.

If allowed to continue is its present form, environmental liability simply becomes a consumer issue. Lending institutions will have to back away from many financially sound real estate loans because of our increased concern for lender liability. Thus, potential borrowers become the ultimate victim in this process because of their inability to achieve financing dollars. This affects not only financial institutions, but the Alaska Industrial Development and Export Authority, U.S. Small Business Administration, and other guarantors and lenders of credit for real estate loans and development. The potential lack of access to these funds will have a negative impact on the overall Alaskan economy.

Just as in everything else, common sense should prevail in this matter. I believe that the financial institutions have previously been listed as PRPs simply because of their financial capacity through which the DEC and EPA felt that they could recover cleanup costs. However, this is putting the financial industry at risk.

Most other states have adopted regulations such as SB154. I ask for your continued support and the support of your colleagues in doing so for the State of Alaska.

I will be happy to address any questions on this matter at any time. Thank you.

Sincerely yours,

Gary Roth

Gary Roth
President and Chief Executive Officer

GR/bf

FRONTIER
ALASKA
STATE CREDIT UNION

MAIN OFFICE:	DIMOND BRANCH:	SOLDOTNA BRANCH:	EAGLE RIVER BRANCH:	CAMPUS BRANCH:
3500 EIDE STREET ANCHORAGE, AK 99503 563-3766	300 E. DIMOND BLVD. ANCHORAGE, AK 99515 344-5144	131 A WAREHOUSE SOLDOTNA, AK 99669 262-7000	16515 CENTERFIELD DRIVE EAGLE RIVER, AK 99577 694-5444	2801 PROVIDENCE DRIVE ANCHORAGE, AK 99508 561-3151

2

April 26, 1991

referred to
S. Judiciary
5/8

State Senator Rick Halford
Resource Committee
P.O. Box V
Juneau, Alaska 99811

Dear Senator Halford:

I am writing to express my Credit Union's support of SB 154 sponsored by Senator Rodey. The bill will limit the liability to the lender for the cost of cleaning contaminated properties acquired through foreclosure.

Frontier Alaska State Credit Union is a source of non-investor real estate lending to its 24,000 member/owners. Due to the risk associated with contaminated property, we have had to curtail some types of real estate lending, most notably raw land loans. We also have had to incur additional expense for inspections, certifications and other expenses associated with holding foreclosed properties. Those additional expenses are passed on to our member/owners in the form of increased fees and/or higher loan rates. We have also found that the property can become contaminated during the term of the loan without the Credit Union's knowledge.

Because of the above mentioned risks, combined with the regulators inherent fear of real estate loans and associated losses, many Alaskans cannot find competititve real estate loans when they need them. Passage of this bill will help make competive real estate loans available to more Alaskans. It will also aid the economic recovery currently taking place in the state. The Board of Directors and Management at Frontier urge swift passage of SB 154, so that affordable real estate loans are available to all qualified Alaskans.

Thank you for your time and attention to this matter. If you have any questions please don't hesitate to contact me.

Sincerely,

Leslie Ellis
President

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 and that without the minimal changes proposed by CS for SB 154(Res) economic development will be adversely affected.

ALASKA CREDIT UNION LEAGUE

SUITE 650, 4000 CREDIT UNION DRIVE
ANCHORAGE, ALASKA 99503-6647
(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 (Res) will 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.

BOX 670232
CHUGIAK
AK 99567
15 JAN 1992

SEN. RICK HALFORD
P.O. BOX V
STATE CAPITOL
JUNEAU
AK 99801

DEAR SEN. HALFORD.

THANKS FOR YOUR LETTER OF CONCERN AND OFFER OF HELP OF 20 DEC. 1991 REGARDING THE BUILDING I RENT TO HOUSE ALTZHEIMER PATIENTS.

ACCORDING TO THE LETTER SENT BY THE FIRE MARSALL, MR. OXFORD, HE CAN NOT ISSUE A WAIVER I REQUESTED. I CONTACTED HIM IN SEPTEMBER AND ASKED IF HE WOULD WAIVER THE REGULATION UNTIL APRIL IF I INSTALLED AN EGRESS WINDOW IN THE LARGEST ROOM THEN AND THE OTHER ROOMS BY 1 APRIL. HE TOLD ME TO INSTALL THE ONE WINDOW AND WRITE TO HIM. I DID BUT HE DECLINED TO ISSUE THE WAIVER. YOUR STAFF HAS COPIES OF THIS CORRESPONDENCE

THE ORGANIZATION THAT OPERATES THE CARE CENTER, "THE SOURCE", HAS BEEN ISSUED A LICENSE BUT WAS TOLD THAT, "IF THERE IS A FIRE HERE, SOMEONE IS GOING TO JAIL."

FOR ME TO INSTALL THESE WINDOWS NOW WOULD BE A FINANCIAL AND PHYSICAL DRAIN. MY WIFE AND I WORKED TWO MONTHS LAST SUMMER AND SPENT $12,000 REMODELING THE BUILDING IN SEPT I RETIRED EARLY BECAUSE OF MY HEALTH. I HAVE TALKED TO THE DIRECTOR OF "THE SOURCE" AND WE HAVE

AGREED TO RUN THE RISK OF JAIL TIME AND I WILL INSTALL THE WINDOWS WHEN THE WEATHER WARMS AND FINANCES IMPROVE. FOUR OF THE WINDOWS WOULD COST ABOUT $500 + EACH. A FIFTH WINDOW, IF THE FIRE MARSHALL INSISTS IS BELOW GRADE AND WOULD PROBABLY COST BETTER THAN $2,500.

THIS BUILDING WAS OPERATED AS A GROUP FOSTER HOME FROM 1968 TO 1972 AND AS A CHILD DAY CARE CENTER FROM 1984 TO 1991. THERE WERE NEVER ANY PROBLEMS BEFORE.

THANKS FOR YOUR CONCERN

SINCERELY

R. C. Cromwell

R. C. CROMWELL, JR.

West's Federal Forms

Actions by United States or officers thereof, see §§ 1069 to 1072.
Fine, see § 7535.
Jurisdiction and venue in district courts, matters pertaining to, see § 1000 et seq.

Library References

Health and Environment ⇐25.5(5, 10), 25.6(3, 9), 25.7(3, 24).

C.J.S. Health and Environment §§ 91 et seq., 103 to 116, 131, 139, 140 et seq., 150 et seq.

Notes of Decisions

Complaint
  Generally 4
  Necessary allegations 5
Construction with Executive Order 1
Crossing of state lines 2
Persons liable 3

---

1. Construction with Executive Order

Section 3(b) of Executive Order, set out as a note under section 9615 of this title, delegating to Administrator of Environmental Protection Agency functions vested in President by this section, providing that President's authority under this chapter to require Attorney General to commence litigation is retained by President, does not require specific presidential authorization to commence litigation under this section but merely defines roles of Administrator and Attorney General in bringing litigation. U. S. v. Reilly Tar & Chemical Corp., D.C.Minn.1982, 546 F.Supp. 1100.

2. Crossing of state lines

This section is not limited to application only when hazardous wastes cross state lines; Congress did not intend this section to incorporate element of interstate effect required in federal common law nuisance actions. U. S. v. Reilly Tar & Chemical Corp., D.C.Minn. 1982, 546 F.Supp. 1100.

3. Persons liable

This section can, in appropriate circumstances, be invoked against prior owner of disposal site. U. S. v. Reilly Tar & Chemical Corp., D.C.Minn.1982, 546 F.Supp. 1100.

This section conferring upon Environmental Protection Agency the authority to seek emergency injunctive relief when presented with evidence of an imminent and substantial endangerment to the public health could not be used to confer liability on nonnegligent past off-site generators of hazardous wastes. U. S. v. Wade, D.C.Pa.1982, 546 F.Supp. 785.

4. Complaint—Generally

Complaints alleging that many of chemicals found in wastes disposed of by allegedly offending party were carcinogens and toxic, that such wastes were spilled, leaked and discharged directly into ground, that they there entered and continued to enter groundwater, that six wells had already been closed, and that contaminants would continue to move into drinking water for metropolitan area unless preventative measures were taken were sufficient to establish imminent and substantial endangerment to public health, welfare or environment so as to state claim under this section. U. S. v. Reilly Tar & Chemical Corp., D.C.Minn.1982, 546 F.Supp. 1100.

5. —— Necessary allegations

Claim under this section need not contain allegation of specific presidential authorization for suit. U. S. v. Reilly Tar & Chemical Corp., D.C.Minn.1982, 546 F.Supp. 1100.

§ 9607. Liability

(a) Covered persons; scope

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel (otherwise subject to the jurisdiction of the United States) or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

(b) Defenses

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

(c) Determination of amounts

(1) Except as provided in paragraph (2) of this subsection, the liability under this section of an owner or operator or other responsible person for each release of a hazardous substance or incident involving release of a hazardous substance shall not exceed—

(A) for any vessel which carries any hazardous substance as cargo or residue, $300 per gross ton, or $5,000,000, whichever is greater;

(B) for any other vessel, $300 per gross ton, or $500,000, whichever is greater;

(C) for any motor vehicle, aircraft, pipeline (as defined in the Hazardous Liquid Pipeline Safety Act of 1979 [49 U.S.C.A. § 2001 et seq.]), or rolling stock, $50,000,000 or such lesser amount as the President shall establish by regulation, but in no event less than $5,000,000 (or, for releases of hazardous substances as defined in section 9601(14) (A) of this title into the navigable waters, $8,000,000). Such regulations shall take into account the size, type, location, storage, and handling capacity and other matters relating to the likelihood of release in each such class and to the economic impact of such limits on each such class; or

(D) for any facility other than those specified in subparagraph (C) of this paragraph, the total of all costs of response plus $50,000,000 for any damages under this subchapter.

(2) Notwithstanding the limitations in paragraph (1) of this subsection, the liability of an owner or operator or other responsible person under this section shall be the full and total costs of response and damages, if (A)(i) the release or threat of release of a hazardous substance was the result of willful misconduct or willful negligence within the privity or knowledge of such person, or (ii) the primary cause of the release was a violation (within the privity or knowledge of such person) of applicable safety, construction, or operating standards or regulations; or (B) such person fails or refuses to provide all reasonable cooperation and assistance requested by a responsible public official in connection with response activities under the national contingency plan with respect to regulated carriers subject to the provisions of Title 49 or vessels subject to the provisions of Title 33 or 46, subparagraph (A)(ii) of this paragraph shall be deemed to refer to Federal standards or regulations.

(3) If any person who is liable for a release or threat of release of a hazardous substance fails without sufficient cause to properly provide removal or remedial action upon order of the President pursuant to section 9604 or 9606 of this title, such person may be liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action. The President is authorized to commence a civil action against any such person to recover the punitive damages, which shall be in addition to any costs recovered from such person pursuant to section

9612(c) of this title. Any moneys received by the United States pursuant to this subsection shall be deposited in the Fund.

(d) Activities pursuant to national contingency plan

No person shall be liable under this subchapter for damages as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the national contingency plan or at the direction of an onscene coordinator appointed under such plan, with respect to an incident creating a danger to public health or welfare or the environment as a result of any release of a hazardous substance or the threat thereof. This subsection shall not preclude liability for damages as the result of gross negligence or intentional misconduct on the part of such person. For the purposes of the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence.

(e) Indemnification, hold harmless, etc., agreements or conveyances; subrogation rights

(1) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

(2) Nothing in this subchapter, including the provisions of paragraph (1) of this subsection, shall bar a cause of action that an owner or operator or any other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.

(f) Actions involving natural resources; maintenance, scope, etc.

In the case of an injury to, destruction of, or loss of natural resources under subparagraph (C) of subsection (a) of this section liability shall be to the United States Government and to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State: *Provided, however,* That no liability to the United States or State shall be imposed under subparagraph (C) of subsection (a) of this section, where the party sought to be charged has demonstrated that the damages to natural resources complained of were specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement, or other comparable environment analysis, and the decision to grant a permit or license authorizes such commitment of natural resources, and the facility or project was otherwise operating within the terms of its permit or license. The President, or the authorized representative of any State, shall act on behalf of the public as trustee of such natural resources to recover for such damages. Sums recovered shall be available for use to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government or the State government, but the measure of such damages shall not be limited by the sums which can be used to restore or replace such resources. There shall be

no recovery under the authority of subparagraph (C) of subsection (a) of this section where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before December 11, 1980.

(g) Applicability to Federal Government branches

Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under this section.

(h) Owner or operator of vessel

The owner or operator of a vessel shall be liable in accordance with this section and as provided under section 9614 of this title notwithstanding any provision of the Act of March 3, 1851 (46 U.S.C. 183ff).

(i) Application of registered pesticide product

No person (including the United States or any State) may recover under the authority of this section for any response costs or damages resulting from the application of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act [7 U.S.C.A. § 136 et seq.]. Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance.

(j) Obligations or liability pursuant to federally permitted release

Recovery by any person (including the United States or any State) for response costs or damages resulting from a federally permitted release shall be pursuant to existing law in lieu of this section. Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or F eral law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance. In addition, costs of response incurred by the Federal Government in connection with a discharge specified in section 9601(10)(B) or (C) of this title shall be recoverable in an action brought under section 1319(b) of Title 33.

(k) Transfer to, and assumption by, Post-closure Liability Fund of liability of owner or operator of hazardous waste disposal facility in receipt of permit under applicable solid waste disposal law; time, criteria applicable, procedures, etc.; monitoring costs; reports

(1) The liability established by this section or any other law for the owner or operator of a hazardous waste disposal facility which has received a permit under subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921

et seq.], shall be transferred to and assumed by the Post-closure Liability Fund established by section 9641 of this title when—

(A) such facility and the owner and operator thereof has complied with the requirements of subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.] and regulations issued thereunder, which may affect the performance of such facility after closure; and

(B) such facility has been closed in accordance with such regulations and the conditions of such permit, and such facility and the surrounding area have been monitored as required by such regulations and permit conditions for a period not to exceed five years after closure to demonstrate that there is no substantial likelihood that any migration offsite or release from confinement of any hazardous substance or other risk to public health or welfare will occur.

(2) Such transfer of liability shall be effective ninety days after the owner or operator of such facility notifies the Administrator of the Environmental Protection Agency (and the State where it has an authorized program under section 3006(b) of the Solid Waste Disposal Act [42 U.S.C.A. § 6926(b)]) that the conditions imposed by this subsection have been satisfied. If within such ninety-day period the Administrator of the Environmental Protection Agency or such State determines that any such facility has not complied with all the conditions imposed by this subsection or that insufficient information has been provided to demonstrate such compliance, the Administrator or such State shall so notify the owner and operator of such facility and the administrator of the Fund established by section 9641 of this title, and the owner and operator of such facility shall continue to be liable with respect to such facility under this section and other law until such time as the Administrator and such State determines that such facility has complied with all conditions imposed by this subsection. A determination by the Administrator or such State that a facility has not complied with all conditions imposed by this subsection or that insufficient information has been supplied to demonstrate compliance, shall be a final administrative action for purposes of judicial review. A request for additional information shall state in specific terms the data required.

(3) In addition to the assumption of liability of owners and operators under paragraph (1) of this subsection, the Post-closure Liability Fund established by section 9641 of this title may be used to pay costs of monitoring and care and maintenance of a site incurred by other persons after the period of monitoring required by regulations under subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.] for hazardous waste disposal facilities meeting the conditions of paragraph (1) of this subsection.

(4)(A) Not later than one year after December 11, 1980, the Secretary of the Treasury shall conduct a study and shall submit a report thereon to the Congress on the feasibility of establishing or qualifying an optional system of private insurance for postclosure financial responsibility for hazardous waste disposal facilities to which this subsection applies. Such study shall include a specification of adequate and realistic minimum standards to assure that any such privately placed insurance will carry out the purposes of this subsection in a reliable, enforceable, and practical manner. Such a

study shall include an examination of the public and private incentives, programs, and actions necessary to make privately placed insurance a practical and effective option to the financing system for the Post-closure Liability Fund provided in subchapter II of this chapter.

(B) Not later than eighteen months after December 11, 1980, and after a public hearing, the President shall by rule determine whether or not it is feasible to establish or qualify an optional system of private insurance for postclosure financial responsibility for hazardous waste disposal facilities to which this subsection applies. If the President determines the establishment or qualification of such a system would be infeasible, he shall promptly publish an explanation of the reasons for such a determination. If the President determines the establishment or qualification of such a system would be feasible, he shall promptly publish notice of such determination. Not later than six months after an affirmative determination under the preceding sentence and after a public hearing, the President shall by rule promulgate adequate and realistic minimum standards which must be met by any such privately placed insurance, taking into account the purposes of this chapter and this subsection. Such rules shall also specify reasonably expeditious procedures by which privately placed insurance plans can qualify as meeting such minimum standards.

(C) In the event any privately placed insurance plan qualifies under subparagraph (B), any person enrolled in, and complying with the terms of, such plan shall be excluded from the provisions of paragraphs (1), (2), and (3) of this subsection and exempt from the requirements to pay any tax or fee to the Post-closure Liability Fund under subchapter II of this chapter.

(D) The President may issue such rules and take such other actions as are necessary to effectuate the purposes of this paragraph.

(Pub.L. 96–510, Title I, § 107, Dec. 11, 1980, 94 Stat. 2781.)

Historical Note

References in Text. The Hazardous Liquid Pipeline Safety Act of 1979, referred to in subsec. (c)(1), is Title II of Pub.L. 96–129, Nov. 30, 1979, 93 Stat. 1003, which is classified principally to chapter 29 (section 2001 et seq.) of Title 49, Transportation. For complete classification of this Act to the Code, see Short Title note set out under section 2001 of Title 49 and Tables volume.

This chapter, referred to in subsecs. (g) and (k)(4)(B), was in the original, "this Act", meaning Pub.L. 96–510, Dec. 11, 1980, 94 Stat. 2767, known as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. For complete classification of this Act to the Code, see Short Title note set out under section 9601 of this title and Tables volume.

Act of March 3, 1851 (46 U.S.C. 183ff), referred to in subsec. (h), is Act Mar. 3, 1851, c. 43, 9 Stat. 635, which was incorporated into the Revised Statutes as R.S. §§ 4282 to 4287 and 4289, and is classified to sections 182, 183, and 184 to 188 of Title 46, Shipping.

The Federal Insecticide, Fungicide, and Rodenticide Act, referred to in subsec. (i), is Act June 25, 1947, c. 125, as amended generally by Pub.L. 92–516, Oct. 21, 1972, 86 Stat. 973, which is classified generally to subchapter II (section 136 et seq.) of chapter 6 of Title 7, Agriculture. For complete classification of this Act to the Code, see Short Title note set out under section 136 of Title 7 and Tables volume.

The Solid Waste Disposal Act, referred to in subsec. (k)(1) and (3), is Title II of Pub.L. 89–272, Oct. 20, 1965, 79 Stat. 997, as amended generally by Pub.L. 94–580, § 2, Oct. 21, 1976, 90 Stat. 2795. Subtitle C of the Solid Waste Disposal Act is classified generally to subchapter III (section 6921 et seq.) of chapter 82 of this title. For complete classification of this Act to the Code, see

Short Title note set out under section 6901 of this title and Tables volume.

Subchapter II of this chapter, referred to in subsec. (k)(4)(A) and (C), was in the original, "Title II of this Act", meaning Title II of Pub.L. 96–510, Dec. 11, 1980, 94 Stat. 2796, known as the Hazardous Substance Response Revenue Act of 1980, which enacted subchapter II of this chapter and sections 4611, 4612, 4661, 4662, 4681, and 4682 of Title 26, Internal Revenue Code. For complete classification of Title II to the Code, see Short Title of 1980 Amendment note set out under section 1 of Title 26 and Tables volume.

Delegation of Functions. Functions of the President under subsec. (c)(1)(C) of this section delegated to the Secretary of Transportation, see section 4(a) of Ex.Ord. No. 12316, Aug. 14, 1981, 46 F.R. 42233, set out as a note under section 9615 of this title.

Functions of the President under subsec. (c)(3) of this section delegated to the Secretary of the Department in which the Coast Guard is operating, with respect to any release or threatened release involving the coastal zone, Great Lakes waters, ports, and harbors, with authority to redelegate, see sections 4(b) and 8(f) of Ex.Ord. No. 12316, set out as a note under section 9615 of this title.

Functions of the President under subsec. (c)(3) of this title, subject to certain specific delegations, delegated to the Administrator of the Environmental Protection Agency, with authority to redelegate, see sections 4(c) and 8(f) of Ex.Ord. No. 12316, set out as a note under section 9615 of this title.

Functions of the President under subsec. (f) of this section delegated to each of the Federal trustees for natural resources, as designated by section 1(d) of Ex.Ord. No. 12316 (the Secretaries of Defense, Interior, Agriculture, and Commerce) for resources under their trusteeship, see section 4(d) of Ex.Ord. No. 12316, set out as a note under section 9615 of this title.

Functions of the President under subsec. (k)(4)(B) of this section delegated to the Secretary of the Treasury, with the Administrator of the Environmental Protection Agency to provide such technical information and assistance as the Administrator has available, see section 5(a) of Ex.Ord. No. 12316, set out as a note under section 9615 of this title.

Legislative History. For legislative history and purpose of Pub.L. 96–510, see 1980 U.S. Code Cong. and Adm.News, p. 6119.

Library References

Health and Environment ⇐25.7(23). C.J.S. Health and Environment §§ 113, 150.

Notes of Decisions

Construction with other laws 1
Defenses 5
Prerequisites for maintaining action 3
Removal of actions 4
Strict liability 2

1. Construction with other laws

Liability for response costs under this section is independent of authorized uses of response fund under section 9611 of this title and of cooperative agreement called for by section 9604(c)(3) of this title which prohibits President from taking "remedial" actions unless cooperative agreement between President and affected state has been entered into. U. S. v. Reilly Tar & Chemical Corp., D.C. Minn.1982, 546 F.Supp. 1100.

2. Strict liability

Legislative history clearly establishes Congress' understanding that it was incorporating a standard of strict liability under this chapter. City of Philadelphia v. Stepan Chemical Co., D.C.Pa.1982, 544 F.Supp. 1135.

3. Prerequisites for maintaining action

State's claim for natural resources damages was not premature on ground that regulations required by section 9651 of this title for assessment of natural resources damages resulting from release of hazardous substances had not been promulgated and that administrative procedures called for by section 9611 of this title with respect to assessment of natural resources damages had not yet been established. U. S. v. Reilly Tar & Chemical Corp., D.C. Minn.1982, 546 F.Supp. 1100.

Congress did not intend final adoption of revisions to national contingency plan to be prerequisite for bringing suit to recover response costs under this section. Id.

4. Removal of actions

Complaint which alleged that hazardous waste disposal facility was a nuisance and which complained of "stinking, obnoxious, nauseating, repugnant, burning chemical fumes and odors," none of which are specifically included within the definition of hazardous substances contained in this chapter, was

not brought under this chapter and thus could not be removed to federal court on the basis of federal question jurisdiction. McCastle v. Rollins Environmental Services, D.C. La.1981, 514 F.Supp. 936.

5. Defenses

Liability for specified response costs under this section is absolute, subject only to defenses of acts of God, acts of war, and certain acts or omissions of third parties. U. S. v. Reilly Tar & Chemical Corp., D.C.Minn. 1982, 546 F.Supp. 1100.

Fact that city was owner of landfill at which hazardous wastes were illegally dumped and might have been liable to federal or state governments had those entities commenced the cleanup did not preclude city from maintaining action under this chapter against the generators of the hazardous waste, where city was not operating a hazardous waste disposal facility on the premises, did not voluntarily permit the placement of hazardous substances thereon, and had undertaken to clean up the ensuing damage. City of Philadelphia v. Stepan Chemical Co., D.C.Pa. 1982, 544 F.Supp. 1135.

§ 9608. Financial responsibility

(a) Establishment and maintenance by owner or operator of vessel; amount; failure to obtain certification of compliance

(1) The owner or operator of each vessel (except a nonself-propelled barge that does not carry hazardous substances as cargo) over three hundred gross tons that uses any port or place in the United States or the navigable waters or any offshore facility, shall establish and maintain, in accordance with regulations promulgated by the President, evidence of financial responsibility of $300 per gross ton (or for a vessel carrying hazardous substances as cargo, or $5,000,000, whichever is greater). Financial responsibility may be established by any one, or any combination, of the following: insurance, guarantee, surety bond, or qualification as a self-insurer. Any bond filed shall be issued by a bonding company authorized to do business in the United States. In cases where an owner or operator owns, operates, or charters more than one vessel subject to this subsection, evidence of financial responsibility need be established only to meet the maximum liability applicable to the largest of such vessels.

(2) The Secretary of the Treasury shall withhold or revoke the clearance required by section 91 of Title 46 of any vessel subject to this subsection that does not have certification furnished by the President that the financial responsibility provisions of paragraph (1) of this subsection have been complied with.

(3) The Secretary of Transportation, in accordance with regulations issued by him, shall (A) deny entry to any port or place in the United States or navigable waters to, and (B) detain at the port or place in the United States from which it is about to depart for any other port or place in the United States, any vessel subject to this subsection that, upon request, does not produce certification furnished by the President that the financial responsibility provisions of paragraph (1) of this subsection have been complied with.

(b) Establishment and maintenance by owner or operator of production etc., facilities; amount; adjustment; consolidated form of responsibility; coverage of motor carriers

(1) Beginning not earlier than five years after December 11, 1980, the President shall promulgate requirements (for facilities in addition to those

Official Business

COMMITTEE:

JUDICIARY

DATE: 1/30/92

Subject of meeting:

SB 154 - LIABILITY FOR ENVIRONMENTAL DAMAGE?LIENS

SIGN-IN

PLEASE PRINT!

NAME	ADDRESS (MAILING) & (ZIP)	PHONE	REPRESENTING	DO YOU WANT TO TESTIFY?
Mary Irvine	PO. Box 22151 Juneau, AK 99802	463-3366	Alaska Environmental Lobby, Inc.	Yes
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Jamie Adair		5450	DEC	Yes