

ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672
7623 SENATE RESOURCES

with dramatic spruce bark beetle population increases in the Kachemak Bay area (Holsten 1990, USDA Forest Service, 1985, 1989). One example is the Halibut Cove infestation which was associated with powerline right-of-way clearing.

Normally, field evaluations are not warranted unless beetle outbreak indicators are present and properly documented. Examples of such indicators include, but are not limited to: direct evidence of reduced stand vigor (low growth increment the last 5 years), continued unseasonable climatic conditions such as we experienced last summer/fall on the Kenai Peninsula, or a major site disturbance (e.g. windstorm, right-of-way clearing). Such indicators would justify a biological evaluation to determine beetle population and preference levels under altered stand conditions.

Conclusions

The short answer to questions 1. and 2. above is this: potential for increased spruce bark beetle activity on SNA land within the Kachemak Bay State Park (and subsequent threat of a major infestation developing) appears to be low at this time.

Field evaluations are needed to document stand composition and health. This will allow us to predict beetle attack susceptibility and insect population dynamics.

Based on surveys and biological evaluations already completed, a formal field evaluation of SNA's land is not warranted unless other outbreak indicators are documented.

Therefore, regarding question 3.: based on past detection surveys, spruce bark beetle impact on southside Kachemak Bay within Kachemak Bay State Park historically is low. Low spruce bark beetle impact is predicted, for the next 2-3 years, based on past survey data for this area. Major site disturbance such as unseasonable climatic trends could alter this prediction. Ongoing sampling will document beetle activity in live timber.

Absent logging, it is unlikely significant spruce beetle populations will occur on SNA/TTC land during the next 2-5 years. Localized infestations (1-20 trees) will likely occur. This observation is based solely on review of historical weather patterns and aerial detection surveys. Until a systematic biological evaluation is performed in this area it is only conjecture to say the local beetle population is decreasing, increasing or at static levels.

A coordinated Federal and state initial spruce beetle sampling

study could occur on SNA's acreage. This may be coordinated with legislative review of the proposed SNA/TTC land and timber purchase legislation. Seldovia Native Association, Inc. state park holdings can be added to the annual detection survey schedule given current KBSP spruce bark beetle interest shown by DLWM. (USFS generally calls for aerial survey service requests in February-April each year; survey generally starts after July 4th). The division will inform DLWM and DOPOR when details are available from the USFS, S&PF.

Bob Dick

12/28/90

Malcolm R. "Bob" Dick, Director

Roger E. Burnside

by Roger E. Burnside, NRM I
Resource Management Section
Insects and Disease

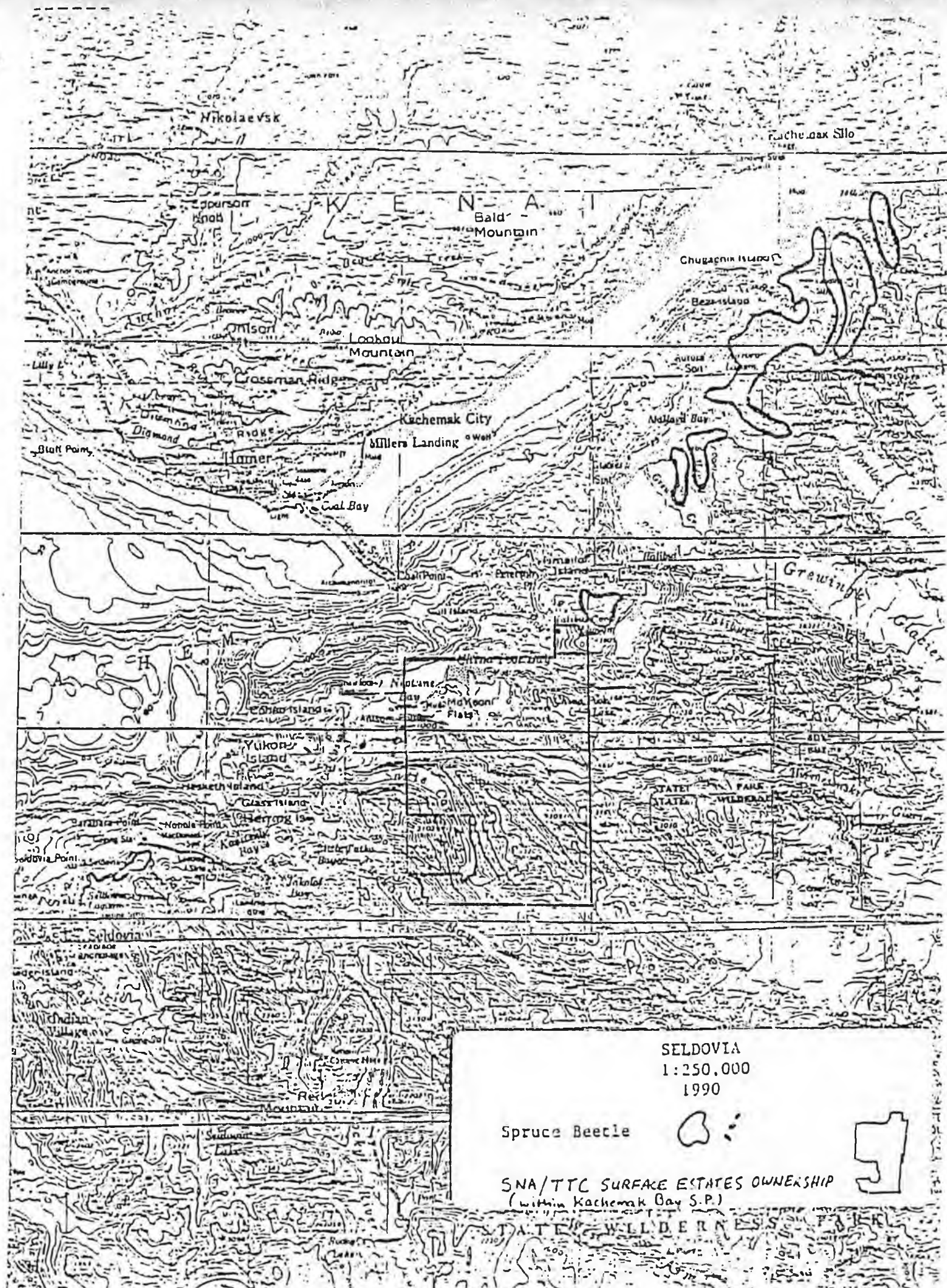
December 19, 1990

References (see page 5)

Attachments(2): map (spruce beetle activity
1985-1990, Kachemak Bay);
map (USFS 1990 aerial detection
survey, Kachemak Bay area)

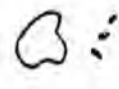
REFERENCES/LITERATURE CITED

- Holsten, E.H. 1990. Spruce Beetle Activity in Alaska: 1920- 1989. Technical Report R10-90-18. Forest Pest Management, State and Private Forestry, Region 10, Alaska. 28p.
- Holsten, F.H. and R.A. Werner. 1990. Comparison of white, Sitka, and Lutz spruce as hosts of the spruce beetle in Alaska. Can. J. For. Res. (in press).
- Holsten, E.H. and K. Zogas. 1987. Spruce Beetle: Mallard Bay. Biological Evaluation R10-87-6. Forest Pest Management, State and Private Forestry, USDA Forest Service, Alaska Region. 9p.
- USDA Forest Service. 1989. Forest Insect and Disease Conditions in Alaska - 1989. Forest Pest Management Report R10-89-C-1. Forest Pest Management, State and Private Forestry, Alaska Region, Juneau, Alaska. 20p.
- _____. 1985. Forest Insect and Disease Conditions in Alaska, 1985. Forest Pest Management, State and Private Forestry, Region 10, Anchorage, Alaska. 28p.
- Werner, R.A., B.H. Baker, and P.A. Rush. 1977. The Spruce Beetle in White Spruce Forests of Alaska. USDA Forest Service General Technical Report PNW-61. 13p.



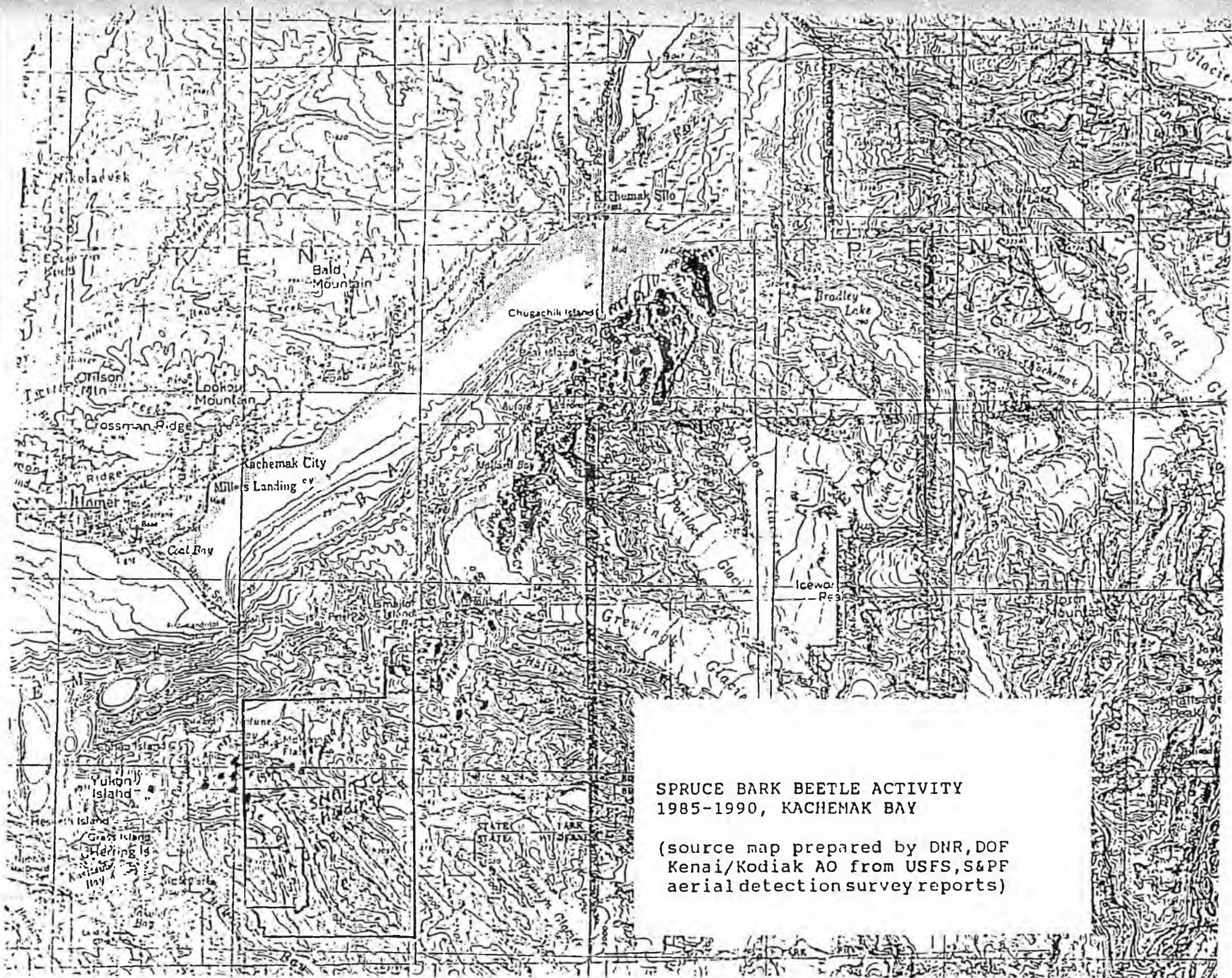
SELDOVIA
 1:250,000
 1990

Spruce Beetle



SNA/TTC SURFACE ESTATES OWNERSHIP
 (within Kachemak Bay S.P.)

STATE WILDERNESS



**SPRUCE BARK BEETLE ACTIVITY
1985-1990, KACHEMAK BAY**

(source map prepared by DNR,DOF
Kenai/Kodiak AO from USFS,S&PF
aerial detection survey reports)

HOMER

Homer—It's a humble name for a little town that is anything but ordinary. Named for Homer Pennock, a gold miner who established the first development on the Homer Spit in 1896, today's Homer is a thriving community of roughly 4,000 residents, most of whom came to this area for one main reason: It is one of the most beautiful places in the world.

Located near the southern tip of Alaska's Kenai Peninsula, Homer is blessed with a view to the south that is stunning in its beauty and grandeur. Across the sparkling waters of Kachemak Bay, the rugged Kenai Mountains spread east, west, and south. Soaring snow-capped peaks overlook massive glaciers crawling toward the sea. Along the coastline, the steep mountain valleys form narrow fjords. The waters within rise and fall with the tides—witnessed at times only by

a bald eagle soaring overhead, or a black bear prowling the shore. The mountains have a thousand moods, depending on the time of day, the sun, the clouds, rain, snow, and wind. Because of this, people who have lived all their lives here still find themselves awestruck when a bend in the road suddenly reveals a glimpse of this panorama.

But what about this side of the bay? Is there anything special about Homer besides the view? Yes—the people who live here. Over the years, Homer has become a mecca for artists, craftspeople, and creative minds of all types. These people have come from all over to find a place where the natural beauty refreshes and inspires them, and where they can share their ideas and talents with others who flourish in this stimulating environment. Consequently, Homer has a wealth of

talent and cultural awareness in the arts— from pottery, weaving, and painting to music, dance, and theatre—typical of a much larger town. This is not to suggest that everyone in Homer is an artist. On the contrary—part of what gives this community its rich texture is the diversity of folk who live here. Fishermen and women abound, along with ranchers and homesteaders, small business owners, guides and outfitters, professionals of all kinds, and kids of all ages. Religious and political views come from left, right, and center. But one thing virtually every visitor to Homer will notice is that the people in this area are warm, enthusiastic, and friendly. The sense that we are all neighbors working to preserve the quality of life here is what holds the community together and provides us with a common identity. Homerites are proud of Homer, and

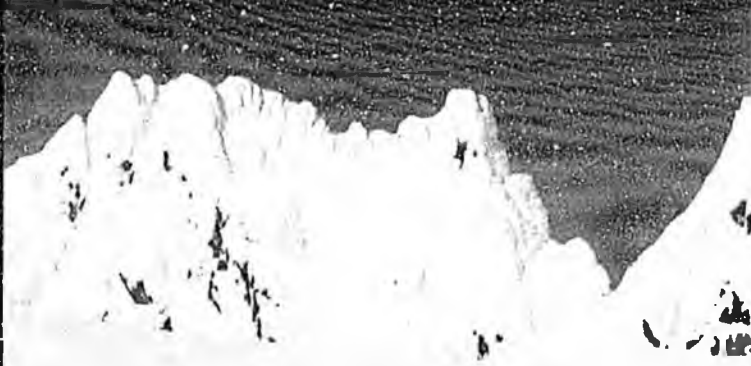
are happy to show visitors from outside the area what a special place this is, whether it's with a tour of the local museums and galleries or a day spent fishing for those world-renowned halibut.

On the high bluffs surrounding Homer, the fireweed bloom in red-violet profusion, catching the light of the setting sun on a late summer's night. A cow moose leads her calf across a grassy field, pausing at the sight of a child on horseback exploring a trail along the ridge. Out on the bay, some fishermen are just returning with their catch of halibut and salmon, as a lone kayaker rounds the tip of the Spit, lured perhaps by a teasing sea otter. This is Homer, the little community of Kachemak Bay which has come to be called the "hamlet by the sea." Come see for yourselves.

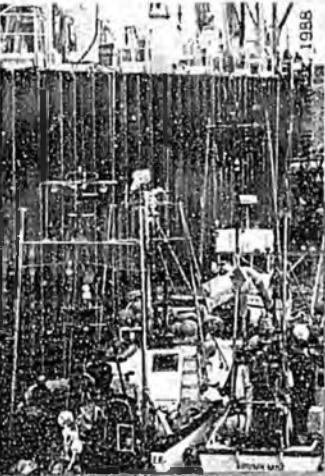


HOMER

alaska



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1988



Alaska State Legislature

Senator Drue Pearce, Chair
Senator Virginia Collins, Vice Chair
Senator Dick Eliason
Senator Rick Halford
Senator Jay Kerttula



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SENATE LABOR AND COMMERCE COMMITTEE

TO: Senator Lloyd Jones, Chair
Senate Resources Committee

FROM: Senator Drue Pearce, Chair *Drue Pearce*
Senate Labor & Commerce Committee

DATE: April 3, 1991

RE: SB 148 - Kachemak Bay State Park

In spite of taking extensive testimony on the subject legislation, there were a considerable number of individuals who, in the interest of time, waived their chance at offering testimony.

For that reason, I would encourage the Senate Resources Committee to allow for teleconference testimony when hearing this legislation. I have enclosed a copy of those who signed up to testify and were unable to do so when it was being heard in the Senate Labor & Commerce Committee.

Attachment

DP:rrm



Alaska Center for the Environment

519 West 8th Avenue, Suite 201 • Anchorage, Alaska 99501 • (907) 274-3621

A RESOLUTION SUPPORTING HOUSE BILL 83/SENATE BILL 148 RELATING TO THE APPROPRIATION OF FUNDS FOR THE PURCHASE OF SELDOVIA NATIVE ASSOCIATION LAND AND TIMBER TRADING COMPANY TIMBER RIGHTS WITHIN KACHEMAK BAY STATE PARK.

WHEREAS, Kachemak Bay State Park was established in 1970 by the Alaska State Legislature in order to protect and preserve these lands and waters for their unique and exceptional scenic nature, and

WHEREAS, the purpose of the Park legislation was primarily to preserve its outstanding natural features, keeping development to a minimum and only for the purpose of making areas available for public enjoyment in a manner consistent with the preservation of natural values such as camping, picnicking, sightseeing, nature study, hiking, riding and related activities with no major modification of the land, forests or water, and

WHEREAS, 29,000 acres of land established as state park by the Alaska State Legislature was awarded to the Seldovia Native Association as a result of the Alaska Native Claims Settlement Act, and

WHEREAS, due to past failed negotiations with the State of Alaska, in 1987 Seldovia Native Association sold their timber rights on native owned land within the Park in order to generate revenue with the land, and

WHEREAS, the most recent round of negotiations produced a cash settlement with the State of Alaska at a value of \$15.5 million to acquire the land from SNA and \$4.5 million to acquire timber rights from Timber Trading Company to remove inholdings from within the Park, and

WHEREAS, Alaska Center for the Environment recognizes Kachemak Bay State Park is a park for all Alaskans and merits permanent protection from any unnecessary development within and adjacent to the park boundaries,

THEREFORE BE IT RESOLVED, THAT

Alaska Center for the Environment urges the 1991 Alaska State Legislature to appropriate the necessary funds to purchase all inholdings within the legislative boundaries of Kachemak Bay State Park, and therefore return these lands to their highest and best use for the people of Alaska. Be it further resolved that the Governor is urged to support the appropriation of funds in its entirety.

As resolved by the Alaska Center for the Environment Board of Directors
April 11, 1991.



Enclosed are reprints from two recent nationally distributed magazines, EDDIE BAUER CATALOG, and NATIONAL FISHERMAN. Both publications remind their millions of subscribers about the importance of wetlands.

Please add the voices of these important publications to the voices you are hearing from around the state and around the world.

Kachemak Bay is valuable, it is productive, its marine productivity is spectacular. It will not remain so if its wetlands, and the shoreline surrounding its chief estuary, China and the Kachemak Bay State Park, is clearcut logged.

Eddie Bauer asks you to think about WETLANDS, "These Vanishing Treasures" and gives prestigious awards to volunteers working to save them.

National Fisherman features FISHERIES IN CRISIS Loss of fisheries habitat. "It is obvious that important estuaries are disappearing at an alarming rate and any plans to improve fishing must include regaining habitat". Think how much cheaper it is to protect Kachemak Bay by protecting its estuaries, rather than by trying to restore that productivity, once lost.

We would like not only to ask for your yes vote for HB33 but also for your support beyond the vote.

As we approach the next century, it has become clear to everyone on this earth, that we must all live and work in ways which are more environmentally sound. As one of our trusted leaders, we want to help you to make the best decisions. We are confident of your support for the wise investment in Kachemak Bays continued richness.

There will never be enough money to match all the funding requests for any state budget. Everywhere in the world legislators are being called upon to forego other expenses to invest in the environment. It makes very sound dollars and sense to Alaska, to protect Kachemak Bay State Park from clearcut logging, then watch over the years as the system continues to quickly repay that investment. It will continue doing so for many future generations.

Sincerely yours,

Michael, Diane, Shannon and Morgan McBride

National Fisherman

APRIL 1991 • VOLUME 71, NO. 12

IN THIS ISSUE

NEWS & FEATURES

20 **Fisheries in crisis**
Making the connection between habitat and poor fishing



FISHERIES IN CRISIS

Our Crisis series continues with a comparison between the loss of fisheries habitat, such as wetlands, and declining fish and shellfish stocks.

Although the connection between the two is not clearcut, it's obvious that important estuaries are disappearing at an alarming rate, and any plans to improve fishing must include regaining habitat.

Making the habitat connection

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In caring for this planet—whether preserving wetlands or recycling our waste—it's the individual effort that makes a difference. This is why we've established "Heroes For The Earth," a program that honors individual efforts to improve and protect the environment.

We rely on you to nominate individuals whose efforts have made a difference in our world. If you know of a person worthy of this honor, send nominations to: *Eddie Bauer Heroes For The Earth*, 14850 N.E. 36th St., Redmond, WA 98052. It will be worth your effort.

Nancy Brown is president of Friends of the Everglades, volunteers who advocate restoration of the natural stream flow in this extraordinary wetland.



Prices in effect through June 30, 1991.

SENATE COMMITTEE REPORT
FIRST COMMITTEE OF REFERENCE

DATE: 2/27/91

FURTHER: Resources
Finance

Date of 5-Day Notice: _____
(in accordance with Uniform Rule 23)

DATE TURNED
INTO OFFICE: _____

L&C Committee considered SB 148

Special appropriations to the Dept. of Natural Resources for the purchase of the inholdings of the Seldovia Native Association, and the timber rights of the Timber Trading Company, within the Kachemak Bay State Park; and recommended:

- replace with _____ CS _____ same title
- attached amendment(s) new title
- _____ letter of intent adopted
- do pass
- do not pass
- no recommendation
- individual recommendations
- further referral to _____

ATTACHES NEW FISCAL NOTE(S):

- | | |
|---|---|
| <input type="checkbox"/> fiscal note(s) _____ Dept/Date _____ | <input checked="" type="checkbox"/> zero fiscal note(s) <u>DNR 13-26-91</u> Dept/Date _____ |
| _____ | _____ |
| _____ | _____ |
| <input type="checkbox"/> appropriation-no fiscal note | <input type="checkbox"/> Governor's bill w/fiscal note |

SIGNING DO PASS:

OTHER RECOMMENDATIONS:

Bill Halford NO REC
John Collier NO REC

[Signature]
Chair: Signature and Recommendation

Operators response attached

MEMORANDUM

State of Alaska

Department of Fish and Game

TO: Martin Maricle
Area Forester
Dept. of Natural Resources
Glennallen

DATE: January 22, 1991

FILE NO:

TELEPHONE NO: 267-2284

SUBJECT: Forest Practices
Renewal of
Notification
SC91-19

FROM: ^{SWA} Steven W. Albert
Habitat Biologist
Region II
Habitat Division
Dept. of Fish and Game

The Alaska Department of Fish and Game (ADF&G) has reviewed the Forest Practices Notification submitted by Whitestone Logging Co. for proposed timber harvest activities north of the Cordova Airport on lands owned by EYAK Corporation. We do not believe that the notification submitted by the operator provided a sufficient amount of information describing their proposed timber harvesting activities. Because the proposed startup date will occur in mid-March, we would have preferred waiting longer to allow submittal of a more complete notification and still allow the operator to begin operations at that time.

A total of 430 acres in 3 sale units located in portions of Sects. 28, 29, and 30, T. 15 S., R. 1 W., C.R.M. are proposed for harvest. These harvest units are located on lands owned by EYAK Corporation and will be clearcut using cable and shovel logging systems. Activities are scheduled to begin during March 15, 1991 and will continue through October 15, 1991.

There are no catalogued anadromous fish streams in the proposed harvest units. However, please be advised that area streams have not been adequately surveyed to determine the distribution of anadromous fish species. We hope to conduct such surveys at the appropriate time later this summer if needed.

Sitka spruce ecosystems in the Cordova area are very productive and support abundant fish and wildlife, biodiversity, and public recreational values. The department believes that these values could be better maintained if wood utilization levels could be increased in units harvested by the operator. Higher utilization rates and the increased removal of debris/slash will increase access and use of the area by wildlife, hasten regeneration of the forest cover and associated browse, and

Should
stop
here -

January 22, 1991

reduce the risk of bark beetle infestation. Presently, the amount of large debris left on the site appears excessive and does not represent responsible forest management with respect to the use of this area by public resources such as wildlife and fish. We recommend the operator submit a detailed debris/slash management plan to describe what will be done to reduce debris levels. We believe such a plan needs to be developed as soon as possible before beginning new operations to reduce the risk of spruce bark beetle infestations.

As you may already know, the spruce bark beetle can attack all species of Picea in North America. Downed material such as fresh windthrown trees, cull logs, and logging debris/slash are highly productive breeding sites for beetles. Evidence indicating bark beetle infestations of Sitka spruce trees is available from the Blackstone Bay, Yakutat Forelands, Glacier Bay, and Kachemak Bay areas. We recommend that spruce debris exceeding 5-inch diameter should be properly handled before beetle emergence. Proper handling includes increased utilization rates, burning, burying, physical removal, or some combination of these methods.

Additionally, we recommend that the operator consider incorporating the following forest management practices in the silvicultural prescription (sale layout, harvest, and post-harvest activities) for these clearcut units that would benefit fish and wildlife resources:

1. Timber harvesting should be avoided on steep slopes or V-notches adjoining any fish streams.
2. Where feasible, soft snags should be left standing in the clearcut areas to provide habitat for hole-nesting birds, woodpeckers, raptors, and other species requiring perching habitat. *Against OSHA laws*
3. Irregular edges are preferable to straight edges. They result in a greater ratio of edge distance to area and allow more complete use of clearcut areas by wildlife by providing peninsulas of cover, thereby reducing the mean maximum distance to cover. Irregular shapes are more aesthetic to most people and should be preferable especially in areas easily seen by the public.
4. Travel corridors for wildlife should be maintained either in the form of uncut strips or clumps of trees scattered throughout the cut area.
5. Because many forest-dwelling wildlife species (moose, black bears, et al.) are reluctant to travel far from cover, clearcut openings should be designed so that the maximum

See Whitestone
response attached

January 22, 1991

distance from the forest edge should not exceed 330 feet from the center of the opening, i.e. 660 feet maximum width.

6. The enhancement of habitat diversity should include retaining large cull trees, residual shrub thickets, naturally vegetated areas surrounding lakes and ponds exceeding 5 acres, and any other special value habitats that can be identified.

We thank you for the opportunity to comment on the proposed sale units and look forward to working with you on this project. Please contact me at 267-2284, if you have any questions regarding our comments or recommendations.

cc: H. Griese, ADF&G
J. Westlund, ADF&G
S. Trickett, DEC
J. Brady, ADF&G
D. Wallingford, DOF

Feb. 5, 1991

Martin Maricle
Area Forester
Dept. of Natural Resources
Box 185
Glennallen, Alaska 99588

Dear Martin,

I have a few comments concerning the memorandum from Steve Albert about our recent Forest Practices Notification.

Paragraph four suggests Whitestone is not properly utilizing the wood. The fact is that Whitestone is taking more of the wood in this area than any other logging area known to me in Alaska. We have been taking tops down to a four inch diameter which is two inches smaller than State or Forest Service standards.

All of our logging methods to date have been to bring the trees full length to the road before limbing or bucking them. This results in much less debris left on the ground than the normal practice of limbing and bucking in the woods. This also provides the local population with an easily accessible source of firewood which is made available by Eyak when the logging is finished. These concentrated piles also make it possible for spot burning if the landowner should so desire. However the DEC may have some objection to slash burning. Also slash burning has never been the practice in Alaska coastal areas. Sherstone Inc. is the timber owner and has voluntarily left buffer zones along the Sheridan River and other water bodies and plans to continue this practice beyond any requirement of the State Forest Practices Act. An example is a wide buffer zone left around Cabin Lake and the nearby campground. Some 30 to 40 thousand board feet of commercial timber was left here purely to enhance public use and enjoyment.

The suggestion that Whitestone submit a debris/slash management plan appears to be another attempt by Fish and Game to expand into areas not specified by the new Forest Practices Act. There is nothing in the act to suggest such a requirement. The comment that debris piles left on the ground, not in streams or lakes, may have an effect on fish populations is ridiculous unless we are expecting a migration of the walking catfish from Florida.

The concern with bark beetle infestations is misplaced. The areas presently infected are standing timber and these beetles did not start from slash. There has been no logging

anywhere near the infestation at Glacier Bay. The huge beetle infestation on the Kenai started in windfalls.

The most effective and proven method of beetle control is aerial spraying with the appropriate pesticides. The next most effective would be a state policy of immediately logging new windthrow areas if they are accessible. Since this would be a beetle control effort, not a commercial enterprise, controlled slash burning could also be used.

The areas laid out in Whitestone's current F.P.A. notification and nearly all of the remaining timber to be logged by Whitestone have little risk of contributing to bark beetle proliferation for two reasons. One, the timber is 80% or more hemlock and two, it is growing on higher elevations and is a mixed stand. U.S.D.A. Alaska Region, Report No.181 "Insects and Diseases of Alaskan Forests" states "the susceptibility of standing spruce decreases in the following order: (1) Large diameter trees along creek bottoms, (2) better stands on benches, (3) poorer stands on ridges and benches, (4) mixtures of spruce and other species, and (5) stands of immature trees." If this study is accepted as fact, then the new requirement for buffer strips, which run heavily to large old growth spruce, along fish streams may be a contributor to spruce beetle proliferation.

Further comments concern recommendations 1 through 6.

1. How steep is too steep? Is this a subjective judgement or is there some guideline to follow? Vague recommendations such as this lead to confusion and debate and have little practical application. Most v-notches in Southeast and Southcentral Alaska occur on slopes too steep to sustain any fish populations. Experience in Southeast Alaska shows that timber left as buffers to v-notches will almost invariably blow down and choke any water course in the v-notch. A good logging practice is to log both ways away from the v-notch and avoid logging straight up or down it.
2. This recommendation is in direct conflict with Federal and State OSHA safety regulations. We are required to cut all snags in clearcut areas.
3. Most timber stands by their nature will grow in irregular patterns. However I question the reference to aesthetic values. This is definitely a subjective area and one man's art is another man's garbage. What study can be referenced to show that irregular shapes are preferable to the majority? The vast croplands of the American heartland are beautiful to my eye in their regularity and symmetry. Does Fish and Game suggest these fields be broken up and made irregular to become more aesthetic or is this idea only applicable to private timber stands in Alaska.

4. Observation will show this is already being done voluntarily.
5. This is another example of attempted rule making, after the fact, by the Fish and Game. As mentioned above, travel corridors are already being left but I question the validity of the comment that "(moose, black bears, et al) are reluctant to travel far from cover" especially as it applies to moose. I recently traveled by helicopter from Cordova to Icy Bay and counted more than fifty moose feeding and bedded down in the Copper River, Bering River, and other areas, miles from any cover higher than four foot willows. I have seen Brown bears crossing high ridges in the snow with no cover for miles. I have also seen bears fishing 200 yards from shore when the tide was out, along the Alaska Peninsula, west of Afognak Island. Any wild game will respond to hunting pressure by holding to cover but, when hunting pressure is removed, game will show no reluctance to live and feed in the open. An example is the large herds of Mule deer and Elk which can be observed near Delta, Colorado in late fall. Moose are commonly seen in residential areas of Anchorage in the winter.

What study supports the recommended 660 foot maximum clearcut width? Is this another shot in the dark by Fish and Game? Without support, this is another vague idea with little if any merit and suggests a Fish and Game bias against timber cutting which seeks to limit harvest by any means.

6. Habitat enhancement is not and should not be a primary goal of private, commercial timber owners.

I believe the recommendations by Mr. Albert have little merit and reveal little understanding of our operations. I know from personal observation over the last 24 years that many of the ideas advanced do not fit the facts. For the record I could not let Mr. Albert's recommendations go unchallenged.

Unreasonable efforts by any State or Federal agency to encroach on or limit the right or ability of private timber owners to develop their resource should be resisted by every means available.

Sincerely,

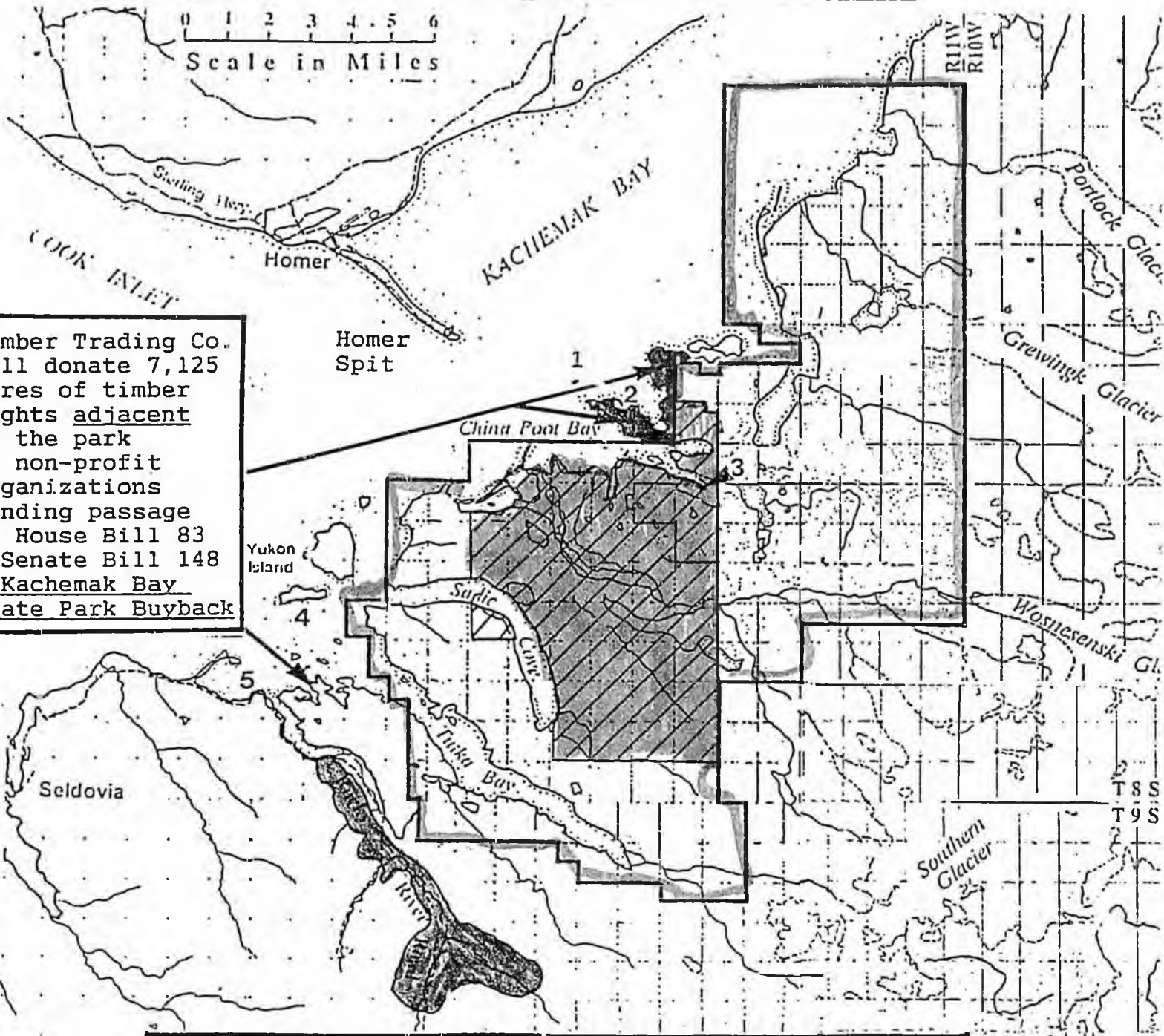


Edward Stewart




HOUSE BILL 83 AND SENATE BILL 148:

LAND AND TIMBER PURCHASE

INSIDE KACHEMAK BAY STATE PARK



Timber Trading Co. will donate 7,125 acres of timber rights adjacent to the park to non-profit organizations pending passage of House Bill 83 & Senate Bill 148 Kachemak Bay State Park Buyback

-  Kachemak Bay State Park
-  Seldovia Native Assoc. inholdings
-  Timber Trading Co. timber rights outside the Park

- 1-Gull Is. seabird rookery
- 2-Center for Ak. Coastal Studies facility
- 3-ADFG personal use dipnet fishery
- 4-sea otter habitat
- 5-Univ. Ak. Fairbanks marine station

Timber Trading Company

For Immediate Release
March 20, 1991

Timber Trading Company

AGREES TO GIFT 7,125 ACRES

OF TIMBER RIGHTS

In 1988, Timber Trading Company (TTC) was approached by The Kachemak Heritage Land Trust (KHLT) concerning timber rights held by TTC outside Kachemak Bay State Park boundaries that would remain unresolved by State Park Buyback legislation. In 1990, KHLT was joined by The Center for Alaskan Coastal Studies (CACs) in their efforts.

After two years of negotiations, TTC has agreed, through Conservation Agreements, to gift 7,125 acres of timber rights to KHLT and CACS pending passage of House Bill 83 and Senate Bill 148.

"We believe that open communication is an effective way to solve environmental issues," says John L. Sturgeon, President of Timber Trading Company. "Cooperative efforts, when attempting to solve difficult issues, offer the best possible ways to reach a solution all parties can agree with."

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Logging concessions hinge on park buyback

by Liz Ruskin
Staff Writer

If the Legislature agrees to pay \$20 million to buy back privately held land and timber in Kachemak Bay State Park, the timber owner will sweeten the deal by giving up its rights to timber on 7,000 acres outside the park boundary, according to an agreement signed recently by the logging company and two local conservation groups.

Under the agreement, Timber Trading Co. agreed to give timber it owns along Rocky River and Peterson and Jakolof bays to the Kachemak Heritage Land Trust, said land trust president Jan Schofield. Timber Trading has also agreed to give the timber on Island Peninsula to the Center for Alaskan Coastal Studies if the park buyback passes the Legislature, she said.

In another conservation agreement, the Seldovia Native Association agreed to sell the coastal studies center the land on Island Peninsula, where the center is located. A price has not been reached, Schofield said, and this agreement also hinges on legislative approval of the park buyback.

If the Legislature fails to pass the bill, though, Timber Trading will proceed with plans to log the area, said John Sturgeon, president of the logging company. Timber Trading is applying for the necessary permits, he said, and logging could begin as early as this summer.

The Native corporation and the Alaska Department of Natural Resources have been negotiating for more than a decade an agreement to restore to the park the 24,000 acres the association owns. The negotiations became more complicated in 1987, when Seldovia sold timber — some of it inside the park and some of it outside — to Timber Trading. The parties at the negotiating table eventually agreed on a price of \$15.5 million for the land and \$4.5 million for the timber. The Legislature balked at the price tag and the appropriation failed last

Some of the most visible of Timber Trading's holdings on the south side of Kachemak Bay, however, are outside of the park boundaries, so a buyback bill alone would not have saved them.

Island Peninsula in particular has been a sensitive spot. Home of the Kachemak Bay Wilderness Lodge as well as the coastal studies center, it lies directly across the bay from the Homer Spit.

The land trust formed two years ago to try to prevent logging in the valuable ecological areas that lie outside the park, Schofield said.

Whether the new incentive will have much effect on the legislature is uncertain.

"The people on the House side that I spoke to were fairly supportive of the idea but had concerns about where the money might come from," said Mary Pearsall of the Kachemak Bay Citizens Coalition, who recently returned from a lobbying mission to Juneau. Legislators are particularly wary of spending General Fund money on the plan, she said.

A proposal by Rep. Mike Navarre, D-Kenai, to use money left over from the Bradley Lake Dam construction is still a possibility, she said, though some railbelt legislators say that money should be reserved for energy projects.

A postcard campaign sponsored by the coalition, the land trust and coastal studies center has at least made legislators aware of the issue, Pearsall said.

Last month, the groups sent 4,000 packets of information, pre-printed postcards and donation slips to people around the state and around the country. So far, Schofield said, the mailing has brought in \$4,500 to the Save-the-Park fund.

"We're getting a 5 percent return," she said. A 1.5 percent return is considered good for direct mail fundraisers, she said.

Though Gov. Walter Hickel has not included the \$20 million park bill in his proposed budget, he recently announced his support of the buyback.

GRASSROOTS MOVEMENT RALLIES SUPPORT FOR STATE PARK BUYBACK

The Kachemak Bay Park Buyback has mobilized citizens both state and nationwide. Grassroots activities of the past two years include:

- *weekly Coalition meetings on the State Park buyback

- *KBCC and KHLT participation in Department of Natural Resources negotiations with SNA and TTC

- *conservation agreement meetings between SNA, TTC, KHLT, CACS, KBCC, and the Nature Conservancy regarding protection of park adjacent lands

- *meeting with TTC Board of Directors regarding transfer of timber rights outside State Park Boundaries to KHLT

- *fundraising- Over \$55,000 has been raised by concerned citizens (since fall 1988) in support of the Kachemak Bay State Park Buyback:

 - KBCC has raised over \$30,000 -- funding mailings and petition drives, as well as lobbyist Mary Pearsall.

 - KHLT received \$4000 in grants for the State Park education campaign.

The Save-the Park campaign (sponsored by KBCC, CACS, and KHLT) features direct mail of educational packets, and promotion of a Save-the-Park fund for sponsoring ads and continued mailings. In the past month, over \$4500 has been raised from state, national, and international donations.

Additional donations to the project include pledges of permanent fund checks and gifts, totalling over \$17,000.

- *press coverage includes statewide newspapers, television, Alaska Geographic, and Wall Street Journal

- *networking with Kachemak Bay State Park Advisory Board and statewide organizations

- *resolutions by local government and statewide associations

- *petition drives supporting the State Park Buyback, garnering over 2000 signature state and nationwide

KBCC: Kachemak Bay Citizens Coalition KHLT: Kachemak Heritage Land Trust
CACS: Center For Alaskan Coastal Studies SNA: Seldovia Native Association
TTC: Timber Trading Co. subsidiary of Weyerhaeuser Forest Products

Land trust may solve trade woes

by Joel Gay
Managing Editor

The complicated three-way Kachemak Bay State Park land trade has just gotten an additional player, but one that may add a measure of stability to the negotiations.

A group of local residents is forming a Kachemak Bay land trust that would, with the help of national organizations and local donors, purchase land or timber rights or make long-term leases outside the park's boundaries.

Janice Schofield, who stumbled onto the See "Land," Back Page

... Land trust idea seen as trade aid

Cont. from Page 1

land trust idea through her work with the Kachemak Bay Citizens Coalition, said she will meet next week with the three main trading partners and hopes to make them an offer they can't refuse.

The land trade was complicated enough when it included just the state and Seldovia Native Association. The state has agreed to give Seldovia state assets worth no more and no less than the association's 23,000 acres within Kachemak Bay State Park. The state thinks it's possible, and last Friday Seldovia's board of directors approved continued negotiations.

The deal starts getting tangled when Koncor Forest Products comes in. They have purchased the right to cut 125 million board-feet of lumber out of Seldovia's holdings in China Poot Bay and other nearby lands.

So not only does the state have to trade Seldovia for the raw land, it must trade Koncor for the timber rights.

What makes the trade difficult, according to all sides, is that not all of Koncor's timber is within the park boundaries. The state does not want to trade for trees outside the park, while Koncor has said their timber holdings are worth less if the good trees in China Poot Bay are removed from their original purchase package.

Seldovia's board last Friday said their number one concern is that the state and

Koncor work out their differences.

Enter Ms. Schofield and the land trust. If a private, non-profit group could purchase those timber holdings outside the park, it would free everyone up for the important work — trading the park lands.

"Koncor sees it as a wonderful possibility," Ms. Schofield said. "They're excited about participating in it."

She said the land trust's articles of incorporation are already being drafted, and she has talked to several national organizations about ways to fund such a deal.

Although she would not divulge details, Ms. Schofield said a key element is the idea of "bridge funding" — in which a national organization might loan the local trust enough money to purchase the timber rights and expect to be paid off within a few years.

The larger organizations might also help the Kachemak Bay group find grants and fund-raisers, she said.

Selling its lands to a non-profit such as the land trust could also give Seldovia and Koncor excellent tax benefits, she said.

However, the Seldovia trade would not be the land trust's sole function, Ms. Schofield said. "This is only the first of any number of projects," she said. It could acquire greenbelt areas around Homer and address other land issues that have high environmental value but no agency or entity to

The land trust is "the brightest ray of sunshine I've seen in this whole trade deal."

Fred Elvsaa

protect them.

Charlie Nash, general manager of Koncor's Timber Trading Co., said he is optimistic about the formation of a land trust and its participation in the trade process.

"We think it's a good idea. We don't know much about it, but to the extent it might provide another vehicle to compensate us for our timber and move the trade along, we think it's worthwhile exercise at this point. We'll help them all we can."

Mr. Elvsaa called the idea "the brightest ray of sunshine I've seen in this whole trade deal."

There are numerous details yet to be worked out, he said, and so he will withhold his full approval until then. But the basic idea is good, he said.

"The concept sounds real good to me. I think it may alleviate some of the problems the state has with trading for land outside the park."



Center for Alaskan Coastal Studies

P.O. Box 2225 Homer, Alaska 99603 907/235-6667

The goal of the Center for Alaskan Coastal Studies, a non-profit organization, is to increase knowledge and understanding of the coastal and marine environments of Alaska by providing educational programs and encouraging research. Supported by approximately 500 paid memberships and numerous volunteers, the Center now delivers educational programs to approximately 1600 students and visitors every year.

The nucleus of the Center's programs is a marine field station on what is called locally the "Island Peninsula," a point of land between Peterson Bay and China Poot Bay, on the south side of Kachemak Bay. Covering this peninsula is a sub-arctic rain forest which is nearly surrounded by rich intertidal areas.

Approximately one half of those served by the Center's programs are children, grades one through twelve, locally and from as far as 500 miles away. In the spring and fall, school groups visit the field station accompanied by trained volunteer naturalists. During the summer months, visitors from all over Alaska, the rest of the United States and other countries visit the Center under the guidance of volunteer naturalist/guide teams.

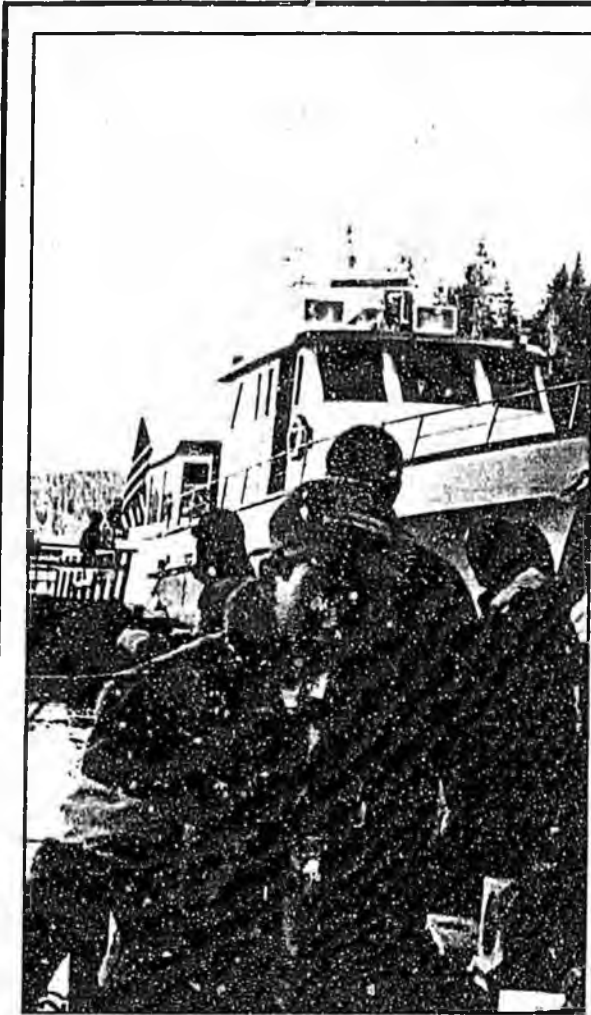
The forest of the Island Peninsula, explored by hundreds of Alaskan school children every year, along with inholdings within Kachemak Bay State Park, is slated for clear-cutting if the Park buy-back (House Bill 83) does not pass. Within site and sound of the richest intertidal study pools will be a log transfer station.

However, if House Bill 83 succeeds, the timber owner (Timber Trading Company) has agreed to give the timber on the Island Peninsula to the Center, and the owner of the land (Seldovia Native Association) has agreed to sell it to the Center. Thus, in addition to restoring the private inholdings in Kachemak Bay State Park to the public in perpetuity, passage of House Bill 83 will enable the Center for Alaskan Coastal Studies to continue to provide its award-winning educational programs to the children of Alaska and other students of nature, while protecting the unique and beautiful Island Peninsula for the study and enjoyment of future generations.

CENTER FOR ALASKAN COASTAL STUDIES

WINTER 1991

Vol. IX No. 1



Visitors to the Center check out the new 'Rainbow Connection' which is now under contract for the 1991 season.

Photo by R. W. Tyler

Board Signs Land Purchase Agreement with SNA

A major item of Center news, one which has caused the later-than-hoped release of this newsletter, concerns the on-going efforts to stave off the timber harvest across the bay from Homer through purchase by the state of 24,000 acres originally part of Kachemak Bay State Park. Efforts are now underway involving the Kache-

See Land Agreement, page 2

Coastline Poem

*Driftwood, stirred together
lengthens and transforms,
to become a twisting, curling ribbon,
running far down the horizon
where foamy crests
roll and swell upon the shore,
adorning the sea like a necklace
of gleaming pearls.*

*Rocks,
little round elephants
of every size,
peaceful, gray Buddhas,
meditating, half-buried
in the warm sand
and the beach-birth.*

*Something urges,
tugs at my feet,
tugs at my mind,
compelling them both
to wander where ever they may choose,
through the tide-lines,
along the beach's rocky spine,
near to the forgetful waves
that sweep away my footprints,
cleansing, nature's own baptism.*

*The sand is accepting, yielding,
and amused at my pausings,
to contemplate the beauty
of a lone sea shell,
glossy and warm as lantern-light
and astray from
its ever changing pastures.*



By Morgan McBride, Age 15
Born and raised on Kachemak Bay, Alaska

Our office Has Moved!

We are in the upstairs corner of the Bay Realty Building at 331 East Pioneer Avenue in the middle of Homer. Our phone number and postal box remain the same.

Land Purchase Agreement with SNA . . .

Continued from Page 1

mak Bay Citizen's Coalition, Kachemak Heritage Land Trust, and ourselves.

For our part, the Center board of directors under the capable and untiring leadership of president Steve Yoshida, has gone through long and involved negotiations with the Seldovia Native Association to gain legal right to purchase the remaining SNA land holdings on the so-called Island Peninsula, location of the Center building.

This area of some 275 acres already contains the bulk of our educational trail system, a nearly pristine segment of one of this continent's most northerly coastal rain forests. It was never included in the Park because of its many private cabins sites, mostly on the Peterson Bay shore. After months of special meetings, personal contacts, fax to fax encounters, offers and counter offers, the Board of Directors and the head of the SNA, Fred Elvaas, have finally signed an agreement satisfactory to both parties. Now CACS has a contract to purchase the Island Peninsula!

This is a major commitment for our small organization and will mean several years of major grant writing and fund raising. It is, however, first and foremost contingent upon a favorable settlement of the park lands issue by the state. Therefore, CACS is more than ever committed to a strong lobbying effort and publicity campaign to bring about the Park restoration through the appropriation of \$20 million by the 1991 legislature. We feel strongly the need to protect the shores of Kachemak Bay as they are a legacy that we of this generation must leave to our descendants. We will be soliciting your help!

WHAT'S HAPPENING

March 13 - April 17, 1991

SPRING INTENSIVE VOLUNTEER TRAINING

April 12 - 14, 1991

FIRST WEEKEND TRAINING SESSION

at Center in Peterson Bay

April 27, 1991

COASTWALK KICKOFF DINNER

April 27 - May 5, 1991

COASTWALK

May 24 - 27, 1991

SECOND WEEKEND TRAINING SESSION

at Center in Peterson Bay



Photo by Mike McBride

Last fall Daisy Lee Bitter was filmed for an episode of "Jay Hammond's Alaska". At her insistence, the bulk of the segment was filmed over and around the beaches at the Center.

"Eight Stars of Gold" for Daisy

In November we learned that Daisy Lee Bitter had again been honored when it was announced that she had been chosen to receive Governor Cowper's "Eight Stars of Gold" award. The award was created to single out eight exemplary Alaskans who have contributed to the state in non-political ways.

Being very familiar with her many faceted work for the Center, we were hardly surprised by the choice except that among the primary attributes ascribed to the selectees were "improvement of health, safety, resource stewardship or the economy, or help (to) foster a better understanding of Alaska and Alaskans."

'Health and safety'? Daisy Lee is a regular volunteer at the long term care unit at South Peninsula Hospital and has given talks and counseling on diabetes, as she is an insulin-dependent diabetic herself.

'The economy'? Daisy and Connie for years have been regular feeders of the soon-to-be-released fingerlings out at Homer's popular Fighting Lagoon on the spit.

'Understanding'? She has been an officer in Pioneers of Alaska, judged science fairs, made presentations to museums, and received the state award in Human Rights for her efforts to help native peoples.

Daisy is doing it all- and we love her for it and applaud this latest recognition of her unique contributions! Thank you Daisy Lee.

FALL 1990 CALENDAR

September 7, 1990

Garage sale, nets over \$750 in spite of torrential rain

September 15, 1990

Annual Volunteer Potluck at Barb Hill's

September 20, 1990

Elderhostel group visits center in rain

September 22, 1990

Fund-raising adventure trip to the Barren Islands. Made it to Dog Fish Bay from which the Barrens were visible through the clouds and squalls. We enjoyed the sheltered waters of Sadie Cove on the return trip. \$830 was raised

October 1 - 14, 1990

Archaeological sites survey, including Island Peninsula, by Janet Klein and Karen Workman

October 6, 1990

Formal Dinner and Fashion Show fundraiser brought in another \$700. Many thanks Donna and Kevin at Fresh Sourdough Express Bakery and to all the volunteers who served, modeled, or organized this professionally produced show, including Corrine Jones who was the narrator. It was extraordinary.



Photo by David Flower

Joste Bills and Barbara Hill d'ish up tasty gumbo at October's 'Taste of Homer'. Patrons were able to buy one of our mug ; and get it filled for free, such a deal!

October 18 - 20, 1990

One of the last school groups to the Center; marine biology students from Dimond High

October 20, 1990

CACS again has a booth at 'Taste of Homer'

October 21, 1990

Annual membership meetings and volunteer appreciation potluck with Craig Matkin speaking on the killer whales of Prince William Sound. Volunteer of the year was Marie Doyle, with honorable mention to Joe Lawlor and Mike Klemann. Congratulations!

November

Second annual Night on the Tide Pools, a well timed minus tide draws a large crowd of interested Homer families out onto the dark sands

November 3, 1990

Work party and wood cutting sortie closes up the Center for the winter and stores our platform over on the gravel flats

November 17, 1990

Christmas Bazaar booth kicks off sale of raffle tickets for Alaska Airlines round trip tickets for two to Seattle. Drawing will be February 8th at the CACS Monte Carlo Night which will kick-off the 1991 Winter Carnival



Volunteers at the potluck at Barb Hill's enjoy the September sun. Left to right: Chaz Ingham, Kathy Herrnsteen, Bill Kitzmiller, Christa Collier, Joste Bills, Delores Butler, and John Ireland.

Archaeological Survey

By Janet R. Klein

The Center for Alaskan Coastal Studies housed participants in an Archaeological Sites survey for two weeks in October. Sponsored by the Pratt Museum of Homer, the survey was conducted by Janet Klein, Curator of Collections, and Karen Workman, Anchorage archaeologist. The facility provided not only comfortable housing but the opportunity to spend two full weeks devoted solely to field research. Researchers systematically surveyed much of Peterson and China Poot Bays.

Much remains unknown about human use and settlement in Kachemak Bay. Setting the Bay apart from the rest of Alaska is the fact that more recent periods are less well known archaeologically. The last 1500 or 1000 years are very poorly represented in the present archaeological record. Also, earlier occupation of the bay was just documented in 1989 and may extend the occupation back five or six thousand years.

The settlement of Kachemak Bay has occurred and continues to occur, primarily along the coast. In light of increasing recreational use of these lands, increased cabin construction, proposed clearcut logging, concern about future oil spills, and natural erosion and land subsidence, the survey was timely. All signs of human settlement and use were documented, whether prehistoric or historic. Much of the time, neither a cultural affinity nor an age could be assigned to a feature.

Because the sites were on private property, permission to survey was obtained in advance of the field work. A listing of some of the features identified and documented includes:

house pits	rock shelters
midden outcrops	tree throws
historic cabins	fox farms
CMTs (culturally modified trees)	

Several visiting school groups from Anchorage were able to meet with Janet and Karen and discuss the diverse resources of the area and their use by prehistoric and historic cultures.

Give Something Back to the Bay

by Steve K. Yoshida
President

Kachemak Bay is a source of constant wonder. The waters team with life. The beauty of the mountains, oceans and wildlife inspires and refreshes my soul. It is more than just enjoying the scenery or tasting the riches from the sea. There is a spiritual or mystical side to my feelings about the Bay.

Professor Joseph Cambell has written about how early cultures expressed this type of feeling. Many engaged in rituals before killing or eating an animal. These rituals elevated an otherwise mundane event into a spiritual one. The ritual was communication with the "almighty one" or the spiritual force that supplied the animal for human needs. The ritual expressed gratitude for the hunter's good fortune and hope that the spiritual force would continue to bless.

I feel the same need to express my gratitude for the joy that I get from the Bay. Nothing in our present day culture will give me the satisfaction that the rituals gave the early peoples. But there is something that gives me a great deal of satisfaction: I contribute my time and money to the Center for Alaskan Coastal Studies. Doing so is my way of giving something back to the Bay that gives me such joy.

The Center is dedicated to educating the public about the wildlife and natural history of the Bay. To the extent that my efforts contribute to the understanding and respect of the Bay, I satisfy my spiritual need to thank the provider of my good fortune. This same feeling must be the motivation behind the countless volunteers and the tireless dedication of the Center staff. Give to the Center, give something back to the Bay.

A REMINDER . . .

When you make your travel reservations, please patronize Homer Travel or Sanctuary Travel in Anchorage. A portion of the proceeds from your ticket sale will be donated to the Center if you request it. Be sure to let them know. Thanks!

Homer Travel 235-7751 Sanctuary Travel 561-1212 or 1-800-247-3149

Center Receives Land for Nature Center

By Daisy Lee Blitter

(Part one of a two part series)

The dream of an educational center on the Homer side of Kachemak Bay is going to be realized. This fall the Wynn Foundation donated the Northwynn property on Skyline Drive to the Center for Alaskan Coastal Studies. This educational facility will be called the Carl E. Wynn Nature Center and will be managed as closely to Carl Wynn's wishes as possible. We appreciate the generosity of the Wynn Foundation and their confidence in us.

The significance and importance of the Nature Center is multifold;

1) The rich diversity of natural habitats can support an outstanding educational, research, and interpretive program. The



'Doc' Frennier, Roberta Highland, and Steve Yoshida at the edge of a stand of Lutz spruce.



Photos by Daisy Lee Blitter

Carl Wynn, Virginia and Burt Hume, and Conrad Blitter relax at the 'Peep Hole' with its scenic view above Bear Canyon. Note the deeply incised big game trail in the foreground.

Center for Alaskan Coastal Studies has already established a record for excellence in its programs.

2) Research opportunities to investigate and document the sub-Alpine Lutz Spruce forest and meadows with in it.

3) Perpetual tribute to Carl Wynn who loved the natural world and all the creatures in it. His dream will not die. It will be carried into future generations by the thousands of children and adults who will experience this inspiring area and develop awareness, knowledge, and an appreciation of the natural world and, thus, become careful stewards of the land in the process.

In part two in the next newsletter, we will print the bulk of this discussion by Daisy Lee on the Carl Wynn Foundation's land donation in which she talks about her good friend Carl and his ideas for a nature center. She will describe the character of the land as shown in pictures taken in late September when the board was being shown some of the unique characteristics of the property.

"For centuries the meeting of land and sea has cured us, restoring our spirits and inducing peace of mind."

Anonymous

BOARD OF DIRECTORS

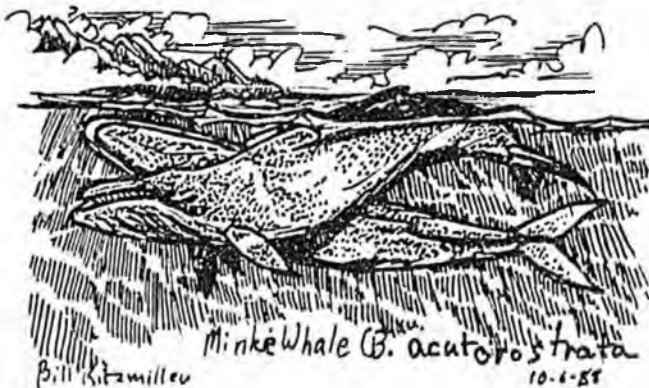
Steve Yoshida President
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 Dr. Boyd Walker Treasurer
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 Daisy Lee Bitter
 Jack Lentfer
 Molly Brann
 Will Files

STAFF

Christa Collier Executive Director
 Susan Alexander Administrative Assistant
 Lisa Ellington Bookkeeper

Will Files is New Member of Board

At the annual meeting in late October, 1990 our membership voted for incumbent board members Molly Brann and Mike McBride. Will Files, a local businessman, will replace Roberta Highland. Roberta will remain active as a volunteer and most of us see her regularly as a member of the Kachemak Citizens Coalition and also on the Boards of KHLT and the Homer Conservation Society, so it is thank you, but not good bye to Roberta! It should also be noted that Dr. Glenn Olds, one of our eminent Board of Advisors has recently been appointed by Governor Hickel to be Commissioner of Commerce and Economic Development.



CENTER FOR ALASKAN COASTAL STUDIES

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Dimond High (Anchorage) marine biology students on the beach at low tide. This active group visited the Center in October, 1990.

ALASKA MARITIME NATIONAL WILDLIFE REFUGE VISITOR CENTER

Objectives

The purpose of the center would be to increase visitor and student awareness, understanding, and enjoyment of the refuge's resources. The Alaska Maritime Refuge is scattered over the widest geographic area of any refuge in the country. It is difficult for the public to use this refuge. Yet the refuge has resources which the public would find fascinating including spectacular concentrations of marine birds and mammals, unusual species unique to the Alaska coastline, and the most dramatic volcano chain in the country. The refuge also has an important story to tell about the interrelationship of marine wildlife and the marine environment and increasing threats to both. The center would allow us to provide an experience for those visitors and students who could not visit the refuge and information and encouragement to those who could.

Audience

Visitors - In addition to its striking natural beauty, Homer has an advantage as a visitor destination in that it is accessible by road, sea, or air. The Alaska Division of Tourism estimated that in 1985, 76,000 non-Alaskans visited Homer. With an expected growth rate for tourism of four to five percent per year, this figure would increase to about 120,000 by 1995, the earliest possible time the center could open, and to 200,000 by 2005, 10 years after opening.

According to the Alaska Division of Tourism's 1985 study, non-Alaskan visitors are better educated, wealthier, and older than the population at large. Over half have college degrees. This type of audience is particularly amenable to educational programs and environmental messages. They are also highly motivated to see wildlife. Wildlife watching followed by bird watching had the highest rates of participation of the outdoor activities investigated in the 1985 study.

Some non-Alaskans visiting Homer would be repeat visitors, but not many. Almost all visitors stay at least one night. Most visitation would occur from April through October with the majority of visitors coming in June, July, and August. Very few non-Alaskans visit Homer from November to March.

Homer is also a very popular destination for Alaskan residents. Many Anchorage people commonly make several trips a summer to Homer. These numbers are harder to come by although some work was done on Alaskan visitors for the Kenai Borough by the McDowell group. Local industry leaders feel half or two-thirds of all visitors are Alaskans. Addition of the Alaskans would put total visitation to Homer at about 150,000 to 225,000 in 1985, 210,000 to 300,000 when the center opens in 1995, and 300,000 to 400,000 after 10 years of operation. These figures are based on a slow

growth rate for Alaskan visitors of one percent per year. Most Alaskan visitors would be repeat visitors to Homer and most would also stay overnight. Their season of use would be the same as for non-Alaskan visitors.

Local residents - The Kachemak Bay area, including Anchor Point, had about 11,000 permanent residents in 1989 (Bechtol, pers. comm. 1990). The area is growing by about four percent per year and is expected to reach about 18,000 by the year 2000. Half the population of Homer has lived there less than five years. Homer residents have a much higher than usual interest in natural history and conservation issues. There are at least five local conservation/natural history citizen organizations in Homer. Marine issues are particularly important to Homer people because so many of them fish commercially or work in fishing related jobs. Homer area residents would undoubtedly be enthusiastic consumers of visitor center services, particularly if special programs such as film series, family activities, or slide talks were offered on weekends or in the evening. Local use would probably be highest in the winter when people have more time.

Educational groups - Kachemak Bay area schools enrolled 1,974 students in 1989 with a growth rate of close to five percent. Other peninsula schools enrolled an additional 6,712 students. However, Homer is serving as a marine science education center for schools from throughout the state because of the activities of the Pratt Museum and the Alaska Center for Coastal Studies. About 2,700 school children from 30 different schools visited the Pratt last year. Since most visits by out of town schools involve overnight stays, groups have the time and inclination to add additional experiences to their trips. In addition to regular school groups, environmentally oriented camps also visit Homer for their marine field trips. Trailside Discovery Camp and Stewardship Earth brought numerous groups to Homer in 1989. Elderhostel, an educational program for senior citizens which attracts participants from throughout the country, has expanded from one 40 student group in 1987 to three in 1990. Kachemak Bay Branch of the Kenai Peninsula College had an enrollment of 185 full time equivalent students in 1988.

As the refuge has become known, requests from these groups for refuge programs or tours of our limited facility have escalated. The addition of a new facility with its own emphasis would create an even greater draw than currently exists with the Pratt and the Alaska Center for Coastal Studies. The number of students coming to Homer and visiting the refuge center would undoubtedly increase beyond the present situation particularly if the refuge center could offer new types of facilities such as live bird observation labs and a marine discovery lab. The number of students expected to use the refuge center is estimated at about 4,000 per year. Most use would occur in April, May, September, and October with some use occurring throughout the year.

Visitor Center use projections - With the exception of Begich Boggs Visitor Center, all other Kenai Peninsula natural history centers receive about 25,000 to 30,000 visitors per year. Begich Boggs receives about 300,000 because it is within an hour's drive of Anchorage. Kenai Fjords National Park Visitor Center is restricted by its small size and inability to handle groups. Kenai Refuge is plagued by a particularly bad access problem which makes it hard to find. It also has too small an auditorium to handle groups. The Pratt Museum is large enough, but is out of the way and not well signed, relying primarily on word of mouth advertising. Visitors also tend to believe they must have more time and pay a fee to attend museums. The Alaska Maritime Refuge visitor center would attract more visitors than the existing facilities if it were designed to overcome some of their shortcomings. It should be large enough to provide a substantial experience and large enough to handle busloads of 60 to 70 people. It should be located on the main tourist thoroughfare. If these conditions were met, attendance in 1995 could be expected to be about 50,000 which would increase to 100,000 after 10 years of operation.

Conclusion - Upon completion in 1995, visitor center use would be expected to be about 50,000 of which 4,000 would be from organized educational groups. Visitor center use would increase over a 10 year period to the 100,000 range. At least a third of the use would be from repeat visitors. Average peak useage in July would be about 600 per day, but could increase to 1,000 per day within 10 years of opening. The summer season would be the busiest and the dominant users would be visitors. Spring and fall would be the most important time of year for educational groups with several groups in the center every day. Local people and local schools would be the dominant users in the winter.

Relationship to other facilities

All other facilities on the Kenai Peninsula and selected facilities throughout the state were investigated to determine how this center would relate to their programs. The only other centers providing marine interpretation are the Pratt Museum in Homer, the Alaska Center for Coastal Studies in Homer, and the Institute of Marine Science in Seward. These three facilities have been visited. Representatives of the boards of the Pratt Museum and the Alaska Center for Coastal Studies also participated on the refuge visitor center working group and feel the proposed visitor center would complement their programs.

The Marine Science Center in Seward is part of the University of Alaska at Fairbanks and is primarily devoted to research and graduate studies. They have a small, poorly funded visitor center which only recieves about 1,500 visitors a year. They hope to expand including a large aquarium, funding permitting. The focus of their exhibits including the proposed aquarium is fish of the open ocean. They have no intention of developing marine bird exhibits and are unlikely to develop marine mammal

exhibits. They offer tours of their labs to school groups but are not interested in other types of environmental education activities.

The Pratt Museum is an impressive multi-faceted regional museum featuring art exhibits, cultural history exhibits, and natural history exhibits including terrestrial and marine wildlife. The museum has two small aquarium and numerous marine bird mounted specimens accompanied by some interpretive information. The museum hopes to develop a large aquarium which would be devoted to fish and possibly tide pool animals. The museum has no plans to expand their treatment of marine birds. About 27,000 people including 2,700 students visit the Pratt each year.

The Alaska Center for Coastal Studies has a small environmental education center located near an area of outstanding tide pool habitat across Kachemak Bay from Homer. Their education activities include hosting school groups for overnight visits and providing day long naturalist led hikes for tourists. These activities take place across the bay, and are limited by the availability of boats, school policies regarding boat travel, and the time commitment required. This group has no plans to expand their naturalist activities to this side of the bay. About 600 students and 1,000 tourists participate in their activities.

Conclusion:

No other facility is doing the job the refuge center intends to do. The proposed Alaska Maritime Refuge Visitor Center would complement the existing facilities particularly the Pratt Museum and the Alaska Center for Coastal Studies. Representatives of both organizations sat on the working group for the proposed center and expressed their support for it. The three facilities are each distinctly different but taken as a whole would provide the visitor or student with a broad array of learning experiences. The refuge would concentrate on refuge resources, principally marine birds and those marine mammals we manage. The other facilities would continue to concentrate on all the other elements of the region's natural and cultural history. No overlap is anticipated with the Seward facility since they will be devoted to fish.

Public Response

Interest in a refuge visitor center has been evident for some time. Prior to receiving planning funds, the City of Homer passed a resolution asking Senator Stevens to support funding for a refuge visitor center and aquarium. Since receiving the funds, the City Council and the Kenai Peninsula Economic Development Council requested presentations by the Service on the center planning.

The refuge created a visitor center working group to tap the interest expressed in the center. The City Council, Homer public

schools, the Pratt Museum, the Alaska Center for Coastal Studies, the Homer Business Association, the Chamber of Commerce, the charter industry, and the marine extension office were represented on the working group. The group felt the visitor center would be very well received as a project which would economically add to the town without having any negative effects. The group felt most Homer people were interested in seeing the town continue to develop as a marine education center and tourist area. They felt the proposed center would fit well into that vision. They were supportive of the size and complexity of the center proposed in this document. They were particularly interested in large aquariums for all types of marine life not just seabirds. At the last meeting of the working group all members bought off on the refuge's vision of the center and agreed that it would contribute to their own programs or businesses.

Conclusion - Interest and support for a complex refuge visitor center is very high in the Homer community.

Interpretive Themes

Interpretive themes and messages will center on the refuge's resources particularly seabirds. The Alaska Maritime Refuge is not a duck refuge among duck refuges but the seabird refuge for the United States. The story must be told here. The goal of the seabird interpretation will be to create an interest in seabirds, an understanding of their dependence on the marine ecosystem, and an understanding of what must be done to insure a continuing resource of seabirds. Possible storylines could include seabird habitats, seabird prey species, seabird colonies, the sheer numbers of seabirds, how to photograph, watch and enjoy them, and threats to their existence.

Marine mammals particularly otters, would be another theme area. Possible story lines could include behavior, habitats, extinction issues (otters at the turn of the century, sea lions now), marine mammal protection act, subsistence uses, threats, relationship to the marine environment, and how to see, photograph and enjoy them.

The refuge itself, its size, geology, geography, and habitats would be another theme area. How to visit the refuge, and the work of the refuge are other important topics. Field work on the Alaska Maritime Refuge is particularly exotic and has a history of significant and sometimes flamboyant biologists such as Sea Otter Jones and Olaus Murie.

The cultural history of the refuge particularly as it relates to wildlife is another potential theme area. Storylines could include Aleut use of marine wildlife, Russian fur traders, fox farmers, World War II, and present day human uses including commercial fishing, the military, and tourism.

Facilities

Facilities recommended for the proposed center are those which would accomplish the objectives of the center and successfully convey the themes discussed above.

Focal exhibit - The live seabird exhibit - The centerpiece of the visitor center from which all other exhibits would flow would be a large tank and adjacent cliff for several species of alcids, the family of seabirds that fly underwater with their wings. The most likely species for exhibit would be horned and tufted puffins, pigeon guillemots, and several species of auklets. The principle purpose of this exhibit is to create interest in seabirds and seabird issues by involving the viewer with real birds. Live animals carry the highest level of intrinsic interest of all exhibitry, because they are dynamic and stimulate active involvement on the part of the viewer (Veerhoken, 1990). Seabirds are a poorly understood resource and do not attract the intrinsic sympathy of larger, fuzzier animals. It is the job of the visitor center to grab the attention of the visitor and stimulate interest in the birds and a desire to learn and see more. A live exhibit would do that better than any other type.

Allowing the visitor to view species and behaviors not commonly visible would be an additional benefit of the exhibit. None of the alcids can be viewed from shore in any accessible areas of mainland Alaska. Not all people are willing to venture on the water or spend the money to do so, and weather is often uncooperative. Horned puffins, the most sought after species, are rarely seen from tourboats in Kachemak Bay. Other species, such as whiskered auklets, are unique to Alaska and can only be seen in remote areas of the Aleutians. Underwater "flying" in pursuit of food is one of the most unique seabird behaviors and is key to understanding their relationship to prey species. Outside of captivity, this behavior cannot be observed except by a few lucky scuba divers.

Curriculum and interpretive signing would be developed to make the most of the learning opportunities presented by the birds presence. Species identification, feeding behavior and requirements, breeding versus winter plumage, and adaptations of diving birds would all be good topics. The birds would be particularly useful in working with young children with limited attention spans.

The birds would attract repeat visitors. Since nearly two-thirds of all visitors are Alaskans, the potential audience of repeat visitors is high. Once lured into returning by the birds, repeat visitors could be exposed to new, temporary exhibits and special programs which would add to their initial visitor center experience.

Public reaction to the display is expected to be very positive. The visitor center working committee unanimously supported the concept. The Homer City Council had passed a resolution supporting development of a refuge visitor center and aquarium before planning even got underway. The owner of the largest charter boat business in town feels the display would not compete with his business, but would instead increase interest in seeing "the real thing". Confining wild birds does not seem to carry negative connotations outside the Fish and Wildlife Service. To prevent development of such a reaction, the tank and cliff should be of a sufficient size to allow "natural" activities for the birds. Interest in the birds would undoubtedly be high enough to create a pool of volunteers to take care of feeding and light cleaning chores.

Conclusion - A dramatic live seabird display would create interest and sympathy for seabirds thereby setting the stage for the interpretive messages of the other exhibits. Public reaction would be positive and visitor center use would be greater.

Permanent exhibits - About 3,000 square feet of space would be devoted to permanent exhibits on the themes discussed above. The space must be large enough to handle the flow of visitors and provide for a substantial experience. The exhibits should be a mix of interactive and passive activities and should make every effort to relate the information to the visitors personal experience.

Temporary exhibits - At least 500 square feet should be devoted to changeable exhibits. These could be on topics of the moment such as the Exxon Valdez oil spill, new listing for endangered species, or Sea Week or Earth Day. Lesser themes may also be handled by temporary exhibits which could be rotated out on a periodic basis.

Nocturnal room - Nocturnal nesting seabird colonies are a spectacular resource that few have an opportunity to experience. A room large enough to accommodate about 10 could be darkened and the viewer surrounded by the sounds of a colony at night. Interpretive messages on the sound tape could describe the species perhaps with the aid of highlighted specimens.

Video exhibits - Two types of video viewing areas would be useful. One type would allow for viewing of very short tapes (less than five minutes) selected from a menu of topics. For instance choices could be between tapes on the different areas of the refuge or different categories of animals in the marine environment, birds, fish, mammals, etc. Another type of viewing area could allow self-selected screening of longer tapes from a library of tapes. This space might accommodate about 10 people.

Auditorium and refuge film - A top quality movie about the refuge would be the principal mechanism by which most viewers

would "experience" the refuge. Dramatic film footage could convey the feel of these remote island habitats and the seabird cities they support. A film would also probably be the best way to portray field work. A nominal fee could be charged and handled by the Alaska Natural History Association. The auditorium would need to be large enough, 150 seats, to accomodate two buses without excluding family visitors. The auditorium would also be useful for slide talks, lectures, and meetings of large groups.

Discovery lab/environmental education classroom - This facility would allow organized educational groups to do hands on activities above and beyond what could occur in the exhibits. For instance a series of simple experiments could be developed with oil, salt water, and seabird feathers. The classroom would have a source of saltwater run off the seabird system which would allow for temporary holding of marine organisms for study. Curriculum and materials would be available to allow teachers to lead their own classes.

Outside environmental area - An outside area would allow a naturalist to work with a class or an impromptu group in an outdoors setting. A large stepped down deck creating an amphitheater would be ideal for this purpose. Some level open ground nearby would also be useful for leading classes in environmental games. If the visitor center had a view of bird concentration areas such as Beluga Slough, spotting scopes should be installed. The visitor center should have easy walking access to the shore so that naturalist led bird or beach walks could originate at the center.

Information areas - Outside kiosks near the entrance would display panels created by other organizations, such as the Pratt Museum, the Chamber of Commerce, and state parks, offering information on their facilities and services. This would be a public service and would "head-off" many non-refuge visitor questions. An information desk inside the front door would be continuously staffed. Display space could also address informational needs such as "How to see the refuge," "Where to see wildlife in the Homer area."

Alaska Natural History Association sales area - The Association manages the sales areas for all the natural resource agency centers in the state, turning the profits back into educational programs. The refuge opened an outlet in 1989. The principle purpose of the sales area is to offer the visitor the opportunity to purchase and take home interpretive and informational materials. The refuge sales area should offer a comprehensive collection of marine literature and literature relevant to geographical areas of the refuge. The sales area must be large enough to allow adequate flow of visitors.

FISCAL NOTE

BILL NO. SB 148

STATE OF ALASKA
1992 LEGISLATIVE SESSION

Revision Date: 12/18/91 Department Affected: Fish and Game

Title: Appropriation for purchase of private lands and BRU: Habitat

timber rights in Kachemak Bay Component: Habitat

Sponsor: Senator Fischer

Requestor: _____ COMPONENT SERIAL NO.

	4	8	6
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Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL	0	0	0	0	0	0
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REVENUE FUND SOURCE:	0	0	0	0	0	0
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FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL	0	0	0	0	0	0

POSITIONS:

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

Estimate of current year impact: No impact on current year.

ANALYSIS: (Attach a separate page if necessary.)

Purchase of timber rights to Seldovia Native Association lands would not result in any expenditures by ADF&G.

Prepared By: Frank Rue, Director Phone: 465-4105

Division: Division of Habitat Date: 12/19/91

Approved by Commissioner: [Signature]

Agency: Department of Fish and Game Date: 12/20/91

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. OSC., & Impacted Agency(ies).

SB

154

SENATE COMMITTEE REPORT
FIRST COMMITTEE OF REFERRAL

DATE: 3/1/91

FURTHER: Judiciary

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

DATE TURNED INTO OFFICE: _____

Resources Committee considered SB 154

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

and recommended:

- replace with _____ CS SB 154 Res same title
- attached amendment(s) new title
- _____ letter of intent adopted

- do pass
- do not pass
- no recommendation
- individual recommendations
- further referral to _____

ATTACHES NEW FISCAL NOTE(S):

fiscal note(s) _____ Dept/Date

zero fiscal note(s) _____ Dept/Date

Previous FN DEC 3/18/91

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

SIGNING DO PASS:

[Signature]

OTHER RECOMMENDATIONS:

[Signature] NO Re

[Signature]

[Signature] (Do Pass)

Chair: Signature and Recommendation

CS FOR SENATE BILL NO. 154 ()

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): SENATOR RODEY

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to the liability of financial institutions for environmental damage or the
2 threat of environmental damage and to liens arising from environmental damage or the
3 threat of environmental damage."

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

5 * Section 1. AS 46.03.822(a) is amended to read:

6 (a) Notwithstanding any other provision or rule of law and subject only to AS 46.03.825.
7 the defenses set out in (b) of this section, and the exception set out in (i) of this section, the
8 following persons are strictly liable, jointly and severally, for damages to persons or property,
9 whether public or private, including damage to the natural resources of the state or a
10 municipality, and for the costs of response, containment, removal, or remedial action incurred by
11 the state or a municipality, resulting from an unpermitted release of a hazardous substance or,
12 with respect to response costs, the substantial threat of an unpermitted release of a hazardous
13 substance:

14 (1) the owner of, and the person having control over, the hazardous substance at

1 the time of the release or threatened release; this paragraph does not apply to a consumer product
2 in consumer use;

3 (2) the owner and the operator of a vessel or facility, from which there is a
4 release, or a threatened release that causes the incurrence of response costs, of a hazardous
5 substance;

6 (3) any person who at the time of disposal of any hazardous substance owned or
7 operated any facility or vessel at which the hazardous substances were disposed of, from which
8 there is a release, or a threatened release that causes the incurrence of response costs, of a
9 hazardous substance;

10 (4) any person who by contract, agreement, or otherwise arranged for disposal or
11 treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous
12 substances owned or possessed by the person, other than domestic sewage, or by any other party
13 or entity, at any facility or vessel owned or operated by another party or entity and containing
14 hazardous substances, from which there is a release, or a threatened release that causes the
15 incurrence of response costs, of a hazardous substance;

16 (5) any person who accepts or accepted any hazardous substances, other than
17 refined oil, for transport to disposal or treatment facilities, vessels or sites selected by the person,
18 from which there is a release, or a threatened release that causes the incurrence of response costs,
19 of a hazardous substance.

20 * Sec. 2. AS 46.03 is amended by adding a new section to read:

21 Sec. 46.03.825. FINANCIAL INSTITUTIONS. (a) Except as provided by (b) of this
22 section, a financial institution is not liable under AS 46.03.822 - 46.03.828 for damages or costs
23 resulting from an unpermitted release of a hazardous substance or the substantial threat of an
24 unpermitted release of a hazardous substance at or from a facility or vessel that

25 (1) the institution acquires through foreclosure;

26 (2) the institution holds as a lessor under the terms of an extension of credit;

27 (3) is subject to the financial control or financial oversight of the institution under
28 the terms of an extension of credit, if the institution does not exercise actual, direct, and continual
29 managerial control that materially divests the borrower, debtor, or obligor of control of the
30 facility or vessel; or

31 (4) the institution acquires in a fiduciary capacity.

1 (b) A financial institution may be required to reimburse the state for the actual benefit
2 received by the institution that results from a response, containment, removal, or remedial action
3 undertaken by the state involving a facility or vessel identified under (a)(1) of this section, but
4 the liability for the reimbursement, including the payment of a state lien, may not exceed the fair
5 market value of the facility or vessel.

6 (c) In this section, "financial institution" means

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

10 (2) a trust company that is owned in whole or in part by a bank or that is subject
11 to regulation by the United States Comptroller of the Currency.

12 * Sec. 3. AS 46.08.075(a) is amended to read:

13 (a) The state has a lien for expenditures by the state from the oil and hazardous substance
14 release response fund or from any other state fund, for the costs of response, containment,
15 removal, or remedial action resulting from an oil or hazardous substance spill, or, with respect
16 to response costs, the substantial threat of a release of oil or a hazardous substance against the
17 facility or vessel that is [ALL PROPERTY] owned by a person who is determined by the
18 commissioner to be liable for the expenditures under this chapter, AS 46.03, AS 46.04, 42 U.S.C.
19 9607, or other state or federal law, and that is subject to the state's response, containment,
20 removal, or remedial action. The lien includes interest, at the maximum rate allowable under
21 AS 45.45.010(a), from the date of the expenditures. The state may file an action in a court of
22 competent jurisdiction in order to foreclose on the lien.

23 * Sec. 4. AS 46.08.075 is amended by adding a new subsection to read:

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

- 1 * Sec. 5. AS 46.08.075(e) is repealed.
- 2 * Sec. 6. AS 46.03.825, enacted by sec. 2 of this Act, applies according to its terms to a release or
- 3 threat of a release that occurs after the effective date of this Act even if the facility or vessel was
- 4 acquired or held by the financial institution before the effective date of this Act or was subject to the
- 5 financial control or financial oversight of the institution before the effective date of this Act.

Section 1. AS 46.03.822 (c) is amended to read:

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

(1) at the time the person acquired the facility the person did not know and had no reason to know that a hazardous substance that is the subject of the release or threatened release was disposed of on, in,, or at the facility;

(2) the person is a governmental entity that acquired the facility by escheat, or through another involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation;

(3) the person is a corporation organized under 43 U.S.C. 1601-1629e (Alaska Native Claims Settlement Act) that acquired the facility under those sections;

(4) the person acquired the facility by inheritance or bequest;

[or]

(5) the person is a state governmental entity and the state acquired the facility under Public Law 85-508 (Alaska Statehood Act)[.] or

(6) the person's interest in the facility arose as a lender to a person owning or controlling the facility or arose as a security holder in the facility, and the person has not controlled, managed, or influenced the operations at or on the facility, whether or not it had the capacity to do so.

***** F A X T R A N S M I T T A L M E M O *****	
TO: <u>Tim Benintendi</u>	NO. OF PAGES 2
DEPT: _____ FAX #: <u>463-3144</u>	
FROM: <u>Staley D.</u> PHONE: <u>452-1855</u>	
CO: <u>Barbara S.</u> FAX #: <u>452-B154</u>	
Post-It brand fax transmittal memo 7671	

Memo to Dan Mogck
From: Barbara Schuhmann
03-26-91

Re: "Trust Company" definition

There is only one trust company in the state of Alaska, Key Trust, according to Terry Lutz, Division of Banking, 465-2521. He advised that anyone can attempt to form a trust company. Ownership is not limited to banks. Key Trust is wholly owned by Key Bank of Alaska. The Alaska Division of Banking apparently must authorize the formation of a state trust company. There are no other state regulations per se as to state trust companies.

The national banks apparently operate trust departments under regulation of the Comptroller of the Currency. This information came to me from a trust officer at the Trust Department of National Bank of Alaska.

No trust company has "deposits", so the way the first draft was worded, Key Trust might not be construed to be included in the type of financial institution whose liability is limited. I think we should re-work the definition in our proposed bill to state:

"No trust company, and no bank, credit union, or savings association, the deposits of which are insured . . ."

If that is too comprehensive for the legislature, we could limit "trust company", to something like:

"No trust company which is wholly-owned by a bank or subject to regulation by the Comptroller of the Currency, and no bank, credit union, or savings association, the deposits of which are insured . . ."

Also, we might insert the word "which" right before subpart (1) and the word "is" at the beginning of subpart (3). The order of the subparts of (a) could be switched around. I am not sure we need all the language of subpart (3) but because of federal decisions, it would probably be better to retain it all.

After giving subpart (b) more thought, I believe we should make it clear that the limit of liability of an institution is the benefit received. Since third parties (besides the state)

could claim they conferred a benefit, the liability should be restricted to reimbursing the state's funds that confer a benefit. Payment should then release any lien the state may have. The state should not be able to recover the "benefit conferred" and also have a lien on the property benefitted. The state has a lien for its expenditures against property owned by persons liable for such expenditures. AS 46.08.075(a). If the lender has not yet foreclosed, it should be able to remove the state's junior lien but be responsible for any benefit received from the state. If the lender has already foreclosed, the state's lien should be released upon payment of the limited amount the institution may owe to the state.

BLS:695

 FAX TRANSMITTAL MEMO
 TO: Tim Benintendi
 DEPT: _____ FAX #: 463-3144
 FROM: Staley, D. PHONE: 452-1855
 CO: Barbara S. FAX #: 452-B154
 Post-It® brand fax transmittal memo 7671

NO. OF PAGES
2

Draft 2 - definition for "financial institution"

Section 1. AS 46.03. is amended by adding a new section to read:

AS.46.03.910 Limited liability for financial institutions.

(a) No trust company *(which is wholly owned by a bank or subject to regulation by the Comptroller of the Currency,)* and no bank, credit union, or savings association (or trust company), the deposits of which are insured in whole or in part by the Federal Deposit Insurance Corporation or by any agency of the United States, or by the state of Alaska, shall be held or construed to be an "owner", "operator", person "having control" over a hazardous substance, or to be liable under any state law imposing strict liability for, or imposing a duty to discover, to contain or to clean up the release or threatened release of a hazardous substance at or from a facility or vessel which:

- (1) it acquired through foreclosure;
- (2) it held as a lessor pursuant to the terms of an extension of credit;
- (3) is subject to its financial control or financial oversight pursuant to the terms of an extension of credit but as to which it did not exercise actual, direct, and continual managerial control that materially divested the borrower, debtor or obligor of such control; or
- (4) it acquired in a fiduciary capacity.

(b) An institution described in subpart (a), or the estate which it represents in a fiduciary capacity, as the case may be, may be liable to (required to reimburse) the state (a third party), but only for any actual benefit received by such institution or estate, from a removal, remedial, containment, or other response action undertaken by the state (third party), the total liability for which benefit, including payment of any state lien, shall not exceed the fair market value of the affected property following such action.

(c) An institution described in subpart (a), or the estate which it represents in a fiduciary capacity, as the case may be, which causes or exacerbates a release or threatened release of a hazardous substance, through activity and not by omission, shall be liable for response costs to the extent that the release or threatened release is attributable to the person's activities.

Section 2. (Repeat Sec. 3 of SB 154)

Section 3. (Repeat Sec. 4 of SB 154)

Section 4. (Repeat Section 5 of SB 154)

BLS:697



MAIN OFFICE:
3500 EIDE STREET
ANCHORAGE, AK 99503
563-3768

DIMOND BRANCH:
300 E. DIMOND BLVD.
ANCHORAGE, AK 99515
344-5144

SOLDOTNA BRANCH:
131-A WAREHOUSE
SOLDOTNA, AK 99869
282-7600

EAGLE RIVER BRANCH:
16515 CENTERFIELD DRIVE
EAGLE RIVER, AK 99577
894-5444

CAMPUS BRANCH:
2801 PROVIDENCE DRIVE
ANCHORAGE, AK 99508
581-3161

April 26, 1991

State Senator Lloyd Jones
Resource Committee
P.O. Box V
Juneau, Alaska 99811

Dear Senator Jones:

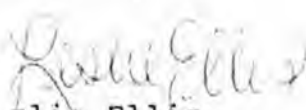
I am writing to express my Credit Union's support of SB 154 sponsored by Senator Rodey. The bill will limit the liability to the lender for the cost of cleaning contaminated properties acquired through foreclosure.

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 competitive real estate loans when they need them. Passage of this bill will help make competitive 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

SB 154

**EPA DRAFT PROPOSAL DEFINING LENDER LIABILITY ISSUES
UNDER THE SECURED CREDITOR EXEMPTION OF CERCLA
(Sept. 14, 1990)**

ENVIRONMENTAL PROTECTION AGENCY
40 CFR Part []

Lender Liability under CERCLA

AGENCY: Environmental Protection Agency

ACTION: Final Interpretative Rule; Proposed Rule and Request for Comments

SUMMARY: The Environmental Protection Agency is issuing this rule to define the meaning of certain statutory elements in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), which pertain to the liability of both financial institutions that lend money to facilities and governmental loan guarantors or entities that acquire ownership, or some indicia thereof, of contaminated facilities. In this rule, EPA is interpreting the secured creditor exemption in CERCLA section 101(20)(A) so that private and governmental lending institutions and successors-in-interest that hold a security interest in a facility may undertake a variety of activities related to a borrower's facility in the course of protecting the security interest, without voiding the exemption. In addition, EPA is interpreting the terms of CERCLA section 101(35)(A)(ii) so that certain federal government entities (the Resolution Trust Corporation (RTC) and the Federal Deposit Insurance Corporation (FDIC) that obtain a security interest or ownership of a contaminated facility as the result of actions mandated under the Federal Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183 (Aug. 9, 1989), fall within the scope of the innocent landowner defense, as long as the other elements of the defense are met.

EFFECTIVE DATE: (insert publication date)

ADDRESSES: Comments on this final interpretative rule and proposed rule must be submitted by (insert date 60 days from date of publication). Commentors must send an original and two copies of their comments to: [Office], U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460. Comments should include the docket number []. The public docket is located at EPA Headquarters at the above address in Room [] and is available for viewing from 9:00 a.m. to 4:00 p.m., Monday through Friday, excluding Federal holidays.

I. Background

The Agency is promulgating this rule to interpret the provisions of sections 101(20) and 101(35) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended, 42 U.S.C. §9601 et seq., as they affect private lending institutions and governmental entities that hold a secured interest in a facility contaminated by or containing hazardous substances, or that acquire ownership of contaminated property in the course of protecting a secured interest.

Section 107(a) of CERCLA, 42 U.S.C. §9607(a), identified four broad classes of responsible parties that are liable for the costs of cleaning up, among other things, hazardous substances when the federal government, state government, or a private party brings suit. The first two classes include certain owners and operators of facilities contaminated by or containing hazardous substances, 42 U.S.C. §9607(a)(1)-(a)(2). The third class consists of certain persons who arranged for disposal or treatment of hazardous substances. *Id.* §9607(a)(3). Finally, the fourth class includes persons who accepted for transportation hazardous substances and selected the disposal facility. *Id.* §9607(a)(4).

It is now well-settled that each of the four groups of responsible parties is strictly liable under section 107(a). See, e.g., *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1572 (5th Cir. 1988); *United States v. Monsanto Co.*, 858 F.2d 160, 167 & n.11 (4th Cir. 1988), cert. denied, 109 S.Ct. 3156 (1989). In addition, it is also settled that such parties are jointly and severally liable when the environmental harm is indivisible. *United States v. Monsanto Co.*, 858 F.2d at 171; *United States v. Chem-Dyne Corp.*, 572 F.Supp. 802, 810-11 (S.D. Ohio 1983).

CERCLA defines "owner or operator" in Section 101(20). However, Section 101(20)(A) exempts those persons who, without participating in the management of the facility, hold indicia of ownership primarily to protect a security interest, 42 U.S.C. §9601(20)(A). The issue of how the "secured creditor" exemption is to be interpreted under CERCLA has generated a great deal of uncertainty in the financial and lending communities regarding the extent to which a secured creditor can undertake activities to oversee the affairs of a borrower for the purposes of protecting a security interest and still maintain the exemption.

These uncertainties were heightened by *dicta* in the recent opinion of the United States Court of Appeals for the Eleventh Circuit in *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990). In this opinion, the court suggested that a secured creditor may be liable, without being an operator, if it participated in the management of a facility "to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes." 901 F.2d at 1557. Another court of appeals has indicated that the mere capacity or right to control facility operations is insufficient to void the secured creditor exemption and suggested that the creditor must participate in the operational management of the facility to lose the exemption's liability shield. See *In re: Bergsøe Metal Corp.*, No. 89-35397, slip op. (9th Cir. Aug. 9, 1990) ("What is critical is not what rights the [creditor] had, but what it did . . . [A creditor] cannot have participated in management if it never exercised [its rights].")

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Further uncertainty has arisen as a result of the role of the Federal Deposit Insurance Corporation and the Resolution Trust Corporation, which act as conservators or receiver of failing or failed lending institutions, and the potential applicability of CERCLA to these governmental entities which have succeeded to the properties and assets owned by the failed lending institutions. In particular, an issue has arisen as to the applicability to these institutions of the so-called "innocent landowner" defense of sections 107(b)(3) and 101(35).

To reduce these uncertainties, EPA is issuing this rule to specify for lenders and these governmental entities what actions they may take and still remain within the bounds of either the secured creditor exemption or the "innocent landowner" defense.

EPA is promulgating this rule as a final interpretative rule which is effective upon publication in the FEDERAL REGISTER in accordance with the provisions of section 553(b) and (d) of the Administrative Procedure Act (APA). These sections of the APA authorize the Agency to issue interpretative rules without providing notice and opportunity to comment and to make today's rule immediately effective rather than wait for the expiration of a 30-day period. Because of the important issues that are raised by this interpretative rule, however, the Agency is accepting public comment for a 60-day period. Upon review of the comments, EPA will formally codify the rule in 40 C.F.R. Part [].

The Agency also believes that judicial review of this rule is governed by the provisions of CERCLA section 113(a). These provisions mandate that any review of a regulation promulgated under CERCLA is confined to the United States Court of Appeals for the District of Columbia Circuit and that any application for such review must be made within ninety days of the rule's date of promulgation. By enacting these provisions, Congress intended that the District of Columbia Circuit Court would have "exclusive" jurisdiction to review regulations and that any petitions for review that were filed after the ninety day period would be barred. S. Rep. No. 848, 96th Cong., 2d Sess. 95 (1980); see *Lubrizol Corp. v. Train*, 547 F.2d 310, 314-16 (6th Cir. 1976) (by centralizing appeals in the D.C. Circuit under the Clean Air Act, congress hoped to avoid needless delays in the implementation of important national programs caused by incessant litigation and inconsistent decisions).

II. Summary

This rule interprets the secured creditor exemption to permit a broad range of lender activity when that activity is conducted primarily to protect a security interest. This rule defines the key terms of CERCLA section 101(20)(A): (1) "indicia of ownership," (2) "primarily to protect a security interest," and (3) "participating in the management of a ... facility." With respect to a government entity acting under FIRREA that may assume ownership, conservatorship, or receivership of financial lending institutions and thereby assume actual ownership of and exercise total control over a contaminated facility, this rule defines those circumstances in which the governmental entity may have a defense available under section 101(53)(A)(ii) of CERCLA.

While section 101(20)(A) provides lenders with a potential exemption from CERCLA liability when the collateral securing the loan is contaminated, it does not otherwise provide protection from the ordinary risk assumed by the lender that the collateral's market value may not be

sufficient to cover the borrower's debt. The CERCLA secured creditor exemption is not a loan guarantee for lending institutions and does not shift to the Superfund the cost of poor loan decisions, but serves only as a shield from CERCLA liability.

From an environmental perspective, the EPA must concern itself first with protection of health and the environment. Following expenditure of public funds to clean up contaminated property, EPA must, as authorized by law, seek to recover the cost expended by the fund from those liable under CERCLA. Accordingly, CERCLA clearly imposes liability on owners of real property where there is a release or threat of release of hazardous substances for the consequences of that release.

This rule seeks to reconcile the lender's need to manage loans with EPA's duty to clean up waste sites and recover public funds spent in remediating these sites. EPA's interpretation of the secured creditor exemption both acknowledges and accommodates these competing interests within the current statutory scheme by protecting the secured creditor that acts in an environmentally responsible manner (which includes requiring environmental audits of the collateral upon making loans) from incurring CERCLA liability.

III. CERCLA Provisions
Protecting a Secured Lender
A. Security Interest Exemption

The section 101(20)(A) security interest exemption is the principal means of avoiding CERCLA liability for a lender or loan guarantor (hereafter referred to as the "lender," "secured lender," "holder of the security interest," or simply "holder"). EPA interprets a security holder as including both the lender and the private or governmental loan guarantor or successor-in-interest. A private successor-in-interest is a subsequent bona fide purchaser of the loan (security interest) in the secondary market. A governmental successor-in-interest is the governmental entity that acquired property involuntarily or by operation of statute through failure, dissolution, or other insolvency of a lending institution (such as the Federal Deposit Insurance Corporation or the Resolution Trust Corporation) acting under FIRREA.

Section 101(2)(A) provides:

"Such term [owner or operator] does not include a person who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility." There are three key terms found in the exemption that are not otherwise defined in the CERCLA: (1) "indicia of ownership" (2) the requirement that the indicia be held "primarily to protect the security interest" in the facility, and (3) the prohibition of the security holder from "participating in the management" of the facility.

(a) "Indicia of ownership."

Ownership indicia within the meaning of Section 101(20)(A) are those interests in real or personal property held as security or collateral for a loan, including the real or personal property acquired in the course of protecting the security interest. The nature of the ownership interest may vary under the laws of different states and by the type of secured loan transaction. Examples of such indicia may include, but are not limited to, a mortgage, deed of trust, or legal title obtained pursuant to foreclosure or its equivalents, or an assignment, lien, pledge, or other right to or encumbrance against the facility that is fur-

ished by the borrower as security for the loan. The mortgage, lien, or other encumbrance must be for the purpose of security for a loan, and not for some other purpose, to come within the exemption. Section 101(2)(A) does not cover an interest in the nature of an investment in the contaminated property, or any interest other than as a security. See, e.g., *United States v. Maryland Bank & Trust*, 632 F. Supp. 573 (D. Md. 1986) (actions taken by lending institution indicate property held as an investment rather than security for a loan). "Indicia of ownership" are maintained or acquired by the lender as an assurance of repayment: ownership indicia within the meaning of the exemption are those given as collateral incident to a loan transaction. For purposes of CERCLA, the security holder's ownership "interest" is not the facility itself but the extent to which the facility or inventory represents a guarantee for the debtor's unpaid obligation.

(2) "Primarily to protect the security interest."

The exemption in section 101(2)(A) requires that the lender's ownership interest have been created and held as security for a loan or other obligation. This requires that the lender's ownership interest represent a true security interest in the facility,¹ as opposed to a lease or a consignment which ordinarily would not be considered a secured transaction.² Because the exemption covers only true security interests, Section 101(20)(A) does not exempt from the CERCLA definition of "ownership" a lender's ownership interest in property held for investment purposes. EPA recognizes that lenders typically have revenue interests in the loan transaction. However, when the lender holds its indicia of ownership in the property for investment purposes, as opposed to assuring repayment of the loan, the secured creditor exemption will not apply. Similarly, the CERCLA secured lender exemption has no application where a lending institution acts as a trustee or manager of property or a business, or where a lending institution acts in a non-lending capacity or has any interest other than one created as bona fide security interest in real or personal property.

Consistent with the exemption, the secured creditor may act to protect the interest by policing the loan, by undertaking financial workout with a borrower where the security interest is threatened, and by foreclosing and expeditiously liquidating the assets securing the loan. In general, such actions are not considered to be participation in the management of a facility provided that the actions taken are necessary to protect the security interest.

Accordingly, a secured party is considered to be acting within the scope of the exemption if it regularly or periodically monitors the borrower's business, requires or conducts on-site inspections and audits, requires certification of financial information or compliance with applicable duties, laws or regulations, or requires other similar actions, provided that the borrower remains substantially in possession and control of the operations of the facility. Such oversight and obligations of compliance imposed by a lender are generally considered to be undertaken to protect the security interest and are not considered part of the management and operation of a facility. Although such requirements and oversight may inform the borrower's management of a facility, the lender is not generally considered to be participating in management where the borrower continues to make operational decisions at the facility.

Making a Loan

CERCLA's broad remedial goal of protecting health and the environment from the hazards of improper waste practices (and, by implication, encouraging safer hazardous waste practices), requires that the lender seeking shelter from CERCLA liability act consistently with the statute's purpose to qualify for the statutory secured creditor exemption. Specifically in order to be considered acting primarily to protect a security interest, a lender must undertake certain affirmative obligations, at the time of the loan, with respect to the property (collateral). For purposes of this CERCLA exemption, when making a loan, lenders are acting consistently with CERCLA when an inspection or audit of the collateral securing the loan is undertaken in an effort to minimize environmental liability. Such an inquiry is required by the exemption as an action taken to protect the security interest through assessing and ensuring the value of the collateral in which the lender has taken an indicia of ownership.³

Policing the Loan

Actions consistent with protecting the security interest may include, but are not limited to, requirements for environmental audits prior to making the loan; cleanup of the property during the life of the loan; requirements of assurance of the borrower's compliance with applicable federal, state, and local environmental and other rules and regulations during the life of the loan; permission for the lender to periodically or regularly monitor or inspect both the collateral (including site inspections) or the borrower's business or financial condition; or other requirements or conditions reasonably necessary for the lender to adequately police the loan or to comply with legal requirements.

Such requirements may be contained in lender-imposed requirements for financial, environmental, and other warranties, covenants, and representations or promises from the borrower, as conditions for the loan and included in loan documents. While the exemption requires that a secured creditor undertake actions consistent with CERCLA when protecting the security interest, a lender is not expected to be an insurer or guarantor of environmental safety at a facility in which it has a security interest. The inclusion of environmental warranties and covenants are not considered to be evidence of a lender acting as an insurer or guarantor, and liability cannot be premised on the existence of such terms, or upon the lender acting to ensure the facility is managed in an environmentally sound manner. Neither are these actions or requirements alone considered to be evidence of participation in management.

Loan Work Out

The lender may need to take actions to secure or safeguard real property or other collateral from loss. These actions are usually necessary when the loan is in default or threat of default, and is a situation commonly referred to as "loan work out." These actions will not take a lender outside of the security interest exemption provided that the actions are taken in the course of protecting the security interest. To remain within the exemption from CERCLA liability, all such actions must be structured to protect and preserve the security interest; such measures are taken to protect the security interest when the lender is assisting the debtor in an effort to prevent default of the loan or diminution of the value of the collateral.

Activities that EPA considers to be "primarily to protect the security interest" (and are not evidence of "participation in management") during the work-out period include, but are not limited to, restructuring or renegotiation of the terms of the loan obligation, payment of additional interest, extension of the payment period, specific financial or operational advice, suggestion, counseling, guidance, or any other action reasonably necessary to protect the lender's security interest. The lender's actions must, however, duly consider and account for the hazardous substances known to be present at the facility, and must not cause or contribute by act or omission to the environmental harm at issue. The Agency believes that this position is consistent with the underlying statutory purposes of CERCLA of ensuring the cleanup of hazardous waste sites and that those who cause harm from hazardous substances bear the costs of such cleanups. S.Rep. No. 84B, 96th Cong., 2d Sess. 12-13 (1980). When the lender does undertake work-out activities, it will remain within the exemption only if the borrower remains the ultimate decision maker for operation of the facility. Where the evidence demonstrates that the lender controls the decisionmaking process of the borrower, EPA considers the lender to be "participating in the management of the facility" and therefore to have voided the exemption.

Foreclosure and Liquidation

The process of foreclosure and sale may require or result in the secured lender taking record title to the property under the laws of some states. Foreclosure, purchase at foreclosure sale, acquisition or assignment of title in lieu of foreclosure, acquisition of a right to title, or other agreement in settlement of the loan obligation, or any other formal or informal manner by which the lender acquires possession for disposition of the borrower's collateral, are generally considered to be actions within the scope of the statutory exemption as necessary to protect the security interest. However, the lender's temporary acquisition must be reasonably necessary to ensure satisfaction or performance of the loan obligation. The lender's actions in outbidding or refusing bids from parties offering fair consideration for the property are evidence that the property is no longer being held primarily to protect the security interest. To remain within the exemption after foreclosure, the foreclosing entity must be acting to preserve the assets of the facility for its subsequent sale at the earliest possible time. In general, the lending institution must undertake to wind up operations expeditiously and liquidate all assets, or take other action as appropriate for maximizing the value of the secured asset prior to sale as a means to realize the debtor's unpaid obligation. "Winding up" is construed as including those actions necessary to properly and responsibly close down a facility's operations, secure the site, and otherwise protect the value of the foreclosed assets for subsequent liquidation. The lender should undertake all necessary security measures or take other actions that protect and preserve a facility's assets. A lender's actions while winding up operations that cause or contribute to environmental contamination are not considered to within the meaning of the exemption. Mitigative or preventative measures that are environmentally responsible are considered to be actions that preserve and protect the value of the facility and, hence, the lender's security interest. In addition, such actions are not considered

evidence of a lender's participation in the management" of the facility.

Holding Property for a Reasonable Period

Having foreclosed upon or otherwise acquired the collateral securing a loan, the lending institution remains within the ambit of the secured creditor exemption only if it disposes of the property as expeditiously as possible. For purposes of this rule, a lender holding property after foreclosure for six months or fewer is presumed to be holding to protect the security interest. However, if the lender has not divested itself of the property within this time, the burden shifts to the lender to demonstrate that it continues to hold the property primarily to protect the security interest, taking all relevant facts and circumstances into account.

A secured lender is considered to be acting to dispose of property in an expeditious manner if it seeks to sell, auction or otherwise liquidate or transfer the assets as soon as practicable, taking into account the condition of the property, what is required to property wind up operations, and other facts and circumstances as appropriate. Evidence that the lender is seeking to divest itself expeditiously of the asset includes, but is not limited to, advertising or auctioning the facility for sale, listing property with a realtor or sales agent, or other actions reasonable demonstrating or manifesting an intent to sell or otherwise divest itself of the asset.

In the event that an EPA cleanup of the contaminated property enhances the value of the collateral during the time that the secured lender is holding its indicia of ownership, much that the lender realizes an amount at the foreclosure sale of the cleaned-up property greater than the value of the property in its contaminated condition. EPA may seek equitable reimbursement, under applicable principles of law, of the amount by which the lender has been enriched or has benefited as a result of the EPA cleanup.

Participation in Management

Whether a lender has engaged in management participation sufficient to void the exemption is a fact-sensitive issue. This depends upon all relevant facts, including, but not limited to, the nature of the borrower's business, the areas in which the lender becomes involved, whether the facility is in the possession of the borrower or lender (after foreclosure), the actual control exercised by the lender over the borrower's activities, and whether the lender has caused or contributed to environmental harm at the facility.

"Participation in management" sufficient to void the exemption means actual operational participation by the lender, and does not include the mere capacity or ability to influence facility operations. In all cases, the determination of whether a lender is participating in management depends on a lender's actions and omissions with respect to facility operations. In general, a lender is considered to be participating in management within the meaning of the exemption if, while the borrower is still in possession, the lender has materially divested the borrower of decisionmaking control over facility operations, particularly with respect to the hazardous substance present at the facility. However, a lender is not considered to be participating in management if it undertakes actions that primarily protect the security interest, as discussed in the preceding section. In particular, and consistent with CERCLA's purpose, actions taken by a

lender that are environmentally beneficial are not considered to be participation in the management of a facility within the meaning of the exemption.

B. Innocent Landowner Defense

The third-party/innocent landowner provisions, sections 107(b)(3) and 101(35)(A)-(B), provide a limited and secondary means of protection for the holder of a security interest. Section 107(b)(3) provides a defense where the harm was caused solely by the acts of third parties with which the defendant had no "contractual relationship" and the defendant establishes certain additional elements specified in section 101(35)(A)-(B). The relevant sections of the third-party innocent landowner defense provide:

Section 107(b):

"There shall be no liability under (section 107(2) for a person who can establish ... that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

- (3) an act or omission of a third party other than ... one whose act or omission occurs in connection with a contractual relationship existing directly or indirectly with the defendant ... if [the defendant] (a) [has] exercised due care with respect to the hazardous substances ...; and (b) he took precautions against the foreseeable acts or omissions of any ... third party. ..."

Section 101(5):

"(A) The term 'contractual relationship,' for the purpose of section 107(b)(3), includes, but is not limited to, land contracts, deeds, or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal placement of hazardous substances, and ...:

- (i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance ... was disposed of on, in or at the facility.
- (ii) The defendant is a government entity which acquired the facility ... through any ... involuntary transfer or acquisition, ...

In addition, ... the defendant must ... satisf[y] the requirements of section 107(b)(3)(a) and (b).

(B) To establish that the defendant had no reason to know, ... the defendant must have undertaken all appropriate inquiry into the private previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability." (emphasis added.)

The section 101(35)(A)(i) innocent landowner defense is not intended to serve as the primary means of protection from potential CERCLA liability for secured lenders; EPA believes that the security interest exemption is ordinarily sufficient for this purpose, and the innocent landowner defense is not necessary to protect a lending institution from liability for properties in which it holds indicia of ownership to protect a security interest. In the limited circumstances in which the secured lender is not in a position to claim the security interest exemption for property which it owns, the lender/owner may seek to defend itself as an innocent landowner in the same manner.

Involuntary Acquisition

Different provisions apply to the government-as-innocent owner of contaminated property. EPA interprets

the phrase "a government entity which acquires the facility ... through any ... involuntary transfer or acquisition" in section 101(35)(A)(ii) as including, but not being limited to, acquisition of the property and assets of failed or insolvent banks, credit unions, savings institutions and thrifts by a government agency or government corporation that is obligated under law to act as a conservator or receiver of the lending institution. Such governmental entities are the Federal Deposit Insurance Corporation or Resolution Trust Corporation acting under FIRREA. The range of assets acquired by such entities say include, among others, simple security interests, property for which the depository or thrift institution holds record title or other form of title through foreclosure, or property that has been purchased or acquired as an investment by the failed institution or its subsidiary.

For these assets or properties in which the failed or insolvent institution held a security interest, as a successor-in-interest the government receiver or conservator has the same rights as any private or commercial holder of the secured interest. It may therefore sell or transfer the interest, engage in loan workout, wind up operations, foreclose, and liquidate the assets securing the loan in the same manner as a private or commercial lending institution acting under the protection of section 101(20)(A).

With respect to those properties the government conservator or receiver acquired by operation of law that were owned by the failed or insolvent institution as an investment interest or for other reasons (i.e., those properties for which the failed institution's indicia of ownership is not held as a security interest and for which the section 101(20)(A) does not apply), EPA interprets section 101(35)(A)(ii) as providing a potential defense to liability. For the purposes of CERCLA, property owned by the failed or insolvent institution to which the government entity succeeds by operation of law has been acquired involuntarily within the meaning of section 101(35)(A)(ii). EPA further interprets section 101(35)(A)(ii) to provide a potential defense to CERCLA liability for contaminated property that is owned by a governmental entity as the result of its foreclosure on a security interest originally acquired by the government entity in its capacity as a conservator or receiver. To establish any such defense, the other provisions of section 107(b)(3) (requirements for due care and precautions against the foreseeable acts of third parties) must also be satisfied.

Where the government entity acquires contaminated property in its corporate capacity (e.g., by transfer of non-salable assets from the FDIC-as-receiver to the FDIC in its corporate capacity), the property remains "involuntarily acquired"; the government entity does not assume CERCLA liability merely because of the transfer of property or assets to it as part of its legally imposed mandate to resolve the affairs of failed or insolvent thrifts and depository institutions.

Part [] — Lender Liability Under CERCLA

(a) Definitions:

- (1) *Indicia of ownership* as used in section 101(20)(A) of CERCLA means interests in real or personal property held as security or collateral for a loan, as well as the real or personal property acquired in the course of protecting the security interest. The interest in the property must be held primarily as security for a loan.

(2) *Security interest* for the purposes of section 101(20)(A) of CERCLA means an interest in property acquired for the purpose of securing payment or performance of an obligation. A security interest exists at any time (A) if, at such time, the property is in existence and the interest has become protected under local law against a subsequent judgment lien arising out of an unsecured obligation, and (B) to the extent that, at such time, the holder has parted with money or money's worth. A holder of a security interest within the scope of the section 101(20)(A) exemption is a private or governmental lender or loan guarantor or successor-in-interest, that receives as collateral for a loan an interest in the real or personal property of the borrower, or that is a subsequent bona fide purchaser of or successor to the security interest. A governmental successor-in-interest includes the government entity that acquires property involuntarily by operation of statute through failure, dissolution, or other insolvency of a lending institution.

(1) *Covered Security Interests.* A "security interest" within the scope of section 101(20)(A) of CERCLA are those that have been created and held as a true security for a loan or other obligation, and do not include a lease or a consignment which may not be considered a secured transaction under applicable principles of commercial law. This term does not include an ownership interest in property held for investment purposes (ownership indicia held for purposes other than for assuring repayment of a loan). The term also does not include the interests of a lending institution acting as a trustee or manager of property of a business, or where a lending institution acts in any other non-lending capacity or has any interest other than one created as bona fide security interest in real or personal property.

(3) *Primarily to protect a security interest* means that the lender's interest in the property is created and held as security for a loan or other obligation, and that certain activities undertaken regarding the interest are necessary and required for its protection. The secured creditor may act further to protect the interest by policing the loan, by undertaking financial workout with a borrower where the security interest is threatened, and by foreclosing and expeditiously liquidating the assets securing the loan. Such actions are within the exemption if taken primarily to protect the security interest.

(i) *Requirement of Inquiry Upon Making a Loan.* At the time that the loan is made, an inquiry into the environmental condition of the collateral securing the loan must be undertaken in an effort to minimize environmental liability and to protect the security interest through assessing and ensuring the value of the collateral.

(ii) *Requirements During the Life of a Performing Loan.* A secured lender is acting consistently to protect its security interest if the lender requires cleanup of the property prior to or during the life of the loan; requires assurance of the borrower's compliance with applicable federal, state, and local environmental and other laws, rules and regulations during the life of the loan; obtains permission to periodically or regularly monitor or inspect both the collateral (including site inspections) or the borrower's business or financial condition; or by taking other actions that are necessary for the lender to adequately police the loan or to comply with applicable legal requirements.

(iii) *Loan Workout and Foreclosure.* A lender's actions during workout, foreclosure, and liquidation must: duly

consider and account for any hazardous substances known to be present at the facility, and must not cause, contribute to, or exacerbate the release or threat of release of hazardous substances. Causing or contributing to a release or threat of release of hazardous substances is not considered to be protection of the security interest. Mitigative or preventative measures that are environmentally responsible are considered to be actions that preserve and protect the value of the facility and the lender's security interest.

(A) *Loan Workout.* Loan workout activities are those actions of the lender that are structured to protect and preserve the security interest by assisting the debtor in an effort to prevent default of the loan or diminution of the value of the collateral. Loan workout activities that are primarily to protect the security interest include, but are not limited to, restructuring or renegotiation of the terms of the loan obligation, payment of additional interest, extension of the payment period, forbearance, or providing or taking other actions when the lender does undertake work-out activities, it will remain within the exemption only if the borrower remains the ultimate decision maker for operational management of the facility.

(B) *Loan Formulation.* When the lender forecloses or by any formal or informal manner requires possession of the property for disposition, the temporary acquisition of the property must be necessary to ensure satisfaction or performance of the loan obligation, and the secured party must set to preserve the assets of the facility by winding up operations expeditiously for subsequent sale or other divestment of the assets at the earliest possible time. A lender is not considered to be acting as expeditiously as possible if, in the context of the lender's actions with respect to a non performing loan, the lender never seeks to foreclose or otherwise acquire or otherwise act to protect the collateral securing the loan, or delays foreclosure for an unreasonable length time once the loan is non performing, in light of all relevant facts and circumstances.

(1) *Winding up operations* means those actions necessary to close down a facility's operations in full compliance with all applicable laws and regulations, secure the site, and otherwise protect the value of the foreclosed assets for subsequent liquidation. While winding up operations, a lender's actions or failure to act that cause or contribute to environmental contamination are not considered to be actions taken primarily to protect the value of the collateral within the meaning of the secured creditor exemption.

(2) A secured lender is presumed to have acted expeditiously to sell or otherwise divest itself of property taken by default, foreclosure, or by other similar means if it has sold or otherwise completely divested itself of any indicia of ownership in six months or fewer after it has foreclosed on or by other means acquired possession of property. After the expiration of this six month period, the burden shifts to the lender to demonstrate that it continues to hold the property primarily to protect the security interest, taking all relevant facts and circumstances into account.

(4) *Participation in the management of a facility* means the exercise of operational management control by a security holder over a borrower's activities with respect to the facility securing the loan obligation.

(i) The term does not include the mere capacity to control or influence a facility's operations, but does in-

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clude the actual exercise of such operational management control. Whether a lender is participating in management depends on a lender's actions with respect to facility operations.

(ii) A security holder is considered to be participating in management if, while the borrower is still in possession, the security holder has materially divested the borrower of decisionmaking control over facility operations, particularly with respect to any hazardous substances present at the facility.

(iii) A lender is not considered to be participating in management if it undertakes actions that primarily protect the security interest, as defined in 40 C.F.R. [(a)(3)].

(5) *Involuntary Transfer or Acquisition*, as used in section 101(35)(A)(ii) of CERCLA, includes acquisition of property and assets of failed or insolvent banks, credit unions, savings institutions and thrifts by a governmental entity that is obligated under the Federal Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183 (Aug. 9, 1989), to act as a conservator or receiver of a lending institution. Involuntarily acquired property includes property that is owned by a governmental entity as the result of its foreclosure on a security interest originally acquired by the government entity in its capacity as a conservator or receiver. (b) *Secured Creditor Exemption*

A person holding an indicia of ownership in a facility primarily to protect a security interest and who does not participate in the management of a facility is not an owner or operator" under section 101(20)(A) of CERCLA.

The CERCLA definition of "facility" includes real property as well as any equipment or other articles

contaminated by hazardous substances. See CERCLA §101(9).

² Whether a sale-and-leaseback, conditional sale, installment sales contract, or other similar commercial transaction is within the security interest exemption under CERCLA is determined by the facts of each case.

³ The requirement under section 101(20)(A) to undertake an environmental assessment of the collateral when making a loan is prospective only, and does not apply to loans already made as of the effective date of this rule. This rule in no way affects the obligation of purchasers to undertake "all appropriate inquiry" required for innocent landowner defense of CERCLA §§101(35) and 107(b)(3).

⁴ To the extent that the foreclosing lender is acting "primarily to protect its security interest" and is within the secured creditor exemption, EPA considers that the ownership of the property remains with the borrower for purposes of the CERCLA lien provision. See 42 U.S.C. §9607(1).

⁵ In this context (a secured lender's actions with respect to a non performing loan), a lender is not considered to be acting as expeditiously as possible if the lender never seeks to foreclose or otherwise acquire the collateral securing the loan, or delays foreclosure for an unreasonable length of time once the loan is non performing, in light of all relevant facts and circumstances.

⁶ See Guidance on Landowner Liability Under Section 107(a)(1) of CERCLA, De Minimis Settlements Under Section 122(g)(1)(B) of CERCLA, and Settlements With Prospective Purchasers of Contaminated Property, 54 Fed. Reg. 34235 (Aug. 18, 1989).

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()
(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.

Senator Pat Rodey

May 1, 1991

Page 2

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

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPT. OF ENVIRONMENTAL CONSERVATION

OFFICE OF THE COMMISSIONER
P.O. BOX 0, JUNEAU, ALASKA 99811-1800

TELEPHONE
(907) 465-2600

POSITION PAPER SB 154

SB 154 would exempt lending institutions and fiduciaries from liability for environmental damage. Even those fiduciaries who have been involved in the control or management of the facility or vessel responsible for the damage would not be liable. Because the potential for liability is believed to lead to better facility management, the Department does not support this limitation. The Department would support both a definition of "management" of a facility or vessel as well as the development of professional standards for environmental audits by the private sector. In that way, just as a structural engineer examines for the lending institution a building's structure, a private environmental engineer would examine the property's environmental condition.

Section Three would limit the responsible party's assets which the State could attach for expenditures from the Oil and Hazardous Substance Release Response Fund. Under this language, the State would only be able to look to the value of the real property which was the subject of the remediation for satisfaction of the responsible party's debt to the State. Currently, the State may look to all assets owned by the responsible party. Without that ability, it is expected that the Department would encounter difficulty in recovering Response Fund costs, and thus the Department does not support this provision.

Section Five in part repeals AS 46.03.822(b)(2) which limits the liability of an owner and operator for damage caused by an unrelated third party or an act of God so long as the owner or operator discovered the hazardous substance and began containment and cleanup within a "reasonable period of time." The Department does support this repeal.



John A. Sandor
Commissioner

WALTER J. HICKEL, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

May 3, 1991

The Hon. Pat Rodey
Alaska State Senator
P. O. Box V
Juneau, AK 99811-3100

Re: CSSB 154

Dear Senator Rodey:

Your office has asked us to review the 4/23/91 work draft of CSSB 154, relating to liability of financial institutions for environmental damage.

As you know, we have reviewed earlier versions of the bill. The 4/23/91 work draft contains virtually all of the problems that existed in prior drafts.

*** Section two would immunize - not merely remove from strict liability - financial institutions in a variety of situations. Even if the policy judgment is made that strict liability should not apply in certain situations involving financial institutions, there is no apparent reason to completely immunize the institutions from liability for their own negligent or intentional acts which caused harm to others or expense to the public.

*** The list of situations (sec. 2) in which financial institutions would receive immunity is so broad that it amounts to a general immunizing of almost all actions regarding land in which the institutions claim a security interest or other interest; it goes far beyond the original rationale for giving relief to such institutions, that they should not have to bear liability for problems which were encountered involuntarily and without fault.

*** The list is stated in the alternative, so that the limitation in proposed AS 46.03.825(a)(3), limiting liability where the institution does not exercise control over the property, does not apply to the other situations listed. For example, an institution may acquire a property through foreclosure; under (a)(1), that fact alone would immunize the institution from liability even if it actively managed the property and even if it knowingly or negligently caused the hazardous substance problem. Likewise, an institution acquiring property as a lessor under an extension of credit arrangement, or acquiring as a fiduciary (an extremely broad category) would be free to manage the property and free to

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FAX: (907) 276-3697

1st NATIONAL CENTER
100 CUSHMAN ST. SUITE 400
FAIRBANKS, ALASKA 99701-4679
PHONE: (907) 452-1568
FAX: (907) 456-1317

P.O. BOX K—STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 463-5295

cause a hazardous substance problem with no liability whatsoever. Note that these are situations in which the bank would have placed itself freely and voluntarily. There is no apparent justification for permitting a lending institution to immunize itself from all liability for the way in which it itself manages property, when its own actions harm either neighboring properties, neighboring people, or create a situation requiring expenditure of state or local funds to protect the public.

*** Subsection (a)(3) in the list in Section 2 implies that immunity is available to an institution with financial control under an extension of credit, only if it does not exercise managerial control. But the apparent limitation is illusory because the immunity applies unless the institution exercises "actual, direct, and continual managerial control that materially divests the borrower . . . of control..." In effect this means that if the institution's control is not constant, e.g., if it only steps in periodically, even if it actually orders actions which cause hazardous substance releases, it has no liability; and if its control is indirect, i.e., if it acts only through some intermediary such as a contractor, even if it orders the contractor to act in a way that harms others, it would bear no liability. And even if the institution's control were direct and continual, as long as the borrower retained some control itself and were not actually totally divested of it, it would bear no immunity. In short there is unlikely ever to be a situation in which an institution would have to bear the consequences of its own actions regarding such property.

*** Proposed AS 46.03.825(b) would limit the ability of the state to recover its response costs from a financial institution to the "actual benefit received" by the institution. This runs counter to the notion that the measure of damages when a party has caused harm to others is the amount of the harm, i.e., what it would take to make the injured party whole. There is no principle that a responsible party should never have to incur a net loss when the state has to step in to protect the public health. In essence this calls for the public treasury to subsidize the institutions' liabilities. The section goes even further, by limiting the reimbursement to the fair market value of the facility. It is common for a hazardous waste problem to cause property to have a negative value; therefore this section would decree that if the problem for which the institution is responsible is bad enough, it would not have to pay anything when the state steps in to prevent it from doing further harm to the public. This provision is analogous to the provision in federal law which limits liability of vessel owners for damages caused by the vessel to the remaining value of the vessel, even if it is zero. Congress removed this limitation of liability as it applies to oil spills last year in the Oil Pollution Act of 1990. This

The Hon. Pat Rodey
Alaska State Senator

May 3, 199
Page 3

provision would reinstate, for both vessels and real property, a limitation on liability which has been universally condemned as archaic and unjust.

*** Section 3 would limit the state's existing statutory lien for its response costs to the vessel or property from which the release came. The result would be that the State could not recover its response costs where the property has become valueless or has been destroyed by the responsible party's own actions. When the legislature passed the existing lien law it carefully considered whether the lien should extend to all property of the responsible party, and it concluded that it was only fair to require the party -- not some damaged vessel or land -- to repay the state's costs in responding to the problem for which the party is legally responsible. In short, this provision is another way of immunizing a responsible party from paying for damages even when it is, in a technical sense, liable.

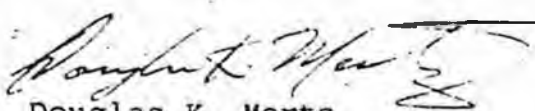
*** Section 5 would repeal the existing provision at AS 46.08.075(e) which permits a property owner, subject to a lien for response costs, to get an adjudication releasing that person's interest from lien upon a showing that the person is not liable. It is not clear why the banks desire this section repealed, but it may be that the banks want all people with an ownership interest in property from which there has been a release to remain subject to the lien along with the bank, so that the bank has leverage against its co-owners. Since this section applies only to persons who can demonstrate lack of liability, a repeal seems particularly unfair.

*** Section 6 would make the provisions limiting liability of institutions retroactive, so that it would apply even when the banks exercised control over the property before the act's effective date; in other words the provision would shift the burden for past situations in which the banks may be liable to other parties or to the taxpayers.

Let us know if we can be of further assistance.

Sincerely yours,

CHARLES E. COLE
ATTORNEY GENERAL

By: 
Douglas K. Mertz
Assistant Attorney General

DKM:tg

Patrick M. Rodey
Senator

Alaska State Legislature



Senate

311 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

SB 154 relates to the strict liability provisions enacted into the state's environmental laws in the spring of 1989. 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 purpose of SB 154 is to eliminate the possibility that a lending institution which forecloses on property that is contaminated with hazardous waste, be liable for the cost of a clean-up, even if the lender 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.

Sections 1 and 2 of the bill exempt designated lending and fiduciary institutions from the definition of "owner" or "operator", or person in "possession" of contaminated property as those terms are used in the strict liability provision of AS 46.03.822.

Sections 3 and 4 clarify the rights of the state to place a lien on real property which the state has had to clean up with state funds. Present law would allow the state to lien ALL PROPERTY of a liable person, including property in no way subject to or affected by the state's lien to the affected property. Section 4 clarifies that the priority of the state's lien is from the date of recording, which is the interpretation being given to present law despite its lack of clarity.

Section 5 of the bill eliminates the unclear language of the existing state lien provisions contained in AS 46.08.075 (e), which are replaced by Section 4 of the bill. Section 5 would also try to revive the exemption from liability contained in AS 46.03.822(b), by eliminating subpart (2) of that section which contains the requirement that a totally innocent person DISCOVER contamination AND begin operations to clean it up. This subpart (2) is not a requirement of federal law, and destroys the exemption to liability otherwise contained in AS 46.03.822(b) by imposing a duty to clean contamination in no way caused by an innocent party.

SB 154 does not address all the environmental problems facing the lending industry, however, it is a good way for the legislature to begin to study and address the problems created by the sweeping and unclear language contained in the present strict liability provisions of AS 46.03.822.

Patrick M. Rodey
Senator

Alaska State Legislature



Senate

314 C. St., Suite 510
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(907) 561-7618

During Session:
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Juneau, Alaska 99811
(907) 465-3793

MEMORANDUM

DATE: March 9, 1991

TO: Senator Lloyd Jones, Chair
Senate Resources Committee

FROM: Senator Pat Rodey *Pat*

SUBJ: Request for Hearing - SB 154

I respectfully request a hearing in the Senate Resources Committee for SB 154, relating to liability for environmental damage, and to liens arising from environmental damage.

The bill has three main objectives. One is to eliminate a state requirement that an innocent third party take responsibility for containment and cleanup of hazardous substance contamination.

The second is to provide an exemption from liability for lending and fiduciary institutions who take title or control through bankruptcy, foreclosure, tax delinquency or abandonment action.

The third objective is to clarify and limit the state's environmental lien provision.

I would appreciate the earliest possible scheduling of SB 154 before the committee.

PMR/tb/memo03

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPT. OF ENVIRONMENTAL CONSERVATION

OFFICE OF THE COMMISSIONER
P.O. BOX 0, JUNEAU, ALASKA 99811-1800

TELEPHONE
(907) 465-2600

POSITION PAPER SB 154

SB 154 would exempt lending institutions and fiduciaries from liability for environmental damage. Even those fiduciaries who have been involved in the control or management of the facility or vessel responsible for the damage would not be liable. Because the potential for liability is believed to lead to better facility management, the Department does not support this limitation. The Department would support both a definition of "management" of a facility or vessel as well as the development of professional standards for environmental audits by the private sector. In that way, just as a structural engineer examines for the lending institution a building's structure, a private environmental engineer would examine the property's environmental condition.

Section Three would limit the responsible party's assets which the State could attach for expenditures from the Oil and Hazardous Substance Release Response Fund. Under this language, the State would only be able to look to the value of the real property which was the subject of the remediation for satisfaction of the responsible party's debt to the State. Currently, the State may look to all assets owned by the responsible party. Without that ability, it is expected that the Department would encounter difficulty in recovering Response Fund costs, and thus the Department does not support this provision.

Section Five in part repeals AS 46.03.822(b)(2) which limits the liability of an owner and operator for damage caused by an unrelated third party or an act of God so long as the owner or operator discovered the hazardous substance and began containment and cleanup within a "reasonable period of time." The Department does support this repeal.



John A. Sandor
Commissioner

Post-It™ brand fax transmittal memo 7671 # of pages 2

To Tim Rodley	From Janice
Co.	Co. DEC
Dept.	Phone #
Fax # 463-3144	Fax #

AlaskaUSA

Federal Credit Union

TO: Senator Pat Rodey

DATE: March 18, 1991

FROM: William B. Eckhardt
President

SUBJECT: ~~Senate Bill 154~~

From a lenders standpoint, the factor which creates a greater potential for loss than either market risk or credit risk, is the risk associated with environmental contamination. Under various laws, a lender can be held liable for the cost of cleanup of contaminated properties. While these environmental laws are extremely complex, liability for clean up is very simple. Regardless of who contaminated the property, the current owner of the property, which a lender becomes through the foreclosure process, is financially responsible for cleanup and damages. While there are methods that can be used to limit lender liability when originating a real estate loan, there is no way to guarantee that during the term of the loan the property value will not be impaired by contamination. If an individual property owner is not financially capable of cleaning up a property, the government can clean the property and file a superior lien for their incurred costs.

Both federal and state environmental laws, as currently written, have severely curtailed or eliminated sources of credit for real estate related transactions. In fact, Alaska USA discontinued granting real estate loans in October of 1989 directly as a result of environmental laws. Prior to that time, the credit union granted \$50 million in real estate loans each year. We feel the availability of credit for real estate-related purposes is an essential part of the economy, without which property values will remain depressed and economic development will be adversely affected.

The criticism of Senate Bill 154, and other proposed legislation on the federal level, is that if lenders are not held responsible for cleanup, then widespread lending to potential polluters will occur. This simply will not happen. If a lender were to blindly extend credit to such potential polluters, they risk the borrower defaulting on the loan because of the ultimate cost of cleanup and additionally risk the loss of the collateral's value if the property is left contaminated. Today, the financial services industry and their regulators are ultra-sensitive to real estate loan losses. The potential extension of credit, as the criticism suggests, would be financially irresponsible and certainly invoke regulatory sanctions.

Currently, prudent lending requires not only the traditional appraisal, title insurance, etc., but also site assessments 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 to ever have economic value, it must be ultimately cleaned. Without third-party lending and the related requirement for site assessments, contaminated properties could go undetected and unreported, and continue to pollute the environment for years.

The proposed changes to existing laws with regard to lender liability will encourage the active involvement of financial institutions in real estate lending. Through required site assessments, financial institutions can assist in the identification of contaminated properties and in policing of the environment. This participation, however, will not occur if lender liability for cleanup remains as currently written. Consequently, we feel it is in the best interest of the environment, the economy, and the people of Alaska that Senate Bill 154 be passed this session.

Section 1. AS 46.03.822 (c) is amended to read:

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

(1) at the time the person acquired the facility the person did not know and had no reason to know that a hazardous substance that is the subject of the release or threatened release was disposed of on, in, or at the facility;

(2) the person is a governmental entity that acquired the facility by escheat, or through another involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation;

(3) the person is a corporation organized under 43 U.S.C. 1601-1629e (Alaska Native Claims Settlement Act) that acquired the facility under those sections;

(4) the person acquired the facility by inheritance or bequest;
[or]

(5) the person is a state governmental entity and the state acquired the facility under Public Law 85-508 (Alaska Statehood Act)[.]; or

(6) the person's interest in the facility arose as a lender to a person owning or controlling the facility or arose as a security holder in the facility, and the person has not controlled, managed, or influenced the operations at or on the facility, whether or not it had the capacity to do so.

define lender

Mr. Chairman, I am pleased to introduce S.B. 154 and recommend its passage by the Senate. The bill relates to the strict liability provisions enacted into the state's environmental laws in the spring of 1989, shortly after the Exxon Valdez tragedy.

The bill the state legislature enacted in 1989 (H.B. 68) was patterned after the strict liability provisions of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §9601 et seq., known as the law that established the "Superfund". Just as the federal Congress and the Environmental Protection Agency now are re-thinking whether the strict liability provisions of federal law should be applied to the lending industry, I believe it is time for the state legislature to analyze the effect that the state strict liability statute has had and will have upon the lending institutions and the availability of credit in Alaska. It is time for us to address the serious questions and solve the problems that our state law provisions have created, before the effect is to seriously jeopardize the availability of credit.

The purpose of S.B. 154 is to eliminate the possibility that a lending institution, that forecloses upon property which is contaminated with hazardous waste, may be liable for the cost of cleaning up the contamination, even if the lender in no way caused or contributed to the contamination. Likewise, the trust companies of banking institutions should not be required to pay for a cleanup of contaminated properties they merely hold in trust for beneficiaries of estates and trust funds. Under present law, a person merely holding title to contaminated property may be liable for a cleanup, even if that title is held in trust for others.

Sections 1 and 2 of the bill exempt designated lending and fiduciary institutions from the definition of "owner", "operator", or person in "possession" of contaminated property, as those terms are used in the strict liability provision of AS 46.03.822.

Sections 3 and 4 of S.B. 154 clarify the rights of the state to place a lien on real property the state has had to clean up with state funds. Present law would allow the state to lien

all property of a liable person, including property in no way subject to or affected by the state's clean up activities. Section 3 would limit the state's lien to the affected property. Section 4 clarifies that the priority of the state's lien is from the date of recording, which is the interpretation being given to present law despite its lack of clarity.

Section 5 of S.B. 154 eliminates the unclear language of the existing state lien provisions contained in AS 46.08.075(e), which are replaced by Section 4 of the bill.

Section 5 also would try to revive the exemption from liability contained in AS 46.03.822(b), by eliminating subpart (2) of that section which contains the requirement that a totally innocent person discover contamination and begin operations to clean it up. This subpart (2) is not a requirement of federal law, (see 42 USC §9607(b)) and destroys the exemption to liability otherwise contained in AS 46.03.822(b), by imposing a duty to cleanup contamination in no way caused by an innocent party.

Mr. Chairman, S.B. 154 does not address all the environmental problems facing the lending industry. I wish that it did. But S.B. 154 is a good way for the legislature to begin to study and address the problems created by the sweeping and unclear language contained in the present strict liability provisions of AS 46.03.822.

FISCAL NOTE

**STATE OF ALASKA
1991 LEGISLATIVE SESSION**

BILL NO. SB 154

Revision Date: _____
 Title: Liability and liens for
Environmental Damage
 Sponsor: Senator Rodey
 Requestor: Senator Rodey

Department Affected: DEC
 BRU: Environmental Quality
 Component: EQ Projects

COMPONENT SERIAL NO. 1 1 0 1 1 6

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
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						
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FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
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 sites for which the State would become responsible for cleaning up would be expected to increase. However, estimating those costs to the State at this time is not possible.

Prepared by: Janice Adair
 Division: Commissioner's Office

Phone: 465-2600
 Date: 3-15-91

Approved by Commissioner: *Michael J. Dunbar*
 Agency: Dept. of Environmental Conservation

Date: 3/18/91

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

Environmental Damage
(liability for/liens arising
out of)

SENATE BILL NO. 154, by Senator RODEY. Relates to liability for environmental damage and to liens arising from environmental damage:

-Amends AS 46.03.826(8) (Environmental Conservation. Definitions), the definition of "owner" and "operator" by adding language to read: "(8) 'owner' and 'operator' ... (B) do not include ... (ii) a designated lending institution that acquires ownership or control of the facility or vessel under the terms of a security interest held by the institution in the facility or vessel; (iii) a corporation that in a fiduciary capacity has legal title to a facility or vessel for the purpose of administering an estate or trust of which the facility or vessel is a part or does not have legal title to a facility or vessel but operates or manages the facility or vessel under the terms of an estate or trust of which the facility or vessel is a part; (iv) an individual who in a fiduciary capacity has legal title to a facility or vessel for the purpose of administering an estate or trust of which the facility or vessel is a part; (v) an indenture trustee for debt securities or for a certificate of interest or participation in debt securities that acquires ownership or control of a facility or vessel as the result of a default under the terms of the indenture agreement, or similar financing document, between the trustee and the entity issuing the debt securities or certificates of interest or participation; (vi) a designated lending institution that acquires ownership of a facility or vessel in connection with a lease subject to regulation by federal or state banking authorities."

-Amends AS 46.03.826(14) (Environmental Conservation. Definitions), by adding a definition of "designated lending institution;" and "possessed" or "possession" as those terms apply to the new language added to the definition of "owner" and "operator."

-Amends AS 46.08.075(a) (Oil and Hazardous Substance Releases. Liens Against Property as Security for State Expenditures) to read: "(a) The state has a lien for expenditures by the state from the oil and hazardous substance release response fund or from any other state fund, for the costs of response, containment, removal, or remedial action resulting from an oil or hazardous substance spill, or, with respect to response costs, the substantial threat of a release of oil or a hazardous substance against all real property that is owned by a person who is determined by the commissioner to be liable for the expenditures under this chapter, AS 46.03, AS 46.04, 42 U.S.C. 9607, or other state or federal law, and that is subject to or affected by a removal or remedial action. ..." (underlined language added to current law).

LEGISLATIVE REPORTING SERVICE
REPORT # 6)
MARCH 4, 1991,
Pgs. 297-298

Adds a new subsection to AS 46.08.075 (Oil and Hazardous Substance Releases. Liens Against Property as Security for State Expenditures) to provide: "(f) The lien imposed by 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 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 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 this section is filed."

-Repeals AS 46.03.822(b)(2) (Environmental Conservation. Strict Liability for the Release of Hazardous Substances), subsection (b)(2) provides: "(b) In an action to recover damages or costs, a person otherwise liable under this section is relieved from liability under this section if the person proves ... (2) in relation to (1)(B) or (C) of this subsection, that the person, within a reasonable period of time after the act occurred, (A) discovered the release or threatened release of the hazardous substance; and (B) began operations to contain and clean up the hazardous substance."

-Repeals AS 46.08.075(e) (Oil and Hazardous Substance Releases. Liens Against Property as Security for State Expenditures), subsection (e) provides: "(e) A person with an ownership interest in property against which a lien is recorded may bring an action in a court of competent jurisdiction to require that the lien be released. The lien may be released to the extent of that person's ownership interest if the court finds that the person is not liable for the expenses incurred by the state in connection with the costs of response, containment, removal, or remedial action resulting from the oil or hazardous substance release or threat of release of oil or a hazardous substance."

Introduced March 1, 1991 and referred to Resources; Judiciary.

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

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Court Plaza, Room 500
Mail Stop 3101

MEMORANDUM

March 12, 1991

SUBJECT: Sectional analysis of SB 154 (W.O. 7-LS0716\A)

TO: Senator Pat Rodey
Attn: Tim

FROM: Theresa L. Bannister *TB*
Legislative Counsel

You have requested a sectional analysis of the above described bill.

As a preliminary matter, note that a sectional analysis 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 adds a list of individuals and entities that are not considered "owners" or "operators" under AS 46.03.822 - 46.03.828, the sections addressing strict liability for the release of hazardous substances.

Section 2 defines "designated lending institution", which appears in the description of some of the entities added by sec. 1. Also defines "possessed" and "possession".

Section 3 qualifies the type of property that is subject to a lien by the state for certain oil/hazardous substance response expenditures. States that the property must be real property and that it must be property that is subject to or affected by a removal or remedial action.

Section 4 states that the lien imposed by AS 46.08.075(a) is subject to the rights of certain entities if the rights are perfected before the notice of the lien is filed. Gives these perfected rights the same protection against the lien as would be provided against a judgment lien that arises out of an unsecured obligation and that arises at the same time as the notice of the lien.

Section 5 repeals certain statutory provisions.

If I may be of further assistance, please advise.

TLB:gc:pl
91-139.glc

S B

166

SENATE COMMITTEE REPORT

FIRST COMMITTEE OF REFERENCE

DATE: 3/6/91

FURTHER: Finance

Date of 5-Day Notice: _____
(in accordance with Uniform Rule 23)

DATE TURNED
INTO OFFICE: _____

Resources Committee considered SB 166

Rejecting the Susitna Basin Recreational Rivers Management Plan submitted by the commissioner of natural resources; efd.

and recommended:

- replace with _____ CS _____ same title
- attached amendment(s) new title
- _____ 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) _____

Dept/Date
 zero fiscal note(s) _____

appropriation-no fiscal note

Governor's bill w/fiscal note

SIGNING DO PASS:

OTHER RECOMMENDATIONS:

Chair: Signature and Recommendation



Alaska State Legislature

SENATE

Office of the Majority Leader

Senator Rick Halford

Official Business

P.O. Box V
State Capitol
Juneau, Alaska 99811

M E M O R A N D U M

TO: Senator Lloyd Jones, Chair
Senate Resources Committee

FROM: Senator Rick Halford *Rick Halford*

DATE: May 6, 1991

RE: Request to Schedule SB 166

I respectfully request that SB 166, an act rejecting the Susitna Basin Recreational Rivers Management Plan submitted by the commissioner of natural resources, be scheduled for a hearing in the Senate Resources Committee at the earliest possible opportunity. This plan establishes unnecessary and unjustified prohibitions for motorized vehicles and the legislature should reject it as provided by AS 41.23.440(a), The Recreation Rivers Act.

The Recreation Rivers Act states (41.23.420(c)), "The commissioner may regulate boating, if necessary, under the Management Plan adopted under AS 41.23.440." Any "necessity" to ban motorized vehicles, including aircraft, has not been established for five of the six rivers affected by the plan. There is no evidence the restrictions are necessary for safety or environmental reasons, nor reasonable for the traditional recreational activities enjoyed in the area.

In fact, testimony taken at the eight public meetings held on the "Public Review Draft, September 1990," was overwhelmingly opposed to non-motorized areas (over 90% in Anchorage, Wasilla and Willow). DNR notes from the Advisory Meetings show that letters and petitions totalled more than 4100 individuals opposed to non-motorized areas while only 67 supported. In addition, the Advisory Board opposed the restrictions 7 to 4.

A fiscal note from DNR is attached, as well as back-up material.

Thank you for your consideration of this request.

**STATE OF ALASKA
1991 LEGISLATIVE SESSION**

BILL NO. SB 166

Revision Date: _____ Department Affected: Natural Resources
 Title: An Act Rejecting Susitna Rec. BRU: Land & Water
Rivers Management Plan Components: Land & Water
 Sponsor: Senator Halford
 Requestor: Senator Halford COMPONENT SERIAL NO. 431

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES	64.7					
TRAVEL	3.5					
CONTRACTUAL	25.0					
SUPPLIES	1.0					
EQUIPMENT						
LAND&STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	94.2	0.0	0.0	0.0	0.0	0.0

CAPITAL						
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REVENUE						
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FUNDING: (Thousands of Dollars)

GENERAL FUND	94.2					
FEDERAL FUNDS						
OTHER						
TOTAL	94.2	0.0	0.0	0.0	0.0	0.0

POSITIONS:

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

Estimate of Current year impact: None

ANALYSIS: (Attach a separate page if necessary)
 See Analysis

Prepared by: Ron Swanson Phone: 762-2680
 Division: Land & Water Date: 16-Apr-91

Approved by Commissioner: Harold Heinze Date: 16-Apr-91
 Agency: Department of Natural Resources

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

SB 166 changes the Recreation Rivers Act so that powerboats cannot be prohibited. Since there are some non-motorized river segments in the current plan, it will have to be revised. The plan revision process will take 6 months. To revise the plan, the Act requires at least two public meetings in each affected community (16 meetings total); notification of all property owners; involvement of the 13-member advisory board, state agencies, and local governments; and a 30 day public notice period.

The planning staff will be responsible for developing and conducting the public participation program, organizing planning team and advisory board meetings, drafting and distributing a draft and final plan, and briefing the commissioner's offices, governor's office and legislature on the planning process.

6 months positions:

NRM I	18/A	27.3
	Contractual	<u>2.2</u>
	Total	29.5
NRO II	16/A	24.1
	Contractual	<u>2.2</u>
	Total	26.3
CT III	8/A	7.8
	Contractual	<u>1.1</u>
	Total	8.9



Alaska Boating Association

P.O. Box 210430
Anchorage, Alaska 99521

Don Sherwood, President
(907) 333-6268

The Susitna Basin Recreation Rivers Management Plan has been transmitted to the Alaska Legislature by the Commissioner of the Department of Natural Resources as required by the Recreation Rivers Act (AS 41.23.440).

The Alaska Boating Association, representing the largest user group of the Recreation Rivers, respectfully requests that the Alaska Legislature modify the submitted plan to eliminate all reference to "non-motorized" areas, or reject the plan entirely.

The single largest user group of these rivers are those individuals seeking recreation opportunities utilizing motorized craft, primarily powerboats, but also including aircraft, off-road and all-terrain vehicles.

According to documents prepared by the National Park Service, in 1989, "... 621 floaters and 2,733 [powerboaters] users per year", were counted on a representative river section (Little Susitna).

The overwhelming testimony and comments in response to the "Public Review Draft, September 1990" were opposed to the "non-motorized" provisions.

The "Summary of Comments on Boating, November 14, 1990" prepared by DNR stated, "At these three meetings [Anchorage, Wasilla, and Willow], most (over 90%) of the people who spoke opposed non-motorized areas."

In, "Public Comments on the Draft Plan, November 1990, and January 1991", letters regarding "non-motorized" areas received from the Planning Team, Advisory Board, Organizations, Companies, and the Public numbered approximately 260 and divided almost evenly "for non-motorized" and "opposed to non-motorized" areas.

However, "Form Letters and Petitions" totalled 4,129 individuals, "opposed to non-motorized" areas. None were received in favor.

The proposed Recreation Rivers Management Plan excludes the single largest user group from the prime of the recreational river systems.

The proposed Recreational Rivers Plan ignores the overwhelming response to the proposed "non-motorized" areas.

The "Susitna Basin Recreation Rivers Management Plan, January 1991" should be modified to remove the "non-motorized" areas, or should be rejected by the Alaska Legislature for failing to accommodate the needs of the largest user groups and for ignoring the overwhelming response to the plan.

February 4, 1991

See map on reverse

SUSITNA BASIN RECREATION RIVERS MANAGEMENT PLAN

