



LAWS OF ALASKA

1989

Source

SCS CSHB 68(Jud)

Chapter No.

39

AN ACT

Relating to liability for the release or threatened release of a hazardous substance; recovery of state costs for an oil or hazardous substance release; liability of response action contractors; and providing for an effective date.

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

THE ACT FOLLOWS ON PAGE 1, LINE 12

UNDERLINED MATERIAL INDICATES TEXT THAT IS BEING ADDED TO THE LAW AND BRACKETED MATERIAL IN CAPITAL LETTERS INDICATES DELETIONS FROM THE LAW; COMPLETELY NEW TEXT OR MATERIAL REPEALED AND RE-ENACTED IS IDENTIFIED IN THE INTRODUCTORY LINE OF EACH BILL SECTION.

Approved by the Governor: May 12, 1989
Actual Effective Date: May 13, 1989

AN ACT

Relating to liability for the release or threatened release of a hazardous substance; recovery of state costs for an oil or hazardous substance release; liability of response action contractors; and providing for an effective date.

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

(60) a certificate relating to a lien under AS 46.08.075.

* Sec. 2. AS 46.03.822 is repealed and reenacted to read:

Sec. 46.03.822. STRICT LIABILITY FOR THE RELEASE OF HAZARDOUS SUBSTANCES. (a) Notwithstanding any other provision or rule of law and subject only to the defenses set out in (b) of this section and the exception set out in (i) of this section, the following persons are strictly liable, jointly and severally, for damages to persons or property, whether public or private, including damage to the natural resources of the state or a municipality, and for the costs of response, containment, removal, or remedial action incurred by the state or a municipality, resulting from an unpermitted release of a hazardous substance or, with respect to response costs, the substantial threat of an unpermitted release of a hazardous substance:

(1) the owner of, and the person having control over, the hazardous substance at the time of the release or threatened release; this paragraph does not apply to a consumer product in consumer use;

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

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

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

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

22 (b) In an action to recover damages or costs, a person otherwise
23 liable under this section is relieved from liability under this sec-
24 tion if the person proves

25 (1) that the release or threatened release of the hazardous
26 substance to which the damages relate occurred solely as a result of

27 (A) an act of war;

28 (B) except as provided under AS 46.03.823(c), an
29 intentional or negligent act or omission of a third party, other

than a party or its agents in privity of contract with, or employed by, the person, and that the person

(i) exercised due care with respect to the hazardous substance; and

(ii) took reasonable precautions against the act or omission of the third party and against the consequences of the act or omission; or

(C) an act of God; and

(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.

(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

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1 facility by escheat, or through another involuntary transfer or acqui-
2 sition, or through the exercise of eminent domain authority by pur-
3 chase or condemnation;

4 (3) the person is a corporation organized under 43 U.S.C.
5 1601 - 1628 (Alaska Native Claims Settlement Act) that acquired the
6 facility under those sections;

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

9 (5) the person is a state governmental entity and the state
10 acquired the facility under Public Law 85 - 508 (Alaska Statehood
11 Act).

12 (d) To establish that a person had no reason to know that the
13 hazardous substance was disposed of on, in, or at the facility, as
14 provided in (c)(1) of this section, the person must have undertaken,
15 at the time of acquisition, all reasonable inquiries into the previous
16 ownership and uses of the property consistent with good commercial or
17 customary practice in an effort to minimize liability. For purposes
18 of this subsection a court shall take into account all relevant facts,
19 including

20 (1) any specialized knowledge or experience the person has;

21 (2) the relationship of the purchase price to the value of
22 the property if it were uncontaminated;

23 (3) commonly known or reasonably ascertainable information
24 about the property;

25 (4) the obviousness of the presence or likely presence of
26 contamination at the property; and

27 (5) the ability to detect contamination by appropriate
28 inspection.

29 (e) This section does not diminish the liability of a person who

previously owned or operated a facility or vessel and who would otherwise be liable. If the person obtained actual knowledge of the release or threatened release of a hazardous substance at the facility or vessel and subsequently transferred ownership to another without disclosing that knowledge, the person is liable under (a)(2) of this section, and a defense under (b)(1)(B) of this section is not available to the person.

(f) This section does not diminish the liability of a person who, by an act or omission, caused or contributed to the release or threatened release of a hazardous substance that is the subject of the action relating to the facility or vessel.

(g) An indemnification, hold harmless, or similar agreement, or conveyance of any nature is not effective to transfer liability under this section from the owner or operator of a facility or vessel or from a person who might be liable for a release or substantial threat of a release under this section. This subsection does not bar an agreement to insure, hold harmless, or indemnify a party to the agreement for liability under this section. This subsection does not bar a cause of action that an owner, operator, or other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against another person.

(h) The state or a municipality is not liable under this section for costs or damages as a result of actions taken in response to an emergency created by a release or threatened release of a hazardous substance generated by or from a facility or vessel owned by another person unless the actions taken by the state or municipality constitute gross negligence or intentional misconduct.

(i) In an action to recover damages and costs, a person otherwise jointly and severally liable under this section is relieved of

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1 joint liability and is liable severally for damages and costs attrib-
2 utable to that person if the person proves that

3 (1) the harm caused by the release or threatened release is
4 divisible; and

5 (2) there is a reasonable basis for apportionment of costs
6 and damages to that person.

7 (j) A person may seek contribution from any other person who is
8 liable under (a) of this section during or after a civil action under
9 (a) of this section. Actions under this subsection shall be brought
10 under the Alaska Rules of Civil Procedure and are governed by state
11 law. In resolving claims for contribution under this section, the
12 court may allocate damages and costs among liable parties using equi-
13 table factors determined to be appropriate by the court. This subsec-
14 tion does not diminish the right of a person to bring an action for
15 contribution in the absence of a civil action under (a) of this sec-
16 tion.

17 * Sec. 3. AS 46.03 is amended by adding a new section to read:

18 Sec. 46.03.823. HAZARDOUS SUBSTANCE RESPONSE ACTION CONTRACTORS.

19 (a) A person who is a response action contractor with respect to a
20 release or threatened release of a hazardous substance is not civilly
21 liable for injuries, costs, damages, expenses, or other liability that
22 results from the release or threatened release unless the release or
23 threatened release is caused by an act or omission of the response
24 action contractor that is negligent or grossly negligent or consti-
25 tutes intentional misconduct. To show negligence by a response action
26 contractor, a claimant must show that the acts or omissions of the
27 contractor under the response action contract were not in accordance
28 with generally accepted professional standards and practices at the
29 time the response action services were performed.

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(b) The liability limitation under (a) of this section does not apply to a response action contractor who would otherwise be strictly liable under this section.

(c) The defense provided in AS 46.03.822(b)(1)(B) is not available to a potentially liable person with respect to costs or damages caused by an act or omission of a response action contractor.

(d) Except as provided in (c) of this section, this section does not affect the liability under this chapter or under any other state law of a person other than a response action contractor.

(e) This section does not affect the liability of a response action contractor that may arise from the response action contractor's failure to comply with the terms or conditions of a response action contract or a remedial action plan if one has been approved by the department.

(f) This section does not affect the liability of an employer who is a response action contractor with respect to an employee of the employer under any provision of law, including a law related to workers' compensation.

(g) In this section,

(1) "response action" means an action taken in connection with the mitigation or cleanup of a hazardous substance release or threatened release, including investigation, evaluation, plan development, mapping and surveying, engineering, design and construction, removal, and equipment provision;

(2) "response action contract" means a written contract or agreement to provide response action with respect to a release or threatened release of a hazardous substance, entered into by a person with

(A) the department; or

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(B) another person who has entered into an agreement with the department that provides for response action subject to the department's oversight and control;

(3) "response action contractor" means

(A) a person who enters into a response action contract with respect to a release or threatened release of a hazardous substance and who is carrying out the contract; and

(B) a person who is retained or hired by and is under the control of a person described in (A) of this paragraph to provide services related to the response action contract.

* Sec. 4. AS 46.03.826(3) is amended to read:

(3) "having control over a hazardous substance" means producing, handling, storing, transporting, or refining a hazardous substance for commercial purposes immediately before entry of the hazardous substance into the atmosphere or in or upon the water, surface, or subsurface land of the state, and specifically includes bailees and carriers of a hazardous substance;

* Sec. 5. AS 46.03.826(4) is amended to read:

(4) "hazardous substance" means

(A) an element or compound which, when it enters into the atmosphere or in or upon the water or surface or subsurface land of the state, presents an imminent and substantial danger to the public health or welfare, including but not limited to fish, animals, vegetation, or any part of the natural habitat in which they are found; [OR]

(B) oil; or

(C) a substance defined as a hazardous substance under 42 U.S.C. 9601(14);

* Sec. 6. AS 46.03.826 is amended by adding new paragraphs to read:

(8) "facility"

(A) includes a

(i) building, structure, installation, equipment, well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, aircraft, or pipe or pipeline, including a pipe into a sewer or publicly-owned treatment works;

(ii) site or area at which a hazardous substance has been deposited, stored, disposed of, placed, or otherwise located;

(B) does not include any consumer product in consumer use;

(9) "natural resources" means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the state or a municipality;

(10) "owner" and "operator"

(A) mean

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

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

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

(iv) in the case of a facility or vessel, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a

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1 unit of the state or a political subdivision of the state,
2 any person who owned, operated, or otherwise controlled the
3 facility or vessel immediately beforehand;

4 (B) do not include a person who, without participating
5 in the management of a vessel or facility, holds indicia of
6 ownership primarily to protect that person's security interest in
7 the vessel or facility;

8 (11) "release" means any spilling, leaking, pumping, pour-
9 ing, emitting, emptying, discharging, injecting, escaping, leaching,
10 dumping, or disposing into the environment, including the abandonment
11 or discarding of barrels, containers, and other closed receptacles
12 containing any hazardous substance, but excluding

13 (A) any release that results in exposure to persons
14 solely within a workplace, with respect to a claim that those
15 persons may assert against the persons' employer; and

16 (B) emissions from the engine exhaust of a motor
17 vehicle, rolling stock, aircraft, or vessel;

18 (12) "transport" means the movement of a hazardous substance
19 by any mode, including pipeline; in the case of a hazardous substance
20 that has been accepted for transportation by a common or contract
21 carrier, "transport" includes any stoppage in transit that is tempo-
22 rary, incidental to the transportation movement, and at the ordinary
23 operating convenience of a common or contract carrier, and any stop-
24 page of this type shall be considered as a continuity of movement and
25 not as the storage of a hazardous substance;

26 (13) "vessel" means every description of watercraft or other
27 artificial contrivance that is used, or is capable of being used, as a
28 means of transportation on water, or that carries hazardous substances
29 for the purpose of incineration of the hazardous substances.

* Sec. 7. AS 46.08 is amended by adding a new section to read:

Sec. 46.08.075. LIENS AGAINST PROPERTY AS SECURITY FOR STATE EXPENDITURES. (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 property 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. The lien includes interest, at the maximum rate allowable under AS 45.45.010(a), from the date of the expenditures. The state may file an action in a court of competent jurisdiction in order to foreclose on the lien.

(b) A lien established under this section against real property is not effective until

(1) a certificate of lien is recorded in the district recorder's office for the district in which the property is located, describing the property and stating the amount of the lien, the name of the owner as grantor, and, if known, the name of the person causing the oil or hazardous substance release; and

(2) the commissioner sends a copy of the certificate of lien by certified mail return receipt requested, or actually delivers a copy of the certificate of lien, to the persons described in (1) of this subsection and to all other persons of record holding an interest in the property.

(c) When any amount with respect to which a lien has been recorded under this section has been paid or reduced, the commissioner shall, upon request of the property owner, issue a certificate

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1 discharging or partially releasing the lien. That certificate may be
2 recorded in the office in which the certificate of lien was recorded.

3 (d) The commissioner may, in the commissioner's discretion,
4 reduce, discharge or partially release a lien under this section if a
5 bond, or other security, in a form and an amount satisfactory to the
6 commissioner is posted. The bond or other security must include an
7 amount sufficient to cover the cost of execution, collection, or
8 foreclosure, including attorney fees. A reduction, discharge, or
9 partial release may not be granted under this subsection if it would
10 be contrary to the public interest. When a lien is reduced, dis-
11 charged, or partially released under this subsection, the commissioner
12 shall, at the request of the property owner, issue a certificate to
13 that effect.

14 (e) A person with an ownership interest in property against
15 which a lien is recorded may bring an action in a court of competent
16 jurisdiction to require that the lien be released. The lien may be
17 released to the extent of that person's ownership interest if the
18 court finds that the person is not liable for the expenses incurred by
19 the state in connection with the costs of response, containment,
20 removal, or remedial action resulting from the oil or hazardous sub-
21 stance release or threat of release of oil or a hazardous substance.

22 * Sec. 8. AS 46.03.822, as amended by sec. 2 of this Act, applies to
23 liability for releases and substantial threats of releases that occurred
24 before the effective date of this Act, and therefore, AS 46.03.822, as
25 amended by sec. 2 of this Act, is retroactive in its effect. However,
26 AS 46.03.822, as amended by sec. 2 of this Act, does not apply to an action
27 in which final judgment no longer subject to appeal has been entered before
28 the effective date of this Act.

29 * Sec. 9. This Act takes effect immediately under AS 01.10.070(c).