

2 **ESSB 6123** - H COMM AMD **ADOPTED 3-4-94**
3 By Committee on Environmental Affairs

4

5 Strike everything after the enacting clause and insert the
6 following:

7 "**Sec. 1.** RCW 70.105D.010 and 1989 c 2 s 1 are each amended to read
8 as follows:

9 (1) Each person has a fundamental and inalienable right to a
10 healthful environment, and each person has a responsibility to preserve
11 and enhance that right. The beneficial stewardship of the land, air,
12 and waters of the state is a solemn obligation of the present
13 generation for the benefit of future generations.

14 (2) A healthful environment is now threatened by the irresponsible
15 use and disposal of hazardous substances. There are hundreds of
16 hazardous waste sites in this state, and more will be created if
17 current waste practices continue. Hazardous waste sites threaten the
18 state's water resources, including those used for public drinking
19 water. Many of our municipal landfills are current or potential
20 hazardous waste sites and present serious threats to human health and
21 environment. The costs of eliminating these threats in many cases are
22 beyond the financial means of our local governments and ratepayers.
23 The main purpose of this act is to raise sufficient funds to clean up
24 all hazardous waste sites and to prevent the creation of future hazards
25 due to improper disposal of toxic wastes into the state's land and
26 waters.

27 (3) Many farmers and small business owners who have followed the
28 law with respect to their uses of pesticides and other chemicals
29 nonetheless may face devastating economic consequences because their
30 uses have contaminated the environment or the water supplies of their
31 neighbors. With a source of funds, the state may assist these farmers
32 and business owners, as well as those persons who sustain damages, such
33 as the loss of their drinking water supplies, as a result of the
34 contamination.

35 (4) It is in the public's interest to efficiently use our finite
36 land base, to integrate our land use planning policies with our clean-

1 up policies, and to clean up and reuse contaminated industrial
2 properties in order to minimize industrial development pressures on
3 undeveloped land and to make clean land available for future social
4 use.

5 (5) Because it is often difficult or impossible to allocate
6 responsibility among persons liable for hazardous waste sites and
7 because it is essential that sites be cleaned up well and
8 expeditiously, each responsible person should be liable jointly and
9 severally.

10 **Sec. 2.** RCW 70.105D.020 and 1989 c 2 s 2 are each amended to read
11 as follows:

12 (1) "Agreed order" means an order issued by the department under
13 this chapter with which the potentially liable person receiving the
14 order agrees to comply. An agreed order may be used to require or
15 approve any cleanup or other remedial actions but it is not a
16 settlement under RCW 70.105D.040(4) and shall not contain a covenant
17 not to sue, or provide protection from claims for contribution, or
18 provide eligibility for public funding of remedial actions under RCW
19 70.105D.070(2)(d)(xi).

20 (2) "Department" means the department of ecology.

21 ~~((+2))~~ (3) "Director" means the director of ecology or the
22 director's designee.

23 ~~((+3))~~ (4) "Facility" means (a) any building, structure,
24 installation, equipment, pipe or pipeline (including any pipe into a
25 sewer or publicly owned treatment works), well, pit, pond, lagoon,
26 impoundment, ditch, landfill, storage container, motor vehicle, rolling
27 stock, vessel, or aircraft, or (b) any site or area where a hazardous
28 substance, other than a consumer product in consumer use, has been
29 deposited, stored, disposed of, or placed, or otherwise come to be
30 located.

31 ~~((+4))~~ (5) "Federal cleanup law" means the federal comprehensive
32 environmental response, compensation, and liability act of 1980, 42
33 U.S.C. Sec. 9601 et seq., as amended by Public Law 99-499.

34 ~~((+5))~~ (6) "Hazardous substance" means:

35 (a) Any dangerous or extremely hazardous waste as defined in RCW
36 70.105.010 (5) and (6), or any dangerous or extremely dangerous waste
37 designated by rule pursuant to chapter 70.105 RCW;

1 (b) Any hazardous substance as defined in RCW 70.105.010(14) or any
2 hazardous substance as defined by rule pursuant to chapter 70.105 RCW;

3 (c) Any substance that, on March 1, 1989, is a hazardous substance
4 under section 101(14) of the federal cleanup law, 42 U.S.C. Sec.
5 9601(14);

6 (d) Petroleum or petroleum products; and

7 (e) Any substance or category of substances, including solid waste
8 decomposition products, determined by the director by rule to present
9 a threat to human health or the environment if released into the
10 environment.

11 The term hazardous substance does not include any of the following
12 when contained in an underground storage tank from which there is not
13 a release: Crude oil or any fraction thereof or petroleum, if the tank
14 is in compliance with all applicable federal, state, and local law.

15 (~~(+6)~~) (7) "Owner or operator" means:

16 (a) Any person with any ownership interest in the facility or who
17 exercises any control over the facility; or

18 (b) In the case of an abandoned facility, any person who had owned,
19 or operated, or exercised control over the facility any time before its
20 abandonment;

21 The term does not include:

22 (i) An agency of the state or unit of local government which
23 acquired ownership or control involuntarily through bankruptcy, tax
24 delinquency, abandonment, or circumstances in which the government
25 involuntarily acquires title. This exclusion does not apply to an
26 agency of the state or unit of local government which has caused or
27 contributed to the release or threatened release of a hazardous
28 substance from the facility; or

29 (ii) A person who, without participating in the management of a
30 facility, holds indicia of ownership primarily to protect the person's
31 security interest in the facility.

32 (~~(+7)~~) (8) "Person" means an individual, firm, corporation,
33 association, partnership, consortium, joint venture, commercial entity,
34 state government agency, unit of local government, federal government
35 agency, or Indian tribe.

36 (~~(+8)~~) (9) "Potentially liable person" means any person whom the
37 department finds, based on credible evidence, to be liable under RCW
38 70.105D.040. The department shall give notice to any such person and

1 allow an opportunity for comment before making the finding, unless an
2 emergency requires otherwise.

3 ~~((9))~~ (10) "Public notice" means, at a minimum, adequate notice
4 mailed to all persons who have made timely request of the department
5 and to persons residing in the potentially affected vicinity of the
6 proposed action; mailed to appropriate news media; published in the
7 newspaper of largest circulation in the city or county of the proposed
8 action; and opportunity for interested persons to comment.

9 ~~((10))~~ (11) "Release" means any intentional or unintentional
10 entry of any hazardous substance into the environment, including but
11 not limited to the abandonment or disposal of containers of hazardous
12 substances.

13 ~~((11))~~ (12) "Remedy" or "remedial action" means any action or
14 expenditure consistent with the purposes of this chapter to identify,
15 eliminate, or minimize any threat or potential threat posed by
16 hazardous substances to human health or the environment including any
17 investigative and monitoring activities with respect to any release or
18 threatened release of a hazardous substance and any health assessments
19 or health effects studies conducted in order to determine the risk or
20 potential risk to human health.

21 (13) "Industrial properties" means properties that are or have been
22 characterized by, or are to be committed to, traditional industrial
23 uses such as processing or manufacturing of materials, marine terminal
24 and transportation areas and facilities, fabrication, assembly,
25 treatment, or distribution of manufactured products, or storage of bulk
26 materials, that are either:

27 (a) Zoned for industrial use by a city or county conducting land
28 use planning under chapter 36.70A RCW; or

29 (b) For counties not planning under chapter 36.70A RCW and the
30 cities within them, zoned for industrial use and adjacent to properties
31 currently used or designated for industrial purposes.

32 **Sec. 3.** RCW 70.105D.030 and 1989 c 2 s 3 are each amended to read
33 as follows:

34 (1) The department may exercise the following powers in addition to
35 any other powers granted by law:

36 (a) Investigate, provide for investigating, or require potentially
37 liable persons to investigate any releases or threatened releases of
38 hazardous substances, including but not limited to inspecting,

1 sampling, or testing to determine the nature or extent of any release
2 or threatened release. If there is a reasonable basis to believe that
3 a release or threatened release of a hazardous substance may exist, the
4 department's authorized employees, agents, or contractors may enter
5 upon any property and conduct investigations. The department shall
6 give reasonable notice before entering property unless an emergency
7 prevents such notice. The department may by subpoena require the
8 attendance or testimony of witnesses and the production of documents or
9 other information that the department deems necessary;

10 (b) Conduct, provide for conducting, or require potentially liable
11 persons to conduct remedial actions (including investigations under (a)
12 of this subsection) to remedy releases or threatened releases of
13 hazardous substances. In carrying out such powers, the department's
14 authorized employees, agents, or contractors may enter upon property.
15 The department shall give reasonable notice before entering property
16 unless an emergency prevents such notice. In conducting, providing for,
17 or requiring remedial action, the department shall give preference to
18 permanent solutions to the maximum extent practicable and shall provide
19 for or require adequate monitoring to ensure the effectiveness of the
20 remedial action;

21 (c) Indemnify contractors retained by the department for carrying
22 out investigations and remedial actions, but not for any contractor's
23 reckless or wilful misconduct;

24 (d) Carry out all state programs authorized under the federal
25 cleanup law and the federal resource, conservation, and recovery act,
26 42 U.S.C. Sec. 6901 et seq., as amended;

27 (e) Classify substances as hazardous substances for purposes of RCW
28 70.105D.020((+5+)) (6) and classify substances and products as
29 hazardous substances for purposes of RCW 82.21.020(1); ((and))

30 (f) Issue orders or enter into consent decrees or agreed orders
31 that include deed restrictions where necessary to protect human health
32 and the environment from a release or threatened release of a hazardous
33 substance from a facility. Prior to establishing a deed restriction
34 under this subsection, the department shall notify and seek comment
35 from a city or county department with land use planning authority for
36 real property subject to a deed restriction;

37 (g) Enforce the application of permanent and effective
38 institutional controls that are necessary for a remedial action to be
39 protective of human health and the environment; and

1 (h) Take any other actions necessary to carry out the provisions of
2 this chapter, including the power to adopt rules under chapter 34.05
3 RCW.

4 (2) The department shall immediately implement all provisions of
5 this chapter to the maximum extent practicable, including investigative
6 and remedial actions where appropriate. The department(~~(, within nine~~
7 ~~months after March 1, 1989,)~~) shall adopt, and thereafter enforce,
8 rules under chapter 34.05 RCW to:

9 (a) Provide for public participation, including at least (i) the
10 establishment of regional citizen's advisory committees, (ii) public
11 notice of the development of investigative plans or remedial plans for
12 releases or threatened releases, and (iii) concurrent public notice of
13 all compliance orders, enforcement orders, or notices of violation;

14 (b) Establish a hazard ranking system for hazardous waste sites;

15 (c) Establish reasonable deadlines not to exceed ninety days for
16 initiating an investigation of a hazardous waste site after the
17 department receives information that the site may pose a threat to
18 human health or the environment and other reasonable deadlines for
19 remedying releases or threatened releases at the site; ~~((and))~~

20 (d) Publish and periodically update minimum cleanup standards for
21 remedial actions at least as stringent as the cleanup standards under
22 section 121 of the federal cleanup law, 42 U.S.C. Sec. 9621, and at
23 least as stringent as all applicable state and federal laws, including
24 health-based standards under state and federal law; and

25 (e) Apply industrial clean-up standards at industrial properties.
26 Rules adopted under this subsection shall ensure that industrial
27 properties cleaned up to industrial standards cannot be converted to
28 nonindustrial uses without approval from the department. The
29 department may require that a property cleaned up to industrial
30 standards is cleaned up to a more stringent applicable standard as a
31 condition of conversion to a nonindustrial use. Industrial clean-up
32 standards may not be applied to industrial properties where hazardous
33 substances remaining at the property after remedial action pose a
34 threat to human health or the environment in adjacent nonindustrial
35 areas.

36 (3) Before November 1st of each even-numbered year, the department
37 shall develop, with public notice and hearing, and submit to the ways
38 and means and appropriate standing environmental committees of the
39 senate and house of representatives a ranked list of projects and

1 expenditures recommended for appropriation from both the state and
2 local toxics control accounts. The department shall also provide the
3 legislature and the public each year with an accounting of the
4 department's activities supported by appropriations from the state
5 toxics control account, including a list of known hazardous waste sites
6 and their hazard rankings, actions taken and planned at each site, how
7 the department is meeting its top two management priorities under RCW
8 70.105.150, and all funds expended under this chapter.

9 (4) The department shall establish a scientific advisory board to
10 render advice to the department with respect to the hazard ranking
11 system, cleanup standards, remedial actions, deadlines for remedial
12 actions, monitoring, the classification of substances as hazardous
13 substances for purposes of RCW 70.105D.020(~~((+5))~~) (6) and the
14 classification of substances or products as hazardous substances for
15 purposes of RCW 82.21.020(1). The board shall consist of five
16 independent members to serve staggered three-year terms. No members
17 may be employees of the department. Members shall be reimbursed for
18 travel expenses as provided in RCW 43.03.050 and 43.03.060.

19 (5) The department shall establish a program to identify potential
20 hazardous waste sites and to encourage persons to provide information
21 about hazardous waste sites.

22 **Sec. 4.** RCW 70.105D.040 and 1989 c 2 s 4 are each amended to read
23 as follows:

24 (1) Except as provided in subsection (3) of this section, the
25 following persons are liable with respect to a facility:

26 (a) The owner or operator of the facility;

27 (b) Any person who owned or operated the facility at the time of
28 disposal or release of the hazardous substances;

29 (c) Any person who owned or possessed a hazardous substance and who
30 by contract, agreement, or otherwise arranged for disposal or treatment
31 of the hazardous substance at the facility, or arranged with a
32 transporter for transport for disposal or treatment of the hazardous
33 substances at the facility, or otherwise generated hazardous wastes
34 disposed of or treated at the facility;

35 (d) Any person (i) who accepts or accepted any hazardous substance
36 for transport to a disposal, treatment, or other facility selected by
37 such person from which there is a release or a threatened release for
38 which remedial action is required, unless such facility, at the time of

1 disposal or treatment, could legally receive such substance; or (ii)
2 who accepts a hazardous substance for transport to such a facility and
3 has reasonable grounds to believe that such facility is not operated in
4 accordance with chapter 70.105 RCW; and

5 (e) Any person who both sells a hazardous substance and is
6 responsible for written instructions for its use if (i) the substance
7 is used according to the instructions and (ii) the use constitutes a
8 release for which remedial action is required at the facility.

9 (2) Each person who is liable under this section is strictly
10 liable, jointly and severally, for all remedial action costs and for
11 all natural resource damages resulting from the releases or threatened
12 releases of hazardous substances. The attorney general, at the request
13 of the department, is empowered to recover all costs and damages from
14 persons liable therefor.

15 (3) The following persons are not liable under this section:

16 (a) Any person who can establish that the release or threatened
17 release of a hazardous substance for which the person would be
18 otherwise responsible was caused solely by:

19 (i) An act of God;

20 (ii) An act of war; or

21 (iii) An act or omission of a third party (including but not
22 limited to a trespasser) other than (A) an employee or agent of the
23 person asserting the defense, or (B) any person whose act or omission
24 occurs in connection with a contractual relationship existing, directly
25 or indirectly, with the person asserting this defense to liability.
26 This defense only applies where the person asserting the defense has
27 exercised the utmost care with respect to the hazardous substance, the
28 foreseeable acts or omissions of the third party, and the foreseeable
29 consequences of those acts or omissions;

30 (b) Any person who is an owner, past owner, or purchaser of a
31 facility and who can establish by a preponderance of the evidence that
32 at the time the facility was acquired by the person, the person had no
33 knowledge or reason to know that any hazardous substance, the release
34 or threatened release of which has resulted in or contributed to the
35 need for the remedial action, was released or disposed of on, in, or at
36 the facility. This subsection (b) is limited as follows:

37 (i) To establish that a person had no reason to know, the person
38 must have undertaken, at the time of acquisition, all appropriate
39 inquiry into the previous ownership and uses of the property,

1 consistent with good commercial or customary practice in an effort to
2 minimize liability. Any court interpreting this subsection (b) shall
3 take into account any specialized knowledge or experience on the part
4 of the person, the relationship of the purchase price to the value of
5 the property if uncontaminated, commonly known or reasonably
6 ascertainable information about the property, the obviousness of the
7 presence or likely presence of contamination at the property, and the
8 ability to detect such contamination by appropriate inspection;

9 (ii) The defense contained in this subsection (b) is not available
10 to any person who had actual knowledge of the release or threatened
11 release of a hazardous substance when the person owned the real
12 property and who subsequently transferred ownership of the property
13 without first disclosing such knowledge to the transferee;

14 (iii) The defense contained in this subsection (b) is not available
15 to any person who, by any act or omission, caused or contributed to the
16 release or threatened release of a hazardous substance at the facility;

17 (c) Any natural person who uses a hazardous substance lawfully and
18 without negligence for any personal or domestic purpose in or near a
19 dwelling or accessory structure when that person is: (i) A resident of
20 the dwelling; (ii) a person who, without compensation, assists the
21 resident in the use of the substance; or (iii) a person who is employed
22 by the resident, but who is not an independent contractor;

23 (d) Any person who, for the purpose of growing food crops, applies
24 pesticides or fertilizers without negligence and in accordance with all
25 applicable laws and regulations.

26 (4) There may be no settlement by the state with any person
27 potentially liable under this chapter except in accordance with this
28 (~~subsection~~) section.

29 (a) The attorney general may agree to a settlement with any
30 potentially liable person only if the department finds, after public
31 notice and hearing, that the proposed settlement would lead to a more
32 expeditious cleanup of hazardous substances in compliance with cleanup
33 standards under RCW 70.105D.030(2)(d) and with any remedial orders
34 issued by the department. Whenever practicable and in the public
35 interest, the attorney general may expedite such a settlement with
36 persons whose contribution is insignificant in amount and toxicity.

37 (b) A settlement agreement under this (~~subsection~~) section shall
38 be entered as a consent decree issued by a court of competent
39 jurisdiction.

1 (c) A settlement agreement may contain a covenant not to sue only
2 of a scope commensurate with the settlement agreement in favor of any
3 person with whom the attorney general has settled under this section.
4 Any covenant not to sue shall contain a reopener clause which requires
5 the court to amend the covenant not to sue if factors not known at the
6 time of entry of the settlement agreement are discovered and present a
7 previously unknown threat to human health or the environment.

8 (d) A party who has resolved its liability to the state under this
9 (~~subsection~~) section shall not be liable for claims for contribution
10 regarding matters addressed in the settlement. The settlement does not
11 discharge any of the other liable parties but it reduces the total
12 potential liability of the others to the state by the amount of the
13 settlement.

14 (5) In addition to the settlement authority provided under
15 subsection (4) of this section, the attorney general may agree to a
16 settlement with a person not currently liable for remedial action at a
17 facility who proposes to purchase, redevelop, or reuse the facility,
18 provided that:

19 (a) The settlement will provide a substantial public benefit,
20 including but not limited to the reuse of a vacant or abandoned
21 manufacturing or industrial facility, or the development of a facility
22 by a governmental entity to address an important public purpose;

23 (b) The settlement will yield substantial new resources to
24 facilitate cleanup;

25 (c) The settlement will expedite remedial action consistent with
26 the rules adopted under this chapter; and

27 (d) Based on available information, the department determines that
28 the redevelopment or reuse of the facility is not likely to contribute
29 to the existing release or threatened release, interfere with remedial
30 actions that may be needed at the site, or increase health risks to
31 persons at or in the vicinity of the site.

32 (6) Nothing in this chapter affects or modifies in any way any
33 person's right to seek or obtain relief under other statutes or under
34 common law, including but not limited to damages for injury or loss
35 resulting from a release or threatened release of a hazardous
36 substance. No settlement by the department or remedial action ordered
37 by a court or the department affects any person's right to obtain a
38 remedy under common law or other statutes.

1 NEW SECTION. **Sec. 5.** A new section is added to chapter 70.105 RCW
2 to read as follows:

3 Solid wastes that designate as dangerous waste or extremely
4 hazardous waste but do not designate as hazardous waste under federal
5 law are conditionally exempt from the requirements of this chapter, if:

6 (1) The waste is generated pursuant to a consent decree issued
7 under chapter 70.105D RCW;

8 (2) The consent decree characterizes the solid waste and specifies
9 management practices and a department-approved treatment or disposal
10 location;

11 (3) The management practices are consistent with RCW 70.105.150 and
12 are protective of human health and the environment as determined by the
13 department of ecology; and

14 (4) Waste treated or disposed of on-site will be managed in a
15 manner determined by the department to be as protective of human health
16 and the environment as clean-up standards pursuant to chapter 70.105D
17 RCW.

18 This section shall not be interpreted to limit the ability of the
19 department to apply any requirement of this chapter through a consent
20 decree issued under chapter 70.105D RCW, if the department determines
21 these requirements to be appropriate. Neither shall this section be
22 interpreted to limit the application of this chapter to a cleanup
23 conducted under the federal comprehensive environmental response,
24 compensation, and liability act (42 U.S.C. Sec. 9601 et seq., as
25 amended).

26 **Sec. 6.** RCW 70.105.050 and 1987 c 488 s 4 are each amended to read
27 as follows:

28 (1) No person shall dispose of designated extremely hazardous
29 wastes at any disposal site in the state other than the disposal site
30 established and approved for such purpose under provisions of this
31 chapter, except:

32 (a) When such wastes are going to a processing facility which will
33 result in the waste being reclaimed, treated, detoxified, neutralized,
34 or otherwise processed to remove its harmful properties or
35 characteristics(~~(-)~~); or

36 (b) When such wastes are managed on-site as part of a remedial
37 action conducted by the department or by potentially liable persons

1 under a consent decree issued by the department pursuant to chapter
2 70.105D RCW.

3 (2) Extremely hazardous wastes that contain radioactive components
4 may be disposed at a radioactive waste disposal site that is (a) owned
5 by the United States department of energy or a licensee of the nuclear
6 regulatory commission and (b) permitted by the department and operated
7 in compliance with the provisions of this chapter. However, prior to
8 disposal, or as a part of disposal, all reasonable methods of
9 treatment, detoxification, neutralization, or other waste management
10 methodologies designed to mitigate hazards associated with these wastes
11 shall be employed, as required by applicable federal and state laws and
12 regulations.

13 NEW SECTION. Sec. 7. A new section is added to chapter 70.105 RCW
14 to read as follows:

15 Nothing in this chapter shall alter or affect the regulatory
16 authority of a county, city, or jurisdictional health district to
17 condition or prohibit the acceptance of hazardous waste in a county or
18 city landfill."

--- END ---