
SUBSTITUTE SENATE BILL 5873

State of Washington

55th Legislature

1998 Regular Session

By Senate Committee on Financial Institutions, Insurance & Housing
(originally sponsored by Senators Benton and Winsley)

Read first time 02/05/98.

1 AN ACT Relating to liability under the model toxics control act;
2 and amending RCW 70.105D.020.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 **Sec. 1.** RCW 70.105D.020 and 1997 c 406 s 2 are each amended to
5 read as follows:

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

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

15 (3) "Director" means the director of ecology or the director's
16 designee.

17 (4) "Facility" means (a) any building, structure, installation,
18 equipment, pipe or pipeline (including any pipe into a sewer or
19 publicly owned treatment works), well, pit, pond, lagoon, impoundment,

1 ditch, landfill, storage container, motor vehicle, rolling stock,
2 vessel, or aircraft, or (b) any site or area where a hazardous
3 substance, other than a consumer product in consumer use, has been
4 deposited, stored, disposed of, or placed, or otherwise come to be
5 located.

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

9 (6) "Foreclosure and its equivalents" means purchase at a
10 foreclosure sale, acquisition, or assignment of title in lieu of
11 foreclosure, termination of a lease, or other repossession, acquisition
12 of a right to title or possession, an agreement in satisfaction of the
13 obligation, or any other comparable formal or informal manner, whether
14 pursuant to law or under warranties, covenants, conditions,
15 representations, or promises from the borrower, by which the holder
16 acquires title to or possession of a facility securing a loan or other
17 obligation.

18 (7) "Hazardous substance" means:

19 (a) Any dangerous or extremely hazardous waste as defined in RCW
20 70.105.010 (5) and (6), or any dangerous or extremely dangerous waste
21 designated by rule pursuant to chapter 70.105 RCW;

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

24 (c) Any substance that, on March 1, 1989, is a hazardous substance
25 under section 101(14) of the federal cleanup law, 42 U.S.C. Sec.
26 9601(14);

27 (d) Petroleum or petroleum products; and

28 (e) Any substance or category of substances, including solid waste
29 decomposition products, determined by the director by rule to present
30 a threat to human health or the environment if released into the
31 environment.

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

36 (8) "Independent remedial actions" means remedial actions conducted
37 without department oversight or approval, and not under an order,
38 agreed order, or consent decree.

1 (9) "Holder" means a person who holds indicia of ownership
2 primarily to protect a security interest. A holder includes the
3 initial holder such as the loan originator, any subsequent holder such
4 as a successor-in-interest or subsequent purchaser of the security
5 interest on the secondary market, a guarantor of an obligation, surety,
6 or any other person who holds indicia of ownership primarily to protect
7 a security interest, or a receiver, court-appointed trustee, or other
8 person who acts on behalf or for the benefit of a holder. A holder can
9 be a public or privately owned financial institution, receiver,
10 conservator, loan guarantor, or other similar persons that loan money
11 or guarantee repayment of a loan. Holders typically are banks or
12 savings and loan institutions but may also include others such as
13 insurance companies, pension funds, or private individuals that engage
14 in loaning of money or credit.

15 (10) "Indicia of ownership" means evidence of a security interest,
16 evidence of an interest in a security interest, or evidence of an
17 interest in a facility securing a loan or other obligation, including
18 any legal or equitable title to a facility acquired incident to
19 foreclosure and its equivalents. Evidence of such interests includes,
20 mortgages, deeds of trust, sellers interest in a real estate contract,
21 liens, surety bonds, and guarantees of obligations, title held pursuant
22 to a lease financing transaction in which the lessor does not select
23 initially the leased facility, or legal or equitable title obtained
24 pursuant to foreclosure and their equivalents. Evidence of such
25 interests also includes assignments, pledges, or other rights to or
26 other forms of encumbrance against the facility that are held primarily
27 to protect a security interest.

28 (11) "Operating a facility primarily to protect a security
29 interest" occurs when all of the following are met: (a) Operating the
30 facility where the borrower has defaulted on the loan or otherwise
31 breached the security agreement; (b) operating the facility to preserve
32 the value of the facility as an ongoing business; (c) the operation is
33 being done in anticipation of a sale, transfer, or assignment of the
34 facility; and (d) the operation is being done primarily to protect a
35 security interest. Operating a facility for longer than one year prior
36 to foreclosure or its equivalents shall be presumed to be operating the
37 facility for other than to protect a security interest.

38 (12) "Owner or operator" means:

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

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

6 The term does not include:

7 (i) An agency of the state or unit of local government which
8 acquired ownership or control involuntarily through bankruptcy, tax
9 delinquency, abandonment, or circumstances in which the government
10 involuntarily acquires title. This exclusion does not apply to an
11 agency of the state or unit of local government which has caused or
12 contributed to the release or threatened release of a hazardous
13 substance from the facility;

14 (ii) A person who, without participating in the management of a
15 facility, holds indicia of ownership primarily to protect the person's
16 security interest in the facility. Holders after foreclosure and its
17 equivalent and holders who engage in any of the activities identified
18 in subsection (13)(e) through (g) of this section shall not lose this
19 exemption provided the holder complies with all of the following:

20 (A) The holder properly maintains the environmental compliance
21 measures already in place at the facility;

22 (B) The holder complies with the reporting requirements in the
23 rules adopted under this chapter;

24 (C) The holder complies with any order issued to the holder by the
25 department to abate an imminent or substantial endangerment;

26 (D) The holder allows the department or potentially liable persons
27 under an order, agreed order, or settlement agreement under this
28 chapter access to the facility to conduct remedial actions and does not
29 impede the conduct of such remedial actions;

30 (E) Any remedial actions conducted by the holder are in compliance
31 with any preexisting requirements identified by the department, or, if
32 the department has not identified such requirements for the facility,
33 the remedial actions are conducted consistent with the rules adopted
34 under this chapter; and

35 (F) The holder does not exacerbate an existing release(~~(i-or)~~).
36 The exemption in this subsection (12)(b)(ii) does not apply to holders
37 who cause or contribute to a new release or threatened release or who
38 are otherwise liable under RCW 70.105D.040(1) (b), (c), (d), and (e);
39 provided, however, that a holder shall not lose this exemption if it

1 establishes that any such new release has been remediated according to
2 the requirements of this chapter and that any hazardous substances
3 remaining at the facility after remediation of the new release are
4 divisible from such new release;

5 (iii) A fiduciary in his, her, or its personal or individual
6 capacity. This exemption does not preclude a claim against the assets
7 of the estate or trust administered by the fiduciary or against a
8 nonemployee agent or independent contractor retained by a fiduciary.
9 This exemption also does not apply to the extent that a person is
10 liable under this chapter independently of the person's ownership as a
11 fiduciary or for actions taken in a fiduciary capacity which cause or
12 contribute to a new release or exacerbate an existing release of
13 hazardous substances. This exemption applies provided that, to the
14 extent of the fiduciary's powers granted by law or by the applicable
15 governing instrument granting fiduciary powers, the fiduciary complies
16 with all of the following:

17 (A) The fiduciary properly maintains the environmental compliance
18 measures already in place at the facility;

19 (B) The fiduciary complies with the reporting requirements in the
20 rules adopted under this chapter;

21 (C) The fiduciary complies with any order issued to the fiduciary
22 by the department to abate an imminent or substantial endangerment;

23 (D) The fiduciary allows the department or potentially liable
24 persons under an order, agreed order, or settlement agreement under
25 this chapter access to the facility to conduct remedial actions and
26 does not impede the conduct of such remedial actions;

27 (E) Any remedial actions conducted by the fiduciary are in
28 compliance with any preexisting requirements identified by the
29 department, or, if the department has not identified such requirements
30 for the facility, the remedial actions are conducted consistent with
31 the rules adopted under this chapter; and

32 (F) The fiduciary does not exacerbate an existing release.

33 The exemption in this subsection (12)(b)(iii) does not apply to
34 fiduciaries who cause or contribute to a new release or threatened
35 release or who are otherwise liable under RCW 70.105D.040(1) (b), (c),
36 (d), and (e); provided however, that a fiduciary shall not lose this
37 exemption if it establishes that any such new release has been
38 remediated according to the requirements of this chapter and that any
39 hazardous substances remaining at the facility after remediation of the

1 new release are divisible from such new release. The exemption in this
2 subsection (12)(b)(iii) also does not apply where the fiduciary's
3 powers to comply with this subsection (12)(b)(iii) are limited by a
4 governing instrument created with the objective purpose of avoiding
5 liability under this chapter or of avoiding compliance with this
6 chapter; or

7 (iv) Any person who has any ownership interest in, operates, or
8 exercises control over real property where a hazardous substance has
9 come to be located solely as a result of migration of the hazardous
10 substance to the real property through the ground water from a source
11 off the property, if:

12 (A) The person can demonstrate that the hazardous substance has not
13 been used, placed, managed, or otherwise handled on the property in a
14 manner likely to cause or contribute to a release of the hazardous
15 substance that has migrated onto the property;

16 (B) The person has not caused or contributed to the release of the
17 hazardous substance;

18 (C) The person does not engage in activities that damage or
19 interfere with the operation of remedial actions installed on the
20 person's property or engage in activities that result in exposure of
21 humans or the environment to the contaminated ground water that has
22 migrated onto the property;

23 (D) If requested, the person allows the department, potentially
24 liable persons who are subject to an order, agreed order, or consent
25 decree, and the authorized employees, agents, or contractors of each,
26 access to the property to conduct remedial actions required by the
27 department. The person may attempt to negotiate an access agreement
28 before allowing access; and

29 (E) Legal withdrawal of ground water does not disqualify a person
30 from the exemption in this subsection (12)(b)(~~(iii)~~) (iv).

31 (~~The exemption in (b)(ii) of this subsection does not apply to~~
32 ~~holders who cause or contribute to a new release or threatened release~~
33 ~~or who are otherwise liable under RCW 70.105D.040(1) (b), (c), (d), and~~
34 ~~(e); provided, however, that a holder shall not lose this exemption if~~
35 ~~it establishes that any such new release has been remediated according~~
36 ~~to the requirements of this chapter and that any hazardous substances~~
37 ~~remaining at the facility after remediation of the new release are~~
38 ~~divisible from such new release.))~~

1 (13) "Participation in management" means exercising decision-making
2 control over the borrower's operation of the facility, environmental
3 compliance, or assuming or manifesting responsibility for the overall
4 management of the enterprise encompassing the day-to-day decision
5 making of the enterprise.

6 The term does not include any of the following: (a) A holder with
7 the mere capacity or ability to influence, or the unexercised right to
8 control facility operations; (b) a holder who conducts or requires a
9 borrower to conduct an environmental audit or an environmental site
10 assessment at the facility for which indicia of ownership is held; (c)
11 a holder who requires a borrower to come into compliance with any
12 applicable laws or regulations at the facility for which indicia of
13 ownership is held; (d) a holder who requires a borrower to conduct
14 remedial actions including setting minimum requirements, but does not
15 otherwise control or manage the borrower's remedial actions or the
16 scope of the borrower's remedial actions except to prepare a facility
17 for sale, transfer, or assignment; (e) a holder who engages in workout
18 or policing activities primarily to protect the holder's security
19 interest in the facility; (f) a holder who prepares a facility for
20 sale, transfer, or assignment or requires a borrower to prepare a
21 facility for sale, transfer, or assignment; (g) a holder who operates
22 a facility primarily to protect a security interest, or requires a
23 borrower to continue to operate, a facility primarily to protect a
24 security interest; and (h) a prospective holder who, as a condition of
25 becoming a holder, requires an owner or operator to conduct an
26 environmental audit, conduct an environmental site assessment, come
27 into compliance with any applicable laws or regulations, or conduct
28 remedial actions prior to holding a security interest is not
29 participating in the management of the facility.

30 (14) "Person" means an individual, firm, corporation, association,
31 partnership, consortium, joint venture, commercial entity, state
32 government agency, unit of local government, federal government agency,
33 or Indian tribe.

34 (15) "Policing activities" means actions the holder takes to insure
35 that the borrower complies with the terms of the loan or security
36 interest or actions the holder takes or requires the borrower to take
37 to maintain the value of the security. Policing activities include:
38 Requiring the borrower to conduct remedial actions at the facility
39 during the term of the security interest; requiring the borrower to

1 comply or come into compliance with applicable federal, state, and
2 local environmental and other laws, regulations, and permits during the
3 term of the security interest; securing or exercising authority to
4 monitor or inspect the facility including on-site inspections, or to
5 monitor or inspect the borrower's business or financial condition
6 during the term of the security interest; or taking other actions
7 necessary to adequately police the loan or security interest such as
8 requiring a borrower to comply with any warranties, covenants,
9 conditions, representations, or promises from the borrower.

10 (16) "Potentially liable person" means any person whom the
11 department finds, based on credible evidence, to be liable under RCW
12 70.105D.040. The department shall give notice to any such person and
13 allow an opportunity for comment before making the finding, unless an
14 emergency requires otherwise.

15 (17) "Prepare a facility for sale, transfer, or assignment" means
16 to secure access to the facility; perform routine maintenance on the
17 facility; remove inventory, equipment, or structures; properly maintain
18 environmental compliance measures already in place at the facility;
19 conduct remedial actions to clean up releases at the facility; or to
20 perform other similar activities intended to preserve the value of the
21 facility where the borrower has defaulted on the loan or otherwise
22 breached the security agreement or after foreclosure and its
23 equivalents and in anticipation of a pending sale, transfer, or
24 assignment, primarily to protect the holder's security interest in the
25 facility. A holder can prepare a facility for sale, transfer, or
26 assignment for up to one year prior to foreclosure and its equivalents
27 and still stay within the security interest exemption in subsection
28 (12)(b)(ii) of this section.

29 (18) "Primarily to protect a security interest" means the indicia
30 of ownership is held primarily for the purpose of securing payment or
31 performance of an obligation. The term does not include indicia of
32 ownership held primarily for investment purposes nor indicia of
33 ownership held primarily for purposes other than as protection for a
34 security interest. A holder may have other, secondary reasons, for
35 maintaining indicia of ownership, but the primary reason must be for
36 protection of a security interest. Holding indicia of ownership after
37 foreclosure or its equivalents for longer than five years shall be
38 considered to be holding the indicia of ownership for purposes other
39 than primarily to protect a security interest. For facilities that

1 have been acquired through foreclosure or its equivalents prior to July
2 23, 1995, this five-year period shall begin as of July 23, 1995.

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

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

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

20 (22) "Security interest" means an interest in a facility created or
21 established for the purpose of securing a loan or other obligation.
22 Security interests include deeds of trusts, sellers interest in a real
23 estate contract, liens, legal, or equitable title to a facility
24 acquired incident to foreclosure and its equivalents, and title
25 pursuant to lease financing transactions. Security interests may also
26 arise from transactions such as sale and leasebacks, conditional sales,
27 installment sales, trust receipt transactions, certain assignments,
28 factoring agreements, accounts receivable financing arrangements,
29 easements, and consignments, if the transaction creates or establishes
30 an interest in a facility for the purpose of securing a loan or other
31 obligation.

32 (23) "Industrial properties" means properties that are or have been
33 characterized by, or are to be committed to, traditional industrial
34 uses such as processing or manufacturing of materials, marine terminal
35 and transportation areas and facilities, fabrication, assembly,
36 treatment, or distribution of manufactured products, or storage of bulk
37 materials, that are either:

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

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

4 (24) "Workout activities" means those actions by which a holder, at
5 any time prior to foreclosure and its equivalents, seeks to prevent,
6 cure, or mitigate a default by the borrower or obligor; or to preserve,
7 or prevent the diminution of, the value of the security. Workout
8 activities include: Restructuring or renegotiating the terms of the
9 security interest; requiring payment of additional rent or interest;
10 exercising forbearance; requiring or exercising rights pursuant to an
11 assignment of accounts or other amounts owed to an obligor; requiring
12 or exercising rights pursuant to an escrow agreement pertaining to
13 amounts owed to an obligor; providing specific or general financial or
14 other advice, suggestions, counseling, or guidance; and exercising any
15 right or remedy the holder is entitled to by law or under any
16 warranties, covenants, conditions, representations, or promises from
17 the borrower.

18 (25)(a) "Fiduciary" means a person acting for the benefit of
19 another party as a bona fide trustee; executor; administrator;
20 custodian; guardian of estates or guardian ad litem; receiver;
21 conservator; committee of estates of incapacitated persons; trustee in
22 bankruptcy; trustee, under an indenture agreement, trust agreement,
23 lease, or similar financing agreement, for debt securities,
24 certificates of interest or certificates of participation in debt
25 securities, or other forms of indebtedness as to which the trustee is
26 not, in the capacity of trustee, the lender. Except as provided in
27 subsection (12)(b)(iii) of this section, the liability of a fiduciary
28 under this chapter shall not exceed the assets held in the fiduciary
29 capacity.

30 (b) "Fiduciary" does not mean:

31 (i) A person acting as a fiduciary with respect to a trust or other
32 fiduciary estate that was organized for the primary purpose of, or is
33 engaged in, actively carrying on a trade or business for profit, unless
34 the trust or other fiduciary estate was created as part of, or to
35 facilitate, one or more estate plans or because of the incapacity of a
36 natural person;

37 (ii) A person who acquires ownership or control of a facility with
38 the objective purpose of avoiding liability of the person or any other
39 person. It is prima facie evidence that the fiduciary acquired

1 ownership or control of the facility to avoid liability if the facility
2 is the only substantial asset in the fiduciary estate at the time the
3 facility became subject to the fiduciary estate;

4 (iii) A person who acts in a capacity other than that of a
5 fiduciary or in a beneficiary capacity and in that capacity directly or
6 indirectly benefits from a trust or fiduciary relationship;

7 (iv) A person who is a beneficiary and fiduciary with respect to
8 the same fiduciary estate, and who while acting as a fiduciary receives
9 benefits that exceed customary or reasonable compensation, and
10 incidental benefits permitted under applicable law;

11 (v) A person who is a fiduciary and receives benefits that
12 substantially exceed customary or reasonable compensation, and
13 incidental benefits permitted under applicable law; or

14 (vi) A person who acts in the capacity of trustee of state or
15 federal lands or resources.

16 (26) "Fiduciary capacity" means the capacity of a person holding
17 title to a facility, or otherwise having control of an interest in the
18 facility pursuant to the exercise of the responsibilities of the person
19 as a fiduciary.

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