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**ENGROSSED SENATE BILL 7900**

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**State of Washington**

**55th Legislature**

**1997 Regular Session**

**By** Senators Swecker, Fraser, Anderson, Rasmussen, Zarelli, Oke, Goings, Morton, Haugen, Hale, Spanel, Rossi, Johnson, Schow, Kohl, Sellar, Franklin, Horn, Kline, McAuliffe and Winsley

Read first time 02/06/97 (Introduced with House Sponsors). Referred to Committee on Agriculture & Environment.

1       AN ACT Relating to implementing the model toxics control act policy  
2 advisory committee recommendations; amending RCW 70.105D.020,  
3 70.105D.030, 70.105D.040, 70.105D.070, and 70.105D.080; and creating a  
4 new section.

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

6       NEW SECTION.   **Sec. 1.** The legislature finds that:

7       (1) Engrossed Substitute House Bill No. 1810 enacted during the  
8 1995 legislative session authorized establishment of the model toxics  
9 control act policy advisory committee, a twenty-two member committee  
10 representing a broad range of interests including the legislature,  
11 agriculture, large and small business, environmental organizations, and  
12 local and state government. The committee was charged with the task of  
13 providing advice to the legislature and the department of ecology to  
14 more effectively implement the model toxics control act, chapter  
15 70.105D RCW.

16       (2) The committee members committed considerable time and effort  
17 to their charge, meeting twenty-six times during 1995 and 1996 to  
18 discuss and decide issues. In addition, the committee created four  
19 subcommittees that met over sixty times during this same period. There

1 were also numerous working subgroups and drafting committees formed on  
2 an ad hoc basis to support the committee's work. Many members of the  
3 public also attended these meetings and were provided opportunities to  
4 contribute to the committee deliberations.

5 (3) The policy advisory committee completed its work and submitted  
6 a final report to the department of ecology and the legislature on  
7 December 15, 1996. That report contains numerous recommendations for  
8 statutory changes that were agreed to by consensus of the committee  
9 members or obtained broad support of most of the committee members.  
10 This act is intended to implement those recommended statutory changes.

11 **Sec. 2.** RCW 70.105D.020 and 1995 c 70 s 1 are each amended to read  
12 as follows:

13 (1) "Agreed order" means an order issued by the department under  
14 this chapter with which the potentially liable person receiving the  
15 order agrees to comply. An agreed order may be used to require or  
16 approve any cleanup or other remedial actions but it is not a  
17 settlement under RCW 70.105D.040(4) and shall not contain a covenant  
18 not to sue, or provide protection from claims for contribution, or  
19 provide eligibility for public funding of remedial actions under RCW  
20 70.105D.070(2)(d)(xi).

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

22 (3) "Director" means the director of ecology or the director's  
23 designee.

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

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

35 (6) "Foreclosure and its equivalents" means purchase at a  
36 foreclosure sale, acquisition, or assignment of title in lieu of  
37 foreclosure, termination of a lease, or other repossession, acquisition  
38 of a right to title or possession, an agreement in satisfaction of the

1 obligation, or any other comparable formal or informal manner, whether  
2 pursuant to law or under warranties, covenants, conditions,  
3 representations, or promises from the borrower, by which the holder  
4 acquires title to or possession of a facility securing a loan or other  
5 obligation.

6 (7) "Hazardous substance" means:

7 (a) Any dangerous or extremely hazardous waste as defined in RCW  
8 70.105.010 (5) and (6), or any dangerous or extremely dangerous waste  
9 designated by rule pursuant to chapter 70.105 RCW;

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

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

15 (d) Petroleum or petroleum products; and

16 (e) Any substance or category of substances, including solid waste  
17 decomposition products, determined by the director by rule to present  
18 a threat to human health or the environment if released into the  
19 environment.

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

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

27 (9) "Holder" means a person who holds indicia of ownership  
28 primarily to protect a security interest. A holder includes the  
29 initial holder such as the loan originator, any subsequent holder such  
30 as a successor-in-interest or subsequent purchaser of the security  
31 interest on the secondary market, a guarantor of an obligation, surety,  
32 or any other person who holds indicia of ownership primarily to protect  
33 a security interest, or a receiver, court-appointed trustee, or other  
34 person who acts on behalf or for the benefit of a holder. A holder can  
35 be a public or privately owned financial institution, receiver,  
36 conservator, loan guarantor, or other similar persons that loan money  
37 or guarantee repayment of a loan. Holders typically are banks or  
38 savings and loan institutions but may also include others such as

1 insurance companies, pension funds, or private individuals that engage  
2 in loaning of money or credit.

3 ~~((9))~~ (10) "Indicia of ownership" means evidence of a security  
4 interest, evidence of an interest in a security interest, or evidence  
5 of an interest in a facility securing a loan or other obligation,  
6 including any legal or equitable title to a facility acquired incident  
7 to foreclosure and its equivalents. Evidence of such interests  
8 ~~((include[s]))~~ includes, mortgages, deeds of trust, sellers interest in  
9 a real estate contract, liens, surety bonds, and guarantees of  
10 obligations, title held pursuant to a lease financing transaction in  
11 which the lessor does not select initially the leased facility, or  
12 legal or equitable title obtained pursuant to foreclosure and their  
13 equivalents. Evidence of such interests also ~~((include[s]))~~ includes  
14 assignments, pledges, or other rights to or other forms of encumbrance  
15 against the facility that are held primarily to protect a security  
16 interest.

17 ~~((10))~~ (11) "Operating a facility primarily to protect a security  
18 interest" occurs when all of the following are met: (a) Operating the  
19 facility where the borrower has defaulted on the loan or otherwise  
20 breached the security agreement; (b) operating the facility to preserve  
21 the value of the facility as an ongoing business; (c) the operation is  
22 being done in anticipation of a sale, transfer, or assignment of the  
23 facility; and (d) the operation is being done primarily to protect a  
24 security interest. Operating a facility for longer than one year prior  
25 to foreclosure or its equivalents shall be presumed to be operating the  
26 facility for other than to protect a security interest.

27 ~~((11))~~ (12) "Owner or operator" means:

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

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

33 The term does not include:

34 (i) An agency of the state or unit of local government which  
35 acquired ownership or control involuntarily through bankruptcy, tax  
36 delinquency, abandonment, or circumstances in which the government  
37 involuntarily acquires title. This exclusion does not apply to an  
38 agency of the state or unit of local government which has caused or

1 contributed to the release or threatened release of a hazardous  
2 substance from the facility; (~~or~~)

3 (ii) A person who, without participating in the management of a  
4 facility, holds indicia of ownership primarily to protect the person's  
5 security interest in the facility. Holders after foreclosure and its  
6 equivalent and holders who engage in any of the activities identified  
7 in subsection (~~(12)~~) (13)(e) through (g) of this section shall not  
8 lose this exemption provided the holder complies with all of the  
9 following:

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

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

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

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

20 (E) Any remedial actions conducted by the holder are in compliance  
21 with any preexisting requirements identified by the department, or, if  
22 the department has not identified such requirements for the facility,  
23 the remedial actions are conducted consistent with the rules adopted  
24 under this chapter; and

25 (F) The holder does not exacerbate an existing release; or

26 (iii) Any person who has any ownership interest in, operates, or  
27 exercises control over real property where a hazardous substance has  
28 come to be located solely as a result of migration of the hazardous  
29 substance to the real property through the ground water from a source  
30 off the property, if:

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

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

37 (C) The person does not engage in activities that damage or  
38 interfere with the operation of remedial actions installed on the  
39 person's property or engage in activities that result in exposure of

1 humans or the environment to the contaminated ground water that has  
2 migrated onto the property;

3 (D) If requested, the person allows the department, potentially  
4 liable persons who are subject to an order, agreed order, or consent  
5 decree, and the authorized employees, agents, or contractors of each,  
6 access to the property to conduct remedial actions required by the  
7 department. The person may attempt to negotiate an access agreement  
8 before allowing access; and

9 (E) Legal withdrawal of ground water does not disqualify a person  
10 from the exemption in this subsection (12)(b)(iii).

11 The exemption in (b)(ii) of this subsection (~~((11)(b)(ii))~~) does  
12 not apply to holders who cause or contribute to a new release or  
13 threatened release or who are otherwise liable under RCW 70.105D.040(1)  
14 (b), (c), (d), and (e); provided, however, that a holder shall not lose  
15 this exemption if it establishes that any such new release has been  
16 remediated according to the requirements of this chapter and that any  
17 hazardous substances remaining at the facility after remediation of the  
18 new release are divisible from such new release.

19 ~~((12))~~ (13) "Participation in management" means exercising  
20 decision-making control over the borrower's operation of the facility,  
21 environmental compliance, or assuming or manifesting responsibility for  
22 the overall management of the enterprise encompassing the day-to-day  
23 decision making of the enterprise.

24 The term does not include any of the following: (a) A holder with  
25 the mere capacity or ability to influence, or the unexercised right to  
26 control facility operations; (b) a holder who conducts or requires a  
27 borrower to conduct an environmental audit or an environmental site  
28 assessment at the facility for which indicia of ownership is held; (c)  
29 a holder who requires a borrower to come into compliance with any  
30 applicable laws or regulations at the facility for which indicia of  
31 ownership is held; (d) a holder who requires a borrower to conduct  
32 remedial actions including setting minimum requirements, but does not  
33 otherwise control or manage the borrower's remedial actions or the  
34 scope of the borrower's remedial actions except to prepare a facility  
35 for sale, transfer, or assignment; (e) a holder who engages in workout  
36 or policing activities primarily to protect the holder's security  
37 interest in the facility; (f) a holder who prepares a facility for  
38 sale, transfer, or assignment or requires a borrower to prepare a  
39 facility for sale, transfer, or assignment; (g) a holder who operates

1 a facility primarily to protect a security interest, or requires a  
2 borrower to continue to operate, a facility primarily to protect a  
3 security interest; and (h) a prospective holder who, as a condition of  
4 becoming a holder, requires an owner or operator to conduct an  
5 environmental audit, conduct an environmental site assessment, come  
6 into compliance with any applicable laws or regulations, or conduct  
7 remedial actions prior to holding a security interest is not  
8 participating in the management of the facility.

9 (~~(13)~~) (14) "Person" means an individual, firm, corporation,  
10 association, partnership, consortium, joint venture, commercial entity,  
11 state government agency, unit of local government, federal government  
12 agency, or Indian tribe.

13 (~~(14)~~) (15) "Policing activities" means actions the holder takes  
14 to insure that the borrower complies with the terms of the loan or  
15 security interest or actions the holder takes or requires the borrower  
16 to take to maintain the value of the security. Policing activities  
17 include: Requiring the borrower to conduct remedial actions at the  
18 facility during the term of the security interest; requiring the  
19 borrower to comply or come into compliance with applicable federal,  
20 state, and local environmental and other laws, regulations, and permits  
21 during the term of the security interest; securing or exercising  
22 authority to monitor or inspect the facility including on-site  
23 inspections, or to monitor or inspect the borrower's business or  
24 financial condition during the term of the security interest; or taking  
25 other actions necessary to adequately police the loan or security  
26 interest such as requiring a borrower to comply with any warranties,  
27 covenants, conditions, representations, or promises from the borrower.

28 (~~(15)~~) (16) "Potentially liable person" means any person whom the  
29 department finds, based on credible evidence, to be liable under RCW  
30 70.105D.040. The department shall give notice to any such person and  
31 allow an opportunity for comment before making the finding, unless an  
32 emergency requires otherwise.

33 (~~(16)~~) (17) "Prepare a facility for sale, transfer, or  
34 assignment" means to secure access to the facility; perform routine  
35 maintenance on the facility; remove inventory, equipment, or  
36 structures; properly maintain environmental compliance measures already  
37 in place at the facility; conduct remedial actions to clean up releases  
38 at the facility; or to perform other similar activities intended to  
39 preserve the value of the facility where the borrower has defaulted on

1 the loan or otherwise breached the security agreement or after  
2 foreclosure and its equivalents and in anticipation of a pending sale,  
3 transfer, or assignment, primarily to protect the holder's security  
4 interest in the facility. A holder can prepare a facility for sale,  
5 transfer, or assignment for up to one year prior to foreclosure and its  
6 equivalents and still stay within the security interest exemption in  
7 subsection (~~(11)~~) (12)(b)(ii) of this section.

8 (~~(17)~~) (18) "Primarily to protect a security interest" means the  
9 indicia of ownership is held primarily for the purpose of securing  
10 payment or performance of an obligation. The term does not include  
11 indicia of ownership held primarily for investment purposes nor indicia  
12 of ownership held primarily for purposes other than as protection for  
13 a security interest. A holder may have other, secondary reasons, for  
14 maintaining indicia of ownership, but the primary reason must be for  
15 protection of a security interest. Holding indicia of ownership after  
16 foreclosure or its equivalents for longer than five years shall be  
17 considered to be holding the indicia of ownership for purposes other  
18 than primarily to protect a security interest. For facilities that  
19 have been acquired through foreclosure or its equivalents prior to July  
20 23, 1995, this five-year period shall begin as of July 23, 1995.

21 (~~(18)~~) (19) "Public notice" means, at a minimum, adequate notice  
22 mailed to all persons who have made timely request of the department  
23 and to persons residing in the potentially affected vicinity of the  
24 proposed action; mailed to appropriate news media; published in the  
25 newspaper of largest circulation in the city or county of the proposed  
26 action; and opportunity for interested persons to comment.

27 (~~(19)~~) (20) "Release" means any intentional or unintentional  
28 entry of any hazardous substance into the environment, including but  
29 not limited to the abandonment or disposal of containers of hazardous  
30 substances.

31 (~~(20)~~) (21) "Remedy" or "remedial action" means any action or  
32 expenditure consistent with the purposes of this chapter to identify,  
33 eliminate, or minimize any threat or potential threat posed by  
34 hazardous substances to human health or the environment including any  
35 investigative and monitoring activities with respect to any release or  
36 threatened release of a hazardous substance and any health assessments  
37 or health effects studies conducted in order to determine the risk or  
38 potential risk to human health.



1       (~~(21)~~) (22) "Security interest" means an interest in a facility  
2 created or established for the purpose of securing a loan or other  
3 obligation. Security interests include deeds of trusts, sellers  
4 interest in a real estate contract, liens, legal, or equitable title to  
5 a facility acquired incident to foreclosure and its equivalents, and  
6 title pursuant to lease financing transactions. Security interests may  
7 also arise from transactions such as sale and leasebacks, conditional  
8 sales, installment sales, trust receipt transactions, certain  
9 assignments, factoring agreements, accounts receivable financing  
10 arrangements, easements, and consignments, if the transaction creates  
11 or establishes an interest in a facility for the purpose of securing a  
12 loan or other obligation.

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

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

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

24       (~~(23)~~) (24) "Workout activities" means those actions by which a  
25 holder, at any time prior to foreclosure and its equivalents, seeks to  
26 prevent, cure, or mitigate a default by the borrower or obligor; or to  
27 preserve, or prevent the diminution of, the value of the security.  
28 Workout activities include: Restructuring or renegotiating the terms  
29 of the security interest; requiring payment of additional rent or  
30 interest; exercising forbearance; requiring or exercising rights  
31 pursuant to an assignment of accounts or other amounts owed to an  
32 obligor; requiring or exercising rights pursuant to an escrow agreement  
33 pertaining to amounts owed to an obligor; providing specific or general  
34 financial or other advice, suggestions, counseling, or guidance; and  
35 exercising any right or remedy the holder is entitled to by law or  
36 under any warranties, covenants, conditions, representations, or  
37 promises from the borrower.

1       **Sec. 3.** RCW 70.105D.030 and 1995 c 70 s 2 are each amended to read  
2 as follows:

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

5       (a) Investigate, provide for investigating, or require potentially  
6 liable persons to investigate any releases or threatened releases of  
7 hazardous substances, including but not limited to inspecting,  
8 sampling, or testing to determine the nature or extent of any release  
9 or threatened release. If there is a reasonable basis to believe that  
10 a release or threatened release of a hazardous substance may exist, the  
11 department's authorized employees, agents, or contractors may enter  
12 upon any property and conduct investigations. The department shall  
13 give reasonable notice before entering property unless an emergency  
14 prevents such notice. The department may by subpoena require the  
15 attendance or testimony of witnesses and the production of documents or  
16 other information that the department deems necessary;

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

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

31       (d) Carry out all state programs authorized under the federal  
32 cleanup law and the federal resource, conservation, and recovery act,  
33 42 U.S.C. Sec. 6901 et seq., as amended;

34       (e) Classify substances as hazardous substances for purposes of RCW  
35 70.105D.020(7) and classify substances and products as hazardous  
36 substances for purposes of RCW 82.21.020(1);

37       (f) Issue orders or enter into consent decrees or agreed orders  
38 that include, or issue written opinions under (i) of this subsection  
39 that may be conditioned upon, deed restrictions where necessary to

1 protect human health and the environment from a release or threatened  
2 release of a hazardous substance from a facility. Prior to  
3 establishing a deed restriction under this subsection, the department  
4 shall notify and seek comment from a city or county department with  
5 land use planning authority for real property subject to a deed  
6 restriction;

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

10 (h) Require holders to conduct remedial actions necessary to abate  
11 an imminent or substantial endangerment pursuant to RCW  
12 70.105D.020(~~((11))~~) (12)(b)(ii)(C); (~~and~~)

13 (i) Provide informal advice and assistance to persons regarding the  
14 administrative and technical requirements of this chapter. This may  
15 include site-specific advice to persons who are conducting or otherwise  
16 interested in independent remedial actions. Any such advice or  
17 assistance shall be advisory only, and shall not be binding on the  
18 department. As a part of providing this advice and assistance for  
19 independent remedial actions, the department may prepare written  
20 opinions regarding whether the independent remedial actions or  
21 proposals for those actions meet the substantive requirements of this  
22 chapter or whether the department believes further remedial action is  
23 necessary at the facility. The department may collect, from persons  
24 requesting advice and assistance, the costs incurred by the department  
25 in providing such advice and assistance; however, the department shall,  
26 where appropriate, waive collection of costs in order to provide an  
27 appropriate level of technical assistance in support of public  
28 participation. The state, the department, and officers and employees  
29 of the state are immune from all liability, and no cause of action of  
30 any nature may arise from any act or omission in providing, or failing  
31 to provide, informal advice and assistance; and

32 (j) Take any other actions necessary to carry out the provisions of  
33 this chapter, including the power to adopt rules under chapter 34.05  
34 RCW.

35 (2) The department shall immediately implement all provisions of  
36 this chapter to the maximum extent practicable, including investigative  
37 and remedial actions where appropriate. The department shall adopt,  
38 and thereafter enforce, rules under chapter 34.05 RCW to:

1 (a) Provide for public participation, including at least (i) the  
2 establishment of regional citizen's advisory committees, (ii) public  
3 notice of the development of investigative plans or remedial plans for  
4 releases or threatened releases, and (iii) concurrent public notice of  
5 all compliance orders, agreed orders, enforcement orders, or notices of  
6 violation;

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

8 (c) Provide for requiring the reporting by an owner or operator of  
9 releases of hazardous substances to the environment that may be a  
10 threat to human health or the environment within ninety days of  
11 discovery, including such exemptions from reporting as the department  
12 deems appropriate, however this requirement shall not modify any  
13 existing requirements provided for under other laws;

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

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

25 (~~(e)~~) (f) Apply industrial clean-up standards at industrial  
26 properties. Rules adopted under this subsection shall ensure that  
27 industrial properties cleaned up to industrial standards cannot be  
28 converted to nonindustrial uses without approval from the department.  
29 The 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(7) and the classification of  
14 substances or products as hazardous substances for purposes of RCW  
15 82.21.020(1). The board shall consist of five independent members to  
16 serve staggered three-year terms. No members may be employees of the  
17 department. Members shall be reimbursed for travel expenses as  
18 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 1994 c 254 s 4 are each amended to  
23 read 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 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 any required hearing, that the proposed settlement would  
32 lead to a more expeditious cleanup of hazardous substances in  
33 compliance with cleanup standards under RCW 70.105D.030(2)((~~d~~)) (e)  
34 and with any remedial orders issued by the department. Whenever  
35 practicable and in the public interest, the attorney general may  
36 expedite such a settlement with persons whose contribution is  
37 insignificant in amount and toxicity. A hearing shall be required only  
38 if at least ten persons request one or if the department determines a  
39 hearing is necessary.

1 (b) A settlement agreement under this section shall be entered as  
2 a consent decree issued by a court of competent jurisdiction.

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

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

15 (e) If the state has entered into a consent decree with an owner or  
16 operator under this section, the state shall not enforce this chapter  
17 against any owner or operator who is a successor in interest to the  
18 settling party unless under the terms of the consent decree the state  
19 could enforce against the settling party, if:

20 (i) The successor owner or operator is liable with respect to the  
21 facility solely due to that person's ownership interest or operator  
22 status acquired as a successor in interest to the owner or operator  
23 with whom the state has entered into a consent decree; and

24 (ii) The stay of enforcement under this subsection does not apply  
25 if the consent decree was based on circumstances unique to the settling  
26 party that do not exist with regard to the successor in interest, such  
27 as financial hardship. For consent decrees entered into before the  
28 effective date of this section, at the request of a settling party or  
29 a potential successor owner or operator, the attorney general shall  
30 issue a written opinion on whether a consent decree contains such  
31 unique circumstances. For all other consent decrees, such unique  
32 circumstances shall be specified in the consent decree.

33 (f) Any person who is not subject to enforcement by the state under  
34 (e) of this subsection is not liable for claims for contribution  
35 regarding matters addressed in the settlement.

36 (5)(a) In addition to the settlement authority provided under  
37 subsection (4) of this section, the attorney general may agree to a  
38 settlement with a person not currently liable for remedial action at a



1 facility who proposes to purchase, redevelop, or reuse the facility,  
2 provided that:

3 ~~((a) The settlement will provide a substantial public benefit,~~  
4 ~~including but not limited to the reuse of a vacant or abandoned~~  
5 ~~manufacturing or industrial facility, or the development of a facility~~  
6 ~~by a governmental entity to address an important public purpose;~~

7 ~~(b)) (i) The settlement will yield substantial new resources to~~  
8 ~~facilitate cleanup;~~

9 ~~((c)) (ii) The settlement will expedite remedial action~~  
10 ~~consistent with the rules adopted under this chapter; and~~

11 ~~((d)) (iii) Based on available information, the department~~  
12 ~~determines that the redevelopment or reuse of the facility is not~~  
13 ~~likely to contribute to the existing release or threatened release,~~  
14 ~~interfere with remedial actions that may be needed at the site, or~~  
15 ~~increase health risks to persons at or in the vicinity of the site.~~

16 (b) The legislature recognizes that the state does not have  
17 adequate resources to participate in all property transactions  
18 involving contaminated property. The primary purpose of this  
19 subsection (5) is to promote the cleanup and reuse of vacant or  
20 abandoned commercial or industrial contaminated property. The attorney  
21 general and the department may give priority to settlements that will  
22 provide a substantial public benefit, including, but not limited to the  
23 reuse of a vacant or abandoned manufacturing or industrial facility, or  
24 the development of a facility by a governmental entity to address an  
25 important public purpose.

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

33 **Sec. 5.** RCW 70.105D.070 and 1994 c 252 s 5 are each amended to  
34 read as follows:

35 (1) The state toxics control account and the local toxics control  
36 account are hereby created in the state treasury.

37 (2) The following moneys shall be deposited into the state toxics  
38 control account: (a) Those revenues which are raised by the tax

1 imposed under RCW 82.21.030 and which are attributable to that portion  
2 of the rate equal to thirty-three one-hundredths of one percent; (b)  
3 the costs of remedial actions recovered under this chapter or chapter  
4 70.105A RCW; (c) penalties collected or recovered under this chapter;  
5 and (d) any other money appropriated or transferred to the account by  
6 the legislature. Moneys in the account may be used only to carry out  
7 the purposes of this chapter, including but not limited to the  
8 following activities:

9 (i) The state's responsibility for hazardous waste planning,  
10 management, regulation, enforcement, technical assistance, and public  
11 education required under chapter 70.105 RCW;

12 (ii) The state's responsibility for solid waste planning,  
13 management, regulation, enforcement, technical assistance, and public  
14 education required under chapter 70.95 RCW;

15 (iii) The hazardous waste cleanup program required under this  
16 chapter;

17 (iv) State matching funds required under the federal cleanup law;

18 (v) Financial assistance for local programs in accordance with  
19 chapters 70.95, 70.95C, 70.95I, and 70.105 RCW;

20 (vi) State government programs for the safe reduction, recycling,  
21 or disposal of hazardous wastes from households, small businesses, and  
22 agriculture;

23 (vii) Hazardous materials emergency response training;

24 (viii) Water and environmental health protection and monitoring  
25 programs;

26 (ix) Programs authorized under chapter 70.146 RCW;

27 (x) A public participation program, including regional citizen  
28 advisory committees;

29 (xi) Public funding to assist potentially liable persons to pay for  
30 the costs of remedial action in compliance with cleanup standards under  
31 RCW 70.105D.030(2)(~~(d)~~) (e) but only when the amount and terms of  
32 such funding are established under a settlement agreement under RCW  
33 70.105D.040(4) and when the director has found that the funding will  
34 achieve both (A) a substantially more expeditious or enhanced cleanup  
35 than would otherwise occur, and (B) the prevention or mitigation of  
36 unfair economic hardship; and

37 (xii) Development and demonstration of alternative management  
38 technologies designed to carry out the top two hazardous waste  
39 management priorities of RCW 70.105.150.

1 (3) The following moneys shall be deposited into the local toxics  
2 control account: Those revenues which are raised by the tax imposed  
3 under RCW 82.21.030 and which are attributable to that portion of the  
4 rate equal to thirty-seven one-hundredths of one percent.

5 (a) Moneys deposited in the local toxics control account shall be  
6 used by the department for grants or loans to local governments for the  
7 following purposes in descending order of priority: (i) Remedial  
8 actions; (ii) hazardous waste plans and programs under chapter 70.105  
9 RCW; and (iii) solid waste plans and programs under chapters 70.95,  
10 70.95C, 70.95I, and 70.105 RCW. Funds for plans and programs shall be  
11 allocated consistent with the priorities and matching requirements  
12 established in chapters 70.105, 70.95C, 70.95I, and 70.95 RCW.

13 (b) Funds may also be appropriated to the department of health to  
14 implement programs to reduce testing requirements under the federal  
15 safe drinking water act for public water systems. The department of  
16 health shall reimburse the account from fees assessed under RCW  
17 70.119A.115 by June 30, 1995.

18 (4) Except for unanticipated receipts under RCW 43.79.260 through  
19 43.79.282, moneys in the state and local toxics control accounts may be  
20 spent only after appropriation by statute.

21 (5) One percent of the moneys deposited into the state and local  
22 toxics control accounts shall be allocated only for public  
23 participation grants to persons who may be adversely affected by a  
24 release or threatened release of a hazardous substance and to not-for-  
25 profit public interest organizations. The primary purpose of these  
26 grants is to facilitate the participation by persons and organizations  
27 in the investigation and remedying of releases or threatened releases  
28 of hazardous substances and to implement the state's solid and  
29 hazardous waste management priorities. No grant may exceed ((fifty))  
30 sixty thousand dollars ((though it)) except that, beginning July 1,  
31 1998, the director may increase the maximum grant award annually to  
32 account for inflation. Any such increase for inflation shall be  
33 calculated by applying the fiscal growth factor calculated by the  
34 office of financial management under RCW 43.135.025 to the previous  
35 year's maximum grant amount and shall become effective upon publication  
36 of a notice by the department in the state register. Grants may be  
37 renewed annually. Moneys appropriated for public participation from  
38 either account which are not expended at the close of any biennium  
39 shall revert to the state toxics control account.

1 (6) No moneys deposited into either the state or local toxics  
2 control account may be used for solid waste incinerator feasibility  
3 studies, construction, maintenance, or operation.

4 (7) The department shall adopt rules for grant or loan issuance and  
5 performance.

6 **Sec. 6.** RCW 70.105D.080 and 1993 c 326 s 1 are each amended to  
7 read as follows:

8 Except as provided in RCW 70.105D.040(4) (d) and (f), a person may  
9 bring a private right of action, including a claim for contribution or  
10 for declaratory relief, against any other person liable under RCW  
11 70.105D.040 for the recovery of remedial action costs. In the action,  
12 natural resource damages paid to the state under this chapter may also  
13 be recovered. Recovery shall be based on such equitable factors as the  
14 court determines are appropriate. Remedial action costs shall include  
15 reasonable attorneys' fees and expenses. Recovery of remedial action  
16 costs shall be limited to those remedial actions that, when evaluated  
17 as a whole, are the substantial equivalent of a department-conducted or  
18 department-supervised remedial action. Substantial equivalence shall  
19 be determined by the court with reference to the rules adopted by the  
20 department under this chapter. An action under this section may be  
21 brought after remedial action costs are incurred but must be brought  
22 within three years from the date remedial action confirms cleanup  
23 standards are met or within one year of May 12, 1993, whichever is  
24 later. The prevailing party in such an action shall recover its  
25 reasonable attorneys' fees and costs. This section applies to all  
26 causes of action regardless of when the cause of action may have  
27 arisen. To the extent a cause of action has arisen prior to May 12,  
28 1993, this section applies retroactively, but in all other respects it  
29 applies prospectively.

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