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By Representatives Anderson, G. Chandler, Linville, Haigh, Schoesler, Rockefeller and K. Schmidt

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1 AN ACT Relating to on-farm chemical uses leading to waste site
2 contamination; and amending RCW 70.105D.040.

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

4 **Sec. 1.** RCW 70.105D.040 and 1997 c 406 s 4 are each amended to
5 read as follows:

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

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

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

11 (c) Any person who owned or possessed a hazardous substance and who
12 by contract, agreement, or otherwise arranged for disposal or treatment
13 of the hazardous substance at the facility, or arranged with a
14 transporter for transport for disposal or treatment of the hazardous
15 substances at the facility, or otherwise generated hazardous wastes
16 disposed of or treated at the facility;

17 (d) Any person (i) who accepts or accepted any hazardous substance
18 for transport to a disposal, treatment, or other facility selected by
19 such person from which there is a release or a threatened release for

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

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

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

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

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

20 (i) An act of God;

21 (ii) An act of war; or

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

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

38 (i) To establish that a person had no reason to know, the person
39 must have undertaken, at the time of acquisition, all appropriate

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

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

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

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

24 (d) Any person who, for the purpose of growing food crops,
25 prepares, stores, mixes, transports, cleans residue of, applies, or
26 otherwise uses pesticides or fertilizers without negligence and in
27 accordance with all applicable laws and regulations.

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

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

1 and toxicity. A hearing shall be required only if at least ten persons
2 request one or if the department determines a hearing is necessary.

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

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

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

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

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

26 (ii) The stay of enforcement under this subsection does not apply
27 if the consent decree was based on circumstances unique to the settling
28 party that do not exist with regard to the successor in interest, such
29 as financial hardship. For consent decrees entered into before July
30 27, 1997, at the request of a settling party or a potential successor
31 owner or operator, the attorney general shall issue a written opinion
32 on whether a consent decree contains such unique circumstances. For
33 all other consent decrees, such unique circumstances shall be specified
34 in the consent decree.

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

38 (5)(a) In addition to the settlement authority provided under
39 subsection (4) of this section, the attorney general may agree to a

1 settlement with a person not currently liable for remedial action at a
2 facility who proposes to purchase, redevelop, or reuse the facility,
3 provided that:

4 (i) The settlement will yield substantial new resources to
5 facilitate cleanup;

6 (ii) The settlement will expedite remedial action consistent with
7 the rules adopted under this chapter; and

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

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

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

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