
SENATE BILL 6046

State of Washington

59th Legislature

2005 Regular Session

By Senators Shin and Rasmussen

Read first time 02/24/2005. Referred to Committee on International Trade & Economic Development.

1 AN ACT Relating to financing local economic development projects;
2 amending RCW 70.105D.020; and adding a new chapter to Title 43 RCW.

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

4 NEW SECTION. **Sec. 1.** (1) The legislature finds that, in many
5 areas of the state, the lack of necessary infrastructure and vacant
6 brownfields act as an impediment to economic growth.

7 (2) The legislature further finds that public improvements to
8 brownfields, carried out in accordance with local economic development
9 plans, will encourage investment in job-producing private development
10 and will expand the public tax base.

11 (3) The legislature intends, through this act, to promote and
12 facilitate the orderly development and economic stability of
13 communities in the state. It is the purpose of this chapter to provide
14 financial resources to assist local jurisdictions in the financing of
15 public improvements which are needed to encourage private development
16 where this development would not otherwise occur due to the presence of
17 contaminated property and other environmental considerations.

1 NEW SECTION. **Sec. 2.** The definitions in this section apply
2 throughout this chapter unless the context clearly requires otherwise.

3 (1) "Authority" means the Washington economic development finance
4 authority created in chapter 43.163 RCW.

5 (2) "Brownfield" means abandoned, idled, or underused property,
6 including industrial and commercial facilities, owned by a local
7 jurisdiction, where expansion or redevelopment is complicated by real
8 or perceived contamination.

9 (3) "Leasehold excise tax" means an excise tax imposed under
10 chapter 82.29A RCW on the act or privilege of occupying or using
11 publicly owned real or personal property.

12 (4) "Local economic development project" means a project that:

13 (a) Promotes economic development and job creation by the private
14 sector; and

15 (b) Includes cleanup of publicly owned contaminated brownfield
16 sites, including adjacent rivers and lakes, that have been designated
17 a priority for cleanup in a local economic development plan and by the
18 department of ecology.

19 (5) "Local economic development project costs" means costs
20 associated with:

21 (a) Environmental cleanup, including restoring brownfields and fish
22 habitat;

23 (b) Street and road construction and improvements;

24 (c) Water and sewer system construction and improvements;

25 (d) Land use planning and associated environmental analysis and
26 project design;

27 (e) Relocation, maintenance, and operation of property pending
28 construction of the local economic development project;

29 (f) Complying with the requirements of this act and other
30 applicable law; and

31 (g) Administrative expenditures reasonably necessary and related to
32 these costs.

33 (6) "Local jurisdiction" means a county, city, town, or port
34 district.

35 NEW SECTION. **Sec. 3.** (1) Local jurisdictions with local economic
36 development projects approved by the department of community, trade,
37 and economic development as provided under subsection (2) of this

1 section may enter into an agreement with the Washington economic
2 development finance authority regarding the issuance of bonds for the
3 purpose of financing local economic development project costs. Such
4 agreement shall require that the local jurisdiction impose a leasehold
5 excise tax and pledge the proceeds of all leasehold excise taxes
6 imposed on and collected with respect to property associated with the
7 completed local economic development project to the payment of these
8 bonds.

9 (2) No local jurisdiction may enter an agreement with the
10 Washington economic development finance authority under this act
11 unless:

12 (a) They have delivered a local economic development project plan
13 to the department of community, trade, and economic development that
14 includes a description of the contemplated property and the local
15 economic development project; the estimated cost of the total project,
16 including both public and private components; the estimated period
17 during which leasehold excise tax revenues are to be devoted to meeting
18 bond obligations; the proposed use of bond funds financing the public
19 portion of the project; and the estimated tax revenues to be derived
20 from the project during the period in which bonds for the project are
21 being paid off and after such period;

22 (b) The department of community, trade, and economic development
23 has reviewed the plan and determined that: (i) There is a sufficient
24 amount of revenue available to fund the project; and (ii) the project
25 meets the definition of local economic development project under
26 section 2 of this act.

27 NEW SECTION. **Sec. 4.** The local economic development project
28 financing account is created in the state treasury. The proceeds of
29 all leasehold excise taxes imposed on and collected with respect to
30 property associated with a completed local economic development project
31 shall be deposited into the local economic development project
32 financing account.

33 (1) All leasehold excise taxes collected by the department of
34 revenue on behalf of a county or city for all leasehold interests in
35 property associated with a local economic development project shall be
36 placed in a separate and identifiable account for subsequent

1 disbursement to the local economic development project financing
2 account in the state treasury.

3 (2) Only the Washington economic development finance authority may
4 authorize expenditures from the account and no appropriation is
5 required for expenditures. The money in the account must be used for
6 the purposes of bond resolution or trust indenture under which the
7 bonds are issued under this chapter and may not be used to replace or
8 supplant existing funding. The deposit of revenue under this section
9 from a local jurisdiction shall cease when the authority specifies that
10 the local jurisdiction has met the monetary obligations of the program.

11 NEW SECTION. **Sec. 5.** In connection with any bonds issued by the
12 authority under the terms of this act, the authority shall enter into
13 agreements with participating local jurisdictions which shall provide
14 for the deposit by each local jurisdiction of all leasehold excise
15 taxes collected on property associated with the completed local
16 economic development project. Leasehold excise taxes shall be
17 disbursed bimonthly into the local economic development project account
18 in the state treasury. The taxes collected shall be sufficient,
19 together with other revenues available to the authority, if any, to:
20 (1) Pay the issuance and administrative fees set by the authority; (2)
21 pay the local economic development project costs financed by the
22 authority, to the extent that the payment of the costs has not
23 otherwise been adequately provided for; (3) pay the principal of,
24 premium, if any, and interest on outstanding bonds of the authority
25 issued to finance the local economic development project costs as the
26 same shall become due and payable; and (4) create and maintain reserves
27 required or provided for in any bond resolution or trust indenture
28 authorizing the issuance of such bonds of the authority. The payments
29 shall not be subject to supervision or regulation by any department,
30 committee, board, body, bureau, or agency of the state other than the
31 authority.

32 NEW SECTION. **Sec. 6.** (1) The authority shall provide the assessor
33 and treasurer of the county within which the local economic development
34 project is located and the department of revenue of the parcel number
35 or numbers and street address or addresses, if any, associated with all
36 property that is part of a local economic development project.

1 (2) The authority may, from time to time, issue its special
2 obligation bonds in order to carry out the purposes of this chapter and
3 to enable the authority to exercise any of the powers granted to it in
4 this chapter. The bonds may be issued on either a taxable or federally
5 tax-exempt basis. The bonds shall be issued pursuant to a bond
6 resolution or trust indenture and shall be payable solely out of the
7 local economic development project financing account created in section
8 4 of this act. The local economic development project financing
9 account shall be funded in whole or in part from moneys paid by one or
10 more local jurisdictions for whose benefit such bonds were issued and
11 from any other sources authorized by law, including from the proceeds
12 of bonds issued by the authority for the purpose of refunding any
13 outstanding bonds of the authority.

14 (3) The bonds may be secured by:

15 (a) A first lien against any unexpended proceeds of the bonds;

16 (b) A first lien against moneys in the local economic development
17 project financing account created in section 4 of this act;

18 (c) A first or subordinate lien against the leasehold excise tax
19 revenue and receipts of the local jurisdiction or jurisdictions that
20 are collected on property associated with the completed local economic
21 development project or projects;

22 (d) A first or subordinate security interest against any real or
23 personal property, tangible or intangible, of the local jurisdiction or
24 jurisdictions that is associated with the local economic development
25 project;

26 (e) Any other real or personal property of the local jurisdiction
27 or jurisdictions, tangible or intangible;

28 (f) Any combination of (a) through (e) of this subsection; or

29 (g) Any other security the authority may deem appropriate or
30 necessary.

31 Any security interest created against the unexpended bond proceeds
32 and against the local economic development project financing account
33 shall be immediately valid and binding against the moneys and any
34 securities in which the moneys may be invested without authority or
35 trustee possession, and the security interest shall be prior to any
36 party having any competing claim against the moneys or securities,
37 without filing or recording under Article 9A of the Uniform Commercial

1 Code or Title 62A RCW, and regardless of whether the party has notice
2 of the security interest.

3 (4) The bonds may be issued as serial bonds or as term bonds or any
4 such combination. The bonds shall bear such date or dates; mature at
5 such time or times; bear interest at such rate or rates, either fixed
6 or variable; be payable at such time or times; be in such
7 denominations; carry such registration privileges; be made
8 transferable, exchangeable, and interchangeable; be payable in lawful
9 money of the United States of America at such place or places; be
10 subject to such terms of redemption; and be sold at public or private
11 sale, in such manner, at such time, and at such price as the authority
12 shall determine. The bonds shall be executed by the manual or
13 facsimile signatures of the chairperson and the authority's duly
14 elected secretary or its executive director, and by the trustee if the
15 authority determines to use a trustee. At least one signature shall be
16 manually subscribed.

17 (5) Any bond resolution, trust indenture, or agreement with a local
18 jurisdiction relating to bonds issued by the authority or the financing
19 or refinancing made available by this act may contain provisions, which
20 may be made a part of the contract with the holders or owners of the
21 bonds to be issued, pertaining to the following, among other matters:

22 (a) The security interests granted by the local jurisdiction to
23 secure repayment of any amounts financed and the performance by the
24 local jurisdiction of its other obligations in the financing;

25 (b) The security interests granted to the holders or owners of the
26 bonds to secure repayment of the bonds;

27 (c) Rentals, fees, and other amounts to be charged, and the sums to
28 be raised in each year through such charges, and the use, investment,
29 and disposition of the sums;

30 (d) The segregation of reserves or sinking funds, and the
31 regulation, investment, and disposition thereof;

32 (e) Limitations on the purposes to which, or the investments in
33 which, the proceeds of the sale of any issue of bonds may be applied;

34 (f) Terms pertaining to the issuance of additional parity bonds;

35 (g) Terms pertaining to the incurrence of parity debt;

36 (h) The refunding of outstanding bonds;

37 (i) Procedures, if any, by which the terms of any contract with
38 bondholders may be amended or abrogated;

1 (j) Acts or failures to act that constitute a default by the local
2 jurisdiction or the authority in their respective obligations and the
3 rights and remedies in the event of a default;

4 (k) Terms governing performance by the trustee of its obligation;
5 or

6 (l) Such other additional covenants, agreements, and provisions as
7 are deemed necessary, useful, or convenient by the authority for the
8 security of the holders of the bonds.

9 (6) Bonds may be issued by the authority to refund other
10 outstanding authority bonds, at or before the maturity thereof, and to
11 pay any redemption premium with respect thereto. Bonds issued for such
12 refunding purposes may be combined with bonds issued for the financing
13 or refinancing of new local economic development project costs.
14 Pending the application of the proceeds of the refunding bonds to the
15 redemption of the bonds to be redeemed, the authority may enter into an
16 agreement or agreements with a corporate trustee under section 8 of
17 this act with respect to the interim investment of the proceeds and the
18 application of the proceeds and the earnings on the proceeds to the
19 payment of the principal of and interest on, and the redemption of the
20 bonds to be redeemed.

21 (7) All bonds and any interest coupons appertaining to the bonds
22 are negotiable instruments under Title 62A RCW.

23 (8) Neither the members of the authority, nor its employees or
24 agents, nor any person executing the bonds is liable personally on the
25 bonds or subject to any personal liability or accountability by reason
26 of the issuance of the bonds.

27 (9) The authority may purchase its bonds with any of its funds
28 available for the purchase. The authority may hold, pledge, cancel, or
29 resell the bonds subject to and in accordance with agreements with
30 bondholders.

31 NEW SECTION. **Sec. 7.** Bonds issued under this chapter shall not be
32 deemed to constitute obligations, either general or special, of the
33 state, or a pledge of the faith and credit of the state, or a general
34 obligation of the authority. The bonds shall be special obligations of
35 the authority and shall be payable solely from the local economic
36 development project financing account created in section 4 of this act.
37 Except for any initial appropriations which may be made, the fund or

1 funds shall be funded in whole or in part from moneys paid by one or
2 more local jurisdictions for whose benefit such bonds were issued and
3 from any other sources authorized by law, including from the proceeds
4 of bonds issued by the authority for the purpose of refunding any
5 outstanding bonds of the authority. The issuance of bonds under this
6 chapter shall not obligate, directly, indirectly, or contingently, the
7 state to levy any taxes or appropriate or expend any funds for the
8 payment of the principal or the interest on the bonds.

9 Neither the proceeds of bonds issued under this chapter nor any
10 money used or to be used to pay the principal of or interest on the
11 bonds shall constitute public money or property. All of such moneys
12 shall be kept segregated and set apart from funds of the state and any
13 political subdivision of the state and shall not be subject to
14 appropriation or allotment by the state or subject to the provisions of
15 chapter 43.88 RCW.

16 NEW SECTION. **Sec. 8.** All moneys received by or on behalf of the
17 authority under this chapter, whether as proceeds from the sale of
18 bonds or from participants or from other sources, shall be deemed to be
19 trust funds to be held and applied solely as provided in this chapter.
20 The authority, in lieu of receiving and applying the moneys itself, may
21 enter into an agreement or trust indenture with one or more banks or
22 trust companies having the power and authority to conduct trust
23 business in the state to:

24 (1) Perform all of any part of the obligations of the authority
25 with respect to: (a) Bonds issued by it; (b) the receipt, investment,
26 and application of the proceeds of the bonds and moneys paid by a local
27 jurisdiction or available from other sources for the payment of the
28 bonds; (c) the enforcement of the obligations of a local jurisdiction
29 in connection with the financing or refinancing of any project; and (d)
30 other matters relating to the exercise of the authority's powers under
31 this chapter;

32 (2) Receive, hold, preserve, and enforce any security interest or
33 evidence of security interest granted by a local jurisdiction for
34 purposes of securing the payment of the bonds; and

35 (3) Act on behalf of the authority or the holders or owners of
36 bonds of the authority for purposes of assuring or enforcing the
37 payment of the bonds, when due.

1 NEW SECTION. **Sec. 9.** (1) After the completion of the local
2 economic development project and the subsequent sale or lease of the
3 property by the local jurisdiction, leasehold excise taxes associated
4 with the property shall become due and payable.

5 If the public property is sold to a private person or entity by the
6 local jurisdiction, regular property taxes shall be paid to the county
7 treasurer in accordance with RCW 84.56.020. If the public property is
8 leased and a leasehold interest, as defined in RCW 82.29A.020, is
9 created, leasehold excise taxes shall be collected by the department of
10 revenue in accordance with RCW 82.29A.040. Tax receipts collected
11 under this section may only be expended to finance and repay local
12 economic development project costs associated with a local economic
13 development project financed in whole or in part by bonds issued by the
14 Washington economic development finance authority.

15 (2) Regular property taxes shall be levied for collection on the
16 assessed value of the property in the same manner as taxes are levied
17 by taxing districts on all other property.

18 (3) Leasehold excise taxes will be levied and collected on the same
19 basis as those taxes are levied on other leasehold interests as
20 specified in chapter 82.29A RCW. The department shall note or
21 otherwise separate the taxes collected on leasehold interests
22 associated with property that is part of a local economic development
23 project.

24 (4) The disbursement of tax receipts from leasehold excise taxes
25 into the local economic development project financing account within
26 the state treasury must cease when the revenues are no longer necessary
27 or obligated to pay the costs associated with the local economic
28 development project.

29 Any excess leasehold excise taxes revenues and earnings remaining
30 must be forwarded to the local leasehold excise account in the state
31 treasury. From this account, the state treasurer shall disburse the
32 excess leasehold excise tax revenues to counties or cities
33 proportionate to the amount of tax collected on behalf of each county
34 or city.

35 NEW SECTION. **Sec. 10.** This chapter supplements and neither
36 restricts nor limits any powers that the state or any local
37 jurisdiction might otherwise have under any laws of this state.

1 NEW SECTION. **Sec. 11.** The legislature finds that local economic
2 development projects benefit all taxing districts and taxing
3 authorities that impose leasehold excise taxes with respect to property
4 associated with a completed local economic development project.

5 Therefore, the legislature also finds that it is a proper purpose
6 of a local jurisdiction, taxing authority, or taxing district, which
7 imposes leasehold excise taxes with respect to property associated with
8 a completed local economic development project, to use leasehold excise
9 taxes imposed with respect to the specific property associated with the
10 completed local economic development project to help finance the costs
11 of this project.

12 NEW SECTION. **Sec. 12.** This chapter provides a complete,
13 additional, and alternative method for accomplishing the purposes of
14 this chapter and shall be regarded as supplemental and additional to
15 powers conferred by other laws. The issuance of bonds and refunding
16 bonds under this chapter need not comply with the requirements of any
17 other law applicable to the issuance of bonds.

18 NEW SECTION. **Sec. 13.** This chapter, being necessary for the
19 welfare of the state and its inhabitants, shall be liberally construed
20 to effect its purposes. Insofar as the provisions of this chapter are
21 inconsistent with the provisions of any general or special law, or
22 parts thereof, the provisions of this chapter shall be controlling.

23 **Sec. 14.** RCW 70.105D.020 and 1998 c 6 s 1 are each amended to read
24 as follows:

25 (1) "Agreed order" means an order issued by the department under
26 this chapter with which the potentially liable person receiving the
27 order agrees to comply. An agreed order may be used to require or
28 approve any cleanup or other remedial actions but it is not a
29 settlement under RCW 70.105D.040(4) and shall not contain a covenant
30 not to sue, or provide protection from claims for contribution, or
31 provide eligibility for public funding of remedial actions under RCW
32 70.105D.070(2)(d)(xi).

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

34 (3) "Director" means the director of ecology or the director's
35 designee.

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

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

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

21 (7) "Hazardous substance" means:

22 (a) Any dangerous or extremely hazardous waste as defined in RCW
23 70.105.010 (5) and (6), or any dangerous or extremely dangerous waste
24 designated by rule pursuant to chapter 70.105 RCW;

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

27 (c) Any substance that, on March 1, 1989, is a hazardous substance
28 under section 101(14) of the federal cleanup law, 42 U.S.C. Sec.
29 9601(14);

30 (d) Petroleum or petroleum products; and

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

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

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

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

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

31 (11) "Operating a facility primarily to protect a security
32 interest" occurs when all of the following are met: (a) Operating the
33 facility where the borrower has defaulted on the loan or otherwise
34 breached the security agreement; (b) operating the facility to preserve
35 the value of the facility as an ongoing business; (c) the operation is
36 being done in anticipation of a sale, transfer, or assignment of the
37 facility; and (d) the operation is being done primarily to protect a

1 security interest. Operating a facility for longer than one year prior
2 to foreclosure or its equivalents shall be presumed to be operating the
3 facility for other than to protect a security interest.

4 (12) "Owner or operator" means:

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

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

10 The term does not include:

11 (i) An agency of the state or unit of local government which
12 acquired ownership or control through a drug forfeiture action under
13 RCW 69.50.505 involuntarily through bankruptcy, tax delinquency, or
14 abandonment((7)); or circumstances in which the government
15 ((involuntarily)) acquires title for redevelopment purposes. This
16 exclusion does not apply to an agency of the state or unit of local
17 government which has caused or contributed to the release or threatened
18 release of a hazardous substance from the facility;

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

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

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

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

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

35 (E) Any remedial actions conducted by the holder are in compliance
36 with any preexisting requirements identified by the department, or, if
37 the department has not identified such requirements for the facility,

1 the remedial actions are conducted consistent with the rules adopted
2 under this chapter; and

3 (F) The holder does not exacerbate an existing release. The
4 exemption in this subsection (12)(b)(ii) does not apply to holders who
5 cause or contribute to a new release or threatened release or who are
6 otherwise liable under RCW 70.105D.040(1) (b), (c), (d), and (e);
7 provided, however, that a holder shall not lose this exemption if it
8 establishes that any such new release has been remediated according to
9 the requirements of this chapter and that any hazardous substances
10 remaining at the facility after remediation of the new release are
11 divisible from such new release;

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

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

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

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

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

34 (E) Any remedial actions conducted by the fiduciary are in
35 compliance with any preexisting requirements identified by the
36 department, or, if the department has not identified such requirements
37 for the facility, the remedial actions are conducted consistent with
38 the rules adopted under this chapter; and

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

2 The exemption in this subsection (12)(b)(iii) does not apply to
3 fiduciaries who cause or contribute to a new release or threatened
4 release or who are otherwise liable under RCW 70.105D.040(1) (b), (c),
5 (d), and (e); provided however, that a fiduciary shall not lose this
6 exemption if it establishes that any such new release has been
7 remediated according to the requirements of this chapter and that any
8 hazardous substances remaining at the facility after remediation of the
9 new release are divisible from such new release. The exemption in this
10 subsection (12)(b)(iii) also does not apply where the fiduciary's
11 powers to comply with this subsection (12)(b)(iii) are limited by a
12 governing instrument created with the objective purpose of avoiding
13 liability under this chapter or of avoiding compliance with this
14 chapter; or

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

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

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

26 (C) The person does not engage in activities that damage or
27 interfere with the operation of remedial actions installed on the
28 person's property or engage in activities that result in exposure of
29 humans or the environment to the contaminated ground water that has
30 migrated onto the property;

31 (D) If requested, the person allows the department, potentially
32 liable persons who are subject to an order, agreed order, or consent
33 decree, and the authorized employees, agents, or contractors of each,
34 access to the property to conduct remedial actions required by the
35 department. The person may attempt to negotiate an access agreement
36 before allowing access; and

37 (E) Legal withdrawal of ground water does not disqualify a person
38 from the exemption in this subsection (12)(b)(iv).

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

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

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

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

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

1 considered to be holding the indicia of ownership for purposes other
2 than primarily to protect a security interest. For facilities that
3 have been acquired through foreclosure or its equivalents prior to July
4 23, 1995, this five-year period shall begin as of July 23, 1995.

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

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

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

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

34 (23) "Industrial properties" means properties that are or have been
35 characterized by, or are to be committed to, traditional industrial
36 uses such as processing or manufacturing of materials, marine terminal
37 and transportation areas and facilities, fabrication, assembly,

1 treatment, or distribution of manufactured products, or storage of bulk
2 materials, that are either:

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

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

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

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

34 (b) "Fiduciary" does not mean:

35 (i) A person acting as a fiduciary with respect to a trust or other
36 fiduciary estate that was organized for the primary purpose of, or is
37 engaged in, actively carrying on a trade or business for profit, unless

1 the trust or other fiduciary estate was created as part of, or to
2 facilitate, one or more estate plans or because of the incapacity of a
3 natural person;

4 (ii) A person who acquires ownership or control of a facility with
5 the objective purpose of avoiding liability of the person or any other
6 person. It is prima facie evidence that the fiduciary acquired
7 ownership or control of the facility to avoid liability if the facility
8 is the only substantial asset in the fiduciary estate at the time the
9 facility became subject to the fiduciary estate;

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

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

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

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

22 (26) "Fiduciary capacity" means the capacity of a person holding
23 title to a facility, or otherwise having control of an interest in the
24 facility pursuant to the exercise of the responsibilities of the person
25 as a fiduciary.

26 NEW SECTION. **Sec. 15.** If any provision of this act or its
27 application to any person or circumstance is held invalid, the
28 remainder of the act or the application of the provision to other
29 persons or circumstances is not affected.

30 NEW SECTION. **Sec. 16.** Sections 1 through 13 of this act
31 constitute a new chapter in Title 43 RCW.

--- END ---