
SENATE BILL 5296

State of Washington 63rd Legislature 2013 Regular Session

By Senators Ericksen, Baumgartner, Rivers, Bailey, Delvin, and Honeyford

Read first time 01/25/13. Referred to Committee on Energy, Environment & Telecommunications.

1 AN ACT Relating to the model toxics control act; amending RCW
2 70.105D.020 and 70.105D.030; reenacting and amending RCW 70.105D.070;
3 adding a new section to chapter 70.105D RCW; and creating new sections.

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

5 NEW SECTION. **Sec. 1.** The legislature finds that there are a large
6 number of toxic waste sites that have been identified in the department
7 of ecology's priority list as ready for immediate cleanup. The
8 legislature further finds that addressing the cleanup of these toxic
9 waste sites will provide needed jobs to citizens of Washington state.
10 It is the intent of the legislature to prioritize the spending of
11 revenues under chapter 70.105D RCW, the model toxics control act, on
12 cleaning up the most toxic sites, while also providing jobs in
13 communities around the state.

14 **Sec. 2.** RCW 70.105D.020 and 2007 c 104 s 18 are each amended to
15 read as follows:

16 The definitions in this section apply throughout this chapter
17 unless the context clearly requires otherwise.

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

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

10 (3) "Director" means the director of ecology or the director's
11 designee.

12 (4) "Environmental covenant" has the same meaning as defined in RCW
13 64.70.020.

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

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

25 (7)(a) "Fiduciary" means a person acting for the benefit of another
26 party as a bona fide trustee; executor; administrator; custodian;
27 guardian of estates or guardian ad litem; receiver; conservator;
28 committee of estates of incapacitated persons; trustee in bankruptcy;
29 trustee, under an indenture agreement, trust agreement, lease, or
30 similar financing agreement, for debt securities, certificates of
31 interest or certificates of participation in debt securities, or other
32 forms of indebtedness as to which the trustee is not, in the capacity
33 of trustee, the lender. Except as provided in subsection (17)(b)(iii)
34 of this section, the liability of a fiduciary under this chapter shall
35 not exceed the assets held in the fiduciary capacity.

36 (b) "Fiduciary" does not mean:

37 (i) A person acting as a fiduciary with respect to a trust or other
38 fiduciary estate that was organized for the primary purpose of, or is

1 engaged in, actively carrying on a trade or business for profit, unless
2 the trust or other fiduciary estate was created as part of, or to
3 facilitate, one or more estate plans or because of the incapacity of a
4 natural person;

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

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

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

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

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

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

27 (9) "Foreclosure and its equivalents" means purchase at a
28 foreclosure sale, acquisition, or assignment of title in lieu of
29 foreclosure, termination of a lease, or other repossession, acquisition
30 of a right to title or possession, an agreement in satisfaction of the
31 obligation, or any other comparable formal or informal manner, whether
32 pursuant to law or under warranties, covenants, conditions,
33 representations, or promises from the borrower, by which the holder
34 acquires title to or possession of a facility securing a loan or other
35 obligation.

36 (10) "Hazardous substance" means:

37 (a) Any dangerous or extremely hazardous waste as defined in RCW

1 70.105.010 (~~(5) and (6)~~) (1) and (7), or any dangerous or extremely
2 dangerous waste designated by rule pursuant to chapter 70.105 RCW;

3 (b) Any hazardous substance as defined in RCW 70.105.010(~~(14)~~)
4 (10) or any hazardous substance as defined by rule pursuant to chapter
5 70.105 RCW;

6 (c) Any substance that, on March 1, 1989, is a hazardous substance
7 under section 101(14) of the federal cleanup law, 42 U.S.C. Sec.
8 9601(14);

9 (d) Petroleum or petroleum products; and

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

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

18 (11) "Holder" means a person who holds indicia of ownership
19 primarily to protect a security interest. A holder includes the
20 initial holder such as the loan originator, any subsequent holder such
21 as a successor-in-interest or subsequent purchaser of the security
22 interest on the secondary market, a guarantor of an obligation, surety,
23 or any other person who holds indicia of ownership primarily to protect
24 a security interest, or a receiver, court-appointed trustee, or other
25 person who acts on behalf or for the benefit of a holder. A holder can
26 be a public or privately owned financial institution, receiver,
27 conservator, loan guarantor, or other similar persons that loan money
28 or guarantee repayment of a loan. Holders typically are banks or
29 savings and loan institutions but may also include others such as
30 insurance companies, pension funds, or private individuals that engage
31 in loaning of money or credit.

32 (12) "Independent remedial actions" means remedial actions
33 conducted without department oversight or approval, and not under an
34 order, agreed order, or consent decree.

35 (13) "Indicia of ownership" means evidence of a security interest,
36 evidence of an interest in a security interest, or evidence of an
37 interest in a facility securing a loan or other obligation, including
38 any legal or equitable title to a facility acquired incident to

1 foreclosure and its equivalents. Evidence of such interests includes,
2 mortgages, deeds of trust, sellers interest in a real estate contract,
3 liens, surety bonds, and guarantees of obligations, title held pursuant
4 to a lease financing transaction in which the lessor does not select
5 initially the leased facility, or legal or equitable title obtained
6 pursuant to foreclosure and their equivalents. Evidence of such
7 interests also includes assignments, pledges, or other rights to or
8 other forms of encumbrance against the facility that are held primarily
9 to protect a security interest.

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

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

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

21 (15) "Institutional controls" means measures undertaken to limit or
22 prohibit activities that may interfere with the integrity of a remedial
23 action or result in exposure to or migration of hazardous substances at
24 a site. "Institutional controls" include environmental covenants.

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

35 (17) "Owner or operator" means:

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

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

4 The term does not include:

5 (i) An agency of the state or unit of local government which
6 acquired ownership or control through a drug forfeiture action under
7 RCW 69.50.505, or involuntarily through bankruptcy, tax delinquency,
8 abandonment, or other circumstances in which the government
9 involuntarily acquires title. This exclusion does not apply to an
10 agency of the state or unit of local government which has caused or
11 contributed to the release or threatened release of a hazardous
12 substance from the facility;

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

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

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

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

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

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

34 (F) The holder does not exacerbate an existing release. The
35 exemption in this subsection (17)(b)(ii) does not apply to holders who
36 cause or contribute to a new release or threatened release or who are
37 otherwise liable under RCW 70.105D.040(1) (b), (c), (d), and (e);
38 provided, however, that a holder shall not lose this exemption if it

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

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

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

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

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

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

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

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

33 The exemption in this subsection (17)(b)(iii) does not apply to
34 fiduciaries who cause or contribute to a new release or threatened
35 release or who are otherwise liable under RCW 70.105D.040(1) (b), (c),
36 (d), and (e); provided however, that a fiduciary shall not lose this
37 exemption if it establishes that any such new release has been
38 remediated according to the requirements of this chapter and that any

1 hazardous substances remaining at the facility after remediation of the
2 new release are divisible from such new release. The exemption in this
3 subsection (17)(b)(iii) also does not apply where the fiduciary's
4 powers to comply with this subsection (17)(b)(iii) are limited by a
5 governing instrument created with the objective purpose of avoiding
6 liability under this chapter or of avoiding compliance with this
7 chapter; or

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

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

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

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

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

30 (E) Legal withdrawal of groundwater does not disqualify a person
31 from the exemption in this subsection (17)(b)(iv).

32 (18) "Participation in management" means exercising decision-making
33 control over the borrower's operation of the facility, environmental
34 compliance, or assuming or manifesting responsibility for the overall
35 management of the enterprise encompassing the day-to-day decision
36 making of the enterprise.

37 The term does not include any of the following: (a) A holder with
38 the mere capacity or ability to influence, or the unexercised right to

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

23 (19) "Person" means an individual, firm, corporation, association,
24 partnership, consortium, joint venture, commercial entity, state
25 government agency, unit of local government, federal government agency,
26 or Indian tribe.

27 (20) "Policing activities" means actions the holder takes to ensure
28 that the borrower complies with the terms of the loan or security
29 interest or actions the holder takes or requires the borrower to take
30 to maintain the value of the security. Policing activities include:
31 Requiring the borrower to conduct remedial actions at the facility
32 during the term of the security interest; requiring the borrower to
33 comply or come into compliance with applicable federal, state, and
34 local environmental and other laws, regulations, and permits during the
35 term of the security interest; securing or exercising authority to
36 monitor or inspect the facility including on-site inspections, or to
37 monitor or inspect the borrower's business or financial condition
38 during the term of the security interest; or taking other actions

1 necessary to adequately police the loan or security interest such as
2 requiring a borrower to comply with any warranties, covenants,
3 conditions, representations, or promises from the borrower.

4 (21) "Potentially liable person" means any person whom the
5 department finds, based on credible evidence, to be liable under RCW
6 70.105D.040. The department shall give notice to any such person and
7 allow an opportunity for comment before making the finding, unless an
8 emergency requires otherwise.

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

23 (23) "Primarily to protect a security interest" means the indicia
24 of ownership is held primarily for the purpose of securing payment or
25 performance of an obligation. The term does not include indicia of
26 ownership held primarily for investment purposes nor indicia of
27 ownership held primarily for purposes other than as protection for a
28 security interest. A holder may have other, secondary reasons, for
29 maintaining indicia of ownership, but the primary reason must be for
30 protection of a security interest. Holding indicia of ownership after
31 foreclosure or its equivalents for longer than five years shall be
32 considered to be holding the indicia of ownership for purposes other
33 than primarily to protect a security interest. For facilities that
34 have been acquired through foreclosure or its equivalents prior to July
35 23, 1995, this five-year period shall begin as of July 23, 1995.

36 (24) "Public notice" means, at a minimum, adequate notice mailed to
37 all persons who have made timely request of the department and to
38 persons residing in the potentially affected vicinity of the proposed

1 action; mailed to appropriate news media; published in the newspaper of
2 largest circulation in the city or county of the proposed action; and
3 opportunity for interested persons to comment.

4 (25) "Release" means any intentional or unintentional entry of any
5 hazardous substance into the environment, including but not limited to
6 the abandonment or disposal of containers of hazardous substances.

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

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

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

1 right or remedy the holder is entitled to by law or under any
2 warranties, covenants, conditions, representations, or promises from
3 the borrower.

4 (29) "Brownfield property" means previously developed and currently
5 abandoned or underutilized real property and adjacent surface waters
6 and sediment where environmental, economic, or community reuse
7 objectives are hindered by the release or threatened release of
8 hazardous substances that the department has determined requires
9 remedial action under this chapter or that the United States
10 environmental protection agency has determined requires remedial action
11 under the comprehensive environmental response, compensation, and
12 liability act.

13 (30) "Model remedy" or "model remedial action" means a set of
14 technologies, procedures, and monitoring protocols identified by the
15 department for use in routine types of clean-up projects that have
16 common features and risks.

17 **Sec. 3.** RCW 70.105D.030 and 2009 c 560 s 10 are each amended to
18 read as follows:

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

21 (a) Investigate, provide for investigating, or require potentially
22 liable persons to investigate any releases or threatened releases of
23 hazardous substances, including but not limited to inspecting,
24 sampling, or testing to determine the nature or extent of any release
25 or threatened release. If there is a reasonable basis to believe that
26 a release or threatened release of a hazardous substance may exist, the
27 department's authorized employees, agents, or contractors may enter
28 upon any property and conduct investigations. The department shall
29 give reasonable notice before entering property unless an emergency
30 prevents such notice. The department may by subpoena require the
31 attendance or testimony of witnesses and the production of documents or
32 other information that the department deems necessary;

33 (b) Conduct, provide for conducting, or require potentially liable
34 persons to conduct remedial actions (including investigations under (a)
35 of this subsection) to remedy releases or threatened releases of
36 hazardous substances. In carrying out such powers, the department's
37 authorized employees, agents, or contractors may enter upon property.

1 The department shall give reasonable notice before entering property
2 unless an emergency prevents such notice. In conducting, providing
3 for, or requiring remedial action, the department shall give preference
4 to permanent solutions to the maximum extent practicable and shall
5 provide for or require adequate monitoring to ensure the effectiveness
6 of the remedial action;

7 (c) Indemnify contractors retained by the department for carrying
8 out investigations and remedial actions, but not for any contractor's
9 reckless or willful misconduct;

10 (d) Carry out all state programs authorized under the federal
11 cleanup law and the federal resource, conservation, and recovery act,
12 42 U.S.C. Sec. 6901 et seq., as amended;

13 (e) Classify substances as hazardous substances for purposes of RCW
14 70.105D.020 and classify substances and products as hazardous
15 substances for purposes of RCW 82.21.020(1);

16 (f) Issue orders or enter into consent decrees or agreed orders
17 that include, or issue written opinions under (i) of this subsection
18 that may be conditioned upon, environmental covenants where necessary
19 to protect human health and the environment from a release or
20 threatened release of a hazardous substance from a facility. Prior to
21 establishing an environmental covenant under this subsection, the
22 department shall consult with and seek comment from a city or county
23 department with land use planning authority for real property subject
24 to the environmental covenant;

25 (g) Enforce the application of permanent and effective
26 institutional controls that are necessary for a remedial action to be
27 protective of human health and the environment and the notification
28 requirements established in RCW 70.105D.110, and impose penalties for
29 violations of that section consistent with RCW 70.105D.050;

30 (h) Require holders to conduct remedial actions necessary to abate
31 an imminent or substantial endangerment pursuant to RCW
32 70.105D.020(17)(b)(ii)(C);

33 (i) Provide informal advice, model remedies, and assistance to
34 persons regarding the administrative and technical requirements of this
35 chapter. This may include site-specific advice to persons who are
36 conducting or otherwise interested in independent remedial actions.
37 Any such advice or assistance shall be advisory only, and shall not be
38 binding on the department. As a part of providing this advice, model

1 remedies, and assistance for independent remedial actions, the
2 department may prepare written opinions regarding whether the
3 independent remedial actions or proposals for those actions meet the
4 substantive requirements of this chapter or whether the department
5 believes further remedial action is necessary at the facility. Nothing
6 in this chapter may be construed to preclude the department from
7 issuing a written opinion on whether further remedial action is
8 necessary at any portion of the real property located within a
9 facility, even if further remedial action is still necessary elsewhere
10 at the same facility. Such a written opinion on a portion of a
11 facility must also provide an opinion on the status of the facility as
12 a whole. The department may collect, from persons requesting advice
13 and assistance, the costs incurred by the department in providing such
14 advice and assistance; however, the department shall, where
15 appropriate, waive collection of costs in order to provide an
16 appropriate level of technical assistance in support of public
17 participation. The department shall provide model remedies without
18 charge. The state, the department, and officers and employees of the
19 state are immune from all liability, and no cause of action of any
20 nature may arise from any act or omission in providing, or failing to
21 provide, informal advice and assistance; (~~and~~)

22 (j) Take any other actions necessary to carry out the provisions of
23 this chapter, including the power to adopt rules under chapter 34.05
24 RCW; and

25 (k) Must consider model remedy proposals from qualified private
26 sector engineers, consultants, and contractors that meet clean-up
27 standards for use in routine types of clean-up projects that have
28 common features and risks.

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

33 (a) Provide for public participation, including at least (i) public
34 notice of the development of investigative plans or remedial plans for
35 releases or threatened releases and (ii) concurrent public notice of
36 all compliance orders, agreed orders, enforcement orders, or notices of
37 violation;

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

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

7 (d) Establish reasonable deadlines not to exceed ninety days for
8 initiating an investigation of a hazardous waste site after the
9 department receives notice or otherwise receives information that the
10 site may pose a threat to human health or the environment and other
11 reasonable deadlines for remedying releases or threatened releases at
12 the site;

13 (e) Publish and periodically update minimum cleanup standards for
14 remedial actions at least as stringent as the cleanup standards under
15 section 121 of the federal cleanup law, 42 U.S.C. Sec. 9621, and at
16 least as stringent as all applicable state and federal laws, including
17 health-based standards under state and federal law; and

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

29 (3) To achieve and protect the state's long-term ecological health,
30 the department shall (~~(prioritize sufficient funding)~~) plan to cleanup
31 hazardous waste sites and prevent the creation of future hazards due to
32 improper disposal of toxic wastes(~~(, and create financing tools to~~
33 ~~cleanup large scale hazardous waste sites requiring multiyear~~
34 ~~commitments))~~) at a pace that matches the estimated cash resources in
35 the state and local toxics control accounts and the special category E
36 account. Estimated cash resources must consider the annual cash flow
37 requirements of major projects that receive appropriations expected to
38 cross multiple biennia. To effectively monitor toxic accounts

1 expenditures, the department shall develop a comprehensive ten-year
2 financing report that identifies long-term remedial action project
3 costs, tracks expenses, and projects future needs. The report must
4 include the number of model remedy proposals prepared by qualified
5 private sector engineers, consultants, or contractors that were
6 accepted and rejected, the reasons for rejection, and the success rate
7 of accepted model remedy proposals as measured by the number of jobs
8 created and achieving the clean-up standard within the proposed time
9 frame and funding provided.

10 (4) Before (~~December~~) September 20th of each even-numbered year,
11 the department shall:

12 (a) Develop a comprehensive ten-year financing report in
13 coordination with all local governments with clean-up responsibilities
14 that identifies the projected biennial hazardous waste site remedial
15 action needs that are eligible for funding from the state and local
16 toxics control account and the special category E account;

17 (b) Work with local governments to develop working capital reserves
18 to be incorporated in the ten-year financing report;

19 (c) Identify the projected remedial action needs for orphaned,
20 abandoned, and other clean-up sites that are eligible for funding from
21 the state toxics control account;

22 (d) Project the remedial action need, cost, revenue, and any
23 recommended working capital reserve estimate to the next biennium's
24 long-term remedial action needs from both the local (~~toxics control~~
25 ~~account~~) and (~~the~~) state toxics control account and the special
26 category E account, and submit this information to the appropriate
27 standing fiscal and environmental committees of the senate and house of
28 representatives. This submittal must also include a ranked list of
29 such remedial action projects for both accounts. The submittal must
30 also identify separate budget estimates for large, multibiennia clean-
31 up projects that exceed ten million dollars. The department shall
32 prepare its ten-year capital budget plan that is submitted to the
33 office of financial management to reflect the separate budget estimates
34 for these large clean-up projects; and

35 (e) Provide the legislature and the public each year with an
36 accounting of the department's activities supported by appropriations
37 from the state and local toxics control accounts and the special
38 category E account, including a list of known hazardous waste sites and

1 their hazard rankings, actions taken and planned at each site, how the
2 department is meeting its waste management priorities under RCW
3 70.105.150, and all funds expended under this chapter.

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

7 (6) For all facilities where an environmental covenant has been
8 required under subsection (1)(f) of this section, including all
9 facilities where the department has required an environmental covenant
10 under an order, agreed order, or consent decree, or as a condition of
11 a written opinion issued under the authority of subsection (1)(i) of
12 this section, the department shall periodically review the
13 environmental covenant for effectiveness. Except as otherwise provided
14 in (c) of this subsection, the department shall conduct a review at
15 least once every five years after an environmental covenant is
16 recorded.

17 (a) The review shall consist of, at a minimum:

18 (i) A review of the title of the real property subject to the
19 environmental covenant to determine whether the environmental covenant
20 was properly recorded and, if applicable, amended or terminated;

21 (ii) A physical inspection of the real property subject to the
22 environmental covenant to determine compliance with the environmental
23 covenant, including whether any development or redevelopment of the
24 real property has violated the terms of the environmental covenant; and

25 (iii) A review of the effectiveness of the environmental covenant
26 in limiting or prohibiting activities that may interfere with the
27 integrity of the remedial action or that may result in exposure to or
28 migration of hazardous substances. This shall include a review of
29 available monitoring data.

30 (b) If an environmental covenant has been amended or terminated
31 without proper authority, or if the terms of an environmental covenant
32 have been violated, or if the environmental covenant is no longer
33 effective in limiting or prohibiting activities that may interfere with
34 the integrity of the remedial action or that may result in exposure to
35 or migration of hazardous substances, then the department shall take
36 any and all appropriate actions necessary to ensure compliance with the
37 environmental covenant and the policies and requirements of this
38 chapter.

1 (c) For facilities where an environmental covenant required by the
2 department under subsection (1)(f) of this section was required before
3 July 1, 2007, the department shall:

4 (i) Enter all required information about the environmental covenant
5 into the registry established under RCW 64.70.120 by June 30, 2008;

6 (ii) For those facilities where more than five years has elapsed
7 since the environmental covenant was required and the department has
8 yet to conduct a review, conduct an initial review according to the
9 following schedule:

10 (A) By December 30, 2008, fifty facilities;

11 (B) By June 30, 2009, fifty additional facilities; and

12 (C) By June 30, 2010, the remainder of the facilities;

13 (iii) Once this initial review has been completed, conduct
14 subsequent reviews at least once every five years.

15 **Sec. 4.** RCW 70.105D.070 and 2012 2nd sp.s. c 7 s 920 and 2012 2nd
16 sp.s. c 2 s 6005 are each reenacted and amended to read as follows:

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

19 (2)(a) The following moneys shall be deposited into the state
20 toxics control account: ~~((a))~~ (i) Forty-seven percent of the amount
21 remaining from those revenues which are raised by the tax imposed under
22 RCW 82.21.030 ~~((and which are attributable to that portion of the rate~~
23 ~~equal to thirty three one hundredths of one percent))~~ after the
24 transfer of funds as required under section 5 of this act; ~~((b))~~ (ii)
25 the costs of remedial actions recovered under this chapter or chapter
26 70.105A RCW; ~~((c))~~ (iii) penalties collected or recovered under this
27 chapter; and ~~((d))~~ (iv) any other money appropriated or transferred
28 to the account by the legislature.

29 (b) Moneys in the state toxics control account ~~((may))~~ must be used
30 only to carry out the purposes of this chapter ~~((, including but not~~
31 ~~limited to the following activities:~~

32 ~~(i) The state's responsibility for hazardous waste planning,~~
33 ~~management, regulation, enforcement, technical assistance, and public~~
34 ~~education required under chapter 70.105 RCW;~~

35 ~~(ii) The state's responsibility for solid waste planning,~~
36 ~~management, regulation, enforcement, technical assistance, and public~~
37 ~~education required under chapter 70.95 RCW;~~

1 ~~(iii) The hazardous waste cleanup program required under this~~
2 ~~chapter;~~
3 ~~(iv) State matching funds required under the federal cleanup law;~~
4 ~~(v) Financial assistance for local programs in accordance with~~
5 ~~chapters 70.95, 70.95C, 70.95I, and 70.105 RCW;~~
6 ~~(vi) State government programs for the safe reduction, recycling,~~
7 ~~or disposal of hazardous wastes from households, small businesses, and~~
8 ~~agriculture;~~
9 ~~(vii) Hazardous materials emergency response training;~~
10 ~~(viii) Water and environmental health protection and monitoring~~
11 ~~programs;~~
12 ~~(ix) Programs authorized under chapter 70.146 RCW;~~
13 ~~(x) A public participation program, including regional citizen~~
14 ~~advisory committees;~~
15 ~~(xi) Public funding to assist potentially liable persons to pay for~~
16 ~~the costs of remedial action in compliance with cleanup standards under~~
17 ~~RCW 70.105D.030(2)(e) but only when the amount and terms of such~~
18 ~~funding are established under a settlement agreement under RCW~~
19 ~~70.105D.040(4) and when the director has found that the funding will~~
20 ~~achieve both (A) a substantially more expeditious or enhanced cleanup~~
21 ~~than would otherwise occur, and (B) the prevention or mitigation of~~
22 ~~unfair economic hardship;~~
23 ~~(xii) Development and demonstration of alternative management~~
24 ~~technologies designed to carry out the hazardous waste management~~
25 ~~priorities of RCW 70.105.150;~~
26 ~~(xiii) During the 2009-2011 and 2011-2013 fiscal biennia, shoreline~~
27 ~~update technical assistance;~~
28 ~~(xiv) During the 2009-2011 fiscal biennium, multijurisdictional~~
29 ~~permitting teams;~~
30 ~~(xv) During the 2011-2013 fiscal biennium, actions for reducing~~
31 ~~public exposure to toxic air pollution, and actions taken through the~~
32 ~~family forest fish passage program to correct barriers to fish passage~~
33 ~~on privately owned small forest lands; and~~
34 ~~(xvi) During the 2011-2013 fiscal biennium, the department of~~
35 ~~ecology's water quality, shorelands and environmental assessment,~~
36 ~~hazardous waste, waste to resources, nuclear waste, and air quality~~
37 ~~programs)) and must be expended for the following purposes in order of~~
38 ~~priority:~~

1 (i) Cleanup of high priority contaminated toxic sites on the
2 department's hazardous sites list that have a completed remedial
3 investigation or feasibility study, a finalized clean-up action plan,
4 and are prepared to begin the clean-up action;

5 (ii) Cleanup and reuse of brownfield properties to make land
6 available for economic and job development opportunities that would not
7 otherwise occur; and

8 (iii) Cleanup of properties where local communities and liable
9 parties have a completed remedial investigation or feasibility study,
10 a finalized clean-up action plan, and are prepared to begin the clean-
11 up action.

12 (3) The following moneys shall be deposited into the local toxics
13 control account: Fifty-three percent of the amount remaining from
14 those revenues which are raised by the tax imposed under RCW 82.21.030
15 ((and which are attributable to that portion of the rate equal to
16 thirty seven one hundredths of one percent)) after the transfer of
17 funds as required under section 5 of this act.

18 ~~((a) Moneys deposited in the local toxics control account shall be~~
19 ~~used by the department for grants or loans to local governments for the~~
20 ~~following purposes in descending order of priority:~~

21 ~~(i) Remedial actions;~~

22 ~~(ii) Hazardous waste plans and programs under chapter 70.105 RCW;~~

23 ~~(iii) Solid waste plans and programs under chapters 70.95, 70.95C,~~
24 ~~70.95I, and 70.105 RCW;~~

25 ~~(iv) Funds for a program to assist in the assessment and cleanup of~~
26 ~~sites of methamphetamine production, but not to be used for the initial~~
27 ~~containment of such sites, consistent with the responsibilities and~~
28 ~~intent of RCW 69.50.511; and~~

29 ~~(v) Cleanup and disposal of hazardous substances from abandoned or~~
30 ~~derelict vessels, defined for the purposes of this section as vessels~~
31 ~~that have little or no value and either have no identified owner or~~
32 ~~have an identified owner lacking financial resources to clean up and~~
33 ~~dispose of the vessel, that pose a threat to human health or the~~
34 ~~environment.~~

35 ~~(b) Funds for plans and programs shall be allocated consistent with~~
36 ~~the priorities and matching requirements established in chapters~~
37 ~~70.105, 70.95C, 70.95I, and 70.95 RCW, except that any applicant that~~
38 ~~is a Puget Sound partner, as defined in RCW 90.71.010, along with any~~

1 ~~project that is referenced in the action agenda developed by the Puget~~
2 ~~Sound partnership under RCW 90.71.310, shall, except as conditioned by~~
3 ~~RCW 70.105D.120, receive priority for any available funding for any~~
4 ~~grant or funding programs or sources that use a competitive bidding~~
5 ~~process. During the 2007-2009 fiscal biennium, moneys in the account~~
6 ~~may also be used for grants to local governments to retrofit public~~
7 ~~sector diesel equipment and for storm water planning and implementation~~
8 ~~activities.~~

9 ~~(c) To expedite cleanups throughout the state, the department shall~~
10 ~~partner with local communities and liable parties for cleanups. The~~
11 ~~department is authorized to use the following additional strategies in~~
12 ~~order to ensure a healthful environment for future generations:~~

13 ~~(i) The director may alter grant-matching requirements to create~~
14 ~~incentives for local governments to expedite cleanups when one of the~~
15 ~~following conditions exists:~~

16 ~~(A) Funding would prevent or mitigate unfair economic hardship~~
17 ~~imposed by the clean-up liability;~~

18 ~~(B) Funding would create new substantial economic development,~~
19 ~~public recreational, or habitat restoration opportunities that would~~
20 ~~not otherwise occur; or~~

21 ~~(C) Funding would create an opportunity for acquisition and~~
22 ~~redevelopment of vacant, orphaned, or abandoned property under RCW~~
23 ~~70.105D.040(5) that would not otherwise occur;~~

24 ~~(ii) The use of outside contracts to conduct necessary studies;~~

25 ~~(iii) The purchase of remedial action cost cap insurance, when~~
26 ~~necessary to expedite multiparty clean-up efforts.~~

27 ~~(d) To facilitate and expedite cleanups using funds from the local~~
28 ~~toxics control account, during the 2009-2011 fiscal biennium the~~
29 ~~director may establish grant-funded accounts to hold and disperse local~~
30 ~~toxics control account funds and funds from local governments to be~~
31 ~~used for remedial actions.))~~

32 ~~(4) Except for unanticipated receipts under RCW 43.79.260 through~~
33 ~~43.79.282, moneys in the state and local toxics control accounts may be~~
34 ~~spent only after appropriation by statute.~~

35 ~~((5) Except during the 2011-2013 fiscal biennium, one percent of~~
36 ~~the moneys deposited into the state and local toxics control accounts~~
37 ~~shall be allocated only for public participation grants to persons who~~
38 ~~may be adversely affected by a release or threatened release of a~~

1 hazardous substance and to not for profit public interest
2 organizations. The primary purpose of these grants is to facilitate
3 the participation by persons and organizations in the investigation and
4 remedying of releases or threatened releases of hazardous substances
5 and to implement the state's solid and hazardous waste management
6 priorities. No grant may exceed sixty thousand dollars. Grants may be
7 renewed annually. Moneys appropriated for public participation from
8 either account which are not expended at the close of any biennium
9 shall revert to the state toxics control account.

10 (6) No moneys deposited into either the state or local toxics
11 control account may be used for solid waste incinerator feasibility
12 studies, construction, maintenance, or operation, or, after January 1,
13 2010, for projects designed to address the restoration of Puget Sound,
14 funded in a competitive grant process, that are in conflict with the
15 action agenda developed by the Puget Sound partnership under RCW
16 90.71.310.

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

19 (8) During the 2011-2013 fiscal biennium, the legislature may
20 transfer from the local toxics control account to the state toxics
21 control account such amounts as reflect excess fund balance in the
22 account.

23 (9) During the 2011-2013 fiscal biennium, the local toxics control
24 account may also be used for local government shoreline update grants
25 and actions for reducing public exposure to toxic air pollution;
26 funding to local governments for flood levee improvements; and grants
27 to local governments for brownfield redevelopment.))

28 NEW SECTION. **Sec. 5.** A new section is added to chapter 70.105D
29 RCW to read as follows:

30 (1) The special category E account is created in the state
31 treasury. Beginning July 1, 2013, and every fiscal year thereafter and
32 to the extent that the combined revenues from RCW 82.21.030 to the
33 state toxics control account and the local toxics control account are
34 forecast to exceed one hundred fifty million dollars, plus the fiscal
35 growth factor under chapter 43.135 RCW, the account revenues must be
36 deposited into the special category E account. Moneys in the account
37 may only be spent after appropriation.

1 (2) Moneys in the special category E account may only be spent on
2 clean-up projects using technologies, procedures, contracts, and
3 project management and oversight that result in significant reductions
4 in the time to complete clean-up projects compared to baseline averages
5 for comparable clean-up projects.

6 NEW SECTION. **Sec. 6.** (1) For the biennium ending June 30, 2015,
7 the state treasurer must transfer twenty-five million dollars from the
8 state toxics control account to the special category E account created
9 in section 5 of this act.

10 (2) For the biennium ending June 30, 2015, the state treasurer must
11 transfer seventy-five million dollars from the local toxics control
12 account to the special category E account created in section 5 of this
13 act.

--- END ---