
SUBSTITUTE SENATE BILL 5890

State of Washington

54th Legislature

1995 Regular Session

By Senate Committee on Financial Institutions & Housing (originally sponsored by Senators Fraser, Hale, Prentice, Deccio and Kohl)

Read first time 03/01/95.

1 AN ACT Relating to clarifying the liability of lenders under the
2 model toxics control act; amending RCW 70.105D.020; and reenacting and
3 amending RCW 70.105D.030.

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

5 **Sec. 1.** RCW 70.105D.020 and 1994 c 254 s 2 are each amended to
6 read as follows:

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

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

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

18 (4) "Facility" means (a) any building, structure, installation,
19 equipment, pipe or pipeline (including any pipe into a sewer or

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

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

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

19 (7) "Hazardous substance" means:

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

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

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

28 (d) Petroleum or petroleum products; and

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

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

37 ((+7)) (8) "Holder" means a person who holds indicia of ownership
38 primarily to protect a security interest. A holder includes the
39 initial holder such as the loan originator, any subsequent holder such

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

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

25 (10) "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 (11) "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 involuntarily through bankruptcy, tax
7 delinquency, abandonment, or circumstances in which the government
8 involuntarily acquires title. This exclusion does not apply to an
9 agency of the state or unit of local government which has caused or
10 contributed to the release or threatened release of a hazardous
11 substance from the facility; or

12 (ii) A person who, without participating in the management of a
13 facility, holds indicia of ownership primarily to protect the person's
14 security interest in the facility. Holder after foreclosure and its
15 equivalent and holders who engage in any of the activities identified
16 in subsection (12) (e) through (g) of this section shall not lose this
17 exemption provided the holder complies with all of the following:

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

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

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

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

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

33 (F) The holder does not exacerbate an existing release.

34 The exemption in this subsection (11)(b)(ii) does not apply to
35 holders who cause or contribute to a new release or threatened release
36 or who are otherwise liable under RCW 70.105D.040(1) (b), (c), (d), and
37 (e); provided, however, that a holder shall not lose this exemption if
38 it establishes that any such new release has been remediated according
39 to the requirements of this chapter and that any hazardous substances

1 remaining at the facility after remediation of the new release are
2 divisible from such new release.

3 ((+8)) (12) "Participation in management" means exercising
4 decision-making control over the borrower's operation of the facility,
5 environmental compliance, or assuming or manifesting responsibility for
6 the overall management of the enterprise encompassing the day-to-day
7 decision making of the enterprise.

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

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

36 ((+9)) (14) "Policing activities" means actions the holder takes
37 to insure that the borrower complies with the terms of the loan or
38 security interest or actions the holder takes or requires the borrower
39 to take to maintain the value of the security. Policing activities

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

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

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

31 (17) "Primarily to protect a security interest" means the indicia
32 of ownership is held primarily for the purpose of securing payment or
33 performance of an obligation. The term does not include indicia of
34 ownership held primarily for investment purposes nor indicia of
35 ownership held primarily for purposes other than as protection for a
36 security interest. A holder may have other, secondary reasons, for
37 maintaining indicia of ownership, but the primary reason must be for
38 protection of a security interest. Holding indicia of ownership after
39 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 the
4 effective date of this act, this five-year period shall begin as of the
5 effective date of this act.

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

12 (~~(11)~~) (19) "Release" means any intentional or unintentional
13 entry of any hazardous substance into the environment, including but
14 not limited to the abandonment or disposal of containers of hazardous
15 substances.

16 (~~(12)~~) (20) "Remedy" or "remedial action" means any action or
17 expenditure consistent with the purposes of this chapter to identify,
18 eliminate, or minimize any threat or potential threat posed by
19 hazardous substances to human health or the environment including any
20 investigative and monitoring activities with respect to any release or
21 threatened release of a hazardous substance and any health assessments
22 or health effects studies conducted in order to determine the risk or
23 potential risk to human health.

24 (~~(13)~~) (21) "Security interest" means an interest in a facility
25 created or established for the purpose of securing a loan or other
26 obligation. Security interests include deeds of trusts, sellers
27 interest in a real estate contract, liens, legal, or equitable title to
28 a facility acquired incident to foreclosure and its equivalents, and
29 title pursuant to lease financing transactions. Security interests may
30 also arise from transactions such as sale and leasebacks, conditional
31 sales, installment sales, trust receipt transactions, certain
32 assignments, factoring agreements, accounts receivable financing
33 arrangements, easements, and consignments, if the transaction creates
34 or establishes an interest in a facility for the purpose of securing a
35 loan or other obligation.

36 (22) "Industrial properties" means properties that are or have been
37 characterized by, or are to be committed to, traditional industrial
38 uses such as processing or manufacturing of materials, marine terminal
39 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 (23) "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 **Sec. 2.** RCW 70.105D.030 and 1994 c 257 s 11 and 1994 c 254 s 3 are
23 each reenacted and amended to read as follows:

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

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

1 (b) Conduct, provide for conducting, or require potentially liable
2 persons to conduct remedial actions (including investigations under (a)
3 of this subsection) to remedy releases or threatened releases of
4 hazardous substances. In carrying out such powers, the department's
5 authorized employees, agents, or contractors may enter upon property.
6 The department shall give reasonable notice before entering property
7 unless an emergency prevents such notice. In conducting, providing for,
8 or requiring remedial action, the department shall give preference to
9 permanent solutions to the maximum extent practicable and shall provide
10 for or require adequate monitoring to ensure the effectiveness of the
11 remedial action;

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

15 (d) Carry out all state programs authorized under the federal
16 cleanup law and the federal resource, conservation, and recovery act,
17 42 U.S.C. Sec. 6901 et seq., as amended;

18 (e) Classify substances as hazardous substances for purposes of RCW
19 70.105D.020(~~(+6)~~) (7) and classify substances and products as
20 hazardous substances for purposes of RCW 82.21.020(1);

21 (f) Issue orders or enter into consent decrees or agreed orders
22 that include deed restrictions where necessary to protect human health
23 and the environment from a release or threatened release of a hazardous
24 substance from a facility. Prior to establishing a deed restriction
25 under this subsection, the department shall notify and seek comment
26 from a city or county department with land use planning authority for
27 real property subject to a deed restriction;

28 (g) Enforce the application of permanent and effective
29 institutional controls that are necessary for a remedial action to be
30 protective of human health and the environment; (~~and~~)

31 (h) Require holders to conduct remedial actions necessary to abate
32 an imminent or substantial endangerment pursuant to RCW
33 70.105D.020(11)(b)(ii)(C); and

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

37 (2) The department shall immediately implement all provisions of
38 this chapter to the maximum extent practicable, including investigative

1 and remedial actions where appropriate. The department shall adopt,
2 and thereafter enforce, rules under chapter 34.05 RCW to:

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

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

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

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

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

31 (3) Before November 1st of each even-numbered year, the department
32 shall develop, with public notice and hearing, and submit to the ways
33 and means and appropriate standing environmental committees of the
34 senate and house of representatives a ranked list of projects and
35 expenditures recommended for appropriation from both the state and
36 local toxics control accounts. The department shall also provide the
37 legislature and the public each year with an accounting of the
38 department's activities supported by appropriations from the state
39 toxics control account, including a list of known hazardous waste sites

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

4 (4) The department shall establish a scientific advisory board to
5 render advice to the department with respect to the hazard ranking
6 system, cleanup standards, remedial actions, deadlines for remedial
7 actions, monitoring, the classification of substances as hazardous
8 substances for purposes of RCW 70.105D.020(~~(+6)~~) (7) and the
9 classification of substances or products as hazardous substances for
10 purposes of RCW 82.21.020(1). The board shall consist of five
11 independent members to serve staggered three-year terms. No members
12 may be employees of the department. Members shall be reimbursed for
13 travel expenses as provided in RCW 43.03.050 and 43.03.060.

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

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