
SENATE BILL 5873

State of Washington

55th Legislature

1997 Regular Session

By Senators Benton and Winsley

Read first time 02/18/97. Referred to Committee on Agriculture & Environment.

1 AN ACT Relating to liability under the model toxics control act;
2 and amending RCW 70.105D.020.

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

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

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

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

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

17 (4) "Facility" means (a) any building, structure, installation,
18 equipment, pipe or pipeline (including any pipe into a sewer or
19 publicly owned treatment works), well, pit, pond, lagoon, impoundment,

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

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

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

18 (7) "Hazardous substance" means:

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

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

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

27 (d) Petroleum or petroleum products; and

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

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

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

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

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

3 (iii) A fiduciary in his, her, or its personal or individual
4 capacity. This exemption does not preclude a claim against the assets
5 of the estate or trust administered by the fiduciary or against a
6 nonemployee agent or independent contractor retained by a fiduciary.
7 This exemption also does not apply to the extent that a person is
8 liable under this chapter independently of the person's ownership as a
9 fiduciary for actions taken in a fiduciary capacity.

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

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

1 (13) "Person" means an individual, firm, corporation, association,
2 partnership, consortium, joint venture, commercial entity, state
3 government agency, unit of local government, federal government agency,
4 or Indian tribe.

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

20 (15) "Potentially liable person" means any person whom the
21 department finds, based on credible evidence, to be liable under RCW
22 70.105D.040. The department shall give notice to any such person and
23 allow an opportunity for comment before making the finding, unless an
24 emergency requires otherwise.

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

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

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

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

23 (20) "Remedy" or "remedial action" means any action or expenditure
24 consistent with the purposes of this chapter to identify, eliminate, or
25 minimize any threat or potential threat posed by hazardous substances
26 to human health or the environment including any investigative and
27 monitoring activities with respect to any release or threatened release
28 of a hazardous substance and any health assessments or health effects
29 studies conducted in order to determine the risk or potential risk to
30 human health.

31 (21) "Security interest" means an interest in a facility created or
32 established for the purpose of securing a loan or other obligation.
33 Security interests include deeds of trusts, sellers interest in a real
34 estate contract, liens, legal, or equitable title to a facility
35 acquired incident to foreclosure and its equivalents, and title
36 pursuant to lease financing transactions. Security interests may also
37 arise from transactions such as sale and leasebacks, conditional sales,
38 installment sales, trust receipt transactions, certain assignments,
39 factoring agreements, accounts receivable financing arrangements,

1 easements, and consignments, if the transaction creates or establishes
2 an interest in a facility for the purpose of securing a loan or other
3 obligation.

4 (22) "Industrial properties" means properties that are or have been
5 characterized by, or are to be committed to, traditional industrial
6 uses such as processing or manufacturing of materials, marine terminal
7 and transportation areas and facilities, fabrication, assembly,
8 treatment, or distribution of manufactured products, or storage of bulk
9 materials, that are either:

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

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

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

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

39 (b) "Fiduciary" does not mean:

1 (i) A person acting as a fiduciary with respect to a trust or other
2 fiduciary estate that was organized for the primary purpose of, or is
3 engaged in, actively carrying on a trade or business for profit, unless
4 the trust or other fiduciary estate was created as part of, or to
5 facilitate, one or more estate plans or because of the incapacity of a
6 natural person;

7 (ii) A person who acquires ownership or control of a facility with
8 the objective purpose of avoiding liability of the person or any other
9 person;

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
12 or indirectly benefits from a trust or fiduciary relationship; or

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

17 (25) "Fiduciary capacity" means the capacity of a person holding
18 title to a facility, or otherwise having control of an interest in, the
19 facility pursuant to the exercise of the responsibilities of the person
20 as a fiduciary.

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