

---

SENATE BILL 5421

---

State of Washington

60th Legislature

2007 Regular Session

By Senators Fraser, Morton, Poulsen, Swecker, Marr, Regala, Rockefeller, Pridemore, Oemig, Honeyford, Rasmussen, Shin, Kohl-Welles and Kline

Read first time 01/18/2007. Referred to Committee on Water, Energy & Telecommunications.

1 AN ACT Relating to environmental covenants; amending RCW 35.21.755,  
2 69.50.511, 70.105D.020, 70.105D.030, and 70.105D.060; and adding a new  
3 chapter to Title 64 RCW.

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

5 NEW SECTION. **Sec. 1.** The legislature finds that the national  
6 conference of commissioners on uniform state laws has developed uniform  
7 legislation called the uniform environmental covenants act. The act  
8 ensures that environmental covenants, recorded use restrictions  
9 negotiated in connection with hazardous waste site cleanups, and other  
10 environmental response projects are legally valid and enforceable. The  
11 uniform environmental covenants act achieves this objective by  
12 providing clear statutory standards that override court-made doctrines  
13 that do not fit such cleanup and reuse contexts. The legislature  
14 further finds that nothing in this chapter will amend or modify any  
15 local or state laws that determine when environmental covenants are  
16 required, when a particular contaminated site must be cleaned up, or  
17 the standards for a cleanup.

18 Adoption of the uniform environmental covenants act in Washington  
19 will provide all participants in a cleanup with greater confidence that

1 environmental covenants and other institutional controls will be  
2 effective over the life of the cleanup. This will facilitate cleanups  
3 of many sites and assist in the recycling of urban brownfield  
4 properties into new economic uses for the benefit of the citizens of  
5 Washington.

6 This chapter adopts most provisions of the uniform legislation  
7 while making modifications to integrate the uniform environmental  
8 covenants act with Washington's environmental cleanup programs.

9 NEW SECTION. **Sec. 2.** This chapter may be cited as the uniform  
10 environmental covenants act.

11 NEW SECTION. **Sec. 3.** The definitions in this section apply  
12 throughout this chapter unless the context clearly requires otherwise.

13 (1) "Activity or use limitations" means restrictions or obligations  
14 created under this chapter with respect to real property.

15 (2) "Agency" means either the department of ecology or the United  
16 States environmental protection agency, whichever determines or  
17 approves the environmental response project pursuant to which the  
18 environmental covenant is created.

19 (3)(a) "Common interest community" means a condominium,  
20 cooperative, or other real property with respect to which a person, by  
21 virtue of the person's ownership of a parcel of real property, is  
22 obligated to pay property taxes or insurance premiums, or for  
23 maintenance, or improvement of other real property described in a  
24 recorded covenant that creates the common interest community.

25 (b) "Common interest community" includes but is not limited to:

26 (i) An association of apartment owners as defined in RCW 64.32.010;

27 (ii) A unit owners' association as defined in RCW 64.34.020 and  
28 organized under RCW 64.34.300;

29 (iii) A master association as provided in RCW 64.34.276;

30 (iv) A subassociation as provided in RCW 64.34.278; and

31 (v) A homeowners' association as defined in RCW 64.38.010.

32 (4) "Environmental covenant" means a servitude arising under an  
33 environmental response project that imposes activity or use  
34 limitations.

35 (5) "Environmental response project" means a plan or work performed  
36 for environmental remediation of real property and conducted:

1 (a) Under a federal or state program governing environmental  
2 remediation of real property, including chapters 43.21C, 64.44, 70.95,  
3 70.98, 70.105, 70.105D, 90.48, and 90.52 RCW;

4 (b) Incident to closure of a solid or hazardous waste management  
5 unit, if the closure is conducted with approval of an agency; or

6 (c) Under the state voluntary clean-up program authorized under  
7 chapter 70.105D RCW.

8 (6) "Holder" means the grantee of an environmental covenant as  
9 specified in section 4(1) of this act.

10 (7) "Person" means an individual, corporation, business trust,  
11 estate, trust, partnership, limited liability company, association,  
12 joint venture, public corporation, government, governmental  
13 subdivision, agency, or instrumentality, or any other legal or  
14 commercial entity.

15 (8) "Record", used as a noun, means information that is inscribed  
16 on a tangible medium or that is stored in an electronic or other medium  
17 and is retrievable in perceivable form.

18 (9) "State" means a state of the United States, the District of  
19 Columbia, Puerto Rico, the United States Virgin Islands, or any  
20 territory or insular possession subject to the jurisdiction of the  
21 United States.

22 NEW SECTION. **Sec. 4.** (1) Any person, including a person that owns  
23 an interest in the real property, the agency, or a municipality or  
24 other unit of local government, may be a holder. An environmental  
25 covenant may identify more than one holder. The interest of a holder  
26 is an interest in real property.

27 (2) A right of an agency under this chapter or under an  
28 environmental covenant, other than a right as a holder, is not an  
29 interest in real property.

30 (3) An agency is bound by any obligation it assumes in an  
31 environmental covenant, but an agency does not assume obligations  
32 merely by signing an environmental covenant. Any other person that  
33 signs an environmental covenant is bound by the obligations the person  
34 assumes in the covenant, but signing the covenant does not change  
35 obligations, rights, or protections granted or imposed under law other  
36 than this chapter except as provided in the covenant.

1 (4) The following rules apply to interests in real property in  
2 existence at the time an environmental covenant is created or amended:

3 (a) An interest that has priority under other law is not affected  
4 by an environmental covenant unless the person that owns the interest  
5 subordinates that interest to the covenant.

6 (b) This chapter does not require a person that owns a prior  
7 interest to subordinate that interest to an environmental covenant or  
8 to agree to be bound by the covenant.

9 (c) A subordination agreement may be contained in an environmental  
10 covenant covering real property or in a separate record. If the  
11 environmental covenant covers commonly owned property in a common  
12 interest community, the record may be signed by any person authorized  
13 by the governing board of the owners' association.

14 (d) An agreement by a person to subordinate a prior interest to an  
15 environmental covenant affects the priority of that person's interest  
16 but does not by itself impose any affirmative obligation on the person  
17 with respect to the environmental covenant.

18 NEW SECTION. **Sec. 5.** (1) An environmental covenant must:

19 (a) State that the instrument is an environmental covenant executed  
20 pursuant to this chapter;

21 (b) Contain a legally sufficient description of the real property  
22 subject to the covenant;

23 (c) Describe with specificity the activity or use limitations on  
24 the real property;

25 (d) Identify every holder;

26 (e) Be signed by the agency, every holder, and unless waived by the  
27 agency every owner of the fee simple of the real property subject to  
28 the covenant; and

29 (f) Identify the name and location of any administrative record for  
30 the environmental response project reflected in the environmental  
31 covenant.

32 (2) In addition to the information required by subsection (1) of  
33 this section, an environmental covenant may contain other information,  
34 restrictions, and requirements agreed to by the persons who signed it,  
35 including any:

36 (a) Requirements for notice following transfer of a specified

1 interest in, or concerning proposed changes in use of, applications for  
2 building permits for, or proposals for any site work affecting the  
3 contamination on, the property subject to the covenant;

4 (b) Requirements for periodic reporting describing compliance with  
5 the covenant;

6 (c) Rights of access to the property granted in connection with  
7 implementation or enforcement of the covenant;

8 (d) Narrative descriptions of the contamination and remedy,  
9 including the contaminants of concern, the pathways of exposure, limits  
10 on exposure, and the location and extent of the contamination;

11 (e) Limitations on amendment or termination of the covenant in  
12 addition to those contained in sections 10 and 11 of this act;

13 (f) Rights of the holder in addition to its right to enforce the  
14 covenant pursuant to section 12 of this act;

15 (g) Other information, restrictions, or requirements required by  
16 the agency, including the department of ecology under the authority of  
17 chapter 70.105D RCW.

18 (3) In addition to other conditions for its approval of an  
19 environmental covenant, the agency may require those persons specified  
20 by the agency who have interests in the real property to sign the  
21 covenant.

22 (4) The agency may also require notice and opportunity to comment  
23 upon an environmental covenant as part of public participation efforts  
24 related to the environmental response project.

25 (5) The agency shall consult with local land use planning  
26 authorities in the development of the land use or activity restrictions  
27 in the environmental covenant. The agency shall consider potential  
28 redevelopment and revitalization opportunities and obtain information  
29 regarding present and proposed land and resource uses, and consider  
30 comprehensive land use plan and zoning provisions applicable to the  
31 real property to be subject to the environmental covenant.

32 NEW SECTION. **Sec. 6.** (1) An environmental covenant that complies  
33 with this chapter runs with the land.

34 (2) An environmental covenant that is otherwise effective is valid  
35 and enforceable even if:

36 (a) It is not appurtenant to an interest in real property;

1 (b) It can be or has been assigned to a person other than the  
2 original holder;

3 (c) It is not of a character that has been recognized traditionally  
4 at common law;

5 (d) It imposes a negative burden;

6 (e) It imposes an affirmative obligation on a person having an  
7 interest in the real property or on the holder;

8 (f) The benefit or burden does not touch or concern real property;

9 (g) There is no privity of estate or contract;

10 (h) The holder dies, ceases to exist, resigns, or is replaced; or

11 (i) The owner of an interest subject to the environmental covenant  
12 and the holder are the same person.

13 (3) An instrument that creates restrictions or obligations with  
14 respect to real property that would qualify as activity or use  
15 limitations except for the fact that the instrument was recorded before  
16 the effective date of this section is not invalid or unenforceable  
17 because of any of the limitations on enforcement of interests described  
18 in subsection (2) of this section or because it was identified as an  
19 easement, servitude, deed restriction, or other interest. This chapter  
20 does not apply in any other respect to such an instrument.

21 (4) This chapter does not invalidate or render unenforceable any  
22 interest, whether designated as an environmental covenant or other  
23 interest, that is otherwise enforceable under the law of this state.

24 NEW SECTION. **Sec. 7.** This chapter does not authorize a use of  
25 real property that is otherwise prohibited by zoning, by law other than  
26 this chapter regulating use of real property, or by a recorded  
27 instrument that has priority over the environmental covenant. An  
28 environmental covenant may prohibit or restrict uses of real property  
29 that are authorized by zoning or by law other than this chapter.

30 NEW SECTION. **Sec. 8.** (1) A copy of an environmental covenant  
31 shall be provided by the persons and in the manner required by the  
32 agency to:

33 (a) Each person that signed the covenant;

34 (b) Each person holding a recorded interest in the real property  
35 subject to the covenant;

1 (c) Each person in possession of the real property subject to the  
2 covenant at the time the covenant is executed;

3 (d) Each municipality or other unit of local government in which  
4 real property subject to the covenant is located;

5 (e) The department of ecology; and

6 (f) Any other person the agency requires.

7 (2) The validity of an environmental covenant is not affected by  
8 failure to provide a copy of the covenant as required under this  
9 section.

10 (3) If the agency has not designated the persons to provide a copy  
11 of an environmental covenant, the grantor shall be responsible for  
12 providing a copy of an environmental covenant as required under  
13 subsection (1) of this section.

14 NEW SECTION. Sec. 9. (1) An environmental covenant and any  
15 amendment or termination of the covenant must be recorded in every  
16 county in which any portion of the real property subject to the  
17 covenant is located. For purposes of indexing, a holder shall be  
18 treated as a grantee.

19 (2) Except as otherwise provided in section 10(3) of this act, an  
20 environmental covenant is subject to the laws of this state governing  
21 recording and priority of interests in real property.

22 NEW SECTION. Sec. 10. (1) An environmental covenant is perpetual  
23 unless it is:

24 (a) By its terms limited to a specific duration or terminated by  
25 the occurrence of a specific event;

26 (b) Terminated by consent pursuant to section 11 of this act;

27 (c) Terminated pursuant to subsection (2) of this section;

28 (d) Terminated by foreclosure of an interest that has priority over  
29 the environmental covenant; or

30 (e) Terminated or modified in an eminent domain proceeding, but  
31 only if:

32 (i) The agency that signed the covenant is a party to the  
33 proceeding;

34 (ii) All persons identified in section 11 (1) and (2) of this act  
35 are given notice of the pendency of the proceeding; and

1 (iii) The court determines, after hearing, that the termination or  
2 modification will not adversely affect human health or the environment.

3 (2) If the agency that signed an environmental covenant has  
4 determined that the intended benefits of the covenant can no longer be  
5 realized, a court, under the doctrine of changed circumstances, in an  
6 action in which all persons identified in section 11 (1) and (2) of  
7 this act have been given notice, may terminate the covenant or reduce  
8 its burden on the real property subject to the covenant.

9 (3) Except as otherwise provided in subsections (1) and (2) of this  
10 section, an environmental covenant may not be extinguished, limited, or  
11 impaired through issuance of a tax deed, foreclosure of a tax lien, or  
12 application of the doctrine of adverse possession, prescription,  
13 abandonment, waiver, lack of enforcement, or acquiescence, or a similar  
14 doctrine.

15 (4) An environmental covenant may not be extinguished, limited, or  
16 impaired by the extinguishment of a mineral interest under chapter  
17 78.22 RCW.

18 NEW SECTION. **Sec. 11.** (1) An environmental covenant may be  
19 amended or terminated by consent only if the amendment or termination  
20 is signed by:

21 (a) The agency;

22 (b) Unless waived by the agency, the current owner of the fee  
23 simple of the real property subject to the covenant;

24 (c) Each person that originally signed the covenant, unless the  
25 person waived in a signed record the right to consent or a court finds  
26 that the person no longer exists or cannot be located or identified  
27 with the exercise of reasonable diligence; and

28 (d) Except as otherwise provided in subsection (4)(b) of this  
29 section, the holder.

30 (2) If an interest in real property is subject to an environmental  
31 covenant, the interest is not affected by an amendment of the covenant  
32 unless the current owner of the interest consents to the amendment or  
33 has waived in a signed record the right to consent to amendments.

34 (3) Except for an assignment undertaken pursuant to a governmental  
35 reorganization, assignment of an environmental covenant to a new holder  
36 is an amendment.

37 (4) Except as otherwise provided in an environmental covenant:



- 1 (a) A holder may not assign its interest without consent of the
- 2 other parties;
- 3 (b) A holder may be removed and replaced by agreement of the other
- 4 parties specified in subsection (1) of this section; and
- 5 (c) A court of competent jurisdiction may fill a vacancy in the
- 6 position of holder.

7 NEW SECTION. **Sec. 12.** (1) A civil action for injunctive or other  
8 equitable relief for violation of an environmental covenant may be  
9 maintained by:

- 10 (a) A party to the covenant;
- 11 (b) The agency or, if it is not the agency, the department of
- 12 ecology;
- 13 (c) Any person to whom the covenant expressly grants power to
- 14 enforce;
- 15 (d) A person whose interest in the real property or whose
- 16 collateral or liability may be affected by the alleged violation of the
- 17 covenant; and
- 18 (e) A municipality or other unit of local government in which the
- 19 real property subject to the covenant is located.

20 (2) This chapter does not limit the regulatory authority of the  
21 agency or the department of ecology under law other than this chapter  
22 with respect to an environmental response project.

23 (3) A person is not responsible for or subject to liability for  
24 environmental remediation solely because it has the right to enforce an  
25 environmental covenant.

26 NEW SECTION. **Sec. 13.** (1) The department of ecology shall  
27 establish and maintain a registry that contains information identifying  
28 all environmental covenants established under this chapter and any  
29 amendment or termination of those covenants, including the county where  
30 the covenant is recorded and the recording number. The registry may  
31 also contain any other information concerning environmental covenants  
32 and the real property subject to them that the department of ecology  
33 considers appropriate. The registry is a public record for purposes of  
34 chapter 42.56 RCW, but the department shall maintain electronic access  
35 to the registry without requiring a public records request for any  
36 information included in the registry.

1 (2) Failure to include information or inclusion of inaccurate  
2 information concerning an environmental covenant in the registry does  
3 not invalidate or limit the application or enforceability of the  
4 covenant.

5 NEW SECTION. **Sec. 14.** In applying and construing this uniform  
6 act, consideration must be given to the need to promote uniformity of  
7 the law with respect to its subject matter among states that enact it.

8 NEW SECTION. **Sec. 15.** This chapter modifies, limits, or  
9 supersedes the federal electronic signatures in global and national  
10 commerce act (15 U.S.C. Sec. 7001 et seq.) but does not modify, limit,  
11 or supersede section 101 of that act (15 U.S.C. Sec. 7001(a)) or  
12 authorize electronic delivery of any of the notices described in  
13 section 103 of that act (15 U.S.C. Sec. 7003(b)).

14 **Sec. 16.** RCW 35.21.755 and 2000 2nd sp.s. c 4 s 29 are each  
15 amended to read as follows:

16 (1) A public corporation, commission, or authority created pursuant  
17 to RCW 35.21.730, 35.21.660, or 81.112.320 shall receive the same  
18 immunity or exemption from taxation as that of the city, town, or  
19 county creating the same: PROVIDED, That, except for (a) any property  
20 within a special review district established by ordinance prior to  
21 January 1, 1976, or listed on or which is within a district listed on  
22 any federal or state register of historical sites or (b) any property  
23 owned, operated, or controlled by a public corporation that is used  
24 primarily for low-income housing, or that is used as a convention  
25 center, performing arts center, public assembly hall, public meeting  
26 place, public esplanade, street, public way, public open space, park,  
27 public utility corridor, or view corridor for the general public or (c)  
28 any blighted property owned, operated, or controlled by a public  
29 corporation that was acquired for the purpose of remediation and  
30 redevelopment of the property in accordance with an agreement or plan  
31 approved by the city, town, or county in which the property is located,  
32 or (d) any property owned, operated, or controlled by a public  
33 corporation created under RCW 81.112.320, any such public corporation,  
34 commission, or authority shall pay to the county treasurer an annual  
35 excise tax equal to the amounts which would be paid upon real property

1 and personal property devoted to the purposes of such public  
2 corporation, commission, or authority were it in private ownership, and  
3 such real property and personal property is acquired and/or operated  
4 under RCW 35.21.730 through 35.21.755, and the proceeds of such excise  
5 tax shall be allocated by the county treasurer to the various taxing  
6 authorities in which such property is situated, in the same manner as  
7 though the property were in private ownership: PROVIDED FURTHER, That  
8 the provisions of chapter 82.29A RCW shall not apply to property within  
9 a special review district established by ordinance prior to January 1,  
10 1976, or listed on or which is within a district listed on any federal  
11 or state register of historical sites and which is controlled by a  
12 public corporation, commission, or authority created pursuant to RCW  
13 35.21.730 or 35.21.660, which was in existence prior to January 1,  
14 1987: AND PROVIDED FURTHER, That property within a special review  
15 district established by ordinance prior to January 1, 1976, or property  
16 which is listed on any federal or state register of historical sites  
17 and controlled by a public corporation, commission, or authority  
18 created pursuant to RCW 35.21.730 or 35.21.660, which was in existence  
19 prior to January 1, 1976, shall receive the same immunity or exemption  
20 from taxation as if such property had been within a district listed on  
21 any such federal or state register of historical sites as of January 1,  
22 1976, and controlled by a public corporation, commission, or authority  
23 created pursuant to RCW 35.21.730 or 35.21.660 which was in existence  
24 prior to January 1, 1976.

25 (2) As used in this section:

26 (a) "Low-income" means a total annual income, adjusted for family  
27 size, not exceeding fifty percent of the area median income.

28 (b) "Area median income" means:

29 (i) For an area within a standard metropolitan statistical area,  
30 the area median income reported by the United States department of  
31 housing and urban development for that standard metropolitan  
32 statistical area; or

33 (ii) For an area not within a standard metropolitan statistical  
34 area, the county median income reported by the department of community,  
35 trade, and economic development.

36 (c) "Blighted property" means property that is contaminated with  
37 hazardous substances as defined under RCW 70.105D.020((+7)).

1       **Sec. 17.** RCW 69.50.511 and 1990 c 213 s 13 are each amended to  
2 read as follows:

3       Law enforcement agencies who during the official investigation or  
4 enforcement of any illegal drug manufacturing facility come in contact  
5 with or are aware of any substances suspected of being hazardous as  
6 defined in RCW 70.105D.020(~~(+5)~~), shall notify the department of  
7 ecology for the purpose of securing a contractor to identify, clean-up,  
8 store, and dispose of suspected hazardous substances, except for those  
9 random and representative samples obtained for evidentiary purposes.  
10 Whenever possible, a destruct order covering hazardous substances which  
11 may be described in general terms shall be obtained concurrently with  
12 a search warrant.       Materials that have been photographed,  
13 fingerprinted, and subsampled by police shall be destroyed as soon as  
14 practical.       The department of ecology shall make every effort to  
15 recover costs from the parties responsible for the suspected hazardous  
16 substance.       All recoveries shall be deposited in the account or fund  
17 from which contractor payments are made.

18       The department of ecology may adopt rules to carry out its  
19 responsibilities under this section.       The department of ecology shall  
20 consult with law enforcement agencies prior to adopting any rule or  
21 policy relating to this section.

22       **Sec. 18.** RCW 70.105D.020 and 2005 c 191 s 1 are each amended to  
23 read as follows:

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

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

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

35       (4) "Environmental covenant" has the same meaning as defined in  
36 section 3 of this act.

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

9       (~~(5)~~) (6) "Federal cleanup law" means the federal comprehensive  
10 environmental response, compensation, and liability act of 1980, 42  
11 U.S.C. Sec. 9601 et seq., as amended by Public Law 99-499.

12       (~~(6)~~) (7)(a) "Fiduciary" means a person acting for the benefit of  
13 another party as a bona fide trustee; executor; administrator;  
14 custodian; guardian of estates or guardian ad litem; receiver;  
15 conservator; committee of estates of incapacitated persons; trustee in  
16 bankruptcy; trustee, under an indenture agreement, trust agreement,  
17 lease, or similar financing agreement, for debt securities,  
18 certificates of interest or certificates of participation in debt  
19 securities, or other forms of indebtedness as to which the trustee is  
20 not, in the capacity of trustee, the lender. Except as provided in  
21 subsection (17)(b)(iii) of this section, the liability of a fiduciary  
22 under this chapter shall not exceed the assets held in the fiduciary  
23 capacity.

24       (b) "Fiduciary" does not mean:

25       (i) A person acting as a fiduciary with respect to a trust or other  
26 fiduciary estate that was organized for the primary purpose of, or is  
27 engaged in, actively carrying on a trade or business for profit, unless  
28 the trust or other fiduciary estate was created as part of, or to  
29 facilitate, one or more estate plans or because of the incapacity of a  
30 natural person;

31       (ii) A person who acquires ownership or control of a facility with  
32 the objective purpose of avoiding liability of the person or any other  
33 person. It is prima facie evidence that the fiduciary acquired  
34 ownership or control of the facility to avoid liability if the facility  
35 is the only substantial asset in the fiduciary estate at the time the  
36 facility became subject to the fiduciary estate;

37       (iii) A person who acts in a capacity other than that of a

1 fiduciary or in a beneficiary capacity and in that capacity directly or  
2 indirectly benefits from a trust or fiduciary relationship;

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

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

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

12 (8) "Fiduciary capacity" means the capacity of a person holding  
13 title to a facility, or otherwise having control of an interest in the  
14 facility pursuant to the exercise of the responsibilities of the person  
15 as a fiduciary.

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

25 ~~((+7))~~ (10) "Hazardous substance" means:

26 (a) Any dangerous or extremely hazardous waste as defined in RCW  
27 70.105.010 (5) and (6), or any dangerous or extremely dangerous waste  
28 designated by rule pursuant to chapter 70.105 RCW;

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

31 (c) Any substance that, on March 1, 1989, is a hazardous substance  
32 under section 101(14) of the federal cleanup law, 42 U.S.C. Sec.  
33 9601(14);

34 (d) Petroleum or petroleum products; and

35 (e) Any substance or category of substances, including solid waste  
36 decomposition products, determined by the director by rule to present  
37 a threat to human health or the environment if released into the  
38 environment.

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

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

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

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

36 ~~(+10))~~ (13) "Indicia of ownership" means evidence of a security  
37 interest, evidence of an interest in a security interest, or evidence  
38 of an interest in a facility securing a loan or other obligation,

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

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

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

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

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

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

36 ~~((+12+))~~ (17) "Owner or operator" means:

37 (a) Any person with any ownership interest in the facility or who  
38 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 ~~((+13+))~~ (18)(e) through (g) of this section shall not  
18 lose this exemption provided the holder complies with all of the  
19 following:

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

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

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

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

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

35 (F) The holder does not exacerbate an existing release. The  
36 exemption in this subsection ~~((+12+))~~ (17)(b)(ii) does not apply to  
37 holders who cause or contribute to a new release or threatened release  
38 or who are otherwise liable under RCW 70.105D.040(1) (b), (c), (d), and

1 (e); provided, however, that a holder shall not lose this exemption if  
2 it establishes that any such new release has been remediated according  
3 to the requirements of this chapter and that any hazardous substances  
4 remaining at the facility after remediation of the new release are  
5 divisible from such new release;

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

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

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

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

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

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

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

34 The exemption in this subsection (~~((+12))~~) (17)(b)(iii) does not  
35 apply to fiduciaries who cause or contribute to a new release or  
36 threatened release or who are otherwise liable under RCW 70.105D.040(1)  
37 (b), (c), (d), and (e); provided however, that a fiduciary shall not  
38 lose this exemption if it establishes that any such new release has

1 been remediated according to the requirements of this chapter and that  
2 any hazardous substances remaining at the facility after remediation of  
3 the new release are divisible from such new release. The exemption in  
4 this subsection (~~((+12+))~~) (17)(b)(iii) also does not apply where the  
5 fiduciary's powers to comply with this subsection (~~((+12+))~~) (17)(b)(iii)  
6 are limited by a governing instrument created with the objective  
7 purpose of avoiding liability under this chapter or of avoiding  
8 compliance with this chapter; or

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

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

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

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

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

31 (E) Legal withdrawal of ground water does not disqualify a person  
32 from the exemption in this subsection (~~((+12+))~~) (17)(b)(iv).

33 (~~((+13+))~~) (18) "Participation in management" means exercising  
34 decision-making control over the borrower's operation of the facility,  
35 environmental compliance, or assuming or manifesting responsibility for  
36 the overall management of the enterprise encompassing the day-to-day  
37 decision making of the enterprise.

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

25 ((+14+)) (19) "Person" means an individual, firm, corporation,  
26 association, partnership, consortium, joint venture, commercial entity,  
27 state government agency, unit of local government, federal government  
28 agency, or Indian tribe.

29 ((+15+)) (20) "Policing activities" means actions the holder takes  
30 to ((insure)) ensure that the borrower complies with the terms of the  
31 loan or security interest or actions the holder takes or requires the  
32 borrower to take to maintain the value of the security. Policing  
33 activities include: Requiring the borrower to conduct remedial actions  
34 at the facility during the term of the security interest; requiring the  
35 borrower to comply or come into compliance with applicable federal,  
36 state, and local environmental and other laws, regulations, and permits  
37 during the term of the security interest; securing or exercising  
38 authority to monitor or inspect the facility including on-site

1 inspections, or to monitor or inspect the borrower's business or  
2 financial condition during the term of the security interest; or taking  
3 other actions necessary to adequately police the loan or security  
4 interest such as requiring a borrower to comply with any warranties,  
5 covenants, conditions, representations, or promises from the borrower.

6 ~~((+16+))~~ (21) "Potentially liable person" means any person whom the  
7 department finds, based on credible evidence, to be liable under RCW  
8 70.105D.040. The department shall give notice to any such person and  
9 allow an opportunity for comment before making the finding, unless an  
10 emergency requires otherwise.

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

25 ~~((+18+))~~ (23) "Primarily to protect a security interest" means the  
26 indicia of ownership is held primarily for the purpose of securing  
27 payment or performance of an obligation. The term does not include  
28 indicia of ownership held primarily for investment purposes nor indicia  
29 of ownership held primarily for purposes other than as protection for  
30 a security interest. A holder may have other, secondary reasons, for  
31 maintaining indicia of ownership, but the primary reason must be for  
32 protection of a security interest. Holding indicia of ownership after  
33 foreclosure or its equivalents for longer than five years shall be  
34 considered to be holding the indicia of ownership for purposes other  
35 than primarily to protect a security interest. For facilities that  
36 have been acquired through foreclosure or its equivalents prior to July  
37 23, 1995, this five-year period shall begin as of July 23, 1995.

1        ~~((19))~~ (24) "Public notice" means, at a minimum, adequate notice  
2 mailed to all persons who have made timely request of the department  
3 and to persons residing in the potentially affected vicinity of the  
4 proposed action; mailed to appropriate news media; published in the  
5 newspaper of largest circulation in the city or county of the proposed  
6 action; and opportunity for interested persons to comment.

7        ~~((20))~~ (25) "Release" means any intentional or unintentional  
8 entry of any hazardous substance into the environment, including but  
9 not limited to the abandonment or disposal of containers of hazardous  
10 substances.

11        ~~((21))~~ (26) "Remedy" or "remedial action" means any action or  
12 expenditure consistent with the purposes of this chapter to identify,  
13 eliminate, or minimize any threat or potential threat posed by  
14 hazardous substances to human health or the environment including any  
15 investigative and monitoring activities with respect to any release or  
16 threatened release of a hazardous substance and any health assessments  
17 or health effects studies conducted in order to determine the risk or  
18 potential risk to human health.

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

31        ~~((23))~~ "~~Industrial properties~~" means ~~properties that are or have~~  
32 ~~been characterized by, or are to be committed to, traditional~~  
33 ~~industrial uses such as processing or manufacturing of materials,~~  
34 ~~marine terminal and transportation areas and facilities, fabrication,~~  
35 ~~assembly, treatment, or distribution of manufactured products, or~~  
36 ~~storage of bulk materials, that are either:~~

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

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

4       ~~(24))~~ (28) "Workout activities" means those actions by which a  
5 holder, at any time prior to foreclosure and its equivalents, seeks to  
6 prevent, cure, or mitigate a default by the borrower or obligor; or to  
7 preserve, or prevent the diminution of, the value of the security.  
8 Workout activities include: Restructuring or renegotiating the terms  
9 of the security interest; requiring payment of additional rent or  
10 interest; exercising forbearance; requiring or exercising rights  
11 pursuant to an assignment of accounts or other amounts owed to an  
12 obligor; requiring or exercising rights pursuant to an escrow agreement  
13 pertaining to amounts owed to an obligor; providing specific or general  
14 financial or other advice, suggestions, counseling, or guidance; and  
15 exercising any right or remedy the holder is entitled to by law or  
16 under any warranties, covenants, conditions, representations, or  
17 promises from the borrower.

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

30       ~~(b) "Fiduciary" does not mean:~~

31       ~~(i) A person acting as a fiduciary with respect to a trust or other~~  
32 ~~fiduciary estate that was organized for the primary purpose of, or is~~  
33 ~~engaged in, actively carrying on a trade or business for profit, unless~~  
34 ~~the trust or other fiduciary estate was created as part of, or to~~  
35 ~~facilitate, one or more estate plans or because of the incapacity of a~~  
36 ~~natural person;~~

37       ~~(ii) A person who acquires ownership or control of a facility with~~  
38 ~~the objective purpose of avoiding liability of the person or any other~~

1 ~~person. It is prima facie evidence that the fiduciary acquired~~  
2 ~~ownership or control of the facility to avoid liability if the facility~~  
3 ~~is the only substantial asset in the fiduciary estate at the time the~~  
4 ~~facility became subject to the fiduciary estate;~~

5 ~~(iii) A person who acts in a capacity other than that of a~~  
6 ~~fiduciary or in a beneficiary capacity and in that capacity directly or~~  
7 ~~indirectly benefits from a trust or fiduciary relationship;~~

8 ~~(iv) A person who is a beneficiary and fiduciary with respect to~~  
9 ~~the same fiduciary estate, and who while acting as a fiduciary receives~~  
10 ~~benefits that exceed customary or reasonable compensation, and~~  
11 ~~incidental benefits permitted under applicable law;~~

12 ~~(v) A person who is a fiduciary and receives benefits that~~  
13 ~~substantially exceed customary or reasonable compensation, and~~  
14 ~~incidental benefits permitted under applicable law; or~~

15 ~~(vi) A person who acts in the capacity of trustee of state or~~  
16 ~~federal lands or resources.~~

17 ~~(26) "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.))~~

21 **Sec. 19.** RCW 70.105D.030 and 2002 c 288 s 3 are each amended to  
22 read as follows:

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

25 (a) Investigate, provide for investigating, or require potentially  
26 liable persons to investigate any releases or threatened releases of  
27 hazardous substances, including but not limited to inspecting,  
28 sampling, or testing to determine the nature or extent of any release  
29 or threatened release. If there is a reasonable basis to believe that  
30 a release or threatened release of a hazardous substance may exist, the  
31 department's authorized employees, agents, or contractors may enter  
32 upon any property and conduct investigations. The department shall  
33 give reasonable notice before entering property unless an emergency  
34 prevents such notice. The department may by subpoena require the  
35 attendance or testimony of witnesses and the production of documents or  
36 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  
8 for, or requiring remedial action, the department shall give preference  
9 to permanent solutions to the maximum extent practicable and shall  
10 provide for or require adequate monitoring to ensure the effectiveness  
11 of the 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 willful 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(~~(+7)~~) and classify substances and products as hazardous  
20 substances for purposes of RCW 82.21.020(1);

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

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

36 (h) Require holders to conduct remedial actions necessary to abate  
37 an imminent or substantial endangerment pursuant to RCW  
38 70.105D.020(~~(+12)~~) (17)(b)(ii)(C);

1 (i) Provide informal advice and assistance to persons regarding the  
2 administrative and technical requirements of this chapter. This may  
3 include site-specific advice to persons who are conducting or otherwise  
4 interested in independent remedial actions. Any such advice or  
5 assistance shall be advisory only, and shall not be binding on the  
6 department. As a part of providing this advice and assistance for  
7 independent remedial actions, the department may prepare written  
8 opinions regarding whether the independent remedial actions or  
9 proposals for those actions meet the substantive requirements of this  
10 chapter or whether the department believes further remedial action is  
11 necessary at the facility. The department may collect, from persons  
12 requesting advice and assistance, the costs incurred by the department  
13 in providing such advice and assistance; however, the department shall,  
14 where appropriate, waive collection of costs in order to provide an  
15 appropriate level of technical assistance in support of public  
16 participation. The state, the department, and officers and employees  
17 of the state are immune from all liability, and no cause of action of  
18 any nature may arise from any act or omission in providing, or failing  
19 to provide, informal advice and assistance; and

20 (j) Take any other actions necessary to carry out the provisions of  
21 this chapter, including the power to adopt rules under chapter 34.05  
22 RCW.

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

27 (a) Provide for public participation, including at least (i) public  
28 notice of the development of investigative plans or remedial plans for  
29 releases or threatened releases and (ii) concurrent public notice of  
30 all compliance orders, agreed orders, enforcement orders, or notices of  
31 violation;

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

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

1 (d) Establish reasonable deadlines not to exceed ninety days for  
2 initiating an investigation of a hazardous waste site after the  
3 department receives notice or otherwise receives information that the  
4 site may pose a threat to human health or the environment and other  
5 reasonable deadlines for remedying releases or threatened releases at  
6 the site;

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

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

23 (3) Before November 1st of each even-numbered year, the department  
24 shall develop, with public notice and hearing, and submit to the ways  
25 and means and appropriate standing environmental committees of the  
26 senate and house of representatives a ranked list of projects and  
27 expenditures recommended for appropriation from both the state and  
28 local toxics control accounts. The department shall also provide the  
29 legislature and the public each year with an accounting of the  
30 department's activities supported by appropriations from the state  
31 toxics control account, including a list of known hazardous waste sites  
32 and their hazard rankings, actions taken and planned at each site, how  
33 the department is meeting its top two management priorities under RCW  
34 70.105.150, and all funds expended under this chapter.

35 (4) The department shall establish a scientific advisory board to  
36 render advice to the department with respect to the hazard ranking  
37 system, cleanup standards, remedial actions, deadlines for remedial  
38 actions, monitoring, the classification of substances as hazardous

1 substances for purposes of RCW 70.105D.020(~~(+7)~~) and the  
2 classification of substances or products as hazardous substances for  
3 purposes of RCW 82.21.020(1). The board shall consist of five  
4 independent members to serve staggered three-year terms. No members  
5 may be employees of the department. Members shall be reimbursed for  
6 travel expenses as provided in RCW 43.03.050 and 43.03.060.

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

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

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

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

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

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

33 (b) If an environmental covenant has been amended or terminated  
34 without proper authority, or if the terms of an environmental covenant  
35 have been violated, or if the environmental covenant is no longer  
36 effective in limiting or prohibiting activities that may interfere with  
37 the integrity of the remedial action or that may result in exposure to  
38 or migration of hazardous substances, then the department shall take

1 any and all appropriate actions necessary to ensure compliance with the  
2 environmental covenant and the policies and requirements of this  
3 chapter.

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

7 (i) Enter all required information about the environmental covenant  
8 into the registry established under section 13 of this act by June 30,  
9 2008;

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

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

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

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

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

19 **Sec. 20.** RCW 70.105D.060 and 2005 c 211 s 3 are each amended to  
20 read as follows:

21 The department's investigative and remedial decisions under RCW  
22 70.105D.030 and 70.105D.050, its decisions regarding filing a lien  
23 under RCW 70.105D.055, and its decisions regarding liable persons under  
24 RCW 70.105D.020(~~(+16+)~~), 70.105D.040, 70.105D.050, and 70.105D.055  
25 shall be reviewable exclusively in superior court and only at the  
26 following times: (1) In a cost recovery suit under RCW 70.105D.050(3);  
27 (2) in a suit by the department to enforce an order or an agreed order,  
28 or seek a civil penalty under this chapter; (3) in a suit for  
29 reimbursement under RCW 70.105D.050(2); (4) in a suit by the department  
30 to compel investigative or remedial action; (5) in a citizen's suit  
31 under RCW 70.105D.050(5); and (6) in a suit for removal or reduction of  
32 a lien under RCW 70.105D.050(7). Except in suits for reduction or  
33 removal of a lien under RCW 70.105D.050(7), the court shall uphold the  
34 department's actions unless they were arbitrary and capricious. In  
35 suits for reduction or removal of a lien under RCW 70.105D.050(7), the  
36 court shall review such suits pursuant to the standards set forth in  
37 RCW 70.105D.050(7).

1        NEW SECTION.   **Sec. 21.**  If any provision of this act or its  
2 application to any person or circumstance is held invalid, the  
3 remainder of the act or the application of the provision to other  
4 persons or circumstances is not affected.

5        NEW SECTION.   **Sec. 22.**  Sections 1 through 15 of this act  
6 constitute a new chapter in Title 64 RCW.

--- END ---