

---

HOUSE BILL 1856

---

State of Washington

54th Legislature

1995 Regular Session

By Representatives Blanton, Costa, Dickerson, D. Schmidt, Thompson, Radcliff, Sherstad, Beeksma and Romero

Read first time 02/13/95. Referred to Committee on Financial Institutions & Insurance.

1 AN ACT Relating to clarifying the liability of lenders under the  
2 model toxics control act; 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 1994 c 254 s 2 are each amended to  
5 read 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 secured facility.

17 (7) "Hazardous substance" means:

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

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

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

26 (d) Petroleum or petroleum products; and

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

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

35 ((+7)) (8) "Holder" means a person who holds indicia of ownership  
36 primarily to protect a security interest. A holder includes the  
37 initial holder such as the loan originator, any subsequent holder such  
38 as a successor-in-interest or subsequent purchaser of the security  
39 interest on the secondary market, a guarantor of an obligation, surety,

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

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

21 (10) "Operating a facility primarily to protect a security  
22 interest" means operating the facility where the borrower has defaulted  
23 on the loan or otherwise breached the security agreement, and operating  
24 the facility is necessary to prevent a substantial reduction in the  
25 value of the facility and in anticipation of a sale, transfer, or  
26 assignment of the facility, and, the operation is being done primarily  
27 to protect a security interest.

28 (11) "Owner or operator" means:

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

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

34 The term does not include:

35 (i) An agency of the state or unit of local government which  
36 acquired ownership or control involuntarily through bankruptcy, tax  
37 delinquency, abandonment, or circumstances in which the government  
38 involuntarily acquires title. This exclusion does not apply to an  
39 agency of the state or unit of local government which has caused or

1 contributed to the release or threatened release of a hazardous  
2 substance from the facility; or

3 (ii) A person who, without participating in the management of a  
4 facility, holds indicia of ownership primarily to protect the person's  
5 security interest in the facility. This exemption applies to a holder  
6 after foreclosure or its equivalents; or to a holder that prepares, or  
7 requires a borrower to prepare, a facility for sale, transfer, or  
8 assignment; or to a holder who operates, or requires a borrower to  
9 continue to operate, a facility primarily to protect a security  
10 interest, only if: The holder maintains the environmental compliance  
11 measures already in place at the facility; the holder complies with the  
12 reporting requirements in the rules adopted under this chapter; the  
13 holder allows the department or potentially liable persons under an  
14 order, agreed order, or settlement agreement under this chapter access  
15 to the facility to conduct remedial actions and does not impede the  
16 conduct of such remedial actions; any remedial actions conducted by the  
17 holder are in compliance with any requirements identified by the  
18 department, or, if the department has not identified such requirements  
19 for the facility, the remedial actions are conducted consistent with  
20 the rules adopted under this chapter and, except as otherwise provided  
21 for in this exemption, the holder does not cause or contribute to a  
22 release or threatened release at the facility. This exemption does not  
23 apply to holders that are liable under RCW 70.105D.040(1) (b), (c),  
24 (d), and (e).

25 ~~((+8))~~ (12) "Participation in management" means exercising  
26 decision-making control over the borrower's operation of the facility,  
27 environmental compliance, or assuming or manifesting responsibility for  
28 the overall management of the enterprise encompassing the day-to-day  
29 decision making of the enterprise.

30 The term does not include: A holder with the mere capacity or  
31 ability to influence, or the unexercised right to control facility  
32 operations; a holder who conducts or requires a borrower to conduct an  
33 environmental audit or an environmental site assessment at the facility  
34 for which indicia of ownership is held; a holder who requires a  
35 borrower to come into compliance with any applicable laws or  
36 regulations at the facility for which indicia of ownership is held; a  
37 holder who requires a borrower to conduct remedial actions but does not  
38 control or manage the borrower's remedial actions or the scope of the  
39 borrower's remedial actions except to prepare a facility for sale,

1 transfer, or assignment; a holder who engages in workout or policing  
2 activities primarily to protect the holder's security interest in the  
3 facility; a holder who prepares or requires a borrower to prepare, a  
4 facility for sale, transfer, or assignment; and a holder who operates,  
5 or requires a borrower to continue to operate, a facility primarily to  
6 protect a security interest.

7 (13) "Person" means an individual, firm, corporation, association,  
8 partnership, consortium, joint venture, commercial entity, state  
9 government agency, unit of local government, federal government agency,  
10 or Indian tribe.

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

26 (15) "Potentially liable person" means any person whom the  
27 department finds, based on credible evidence, to be liable under RCW  
28 70.105D.040. The department shall give notice to any such person and  
29 allow an opportunity for comment before making the finding, unless an  
30 emergency requires otherwise.

31 ~~((10))~~ (16) "Prepare a facility for sale, transfer, or  
32 assignment" means to secure access to the facility; perform routine  
33 maintenance on the facility; remove inventory, equipment, or  
34 structures; maintain environmental compliance measures already in place  
35 at the facility; conduct remedial actions to clean up releases at the  
36 facility; or to perform other similar activities intended to preserve  
37 the value of the facility where the borrower has defaulted on the loan  
38 or otherwise breached the security agreement or after foreclosure and  
39 its equivalents and in anticipation of a pending sale, transfer, or

1 assignment, primarily to protect the holder's security interest in the  
2 facility.

3 (17) "Primarily to protect a security interest" means the indicia  
4 of ownership is held primarily for the purpose of securing payment or  
5 performance of an obligation. The term does not include indicia of  
6 ownership held primarily for investment purposes nor indicia of  
7 ownership held primarily for purposes other than as protection for a  
8 security interest. A holder may have other, secondary reasons, for  
9 maintaining indicia of ownership, but the primary reason must be for  
10 protection of a security interest. Holding indicia of ownership after  
11 foreclosure or its equivalents, or assuming operation of the facility  
12 prior to foreclosure or its equivalents, or any combination thereof for  
13 a total combined time period of longer than five years, shall be  
14 considered to be holding the indicia of ownership for purposes other  
15 than primarily to protect a security interest.

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

22 ~~((+11))~~ (19) "Release" means any intentional or unintentional  
23 entry of any hazardous substance into the environment, including but  
24 not limited to the abandonment or disposal of containers of hazardous  
25 substances.

26 ~~((+12))~~ (20) "Remedy" or "remedial action" means any action or  
27 expenditure consistent with the purposes of this chapter to identify,  
28 eliminate, or minimize any threat or potential threat posed by  
29 hazardous substances to human health or the environment including any  
30 investigative and monitoring activities with respect to any release or  
31 threatened release of a hazardous substance and any health assessments  
32 or health effects studies conducted in order to determine the risk or  
33 potential risk to human health.

34 ~~((+13))~~ (21) "Security interest" means an interest in a facility  
35 created or established for the purpose of securing a loan or other  
36 obligation. Security interests include deeds of trusts, liens, legal,  
37 or equitable title to a facility acquired incident to foreclosure and  
38 its equivalents, and title pursuant to lease financing transactions.  
39 Security interests may also arise from transactions such as sale and

1 leasebacks, conditional sales, installment sales, trust receipt  
2 transactions, certain assignments, factoring agreements, accounts  
3 receivable financing arrangements, easements, and consignments, if the  
4 transaction creates or establishes an interest in a facility for the  
5 purpose of securing a loan or other obligation.

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

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

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

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

--- END ---