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SENATE BILL 5890

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State of Washington

54th Legislature

1995 Regular Session

By Senators Fraser, Hale, Prentice, Deccio and Kohl

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

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 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 ((+7)) (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 include,  
16 mortgages, deeds of trust, sellers interest in a real estate contract,  
17 liens, surety bonds, and guarantees of obligations, title held pursuant  
18 to a lease financing transaction in which the lessor does not select  
19 initially the leased facility, or legal or equitable title obtained  
20 pursuant to foreclosure and their equivalents. Evidence of such  
21 interests also include assignments, pledges, or other rights to or  
22 other forms of encumbrance against the facility that are held primarily  
23 to protect a security interest.

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

34 (11) "Owner or operator" means:

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

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

1 The term does not include:

2 (i) An agency of the state or unit of local government which  
3 acquired ownership or control involuntarily through bankruptcy, tax  
4 delinquency, abandonment, or circumstances in which the government  
5 involuntarily acquires title. This exclusion does not apply to an  
6 agency of the state or unit of local government which has caused or  
7 contributed to the release or threatened release of a hazardous  
8 substance from the facility; or

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

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

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

19 (C) The holder conducts any remedial actions identified by the  
20 department as necessary to abate an imminent and substantial  
21 endangerment;

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

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

31 (F) The holder does not exacerbate an existing release or cause or  
32 contribute to a new release or threatened release, as distinct from a  
33 continuing release, at the facility.

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 who establishes that a new  
38 release has been completely remediated shall not lose this exemption.

1       (~~(8)~~) (12) "Participation in management" means exercising  
2 decision-making control over the borrower's operation of the facility,  
3 environmental compliance, or assuming or manifesting responsibility for  
4 the overall management of the enterprise encompassing the day-to-day  
5 decision making of the enterprise.

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

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

29       (~~(9)~~) (14) "Policing activities" means actions the holder takes  
30 to insure that the borrower complies with the terms of the loan or  
31 security interest or actions the holder takes or requires the borrower  
32 to take to maintain the value of the security. Policing activities  
33 include: Requiring the borrower to conduct remedial actions at the  
34 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  
39 inspections, or to monitor or inspect the borrower's business or

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

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

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

24 (17) "Primarily to protect a security interest" means the indicia  
25 of ownership is held primarily for the purpose of securing payment or  
26 performance of an obligation. The term does not include indicia of  
27 ownership held primarily for investment purposes nor indicia of  
28 ownership held primarily for purposes other than as protection for a  
29 security interest. A holder may have other, secondary reasons, for  
30 maintaining indicia of ownership, but the primary reason must be for  
31 protection of a security interest. Holding indicia of ownership after  
32 foreclosure or its equivalents, or assuming operation of the facility  
33 prior to foreclosure or its equivalents, or any combination thereof for  
34 a total combined time period of longer than five years, shall be  
35 considered to be holding the indicia of ownership for purposes other  
36 than primarily to protect a security interest.

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

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

4 ~~((11))~~ (19) "Release" means any intentional or unintentional  
5 entry of any hazardous substance into the environment, including but  
6 not limited to the abandonment or disposal of containers of hazardous  
7 substances.

8 ~~((12))~~ (20) "Remedy" or "remedial action" means any action or  
9 expenditure consistent with the purposes of this chapter to identify,  
10 eliminate, or minimize any threat or potential threat posed by  
11 hazardous substances to human health or the environment including any  
12 investigative and monitoring activities with respect to any release or  
13 threatened release of a hazardous substance and any health assessments  
14 or health effects studies conducted in order to determine the risk or  
15 potential risk to human health.

16 ~~((13))~~ (21) "Security interest" means an interest in a facility  
17 created or established for the purpose of securing a loan or other  
18 obligation. Security interests include deeds of trusts, sellers  
19 interest in a real estate contract, liens, legal, or equitable title to  
20 a facility acquired incident to foreclosure and its equivalents, and  
21 title pursuant to lease financing transactions. Security interests may  
22 also arise from transactions such as sale and leasebacks, conditional  
23 sales, installment sales, trust receipt transactions, certain  
24 assignments, factoring agreements, accounts receivable financing  
25 arrangements, easements, and consignments, if the transaction creates  
26 or establishes an interest in a facility for the purpose of securing a  
27 loan or other obligation.

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

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

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

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

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