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

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

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

Adoption of the uniform environmental covenants act in Washington will provide all participants in a cleanup with greater confidence that
environmental covenants and other institutional controls will be effective over the life of the cleanup. This will facilitate cleanups of many sites and assist in the recycling of urban brownfield properties into new economic uses for the benefit of the citizens of Washington.

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

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

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

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

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

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

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

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

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

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

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

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

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

(5) "Environmental response project" means a plan or work performed for environmental remediation of real property and conducted:
(a) Under a federal or state program governing environmental remediation of real property, including chapters 43.21C, 64.44, 70.95, 70.98, 70.105, 70.105D, 90.48, and 90.52 RCW;

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

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

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

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

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

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

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

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

(3) An agency is bound by any obligation it assumes in an environmental covenant, but an agency does not assume obligations merely by signing an environmental covenant. Any other person that signs an environmental covenant is bound by the obligations the person assumes in the covenant, but signing the covenant does not change obligations, rights, or protections granted or imposed under law other than this chapter except as provided in the covenant.
The following rules apply to interests in real property in existence at the time an environmental covenant is created or amended:

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

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

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

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

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

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

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

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

(d) Identify every holder;

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

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

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

(a) Requirements for notice following transfer of a specified
interest in, or concerning proposed changes in use of, applications for
building permits for, or proposals for any site work affecting the
contamination on, the property subject to the covenant;

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

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

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

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

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

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

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

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

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

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

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

(a) It is not appurtenant to an interest in real property;
(b) It can be or has been assigned to a person other than the original holder;
(c) It is not of a character that has been recognized traditionally at common law;
(d) It imposes a negative burden;
(e) It imposes an affirmative obligation on a person having an interest in the real property or on the holder;
(f) The benefit or burden does not touch or concern real property;
(g) There is no privity of estate or contract;
(h) The holder dies, ceases to exist, resigns, or is replaced; or
(i) The owner of an interest subject to the environmental covenant and the holder are the same person.

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

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

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

NEW SECTION. Sec. 8. (1) A copy of an environmental covenant shall be provided by the persons and in the manner required by the agency to:
(a) Each person that signed the covenant;
(b) Each person holding a recorded interest in the real property subject to the covenant;
(c) Each person in possession of the real property subject to the
  covenant at the time the covenant is executed;
 (d) Each municipality or other unit of local government in which
  real property subject to the covenant is located;
 (e) The department of ecology; and
 (f) Any other person the agency requires.
 (2) The validity of an environmental covenant is not affected by
  failure to provide a copy of the covenant as required under this
  section.
 (3) If the agency has not designated the persons to provide a copy
  of an environmental covenant, the grantor shall be responsible for
  providing a copy of an environmental covenant as required under
  subsection (1) of this section.

NEW SECTION.  Sec. 9.  (1) An environmental covenant and any
amendment or termination of the covenant must be recorded in every
county in which any portion of the real property subject to the
 covenant is located.  For purposes of indexing, a holder shall be
treated as a grantee.
 (2) Except as otherwise provided in section 10(3) of this act, an
environmental covenant is subject to the laws of this state governing
recording and priority of interests in real property.

NEW SECTION.  Sec. 10.  (1) An environmental covenant is perpetual
unless it is:
 (a) By its terms limited to a specific duration or terminated by
  the occurrence of a specific event;
 (b) Terminated by consent pursuant to section 11 of this act;
 (c) Terminated pursuant to subsection (2) of this section;
 (d) Terminated by foreclosure of an interest that has priority over
  the environmental covenant; or
 (e) Terminated or modified in an eminent domain proceeding, but
  only if:
     (i) The agency that signed the covenant is a party to the
     proceeding;
     (ii) All persons identified in section 11 (1) and (2) of this act
     are given notice of the pendency of the proceeding; and
(iii) The court determines, after hearing, that the termination or modification will not adversely affect human health or the environment.

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

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

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

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

(a) The agency;

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

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

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

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

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

(4) Except as otherwise provided in an environmental covenant:
(a) A holder may not assign its interest without consent of the other parties;
(b) A holder may be removed and replaced by agreement of the other parties specified in subsection (1) of this section; and
(c) A court of competent jurisdiction may fill a vacancy in the position of holder.

NEW SECTION. Sec. 12. (1) A civil action for injunctive or other equitable relief for violation of an environmental covenant may be maintained by:
(a) A party to the covenant;
(b) The agency or, if it is not the agency, the department of ecology;
(c) Any person to whom the covenant expressly grants power to enforce;
(d) A person whose interest in the real property or whose collateral or liability may be affected by the alleged violation of the covenant; and
(e) A municipality or other unit of local government in which the real property subject to the covenant is located.

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

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

NEW SECTION. Sec. 13. (1) The department of ecology shall establish and maintain a registry that contains information identifying all environmental covenants established under this chapter and any amendment or termination of those covenants, including the county where the covenant is recorded and the recording number. The registry may also contain any other information concerning environmental covenants and the real property subject to them that the department of ecology considers appropriate. The registry is a public record for purposes of chapter 42.56 RCW, but the department shall maintain electronic access to the registry without requiring a public records request for any information included in the registry.
(2) Failure to include information or inclusion of inaccurate information concerning an environmental covenant in the registry does not invalidate or limit the application or enforceability of the covenant.

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

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

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

(1) A public corporation, commission, or authority created pursuant to RCW 35.21.730, 35.21.660, or 81.112.320 shall receive the same immunity or exemption from taxation as that of the city, town, or county creating the same: PROVIDED, That, except for (a) any property within a special review district established by ordinance prior to January 1, 1976, or listed on or which is within a district listed on any federal or state register of historical sites or (b) any property owned, operated, or controlled by a public corporation that is used primarily for low-income housing, or that is used as a convention center, performing arts center, public assembly hall, public meeting place, public esplanade, street, public way, public open space, park, public utility corridor, or view corridor for the general public or (c) any blighted property owned, operated, or controlled by a public corporation that was acquired for the purpose of remediation and redevelopment of the property in accordance with an agreement or plan approved by the city, town, or county in which the property is located, or (d) any property owned, operated, or controlled by a public corporation created under RCW 81.112.320, any such public corporation, commission, or authority shall pay to the county treasurer an annual excise tax equal to the amounts which would be paid upon real property
and personal property devoted to the purposes of such public
corporation, commission, or authority were it in private ownership, and
such real property and personal property is acquired and/or operated
under RCW 35.21.730 through 35.21.755, and the proceeds of such excise
tax shall be allocated by the county treasurer to the various taxing
authorities in which such property is situated, in the same manner as
though the property were in private ownership: PROVIDED FURTHER, That
the provisions of chapter 82.29A RCW shall not apply to property within
a special review district established by ordinance prior to January 1,
1976, or listed on or which is within a district listed on any federal
or state register of historical sites and which is controlled by a
public corporation, commission, or authority created pursuant to RCW
35.21.730 or 35.21.660, which was in existence prior to January 1,
1987: AND PROVIDED FURTHER, That property within a special review
district established by ordinance prior to January 1, 1976, or property
which is listed on any federal or state register of historical sites
and controlled by a public corporation, commission, or authority
created pursuant to RCW 35.21.730 or 35.21.660, which was in existence
prior to January 1, 1976, shall receive the same immunity or exemption
from taxation as if such property had been within a district listed on
any such federal or state register of historical sites as of January 1,
1976, and controlled by a public corporation, commission, or authority
created pursuant to RCW 35.21.730 or 35.21.660 which was in existence
prior to January 1, 1976.

(2) As used in this section:
(a) "Low-income" means a total annual income, adjusted for family
size, not exceeding fifty percent of the area median income.
(b) "Area median income" means:
(i) For an area within a standard metropolitan statistical area,
the area median income reported by the United States department of
housing and urban development for that standard metropolitan
statistical area; or
(ii) For an area not within a standard metropolitan statistical
area, the county median income reported by the department of community,
trade, and economic development.
(c) "Blighted property" means property that is contaminated with
hazardous substances as defined under RCW 70.105D.020(((7))).
Sec. 17. RCW 69.50.511 and 1990 c 213 s 13 are each amended to read as follows:

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

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

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

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

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

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

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


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

(b) "Fiduciary" does not mean:

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

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

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

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

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

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

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

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

((7)) (10) "Hazardous substance" means:

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

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

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

(d) Petroleum or petroleum products; and

(e) Any substance or category of substances, including solid waste decomposition products, determined by the director by rule to present a threat to human health or the environment if released into the environment.
The term hazardous substance does not include any of the following when contained in an underground storage tank from which there is not a release: Crude oil or any fraction thereof or petroleum, if the tank is in compliance with all applicable federal, state, and local law.

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

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

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

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

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

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

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

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

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

"Owner or operator" means:

(a) Any person with any ownership interest in the facility or who exercises any control over the facility; or
(b) In the case of an abandoned facility, any person who had owned, or operated, or exercised control over the facility any time before its abandonment;

The term does not include:

(i) An agency of the state or unit of local government which acquired ownership or control through a drug forfeiture action under RCW 69.50.505, or involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title. This exclusion does not apply to an agency of the state or unit of local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility;

(ii) A person who, without participating in the management of a facility, holds indicia of ownership primarily to protect the person's security interest in the facility. Holders after foreclosure and its equivalent and holders who engage in any of the activities identified in subsection (((13))) (18)(e) through (g) of this section shall not lose this exemption provided the holder complies with all of the following:

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

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

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

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

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

(F) The holder does not exacerbate an existing release. The exemption in this subsection (((12))) (17)(b)(ii) does not apply to holders who cause or contribute to a new release or threatened release or who are otherwise liable under RCW 70.105D.040(1) (b), (c), (d), and
(e); provided, however, that a holder shall not lose this exemption if it establishes that any such new release has been remediated according to the requirements of this chapter and that any hazardous substances remaining at the facility after remediation of the new release are divisible from such new release;

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

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

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

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

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

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

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

The exemption in this subsection (((12)) (17)(b)(iii)) does not apply to fiduciaries who cause or contribute to a new release or threatened release or who are otherwise liable under RCW 70.105D.040(1)(b), (c), (d), and (e); provided however, that a fiduciary shall not lose this exemption if it establishes that any such new release has
been remediated according to the requirements of this chapter and that any hazardous substances remaining at the facility after remediation of the new release are divisible from such new release. The exemption in this subsection ((12)) (17)(b)(iii) also does not apply where the fiduciary's powers to comply with this subsection ((12)) (17)(b)(iii) are limited by a governing instrument created with the objective purpose of avoiding liability under this chapter or of avoiding compliance with this chapter; or

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

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

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

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

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

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

((13)) (18) "Participation in management" means exercising decision-making control over the borrower's operation of the facility, environmental compliance, or assuming or manifesting responsibility for the overall management of the enterprise encompassing the day-to-day decision making of the enterprise.
The term does not include any of the following: (a) A holder with
the mere capacity or ability to influence, or the unexercised right to
control facility operations; (b) a holder who conducts or requires a
borrower to conduct an environmental audit or an environmental site
assessment at the facility for which indicia of ownership is held; (c)
a holder who requires a borrower to come into compliance with any
applicable laws or regulations at the facility for which indicia of
ownership is held; (d) a holder who requires a borrower to conduct
remedial actions including setting minimum requirements, but does not
otherwise control or manage the borrower's remedial actions or the
scope of the borrower's remedial actions except to prepare a facility
for sale, transfer, or assignment; (e) a holder who engages in workout
or policing activities primarily to protect the holder's security
interest in the facility; (f) a holder who prepares a facility for
sale, transfer, or assignment or requires a borrower to prepare a
facility for sale, transfer, or assignment; (g) a holder who operates
a facility primarily to protect a security interest, or requires a
borrower to continue to operate, a facility primarily to protect a
security interest; and (h) a prospective holder who, as a condition of
becoming a holder, requires an owner or operator to conduct an
environmental audit, conduct an environmental site assessment, come
into compliance with any applicable laws or regulations, or conduct
remedial actions prior to holding a security interest is not
participating in the management of the facility.

"Person" means an individual, firm, corporation,
association, partnership, consortium, joint venture, commercial entity,
state government agency, unit of local government, federal government
agency, or Indian tribe.

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

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

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

((18)) (23) "Primarily to protect a security interest" means the
indicia of ownership is held primarily for the purpose of securing
payment or performance of an obligation. The term does not include
indicia of ownership held primarily for investment purposes nor indicia
of ownership held primarily for purposes other than as protection for
a security interest. A holder may have other, secondary reasons, for
maintaining indicia of ownership, but the primary reason must be for
protection of a security interest. Holding indicia of ownership after
foreclosure or its equivalents for longer than five years shall be
considered to be holding the indicia of ownership for purposes other
than primarily to protect a security interest. For facilities that
have been acquired through foreclosure or its equivalents prior to July
"Public notice" means, at a minimum, adequate notice mailed to all persons who have made timely request of the department and to persons residing in the potentially affected vicinity of the proposed action; mailed to appropriate news media; published in the newspaper of largest circulation in the city or county of the proposed action; and opportunity for interested persons to comment.

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

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

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

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

(a) Zoned for industrial use by a city or county conducting land use planning under chapter 36.70A RCW; or
(b) For counties not planning under chapter 36.70A RCW and the
cities within them, zoned for industrial use and adjacent to properties
currently used or designated for industrial purposes.

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

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

(b) "Fiduciary" does not mean:

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

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

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

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

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

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

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

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

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

(a) Investigate, provide for investigating, or require potentially liable persons to investigate any releases or threatened releases of hazardous substances, including but not limited to inspecting, sampling, or testing to determine the nature or extent of any release or threatened release. If there is a reasonable basis to believe that a release or threatened release of a hazardous substance may exist, the department's authorized employees, agents, or contractors may enter upon any property and conduct investigations. The department shall give reasonable notice before entering property unless an emergency prevents such notice. The department may by subpoena require the attendance or testimony of witnesses and the production of documents or other information that the department deems necessary;
(b) Conduct, provide for conducting, or require potentially liable persons to conduct remedial actions (including investigations under (a) of this subsection) to remedy releases or threatened releases of hazardous substances. In carrying out such powers, the department's authorized employees, agents, or contractors may enter upon property. The department shall give reasonable notice before entering property unless an emergency prevents such notice. In conducting, providing for, or requiring remedial action, the department shall give preference to permanent solutions to the maximum extent practicable and shall provide for or require adequate monitoring to ensure the effectiveness of the remedial action;

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

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

(e) Classify substances as hazardous substances for purposes of RCW 70.105D.020(7) and classify substances and products as hazardous substances for purposes of RCW 82.21.020(1);

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

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

(h) Require holders to conduct remedial actions necessary to abate an imminent or substantial endangerment pursuant to RCW 70.105D.020(12));
(i) Provide informal advice and assistance to persons regarding the
administrative and technical requirements of this chapter. This may
include site-specific advice to persons who are conducting or otherwise
interested in independent remedial actions. Any such advice or
assistance shall be advisory only, and shall not be binding on the
department. As a part of providing this advice and assistance for
independent remedial actions, the department may prepare written
opinions regarding whether the independent remedial actions or
proposals for those actions meet the substantive requirements of this
chapter or whether the department believes further remedial action is
necessary at the facility. The department may collect, from persons
requesting advice and assistance, the costs incurred by the department
in providing such advice and assistance; however, the department shall,
where appropriate, waive collection of costs in order to provide an
appropriate level of technical assistance in support of public
participation. The state, the department, and officers and employees
of the state are immune from all liability, and no cause of action of
any nature may arise from any act or omission in providing, or failing
to provide, informal advice and assistance; and

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

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

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

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

(c) Provide for requiring the reporting by an owner or operator of
releases of hazardous substances to the environment that may be a
threat to human health or the environment within ninety days of
discovery, including such exemptions from reporting as the department
deems appropriate, however this requirement shall not modify any
existing requirements provided for under other laws;
(d) Establish reasonable deadlines not to exceed ninety days for initiating an investigation of a hazardous waste site after the department receives notice or otherwise receives information that the site may pose a threat to human health or the environment and other reasonable deadlines for remedying releases or threatened releases at the site;

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

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

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

(4) The department shall establish a scientific advisory board to render advice to the department with respect to the hazard ranking system, cleanup standards, remedial actions, deadlines for remedial actions, monitoring, the classification of substances as hazardous
substances for purposes of RCW 70.105D.020((47)) and the
classification of substances or products as hazardous substances for
purposes of RCW 82.21.020(1). The board shall consist of five
independent members to serve staggered three-year terms. No members
may be employees of the department. Members shall be reimbursed for
travel expenses as provided in RCW 43.03.050 and 43.03.060.

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

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

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

                        (i) A review of the title of the real property subject to the
                                environmental covenant to determine whether the environmental covenant
                                was properly recorded and, if applicable, amended or terminated;
                        (ii) A physical inspection of the real property subject to the
                                environmental covenant to determine compliance with the environmental
                                covenant, including whether any development or redevelopment of the
                                real property has violated the terms of the environmental covenant; and
                        (iii) A review of the effectiveness of the environmental covenant
                                in limiting or prohibiting activities that may interfere with the
                                integrity of the remedial action or that may result in exposure to or
                                migration of hazardous substances. This shall include a review of
                                available monitoring data.

                        (b) If an environmental covenant has been amended or terminated
                                without proper authority, or if the terms of an environmental covenant
                                have been violated, or if the environmental covenant is no longer
                                effective in limiting or prohibiting activities that may interfere with
                                the integrity of the remedial action or that may result in exposure to
                                or migration of hazardous substances, then the department shall take
any and all appropriate actions necessary to ensure compliance with the environmental covenant and the policies and requirements of this chapter.

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

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

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

(A) By December 30, 2008, fifty facilities;
(B) By June 30, 2009, fifty additional facilities; and
(C) By June 30, 2010, the remainder of the facilities;

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

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

The department’s investigative and remedial decisions under RCW 70.105D.030 and 70.105D.050, its decisions regarding filing a lien under RCW 70.105D.055, and its decisions regarding liable persons under RCW 70.105D.020((16)), 70.105D.040, 70.105D.050, and 70.105D.055 shall be reviewable exclusively in superior court and only at the following times: (1) In a cost recovery suit under RCW 70.105D.050(3); (2) in a suit by the department to enforce an order or an agreed order, or seek a civil penalty under this chapter; (3) in a suit for reimbursement under RCW 70.105D.050(2); (4) in a suit by the department to compel investigative or remedial action; (5) in a citizen’s suit under RCW 70.105D.050(5); and (6) in a suit for removal or reduction of a lien under RCW 70.105D.050(7). Except in suits for reduction or removal of a lien under RCW 70.105D.050(7), the court shall uphold the department’s actions unless they were arbitrary and capricious. In suits for reduction or removal of a lien under RCW 70.105D.050(7), the court shall review such suits pursuant to the standards set forth in RCW 70.105D.050(7).
NEW SECTION. Sec. 21. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

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