
SENATE BILL 5404

State of Washington

53rd Legislature

1993 Regular Session

By Senators Fraser and Barr

Read first time 01/27/93. Referred to Committee on Ecology & Parks.

1 AN ACT Relating to confirming a private right of action or right of
2 contribution under the model toxic control act; and amending RCW
3 70.105D.040.

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

5 **Sec. 1.** RCW 70.105D.040 and 1989 c 2 s 4 are each amended to read
6 as follows:

7 (1) Except as provided in subsection (3) of this section, the
8 following persons are liable with respect to a facility:

9 (a) The owner or operator of the facility;

10 (b) Any person who owned or operated the facility at the time of
11 disposal or release of the hazardous substances;

12 (c) Any person who owned or possessed a hazardous substance and who
13 by contract, agreement, or otherwise arranged for disposal or treatment
14 of the hazardous substance at the facility, or arranged with a
15 transporter for transport for disposal or treatment of the hazardous
16 substances at the facility, or otherwise generated hazardous wastes
17 disposed of or treated at the facility;

18 (d) Any person (i) who accepts or accepted any hazardous substance
19 for transport to a disposal, treatment, or other facility selected by

1 such person from which there is a release or a threatened release for
2 which remedial action is required, unless such facility, at the time of
3 disposal or treatment, could legally receive such substance; or (ii)
4 who accepts a hazardous substance for transport to such a facility and
5 has reasonable grounds to believe that such facility is not operated in
6 accordance with chapter 70.105 RCW; and

7 (e) Any person who both sells a hazardous substance and is
8 responsible for written instructions for its use if (i) the substance
9 is used according to the instructions and (ii) the use constitutes a
10 release for which remedial action is required at the facility.

11 (2) Each person who is liable under this section is strictly
12 liable, jointly and severally, for all remedial action costs and for
13 all natural resource damages resulting from the releases or threatened
14 releases of hazardous substances. The attorney general, at the request
15 of the department, is empowered to recover all costs and damages from
16 persons liable therefor.

17 (3) The following persons are not liable under this section:

18 (a) Any person who can establish that the release or threatened
19 release of a hazardous substance for which the person would be
20 otherwise responsible was caused solely by:

21 (i) An act of God;

22 (ii) An act of war; or

23 (iii) An act or omission of a third party (including but not
24 limited to a trespasser) other than (A) an employee or agent of the
25 person asserting the defense, or (B) any person whose act or omission
26 occurs in connection with a contractual relationship existing, directly
27 or indirectly, with the person asserting this defense to liability.
28 This defense only applies where the person asserting the defense has
29 exercised the utmost care with respect to the hazardous substance, the
30 foreseeable acts or omissions of the third party, and the foreseeable
31 consequences of those acts or omissions;

32 (b) Any person who is an owner, past owner, or purchaser of a
33 facility and who can establish by a preponderance of the evidence that
34 at the time the facility was acquired by the person, the person had no
35 knowledge or reason to know that any hazardous substance, the release
36 or threatened release of which has resulted in or contributed to the
37 need for the remedial action, was released or disposed of on, in, or at
38 the facility. This subsection (b) is limited as follows:

1 (i) To establish that a person had no reason to know, the person
2 must have undertaken, at the time of acquisition, all appropriate
3 inquiry into the previous ownership and uses of the property,
4 consistent with good commercial or customary practice in an effort to
5 minimize liability. Any court interpreting this subsection (b) shall
6 take into account any specialized knowledge or experience on the part
7 of the person, the relationship of the purchase price to the value of
8 the property if uncontaminated, commonly known or reasonably
9 ascertainable information about the property, the obviousness of the
10 presence or likely presence of contamination at the property, and the
11 ability to detect such contamination by appropriate inspection;

12 (ii) The defense contained in this subsection (b) is not available
13 to any person who had actual knowledge of the release or threatened
14 release of a hazardous substance when the person owned the real
15 property and who subsequently transferred ownership of the property
16 without first disclosing such knowledge to the transferee;

17 (iii) The defense contained in this subsection (b) is not available
18 to any person who, by any act or omission, caused or contributed to the
19 release or threatened release of a hazardous substance at the facility;

20 (c) Any natural person who uses a hazardous substance lawfully and
21 without negligence for any personal or domestic purpose in or near a
22 dwelling or accessory structure when that person is: (i) A resident of
23 the dwelling; (ii) a person who, without compensation, assists the
24 resident in the use of the substance; or (iii) a person who is employed
25 by the resident, but who is not an independent contractor;

26 (d) Any person who, for the purpose of growing food crops, applies
27 pesticides or fertilizers without negligence and in accordance with all
28 applicable laws and regulations.

29 (4) There may be no settlement by the state with any person
30 potentially liable under this chapter except in accordance with this
31 subsection.

32 (a) The attorney general may agree to a settlement with any
33 potentially liable person only if the department finds, after public
34 notice and hearing, that the proposed settlement would lead to a more
35 expeditious cleanup of hazardous substances in compliance with cleanup
36 standards under RCW 70.105D.030(2)(d) and with any remedial orders
37 issued by the department. Whenever practicable and in the public
38 interest, the attorney general may expedite such a settlement with
39 persons whose contribution is insignificant in amount and toxicity.

1 (b) A settlement agreement under this subsection shall be entered
2 as a consent decree issued by a court of competent jurisdiction.

3 (c) A settlement agreement may contain a covenant not to sue only
4 of a scope commensurate with the settlement agreement in favor of any
5 person with whom the attorney general has settled under this section.
6 Any covenant not to sue shall contain a reopener clause which requires
7 the court to amend the covenant not to sue if factors not known at the
8 time of entry of the settlement agreement are discovered and present a
9 previously unknown threat to human health or the environment.

10 (d) A party who has resolved its liability to the state under this
11 subsection shall not be liable for claims for contribution regarding
12 matters addressed in the settlement. The settlement does not discharge
13 any of the other liable parties but it reduces the total potential
14 liability of the others to the state by the amount of the settlement.

15 (5) Nothing in this chapter affects or modifies in any way any
16 person's right to seek or obtain relief under other statutes or under
17 common law, including but not limited to damages for injury or loss
18 resulting from a release or threatened release of a hazardous
19 substance. No settlement by the department or remedial action ordered
20 by a court or the department affects any person's right to obtain a
21 remedy under common law or other statutes.

22 (6) Except as provided in subsection (4)(d) of this section, a
23 person may bring a private right of action, including a claim for
24 contribution or for declaratory relief, against any other person liable
25 under this section for the recovery of remedial action costs. In the
26 action, natural resource damages paid to the state under this chapter
27 may also be recovered. Recovery shall be based on the equitable
28 factors as the court determines are appropriate and may include the
29 prevailing party's attorneys' fees. Recovery of remedial action costs
30 shall be limited to those remedial actions that, when evaluated as a
31 whole, are the substantial equivalent of a department-conducted or
32 department-supervised remedial action. Substantial equivalence shall
33 be determined by the court with reference to the rules adopted by the
34 department under this chapter. An action under this subsection may be
35 brought after remedial action costs are incurred but must be brought
36 within three years from the date remedial action confirms cleanup
37 standards are met or within one year of the effective date of this act,

1 whichecker is later. The right of action created by this subsection is
2 retroactive.

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