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**SENATE BILL 5754**

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**State of Washington****53rd Legislature****1993 Regular Session****By** Senators Fraser, Barr and Haugen

Read first time 02/11/93. Referred to Committee on Ecology &amp; Parks.

1       AN ACT Relating to cleanup of sites contaminated by storm water  
2 discharges; and amending RCW 70.105D.020, 70.105D.030, 70.105D.040, and  
3 70.105D.070.

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

5       **Sec. 1.** RCW 70.105D.020 and 1989 c 2 s 2 are each amended to read  
6 as follows:

7       (1) "Department" means the department of ecology.

8       (2) "Director" means the director of ecology or the director's  
9 designee.

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

1       (4) "Federal cleanup law" means the federal comprehensive  
2 environmental response, compensation, and liability act of 1980, 42  
3 U.S.C. Sec. 9601 et seq., as amended by Public Law 99-499.

4       (5) "Hazardous substance" means:

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

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

10          (c) Any substance that, on March 1, 1989, is a hazardous substance  
11 under section 101(14) of the federal cleanup law, 42 U.S.C. Sec.  
12 9601(14);

13          (d) Petroleum or petroleum products; and

14          (e) Any substance or category of substances, including solid waste  
15 decomposition products, determined by the director by rule to present  
16 a threat to human health or the environment if released into the  
17 environment.

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

22       (6) "Owner or operator" means:

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

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

28       The term does not include:

29           (i) An agency of the state or unit of local government which  
30 acquired ownership or control involuntarily through bankruptcy, tax  
31 delinquency, abandonment, or circumstances in which the government  
32 involuntarily acquires title. This exclusion does not apply to an  
33 agency of the state or unit of local government which has caused or  
34 contributed to the release or threatened release of a hazardous  
35 substance from the facility; or

36           (ii) A person who, without participating in the management of a  
37 facility, holds indicia of ownership primarily to protect the person's  
38 security interest in the facility.

1       (7) "Person" means an individual, firm, corporation, association,  
2 partnership, consortium, joint venture, commercial entity, state  
3 government agency, unit of local government, federal government agency,  
4 or Indian tribe.

5       (8) "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      (9) "Public notice" means, at a minimum, adequate notice mailed to  
11 all persons who have made timely request of the department and to  
12 persons residing in the potentially affected vicinity of the proposed  
13 action; mailed to appropriate news media; published in the newspaper of  
14 largest circulation in the city or county of the proposed action; and  
15 opportunity for interested persons to comment.

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

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

27      (12) "Storm water discharge" means the discharge from a municipal  
28 or industrial separate storm sewer system to surface or ground waters  
29 of the state, or onto property not owned in fee title by the owner of  
30 the storm sewer system.

31      **Sec. 2.** RCW 70.105D.030 and 1989 c 2 s 3 are each amended to read  
32 as follows:

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

35      (a) Investigate, provide for investigating, or require potentially  
36 liable persons to investigate any releases or threatened releases of  
37 hazardous substances, including but not limited to inspecting,  
38 sampling, or testing to determine the nature or extent of any release

1 or threatened release. If there is a reasonable basis to believe that  
2 a release or threatened release of a hazardous substance may exist, the  
3 department's authorized employees, agents, or contractors may enter  
4 upon any property and conduct investigations. The department shall  
5 give reasonable notice before entering property unless an emergency  
6 prevents such notice. The department may by subpoena require the  
7 attendance or testimony of witnesses and the production of documents or  
8 other information that the department deems necessary;

9 (b) Conduct, provide for conducting, or require potentially liable  
10 persons to conduct remedial actions (including investigations under (a)  
11 of this subsection) to remedy releases or threatened releases of  
12 hazardous substances. In carrying out such powers, the department's  
13 authorized employees, agents, or contractors may enter upon property.  
14 The department shall give reasonable notice before entering property  
15 unless an emergency prevents such notice. In conducting, providing for,  
16 or requiring remedial action, the department shall give preference to  
17 permanent solutions to the maximum extent practicable and shall provide  
18 for or require adequate monitoring to ensure the effectiveness of the  
19 remedial action;

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

23 (d) Carry out all state programs authorized under the federal  
24 cleanup law and the federal resource, conservation, and recovery act,  
25 42 U.S.C. Sec. 6901 et seq., as amended;

26 (e) Classify substances as hazardous substances for purposes of RCW  
27 70.105D.020(5) and classify substances and products as hazardous  
28 substances for purposes of RCW 82.21.020(1); and

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

32 (2) The department shall immediately implement all provisions of  
33 this chapter to the maximum extent practicable, including investigative  
34 and remedial actions where appropriate. The department, within nine  
35 months after March 1, 1989, shall adopt, and thereafter enforce, rules  
36 under chapter 34.05 RCW to:

37 (a) Provide for public participation, including at least (i) the  
38 establishment of regional citizen's advisory committees, (ii) public  
39 notice of the development of investigative plans or remedial plans for

1 releases or threatened releases, and (iii) concurrent public notice of  
2 all compliance orders, enforcement orders, or notices of violation;

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

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

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

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

26 (4) The department shall establish a scientific advisory board to  
27 render advice to the department with respect to the hazard ranking  
28 system, cleanup standards, remedial actions, deadlines for remedial  
29 actions, monitoring, the classification of substances as hazardous  
30 substances for purposes of RCW 70.105D.020(5) and the classification of  
31 substances or products as hazardous substances for purposes of RCW  
32 82.21.020(1). The board shall consist of five independent members to  
33 serve staggered three-year terms. No members may be employees of the  
34 department. Members shall be reimbursed for travel expenses as  
35 provided in RCW 43.03.050 and 43.03.060.

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

1       (6) On or before January 1, 1994, the department shall adopt a  
2 schedule for assigning a hazard ranking to and initiate remedial  
3 investigations and feasibility studies for at least ten sites included  
4 on the department's contaminated sites list that are contaminated  
5 principally from storm water discharges. For those sites with the  
6 highest rankings, the department shall establish a schedule to initiate  
7 remedial action no later than July 1, 1995.

8       (7) The department may adopt an enforcement policy to exclude from  
9 enforcement owners of residential properties that were not the cause of  
10 a hazardous substance release, including owners of residential  
11 properties contaminated by storm water discharges.

12      **Sec. 3.** RCW 70.105D.040 and 1989 c 2 s 4 are each amended to read  
13 as follows:

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

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

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

19       (c) Any person who owned or possessed a hazardous substance and who  
20 by contract, agreement, or otherwise arranged for disposal or treatment  
21 of the hazardous substance at the facility, or arranged with a  
22 transporter for transport for disposal or treatment of the hazardous  
23 substances at the facility, or otherwise generated hazardous wastes  
24 disposed of or treated at the facility;

25       (d) Any person (i) who accepts or accepted any hazardous substance  
26 for transport to a disposal, treatment, or other facility selected by  
27 such person from which there is a release or a threatened release for  
28 which remedial action is required, unless such facility, at the time of  
29 disposal or treatment, could legally receive such substance; or (ii)  
30 who accepts a hazardous substance for transport to such a facility and  
31 has reasonable grounds to believe that such facility is not operated in  
32 accordance with chapter 70.105 RCW; and

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

37       (2) Each person who is liable under this section is strictly  
38 liable, jointly and severally, for all remedial action costs and for

1 all natural resource damages resulting from the releases or threatened  
2 releases of hazardous substances. The attorney general, at the request  
3 of the department, is empowered to recover all costs and damages from  
4 persons liable therefor.

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

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

9 (i) An act of God;

10 (ii) An act of war; or

11 (iii) An act or omission of a third party (including but not  
12 limited to a trespasser) other than (A) an employee or agent of the  
13 person asserting the defense, or (B) any person whose act or omission  
14 occurs in connection with a contractual relationship existing, directly  
15 or indirectly, with the person asserting this defense to liability.  
16 This defense only applies where the person asserting the defense has  
17 exercised the utmost care with respect to the hazardous substance, the  
18 foreseeable acts or omissions of the third party, and the foreseeable  
19 consequences of those acts or omissions;

20 (b) Any person who is an owner, past owner, or purchaser of a  
21 facility and who can establish by a preponderance of the evidence that  
22 at the time the facility was acquired by the person, the person had no  
23 knowledge or reason to know that any hazardous substance, the release  
24 or threatened release of which has resulted in or contributed to the  
25 need for the remedial action, was released or disposed of on, in, or at  
26 the facility. The department shall adopt rules by July 1, 1994,  
defining the criteria to be considered in determining the applicability  
of this subsection (3)(b) to persons owning or having owned a facility  
to which hazardous substances were released by storm water discharges.  
30 This subsection (3)(b) is limited as follows:

31 (i) To establish that a person had no reason to know, the person  
32 must have undertaken, at the time of acquisition, all appropriate  
33 inquiry into the previous ownership and uses of the property,  
34 consistent with good commercial or customary practice in an effort to  
35 minimize liability. Any court interpreting this subsection (b) shall  
36 take into account any specialized knowledge or experience on the part  
37 of the person, the relationship of the purchase price to the value of  
38 the property if uncontaminated, commonly known or reasonably  
39 ascertainable information about the property, the obviousness of the

1 presence or likely presence of contamination at the property, and the  
2 ability to detect such contamination by appropriate inspection;

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

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

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

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

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

23       (a) The attorney general may agree to a settlement with any  
24 potentially liable person only if the department finds, after public  
25 notice and hearing, that the proposed settlement would lead to a more  
26 expeditious cleanup of hazardous substances in compliance with cleanup  
27 standards under RCW 70.105D.030(2)(d) and with any remedial orders  
28 issued by the department. Whenever practicable and in the public  
29 interest, the attorney general may expedite such a settlement with  
30 persons whose contribution is insignificant in amount and toxicity.

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

33       (c) A settlement agreement may contain a covenant not to sue only  
34 of a scope commensurate with the settlement agreement in favor of any  
35 person with whom the attorney general has settled under this section.  
36 Any covenant not to sue shall contain a reopen clause which requires  
37 the court to amend the covenant not to sue if factors not known at the  
38 time of entry of the settlement agreement are discovered and present a  
39 previously unknown threat to human health or the environment.

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

6       (e) The department shall adopt rules by January 1, 1994, providing  
7 the procedures and criteria for recommending to the attorney general  
8 that a settlement be entered into with persons whose contribution to  
9 the release is insignificant in amount and toxicity. The rules shall  
10 include owners and past owners of property on which the release was  
11 caused principally by storm water discharges.

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

19      **Sec. 4.** RCW 70.105D.070 and 1991 sp.s. c 13 s 69 are each amended  
20 to read as follows:

21      (1) The state toxics control account and the local toxics control  
22 account are hereby created in the state treasury.

23      (2) The following moneys shall be deposited into the state toxics  
24 control account: (a) Those revenues which are raised by the tax  
25 imposed under RCW 82.21.030 and which are attributable to that portion  
26 of the rate equal to thirty-three one-hundredths of one percent; (b)  
27 the costs of remedial actions recovered under this chapter or chapter  
28 70.105A RCW; (c) penalties collected or recovered under this chapter;  
29 and (d) any other money appropriated or transferred to the account by  
30 the legislature. Moneys in the account may be used only to carry out  
31 the purposes of this chapter, including but not limited to the  
32 following activities:

33      (i) The state's responsibility for hazardous waste planning,  
34 management, regulation, enforcement, technical assistance, and public  
35 education required under chapter 70.105 RCW;

36      (ii) The state's responsibility for solid waste planning,  
37 management, regulation, enforcement, technical assistance, and public  
38 education required under chapter 70.95 RCW;

1       (iii) The hazardous waste cleanup program required under this  
2 chapter;

3       (iv) State matching funds required under the federal cleanup law;  
4       (v) Financial assistance for local programs in accordance with RCW  
5 70.95.130, 70.95.140, 70.95.220, 70.95.230, 70.95.530, 70.105.220,  
6 70.105.225, 70.105.235, and 70.105.260;

7       (vi) State government programs for the safe reduction, recycling,  
8 or disposal of hazardous wastes from households, small businesses, and  
9 agriculture;

10      (vii) Hazardous materials emergency response training;

11      (viii) Water and environmental health protection and monitoring  
12 programs;

13      (ix) Programs authorized under chapter 70.146 RCW;

14      (x) A public participation program, including regional citizen  
15 advisory committees;

16      (xi) Public funding to assist potentially liable persons to pay for  
17 the costs of remedial action in compliance with cleanup standards under  
18 RCW 70.105D.030(2)(d) but only when the amount and terms of such  
19 funding are established under a settlement agreement under RCW  
20 70.105D.040(4) and when the director has found that the funding will  
21 achieve both (A) a substantially more expeditious or enhanced cleanup  
22 than would otherwise occur, and (B) the prevention or mitigation of  
23 unfair economic hardship; ((and))

24      (xii) Development and demonstration of alternative management  
25 technologies designed to carry out the top two hazardous waste  
26 management priorities of RCW 70.105.150; and

27      (xiii) For the period July 1, 1993, through June 30, 1997, five  
28 percent of the funds appropriated from the state toxics control account  
29 shall be available for the department's investigations, remedial  
30 actions, and other activities under RCW 70.105D.030(6).

31      (3) The following moneys shall be deposited into the local toxics  
32 control account: Those revenues which are raised by the tax imposed  
33 under RCW 82.21.030 and which are attributable to that portion of the  
34 rate equal to thirty-seven one-hundredths of one percent. Moneys  
35 deposited in the local toxics control account shall be used by the  
36 department for grants to local governments for the following purposes  
37 in descending order of priority: (a) Remedial actions; (b) hazardous  
38 waste plans and programs under RCW 70.105.220, 70.105.225, 70.105.235,  
39 and 70.105.260; and (c) solid waste plans and programs under RCW

1 70.95.130, 70.95.140, 70.95.220, and 70.95.230. Funds for plans and  
2 programs shall be allocated consistent with the priorities and matching  
3 requirements established in chapters 70.105 and 70.95 RCW. For the  
4 period July 1, 1993, to June 30, 1997, ten percent of the moneys  
5 appropriated from the local toxics control account shall be expended as  
6 grants to local governments undertaking remedial actions at sites  
7 contaminated by storm water discharges, and for providing source  
8 controls and best management practices in connection with such  
9 discharges. The department shall require at least a fifty percent  
10 match from nonstate sources for any grant.

11 (4) Except for unanticipated receipts under RCW 43.79.260 through  
12 43.79.282, moneys in the state and local toxics control accounts may be  
13 spent only after appropriation by statute.

14 (5) One percent of the moneys deposited into the state and local  
15 toxics control accounts shall be allocated only for public  
16 participation grants to persons who may be adversely affected by a  
17 release or threatened release of a hazardous substance and to not-for-  
18 profit public interest organizations. The primary purpose of these  
19 grants is to facilitate the participation by persons and organizations  
20 in the investigation and remediying of releases or threatened releases  
21 of hazardous substances and to implement the state's solid and  
22 hazardous waste management priorities. No grant may exceed fifty  
23 thousand dollars though it may be renewed annually. Moneys  
24 appropriated for public participation from either account which are not  
25 expended at the close of any biennium shall revert to the state toxics  
26 control account.

27 (6) No moneys deposited into either the state or local toxics  
28 control account may be used for solid waste incinerator feasibility  
29 studies, construction, maintenance, or operation.

30 (7) The department shall adopt rules for grant issuance and  
31 performance.

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