
SUBSTITUTE SENATE BILL 5170

State of Washington 65th Legislature 2017 Regular Session

By Senate Energy, Environment & Telecommunications (originally sponsored by Senator Ericksen)

READ FIRST TIME 02/10/17.

1 AN ACT Relating to independent remedial actions under the model
2 toxics control act; and amending RCW 70.105D.090, 70.105D.030,
3 70.94.335, 70.95.270, 70.105.116, 77.55.061, 90.48.039, and
4 90.58.355.

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

6 **Sec. 1.** RCW 70.105D.090 and 2003 c 39 s 30 are each amended to
7 read as follows:

8 (1) A person conducting an independent remedial action, a
9 remedial action at a facility under a consent decree, order, or
10 agreed order, and the department when it conducts a remedial action,
11 are exempt from the procedural requirements of chapters 70.94, 70.95,
12 70.105, 77.55, 90.48, and 90.58 RCW, and the procedural requirements
13 of any laws requiring or authorizing local government permits or
14 approvals for the remedial action. For a remedial action conducted
15 under a consent decree, order, or agreed order, or when the
16 department conducts a remedial action, the department shall ensure
17 compliance with the substantive provisions of chapters 70.94, 70.95,
18 70.105, 77.55, 90.48, and 90.58 RCW, and the substantive provisions
19 of any laws requiring or authorizing local government permits ((~~or~~))
20 or approvals. The department shall establish procedures for ensuring
21 that ((~~such~~)) remedial actions, except independent remedial actions,

1 comply with the substantive requirements adopted pursuant to such
2 laws, and shall consult with the state agencies and local governments
3 charged with implementing these laws. The procedures shall provide an
4 opportunity for comment by the public and by the state agencies and
5 local governments that would otherwise implement the laws referenced
6 in this section. Nothing in this section is intended to prohibit
7 implementing agencies from charging a fee to the person conducting
8 the remedial action to defray the costs of services rendered relating
9 to the substantive requirements for the remedial action.

10 (2) An exemption in this section or in RCW 70.94.335, 70.95.270,
11 70.105.116, (~~77.55.030~~) 77.55.061, 90.48.039, and 90.58.355 shall
12 not apply if the department determines that the exemption would
13 result in loss of approval from a federal agency necessary for the
14 state to administer any federal law, including the federal resource
15 conservation and recovery act, the federal clean water act, the
16 federal clean air act, and the federal coastal zone management act.
17 Such a determination by the department shall not affect the
18 applicability of the exemptions to other statutes specified in this
19 section.

20 **Sec. 2.** RCW 70.105D.030 and 2013 2nd sp.s. c 1 s 6 are each
21 amended to read as follows:

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

24 (a) Investigate, provide for investigating, or require
25 potentially liable persons to investigate any releases or threatened
26 releases of hazardous substances, including but not limited to
27 inspecting, sampling, or testing to determine the nature or extent of
28 any release or threatened release. If there is a reasonable basis to
29 believe that a release or threatened release of a hazardous substance
30 may exist, the department's authorized employees, agents, or
31 contractors may enter upon any property and conduct investigations.
32 The department shall give reasonable notice before entering property
33 unless an emergency prevents such notice. The department may by
34 subpoena require the attendance or testimony of witnesses and the
35 production of documents or other information that the department
36 deems necessary;

37 (b) Conduct, provide for conducting, or require potentially
38 liable persons to conduct remedial actions (including investigations
39 under (a) of this subsection) to remedy releases or threatened

1 releases of hazardous substances. In carrying out such powers, the
2 department's authorized employees, agents, or contractors may enter
3 upon property. The department shall give reasonable notice before
4 entering property unless an emergency prevents such notice. In
5 conducting, providing for, or requiring remedial action, the
6 department shall give preference to permanent solutions to the
7 maximum extent practicable and shall provide for or require adequate
8 monitoring to ensure the effectiveness of the remedial action;

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

12 (d) Carry out all state programs authorized under the federal
13 cleanup law and the federal resource, conservation, and recovery act,
14 42 U.S.C. Sec. 6901 et seq., as amended;

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

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

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

32 (h) Require holders to conduct remedial actions necessary to
33 abate an imminent or substantial endangerment pursuant to RCW
34 70.105D.020(22)(b)(ii)(C);

35 (i) Provide informal advice and assistance to persons regarding
36 the administrative and technical requirements of this chapter. This
37 may include site-specific advice, and advice and assistance relating
38 to the requirements of RCW 70.105D.090, to persons who are conducting
39 or otherwise interested in independent remedial actions. Any such
40 advice or assistance shall be advisory only, and shall not be binding

1 on the department. As a part of providing this advice and assistance
2 for independent remedial actions, the department may prepare written
3 opinions regarding whether the independent remedial actions or
4 proposals for those actions meet the substantive requirements of this
5 chapter or whether the department believes further remedial action is
6 necessary at the facility. Nothing in this chapter may be construed
7 to preclude the department from issuing a written opinion on whether
8 further remedial action is necessary at any portion of the real
9 property located within a facility, even if further remedial action
10 is still necessary elsewhere at the same facility. Such a written
11 opinion on a portion of a facility must also provide an opinion on
12 the status of the facility as a whole. The department may collect,
13 from persons requesting advice and assistance, the costs incurred by
14 the department in providing such advice and assistance; however, the
15 department shall, where appropriate, waive collection of costs in
16 order to provide an appropriate level of technical assistance in
17 support of public participation. The state, the department, and
18 officers and employees of the state are immune from all liability,
19 and no cause of action of any nature may arise from any act or
20 omission in providing, or failing to provide, informal advice and
21 assistance. The department must track the number of requests for
22 reviews of planned or completed independent remedial actions and
23 establish performance measures to track how quickly the department is
24 able to respond to those requests(~~(. By November 1, 2015, the~~
25 ~~department must submit to the governor and the appropriate~~
26 ~~legislative fiscal and policy committees a report on achieving the~~
27 ~~performance measures and provide recommendations for improving~~
28 ~~performance, including staffing needs));~~

29 (j) In fulfilling the objectives of this chapter, the department
30 shall allocate staffing and financial assistance in a manner that
31 considers both the reduction of human and environmental risks and the
32 land reuse potential and planning for the facilities to be cleaned
33 up. This does not preclude the department from allocating resources
34 to a facility based solely on human or environmental risks;

35 (k) Establish model remedies for common categories of facilities,
36 types of hazardous substances, types of media, or geographic areas to
37 streamline and accelerate the selection of remedies for routine types
38 of cleanups at facilities;

39 (i) When establishing a model remedy, the department shall:

1 (A) Identify the requirements for characterizing a facility to
2 select a model remedy, the applicability of the model remedy for use
3 at a facility, and monitoring requirements;

4 (B) Describe how the model remedy meets clean-up standards and
5 the requirements for selecting a remedy established by the department
6 under this chapter; and

7 (C) Provide public notice and an opportunity to comment on the
8 proposed model remedy and the conditions under which it may be used
9 at a facility;

10 (ii) When developing model remedies, the department shall solicit
11 and consider proposals from qualified persons. The proposals must, in
12 addition to describing the model remedy, provide the information
13 required under (k)(i)(A) and (B) of this subsection;

14 (iii) If a facility meets the requirements for use of a model
15 remedy, an analysis of the feasibility of alternative remedies is not
16 required under this chapter. For department-conducted and department-
17 supervised remedial actions, the department must provide public
18 notice and consider public comments on the proposed use of a model
19 remedy at a facility. The department may waive collection of its
20 costs for providing a written opinion under (i) of this subsection on
21 a cleanup that qualifies for and appropriately uses a model remedy;
22 and

23 (1) Take any other actions necessary to carry out the provisions
24 of this chapter, including the power to adopt rules under chapter
25 34.05 RCW.

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

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

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

37 (c) Provide for requiring the reporting by an owner or operator
38 of releases of hazardous substances to the environment that may be a
39 threat to human health or the environment within ninety days of
40 discovery, including such exemptions from reporting as the department

1 deems appropriate, however this requirement shall not modify any
2 existing requirements provided for under other laws;

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

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

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

25 (3) To achieve and protect the state's long-term ecological
26 health, the department shall plan to clean up hazardous waste sites
27 and prevent the creation of future hazards due to improper disposal
28 of toxic wastes at a pace that matches the estimated cash resources
29 in the state and local toxics control accounts and the environmental
30 legacy stewardship account created in RCW 70.105D.170. Estimated cash
31 resources must consider the annual cash flow requirements of major
32 projects that receive appropriations expected to cross multiple
33 biennia. To effectively monitor toxic accounts expenditures, the
34 department shall develop a comprehensive ten-year financing report
35 that identifies long-term remedial action project costs, tracks
36 expenses, and projects future needs.

37 (4) By November 1, 2016, the department must submit to the
38 governor and the appropriate legislative committees a report on the
39 status of developing model remedies and their use under this chapter.
40 The report must include: The number and types of model remedies

1 identified by the department under subsection (1)(k) of this section;
2 the number and types of model remedy proposals prepared by qualified
3 private sector engineers, consultants, or contractors that were
4 accepted or rejected under subsection (1)(k) of this section and the
5 reasons for rejection; and the success of model remedies in
6 accelerating the cleanup as measured by the number of jobs created by
7 the cleanup, where this information is available to the department,
8 acres of land restored, and the number and types of hazardous waste
9 sites successfully remediated using model remedies.

10 (5) Before September 20th of each even-numbered year, the
11 department shall:

12 (a) Develop a comprehensive ten-year financing report in
13 coordination with all local governments with clean-up
14 responsibilities that identifies the projected biennial hazardous
15 waste site remedial action needs that are eligible for funding from
16 the state and local toxics control account and the environmental
17 legacy stewardship account;

18 (b) Work with local governments to develop working capital
19 reserves to be incorporated in the ten-year financing report;

20 (c) Identify the projected remedial action needs for orphaned,
21 abandoned, and other clean-up sites that are eligible for funding
22 from the state toxics control account;

23 (d) Project the remedial action need, cost, revenue, and any
24 recommended working capital reserve estimate to the next biennium's
25 long-term remedial action needs from both the local and state toxics
26 control account and the environmental legacy stewardship account, and
27 submit this information to the appropriate standing fiscal and
28 environmental committees of the senate and house of representatives.
29 This submittal must also include a ranked list of such remedial
30 action projects for both accounts. The submittal must also identify
31 separate budget estimates for large, multibiennia clean-up projects
32 that exceed ten million dollars. The department shall prepare its
33 ten-year capital budget plan that is submitted to the office of
34 financial management to reflect the separate budget estimates for
35 these large clean-up projects and include information on the
36 anticipated private and public funding obligations for completion of
37 the relevant projects.

38 (6) By December 1st of each odd-numbered year, the department
39 must provide the legislature and the public a report of the
40 department's activities supported by appropriations from the state

1 and local toxics control accounts and the environmental legacy
2 stewardship account. The report must be prepared and displayed in a
3 manner that allows the legislature and the public to easily determine
4 the statewide and local progress made in cleaning up hazardous waste
5 sites under this chapter. The report must include, at a minimum:

6 (a) The name, location, hazardous waste ranking, and a short
7 description of each site on the hazardous sites list, and the date
8 the site was placed on the hazardous waste sites list; and

9 (b) For sites where there are state contracts, grants, loans, or
10 direct investments by the state:

11 (i) The amount of money from the state and local toxics control
12 accounts and the environmental legacy stewardship account used to
13 conduct remedial actions at the site and the amount of that money
14 recovered from potentially liable persons;

15 (ii) The actual or estimated start and end dates and the actual
16 or estimated expenditures of funds authorized under this chapter for
17 the following project phases:

18 (A) Emergency or interim actions, if needed;

19 (B) Remedial investigation;

20 (C) Feasibility study and selection of a remedy;

21 (D) Engineering design and construction of the selected remedy;

22 (E) Operation and maintenance or monitoring of the constructed
23 remedy; and

24 (F) The final completion date.

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

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

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

39 (i) A review of the title of the real property subject to the
40 environmental covenant to determine whether the environmental

1 covenant was properly recorded and, if applicable, amended or
2 terminated;

3 (ii) A physical inspection of the real property subject to the
4 environmental covenant to determine compliance with the environmental
5 covenant, including whether any development or redevelopment of the
6 real property has violated the terms of the environmental covenant;
7 and

8 (iii) A review of the effectiveness of the environmental covenant
9 in limiting or prohibiting activities that may interfere with the
10 integrity of the remedial action or that may result in exposure to or
11 migration of hazardous substances. This shall include a review of
12 available monitoring data.

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

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

25 (i) Enter all required information about the environmental
26 covenant into the registry established under RCW 64.70.120 by June
27 30, 2008;

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

32 (A) By December 30, 2008, fifty facilities;

33 (B) By June 30, 2009, fifty additional facilities; and

34 (C) By June 30, 2010, the remainder of the facilities;

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

37 **Sec. 3.** RCW 70.94.335 and 1994 c 257 s 15 are each amended to
38 read as follows:

1 The procedural requirements of this chapter shall not apply to
2 any person conducting an independent remedial action, a remedial
3 action at a facility pursuant to a consent decree, order, or agreed
4 order issued pursuant to chapter 70.105D RCW, or to the department of
5 ecology when it conducts a remedial action under chapter 70.105D RCW.
6 Except for independent remedial actions, the department of ecology
7 shall ensure compliance with the substantive requirements of this
8 chapter through the consent decree, order, or agreed order issued
9 pursuant to chapter 70.105D RCW, or during the department-conducted
10 remedial action, through the procedures developed by the department
11 pursuant to RCW 70.105D.090.

12 **Sec. 4.** RCW 70.95.270 and 1994 c 257 s 16 are each amended to
13 read as follows:

14 The procedural requirements of this chapter shall not apply to
15 any person conducting an independent remedial action, a remedial
16 action at a facility pursuant to a consent decree, order, or agreed
17 order issued pursuant to chapter 70.105D RCW, or to the department of
18 ecology when it conducts a remedial action under chapter 70.105D RCW.
19 Except for independent remedial actions, the department of ecology
20 shall ensure compliance with the substantive requirements of this
21 chapter through the consent decree, order, or agreed order issued
22 pursuant to chapter 70.105D RCW, or during the department-conducted
23 remedial action, through the procedures developed by the department
24 pursuant to RCW 70.105D.090.

25 **Sec. 5.** RCW 70.105.116 and 1994 c 257 s 17 are each amended to
26 read as follows:

27 The procedural requirements of this chapter shall not apply to
28 any person conducting an independent remedial action, a remedial
29 action at a facility pursuant to a consent decree, order, or agreed
30 order issued pursuant to chapter 70.105D RCW, or to the department of
31 ecology when it conducts a remedial action under chapter 70.105D RCW.
32 Except for independent remedial actions, the department of ecology
33 shall ensure compliance with the substantive requirements of this
34 chapter through the consent decree, order, or agreed order issued
35 pursuant to chapter 70.105D RCW, or during the department-conducted
36 remedial action, through the procedures developed by the department
37 pursuant to RCW 70.105D.090.

1 **Sec. 6.** RCW 77.55.061 and 1994 c 257 s 18 are each amended to
2 read as follows:

3 The procedural requirements of this chapter shall not apply to
4 any person conducting an independent remedial action, a remedial
5 action at a facility pursuant to a consent decree, order, or agreed
6 order issued pursuant to chapter 70.105D RCW, or to the department of
7 ecology when it conducts a remedial action under chapter 70.105D RCW.
8 Except for independent remedial actions, the department of ecology
9 shall ensure compliance with the substantive requirements of this
10 chapter through the consent decree, order, or agreed order issued
11 pursuant to chapter 70.105D RCW, or during the department-conducted
12 remedial action, through the procedures developed by the department
13 pursuant to RCW 70.105D.090.

14 **Sec. 7.** RCW 90.48.039 and 1994 c 257 s 19 are each amended to
15 read as follows:

16 The procedural requirements of this chapter shall not apply to
17 any person conducting an independent remedial action, a remedial
18 action at a facility pursuant to a consent decree, order, or agreed
19 order issued pursuant to chapter 70.105D RCW, or to the department of
20 ecology when it conducts a remedial action under chapter 70.105D RCW.
21 Except for independent remedial actions, the department of ecology
22 shall ensure compliance with the substantive requirements of this
23 chapter through the consent decree, order, or agreed order issued
24 pursuant to chapter 70.105D RCW, or during the department-conducted
25 remedial action, through the procedures developed by the department
26 pursuant to RCW 70.105D.090.

27 **Sec. 8.** RCW 90.58.355 and 2015 3rd sp.s. c 15 s 9 are each
28 amended to read as follows:

29 Requirements to obtain a substantial development permit,
30 conditional use permit, variance, letter of exemption, or other
31 review conducted by a local government to implement this chapter do
32 not apply to:

33 (1) Any person conducting an independent remedial action, a
34 remedial action at a facility pursuant to a consent decree, order, or
35 agreed order issued pursuant to chapter 70.105D RCW, or to the
36 department of ecology when it conducts a remedial action under
37 chapter 70.105D RCW. Except for independent remedial actions, the
38 department must ensure compliance with the substantive requirements

1 of this chapter through the consent decree, order, or agreed order
2 issued pursuant to chapter 70.105D RCW, or during the department-
3 conducted remedial action, through the procedures developed by the
4 department pursuant to RCW 70.105D.090;

5 (2) Any person installing site improvements for storm water
6 treatment in an existing boatyard facility to meet requirements of a
7 national pollutant discharge elimination system storm water general
8 permit. The department must ensure compliance with the substantive
9 requirements of this chapter through the review of engineering
10 reports, site plans, and other documents related to the installation
11 of boatyard storm water treatment facilities; or

12 (3) The department of transportation projects and activities that
13 meet the conditions of RCW 90.58.356.

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