
SENATE BILL 5170

State of Washington

65th Legislature

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By Senator Ericksen

Read first time 01/16/17. Referred to Committee on Energy,
Environment & Telecommunications.

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 43.21C.036, 70.94.335, 70.95.270, 70.105.116, 77.55.061, 90.48.039,
4 and 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. The department shall ensure
15 compliance with the substantive provisions of chapters 70.94, 70.95,
16 70.105, 77.55, 90.48, and 90.58 RCW, and the substantive provisions
17 of any laws requiring or authorizing local government permits ((~~or~~))
18 or approvals. The department shall establish procedures for ensuring
19 that such remedial actions comply with the substantive requirements
20 adopted pursuant to such laws, and shall consult with the state
21 agencies and local governments charged with implementing these laws.

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

8 (2) An exemption in this section or in RCW 70.94.335, 70.95.270,
9 70.105.116, (~~77.55.030~~) 77.55.061, 90.48.039, and 90.58.355 shall
10 not apply if the department determines that the exemption would
11 result in loss of approval from a federal agency necessary for the
12 state to administer any federal law, including the federal resource
13 conservation and recovery act, the federal clean water act, the
14 federal clean air act, and the federal coastal zone management act.
15 Such a determination by the department shall not affect the
16 applicability of the exemptions to other statutes specified in this
17 section.

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

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

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

35 (b) Conduct, provide for conducting, or require potentially
36 liable persons to conduct remedial actions (including investigations
37 under (a) of this subsection) to remedy releases or threatened
38 releases of hazardous substances. In carrying out such powers, the
39 department's authorized employees, agents, or contractors may enter

1 upon property. The department shall give reasonable notice before
2 entering property unless an emergency prevents such notice. In
3 conducting, providing for, or requiring remedial action, the
4 department shall give preference to permanent solutions to the
5 maximum extent practicable and shall provide for or require adequate
6 monitoring to ensure the effectiveness of the remedial action;

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

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

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

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

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

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

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

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

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

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

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

38 (A) Identify the requirements for characterizing a facility to
39 select a model remedy, the applicability of the model remedy for use
40 at a facility, and monitoring requirements;

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

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

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

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

20 (1) Take any other actions necessary to carry out the provisions
21 of this chapter, including the power to adopt rules under chapter
22 34.05 RCW.

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

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

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

34 (c) Provide for requiring the reporting by an owner or operator
35 of releases of hazardous substances to the environment that may be a
36 threat to human health or the environment within ninety days of
37 discovery, including such exemptions from reporting as the department
38 deems appropriate, however this requirement shall not modify any
39 existing requirements provided for under other laws;

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

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

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

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

35 (4) By November 1, 2016, the department must submit to the
36 governor and the appropriate legislative committees a report on the
37 status of developing model remedies and their use under this chapter.
38 The report must include: The number and types of model remedies
39 identified by the department under subsection (1)(k) of this section;
40 the number and types of model remedy proposals prepared by qualified

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

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

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

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

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

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

36 (6) By December 1st of each odd-numbered year, the department
37 must provide the legislature and the public a report of the
38 department's activities supported by appropriations from the state
39 and local toxics control accounts and the environmental legacy
40 stewardship account. The report must be prepared and displayed in a

1 manner that allows the legislature and the public to easily determine
2 the statewide and local progress made in cleaning up hazardous waste
3 sites under this chapter. The report must include, at a minimum:

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

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

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

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

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

17 (B) Remedial investigation;

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

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

20 (E) Operation and maintenance or monitoring of the constructed
21 remedy; and

22 (F) The final completion date.

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

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

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

37 (i) A review of the title of the real property subject to the
38 environmental covenant to determine whether the environmental
39 covenant was properly recorded and, if applicable, amended or
40 terminated;

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

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

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

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

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

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

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

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

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

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

35 **Sec. 3.** RCW 43.21C.036 and 1994 c 257 s 21 are each amended to
36 read as follows:

37 ~~((In conducting))~~ For the purposes of conducting an independent
38 remedial action if applicable, a remedial action at a facility
39 pursuant to a consent decree, order, or agreed order issued pursuant

1 to chapter 70.105D RCW, or if conducted by the department of ecology,
2 the department of ecology to the maximum extent practicable shall
3 integrate the procedural requirements and documents of this chapter
4 with the procedures and documents under chapter 70.105D RCW. Such
5 integration shall at a minimum include the public participation
6 procedures of chapter 70.105D RCW and the public notice and review
7 requirements of this chapter.

8 **Sec. 4.** RCW 70.94.335 and 1994 c 257 s 15 are each amended to
9 read as follows:

10 The procedural requirements of this chapter shall not apply to
11 any person conducting an independent remedial action, a remedial
12 action at a facility pursuant to a consent decree, order, or agreed
13 order issued pursuant to chapter 70.105D RCW, or to the department of
14 ecology when it conducts a remedial action under chapter 70.105D RCW.
15 The department of ecology shall ensure compliance with the
16 substantive requirements of this chapter (~~((through the consent
17 decree, order, or agreed order issued pursuant to chapter 70.105D
18 RCW, or during the department conducted remedial action,))~~) through
19 the procedures developed by the department pursuant to RCW
20 70.105D.090.

21 **Sec. 5.** RCW 70.95.270 and 1994 c 257 s 16 are each amended to
22 read as follows:

23 The procedural requirements of this chapter shall not apply to
24 any person conducting an independent remedial action, a remedial
25 action at a facility pursuant to a consent decree, order, or agreed
26 order issued pursuant to chapter 70.105D RCW, or to the department of
27 ecology when it conducts a remedial action under chapter 70.105D RCW.
28 The department of ecology shall ensure compliance with the
29 substantive requirements of this chapter (~~((through the consent
30 decree, order, or agreed order issued pursuant to chapter 70.105D
31 RCW, or during the department conducted remedial action,))~~) through
32 the procedures developed by the department pursuant to RCW
33 70.105D.090.

34 **Sec. 6.** RCW 70.105.116 and 1994 c 257 s 17 are each amended to
35 read as follows:

36 The procedural requirements of this chapter shall not apply to
37 any person conducting an independent remedial action, a remedial

1 action at a facility pursuant to a consent decree, order, or agreed
2 order issued pursuant to chapter 70.105D RCW, or to the department of
3 ecology when it conducts a remedial action under chapter 70.105D RCW.
4 The department of ecology shall ensure compliance with the
5 substantive requirements of this chapter (~~((through the consent
6 decree, order, or agreed order issued pursuant to chapter 70.105D
7 RCW, or during the department conducted remedial action,))~~) through
8 the procedures developed by the department pursuant to RCW
9 70.105D.090.

10 **Sec. 7.** RCW 77.55.061 and 1994 c 257 s 18 are each amended to
11 read as follows:

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

23 **Sec. 8.** RCW 90.48.039 and 1994 c 257 s 19 are each amended to
24 read as follows:

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

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

1 Requirements to obtain a substantial development permit,
2 conditional use permit, variance, letter of exemption, or other
3 review conducted by a local government to implement this chapter do
4 not apply to:

5 (1) Any person conducting an independent remedial action, a
6 remedial action at a facility pursuant to a consent decree, order, or
7 agreed order issued pursuant to chapter 70.105D RCW, or to the
8 department of ecology when it conducts a remedial action under
9 chapter 70.105D RCW. The department must ensure compliance with the
10 substantive requirements of this chapter (~~((through the consent
11 decree, order, or agreed order issued pursuant to chapter 70.105D
12 RCW, or during the department conducted remedial action,))~~) through
13 the procedures developed by the department pursuant to RCW
14 70.105D.090;

15 (2) Any person installing site improvements for storm water
16 treatment in an existing boatyard facility to meet requirements of a
17 national pollutant discharge elimination system storm water general
18 permit. The department must ensure compliance with the substantive
19 requirements of this chapter through the review of engineering
20 reports, site plans, and other documents related to the installation
21 of boatyard storm water treatment facilities; or

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

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