
SUBSTITUTE SENATE BILL 6078

State of Washington

53rd Legislature

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By Senate Committee on Ecology & Parks (originally sponsored by Senators Talmadge, Deccio and Fraser)

Read first time 02/04/94.

1 AN ACT Relating to liability for the cleanup of hazardous waste
2 sites; amending RCW 70.105D.040; adding new sections to chapter 70.105D
3 RCW; and creating a new section.

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 and section 2 of this act.

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 Except for covenants authorized under section 2 of this act, any
7 covenant not to sue shall contain a reopener clause which requires the
8 court to amend the covenant not to sue if factors not known at the time
9 of entry of the settlement agreement are discovered and present a
10 previously unknown threat to human health or the environment.

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

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

23 NEW SECTION. **Sec. 2.** A new section is added to chapter 70.105D
24 RCW to read as follows:

25 (1) The attorney general, with the concurrence of the director, may
26 enter a settlement agreement under the authority of RCW 70.105D.040(4)
27 that includes a covenant not to sue without the reopener clause
28 described by RCW 70.105D.040(4)(c), if the attorney general determines
29 that:

30 (a) The agreement meets the requirements applicable to all
31 settlement agreements under RCW 70.105D.040(4)(a);

32 (b) The agreement requires the persons entering the agreement to
33 make payment into the site cleanup reserve account in an amount meeting
34 the standards under subsection (3) of this section; and

35 (c) The director has provided his or her concurrence that the
36 covenant not to sue is in the public interest, considering the factors
37 in subsection (2) of this section.

1 (2) In making the public interest determination under subsection
2 (1)(c) of this section, the director shall consider such factors as:

3 (a) The effectiveness and reliability of the remedial action, in
4 light of the other alternative actions considered for the facility
5 concerned;

6 (b) The nature of the risks remaining at the facility;

7 (c) The extent to which performance standards are included in the
8 settlement agreement;

9 (d) The extent to which the actions provide a complete remedy,
10 including a reduction in the hazardous nature of the substances at the
11 facility;

12 (e) The extent to which the technology used is demonstrated to be
13 effective;

14 (f) Whether the payment to the site cleanup reserve account would
15 be sufficient to fund additional remedial actions that might eventually
16 be necessary at the facility;

17 (g) Whether the remedial action will be carried out, in whole or in
18 significant part, by the potentially liable persons entering the
19 settlement agreement; and

20 (h) The size and proximity of populations that may be exposed to a
21 future release of hazardous substances from the facility.

22 (3) The attorney general, with the assistance of the director,
23 shall determine the amount of a monetary payment to be made to the site
24 cleanup reserve account, which shall be made by the potentially liable
25 persons entering a settlement agreement containing a covenant not to
26 sue described under subsection (1) of this section. The amount shall
27 be sufficient to cover the cost of periodically monitoring the facility
28 to ensure maintenance of the remedy, and to cover the risk that future
29 remedial action may be necessary at the facility. In determining the
30 amount the attorney general shall consider:

31 (a) The completeness of the remedial action to be undertaken, and
32 the degree to which the action encompasses permanent remedies that
33 destroy the hazardous substances or otherwise treat or stabilize the
34 substances to eliminate their hazardous nature;

35 (b) The potential future uses of the facility after cleanup;

36 (c) The current balance in the site cleanup reserve account in
37 comparison to the total number of sites eligible for funding from the
38 account for future remedial action that may become necessary.

1 (4) The attorney general, with the assistance of the director,
2 shall develop by rule a payment schedule for determining the amount of
3 payments to the site cleanup reserve account, to ensure consistency and
4 fairness among all settlement agreements. The schedule may be revised
5 from time to time to reflect new information regarding expenditures
6 from the account in relation to payments into the account. The payment
7 schedule may establish criteria to waive an amount for facility
8 monitoring costs where, because of the size of the facility or the
9 amount or toxicity of hazardous substances remaining at the facility
10 after remedial action, it is not anticipated that periodic monitoring
11 of the facility will be necessary. The schedule shall also establish
12 criteria for the reduction or waiver of the fee, where the remedial
13 action will employ cleanup technologies with a high degree of
14 demonstrated effectiveness in complete remediation at sites with
15 substantially similar circumstances to that addressed in the proposed
16 settlement agreement.

17 (5) A covenant not to sue under subsection (1) of this section is
18 subject to the satisfactory performance by such person of its
19 obligations under the settlement agreement, and shall not take effect
20 until the director certifies that remedial action has been completed in
21 accordance with the requirements of this chapter and with the terms of
22 the settlement agreement. The covenant shall not bar the state from
23 taking actions necessary to protect members of the public from a health
24 hazard, including, but not limited to, actions to prevent entrance upon
25 the facility, or to enter the facility for the purpose of assessing the
26 need for or for conducting remedial action at the facility. The
27 covenant shall not bar the state from taking action against a person
28 entering the settlement agreement regarding releases or potential
29 releases at the facility known by the person at the time of entering
30 the settlement agreement but not disclosed to the attorney general.

31 (6) The issuance of a covenant not to sue to a potentially liable
32 person does not relieve or decrease any other person's liability to the
33 state.

34 NEW SECTION. **Sec. 3.** A new section is added to chapter 70.105D
35 RCW to read as follows:

36 The site cleanup reserve account is created in the state treasury.
37 All payments made as a condition of a settlement agreement under

1 section 2(1) of this act shall be deposited to the account. Money in
2 the account shall be used solely for:

3 (1) Remedial action by the state to address releases or potential
4 releases at or from facilities for which remedial action had previously
5 been completed under the terms of a settlement agreement containing a
6 covenant not to sue under section 2(1) of this act; and

7 (2) Periodically monitoring such facilities to determine whether
8 further remedial action is necessary.

9 Money deposited in the account shall be administered by the
10 department and is subject to legislative appropriation. All earnings
11 from investment of balances in the site cleanup reserve account shall
12 be credited to the account.

13 NEW SECTION. **Sec. 4.** (1) The pollution liability insurance agency
14 shall conduct a study on insurance coverage for environmental
15 remediation liability. The study shall include a review of: (a) The
16 availability of policies for such coverage in all areas of the state,
17 and the insurance firms offering such policies; (b) the prevailing
18 policy coverage available, including types of liability covered,
19 exclusions from coverage, and other significant policy limitations; (c)
20 premium costs; (d) prevailing policy provisions and insurance industry
21 practices regarding future liability of insureds at remediated
22 hazardous waste sites; and (e) methods by which the risks to the state
23 of costs for future cleanup at remediated site subject to settlements
24 entered under section 2 of this act may be managed through obtaining
25 private insurance coverage. The study shall include recommendations
26 for legislative and administrative actions to assist in making
27 affordable clean-up liability insurance available and reducing
28 transactional costs associated with determining policy coverage and
29 payments made under such policies.

30 (2) The department of ecology, office of the insurance
31 commissioner, office of financial management, and the attorney
32 general's office shall provide assistance to the agency in preparing
33 the report. The agency shall also consult with insurance industry
34 representatives as well as persons or businesses who are insured under
35 such policies, may desire such insurance, or may be undertaking
36 environmental cleanup.

1 (3) The report shall be submitted to the standing committees of the
2 house of representatives and the senate with jurisdiction over
3 environmental and insurance matters on or before December 1, 1994.

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