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**SUBSTITUTE SENATE BILL 6123**

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**State of Washington**

**53rd Legislature**

**1994 Regular Session**

**By** Senate Committee on Ecology & Parks (originally sponsored by Senators Fraser, Deccio, Amondson, Loveland, Snyder, Sellar, Skratek, Pelz and Winsley)

Read first time 01/28/94.

1 AN ACT Relating to authority of the state under the model toxics  
2 control act; amending RCW 70.105D.010, 70.105D.020, 70.105D.030,  
3 70.105D.040, and 70.105.050; and adding a new section to chapter 70.105  
4 RCW.

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

6 **Sec. 1.** RCW 70.105D.010 and 1989 c 2 s 1 are each amended to read  
7 as follows:

8 (1) Each person has a fundamental and inalienable right to a  
9 healthful environment, and each person has a responsibility to preserve  
10 and enhance that right. The beneficial stewardship of the land, air,  
11 and waters of the state is a solemn obligation of the present  
12 generation for the benefit of future generations.

13 (2) A healthful environment is now threatened by the irresponsible  
14 use and disposal of hazardous substances. There are hundreds of  
15 hazardous waste sites in this state, and more will be created if  
16 current waste practices continue. Hazardous waste sites threaten the  
17 state's water resources, including those used for public drinking  
18 water. Many of our municipal landfills are current or potential  
19 hazardous waste sites and present serious threats to human health and

1 environment. The costs of eliminating these threats in many cases are  
2 beyond the financial means of our local governments and ratepayers.  
3 The main purpose of this act is to raise sufficient funds to clean up  
4 all hazardous waste sites and to prevent the creation of future hazards  
5 due to improper disposal of toxic wastes into the state's land and  
6 waters.

7 (3) Many farmers and small business owners who have followed the  
8 law with respect to their uses of pesticides and other chemicals  
9 nonetheless may face devastating economic consequences because their  
10 uses have contaminated the environment or the water supplies of their  
11 neighbors. With a source of funds, the state may assist these farmers  
12 and business owners, as well as those persons who sustain damages, such  
13 as the loss of their drinking water supplies, as a result of the  
14 contamination.

15 (4) It is in the public's interest to efficiently use our finite  
16 land base, to integrate our land use planning policies with our clean-  
17 up policies, and to clean up and reuse contaminated industrial  
18 properties in order to minimize industrial development pressures on  
19 undeveloped land and to make clean land available for future social  
20 use.

21 (5) Because it is often difficult or impossible to allocate  
22 responsibility among persons liable for hazardous waste sites and  
23 because it is essential that sites be cleaned up well and  
24 expeditiously, each responsible person should be liable jointly and  
25 severally.

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

28 (1) "Agreed order" means an order issued by the department under  
29 this chapter that the potentially liable person receiving the order  
30 agrees to comply with. An agreed order may be used to require a  
31 remedial action but it is not a settlement under RCW 70.105D.040(4) and  
32 may not contain a covenant not to sue, or provide protection from  
33 claims for contribution, or provide eligibility for public funding of  
34 remedial actions under RCW 70.105D.070(2)(d)(xi).

35 (2) "Department" means the department of ecology.

36 ((+2+)) (3) "Director" means the director of ecology or the  
37 director's designee.

1       (~~(3)~~) (4) "Facility" means (a) any building, structure,  
2 installation, equipment, pipe or pipeline (including any pipe into a  
3 sewer or publicly owned treatment works), well, pit, pond, lagoon,  
4 impoundment, ditch, landfill, storage container, motor vehicle, rolling  
5 stock, vessel, or aircraft, or (b) any site or area where a hazardous  
6 substance, other than a consumer product in consumer use, has been  
7 deposited, stored, disposed of, or placed, or otherwise come to be  
8 located.

9       (~~(4)~~) (5) "Federal cleanup law" means the federal comprehensive  
10 environmental response, compensation, and liability act of 1980, 42  
11 U.S.C. Sec. 9601 et seq., as amended by Public Law 99-499.

12       (~~(5)~~) (6) "Hazardous substance" means:

13       (a) Any dangerous or extremely hazardous waste as defined in RCW  
14 70.105.010 (5) and (6), or any dangerous or extremely dangerous waste  
15 designated by rule pursuant to chapter 70.105 RCW;

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

18       (c) Any substance that, on March 1, 1989, is a hazardous substance  
19 under section 101(14) of the federal cleanup law, 42 U.S.C. Sec.  
20 9601(14);

21       (d) Petroleum or petroleum products; and

22       (e) Any substance or category of substances, including solid waste  
23 decomposition products, determined by the director by rule to present  
24 a threat to human health or the environment if released into the  
25 environment.

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

30       (~~(6)~~) (7) "Owner or operator" means:

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

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

36       The term does not include:

37       (i) An agency of the state or unit of local government which  
38 acquired ownership or control involuntarily through bankruptcy, tax  
39 delinquency, abandonment, or circumstances in which the government

1 involuntarily acquires title. This exclusion does not apply to an  
2 agency of the state or unit of local government which has caused or  
3 contributed to the release or threatened release of a hazardous  
4 substance from the facility; or

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

8 ~~((+7))~~ (8) "Person" means an individual, firm, corporation,  
9 association, partnership, consortium, joint venture, commercial entity,  
10 state government agency, unit of local government, federal government  
11 agency, or Indian tribe.

12 ~~((+8))~~ (9) "Potentially liable person" means any person whom the  
13 department finds, based on credible evidence, to be liable under RCW  
14 70.105D.040. The department shall give notice to any such person and  
15 allow an opportunity for comment before making the finding, unless an  
16 emergency requires otherwise.

17 ~~((+9))~~ (10) "Public notice" means, at a minimum, adequate notice  
18 mailed to all persons who have made timely request of the department  
19 and to persons residing in the potentially affected vicinity of the  
20 proposed action; mailed to appropriate news media; published in the  
21 newspaper of largest circulation in the city or county of the proposed  
22 action; and opportunity for interested persons to comment.

23 ~~((+10))~~ (11) "Release" means any intentional or unintentional  
24 entry of any hazardous substance into the environment, including but  
25 not limited to the abandonment or disposal of containers of hazardous  
26 substances.

27 ~~((+11))~~ (12) "Remedy" or "remedial action" means any action or  
28 expenditure consistent with the purposes of this chapter to identify,  
29 eliminate, or minimize any threat or potential threat posed by  
30 hazardous substances to human health or the environment including any  
31 investigative and monitoring activities with respect to any release or  
32 threatened release of a hazardous substance and any health assessments  
33 or health effects studies conducted in order to determine the risk or  
34 potential risk to human health.

35 (13) "Industrial properties" means properties that are or have been  
36 characterized by, or are to be committed to, traditional industrial  
37 uses such as processing or manufacturing of materials, marine terminal  
38 and transportation areas and facilities, fabrication, assembly,

1 treatment, or distribution of manufactured products, or storage of bulk  
2 materials, that are either:

3 (a) Zoned for industrial use by a city or county conducting land  
4 use planning under chapter 36.70A RCW; or

5 (b) For counties not planning under chapter 36.70A RCW and the  
6 cities within them, zoned for industrial use and adjacent to properties  
7 currently used or designated for industrial purposes.

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

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

12 (a) Investigate, provide for investigating, or require potentially  
13 liable persons to investigate any releases or threatened releases of  
14 hazardous substances, including but not limited to inspecting,  
15 sampling, or testing to determine the nature or extent of any release  
16 or threatened release. If there is a reasonable basis to believe that  
17 a release or threatened release of a hazardous substance may exist, the  
18 department's authorized employees, agents, or contractors may enter  
19 upon any property and conduct investigations. The department shall  
20 give reasonable notice before entering property unless an emergency  
21 prevents such notice. The department may by subpoena require the  
22 attendance or testimony of witnesses and the production of documents or  
23 other information that the department deems necessary;

24 (b) Conduct, provide for conducting, or require potentially liable  
25 persons to conduct remedial actions (including investigations under (a)  
26 of this subsection) to remedy releases or threatened releases of  
27 hazardous substances. In carrying out such powers, the department's  
28 authorized employees, agents, or contractors may enter upon property.  
29 The department shall give reasonable notice before entering property  
30 unless an emergency prevents such notice. In conducting, providing for,  
31 or requiring remedial action, the department shall give preference to  
32 permanent solutions to the maximum extent practicable and shall provide  
33 for or require adequate monitoring to ensure the effectiveness of the  
34 remedial action;

35 (c) Indemnify contractors retained by the department for carrying  
36 out investigations and remedial actions, but not for any contractor's  
37 reckless or wilful misconduct;

1 (d) Carry out all state programs authorized under the federal  
2 cleanup law and the federal resource, conservation, and recovery act,  
3 42 U.S.C. Sec. 6901 et seq., as amended;

4 (e) Classify substances as hazardous substances for purposes of RCW  
5 70.105D.020(~~(+5)~~) (6) and classify substances and products as  
6 hazardous substances for purposes of RCW 82.21.020(1); ~~((and))~~

7 (f) Enter into consent decrees or agreed orders that include deed  
8 restrictions where necessary to ensure the protection of human health  
9 and the environment where there is a release or threatened release of  
10 a hazardous substance from a facility, provided that the city or county  
11 department with land use planning authority for the real property  
12 subject to industrial restrictions is notified and provided a copy of  
13 the consent decree or agreed order and given an opportunity to comment  
14 on the proposed land use restrictions;

15 (g) Enforce the application of permanent and effective  
16 institutional controls that are necessary for a remedial action to be  
17 protective of human health and the environment; and

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

21 (2) The department shall immediately implement all provisions of  
22 this chapter to the maximum extent practicable, including investigative  
23 and remedial actions where appropriate. The department(~~(, within nine~~  
24 ~~months after March 1, 1989,)~~) shall adopt, and thereafter enforce,  
25 rules under chapter 34.05 RCW to:

26 (a) Provide for public participation, including at least (i) the  
27 establishment of regional citizen's advisory committees, (ii) public  
28 notice of the development of investigative plans or remedial plans for  
29 releases or threatened releases, and (iii) concurrent public notice of  
30 all compliance orders, enforcement orders, or notices of violation;

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

32 (c) Establish reasonable deadlines not to exceed ninety days for  
33 initiating an investigation of a hazardous waste site after the  
34 department receives information that the site may pose a threat to  
35 human health or the environment and other reasonable deadlines for  
36 remedying releases or threatened releases at the site; ~~((and))~~

37 (d) Publish and periodically update minimum cleanup standards for  
38 remedial actions at least as stringent as the cleanup standards under  
39 section 121 of the federal cleanup law, 42 U.S.C. Sec. 9621, and at

1 least as stringent as all applicable state and federal laws, including  
2 health-based standards under state and federal law; and

3 (e) Provide for the application of industrial clean-up standards at  
4 industrial properties, and to ensure that industrial properties that  
5 are cleaned up to industrial standards cannot be converted to  
6 nonindustrial uses without approval from the department. In such  
7 cases, the department may require that the property be cleaned up to  
8 the standard applicable to the proposed subsequent nonindustrial use.  
9 Industrial clean-up standards may not be applied to industrial  
10 properties where hazardous substances remaining at the property after  
11 remedial action pose a threat to human health or the environment in  
12 adjacent nonindustrial areas.

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

25 (4) The department shall establish a scientific advisory board to  
26 render advice to the department with respect to the hazard ranking  
27 system, cleanup standards, remedial actions, deadlines for remedial  
28 actions, monitoring, the classification of substances as hazardous  
29 substances for purposes of RCW 70.105D.020((+5)) (6) and the  
30 classification of substances or products as hazardous substances for  
31 purposes of RCW 82.21.020(1). The board shall consist of five  
32 independent members to serve staggered three-year terms. No members  
33 may be employees of the department. Members shall be reimbursed for  
34 travel expenses as provided in RCW 43.03.050 and 43.03.060.

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

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

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

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

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

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

14       (d) Any person (i) who accepts or accepted any hazardous substance  
15 for transport to a disposal, treatment, or other facility selected by  
16 such person from which there is a release or a threatened release for  
17 which remedial action is required, unless such facility, at the time of  
18 disposal or treatment, could legally receive such substance; or (ii)  
19 who accepts a hazardous substance for transport to such a facility and  
20 has reasonable grounds to believe that such facility is not operated in  
21 accordance with chapter 70.105 RCW; and

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

26       (2) Each person who is liable under this section is strictly  
27 liable, jointly and severally, for all remedial action costs and for  
28 all natural resource damages resulting from the releases or threatened  
29 releases of hazardous substances. The attorney general, at the request  
30 of the department, is empowered to recover all costs and damages from  
31 persons liable therefor.

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

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

36       (i) An act of God;

37       (ii) An act of war; or

38       (iii) An act or omission of a third party (including but not  
39 limited to a trespasser) other than (A) an employee or agent of the



1 person asserting the defense, or (B) any person whose act or omission  
2 occurs in connection with a contractual relationship existing, directly  
3 or indirectly, with the person asserting this defense to liability.  
4 This defense only applies where the person asserting the defense has  
5 exercised the utmost care with respect to the hazardous substance, the  
6 foreseeable acts or omissions of the third party, and the foreseeable  
7 consequences of those acts or omissions;

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

15 (i) To establish that a person had no reason to know, the person  
16 must have undertaken, at the time of acquisition, all appropriate  
17 inquiry into the previous ownership and uses of the property,  
18 consistent with good commercial or customary practice in an effort to  
19 minimize liability. Any court interpreting this subsection (b) shall  
20 take into account any specialized knowledge or experience on the part  
21 of the person, the relationship of the purchase price to the value of  
22 the property if uncontaminated, commonly known or reasonably  
23 ascertainable information about the property, the obviousness of the  
24 presence or likely presence of contamination at the property, and the  
25 ability to detect such contamination by appropriate inspection;

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

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

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

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

4 (4) There may be no settlement by the state with any person  
5 potentially liable under this chapter except in accordance with this  
6 (~~subsection~~) section.

7 (a) The attorney general may agree to a settlement with any  
8 potentially liable person only if the department finds, after public  
9 notice and hearing, that the proposed settlement would lead to a more  
10 expeditious cleanup of hazardous substances in compliance with cleanup  
11 standards under RCW 70.105D.030(2)(d) and with any remedial orders  
12 issued by the department. Whenever practicable and in the public  
13 interest, the attorney general may expedite such a settlement with  
14 persons whose contribution is insignificant in amount and toxicity.

15 (b) A settlement agreement under this (~~subsection~~) section shall  
16 be entered as a consent decree issued by a court of competent  
17 jurisdiction.

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

25 (d) A party who has resolved its liability to the state under this  
26 (~~subsection~~) section shall not be liable for claims for contribution  
27 regarding matters addressed in the settlement. The settlement does not  
28 discharge any of the other liable parties but it reduces the total  
29 potential liability of the others to the state by the amount of the  
30 settlement.

31 (5) In addition to the settlement authority provided under  
32 subsection (4) of this section, the attorney general may agree to a  
33 settlement with a person not currently liable for remedial action at a  
34 facility who proposes to purchase, redevelop, or reuse the facility,  
35 provided that:

36 (a) The settlement will provide a substantial public benefit,  
37 including but not limited to the reuse of a vacant or abandoned  
38 manufacturing or industrial facility, or the development of a facility  
39 by a governmental entity to address an important public purpose;

1       (b) The settlement will yield substantial new resources to  
2 facilitate cleanup;

3       (c) The settlement will expedite remedial action consistent with  
4 the rules adopted under this chapter; and

5       (d) Based on available information, the department determines that  
6 the redevelopment or reuse of the facility is not likely to contribute  
7 to the existing release or threatened release, interfere with remedial  
8 actions that may be needed at the site, or increase health risks to  
9 persons at or in the vicinity of the site.

10       This settlement may be assigned or transferred after notice to the  
11 department provided that the assignee or transferee is not already  
12 liable for any release or threatened release at the facility.

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

20       NEW SECTION. Sec. 5. A new section is added to chapter 70.105 RCW  
21 to read as follows:

22       The department shall conditionally exempt from the requirements of  
23 this chapter solid wastes that designate as dangerous waste or  
24 extremely hazardous waste, and do not qualify as hazardous waste under  
25 federal law, provided that:

26       (1) The solid waste is generated pursuant to a consent decree  
27 issued under chapter 70.105D RCW; and

28       (2) The consent decree characterizes the solid waste and specifies  
29 a department-approved disposal location.

30       The department shall require any conditionally exempted upland  
31 solid wastes removed from a site under the authority of this section to  
32 be treated or disposed of in a landfill facility that meets all  
33 applicable minimum functional standards for the disposal of municipal  
34 solid waste.

35       **Sec. 6.** RCW 70.105.050 and 1987 c 488 s 4 are each amended to read  
36 as follows:

1 (1) No person shall dispose of designated extremely hazardous  
2 wastes at any disposal site in the state other than the disposal site  
3 established and approved for such purpose under provisions of this  
4 chapter, except:

5 (a) When such wastes are going to a processing facility which will  
6 result in the waste being reclaimed, treated, detoxified, neutralized,  
7 or otherwise processed to remove its harmful properties or  
8 characteristics((-)); or

9 (b) When such wastes are the subject of a remedial action conducted  
10 by the department or by potentially liable persons under a settlement,  
11 consent decree, or agreed order issued by the department pursuant to  
12 chapter 70.105D RCW.

13 (2) Extremely hazardous wastes that contain radioactive components  
14 may be disposed at a radioactive waste disposal site that is (a) owned  
15 by the United States department of energy or a licensee of the nuclear  
16 regulatory commission and (b) permitted by the department and operated  
17 in compliance with the provisions of this chapter. However, prior to  
18 disposal, or as a part of disposal, all reasonable methods of  
19 treatment, detoxification, neutralization, or other waste management  
20 methodologies designed to mitigate hazards associated with these wastes  
21 shall be employed, as required by applicable federal and state laws and  
22 regulations.

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