
SUBSTITUTE SENATE BILL 5809

State of Washington

56th Legislature

1999 Regular Session

By Senate Committee on Environmental Quality & Water Resources
(originally sponsored by Senators McAuliffe, Swecker, Prentice, Eide,
Thibaudeau, Fraser, Kohl-Welles and Kline)

Read first time 03/03/99.

1 AN ACT Relating to the control of dioxin; amending RCW 70.105.010,
2 70.95C.020, 70.95E.010, 70.105.020, and 70.105D.020; adding new
3 sections to chapter 70.105 RCW; creating new sections; and providing
4 effective dates.

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

6 NEW SECTION. **Sec. 1.** The legislature finds that dioxin is a
7 concern for public health, safety, and the environment because it
8 builds up in the environment, enters humans and wildlife through the
9 food chain, and can cause health effects such as cancer, immune
10 suppression, and reproductive problems.

11 In order to protect the health of communities, the environment, and
12 food in Washington state, the legislature further finds that it is
13 necessary for the department of ecology to place controls on dioxin.

14 **Sec. 2.** RCW 70.105.010 and 1989 c 376 s 1 are each amended to read
15 as follows:

16 The words and phrases defined in this section shall have the
17 meanings indicated when used in this chapter unless the context clearly
18 requires otherwise.

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

2 (2) ~~"Director" means the director of the department of ecology or~~

3 ~~the director's designee.~~

4 (3) ~~"Disposal site" means a geographical site in or upon which~~

5 ~~hazardous wastes are disposed of in accordance with the provisions of~~

6 ~~this chapter.~~

7 (4) ~~"Dispose or disposal" means the discarding or abandoning of~~

8 ~~hazardous wastes or the treatment, decontamination, or recycling of~~

9 ~~such wastes once they have been discarded or abandoned.~~

10 (5)) "Dangerous wastes" means any discarded, useless, unwanted, or

11 abandoned substances, including but not limited to certain pesticides,

12 or any residues or containers of such substances which are disposed of

13 in such quantity or concentration as to pose a substantial present or

14 potential hazard to human health, wildlife, or the environment because

15 such wastes or constituents or combinations of such wastes:

16 (a) Have short-lived, toxic properties that may cause death,

17 injury, or illness or have mutagenic, teratogenic, or carcinogenic

18 properties; or

19 (b) Are corrosive, explosive, flammable, or may generate pressure

20 through decomposition or other means.

21 (~~(6))~~) (2) "Department" means the department of ecology.

22 (3) "Designated zone facility" means any facility that requires an

23 interim or final status permit under rules adopted under this chapter

24 and that is not a preempted facility as defined in this section.

25 (4) "Director" means the director of the department of ecology or

26 the director's designee.

27 (5) "Disposal site" means a geographical site in or upon which

28 hazardous wastes are disposed of in accordance with the provisions of

29 this chapter.

30 (6) "Dispose or disposal" means the discarding or abandoning of

31 hazardous wastes or the treatment, decontamination, or recycling of

32 such wastes once they have been discarded or abandoned.

33 (7) "Extremely hazardous waste" means any dangerous waste which

34 (a) will persist in a hazardous form for several years or more at

35 a disposal site and which in its persistent form

36 (i) presents a significant environmental hazard and may be

37 concentrated by living organisms through a food chain or may affect the

38 genetic make-up of man or wildlife, and

39 (ii) is highly toxic to man or wildlife

1 (b) if disposed of at a disposal site in such quantities as would
2 present an extreme hazard to man or the environment.

3 (~~(7)~~) "~~Person~~" means any person, firm, association, county, public
4 or municipal or private corporation, agency, or other entity
5 whatsoever.

6 (~~(8)~~) "~~Pesticide~~" shall have the meaning of the term as defined in
7 RCW 15.58.030 as now or hereafter amended.

8 (~~(9)~~) "~~Solid waste advisory committee~~" means the same advisory
9 committee as per RCW 70.95.040 through 70.95.070.

10 (~~(10)~~) "~~Designated zone facility~~" means any facility that requires an
11 interim or final status permit under rules adopted under this chapter
12 and that is not a preempted facility as defined in this section.

13 (~~(11)~~) (8) "Facility" means all contiguous land and structures,
14 other appurtenances, and improvements on the land used for recycling,
15 storing, treating, incinerating, or disposing of hazardous waste.

16 (~~(12)~~) "~~Preempted facility~~" means any facility that includes as a
17 significant part of its activities any of the following operations:
18 ~~(a) Landfill, (b) incineration, (c) land treatment, (d) surface~~
19 ~~impoundment to be closed as a landfill, or (e) waste pile to be closed~~
20 ~~as a landfill.~~

21 (~~(13)~~) (9) "Hazardous household substances" means those substances
22 identified by the department as hazardous household substances in the
23 guidelines developed under RCW 70.105.220.

24 (~~(14)~~) (10) "Hazardous substances" means any liquid, solid, gas,
25 or sludge, including any material, substance, product, commodity, or
26 waste, regardless of quantity, that exhibits any of the characteristics
27 or criteria of hazardous waste as described in rules adopted under this
28 chapter.

29 (~~(15)~~) (11) "Hazardous waste" means and includes all dangerous
30 and extremely hazardous waste, including substances composed of both
31 radioactive and hazardous components.

32 (~~(16)~~) (12) "Local government" means a city, town, or county.

33 (~~(17)~~) (13) "Moderate-risk waste" means (a) any waste that
34 exhibits any of the properties of hazardous waste but is exempt from
35 regulation under this chapter solely because the waste is generated in
36 quantities below the threshold for regulation, and (b) any household
37 wastes which are generated from the disposal of substances identified
38 by the department as hazardous household substances.

1 (~~(18)~~) (14) "Person" means any person, firm, association, county,
2 public or municipal or private corporation, agency, or other entity
3 whatsoever.

4 (15) "Pesticide" has the same meaning as defined in RCW 15.58.030.

5 (16) "Preempted facility" means any facility that includes as a
6 significant part of its activities any of the following operations:
7 (a) Landfill, (b) incineration, (c) land treatment, (d) surface
8 impoundment to be closed as a landfill, or (e) waste pile to be closed
9 as a landfill.

10 (17) "Service charge" means an assessment imposed under RCW
11 70.105.280 against those facilities that store, treat, incinerate, or
12 dispose of dangerous or extremely hazardous waste that contains both a
13 nonradioactive hazardous component and a radioactive component.
14 Service charges shall also apply to facilities undergoing closure under
15 this chapter in those instances where closure entails the physical
16 characterization of remaining wastes which contain both a
17 nonradioactive hazardous component and a radioactive component or the
18 management of such wastes through treatment or removal, except any
19 commercial low-level radioactive waste facility.

20 (18) "Solid waste" has the same meaning as defined in RCW
21 70.95.030.

22 (19) "Solid waste advisory committee" means the same advisory
23 committee as per RCW 70.95.040 through 70.95.070.

24 NEW SECTION. Sec. 3. A new section is added to chapter 70.105 RCW
25 to read as follows:

26 (1) The department shall prohibit the sale or use of commercial
27 fertilizers or soil amendments that contain any solid waste as defined
28 in RCW 70.95.030, hazardous waste, by-products, or co-products,
29 resulting from an industrial process that creates or releases dioxin.

30 (2) Any person in Washington state generating a solid waste,
31 hazardous waste, by-product, or co-product, resulting from an
32 industrial process that may create or release dioxin shall report
33 annually to the department if such wastes, by-products, or co-products
34 can be used for the purposes of commercial fertilizer or soil
35 amendments.

36 (3) Any person importing to Washington state a solid waste,
37 hazardous waste, by-product, or co-product, resulting from an
38 industrial process that may create or release dioxin shall report

1 annually to the department if such wastes, by-products, or co-products
2 can be used for the purposes of commercial fertilizer or soil
3 amendments.

4 (4) The department has the authority to immediately stop the sale
5 or use of any commercial fertilizer or soil amendment which is made
6 from, contains, or is a solid waste, hazardous waste, by-product, or
7 co-product, resulting from an industrial process that creates or
8 releases dioxin.

9 (5) The department shall adopt rules as necessary to implement this
10 section.

11 (6) This section does not apply to biosolids regulated under
12 chapter 70.95J RCW.

13 (7) For the purposes of this section, "industrial processes" means
14 processes that use or burn chlorine or chlorine compounds such as
15 processes at pulp mills, cement kilns, waste incinerators, oil
16 refineries, and steel smelting operations.

17 (8) For the purposes of this section "dioxin" means polychlorinated
18 dibenzo-p-dioxins and polychlorinated dibenzofurans with chlorine atoms
19 in the 2, 3, 7, and 8 positions of the molecule.

20 NEW SECTION. **Sec. 4.** A new section is added to chapter 70.105 RCW
21 to read as follows:

22 Forms for reporting under section 3 of this act shall be provided
23 by the department and at a minimum require the following information:
24 The amount, type, and origin of waste, by-product, or co-product and
25 whether it has in the past or has the potential to be incorporated into
26 commercial fertilizer or soil amendment and the levels of dioxin.

27 **Sec. 5.** RCW 70.95C.020 and 1991 c 319 s 313 are each amended to
28 read as follows:

29 As used in this chapter, the following terms have the meanings
30 indicated unless the context clearly requires otherwise.

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

32 (2) "Director" means the director of the department of ecology or
33 the director's designee.

34 (3) "Dangerous waste" shall have the same definition as set forth
35 in RCW 70.105.010(~~(+5)~~) and shall specifically include those wastes
36 designated as dangerous by rules adopted pursuant to chapter 70.105
37 RCW.

1 (4) "EPA/state identification number" means the number assigned by
2 the EPA (environmental protection agency) or by the department of
3 ecology to each generator and/or transporter and treatment, storage,
4 and/or disposal facility.

5 (5) "Extremely hazardous waste" shall have the same definition as
6 set forth in RCW 70.105.010(~~(+6)~~) and shall specifically include those
7 wastes designated as extremely hazardous by rules adopted pursuant to
8 chapter 70.105 RCW.

9 (6) "Fee" means the annual hazardous waste fees imposed under RCW
10 70.95E.020 and 70.95E.030.

11 (7) "Generate" means any act or process which produces hazardous
12 waste or first causes a hazardous waste to become subject to
13 regulation.

14 (8) "Hazardous substance" means any hazardous substance listed as
15 a hazardous substance as of March 21, 1990, pursuant to section 313 of
16 Title III of the Superfund Amendments and Reauthorization Act, any
17 other substance determined by the director by rule to present a threat
18 to human health or the environment, and all ozone depleting compounds
19 as defined by the Montreal Protocol of October 1987.

20 (9)(a) "Hazardous substance use reduction" means the reduction,
21 avoidance, or elimination of the use or production of hazardous
22 substances without creating substantial new risks to human health or
23 the environment.

24 (b) "Hazardous substance use reduction" includes proportionate
25 changes in the usage of hazardous substances as the usage of a
26 hazardous substance or hazardous substances changes as a result of
27 production changes or other business changes.

28 (10) "Hazardous substance user" means any facility required to
29 report under section 313 of Title III of the Superfund Amendments and
30 Reauthorization Act, except for those facilities which only distribute
31 or use fertilizers or pesticides intended for commercial agricultural
32 applications.

33 (11) "Hazardous waste" means and includes all dangerous and
34 extremely hazardous wastes, but does not include radioactive wastes or
35 a substance composed of both radioactive and hazardous components and
36 does not include any hazardous waste generated as a result of a
37 remedial action under state or federal law.

38 (12) "Hazardous waste generator" means any person generating
39 hazardous waste regulated by the department.

1 (13) "Office" means the office of waste reduction.

2 (14) "Plan" means the plan provided for in RCW 70.95C.200.

3 (15) "Person" means an individual, trust, firm, joint stock
4 company, partnership, association, state, public or private or
5 municipal corporation, commission, political subdivision of a state,
6 interstate body, the federal government, including any agency or
7 officer thereof, and any Indian tribe or authorized tribal
8 organization.

9 (16) "Process" means all industrial, commercial, production, and
10 other processes that result in the generation of waste.

11 (17) "Recycled for beneficial use" means the use of hazardous
12 waste, either before or after reclamation, as a substitute for a
13 commercial product or raw material, but does not include: (a) Use
14 constituting disposal; (b) incineration; or (c) use as a fuel.

15 (18) "Recycling" means reusing waste materials and extracting
16 valuable materials from a waste stream. Recycling does not include
17 burning for energy recovery.

18 (19) "Treatment" means the physical, chemical, or biological
19 processing of waste to render it completely innocuous, produce a
20 recyclable by-product, reduce toxicity, or substantially reduce the
21 volume of material requiring disposal as described in the priorities
22 established in RCW 70.105.150. Treatment does not include
23 incineration.

24 (20) "Used oil" means (a) lubricating fluids that have been removed
25 from an engine crankcase, transmission, gearbox, hydraulic device, or
26 differential of an automobile, bus, truck, vessel, plane, heavy
27 equipment, or machinery powered by an internal combustion engine; (b)
28 any oil that has been refined from crude oil, used, and as a result of
29 use, has been contaminated with physical or chemical impurities; and
30 (c) any oil that has been refined from crude oil and, as a consequence
31 of extended storage, spillage, or contamination, is no longer useful to
32 the original purchaser. "Used oil" does not include used oil to which
33 hazardous wastes have been added.

34 (21) "Waste" means any solid waste as defined under RCW 70.95.030,
35 any hazardous waste, any air contaminant as defined under RCW
36 70.94.030, and any organic or inorganic matter that shall cause or tend
37 to cause water pollution as defined under RCW 90.48.020.

38 (22) "Waste generator" means any individual, business, government
39 agency, or any other organization that generates waste.

1 (23) "Waste reduction" means all in-plant practices that reduce,
2 avoid, or eliminate the generation of wastes or the toxicity of wastes,
3 prior to generation, without creating substantial new risks to human
4 health or the environment. As used in RCW 70.95C.200 through
5 70.95C.240, "waste reduction" refers to hazardous waste only.

6 **Sec. 6.** RCW 70.95E.010 and 1995 c 207 s 1 are each amended to read
7 as follows:

8 As used in this chapter, the following terms have the meanings
9 indicated unless the context clearly requires otherwise.

10 (1) "Dangerous waste" shall have the same definition as set forth
11 in RCW 70.105.010(~~(+5)~~) and shall include those wastes designated as
12 dangerous by rules adopted pursuant to chapter 70.105 RCW.

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

14 (3) "EPA/state identification number" means the number assigned by
15 the EPA (environmental protection agency) or by the department of
16 ecology to each generator and/or transporter and treatment, storage,
17 and/or disposal facility.

18 (4) "Extremely hazardous waste" shall have the same definition as
19 set forth in RCW 70.105.010(~~(+6)~~) and shall specifically include those
20 wastes designated as extremely hazardous by rules adopted pursuant to
21 chapter 70.105 RCW.

22 (5) "Fee" means the annual fees imposed under this chapter.

23 (6) "Generate" means any act or process which produces hazardous
24 waste or first causes a hazardous waste to become subject to
25 regulation.

26 (7) "Hazardous waste" means and includes all dangerous and
27 extremely hazardous wastes but for the purposes of this chapter
28 excludes all radioactive wastes or substances composed of both
29 radioactive and hazardous components.

30 (8) "Hazardous waste generator" means all persons whose primary
31 business activities are identified by the department to generate any
32 quantity of hazardous waste in the calendar year for which the fee is
33 imposed.

34 (9) "Person" means an individual, trust, firm, joint stock company,
35 partnership, association, state, public or private or municipal
36 corporation, commission, political subdivision of a state, interstate
37 body, the federal government including any agency or officer thereof,
38 and any Indian tribe or authorized tribal organization.

1 (10) "Price deflator" means the United States department of
2 commerce bureau of economic analysis, "Implicit Price Deflator for
3 Gross National Product" for "Government Purchases of Goods and
4 Services," for "State and Local Government."

5 (11) "Recycled for beneficial use" means the use of hazardous
6 waste, either before or after reclamation, as a substitute for a
7 commercial product or raw material, but does not include: (a) Use
8 constituting disposal; (b) incineration; or (c) use as a fuel.

9 (12) "Waste generation site" means any geographical area that has
10 been assigned an EPA/state identification number.

11 **Sec. 7.** RCW 70.105.020 and 1994 c 264 s 42 are each amended to
12 read as follows:

13 The department after notice and public hearing shall:

14 (1) Adopt regulations designating as extremely hazardous wastes
15 subject to the provisions of this chapter those substances which
16 exhibit characteristics consistent with the definition provided in RCW
17 70.105.010(~~(+6)~~);

18 (2) Adopt and may revise when appropriate, minimum standards and
19 regulations for disposal of extremely hazardous wastes to protect
20 against hazards to the public, and to the environment. Before adoption
21 of such standards and regulations, the department shall consult with
22 appropriate agencies of interested local governments and secure
23 technical assistance from the department of agriculture, the department
24 of social and health services, the department of fish and wildlife, the
25 department of natural resources, the department of labor and
26 industries, and the department of community, trade, and economic
27 development, through the director of fire protection.

28 **Sec. 8.** RCW 70.105D.020 and 1998 c 6 s 1 are each amended to read
29 as follows:

30 (1) "Agreed order" means an order issued by the department under
31 this chapter with which the potentially liable person receiving the
32 order agrees to comply. An agreed order may be used to require or
33 approve any cleanup or other remedial actions but it is not a
34 settlement under RCW 70.105D.040(4) and shall not contain a covenant
35 not to sue, or provide protection from claims for contribution, or
36 provide eligibility for public funding of remedial actions under RCW
37 70.105D.070(2)(d)(xi).

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

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

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

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

15 (6) "Foreclosure and its equivalents" means purchase at a
16 foreclosure sale, acquisition, or assignment of title in lieu of
17 foreclosure, termination of a lease, or other repossession, acquisition
18 of a right to title or possession, an agreement in satisfaction of the
19 obligation, or any other comparable formal or informal manner, whether
20 pursuant to law or under warranties, covenants, conditions,
21 representations, or promises from the borrower, by which the holder
22 acquires title to or possession of a facility securing a loan or other
23 obligation.

24 (7) "Hazardous substance" means:

25 (a) Any dangerous or extremely hazardous waste as defined in RCW
26 70.105.010 (~~((5) and (6))~~), or any dangerous or extremely dangerous
27 waste designated by rule pursuant to chapter 70.105 RCW;

28 (b) Any hazardous substance as defined in RCW 70.105.010(~~((14))~~) or
29 any hazardous substance as defined by rule pursuant to chapter 70.105
30 RCW;

31 (c) Any substance that, on March 1, 1989, is a hazardous substance
32 under section 101(14) of the federal cleanup law, 42 U.S.C. Sec.
33 9601(14);

34 (d) Petroleum or petroleum products; and

35 (e) Any substance or category of substances, including solid waste
36 decomposition products, determined by the director by rule to present
37 a threat to human health or the environment if released into the
38 environment.

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

5 (8) "Independent remedial actions" means remedial actions conducted
6 without department oversight or approval, and not under an order,
7 agreed order, or consent decree.

8 (9) "Holder" means a person who holds indicia of ownership
9 primarily to protect a security interest. A holder includes the
10 initial holder such as the loan originator, any subsequent holder such
11 as a successor-in-interest or subsequent purchaser of the security
12 interest on the secondary market, a guarantor of an obligation, surety,
13 or any other person who holds indicia of ownership primarily to protect
14 a security interest, or a receiver, court-appointed trustee, or other
15 person who acts on behalf or for the benefit of a holder. A holder can
16 be a public or privately owned financial institution, receiver,
17 conservator, loan guarantor, or other similar persons that loan money
18 or guarantee repayment of a loan. Holders typically are banks or
19 savings and loan institutions but may also include others such as
20 insurance companies, pension funds, or private individuals that engage
21 in loaning of money or credit.

22 (10) "Indicia of ownership" means evidence of a security interest,
23 evidence of an interest in a security interest, or evidence of an
24 interest in a facility securing a loan or other obligation, including
25 any legal or equitable title to a facility acquired incident to
26 foreclosure and its equivalents. Evidence of such interests includes,
27 mortgages, deeds of trust, sellers interest in a real estate contract,
28 liens, surety bonds, and guarantees of obligations, title held pursuant
29 to a lease financing transaction in which the lessor does not select
30 initially the leased facility, or legal or equitable title obtained
31 pursuant to foreclosure and their equivalents. Evidence of such
32 interests also includes assignments, pledges, or other rights to or
33 other forms of encumbrance against the facility that are held primarily
34 to protect a security interest.

35 (11) "Operating a facility primarily to protect a security
36 interest" occurs when all of the following are met: (a) Operating the
37 facility where the borrower has defaulted on the loan or otherwise
38 breached the security agreement; (b) operating the facility to preserve
39 the value of the facility as an ongoing business; (c) the operation is

1 being done in anticipation of a sale, transfer, or assignment of the
2 facility; and (d) the operation is being done primarily to protect a
3 security interest. Operating a facility for longer than one year prior
4 to foreclosure or its equivalents shall be presumed to be operating the
5 facility for other than to protect a security interest.

6 (12) "Owner or operator" means:

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

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

12 The term does not include:

13 (i) An agency of the state or unit of local government which
14 acquired ownership or control involuntarily through bankruptcy, tax
15 delinquency, abandonment, or circumstances in which the government
16 involuntarily acquires title. This exclusion does not apply to an
17 agency of the state or unit of local government which has caused or
18 contributed to the release or threatened release of a hazardous
19 substance from the facility;

20 (ii) A person who, without participating in the management of a
21 facility, holds indicia of ownership primarily to protect the person's
22 security interest in the facility. Holders after foreclosure and its
23 equivalent and holders who engage in any of the activities identified
24 in subsection (13)(e) through (g) of this section shall not lose this
25 exemption provided the holder complies with all of the following:

26 (A) The holder properly maintains the environmental compliance
27 measures already in place at the facility;

28 (B) The holder complies with the reporting requirements in the
29 rules adopted under this chapter;

30 (C) The holder complies with any order issued to the holder by the
31 department to abate an imminent or substantial endangerment;

32 (D) The holder allows the department or potentially liable persons
33 under an order, agreed order, or settlement agreement under this
34 chapter access to the facility to conduct remedial actions and does not
35 impede the conduct of such remedial actions;

36 (E) Any remedial actions conducted by the holder are in compliance
37 with any preexisting requirements identified by the department, or, if
38 the department has not identified such requirements for the facility,

1 the remedial actions are conducted consistent with the rules adopted
2 under this chapter; and

3 (F) The holder does not exacerbate an existing release. The
4 exemption in this subsection (12)(b)(ii) does not apply to holders who
5 cause or contribute to a new release or threatened release or who are
6 otherwise liable under RCW 70.105D.040(1) (b), (c), (d), and (e);
7 provided, however, that a holder shall not lose this exemption if it
8 establishes that any such new release has been remediated according to
9 the requirements of this chapter and that any hazardous substances
10 remaining at the facility after remediation of the new release are
11 divisible from such new release;

12 (iii) A fiduciary in his, her, or its personal or individual
13 capacity. This exemption does not preclude a claim against the assets
14 of the estate or trust administered by the fiduciary or against a
15 nonemployee agent or independent contractor retained by a fiduciary.
16 This exemption also does not apply to the extent that a person is
17 liable under this chapter independently of the person's ownership as a
18 fiduciary or for actions taken in a fiduciary capacity which cause or
19 contribute to a new release or exacerbate an existing release of
20 hazardous substances. This exemption applies provided that, to the
21 extent of the fiduciary's powers granted by law or by the applicable
22 governing instrument granting fiduciary powers, the fiduciary complies
23 with all of the following:

24 (A) The fiduciary properly maintains the environmental compliance
25 measures already in place at the facility;

26 (B) The fiduciary complies with the reporting requirements in the
27 rules adopted under this chapter;

28 (C) The fiduciary complies with any order issued to the fiduciary
29 by the department to abate an imminent or substantial endangerment;

30 (D) The fiduciary allows the department or potentially liable
31 persons under an order, agreed order, or settlement agreement under
32 this chapter access to the facility to conduct remedial actions and
33 does not impede the conduct of such remedial actions;

34 (E) Any remedial actions conducted by the fiduciary are in
35 compliance with any preexisting requirements identified by the
36 department, or, if the department has not identified such requirements
37 for the facility, the remedial actions are conducted consistent with
38 the rules adopted under this chapter; and

39 (F) The fiduciary does not exacerbate an existing release.

1 The exemption in this subsection (12)(b)(iii) does not apply to
2 fiduciaries who cause or contribute to a new release or threatened
3 release or who are otherwise liable under RCW 70.105D.040(1) (b), (c),
4 (d), and (e); provided however, that a fiduciary shall not lose this
5 exemption if it establishes that any such new release has been
6 remediated according to the requirements of this chapter and that any
7 hazardous substances remaining at the facility after remediation of the
8 new release are divisible from such new release. The exemption in this
9 subsection (12)(b)(iii) also does not apply where the fiduciary's
10 powers to comply with this subsection (12)(b)(iii) are limited by a
11 governing instrument created with the objective purpose of avoiding
12 liability under this chapter or of avoiding compliance with this
13 chapter; or

14 (iv) Any person who has any ownership interest in, operates, or
15 exercises control over real property where a hazardous substance has
16 come to be located solely as a result of migration of the hazardous
17 substance to the real property through the ground water from a source
18 off the property, if:

19 (A) The person can demonstrate that the hazardous substance has not
20 been used, placed, managed, or otherwise handled on the property in a
21 manner likely to cause or contribute to a release of the hazardous
22 substance that has migrated onto the property;

23 (B) The person has not caused or contributed to the release of the
24 hazardous substance;

25 (C) The person does not engage in activities that damage or
26 interfere with the operation of remedial actions installed on the
27 person's property or engage in activities that result in exposure of
28 humans or the environment to the contaminated ground water that has
29 migrated onto the property;

30 (D) If requested, the person allows the department, potentially
31 liable persons who are subject to an order, agreed order, or consent
32 decree, and the authorized employees, agents, or contractors of each,
33 access to the property to conduct remedial actions required by the
34 department. The person may attempt to negotiate an access agreement
35 before allowing access; and

36 (E) Legal withdrawal of ground water does not disqualify a person
37 from the exemption in this subsection (12)(b)(iv).

38 (13) "Participation in management" means exercising decision-making
39 control over the borrower's operation of the facility, environmental

1 compliance, or assuming or manifesting responsibility for the overall
2 management of the enterprise encompassing the day-to-day decision
3 making of the enterprise.

4 The term does not include any of the following: (a) A holder with
5 the mere capacity or ability to influence, or the unexercised right to
6 control facility operations; (b) a holder who conducts or requires a
7 borrower to conduct an environmental audit or an environmental site
8 assessment at the facility for which indicia of ownership is held; (c)
9 a holder who requires a borrower to come into compliance with any
10 applicable laws or regulations at the facility for which indicia of
11 ownership is held; (d) a holder who requires a borrower to conduct
12 remedial actions including setting minimum requirements, but does not
13 otherwise control or manage the borrower's remedial actions or the
14 scope of the borrower's remedial actions except to prepare a facility
15 for sale, transfer, or assignment; (e) a holder who engages in workout
16 or policing activities primarily to protect the holder's security
17 interest in the facility; (f) a holder who prepares a facility for
18 sale, transfer, or assignment or requires a borrower to prepare a
19 facility for sale, transfer, or assignment; (g) a holder who operates
20 a facility primarily to protect a security interest, or requires a
21 borrower to continue to operate, a facility primarily to protect a
22 security interest; and (h) a prospective holder who, as a condition of
23 becoming a holder, requires an owner or operator to conduct an
24 environmental audit, conduct an environmental site assessment, come
25 into compliance with any applicable laws or regulations, or conduct
26 remedial actions prior to holding a security interest is not
27 participating in the management of the facility.

28 (14) "Person" means an individual, firm, corporation, association,
29 partnership, consortium, joint venture, commercial entity, state
30 government agency, unit of local government, federal government agency,
31 or Indian tribe.

32 (15) "Policing activities" means actions the holder takes to insure
33 that the borrower complies with the terms of the loan or security
34 interest or actions the holder takes or requires the borrower to take
35 to maintain the value of the security. Policing activities include:
36 Requiring the borrower to conduct remedial actions at the facility
37 during the term of the security interest; requiring the borrower to
38 comply or come into compliance with applicable federal, state, and
39 local environmental and other laws, regulations, and permits during the

1 term of the security interest; securing or exercising authority to
2 monitor or inspect the facility including on-site inspections, or to
3 monitor or inspect the borrower's business or financial condition
4 during the term of the security interest; or taking other actions
5 necessary to adequately police the loan or security interest such as
6 requiring a borrower to comply with any warranties, covenants,
7 conditions, representations, or promises from the borrower.

8 (16) "Potentially liable person" means any person whom the
9 department finds, based on credible evidence, to be liable under RCW
10 70.105D.040. The department shall give notice to any such person and
11 allow an opportunity for comment before making the finding, unless an
12 emergency requires otherwise.

13 (17) "Prepare a facility for sale, transfer, or assignment" means
14 to secure access to the facility; perform routine maintenance on the
15 facility; remove inventory, equipment, or structures; properly maintain
16 environmental compliance measures already in place at the facility;
17 conduct remedial actions to clean up releases at the facility; or to
18 perform other similar activities intended to preserve the value of the
19 facility where the borrower has defaulted on the loan or otherwise
20 breached the security agreement or after foreclosure and its
21 equivalents and in anticipation of a pending sale, transfer, or
22 assignment, primarily to protect the holder's security interest in the
23 facility. A holder can prepare a facility for sale, transfer, or
24 assignment for up to one year prior to foreclosure and its equivalents
25 and still stay within the security interest exemption in subsection
26 (12)(b)(ii) of this section.

27 (18) "Primarily to protect a security interest" means the indicia
28 of ownership is held primarily for the purpose of securing payment or
29 performance of an obligation. The term does not include indicia of
30 ownership held primarily for investment purposes nor indicia of
31 ownership held primarily for purposes other than as protection for a
32 security interest. A holder may have other, secondary reasons, for
33 maintaining indicia of ownership, but the primary reason must be for
34 protection of a security interest. Holding indicia of ownership after
35 foreclosure or its equivalents for longer than five years shall be
36 considered to be holding the indicia of ownership for purposes other
37 than primarily to protect a security interest. For facilities that
38 have been acquired through foreclosure or its equivalents prior to July
39 23, 1995, this five-year period shall begin as of July 23, 1995.

1 (19) "Public notice" means, at a minimum, adequate notice mailed to
2 all persons who have made timely request of the department and to
3 persons residing in the potentially affected vicinity of the proposed
4 action; mailed to appropriate news media; published in the newspaper of
5 largest circulation in the city or county of the proposed action; and
6 opportunity for interested persons to comment.

7 (20) "Release" means any intentional or unintentional entry of any
8 hazardous substance into the environment, including but not limited to
9 the abandonment or disposal of containers of hazardous substances.

10 (21) "Remedy" or "remedial action" means any action or expenditure
11 consistent with the purposes of this chapter to identify, eliminate, or
12 minimize any threat or potential threat posed by hazardous substances
13 to human health or the environment including any investigative and
14 monitoring activities with respect to any release or threatened release
15 of a hazardous substance and any health assessments or health effects
16 studies conducted in order to determine the risk or potential risk to
17 human health.

18 (22) "Security interest" means an interest in a facility created or
19 established for the purpose of securing a loan or other obligation.
20 Security interests include deeds of trusts, sellers interest in a real
21 estate contract, liens, legal, or equitable title to a facility
22 acquired incident to foreclosure and its equivalents, and title
23 pursuant to lease financing transactions. Security interests may also
24 arise from transactions such as sale and leasebacks, conditional sales,
25 installment sales, trust receipt transactions, certain assignments,
26 factoring agreements, accounts receivable financing arrangements,
27 easements, and consignments, if the transaction creates or establishes
28 an interest in a facility for the purpose of securing a loan or other
29 obligation.

30 (23) "Industrial properties" means properties that are or have been
31 characterized by, or are to be committed to, traditional industrial
32 uses such as processing or manufacturing of materials, marine terminal
33 and transportation areas and facilities, fabrication, assembly,
34 treatment, or distribution of manufactured products, or storage of bulk
35 materials, that are either:

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

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

4 (24) "Workout activities" means those actions by which a holder, at
5 any time prior to foreclosure and its equivalents, seeks to prevent,
6 cure, or mitigate a default by the borrower or obligor; or to preserve,
7 or prevent the diminution of, the value of the security. Workout
8 activities include: Restructuring or renegotiating the terms of the
9 security interest; requiring payment of additional rent or interest;
10 exercising forbearance; requiring or exercising rights pursuant to an
11 assignment of accounts or other amounts owed to an obligor; requiring
12 or exercising rights pursuant to an escrow agreement pertaining to
13 amounts owed to an obligor; providing specific or general financial or
14 other advice, suggestions, counseling, or guidance; and exercising any
15 right or remedy the holder is entitled to by law or under any
16 warranties, covenants, conditions, representations, or promises from
17 the borrower.

18 (25)(a) "Fiduciary" means a person acting for the benefit of
19 another party as a bona fide trustee; executor; administrator;
20 custodian; guardian of estates or guardian ad litem; receiver;
21 conservator; committee of estates of incapacitated persons; trustee in
22 bankruptcy; trustee, under an indenture agreement, trust agreement,
23 lease, or similar financing agreement, for debt securities,
24 certificates of interest or certificates of participation in debt
25 securities, or other forms of indebtedness as to which the trustee is
26 not, in the capacity of trustee, the lender. Except as provided in
27 subsection (12)(b)(iii) of this section, the liability of a fiduciary
28 under this chapter shall not exceed the assets held in the fiduciary
29 capacity.

30 (b) "Fiduciary" does not mean:

31 (i) A person acting as a fiduciary with respect to a trust or other
32 fiduciary estate that was organized for the primary purpose of, or is
33 engaged in, actively carrying on a trade or business for profit, unless
34 the trust or other fiduciary estate was created as part of, or to
35 facilitate, one or more estate plans or because of the incapacity of a
36 natural person;

37 (ii) A person who acquires ownership or control of a facility with
38 the objective purpose of avoiding liability of the person or any other
39 person. It is prima facie evidence that the fiduciary acquired

1 ownership or control of the facility to avoid liability if the facility
2 is the only substantial asset in the fiduciary estate at the time the
3 facility became subject to the fiduciary estate;

4 (iii) A person who acts in a capacity other than that of a
5 fiduciary or in a beneficiary capacity and in that capacity directly or
6 indirectly benefits from a trust or fiduciary relationship;

7 (iv) A person who is a beneficiary and fiduciary with respect to
8 the same fiduciary estate, and who while acting as a fiduciary receives
9 benefits that exceed customary or reasonable compensation, and
10 incidental benefits permitted under applicable law;

11 (v) A person who is a fiduciary and receives benefits that
12 substantially exceed customary or reasonable compensation, and
13 incidental benefits permitted under applicable law; or

14 (vi) A person who acts in the capacity of trustee of state or
15 federal lands or resources.

16 (26) "Fiduciary capacity" means the capacity of a person holding
17 title to a facility, or otherwise having control of an interest in the
18 facility pursuant to the exercise of the responsibilities of the person
19 as a fiduciary.

20 NEW SECTION. **Sec. 9.** (1) Section 3 of this act takes effect
21 January 1, 2001.

22 (2) Section 4 of this act takes effect September 1, 2000.

23 NEW SECTION. **Sec. 10.** The department of ecology shall adopt all
24 rules necessary to implement this act by June 30, 2000.

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