
HOUSE BILL 2901

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By Representatives Morrell, Green, Campbell, Roberts, Wallace, Ericks, Lantz, Kilmer, Blake, Grant, Hudgins, Darneille, McDonald, Linville, McCune and Ormsby

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1 AN ACT Relating to the clean up of properties contaminated by the
2 manufacturing of illegal drugs; amending RCW 64.44.010, 64.44.020,
3 64.44.030, 64.44.040, 64.44.050, 64.44.060, 64.44.070, and 70.105D.020;
4 adding new sections to chapter 64.44 RCW; and prescribing penalties.

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

6 **Sec. 1.** RCW 64.44.010 and 1999 c 292 s 2 are each amended to read
7 as follows:

8 The words and phrases defined in this section shall have the
9 following meanings when used in this chapter unless the context clearly
10 indicates otherwise.

11 (1) "Authorized contractor" means a person who decontaminates,
12 demolishes, or disposes of contaminated property as required by this
13 chapter who is certified by the department as provided for in RCW
14 64.44.060.

15 (2) "Contaminated" or "contamination" means polluted by hazardous
16 chemicals so that the property is unfit for human habitation or use due
17 to immediate or long-term hazards. Property that at one time was
18 contaminated but has been satisfactorily decontaminated according to

1 procedures established by the state board of health is not
2 "contaminated."

3 (3) "Department" means the department of health.

4 (4) "Hazardous chemicals" means the following substances ((used
5 in)) associated with the manufacture of illegal drugs: (a) Hazardous
6 substances as defined in RCW 70.105D.020(~~(, and))~~; (b) precursor
7 substances as defined in RCW 69.43.010 which the state board of health,
8 in consultation with the state board of pharmacy, has determined
9 present an immediate or long-term health hazard to humans; and (c) the
10 controlled substance or substances being manufactured, as defined in
11 RCW 69.50.101.

12 ((+4)) (5) "Officer" means a local health officer authorized under
13 chapters 70.05, 70.08, and 70.46 RCW.

14 ((+5)) (6) "Property" means any real or personal property, ((~~site,~~
15 ~~structure, or part of a structure which~~)) or segregable part thereof,
16 that is involved in or affected by the unauthorized manufacture,
17 distribution, or storage of hazardous chemicals. This includes but is
18 not limited to single-family residences, units of multiplexes,
19 condominiums, apartment buildings, motels, hotels, boats, motor
20 vehicles, trailers, manufactured housing, ((or)) any shop, booth,
21 ((or)) garden, or storage shed, and all contents of the items
22 referenced in this subsection.

23 **Sec. 2.** RCW 64.44.020 and 1999 c 292 s 3 are each amended to read
24 as follows:

25 Whenever a law enforcement agency becomes aware that property has
26 been contaminated by hazardous chemicals, that agency shall report the
27 contamination to the local health officer. The local health officer
28 shall ((~~post~~)) cause a posting of a written warning on the premises
29 within one working day of notification of the contamination and shall
30 inspect the property within fourteen days after receiving the notice of
31 contamination. The warning shall inform the potential occupants that
32 hazardous chemicals may exist on, or have been removed from, the
33 premises and that entry is unsafe. If a property owner believes that
34 a tenant has contaminated property that was being leased or rented, and
35 the property is vacated or abandoned, then the property owner shall
36 contact the local health officer about the possible contamination.

1 Local health officers or boards may charge property owners reasonable
2 fees for inspections of suspected contaminated property requested by
3 property owners.

4 A local health officer may enter, inspect, and survey at reasonable
5 times any properties for which there are reasonable grounds to believe
6 that the property has become contaminated. If the property is
7 contaminated, the local health officer shall post a written notice
8 declaring that the officer intends to issue an order prohibiting use of
9 the property as long as the property is contaminated.

10 If access to the property is denied, a superior, district, or
11 municipal court within the jurisdiction of the property may, based upon
12 cause to believe that the property is contaminated, issue warrants for
13 the purpose of conducting administrative inspections and seizure of
14 property appropriate to the inspections.

15 Local health officers must report all cases of contaminated
16 property to the state department of health. The department may make
17 the list of contaminated properties available to health associations,
18 landlord and realtor organizations, prosecutors, and other interested
19 groups. The department shall promptly update the list of contaminated
20 properties to remove those which have been decontaminated according to
21 provisions of this chapter.

22 The local health officer may determine when the services of an
23 authorized contractor are necessary.

24 **Sec. 3.** RCW 64.44.030 and 1999 c 292 s 4 are each amended to read
25 as follows:

26 (1) If after the inspection of the property, the local health
27 officer finds that it is contaminated, then the (~~property shall be~~
28 ~~found unfit for~~) local health officer shall issue an order declaring
29 the property unfit and prohibiting its use. The local health officer
30 shall cause the order to be served (~~an order prohibiting use~~) either
31 personally or by certified mail, with return receipt requested, upon
32 all occupants and persons having any interest therein as shown upon the
33 records of the auditor's office of the county in which such property is
34 located. The local health officer shall also (~~post~~) cause the order
35 (~~prohibiting use~~) to be posted in a conspicuous place on the
36 property. If the whereabouts of such persons is unknown and the same
37 cannot be ascertained by the local health officer in the exercise of

1 reasonable diligence, and the health officer makes an affidavit to that
2 effect, then the serving of the order upon such persons may be made
3 either by personal service or by mailing a copy of the order by
4 certified mail, postage prepaid, return receipt requested, to each
5 person at the address appearing on the last equalized tax assessment
6 roll of the county where the property is located or at the address
7 known to the county assessor, and the order shall be posted
8 conspicuously at the residence. A copy of the order shall also be
9 mailed, addressed to each person or party having a recorded right,
10 title, estate, lien, or interest in the property. The order shall
11 contain a notice that a hearing before the local health board or
12 officer shall be held upon the request of a person required to be
13 notified of the order under this section. The request for a hearing
14 must be made within ten days of serving the order. The hearing shall
15 then be held within not less than twenty days nor more than thirty days
16 after the serving of the order. The officer shall prohibit use as long
17 as the property is found to be contaminated. A copy of the order shall
18 also be filed with the auditor of the county in which the property is
19 located, where the order pertains to real property, and such filing of
20 the complaint or order shall have the same force and effect as other
21 lis pendens notices provided by law. In any hearing concerning whether
22 property is fit for use, the property owner has the burden of showing
23 that the property is decontaminated or fit for use. The owner or any
24 person having an interest in the property may file an appeal on any
25 order issued by the local health board or officer within thirty days
26 from the date of service of the order with the appeals commission
27 established pursuant to RCW 35.80.030. All proceedings before the
28 appeals commission, including any subsequent appeals to superior court,
29 shall be governed by the procedures established in chapter 35.80 RCW.

30 (2) If the local health officer determines immediate action is
31 necessary to protect public health, safety, or the environment, the
32 officer may issue or cause to be issued an emergency order, and any
33 person to whom such an order is directed shall comply immediately.
34 Emergency orders issued pursuant to this section shall expire no later
35 than seventy-two hours after issuance and shall not impair the health
36 officer from seeking an order under subsection (1) of this section.

1 **Sec. 4.** RCW 64.44.040 and 1999 c 292 s 5 are each amended to read
2 as follows:

3 (1) Upon issuance of an order declaring property unfit and
4 prohibiting its use, the city or county in which the contaminated
5 property is located may take action to prohibit use, occupancy, or
6 removal of such property; condemn, decontaminate, or demolish the
7 property; or ((to)) require that the property be vacated or the
8 contents removed from the property. The city or county may use an
9 authorized contractor if property is demolished, decontaminated, or
10 removed under this section. The city, county, or contractor shall
11 comply with all orders of the health officer during these processes.
12 No city or county may condemn, decontaminate, or demolish property
13 pursuant to this section until all procedures granting the right of
14 notice and the opportunity to appeal in RCW 64.44.030 have been
15 exhausted, but may prohibit use, occupancy, or removal of contaminated
16 property pending appeal of the order.

17 (2)(a) It is unlawful for any person to enter upon any property, or
18 to remove any property, that has been found unfit for use by a local
19 health officer pursuant to RCW 64.44.030.

20 (b) This section does not apply to: (i) Health officials, law
21 enforcement officials, or other government agents performing their
22 official duties; (ii) authorized contractors or owners performing
23 decontamination pursuant to authorization by the local health officer;
24 and (iii) any person acting with permission of a local health officer,
25 or of a superior court hearing examiner following an appeal of a
26 decision of the local health officer.

27 (c) Any person who violates this section is guilty of a
28 misdemeanor.

29 **Sec. 5.** RCW 64.44.050 and 1999 c 292 s 6 are each amended to read
30 as follows:

31 (1) An owner of contaminated property who desires to have the
32 property decontaminated, demolished, or disposed of shall use the
33 services of an authorized contractor unless otherwise authorized by the
34 local health officer. The contractor and property owner shall prepare
35 and submit a written work plan for decontamination, demolishing, or
36 disposal to the local health officer. The local health officer may
37 charge a reasonable fee for review of the work plan. If the work plan

1 is approved and the decontamination, demolishing, or disposal is
2 completed and the property is retested according to the plan and
3 properly documented, then the health officer shall allow reuse of the
4 property. A release for reuse document shall be recorded in the real
5 property records indicating the property has been decontaminated,
6 demolished, or disposed of in accordance with rules of the state
7 department of health. The property owner is responsible for: (a) The
8 costs of any property testing which may be required to demonstrate the
9 presence or absence of hazardous chemicals; and (b) the costs of the
10 property's decontamination, demolishing, and disposal expenses, as well
11 as costs incurred by the local health officer resulting from the
12 enforcement of this chapter.

13 (2) The local health officer may establish a time period in which
14 decontamination, demolishing, and disposal shall be completed. The
15 local health officer, city, or county may assess a fine or institute
16 appropriate action upon failure to meet the decontamination,
17 demolishing, and disposal deadline.

18 **Sec. 6.** RCW 64.44.060 and 1999 c 292 s 7 are each amended to read
19 as follows:

20 (1) A contractor, supervisor, or worker may not perform
21 decontamination, demolition, or disposal work unless issued a
22 certificate by the state department of health. The department shall
23 establish performance standards for contractors, supervisors, and
24 workers by rule in accordance with chapter 34.05 RCW, the
25 administrative procedure act. The department shall train and test, or
26 may approve courses to train and test, contractors, supervisors, and
27 ~~((their employees))~~ workers on the essential elements in assessing
28 property used as an illegal drug manufacturing or storage site to
29 determine hazard reduction measures needed, techniques for adequately
30 reducing contaminants, use of personal protective equipment, methods
31 for proper decontamination, demolition, removal, and disposal of
32 contaminated property, and relevant federal and state regulations.
33 Upon successful completion of the training, and after a background
34 check, the contractor, supervisor, or ~~((employee))~~ worker shall be
35 certified.

36 (2) The department may require the successful completion of annual

1 refresher courses provided or approved by the department for the
2 continued certification of the contractor or employee.

3 (3) The department shall provide for reciprocal certification of
4 any individual trained to engage in decontamination, demolition, or
5 disposal work in another state when the prior training is shown to be
6 substantially similar to the training required by the department. The
7 department may require such individuals to take an examination or
8 refresher course before certification.

9 (4) The department may deny, suspend, ~~((or))~~ revoke, or place
10 restrictions on a certificate for failure to comply with the
11 requirements of this chapter or any rule adopted pursuant to this
12 chapter. A certificate may be denied, suspended, ~~((or))~~ revoked, or
13 have restrictions placed on it on any of the following grounds:

14 (a) Failing to perform decontamination, demolition, or disposal
15 work under the supervision of trained personnel;

16 (b) Failing to perform decontamination, demolition, or disposal
17 work using department of health certified decontamination personnel;

18 (c) Failing to file a work plan;

19 ~~((+e))~~ (d) Failing to perform work pursuant to the work plan;

20 ~~((+d))~~ (e) Failing to perform work that meets the requirements of
21 the department and the requirements of the local health officers;

22 ~~((+e) The certificate was obtained by error, misrepresentation, or~~
23 ~~fraud; or))~~

24 (f) Failing to properly dispose of contaminated property;

25 (g) Committing fraud or misrepresentation in: (i) Applying for or
26 obtaining a certification, recertification, or reinstatement; (ii)
27 seeking approval of a work plan; and (iii) documenting completion of
28 work to the department or local health officer;

29 (h) Failing to cooperate with the department or the local health
30 officer;

31 (i) Failing the evaluation and inspection of decontamination
32 projects pursuant to section 8 of this act;

33 (j) Conviction of any gross misdemeanor or felony. For purposes of
34 this subsection, "conviction" is intended to apply to all instances in
35 which an adjudication of guilt has occurred, whether or not a deferred
36 or alternative sentence has been imposed; or

37 (k) If the person has been certified pursuant to RCW 74.20A.320 by
38 the department of social and health services as a person who is not in

1 compliance with a support order or a residential or visitation order.
2 If the person has continued to meet all other requirements for
3 reinstatement during the suspension, reissuance of the license or
4 certificate shall be automatic upon the department's receipt of a
5 release issued by the department of social and health services stating
6 that the person is in compliance with the order.

7 (5) A contractor, supervisor, or worker who violates any provision
8 of this chapter may be assessed a fine not to exceed five hundred
9 dollars for each violation.

10 (6) The department of health shall prescribe fees as provided for
11 in RCW 43.70.250 for the issuance and renewal of certificates, the
12 administration of examinations, and for the review of training courses.

13 (7) The decontamination account is hereby established in the state
14 treasury. All fees collected under this chapter shall be deposited in
15 this account. Moneys in the account may only be spent after
16 appropriation for costs incurred by the department in the
17 administration and enforcement of this chapter.

18 **Sec. 7.** RCW 64.44.070 and 1999 c 292 s 8 are each amended to read
19 as follows:

20 (1) The state board of health shall promulgate rules and standards
21 for carrying out the provisions in this chapter in accordance with
22 chapter 34.05 RCW, the administrative procedure act. The local board
23 of health and the local health officer are authorized to exercise such
24 powers as may be necessary to carry out this chapter. The department
25 shall provide technical assistance to local health boards and health
26 officers to carry out their duties under this chapter.

27 (2) The department shall adopt rules for decontamination of a
28 property used as an illegal drug laboratory and methods for the testing
29 of porous and nonporous surfaces, ground water, surface water, soil,
30 and septic tanks for contamination. The rules shall establish
31 decontamination standards for hazardous chemicals, including but not
32 limited to methamphetamine, lead, mercury, and total volatile organic
33 compounds. The department shall also adopt rules pertaining to
34 independent third party sampling to verify satisfactory decontamination
35 of property deemed contaminated and unfit for use. For the purposes of
36 this section, an independent third party sampler is a person who is not
37 an employee, agent, representative, partner, joint venturer,

1 shareholder, or parent or subsidiary company of the clandestine drug
2 laboratory decontamination contractor, the contractor's company, or
3 property owner.

4 NEW SECTION. **Sec. 8.** A new section is added to chapter 64.44 RCW
5 to read as follows:

6 The department may evaluate annually a number of the property
7 decontamination projects performed by licensed contractors to determine
8 the adequacy of the decontamination work, using the services of an
9 independent environmental contractor or state or local agency. If a
10 project fails the evaluation and inspection, the contractor is subject
11 to a civil penalty and license suspension, pursuant to RCW 64.44.060
12 (4) and (5); and the contractor is prohibited from performing
13 additional work until deficiencies have been corrected.

14 NEW SECTION. **Sec. 9.** A new section is added to chapter 64.44 RCW
15 to read as follows:

16 (1) The methamphetamine contamination cleanup account is created in
17 the state treasury. All receipts from appropriations for this purpose
18 must be deposited into the account. Moneys in the account may be spent
19 only after appropriation. Expenditures from the account may be used
20 only for cleanup of residential rental properties contaminated by
21 methamphetamine production.

22 (2) The department of health shall review applications and make
23 grants to landlords who own residential rental properties that have
24 been contaminated by methamphetamine production. The department may
25 only make grants to landlords who had no knowledge or consent
26 concerning the production of methamphetamine on the property.

27 **Sec. 10.** RCW 70.105D.020 and 2005 c 191 s 1 are each amended to
28 read as follows:

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

1 provide eligibility for public funding of remedial actions under RCW
2 70.105D.070(2)(d)(xi).

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

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

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

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

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

26 (7) "Hazardous substance" means:

27 (a) Any dangerous or extremely hazardous waste as defined in RCW
28 70.105.010 (5) and (6), or any dangerous or extremely dangerous waste
29 designated by rule pursuant to chapter 70.105 RCW;

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

32 (c) Any substance that, on March 1, 1989, is a hazardous substance
33 under section 101(14) of the federal cleanup law, 42 U.S.C. Sec.
34 9601(14);

35 (d) Petroleum or petroleum products; and

36 (e) Any substance or category of substances, including solid waste
37 decomposition products, determined by the director by rule to present

1 a threat to human health or the environment if released into the
2 environment.

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

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

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

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

37 (11) "Operating a facility primarily to protect a security
38 interest" occurs when all of the following are met: (a) Operating the

1 facility where the borrower has defaulted on the loan or otherwise
2 breached the security agreement; (b) operating the facility to preserve
3 the value of the facility as an ongoing business; (c) the operation is
4 being done in anticipation of a sale, transfer, or assignment of the
5 facility; and (d) the operation is being done primarily to protect a
6 security interest. Operating a facility for longer than one year prior
7 to foreclosure or its equivalents shall be presumed to be operating the
8 facility for other than to protect a security interest.

9 (12) "Owner or operator" means:

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

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

15 The term does not include:

16 (i) An agency of the state or unit of local government which
17 acquired ownership or control through a drug forfeiture action under
18 RCW 69.50.505, through a voluntary conveyance for the purpose of
19 remediating the property for a public purpose, or involuntarily through
20 bankruptcy, tax delinquency, abandonment, or other circumstances in
21 which the government involuntarily acquires title. This exclusion does
22 not apply to an agency of the state or unit of local government which
23 has caused or contributed to the release or threatened release of a
24 hazardous substance from the facility;

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

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

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

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

37 (D) The holder allows the department or potentially liable persons

1 under an order, agreed order, or settlement agreement under this
2 chapter access to the facility to conduct remedial actions and does not
3 impede the conduct of such remedial actions;

4 (E) Any remedial actions conducted by the holder are in compliance
5 with any preexisting requirements identified by the department, or, if
6 the department has not identified such requirements for the facility,
7 the remedial actions are conducted consistent with the rules adopted
8 under this chapter; and

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

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

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

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

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

36 (D) The fiduciary allows the department or potentially liable
37 persons under an order, agreed order, or settlement agreement under

1 this chapter access to the facility to conduct remedial actions and
2 does not impede the conduct of such remedial actions;

3 (E) Any remedial actions conducted by the fiduciary are in
4 compliance with any preexisting requirements identified by the
5 department, or, if the department has not identified such requirements
6 for the facility, the remedial actions are conducted consistent with
7 the rules adopted under this chapter; and

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

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

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

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

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

33 (C) The person does not engage in activities that damage or
34 interfere with the operation of remedial actions installed on the
35 person's property or engage in activities that result in exposure of
36 humans or the environment to the contaminated ground water that has
37 migrated onto the property;

1 (D) If requested, the person allows the department, potentially
2 liable persons who are subject to an order, agreed order, or consent
3 decree, and the authorized employees, agents, or contractors of each,
4 access to the property to conduct remedial actions required by the
5 department. The person may attempt to negotiate an access agreement
6 before allowing access; and

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

9 (13) "Participation in management" means exercising decision-making
10 control over the borrower's operation of the facility, environmental
11 compliance, or assuming or manifesting responsibility for the overall
12 management of the enterprise encompassing the day-to-day decision
13 making of the enterprise.

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

1 (14) "Person" means an individual, firm, corporation, association,
2 partnership, consortium, joint venture, commercial entity, state
3 government agency, unit of local government, federal government agency,
4 or Indian tribe.

5 (15) "Policing activities" means actions the holder takes to insure
6 that the borrower complies with the terms of the loan or security
7 interest or actions the holder takes or requires the borrower to take
8 to maintain the value of the security. Policing activities include:
9 Requiring the borrower to conduct remedial actions at the facility
10 during the term of the security interest; requiring the borrower to
11 comply or come into compliance with applicable federal, state, and
12 local environmental and other laws, regulations, and permits during the
13 term of the security interest; securing or exercising authority to
14 monitor or inspect the facility including on-site inspections, or to
15 monitor or inspect the borrower's business or financial condition
16 during the term of the security interest; or taking other actions
17 necessary to adequately police the loan or security interest such as
18 requiring a borrower to comply with any warranties, covenants,
19 conditions, representations, or promises from the borrower.

20 (16) "Potentially liable person" means any person whom the
21 department finds, based on credible evidence, to be liable under RCW
22 70.105D.040. The department shall give notice to any such person and
23 allow an opportunity for comment before making the finding, unless an
24 emergency requires otherwise.

25 (17) "Prepare a facility for sale, transfer, or assignment" means
26 to secure access to the facility; perform routine maintenance on the
27 facility; remove inventory, equipment, or structures; properly maintain
28 environmental compliance measures already in place at the facility;
29 conduct remedial actions to clean up releases at the facility; or to
30 perform other similar activities intended to preserve the value of the
31 facility where the borrower has defaulted on the loan or otherwise
32 breached the security agreement or after foreclosure and its
33 equivalents and in anticipation of a pending sale, transfer, or
34 assignment, primarily to protect the holder's security interest in the
35 facility. A holder can prepare a facility for sale, transfer, or
36 assignment for up to one year prior to foreclosure and its equivalents
37 and still stay within the security interest exemption in subsection
38 (12)(b)(ii) of this section.

1 (18) "Primarily to protect a security interest" means the indicia
2 of ownership is held primarily for the purpose of securing payment or
3 performance of an obligation. The term does not include indicia of
4 ownership held primarily for investment purposes nor indicia of
5 ownership held primarily for purposes other than as protection for a
6 security interest. A holder may have other, secondary reasons, for
7 maintaining indicia of ownership, but the primary reason must be for
8 protection of a security interest. Holding indicia of ownership after
9 foreclosure or its equivalents for longer than five years shall be
10 considered to be holding the indicia of ownership for purposes other
11 than primarily to protect a security interest. For facilities that
12 have been acquired through foreclosure or its equivalents prior to July
13 23, 1995, this five-year period shall begin as of July 23, 1995.

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

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

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

31 (22) "Security interest" means an interest in a facility created or
32 established for the purpose of securing a loan or other obligation.
33 Security interests include deeds of trusts, sellers interest in a real
34 estate contract, liens, legal, or equitable title to a facility
35 acquired incident to foreclosure and its equivalents, and title
36 pursuant to lease financing transactions. Security interests may also
37 arise from transactions such as sale and leasebacks, conditional sales,
38 installment sales, trust receipt transactions, certain assignments,

1 factoring agreements, accounts receivable financing arrangements,
2 easements, and consignments, if the transaction creates or establishes
3 an interest in a facility for the purpose of securing a loan or other
4 obligation.

5 (23) "Industrial properties" means properties that are or have been
6 characterized by, or are to be committed to, traditional industrial
7 uses such as processing or manufacturing of materials, marine terminal
8 and transportation areas and facilities, fabrication, assembly,
9 treatment, or distribution of manufactured products, or storage of bulk
10 materials, that are either:

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

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

16 (24) "Workout activities" means those actions by which a holder, at
17 any time prior to foreclosure and its equivalents, seeks to prevent,
18 cure, or mitigate a default by the borrower or obligor; or to preserve,
19 or prevent the diminution of, the value of the security. Workout
20 activities include: Restructuring or renegotiating the terms of the
21 security interest; requiring payment of additional rent or interest;
22 exercising forbearance; requiring or exercising rights pursuant to an
23 assignment of accounts or other amounts owed to an obligor; requiring
24 or exercising rights pursuant to an escrow agreement pertaining to
25 amounts owed to an obligor; providing specific or general financial or
26 other advice, suggestions, counseling, or guidance; and exercising any
27 right or remedy the holder is entitled to by law or under any
28 warranties, covenants, conditions, representations, or promises from
29 the borrower.

30 (25)(a) "Fiduciary" means a person acting for the benefit of
31 another party as a bona fide trustee; executor; administrator;
32 custodian; guardian of estates or guardian ad litem; receiver;
33 conservator; committee of estates of incapacitated persons; trustee in
34 bankruptcy; trustee, under an indenture agreement, trust agreement,
35 lease, or similar financing agreement, for debt securities,
36 certificates of interest or certificates of participation in debt
37 securities, or other forms of indebtedness as to which the trustee is
38 not, in the capacity of trustee, the lender. Except as provided in

1 subsection (12)(b)(iii) of this section, the liability of a fiduciary
2 under this chapter shall not exceed the assets held in the fiduciary
3 capacity.

4 (b) "Fiduciary" does not mean:

5 (i) A person acting as a fiduciary with respect to a trust or other
6 fiduciary estate that was organized for the primary purpose of, or is
7 engaged in, actively carrying on a trade or business for profit, unless
8 the trust or other fiduciary estate was created as part of, or to
9 facilitate, one or more estate plans or because of the incapacity of a
10 natural person;

11 (ii) A person who acquires ownership or control of a facility with
12 the objective purpose of avoiding liability of the person or any other
13 person. It is prima facie evidence that the fiduciary acquired
14 ownership or control of the facility to avoid liability if the facility
15 is the only substantial asset in the fiduciary estate at the time the
16 facility became subject to the fiduciary estate;

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

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

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

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

29 (26) "Fiduciary capacity" means the capacity of a person holding
30 title to a facility, or otherwise having control of an interest in the
31 facility pursuant to the exercise of the responsibilities of the person
32 as a fiduciary.

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