
SENATE BILL 6517

State of Washington

59th Legislature

2006 Regular Session

By Senators Fraser, Poulsen, Pridemore, Rockefeller, Regala and Kline

Read first time 01/13/2006. Referred to Committee on Water, Energy & Environment.

1 AN ACT Relating to the uniform environmental covenants act;
2 amending RCW 70.105D.060, 70.105D.050, and 70.105D.020; adding a new
3 chapter to Title 64 RCW; and providing an effective date.

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

5 NEW SECTION. **Sec. 1.** The legislature finds that the national
6 conference of commissioners on uniform state laws has developed model
7 legislation called the uniform environmental covenants act. The act
8 ensures that environmental covenants, recorded use restrictions
9 negotiated in connection with hazardous waste site cleanups, and other
10 environmental response projects are legally valid and enforceable. The
11 uniform environmental covenants act achieves this objective by
12 providing clear statutory standards that override court-made doctrines
13 that do not fit such land cleanup and reuse contexts. The legislature
14 further finds that nothing in this chapter will amend or modify any
15 local or state laws that determine when environmental covenants are
16 required, when a particular contaminated site must be cleaned up, or
17 the standards for a cleanup.

18 Adoption of the uniform environmental covenants act in Washington
19 will provide all participants in a cleanup with greater confidence that

1 environmental covenants and other institutional controls will be
2 effective over the life of the cleanup. This will speed cleanups of
3 many sites and assist in the recycling of urban brownfield properties
4 into new economic uses for the benefit of the citizens of Washington.

5 This chapter adopts most provisions of the model legislation while
6 making modifications to integrate the uniform environmental covenants
7 act with Washington's environmental cleanup programs.

8 NEW SECTION. **Sec. 2.** This chapter may be cited as the uniform
9 environmental covenants act.

10 NEW SECTION. **Sec. 3.** The definitions in this section apply
11 throughout this chapter unless the context clearly requires otherwise.

12 (1) "Activity and use limitations" means restrictions or
13 obligations created under this chapter with respect to real property.

14 (2) "Agency" means the department of ecology or any other local
15 government or state agency or the United States environmental
16 protection agency that determines or approves the environmental
17 response project pursuant to which the environmental covenant is
18 created.

19 (3)(a) "Common interest community" means a condominium,
20 cooperative, or other real property with respect to which a person, by
21 virtue of the person's ownership of a parcel of real property, is
22 obligated to pay property taxes or insurance premiums, or for
23 maintenance, or improvement of other real property described in a
24 recorded covenant that creates the common interest community.

25 (b) "Common interest community" includes but is not limited to:

26 (i) An association of apartment owners as defined in RCW 64.32.010;

27 (ii) A unit owners' association as defined in RCW 64.34.020 and
28 organized under RCW 64.34.300;

29 (iii) A master association as provided in RCW 64.34.276;

30 (iv) A subassociation as provided in RCW 64.34.278; and

31 (v) A homeowners' association as defined in RCW 64.38.010.

32 (4) "Environmental covenant" means a servitude arising under an
33 environmental response project that imposes activity and use
34 limitations and includes institutional controls consisting of
35 restrictive covenants under chapter 70.105D RCW.

1 (5) "Environmental response project" means a plan or work performed
2 for environmental remediation of real property and conducted:

3 (a) Under a federal or state program governing environmental
4 remediation of real property, including chapters 43.21C, 64.44, 70.95,
5 70.98, 70.105, 70.105D, 90.48, and 90.52 RCW;

6 (b) Incident to closure of a solid or hazardous waste management
7 unit, if the closure is conducted with approval of an agency; or

8 (c) Under the state voluntary clean-up program authorized under
9 chapter 70.105D RCW.

10 (6) "Holder" means the grantee of an environmental covenant as
11 specified in section 4(1) of this act.

12 (7) "Person" means an individual, corporation, business trust,
13 estate, trust, partnership, limited liability company, association,
14 joint venture, public corporation, government, governmental
15 subdivision, agency, or instrumentality, or any other legal or
16 commercial entity.

17 (8) "Record", used as a noun, means information that is inscribed
18 on a tangible medium or that is stored in an electronic or other medium
19 and is retrievable in perceivable form.

20 (9) "State" means a state of the United States, the District of
21 Columbia, Puerto Rico, the United States Virgin Islands, or any
22 territory or insular possession subject to the jurisdiction of the
23 United States.

24 NEW SECTION. **Sec. 4.** (1) Any person, including a person that owns
25 an interest in the real property, the agency, or a municipality or
26 other unit of local government, may be a holder. An environmental
27 covenant may identify more than one holder. The interest of a holder
28 is an interest in real property.

29 (2) A right of an agency under this chapter or under an
30 environmental covenant, other than a right as a holder, is not an
31 interest in real property.

32 (3) An agency is bound by any obligation it assumes in an
33 environmental covenant, but an agency does not assume obligations
34 merely by signing an environmental covenant. Any other person that
35 signs an environmental covenant is bound by the obligations the person
36 assumes in the covenant, but signing the covenant does not change

1 obligations, rights, or protections granted or imposed under law other
2 than this chapter except as provided in the covenant.

3 (4) The following rules apply to interests in real property in
4 existence at the time an environmental covenant is created or amended:

5 (a) An interest that has priority under other law is not affected
6 by an environmental covenant unless the person that owns the interest
7 subordinates that interest to the covenant.

8 (b) This chapter does not require a person that owns a prior
9 interest to subordinate that interest to an environmental covenant or
10 to agree to be bound by the covenant.

11 (c) A subordination agreement may be contained in an environmental
12 covenant covering real property or in a separate record. If the
13 environmental covenant covers commonly owned property in a common
14 interest community, the record may be signed by any person authorized
15 by the governing board of the owners' association.

16 (d) An agreement by a person to subordinate a prior interest to an
17 environmental covenant affects the priority of that person's interest
18 but does not by itself impose any affirmative obligation on the person
19 with respect to the environmental covenant.

20 NEW SECTION. **Sec. 5.** (1) An environmental covenant must:

21 (a) State that the instrument is an environmental covenant executed
22 pursuant to this chapter;

23 (b) Contain a legally sufficient description of the real property
24 subject to the covenant;

25 (c) Describe the activity and use limitations on the real property;

26 (d) Identify every holder;

27 (e) Be signed by the agency, every holder, and unless waived by the
28 agency every owner of the fee simple of the real property subject to
29 the covenant; and

30 (f) Identify the name and location of any administrative record for
31 the environmental response project reflected in the environmental
32 covenant.

33 (2) In addition to the information required by subsection (1) of
34 this section, an environmental covenant may contain other information,
35 restrictions, and requirements agreed to by the persons who signed it,
36 including any:

1 (a) Requirements for notice following transfer of a specified
2 interest in, or concerning proposed changes in use of, applications for
3 building permits for, or proposals for any site work affecting the
4 contamination on, the property subject to the covenant;

5 (b) Requirements for periodic reporting describing compliance with
6 the covenant;

7 (c) Rights of access to the property granted in connection with
8 implementation or enforcement of the covenant;

9 (d) Brief narrative description of the contamination and remedy,
10 including the contaminants of concern, the pathways of exposure, limits
11 on exposure, and the location and extent of the contamination;

12 (e) Limitation on amendment or termination of the covenant in
13 addition to those contained in sections 10 and 11 of this act;

14 (f) Rights of the holder in addition to its right to enforce the
15 covenant pursuant to section 12 of this act;

16 (g) Other information, restrictions, or requirements required by
17 the agency, including the department of ecology where the covenant is
18 executed as an institutional control under the authority of RCW
19 70.105D.030.

20 (3) In addition to other conditions for its approval of an
21 environmental covenant, the agency may require those persons specified
22 by the agency who have interests in the real property to sign the
23 covenant.

24 (4) The agency may also require notice and opportunity to comment
25 upon an environmental covenant as part of public participation efforts
26 related to the environmental response project.

27 (5) The lead agency for environmental response shall coordinate and
28 collaborate with local land use planning authorities in the development
29 of the land use and activity restrictions in the environmental
30 covenant. The agencies involved in developing the restrictions shall
31 consider potential redevelopment and revitalization opportunities and
32 obtain information regarding present and proposed land and resource
33 uses, and the applicable comprehensive land use plan and zoning
34 provisions applicable to the property to be subject to the
35 environmental covenant.

36 NEW SECTION. **Sec. 6.** (1) An environmental covenant that complies
37 with this chapter runs with the land.

1 (2) An environmental covenant that is otherwise effective is valid
2 and enforceable even if:

3 (a) It is not appurtenant to an interest in real property;

4 (b) It can be or has been assigned to a person other than the
5 original holder;

6 (c) It is not of a character that has been recognized traditionally
7 at common law;

8 (d) It imposes a negative burden;

9 (e) It imposes an affirmative obligation on a person having an
10 interest in the real property or on the holder;

11 (f) The benefit or burden does not touch or concern real property;

12 (g) There is no privity of estate or contract;

13 (h) The holder dies, ceases to exist, resigns, or is replaced; or

14 (i) The owner of an interest subject to the environmental covenant
15 and the holder are the same person.

16 (3) An instrument that creates restrictions or obligations with
17 respect to real property that would qualify as activity and use
18 limitations except for the fact that the instrument was recorded before
19 the effective date of this section is not invalid or unenforceable
20 because of any of the limitations on enforcement of interests described
21 in subsection (2) of this section or because it was identified as an
22 easement, servitude, deed restriction, or other interest. This chapter
23 does not apply in any other respect to such an instrument.

24 (4) This chapter does not invalidate or render unenforceable any
25 interest, whether designated as an environmental covenant or other
26 interest, that is otherwise enforceable under the law of this state.

27 NEW SECTION. **Sec. 7.** This chapter does not authorize a use of
28 real property that is otherwise prohibited by zoning, by law other than
29 this chapter regulating use of real property, or by a recorded
30 instrument that has priority over the environmental covenant. An
31 environmental covenant may prohibit or restrict uses of real property
32 that are authorized by zoning or by law other than this chapter.

33 NEW SECTION. **Sec. 8.** (1) A copy of an environmental covenant
34 shall be provided by the persons and in the manner required by the
35 agency to:

36 (a) Each person that signed the covenant;

- 1 (b) Each person holding a recorded interest in the real property
2 subject to the covenant;
- 3 (c) Each person in possession of the real property subject to the
4 covenant;
- 5 (d) Each municipality or other unit of local government in which
6 real property subject to the covenant is located;
- 7 (e) The department of ecology; and
8 (f) Any other person the agency requires.
- 9 (2) The validity of an environmental covenant is not affected by
10 failure to provide a copy of the covenant as required under this
11 section.

12 NEW SECTION. **Sec. 9.** (1) An environmental covenant and any
13 amendment or termination of the covenant must be recorded in every
14 county in which any portion of the real property subject to the
15 covenant is located. For purposes of indexing, a holder shall be
16 treated as a grantee.

17 (2) Except as otherwise provided in section 10(3) of this act, an
18 environmental covenant is subject to the laws of this state governing
19 recording and priority of interests in real property.

20 NEW SECTION. **Sec. 10.** (1) An environmental covenant is perpetual
21 unless it is:

22 (a) By its terms limited to a specific duration or terminated by
23 the occurrence of a specific event;

24 (b) Terminated by consent pursuant to section 11 of this act;

25 (c) Terminated pursuant to subsection (2) of this section;

26 (d) Terminated by foreclosure of an interest that has priority over
27 the environmental covenant; or

28 (e) Terminated or modified in an eminent domain proceeding, but
29 only if:

30 (i) The agency that signed the covenant is a party to the
31 proceeding;

32 (ii) All persons identified in section 11 (1) and (2) of this act
33 are given notice of the pendency of the proceeding; and

34 (iii) The court determines, after hearing, that the termination or
35 modification will not adversely affect human health or the environment.

1 (2) If the agency that signed an environmental covenant has
2 determined that the intended benefits of the covenant can no longer be
3 realized, a court, under the doctrine of changed circumstances, in an
4 action in which all persons identified in section 11 (1) and (2) of
5 this act have been given notice, may terminate the covenant or reduce
6 its burden on the real property subject to the covenant. The agency's
7 determination or its failure to make a determination upon request is
8 subject to review pursuant to chapter 34.05 RCW.

9 (3) Except as otherwise provided in subsections (1) and (2) of this
10 section, an environmental covenant may not be extinguished, limited, or
11 impaired through issuance of a tax deed, foreclosure of a tax lien, or
12 application of the doctrine of adverse possession, prescription,
13 abandonment, waiver, lack of enforcement, or acquiescence, or a similar
14 doctrine.

15 (4) An environmental covenant may not be extinguished, limited, or
16 impaired by the extinguishment of a mineral interest under chapter
17 78.22 RCW.

18 NEW SECTION. **Sec. 11.** (1) An environmental covenant may be
19 amended or terminated by consent only if the amendment or termination
20 is signed by:

21 (a) The agency;

22 (b) Unless waived by the agency, the current owner of the fee
23 simple of the real property subject to the covenant;

24 (c) Each person that originally signed the covenant, unless the
25 person waived in a signed record the right to consent or a court finds
26 that the person no longer exists or cannot be located or identified
27 with the exercise of reasonable diligence; and

28 (d) Except as otherwise provided in subsection (4)(b) of this
29 section, the holder.

30 (2) If an interest in real property is subject to an environmental
31 covenant, the interest is not affected by an amendment of the covenant
32 unless the current owner of the interest consents to the amendment or
33 has waived in a signed record the right to consent to amendments.

34 (3) Except for an assignment undertaken pursuant to a governmental
35 reorganization, assignment of an environmental covenant to a new holder
36 is an amendment.

37 (4) Except as otherwise provided in an environmental covenant:

- 1 (a) A holder may not assign its interest without consent of the
- 2 other parties;
- 3 (b) A holder may be removed and replaced by agreement of the other
- 4 parties specified in subsection (1) of this section; and
- 5 (c) A court of competent jurisdiction may fill a vacancy in the
- 6 position of holder.

7 NEW SECTION. **Sec. 12.** (1) A civil action for injunctive or other
8 equitable relief for violation of an environmental covenant may be
9 maintained by:

- 10 (a) A party to the covenant;
- 11 (b) The agency or, if it is not the agency, the department of
- 12 ecology;
- 13 (c) Any person to whom the covenant expressly grants power to
- 14 enforce;
- 15 (d) A person whose interest in the real property or whose
- 16 collateral or liability may be affected by the alleged violation of the
- 17 covenant;
- 18 (e) A municipality or other unit of local government in which the
- 19 real property subject to the covenant is located;
- 20 (f) An owner of real property that directly abuts the real property
- 21 subject to the environmental covenant; or
- 22 (g) An owner of property affected by a hazardous substance release
- 23 addressed in the environmental covenant.

24 (2) This chapter does not limit the regulatory authority of the
25 agency or the department of ecology under law other than this chapter
26 with respect to an environmental response project.

27 (3) A person is not responsible for or subject to liability for
28 environmental remediation solely because it has the right to enforce an
29 environmental covenant.

30 NEW SECTION. **Sec. 13.** (1) The department of ecology shall
31 establish and maintain a registry that contains the complete text of
32 all environmental covenants and any amendment or termination of those
33 covenants. The registry may also contain any other information
34 concerning environmental covenants and the real property subject to
35 them that the department of ecology considers appropriate. The
36 registry is a public record for purposes of chapter 42.56 RCW, but the

1 department shall maintain electronic access to the registry without
2 requiring a public records request for any information included in the
3 registry.

4 (2) After an environmental covenant or an amendment or termination
5 of a covenant is filed in the registry established pursuant to
6 subsection (1) of this section, a notice of the covenant, amendment, or
7 termination that complies with this section may be recorded in the land
8 records in lieu of recording the entire covenant. Any such notice must
9 contain:

10 (a) A legally sufficient description and any available street
11 address of the real property subject to the covenant;

12 (b) The name and address of the owner of the fee simple interest in
13 the real property, the agency, and the holder if other than the agency;

14 (c) A statement that the covenant, amendment, or termination is
15 available in a registry at the department of ecology, which discloses
16 the method of any electronic access; and

17 (d) A statement that the notice is notification of an environmental
18 covenant executed pursuant to this chapter.

19 (3) A statement in substantially the following form, executed with
20 the same formalities as a deed in this state, satisfies the
21 requirements of subsection (2) of this section:

22 "1. This notice is filed in the land records of the [political
23 subdivision] of [insert name of jurisdiction in which the real property
24 is located] pursuant to section 13 of this act.

25 2. This notice and the covenant, amendment, or termination to
26 which it refers may impose significant obligations with respect to the
27 property described below.

28 3. A legal description of the property is attached as Exhibit A to
29 this notice. The address of the property that is subject to the
30 environmental covenant is [insert address of property] or [not
31 available].

32 4. The name and address of the owner of the fee simple interest in
33 the real property on the date of this notice is [insert name of current
34 owner of the property and the owner's current address as shown on the
35 tax records of the jurisdiction in which the property is located].

36 5. The environmental covenant, amendment, or termination was
37 signed by [insert name and address of the agency].

1 6. The environmental covenant, amendment, or termination was filed
2 in the registry on [insert date of filing].

3 7. The full text of the covenant, amendment, or termination and
4 any other information required by the agency is on file and available
5 for inspection and copying in the registry maintained for that purpose
6 by the department of ecology."

7 (4) Failure to file a notice in the registry does not invalidate or
8 limit the application or enforceability of the covenant.

9 **Sec. 14.** RCW 70.105D.060 and 2005 c 211 s 3 are each amended to
10 read as follows:

11 The department's investigative and remedial decisions under RCW
12 70.105D.030 and 70.105D.050, its decisions regarding filing a lien
13 under RCW 70.105D.055, and its decisions regarding liable persons under
14 RCW 70.105D.020(16), 70.105D.040, 70.105D.050, and 70.105D.055 shall be
15 reviewable exclusively in superior court and only at the following
16 times: (1) In a cost recovery suit under RCW 70.105D.050(3); (2) in a
17 suit by the department to enforce an order or an agreed order, or seek
18 a civil penalty under this chapter; (3) in a suit for reimbursement
19 under RCW 70.105D.050(2); (4) in a suit by the department to compel
20 investigative or remedial action; (5) in a citizen's suit under RCW
21 70.105D.050(5); ~~((and))~~ (6) in a suit for removal or reduction of a
22 lien under RCW 70.105D.050(7); and (7) in a review of a determination
23 or failure to make a determination whether to seek a judicial
24 termination or modification of an environmental covenant under section
25 10 of this act. Except in suits for reduction or removal of a lien
26 under RCW 70.105D.050(7), the court shall uphold the department's
27 actions unless they were arbitrary and capricious. In suits for
28 reduction or removal of a lien under RCW 70.105D.050(7), the court
29 shall review such suits pursuant to the standards set forth in RCW
30 70.105D.050(7).

31 **Sec. 15.** RCW 70.105D.050 and 2005 c 211 s 2 are each amended to
32 read as follows:

33 (1) With respect to:

34 (a) Any release, or threatened release, for which the department
35 does not conduct or contract for conducting remedial action and for

1 which the department believes remedial action is in the public
2 interest(~~(τ)~~); and

3 (b) Any violation of an environmental covenant executed as an
4 element of a remedial action, the director shall issue orders or agreed
5 orders requiring potentially liable persons to provide the remedial
6 action or comply with the terms of the environmental covenant. Any
7 liable person who refuses, without sufficient cause, to comply with an
8 order or agreed order of the director is liable in an action brought by
9 the attorney general for:

10 ~~((a))~~ (i) Up to three times the amount of any costs incurred by
11 the state as a result of the party's refusal to comply; and

12 ~~((b))~~ (ii) A civil penalty of up to twenty-five thousand dollars
13 for each day the party refuses to comply.

14 The treble damages and civil penalty under this subsection apply to all
15 recovery actions filed on or after March 1, 1989.

16 (2) Any person who incurs costs complying with an order issued
17 under subsection (1) of this section may petition the department for
18 reimbursement of those costs. If the department refuses to grant
19 reimbursement, the person may within thirty days thereafter file suit
20 and recover costs by proving that he or she was not a liable person
21 under RCW 70.105D.040 and that the costs incurred were reasonable.

22 (3) The attorney general shall seek, by filing an action if
23 necessary, to recover the amounts spent by the department for
24 investigative and remedial actions and orders, and agreed orders,
25 including amounts spent prior to March 1, 1989.

26 (4) The attorney general may bring an action to secure such relief
27 as is necessary to protect human health and the environment under this
28 chapter.

29 (5)(a) Any person may commence a civil action to compel the
30 department to perform any nondiscretionary duty under this chapter. At
31 least thirty days before commencing the action, the person must give
32 notice of intent to sue, unless a substantial endangerment exists. The
33 court may award attorneys' fees and other costs to the prevailing party
34 in the action.

35 (b) Civil actions under this section and RCW 70.105D.060 may be
36 brought in the superior court of Thurston county or of the county in
37 which the release or threatened release exists.

1 (6) Any person who fails to provide notification of releases
2 consistent with RCW 70.105D.110 or who submits false information is
3 liable in an action brought by the attorney general for a civil penalty
4 of up to five thousand dollars per day for each day the party refuses
5 to comply.

6 (7) Any person who owns real property or lender holding a mortgage
7 on real property that is subject to a lien filed under RCW 70.105D.055
8 may petition the department to have the lien removed or the amount of
9 the lien reduced. If, after consideration of the petition and the
10 information supporting the petition, the department decides to deny the
11 request, the person may, within ninety days after receipt of the
12 department's denial, file suit for removal or reduction of the lien.
13 The person is entitled to removal of a lien filed under RCW
14 70.105D.055(2)(a) if they can prove by a preponderance of the evidence
15 that the person is not a liable party under RCW 70.105D.040. The
16 person is entitled to a reduction of the amount of the lien if they can
17 prove by a preponderance of the evidence:

18 (a) For liens filed under RCW 70.105D.055(2)(a), the amount of the
19 lien exceeds the remedial action costs the department incurred related
20 to cleanup of the real property; and

21 (b) For liens filed under RCW 70.105D.055(2)(c), the amount of the
22 lien exceeds the remedial action costs the department incurred related
23 to cleanup of the real property or exceeds the increase of the fair
24 market value of the real property solely attributable to the remedial
25 action conducted by the department.

26 **Sec. 16.** RCW 70.105D.020 and 2005 c 191 s 1 are each amended to
27 read as follows:

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

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

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

3 (4) "Environmental covenant" has the same meaning as defined in
4 section 3 of this act.

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

13 ((+5)) (6) "Federal cleanup law" means the federal comprehensive
14 environmental response, compensation, and liability act of 1980, 42
15 U.S.C. Sec. 9601 et seq., as amended by Public Law 99-499.

16 ((+6)) (7) "Foreclosure and its equivalents" means purchase at a
17 foreclosure sale, acquisition, or assignment of title in lieu of
18 foreclosure, termination of a lease, or other repossession, acquisition
19 of a right to title or possession, an agreement in satisfaction of the
20 obligation, or any other comparable formal or informal manner, whether
21 pursuant to law or under warranties, covenants, conditions,
22 representations, or promises from the borrower, by which the holder
23 acquires title to or possession of a facility securing a loan or other
24 obligation.

25 ((+7)) (8) "Hazardous substance" means:

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

29 (b) Any hazardous substance as defined in RCW 70.105.010(14) or any
30 hazardous substance as defined by rule pursuant to chapter 70.105 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+))~~ (9) "Independent remedial actions" means remedial actions
6 conducted without department oversight or approval, and not under an
7 order, agreed order, or consent decree.

8 ~~((+9+))~~ (10) "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+))~~ (11) "Indicia of ownership" means evidence of a security
23 interest, evidence of an interest in a security interest, or evidence
24 of an interest in a facility securing a loan or other obligation,
25 including any legal or equitable title to a facility acquired incident
26 to foreclosure and its equivalents. Evidence of such interests
27 includes, mortgages, deeds of trust, sellers interest in a real estate
28 contract, liens, surety bonds, and guarantees of obligations, title
29 held pursuant to a lease financing transaction in which the lessor does
30 not select initially the leased facility, or legal or equitable title
31 obtained pursuant to foreclosure and their equivalents. Evidence of
32 such interests also includes assignments, pledges, or other rights to
33 or other forms of encumbrance against the facility that are held
34 primarily to protect a security interest.

35 ~~((+11+))~~ (12) "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

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

7 ~~((+12+))~~ (13) "Owner or operator" means:

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

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

13 The term does not include:

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

22 (ii) A person who, without participating in the management of a
23 facility, holds indicia of ownership primarily to protect the person's
24 security interest in the facility. Holders after foreclosure and its
25 equivalent and holders who engage in any of the activities identified
26 in subsection ~~((+13+))~~ (14)(e) through (g) of this section shall not
27 lose this exemption provided the holder complies with all of the
28 following:

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

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

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

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

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

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

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

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

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

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

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

37 (E) Any remedial actions conducted by the fiduciary are in
38 compliance with any preexisting requirements identified by the

1 department, or, if the department has not identified such requirements
2 for the facility, the remedial actions are conducted consistent with
3 the rules adopted under this chapter; and

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

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

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

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

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

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

34 (D) If requested, the person allows the department, potentially
35 liable persons who are subject to an order, agreed order, or consent
36 decree, and the authorized employees, agents, or contractors of each,
37 access to the property to conduct remedial actions required by the

1 department. The person may attempt to negotiate an access agreement
2 before allowing access; and

3 (E) Legal withdrawal of ground water does not disqualify a person
4 from the exemption in this subsection (~~((+12+))~~) (13)(b)(iv).

5 (~~((+13+))~~) (14) "Participation in management" means exercising
6 decision-making control over the borrower's operation of the facility,
7 environmental compliance, or assuming or manifesting responsibility for
8 the overall management of the enterprise encompassing the day-to-day
9 decision making of the enterprise.

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

34 (~~((+14+))~~) (15) "Person" means an individual, firm, corporation,
35 association, partnership, consortium, joint venture, commercial entity,
36 state government agency, unit of local government, federal government
37 agency, or Indian tribe.

1 (~~(15)~~) (16) "Policing activities" means actions the holder takes
2 to (~~insure~~) ensure that the borrower complies with the terms of the
3 loan or security interest or actions the holder takes or requires the
4 borrower to take to maintain the value of the security. Policing
5 activities include: Requiring the borrower to conduct remedial actions
6 at the facility during the term of the security interest; requiring the
7 borrower to comply or come into compliance with applicable federal,
8 state, and local environmental and other laws, regulations, and permits
9 during the term of the security interest; securing or exercising
10 authority to monitor or inspect the facility including on-site
11 inspections, or to monitor or inspect the borrower's business or
12 financial condition during the term of the security interest; or taking
13 other actions necessary to adequately police the loan or security
14 interest such as requiring a borrower to comply with any warranties,
15 covenants, conditions, representations, or promises from the borrower.

16 (~~(16)~~) (17) "Potentially liable person" means any person whom the
17 department finds, based on credible evidence, to be liable under RCW
18 70.105D.040. The department shall give notice to any such person and
19 allow an opportunity for comment before making the finding, unless an
20 emergency requires otherwise.

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

35 (~~(18)~~) (19) "Primarily to protect a security interest" means the
36 indicia of ownership is held primarily for the purpose of securing
37 payment or performance of an obligation. The term does not include
38 indicia of ownership held primarily for investment purposes nor indicia

1 of ownership held primarily for purposes other than as protection for
2 a security interest. A holder may have other, secondary reasons, for
3 maintaining indicia of ownership, but the primary reason must be for
4 protection of a security interest. Holding indicia of ownership after
5 foreclosure or its equivalents for longer than five years shall be
6 considered to be holding the indicia of ownership for purposes other
7 than primarily to protect a security interest. For facilities that
8 have been acquired through foreclosure or its equivalents prior to July
9 23, 1995, this five-year period shall begin as of July 23, 1995.

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

16 ~~((+20+))~~ (21) "Release" means any intentional or unintentional
17 entry of any hazardous substance into the environment, including but
18 not limited to the abandonment or disposal of containers of hazardous
19 substances.

20 ~~((+21+))~~ (22) "Remedy" or "remedial action" means any action or
21 expenditure consistent with the purposes of this chapter to identify,
22 eliminate, or minimize any threat or potential threat posed by
23 hazardous substances to human health or the environment including any
24 investigative and monitoring activities with respect to any release or
25 threatened release of a hazardous substance and any health assessments
26 or health effects studies conducted in order to determine the risk or
27 potential risk to human health.

28 ~~((+22+))~~ (23) "Security interest" means an interest in a facility
29 created or established for the purpose of securing a loan or other
30 obligation. Security interests include deeds of trusts, sellers
31 interest in a real estate contract, liens, legal, or equitable title to
32 a facility acquired incident to foreclosure and its equivalents, and
33 title pursuant to lease financing transactions. Security interests may
34 also arise from transactions such as sale and leasebacks, conditional
35 sales, installment sales, trust receipt transactions, certain
36 assignments, factoring agreements, accounts receivable financing
37 arrangements, easements, and consignments, if the transaction creates

1 or establishes an interest in a facility for the purpose of securing a
2 loan or other obligation.

3 ~~((+23+))~~ (24) "Industrial properties" means properties that are or
4 have been characterized by, or are to be committed to, traditional
5 industrial uses such as processing or manufacturing of materials,
6 marine terminal and transportation areas and facilities, fabrication,
7 assembly, treatment, or distribution of manufactured products, or
8 storage of bulk materials, that are either:

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

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

14 ~~((+24+))~~ (25) "Workout activities" means those actions by which a
15 holder, at any time prior to foreclosure and its equivalents, seeks to
16 prevent, cure, or mitigate a default by the borrower or obligor; or to
17 preserve, or prevent the diminution of, the value of the security.
18 Workout activities include: Restructuring or renegotiating the terms
19 of the security interest; requiring payment of additional rent or
20 interest; exercising forbearance; requiring or exercising rights
21 pursuant to an assignment of accounts or other amounts owed to an
22 obligor; requiring or exercising rights pursuant to an escrow agreement
23 pertaining to amounts owed to an obligor; providing specific or general
24 financial or other advice, suggestions, counseling, or guidance; and
25 exercising any right or remedy the holder is entitled to by law or
26 under any warranties, covenants, conditions, representations, or
27 promises from the borrower.

28 ~~((+25+))~~ (26)(a) "Fiduciary" means a person acting for the benefit
29 of another party as a bona fide trustee; executor; administrator;
30 custodian; guardian of estates or guardian ad litem; receiver;
31 conservator; committee of estates of incapacitated persons; trustee in
32 bankruptcy; trustee, under an indenture agreement, trust agreement,
33 lease, or similar financing agreement, for debt securities,
34 certificates of interest or certificates of participation in debt
35 securities, or other forms of indebtedness as to which the trustee is
36 not, in the capacity of trustee, the lender. Except as provided in
37 subsection ~~((+12+))~~ (13)(b)(iii) of this section, the liability of a

1 fiduciary under this chapter shall not exceed the assets held in the
2 fiduciary capacity.

3 (b) "Fiduciary" does not mean:

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

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

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

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

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

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

28 ~~((+26+))~~ (27) "Fiduciary capacity" means the capacity of a person
29 holding title to a facility, or otherwise having control of an interest
30 in the facility pursuant to the exercise of the responsibilities of the
31 person as a fiduciary.

32 NEW SECTION. **Sec. 17.** This chapter modifies, limits, or
33 supersedes the federal electronic signatures in global and national
34 commerce act (15 U.S.C. Sec. 7001 et seq.) but does not modify, limit,
35 or supersede section 101 of that act (15 U.S.C. Sec. 7001(a)) or
36 authorize electronic delivery of any of the notices described in
37 section 103 of that act (15 U.S.C. Sec. 7003(b)).

1 NEW SECTION. **Sec. 18.** If any provision of this act or its
2 application to any person or circumstance is held invalid, the
3 remainder of the act or the application of the provision to other
4 persons or circumstances is not affected.

5 NEW SECTION. **Sec. 19.** Sections 1 through 13, 16, and 17 of this
6 act constitute a new chapter in Title 64 RCW.

7 NEW SECTION. **Sec. 20.** This act takes effect July 1, 2006.

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