

1 SENATE BILL NO. 6

2 INTRODUCED BY M. COLE

3 BY REQUEST OF THE ENVIRONMENTAL QUALITY COUNCIL

4

5 A BILL FOR AN ACT ENTITLED: "AN ACT LIMITING THE LIABILITY OF A PROPERTY OWNER WHOSE
6 PROPERTY IS TAKEN BY EMINENT DOMAIN TO INSTANCES OF NEGLIGENCE OR INTENTIONAL
7 CONDUCT; PROVIDING FOR INDEMNIFICATION FOR COSTS AND ATTORNEY FEES FOR A PROPERTY
8 OWNER WHO IS MADE A PARTY TO AN ACTION BUT IS NOT FOUND LIABLE FOR DAMAGES;
9 AMENDING SECTION 75-10-715, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

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11 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

12

13 NEW SECTION. **Section 1. Liability limitation -- SEVERAL LIABILITY -- defense costs.** (1) Subject to
14 subsection (2), a condemnee or a condemnee's successor in interest is not liable for damages that result
15 from the construction, use, or maintenance of a project on property in which the condemnee or the
16 condemnee's successor in interest has an interest UNLESS THE NEGLIGENCE OR INTENTIONAL CONDUCT OF THE
17 CONDEMNEE OR THE CONDEMNEE'S SUCCESSOR IN INTEREST IS A CAUSE OF THE DAMAGES.

18 (2) A condemnee or a condemnee's successor in interest WHO is liable for ~~the portion of~~ damages
19 ~~that results from the construction, use, or maintenance of a project on property in which the condemnee~~
20 ~~or the condemnee's successor in interest has an interest if the negligence or intentional conduct of the~~
21 ~~condemnee or the condemnee's successor in interest is a cause of the damages~~ UNDER SUBSECTION (1) IS
22 SEVERALLY LIABLE ONLY AND IS RESPONSIBLE ONLY FOR THE PERCENTAGE OF NEGLIGENCE ATTRIBUTABLE TO THE
23 CONDEMNEE OR THE CONDEMNEE'S SUCCESSOR IN INTEREST.

24 (3) If a condemnee or a condemnee's successor in interest is joined in an action for damages that
25 are alleged to result from the construction, use, or maintenance of a project on property in which the
26 condemnee or the condemnee's successor in interest has an interest, the project owner or operator is liable
27 for the costs and attorney fees incurred by the condemnee or the condemnee's successor in interest unless
28 the condemnee or the condemnee's successor in interest is found liable for damages under ~~subsection~~
29 SUBSECTIONS (1) AND (2).

30

1 **Section 2.** Section 75-10-715, MCA, is amended to read:

2 **"75-10-715. Liability -- reimbursement and penalties -- proceedings -- defenses and exclusions.**

3 (1) Except as provided in [section 1] and 75-10-742 through 75-10-752, notwithstanding any other
4 provision of law, and subject only to the defenses set forth in subsection (5) and the exclusions set forth
5 in subsection (7), the following persons are jointly and severally liable for a release or threatened release
6 of a hazardous or deleterious substance from a facility:

7 (a) a person who owns or operates a facility where a hazardous or deleterious substance was
8 disposed of;

9 (b) a person who at the time of disposal of a hazardous or deleterious substance owned or
10 operated a facility where the hazardous or deleterious substance was disposed of;

11 (c) a person who generated, possessed, or was otherwise responsible for a hazardous or
12 deleterious substance and who, by contract, agreement, or otherwise, arranged for disposal or treatment
13 of the substance or arranged with a transporter for transport of the substance for disposal or treatment;
14 and

15 (d) a person who accepts or has accepted a hazardous or deleterious substance for transport to
16 a disposal or treatment facility.

17 (2) A person identified in subsection (1) is liable for the following costs:

18 (a) all remedial action costs incurred by the state; and

19 (b) damages for injury to, destruction of, or loss of natural resources caused by the release or
20 threatened release, including the reasonable technical and legal costs of assessing and enforcing a claim
21 for the injury, destruction, or loss resulting from the release, unless the impaired natural resources were
22 specifically identified as an irreversible and irretrievable commitment of natural resources in an approved
23 final state or federal environmental impact statement or other comparable approved final environmental
24 analysis for a project or facility that was the subject of a governmental permit or license and the project
25 or facility was being operated within the terms of its permit or license.

26 (3) If the person liable under subsection (1) fails, without sufficient cause, to comply with a
27 department order issued pursuant to 75-10-711(4) or to properly provide remedial action upon notification
28 by the department pursuant to 75-10-711(3), the person may be liable for penalties in an amount not to
29 exceed two times the amount of any costs incurred by the state pursuant to this section.

30 (4) The department may initiate civil proceedings in district court to recover remedial action costs,

1 natural resource damages, or penalties under subsections (1), (2), and (3). Proceedings to recover costs
2 and penalties must be conducted in accordance with 75-10-722. Venue for any action to recover costs,
3 damages, or penalties lies in the county where the release occurred or where the person liable under
4 subsection (1) resides or has its principal place of business or in the district court of the first judicial
5 district.

6 (5) A person has a defense and is not liable under subsections (1), (2), and (3) if the person can
7 establish by a preponderance of the evidence that:

8 (a) the department failed to follow the notice provisions of 75-10-711 when required;

9 (b) the release did not emanate from any vessel, vehicle, or facility to which the person
10 contributed any hazardous or deleterious substance or over which the person had any ownership,
11 authority, or control and was not caused by any action or omission of the person;

12 (c) the release or threatened release occurred solely as a result of:

13 (i) an act or omission of a third party other than either an employee or agent of the person; or

14 (ii) an act or omission of a third party other than one whose act or omission occurs in connection
15 with a contractual relationship, existing directly or indirectly, with the person, if the person establishes by
16 a preponderance of the evidence that the person:

17 (A) exercised due care with respect to the hazardous or deleterious substance concerned, taking
18 into consideration the characteristics of the hazardous or deleterious substance in light of all relevant facts
19 and circumstances; and

20 (B) took precautions against foreseeable acts or omissions of a third party and the consequences
21 that could foreseeably result from those acts or omissions;

22 (d) the release or threat of release occurred solely as the result of an act of God or an act of war;

23 (e) the release or threatened release was from a facility for which a permit had been issued by the
24 department, the hazardous or deleterious substance was specifically identified in the permit, and the
25 release was within the limits allowed in the permit;

26 (f) in the case of assessment of penalties under subsection (3), factors beyond the control of the
27 person prevented the person from taking timely remedial action; or

28 (g) the person transported only household refuse, unless that person knew or reasonably should
29 have known that the hazardous or deleterious substance was present in the refuse.

30 (6) (a) For the purpose of subsection (5)(c)(ii), the term "contractual relationship" includes but is

1 not limited to land contracts, deeds, or other instruments transferring title or possession, unless the real
2 property on which the facility is located was acquired by the person after the disposal or placement of the
3 hazardous or deleterious substance on, in, or at the facility and one or more of the following circumstances
4 is also established by the person by a preponderance of the evidence:

5 (i) At the time the person acquired the facility, the person did not know and had no reason to
6 know that a hazardous or deleterious substance that is the subject of the release or threatened release was
7 disposed of on, in, or at the facility.

8 (ii) The person is a governmental entity that acquired the facility by escheat, lien foreclosure, or
9 through any other involuntary transfer or acquisition or through the exercise of eminent domain authority
10 by purchase or condemnation.

11 (iii) The person acquired the facility by inheritance or bequest.

12 (b) In addition to establishing one or more of the circumstances in subsection (6)(a)(i) through
13 (6)(a)(iii), the person shall establish that the person has satisfied the requirements of subsection (5)(c)(i)
14 or (5)(c)(ii).

15 (c) To establish that the person had no reason to know, as provided in subsection (6)(a)(i), the
16 person must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership
17 and uses of the property consistent with good commercial or customary practice in an effort to minimize
18 liability. For purposes of assessing this inquiry, the following must be taken into account:

19 (i) any specialized knowledge or experience on the part of the person;

20 (ii) the relationship of the purchase price to the value of the property if uncontaminated;

21 (iii) commonly known or reasonably ascertainable information about the property;

22 (iv) the obviousness of the presence or the likely presence of contamination on the property; and

23 (v) the ability to detect the contamination by appropriate inspection.

24 (d) (i) Subsections (5)(b) and (5)(c) or this subsection (6) may not diminish the liability of a
25 previous owner or operator of the facility who would otherwise be liable under this part.

26 (ii) Notwithstanding this subsection (6), if the previous owner or operator obtained actual
27 knowledge of the release or threatened release of a hazardous or deleterious substance at the facility when
28 the person owned the real property and then subsequently transferred ownership of the property to
29 another person without disclosing the knowledge, the previous owner is liable under subsections (1), (2),
30 and (3) and a defense under subsection (5)(b) or (5)(c) is not available to that person.

1 (e) Subsection (6) does not affect the liability under this part of a person who, by any act or
2 omission, caused or contributed to the release or threatened release of a hazardous or deleterious
3 substance that is the subject of the action relating to the facility.

4 (7) A person has an exclusion and is not liable under this section if:

5 (a) the person generated or disposed of only household refuse, unless the person knew or
6 reasonably should have known that the hazardous or deleterious substance was present in the refuse;

7 (b) the person owns or operates real property where hazardous or deleterious substances have
8 come to be located solely as a result of subsurface migration in an aquifer from a source or sources outside
9 the person's property, provided that the following conditions are met:

10 (i) the owner or operator did not cause, contribute to, or exacerbate the release or threatened
11 release of any hazardous or deleterious substances through any act or omission. The failure to take
12 affirmative steps to mitigate or address contamination that has migrated from a source outside the owner's
13 or operator's property does not, in the absence of exceptional circumstances, constitute an omission by
14 the owner or operator.

15 (ii) the person who caused, contributed to, or exacerbated the release or threatened release of any
16 hazardous or deleterious substance is not and was not an agent or employee of the owner or operator and
17 is not or was not in a direct or indirect contractual relationship with the owner or operator, unless the
18 department provides a written determination that an existing or proposed contractual relationship is an
19 insufficient basis to establish liability under this section;

20 (iii) there is no other basis of liability under subsection (1) for the owner or operator for the release
21 or threatened release of a hazardous or deleterious substance; and

22 (iv) the owner or operator cooperates with the department and all persons conducting
23 department-approved remedial actions on the property, including granting access and complying with and
24 implementing all required institutional controls;

25 (c) the person owns or occupies real property of 20 acres or less for residential purposes, provided
26 that the following conditions are met:

27 (i) the person did not cause, contribute to, or exacerbate the release or threatened release of any
28 hazardous or deleterious substance through any act or omission;

29 (ii) the person uses or allows the use of the real property for residential purposes. This exclusion
30 does not apply to any person who acquires or develops real property for commercial use or any use other

1 than residential use.

2 (iii) at the time the person purchased or occupied the real property, there were no visible indications
3 of contamination on the surface of the real property;

4 (iv) the person cooperates with the department and all persons conducting department-approved
5 remedial actions on the property, including granting access and complying with and implementing all
6 required institutional controls; and

7 (v) there is no other basis of liability under subsection (1) for the owner or occupier for the release
8 or threatened release of a hazardous or deleterious substance.

9 (8) A person is liable under this section if the department provides substantial credible evidence
10 that the person fails to satisfy any element of each exclusion in subsections (7)(a) through (7)(c).

11 (9) The liability of a fiduciary under the provisions of this part for a release or a threatened release
12 of a hazardous or deleterious substance from a facility held in a fiduciary capacity may not exceed the
13 assets held in the fiduciary capacity that are available to indemnify the fiduciary unless the fiduciary is
14 liable under this part independent of the person's ownership or actions taken in a fiduciary capacity.

15 (10) A person who holds indicia of ownership in a facility primarily to protect a security interest
16 is not liable under subsections (1)(a) and (1)(b) for having participated in the management of a facility
17 within the meaning of 75-10-701(15)(b) because of any one or any combination of the following:

18 (a) holding an interest in real or personal property when the interest is being held as security for
19 payment or performance of an obligation, including but not limited to a mortgage, deed of trust, lien,
20 security interest, assignment, pledge, or other right or encumbrance against real or personal property that
21 is furnished by the owner to ensure repayment of a financial obligation;

22 (b) requiring or conducting financial or environmental assessments of a facility or a portion of a
23 facility, making financing conditional upon environmental compliance, or providing environmental
24 information or reports;

25 (c) monitoring the operations conducted at a facility or providing access to a facility to the
26 department or its agents or to remedial action contractors;

27 (d) having the mere capacity or unexercised right to influence a facility's management of
28 hazardous or deleterious substances;

29 (e) giving advice, information, guidance, or direction concerning the administrative and financial
30 aspects, as opposed to day-to-day operational aspects, of a borrower's operations;

1 (f) providing general information concerning federal, state, or local laws governing the
2 transportation, storage, treatment, and disposal of hazardous or deleterious substances and concerning
3 the hiring of remedial action contractors;

4 (g) engaging in financial workouts, restructuring, or refinancing of a borrower's obligations;

5 (h) collecting rent, maintaining utility services, securing a facility from unauthorized entry, or
6 undertaking other activities to protect or preserve the value of the security interest in a facility;

7 (i) extending or denying credit to a person owning or in lawful possession of a facility;

8 (j) in an emergency, requiring or undertaking activities to prevent exposure of persons to
9 hazardous or deleterious substances or to contain a release;

10 (k) requiring or conducting remedial action in response to a release or threatened release if prior
11 notice is given to the department and the department approves of the remedial action; or

12 (l) taking title to a facility by foreclosure, provided that the holder of indicia of ownership, from
13 the time the holder acquires title, undertakes to sell, re-lease property held pursuant to a lease financing
14 transaction (whether by a new lease financing transaction or substitution of the lessee), or otherwise
15 divest itself of the property in a reasonably expeditious manner, using whatever commercially reasonable
16 means are relevant or appropriate with respect to the facility and taking all facts and circumstances into
17 consideration and provided that the holder does not:

18 (i) outbid or refuse a bid for fair consideration for the property or outbid or refuse a bid that would
19 effectively compensate the holder for the amount secured by the facility;

20 (ii) worsen the contamination at the facility;

21 (iii) incur liability under subsection (1)(c) or (1)(d) by arranging for disposal of or transporting
22 hazardous or deleterious substances; or

23 (iv) engage in conduct described in subsection (11).

24 (11) The protection from liability provided in subsections (9) and (10) is not available to a fiduciary
25 or to a person holding indicia of ownership primarily to protect a security interest if the fiduciary or person
26 through affirmative conduct:

27 (a) causes or contributes to a release of hazardous or deleterious substances from the facility;

28 (b) allows others to cause or contribute to a release of hazardous or deleterious substances; or

29 (c) in the case of a person holding indicia of ownership primarily to protect a security interest,
30 actually participates in the management of a facility by:

- 1 (i) exercising decisionmaking control over environmental compliance; or
2 (ii) exercising control at a level comparable to that of a manager of the enterprise with
3 responsibility for day-to-day decisionmaking either with respect to environmental compliance or
4 substantially all of the operational, as opposed to financial or administrative, aspects of the facility."

5

6 NEW SECTION. **Section 3. Codification instruction.** [Section 1] is intended to be codified as an
7 integral part of Title 70, chapter 30, part 3, and the provisions of Title 70, chapter 30, part 3, apply to
8 [section 1].

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10 NEW SECTION. **Section 4. Effective date.** [This act] is effective on passage and approval.

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