

HOUSE BILL NO. 434

INTRODUCED BY S. FITZPATRICK

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A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE COMPREHENSIVE ENVIRONMENTAL CLEANUP AND RESPONSIBILITY ACT LAWS; CLARIFYING COURT JURISDICTION OVER ORDERS AND NOTIFICATION LETTERS; CLARIFYING WHAT CONSTITUTES THE ADMINISTRATIVE RECORD; CLARIFYING CERTAIN LIABILITY REQUIREMENTS; AMENDING SECTIONS 75-10-711 AND 75-10-715, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

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

**Section 1.** Section 75-10-711, MCA, is amended to read:

**"75-10-711. Remedial action -- orders -- penalties -- judicial proceedings.** (1) The department may

take remedial action whenever:

(a) there has been a release or there is a substantial threat of a release into the environment that may present an imminent and substantial endangerment to the public health, welfare, or safety or the environment; and

(b) none of the persons who are liable or potentially liable under 75-10-715(1) and who have been given the opportunity by letter to properly and expeditiously perform the appropriate remedial action will properly and expeditiously perform the appropriate remedial action. Any person liable under 75-10-715(1) shall take immediate action to contain, remove, and abate the release.

(2) Whenever the department is authorized to act pursuant to subsection (1) or has reason to believe that a release has occurred or is about to occur, the department may undertake remedial action in the form of any investigation, monitoring, survey, testing, or other information gathering as authorized by 75-10-707 that is necessary and appropriate to identify the existence, nature, origin, and extent of the release or the threat of release and the extent and imminence of the danger to the public health, safety, or welfare or the environment.

(3) Except as provided in 75-10-712, the department is authorized to draw upon the fund to take action under subsection (1) if it has made diligent good faith efforts to determine the identity of the person or persons liable for the release or threatened release and:

(a) is unable to determine the identity of the liable person or persons in a manner consistent with the



1 need to take timely remedial action; or

2 (b) a person or persons determined by the department to be liable or potentially liable under  
3 75-10-715(1) have been informed in writing of the department's determination and have been requested by the  
4 department to take appropriate remedial action but are unable or unwilling to take action in a timely manner; and

5 (c) the written notice informs the person that if subsequently found liable pursuant to 75-10-715(1), the  
6 person may be required to reimburse the fund for the state's remedial action costs and may be subject to  
7 penalties pursuant to this part.

8 (4) Whenever the department is authorized to act pursuant to subsection (1), it may issue to any person  
9 liable under 75-10-715(1) cease and desist, remedial, or other orders as may be necessary or appropriate to  
10 protect the public health, safety, or welfare or the environment.

11 (5) (a) A person who violates or fails or refuses to comply with an order issued under 75-10-707 or this  
12 section may, in an action brought to enforce the order, be assessed a civil penalty of not more than \$10,000 for  
13 each day in which a violation occurs or a failure or refusal to comply continues. In determining the amount of any  
14 penalty assessed, the court may take into account:

15 (i) the nature, circumstances, extent, and gravity of the noncompliance;

16 (ii) with respect to the person liable under 75-10-715(1):

17 (A) the person's ability to pay;

18 (B) any prior history of violations;

19 (C) the degree of culpability; and

20 (D) the economic benefit or savings, if any, resulting from the noncompliance; and

21 (iii) any other matters as justice may require.

22 (b) Civil penalties collected under subsection (5)(a) must be deposited into the environmental quality  
23 protection fund established in 75-10-704.

24 (6) A court has jurisdiction to review an order or a letter of notification issued under 75-10-707 or this  
25 section only in the following actions:

26 (a) an action under 75-10-715 to recover remedial action costs or penalties or for contribution;

27 (b) an action to enforce an order issued under 75-10-707 or this section;

28 (c) an action to recover a civil penalty for violation of or failure to comply with an order issued under  
29 75-10-707 or this section;

30 (d) an action by a person to whom a letter of notification has been issued pursuant to this section; or

1           ~~(d)~~(e) an action by a person to whom an order or letter of notification has been issued to determine the  
 2 validity of the order or letter, only if the person has been in compliance and continues in compliance with the order  
 3 pending a decision of the court. However, the court has the authority to enjoin the enforcement of an order or  
 4 letter of notification upon a showing of good cause.

5           (7) In considering objections raised in a judicial action regarding orders or letters issued under this part,  
 6 the court shall uphold and enforce an order issued by the department unless the objecting party can demonstrate,  
 7 on the administrative record, that the department's decision to issue the order was arbitrary and capricious or  
 8 otherwise not in accordance with law. For purposes of court review of orders and letters of notification, the  
 9 administrative record consists of all materials in the department's files unless otherwise agreed to by the  
 10 department and the person.

11           (8) Instead of issuing a notification or an order under this section, the department may bring an action  
 12 for legal or equitable relief in the district court of the county where the release or threatened release occurred ~~or~~  
 13 ~~in the first judicial district~~ as may be necessary to abate any imminent and substantial endangerment to the public  
 14 health, safety, or welfare or the environment resulting from the release or threatened release. In considering  
 15 objections raised in the judicial action, the court shall uphold and enforce the department's decision on whether  
 16 and how to abate the endangerment unless the objecting party can demonstrate on the administrative record that  
 17 the department's decision was arbitrary and capricious or otherwise not in accordance with law.

18           (9) The department may take remedial action pursuant to subsection (1) at a site that is regulated under  
 19 the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Public Law  
 20 96-510, if the department determines that remedial action is necessary to carry out the purposes of this part.

21           (10) For purposes of court review of orders, letters of notification, or decisions on whether and how to  
 22 abate an imminent and substantial endangerment to public health, safety, or welfare or the environment, the  
 23 administrative record consists of all materials in the department's files unless otherwise agreed to by the  
 24 department and the person objecting to the order, letter, or decision."

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

27           **"75-10-715. Liability -- reimbursement and penalties -- proceedings -- defenses and exclusions.**

28 (1) Except as provided in 70-30-323 and 75-10-742 through 75-10-751, notwithstanding any other provision of  
 29 law, and subject only to the defenses set forth in subsection (5) and the exclusions set forth in subsection (7),  
 30 the following persons are jointly and severally liable for a release or threatened release of a hazardous or

1 deleterious substance from a facility:

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

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

6 (c) a person who generated, possessed, or was otherwise responsible for a hazardous or deleterious  
7 substance and who, by contract, agreement, or otherwise, ~~arranged~~ intended to arrange for disposal or treatment  
8 of the substance or arranged with a transporter for transport of the substance for disposal or treatment; and

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

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

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

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

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

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

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

1 (a) the department failed to provide notice to the person claiming the defense when required by  
2 75-10-711. Establishment of this defense only prohibits the department from collecting those costs incurred or  
3 encumbered by the department prior to providing notice to the person and does not provide the person a defense  
4 to any other liability.

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

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

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

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

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

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

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

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

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

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

26 (6) (a) For the purpose of subsection (5)(c)(ii), the term "contractual relationship" includes but is not  
27 limited to land contracts, deeds, or other instruments transferring title or possession, unless the real property on  
28 which the facility is located was acquired by the person after the disposal or placement of the hazardous or  
29 deleterious substance on, in, or at the facility and one or more of the following circumstances is also established  
30 by the person by a preponderance of the evidence:

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

4 (ii) The person is a governmental entity that acquired the facility by escheat, lien foreclosure, or through  
5 any other involuntary transfer or acquisition or through the exercise of eminent domain authority by purchase or  
6 condemnation pursuant to Title 70, chapter 30.

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

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

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

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

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

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

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

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

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

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

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

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

30 (a) the person generated or disposed of only household refuse, unless the person knew or reasonably

1 should have known that the hazardous or deleterious substance was present in the refuse;

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

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

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

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

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

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

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

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

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

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

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

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

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

9 (10) A person who holds indicia of ownership in a facility primarily to protect a security interest is not liable  
10 under subsections (1)(a) and (1)(b) for having participated in the management of a facility within the meaning of  
11 75-10-701(15)(b) because of any one or any combination of the following:

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

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

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

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

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

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

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

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

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

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

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

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

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

13 (ii) worsen the contamination at the facility;

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

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

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

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

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

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

24 (i) exercising decisionmaking control over environmental compliance; or

25 (ii) exercising control at a level comparable to that of a manager of the enterprise with responsibility for  
26 day-to-day decisionmaking either with respect to environmental compliance or substantially all of the operational,  
27 as opposed to financial or administrative, aspects of the facility."  
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29 **NEW SECTION. Section 3. Effective date.** [This act] is effective on passage and approval.

30 - END -