

HOUSE BILL NO. 434

INTRODUCED BY S. FITZPATRICK, SHOCKLEY

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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 AN
25 ORDER OR A LETTER OF NOTIFICATION ISSUED UNDER this 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 OR LETTER pending a decision of the court. However, the court has the authority to enjoin the enforcement of an
 4 order or 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. IF THE OBJECTING PARTY AND THE DEPARTMENT
 25 CANNOT AGREE AS TO WHAT PORTION OF THE ADMINISTRATIVE RECORD SHOULD BE TRANSMITTED TO THE COURT FOR
 26 REVIEW, THE OBJECTING PARTY SHALL PAY FOR THE COST OF TRANSMITTING THAT PORTION OF THE RECORD THAT THE
 27 OBJECTING PARTY WISHES THE COURT TO REVIEW."

28
 29 **Section 2.** Section 75-10-715, MCA, is amended to read:
 30 **"75-10-715. Liability -- reimbursement and penalties -- proceedings -- defenses and exclusions.**

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

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

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

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

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

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

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

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

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

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

1 principal place of business or in the district court of the first judicial district.

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

4 (a) the department failed to provide notice to the person claiming the defense when required by
5 75-10-711. Establishment of this defense only prohibits the department from collecting those costs incurred or
6 encumbered by the department prior to providing notice to the person and does not provide the person a defense
7 to any other liability.

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

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

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

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

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

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

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

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

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

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

29 (6) (a) For the purpose of subsection (5)(c)(ii), the term "contractual relationship" includes but is not
30 limited to land contracts, deeds, or other instruments transferring title or possession, unless the real property on

1 which the facility is located was acquired by the person after the disposal or placement of the hazardous or
2 deleterious substance on, in, or at the facility and one or more of the following circumstances is also established
3 by the person by a preponderance of the evidence:

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

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

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

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

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

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

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

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

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

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

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

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

29 (e) This subsection (6) does not affect the liability under this part of a person who, by any act or
30 omission, caused or contributed to the release or threatened release of a hazardous or deleterious substance

1 that is the subject of the action relating to the facility.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 (10) A person who holds indicia of ownership in a facility primarily to protect a security interest is not liable
13 under subsections (1)(a) and (1)(b) for having participated in the management of a facility within the meaning of
14 75-10-701(15)(b) because of any one or any combination of the following:

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

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

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

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

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

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

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

- 1 (h) collecting rent, maintaining utility services, securing a facility from unauthorized entry, or undertaking
2 other activities to protect or preserve the value of the security interest in a facility;
- 3 (i) extending or denying credit to a person owning or in lawful possession of a facility;
- 4 (j) in an emergency, requiring or undertaking activities to prevent exposure of persons to hazardous or
5 deleterious substances or to contain a release;
- 6 (k) requiring or conducting remedial action in response to a release or threatened release if prior notice
7 is given to the department and the department approves of the remedial action; or
- 8 (l) taking title to a facility by foreclosure, provided that the holder of indicia of ownership, from the time
9 the holder acquires title, undertakes to sell, re-lease property held pursuant to a lease financing transaction
10 (whether by a new lease financing transaction or substitution of the lessee), or otherwise divest itself of the
11 property in a reasonably expeditious manner, using whatever commercially reasonable means are relevant or
12 appropriate with respect to the facility and taking all facts and circumstances into consideration and provided that
13 the holder does not:
- 14 (i) outbid or refuse a bid for fair consideration for the property or outbid or refuse a bid that would
15 effectively compensate the holder for the amount secured by the facility;
- 16 (ii) worsen the contamination at the facility;
- 17 (iii) incur liability under subsection (1)(c) or (1)(d) by arranging for disposal of or transporting hazardous
18 or deleterious substances; or
- 19 (iv) engage in conduct described in subsection (11).
- 20 (11) The protection from liability provided in subsections (9) and (10) is not available to a fiduciary or to
21 a person holding indicia of ownership primarily to protect a security interest if the fiduciary or person through
22 affirmative conduct:
- 23 (a) causes or contributes to a release of hazardous or deleterious substances from the facility;
- 24 (b) allows others to cause or contribute to a release of hazardous or deleterious substances; or
- 25 (c) in the case of a person holding indicia of ownership primarily to protect a security interest, actually
26 participates in the management of a facility by:
- 27 (i) exercising decisionmaking control over environmental compliance; or
- 28 (ii) exercising control at a level comparable to that of a manager of the enterprise with responsibility for
29 day-to-day decisionmaking either with respect to environmental compliance or substantially all of the operational,
30 as opposed to financial or administrative, aspects of the facility."

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2 NEW SECTION. **Section 3. Effective date.** [This act] is effective on passage and approval.

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