

HOUSE BILL NO. 209
INTRODUCED BY C. HARRIS

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE REMEDIAL ACTION UPON RELEASE OF HAZARDOUS SUBSTANCE LAWS; AUTHORIZING THE SUBMITTAL OF CLAIMS FOR PRIVATE RESPONSE COSTS TO THE DEPARTMENT OF ENVIRONMENTAL QUALITY; AUTHORIZING THE DEPARTMENT TO RECOVER PRIVATE RESPONSE COSTS FROM LIABLE PARTIES AND TO REIMBURSE THE PRIVATE CLAIMANTS; PROVIDING A LIABILITY FOR PRIVATE RESPONSE COSTS; AUTHORIZING THE DEPARTMENT TO ISSUE ORDERS TO LIABLE PARTIES FOR THE REIMBURSEMENT OF PRIVATE RESPONSE COSTS; ESTABLISHING CLAIM PROCEDURES; PROHIBITING THE ACCEPTANCE OF A VOLUNTARY CLEANUP PLAN OR THE CLOSURE OF A FACILITY CLEANUP PLAN UNTIL PRIVATE RESPONSE COSTS ARE RECOVERED; PROVIDING FOR A PRIVATE RIGHT OF ACTION TO RECOVER COSTS FROM LIABLE PERSONS; AMENDING SECTIONS 75-10-701, 75-10-704, 75-10-711, 75-10-715, 75-10-718, 75-10-719, 75-10-720, 75-10-722, 75-10-724, 75-10-733, AND 75-10-738, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

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

Section 1. Section 75-10-701, MCA, is amended to read:

"75-10-701. Definitions. As used in this part, unless the context requires otherwise, the following definitions apply:

- (1) "Department" means the department of environmental quality provided for in 2-15-3501.
- (2) "Director" means the director of the department.
- (3) "Environment" means any surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the state of Montana or under the jurisdiction of the state of Montana.
- (4) (a) "Facility" means:
 - (i) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft; or
 - (ii) any site or area where a hazardous or deleterious substance has been deposited, stored, disposed of, placed, or otherwise come to be located.

(b) The term does not include any consumer product in consumer use.

(5) "Fiduciary" means a trustee, executor, administrator, personal representative, custodian, conservator, guardian, or receiver acting or holding property for the exclusive benefit of another person. The term does not include:

(a) a person who has previously owned or operated the property in a nonfiduciary capacity; or

(b) a person acting as fiduciary with respect to a trust or other fiduciary estate that has no objectively reasonable or substantial purpose apart from avoidance of or limitation of liability under this part. For the purposes of 75-10-715(9), the term does not include the state, a state agency, or a political subdivision of the state acting as trustee of natural resources within the state of Montana.

(6) "Foreclosure" means acquisition of title to property through foreclosure, purchase at foreclosure sale, assignment or acquisition of title in lieu of foreclosure, repossession in the case of a lease financing transaction, or acquisition of a right to title or other agreement in full or partial settlement of a loan obligation.

(7) "Fund" means the environmental quality protection fund established in 75-10-704.

(8) "Hazardous or deleterious substance" means a substance that because of its quantity, concentration, or physical, chemical, or infectious characteristics may pose an imminent and substantial threat to public health, safety, or welfare or the environment and is:

(a) a substance that is defined as a hazardous substance by section 101(14) of the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601(14), as amended;

(b) a substance identified by the administrator of the United States environmental protection agency as a hazardous substance pursuant to section 102 of CERCLA, 42 U.S.C. 9602, as amended;

(c) a substance that is defined as a hazardous waste pursuant to section 1004(5) of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6903(5), as amended, including a substance listed or identified in 40 CFR 261; or

(d) any petroleum product.

(9) "Household" means single and multiple residences, hotels and motels, bunkhouses, ranger stations, crew quarters, campgrounds, picnic grounds, day-use recreational areas, or similar structures or areas.

(10) "Household refuse" means garbage, trash, and sanitary wastes in septic tanks that are derived from a household.

(11) "Institutional control" means a restriction on the use of real property that mitigates the risk posed to public health, safety, and welfare and the environment. Institutional controls include but are not limited to:

(a) deed restrictions;

(b) easements;

(c) reservations;

(d) covenants, either restrictive or affirmative; and

(e) other mechanisms or physical restrictions for controlling present and future land use, including controlled ground water areas, that are placed upon real property to mitigate the risk to public health, safety, and welfare and the environment.

(12) "Natural resources" means land, fish, wildlife, biota, air, surface water, ground water, drinking water supplies, and any other resources within the state of Montana owned, managed, held in trust, or otherwise controlled by or appertaining to the state of Montana or a political subdivision of the state.

(13) "Orphan share" means the percentage share of remedial action costs for a facility that is attributable, under the procedures in 75-10-742 through 75-10-752, to identified but bankrupt or defunct persons who are not an affiliate of any viable person, unless affiliated by stock ownership.

(14) "Orphan share fund" means the fund for the orphan share account established in 75-10-743.

(15) (a) "Owns or operates" means owning, leasing, operating, managing activities at, or exercising control over the operation of a facility.

(b) The term does not include holding the indicia of ownership of a facility primarily to protect a security interest in the facility or other location unless the holder has participated in the management of the facility. The term does not apply to the state or a local government that acquired ownership or control through bankruptcy, tax delinquency, abandonment, lien foreclosure, or other circumstances in which the government acquires title by virtue of its function as sovereign, unless the state or local government has caused or contributed to the release or threatened release of a hazardous or deleterious substance from the facility. The term also does not include the owner or operator of the Milltown dam licensed under part 1 of the Federal Power Act (FERC license No. 2543-004) if a hazardous or deleterious substance has been released into the environment upstream of the dam and has subsequently come to be located in the reservoir created by the dam, unless the owner or operator is a person who would otherwise be liable for a release or threatened release under 75-10-715(1).

(16) "Person" means an individual, trust, firm, joint-stock company, joint venture, consortium, commercial entity, partnership, association, corporation, commission, state or state agency, political subdivision of the state, interstate body, or the federal government, including a federal agency.

(17) "Petroleum product" includes gasoline, crude oil (except for crude oil at production facilities subject to regulation under Title 82), fuel oil, diesel oil or fuel, lubricating oil, oil sludge or refuse, and any other

petroleum-related product or waste or fraction of the product or waste that is liquid at standard conditions of temperature and pressure (60 degrees F and 14.7 pounds per square inch absolute).

(18) "Private response costs" means only those reasonable, noninsured, out-of-pocket expenses incurred by an individual or small business owner to replace contaminated water supplies or to prevent exposure to air contaminated by a person liable under 75-10-715;

~~(18)~~(19) "Reasonably anticipated future uses" means likely future land or resource uses that take into consideration:

- (a) local land and resource use regulations, ordinances, restrictions, or covenants;
- (b) historical and anticipated uses of the facility;
- (c) patterns of development in the immediate area; and
- (d) relevant indications of anticipated land use from the owner of the facility and local planning officials.

~~(19)~~(20) "Release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing of a hazardous or deleterious substance directly into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous or deleterious substance), but excludes releases confined to the indoor workplace environment, the use of pesticides as defined in 80-8-102(30) when they are applied in accordance with approved federal and state labels, and the use of commercial fertilizers, as defined in 80-10-101(2), when applied as part of accepted agricultural practice.

~~(20)~~(21) "Remedial action" includes all notification, investigation, administration, monitoring, cleanup, restoration, mitigation, abatement, removal, replacement, acquisition, enforcement, legal action, health studies, feasibility studies, and other actions necessary or appropriate to respond to a release or threatened release.

~~(21)~~(22) "Remedial action contract" means a written contract or agreement entered into by a remedial action contractor with the state, or with a potentially liable person acting pursuant to an order or request issued by the department, the United States, or any federal agency, to provide a remedial action with respect to a release or threatened release of a hazardous or deleterious substance.

~~(22)~~(23) "Remedial action contractor" means:

- (a) any person who enters into and is carrying out a remedial action contract; or
- (b) any person who is retained or hired by a person described in subsection ~~(22)~~(23)(a) to provide services relating to a remedial action.

~~(23)~~(24) "Remedial action costs" means reasonable costs that are attributable to or associated with a remedial action at a facility, including but not limited to the costs of administration, investigation, legal or

enforcement activities, contracts, feasibility studies, or health studies."

Section 2. Section 75-10-704, MCA, is amended to read:

"75-10-704. Environmental quality protection fund. (1) There is in the state special revenue fund an environmental quality protection fund to be administered as a revolving fund by the department. The department is authorized to expend amounts from the fund necessary to carry out the purposes of this part.

(2) The fund may be used by the department only to carry out the provisions of this part ~~and~~, for remedial actions taken by the department, and for the reimbursement of private response costs that are recovered pursuant to this part in response to a release of hazardous or deleterious substances.

(3) The department shall:

(a) except as provided in subsection (7), establish and implement a system, including the preparation of a priority list, for prioritizing sites for remedial action based on potential effects on human health and the environment; and

(b) investigate, negotiate, and take legal action, as appropriate, to identify liable persons, to obtain the participation and financial contribution of liable persons for the remedial action, to achieve remedial action, ~~and~~ to recover costs and damages incurred by the state, and to seek recovery of private response costs submitted pursuant to [section 5].

(4) There must be deposited in the fund:

(a) all penalties, forfeited financial assurance, natural resource damages, ~~and~~ remedial action costs, and private response costs recovered pursuant to 75-10-715 and 75-10-722;

(b) all administrative penalties assessed pursuant to 75-10-714 and all civil penalties assessed pursuant to 75-10-711(5);

(c) funds appropriated to the fund by the legislature;

(d) funds received from the interest income of the resource indemnity trust fund pursuant to 15-38-202;

(e) funds received from the interest income of the fund; and

(f) funds received from settlements pursuant to 75-10-719(7).

(5) Whenever a legislative appropriation is insufficient to carry out the provisions of this part and additional money remains in the fund, the department shall seek additional authority to spend money from the fund through the budget amendment process provided for in Title 17, chapter 7, part 4.

(6) Whenever the amount of money in the fund is insufficient to carry out remedial action, the department may apply to the governor for a grant from the environmental contingency account established pursuant to

75-1-1101.

(7) (a) There is established a state special revenue account for all funds donated or granted from private parties to remediate a specific release at a specific facility. There must be deposited into the account the interest income earned on the account. A person is not liable under 75-10-715 solely as a result of contributing to this account.

(b) Funds donated or granted for a specific project pursuant to this subsection (7) must be accumulated in the fund until the balance of the donated or granted funds is sufficient, as determined by the department, to remediate the facility pursuant to the requirements of 75-10-721 for which the funds are donated.

(c) If the balance of the fund created in this subsection (7), as determined by the department pursuant to the requirements of 75-10-721, is not sufficient to remediate the facility within 1 year from the date of the initial contribution, all donated or granted funds, including any interest on those donated or granted funds, must be returned to the grantor.

(d) If the balance for a specific project is determined by the department to be sufficient to remediate the facility pursuant to the requirements of 75-10-721, the department shall give that site high priority for remedial action, using the funds donated under this subsection (7).

(e) This subsection (7) is not intended to delay, to interfere with, or to diminish the authority or actions of the department to investigate, negotiate, and take legal action, as appropriate, to identify liable persons, to obtain the participation and financial contribution of liable persons for the remedial action, to achieve remedial action, and to recover costs and damages incurred by the state.

(f) The department shall expend the funds in a manner that maximizes the application of the funds to physically remediating the specific release.

(8) (a) A person may donate in-kind services to remediate a specific release at a specific facility pursuant to subsection (7). A person who donates in-kind services is not liable under 75-10-715 solely as a result of the contribution of in-kind services.

(b) A person who donates in-kind services with respect to remediating a specific release at a specific facility is not liable under this part to any person for injuries, costs, damages, expenses, or other liability that results from the release or threatened release, including but not limited to claims for indemnification or contribution and claims by third parties for death, personal injury, illness, loss of or damage to property, or economic loss.

(c) Immunity from liability, pursuant to subsection (8)(b), does not apply in the case of a release that is caused by conduct of the entity providing in-kind services that is negligent or grossly negligent or that constitutes

intentional misconduct.

(d) When a person is liable under 75-10-715 for costs or damages incurred as a result of a release or threatened release of a hazardous or deleterious substance, the person may not avoid that liability or responsibility under 75-10-711 by subsequent donations of money or in-kind services under the provisions of subsection (7) and this subsection (8).

(e) Any donated in-kind services that are employed as part of a remedial action pursuant to this subsection (8) must be approved by the department as appropriate remedial action."

Section 3. 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) the appropriate remedial action will not be done properly and expeditiously by any person liable under 75-10-715(1) and each person that is liable or potentially liable under 75-10-715(1) has been given the opportunity by letter to 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 need to take timely remedial action; or

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

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

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

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

- (i) the nature, circumstances, extent, and gravity of the noncompliance;
- (ii) with respect to the person liable under 75-10-715(1):
 - (A) the person's ability to pay;
 - (B) any prior history of violations;
 - (C) the degree of culpability; and
 - (D) the economic benefit or savings, if any, resulting from the noncompliance; and
- (iii) any other matters as justice may require.

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

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

(a) an action under 75-10-715 to recover remedial action costs, private response costs submitted pursuant to [section 5], or penalties or for contribution;

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

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

(d) an action by a person to whom an order has been issued to determine the validity of the order, only if the person has been in compliance and continues in compliance with the order pending a decision of the court.

(7) In considering objections raised in a judicial action regarding orders issued under this part, the court

shall uphold and enforce an order issued by the department unless the objecting party can demonstrate, on the administrative record, that the department's decision to issue the order was arbitrary and capricious or otherwise not in accordance with law.

(8) Instead of issuing a notification or an order under this section, the department may bring an action for legal or equitable relief in the district court of the county where the release or threatened release occurred or in the first judicial district as may be necessary to abate any imminent and substantial endangerment to the public health, safety, or welfare or the environment resulting from the release or threatened release.

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

Section 4. Section 75-10-715, MCA, is amended to read:

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

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

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

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

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

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

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

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

(b) all private response costs submitted pursuant to [section 5]; and

~~(b)(c)~~ damages for injury to, destruction of, or loss of natural resources caused by the release or threatened release, including the reasonable technical and legal costs of assessing and enforcing a claim for the

injury, destruction, or loss resulting from the release, unless the impaired natural resources were specifically identified as an irreversible and irretrievable commitment of natural resources in an approved final state or federal environmental impact statement or other comparable approved final environmental analysis for a project or facility that was the subject of a governmental permit or license and the project or facility was being operated within the terms of its permit or license.

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

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

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

- (a) the department failed to follow the notice provisions of 75-10-711 when required;
- (b) the release did not emanate from any vessel, vehicle, or facility to which the person contributed any hazardous or deleterious substance or over which the person had any ownership, authority, or control and was not caused by any action or omission of the person;
- (c) the release or threatened release occurred solely as a result of:
 - (i) an act or omission of a third party other than either an employee or agent of the person; or
 - (ii) an act or omission of a third party other than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the person, if the person establishes by a preponderance of the evidence that the person:
 - (A) exercised due care with respect to the hazardous or deleterious substance concerned, taking into consideration the characteristics of the hazardous or deleterious substance in light of all relevant facts and circumstances; and
 - (B) took precautions against foreseeable acts or omissions of a third party and the consequences that could foreseeably result from those acts or omissions;
- (d) the release or threat of release occurred solely as the result of an act of God or an act of war;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(d) (i) Subsections (5)(b) and (5)(c) or this subsection (6) may not diminish the liability of a previous

owner or operator of the facility who would otherwise be liable under this part.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(ii) worsen the contamination at the facility;

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

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

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

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

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

(c) in the case of a person holding indicia of ownership primarily to protect a security interest, actually

participates in the management of a facility by:

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

NEW SECTION. Section 5. Private response costs -- submission of claims. (1) A person who is an individual or a small business, as defined by 33-27-103, may submit claims for private response costs to the department. The department shall include claims that comply with this section in any complaint, order, or other action initiated under this part against any person liable under 75-10-715.

(2) Claims must be certified by the department to be reasonable, actual, and necessary expenditures that were incurred by the claimant as the result of a release by a person liable under 75-10-715. Examples of expenditures may include but are not limited to the following:

- (a) provision of temporary potable water supplies;
- (b) installation and operation of water treatment equipment;
- (c) replacement of contaminated wells and pumps;
- (d) connection to a public water supply;
- (e) installation of impervious barriers to isolate environments;
- (f) provision and operation of venting or air pressure devices; and
- (g) any additional mandatory or preventative private response costs incurred by the individual or small business that would not have been necessary except for the release.

(3) Claims must be dated, signed by the claimant, certified that they were noninsured, out-of-pocket expenses paid by the claimant, and specific as to the service provided and the cost of the service obtained.

(4) The department may accept claims for private response costs until the date it files an action or order to recover state remedial action costs from a person liable under 75-10-715.

(5) The department shall make diligent good faith efforts to notify persons with private response claims prior to filing a cost recovery action under this part.

NEW SECTION. Section 6. Private response costs -- prohibitions. (1) A person may not file a claim for private response costs against the orphan share under the procedures in 75-10-742 through 75-10-752 or against the orphan share fund or account established in 75-10-743.

(2) A person may not seek recovery of private response costs that have been paid by a third-party provider, by an insurer, through a settlement arrangement, as the result of any action taken under 75-10-724, or by any other means.

(3) The department may not seek cost recovery of private response costs that have been previously paid by persons other than the claimant.

(4) The state is not financially liable for reimbursing any portion of a private response claim. A reimbursement of private response costs by the department under 75-10-722 may only be made from those costs recovered, if any, by the department from a person liable under 75-10-715 in an action on behalf of the claimant. If less than full cost recovery is obtained, then reimbursements for the state's remedial action costs, private response costs, penalties, and legal expenses, if any, must be apportioned in equal percentages.

Section 7. Section 75-10-718, MCA, is amended to read:

"75-10-718. Liability of remedial action contractor. (1) A person who is a remedial action contractor with respect to a release or threatened release of a hazardous or deleterious substance is not liable under this part to any person for injuries, costs, damages, expenses, or other liability that results from the release or threatened release, including but not limited to claims for indemnification or contribution and claims by third parties for death, personal injury, illness, loss or damage to property, or economic loss.

(2) Immunity from liability, pursuant to subsection (1), does not apply in the case of a release that is caused by conduct of the remedial action contractor that is negligent or grossly negligent or that constitutes intentional misconduct.

(3) This section does not affect the liability of a person under a warranty under federal, state, or common law or the liability to an employee of an employer who is a remedial action contractor under any provision of law, including any provision of a law relating to workers' compensation.

(4) A state agency or state employee or an employee of a political subdivision who provides services relating to remedial action while acting within the scope of the entity's or individual's authority as a governmental agency or employee has the same exemption from liability as is provided to the remedial action contractor under this section.

(5) The defense provided by 75-10-715(5)(c) is not available to a person liable under 75-10-715(1) with respect to remedial action costs, private response costs, or damages caused by an act or omission of a remedial action contractor.

(6) Except as provided in subsections (4) and (5), this section does not affect the liability under this part

of a person other than a remedial action contractor.

(7) This section does not affect the plaintiff's burden of establishing liability under this part.

(8) This section does not minimize the liability, lessen the standard of liability, or otherwise shield from liability a potentially liable person under 75-10-715 or section 107 of CERCLA for costs or damages incurred as a result of a release or threatened release of a hazardous or deleterious substance."

Section 8. Section 75-10-719, MCA, is amended to read:

"75-10-719. Settlement -- bar to contribution liability. (1) A person who has resolved that person's liability to the state arising under 75-10-715 or section 107(a)(1) through (a)(4) of CERCLA, 42 U.S.C. 9607(a)(1) through (a)(4), in an administrative or judicially approved settlement is not liable for claims for contribution regarding matters addressed in the settlement. The settlement does not discharge any of the other potentially liable persons unless its terms provide a discharge. The terms of the settlement may reduce the potential liability of the other potentially liable persons by the amount of the settlement.

(2) If the state has obtained less than complete relief from a person who has resolved that person's liability to the state in an administrative or judicially approved settlement, the state may bring an action against any other person who has not resolved that person's liability.

(3) A person who has resolved, in whole or in part, that person's liability to the state for the release, or for remedial action costs, or for private response costs in an administrative or judicially approved settlement may seek contribution from a person who is not party to a settlement referred to in subsection (1).

(4) Whenever practicable and in the public interest, as determined by the director of the department, the department may, as promptly as possible, reach a final settlement with a potentially liable or liable person under 75-10-715 in an administrative or civil action under 75-10-711 if the settlement involves only a minor portion of the remedial action costs or private response costs at the facility concerned and, in the judgment of the department, taking into account the toxicity of the hazardous or deleterious substances involved and the person's contribution of hazardous or deleterious substances in relation to the total volume of hazardous or deleterious substances at the facility, the conditions in any of the following subsections (4)(a) through (4)(d) are met:

(a) the person is one whose liability is based solely on 75-10-715(1)(c) or (1)(d) and who presents substantial credible evidence that the person contributed less than 0.002% of the total volume or less than 100 gallons or 200 pounds of materials containing hazardous or deleterious substances at a facility that received hazardous or deleterious substances from multiple contributors. The department may not require the payment of remedial action costs or private response costs from this person.

(b) (i) the person is one whose liability is based solely on 75-10-715(1)(c) or (1)(d) and who presents substantial credible evidence that the person arranged for disposal or treatment of less than 5% of the total quantity of solid waste or hazardous or deleterious substances disposed of at a facility that received solid waste or hazardous or deleterious substances from multiple contributors.

(ii) For the purposes of subsection (5)(a) and this subsection (4)(b) only, the term "solid waste" means:

- (A) all putrescible and nonputrescible wastes, including garbage, rubbish, refuse, or ashes;
- (B) sludge from sewage treatment plants, water supply plants, or air pollution control facilities;
- (C) construction and demolition wastes;
- (D) dead animals, including offal;
- (E) discarded home and industrial appliances; and
- (F) wood products or wood byproducts and inert materials.

(c) (i) the person:

(A) is the owner of the real property on or in which the facility is located;

(B) did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous or deleterious substance at the facility; and

(C) did not contribute to the release or threat of release of a hazardous or deleterious substance at the facility through any action or omission.

(ii) This subsection (4)(c) does not apply if the person purchased the real property with actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous or deleterious substance.

(d) the person presents substantial credible evidence that the person has a defense under 75-10-715(5).

(5) When reaching a settlement under subsection (4)(b), (4)(c), or (4)(d), the department may require the payment of remedial action costs and private response costs not to exceed two times the person's reasonably projected liability for remedial action costs and private response costs as determined by the department. Except as provided in subsection (6), the settlement must contain a reservation of rights clause in the event that the department obtains new information showing that the settling person no longer qualifies for a settlement because:

(a) the solid waste or hazardous or deleterious substances contributed by the person was of a greater volume or toxicity than originally estimated; or

(b) the settlement was reached under subsection (4)(c) and, after settlement, the department finds that the person had actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous or deleterious substance.

(6) A person who agrees to a liability settlement may avoid the reservation of rights clause under subsection (5) by paying remedial action costs and private response costs in the amount of four times the person's reasonably projected liability for remedial action costs and private response costs as determined by the department.

(7) All funds received as a result of settlements under this section must be paid in the following order of priority:

(a) to the department as reimbursement for its remedial action costs at the facility and as reimbursement for private response costs submitted pursuant to [section 5];

(b) to liable persons as reimbursement for remedial action costs at the facility. In the event of an allocation under 75-10-742 through 75-10-752, the reimbursement must be in proportion to each liable person's share of liability as determined under the provisions of 75-10-750 or 75-10-751;

(c) the remainder, if any:

(i) to the orphan share fund provided in 75-10-743 if the facility went through the allocation process provided in 75-10-742 through 75-10-752; or

(ii) to the fund provided in 75-10-704 if the facility did not undergo the allocation process provided in 75-10-742 through 75-10-752.

(8) Any person who enters into a settlement under this section may not be subject to or assigned a share in the allocation process provided in 75-10-742 through 75-10-752.

(9) As part of an administrative or judicially approved settlement agreement, the department may require the liable person to provide financial assurance, in an amount determined by the department, to ensure the long-term operation and maintenance of the remedial action site. The liable person shall provide the financial assurance by any one method or combination of methods satisfactory to the department, including but not limited to insurance, guarantee, performance or other surety bond, letter of credit, qualification as a self-insurer, or other demonstration of financial capability."

Section 9. Section 75-10-720, MCA, is amended to read:

"75-10-720. Condemnation -- creation of state lien. (1) Whenever the department determines that property upon which a release or threatened release of a hazardous or deleterious substance has occurred may present an imminent and substantial endangerment to the public health, safety, or welfare or the environment, the department may condemn the property for public use to mitigate the threat. The taking of the property must be conducted in accordance with the procedure set forth in Title 70, chapter 30, parts 1 through 3.

(2) All costs, including private response costs, penalties, and natural resource damages for which a person has been judicially determined to be liable to the state pursuant to 75-10-715 constitute a lien in favor of the state upon all property and rights to the property that belong to the person.

(3) The lien imposed by this section arises at the time notice incorporating a description of the property subject to the remedial action and an identification of the amount of costs, including private response costs submitted pursuant to [section 5], penalties, and natural resource damages is filed with the clerk and recorder of the county in which the real property is located. A copy of the notice must be served by certified mail upon the liable person.

(4) The costs, including private response costs, penalties, and natural resource damages constituting the lien may be recovered in an action in the district court for the district in which the property is located or in which the remedial action is occurring or has occurred. This section does not affect the right of the state or any person to bring an action against a person to recover all costs, including private response costs, penalties, and natural resource damages for which that person is liable under this part or any other provision of state or federal law.

(5) The lien must continue until the liability for the costs and damages incurred as a result of the release of a hazardous or deleterious substance is satisfied.

(6) If the department expends money from the fund for orphan share remedial action costs at a facility or for a facility at which a reimbursed orphan share exists, the state has a lien upon the facility for the unrecovered costs. The lien:

(a) may not exceed the increase in fair market value of the property attributable to the unfunded portion of the remedial action at the time of a subsequent sale or other disposition of the property;

(b) arises at the time costs are first incurred;

(i) by the department with respect to a remedial action at the facility; or

(ii) by an individual or small business with respect to private response costs;

(c) must be filed according to subsection (3); and

(d) continues until the earlier of satisfaction of the lien or recovery of all remedial action costs incurred at the facility and the recovery of all private response costs submitted pursuant to [section 5].

(7) Payment of any liens under this section must be deposited in one of the two accounts from which the remedial action costs originated, including the fund established in 75-10-704 or the orphan share fund established in 75-10-743."

Section 10. Section 75-10-722, MCA, is amended to read:

"75-10-722. Payment of state costs and penalties. (1) The department shall keep a record of the state's remedial action costs and a record of private response costs submitted pursuant to [section 5].

(2) Based on this record, the department may require a person liable under 75-10-715 to pay the amount of the state's remedial action costs, the private response costs, and, if applicable, penalties under 75-10-715(3).

(3) If the state's remedial action costs, any private response costs submitted pursuant to [section 5], and penalties are not paid by the liable person to the department within 60 days after receipt of notice that the costs and penalties are due, the department shall bring an action in the name of the state to recover the amount owed plus reasonable legal expenses.

(4) An action to recover remedial action costs and private response costs may be brought under this section at any time after any ~~remedial action~~ costs have been incurred, and the court may enter a declaratory judgment on liability for ~~remedial action~~ the costs that is binding on any subsequent action or actions to recover further remedial action costs or private response costs. The court may disallow costs or damages only if the person liable under 75-10-715 can show on the record that the costs are not reasonable and are not consistent with this part.

(5) An initial action brought under 75-10-715(4) or a contribution action for costs incurred under this part must be commenced within 6 years after initiation of physical onsite construction of the final permanent remedy.

(6) Remedial action costs, private response costs, and any penalties recovered by the state under 75-10-715 must be deposited into the environmental quality protection fund established in 75-10-704.

(7) Within 30 days of receipt by the department, private response costs recovered by the state must be paid to the person who submitted the claim for costs to the department pursuant to [section 5]."

Section 11. Section 75-10-724, MCA, is amended to read:

"75-10-724. Private right of action. (1) Any person who receives notice under 75-10-711, who is held jointly and severally liable under 75-10-715, or who initiates a voluntary cleanup under the provisions of 75-10-730 through 75-10-738 may bring a private right of action, including a claim for contribution or declaratory relief, against any other person who is liable or potentially liable under 75-10-715 for the recovery of remedial action costs. In resolving contribution claims, the court shall allocate remedial action costs among the liable persons based on the factors set out in 75-10-750.

(2) An individual or small business that has incurred private response costs resulting from the action or inaction of any other person who is liable under 75-10-715 may bring a private right of action in district court to

recover those costs, including legal costs incurred in bringing the action if the action is successful.

(3) An individual or small business may not recover private response costs from both an action taken pursuant to subsection (2) and from cost recovery efforts available elsewhere in this part."

Section 12. Section 75-10-733, MCA, is amended to read:

"75-10-733. Voluntary cleanup plan and reimbursement of remedial action costs and private response costs. (1) Any person may submit an application for the approval of a voluntary cleanup plan to the department under the provisions of this section.

(2) A voluntary cleanup plan must include:

(a) an environmental assessment of the facility that includes the information required in 75-10-734;

(b) a remediation proposal that includes the information required in 75-10-734 and that meets the requirements of 75-10-721; and

(c) the written consent of current owners of the facility or property to both the implementation of the voluntary cleanup plan and access to the facility by the applicant and its agents and the department.

(3) The applicant shall reimburse the department for any remedial action costs that the state incurs in the review and oversight of a voluntary cleanup plan.

(4) The department may not approve a voluntary cleanup plan under 76-10-736 unless the applicant has reimbursed all claims for private response costs submitted pursuant to [section 5].

~~(4)~~(5) The department may approve a voluntary cleanup plan that provides for phases of remediation or that addresses only a portion of the facility. To the extent that the original environmental assessment required under 75-10-734 addresses subsequent phases of remediation, the applicant may rely on that assessment when submitting voluntary cleanup plans for subsequent phases of remediation."

Section 13. Section 75-10-738, MCA, is amended to read:

"75-10-738. Closure. (1) After completion of the voluntary cleanup plan, an applicant may petition the department for closure of the facility under 75-10-730 through 75-10-738.

(2) Within 60 days of receipt of a petition for closure, weather permitting, the department shall conduct a review to determine that the releases or threatened releases addressed in the voluntary cleanup plan do not pose a significant threat to public health, welfare, or safety or to the environment as determined in accordance with 75-10-721 and that the applicant has:

(a) implemented all appropriate remedial actions;

- (b) if necessary, provided for long-term funding for facility maintenance or monitoring; ~~and~~
- (c) reimbursed the department for all remedial action costs of the voluntary cleanup; and
- (d) reimbursed all private response costs submitted pursuant to [section 5].

(3) In the event that the petition for closure is not approved by the department, the department shall promptly provide the applicant with a written statement of the reasons for denial. Written notification that the petition is approved by the department must include the following language:

"Based upon the information provided by [insert name(s) of applicant(s)] concerning property located at [insert address], it is the opinion of the Montana Department of Environmental Quality that upon completion of the voluntary cleanup plan, no further action is required to ensure that this facility, when used for [insert purposes identified], is protective of existing and proposed uses and does not pose a significant risk to public health, safety, or welfare or the environment at the facility with regard to releases or threatened releases addressed in the voluntary cleanup plan. The department reserves the right to conduct or require further remedial action at this facility if a new release occurs or if the department receives new or different information than presented in the approved voluntary cleanup plan."

(4) After completion of a portion of a facility addressed in the voluntary cleanup plan, the department shall issue a letter of completion notice to the applicant if the department determines that the applicant has satisfied the requirements of subsection (2)."

NEW SECTION. **Section 14. Codification instruction.** [Sections 5 and 6] are intended to be codified as an integral part of Title 75, chapter 10, part 7, and the provisions of Title 75, chapter 10, part 7, apply to [sections 5 and 6].

NEW SECTION. **Section 15. Severability.** If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. **Section 16. Effective date.** [This act] is effective on passage and approval.

- END -

