

SENATE BILL NO. 200

INTRODUCED BY

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A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE COMPREHENSIVE ENVIRONMENTAL CLEANUP AND RESPONSIBILITY ACT; CLARIFYING THE EXEMPTION FROM LIABILITY FOR PERSONS HOLDING INDICIA OF OWNERSHIP PRIMARILY TO PROTECT SECURITY INTERESTS; AMENDING SECTIONS 75-10-701, 75-10-711, 75-10-715, 75-10-718, AND 75-10-722, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

STATEMENT OF INTENT

A statement of intent is included with this bill because of the authorization granted to the department in 75-10-702 to adopt rules to implement Title 75, chapter 10, part 7, including implementation of the exemption from liability for persons holding indicia of ownership primarily to protect a security interest. To date, the department has not adopted rules under this section.

The legislature finds that existing state law related to the liability of persons holding security interests for environmental contamination is unclear and that this lack of clarity has created uncertainty on the part of security interest holders as to whether they are liable for environmental contamination caused by their borrowers or other third parties. The uncertainty has negatively affected the availability of credit in Montana.

In enacting Montana's Comprehensive Environmental Cleanup and Responsibility Act (CECRA), the legislature modeled the statute after and borrowed many terms from the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). The legislature specifically borrowed the term "own or operate", which excludes from liability those persons who, without participating in the management of the facility, hold indicia of ownership merely to protect a security interest.

When significant questions arose under CERCLA as to the scope of the terms "indicia of ownership" and "participating in the management of the facility", the federal government devoted substantial effort to developing a federal policy and a rule that employ a framework of specific tests to provide clearer articulation of a lender's scope of liability under CERCLA, both to governmental agencies and to third parties. The April 1992 rule, which appears at 40 CFR 300.1100, et seq., was preceded by many public hearings and public comment periods. Although the rule was recently judged to be technically beyond

1 EPA's rulemaking authority, the contents of the rule still constitute EPA policy on the scope of the secured  
2 creditor exemption under CERCLA and the legislature finds that the rule in its current form provides a  
3 well-reasoned basis for interpreting the identical language in CECRA.

4 Therefore the legislature finds that the clarification of potential liability in a manner consistent with  
5 federal statutes, current EPA policy, and the regulations at 40 CFR 300.1100, et seq., is desirable in order  
6 to provide certainty for security interest holders, including persons engaged in lease financing, to enhance  
7 the availability of credit, and to encourage responsible practices by those security interest holders and  
8 borrowers to protect the public health and environment.

9 The legislature also finds that uncertainty exists in state law regarding the potential liability of  
10 certain fiduciaries for environmental contamination on property held in their fiduciary capacity and  
11 determines that a similar limited exemption from liability should apply to fiduciaries.

12 Therefore, in adopting rules under 75-10-702 to implement the exemption under 75-10-701(10)(b)  
13 for holders of "the indicia of ownership", the department of health and environmental sciences shall adopt  
14 rules consistent with the revisions to CECRA contained in this bill, including rules that address fiduciaries  
15 within the exemption. The rules also must be consistent with and parallel to the federal regulations set  
16 forth at 40 CFR 300.1100, et seq.

17

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

19

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

21 **"75-10-701. Definitions.** As used in this part, unless the context requires otherwise, the following  
22 definitions apply:

23 (1) "Department" means the department of health and environmental sciences provided for in Title  
24 2, chapter 15, part 21.

25 (2) "Director" means the director of the department of health and environmental sciences.

26 (3) "Environment" means any surface water, ground water, drinking water supply, land surface  
27 or subsurface strata, or ambient air within the state of Montana or under the jurisdiction of the state of  
28 Montana.

29 (4) (a) "Facility" means:

30 (i) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer

1 or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container,  
2 motor vehicle, rolling stock, or aircraft; or

3 (ii) any site or area where a hazardous or deleterious substance has been deposited, stored,  
4 disposed of, placed, or otherwise come to be located.

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

6 (5) "Fiduciary" means a trustee, executor, administrator, guardian, receiver, conservator, personal  
7 representative, or other person holding property in a fiduciary capacity.

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

12 ~~(5)~~(7) "Fund" means the environmental quality protection fund established in 75-10-704.

13 ~~(6)~~(8) "Hazardous or deleterious substance" means a substance that because of its quantity,  
14 concentration, or physical, chemical, or infectious characteristics may pose an imminent and substantial  
15 threat to public health, safety, or welfare or the environment and is:

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

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

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

24 (d) any petroleum product.

25 ~~(7)~~(9) "Natural resources" means land, fish, wildlife, biota, air, surface water, ground water,  
26 drinking water supplies, and any other ~~such~~ resources within the state of Montana owned, managed, held  
27 in trust or otherwise controlled by or appertaining to the state of Montana or a political subdivision of the  
28 state.

29 ~~(8)~~(10) (a) "Owns or operates" means owning, leasing, operating, managing activities at, or  
30 exercising control over the operation of a facility.

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

12 ~~(9)~~(11) "Person" means an individual, trust, firm, joint stock company, joint venture, consortium,  
13 commercial entity, partnership, association, corporation, commission, state or state agency, political  
14 subdivision of the state, interstate body, or the federal government, including a federal agency.

15 ~~(10)~~(12) "Petroleum product" includes gasoline, crude oil (except for crude oil at production  
16 facilities subject to regulation under Title 82), fuel oil, diesel oil or fuel, lubricating oil, oil sludge or refuse,  
17 and any other petroleum-related product or waste or fraction ~~thereof~~ of the product or waste that is liquid  
18 at standard conditions of temperature and pressure (60 degrees F and 14.7 pounds per square inch  
19 absolute).

20 ~~(11)~~(13) "Release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging,  
21 injecting, escaping, leaching, dumping, or disposing of a hazardous or deleterious substance directly into  
22 the environment (including the abandonment or discarding of barrels, containers, and other closed  
23 receptacles containing any hazardous or deleterious substance), but excludes releases confined to the  
24 indoor workplace environment, the use of pesticides as defined in 80-8-102(30) when they are applied in  
25 accordance with approved federal and state labels, and the use of commercial fertilizers as defined in  
26 80-10-101(2) when applied as part of accepted agricultural practice.

27 ~~(12)~~(14) "Remedial action" includes all notification, investigation, administration, monitoring,  
28 cleanup, restoration, mitigation, abatement, removal, replacement, acquisition, enforcement, legal action,  
29 health studies, feasibility studies, and other actions necessary or appropriate to respond to a release or  
30 threatened release.

1           ~~(13)~~(15) "Remedial action contract" means a written contract or agreement entered into by a  
 2 remedial action contractor with the state, or with a potentially liable person acting pursuant to an order or  
 3 request issued by the department, the United States, or any federal agency, to provide a remedial action  
 4 with respect to a release or threatened release of a hazardous or deleterious substance.

5           ~~(14)~~(16) "Remedial action contractor" means:

6           (a) any person who enters into and is carrying out a remedial action contract; or

7           (b) any person who is retained or hired by a person described in subsection ~~(14)~~(a) (16)(a) to  
 8 provide services relating to a remedial action.

9           ~~(15)~~(17) "Remedial action costs" means reasonable costs that are attributable to or associated with  
 10 a remedial action at a facility, including but not limited to the costs of administration, investigation, legal  
 11 or enforcement activities, contracts, feasibility studies, or health studies.

12           (18) "Third party" means a person or entity, other than a state or state agency, a political  
 13 subdivision of the state, or the federal government or a federal agency, that seeks to enforce federal, state,  
 14 or local environmental requirements or remedies, that seeks to recover remedial action costs, or that seeks  
 15 liability apportionment or contribution under 75-10-724.

16           (19) "Third-party liability" means liability to a third party for any claims that arise from  
 17 contamination of property by hazardous or deleterious substance, including but not limited to claims for  
 18 personal injury, property damage, environmental cleanup, and remedial action costs expended by a third  
 19 party."

20  
 21           **Section 2.** Section 75-10-711, MCA, is amended to read:

22           **"75-10-711. Remedial action -- orders -- penalties -- judicial proceedings.** (1) The department may  
 23 take remedial action whenever:

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

27           (b) the appropriate remedial action will not be done properly and expeditiously by any person liable  
 28 under 75-10-715(1).

29           (2) Whenever the department is authorized to act pursuant to subsection (1) or has reason to  
 30 believe that a release has occurred or is about to occur, the department may undertake remedial action in

1 the form of any investigation, monitoring, survey, testing, or other information-gathering as authorized by  
 2 75-10-707 that is necessary and appropriate to identify the existence, nature, origin, and extent of the  
 3 release or the threat of release and the extent and imminence of the danger to the public health, safety,  
 4 or welfare or the environment.

5 (3) Any person liable under 75-10-715(1) must take immediate action to contain, remove, and  
 6 abate the release. Except as provided in 75-10-712, the department is authorized to draw upon the fund  
 7 to take action under subsection (1) if it has made diligent good faith efforts to determine the identity of the  
 8 person or persons liable for the release or threatened release and:

9 (a) is unable to determine the identity of the liable person or persons in a manner consistent with  
 10 the need to take timely remedial action; or

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

14 (c) the written notice to each person informs ~~him~~ the person that if ~~he is~~ subsequently found liable  
 15 pursuant to 75-10-715(1), ~~he~~ the person may be required to reimburse the fund for the state's remedial  
 16 action costs and may be subject to penalties pursuant to ~~75-10-716(3)~~ 75-10-711(5).

17 (4) Whenever the department is authorized to act pursuant to subsection (1) or has reason to  
 18 believe that a release that may pose an imminent and substantial threat to the public health, safety, or  
 19 welfare or the environment has occurred or is about to occur, it may issue to any person liable under  
 20 75-10-715(1) cease and desist, remedial, or other orders as may be necessary or appropriate to protect the  
 21 public health, safety, or welfare or the environment.

22 (5) (a) A person who violates or fails or refuses to comply with an order issued under 75-10-707  
 23 or this section may, in an action brought to enforce the order, be assessed a civil penalty of not more than  
 24 \$10,000 for each day in which a violation occurs or a failure or refusal to comply continues. In determining  
 25 the amount of any penalty assessed, the court may take into account:

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

27 (ii) with respect to the person liable under 75-10-715(1), ~~his;~~

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

29 (B) any prior history of ~~such~~ violations;

30 (C) the degree of culpability; and

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

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

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

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

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

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

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

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

14           (7) In considering objections raised in a judicial action regarding orders issued under this part, the  
15 court shall uphold and enforce an order issued by the department unless the objecting party can  
16 demonstrate, on the administrative record, that the department's decision to issue the order was arbitrary  
17 and capricious or otherwise not in accordance with law.

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

23           (9) The department may take remedial action pursuant to subsection (1) at a site that is regulated  
24 under the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Public  
25 Law 96-510, if the department determines that remedial action is necessary to carry out the purposes of  
26 this part."  
27

28           **Section 3.** Section 75-10-715, MCA, is amended to read:

29           **"75-10-715. Liability -- reimbursement and penalties -- proceedings -- defenses.** (1)  
30 Notwithstanding any other provision of law and subject only to the defenses set forth in subsection ~~(5)~~ (7),

1 the following persons are jointly and severally liable for a release or threatened release of a hazardous or  
2 deleterious substance from a facility:

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

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

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

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

13 (2) A fiduciary or person who holds indicia of ownership in a facility solely to protect a security  
14 interest is not liable under subsections (1)(a) and (1)(b) or for third-party liability if the fiduciary or person  
15 is holding indicia of ownership for any of the following reasons:

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

20 (b) in the case of a fiduciary, acquiring control over or ownership status of a facility when the status  
21 arises by law upon appointment or when requiring or conducting any activity that is necessary to carry out  
22 the fiduciary's duties and that falls within the scope of the fiduciary's authority;

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

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

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

30 (f) giving advice, information, guidance, or direction concerning the general business and financial



- 1 aspects of a borrower's operations;
- 2 (g) providing general information concerning federal, state, or local laws governing the  
3 transportation, storage, treatment, and disposal of hazardous or deleterious substances and concerning the  
4 hiring of remedial action contractors;
- 5 (h) engaging in financial workouts, restructuring, or refinancing of a borrower's obligations;
- 6 (i) collecting rent, maintaining utility services, securing a facility from unauthorized entry, or  
7 undertaking other activities to protect or preserve the value of the security interest in a facility;
- 8 (j) extending or denying credit to a person owning or in lawful possession of a facility;
- 9 (k) taking title to a facility by foreclosure, provided that the holder of indicia of ownership, from  
10 the time the holder acquires title, undertakes to sell, re-lease property held pursuant to a lease financing  
11 transaction (whether by a new lease financing transaction or substitution of the lessee), or otherwise divest  
12 itself of the property in a reasonably expeditious manner, using whatever commercially reasonable means  
13 are relevant or appropriate with respect to the facility and taking all facts and circumstances into  
14 consideration, and provided that the holder does not:
- 15 (i) outbid or refuse a bid for fair consideration for the property;
- 16 (ii) worsen the contamination at the facility;
- 17 (iii) incur liability under 75-10-715(1)(c) by arranging for disposal of hazardous or deleterious  
18 substances; or
- 19 (iv) engage in conduct described in subsection (3)(a) or (3)(b);
- 20 (l) in an emergency, requiring or undertaking activities to prevent exposure of persons to hazardous  
21 or deleterious substances or to contain a release; or
- 22 (m) requiring or conducting remedial action in response to a release or threatened release, provided  
23 that prior notice is given to the department and the department approves of the remedial action.
- 24 (3) The protection from liability provided in subsection (2) is not available to a fiduciary or to a  
25 person holding indicia of ownership primarily to protect a security interest if the fiduciary or person:
- 26 (a) through affirmative conduct, knowingly or recklessly:
- 27 (i) causes or contributes to a new release of hazardous or deleterious substances; or
- 28 (ii) allows others to cause or contribute to a new release of hazardous or deleterious substances;
- 29 or
- 30 (b) in the case of a person holding indicia of ownership primarily to protect a security interest,

1 through affirmative conduct participates in the management of a facility by:

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

3 (ii) exercising control at a level comparable to that of a manager of the enterprise with responsibility

4 for day-to-day decisionmaking either with respect to environmental compliance or substantially all of the

5 operational, but not financial or administrative, aspects of the facility.

6 ~~(2)~~(4) A person identified in subsection (1) is liable for the following costs:

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

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

15 ~~(3)~~(5) If the person liable under ~~75-10-715~~ subsection (1) fails, without sufficient cause, to comply  
16 with a department order issued pursuant to 75-10-711(4) or to properly provide remedial action upon  
17 notification by the department pursuant to 75-10-711(3), the person may be liable for penalties in an  
18 amount not to exceed two times the amount of any costs incurred by the state pursuant to this section.

19 ~~(4)~~(6) The department may initiate civil proceedings in district court to recover remedial action  
20 costs, natural resource damages, or penalties under subsections (1), ~~through (3)~~ (4), and (5). Proceedings  
21 to recover costs and penalties must be conducted in accordance with 75-10-722. Venue for any action to  
22 recover costs, damages, or penalties lies in the county where the release occurred or where the person  
23 liable under ~~75-10-715~~ subsection (1) resides or has its principal place of business or in the district court  
24 of the first judicial district.

25 ~~(5)~~(7) ~~No~~ A person is not liable under subsections (1), ~~through (3)~~ (4), and (5) if ~~that~~ the person  
26 can establish by a preponderance of the evidence that:

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

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

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

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

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

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

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

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

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

15 (f) in the case of assessment of penalties under subsection ~~(3)~~ (5), ~~that~~ factors beyond the control  
16 of the person prevented the person from taking timely remedial action; or

17 (g) the person accepted only household refuse (garbage, trash, or septic tank sanitary wastes  
18 generated by single or multiple residences, hotels, motels, restaurants, or similar facilities) for transport to  
19 a solid waste disposal facility, unless that person knew or reasonably should have known that the  
20 hazardous or deleterious substance was present in the refuse.

21 ~~(6)~~ (8) (a) For the purpose of subsection ~~(5)(e)(iii)~~ (7)(c)(ii), the term "contractual relationship"  
22 includes but is not limited to land contracts, deeds, or other instruments transferring title or possession,  
23 unless the real property on which the facility is located was acquired by the person after the disposal or  
24 placement of the hazardous or deleterious substance on, in, or at the facility and one or more of the  
25 following circumstances is also established by the person by a preponderance of the evidence:

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

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

1 by purchase or condemnation.

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

3 (b) In addition to establishing one or more of the circumstances in subsection ~~(6)(a)(i)~~ (8)(a)(i)  
4 through ~~(6)(a)(iii)~~ (8)(a)(iii), the person shall establish that ~~he~~ the person has satisfied the requirements of  
5 ~~subsections (5)(c)(i)~~ subsection (7)(c)(i) or ~~(5)(c)(ii)~~ (7)(c)(ii).

6 (c) To establish that the person had no reason to know, as provided in subsection ~~(6)(a)(i)~~ (8)(a)(i),  
7 the person must have undertaken, at the time of acquisition, all appropriate inquiry into the previous  
8 ownership and uses of the property consistent with good commercial or customary practice in an effort to  
9 minimize liability. For purposes of assessing this inquiry, the following must be taken into account:

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

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

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

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

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

15 (d) (i) Nothing in subsections ~~(5)(b)~~ (7)(b) and ~~(5)(c)~~ (7)(c) or in this subsection ~~(6)~~ (8) may diminish  
16 the liability of a previous owner or operator of the facility who would otherwise be liable under this part.

17 (ii) Notwithstanding this subsection ~~(6)~~ (8), if the previous owner or operator obtained actual  
18 knowledge of the release or threatened release of a hazardous or deleterious substance at the facility when  
19 the person owned the real property and then subsequently transferred ownership of the property to another  
20 person without disclosing the knowledge, the previous owner is liable under subsections (1), ~~through (3)~~  
21 (4), and (5) and no defense under subsection ~~(5)(b)~~ (7)(b) or ~~(5)(c)~~ (7)(c) is available to that person.

22 (e) Nothing in this subsection ~~(6)~~ (8) affects the liability under this part of a person who, by any  
23 act or omission, caused or contributed to the release or threatened release of a hazardous or deleterious  
24 substance that is the subject of the action relating to the facility."  
25

26 **Section 4.** Section 75-10-718, MCA, is amended to read:

27 **"75-10-718. Liability of remedial action contractor.** (1) A person who is a remedial action  
28 contractor with respect to a release or threatened release of a hazardous or deleterious substance is not  
29 liable under this part to any person for injuries, costs, damages, expenses, or other liability that results from  
30 the release or threatened release, including but not limited to claims for indemnification or contribution and

1 claims by third parties for death, personal injury, illness, loss or damage to property, or economic loss.

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

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

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

12 (5) The defense provided by ~~75-10-715(5)(e)~~ 75-10-715(7)(c) is not available to a person liable  
13 under 75-10-715(1) with respect to remedial action costs or damages caused by an act or omission of a  
14 remedial action contractor.

15 (6) Except as provided in subsections (4) and (5), this section does not affect the liability under  
16 this part of a person other than a remedial action contractor.

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

18 (8) This section does not minimize the liability, lessen the standard of liability, or otherwise shield  
19 from liability a potentially liable person under 75-10-715 or section 107 of CERCLA for costs or damages  
20 incurred as a result of a release or threatened release of a hazardous or deleterious substance."  
21

22 **Section 5.** Section 75-10-722, MCA, is amended to read:

23 **"75-10-722. Payment of state costs and penalties.** (1) The department shall keep a record of the  
24 state's remedial action costs.

25 (2) Based on this record, the department shall require a person liable under 75-10-715 to pay the  
26 amount of the state's remedial action costs and, if applicable, penalties under ~~75-10-715(3)~~ 75-10-715(5).

27 (3) If the state's remedial action costs and penalties are not paid by the liable person to the  
28 department within 60 days after receipt of notice that the costs and penalties are due, the department shall  
29 bring an action in the name of the state to recover the amount owed plus reasonable legal expenses.

30 (4) An action to recover remedial action costs may be brought under this section at any time after

1 any remedial action costs have been incurred, and the court may enter a declaratory judgment on liability  
2 for remedial action costs that is binding on any subsequent action or actions to recover further remedial  
3 action costs. The court may disallow costs or damages only if the person liable under 75-10-715 can show  
4 on the record that the costs are not reasonable and are not consistent with this part.

5 (5) An initial action for recovery of remedial action costs must be commenced within 6 years after  
6 initiation of physical onsite construction of the remedial action.

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

9

10 NEW SECTION. **Section 6. Effective date.** [This act] is effective on passage and approval.

11

-END-

## 1 SENATE BILL NO. 200

2 INTRODUCED BY LYNCH, SHEA, GROSFIELD, CRIPPEN, HALLIGAN, CHRISTIAENS, ANDERSON,  
3 QUILICI, BROWN, PAVLOVICH, HARP, GRINDE

4  
5 A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE COMPREHENSIVE ENVIRONMENTAL CLEANUP  
6 AND RESPONSIBILITY ACT; CLARIFYING THE EXEMPTION FROM LIABILITY FOR PERSONS HOLDING  
7 INDICIA OF OWNERSHIP PRIMARILY TO PROTECT SECURITY INTERESTS; EXTENDING A LIMITED  
8 EXEMPTION TO FIDUCIARIES; DEFINING "FORECLOSURE" AND "FIDUCIARY"; CLARIFYING THE STATUTE  
9 OF LIMITATIONS FOR COST RECOVERY TO CONFORM TO THE FEDERAL COMPREHENSIVE  
10 ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT; AMENDING SECTIONS 75-10-701,  
11 75-10-711, 75-10-715, 75-10-718, AND 75-10-722, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE  
12 DATE."

13  
14 STATEMENT OF INTENT

15 A statement of intent is included with this bill because of the authorization granted to the  
16 department in 75-10-702 to adopt rules to implement Title 75, chapter 10, part 7, including implementation  
17 of the exemption from liability for persons holding indicia of ownership primarily to protect a security  
18 interest. To date, the department has not adopted rules under this section.

19 The legislature finds that existing state law related to the liability of persons holding security  
20 interests for environmental contamination is unclear and that this lack of clarity has created uncertainty on  
21 the part of security interest holders as to whether they are liable for environmental contamination caused  
22 by their borrowers or other third parties. The uncertainty has negatively affected the availability of credit  
23 in Montana.

24 In enacting Montana's Comprehensive Environmental Cleanup and Responsibility Act (CECRA), the  
25 legislature modeled the statute after and borrowed many terms from the federal Comprehensive  
26 Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). The legislature specifically  
27 borrowed the term "own or operate", which excludes from liability those persons who, without participating  
28 in the management of the facility, hold indicia of ownership merely to protect a security interest.

29 When significant questions arose under CERCLA as to the scope of the terms "indicia of ownership"  
30 and "participating in the management of the facility", the federal government devoted substantial effort to

1 developing a federal policy and a rule that employ a framework of specific tests to provide clearer  
 2 articulation of a lender's scope of liability under CERCLA, both to governmental agencies and to third  
 3 parties. The April 1992 rule, which appears at 40 CFR 300.1100, et seq., was preceded by many public  
 4 hearings and public comment periods. Although the rule was recently judged to be technically beyond  
 5 EPA's rulemaking authority, the contents of the rule still constitute EPA policy on the scope of the secured  
 6 creditor exemption under CERCLA and the legislature finds that the rule in its current form provides a  
 7 well-reasoned basis for interpreting the identical language in CECRA.

8 Therefore the legislature finds that the clarification of potential liability in a manner consistent with  
 9 federal statutes, current EPA policy, and the regulations at 40 CFR 300.1100, et seq., is desirable in order  
 10 to provide certainty for security interest holders, including persons engaged in lease financing, to enhance  
 11 the availability of credit, and to encourage responsible practices by those security interest holders and  
 12 borrowers to protect the public health and environment.

13 The legislature also finds that uncertainty exists in state law regarding the potential liability of  
 14 certain fiduciaries for environmental contamination on property held in their fiduciary capacity and  
 15 determines that a ~~similar~~ limited exemption from liability, COMPARABLE TO THE ONE BEING PROPOSED  
 16 FOR ACTION BY CONGRESS UNDER CERCLA, should apply to fiduciaries AND THAT IT IS NECESSARY  
 17 TO ADD LANGUAGE CONCERNING FIDUCIARIES TO TITLE 75, CHAPTER 10, PART 7.

18 Therefore, in adopting rules under 75-10-702 to implement the exemption under 75-10-701(10)(b)  
 19 for holders of "the indicia of ownership", the department of health and environmental sciences shall adopt  
 20 rules consistent with the revisions to CECRA contained in this bill, including rules that address fiduciaries  
 21 within the exemption. The rules also must be consistent with ~~and parallel to~~ the federal regulations set  
 22 forth at 40 CFR 300.1100, et seq.

23 FINALLY, THE LEGISLATURE INTENDS THAT THE LIMITED EXEMPTIONS FOR SECURED  
 24 CREDITORS AND FIDUCIARIES THAT ARE CLARIFIED AND GRANTED BY THIS LEGISLATION EXTEND  
 25 NOT ONLY TO LIABILITY ASSERTED BY GOVERNMENTAL ENTITIES BUT ALSO EXTEND TO CLAIMS BY  
 26 ANY THIRD PARTIES FOR CLEANUP OR FOR COST RECOVERY OR CONTRIBUTION.

27  
 28 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

29  
 30 **Section 1.** Section 75-10-701, MCA, is amended to read:



1           **"75-10-701. Definitions.** As used in this part, unless the context requires otherwise, the following  
2 definitions apply:

3           (1) "Department" means the department of health and environmental sciences provided for in Title  
4 2, chapter 15, part 21.

5           (2) "Director" means the director of the department of health and environmental sciences.

6           (3) "Environment" means any surface water, ground water, drinking water supply, land surface  
7 or subsurface strata, or ambient air within the state of Montana or under the jurisdiction of the state of  
8 Montana.

9           (4) (a) "Facility" means:

10           (i) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer  
11 or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container,  
12 motor vehicle, rolling stock, or aircraft; or

13           (ii) any site or area where a hazardous or deleterious substance has been deposited, stored,  
14 disposed of, placed, or otherwise come to be located.

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

16           (5) "Fiduciary" means a trustee, executor, administrator, PERSONAL REPRESENTATIVE,  
17 CUSTODIAN, CONSERVATOR, guardian, OR receiver, conservator, personal representative, or other person  
18 ACTING OR holding property in a fiduciary capacity. FOR THE EXCLUSIVE BENEFIT OF ANOTHER PERSON.  
19 THE TERM DOES NOT INCLUDE:

20           (A) A PERSON WHO HAS PREVIOUSLY OWNED OR OPERATED THE PROPERTY IN A  
21 NONFIDUCIARY CAPACITY; OR

22           (B) A PERSON ACTING AS FIDUCIARY WITH RESPECT TO A TRUST OR OTHER FIDUCIARY  
23 ESTATE THAT HAS NO OBJECTIVELY REASONABLE OR SUBSTANTIAL PURPOSE APART FROM  
24 AVOIDANCE OF OR LIMITATION OF LIABILITY UNDER THIS PART.

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

29           ~~(5)~~(7) "Fund" means the environmental quality protection fund established in 75-10-704.

30           ~~(6)~~(8) "Hazardous or deleterious substance" means a substance that because of its quantity,

1 concentration, or physical, chemical, or infectious characteristics may pose an imminent and substantial  
2 threat to public health, safety, or welfare or the environment and is:

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

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

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

11 (d) any petroleum product.

12 ~~7~~(9) "Natural resources" means land, fish, wildlife, biota, air, surface water, ground water,  
13 drinking water supplies, and any other ~~such~~ resources within the state of Montana owned, managed, held  
14 in trust or otherwise controlled by or appertaining to the state of Montana or a political subdivision of the  
15 state.

16 ~~8~~(10) (a) "Owns or operates" means owning, leasing, operating, managing activities at, or  
17 exercising control over the operation of a facility.

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

29 ~~9~~(11) "Person" means an individual, trust, firm, joint stock company, joint venture, consortium,  
30 commercial entity, partnership, association, corporation, commission, state or state agency, political

1 subdivision of the state, interstate body, or the federal government, including a federal agency.

2 ~~(10)~~(12) "Petroleum product" includes gasoline, crude oil (except for crude oil at production  
3 facilities subject to regulation under Title 82), fuel oil, diesel oil or fuel, lubricating oil, oil sludge or refuse,  
4 and any other petroleum-related product or waste or fraction ~~thereof~~ of the product or waste that is liquid  
5 at standard conditions of temperature and pressure (60 degrees F and 14.7 pounds per square inch  
6 absolute).

7 ~~(11)~~(13) "Release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging,  
8 injecting, escaping, leaching, dumping, or disposing of a hazardous or deleterious substance directly into  
9 the environment (including the abandonment or discarding of barrels, containers, and other closed  
10 receptacles containing any hazardous or deleterious substance), but excludes releases confined to the  
11 indoor workplace environment, the use of pesticides as defined in 80-8-102(30) when they are applied in  
12 accordance with approved federal and state labels, and the use of commercial fertilizers as defined in  
13 80-10-101(2) when applied as part of accepted agricultural practice.

14 ~~(12)~~(14) "Remedial action" includes all notification, investigation, administration, monitoring,  
15 cleanup, restoration, mitigation, abatement, removal, replacement, acquisition, enforcement, legal action,  
16 health studies, feasibility studies, and other actions necessary or appropriate to respond to a release or  
17 threatened release.

18 ~~(13)~~(15) "Remedial action contract" means a written contract or agreement entered into by a  
19 remedial action contractor with the state, or with a potentially liable person acting pursuant to an order or  
20 request issued by the department, the United States, or any federal agency, to provide a remedial action  
21 with respect to a release or threatened release of a hazardous or deleterious substance.

22 ~~(14)~~(16) "Remedial action contractor" means:

23 (a) any person who enters into and is carrying out a remedial action contract; or

24 (b) any person who is retained or hired by a person described in subsection ~~(14)(a)~~ (16)(a) to  
25 provide services relating to a remedial action.

26 ~~(15)~~(17) "Remedial action costs" means reasonable costs that are attributable to or associated with  
27 a remedial action at a facility, including but not limited to the costs of administration, investigation, legal  
28 or enforcement activities, contracts, feasibility studies, or health studies.

29 ~~(18)~~ "Third party" means ~~a person or entity, other than a state or state agency, a political~~  
30 ~~subdivision of the state, or the federal government or a federal agency, that seeks to enforce federal, state,~~

1 ~~or local environmental requirements or remedies, that seeks to recover remedial action costs, or that seeks~~  
 2 ~~liability apportionment or contribution under 75-10-724.~~

3 ~~(19) "Third party liability" means liability to a third party for any claims that arise from~~  
 4 ~~contamination of property by hazardous or deleterious substance, including but not limited to claims for~~  
 5 ~~personal injury, property damage, environmental cleanup, and remedial action costs expended by a third~~  
 6 ~~party."~~

7  
 8 **Section 2.** Section 75-10-711, MCA, is amended to read:

9 **"75-10-711. Remedial action -- orders -- penalties -- judicial proceedings.** (1) The department may  
 10 take remedial action whenever:

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

14 (b) the appropriate remedial action will not be done properly and expeditiously by any person liable  
 15 under 75-10-715(1).

16 (2) Whenever the department is authorized to act pursuant to subsection (1) or has reason to  
 17 believe that a release has occurred or is about to occur, the department may undertake remedial action in  
 18 the form of any investigation, monitoring, survey, testing, or other information-gathering as authorized by  
 19 75-10-707 that is necessary and appropriate to identify the existence, nature, origin, and extent of the  
 20 release or the threat of release and the extent and imminence of the danger to the public health, safety,  
 21 or welfare or the environment.

22 (3) Any person liable under 75-10-715(1) must take immediate action to contain, remove, and  
 23 abate the release. Except as provided in 75-10-712, the department is authorized to draw upon the fund  
 24 to take action under subsection (1) if it has made diligent good faith efforts to determine the identity of the  
 25 person or persons liable for the release or threatened release and:

26 (a) is unable to determine the identity of the liable person or persons in a manner consistent with  
 27 the need to take timely remedial action; or

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

1 (c) the written notice to each person informs ~~him~~ the person that if ~~he is~~ subsequently found liable  
 2 pursuant to 75-10-715(1), ~~he~~ the person may be required to reimburse the fund for the state's remedial  
 3 action costs and may be subject to penalties pursuant to ~~75-10-715(3)~~ 75-10-711(5).

4 (4) Whenever the department is authorized to act pursuant to subsection (1) or has reason to  
 5 believe that a release that may pose an imminent and substantial threat to the public health, safety, or  
 6 welfare or the environment has occurred or is about to occur, it may issue to any person liable under  
 7 75-10-715(1) cease and desist, remedial, or other orders as may be necessary or appropriate to protect the  
 8 public health, safety, or welfare or the environment.

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

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

14 (ii) with respect to the person liable under 75-10-715(1), ~~his;~~

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

16 (B) any prior history of ~~such~~ violations;

17 (C) the degree of culpability; and

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

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

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

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

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

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

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

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

1 (7) In considering objections raised in a judicial action regarding orders issued under this part, the  
 2 court shall uphold and enforce an order issued by the department unless the objecting party can  
 3 demonstrate, on the administrative record, that the department's decision to issue the order was arbitrary  
 4 and capricious or otherwise not in accordance with law.

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

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

14  
 15 **Section 3.** Section 75-10-715, MCA, is amended to read:

16 **"75-10-715. Liability -- reimbursement and penalties -- proceedings -- defenses.** (1)  
 17 Notwithstanding any other provision of law and subject only to the defenses set forth in subsection ~~(5)~~ ~~(7)~~  
 18 (5), the following persons are jointly and severally liable for a release or threatened release of a hazardous  
 19 or deleterious substance from a facility:

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

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

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

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

30 ~~(2) A fiduciary or person who holds indicia of ownership in a facility solely to protect a security~~

- 1 ~~interest is not liable under subsections (1)(a) and (1)(b) or for third party liability if the fiduciary or person~~  
2 ~~is holding indicia of ownership for any of the following reasons:~~
- 3 ~~(a) holding an interest in real or personal property when the interest is being held as security for~~  
4 ~~payment or performance of an obligation, including but not limited to a mortgage, deed of trust, contract~~  
5 ~~for deed, lien, security interest, assignment, pledge, or other right or encumbrance against real or personal~~  
6 ~~property that is furnished by the owner to ensure repayment of a financial obligation;~~
- 7 ~~(b) in the case of a fiduciary, acquiring control over or ownership status of a facility when the status~~  
8 ~~arises by law upon appointment or when requiring or conducting any activity that is necessary to carry out~~  
9 ~~the fiduciary's duties and that falls within the scope of the fiduciary's authority;~~
- 10 ~~(c) requiring or conducting financial or environmental assessments of a facility or a portion of a~~  
11 ~~facility, making financing conditional upon environmental compliance, or providing environmental~~  
12 ~~information or reports;~~
- 13 ~~(d) monitoring the operations conducted at a facility or providing access to a facility to the~~  
14 ~~department or its agents or to remedial action contractors;~~
- 15 ~~(e) having the mere capacity or unexercised right to influence a facility's management of hazardous~~  
16 ~~or deleterious substances;~~
- 17 ~~(f) giving advice, information, guidance, or direction concerning the general business and financial~~  
18 ~~aspects of a borrower's operations;~~
- 19 ~~(g) providing general information concerning federal, state, or local laws governing the~~  
20 ~~transportation, storage, treatment, and disposal of hazardous or deleterious substances and concerning the~~  
21 ~~hiring of remedial action contractors;~~
- 22 ~~(h) engaging in financial workouts, restructuring, or refinancing of a borrower's obligations;~~
- 23 ~~(i) collecting rent, maintaining utility services, securing a facility from unauthorized entry, or~~  
24 ~~undertaking other activities to protect or preserve the value of the security interest in a facility;~~
- 25 ~~(j) extending or denying credit to a person owning or in lawful possession of a facility;~~
- 26 ~~(k) taking title to a facility by foreclosure, provided that the holder of indicia of ownership, from~~  
27 ~~the time the holder acquires title, undertakes to sell, re lease property held pursuant to a lease financing~~  
28 ~~transaction (whether by a new lease financing transaction or substitution of the lessee), or otherwise divest~~  
29 ~~itself of the property in a reasonably expeditious manner, using whatever commercially reasonable means~~  
30 ~~are relevant or appropriate with respect to the facility and taking all facts and circumstances into~~

1 ~~consideration, and provided that the holder does not:~~

2 ~~(i) outbid or refuse a bid for fair consideration for the property;~~

3 ~~(ii) worsen the contamination at the facility;~~

4 ~~(iii) incur liability under 75-10-715(1)(c) by arranging for disposal of hazardous or deleterious~~  
5 ~~substances; or~~

6 ~~(iv) engage in conduct described in subsection (3)(a) or (3)(b);~~

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

9 ~~(m) requiring or conducting remedial action in response to a release or threatened release, provided~~  
10 ~~that prior notice is given to the department and the department approves of the remedial action.~~

11 ~~(3) The protection from liability provided in subsection (2) is not available to a fiduciary or to a~~  
12 ~~person holding indicia of ownership primarily to protect a security interest if the fiduciary or person:~~

13 ~~(a) through affirmative conduct, knowingly or recklessly:~~

14 ~~(i) causes or contributes to a new release of hazardous or deleterious substances; or~~

15 ~~(ii) allows others to cause or contribute to a new release of hazardous or deleterious substances;~~

16 ~~or~~

17 ~~(b) in the case of a person holding indicia of ownership primarily to protect a security interest,~~  
18 ~~through affirmative conduct participates in the management of a facility by:~~

19 ~~(i) exercising decisionmaking control over environmental compliance; or~~

20 ~~(ii) exercising control at a level comparable to that of a manager of the enterprise with responsibility~~  
21 ~~for day to day decisionmaking either with respect to environmental compliance or substantially all of the~~  
22 ~~operational, but not financial or administrative, aspects of the facility.~~

23 ~~(2)(4)(2)~~ A person identified in subsection (1) is liable for the following costs:

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

25 (b) damages for injury to, destruction of, or loss of natural resources caused by the release or  
26 threatened release, including the reasonable technical and legal costs of assessing and enforcing a claim  
27 for the injury, destruction, or loss resulting from the release, unless the impaired natural resources were  
28 specifically identified as an irreversible and irretrievable commitment of natural resources in an approved  
29 final state or federal environmental impact statement or other comparable approved final environmental  
30 analysis for a project or facility that was the subject of a governmental permit or license and the project



1 or facility was being operated within the terms of its permit or license.

2 ~~(3)(5)(3)~~ If the person liable under ~~75-10-715~~ subsection (1) fails, without sufficient cause, to  
3 comply with a department order issued pursuant to 75-10-711~~(4)~~ or to properly provide remedial action  
4 upon notification by the department pursuant to 75-10-711~~(3)~~, the person may be liable for penalties in an  
5 amount not to exceed two times the amount of any costs incurred by the state pursuant to this section.

6 ~~(4)(6)(4)~~ The department may initiate civil proceedings in district court to recover remedial action  
7 costs, natural resource damages, or penalties under subsections (1), ~~through (3) (4), and (5) (2), AND (3)~~.  
8 Proceedings to recover costs and penalties must be conducted in accordance with 75-10-722. Venue for  
9 any action to recover costs, damages, or penalties lies in the county where the release occurred or where  
10 the person liable under ~~75-10-715~~ subsection (1) resides or has its principal place of business or in the  
11 district court of the first judicial district.

12 ~~(5)(7)(5)~~ ~~No~~ A person is not liable under subsections (1), ~~through (3) (4), and (5) (2), AND (3)~~ if  
13 ~~that~~ the person can establish by a preponderance of the evidence that:

- 14 (a) the department failed to follow the notice provisions of 75-10-711 when required;
- 15 (b) the release did not emanate from any vessel, vehicle, or facility to which the person contributed  
16 any hazardous or deleterious substance or over which the person had any ownership, authority, or control  
17 and was not caused by any action or omission of the person;
- 18 (c) the release or threatened release occurred solely as a result of:
- 19 (i) an act or omission of a third party other than either an employee or agent of the person; or  
20 (ii) an act or omission of a third party other than one whose act or omission occurs in connection  
21 with a contractual relationship, existing directly or indirectly, with the person, if the person establishes by  
22 a preponderance of the evidence that ~~he~~ the person:

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

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

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

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

1 was within the limits allowed in the permit;

2 (f) in the case of assessment of penalties under subsection ~~(3)~~ ~~(5)~~ (3), that factors beyond the  
3 control of the person prevented the person from taking timely remedial action; or

4 (g) the person accepted only household refuse (garbage, trash, or septic tank sanitary wastes  
5 generated by single or multiple residences, hotels, motels, restaurants, or similar facilities) for transport to  
6 a solid waste disposal facility, unless that person knew or reasonably should have known that the  
7 hazardous or deleterious substance was present in the refuse.

8 ~~(6)(8)(6)~~ (a) For the purpose of subsection ~~(5)(c)(iii)~~ ~~(7)(c)(iii)~~ (5)(C)(II), the term "contractual  
9 relationship" includes but is not limited to land contracts, deeds, or other instruments transferring title or  
10 possession, unless the real property on which the facility is located was acquired by the person after the  
11 disposal or placement of the hazardous or deleterious substance on, in, or at the facility and one or more  
12 of the following circumstances is also established by the person by a preponderance of the evidence:

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

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

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

20 (b) In addition to establishing one or more of the circumstances in subsection ~~(6)(a)(i)~~ ~~(8)(a)(i)~~  
21 (6)(A)(I) through ~~(6)(a)(iii)~~ ~~(8)(a)(iii)~~ (6)(A)(III), the person shall establish that ~~he~~ the person has satisfied the  
22 requirements of ~~subsections (5)(c)(i) subsection (7)(c)(i) (5)(C)(I) or (5)(c)(ii) (7)(c)(ii) (5)(C)(II)~~.

23 (c) To establish that the person had no reason to know, as provided in subsection ~~(6)(a)(i)~~ ~~(8)(a)(i)~~  
24 (6)(A)(I), the person must have undertaken, at the time of acquisition, all appropriate inquiry into the  
25 previous ownership and uses of the property consistent with good commercial or customary practice in an  
26 effort to minimize liability. For purposes of assessing this inquiry, the following must be taken into account:

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

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

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

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

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

2 (d) (i) Nothing in subsections ~~(5)(b) (7)(b) (5)(B)~~ and ~~(5)(c) (7)(c) (5)(C)~~ or in this subsection ~~(6) (8)~~  
3 ~~(6)~~ may diminish the liability of a previous owner or operator of the facility who would otherwise be liable  
4 under this part.

5 (ii) Notwithstanding this subsection ~~(6) (8) (6)~~, if the previous owner or operator obtained actual  
6 knowledge of the release or threatened release of a hazardous or deleterious substance at the facility when  
7 the person owned the real property and then subsequently transferred ownership of the property to another  
8 person without disclosing the knowledge, the previous owner is liable under subsections (1), ~~through (3)~~  
9 ~~(4), and (5) (2), AND (3)~~ and no defense under subsection ~~(5)(b) (7)(b) (5)(B)~~ or ~~(5)(c) (7)(c) (5)(C)~~ is  
10 available to that person.

11 (e) Nothing in this subsection ~~(6) (8) (6)~~ affects the liability under this part of a person who, by any  
12 act or omission, caused or contributed to the release or threatened release of a hazardous or deleterious  
13 substance that is the subject of the action relating to the facility.

14 (7) THE LIABILITY OF A FIDUCIARY UNDER THE PROVISIONS OF THIS PART FOR A RELEASE OR  
15 A THREATENED RELEASE OF A HAZARDOUS OR DELETERIOUS SUBSTANCE FROM A FACILITY HELD  
16 IN A FIDUCIARY CAPACITY MAY NOT EXCEED THE ASSETS HELD IN THE FIDUCIARY CAPACITY THAT  
17 ARE AVAILABLE TO INDEMNIFY THE FIDUCIARY UNLESS THE FIDUCIARY IS LIABLE UNDER THIS PART  
18 INDEPENDENT OF THE PERSON'S OWNERSHIP OR ACTIONS TAKEN IN A FIDUCIARY CAPACITY.

19 (8) A PERSON WHO HOLDS INDICIA OF OWNERSHIP IN A FACILITY PRIMARILY TO PROTECT  
20 A SECURITY INTEREST IS NOT LIABLE UNDER SUBSECTIONS (1)(A) AND (1)(B) FOR HAVING  
21 PARTICIPATED IN THE MANAGEMENT OF A FACILITY WITHIN THE MEANING OF 75-10-701(10)(B)  
22 BECAUSE OF ANY ONE OR ANY COMBINATION OF THE FOLLOWING:

23 (A) HOLDING AN INTEREST IN REAL OR PERSONAL PROPERTY WHEN THE INTEREST IS BEING  
24 HELD AS SECURITY FOR PAYMENT OR PERFORMANCE OF AN OBLIGATION, INCLUDING BUT NOT  
25 LIMITED TO A MORTGAGE, DEED OF TRUST, LIEN, SECURITY INTEREST, ASSIGNMENT, PLEDGE, OR  
26 OTHER RIGHT OR ENCUMBRANCE AGAINST REAL OR PERSONAL PROPERTY THAT IS FURNISHED BY  
27 THE OWNER TO ENSURE REPAYMENT OF A FINANCIAL OBLIGATION;

28 (B) REQUIRING OR CONDUCTING FINANCIAL OR ENVIRONMENTAL ASSESSMENTS OF A  
29 FACILITY OR A PORTION OF A FACILITY, MAKING FINANCING CONDITIONAL UPON ENVIRONMENTAL  
30 COMPLIANCE, OR PROVIDING ENVIRONMENTAL INFORMATION OR REPORTS;

1           (C) MONITORING THE OPERATIONS CONDUCTED AT A FACILITY OR PROVIDING ACCESS TO  
2 A FACILITY TO THE DEPARTMENT OR ITS AGENTS OR TO REMEDIAL ACTION CONTRACTORS;

3           (D) HAVING THE MERE CAPACITY OR UNEXERCISED RIGHT TO INFLUENCE A FACILITY'S  
4 MANAGEMENT OF HAZARDOUS OR DELETERIOUS SUBSTANCES;

5           (E) GIVING ADVICE, INFORMATION, GUIDANCE, OR DIRECTION CONCERNING THE  
6 ADMINISTRATIVE AND FINANCIAL ASPECTS, AS OPPOSED TO DAY-TO-DAY OPERATIONAL ASPECTS,  
7 OF A BORROWER'S OPERATIONS;

8           (F) PROVIDING GENERAL INFORMATION CONCERNING FEDERAL, STATE, OR LOCAL LAWS  
9 GOVERNING THE TRANSPORTATION, STORAGE, TREATMENT, AND DISPOSAL OF HAZARDOUS OR  
10 DELETERIOUS SUBSTANCES AND CONCERNING THE HIRING OF REMEDIAL ACTION CONTRACTORS;

11           (G) ENGAGING IN FINANCIAL WORKOUTS, RESTRUCTURING, OR REFINANCING OF A  
12 BORROWER'S OBLIGATIONS;

13           (H) COLLECTING RENT, MAINTAINING UTILITY SERVICES, SECURING A FACILITY FROM  
14 UNAUTHORIZED ENTRY, OR UNDERTAKING OTHER ACTIVITIES TO PROTECT OR PRESERVE THE VALUE  
15 OF THE SECURITY INTEREST IN A FACILITY;

16           (I) EXTENDING OR DENYING CREDIT TO A PERSON OWNING OR IN LAWFUL POSSESSION OF  
17 A FACILITY;

18           (J) IN AN EMERGENCY, REQUIRING OR UNDERTAKING ACTIVITIES TO PREVENT EXPOSURE OF  
19 PERSONS TO HAZARDOUS OR DELETERIOUS SUBSTANCES OR TO CONTAIN A RELEASE;

20           (K) REQUIRING OR CONDUCTING REMEDIAL ACTION IN RESPONSE TO A RELEASE OR  
21 THREATENED RELEASE IF THAT PRIOR NOTICE IS GIVEN TO THE DEPARTMENT AND THE DEPARTMENT  
22 APPROVES OF THE REMEDIAL ACTION; OR

23           (L) TAKING TITLE TO A FACILITY BY FORECLOSURE, PROVIDED THAT THE HOLDER OF INDICIA  
24 OF OWNERSHIP, FROM THE TIME THE HOLDER ACQUIRES TITLE, UNDERTAKES TO SELL, RE-LEASE  
25 PROPERTY HELD PURSUANT TO A LEASE FINANCING TRANSACTION (WHETHER BY A NEW LEASE  
26 FINANCING TRANSACTION OR SUBSTITUTION OF THE LESSEE), OR OTHERWISE DIVEST ITSELF OF THE  
27 PROPERTY IN A REASONABLY EXPEDITIOUS MANNER, USING WHATEVER COMMERCIALY  
28 REASONABLE MEANS ARE RELEVANT OR APPROPRIATE WITH RESPECT TO THE FACILITY AND TAKING  
29 ALL FACTS AND CIRCUMSTANCES INTO CONSIDERATION AND PROVIDED THAT THE HOLDER DOES  
30 NOT:

1           (I) OUTBID OR REFUSE A BID FOR FAIR CONSIDERATION FOR THE PROPERTY OR OUTBID OR  
 2 REFUSE A BID THAT WOULD EFFECTIVELY COMPENSATE THE HOLDER FOR THE AMOUNT SECURED  
 3 BY THE FACILITY;

4           (II) WORSEN THE CONTAMINATION AT THE FACILITY;

5           (III) INCUR LIABILITY UNDER SUBSECTION (1)(C) OR (1)(D) BY ARRANGING FOR DISPOSAL OF  
 6 OR TRANSPORTING HAZARDOUS OR DELETERIOUS SUBSTANCES; OR

7           (IV) ENGAGE IN CONDUCT DESCRIBED IN SUBSECTION (9)(A) OR (9)(B).

8           (9) THE PROTECTION FROM LIABILITY PROVIDED IN SUBSECTIONS (7) AND (8) IS NOT  
 9 AVAILABLE TO A FIDUCIARY OR TO A PERSON HOLDING INDICIA OF OWNERSHIP PRIMARILY TO  
 10 PROTECT A SECURITY INTEREST IF THE FIDUCIARY OR PERSON THROUGH AFFIRMATIVE CONDUCT:

11           (A) CAUSES OR CONTRIBUTES TO A RELEASE OF HAZARDOUS OR DELETERIOUS SUBSTANCES  
 12 FROM THE FACILITY;

13           (B) ALLOWS OTHERS TO CAUSE OR CONTRIBUTE TO A RELEASE OF HAZARDOUS OR  
 14 DELETERIOUS SUBSTANCES; OR

15           (C) IN THE CASE OF A PERSON HOLDING INDICIA OF OWNERSHIP PRIMARILY TO PROTECT A  
 16 SECURITY INTEREST, PARTICIPATES IN THE MANAGEMENT OF A FACILITY BY:

17           (I) EXERCISING DECISIONMAKING CONTROL OVER ENVIRONMENTAL COMPLIANCE; OR

18           (II) EXERCISING CONTROL AT A LEVEL COMPARABLE TO THAT OF A MANAGER OF THE  
 19 ENTERPRISE WITH RESPONSIBILITY FOR DAY-TO-DAY DECISIONMAKING EITHER WITH RESPECT TO  
 20 ENVIRONMENTAL COMPLIANCE OR SUBSTANTIALLY ALL OF THE OPERATIONAL, BUT NOT FINANCIAL  
 21 OR ADMINISTRATIVE, ASPECTS OF THE FACILITY."

22  
 23           **Section 4.** Section 75-10-718, MCA, is amended to read:

24           **"75-10-718. Liability of remedial action contractor.** (1) A person who is a remedial action  
 25 contractor with respect to a release or threatened release of a hazardous or deleterious substance is not  
 26 liable under this part to any person for injuries, costs, damages, expenses, or other liability that results from  
 27 the release or threatened release, including but not limited to claims for indemnification or contribution and  
 28 claims by third parties for death, personal injury, illness, loss or damage to property, or economic loss.

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

1 constitutes intentional misconduct.

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

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

9 (5) The defense provided by ~~75-10-715(5)(e)~~ ~~75-10-715(7)(e)~~ 75-10-715(5)(C) is not available to  
10 a person liable under 75-10-715(1) with respect to remedial action costs or damages caused by an act or  
11 omission of a remedial action contractor.

12 (6) Except as provided in subsections (4) and (5), this section does not affect the liability under  
13 this part of a person other than a remedial action contractor.

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

15 (8) This section does not minimize the liability, lessen the standard of liability, or otherwise shield  
16 from liability a potentially liable person under 75-10-715 or section 107 of CERCLA for costs or damages  
17 incurred as a result of a release or threatened release of a hazardous or deleterious substance."  
18

19 **Section 5.** Section 75-10-722, MCA, is amended to read:

20 **"75-10-722. Payment of state costs and penalties.** (1) The department shall keep a record of the  
21 state's remedial action costs.

22 (2) Based on this record, the department shall require a person liable under 75-10-715 to pay the  
23 amount of the state's remedial action costs and, if applicable, penalties under ~~75-10-715(3)~~ 75-10-715(5)  
24 75-10-715(3).

25 (3) If the state's remedial action costs and penalties are not paid by the liable person to the  
26 department within 60 days after receipt of notice that the costs and penalties are due, the department shall  
27 bring an action in the name of the state to recover the amount owed plus reasonable legal expenses.

28 (4) An action to recover remedial action costs may be brought under this section at any time after  
29 any remedial action costs have been incurred, and the court may enter a declaratory judgment on liability  
30 for remedial action costs that is binding on any subsequent action or actions to recover further remedial

1 action costs. The court may disallow costs or damages only if the person liable under 75-10-715 can show  
2 on the record that the costs are not reasonable and are not consistent with this part.

3 (5) An initial action ~~for recovery of remedial action costs~~ BROUGHT UNDER 75-10-715(4) OR A  
4 CONTRIBUTION ACTION FOR COSTS INCURRED UNDER THIS PART must be commenced within 6 years  
5 after initiation of physical onsite construction of the ~~remedial action~~ FINAL PERMANENT REMEDY.

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

8

9 NEW SECTION. **Section 6. Effective date.** [This act] is effective on passage and approval.

10

-END-

## 1 SENATE BILL NO. 200

2 INTRODUCED BY LYNCH, SHEA, GROSFIELD, CRIPPEN, HALLIGAN, CHRISTIAENS, ANDERSON,  
3 QUILICI, BROWN, PAVLOVICH, HARP, GRINDE

4  
5 A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE COMPREHENSIVE ENVIRONMENTAL CLEANUP  
6 AND RESPONSIBILITY ACT; CLARIFYING THE EXEMPTION FROM LIABILITY FOR PERSONS HOLDING  
7 INDICIA OF OWNERSHIP PRIMARILY TO PROTECT SECURITY INTERESTS; EXTENDING A LIMITED  
8 EXEMPTION TO FIDUCIARIES; DEFINING "FORECLOSURE" AND "FIDUCIARY"; CLARIFYING THE STATUTE  
9 OF LIMITATIONS FOR COST RECOVERY TO CONFORM TO THE FEDERAL COMPREHENSIVE  
10 ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT; AMENDING SECTIONS 75-10-701,  
11 75-10-711, 75-10-715, 75-10-718, AND 75-10-722, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE  
12 DATE."

THERE ARE NO CHANGES IN THIS BILL AND IT WILL  
NOT BE REPRINTED. PLEASE REFER TO SECOND  
READING COPY (YELLOW) FOR COMPLETE TEXT.






## HOUSE STANDING COMMITTEE REPORT

March 9, 1995

Page 1 of 2

Mr. Speaker: We, the committee on Natural Resources report that Senate Bill 200 (third reading copy -- blue) be concurred in as amended.

Signed:   
Dick Knox, Chair

Carried by: Rep. Quilici

And, that such amendments read:

1. Title, line 12.

Following: "DATE"

Insert: "AND AN APPLICABILITY DATE"

2. Page 3, line 24.

Following: "PART."

Insert: "For the purposes of 75-10-715(7), 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."

3. Page 4, line 13.

Following: "~~such~~"

Insert: "such"

4. Page 7, line 3.

Strike: "75-10-711(5)"

Insert: "this part"

5. Page 14, line 21.

Strike: "THAT"

6. Page 15, line 16.

Following: "INTEREST."

SB 200

Committee Vote:

Yes 16, No 2

HOUSE

Insert: "actually"

7. Page 15, line 20.

Strike: "BUT NOT"

Insert: "as opposed to"

8. Page 17.

Following: line 7

Strike: "NEW SECTION. Section 6. Applicability. [This act]  
does not apply to civil actions commenced prior to the  
[effective date of this act] or to the claims upon which  
such civil actions are based."

Renumber: subsequent section

-END-



# HOUSE COMMITTEE OF THE WHOLE AMENDMENT

Senate Bill 200  
Representative Ohs

March 27, 1995 3:38 pm  
Page 1 of 1

Mr. Chairman: I move to amend Senate Bill 200 (third reading copy -- blue).

Signed:   
Representative Ohs

And, that such amendments to Senate Bill 200 read as follows:

1. Page 15, line 7.  
Following: "IN SUBSECTION (9)"  
Strike: "(A) OR (9) (B)"

-END-

ADOPT

REJECT

92-1

SB 200

HOUSE

## 1 SENATE BILL NO. 200

2 INTRODUCED BY LYNCH, SHEA, GROSFIELD, CRIPPEN, HALLIGAN, CHRISTIAENS, ANDERSON,  
3 QUILICI, BROWN, PAVLOVICH, HARP, GRINDE

4  
5 A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE COMPREHENSIVE ENVIRONMENTAL CLEANUP  
6 AND RESPONSIBILITY ACT; CLARIFYING THE EXEMPTION FROM LIABILITY FOR PERSONS HOLDING  
7 INDICIA OF OWNERSHIP PRIMARILY TO PROTECT SECURITY INTERESTS; EXTENDING A LIMITED  
8 EXEMPTION TO FIDUCIARIES; DEFINING "FORECLOSURE" AND "FIDUCIARY"; CLARIFYING THE STATUTE  
9 OF LIMITATIONS FOR COST RECOVERY TO CONFORM TO THE FEDERAL COMPREHENSIVE  
10 ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT; AMENDING SECTIONS 75-10-701,  
11 75-10-711, 75-10-715, 75-10-718, AND 75-10-722, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE  
12 DATE AND AN APPLICABILITY DATE."

13  
14 STATEMENT OF INTENT

15 A statement of intent is included with this bill because of the authorization granted to the  
16 department in 75-10-702 to adopt rules to implement Title 75, chapter 10, part 7, including implementation  
17 of the exemption from liability for persons holding indicia of ownership primarily to protect a security  
18 interest. To date, the department has not adopted rules under this section.

19 The legislature finds that existing state law related to the liability of persons holding security  
20 interests for environmental contamination is unclear and that this lack of clarity has created uncertainty on  
21 the part of security interest holders as to whether they are liable for environmental contamination caused  
22 by their borrowers or other third parties. The uncertainty has negatively affected the availability of credit  
23 in Montana.

24 In enacting Montana's Comprehensive Environmental Cleanup and Responsibility Act (CECRA), the  
25 legislature modeled the statute after and borrowed many terms from the federal Comprehensive  
26 Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). The legislature specifically  
27 borrowed the term "own or operate", which excludes from liability those persons who, without participating  
28 in the management of the facility, hold indicia of ownership merely to protect a security interest.

29 When significant questions arose under CERCLA as to the scope of the terms "indicia of ownership"  
30 and "participating in the management of the facility", the federal government devoted substantial effort to

1 developing a federal policy and a rule that employ a framework of specific tests to provide clearer  
 2 articulation of a lender's scope of liability under CERCLA, both to governmental agencies and to third  
 3 parties. The April 1992 rule, which appears at 40 CFR 300.1100, et seq., was preceded by many public  
 4 hearings and public comment periods. Although the rule was recently judged to be technically beyond  
 5 EPA's rulemaking authority, the contents of the rule still constitute EPA policy on the scope of the secured  
 6 creditor exemption under CERCLA and the legislature finds that the rule in its current form provides a  
 7 well-reasoned basis for interpreting the identical language in CECRA.

8 Therefore the legislature finds that the clarification of potential liability in a manner consistent with  
 9 federal statutes, current EPA policy, and the regulations at 40 CFR 300.1100, et seq., is desirable in order  
 10 to provide certainty for security interest holders, including persons engaged in lease financing, to enhance  
 11 the availability of credit, and to encourage responsible practices by those security interest holders and  
 12 borrowers to protect the public health and environment.

13 The legislature also finds that uncertainty exists in state law regarding the potential liability of  
 14 certain fiduciaries for environmental contamination on property held in their fiduciary capacity and  
 15 determines that a ~~similar~~ limited exemption from liability, COMPARABLE TO THE ONE BEING PROPOSED  
 16 FOR ACTION BY CONGRESS UNDER CERCLA, should apply to fiduciaries AND THAT IT IS NECESSARY  
 17 TO ADD LANGUAGE CONCERNING FIDUCIARIES TO TITLE 75, CHAPTER 10, PART 7.

18 Therefore, in adopting rules under 75-10-702 to implement the exemption under 75-10-701(10)(b)  
 19 for holders of "the indicia of ownership", the department of health and environmental sciences shall adopt  
 20 rules consistent with the revisions to CECRA contained in this bill, including rules that address fiduciaries  
 21 within the exemption. The rules also must be consistent with ~~and parallel to~~ the federal regulations set  
 22 forth at 40 CFR 300.1100, et seq.

23 FINALLY, THE LEGISLATURE INTENDS THAT THE LIMITED EXEMPTIONS FOR SECURED  
 24 CREDITORS AND FIDUCIARIES THAT ARE CLARIFIED AND GRANTED BY THIS LEGISLATION EXTEND  
 25 NOT ONLY TO LIABILITY ASSERTED BY GOVERNMENTAL ENTITIES BUT ALSO EXTEND TO CLAIMS BY  
 26 ANY THIRD PARTIES FOR CLEANUP OR FOR COST RECOVERY OR CONTRIBUTION.

27

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

29

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

1           **"75-10-701. Definitions.** As used in this part, unless the context requires otherwise, the following  
2 definitions apply:

3           (1) "Department" means the department of health and environmental sciences provided for in Title  
4 2, chapter 15, part 21.

5           (2) "Director" means the director of the department of health and environmental sciences.

6           (3) "Environment" means any surface water, ground water, drinking water supply, land surface  
7 or subsurface strata, or ambient air within the state of Montana or under the jurisdiction of the state of  
8 Montana.

9           (4) (a) "Facility" means:

10           (i) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer  
11 or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container,  
12 motor vehicle, rolling stock, or aircraft; or

13           (ii) any site or area where a hazardous or deleterious substance has been deposited, stored,  
14 disposed of, placed, or otherwise come to be located.

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

16           (5) "Fiduciary" means a trustee, executor, administrator, PERSONAL REPRESENTATIVE,  
17 CUSTODIAN, CONSERVATOR, guardian, OR receiver, conservator, personal representative, or other person  
18 ACTING OR holding property in a fiduciary capacity. FOR THE EXCLUSIVE BENEFIT OF ANOTHER PERSON.

19 THE TERM DOES NOT INCLUDE:

20           (A) A PERSON WHO HAS PREVIOUSLY OWNED OR OPERATED THE PROPERTY IN A  
21 NONFIDUCIARY CAPACITY; OR

22           (B) A PERSON ACTING AS FIDUCIARY WITH RESPECT TO A TRUST OR OTHER FIDUCIARY  
23 ESTATE THAT HAS NO OBJECTIVELY REASONABLE OR SUBSTANTIAL PURPOSE APART FROM  
24 AVOIDANCE OF OR LIMITATION OF LIABILITY UNDER THIS PART. FOR THE PURPOSES OF  
25 75-10-715(7), THE TERM DOES NOT INCLUDE THE STATE, A STATE AGENCY, OR A POLITICAL  
26 SUBDIVISION OF THE STATE ACTING AS TRUSTEE OF NATURAL RESOURCES WITHIN THE STATE OF  
27 MONTANA.

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

1 obligation.

2 ~~(5)~~(7) "Fund" means the environmental quality protection fund established in 75-10-704.

3 ~~(6)~~(8) "Hazardous or deleterious substance" means a substance that because of its quantity,  
4 concentration, or physical, chemical, or infectious characteristics may pose an imminent and substantial  
5 threat to public health, safety, or welfare or the environment and is:

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

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

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

14 (d) any petroleum product.

15 ~~(7)~~(9) "Natural resources" means land, fish, wildlife, biota, air, surface water, ground water,  
16 drinking water supplies, and any other ~~such~~ SUCH resources within the state of Montana owned, managed,  
17 held in trust or otherwise controlled by or appertaining to the state of Montana or a political subdivision of  
18 the state.

19 ~~(8)~~(10) (a) "Owns or operates" means owning, leasing, operating, managing activities at, or  
20 exercising control over the operation of a facility.

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

1 a release or threatened release under 75-10-715(1).

2 ~~(9)~~(11) "Person" means an individual, trust, firm, joint stock company, joint venture, consortium,  
3 commercial entity, partnership, association, corporation, commission, state or state agency, political  
4 subdivision of the state, interstate body, or the federal government, including a federal agency.

5 ~~(10)~~(12) "Petroleum product" includes gasoline, crude oil (except for crude oil at production facilities  
6 subject to regulation under Title 82), fuel oil, diesel oil or fuel, lubricating oil, oil sludge or refuse, and any  
7 other petroleum-related product or waste or fraction ~~thereof~~ of the product or waste that is liquid at  
8 standard conditions of temperature and pressure (60 degrees F and 14.7 pounds per square inch absolute).

9 ~~(11)~~(13) "Release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging,  
10 injecting, escaping, leaching, dumping, or disposing of a hazardous or deleterious substance directly into  
11 the environment (including the abandonment or discarding of barrels, containers, and other closed  
12 receptacles containing any hazardous or deleterious substance), but excludes releases confined to the  
13 indoor workplace environment, the use of pesticides as defined in 80-8-102(30) when they are applied in  
14 accordance with approved federal and state labels, and the use of commercial fertilizers as defined in  
15 80-10-101(2) when applied as part of accepted agricultural practice.

16 ~~(12)~~(14) "Remedial action" includes all notification, investigation, administration, monitoring,  
17 cleanup, restoration, mitigation, abatement, removal, replacement, acquisition, enforcement, legal action,  
18 health studies, feasibility studies, and other actions necessary or appropriate to respond to a release or  
19 threatened release.

20 ~~(13)~~(15) "Remedial action contract" means a written contract or agreement entered into by a  
21 remedial action contractor with the state, or with a potentially liable person acting pursuant to an order or  
22 request issued by the department, the United States, or any federal agency, to provide a remedial action  
23 with respect to a release or threatened release of a hazardous or deleterious substance.

24 ~~(14)~~(16) "Remedial action contractor" means:

25 (a) any person who enters into and is carrying out a remedial action contract; or

26 (b) any person who is retained or hired by a person described in subsection ~~(14)(a)~~ (16)(a) to  
27 provide services relating to a remedial action.

28 ~~(15)~~(17) "Remedial action costs" means reasonable costs that are attributable to or associated with  
29 a remedial action at a facility, including but not limited to the costs of administration, investigation, legal  
30 or enforcement activities, contracts, feasibility studies, or health studies.



1           ~~(18) "Third party" means a person or entity, other than a state or state agency, a political~~  
 2 ~~subdivision of the state, or the federal government or a federal agency, that seeks to enforce federal, state,~~  
 3 ~~or local environmental requirements or remedies, that seeks to recover remedial action costs, or that seeks~~  
 4 ~~liability apportionment or contribution under 75-10-724.~~

5           ~~(19) "Third party liability" means liability to a third party for any claims that arise from~~  
 6 ~~contamination of property by hazardous or deleterious substance, including but not limited to claims for~~  
 7 ~~personal injury, property damage, environmental cleanup, and remedial action costs expended by a third~~  
 8 ~~party."~~

9  
 10           **Section 2.** Section 75-10-711, MCA, is amended to read:

11           **"75-10-711. Remedial action -- orders -- penalties -- judicial proceedings.** (1) The department may  
 12 take remedial action whenever:

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

16           (b) the appropriate remedial action will not be done properly and expeditiously by any person liable  
 17 under 75-10-715(1).

18           (2) Whenever the department is authorized to act pursuant to subsection (1) or has reason to  
 19 believe that a release has occurred or is about to occur, the department may undertake remedial action in  
 20 the form of any investigation, monitoring, survey, testing, or other information-gathering as authorized by  
 21 75-10-707 that is necessary and appropriate to identify the existence, nature, origin, and extent of the  
 22 release or the threat of release and the extent and imminence of the danger to the public health, safety,  
 23 or welfare or the environment.

24           (3) Any person liable under 75-10-715(1) must take immediate action to contain, remove, and  
 25 abate the release. Except as provided in 75-10-712, the department is authorized to draw upon the fund  
 26 to take action under subsection (1) if it has made diligent good faith efforts to determine the identity of the  
 27 person or persons liable for the release or threatened release and:

28           (a) is unable to determine the identity of the liable person or persons in a manner consistent with  
 29 the need to take timely remedial action; or

30           (b) the person or persons determined by the department to be liable under 75-10-715(1) have been

1 informed in writing of the department's determination and have been requested by the department to take  
2 appropriate remedial action but are unable or unwilling to take action in a timely manner; and

3 (c) the written notice to each person informs ~~him~~ the person that if ~~he is~~ subsequently found liable  
4 pursuant to 75-10-715(1), ~~he~~ the person may be required to reimburse the fund for the state's remedial  
5 action costs and may be subject to penalties pursuant to ~~75-10-715(3) 75-10-711(5)~~ THIS PART.

6 (4) Whenever the department is authorized to act pursuant to subsection (1) or has reason to  
7 believe that a release that may pose an imminent and substantial threat to the public health, safety, or  
8 welfare or the environment has occurred or is about to occur, it may issue to any person liable under  
9 75-10-715(1) cease and desist, remedial, or other orders as may be necessary or appropriate to protect the  
10 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  
12 or this section may, in an action brought to enforce the order, be assessed a civil penalty of not more than  
13 \$10,000 for each day in which a violation occurs or a failure or refusal to comply continues. In determining  
14 the amount of any penalty assessed, the court may take into account:

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

16 (ii) with respect to the person liable under 75-10-715(1), ~~his;~~

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

18 (B) any prior history of ~~such~~ 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 ~~this~~ subsection (5)(a) must be deposited into the environmental  
23 quality protection fund established in 75-10-704.

24 (6) A court has jurisdiction to review an order issued under 75-10-707 or this section only in the  
25 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  
29 under 75-10-707 or this section; or

30 (d) an action by a person to whom an order has been issued to determine the validity of the order,

1 only if the person has been in compliance and continues in compliance with the order pending decision of  
2 the court.

3 (7) In considering objections raised in a judicial action regarding orders issued under this part, the  
4 court shall uphold and enforce an order issued by the department unless the objecting party can  
5 demonstrate, on the administrative record, that the department's decision to issue the order was arbitrary  
6 and capricious or otherwise not in accordance with law.

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

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

16

17 **Section 3.** Section 75-10-715, MCA, is amended to read:

18 **"75-10-715. Liability -- reimbursement and penalties -- proceedings -- defenses.** (1)  
19 Notwithstanding any other provision of law and subject only to the defenses set forth in subsection ~~(6)~~ (7)  
20 (5), the following persons are jointly and severally liable for a release or threatened release of a hazardous  
21 or deleterious substance from a facility:

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

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

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

30 (d) a person who accepts or has accepted a hazardous or deleterious substance for transport to

1 a disposal or treatment facility.

2 ~~(2) A fiduciary or person who holds indicia of ownership in a facility solely to protect a security~~  
3 ~~interest is not liable under subsections (1)(a) and (1)(b) or for third party liability if the fiduciary or person~~  
4 ~~is holding indicia of ownership for any of the following reasons:~~

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

9 ~~(b) in the case of a fiduciary, acquiring control over or ownership status of a facility when the~~  
10 ~~status arises by law upon appointment or when requiring or conducting any activity that is necessary to~~  
11 ~~carry out the fiduciary's duties and that falls within the scope of the fiduciary's authority;~~

12 ~~(c) requiring or conducting financial or environmental assessments of a facility or a portion of a~~  
13 ~~facility, making financing conditional upon environmental compliance, or providing environmental~~  
14 ~~information or reports;~~

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

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

19 ~~(f) giving advice, information, guidance, or direction concerning the general business and financial~~  
20 ~~aspects of a borrower's operations;~~

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

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

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

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

28 ~~(k) taking title to a facility by foreclosure, provided that the holder of indicia of ownership, from~~  
29 ~~the time the holder acquires title, undertakes to sell, re-lease property held pursuant to a lease financing~~  
30 ~~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;~~

~~(ii) worsen the contamination at the facility;~~

~~(iii) incur liability under 75-10-715(1)(c) by arranging for disposal of hazardous or deleterious substances; or~~

~~(iv) engage in conduct described in subsection (3)(a) or (3)(b);~~

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

~~(m) requiring or conducting remedial action in response to a release or threatened release, provided that prior notice is given to the department and the department approves of the remedial action;~~

~~(3) The protection from liability provided in subsection (2) 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:~~

~~(a) through affirmative conduct, knowingly or recklessly;~~

~~(i) causes or contributes to a new release of hazardous or deleterious substances; or~~

~~(ii) allows others to cause or contribute to a new release of hazardous or deleterious substances;~~

~~or~~

~~(b) in the case of a person holding indicia of ownership primarily to protect a security interest, through affirmative conduct 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, but not financial or administrative, aspects of the facility;~~

~~(2)(4)(2) A person identified in subsection (1) is liable for the following costs:~~

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

~~(b) 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~~

1 final state or federal environmental impact statement or other comparable approved final environmental  
 2 analysis for a project or facility that was the subject of a governmental permit or license and the project  
 3 or facility was being operated within the terms of its permit or license.

4 ~~(3)(5)(3)~~ If the person liable under ~~75-10-715~~ subsection (1) fails, without sufficient cause, to  
 5 comply with a department order issued pursuant to 75-10-711(4) or to properly provide remedial action  
 6 upon notification by the department pursuant to 75-10-711(3), the person may be liable for penalties in an  
 7 amount not to exceed two times the amount of any costs incurred by the state pursuant to this section.

8 ~~(4)(6)(4)~~ The department may initiate civil proceedings in district court to recover remedial action  
 9 costs, natural resource damages, or penalties under subsections (1), ~~through (3) (4), and (5) (2), AND (3).~~  
 10 Proceedings to recover costs and penalties must be conducted in accordance with 75-10-722. Venue for  
 11 any action to recover costs, damages, or penalties lies in the county where the release occurred or where  
 12 the person liable under ~~75-10-715~~ subsection (1) resides or has its principal place of business or in the  
 13 district court of the first judicial district.

14 ~~(5)(7)(5)~~ ~~No~~ A person is not liable under subsections (1), ~~through (3) (4), and (5) (2), AND (3)~~ if  
 15 ~~that~~ the person can establish by a preponderance of the evidence that:

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

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

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

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

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

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

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

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

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

4 (f) in the case of assessment of penalties under subsection ~~(3) (5) (3)~~, that factors beyond the  
 5 control of the person prevented the person from taking timely remedial action; or

6 (g) the person accepted only household refuse (garbage, trash, or septic tank sanitary wastes  
 7 generated by single or multiple residences, hotels, motels, restaurants, or similar facilities) for transport to  
 8 a solid waste disposal facility, unless that person knew or reasonably should have known that the  
 9 hazardous or deleterious substance was present in the refuse.

10 ~~(6)(8)(6)~~ (a) For the purpose of subsection ~~(5)(c)(iii) (7)(e)(iii) (5)(C)(II)~~, the term "contractual  
 11 relationship" includes but is not limited to land contracts, deeds, or other instruments transferring title or  
 12 possession, unless the real property on which the facility is located was acquired by the person after the  
 13 disposal or placement of the hazardous or deleterious substance on, in, or at the facility and one or more  
 14 of the following circumstances is also established by the person by a preponderance of the evidence:

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

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

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

22 (b) In addition to establishing one or more of the circumstances in subsection ~~(6)(a)(i) (8)(a)(i)~~  
 23 ~~(6)(A)(I) through (6)(a)(iii) (8)(a)(iii) (6)(A)(III)~~, the person shall establish that ~~he~~ the person has satisfied the  
 24 requirements of ~~subsections (5)(c)(i) subsection (7)(e)(i) (5)(C)(I) or (5)(c)(iii) (7)(e)(iii) (5)(C)(II)~~.

25 (c) To establish that the person had no reason to know, as provided in subsection ~~(6)(a)(i) (8)(a)(i)~~  
 26 ~~(6)(A)(I)~~, the person must have undertaken, at the time of acquisition, all appropriate inquiry into the  
 27 previous ownership and uses of the property consistent with good commercial or customary practice in an  
 28 effort to minimize liability. For purposes of assessing this inquiry, the following must be taken into account:

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

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

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

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

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

4 (d) (i) Nothing in subsections ~~(5)(b)~~ ~~(7)(b)~~ (5)(B) and ~~(5)(e)~~ ~~(7)(e)~~ (5)(C) or in this subsection ~~(6)~~ ~~(8)~~  
5 (6) may diminish the liability of a previous owner or operator of the facility who would otherwise be liable  
6 under this part.

7 (ii) Notwithstanding this subsection ~~(6)~~ ~~(8)~~ (6), if the previous owner or operator obtained actual  
8 knowledge of the release or threatened release of a hazardous or deleterious substance at the facility when  
9 the person owned the real property and then subsequently transferred ownership of the property to another  
10 person without disclosing the knowledge, the previous owner is liable under subsections (1), ~~through (3)~~  
11 ~~(4), and (5)~~ (2), AND (3) and no defense under subsection ~~(5)(b)~~ ~~(7)(b)~~ (5)(B) or ~~(5)(e)~~ ~~(7)(e)~~ (5)(C) is  
12 available to that person.

13 (e) Nothing in this subsection ~~(6)~~ ~~(8)~~ (6) affects the liability under this part of a person who, by any  
14 act or omission, caused or contributed to the release or threatened release of a hazardous or deleterious  
15 substance that is the subject of the action relating to the facility.

16 (7) THE LIABILITY OF A FIDUCIARY UNDER THE PROVISIONS OF THIS PART FOR A RELEASE OR  
17 A THREATENED RELEASE OF A HAZARDOUS OR DELETERIOUS SUBSTANCE FROM A FACILITY HELD  
18 IN A FIDUCIARY CAPACITY MAY NOT EXCEED THE ASSETS HELD IN THE FIDUCIARY CAPACITY THAT  
19 ARE AVAILABLE TO INDEMNIFY THE FIDUCIARY UNLESS THE FIDUCIARY IS LIABLE UNDER THIS PART  
20 INDEPENDENT OF THE PERSON'S OWNERSHIP OR ACTIONS TAKEN IN A FIDUCIARY CAPACITY.

21 (8) A PERSON WHO HOLDS INDICIA OF OWNERSHIP IN A FACILITY PRIMARILY TO PROTECT  
22 A SECURITY INTEREST IS NOT LIABLE UNDER SUBSECTIONS (1)(A) AND (1)(B) FOR HAVING  
23 PARTICIPATED IN THE MANAGEMENT OF A FACILITY WITHIN THE MEANING OF 75-10-701(10)(B)  
24 BECAUSE OF ANY ONE OR ANY COMBINATION OF THE FOLLOWING:

25 (A) HOLDING AN INTEREST IN REAL OR PERSONAL PROPERTY WHEN THE INTEREST IS BEING  
26 HELD AS SECURITY FOR PAYMENT OR PERFORMANCE OF AN OBLIGATION, INCLUDING BUT NOT  
27 LIMITED TO A MORTGAGE, DEED OF TRUST, LIEN, SECURITY INTEREST, ASSIGNMENT, PLEDGE, OR  
28 OTHER RIGHT OR ENCUMBRANCE AGAINST REAL OR PERSONAL PROPERTY THAT IS FURNISHED BY  
29 THE OWNER TO ENSURE REPAYMENT OF A FINANCIAL OBLIGATION;

30 (B) REQUIRING OR CONDUCTING FINANCIAL OR ENVIRONMENTAL ASSESSMENTS OF A



1 FACILITY OR A PORTION OF A FACILITY, MAKING FINANCING CONDITIONAL UPON ENVIRONMENTAL  
2 COMPLIANCE, OR PROVIDING ENVIRONMENTAL INFORMATION OR REPORTS;

3 (C) MONITORING THE OPERATIONS CONDUCTED AT A FACILITY OR PROVIDING ACCESS TO  
4 A FACILITY TO THE DEPARTMENT OR ITS AGENTS OR TO REMEDIAL ACTION CONTRACTORS;

5 (D) HAVING THE MERE CAPACITY OR UNEXERCISED RIGHT TO INFLUENCE A FACILITY'S  
6 MANAGEMENT OF HAZARDOUS OR DELETERIOUS SUBSTANCES;

7 (E) GIVING ADVICE, INFORMATION, GUIDANCE, OR DIRECTION CONCERNING THE  
8 ADMINISTRATIVE AND FINANCIAL ASPECTS, AS OPPOSED TO DAY-TO-DAY OPERATIONAL ASPECTS,  
9 OF A BORROWER'S OPERATIONS;

10 (F) PROVIDING GENERAL INFORMATION CONCERNING FEDERAL, STATE, OR LOCAL LAWS  
11 GOVERNING THE TRANSPORTATION, STORAGE, TREATMENT, AND DISPOSAL OF HAZARDOUS OR  
12 DELETERIOUS SUBSTANCES AND CONCERNING THE HIRING OF REMEDIAL ACTION CONTRACTORS;

13 (G) ENGAGING IN FINANCIAL WORKOUTS, RESTRUCTURING, OR REFINANCING OF A  
14 BORROWER'S OBLIGATIONS;

15 (H) COLLECTING RENT, MAINTAINING UTILITY SERVICES, SECURING A FACILITY FROM  
16 UNAUTHORIZED ENTRY, OR UNDERTAKING OTHER ACTIVITIES TO PROTECT OR PRESERVE THE VALUE  
17 OF THE SECURITY INTEREST IN A FACILITY;

18 (I) EXTENDING OR DENYING CREDIT TO A PERSON OWNING OR IN LAWFUL POSSESSION OF  
19 A FACILITY;

20 (J) IN AN EMERGENCY, REQUIRING OR UNDERTAKING ACTIVITIES TO PREVENT EXPOSURE OF  
21 PERSONS TO HAZARDOUS OR DELETERIOUS SUBSTANCES OR TO CONTAIN A RELEASE;

22 (K) REQUIRING OR CONDUCTING REMEDIAL ACTION IN RESPONSE TO A RELEASE OR  
23 THREATENED RELEASE IF THAT PRIOR NOTICE IS GIVEN TO THE DEPARTMENT AND THE DEPARTMENT  
24 APPROVES OF THE REMEDIAL ACTION; OR

25 (L) TAKING TITLE TO A FACILITY BY FORECLOSURE, PROVIDED THAT THE HOLDER OF INDICIA  
26 OF OWNERSHIP, FROM THE TIME THE HOLDER ACQUIRES TITLE, UNDERTAKES TO SELL, RE-LEASE  
27 PROPERTY HELD PURSUANT TO A LEASE FINANCING TRANSACTION (WHETHER BY A NEW LEASE  
28 FINANCING TRANSACTION OR SUBSTITUTION OF THE LESSEE), OR OTHERWISE DIVEST ITSELF OF THE  
29 PROPERTY IN A REASONABLY EXPEDITIOUS MANNER, USING WHATEVER COMMERCIALY  
30 REASONABLE MEANS ARE RELEVANT OR APPROPRIATE WITH RESPECT TO THE FACILITY AND TAKING

1 ALL FACTS AND CIRCUMSTANCES INTO CONSIDERATION AND PROVIDED THAT THE HOLDER DOES  
 2 NOT:

3 (I) OUTBID OR REFUSE A BID FOR FAIR CONSIDERATION FOR THE PROPERTY OR OUTBID OR  
 4 REFUSE A BID THAT WOULD EFFECTIVELY COMPENSATE THE HOLDER FOR THE AMOUNT SECURED  
 5 BY THE FACILITY;

6 (II) WORSEN THE CONTAMINATION AT THE FACILITY;

7 (III) INCUR LIABILITY UNDER SUBSECTION (1)(C) OR (1)(D) BY ARRANGING FOR DISPOSAL OF  
 8 OR TRANSPORTING HAZARDOUS OR DELETERIOUS SUBSTANCES; OR

9 (IV) ENGAGE IN CONDUCT DESCRIBED IN SUBSECTION (9)(A) OR (9)(B).

10 (9) THE PROTECTION FROM LIABILITY PROVIDED IN SUBSECTIONS (7) AND (8) IS NOT  
 11 AVAILABLE TO A FIDUCIARY OR TO A PERSON HOLDING INDICIA OF OWNERSHIP PRIMARILY TO  
 12 PROTECT A SECURITY INTEREST IF THE FIDUCIARY OR PERSON THROUGH AFFIRMATIVE CONDUCT:

13 (A) CAUSES OR CONTRIBUTES TO A RELEASE OF HAZARDOUS OR DELETERIOUS SUBSTANCES  
 14 FROM THE FACILITY;

15 (B) ALLOWS OTHERS TO CAUSE OR CONTRIBUTE TO A RELEASE OF HAZARDOUS OR  
 16 DELETERIOUS SUBSTANCES; OR

17 (C) IN THE CASE OF A PERSON HOLDING INDICIA OF OWNERSHIP PRIMARILY TO PROTECT A  
 18 SECURITY INTEREST, ACTUALLY PARTICIPATES IN THE MANAGEMENT OF A FACILITY BY:

19 (I) EXERCISING DECISIONMAKING CONTROL OVER ENVIRONMENTAL COMPLIANCE; OR

20 (II) EXERCISING CONTROL AT A LEVEL COMPARABLE TO THAT OF A MANAGER OF THE  
 21 ENTERPRISE WITH RESPONSIBILITY FOR DAY-TO-DAY DECISIONMAKING EITHER WITH RESPECT TO  
 22 ENVIRONMENTAL COMPLIANCE OR SUBSTANTIALLY ALL OF THE OPERATIONAL, BUT NOT AS  
 23 OPPOSED TO FINANCIAL OR ADMINISTRATIVE, ASPECTS OF THE FACILITY."

24

25 **Section 4.** Section 75-10-718, MCA, is amended to read:

26 **"75-10-718. Liability of remedial action contractor.** (1) A person who is a remedial action  
 27 contractor with respect to a release or threatened release of a hazardous or deleterious substance is not  
 28 liable under this part to any person for injuries, costs, damages, expenses, or other liability that results from  
 29 the release or threatened release, including but not limited to claims for indemnification or contribution and  
 30 claims by third parties for death, personal injury, illness, loss or damage to property, or economic loss.

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

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

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

11 (5) The defense provided by ~~75-10-715(5)(e)~~ 75-10-715(7)(e) ~~75-10-715(5)(C)~~ is not available to  
12 a person liable under 75-10-715(1) with respect to remedial action costs or damages caused by an act or  
13 omission of a remedial action contractor.

14 (6) Except as provided in subsections (4) and (5), this section does not affect the liability under  
15 this part of a person other than a remedial action contractor.

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

17 (8) This section does not minimize the liability, lessen the standard of liability, or otherwise shield  
18 from liability a potentially liable person under 75-10-715 or section 107 of CERCLA for costs or damages  
19 incurred as a result of a release or threatened release of a hazardous or deleterious substance."  
20

21 **Section 5.** Section 75-10-722, MCA, is amended to read:

22 **"75-10-722. Payment of state costs and penalties.** (1) The department shall keep a record of the  
23 state's remedial action costs.

24 (2) Based on this record, the department shall require a person liable under 75-10-715 to pay the  
25 amount of the state's remedial action costs and, if applicable, penalties under ~~75-10-715(3)~~ 75-10-715(5)  
26 75-10-715(3).

27 (3) If the state's remedial action costs and penalties are not paid by the liable person to the  
28 department within 60 days after receipt of notice that the costs and penalties are due, the department shall  
29 bring an action in the name of the state to recover the amount owed plus reasonable legal expenses.

30 (4) An action to recover remedial action costs may be brought under this section at any time after

1 any remedial action costs have been incurred, and the court may enter a declaratory judgment on liability  
2 for remedial action costs that is binding on any subsequent action or actions to recover further remedial  
3 action costs. The court may disallow costs or damages only if the person liable under 75-10-715 can show  
4 on the record that the costs are not reasonable and are not consistent with this part.

5 (5) An initial action ~~for recovery of remedial action costs~~ BROUGHT UNDER 75-10-715(4) OR A  
6 CONTRIBUTION ACTION FOR COSTS INCURRED UNDER THIS PART must be commenced within 6 years  
7 after initiation of physical onsite construction of the ~~remedial action~~ FINAL PERMANENT REMEDY.

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

10

11 NEW SECTION. SECTION 6. APPLICABILITY. [THIS ACT] DOES NOT APPLY TO CIVIL ACTIONS  
12 COMMENCED PRIOR TO THE [EFFECTIVE DATE OF THIS ACT] OR TO THE CLAIMS UPON WHICH SUCH  
13 CIVIL ACTIONS ARE BASED.

14

15 NEW SECTION. Section 7. Effective date. [This act] is effective on passage and approval.

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