

104TH CONGRESS
1ST SESSION

H. R. 200

To amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 4, 1995

Mr. UPTON (for himself and Mr. TAUZIN) introduced the following bill; which was referred to the Committee on Commerce and, in addition, to the Committee on Transportation and Infrastructure, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Lender and Fiduciary
5 Fairness in Liability Act of 1995”.

6 **SEC. 2. LENDER AND FIDUCIARY LIABILITY.**

7 (a) DEFINITIONS.—Section 101(20) of the Com-
8 prehensive Environmental Response, Compensation, and

1 Liability Act of 1980 (42 U.S.C. 9601(20)) is amended
2 by adding at the end the following new subparagraphs:

3 “(E) DEFINITION OF PARTICIPATION IN
4 MANAGEMENT.—

5 “(i) The term ‘participation in man-
6 agement’ does not include—

7 “(I) the mere capacity to influ-
8 ence, or ability to influence, or the
9 unexercised right to control vessel or
10 facility operations; or

11 “(II) any act of the security in-
12 terest holder to require another per-
13 son or itself, to comply with applicable
14 laws or to respond lawfully to disposal
15 of any hazardous substance.

16 “(ii) A security interest holder will not
17 be deemed to be participating in manage-
18 ment of a facility unless the security inter-
19 est holder—

20 “(I) has undertaken responsibil-
21 ity for the facility’s hazardous sub-
22 stance handling or disposal practices;
23 or

24 “(II) has undertaken overall
25 management of the facility encom-

1 passing day-to-day decisionmaking
2 over either environmental compliance
3 or over the operational, as opposed to
4 financial and administrative, aspects
5 of the facility. The term ‘operational
6 aspects’ include functions such as that
7 of facility or plant manager, oper-
8 ations manager, chief operating offi-
9 cer, or chief executive officer.

10 “(iii) The term ‘participate in man-
11 agement’ does not include conducting an
12 act or failing to act prior to the time that
13 a security interest is created in a vessel or
14 facility; and

15 “(I) the term ‘participate in
16 management’ does not include—

17 “(aa) holding such a secu-
18 rity interest or abandoning or re-
19 leasing such a security interest;

20 “(bb) including in the terms
21 of an extension of credit, or in a
22 contract or security agreement
23 relating to such an extension,
24 covenants, warranties, or other

1 terms and conditions that related
2 to environmental compliance;

3 “(cc) monitoring or enforc-
4 ing the terms and conditions of
5 the extension of credit or security
6 interest;

7 “(dd) monitoring or under-
8 taking 1 or more inspections of
9 the vessel or facility;

10 “(ee) requiring or conduct-
11 ing response action or other law-
12 ful means of addressing the re-
13 lease or threatened release of a
14 hazardous substance in connec-
15 tion with the vessel or facility
16 prior to, during, or upon the ex-
17 piration of the term of the exten-
18 sion of credit;

19 “(ff) providing financial or
20 other advice or counseling in an
21 effort to mitigate, prevent, or
22 cure default or diminution in the
23 value of the vessel or facility;

24 “(gg) restructuring,
25 renegotiating, or otherwise agree-

1 ing to alter the terms and condi-
2 tions of the extension of credit or
3 security interest, exercising for-
4 bearance; or

5 “(hh) exercising other rem-
6 edies that may be available under
7 applicable law for the breach of
8 any term or condition of the ex-
9 tension of credit or security
10 agreement;

11 if such actions do not rise to the level
12 of participating in management, as
13 defined in above.

14 “(iv) Legal or equitable title acquired
15 by a security interest holder through fore-
16 closure or its equivalents will be deemed to
17 be held primarily to protect a security in-
18 terest provided that the holder undertakes
19 to sell, re-lease, or otherwise divest the
20 property in a reasonably expeditious man-
21 ner on commercially reasonable terms.

22 “(v) The term ‘security interest’ in-
23 cludes rights under a mortgage, deed of
24 trust, assignment, judgment lien, pledge,
25 security agreement, factoring agreement,

1 lease, or any other right accruing to person
2 to secure the repayment of money, the per-
3 formance of a duty, or some other obliga-
4 tion.

5 “(F) PROTECTION FOR FIDUCIARIES FROM
6 INDIVIDUAL LIABILITY—

7 “(i) The term ‘owner or operator’
8 does not include a fiduciary who holds
9 legal title to, is the mortgagee or secured
10 party with respect to, controls, or man-
11 ages, directly or indirectly, any facility or
12 vessel for purposes of administering an es-
13 tate or trust of which such facility or ves-
14 sel is a part.

15 “(ii) For purposes of clause (i), the
16 term ‘fiduciary’ means a person who is act-
17 ing in any of the following representative
18 capacities, but only to the extent such per-
19 son is acting in such representative capac-
20 ity:

21 “(I) An executor or adminis-
22 trator of an estate, including a vol-
23 untary executor or a voluntary admin-
24 istrator.

25 “(II) A guardian.

1 “(III) A conservator.

2 “(IV) A trustee under a will
3 under which the trustee takes title to,
4 or otherwise controls or manages,
5 property for the purpose of protecting
6 or conserving such property under the
7 ordinary rules applied in State courts.

8 “(V) A court-appointed receiver.

9 “(VI) A trustee appointed in pro-
10 ceedings under Federal bankruptcy
11 laws.

12 “(VII) An assignee or a trustee
13 acting under an assignment made for
14 the benefit of creditors.

15 “(VIII) A trustee, or any succes-
16 sor thereto, pursuant to an indenture
17 agreement, trust agreement, lease, or
18 similar financing agreement, for debt
19 securities, certificates of interest of
20 participation in any such debt securi-
21 ties, or other forms of indebtedness as
22 to which it is not, in its capacity as
23 trustee, the lender.

24 “(iii) FIDUCIARY CAPACITY.—A per-
25 son acts in a ‘fiduciary capacity’ with re-

1 spect to property if the person holds title
2 to such property, or otherwise has control
3 of or an interest in such property, pursu-
4 ant to the exercise of such person’s respon-
5 sibilities as a fiduciary.”.

6 (b) LIABILITY.—Section 107 of the Comprehensive
7 Environmental Response, Compensation, and Liability Act
8 of 1980 (42 U.S.C. 9607), is amended by adding the fol-
9 lowing new subsections at the end:

10 “(n) LIABILITY OF FIDUCIARIES.—

11 “(1) IN GENERAL.—The liability of a fiduciary
12 that is liable under any other provision of this Act
13 for the release or threatened release of a hazardous
14 substance at, from, or in connection with property
15 held in a fiduciary capacity, may not exceed the as-
16 sets held in such fiduciary capacity that are avail-
17 able to indemnify the fiduciary.

18 “(2) EXEMPTION.—Except as provided in para-
19 graph (3), a fiduciary (as defined in section
20 101(20)) shall not be liable in its individual capacity
21 under this section.

22 “(3) EXCEPTIONS.—Nothing in this paragraph
23 may be construed as preventing claims under this
24 Act against—

1 “(A) the assets of the estate or trust ad-
2 ministered by a fiduciary; or

3 “(B) non-employee agents or independent
4 contractors retained by a fiduciary.

5 “(4) NEGLIGENCE OR INTENTIONAL MIS-
6 CONDUCT.—Nothing in this paragraph may be con-
7 strued as preventing claims under this Act against
8 a fiduciary in its individual capacity whose negligent
9 acts or intentional misconduct caused a release or
10 threatened release of hazardous substances at a fa-
11 cility or vessel. A fiduciary shall not be attributed
12 with negligence or intentional misconduct of non-em-
13 ployee agents or independent contractors if the fidu-
14 ciary has conducted itself without negligence or in-
15 tentional misconduct with regard to its relationship
16 with such agents or contractors.

17 “(5) SAFE HARBOR.—A fiduciary shall not be
18 liable in its individual capacity under this Act—

19 “(A) for undertaking or directing another
20 to undertake a response action under section
21 107(d)(1) or under the direction of an on-scene
22 coordinator;

23 “(B) for undertaking or directing another
24 to undertake any other lawful means of ad-

1 dressing hazardous substances in connection
2 with the property;

3 “(C) for terminating the fiduciary relation-
4 ship;

5 “(D) for including in the terms of the fidu-
6 ciary agreement covenants, warranties, or other
7 terms and conditions that relate to compliance
8 with environmental laws, or monitoring or en-
9 forcing such terms;

10 “(E) for monitoring or undertaking 1 or
11 more inspections of the property;

12 “(F) for providing financial or other advice
13 or counseling to other parties to the fiduciary
14 relationship, including the settler or beneficiary;

15 “(G) for restructuring, renegotiating, or
16 otherwise altering the terms and conditions of
17 the fiduciary relationship;

18 “(H) if the property was contaminated be-
19 fore the fiduciary’s period of service began; or

20 “(I) for declining to take any of the ac-
21 tions described in paragraphs (2) through (7).

22 “(o) LIABILITY LIMITATIONS.—

23 “(1) ACTUAL BENEFIT.—The liability of a lend-
24 er that is liable under any other provision of this Act

1 for the release or threatened release of a hazardous
2 substance at, from, or in connection with property—

3 “(A) acquired through foreclosure;

4 “(B) subject to a security interest held by
5 such institution or lender;

6 “(C) held by a lessor pursuant to the
7 terms of an extension of credit; or

8 “(D) subject to financial control or finan-
9 cial oversight pursuant to the terms of an ex-
10 tension of credit;

11 shall be limited to the actual benefit conferred on
12 such lender by a removal, remedial, or other re-
13 sponse action undertaken by another party.

14 “(2) COMPUTATION OF ACTUAL BENEFIT.—For
15 purposes of this section, the actual benefit conferred
16 on an institution or lender by a removal, remedial,
17 or other response action shall be equal to the net
18 gain, if any, realized by such institution or lender
19 due to such action. For purposes of this subsection,
20 the ‘net gain’ shall not exceed the amount realized
21 by the institution or lender on the sale of property
22 less acquisition, holding, and disposition costs.

23 “(3) EXCLUSION.—Notwithstanding paragraph
24 (1), but subject to the provisions of section 107(d),
25 a lender that caused or contributed to the release of

1 a hazardous substance may be liable for a response
2 action pertaining to that release.

3 “(4) DEFINITIONS.—For purposes of this Act
4 the following definitions shall apply:

5 “(A) PROPERTY ACQUIRED THROUGH
6 FORECLOSURE.—

7 “(i) IN GENERAL.—The term ‘prop-
8 erty acquired through foreclosure’ means
9 property acquired, or the act of acquiring
10 property, from a nonaffiliated party by a
11 lender—

12 “(I) through purchase at sales
13 under judgment or decree, power of
14 sales, nonjudicial foreclosure sales, or
15 from a trustee, deed in lieu of fore-
16 closure, or similar conveyance, or
17 through repossession, if such property
18 was security for an extension of credit
19 previously contracted;

20 “(II) through conveyance pursu-
21 ant to an extension of credit pre-
22 viously contracted, including the ter-
23 mination of a lease agreement; or

24 “(III) through any other formal
25 or informal manner by which the lend-

1 er temporarily acquires, for subse-
2 quent disposition, possession of collat-
3 eral in order to protect its interest.

4 “(ii) EXCLUSION.—Property is not ac-
5 quired through foreclosure if the lender
6 does not seek to sell or otherwise divest
7 such property at the earliest practical,
8 commercially reasonable time, on commer-
9 cially reasonable terms, taking into account
10 market conditions and legal and regulatory
11 requirements.

12 “(B) LENDER.—The term ‘lender’
13 means—

14 “(i) a person that makes a bona fide
15 extension of credit to, or takes a security
16 interest from, another party;

17 “(ii) the Federal National Mortgage
18 Association, the Federal Home Loan Mort-
19 gage Corporation, the Federal Agricultural
20 Mortgage Corporation, or other entity that
21 in a bona fide manner is engaged in the
22 business of buying or selling loans or inter-
23 ests therein.

24 “(iii) any person engaged in the busi-
25 ness of insuring or guaranteeing against a

1 default in the repayment of an extension of
2 credit, or acting as a surety with respect to
3 an extension of credit, to another party;
4 and

5 “(iv) any person regularly engaged in
6 the business of providing title insurance
7 who acquires the property as a result of
8 assignment or conveyance in the course of
9 underwriting claims and claims settlement.

10 “(C) EXTENSIONS OF CREDIT.—The term
11 ‘extension of credit’ includes a lease finance
12 transaction—

13 “(i) in which the lessor does not ini-
14 tially select the leased property and does
15 not during the lease term control the daily
16 operations or maintenance of the property;
17 or

18 “(ii) that conforms any regulations is-
19 sued by the appropriate Federal banking
20 agency (as defined in section 3 of the Fed-
21 eral Deposit Insurance Act) or the appro-
22 priate State banking regulatory authority.

23 “(D) FORECLOSURE; FORECLOSE.—The
24 terms ‘foreclosure’ and ‘foreclose’ mean, respec-

1 tively, acquiring, and to acquire, a vessel or fa-
2 cility through—

3 “(i) purchase at sale under a judg-
4 ment or decree, a power of sale, a
5 nonjudicial foreclosure sale, or from a
6 trustee, deed in lieu of foreclosure, or simi-
7 lar conveyance, or through repossession, if
8 such vessel or facility was security for an
9 extension of credit previously contracted;

10 “(ii) conveyance pursuant to an exten-
11 sion of credit previously contracted, includ-
12 ing the termination of a lease agreement;
13 or

14 “(iii) any other formal or informal
15 manner by which the person acquires, for
16 subsequent disposition, possession of collat-
17 eral in order to protect the security inter-
18 est of the person.—

19 “(p) SAVINGS CLAUSE.—Nothing in this section
20 shall—

21 “(1) affect the rights or immunities or other de-
22 fenses that are available under this Act or other ap-
23 plicable law to any party subject to the provisions of
24 this section;

1 “(2) be construed to create any liability for any
2 party; or

3 “(3) create a private right of action against any
4 lender or against any Federal agency that regulates
5 lenders.”.

6 **SEC. 3. INNOCENT LANDOWNER.**

7 Section 101(35) of the Comprehensive Environmental
8 Response, Compensation, and Liability Act of 1980 (42
9 U.S.C. 9601 (35)) is amended by redesignating subpara-
10 graphs (C) and (D) as subparagraphs (D) and (E),
11 respectively, and inserting after subparagraph (B) the
12 following:

13 “(C)(i) A defendant who has acquired real
14 property shall have established a rebuttable pre-
15 sumption that he has made all appropriate in-
16 quiry within the meaning of subparagraph (B)
17 if he establishes that, within 180 days prior to
18 the time of acquisition, he conducted an envi-
19 ronmental site assessment of the real property
20 which meets the requirements of this subpara-
21 graph.

22 “(ii) For purposes of this subparagraph,
23 the term ‘environmental site assessment’ means
24 an assessment of the real property and sur-
25 rounding areas to obtain commonly known or

1 reasonably ascertainable information about the
2 property and to assess the obviousness of the
3 presence or likely presence of contamination at
4 the real property, and which consists of each
5 of the following elements:

6 “(I) Interview of owners, operators,
7 and occupants of the property to determine
8 information regarding the potential for
9 contamination there.

10 “(II) Review of standard historical
11 sources as necessary to determine previous
12 uses and occupancies of the property since
13 the property was first developed. For pur-
14 poses of this subclause, the term ‘standard
15 historical sources’ means any of the follow-
16 ing, providing they are reasonable ascer-
17 tainable: recorded chain of title documents
18 regarding the real property, including all
19 deeds, easements, leases, restrictions, and
20 covenants, aerial photographs, fire insur-
21 ance maps, property tax files, USGS 7.5
22 minutes topographic maps, local street di-
23 rectories, building department records,
24 zoning/land use records, and any other
25 sources that are credible to a reasonable

1 person and that identify past uses and oc-
2 cupancies of the property.

3 “(III) Determination of the existence
4 of recorded environmental cleanup liens
5 against the real property which have arisen
6 pursuant to Federal, State, or local stat-
7 utes.

8 “(IV) Review of reasonably ascertain-
9 able Federal, State, and local government
10 records of sites or facilities that are likely
11 to cause or contribute to contamination at
12 the real property, including, as appro-
13 priate, investigation reports for such sites
14 or facilities; records of activities likely to
15 cause or contribute to contamination at the
16 real property, including landfill and other
17 disposal location records, underground
18 storage tank records, hazardous waste han-
19 dler and generator records and spill report-
20 ing records; and such other reasonable as-
21 certainable Federal, State, and local gov-
22 ernment environmental records which re-
23 flect incidents or activities which are likely
24 to cause or contribute to contamination at
25 the real property.

1 “(V) A visual site inspection of the
2 real property and all facilities and improve-
3 ments on the real property and a visual in-
4 spection of immediately adjacent prop-
5 erties, including an investigation of any
6 hazardous substance use, storage, treat-
7 ment, and disposal practices on the prop-
8 erty.

9 A record is considered to be ‘reasonably ascer-
10 tainable’ for purposes of this clause if a copy or
11 reasonable facsimile of the record, or access to
12 it, is obtainable from the government agency by
13 request (within reasonable time and cost con-
14 straints) and the record is practically
15 reviewable.

16 “(iii) No presumption shall arise under
17 clause (i) unless the defendant has maintained
18 a complication of the information reviewed in
19 the course of the environmental site assessment.

20 “(iv) Notwithstanding any other provision
21 of this paragraph, if the environmental site as-
22 sessment discloses the presence of contamina-
23 tion at the real property to be acquired, no pre-
24 sumption shall arise under clause (i) with re-
25 spect to such contamination unless the defend-

1 ant has taken reasonable steps, in accordance
2 with commonly available technology, existing
3 law, and generally acceptable engineering prac-
4 tices, as may be necessary to confirm the ab-
5 sence of such contamination.

6 “(v) For the purposes of this paragraph,
7 the term ‘contamination’ means an existing re-
8 lease, a past release, or the material threat of
9 a release of a hazardous substance, other than
10 de minimis conditions that generally do not
11 present a material risk of harm to public health
12 or welfare or the environment.”.

13 **SEC. 4. LIMITATION OF LIABILITY UNDER SOLID WASTE**
14 **DISPOSAL ACT.**

15 The Solid Waste Disposal Act (42 U.S.C. 6901 et
16 seq.) is amended as follows:

17 (1) By adding at the end of section 1004 the
18 following paragraph:

19 “(42) The terms ‘operator’, ‘generator’, and
20 ‘transporter’ do not include a person who would not
21 be an owner or operator within the meaning of sub-
22 paragraphs (E) and (F) of section 101(20) of the
23 Comprehensive Environmental Response, Compensa-
24 tion and Liability Act of 1980.”.

1 (2) By adding at the end of section 9003(h)(9)
2 the following sentence: “This definition shall be con-
3 strued to be parallel and comparable to that speci-
4 fied in section 101(20)(E) of the Comprehensive En-
5 vironmental Response, Compensation, and Liability
6 Act of 1980.”.

7 **SEC. 5. EFFECTIVE DATE.**

8 The amendments made by this Act shall become ef-
9 fective immediately upon enactment.

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