
THE GENERAL ASSEMBLY OF PENNSYLVANIA

SENATE BILL

No. 11

Session of
1995

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DELP, HART, ULIANA AND GERLACH, JANUARY 17, 1995

REFERRED TO ENVIRONMENTAL RESOURCES AND ENERGY, JANUARY 17, 1995

AN ACT

1 Limiting environmental liability for economic development
2 agencies, financiers and fiduciaries.

3 The General Assembly of the Commonwealth of Pennsylvania
4 hereby enacts as follows:

5 Section 1. Short title.

6 This act shall be known and may be cited as the Economic
7 Development Agency and Lender Environmental Liability Protection
8 Act.

9 Section 2. Declaration of policy.

10 The General Assembly finds and declares as follows:

11 (1) The Commonwealth has provided grant and loan funds
12 to a variety of economic development agencies, all for the
13 purpose of assisting these agencies in their efforts to
14 promote the general welfare of this Commonwealth by
15 encouraging economic development and industrial redevelopment

1 throughout this Commonwealth.

2 (2) Economic development agencies acquire title to
3 industrial property for financing purposes only and lease or
4 sell the same to industrial occupants who have sole
5 possession of the facilities for an amount of rent or
6 installment payments pursuant to an installment sale contract
7 which is determined solely on a basis of meeting the costs of
8 the financing and other costs associated with ownership
9 unrelated to profit.

10 (3) Economic development agencies acquire possession of
11 these industrial sites from time to time when the industrial
12 occupant defaults under its obligations to the agencies under
13 its lease or installment sales agreements.

14 (4) Economic development agencies also acquire
15 industrial property either for the purpose of financing or
16 redevelopment but without a motive for profit or to occupy
17 the property for their own industrial operations.

18 (5) Economic development agencies are reluctant to
19 acquire title to or other interests in property whether for
20 financing or redevelopment purposes or to secure repayment of
21 obligations unless the economic development agencies are
22 protected from liability for environmental contamination on
23 those sites they seek to assist to develop.

24 (6) The taking of legal title and any foreclosure or
25 retaking of possession of property by an industrial
26 development agency, area loan organization or industrial and
27 commercial development authority is pursuant to the following
28 acts:

29 (i) The act of May 17, 1956 (1955 P.L.1609, No.537),
30 known as the Pennsylvania Industrial Development

1 Authority Act, which expressly requires that the
2 Pennsylvania Industrial Development Authority loan money
3 to industrial development agencies secured by not less
4 than a second mortgage lien.

5 (ii) The act of August 23, 1967 (P.L.251, No.102),
6 known as the Economic Development Financing Law, which
7 provides for issuance of debt by industrial and
8 commercial development authorities and authorizes these
9 authorities to take title to real property as security
10 for the indebtedness.

11 (iii) The act of July 2, 1984 (P.L.545, No.109),
12 known as the Capital Loan Fund Act, which requires that
13 its loans be made to area loan organizations with
14 adequate collateral.

15 (7) The maximum level of economic development and
16 business opportunity and employment and the elimination or
17 prevention of abandoned industrial and commercial property
18 and Federal Government or military lands which can best be
19 provided by the promotion, attraction, stimulation,
20 rehabilitation and revitalization of all types of industry,
21 commerce, manufacturing and business development within this
22 Commonwealth.

23 (8) To continue and further the stimulation of business
24 opportunities and economic development within this
25 Commonwealth and thereby cause the reuse and rehabilitation
26 of industrial and commercial property, it is necessary to
27 ensure various means of financing to promote economic growth
28 and the availability of fiduciary services to persons within
29 this Commonwealth.

30 (9) Lenders are reluctant to provide funding for

1 business opportunities and economic development, and
2 fiduciaries are reluctant to provide services to persons with
3 environmental problems, because of catastrophic risks of
4 environmental liability and remediation costs under
5 environmental laws relating to releases and contamination
6 which were not caused by lenders and fiduciaries.

7 (10) When borrowers default on loans, lenders are
8 reluctant to foreclose upon commercial property with
9 environmental problems because lenders may be forced to
10 assume costly environmental liabilities; thus, commercial
11 property is being abandoned in this Commonwealth and new
12 businesses are unable to obtain financing to purchase such
13 properties.

14 (11) Family businesses are unable to establish trusts to
15 convey their business interests to the next generation and
16 other businesses are unable to receive retirement, investment
17 and other trust services from fiduciaries, when fiduciaries,
18 in their personal or individual capacities, may be held
19 liable for environmental contamination caused by other
20 persons merely by virtue of owning property in their trustee
21 capacities and providing fiduciary services.

22 (12) In order to continue to stimulate growth and
23 continue the use or reuse of industrial and commercial
24 property, it is necessary to provide protection, to lenders,
25 fiduciaries and economic development agencies, from
26 environmental liability and remediation costs under
27 environmental laws for releases and contamination caused by
28 others.

29 (13) Environmental liability for lenders, fiduciaries
30 and economic development agencies shall be limited in scope

as specifically provided in this act, and this act shall be interpreted as broadly as possible in order to preempt any laws, regulations or ordinances imposing environmental liability on such persons in order to promote economic development.

Section 3. Definitions.

The following words and phrases when used in this act shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Board." The Environmental Hearing Board of the Commonwealth.

"Borrower." A person who has received an extension of credit. The term includes, but is not limited to, a debtor, a lessor, a lessee or an obligor.

"Conservancy." A charitable corporation, charitable association or charitable trust registered with the Bureau of Charitable Organizations and exempt from taxation pursuant to section 501(c)(3) of the Internal Revenue Code of 1986 (Public Law 99-514, 26 U.S.C. § 501(c)(3)) or other Federal or Commonwealth statutes or regulations, the purpose or powers of which include retaining or protecting natural, scenic, agricultural or open-space values of real property; assuring the availability of real property for agricultural, forest, recreational or open-space use; protecting natural resources and wildlife; maintaining or enhancing land, air or water quality; or preserving the historical, architectural, archaeological or cultural aspects of real property.

"Department." The Department of Environmental Resources of the Commonwealth.

"Economic development agencies." The term includes:

1 (1) Any redevelopment authority created under the act of
2 May 24, 1945 (P.L.991, No.385), known as the Urban
3 Redevelopment Law.

4 (2) Any industrial development agency as that term is
5 defined in the act of May 17, 1956 (1955 P.L.1609, No.537),
6 known as the Pennsylvania Industrial Development Authority
7 Act.

8 (3) Any industrial and commercial development authority
9 created under the act of August 23, 1967 (P.L.251, No.102),
10 known as the Economic Development Financing Law.

11 (4) Any area loan organization as that term is defined
12 in the act of July 2, 1984 (P.L.545, No.109), known as the
13 Capital Loan Fund Act.

14 (5) Any other Commonwealth or municipal authority which
15 acquires title or an interest in property.

16 (6) Municipalities or municipal industrial development
17 or community development departments organized by ordinance
18 under a home rule charter which buy and sell land for
19 community development purposes.

20 (7) Tourist promotion agencies or their local community-
21 based nonprofit sponsor which engage in the acquisition of
22 former industrial sites as part of an "Industrial Heritage"
23 or similar program.

24 (8) Conservancies engaged in the renewal or reclamation
25 of an industrial site.

26 "Environmental acts." Collectively and separately, the act
27 of June 22, 1937 (P.L.1987, No.394), known as The Clean Streams
28 Law, the act of January 8, 1960 (1959 P.L.2119, No.787), known
29 as the Air Pollution Control Act, the act of July 7, 1980
30 (P.L.380, No.97), known as the Solid Waste Management Act, the

1 act of October 5, 1984 (P.L.734, No.159), known as the Worker
2 and Community Right-to-Know Act, the act of July 13, 1988
3 (P.L.525, No.93), referred to as the Infectious and
4 Chemotherapeutic Waste Law, the act of October 18, 1988
5 (P.L.756, No.108), known as the Hazardous Sites Cleanup Act, the
6 act of July 6, 1989 (P.L.169, No.32), known as the Storage Tank
7 and Spill Prevention Act, the act of December 7, 1990 (P.L.639,
8 No.165), known as the Hazardous Material Emergency Planning and
9 Response Act, and the act of June 11, 1992 (P.L.303, No.52),
10 known as the Oil Spill Responder Liability Act, and all such
11 acts as they may be amended from time to time, and any Federal,
12 State or local law, statute, regulation, rule, ordinance, court
13 or administrative order or decree, interpretation or guidance,
14 now or hereafter in existence pertaining to employees,
15 occupational health and safety, public health or safety, natural
16 resources or the environment.

17 "Environmental due diligence." Investigative techniques,
18 including, but not limited to, visual property inspections,
19 electronic environmental data base searches, review of ownership
20 and use history of the property, environmental questionnaires,
21 transaction screens, environmental assessments or audits.

22 "Fiduciary." Any person which is considered a fiduciary
23 under section 3(21) of the Employee Retirement Income Security
24 Act of 1974 (Public Law 93-406, 88 Stat. 829) or who acts as
25 trustee, executor, administrator, custodian, guardian of
26 estates, conservator, committee of estates of persons who are
27 disabled, personal representative, receiver, agent, nominee,
28 registrar of stocks and bonds, assignee or in any other capacity
29 for the benefit of another person.

30 "Foreclosure." The date upon which title vests in property

1 through realizing upon a security interest, including, but not
2 limited to, any ownership of property recognized under
3 applicable law as vesting the holder of the security interest
4 with some indicia of title, legal or equitable title obtained at
5 or in lieu of foreclosure, sheriff sales, bankruptcy
6 distributions and their equivalents.

7 "Fund." Collectively and separately, any special fund of
8 Commonwealth moneys administered by the Commonwealth or the
9 Department of Environmental Resources, including, but not
10 limited to, the Hazardous Sites Cleanup Fund and the Underground
11 Storage Tank Indemnification Fund, as well as any other fund of
12 Commonwealth moneys now or hereafter in existence created for
13 the funding or reimbursement of costs and damages such as
14 response costs, emergency response measures and their equivalent
15 relating to natural resources or the environment.

16 "Guarantor." The term includes guarantors and sureties of
17 security interests, securities and other obligations, issuers of
18 letters of credit and other credit enhancements, title insurers
19 and entities which directly or indirectly acquire indicia of
20 ownership in the course of protecting a security interest or
21 acting as such guarantors, sureties, issuers of letters of
22 credit or other credit enhancements or title insurers. The term
23 includes guaranties, surety bonds, title insurance policies,
24 letters of credit and other credit enhancements, and other
25 agreements with a guarantor relating to the obligations
26 described in this definition. The term directly or indirectly
27 includes any interest in property, security interest, indicia of
28 ownership title or right to title held or acquired by a
29 fiduciary or similar entity for the benefit of a holder of a
30 security interest.

1 "Indicia of ownership." Any legal or equitable interest in
2 property acquired directly or indirectly:

3 (1) for securing payment of a loan or indebtedness, a
4 right of reimbursement or subrogation under a guaranty or the
5 performance of another obligation;

6 (2) evidencing ownership under a lease financing
7 transaction where the lessor does not initially select or
8 ordinarily control the daily operation or maintenance of the
9 property; or

10 (3) in the course of creating, protecting or enforcing a
11 security interest or right of reimbursement of subrogation
12 under a guaranty.

13 The term includes evidence of interest in mortgages, deeds of
14 trust, liens, surety bonds, guaranties, lease financing
15 transactions where the lessor does not initially select or
16 ordinarily control the daily operation or maintenance of the
17 property, other forms of encumbrances against property
18 recognized under applicable law as vesting the holder of the
19 security interest with some indicia of title.

20 "Industrial activity." Commercial, manufacturing, mining or
21 any other activity done to further either the development,
22 manufacturing or distribution of goods and services, including,
23 but not limited to, research and development, warehousing,
24 shipping, transport, remanufacturing, repair and maintenance of
25 commercial machinery and equipment.

26 "Industrial site." A site which now has or once had an
27 industrial activity on it.

28 "Lender." Any person regulated or supervised by any Federal
29 or State regulatory agency and any of its affiliates or
30 subsidiaries, successors or assigns, including its officers,

1 directors, employees, representatives or agents, and any Federal
2 or State banking or lending agency or its successors, including,
3 but not limited to, Resolution Trust Corporation, Federal
4 Deposit Insurance Corporation, Federal Reserve Bank, Board of
5 Governors of the Federal Reserve System, Federal Home Loan Bank,
6 National Credit Union Administrator Board, Office of the
7 Comptroller of the Currency, Office of Thrift Supervision, Farm
8 Credit Administration and Small Business Administration or
9 similarly chartered Federal instrumentality. The term also
10 includes the initial lender and any subsequent holder of a
11 security interest or note, guarantor, lease financier or any
12 successor or a receiver or other person who acts on behalf or
13 for the benefit of a holder of a security interest. The term
14 includes an economic development agency.

15 "Occupant." A party which occupies or has the right to
16 occupy property owned by an economic development agency by any
17 instrument, including, but not limited to, a lease, mortgage,
18 installment sale contract, disposition agreement or trust
19 agreement.

20 "Person." An individual, partnership, corporation, business
21 trust, joint-stock fund, estate trust, banking association,
22 governmental, administrative or regulatory agency, institution
23 or any other type of legal entity whatsoever.

24 "Property." All types of real and personal and tangible and
25 intangible property.

26 "Redevelopment." Undertakings and activities made under the
27 act of May 24, 1945 (P.L.991, No.385), known as the Urban
28 Redevelopment Law, including, but not limited to, planning,
29 acquisition, site preparation, demolition, rehabilitation,
30 renovation, conservation, reuse, renewal, improvement,

1 clearance, sale and lease of real property and improvements
2 thereon.

3 "Regulated substance." Any element, compound or material
4 which is subject to regulation under the environmental acts or
5 any element, compound or material defined as a hazardous, toxic,
6 regulated infectious chemotherapeutic substance or chemical
7 contaminant, waste, any type of pollution or condition or any
8 equivalent under the environmental acts.

9 "Release." Any spill, rupture, emission, discharge, other
10 action, occurrence, condition or any other term defined as a
11 "release" or other threat of release or operative word or event
12 which would trigger compliance requirements or liability under
13 the environmental acts.

14 "Response action." An action, including, but not limited to,
15 a response or interim response, remedial response or remedy or
16 corrective action, closure, or any other action under the
17 environmental acts in response to a release, such as testing,
18 inspections, sampling, installations, corrective action,
19 removals, closure, response costs, assessments or any types of
20 claims, damages, actions, fines and penalties.

21 "Security interest." An interest in property created or
22 established for the purpose of securing a loan, right of
23 reimbursement or subrogation under a guaranty or other
24 obligation or constituting a lease financing transaction. The
25 term includes security interests created under 13 Pa.C.S.
26 (relating to commercial code), mortgages, deeds of trust, liens,
27 lease financing transactions in which the lessor does not
28 initially select or ordinarily control the daily operation or
29 maintenance of the property, trust receipt transactions and
30 their equivalents. Security interest may also arise from

1 transactions such as sales and leasebacks, conditional sales,
2 installment sales, certain assignments, factoring agreements,
3 accounts receivable, financing arrangements and consignments, if
4 the transaction creates or establishes an interest in property
5 for the purpose of securing a loan, right of reimbursement or
6 subrogation under a guaranty or other obligation. The term also
7 includes a confession of judgment or money judgment whereby a
8 lender commences an execution on such judgments with a writ of
9 execution and thereby causes property to be levied and attached.

10 Section 4. Limitation of economic development agency

11 environmental liability.

12 An economic development agency that holds an indicia of
13 ownership in property as a security interest for the purpose of
14 developing or redeveloping the property or to finance an
15 economic development or redevelopment activity shall not be
16 liable under the environmental acts to the department or to any
17 other person in accordance with the following:

18 (1) An economic development agency shall not be liable
19 in an action by the department, as a responsible person,
20 owner, operator or occupier, for remediating a release if the
21 economic development agency demonstrates any of the
22 following:

23 (i) The economic development agency exercised
24 reasonable maintenance of the property when it had
25 possession of the property.

26 (ii) The economic development agency, including its
27 employees and agents, did not cause or exacerbate a
28 release of regulated substances on or from the property.

29 (iii) The property is an industrial site.

30 (2) An economic development agency which forecloses on

1 or assumes possession of a property shall remain within the
2 exemption from liability under this section.

3 (3) An economic development agency that conducts a
4 remedial action in accordance with a written agreement with
5 the department shall not be liable, as a responsible party,
6 owner, operator or occupier, in any action by the department
7 for a release or potential release of any regulated
8 substance.

9 (4) There is cooperation with governmental agencies
10 performing a remedial action, as follows:

11 (i) An economic development agency and any of its
12 successors and assigns may take no action that would
13 disturb or be inconsistent with remedial response that is
14 proposed, approved or implemented by the Federal
15 Environmental Protection Agency.

16 (ii) An economic development agency and any of its
17 successors and assigns shall permit access to Federal and
18 Commonwealth agencies and other parties acting under the
19 direction of these agencies to evaluate, perform or
20 maintain a remedial action.

21 (iii) An economic development agency or any of its
22 successors and assigns shall perform, operate and
23 maintain remedial actions pursuant to State laws as
24 directed by the department.

25 Section 5. Limitation of lender environmental liability.

26 (a) Scope of lender liability.--A lender who engages in
27 activities involved in the routine practices of commercial
28 lending, including, but not limited to, the providing of
29 financial services, holding of security interests, workout
30 practices, foreclosure or the recovery of funds from the sale of

1 property shall not be liable under the environmental acts or
2 common law equivalents to the Department of Environmental
3 Resources or to any other person by virtue of the fact that the
4 lender engages in such commercial lending practice unless:

5 (1) the lender, its employees or agents directly cause
6 an immediate release or directly exacerbate a release of
7 regulated substances on or from the property; or

8 (2) the lender, its employees or agents knowingly and
9 willfully compelled the borrower to:

10 (i) do an action which caused an immediate release
11 of regulated substances; or

12 (ii) violate an environmental act.

13 (b) Limitation of lender liability.--Liability pursuant to
14 this act shall be limited to the cost for a response action
15 which may be directly attributable to the lender's activities as
16 specified in subsection (a). Liability shall arise only if the
17 lender's actions were the proximate and efficient cause of the
18 release or violation. Ownership or control of the property after
19 foreclosure shall not by itself trigger liability. No lender
20 shall be liable for any response action, if such response action
21 arises solely from a release of regulated substances which
22 occurred prior to or commences before and continues after
23 foreclosure, provided, however, that the lender shall be
24 responsible for that portion of the response action which is
25 directly attributed to the lender's exacerbation of a release. A
26 release of regulated substances discovered in the course of
27 conducting environmental due diligence shall be presumed to be a
28 prior or continuing release on the property.

29 Section 6. Limitation of fiduciary environmental liability.

30 (a) Scope of fiduciary liability.--Any person who acts or

1 has acted as a fiduciary to another person shall not be liable
2 in its personal or individual capacity under the environmental
3 acts or common law equivalents to the department or to any other
4 person by virtue of the fact that the fiduciary provides or
5 provided such services unless:

6 (1) during the time when the fiduciary services were
7 actively provided, an event occurred which constituted a
8 release of regulated substances according to the
9 environmental acts at the time of such event;

10 (2) the fiduciary had the express power and authority to
11 control property which was the cause of or the site of such
12 release as part of actively providing services; and

13 (3) the release was caused by an act or omission which
14 constituted gross negligence or willful misconduct of the
15 fiduciary according to the law or standard practices at the
16 time of the release.

17 (b) Limitation of fiduciary liability.--Liability under this
18 act shall be limited to only the cost for a response action
19 which is directly attributable to the fiduciary's activities as
20 specified in this section. Under subsection (a)(2), control of
21 property shall be deemed to be in the lessee and not the lessor
22 for leased property. No fiduciary shall be liable for any
23 response action, if such response action arises from a release
24 of regulated substances which occurred prior to, or commences
25 before and continues after the fiduciary takes action as
26 specified in subsection (a). Notwithstanding the foregoing, a
27 fiduciary shall be responsible for that portion of a response
28 action which is directly attributable to exacerbating a release.
29 A release of regulated substances discovered in the course of
30 conducting an environmental due diligence shall be presumed to

1 be a prior and continuing release on the property.

2 (c) Estate claims.--Nothing in this section shall prevent
3 claims against the fiduciary in its representative capacity.

4 Section 7. Defenses to liability.

5 A lender, fiduciary or economic development agency can avoid
6 liability under the environmental acts or the common-law
7 equivalents by showing evidence that a release or threatened
8 release of regulated substances for which the lender or
9 fiduciary otherwise is responsible under sections 4, 5 and 6 was
10 caused by any of the following:

11 (1) An act of God.

12 (2) An intervening act of a public agency.

13 (3) Migration from property owned by a third party.

14 (4) Actions taken or omitted in the course of rendering
15 care, assistance or advice in accordance with the
16 environmental acts or at the direction of the department.

17 (5) An act of a third party who was not an agent or
18 employee of the lender, fiduciary or economic development
19 agency.

20 (6) If the alleged liability for a lender or economic
21 development agency arises after foreclosure, and the lender
22 or economic development agency exercised due care with
23 respect to the lender's or economic development agency's
24 knowledge about the regulated substances, and took reasonable
25 precautions based upon such knowledge against foreseeable
26 actions of third parties and the consequences arising
27 therefrom. A lender, fiduciary or economic development agency
28 can avoid liability by proving any other defense which may be
29 available to it under the environmental acts or common law.

30 Section 8. Savings clause.

1 Nothing in this act shall affect the rights, immunities or
2 other defenses that are available under other applicable law to
3 a lender, fiduciary or economic development agency, including,
4 but not limited to, rights of contribution and indemnity.

5 Nothing in this act shall be construed to create any new,
6 different or additional liability for or create a private right
7 of action against any lender, fiduciary or economic development
8 agency.

9 Section 9. Apportionment of liability.

10 Notwithstanding anything to the contrary, if two or more
11 persons acting independently cause distinct harm or a single
12 harm for which there is a reasonable basis for division
13 according to the contribution of each, a lender, fiduciary or
14 economic development agency shall be subject to liability only
15 for the portion of the total liability that is directly
16 attributable to the lender or fiduciary.

17 Section 10. Construction of act.

18 The terms and conditions of this act are to be liberally
19 construed so as to best achieve and effectuate the goals and
20 purposes of this act. Liability shall be based on proximate and
21 efficient causation. This act preempts and eliminates all
22 present liability standards, including, but not limited to, the
23 concept of a person who, without participation in the management
24 of property, holds indicia of ownership primarily to protect a
25 security interest. Under all provisions herein, the burden of
26 proof shall be upon the person seeking to have a lender,
27 fiduciary or economic development agency held liable for a
28 response action. The burden of proof shall be upon the person
29 seeking to have a lender or a fiduciary held liable for a
30 response action or damages.

1 Section 11. Severability.

2 The provisions of this act are severable. If any provision of
3 this act or its application to any person or circumstance is
4 held invalid, the invalidity shall not affect other provisions
5 or applications of this act which can be given effect without
6 the invalid provision or application.

7 Section 12. Repeals.

8 To the extent that any environmental acts are inconsistent
9 with this act, or pose liability as addressed in this act, such
10 provision of those laws are preempted and deemed repealed so
11 that the provisions of this act may be enforced. No
12 environmental law enacted after this act shall be applied
13 retroactively to impose liability upon lenders, fiduciaries or
14 economic development agencies, unless there are express
15 repealers which explain the extent of the repeal.

16 Section 13. Applicability.

17 The provisions of this act shall apply to the following:

18 (1) All indicia of ownership, including those presently
19 or subsequently acquired, or those acquired prior to the date
20 of enactment that are held primarily to protect a security
21 interest in the property.

22 (2) Each fiduciary with respect to any services provided
23 by the fiduciary, including those presently or subsequently
24 provided, and those rendered prior to the date of enactment.

25 (3) All administrative actions, actions, suits or claims
26 against lenders, fiduciaries or economic development agencies
27 not yet finally resolved by the department or any court or
28 administrative hearing board having any action, suit or claim
29 pending before it or an appeal from a lower court, regardless
30 of when the release or interest in the subject property

1 occurred.

2 Section 14. Effective date.

3 This act shall take effect immediately upon the effective
4 date of the act of , 1995 (P.L. , No.) known
5 as the Land Recycling and Environmental Remediation Standards
6 Act.