

THE GENERAL ASSEMBLY OF PENNSYLVANIA

**HOUSE BILL**  
**No. 2565** Session of  
1994

INTRODUCED BY LESCOVITZ, HASAY, COY, VEON, ITKIN, DeWEESE AND  
BELARDI, MARCH 7, 1994

REFERRED TO COMMITTEE ON BUSINESS AND ECONOMIC DEVELOPMENT,  
MARCH 7, 1994

AN ACT

1 Providing for the safe harbor from liability of certain lenders  
2 and fiduciaries for environmental liability and remediation  
3 relating to releases which were not caused by lenders and  
4 fiduciaries in order to stimulate economic development within  
5 this Commonwealth.

6 The General Assembly of the Commonwealth of Pennsylvania  
7 hereby enacts as follows:

8 Section 1. Short title.

9 This act shall be known and may be cited as the Environmental  
10 Economic Development Promotion and Environmental Liability  
11 Protection Act.

12 Section 2. Declaration of policy.

13 The General Assembly finds and declares as follows:

14 (1) That a maximum level of economic development,  
15 business opportunity and employment, and the elimination or  
16 prevention of abandoned industrial and commercial property  
17 can best be provided by the promotion, attraction,  
18 stimulation, rehabilitation and revitalization of all types  
19 of industry, commerce, manufacturing and business development

1 within this Commonwealth.

2 (2) That to continue and further the stimulation of  
3 business opportunities and economic development within this  
4 Commonwealth and thereby cause the reuse and rehabilitation  
5 of industrial and commercial property, it is necessary to  
6 ensure various means of financing to promote economic growth  
7 and the availability of fiduciary services to persons within  
8 this Commonwealth.

9 (3) That lenders are reluctant to provide funding for  
10 business opportunities and economic development, and  
11 fiduciaries are reluctant to provide services to persons with  
12 environmental problems because of the catastrophic risks of  
13 environmental liability and remediation costs under  
14 environmental laws relating to releases and contamination  
15 which were not caused by lenders and fiduciaries.

16 (4) That, when borrowers default on loans, lenders are  
17 reluctant to foreclose upon commercial property with  
18 environmental problems because lenders may be forced to  
19 assume costly environmental liabilities; thus commercial  
20 property is being abandoned in this Commonwealth, and new  
21 businesses are unable to obtain financing to purchase such  
22 properties.

23 (5) That family businesses are unable to establish  
24 trusts to convey their business interests to the next  
25 generation, and other businesses are unable to receive  
26 retirement, investment and other trust services from  
27 fiduciaries when fiduciaries, in their personal or individual  
28 capacities, may be held liable for environmental  
29 contamination caused by other persons merely by virtue of  
30 owning property in their trustee capacities and providing

1       fiduciary services.

2           (6) That, in order to continue to stimulate economic  
3       growth and continue the use or reuse of industrial and  
4       commercial property, it is necessary to provide protection to  
5       lenders and fiduciaries from environmental liability and  
6       remediation costs under the environmental laws for releases  
7       and contamination caused by others.

8           (7) That environmental liability for lenders and  
9       fiduciaries shall be limited in scope as specifically  
10      provided in this act, and this act shall be interpreted as  
11      broadly as possible in order to preempt any laws, regulations  
12      or other documents imposing environmental liability on such  
13      persons to the extent permitted by this act in order to  
14      promote economic development.

15   Section 3. Definitions.

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

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

21      "Borrower." A person whose property is encumbered by a  
22      security interest. The term includes a debtor, a lessor or an  
23      obligor.

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

26      "Emergency event." A sudden occurrence or condition of such  
27      severity or magnitude that it threatens immediate and  
28      irreparable harm to the environment or public health, and an  
29      immediate emergency response measure is necessary for its  
30      stabilization or control.

1 "Emergency response measure." The notification of the  
2 applicable county emergency management agency or the  
3 Pennsylvania Emergency Management Agency and the Department of  
4 Environmental Resources and such minimum steps as may be  
5 reasonably necessary according to the equities of the situation  
6 to attempt to stabilize and control the emergency event and to  
7 mitigate further damages.

8 "Environmental acts." Collectively and separately, the act  
9 of June 22, 1937 (P.L.1987, No.394), known as The Clean Streams  
10 Law, the act of January 8, 1960 (1959 P.L.2119, No.787), known  
11 as the Air Pollution Control Act, the act of July 7, 1980  
12 (P.L.380, No.97), known as the Solid Waste Management Act, the  
13 act of October 5, 1984 (P.L.734, No.159), known as the Worker  
14 and Community Right-to-Know Act, the act of July 13, 1988  
15 (P.L.525, No.93), referred to as the Infectious and  
16 Chemotherapeutic Waste Law, the act of October 18, 1988  
17 (P.L.756, No.108), known as the Hazardous Sites Cleanup Act, the  
18 act of July 6, 1989 (P.L.169, No.32), known as the Storage Tank  
19 and Spill Prevention Act, the act of December 7, 1990 (P.L.639,  
20 No.165), known as the Hazardous Material Emergency Planning and  
21 Response Act, and the act of June 11, 1992 (P.L.303, No.52),  
22 known as the Oil Spill Responder Liability Act, and all such  
23 acts as they may be amended from time to time, and any Federal,  
24 State or local law, statute, regulation, rule, ordinance, court  
25 or administrative order or decree, interpretation or guidance,  
26 now or hereafter in existence pertaining to employees,  
27 occupational health and safety, public health or safety, natural  
28 resources or the environment.

29 "Environmental due diligence." Investigative techniques,  
30 including, but not limited to, visual property inspections,

1 electronic environmental data base searches, review of ownership  
2 and use history of the property, environmental questionnaires,  
3 transaction screens, environmental assessments or audits.

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

12 "Foreclosure." The date upon which title vests in property  
13 through realizing upon a security interest, including, but not  
14 limited to, any ownership of property recognized under  
15 applicable law as vesting the holder of the security interest  
16 with some indicia of title, legal or equitable title obtained at  
17 or in lieu of foreclosure, sheriff sales, bankruptcy  
18 distributions and their equivalents.

19 "Fund." Collectively and separately, any special fund of  
20 Commonwealth moneys administered by the Commonwealth or the  
21 Department of Environmental Resources, including, but not  
22 limited to, the Hazardous Sites Cleanup Fund and the Underground  
23 Storage Tank Indemnification Fund, as well as any other fund of  
24 Commonwealth moneys now or hereafter in existence created for  
25 the funding or reimbursement of costs and damages such as  
26 response costs, emergency response measures and their equivalent  
27 relating to natural resources or the environment.

28 "Guarantor." The term includes guarantors and sureties of  
29 security interests, securities and other obligations, issuers of  
30 letters of credit and other credit enhancements, title insurers

1 and entities which directly or indirectly acquire indicia of  
2 ownership in the course of protecting a security interest or  
3 acting as such guarantors, sureties, issuers of letters of  
4 credit or other credit enhancements or title insurers. The term  
5 includes guaranties, surety bonds, title insurance policies,  
6 letters of credit and other credit enhancements, and other  
7 agreements with a guarantor relating to the obligations  
8 described in this definition. The term directly or indirectly  
9 includes any interest in property, security interest, indicia of  
10 ownership title or right to title held or acquired by a  
11 fiduciary or similar entity for the benefit of a holder of a  
12 security interest.

13 "Holder of a security interest." A person who holds indicia  
14 of ownership in property primarily to protect a security  
15 interest. The term includes the following:

16 (1) The initial holder and any subsequent holder of the  
17 security interest on the secondary market.

18 (2) Guarantor, lease financier or any successor where  
19 the lessor does not initially select or ordinarily control  
20 the daily operation or maintenance of the property.

21 (3) Any person who holds indicia of ownership primarily  
22 to protect a security interest.

23 (4) A receiver or other person who acts on behalf or for  
24 the benefit of a holder of a security interest.

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

27 (1) for the purpose of securing payment of a loan or  
28 indebtedness, a right of reimbursement or subrogation under a  
29 guaranty or the performance of another obligation;

30 (2) evidencing ownership under a lease financing

1 transaction where the lessor does not initially select or  
2 ordinarily control the daily operation or maintenance of the  
3 property; or

4 (3) in the course of creating, protecting or enforcing a  
5 security interest or right of reimbursement of subrogation  
6 under a guaranty.

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

14 "Lender." Any person regulated or supervised by any Federal  
15 or State regulatory agency and any of its affiliates or  
16 subsidiaries, successors or assigns, including its officers,  
17 directors, employees, representatives or agents, and any Federal  
18 or State banking or lending agency or its successors, including,  
19 but not limited to, Resolution Trust Corporation, Federal  
20 Deposit Insurance Corporation, Federal Reserve Bank, Board of  
21 Governors of the Federal Reserve System, Federal Home Loan Bank,  
22 National Credit Union Administrator Board, Office of the  
23 Comptroller of the Currency, Office of Thrift Supervision, Farm  
24 Credit Administration and Small Business Administration or  
25 similarly chartered Federal instrumentality. The term also  
26 includes the initial lender and any subsequent holder of a  
27 security interest or note, guarantor, lease financier or any  
28 successor or a receiver or other person who acts on behalf or  
29 for the benefit of a holder of a security interest.

30 "Person." An individual, partnership, corporation, business

1 trust, joint-stock fund, estate trust, banking association,  
2 governmental, administrative or regulatory agency, institution  
3 or any other type of legal entity whatsoever.

4 "Property." All types of real and personal and tangible and  
5 intangible property.

6 "Regulated substance." Any element, compound or material  
7 which is subject to regulation under the environmental acts or  
8 any element, compound or material defined as a contaminant,  
9 pollution, waste, or equivalent under the environmental acts.

10 "Release." Any spill, rupture, emission, discharge, other  
11 action, occurrence or any other term defined as a "release" or  
12 other operative word under the environmental acts.

13 "Reportable event." Any release, threat of release or action  
14 which must be reported to the Department of Environmental  
15 Resources or any other governmental agency, including, but not  
16 limited to, notices of amounts equal to or greater than  
17 reportable released quantities of regulated substances, any  
18 amounts equal to or greater than a discharge or any permit  
19 violations or other violations which may require reports or  
20 notifications to government agencies under the environmental  
21 acts.

22 "Response action." An action, including, but not limited to,  
23 a response or interim response, remedial response or remedy or  
24 corrective action, closure, or any other action under the  
25 environmental acts, such as testing, inspections, sampling,  
26 installations, corrective action, removals, closure, response  
27 costs, assessments, claims, damages, actions, fines and  
28 penalties.

29 "Security interest." An interest in property created or  
30 established for the purpose of securing a loan, right of



1 reimbursement or subrogation under a guaranty or other  
2 obligation or constituting a lease financing transaction. The  
3 term includes security interests created under 13 Pa.C.S.  
4 (relating to commercial code), mortgages, deeds of trust, liens,  
5 lease financing transactions in which the lessor does not  
6 initially select or ordinarily control the daily operation or  
7 maintenance of the property, trust receipt transactions and  
8 their equivalents. Security interest may also arise from  
9 transactions such as sales and leasebacks, conditional sales,  
10 installment sales, certain assignments, factoring agreements,  
11 accounts receivable, financing arrangements and consignments, if  
12 the transaction creates or establishes an interest in property  
13 for the purpose of securing a loan, right of reimbursement or  
14 subrogation under a guaranty or other obligation. The term also  
15 includes a confession of judgment or money judgment whereby a  
16 lender commences an execution on such judgments with a writ of  
17 execution and thereby causes property to be levied and attached.  
18 Section 4. Limitation of lender environmental liability.

19 (a) Scope of lender liability.--A lender who provides  
20 financial services or holds indicia of ownership in property as  
21 a security interest shall not be liable under the environmental  
22 acts to the department or to any other person by virtue of fact  
23 that the lender provides financial services or holds indicia of  
24 ownership primarily to protect its security interest in the  
25 property, unless:

26 (1) the lender, its employees or agents cause or  
27 exacerbate a release of regulated substances on or from the  
28 property; or

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

1           (i) do an action which caused an immediate release  
2           of regulated substances; or  
3           (ii) violate an environmental act.

4       (b) Limitation of lender liability.--Liability pursuant to  
5 this act shall be limited to the cost for a response action  
6 which may be directly attributable to the lender's activities as  
7 specified in subsection (a). No lender shall be liable for any  
8 damages, including any response action, if such damages arise  
9 solely from a release of regulated substances which occurred  
10 prior to or commences before and continues after foreclosure,  
11 provided, however, that the lender shall be responsible for that  
12 portion of damages which are directly attributed to the lender's  
13 exacerbation of a release. A release of regulated substances  
14 discovered in the course of conducting environmental due  
15 diligence shall be presumed to be a prior or continuing release  
16 on the property.

17       (c) Emergency event after foreclosure.--If an emergency  
18 event occurs after foreclosure and, if upon the basis of  
19 information available to the lender at the time of that  
20 emergency event, there is a clear and convincing basis to  
21 believe that prompt action is necessary, then the lender shall  
22 undertake an emergency response measure without the loss of the  
23 protection afforded by this act. A lender which undertakes an  
24 emergency response measure must use reasonable care and endeavor  
25 to complete the emergency response measure so as to stabilize  
26 the emergency event. No lender shall be liable for any damages  
27 resulting from an emergency event or emergency response measure  
28 or any other damages, including, but not limited to, costs for  
29 response actions at the property, adjoining areas and locations  
30 to which hazardous substances are transported for handling,

1 treatment, storage and disposal, except for damages due to the  
2 lender's acts or omissions which constitute gross negligence or  
3 willful misconduct. Liability pursuant to this subsection shall  
4 be limited to the lesser amount of:

- 5 (1) the remaining value of the affected property;
- 6 (2) the principal amount of the loan secured by the  
7 affected property; or
- 8 (3) the extent of the damages that result due to the  
9 lender's acts or omissions which constitute gross negligence  
10 or willful misconduct in undertaking the emergency response  
11 measure.

12 It shall be a rebuttable presumption of law that a lender who  
13 has taken steps to conduct an emergency response measure has  
14 acted properly and is entitled to protection from liability and  
15 reimbursement as provided in this act; and provided further that  
16 an occurrence or condition constituting a reportable event under  
17 the environmental acts alone shall not be considered by reason  
18 of such status as a reportable event to be an emergency event.

19 (d) Notification requirements.--Notification for an  
20 emergency response measure under this section shall include the  
21 following to the extent known by the lender at the time of such  
22 notification:

- 23 (1) The name and telephone number of the person making  
24 the notification.
- 25 (2) The name and telephone number of the person employed  
26 by the lender who has the authority to take or coordinate the  
27 emergency response measure.
- 28 (3) The time, location and duration of the release.
- 29 (4) The chemical name or identity of any substance  
30 involved in the release.

1 (5) The medium or media into which the release occurred.

2 (6) An estimate of the quantity of the substance that  
3 was released into the environment.

4 (7) Such steps taken to attempt to stabilize and control  
5 the emergency event and mitigate damages.

6 (8) Any additional information that such person deems  
7 appropriate under the circumstances.

8 (e) Emergency response measure costs.--A lender who  
9 undertakes an emergency response measure may be reimbursed for  
10 its costs, including, but not limited to, legal fees, from the  
11 fund by filing an action with the board within 60 days after  
12 completion of the emergency response measure in accordance with  
13 section 505(f) of the act of October 18, 1988 (P.L.756, No.108),  
14 known as the Hazardous Sites Cleanup Act. To recover costs, the  
15 action must include a written summary of the acts taken for the  
16 emergency response measure and documentation of the costs.  
17 Notwithstanding the foregoing, a lender who undertakes an  
18 emergency response measure may also recover its costs and  
19 damages, including legal fees, or seek contribution from a  
20 responsible person in a legal action brought before a court of  
21 competent jurisdiction. In the event that a lender recovers  
22 duplicative costs and damages in a legal action against a  
23 responsible person after being reimbursed for its costs by the  
24 board, the lender shall promptly return to the board any  
25 duplicative amounts received from the fund.

26 Section 5. Limitation of fiduciary environmental liability.

27 (a) Scope of fiduciary liability.--Any person who acts or  
28 has acted as a fiduciary to another person shall not be liable  
29 in its personal or individual capacity under the environmental  
30 acts to the department or to any other person by virtue of the

1 fact that the fiduciary provides or provided such services  
2 unless:

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

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

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

14 (b) Limitation of fiduciary liability.--Liability under this  
15 act shall be limited to only the cost for a response action  
16 which is directly attributable to the fiduciary's activities as  
17 specified in this section. No fiduciary shall be liable for any  
18 damages, including any response action, if such damages solely  
19 arise from a release of regulated substances which occurred  
20 prior to, or commences before and continues after the fiduciary  
21 takes action as specified in subsection (a). Notwithstanding the  
22 foregoing, a fiduciary shall be responsible for that portion of  
23 damages which are directly attributable to exacerbating a  
24 release. A release of regulated substances discovered in the  
25 course of conducting an environmental due diligence shall be  
26 presumed to be a prior and continuing release on the property.

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

29 Section 6. Defenses to liability.

30 A lender or fiduciary can avoid liability under this act by

1 showing evidence that a release or threatened release of  
2 regulated substances for which the lender or fiduciary otherwise  
3 be responsible was caused by any of the following:

4 (1) An act of God.

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

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

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

10 (5) An act of a third party who was not an agent or  
11 employee of the lender or fiduciary.

12 (6) If the alleged liability for a lender arises after  
13 foreclosure and the lender exercised due care with respect to  
14 the regulated substance and took precautions against  
15 foreseeable actions of third parties and the consequences  
16 arising therefrom.

17 Section 7. Savings clause.

18 Nothing in this act shall affect the rights, immunities or  
19 other defenses that are available under other applicable law to  
20 a lender or fiduciary, including, but not limited to, rights of  
21 contribution and indemnity. Nothing in this act shall be  
22 construed to create any liability for or create a private right  
23 of action against any lender or fiduciary.

24 Section 8. Apportionment of liability.

25 Notwithstanding anything to the contrary, if two or more  
26 persons acting independently cause distinct harm or a single  
27 harm for which there is a reasonable basis for division  
28 according to the contribution of each, a lender or fiduciary  
29 shall be subject to liability only for the portion of the total  
30 liability that is directly attributable to the lender or

1 fiduciary.

2 Section 9. Construction of act.

3 The terms and conditions of this act are to be liberally  
4 construed so as to best achieve and effectuate the goals and  
5 purposes of this act. The burden of proof shall be upon the  
6 person seeking to have a lender or a fiduciary held liable for a  
7 response action or damages.

8 Section 10. Severability.

9 The provisions of this act are severable. If any provision of  
10 this act or its application to any person or circumstance is  
11 held invalid, the invalidity shall not affect other provisions  
12 or applications of this act which can be given effect without  
13 the invalid provision or application.

14 Section 11. Repeals.

15 To the extent that any environmental acts are inconsistent  
16 with this act, such laws are deemed repealed so that the  
17 provisions of this act may be enforced. No environmental law  
18 enacted after this act shall be applied retroactively to impose  
19 liability upon lenders and fiduciaries.

20 Section 12. Applicability.

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

22 (1) All indicia of ownership, including those presently  
23 or subsequently acquired, or those acquired prior to the date  
24 of enactment that are held primarily to protect a security  
25 interest in the property.

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

29 (3) All administrative actions, actions, suits or claims  
30 against lenders or fiduciaries not yet finally resolved by

1       the department or any court or administrative hearing board  
2       having any action, suit or claim pending before it or an  
3       appeal from a lower court.

4 Section 13.   Effective date.

5       This act shall take effect immediately.