

104TH CONGRESS  
1ST SESSION

# H. R. 200

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

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## 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

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## 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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