



SPONSOR: Sen. McBride & Rep. Carey &
Sen. Marshall & Rep. Quillen; Sens.
Bunting, Venables, Connor & Simpson,
Reps. Atkins, Booth, Caulk, Hocker, Hall-
Long, Mulrooney & Plant

DELAWARE STATE SENATE

142nd GENERAL ASSEMBLY

SENATE BILL NO. 157
AS AMENDED BY
SENATE AMENDMENT NO. 1

AN ACT TO AMEND CHAPTER 91 OF TITLE 7 OF THE DELAWARE CODE RELATIANG TO CONSERVATION AND TO DEFINE PROSPECTIVE PURCHASER, TO CREATE LIABILITY PROTECTIONS FOR PROSPECTIVE PURCHASERS, INNOCENT LANDOWNERS, AND CONTIGUOUS PROPERTIES, AND CREATE A BROWNFIELDS REDEVELOPMENT DATABASE.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

1 Section 1. “The General Assembly finds that:

2 (a) There is a need for a consistent scheme of liability concerning brownfields between the Delaware Code as
3 administered by the Department of Natural Resources and Environmental Control and the Small Business Liability Relief
4 and Brownfields Revitalization Act as administered by the U. S. Environmental Protection Agency;

5 (b) The uncertainty and high potential costs associated with the liability at brownfields in the State of Delaware
6 prevent the utilization of these sites at their highest economic potential;

7 (c) The underutilization of brownfields in the State of Delaware operates to the economic detriment of the
8 citizens of the State of Delaware, because the underutilization of these sites limits employment opportunities and
9 needlessly uses valuable ‘greenfield’ resources; and,

10 (d) If liability protections were provided to those not responsible for the release of hazardous substances and who
11 are willing to conduct assessments and cleanups, a greater number of brownfields would be environmentally assessed, and
12 necessary remedies would be performed, thus returning these sites to more productive use and enhancing the economic
13 well being of the citizens of the State of Delaware.”

14 Section 2. Amend §9103 of Title 7 of the Delaware Code by re-designating subsections (5) through (21) as
15 subsections (6) through (22) and adding a new subsection (5) as follows:

16 “(5) ‘Contractual relationship’ means, but is not limited to, land contracts, deeds, easements, leases, or other
17 instruments transferring title or possession. A ‘contractual relationship’ does not exist if the real property on which the
18 facility concerned is located was acquired by the person after the disposal or placement of the hazardous substance on, in,
19 or at the facility, and one or more of the circumstances described in subsection (a), (b), or (c) is also established by the
20 person by a preponderance of the evidence:

21 a. At the time the person acquired the facility the person did not know and had no reason to know that any
22 hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the
23 facility.

24 b. The person is a government entity which acquired the facility by escheat, or through any other involuntary
25 transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.

26 c. The person acquired the facility by inheritance or bequest.

27 Section 3. Amend §9103 of Title 7 of the Delaware Code by re-designating subsections (18) through (22) as
28 subsections (19) through (23) and adding a new subsection (18) as follows:

29 “(18) “Prospective Purchaser” means a person (or a tenant of a person) that acquires or intends to acquire
30 ownership of a facility after the date of the enactment of this paragraph and that establishes each of the following:

31 a. All disposal of hazardous substances at the facility occurred before the person acquired the facility.

32 b. Inquiries.

33 1. The person made all appropriate inquiries into the previous ownership and uses of the facility in
34 accordance with standards and practices in accordance with subsections 2 and 3, below.

35 2. The standards and practices referred to in §9105(c)(2)b.1. and 2., shall be considered to satisfy the
36 requirements of this subsection.

37 3. In the case of property in residential or other similar use at the time of purchase by a nongovernmental or
38 noncommercial entity, a facility inspection and title search that reveal no basis for further investigation shall be
39 considered to satisfy the requirements of this subsection.

40 c. Notices. The person provides all legally required notices with respect to the discovery or release of any
41 hazardous substance(s) at the facility.”

42 Section 4. Amend §9105(c) of Title 7 by adding a new subsection as follows:

43 “(4) Prospective Purchaser Agreements.

a. Notwithstanding §9105(c)(5), a prospective purchaser whose potential liability for a release or threatened release is based solely on the purchaser's being considered to be an owner or operator of a facility shall not be liable as long as the prospective purchaser, with or without the participation of the seller of the property, enters into a Prospective Purchaser Agreement in which the parties responsible for completing a site investigation and any subsequent remediation are identified and subsection b is met. Such Prospective Purchaser Agreements shall:

1. Define the scope of and financial responsibility for the environmental work to be performed pursuant to the agreement;
2. Define the amount, if any, of assistance to be provided by the Department; and
3. Define the scope of any lien to be secured.

b. Requirements for Operation Under a Prospective Purchaser Agreement.

1. The person shall exercise appropriate care with respect to hazardous substance(s) found at the facility by:

(i) As a prospective purchaser (i.e. prior to acquisition of the property):

(I) Not causing a new release of hazardous substances; and

(II) Not taking any action to exacerbate or contribute to an existing release.

(ii) As owner after acquisition of the property, unless specifically addressed in a prospective

purchaser agreement with the Department, by:

(I) Stopping or mitigating any on-going release;

(II) Preventing any threatened future release; and

(III) Preventing or limiting exposure (human, environmental, or natural resource) to any previously released hazardous substance(s).

2. The person shall provide cooperation, assistance, and access to persons that are authorized to oversee remedies or natural resource restoration at a facility (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial remedies or natural resource restoration at the facility).

3. The person shall:

- (i). Be in compliance with any land use restrictions established or relied on in connection with the remedy at a facility; and

(ii). Not impede the effectiveness or integrity of any institutional control employed at the facility in connection with a remedy.

4. The person shall comply with any request for information or administrative subpoena issued by the Secretary under this Chapter.

5. The person shall not be affiliated with any other person that is potentially liable pursuant to 9105(a), for response costs at a facility through:

(i). Any direct or indirect familial relationship, to include spouse, domestic partner, parent, grandparent, brother, sister, son, son-in-law, daughter, daughter-in-law, grandson, granddaughter, step-parent, the parent, son or daughter of a son or daughter of the person's spouse or domestic partner, nephew, niece, aunt, uncle, brother-in-law, sister-in-law, grandparent-in-law, or any relative or friend living in the person's household; or

(ii). Any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by the instruments by which title to the facility is conveyed or financed or by a contract for the sale of goods or services); or

(iii). The result of a reorganization of a business entity that was potentially liable.

c. Lien.

1. If there are unrecovered remedial costs incurred by the State at a facility for which an owner of the facility is not liable by reason of paragraph a., the State may by agreement with the owner, obtain from the owner a lien on this or on any other property or other assurance of payment satisfactory to the Secretary, for all or any portion of the unrecovered remedial costs.

2. A lien under this subsection:

(i) Shall be in an amount not to exceed the unrecovered remedial costs incurred by the State;

(ii) Shall be subject to the requirements of subsection a.; and

(iii) Shall not exceed the value added to the worth of the property by the remedial action.”

Section 5. Amend §9105 by striking the language of subsection (c)(2)a. through subsection (c)(2)c. thereof in its entirety and substituting the following language:

“a. Reason to Know.

1. To establish that the person had no reason to know of the matter described in section 9103(5)a. the person must demonstrate that on or before the date on which the person acquired the facility, the person carried out all appropriate inquiries, as provided in subsection b below, into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices.

b. All Appropriate Inquiry

1. With respect to property purchased on or after May 31, 1997, the procedures of the American Society for Testing and Materials (“ASTM”), including the documents known as “Standard E1527–97” and “Standards E1527-00”, entitled “Standard Practice for Environmental Site Assessment: Phase 1 Environmental Site Assessment Process”, or any other procedure the Secretary may adopt by regulation, shall satisfy the requirements in subsection a.

2. With respect to property purchased before May 31, 1997, in making a determination with respect to a person described in subsection a., the following factors shall be taken into account:

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

(ii) The relationship of the purchase price to the value of the property, if the property was not contaminated;

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

(iv) The obviousness of the presence or likely presence of contamination at the property; and

(v) The ability of the person to detect the contamination by appropriate inspection.

3. In the case of property for residential use or other similar use purchased by a nongovernmental or noncommercial entity, a facility inspection and title search that reveal no basis for further investigation shall be considered to satisfy the requirements of subsection a.

c. Nothing in §9105(c) shall diminish the liability of any previous owner or operator of such facility who would otherwise be liable under this Chapter.

d. Notwithstanding §9105(c), if the person obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the person owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge, such person shall be treated as liable under §9105(a) and no defense under §9105(c) shall be available to such person.

e. Nothing in §9105(c) shall affect the liability under this Chapter of a person who, by any act or omission, caused or contributed to the release or threatened release of a hazardous substance which is the subject of the action relating to the facility.”

Section 6. Amend §9105(c) of Title 7 by adding a new subsection as follows:

“(5) Contiguous Properties.

a. Not Considered to be an Owner or Operator.

1. A person that owns real property that is contiguous to or otherwise similarly situated with respect to, and that is or may be contaminated by a release or threatened release of a hazardous substance from, real property that is not owned by that person shall not be considered to be an owner or operator of a facility under subsection 1 or 2 of subsection (5)a. solely by reason of said release if:

(i) The person did not cause, contribute, or consent to the release or threatened release;

(ii) The person is not:

(I) Potentially liable, or affiliated with any other person that is potentially liable, for costs at a facility through any direct or indirect familial relationship or any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by a contract for the sale of goods or services); or

(II) The result of a reorganization of a business entity that was potentially liable;

(iii) The person takes reasonable steps to:

(I) not cause a release of hazardous substances on their property; and

(II) not take any action to exacerbate or contribute to contamination migrating onto their property

(iv) The person provides reasonable cooperation, assistance, and access to persons that are authorized to conduct a remedy or natural resource restoration at the facility from which there has been a release or threatened release (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial remedy or natural resource restoration at the facility);

(v) The person:

(I) Is in compliance with any land use restrictions established or relied on in connection with the remedy at the facility; and

(II) Does not impede the effectiveness or integrity of any institutional control employed in connection with a remedy;

(vi) The person is in compliance with any written request for information related to the property or contamination or administrative subpoena issued by the Secretary or a court pursuant to this Chapter;

(vii) The person provides all legally required notices with respect to the discovery or release of any hazardous substances at the facility; and

(viii) At the time at which the person acquired the property, the person conducted all appropriate inquiry within the meaning of §9105(c)(2)b. with respect to the property.

2. To qualify as a person described in subsection 1., a person must establish by a preponderance of the evidence that the conditions in subsections (i) through (viii) of subsection 1 have been met.

3. Any person that does not qualify as a person described in this paragraph because the person had, or had reason to have, knowledge specified in subsection 1(viii) at the time of acquisition of the real property may qualify as a prospective purchaser under §9103(18) if the person is otherwise described in that section.

b. With respect to a person described in this subsection, nothing in this subsection:

1. Limits any defense to liability that may be available to the person under any other provision of law; or

2. Imposes liability on the person that is not otherwise imposed by subsection a.

c. The Secretary shall, upon written request:

1. Issue an assurance in writing that no enforcement action under this Chapter will be initiated against a person described in subsection a; and

2. Grant a person described in paragraph a protection against a cost recovery or contribution action under §9107(c).”

Section 7. Amend §9104(b)(2) by adding a new subsection as follows:

“q. For listing of Brownfield, or potential Brownfield, sites on a Brownfield redevelopment database.”

Section 8. This Act shall become effective upon its enactment into law.