

# Senate Bill 867

Sponsored by COMMITTEE ON JUDICIARY (at the request of Oregon Law Commission)

## SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Specifies that Department of Environmental Quality may enter into agreements to implement institutional controls for purposes related to reducing exposure to hazardous substances. Makes all conditions imposed under those agreements valid and enforceable with any conveyance or assignment of interest in real property.

Declares emergency, effective on passage.

## A BILL FOR AN ACT

1  
2 Relating to agreements that implement institutional controls on real property; creating new pro-  
3 visions; amending ORS 465.225, 465.230, 465.235 and 465.315; and declaring an emergency.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1.** ORS 465.315 is amended to read:

6 465.315. (1)(a) Any removal or remedial action performed under the provisions of ORS 465.200  
7 to 465.545 and 465.900 shall attain a degree of cleanup of the hazardous substance and control of  
8 further release of the hazardous substance that assures protection of present and future public  
9 health, safety and welfare and of the environment.

10 (b) The Director of the Department of Environmental Quality shall select or approve remedial  
11 actions that are protective of human health and the environment. The protectiveness of a remedial  
12 action shall be determined based on application of both of the following:

13 (A) The acceptable risk level for exposures. For protection of humans, the acceptable risk level  
14 for exposure to individual carcinogens shall be a lifetime excess cancer risk of one per one million  
15 people exposed, and the acceptable risk level for exposure to noncarcinogens shall be the exposure  
16 that results in a Hazard Index number equal to or less than one. "Hazard Index number" means a  
17 number equal to the sum of the noncarcinogenic risks (hazard quotient) attributable to systemic  
18 toxicants with similar toxic endpoints. For protection of ecological receptors, if a release of haz-  
19 ardous substances causes or is reasonably likely to cause significant adverse impacts to the health  
20 or viability of a species listed as threatened or endangered pursuant to 16 U.S.C. 1531 et seq. or  
21 ORS 496.172, or a population of plants or animals in the locality of the facility, the acceptable risk  
22 level shall be the point before such significant adverse impacts occur.

23 (B) A risk assessment undertaken in accordance with the risk protocol established by the En-  
24 vironmental Quality Commission in accordance with subsection (2)(a) of this section.

25 (c) A remedial action may achieve protection of human health and the environment through:

26 (A) Treatment that eliminates or reduces the toxicity, mobility or volume of hazardous sub-  
27 stances;

28 (B) Excavation and off-site disposal;

29 (C) Containment or other engineering controls;

30 (D) Institutional controls;

**NOTE:** Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

1 (E) Any other method of protection; or

2 (F) A combination of the above.

3 (d) The method of remediation appropriate for a specific facility shall be determined through an  
4 evaluation of remedial alternatives and a selection process to be established pursuant to rules  
5 adopted by the commission. The director shall select or approve a protective alternative that bal-  
6 ances the following factors:

7 (A) The effectiveness of the remedy in achieving protection;

8 (B) The technical and practical implementability of the remedy;

9 (C) The long term reliability of the remedy;

10 (D) Any short term risk from implementing the remedy posed to the community, to those en-  
11 gaged in the implementation of the remedy and to the environment; and

12 (E) The reasonableness of the cost of the remedy. The cost of a remedial action shall not be  
13 considered reasonable if the costs are disproportionate to the benefits created through risk re-  
14 duction or risk management. Subject to the preference for treatment of hot spots, when two or more  
15 remedial action alternatives are protective as provided in paragraph (b) of this subsection, the least  
16 expensive remedial action shall be preferred unless the additional cost of a more expensive alter-  
17 native is justified by proportionately greater benefits within one or more of the factors set forth in  
18 subparagraphs (A) to (D) of this paragraph. The director shall use a higher threshold for evaluating  
19 the reasonableness of the costs for treating hot spots than for remediation of areas other than hot  
20 spots.

21 (e) For contamination constituting a hot spot as defined by the commission pursuant to sub-  
22 section (2)(b) of this section, the director shall select or approve a remedial action requiring treat-  
23 ment of the hot spot contamination unless treatment is not feasible considering the factors set forth  
24 in paragraph (d) of this subsection. For contamination constituting a hot spot under subsection  
25 (2)(b)(A) of this section, the director shall evaluate, with the same preference as treatment, the ex-  
26 cavation and off-site disposal of the contamination at a facility authorized for such disposal under  
27 state or federal law. For excavation and off-site disposal of contamination that is a hazardous waste  
28 as described in ORS 466.005, the director shall consider the method and distance for transportation  
29 of the contamination to available disposal facilities in selecting or approving a remedial action that  
30 is protective under subsection (1)(d) of this section. If requested by the responsible party or recom-  
31 mended by the Department of Environmental Quality, the director may select or approve excavation  
32 and off-site disposal as the remedial action for contamination constituting a hot spot under sub-  
33 section (2)(b)(A) of this section.

34 (f) The Department of Environmental Quality shall develop or identify generic remedies for  
35 common categories of facilities considering the balancing factors set forth in paragraph (d) of this  
36 subsection. The department's development of generic remedies shall take into consideration demon-  
37 strated remedial actions and technologies and scientific and engineering evaluation of performance  
38 data. Where a generic remedy would be protective and satisfy the balancing factors under paragraph  
39 (d) of this subsection at a specific facility, the director may select or approve the generic remedy  
40 for that site on a streamlined basis with a limited evaluation of other remedial alternatives.

41 (g) Subject to paragraphs (b) and (d) of this subsection, in selecting or approving a remedial  
42 action, the director shall consider current and reasonably anticipated future land uses at the facility  
43 and surrounding properties, taking into account current land use zoning, other land use desig-  
44 nations, land use plans as established in local comprehensive plans and land use implementing reg-  
45 ulations of any governmental body having land use jurisdiction, and concerns of the facility owner,

1 neighboring owners and the community.

2 **(h) As used in this subsection, “institutional control” means a prohibition, restriction or**  
3 **obligation relating to the type and extent of activity allowed on real property that is imple-**  
4 **mented to reduce the potential of exposure to hazardous substances. As used in this para-**  
5 **graph, “activity” includes the use, maintenance or monitoring of property, the restriction**  
6 **of access to the property or the allowance of access to the property for the purpose of im-**  
7 **plementing or monitoring an institutional control.**

8 (2) The commission shall adopt rules:

9 (a) Establishing a risk protocol for conducting risk assessments. The risk protocol shall:

10 (A) Require consideration of existing and reasonably likely future human exposures and signif-  
11 icant adverse effects to ecological receptor health and viability, both in a baseline risk assessment  
12 and in an assessment of residual risk after a remedial action;

13 (B) Require risk assessments to include reasonable estimates of plausible upper-bound exposures  
14 that neither grossly underestimate nor grossly overestimate risks;

15 (C) Require risk assessments to consider, to the extent practicable, the range of probabilities  
16 of risks actually occurring, the range of size of the populations likely to be exposed to the risk,  
17 current and reasonably likely future land uses, and quantitative and qualitative descriptions of un-  
18 certainties;

19 (D) Identify appropriate sources of toxicity information;

20 (E) Define the use of probabilistic modeling;

21 (F) Identify criteria for the selection and application of fate and transport models;

22 (G) Define the use of high-end and central-tendency exposure cases and assumptions;

23 (H) Define the use of population risk estimates in addition to individual risk estimates;

24 (I) To the extent deemed appropriate and feasible by the commission considering available sci-  
25 entific information, define appropriate approaches for addressing cumulative risks posed by multiple  
26 contaminants or multiple exposure pathways, including how the acceptable risk levels set forth in  
27 subsection (1)(b)(A) of this section shall be applied in relation to cumulative risks; and

28 (J) Establish appropriate sampling approaches and data quality requirements.

29 (b) Defining hot spots of contamination. The definition of hot spots shall include:

30 (A) Hazardous substances that are present in high concentrations, are highly mobile or cannot  
31 be reliably contained, and that would present a risk to human health or the environment exceeding  
32 the acceptable risk level if exposure occurs.

33 (B) Concentrations of hazardous substances in ground water or surface water that have a sig-  
34 nificant adverse effect on existing or reasonably likely future beneficial uses of the water and for  
35 which treatment is reasonably likely to restore or protect such beneficial use within a reasonable  
36 time.

37 (3) Except as provided in subsection (4) of this section, the director may exempt the on-site  
38 portion of any removal or remedial action conducted under ORS 465.200 to 465.545 and 465.900 from  
39 any requirement of ORS 466.005 to 466.385 and ORS chapters 459, 468, 468A and 468B. Without af-  
40 fecting substantive requirements, no state or local permit, license or other authorization shall be  
41 required for, and no procedural requirements shall apply to, the portion of any removal or remedial  
42 action conducted on-site where such removal or remedial action has been selected or approved by  
43 the director under this section, unless the permit, license, authorization or procedural requirement  
44 is necessary to preserve or obtain federal authorization of a state program or the person performing  
45 a removal or remedial action elects to obtain the permit, license or authorization or comply with

1 the procedural requirement. The person performing a removal or remedial action shall notify the  
 2 appropriate state or local governmental body of the permits, licenses, authorizations or procedural  
 3 requirements waived under this subsection and, at the request of the governmental body, pay appli-  
 4 cable fees. Any costs paid as a fee to a governmental body under this subsection shall not also be  
 5 recoverable by the governmental body as remedial action costs.

6 (4) Notwithstanding any provision of subsection (3) of this section, any on-site treatment, storage  
 7 or disposal of a hazardous substance shall comply with the standard established under subsection  
 8 (1)(a) of this section and any activities conducted in a public right of way under a removal or re-  
 9 medial action pursuant to this section shall comply with the requirements of the applicable juris-  
 10 diction.

11 (5) Nothing in this section shall affect the authority of the director to undertake, order or au-  
 12 thorize an interim or emergency removal action.

13 (6) Nothing in this section or in rules adopted pursuant to this section shall prohibit the appli-  
 14 cation of rules in effect on July 18, 1995, that use numeric soil cleanup standards to govern reme-  
 15 diation of motor fuel and heating oil releases from underground storage tanks.

16 **SECTION 2. Section 3 of this 2011 Act is added to and made a part of ORS 465.200 to**  
 17 **465.545.**

18 **SECTION 3. (1) As used in this section:**

19 (a) **“Agreement” means an easement, equitable servitude, covenant or similar instru-**  
 20 **ment, or any combination thereof.**

21 (b) **“Institutional control” has the meaning given that term in ORS 465.315 (1)(h).**

22 (2) **The Department of Environmental Quality may enter into an agreement, as grantee**  
 23 **of an enforceable interest in real property, to implement an institutional control.**

24 (3) **An agreement that implements an institutional control must be signed by the Direc-**  
 25 **tor of the Department of Environmental Quality or the director’s designee and all other**  
 26 **parties to the agreement.**

27 (4) **After an agreement that implements an institutional control is signed by the director**  
 28 **or the director’s designee and all other parties to the agreement, the department shall file**  
 29 **the agreement in the County Clerk Lien Record for every county within which a portion of**  
 30 **the real property that is subject to the agreement is located.**

31 (5) **The department may require such conditions in an agreement as the department de-**  
 32 **termines are necessary to implement an institutional control, including but not limited to**  
 33 **the recovery of the department’s costs for monitoring and enforcing an institutional control.**

34 (6) **An agreement entered into by the department for the purpose of implementing an**  
 35 **institutional control:**

36 (a) **Transfers with any conveyance or assignment of real property subject to the agree-**  
 37 **ment; and**

38 (b) **Is valid and enforceable against a person whose interest in the real property vests**  
 39 **after a conveyance or assignment of the real property even if:**

40 (A) **The condition is not appurtenant to an interest in the real property;**

41 (B) **The condition imposes a negative burden;**

42 (C) **The condition creates an affirmative obligation;**

43 (D) **The benefit or burden of the condition does not touch or concern the real property;**

44 (E) **There is no privity of estate or contract between the department and the person who**  
 45 **has the interest in the real property;**

1       **(F) The condition is not otherwise recognized under common law as a condition that**  
 2 **transfers with the conveyance or assignment of real property; or**

3       **(G) The department assigns its interest in the real property to another person, except**  
 4 **that such assignment does not make the condition valid and enforceable against a person**  
 5 **whose interest in the real property vests after the department's assignment unless all per-**  
 6 **sons that have an interest in the real property agree to the assignment.**

7       **SECTION 4.** ORS 465.225 is amended to read:

8       465.225. (1) For the purpose of providing public information, the Director of the Department of  
 9 Environmental Quality shall develop and maintain an inventory of all facilities for which:

10       (a) A confirmed release is documented by the department; and

11       (b) The director determines that additional investigation, removal, remedial action, long-term  
 12 environmental controls or institutional controls are needed to assure protection of present and fu-  
 13 ture public health, safety, welfare or the environment.

14       (2) The determination that additional investigation, removal, remedial action, long-term envi-  
 15 ronmental controls or institutional controls are needed under subsection (1) of this section shall be  
 16 based upon a preliminary assessment approved or conducted by the department.

17       (3) Before the department conducts a preliminary assessment, the director shall notify the owner  
 18 and operator, if known, that the department is proceeding with a preliminary assessment and that  
 19 the owner or operator may submit information to the department that would assist the department  
 20 in conducting a complete and accurate preliminary assessment.

21       (4) At least 60 days before the director adds a facility to the inventory, the director shall notify  
 22 by certified mail or personal service the owner and operator, if known, of all or any part of the fa-  
 23 cility that is to be included in the inventory. The decision of the director to add a facility to the  
 24 inventory is not appealable to the Environmental Quality Commission or subject to judicial review  
 25 under ORS chapter 183.

26       (5) The notice provided under subsection (4) of this section shall include the preliminary as-  
 27 sessment and shall inform the owner or operator that the owner or operator may comment on the  
 28 information contained in the preliminary assessment within 45 days after receiving the notice. For  
 29 good cause shown, the department may grant an extension of time to comment. The extension shall  
 30 not exceed 45 additional days.

31       (6) The director shall consider relevant and appropriate information submitted by the owner or  
 32 operator in making the final decision about whether to add a facility to the inventory.

33       (7) The director shall review the information submitted and add the facility to inventory if the  
 34 director determines that a confirmed release has occurred and that additional investigation, re-  
 35 moval, remedial action, long-term environmental controls or institutional controls are needed to as-  
 36 sure protection of present and future public health, safety, welfare or the environment.

37       **(8) As used in this section, "institutional control" has the meaning given that term in**  
 38 **ORS 465.315 (1)(h).**

39       **SECTION 5.** ORS 465.230 is amended to read:

40       465.230. (1) According to rules adopted by the Environmental Quality Commission, the Director  
 41 of the Department of Environmental Quality shall remove a facility from the list or inventory, or  
 42 both, if the director determines:

43       (a) Actions taken at the facility have attained a degree of cleanup and control of further release  
 44 that assures protection of present and future public health, safety, welfare and the environment;

45       (b) No further action is needed to assure protection of present and future public health, safety,

1 welfare and the environment; or

2 (c) The facility satisfies other appropriate criteria for assuring protection of present and future  
3 public health, safety, welfare and the environment.

4 (2) The director shall not remove a facility if continuing environmental controls or institutional  
5 controls are needed to assure protection of present and future public health, safety, welfare and the  
6 environment, so long as such controls are related to removal or remedial action.

7 **(3) As used in this section, “institutional control” has the meaning given that term in**  
8 **ORS 465.315 (1)(h).**

9 **SECTION 6.** ORS 465.235 is amended to read:

10 465.235. (1) The Director of the Department of Environmental Quality shall make the inventory  
11 available to the public at the office of the Department of Environmental Quality.

12 (2) The inventory shall include but need not be limited to:

13 (a) The following information, if known:

14 (A) A general description of the facility;

15 (B) Address or location;

16 (C) Time period during which a release occurred;

17 (D) Name of current owner and operator and names of any past owners and operators during  
18 the time period of a release of a hazardous substance;

19 (E) Type and quantity of a hazardous substance released at the facility;

20 (F) Manner of release of the hazardous substance;

21 (G) Levels of a hazardous substance, if any, in ground water, surface water, air and soils at the  
22 facility;

23 (H) Hazard ranking and narrative information regarding threats to the environment and public  
24 health;

25 (I) Status of removal or remedial actions at the facility; and

26 (J) Other items the director determines necessary; and

27 (b) Information that indicates whether the remedial action at the facility will be funded prima-  
28 rily by:

29 (A) The department through the use of moneys in the Hazardous Substance Remedial Action  
30 Fund;

31 (B) An owner or operator or other person under an agreement, order or consent judgment under  
32 ORS 465.200 to 465.545; or

33 (C) An owner or operator or other person under other state or federal authority.

34 (3) The department may organize the inventory into categories of facilities, including but not  
35 limited to the types of facilities listed in subsection (2) of this section.

36 (4) On or before January 15 of each year, the department shall submit the inventory and a re-  
37 port to the Governor, the Legislative Assembly and the Environmental Quality Commission. The  
38 annual report shall include a quantitative and narrative summary of the department’s accomplish-  
39 ments during the previous fiscal year and the department’s goals for the current fiscal year, in-  
40 cluding but not limited to each of the following areas:

41 (a) Facilities with a suspected release added to the department’s database;

42 (b) Facilities with a confirmed release added to the department’s list;

43 (c) Facilities added to and removed from the inventory;

44 (d) Removals initiated and completed;

45 (e) Preliminary assessments initiated and completed;

- 1 (f) Remedial investigations initiated and completed;
- 2 (g) Feasibility studies initiated and completed; and
- 3 (h) Remedial actions, including long-term environmental controls and institutional controls, ini-
- 4 tiated and completed.

5 (5) Beginning in 1991, and every fourth year thereafter, the report required under subsection (4)  
6 of this section shall include a four-year plan of action for those items under subsection (4)(e) to (h)  
7 of this section. The four-year plan shall include projections of funding and staffing levels necessary  
8 to implement the four-year plan.

9 **(6) As used in this section, “institutional control” has the meaning given that term in**  
10 **ORS 465.315 (1)(h).**

11 **SECTION 7. Section 3 of this 2011 Act applies to any conveyance or assignment of real**  
12 **property that occurs on or after the effective date of this 2011 Act.**

13 **SECTION 8. This 2011 Act being necessary for the immediate preservation of the public**  
14 **peace, health and safety, an emergency is declared to exist, and this 2011 Act takes effect**  
15 **on its passage.**

16