

Senate Bill 469

Sponsored by Senator GEORGE (at the request of Thomas Benke)

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**.

Provides for reimbursement to certain persons for remedial action costs. Provides that certain persons may seek contribution from persons who have resolved liability to state in administrative or judicially approved settlement.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to hazardous substances; creating new provisions; amending ORS 465.325; and declaring an
3 emergency.

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

5 **SECTION 1.** ORS 465.325 is amended to read:

6 465.325. (1) The Director of the Department of Environmental Quality, in the director's dis-
7 cretion, may enter into an agreement with any person including the owner or operator of the facility
8 from which a release emanates, or any other potentially responsible person to perform any removal
9 or remedial action if the director determines that the actions will be properly done by the person.
10 Whenever practicable and in the public interest, as determined by the director, the director, in order
11 to expedite effective removal or remedial actions and minimize litigation, shall act to facilitate
12 agreements under this section that are in the public interest and consistent with the rules adopted
13 under ORS 465.400. If the director decides not to use the procedures in this section, the director
14 shall notify in writing potentially responsible parties at the facility of such decision.
15 Notwithstanding ORS chapter 183, a decision of the director to use or not to use the procedures
16 described in this section shall not be appealable to the Environmental Quality Commission or sub-
17 ject to judicial review.

18 (2)(a) An agreement under this section may provide that the director will reimburse the parties
19 to the agreement from the fund, with interest, for certain costs of actions under the agreement that
20 the parties have agreed to perform and the director has agreed to finance. In any case in which the
21 director provides such reimbursement and, in the judgment of the director, cost recovery is in the
22 public interest, the director shall make reasonable efforts to recover the amount of such re-
23 imbursement under ORS 465.200 to 465.545 and 465.900 or under other relevant authority.

24 (b) Notwithstanding ORS chapter 183, the director's decision regarding fund financing under this
25 subsection shall not be appealable to the commission or subject to judicial review.

26 (c) When a remedial action is completed under an agreement described in paragraph (a) of this
27 subsection, the fund shall be subject to an obligation for any subsequent remedial action at the same
28 facility but only to the extent that such subsequent remedial action is necessary by reason of the
29 failure of the original remedial action. Such obligation shall be in a proportion equal to, but not
30 exceeding, the proportion contributed by the fund for the original remedial action. The fund's obli-

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 gation for such future remedial action may be met through fund expenditures or through payment,
 2 following settlement or enforcement action, by persons who were not signatories to the original
 3 agreement.

4 (3) If an agreement has been entered into under this section, the director may take any action
 5 under ORS 465.260 against any person who is not a party to the agreement, once the period for
 6 submitting a proposal under subsection (5)(c) of this section has expired. Nothing in this section
 7 shall be construed to affect either of the following:

8 (a) The liability of any person under ORS 465.255 or 465.260 with respect to any costs or dam-
 9 ages which are not included in the agreement.

10 (b) The authority of the director to maintain an action under ORS 465.200 to 465.545 and 465.900
 11 against any person who is not a party to the agreement.

12 (4)(a) Whenever the director enters into an agreement under this section with any potentially
 13 responsible person with respect to remedial action, following approval of the agreement by the At-
 14 torney General and except as otherwise provided in the case of certain administrative settlements
 15 referred to in subsection (8) of this section, the agreement shall be entered in the appropriate circuit
 16 court as a consent judgment. The director need not make any finding regarding an imminent and
 17 substantial endangerment to the public health, safety, welfare or the environment in connection with
 18 any such agreement or consent judgment.

19 (b) The entry of any consent judgment under this subsection shall not be construed to be an
 20 acknowledgment by the parties that the release concerned constitutes an imminent and substantial
 21 endangerment to the public health, safety, welfare or the environment. Except as otherwise provided
 22 in the Oregon Evidence Code, the participation by any party in the process under this section shall
 23 not be considered an admission of liability for any purpose, and the fact of such participation shall
 24 not be admissible in any judicial or administrative proceeding, including a subsequent proceeding
 25 under this section.

26 (c) The director may fashion a consent judgment so that the entering of the judgment and com-
 27 pliance with the judgment or with any determination or agreement made under this section shall
 28 not be considered an admission of liability for any purpose.

29 (d) The director shall provide notice and opportunity to the public and to persons not named
 30 as parties to the agreement to comment on the proposed agreement before its submittal to the court
 31 as a proposed consent judgment, as provided under ORS 465.320. The director shall consider any
 32 written comments, views or allegations relating to the proposed agreement. The director or any
 33 party may withdraw, withhold or modify its consent to the proposed agreement if the comments,
 34 views and allegations concerning the agreement disclose facts or considerations which indicate that
 35 the proposed agreement is inappropriate, improper or inadequate.

36 **(e) From the proceeds of any agreement entered into under this section, the director**
 37 **shall reimburse any person who is not liable under the provisions of ORS 465.255 for any**
 38 **remedial action costs incurred by that person at the facility that is subject to the agreement**
 39 **if:**

40 **(A) The director ordered the person to respond to the release of a hazardous substance**
 41 **at the facility; or**

42 **(B) The person has performed removal or remedial action at the facility pursuant to an**
 43 **agreement under subsection (1) of this section.**

44 (5)(a) If the director determines that a period of negotiation under this subsection would facili-
 45 tate an agreement with potentially responsible persons for taking removal or remedial action and

1 would expedite removal or remedial action, the director shall so notify all such parties and shall
2 provide them with the following information to the extent the information is available:

3 (A) The names and addresses of potentially responsible persons including owners and operators
4 and other persons referred to in ORS 465.255.

5 (B) The volume and nature of substances contributed by each potentially responsible person
6 identified at the facility.

7 (C) A ranking by volume of the substances at the facility.

8 (b) The director shall make the information referred to in paragraph (a) of this subsection
9 available in advance of notice under this subsection upon the request of a potentially responsible
10 person in accordance with procedures provided by the director. The provisions of ORS 465.250 (5)
11 regarding confidential information apply to information provided under paragraph (a) of this sub-
12 section.

13 (c) Any person receiving notice under paragraph (a) of this subsection shall have 60 days from
14 the date of receipt of the notice to submit to the director a proposal for undertaking or financing
15 the action under ORS 465.260. The director may grant extensions for up to an additional 60 days.

16 (6)(a) Any person may seek contribution from any other person who is liable or potentially liable
17 under ORS 465.255. In resolving contribution claims, the court shall allocate remedial action costs
18 among liable parties in accordance with ORS 465.257.

19 (b) A person who has resolved its liability to the state in an administrative or judicially ap-
20 proved settlement shall not be liable for claims for contribution regarding matters addressed in the
21 settlement. **The provisions of this paragraph do not apply to claims for contribution against**
22 **a person described in this paragraph by:**

23 **(A) A person ordered by the director to respond to the release of a hazardous substance**
24 **at the facility that is subject to the settlement.**

25 **(B) A person who has performed removal or remedial action at the facility that is subject**
26 **to the settlement pursuant to an agreement under subsection (1) of this section.**

27 (c) [*Such*] **A settlement described in this section** does not discharge any of the other poten-
28 tially responsible persons unless its terms so provide, but it reduces the potential liability of the
29 others by the amount of the settlement.

30 [(c)(A)] **(d)(A)** If the state has obtained less than complete relief from a person who has resolved
31 its liability to the state in an administrative or judicially approved settlement, the director may
32 bring an action against any person who has not so resolved its liability.

33 (B) A person who has resolved its liability to the state for some or all of a removal or remedial
34 action or for some or all of the costs of such action in an administrative or judicially approved
35 settlement may seek contribution from any person who is not party to [a] **the** settlement [*referred*
36 *to in paragraph (b) of this subsection*].

37 (C) In any action under this paragraph, the rights of any person who has resolved its liability
38 to the state shall be subordinate to the rights of the state.

39 (7)(a) In entering an agreement under this section, the director may provide any person subject
40 to the agreement with a covenant not to sue concerning any liability to the State of Oregon under
41 ORS 465.200 to 465.545 and 465.900, including future liability, resulting from a release of a hazardous
42 substance addressed by the agreement if each of the following conditions is met:

43 (A) The covenant not to sue is in the public interest.

44 (B) The covenant not to sue would expedite removal or remedial action consistent with rules
45 adopted by the commission under ORS 465.400 (2).

1 (C) The person is in full compliance with a consent judgment under subsection (4)(a) of this
2 section for response to the release concerned.

3 (D) The removal or remedial action has been approved by the director.

4 (b) The director shall provide a person with a covenant not to sue with respect to future liability
5 to the State of Oregon under ORS 465.200 to 465.545 and 465.900 for a future release of a hazardous
6 substance from a facility, and a person provided such covenant not to sue shall not be liable to the
7 State of Oregon under ORS 465.255 with respect to such release at a future time, for the portion
8 of the remedial action:

9 (A) That involves the transport and secure disposition offsite of a hazardous substance in a
10 treatment, storage or disposal facility meeting the requirements of section 3004(c) to (g), (m), (o), (p),
11 (u) and (v) and 3005(c) of the federal Solid Waste Disposal Act, as amended, P.L. 96-482 and P.L.
12 98-616, if the director has rejected a proposed remedial action that is consistent with rules adopted
13 by the commission under ORS 465.400 that does not include such offsite disposition and has there-
14 after required offsite disposition; or

15 (B) That involves the treatment of a hazardous substance so as to destroy, eliminate or perma-
16 nently immobilize the hazardous constituents of the substance, so that, in the judgment of the di-
17 rector, the substance no longer presents any current or currently foreseeable future significant risk
18 to public health, safety, welfare or the environment, no by-product of the treatment or destruction
19 process presents any significant hazard to public health, safety, welfare or the environment, and all
20 by-products are themselves treated, destroyed or contained in a manner that assures that the by-
21 products do not present any current or currently foreseeable future significant risk to public health,
22 safety, welfare or the environment.

23 (c) A covenant not to sue concerning future liability to the State of Oregon shall not take effect
24 until the director certifies that the removal or remedial action has been completed in accordance
25 with the requirements of subsection (10) of this section at the facility that is the subject of the
26 covenant.

27 (d) In assessing the appropriateness of a covenant not to sue under paragraph (a) of this sub-
28 section and any condition to be included in a covenant not to sue under paragraph (a) or (b) of this
29 subsection, the director shall consider whether the covenant or conditions are in the public interest
30 on the basis of factors such as the following:

31 (A) The effectiveness and reliability of the remedial action, in light of the other alternative re-
32 medial actions considered for the facility concerned.

33 (B) The nature of the risks remaining at the facility.

34 (C) The extent to which performance standards are included in the order or judgment.

35 (D) The extent to which the removal or remedial action provides a complete remedy for the fa-
36 cility, including a reduction in the hazardous nature of the substances at the facility.

37 (E) The extent to which the technology used in the removal or remedial action is demonstrated
38 to be effective.

39 (F) Whether the fund or other sources of funding would be available for any additional removal
40 or remedial action that might eventually be necessary at the facility.

41 (G) Whether the removal or remedial action will be carried out, in whole or in significant part,
42 by the responsible parties themselves.

43 (e) Any covenant not to sue under this subsection shall be subject to the satisfactory perform-
44 ance by such party of its obligations under the agreement concerned.

45 (f)(A) Except for the portion of the removal or remedial action that is subject to a covenant not

1 to sue under paragraph (b) of this subsection or de minimis settlement under subsection (8) of this
2 section, a covenant not to sue a person concerning future liability to the State of Oregon:

3 (i) Shall include an exception to the covenant that allows the director to sue the person con-
4 cerning future liability resulting from the release or threatened release that is the subject of the
5 covenant if the liability arises out of conditions unknown at the time the director certifies under
6 subsection (10) of this section that the removal or remedial action has been completed at the facility
7 concerned; and

8 (ii) May include an exception to the covenant that allows the director to sue the person con-
9 cerning future liability resulting from failure of the remedial action.

10 (B) In extraordinary circumstances, the director may determine, after assessment of relevant
11 factors such as those referred to in paragraph (d) of this subsection and volume, toxicity, mobility,
12 strength of evidence, ability to pay, litigative risks, public interest considerations, precedential value
13 and the inequities and aggravating factors, not to include the exception referred to in paragraph
14 (f)(A) of this subsection if other terms, conditions or requirements of the agreement containing the
15 covenant not to sue are sufficient to provide all reasonable assurances that public health, safety,
16 welfare and the environment will be protected from any future release at or from the facility.

17 (C) The director may include any provisions allowing future enforcement action under ORS
18 465.260 that in the discretion of the director are necessary and appropriate to assure protection of
19 public health, safety, welfare and the environment.

20 (8)(a) Whenever practicable and in the public interest, as determined by the director, the direc-
21 tor shall as promptly as possible reach a final settlement with a potentially responsible person in
22 an administrative or civil action under ORS 465.255 if such settlement involves only a minor portion
23 of the remedial action costs at the facility concerned and, in the judgment of the director, both of
24 the following are minimal in comparison to any other hazardous substance at the facility:

25 (A) The amount of the hazardous substance contributed by that person to the facility; and

26 (B) The toxic or other hazardous effects of the substance contributed by that person to the fa-
27 cility.

28 (b) The director may provide a covenant not to sue with respect to the facility concerned to any
29 party who has entered into a settlement under this subsection unless such a covenant would be in-
30 consistent with the public interest as determined under subsection (7) of this section.

31 (c) The director shall reach any such settlement or grant a covenant not to sue as soon as
32 possible after the director has available the information necessary to reach a settlement or grant
33 a covenant not to sue.

34 (d) A settlement under this subsection shall be entered as a consent judgment or embodied in
35 an administrative order setting forth the terms of the settlement. The circuit court for the county
36 in which the release or threatened release occurs or the Circuit Court of Marion County may en-
37 force any such administrative order.

38 (e) A party who has resolved its liability to the state under this subsection shall not be liable
39 for claims for contribution regarding matters addressed in the settlement. The settlement does not
40 discharge any of the other potentially responsible persons unless its terms so provide, but it reduces
41 the potential liability of the others by the amount of the settlement.

42 (f) Nothing in this subsection shall be construed to affect the authority of the director to reach
43 settlements with other potentially responsible persons under ORS 465.200 to 465.545 and 465.900.

44 (9)(a) Notwithstanding ORS chapter 183, except for those covenants required under subsection
45 (7)(b)(A) and (B) of this section, a decision by the director to agree or not to agree to inclusion of

1 any covenant not to sue in an agreement under this section shall not be appealable to the commis-
2 sion or subject to judicial review.

3 (b) Nothing in this section shall limit or otherwise affect the authority of any court to review,
4 in the consent judgment process under subsection (4) of this section, any covenant not to sue con-
5 tained in an agreement under this section.

6 (10)(a) Upon completion of any removal or remedial action under an agreement under this sec-
7 tion, or pursuant to an order under ORS 465.260, the party undertaking the removal or remedial
8 action shall notify the department and request certification of completion. Within 90 days after re-
9 ceiving notice, the director shall determine by certification whether the removal or remedial action
10 is completed in accordance with the applicable agreement or order.

11 (b) Before submitting a final certification decision to the court that approved the consent judg-
12 ment, or before entering a final administrative order, the director shall provide to the public and to
13 persons not named as parties to the agreement or order notice and opportunity to comment on the
14 director's proposed certification decision, as provided under ORS 465.320.

15 (c) Any person aggrieved by the director's certification decision may seek judicial review of the
16 certification decision by the court that approved the relevant consent judgment or, in the case of
17 an administrative order, in the circuit court for the county in which the facility is located or in
18 Marion County. The decision of the director shall be upheld unless the person challenging the cer-
19 tification decision demonstrates that the decision was arbitrary and capricious, contrary to the
20 provisions of ORS 465.200 to 465.545 and 465.900 or not supported by substantial evidence. The court
21 shall apply a presumption in favor of the director's decision. The court may award attorney fees and
22 costs to the prevailing party if the court finds the challenge or defense of the director's decision to
23 have been frivolous. The court may assess against a party and award to the state, in addition to
24 attorney fees and costs, an amount equal to the economic gain realized by the party if the court
25 finds the only purpose of the party's challenge to the director's decision was delay for economic
26 gain.

27 **SECTION 2. The amendments to ORS 465.325 by section 1 of this 2013 Act apply to:**

28 **(1) Persons ordered to respond to the release of a hazardous substance before, on or after**
29 **the effective date of this 2013 Act.**

30 **(2) Persons who have entered into agreements with the Director of the Department of**
31 **Environmental Quality under ORS 465.325 (1) before, on or after the effective date of this**
32 **2013 Act.**

33 **SECTION 3. This 2013 Act being necessary for the immediate preservation of the public**
34 **peace, health and safety, an emergency is declared to exist, and this 2013 Act takes effect**
35 **on its passage.**

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