

Enrolled
Senate Bill 476

Sponsored by Senator SHIELDS

CHAPTER

AN ACT

Relating to the environment; creating new provisions; amending ORS 465.325; and declaring an emergency.

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

SECTION 1. ORS 465.325 is amended to read:

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

(b)(A) At least 30 days before an agreement is entered into under this section, the director shall provide written notice to any person who has entered into an agreement with the Department of Environmental Quality under ORS 465.327 related to the facility and who is in substantial compliance with the agreement entered into under ORS 465.327. A person receiving notice under this paragraph shall be provided with an opportunity to participate in any negotiations under this section related to an agreement concerning the facility, and the person may provide written comments related to the proposed agreement.

(B) At the conclusion of any negotiations described in this paragraph and at least 30 days before submittal to the appropriate circuit court as a proposed consent judgment, the director shall provide written notice of the proposed agreement to any person who has entered into an agreement with the department under ORS 465.327 related to the facility.

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

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

(c) When a remedial action is completed under an agreement described in paragraph (a) of this subsection, the fund shall be subject to an obligation for any subsequent remedial action at the same facility but only to the extent that such subsequent remedial action is necessary by reason of the failure of the original remedial action. Such obligation shall be in a proportion equal to, but not exceeding, the proportion contributed by the fund for the original remedial action. The fund's obligation for such future remedial action may be met through fund expenditures or through payment, following settlement or enforcement action, by persons who were not signatories to the original agreement.

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

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

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

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

(B)(i) A person described in subsection (1)(b) of this section who submits written comments to the director regarding the proposed agreement may intervene as a party in the proceedings related to the entry of a consent judgment.

(ii) If a person described in subsection (1)(b) of this section intervenes in the proceedings, the circuit court shall review the proposed agreement, and the circuit court may not enter the proposed agreement as a consent judgment, unless the circuit court determines that the proposed agreement is fair, reasonable and consistent with the provisions of ORS 465.200 to 465.545 and that any contribution protections provided under subsection (6)(b) of this section are supported by substantial evidence as being in the public interest.

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

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

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

(5)(a) If the director determines that a period of negotiation under this subsection would facilitate an agreement with potentially responsible persons for taking removal or remedial action and would expedite removal or remedial action, the director shall so notify all such parties and shall provide them with the following information to the extent the information is available:

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

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

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

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

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

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

(b) A person who has resolved its liability to the state in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially responsible persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

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

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

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

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

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

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

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

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

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

(A) That involves the transport and secure disposition offsite of a hazardous substance in a treatment, storage or disposal facility meeting the requirements of section 3004(c) to (g), (m), (o), (p), (u) and (v) and 3005(c) of the federal Solid Waste Disposal Act, as amended, P.L. 96-482 and P.L.

98-616, if the director has rejected a proposed remedial action that is consistent with rules adopted by the commission under ORS 465.400 that does not include such offsite disposition and has thereafter required offsite disposition; or

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

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

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

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

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

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

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

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

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

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

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

(f)(A) Except for the portion of the removal or remedial action that is subject to a covenant not to sue under paragraph (b) of this subsection or de minimis settlement under subsection (8) of this section, a covenant not to sue a person concerning future liability to the State of Oregon:

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

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

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

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

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

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

(B) The toxic or other hazardous effects of the substance contributed by that person to the facility.

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

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

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

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

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

(9)(a) Notwithstanding ORS chapter 183, except for those covenants required under subsection (7)(b)(A) and (B) of this section, a decision by the director to agree or not to agree to inclusion of any covenant not to sue in an agreement under this section shall not be appealable to the commission or subject to judicial review.

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

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

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

(c) Any person aggrieved by the director's certification decision may seek judicial review of the certification decision by the court that approved the relevant consent judgment or, in the case of an administrative order, in the circuit court for the county in which the facility is located or in Marion County. The decision of the director shall be upheld unless the person challenging the certification decision demonstrates that the decision was arbitrary and capricious, contrary to the provisions of ORS 465.200 to 465.545 and 465.900 or not supported by substantial evidence. The court shall apply a presumption in favor of the director's decision. The court may award attorney fees and costs to the prevailing party if the court finds the challenge or defense of the director's decision to have been frivolous. The court may assess against a party and award to the state, in addition to

attorney fees and costs, an amount equal to the economic gain realized by the party if the court finds the only purpose of the party's challenge to the director's decision was delay for economic gain.

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

(1) Agreements described in ORS 465.325 entered into on or after the effective date of this 2013 Act.

(2) Agreements described in ORS 465.327 entered into on or after the effective date of this 2013 Act.

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

Passed by Senate April 25, 2013

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Robert Taylor, Secretary of Senate

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Peter Courtney, President of Senate

Passed by House June 3, 2013

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Tina Kotek, Speaker of House

Received by Governor:

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Approved:

.....M,....., 2013

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John Kitzhaber, Governor

Filed in Office of Secretary of State:

.....M,....., 2013

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Kate Brown, Secretary of State