

## SENATE AMENDMENTS TO SENATE BILL 476

By COMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES

April 23

1 On page 1 of the printed bill, line 2, after “environment” insert “; creating new provisions;  
2 amending ORS 465.325; and declaring an emergency”.

3 Delete lines 4 through 29 and delete pages 2 and 3 and insert:

4 “**SECTION 1.** ORS 465.325 is amended to read:

5 “465.325. (1)(a) The Director of the Department of Environmental Quality, in the director’s dis-  
6 cretion, may enter into an agreement with any person including the owner or operator of the facility  
7 from which a release emanates, or any other potentially responsible person to perform any removal  
8 or remedial action if the director determines that the actions will be properly done by the person.  
9 Whenever practicable and in the public interest, as determined by the director, the director, in order  
10 to expedite effective removal or remedial actions and minimize litigation, shall act to facilitate  
11 agreements under this section that are in the public interest and consistent with the rules adopted  
12 under ORS 465.400. If the director decides not to use the procedures in this section, the director  
13 shall notify in writing potentially responsible parties at the facility of such decision.  
14 Notwithstanding ORS chapter 183, a decision of the director to use or not to use the procedures  
15 described in this section shall not be appealable to the Environmental Quality Commission or sub-  
16 ject to judicial review.

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

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

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

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

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

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

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

15 “(b) The authority of the director to maintain an action under ORS 465.200 to 465.545 and  
16 465.900 against any person who is not a party to the agreement.

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

24 “(B)(i) **A person described in subsection (1)(b) of this section who submits written com-  
25 ments to the director regarding the proposed agreement may intervene as a party in the  
26 proceedings related to the entry of a consent judgment.**

27 “(ii) **If a person described in subsection (1)(b) of this section intervenes in the pro-  
28 ceedings, the circuit court shall review the proposed agreement, and the circuit court may  
29 not enter the proposed agreement as a consent judgment, unless the circuit court deter-  
30 mines that the proposed agreement is fair, reasonable and consistent with the provisions of  
31 ORS 465.200 to 465.545 and that any contribution protections provided under subsection (6)(b)  
32 of this section are supported by substantial evidence as being in the public interest.**

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

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

43 “(d) The director shall provide notice and opportunity to the public and to persons not named  
44 as parties to the agreement to comment on the proposed agreement before its submittal to the court  
45 as a proposed consent judgment, as provided under ORS 465.320. The director shall consider any

1 written comments, views or allegations relating to the proposed agreement. The director or any  
2 party may withdraw, withhold or modify its consent to the proposed agreement if the comments,  
3 views and allegations concerning the agreement disclose facts or considerations which indicate that  
4 the proposed agreement is inappropriate, improper or inadequate.

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

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

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

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

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

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

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

25 “(b) A person who has resolved its liability to the state in an administrative or judicially ap-  
26 proved settlement shall not be liable for claims for contribution regarding matters addressed in the  
27 settlement. Such settlement does not discharge any of the other potentially responsible persons un-  
28 less its terms so provide, but it reduces the potential liability of the others by the amount of the  
29 settlement.

30 “(c)(A) If the state has obtained less than complete relief from a person who has resolved its  
31 liability to the state in an administrative or judicially approved settlement, the director may bring  
32 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 settlement referred to in  
36 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 li-  
5 ability to the State of Oregon under ORS 465.200 to 465.545 and 465.900 for a future release of a  
6 hazardous substance from a facility, and a person provided such covenant not to sue shall not be  
7 liable to the State of Oregon under ORS 465.255 with respect to such release at a future time, for  
8 the portion 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 per-  
16 manently immobilize the hazardous constituents of the substance, so that, in the judgment of the  
17 director, the substance no longer presents any current or currently foreseeable future significant  
18 risk to public health, safety, welfare or the environment, no by-product of the treatment or de-  
19 struction process presents any significant hazard to public health, safety, welfare or the environ-  
20 ment, and all by-products are themselves treated, destroyed or contained in a manner that assures  
21 that the by-products do not present any current or currently foreseeable future significant risk to  
22 public health, safety, welfare or the environment.

23 “(c) A covenant not to sue concerning future liability to the State of Oregon shall not take ef-  
24 fect until the director certifies that the removal or remedial action has been completed in accord-  
25 ance 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  
32 remedial 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  
36 facility, 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 per-  
44 formance 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

1 not to sue under paragraph (b) of this subsection or de minimis settlement under subsection (8) of  
2 this 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 di-  
21 rector shall as promptly as possible reach a final settlement with a potentially responsible person  
22 in an administrative or civil action under ORS 465.255 if such settlement involves only a minor  
23 portion of the remedial action costs at the facility concerned and, in the judgment of the director,  
24 both of 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  
27 facility.

28 “(b) The director may provide a covenant not to sue with respect to the facility concerned to  
29 any party who has entered into a settlement under this subsection unless such a covenant would  
30 be inconsistent 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  
7 section, 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  
12 judgment, or before entering a final administrative order, the director shall provide to the public  
13 and to persons not named as parties to the agreement or order notice and opportunity to comment  
14 on the 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) Agreements described in ORS 465.325 entered into on or after the effective date of**  
29 **this 2013 Act.**

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

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

35