

Chapter 465

1991 EDITION

Hazardous Waste and Hazardous Materials I

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REDUCTION OF USE OF TOXIC SUBSTANCES AND HAZARDOUS WASTE GENERATION

465.003 Definitions for ORS 465.003 to 465.034. As used in ORS 465.003 to 465.034:

- (1) "Commission" means the Environmental Quality Commission.
- (2) "Conditionally exempt generator" means a generator who generates less than 2.2 pounds of acute hazardous waste as defined by 40 C.F.R. 261, or who generates less than 220 pounds of hazardous waste in one calendar month.
- (3) "Department" means the Department of Environmental Quality.
- (4) "Director" means the Director of the Department of Environmental Quality.
- (5) "Facility" means all buildings, equipment, structures and other stationary items located on a single site or on contiguous or adjacent sites and owned or operated by the same person or by any person who controls, is controlled by or under common control with any person.
- (6) "Fully regulated generator" means a generator who generates 2.2 pounds or more of acute hazardous waste as defined by 40 C.F.R. 261, or 2,200 pounds or more of hazardous waste in one calendar month.
- (7) "Generator" means a person who, by virtue of ownership, management or control, is responsible for causing or allowing to be caused the creation of hazardous waste.
- (8) "Hazardous waste" has the meaning given that term in ORS 466.005.
- (9) "Large user" means a facility required to report under section 313 of Title III of the Superfund Amendments and Reauthorization Act of 1986 (P.L. 99-499).
- (10) "Person" means individual, the United States, the state or a public or private corporation, local government unit, public agency, partnership, association, firm, trust, estate or any other legal entity.
- (11) "Small-quantity generator" means a generator who generates between 220 and 2,200 pounds of hazardous waste in one calendar month.
- (12) "Toxic substance" or "toxics" means any substance in a gaseous, liquid or solid state listed pursuant to Title III, Section 313 of the Superfund Amendments and Reauthorization Act of 1986, or any substance added by the commission under ORS 465.009. "Toxic substance" does not include a substance used as a pesticide or herbicide in routine commercial agricultural applications.
- (13)(a) "Toxics use reduction" means in-plant changes in production or other proc-

esses or operations, products or raw materials that reduce, avoid or eliminate the use or production of toxic substances without creating substantial new risks to public health, safety and the environment, through the application of any of the following techniques:

(A) Input substitution, which refers to replacing a toxic substance or raw material used in a production or other process or operation with a nontoxic or less toxic substance;

(B) Product reformulation, which refers to substituting for an existing end product, an end product which is nontoxic or less toxic upon use, release or disposal;

(C) Production or other process or operation redesign or modifications;

(D) Production or other process or operation modernization, which refers to upgrading or replacing existing equipment and methods with other equipment and methods;

(E) Improved operation and maintenance controls of production or other process or operation equipment and methods, which refers to modifying or adding to existing equipment or methods including, but not limited to, techniques such as improved housekeeping practices, system adjustments, product and process inspections or production or other process or operation control equipment or methods; or

(F) Recycling, reuse or extended use of toxics by using equipment or methods that become an integral part of the production or other process or operation of concern, including but not limited to filtration and other methods.

(b) "Toxics use reduction" includes proportionate changes in the usage of a particular toxic substance by any of the methods set forth in paragraph (a) of this subsection as the usage of that toxic substance changes as a result of production changes or other business changes.

(14) "Toxics use" means use or production of a toxic substance.

(15) "Toxics user" means a large user, a fully regulated generator or a small-quantity generator.

(16)(a) "Waste reduction" means any recycling or other activity applied after hazardous waste is generated that is consistent with the general goal of reducing present and future threats to public health, safety and the environment and that results in:

(A) The reduction of total volume or quantity of hazardous waste generated that would otherwise be treated, stored or disposed of;

(B) The reduction of toxicity of hazardous waste that would otherwise be treated, stored or disposed of; or

(C) Both the reduction of total volume or quantity and the reduction of toxicity of hazardous waste.

(b) "Waste reduction" includes proportionate changes in the total volume, quantity or toxicity of a particular hazardous waste in accordance with paragraph (a) of this subsection as the generation of that waste changes as a result of production changes or other business changes.

(c) "Waste reduction" may include either onsite or offsite treatment where such treatment can be shown to confer a higher degree of protection of the public health, safety and the environment than other technically and economically practicable waste reduction alternatives. [1989 c.833 §2]

465.006 Policy. (1) In the interest of protecting the public health, safety and the environment, the Legislative Assembly declares that it is the policy of the State of Oregon to encourage reduction in the use of toxic substances and to reduce the generation of hazardous waste whenever technically and economically practicable, without shifting risks from one part of a process, environmental media or product to another. Priority shall be given to methods that reduce the amount of toxics used and, where that is not technically and economically practicable, methods that reduce the generation of hazardous waste.

(2) The Legislative Assembly finds that the best means to achieve the policy set forth in subsection (1) of this section is by:

(a) Providing toxics users and generators with technical assistance;

(b) Requiring toxics users to engage in comprehensive planning and develop measurable performance goals; and

(c) Monitoring the use of toxic substances and the generation of hazardous waste. [1989 c.833 §3]

465.009 Exemption of substance or waste by rule. The Environmental Quality Commission by rule may add or remove any toxic substance or hazardous waste from the provisions of ORS 465.003 to 465.034. [1989 c.833 §4]

465.010 [Amended by 1971 c.743 §371; repealed by 1989 c.846 §15]

465.012 Technical assistance to users and generators; priority; restrictions on enforcement resulting from technical assistance. (1) The Department of Environmental Quality shall provide technical assistance to toxics users and conditionally exempt generators. In identifying the users

and generators to which the department shall give priority in providing technical assistance, the department shall consider at least the following:

(a) Amounts and toxicity of toxics used and amounts of hazardous waste disposed of, discharged and released;

(b) Potential for current and future toxics use reduction and hazardous waste reduction; and

(c) The toxics related exposures and risks posed to public health, safety and the environment.

(2) In providing technical assistance, the department shall give priority to assisting toxics users and conditionally exempt generators in developing and implementing an adequate toxics use reduction and hazardous waste reduction plan as established under ORS 465.015. The assistance may include but need not be limited to:

(a) Information clearinghouse activities;

(b) Telephone hotline assistance;

(c) Toxics use reduction and hazardous waste reduction training workshops;

(d) Establishing a technical publications library;

(e) The development of a system to evaluate the effectiveness of toxics use reduction and hazardous waste reduction measures;

(f) The development of a recognition program to publicly acknowledge toxics users and conditionally exempt generators who develop and implement successful toxics use reduction and hazardous waste reduction plans; and

(g) Direct onsite assistance to toxics users and conditionally exempt generators in developing the plans.

(3) The department shall:

(a) Coordinate its technical assistance efforts with industry trade associations and local colleges and universities as appropriate.

(b) Follow up with toxics users who receive technical assistance to determine whether the user or generator implemented a toxics use reduction and hazardous waste reduction plan.

(4) Technical assistance services provided under this section shall not result in inspections or other enforcement actions unless there is reasonable cause to believe there exists a clear and immediate danger to the public health and safety or to the environment. The commission may develop rules to carry out the intent of this subsection. [1989 c.833 §5]

465.015 Guidelines for reduction plans; performance goals; rationale for goals;

annual progress reports; modification of plans. (1) Not later than September 1, 1990, the commission shall establish guidelines for toxics use reduction and hazardous waste reduction plans. At a minimum, the guidelines shall include:

(a) A written policy articulating upper management and corporate support for the toxics use reduction and hazardous waste reduction plan and a commitment to implement plan goals.

(b) Plan scope and objectives, including the evaluation of technologies, procedures and personnel training programs to insure unnecessary toxic substances are not used and unnecessary waste is not generated. In addition to the goals required in subsection (2) of this section, specific goals may be set for toxics use reduction and hazardous waste reduction, based on a realistic assessment of what is technically and economically practicable.

(c) Internal analysis of toxic substance usage and hazardous waste streams, with periodic toxics use reduction and hazardous waste reduction assessments, to review individual processes or facilities and other activities where toxic substances are used and waste may be generated and identify opportunities to reduce or eliminate toxic substance usage and waste generation. Such assessments shall evaluate data on the types, amount and hazardous constituents of toxic substances used and waste generated, where and why those toxics were used and waste was generated within the production process or other operations, and potential toxics use reduction and hazardous waste reduction and recycling techniques applicable to those toxic substances and wastes.

(d) Toxics use and hazardous waste accounting systems that identify toxics use and waste management costs and factor in liability, compliance and oversight costs to the extent technically and economically practicable.

(e) Employee awareness and training programs, to involve employees in toxics use reduction and hazardous waste reduction planning and implementation to the maximum extent feasible.

(f) Institutionalization of the plan to insure an ongoing effort as demonstrated by incorporation of the plan into management practices and procedures.

(g) Implementation of technically and economically practicable toxics use reduction and hazardous waste reduction options, including a plan for implementation. This shall include a description of options considered and an explanation of why options considered were not implemented. The plan shall distin-

guish between toxics use reduction options and waste reduction options, and the analysis of options considered shall demonstrate that toxics use reduction options were given priority wherever technically and economically practicable.

(2) As part of each plan developed under ORS 465.018, a toxics user shall establish specific performance goals for the reduction of toxics and waste in the following categories:

(a) Any toxic substance used in quantities in excess of 10,000 pounds a year;

(b) Any toxic substance used in quantities in excess of 1,000 pounds a year that constitutes 10 percent or more of the total toxic substances used; and

(c) For fully regulated generators, any waste representing 10 percent or more by weight of the cumulative waste stream generated per year.

(3) Wherever technically and economically practicable, the specific performance goals established under subsection (2) of this section shall be expressed in numeric terms. If the establishment of numeric performance goals is not practicable, the performance goals shall include a clearly stated list of objectives designed to lead to the establishment of numeric goals as soon as is practicable.

(4) Each toxics user shall explain the rationale for each performance goal. The rationale for a particular performance goal shall address any impediments to toxics use reduction and hazardous waste reduction, including but not limited to the following:

(a) The availability of technically practicable toxics use reduction and hazardous waste reduction methods, including any anticipated changes in the future.

(b) The economic practicability of available toxics use reduction and hazardous waste reduction methods, including any anticipated changes in the future. Examples of situations where toxics use reduction or hazardous waste reduction may not be economically practicable include but are not limited to:

(A) For valid reasons of prioritization, a particular company has chosen to first address other more serious toxics use reduction or hazardous waste reduction concerns;

(B) Necessary steps to reduce toxics use and hazardous waste are likely to have significant adverse impacts on product quality; or

(C) Legal or contractual obligations interfere with the necessary steps that would lead to toxics use reduction or hazardous waste reduction.

(5) All toxics users shall complete annually a toxics use reduction and hazardous waste reduction progress report.

(6) An annual progress report shall:

(a) Analyze progress made, if any, in toxics use reduction and hazardous waste reduction, relative to each performance goal established under subsection (2) of this section; and

(b) Set forth amendments to the toxics use reduction and hazardous waste reduction plan and explain the need for the amendments.

(7) The commission by rule may provide for modifications for small-quantity generators related to the kind of information to be included in the plan. [1989 c.833 §7]

465.018 Time limitation for completion of plan; plan not public record; inspection of plan. (1) All large users and fully regulated generators shall complete a toxics use reduction and hazardous waste reduction plan on or before September 1, 1991, and all small-quantity generators shall complete a toxics use reduction and hazardous waste reduction plan on or before September 1, 1992. Upon completion of a plan, the user shall notify the Department of Environmental Quality in writing on a form supplied by the department.

(2) A facility required to complete a toxics use reduction and hazardous waste reduction plan under subsection (1) of this section may include as a preface to its initial plan:

(a) An explanation and documentation regarding toxics use reduction and hazardous waste reduction efforts completed or in progress before the first reporting date; and

(b) An explanation and documentation regarding impediments to toxics use reduction and hazardous waste reduction specific to the individual facility.

(3) The department shall consider information provided under subsection (2) of this section in any review of a facility plan under ORS 465.021.

(4) Except as provided in ORS 465.021, a toxics use reduction and hazardous waste reduction plan developed under this section shall be retained at the facility and is not a public record under ORS 192.410.

(5) For the purposes of this section and ORS 465.012 and 465.021, a toxics user shall permit the director or any designated employee of the director to inspect the toxics use reduction and hazardous waste reduction plan.

(6) A facility shall determine whether it is required to complete a plan under sub-

section (1) of this section based on whether its toxics use or waste generation results in the facility meeting the definition of toxics user as defined in ORS 465.003 for the calendar year ending December 31 of the year immediately preceding the September 1 reporting deadline. [1989 c.833 §8]

465.020 [Amended by 1979 c.284 §151; repealed by 1989 c.846 §15]

465.021 Review of plans; determination of inadequacies; revised plan or progress report; log of inadequacy findings; public inspection of log. (1) The Department of Environmental Quality may review a plan or an annual progress report to determine whether the plan or progress report is adequate according to the guidelines established under ORS 465.015. If a toxics user fails to complete an adequate plan or annual progress report as required under ORS 465.015 and 465.018, the department may notify the user of the inadequacy, identifying the specific deficiencies. The department also may specify a reasonable time frame, of not less than 90 days, within which the user shall submit a modified plan or progress report addressing the specified deficiencies. The department also may make technical assistance available to aid the user in modifying its plan or progress report.

(2) If the department determines that a modified plan or progress report submitted pursuant to subsection (1) of this section is inadequate, the department may, within its discretion, either require further modification or issue an administrative order pursuant to subsection (3) of this section.

(3) If after having received a list of specified deficiencies from the department, a toxics user fails to develop an adequate plan or progress report within a time frame specified pursuant to subsection (1) or (2) of this section, the department may order such toxics user to submit an adequate plan or progress report within a reasonable time frame of not less than 90 days. If the toxics user fails to develop an adequate plan or progress report within the time frame specified, the department shall conduct a public hearing on the plan or progress report. Except as provided under ORS 465.031, in any hearing under this section the relevant plan or progress report shall be considered a public record as defined in ORS 192.410.

(4) In reviewing the adequacy of any plan or progress report, the department shall base its determination solely on whether the plan or progress report is complete and prepared in accordance with ORS 465.015.

(5) The department shall maintain a log of each plan or progress report it reviews, a list of all plans or progress reports that have

been found inadequate under subsection (3) of this section and descriptions of corrective actions taken. This information shall be available to the public at the department's office. [1989 c.833 §9]

465.024 Report of quantities of toxics generated; narrative summary; inspection of progress report. (1) From each annual progress report, the toxics user shall report to the Department of Environmental Quality the quantities of toxics used that are within the categories set forth in ORS 465.015 (2).

(2) From each annual progress report, the toxics user shall report to the department the quantities of hazardous wastes generated that are within the categories set forth in ORS 465.015 (2).

(3) The report shall include a narrative summary explaining the data. The narrative summary may include:

(a) A description of goals and progress made in reducing the use of the toxic substance or generation of hazardous waste; and

(b) A description of any impediments to reducing the use of the toxic substance or generation of hazardous waste.

(4) The Environmental Quality Commission, by rule, shall develop uniform reporting requirements for the data required under subsections (1) and (2) of this section.

(5) Except for the information reported to the department under this section, the annual progress report shall be retained at the facility and shall not be considered a public record under ORS 192.410. However, the user shall permit any officer, employee or representative of the department at all reasonable times to have access to the annual progress report. [1989 c.833 §10]

Note: Section 11, chapter 833, Oregon Laws 1989, provides:

Sec. 11. Large users and fully regulated generators shall complete the first annual progress report required under section 7 of this Act [465.015] on or before September 1, 1992. Small-quantity generators shall complete the first annual progress report required under section 7 of this Act on or before September 1, 1993. [1989 c.833 §11]

465.027 Contract for assistance with higher education institution. Subject to available funding, the Department of Environmental Quality shall contract with an established institution of higher education to assist the department in carrying out the provisions of ORS 465.003 to 465.034. The assistance shall emphasize strategies to encourage toxics use reduction and hazardous waste reduction and shall provide assistance to facilities under ORS 465.003 to 465.034. The assistance may include but need not be limited to:

- (1) Engineering internships;
- (2) Engineering curriculum development;
- (3) Applied toxics use reduction and hazardous waste reduction research; and
- (4) Engineering assistance to users and generators. [1989 c.833 §12]

465.030 [Repealed by 1989 c.846 §15]

465.031 Classification of plan or progress report as confidential; trade secrets; restricted use of confidential information. (1) Upon a showing satisfactory to the director by any person that a plan or annual progress report developed under ORS 465.015 or 465.018, or any portion thereof, if made public, would divulge methods, processes or other information entitled to protection as trade secrets, as defined under ORS 192.501, of such person, the director shall classify as confidential such plan or annual progress report, or portion thereof.

(2) To the extent that any plan or annual progress report under subsection (1) of this section, or any portion thereof, would otherwise qualify as a trade secret under ORS 192.501, no action taken by the director or any authorized employee of the department in inspecting or reviewing such information shall affect its status as a trade secret.

(3) Any information classified by the director as confidential under subsection (1) of this section shall not be made a part of any public record, used in any public hearing or disclosed to any party outside of the department unless a circuit court determines that evidence is necessary to the determination of an issue or issues being decided at the public hearing. [1989 c.833 §14]

Note: Section 15, chapter 833, Oregon Laws 1989, provides:

Sec. 15. On or before January 1, 1991, and January 1, 1993, the Environmental Quality Commission shall report to the Legislative Assembly on the status of implementing sections 2 to 16 of this Act [465.003 to 465.034]. This report shall include information regarding:

- (1) The status of the technical assistance program;
- (2) Progress toward reducing the quantities of toxic substances used and hazardous wastes generated in Oregon; and

(3) An analysis and recommendations for changes to the program including but not limited to the need for any additional enforcement provisions. [1989 c.833 §15]

465.034 Application of ORS 465.003 to 465.031. Notwithstanding any other provision of ORS 465.003 to 465.031, nothing in chapter 833, Oregon Laws 1989, shall be considered to apply to any hazardous wastes that become subject to regulation solely as a result of remedial activities taken in response to environmental contamination. [1989 c.833 §16]

Note: The Legislative Counsel has not, pursuant to 173.160, undertaken to substitute specific ORS refer-

ences for the words "this Act" in 465.034. Chapter 833, Oregon Laws 1989, enacted into law and amended the ORS sections which may be found by referring to the 1989 Comparative Section Table located in volume 15 of Oregon Revised Statutes (1989 Edition).

465.037 Short title. ORS 465.003 to 465.034 shall be known as the Toxics Use Reduction and Hazardous Waste Reduction Act. [1989 c.833 §1]

465.040 [Amended by 1971 c.743 §372; repealed by 1989 c.846 §15]

465.050 [Amended by 1971 c.743 §373; repealed by 1989 c.846 §15]

465.060 [Repealed by 1989 c.846 §15]

465.070 [1989 Repealed by 1989 c.846 §15]

465.090 [Amended by 1971 c.743 §374; repealed by 1989 c.846 §15]

465.100 [1977 c.850 §2; 1985 c.728 §83; 1987 c.914 §26; renumbered 464.430 in 1987]

BULK PETROLEUM PRODUCT WITHDRAWAL REGULATION

465.101 Definitions for ORS 465.101 to 465.131. As used in ORS 465.101 to 465.131:

(1) "Bulk facility" means a facility, including pipeline terminals, refinery terminals, rail and barge terminals and associated underground and aboveground tanks, connected or separate, from which petroleum products are withdrawn from bulk and delivered into a cargo tank or barge used to transport those products.

(2) "Cargo tank" means an assembly used for transporting, hauling or delivering petroleum products and consisting of a tank having one or more compartments mounted on a wagon, truck, trailer, truck-trailer, railcar or wheels. "Cargo tank" does not include any assembly used for transporting, hauling or delivering petroleum products that holds less than 100 gallons in individual, separable containers.

(3) "Department" means the Department of Revenue.

(4) "Person" means an individual, trust, firm, joint stock company, corporation, partnership, joint venture, consortium, association, state, municipality, commission, political subdivision of a state or any interstate body, any commercial entity and the Federal Government or any agency of the Federal Government.

(5) "Petroleum product" means a petroleum product that is obtained from distilling and processing crude oil and that is capable of being used as a fuel for the propulsion of a motor vehicle or aircraft, including motor gasoline, gasohol, other alcohol-blended fuels, aviation gasoline, kerosene, distillate fuel oil and number 1 and number 2 diesel. The term does not include naphtha-type jet fuel, kerosene-type jet fuel, or a petroleum product destined for use in chemical manufactur-

ing or feedstock of that manufacturing or fuel sold to vessels engaged in interstate or foreign commerce.

(6) "Withdrawal from bulk" means the removal of a petroleum product from a bulk facility for delivery directly into a cargo tank or a barge to be transported to another location other than another bulk facility for use or sale in this state. [1989 c.833 §139]

465.104 Fees for petroleum product delivery or withdrawals; exceptions; registration of facility operators. (1) Beginning September 1, 1989, the seller of a petroleum product withdrawn from a bulk facility, on withdrawal from bulk of the petroleum product, shall collect from the person who orders the withdrawal a petroleum products withdrawal delivery fee in the maximum amount of \$10.

(2) Beginning September 1, 1989, any person who imports petroleum products in a cargo tank or a barge for delivery into a storage tank, other than a tank connected to a bulk facility, shall pay a petroleum products import delivery fee in the maximum amount of \$10 to the Department of Revenue for each such delivery of petroleum products into a storage tank located in the state.

(3) Subsections (1) and (2) of this section do not apply to a delivery or import of petroleum products destined for export from this state if the petroleum products are in continuous movement to a destination outside the state.

(4) The seller of petroleum products withdrawn from a bulk facility and each person importing petroleum products shall remit the first payment on October 1, 1989. Beginning January 1, 1990, payment of the fee due shall be on a quarterly basis.

(5) Each operator of a bulk facility and each person who imports petroleum products shall register with the Department of Revenue by August 1, 1989, or 30 days prior to operating a bulk facility or importing a cargo tank of petroleum products, whichever comes first. [1989 c.833 §140]

465.110 [Amended by 1953 c.540 §5; 1967 c.470 §62; 1969 c.684 §16; 1983 c.470 §6; repealed by 1989 c.846 §15]

465.111 Department of Revenue to collect fee; exemption from fee of protected petroleum products. (1) The Department of Revenue shall collect the fee imposed under ORS 465.104.

(2) Any petroleum product which the Constitution or laws of the United States prohibit the state from taxing is exempt from the fee imposed under ORS 465.104. [1989 c.833 §142]

465.114 Extension of time for paying fee; interest on extended payment. The

Department of Revenue for good cause may extend, for not to exceed one month, the time for payment of the fee due under ORS 465.101 to 465.131. The extension may be granted at any time if a written request is filed with the department within or prior to the period for which the extension may be granted. If the time for payment is extended at the request of a person, interest at the rate established under ORS 305.220, for each month, or fraction of a month, from the time the payment was originally due to the time payment is actually made, shall be added and paid. [1989 c.833 §143]

465.117 Records of petroleum products transactions; inspection by Department of Revenue. (1) Each operator of a bulk facility and each person who imports petroleum products into this state shall keep at the person's registered place of business complete and accurate records of any petroleum products sold, purchased by or brought in or caused to be brought in to the place of business.

(2) The Department of Revenue, upon oral or written reasonable notice, may make such examinations of the books, papers, records and equipment required to be kept under this section as it may deem necessary in carrying out the provisions of ORS 465.101 to 465.131. [1989 c.833 §144]

465.120 [Amended by 1979 c.284 §152; repealed by 1989 c.846 §15]

465.121 Rules. The department is authorized to establish those rules and procedures for the implementation and enforcement of ORS 465.101 to 465.131 that are consistent with its provisions and are considered necessary and appropriate. [1989 c.833 §145]

465.124 Application of ORS chapters 305 and 314 to fee collection. The provisions of ORS chapters 305 and 314 as to liens, delinquencies, claims for refund, issuance of refunds, conferences, appeals to the director of the department, appeals to the Oregon Tax Court, stay of collection pending appeal, cancellation, waiver, reduction or compromise of fees, penalties or interest, subpoenaing and examining witnesses and books and papers, and the issuance of warrants and the procedures relating thereto, shall apply to the collection of fees, penalties and interest by the department under ORS 465.101 to 465.131, except where the context requires otherwise. [1989 c.833 §146]

465.127 Disposition of fees; administrative expenses; purposes of which fees expended. (1) All moneys received by the Department of Revenue under ORS 465.101 to 465.131 shall be deposited in the State Treasury and credited to a suspense account

established under ORS 293.445. After payment of administration expenses incurred by the department in the administration of ORS 465.101 to 465.131 and of refunds or credits arising from erroneous overpayments, the balance of the money shall be credited to the appropriate accounts as approved by the Legislative Assembly to:

(a) Carry out the state's oil, hazardous material and hazardous substance emergency response program;

(b) Provide up to \$1 million each year to fund the Orphan Site Account; and

(c) To provide funds for the Underground Storage Tank Insurance Fund in an amount adequate to establish a program to enable owners and permittees of underground storage tanks to satisfy the financial responsibility requirements established under ORS 466.815 and any applicable federal law.

(2) If the balance of the money, is less than that approved by the Legislative Assembly, the department shall distribute the money to the accounts in a ratio equal to the ratio of the amounts approved by the Legislative Assembly. [1989 c.833 §147; 1989 c.935 §4]

465.130 [Repealed by 1989 c.846 §15]

465.131 Fee imposed by ORS 465.104 in addition to fees established by local government. The fee imposed by ORS 465.104 is in addition to all other state, county or municipal fees on a petroleum product. [1989 c.833 §148]

Note: Sections 161 to 167, chapter 833, Oregon Laws 1989, provide:

Sec. 161. Sections 162 to 168 of this Act become operative on the date the Supreme Court declares that sections 139 to 148 of this Act [465.101 to 465.131] impose a tax or excise levied on, with respect to or measured by the extraction, production, storage, use, sale, distribution or receipt of oil or natural gas or levied on the ownership of oil or natural gas, that is subject to the provisions of section 2, Article VIII or section 3a, Article IX of the Oregon Constitution. [1989 c.833 §161]

Sec. 162. (1) In addition to any other fees required by law, each petroleum supplier shall pay to the Department of Revenue annually its share of an assessment to be deposited in accordance with section 165 of this Act. The amount of the total assessment shall be not more than \$1 million each year for that portion of the fee necessary to carry out the state's hazardous material emergency response system and up to \$1 million each year for that portion of the fee necessary to provide funding for the Orphan Site Account.

(2) Each petroleum supplier shall provide the Department of Revenue, on or before September 1, 1989, and by May 1 of each year thereafter, a verified statement showing the petroleum supplier's gross operating revenues derived within the state for the preceding calendar year. The statement shall be in the form prescribed by the Department of Revenue and is subject to audit by the department. The statement shall include an entry showing the total operating revenue derived by petroleum suppliers from fuels sold that are subject to the requirements of section 3a, Article IX of the Oregon Constitution, ORS 319.020 and 319.530 with reference to aircraft fuel and motor vehicle fuel or from oil and na-

tural gas extracted within this state subject to section 2, Article VIII of the Oregon Constitution. The department may grant an extension of not more than 15 days for the requirements of this subsection if:

(a) The petroleum supplier makes a showing of hardship caused by the deadline;

(b) The petroleum supplier provides reasonable assurance that the petroleum supplier can comply with the revised deadline; and

(c) The extension of time does not prevent an affected agency from fulfilling its statutory responsibilities.

(3) The amount assessed to a petroleum supplier shall be based on the ratio which that supplier's annual gross operating revenue derived within this state in the preceding calendar year bears to the total gross operating revenue derived within this state during that year by all petroleum suppliers. The Department of Revenue shall exempt from payment of an assessment any individual petroleum supplier whose calculated share of the annual assessment is less than \$250.

(4) Based on the formula set forth in subsection (3) of this section, on or before October 1, 1989, and by June 1 of each year thereafter, the Department of Revenue shall send each petroleum supplier subject to assessment a fee billing by registered or certified mail. The amount assessed to the petroleum supplier shall be considered to the extent otherwise permitted by law a government-imposed cost and recoverable by the petroleum supplier as a cost included within the price of the service or product supplied.

(5) The amounts assessed to individual petroleum suppliers pursuant to subsection (3) of this section shall be paid to the Department of Revenue not later than November 1, 1989, and by July 1 of each year thereafter.

(6) As used in this section:

(a) "Department" means the Department of Revenue.

(b) "Gross operating revenue" means gross receipts from sales or service made or provided within this state during the regular course of the petroleum supplier's business, but does not include:

(A) Revenue derived from interutility sales within the state; or

(B) Revenue received by a petroleum supplier from the sale of fuels that are:

(i) Used to operate railroad locomotives; or

(ii) Subject to the requirements of section 3a, Article IX of the Oregon Constitution, ORS 319.020 or 319.530 or section 2, Article VIII of the Oregon Constitution.

(c) "Petroleum supplier" has the meaning given that term in ORS 469.020 but does not include a person supplying natural gas.

(7) The amount of revenues that must be derived from any class of petroleum suppliers by assessment pursuant to this subsection shall be determined by the department.

(8) A fee billing sent by the department under this section shall be subject to appeal under ORS 305.275. The filing of an appeal shall not operate to stay the obligation of a petroleum supplier to pay amounts assessed to it on or before the statutory deadline. [1989 c.833 §162]

Sec. 163. (1) In addition to any other fee required by law, each railroad company that transports hazardous substance in Oregon shall pay, on or before January 1 of each even-numbered year, a biennial fee to the Department of Revenue. The fee shall be determined by dividing the number of miles of main track, branch line track and yard track in this state, as determined under ORS 308.570, into the sum of up to \$100,000. Each rail-

road company shall then be billed for its pro rata share based on the number of miles of track owned.

(2) The Director of the Department of Revenue shall deposit the fee collected under subsection (1) of this section in accordance with section 165 of this Act.

(3) As used in this section:

(a) "Hazardous substance" has the meaning given that term in ORS 453.307.

(b) "Railroad" means a Class 1 railroad as defined in ORS 760.005. [1989 c.833 §163]

Sec. 164. (1) In addition to other fees and taxes imposed by law upon motor carriers, there shall be assessed against and collected, on or before January 1 of each even-numbered year, from every motor carrier a biennial fee.

(2) The fee imposed under subsection (1) of this section shall be based upon the estimated incidence of hazardous substance spilled or discharged by motor carriers.

(3) For the purpose of computing the fee under subsection (1) of this section:

(a) Not more than \$100 shall be assessed for any motor carrier transporting hazardous substance; and

(b) Not more than \$25 shall be assessed for each motor carrier.

(4) The fee imposed under this section shall be paid to the Department of Revenue and deposited in accordance with section 165 of this Act.

(5) The Public Utility Commission shall provide the Department of Revenue with a list of all motor carriers registered with the Public Utility Commission. The list shall be current as of January 1 of each odd-numbered year and shall identify all motor carriers and those motor carriers who transport any hazardous substance.

(6) As used in this section:

(a) "Hazardous substance" has the meaning given that term in ORS 767.458.

(b) "Motor carrier" has the meaning given that term in ORS 767.005. [1989 c.833 §164]

Sec. 165. All moneys received by the Department of Revenue under sections 162 to 164 of this Act shall be deposited in the State Treasury and credited to a suspense account established under ORS 293.445. After payment of administration expenses incurred by the department in the administration of sections 162 to 164 of this Act and of refunds or credits arising from erroneous overpayments, the balance of the money shall be credited to the appropriate accounts as approved by the Legislative Assembly to carry out the state's hazardous material emergency response system and to provide funding for the Orphan Site Account. If the balance of the money is less than that approved by the Legislative Assembly, the department shall distribute the money to the accounts in a ratio equal to the ratio of the amounts approved by the Legislative Assembly. Moneys collected under sections 162 to 168 of this Act and credited to the Orphan Site Account shall not be used for removal or remedial action costs at solid waste disposal sites for which a fee is collected under section 137 or 138 of this Act [459.311 or 459.236]. [1989 c.833 §165]

Sec. 166. The provisions of ORS chapters 305 and 314 as to liens, delinquencies, claims for refund, issuance of refunds, conferences, appeals to the Director of the Department of Revenue, appeals to the Oregon Tax Court, stay of collection pending appeal, cancellation, waiver, reduction or compromise of fees, penalties or interest, subpoenaing and examining witnesses and books and papers and the issuance of warrants and the procedures relating thereto, shall apply to the collection of fees, penalties and interest by the Department of Revenue under sections 162 to 168 of this Act, except where the context requires otherwise. [1989 c.833 §166]

Sec. 167. If any person fails to pay a fee imposed under sections 162 to 168 of this Act, within 60 days after receiving a billing, there shall be added to the fee, a penalty of five percent of the amount of the fee. Any payment made after 60 days shall bear interest at the rate prescribed under ORS 305.220. [1989 c.833 §167]

465.140 [1989 c.846 §12; renumbered 105.570 in 1989]

465.150 [Amended by 1953 c.540 §5; repealed by 1989 c.846 §15]

465.155 [1953 c.540 §4; repealed by 1989 c.846 §15]

465.160 [Repealed by 1989 c.846 §15]

465.170 [Repealed by 1989 c.846 §15]

465.180 [Repealed by 1989 c.846 §15]

REMOVAL OR REMEDIAL ACTION

465.200 Definitions for ORS 465.200 to 465.455. As used in ORS 465.200 to 465.455 and 465.900:

(1) "Claim" means a demand in writing for a sum certain.

(2) "Commission" means the Environmental Quality Commission.

(3) "Department" means the Department of Environmental Quality.

(4) "Director" means the Director of the Department of Environmental Quality.

(5) "Environment" includes the waters of the state, any drinking water supply, any land surface and subsurface strata and ambient air.

(6) "Facility" means any building, structure, installation, equipment, pipe or pipeline including any pipe into a sewer or publicly owned treatment works, well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, above ground tank, underground storage tank, motor vehicle, rolling stock, aircraft, or any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located and where a release has occurred or where there is a threat of a release, but does not include any consumer product in consumer use or any vessel.

(7) "Fund" means the Hazardous Substance Remedial Action Fund established by ORS 465.380.

(8) "Guarantor" means any person, other than the owner or operator, who provides evidence of financial responsibility for an owner or operator under ORS 465.200 to 465.455 and 465.900.

(9) "Hazardous substance" means:

(a) Hazardous waste as defined in ORS 466.005.

(b) Any substance defined as a hazardous substance pursuant to section 101(14) of the federal Comprehensive Environmental Response, Compensation and Liability Act, P.L. 96-510, as amended, and P.L. 99-499.

(c) Oil.

(d) Any substance designated by the commission under ORS 465.400.

(10) "Natural resources" includes but is not limited to land fish, wildlife, biota, air, surface water, groundwater, drinking water supplies and any other resource owned, managed, held in trust or otherwise controlled by the State of Oregon or a political subdivision of the state.

(11) "Oil" includes gasoline, crude oil, fuel oil, diesel oil, lubricating oil, oil sludge or refuse and any other petroleum-related product, or waste or fraction thereof that is liquid at a temperature of 60 degrees Fahrenheit and pressure of 14.7 pounds per square inch absolute.

(12) "Owner or operator" means any person who owned, leased, operated, controlled or exercised significant control over the operation of a facility. "Owner or operator" does not include a person, who, without participating in the management of a facility, holds indicia of ownership primarily to protect a security interest in the facility.

(13) "Person" means an individual, trust, firm, joint stock company, joint venture, consortium, commercial entity, partnership, association, corporation, commission, state and any agency thereof, political subdivision of the state, interstate body or the Federal Government including any agency thereof.

(14) "Release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment including the abandonment or discarding of barrels, containers and other closed receptacles containing any hazardous substance, or threat thereof, but excludes:

(a) Any release which results in exposure to a person solely within a workplace, with respect to a claim that the person may assert against the person's employer under ORS chapter 656;

(b) Emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel or pipeline pumping station engine;

(c) Any release of source, by-product or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954, as amended, if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under section 170 of the Atomic Energy Act of 1954, as amended, or, for the purposes of ORS 465.260 or any other removal or remedial action, any release of source by-product or special nuclear material from any processing site designated under section 102(a)(1)

or 302(a) of the Uranium Mill Tailings Radiation Control Act of 1978; and

(d) The normal application of fertilizer.

(15) "Remedial action" means those actions consistent with a permanent remedial action taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of a hazardous substance so that it does not migrate to cause substantial danger to present or future public health, safety, welfare or the environment. "Remedial action" includes, but is not limited to:

(a) Such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative drinking and household water supplies, and any monitoring reasonably required to assure that such actions protect the public health, safety, welfare and the environment.

(b) Offsite transport and offsite storage, treatment, destruction or secure disposition of hazardous substances and associated, contaminated materials.

(c) Such actions as may be necessary to monitor, assess, evaluate or investigate a release or threat of release.

(16) "Remedial action costs" means reasonable costs which are attributable to or associated with a removal or remedial action at a facility, including but not limited to the costs of administration, investigation, legal or enforcement activities, contracts and health studies.

(17) "Removal" means the cleanup or removal of a released hazardous substance from the environment, such actions as may be necessary taken in the event of the threat of release of a hazardous substance into the environment, such actions as may be necessary to monitor, assess and evaluate the release or threat of release of a hazardous substance, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize or mitigate damage to the public health, safety, welfare or to the environment, which may otherwise result from a release or threat of release. "Removal" also includes but is not limited to security fencing or other measures to limit access, provision of alternative drinking and household water supplies, temporary evacu-

ation and housing of threatened individuals and action taken under ORS 465.260.

(18) "Transport" means the movement of a hazardous substance by any mode, including pipeline and in the case of a hazardous substance which has been accepted for transportation by a common or contract carrier, the term "transport" shall include any stoppage in transit which is temporary, incidental to the transportation movement, and at the ordinary operating convenience of a common or contract carrier, and any such stoppage shall be considered as a continuity of movement and not as the storage of a hazardous substance.

(19) "Underground storage tank" has the meaning given that term in ORS 466.706.

(20) "Waters of the state" has the meaning given that term in ORS 468B.005. [Formerly 466.540]

465.205 Legislative findings. (1) The Legislative Assembly finds that:

(a) The release of a hazardous substance into the environment may present an imminent and substantial threat to the public health, safety, welfare and the environment; and

(b) The threats posed by the release of a hazardous substance can be minimized by prompt identification of facilities and implementation of removal or remedial action.

(2) Therefore, the Legislative Assembly declares that:

(a) It is in the interest of the public health, safety, welfare and the environment to provide the means to minimize the hazards of and damages from facilities.

(b) It is the purpose of ORS 465.200 to 465.455 and 465.900 to:

(A) Protect the public health, safety, welfare and the environment; and

(B) Provide sufficient and reliable funding for the department to expediently and effectively authorize, require or undertake removal or remedial action to abate hazards to the public health, safety, welfare and the environment. [Formerly 466.547]

465.210 Authority of department for removal or remedial action. (1) In addition to any other authority granted by law, the department may:

(a) Undertake independently, in cooperation with others or by contract, investigations, studies, sampling, monitoring, assessments, surveying, testing, analyzing, planning, inspecting, training, engineering, design, construction, operation, maintenance and any other activity necessary to conduct removal or remedial action and to carry out

the provisions of ORS 465.200 to 465.455 and 465.900; and

(b) Recover the state's remedial action costs.

(2) The commission and the department may participate in or conduct activities pursuant to the federal Comprehensive Environmental Response, Compensation and Liability Act, as amended, P.L. 96-510 and P.L. 99-499, and the corrective action provisions of Subtitle I of the federal Solid Waste Disposal Act, as amended, P.L. 96-482 and P.L. 98-616. Such participation may include, but need not be limited to, entering into a cooperative agreement with the United States Environmental Protection Agency.

(3) Nothing in ORS 465.200 to 465.455 and 465.900 shall restrict the State of Oregon from participating in or conducting activities pursuant to the federal Comprehensive Environmental Response, Compensation and Liability Act, as amended, P.L. 96-510 and P.L. 99-499. [Formerly 466.550]

465.215 List of facilities with confirmed release. (1) For the purposes of providing public information, the director shall develop and maintain a list of all facilities with a confirmed release as defined by the Environmental Quality Commission under ORS 465.405.

(2) The director shall make the list available for the public at the department's offices.

(3) The list shall include but need not be limited to the following items, if known:

(a) A general description of the facility;

(b) Address or location;

(c) Time period during which a release occurred;

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

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

(f) Manner of release of the hazardous substance;

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

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

(i) Other items the director determines necessary.

(4) At least 60 days before a facility is added to the list the director shall notify by certified mail or personal service the owner and operator, if known, of all or any part of the facility that is to be included in the list.

The notice shall inform the owner and operator that the owner and operator may comment on the decision of the director to add the facility to the list within 45 days of receiving the notice. The decision of the director to add a facility to the list is not appealable to the Environmental Quality Commission or subject to judicial review under ORS 183.310 to 183.550. [Formerly 466.557]

465.220 Comprehensive statewide identification program; notice. (1) The department shall develop and implement a comprehensive statewide program to identify any release or threat of release from a facility that may require remedial action.

(2) The department shall notify all daily and weekly newspapers of general circulation in the state and all broadcast media of the program developed under subsection (1) of this section. The notice shall include information about how the public may provide information on a release or threat of release from a facility.

(3) In developing the program under subsection (1) of this section, the department shall examine, at a minimum, any industrial or commercial activity that historically has been a major source in this state of releases of hazardous substances.

(4) The department shall include information about the implementation and progress of the program developed under subsection (1) of this section in the report required under ORS 465.235. [Formerly 466.560]

465.225 Inventory of facilities needing environmental controls; preliminary assessment; notice to operator; criteria for adding facilities to inventory. (1) For the purpose of providing public information, the director shall develop and maintain an inventory of all facilities for which:

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

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

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

(3) Before the department conducts a preliminary assessment, the director shall notify the owner and operator, if known, that the department is proceeding with a preliminary assessment and that the owner or oper-

ator may submit information to the department that would assist the department in conducting a complete and accurate preliminary assessment.

(4) At least 60 days before the director adds a facility to the inventory, the director shall notify by certified mail or personal service the owner and operator, if known, of all or any part of the facility that is to be included in the inventory. The decision of the director to add a facility to the inventory is not appealable to the Environmental Quality Commission or subject to judicial review under ORS 183.310 to 183.550.

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

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

(7) The director shall review the information submitted and add the facility to inventory if the director determines that a confirmed release has occurred and that additional investigation, removal, remedial action, long-term environmental controls or institutional controls are needed to assure protection of present and future public health, safety, welfare or the environment. [1989 c.485 §3]

465.230 Removal of facilities from inventory; criteria. (1) According to rules adopted by the Environmental Quality Commission, the director shall remove a facility from the list or inventory, or both, if the director determines:

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

(b) No further action is needed to assure protection of present and future public health, safety, welfare and the environment; or

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

(2) The director shall not remove a facility if continuing environmental controls or institutional controls are needed to assure

protection of present and future public health, safety, welfare and the environment, so long as such controls are related to removal or remedial action. [1989 c.485 §4]

465.235 Public inspection of inventory; information included in inventory; organization; report; action plan. (1) The director shall make the inventory available to the public at the office of the Department of Environmental Quality.

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

(a) The following information, if known:

(A) A general description of the facility;

(B) Address or location;

(C) Time period during which a release occurred;

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

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

(F) Manner of release of the hazardous substance;

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

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

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

(J) Other items the director determines necessary; and

(b) Information that indicates whether the remedial action at the facility will be funded primarily by:

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

(B) An owner or operator or other person under an agreement, order or consent decree under ORS 465.200 to 465.455; or

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

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

(4) On or before January 15 of each year, the department shall submit the inventory and a report to the Governor, the Legislative Assembly and the Environmental Quality Commission. The annual report shall include a quantitative and narrative summary of the department's accomplishments during the previous fiscal year and the department's

goals for the current fiscal year, including but not limited to each of the following areas:

(a) Facilities with a suspected release added to the department's data base;

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

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

(d) Removals initiated and completed;

(e) Preliminary assessments initiated and completed;

(f) Remedial investigations initiated and completed;

(g) Feasibility studies initiated and completed; and

(h) Remedial actions, including long-term environmental controls and institutional controls, initiated and completed.

(5) Beginning in 1991, and every fourth year thereafter, the report required under subsection (4) of this section shall include a four-year plan of action for those items under paragraphs (e) to (h) of subsection (4) of this section. The four-year plan shall include projections of funding and staffing levels necessary to implement the four-year plan. [1989 c.485 §5]

465.240 Inventory listing not prerequisite to other remedial action. Nothing in ORS 465.225 to 465.240, 465.405 and 465.410 or placement of a facility on the list under ORS 465.215 shall be construed to be a prerequisite to or otherwise affect the authority of the director to undertake, order or authorize a removal or remedial action under ORS 465.200 to 465.455 and 465.900. [1989 c.485 §6]

465.245 Preliminary assessment of potential facility. When the department receives information about a release or a threat of release from a potential facility, the department shall evaluate the information and document its conclusions and may approve or conduct a preliminary assessment. However, if the department determines there is a significant threat to present or future public health, safety, welfare or the environment, the department shall approve or conduct a preliminary assessment according to rules of the commission. The preliminary assessment shall be conducted as expeditiously as possible within the budgetary constraints of the department. [Formerly 466.563]

465.250 Accessibility of information about hazardous substances. (1) Any person who has or may have information, documents or records relevant to the identification, nature and volume of a hazardous substance generated, treated, stored,

transported to, disposed of or released at a facility and the dates thereof, or to the identity or financial resources of a potentially responsible person, shall, upon request by the department or its authorized representative, disclose or make available for inspection and copying such information, documents or records.

(2) Upon reasonable basis to believe that there may be a release of a hazardous substance at or upon any property or facility, the department or its authorized representative may enter any property or facility at any reasonable time to:

(a) Sample, inspect, examine and investigate;

(b) Examine and copy records and other information; or

(c) Carry out removal or remedial action or any other action authorized by ORS 465.200 to 465.455 and 465.900.

(3) If any person refuses to provide information, documents, records or to allow entry under subsections (1) and (2) of this section, the department may request the Attorney General to seek from a court of competent jurisdiction an order requiring the person to provide such information, documents, records or to allow entry.

(4)(a) Except as provided in paragraphs (b) and (c) of this subsection, the department or its authorized representative shall, upon request by the current owner or operator of the facility or property, provide a portion of any sample obtained from the property or facility to the owner or operator.

(b) The department may decline to give a portion of any sample to the owner or operator if, in the judgment of the department or its authorized representative, apportioning a sample:

(A) May alter the physical or chemical properties of the sample such that the portion of the sample retained by the department would not be representative of the material sampled; or

(B) Would not provide adequate volume to perform the laboratory analysis.

(c) Nothing in this subsection shall prevent or unreasonably hinder or delay the department or its authorized representative in obtaining a sample at any facility or property.

(5) Persons subject to the requirements of this section may make a claim of confidentiality regarding any information, documents or records, in accordance with ORS 466.090. [Formerly 466.565]

465.255 Strict liability for remedial action costs for injury or destruction of

natural resource; limited exclusions. (1) The following persons shall be strictly liable for those remedial action costs incurred by the state or any other person that are attributable to or associated with a facility and for damages for injury to or destruction of any natural resources caused by a release:

(a) Any owner or operator at or during the time of the acts or omissions that resulted in the release.

(b) Any owner or operator who became the owner or operator after the time of the acts or omissions that resulted in the release, and who knew or reasonably should have known of the release when the person first became the owner or operator.

(c) Any owner or operator who obtained actual knowledge of the release at the facility during the time the person was the owner or operator of the facility and then subsequently transferred ownership or operation of the facility to another person without disclosing such knowledge.

(d) Any person who, by any acts or omissions, caused, contributed to or exacerbated the release, unless the acts or omissions were in material compliance with applicable laws, standards, regulations, licenses or permits.

(e) Any person who unlawfully hinders or delays entry to, investigation of or removal or remedial action at a facility.

(2) Except as provided in paragraphs (c) to (e) of subsection (1) of this section and subsection (4) of this section, the following persons shall not be liable for remedial action costs incurred by the state or any other person that are attributable to or associated with a facility, or for damages for injury to or destruction of any natural resources caused by a release:

(a) Any owner or operator who became the owner or operator after the time of the acts or omissions that resulted in a release, and who did not know and reasonably should not have known of the release when the person first became the owner or operator.

(b) Any owner or operator if the release at the facility was caused solely by one or a combination of the following:

(A) An act of God. "Act of God" means an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight.

(B) An act of war.

(C) Acts or omissions of a third party, other than an employee or agent of the person asserting this defense, or other than a

person whose acts or omissions occur in connection with a contractual relationship, existing directly or indirectly, with the person asserting this defense. As used in this subparagraph, "contractual relationship" includes but is not limited to land contracts, deeds or other instruments transferring title or possession.

(3) Except as provided in paragraphs (c) to (e) of subsection (1) of this section or subsection (4) of this section, the following persons shall not be liable for remedial action costs incurred by the state or any other person that are attributable to or associated with a facility, or for damages for injury to or destruction of any natural resources caused by a release:

(a) A unit of state or local government that acquired ownership or control of a facility in the following ways:

(A) Involuntarily by virtue of its function as sovereign, including but not limited to escheat, bankruptcy, tax delinquency or abandonment; or

(B) Through the exercise of eminent domain authority by purchase or condemnation.

(b) A person who acquired a facility by inheritance or bequest.

(c) Any fiduciary exempted from liability in accordance with rules adopted by the commission under ORS 465.440.

(4) Notwithstanding the exclusions from liability provided for specified persons in subsections (2) and (3) of this section such persons shall be liable for remedial action costs incurred by the state or any other person that are attributable to or associated with a facility, and for damages for injury to or destruction of any natural resources caused by a release, to the extent that the person's acts or omissions contribute to such costs or damages, if the person:

(a) Obtained actual knowledge of the release and then failed to promptly notify the department and exercise due care with respect to the hazardous substance concerned, taking into consideration the characteristics of the hazardous substance in light of all relevant facts and circumstances; or

(b) Failed to take reasonable precautions against the reasonably foreseeable acts or omissions of a third party and the reasonably foreseeable consequences of such acts or omissions.

(5)(a) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from any person who may be liable under this section, to any other person, the liability imposed under this section. Nothing in this section shall bar any agreement to insure, hold harmless or

indemnify a party to such agreement for any liability under this section.

(b) A person who is liable under this section shall not be barred from seeking contribution from any other person for liability under ORS 465.200 to 465.455 and 465.900.

(c) Nothing in ORS 465.200 to 465.455 and 465.900 shall bar a cause of action that a person liable under this section or a guarantor has or would have by reason of subrogation or otherwise against any person.

(d) Nothing in this section shall restrict any right that the state or any person might have under federal statute, common law or other state statute to recover remedial action costs or to seek any other relief related to a release.

(6) To establish, for purposes of paragraph (b) of subsection (1) of this section or paragraph (a) of subsection (2) of this section, that the person did or did not have reason to know, the person must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability.

(7)(a) Except as provided in paragraph (b) of this subsection, no person shall be liable under ORS 465.200 to 465.455 and 465.900 for costs or damages as a result of actions taken or omitted in the course of rendering care, assistance or advice in accordance with rules adopted under ORS 465.400 or at the direction of the department or its authorized representative, with respect to an incident creating a danger to public health, safety, welfare or the environment as a result of any release of a hazardous substance. This paragraph shall not preclude liability for costs or damages as the result of negligence on the part of such person.

(b) No state or local government shall be liable under ORS 465.200 to 465.455 and 465.900 for costs or damages as a result of actions taken in response to an emergency created by the release of a hazardous substance generated by or from a facility owned by another person. This paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the state or local government. For the purpose of this paragraph, reckless, willful or wanton misconduct shall constitute gross negligence.

(c) This subsection shall not alter the liability of any person covered by subsection (1) of this section. [Formerly 466.567; 1991 c.680 §9; 1991 c.692 §1]

Note: Section 3, chapter 692, Oregon Laws 1991, provides:

Sec. 3. The amendments to ORS 465.255 by section 1 of this Act apply to all causes of action, whether arising before, on or after the effective date of this Act [July 25, 1991], that have not been reduced to judgment and entered in the register of a court. [1991 c.692 §3]

465.260 Removal or remedial action; reimbursement of costs. (1) The director may undertake any removal or remedial action necessary to protect the public health, safety, welfare and the environment.

(2) The director may authorize any person to carry out any removal or remedial action in accordance with any requirements of or directions from the director, if the director determines that the person will commence and complete removal or remedial action properly and in a timely manner.

(3) Nothing in ORS 465.200 to 465.455 and 465.900 shall prevent the director from taking any emergency removal or remedial action necessary to protect public health, safety, welfare or the environment.

(4) The director may require a person liable under ORS 465.255 to conduct any removal or remedial action or related actions necessary to protect the public health, safety, welfare and the environment. The director's action under this subsection may include but need not be limited to issuing an order specifying the removal or remedial action the person must take.

(5) The director may request the Attorney General to bring an action or proceeding for legal or equitable relief, in the circuit court of the county in which the facility is located or in Marion County, as may be necessary:

(a) To enforce an order issued under subsection (4) of this section; or

(b) To abate any imminent and substantial danger to the public health, safety, welfare or the environment related to a release.

(6) Notwithstanding any provision of ORS 183.310 to 183.550, and except as provided in subsection (7) of this section, any order issued by the director under subsection (4) of this section shall not be appealable to the commission or subject to judicial review.

(7)(a) Any person who receives and complies with the terms of an order issued under subsection (4) of this section may, within 60 days after completion of the required action, petition the director for reimbursement from the fund for the reasonable costs of such action.

(b) If the director refuses to grant all or part of the reimbursement, the petitioner may, within 30 days of receipt of the director's refusal, file an action against the director seeking reimbursement from the fund in the circuit court of the county in which the facility is located or in the Circuit Court of

Marion County. To obtain reimbursement, the petitioner must establish by a preponderance of the evidence that the petitioner is not liable under ORS 465.255 and that costs for which the petitioner seeks reimbursement are reasonable in light of the action required by the relevant order. A petitioner who is liable under ORS 465.255 may also recover reasonable remedial action costs to the extent that the petitioner can demonstrate that the director's decision in selecting the removal or remedial action ordered was arbitrary and capricious or otherwise not in accordance with law.

(8) If any person who is liable under ORS 465.255 fails without sufficient cause to conduct a removal or remedial action as required by an order of the director, the person shall be liable to the department for the state's remedial action costs and for punitive damages not to exceed three times the amount of the state's remedial action costs.

(9) Nothing in this section is intended to interfere with, limit or abridge the authority of the State Fire Marshal or any other state agency or local unit of government relating to an emergency that presents a combustion or explosion hazard. [Formerly 466.570]

465.265 "Person" defined for ORS 465.265 to 465.310. As used in ORS 465.265 to 465.310, "person" includes but need not be limited to a person liable under ORS 465.255. Except as provided in ORS 465.275 (2), "person" does not include the state or any state agency or the Federal Government or any agency of the Federal Government. [1989 c.833 §103]

465.270 Policy. (1) The Legislative Assembly finds that:

(a) The costs of cleanup may result in economic hardship or bankruptcy for individuals and businesses that are otherwise financially viable;

(b) These persons may be willing to clean up their sites and pay the associated costs; however, financial assistance from private lenders may not be available to pay for the cleanup; and

(c) It is in the interest of the public health, safety, welfare and the environment to establish a program of financial assistance for cleanups, to help individuals and businesses maintain financial viability, increasing the share of cleanup costs paid by responsible persons and ultimately decreasing amounts paid from state funds.

(2) Therefore, the Legislative Assembly declares that it is the intent of ORS 465.265 to 465.310:

(a) To assure that moneys for financial assistance are available on a continuing ba-

sis consistent with the length and terms provided by the financial assistance agreements; and

(b) To provide authority to the Department of Environmental Quality to develop and implement innovative approaches to financial assistance for cleanups conducted under ORS 465.200 to 465.455 or, at the discretion of the department, under other applicable authorities. [1989 c.833 §102]

465.275 Remedial action and financial assistance program; contracts for implementation. (1) The Department of Environmental Quality may conduct:

(a) A financial assistance program, including but not limited to loan guarantees, to assist persons in financing the cost of remedial action.

(b) Activities necessary to carry out the purpose of ORS 465.380, 468.220, 468.230 and 465.265 to 465.310, including but not limited to entering into contracts or agreements, making and guaranteeing loans, taking security and instituting appropriate actions to enforce agreements made under ORS 465.285.

(2) The department may enter into a contract or agreement for services to implement a financial assistance program with any person, including but not limited to a financial institution or a unit of local, state or federal government. The services may include but need not be limited to evaluating creditworthiness of applicants, preparing and marketing financial assistance packages and administering and servicing financial assistance agreements. [1989 c.833 §104]

465.280 Rules; insuring tax deductibility of interest on bonds. In accordance with the applicable provisions of ORS 183.310 to 183.550, the Environmental Quality Commission may adopt rules necessary to carry out the provisions of ORS 465.380, 468.220, 468.230 and 465.265 to 465.310 and to insure that interest on bonds issued under ORS 468.195 to be used for removal or remedial action of hazardous substances is not includable in gross income under the United States Internal Revenue Code. [1989 c.833 §105]

465.285 Requirements for financial assistance; contents of agreements. (1) The department may provide financial assistance only to persons who meet all of the following eligibility requirements:

(a) The department has determined that removal or remedial action proposed by the applicant is necessary to protect the public health, safety and welfare or the environment.

(b) The applicant demonstrates to the department's satisfaction that the applicant ei-

ther is unable to obtain financing for the removal or remedial action from other sources or that financing for the removal or remedial action is not available to the applicant at reasonable rates and terms.

(c) The applicant demonstrates to the department's satisfaction that there is a reasonable likelihood the applicant has the ability to repay.

(d) The applicant agrees to conduct the removal or remedial action according to an agreement with the department.

(e) Any other requirement the department considers necessary or appropriate.

(2) A financial assistance agreement shall include any provision the department considers necessary, but shall at least include the following provisions:

(a) Terms of the financial assistance; and

(b) A statement that moneys obligated by the department under the agreement are limited to moneys in the Hazardous Substance Remedial Action Fund expressly designated by the department for financial assistance purposes. [1989 c.833 §106]

465.290 Financial assistance agreement not General Fund obligation; cost estimates; security; recovery of costs; compromise of obligations. (1) The obligation of the department to provide financial assistance or to advance money under a financial assistance agreement made under ORS 465.285 shall not constitute an obligation against the General Fund or any other state fund except against the Hazardous Substance Remedial Action Fund to the extent moneys in the Hazardous Substance Remedial Action Fund are expressly designated by the department for such financial assistance purposes.

(2) The department may provide a remedial action cost estimate for use by the department, a lender or a guarantor in determining the amount of financial assistance, evaluating the creditworthiness of a borrower, providing loan guarantees or as the department considers appropriate.

(3) When financial assistance is provided to a local governmental unit, the agreement may be secured as the department requires for adequate security.

(4) The department may take any action under ORS 465.260, 465.330 or 465.335 or other applicable authority to recover costs incurred or moneys advanced under a financial assistance agreement. Costs incurred or money advanced under a financial assistance agreement entered into under ORS 465.285 shall be remedial action costs. At the department's discretion, the department may file a claim of lien for such remedial action

costs in accordance with the procedures set forth in ORS 465.335 (1), (2)(a) to (c), (3) and (4).

(5) The department may settle, compromise or release all or part of any obligation arising under a financial assistance agreement so long as the department's action is consistent with the purposes of ORS 465.265 to 465.310. [1989 c.833 §107]

465.295 Decision regarding financial assistance not subject to judicial review. Notwithstanding any provision of ORS 183.310 to 183.550, the department's decision to approve or deny financial assistance under ORS 465.265 to 465.310 or the department's determination of the amount or use of a remedial action cost estimate under ORS 465.290 shall not be subject to appeal to the Environmental Quality Commission or subject to judicial review. [1989 c.833 §108]

465.300 Records and financial assistance applications not subject to judicial review. Financial records and other information that are submitted to the department as part of an application for financial assistance under ORS 465.265 to 465.310 shall be exempt from disclosure under ORS 192.410 to 192.505, unless the public interest requires disclosure in a particular instance. [1989 c.833 §109]

465.305 Application fees. The Environmental Quality Commission may establish by rule reasonable fees for applicants for financial assistance sufficient to pay for the department's costs of carrying out the provisions of ORS 465.265 to 465.310. [1989 c.833 §110]

465.310 Accounting procedure for financial assistance moneys. For the purposes of ORS 465.265 to 465.310, the department may place moneys for the purpose of providing financial assistance in reserve status or subaccounts within the Hazardous Substance Remedial Action Fund. Moneys placed in reserve status or subaccounts under this section in connection with a financial assistance agreement shall not be subject to claims under ORS 465.260 or otherwise except as provided in the financial assistance agreement. [1989 c.833 §111]

465.315 Standards for degree of cleanup required; exemption. (1)(a) Any removal or remedial action performed under the provisions of ORS 465.200 to 465.455 and 465.900 shall attain a degree of cleanup of the hazardous substance and control of further release of the hazardous substance that assure protection of present and future public health, safety, welfare and of the environment.

(b) To the maximum extent practicable, the director shall select a remedial action

that is protective of human health and the environment, that is cost effective, and that uses permanent solutions and alternative treatment technologies or resource recovery technologies.

(2) Except as provided in subsection (3) of this section, the director may exempt the onsite portion of any removal or remedial action conducted under ORS 465.200 to 465.455 and 465.900 from any requirement of ORS 466.005 to 466.385 and ORS chapters 459 and 459A or ORS chapters 468, 468A and 468B.

(3) Notwithstanding any provision of subsection (2) of this section, any onsite treatment, storage or disposal of a hazardous substance shall comply with the standard established under subsection (1) of this section. [Formerly 466.573]

465.320 Notice of cleanup action; receipt and consideration of comment; notice of approval. Except as provided in ORS 465.260 (3), before approval of any remedial action to be undertaken by the department or any other person, or adoption of a certification decision under ORS 465.325, the department shall:

(1) Publish a notice and brief description of the proposed action in a local paper of general circulation and in the Secretary of State's Bulletin, and make copies of the proposal available to the public.

(2) Provide at least 30 days for submission of written comments regarding the proposed action, and, upon written request by 10 or more persons or by a group having 10 or more members, conduct a public meeting at or near the facility for the purpose of receiving verbal comment regarding the proposed action.

(3) Consider any written or verbal comments before approving the removal or remedial action.

(4) Upon final approval of the remedial action, publish notice, as provided under subsection (1) of this section, and make copies of the approved action available to the public. [Formerly 466.575]

465.325 Agreement to perform removal of remedial action; reimbursement; agreement as order and consent decree; effect on liability. (1) The director, 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 183.310 to 183.550, a decision of the director to use or not to use the procedures described in this section shall not be appealable to the commission or subject to judicial review.

(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 465.455 and 465.900 or under other relevant authority.

(b) Notwithstanding ORS 183.310 to 183.550, 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 paragraph (c) of subsection (5) 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

465.455 and 465.900 against any person who is not a party to the agreement.

(4)(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 decree. 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 decree.

(b) The entry of any consent decree 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 decree so that the entering of the decree and compliance with the decree 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 decree, 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 may allocate remedial action costs among liable parties using such equitable factors as the court determines are appropriate.

(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 465.455 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 decree under paragraph (a) of subsection (4) 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 465.455 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 decree.

(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 subparagraph (A) of paragraph (f) 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 decree 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 465.455 and 465.900.

(9)(a) Notwithstanding ORS 183.310 to 183.550, except for those covenants required under subparagraphs (A) and (B) of paragraph (b) of subsection (7) 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 decree 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 decree, 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 decree 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, con-

trary to the provisions of ORS 465.200 to 465.455 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. [Formerly 466.577]

465.330 State costs; payment; effect of failure to pay. (1) The department shall keep a record of the state's remedial action costs.

(2) Based on the record compiled by the department under subsection (1) of this section, the department shall require any person liable under ORS 465.255 or 465.260 to pay the amount of the state's remedial action costs and, if applicable, punitive damages.

(3) If the state's remedial action costs and punitive damages are not paid by the liable person to the department within 45 days after receipt of notice that such costs and damages are due and owing, the Attorney General, at the request of the director, shall bring an action in the name of the State of Oregon in a court of competent jurisdiction to recover the amount owed, plus reasonable legal expenses.

(4) All moneys received by the department under this section shall be deposited in the Hazardous Substance Remedial Action Fund established under ORS 465.380 if the moneys received pertain to a removal or remedial action taken at any facility. [Formerly 466.580]

465.335 Costs as lien; enforcement of lien. (1) All of the state's remedial action costs, penalties and punitive damages for which a person is liable to the state under ORS 465.255, 465.260 or 465.900 shall constitute a lien upon any real and personal property owned by the person.

(2) At the department's discretion, the department may file a claim of lien on real property or a claim of lien on personal property. The department shall file a claim of lien on real property to be charged with a lien under this section with the recording officer of each county in which the real property is located and shall file a claim of lien on personal property to be charged with a lien under this section with the Secretary of State. The lien shall attach and become enforceable on the day of such filing. The lien claim shall contain:

(a) A statement of the demand;

(b) The name of the person against whose property the lien attaches;

(c) A description of the property charged with the lien sufficient for identification; and

(d) A statement of the failure of the person to conduct removal or remedial action and pay penalties and damages as required.

(3) The lien created by this section may be foreclosed by a suit on real and personal property in the circuit court in the manner provided by law for the foreclosure of other liens.

(4) Nothing in this section shall affect the right of the state to bring an action against any person to recover all costs and damages for which the person is liable under ORS 465.255, 465.260 or 465.900. [Formerly 466.583]

465.340 Contractor liability. (1)(a) A person who is a contractor with respect to any release of a hazardous substance from a facility shall not be liable under ORS 465.200 to 465.455 and 465.900 or under any other state law to any person for injuries, costs, damages, expenses or other liability including but not limited to claims for indemnification or contribution and claims by third parties for death, personal injury, illness or loss of or damage to property or economic loss that result from such release.

(b) Paragraph (a) of this subsection shall not apply if the release is caused by conduct of the contractor that is negligent, reckless, willful or wanton misconduct or that constitutes intentional misconduct.

(c) Nothing in this subsection shall affect the liability of any other person under any warranty under federal, state or common law. Nothing in this subsection shall affect the liability of an employer who is a contractor to any employee of such employer under any provision of law, including any provision of any law relating to workers' compensation.

(d) A state employee or an employee of a political subdivision who provides services relating to a removal or remedial action while acting within the scope of the person's authority as a governmental employee shall have the same exemption from liability subject to the other provisions of this section, as is provided to the contractor under this section.

(2)(a) The exclusion provided by ORS 465.255 (2) (b)(C) shall not be available to any potentially responsible party with respect to any costs or damages caused by any act or omission of a contractor.

(b) Except as provided in paragraph (d) of subsection (1) of this section and para-

graph (a) of this subsection, nothing in this section shall affect the liability under ORS 465.200 to 465.455 and 465.900 or under any other federal or state law of any person, other than a contractor.

(c) Nothing in this section shall affect the plaintiff's burden of establishing liability under ORS 465.200 to 465.455 and 465.900.

(3)(a) The director may agree to hold harmless and indemnify any contractor meeting the requirements of this subsection against any liability, including the expenses of litigation or settlement, for negligence arising out of the contractor's performance in carrying out removal or remedial action activities under ORS 465.200 to 465.455 and 465.900, unless such liability was caused by conduct of the contractor which was grossly negligent, reckless, willful or wanton misconduct, or which constituted intentional misconduct.

(b) This subsection shall apply only to a removal or remedial action carried out under written agreement with:

(A) The director;

(B) Any state agency; or

(C) Any potentially responsible party carrying out any agreement under ORS 465.260 or 465.325.

(c) For purposes of ORS 465.200 to 465.455 and 465.900, amounts expended from the fund for indemnification of any contractor shall be considered remedial action costs.

(d) An indemnification agreement may be provided under this subsection only if the director determines that each of the following requirements are met:

(A) The liability covered by the indemnification agreement exceeds or is not covered by insurance available, at a fair and reasonable price, to the contractor at the time the contractor enters into the contract to provide removal or remedial action, and adequate insurance to cover such liability is not generally available at the time the contract is entered into.

(B) The contractor has made diligent efforts to obtain insurance coverage.

(C) In the case of a contract covering more than one facility, the contractor agrees to continue to make diligent efforts to obtain insurance coverage each time the contractor begins work under the contract at a new facility.

(4)(a) Indemnification under this subsection shall apply only to a contractor liability which results from a release of any hazardous substance if the release arises out of removal or remedial action activities.

(b) An indemnification agreement under this subsection shall include deductibles and shall place limits on the amount of indemnification to be made available.

(c)(A) In deciding whether to enter into an indemnification agreement with a contractor carrying out a written contract or agreement with any potentially responsible party, the director shall determine an amount which the potentially responsible party is able to indemnify the contractor. The director may enter into an indemnification agreement only if the director determines that the amount of indemnification available from the potentially responsible party is inadequate to cover any reasonable potential liability of the contractor arising out of the contractor's negligence in performing the contract or agreement with the party. In making the determinations required under this subparagraph related to the amount and the adequacy of the amount, the director shall take into account the total net assets and resources of the potentially responsible party with respect to the facility at the time the director makes the determinations.

(B) The director may pay a claim under an indemnification agreement referred to in subparagraph (A) of this paragraph for the amount determined under subparagraph (A) of this paragraph only if the contractor has exhausted all administrative, judicial and common law claims for indemnification against all potentially responsible parties participating in the cleanup of the facility with respect to the liability of the contractor arising out of the contractor's negligence in performing the contract or agreement with the parties. The indemnification agreement shall require the contractor to pay any deductible established under paragraph (b) of this subsection before the contractor may recover any amount from the potentially responsible party or under the indemnification agreement.

(d) No owner or operator of a facility regulated under the federal Solid Waste Disposal Act, as amended, P.L. 96-482 and P.L. 98-616, may be indemnified under this subsection with respect to such facility.

(e) For the purposes of ORS 465.255, any amounts expended under this section for indemnification of any person who is a contractor with respect to any release shall be considered a remedial action cost incurred by the state with respect to the release.

(5) The exemption provided under subsection (1) of this section and the authority of the director to offer indemnification under subsection (3) of this section shall not apply to any person liable under ORS 465.255 with respect to the release or threatened release

concerned if the person would be covered by the provisions even if the person had not carried out any actions referred to in subsection (6) of this section.

(6) As used in this section:

(a) "Contract" means any written contract or agreement to provide any removal or remedial action under ORS 465.200 to 465.455 and 465.900 at a facility, or any removal under ORS 465.200 to 465.455 and 465.900, with respect to any release of a hazardous substance from the facility or to provide any evaluation, planning, engineering, surveying and mapping, design, construction, equipment or any ancillary services thereto for such facility, that is entered into by a contractor as defined in subparagraph (A) of paragraph (b) of this subsection with:

(A) The director;

(B) Any state agency; or

(C) Any potentially responsible party carrying out an agreement under ORS 465.260 or 465.325.

(b) "Contractor" means:

(A) Any person who enters into a removal or remedial action contract with respect to any release of a hazardous substance from a facility and is carrying out such contract; and

(B) Any person who is retained or hired by a person described in subparagraph (A) of this paragraph to provide any services relating to a removal or remedial action.

(c) "Insurance" means liability insurance that is fair and reasonably priced, as determined by the director, and that is made available at the time the contractor enters into the removal or remedial action contract to provide removal or remedial action. [Formerly 466.585; 1991 c.692 §2]

465.375 Monthly fee of operators. (1) Every person who operates a facility for the purpose of disposing of hazardous waste or PCB that is subject to interim status or a permit issued under ORS 466.005 to 466.385 and 466.890 shall pay the hazardous waste management fee described in subsections (2) and (3) of this section by the 45th day after the last day of each month for all waste brought into the facility during that month for treatment by incinerator or for disposal by landfill at the facility. The operator of the facility shall provide to every person who disposes of waste at the facility a statement showing the amount of the hazardous waste management fee paid by the person to the facility.

(2) The hazardous waste management fee under subsection (1) of this section shall be \$20 a ton.

(3) In addition to the portion of the fee under subsection (2) of this section, the following additional amounts shall be included as part of the hazardous waste management fee:

(a) \$4 per ton for the period beginning July 1, 1991, and ending December 31, 1991.

(b) \$5.50 per ton for the period beginning January 1, 1992, and ending June 30, 1992.

(c) \$7 per ton for the period beginning July 1, 1992, and ending December 31, 1992.

(d) \$8.50 per ton for the period beginning January 1, 1993, and ending March 31, 1993.

(e) \$10 per ton after March 31, 1993.

(4) The additional amounts collected under subsection (3) of this section shall be deposited in the State Treasury to the credit of an account of the department. Such moneys are continuously appropriated to the department to be used to carry out the department's duties under ORS 466.005 to 466.385 related to the management of hazardous waste.

(5) Beginning January 1, 1993, at least 50 percent of the fees collected under subsection (3) of this section shall be used by the department to implement ORS 466.068. [Formerly 466.587; 1991 c.721 §1]

465.380 Hazardous Substance Remedial Action Fund and Orphan Site Account; sources; uses; restrictions. (1) The Hazardous Substance Remedial Action Fund is established separate and distinct from the General Fund in the State Treasury. Interest earned by the fund shall be credited to the fund.

(2) The following shall be deposited into the State Treasury and credited to the Hazardous Substance Remedial Action Fund:

(a) Fees received by the department under ORS 465.375 (2).

(b) Moneys recovered or otherwise received from responsible parties for remedial action costs. Moneys recovered from responsible parties for costs paid by the department from the Orphan Site Account established under subsection (6) of this section shall be credited to the Orphan Site Account.

(c) Moneys received under the schedule of fees established under ORS 453.402 (2)(c), under ORS 459.236 and under ORS 465.101 to 465.131 for the purpose of providing funds for the Orphan Site Account which shall be credited to the Orphan Site Account established under subsection (6) of this section.

(d) Any penalty, fine or punitive damages recovered under ORS 465.255, 465.260, 465.335 or 465.900.

(e) Fees received by the department under ORS 465.305.

(f) Moneys and interest, that are paid, recovered or otherwise received under financial assistance agreements.

(g) Moneys appropriated to the fund by the Legislative Assembly.

(h) Moneys from any grant made to the fund by a federal agency.

(3) The State Treasurer may invest and reinvest moneys in the Hazardous Substance Remedial Action Fund in the manner provided by law.

(4) The moneys in the Hazardous Substance Remedial Action Fund are appropriated continuously to the department to be used as provided in subsection (5) of this section.

(5) Moneys in the Hazardous Substance Remedial Action Fund may be used for the following purposes:

(a) Payment of the department's remedial action costs;

(b) Funding any action or activity authorized by ORS 465.200 to 465.455 and 465.900, including but not limited to providing financial assistance pursuant to an agreement entered into under ORS 465.285; and

(c) Providing the state cost share for a removal or remedial action, as required by section 104(c)(3) of the federal Comprehensive Environmental Response, Compensation and Liability Act, P.L. 96-510 and as amended by P.L. 99-499.

(6)(a) The Orphan Site Account is established in the Hazardous Substance Remedial Action Fund in the State Treasury. All moneys credited to the Orphan Site Account are continuously appropriated to the department for:

(A) Expenses of the department related to facilities or activities associated with the removal or remedial action where the department determines the responsible party is unknown, unwilling or unable to undertake all required removal or remedial action; and

(B) Grants and loans to local government units for facilities or activities associated with the removal or remedial action of a hazardous substance.

(b) The Orphan Site Account may not be used to pay the state's remedial action costs at facilities owned by the state.

(c) The Orphan Site Account may be used to pay claims for reimbursement filed and approved under ORS 465.260 (7).

(d) If bonds have been issued under ORS 468.195 to provide funds for removal or remedial action, the department shall first transfer from the Orphan Site Account to the Pollution Control Sinking Fund, solely from

the fees collected pursuant to ORS 453.402 (2)(c), under ORS 459.236 and from ORS 465.101 to 465.131 for such purposes, any amount necessary to provide for the payment of the principal and interest upon such bonds. Moneys from repayment of financial assistance or recovered from a responsible party shall not be used to provide for the payment of the principal and interest upon such bonds.

(7)(a) Of the funds in the Orphan Site Account derived from the fees collected pursuant to ORS 453.402 (2)(c), under ORS 459.236 and 465.101 to 465.131 for the purpose of providing funds for the Orphan Site Account, and the proceeds of any bond sale under ORS 468.195 supported by the fees collected pursuant to ORS 453.402 (2)(c), under ORS 459.236 and 465.101 to 465.131 for the purpose of providing funds for the Orphan Site Account, no more than 25 percent may be obligated in any biennium by the department to pay for removal or remedial action at facilities determined by the department to have an unwilling responsible party, unless the department first receives approval from the Legislative Assembly within the budget authorized by the Legislative Assembly or as that budget may be modified by the Emergency Board.

(b) Before the department obligates money from the Orphan Site Account derived from the fees collected pursuant to ORS 453.402 (2)(c), under ORS 459.236 and 465.101 to 465.131 for the purpose of providing funds for the Orphan Site Account, and the proceeds from any bond sale under ORS 468.195 supported by fees collected pursuant to ORS 453.402 (2)(c), under ORS 459.236 and 465.101 to 465.131 for the purpose of providing funds for the Orphan Site Account, for removal or remedial action at a facility determined by the department to have an unwilling responsible party, the department must first determine whether there is a need for immediate removal or remedial action at the facility to protect public health, safety, welfare or the environment. The department shall determine the need for immediate removal or remedial action in accordance with rules adopted by the Environmental Quality Commission. [Formerly 466.590; 1991 c.703 §47; 1991 c.721 §2]

Note: Section 169, chapter 833, Oregon Laws 1989 provides:

Sec. 169. If the Supreme Court declares that sections 139 to 148 of this Act impose a tax or excise levied on, with respect to or measured by the extractions, production, storage, use, sale, distribution or receipt of oil or natural gas or levied on the ownership of oil or natural gas, that is subject to the provisions of section 2, Article VIII, or section 3a, Article IX of the Oregon Constitution, ORS 466.590 (renumbered 465.380 in 1989), as amended by section 113 of this Act, is further amended to read:

465.380. (1) The Hazardous Substance Remedial Action Fund is established separate and distinct from the General Fund in the State Treasury. Interest earned by the fund shall be credited to the fund.

(2) The following shall be deposited into the State Treasury and credited to the Hazardous Substance Remedial Action Fund:

(a) Fees received by the department under ORS 465.375.

(b) Moneys recovered or otherwise received from responsible parties for remedial action costs. Moneys recovered from responsible parties for costs paid by the department from the Orphan Site Account established under subsection (6) of this section shall be credited to the Orphan Site Account.

(c) Moneys received under the schedule of fees established under ORS 453.402 (2)(c), under ORS 459.236 and under sections 162 to 168, chapter 833, Oregon Laws 1989, for the purpose of providing funds for the Orphan Site Account which shall be credited to the Orphan Site Account established under subsection (6) of this section.

(d) Any penalty, fine or punitive damages recovered under ORS 465.255, 465.260, 465.335 or 465.900.

(e) Fees received by the department under ORS 465.305.

(f) Moneys and interest, that are paid, recovered or otherwise received under financial assistance agreements.

(g) Moneys appropriated to the fund by the Legislative Assembly.

(h) Moneys from any grant made to the fund by a federal agency.

(3) The State Treasurer may invest and reinvest moneys in the Hazardous Substance Remedial Action Fund in the manner provided by law.

(4) The moneys in the Hazardous Substance Remedial Action Fund are appropriated continuously to the department to be used as provided in subsection (5) of this section.

(5) Moneys in the Hazardous Substance Remedial Action Fund may be used for the following purposes:

(a) Payment of the department's remedial action costs,

(b) Funding any action or activity authorized by ORS 465.200 to 465.455 and 465.900, including but not limited to providing financial assistance pursuant to an agreement entered into under ORS 465.285; and

(c) Providing the state cost share for a removal or remedial action, as required by section 104(c)(3) of the federal Comprehensive Environmental Response, Compensation and Liability Act, P.L. 96-510 and as amended by P.L. 99-499.

(6)(a) The Orphan Site Account is established in the Hazardous Substance Remedial Action Fund in the State Treasury. All moneys credited to the Orphan Site Account are continuously appropriated to the department for:

(A) Expenses of the department related to facilities or activities associated with the removal or remedial action where the department determines the responsible party is unknown, unwilling or unable to undertake all required removal or remedial action; and

(B) Grants and loans to local government units for facilities or activities associated with the removal or remedial action of a hazardous substance.

(b) The Orphan Site Account may not be used to pay the state's remedial action costs at facilities owned by the state.

(c) The Orphan Site Account may be used to pay claims for reimbursement filed and approved under ORS 465.260 (7).

(d) If bonds have been issued under ORS 468.195 to provide funds for removal or remedial action, the department shall first transfer from the Orphan Site Account to the Pollution Control Sinking Fund, solely from the fees collected pursuant to ORS 453.402 (2)(c), under ORS 459.236 and from sections 162 to 168, chapter 833, Oregon Laws 1989, for such purposes, any amount necessary to provide for the payment of the principal and interest upon such bonds. Moneys from repayment of financial assistance or recovered from a responsible party shall not be used to provide for the payment of the principal and interest upon such bonds.

(7)(a) Of the funds in the Orphan Site Account derived from the fees collected pursuant to ORS 453.402 (2)(c), under ORS 459.236 and sections 162 to 168, chapter 833, Oregon Laws 1989, for the purpose of providing funds for the Orphan Site Account, and the proceeds of any bond sale under ORS 468.195 supported by the fees collected pursuant to ORS 453.402 (2)(c), under ORS 459.236 and sections 162 to 168, chapter 833, Oregon Laws 1989, for the purpose of providing funds for the Orphan Site Account, no more than 25 percent may be obligated in any biennium by the department to pay for removal or remedial action at facilities determined by the department to have an unwilling responsible party, unless the department first receives approval from the Legislative Assembly or the Emergency Board.

(b) Before the department obligates money from the Orphan Site Account derived from the fees collected pursuant to ORS 453.402 (2)(c), under ORS 459.236 and sections 162 to 168, chapter 833, Oregon Laws 1989, for the purpose of providing funds for the Orphan Site Account and the proceeds from any bond sale under ORS 468.195 supported by fees collected pursuant to ORS 453.402 (2)(c), under ORS 459.236 and for the purpose of providing funds for the Orphan Site Account, for removal or remedial action at a facility determined by the department to have an unwilling responsible party, the department must first determine whether there is a need for immediate removal or remedial action at the facility to protect public health, safety, welfare or the environment. The department shall determine the need for immediate removal or remedial action in accordance with rules adopted by the Environmental Quality Commission.

Note: Sections 117 and 118, chapter 833, Oregon Laws 1989, provide:

Sec. 117. (1) A potentially responsible party shall be considered unwilling under ORS 466.590 [renumbered 465.380 in 1989] if:

(a) The department requests the potentially responsible party to enter into negotiations for an agreement to perform removal or remedial action, and the potentially responsible party refuses to enter into negotiations within 60 days after receipt of the department's written request; or

(b) After entering into negotiations for an agreement to perform removal or remedial action, the potentially responsible party and the department are unable to reach agreement and the potentially responsible party refuses to agree, within 60 days after receipt of a written request from the department, to nonbinding review under subsection (2) of this section, or to agree to an independent expert's decision under subsection (2) of this section.

(2) If the department and a potentially responsible party enter into negotiations for an agreement to perform removal or remedial action, and the parties to the negotiations are unable to reach agreement on one or more issues, any party to the negotiations may request that the issues in dispute be submitted to nonbinding review under this section. Within 15 days after the request, the parties may select a mutually acceptable independent expert, each party to bear the party's own costs. A request for nonbinding review shall be in writ-

ing and served upon each of the other parties to the negotiations and shall state with reasonable specificity the issues in dispute. If the parties are unable to agree upon an expert, the department shall petition the circuit court for the county in which the facility is located for the appointment of an independent expert. Each party to the negotiations may submit to the court a list of acceptable experts. Within 30 days after receipt of the petition, the circuit court shall appoint an independent expert from the names submitted by the parties. Within 15 days after the selection of the independent expert, each of the parties shall submit to the independent expert a written statement of the party's position and the factual, legal and equitable arguments in support of the party's position. Upon request of any party, or on the independent expert's own motion, the independent expert shall allow oral argument regarding the issues in dispute. Within 60 days after selection of the independent expert, the independent expert shall issue an advisory decision in settlement of the issues in dispute. No portion of the independent expert's decision shall be binding upon any party to the negotiations or the non-binding review until that portion of the decision is incorporated into a final agreement between the parties. The department or any potentially responsible party may refuse to agree with the independent expert's decision without prejudicing or affecting in any way any right, remedy or obligation of the department or the party or any other person. Neither the independent expert's decision nor the department's decision not to agree to the independent expert's decision shall be appealable to the Environmental Quality Commission or subject to judicial review.

(3) The Environmental Quality Commission shall establish by rule the subjects that may be resolved by nonbinding review under this section. [1989 c.833 §117]

Sec. 118. Section 117 of this Act is repealed July 1, 1993. [1989 c.833 §118]

465.385 Fee increase; deposit in Orphan Site Account. (1) Notwithstanding the totals established in ORS 453.400, 459.236 and 465.104, after July 1, 1991, the Environmental Quality Commission by rule may increase the total amount to be collected annually as a fee and deposited into the Orphan Site Account under ORS 453.400, 459.236 and 465.104. The commission shall approve an increase if the commission determines:

(a) Existing fees being deposited into the Orphan Site Account are not sufficient to pay debt service on bonds sold to pay for removal or remedial actions at sites where the department determines the responsible party is unknown, unwilling or unable to undertake all required removal or remedial action; or

(b) Revenues from the sale of bonds cannot be used to pay for activities related to removal or remedial action, and existing fees being deposited into the Orphan Site Account are not sufficient to pay for these activities.

(2) The increased amount approved by the commission under subsection (1) of this section:

(a) Shall be no greater than the amount needed to pay anticipated costs specifically identified by the Department of Environ-

mental Quality at sites where the department determines the responsible party is unknown, unwilling or unable to undertake all required removal or remedial action; and

(b) Shall be subject to prior approval by the Executive Department and a report to the Emergency Board prior to adopting the fees and be within the budget authorized by the Legislative Assembly as that budget may be modified by the Emergency Board during the interim period between sessions. [1989 c.833 §132; 1991 c.703 §13]

Note: Section 171, chapter 833, Oregon Laws 1989, provides:

Sec. 171. If the Supreme Court declares that sections 139 to 148 of this Act [465.101 to 465.131] impose a tax or excise levied on, with respect to or measured by the extractions, production, storage, use, sale, distribution or receipt of oil or natural gas or levied on the ownership of oil or natural gas, that is subject to the provisions of section 2, Article VIII, or section 3a, Article IX of the Oregon Constitution, section 132 of this Act [465.385] is amended to read:

465.385. (1) Notwithstanding the totals established in ORS 453.400, 459.236 and section 162, chapter 833, Oregon Laws 1989, after July 1, 1991, the Environmental Quality Commission by rule, may increase the total amount to be collected annually as a fee and deposited into the Orphan Site Account under ORS 453.400, 459.236 and section 162, chapter 833, Oregon Laws 1989. The commission shall approve an increase if the commission determines:

(a) Existing fees being deposited into the Orphan Site Account are not sufficient to pay debt service on bonds sold to pay for removal or remedial actions at sites where the department determines the responsible party is unknown, unwilling or unable to undertake all required removal or remedial action; or

(b) Revenues from the sale of bonds cannot be used to pay for activities related to removal or remedial action, and existing fees being deposited into the Orphan Site Account are not sufficient to pay for these activities.

(2) The increased amount approved by the commission under subsection (1) of this section:

(a) Shall be no greater than the amount needed to pay anticipated costs specifically identified by the Department of Environmental Quality at sites where the department determines the responsible party is unknown, unwilling or unable to undertake all required removal or remedial action; and

(b) Shall be specifically approved by the Joint Committee on Ways and Means during the legislative sessions or the Emergency Board during the interim period between sessions.

465.390 Effect of law on liability of person. Nothing in ORS 453.396 to 453.408, 453.414, 459.311, 459.236, 465.101 to 465.131 and 465.385, including the limitation on the amount a local government unit must contribute under ORS 459.311 and 459.236, shall be construed to affect or limit the liability of any person. [1989 c.833 §133]

Note: Section 172, chapter 833, Oregon Laws 1989, provides:

Sec. 172. If the Supreme Court declares that sections 139 to 148 of this Act [465.101 to 465.131] impose a tax or excise levied on, with respect to or measured by the extractions, production, storage, use, sale, dis-

tribution or receipt of oil or natural gas or levied on the ownership of oil or natural gas, that is subject to the provisions of section 2, Article VIII, or section 3a, Article IX of the Oregon Constitution, section 133 of this Act [465.390] is amended to read:

465.390. Nothing in ORS 453.396 to 453.408, 453.414, 459.311, 459.236, 465.385 and sections 162 to 168, chapter 833, Oregon Laws 1989, including the limitation on the amount a local government unit must contribute under ORS 459.311 and 459.236 shall be construed to affect or limit the liability of any person.

465.400 Rules; designation of hazardous substance. (1) In accordance with the applicable provisions of ORS 183.310 to 183.550, the commission may adopt rules necessary to carry out the provisions of ORS 465.200 to 465.455 and 465.900.

(2)(a) Within one year after July 16, 1987, the commission shall adopt rules establishing the levels, factors, criteria or other provisions for the degree of cleanup including the control of further releases of a hazardous substance, and the selection of remedial actions necessary to assure protection of the public health, safety, welfare and the environment.

(b) In developing rules pertaining to the degree of cleanup and the selection of remedial actions under paragraph (a) of this subsection, the commission may, as appropriate, take into account:

(A) The long-term uncertainties associated with land disposal;

(B) The goals, objectives and requirements of ORS 466.005 to 466.385;

(C) The persistence, toxicity, mobility and propensity to bioaccumulate of such hazardous substances and their constituents;

(D) The short-term and long-term potential for adverse health effects from human exposure to the hazardous substance;

(E) Long-term maintenance costs;

(F) The potential for future remedial action costs if the alternative remedial action in question were to fail;

(G) The potential threat to human health and the environment associated with excavation, transport and redispersion or containment; and

(H) The cost effectiveness.

(3)(a) By rule, the commission may designate as a hazardous substance any element, compound, mixture, solution or substance or any class of substances that, should a release occur, may present a substantial danger to the public health, safety, welfare or the environment.

(b) Before designating a substance or class of substances as a hazardous substance, the commission must find that the substance, because of its quantity, concentration, or physical, chemical or toxic characteristics,

may pose a present or future hazard to human health, safety, welfare or the environment should a release occur. [Formerly 466.553]

465.405 Rules; "confirmed release"; "preliminary assessment." (1) The Environmental Quality Commission shall adopt by rule:

(a) A definition of "confirmed release" and "preliminary assessment"; and

(b) Criteria to be applied by the director in determining whether to remove a facility from the list and inventory under ORS 465.230.

(2) In adopting rules under this section, the commission shall exclude from the list and inventory the following categories of releases to the extent the commission determines the release poses no significant threat to present or future public health, safety, welfare or the environment:

(a) De minimis releases;

(b) Releases that by their nature rapidly dissipate to undetectable or insignificant levels;

(c) Releases specifically authorized by and in compliance with a current and legally enforceable permit issued by the department or the United States Environmental Protection Agency; or

(d) Other releases that the commission finds pose no significant threat to present and future public health, safety, welfare or the environment.

(3) The director shall exclude from the list and inventory releases the director determines have been cleaned up to a level that:

(a) Is consistent with rules adopted by the commission under ORS 465.400; or

(b) Poses no significant threat to present or future public health, safety, welfare or the environment. [1989 c.485 §7]

465.410 Ranking of inventory according to risk; rules. In addition to the rules adopted under ORS 465.405, the Environmental Quality Commission shall adopt by rule a procedure for ranking facilities on the inventory based on the short-term and long-term risks they pose to present and future public health, safety, welfare or the environment. [1989 c.485 §8]

465.420 Remedial Action Advisory Committee. The director shall appoint a Remedial Action Advisory Committee in order to advise the department in the development of rules for the implementation of ORS 465.200 to 465.455 and 465.900. The committee shall be comprised of members representing at least the following interests:

(1) Citizens;

- (2) Local governments;
- (3) Environmental organizations; and
- (4) Industry. [Formerly 466.555]

465.425 Definition of security interest holder. As used in ORS 465.430 to 465.455, "security interest holder" means a person who, without participating in the management of a facility, holds indicia of ownership primarily to protect a security interest in a facility. [1991 c.680 §2]

465.430 Findings. (1)(a) The Legislative Assembly finds that existing federal and state law related to liability of a security interest holder for environmental contamination is unclear, and that such lack of clarity has created uncertainty on the part of security interest holders as to whether security interest holders are liable for environmental contamination caused by their borrowers or other third parties.

(b) The Legislative Assembly therefore declares that clarification regarding such potential liability in a manner consistent with federal statutes and regulations is desirable in order to provide certainty for security interest holders and to encourage responsible practices by security interest holders and borrowers to protect the public health and the environment.

(2)(a) The Legislative Assembly also finds that uncertainty exists in state law as to potential liability of certain fiduciaries for environmental contamination at property held in their fiduciary capacity.

(b) The Legislative Assembly therefore declares that it is in the public interest to provide an exemption from such potential liability in certain circumstances. [1991 c.680 §3]

465.435 Rules. (1) The Environmental Quality Commission may adopt rules necessary to clarify the scope and meaning of the exemption from liability under ORS 465.255 of a security interest holder. The rules shall:

(a) Identify activities that are consistent with holding and protecting a security interest in a facility and therefore exempt from liability under ORS 465.255;

(b) Identify the extent to which a security interest holder may undertake activities to oversee the affairs of a borrower for purposes of protecting a security interest in a facility and continue to be exempt from the liability imposed under ORS 465.255;

(c) Identify the activities a security interest holder may undertake in connection with foreclosure on a security interest in a facility and continue to be exempt from the liability imposed under ORS 465.255; and

(d) Allow a security interest holder to encourage and require responsible environmental management by borrowers.

(2) In adopting rules under subsection (1) of this section, the commission shall:

(a) Exclude the mere capacity or unexercised right to influence a facility's management of hazardous substance from activities that might void a security interest holder's exemption from liability; and

(b) Distinguish activities that are consistent with holding, protecting and foreclosing of a security interest, and that are therefore exempt from liability, from activities that constitute actual participation in the management of a facility that may be grounds for liability under ORS 465.255.

(3) In adopting rules under subsection (1) of this section, the commission shall consider and, to the extent consistent with subsections (1) and (2) of this section, adopt rules parallel in effect to any federal statute or regulation, adopted and effective on or after May 1, 1991, pertaining to the scope and meaning of the exemption from liability under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (P. L. 96-510 and 99-499), of a security interest holder. [1991 c.680 §4]

465.440 Exemption from liability for environmental contamination. In accordance with the purposes of ORS 465.425 to 465.455, the Environmental Quality Commission by rule shall define the instances in which a person acting under ORS chapter 709 and in a fiduciary capacity shall be exempt from liability for environmental contamination at property the fiduciary holds in a fiduciary capacity. In adopting the rules, the commission shall consider and, to the extent appropriate, provide exemptions from liability for the fiduciaries that are similar in purpose and effect to those exemptions provided for security interest holders under rules adopted under ORS 465.435. [1991 c.680 §5]

465.445 Advisory committee. The Director of the Department of Environmental Quality shall appoint an advisory committee to advise the department and the commission in the development of rules under ORS 465.435 and 465.440. [1991 c.680 §6]

465.450 Limitation on commission's discretion to adopt rules. Notwithstanding the discretion otherwise allowed under ORS 465.435, if federal law is enacted or regulations are adopted and become effective after May 1, 1991, the Environmental Quality Commission shall adopt rules under ORS 465.435. [1991 c.680 §7]

465.455 Construction of ORS 465.425 to 465.455. Nothing in ORS 465.425 to 465.455 or any rule adopted under ORS 465.435 or 465.440 shall be construed to impose liability on a security interest holder or fiduciary or to expand the liability of a security interest holder or fiduciary beyond that which might otherwise exist. [1991 c.680 §8]

CIVIL PENALTIES

465.900 Civil penalties for violation of removal or remedial actions. (1) In addition to any other penalty provided by law, any person who violates a provision of ORS 465.200 to 465.455, or any rule or order entered or adopted under ORS 465.200 to

465.455, shall incur a civil penalty not to exceed \$10,000 a day for each day that such violation occurs or that failure to comply continues.

(2) The civil penalty authorized by subsection (1) of this section shall be imposed in the manner provided by ORS 468.135, except that a penalty collected under this section shall be deposited in the Hazardous Substance Remedial Action Fund established under ORS 465.380, if the penalty pertains to a release at any facility. [Formerly 466.900; 1991 c.734 §34]

~~465.990~~ [Amended by 1953 c.540 §5; repealed by 1989 c.846 §15]