House Engrossed

State of Arizona
House of Representatives
Forty-sixth Legislature
Second Regular Session
2004

CHAPTER 146

HOUSE BILL 2484

AN ACT

AMENDING SECTIONS 49-287.01, 49-292, 49-292.01 AND 49-292.02, ARIZONA REVISED STATUTES; RELATING TO WATER QUALITY.

(TEXT OF BILL BEGINS ON NEXT PAGE)

Be it enacted by the Legislature of the State of Arizona:

Section 1. Section 49-287.01, Arizona Revised Statutes, is amended to read:

49-287.01. Investigation scoring and site registry; no further action

A. ~~Based on~~ WHEN information of a possible release or threatened release of a hazardous substance IS RECEIVED, the director may conduct a preliminary investigation to obtain additional information necessary to determine the potential risk to the public health or welfare or the environment in order to score the site or portion of the site and include it on the site registry. By written agreement, the director may allow any person to conduct any portion of the preliminary investigation.

B. After completing the preliminary investigation OR AT ANY TIME DURING THE PRELIMINARY INVESTIGATION, the director ~~shall either~~ MAY SUSPEND OR TERMINATE AN INVESTIGATION OR determine that no further investigation or action is necessary. ~~or~~ THE DIRECTOR MAY REOPEN THE PRELIMINARY INVESTIGATION ON A DETERMINATION THAT THE RELEASE OR THREATENED RELEASE CONTINUES TO PRESENT AN IMMINENT AND SUBSTANTIAL THREAT TO THE PUBLIC HEALTH OR WELFARE OR THE ENVIRONMENT. IF A PRELIMINARY INVESTIGATION IS COMPLETED, THE DIRECTOR shall prepare a draft of the site registry report required under subsection D of this section. IF THE DIRECTOR DRAFTS A SITE REGISTRY REPORT PURSUANT TO THIS SECTION, the report shall contain a description of the site or portion of the site, including its geographical boundaries, and a score in accordance with the site scoring method established in rules adopted by the director.

C. Before finalizing the report and the score, the director shall furnish a copy to the current owners and operators of the site or portion of the site, if known, and shall provide fifteen days for review and comment. The director shall then place a copy in the public file and shall publish the score in a newspaper of general circulation within the county in which the site is located. The director shall provide thirty days for comment and shall consider any comments before issuing the final report and score.

D. The director shall maintain a registry of scored sites or portions of sites that includes a brief description of the site or portion of the site, its score and a brief description of the status of investigative and remedial actions. The scoring of a site or portion of the site, its relative score or its placement on the registry does not necessarily represent a determination that the release of a hazardous substance from the site poses a threat to human health or welfare or the environment. Prior to approving any remedy that may result in water quality exceeding water quality standards after completion of the remedy, the director shall place a notice in the registry established pursuant to this subsection that the remedy may result in water quality exceeding water quality standards.

1 E. New scores shall be added to the registry as soon as
2 practicable. The registry shall be published annually by the secretary of
3 state in the Arizona administrative register. The department shall also
4 publish notice of the availability of the registry in a newspaper of general
5 statewide circulation.
6 F. Any person may request that the director make a determination that
7 a site or portion of a site requires no further action or should be
8 rescored. The request shall include information, including the specific
9 hazardous substances released at or from the site or portion of the site, and
10 a geographical description of the site or portion of the site sufficient for
11 a determination by the director regarding the requested action. The director
12 may request additional information from the requesting party within ninety
13 days after receiving the party's request, and the director shall provide the
14 reasons for requesting the additional information. The person making the
15 request shall submit the additional information within sixty days after
16 receiving the director's request for additional information. Within thirty
17 days of receipt of the additional information, the director shall notify the
18 requesting party if the additional information is complete. The submission
19 of incomplete information may result in a denial of the no further action
20 request. The parties may agree in writing to additional time for
21 responses. In addition to requesting information, the director or the
22 director's authorized representative may conduct an investigation of the site
23 or portion of the site and shall be given access to the portion of the site
24 under the control of the requestor. The director or the director's
25 authorized representative shall be allowed access to the site as a
26 requirement for making a no further action request. The director shall deny
27 a request for a no further action determination if access to the site is not
28 provided. A request pursuant to this subsection may only be made once per
29 calendar year. After determining that the information submitted is
30 sufficient for action on the request, the director shall publish notice of
31 the request for rescoring or determination of no further action on a site or
32 portion of the site and shall provide thirty days for public comment. Based
33 on the information and comments received, and within sixty days after the
34 close of the public comment period, unless extended by the director for good
35 cause, the director shall determine whether the score should be changed or
36 a determination of no further action should be made and shall give notice of
37 that decision to the person who made the request and any persons who provided
38 comment. The director shall make a final decision on a no further action or
39 rescoring request within three hundred days after receiving the request
40 unless the time is extended in writing by the parties. The director's
41 decision shall contain the factual, technical and legal grounds for the
42 decision. Any changes to a score or determinations of no further action
43 shall be published in the registry.
44 G. A determination of no further action shall be made if the director
45 finds that the site or portion of the site does not present a significant

1 risk to the public health or welfare or the environment. The director's
2 determination on a no further action request shall be based on the rules
3 adopted by the department pursuant to section 49-282.06. A determination of
4 no further action shall state whether it is for soils or the groundwater, or
5 both. A determination of no further action regarding a site or a portion of
6 the site means that the department shall not proceed with or require further
7 remedial action under this article for the specific hazardous substances
8 within the geographical area covered by the determination, provided that the
9 determination of no further action does not preclude the director from
10 obtaining access to the area covered by the determination under this article
11 or any other law. The department may reopen an investigation and take or
12 require remedial action for any of the following reasons:
13 1. On discovery of new information that, based on the rules adopted
14 by the department pursuant to section 49-282.06, would result in the
15 potential denial of a no further action request.
16 2. That information submitted to the director pursuant to subsection
17 F of this section was inaccurate, misleading or incomplete.
18 3. The reopening of an investigation or the taking of a remedial
19 action is necessary to respond to a release or the threat of a release of a
20 hazardous substance that may present an imminent and substantial danger to
21 the public health or welfare or the environment.
22 H. The director's decision under subsection F of this section may be
23 appealed pursuant to section 49-298, subsection B by the person who made the
24 request or any party who will be adversely affected by the action and who
25 submitted comments. A person who has previously filed an administrative
26 appeal under this subsection or any provision of law in effect on or after
27 April 29, 1997 concerning previous investigations by the director that
28 resulted in the director's decision being upheld bears the burden of proving
29 by clear and convincing evidence that the director's action that is being
30 appealed was unsupported by the evidence in any further administrative
31 appeals involving the same site or portion of the site and shall pay the
32 director's cost of reviewing the request and the director's attorney fees and
33 costs incurred in the appeal if the director's decision is upheld.
34 I. If the director determines that remediation of a site or a portion
35 of a site will be addressed pursuant to a provision of this title other than
36 this article, the director may suspend any further investigation or action
37 under this article. If the site or portion of a site is listed on the
38 registry, the suspension shall be reflected on the registry.
39 J. IF A SITE HAS BEEN PLACED ON THE REGISTRY AND THE DIRECTOR
40 DETERMINES THAT REMEDIATION OF A SITE OR A PORTION OF A SITE WILL BE
41 ADDRESSED PURSUANT TO A PROVISION OF THIS TITLE OTHER THAN THIS ARTICLE, THE
42 DIRECTOR MAY REMOVE THE SITE FROM THE REGISTRY.
43 K. IF THE DIRECTOR DETERMINES THAT A SITE ON THE REGISTRY DOES NOT
44 REQUIRE FURTHER REMEDIAL ACTION UNDER THIS ARTICLE, THE DIRECTOR MAY REMOVE
45 THE SITE FROM THE REGISTRY.

L. THE DIRECTOR SHALL MAINTAIN A LIST OF SITES REMOVED FROM THE REGISTRY. THIS LIST SHALL BE AVAILABLE TO THE PUBLIC.

M. A SITE THAT HAS BEEN REMOVED FROM THE REGISTRY MAY BE REOPENED AND REMEDIAL ACTION TAKEN OR REQUIRED FOR ANY OF THE FOLLOWING REASONS:

1. ON DISCOVERY OF NEW INFORMATION THAT, BASED ON THE RULES ADOPTED BY THE DEPARTMENT PURSUANT TO SECTION 49-282.06, WOULD RESULT IN THE POTENTIAL DENIAL OF A NO FURTHER ACTION REQUEST.

2. INFORMATION SUBMITTED TO THE DIRECTOR PURSUANT TO THIS SECTION IS INACCURATE, MISLEADING OR INCOMPLETE.

3. THE REOPENING OF AN INVESTIGATION OR THE TAKING OF A REMEDIAL ACTION IS NECESSARY TO RESPOND TO A RELEASE OR THE THREATENED RELEASE OF A HAZARDOUS SUBSTANCE THAT MAY PRESENT AN IMMINENT AND SUBSTANTIAL DANGER TO THE PUBLIC HEALTH OR WELFARE OR THE ENVIRONMENT.

Sec. 2. Section 49-292, Arizona Revised Statutes, is amended to read:

49-292. Settlement; authority and effect

A. The director shall consider any offer of settlement by a person who is potentially liable for remedial action costs under this article and CERCLA. The director shall consider the factors in section 49-282.06 and section 49-285, subsections E and F in determining whether to settle any person's liability. In determining the settlement amount, the director shall take into account any past costs incurred for remedial actions at the site by the person. Costs of remedial actions that are incurred by an eligible party as defined in section 49-281, that are or have been approved by the director pursuant to section 49-285, subsection B and that are conducted under the oversight of the director shall be used as a credit against that eligible party's liability. Nothing in this section requires the director to reimburse from the fund the orphan share of costs of approved remedial actions incurred by an eligible party before June 30, 1997. The director may enter into a settlement agreement or consent decree with a potentially responsible party or with a prospective purchaser pursuant to section 49-285.01 without making an express finding in the SETTLEMENT agreement OR CONSENT DECREE regarding an imminent and substantial endangerment to the public health or welfare, the waters of this state or the environment.

B. In any settlement agreement or consent decree entered into pursuant to subsection A of this section, the director may provide any potentially responsible party with a covenant not to sue concerning any liability to the state under this article or under CERCLA including future liability that may result from a release or threat of a release of a hazardous substance addressed by a remedial action whether that action is on site or off site. A covenant not to sue takes effect when the settlement agreement or consent decree becomes final. A covenant not to sue with respect to future liability shall include an exception that allows the director to sue the responsible party concerning future liability from the release or threatened release that is the subject of the covenant if the liability arises out of conditions that are unknown to the director at the time the director enters into the

1 covenant. A covenant not to sue does not preclude the director from suing
2 the potentially responsible party for failure to comply with the terms of the
3 settlement agreement or consent decree in which the covenant was included.
4 C. A potentially responsible party who has resolved its liability to
5 the state that arises from this article or from CERCLA in a judicially
6 approved consent decree is not liable for claims for contribution or cost
7 recovery regarding matters addressed in the consent decree. Any such
8 judicially approved consent decree does not discharge other potentially
9 responsible parties unless its terms so provide, but such a settlement does
10 reduce the potential liability of other potentially responsible parties by
11 the amount of the settlement. If a potentially responsible party receives
12 an allocation pursuant to section 49-287.06 or 49-287.07 that is less than
13 the amount the potentially responsible party agreed to pay the state pursuant
14 to a settlement agreement or consent decree, the excess amount paid by the
15 potentially responsible party shall be credited to the fund. Any payment by
16 a potentially responsible party in excess of the allocation shall not reduce
17 the proportionate liability of any other potentially responsible party.
18 D. If the state has obtained less than complete relief from a
19 potentially responsible party who has resolved its liability to the state,
20 the state may bring an action against any other potentially responsible party
21 pursuant to section 49-287.07 who has not so resolved its liability.
22 E. A potentially responsible party who has resolved its liability to
23 the state may seek contribution for matters addressed in the settlement from
24 any person who is not a party to a settlement entered into under this
25 section.
26 F. In any action under this section, the rights of any potentially
27 responsible party who has resolved its liability to the state in a judicially
28 approved consent decree or a settlement agreement are subordinate to the
29 rights of the state for matters addressed in the settlement agreement or
30 consent decree, unless otherwise provided in the settlement agreement or
31 consent decree. If a potentially responsible party who has resolved its
32 liability to the state in a settlement agreement or a consent decree provides
33 written notice to the department that it has initiated a lawsuit to recover
34 some or all of its remedial action costs from other potentially responsible
35 parties, the department within thirty days shall provide written notice to
36 the party filing the lawsuit of the department's intent to assert any
37 superior claims the department may have against the other potentially
38 responsible parties. If practicable, the written notice shall include the
39 anticipated dollar amount of the department's claims against each party.
40 G. The court shall not approve a consent decree entered into pursuant
41 to this section for a period of thirty days after the date that notice of the
42 terms of the consent decree is provided to the public to allow for public
43 comment. Any comment shall be filed with the court AND A COPY SHALL BE SENT
44 BY MAIL TO THE DIRECTOR AND TO THE SETTLING PARTY. After the expiration of

1 the thirty day public comment period, the director through the attorney
2 general may petition the court for entry of the consent order.
3 H. A person's decision to enter into a settlement agreement pursuant
4 to this article shall not be construed as an admission in any other judicial
5 proceeding as to the fact or extent of that person's liability with respect
6 to the releases or threatened releases that are covered by the settlement.
7 Sec. 3. Section 49-292.01, Arizona Revised Statutes, is amended to
8 read:
9 49-292.01. Qualified business settlements; definition
10 A. The director shall enter into a settlement under this article and
11 section 107 of CERCLA with a person that qualifies pursuant to this section
12 without regard to the extent of its liability except for a person whose
13 liability under this article arose from criminal acts.
14 B. An applicant seeking settlement under this section shall have
15 identifiable gross income as defined in section 61 of the internal revenue
16 code greater than one dollar in each of the two years prior to the
17 application and in each of the two years preceding the year that an
18 investigation of the applicant's share was initiated by either the department
19 or the United States environmental protection agency. The applicant shall
20 submit a letter to the director requesting a qualified business settlement
21 on a form provided by the director. The request letter shall include the
22 applicant's tax returns for the time periods provided in subsection J of this
23 section. The director may require additional information to verify the
24 applicant's eligibility for a settlement under this section. Financial
25 information submitted by the applicant pursuant to this section and marked
26 "confidential" shall be kept confidential by the director.
27 C. If the director verifies that the applicant meets the definition
28 of a qualified business, the director shall enter into a settlement within
29 ninety days after receipt of the request letter and other information
30 required under this section. The settlement shall meet the requirements of
31 section 49-292, but without regard to the extent of its liability, and shall
32 require that:
33 1. The qualified business pay ten per cent of its average annual gross
34 income for the two years preceding the year that a request was submitted by
35 the applicant including the income from money or assets transferred by the
36 applicant within the two years preceding the application. The director shall
37 allow the settlement amount to be paid over time, up to a maximum of ten
38 years, subject to payment of interest at the rate of six per cent per
39 year. If the settlement amount is paid in full within the first five years,
40 the payments shall not be subject to the payment of interest. An applicant
41 may file a petition with the director to modify the payment schedule.
42 2. The qualified business cooperate with the director in providing
43 reasonable access and information necessary for the director to carry out the
44 requirements of this article.

D. Notice of the settlement shall be published as provided in section 49-292. The notice shall provide a general description of the contents of the agreement. Any interested person may comment on whether the applicant is a qualified business in writing to the director. The director may withdraw from a settlement after considering the comments.

E. If the director determines that the business does not qualify for the qualified business settlement pursuant to this section, the director shall notify the applicant in writing within ninety days of the receipt of all information required under subsection B of this section stating the reasons for denial. If the director does not notify the applicant within ninety days, the application is deemed denied. A denial of a settlement under this section may be appealed to the office of administrative hearings pursuant to section 49-298. In any appeal made pursuant to section 49-298, the documents submitted by the applicant under subsection B of this section are not confidential.

F. In reviewing a proposed settlement, the United States district court or superior court shall give deference to the department's determination that the settlement is in the public interest and meets applicable legal standards for court approval. Any person who challenges a proposed settlement bears the burden of proving that the proposed settlement does not meet applicable legal standards for court approval. If a settlement is reached with an applicant, the confidential information supplied to the director under this section may be submitted under seal to the court for in camera review.

G. In determining the applicant's gross income for purposes of determining eligibility pursuant to subsection J of this section, the income of all concerns in which the applicant maintains ownership, control or management may be considered by the director. Any transfer of money or assets by the applicant within the two years preceding the application shall be presumed void for purposes of determining eligibility under this section. This presumption may be rebutted by the applicant if the applicant submits a written presumption rebuttal statement that includes the reasons why the transfer of money or assets within this time period should not be presumed void for purposes of determining eligibility. The department shall consider this statement and provide a written record of decision to the applicant that either affirms or denies the applicant's reasons provided in the presumption rebuttal statement.

H. The director may adopt rules to implement this section. A settlement under this section applies only to the applicant and does not release or affect in any way the liability of any other person.

I. If a settlement is made pursuant to this section, the director shall not file a lien pursuant to section 49-295 for an amount greater than the settlement.

J. For THE purposes of this section, "qualified business" means an applicant ~~whose~~ WHO MEETS BOTH OF THE FOLLOWING CONDITIONS:

1 1. THE APPLICANT'S gross income as defined by section 61 of the
2 internal revenue service code is less than two million dollars per year and
3 greater than one dollar per year.
4 2. ~~An~~ THE applicant ~~under this section is required to comply~~ COMPLIES
5 with the definition for the average of the two years preceding the year that
6 an investigation of the applicant's share was initiated by either the
7 department or the United States environmental protection agency, and for each
8 of the two years preceding the year that a request was submitted by the
9 applicant pursuant to subsection B of this section.
10 If a person does not qualify as a qualified business under this section, the
11 person is eligible to settle its liability under this article and section 107
12 of CERCLA for less than its proportionate share under section 49-285 on a
13 demonstration of financial hardship under section 49-292.02.
14 Sec. 4. Section 49-292.02, Arizona Revised Statutes, is amended to
15 read:
16 49-292.02. Financial hardship settlement
17 A. The director shall consider any offer by a person who ~~is~~ MAY BE
18 potentially liable for remedial action costs under this article or section
19 107(a) of CERCLA without regard to the extent of that person's liability. In
20 order to obtain a settlement under this section, a person must demonstrate
21 a financial hardship with respect to payment of a potential liability under
22 this article or under CERCLA. A person whose liability under this article
23 arose or could arise from criminal acts is not eligible to request a
24 settlement under this section. In considering a person's ability to pay, the
25 director shall consider all of the following:
26 1. The financial resources of the person, including available
27 insurance.
28 2. The person's ability to continue in business after payment of a
29 settlement amount.
30 3. Whether liability for the settlement amount would require the
31 person to seek protection under federal bankruptcy law.
32 B. An applicant seeking settlement under this section shall submit a
33 letter to the director requesting a financial hardship settlement on a form
34 provided by the director. The request letter shall include the applicant's
35 tax returns and all schedules, financial statements, balance statements and
36 other information concerning the person's gross income and net worth for the
37 five years preceding the date of the application on a form provided by the
38 director. Within ninety days of the application, the director may require
39 additional information to verify the applicant's eligibility for settlement
40 under this section. The applicant may provide any additional information the
41 applicant believes to be relevant. Financial information submitted by the
42 applicant pursuant to this section and marked "confidential" shall be kept
43 confidential by the director. If the director or the attorney general
44 disputes a claim of confidentiality, written notice shall be provided to the
45 person claiming the confidentiality that the claim is disputed. If the

1 person claiming the confidentiality does not file an action for declaratory
2 relief in superior court within thirty days after receiving this notice, the
3 information shall be made available to the public. An applicant who submits
4 false or intentionally misleading information is not eligible for a
5 settlement pursuant to this section.
6 C. If the director verifies that the applicant has demonstrated a
7 financial hardship with respect to payment of a potential liability under
8 this article or CERCLA, the director shall enter into a settlement within
9 ninety days after receipt of the request letter and other information
10 required under this section. The settlement shall meet the requirements of
11 section 49-292, but without regard to the extent of the person's liability,
12 and shall be made pursuant to subsection A of this section. The director
13 shall allow the settlement amount to be paid over time, up to a maximum of
14 ten years, subject to payment of interest at the rate of six per cent per
15 year. If the settlement amount is paid in full within the first five years,
16 the payments shall not be subject to the payment of interest. An applicant
17 may file a petition with the director to modify the payment schedule.
18 D. The applicant shall cooperate with the director in providing
19 reasonable access and information necessary for the director to carry out the
20 requirements of this article.
21 E. Notice of the settlement shall be published as provided in section
22 49-292. The notice shall provide a general description of the contents of
23 the agreement. Any interested person may comment on whether the applicant
24 qualifies for a settlement pursuant to this section in writing to the
25 director. The director may withdraw from a settlement after considering the
26 comments.
27 F. If the director determines that the applicant does not qualify for
28 a settlement pursuant to this section, the director shall notify the
29 applicant in writing within ninety days of the receipt of all information
30 required under subsection B of this section stating the reasons. If the
31 director does not notify the applicant within ninety days, the application
32 is deemed denied. A denial of settlement under this section may be appealed
33 to the office of administrative hearings pursuant to section 49-298. In any
34 appeal made pursuant to section 49-298, the documents submitted by the
35 applicant under subsection B of this section are not confidential. The
36 appeal shall determine only the amount the applicant is able to pay.
37 G. In reviewing a proposed settlement, the federal district court or
38 superior court shall give deference to the director's determination that the
39 settlement is in the public interest and meets applicable legal standards for
40 court approval. Any person challenging a proposed settlement shall bear the
41 burden of proving that the proposed settlement does not meet the applicable
42 legal standards for court approval. If a settlement is reached with an
43 applicant, the confidential information supplied to the director under this
44 section may be submitted under seal to the court for in camera review.

H. In determining the applicant's financial resources, the financial resources of all concerns in which the applicant maintains ownership, control or management may be considered by the director. A settlement under this section applies only to the applicant and does not release, affect or increase the liability of any other person. The director may adopt rules to implement this section.

I. If a settlement is made pursuant to this section, the director shall not file a lien pursuant to section 49-295 for an amount greater than the settlement.

J. Within thirty days after the director has proposed an allocation share under section 49-287.05 or a share has been allocated under section 49-287.06 to a person who has previously settled with the department pursuant to this section, the director may request that the previous settlement be reopened to determine whether the person who has settled can pay an amount that is greater than the previous settlement amount but not more than the allocated share. A decision by the director to initiate a review of the previous settlement shall be published in a newspaper of general circulation twice within a one week period. The notice shall provide a general description of the director's reasons for initiating a review of the previous settlement. Any interested person may comment in writing to the director on whether the settlement should be reopened and whether the person who previously settled with the department pursuant to this section should be required to pay a different amount from the previous settlement amount. Public comments must be received by the director within thirty days of the last date of publication. The person who settled shall submit updated versions of the documents prescribed by subsection B of this section to provide financial information since the previous settlement. Within ninety days after receipt of the information prescribed by this subsection, the director shall notify the person whether the original settlement amount will be revised. If the director determines that the original settlement amount will be revised, the director shall provide the person with the revised settlement amount and the basis for that revision. Any monies paid pursuant to the original settlement shall be credited toward any revised settlement amount. If the director does not notify the person who settled within ninety days, the original settlement amount is not subject to revision. Within thirty days after the director's decision to revise the original settlement amount, the director must petition the court having jurisdiction over the settlement. The court shall determine whether the settlement amount shall be reopened and what the settlement amount shall be, but it shall not be more than the allocated share.

APPROVED BY THE GOVERNOR APRIL 23, 2004.

FILED IN THE OFFICE OF THE SECRETARY OF STATE APRIL 23, 2004.

Passed the House March 15, 2004, by the following vote: 57 Ayes, 0 Nays, 3 Not Voting

Jake Flake
Speaker of the House

Norman L. Moore
Chief Clerk of the House

Passed the Senate April 15, 2004, by the following vote: 29 Ayes, 0 Nays, 1 Not Voting

Ken Bennett
President of the Senate

Charmin Bishop
Secretary of the Senate

EXECUTIVE DEPARTMENT OF ARIZONA
OFFICE OF GOVERNOR

This Bill was received by the Governor this 19th day of April, 2004, at 2:30 o'clock P. M.

Jennifer Ybarra
Secretary to the Governor

Approved this 23 day of April, 2004, at 2:00 o'clock P. M.

J T Napolitano
Governor of Arizona

EXECUTIVE DEPARTMENT OF ARIZONA
OFFICE OF SECRETARY OF STATE

This Bill was received by the Secretary of State this 23 day of April, 2004, at 3:05 o'clock P. M.

Janice K. Brewer
Secretary of State

H.B. 2484