

SENATE BILL NO. 96

INTRODUCED BY J. KEANE

BY REQUEST OF THE DEPARTMENT OF ENVIRONMENTAL QUALITY

A BILL FOR AN ACT ENTITLED: "AN ACT EXPANDING THE USES OF THE ORPHAN SHARE ACCOUNT TO PAY CERTAIN REMEDIAL ACTION COSTS INCURRED BY THE DEPARTMENT OF ENVIRONMENTAL QUALITY; REQUIRING THE DEPARTMENT TO REPORT USE OF THE ACCOUNT TO THE ENVIRONMENTAL QUALITY COUNCIL; AMENDING SECTIONS 75-10-711 AND 75-10-743, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 75-10-711, MCA, is amended to read:

"75-10-711. Remedial action -- orders -- penalties -- judicial proceedings. (1) The department may take remedial action whenever:

(a) there has been a release or there is a substantial threat of a release into the environment that may present an imminent and substantial endangerment to the public health, safety, or welfare, ~~or safety~~ or to the environment; and

(b) none of the persons who are liable or potentially liable under 75-10-715(1) and who have been given the opportunity by letter to properly and expeditiously perform the appropriate remedial action will properly and expeditiously perform the appropriate remedial action. Any person liable under 75-10-715(1) shall take immediate action to contain, remove, and abate the release.

(2) Whenever the department is authorized to act pursuant to subsection (1) or has reason to believe that a release has occurred or is about to occur, the department may undertake remedial action in the form of any investigation, monitoring, survey, testing, or other information gathering as authorized by 75-10-707 that is necessary and appropriate to identify the existence, nature, origin, and extent of the release or the threat of release and the extent and imminence of the danger to the public health, safety, or welfare or to the environment.

(3) Except as provided in 75-10-712, the department is authorized to draw ~~upon~~ on the fund to take action under subsection (1) if it has made diligent good faith efforts to determine the identity of the person or persons liable for the release or threatened release and:

1 (a) is unable to determine the identity of the liable person or persons in a manner consistent with the
2 need to take timely remedial action; or

3 (b) a person or persons determined by the department to be liable or potentially liable under
4 75-10-715(1) have been informed in writing of the department's determination and have been requested by the
5 department to take appropriate remedial action but are unable or unwilling to take action in a timely manner; and

6 (c) the written notice informs the person that if subsequently found liable pursuant to 75-10-715(1), the
7 person may be required to reimburse the fund for the state's remedial action costs and may be subject to
8 penalties pursuant to this part.

9 (4) Whenever the department is authorized to act pursuant to subsection (1), it may issue to any person
10 liable under 75-10-715(1) cease and desist, remedial, or other orders as may be necessary or appropriate to
11 protect the public health, safety, or welfare or the environment.

12 (5) (a) A person who violates or fails to comply with or refuses to comply with an order issued under
13 75-10-707 or this section may, in an action brought to enforce the order, be assessed a civil penalty of not more
14 than \$10,000 for each day in which a violation occurs or a failure or refusal to comply continues. In determining
15 the amount of any penalty assessed, the court may take into account:

16 (i) the nature, circumstances, extent, and gravity of the noncompliance;

17 (ii) with respect to the person liable under 75-10-715(1):

18 (A) the person's ability to pay;

19 (B) any prior history of violations;

20 (C) the degree of culpability; and

21 (D) the economic benefit or savings, if any, resulting from the noncompliance; and

22 (iii) any other matters as justice may require.

23 (b) Civil penalties collected under subsection (5)(a) must be deposited into the environmental quality
24 protection fund established in 75-10-704.

25 (6) A court has jurisdiction to review an order issued under 75-10-707 or this section only in the following
26 actions:

27 (a) an action under 75-10-715 to recover remedial action costs or penalties or for contribution;

28 (b) an action to enforce an order issued under 75-10-707 or this section;

29 (c) an action to recover a civil penalty for violation of or failure or refusal to comply with an order issued
30 under 75-10-707 or this section; or

1 (d) an action by a person to whom an order has been issued to determine the validity of the order, only
2 if the person has been in compliance and continues in compliance with the order pending a decision of the court.

3 (7) In considering objections raised in a judicial action regarding orders issued under this part, the court
4 shall uphold and enforce an order issued by the department unless the objecting party can demonstrate, on the
5 administrative record, that the department's decision to issue the order was arbitrary and capricious or otherwise
6 not in accordance with law.

7 (8) Instead of issuing a notification or an order under this section, the department may bring an action
8 for legal or equitable relief in the district court of the county where the release or threatened release occurred or
9 in the first judicial district as may be necessary to abate any imminent and substantial endangerment to the public
10 health, safety, or welfare or to the environment resulting from the release or threatened release.

11 (9) A person who is not subject to an administrative or judicial order may not conduct any remedial action
12 at any facility that is subject to an administrative or judicial order issued pursuant to this part without the written
13 permission of the department. If a state or federal administrative or judicial order is issued relative to a facility,
14 the order and any remedial activity conducted pursuant to the order may be admissible in a civil action pertaining
15 to the facility or property adjacent to or allegedly impacted by the facility provided that the reviewing court in its
16 discretion determines the order to be relevant and more probative than prejudicial. Admission of this evidence
17 does not make the department a necessary party to the action. Remedial action performed in accordance with
18 this part is intended to provide for the protection of the environmental life support system from degradation and
19 to prevent unreasonable depletion and degradation of natural resources.

20 (10) The department may take remedial action pursuant to subsection (1) at a site that is regulated under
21 the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Public Law
22 96-510, if the department determines that remedial action is necessary to carry out the purposes of this part.

23 (11) The department may take remedial action as provided for in 75-10-743(12)."

24

25 **Section 2.** Section 75-10-743, MCA, is amended to read:

26 **"75-10-743. Orphan share state special revenue account -- reimbursement of claims -- payment**
27 **of department costs.** (1) There is an orphan share account in the state special revenue fund established in
28 17-2-102 that is to be administered by the department. Money in the account is available to the department by
29 appropriation and, except as provided in subsections (9), (10), and (11), must be used to reimburse remedial
30 action costs claimed pursuant to 75-10-742 through 75-10-751, ~~and~~ to pay costs incurred by the department in

1 defending the orphan share, and to pay remedial action costs incurred by the department pursuant to subsection
2 (12).

3 (2) There must be deposited in the orphan share account:

4 (a) all penalties assessed pursuant to 75-10-750(12);

5 (b) funds received from the distribution of oil and natural gas production taxes pursuant to 15-36-331;

6 (c) unencumbered funds remaining in the abandoned mines state special revenue account;

7 (d) interest income on the account;

8 (e) funds received from settlements pursuant to 75-10-719(7); and

9 (f) funds received from reimbursement of the department's orphan share defense costs pursuant to
10 subsection (6).

11 (3) If the orphan share ~~fund~~ account contains sufficient money, valid claims must be reimbursed
12 subsequently in the order in which they were received by the department. If the orphan share ~~fund~~ account does
13 not contain sufficient money to reimburse claims for completed remedial actions, a reimbursement may not be
14 made and the orphan share ~~fund~~ account, the department, and the state are not liable for making any
15 reimbursement for the costs. The department and the state are not liable for any penalties if the orphan share
16 ~~fund~~ account does not contain sufficient money to reimburse claims, and interest may not accrue on outstanding
17 claims.

18 (4) Except as provided in subsections (6) and (7), claims may not be submitted and remedial action costs
19 may not be reimbursed from the orphan share ~~fund~~ account until all remedial actions, except for operation and
20 maintenance, are completed at a facility.

21 (5) Except as provided in subsection (6), reimbursement from the orphan share ~~fund~~ account must be
22 limited to actual documented remedial action costs incurred after the date of a petition provided for in 75-10-745.
23 Reimbursement may not be made for attorney fees, legal costs, or operation and maintenance costs.

24 (6) (a) The department's costs incurred in defending the orphan share must be paid by the persons
25 participating in the allocation under 75-10-742 through 75-10-751 in proportion to their allocated shares. The
26 orphan share ~~fund~~ account is responsible for a portion of the department's costs incurred in defending the orphan
27 share in proportion to the orphan share's allocated share, as follows:

28 (i) If sufficient funds are available in the orphan share ~~fund~~ account, the department's costs incurred in
29 defending the orphan share must be paid from the orphan share ~~fund~~ account in proportion to the share of liability
30 allocated to the orphan share.

1 (ii) If sufficient funds are not available in the orphan share ~~fund~~ account, persons participating in the
2 allocation under 75-10-742 through 75-10-751 shall pay all the orphan share's allocated share of the department's
3 costs incurred in defending the orphan share in proportion to each person's allocated share of liability.

4 (b) A person who pays the orphan share's proportional share of costs has a claim against the orphan
5 share ~~fund~~ account and must be reimbursed as provided in subsection (3).

6 (c) A state agency that is liable for remedial action costs incurred has a claim against the orphan share
7 ~~fund~~ account and must be reimbursed as provided in subsection (3). The agency may submit a claim before or
8 after remedial action is complete. Reimbursement may not be made for attorney fees, legal costs, or operation
9 and maintenance costs. The agency may be reimbursed only after:

10 (i) its liability has been determined pursuant to 75-10-742 through 75-10-751 or by a court of competent
11 jurisdiction;

12 (ii) it has received a notice letter pursuant to 75-10-711; and

13 (iii) the department has approved the costs.

14 (7) (a) If the lead liable person under 75-10-746 presents evidence to the department that the person
15 cannot complete the remedial actions without partial reimbursement and that a delay in reimbursement will cause
16 undue financial hardship on the person, the department may allow the submission of claims and may reimburse
17 the claims prior to the completion of all remedial actions. A person is not eligible for early reimbursement unless
18 the person is in substantial compliance with all department-approved remedial action plans.

19 (b) The department may reimburse claims from a lead liable person upon completion and department
20 approval of a report evaluating the nature and extent of contamination and a report formulating and evaluating
21 final remediation alternatives. This early reimbursement is limited to those eligible costs incurred by the lead liable
22 person for the preparation of the reports.

23 (8) A person participating in the allocation process who received funds under the mixed funding pilot
24 program provided for in sections 14 through 20, Chapter 584, Laws of 1995, may not claim or receive
25 reimbursement from the orphan share ~~fund~~ account for the amount of funds received under the mixed funding
26 pilot program that are later attributed to the orphan share under the allocation process.

27 (9) (a) For the biennium beginning July 1, 2005, up to \$1.25 million may be used by the department to
28 pay the costs incurred by the department in contracting for evaluating the extent of contamination and formulating
29 final remediation alternatives for releases at the Kalispell pole and timber, reliance refinery company, and Yale
30 oil corporation facility complex. If the department spends less than \$1.25 million for those purposes, the remaining

1 funds must be spent for remediation of the facility complex. The department may not seek recovery of the \$1.25
2 million from potentially liable persons.

3 (b) The money spent pursuant to subsection (9)(a) must be credited against the amount owed by the
4 state agency in a judgment or settlement agreement for payment of the remedial action costs at the facility for
5 which the money was spent.

6 (10) (a) The department shall transfer from the orphan share account to the long-term or perpetual water
7 treatment permanent trust fund provided for in 82-4-367 \$1.2 million in each fiscal year until the board of
8 investments makes the certification pursuant to subsection (10)(b) of this section.

9 (b) (i) The board of investments shall monitor the long-term or perpetual water treatment permanent trust
10 fund provided for in 82-4-367 to determine when the amount of money in the long-term or perpetual water
11 treatment permanent trust fund will be sufficient, with future earnings, to provide a fund balance of \$19.3 million
12 on January 1, 2018.

13 (ii) When the board of investments makes the determination pursuant to subsection (10)(b)(i), the board
14 of investments shall notify the department and certify to the department the amount of money, if any, that must
15 be transferred during the fiscal year in which the board of investments makes its determination pursuant to
16 subsection (10)(b)(i) in order to provide a fund balance of \$19.3 million on January 1, 2018.

17 (iii) In the fiscal year that the board of investments makes its determination and notifies the department,
18 the department shall transfer only the amount certified by the board of investments, if any, and may not make
19 additional transfers during subsequent fiscal years.

20 (11) The orphan share account is subject to legislative fund transfers.

21 (12) Except as provided in subsection (13), the department may use the orphan share account to:

22 (a) take remedial action at a facility where there has been a release or there is a substantial threat of a
23 release into the environment that may present an imminent and substantial endangerment to the public health,
24 safety, or welfare or to the environment;

25 (b) fund the administration of data collection and the initial assessment of a facility to determine whether
26 that facility may be closed or delisted; or

27 (c) monitor the performance of remedial actions.

28 (13) During a biennium, the department may not use for data collection, initial assessments, or monitoring
29 pursuant to subsections (12)(b) and (12)(c) more than 25% of the funds available from the orphan share account
30 at the beginning of the biennium.

1 (14) On or before July 1 of each year, the department shall report to the environmental quality council
2 the amount of funds from the orphan share account used pursuant to subsection (12), the type of expenditures
3 made, and the identity and location of facilities addressed."

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5 NEW SECTION. **Section 3. Effective date.** [This act] is effective on passage and approval.

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