

**Provisions for
Consent Orders, Covenants Not to Sue, and Settlements**

Section 324.XXXXX Covenant not to sue generally; future enforcement action.

- (1) The state may provide a person with a covenant not to sue concerning any liability to the state under this part, including liability resulting from a release or threatened release addressed by response activities if each of the following is met:
 - (a) The covenant not to sue is in the public interest.
 - (b) The covenant not to sue would expedite response activity consistent with rules promulgated under this part.
 - (c) There is full compliance with a consent order under this part for response to the release or threatened release concerned, or other liability covered under the consent order.
 - (d) The response activity has been approved by the department.
 - (e) In the judgment of the department, the hazardous substance or its by-products or degradation products does not and will not present any current or reasonably foreseeable significant risk to the public health, safety, or welfare, or the environment in the future.

- (2) In assessing the appropriateness of a covenant not to sue granted under subsection (1) and any condition to be included in a covenant not to sue under subsection (1), the state shall consider whether the covenant or condition is in the public interest on the basis of factors, including, but not limited to, the following:
 - (a) The effectiveness and reliability of the response activity, in light of the other alternative response activities 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 consent order.
 - (d) The extent to which the response activity provides a durable 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 response activity is demonstrated to be effective.
 - (f) Whether the fund or other sources of funding would be available for any additional response activities that might eventually be necessary at the facility.
 - (g) Whether response activity will be carried out, in whole or in significant part, by persons who are liable under this part.

- (3) A covenant not to sue under this section is subject to the satisfactory performance by a person of his or her obligations under the agreement.

- (4) A covenant not to sue concerning liability to the state at the facility shall not take effect until the department issues a written determination that the response activity has been conducted in accordance with the requirements of a consent order that provides for the covenant.

- (5) A covenant not to sue a person concerning liability to the state shall include the following exceptions:
 - (a) Allows the state to sue that 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 that are unknown at the time the department enters the consent order and to the extent the previously unknown conditions and related hazardous substances present a significant risk to the public health, safety, welfare, or the environment.

- (b) The person's acts or omissions cause a new release or exacerbate the release that was the subject of the consent order.
 - (c) The covenant not to sue shall not alter a person's liability under this part if he or she is responsible for an activity causing a release or threat of release that was not covered by the covenant.
- (6) After an assessment of the relevant provisions of (a) through (g) and only in extraordinary circumstances, the state may determine not to include the exception in subsection (5)(a) if the terms, conditions or requirements of the consent order containing the covenant not to sue are sufficient to provide all reasonable assurances that the public health, safety, and welfare, and the environment will be protected from any future releases at or from the facility. The covenant not to sue for future releases shall only be granted if the person receiving the covenant not to sue is not currently and will not in the future be an owner or operator of the facility.
- (a) The factors referred to subsection (2).
 - (b) The volume, toxicity, mobility of the hazardous substances.
 - (c) The strength of evidence.
 - (d) The person's ability to pay.
 - (e) The litigative risks.
 - (f) The public interest considerations.
 - (g) The precedential value.
- (7) The state may include any provisions providing for future enforcement action under sections xxxxxx or xxxxx (*Administrative Actions or Civil Actions*) that, in the discretion of the department, are necessary and appropriate to assure protection of the public health, safety, welfare, and the environment.
- (8) A covenant not to sue under this section may be set aside if information obtained after the consent order is entered indicates that the conditions set forth in this section for granting the covenant were not met at the time the covenant was granted.

Section 324.XXXXXX Redevelopment or reuse of facility; covenant not to sue; conditions; demonstration; limitation; reservation of right to assert claims; irrevocable right of entry; monitoring compliance.

- (1) The state may enter a consent order to provide a person who proposes to redevelop or reuse a facility, including a vacant manufacturing or abandoned industrial site, with a covenant not to sue concerning liability under this part, if all of the following conditions are met:
- (a) The covenant not to sue is in the public interest.
 - (b) The covenant not to sue will yield new resources to facilitate implementation of response activity.
 - (c) The covenant not to sue would, when appropriate, expedite response activity consistent with the rules promulgated under this part.
 - (d) Based upon available information, the department determines that the redevelopment or reuse of the facility is not likely to do any of the following:

- (i) Exacerbate or contribute to the existing release or threat of release.
 - (ii) Interfere with the implementation of response activities.
 - (iii) Pose health risks related to the release or threat of release to persons who may be present at or in the vicinity of the facility.
 - (e) The proposal to redevelop or reuse the facility has economic development benefit.
- (2) A person who requests a covenant not to sue under subsection (1) shall demonstrate to the satisfaction of the state all of the following:
- (a) That the person is financially capable of redeveloping and reusing the facility in accordance with the covenant not to sue.
 - (b) That the person is not affiliated in any way with any person who is liable under this part for a release or threat of release at the facility.
- (3) A covenant not to sue issued under this section shall not alter the person's liability if they are responsible for an activity causing a release or threat of release. The consent order shall expressly reserve the right of the state to assert all claims against the person that proposes to redevelop or reuse the facility, including, but not limited to, those claims arising from any of the following:
- (a) The release or threat of release of any hazardous substance resulting from the redevelopment or reuse of the facility to the extent such claims otherwise arise under this part.
 - (b) Interference with or failure to cooperate with the department, its contractors, or other persons conducting response activities approved by the department.
 - (c) Failure to comply with inquiry, release reporting, and due care provisions in sections xxxxx, xxxxx and xxxxx.
- (4) A covenant not to sue issued under this section shall provide for an irrevocable right of entry to the department, its contractors, or other persons performing response activity related to the facility addressed by the covenant not to sue for the purposes listed in sections xxxxx(1)(a) through (h) [*Access to Property*] and for monitoring compliance with the covenant not to sue.
- (5) A covenant not to sue under this section may be set aside if information obtained after the consent order entered indicates that the conditions set forth in this section for granting the covenant were not met at the time the covenant was granted.

Section 324.XXXXX Consent order

- (1) The department may enter into a consent order with a person who is liable under this part or any group of persons who are liable under this part if the department determines that:
- (a) The persons will properly implement the response activity, including, but not limited to, the compliance with:
 - (i) The schedule and performance requirements of the response activity.
 - (ii) The payment of response activity costs including costs to oversee and enforce the consent order.
 - (iii) The resolution of natural resource damages.
 - (b) The persons will properly resolve administrative and civil fines and penalties,
 - (c) That the consent order is in the public interest, will expedite effective response activity, and will minimize litigation.

- (d) That there is means to distinguish the liability covered under the consent order from liability of the settling party that arises later from conditions that were unknown at the time the settlement was entered.
- (2) A consent order that includes settlement of natural resource assessment costs and damages or contribution shall consider the claims of other persons that may be barred by the settlement.
- (3) A decision by the department not to enter into a consent order under this part is not subject to judicial review.
- (4) Whenever practical and in the public interest, as determined by the department, the department shall as promptly as possible reach a final settlement with a person in an administrative action under this part if this settlement involves only a minor portion of the response costs at the facility concerned and, in the judgment of the department, both of the following are minimal in comparison to other hazardous substances at the facility:
 - (a) The amount of the hazardous substances contributed by that person to the facility.
 - (b) The toxic or other hazardous effects of the substances contributed by that person to the facility.
- (5) A consent order under this section may be set aside if information obtained after the settlement indicates that the person settling does not meet the conditions set forth in this section.