

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT (EXCERPT)
Act 451 of 1994

324.21323g Covenant not to sue; conditions; effect; factors; covenant not to sue concerning future liability; exception; provisions providing for future enforcement action.

Sec. 21323g.

(1) The state may provide a person with a covenant not to sue concerning any liability to the state under this part, including future liability, resulting from a release or threatened release addressed by corrective action, whether that action is on or off the property on which an underground storage tank system is located, 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 corrective action 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.
 - (d) The corrective action has been approved by the department.
- (2) A covenant not to sue concerning future liability to the state shall not take effect until the department certifies that corrective action has been completed in accordance with the requirements of this part at the property that is the subject of the covenant.

(3) In assessing the appropriateness of a covenant not to sue and any condition to be included in a covenant not to sue, the state shall consider whether the covenant or condition is in the public interest on the basis of factors such as the following:

- (a) The effectiveness and reliability of the corrective action, in light of the other alternative corrective actions considered for the property concerned.
- (b) The nature of the risks remaining at the property.
- (c) The extent to which performance standards are included in the consent order.
- (d) The extent to which the corrective action provides a complete remedy for the property, including a reduction in the hazardous nature of the substances at the property.
- (e) The extent to which the technology used in the corrective action is demonstrated to be effective.
- (f) Whether corrective action will be carried out, in whole or in significant part, by persons that are liable under section 21323a.

(4) A covenant not to sue under this section is subject to the satisfactory performance by a person of that person's obligations under the agreement concerned.

(5) A covenant not to sue a person concerning future liability to the state shall include an exception to the covenant that 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 certifies under subsection (2) that corrective action has been completed at the property concerned.

(6) In extraordinary circumstances, the state may determine, after assessment of relevant factors such as those referred to in subsection (3) and volume, toxicity, mobility, strength of evidence, ability to pay, litigative risks, public interest considerations, precedential value, and inequities and aggravating factors, not to include the exception in subsection (5) if other terms, conditions, or requirements of the agreement containing the covenant not to sue are sufficient to provide all reasonable assurances that the public health and the environment will be protected from any future releases at or from the property.

(7) The state may include any provisions providing for future enforcement action that in the discretion of the department are necessary and appropriate to assure protection of the public health, safety, and welfare and the environment.

History: Add. 2012, Act 108, Imd. Eff. May 1, 2012

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