

STATE OF OKLAHOMA

2nd Session of the 49th Legislature (2004)

CONFERENCE COMMITTEE
SUBSTITUTE
FOR ENGROSSED
HOUSE BILL NO. 2198

By: Leist of the House

and

Shurden of the Senate

CONFERENCE COMMITTEE SUBSTITUTE

An Act relating to environment and natural resources; amending 51 O.S. 2001, Section 155, as amended by Section 3, Chapter 304, O.S.L. 2003 (51 O.S. Supp. 2003, Section 155), which relates to The Governmental Tort Claims Act; adding liability exemption for authorized environmental cleanup; amending 27A O.S. 2001, Section 1-2-101, as amended by Section 1, Chapter 381, O.S.L. 2003 (27A O.S. Supp. 2003, Section 1-2-101), which relates to duties of Secretary of the Environment; expanding distribution of certain reports; amending 27A O.S. 2001, Section 2-4-201, as amended by Section 3, Chapter 118, O.S.L. 2003 (27A O.S. Supp. 2003, Section 2-4-201), which relates to state environmental laboratories; authorizing Department of Environmental Quality to operate laboratories for certain purposes; modifying purposes; amending 27A O.S. 2001, Section 2-5-112, as amended by Section 1 of Enrolled House Bill No. 1876 of the 2nd Session of the 49th Oklahoma Legislature, which relates to air emissions; modifying deadline for notification of change in ownership; amending 27A O.S. 2001, Section 2-15-108, as amended by Section 7 of Enrolled Senate Bill No. 1167 of the 2nd Session of the 49th Oklahoma Legislature, which relates to the Oklahoma Brownfields Voluntary Redevelopment Act; providing liability exemption for certain persons and legal entities; repealing 27A O.S. 2001, Section 2-15-108, as amended by Section 7 of Enrolled House Bill No. 2615 of the 2nd Session of the 49th Oklahoma Legislature, which relates to certain administrative penalties; and declaring an emergency.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY 51 O.S. 2001, Section 155, as amended by Section 3, Chapter 304, O.S.L. 2003 (51 O.S. Supp. 2003, Section 155), is amended to read as follows:

Section 155. The state or a political subdivision shall not be liable if a loss or claim results from:

1. Legislative functions;
2. Judicial, quasi-judicial, or prosecutorial functions, other than claims for wrongful criminal felony conviction resulting in imprisonment provided for in Section 154 of this title;
3. Execution or enforcement of the lawful orders of any court;
4. Adoption or enforcement of or failure to adopt or enforce a law, whether valid or invalid, including, but not limited to, any statute, charter provision, ordinance, resolution, rule, regulation or written policy;
5. Performance of or the failure to exercise or perform any act or service which is in the discretion of the state or political subdivision or its employees;
6. Civil disobedience, riot, insurrection or rebellion or the failure to provide, or the method of providing, police, law enforcement or fire protection;
7. Any claim based on the theory of attractive nuisance;
8. Snow or ice conditions or temporary or natural conditions on any public way or other public place due to weather conditions, unless the condition is affirmatively caused by the negligent act of the state or a political subdivision;
9. Entry upon any property where that entry is expressly or implied authorized by law;
10. Natural conditions of property of the state or political subdivision;
11. Assessment or collection of taxes or special assessments, license or registration fees, or other fees or charges imposed by law;
12. Licensing powers or functions including, but not limited to, the issuance, denial, suspension or revocation of or failure or

refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authority;

13. Inspection powers or functions, including failure to make an inspection, review or approval, or making an inadequate or negligent inspection, review or approval of any property, real or personal, to determine whether the property complies with or violates any law or contains a hazard to health or safety, or fails to conform to a recognized standard;

14. Any loss to any person covered by any workers' compensation act or any employer's liability act;

15. Absence, condition, location or malfunction of any traffic or road sign, signal or warning device unless the absence, condition, location or malfunction is not corrected by the state or political subdivision responsible within a reasonable time after actual or constructive notice or the removal or destruction of such signs, signals or warning devices by third parties, action of weather elements or as a result of traffic collision except on failure of the state or political subdivision to correct the same within a reasonable time after actual or constructive notice. Nothing herein shall give rise to liability arising from the failure of the state or any political subdivision to initially place any of the above signs, signals or warning devices. The signs, signals and warning devices referred to herein are those used in connection with hazards normally connected with the use of roadways or public ways and do not apply to the duty to warn of special defects such as excavations or roadway obstructions;

16. Any claim which is limited or barred by any other law;

17. Misrepresentation, if unintentional;

18. An act or omission of an independent contractor or consultant or his employees, agents, subcontractors or suppliers or of a person other than an employee of the state or political subdivision at the time the act or omission occurred;

19. Theft by a third person of money in the custody of an employee unless the loss was sustained because of the negligence or wrongful act or omission of the employee;

20. Participation in or practice for any interscholastic or other athletic contest sponsored or conducted by or on the property of the state or a political subdivision;

21. Participation in any activity approved by a local board of education and held within a building or on the grounds of the school district served by that local board of education before or after normal school hours or on weekends;

22. Any court-ordered or Department of Corrections approved work release program; provided, however, this provision shall not apply to claims from individuals not in the custody of the Department of Corrections based on accidents involving motor vehicles owned or operated by the Department of Corrections;

23. The activities of the National Guard, the militia or other military organization administered by the Military Department of the state when on duty pursuant to the lawful orders of competent authority:

- a. in an effort to quell a riot,
- b. in response to a natural disaster or military attack,
or
- c. if participating in a military mentor program ordered
by the court;

24. Provision, equipping, operation or maintenance of any prison, jail or correctional facility, or injuries resulting from the parole or escape of a prisoner or injuries by a prisoner to any other prisoner; provided, however, this provision shall not apply to claims from individuals not in the custody of the Department of Corrections based on accidents involving motor vehicles owned or operated by the Department of Corrections;

25. Provision, equipping, operation or maintenance of any juvenile detention facility, or injuries resulting from the escape of a juvenile detainee, or injuries by a juvenile detainee to any other juvenile detainee;

26. Any claim or action based on the theory of manufacturer's products liability or breach of warranty, either expressed or implied;

27. Any claim or action based on the theory of indemnification or subrogation;

28. Any claim based upon an act or omission of an employee in the placement of children;

29. Acts or omissions done in conformance with then current recognized standards;

30. Maintenance of the state highway system or any portion thereof unless the claimant presents evidence which establishes either that the state failed to warn of the unsafe condition or that the loss would not have occurred but for a negligent affirmative act of the state;

31. Any confirmation of the existence or nonexistence of any effective financing statement on file in the office of the Secretary of State made in good faith by an employee of the office of the Secretary of State as required by the provisions of Section 1-9-320.6 of Title 12A of the Oklahoma Statutes; ~~or~~

32. Any court-ordered community sentence; or

33. Remedial action and any subsequent related maintenance of property pursuant to and in compliance with an authorized environmental remediation program, order, or requirement of a federal or state environmental agency.

SECTION 2. AMENDATORY 27A O.S. 2001, Section 1-2-101, as amended by Section 1, Chapter 381, O.S.L. 2003 (27A O.S. Supp. 2003, Section 1-2-101), is amended to read as follows:

Section 1-2-101. A. The Secretary of Environment or successor cabinet position having authority over the Department of Environmental Quality shall have the following jurisdictional areas of environmental responsibility:

1. Powers and duties for environmental areas designated to such position by the Governor;

2. The recipient of federal funds disbursed pursuant to the Federal Water Pollution Control Act, provided the Oklahoma Water Resources Board is authorized to be the recipient of federal funds to administer the State Revolving Fund Program. The federal funds received by the Secretary of Environment shall be disbursed to each state environmental agency and state agency with limited environmental responsibilities based upon its statutory duties and responsibilities relating to environmental areas as determined by the Secretary of Environment in consultation with the Secretary of Agriculture. Such funds shall be distributed to the appropriate state environmental agency or state agency with limited environmental responsibilities within thirty (30) days of its receipt by the Secretary or as otherwise provided by grant or contract terms without any assessment of administrative fees or costs. Disbursement of other federal environmental funds shall not be subject to this section. The Secretary of Environment shall make an annual written report no later than November 1 to the President Pro Tempore of the Senate ~~and~~, the Speaker of the House of Representatives, and the Chair of each environmental committee of both the House of Representatives and Senate detailing the disbursement of federal funds;

3. Coordinate pollution control and complaint management activities of the state carried on by all state agencies to avoid duplication of effort including but not limited to the development of a common data base for water quality information with a uniform format for use by all state agencies and the public; and

4. Act on behalf of the public as trustee for natural resources under the federal Oil Pollution Act of 1990, the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, the federal Water Pollution Control Act and any other federal laws providing that a trustee for the natural resources is to be designated. The Secretary is authorized to make claims against federal funds, receive federal payments, establish and manage a revolving fund in relation to duties as the natural resources trustee consistent with the federal enabling acts and to coordinate, monitor and gather information from and enter into agreements with the appropriate state environmental agencies or state agencies with limited environmental responsibilities in carrying out the duties and functions of the trustee for the natural resources of this state.

B. 1. The Secretary of the Environment or successor cabinet position having authority over the Department of Environmental Quality shall develop and implement, by January 1, 2000, public participation procedures for the development and/or modification of:

- a. the federally required list of impaired waters (303(d) report),
- b. the federally required water quality assessment (305(b) report),
- c. the federally required nonpoint source state assessment (319 report), and
- d. the continuing planning process document.

2. The procedures shall provide for the documents to be submitted for formal public review with a published notice consistent with the Administrative Procedures Act, providing for a thirty-day comment period and the preparation of a responsiveness summary by the applicable state environmental agency.

3. Information from current research shall be considered when made available to the agency.

SECTION 3. AMENDATORY 27A O.S. 2001, Section 2-4-201, as amended by Section 3, Chapter 118, O.S.L. 2003 (27A O.S. Supp. 2003, Section 2-4-201), is amended to read as follows:

Section 2-4-201. A. The Department of Environmental Quality is authorized to acquire, operate and maintain laboratories to analyze samples to:

1. ~~From pollution studies to:~~

- a. ~~obtain~~ Obtain factual data to support any order, permit, function or program of the Department,;
- b. ~~provide accurate information on wastewater flows and discharges or the chemical, physical or biological characteristics of wastewater,~~
- c. ~~check the operations of treatment or disposal systems or works to determine whether they meet plans and specifications approved by the Department, and~~
- d. provide

2. Provide laboratory service for individuals, cities, towns, counties, tribes, state institutions and other state and federal agencies;

~~2. From studies and investigations of any waste or pollutant entering treatment systems or waters of the state or any media in which the presence of a contaminant or pollutant is suspected; and~~

3. ~~To provide~~ Provide such services and perform such other analyses as is necessary to implement and enforce the programs and functions under the jurisdiction of the Department pursuant to this Code.

B. The Board of Environmental Quality shall promulgate rules for laboratory services under this Code. The Board shall follow the procedures required by the Administrative Procedures Act for promulgation of such rules.

C. 1. The Board, pursuant to the Administrative Procedures Act, shall promulgate as a rule a fee schedule based on actual cost

of analyses and the costs of the provision of laboratory services. The schedule shall include fees for specific analytes and procedures.

2. Fees charged pursuant to this section shall be paid into the Department of Environmental Quality Revolving Fund and shall only be used by the Department in administering the Department's environmental laboratory.

D. The Department may, if necessary to meet the demand for laboratory services, contract, pursuant to the provisions of the Central Purchasing Act, for the performance of analyses with laboratories accredited by the Department.

SECTION 4. AMENDATORY 27A O.S. 2001, Section 2-5-112, as amended by Section 1 of Enrolled House Bill No. 1876 of the 2nd Session of the 49th Oklahoma Legislature, is amended to read as follows:

Section 2-5-112. A. Upon the effective date of permitting rules promulgated pursuant to the Oklahoma Clean Air Act, it shall be unlawful for any person to construct any new source, or to modify or operate any new or existing source of emission of air contaminants except in compliance with a permit issued by the Department of Environmental Quality, unless the source has been exempted or deferred or is in compliance with an applicable deadline for submission of an application for such permit.

B. The Department shall have the authority and the responsibility, in accordance with rules of the Environmental Quality Board, to implement a comprehensive permitting program for the state consistent with the requirements of the Oklahoma Clean Air Act. Such authority shall include but shall not be limited to the authority to:

1. Expeditiously issue, reissue, modify and reopen for cause, permits for new and existing sources for the emission of air contaminants, and to grant a reasonable measure of priority to the

processing of applications for new construction or modifications. The Department may also revoke, suspend, deny, refuse to issue or to reissue a permit upon a determination that any permittee or applicant is in violation of any substantive provisions of the Oklahoma Clean Air Act, or any rule promulgated thereunder or any permit issued pursuant thereto;

2. Refrain from issuing a permit when issuance has been objected to by the Environmental Protection Agency in accordance with Title V of the Federal Clean Air Act;

3. Revise any permit for cause or automatically reopen it to incorporate newly applicable rules or requirements if the remaining permit term is greater than three (3) years; or incorporate insignificant changes into a permit without requiring a revision;

4. Establish and enforce reasonable permit conditions which may include, but not be limited to:

- a. emission limitations for regulated air contaminants,
- b. operating procedures when related to emissions,
- c. performance standards,
- d. provisions relating to entry and inspections, and
- e. compliance plans and schedules;

5. Require, if necessary, at the expense of the permittee or applicant:

- a. installation and utilization of continuous monitoring devices,
- b. sampling, testing and monitoring of emissions as needed to determine compliance,
- c. submission of reports and test results, and
- d. ambient air modeling and monitoring;

6. Issue:

- a. general permits covering similar sources, and

b. permits to sources in violation, when compliance plans, which shall be enforceable by the Department, are incorporated into the permit;

7. Require, at a minimum, that emission control devices on stationary sources be reasonably maintained and properly operated;

8. Require that a permittee certify that the facility is in compliance with all applicable requirements of the permit and to promptly report any deviations therefrom to the Department;

9. Issue permits to sources requiring permits under Title V of the Federal Clean Air Act for a term not to exceed five (5) years, except that solid waste incinerators may be allowed a term of up to twelve (12) years provided that the permit shall be reviewed no less frequently than every five (5) years;

10. Specify requirements and conditions applicable to the content and submittal of permit applications; set by rule, a reasonable time in which the Department must determine the completeness of such applications; and

11. Determine the form and content of emission inventories and require their submittal by any source or potential source of air contaminant emissions.

C. Rules of the Board may set limits below which a source of air contaminants may be exempted from the requirement to obtain a permit or to pay any fee. Any source so exempted, however, shall remain under jurisdiction of the Department and shall be subject to any applicable rules or general permit requirements. Such rules shall not prohibit sawmill facilities from open burning any wood waste resulting from the milling of untreated cottonwood lumber in areas that have always attained ambient air quality standards.

D. To ensure against unreasonable delay on the part of the Department, the failure of the Department to act in either the issuance, denial or renewal of a permit in a reasonable time, as determined by rule, shall be deemed to be a final permit action

solely for purpose of judicial review under the Administrative Procedures Act, with regard to the applicant or any person who participated in the public review process. The Supreme Court or the district court, as the case may be, may require that action be taken by the Department on the application without additional delay. No permit, however, may be issued by default.

E. The Department shall notify, or require that any applicant notify, all states whose air quality may be affected and that are contiguous to the State of Oklahoma, or are within fifty (50) miles of the source of each permit application or proposed permit for those sources requiring permits under Title V of the Federal Clean Air Act, and shall provide an opportunity for such states to submit written recommendations respecting the issuance of the permit and its terms and conditions.

F. No person, including but not limited to the applicant, shall raise any reasonably ascertainable issue in any future proceeding, unless the same issues have been raised and documented before the close of the public comment period on the draft permit.

G. A change in ownership of any facility or source subject to permitting requirements under this section shall not necessitate any action by the Department not otherwise required by the Oklahoma Clean Air Act. Any permit applicable to such source at the time of transfer shall be enforceable in its entirety against the transferee in the same manner as it would have been against the transferor, as shall any requirement contained in any rule, or compliance schedule set forth in any variance or order regarding or applicable to such source. Provided, however, no transferee in good faith shall be held liable for penalties for violations of the transferor unless the transferee assumes all assets and liabilities through contract or other means. For the purposes of this subsection, good faith shall be construed to mean neither having actual knowledge of a previous violation nor constructive knowledge which would lead a

reasonable person to know of the violation. It shall be the responsibility of the transferor to notify the Department in writing within ~~ten (10)~~ thirty (30) days of the change in ownership.

H. Operating permits may be issued to new sources without public review upon a proper determination by the Department that:

1. The construction permit was issued pursuant to the public review requirements of the Code and rules promulgated thereunder; and

2. The operating permit, as issued, does not differ from the construction permit in any manner which would otherwise subject the permit to public review.

SECTION 5. AMENDATORY 27A O.S. 2001, Section 2-15-108, as amended by Section 7 of Enrolled Senate Bill No. 1167 of the 2nd Session of the 49th Oklahoma Legislature, is amended to read as follows:

Section 2-15-108. A. 1. The Department of Environmental Quality shall not assess against an applicant administrative penalties or pursue civil actions associated with the pollution which is the subject of the consent order or no action necessary determination if:

- a. the applicant is in compliance with the consent order during remediation or with the Certificate of No Action Necessary, and
- b. the applicant is in compliance with any post-certification conditions or requirements specified in the consent order.

2. After issuance of the Certificate of Completion or Certificate of No Action Necessary, the Department shall not assess administrative penalties or pursue civil actions ~~associated with~~ regarding the pollution which is the subject of the consent order or no action necessary determination against any lender, lessee, or successor or assign if the lender, lessee, or successor or assign is

in compliance with any post-certification conditions or requirements as specified in the consent order or Certificate of No Action Necessary.

B. 1. Failure of the applicant and any lenders, lessees, or successors or assigns to materially comply with the consent order entered into pursuant to the Oklahoma Brownfields Voluntary Redevelopment Act shall render the consent order or the Certificate of Completion or the Certificate of No Action Necessary voidable.

2. Submission of any false or materially misleading information by the applicant knowing such information to be false or misleading shall render the consent order, Certificate of Completion, or Certificate of No Action Necessary voidable.

C. 1. An applicant to whom a Certificate of Completion or a Certificate of No Action Necessary has been issued pursuant to the Oklahoma Brownfields Voluntary Redevelopment Act and such applicant's lenders, lessees, or successors or assigns or any other person, this state or a local political subdivision thereof or any other legal entity purchasing, in good faith, the property which was subject to the Oklahoma Brownfields Voluntary Redevelopment Act shall not be subject to civil liability ~~with regard to the remedial actions taken by the applicant for pollution as required by the consent order if the remedial action is not performed in a reckless or negligent manner~~ regarding the pollution which was the subject of the consent order or certificate if the applicant is in compliance with any post-certification conditions or requirements specified in the consent order or certificate.

2. Except as otherwise provided in this subsection, nothing in the Oklahoma Brownfields Voluntary Redevelopment Act shall be construed to limit or negate any other rights of any person from pursuing or receiving legal or equitable relief from the applicant or any other person or legal entity causing or contributing to the pollution.

3. In those cases where an applicant conducts a voluntary remediation in conjunction with a party responsible for the pollution, the responsible party shall also be released from liability to the same extent as the applicant.

D. The release of liability from administrative penalties and any civil actions authorized by the Oklahoma Brownfields Voluntary Redevelopment Act shall not apply to:

1. Any pollution and consequences thereof that the applicant causes or has caused outside the scope of the consent order or the certificate issued by the Department;

2. Any pollution caused or resulting from any subsequent redevelopment of the property;

3. Existing pollution not addressed prior to issuance of the Certificate of Completion or the Certificate of No Action Necessary;
or

4. Any person responsible for pollution who has not participated in the voluntary remediation.

SECTION 6. REPEALER 27A O.S. 2001, Section 2-15-108, as amended by Section 7 of Enrolled House Bill No. 2615 of the 2nd Session of the 49th Oklahoma Legislature, is hereby repealed.

SECTION 7. It being immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this act shall take effect and be in full force from and after its passage and approval.

49-2-9147 KSM 05/17/04