



AN ACT GENERALLY REVISING CIVIL LAWS; REVISING LAWS RELATED TO THE USE OF FUNDS FOR PROPERTY RESTORATION; REVISING THE LIABILITY STANDARD USED IN REMEDIAL ACTIONS IN THE COMPREHENSIVE ENVIRONMENTAL CLEANUP AND RESPONSIBILITY ACT; REQUIRING THAT AWARDS AND SETTLEMENT FUNDS FOR RESTORATION DAMAGES ARE USED FOR CORRECTIVE ACTION ON PROPERTY; REQUIRING FUNDS TO BE PLACED IN ESCROW OR TRUST ACCOUNTS AND USED FOR INTENDED PURPOSES; PROVIDING OTHER CRITERIA RELATED TO THE USE OF THE FUNDS; PROVIDING FOR RESTORATION DAMAGES; PROVIDING DEFINITIONS; AMENDING SECTION 75-10-711, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

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

**Section 1. Restoration damages.** (1) Except as provided in subsections (2) and (3), this section applies to civil claims brought in judicial proceedings on behalf of individuals and entities for the recovery of restoration damages to address impacts to real property caused by releases of hazardous or deleterious substances.

(2) Restoration damages may be awarded only for a claim alleging contamination of special use property and may be obtained only in accordance with the definitions and other requirements set forth in this section. The plaintiff bears the burden of proof to show that the property meets the definition of special use property.

(3) Restoration damages may not be awarded or used to alter an interim or final remedial action that has been or will be undertaken on, or will benefit, a special use property pursuant to any of the following authorities:

- (a) a federal administrative order issued pursuant to 42 USC 9601, et seq., as of March 27, 2021;
- (b) a state administrative order issued pursuant to this part;

(c) a judicially approved consent decree; or

(d) any other interim or final remedial action plan approved by the department pursuant to state statutory or administrative law.

(4) (a) Restoration damages awarded pursuant to subsection (2), exclusive of awards of attorney fees and costs, may be used only to conduct remedial and corrective action necessary to restore the special use property for which the damages were awarded. Restoration must commence within 3 years from the date the judgment is paid or settlement proceeds are received.

(b) If any awarded restoration damages remain after completion of the restoration work, the surplus must be refunded to the defendant. If the defendant is no longer viable or cannot be found, the funds must be remitted to the department.

(5) Any party may request that a court awarding restoration damages also order that those damages be deposited in a segregated trust or escrow account at a commercial bank or trust company to ensure compliance with subsection (4)(a). The plaintiff may create a trust or escrow account to be overseen by a qualified professional to restore the special use property.

(6) Nothing in this section precludes the award of other damages allowed under common law and statute.

(7) As used in this section, the following definitions apply:

(a) "Qualified professional" means a person who possesses sufficient specific education, training, and experience necessary to exercise professional judgement to design and oversee implementation of a restoration plan.

(b) "Restoration damages" means the amount of compensation determined reasonably necessary by a trier of fact to restore a contaminated special use property to its function, use, or condition prior to the contamination on which a civil claim is based, unless contamination was present at the time the plaintiff acquired the special use property, in which case the term means the amount of compensation determined necessary by a trier of fact to restore a contaminated special use property to the function, use, or condition that existed at the time the plaintiff acquired the special use property.

(c) "Special use property" means real property contaminated by a release of a hazardous or deleterious substance that is found by a trier of fact to have objectively reasonable personal value to the plaintiff

not reflected in the market value of the property or to have unique public, historic, cultural, or religious value not reflected in the market value of the property.

**Section 2.** 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 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 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:

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

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

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

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

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

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

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

(A) the person's ability to pay;

(B) any prior history of violations;

(C) the degree of culpability; and

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

(iii) any other matters as justice may require.

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

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

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

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

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

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

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

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

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

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

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

**Section 3. Codification instruction.** (1) [Section 4 1] is intended to be codified in Title 75, chapter 10, part 7, and the provisions of Title 75, chapter 10, part 7, apply to [section 4 1].

**Section 4. Saving clause.** [This act] does not affect proceedings that were begun before [the

effective date of this act].

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

- END -

I hereby certify that the within bill,  
SB 316, originated in the Senate.

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Secretary of the Senate

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President of the Senate

Signed this \_\_\_\_\_ day  
of \_\_\_\_\_, 2021.

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Speaker of the House

Signed this \_\_\_\_\_ day  
of \_\_\_\_\_, 2021.

SENATE BILL NO. 316

INTRODUCED BY S. FITZPATRICK

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