

ASSEMBLY, No. 1033

STATE OF NEW JERSEY

Introduced Pending Technical Review by Legislative Counsel

PRE-FILED FOR INTRODUCTION IN THE 1996 SESSION

By Assemblymen DiGAETANO and PASCRELL

1 AN ACT eliminating the Department of Environmental Protection's
2 discretionary authority to authorize the recovery of treble damages,
3 and amending P.L.1976, c.141.

4

5 **BE IT ENACTED** by the Senate and General Assembly of the State
6 of New Jersey:

7

8 1. Section 7 of P.L.1976, c.141 (C.58:10-23.11f) is amended to
9 read as follows:

10 7. a. (1) Whenever any hazardous substance is discharged, the
11 department may, in its discretion, act to clean up and remove or
12 arrange for the cleanup and removal of such discharge or may direct
13 the discharger to clean up and remove, or arrange for the cleanup and
14 removal of, such discharge. If the discharge occurs at any hazardous
15 or solid waste disposal facility, the department may order the facility
16 closed for the duration of the cleanup and removal operations. The
17 department may monitor the discharger's compliance with any such
18 directive. Any discharger who fails to comply with such a directive
19 shall be liable to the department in an amount equal to three times the
20 cost of such cleanup and removal, and shall be subject to the
21 revocation or suspension of any license or permit he holds authorizing
22 him to operate a hazardous or solid waste disposal facility.

23 (2) Whenever one or more dischargers or persons cleans up and
24 removes a discharge of a hazardous substance, those dischargers and
25 persons shall have a right of contribution against all other dischargers
26 and persons in any way responsible for a discharged hazardous
27 substance who are liable for the cost of the cleanup and removal of
28 that discharge of a hazardous substance. In an action for contribution,
29 the contribution plaintiffs need prove only that a discharge occurred
30 for which the contribution defendant or defendants are liable pursuant
31 to the provisions of subsection c. of section 8 of P.L.1976, c.141
32 (C.58:10-23.11g), and the contribution defendant shall have only the

EXPLANATION - Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and intended to be omitted in the law.

Matter underlined thus is new matter.

1 defenses to liability available to parties pursuant to subsection d. of
2 section 8 of P.L.1976, c.141 (C.58:10-23.11g). In resolving
3 contribution claims, a court may allocate the costs of cleanup and
4 removal among liable parties using such equitable factors as the court
5 determines are appropriate. Nothing in this subsection shall affect the
6 right of any party to seek contribution pursuant to any other statute or
7 under common law.

8 (3) [The department may, in its sole discretion, when it will
9 expedite the cleanup and removal of any discharged hazardous
10 substance, and when the department determines that it is in the public
11 interest, authorize parties who have entered into an agreement with the
12 department to clean up and remove or arrange for the cleanup and
13 removal of a hazardous substance and who seek contribution, to
14 collect treble damages from any contribution defendant who has failed
15 or refused to comply with any directive, was named on the directive,
16 and who is subject to contribution pursuant to this subsection. The
17 treble damages shall be based on the amount of contribution owed by
18 a contribution defendant, which share of contribution shall be
19 determined by the court. A contribution defendant from whom treble
20 damages is sought in a contribution action shall not be assessed treble
21 damages by any court where the contribution defendant, for good
22 cause shown, failed or refused to enter the settlement agreement with
23 the department or with the contribution plaintiffs or where principles
24 of fundamental fairness will be violated. One third of an award of
25 treble damages in a contribution action pursuant to this paragraph shall
26 be paid to the department, which sum shall be deposited in the New
27 Jersey Spill Compensation Fund. The other two thirds of the treble
28 damages award shall be shared by the contribution plaintiffs in the
29 proportion of the responsibility for the cost of the cleanup and removal
30 that the contribution plaintiffs have agreed to with the department or
31 in an amount as has been agreed to by those parties. Nothing in this
32 subsection affects the rights of any party to seek contribution pursuant
33 to any other statute or under common law.]

34 Cleanup and removal of hazardous substances and actions to
35 minimize damage from discharges shall, to the greatest extent possible,
36 be in accordance with the National Contingency Plan for cleanup and
37 removal of oil and hazardous substances established pursuant to
38 section 311(c)(2) of the federal Water Pollution Control Act
39 Amendments of 1972 (Pub.L.92-500, 33 U.S.C.§1251 et seq.).

40 Whenever the department acts to clean up and remove a discharge
41 or contracts to secure prospective cleanup and removal services, it is
42 authorized to draw upon the money available in the fund. Such money
43 shall be used to pay promptly for all cleanup and removal costs
44 incurred by the department in cleaning up, in removing or in
45 minimizing damage caused by such discharge.

46 Nothing in this section is intended to preclude removal and cleanup

1 operations by any person threatened by such discharges, provided such
2 persons coordinate and obtain approval for such actions with ongoing
3 State or federal operations. No action taken by any person to contain
4 or clean up and remove a discharge shall be construed as an admission
5 of liability for said discharge. No person who renders assistance in
6 containing or cleaning up and removing a discharge shall be liable for
7 any civil damages to third parties resulting solely from acts or
8 omissions of such person in rendering such assistance, except for acts
9 or omissions of gross negligence or willful misconduct. In the course
10 of cleanup or removal operations, no person shall discharge any
11 detergent into the waters of this State without prior authorization of
12 the commissioner.

13 b. Notwithstanding any other provisions of P.L.1976, c.141
14 (C.58:10-23.11 et seq.), the department, subject to the approval of the
15 administrator with regard to the availability of funds therefor, or a
16 local unit as a part of an emergency response action and with the
17 approval of the department, may clean up and remove or arrange for
18 the cleanup and removal of any hazardous substance which:

19 (1) Has not been discharged from a grounded or disabled vessel,
20 if the department determines that such cleanup and removal is
21 necessary to prevent an imminent discharge of such hazardous
22 substance; or

23 (2) Has not been discharged, if the department determines that
24 such substance is not satisfactorily stored or contained and said
25 substance possesses any one or more of the following characteristics:

26 (a) Explosiveness;

27 (b) High flammability;

28 (c) Radioactivity;

29 (d) Chemical properties which in combination with any discharged
30 hazardous substance at the same storage facility would create a
31 substantial risk of imminent damage to public health or safety or an
32 imminent and severe damage to the environment;

33 (e) Is stored in a container from which its discharge is imminent as
34 a result of contact with a hazardous substance which has already been
35 discharged and such additional discharge would create a substantial
36 risk of imminent damage to public health or safety or imminent and
37 severe damage to the environment; or

38 (f) High toxicity and is stored or being transported in a container
39 or motor vehicle, truck, rail car or other mechanized conveyance from
40 which its discharge is imminent as a result of the significant
41 deterioration or the precarious location of the container, motor
42 vehicle, truck, rail car or other mechanized conveyance, and such
43 discharge would create a substantial risk of imminent damage to public
44 health or safety or imminent and severe damage to the environment;
45 or

1 (3) Has been discharged prior to the effective date of P.L.1976,
2 c.141.

3 c. If and to the extent that he determines that funds are available,
4 the administrator shall approve and make payments for any cleanup
5 and removal costs incurred by the department for the cleanup and
6 removal of a hazardous substance other than petroleum as authorized
7 by subsection b. of this section; provided that in determining the
8 availability of funds, the administrator shall not include as available
9 funds revenues realized or to be realized from the tax on the transfer
10 of petroleum, to the extent that such revenues result from a tax levied
11 at a rate in excess of \$0.01 per barrel, pursuant to subsection b. of
12 section 9 of P.L.1976, c.141 (C.58:10-23.11h), unless the
13 administrator determines that the sum of claims paid by the fund on
14 behalf of petroleum discharges or cleanup and removals plus pending
15 reasonable claims against the fund on behalf of petroleum discharges
16 or cleanup and removals is greater than 30% of the sum of all claims
17 paid by the fund plus all pending reasonable claims against the fund.

18 d. The administrator may only approve and make payments for any
19 cleanup and removal costs incurred by the department for the cleanup
20 and removal of a hazardous substance discharged prior to the effective
21 date of P.L.1976, c.141, pursuant to subsection b. of this section, if,
22 and to the extent that, he determines that adequate funds from another
23 source are not or will not be available; and provided further, with
24 regard to the cleanup and removal costs incurred for discharges which
25 occurred prior to the effective date of P.L.1976, c.141, the
26 administrator may not during any one-year period pay more than
27 \$18,000,000 in total or more than \$3,000,000 for any discharge or
28 related set or series of discharges.

29 e. Notwithstanding any other provisions of P.L.1976, c.141, the
30 administrator, after considering, among any other relevant factors, the
31 department's priorities for spending funds pursuant to P.L.1976, c.141,
32 and within the limits of available funds, shall make payments for the
33 restoration or replacement of, or connection to an alternative water
34 supply for, any private residential well destroyed, contaminated, or
35 impaired as a result of a discharge prior to the effective date of
36 P.L.1976, c.141; provided, however, total payments for said purpose
37 shall not exceed \$500,000 for the period between the effective date of
38 this subsection e. and January 1, 1983, and in any calendar year
39 thereafter.

40 f. Any expenditures made by the administrator pursuant to this act
41 shall constitute, in each instance, a debt of the discharger to the fund.
42 The debt shall constitute a lien on all property owned by the discharger
43 when a notice of lien, incorporating a description of the property of
44 the discharger subject to the cleanup and removal and an identification
45 of the amount of cleanup, removal and related costs expended from
46 the fund, is duly filed with the clerk of the Superior Court. The clerk

1 shall promptly enter upon the civil judgment or order docket the name
2 and address of the discharger and the amount of the lien as set forth
3 in the notice of lien. Upon entry by the clerk, the lien, to the amount
4 committed by the administrator for cleanup and removal, shall attach
5 to the revenues and all real and personal property of the discharger,
6 whether or not the discharger is insolvent.

7 The notice of lien filed pursuant to this subsection which affects the
8 property of a discharger subject to the cleanup and removal of a
9 discharge shall create a lien with priority over all other claims or liens
10 which are or have been filed against the property, except if the
11 property comprises six dwelling units or less and is used exclusively
12 for residential purposes, this notice of lien shall not affect any valid
13 lien, right or interest in the property filed in accordance with
14 established procedure prior to the filing of this notice of lien. The
15 notice of lien filed pursuant to this subsection which affects any
16 property of a discharger, other than the property subject to the cleanup
17 and removal, shall have priority from the day of the filing of the notice
18 of the lien over all other claims and liens filed against the property, but
19 shall not affect any valid lien, right, or interest in the property filed in
20 accordance with established procedure prior to the filing of a notice of
21 lien pursuant to this subsection.

22 g. In the event a vessel discharges a hazardous substance into the
23 waters of the State, the cleanup and removal and related costs
24 resulting from that discharge that constitute a maritime lien on the
25 discharging vessel pursuant to 33 U.S.C. §1321 or any other law, may
26 be recovered by the Department of Environmental Protection in an
27 action in rem brought in the district court of the United States. An
28 impoundment of a vessel resulting from this action shall continue until:

29 (1) the claim against the owner or operator of the vessel for the
30 cleanup and removal and related costs of the discharge is satisfied;

31 (2) the owner or operator of the vessel, or a representative of the
32 owner or operator, provides evidence of financial responsibility as
33 provided in section 2 of P.L.1991, c.58 (C.58:10-23.11g2) and
34 satisfactorily guarantees that these costs will be paid; or

35 (3) the impoundment is otherwise vacated by a court order. The
36 remedy provided in this subsection is in addition to any other remedy
37 or enforcement power that the department may have under any other
38 law.

39 Any action brought by the State pursuant to this subsection and any
40 impoundment of a vessel resulting therefrom shall not subject the State
41 to be in any way liable for a subsequent or continued discharge of a
42 hazardous substance from that vessel.

43 (cf: P.L.1991, c.373, s.14)

44

45 2. This act shall take effect immediately.

STATEMENT

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31

This bill would amend the "Spill Compensation and Control Act," (Spill Act) P.L.1976, c.141 (C.58:10-23.11 et seq.) to delete the provision which authorizes the Department of Environmental Protection to authorize a person who cleans up or removes a hazardous discharge to seek treble damages from any other person liable for the discharge who is not involved in the cleanup.

Until 1991, the Spill Act provided that if the DEP ordered a party liable for a hazardous discharge to clean up and remove the discharge, and the party refused, thus requiring the expenditure of moneys from the Spill Fund to conduct the cleanup and removal, the DEP could seek damages from the responsible party in an amount equal to three times the amount (treble damages) expended by the DEP for the cleanup and removal. In 1991 the Spill Act was amended to enable private responsible parties performing a cleanup to seek treble damages from other responsible parties. As a result of a 1991 amendment, the Spill Act currently provides that any person seeking treble damages (the contribution plaintiff) from another discharger (the contribution defendant) must be authorized to do so by the DEP, and further provides that one-third of the amount of any treble damages recovered must be paid to the DEP for deposit in the Spill Compensation Fund. This bill would remove this authorization, thus allowing only DEP the right to seek treble damages under the Spill Act.

Deletes DEP authorization for private party recovery of treble damages for hazardous discharge cleanup.