

[First Reprint]
ASSEMBLY, No. 1033

STATE OF NEW JERSEY

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 ¹[such] the¹ discharge or may
13 direct the discharger to clean up and remove, or arrange for the
14 cleanup and removal of, ¹[such] the¹ discharge. If the discharge
15 occurs at any hazardous ¹waste facility¹ or solid waste ¹[disposal]¹
16 facility, the department may order the ¹hazardous waste facility or
17 solid waste¹ facility closed for the duration of the cleanup and removal
18 operations. The department may monitor the discharger's compliance
19 with any such directive. Any discharger who fails to comply with such
20 a directive shall be liable to the department in an amount equal to three
21 times the cost of such cleanup and removal, and shall be subject to the
22 revocation or suspension of any license ¹issued¹ or permit ¹[he holds]
23 held¹ authorizing ¹[him] that person¹ to operate a hazardous ¹waste
24 facility¹ or solid waste ¹[disposal]¹ facility.

25 (2) Whenever one or more dischargers or persons cleans up and
26 removes a discharge of a hazardous substance, those dischargers and
27 persons shall have a right of contribution against all other dischargers
28 and persons in any way responsible for a discharged hazardous
29 substance who are liable for the cost of the cleanup and removal of
30 that discharge of a hazardous substance. In an action for contribution,
31 the contribution plaintiffs need prove only that a discharge occurred

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.

Matter enclosed in superscript numerals has been adopted as follows:

¹ Assembly AAW committee amendments adopted December 5, 1996.

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

11 (3) [The department may, in its sole discretion, when it will
12 expedite the cleanup and removal of any discharged hazardous
13 substance, and when the department determines that it is in the public
14 interest, authorize parties who have entered into an agreement with the
15 department to clean up and remove or arrange for the cleanup and
16 removal of a hazardous substance and who seek contribution, to
17 collect treble damages from any contribution defendant who has failed
18 or refused to comply with any directive, was named on the directive,
19 and who is subject to contribution pursuant to this subsection. The
20 treble damages shall be based on the amount of contribution owed by
21 a contribution defendant, which share of contribution shall be
22 determined by the court. A contribution defendant from whom treble
23 damages is sought in a contribution action shall not be assessed treble
24 damages by any court where the contribution defendant, for good
25 cause shown, failed or refused to enter the settlement agreement with
26 the department or with the contribution plaintiffs or where principles
27 of fundamental fairness will be violated. One third of an award of
28 treble damages in a contribution action pursuant to this paragraph shall
29 be paid to the department, which sum shall be deposited in the New
30 Jersey Spill Compensation Fund. The other two thirds of the treble
31 damages award shall be shared by the contribution plaintiffs in the
32 proportion of the responsibility for the cost of the cleanup and removal
33 that the contribution plaintiffs have agreed to with the department or
34 in an amount as has been agreed to by those parties. Nothing in this
35 subsection affects the rights of any party to seek contribution pursuant
36 to any other statute or under common law.] ¹In an action for
37 contribution taken pursuant to this subsection, a contribution plaintiff
38 may file a claim with the court for treble damages. A contribution
39 plaintiff may be granted an award of treble damages by the court from
40 one or more contribution defendants only upon a finding by the court
41 that: (a) the contribution defendant is a person who was named on or
42 subject to a directive issued by the department, who failed or refused
43 to comply with such a directive, and who is subject to contribution
44 pursuant to this subsection; (b) the contribution plaintiff gave 30 days
45 notice to the contribution defendant of the plaintiff's intention to seek
46 treble damages pursuant to this subsection and gave the contribution

1 defendant an opportunity to participate in the cleanup; (c) the
2 contribution defendant failed or refused to enter into a settlement
3 agreement with the contribution plaintiff; and (d) the contribution
4 plaintiff entered into an agreement with the department to remediate
5 the site. Notwithstanding the foregoing requirements, any
6 authorization to seek treble damages made by the department prior to
7 the effective date of P.L. , c. (pending in the Legislature as this bill)
8 shall remain in effect, provided that the department or the contribution
9 plaintiff gave notice to the contribution defendant of the plaintiff's
10 request to the department for authorization to seek treble damages.

11 A contribution defendant from whom treble damages is sought in
12 a contribution action shall not be assessed treble damages by any court
13 where the contribution defendant, for good cause shown, failed or
14 refused to enter the settlement agreement with the contribution
15 plaintiff or where principles of fundamental fairness will be violated.
16 One third of an award of treble damages in a contribution action
17 pursuant to this paragraph shall be paid to the department, which sum
18 shall be deposited in the New Jersey Spill Compensation Fund. The
19 other two thirds of the treble damages award shall be shared by the
20 contribution plaintiffs in the proportion of the responsibility for the
21 cost of the cleanup and removal that the contribution plaintiffs have
22 agreed to with the department or in an amount as has been agreed to
23 by those parties. Nothing in this subsection affects the rights of any
24 party to seek contribution pursuant to any other statute or under
25 common law.¹

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

32 Whenever the department acts to clean up and remove a discharge
33 or contracts to secure prospective cleanup and removal services, it is
34 authorized to draw upon the money available in the fund. Such money
35 shall be used to pay promptly for all cleanup and removal costs
36 incurred by the department in cleaning up, in removing or in
37 minimizing damage caused by such discharge.

38 Nothing in this section is intended to preclude removal and cleanup
39 operations by any person threatened by such discharges, provided such
40 persons coordinate and obtain approval for such actions with ongoing
41 State or federal operations. No action taken by any person to contain
42 or clean up and remove a discharge shall be construed as an admission
43 of liability for said discharge. No person who renders assistance in
44 containing or cleaning up and removing a discharge shall be liable for
45 any civil damages to third parties resulting solely from acts or
46 omissions of such person in rendering such assistance, except for acts

1 or omissions of gross negligence or willful misconduct. In the course
2 of cleanup or removal operations, no person shall discharge any
3 detergent into the waters of this State without prior authorization of
4 the commissioner.

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

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

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

18 (a) Explosiveness;

19 (b) High flammability;

20 (c) Radioactivity;

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

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

30 (f) High toxicity and is stored or being transported in a container
31 or motor vehicle, truck, rail car or other mechanized conveyance from
32 which its discharge is imminent as a result of the significant
33 deterioration or the precarious location of the container, motor
34 vehicle, truck, rail car or other mechanized conveyance, and such
35 discharge would create a substantial risk of imminent damage to public
36 health or safety or imminent and severe damage to the environment;
37 or

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

40 c. If and to the extent that ¹[he] the administrator¹ determines that
41 funds are available, the administrator shall approve and make payments
42 for any cleanup and removal costs incurred by the department for the
43 cleanup and removal of a hazardous substance other than petroleum
44 as authorized by subsection b. of this section; provided that in
45 determining the availability of funds, the administrator shall not
46 include as available funds revenues realized or to be realized from the

1 tax on the transfer of petroleum, to the extent that such revenues
2 result from a tax levied at a rate in excess of \$0.01 per barrel, pursuant
3 to subsection b. of section 9 of P.L.1976, c.141 (C.58:10-23.11h),
4 unless the administrator determines that the sum of claims paid by the
5 fund on behalf of petroleum discharges or cleanup and removals plus
6 pending reasonable claims against the fund on behalf of petroleum
7 discharges or cleanup and removals is greater than 30% of the sum of
8 all claims paid by the fund plus all pending reasonable claims against
9 the fund.

10 d. The administrator may only approve and make payments for any
11 cleanup and removal costs incurred by the department for the cleanup
12 and removal of a hazardous substance discharged prior to the effective
13 date of P.L.1976, c.141, pursuant to subsection b. of this section, if,
14 and to the extent that, ¹[he] the administrator¹ determines that
15 adequate funds from another source are not or will not be available;
16 and provided further, with regard to the cleanup and removal costs
17 incurred for discharges which occurred prior to the effective date of
18 P.L.1976, c.141, the administrator may not during any one-year period
19 pay more than \$18,000,000 in total or more than \$3,000,000 for any
20 discharge or related set or series of discharges.

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

32 f. Any expenditures made by the administrator pursuant to this act
33 shall constitute, in each instance, a debt of the discharger to the fund.
34 The debt shall constitute a lien on all property owned by the discharger
35 when a notice of lien, incorporating a description of the property of
36 the discharger subject to the cleanup and removal and an identification
37 of the amount of cleanup, removal and related costs expended from
38 the fund, is duly filed with the clerk of the Superior Court. The clerk
39 shall promptly enter upon the civil judgment or order docket the name
40 and address of the discharger and the amount of the lien as set forth
41 in the notice of lien. Upon entry by the clerk, the lien, to the amount
42 committed by the administrator for cleanup and removal, shall attach
43 to the revenues and all real and personal property of the discharger,
44 whether or not the discharger is insolvent.

45 The notice of lien filed pursuant to this subsection which affects the
46 property of a discharger subject to the cleanup and removal of a

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

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

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

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

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

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

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

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37 2. This act shall take effect immediately.

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