

58:10-23.11f8

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NJSA: 58:10-23.11f8 ("Hazardous substance response action
contractors-indemnification act")

LAWS OF: 1991 CHAPTER: 373

Bill No: S2844

Sponsor(s): Lesniak

Date Introduced: September 24, 1990

Committee: Assembly: Energy and Environment

Senate: Environmental Quality

Amended during passage: Yes Senate Committee substitute (2R) enacted
re-enacted 1-9-92
re-enacted 12-9-91

Date of Passage: Assembly: June 20, 1991

Senate: June 13, 1991

Date of Approval: January 10, 1992

Following statements are attached if available:

Sponsor statement: Yes

Committee Statement: Assembly: Yes

Senate: Yes

Fiscal Note: Yes

Veto Message: Yes

Message on signing: No

Following were printed:

Reports: No

Hearings: No

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SENATE COMMITTEE SUBSTITUTE FOR
SENATE, No. 2844 and ASSEMBLY, No. 3729

STATE OF NEW JERSEY

ADOPTED JANUARY 10, 1991

Sponsored by Senator LESNIAK

1 AN ACT concerning response action contractor indemnification
2 and liability, limiting the liability of sureties for certain
3 hazardous waste service contracts, amending P.L.1985, c.461¹,
4 amending and supplementing P.L.1976, c.141, and repealing
5 section 5 of P.L.1986, c.59.
6

7 BE IT ENACTED by the Senate and General Assembly of the
8 State of New Jersey:

9 1. (New section) This act shall be known and may be cited as
10 the "Hazardous Substance Response Action Contractors
11 Indemnification Act."

12 2. (New section) The Legislature finds and declares that it is
13 the public policy of this State to safely and expeditiously handle,
14 treat, remove and dispose of hazardous substances released or
15 spilled to the environment or at hazardous waste sites where no
16 responsible party has been identified or has undertaken a cleanup;
17 that the availability of an adequate supply of private contractors
18 for performing the design, engineering and construction of
19 cleanup or mitigation of sites contaminated by hazardous
20 substances is essential for assuring both the expeditious cleanup
21 of such sites and a competitive marketplace for contractor
22 services; that hazardous substance response action contractors
23 continue to experience considerable difficulties in obtaining
24 environmental liability insurance at affordable prices; that even
25 when environmental liability insurance coverage is available it is
26 being written on a claims-made basis for limited durations; and
27 that the interests of the state would be promoted by permitting
28 the Department of Environmental Protection to offer
29 indemnification to cleanup contractors where necessary to solicit
30 qualified contractors.

31 3. (New section) As used in this act:
32 "Department" means the Department of Environmental
33 Protection.

34 "Division" means the Division of Purchase and Property within
35 the Department of Treasury.

36 ¹"Engineering services" means services or creative work such
37 as consultation, investigation, the evaluation, planning, and

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

Matter underlined thus is new matter.

Matter enclosed in superscript numerals has been adopted as follows:

¹ Senate floor amendments adopted February 28, 1991.

² Senate amendments adopted in accordance with Governor's
recommendations September 26, 1991.

1 design of engineering works and systems, planning the use of land
2 and water, engineering studies, and the administration of
3 construction for the purpose of determining compliance with
4 drawings and specifications, the adequate performance of which
5 requires engineering education, training, and experience, and the
6 application of special knowledge of the mathematical, physical,
7 and engineering sciences.¹

8 "Hazardous substance" means a hazardous substance as defined
9 in section 3 of P.L.1976, c.141 (C.58:10-23.11b).

10 "Remediation" means the cleanup, removal, mitigation, control
11 or management of a discharge of a hazardous substance.

12 "Response action contract" or "contract" means a contract
13 entered into by a response action contractor with the
14 department, or any other agency of the State, or with the division
15 on behalf of the department to provide services or work for, or
16 relating to, the remediation, or ¹[attempted] attempted¹
17 remediation, of a hazardous substance, or to prevent or mitigate
18 damages to the public health, safety, or welfare, including
19 damages to public or private property, pursuant to P.L.1976,
20 c.141 (C.58:10-23.11 et seq.), which services or work shall include
21 evaluation, planning, engineering, surveying, design, construction,
22 or other related services or work.

23 "Response action contractor" or "contractor" means a person,
24 including an employee or subcontractor of a person, who enters
25 into a response action contract, and, for the purposes of
26 indemnification by the department, a surety that issues a bid,
27 performance, or payment bond for the contractor on the response
28 action contract, and who begins activities to meet the obligations
29 under such bond but only in connection with such activities or
30 obligations.

31 4. (New section) As part of a response action contract
32 awarded by or on behalf of the department, the department may
33 agree to defend and indemnify the contractor against claims and
34 judgments for death or bodily injury to persons or loss and
35 damage to property resulting from the contamination of the
36 environment by hazardous substances as a direct consequence of
37 the performance of the response action contract. This provision
38 applies only to contracts wholly funded with State monies,
39 including monies in the New Jersey Spill Compensation Fund
40 established pursuant to section 10 of P.L.1976, c.141
41 (C.58:10-23.11i).

42 The department may determine to offer indemnification when
43 it is deemed necessary to solicit qualified contractors and to
44 promote adequate competition among qualified bidders. The
45 department may offer indemnification of up to \$25 million per
46 occurrence and \$50 million per contract as it deems necessary to
47 solicit qualified contractors, depending on the nature, risk and
48 size of the job. Any indemnification offered by the department
49 shall be subject to the exemptions and deductible limits

1 established herein and to terms and conditions established by the
2 department with the advice of the Attorney General.

3 As part of a bidding process, the department may give
4 preference to the extent a bidder is covered by an occurrence
5 based policy of environmental impairment liability insurance.
6 Any such preference shall be based on determinations articulated
7 in the bid documents as to the relative value and cost to the
8 State of insurance and indemnification.

9 Nothing in this act shall be construed to: (1) limit the right of
10 an eligible claimant to pursue any remedy available under
11 statutory or common law against a discharger or person in any
12 way responsible for a discharge pursuant to subsection c. of
13 section 8 of P.L.1976, c.141 (C.58:10-23.11g.), for any claim
14 amount in excess of the liability limits established pursuant to
15 this act; or (2) authorize indemnification of a response action
16 contractor for a claim by a person in the employment of the
17 contractor, including any subcontractor engaged by the
18 contractor, or any employee thereof.

19 Nothing in this act shall be construed to authorize
20 indemnification of a discharger or person in any way responsible
21 for a discharge or of a response action contractor engaged in a
22 remediation action on behalf of a discharger or person in any way
23 responsible for a discharge whether or not the remediation action
24 is funded in part by the State.

25 5. (New section) a. ¹[Every claim or judgment covered by
26 indemnification shall be subject to a deductible equal to .30 times
27 the amount of the contract, but not to exceed \$1,500,000. This
28 deductible shall be on a per occurrence basis. In addition to the
29 deductible, each claim or judgment in excess of the deductible
30 shall be subject to a copayment equal to 10% of the amount of
31 the claim or judgment in excess of the deductible for which the
32 contractor shall be responsible as a condition of indemnification.

33 b.] ²[An indemnification agreement entered into between the
34 State and a response action contractor, for the provision of
35 engineering services, shall specify and allocate the responsibility
36 of the parties for the payment of claims or judgments covered by
37 the indemnification agreement as follows:

38 (1) the response action contractor shall be responsible, for all
39 claims or judgments resulting from a single occurrence, for a
40 total payment of an amount equal to either (a) 30% of the amount
41 of the response action contract or (b) \$100,000, whichever is
42 less. A response action contractor shall be responsible for the
43 payment under this paragraph only for a maximum of two
44 occurrences per any response action contract;

45 (2) the State shall be responsible for payment of one or more
46 claims or judgments only up to the amount of indemnification set
47 forth for such occurrence in the indemnification agreement, less
48 the amount for which the response action contractor is
49 responsible pursuant to paragraph (1) of this subsection;

1 (3) a response action contractor shall be responsible for the
2 payment of a claim or judgment covered by an indemnification
3 agreement only to the extent of the amount for which the
4 response action contractor is responsible pursuant to paragraph
5 (1) of this subsection. A response action contractor shall not be
6 responsible for payment of any part of a claim or judgment
7 arising from performance under a response action contract
8 covered by an indemnification agreement, where the amount of
9 available indemnification for those claims or judgments has been
10 exhausted. Nothing in this subsection shall be construed to limit
11 the liability or responsibility of a response action contractor for
12 payment of any claim or judgement except where the response
13 action contractor has entered into an indemnification agreement
14 with the State pursuant to this act and to the extent provided in
15 that agreement.

16 The allocations and limits for the payment of claims or
17 judgments for the State and response action contractors pursuant
18 to this subsection do not apply to claims or judgments covered by
19 the provisions of subsection c. of this section.

20 b.]² An indemnification agreement entered into between the
21 State and a response action contractor ²[, for the provision of
22 services other than engineering services,]² shall specify and
23 allocate the responsibility of the parties for the payment of
24 claims or judgments covered by the indemnification agreement as
25 follows:

26 (1) the response action contractor shall be responsible, for all
27 claims or judgments resulting from a single occurrence, for a
28 total payment of an amount equal to either (a) 30% of the amount
29 of the response action contract or (b) \$1,500,000, whichever is
30 less;

31 (2) the response action contractor shall be responsible, for all
32 claims or judgments resulting from a single occurrence, for a
33 total payment in an amount equal to 10% of either (a) the amount
34 of the total claims or judgments that are in excess of the amount
35 for which the response action contractor is responsible pursuant
36 to paragraph (1) of this subsection, or (b) the amount of
37 indemnification for such occurrence set forth in the
38 indemnification agreement that is in excess of the amount for
39 which the response action contractor is responsible pursuant to
40 paragraph (1) of this subsection, whichever is less;

41 (3) the State shall be responsible for payment of one or more
42 claims or judgments only up to the amount of indemnification set
43 forth for such occurrence in the indemnification agreement, less
44 the amounts for which the response action contractor is
45 responsible pursuant to paragraphs (1) and (2) of this subsection;

46 (4) a response action contractor shall be responsible for the
47 payment of a claim or judgment covered by an indemnification
48 agreement only to the extent of the amounts for which the
49 response action contractor is responsible pursuant to paragraphs

1 (1) and (2) of this subsection. A response action contractor shall
2 not be responsible for payment of any part of a claim or judgment
3 arising from performance under a response action contract,
4 covered by an indemnification agreement, where the amount of
5 available indemnification for those claims or judgments has been
6 exhausted. Nothing in this subsection shall be construed to limit
7 the liability or responsibility of a response action contractor for
8 payment of any claim or judgment except where the response
9 action contractor has entered into an indemnification agreement
10 with the State pursuant to this act and to the extent provided in
11 that agreement.

12 The allocations and limits for the payment of claims or
13 judgments for the State and response action contractors pursuant
14 to this subsection do not apply to claims or judgments covered by
15 the provisions of subsection c. of this section.

16 ²b. The department is authorized to lower, on a
17 contract-by-contract or other basis, the amount for which the
18 response action contractor shall be responsible, pursuant to
19 subsection a. of this section, for all claims or judgments covered
20 by the indemnification agreement. The department may lower
21 the amount for which the response action contractor shall be
22 responsible for specific kinds of services in a contract, including,
23 but not limited to engineering services, or for all of the services
24 provided in a contract. The department shall make the
25 determination to lower the amount for which the response action
26 contractor shall be responsible based on the availability of
27 environmental liability insurance for contractors in the private
28 market, on the number and quality of bidders, or on other factors
29 the department deems relevant.²

30 c.¹ Legal defense and indemnification shall not apply to (1)
31 claims that are found to have arisen from actions involving gross
32 negligence, willful misconduct, fraud, intentional tort, bad faith,
33 intentional breach of contract, or criminal misconduct by the
34 contractor, (2) claims or judgments for punitive or exemplary
35 damages, or (3) claims involving actions outside the scope of the
36 response action contract.

37 ¹[c.] d.¹ Legal defense and indemnification provided to a
38 contractor shall be on such terms and conditions as shall be
39 prescribed by the department with the advice of the Attorney
40 General consistent with the provisions of this act.

41 ¹[d.] e.¹ Legal defense and indemnification of a contractor
42 pursuant to this section or section 9 of P.L. , c. (C.)
43 (pending in the Legislature as this bill), shall not bar the State
44 from exercising any available legal remedies for the enforcement
45 of a contract between, or on the behalf of, the department or
46 other contracting agency and the contractor, the recovery of
47 damages to which the department or agency may be entitled as a
48 result of a contractor's failure to perform the contract, or for
49 the recovery by the Attorney General of funds expended for the

1 defense or indemnification of a contractor if the defense was
2 undertaken in response to a claim brought against the contractor
3 that is found to have arisen from gross negligence, willful
4 misconduct, fraud, intentional tort, bad faith, intentional breach
5 of contract, or criminal misconduct.

6 ¹[e.] f.¹ No person other than a contractor shall have the right
7 to enforce a right of legal defense and indemnification pursuant
8 to this section.

9 6. (New section) A contractor shall not, except for good and
10 substantial cause, be entitled to legal defense and
11 indemnification by the Attorney General pursuant to this act
12 unless within 10 calendar days of receipt of any summons,
13 complaint, process, notice, demand or pleading subject to legal
14 defense and indemnification, the contractor delivers, by certified
15 mail or personal delivery, the original or a copy of the summons,
16 complaint, process, notice, demand or pleading to the department
17 or other contracting agency, and the Attorney General. Delivery
18 of notice shall constitute an agreement by the contractor that
19 the Attorney General shall be responsible for the conduct of the
20 defense for the claim amount in excess of the contractor's
21 deductible in a manner that the Attorney General deems to be in
22 the best interests of the contractor and the State, including
23 authority to enter into a negotiated settlement of that excess
24 amount. The contractor shall cooperate fully with the Attorney
25 General's defense.

26 The Attorney General shall submit a certified voucher to the
27 State for payment of the amount of the judgment or settlement
28 and court costs.

29 No settlement shall be entered into by a contractor or his
30 authorized representative if the amount of the settlement
31 exceeds the contractor's deductible unless the settlement is
32 approved by the Attorney General. If the contractor enters into
33 such a settlement without the Attorney General's approval, this
34 shall be deemed a waiver by the contractor of any right to
35 indemnification for the settlement.

36 7. (New section) a. Notwithstanding the provision of any
37 other law to the contrary, a person shall be barred from
38 recovering against a response action contractor indemnified
39 pursuant to P.L. , c. (C.) (pending in the Legislature
40 as this bill) for injury to persons, or damage to, or loss of,
41 property if:

42 (1) the claimant fails to file a notice of claim with the
43 contractor within 90 days of accrual of the claim, except that the
44 Superior Court may permit a claimant to file a notice at any time
45 within one year of accrual of the claim provided that the
46 contractor and the State are not substantially prejudiced thereby,
47 and provided further that the claimant shows sufficient reasons
48 for his failure to file a notice of claim within the 90 days;

49 (2) two years have elapsed since accrual of the claim and the

1 claimant has failed to file an action therefor; or
2 (3) the claimant or his authorized representative entered into
3 a settlement with respect to the claim.
4 b. The provisions of this section shall not apply to a claim not
5 subject to legal defense and indemnification pursuant to P.L. ,
6 c. (C.) (pending in the Legislature as this bill).
7 Nothing in this section shall prohibit an infant or incompetent
8 person from commencing an action under this act within the time
9 limitations specified in this section, after his coming or being of
10 full age or sane mind.
11 8. (New section) a. In the event the Attorney General
12 determines that (1) appearing and defending a contractor
13 pursuant to P.L. , c. (C.) (pending in the Legislature
14 as this bill) involves an actual or potential conflict of interest
15 between the State and the contractor, or (2) the act or omission
16 giving rise to the claim is either not within the scope of the
17 contract, or involves gross negligence, willful misconduct, fraud,
18 intentional tort, bad faith, intentional breach of contract, or
19 criminal misconduct by the contractor, the Attorney General
20 shall decline in writing to appear or defend, or shall promptly
21 withdraw as attorney for the contractor. The contractor
22 thereupon may employ his own attorney to appear and defend
23 against the claim.
24 b. If the Attorney General declines to appear and defend a
25 contractor by reason of an actual or potential conflict of
26 interest, the Attorney General shall authorize indemnification of
27 the contractor for the amount of the judgment in excess of the
28 amount of contractor's indemnification deductible and less the
29 copayment, and reasonable legal expenses and court costs
30 incurred by the contractor in defending against the amount of the
31 claim or judgment in excess of the contractor's deductible.
32 c. If the Attorney General declines to appear and defend, or
33 withdraws from defending, on the grounds that the act or
34 omission giving rise to the claim or costs was not within the
35 scope of the contract, or was the result of gross negligence,
36 willful misconduct, fraud, intentional tort, bad faith, intentional
37 breach of contract, or criminal misconduct on the part of the
38 contractor, but the court finds that the act or omission was
39 within the scope of the contract, or was not the result of gross
40 negligence, willful misconduct, fraud, intentional tort, bad faith,
41 intentional breach of contract, or criminal misconduct on the
42 part of the contractor, the Attorney General shall authorize
43 indemnification of the contractor for the amount of the judgment
44 in excess of the amount of the contractor's indemnification
45 deductible, and reasonable legal expenses and court costs
46 incurred by the contractor in defending against the amount of the
47 claim or judgment in excess of the contractor's deductible.
48 d. The State shall have the right to intervene in any case that
49 may involve State indemnification and the court shall, at the

1 request of the State, make a finding as to whether the
2 contractor's actions were a result of gross negligence, willful
3 misconduct, fraud, intentional tort, bad faith, intentional breach
4 of contract, or criminal misconduct.

5 9. (New section) A certified copy of any judgment or
6 settlement entered into pursuant to section 8 of P.L. , c.
7 (C.) (pending in the Legislature as this bill) shall be
8 submitted to the Attorney General for a determination as to
9 whether the judgment is final and subject to indemnification. If
10 the judgment is final and subject to indemnification, the Attorney
11 General shall submit a certified voucher to the State for payment
12 of the amount in the manner specified in section 8.

13 10. (New section) A judgment or settlement against a
14 contractor, where indemnification is provided shall be subject to
15 such applicable limitations or conditions as are set forth in
16 N.J.S.59:9-2 through 59:9-5. In determining the amount of an
17 award for damages to property subject to the provisions of this
18 section, the court may reduce the amount of the award for
19 damages to property by all or a portion of the enhancement value
20 resulting from the remediation action taken or paid for by the
21 State.

22 11. (New section) a. The State is subrogated to any rights of
23 a claimant paid by the State for an indemnified claim or
24 judgment, including court and legal costs, against a discharger or
25 person in any way responsible for a discharge pursuant to
26 subsection c. of section 8 of P.L.1976, c.141 (C.58:10-23.11g.).

27 b. Nothing in P.L. ,c. (C.) (pending in the Legislature
28 as this bill) shall be construed to limit the liability of a party
29 responsible for a discharge for all costs recoverable pursuant to
30 section 8 of P.L.1976, c.141 (C.58:10-23.11g.).

31 c. Nothing in this act shall be construed to affect any of the
32 defenses and immunities available to the State pursuant to the
33 "New Jersey Tort Claims Act," N.J.S.59:1-1 et seq., or any other
34 provisions contained therein, for claims against the State or any
35 of its employees.

36 12. Section 2 of P.L.1976, c.141 (C.58:10-23.11a) is amended
37 to read as follows:

38 2. The Legislature finds and declares: that New Jersey's lands
39 and waters constitute a unique and delicately balanced resource;
40 that the protection and preservation of these lands and waters
41 promote the health, safety and welfare of the people of this
42 State; that the tourist and recreation industry dependent on clean
43 waters and beaches is vital to the economy of this State; that the
44 State is the trustee, for the benefit of its citizens, of all natural
45 resources within its jurisdiction; and that the storage and transfer
46 of petroleum products and other hazardous substances between
47 vessels, between facilities and vessels, and between facilities,
48 whether onshore or offshore, is a hazardous undertaking and
49 imposes risk of damage to persons and property within this State.

1 The Legislature finds and declares that the discharge of
2 petroleum products and other hazardous substances within or
3 outside the jurisdiction of this State constitutes a threat to the
4 economy and environment of this State. The Legislature intends
5 by the passage of this act to exercise the powers of this State to
6 control the transfer and storage of hazardous substances and to
7 provide liability for damage sustained within this State as a result
8 of any discharge of said substances, by requiring the prompt
9 containment and removal of such pollution and substances, and to
10 provide a fund for swift and adequate compensation to resort
11 businesses and other persons damaged by such discharges, and to
12 provide for the defense and indemnification of certain persons
13 under contract with the State [or federal government] for claims
14 or actions resulting from the provision of services or work to
15 mitigate or clean up a release or discharge of hazardous
16 substances.

17 (cf: P.L.1986, c.59, s.1)

18 13. Section 3 of P.L.1976, c.141 (C.58:10-23.11b) is amended
19 to read as follows:

20 3. Unless the context clearly indicates otherwise, the
21 following terms shall have the following meanings:

22 a. "Administrator" means the chief executive of the New
23 Jersey Spill Compensation Fund;

24 b. "Barrel" means 42 United States gallons or 159.09 liters or
25 an appropriate equivalent measure set by the director for
26 hazardous substances which are other than fluid or which are not
27 commonly measured by the barrel;

28 c. "Board" means a board of arbitration convened by the
29 administrator to settle disputed disbursements from the fund;

30 d. "Cleanup and removal costs" means all costs associated
31 with a discharge, incurred by the State or its political
32 subdivisions or their agents or any person with written approval
33 from the department in the: (1) removal or attempted removal of
34 hazardous substances, or (2) taking of reasonable measures to
35 prevent or mitigate damage to the public health, safety, or
36 welfare, including, but not limited to, public and private
37 property, shorelines, beaches, surface waters, water columns and
38 bottom sediments, soils and other affected property, including
39 wildlife and other natural resources, and shall include costs
40 incurred by the [department] State for the indemnification and
41 legal defense of contractors pursuant to [subsection a. of section
42 7 of this act, subject to the appropriation by law of moneys from
43 the General Fund to the fund to defray these costs] sections 1
44 through 11 of P.L. , c. (C.) (pending in the
45 Legislature as this bill);

46 e. "Commissioner" means the Commissioner of Environmental
47 Protection;

48 f. "Department" means the Department of Environmental
49 Protection;

1 g. "Director" means the Director of the Division of Taxation
2 in the Department of the Treasury;

3 h. "Discharge" means any intentional or unintentional action
4 or omission resulting in the releasing, spilling, leaking, pumping,
5 pouring, emitting, emptying or dumping of hazardous substances
6 into the waters or onto the lands of the State, or into waters
7 outside the jurisdiction of the State, when damage may result to
8 the lands, waters or natural resources within the jurisdiction of
9 the State;

10 i. "Fair market value" means the invoice price of the
11 hazardous substances transferred, including transportation
12 charges; but where no price is so fixed, "fair market value" shall
13 mean the market price as of the close of the nearest day to the
14 transfer, paid for similar hazardous substances, as shall be
15 determined by the taxpayer pursuant to rules of the director;

16 j. "Fund" means the New Jersey Spill Compensation Fund;

17 k. "Hazardous substances" means the "environmental
18 hazardous substances" on the environmental hazardous substance
19 list adopted by the department pursuant to section 4 of P.L.1983,
20 c.315 (C.34:5A-4); such elements and compounds, including
21 petroleum products, which are defined as such by the department,
22 after public hearing, and which shall be consistent to the
23 maximum extent possible with, and which shall include, the list of
24 hazardous substances adopted by the federal Environmental
25 Protection Agency pursuant to section 311 of the federal Water
26 Pollution Control Act Amendments of 1972, Pub.L.92-500, as
27 amended by the Clean Water Act of 1977, Pub.L.95-217 (33
28 U.S.C. § 1251 et seq.); the list of toxic pollutants designated by
29 Congress or the EPA pursuant to section 307 of that act; and the
30 list of hazardous substances adopted by the federal
31 Environmental Protection Agency pursuant to section 101 of the
32 "Comprehensive Environmental Response, Compensation and
33 Liability Act of 1980," Pub.L.96-510 (42 U.S.C. § 9601 et seq.);
34 provided, however, that sewage and sewage sludge shall not be
35 considered as hazardous substances for the purposes of this act;

36 l. "Major facility" includes, but is not limited to, any refinery,
37 storage or transfer terminal, pipeline, deep-water port, drilling
38 platform or any appurtenance related to any of the preceding
39 that is used or is capable of being used to refine, produce, store,
40 handle, transfer, process or transport hazardous substances. A
41 vessel shall be considered a major facility only when hazardous
42 substances are transferred between vessels.

43 A facility shall not be considered a major facility for the
44 purpose of this act unless it has total combined above ground or
45 buried storage capacity of:

46 (1) 20,000 gallons or more for hazardous substances which are
47 other than petroleum or petroleum products, or

48 (2) 200,000 gallons or more for hazardous substances of all
49 kinds.

1 For the purposes of this definition, "storage capacity" shall
2 mean only that total combined capacity which is dedicated to,
3 used for or intended to be used for storage of hazardous
4 substances of all kinds. Where appropriate to the nature of the
5 facility, storage capacity may be determined by the intended or
6 actual use of open land or unenclosed space as well as by the
7 capacities of tanks or other enclosed storage spaces;

8 m. "Natural resources" means all land, fish, shellfish, wildlife,
9 biota, air, waters and other such resources owned, managed, held
10 in trust or otherwise controlled by the State;

11 n. "Owner" or "operator" means, with respect to a vessel, any
12 person owning, operating or chartering by demise such vessel;
13 with respect to any major facility, any person owning such
14 facility, or operating it by lease, contract or other form of
15 agreement; with respect to abandoned or derelict major
16 facilities, the person who owned or operated such facility
17 immediately prior to such abandonment, or the owner at the time
18 of discharge;

19 o. "Person" means public or private corporations, companies,
20 associations, societies, firms, partnerships, joint stock companies,
21 individuals, the United States, the State of New Jersey and any of
22 its political subdivisions or agents;

23 p. "Petroleum" or "petroleum products" means oil or
24 petroleum of any kind and in any form, including, but not limited
25 to, oil, petroleum, gasoline, kerosene, fuel oil, oil sludge, oil
26 refuse, oil mixed with other wastes, crude oils, and substances or
27 additives to be utilized in the refining or blending of crude
28 petroleum or petroleum stock in this State; however, any
29 compound designated by specific chemical name on the list of
30 hazardous substances adopted by the department pursuant to
31 subsection 3 k. shall not be considered petroleum or a petroleum
32 product for the purposes of this act, unless such compound is to
33 be utilized in the refining or blending of crude petroleum or
34 petroleum stock in this State;

35 q. "Taxpayer" means the owner or operator of a major facility
36 subject to the tax provisions of this act;

37 r. "Tax period" means every calendar month on the basis of
38 which the taxpayer is required to report under this act;

39 s. "Transfer" means unloading or offloading between major
40 facilities and vessels, or vessels and major facilities, and from
41 vessel to vessel or major facility to major facility, except for
42 fueling or refueling operations and except that with regard to the
43 movement of hazardous substances other than petroleum, it shall
44 also include any unloading of or offloading from a major facility;

45 t. "Vessel" means every description of watercraft or other
46 contrivance that is practically capable of being used as a means
47 of commercial transportation of hazardous substances upon the
48 water, whether or not self-propelled;

49 u. "Waters" means the ocean and its estuaries to the seaward

1 limit of the State's jurisdiction, all springs, streams and bodies of
2 surface or groundwater, whether natural or artificial, within the
3 boundaries of this State;

4 v. "Act of God" means an act exclusively occasioned by an
5 unanticipated, grave natural disaster without the interference of
6 any human agency.

7 (cf: P.L.1986, c.143, s.1)

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

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

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

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

35 [The department may agree to defend and indemnify a
36 contractor against claims, causes of action, demands, costs, or
37 judgments made against a contractor arising as a direct result of
38 the contractor's provision of hazardous substance cleanup or
39 mitigation services pursuant to a contract with the department.
40 This legal defense and indemnification shall not apply to claims,
41 causes of action, demands, costs, or judgments which are proven
42 to have arisen from gross negligence, willful misconduct, fraud,
43 intentional tort, bad faith, or criminal misconduct, or to claims
44 for punitive or exemplary damage. The department shall agree to
45 provide legal defense and indemnification to a contractor only if
46 it determines that adequate environmental liability insurance is
47 not available or not available at a reasonable cost to the
48 contractor. The department shall agree to provide legal defense
49 and indemnification to a contractor pursuant to terms and

1 limitations which it deems appropriate. Any agreement by the
2 department to defend or indemnify a contractor shall not bar the
3 department from the exercise of any available legal remedies for
4 the enforcement of the contract between the department and the
5 contractor, the recovery of damages to which the department
6 may be entitled resulting from a contractor's failure to perform
7 the contract, or for the recovery of funds expended for the
8 defense of a contractor if the defense was undertaken in response
9 to a claim or cause of action brought against the contractor
10 which is proven to have arisen from gross negligence, willful
11 misconduct, fraud, intentional tort, bad faith, or criminal
12 misconduct. No person other than a contractor shall have the
13 right to enforce any agreement for defense and indemnification
14 between a contractor and the department. The department shall
15 not enter into an agreement to provide legal defense and
16 indemnification to a contractor after January 1, 1990. For the
17 purposes of this subsection, "contractor" means a person
18 providing services to mitigate or clean up a discharge or release
19 or threatened discharge or release of a hazardous substance in
20 this State pursuant to P.L.1976, c.141 (C.58:10-23.11 et seq.) or
21 the "Comprehensive Environmental Response, Compensation and
22 Liability Act of 1980," Pub.L.96-510 (42 U.S.C. §9601 et seq.)]

23 Nothing in this section is intended to preclude removal and
24 cleanup operations by any person threatened by such discharges,
25 provided such persons coordinate and obtain approval for such
26 actions with ongoing State or federal operations. No action taken
27 by any person to contain or remove a discharge shall be construed
28 as an admission of liability for said discharge. No person who
29 renders assistance in containing or removing a discharge shall be
30 liable for any civil damages to third parties resulting solely from
31 acts or omissions of such person in rendering such assistance,
32 except for acts or omissions of gross negligence or willful
33 misconduct. In the course of cleanup operations, no person shall
34 discharge any detergent into the waters of this State without
35 prior authorization of the commissioner.

36 b. Notwithstanding any other provisions of P.L.1976, c.141
37 (C.58:10-23.11 et seq.), the department, subject to the approval
38 of the administrator with regard to the availability of funds
39 therefor, may remove or arrange for the removal of any
40 hazardous substance which:

41 (1) Has not been discharged from a grounded or disabled
42 vessel, if the department determines that such removal is
43 necessary to prevent an imminent discharge of such hazardous
44 substance; or

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

49 (a) Explosiveness;

- 1 (b) High flammability;
 - 2 (c) Radioactivity;
 - 3 (d) Chemical properties which in combination with any
4 discharged hazardous substance at the same storage facility
5 would create a substantial risk of imminent damage to public
6 health or safety or an imminent and severe damage to the
7 environment;
 - 8 (e) Is stored in a container from which its discharge is
9 imminent as a result of contact with a hazardous substance which
10 has already been discharged and such additional discharge would
11 create a substantial risk of imminent damage to public health or
12 safety or imminent and severe damage to the environment; or
 - 13 (f) High toxicity and is stored or being transported in a
14 container or motor vehicle, truck, railcar or other mechanized
15 conveyance from which its discharge is imminent as a result of
16 the significant deterioration or the precarious location of the
17 container, motor vehicle, truck, railcar or other mechanized
18 conveyance, and such discharge would create a substantial risk of
19 imminent damage to public health or safety or imminent and
20 severe damage to the environment; or
 - 21 (3) Has been discharged prior to the effective date of
22 P.L.1976, c.141.
- 23 c. If and to the extent that he determines that funds are
24 available, the administrator shall approve and make payments for
25 any cleanup and removal costs incurred by the department for the
26 removal of a hazardous substance other than petroleum as
27 authorized by subsection b. of this section; provided that in
28 determining the availability of funds, the administrator shall not
29 include as available funds revenues realized or to be realized
30 from the tax on the transfer of petroleum, to the extent that
31 such revenues result from a tax levied at a rate in excess of \$0.01
32 per barrel, pursuant to subsection 9b. of P.L.1976, c.141
33 (C.58:10-23.11h), unless the administrator determines that the
34 sum of claims paid by the fund on behalf of petroleum discharges
35 or removals plus pending reasonable claims against the fund on
36 behalf of petroleum discharges or removals is greater than 30%
37 of the sum of all claims paid by the fund plus all pending
38 reasonable claims against the fund.
- 39 d. The administrator may only approve and make payments for
40 any cleanup and removal costs incurred by the department for the
41 removal of a hazardous substance discharged prior to the
42 effective date of P.L.1976, c.141, pursuant to subsection b. of
43 this section, if, and to the extent that, he determines that
44 adequate funds from another source are not or will not be
45 available; and provided further, with regard to the cleanup and
46 removal costs incurred for discharges which occurred prior to the
47 effective date of P.L.1976, c.141, the administrator may not
48 during any one-year period pay more than \$18,000,000[.00] in
49 total or more than \$3,000,000[.00] for any discharge or related

1 set or series of discharges.

2 e. Notwithstanding any other provisions of P.L.1976, c.141, the
3 administrator, after considering, among any other relevant
4 factors, the department's priorities for spending funds pursuant
5 to P.L.1976, c.141, and within the limits of available funds, shall
6 make payments for the restoration or replacement of, or
7 connection to an alternative water supply for, any private
8 residential well destroyed, contaminated, or impaired as a result
9 of a discharge prior to the effective date of P.L.1976, c.141;
10 provided, however, total payments for said purpose shall not
11 exceed \$500,000[.00] for the period between the effective date of
12 this subsection e. and January 1, 1983, and in any calendar year
13 thereafter.

14 f. Any expenditures made by the administrator pursuant to this
15 act shall constitute, in each instance, a debt of the discharger to
16 the fund. The debt shall constitute a lien on all property owned by
17 the discharger when a notice of lien, incorporating a description
18 of the property of the discharger subject to the cleanup and
19 removal and an identification of the amount of cleanup, removal
20 and related costs expended from the fund, is duly filed with the
21 clerk of the Superior Court. The clerk shall promptly enter upon
22 the civil judgment or order docket the name and address of the
23 discharger and the amount of the lien as set forth in the notice of
24 lien. Upon entry by the clerk, the lien, to the amount committed
25 by the administrator for cleanup and removal, shall attach to the
26 revenues and all real and personal property of the discharger,
27 whether or not the discharger is insolvent.

28 The notice of lien filed pursuant to this subsection which
29 affects the property of a discharger subject to the cleanup and
30 removal of a discharge shall create a lien with priority over all
31 other claims or liens which are or have been filed against the
32 property, except if the property comprises six dwelling units or
33 less and is used exclusively for residential purposes, this notice of
34 lien shall not affect any valid lien, right or interest in the
35 property filed in accordance with established procedure prior to
36 the filing of this notice of lien. The notice of lien filed pursuant
37 to this subsection which affects any property of a discharger,
38 other than the property subject to the cleanup and removal, shall
39 have priority from the day of the filing of the notice of the lien
40 over all other claims and liens filed against the property, but
41 shall not affect any valid lien, right, or interest in the property
42 filed in accordance with established procedure prior to the filing
43 of a notice of lien pursuant to this subsection.

44 (cf: P.L.1987, c.415, s.1)

45 15. Section 16 of P.L.1976, c.141 (C.58:10-23.11o) is amended
46 to read as follows:

47 16. Moneys in the New Jersey Spill Compensation Fund shall
48 be disbursed by the administrator for the following purposes and
49 no others:

- 1 (1) Costs incurred under section 7 of [this act] P.L.1976, c.141
2 (C.58:10.23.11f);
- 3 (2) Damages as defined in section 8 of [this act] P.L.1976,
4 c.141 (C.58:10-23.11g);
- 5 (3) Such sums as may be necessary for research on the
6 prevention and the effects of spills of hazardous substances on
7 the marine environment and on the development of improved
8 cleanup and removal operations as may be appropriated by the
9 Legislature; provided, however, that such sums shall not exceed
10 the amount of interest which is credited to the fund;
- 11 (4) Such sums as may be necessary for the boards, general
12 administration of the fund, equipment and personnel costs of the
13 department and any other State agency related to the
14 enforcement of [this act] P.L.1976, c.141, including any costs
15 incurred by the department pursuant to P.L.1990, c.78 or
16 pursuant to any other law designed to prevent the discharge of a
17 hazardous substance, as may be appropriated by the Legislature;
- 18 (5) Such sums as may be appropriated by the Legislature for
19 research and demonstration programs concerning the causes and
20 abatement of ocean pollution; provided, however, that such sums
21 shall not exceed the amount of interest which is credited to the
22 fund;
- 23 (6) Such sums as may be requested by the commissioner, up to
24 a limit of \$400,000[.00] per year, to cover the costs associated
25 with the administration of the "Environmental Cleanup
26 Responsibility Act," P.L.1983, c.330 (C.13:1K-6 et seq.);
- 27 (7) Costs attributable to the [department's] State's obligation
28 to defend and indemnify a contractor pursuant to [subsection a.
29 of section 7 of this act, subject to the appropriation by law of
30 monies from the General Fund to the fund to defray these costs]
31 sections 1 through 11 of P.L. , c. (C.) (pending
32 in the Legislature as this bill);
- 33 (8) Administrative costs incurred by the department to
34 implement the provisions of P.L.1977, c.74 (C.58:10A-1 et seq.),
35 as amended and supplemented by P.L.1990, c.28, on a timely
36 basis, except that the amounts used for this purpose shall not
37 exceed \$2,000,000. Any moneys disbursed by the department from
38 the fund for this purpose shall be repaid to the fund in equal
39 amounts from the penalties collected by the department pursuant
40 to P.L.1977, c.74 and P.L. 1990, c.28, in annual installments
41 beginning July 1, 1991 and annually thereafter until the full
42 amount is repaid according to a schedule of repayments
43 determined by the State Treasurer.
- 44 The Treasurer may invest and reinvest any moneys in said fund
45 in legal obligations of the United States, this State or any of its
46 political subdivisions. Any income or interest derived from such
47 investment shall be included in the fund.
- 48 (cf: P.L.1990, c.78, s.18)
- 49 ¹16. Section 1 of P.L. 1985, c.461 (C.58:10-23.11g1) is amended

1 to read as follows:

2 1. The provisions of P.L. 1976, c. 141 (C. 58:10-23.11 et seq.),
3 or any other law, rule or regulation to the contrary
4 notwithstanding, the liability of any person performing hazardous
5 discharge mitigation or cleanup services in accordance with
6 procedures established pursuant to State or federal law and a
7 surety who issues a bid, performance or payment bond for such
8 person for such services for any injury to a person or property
9 caused by or related to these services shall be limited to acts or
10 omissions of the person or surety during the course of performing
11 these services which can be shown, based on a preponderance of
12 the evidence, to have been negligent. For the purposes of this
13 act, the demonstration that acts or omissions of a person or
14 surety performing mitigation or cleanup services were in
15 accordance with generally accepted practice and
16 state-of-the-art scientific knowledge, and utilized the best
17 technology reasonably available to the person at the time the
18 mitigation or cleanup services were performed shall create a
19 rebuttable presumption that the acts or omissions were not
20 negligent.¹

21 (cf: P.L.1985, c.461, s.1)

22 ¹[16.] 17.¹ (New section) a. When hazardous substance
23 remediation is to be undertaken under contract with the
24 department, and a surety bond is required pursuant to ¹[N.J.S.A.]
25 N.J.S.¹ 2A:44-143, the officer or agent contracting on behalf of
26 the department shall require a performance surety bond with
27 good and sufficient sureties, with an additional obligation for the
28 payment by the contractor, and by all subcontractors and
29 suppliers having a direct, contractual relationship with the
30 response action contractor, or with the owner of the site, as the
31 case may be, for all labor performed or materials, provisions,
32 provender, or other supplies, fuels, oils, implements, or
33 machinery used or consumed in such remediation work. When
34 such contract is to be performed for a sum not exceeding
35 \$20,000, the department may at its discretion waive the bond
36 requirement of this section.

37 b. A surety's obligation shall not extend to any claim for
38 damages based upon alleged negligence that resulted in personal
39 injury, wrongful death, or damage to real or personal property,
40 and no bond shall in any way be construed as a liability insurance
41 policy. The surety shall in no event be liable on bonds to
42 indemnify or compensate the obligee for loss or liability arising
43 from personal injury or property damage whether or not caused
44 by a breach of the bonded contract. Nothing herein shall relieve
45 the surety's obligation to guarantee the contractor's
46 performance of all conditions of the contract. Only the obligee
47 named on the bond, and any person performing labor for a
48 contractor or subcontractor covered by the surety bond, or any
49 person providing materials for remediation work for which the

1 bond is required pursuant to this section, shall have any claim
2 against the surety under the bond. Unless otherwise provided for
3 by the division in the bond, in the event of a default, the surety's
4 liability on a performance bond shall be only for the cost of
5 completion of the contract work in accordance with the plans and
6 specifications, less the balance of funds remaining to be paid
7 under the contract, up to the penal sum of the bond.

8 ¹[17.] 18.¹ (New section) The Department of Environmental
9 Protection shall, ¹[6] 24¹ months ¹[prior to the expiration] after
10 the enactment¹ of this act, submit a report to the Assembly
11 Energy and Environment Committee and the Senate
12 Environmental Quality Committee, or their successors, assessing
13 the current availability and affordability of environmental
14 liability insurance for contractors in the private market, and the
15 legal defense and indemnification program administered pursuant
16 to sections 1 through 11 of P.L. , (C.) (pending in the
17 Legislature as this bill). The report shall include the costs of
18 administering the program to the State; a list of contractors
19 indemnified by the State and the amount of indemnification
20 provided; a list of site specific bids and awards for each contract
21 for which the State provided indemnification; the impact of the
22 program on the quality and cost of response action contracts; the
23 number and nature of any actions or claims defended by the State
24 under the legal defense and indemnification program and their
25 disposition; the number and nature of any actions or claims for
26 environmental impairment damages brought against contractors
27 for which private insurance carriers were liable and their
28 disposition; a technical evaluation of contractor practices that
29 were causes of claims against the program, and recommendations
30 for rectifying any such deficiencies; such other information as
31 may be helpful to the Legislature in evaluating the continued
32 need for, and usefulness of, the legal defense and indemnification
33 program; and a recommendation as to whether the legal defense
34 and indemnification program should be continued. If the
35 department recommends a continuation of the program, the
36 department shall identify, as practicable, measures that may be
37 taken to minimize the legal exposure of, and the costs to, the
38 State under the program, as well as such other measures as would
39 improve program effectiveness.

40 ¹[18.] 19.¹ Within 120 days of the effective date of this act,
41 the State Treasurer and the Attorney General as necessary shall,
42 pursuant to "Administrative Procedure Act," P.L.1968, c.410
43 (C.52:14B-1 et seq.), respectively adopt rules and regulations to
44 implement the provisions of this act.

45 ¹[19.] 20.¹ The provisions of this amendatory and
46 supplementary act shall not affect any contract or agreement for
47 legal defense and indemnification entered into by the Department
48 of Environmental Protection with a contractor pursuant to
49 P.L.1986, c.59 prior to the effective date of P.L. , c. (C.)

1 (pending in the Legislature as this bill).

2 ¹[20.] 21.¹ Section 5 of P.L.1986, c.59 is repealed.

3 ¹[21.] 22.¹ This act shall take effect immediately and sections
4 1 through ¹[19] 11 and section 19¹ shall expire three years from
5 the date of its enactment.

6

7

8

ENVIRONMENT

9

10 Provides for the indemnification by the State of certain
11 hazardous substance response action contractors and limits the
12 liability of those contractors and of certain sureties.

SENATE, No. 2844

STATE OF NEW JERSEY

INTRODUCED SEPTEMBER 24, 1990

By Senator LESNIAK

1 AN ACT concerning response action contractor indemnification,
2 amending and supplementing P.L.1976, c.141, and repealing
3 section 5 of P.L.1986, c.59.
4

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

7 1. (New section) This act shall be known and may be cited as
8 the "Hazardous Substance Response Action Contractors
9 Indemnification Act."

10 2. (New section) The Legislature finds and declares that it is
11 the public policy of this State to safely and expeditiously handle,
12 treat, remove and dispose of hazardous substances released or
13 spilled to the environment or at hazardous waste sites for which
14 there is no responsible party; that the availability of an adequate
15 supply of private contractors for performing the design,
16 engineering and construction of cleanup or mitigation of sites
17 contaminated by hazardous substances is essential for assuring
18 both the expeditious cleanup of such sites and a competitive
19 marketplace for contractor services; that hazardous substance
20 response action contractors continue to experience considerable
21 difficulties in obtaining environmental liability insurance at
22 affordable prices; that even when environmental liability
23 insurance coverage is available it is being written on a
24 claims-made basis for limited durations; that the current
25 alternatives to State indemnification, including self-insurance
26 and liability insurance, fail to sufficiently protect the State from
27 possible future claims against the State, as well as fail to protect
28 the interests of prospective claimants; and that the interests of
29 the State, its residents, and response action contractors would be
30 better served by the creation of a "Hazardous Substance
31 Response Action Contractors Indemnification," funded through an
32 indemnification fee assessed against response contractors, which
33 would be used to pay excess environmental liability claims arising
34 from hazardous substance cleanup work contracted by the State.

35 3. (New section) As used in this act:

36 "Department" means the Department of Environmental
37 Protection.

38 "Fund" means the "Hazardous Substance Response Action
39 Contractors Indemnification Fund".

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

Matter underlined thus is new matter.

1 "Hazardous substance" means a hazardous substance as defined
2 in section 3 of P.L.1976, c.141 (C.58:10-23.11b).

3 "Remediation" means the cleanup, removal, mitigation, control
4 or management of a discharge of a hazardous substance.

5 "Response action contract" or "contract" means a contract
6 entered into by a response action contractor with the department
7 or any other agency of the State to provide services or work for,
8 or relating to, the remediation, or attempted remediation, of a
9 hazardous substance, or to prevent or mitigate damages to the
10 public health, safety, or welfare, including damages to public or
11 private property, pursuant to P.L.1976, c.141 (C.58:10-23.11 et
12 seq.), which services or work shall include evaluation, planning,
13 engineering, surveying, design, construction, or other related
14 services or work.

15 "Response action contractor" or "contractor" means a person,
16 including an employee or subcontractor of a person, who enters
17 into a response action contract.

18 4. (New section) a. There is created in the Department of the
19 Treasury a "Hazardous Substance Response Action Contractors
20 Indemnification Fund." The State Treasurer shall be custodian of
21 the fund, and shall direct payments to be made from the fund for
22 legal defense and indemnification provided to an eligible response
23 action contractor, including amounts certified by the Attorney
24 General pursuant to section 9 of P.L. c. (C.) (pending
25 in the Legislature as this bill). Interest or other return earned on
26 monies deposited in the fund shall be credited to the fund.

27 b. An indemnification fee of 6% shall be assessed on the total
28 amount of each response action contract entered into on or after
29 the effective date of this act by the department or other agency
30 of the State with a response action contractor for the provision
31 of hazardous substance remediation wholly or partially funded
32 with State monies, including monies in the New Jersey Spill
33 Compensation Fund, established pursuant to section 10 of
34 P.L.1976, c.141 (C.58:10-23.11i), except that indemnification
35 shall not be provided to any project wholly or partially funded
36 with federal monies if indemnification is available from a federal
37 governmental agency, or the response action contractor is
38 required to satisfy other financial responsibility requirements
39 under federal law. The purpose of the indemnification fee is to
40 provide response action contractors with legal defense and
41 indemnification for any claim or judgment not otherwise
42 excepted pursuant to subsection c. of section 5 of P.L. , c.
43 (C.) (pending in the Legislature as this bill), if the claim or
44 judgment exceeds the amount of a contractor's indemnification
45 deductible as determined pursuant to subsection b. of the
46 aforesaid section 5. An amount equal to 6% of each payment
47 made under the response action contract shall be deducted as the
48 indemnification fee charge by the department from each payment

1 to a contractor, and shall be deposited directly into the fund.

2 5. (New section) a. Except as otherwise provided in
3 subsection b. of this section, the Attorney General shall defend
4 and indemnify a response action contractor who has paid an
5 indemnification fee pursuant to subsection b. of section 4 of
6 P.L. , c. (C.) (pending in the Legislature as this
7 bill) against a claim or judgment arising as a direct result of
8 services or work rendered pursuant to a response action contract
9 paid wholly or partially from State monies, including monies from
10 the "New Jersey Spill Compensation Fund, except as otherwise
11 provided in subsection c. of section 5 of P.L. , c.
12 (C.) (pending in the Legislature as this bill), if the
13 amount of the claim or judgment exceeds the amount of the
14 deductible prescribed under the terms of a contract of legal
15 defense and indemnification entered into by the contractor and
16 the department or other contracting agency of the State.
17 Indemnification shall be for claims involving death or injury to
18 persons, or loss or damage to property, and shall be for the
19 amount of a claim or judgment in excess of the deductible, and,
20 as hereinafter provided, legal defense and court costs incurred in
21 defending against the amount of the claim or judgment in excess
22 of the deductible, except that State liability for any one
23 occurrence shall not exceed \$25,000,000, or shall not exceed in
24 the aggregate on any single contract \$50,000,000. A response
25 action contractor shall not be liable for a claim or judgment in
26 excess of the State's liability limits unless the claim or judgment
27 is otherwise excepted from indemnification pursuant to the
28 provisions of subsection c. of section 5 of this act.

29 Nothing in this subsection shall be construed to limit the right
30 of an eligible claimant to pursue any other remedy available
31 under statutory or common law against a responsible party, as
32 defined in subsection c. of section 8 of P.L.1976, c.141
33 (C.58:10-23.11g.), other than a response action contractor, for
34 any claim amount in excess of the liability limits established
35 pursuant to this subsection.

36 b. Every contract of indemnification shall contain a deductible
37 equal to 0.75 times the amount of the contract, but not to exceed
38 \$5,000,000. The deductible shall be on a per occurrence basis.

39 c. Legal defense and indemnification shall not apply to (1)
40 claims that are proven to have arisen from actions involving
41 gross negligence, willful misconduct, fraud, intentional tort, bad
42 faith, or criminal misconduct by the contractor, (2) claims or
43 judgments for punitive or exemplary damages, or (3) claims
44 involving actions outside the scope of the response action
45 contract.

46 d. Legal defense and indemnification provided to a contractor
47 shall be on such terms and conditions as shall be prescribed by the
48 Attorney General and as may be consistent with the provisions of

1 this act.

2 e. Legal defense and indemnification of a contractor pursuant
3 to this section or section 9 of P.L. , c. (C.) (pending in
4 the Legislature as this bill) , shall not bar the State from
5 exercising any available legal remedies for the enforcement of a
6 contract between the department or other contracting agency
7 and the contractor, the recovery of damages to which the
8 department or agency may be entitled as a result of a
9 contractor's failure to perform the contract, or for the recovery
10 by the Attorney General of funds expended for the defense or
11 indemnification of a contractor if the defense was undertaken in
12 response to a claim brought against the contractor that is proven
13 to have arisen from gross negligence, willful misconduct, fraud,
14 intentional tort, bad faith, or criminal misconduct.

15 f. No person other than a contractor shall have the right to
16 enforce a right of legal defense and indemnification pursuant to
17 this section.

18 Nothing in this section shall be construed to authorize
19 indemnification of a responsible party or other person, or of a
20 response action contractor engaged in a remediation action on
21 behalf of a responsible party or other person, whether or not the
22 remediation action is funded in part by the State.

23 6. (New section) A contractor shall not, except for good and
24 substantial cause, be entitled to legal defense and
25 indemnification by the Attorney General pursuant to this act
26 unless within 10 calendar days of receipt of any summons,
27 complaint, process, notice, demand or pleading subject to legal
28 defense and indemnification, the contractor delivers, by certified
29 mail or personal delivery, the original or a copy of the summons,
30 complaint, process, notice, demand or pleading to the department
31 or other contracting agency, and the Attorney General. Delivery
32 of notice shall constitute an agreement by the contractor that
33 the Attorney General shall be responsible for the conduct of the
34 defense for the claim amount in excess of the contractor's
35 deductible in a manner that the Attorney General deems to be in
36 the best interests of the contractor and the State, including
37 authority to enter into a negotiated settlement of that excess
38 amount. The contractor shall cooperate fully with the Attorney
39 General's defense.

40 The Attorney General shall submit a certified voucher to the
41 fund for payment of the amount of the judgment or settlement
42 and court costs, and for payment to the Department of Law and
43 Public Safety of legal defense costs incurred by that department.

44 No settlement shall be entered into by a contractor or his
45 authorized representative if the amount of the settlement
46 exceeds the contractor's deductible unless the settlement is
47 approved by the Attorney General.

48 7. (New section) a. Notwithstanding the provision of any

1 other law to the contrary, a person shall be barred from
2 recovering against a response action contractor indemnified
3 pursuant to P.L. , c. (C.) (pending in the Legislature
4 as this bill) for injury to persons, or damage to, or loss of,
5 property if:

6 (1) the claimant fails to file a notice of claim with the
7 contractor within 90 days of accrual of the claim, except that the
8 Superior Court may permit a claimant to file a notice at any time
9 within one year of accrual of the claim provided that the
10 contractor and, as applicable, the State are not substantially
11 prejudiced thereby, and provided further that the claimant shows
12 sufficient reasons for his failure to file a notice of claim within
13 the 90 days;

14 (2) two years have elapsed since accrual of the claim and the
15 claimant has failed to file an action therefor; or

16 (3) the claimant or his authorized representative entered into
17 a settlement with respect to the claim.

18 b. The provisions of this section shall not apply to a claim not
19 subject to legal defense and indemnification pursuant to
20 subsection c. of section 5 of this P.L. , c. (C.)
21 (pending in the Legislature as this bill). Nothing in this section
22 shall prohibit an infant or incompetent person from commencing
23 an action under this act within the time limitations specified in
24 this section, after his coming or being of full age or sane mind.

25 8. (New section) a. In the event the Attorney General
26 determines that appearing and defending a contractor pursuant to
27 section 5 of P.L. , c. (C.) (pending in the Legislature
28 as this bill) (1) involves an actual or potential conflict of interest
29 between the State and the contractor, (2) the act or omission
30 giving rise to (a) the claim is not within the scope of the service
31 contract, or (b) the claim or costs involve gross negligence,
32 willful misconduct, fraud, intentional tort, bad faith, or criminal
33 misconduct by the contractor, the Attorney General shall decline
34 in writing to appear or defend, or shall promptly withdraw as
35 attorney for the contractor. The contractor thereupon may
36 employ his own attorney to appear and defend against the claim.

37 b. If the Attorney General declines to appear and defend a
38 contractor by reason of an actual or potential conflict of
39 interest, the Attorney General shall authorize indemnification of
40 the contractor for the amount of the judgment in excess of the
41 amount of contractor's indemnification deductible, and
42 reasonable legal expenses and court costs incurred by the
43 contractor in defending against the amount of the claim or
44 judgment in excess of the contractor's deductible.

45 c. If the Attorney General declines to appear and defend, or
46 withdraws from defending, on the grounds that the act or
47 omission giving rise to the claim or costs was not within the
48 scope of the service contract, or was the result of gross

1 negligence, willful misconduct, fraud, intentional tort, bad faith,
2 or criminal misconduct on the part of the contractor, but the
3 court finds that the act or omission was within the scope of the
4 contract, or was not the result of gross negligence, willful
5 misconduct, fraud, intentional tort, bad faith, or criminal
6 misconduct on the part of the contractor, the Attorney General
7 shall authorize indemnification of the contractor for the amount
8 of the judgment in excess of the amount of the contractor's
9 indemnification deductible, and reasonable legal expenses and
10 court costs incurred by the contractor in defending against the
11 amount of the claim or judgment in excess of the contractor's
12 deductible.

13 No settlement shall be entered into by a contractor or an
14 authorized representative if the amount of the settlement
15 exceeds the contractor's deductible unless the settlement is
16 approved by the Attorney General.

17 9. (New section) A certified copy of any judgment or
18 settlement entered into pursuant to section 8 of P.L. , c.
19 (C.) (pending in the Legislature as this bill) shall be
20 submitted to the Attorney General for a determination as to
21 whether the judgment is final and subject to indemnification. If
22 the judgment is final and subject to indemnification, the Attorney
23 General shall submit a certified voucher to the fund for payment
24 of the amount in the manner specified in subsection c. of section
25 8.

26 10. (New section) A judgment or settlement against a
27 contractor, including judgments or settlements where
28 indemnification is not provided because of the deductible
29 required in accordance with subsection b. of section 5 of P.L. ,
30 c. (C.) (pending in the Legislature as this bill), but
31 excluding a judgment or settlement involving a claim exempted
32 pursuant subsection c. of that section, shall be subject to such
33 applicable limitations or conditions as are set forth in
34 N.J.S.59:9-2 through 59:9-5. In determining the amount of an
35 award for damages to property subject to the provisions of this
36 section, the court may reduce the amount of the award for
37 damages to property by all or a portion of the enhancement value
38 resulting from the remediation action taken or paid for by the
39 State.

40 11. (New section) a. The fund is subrogated to any rights of a
41 claimant paid by the fund for an indemnified claim or judgment,
42 including court and legal costs, against a party responsible for the
43 discharge as defined in subsection c. of section 8 of P.L.1976,
44 c.141 (C.58:10-23.11g.), other than a response action contractor
45 not excepted from indemnification under the provisions of
46 subsection c. of section 5 of P.L. , c. (C.) (pending in
47 the Legislature as this bill).

48 b. Nothing in P.L. ,c. (C.) (pending in the Legislature

1 as this bill) shall be construed to limit the liability of a party
2 responsible for a discharge, other than a response action
3 contractor not excepted from indemnification, to the "New
4 Jersey Spill Compensation Fund," established pursuant to section
5 10 of P.L.1976, c.141 (C.58:10-23.11i.), for all costs recoverable
6 pursuant to section 8 of P.L.1976, c.141 (C.58:10-23.11g.).

7 c. Nothing in this act shall be construed to affect any of the
8 defenses and immunities available to the State pursuant to the
9 "New Jersey Tort Claims Act," N.J.S.59:1-1 et seq., or any other
10 provisions contained therein, for claims against the State or any
11 of its employees.

12 12. (New section) a. In the event that monies in the fund are
13 insufficient to pay legal defense or indemnification costs incurred
14 by the State, the amount of the insufficiency shall be paid from
15 the New Jersey Spill Compensation Fund to the extent that
16 monies are available therefor. Monies provided to the fund from
17 the New Jersey Spill Compensation Fund shall be paid back to the
18 fund.

19 b. If monies in the fund are insufficient to pay legal defense
20 and indemnification costs incurred by the State over a 12-month
21 period, the department shall petition the Governor and the
22 Legislature for an increase in indemnification fee assessments
23 made pursuant to section 4 of this act.

24 13. Section 2 of P.L.1976, c.141 (C.58:10-23.11a) is amended
25 to read as follows:

26 2. The Legislature finds and declares: that New Jersey's lands
27 and waters constitute a unique and delicately balanced resource;
28 that the protection and preservation of these lands and waters
29 promote the health, safety and welfare of the people of this
30 State: that the tourist and recreation industry dependent on clean
31 waters and beaches is vital to the economy of this State; that the
32 State is the trustee, for the benefit of its citizens, of all natural
33 resources within its jurisdiction; and that the storage and transfer
34 of petroleum products and other hazardous substances between
35 vessels, between facilities and vessels, and between facilities,
36 whether onshore or offshore, is a hazardous undertaking and
37 imposes risk of damage to persons and property within this State.

38 The Legislature finds and declares that the discharge of
39 petroleum products and other hazardous substances within or
40 outside the jurisdiction of this State constitutes a threat to the
41 economy and environment of this State. The Legislature intends
42 by the passage of this act to exercise the powers of this State to
43 control the transfer and storage of hazardous substances and to
44 provide liability for damage sustained within this State as a result
45 of any discharge of said substances, by requiring the prompt
46 containment and removal of such pollution and substances, and to
47 provide a fund for swift and adequate compensation to resort
48 businesses and other persons damaged by such discharges, and a

1 fund for the defense and indemnification of certain persons under
2 contract with the State [or federal government] for claims or
3 actions resulting from the provision of services or work to
4 mitigate or clean up a release or discharge of hazardous
5 substances.

6 (cf: P.L.1986, c.59, s.1)

7 14. Section 3 of P.L.1976, c.141 (C.58:10-23.11b) is amended
8 to read as follows:

9 3. Unless the context clearly indicates otherwise, the
10 following terms shall have the following meanings:

11 a. "Administrator" means the chief executive of the New
12 Jersey Spill Compensation Fund;

13 b. "Barrel" means 42 United States gallons or 159.09 liters or
14 an appropriate equivalent measure set by the director for
15 hazardous substances which are other than fluid or which are not
16 commonly measured by the barrel;

17 c. "Board" means a board of arbitration convened by the
18 administrator to settle disputed disbursements from the fund;

19 d. "Cleanup and removal costs" means all costs associated
20 with a discharge, incurred by the State or its political
21 subdivisions or their agents or any person with written approval
22 from the department in the: (1) removal or attempted removal of
23 hazardous substances, or (2) taking of reasonable measures to
24 prevent or mitigate damage to the public health, safety, or
25 welfare, including, but not limited to, public and private
26 property, shorelines, beaches, surface waters, water columns and
27 bottom sediments, soils and other affected property, including
28 wildlife and other natural resources, and shall include costs
29 incurred by the [department] State for the indemnification and
30 legal defense of contractors pursuant to [subsection a. of section
31 7 of this act, subject to the appropriation by law of moneys from
32 the General Fund to the fund to defray these costs] section 1
33 through 12 of P.L. , c. (C.) (pending in the
34 Legislature as this bill);

35 e. "Commissioner" means the Commissioner of Environmental
36 Protection;

37 f. "Department" means the Department of Environmental
38 Protection;

39 g. "Director" means the Director of the Division of Taxation
40 in the Department of the Treasury;

41 h. "Discharge" means any intentional or unintentional action
42 or omission resulting in the releasing, spilling, leaking, pumping,
43 pouring, emitting, emptying or dumping of hazardous substances
44 into the waters or onto the lands of the State, or into waters
45 outside the jurisdiction of the State, when damage may result to
46 the lands, waters or natural resources within the jurisdiction of
47 the State;

48 i. "Fair market value" means the invoice price of the

1 hazardous substances transferred, including transportation
2 charges; but where no price is so fixed, "fair market value" shall
3 mean the market price as of the close of the nearest day to the
4 transfer, paid for similar hazardous substances, as shall be
5 determined by the taxpayer pursuant to rules of the director;

6 j. "Fund" means the New Jersey Spill Compensation Fund;

7 k. "Hazardous substances" means the "environmental
8 hazardous substances" on the environmental hazardous substance
9 list adopted by the department pursuant to section 4 of P.L.1983,
10 c.315 (C.34:5A-4); such elements and compounds, including
11 petroleum products, which are defined as such by the department,
12 after public hearing, and which shall be consistent to the
13 maximum extent possible with, and which shall include, the list of
14 hazardous substances adopted by the federal Environmental
15 Protection Agency pursuant to section 311 of the federal Water
16 Pollution Control Act Amendments of 1972, Pub.L.92-500, as
17 amended by the Clean Water Act of 1977, Pub.L.95-217 (33
18 U.S.C. § 1251 et seq.); the list of toxic pollutants designated by
19 Congress or the EPA pursuant to section 307 of that act; and the
20 list of hazardous substances adopted by the federal
21 Environmental Protection Agency pursuant to section 101 of the
22 "Comprehensive Environmental Response, Compensation and
23 Liability Act of 1980," Pub.L.96-510 (42 U.S.C. § 9601 et seq.);
24 provided, however, that sewage and sewage sludge shall not be
25 considered as hazardous substances for the purposes of this act;

26 l. "Major facility" includes, but is not limited to, any refinery,
27 storage or transfer terminal, pipeline, deep-water port, drilling
28 platform or any appurtenance related to any of the preceding
29 that is used or is capable of being used to refine, produce, store,
30 handle, transfer, process or transport hazardous substances. A
31 vessel shall be considered a major facility only when hazardous
32 substances are transferred between vessels.

33 A facility shall not be considered a major facility for the
34 purpose of this act unless it has total combined above ground or
35 buried storage capacity of:

36 (1) 20,000 gallons or more for hazardous substances which are
37 other than petroleum or petroleum products, or

38 (2) 200,000 gallons or more for hazardous substances of all
39 kinds.

40 For the purposes of this definition, "storage capacity" shall
41 mean only that total combined capacity which is dedicated to,
42 used for or intended to be used for storage of hazardous
43 substances of all kinds. Where appropriate to the nature of the
44 facility, storage capacity may be determined by the intended or
45 actual use of open land or unenclosed space as well as by the
46 capacities of tanks or other enclosed storage spaces;

47 m. "Natural resources" means all land, fish, shellfish, wildlife,
48 biota, air, waters and other such resources owned, managed, held

- 1 in trust or otherwise controlled by the State;
- 2 n. "Owner" or "operator" means, with respect to a vessel, any
3 person owning, operating or chartering by demise such vessel;
4 with respect to any major facility, any person owning such
5 facility, or operating it by lease, contract or other form of
6 agreement; with respect to abandoned or derelict major
7 facilities, the person who owned or operated such facility
8 immediately prior to such abandonment, or the owner at the time
9 of discharge;
- 10 o. "Person" means public or private corporations, companies,
11 associations, societies, firms, partnerships, joint stock companies,
12 individuals, the United States, the State of New Jersey and any of
13 its political subdivisions or agents;
- 14 p. "Petroleum" or "petroleum products" means oil or
15 petroleum of any kind and in any form, including, but not limited
16 to, oil, petroleum, gasoline, kerosene, fuel oil, oil sludge, oil
17 refuse, oil mixed with other wastes, crude oils, and substances or
18 additives to be utilized in the refining or blending of crude
19 petroleum or petroleum stock in this State; however, any
20 compound designated by specific chemical name on the list of
21 hazardous substances adopted by the department pursuant to
22 subsection 3 k. shall not be considered petroleum or a petroleum
23 product for the purposes of this act, unless such compound is to
24 be utilized in the refining or blending of crude petroleum or
25 petroleum stock in this State;
- 26 q. "Taxpayer" means the owner or operator of a major facility
27 subject to the tax provisions of this act;
- 28 r. "Tax period" means every calendar month on the basis of
29 which the taxpayer is required to report under this act;
- 30 s. "Transfer" means onloading or offloading between major
31 facilities and vessels, or vessels and major facilities, and from
32 vessel to vessel or major facility to major facility, except for
33 fueling or refueling operations and except that with regard to the
34 movement of hazardous substances other than petroleum, it shall
35 also include any onloading of or offloading from a major facility;
- 36 t. "Vessel" means every description of watercraft or other
37 contrivance that is practically capable of being used as a means
38 of commercial transportation of hazardous substances upon the
39 water, whether or not self-propelled;
- 40 u. "Waters" means the ocean and its estuaries to the seaward
41 limit of the State's jurisdiction, all springs, streams and bodies of
42 surface or groundwater, whether natural or artificial, within the
43 boundaries of this State;
- 44 v. "Act of God" means an act exclusively occasioned by an
45 unanticipated, grave natural disaster without the interference of
46 any human agency.
47 (cf. P.L.1986, c.143, s.1)
- 48 15. Section 7 of P.L.1976, c.141 (C.58:20-23.11f) is amended

1 to read as follows:

2 7. a. Whenever any hazardous substance is discharged, the
3 department may, in its discretion, act to remove or arrange for
4 the removal of such discharge or may direct the discharger to
5 remove, or arrange for the removal of, such discharge. If the
6 discharge occurs at any hazardous or solid waste disposal facility,
7 the department may order the facility closed for the duration of
8 the removal operations. The department may monitor the
9 discharger's compliance with any such directive. Any discharger
10 who fails to comply with such a directive shall be liable to the
11 department in an amount equal to three times the cost of such
12 removal, and shall be subject to the revocation or suspension of
13 any license or permit he holds authorizing him to operate a
14 hazardous or solid waste disposal facility.

15 Removal of hazardous substances and actions to minimize
16 damage from discharges shall, to the greatest extent possible, be
17 in accordance with the National Contingency Plan for removal of
18 oil and hazardous substances established pursuant to section
19 311(c)(2) of the federal Water Pollution Control Act Amendments
20 of 1972 (Pub.L.92-500, 33 U.S.C. §1251 et seq.).

21 Whenever the department acts to remove a discharge or
22 contracts to secure prospective removal services, it is authorized
23 to draw upon the money available in the fund. Such money shall
24 be used to pay promptly for all cleanup costs incurred by the
25 department in removing or in minimizing damage caused by such
26 discharge.

27 [The department may agree to defend and indemnify a
28 contractor against claims, causes of action, demands, costs, or
29 judgments made against a contractor arising as a direct result of
30 the contractor's provision of hazardous substance cleanup or
31 mitigation services pursuant to a contract with the department.
32 This legal defense and indemnification shall not apply to claims,
33 causes of action, demands, costs, or judgments which are proven
34 to have arisen from gross negligence, willful misconduct, fraud,
35 intentional tort, bad faith, or criminal misconduct, or to claims
36 for punitive or exemplary damage. The department shall agree to
37 provide legal defense and indemnification to a contractor only if
38 it determines that adequate environmental liability insurance is
39 not available or not available at a reasonable cost to the
40 contractor. The department shall agree to provide legal defense
41 and indemnification to a contractor pursuant to terms and
42 limitations which it deems appropriate. Any agreement by the
43 department to defend or indemnify a contractor shall not bar the
44 department from the exercise of any available legal remedies for
45 the enforcement of the contract between the department and the
46 contractor, the recovery of damages to which the department
47 may be entitled resulting from a contractor's failure to perform
48 the contract, or for the recovery of funds expended for the

1 defense of a contractor if the defense was undertaken in response
2 to a claim or cause of action brought against the contractor
3 which is proven to have arisen from gross negligence, willful
4 misconduct, fraud, intentional tort, bad faith, or criminal
5 misconduct. No person other than a contractor shall have the
6 right to enforce any agreement for defense and indemnification
7 between a contractor and the department. The department shall
8 not enter into an agreement to provide legal defense and
9 indemnification to a contractor after January 1, 1990. For the
10 purposes of this subsection, "contractor" means a person
11 providing services to mitigate or clean up a discharge or release
12 or threatened discharge or release of a hazardous substance in
13 this State pursuant to P.L.1976, c.141 (C.58:10-23.11 et seq.) or
14 the "Comprehensive Environmental Response, Compensation and
15 Liability Act of 1980," Pub.L.96-510 (42 U.S.C. § 9601 et seq.)]

16 Nothing in this section is intended to preclude removal and
17 cleanup operations by any person threatened by such discharges,
18 provided such persons coordinate and obtain approval for such
19 actions with ongoing State or federal operations. No action taken
20 by any person to contain or remove a discharge shall be construed
21 as an admission of liability for said discharge. No person who
22 renders assistance in containing or removing a discharge shall be
23 liable for any civil damages to third parties resulting solely from
24 acts or omissions of such person in rendering such assistance,
25 except for acts or omissions of gross negligence or willful
26 misconduct. In the course of cleanup operations, no person shall
27 discharge any detergent into the waters of this State without
28 prior authorization of the commissioner.

29 b. Notwithstanding any other provisions of P.L.1976, c.141
30 (C.58:10-23.11 et seq.), the department, subject to the approval
31 of the administrator with regard to the availability of funds
32 therefor, may remove or arrange for the removal of any
33 hazardous substance which:

34 (1) Has not been discharged from a grounded or disabled
35 vessel, if the department determines that such removal is
36 necessary to prevent an imminent discharge of such hazardous
37 substance; or

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

42 (a) Explosiveness;

43 (b) High flammability;

44 (c) Radioactivity;

45 (d) Chemical properties which in combination with any
46 discharged hazardous substance at the same storage facility
47 would create a substantial risk of imminent damage to public
48 health or safety or an imminent and severe damage to the

1 environment;

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

7 (f) High toxicity and is stored or being transported in a
8 container or motor vehicle, truck, railcar or other mechanized
9 conveyance from which its discharge is imminent as a result of
10 the significant deterioration or the precarious location of the
11 container, motor vehicle, truck, railcar or other mechanized
12 conveyance, and such discharge would create a substantial risk of
13 imminent damage to public health or safety or imminent and
14 severe damage to the environment; or

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

17 c. If and to the extent that he determines that funds are
18 available, the administrator shall approve and make payments for
19 any cleanup and removal costs incurred by the department for the
20 removal of a hazardous substance other than petroleum as
21 authorized by subsection b. of this section; provided that in
22 determining the availability of funds, the administrator shall not
23 include as available funds revenues realized or to be realized
24 from the tax on the transfer of petroleum, to the extent that
25 such revenues result from a tax levied at a rate in excess of \$0.01
26 per barrel, pursuant to subsection 9b. of P.L.1976, c.141
27 (C.58:10-23.11h), unless the administrator determines that the
28 sum of claims paid by the fund on behalf of petroleum discharges
29 or removals plus pending reasonable claims against the fund on
30 behalf of petroleum discharges or removals is greater than 30%
31 of the sum of all claims paid by the fund plus all pending
32 reasonable claims against the fund.

33 d. The administrator may only approve and make payments for
34 any cleanup and removal costs incurred by the department for the
35 removal of a hazardous substance discharged prior to the
36 effective date of P.L.1976, c.141, pursuant to subsection b. of
37 this section, if, and to the extent that, he determines that
38 adequate funds from another source are not or will not be
39 available; and provided further, with regard to the cleanup and
40 removal costs incurred for discharges which occurred prior to the
41 effective date of P.L.1976, c.141, the administrator may not
42 during any one-year period pay more than \$18,000,000.00 in total
43 or more than \$3,000,000.00 for any discharge or related set or
44 series of discharges.

45 e. Notwithstanding any other provisions of P.L.1976, c.141, the
46 administrator, after considering, among any other relevant
47 factors, the department's priorities for spending funds pursuant
48 to P.L.1976, c.141, and within the limits of available funds, shall

1 make payments for the restoration or replacement of, or
2 connection to an alternative water supply for, any private
3 residential well destroyed, contaminated, or impaired as a result
4 of a discharge prior to the effective date of P.L.1976, c.141;
5 provided, however, total payments for said purpose shall not
6 exceed \$500,000.00 for the period between the effective date of
7 this subsection e. and January 1, 1983, and in any calendar year
8 thereafter.

9 f. Any expenditures made by the administrator pursuant to this
10 act shall constitute, in each instance, a debt of the discharger to
11 the fund. The debt shall constitute a lien on all property owned by
12 the discharger when a notice of lien, incorporating a description
13 of the property of the discharger subject to the cleanup and
14 removal and an identification of the amount of cleanup, removal
15 and related costs expended from the fund, is duly filed with the
16 clerk of the Superior Court. The clerk shall promptly enter upon
17 the civil judgment or order docket the name and address of the
18 discharger and the amount of the lien as set forth in the notice of
19 lien. Upon entry by the clerk, the lien, to the amount committed
20 by the administrator for cleanup and removal, shall attach to the
21 revenues and all real and personal property of the discharger,
22 whether or not the discharger is insolvent.

23 The notice of lien filed pursuant to this subsection which
24 affects the property of a discharger subject to the cleanup and
25 removal of a discharge shall create a lien with priority over all
26 other claims or liens which are or have been filed against the
27 property, except if the property comprises six dwelling units or
28 less and is used exclusively for residential purposes, this notice of
29 lien shall not affect any valid lien, right or interest in the
30 property filed in accordance with established procedure prior to
31 the filing of this notice of lien. The notice of lien filed pursuant
32 to this subsection which affects any property of a discharger,
33 other than the property subject to the cleanup and removal, shall
34 have priority from the day of the filing of the notice of the lien
35 over all other claims and liens filed against the property, but
36 shall not affect any valid lien, right, or interest in the property
37 filed in accordance with established procedure prior to the filing
38 of a notice of lien pursuant to this subsection.

39 (cf: P.L.1987, c.415, s.1)

40 16. Section 16 of P.L.1976, c.141 (C.58:10-23.11o) is amended
41 to read as follows:

42 16. Moneys in the New Jersey Spill Compensation Fund shall
43 be disbursed by the administrator for the following purposes and
44 no others:

- 45 (1) Costs incurred under section 7 of this act;
- 46 (2) Damages as defined in section 8 of this act;
- 47 (3) Such sums as may be necessary for research on the
48 prevention and the effects of spills of hazardous substances on

1 the marine environment and on the development of improved
2 cleanup and removal operations as may be appropriated by the
3 Legislature; provided, however, that such sums shall not exceed
4 the amount of interest which is credited to the fund;

5 (4) Such sums as may be necessary for the boards, general
6 administration of the fund, equipment and personnel costs of the
7 department and any other State agency related to the
8 enforcement of this act as may be appropriated by the
9 Legislature;

10 (5) Such sums as may be appropriated by the Legislature for
11 research and demonstration programs concerning the causes and
12 abatement of ocean pollution; provided, however, that such sums
13 shall not exceed the amount of interest which is credited to the
14 fund;

15 (6) Such sums as may be requested by the commissioner, up to
16 a limit of \$400,000.00 per year, to cover the costs associated
17 with the administration of the "Environmental Cleanup
18 Responsibility Act," P.L.1983, c.330 (C.13:1K-6 et seq.);

19 (7) Costs attributable to the [department's] State's obligation
20 to defend and indemnify a contractor pursuant to [subsection a.
21 of section 7 of this act, subject to the appropriation by law of
22 monies from the General Fund to the fund to defray these costs]
23 sections 1 through 12 of P.L. , c. (C.) (pending
24 in the Legislature as this bill).

25 The Treasurer may invest and reinvest any moneys in said fund
26 in legal obligations of the United States, this State or any of its
27 political subdivisions. Any income or interest derived from such
28 investment shall be included in the fund.

29 (cf: P.L.1986, c.59, s.4)

30 17. Within 120 days of the effective date of this act, the State
31 Treasurer and the Attorney General as necessary shall, pursuant
32 to "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1
33 et seq.), respectively adopt rules and regulations to implement
34 the provisions of this act.

35 18. The provisions of this amendatory and supplementary act
36 shall not affect any contract or agreement for legal defense and
37 indemnification entered into by the Department of Environmental
38 Protection with a contractor pursuant to P.L.1986, c.59 prior to
39 the effective date of P.L. , c. (C.) (pending in the
40 Legislature as this bill).

41 19. Section 5 of P.L.1986, c.59 is repealed.

42 20. This act shall take effect immediately.

43 44 45 STATEMENT

46
47 This bill alters the current system of State indemnification of
48 response action contractors providing work or services for, or

1 related to, the removal or attempted removal of a hazardous
2 substance pursuant to a contract with the Department of
3 Environmental Protection (DEP) or other agency of the State.

4 Under current law DEP may agree to provide legal defense and
5 indemnification to a contractor against claims, costs or
6 judgments that are a direct result of hazardous substance cleanup
7 or mitigation services or work rendered under contract to DEP.
8 DEP must provide legal defense and indemnification upon a
9 determination that adequate environmental liability insurance is
10 unavailable. In practice, DEP allows a prospective contractor to
11 provide liability insurance, to self-insure, or to enter into an
12 indemnification agreement with the State for all or a portion of
13 the contractor's liability, and adjusts contractor bid prices
14 accordingly.

15 This bill establishes a mandatory State legal defense and
16 indemnification program, for response action contractors
17 whenever the contract is to be paid in whole or in party with
18 with State monies, including spill fund monies, unless
19 indemnification is provided by a federal governmental agency, or
20 other evidence of financial responsibility is required under
21 federal law. Responsible party remediation actions are excluded
22 from indemnification. An indemnification fee of 6% is to be
23 charged on the amount of each contract entered into with DEP or
24 other State agency for remediation work or services. State
25 defense and indemnification would, however, apply only to
26 claims, judgments and costs when the amount of the claim or
27 judgment exceeds an indemnification deductible equal to 0.75 of
28 the contract price, but not to exceed \$5,000,000. The State's
29 obligation would be only for the amount of the claim or judgment
30 in excess of the contractor's deductible, and for court and legal
31 costs associated in defending against the excess claim.

32 The bill establishes a "Hazardous Substance Response Action
33 Contractors Indemnification Fund" in the Department of the
34 Treasury. Indemnification fees are to be deposited in that fund
35 and used to pay, or reimburse the Attorney General for, legal
36 defense services provided to a contractor, and to pay
37 indemnification awards in excess of a contractor's deductible. In
38 the event that monies are inadequate to cover claims on the fund,
39 DEP may petition the Governor and Legislature for an increase in
40 indemnification fee assessments.

41 Defense and indemnification shall not be provided for (1)
42 claims that are proven to have arisen from actions involving
43 gross negligence, willful misconduct, fraud, intentional tort, bad
44 faith, or criminal misconduct by the contractor, (2) claims or
45 judgments for punitive or exemplary damages, or (3) claims
46 involving actions outside the scope of the response action
47 contract.

48 Judgments against a response action contractor, except as

1 otherwise exempted in the bill, would be subject to certain
2 limitations and conditions imposed on judgments subject to the
3 New Jersey Torts Claims Act.

4

5

6

ENVIRONMENT

7

8 Establishing a "Hazardous Substance Response Action
9 Contractors Indemnification Fund."

ASSEMBLY, No. 3729

STATE OF NEW JERSEY

INTRODUCED JUNE 28, 1990

DO NOT REMOVE

By Assemblymen SMITH and MARTIN

1 AN ACT concerning response action contractor indemnification,
2 amending and supplementing P.L.1976, c.141, and repealing
3 section 5 of P.L.1986, c.59.
4

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

7 1. (New section) This act shall be known and may be cited as
8 the "Hazardous Substance Response Action Contractors
9 Indemnification Act."

10 2. (New section) The Legislature finds and declares that it is
11 the public policy of this State to safely and expeditiously handle,
12 treat, remove and dispose of hazardous substances released or
13 spilled to the environment or at hazardous waste sites for which
14 there is no responsible party; that the availability of an adequate
15 supply of private contractors for performing the design,
16 engineering and construction of cleanup or mitigation of sites
17 contaminated by hazardous substances is essential for assuring
18 both the expeditious cleanup of such sites and a competitive
19 marketplace for contractor services; that hazardous substance
20 response action contractors continue to experience considerable
21 difficulties in obtaining environmental liability insurance at
22 affordable prices; that even when environmental liability
23 insurance coverage is available it is being written on a
24 claims-made basis for limited durations; that the current
25 alternatives to State indemnification, including self-insurance
26 and liability insurance, fail to sufficiently protect the State from
27 possible future claims against the State, as well as fail to protect
28 the interests of prospective claimants; and that the interests of
29 the State, its residents, and response action contractors would be
30 better served by the creation of a "Hazardous Substance
31 Response Action Contractors Indemnification," funded through an
32 indemnification fee assessed against response contractors, which
33 would be used to pay excess environmental liability claims arising
34 from hazardous substance cleanup work contracted by the State.

35 3. (New section) As used in this act:
36 "Department" means the Department of Environmental
37 Protection.

38 "Fund" means the "Hazardous Substance Response Action
39 Contractors Indemnification Fund".

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

Matter underlined thus is new matter.

1 "Hazardous substance" means a hazardous substance as defined
2 in section 3 of P.L.1976, c.141 (C.58:10-23.11b).

3 "Remediation" means the cleanup, removal, mitigation, control
4 or management of a discharge of a hazardous substance.

5 "Response action contract" or "contract" means a contract
6 entered into by a response action contractor with the department
7 or any other agency of the State to provide services or work for,
8 or relating to, the remediation, or attempted remediation, of a
9 hazardous substance, or to prevent or mitigate damages to the
10 public health, safety, or welfare, including damages to public or
11 private property, pursuant to P.L.1976, c.141 (C.58:10-23.11 et
12 seq.), which services or work shall include evaluation, planning,
13 engineering, surveying, design, construction, or other related
14 services or work.

15 "Response action contractor" or "contractor" means a person,
16 including an employee or subcontractor of a person, who enters
17 into a response action contract.

18 4. (New section) a. There is created in the Department of the
19 Treasury a "Hazardous Substance Response Action Contractors
20 Indemnification Fund." The State Treasurer shall be custodian of
21 the fund, and shall direct payments to be made from the fund for
22 legal defense and indemnification provided to an eligible response
23 action contractor, including amounts certified by the Attorney
24 General pursuant to section 9 of P.L. c. (C.) (pending
25 in the Legislature as this bill). Interest or other return earned on
26 monies deposited in the fund shall be credited to the fund.

27 b. An indemnification fee of 6% shall be assessed on the total
28 amount of each response action contract entered into on or after
29 the effective date of this act by the department or other agency
30 of the State with a response action contractor for the provision
31 of hazardous substance remediation wholly or partially funded
32 with State monies, including monies in the New Jersey Spill
33 Compensation Fund, established pursuant to section 10 of
34 P.L.1976, c.141 (C.58:10-23.11i), except that indemnification
35 shall not be provided to any project wholly or partially funded
36 with federal monies if indemnification is available from a federal
37 governmental agency, or the response action contractor is
38 required to satisfy other financial responsibility requirements
39 under federal law. The purpose of the indemnification fee is to
40 provide response action contractors with legal defense and
41 indemnification for any claim or judgment not otherwise
42 excepted pursuant to subsection c. of section 5 of P.L. , c.
43 (C.) (pending in the Legislature as this bill), if the claim or
44 judgment exceeds the amount of a contractor's indemnification
45 deductible as determined pursuant to subsection b. of the
46 aforesaid section 5. An amount equal to 6% of each payment
47 made under the response action contract shall be deducted as the
48 indemnification fee charge by the department from each payment

1 to a contractor, and shall be deposited directly into the fund.

2 5. (New section) a. Except as otherwise provided in
3 subsection b. of this section, the Attorney General shall defend
4 and indemnify a response action contractor who has paid an
5 indemnification fee pursuant to subsection b. of section 4 of
6 P.L. , c. (C.) (pending in the Legislature as this
7 bill) against a claim or judgment arising as a direct result of
8 services or work rendered pursuant to a response action contract
9 paid wholly or partially from State monies, including monies from
10 the "New Jersey Spill Compensation Fund, except as otherwise
11 provided in subsection c. of section 5 of P.L. , c.
12 (C.) (pending in the Legislature as this bill), if the
13 amount of the claim or judgment exceeds the amount of the
14 deductible prescribed under the terms of a contract of legal
15 defense and indemnification entered into by the contractor and
16 the department or other contracting agency of the State.
17 Indemnification shall be for claims involving death or injury to
18 persons, or loss or damage to property, and shall be for the
19 amount of a claim or judgment in excess of the deductible, and,
20 as hereinafter provided, legal defense and court costs incurred in
21 defending against the amount of the claim or judgment in excess
22 of the deductible, except that State liability for any one
23 occurrence shall not exceed \$25,000,000, or shall not exceed in
24 the aggregate on any single contract \$50,000,000. A response
25 action contractor shall not be liable for a claim or judgment in
26 excess of the State's liability limits unless the claim or judgment
27 is otherwise excepted from indemnification pursuant to the
28 provisions of subsection c. of section 5 of this act.

29 Nothing in this subsection shall be construed to limit the right
30 of an eligible claimant to pursue any other remedy available
31 under statutory or common law against a responsible party, as
32 defined in subsection c. of section 8 of P.L.1976, c.141
33 (C.58:10-23.11g.), other than a response action contractor, for
34 any claim amount in excess of the liability limits established
35 pursuant to this subsection.

36 b. Every contract of indemnification shall contain a deductible
37 equal to 0.75 times the amount of the contract, but not to exceed
38 \$5,000,000. The deductible shall be on a per occurrence basis.

39 c. Legal defense and indemnification shall not apply to (1)
40 claims that are proven to have arisen from actions involving
41 gross negligence, willful misconduct, fraud, intentional tort, bad
42 faith, or criminal misconduct by the contractor, (2) claims or
43 judgments for punitive or exemplary damages, or (3) claims
44 involving actions outside the scope of the response action
45 contract.

46 d. Legal defense and indemnification provided to a contractor
47 shall be on such terms and conditions as shall be prescribed by the
48 Attorney General and as may be consistent with the provisions of

1 this act.

2 e. Legal defense and indemnification of a contractor pursuant
3 to this section or section 9 of P.L. , c. (C.) (pending in
4 the Legislature as this bill) , shall not bar the State from
5 exercising any available legal remedies for the enforcement of a
6 contract between the department or other contracting agency
7 and the contractor, the recovery of damages to which the
8 department or agency may be entitled as a result of a
9 contractor's failure to perform the contract, or for the recovery
10 by the Attorney General of funds expended for the defense or
11 indemnification of a contractor if the defense was undertaken in
12 response to a claim brought against the contractor that is proven
13 to have arisen from gross negligence, willful misconduct, fraud,
14 intentional tort, bad faith, or criminal misconduct.

15 f. No person other than a contractor shall have the right to
16 enforce a right of legal defense and indemnification pursuant to
17 this section.

18 Nothing in this section shall be construed to authorize
19 indemnification of a responsible party or other person, or of a
20 response action contractor engaged in a remediation action on
21 behalf of a responsible party or other person, whether or not the
22 remediation action is funded in part by the State.

23 6. (New section) A contractor shall not, except for good and
24 substantial cause, be entitled to legal defense and
25 indemnification by the Attorney General pursuant to this act
26 unless within 10 calendar days of receipt of any summons,
27 complaint, process, notice, demand or pleading subject to legal
28 defense and indemnification, the contractor delivers, by certified
29 mail or personal delivery, the original or a copy of the summons,
30 complaint, process, notice, demand or pleading to the department
31 or other contracting agency, and the Attorney General. Delivery
32 of notice shall constitute an agreement by the contractor that
33 the Attorney General shall be responsible for the conduct of the
34 defense for the claim amount in excess of the contractor's
35 deductible in a manner that the Attorney General deems to be in
36 the best interests of the contractor and the State, including
37 authority to enter into a negotiated settlement of that excess
38 amount. The contractor shall cooperate fully with the Attorney
39 General's defense.

40 The Attorney General shall submit a certified voucher to the
41 fund for payment of the amount of the judgment or settlement
42 and court costs, and for payment to the Department of Law and
43 Public Safety of legal defense costs incurred by that department.

44 No settlement shall be entered into by a contractor or his
45 authorized representative if the amount of the settlement
46 exceeds the contractor's deductible unless the settlement is
47 approved by the Attorney General.

48 7. (New section) a. Notwithstanding the provision of any

1 other law to the contrary, a person shall be barred from
2 recovering against a response action contractor indemnified
3 pursuant to P.L. , c. (C.) (pending in the Legislature
4 as this bill) for injury to persons, or damage to, or loss of,
5 property if:

6 (1) the claimant fails to file a notice of claim with the
7 contractor within 90 days of accrual of the claim, except that the
8 Superior Court may permit a claimant to file a notice at any time
9 within one year of accrual of the claim provided that the
10 contractor and, as applicable, the State are not substantially
11 prejudiced thereby, and provided further that the claimant shows
12 sufficient reasons for his failure to file a notice of claim within
13 the 90 days;

14 (2) two years have elapsed since accrual of the claim and the
15 claimant has failed to file an action therefor; or

16 (3) the claimant or his authorized representative entered into
17 a settlement with respect to the claim.

18 b. The provisions of this section shall not apply to a claim not
19 subject to legal defense and indemnification pursuant to
20 subsection c. of section 5 of this P.L. , c. (C.)
21 (pending in the Legislature as this bill). Nothing in this section
22 shall prohibit an infant or incompetent person from commencing
23 an action under this act within the time limitations specified in
24 this section, after his coming or being of full age or sane mind.

25 8. (New section) a. In the event the Attorney General
26 determines that appearing and defending a contractor pursuant to
27 section 5 of P.L. , c. (C.) (pending in the Legislature
28 as this bill) (1) involves an actual or potential conflict of interest
29 between the State and the contractor, (2) the act or omission
30 giving rise to (a) the claim is not within the scope of the service
31 contract, or (b) the claim or costs involve gross negligence,
32 willful misconduct, fraud, intentional tort, bad faith, or criminal
33 misconduct by the contractor, the Attorney General shall decline
34 in writing to appear or defend, or shall promptly withdraw as
35 attorney for the contractor. The contractor thereupon may
36 employ his own attorney to appear and defend against the claim.

37 b. If the Attorney General declines to appear and defend a
38 contractor by reason of an actual or potential conflict of
39 interest, the Attorney General shall authorize indemnification of
40 the contractor for the amount of the judgment in excess of the
41 amount of contractor's indemnification deductible, and
42 reasonable legal expenses and court costs incurred by the
43 contractor in defending against the amount of the claim or
44 judgment in excess of the contractor's deductible.

45 c. If the Attorney General declines to appear and defend, or
46 withdraws from defending, on the grounds that the act or
47 omission giving rise to the claim or costs was not within the
48 scope of the service contract, or was the result of gross

1 negligence, willful misconduct, fraud, intentional tort, bad faith,
2 or criminal misconduct on the part of the contractor, but the
3 court finds that the act or omission was within the scope of the
4 contract, or was not the result of gross negligence, willful
5 misconduct, fraud, intentional tort, bad faith, or criminal
6 misconduct on the part of the contractor, the Attorney General
7 shall authorize indemnification of the contractor for the amount
8 of the judgment in excess of the amount of the contractor's
9 indemnification deductible, and reasonable legal expenses and
10 court costs incurred by the contractor in defending against the
11 amount of the claim or judgment in excess of the contractor's
12 deductible.

13 No settlement shall be entered into by a contractor or an
14 authorized representative if the amount of the settlement
15 exceeds the contractor's deductible unless the settlement is
16 approved by the Attorney General.

17 9. (New section) A certified copy of any judgment or
18 settlement entered into pursuant to section 8 of P.L. , c.
19 (C.) (pending in the Legislature as this bill) shall be
20 submitted to the Attorney General for a determination as to
21 whether the judgment is final and subject to indemnification. If
22 the judgment is final and subject to indemnification, the Attorney
23 General shall submit a certified voucher to the fund for payment
24 of the amount in the manner specified in subsection c. of section
25 8.

26 10. (New section) A judgment or settlement against a
27 contractor, including judgments or settlements where
28 indemnification is not provided because of the deductible
29 required in accordance with subsection b. of section 5 of P.L. ,
30 c. (C.) (pending in the Legislature as this bill), but
31 excluding a judgment or settlement involving a claim exempted
32 pursuant subsection c. of that section, shall be subject to such
33 applicable limitations or conditions as are set forth in
34 N.J.S.59:9-2 through 59:9-5. In determining the amount of an
35 award for damages to property subject to the provisions of this
36 section, the court may reduce the amount of the award for
37 damages to property by all or a portion of the enhancement value
38 resulting from the remediation action taken or paid for by the
39 State.

40 11. (New section) a. The fund is subrogated to any rights of a
41 claimant paid by the fund for an indemnified claim or judgment,
42 including court and legal costs, against a party responsible for the
43 discharge as defined in subsection c. of section 8 of P.L.1976,
44 c.141 (C.58:10-23.11g.), other than a response action contractor
45 not excepted from indemnification under the provisions of
46 subsection c. of section 5 of P.L. , c. (C.) (pending in
47 the Legislature as this bill).

48 b. Nothing in P.L. ,c. (C.) (pending in the Legislature

1 as this bill) shall be construed to limit the liability of a party
2 responsible for a discharge, other than a response action
3 contractor not excepted from indemnification, to the "New
4 Jersey Spill Compensation Fund," established pursuant to section
5 10 of P.L.1976, c.141 (C.58:10-23.11i.), for all costs recoverable
6 pursuant to section 8 of P.L.1976, c.141 (C.58:10-23.11g.).

7 c. Nothing in this act shall be construed to affect any of the
8 defenses and immunities available to the State pursuant to the
9 "New Jersey Tort Claims Act." N.J.S.59:1-1 et seq., or any other
10 provisions contained therein. for claims against the State or any
11 of its employees.

12 12. (New section) a. In the event that monies in the fund are
13 insufficient to pay legal defense or indemnification costs incurred
14 by the State, the amount of the insufficiency shall be paid from
15 the New Jersey Spill Compensation Fund to the extent that
16 monies are available therefor. Monies provided to the fund from
17 the New Jersey Spill Compensation Fund shall be paid back to the
18 fund.

19 b. If monies in the fund are insufficient to pay legal defense
20 and indemnification costs incurred by the State over a 12-month
21 period, the department shall petition the Governor and the
22 Legislature for an increase in indemnification fee assessments
23 made pursuant to section 4 of this act.

24 13. Section 2 of P.L.1976, c.141 (C.58:10-23.11a) is amended
25 to read as follows:

26 2. The Legislature finds and declares: that New Jersey's lands
27 and waters constitute a unique and delicately balanced resource;
28 that the protection and preservation of these lands and waters
29 promote the health, safety and welfare of the people of this
30 State; that the tourist and recreation industry dependent on clean
31 waters and beaches is vital to the economy of this State; that the
32 State is the trustee, for the benefit of its citizens, of all natural
33 resources within its jurisdiction; and that the storage and transfer
34 of petroleum products and other hazardous substances between
35 vessels, between facilities and vessels, and between facilities,
36 whether onshore or offshore, is a hazardous undertaking and
37 imposes risk of damage to persons and property within this State.

38 The Legislature finds and declares that the discharge of
39 petroleum products and other hazardous substances within or
40 outside the jurisdiction of this State constitutes a threat to the
41 economy and environment of this State. The Legislature intends
42 by the passage of this act to exercise the powers of this State to
43 control the transfer and storage of hazardous substances and to
44 provide liability for damage sustained within this State as a result
45 of any discharge of said substances, by requiring the prompt
46 containment and removal of such pollution and substances, and to
47 provide a fund for swift and adequate compensation to resort
48 businesses and other persons damaged by such discharges, and a

1 fund for the defense and indemnification of certain persons under
2 contract with the State [or federal government] for claims or
3 actions resulting from the provision of services or work to
4 mitigate or clean up a release or discharge of hazardous
5 substances.

6 (cf: P.L.1986, c.59, s.1)

7 14. Section 3 of P.L.1976, c.141 (C.58:10-23.11b) is amended
8 to read as follows:

9 3. Unless the context clearly indicates otherwise, the
10 following terms shall have the following meanings:

11 a. "Administrator" means the chief executive of the New
12 Jersey Spill Compensation Fund;

13 b. "Barrel" means 42 United States gallons or 159.09 liters or
14 an appropriate equivalent measure set by the director for
15 hazardous substances which are other than fluid or which are not
16 commonly measured by the barrel;

17 c. "Board" means a board of arbitration convened by the
18 administrator to settle disputed disbursements from the fund;

19 d. "Cleanup and removal costs" means all costs associated
20 with a discharge, incurred by the State or its political
21 subdivisions or their agents or any person with written approval
22 from the department in the: (1) removal or attempted removal of
23 hazardous substances, or (2) taking of reasonable measures to
24 prevent or mitigate damage to the public health, safety, or
25 welfare, including, but not limited to, public and private
26 property, shorelines, beaches, surface waters, water columns and
27 bottom sediments, soils and other affected property, including
28 wildlife and other natural resources, and shall include costs
29 incurred by the [department] State for the indemnification and
30 legal defense of contractors pursuant to [subsection a. of section
31 7 of this act, subject to the appropriation by law of moneys from
32 the General Fund to the fund to defray these costs] section 1
33 through 12 of P.L. , c. (C.) (pending in the
34 Legislature as this bill);

35 e. "Commissioner" means the Commissioner of Environmental
36 Protection;

37 f. "Department" means the Department of Environmental
38 Protection;

39 g. "Director" means the Director of the Division of Taxation
40 in the Department of the Treasury;

41 h. "Discharge" means any intentional or unintentional action
42 or omission resulting in the releasing, spilling, leaking, pumping,
43 pouring, emitting, emptying or dumping of hazardous substances
44 into the waters or onto the lands of the State, or into waters
45 outside the jurisdiction of the State, when damage may result to
46 the lands, waters or natural resources within the jurisdiction of
47 the State;

48 i. "Fair market value" means the invoice price of the

1 hazardous substances transferred, including transportation
2 charges; but where no price is so fixed, "fair market value" shall
3 mean the market price as of the close of the nearest day to the
4 transfer, paid for similar hazardous substances, as shall be
5 determined by the taxpayer pursuant to rules of the director;

6 j. "Fund" means the New Jersey Spill Compensation Fund;

7 k. "Hazardous substances" means the "environmental
8 hazardous substances" on the environmental hazardous substance
9 list adopted by the department pursuant to section 4 of P.L.1983,
10 c.315 (C.34:5A-4); such elements and compounds, including
11 petroleum products, which are defined as such by the department,
12 after public hearing, and which shall be consistent to the
13 maximum extent possible with, and which shall include, the list of
14 hazardous substances adopted by the federal Environmental
15 Protection Agency pursuant to section 311 of the federal Water
16 Pollution Control Act Amendments of 1972, Pub.L.92-500, as
17 amended by the Clean Water Act of 1977, Pub.L.95-217 (33
18 U.S.C. § 1251 et seq.); the list of toxic pollutants designated by
19 Congress or the EPA pursuant to section 307 of that act; and the
20 list of hazardous substances adopted by the federal
21 Environmental Protection Agency pursuant to section 101 of the
22 "Comprehensive Environmental Response, Compensation and
23 Liability Act of 1980," Pub.L.96-510 (42 U.S.C. § 9601 et seq.);
24 provided, however, that sewage and sewage sludge shall not be
25 considered as hazardous substances for the purposes of this act;

26 l. "Major facility" includes, but is not limited to, any refinery,
27 storage or transfer terminal, pipeline, deep-water port, drilling
28 platform or any appurtenance related to any of the preceding
29 that is used or is capable of being used to refine, produce, store,
30 handle, transfer, process or transport hazardous substances. A
31 vessel shall be considered a major facility only when hazardous
32 substances are transferred between vessels.

33 A facility shall not be considered a major facility for the
34 purpose of this act unless it has total combined above ground or
35 buried storage capacity of:

36 (1) 20,000 gallons or more for hazardous substances which are
37 other than petroleum or petroleum products, or

38 (2) 200,000 gallons or more for hazardous substances of all
39 kinds.

40 For the purposes of this definition, "storage capacity" shall
41 mean only that total combined capacity which is dedicated to,
42 used for or intended to be used for storage of hazardous
43 substances of all kinds. Where appropriate to the nature of the
44 facility, storage capacity may be determined by the intended or
45 actual use of open land or unenclosed space as well as by the
46 capacities of tanks or other enclosed storage spaces;

47 m. "Natural resources" means all land, fish, shellfish, wildlife,
48 biota, air, waters and other such resources owned, managed, held

1 in trust or otherwise controlled by the State;

2 n. "Owner" or "operator" means, with respect to a vessel, any
3 person owning, operating or chartering by demise such vessel;
4 with respect to any major facility, any person owning such
5 facility, or operating it by lease, contract or other form of
6 agreement; with respect to abandoned or derelict major
7 facilities, the person who owned or operated such facility
8 immediately prior to such abandonment, or the owner at the time
9 of discharge;

10 o. "Person" means public or private corporations, companies,
11 associations, societies, firms, partnerships, joint stock companies,
12 individuals, the United States, the State of New Jersey and any of
13 its political subdivisions or agents;

14 p. "Petroleum" or "petroleum products" means oil or
15 petroleum of any kind and in any form, including, but not limited
16 to, oil, petroleum, gasoline, kerosene, fuel oil, oil sludge, oil
17 refuse, oil mixed with other wastes, crude oils, and substances or
18 additives to be utilized in the refining or blending of crude
19 petroleum or petroleum stock in this State; however, any
20 compound designated by specific chemical name on the list of
21 hazardous substances adopted by the department pursuant to
22 subsection 3 k. shall not be considered petroleum or a petroleum
23 product for the purposes of this act, unless such compound is to
24 be utilized in the refining or blending of crude petroleum or
25 petroleum stock in this State;

26 q. "Taxpayer" means the owner or operator of a major facility
27 subject to the tax provisions of this act;

28 r. "Tax period" means every calendar month on the basis of
29 which the taxpayer is required to report under this act;

30 s. "Transfer" means onloading or offloading between major
31 facilities and vessels, or vessels and major facilities, and from
32 vessel to vessel or major facility to major facility, except for
33 fueling or refueling operations and except that with regard to the
34 movement of hazardous substances other than petroleum, it shall
35 also include any onloading of or offloading from a major facility;

36 t. "Vessel" means every description of watercraft or other
37 contrivance that is practically capable of being used as a means
38 of commercial transportation of hazardous substances upon the
39 water, whether or not self-propelled;

40 u. "Waters" means the ocean and its estuaries to the seaward
41 limit of the State's jurisdiction, all springs, streams and bodies of
42 surface or groundwater, whether natural or artificial, within the
43 boundaries of this State;

44 v. "Act of God" means an act exclusively occasioned by an
45 unanticipated, grave natural disaster without the interference of
46 any human agency.

47 (cf. P.L.1986, c.143, s.1)

48 15. Section 7 of P.L.1976, c.141 (C.58:20-23.11f) is amended

1 to read as follows:

2 7. a. Whenever any hazardous substance is discharged, the
3 department may, in its discretion, act to remove or arrange for
4 the removal of such discharge or may direct the discharger to
5 remove, or arrange for the removal of, such discharge. If the
6 discharge occurs at any hazardous or solid waste disposal facility,
7 the department may order the facility closed for the duration of
8 the removal operations. The department may monitor the
9 discharger's compliance with any such directive. Any discharger
10 who fails to comply with such a directive shall be liable to the
11 department in an amount equal to three times the cost of such
12 removal, and shall be subject to the revocation or suspension of
13 any license or permit he holds authorizing him to operate a
14 hazardous or solid waste disposal facility.

15 Removal of hazardous substances and actions to minimize
16 damage from discharges shall, to the greatest extent possible, be
17 in accordance with the National Contingency Plan for removal of
18 oil and hazardous substances established pursuant to section
19 311(c)(2) of the federal Water Pollution Control Act Amendments
20 of 1972 (Pub.L.92-500, 33 U.S.C. §1251 et seq.).

21 Whenever the department acts to remove a discharge or
22 contracts to secure prospective removal services, it is authorized
23 to draw upon the money available in the fund. Such money shall
24 be used to pay promptly for all cleanup costs incurred by the
25 department in removing or in minimizing damage caused by such
26 discharge.

27 [The department may agree to defend and indemnify a
28 contractor against claims, causes of action, demands, costs, or
29 judgments made against a contractor arising as a direct result of
30 the contractor's provision of hazardous substance cleanup or
31 mitigation services pursuant to a contract with the department.
32 This legal defense and indemnification shall not apply to claims,
33 causes of action, demands, costs, or judgments which are proven
34 to have arisen from gross negligence, willful misconduct, fraud,
35 intentional tort, bad faith, or criminal misconduct, or to claims
36 for punitive or exemplary damage. The department shall agree to
37 provide legal defense and indemnification to a contractor only if
38 it determines that adequate environmental liability insurance is
39 not available or not available at a reasonable cost to the
40 contractor. The department shall agree to provide legal defense
41 and indemnification to a contractor pursuant to terms and
42 limitations which it deems appropriate. Any agreement by the
43 department to defend or indemnify a contractor shall not bar the
44 department from the exercise of any available legal remedies for
45 the enforcement of the contract between the department and the
46 contractor, the recovery of damages to which the department
47 may be entitled resulting from a contractor's failure to perform
48 the contract, or for the recovery of funds expended for the

1 defense of a contractor if the defense was undertaken in response
2 to a claim or cause of action brought against the contractor
3 which is proven to have arisen from gross negligence, willful
4 misconduct, fraud, intentional tort, bad faith, or criminal
5 misconduct. No person other than a contractor shall have the
6 right to enforce any agreement for defense and indemnification
7 between a contractor and the department. The department shall
8 not enter into an agreement to provide legal defense and
9 indemnification to a contractor after January 1, 1990. For the
10 purposes of this subsection, "contractor" means a person
11 providing services to mitigate or clean up a discharge or release
12 or threatened discharge or release of a hazardous substance in
13 this State pursuant to P.L.1976, c.141 (C.58:10-23.11 et seq.) or
14 the "Comprehensive Environmental Response, Compensation and
15 Liability Act of 1980," Pub.L.96-510 (42 U.S.C. § 9601 et seq.)]

16 Nothing in this section is intended to preclude removal and
17 cleanup operations by any person threatened by such discharges,
18 provided such persons coordinate and obtain approval for such
19 actions with ongoing State or federal operations. No action taken
20 by any person to contain or remove a discharge shall be construed
21 as an admission of liability for said discharge. No person who
22 renders assistance in containing or removing a discharge shall be
23 liable for any civil damages to third parties resulting solely from
24 acts or omissions of such person in rendering such assistance,
25 except for acts or omissions of gross negligence or willful
26 misconduct. In the course of cleanup operations, no person shall
27 discharge any detergent into the waters of this State without
28 prior authorization of the commissioner.

29 b. Notwithstanding any other provisions of P.L.1976, c.141
30 (C.58:10-23.11 et seq.), the department, subject to the approval
31 of the administrator with regard to the availability of funds
32 therefor, may remove or arrange for the removal of any
33 hazardous substance which:

34 (1) Has not been discharged from a grounded or disabled
35 vessel, if the department determines that such removal is
36 necessary to prevent an imminent discharge of such hazardous
37 substance; or

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

42 (a) Explosiveness;

43 (b) High flammability;

44 (c) Radioactivity;

45 (d) Chemical properties which in combination with any
46 discharged hazardous substance at the same storage facility
47 would create a substantial risk of imminent damage to public
48 health or safety or an imminent and severe damage to the

1 environment;

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

7 (f) High toxicity and is stored or being transported in a
8 container or motor vehicle, truck, railcar or other mechanized
9 conveyance from which its discharge is imminent as a result of
10 the significant deterioration or the precarious location of the
11 container, motor vehicle, truck, railcar or other mechanized
12 conveyance, and such discharge would create a substantial risk of
13 imminent damage to public health or safety or imminent and
14 severe damage to the environment; or

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

17 c. If and to the extent that he determines that funds are
18 available, the administrator shall approve and make payments for
19 any cleanup and removal costs incurred by the department for the
20 removal of a hazardous substance other than petroleum as
21 authorized by subsection b. of this section; provided that in
22 determining the availability of funds, the administrator shall not
23 include as available funds revenues realized or to be realized
24 from the tax on the transfer of petroleum, to the extent that
25 such revenues result from a tax levied at a rate in excess of \$0.01
26 per barrel, pursuant to subsection 9b. of P.L.1976, c.141
27 (C.58:10-23.11h), unless the administrator determines that the
28 sum of claims paid by the fund on behalf of petroleum discharges
29 or removals plus pending reasonable claims against the fund on
30 behalf of petroleum discharges or removals is greater than 30%
31 of the sum of all claims paid by the fund plus all pending
32 reasonable claims against the fund.

33 d. The administrator may only approve and make payments for
34 any cleanup and removal costs incurred by the department for the
35 removal of a hazardous substance discharged prior to the
36 effective date of P.L.1976, c.141, pursuant to subsection b. of
37 this section, if, and to the extent that, he determines that
38 adequate funds from another source are not or will not be
39 available; and provided further, with regard to the cleanup and
40 removal costs incurred for discharges which occurred prior to the
41 effective date of P.L.1976, c.141, the administrator may not
42 during any one-year period pay more than \$18,000,000.00 in total
43 or more than \$3,000,000.00 for any discharge or related set or
44 series of discharges.

45 e. Notwithstanding any other provisions of P.L.1976, c.141, the
46 administrator, after considering, among any other relevant
47 factors, the department's priorities for spending funds pursuant
48 to P.L.1976, c.141, and within the limits of available funds, shall

1 make payments for the restoration or replacement of, or
2 connection to an alternative water supply for, any private
3 residential well destroyed, contaminated, or impaired as a result
4 of a discharge prior to the effective date of P.L.1976, c.141;
5 provided, however, total payments for said purpose shall not
6 exceed \$500,000.00 for the period between the effective date of
7 this subsection e. and January 1, 1983, and in any calendar year
8 thereafter.

9 f. Any expenditures made by the administrator pursuant to this
10 act shall constitute, in each instance, a debt of the discharger to
11 the fund. The debt shall constitute a lien on all property owned by
12 the discharger when a notice of lien, incorporating a description
13 of the property of the discharger subject to the cleanup and
14 removal and an identification of the amount of cleanup, removal
15 and related costs expended from the fund, is duly filed with the
16 clerk of the Superior Court. The clerk shall promptly enter upon
17 the civil judgment or order docket the name and address of the
18 discharger and the amount of the lien as set forth in the notice of
19 lien. Upon entry by the clerk, the lien, to the amount committed
20 by the administrator for cleanup and removal, shall attach to the
21 revenues and all real and personal property of the discharger,
22 whether or not the discharger is insolvent.

23 The notice of lien filed pursuant to this subsection which
24 affects the property of a discharger subject to the cleanup and
25 removal of a discharge shall create a lien with priority over all
26 other claims or liens which are or have been filed against the
27 property, except if the property comprises six dwelling units or
28 less and is used exclusively for residential purposes, this notice of
29 lien shall not affect any valid lien, right or interest in the
30 property filed in accordance with established procedure prior to
31 the filing of this notice of lien. The notice of lien filed pursuant
32 to this subsection which affects any property of a discharger,
33 other than the property subject to the cleanup and removal, shall
34 have priority from the day of the filing of the notice of the lien
35 over all other claims and liens filed against the property, but
36 shall not affect any valid lien, right, or interest in the property
37 filed in accordance with established procedure prior to the filing
38 of a notice of lien pursuant to this subsection.

39 (cf: P.L.1987, c.415, s.1)

40 16. Section 16 of P.L.1976, c.141 (C.58:10-23.11o) is amended
41 to read as follows:

42 16. Moneys in the New Jersey Spill Compensation Fund shall
43 be disbursed by the administrator for the following purposes and
44 no others:

- 45 (1) Costs incurred under section 7 of this act;
- 46 (2) Damages as defined in section 8 of this act;
- 47 (3) Such sums as may be necessary for research on the
48 prevention and the effects of spills of hazardous substances on

1 the marine environment and on the development of improved
2 cleanup and removal operations as may be appropriated by the
3 Legislature; provided, however, that such sums shall not exceed
4 the amount of interest which is credited to the fund;

5 (4) Such sums as may be necessary for the boards, general
6 administration of the fund, equipment and personnel costs of the
7 department and any other State agency related to the
8 enforcement of this act as may be appropriated by the
9 Legislature;

10 (5) Such sums as may be appropriated by the Legislature for
11 research and demonstration programs concerning the causes and
12 abatement of ocean pollution; provided, however, that such sums
13 shall not exceed the amount of interest which is credited to the
14 fund;

15 (6) Such sums as may be requested by the commissioner, up to
16 a limit of \$400,000.00 per year, to cover the costs associated
17 with the administration of the "Environmental Cleanup
18 Responsibility Act," P.L.1983, c.330 (C.13:1K-6 et seq.);

19 (7) Costs attributable to the [department's] State's obligation
20 to defend and indemnify a contractor pursuant to [subsection a.
21 of section 7 of this act, subject to the appropriation by law of
22 monies from the General Fund to the fund to defray these costs]
23 sections 1 through 12 of P.L. , c. (C.) (pending
24 in the Legislature as this bill).

25 The Treasurer may invest and reinvest any moneys in said fund
26 in legal obligations of the United States, this State or any of its
27 political subdivisions. Any income or interest derived from such
28 investment shall be included in the fund.

29 (cf: P.L.1986, c.59, s.4)

30 17. Within 120 days of the effective date of this act, the State
31 Treasurer and the Attorney General as necessary shall, pursuant
32 to "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1
33 et seq.), respectively adopt rules and regulations to implement
34 the provisions of this act.

35 18. The provisions of this amendatory and supplementary act
36 shall not affect any contract or agreement for legal defense and
37 indemnification entered into by the Department of Environmental
38 Protection with a contractor pursuant to P.L.1986, c.59 prior to
39 the effective date of P.L. , c. (C.) (pending in the
40 Legislature as this bill).

41 19. Section 5 of P.L.1986, c.59 is repealed.

42 20. This act shall take effect immediately.

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45 *SPONSOR'S* STATEMENT

46
47 This bill alters the current system of State indemnification of
48 response action contractors providing work or services for, or

1 related to, the removal or attempted removal of a hazardous
2 substance pursuant to a contract with the Department of
3 Environmental Protection (DEP) or other agency of the State.

4 Under current law DEP may agree to provide legal defense and
5 indemnification to a contractor against claims, costs or
6 judgments that are a direct result of hazardous substance cleanup
7 or mitigation services or work rendered under contract to DEP.
8 DEP must provide legal defense and indemnification upon a
9 determination that adequate environmental liability insurance is
10 unavailable. In practice, DEP allows a prospective contractor to
11 provide liability insurance, to self-insure, or to enter into an
12 indemnification agreement with the State for all or a portion of
13 the contractor's liability, and adjusts contractor bid prices
14 accordingly.

15 This bill establishes a mandatory State legal defense and
16 indemnification program, for response action contractors
17 whenever the contract is to be paid in whole or in party with
18 with State monies, including spill fund monies, unless
19 indemnification is provided by a federal governmental agency, or
20 other evidence of financial responsibility is required under
21 federal law. Responsible party remediation actions are excluded
22 from indemnification. An indemnification fee of 6% is to be
23 charged on the amount of each contract entered into with DEP or
24 other State agency for remediation work or services. State
25 defense and indemnification would, however, apply only to
26 claims, judgments and costs when the amount of the claim or
27 judgment exceeds an indemnification deductible equal to 0.75 of
28 the contract price, but not to exceed \$5,000,000. The State's
29 obligation would be only for the amount of the claim or judgment
30 in excess of the contractor's deductible, and for court and legal
31 costs associated in defending against the excess claim.

32 The bill establishes a "Hazardous Substance Response Action
33 Contractors Indemnification Fund" in the Department of the
34 Treasury. Indemnification fees are to be deposited in that fund
35 and used to pay, or reimburse the Attorney General for, legal
36 defense services provided to a contractor, and to pay
37 indemnification awards in excess of a contractor's deductible. In
38 the event that monies are inadequate to cover claims on the fund,
39 DEP may petition the Governor and Legislature for an increase in
40 indemnification fee assessments.

41 Defense and indemnification shall not be provided for (1)
42 claims that are proven to have arisen from actions involving
43 gross negligence, willful misconduct, fraud, intentional tort, bad
44 faith, or criminal misconduct by the contractor, (2) claims or
45 judgments for punitive or exemplary damages, or (3) claims
46 involving actions outside the scope of the response action
47 contract.

48 Judgments against a response action contractor, except as

1 otherwise exempted in the bill, would be subject to certain
2 limitations and conditions imposed on judgments subject to the
3 New Jersey Torts Claims Act.

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ENVIRONMENT

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8 Establishing a "Hazardous Substance Response Action
9 Contractors Indemnification Fund."

ASSEMBLY ENERGY AND ENVIRONMENT COMMITTEE

STATEMENT TO

ASSEMBLY, No. 3729

with Assembly committee amendments

STATE OF NEW JERSEY

DATED: SEPTEMBER 13, 1990

The Assembly Energy and Environment Committee favorably reports Assembly Bill No. 3729 with committee amendments.

Assembly Bill No. 3729, as amended by committee, alters the current system of State indemnification of cleanup contractors providing hazardous discharge site cleanup or remediation services pursuant to a contract with the Department of Environmental Protection (DEP) or other agency of the State.

Under current law, DEP may agree to provide legal defense and indemnification to a contractor against claims, costs or judgments that are a direct result of hazardous discharge site cleanup or mitigation services rendered under contract to DEP. DEP must provide legal defense and indemnification upon a determination that adequate environmental liability insurance is unavailable. In practice, DEP allows a prospective contractor to provide liability insurance, to self-insure, or to enter into an indemnification agreement with the State for all or a portion of the contractor's liability, and adjusts the contractor's bid prices accordingly.

This bill establishes a permissive State legal defense and indemnification program for cleanup contractors whenever the contract is to be paid in whole with State monies. The DEP may offer indemnification and legal defense for claims of up to \$25 million per occurrence and up to \$50 million per contract. (Responsible party remediation actions are excluded from indemnification and legal defense.) State defense and indemnification would, however, apply only to claims, judgments and costs which exceeds a deductible equal to 30% of the contract price or \$1,500,000, whichever is less. In addition, the contractor would be liable for a copayment of 10% of the claim or judgment above the deductible up to a limit of a \$50 million. The contractor would not be liable for any amount in excess of the deductible and copayment. The State's obligation would be only for the amount of the claim or judgment in excess of the contractor's deductible and the copayment, and for court and legal costs associated in defending against the excess claim.

This bill provides that defense and indemnification would not be provided for (1) claims that are proven to have arisen from actions involving gross negligence, willful misconduct, fraud,

intentional tort, bad faith, or criminal misconduct by the cleanup contractor, (2) punitive or exemplary damages, or (3) claims involving actions outside the scope of the cleanup contract.

Judgments against a cleanup contractor, except as otherwise exempted in the bill, would be subject to certain limitations and conditions imposed on judgments subject to the New Jersey Torts Claims Act.

The committee amended the bill to:

- 1) eliminate the indemnification fund and the 6% assessment on each response action contract;
- 2) provide that the granting indemnification is permissive by the department;
- 3) allow certain preferences to be given in the bidding process for bidders with occurrence based insurance, who self insure, or who decline indemnification;
- 4) lower the deductible from 75% of the contract price and not to exceed \$5 million, to 30% of the contract price and not to exceed \$1.5 million;
- 5) provide for the 10% copayment capped at the \$50 million claim or judgment mark;
- 6) provide that the department prepare and submit a report on the operation of the indemnification program; and
- 7) make certain technical and clarifying amendments to the bill.

LEGISLATIVE FISCAL ESTIMATE TO

[FIRST REPRINT]

ASSEMBLY, No. 3729

STATE OF NEW JERSEY

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DATED: December 13, 1990

Assembly Bill No. 3729 (1R) of 1990 alters the current system of State indemnification of cleanup contractors providing hazardous discharge site cleanup or remediation services pursuant to a contract with the Department of Environmental Protection (DEP) or other state agencies. Under current law, the DEP may agree to provide legal defense and indemnification to a contractor against claims, costs or judgments that are a direct result of hazardous discharge site cleanup or mitigation services rendered under contract to the DEP. In practice, DEP allows a prospective contractor to provide liability insurance, to self-insure, or to enter into an indemnification agreement with the State for all or a portion of the contractor's liability, and adjusts the contractor's bid prices accordingly.

The bill establishes a permissive State legal defense and indemnification program for cleanup contractors whenever the contract is to be paid in whole with State monies. The DEP may offer indemnification and legal defense for claims of up to \$25 million per occurrence and up to \$50 million per contract.

The Office of Legislative Services cannot estimate the potential fiscal impact of the bill because no such claims or lawsuits have ever been initiated under the department's existing indemnification program. As such, the development of cost estimates based on this type of comparative data cannot not be made.

This legislative fiscal estimate has been produced by the Office of Legislative Services due to the failure of the Executive Branch to respond to our request for a fiscal note.

This fiscal estimate has been prepared pursuant to P.L.1980, c.67.

SENATE ENVIRONMENTAL QUALITY COMMITTEE

STATEMENT TO

SENATE COMMITTEE SUBSTITUTE FOR
SENATE, No. 2844 and ASSEMBLY, No. 3729

STATE OF NEW JERSEY

DATED: JANUARY 10, 1991

The Senate Environmental Quality Committee favorably reports a Senate Committee Substitute for Senate Bill No. 2844 and Assembly Bill No. 3729.

The Senate Committee Substitute would alter the current system pursuant to which the State indemnifies contractors who provide hazardous discharge site cleanup or remediation services pursuant to contracts with the Department of Environmental Protection (DEP).

Under current law, DEP may agree to provide legal defense and indemnification to a contractor against claims, costs, or judgments that are a direct result of hazardous discharge site remediation services rendered under contract to DEP. DEP must provide legal defense and indemnification upon a determination that adequate private environmental liability insurance is unavailable. In practice, DEP allows a prospective contractor to provide liability insurance, to self-insure, or to enter into an indemnification agreement with the State for all or a portion of the contractor's liability, and adjusts the contractor's bid prices accordingly. This substitute bill would allow DEP to give preference in the bidding process only to contractors with occurrence based insurance.

This bill establishes a permissive State legal defense and indemnification program for cleanup contractors whenever the contract is to be paid in whole with State monies. The DEP may offer indemnification and legal defense for claims of up to \$25 million per occurrence and up to \$50 million per contract. (Responsible party remediation actions are excluded from indemnification and legal defense.) State defense and indemnification would, however, apply only to claims, judgments, and costs which exceed a deductible equal to 30% of the contract price or \$1,500,000, whichever is less. In addition, the contractor would be liable for a copayment of 10% of the amount of the claim or judgment in excess of the deductible.

This bill provides that defense and indemnification would not be provided for (1) claims that are proven to have arisen from actions involving gross negligence, willful misconduct, fraud, intentional tort, bad faith, intentional breach of contract, or criminal misconduct by the cleanup contractor, (2) punitive or exemplary damages, or (3) claims involving actions outside the scope of the cleanup contract. Judgments against a cleanup contractor, except as

otherwise exempted in the bill, would be subject to certain limitations and conditions imposed on judgments subject to the New Jersey Torts Claims Act.

The Senate substitute bill also provides that a surety bond's obligation would not extend to any claim for damages, and no surety bond could be construed as a liability insurance policy. In addition, the surety's liability extends only to expenditures in excess of the original contract amount. In effect, this would make a surety liable for cost overruns resulting from a default by the original contractor up to the original amount of the bond. The bill also provides that a surety would be indemnified by the State only when the surety acts as the response action contractor. The language in section 16 is drawn from recently enacted federal legislation amending the "Miller Act."

The bill will expire three years from the date of its enactment. Prior to that date, the department must submit a report assessing the indemnification program and making recommendations thereon.

STATE OF NEW JERSEY
EXECUTIVE DEPARTMENT

September 23, 1991

SENATE COMMITTEE SUBSTITUTE for
SENATE BILL NO. 2844 and ASSEMBLY BILL NO. 3729
(First Reprint)

To the Senate:

Pursuant to Article V, Section I, Paragraph 14, of the New Jersey Constitution, I am herewith returning Senate Committee Substitute for Senate Bill No. 2844 and Assembly Bill No. 3729 (First Reprint) with my objections for reconsideration.

This bill alters the current system of State indemnification of response action contractors providing work or services for, or related to, the cleanup of hazardous substances pursuant to a contract with the Department of Environmental Protection, or with any other State agency, that is paid in whole with State monies.

The bill establishes a flexible indemnification program which authorizes the Department of Environmental Protection to offer legal defense and indemnification of up to \$25 million per occurrence and up to \$50 million per contract. The covered contractor would be responsible for paying a portion of any claim or judgment, equal to 30% of the contract amount, up to \$1.5 million, along with a 10% copayment. The bill includes a special category for engineering work, which provides that for engineering services, the covered contractor would be responsible for a portion of any claim or judgment equal to 30% of the contract amount up to \$100,000, with no copayment.

The bill provides that legal defense and indemnification would not be provided for: (1) claims that have arisen from actions involving gross negligence, willful misconduct, fraud, bad faith or criminal misconduct by the contractor or an intentional tort; (2) punitive or exemplary damages; or (3) claims involving actions beyond the scope of the contract. The bill expires three years after enactment, and requires that the Department of Environmental Protection submit a report to the Legislature assessing the program, and examining the availability of similar coverage by the private insurance market.

STATE OF NEW JERSEY
EXECUTIVE DEPARTMENT

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This bill is basically sound. It establishes a program that provides contractors with adequate coverage in the event of an accident, while maintaining a balance that will ensure careful work and will not expose the State Treasury to a high number of claims. In addition, by setting a clearly defined deductible and copayment, it provides an incentive for the private insurance market to step in to provide coverage.

While I understand the desire of some engineering firms to avoid potential risks, I do not believe that it is necessary to define a special category for engineering services with a deductible of \$100,000 and no copayment. I believe that it makes more sense to give the Department of Environmental Protection discretion to lower the deductible and copayment level as necessary to adjust to market conditions. If private insurance becomes available for the deductible and copayment, or if companies are able to self-insure for that amount, the levels can be maintained. If there is a need to adjust the levels to attract more bids, the Department should have the authority to make the adjustments. This flexibility makes sense for all of the services covered by the bill, but perhaps especially for engineering services.

Therefore, I herewith return Senate Committee Substitute for Senate Bill No. 2844 and Assembly Bill No. 3729 (First Reprint) and recommend that it be amended as follows:

Page 3, Section 5, Lines 32-50: Delete in entirety

Page 4, Section 5, Lines 1-17: Delete in entirety

Page 4, Section 5, Line 18: Delete "b."

Page 4, Section 5, Lines 19-20: After "a response action contractor" delete ", for the provision of services other than engineering services,"

Page 5, Section 5, After Line 13: Insert new subsection b. as follows:

"b. The department is authorized to lower, on a contract-by-contract or other basis, the amount for which the response action contractor shall be responsible, pursuant to

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EXECUTIVE DEPARTMENT

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subsection a. of this section, for all claims or judgments covered by the indemnification agreement. The department may lower the amount for which the response action contractor shall be responsible for specific kinds of services in a contract, including, but not limited to engineering services, or for all of the services provided in a contract. The department shall make the determination to lower the amount for which the response action contractor shall be responsible based on the availability of environmental liability insurance for contractors in the private market, on the number and quality of bidders, or on other factors the department deems relevant."

Respectfully,

/s/ Jim Florio

GOVERNOR

[seal]

Attest:

/s/ Andrew Weber

Counsel to the Governor