

58:10-23.11f

LEGISLATIVE HISTORY CHECKLIST

NJSA: 58:10-23.11f (Contractor liability indemnification-- extend "sunset" provision)

LAWS OF: 1987 CHAPTER: 415

BILL NO: S3658

Sponsor(s): Lesniak

Date Introduced: September 14, 1987

Committee: Assembly: -----

Senate: Energy and Environment

Amended during passage: No

Date of Passage: Assembly: January 11, 1988

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following statements are attached if available:

Sponsor statement: Yes

Committee statement: Assembly No

Senate Yes

Fiscal Note: No

Veto Message: No

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Reports: No

Hearings: No

SENATE, No. 3658
STATE OF NEW JERSEY

INTRODUCED SEPTEMBER 14, 1987

By Senator LESNIAK

Referred to Committee on Energy and Environment

AN ACT concerning the defense and indemnification of hazardous substance discharge cleanup contractors, and amending P. L. 1976, c. 141.

1 BE IT ENACTED by the Senate and General Assembly of the State
2 of New Jersey:

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

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

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

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 printed in italics thus is new matter.

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

28 The department may agree to defend and indemnify a contractor
29 against claims, causes of action, demands, costs, or judgments
30 made against a contractor arising as a direct result of the con-
31 tractor's provision of hazardous substance cleanup or mitigation
32 services pursuant to a contract with the department. This legal
33 defense and indemnification shall not apply to claims, causes of
34 action, *demands, costs, or judgments which are proven* to have
35 arisen from gross negligence, willful misconduct, fraud, intentional
36 tort, bad faith, or criminal misconduct, or to claims for punitive or
37 exemplary damage. The department shall agree to provide legal
38 defense and indemnification to a contractor only if it determines
39 that adequate environmental liability insurance is not available
40 or not available at a reasonable cost to the contractor. The depart-
41 ment shall agree to provide legal defense and indemnification to a
42 contractor pursuant to terms and limitations which it deems appro-
43 priate. Any agreement by the department to defend or indemnify
44 a contractor shall not bar the department from the exercise of any
45 available legal remedies for the enforcement of the contract between
46 the department and the contractor, the recovery of damages to
47 which the department may be entitled resulting from a contractor's
48 failure to perform the contract, or for the recovery of funds ex-
49 pended for the defense of a contractor if the defense was under-
50 taken in response to a claim or cause of action brought against the
51 contractor which is proven to have arisen from gross negligence,
52 willful misconduct, fraud, intentional tort, bad faith, or criminal
53 misconduct. No person other than a contractor shall have the
54 right to enforce any agreement for defense and indemnification
55 between a contractor and the department. The department shall
56 not enter into an agreement to provide legal defense and indemnifi-
57 cation to a contractor after [January 1, 1988] *January 1, 1990*.
58 For the purposes of this subsection, "Contractor" means a person
59 providing services to mitigate or cleanup a discharge or release or
60 threatened discharge or release of a hazardous substance in this
61 State pursuant to P. L. 1976, c. 141 (C. 58:10-23.11 et seq.) or the
62 "Comprehensive Environmental Response, Compensation and
63 Liability Act of 1980," Pub. L. 96-510 (42 U. S. C. 9601 et seq.).

64 Nothing in this section is intended to preclude removal and
65 cleanup operations by any person threatened by such discharges,
66 provided such persons coordinate and obtain approval for such
67 actions with ongoing State or federal operations. No action taken
68 by any person to contain or remove a discharge shall be construed
69 as an admission of liability for said discharge. No person who
70 renders assistance in containing or removing a discharge shall be
71 liable for any civil damages to third parties resulting solely from
72 acts or omissions of such person in rendering such assistance,
73 except for acts or omissions of gross negligence or willful mis-
74 conduct. In the course of cleanup operations, no person shall dis-
75 charge any detergent into the waters of this State without prior
76 authorization of the commissioner.

77 b. Notwithstanding any other provisions of P. L. 1976, c. 141
78 (C. 58:10-23.11 et seq.), the department, subject to the approval
79 of the administrator with regard to the availability of funds
80 therefor, may remove or arrange for the removal of any haz-
81 ardous substance which:

82 (1) Has not been discharged from a grounded or disabled ves-
83 sel, if the department determines that such removal is necessary
84 to prevent an imminent discharge of such hazardous substance; or

85 (2) Has not been discharged, if the department determines that
86 such substance is not satisfactorily stored or contained and said
87 substance possesses any one or more of the following character-
88 istics:

89 (a) Explosiveness;

90 (b) High flammability;

91 (c) Radioactivity;

92 (d) Chemical properties which in combination with any dis-
93 charged hazardous substance at the same storage facility would
94 create a substantial risk of imminent damage to public health
95 or safety or an imminent and severe damage to the environment;

96 (e) Is stored in a container from which its discharge is im-
97 minent as a result of contact with a hazardous substance which
98 has already been discharged and such additional discharge would
99 create a substantial risk of imminent damage to public health or
100 safety or imminent and severe damage to the environment; or

101 (f) High toxicity and is stored or being transported in a con-
102 tainer or motor vehicle, truck, railcar or other mechanized con-
103 veyance from which its discharge is imminent as a result of the
104 significant deterioration or the precarious location of the con-
105 tainer, motor vehicle, truck, railcar or other mechanized convey-

106 ance, and such discharge would create a substantial risk of im-
107 minent damage to public health or safety or imminent and severe
108 damage to the environment; or

109 (3) Has been discharged prior to the effective date of P. L.
110 1976, c. 141.

111 c. If and to the extent that he determines that funds are avail-
112 able, the administrator shall approve and make payments for any
113 cleanup and removal costs incurred by the department for the
114 removal of a hazardous substance other than petroleum as autho-
115 rized by subsection b. of this section; provided that in determining
116 the availability of funds, the administrator shall not include as
117 available funds revenues realized or to be realized from the tax
118 on the transfer of petroleum, to the extent that such revenues
119 result from a tax levied at a rate in excess of \$0.01 per barrel,
120 pursuant to subsection 9b. of P. L. 1976, c. 141 (C. 58:10-23.11h),
121 unless the administrator determines that the sum of claims paid
122 by the fund on behalf of petroleum discharges or removals plus
123 pending reasonable claims against the fund on behalf of petroleum
124 discharges or removals is greater than 30% of the sum of all
125 claims paid by the fund plus all pending reasonable claims against
126 the fund.

127 d. The administrator may only approve and make payments for
128 any cleanup and removal costs incurred by the department for
129 the removal of a hazardous substance discharged prior to the
130 effective date of P. L. 1976, c. 141, pursuant to subsection b. of
131 this section, if, and to the extent that, he determines that ade-
132 quate funds from another source are not or will not be available;
133 and further provided, with regard to the cleanup and removal
134 costs incurred for discharges which occurred prior to the effective
135 date of P. L. 1976, c. 141, the administrator may not during any
136 year period pay more than \$18,000,000.00 in total or more than
137 \$3,000,000.00 for any discharge or related set or series of dis-
138 charges.

139 Notwithstanding any other provisions of P. L. 1976, c. 141, the
140 administrator, after considering, among any other relevant
141 factors, the department's priorities for spending funds pursuant
142 to P. L. 1976, c. 141, and within the limits of available funds,
143 shall make payments for the restoration or replacement of, or
144 connection to an alternative water supply for, any private resi-
145 dential well destroyed, contaminated, or impaired as a result
146 of a discharge prior to the effective date of P. L. 1976, c. 141,
147 provided however total payments for said purpose shall not exceed

148 \$500,000.00 for the period between the effective date of this sub-
149 section c. and January 1, 1983, and in any calendar year there-
150 after.

151 f. Any expenditures made by the administrator pursuant to
152 this act shall constitute in each instance, a debt of the discharger
153 to the fund. The debt shall constitute a lien on all property owned
154 by the discharger when a notice of lien, incorporating a descrip-
155 tion of the property of the discharger subject to the cleanup and
156 removal and an identification of the amount of cleanup, removal
157 and related costs expended from the fund is duly filed with the
158 clerk of the Superior Court. The clerk shall promptly enter upon
159 the civil judgment or order docket the name and address of the
160 discharger and the amount of the lien as set forth in the notice
161 of lien. Upon entry by the clerk, the lien, to the amount com-
162 mitted by the administrator for cleanup and removal, shall attach
163 to the revenues and all real and personal property of the dis-
164 charger, whether or not the discharger is insolvent.

165 The notice of lien filed pursuant to this subsection which affects
166 the property of a discharger subject to the cleanup and removal
167 of a discharge shall create a lien with priority over all other
168 claims or liens which are or have been filed against the property,
169 except if the property comprises six dwelling units or less and
170 is used exclusively for residential purposes, this notice of lien
171 shall not affect any valid lien, right or interest in the property
172 filed in accordance with established procedure prior to the filing
173 of this notice of lien. The notice of lien filed pursuant to this sub-
174 section which affects any property of a discharger other than the
175 property subject to the cleanup and removal, shall have priority
176 from the day of the filing of the notice of the lien over all other
177 claims and liens filed against the property, but shall not affect any
178 valid lien, right, or interest in the property filed in accordance with
179 established procedure prior to the filing of a notice of lien pursuant
180 to this subsection.

1 2. This act shall take effect immediately.

STATEMENT

This measure would extend from January 1, 1988 to January 1, 1990 the date after which the Department of Environmental Protection may not enter into an agreement to provide legal defense and indemnification to hazardous discharge cleanup contractors. The work of these contractors is vital to the success of the State's ongoing hazardous waste cleanup program, and their protection

against claims for damages that may unwittingly result from their work is pivotal. The health, safety, and welfare of the citizens of this State therefore require that State indemnification continue for two more years.

HAZARDOUS WASTE

Extends sunset of contractor liability indemnification for two years.

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SENATE ENERGY AND ENVIRONMENT COMMITTEE
STATEMENT TO
SENATE, No. 3658
STATE OF NEW JERSEY

DATED: DECEMBER 7, 1987

The Senate Energy and Environment Committee favorably reports Senate Bill No. 3658.

Senate Bill No. 3658 would extend from January 1, 1988 to January 1, 1990 the date after which the Department of Environmental Protection would be prohibited from agreeing to provide legal defense and indemnification to hazardous discharge cleanup contractors.

P. L. 1986, c. 59 established a procedure under which DEP may agree to indemnify and provide legal defense for contractors providing hazardous discharge cleanup services pursuant to State or federal law. The statute was designed to address instances in which contractors could not provide crucial mitigation and cleanup services because they could not obtain, or afford, the liability insurance necessary to protect them against claims which may arise as a result of providing these cleanup or mitigation services.

P. L. 1986, c. 59 (which took effect July 28, 1986) established a year and one-half trial period (until January 1, 1988) during which DEP was authorized to enter into indemnification and defense agreements. This bill would extend this period by two years.