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[First Reprint]

ASSEMBLY, No. 4265

STATE OF NEW JERSEY
213th LEGISLATURE

INTRODUCED NOVEMBER 30, 2009

Sponsored by:

Assemblyman JOHN F. MCKEON

District 27 (Essex)

Assemblyman UPENDRA J. CHIVUKULA

District 17 (Middlesex and Somerset)

Co-Sponsored by:

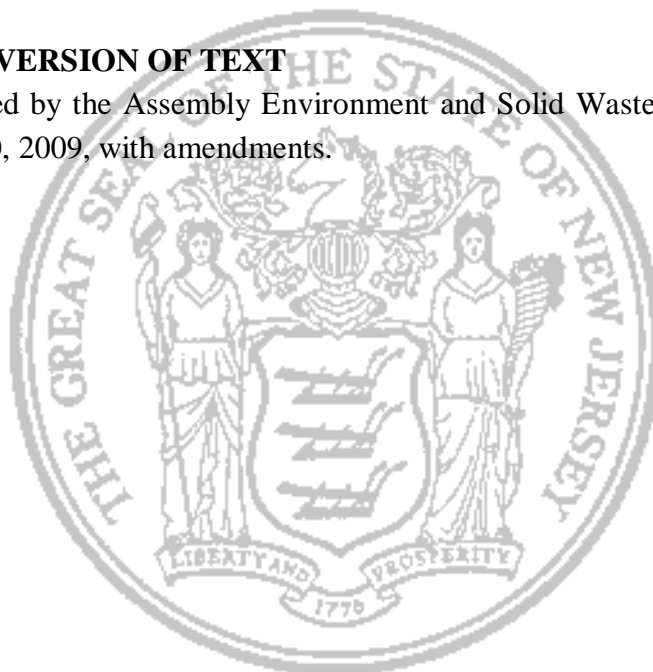
Senators B.Smith and Ciesla

SYNOPSIS

Provides for covenant not to sue by operation of law upon issuance of no further action letter in certain circumstances relating to site remediations.

CURRENT VERSION OF TEXT

As reported by the Assembly Environment and Solid Waste Committee on November 30, 2009, with amendments.



(Sponsorship Updated As Of: 1/12/2010)

1 AN ACT concerning covenants not to sue and amending P.L.1997,
2 c.278.

3

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

6

7 1. Section 6 of P.L.1997, c.278 (C.58:10B-13.1) is amended to
8 read as follows:

9 6. a. Whenever on or after **[**the effective date of P.L.1997,
10 c.278 (C.58:10B-1.1 et al.)**]** October 16, 2009 the Department of
11 Environmental Protection issues a no further action letter pursuant
12 to a remediation, **[**it shall also issue to the person performing the
13 remediation a covenant not to sue with respect to the real property
14 upon which the remediation has been conducted. A covenant not to
15 sue shall be executed by the person performing the remediation and
16 by the department in order to become effective**]** the person
17 responsible for conducting the remediation shall be deemed by
18 operation of law to have received a covenant not to sue with respect
19 to the real property upon which the remediation has been
20 conducted. The covenant not to sue shall be consistent with any
21 conditions and limitations contained in the no further action letter.
22 The covenant not to sue shall be for any area of concern remediated
23 and may apply to the entire real property if the remediation
24 included a preliminary assessment and, if necessary, a site
25 investigation of the entire real property, and any other necessary
26 remedial actions. The covenant remains effective only for as long
27 as the real property for which the covenant was issued continues to
28 meet the conditions of the no further action letter. Upon a finding
29 by the department that real property or a portion thereof to which a
30 covenant not to sue pertains, no longer meets with the conditions of
31 the no further action letter, the department shall provide notice of
32 that fact to the person responsible for maintaining compliance with
33 the no further action letter. The department may allow the person a
34 reasonable time to come into compliance with the terms of the
35 original no further action letter. If the property does not meet the
36 conditions of the no further action letter and if the department does
37 not allow for a period of time to come into compliance or if the
38 person fails to come into compliance within the time period, the
39 **[**department may invoke the provisions of the covenant not to sue
40 permitting revocation of the**]** covenant not to sue shall be deemed
41 to be revoked by operation of law.

42 Except as provided in subsection e. of this section, a covenant
43 not to sue shall **[**contain**]** by operation of law provide for the
44 following, as applicable:

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:

¹Assembly AEN committee amendments adopted November 30, 2009.

1 (1) a provision releasing the person who undertook the
2 remediation from all civil liability to the State to perform any
3 additional remediation, to pay compensation for damage to, or loss
4 of, natural resources, for the restoration of natural resources in
5 connection with the discharge on the property or for any cleanup
6 and removal costs;

7 (2) for a remediation that involves the use of engineering or
8 institutional controls:

9 (a) a provision requiring the person, or any subsequent owner,
10 lessee, or operator during the person's period of ownership, tenancy,
11 or operation, to maintain those controls, conduct periodic
12 monitoring for compliance, and submit to the department, on a
13 biennial basis, a certification that the engineering and institutional
14 controls are being properly maintained and continue to be protective
15 of public health and safety and of the environment. The
16 certification shall state the underlying facts and shall include the
17 results of any tests or procedures performed that support the
18 certification; and

19 (b) a provision **[revoking]** that the covenant is revoked by
20 operation of law if the engineering or institutional controls are not
21 being maintained or are no longer in place; and

22 (3) for a remediation that involves the use of engineering
23 controls but not for any remediation that involves the use of
24 institutional controls only, a provision barring the person or persons
25 whom the covenant not to sue benefits, from making a claim against
26 the New Jersey Spill Compensation Fund and the Sanitary Landfill
27 Facility Contingency Fund for any costs or damages relating to the
28 real property and remediation covered by the covenant not to sue.
29 The covenant not to sue shall not bar a claim by any person against
30 the New Jersey Spill Compensation Fund and the Sanitary Landfill
31 Contingency Fund for any remediation that involves only the use of
32 institutional controls if, after a valid no further action letter has
33 been issued, the department orders additional remediation, except
34 that the covenant shall bar such a claim if the department ordered
35 additional remediation in order to remove the institutional control.

36 b. Unless a covenant not to sue issued under this section is
37 revoked by the department, or by operation of law, the covenant
38 shall remain effective. The covenant not to sue shall apply to all
39 successors in ownership of the property and to all persons who lease
40 the property or who engage in operations on the property.

41 c. If a covenant not to sue is revoked, liability for any
42 additional remediation shall not be applied retroactively to any
43 person for whom the covenant remained in effect during that
44 person's ownership, tenancy, or operation of the property.

45 d. A covenant not to sue and the protections it affords shall not
46 apply to any discharge that occurs subsequent to the issuance of the
47 no further action letter which was the basis of the issuance of the
48 covenant, nor shall a covenant not to sue and the protections it

1 affords relieve any person of the obligations to comply in the future
2 with laws and regulations.

3 e. The covenant not to sue ~~【may be issued】~~ shall be deemed to
4 apply to any person who obtains a no further action letter as
5 provided in subsection a. of this section. The covenant not to sue
6 shall not provide relief from any liability, either under statutory or
7 common law, to any person who is liable for cleanup and removal
8 costs pursuant to subsection c. of section 8 of P.L.1976, c.141
9 (C.58:10-23.11g), and who does not have a defense to liability
10 pursuant to subsection d. of that section.

11 f. (1) Except as provided in ¹~~【paragraph (2)】~~ paragraphs (2)
12 and (3)¹ of this subsection, the department shall not issue covenants
13 not to sue after the issuance of licenses to site remediation
14 professionals pursuant to the provisions of section 12 of P.L.2009,
15 c.60 (C.58:10C-12).

16 (2) The department may issue a covenant not to sue ~~【pursuant~~
17 ~~to】~~ that is consistent with the provisions of this section ~~【when it~~
18 ~~issues a no further action letter for a remediation of a discharge~~
19 ~~from an unregulated heating oil tank】~~ ¹when it issues a no further
20 action letter for a remediation of a discharge from an unregulated
21 heating oil tank.

22 (3) The department may issue a covenant not to sue¹ as part of a
23 settlement of litigation .

24 (cf: P.L.2009, c.60, s.49)

25

26 2. This act shall take effect immediately and shall be
27 retroactive to October 16, 2009.

ASSEMBLY, No. 4265

STATE OF NEW JERSEY 213th LEGISLATURE

INTRODUCED NOVEMBER 30, 2009

Sponsored by:

Assemblyman JOHN F. MCKEON

District 27 (Essex)

SYNOPSIS

Provides for covenant not to sue by operation of law upon issuance of no further action letter in certain circumstances relating to site remediations.

CURRENT VERSION OF TEXT

As introduced.



1 AN ACT concerning covenants not to sue and amending P.L.1997,
2 c.278.

3

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

6

7 1. Section 6 of P.L.1997, c.278 (C.58:10B-13.1) is amended to
8 read as follows:

9 6. a. Whenever on or after **[**the effective date of P.L.1997, c.278
10 (C.58:10B-1.1 et al.)**]** October 16, 2009 the Department of
11 Environmental Protection issues a no further action letter pursuant
12 to a remediation, **[**it shall also issue to the person performing the
13 remediation a covenant not to sue with respect to the real property
14 upon which the remediation has been conducted. A covenant not to
15 sue shall be executed by the person performing the remediation and
16 by the department in order to become effective**]** the person
17 responsible for conducting the remediation shall be deemed by
18 operation of law to have received a covenant not to sue with respect
19 to the real property upon which the remediation has been conducted

20 . The covenant not to sue shall be consistent with any conditions
21 and limitations contained in the no further action letter. The
22 covenant not to sue shall be for any area of concern remediated and
23 may apply to the entire real property if the remediation included a
24 preliminary assessment and, if necessary, a site investigation of the
25 entire real property, and any other necessary remedial actions. The
26 covenant remains effective only for as long as the real property for
27 which the covenant was issued continues to meet the conditions of
28 the no further action letter. Upon a finding by the department that
29 real property or a portion thereof to which a covenant not to sue
30 pertains, no longer meets with the conditions of the no further
31 action letter, the department shall provide notice of that fact to the
32 person responsible for maintaining compliance with the no further
33 action letter. The department may allow the person a reasonable
34 time to come into compliance with the terms of the original no
35 further action letter. If the property does not meet the conditions of
36 the no further action letter and if the department does not allow for
37 a period of time to come into compliance or if the person fails to
38 come into compliance within the time period, the **[**department may
39 invoke the provisions of the covenant not to sue permitting
40 revocation of the**]** covenant not to sue shall be deemed to be
41 revoked by operation of law.

42 Except as provided in subsection e. of this section, a covenant
43 not to sue shall **[**contain**]** by operation of law provide for the
44 following, as applicable:

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 (1) a provision releasing the person who undertook the
2 remediation from all civil liability to the State to perform any
3 additional remediation, to pay compensation for damage to, or loss
4 of, natural resources, for the restoration of natural resources in
5 connection with the discharge on the property or for any cleanup
6 and removal costs;

7 (2) for a remediation that involves the use of engineering or
8 institutional controls:

9 (a) a provision requiring the person, or any subsequent owner,
10 lessee, or operator during the person's period of ownership, tenancy,
11 or operation, to maintain those controls, conduct periodic
12 monitoring for compliance, and submit to the department, on a
13 biennial basis, a certification that the engineering and institutional
14 controls are being properly maintained and continue to be protective
15 of public health and safety and of the environment. The
16 certification shall state the underlying facts and shall include the
17 results of any tests or procedures performed that support the
18 certification; and

19 (b) a provision **[revoking]** that the covenant is revoked by
20 operation of law if the engineering or institutional controls are not
21 being maintained or are no longer in place; and

22 (3) for a remediation that involves the use of engineering
23 controls but not for any remediation that involves the use of
24 institutional controls only, a provision barring the person or persons
25 whom the covenant not to sue benefits, from making a claim against
26 the New Jersey Spill Compensation Fund and the Sanitary Landfill
27 Facility Contingency Fund for any costs or damages relating to the
28 real property and remediation covered by the covenant not to sue.
29 The covenant not to sue shall not bar a claim by any person against
30 the New Jersey Spill Compensation Fund and the Sanitary Landfill
31 Contingency Fund for any remediation that involves only the use of
32 institutional controls if, after a valid no further action letter has
33 been issued, the department orders additional remediation, except
34 that the covenant shall bar such a claim if the department ordered
35 additional remediation in order to remove the institutional control.

36 b. Unless a covenant not to sue issued under this section is
37 revoked by the department, or by operation of law, the covenant
38 shall remain effective. The covenant not to sue shall apply to all
39 successors in ownership of the property and to all persons who lease
40 the property or who engage in operations on the property.

41 c. If a covenant not to sue is revoked, liability for any
42 additional remediation shall not be applied retroactively to any
43 person for whom the covenant remained in effect during that
44 person's ownership, tenancy, or operation of the property.

45 d. A covenant not to sue and the protections it affords shall not
46 apply to any discharge that occurs subsequent to the issuance of the
47 no further action letter which was the basis of the issuance of the
48 covenant, nor shall a covenant not to sue and the protections it

1 affords relieve any person of the obligations to comply in the future
2 with laws and regulations.

3 e. The covenant not to sue ~~【may be issued】~~ shall be deemed to
4 apply to any person who obtains a no further action letter as
5 provided in subsection a. of this section. The covenant not to sue
6 shall not provide relief from any liability, either under statutory or
7 common law, to any person who is liable for cleanup and removal
8 costs pursuant to subsection c. of section 8 of P.L.1976, c.141
9 (C.58:10-23.11g), and who does not have a defense to liability
10 pursuant to subsection d. of that section.

11 f. (1) Except as provided in paragraph (2) of this subsection, the
12 department shall not issue covenants not to sue after the issuance of
13 licenses to site remediation professionals pursuant to the provisions
14 of section 12 of P.L.2009, c.60 (C.58:10C-12).

15 (2) The department may issue a covenant not to sue ~~【pursuant~~
16 ~~to】~~ that is consistent with the provisions of this section ~~【when it~~
17 ~~issues a no further action letter for a remediation of a discharge~~
18 ~~from an unregulated heating oil tank】~~ as part of a settlement of
19 litigation.

20 (cf: P.L.2009, c.60, s.49)

21

22 2. This act shall take effect immediately and shall be retroactive
23 to October 16, 2009.

24

25

26

STATEMENT

27

28 This bill would provide that for a no further action letter for a
29 remediation issued by the Department of Environmental Protection
30 on or after October 16, 2009 to a person performing a remediation,
31 the person would be deemed by operation of law to have also
32 received a covenant not to sue. When the "Site Remediation
33 Reform Act" was enacted, the department was prohibited from
34 issuing a covenant not to sue for most remediations after it began
35 the issuance of temporary licenses to site remediation professionals,
36 on October 16, 2009. Further, for a remediation performed by a
37 licensed site remediation professional, a covenant not to sue applies
38 by operation of law when the response action outcome is issued.
39 This created an inconsistency in the law for remediations. For those
40 persons who are issued a no further action letter by the department,
41 a covenant not to sue would not be available. This bill would
42 provide consistency so that a covenant not to sue by operation of
43 law for a remediation that has department oversight for which a no
44 further action letter is issued would be available just as for a
45 remediation that is performed by a licensed site remediation
46 professional for which a response action outcome is issued. This
47 correction to the law would apply retroactively to October 16, 2009.

A4265 MCKEON

5

1 The bill also authorizes the department to issue a covenant not to
2 sue as a part of a settlement of litigation by the department.

ASSEMBLY ENVIRONMENT AND SOLID WASTE
COMMITTEE

STATEMENT TO

ASSEMBLY, No. 4265

with committee amendments

STATE OF NEW JERSEY

DATED: NOVEMBER 30, 2009

The Assembly Environment and Solid Waste Committee reports favorably and with committee amendments Assembly Bill No.4265.

As amended by the committee, this bill would provide that for a no further action letter for a remediation issued by the Department of Environmental Protection on or after October 16, 2009 to a person performing a remediation, the person would be deemed by operation of law to have also received a covenant not to sue.

When the "Site Remediation Reform Act" was enacted, the department was prohibited from issuing a covenant not to sue for most remediations after it began the issuance of temporary licenses to site remediation professionals, on October 16, 2009. Further, for a remediation performed by a licensed site remediation professional, a covenant not to sue applies by operation of law when the response action outcome is issued. This created an inconsistency in the law for remediations. For those persons who are issued a no further action letter by the department, a covenant not to sue would not be available. This bill would provide consistency so that a covenant not to sue by operation of law for a remediation that has department oversight for which a no further action letter is issued would be available just as for a remediation that is performed by a licensed site remediation professional for which a response action outcome is issued. This correction to the law would apply retroactively to October 16, 2009.

The bill, as amended, also authorizes the department to issue a covenant not to sue, that is consistent with the provisions of law, when it issues a no further action letter for a remediation of a discharge from an unregulated heating oil tank. Lastly, the bill, as amended, provides that the department may issue a covenant not to sue as part of a settlement of litigation.

COMMITTEE AMENDMENTS:

The committee amendments to the bill:

1) authorize the department to issue a covenant not to sue, that is consistent with the provisions of law, when it issues a no further action

letter for a remediation of a discharge from an unregulated heating oil tank; and

2) authorize the department to issue a covenant not to sue as part of a settlement of litigation.

SENATE, No. 3040

STATE OF NEW JERSEY 213th LEGISLATURE

INTRODUCED NOVEMBER 23, 2009

Sponsored by:

Senator BOB SMITH

District 17 (Middlesex and Somerset)

Senator ANDREW R. CIESLA

District 10 (Monmouth and Ocean)

SYNOPSIS

Provides for covenant not to sue by operation of law upon issuance of no further action letter in certain circumstances relating to site remediations.

CURRENT VERSION OF TEXT

As introduced.



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2 c.278.

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17 responsible for conducting the remediation shall be deemed by
18 operation of law to have received a covenant not to sue with respect
19 to the real property upon which the remediation has been
20 conducted. The covenant not to sue shall be consistent with any
21 conditions and limitations contained in the no further action letter.
22 The covenant not to sue shall be for any area of concern remediated
23 and may apply to the entire real property if the remediation
24 included a preliminary assessment and, if necessary, a site
25 investigation of the entire real property, and any other necessary
26 remedial actions. The covenant remains effective only for as long
27 as the real property for which the covenant was issued continues to
28 meet the conditions of the no further action letter. Upon a finding
29 by the department that real property or a portion thereof to which a
30 covenant not to sue pertains, no longer meets with the conditions of
31 the no further action letter, the department shall provide notice of
32 that fact to the person responsible for maintaining compliance with
33 the no further action letter. The department may allow the person a
34 reasonable time to come into compliance with the terms of the
35 original no further action letter. If the property does not meet the
36 conditions of the no further action letter and if the department does
37 not allow for a period of time to come into compliance or if the
38 person fails to come into compliance within the time period, the
39 **[**department may invoke the provisions of the covenant not to sue
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6 and removal costs;

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8 institutional controls:

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14 controls are being properly maintained and continue to be protective
15 of public health and safety and of the environment. The
16 certification shall state the underlying facts and shall include the
17 results of any tests or procedures performed that support the
18 certification; and

19 (b) a provision **[revoking]** that the covenant is revoked by
20 operation of law if the engineering or institutional controls are not
21 being maintained or are no longer in place; and

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27 Facility Contingency Fund for any costs or damages relating to the
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37 revoked by the department, or by operation of law, the covenant
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42 additional remediation shall not be applied retroactively to any
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47 no further action letter which was the basis of the issuance of the
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3 e. The covenant not to sue **【may be issued】** shall be deemed to
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9 (C.58:10-23.11g), and who does not have a defense to liability
10 pursuant to subsection d. of that section.

11 f. (1) Except as provided in paragraph (2) of this subsection, the
12 department shall not issue covenants not to sue after the issuance of
13 licenses to site remediation professionals pursuant to the provisions
14 of section 12 of P.L.2009, c.60 (C.58:10C-12).

15 (2) The department may issue a covenant not to sue **【pursuant**
16 **to】** that is consistent with the provisions of this section **【when it**
17 **issues a no further action letter for a remediation of a discharge**
18 **from an unregulated heating oil tank】** as part of a settlement of
19 litigation.

20 (cf: P.L.2009, c.60, s.49)

21

22 2. This act shall take effect immediately and shall be retroactive
23 to October 16, 2009.

24

25 STATEMENT

26

27 This bill would provide that for a no further action letter for a
28 remediation issued by the Department of Environmental Protection
29 on or after October 16, 2009 to a person performing a remediation,
30 the person would be deemed by operation of law to have also
31 received a covenant not to sue. When the "Site Remediation
32 Reform Act" was enacted, the department was prohibited from
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34 the issuance of temporary licenses to site remediation professionals,
35 on October 16, 2009. Further, for a remediation performed by a
36 licensed site remediation professional, a covenant not to sue applies
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40 a covenant not to sue would not be available. This bill would
41 provide consistency so that a covenant not to sue by operation of
42 law for a remediation that has department oversight for which a no
43 further action letter is issued would be available just as for a
44 remediation that is performed by a licensed site remediation
45 professional for which a response action outcome is issued. This
46 correction to the law would apply retroactively to October 16, 2009.

47 The bill also authorizes the department to issue a covenant not to
48 sue as a part of a settlement of litigation by the department.

SENATE ENVIRONMENT COMMITTEE

STATEMENT TO

SENATE, No. 3040

with committee amendments

STATE OF NEW JERSEY

DATED: DECEMBER 3, 2009

The Senate Environment Committee favorably reports Senate Bill No. 3040 with committee amendments.

This bill would provide that for a no further action letter for a remediation issued by the Department of Environmental Protection on or after October 16, 2009 to a person performing a remediation, the person would be deemed by operation of law to have also received a covenant not to sue. When the "Site Remediation Reform Act" was enacted, the department was prohibited from issuing a covenant not to sue for most remediations after it began the issuance of temporary licenses to site remediation professionals, on October 16, 2009. Further, for a remediation performed by a licensed site remediation professional, a covenant not to sue applies by operation of law when the response action outcome is issued. This created an inconsistency in the law for remediations. For those persons who are issued a no further action letter by the department, a covenant not to sue would not be available. This bill would provide consistency so that a covenant not to sue by operation of law for a remediation that has department oversight for which a no further action letter is issued would be available just as for a remediation that is performed by a licensed site remediation professional for which a response action outcome is issued. This correction to the law would apply retroactively to October 16, 2009.

The bill, as amended, would authorize the department to issue a covenant not to sue, that is consistent with the provisions of law, when it issues a no further action letter for a remediation of a discharge from an unregulated heating oil tank. The bill, as amended, also authorizes the department to issue a covenant not to sue as a part of a settlement of litigation by the department.

The bill, as amended, is identical to Assembly Bill No. 4265 (1R).