NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, *et al.*, Plaintiffs, v. OCCIDENTAL CHEMICAL CORPORATION, TIERRA SOLUTIONS, INC., MAXUS ENERGY CORPORATION, *et al.*, Defendants,	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: ESSEX COUNTY DOCKET NO. L-9868-05 (PASR) CIVIL ACTION
MAXUS ENERGY CORPORATION and TIERRA SOLUTIONS, INC., Third Party Plaintiffs, v. 3M COMPANY, *et al.*, Third Party Defendants.	:	

BRIEF AND APPENDIX OF TIERRA SOLUTIONS, INC. IN OPPOSITION TO THE MOTIONS FOR PARTIAL SUMMARY JUDGMENT OF PLAINTIFFS AND DEFENDANT OCCIDENTAL CHEMICAL CORPORATION

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PRELIMINARY STATEMENT

Plaintiffs (the "State") and Defendant Occidental Chemical Corporation ("Occidental") seek to impose Spill Act liability on Tierra Solutions, Inc. ("Tierra"), the current owner of the Lister Site, solely on the basis that it knowingly purchased contaminated land. This theory runs contrary to the Act's plain language and thirty years of consistent New Jersey court rulings holding that property owners are responsible under the Spill Act only for discharges occurring during their ownership. Notably, neither the State nor Occidental makes any attempt to establish that essential prerequisite to liability -- i.e., that there were discharges from the Lister Site after Tierra took ownership in 1986. Rather, they contend that Tierra is liable merely for purchasing contaminated property, a claim that cannot be squared with the plain language of the Spill Act's liability provisions. Those liability provisions are scarcely mentioned by the State or Occidental, yet they contain a specific provision governing the liability of parties that acquire contaminated property. The problem for the State and Occidental is that the Spill Act's provision confines liability to parties that acquire contaminated property "on or after **September 14, 1993**." Unmistakably, parties that acquired contaminated property **before** 1993 -- like Tierra -- are thus outside of the Spill Act's express reach.

Indeed, the State in this very case previously recognized that it would need to prove that discharges from the Lister Site had occurred during Tierra's ownership. When moving to dismiss the State's Spill Act claim before Judge Davidson, Tierra had urged that its liability could not be based on the migration of contaminants that were discharged prior to its ownership and that Plaintiffs had failed to adequately allege that discharges had occurred after Tierra became owner in 1986. The State responded by acknowledging that the migration of previously-discharged contaminants did not make Tierra liable, but asserted that it had sufficiently pled and

was prepared to prove the existence of discharges during Tierra's ownership. On that basis, the Court denied Tierra's motion to dismiss, leaving the State to its proofs.

Now, the State returns to court, this time with Occidental at its shoulder, reversing its prior position and claiming that it need not prove that any discharges occurred during Tierra's ownership. Instead, the State and Occidental contend that a 2001 amendment establishing a new defense to environmental liability under the Spill Act and the common law should be read to have silently amended the Spill Act's liability provision to cover all persons who knowingly purchased contaminated property, not just those that bought after 1993. If that were the legislative intent, however, the Legislature would have amended the Spill Act's liability provision and unambiguously provided that all purchasers of contaminated property -- not just post-1993 buyers -- were subject to liability. But it did not and, indeed, it chose not to do so. During the legislative process, the Legislature considered draft language that would have expanded liability to cover all purchasers of contaminated property. Yet, the Legislature decided not to include that language in the 2001 legislation, leaving the Spill Act's liability provisions so that they only encompass post-1993 purchasers. Unwilling to abide by the decision of the Legislature, the State and Occidental now urge this Court to rewrite the Spill Act to include the language the Legislature specifically rejected.

Moreover, the State and Occidental mistake the purpose of the 2001 amendment. Far from expanding Spill Act liability, the 2001 amendment represented a legislative effort to fine tune the defenses available to environmental liability of all kinds. Accordingly, the Legislature added a defense to both statutory and common law environmental liability. As the State advised the Supreme Court when discussing an innocent purchaser defense in its own Spill Act regulations, "[a] due diligence defense is a *shield* which a deserving claimant may invoke to

escape liability; it is not [a] *sword* which [the State] can employ to impose liability where it would not otherwise exist." Appendix, Exh. A at 9 (emphasis in original). Yet, that is now the leap that Plaintiffs and Occidental ask this Court to take, turning the shield of an innocent owner defense covering all environmental liability into a sword to be employed to impose Spill Act liability where it would not otherwise exist.

Without hesitation, this Court should refuse that invitation, which would overturn long-established law and raise constitutional issues of consequence. Rather, the Court should interpret the Spill Act's liability provisions consistent with their plain language as well as thirty years of New Jersey case law and reject the pending motions.

BACKGROUND

Tierra has submitted separate responses to the Statements of Material of Facts filed by both the State and Occidental, which are incorporated herein by reference. Two points, however, merit highlighting.

The first relates to the remedial purpose behind Tierra's acquisition of the Lister Site. Tierra acquired the property in 1986 and remains its owner, but it did not acquire the site in order to conduct any manufacturing operation or other business activity at the property and, in fact, none has been conducted. Rather, all parties acknowledge that Tierra's acquisition of the property was for the sole purpose of facilitating the remediation of contamination found at the site. By taking ownership of the property, Tierra could make sure that the property was fully accessible for remediation purposes and that nobody else had the ability to use the site for any other purpose. In fact, no one has contended that, since the property was acquired by Tierra twenty-five years ago, any activities have occurred on the property except for remediation

activities undertaken pursuant to the direction of the United States Environmental Protection Agency.

Second, in the current motion, the State asserts newfound arguments on Tierra's liability that stand in sharp contrast to its position when opposing Tierra's prior motion to dismiss the State's Spill Act claim as well as the resulting Court ruling. Tierra's earlier motion had urged that it could not be held responsible under the Spill Act based on any passive migration of contamination discharged before it took ownership in 1986 and that the State's Complaint was devoid of the factual allegations needed to support the legal conclusion that there were discharges during its ownership.

In opposing Tierra's motion, the State never contended that Tierra could be held liable under the Spill Act simply because it owned the Lister site or knew of pre-existing contamination. Nor did the State ever cite to N.J.S.A. 58:10-23.11g.d.(5), the statutory provision that it now contends automatically creates owner liability for pre-1993 purchasers of contaminated property. Instead, after acknowledging that "[i]t is undisputed that courts have interpreted [the Spill Act] to exclude passive migration of pre-existing contamination[,]" the State rested its case on its allegations that there were discharges during Tierra's ownership. Appendix, Exh. B at 13. The State pointed to the allegations in its pleadings that discharges continued during Tierra's ownership and stressed that "[t]he Complaint clearly and unequivocally states that discharges continued into the 1980s under the watch of Maxus and Tierra." Id. at 6, 13; see also id. at 12 (the Complaint "is simple, concise, direct, and unmistakable: Maxus and Tierra discharged hazardous substances (TCDD) during the period of their ownership or control of the Lister Site.") Thus, the State argued that it had a claim under the Spill Act arising out of discharges during the time Tierra owned or controlled the Lister Site,

citing to the Supreme Court decisions in Marsh v. DEP, 152 N.J. 137 (1997), and State v. Ventron Corp., 94 N.J. 473 (1983), for the proposition that "ownership or control over property at the time of a discharge makes a party a discharger." Appendix, Exh. B at 14.

In resolving this aspect of Tierra's motion, the Court began by acknowledging the parties' agreement that "passive migration cannot be a basis for liability in this case." Appendix, Exh. C at 7. The Court then noted that the Lister Site closed in 1969 and that Maxus and Tierra's involvement began in 1983 at the earliest, prompting the Court to observe that "[a]t first blush it might appear that once the Lister Site closed there could no longer be any active discharge, only passive migration." Id. at 8. The Court held, however, that Plaintiffs had adequately alleged that discharges continued to occur "during the time of [Tierra's] ownership," and that even though "Plaintiffs do not explain how such discharges might have occurred as late as 1983, and the facts may ultimately not support the claim[,] ... this is a factual issue, appropriate perhaps for summary judgment, but not on a motion for failure to state a claim." Id. Consequently, the Court denied Tierra's motion because "[w]hether there were still discharges occurring over fourteen years after the Lister Site was shut down is a fact question that cannot be determined on the papers submitted and that probably cannot be determined at this early stage of the case." Id. at 9.

LEGAL ARGUMENT

TIERRA CANNOT BE FOUND LIABLE UNDER THE SPILL ACT FOR MERE OWNERSHIP OF THE LISTER SITE.

Although the State acknowledged in prior motion practice that Tierra's Spill Act liability necessitated proof of actual discharges of hazardous substances occurring during Tierra's ownership, its current motion is premised on the proposition that no such proof is needed and that Tierra's acquisition of the Lister Site as part of an effort to remediate the property alone is

sufficient to make Tierra liable under the Spill Act. That proposition ignores the Spill Act's express liability provisions as well as court rulings on the scope of Spill Act liability spanning three decades. The State's assertion also erroneously seeks to transform a 2001 amendment designed to reduce the environmental liabilities of pre-1993 purchasers of contaminated property into a legislative determination to expand Spill Act liability. See P.L. 2001, c. 154, §2 (the "2001 Amendment"). In short, the State got it right the first time and must be held to its previously-acknowledged burden of establishing that discharges occurred during Tierra's ownership of the Lister Site.

A. Under The Plain Language Of The Spill Act, Tierra Is Not Liable For Mere Ownership Of The Lister Site.

In arguing that Tierra is liable, the State and Occidental rely on the defenses to Spill Act liability without ever explaining, or even citing, the Act's liability provisions. The section of the Spill Act addressing issues of liability -- N.J.S.A. 58:10-23.11g -- contains a subsection defining the classes of parties liable under the Spill Act (Subsection c) and a completely separate subsection listing the available defenses to environmental liability (Subsection d). Specifically, Subsection c establishes three categories of liable parties:

> (1) . . . any person who has discharged a hazardous substance, or is in any way responsible for any hazardous substance . . .
>
> (2) In addition to the persons liable pursuant to this subsection, in the case of a discharge of a hazardous substance from a vessel into the waters of the State, . . . any . . . person who was . . . scheduled to assume ownership of the discharged hazardous substance . . .
>
> (3) In addition to the persons liable pursuant to this subsection, any person who owns real property acquired on or after September 14, 1993 on which there has been a discharge prior to the person's acquisition of that property and who knew or should have known that a hazardous substance had been discharged at the real property. . . . Nothing in this paragraph shall be construed to alter liability of any person who acquired real property prior to September 14, 1993. [N.J.S.A. 58:10-23.11g.c. (emphasis supplied).]

Absent proof of a discharge occurring during Tierra's ownership, Tierra does not fit into any of these categories of liable parties. Without such proof, Tierra cannot be a discharger under N.J.S.A. 58:10-23.11g.c.(1). Similarly, under longstanding caselaw previously relied upon by the State when opposing Tierra's motion to dismiss and discussed further below, Tierra cannot be a person "in any way responsible" under N.J.S.A. 58:10-23.11g.c.(1) unless discharges occurred during its ownership. Thus, subsection (1) does not apply. Tierra is also not a party scheduled to assume ownership of hazardous substances discharged from a vessel under N.J.S.A. 58:10-23.11g.c.(2). Thus, subsection (2) does not apply. Finally, regarding N.J.S.A. 58:10-23.11g.c.(3), Tierra acquired the Lister Site to aid remediation efforts in 1986, and thus indisputably is not a party that acquired contaminated property after September 14, 1993.[1] Therefore, subsection (3) does not apply.

The State and Occidental do argue that Tierra qualifies as a party "in any way responsible for any hazardous substance" under N.J.S.A. 58:10-23.11g.c.(1) simply by virtue of its acquisition of the Lister Site in 1986 with knowledge of its contamination. But, that argument ignores and, in fact, annuls N.J.S.A. 58:10-23.11g.c.(3). The third class of liable parties plainly and precisely defined in N.J.S.A. 58:10-23.11g.c.(3) covers "any person who owns real property acquired on or after September 14, 1993 on which there has been a discharge prior to the person's acquisition of that property and who knew or should have known that a hazardous substance had been discharged at the real property." (Emphasis added). Under the State and Occidental's argument, this provision is superfluous. If a party becomes a person "in any way

[1] The Legislature did not randomly select September 14, 1993 as the date after which ownership liability would attach. Rather, September 14, 1993 is the effective date of part of the Industrial Site Recovery Act ("ISRA"). P.L. 1993, c. 139, §50.

responsible" simply because it knowingly purchased contaminated property, this third class of liable parties would be wholly subsumed within the first class of liable parties.

Under elementary canons of statutory interpretation, a "construction that will render any part of a statute inoperative, superfluous, or meaningless, is to be avoided." State v. Reynolds, 124 N.J. 559, 564 (1991). The only way to give N.J.S.A. 58:10-23.11g.c.(3) any meaning is to hold that mere ownership of property does not make a party "in any way responsible for any hazardous substance" under N.J.S.A. 58:10-23.11g.c.(1). Instead, liability for ownership of contaminated real property is governed by N.J.S.A. 58:10-23.11g.c.(3), which imposes liability only upon those that acquire property after September 14, 1993.

Moreover, the plain language of the 1998 amendment that added the ownership liability provisions of N.J.S.A. 58:10-23.11g.c.(3) is clear that it was creating a new category of liability, above and beyond what was contained in the "in any way responsible" language in N.J.S.A. 58:10-23.11g.c.(1). The 1998 amendment expressly states that this new class of liable parties composed of post-1993 owners was "[i]n addition to" those persons who were already liable under the Spill Act as dischargers or persons "in any way responsible" for discharged hazardous substances. N.J.S.A. 58:10-23.11g.c.(3). The 1998 amendment thus confirmed that post-1993 owners were not previously "in any way responsible" under the Spill Act, and, obviously, pre-1993 purchasers were not either.

The Legislature also included language in the 1998 amendment to insure that no one might assert that pre-1993 purchasers possess a similar liability to that established for post-1993 purchasers. When creating this third class of liable parties, the Legislature unambiguously stated that "Nothing in this paragraph shall be construed to alter liability of any person who acquired real property prior to September 14, 1993." N.J.S.A. 58:10-23.11g.c.(3). Thus, while the

Legislature was expressly creating an "addition[al]" class of liable parties encompassing certain post-1993 buyers of real estate, it was careful to emphasize that it was not altering the status of parties like Tierra that acquired real property prior to 1993.

B. Long Established Case Law Holds That Simply Owning Contaminated Property Does Not Create Liability As a Party "In Any Way Responsible" Under The Spill Act.

The fact that subsequent purchasers of contaminated property are not "in any way responsible" under the Spill Act has been confirmed by thirty years of New Jersey court rulings consistently holding that property owners are responsible only for the contamination discharged during their tenure. As summarized by the Appellate Division just a few months ago, "the Spill Act cases determining issues of liability have generally focused on the necessary connection between the offending discharge and the discharger and/or owner of the property, broadly construing the statutory standard of 'in any way responsible' as encompassing either ownership or control over the property at the time of the damaging discharge, or control over the hazardous substance that caused the contamination." NJDEP v. Dimant, 418 N.J. Super. 530, 543 (App. Div. 2011) (emphasis added). Even the Supreme Court decision cited by the State to establish the breadth of the Spill Act's liability provisions does not extend liability to subsequent purchasers of contaminated land, recognizing that "in any way responsible" liability attaches when a party is "even remotely responsible for causing contamination[.]" In re Kimber Petroleum Corp., 110 N.J. 69, 85 (1988) appeal dismissed, 488 U.S. 935 (1988) (emphasis added).

The legal principle that a party must have either owned or controlled a property at the time of a discharge in order to be considered a person "in any way responsible" was first articulated in the seminal case interpreting the Spill Act, State v. Ventron Corp., 182 N.J. Super. 210 (App. Div. 1981), aff'd as modified, 94 N.J. 473 (1983), and has been reinforced in multiple

Supreme Court and Appellate Division rulings thereafter. In Ventron, the Appellate Division expressly rejected the DEP's attempt to impose liability on the current owners of the property (the Wolfs), where there was no evidence of discharges from the property during their ownership. Ventron, 182 N.J. Super. at 226-27. Notably, the DEP did not even seek certification on this question from the Supreme Court, Ventron, 94 N.J. at 493, instead choosing to let the Appellate Division's ruling stand as the final word and as binding precedent on that issue. Nevertheless, in discussing the liability of other defendants, the Supreme Court provided clear guidance as to the scope of the statutory phrase "in any way responsible." The Court articulated a basic principle that has since been routinely applied by New Jersey courts: "[t]he subsequent acquisition of land on which hazardous substances have been dumped may be insufficient to hold the owner responsible. Ownership or control over the property at the time of the discharge, however, will suffice." Id. at 502. A decade-and-a-half later, the Supreme Court would quote Ventron's language and emphasize its distinction between a party that owned property at the time of a discharge and one that subsequently acquired contaminated property, while also noting that the DEP's own regulations "incorporate[] a similar interpretation of responsibility[.]" Marsh, 152 N.J. at 146-47.

Since the seminal Ventron decisions, New Jersey courts have repeatedly applied the principle that the subsequent ownership of land from which discharges have occurred does not make a party "in any way responsible" for hazardous substances. For example, in DEP v. Arky's Auto Sales, 224 N.J. Super. 200 (App. Div. 1988), the DEP sought to impose liability on the Arky brothers, who had owned the contaminated property in question for a few years, but the Appellate Division found no actual proof that any discharges occurred during the Arky brothers' ownership. Id. at 207. The court thus concluded that the Arky brothers were not subject to Spill

Act liability because "continuing contamination from an old spill is not a present discharge." Id. (citing Atlantic City Mun. Utilities Authority v. Hunt, 210 N.J. Super. 76, 98 (App. Div. 1986) and referencing Ventron, 94 N.J. at 493).

The lesson to be learned from Arky's and also from Ventron was well summarized by the State in a brief previously filed with the Supreme Court. There, the State explained that "[t]he Arky *brothers* were shielded from individual liability . . . because, as in Ventron, there was no factual basis upon which the Court could conclude that any leakage occurred during their individual ownership. . . . The prevailing rule established by Ventron, Arky's and Tree Realty is: if a discharge is occurring during a party's ownership, the party is liable for the discharge." Appendix, Exh. D at 18-19 (italics in original; emphasis added).

This same principle was applied in White Oak Funding v. Winning, 341 N.J. Super. 294 (App. Div.) certif. denied, 170 N.J. 209 (2001). There, plaintiff contended that two prior owners (the Scarboroughs) were persons "in any way responsible" because they were aware of the prior use of the property for an oil distribution business, conducted no environmental due diligence prior to their purchase, and the pre-existing contamination migrated and spread during their ownership. Id. at 300-01. The Appellate Division found this contention to be meritless, explaining in unambiguous terms that "[t]hese circumstances, however, are devoid of the critical factor which triggers liability under this provision: the person must be in any way responsible for the discharge that caused the contamination." Id. at 301 (emphasis in original). Citing Ventron and Marsh, the Court focused on the fact that "[t]he Scarboroughs had neither ownership nor control over the property when the discharge of fuel oil onto the land occurred, during Winnings' ownership." Id.

Likewise, in Housing Auth. of the City of New Brunswick v. Suydam Investors, 355 N.J. Super. 530 (App. Div. 2002), rev'd on other grounds, 177 N.J. 2 (2003), the Appellate Division addressed the fair market value of contaminated properties in condemnation proceedings. The court was careful to note that even though condemnees were, by definition, the current property owners, they would not be liable for the environmental conditions on their property unless caused by discharges that occurred during their ownership. Following White Oak, the court explained that

> Generally, a property owner may be held liable for an environmental claim only if it was responsible for the contamination. See White Oak Funding, Inc. v. Winning, 341 N.J. Super. 294, 298-302 (App. Div.), certif. denied, 170 N.J. 209 (2001). Thus, if a predecessor in title or an owner of an adjoining property were responsible for environmental contamination on a condemnee's property, that other party, not the condemnee, ordinarily would be subject to liability under the Spill Act or other environmental legislation. [Id. at 552.]

The Supreme Court reversed in Housing Authority on the issue of how contamination should be accounted for in a condemnation proceeding, but did not express any disagreement with the Appellate Division's understanding of the scope of Spill Act liability.

This unbroken line of New Jersey court rulings has continued to this day, with two decisions in the last year. In Northern International Remail and Express Co. v. Robbins, 2010 WL 4068204 (App. Div. 2010)(Appendix, Exh. E),[2] plaintiff had sued Robbins, who had purchased a property after solvents had been discharged. Plaintiff argued that Robbins' tenants were registered generators of hazardous waste and, thus, that there were potential discharges during Robbins' ownership. Citing once again to Ventron and Marsh, the Appellate Division reasoned that

[2] Pursuant to R .1:36-3, counsel advises the Court that it is unaware of any contrary unpublished decisions.

> while there is no question that an owner is responsible for a discharge on its property, that responsibility does not attach unless there is evidence of a discharge during ownership. In the absence of evidence that the waste generated by [Robbins' tenants] included the contaminants detected, there was no basis for an inference permitting a finding that either [tenant] discharged the hazardous waste generated. [Id. at *5 (emphasis added)].

Because there was no such evidence of discharges during the time Robbins owned the property, the Appellate Division affirmed judgment in Robbins' favor. Finally, in Dimant, decided earlier this year, the Appellate Division again explained that liability as a person "in any way responsible" under the Spill Act "encompass[es] either ownership or control over the property at the time of the damaging discharge, or control over the hazardous substance that caused the contamination." Dimant, 418 N.J. Super. at 543 (emphasis added).

In sum, starting with the Appellate Division's decision in Ventron in 1981 and continuing through the Dimant decision handed down just this past March, thirty years of consistent jurisprudence has interpreted the Spill Act's "in any way responsible" provision to impose liability upon a property owner only for contamination discharged during its ownership.[3] The guiding principle is simple and straightforward: ownership at the time of discharge establishes that the person is "in any way responsible" for the discharge; ownership of previously-contaminated property does not. Applying this rule, no New Jersey court has previously held a property owner to be a person "in any way responsible" for pre-existing contamination. Having solely acquired ownership of the Lister Site in order to facilitate remediation, Tierra should not be the first to be held liable on that basis.

[3] The same conclusion was also reached by the federal district court in New Jersey, which has held that "mere ownership of a property on or in which contamination was ongoing before the particular owner's watch does not trigger Spill Act liability." United States v. CDMG Realty Co., 875 F. Supp. 1077, 1087 (D.N.J. 1995) rev'd on other grounds, 96 F.3d 706 (3d Cir. 1996).

C. Neither The 2001 Amendment Nor Case Law Supports Holding Tierra Liability Solely For Owning The Lister Site.

1. The 2001 Amendment To The Spill Act Adding An Innocent Purchaser Defense Covering Pre-1993 Property Purchasers Did Not Silently Amend The Spill Act To Expose These Pre-1993 Purchasers To Spill Act Liability.

Undeterred by the caselaw consistently interpreting the Spill Act, the State and Occidental assert that the 2001 Amendment adding a new **defense** to environmental liability altered this state of affairs. The portion of the 2001 Amendment on which the State and Occidental rely provides in pertinent part that:

> A person, including an owner or operator of a major facility, who owns real property acquired prior to September 14, 1993 on which there has been a discharge, shall not be liable for cleanup and removal costs or for any other damages to the State or to any other person for the discharged hazardous substance pursuant to subsection c. of this section or pursuant to civil common law, if that person can establish by a preponderance of evidence that subparagraphs (a) through (d) apply. . . . [N.J.S.A. 58:10-23.11g.d.(5).]

Ironically, even if the State and Occidental were correct, their interpretation would only have a limited effect on this case because the State's case hinges on direct releases into the Passaic River. Although the State asserts that Tierra is liable for "the hazardous substances discharged at and from the Lister Plant[,]" (Pb3; emphasis added), the 2001 Amendment only covers discharges on a property. Specifically, the 2001 Amendment covers persons who acquire real property "on which there has been a discharge" and creates a defense applicable to "the discharged hazardous substance[.]" N.J.S.A. 58:10-23.11g.d.(5) (emphasis added). Yet, Tierra did not acquire and does not own the Passaic River, the property which received the discharges at the center of this case. Moreover, the property that Tierra does own has already been

remediated and has been specifically excluded from the scope of the State's lawsuit. Third Party Complaint, ¶¶77-78; Prayer for Relief (final paragraph of each Count).

In addition to this key flaw, the State's and Occidental's interpretation of the 2001 Amendment is untenable for multiple reasons.

First, the 2001 Amendment did not amend Subsection c of N.J.S.A. 58:10-23.11g, which defines the three classes of persons who are liable under the Spill Act. If the Legislature sought to alter the scope of liability under the Spill Act, it would have amended Subsection c and its delineation of those who qualify as liable parties. Subsection c continues to make liable "any person who owns real property acquired on or after September 14, 1993 on which there has been a discharge prior to the person's acquisition of that property and who knew or should have known that a hazardous substance had been discharged at the real property." (Emphasis added). Had the Legislature intended to impose liability on pre-1993 purchasers, it could have simply stricken "acquired on or after September 14, 1993." However, the Legislature chose not to do so, and instead left the Spill Act's liability provision intact, so that it continued to impose "ownership" responsibility only on those who acquired property "on or after September 14, 1993." Without hesitation, the Court should reject the State's and Occidental's request to ignore the plain statutory language employed by the Legislature and to rewrite the Spill Act to impose liability on all owners of property where discharges had previously occurred. See Ryan v. Renny, 203 N.J. 37, 54 (2010) ("It is not the court's function to rewrite a plainly-written enactment of the Legislature [or] presume that the Legislature intended something other than that expressed by way of the plain language.")(citations and internal quotations omitted); Jablonowska v. Suther, 195 N.J. 91, 105 (2008)(same).

Second, the State's and Occidental's interpretation transforms the third class of liable parties defined in Subsection c into a nullity. The State and Occidental contend that the term "in any way responsible" contained in N.J.S.A. 58:10-23.11g.c.(1) covers all owners of property on which discharges previously occurred. If this is true, then N.J.S.A. 58:10-23.11g.c.(3), the liability provision covering post-1993 purchasers, is a meaningless provision without purpose or effect, since post-1993 purchasers would be subject to the same liability in its absence. The State and Occidental's interpretation thus renders N.J.S.A. 58:10-23.11g.c.(3) mere surplusage, violating basic principles of statutory construction. County of Monmouth v. Wissell, 68 N.J. 35, 42 (1975) ("There is a strong presumption against any legislative intent to find that an entire section of a statute, plain and unambiguous on its face, is a nullity on the ground that it is useless"); In re: Adoption of N.J.A.C., 341 N.J. Super. 536, 545 (App. Div. 2001) (applying "firmly established principle of statutory interpretation that words used by the Legislature have a purpose and a meaning and that we cannot assume that the Legislature used superfluous or meaningless language").

Third, the State's and Occidental's position means that the Legislature silently amended the liability provisions of the Spill Act by implication. However, the Court should not so casually assume that the Legislature intended to amend the Spill Act's liability provisions and overrule the longstanding caselaw holding that owners are responsible parties only for discharges occurring during their ownership. State v. Dalglish, 86 N.J. 503, 512 (1981) (absent clear legislative signal, court "shall not impute to the Legislature an intention to change established law"). Here, not only did the Legislature fail to amend the classes of persons defined as liable under the statute, there is absolutely nothing in the legislative history demonstrating that the Legislature set out to expand liability under the Spill Act.

Fourth, when the Legislature added the innocent purchaser defense covering pre-1993 purchasers, it had before it a draft of the 2001 Amendment that would also have added a provision expanding the Spill Act's three classes of liable parties to add a fourth class encompassing pre-1993 purchasers. As introduced on May 3, 2001, the bill that became the 2001 Amendment solely amended the statute of limitations for certain environmental claims, but did not contain any provisions dealing with the issues at bar. Appendix, Exh. F. However, the bill was reported out of the Senate Environment Committee on June 11, 2001 by way of Senate Committee Substitute. Appendix, Exh. G. The Senate Committee Substitute included the new innocent purchaser defense applicable to pre-1993 purchasers in exactly the same form that was ultimately enacted into law. Id. at §2.

Critically, on June 8, 2001, just three days before the Senate Environment Committee endorsed the Senate Committee Substitute, a draft of the Senate Committee Substitute was prepared that would have amended both Subsection c and Subsection d of N.J.S.A. 58:10-23.11g. Appendix, Exh. H. In addition to amending Subsection d to add the innocent purchaser defense for pre-1993 buyers, the June 8 draft proposed to amend Subsection c to add a fourth class of liable parties covering parties like Tierra -- *i.e.*, those who purchased contaminated property before September 14, 1993. The language proposed to be added to the liability provisions by the June 8, 2001 draft Senate Committee Substitute is as follows:

> (4) In addition to the persons liable pursuant to this subsection, any person who owns real property acquired prior to September 14, 1993, on which there has been a discharge prior to the person's acquisition of that property and who knew or should have known that a hazardous substance had been discharged at the real property, shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs no matter by whom incurred. Such person shall also be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs incurred by the department or a local unit pursuant to subsection b. of section 7 of P.L. 1976, c. 141 (C. 58:10-23.11f). Nothing in this

> paragraph shall be construed to alter liability of any person who acquired real property on or after September 14, 1993. [Appendix Exh. H, §2 (emphasis added)].

Ultimately, the Legislature chose not to adopt the draft's liability expansion, but proceeded to enact only the innocent purchaser defense. Plainly, the Legislature never intended to expand the Spill Act's liability net to capture pre-1993 purchasers of contaminated property like Tierra. It had language before it that would have done just that, but decided against including it in the 2001 Amendment. See Bd. Of Chosen Freeholders of the County of Morris v. State of New Jersey, 159 N.J. 565, 580 (1999) (State was not required to assume the capital costs of judicial facilities because the Legislature, in drafting the resolution which was later adopted by the electorate as a Constitutional amendment, included some of the recommendations of an appointed study commission but reject its recommendation to include the word "capital" in the list of enumerated judicial costs); State v. Maguire, 84 N.J. 508, 523-24 (1980) (interpreting statute consistent with Legislature's consideration and rejection of amendatory language); Castro v. NYT Television, 370 N.J. Super 282, 291-92 (App. Div. 2004) (when an Assembly Committee deleted an express authorization for private lawsuits from bill prior to its enactment into law, the Legislature signaled its intent that patients cannot bring private actions for violations of the Hospital Patients Bill of Rights Act).

Fifth, not only did the Legislature choose not to enact the draft language that would have expanded the classes of persons liable under the Spill Act, but the legislative statements accompanying the 2001 Amendment make clear that its actions were intentional. The Committee Statement issued by the Senate Environment Committee when reporting the 2001 Amendment to the Senate floor on June 11, 2001 stated as follows:

> The [bill] is intended to provide a defense to liability for only those persons who purchased contaminated property before September 14, 1993 and, after appropriate inquiry, did not know and had no reason to know that the property was contaminated. The [bill] is not intended to change any liability that otherwise exists for persons who acquired contaminated property before September 14, 1993. [Appendix to Plaintiffs' Brief, Exh. A at 2 (emphasis added)].

By leaving no doubt that the bill's addition of a defense was not intended to otherwise alter the scope of liability that previously existed under the Spill Act, the Committee Statement directly refutes the State's and Occidental's contrary contention.

Finally, the express language of the 2001 Amendment reveals its true purpose: to provide a defense to environmental liability of all types. The added language provides that "A person, including an owner or operator of a major facility, who owns real property acquired prior to September 14, 1993 on which there has been a discharge, shall not be liable for cleanup and removal costs or for any other damages to the State or to any other person for the discharged hazardous substance pursuant to subsection c. of this section or pursuant to civil common law" if the person can satisfy the requirement of the defense. N.J.S.A. 58:10-23.11g.d.(5) (emphasis added). Thus, although placed in the Spill Act, the 2001 Amendment is not truly a Spill Act amendment, but addresses environmental claims of all types, whether arising under the Spill Act or the common law and whether brought by the State or by private parties. By adding this new defense, the Legislature clearly intended to protect innocent pre-1993 purchasers from all environmental liabilities, no matter what the asserted legal basis for liability and no matter who brought the case.[4]

[4] Although Occidental argues that the inclusion of the Spill Act within the scope of the innocent purchaser defense is mere surplusage unless one "presuppose[s]" Spill Act liability for pre-1993 purchasers, OCCb4, that assertion ignores the role of the defense in the Spill Fund claims process. As discussed in the Marsh case, the Spill Act contains a process through which private parties can file claims against the Spill Fund to obtain public funds to pay

(Continued)

As enacted, the 2001 Amendment clearly serves this goal and should not be interpreted to serve a different and unexpressed agenda of expanding the class of liable parties under the Spill Act. In the State's brief to the Supreme Court in Marsh, the Attorney General recognized this same principle of interpretation when defending the Spill Fund's regulation on claims made by innocent purchasers of property. There, the Attorney General wrote: "a due diligence defense is a *shield* which a deserving claimant may invoke to escape liability; it is not [a] *sword* which [the State] can employ to impose liability where it would not otherwise exist." Appendix, Exh. A at 9 (emphasis in original).

2. Two Federal District Court Cases That Provide No Analysis Cannot Overcome The Plain Language of the Spill Act or Thirty Years of New Jersey Case Law.

Without addressing any of the clear indicators that the 2001 Amendment was not intended to expand the Spill Act's liability provisions, State and Occidental highlight two decisions from federal district courts. The first of these is the unpublished decision in Litgo, NJ, Inc. v. Martin, 2010 WL 2400388 (D.N.J. June 10, 2010), mod. on other grounds, 2011 WL 65933 (D.N.J. January 7, 2011). As an attempt by a federal court to predict how the New Jersey courts would interpret the 2001 Amendment, the unpublished Litgo decision does not constitute a precedent binding upon this Court. Shaw v. City of Jersey City, 346 N.J. Super. 219, 229 (App. Div.) rev'd on other grounds 174 N.J. 567 (2002).

(Continued)

for cleanups. Separate and apart from the Spill Act's liability provisions, and even before the enactment of the statutory innocent purchaser provisions, the Spill Fund declined to use public monies to pay the claims of those who acquired contaminated properties knowingly or without undertaking reasonable due diligence. Marsh, 152 N.J. at 139. The enactment of the innocent purchaser provision covering pre-1993 purchasers established the clear standards to be met by claimants that purchased land before 1993 in order to qualify for Spill Fund reimbursement. As Occidental itself recognizes, the 2001 Amendment codified the Spill Fund's pre-existing regulations on that subject. OCCb4.

Nor is the decision persuasive since it fails to contain any reasoned analysis of the issue at bar. The district court's statutory reading is confined to a single sentence that summarily states: "The Spill Act, as enacted by the New Jersey legislature, is structured so that the current owners of a property purchased before September 14, 1993 are liable for removal and cleanup costs unless they can prove that they" meet the four criteria in the innocent purchaser defense. Litgo at *34. The decision does not attempt to square this spare conclusion with the actual liability provisions of the Spill Act, including N.J.S.A. 58:10-23.11g.c.(3), which imposes liability only if the property was acquired after September 14, 1993. The opinion contains no explanation of why the inclusion of a new defense expanded the Spill Act's liability net and fails to discuss the legislative history reflecting that the statute was purposefully enacted without amending the Spill Act's liability provisions and sought to mitigate environmental liabilities of all kinds. The opinion is also devoid of any discussion of the three decades of State court precedent confirming that property owners are "in any way responsible" only for discharges occurring on their watch. Nor were any of these issues briefed to the court.[5] Because there is absolutely no indication that the Litgo court considered any of the issues now pending before this Court prior to making its ruling, the Litgo decision provides this Court with no useful assistance in resolving the issues before it.

The movants also cite to a second federal district court case which applied the 2001 Amendment in a trio of decisions. Interfaith Cmty. Org. v. Honeywell Int'l Inc., 204 F. Supp. 2d 804 (D.N.J. 2002); Interfaith Cmty. Org. v. Honeywell Int'l Inc., 215 F. Supp. 2d 482 (D.N.J. 2002); Interfaith Cmty. Org. v. Honeywell Int'l Inc., 263 F. Supp. 2d 796 (D.N.J. 2003). Much

[5] We have reviewed all of the submissions made by the parties in Litgo and have been unable to identify any discussion of the statutory provisions at issue.

like the Litgo decision, the Interfaith rulings are of no assistance to this Court because they do not deal with any of the arguments now pending before this Court.

Moreover, the Interfaith court never found Spill Act liability based on the 2001 Amendment. In its initial decision, the court dismissed Honeywell's Spill Act contribution cross-claim against defendant Roned-JC, relying principally on the holding in White Oak and based on the conclusions that Roned-JC had purchased the property in 1979 and that there were no discharges during its ownership. Interfaith, 204 F. Supp. 2d at 815. The court's second decision then reversed that determination when it realized that factual issues existed as to whether the property was purchased before or after 1993. Interfaith, 215 F. Supp. 2d at 505-08. The court acknowledged that if Honeywell could prove that Roned-JC and another defendant, ECARG (the owner of a neighboring property that did not cause discharges during its ownership), purchased their properties after 1993, they would then be held liable under N.J.S.A. 58:10-23.11g.c.(3). Id. at 505-08. The court never reached the question as to whether the 2001 Amendment imposed liability upon purchasers of property before 1993, but did note that if these defendants purchased their properties before 1993, they could be shielded from liability under N.J.S.A. 58:10-23.11g.d.(5). Id. Ultimately, in its third and final ruling issued after trial, the court noted that Roned-JC had settled with Honeywell and that ECARG qualified as an innocent purchaser and was thus free of all liability but never reached the issue of whether the 2001 Amendment created not just a defense to all environmental liability but also expanded Spill Act liability to cover pre-1993 owners. Interfaith, 263 F. Supp. 2d at 804-05, 868-69.

3. Marsh Does Not Deviate From Consistent Court Rulings On The Scope Of Spill Act Liability.

The State and Occidental also rely heavily on Marsh, but that case simply does not support their arguments. Marsh arose out of the Spill Fund Administrator's rejection of Marsh's

claim seeking reimbursement of remediation costs. Soon after acquiring a former gas station property from her mother, Marsh discovered a set of underground tanks, at least one of which was still leaking petroleum. Marsh, 152 N.J. at 140. She then filed a claim with the Spill Fund requesting that it pay for the cleanup of her property.

At least three times in the opinion, the Supreme Court is clear that Marsh's claim was properly rejected because "the property was discharging pollutants during the period of her ownership." Id. at 139; see also id. at 146, 150. By contrast, the State and Occidental have avoided trying to prove in their summary judgment papers that any hazardous substances were discharged at the Lister Site during Tierra's ownership. In short, Marsh dealt with a completely different theory from that which the State and Occidental are pursuing against Tierra -- i.e., whether a party could be liable for discharges that started before, but continued during its ownership. The Marsh opinion must be read in light of the issues it was addressing.

Moreover, Marsh is explicit that it was not ruling on the basis that Marsh merely owned contaminated property and could not qualify as an innocent purchaser. The Court wrote: "We are convinced that Marsh is a responsible person within the meaning of 11g(c). We reach this conclusion not because of any lack of due diligence on Marsh's part, and not because Marsh actively discharged any pollutants, but because the underground gasoline tanks leaked during Marsh's ownership of the property." Id. at 145-46 (emphasis added).

Finally, Marsh actually supports the thirty years of case law holding that an owner of a contaminated property cannot be liable under the Spill Act based solely on its ownership. Marsh quotes the Supreme Court's prior language in Ventron that "[t]he subsequent acquisition of land on which hazardous substances have been dumped may be insufficient to hold the owner responsible." Id. at 146. If Marsh supported the State's and Occidental's argument, then the

Supreme Court in Marsh would have rejected or qualified its prior language in Ventron. Yet, Marsh quotes it with approval, establishing that the Supreme Court continues to adhere to the long-established principle that mere ownership of property does not make one "in any way responsible" for prior discharges.

4. White Oak Is Directly On Point And Continues To Be Good Law.

The State's and Occidental's attempts to distinguish the case law relied on by Tierra are similarly futile. Under the mistaken impression that White Oak is the only case supporting Tierra's position, the State and Occidental focus their energies on aggressively attacking the Appellate Division's ruling, with the State going so far to assert that White Oak was never good law and misinterpreted Marsh. But, White Oak is a published decision of the Appellate Division and constitutes binding precedent. Thus, the White Oak court's interpretation of the Spill Act and its understanding of the Marsh decision -- not the State's divergent understanding -- must govern in this proceeding.

The State also focuses on a footnote in the White Oak opinion where the court suggests its ruling might well have been different had the defendants at issue, the Scarboroughs, purchased the previously-contaminated property after September 14, 1993. The State then faults the Appellate Division for "never provid[ing] a basis for distinguishing acquisitions of contaminated properties before September 14, 1993 from acquisitions that occurred after that date." Pb15. However, the distinction eluding the State can be found in the Spill Act itself, which expressly establishes the liability of parties that knowingly purchased contaminated property "on or after September 14, 1993," but does not expose pre-1993 buyers to a similar liability.

The State also argues that White Oak would have been decided differently after the enactment of the 2001 Amendment and its innocent purchaser defense for pre-1993 purchasers.

As has been previously discussed, this argument simply misreads the effect of the 2001 Amendment and the defense it added. In short, although the State questions the continuing validity of White Oak since enactment of the 2001 Amendment, New Jersey courts have not hesitated to apply the principles of White Oak since 2001. See Housing Authority; Northern International; Dimant.

Finally, apparently recognizing the flaws in the State's approach, Occidental argues that White Oak is simply beside the point because the Scarboroughs were former, not current owners of contaminated property. That contention can be quickly laid to rest. There is absolutely no indication in White Oak (or any other New Jersey case) that former and current owners are treated differently when assessing whether they are persons "in any way responsible" under the Spill Act. Indeed, the liability principle applied by the White Oak court -- that owners are responsible parties only for discharges during their ownership -- has been applied to current property owners like Tierra, both before White Oak (see, *e.g.*, Ventron) and after (see, *e.g.*, Housing Authority).

D. An Interpretation of the 2001 Amendment That Would Expose Pre-1993 Owners of Contaminated Property to Liability for Spills That Occurred Prior to Their Ownership Would Upset Settled Expectations and Should Be Rejected to Avoid Material Doubts as to The Statute's Constitutionality.

Up to (and even after) the enactment of the 2001 Amendment, the courts of the State of New Jersey interpreted the Spill Act to impose cleanup liability on pre-1993 purchasers of contaminated sites only for discharges that occurred during their ownership. The same liability principle also prevailed prior to the enactment of the Spill Act. State v. Exxon, 151 N.J. Super. 464 (Chan. Div. 1977). Although the State asserts that Tierra acquired the Lister Site in 1986 "with the full understanding that, by virtue of the acquisition, it would be a party 'in any way responsible'" under the Spill Act (Pb17), the opposite is in fact true: Tierra could easily

appreciate from established legal precedents, including the Ventron decisions, that ownership at the time of discharge was the essential prerequisite for liability.

Tierra has acted consistent with that understanding not only when acquiring the Lister Site, but also when determining which third parties should be added to this litigation. Following the liability rules articulated in Ventron and followed ever since, Tierra did not name the property owners at numerous sites covered by the Third Party Complaints whose ownership post-dated the discharges that contributed to the pollution in the Newark Bay Complex. Moreover, the Third Party Complaints did not bring before the Court still other sites where Tierra could not locate a viable party associated with the discharges -- even though those sites may now be owned by viable parties that acquired the property after the discharges ceased. Obviously, those decisions will need to be revisited should the Court accept the argument now made by the State and Occidental.

In light of these settled expectations, the expansion of liability that the State and Occidental assert was accomplished by the 2001 Amendment would raise constitutional and legal issues of substantial magnitude that counsel against movants' proffered statutory interpretation. In Kimber, the Supreme Court was confronted with a parallel situation. The State had suggested an interpretation of the Spill Act's mandatory treble damages provision that the Court found raised "doubts" as to the statute's constitutionality. Kimber, 110 N.J. at 79. The Court did not proceed to find the Spill Act to be unconstitutional but chose to avoid adjudicating the constitutional concerns by interpreting the statute to contain a good faith exception to mandatory treble damages. Id. at 82. Kimber followed the well-established interpretive principle that a statute should be construed so as to free it from constitutional doubt. See, e.g., N.J. Chamber of Commerce v. N.J. Elec. Law Enforcement Comm'n, 82 N.J. 57, 75 (1980).

Here, too, the statutory interpretation urged by the State raises significant issues. Under the State's interpretation, the Legislature would have retroactively imposed liability on pre-1993 purchasers depending on whether they conducted reasonable due diligence before acquiring a site. Because the new liability rule would only have been articulated well after 1993, these purchasers would have no ability to avoid liability, either by not proceeding with their acquisition or by performing the required due diligence.

New Jersey courts have long understood that "retroactive application of new laws involves a high risk of being unfair." Gibbons v. Gibbons, 86 N.J. 515, 522 (1981); see also Gen. Motors Corp. v. Romein, 503 U.S. 181, 191 (1992) (noting that retroactive legislation "presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions"). As the Supreme Court recognized in Ventron, retroactive application of a statute can raise constitutional issues or result in a manifest injustice. 94 N.J. at 498.

Here, the retroactive imposition of liability would raise these concerns. As a matter of due process, the retroactive imposition of liability must be "supported by a legitimate legislative purpose furthered by rational means." Nobrega v. Edison Glen Assocs., 167 N.J. 520, 543 (2001); see also Twiss v. State, Dep't. of Treasury, 124 N.J. 461, 469-70 (1991) (retroactive legislation will violate due process where consequences are "particularly harsh and oppressive"). Retroactive imposition of liability can also amount to a "taking" depending on (1) the scope of the economic impact of the retroactive application of the law, (2) whether the law interferes with economic-backed expectations, and (3) the nature of the government action, including whether the law imposes a burden unrelated to any prior commitment made or injury caused by the defendant. Eastern Enters. v. Apfel, 524 U.S. 498 (1998) (plurality decision). Further, courts

undertaking a manifest injustice analysis will "look to matters of unfairness and inequity", In re D.C., 146 N.J. 31, 58 (1996), and will assess:

> whether the affected party relied, to his or her prejudice, on the law that is now to be changed as a result of the retroactive application of the statute, and whether the consequences of this reliance are so deleterious and irrevocable that it would be unfair to apply the statute retroactively.

Gibbons, 86 N.J. at 523-24; see also State Troopers Fraternal Ass'n v. State, 149 N.J. 38, 56 (1997) (finding manifest injustice in retroactive application of administrative regulation amending back-pay rule because of reasonable reliance by employees on pre-amendment rule determining when to retire or resign from employment); Oberhand v. Dir., Div. of Taxation, 193 N.J. 558, 573-74 (2008) (executor's reasonable reliance on prior law regarding estate taxes outweighed public interest in retroactive application of amendment to law).

It is doubtful that the 2001 Amendment as interpreted by the movants could satisfy these standards. The liability that would be imposed here would be truly extraordinary: in Tierra's case, it would encompass joint and several liability for the cleanup of the entire Newark Bay Complex and for all damages caused by contamination in the estuary, while in other circumstances it would impose new and massive liabilities on industrial property owners along the Delaware, the Raritan and multiple other rivers and water bodies based on long distant operations historically conducted at their properties. Moreover, the considerable financial burden that would result would be completely unrelated to any injury caused by Tierra, and liability would constitute a marked departure from prior law, interfering with Tierra's settled expectations when it acquired the property. Finally, imposing joint and several liability on Tierra, a party that purchased property to facilitate a federally-supervised remediation, is

unnecessary to achieve the purposes of the Spill Act, given the many parties responsible for discharges of contamination into the Newark Bay Complex.[6]

In these circumstances, the Court should follow the lead of the Kimber Court and interpret the 2001 Amendment to avoid these constitutional and legal issues. To do so, this Court is presented with a far easier task than that confronted by the Kimber Court, which had to resort to "judicial surgery" to establish a defense to mandatory treble damages wholly absent from the statute. Kimber, 110 N.J. at 83. By contrast, here, any infirmity can be avoided simply by interpreting the 2001 Amendment in accord with its express language, creating a defense, but not a liability. For all of the reasons articulated above, that is clearly the sound course of action that should be taken in this case.

CONCLUSION

For the foregoing reasons, the Court is respectfully requested to deny the motions for partial summary judgment filed against Tierra by the State and Occidental.

Respectfully submitted,

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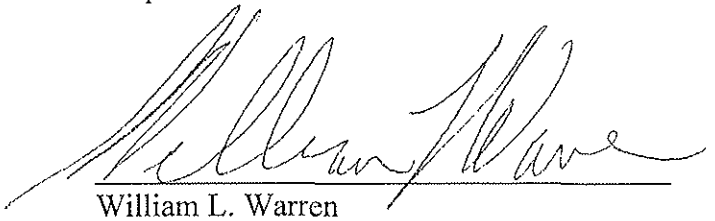

William L. Warren

Dated: June 23, 2011

[6] In Ventron, the Supreme Court sustained the Spill Act's retroactive imposition of liability on dischargers and other responsible parties in principal measure because prior law had already imposed liability, and the Spill Act merely created new remedies. 94 N.J. at 499. Here, however, the 2001 Amendment as read by movants would constitute a marked departure from prior law and create liability where none previously existed.

EXHIBIT A

A-7 - SEP 1997

[redacted]

A-8 - SEP 1997

FILED

SEP 16 1997

SUPREME COURT OF NEW JERSEY
DOCKET NO. 42,163

CLERK

MARIE MARSH, Respondent, v. NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION/ ENVIRONMENTAL CLAIMS ADMINISTRATION/SPILL COMPENSATION FUND, Petitioner.	)	Civil Action On Petition For Certification Sat Below: Brochin and Long, JJ.A.D.

CONSOLIDATED REPLY TO RESPONDENT'S CROSS-PETITION FOR CERTIFICATION AND OPPOSITION TO PETITIONER'S PETITION FOR CERTIFICATION

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PRELIMINARY STATEMENT

The Spill Compensation Fund ("Spill Fund") of the Department of Environmental Protection ("DEP") has received since its petition for certification two briefs from claimant Marie Bernardo Marsh. The first brief provides arguments in support of Mrs. Marsh's cross-petition for certification. The second brief contains Mrs. Marsh's opposition to the Spill Fund's position. In accordance with R. 2:12-8 and direction received from the Clerk's office, this brief contains a consolidated reply to both briefs.

This brief highlights the legal and logical flaws in Mrs. Marsh's two principal arguments. First, she unreasonably maintains that those who acquired contaminated property pre-ISRA can recover from the Fund even if they failed to examine the property before acquiring it or, more disturbingly, even if they knew it was contaminated. Second, in supporting a *de minimis* standard, she argues that the Spill Fund must pay the claims of those who own property during a discharge unless the Spill Fund can both establish that the owner actively caused discharge and can quantify how much of the discharge occurred during the claimant's ownership, vis-a-vis during their predecessor-in-title's ownership. Both arguments clearly undermine the language and purpose of the Spill Act. See N.J.S.A. 58:10-23.11 et seq.

COUNTER STATEMENT OF FACTS

In her statement of facts Mrs. Marsh admits-- as she stipulated-- that she knew when she took the property that her parents had rented it to a gas station operator for six years, ending in 1974. She further stipulates that she knew of no other use of the property between 1974 and February 1992, when she acquired it. She concedes that when she was given the property "she was not told nor was she given any documentation concerning whether any tanks which had existed during gasoline station's operation had been removed, drained or filled." (Aa 3).

Second, Mrs. Marsh incorrectly contends that she never owned the tanks beneath the subject property. A review of the stipulation and the attached exhibits reveals that she did own the tanks when she took the property from her mother. When Mrs. Marsh's mother transferred the property to her through a quitclaim deed, she transferred "*whatever* interest the Grantor (i.e. Mary Bernardo) ha[d] to the Grantee (i.e. Marie Bernardo Marsh)." (Emphasis added). According to the instrument of conveyance between the Leggeries (who sold the property to Mrs. Bernardo Marsh's parents) and Marie Bernardo Marsh's parents, Vincent and Mary E. Bernardo, in 1968 Mary Bernardo received the land "[t]ogether with all and singular, the buildings, improvements,

woods, ways, rights, liberties, privileges, hereditaments and appurtenances to the subject property." (Pa 24).* Thus, all available evidence reveals that Mrs. Bernardo Marsh did own the subject property, including the tanks, after February 23, 1991.

Third, although Mrs. Marsh attempts to establish that the three leaking tanks were hidden beneath other tanks on her property, there is no support in the record for this contention. The fundamental fact concerning the detection of contamination is that she did not even begin to look for tanks until after she accepted the property.

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*Pa refers to petitioner's/DEP's Appendix to its January 19, 1995 Appellate Division Brief.

LEGAL ARGUMENT

POINT I

BOTH THE CLAIMANT AND THE SPILL FUND AGREE THAT THIS COURT SHOULD GRANT CERTIFICATION TO CONSIDER THE ISSUES PRESENTED BY THIS APPEAL

This Court should grant certification to resolve the questions of general public importance presented, see Bandel v. Friedrich, 122 N.J. 235, 237-38 (1991), and because the disposition of this matter transcends the immediate interest of the litigants, thereby calling for the exercise of the Court's supervision. Mahony v. Danis, 95 N.J. 50, 52, (1983) (Handler, J. concurring). Both DEP and Mrs. Marsh agree that the Appellate Division's opinion contains pronouncements regarding due diligence and owner liability which profoundly affect the apportionment of responsibility for cleaning up hazardous substance discharges. These doctrines will apply to many parties other than these two litigants, particularly because hazardous substance discharges are often detected years after they occur. Consequently, this Court should take this opportunity to interpret the Spill Act to resolve the issues raised by both DEP and the claimant.

POINT II

MARSH'S ARGUMENT THAT ISRA'S DUE DILIGENCE PROVISION WAS PROSPECTIVE IS CLEARLY INCORRECT; ISRA'S TREATMENT OF THIS REQUIREMENT MERELY CODIFIED IT AND COMPORTS WITH THE SPILL ACT'S LANGUAGE AND PURPOSE.

Mrs. Marsh argues that it is unreasonable for a court to require a party who took contaminated property prior to ISRA's effective date to have examined that property for hazardous substance contamination. In support of her argument, Marsh repeatedly emphasizes that "the Legislature noted that this requirement of a 'diligent inquiry was a prospective one...'"

Mrs. Marsh inaccurately paraphrases ISRA. The Legislature *never* said that the diligent inquiry requirement was prospective. Rather, the Legislature declared that "[n]othing in this paragraph (2) [which includes the diligent inquiry requirement] shall be construed to alter the liability of any person who acquired real property prior to the effective date of P.L. 1993, c. 139" ["ISRA"].

The Legislature's statement that ISRA "would not alter the liability of any person who acquired real property prior to [its] effective date" demonstrates that N.J.S.A. 58:10-23.11g(d)(2)(d) merely statutorily codified then existing regulatory language and agency policy to deny the claims of those

who fail to exercise due diligence before purchasing contaminated property. See N.J.A.C. 7:1J-2.7(b). In In re Gap View Associates, decided November 8, 1994 (Judge Furman, a member of the Ventron Appellate Division panel, recognizes pre-ISRA existence of due diligence requirement while sitting as an arbitrator). (Pa 10).

As noted in DEP's Petition for Certification, DEP reasonably applied a pre-ISRA due diligence requirement, which is consistent with federal law concerning responsibility for toxic discharges. Further, Mrs. Marsh's argument that the due diligence requirement did not exist until ISRA's enactment is, at bottom, an argument for the untenable proposition that prior to ISRA's amendment in 1993, even parties who *knowingly* purchased contaminated property could recover from the Spill Fund. This illogical outcome clearly cannot have been authorized by the Spill Act prior to ISRA's effective date.

Mrs. Marsh's argument that someone can acquire contaminated property and make a claim against the Spill Fund would effectively allow a double recovery by that party. When a party acquires a property, it acquires all of the property's characteristics, both favorable and unfavorable. The existence of contamination reduces the net value of a property because the owner of such property must pay to have it cleaned up. If Mrs. Marsh

were allowed to acquire a contaminated property and then recover cleanup costs from the Spill Fund, she would effectively receive the value of a clean property, not the contaminated property she was actually given. Thus, the net effect of a Spill Fund payment in such circumstances would be to confer more on the taker of property than the owner had to give. The Legislature surely did not intend the subsidization of such windfalls in private transactions.

In this regard, the Appellate Division opinion is remarkably inconsistent. The Appellate Division denied Marsh's, a donee's, claim because it recognized the fundamental unfairness of allowing an owner of contaminated property to evade responsibility for hazardous substance contamination cleanup by giving that property to another. Marsh v. Spill Compensation Fund, 286 N.J. Super. 620, 632 (App. Div. 1996). Yet, the Appellate Division leaves the door wide open to claims by those who *purchased* contaminated property, even if they bought it at a sharply discounted price because of the contamination. The difference between a gift and a sale at a discounted price is only a matter of degree. In either event, the net effect of authorizing a Spill Fund award to one who acquired contaminated property would be to shift the burden of cleanup costs from the owner/responsible party

to the Spill Fund. Additionally, if a discounted price had been paid because of the contamination and a Spill Fund award were granted, the party acquiring the property would receive a windfall subsidized by the Spill Fund. The only difference between the gift and sale contexts is the magnitude of the subsidy.

Moreover, the unreasonableness of Marie Marsh's argument that due diligence was not required pre-ISRA is highlighted by an internal inconsistency in her petition for certification. Despite arguing that she should not be required to exercise due diligence, she strives to convince the Court that a diligent inquiry would not have revealed the existence of the three so-called "hidden" tanks beneath her property. (The undisputed facts demonstrate otherwise. Mrs. Marsh concedes that she made no effort to detect *any* underground tanks or to examine their condition prior to receiving the property). Mrs. Marsh discusses at length what a diligent inquiry would have disclosed because she implicitly recognizes that it is reasonable for a claimant against the Spill Fund to have taken measures to avert damages by exploring a property's characteristics before acquisition.

Additionally, Mrs. Marsh's arguments against the application of a due diligence standard are fundamentally misguided because she fails to recognize that the statutory due diligence

provision merely establishes the basis for an affirmative defense by a claimant whose claims would otherwise be denied. ISRA did not impose new, additional responsibilities on a purchaser of property. Rather, it formally provided what had already existed in Department policy, i.e., protection to those who obtained previously contaminated property and who did not know and had no reason to know after undertaking all appropriate inquiry into prior uses of the property that any hazardous substance had been discharged. A due diligence defense is a *shield* which a deserving claimant may invoke to escape liability; it is not *sword* which DEP/ECA can employ to impose liability where it would not otherwise exist. Thus, no one who acquired property prior to ISRA can reasonably maintain that they were blind-sided by what Mrs. Marsh asserts was ISRA's "addition" of a due diligence requirement. Rather, ISRA gave them an additional opportunity to recover from the Fund.

Mrs. Marsh incorrectly argues that payment of her claim would encourage other parties to clean up contaminated property instead of allowing contamination to continue to spread. Even under the Appellate Division's interpretation of the Spill Act in Marsh, those who control contaminated property have an obligation to prevent the contamination from spreading. See Marsh, 286 N.J. Super. at 630. ("[I]f Mrs. Marsh failed to take preventive or

remedial action when she knew or should have known of the discharge, that failure would constitute an 'intentional or unintentional act or omission,' and render her ineligible for reimbursement.") Thus, legal incentives to prevent the spread of contamination already exist.

Additionally, business considerations militate in favor of private party cleanups. No rational owner of property which has residual value once cleaned up will abandon that property because he or she must pay for its cleanup. Rather, such an owner will invest in the cleanup because it will yield a return when the property is sold. In this vein, while Mrs. Marsh repeatedly maintains that the cleanup on this property imposes a financial hardship upon her, she declines to mention that the property may have considerable residual value and that, once cleaned up, she can sell the property to realize its value.

Mrs. Marsh's reliance on Department of Env. Prot. v. Ventron, 94 N.J. 473 (1983), is misplaced. First, the assessment of the Wolfs' responsibility made by the trial court and the Appellate Division was made in the context of a civil suit involving apportionment of liability for cleanup costs. The Wolfs did not make a Spill Fund claim and their eligibility for Spill Fund payments was never analyzed. The Ventron court merely held

that the Wolfs should not have to foot the cleanup bill for the responsible parties.

More importantly, even if only a small discharge had occurred during Mrs. Marsh's ownership, Marsh cannot place herself in the Wolfs' shoes. The Wolfs were affirmatively defrauded by the sellers regarding the acquired property's characteristics, 94 N.J. at 503-4. Thus, the Wolfs' attempt to exercise due diligence was thwarted by the Ventron Corporation, which sold them the property.

Therefore, Mrs. Marsh's arguments that she need not have exercised due diligence before acquiring the property defy statutory language, case law and common sense.

POINT III

MRS. MARSH'S ARGUMENT THAT ONLY A DE MINIMIS COMPONENT OF THE DISCHARGE OCCURRED WHILE SHE OWNED THE PROPERTY IGNORES THE LANGUAGE OF THE SPILL ACT WHICH IMPOSES RESPONSIBILITY UPON PROPERTY OWNERS FOR ALL HAZARDOUS SUBSTANCES STORED ON THEIR PROPERTIES AND WHICH MAKES THEM LIABLE FOR ANY ACT OR FAILURE TO ACT WHICH CAUSES A DISCHARGE.

Mrs. Marsh argues that she is not responsible for the discharge which occurred and that only a *de minimis* component of such a discharge occurred during her ownership. However, as previously stated, the Spill Act prohibits recovery against the Spill Fund by a person "in any way responsible for any hazardous *substance*." Thus, as Mrs. Marsh herself acknowledges, See Marsh Opposition brief, Page 17, the focus in the Act is on responsibility for the *substance*, not for the discharge. All property owners have the duty to prevent discharges of hazardous substances and are liable for any "intentional or unintentional act or omission which results in such a discharge."

Mrs. Marsh fails to reckon with Ventron's unequivocal pronouncement that those who own property at the time of the discharge, as she did, are liable for such contamination, 94 N.J. at 502. Further, Mrs. Marsh continues to overlook the fact that in Ventron the trial court expressly found that DEP had not proven that a discharge occurred during the Wolfs' ownership. She also

wrongly states that "all three courts (the Trial Court, the Appellate Division and the Supreme Court) found that [the] Wolfs did release some mercury into the environment." Mrs. Marsh never mentions that the Supreme Court expressly declined to rule on the Wolfs' liability because DEP had not petitioned for review of this issue. Thus, only the Appellate Division mistakenly characterized the Wolfs' discharge as *de minimis*. Moreover, Mrs. Marsh declines to mention that, unlike in Ventron, where there was an extensive history of contamination, the only known discharge in this case occurred during her ownership. (See also pages 10-11, supra, for a discussion of factual differences between the Wolfs in Ventron and Mrs. Marsh relevant to both due diligence and owner liability).

This pronouncement of owner liability has been reinforced by Tree Realty v. Department of Treasury, 205 N.J. Super. 346, 348-49 (App. Div. 1985), and in an arbitration decision by Judge Furman, which the Appellate Division also affirmed. Serv-Gar, Inc. v. Environmental Claims Administration; Docket No. A2498-92T3, March 11, 1994 (Aa 126).* Notably, Judge Furman was also on the Appellate Division panel that decided Ventron. As Judge Furman stated in Serv-Gar, "[S]ome degree of involvement or knowledge of

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*Aa refers to respondent's/(Marsh') Appendix to Appellate Division appeal.

the owner in the operations of its leases in both Ventron and Arky's Auto may be argued to limit the broad language of both cases that the owner of real property is responsible for any hazardous substances thereon. That uncertainty is resolved in Tree Realty." Id. at 129.

In discussing Tree Realty, Arbitrator Furman observed that the Appellate Division held in that case that the owner of property on which its lessee operated a landfill was liable for all cleanup and removal costs "*without regard to fault.*" The opinion quotes approvingly Ventron's pronouncement that owners of a property at the time of the discharge of a hazardous substance are encompassed within the statutory phrase "in any way responsible." Id. at 130. Arbitrator Furman and the Appellate Division concluded they were bound by Ventron's and Tree Realty's interpretations of N.J.S.A. 58:10-23.11g(c)(1) which impose owner liability without regard to fault.

Thus, even if Mrs. Marsh did not affirmatively cause the discharge, she is, upon acquisition of the property, responsible for the substances stored there and is liable for discharges of the substances while she is responsible for them.

Although Mrs. Marsh assails DEP's request to preserve its discretion to decide whether various components of spills are *de*

minimis in relation to the overall discharge, the Appellate Division has already recognized the necessity for such discretion in In re Adoption of N.J.A.C. 7:1E, 255 N.J. Super. 473, 477 (App. Div. 1994).

The application of a *de minimis* standard is eminently unworkable in the context of hazardous substance leakage from underground storage tanks. Given the chronic nature of discharges, one detecting a discharge can never be certain as to when it began. Therefore, DEP must not, as Mrs. Marsh advocates, be required to establish precisely what component of each discharge occurred during each owner's tenure.

The Legislature was mindful of the difficulty of discharge apportionment when it included a joint and several liability provision in the Spill Act. The addition of a *de minimis* requirement in the context of Spill Fund claim review abrogates the joint and several liability provision of the Spill Act, see N.J.S.A. 58:10-23.11g(c)(1), and will place DEP in the untenable position of refuting a claimant's arguments that the component of a discharge which occurred during a claimant's ownership was insignificant in comparison to that which occurred before his ownership. In this context, DEP will be forced to pay unmeritorious claims because, even though it could establish that

discharge was occurring during the claimant's ownership, it will be unable to prove exactly *how much* of the contamination occurred then. Hence, the Court should reject Mrs. Marsh's arguments, which seek to attenuate ownership liability, and should uphold the Spill Act's joint and several liability provisions.

CONCLUSION

In view of the foregoing, this Court should grant DEP's petition for certification and should modify the Appellate Division Decision in order to effect the language and purpose of the Spill Act.

Respectfully submitted,

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EXHIBIT B

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NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION and THE ADMINISTRATOR OF THE NEW JERSEY SPILL COMPENSATION FUND, Plaintiffs, v. OCCIDENTAL CHEMICAL CORPORATION, TIERRA SOLUTIONS, INC., MAXUS ENERGY CORPORATION, REPSOL YPF, S.A., YPF, S.A., YPF HOLDINGS, INC., and CLH HOLDINGS, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION - ESSEX COUNTY DOCKET NO. ESX-L-9868-05 CIVIL ACTION **PLAINTIFFS' BRIEF IN OPPOSITION TO MAXUS ENERGY CORPORATION'S AND TIERRA SOLUTIONS, INC.'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

PLAINTIFFS' BRIEF IN OPPOSITION TO MAXUS ENERGY CORPORATION'S AND TIERRA SOLUTIONS, INC.'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

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PRELIMINARY STATEMENT

To be clear: this suit is about remediating the dioxin[1] and other hazardous substances that the defendants intentionally dumped into the Passaic River for decades. By this suit, Plaintiffs New Jersey Department of Environmental Protection ("DEP") and the Administrator of the New Jersey Spill Compensation Fund ("Administrator") (collectively, the "State") seek past and future costs incurred by the State as a result of the defendants' discharges of TCDD into the Passaic River and Newark Bay Complex. Among other things, the State is seeking:

(1) "all cleanup and removal costs, other costs of investigation, cleanup and removal, the costs of all reasonable measures taken to mitigate damage to the public health, safety or welfare as a result of the discharges, any unreimbursed costs or damages paid from the Spill Fund, and any other costs incurred...." under the New Jersey Spill Compensation and Control Act ("Spill Act"), Pls.' Am. Compl. at p. 22, Prayer for Relief ¶ a; and

(2) "the costs of any investigation, inspection, or monitoring survey which led to the establishment of the violation and the cost incurred in removing, correcting, or terminating the adverse effects upon water quality resulting from the unauthorized discharge of TCDD...." pursuant to the New Jersey Water Pollution Control Act ("WPCA"), Pls.' Am. Compl. at p. 25, Prayer for Relief ¶ a.

Under the Spill Act, the State may direct a discharger to clean up its contamination, direct the discharger to pay the State's costs in advance, or bring suit against the discharger for the State's costs. Because of the defendants' transparent strategy to delay and impede the remediation of the Newark Bay Complex for more than twenty years (Pls.' Am. Compl. at ¶¶ 50-62), in this instance the State chose to seek the cleanup and removal costs that it has incurred and will incur,

[1] Defendants deliberately discharged 2,3,7,8-tetrachlorodibenzo-p-dioxin ("TCDD"), a particularly potent form of dioxin, from the plant at 80 Lister Avenue into the Passaic River and Newark Bay Complex. Pls.' Am. Compl. at ¶ 1.

separately or in conjunction with federal agencies (Pls.' Am. Compl. at p. 22, Prayer for Relief ¶ a). That decision in no way changes the facts, character or goals of this lawsuit: remediation.

Nonetheless, from the first page of the Brief in Support of Maxus Energy Corporation's ("Maxus") and Tierra Solutions, Inc.'s ("Tierra") Motion to Dismiss ("Motion"), Maxus and Tierra loudly argue that this suit is "***not about remediation*** but solely about money." Maxus and Tierra Mot. to Dismiss at p. 1 (emphasis is original). Along with their co-defendant Occidental Chemical Corporation ("OCC"),[2] Maxus and Tierra seek to mischaracterize the State's action in a tortured effort to achieve dismissal of the State's claims through the application of the wrong statute of limitations. See Maxus and Tierra Mot. to Dismiss at p. 2 ("Most significantly, as Occidental explains, plaintiffs' decision to forego remediation-oriented claims means that their claims for money damages are governed by a less forgiving statute of limitations, which plaintiffs have clearly allowed to expire."). To be sure, the State expects that it will be properly compensated for the damages Defendants have caused as well, but in no way has the State foregone its opportunity to require these defendants to fund the remediation of the Newark Bay Complex. A fair reading of the State's First Amended Complaint ("Complaint") makes this abundantly clear.

Moreover, in a brassy attempt to fortify their arguments against liability and the application of the State's statutory claims, Maxus and Tierra also repeatedly argue that the State did not allege a discharge after 1969. Instead of actually examining the words written in the

[2] Maxus, Tierra and OCC (collectively, "Defendants") have common outside lawyers but chose to file two briefs. Maxus and Tierra adopt and incorporate OCC's arguments into their Motion. Accordingly, the State also incorporates by reference herein its Brief in Opposition to OCC's Motion to Dismiss for all purposes.

Complaint, Maxus and Tierra would rather the Court examine their characterization of the Complaint:

> When the Amended Complaint is read as a whole, it is clear that all bare allegations of "discharges" after the Lister Plant closed in 1969 are nothing more than synonyms for *migration* of contamination previously released by Diamond's operations.

Maxus and Tierra Mot. to Dismiss at p. 16. In fact, Maxus and Tierra spend approximately one-quarter of their brief arguing that the allegations in the Complaint do not actually (or adequately) allege a discharge after 1969 (Maxus and Tierra Mot. to Dismiss at pp. 3-4, 15-18), yet they never cite the Court to paragraphs 22 and 23 of the Complaint, which plainly state:

> During the time of Maxus' control, discharges of TCDD continued to occur from the Lister Site and into the Newark Bay Complex. Pls.' Am. Compl. at ¶ 22.

> During the time of Tierra's ownership and control, discharges of TCDD continued to occur from the Lister Site into the Newark Bay Complex. Pls.' Am. Compl. at ¶ 23.

The Complaint also plainly states that Maxus' control and Tierra's ownership and control began no earlier than 1983. Pls.' Am. Compl. at ¶ 19-23. Certainly, Defendants' TCDD has migrated throughout the Newark Bay Complex. Just as certain, however, is the fact, well known to Defendants, that "discharges" from leaking pipes, tanks, buildings, sumps, pumps, drains and other contaminated vessels continued into the 1980s, when Maxus and Tierra controlled and/or owned the Lister Site.[3]

The Complaint clearly and unequivocally states that discharges continued into the 1980s under the watch of Maxus and Tierra. As such, Maxus and Tierra are strictly, jointly and

[3] This is precisely why the State alleged that Maxus and Tierra are responsible for discharges under the Spill Act and WPCA, and the Defendants' position that the New Jersey Department of Environmental Protection does not know what is meant by a "discharge" under the Spill Act and WPCA is disingenuous, at best.

severally liable for all cleanup and removal costs and damages sought in this action, and their Motion should be denied. In this regard, Maxus and Tierra misunderstand the State's allegations regarding alter ego and common economic unit. The State alleges that the other members of the Repsol Group are jointly and severally liable for the acts and liabilities of Maxus and Tierra, not OCC. Accordingly, Maxus' and Tierra's argument for dismissal on this point is misplaced.

Finally, not only do Maxus and Tierra ignore the factual allegations in the Complaint regarding their direct discharges, they go so far as to virtually rewrite the State's allegations regarding their conduct in conducting "response actions" to support a preemption argument that does not otherwise exist. The Chief Judge for the United States District Court of New Jersey, Judge Garrett E. Brown, recently rejected Defendants' same efforts to recast the State's Complaint into a challenge to the United States Environmental Protection Agency's ("USEPA") remedial actions in the Newark Bay Complex. Pursuant to its own clear terms, the State's Complaint does not challenge any actions taken by USEPA or Defendants pursuant to the relevant agreements. This action is brought to recover the State's cleanup and removal costs and other damages suffered because of Defendants' discharges of TCDD.[4] As found by numerous courts, there is no basis for preemption under these circumstances.

In short, under the clear standards by which a motion to dismiss for failure to state a claim must be judged, Maxus' and Tierra's Motion should be denied in its entirety.

STATEMENT OF FACTS

As alluded in Maxus' and Tierra's Motion – from a single pesticide manufacturing plant on the banks of the Passaic River, Defendants, including Maxus and Tierra, have single-handedly

[4] The State, however, is not seeking natural resources damages in this action and specifically reserves the right to bring such action in the future. Pls.' Am. Compl. at ¶ 6.

created one of the world's worst sites for dioxin contamination. Pls.' Am. Compl. at ¶ 2. Beginning in the 1940s with OCC's operation of the Lister Site as a pesticide manufacturing plant and continuing into the 1980s during Maxus' and Tierra's ownership and control, Defendants discharged an extremely hazardous substance, TCDD, onto the Lister Site itself, into outfalls, sewer lines and other conduits, and into the Passaic River and Newark Bay Complex. See Pls.' Am Compl. at ¶¶ 23, 24. The detrimental effects of Defendants' discharges and the resulting contamination throughout the Newark Bay Complex cannot be under-emphasized. There is now a complete ban on the consumption of all fish and crab from the Newark Bay Complex, which continues to present a substantial threat to the health of the citizens of New Jersey and the environment. Id. at ¶ 3.

From the beginning of its operations at the Lister Site, OCC dumped nearly all of its waste, including TCDD, into the Passaic River. Id. at ¶ 45. In addition to dumping nearly all of its contaminated waste into the Passaic River, the plant was also in deplorable condition, continuously leaking and spilling TCDD from the buildings and equipment at the Lister Site. Pls.' Am. Compl. at ¶¶ 42-45. The equipment and pipes at the Lister Site were continually blocked and leaking to such an extent that OCC was forced to wash the floor with sulfuric acid twice monthly in an effort to remove the TCDD-saturated products spilled on the floor of the manufacturing building. Id. at ¶ 45. Although OCC ceased production at the Lister Site in 1969, the discharges of TCDD and other hazardous substances from the buildings, equipment, pipes, drains, sewers and other vessels did not stop but continued into the 1980s. See id. at ¶¶ 18, 22-23.

In 1983, Maxus was created as the parent company of OCC's predecessor in interest, known at one time as Diamond Shamrock Chemicals Company. Id. at ¶¶ 19-20. In 1986, Maxus sold the stock of Diamond Shamrock Chemical Company to OCC, which eventually merged Diamond into itself. Id. at ¶ 20. As part of the 1986 transaction, Maxus agreed to manage and indemnify OCC from the environmental liabilities associated with the Lister Site. Id. at ¶¶ 21-22. OCC acquired 120 Lister Avenue and re-acquired 80 Lister Avenue in 1984 and 1986, respectively, and OCC transferred both properties to Tierra in 1986. Id. at ¶ 23.

Since discovering the TCDD contamination in the early 1980s, DEP has been working alongside USEPA, the United States Army Corps of Engineers, New Jersey Department of Transportation, and various other local, State and federal agencies to address the multifarious impacts of the TCDD contamination at and from the Lister Site. Id. at ¶¶ 51-53, 60-62.

The State brought this action to recover its past costs associated with Defendants' discharges, for a declaratory judgment for its future costs associated with the Defendants' discharges, and to recover damages that the State has suffered as a result of the Defendants' conduct. Id. at ¶¶ 66-98.

LEGAL ARGUMENTS

POINT I

LOW STANDARD OF REVIEW FOR MOTION TO DISMISS.

Maxus and Tierra seek the dismissal of all of the State's claims pursuant to R. 4:6-2(e) for failure to state a claim. The level of pleading necessary to survive a motion to dismiss pursuant to R. 4:6-2 (e) is minimal. "To survive a motion to dismiss for failure to state a claim the facts alleged in the complaint must merely suggest a cause of action." Printing Mart-

Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989). The Supreme Court has made clear that a motion to dismiss for failure to state a claim "should be granted in only the rarest of instances." Id.; see also F.G. v. MacDonell, 150 N.J. 550, 556 (1997).

In considering a motion to dismiss, a court is required to examine the pleadings generously in favor of the non-movant, excluding evidence outside the pleadings. See MacDonell, 150 N.J. at 556. A court may not consider anything other than whether the complaint states a cognizable cause of action. Rieder v. Dep't of Transp., 221 N.J. Super. 547, 552 (Ch. Div. 1987). If a generous reading of the allegations in the complaint merely suggests a cause of action, the complaint will withstand the motion. Printing Mart-Morristown, 116 N.J. at 746. Pleading standards are liberal at this stage of the case and require the Court to accept as true all of the allegations put forth by the State in its Complaint. Id. The Court must also give the allegations in the Complaint the benefit of all reasonable inferences. See Indep. Dairy Workers Union v. Milk Drivers Local 680, 23 N.J. 85, 89 (1956). The Court must search "the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure state of claim." Printing Mart-Morristown, 116 N.J. at 746. The standard is important because Maxus' and Tierra's Motion is based almost entirely on their allegation that the State did not assert that discharges occurred during their ownership or control, which necessarily requires the reader to omit entire sections of the Complaint.

The State's Complaint is well within the purview of the Rules. The Complaint sets forth facts supporting each cause of action, including Maxus' and Tierra's discharges of TCDD and other hazardous substances into the Newark Bay Complex. Defendants cannot show that the State's Complaint demonstrates the "rarest of instance" where a claim warrants dismissal. See

Printing Mart-Morristown, 116 N.J. at 746. Because the Court must consider what is actually pleaded in the Complaint, Maxus' and Tierra's Motion must be denied.

POINT II.

MAXUS AND TIERRA ARE LIABLE FOR DIRECT DISCHARGES TO THE NEWARK BAY COMPLEX.

Maxus' and Tierra's entire Motion is predicated on their assertion that the State failed to allege that any discharge occurred from or onto the Lister Site during the time of their ownership or control. See Maxus and Tierra Mot. to Dismiss at p. 3. At the same time, Maxus and Tierra acknowledge that they would be liable "if the State can prove (among other things) that Maxus and Tierra . . . *actively* discharged contamination into the environment." Id. (emphasis in original). Oddly, Maxus and Tierra completely ignore the allegations in the State's Complaint that Maxus and Tierra are responsible for active discharges of contamination into the environment: "discharges of TCDD continued to occur from the Lister Site" during their ownership and control of the site. Pls.' Am. Compl. at ¶¶ 22-23.

The State's Complaint is more than sufficient to defeat a motion to dismiss filed pursuant to R. 4:6-2 (e).

A. The State's Complaint alleges that Maxus and Tierra are directly responsible for discharges of TCDD.

1. The State's Complaint alleges that discharges of TCDD and other hazardous substances occurred during Maxus' and Tierra's ownership or control of the Lister Site.

Although wholly ignored by Maxus and Tierra, the State's Complaint clearly and specifically alleges that discharges of TCDD occurred while both Maxus and Tierra owned and controlled the Lister Site. The Complaint states:

> During the time of Maxus' control [beginning in 1983], discharges of TCDD continued to occur from the Lister Site into the Newark Bay Complex.
>
> During the time of Tierra's ownership and control [beginning in 1986], discharges of TCDD continued to occur from the Lister Site into the Newark Bay Complex.

Pls.' Am. Compl. at ¶¶ 19-23;

> Defendants [Maxus and Tierra] discharged pollutants (TCDD) into the Newark Bay Complex within the meaning of N.J.S.A. 58:10A-3 & 58:10A-6.

Pls.' Am. Compl. at ¶ 77.

> Defendants [Maxus and Tierra] released and discharged hazardous substances (TCDD) into the Newark Bay Complex and surrounding areas . . . .

Pls.' Am. Compl. at ¶ 84.

> Defendants released, discharged, and failed to remedy the releases and discharges of TCDD into the Newark Bay Complex and surrounding areas . . . .

Pls.' Am. Compl. at ¶¶ 92, 97. This language is simple, concise, direct, and unmistakable: Maxus and Tierra discharged hazardous substances (TCDD) during the period of their ownership or control of the Lister Site.[5] In addition to the specific language above, the Complaint repeatedly states that Maxus and Tierra are dischargers of TCDD and that, under the Spill Act, Maxus and Tierra are liable as "dischargers" and "persons in any way responsible." See Pls.' Am. Compl. at ¶¶ 5, 23, 23, 72, 73, 77, 84, 85, 86, 87, 92.

2. The Court must reject Maxus' and Tierra's attempt to re-characterize the State's allegation of direct discharges.

Maxus and Tierra go to great lengths to argue that, although the State's Complaint says "discharge," the State really means passive migration. However, neither Maxus nor Tierra is the author of the State's Complaint. When the State's Complaint states "discharge," the State means

[5] Rule 4:5-7 simply requires that allegations in a pleading be simple, concise, and direct and that the pleading shall be liberally construed in the interest of justice.

discharge, not passive migration. The terms "discharge" and "a discharger" are statutorily defined and, as courts have determined, do not involve the passive migration of pre-existing contamination. The Spill Act defines "discharge" as:

> any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of hazardous substances into the waters or onto lands of the State....

N.J.S.A. 58:10-23.11b. Similarly, the WPCA defines "discharge" as:

> any action or omission resulting in the releasing, spilling, leaking, pumping, emitting, emptying, or dumping of pollutants into the waters of the State, onto land or into wells from which it might flow or drain into said waters....

N.J.S.A. 58:10A-3e. It is undisputed that courts have interpreted these definitions to exclude passive migration of pre-existing contamination.

When the State of New Jersey, through the DEP and the New Jersey Division of Law, alleges claims in its Complaint pursuant to the Spill Act and WPCA and uses the word "discharges" to describe Defendants' conduct, the only rational reading of that document is that the State means "discharges" as they are defined in the cited statutes. Thus, taking the allegations in the State's Complaint as true, Maxus and Tierra are directly responsible for discharges of hazardous substances and subject to liability under the Spill Act, WPCA, trespass, public nuisance, and strict liability.

Maxus and Tierra base their entire argument on the fact that OCC ceased operations at the plant on the Lister Site in 1969. See Maxus and Tierra Mot. Dismiss at p. 16. The fact that OCC ceased production at the Lister Site in 1969 has no bearing on whether discharges of TCDD and other hazardous substances continued from the buildings, tanks, pipes, sumps, pumps, sewers, and other vessels on the Lister Site into the 1980s. As the Supreme Court has

emphasized, there is no *de minimis* threshold for liability for a discharge. Marsh v. Dep't of Envtl. Prot., 152 N.J. 137, 150 (1997). Thus, if any TCDD or other hazardous substances released, spilled, leaked, emitted, emptied or otherwise escaped from the vessels on the Lister Site while Maxus and Tierra owned and/or controlled the site, Maxus and Tierra are jointly and severally liable for all costs and damages. The Motion must be denied.

B. Direct discharges of TCDD impose joint and several liability pursuant to the Spill Act, WPCA, public nuisance, trespass and strict liability.

A discharge of hazardous substances from and onto the Lister Site imposes joint and several liability on Maxus and Tierra for all causes of action alleged by the State.

1. The Spill Act and WPCA impose strict, joint and several liability.

The Spill Act imposes strict, joint and several liability on any person that discharged or is in any way responsible for a discharge of hazardous substances. N.J.S.A. 58:10-23.11g; In re Kimber v. Petro. Corp., 110 N.J. 69, 73 (1988). Under the Spill Act, a "discharger" is one who has discharged a hazardous substance or is in any way responsible for such hazardous substance discharged. In re Kimber, 110 N.J. at 73. As the Supreme Court stated, "the liability of a discharger is absolute - it is strict, 'without regard to fault,' and joint and several...." Id. Thus, because the State's Complaint clearly states that Maxus and Tierra discharged a hazardous substance (TCDD), it has sufficiently pleaded a cause of action under the Spill Act. This is true even if Maxus and Tierra simply owned or controlled the Lister Site at the time of a discharge. See Marsh, 152 N.J. at 148-150 (an owner or operator of property from which a hazardous substance was discharged during its period of ownership or control is a discharger); Dep't of Envtl. Prot. v. Ventron Corp., 94 N.J. 473, 502 (1983) (ownership or control over property at the time of a discharge makes a party a discharger).

Similarly, the WPCA defines discharge to mean "an intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying, or dumping of a pollutant into the waters of the State, onto land or into wells from which it might flow or drain into said waters . . . ." N.J.S.A. 58:10A-3. The WPCA also imposes strict, joint and several liability against dischargers. See CPS Chem. Co. v. Cont'l Ins. Co., 222 N.J. Super. 175, 179-180 (App. Div. 1988) (contamination of a watershed and well field was indivisible and thus defendants were held jointly and severally liable for the costs of the curative measures designed to combat the condition they created).[6] As such, any act or omission by Maxus or Tierra during their ownership or control leading to a discharge would subject them to joint and several liability under the WPCA.

2. *Direct discharges of TCDD also impose liability on Maxus and Tierra under the common law.*

Maxus and Tierra also argue that the State's common law claims of public nuisance, trespass, and strict liability must be dismissed because the State only alleges that Maxus and Tierra are responsible for passive migration.[7] See Maxus and Tierra Mot. to Dismiss at pp. 11-

[6] The application of joint and several liability under the WPCA is further evidenced by the 1987 amendment to the Comparative Negligence Act, N.J.S.A. 2A:15-5.4 which modified joint and several liability in toxic tort actions with the exception of actions brought pursuant to New Jersey's environmental laws. "Nothing in this act shall be construed to apply to any action brought by the Department of Environmental Protection, or any other governmental agency or entity pursuant to the environmental laws of this State including, but not limited, to the ... Water Pollution Control Act." N.J.S.A. 2A:15-5.4.

[7] Maxus and Tierra also argue in a footnote that the State's common law claims should be dismissed because they are "premised on 'old remedies' that are 'inappropriate' for environmental pollution cases . . . ." Maxus and Tierra Mot. Dismiss at p. 12, n. 3. It is ironic that in one brief Defendants (represented by common counsel) argue that the State's statutory claims should be dismissed because their discharges pre-date the Spill Act and WPCA, (OCC Mot. to Dismiss at pp. 1, 6, 10, 13) and in the other brief argue that the State's common law claims should be dismissed because they have been replaced with the statutory claims. Notwithstanding the inherent inconsistency in the Defendants' arguments, as the Chief Justice of the Supreme Court once noted, common law remedies, including trespass, nuisance and strict liability, are useful remedies in hazardous waste suits. J. Zazzali and F. Grad, "*Hazardous Wastes: New Rights and Remedies*" 13 SETON HALL L.REV. 446, 460-462 (1983); see also Ventron, 94 N.J. at 492-93 (finding that a polluter was liable under public nuisance and strict liability, in addition to the Spill Act.)

15. To be sure, the dioxins from the Lister Site have churned throughout a vast expanse of New Jersey's waterways. However, as previously discussed, Maxus and Tierra are liable for discharges of TCDD, which is sufficient to impose liability under the State's common law claims.

Under well-established principles, one who owns or controls property is "strictly liable to others for harm caused by toxic wastes that are stored on his property and flow onto the property of others." Ventron, 94 N.J. at 488; see also Morton Int'l, Inc. v. Gen. Acc. Ins. Co. of Am., 134 N.J. 1, 89-90 (1993). In Ventron, the Supreme Court held that environmental law "has evolved" such that "those who use, or permit others to use, land for the conduct of abnormally dangerous activities are strictly liable for resultant damages." Id.; see also Dep't of Envtl. Prot. v. Arlington Warehouse, 203 N.J. Super. 9, 14 (App. Div. 1985) (holding that under common law principles pre-existing the Spill Act, those who own or store hazardous substances are strictly liable for their discharge).

Thus, Maxus and Tierra cannot evade their liability by claiming that they are merely subsequent owners of the Lister Site. If, as the State alleges, discharges continued to occur from the vessels on the Lister Site while it was under the ownership and/or control of Maxus and Tierra, they are liable as such. A discharge occurs when hazardous materials leak, not when they come to rest inside a vessel. See Atlantic City Mun. Util. Auth. v. Hunt, 210 N.J. Super. 76, 96 (App. Div. 1986). Accordingly, Maxus and Tierra are liable for the discharges that occurred during their ownership and control as alleged in the State's Complaint. See id.

POINT III.

FEDERAL LAW DOES NOT PREEMPT THE STATE'S CLAIMS.

Because Maxus' and Tierra's argument regarding preemption simply reiterates the arguments raised in OCC's Motion to Dismiss regarding preemption, the State adopts and incorporates its Brief in Opposition to OCC's Motion to Dismiss concerning preemption. See Pls.' Resp. OCC Mot. to Dismiss at pp. 13-20. The State will, however, briefly address the arguments set forth in Maxus' and Tierra's motion.

Maxus' and Tierra's arguments seeking dismissal of the State's claims based on preemption are wholly contingent upon their mischaracterization of the State's claims. The standard of review in deciding a motion to dismiss, however, requires that the Court limit its analysis to the claims as alleged in the relevant pleading and does not permit the Court to review extrinsic evidence or adopt Defendants' mischaracterization of the State's claims. Printing Mart-Morristown, 116 N.J. at 746 (on a motion to dismiss for failure to state a claim, plaintiffs are entitled to every reasonable inference of fact). This standard is consistent with the United States Supreme Court precedent concerning preemption analysis. Indeed, federal preemption of state law is disfavored and "courts should not lightly infer" that state law has been preempted by federal law. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 490 (1987). Thus, the issue before this Court is not whether the Complaint contains any set of facts which could support a claim that is preempted by federal law, but rather, whether any generous reading of the Complaint supports a claim that is not preempted by federal law. Because the State has not alleged a cause of action based upon Maxus' or Tierra's conduct in implementing "response actions" with the USEPA or any other State or federal agency, there is no claim to preempt. The Motion must fail on that point alone.

Moreover, it is interesting to note that Maxus and Tierra also go to great lengths to incorporate out-of-context quotes from the recent opinion in New Mexico v. General Elec. Co., 467 F.3d 1223 (10th Cir. 2006). In that case, the issue before the court was whether the State of New Mexico could recover natural resource damages under state law for groundwater contamination (a contaminant plume) situated outside the USEPA's existing remediation system. New Mexico, 467 F.3d at 1240. To support its natural resource damages theory, New Mexico argued that the USEPA's selected remedy failed to address the entirety of the contamination and that the on-going remedial work was insufficient to restore the groundwater to acceptable levels. Id. at 1249. The court held that because the USEPA had already selected a remedial response plan, New Mexico's claims constituted an impermissible challenge and were therefore preempted.[8] The court further observed that to award New Mexico natural resource damages under its theory that the USEPA's remedial action was insufficient would require the court to substitute its judgment for that of the USEPA, an act it was loathe to do. Id. at 1249-50.

Despite being inapplicable to New Jersey courts, and expressly rejected by the federal courts sitting in New Jersey, Maxus and Tierra argue that rationale behind the New Mexico decision is dispositive of this case. However, neither the facts, the claims at issue, nor the relief sought in New Mexico are similar to this case. In the instant case, the State is not seeking to recover natural resource damages, thus the panoply of issues related to the scope and efficacy of USEPA's remedial efforts and their effect on potential natural resource damages simply do not

[8] In determining that New Mexico's claims for natural resource damages constituted a challenge, it appears the court applied the expansive Ninth Circuit view of federal jurisdiction over claims based solely on state law. The opinion provides that "the State's lawsuit calls into question the EPA's remedial response plan, it is related to the goals of the cleanup, and thus constitutes a challenge to the cleanup . . . ." However, in the United States District Court for the District of New Jersey, Chief Judge Brown flatly rejected the Ninth Circuit Court of Appeals' expansive view of federal jurisdiction and preemption, holding that the Ninth Circuit's standard was inconsistent with binding Third Circuit precedent. See Dep't of Envtl. Prot. v. Occidental Chem. Corp., No. 06-401, 2006 WL 2806231 *9-10 (D.N.J. Sept. 28, 2006).

exist. Pls.' Am. Compl. at ¶ 6. Further, unlike New Mexico's claims, here, the State's claims do not constitute a "challenge" and undeniably do not require that USEPA alter or amend its selected remedy. In his Order granting the State's Motion to Remand, Judge Garrett E. Brown, Chief Judge of the United States District Court for the District of New Jersey, thoroughly examined the issue of whether the State's claims for monetary damages constituted a challenge to USEPA's actions and determined they did not. Dep't of Envtl. Prot. v. Occidental Chem. Corp., No. 06-401, 2006 WL 2806231 *9-10 (D.N.J. Sept. 28, 2006).

Accordingly, Maxus' and Tierra's reliance on New Mexico is misplaced, and that case is inapplicable to this matter. Moreover, New Mexico does not stand for the proposition that all claims for costs and monetary damages are preempted by federal law. Rather, it was limited to the specific facts of that case. For these reasons and the reasons set forth in the State's Brief in Opposition to OCC's Motion to Dismiss, Maxus' and Tierra's Motion should be denied.

POINT IV.

THE STATE DOES NOT CLAIM THAT MAXUS AND TIERRA ARE LIABLE AS THE ALTER EGOS OF OCC.

Maxus and Tierra lastly argue that the "Repsol Group's" status as a common economic unit and the alter ego of each other is insufficient to impose liability on Maxus and Tierra for the actions of OCC. Maxus and Tierra Mot. to Dismiss at p. 22. Maxus and Tierra create an argument that does not exist under the State's Complaint. Nowhere in the State's Complaint does the State allege that the Repsol Group (defined as Maxus, Tierra, Repsol YPF, S.A., YPF, S.A., YPF Holdings, Inc., and CLH Holdings) includes OCC. Nor does the State allege that any member of the Repsol Group, individually or in any combination with any other members, is the alter ego of OCC. Thus, OCC is not part of the alter ego or common economic unit allegations.

However, the Complaint does allege that the members of the Repsol Group are the alter egos of each other and act as a common economic unit.[9] Pls.' Am. Compl. at ¶ 38. The Complaint further provides that Maxus and Tierra are liable as dischargers and persons in any way responsible for discharges of TCDD. See Pls.' Am. Compl. at ¶¶ 22, 23 and 28. Thus, it is the direct liability of Maxus and Tierra that makes them, and each member of the Repsol Group, jointly and severally liable to the State. Again, on this basis, the Motion should be denied.

CONCLUSION

The Motion to Dismiss filed by Maxus and Tierra should be denied upon one fair reading the State's First Amended Complaint. At this point in the proceedings, the facts alleged in the Complaint need only suggest a cause of action and must be taken as true. Maxus' and Tierra's omission of the factual allegations contained in paragraphs 22 and 23 aside, the Complaint alleges discharges while the Lister Site was owned and/or controlled by Maxus and Tierra. This fact alone requires that Maxus' and Tierra's entire Motion fail. Every argument that Maxus and Tierra put forward, independent of OCC's Motion to Dismiss, depends upon a reading of the Complaint that is unsupported by the actual words used in the Complaint. For these reasons, and the reasons set forth in the State's Brief in Opposition to Occidental Chemical Corporation's Motion to Dismiss for Failure to State a Claim, Maxus' and Tierra's Motion to Dismiss should be denied in its entirety.

[9] Maxus and Tierra do not assert that the State's Complaint fails to sufficiently allege the alter ego and common economic unit status of the Repsol Group and its members.

Respectfully Submitted,

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Attorney for Plaintiffs

By: _____
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Dated: February 5, 2007

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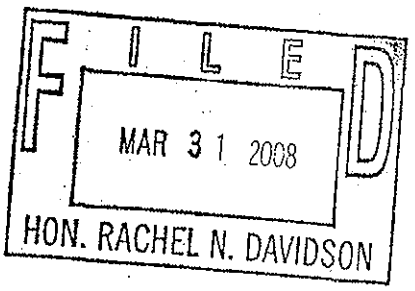
EXHIBIT C



SUPERIOR COURT OF NEW JERSEY
ESSEX COUNTY: LAW DIVISION

PREPARED BY THE COURT

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, et al,
Plaintiffs,

vs.

OCCIDENTAL CHEMICAL CORP., et al,
Defendants.

DOCKET NO. ESX-L-9868-05

Civil Action

ORDER

THIS MATTER having come before the court on motion of defendant Occidental and motion of defendants Maxus and Tierra, each seeking to dismiss the amended complaint for failure to state a claim under which relief can be granted, and for the reasons attached,

IT IS on this 31st day of March, 2008, **ORDERED** that:

1. Both motions are denied.

A copy of this order shall be served on all parties within seven days.

Rachel N. Davidson

Rachel N. Davidson, J.S.C.

MEMORDANDUM OF DECISION

This matter comes before the court on two motions filed by two different groups of defendants in this matter. Both motions seek to dismiss plaintiffs' complaint for failure to state a claim.

The Amended Complaint in this matter was filed on November 30, 2006, by the New Jersey Department of Environmental Protection (NJDEP) against Occidental Chemical Corporation (Occidental), Tierra Solutions, Inc. (Tierra), Maxus Energy Corporation (Maxus), and other defendants collectively referred to the as the Repsol defendants, alleged to be the alter egos of Maxus and Tierra. Plaintiffs' complaint relates to the discharge of 2,3,7,8-tetrachlorodibenzo-p-dioxin, known as TCDD, from what was a plant manufacturing pesticides, located at 80 Lister Avenue in Newark, New Jersey. Plaintiffs claim that TCDD was discharged into the Passaic River and the Newark Bay.

Plaintiffs' claims fall into five categories: claims under the Spill Compensation and Control Act (Spill Act), N.J.S.A. 58:10-23.11a et al., enacted in 1977, claims brought under the Water Pollution Control Act (WCPA), N.J.S.A. et al., also enacted in 1977, and claims brought under common law theories of nuisance, trespass and strict liability. Under the Spill Act, the State has different options as to how to respond to a polluted site: "cleanup the discharge and bring an action to recover the costs," "direct the discharger to cleanup or arrange for the cleanup of the discharge," or "require responsible polluters to pay for cleanup and removal costs prior to remedial action." New Jersey Dep't of Environmental Protection v. Exxon Mobil Corp., 393 N.J. Super. 388 (App. Div. 2007) (citations omitted). In this case, plaintiffs have begun remediation of the site and are

seeking reimbursement for those costs, a declaratory judgment that the defendants have to pay for future costs and additional damages.

The standard that the court must apply in addressing a motion for failure to state a claim is well established. See Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739 (N.J. 1989). Dismissing complaints at this early stage is discouraged and if plaintiffs' complaint can be construed as stating a cause of action, defendants' motions must be denied.

The history of the ownership of the plant in question is extremely convoluted. Because the motion is one for failure to state a claim, the court need only worry about what the complaint alleges, not whether the allegations are true. The complaint alleges that the property was owned by OCC, which stopped manufacturing at the site in question in 1969. Amended Complaint ¶ 26. The complaint also alleges that the TCDD continued to leak from the site into the 1980s. Amended Complaint ¶ 18, 22-23. The complaint also alleges that as a result of a transaction that occurred in 1986, Maxus agreed to manage and indemnify OCC from environmental liabilities at the site. Amended Complaint ¶ 27.

For the sake of clarity, defendants' arguments will be addressed in the order in which they are presented in their papers.

Occidental's motion

Occidental argues first that "because the Amended Complaint itself makes clear that all of plaintiffs' claims arise out of discharges that ceased in 1969," almost all of plaintiff's claims are barred by the statute of limitations. The Spill Act defines "discharge" as "any intentional or unintentional action or omission resulting in the

releasing . . . of hazardous substances . . . ." N.J.S.A. 58:10-23.11b. The Water Act defines "discharge" as "an intentional or unintentional action or omission resulting in the releasing . . . of a pollutant . . . ." N.J.S.A. 58:10A-3e. Plaintiff agrees that passive migration is not a "discharge" under either statute. The Amended Complaint alleges in ¶ 39:

> OCC owned the Lister Site from 1940 through 1971. From the mid-1940s through 1969, OCC manufactured agricultural chemicals at a portion of the Lister site, including dichlorodiphenyltrichloroethane ("DDT") and phenoxy herbicides. DDT production began before the end of World War II and continued through the late-1950s when OCC's DDT operations were consolidated at its Greens Bayou Plant in Houston, Texas. The Greens Bayou Plant was also extensively contaminated with hazardous substances intentionally discharged by OCC.

The plain reading of the complaint is that manufacturing at the Lister Site ceased in 1969, a fact on which all parties agree. However, the complaint does not allege that discharge ceased in 1969. Moreover, even if ¶ 39 were ambiguous as to whether what ceased in 1969 was the discharging of pollutants or the manufacturing activities, the caselaw in New Jersey on dismissals for failure to state a claim under N.J. Court R. 4:6-2(e), requires that all inferences be made in favor of plaintiff and in favor of a reading that would give rise to a viable cause of action. The complaint is also clear that discharges occurred into the Newark Bay Complex during the time that Maxus controlled and that Tierra owned and controlled the Lister Avenue site. Amended Complaint ¶¶ 22, 23. This was no earlier than 1983, after the enactment of both the Spill Act and the Water Act. Amended Complaint ¶ 19 – 23. To summarize, the court finds that the Amended Complaint alleges discharges for which Occidental could be found liable that

occurred at least as late as 1983. Thus, the court also rejects any argument by Occidental based on the applicability of the Spill Act and the WPCA to claims for discharges that occurred before these statutes were enacted.

Occidental next argues that the limitations period is ten years, under N.J.S.A. 2A:14-1.2(a). N.J.S.A. 2A:14-1.2 provides for a ten year statute of limitations for State actions, excepting any civil actions commenced by the State "concerning the remediation of a contaminated site or the closure of a sanitary landfill facility, or the payment of compensation for damage to, or loss of, natural resources due to the discharge of a hazardous substance, and subject to the limitations period specified in section 5 of P.L. 2001, c. 154 (C. 58:10B-17.1)." N.J.S.A. § 2A:14-1.2.

N.J.S.A. 58:10B-17.1 applies to "any civil action concerning the remediation of a contaminated site . . . commenced by the State pursuant to the State's environmental laws . . . ." N.J.S.A. 58:10B-17.1. The statute defines environmental laws as including not only the Spill Act and the WPCA, to which it expressly refers, but also "any other law of regulation by which the State may compel a person to perform remediation activities on contaminated property." N.J.S.A. 58:10B-17.1. While conceding that this statute saves the Spill Act claims for clean up and removal costs, Occidental argues that the Spill Act claims for damages to state property, Spill Act claims for civil penalties, and the common law claims fall outside of N.J.S.A. 58:10B-17.1, and are governed by the ten year statute of limitations in N.J.S.A. 2A:14-1.2. Plaintiffs argue that the broader limitations period of N.J.S.A. applies to all of their claims.

The court agrees with the plaintiffs' plain reading of this statute. Certainly, the common law causes of action may be used to compel a person to perform "remediation

activities on contaminated property," and therefore the common law claims are covered by the more generous limitations period. The court finds that the Spill Act claims for damages to state property and for civil penalties are also covered by N.J.S.A. 58:10B-17.1. The statute refers to causes of action "concerning" remediation, which means relating to or having to with the remediation of the contaminated site. Webster's New World College Dictionary, Fourth Edition. Thus, while the Spill Act claims in question certainly do not "arise" out of remediation, they do concern it.

Occidental next argues that the course of dealing with the federal government's EPA preempts a state action. Occidental states that plaintiffs' "attempt to impose liability on Occidental and the other defendants for activities taken in furtherance of USEPA's response action at the Lister Avenue Site, the Passaic River and Newark Bay is preempted as a matter of federal law." Occ. Br. p. 15. Occidental concedes that CERCLA does not expressly preempt state law. Absent express preemption, Occidental relies on conflict preemption, arguing that "plaintiffs' claims that defendants are subject to statutory liability or have committed tortious conduct by performing their agreements with the USEPA directly interferes with central aims of CERCLA and must yield to federal law." Occ. Br. p. 16. The defendants are currently involved in federally mandated clean up programs.

Again, the court has before it the plain language of the complaint. The complaint is careful to avoid preemption issues; it explicitly states after every count that:

> nothing herein is intended to seek, and should not be interpreted to seek, that Defendants undertake any cleanup, removal, or remedial action within the Newark Bay Complex or on the Lister Site in response to this Complaint. Plaintiffs are not seeking, and this Complaint should not be characterized as asserting a claim for natural

> resources damages....Additionally, Plaintiffs are not seeking to enforce or recover any costs covered by the 1990 Consent Decree regarding the Lister Site, nor are they seeking to enforce the December 14, 2005 Directive regarding the funding of a source control dredge plan or the September 19, 2003 Directive regarding assessment of natural resources damages.

Thus, plaintiff's complaint is careful to seek only monetary damages. The court agrees with the distinction made by the Hon. Garrett E. Brown, Jr., in New Jersey Dep't of Environmental Protection v. Occidental Chemical Corp., 2006 WL 2806231 (D.N.J., Sept. 28, 2006) (Brown, J.), between monetary damages and other relief. As the District Court found, while the monetary relief sought may be "related to" the EPA's actions in this area, this is not sufficient to find preemption.

There are no claims in the complaint seeking damages resulting from either the defendants' "activities taken in furtherance of USEPA's response action" or conduct resulting from "performing their agreements with the USEPA." In considering whether plaintiffs' claims should be dismissed for failure to state a claim at this early stage, the court must accept the complaint on its face and on its face there is nothing to give rise to preemption. It appears from a comparison of the plaintiffs' and Occidental's briefs on this issue, that there is little or no area of disagreement with regard to the law in this area and its ramifications in a case such as this. Instead, the disagreement is on the facts and whether liability arising from specific actions taken by Occidental may give rise to a preemption argument. It may be that as this case progresses, facts develop in such a way that preemption of all or part of plaintiffs' claims does become an issue. But it is not an issue based on the plain meaning of the complaint and therefore defendants' motions are denied on this issue.

Finally, Occidental argues that plaintiffs cannot state a claim for restitution or unjust enrichment. The Amended Complaint seeks "restitution for [defendants'] unjust enrichment." On its face, this language of the complaint appears to allege a theory of unjust enrichment. Unjust enrichment is a legal theory, for which restitution is a measure of damages. Restat. 1st of Restitution, § 1 (2008) ("A person who has been unjustly enriched at the expense of another is required to make restitution to the other."). Occidental demonstrates that under the law plaintiffs cannot make a claim for unjust enrichment based on the facts alleged in the complaint. Once again, there is no real dispute between the parties. Plaintiffs repeat that they are putting forward five claims: Spill Act, WPCA, trespass, nuisance and strict liability, thus disavowing any claims under a theory of unjust enrichment. Because the theory of unjust enrichment is not a claim that is being promoted by plaintiffs, despite their use of the phrase, no cause of action or unjust enrichment exists to be dismissed. As to restitution, it is sought as a measure of damages and Occidental does not argue that plaintiff's claim for restitution as damages should be dismissed.

Maxus and Tierra's motion

The Maxus and Tierra defendants also seek to dismiss the Amended Complaint on grounds that it fails to set forth a cause of action against them under Rule 4:6-2(e).

The first basis for the motion is that the complaint fails to allege that Maxus and Tierra discharged dioxin. In support of their motion, the Maxus defendants claim that the complaint does not allege that any "discharge" took place during the time that they allegedly owned and operated the site. Plaintiffs and defendants agree that passive migration cannot be a basis for liability in this case. The complaint makes clear that the

Lister Site closed in 1969 and the moving defendants' ownership began in 1983 at the earliest. The moving defendants argue that they could not have been responsible for the discharge of dioxin from the Lister Avenue site as they are corporate entities that did not come into existence until much later. However, the plaintiffs do allege in the complaint that these defendants discharged dioxin. See Amended Complaint ¶¶ 22, 23. These counts recognize the passage of time; they allege that during the time of the moving defendants' ownership, "discharges of TCDD continued to occur."

At first blush it might appear that once the Lister Site closed there could no longer be any active discharge, only passive migration. This is the claim of the moving defendants ("defendants had no nexus with the Lister Site until a point at which only passive migration of previously-discharged contaminants was allegedly occurring" Reply Br. p. 1) and it is clearly the conclusion that the moving defendants would like this court to reach. However, the definitions of "discharge" under both the Spill Act and under the WPCA are broader than that commonly used. Plaintiffs do not explain how such discharges might have occurred as late as 1983, and the facts may ultimately not support the claim. But this is a factual issue, appropriate perhaps for summary judgment, but not on a motion for failure to state a claim. See Central Bergen Props. v. Crown Leisure Prods., 1996 U.S. Dist. LEXIS 22483 (D.N.J. 1996) (dismissing defendant's motion to dismiss count three of the amended complaint where defendant's argued that "a past discharge does not constitute a continuous violation of the WPCA....because all operations were ceased at Plaintiff's property" prior to the relevant time period); see also Atlantic City Municipal Utilities Authority v. Hunt, 210 N.J. Super 76 (1986) (suggesting that leaking is a discharge under these statutes).

The moving defendants argue in their reply brief that the plaintiffs have failed to allege facts to support their legal conclusion that the moving defendants are dischargers of dioxin and that they cannot do so because the "State lacks evidence to assert that any such leaks were discharging contaminants as late as 1986." Reply Br. p. 4. Moving defendants also argue that "there is good reason to be skeptical that the State has truly mustered evidence of discharges that can be used to indict Maxus and Tierra." Reply Br. p. 9. This court cannot determine on this motion whether Maxus and Tierra discharged dioxin when they owned the property, which was in 1983 at the earliest. Whether there were still discharges occurring over fourteen years after the Lister Site was shut down is a fact question that cannot be determined on the papers submitted and that probably cannot be determined at this early stage of the case.

The scope of review at this point is limited; the court is required to examine the complaint for anything that could state a cause of action. The court understands the amended complaint as alleging that while the moving defendants owned the Lister Site, dioxin was "discharged." If the defendants are confident that the plaintiffs have no facts to support such a claim, they can move under N.J. Ct. R. 1:4-8 and under N.J.S.A. § 2A:15-59.1, make a motion for summary judgment, or both, but the court cannot dismiss plaintiff's complaint for failure to state a claim based on facts outside the pleadings.

Maxus and Tierra also argue that they cannot be liable for discharges that occurred prior to their becoming Diamond's parent company in 1983, because a parent corporation "cannot be held liable under the Spill Act" for its subsidiary's past discharges when the parent did not own the subsidiary until "after the discharged had ceased." Analytical Measurements, Inc. v. The Keuffel & Esser Co., 843 F. Supp. 920, 925

(D.N.J. 1993). They are correct on this point; plaintiff does not argue otherwise. See also State, Dept. of Environmental Protection v. Ventron Corp., 94 N.J. 473 (N.J. 1983) (holding ownership or control over a property at the time of the discharge is sufficient to hold a party responsible under the Spill Act, and thus finding liability on the part of a parent company, because the parent company had exercised effective control over the property at the time of the discharge).

Maxus and Tierra also moved on grounds that the complaint does not set forth a cause of action under theories of stranding environmental liability and alter ego. In its opposition to their motion, the plaintiff expressly disclaims all such claims and therefore this issue also does not need to be reached by the court.

Finally, Maxus and Tierra's motion to dismiss based on federal preemption is denied for the same reasons as set forth on pages five to seven above.

EXHIBIT D

[redacted]

A-7 - SEP 1997

A-2 - SEP 1997

SUPREME COURT OF NEW JERSEY
DOCKET NO. 42,163

MARIE MARSH,

Respondent,

v.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION/ ENVIRONMENTAL CLAIMS ADMINISTRATION/SPILL COMPENSATION FUND,

Petitioner.

Civil Action

On Petition For Certification

Sat Below:
Brochin and Long, JJ.A.D.

PETITION FOR CERTIFICATION ON BEHALF OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

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On the Brief

TABLE OF AUTHORITIES

CASES CITED

STATUTES CITED

REGULATIONS CITED

COURT RULES CITED

PRELIMINARY STATEMENT

The New Jersey Spill Compensation Fund ("Spill Fund") petitions the Supreme Court for review of that part of an Appellate Division decision that unnecessarily invalidates a claim eligibility regulation and dramatically expands the kinds of claims eligible for Spill Fund compensation. First, the Appellate Division improperly invalidated N.J.A.C. 7:1J-2.7(b), which required claimants who sought Spill Fund compensation to have examined a property before purchasing it to determine if it had hazardous substance contamination. Second, the Appellate Division created a *de minimis* exemption from liability with no basis in the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11g(c)1, ("Spill Act"), and allowed property owners to receive compensation even when a discharge occurred during their ownership. Neither standard exists in the Spill Act and both requirements squarely contravene fundamental Spill Act policies.

New Jersey's hazardous substance contamination is a problem of the highest magnitude. See Matter of Kimber Petroleum, 110 N.J. 66, 88 (1988), appeal dismissed, 488 U.S. 935, 109 S.Ct. 358, 102 L.Ed.2d 349 (1988) (Wilentz, C.J., dissenting). The Spill Fund pays for hazardous substance discharges when responsible parties are insolvent or judgment proof. Yet, the Fund has far too little money to perform this task. See 110 N.J. at 90. Therefore, it is critical that the Fund be used only for legislatively authorized purposes. Private parties must be encouraged to prevent discharges and to apportion between themselves in market transactions cleanup costs for discharges which have already occurred.

If left standing, the Appellate Division's decision will seriously impede the Spill Fund's fulfillment of its legislative mandate, namely to compensate only those parties harmed by, but not liable for, hazardous substance discharges. The rule invalidation may require the Spill Fund to pay large sums to claimants who invited their own damages by carelessly or even knowingly purchasing contaminated property. The Fund must not be required to subsidize the poor business decisions of those who purchased property without examining its characteristics. Second, the Appellate Division's attenuation of owner liability will undermine the paramount objective of the Spill Act, namely ensuring vigilance in the handling of hazardous substances and thus preventing their discharge. If property owners know they can recover from the Fund when hazardous discharges occur, they will be less likely to take steps to prevent such discharges.

Given the general public importance of these issues, the DEP asks that this Court grant DEP's petition for certification, and expressly overrule the Appellate Division's invalidation of N.J.A.C. 7:1J-2.7(b) and its erroneous expansion of Spill Fund eligibility.

PROCEDURAL HISTORY

Marie Marsh filed a Spill Fund claim on April 23, 1992. After DEP issued two Notices of Intent to Deny ("NOI") this claim, (Aa 4) DEP sought and received additional claim information. (Aa 5). DEP denied the claim on July 8, 1993. Ibid.

Consequently, Marsh requested arbitration under N.J.S.A. 58:10-23.11n and N.J.A.C. 7:1J-6.7(g). (Aa 6).* Following the stipulation of relevant facts, DEP sought summary decision upholding its claim denial. (Aa 133). Administrative Law Judge Beatrice Tylutki, sitting as a Spill Fund Arbitrator, granted DEP's motion and denied the claim on July 11, 1994. Ibid. Applying abundant precedent, Judge Tylutki found Marsh responsible for the discharge because at least some of it occurred during her ownership and because she acquired the property without examining it to determine whether or not it was contaminated. Ibid.

Marsh appealed this denial to the Appellate Division. (Pa 26). Despite upholding this claim denial, the Appellate Decision's January 25, 1996, opinion gratuitously invalidated N.J.A.C. 7:1J-2.7(b) and sua sponte added two requirements not included in the Spill Act, namely that, in order for the Spill Fund to bar recovery, it must prove that a claimant affirmatively caused a discharge and that more than a *de minimis* amount of the hazardous substance must be discharged during its ownership. Ibid. As these analyses were not necessary to the decision on appeal, DEP moved for reconsideration of these aspects of its decision. The Appellate Division denied this motion on February 28, 1996.

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*Aa refers to appellant's/(Marsh's) appendix to Appellate Division appeal.

Pa refers to petitioner's/DEP's appendix to Appellate Division response.

STATEMENT OF FACTS

Between 1951 and 1974, the property eventually owned by Marie Marsh at 772 Black Horse Pike in Turnersville, New Jersey, was leased to the Sinclair Refining Company, and then to the Citgo Oil Company for use as a gasoline station. (Aa 1). Claimant Marie Marsh's parents owned the property for the final seven years of this period. Ibid.

In February 1991, Mary Bernardo, the claimant's mother, gave Ms. Marsh the property. (Aa 2). Ms. Marsh then applied to the Township to have the property approved for a subdivision. According to the certification which Ms. Marsh submitted in support of her claim, "At the time [of the subdivision application] I was advised by Township officials that they did not believe the subdivision application could be approved until some underground storage tanks which allegedly existed at the property were removed." Ibid. Ms. Marsh stipulated that she knew that the property had been used as a gas station for decades and that she had received no affirmative notification that the tanks beneath the properties had ever been removed. (Aa 1-3).

Ms. Marsh hired a consultant, the Krydon Group, to examine the status of underground gasoline storage tanks at the site. (Aa 2). Tanks were found. However, they were not removed until July and August 1991, over six months after Marie Marsh took title to the property. (Pa 6-9). Ms. Marsh certified that she knew of two tanks on the property prior to acquiring title and that "[in late July and early August 1991, during the course of tank excavation work, I was informed by representatives of the

Krydon Group that there were four instead of two tanks and that the tanks were leaking product into the adjoining soils." (Pa 7). (Emphasis added).

Similarly, her expert Michael Iles's Certification declares that "[i]n late July and August when Pedrick began tank excavation under the supervision of the Krydon Group, ... we ascertained that the tanks were perforated and were leaking product. We noted that some of the tanks still had free product in them." (Pa 9, emphasis added)

Thus, the tanks were indisputably discharging in July-August 1991, five or six months after Ms. Marsh assumed ownership of the property. The acknowledged existence of free product in perforated tanks underscores the fact that at least part of the discharge occurred during Ms. Marsh's ownership.

ARGUMENT

CERTIFICATION SHOULD BE GRANTED TO CONSIDER THE APPELLATE DIVISION'S UNNECESSARY AND STATUTORILY UNAUTHORIZED INVALIDATION OF A RULE REQUIRING CLAIMANTS TO EXERCISE DUE DILIGENCE REGARDING POTENTIAL CONTAMINATION ON A SITE BEFORE SEPTEMBER 14, 1993, AND TO REVIEW ITS HOLDINGS THAT CERTAIN PROPERTY OWNERS ARE NOT LIABLE FOR HAZARDOUS SUBSTANCES STORED ON THEIR PROPERTIES.

Court rules provide that certification will be granted to review final judgments of the Appellate Division when there are special reasons for such review by the Supreme Court. R. 2:12-4. Special reasons may be found when an appeal presents a question of general public importance that has not been, but should be, settled by the Supreme Court. Ibid. See Bandel v. Friedrich, 122 N.J. 235, 237-38 (1991); In

re Route 280 Contract, 89 N.J. 1 (1982). Certification is also warranted when the disposition of an issue in a case transcends the immediate interests of the litigants, thereby calling for the exercise of the Court's supervision. Mahony v. Danis, 95 N.J. 50, 52 (1983) (Handler, J., concurring).

New Jersey's hazardous waste problem is enormous. See Matter of Kimber, supra, (Wilentz, C.J., dissenting). New Jersey's citizens rely on the Spill Fund to pay for hazardous site cleanups. See N.J.S.A. 58:10-23.11a. The Appellate Division's unnecessary and patently erroneous holdings that even those who knowingly purchased contaminated property can recover from the Spill Fund and that some property owners are not legally responsible for hazardous substances stored on their properties will authorize Spill Fund recoveries by many parties previously and properly barred from the Fund.

Further, the issues of due diligence and ownership liability raised by Marsh must also be resolved in two pending appellate matters, Newhan Properties v. Department of Env. Prot./Environmental Claims Administration, Docket No. A 2915-95T2, and Voorhees Tp. v. Department of Env. Prot./ Environmental Claims Administration, ___ N.J. Super. ___ (App. Div.), decided June 3, 1996. (DEP petition for certification pending). Given the Appellate Division opinion's potential adverse impact on the viability of the Spill Fund and the presentation of the same issues in other cases, Marsh presents a matter of clear public importance, which transcends the interests of the immediate parties to

this case. Certification is warranted to resolve the significant questions presented. See R. 2:12-4.

A. The Appellate Division's Nullification of N.J.A.C. 7:1J-2.7(b) Will Improperly Authorize Spill Fund Recoveries by Those Who Purchased Property That They Knew or Should Have Known to Be Contaminated.

Although it affirmed DEP's denial of Marsh's claim, the Appellate Division invalidated N.J.A.C. 7:1J-2.7(b), a critically important regulation that DEP has frequently invoked to preclude property owners from being unjustly enriched by the Spill Fund. This regulation denies Spill Fund damage payments to persons who acquire title to contaminated property, unless they can show that:

> Despite exercising reasonable diligence and intelligence before purchasing or otherwise acquiring or obtaining title to the land, the claimant did not discover until after purchasing or otherwise acquiring or obtaining title to the land that any hazardous substance has been discharged or was discharging from the property in question; and, before purchasing or otherwise acquiring or obtaining title to the land, the claimant conducted a diligent and thorough inquiry into previous ownership and uses of the property.

Surprisingly, the Appellate Division found this requirement inconsistent with the pre-1993 Spill Act and directed that it not be applied to claimants who acquired property before the September 1993 statutory amendments.

In reviewing a challenge to a regulation, courts will apply "a strong presumption of reasonableness" in assessing "an administrative agency's exercise of statutorily delegated responsibility." City of

Newark v. Natural Resource Coun. Dept. Env. Prot., 82 N.J. 530, 539 (1980). Consequently, "the scope of judicial review of an administrative rule, regulations, or policy is generally limited to a determination whether the rule is arbitrary, capricious, unreasonable, or beyond the agency's delegated powers." In re Amendment of N.J.A.C. 8:31B-3.31, 119 N.J. 531, 544 (1990), citing Bergen Pines Hosp. v. Department of Human Servs., 96 N.J. 456, 474 (1984). Furthermore, it is axiomatic that "the opinion as to the construction of a regulatory statute of the expert administrative agency charged with the enforcement of that statute is entitled to great weight and is a 'substantial factor to be considered in construing the statute'." N.J. Guild of Hearing Aid Dispensers v. Long, supra, 75 N.J. at 575 (quoting Youakim v. Miller, 425 U.S. 231, 235, 96 S.Ct. 1399, 1402, 47 L.Ed.2d 701 (1976)); Matter of Bd. of Educ. of Town of Boonton, 99 N.J. 523, 534 (1985); Peper v. Princeton Univ. Bd. of Trustees, 77 N.J. 55, 69 (1978).

The Spill Act, N.J.S.A. 58:10-23.11g.a., provides a fund to pay for hazardous substance cleanup and removal costs. However, not all cleanup costs are compensable. N.J.S.A. 58:10-23.11gc(1) provides that "any person who has discharged a hazardous substance *or is in any way responsible* for a hazardous substance is strictly liable, jointly and severally, without regard to fault for all cleanup and removal costs." (Emphasis added). Obviously, the Act does not contemplate a recovery under N.J.S.A. 58:10-23.11g(a) against the Spill Fund by a person "in any way responsible for a hazardous substance," followed by an offsetting

recovery by the Spill Fund against the same party. See Tree Realty, Inc. v. Department of Treasury, 205 N.J. Super. 346, 348-349 (App. Div. 1985). Therefore, if a claimant is "in any way responsible" for a discharge, he cannot recover from the Fund.

The Legislature's decision to cast a wide net of responsibility for hazardous substances, and its inclusion of the words "without regard to fault," were deliberate and meaningful. Ascribing broad responsibility and liability ensures that the limited money available to the Fund will be used to pay only those claims which arise out of incidents or transactions which could not have been avoided by the party claiming the damage. See Kimber, 110 N.J. at 90 ("The problem of remedying today's new spills and the consequences of past pollution far exceeds the limits of the Spill Fund.") The Legislature has continually struggled to adequately finance the Spill Fund while limiting the negative economic effects caused by taxes on the industries that contribute to the Fund. See, e.g., Public Hearing Before the Assembly Agriculture and Environment Committee on Hazardous Waste Cleanup Operations, March 23, 1983.

Those purchasing property bear some responsibility for the hazardous substances on the properties that they purchase. As is already expected of homeowners purchasing an ordinary residential property, Spill Fund claimants who purchased property upon which contamination has already occurred could have averted their damages by requiring the seller to remedy the problem or by adjusting the sale price prior to

consummation of the sale. Requiring such diligence of claimants against a public fund is especially reasonable in the context of industrial property purchases. In such cases, there is a greater likelihood of contamination and the party acquiring the property generally is more sophisticated than in a residential transaction.

Thus, the Spill Act clearly authorized N.J.A.C. 7:1J-2.7(b), particularly given the wide latitude accorded to administrative agencies in rulemaking. The Court's nullification of N.J.A.C. 7:1J-2.7(b) attenuates the Spill Act's deliberately broad liability provision and undermines the clearly expressed legislative intent to impose liability on a range of parties wider than just those who actively discharged.

The Appellate Division's misinterpretation of the Spill Act would unreasonably allow a person or a corporation who acquired contaminated property prior to 1993 to receive payments from the Spill Fund, even though the contamination could easily have been discovered through a pre-purchase investigation. Even more disturbingly, the court's language authorizes claim payments to those who *actually knew* that the property was contaminated before taking title and encourages sham transfers of contaminated property.

In addition to the practical necessity of N.J.A.C. 7:1J-2.7(b), there are also Legislative indicia of its reasonableness. The Legislature expressly amended the Spill Act in 1993 through its passage of the Industrial Site Recovery Act ("ISRA"), S. 1070, the relevant section of which is now codified at N.J.S.A. 58:10-23.11g.d.(2). The

Legislature's express inclusion of a due diligence requirement in its 1993 ISRA amendments must be viewed as a ratification of past administrative interpretations of the Spill Act's responsible party definitions. The Legislature clearly emphasized in the legislative statement which accompanied S. 1070, that "Section 44, (i.e., N.J.S.A. 58:10-23.11g.d.(2)) does not change existing Spill Compensation and Control Act liability of persons who obtained real property before the effective date of the Act." Thus, if ISRA now expressly requires claimants to have made a diligent pre-purchase inquiry, pre-ISRA Spill Act regulations containing this requirement must have been reasonable and consistent with the overall purpose of the Spill Act.

Moreover, New Jersey is not unique in holding those who purchase properties that contain hazardous substances liable for the discharge of such substances. Under the federal analog of the Spill Act, the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C.A. § 9601 et seq. ("CERCLA"/"Superfund Act"), such a purchaser is liable unless he can demonstrate that he performed "all appropriate inquiry" regarding the property's characteristics before purchasing it. 42 U.S.C.A. at §§ 9601 (35)(A) and (B) and 9607 (a)(1) and (b). See State of New York v. Shore Realty Corp., 759 F. 2d 1032, 1045 (1985)("It is quite clear that if the current owner of a site could avoid liability merely by having purchased the site after chemical dumping had ceased, waste sites would certainly be sold, following the cessation of dumping, to new owners who could avoid the liability otherwise required by

CERCLA.") Additionally, if the Spill Fund were to pay the claim of a landowner who purchased a property upon which a hazardous substance was stored, DEP would have a cause of action against the landowner under CERCLA to recover its cleanup costs.

Further, it is illogical to presume that the Legislature, while on one hand imposing broad liability for contamination, would simultaneously require the Spill Fund to pay damages to a party who could have been deemed to have assumed liability under common law because he assumed the risk of purchasing a property that had been used for an ultrahazardous activity. See T & E Industries, Inc. v. Safety Light Corp., 123 N.J. 371, 390 (1991). That result would be inconsistent with generally established rules of statutory construction, which require the court to interpret a statute as a consistent whole. See State v. Sutton, 132 N.J. 471 (1993); State v. A.N.J., 98 N.J. 421, 424 (1985).

N.J.A.C. 7:1J-2.7(b) does not deny damages to innocent purchasers. It merely requires that, in order to qualify as an innocent landowner for a Fund award to remedy pollution, the purchaser must make a reasonable effort to ensure that the property is not contaminated. A party who accepts title to property that he knew or should have known to be contaminated must accept the consequence of that action. Public monies should not be used to subsidize a bad investment. Rather, private parties to a real estate transaction should apportion contamination risks among themselves. See Dixon Venture v. Joseph Dixon Crucible Co., 122 N.J. 228, 234 (1991). The importance of placing some burden on the

purchaser of real property who seeks to recover damages from the Spill Fund is particularly clear when one considers that future claimants may interpret Marsh to allow recovery by persons who knowingly purchased contaminated property.

Therefore, the Appellate Division's refusal to acknowledge that pre-1993 purchasers of property must exercise pre-purchase due diligence is inconsistent with the overall purpose and structure of the Spill Act and CERCLA. Consequently, that portion of the Court's ruling should be vacated.

B. In Authorizing Spill Fund Payments to Property Owners for Discharges Which Occurred During Their Ownership or for *De Minimis* Discharges, The Appellate Division Ignored the Broad Liability Provisions of the Spill Act, Undermined the Spill Act's Purpose of Promoting Vigilance in the Handling of Hazardous Substances and Imposed an Unreasonable Evidentiary Burden on the Fund.

The Appellate Division's opinion requires further correction because it creates a *de minimis* exemption from liability with no basis in the Spill Act and allows Spill Fund money to be used to compensate property owners even when discharges occur during their ownership. Both of these standards effectively nullify both the language and purpose of the Spill Act, which authorizes only the payment of claims by truly innocent hazardous substance discharge victims.

N.J.S.A. 58:10-23.11g.c.(1) provides that "any person who has discharged a hazardous substance, *or is in any way responsible for any hazardous substance*, shall be strictly liable, jointly and severally, *without regard to fault*, for all cleanup and removal costs...."

(Emphasis added). A discharge is expressly defined as "*any intentional or unintentional action or omission* resulting in the releasing...of hazardous substances...." See N.J.S.A. 58:10-23.11b.

Prior Spill Fund decisions all recognize this deliberate legislative distinction between *responsibility* for a hazardous *substance* and *liability* for its *discharge*. See e.g., State, Department of Env. Prot. v. Arlington Warehouse, 203 N.J. Super. 9 (App. Div. 1985); Tree Realty, supra, 205 N.J. Super. at 207 (App. Div. 1985) (landowner/lessor liable for discharge of substances stored by tenant). Thus, even those who did not *actively* cause a discharge are liable, without fault, for a discharge if they were responsible for the discharged substance.

The Legislature's broad definition of parties responsible for hazardous substances and its inclusion of the words "whether intentional or unintentional" and "without regard to fault" were deliberate and meaningful. Broad responsibility and liability serve the paramount objective of the Spill Act, prevention of hazardous substance discharges, which has long been recognized by this Court. See N.J.S.A. 58:10-23.11a; GATX Terminals Corporation v. Department of Env. Prot., 86 N.J. 46, 49 (1981). Those in any way responsible for hazardous substances, such as owners, are in the best position to prevent or curtail such discharges by, for example, vigilantly monitoring the containers in which such substances are stored. By disregarding this express statutory language and by requiring the Fund to prove that a claimant affirmatively caused a discharge, the Court attenuates the strict liability provision of the

Spill Act and undermines the clearly expressed legislative intent to impose liability on a range of parties wider than just those who actively discharged.

Similarly, the "more than *de minimis*" standard lacks support in N.J.S.A. 58:10-23.11b and g.c(1). These statutory provisions impose liability for all discharges, regardless of magnitude.

The Legislature clearly knows how to say *de minimis* when it wants to. For example, in the Worker and Community Right to Know Act, N.J.S.A. 34:5A-3(m)3, the Legislature excluded from the definition of hazardous substances mixtures which contain less than one percent hazardous substances. Similarly, in the Air Pollution Control Act, N.J.S.A. 26:2C-2, the Legislature expressly classifies as "research and development facilities" those which engage in only *de minimis* manufacture of products for commercial sale. No comparable provision exists in the Spill Act. Thus, there is no express statutory support for the Appellate Division's addition of a *de minimis* requirement.

Further, the requirement of proof of causation and the application of a *de minimis* standard disregard the characteristics of hazardous substance discharges and the policies underlying the Spill Act. Hazardous substances may be so harmful that human ingestion of even small amounts can cause death, neurological damage or cancer. Thus, the Spill Act does not countenance even small discharges of such substances. See In re Adoption of N.J.A.C. 7:1E, 255 N.J. Super. 469, 477-80 (App. Div. 1992) (application of a *de minimis* standard would thwart the

Legislature's intention to promote public health, safety and welfare). Further, the opinion fails to define causation or to quantify how much of a substance would be considered *de minimis*. This failure to define causation or *de minimis* is especially problematic from an evidentiary standpoint because many hazardous substance discharges result from slow leaks from underground storage tanks. In the context of the present opinion, virtually all parties upon whose property hazardous discharges occurred would assert that their predecessor caused the discharge and that the part of the discharge that occurred during their ownership was *de minimis*. Thus, the Spill Fund would have the unsustainable burden of proving, with no objective criterion, that more than a *de minimis* discharge occurred during an owner's watch and that the owner caused it.

Of course, some discharges may actually be *de minimis*. The Fund might pay claims in such circumstances. However, it must have enforcement discretion to avert the evidentiary problem noted. See In re Adoption of N.J.A.C. 7:1E, 255 N.J. Super. 473, 477 (App. Div. 1994). In the absence of a *de minimis* standard, courts can monitor the reasonableness of agency actions. See id. at 481 (D'Annunzio, J., concurring).

Moreover, denial of access to the Spill Fund does not leave property owners who did not affirmatively discharge hazardous substances without a remedy. The Legislature has authorized private contribution suits between such parties. See N.J.S.A. 58:10-23.11f(a). Allowing property owners to recover from the Fund will eliminate their incentive

to seek contribution from other responsible parties such as their predecessors in title. Thus, the Fund will unnecessarily bear litigation expenses that private parties should bear.

Finally, the cases upon which the Court relies, Ventron, supra, 182 N.J. Super. 210 (App. Div. 1981), aff'd as mod. on other grounds, 94 N.J. 473 (1983), and State, Department of Env. Prot. v. Arky's Auto Sales, supra, 224 N.J. Super. at 200, do not support a *de minimis* standard.

The Ventron trial court opinion provides the factual basis upon which the ensuing appellate proceedings should have been decided. In framing the issue of the Wolfs' liability, the trial court asked: "Have the defendants Wolf and/or Rovic discharged within the meaning of the 1971 statute?" [i.e., the predecessor to the Spill Act, now repealed, N.J.S.A. 58:10-23.1 to N.J.S.A. 58:10-23.10] It found: "The Court thinks not. While some demolition-construction may have moved some of the pollutants around the Wolf site, there is no adequate proof that any such action added to the pollution in Berry's Creek, a *sine qua non* to liability under the State's case." Ra 9, (emphasis added). Thus, the trial court never said the Wolfs caused any contamination, not even a *de minimis* amount. On this basis, the Court declined to impose liability upon the Wolfs. This critical factual finding is very different from the Appellate Division's conclusion that the Wolfs were found to have discharged hazardous substances but were not liable because they had only discharged a *de minimis* amount.

Nor does State, Department of Env. Prot. v. Arky's Auto, supra, 224 N.J. Super. at 200, support the conclusion that claimants can recover from the Fund if only a *de minimis* discharge occurred during their ownership. To the contrary, Arky's squarely holds that owners are liable for hazardous substance discharges which occur during their ownership, regardless of whether or not the owner "participated in" the discharge. Id. at 206-7. The Arky's *corporation*, which owned the property during the identifiable period of discharge, was clearly found liable on the basis of such ownership. The Arky *brothers* were shielded from individual liability by virtue of their corporate form and because, as in Ventron, there was no factual basis upon which the Court could conclude that any leakage occurred during their individual ownership. Regarding this critical factual issue, the Court expressly stated:

> Nor is there a factual basis in the record to impose liability for discharges against the Arky brothers during the four-year period of their individual ownership from 1977 to 1981. Speculatively, buried drums may have leaked hazardous substances but there is no factual record. [Id. at 207. (emphasis added)]

Further, the court expressly distinguished the Arky's facts from those in Township of South Orange Village v. Hunt, 210 N.J. Super. 407 (App. Div. 1986), where there was evidence of continuing leakage of gasoline (and, therefore, liability) from an underground storage tank or tanks. Ibid.

Thus, both Ventron and Arky's prompt a very different conclusion than that reached by the Court in Marsh regarding owner

liability. The prevailing rule established by Ventron, Arky's and Tree Realty is: if a discharge is occurring during a party's ownership, the party is liable for the discharge. In summary, there is no statutory basis for the language in the opinion which authorizes recovery against the Fund by someone who owned property during a hazardous substance discharge. Further, allowing such recoveries would do violence to the Spill Act's purpose, namely the promotion of vigilance by "any person in any way responsible" for any intentional or unintentional discharge of hazardous substances. See N.J.S.A. 58:10-23.11g(c).

Neither the Court's rule invalidation nor its treatment of owner liability were necessary to resolve the underlying litigation. The discussion of these issues contravenes the judicial policy which disfavors unnecessary, advisory pronouncements. Therefore, DEP asks this Court grant certification and to exercise its supervisory authority over the Appellate Division, see R. 2:12-4, by deleting those portions of the Appellate Division's opinion which discuss the validity of N.J.A.C. 7:1J-2.7(b) to pre-1993 claims.

CONCLUSION

As the Appellate Division's decision may have a broad impact on the interpretation of the Spill Act and will cause the Spill Fund to pay large claims by undeserving claimants, this Court should grant DEP's petition for certification in order to correct the profound errors in the Appellate Division's analysis.

Respectfully submitted,

PETER VERNIERO
ATTORNEY GENERAL OF NEW JERSEY

By: DAG for
Mark D. Oshinskie
Deputy Attorney General

DATED: 7/15/96

CERTIFICATION

Pursuant to R. 2:12-7, I hereby certify that this petition presents a substantial question for consideration by the Court. I further certify that this petition is filed in good faith and not for purposes of delay.

DAG for

Mark Oshinskie
Deputy Attorney General

DATED: 7/15/96

EXHIBIT E

Not Reported in A.2d, 2010 WL 4068204 (N.J.Super.A.D.)
(Cite as: 2010 WL 4068204 (N.J.Super.A.D.))

C
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.
NORTHERN INTERNATIONAL REMAIL AND **EXPRESS** CO., Plaintiff-Appellant/Cross-Respondent,
and
Satec, Inc., Plaintiff,
v.
Lester ROBBINS, Trustee Under Trust Indenture Dated June 28, 1976,[FN1] Defendant-Respondent/Cross-Appellant,

FN1. Improperly pleaded as Lester Robbins, Trustee d/b/a Milltown Court Associates.

and
Milltown Court Associates, Purex Industries, Inc., and Honeywell International, Defendants.

Argued May 11, 2010.
Decided Aug. 18, 2010.

West KeySummary**Environmental Law 149E** ⚿445(1)

149E Environmental Law
149EIX Hazardous Waste or Materials
149Ek436 Response and Cleanup; Liability
149Ek445 Persons Responsible
149Ek445(1) k. In general. Most Cited Cases

Prior owner of commercial property was not liable for cleanup of hazardous waster under the Spill Compensation and Control Act. The spill of hazardous waste was caused by a tenant that preceded the prior owner's purchase of the property. Responsibility for the cleanup did not attach under the Act unless there was evidence of a discharge during ownership. N.J.S.A. 58:10-23.11g(c)(1).

On appeal from Superior Court of New Jersey, Law Division, Union County, Docket No. L-1372-05.
Richard J. Dewland argued the cause for appellant/cross-respondent (Coffey & Associates, attorneys; Gregory J. Coffey, of counsel and on the brief; Mr. Dewland, on the brief).

Daniel L. Schmutter argued the cause for respondent/cross-appellant (Farer Fersko, P.A., attorneys; Mr. Schmutter, on the brief).

PER CURIAM.

***1** The litigation that gives rise to this appeal involves environmental contamination of commercial real estate in Union (the Union property). This is an appeal and cross-appeal from an order of April 13, 2009 that resolves all claims that were not settled by plaintiffs and defendant Honeywell Industries, Inc. The order was entered on cross-motions for summary judgment and a motion by plaintiffs to add additional counts to their complaint. We affirm, substantially for the reasons stated by Judge Anzaldi in his oral decisions of March 6 and 13, 2009, as supplemented herein.

Only two of the parties are participating in this appeal. They are plaintiff-appellant Northern International Remail and Express Co. (Northern) and defendant-cross-appellant Lester Robbins, Trustee Under Trust Indenture dated June 28, 1976 (Robbins). Northern purchased the Union property from Robbins in 1991.

In a complaint filed on April 15, 2008, Northern sought declaratory relief and damages from Robbins and the other defendants, including Honeywell International, Inc. Northern's claims were based on contamination of the Union property and asserted under the New Jersey Spill Compensation and Control Act, *N.J.S.A.* 58-10:23.11 to -23.24 (the Spill Act) and the common law governing

strict liability, nuisance, negligence, indemnification and restitution. Northern subsequently moved to add counts alleging misrepresentations by Robbins. Honeywell filed a counterclaim against Northern, and Honeywell and Robbins filed cross-claims for indemnification.

Judge Anzaldi dismissed Northern's common law claims and denied its motion to add a new common law claim on the ground that the six-year limitation period, which commenced in 1998 when Northern knew it had a basis for asserting claims based on contamination of the Union property, had expired when the complaint was filed. He entered judgment in favor of Robbins under the Spill Act on the ground that the evidence did not permit a finding that there had been a "discharge" during the period of Robbins's ownership. Northern appeals from those determinations.

The judge also dismissed Robbins's cross-claim for indemnification by Honeywell because he found that the legal relationship essential for common law indemnification was lacking. Robbins cross-appeals from that determination. Northern opposes that cross-appeal, but Honeywell does not.

The evidential materials submitted on the motions, viewed in the light most favorable to the non-prevailing party, support Judge Anzaldi's factual findings on the rulings challenged by Northern and Robbins. We agree with his determination that the prevailing parties were entitled to judgment as a matter of law.

Robbins took title to the Union property on June 30, 1976, and Robbins transferred title to Northern on December 31, 1991. In 2003, Northern sold the property to plaintiff Satec, Inc. Honeywell is the successor-in-interest to Baron-Blakeslee, Inc., (Baron), which was a division of defendant Purex Industries, Inc., during a portion of the term of the lease.[FN2] Baron was a tenant of the Union property under a lease between the owner from whom Robbins took title. Baron's ten-year lease was signed on November 10, 1967.

FN2. Although Purex was named as a defendant, Purex did not participate in this litigation at any point, presumably because Honeywell was acting as Baron's successor-in-interest.

***2** Between November 10, 1967 and August 1970, Baron used the property to store and distribute solvents. The solvents were distributed in drums to customers who purchased degreasing machines from Baron. At this site, Baron received the solvent in drums and also had a minimum of two 1000-gallon outdoor tanks in which it stored solvents. The solvents contained trichloroethylene (TCE); perchloroethylene; methylene chloride; Freon; and 1,1,1-trichloroethylene (TCA). The tanks were mounted on a concrete storage pad outside the building.

In August 1970, Baron moved the work done on the Union property to another location. Northern does not assert that Baron discharged any solvent at the Union property after Robbins took title in June 1976. After moving its operation in August 1970, Baron sub-leased the property to J & J Construction Co. (J & J), for a term beginning on September 16, 1970 and ending on December 14, 1977.

There is additional evidence that Baron was not operating on the Union property. A June 1981 Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS) report lists the Union property and refers to "Purex Corporation/Baron-Blakeslee." The CERCLIS listing indicates that no hazardous substances were being handled on site at that time and that there were no underground or above-ground storage tanks.

J & J is in the business of installing car radios. In October 1977, Robbins leased the property to J & J for a term ending on September 30, 1982. That lease was either renewed or extended. Records of the United States Environmental Protection Agency (EPA) show that in 1985 J & J was registered as a "large quantity generator" of hazardous waste at the

Union property. Moreover, in 1987, J & J sub-leased a portion of the Union property to Northern. There is no evidence demonstrating what waste J & J generated and no evidence of any investigation of or governmental action taken against J & J.

A second entity, T & T Corporation, was registered with the EPA as a "small quantity generator" of hazardous waste. The parties, however, were never able to identify T & T. There is no evidence that T & T was a tenant of Robbins or a sub-lessee under an agreement with a tenant of Robbins.

As noted above, Northern purchased the property from Robbins in 1991. Northern took title on December 31, 1991 at a purchase price of about $575,000. Paragraph five of that contract of sale provides:

> ECRA Obligations. Buyer and Seller acknowledge that sale of the premises may be subject to compliance with the Environmental Cleanup Responsibility Act, *N.J.S.A.* 13:1K-6, et seq. and the regulations promulgated thereunder ("ECRA").
>
> As a condition precedent to Seller's obligation to sell the premises pursuant to this Contract, Seller shall have received from the Industrial Site Evaluation [E]lement, or its successor either (a) a nonapplicability letter; (b) a deminimus [sic] quantity exemption; or (c) approval of Seller's negative declaration.

*3 Further, paragraph nine provides:

> Physical Condition of Property. This property is being sold "as is." The Seller makes no claim or representation about the condition or value of any of the property included in this sale. The Buyer has satisfied itself prior to entering into this agreement as to the condition of the premises and the building thereon.

Pursuant to paragraph twenty-four of the contract, Northern was authorized to conduct tests on the property.

A letter of nonapplicability issued by the New Jersey Department of Environmental Protection (DEP) on November 22, 1991, states:

> On the basis of the sworn statements set forth in the affidavit signed by Lester Robbins, the Department finds that this transaction is not subject to the provisions of [the Environmental Cleanup Responsibility Act] ECRA.
>
> This decision is made in light of the absence of an industrial establishment as defined within the Standard Industrial Classification numbers covered by the Act. Any inaccuracies in the affidavit or subsequent changes in the facts as stated therein could alter the Department's determination.

According to Stefan Puzyk, owner of Northern, neither Northern nor Robbins secured an environmental study. In Puzyk's view, he "was set up," and Robbins took advantage of him by not disclosing that there were environmental issues.

Robbins issued an Affidavit of Title dated December 30, 1991. In paragraph seven of the affidavit, Robbins certified that "the Subordination and Non-Disturbance Agreement dated March 19, 1968 with American Savings Bank referring to the Baron-Blakeslee, Inc., lease is no longer effective since Baron-Blakeslee, Inc.[,] vacated the premises more than ten (10) years ago." There is no evidence that this information about Baron's departure was incorrect.

After taking ownership, Northern leased some portions of the property to Design Furniture, an office furniture distributor, and to Mattiola Construction Company, an office and warehouse for a concrete cutting firm.

In July 1998, Northern sought to refinance. In connection with that refinancing, Roux Associates, Inc., conducted an environmental investigation. Puzyk completed a questionnaire in which he stated that testing wells had been installed on Northern's

property in connection with an investigation of a leaking storage tank on an adjacent property. Puzyk gave the adjacent property owner permission to install the test wells on Northern's property in 1994, and he admitted that he knew that benzene, a harmful and hazardous chemical, had been detected.

Roux's preliminary report was completed on July 28, 1998. It referenced the storage tank investigation of Northern's neighbor mentioned by Puzyk. According to Roux, that investigation was done in 1994, and it had disclosed chlorinated solvents in the groundwater on Northern's premises in excess of the New Jersey Ground Water Quality Criteria. Roux stated that the presence of chlorinated solvents might be attributable to an incident that occurred while Purex, meaning Baron as a division of Purex, occupied the premises.

***4** Roux concluded:

> [T]he historical use of the property and chlorinated solvents detected in the on-site ground water is a concern. The environmental database identified historical generation of hazardous wastes by previous occupants and an USEPA CERCLA [Comprehensive Environmental Response, Compensation and Liability Act] investigation of the site. The chlorinated solvents were detected in higher concentrations in the on-site wells than in the upgradient monitoring wells indicating that the site may have been the site of a release of chlorinated solvents.

The bank denied the loan Northern sought.

By letter dated October 16, 1998, Northern's counsel asked Robbins to contribute to the cost of cleanup of the property, and in a letter dated January 13, 1999, Northern's attorney notified the DEP of Roux's findings and asked the agency to issue a Full Compliance Determination and a covenant not to sue Northern with respect to the presence of chlorinated solvents. In that letter, which Puzyk reviewed, there was a summary of the findings of the Roux report and references to Purex/Baron and an off-site source of contamination, Carpenter Technology.

In August 1999, Northern sought approval from the DEP to conduct a cleanup under the DEP's oversight pursuant to a Memorandum of Agreement (MOA) with the agency and thereby obtain a Full Compliance Letter. On August 31, 1999, the DEP executed the MOA. Northern requested a "no further action" determination from the DEP, but the DEP directed Northern to do more testing.

In 2003 Northern and Satec negotiated a contract of sale and purchase. Satec had Code Enviro-Sciences, LLC (CODE) test the soil and groundwater. CODE found vinyl chloride in the soil at the property "at the [ ]DEP Residential Direct Contact Soil Cleanup Criteria"; dichloroethene in the soil in excess of the permitted level; and "extremely elevated concentrations of vinyl chloride" and other compounds in the ground water. CODE could not determine whether the contamination was attributable to prior operations on the Union property or an off-site source, or both.

Satec obtained additional studies after closing. In June 2004, Hillman Environmental Group, LLC, was retained to assess the impact of "former business operations" on the site. Hillman confirmed the presence of chlorinated solvents-cis-1, 2-dichloroethene, tetrachloroethene, 1,1,1-trichloroethane, and trichloroethane-in the soil and groundwater at unacceptable concentrations. They were near the concrete pad used by Baron for its storage tanks until August 1970. Hillman concluded that "the site may have been impacted by a release from an off-site source[, Carpenter Technology,] as well as previous on-site operations." Hillman noted on-site migration of chlorinated solvents from an up-gradient source and deemed that migration to be "not indicative of the source of contamination on the subject property." Hillman noted that its search of records revealed a regional groundwater chlorinated solvent impact.

***5** On April 14, 2005, the DEP concluded that

Hillman had attributed the chlorinated solvent contamination to a former occupant's handling, storage and usage of chlorinated solvents.

Northern argues that Robbins was not entitled to summary judgment under the Spill Act because the judge overlooked evidence indicating that there were potential dischargers of hazardous waste, other than Baron, on the Union property while Robbins owned it. Northern's claim is based on the evidence showing that T & T and J & J were registered generators of hazardous waste at the Union property during the period that Robbins was the owner.

We reject Northern's claim that the EPA registrations were adequate to raise a genuine dispute of fact as to Robbins's liability under the Spill Act. At best, the registrations raised a question as to whether T & T and J & J generated hazardous waste.

Generation of hazardous waste, without more, does not give rise to liability. The Spill Act was enacted to "prohibit[ ] the discharge of petroleum and other hazardous substances into New Jersey waters and provide[ ] for the cleanup of any such discharge...." *Buonviaggio v. Hillsborough Twp. Comm.*, 122 *N.J.* 5, 8, 583 A.2d 739 (1991) (internal quotations omitted). To that end, "[t]he Spill Act imposes strict liability, 'jointly and severally, without regard to fault,' on 'any person who has discharged, ... or is in any way responsible' for the discharge of any hazardous substance." *Hous. Auth. v. Suydam Investors, L.L.C.*, 177 *N.J*. 2, 18, 826 A.2d 673 (2003) (quoting *N.J.S.A.* 58:10-23.11g(c)(1)).

The Spill Act defines "discharge" as "any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of hazardous substances into the waters or onto the lands of the State...." *N.J.S.A.* 58:10-23.11b. Although the phrase "in any way responsible" is not defined in the statute, it has been interpreted to include "[o]wnership or control over the property at the time of the discharge." *State, Dep't of Envtl. Prot. v. Ventron Corp.*, 94 *N.J.* 473, 502, 468 A.2d 150 (1983); *see Marsh v. N.J. Dep't of Envtl. Prot.*, 152 *N.J.* 137, 145-46, 703 A.2d 927 (1997).

Thus, while there is no question that an owner is responsible for a discharge on its property, that responsibility does not attach unless there is evidence of a discharge during ownership. In the absence of evidence that the waste generated by these companies included the contaminants detected, there was no basis for an inference permitting a finding that either T & T or J & J discharged the hazardous waste generated. We stress that Northern acknowledges that Robbins did not own the property while Baron was operating on the Union property.

Northern also maintains that the court misinterpreted the Spill Act's "broad liability scheme." They posit that under the Spill Act, Robbins is liable for a "continuing discharge[ ] [from Baron's activity that ended prior to Robbins's ownership that] took place during the entire time that this property was owned."

***6** That question has been resolved against Northern's position. Liability under the Spill Act is not imposed if a party's only link to the discharge is through the passive migration of pre-existing contamination. *White Oak Funding, Inc. v. Winning*, 341 *N.J.Super.* 294, 300, 775 A.2d 222 (App.Div.), *certif. denied*, 170 *N.J.* 209, 785 A.2d 437 (2001).

The arguments presented on appeal disclose no basis for us to disturb Judge Anzaldi's award of summary judgment in favor of Robbins on the Spill Act claim.

Northern also argues that the trial judge erred by dismissing its common law claims against Robbins on the basis of the statute of limitations. Northern asserts that there were disputed facts relevant to the date upon which Northern acquired information about the contamination that is sufficient to trigger the running of the limitations period.

We have reviewed the record in light of the arguments presented and conclude, as did Judge Anzaldi, that the information in the 1998 Roux report and the letter of October 1998, in which Northern requested contribution from Robbins, was more than sufficient to resolve the factual question against Northern as a matter of law.

"Statutes of limitation begin to run upon the 'accrual' of a cause of action"; that is, "upon the occurrence of a wrongful act resulting in injury for which the law provides a remedy." *Estate of Hainthaler v. Zurich Commercial Ins.,* 387 *N.J.Super.* 318, 327, 903 A.2d 1103 (App.Div.), *certif. denied,* 188 *N.J.* 577, 911 A.2d 69 (2006). Pursuant to the "discovery rule," however, " 'a cause of action will be held not to accrue until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he may have a basis for an actionable claim.' " *Nester v. O'Donnell,* 301 *N.J.Super.* 198, 204, 693 A.2d 1214 (App.Div.1997) (quoting *Lopez v. Swyer,* 62 *N.J.* 267, 272, 300 A.2d 563 (1973)). When the discovery rule applies, the limitations period commences on the date the "plaintiff 'learns, or reasonably should learn, the existence of that state of facts which may equate in law with a cause of action.' " *Vispisiano v. Ashland Chem. Co.,* 107 *N.J* .416, 426, 527 A.2d 66 (1987) (quoting *Burd v. New Jersey Tel. Co.,* 76 *N.J.* 284, 291, 386 A.2d 1310 (1978)).

The 1998 Roux report states facts that may equate in law with a cause of action. Moreover, Northern's 1998 letter demonstrates its understanding of those facts.

The arguments to the contrary lack sufficient merit to warrant discussion. *R.* 2:11-3(e)(1)(E).

We affirm Judge Anzaldi's decision to deny Northern leave to amend the complaint to state claims of misrepresentation for the reasons he stated. " '[T]he granting of a motion to file an amended complaint always rests in the court's sound discretion.' " *Notte v. Merchs. Mut. Ins. Co.,* 185 *N.J.* 490, 501, 888 A.2d 464 (2006) (quoting *Kernan v. One Washington Park Urban Renewal Assocs.,* 154 *N.J.* 437, 456-57, 713 A.2d 411 (1998)). There is no abuse of discretion here.

*7 We turn to consider Robbins's cross-appeal. It is important to note that Honeywell, as Baron's successor-in-interest, stands in the position of Baron on Robbins's claim for indemnification based on common law principles. Thus, we consider the relationship between Baron and Robbins.[FN3]

> FN3. As Robbins escaped all liability, we presume that Robbins pursues the issue on appeal to recover the cost of its defense. *Central Motor Parts Corp. v. E.I. duPont deNemours & Co.,* 251 *N.J.Super.* 5, 9, 596 A.2d 759 (App.Div.1991).

In this case, there is no contract, agreement or statute to which Robbins can point as requiring indemnification. Thus, Robbins's claim depends on the existence of a special legal relationship between it and Baron that implies a right to indemnification. *Port Authority of New York & New Jersey v. Honeywell Protective Servs., Honeywell, Inc.,* 222 *N.J.Super.* 11, 20, 535 A.2d 974 (App.Div.1987); *Ruvolo v. U.S. Steel Corp.,* 133 *N.J.Super.* 362, 367, 336 A.2d 508 (Law Div.1975). A lessor-lessee relationship has been recognized as one implying that right. *Ramos v. Browning Ferris Indus., Inc.,* 103 *N.J.* 177, 189, 510 A.2d 1152 (1986); *Ruvolo v. U.S. Steel Corp.,* 139 *N.J.Super.* 578, 584, 354 A.2d 685 (Law Div.1976). But, we agree with Judge Anzaldi's conclusion that this lessor-lessee relationship is too tenuous a link in this case, which involves claims based on Robbins's conduct on the property years before Robbins took title and under a lease issued to Baron by the prior owner. In short, the relationship did not exist until after the discharge that gave rise to this litigation.

Thus, we reject Northern's argument and affirm the dismissal of Robbins's cross-claim.

Affirmed.

N.J.Super.A.D.,2010.
Northern Intern. Remail and Exp. Co. v. Robbins
Not Reported in A.2d, 2010 WL 4068204 (N.J.Super.A.D.)

END OF DOCUMENT

EXHIBIT F

SENATE, No. 2345

STATE OF NEW JERSEY

209th LEGISLATURE

INTRODUCED MAY 3, 2001

Sponsored by:
Senator HENRY P. MCNAMARA
District 40 (Bergen and Passaic)
Senator JOHN H. ADLER
District 6 (Camden)

SYNOPSIS

Extends and changes statute of limitations for actions by the State pursuant to various environmental cleanup laws.

CURRENT VERSION OF TEXT

As introduced.

(Sponsorship Updated As Of: 6/12/2001)

AN ACT concerning the limitation of actions under certain environmental laws, and amending P.L.1991, c.387.

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

1. Section 2 of P.L.1991, c.387 (C.2A:14-1.2) is amended to read as follows:

2. a. (1) Except as provided in paragraph (2) of this subsection, or except where a limitations provision expressly and specifically applies to actions commenced by the State or where a longer limitations period would otherwise apply, and subject to any statutory provisions or common law rules extending limitations periods, any civil action commenced by the State shall be commenced within ten years next after the cause of action shall have accrued.

(2) Except where a limitations provision expressly and specifically applies to actions commenced by the State or where a longer limitations period would otherwise apply, and subject to any statutory provisions or common law rules extending limitations periods, any civil action concerning the remediation of a contaminated site or the closure of a sanitary landfill facility commenced by the State pursuant to the State's environmental laws shall be commenced within three years next after the cause of action shall have accrued.

b. (1) For purposes of determining whether **[**an**]** a civil action subject to the limitations period specified in paragraph (1) of subsection a. of this section has been commenced within time, no **[**such**]** cause of action shall be deemed to have accrued prior to January 1, 1992.

(2) For purposes of determining whether a civil action subject to the limitations period specified in paragraph (2) of subsection a. of this section has been commenced within time, no cause of action shall be deemed to have accrued prior to January 1, 2002, or until the contaminated site has been remediated or the sanitary landfill facility has been properly closed, whichever is later.

c. As used in this act**[**, the term**]** :

"State's environmental laws" means the "Spill Compensation and Control Act," P.L.1976, c.141 (C.58:10-23.11 et seq.), the "Water Pollution Control Act," P.L.1977, c.74 (C.58:10A-1 et seq.), P.L.1986, c.102 (C.58:10A-21 et seq.), the "Brownfield and Contaminated Site Remediation Act," P.L.1997, c.278 (C.58:10B-1.1 et al.), the "Industrial Site Recovery Act," P.L.1983, c.330 (C.13:1K-6 et al.), the "Solid Waste Management Act," P.L.1970, c.39 (C.13:1E-1 et seq.), the "Comprehensive Regulated Medical Waste Management

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.

Act," P.L.1989, c.34 (C.13:1E-48.1 et seq.), the "Major Hazardous Waste Facilities Siting Act," P.L.1981, c.279 (C.13:1E-49 et seq.), the "Sanitary Landfill Facility Closure and Contingency Fund Act," P.L.1981, c.306 (C.13:1E-100 et seq.), the "Regional Low-Level Radioactive Waste Disposal Facility Siting Act," P.L.1987, c.333 (C.13:1E-177 et seq.), or any other law or regulation by which the State may compel a person to perform remediation activities on contaminated property; and

"State" means the State, its political subdivisions, any office, department, division, bureau, board, commission or agency of the State or one of its political subdivisions, and any public authority or public agency, including, but not limited to, the New Jersey Transit Corporation and the University of Medicine and Dentistry of New Jersey.

(cf: P.L.1991, c.387, s.2)

2. This act shall take effect immediately.

STATEMENT

This bill would extend and change the statute of limitations for civil actions brought by the State pursuant to laws concerning the remediation of contaminated sites or the closure of sanitary landfill facilities. The bill would provide that a cause of action concerning the remediation of contaminated sites or the closure of sanitary landfill facilities shall not be deemed to have accrued, for the purposes of the statute of limitations, prior to January 1, 2002, or until the contaminated site has been remediated or the landfill has been properly closed, whichever is later, in which case any civil action by the State must be commenced within three years next after the cause of action shall have accrued.

EXHIBIT G

SENATE COMMITTEE SUBSTITUTE FOR

SENATE, No. 2345

STATE OF NEW JERSEY

209th LEGISLATURE

ADOPTED JUNE 11, 2001

Sponsored by:
Senator HENRY P. MCNAMARA
District 40 (Bergen and Passaic)
Senator JOHN H. ADLER
District 6 (Camden)

SYNOPSIS

Establishes and extends statute of limitations for site cleanups; clarifies liability for purchasers of contaminated sites.

CURRENT VERSION OF TEXT

Substitute as adopted by the Senate Environment Committee.

AN ACT concerning the cleanup of contaminated property, amending and supplementing Title 58 of the Revised Statutes, and amending P.L.1991, c.387.

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

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

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

"Act of God" means an act exclusively occasioned by an unanticipated, grave natural disaster without the interference of any human agency;

"Administrator" means the chief executive of the New Jersey Spill Compensation Fund;

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

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

"Cleanup and removal costs" means all costs associated with a discharge, incurred by the State or its political subdivisions or their agents or any person with written approval from the department in the: (1) removal or attempted removal of hazardous substances, or (2) taking of reasonable measures to prevent or mitigate damage to the public health, safety, or welfare, including, but not limited to, public and private property, shorelines, beaches, surface waters, water columns and bottom sediments, soils and other affected property, including wildlife and other natural resources, and shall include costs incurred by the State for the indemnification and legal defense of contractors pursuant to sections 1 through 11 of P.L.1991, c.373 (C.58:10-23.11f8 et seq.). For the purposes of this definition, costs incurred by the State shall not include any indirect costs for department oversight performed after the effective date of P.L.1997, c.278 (C.58:10B-1.1 et al.), but may include only those program costs directly related to the cleanup and removal of the discharge; however, where the State or the fund have expended money for the cleanup and removal of a discharge and are seeking to recover the costs incurred in that cleanup and removal action from a responsible party, costs incurred by the State shall include any indirect costs;

"Commissioner" means the Commissioner of Environmental

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.

Protection;

"Contamination" or "contaminant" means any discharged hazardous substance, hazardous waste as defined pursuant to section 1 of P.L.1976, c.99 (C.13:1E-38), or pollutant as defined pursuant to section 3 of P.L.1977, c.74 (C.58:10A-3);

"Department" means the Department of Environmental Protection;

"Director" means the Director of the Division of Taxation in the Department of the Treasury;

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

"Emergency response action" means those activities conducted by a local unit to clean up, remove, prevent, contain, or mitigate a discharge that poses an immediate threat to the environment or to the public health, safety, or welfare;

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

"Fund" means the New Jersey Spill Compensation Fund;

"Hazardous substances" means the "environmental hazardous substances" on the environmental hazardous substance list adopted by the department pursuant to section 4 of P.L.1983, c.315 (C.34:5A-4); such elements and compounds, including petroleum products, which are defined as such by the department, after public hearing, and which shall be consistent to the maximum extent possible with, and which shall include, the list of hazardous substances adopted by the federal Environmental Protection Agency pursuant to section 311 of the federal Water Pollution Control Act Amendments of 1972, Pub.L.92-500, as amended by the Clean Water Act of 1977, Pub.L.95-217 (33 U.S.C. 1251 et seq.); the list of toxic pollutants designated by Congress or the EPA pursuant to section 307 of that act; and the list of hazardous substances adopted by the federal Environmental Protection Agency pursuant to section 101 of the "Comprehensive Environmental Response, Compensation and Liability Act of 1980," Pub.L.96-510 (42 U.S.C. s.9601 et seq.); provided, however, that sewage and sewage sludge shall not be considered as hazardous substances for the purposes of P.L.1976, c.141 (C.58:10-23.11 et seq.);

"Local unit" means any county or municipality, or any agency or other instrumentality thereof, or a duly incorporated volunteer fire,

ambulance, first aid, emergency, or rescue company or squad;

"Major facility" includes, but is not limited to, any refinery, storage or transfer terminal, pipeline, deep-water port, drilling platform or any appurtenance related to any of the preceding that is used or is capable of being used to refine, produce, store, handle, transfer, process or transport hazardous substances. "Major facility" shall include a vessel only when that vessel is engaged in a transfer of hazardous substances between it and another vessel, and in any event shall not include a vessel used solely for activities directly related to recovering, containing, cleaning up or removing discharges of petroleum in the surface waters of the State, including training, research, and other activities directly related to spill response.

A facility shall not be considered a major facility for the purpose of P.L.1976, c.141 unless it has total combined aboveground or buried storage capacity of:

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

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

In determining whether a facility is a major facility for the purposes of P.L.1976, c.141 (C.58:10-23.11 et seq.), any underground storage tank at the facility used solely to store heating oil for on-site consumption shall not be considered when determining the combined storage capacity of the facility.

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

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

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

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

"Petroleum" or "petroleum products" means oil or petroleum of any kind and in any form, including, but not limited to, oil, petroleum,

gasoline, kerosene, fuel oil, oil sludge, oil refuse, oil mixed with other wastes, crude oils, and substances or additives to be utilized in the refining or blending of crude petroleum or petroleum stock in this State; however, any compound designated by specific chemical name on the list of hazardous substances adopted by the department pursuant to this section shall not be considered petroleum or a petroleum product for the purposes of P.L.1976, c.141, unless such compound is to be utilized in the refining or blending of crude petroleum or petroleum stock in this State;

"Preliminary assessment" means the first phase in the process of identifying areas of concern and determining whether contaminants are or were present at a site or have migrated or are migrating from a site, and shall include the initial search for and evaluation of, existing site specific operational and environmental information, both current and historic, to determine if further investigation concerning the documented, alleged, suspected or latent discharge of any contaminant is required. The evaluation of historic information shall be conducted from 1932 to the present, except that the department may require the search for and evaluation of additional information relating to ownership and use of the site prior to 1932 if such information is available through diligent inquiry of the public records;

"Remedial action" means those actions taken at a site or offsite if a contaminant has migrated or is migrating therefrom, as may be required by the department, including the removal, treatment, containment, transportation, securing, or other engineering or treatment measures, whether to an unrestricted use or otherwise, designed to ensure that any discharged contaminant at the site or that has migrated or is migrating from the site, is remediated in compliance with the applicable health risk or environmental standards;

"Remedial investigation" means a process to determine the nature and extent of a discharge of a contaminant at a site or a discharge of a contaminant that has migrated or is migrating from the site and the problems presented by a discharge, and may include data collected, site characterization, sampling, monitoring, and the gathering of any other sufficient and relevant information necessary to determine the necessity for remedial action and to support the evaluation of remedial actions if necessary;

"Remediation" or "remediate" means all necessary actions to investigate and clean up or respond to any known, suspected, or threatened discharge, including, as necessary, the preliminary assessment, site investigation, remedial investigation, and remedial action, provided, however, that "remediation" or "remediate" shall not include the payment of compensation for damage to, or loss of, natural resources;

"Site investigation" means the collection and evaluation of data adequate to determine whether or not discharged contaminants exist

at a site or have migrated or are migrating from the site at levels in excess of the applicable remediation standards. A site investigation shall be developed based upon the information collected pursuant to the preliminary assessment;

"Taxpayer" means the owner or operator of a major facility subject to the tax provisions of P.L.1976, c.141;

"Tax period" means every calendar month on the basis of which the taxpayer is required to report under P.L.1976, c.141;

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

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

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

(cf: P.L.1997, c.278, s.19)

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

8. a. The fund shall be strictly liable, without regard to fault, for all cleanup and removal costs and for all direct and indirect damages no matter by whom sustained, including but not limited to:

(1) The cost of restoring, repairing, or replacing any real or personal property damaged or destroyed by a discharge, any income lost from the time such property is damaged to the time such property is restored, repaired or replaced, and any reduction in value of such property caused by such discharge by comparison with its value prior thereto;

(2) The cost of restoration and replacement, where possible, of any natural resource damaged or destroyed by a discharge;

(3) Loss of income or impairment of earning capacity due to damage to real or personal property, including natural resources destroyed or damaged by a discharge; provided that such loss or impairment exceeds 10% of the amount which claimant derives, based upon income or business records, exclusive of other sources of income, from activities related to the particular real or personal property or natural resources damaged or destroyed by such discharge during the week, month or year for which the claim is filed;

(4) Loss of tax revenue by the State or local governments for a

period of one year due to damage to real or personal property proximately resulting from a discharge;

(5) Interest on loans obtained or other obligations incurred by a claimant for the purpose of ameliorating the adverse effects of a discharge pending the payment of a claim in full as provided by this act.

b. The damages which may be recovered by the fund, without regard to fault, subject to the defenses enumerated in subsection d. of this section against the owner or operator of a major facility or vessel, shall not exceed $50,000,000.00 for each major facility or $150.00 per gross ton for each vessel, except that such maximum limitation shall not apply and the owner or operator shall be liable, jointly and severally, for the full amount of such damages if it can be shown that such discharge was the result of (1) gross negligence or willful misconduct, within the knowledge and privity of the owner, operator or person in charge, or (2) a gross or willful violation of applicable safety, construction or operating standards or regulations. Damages which may be recovered from, or by, any other person shall be limited to those authorized by common or statutory law.

c. (1) Any person who has discharged a hazardous substance, or is in any way responsible for any hazardous substance, shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs no matter by whom incurred. Such person shall also be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs incurred by the department or a local unit pursuant to subsection b. of section 7 of P.L.1976, c.141 (C.58:10-23.11f).

(2) In addition to the persons liable pursuant to this subsection, in the case of a discharge of a hazardous substance from a vessel into the waters of the State, the owner or operator of a refinery, storage, transfer, or pipeline facility to which the vessel was en route to deliver the hazardous substance who, by contract, agreement, or otherwise, was scheduled to assume ownership of the discharged hazardous substance, and any other person who was so scheduled to assume ownership of the discharged hazardous substance, shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs if the owner or operator of the vessel did not have the evidence of financial responsibility required pursuant to section 2 of P.L.1991, c.58 (C.58:10-23.11g2).

Where a person is liable for cleanup and removal costs as provided in this paragraph, any expenditures made by the administrator for that cleanup and removal shall constitute a debt of that person to the fund. The debt shall constitute a lien on all property owned by that person when a notice of lien identifying the nature of the discharge and the amount of the cleanup, removal and related costs expended from the fund is duly filed with the clerk of the Superior Court. The clerk shall

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

For the purpose of determining priority of this lien over all other claims or liens which are or have been filed against the property of an owner or operator of a refinery, storage, transfer, or pipeline facility, the lien on the facility to which the discharged hazardous substance was en route shall have priority over all other claims or liens which are or have been filed against the property. The notice of lien filed pursuant to this paragraph which affects any property of a person liable pursuant to this paragraph other than the property of an owner or operator of a refinery, storage, transfer, or pipeline facility to which the discharged hazardous substance was en route, shall have priority from the day of the filing of the notice of the lien over all claims and liens filed against the property, but shall not affect any valid lien, right, or interest in the property filed in accordance with established procedure prior to the filing of a notice of lien pursuant to this paragraph.

To the extent that a person liable pursuant to this paragraph is not otherwise liable pursuant to paragraph (1) of this subsection, or under any other provision of law or under common law, that person may bring an action for indemnification for costs paid pursuant to this paragraph against any other person who is strictly liable pursuant to paragraph (1) of this subsection.

Nothing in this paragraph shall be construed to extend or negate the right of any person to bring an action for contribution that may exist under P.L.1976, c.141, or any other act or under common law.

(3) In addition to the persons liable pursuant to this subsection, any person who owns real property acquired on or after September 14, 1993 on which there has been a discharge prior to the person's acquisition of that property and who knew or should have known that a hazardous substance had been discharged at the real property, shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs no matter by whom incurred. Such person shall also be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs incurred by the department or a local unit pursuant to subsection b. of section 7 of P.L.1976, c.141 (C.58:10-23.11f). Nothing in this paragraph shall be construed to alter liability of any person who acquired real property prior to September 14, 1993.

d. (1) In addition to those defenses provided in this subsection, an act or omission caused solely by war, sabotage, or God, or a combination thereof, shall be the only defenses which may be raised by

any owner or operator of a major facility or vessel responsible for a discharge in any action arising under the provisions of this act.

(2) A person, including an owner or operator of a major facility, who owns real property acquired on or after September 14, 1993 on which there has been a discharge, shall not be liable for cleanup and removal costs or for any other damages to the State or to any other person for the discharged hazardous substance pursuant to subsection c. of this section or pursuant to civil common law, if that person can establish by a preponderance of the evidence that subparagraphs (a) through (d) apply, or if applicable, subparagraphs (a) through (e) apply:

(a) the person acquired the real property after the discharge of that hazardous substance at the real property;

(b) (i) at the time the person acquired the real property, the person did not know and had no reason to know that any hazardous substance had been discharged at the real property, or (ii) the person acquired the real property by devise or succession, except that any other funds or property received by that person from the deceased real property owner who discharged a hazardous substance or was in any way responsible for a hazardous substance, shall be made available to satisfy the requirements of P.L.1976, c.141, or (iii) the person complies with the provisions of subparagraph (e) of paragraph (2) of this subsection;

(c) the person did not discharge the hazardous substance, is not in any way responsible for the hazardous substance , and is not a corporate successor to the discharger or to any person in any way responsible for the hazardous substance or to anyone liable for cleanup and removal costs pursuant to this section;

(d) the person gave notice of the discharge to the department upon actual discovery of that discharge.

To establish that a person had no reason to know that any hazardous substance had been discharged for the purposes of this paragraph (2), the person must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property. For the purposes of this paragraph (2), all appropriate inquiry shall mean the performance of a preliminary assessment, and site investigation, if the preliminary assessment indicates that a site investigation is necessary, as defined in section 23 of P.L.1993, c.139 (C.58:10B-1), and performed in accordance with rules and regulations promulgated by the department defining these terms.

Nothing in this paragraph (2) shall be construed to alter liability of any person who acquired real property prior to September 14, 1993; and

(c) For the purposes of this subparagraph the person must have (i) acquired the property subsequent to a hazardous substance being

discharged on the site and which discharge was discovered at the time of acquisition as a result of the appropriate inquiry, as defined in this paragraph (2), (ii) performed, following the effective date of P.L.1997, c.278, a remediation of the site or discharge consistent with the provisions of section 35 of P.L.1993, c.139 (C.58:10B-12), or, relied upon a valid no further action letter from the department for a remediation performed prior to acquisition, or obtained approval of a remedial action workplan by the department after the effective date of P.L.1997, c.278 and continued to comply with the conditions of that workplan, and (iii) established and maintained all engineering and institutional controls as may be required pursuant to sections 35 and 36 of P.L.1993, c.139. A person who complies with the provisions of this subparagraph by actually performing a remediation of the site or discharge as set forth in (ii) above shall be issued, upon application, a no further action letter by the department. A person who complies with the provisions of this subparagraph either by receipt of a no further action letter from the department following the effective date of P.L.1997, c.278, or by relying on a previously issued no further action letter shall not be liable for any further remediation including any changes in a remediation standard or for the subsequent discovery of a hazardous substance, at the site, if the remediation was for the entire site, and the hazardous substance was discharged prior to the person acquiring the property. Notwithstanding any other provisions of this subparagraph, a person who complies with the provisions of this subparagraph only by virtue of the existence of a previously issued no further action letter shall receive no liability protections for any discharge which occurred during the time period between the issuance of the no further action letter and the property acquisition. Compliance with the provisions of this subparagraph (e) shall not relieve any person of any liability for a discharge that is off the site of the property covered by the no further action letter, for a discharge that occurs at that property after the person acquires the property, for any actions that person negligently takes that aggravates or contributes to a discharge of a hazardous substance, for failure to comply in the future with laws and regulations , or if that person fails to maintain the institutional or engineering controls on the property or to otherwise comply with the provisions of the no further action letter.

(3) Notwithstanding the provisions of paragraph (2) of this subsection to the contrary, if a person who owns real property obtains actual knowledge of a discharge of a hazardous substance at the real property during the period of that person's ownership and subsequently transfers ownership of the property to another person without disclosing that knowledge, the transferor shall be strictly liable for the cleanup and removal costs of the discharge and no defense under this subsection shall be available to that person.

(4) Any federal, State, or local governmental entity which acquires

ownership of real property through bankruptcy, tax delinquency, abandonment, escheat, eminent domain, condemnation or any circumstance in which the governmental entity involuntarily acquires title by virtue of its function as sovereign, or where the governmental entity acquires the property by any means for the purpose of promoting the redevelopment of that property, shall not be liable, pursuant to subsection c. of this section or pursuant to common law, to the State or to any other person for any discharge which occurred or began prior to that ownership. This paragraph shall not provide any liability protection to any federal, State or local governmental entity which has caused or contributed to the discharge of a hazardous substance. This paragraph shall not provide any liability protection to any federal, State, or local government entity that acquires ownership of real property by condemnation or eminent domain where the real property is being remediated in a timely manner at the time of the condemnation or eminent domain action.

(5) A person, including an owner or operator of a major facility, who owns real property acquired prior to September 14, 1993 on which there has been a discharge, shall not be liable for cleanup and removal costs or for any other damages to the State or to any other person for the discharged hazardous substance pursuant to subsection c. of this section or pursuant to civil common law, if that person can establish by a preponderance of the evidence that subparagraphs (a) through (d) apply:

(a) the person acquired the real property after the discharge of that hazardous substance at the real property;

(b) (i) at the time the person acquired the real property, the person did not know and had no reason to know that any hazardous substance had been discharged at the real property, or (ii) the person acquired the real property by devise or succession, except that any other funds or property received by that person from the deceased real property owner who discharged a hazardous substance or was in any way responsible for a hazardous substance, shall be made available to satisfy the requirements of P.L.1976, c.141;

(c) the person did not discharge the hazardous substance, is not in any way responsible for the hazardous substance, and is not a corporate successor to the discharger or to any person in any way responsible for the hazardous substance or to anyone liable for cleanup and removal costs pursuant to this section;

(d) the person gave notice of the discharge to the department upon actual discovery of that discharge.

To establish that a person had no reason to know that any hazardous substance had been discharged for the purposes of this paragraph (5), the person must have undertaken, at the time of acquisition, all appropriate inquiry on the previous ownership and uses of the property based upon generally accepted good and customary

standards.

Nothing in this paragraph (5) shall be construed to alter liability of any person who acquired real property on or after September 14, 1993.

e. Neither the fund nor the Sanitary Landfill Contingency Fund established pursuant to P.L.1981, c.306 (C.13:1E-100 et seq.) shall be liable for any damages incurred by any person who is relieved from liability pursuant to subsection d. or f. of this section for a remediation that involves the use of engineering controls but the fund and the Sanitary Landfill Contingency Fund shall be liable for any remediation that involves only the use of institutional controls if after a valid no further action letter has been issued the department orders additional remediation except that the fund and the Sanitary Landfill Contingency Fund shall not be liable for any additional remediation that is required to remove an institutional control.

f. Notwithstanding any other provision of this section, a person, who owns real property acquired on or after the effective date of P.L.1997, c.278 (C.58:10B-11.1 et al.), shall not be liable for any cleanup and removal costs or damages, under this section or pursuant to any other statutory or civil common law, to any person, other than the State and the federal government, harmed by any hazardous substance discharged on that property prior to acquisition, and any migration off that property related to that discharge, provided all the conditions of this subsection are met:

(1) the person acquired the real property after the discharge of that hazardous substance at the real property;

(2) the person did not discharge the hazardous substance, is not in any way responsible for the hazardous substance, and is not a corporate successor to the discharger or to any person in any way responsible for the hazardous substance or to anyone liable for a discharge pursuant to this section;

(3) the person gave notice of the discharge to the department upon actual discovery of that discharge;

(4) within 30 days after acquisition of the property, the person commenced a remediation of the discharge, including any migration, pursuant to a department oversight document executed prior to acquisition, and the department is satisfied that remediation was completed in a timely and appropriate fashion; and

(5) Within ten days after acquisition of the property, the person agrees in writing to provide access to the State for remediation and related activities, as determined by the State.

The provisions of this subsection shall not relieve any person of any liability:

(1) for a discharge that occurs at that property after the person acquired the property;

(2) for any actions that person negligently takes that aggravates or

contributes to the harm inflicted upon any person;

(3) if that person fails to maintain the institutional or engineering controls on the property or to otherwise comply with the provisions of a no further action letter or a remedial action workplan and a person is harmed thereby;

(4) for any liability to clean up and remove, pursuant to the department's regulations and directions, any hazardous substances that may have been discharged on the property or that may have migrated therefrom; and

(5) for that person's failure to comply in the future with laws and regulations.

g. Nothing in the amendatory provisions to this section adopted pursuant to P.L.1997, c.278 shall be construed to remove any defense to liability that a person may have had pursuant to subsection e. of this section that existed prior to the effective date of P.L.1997, c.278.

h. Nothing in this section shall limit the requirements of any person to comply with P.L.1983, c.330 (C.13:1K-6 et seq.).

(cf: P.L.1997, c.278, s.20)

3. Section 23 of P.L.1993, c.139 (C.58:10B-1) is amended to read as follows:

23. As used in sections 23 through 43 and section 45 of P.L.1993, c.139 (C.58:10B-1 et seq.), as may be amended and supplemented:

"Area of concern" means any location where contaminants are or were known or suspected to have been discharged, generated, manufactured, refined, transported, stored, handled, treated, or disposed, or where contaminants have or may have migrated;

"Authority" means the New Jersey Economic Development Authority established pursuant to P.L.1974, c.80 (C.34:1B-1 et seq.);

"Contamination" or "contaminant" means any discharged hazardous substance as defined pursuant to section 3 of P.L.1976, c.141 (C.58:10-23.11b), hazardous waste as defined pursuant to section 1 of P.L.1976, c.99 (C.13:1E-38), or pollutant as defined pursuant to section 3 of P.L.1977, c.74 (C.58:10A-3);

"Department" means the Department of Environmental Protection;

"Discharge" means an intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying, or dumping of a contaminant onto the land or into the waters of the State;

"Engineering controls" means any mechanism to contain or stabilize contamination or ensure the effectiveness of a remedial action. Engineering controls may include, without limitation, caps, covers, dikes, trenches, leachate collection systems, signs, fences and physical access controls;

"Environmental opportunity zone" has the meaning given that term pursuant to section 3 of P.L.1995, c.413 (C.54:4-3.152);

"Financial assistance" means loans or loan guarantees;

"Institutional controls" means a mechanism used to limit human activities at or near a contaminated site, or to ensure the effectiveness of the remedial action over time, when contaminants remain at a contaminated site in levels or concentrations above the applicable remediation standard that would allow unrestricted use of that property. Institutional controls may include, without limitation, structure, land, and natural resource use restrictions, well restriction areas, and deed notices;

"Limited restricted use remedial action" means any remedial action that requires the continued use of institutional controls but does not require the use of an engineering control;

"No further action letter" means a written determination by the department that based upon an evaluation of the historical use of a particular site, or of an area of concern or areas of concern at that site, as applicable, and any other investigation or action the department deems necessary, there are no discharged contaminants present at the site, at the area of concern or areas of concern, at any other site to which a discharge originating at the site has migrated, or that any discharged contaminants present at the site or that have migrated from the site have been remediated in accordance with applicable remediation regulations;

"Preliminary assessment" means the first phase in the process of identifying areas of concern and determining whether contaminants are or were present at a site or have migrated or are migrating from a site, and shall include the initial search for and evaluation of, existing site specific operational and environmental information, both current and historic, to determine if further investigation concerning the documented, alleged, suspected or latent discharge of any contaminant is required. The evaluation of historic information shall be conducted from 1932 to the present, except that the department may require the search for and evaluation of additional information relating to ownership and use of the site prior to 1932 if such information is available through diligent inquiry of the public records;

"Remedial action" means those actions taken at a site or offsite if a contaminant has migrated or is migrating therefrom, as may be required by the department, including the removal, treatment, containment, transportation, securing, or other engineering or treatment measures, whether to an unrestricted use or otherwise, designed to ensure that any discharged contaminant at the site or that has migrated or is migrating from the site, is remediated in compliance with the applicable health risk or environmental standards;

"Remedial action workplan" means a plan for the remedial action to be undertaken at a site, or at any area to which a discharge originating at a site is migrating or has migrated; a description of the remedial action to be used to remediate a site; a time schedule and cost

estimate of the implementation of the remedial action; and any other information the department deems necessary;

"Remedial investigation" means a process to determine the nature and extent of a discharge of a contaminant at a site or a discharge of a contaminant that has migrated or is migrating from the site and the problems presented by a discharge, and may include data collected, site characterization, sampling, monitoring, and the gathering of any other sufficient and relevant information necessary to determine the necessity for remedial action and to support the evaluation of remedial actions if necessary;

"Remediation" or "remediate" means all necessary actions to investigate and clean up or respond to any known, suspected, or threatened discharge of contaminants, including, as necessary, the preliminary assessment, site investigation, remedial investigation, and remedial action , provided, however, that "remediation" or "remediate" shall not include the payment of compensation for damage to, or loss of, natural resources;

"Remediation fund" means the Hazardous Discharge Site Remediation Fund established pursuant to section 26 of P.L.1993, c.139 (C.58:10B-4);

"Remediation funding source" means the methods of financing the remediation of a discharge required to be established by a person performing the remediation pursuant to section 25 of P.L.1993, c.139 (C.58:10B-3);

"Remediation standards" means the combination of numeric standards that establish a level or concentration , and narrative standards to which contaminants must be treated, removed, or otherwise cleaned for soil, groundwater, or surface water, as provided by the department pursuant to section 35 of P.L.1993, c.139 (C.58:10B-12) in order to meet the health risk or environmental standards;

"Restricted use remedial action" means any remedial action that requires the continued use of engineering and institutional controls in order to meet the established health risk or environmental standards;

"Site investigation" means the collection and evaluation of data adequate to determine whether or not discharged contaminants exist at a site or have migrated or are migrating from the site at levels in excess of the applicable remediation standards. A site investigation shall be developed based upon the information collected pursuant to the preliminary assessment;

"Unrestricted use remedial action" means any remedial action that does not require the continued use of engineering or institutional controls in order to meet the established health risk or environmental standards;

"Voluntarily perform a remediation" means performing a remediation without having been ordered or directed to do so by the

department or by a court and without being compelled to perform a remediation pursuant to the provisions of P.L.1983, c.330 (C.13:1K-6 et al.).

(cf: P.L.1997, c.278, s.9)

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

6. a. Whenever after the effective date of P.L.1997, c.278 (C.58:10B-1.1 et al.) the Department of Environmental Protection issues a no further action letter pursuant to a remediation, it shall also issue to the person performing the remediation a covenant not to sue with respect to the real property upon which the remediation has been conducted. A covenant not to sue shall be executed by the person performing the remediation and by the department in order to become effective. The covenant not to sue shall be consistent with any conditions and limitations contained in the no further action letter. The covenant not to sue shall be for any area of concern remediated and may apply to the entire real property if the remediation included a preliminary assessment and, if necessary, a site investigation of the entire real property, and any other necessary remedial actions. The covenant remains effective only for as long as the real property for which the covenant was issued continues to meet the conditions of the no further action letter. Upon a finding by the department that real property or a portion thereof to which a covenant not to sue pertains, no longer meets with the conditions of the no further action letter, the department shall provide notice of that fact to the person responsible for maintaining compliance with the no further action letter. The department may allow the person a reasonable time to come into compliance with the terms of the original no further action letter. If the property does not meet the conditions of the no further action letter and if the department does not allow for a period of time to come into compliance or if the person fails to come into compliance within the time period, the department may invoke the provisions of the covenant not to sue permitting revocation of the covenant not to sue.

Except as provided in subsection e. of this section, a covenant not to sue shall contain the following, as applicable:

(1) a provision releasing the person who undertook the remediation from all civil liability to the State to perform any additional remediation, to pay compensation for damage to, or loss of, natural resources, or for any cleanup and removal costs;

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

(a) a provision requiring the person, or any subsequent owner, lessee, or operator during the person's period of ownership, tenancy, or operation, to maintain those controls, conduct periodic monitoring

for compliance, and submit to the department, on a biennial basis, a certification that the engineering and institutional controls are being properly maintained and continue to be protective of public health and safety and of the environment. The certification shall state the underlying facts and shall include the results of any tests or procedures performed that support the certification; and

(b) a provision revoking the covenant if the engineering or institutional controls are not being maintained or are no longer in place; and

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

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

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

d. A covenant not to sue and the protections it affords shall not apply to any discharge that occurs subsequent to the issuance of the no further action letter which was the basis of the issuance of the covenant, nor shall a covenant not to sue and the protections it affords relieve any person of the obligations to comply in the future with laws and regulations.

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

(cf: P.L.1997, c.278, s.6)

5. (New section) a. (1) Except where a limitations provision expressly and specifically applies to actions commenced by the State or where a longer limitations period would otherwise apply, and subject to any statutory provisions or common law rules extending limitations periods, any civil action concerning the remediation of a contaminated site or the closure of a sanitary landfill facility commenced by the State pursuant to the State's environmental laws shall be commenced within three years next after the cause of action shall have accrued.

(2) For purposes of determining whether a civil action subject to the limitations periods specified in paragraph (1) of this subsection has been commenced within time, no cause of action shall be deemed to have accrued prior to January 1, 2002 or until the contaminated site is remediated or the sanitary landfill has been properly closed, whichever is later.

b. (1) Except where a limitations provision expressly and specifically applies to actions commenced by the State or where a longer limitations period would otherwise apply, and subject to any statutory provisions or common law rules extending limitations periods, any civil action concerning the payment of compensation for damage to, or loss of, natural resources due to the discharge of a hazardous substance, commenced by the State pursuant to the State's environmental laws, shall be commenced within four years next after the cause of action shall have accrued.

(2) For purposes of determining whether a civil action subject to the limitations periods specified in paragraph (1) of this subsection has been commenced within time, no cause of action shall be deemed to have accrued prior to January 1, 2002 or until the performance of the preliminary assessment, site investigation, and remedial investigation, if necessary, of the contaminated site or the sanitary landfill facility, whichever is later.

c. As used in this section:

"State's environmental laws" means the "Spill Compensation and Control Act," P.L.1976, c.141 (C.58:10-23.11 et seq.), the "Water Pollution Control Act," P.L.1977, c.74 (C.58:10A-1 et seq.), P.L.1986, c.102 (C.58:10A-21 et seq.), the "Brownfield and Contaminated Site Remediation Act," P.L.1997, c.278 (C.58:10B-1.1 et al.), the "Industrial Site Recovery Act," P.L.1983, c.330 (C.13:1K-6 et al.), the "Solid Waste Management Act," P.L.1970, c.39 (C.13:1E-1 et seq.), the "Comprehensive Regulated Medical Waste Management Act," P.L.1989, c.34 (C.13:1E-48.1 et seq.), the "Major Hazardous Waste Facilities Siting Act," P.L.1981, c.279 (C.13:1E-49 et seq.), the "Sanitary Landfill Facility Closure and Contingency Fund Act," P.L.1981, c.306 (C.13:1E-100 et seq.), the "Regional Low-Level Radioactive Waste Disposal Facility Siting Act," P.L.1987, c.333 (C.13:1E-177 et seq.), or any other law or regulation by which the

State may compel a person to perform remediation activities on contaminated property; and

"State" means the State, its political subdivisions, any office, department, division, bureau, board, commission or agency of the State or one of its political subdivisions, and any public authority or public agency, including, but not limited to, the New Jersey Transit Corporation and the University of Medicine and Dentistry of New Jersey.

6. (New section) Any person who has a defense to liability pursuant to paragraphs (2) and (5) of subsection d. of section 8 of P.L.1976, c.141 (C.58:10-23.11g) shall not be liable for the payment of compensation for damage to, or loss of, natural resources due to the discharge of a hazardous substance.

7. Section 2 of P.L.1991, c.387 (C.2A:14-1.2) is amended to read as follows:

2. a. Except where a limitations provision expressly and specifically applies to actions commenced by the State or where a longer limitations period would otherwise apply, and subject to any statutory provisions or common law rules extending limitations periods, any civil action commenced by the State shall be commenced within ten years next after the cause of action shall have accrued.

b. For purposes of determining whether an action subject to the limitations period specified in subsection a. of this section has been commenced within time, no such action shall be deemed to have accrued prior to January 1, 1992.

c. As used in this act, the term "State" means the State, its political subdivisions, any office, department, division, bureau, board, commission or agency of the State or one of its political subdivisions, and any public authority or public agency, including, but not limited to, the New Jersey Transit Corporation and the University of Medicine and Dentistry of New Jersey.

The provisions of this section shall not apply to any civil action commenced by the State concerning the remediation of a contaminated site or the closure of a sanitary landfill facility, or the payment of compensation for damage to, or loss of, natural resources due to the discharge of a hazardous substance, and subject to the limitations period specified in section 5 of P.L. , c. (C.) (before the Legislature as this bill).

(cf: P.L.1991, c.387, s.2)

8. This act shall take effect immediately.

EXHIBIT H

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SENATE COMMITTEE SUBSTITUTE FOR

SENATE, No. 2345

STATE OF NEW JERSEY

Sponsored by Senator McNAMARA

AN ACT concerning the cleanup of contaminated property, amending and supplementing Title 58 of the Revised Statutes, and amending P.L.1991, c.387.

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

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

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

"Act of God" means an act exclusively occasioned by an unanticipated, grave natural disaster without the interference of any human agency;

"Administrator" means the chief executive of the New Jersey Spill Compensation Fund;

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

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

"Cleanup and removal costs" means all costs associated with a discharge, incurred by the State or its political subdivisions or their agents or any person with written approval from the department in the: (1) removal or attempted removal of hazardous substances, or (2) taking of reasonable measures to prevent or mitigate damage to the public health, safety, or welfare, including, but not limited to, public and private property, shorelines, beaches, surface waters, water columns and bottom

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

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sediments, soils and other affected property, including wildlife and other natural resources, and shall include costs incurred by the State for the indemnification and legal defense of contractors pursuant to sections 1 through 11 of P.L.1991, c.373 (C.58:10-23.11f8 et seq.). For the purposes of this definition, costs incurred by the State shall not include any indirect costs for department oversight performed after the effective date of P.L.1997, c.278 (C.58:10B-1.1 et al.), but may include only those program costs directly related to the cleanup and removal of the discharge; however, where the State or the fund have expended money for the cleanup and removal of a discharge and are seeking to recover the costs incurred in that cleanup and removal action from a responsible party, costs incurred by the State shall include any indirect costs;

"Commissioner" means the Commissioner of Environmental Protection;

"Contamination" or "contaminant" means any discharged hazardous substance, hazardous waste as defined pursuant to section 1 of P.L.1976, c.99 (C.13:1E-38), or pollutant as defined pursuant to section 3 of P.L.1977, c.74 (C.58:10A-3);

"Department" means the Department of Environmental Protection;

"Director" means the Director of the Division of Taxation in the Department of the Treasury; "Discharge" means any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of hazardous substances into the waters or onto the lands of the State, or into waters outside the jurisdiction of the State when damage may result to the lands, waters or natural resources within the jurisdiction of the State;

"Emergency response action" means those activities conducted by a local unit to clean up, remove, prevent, contain, or mitigate a discharge that poses an immediate threat to the environment or to the public health, safety, or welfare;

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

"Fund" means the New Jersey Spill Compensation Fund;

"Hazardous substances" means the "environmental hazardous substances" on the environmental hazardous substance list adopted by the department pursuant to section 4 of P.L.1983, c.315 (C.34:5A-4); such elements and compounds, including petroleum products, which are defined as such by the department, after public hearing, and which shall

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be consistent to the maximum extent possible with, and which shall include, the list of hazardous substances adopted by the federal Environmental Protection Agency pursuant to section 311 of the federal Water Pollution Control Act Amendments of 1972, Pub.L.92-500, as amended by the Clean Water Act of 1977, Pub.L.95-217 (33 U.S.C. 1251 et seq.); the list of toxic pollutants designated by Congress or the EPA pursuant to section 307 of that act; and the list of hazardous substances adopted by the federal Environmental Protection Agency pursuant to section 101 of the "Comprehensive Environmental Response, Compensation and Liability Act of 1980," Pub.L.96-510 (42 U.S.C. s.9601 et seq.); provided, however, that sewage and sewage sludge shall not be considered as hazardous substances for the purposes of P.L.1976, c.141 (C.58:10-23.11 et seq.);

"Local unit" means any county or municipality, or any agency or other instrumentality thereof, or a duly incorporated volunteer fire, ambulance, first aid, emergency, or rescue company or squad;

"Major facility" includes, but is not limited to, any refinery, storage or transfer terminal, pipeline, deep-water port, drilling platform or any appurtenance related to any of the preceding that is used or is capable of being used to refine, produce, store, handle, transfer, process or transport hazardous substances. "Major facility" shall include a vessel only when that vessel is engaged in a transfer of hazardous substances between it and another vessel, and in any event shall not include a vessel used solely for activities directly related to recovering, containing, cleaning up or removing discharges of petroleum in the surface waters of the State, including training, research, and other activities directly related to spill response.

A facility shall not be considered a major facility for the purpose of P.L.1976, c.141 unless it has total combined aboveground or buried storage capacity of:

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

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

In determining whether a facility is a major facility for the purposes of P.L.1976, c.141 (C.58:10-23.11 et seq.), any underground storage tank at the facility used solely to store heating oil for on-site consumption shall not be considered when determining the combined storage capacity of the facility.

For the purposes of this definition, "storage capacity" shall mean only that total combined capacity which is dedicated to, used for or intended to be used for storage of hazardous substances of all kinds. Where appropriate to the nature of the facility, storage capacity may be

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determined by the intended or actual use of open land or unenclosed space as well as by the capacities of tanks or other enclosed storage spaces;

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

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

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

"Petroleum" or "petroleum products" means oil or petroleum of any kind and in any form, including, but not limited to, oil, petroleum, gasoline, kerosene, fuel oil, oil sludge, oil refuse, oil mixed with other wastes, crude oils, and substances or additives to be utilized in the refining or blending of crude petroleum or petroleum stock in this State; however, any compound designated by specific chemical name on the list of hazardous substances adopted by the department pursuant to this section shall not be considered petroleum or a petroleum product for the purposes of P.L.1976, c.141, unless such compound is to be utilized in the refining or blending of crude petroleum or petroleum stock in this State;

"Preliminary assessment" means the first phase in the process of identifying areas of concern and determining whether contaminants are or were present at a site or have migrated or are migrating from a site, and shall include the initial search for and evaluation of, existing site specific operational and environmental information, both current and historic, to determine if further investigation concerning the documented, alleged, suspected or latent discharge of any contaminant is required. The evaluation of historic information shall be conducted from 1932 to the present, except that the department may require the search for and evaluation of additional information relating to ownership and use of the site prior to 1932 if such information is available through diligent inquiry of the public records;

"Remedial action" means those actions taken at a site or offsite if a contaminant has migrated or is migrating therefrom, as may be required

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by the department, including the removal, treatment, containment, transportation, securing, or other engineering or treatment measures, whether to an unrestricted use or otherwise, designed to ensure that any discharged contaminant at the site or that has migrated or is migrating from the site, is remediated in compliance with the applicable health risk or environmental standards;

"Remedial investigation" means a process to determine the nature and extent of a discharge of a contaminant at a site or a discharge of a contaminant that has migrated or is migrating from the site and the problems presented by a discharge, and may include data collected, site characterization, sampling, monitoring, and the gathering of any other sufficient and relevant information necessary to determine the necessity for remedial action and to support the evaluation of remedial actions if necessary;

"Remediation" or "remediate" means all necessary actions to investigate and clean up or respond to any known, suspected, or threatened discharge, including, as necessary, the preliminary assessment, site investigation, remedial investigation, and remedial action, provided, however, that "remediation" or "remediate" shall not include the payment of compensation for damage to, or loss of, natural resources;

"Site investigation" means the collection and evaluation of data adequate to determine whether or not discharged contaminants exist at a site or have migrated or are migrating from the site at levels in excess of the applicable remediation standards. A site investigation shall be developed based upon the information collected pursuant to the preliminary assessment;

"Taxpayer" means the owner or operator of a major facility subject to the tax provisions of P.L.1976, c.141;

"Tax period" means every calendar month on the basis of which the taxpayer is required to report under P.L.1976, c.141;

"Transfer" means onloading or offloading between major facilities and vessels, or vessels and major facilities, and from vessel to vessel or major facility to major facility, except for fueling or refueling operations and except that with regard to the movement of hazardous substances other than petroleum, it shall also include any onloading of or offloading from a major facility; "Vessel" means every description of watercraft or other contrivance that is practically capable of being used as a means of commercial transportation of hazardous substances upon the water, whether or not self-propelled;

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

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(cf: P.L.1997, c.278, s.19)

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

8. a. The fund shall be strictly liable, without regard to fault, for all cleanup and removal costs and for all direct and indirect damages no matter by whom sustained, including but not limited to:

(1) The cost of restoring, repairing, or replacing any real or personal property damaged or destroyed by a discharge, any income lost from the time such property is damaged to the time such property is restored, repaired or replaced, and any reduction in value of such property caused by such discharge by comparison with its value prior thereto;

(2) The cost of restoration and replacement, where possible, of any natural resource damaged or destroyed by a discharge;

(3) Loss of income or impairment of earning capacity due to damage to real or personal property, including natural resources destroyed or damaged by a discharge; provided that such loss or impairment exceeds 10% of the amount which claimant derives, based upon income or business records, exclusive of other sources of income, from activities related to the particular real or personal property or natural resources damaged or destroyed by such discharge during the week, month or year for which the claim is filed;

(4) Loss of tax revenue by the State or local governments for a period of one year due to damage to real or personal property proximately resulting from a discharge;

(5) Interest on loans obtained or other obligations incurred by a claimant for the purpose of ameliorating the adverse effects of a discharge pending the payment of a claim in full as provided by this act.

b. The damages which may be recovered by the fund, without regard to fault, subject to the defenses enumerated in subsection d. of this section against the owner or operator of a major facility or vessel, shall not exceed $50,000,000.00 for each major facility or $150.00 per gross ton for each vessel, except that such maximum limitation shall not apply and the owner or operator shall be liable, jointly and severally, for the full amount of such damages if it can be shown that such discharge was the result of (1) gross negligence or willful misconduct, within the knowledge and privity of the owner, operator or person in charge, or (2) a gross or willful violation of applicable safety, construction or operating standards or regulations. Damages which may be recovered from, or by, any other person shall be limited to those authorized by common or statutory law.

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c. (1) Any person who has discharged a hazardous substance, or is in any way responsible for any hazardous substance, shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs no matter by whom incurred. Such person shall also be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs incurred by the department or a local unit pursuant to subsection b. of section 7 of P.L.1976, c.141 (C.58:10-23.11f).

(2) In addition to the persons liable pursuant to this subsection, in the case of a discharge of a hazardous substance from a vessel into the waters of the State, the owner or operator of a refinery, storage, transfer, or pipeline facility to which the vessel was en route to deliver the hazardous substance who, by contract, agreement, or otherwise, was scheduled to assume ownership of the discharged hazardous substance, and any other person who was so scheduled to assume ownership of the discharged hazardous substance, shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs if the owner or operator of the vessel did not have the evidence of financial responsibility required pursuant to section 2 of P.L.1991, c.58 (C.58:10-23.11g2).

Where a person is liable for cleanup and removal costs as provided in this paragraph, any expenditures made by the administrator for that cleanup and removal shall constitute a debt of that person to the fund. The debt shall constitute a lien on all property owned by that person when a notice of lien identifying the nature of the discharge and the amount of the cleanup, removal and related costs expended from the fund is duly filed with the clerk of the Superior Court. The clerk shall promptly enter upon the civil judgment or order docket the name and address of the liable person and the amount of the lien as set forth in the notice of lien. Upon entry by the clerk, the lien, to the amount committed by the administrator for cleanup and removal, shall attach to the revenues and all real and personal property of the liable person, whether or not that person is insolvent.

For the purpose of determining priority of this lien over all other claims or liens which are or have been filed against the property of an owner or operator of a refinery, storage, transfer, or pipeline facility, the lien on the facility to which the discharged hazardous substance was en route shall have priority over all other claims or liens which are or have been filed against the property. The notice of lien filed pursuant to this paragraph which affects any property of a person liable pursuant to this paragraph other than the property of an owner or operator of a refinery, storage, transfer, or pipeline facility to which the discharged hazardous substance was en route, shall have priority from the day of the filing of the notice of the lien over all claims and liens filed against the property,

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but shall not affect any valid lien, right, or interest in the property filed in accordance with established procedure prior to the filing of a notice of lien pursuant to this paragraph.

To the extent that a person liable pursuant to this paragraph is not otherwise liable pursuant to paragraph (1) of this subsection, or under any other provision of law or under common law, that person may bring an action for indemnification for costs paid pursuant to this paragraph against any other person who is strictly liable pursuant to paragraph (1) of this subsection.

Nothing in this paragraph shall be construed to extend or negate the right of any person to bring an action for contribution that may exist under P.L.1976, c.141, or any other act or under common law.

(3) In addition to the persons liable pursuant to this subsection, any person who owns real property acquired on or after September 14, 1993 on which there has been a discharge prior to the person's acquisition of that property and who knew or should have known that a hazardous substance had been discharged at the real property, shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs no matter by whom incurred. Such person shall also be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs incurred by the department or a local unit pursuant to subsection b. of section 7 of P.L.1976, c.141 (C.58:10-23.11f). Nothing in this paragraph shall be construed to alter liability of any person who acquired real property prior to September 14, 1993.

(4) In addition to the persons liable pursuant to this subsection, any person who owns real property acquired prior to September 14, 1993, on which there has been a discharge prior to the person's acquisition of that property and who knew or should have known that a hazardous substance had been discharged at the real property, shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs no matter by whom incurred. Such person shall also be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs incurred by the department or a local unit pursuant to subsection b. of section 7 of P.L.1976, c.141 (C.58:10-23.11f). Nothing in this paragraph shall be construed to alter liability of any person who acquired real property on or after September 14, 1993.

d. (1) In addition to those defenses provided in this subsection, an act or omission caused solely by war, sabotage, or God, or a combination thereof, shall be the only defenses which may be raised by any owner or operator of a major facility or vessel responsible for a discharge in any action arising under the provisions of this act.

(2) A person, including an owner or operator of a major facility, who

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owns real property acquired on or after September 14, 1993 on which there has been a discharge, shall not be liable for cleanup and removal costs or for any other damages to the State or to any other person for the discharged hazardous substance pursuant to subsection c. of this section or pursuant to civil common law, if that person can establish by a preponderance of the evidence that subparagraphs (a) through (d) apply, or if applicable, subparagraphs (a) through (e) apply:

(a) the person acquired the real property after the discharge of that hazardous substance at the real property;

(b) (i) at the time the person acquired the real property, the person did not know and had no reason to know that any hazardous substance had been discharged at the real property, or (ii) the person acquired the real property by devise or succession, except that any other funds or property received by that person from the deceased real property owner who discharged a hazardous substance or was in any way responsible for a hazardous substance, shall be made available to satisfy the requirements of P.L.1976, c.141, or (iii) the person complies with the provisions of subparagraph (e) of paragraph (2) of this subsection;

(c) the person did not discharge the hazardous substance, is not in any way responsible for the hazardous substance , and is not a corporate successor to the discharger or to any person in any way responsible for the hazardous substance or to anyone liable for cleanup and removal costs pursuant to this section;

(d) the person gave notice of the discharge to the department upon actual discovery of that discharge.

To establish that a person had no reason to know that any hazardous substance had been discharged for the purposes of this paragraph (2), the person must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property. For the purposes of this paragraph (2), all appropriate inquiry shall mean the performance of a preliminary assessment, and site investigation, if the preliminary assessment indicates that a site investigation is necessary, as defined in section 23 of P.L.1993, c.139 (C.58:10B-1), and performed in accordance with rules and regulations promulgated by the department defining these terms.

Nothing in this paragraph (2) shall be construed to alter liability of any person who acquired real property prior to September 14, 1993; and

(e) For the purposes of this subparagraph the person must have (i) acquired the property subsequent to a hazardous substance being discharged on the site and which discharge was discovered at the time of acquisition as a result of the appropriate inquiry, as defined in this paragraph (2), (ii) performed, following the effective date of P.L.1997,

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c.278, a remediation of the site or discharge consistent with the provisions of section 35 of P.L.1993, c.139 (C.58:10B-12), or, relied upon a valid no further action letter from the department for a remediation performed prior to acquisition, or obtained approval of a remedial action workplan by the department after the effective date of P.L.1997, c.278 and continued to comply with the conditions of that workplan, and (iii) established and maintained all engineering and institutional controls as may be required pursuant to sections 35 and 36 of P.L.1993, c.139. A person who complies with the provisions of this subparagraph by actually performing a remediation of the site or discharge as set forth in (ii) above shall be issued, upon application, a no further action letter by the department. A person who complies with the provisions of this subparagraph either by receipt of a no further action letter from the department following the effective date of P.L.1997, c.278, or by relying on a previously issued no further action letter shall not be liable for any further remediation including any changes in a remediation standard or for the subsequent discovery of a hazardous substance, at the site, if the remediation was for the entire site, and the hazardous substance was discharged prior to the person acquiring the property. Notwithstanding any other provisions of this subparagraph, a person who complies with the provisions of this subparagraph only by virtue of the existence of a previously issued no further action letter shall receive no liability protections for any discharge which occurred during the time period between the issuance of the no further action letter and the property acquisition. Compliance with the provisions of this subparagraph (e) shall not relieve any person of any liability for a discharge that is off the site of the property covered by the no further action letter, for a discharge that occurs at that property after the person acquires the property, for any actions that person negligently takes that aggravates or contributes to a discharge of a hazardous substance, for failure to comply in the future with laws and regulations , or if that person fails to maintain the institutional or engineering controls on the property or to otherwise comply with the provisions of the no further action letter.

(3) Notwithstanding the provisions of paragraph (2) of this subsection to the contrary, if a person who owns real property obtains actual knowledge of a discharge of a hazardous substance at the real property during the period of that person's ownership and subsequently transfers ownership of the property to another person without disclosing that knowledge, the transferor shall be strictly liable for the cleanup and removal costs of the discharge and no defense under this subsection shall be available to that person.

(4) Any federal, State, or local governmental entity which acquires

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ownership of real property through bankruptcy, tax delinquency, abandonment, escheat, eminent domain, condemnation or any circumstance in which the governmental entity involuntarily acquires title by virtue of its function as sovereign, or where the governmental entity acquires the property by any means for the purpose of promoting the redevelopment of that property, shall not be liable, pursuant to subsection c. of this section or pursuant to common law, to the State or to any other person for any discharge which occurred or began prior to that ownership. This paragraph shall not provide any liability protection to any federal, State or local governmental entity which has caused or contributed to the discharge of a hazardous substance. This paragraph shall not provide any liability protection to any federal, State, or local government entity that acquires ownership of real property by condemnation or eminent domain where the real property is being remediated in a timely manner at the time of the condemnation or eminent domain action.

(5) A person, including an owner or operator of a major facility, who owns real property acquired prior to September 14, 1993 on which there has been a discharge, shall not be liable for cleanup and removal costs or for any other damages to the State or to any other person for the discharged hazardous substance pursuant to subsection c. of this section or pursuant to civil common law, if that person can establish by a preponderance of the evidence that subparagraphs (a) through (d) apply:

(a) the person acquired the real property after the discharge of that hazardous substance at the real property;

(b) (i) at the time the person acquired the real property, the person did not know and had no reason to know that any hazardous substance had been discharged at the real property, or (ii) the person acquired the real property by devise or succession, except that any other funds or property received by that person from the deceased real property owner who discharged a hazardous substance or was in any way responsible for a hazardous substance, shall be made available to satisfy the requirements of P.L.1976, c.141;

(c) the person did not discharge the hazardous substance, is not in any way responsible for the hazardous substance, and is not a corporate successor to the discharger or to any person in any way responsible for the hazardous substance or to anyone liable for cleanup and removal costs pursuant to this section;

(d) the person gave notice of the discharge to the department upon actual discovery of that discharge.

To establish that a person had no reason to know that any hazardous substance had been discharged for the purposes of this paragraph (5), the person must have undertaken, at the time of acquisition, all appropriate

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inquiry on the previous ownership and uses of the property based upon generally accepted good and customary standards.

Nothing in this paragraph (5) shall be construed to alter liability of any person who acquired real property on or after September 14, 1993.

e. Neither the fund nor the Sanitary Landfill Contingency Fund established pursuant to P.L. 1981, c.306 (C.13:1E-100 et seq.) shall be liable for any damages incurred by any person who is relieved from liability pursuant to subsection d. or f. of this section for a remediation that involves the use of engineering controls but the fund and the Sanitary Landfill Contingency Fund shall be liable for any remediation that involves only the use of institutional controls if after a valid no further action letter has been issued the department orders additional remediation except that the fund and the Sanitary Landfill Contingency Fund shall not be liable for any additional remediation that is required to remove an institutional control.

f. Notwithstanding any other provision of this section, a person, who owns real property acquired on or after the effective date of P.L.1997, c.278 (C.58:10B-11.1 et al.), shall not be liable for any cleanup and removal costs or damages, under this section or pursuant to any other statutory or civil common law, to any person, other than the State and the federal government, harmed by any hazardous substance discharged on that property prior to acquisition, and any migration off that property related to that discharge, provided all the conditions of this subsection are met:

(1) the person acquired the real property after the discharge of that hazardous substance at the real property;

(2) the person did not discharge the hazardous substance, is not in any way responsible for the hazardous substance, and is not a corporate successor to the discharger or to any person in any way responsible for the hazardous substance or to anyone liable for a discharge pursuant to this section;

(3) the person gave notice of the discharge to the department upon actual discovery of that discharge;

(4) within 30 days after acquisition of the property, the person commenced a remediation of the discharge, including any migration, pursuant to a department oversight document executed prior to acquisition, and the department is satisfied that remediation was completed in a timely and appropriate fashion; and

(5) Within ten days after acquisition of the property, the person agrees in writing to provide access to the State for remediation and related activities, as determined by the State.

The provisions of this subsection shall not relieve any person of any

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liability:

(1) for a discharge that occurs at that property after the person acquired the property;

(2) for any actions that person negligently takes that aggravates or contributes to the harm inflicted upon any person;

(3) if that person fails to maintain the institutional or engineering controls on the property or to otherwise comply with the provisions of a no further action letter or a remedial action workplan and a person is harmed thereby;

(4) for any liability to clean up and remove, pursuant to the department's regulations and directions, any hazardous substances that may have been discharged on the property or that may have migrated therefrom; and

(5) for that person's failure to comply in the future with laws and regulations.

g. Nothing in the amendatory provisions to this section adopted pursuant to P.L.1997, c.278 shall be construed to remove any defense to liability that a person may have had pursuant to subsection e. of this section that existed prior to the effective date of P.L.1997, c.278.

h. Nothing in this section shall limit the requirements of any person to comply with P.L.1983, c.330 (C.13:1K-6 et seq.).

(cf: P.L.1997, c.278, s.20)

3. Section 23 of P.L.1993, c.139 (C.58:10B-1) is amended to read as follows:

23. As used in sections 23 through 43 and section 45 of P.L.1993, c.139 (C.58:10B-1 et seq.) , as may be amended and supplemented:

"Area of concern" means any location where contaminants are or were known or suspected to have been discharged, generated, manufactured, refined, transported, stored, handled, treated, or disposed, or where contaminants have or may have migrated;

"Authority" means the New Jersey Economic Development Authority established pursuant to P.L.1974, c.80 (C.34:1B-1 et seq.);

"Contamination" or "contaminant" means any discharged hazardous substance as defined pursuant to section 3 of P.L.1976, c.141 (C.58:10-23.11b), hazardous waste as defined pursuant to section 1 of P.L.1976, c.99 (C.13:1E-38), or pollutant as defined pursuant to section 3 of P.L.1977, c.74 (C.58:10A-3);

"Department" means the Department of Environmental Protection;

"Discharge" means an intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying, or dumping of a contaminant onto the land or into the waters

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of the State;

"Engineering controls" means any mechanism to contain or stabilize contamination or ensure the effectiveness of a remedial action. Engineering controls may include, without limitation, caps, covers, dikes, trenches, leachate collection systems, signs, fences and physical access controls;

"Environmental opportunity zone" has the meaning given that term pursuant to section 3 of P.L. 1995, c.413 (C.54:4-3.152);

"Financial assistance" means loans or loan guarantees;

"Institutional controls" means a mechanism used to limit human activities at or near a contaminated site, or to ensure the effectiveness of the remedial action over time, when contaminants remain at a contaminated site in levels or concentrations above the applicable remediation standard that would allow unrestricted use of that property. Institutional controls may include, without limitation, structure, land, and natural resource use restrictions, well restriction areas, and deed notices;

"Limited restricted use remedial action" means any remedial action that requires the continued use of institutional controls but does not require the use of an engineering control;

"No further action letter" means a written determination by the department that based upon an evaluation of the historical use of a particular site, or of an area of concern or areas of concern at that site, as applicable, and any other investigation or action the department deems necessary, there are no discharged contaminants present at the site, at the area of concern or areas of concern, at any other site to which a discharge originating at the site has migrated, or that any discharged contaminants present at the site or that have migrated from
the site have been remediated in accordance with applicable remediation regulations;

"Preliminary assessment" means the first phase in the process of identifying areas of concern and determining whether contaminants are or were present at a site or have migrated or are migrating from a site, and shall include the initial search for and evaluation of, existing site specific operational and environmental information, both current and historic, to determine if further investigation concerning the documented, alleged, suspected or latent discharge of any contaminant is required. The evaluation of historic information shall be conducted from 1932 to the present, except that the department may require the search for and evaluation of additional information relating to ownership and use of the site prior to 1932 if such information is available through diligent inquiry of the public records;

"Remedial action" means those actions taken at a site or offsite if a

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contaminant has migrated or is migrating therefrom, as may be required by the department, including the removal, treatment, containment, transportation, securing, or other engineering or treatment measures, whether to an unrestricted use or otherwise, designed to ensure that any discharged contaminant at the site or that has migrated or is migrating from the site, is remediated in compliance with the applicable health risk or environmental standards;

"Remedial action workplan" means a plan for the remedial action to be undertaken at a site, or at any area to which a discharge originating at a site is migrating or has migrated; a description of the remedial action to be used to remediate a site; a time schedule and cost estimate of the implementation of the remedial action; and any other information the department deems necessary;

"Remedial investigation" means a process to determine the nature and extent of a discharge of a contaminant at a site or a discharge of a contaminant that has migrated or is migrating from the site and the problems presented by a discharge, and may include data collected, site characterization, sampling, monitoring, and the gathering of any other sufficient and relevant information necessary to determine the necessity for remedial action and to support the evaluation of remedial actions if necessary;

"Remediation" or "remediate" means all necessary actions to investigate and clean up or respond to any known, suspected, or threatened discharge of contaminants, including, as necessary, the preliminary assessment, site investigation, remedial investigation, and remedial action , provided, however, that "remediation" or "remediate" shall not include the payment of compensation for damage to, or loss of, natural resources;

"Remediation fund" means the Hazardous Discharge Site Remediation Fund established pursuant to section 26 of P.L.1993, c.139 (C.58:10B-4);

"Remediation funding source" means the methods of financing the remediation of a discharge required to be established by a person performing the remediation pursuant to section 25 of P.L.1993, c.139 (C.58:10B-3);

"Remediation standards" means the combination of numeric standards that establish a level or concentration , and narrative standards to which contaminants must be treated, removed, or otherwise cleaned for soil, groundwater, or surface water, as provided by the department pursuant to section 35 of P.L.1993, c.139 (C.58:10B-12) in order to meet the health risk or environmental standards;

"Restricted use remedial action" means any remedial action that

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requires the continued use of engineering and institutional controls in order to meet the established health risk or environmental standards;

"Site investigation" means the collection and evaluation of data adequate to determine whether or not discharged contaminants exist at a site or have migrated or are migrating from the site at levels in excess of the applicable remediation standards. A site investigation shall be developed based upon the information collected pursuant to the preliminary assessment;

"Unrestricted use remedial action" means any remedial action that does not require the continued use of engineering or institutional controls in order to meet the established health risk or environmental standards;

"Voluntarily perform a remediation" means performing a remediation without having been ordered or directed to do so by the department or by a court and without being compelled to perform a remediation pursuant to the provisions of P.L. 1983, c.330 (C.13:1K-6 et al.).

(cf: P.L.1997, c.278, s.9)

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

6. a. Whenever after the effective date of P.L.1997, c.278 (C.58:10B-1.1 et al.) the Department of Environmental Protection issues a no further action letter pursuant to a remediation, it shall also issue to the person performing the remediation a covenant not to sue with respect to the real property upon which the remediation has been conducted. A covenant not to sue shall be executed by the person performing the remediation and by the department in order to become effective. The covenant not to sue shall be consistent with any conditions and limitations contained in the no further action letter. The covenant not to sue shall be for any area of concern remediated and may apply to the entire real property if the remediation included a preliminary assessment and, if necessary, a site investigation of the entire real property, and any other necessary remedial actions. The covenant remains effective only for as long as the real property for which the covenant was issued continues to meet the conditions of the no further action letter. Upon a finding by the department that real property or a portion thereof to which a covenant not to sue pertains, no longer meets with the conditions of the no further action letter, the department shall provide notice of that fact to the person responsible for maintaining compliance with the no further action letter. The department may allow the person a reasonable time to come into compliance with the terms of the original no further action letter. If the property does not meet the conditions of the no further action letter and if the department does not allow for a period of time to

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come into compliance or if the person fails to come into compliance within the time period, the department may invoke the provisions of the covenant not to sue permitting revocation of the covenant not to sue.

Except as provided in subsection e. of this section, a covenant not to sue shall contain the following, as applicable:

(1) a provision releasing the person who undertook the remediation from all civil liability to the State to perform any additional remediation, to pay compensation for damage to, or loss of, natural resources, or for any cleanup and removal costs;

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

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

(b) a provision revoking the covenant if the engineering or institutional controls are not being maintained or are no longer in place; and

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

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

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

d. A covenant not to sue and the protections it affords shall not apply to any discharge that occurs subsequent to the issuance of the no further action letter which was the basis of the issuance of the covenant, nor shall a covenant not to sue and the protections it affords relieve any person of the obligations to comply in the future with laws and regulations.

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

(cf: P.L.1997, c.278, s.6)

5. (New section) a. (1) Except where a limitations provision expressly and specifically applies to actions commenced by the State or where a longer limitations period would otherwise apply, and subject to any statutory provisions or common law rules extending limitations periods, any civil action concerning the remediation of a contaminated site or the closure of a sanitary landfill facility commenced by the State pursuant to the State's environmental laws shall be commenced within three years next after the cause of action shall have accrued.

(2) For purposes of determining whether a civil action subject to the limitations periods specified in paragraph (1) of this subsection has been commenced within time, no cause of action shall be deemed to have accrued prior to January 1, 2002 or until the contaminated site is remediated or the sanitary landfill has been properly closed, whichever is later.

b. (1) Except where a limitations provision expressly and specifically applies to actions commenced by the State or where a longer limitations period would otherwise apply, and subject to any statutory provisions or common law rules extending limitations periods, any civil action concerning the payment of compensation for damage to, or loss of, natural resources due to the discharge of a hazardous substance, commenced by the State pursuant to the State's environmental laws, shall be commenced within four years next after the cause of action shall have accrued.

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(2) For purposes of determining whether a civil action subject to the limitations periods specified in paragraph (1) of this subsection has been commenced within time, no cause of action shall be deemed to have accrued prior to January 1, 2002 or until the performance of the preliminary assessment, site investigation, and remedial investigation, if necessary, of the contaminated site or the sanitary landfill facility, whichever is later.

c. As used in this section:

"State's environmental laws" means the "Spill Compensation and Control Act," P.L.1976, c.141 (C.58:10-23.11 et seq.), the "Water Pollution Control Act," P.L.1977, c.74 (C.58:10A-1 et seq.), P.L.1986, c.102 (C.58:10A-21 et seq.), the "Brownfield and Contaminated Site Remediation Act," P.L.1997, c.278 (C.58:10B-1.1 et al.), the "Industrial Site Recovery Act," P.L.1983, c.330 (C.13:1K-6 et al.), the "Solid Waste Management Act," P.L.1970, c.39 (C.13:1E-1 et seq.), the "Comprehensive Regulated Medical Waste Management Act," P.L.1989, c.34 (C.13:1E-48.1 et seq.), the "Major Hazardous Waste Facilities Siting Act," P.L.1981, c.279 (C.13:1E-49 et seq.), the "Sanitary Landfill Facility Closure and Contingency Fund Act," P.L.1981, c.306 (C.13:1E-100 et seq.), the "Regional Low-Level Radioactive Waste Disposal Facility Siting Act," P.L.1987, c.333 (C.13:1E-177 et seq.), or any other law or regulation by which the State may compel a person to perform remediation activities on contaminated property; and

"State" means the State, its political subdivisions, any office, department, division, bureau, board, commission or agency of the State or one of its political subdivisions, and any public authority or public agency, including, but not limited to, the New Jersey Transit Corporation and the University of Medicine and Dentistry of New Jersey.

6. (New section) Any person who has a defense to liability pursuant to paragraphs (2) and (5) of subsection d. of section 8 of P.L.1976, c.141 (C.58:10-23.11g) shall not be liable for the payment of compensation for damage to, or loss of, natural resources due to the discharge of a hazardous substance.

7. Section 2 of P.L.1991, c.387 (C.2A:14-1.2) is amended to read as follows:

2. a. Except where a limitations provision expressly and specifically applies to actions commenced by the State or where a longer limitations period would otherwise apply, and subject to any statutory provisions or common law rules extending limitations periods, any civil action commenced by the State shall be commenced within ten years next after

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the cause of action shall have accrued.

b. For purposes of determining whether an action subject to the limitations period specified in subsection a. of this section has been commenced within time, no such action shall be deemed to have accrued prior to January 1, 1992.

c. As used in this act, the term "State" means the State, its political subdivisions, any office, department, division, bureau, board, commission or agency of the State or one of its political subdivisions, and any public authority or public agency, including, but not limited to, the New Jersey Transit Corporation and the University of Medicine and Dentistry of New Jersey.

The provisions of this section shall not apply to any civil action commenced by the State concerning the remediation of a contaminated site or the closure of a sanitary landfill facility, the payment of compensation for damage to, or loss of, natural resources due to the discharge of a hazardous substance, and subject to the limitations period specified in section 5 of P.L. , c. (C.) (before the Legislature as this bill).

(cf: P.L.1991, c.387, s.2)

8. This act shall take effect immediately.

Establishes and extends statute of limitations for site cleanups; clarifies liability for purchasers of contaminated sites.

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