

## **N.J.S.A. 58:10-23.11 Spill Compensation and Control Act**

### **58:10-23.11 Short Title**

This act shall be known and may be cited as the "Spill Compensation and Control Act."

### **58:10-23.11a Legislative Findings and Declaration**

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

The Legislature finds and declares that the discharge of petroleum products and other hazardous substances within or outside the jurisdiction of this State constitutes a threat to the economy and environment of this State. The Legislature intends by the passage of this act to exercise the powers of this State to control the transfer and storage of hazardous substances and to provide liability for damage sustained within this State as a result of any discharge of said substances, by requiring the prompt containment and removal of such pollution and substances, and to provide a fund for swift and adequate compensation to resort businesses and other persons damaged by such discharge, and for the defense and indemnification of certain persons under contract with the State or federal government for claims or actions resulting from the provision of services to mitigate or clean up a release or discharge of hazardous substances.

The Legislature further finds and declares that many former industrial sites in the State remain vacant or underutilized in part because they have been contaminated by a discharge of a hazardous substance; that these properties constitute an economic drain on the State and the municipalities in which they exist; that it is in the public interest to have these properties cleaned up sufficiently so that they can be safely returned to productive use; and that it should be a function of the Department of Environmental Protection to facilitate and coordinate activities and functions designed to clean up contaminated sites in this State.

### **58:10-23.11b Definitions**

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 Protection;

"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. 9601 et seq.); provided, however, that sewage and sewage sludge shall not be considered as hazardous substances for the purposes of this act;

"Local unit" means any county or municipality, or any agency or 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;

"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.

### **58:10-23.11c Hazardous substances discharge prohibition; exceptions**

The discharge of hazardous substances is prohibited. This section shall not apply to discharges of hazardous substances pursuant to and in compliance with the conditions of a Federal or State permit, or to any discharge of petroleum to the surface waters of the State that occurs as the result of the process of recovering, containing, cleaning up or removing a discharge of petroleum in the surface waters of the State and that is undertaken in compliance with the instructions of a federal on-scene coordinator or of the commissioner or commissioner's designee.

### **58:10-23.11d1Definitions**

As used in this act:

"Major facility" has the same meaning as set forth in section 3 of P.L.1976, c.141 (C.58:10-23.11b);

"Transmission pipeline" means new and existing pipe and any equipment, facility, rights-of-way, or building used or intended for use in the transportation of a hazardous substance by a pipeline and having a throughput capacity as established by regulations adopted by the department. Transmission pipeline does not include the transportation of a hazardous substance through onshore production or flow lines, refining, or manufacturing facilities, or storage terminals or

inplant piping systems associated with those facilities that are within the boundaries of a major facility.

#### **58:10-23.11d2Submission of discharge prevention, control, and countermeasure plan**

a. Each owner or operator of a major facility or a transmission pipeline shall submit to the Department of Environmental Protection a discharge prevention, control, and countermeasure (DPCC) plan reviewed and certified by a professional engineer licensed pursuant to P.L.1938, c.342 (C.45:8-27 et seq.) who shall attest that the plan complies with all applicable departmental requirements and has been prepared in accordance with sound engineering practices.

b. The DPCC plan shall contain the following information:

(1) The name of the major facility or transmission pipeline;

(2) The name and address of the owner or operator of the major facility or transmission pipeline;

(3) The location of the major facility or transmission pipeline;

(4) A description of the major facility or transmission pipeline and a general site plan and maps showing, as applicable, the locations of all below- ground or above-ground structures in which hazardous substances are stored, handled, used, or transported, including off-site transmission pipelines from a major facility and respective pipeline terminuses in- or out-of-State, along with flow diagrams of major facility or transmission pipeline operations;

(5) The number of barrels or other storage capacity of the major facility, or, in the case of transmission pipelines, the transportation capacity of these pipelines, the type and amount of hazardous substances transferred, refined, processed, or stored at the major facility or transmission pipeline, and the average daily throughput of the major facility or transmission pipeline;

(6) Topographical and other maps of the major facility's or transmission pipeline site and off-site land and water areas in proximity to the major facility or transmission pipeline that could be adversely affected by a discharge or other emergency. The maps shall identify and delineate residential and other land use areas, as well as all environmentally sensitive areas, and identify the nature of the threats from a discharge thereto;

(7) Drainage and diversion plans of the major facility or transmission pipeline, including the location of all major sewers, storm sewers, catchment or containment systems or basins, diversion systems, and all watercourses into which surface water run-off from the major facility or transmission pipeline drains, which drainage and diversion plans shall be designed, where applicable, to prevent hazardous substances, including nonpoint source pollutants, from draining off-site or into ground or surface waters of the State;

(8) A discharge prevention plan and policy statement that identifies (a) leak detection and discharge prevention safety systems, devices, equipment, procedures, or other measures established for the major facility or transmission pipeline to prevent an unauthorized discharge, (b) the schedules, methods, and procedures for testing, maintaining, and inspecting above-ground

and below-ground storage tanks, pipelines, and other structures, and leak detection and other preventive or safety systems, devices or equipment and (c) the qualifications of personnel specifically charged with implementing the DPCC plan and policy, and the authority delegated thereto;

(9) A summary of the nature, scope, and frequency of discharge prevention and emergency response training programs and requirements for major facility or transmission pipeline personnel;

(10) Any other information deemed necessary or useful by the department.

The department may determine the manner and form in which the above information is to be provided, including the form and technology to be used in complying with the mapping requirements of this subsection.

### **58:10-23.11d3 Submission of discharge response, cleanup, and removal contingency plan**

a. Each owner or operator of a major facility or transmission pipeline shall submit to the Department of Environmental Protection a discharge response, cleanup, and removal contingency plan, attested to by the owner or operator, who shall certify the maximum emergency response capability at the major facility or transmission pipeline, that the trained personnel and response equipment as specified in the contingency plan are available or are at the disposal for the major facility or transmission pipeline, that the equipment is in good repair, and that the contingency plan is consistent with applicable local, regional, and State emergency response plans.

b. The contingency plan shall contain the following information:

(1) A summary and detailed description of the major facility's or transmission pipeline's action plan used by a major facility's or transmission pipeline's personnel and discharge cleanup contractors, as applicable, in responding to, and minimizing health and environmental dangers from, fires, explosions, or unauthorized discharges or releases of hazardous substances to the air, soil, or waters of the State, including the deployment of personnel and equipment in the event of a discharge or other emergency, and the chain of command for an emergency response action. The action plan shall provide for simulated emergency response drills, to be conducted at least once a year, to determine the currency and adequacy of, and personnel familiarity with, the emergency response action plan;

(2) An identification of all personnel and equipment available for clean-up and response activities, including all equipment and personnel located off-site that are either under the direct control of the owner or operator of the major facility or transmission pipeline, or that are available, by contract, to the major facility or transmission pipeline in the event of discharge or other emergency, and the amount of time that would be required to mobilize and deploy all response personnel and equipment. A copy of all current contracts or agreements between the owner or operator of a major facility or transmission pipeline and a discharge cleanup organization for emergency response service, including containment, cleanup, removal and disposal, shall be maintained at the facility, or in the case of a transmission pipeline, with a registered agent of the owner or operator or the transmission pipeline. Upon request the contracts

or agreements shall be made available to the department;

(3) The names, home addresses, and qualifications of major facility or transmission pipeline emergency response coordinators, and alternates, and identification and qualifications of the other emergency response personnel trained and required to respond to a discharge or other emergency, and to operate containment, cleanup, and removal equipment. The contingency plan shall specify the authority and responsibilities of the coordinator or alternate in the event of a discharge or other emergency. A qualified coordinator or alternate shall be present at all times at a major facility;

(4) A plan identifying priorities for the off-site deployment of personnel and equipment to protect residential, environmentally sensitive, or other areas against a discharge or other emergency based on use, seasonal sensitivity, or other relevant factors;

(5) An environmentally sensitive areas and habitats protection plan, reviewed and certified by a marine biologist and an ornithologist, that shall (a) identify all environmentally sensitive areas and wildlife habitats that could be affected by a discharge from the major facility or transmission pipeline, (b) identify the seasonal sensitivity of the areas or habitats, (c) in the event of a discharge, provide for the protection from, and mitigation of, any potentially adverse impact of the discharge on the identified areas or habitats, and (d) provide for an environmental assessment of the impact of any discharge on the identified areas and habitats, including the effects on the habitat's flora, fauna or organisms. The environmentally sensitive areas and habitats protection plan shall, using criteria established by the department for identifying environmentally sensitive areas or habitats, identify any environmentally sensitive area or habitat that could be adversely affected by a discharge from a major facility or transmission pipeline;

(6) A copy of an agreement with the local emergency planning committee or committees that coordinate the emergency responses of the parties to the agreement;

(7) Any other information deemed necessary or useful by the department.

c. The department shall develop base maps, including but not limited to, waterways, wetlands, coastal areas, water supply areas, shellfish growing areas, and endangered and threatened species areas, to provide comprehensive, contiguous coverage of land and water areas.

#### **58:10-23.11d4Renewal of plans**

Each DPCC plan and contingency plan shall be renewed every five years with the department unless the department requires a more frequent submission. Applications for plan renewals shall be accompanied by a summary of all unauthorized discharges at a major facility or transmission pipeline, and any other information as may be deemed necessary or useful by the department. Plan renewals may be limited to certifying that the existing plans on file with the department are current. Filing of a revised plan may be required by the department at the time of renewal so as to incorporate into the plan all amendments adopted since the filing of the original plan or its last renewal. Amendments to a DPCC plan, a contingency plan, or any other information required to be filed with the department pursuant to this act shall be filed within 30 days of the date of any modification of a facility or transmission pipeline necessitating a change in a plan or other information filed with the department. Plan renewals or amendments shall be certified in the

same manner as the original plan.

#### **58:10-23.11d5 Retention of evidence of financial responsibility of cleanups**

The owner or operator of a major facility or transmission pipeline shall, at all times, retain on file with the department evidence of financial responsibility for cleaning up and removing a discharge or release of a hazardous substance, and for the removal of any abandoned structure owned or operated, as the case may be, by the owner or operator of a major facility or transmission pipeline. The amount, nature, terms, and conditions of the financial responsibility shall be determined by the department. The owner or operator of a major facility or transmission pipeline shall file evidence of financial responsibility with the department within 180 days of the effective date of P.L.1990, c.78 (C.58:10-23.11d).

#### **58:10-23.11d6 Regulation of submitted plans, renewals, amendments**

The Department shall prescribe, by regulation, the manner, form and contents of the plans, renewals, amendments, and other submissions required to be filed pursuant to P.L.1990, c.78 (C.58:10-23.11d) so as to ensure the consistency of plans, specifications, maps or other submissions filed with the department pursuant to this act as to form, content, clarity, geographical reference to State plan coordinates, or any other criteria deemed necessary by the department. The department shall prescribe by regulation the amount, nature, and conditions of financial responsibility of the owner or operator of a major facility or transmission pipeline as required pursuant to section 5 of P.L.1990, c.78 (C.58:10-

23.11d5). The department shall establish, as applicable, minimum performance standards or requirements for any of the DPCC or contingency plan elements. Plans, plan renewals and amendments, plan components and any other required submissions to the department shall comply with departmental regulations, and, as applicable, shall be certified by a licensed engineer or land surveyor.

#### **58:10-23.11d7 Filing of plans with local emergency prevention or planning committee**

A copy of a DPCC plan and contingency plan, or plan renewal, and all plan amendments shall be filed by the owner or operator of a major facility or transmission pipeline with the local emergency prevention or local emergency planning committee or committees.

#### **58:10-23.11d8 Distribution of submission, filing of plans**

The owner or operator of a major facility or transmission pipeline who has on file with the department as of the date of adoption of rules or regulations pursuant to section 14 of P.L.1990, c.78 (C.58:10-23.11d14) a DPCC plan and a contingency plan reviewed and approved pursuant to section 5 of P.L.1976, c.141 (C.58:10-23.11d), or the owner or operator of a major facility or transmission pipe-line who does not have on file with the department a DPCC plan and a contingency plan reviewed and approved by the department, shall file a new DPCC plan and a contingency plan in accordance with a schedule provided by the department and promulgated pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.) so as to



evenly distribute the submittal and filing of DPCC plans and contingency plans.

The department shall use the following criteria to evenly distribute the submittal and filing of DPCC plans and contingency plans: size of the facility, material being stored, and proximity to environment-ally sensitive areas or habitats. The schedule adopted by the department for submitting a DPCC plan or a contingency plan shall not extend beyond three years after the adoption of the rules or regulations pursuant to section 14 of P.L.1990, c.78 (C.58:10-23.11d14).

#### **58:10-23.11d9 Review of plans filed**

a. Except as otherwise provided in subsection b. of this section, the department shall, as soon as practicable, but not later than six months following a filing of a DPCC plan, contingency plan or a renewal thereof, or, in the case of plan amendments, within 60 days of the filing of the amendments, review the filing to determine compliance with all statutory requirements, including rules and regulations adopted thereunder.

b. The department may, at any time during the plan, plan renewal or plan amendment review period approve, conditionally approve, or disapprove a plan, plan renewal, or plan amendments. If a plan, plan renewal or plan amendments are disapproved, the owner or operator of the major facility or transmission pipeline shall have 30 days from receipt of written notice of the disapproval, and the reasons therefor, within which to submit a revised plan or plan amendments. The department may, at any time after an on-site inspection of a facility or pipeline, or a discharge or other emergency at a facility or pipeline, direct the owner or operator of the major facility or transmission pipeline to submit amendments to a DPCC plan or contingency plan on file with the department, or to submit additional documentation or information in conjunction with a filed plan or amendments. If within 30 days of receipt of a written request therefor, the owner or operator of the major facility or transmission pipeline fails to file a revised plan, amendments, or requested information satisfactory to the department, or fails to contest the department's request in accordance with the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), the DPCC plan, contingency plan, renewal plan, or plan amend-ments shall be deemed to have been disapproved by the department and the owner or operator of the facility or pipeline shall be in violation of Section 2 or section 3, as appropriate, of P.L.1990, c.78 (C.58:10-23.11d2, 58:10-23.11d3). The department may, for good cause, extend by up to an additional 30 days the time period for filing a revised plan or plan amendments, or for responding to a request for information.

#### **58:10-23.11d10 Report of unauthorized discharge, system malfunction**

a. The owner or operator of a major facility or transmission pipeline shall immediately report any unauthorized discharge occurring at the major facility or transmission pipeline. Within 30 days of the reporting of a discharge, the owner or operator of a major facility or transmission pipeline shall provide the department with a full report on the nature and causes of the discharge, the nature and chronology of the actions taken by the owner or operator and other parties to cleanup and remove the discharged hazardous substance, an evaluation of all pertinent prevention and response plans and policies in light of the discharge, and the owner's or operator's response thereto, and the measures taken to avoid a recurrence of similar discharges and to remedy shortcomings in the prevention, detection, response, containment, cleanup, or removal

plan components. The report shall be accompanied by any amendments that may be required to the DPCC and contingency plans. Upon evaluation of the report, the department may direct the owner or operator of the major facility or transmission pipeline to make appropriate amendments to its DPCC or contingency plan in order to prevent a recurrence of similar discharges, to improve the response capability at the major facility or transmission pipeline, or to minimize the possible adverse impacts of any future discharges on public safety and the environment. The owner or operator of the major facility or transmission pipeline shall provide the department with any other information that may be required by the department to evaluate the prevention and response capabilities at the major facility or transmission pipeline.

b. The owner or operator of a major facility or transmission pipeline shall immediately notify the department's environmental action line of any malfunction of a leak detection or other discharge monitoring system, or other discharge prevention, safety system, or device. The owner or operator of the major facility or transmission pipeline shall provide information as to the nature of the malfunction and the measures taken to avoid a recurrence. The department may, at any time, require the installation or replacement of a leak detection, discharge monitoring system, or other discharge prevention, safety system, or device because of severe or repeated malfunctions or other failures, or that fails to satisfy the standards prescribed therefor pursuant to section 11 of P.L.1990, c.78 (C.58:10-23.11d11).

Nothing in this section shall be construed to limit the authority of the department to direct the owner or operator of a facility or pipeline at any time to take immediate measures to strengthen its prevention or response capabilities.

**58:10-23.11d11 Compliance with construction, performance standards**

a. On or after the effective date of this act, any new, or substantial modification or replacement of an existing, above-ground storage tank or other above-ground enclosed storage space, or of an existing transmission pipeline, including appurtenant structures, or a leak detection or other monitoring system, and prevention or safety system or devices shall comply with construction or performance standards based upon best available technology, industry standards, or federal requirements, whichever may be more stringent, as may be prescribed by the department or required by law. Except in emergency situations as defined by the department, notice of a proposed new construction or installation, substantial modification or replacement of any structure, system, or device subject to the provisions of this subsection shall be provided to the department at least 60 days prior to the commencement of construction, installation, or modification. The department shall also adopt standards and requirements for retrofitting existing structures, systems, or devices subject to the provisions of this subsection in order to prevent, or to minimize the adverse impacts of, unauthorized discharges.

b. (1) The owner or operator of a major facility shall conduct, or cause to be conducted, a structural integrity test of above-ground storage tanks or other above-ground enclosed storage spaces storing hazardous substances, including connecting underground or above-ground pipelines.

(2) The owner or operator of a transmission pipeline shall conduct, or cause to be conducted, a structural integrity test of all parts of the pipeline, including all line pipe, valves, and other

appurtenances connected to line pipe, or other facilities that store or transport hazardous substances associated with the pipeline.

The department shall prescribe the size of the tanks to be tested, where applicable, and the nature and frequency of the testing.

c. Any above-ground storage tank or other enclosed storage space, and any transmission pipeline existing prior to and on the effective date of P.L.1990, c.78 (C.58:10-23.11d et al.), shall be tested in accordance with this subsection within two years of the adoption by the department of standards and regulations thereof. The sequence of testing of existing tanks, enclosed storage spaces, or transmission pipelines shall be determined by the age or suspected age of the structure, the proximity to potable water supplies, the discharge record of the structure for the preceding five years, and the date of the last structural integrity test performed on the structure. The test results and a summary of any remedial actions taken as a consequence thereof shall be submitted to the department within 30 days of completion.

d. Testing or inspection of leak detection or other monitoring systems, and preventive or safety systems or devices shall be conducted as frequently as may be required by the department.

e. In developing standards or testing procedures or other requirements pursuant to this section, the department shall consider applicable standards and procedures adopted or recommended by the United States Environmental Protection Agency, and the following organizations:

- (1) American Petroleum Institute (API), 1220 L Street, N.W., Washington, D.C. 20005;
- (2) American Society for Testing and Materials (ASTM), 1916 Race Street, Philadelphia, Pennsylvania 19103;
- (3) National Association of Corrosion Engineers (NACE), P.O. Box 218340, Houston, Texas 77218;
- (4) National Fire Protection Association (NFPA), Batterymarch Park, Quincy, Massachusetts 02269; and
- (5) Underwriters Laboratories (UL), 333 Pfingston Road, Northbrook, Illinois 60062.

Standards or other requirements for transmission pipelines shall be at least as stringent as those established for pipeline facilities by the Secretary of the United States Department of Transportation pursuant to the "Hazardous Liquid Pipeline Safety Act of 1979," 49 U.S.C. 2001 et seq.; except that transmission pipeline standards and requirements adopted pursuant to this section shall be consistent with applicable standards and requirements adopted pursuant to any other State law regulating transmission pipelines.

f. The Department of Community Affairs shall, within 60 days of the adoption of regulations by the department, adopt in the State Uniform Construction Code, all applicable rules and regulations adopted by the department pursuant to this section.

**58:10-23.11d12      Inspection of facility required**

The owner or operator of a major facility or transmission pipeline shall visually inspect, or cause to be visually inspected, at least once each month, all above-ground pipelines, above-ground storage tanks, and above-ground enclosed storage spaces for leaks, structural and foundation weaknesses, or other maintenance needs.

**58:10-23.11d13 Maintenance of records**

The owner or operator of a major facility or transmission pipeline shall maintain at the major facility, or in the case of a transmission pipeline, with a registered agent of the owner or operator, for at least 10 years, records of any testing, inspection, maintenance, and repair of all structures, equipment, and detection or monitoring, prevention or safety devices related to discharge prevention and response, and shall make these records available for inspection by the department or appropriate local agencies upon request. Records of employee training and simulated drills for discharge prevention and emergency response shall also be retained and be available for inspection by the department or appropriate local agencies.

**58:10-23.11d14 Rules, regulations**

Within one year of the effective date of P.L.1990, c.78 (C.58:10-23.11d1 et al.), the department shall adopt, pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), rules and regulations necessary to implement the provisions of P.L.1990, c.78 (C.58:10-23.11d1 et al.). Pending adoption of rules and regulations, the department may require a major facility or transmissions pipeline to take such action to upgrade the discharge and prevention capabilities at the facility or pipeline as the department may deem appropriate.

**58:10-23.11d15 Compliance not deemed defense**

Compliance with any standard or plan required to be submitted or adopted pursuant to P.L.1990, c.78 (C.58:10-23.11d1 et al.) shall not be deemed a defense in addition to the defenses enumerated in subsection d. of section 8 of P.L.1976, c.141 (C.58:10-23.11g).

**58:10-23.11d16 Submission of status report**

Eighteen months after the adoption of regulations pursuant to section 14 of P.L.1990, c.78 (C.58:10-23.11d14) the department shall prepare and submit to the Senate Environmental Quality Committee, the Assembly Energy and Environment Committee, or their successors, and to the library of the New Jersey Office of Legislative Services, a status report on the submittals of the DPCC and contingency plans required to be adopted pursuant to P.L.1990, c.78 (C.58:10-23.11d1 et seq.). The status report shall contain, but need not be limited to, a copy of the schedule of DPCC and contingency plan submittals, the number of major facilities, the number of submittals received, and the submittal schedule for plans not yet received.

**58:10-23.11d17 Maps filed with DEP before June 5, 1998 under P.L. 1990, c.78**

Notwithstanding the provisions of section 6 of P.L.1990, c.78 (C.58:10-23.11d6) or any other law, rule or regulation to the contrary, the Department of Environmental Protection shall not require a map required to be filed pursuant to P.L.1990, c.78 (C.58:10-23.11d1 et al.) and filed with the department on or before the effective date of this section to be resubmitted in digital form prior to January 1, 2000.

### **58:10-23.11e Person responsible for discharge; notice to department**

Any person who may be subject to liability for a discharge which occurred prior to or after the effective date of the act of which this act is amendatory shall immediately notify the department. Failure to so notify shall make persons liable to the penalty provisions of section 22 of this act.

#### **58:10-23.11e1 Hazardous discharge by aircraft to be reported**

Whenever an aircraft discharges fuel into the airspace over the land or waters of this State, the operator shall note the amount of fuel discharged, location in flight path of the discharge, wind speed and direction, and area likely to be affected by the discharge. The operator shall include this information in its report of a hazardous discharge to the department. Whenever the department receives notice of a discharge from an overhead aircraft, the department shall notify the governing body of each affected municipality of the discharge.

#### **58:10-23.11f Cleanup and removal of hazardous substance**

a. (1) Whenever any hazardous substance is discharged, the department may, in its discretion, act to clean up and remove or arrange for the cleanup and removal of such discharge or may direct the discharger to clean up and remove, or arrange for the cleanup and removal of, the discharge. If the discharge occurs at any hazardous or solid waste disposal facility, the department may order the facility closed for the duration of the cleanup and removal operations. The department may monitor the discharger's compliance with any such directive. Any discharger who fails to comply with such a directive shall be liable to the department in an amount equal to three times the cost of such cleanup and removal, and shall be subject to the revocation or suspension of any license issued or permit held authorizing that person to operate a hazardous waste facility or solid waste facility.

(2) Whenever one or more dischargers or persons cleans up and removes a discharge of a hazardous substance, those dischargers and persons shall have a right of contribution against all other dischargers and persons in any way responsible for a discharged hazardous substance or other persons who are liable for the cost of the cleanup and removal of that discharge of a hazardous substance. In an action for contribution, the contribution plaintiffs need prove only that a discharge occurred for which the contribution defendant or defendants are liable pursuant to the provisions of subsection c. of section 8 of P.L.1976, c.141 (C.58:10-23.11g), and the contribution defendant shall have only the defenses to liability available to parties pursuant to subsection d. of section 8 of P.L.1976, c.141 (C.58:10-23.11g). In resolving contribution claims, a court may allocate the costs of cleanup and removal among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall affect the right of any party to seek contribution pursuant to any other statute or under common law.

(3) In an action for contribution taken pursuant to this subsection, a contribution plaintiff may file a claim with the court for treble damages. A contribution plaintiff may be granted an award of treble damages by the court from one or more contribution defendants only upon a finding by the court that: (a) the contribution defendant is a person who was named on or subject to a directive issued by the department, who failed or refused to comply with such a directive, and who is subject to contribution pursuant to this subsection; (b) the contribution plaintiff gave

30 days' notice to the contribution defendant of the plaintiff's intention to seek treble damages pursuant to this subsection and gave the contribution defendant an opportunity to participate in the cleanup; (c) the contribution defendant failed or refused to enter into a settlement agreement with the contribution plaintiff; and (d) the contribution plaintiff entered into an agreement with the department to remediate the site. Notwithstanding the foregoing requirements, any authorization to seek treble damages made by the department prior to the effective date of P.L.1997, c.278 (C.58:10B-1.1 et al.) shall remain in effect, provided that the department or the contribution plaintiff gave notice to the contribution defendant of the plaintiff's request to the department for authorization to seek treble damages.

A contribution defendant from whom treble damages is sought in a contribution action shall not be assessed treble damages by any court where the contribution defendant, for good cause shown, failed or refused to enter the settlement agreement with the contribution plaintiff or where principles of fundamental fairness will be violated. One third of an award of treble damages in a contribution action pursuant to this paragraph shall be paid to the department, which sum shall be deposited in the New Jersey Spill Compensation Fund. The other two thirds of the treble damages award shall be shared by the contribution plaintiffs in the proportion of the responsibility for the cost of the cleanup and removal that the contribution plaintiffs have agreed to with the department or in an amount as has been agreed to by those parties.

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

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

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

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

- (1) Has not been discharged from a grounded or disabled vessel, if the department determines that such cleanup and removal is necessary to prevent an imminent discharge of such hazardous substance; or
- (2) Has not been discharged, if the department determines that such substance is not satisfactorily stored or contained and said substance possesses any one or more of the following characteristics:
  - (a) Explosiveness;
  - (b) High flammability;
  - (c) Radioactivity;
  - (d) Chemical properties which in combination with any discharged hazardous substance at the same storage facility would create a substantial risk of imminent damage to public health or safety or an imminent and severe damage to the environment;
  - (e) Is stored in a container from which its discharge is imminent as a result of contact with a hazardous substance which has already been discharged and such additional discharge would create a substantial risk of imminent damage to public health or safety or imminent and severe damage to the environment; or
  - (f) High toxicity and is stored or being transported in a container or motor vehicle, truck, railcar or other mechanized conveyance from which its discharge is imminent as a result of the significant deterioration or the precarious location of the container, motor vehicle, truck, railcar or other mechanized conveyance, and such discharge would create a substantial risk of imminent damage to public health or safety or imminent and severe damage to the environment; or
- (3) Has been discharged prior to the effective date of P.L.1976, c.141.

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

d. The administrator may only approve and make payments for any cleanup and removal costs incurred by the department for the cleanup and removal of a hazardous substance discharged prior to the effective date of P.L.1976, c.141, pursuant to subsection b. of this section, if, and to the extent that, he determines that adequate funds from another source are not or will not be available; and provided further, with regard to the cleanup and removal costs incurred for discharges which occurred prior to the effective date of P.L.1976, c.141, the administrator may

not during any one-year period pay more than \$18,000,000 in total or more than \$3,000,000 for any discharge or related set or series of discharges.

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

f. Any expenditures made by the administrator pursuant to this act shall constitute, in each instance, a debt of the discharger to the fund. The debt shall constitute a lien on all property owned by the discharger when a notice of lien, incorporating a description of the property of the discharger subject to the cleanup and removal and an identification of the amount of 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 discharger 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 discharger, whether or not the discharger is insolvent.

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

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

- (1) The claim against the owner or operator of the vessel for the cleanup and removal and related costs of the discharge is satisfied;
- (2) The owner or operator of the vessel, or a representative of the owner or operator, provides evidence of financial responsibility as provided in section 2 of P.L.1991, c.58 (C.58:10-23.11g2) and satisfactorily guarantees that these costs will be paid; or



(3) The impoundment is otherwise vacated by a court order.

The remedy provided in this subsection is in addition to any other remedy or enforcement power that the department may have under any other law.

Any action brought by the State pursuant to this subsection and any impoundment of a vessel resulting therefrom shall not subject the State to any liability to any person harmed thereby or cause the State to be in anyway liable for a subsequent or continued discharge of a hazardous substance from that vessel.

**58:10-23.11f1                      Illumination for non-daylight hazardous  
substance transfers**

An owner or operator of a refinery, storage, transfer terminal, or pipeline facility, or a vessel that transports a hazardous substance, shall provide during non-daylight hours illumination for any transfer of the hazardous substance between the facility and such vessel, or among two or more vessels. Illumination shall be provided at each transfer connection point in use, and for adjacent facility or vessel areas, and surrounding waters. The intensity and area of illumination shall be sufficient in the estimation of the department, to permit the visual detection of a discharge of a hazardous substance into the land or waters of the State. To the extent practicable and necessary to effectuate the purposes of this section, the department may require illumination of locations at which underwater transmission pipelines emerge onto the lands of the State.

The department shall, within one year of the effective date of this act, adopt guidelines for the implementation of its provisions. The guidelines shall, to the maximum extent practicable, be consistent with applicable United States Coast Guard standards or requirements adopted for hazardous substance transfers from vessels during non-daylight hours.

The department may use monies from the New Jersey Spill Compensation Fund, as authorized pursuant to paragraph (2) of subsection b. of section 9 of P.L.1976, c.141 (C.58:10-23.11h), for program costs incurred in implementing the provisions of this act.

**58:10-23.11f2                      Transfer of hazardous liquids regulated**

a. On the 31st day following the adoption of rules and regulations pursuant to section 5 of this act, no owner or operator of a refinery, storage, transfer terminal, or pipeline facility, or a vessel while in the waters of the State, shall transfer, or authorize or allow to be transferred any hazardous liquid between any such facility and a vessel, or among two or more vessels, unless, as prescribed by the department, either a boom or other containment device is in place as hereinafter provided, or the con-tainment device is available, along with trained personnel, at the site of transfer operations on a stand-

by basis for immediate deployment in the event of a discharge, spill or release during the transfer.

In the case of (1) a transfer of a hazardous liquid between a land-based facility and a vessel, or between two or more vessels at a facility, the owner or operator of the facility shall be responsible for the containment device, trained personnel, or other containment or mitigation measures required by the department, or (2) a vessel-to-vessel transfer occurring away from a

land- based facility, the owner or operator of each of the vessels involved shall be responsible therefor.

b. If a containment device is required by the department to be in place during a transfer of a hazardous liquid, the device shall be deployed not less than 15 feet from the vessel or vessels prior to commencement of the transfer operation, except that in the case of a docked vessel the dock may be used to complete the encirclement of a vessel with a containment device.

The provisions of this act shall not apply to the transfer of a hazardous liquid to be used solely as fuel to power a vessel.

As used in this act, "hazardous liquid" shall mean a hazardous substance as such term is defined in section 3 of P.L.1976, c.141 (C.58:10-23.11b) that is in liquid form at the time of transfer of the hazardous substance from facility to vessel or from vessel-to-vessel; "list hazardous liquid" means a hazardous liquid placed on a list prepared by the department pursuant to subsection a. of section 2 of this act.

**58:10-23.11f3 Identification of hazardous liquids; use of  
containment device; prevention, response measures**

a. The department shall identify individual or categories or classes of hazardous liquids, or the circumstances of a transfer of a hazardous liquid for which a containment device may be usefully and safely deployed without posing a substantial danger to the safety of a vessel or its crew. A list of all such hazardous liquids shall be identified and published by the department in the New Jersey Register.

b. The department (1) may require all facilities or vessels either to deploy, or to maintain on a stand-by basis a containment device during a transfer of any hazardous liquid listed by the department pursuant to subsection a. of this section, or (2) may require a particular facility or vessel to deploy a containment device during transfer operations for one or more list hazardous liquids, based upon the past record of the facility, or the owner or operator of a vessel, the nature of the hazards involved, including the characteristics of the hazardous liquid, the size, complexity or circumstances of the transfer, or the potential dangers to public health and safety, or to environmentally sensitive areas in reasonable proximity to the transfer operations.

c. In addition to requiring a containment device to be deployed or maintained on a stand-by basis during transfer operations for a list hazardous liquid, the department shall require such other equipment or chemicals to be maintained on a stand-by basis at the site of the transfer during the transfer of a hazardous liquid from any facility or vessel for purposes of minimizing the amount of a discharge, spill or release, and containing, removing or mitigating the adverse effects therefrom. The provisions of this subsection shall also apply to any hazardous liquid whether or not a list hazardous liquid.

d. The discharge prevention, control and countermeasure plan, and the discharge response, cleanup and removal contingency plan of a major facility shall set forth all of the prevention and response measures required by the department pursuant to this act. The department may, at any time, require amendments to plan provisions for transfer operations at a major facility in order to improve the discharge prevention and response capabilities of a facility.

**58:10-23.11f4 County, municipal ordinances etc., superseded**

Any ordinance, resolution, or regulation of a county or municipality inconsistent with the provisions of this act, including rules and regulations adopted hereunder, shall be of no effect upon final adoption of rules and regulations by the department pursuant to section 5 of this act.

**58:10-23.11f5 Violations, penalties**

Any person violating the provisions of this act shall be subject to the penalty and injunctive relief provisions of section 22 of P.L.1976, c.141 (C.58:10-23.11u).

**58:10-23.11f6 Rules, regulations**

Within one year of the effective date of this act, the department shall adopt, in accordance with the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), rules and regulations to implement the provisions of this act. Nothing in this act shall be construed to limit the authority of the department pursuant to P.L.1976, c.141 (C.58:10-23.11 et seq.) to require a major facility, as defined in section 3 of P.L.1976, c.141 (C.58:10-23.11b), to take all necessary measures pursuant thereto to improve the discharge or prevention capabilities of the facility prior to, or after the adoption of rules and regulations by the department pursuant to this act.

**58:10-23.11f7 Use of New Jersey Spill Compensation Fund monies for program costs**

The department may use monies from the New Jersey Spill Compensation Fund, as authorized pursuant to paragraph (2) of subsection b. of section 9 of P.L.1976, c.141 (C.58:10-23.11h), for program costs incurred in implementing the provisions of this act.

**58:10-23.11f8 Short title**

This act shall be known and may be cited as the "Hazardous Substance Response Action Contractors Indemnification Act."

**58:10-23.11f9 Findings and declarations**

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

## **58:10-23.11f10        Definitions**

As used in this act:

"Department" means the Department of Environmental Protection.

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

"Engineering services" means services or creative work such as consultation, investigation, the evaluation, planning, and design of engineering works and systems, planning the use of land and water, engineering studies, and the administration of construction for the purpose of determining compliance with drawings and specifications, the adequate performance of which requires engineering education, training, and experience, and the application of special knowledge of the mathematical, physical, and engineering sciences.

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

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

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

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

## **58:10-23.11f11        Indemnification of the contractor; conditions**

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

The department may determine to offer indemnification when it is deemed necessary to solicit qualified contractors and to promote adequate competition among qualified bidders. The

department may offer indemnification of up to \$25 million per occurrence and \$50 million per contract as it deems necessary to solicit qualified contractors, depending on the nature, risk and size of the job. Any indemnification offered by the department shall be subject to the exemptions and deductible limits established herein and to terms and conditions established by the department with the advice of the Attorney General.

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

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

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

#### **58:10-23.11f12      Indemnification agreements**

a. An indemnification agreement entered into between the State and a response action contractor shall specify and allocate the responsibility of the parties for the payment of claims or judgments covered by the indemnification agreement as follows:

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

(2) the response action contractor shall be responsible, for all claims or judgments resulting from a single occurrence, for a total payment in an amount equal to 10% of either (a) the amount of the total claims or judgments that are in excess of the amount for which the response action contractor is responsible pursuant to paragraph (1) of this subsection, or (b) the amount of indemnification for such occurrence set forth in the indemnification agreement that is in excess of the amount for which the re-sponse action contractor is responsible pursuant to paragraph (1) of this subsection, whichever is less;

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

(4) a response action contractor shall be responsible for the payment of a claim or judgment covered by an indemnification agreement only to the extent of the amounts for which

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

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

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

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

d. Legal defense and indemnification provided to a contractor shall be on such terms and conditions as shall be prescribed by the department with the advice of the Attorney General consistent with the provisions of this act.

e. Legal defense and indemnification of a contractor pursuant to this section or section 9 of P.L.1991, c.373 (C.58:10-23.11f16), shall not bar the State from exercising any available legal remedies for the enforcement of a contract between, or on the behalf of, the department or other contracting agency and the contractor, the recovery of damages to which the department or agency may be entitled as a result of a contractor's failure to perform the contract, or for the recovery by the Attorney General of funds expended for the defense or indemnification of a contractor if the defense was undertaken in response to a claim brought against the contractor that is found to have arisen from gross negligence, willful misconduct, fraud, intentional tort, bad faith, intentional breach of contract, or criminal misconduct.

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

### **58:10-23.11f13      Initiation of defense and indemnification, cooperation**

A contractor shall not, except for good and substantial cause, be entitled to legal defense

and indemnification by the Attorney General pursuant to this act unless within 10 calendar days of receipt of any summons, complaint, process, notice, demand or pleading subject to legal defense and indemnification, the contractor delivers, by certified mail or personal delivery, the original or a copy of the summons, complaint, process, notice, demand or pleading to the department or other contracting agency, and the Attorney General. Delivery of notice shall constitute an agreement by the contractor that the Attorney General shall be responsible for the conduct of the defense for the claim amount in excess of the contractor's deductible in a manner that the Attorney General deems to be in the best interests of the contractor and the State, including authority to enter into a negotiated settlement of that excess amount. The contractor shall cooperate fully with the Attorney General's defense.

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

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

#### **58:10-23.11f14 Notice of claim, periods of limitations**

a. Notwithstanding the provision of any other law to the contrary, a person shall be barred from recovering against a response action contractor indemnified pursuant to P.L.1991, c.373 (C.58:10-23.11f8 et al.) for injury to persons, or damage to, or loss of, property if:

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

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

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

b. The provisions of this section shall not apply to a claim not subject to legal defense and indemnification pursuant to P.L.1991, c.373 (C.58:10-23.11f8 et al.). Nothing in this section shall prohibit an infant or incompetent person from commencing an action under this act within the time limitations specified in this section, after his coming or being of full age or sane mind.

#### **58:10-23.11f15 Representation other than by Attorney General; intervention**

a. In the event the Attorney General determines that (1) appearing and defending a

contractor pursuant to P.L.1991, c.373 (C.58:10-23.11f8 et al.) involves an actual or potential conflict of interest between the State and the contractor, or (2) the act or omission giving rise to the claim is either not within the scope of the contract, or involves gross negligence, willful misconduct, fraud, intentional tort, bad faith, intentional breach of contract, or criminal misconduct by the contractor, the Attorney General shall decline in writing to appear or defend, or shall promptly withdraw as attorney for the contractor. The contractor thereupon may employ his own attorney to appear and defend against the claim.

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

c. If the Attorney General declines to appear and defend, or withdraws from defending, on the grounds that the act or omission giving rise to the claim or costs was not within the scope of the contract, or was the result of gross negligence, willful misconduct, fraud, intentional tort, bad faith, intentional breach of contract, or criminal misconduct on the part of the contractor, but the court finds that the act or omission was within the scope of the contract, or was not the result of gross negligence, willful misconduct, fraud, intentional tort, bad faith, intentional breach of contract, or criminal misconduct on the part of the contractor, the Attorney General shall authorize indemnification of the contractor for the amount of the judgment in excess of the amount of the contractor's indemnification deductible, and reasonable legal expenses and court costs incurred by the contractor in defending against the amount of the claim or judgment in excess of the contractor's deductible.

d. The State shall have the right to intervene in any case that may involve State indemnification and the court shall, at the request of the State, make a finding as to whether the contractor's actions were a result of gross negligence, willful misconduct, fraud, intentional tort, bad faith, intentional breach of contract, or criminal misconduct.

#### **58:10-23.11f16 Submission of judgment to Attorney General**

A certified copy of any judgment or settlement entered into pursuant to section 8 of P.L.1991, c.373 (C.58:10-23.11f15) shall be submitted to the Attorney General for a determination as to whether the judgment is final and subject to indemnification. If the judgment is final and subject to indemnification, the Attorney General shall submit a certified voucher to the State for payment of the amount in the manner specified in section 8.

#### **58:10-23.11f17 Award for damages**

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



**58:10-23.11f18 Subrogation; construction with other law**

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

b. Nothing in P.L.1991, c.373 (C.58:10-23.11f8 et al.) shall be construed to limit the liability of a party responsible for a discharge for all costs recoverable pursuant to section 8 of P.L.1976, c.141 (C.58:10-23.11g).

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

**58:10-23.11f19 Performance surety bond**

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

b. A surety's obligation shall not extend to any claim for damages based upon alleged negligence that resulted in personal injury, wrongful death, or damage to real or personal property, and no bond shall in any way be construed as a liability insurance policy. The surety shall in no event be liable on bonds to indemnify or compensate the obligee for loss or liability arising from personal injury or property damage whether or not caused by a breach of the bonded contract. Nothing herein shall relieve the surety's obligation to guarantee the contractor's performance of all conditions of the contract. Only the obligee named on the bond, and any person performing labor for a contractor or subcontractor covered by the surety bond, or any person providing materials for remediation work for which the bond is required pursuant to this section, shall have any claim against the surety under the bond. Unless otherwise provided for by the division in the bond, in the event of a default, the surety's liability on a performance bond shall be only for the cost of completion of the contract work in accordance with the plans and specifications, less the balance of funds remaining to be paid under the contract, up to the penal sum of the bond.

**58:10-23.11f20 Rules, regulations**

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

**58:10-23.11f21 Act not applicable to certain contracts or agreements**

The provisions of this amendatory and supplementary act shall not affect any contract or agreement for legal defense and indemnification entered into by the Department of Environmental Protection with a contractor pursuant to P.L.1986, c.59 prior to the effective date of P.L.1991, c.373 (C.58:10-23.11f8 et al.).

**58:10-23.11g Liability for cleanup and removal costs**

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 1 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 discharge 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 the 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 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

(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, 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.

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.).

### **58:10-23.11g1 Hazardous discharge cleanup liability**

The provisions of P.L.1976, c.141 (C.58:10-23.11 et seq.), or any other law, rule or regulation to the contrary notwithstanding, the liability of any person performing hazardous discharge mitigation or cleanup services in accordance with procedures established pursuant to State or federal law for any injury to a person or property caused by or related to these services shall be limited to acts or omissions of the person during the course of performing these services which can be shown, based on a preponderance of the evidence, to have been negligent. For the purposes of this act, the demonstration that acts or omissions of a person performing mitigation or cleanup services were in accordance with generally accepted practice and state-of-the-art scientific knowledge, and utilized the best technology reasonably available to the person at the time the mitigation or cleanup services were performed shall create a rebuttable presumption that the acts or omissions were not negligent.

### **58:10-23.11g2 Owners, operators of vessels shall assure financial resources for cleanup costs, enforcement**

The owners or operators of vessels shall establish and maintain evidence of financial responsibility for the purpose of assuring adequate financial resources to pay for the cost of cleanup and removal of a discharged hazardous substance as a result of the transportation of a hazardous substance by vessel or a transfer of that hazardous substance between a refinery, storage, transfer, or pipeline facility and a vessel or between two vessels. Evidence of financial responsibility shall be established by a method set forth under section 108 of the "Comprehensive Environmental Response, Compensation, and Liability Act of 1980" (42 U.S.C. 9607) or section 1016 of the "Oil Pollution Act of 1990", any regulation adopted pursuant thereto, or any other federal law requiring evidence of financial responsibility to operate a vessel in the waters of the United States.

The evidence of financial responsibility required by this section shall be the only evidence required by the State that a vessel has the ability to meet the liabilities incurred for violation of P.L.1976, c.141, but nothing in this section shall be construed to limit the liability of any person for a discharge of a hazardous substance for which the person is liable pursuant to P.L.1976,

c.141 or under any other law or under common law. The State Police shall have the power to inspect any vessel and to require the display of evidence of financial responsibility in order to ensure compliance with this section. The State Police may deny entry to any vessel to any place in the State, or to the navigable waters under the jurisdiction of the State, or detain at the place, any vessel that, upon request, does not produce the evidence of financial responsibility required for that vessel pursuant to this section. Any vessel subject to the requirements of this section which is found in the navigable waters of the State without the necessary evidence of financial responsibility for the vessel shall be subject to seizure by and forfeiture to the State.

**58:10-23.11g3 No liability for cleanup and removal costs for actions taken with respect to discharges of petroleum**

a. Notwithstanding the provisions of P.L.1976, c.141 (C.58:10-23.11g) or any other law, including common law, to the contrary, a person is not liable for any cleanup and removal costs or damages of any kind, direct or indirect no matter by whom sustained, which result from actions taken or not taken in the course of rendering care, assistance, or advice with respect to the discharge or threatened discharge of petroleum into the State's surface waters where the care, assistance, or advice is consistent with or pursuant to any of the following:

- (1) the federal National Contingency Plan prepared pursuant to 33 U.S.C. s.1321;
- (2) a State contingency plan;
- (3) a State or federal vessel-specific contingency plan;
- (4) the direction of a federal on-scene coordinator or an appropriate State official; or
- (5) the emergency request of a person who is attempting to prevent the threatened discharge of petroleum from a vessel or who is otherwise liable for cleanup and removal costs of the initial discharge from the vessel pursuant to subsection c. of section 8 of P.L.1976, c.141 (C.58:10-23.11g), provided that a person rendering care, assistance, or advice shall provide notification of the threatened discharge or emergency, to the extent actually known to such person, to the United States Coast Guard or an appropriate federal or State official as soon as practicable (although not of necessity before rendering care, assistance or advice) in the event such person is attempting to unload petroleum from a vessel to prevent or mitigate a discharge, or to tow, push, maneuver or otherwise physically move a vessel transporting petroleum to end the emergency.

b. The defense from liability granted pursuant to subsection a. of this section shall not apply (1) to a person otherwise liable for cleanup and removal costs of the initial discharge pursuant to subsection c. of section 8 of P.L.1976, c.141 (C.58:10-23.11g), (2) with respect to personal injury or wrongful death, or (3) if the person is grossly negligent or engages in willful misconduct.

c. A person liable for the initial discharge or threat of discharge pursuant to subsection c. of section 8 of P.L.1976, c.141 (C.58:10-23.11g) is liable for any cleanup and removal costs and damages that another person is relieved of under this section.

d. Nothing in this section shall limit other defenses or immunities to liability that may exist in P.L.1976, c.141.



e. For the purposes of this section "petroleum" does not include dredged spoil.

#### **58:10-23.11g4Definitions**

For purposes of sections 1 through 5 of P.L.1993, c.112 (C.58:10-23.11g4 through 58:10-23.11g8):

"Active participation in the management" or "participation in the management" means actual participation in the management or operational affairs by the holder of the security interest and shall not include the mere capacity, or ability to influence, or the unexercised right to control vessel, facility, or underground storage tank facility operations.

(1) A holder of a security interest shall be considered to be in active participation in the management, while the borrower is still in possession, only if the holder either:

(a) exercises decision making control over the borrower's environmental compliance, such that the holder has undertaken responsibility for the borrower's waste disposal or hazardous substance handling practices; or

(b) exercises control at a level comparable to that of a manager of the borrower's enterprise, such that the holder has assumed or manifested responsibility for the overall management of the enterprise encompassing the day-to-day decision making of the enterprise with respect to:

(i) environmental compliance; or

(ii) all, or substantially all, of the operational (as opposed to financial or administrative) aspects of the enterprise other than environmental compliance. Operational aspects of the enterprise include functions such as that of facility manager, underground storage tank facility manager, or plant manager, operations manager, chief operating officer, or chief executive officer. Financial or administrative aspects include functions such as that of credit manager, accounts payable or receivable manager, or both, personnel manager, controller, chief financial officer, or similar functions.

(2) No act or omission prior to the time that indicia of ownership are held primarily to protect a security interest constitutes evidence of participation in management. A prospective holder who undertakes or requires an environmental inspection of the vessel, facility, or underground storage tank facility in which indicia of ownership are to be held, or requires a prospective borrower to clean up a vessel, facility, or underground storage tank facility or to comply or come into compliance (whether prior or subsequent to the time that indicia of ownership are held primarily to protect a security interest) with any applicable law or regulation, is not by such action considered to be participating in the vessel's, facility's, or underground storage tank facility's management, provided however, that a holder shall not be required to conduct or require an inspection to qualify for the protection for holders granted pursuant to sections 1 through 5 of P.L.1993, c.112 (C.58:10-23.11g4 through 58:10-23.11g8), and the liability of a holder shall not be based on or affected by the holder not conducting or not requiring an inspection.

(3) Actions that are consistent with holding ownership indicia primarily to protect a

security interest do not constitute participation in management for purposes of sections 1 through 5 of P.L.1993, c.112 (C.58:10-23.11g4 through 58:10-23.11g8). The authority for the holder to make such actions may, but need not, be contained in contractual or other documents specifying requirements for financial, environmental, and other warranties, covenants, conditions, representations or promises from the borrower. Loan policing and work out activities cover and include all activities up to foreclosure and its equivalents.

(a) A holder who engages in policing activities prior to foreclosure shall remain within the exemption provided that the holder does not by such actions participate in the management of the vessel, facility, or underground storage tank facility. Such actions include, but are not limited to, requiring the borrower to clean up the vessel, facility, or underground storage tank facility during the term of the security interest; requiring the borrower to comply or come into compliance with applicable federal, State, and local environmental and other laws, rules and regulations during the term of the security interest; securing or exercising authority to monitor or inspect the vessel, facility, or underground storage tank facility (including on-site inspections) in which indicia of ownership are maintained, or the borrower's business or financial conditions during the term of the security interest; or taking other actions to adequately police the loan or security interest (such as requiring a borrower to comply with any warranties, covenants, conditions, representations or promises from the borrower).

(b) A holder who engages in work out activities prior to foreclosure and its equivalents shall remain within the exemption provided that the holder does not by such action participate in the management of the vessel, facility, or underground storage tank facility. For purposes of this act, "work out" refers to those actions by which a holder, at any time prior to foreclosure and its equivalents, seeks to: prevent, cure, or mitigate a default by the borrower or obligor; or preserve or prevent the diminution of the value of the security. Work out activities include, but are not limited to: restructuring or renegotiating the terms of the security interest; requiring payment of additional rent or interest; exercising forbearance; requiring or exercising rights pursuant to an assignment of accounts or other amounts owing to an obligor; requiring or exercising rights pursuant to an escrow agreement pertaining to amounts owing to an obligor; providing specific or general financial or other advice, suggestions, counseling, or guidance; and exercising any right or remedy the holder is entitled to by law or under any warranties, covenants, conditions, representations or promises from the borrower.

(4) A holder does not participate in the management of a vessel, facility, or underground storage tank facility by making any response or performing any response action or undertaking any cleanup or removal or similar action under the federal "Comprehensive Environmental Response, Compensation, and Liability Act of 1980," Pub.L.96-510 (42 U.S.C. s.9601 et seq.), the "Spill Compensation and Control Act," P.L.1976, c.141 (C.58:10-23.11 et seq.), P.L.1986, c.102 (C.58:10A-21 et seq.), or any other State or federal environmental law or regulation.

"Date of foreclosure" means the date on which the holder obtains legal or equitable title to the vessel or facility pursuant to or incident to foreclosure.

"Fair consideration" means the value of the security interest when calculated as an amount equal to or in excess of the sum of the outstanding principal (or comparable amount in the cases of a lease that constitutes a security interest) owed to the holder immediately preceding

the acquisition of full title (or possession in the case of property subject to a lease financing transaction) pursuant to foreclosure and its equivalents, plus any unpaid interest, rent or penalties (whether arising before or after foreclosure and its equivalents), plus all reasonable and necessary costs, fees, or other charges incurred by the holder incident to work out, foreclosure and its equivalents, retention, maintaining the business activities of the enterprise, preserving, protecting and preparing the vessel, facility, or underground storage tank facility prior to sale, re-lease of property held pursuant to a lease financing transaction (whether by a new lease financing transaction or substitution of the lessee) or other disposition, plus response costs incurred under applicable federal or State environmental cleanup laws or regulations, or at the direction of an on-scene coordinator, less any amounts received by the holder in connection with any partial disposition of the property, net revenues received as a result of maintaining the business activities of the enterprise, and any amounts paid by the borrower subsequent to the acquisition of full title (or possession in the case of property subject to a lease financing transaction) pursuant to foreclosure and its equivalents. In the case of a holder maintaining indicia of ownership primarily to protect a junior security interest, fair consideration is the value of all outstanding higher priority security interests plus the value of the security interest held by the junior holder, each calculated as set forth in this definition.

"Foreclosure" or "foreclosure and its equivalents" means purchase at foreclosure sale; acquisition or assignment of title in lieu of foreclosure; termination of a lease or other repossession; acquisition of a right to title or possession; an agreement in satisfaction of the obligation; or any other form or informal manner (whether pursuant to law or under warranties, covenants, conditions, representations or promises from the borrower) by which the holder acquires title to or possession of the secured property.

"Holder" is a person who maintains indicia of ownership primarily to protect a security interest. A holder includes the initial holder (such as a loan originator), any subsequent holder (such as a successor-in-interest or subsequent purchaser of the security interest on the secondary market), a guarantor of an obligation, surety, or any other person who holds ownership indicia primarily to protect a security interest, or a receiver or other person who acts on behalf or for the benefit of a holder.

"Indicia of ownership" means evidence of a security interest, evidence of an interest in a security interest, or evidence of an interest in real or personal property securing a loan or other obligation, including any legal or equitable title to real or personal property acquired incident to foreclosure and its equivalents. Evidence of such interests include, but are not limited to, mortgages, deeds of trust, liens, surety bonds and guarantees of obligations, title held pursuant to a lease financing transaction in which the lessor does not select initially the leased property (hereinafter "lease financing transaction"), legal or equitable title obtained pursuant to foreclosure and their equivalents. Evidence of such interests also includes assignments, pledges, or other rights to or other forms of encumbrance against property that are held primarily to protect a security interest. A person is not required to hold title or a security interest in order to maintain indicia of ownership.

"Primarily to protect a security interest" means that the holder's indicia of ownership are held primarily for the purpose of securing payment or performance of an obligation but does not include indicia of ownership held primarily for investment purposes, nor ownership indicia held primarily for purposes other than as a protection for a security interest. A holder may have other,

secondary reasons for maintaining indicia of ownership, but the primary reasons why any ownership indicia are held shall be as protection for a security interest.

"Security interest" means an interest in a vessel or facility created or established for the purpose of securing a loan or other obligation. Security interests include, but are not limited to, mortgages, deeds of trusts, liens, and title pursuant to lease financing transactions. Security interests may also arise from transactions such as sale and leasebacks, conditional sales, installment sales, trusts receipt transactions, certain assignments, factoring agreements, accounts receivable financing arrangements, and consignments, if the transaction creates or establishes an interest in a vessel or facility for the purpose of securing a loan or other obligation.

"Underground storage tank" shall have the same meaning as set forth in section 2 of P.L. 1986, c.102 (C.58:10A-22).

"Underground storage tank facility" shall mean one or more underground storage tanks.

### **58:10-23.11g5 Liability for cleanup costs, damages**

A person who maintains indicia of ownership of a vessel, facility, or underground storage tank facility primarily to protect a security interest in a vessel, facility, or underground storage tank facility and who does not participate in the management of the vessel or facility or underground storage tank facility is not deemed to be an owner or operator of the vessel, facility, or underground storage tank facility, shall not be deemed the discharger or responsible party for a discharge from the vessel, facility, or underground storage tank facility and shall not be liable for cleanup costs or damages resulting from discharges from the vessel or facility pursuant to sections 8, 18, and 22 of P.L.1976, c.141 (C.58:10-23.11g, 58:10-23.11q and 58:10-23.11u), section 2 of P.L.1990, c.75 (C.58:10-23.11u1), or section 8 of P.L.1986, c.102 (C.58:10A-28) except to the extent that liability may still apply to holders after foreclosure as set forth in section 3 of P.L. 1993, c.112 (C.58:10-23.11g6).

### **58:10-23.11g6 Status and liability of holders after foreclosure**

The indicia of ownership, held after foreclosure, continue to be maintained primarily as a protection for a security interest provided that the holder did not participate in management prior to foreclosure and that the holder undertakes to sell, re-lease property held pursuant to a lease financing transaction (whether by a new lease financing transaction or substitution of the lessee) or otherwise divest itself of the vessel, facility, or underground storage tank facility in a reasonably expeditious manner in accordance with the means and procedures specified in this section. Such a holder may liquidate, maintain business operations, undertake environmental response actions pursuant to State and federal law, and take measures to preserve, protect or prepare the secured asset prior to sale or other disposition, without losing status as a person who maintains indicia of ownership primarily to protect a security pursuant to section 2 of P.L.1993, c.112 (C.58:10-23.11g5).

a. For purposes of establishing that a holder is seeking to sell, re-lease property held pursuant to a new lease financing transaction (whether by a new lease financing transaction or substitution of the lessee), or divest a vessel, facility, or underground storage tank facility in a reasonably expeditious manner, the holder may use whatever commercially reasonable means are relevant or appropriate with respect to the vessel, facility, or underground storage tank facility, or

may employ the means specified in this section.

b. (1) A holder that outbids, rejects or fails to act upon a written bona fide, firm offer of fair consideration within 90 days of receipt of the offer, and which offer is received at any time after six months following the date of foreclosure, shall not be deemed to be using a commercially reasonable means for the purpose of this section. A "written bona fide, firm offer" means a legally enforceable, commercially reasonable, cash offer solely for the foreclosed vessel, facility, or underground storage tank facility, including all material terms of the transaction, from a ready, willing, and able purchaser who demonstrates to the holder's satisfaction the ability to perform. For purposes of this subsection, the six-month period begins to run from the time that the holder acquires a marketable title, provided that the holder, after the expiration of any redemption or other waiting period provided by law, was acting diligently to acquire marketable title.

(2) A holder that outbids, rejects, or fails to act upon an offer of fair consideration for the vessel, facility, or underground storage tank facility within the 90-day period, establishes that the ownership indicia in the secured property are not held primarily to protect the security interest, unless the holder is required, in order to avoid liability under federal or State law, to make a higher bid, to obtain a higher offer, or to seek or obtain an offer in a different manner.

c. A holder establishes that it is proceeding in a commercially reasonable manner after fore-closure by, within 12 months following foreclosure, listing the vessel, facility, or underground storage tank facility with a broker, dealer, or agent who deals with the type of property in question, or by advertising the vessel, facility, or underground storage tank facility as being for sale or disposition on at least a monthly basis in either a real estate publication or a trade or other publication suitable for the vessel, facility, or underground storage tank facility in question, or a newspaper of general circulation (defined as one with a circulation over 10,000, or one suitable under any applicable federal, State, or local rules of court for publication required by court order or rules of civil procedure) covering the area where the property is located. For purposes of this subsection, the 12-month period begins to run from the time that the holder acquires marketable title, provided that the holder, after the expiration of any redemption or other waiting period provided by law, was acting diligently to acquire marketable title.

d. A holder shall sell, re-lease the property held pursuant to a new lease financing transaction, or otherwise divest such vessel, facility, or underground storage tank facility in a reasonably expeditious manner, but not later than five years after the date of foreclosure, except that a holder may continue to hold the property for a time period longer than five years without losing status as a person who main-tains indicia of ownership primarily to protect a security interest if (1) the holder has made a good faith effort to sell, re-lease or otherwise divest itself of the property using commercially reasonable means or other procedures prescribed by this act; (2) the holder has obtained any approvals required pursuant to applicable federal or State banking or other lending laws to continue its possession of the property; and (3) the holder has exercised reasonable custodial care to prevent or mitigate any new discharges from the vessel, facility, or underground storage tank facility that could substantially diminish the market value of the property.

e. (1) The exemption granted to holders pursuant to this section shall not apply to the liability for any new discharge from the vessel, facility, or underground storage tank

facility, occurring after the date of foreclosure, that is caused by acts or omissions of the holder which can be shown, based on a preponderance of the evidence, to have been negligent. In the event a property has both preexisting and new discharges, the liability, if any, allocable to the holder pursuant to this subsection shall be limited to those cleanup costs or damages that relate directly to the new discharge. In the event there is a substantial commingling of a new discharge with a preexisting discharge, the liability, if any, allocable to the holder pursuant to this subsection shall be limited to the cleanup costs or damages in excess of those cleanup costs or damages relating to the preexisting discharge.

In order to establish that a discharge occurred or began prior to the date of foreclosure, a holder may perform, but shall not be required to perform, an environmental audit, in accordance with any applicable Department of Environmental Protection regulations and guidelines, to identify such discharges at the vessel, facility, or underground storage tank facility. Upon receipt of a complete audit from the holder, the Department of Environmental Protection shall, within 90 days of its receipt of the audit, review the audit and transmit its findings to the holder. The Department of Environmental Protection may charge reasonable fees and adopt any additional regulations necessary to provide guidelines for the submission and review of such audits.

(2) Nothing in this subsection shall be deemed to impose liability for a new discharge from the vessel, facility, or underground storage tank facility that is authorized pursuant to a federal or State permit or cleanup procedure.

(3) The exemption granted to holders of indicia of ownership to protect a security interest shall not apply to liability, if any, pursuant to applicable law and regulation, for arranging for the offsite disposal or treatment of a hazardous substance or by accepting for transportation and disposing of a hazardous substance at an offsite facility selected by the holder.

f. (1) A holder who acquires an underground storage tank continues to hold the exemption granted to holders pursuant to this section if there is an operator of the underground storage tank, other than the holder, who is in control of the underground storage tank or has responsibility for compliance with applicable federal and State requirements.

(2) If an operator does not exist, a holder continues to maintain the exemption from liability granted to holders pursuant to this section if the holder: (i) empties all underground storage tanks within 60 days after foreclosure or within 60 days after the effective date of P.L.1997, c.278 (C.58:10B-1.1 et al.), whichever is later, so that no more than one inch of residue, or .3 percent by weight of the total capacity of the underground storage tank remains in the underground storage tank, leaves vent lines open and functioning, and caps and secures all other lines, pumps, manways, and ancillary equipment; (ii) empties those underground storage tanks that are discovered after foreclosure within 60 days of discovery or within 60 days of the effective date of P.L.1997, c.278, whichever is later, so that no more than one inch of residue, or .3 percent by weight of the total capacity of the underground storage tank remains in the system, leaves vent lines open and functioning, and caps and secures all other lines, pumps, manways, and ancillary equipment; and (iii) permanently closes the underground storage tank pursuant to the provisions of P.L.1986, c.102 (C.58:10A-21 et seq.) or temporarily closes the underground storage tank.

g. An underground storage tank may be temporarily closed until a subsequent

purchaser has acquired marketable title to the underground storage tank. When a subsequent purchaser acquires marketable title to the facility, the purchaser shall operate the underground storage tank in accordance with applicable State and federal laws or shall permanently close or remove the underground storage tank in accordance with the provisions of P.L.1986. c.102 (C.58:10A-21 et seq.).

For the purposes of this section, an underground storage tank shall be considered temporarily closed if a holder installs or continues to operate and maintain corrosion protection and reports suspected releases to the Department of Environmental Protection. If the underground storage tank has not been upgraded to comply with the provisions of P.L.1986, c.102 and the applicable federal law or does not comply with the standards for new underground storage tanks pursuant to State and federal law except for spill and overfill protection, and is temporarily closed for 12 months or more, the holder shall conduct a site investigation in accordance with rules and regulations adopted by the department.

### **58:10-23.11g7 Departmental rights retained; violations, penalties**

a. Nothing in sections 1 through 5 of P.L.1993, c.112 (C.58:10-23.11g4 through 58:10-23.11g8) shall be deemed to prohibit or limit the rights of the Department of Environmental Protection to clean up a property or to obtain a lien on the property of a discharger or holder in order to recover cleanup costs pursuant to section 7 of P.L.1976, c.141 (C.58:10-23.11f). Any recovery of cleanup costs from a holder pursuant to a lien obtained by the Department of Environmental Protection shall be limited to the actual financial benefit conferred on such holder by a cleanup or removal action, and shall not exceed the amount realized by the holder on the sale or other disposition of the property.

b. Nothing in sections 1 through 5 of P.L. 1993, c. 112 (C.58:10-23.11g4 through 58:10-23.11g8) shall be deemed to prohibit or limit the rights of the Department of Environmental Protection, pursuant to section 7 of P.L.1976, c.141 (C.58:10-23.11f), to direct the holder to take any emergency response actions, including closure of the vessel, facility, or underground storage tank facility, necessary to prevent, contain or mitigate a continuing or new discharge that poses an immediate threat to the environment or to the public health, safety or welfare.

c. (1) If a holder forecloses on a vessel, facility, or underground storage tank facility at which it has actual knowledge a discharge occurred or began prior to the date of foreclosure, the holder shall, within 30 days of the date of foreclosure, notify the Department of Environmental Protection that foreclosure has occurred. Any person who fails to give notice required pursuant to this subsection or knowingly gives or causes to be given false information in any such report, shall be subject to a civil penalty not to exceed \$25,000. A court, in determining the amount of the penalty to be imposed, shall consider, among other relevant factors, the amount of any damages caused by the failure to give timely notice and whether the failure to notify was inadvertent or intentional.

(2) The holder shall immediately notify the Department of Environmental Protection of any new discharge, of which it has actual knowledge, occurring after the date of foreclosure, from the vessel, facility, or underground storage tank facility. Any person who fails to give notice required pursuant to this subsection or knowingly gives or causes to be given any false

information in any such report, shall be subject to a civil penalty not to exceed \$10,000 per day for each violation. A court, in determining the amount of the penalty to be imposed and the appropriateness of imposing multiple penalties for a continuing offense, shall consider, among other relevant factors, the amount of any damages caused by the failure to give timely notice and whether the failure to notify was inadvertent or intentional.

(3) Any penalty incurred under this section may be recovered with costs in a summary proceeding pursuant to "the penalty enforcement law," N.J.S.2A:58-1 et seq., in the Superior Court or a municipal court. Failure to give any required notice pursuant to this subsection shall not cause the holder to lose its status as a person who maintains indicia of ownership primarily to protect a security interest.

### **58:10-23.11g8 Environmental inspection not required**

Nothing in sections 2 through 4 of this act shall be construed to require a holder of a security interest to conduct or require an environmental inspection and the liability of the holder of the security interest pursuant to P.L.1976, c.141 (C.58:10-23.11 et seq.) shall not be based on or affected by a failure to conduct an environmental inspection.

### **58:10-23.11g8a Compliance not required; loss of exemption**

A holder of an interest in an underground storage tank shall not be required to comply with the provisions of P.L.1986, c.102 (C.58:10A-21 et seq.) unless the holder loses the exemption under P.L.1993, c.112 (C.58:10-23.11g4 et seq.).

### **58:10-23.11g9 Obligations of trusts, estates**

In the event of the discharge of a hazardous substance from a vessel, facility, or underground storage tank facility, which vessel, facility, or underground storage tank facility is all or part of a trust, receivership estate, guardianship estate or estate of a deceased person, only the assets of the trust or estate, or assets of any discharger other than the fiduciary of such trust or estate, shall be subject to the obligation to pay for the cleanup of the discharge as set forth in the "Spill Compensation and Control Act," P.L.1976, c.141 (C.58:10-23.11 et seq.) or subject to any obligations imposed pursuant to P.L.1986, c.102 (C.58:10A-21 et seq.).

### **58:10-23.11g10 Discharges on certain public property; definitions**

a. As used in this section:

"Governmental unit" means the State, a municipality, county, or other political subdivision of the State, or any agency thereof authorized to administer, protect and maintain lands or structures for recreation or conservation purposes;

"Recreation or conservation purposes" means the use of lands for parks, natural areas, ecological and biological study, historic areas, historic buildings or structures, forests, trails, camping, fishing, water reserves, wildlife preserves, hunting, boating, winter sports and similar uses for either public outdoor recreation or conservation of natural resources, or both.

b. A governmental unit that holds an easement interest in any real property for recreation or conservation purposes on which there has been a discharge of a hazardous



substance, shall not be liable pursuant to P.L.1976, c.141 (C.58:10-23.11 et seq.), any other law, or common law, for cleanup and removal costs, or for any direct or indirect damages, due to the discharge of a hazardous substance

on the property. The provisions of this section shall not apply to a governmental unit if that entity has caused or contributed to the discharge of a hazardous substance on the property.

**58:10-23.11h Imposition of tax; measurement; return; filing; failure to file; penalty; presumptive evidence; powers of director**

a. There is hereby levied upon each owner or operator of one or more major facilities a tax to insure compensation for cleanup costs and damages associated with any discharge of hazardous substances to be paid by the transferee; provided, however, that in the case of a major facility which operates as a public storage terminal for hazardous substances owned by others, the owner of the hazardous substance transferred to such major facility or his authorized agent shall be considered to be the transferee or transferor, as the case may be, for the purposes of this section and shall be deemed to be a taxpayer for purposes of this act. Where such person has failed to file a return or pay the tax imposed by this act within 60 days after the due date thereof, the director shall forthwith take appropriate steps to collect same from the owner of the hazardous substance. In the event the director is not successful in collecting said tax, then on notice to the owner or operator of the public storage terminal of said fact said owner or operator shall not release any hazardous substance owned by the taxpayer. The director may forthwith proceed to satisfy any tax liability of the taxpayer by seizing, selling or otherwise disposing of said hazardous substance to satisfy the taxpayer's tax liability and to take any further steps permitted by law for its collection. For the purposes of this act, public storage terminal shall mean a public or privately owned major facility operated for public use which is used for the storage or transfer of hazardous substances. The tax shall be measured by the number of barrels or the fair market value, as the case may be, of hazardous substances transferred to the major facility; provided, however, that the same barrel, including any products derived therefrom, subject to multiple transfers from or between major facilities shall be taxed only once at the point of the first transfer.

When a hazardous substance other than petroleum which has not been previously taxed is transferred from a major in-State facility to a facility which is not a major facility, the transferor shall be liable for tax payment for said transfer.

b. (1) The tax shall be \$0.0150 per barrel transferred and in the case of the transfer of hazardous substances other than petroleum or petroleum products, the tax shall be the greater of \$0.0150 per barrel or 1.0% of the fair market value of the product plus \$0.0025 per barrel; provided, however, that with respect to transfers of hazardous substances other than petroleum or petroleum products which are or contain any precious metals to be recycled, refined, or rerefined in this State, which are transferred into this State subsequent to being recycled, refined or rerefined, or which are or contain elemental phosphorus, the tax shall be \$0.0150 per barrel of the hazardous substance; and provided further, however, that the total aggregate tax due for any individual taxpayer which has paid the tax in the 1986 tax year shall not exceed 125% of the tax due and payable by that taxpayer during the 1986 tax year plus an additional \$0.0025 per barrel; except that for a hazardous substance which is directly converted to, and comprises more than 90% by weight of, a non-hazardous final product, the taxpayer shall pay no more than 100% of

the tax due and payable in the 1986 tax year plus an additional \$0.0025 per barrel. In computing 125% of the tax due and payable by the taxpayer during the 1986 tax year, for taxes due after January 1, 1996 from an owner or operator of one or more major facilities who has continuously since 1986 filed a combined tax return for more than one major facility but who prior to January 1, 1996 has closed one or more of those major facilities, a taxpayer shall include 1986 taxes arising from major facilities which (1) caused the taxpayer to incur a tax liability in 1986, and (2) continue to cause the taxpayer to incur a tax liability during the current tax year. For transfers which are or contain elemental phosphorus, in computing the 125% of the taxes due and payable by the taxpayer during the 1986 tax year, a taxpayer shall calculate the tax at \$0.015 per barrel. For the purposes of this section, "precious metals" means gold, silver, osmium, platinum, palladium, iridium, rhodium, ruthenium and copper. In the event of a major discharge or series of discharges of petroleum or petroleum products resulting in reasonable claims against the fund exceeding the existing balance of the fund, the tax shall be levied at the rate of \$0.04 per barrel of petroleum or petroleum products transferred, until the revenue produced by such increased rate equals 150% of the total dollar amount of all pending reasonable claims resulting from the discharge of petroleum or petroleum products; provided, however, that such rate may be set at less than \$0.04 per barrel transferred if the administrator determines that the revenue produced by such lower rate will be sufficient to pay outstanding reasonable claims against the fund within one year of such levy. For the purposes of determining the existing balance of the fund, the administrator shall not include any amount in the fund collected from the \$0.0025 per barrel increase in the tax imposed pursuant to P.L.1990, c.78 and dedicated for hazardous substance discharge prevention in accordance with paragraph (2) of this subsection.

Interest received on moneys in the fund shall be credited to the fund.

(2) An amount of \$0.0025 per barrel collected from the proceeds of the tax imposed pursuant to this subsection shall be deposited into the New Jersey Spill Compensation Fund and dedicated for the purposes of P.L.1990, c.78 and for other authorized purposes designed to prevent the discharge of a hazardous substance.

c. (1) Every taxpayer and owner or operator of a public storage terminal for hazardous substances shall on or before the 20th day of the month following the close of each tax period render a return under oath to the director on such forms as may be prescribed by the director indicating the number of barrels of hazardous substances transferred and where appropriate, the fair market value of the hazardous substances transferred to or from the major facility, and at said time the taxpayer shall pay the full amount of the tax due.

(2) Every taxpayer or owner or operator of a major facility or vessel which transfers a hazardous substance, as defined in this act, and who is subject to the tax under subsection a. shall within 20 days after the first such transfer in any fiscal year register with the director on such form as shall be prescribed by him.

d. If a return required by this act is not filed, or if a return when filed is incorrect or insufficient in the opinion of the director, the amount of tax due shall be determined by the director from such information as may be available. Notice of such determination shall be given to the taxpayer liable for the payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within 30 days after receiving notice of such determination, shall apply to the director for a hearing, or unless the director on his own

motion shall redetermine the same. After such hearing the director shall give notice of his determination to the person to whom the tax is assessed.

e. Any taxpayer who shall fail to file his return when due or to pay any tax when the same becomes due, as herein provided, shall be subject to such penalties and interest as provided in the "State Tax Uniform Procedure Law," R.S.54:48-1 et seq. If the Division of Taxation determines that the failure to comply with any provision of this section was excusable under the circumstances, it may remit such part or all of the penalty as shall be appropriate under such circumstances.

f. (1) (Deleted by amendment, P.L.1987, c.76)

(2) (Deleted by amendment, P.L.1987, c.76)

g. In addition to the other powers granted to the director in this section, he is hereby authorized and empowered:

(1) To delegate to any officer or employee of his division such of his powers and duties as he may deem necessary to carry out efficiently the provisions of this section, and the person or persons to whom such power has been delegated shall possess and may exercise all of said powers and perform all of the duties delegated by the director;

(2) To prescribe and distribute all necessary forms for the implementation of the section.

h. The tax imposed by this act shall be governed in all respects by the provisions of the "State Tax Uniform Procedure Law," R.S.54:48-1 et seq., except only to the extent that a specific provision of this act may be in conflict therewith.

i. (Deleted by amendment, P.L.1986, c.143.)

#### **58:10-23.11h1List of major facilities**

a. The Department of Environmental Protection shall compile a list of facilities which, based on all information made available to or collected by the department pursuant to any State or federal law, may have sufficient storage capacity to be classified as a major facility.

b. The department shall transmit this list to the Director of the Division of Taxation in the Department of the Treasury on January 1 of the year next following the enactment of this act and annually thereafter, provided that the department may update the list more frequently as it deems appropriate.

c. The director shall utilize the list compiled by the department to notify the owners or operators of the facilities thereon that they may be liable for the tax levied pursuant to section 9 of P.L.1976, c.141 (C.58:10- 23.11h).

d. The owner or operator of a facility so notified by the director shall pay the tax or provide an explanation as to why the facility should not be classified as a major facility.

#### **58:10-23.11h2List of major facilities for nonpetroleum products**

The department shall compile a list of facilities which, based on all information made available

to or collected by the department pursuant to any State or federal law, would be classified as a major facility if storage capacity therefor were set at 5,000 gallons of hazardous substances which are not petroleum or petroleum products.

#### **58:10-23.11i Spill Compensation Fund**

The New Jersey Spill Compensation Fund is hereby established as a nonlapsing, revolving fund in the department to carry out the purposes of this act. The fund shall be credited with all taxes and penalties related to this act. Interest received on moneys in the fund shall be credited to the fund.

#### **58:10-23.11j Administrator**

The commissioner shall appoint and supervise an administrator of the fund. The administrator shall be the chief executive of the fund and shall have the following powers and duties:

- a. To represent the State in meetings with the alleged discharger and claimants concerning liability for the discharge and the amount of the claims;
- b. To determine if boards of arbitration are needed to settle particular claims;
- c. To administer boards of arbitration;
- d. To certify the amount of claims and names of claimants to the commissioner.

#### **58:10-23.11j1 Transfer to Environmental Protection**

- a. Except as otherwise provided by this amendatory and supplementary act, all the functions, powers and duties of the administrator in the Department of the Treasury are continued in the administrator in the Department of Environmental Protection.
- b. All files, books, papers, records, equipment and other property of the administrator in the Department of the Treasury are transferred to the administrator in the Department of Environmental Protection.
- c. The rules, regulations and orders of the administrator in the Department of the Treasury shall continue with full force as the rules, regulations and orders of the administrator in the Department of Environmental Protection until amended or repealed.

#### **58:10-23.11j2 Monies transferred**

After consultation between the commissioner and the State Treasurer, all relevant appropriations, grants and other moneys available to the administrator in the Department of the Treasury shall be transferred to the administrator in the Department of Environmental Protection and shall remain available for the objects and purposes for which appropriated, subject to any terms, restrictions, limitations or other requirements imposed by federal or State law.

#### **58:10-23.11j3 Transfer of employees**

After consultation between the commissioner and State Treasurer, the employees of the administrator, including the administrator, in the Department of the Treasury may be transferred

to the Department of Environment Protection. Nothing in this amendatory and supplementary act shall be construed to deprive these employees of any rights or protection provided them by the civil service, pension or retirement laws of this State.

**58:10-23.11j4                    Substitution**

Whenever in any law, rule, regulation, order, contract, document, judicial or administrative proceedings, or otherwise, reference is made to the administrator in the Department of Treasury, the same shall be considered to mean and refer to the administrator in the Department of Environmental Protection.

**58:10-23.11j5                    Pending proceedings unaffected**

This amendatory and supplementary act shall not affect any proceedings, civil or criminal, brought by or against the administrator in the Department of Treasury and pending on the effective date of this amendatory and supplementary act, but these actions or proceedings may be further prosecuted or defended in the same manner and to the same effect by the administrator in the Department of Environmental Protection.

**58:10-23.11j6                    "Agency Transfer Act" applicable**

The transfers directed by this amendatory and supplementary act, except as otherwise provide herein, shall be made in accordance with the "State Agency Transfer Act," P.L.1971, c.375 (C.52:14D-1 et seq.).

**58:10-23.11j7                    Services of other State agencies**

In order to effectuate the purposes of this act, the Department of Environmental Protection may call to its assistance and avail itself of the services of any State department, board, commission or agency as may be required.

**58:10-23.11k Claims; limitations; forms and procedures; false information; misdemeanor; notice**

Claims shall be filed with the administrator not later than one year after the date of discovery of damage. The administrator shall prescribe appropriate forms and procedures for such claims, which shall include a provision requiring the claimant to make a sworn verification of the claim to the best of his knowledge. Any person who knowingly gives or causes to be given any false information as a part of any such claim shall, in addition to any other penalties herein or elsewhere prescribed, be guilty of a misdemeanor. Upon receipt of any claim, the administrator shall as soon as practicable inform all affected parties of the claim.

**58:10-23.11k1 Claims for cost recovery filed by local units**

If a local unit files a claim pursuant to section 12 of P.L.1976, c.141 (C.58:10-23.11k) seeking to recover cleanup, removal and related costs incurred as a result of an emergency response action, including costs related to the prevention, containment, or mitigation of a discharge, the administrator shall approve or deny the claim for reimbursable costs incurred pursuant to an emergency response action, without regard to the requirements of sections 13, 14, or 15 of P.L.1976, c.141, within 120 days of the filing of a completed claim, including all supportive

information or documentation required by the administrator; provided, however, that the local unit shall obtain the approval of the department prior to initiating cleanup or removal, including prevention, containment or mitigation, activities. If the administrator fails to approve, in whole or in part, or deny the claim within the 120-day period, all costs in the claim shall be deemed approved. If the administrator denies the claim or approves only part of the costs claimed, the local unit shall not be precluded from seeking recovery of the costs denied by the administrator under other provisions of statutory law or in accordance with any remedies available under the common law.

#### **58:10-23.11l Settlement between claimant and alleged discharger**

The administrator shall attempt to promote and arrange a settlement between the claimant and the person responsible for the discharge. If the source of the discharge can be determined and liability is conceded, the claimant and the alleged discharge may agree to a settlement which shall be final and binding upon the parties and which will waive all recourse against the fund.

#### **58:10-23.11m Settlement of claim against fund**

If the source of the discharge is unknown or cannot be determined, the claimant and the administrator shall attempt to arrange a settlement of any claim against the fund. The administrator is authorized to enter and certify payment of such settlement subject to such proof and procedures contained in regulations promulgated by the administrator.

#### **58:10-23.11n Boards of arbitration**

a. Boards of arbitration shall be convened by the administrator when persons alleged to have caused the discharge, the administrator or other persons contest the validity or amount of damage claims or cleanup and removal costs presented to the fund for payment. If the source of discharge is not known, any person may contest such claims presented for payment to the fund.

b. In the discretion of the administrator, a board of arbitration may consist of three persons or a single neutral person. In the case of three-person boards, one person shall be chosen by the person alleged to have caused the discharge, one person shall be chosen by the claimant, and one person shall be chosen by the first two to serve as chairman. If the two arbitrators cannot agree upon, select and name the neutral arbitrator after their appointment, the administrator shall request the American Arbitration Association to utilize its procedures to select the neutral arbitrator. If the source of the discharge is unknown or liability is not conceded, the administrator shall request the American Arbitration Association to utilize its procedures to select the neutral arbitrator and an arbitrator normally selected by the absent or unknown person. Representation by any party on the board shall not be considered as any admission of liability for such discharges. In the case of a one-person board, such neutral arbitrator may, in the discretion of the administrator, be selected by the administrator, by agreement of the affected parties or by utilization of the procedures of the American Arbitration Association; provided, however, that the administrator or any regular employee of the department shall not act as an arbitrator.

(1) Arbitrators shall be designated by their principals within 30 calendar days after the administrator notifies the principals of claims against the fund arising from a discharge.

(2) Should either party fail to name an arbitrator within the designated time, then the administrator shall request the American Arbitration Association to utilize its procedures to select that arbitrator. The two arbitrators thus chosen shall select the neutral arbitrator required by this section.

c. One board of arbitration may be convened to hear and determined all claims arising from or related to a common discharge.

d. The boards shall have the power to order testimony under oath and may subpoena attendance and testimony of witnesses and the production of such documentary materials pertinent to the issues presented to the board for determination. Each person appearing before the board shall have the right to counsel.

e. All costs and expenses approved by the administrator attributable to the employment of any arbitrator shall be payable from the fund.

f. All decisions of the boards of arbitration shall be in writing with notification to all appropriate parties, and shall be rendered within 60 calendar days of the final appointment of the board unless the parties otherwise agree in writing to an extension.

g. Determinations made by the board shall be final. Any action for judicial review shall be filed in the Appellate Division of the Superior Court within 30 days of the filing of the decision with the administrator.

h. No sooner than 30 days after the determination of the arbitrators, nor more than 60 days thereafter, the arbitrators shall certify all claims settled or arbitrated to the administrator who, in turn, shall certify the amount of the award and the name of the claimant to the commissioner, who shall direct the administrator to pay the award from the fund. In any case in which the person responsible for the discharge seeks judicial review, reasonable attorney's fees and costs shall be awarded to the claimant if the decision of the board is affirmed.

#### **58:10-23.11o Disbursement of moneys from fund; purposes**

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

(1) Costs incurred under section 7 of P.L.1976, c.141 (C.58:10-23.11f);

(2) Damages as defined in section 8 of P.L.1976, c.141 (C.58:10-23.11g);

(3) Such sums as may be necessary for research on the prevention and the effects of spills of hazardous substances on the marine environment and on the development of improved cleanup and removal operations as may be appropriated by the Legislature; provided, however, that such sums shall not exceed the amount of interest which is credited to the fund;

(4) Such sums as may be necessary for the boards, general administration of the fund, equipment and personnel costs of the department and any other State agency related to the enforcement of P.L.1976, c.141, including any costs incurred by the department pursuant to P.L.1990, c.78 or pursuant to any other law designed to prevent the discharge of a hazardous substance, as may be appropriated by the Legislature;

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

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

(7) Costs attributable to the department's obligation to defend and indemnify a contractor pursuant to subsection a. of section 7 of this act P.L.1976, c.141 (C.58:10-23.11f), subject to the appropriation by law of monies from the General Fund to the fund to defray these costs;

(8) Administrative costs incurred by the department to implement the provisions of P.L.1977, c.74 (C.58:10A-1 et seq.), as amended and supplemented by P.L.1990, c.28 (C.58:10A-10.1 et al.), on a timely basis, except that the amounts used for this purpose shall not exceed \$2,000,000. Any moneys disbursed by the department from the fund for this purpose shall be repaid to the fund in equal amounts from the penalties collected by the department pursuant to P.L.1977, c.74 and P.L.1990, c.28, in annual installments beginning July 1, 1991 and annually thereafter until the full amount is repaid according to a schedule of repayments determined by the State Treasurer;

(9) Such sums as may be necessary to reimburse a local unit for costs incurred in an emergency response action taken to prevent, contain, mitigate, cleanup or remove a discharge of a hazardous substance.

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

#### **58:10-23.11q Payments of cleanup costs or damages arising from a single incident**

Payment of any cleanup costs or damages by the fund arising from a single incident shall be conditioned upon the administrator acquiring by subrogation all rights of the claimant to recovery of such costs or damages from the discharger or other responsible party. The administrator shall then seek satisfaction from the discharger or other responsible party in the Superior Court if the discharger or other responsible party does not reimburse the fund. In any such suit, except as provided by subsection d. of section 8 of P.L.1976, c.141 (C.58:10-23.11g), the administrator need prove only that an unlawful discharge occurred which was the responsibility of the discharger or other responsible party or that a hazardous substance was removed pursuant to subsection b. of section 7 of P.L.1976, c.141 (C.58:10-23.11f) for which the person was in any way responsible. The administrator is hereby authorized and empowered to compromise and settle the amount sought for costs and damages from the discharger or other responsible party and any penalty arising under this act.

#### **58:10-23.11r Awards in excess of current balance of fund; payment on pro rata basis; priorities**

In the event that the total awards for a specific occurrence exceed the current balance of the fund,



the immediate award shall be paid on a prorated basis, and all claimants paid on a prorated basis shall be paid, as determined by the administrator, a pro rata share of all funds received by the fund until the total amount of the proven damages is paid to the claimant or claimants. The administrator may also provide through regulation to fix the priority for the payment of claims based on extreme hardship.

**58:10-23.11s Actions against bond, insurer or other person providing evidence of financial responsibility**

Any claims for costs of cleanup, civil penalties or damages by the State, and any claim for damages by any injured person, may be brought directly against the bond, the insurer, or any other person providing evidence of financial responsibility.

**58:10-23.11t Rules and regulations**

The commissioner, the State Treasurer and the director, respectively, are authorized to adopt, amend, repeal, and enforce such rules and regulations pursuant to the Administrative Procedure Act, P.L.1968, c.410 (C.52:14B-1 et seq.) as they may deem necessary to accomplish their respective purposes and responsibilities under this act.

**58:10-23.11u Violations; remedies; enforcement**

a. (1) Whenever, on the basis of available information, the department determines that a person is in violation of a provision of P.L.1976, c.141 (C.58:10-23.11 et seq.), including any rule, regulation, plan, information request, access request, order or directive promulgated or issued pursuant thereto, or that a person knowingly has given false testimony, documents or information to the department, the department may:

- (a) bring a civil action in accordance with subsection b. of this section;
- (b) levy a civil administrative penalty in accordance with subsection c. of this section; or
- (c) bring an action for a civil penalty in accordance with subsection d. of this section

Use of any remedy specified in this section shall not preclude use of any other remedy. The department may simultaneously pursue administrative and judicial remedies provided in this section.

b. The department may commence a civil action in Superior Court for, singly or in combination:

- (1) a temporary or permanent injunction;
- (2) the costs of any investigation, cleanup or removal, and for the reasonable costs of preparing and successfully litigating an action under this subsection;
- (3) the cost of restoring, repairing, or replacing real or personal property damaged or destroyed by a discharge, any income lost from the time the property is damaged to the time it is restored, repaired or replaced, and any reduction in value of the property caused by the discharge

by comparison with its value prior thereto;

(4) the cost of restoration and replacement, where practicable, of any natural resource damaged or destroyed by a discharge; and

(5) any other costs incurred by the department pursuant to P.L.1976, c.141.

Compensatory damages for damages awarded to a person other than the State shall be paid to the person injured by the discharge.

c. (1) The department may assess a civil administrative penalty of not more than \$50,000 for each violation, and each day of violation shall constitute an additional, separate and distinct violation. A civil administrative penalty shall not be levied until a violator has been notified by certified mail or personal service of:

(a) the statutory or regulatory basis of the violation;

(b) the specific citation of the act or omission constituting the violation;

(c) the amount of the civil administrative penalty to be imposed;

(d) the right of the violator to a hearing on any matter contained in the notice and the procedures for requesting a hearing.

(2) (a) A violator shall have 20 calendar days following receipt of notice within which to request a hearing on any matter contained in the notice, and shall comply with all procedures for requesting a hearing. Failure to submit a timely request or to comply with all departmental procedures shall constitute grounds for denial of a hearing request. After a hearing and upon a finding that a violation has occurred, the department shall issue a final order assessing the amount of the civil administrative penalty specified in the notice. If a violator does not request a hearing or fails to satisfy the statutory and administrative requirements for requesting a hearing, the notice of assessment of a civil administrative penalty shall become a final order on the 21st calendar day following receipt of the notice by the violator. If the department denies a hearing request, the notice of denial shall become a final order upon receipt of the notice by the violator.

(b) A civil administrative penalty may be settled by the department on such terms and conditions as the department may determine.

(c) Payment of a civil administrative penalty shall not be deemed to affect the availability of any other enforcement remedy in connection with the violation for which the penalty was levied.

(3) If a civil administrative penalty imposed pursuant to this section is not paid within 30 days of the date that the penalty is due and owing, and the penalty is not contested by the person against whom the penalty has been assessed, or the person fails to make a payment pursuant to a payment schedule entered into with the department, an interest charge shall accrue on the amount of the penalty from the 30th day that amount was due and owing. In the case of an appeal of a civil administrative penalty, if the amount of the penalty is upheld, in whole or in part, the rate of interest shall be calculated on that amount as of the 30th day from the date the amount was due and owing under the administrative order. The rate of interest shall be that established by the New Jersey Supreme Court for interest rates on judgments, as set forth in the Rules Governing

the Courts of the State of New Jersey.

(4) The Department may assess and recover, by civil administrative order, the costs of any investigation, cleanup or removal, and the reasonable costs of preparing and successfully enforcing a civil administrative penalty pursuant to this subsection. The assessment may be recovered at the same time as a civil administrative penalty, and shall be in addition to the penalty assessment.

(d) Any person who violates a provision of P.L.1976, c.141 (C.58:10- 23.11 et seq.), or a court order issued pursuant thereto, or who fails to pay a civil administrative penalty in full or to agree to a schedule of payments therefor, shall be subject to a civil penalty not to exceed \$50,000.00 per day for each violation, and each day's continuance of the violation shall constitute a separate violation. Any penalty incurred under this subsection may be recovered with costs in a summary proceeding pursuant to "the penalty enforcement law" (N.J.S. 2A:58-1 et seq.) in the Superior Court or a municipal court.

e. All conveyances used or intended for use in the willful discharge of any hazardous substance are subject to forfeiture to the State pursuant to the provisions of P.L.1981, c.387 (C. 13:1K-1 et seq.).

#### **58:10-23.11u1 Additional civil penalties**

In addition to the penalties, charges, or other liabilities imposed pursuant to the provisions of P.L.1976, c.141 (C.58:10-23.11 et seq.), any person whose intentional or unintentional act or omission proximately results in an unauthorized releasing, spilling, pumping, pouring, emitting, emptying, or dumping of 100,000 gallons or more of a hazardous substance, or combination of hazardous substances, into the waters or onto the lands of the State, or entering the lands or waters of the State from a discharge occurring outside the jurisdiction of the State, is liable to a civil administrative penalty or civil penalty of not more than \$10,000,000, to be collected in accordance with the procedures set forth in section 22 of P.L.1976, c.141 (C.58:10-23.11u). The penalty provisions of this section are in addition to assessments authorized by law for costs incurred by the State or local governmental agencies in the cleanup and removal of an unauthorized release or discharge, including supervision or oversight of the violator's cleanup activities, or compensation or damages recoverable for the loss of wildlife or destruction of the environment, and the restoration thereof. In assessing a penalty pursuant to this section, the department shall take into account the circumstances of the discharge, the conduct and culpability of the discharger, or both, prior to, during, and after the discharge, and the extent of the harm resulting from the discharge to persons, property, wildlife, or natural resources.

The provisions of this section shall not apply to any discharge which is contained in a containment area or areas approved by, or otherwise meeting the requirements of, the department, or which containment area is designed to, and reasonably capable of preventing the hazardous substance from entering the waters of the State or otherwise entering the lands of the State, except where 100,000 or more gallons of one or more hazardous substances escapes beyond the containment area.

#### **58:10-23.11v Inapplicability of act to pursuit of other remedy; double compensation for same damages or costs; prohibition**

Nothing in this act shall be deemed to preclude the pursuit of any other civil or injunctive remedy by any person. The remedies provided in this act are in addition to those provided by existing statutory or common law, but no person who receives compensation for damages or cleanup costs pursuant to any other State or Federal law shall be permitted to receive compensation for the same damages or cleanup costs under this act.

**58:10-23.11w Severability**

If any section, subsection, provision, clause or portion of this act is adjudged unconstitutional or invalid by a court of competent jurisdiction, the remainder of this act shall not be affected thereby.

**58:10-23.11x Liberal construction**

This act, being necessary for the general health, safety, and welfare of the people of this State, shall be liberally construed to effect its purposes.

**58:10-23.11y Annual report**

The commissioner shall make an annual report to the Legislature and Governor which shall describe the quality and quantity of spills of hazardous substances, the costs and damages paid by and recovered for the fund, and the economic and environmental impact on the State as a result of the administration of this act.

**58:10-23.11y1 Annual report**

The department shall annually submit a written report to the Senate Energy and Environment Committee and to the Assembly Environmental Quality Committee, or their successors, which shall include the information required pursuant to section 26 of P.L.1976, c.141 (C.58:10-23.11y) as well as the list transmitted to the Director of the Division of Taxation in the Department of the Treasury pursuant to section 3 of this amendatory and supplementary act and the list compiled by the department pursuant to section 4 of this amendatory and supplementary act.

**58:10-23.11z Recommendations for amendments to this act to conform with federal legislation**

If the United States Congress enacts legislation providing compensation for the discharge of petroleum and hazardous products, the commissioner shall determine to what degree that legislation provides the needed protection for our citizens, businesses and environment and shall make the appropriate recommendations to the Legislature for amendments to this act.