

Facilitating Cleanup of Hazardous Waste Sites—Hazardous Wastes—Cleanup or Mitigation Services—Indemnification and Defense—Environment—1986 N.J. Sess. Law Serv. 59 (West).

The public is no longer naive to the health and environmental risks posed by the discharge of toxic pollutants. Whether by industry or individuals, or by storage or transfer activities, the discharge of hazardous wastes and products has become a concern shared by most New Jersey residents. Neither has the issue escaped the attention of the New Jersey Legislature. In the last ten years, the legislature has passed a plethora of laws to safeguard human, water, and economic resources of the state from the threat of toxic discharges.

In 1976, the legislature established the Spill Compensation and Control Act.¹ The Spill Act was the first legislation in the state to directly regulate discharges of toxic materials. The Spill Act empowers the state, through the Department of Environmental Protection (DEP), to regulate the transfer and storage of hazardous substances. In addition, the Act authorizes the DEP to seek liability for damages, resulting from discharges of hazardous substances, and to require the prompt containment and removal of discharged materials.

The Spill Act also requires the DEP, in the event a hazardous substance is discharged, to either remove or arrange for the removal of the discharge, or to direct the discharger to do so. All removal efforts must comply with the National Contingency Plan.² The Spill Act precludes actions taken to contain or remove discharges from being construed as admissions of liability. Also, the Act shields persons assisting in the containment of discharges from liability for civil damages resulting from their acts or omissions in providing such assistance, as long as their acts or omissions are not the result of gross negligence or willful misconduct.

In the event a discharge occurs at a hazardous or solid waste disposal facility, the DEP is authorized to close the facility for the

¹ Spill Compensation and Control Act, N.J. STAT. ANN. §§ 58:10 to -23.11 to -23.11z, and -23:12 to -23:24, -23:34 (West Supp. 1986) [hereinafter Spill Act].

² Federal Water Pollution Control Act of 1972, Pub. L. No. 92-500, § 311(c)(2), 86 STAT. 815, 33 U.S.C. § 1321(c) (1977).

duration of the removal operation. Costs incurred by the DEP in its removal efforts are paid from funds provided in the New Jersey Spill Compensation Fund.³ The Spill Act creates this Fund and provides for its funding through state appropriations and taxes on certain hazardous substances. The Fund is also used to compensate businesses and persons damaged by any discharge, and for research, demonstration programs, and administrative expenses. Finally, the Spill Act limits the amount of funds the Administrator may expend for any discharge as well as the time within which funds may be used for removal efforts.

In early 1986, potential contractors were finding it increasingly difficult, and in some cases impossible, to obtain the liability insurance coverage necessary to protect them against claims that might arise as a result of providing hazardous waste cleanup and mitigation services. Consequently, fewer companies were able to obtain bonding⁴ and the DEP had difficulty locating qualified contractors to provide cleanup services. The Hazardous Wastes-Cleanup or Mitigation Services—Indemnification and Defense Act⁵ was enacted in 1986 to meet the insurance needs of these contractors and to alleviate the difficulties the DEP was experiencing in locating qualified contractors.

The Indemnification and Defense Act amends and supplements the Spill Act. It empowers the DEP to provide for the defense and indemnification of certain persons under contract with the state of New Jersey or the federal government to perform hazardous substance cleanup, containment, or removal. The indemnification applies to claims, causes of action, demands, costs, or judgments made against the contractor resulting from the contractor's activities in providing hazardous substance mitigation or cleanup services. The Indemnification and Defense Act authorizes the DEP to enter into agreements to defend and indemnify certain contractors against claims that result after January 1, 1988, and arise from the contractor's mitigation or cleanup services. The claims, however, cannot be predicated on gross negligence, willful misconduct, fraud, intentional tort, bad faith or criminal misconduct.

³ N.J. STAT. ANN. § 58:10-23.11o (West Supp. 1986).

⁴ Bonding is a requirement for contractors performing on state contracts.

⁵ Hazardous Wastes-Cleanup or Mitigation Services-Indemnification and Defense, 1986 N.J. Sess. Law Serv. 59 (West).

In addition, only those contractors unable to obtain liability insurance at a reasonable cost are eligible to receive legal defense and be indemnified by the State, and only the particular contractor providing services may enforce an agreement for defense and indemnification between the contractor and the DEP. The Act does not bar the DEP from enforcing any contractual agreement it might have with a contractor it defends or indemnifies. Nor does the Act preclude the DEP from recovering funds expended in defense of a contractor where the claims are subsequently found to be the result of gross negligence, willful misconduct, fraud, intentional tort, bad faith, or criminal wrongdoing.

All costs incurred by the DEP for legal defense and indemnification of contractors are paid from the New Jersey Spill Compensation Fund.⁶ However, only those funds specifically appropriated from the General Fund may be used. The Indemnification and Defense Act became effective on July 28, 1986, and applies to contracts entered into by the DEP as of July 28, 1986, and prior to that date if work is still in progress.

The Spill Compensation and Control Act⁷ and the Hazardous Wastes-Cleanup or Mitigation Services—Indemnification and Defense Act,⁸ represent significant advances by New Jersey to control and remediate pervasive toxic and hazardous waste problems. These initiatives provide solutions to many hazardous waste concerns. Further, these laws, combined with other initiatives, provide the foundation for a multi-faceted hazardous waste management program capable of addressing New Jersey's future needs.

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⁶ See *supra* note 3.

⁷ See *supra* note 1.

⁸ See *supra* note 5.