

CHAPTER 50

AN ACT concerning hazardous substances, and amending P.L.1976, c.141 and P.L.2002, c.37.

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

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

C.58:10-23.11b Definitions.

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

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

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

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

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

"Cleanup and removal costs" means all direct costs associated with a discharge, and those indirect costs that may be imposed by the department pursuant to section 1 of P.L.2002, c.37 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.);

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

"Department" means the Department of Environmental Protection;

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

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

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

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

"Fund" means the New Jersey Spill Compensation Fund;

"Hazardous substances" means the "environmental hazardous substances" on the environmental hazardous substance list adopted by the department pursuant to section 4 of P.L.1983, c.315 (C.34:5A-4); such elements and compounds, including petroleum products, which are defined as such by the department, after public hearing, and which shall 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.s.1251 et seq.); the list of toxic pollutants designated by Congress or the EPA pursuant to section 307 of that act; and the list of hazardous substances adopted by the federal Environmental Protection Agency pursuant to section 101 of the "Comprehensive Environmental Response, Compensation and Liability Act of 1980,"

Pub.L.96-510 (42 U.S.C.s.9601 et seq.); provided, however, that sewage and sewage sludge shall not be considered as hazardous substances for the purposes of P.L.1976, c.141 (C.58:10-23.11 et seq.);

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

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

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

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

(2) 200,000 gallons or more for hazardous substances of all kinds. In determining whether a facility is a major facility for the purposes of P.L.1976, c.141 (C.58:10-23.11 et seq.), any underground storage tank at the facility used solely to store heating oil for on-site consumption shall not be considered when determining the combined storage capacity of the facility.

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

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

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

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

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

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

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

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

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

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

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

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

"Transfer" means unloading 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 unloading 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.

2. Section 9 of P.L.1976, c.141 (C.58:10-23.11h) is amended to read as follows:

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

9. 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) (a) The tax shall be \$0.023 per barrel transferred and in the case of the transfer of hazardous substances other than petroleum or petroleum products, the tax shall be 1.53% of the fair market value of the product; 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, or which are elemental antimony or antimony trioxide sold for use in the manufacture or for the purpose of fire retardants, the tax shall be \$0.023 per barrel of the hazardous substance; and provided further, however, that the total aggregate tax due for any individual taxpayer facility which has paid the tax in the 1986 tax year shall not exceed 125% of the tax due and payable by that taxpayer facility 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 facility shall pay no more than 100% of the tax due and payable in the 1986 tax year plus an additional \$0.0025 per barrel. For major facilities established by the subdivision of a major facility which existed in 1986, including subsequent owners and operators of the subdivided major facilities, the total aggregated tax due shall not exceed 100% of the tax paid in 1999. For the purposes of applying the 125% of tax due limitation, a successor in interest pursuant to a sale or a reorganization, as defined pursuant to the Internal Revenue Code of 1986, on or before June 1, 2001 shall be entitled to the predecessor taxpayer's limitation. 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 including the successor in interest pursuant to a sale or a reorganization as defined in this paragraph 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 entirely closed and decommissioned 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, or which are elemental antimony or antimony trioxide sold for use in the manufacture or for the purpose of fire retardants, in computing the 125% of the taxes due and payable by the taxpayer during the 1986 tax year, a taxpayer, which shall include any subsequent owner or operator of a major facility which transfers elemental phosphorus, 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.

(b) Notwithstanding any provision of subparagraph (a) of this paragraph to the contrary, in order to qualify for the reduced tax rate for elemental antimony or antimony trioxide sold for use

in the manufacture or for the purpose of fire retardants authorized in that subparagraph, the taxpayer shall demonstrate, by December 31 of each year, to the satisfaction of the Department of the Treasury, acting in cooperation with the Department of Environmental Protection, all of the following: (i) that the taxpayer's sales of the hazardous substance constitute, in the calendar year immediately prior to the first calendar year in which the reduced tax rate shall apply, at least 75% of the taxpayer's total annual income in that immediately prior calendar year; (ii) that no other competitor of the taxpayer located in another state is subject to a tax in that other state, with respect to the hazardous substance, that is substantially similar to the tax imposed thereon pursuant to this section; (iii) that the taxpayer otherwise would suffer economic stress unless the benefit from the reduced tax rate is allowed; (iv) that the taxpayer has never filed a successful claim against the New Jersey Spill Compensation Fund; (v) that the taxpayer has never discharged a hazardous substance that required cleanup and removal in accordance with P.L.1976, c.141 (C.58:10-23.11 et seq.); and (vi) that, upon request of the State Treasurer, the taxpayer's accountant or counsel can provide a certified document detailing, with respect to the hazardous substance, the amount of tax that would have been paid each calendar year by the taxpayer had the reduced tax rate not been in effect and the amount that was actually paid each calendar year under the reduced tax rate, so that the State Treasurer may calculate the loss of tax revenue, if any, to the State attributable to the reduced tax rate. If the taxpayer fails to qualify under the provisions of this subparagraph for the reduced tax rate, the taxpayer shall pay, for that calendar year, the tax at the full rate imposed pursuant to subparagraph (a) of this paragraph.

(c) 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.

(3) Those hazardous substances determined by the Department of Environmental Protection not to be subject to regulation pursuant to P.L.1976, c.141 (C.58:10-23.11 et seq.) or P.L.1990, c.78 shall not be subject to taxation pursuant to this section.

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 this section.

h. The tax imposed by this act shall be governed in all respects by the provisions of the "State Uniform Tax 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.)

3. For any transfer of a hazardous substance subject to the tax imposed pursuant to section 9 of P.L.1976, c.141 (C.58:10-23.11h) and occurring on or after January 1, 2004, a taxpayer shall file an amended tax return on or before the third month following the date of enactment of this act and shall pay the additional taxes owed on transfers occurring between January 1, 2004 and the date of enactment of this act.

4. Section 3 of P.L.2002, c.37 is amended to read as follows:

3. This act shall take effect immediately.

5. Sections 1 and 4 of this act shall take effect on June 30, 2004, section 2 of this act shall take effect immediately, shall be retroactive to January 1, 2004 and shall apply to all transfers of hazardous substances occurring on or after January 1, 2004, and section 3 shall take effect immediately; provided, however, that if this act is enacted after June 30, 2004, sections 1 and 4 shall be retroactive to June 30, 2004.

Approved June 29, 2004.