

CHAPTER 300

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

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

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

C.58:10B-13.1 No further action letter; covenant not to sue.

6. a. Whenever on or after October 16, 2009 the Department of Environmental Protection issues a no further action letter pursuant to a remediation, the person responsible for conducting the remediation shall be deemed by operation of law to have received a covenant not to sue with respect to the real property upon which the remediation has been conducted. The covenant not to sue shall be consistent with any conditions and limitations contained in the no further action letter. The covenant not to sue shall be for any area of concern remediated and may apply to the entire real property if the remediation included a preliminary assessment and, if necessary, a site investigation of the entire real property, and any other necessary remedial actions. The covenant remains effective only for as long as the real property for which the covenant was issued continues to meet the conditions of the no further action letter. Upon a finding by the department that real property or a portion thereof to which a covenant not to sue pertains, no longer meets with the conditions of the no further action letter, the department shall provide notice of that fact to the person responsible for maintaining compliance with the no further action letter. The department may allow the person a reasonable time to come into compliance with the terms of the original no further action letter. If the property does not meet the conditions of the no further action letter and if the department does not allow for a period of time to come into compliance or if the person fails to come into compliance within the time period, the covenant not to sue shall be deemed to be revoked by operation of law.

Except as provided in subsection e. of this section, a covenant not to sue shall by operation of law provide for the following, as applicable:

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

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

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

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

(3) for a remediation that involves the use of engineering controls but not for any remediation that involves the use of institutional controls only, a provision barring the person or persons whom the covenant not to sue benefits, from making a claim against the New Jersey Spill Compensation Fund and the Sanitary Landfill Facility Contingency Fund for any costs or damages relating to the real property and remediation covered by the covenant not to sue. The covenant not to sue shall not bar a claim by any person against the New Jersey Spill

Compensation Fund and the Sanitary Landfill Contingency Fund for any remediation that involves only the use of institutional controls if, after a valid no further action letter has been issued, the department orders additional remediation, except that the covenant shall bar such a claim if the department ordered additional remediation in order to remove the institutional control.

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

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

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

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

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

(2) The department may issue a covenant not to sue that is consistent with the provisions of this section when it issues a no further action letter for a remediation of a discharge from an unregulated heating oil tank.

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

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

Approved January 17, 2010.