S T A T E O F N E W Y O R K

5418--B

2011-2012 Regular Sessions

I N S E N A T E

May 19, 2011

Introduced by Sens. GRISANTI, MAZIARZ, RITCHIE -- read twice and ordered printed, and when printed to be committed to the Committee on Environmental Conservation -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- recommitted to the Committee on Environmental Conservation in accordance with Senate Rule 6, sec. 8 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the navigation law, in relation to responsible parties for petroleum contaminated sites and incentives to parties who are willing to remediate petroleum contaminated sites

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Paragraph (a) of subdivision 2 of section 176 of the navigation law, as amended by chapter 584 of the laws of 1992, is amended to read as follows:

(a) Upon the occurrence of a discharge of petroleum, the department shall respond promptly and proceed to cleanup and remove the discharge in accordance with environmental priorities or may, at its discretion, direct the discharger to promptly cleanup and remove the discharge. IF A PERSON THE DEPARTMENT DEEMS A DISCHARGER, AND THUS DIRECTS TO CLEANUP AND REMOVE THE DISCHARGE PURSUANT TO THIS SECTION PRESENTS THE DEPARTMENT WITH EVIDENCE THAT A THIRD PARTY IS SOLELY RESPONSIBLE FOR THE DISCHARGE AND REQUESTS THE DEPARTMENT TO DETERMINE WHETHER THE EVIDENCE ESTABLISHES THE THIRD PARTY IS IN FACT SOLELY RESPONSIBLE, THE DEPARTMENT SHALL, WITHIN THIRTY DAYS OF RECEIPT OF SUCH REQUEST, DETERMINE IN WRITING EITHER THAT THE THIRD PARTY: (I) SHALL BE DEEMED A DISCHARGER BY THE DEPARTMENT, AND SHALL BE DIRECTED TO UNDERTAKE THE CLEANUP AND REMOVAL OF THE DISCHARGE; OR (II) WILL NOT BE DEEMED A DISCHARGER BY THE DEPARTMENT BECAUSE THE INFORMATION PRESENTED DOES NOT ESTABLISH THE RESPONSIBILITY OF THE THIRD PARTY BY A PREPONDERANCE OF THE EVIDENCE. IF THE DEPARTMENT DETERMINES THAT THE PERSON THE DEPARTMENT INITIALLY DEEMS

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD11700-04-2

A DISCHARGER AND THE THIRD PARTY ARE BOTH DISCHARGERS, THE DEPARTMENT SHALL, WITHIN THIRTY DAYS OF SUCH REQUEST, ADVISE EACH OF THE PARTIES THAT THEY ARE DEEMED DISCHARGERS SUBJECT TO APPORTIONMENT OF LIABILITY FOR THE DISCHARGE PURSUANT TO SUBDIVISIONS ONE AND TWO OF SECTION ONE HUNDRED EIGHTY OF THIS ARTICLE. The department shall be responsible for cleanup and removal or as the case may be, for retaining agents and contractors who shall operate under the direction of that department for such purposes. Implementation of cleanup and removal procedures after each discharge shall be conducted in accordance with environmental priorities and procedures established by the department.

S 2. Subdivision 8 of section 176 of the navigation law, as added by chapter 712 of the laws of 1989, is amended and a new subdivision 9 is added to read as follows:

8. Notwithstanding any other provision of law to the contrary, including but not limited to SUBDIVISION (C) OF section 15-108 of the general obligations law, every person providing cleanup, removal of discharge of petroleum or relocation of persons pursuant to this section shall be entitled to contribution from any other responsible party.

9. THE FOLLOWING SHALL NOT BE DEEMED A FINAL AGENCY ACTION SUBJECT TO REVIEW PURSUANT TO ARTICLE SEVENTY-EIGHT OF THE CIVIL PRACTICE LAW AND RULES, AND SHALL NOT HAVE A BINDING EFFECT ON ANY PARTY IN PENDING OR FUTURE PROCEEDINGS REGARDING THE DISCHARGE: (A) A DETERMINATION OR ACTION OF THE DEPARTMENT PURSUANT TO SUBDIVISION ONE, TWO, OR THREE OF THIS SECTION, INCLUDING BUT NOT LIMITED TO, A DETERMINATION OF THE REASONABLENESS OF ANY COSTS INCURRED; (B) A DETERMINATION OR ACTION OF THE ADMINISTRATOR PURSUANT TO SECTION ONE HUNDRED EIGHTY, ONE HUNDRED EIGHTY-ONE-A, OR ONE HUNDRED EIGHTY-THREE OF THIS ARTICLE, INCLUDING THE FILING OF AN ENVIRONMENTAL LIEN.

S 3. Subdivisions 1 and 2 of section 180 of the navigation law, subdivision 1 as added by chapter 845 of the laws of 1977 and subdivision 2 as amended by chapter 672 of the laws of 1991, are amended to read as follows:

1. To represent the state in meetings with the alleged discharger OR DISCHARGERS and claimants concerning liability for the discharge and amount of the claims, AND, IF THERE IS MORE THAN ONE DISCHARGER IN A MEETING, TO APPORTION LIABILITY FOR THE DISCHARGE;

2. To determine if hearings are needed to settle particular claims filed by injured persons AND TO APPORTION LIABILITY BETWEEN AND AMONG DISCHARGERS;

S 4. Subdivision 1 of section 181 of the navigation law, as amended by chapter 712 of the laws of 1989, is amended and a new subdivision 7 is added to read as follows:

1. (A) Any person who has discharged petroleum shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained, as defined in this section, UNLESS THE LIABILITY LIMITATION AS DESCRIBED UNDER PARAGRAPH (B) OF THIS SUBDIVISION APPLIES. In addition to cleanup and removal costs and damages, any such person who is notified of such release and who did not undertake relocation of persons residing in the area of the discharge in accordance with paragraph (c) of subdivision seven of section one hundred seventy-six of this article, shall be liable to the fund for an amount equal to two times the actual and necessary expense incurred by the fund for such relocation pursuant to section one hundred seventy-seven-a of this article.

(B) (I) ANY PERSON WHO AGREES TO REMEDIATE THE DISCHARGE TO THE SATISFACTION OF THE DEPARTMENT, AND IN CONFORMANCE WITH THIS ARTICLE, SHALL

BE ENTITLED TO RECEIVE LIABILITY LIMITATION. SUCH AGREEMENT SHALL BE CALLED THE LIABILITY LIMITATION AGREEMENT AND SHALL BE WRITTEN AND EXECUTED BY BOTH THE DEPARTMENT AND SUCH PERSON. AFTER EXECUTION OF THE LIABILITY LIMITATION AGREEMENT, SUCH PERSON SHALL NOT BE LIABLE TO THE STATE UPON ANY STATUTORY OR COMMON LAW CAUSE OF ACTION, ARISING OUT OF THE PRESENCE OF ANY CONTAMINATION IN, ON, OR EMANATING FROM THE SITE THAT WAS THE SUBJECT OF THE LIABILITY LIMITATION, EXCEPT THAT SUCH PERSON SHALL NOT RECEIVE A RELEASE FOR NATURAL RESOURCE DAMAGES THAT MAY BE AVAILABLE UNDER LAW. THE LIABILITY LIMITATION 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, PROVIDED THAT SUCH PERSONS ACT WITH DUE CARE AND IN GOOD FAITH TO ADHERE TO THE REQUIREMENTS OF THE LIABILITY LIMITATION AGREEMENT.

(II) A LIABILITY LIMITATION AGREEMENT AND THE PROTECTIONS IT AFFORDS SHALL NOT APPLY TO ANY DISCHARGE THAT OCCURS SUBSEQUENT TO THE EXECUTION OF THE LIABILITY LIMITATION AGREEMENT, NOR SHALL A LIABILITY LIMITATION AGREEMENT AND THE PROTECTIONS IT AFFORDS RELIEVE ANY PERSON OF THE OBLIGATIONS TO COMPLY IN THE FUTURE WITH LAWS AND REGULATIONS. THE STATE NONETHELESS SHALL RESERVE ALL OF ITS RIGHTS CONCERNING, AND SUCH LIABILITY LIMITATION SHALL NOT EXTEND TO, ANY FURTHER INVESTIGATION AND/OR REMEDIATION THE DEPARTMENT DEEMS NECESSARY DUE TO FRAUD, NONCOMPLIANCE WITH THE TERMS THAT FORMED THE LIABILITY LIMITATION AGREEMENT, OR A WRITTEN FINDING BY THE DEPARTMENT THAT A CHANGE IN AN ENVIRONMENTAL STANDARD, FACTOR, OR CRITERION UPON WHICH THE LIABILITY LIMITATION AGREEMENT WAS BASED WOULD RENDER REMEDIATION ACTIVITIES NO LONGER PROTECTIVE OF PUBLIC HEALTH OR THE ENVIRONMENT. NOTHING IN THIS SECTION SHALL AFFECT THE LIABILITY OF THE PERSON RESPONSIBLE FOR SUCH PERSON'S OWN ACTS OR OMISSIONS CAUSING WRONGFUL DEATH OR PERSONAL INJURY. NOTHING IN THIS SECTION SHALL AFFECT THE LIABILITY OF ANY PERSON WITH RESPECT TO ANY CIVIL ACTION BROUGHT BY A PARTY OTHER THAN THE STATE. THE PROVISIONS OF THIS SECTION SHALL NOT AFFECT AN ACTION OR A CLAIM, INCLUDING A STATUTORY OR COMMON LAW CLAIM FOR CONTRIBUTION OR INDEMNIFICATION, THAT SUCH PERSON HAS OR MAY HAVE AGAINST A THIRD PARTY.

7. NOTWITHSTANDING ANY OTHER PROVISION OF THIS SECTION, A PUBLIC CORPORATION SHALL NOT BE LIABLE FOR THE DISCHARGE OF PETROLEUM AT A SITE IF SUCH PUBLIC CORPORATION ACQUIRED SUCH SITE INVOLUNTARILY, AND SUCH PUBLIC CORPORATION RETAINED SUCH SITE WITHOUT PARTICIPATING IN THE DEVELOPMENT OF SUCH SITE. THIS EXEMPTION SHALL NOT APPLY TO ANY PUBLIC CORPORATION THAT HAS (A) CAUSED OR CONTRIBUTED TO THE DISCHARGE OF PETROLEUM FROM OR AT THE SITE, (B) PURCHASED, SOLD, REFINED, TRANSPORTED, OR DISCHARGED PETROLEUM FROM OR AT SUCH SITE, OR (C) CAUSED THE PURCHASE, SALE, REFINEMENT, TRANSPORTATION, OR DISCHARGE OF PETROLEUM FROM OR AT SUCH SITE. THE TERMS "PARTICIPATION IN DEVELOPMENT," "PUBLIC CORPORATION" AND "INVOLUNTARY ACQUISITION OF OWNERSHIP OR CONTROL" SHALL HAVE THE SAME MEANING AS THOSE TERMS ARE DEFINED IN PARAGRAPHS (C), (D) AND (E) OF SUBDIVISION TWO OF SECTION 27-1323 OF THE ENVIRONMENTAL CONSERVATION LAW. HOWEVER, "PARTICIPATION IN DEVELOPMENT" SHALL NOT INCLUDE IMPROVEMENTS WHICH ARE PART OF A CLEANUP AND REMOVAL OF A DISCHARGE OF PETROLEUM PURSUANT TO THIS ARTICLE.

S 5. Section 183 of the navigation law, as added by chapter 845 of the laws of 1977, is amended to read as follows:

S 183. Settlements. The administrator shall attempt to promote and arrange a settlement between the claimant and the person OR PERSONS responsible for the discharge. If the source of the discharge can be determined and liability is conceded, the claimant and the alleged discharger OR DISCHARGERS may agree to a settlement which shall be final

and binding upon the parties and which will waive all recourse against the fund. TO THE EXTENT AN ALLEGED DISCHARGER PRESENTS EVIDENCE TO THE ADMINISTRATOR THAT ANOTHER PARTY IS WHOLLY OR PARTIALLY RESPONSIBLE FOR THE CLAIM, AND REQUESTS THE ADMINISTRATOR TO CONSIDER WHETHER SUCH INFORMATION PRESENTED ESTABLISHES BY A PREPONDERANCE OF THE EVIDENCE THAT THE THIRD PARTY IS IN FACT WHOLLY OR PARTIALLY RESPONSIBLE, THE ADMINISTRATOR WITHIN THIRTY DAYS OF RECEIPT OF SUCH REQUEST SHALL EITHER DETERMINE: (1) IN WRITING, IF THE THIRD PARTY SHALL BE DEEMED AN ADDITIONAL DISCHARGER TO ANY PENDING OR ANTICIPATED CLAIM OR (2) IF AN ADMINISTRATIVE HEARING AS TO LIABILITY IS NECESSARY.

S 6. This act shall take effect immediately.