

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

8192--A

2011-2012 Regular Sessions

I N A S S E M B L Y

June 6, 2011

Introduced by M. of A. SCHIMMINGER -- read once and referred to the Committee on Environmental Conservation -- recommitted to the Committee on Environmental Conservation in accordance with Assembly Rule 3, sec. 2 -- 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:

1 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
2 read as follows:
3 (a) Upon the occurrence of a discharge of petroleum, the department
4 shall respond promptly and proceed to cleanup and remove the discharge
5 in accordance with environmental priorities or may, at its discretion,
6 direct the discharger to promptly cleanup and remove the discharge. IF
7 A PERSON THE DEPARTMENT DEEMS A DISCHARGER, AND THUS DIRECTS TO CLEANUP
8 AND REMOVE THE DISCHARGE PURSUANT TO THIS SECTION PRESENTS THE DEPARTMENT
9 WITH EVIDENCE THAT A THIRD PARTY IS SOLELY RESPONSIBLE FOR THE
10 DISCHARGE AND REQUESTS THE DEPARTMENT TO DETERMINE WHETHER THE EVIDENCE
11 ESTABLISHES THE THIRD PARTY IS IN FACT SOLELY RESPONSIBLE, THE DEPARTMENT
12 SHALL, WITHIN THIRTY DAYS OF RECEIPT OF SUCH REQUEST, DETERMINE IN
13 WRITING EITHER THAT THE THIRD PARTY: (I) SHALL BE DEEMED A DISCHARGER BY
14 THE DEPARTMENT, AND SHALL BE DIRECTED TO UNDERTAKE THE CLEANUP AND
15 REMOVAL OF THE DISCHARGE; OR (II) WILL NOT BE DEEMED A DISCHARGER BY THE
16 DEPARTMENT BECAUSE THE INFORMATION PRESENTED DOES NOT ESTABLISH THE
17 RESPONSIBILITY OF THE THIRD PARTY BY A PREPONDERANCE OF THE EVIDENCE. IF
18 THE DEPARTMENT DETERMINES THAT THE PERSON THE DEPARTMENT INITIALLY DEEMS
19 A DISCHARGER AND THE THIRD PARTY ARE BOTH DISCHARGERS, THE DEPARTMENT
20 SHALL, WITHIN THIRTY DAYS OF SUCH REQUEST, ADVISE EACH OF THE PARTIES
21

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

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1 THAT THEY ARE DEEMED DISCHARGERS SUBJECT TO APPORTIONMENT OF LIABILITY
2 FOR THE DISCHARGE PURSUANT TO SUBDIVISIONS ONE AND TWO OF SECTION ONE
3 HUNDRED EIGHTY OF THIS ARTICLE. The department shall be responsible for
4 cleanup and removal or as the case may be, for retaining agents and
5 contractors who shall operate under the direction of that department for
6 such purposes. Implementation of cleanup and removal procedures after
7 each discharge shall be conducted in accordance with environmental
8 priorities and procedures established by the department.

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

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

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

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

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

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

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

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

53 (B) (I) ANY PERSON WHO AGREES TO REMEDIATE THE DISCHARGE TO THE SATIS-
54 FACTION OF THE DEPARTMENT, AND IN CONFORMANCE WITH THIS ARTICLE, SHALL
55 BE ENTITLED TO RECEIVE LIABILITY LIMITATION. SUCH AGREEMENT SHALL BE
56 CALLED THE LIABILITY LIMITATION AGREEMENT AND SHALL BE WRITTEN AND

1 EXECUTED BY BOTH THE DEPARTMENT AND SUCH PERSON. AFTER EXECUTION OF THE
2 LIABILITY LIMITATION AGREEMENT, SUCH PERSON SHALL NOT BE LIABLE TO THE
3 STATE UPON ANY STATUTORY OR COMMON LAW CAUSE OF ACTION, ARISING OUT OF
4 THE PRESENCE OF ANY CONTAMINATION IN, ON, OR EMANATING FROM THE SITE
5 THAT WAS THE SUBJECT OF THE LIABILITY LIMITATION, EXCEPT THAT SUCH
6 PERSON SHALL NOT RECEIVE A RELEASE FOR NATURAL RESOURCE DAMAGES THAT MAY
7 BE AVAILABLE UNDER LAW. THE LIABILITY LIMITATION SHALL APPLY TO ALL
8 SUCCESSORS IN OWNERSHIP OF THE PROPERTY AND TO ALL PERSONS WHO LEASE THE
9 PROPERTY OR WHO ENGAGE IN OPERATIONS ON THE PROPERTY, PROVIDED THAT SUCH
10 PERSONS ACT WITH DUE CARE AND IN GOOD FAITH TO ADHERE TO THE REQUIRE-
11 MENTS OF THE LIABILITY LIMITATION AGREEMENT.

12 (II) A LIABILITY LIMITATION AGREEMENT AND THE PROTECTIONS IT AFFORDS
13 SHALL NOT APPLY TO ANY DISCHARGE THAT OCCURS SUBSEQUENT TO THE EXECUTION
14 OF THE LIABILITY LIMITATION AGREEMENT, NOR SHALL A LIABILITY LIMITATION
15 AGREEMENT AND THE PROTECTIONS IT AFFORDS RELIEVE ANY PERSON OF THE OBLI-
16 GATIONS TO COMPLY IN THE FUTURE WITH LAWS AND REGULATIONS. THE STATE
17 NONETHELESS SHALL RESERVE ALL OF ITS RIGHTS CONCERNING, AND SUCH LIABIL-
18 ITY LIMITATION SHALL NOT EXTEND TO, ANY FURTHER INVESTIGATION AND/OR
19 REMEDIATION THE DEPARTMENT DEEMS NECESSARY DUE TO FRAUD, NONCOMPLIANCE
20 WITH THE TERMS THAT FORMED THE LIABILITY LIMITATION AGREEMENT, OR A
21 WRITTEN FINDING BY THE DEPARTMENT THAT A CHANGE IN AN ENVIRONMENTAL
22 STANDARD, FACTOR, OR CRITERION UPON WHICH THE LIABILITY LIMITATION
23 AGREEMENT WAS BASED WOULD RENDER REMEDIATION ACTIVITIES NO LONGER
24 PROTECTIVE OF PUBLIC HEALTH OR THE ENVIRONMENT. NOTHING IN THIS SECTION
25 SHALL AFFECT THE LIABILITY OF THE PERSON RESPONSIBLE FOR SUCH PERSON'S
26 OWN ACTS OR OMISSIONS CAUSING WRONGFUL DEATH OR PERSONAL INJURY. NOTHING
27 IN THIS SECTION SHALL AFFECT THE LIABILITY OF ANY PERSON WITH RESPECT TO
28 ANY CIVIL ACTION BROUGHT BY A PARTY OTHER THAN THE STATE. THE PROVISIONS
29 OF THIS SECTION SHALL NOT AFFECT AN ACTION OR A CLAIM, INCLUDING A STAT-
30 UTORY OR COMMON LAW CLAIM FOR CONTRIBUTION OR INDEMNIFICATION, THAT SUCH
31 PERSON HAS OR MAY HAVE AGAINST A THIRD PARTY.

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

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

50 S 183. Settlements. The administrator shall attempt to promote and
51 arrange a settlement between the claimant and the person OR PERSONS
52 responsible for the discharge. If the source of the discharge can be
53 determined and liability is conceded, the claimant and the alleged
54 discharger OR DISCHARGERS may agree to a settlement which shall be final
55 and binding upon the parties and which will waive all recourse against
56 the fund. TO THE EXTENT AN ALLEGED DISCHARGER PRESENTS EVIDENCE TO THE

1 ADMINISTRATOR THAT ANOTHER PARTY IS WHOLLY OR PARTIALLY RESPONSIBLE FOR
2 THE CLAIM, AND REQUESTS THE ADMINISTRATOR TO CONSIDER WHETHER SUCH
3 INFORMATION PRESENTED ESTABLISHES BY A PREPONDERANCE OF THE EVIDENCE
4 THAT THE THIRD PARTY IS IN FACT WHOLLY OR PARTIALLY RESPONSIBLE, THE
5 ADMINISTRATOR WITHIN THIRTY DAYS OF RECEIPT OF SUCH REQUEST SHALL EITHER
6 DETERMINE: (1) IN WRITING, IF THE THIRD PARTY SHALL BE DEEMED AN ADDI-
7 TIONAL DISCHARGER TO ANY PENDING OR ANTICIPATED CLAIM OR (2) IF AN
8 ADMINISTRATIVE HEARING AS TO LIABILITY IS NECESSARY.
9 S 6. This act shall take effect immediately.