

**§ 181. Liability.** 1. 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. 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.

2. The fund 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, including, but not limited to:

(a) The cost of restoring, repairing, or replacing any real or personal property damaged or destroyed by a discharge, any income lost from the time such property is damaged to the time such property is restored, repaired or replaced, any reduction in value of such property caused by such discharge by comparison with its value prior thereto;

(b) The cost of restoration and replacement, where possible, of any natural resource damaged or destroyed by a discharge;

(c) Loss of income or impairment of earning capacity due to damage to real or personal property, including natural resources destroyed or damaged by a discharge; provided that such loss or impairment exceeds ten percent of the amount which claimant derives, based upon income or business records, exclusive of other sources of income, from activities related to the particular real or personal property or natural resources damaged or destroyed by such discharge during the week, month or year for which the claim is filed;

(d) Loss of tax revenue by the state or local governments for a period of one year due to damage to real or personal property proximately resulting from a discharge;

(e) Interest on loans obtained or other obligations incurred by a claimant for the purpose of ameliorating the adverse effects of a discharge pending the payment of a claim in full as provided by this article.

3. (a) The owner or operator of a major facility or vessel which has discharged petroleum shall be strictly liable, without regard to fault, subject to the defenses enumerated in subdivision four of this section, for all cleanup and removal costs and all direct and indirect damages paid by the fund. However, the cleanup and removal costs and direct and indirect damages which may be recovered by the fund with respect to each incident shall not exceed:

(i) for a tank vessel, the greater of:

(1) one thousand two hundred dollars per gross ton; or

(2) (A) in the case of a vessel greater than three thousand gross tons, ten million dollars; or

(B) in the case of a vessel or three thousand gross tons or less, two million dollars;

(ii) for any other vessel subject to the liability limits set forth in the Federal Oil Pollution Act of 1990 (33 U.S.C. 2701 et seq.), six hundred dollars per gross ton or five hundred thousand dollars, whichever is greater;

(iii) for any other vessel not subject to the liability limits set forth in the Federal Oil Pollution Act of 1990 (33 U.S.C. 2701 et seq.), three hundred dollars per gross ton for each vessel;

(iv) for a major facility that is defined as an "onshore facility" and covered by the liability limits established under the Federal Oil Pollution Act of 1990 (33 U.S.C. 2701 et seq.), three hundred fifty million dollars. This liability limit shall not be considered to increase the liability above the federal limit of three hundred fifty million dollars per incident.

(v) for a major facility not covered in subparagraph (iv) of this paragraph, fifty million dollars.

(b) The liability limits established in subparagraphs (i) and (ii) of paragraph (a) of this subdivision shall not be considered to increase liability above the federal limits for tank vessels or vessels as defined in the Federal Oil Pollution Act of 1990 (33 U.S.C. 2701 et seq.).

(c) (i) The department shall establish, by regulation, a limit of liability under this subdivision of less than three hundred fifty million dollars but not less than eight million dollars, for major

facilities defined as "onshore facilities" under the Federal Oil Pollution Act of 1990 (33 U.S.C. 2701 et seq.), taking into account facility size, storage capacity, throughput, proximity to environmentally sensitive areas, type of petroleum handled, and other factors relevant to risks posed by the class or category of facility.

(ii) The department shall establish, by regulation, a limit of liability under this subdivision of fifty million dollars or less for major facilities other than vessels that are not defined as "onshore facilities" under the Federal Oil Pollution Act of 1990 (33 U.S.C. 2701 et seq.), taking into account facility size, storage capacity, throughput, proximity to environmentally sensitive areas, type of petroleum handled, and other factors relevant to risks posed by the class or category of facility.

(d) The provisions of paragraph (a) of this subdivision shall not apply and the owner or operator shall be liable for the full amount of cleanup and removal costs and damages if it can be shown that the discharge was the result of (i) gross negligence or willful misconduct, within the knowledge and privity of the owner, operator or person in charge, or (ii) a gross or willful violation of applicable safety, construction or operating standards or regulations. In addition, the provisions of paragraph (a) of this subdivision shall not apply if the owner or operator fails or refuses:

(1) to report the discharge as required by section one hundred seventy-five of this article and the owner or operator knows or had reason to know of the discharge; or

(2) to provide all reasonable cooperation and assistance requested by the federal on-scene coordinator or the commissioner or his designee in connection with cleanup and removal activities.

(e) (i) The owner or operator of a vessel shall establish and maintain with the department evidence of financial responsibility sufficient to meet the amount of liability established pursuant to paragraph (a) of this subdivision. The owner or operator of any vessel which demonstrates financial responsibility pursuant to the requirements of the Federal Oil Pollution Act of 1990 (33 U.S.C. 2701 et seq.), shall be deemed to have demonstrated financial responsibility in accordance with this paragraph.

(ii) The commissioner in consultation with the superintendent of financial services may promulgate regulations requiring the owner or

operator of a major facility other than a vessel to establish and maintain evidence of financial responsibility in an amount not to exceed twenty-five dollars, per incident, for each barrel of total petroleum storage capacity at the facility, subject to a maximum of one million dollars per incident per facility in an aggregate not to exceed two million dollars per facility per year; provided, however, that if the owner or operator establishes to the satisfaction of the commissioner that a lesser amount will be sufficient to protect the environment and public health, safety and welfare, the commissioner shall accept evidence of financial responsibility in such lesser amount. In determining the sufficiency of the amount of financial responsibility required under this section, the commissioner and the superintendent of financial services shall take into consideration facility size, storage capacity, throughput, proximity to environmentally sensitive areas, type of petroleum handled, and other factors relevant to the risks posed by the class or category of facility, as well as the availability and affordability of pollution liability insurance. Any regulations promulgated pursuant to this subparagraph shall not take effect until forty-eight months after the effective date of this section.

(iii) Financial responsibility under this paragraph may be established by any one or a combination of the following methods acceptable to the commissioner in consultation with the superintendent of financial services: evidence of insurance, surety bonds, guarantee, letter of credit, qualification as a self-insurer, or other evidence of financial responsibility, including certifications which qualify under the Federal Oil Pollution Act of 1990 (33 U.S.C. 2701 et seq.).

(iv) The liability of a third-party insurer providing proof of financial responsibility on behalf of a person required to establish and maintain evidence of financial responsibility under this section is limited to the type of risk assumed and the amount of coverage specified in the proof of financial responsibility furnished to and approved by the department. For the purposes of this section, the term "third-party insurer" means a third-party insurer, surety, guarantor, person furnishing a letter of credit, or other group or person providing proof of financial responsibility on behalf of another person; it does not include the person required to establish and maintain evidence of such financial responsibility.

4. (a) The only defenses that may be raised by a person responsible for a discharge of petroleum are: an act or omission caused solely by (i) war, sabotage, or governmental negligence or (ii) an act or omission of a third party other than an employee or agent of the person responsible, or a third party whose act or omission occurs in connection with a contractual relationship with the person responsible, if the person responsible establishes by a preponderance of the evidence that the person responsible (a) exercised due care with respect to the petroleum concerned, taking into consideration the characteristics of petroleum and in light of all relevant facts and circumstances; and (b) took precautions against the acts or omissions of any such third party and the consequences of those acts or omissions. These defenses shall not apply to a person responsible who refuses or fails to (a) report the discharge, or (b) provide all reasonable cooperation and assistance in cleanup and removal activities undertaken on behalf of the fund by the department. In any case where a person responsible for a discharge establishes by a preponderance of the evidence that a discharge and the resulting cleanup and removal costs were caused solely by an act or omission of one or more third parties as described above, the third party or parties shall be treated as the person or persons responsible for the purposes of determining liability under this article.

(b) Nothing set forth in this subdivision shall be construed to hold a lender liable to the state as a person responsible for the discharge of petroleum at a site in the event: (i) such lender, without participating in the management of such site, holds indicia of ownership primarily to protect the lender's security interest in the site, or (ii) such lender did not participate in the management of such site prior to a foreclosure, and such lender:

(1) forecloses on such site; and

(2) after foreclosure, sells, re-leases (in the case of a lease finance transaction), or liquidates such site, maintains business activities, winds up operations, or takes any other measure to preserve, protect or prepare such site for sale or disposition; provided however, that such lender shall take actions to sell, re-lease (in the case of a lease finance transaction), or otherwise divest itself of such site at the earliest practicable, commercially reasonable time, on commercially

reasonable terms, taking into account market conditions and legal and regulatory requirements.

(c) This exemption shall not apply to any lender that has (i) caused or contributed to the discharge of petroleum from or at the site, (ii) purchased, sold, refined, transported, or discharged petroleum from or at such site, or (iii) caused the purchase, sale, refinement, transportation, or discharge of petroleum from or at such site.

The terms "participating in management," "foreclosure," "lender" and "security interest" shall have the same meaning as those terms are defined in paragraph (c) of subdivision one of section 27-1323 of the environmental conservation law.

5. Any claim by any injured person for the costs of cleanup and removal and direct and indirect damages based on the strict liability imposed by this section may be brought directly against the person who has discharged the petroleum, provided, however, that damages recoverable by any injured person in such a direct claim based on the strict liability imposed by this section shall be limited to the damages authorized by this section.

6. Notwithstanding any other provision of this section, a volunteer firefighter, volunteer fire company, volunteer fire district, volunteer fire protection district, or volunteer fire department shall not be strictly liable for discharged petroleum when such discharge results from such volunteer firefighter, volunteer fire company, volunteer fire district, volunteer fire protection district, or volunteer fire department performing his, her, or their firefighting duties and there is not a showing of willful or gross negligence. This subdivision shall not be construed to provide an exemption from liability for a discharge of petroleum on or from real or personal property owned, leased, or operated by any such volunteer fire company, volunteer fire district, volunteer fire protection district, or volunteer fire department.