

ASSEMBLY, No. 3117

STATE OF NEW JERSEY 211th LEGISLATURE

INTRODUCED JUNE 21, 2004

Sponsored by:

Assemblyman JOHN F. MCKEON

District 27 (Essex)

SYNOPSIS

Makes certain changes to taxes and fees imposed for hazardous substance transfers and discharges.

CURRENT VERSION OF TEXT

As introduced.



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

3

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

6

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

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

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

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

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

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

22 "Cleanup and removal costs" means all direct costs associated with
23 a discharge, and those indirect costs that may be imposed by the
24 department pursuant to section 1 of P.L.2002, c.37 associated with a
25 discharge, incurred by the State or its political subdivisions or their
26 agents or any person with written approval from the department in the:
27 (1) removal or attempted removal of hazardous substances, or (2)
28 taking of reasonable measures to prevent or mitigate damage to the
29 public health, safety, or welfare, including, but not limited to, public
30 and private property, shorelines, beaches, surface waters, water
31 columns and bottom sediments, soils and other affected property,
32 including wildlife and other natural resources, and shall include costs
33 incurred by the State for the indemnification and legal defense of
34 contractors pursuant to sections 1 through 11 of P.L.1991, c.373
35 (C.58:10-23.11f8 et seq.)**[** For the fiscal year beginning on July 1,
36 2004, for the purposes of this definition, costs incurred by the State
37 shall not include any indirect costs for department oversight performed
38 after June 30, 2004, but may include only those program costs directly
39 related to the cleanup and removal of the discharge; however,
40 whenever the State or the fund have expended money for the cleanup
41 and removal of a discharge and are seeking to recover the costs
42 incurred in that cleanup and removal action from a responsible party,
43 costs incurred by the State shall include any indirect costs**]**;

EXPLANATION - Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

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1 "Commissioner" means the Commissioner of Environmental
2 Protection; "Contamination" or "contaminant" means any discharged
3 hazardous substance, hazardous waste as defined pursuant to section
4 1 of P.L.1976, c.99 (C.13:1E-38), or pollutant as defined pursuant to
5 section 3 of P.L.1977, c.74 (C.58:10A-3);

6 "Department" means the Department of Environmental Protection;

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

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

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

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

25 "Fund" means the New Jersey Spill Compensation Fund;

26 "Hazardous substances" means the "environmental hazardous
27 substances" on the environmental hazardous substance list adopted by
28 the department pursuant to section 4 of P.L.1983, c.315 (C.34:5A-4);
29 such elements and compounds, including petroleum products, which
30 are defined as such by the department, after public hearing, and which
31 shall be consistent to the maximum extent possible with, and which
32 shall include, the list of hazardous substances adopted by the federal
33 Environmental Protection Agency pursuant to section 311 of the
34 federal Water Pollution Control Act Amendments of 1972,
35 Pub.L.92-500, as amended by the Clean Water Act of 1977,
36 Pub.L.95-217 (33 U.S.C.s.1251 et seq.); the list of toxic pollutants
37 designated by Congress or the EPA pursuant to section 307 of that
38 act; and the list of hazardous substances adopted by the federal
39 Environmental Protection Agency pursuant to section 101 of the
40 "Comprehensive Environmental Response, Compensation and Liability
41 Act of 1980," Pub.L.96-510 (42 U.S.C.s.9601 et seq.); provided,
42 however, that sewage and sewage sludge shall not be considered as
43 hazardous substances for the purposes of P.L.1976, c.141
44 (C.58:10-23.11 et seq.);

45 "Local unit" means any county or municipality, or any agency or
46 other instrumentality thereof, or a duly incorporated volunteer fire,

1 ambulance, first aid, emergency, or rescue company or squad;

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

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

16 (1) 20,000 gallons or more for hazardous substances which are
17 other than petroleum or petroleum products, or

18 (2) 200,000 gallons or more for hazardous substances of all kinds.

19 In determining whether a facility is a major facility for the purposes
20 of P.L.1976, c.141 (C.58:10-23.11 et seq.), any underground storage
21 tank at the facility used solely to store heating oil for on-site
22 consumption shall not be considered when determining the combined
23 storage capacity of the facility.

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

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

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

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

45 "Petroleum" or "petroleum products" means oil or petroleum of any
46 kind and in any form, including, but not limited to, oil, petroleum,

1 gasoline, kerosene, fuel oil, oil sludge, oil refuse, oil mixed with other
2 wastes, crude oils, and substances or additives to be utilized in the
3 refining or blending of crude petroleum or petroleum stock in this
4 State; however, any compound designated by specific chemical name
5 on the list of hazardous substances adopted by the department
6 pursuant to this section shall not be considered petroleum or a
7 petroleum product for the purposes of P.L.1976, c.141, unless such
8 compound is to be utilized in the refining or blending of crude
9 petroleum or petroleum stock in this State;

10 "Preliminary assessment" means the first phase in the process of
11 identifying areas of concern and determining whether contaminants are
12 or were present at a site or have migrated or are migrating from a site,
13 and shall include the initial search for and evaluation of, existing site
14 specific operational and environmental information, both current and
15 historic, to determine if further investigation concerning the
16 documented, alleged, suspected or latent discharge of any contaminant
17 is required. The evaluation of historic information shall be conducted
18 from 1932 to the present, except that the department may require the
19 search for and evaluation of additional information relating to
20 ownership and use of the site prior to 1932 if such information is
21 available through diligent inquiry of the public records; "Remedial
22 action" means those actions taken at a site or offsite if a contaminant
23 has migrated or is migrating therefrom, as may be required by the
24 department, including the removal, treatment, containment,
25 transportation, securing, or other engineering or treatment measures,
26 whether to an unrestricted use or otherwise, designed to ensure that
27 any discharged contaminant at the site or that has migrated or is
28 migrating from the site, is remediated in compliance with the
29 applicable health risk or environmental standards;

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

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

45 "Site investigation" means the collection and evaluation of data
46 adequate to determine whether or not discharged contaminants exist

1 at a site or have migrated or are migrating from the site at levels in
2 excess of the applicable remediation standards. A site investigation
3 shall be developed based upon the information collected pursuant to
4 the preliminary assessment;

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

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

9 "Transfer" means unloading or offloading between major facilities
10 and vessels, or vessels and major facilities, and from vessel to vessel
11 or major facility to major facility, except for fueling or refueling
12 operations and except that with regard to the movement of hazardous
13 substances other than petroleum, it shall also include any unloading of
14 or offloading from a major facility;

15 "Vessel" means every description of watercraft or other contrivance
16 that is practically capable of being used as a means of commercial
17 transportation of hazardous substances upon the water, whether or not
18 self-propelled;

19 "Waters" means the ocean and its estuaries to the seaward limit of
20 the State's jurisdiction, all springs, streams and bodies of surface or
21 groundwater, whether natural or artificial, within the boundaries of
22 this State.

23 (cf: P.L.2002, c.37, s.2)

24

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

27 9. a. There is hereby levied upon each owner or operator of one
28 or more major facilities a tax to insure compensation for cleanup costs
29 and damages associated with any discharge of hazardous substances
30 to be paid by the transferee; provided, however, that in the case of a
31 major facility which operates as a public storage terminal for
32 hazardous substances owned by others, the owner of the hazardous
33 substance transferred to such major facility or his authorized agent
34 shall be considered to be the transferee or transferor, as the case may
35 be, for the purposes of this section and shall be deemed to be a
36 taxpayer for purposes of this act. Where such person has failed to file
37 a return or pay the tax imposed by this act within 60 days after the due
38 date thereof, the director shall forthwith take appropriate steps to
39 collect same from the owner of the hazardous substance. In the event
40 the director is not successful in collecting said tax, then on notice to
41 the owner or operator of the public storage terminal of said fact said
42 owner or operator shall not release any hazardous substance owned by
43 the taxpayer. The director may forthwith proceed to satisfy any tax
44 liability of the taxpayer by seizing, selling or otherwise disposing of
45 said hazardous substance to satisfy the taxpayer's tax liability and to
46 take any further steps permitted by law for its collection. For the

1 purposes of this act, public storage terminal shall mean a public or
2 privately owned major facility operated for public use which is used
3 for the storage or transfer of hazardous substances. The tax shall be
4 measured by the number of barrels or the fair market value, as the case
5 may be, of hazardous substances transferred to the major facility;
6 provided, however, that the same barrel, including any products
7 derived therefrom, subject to multiple transfers from or between major
8 facilities shall be taxed only once at the point of the first transfer.

9 When a hazardous substance other than petroleum which has not
10 been previously taxed is transferred from a major in-State facility to a
11 facility which is not a major facility, the transferor shall be liable for
12 tax payment for said transfer.

13 b. (1) (a) The tax shall be [~~\$0.0150~~] \$0.023 per barrel
14 transferred and in the case of the transfer of hazardous substances
15 other than petroleum or petroleum products, the tax shall be [the
16 greater of \$0.0150 per barrel or 1.0%] 1.53% of the fair market value
17 of the product [plus \$0.0025 per barrel]; provided, however, that with
18 respect to transfers of hazardous substances other than petroleum or
19 petroleum products which are or contain any precious metals to be
20 recycled, refined, or rerefined in this State, which are transferred into
21 this State subsequent to being recycled, refined or rerefined, or which
22 are or contain elemental phosphorus, or which are elemental antimony
23 or antimony trioxide sold for use in the manufacture or for the purpose
24 of fire retardants, the tax shall be [~~\$0.0150~~] \$0.023 per barrel of the
25 hazardous substance[; and provided further, however, that the total
26 aggregate tax due for any individual taxpayer facility which has paid
27 the tax in the 1986 tax year shall not exceed 125% of the tax due and
28 payable by that taxpayer facility during the 1986 tax year plus an
29 additional \$0.0025 per barrel; except that for a hazardous substance
30 which is directly converted to, and comprises more than 90% by
31 weight of, a non-hazardous final product, the taxpayer facility shall
32 pay no more than 100% of the tax due and payable in the 1986 tax
33 year plus an additional \$0.0025 per barrel. For major facilities
34 established by the subdivision of a major facility which existed in 1986,
35 including subsequent owners and operators of the subdivided major
36 facilities, the total aggregated tax due shall not exceed 100% of the tax
37 paid in 1999. For the purposes of applying the 125% of tax due
38 limitation, a successor in interest pursuant to a sale or a
39 reorganization, as defined pursuant to the Internal Revenue Code of
40 1986, on or before June 1, 2001 shall be entitled to the predecessor
41 taxpayer's limitation. In computing 125% of the tax due and payable
42 by the taxpayer during the 1986 tax year, for taxes due after January
43 1, 1996 from an owner or operator including the successor in interest
44 pursuant to a sale or a reorganization as defined in this paragraph of
45 one or more major facilities who has continuously since 1986 filed a
46 combined tax return for more than one major facility but who prior to

1 January 1, 1996 has entirely closed and decommissioned one or more
2 of those major facilities, a taxpayer shall include 1986 taxes arising
3 from major facilities which (1) caused the taxpayer to incur a tax
4 liability in 1986, and (2) continue to cause the taxpayer to incur a tax
5 liability during the current tax year. For transfers which are or contain
6 elemental phosphorus, or which are elemental antimony or antimony
7 trioxide sold for use in the manufacture or for the purpose of fire
8 retardants, in computing the 125% of the taxes due and payable by the
9 taxpayer during the 1986 tax year, a taxpayer, which shall include any
10 subsequent owner or operator of a major facility which transfers
11 elemental phosphorus, shall calculate the tax at \$0.015 per barrel].
12 For the purposes of this section, "precious metals" means gold, silver,
13 osmium, platinum, palladium, iridium, rhodium, ruthenium and copper.
14 In the event of a major discharge or series of discharges of petroleum
15 or petroleum products resulting in reasonable claims against the fund
16 exceeding the existing balance of the fund, the tax shall be levied at the
17 rate of \$0.04 per barrel of petroleum or petroleum products
18 transferred, until the revenue produced by such increased rate equals
19 150% of the total dollar amount of all pending reasonable claims
20 resulting from the discharge of petroleum or petroleum products;
21 provided, however, that such rate may be set at less than \$0.04 per
22 barrel transferred if the administrator determines that the revenue
23 produced by such lower rate will be sufficient to pay outstanding
24 reasonable claims against the fund within one year of such levy. For
25 the purposes of determining the existing balance of the fund, the
26 administrator shall not include any amount in the fund collected from
27 the \$0.0025 per barrel increase in the tax imposed pursuant to
28 P.L.1990, c.78 and dedicated for hazardous substance discharge
29 prevention in accordance with paragraph (2) of this subsection.

30 (b) Notwithstanding any provision of subparagraph (a) of this
31 paragraph to the contrary, in order to qualify for the reduced tax rate
32 for elemental antimony or antimony trioxide sold for use in the
33 manufacture or for the purpose of fire retardants authorized in that
34 subparagraph, the taxpayer shall demonstrate, by December 31 of each
35 year, to the satisfaction of the Department of the Treasury, acting in
36 cooperation with the Department of Environmental Protection, all of
37 the following: (i) that the taxpayer's sales of the hazardous substance
38 constitute, in the calendar year immediately prior to the first calendar
39 year in which the reduced tax rate shall apply, at least 75% of the
40 taxpayer's total annual income in that immediately prior calendar year;
41 (ii) that no other competitor of the taxpayer located in another state
42 is subject to a tax in that other state, with respect to the hazardous
43 substance, that is substantially similar to the tax imposed thereon
44 pursuant to this section; (iii) that the taxpayer otherwise would suffer
45 economic stress unless the benefit from the reduced tax rate is
46 allowed; (iv) that the taxpayer has never filed a successful claim

1 against the New Jersey Spill Compensation Fund; (v) that the taxpayer
2 has never discharged a hazardous substance that required cleanup and
3 removal in accordance with P.L.1976, c.141 (C.58:10-23.11 et seq.);
4 and (vi) that, upon request of the State Treasurer, the taxpayer's
5 accountant or counsel can provide a certified document detailing, with
6 respect to the hazardous substance, the amount of tax that would have
7 been paid each calendar year by the taxpayer had the reduced tax rate
8 not been in effect and the amount that was actually paid each calendar
9 year under the reduced tax rate, so that the State Treasurer may
10 calculate the loss of tax revenue, if any, to the State attributable to the
11 reduced tax rate. If the taxpayer fails to qualify under the provisions
12 of this subparagraph for the reduced tax rate, the taxpayer shall pay,
13 for that calendar year, the tax at the full rate imposed pursuant to
14 subparagraph (a) of this paragraph.

15 (c) Interest received on moneys in the fund shall be credited to the
16 fund.

17 (2) An amount of \$0.0025 per barrel collected from the proceeds
18 of the tax imposed pursuant to this subsection shall be deposited into
19 the New Jersey Spill Compensation Fund and dedicated for the
20 purposes of P.L.1990, c.78 and for other authorized purposes
21 designed to prevent the discharge of a hazardous substance.

22 c. (1) Every taxpayer and owner or operator of a public storage
23 terminal for hazardous substances shall on or before the 20th day of
24 the month following the close of each tax period render a return under
25 oath to the director on such forms as may be prescribed by the director
26 indicating the number of barrels of hazardous substances transferred
27 and where appropriate, the fair market value of the hazardous
28 substances transferred to or from the major facility, and at said time
29 the taxpayer shall pay the full amount of the tax due.

30 (2) Every taxpayer or owner or operator of a major facility or
31 vessel which transfers a hazardous substance, as defined in this act,
32 and who is subject to the tax under subsection a. shall within 20 days
33 after the first such transfer in any fiscal year register with the director
34 on such form as shall be prescribed by him.

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

39 d. If a return required by this act is not filed, or if a return when
40 filed is incorrect or insufficient in the opinion of the director, the
41 amount of tax due shall be determined by the director from such
42 information as may be available. Notice of such determination shall be
43 given to the taxpayer liable for the payment of the tax. Such
44 determination shall finally and irrevocably fix the tax unless the person
45 against whom it is assessed, within 30 days after receiving notice of
46 such determination, shall apply to the director for a hearing, or unless

1 the director on his own motion shall redetermine the same. After such
2 hearing the director shall give notice of his determination to the person
3 to whom the tax is assessed.

4 e. Any taxpayer who shall fail to file his return when due or to pay
5 any tax when the same becomes due, as herein provided, shall be
6 subject to such penalties and interest as provided in the "State Tax
7 Uniform Procedure Law," R.S.54:48-1 et seq. If the Division of
8 Taxation determines that the failure to comply with any provision of
9 this section was excusable under the circumstances, it may remit such
10 part or all of the penalty as shall be appropriate under such
11 circumstances.

12 f. (1) (Deleted by amendment, P.L.1987, c.76.)

13 (2) (Deleted by amendment, P.L.1987, c.76.)

14 g. In addition to the other powers granted to the director in this
15 section, he is hereby authorized and empowered:

16 (1) To delegate to any officer or employee of his division such of
17 his powers and duties as he may deem necessary to carry out
18 efficiently the provisions of this section, and the person or persons to
19 whom such power has been delegated shall possess and may exercise
20 all of said powers and perform all of the duties delegated by the
21 director;

22 (2) To prescribe and distribute all necessary forms for the
23 implementation of this section.

24 h. The tax imposed by this act shall be governed in all respects by
25 the provisions of the "State [Tax] Uniform Tax Procedure Law,"
26 R.S.54:48-1 et seq., except only to the extent that a specific provision
27 of this act may be in conflict therewith.

28 i. (Deleted by amendment, P.L.1986, c.143.)

29 (cf: P.L.2001, c.424, s.1)

30
31 3. For any transfer of a hazardous substance subject to the tax
32 imposed pursuant to section 9 of P.L.1976, c.141 (C.58:10-23.11h)
33 and occurring on or after January 1, 2004, a taxpayer shall file an
34 amended tax return on or before the third month following the date of
35 enactment of this act and shall pay the additional taxes owed on
36 transfers occurring between January 1, 2004 and the date of enactment
37 of this act.

38
39 4. Section 3 of P.L.2002, c.37 is amended to read as follows:

40 3. This act shall take effect immediately[, and section 1 shall expire
41 on June 30, 2004].

42
43 5. Sections 1 and 4 of this act shall take effect on June 30, 2004,
44 section 2 of this act shall take effect immediately, shall be retroactive
45 to January 1, 2004 and shall apply to all transfers of hazardous
46 substances occurring on or after January 1, 2004, and section 3 shall

1 take effect immediately; provided, however, that if this act is enacted
2 after June 30, 2004, sections 1 and 4 shall be retroactive to June 30,
3 2004.

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5

6

STATEMENT

7

8 This bill would change the tax imposed pursuant to section 9 of
9 P.L.1976, c.141 (C.58:10-23.11h) for transfers of hazardous
10 substances to \$.023 per barrel for petroleum or petroleum products,
11 precious metals, elemental phosphorus, or in certain circumstances,
12 antimony or antimony trioxide sold for use in the manufacture or for
13 the purpose of fire retardants. For hazardous substances other than
14 petroleum products, precious metals, elemental phosphorus, or, in
15 certain circumstances, antimony or antimony trioxide sold for use in
16 the manufacture or for the purpose of fire retardants, the bill changes
17 the tax to the greater of \$.023 per barrel or 1.53% of the fair market
18 value of the product. The bill would also eliminate the cap on total
19 aggregate taxes due for any individual taxpayer facility. The bill
20 would make the changes retroactive to January 1, 2004. The bill
21 would require a taxpayer to file an amended tax return on or before
22 the third month following the date of enactment and pay the additional
23 taxes owed on transfers occurring between January 1, 2004 and the
24 date of enactment of this act.

25 The bill would also make permanent section 1 of P.L.2002, c.37
26 which defines the circumstances under which the Department of
27 Environmental Protection may establish or impose fees for department
28 oversight of hazardous substance cleanups and remediations which
29 include indirect costs. This provision is scheduled to expire on June
30 30, 2004.