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In Senate, February 16, 2021

An Act Regarding the Authority of the Department of Environmental Protection Regarding Applications, Permits and Fines

Submitted by the Department of Environmental Protection pursuant to Joint Rule 204. Received by the Secretary of the Senate on February 11, 2021. Referred to the Committee on Environment and Natural Resources pursuant to Joint Rule 308.2 and ordered printed.

DAREK M. GRANT Secretary of the Senate

Presented by Senator BRENNER of Cumberland.

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 38 MRSA §341-I is enacted to read:

§341-I. Fees, interest and lien authority

- 1. Applicability. Notwithstanding any provision of this Title to the contrary, this section applies to all fees established pursuant to this Title.
- 2. Interest. In addition to other remedies specifically authorized in this Title, the department shall charge interest at a rate of 15% per annum on any fee or portion of a fee not paid by its due date, unless the commissioner finds the amount too small or the likelihood of recovery too uncertain.
- 3. Lien established. A fee or any portion of a fee not paid within 90 days of its due date and accruing interest is a lien against real estate of a license holder.
 - A. A certificate of lien signed by the commissioner must be sent by certified mail to the license holder or agent of record prior to being recorded and may be filed in the office of the clerk of the municipality in which the real estate is located. The lien is effective when the certificate is recorded with the registry of deeds for the county in which the real estate is located. The certificate of lien must include a description of the real estate, the amount of the lien and the name of the owner as grantor.
 - B. When the amount for which a lien has been recorded under this subsection has been paid or reduced, the commissioner, upon request by any person of record holding interest in the real estate that is the subject of the lien, shall issue a certificate discharging or partially discharging the lien. The certificate must be recorded in the registry in which the lien was recorded pursuant to paragraph A. Any action of foreclosure of the lien must be brought by the Attorney General in the name of the State in the Superior Court for the judicial district in which the real estate subject to the lien is located.

Sec. 2. 38 MRSA §344, sub-§2-C is enacted to read:

- **2-C.** After-the-fact application. For an application submitted to the department after an activity requiring a permit pursuant to this Title has begun, the department may either accept or refuse to accept, in whole or in part, the application for processing. When considering whether to accept an application submitted after the date and time it is required to be submitted pursuant to this Title, the department may consider relevant factors including, but not limited to, the following:
- A. The amount of time that has passed since the application was required to be submitted;
- B. The impact on the environment caused by the activity that is the subject of the application;
- C. Other violations of rules, statutes or licenses related to the activity that is the subject
 of the application;
- D. The applicant's prior noncompliance with rules, statutes or licenses and deadlines for submission of applications under this Title;

E. The potential negative effect on voluntary compliance programs and other licensing programs within the department caused by accepting the application; and

- F. The deterrent effect a refusal to accept the application would have on both the applicant and others that perform activities requiring approval by the department without first submitting a timely application.
- **Sec. 3. 38 MRSA §347-A, sub-§1, ¶B,** as repealed and replaced by PL 1993, c. 204, §1, is amended to read:
 - Before initiating a civil enforcement action pursuant to paragraph A, the commissioner shall issue a notice of violation to the person or persons the commissioner considers likely to be responsible for the alleged violation or violations. The notice of violation must describe the alleged violation or violations, to the extent then known by the commissioner; cite the applicable law, rule and term or condition of the license, permit or order alleged to have been violated; and provide time periods for the alleged violator to take necessary corrective action and to respond to the notice. A notice of violation does not represent a final agency decision and is not appealable. For violations the commissioner finds to be minor, the notice may state that further enforcement action will not be pursued if compliance is achieved within the time period specified in the notice or under other appropriate circumstances. The commissioner is not required to issue a notice of violation before issuing an emergency order pursuant to subsection 3 or other applicable provision of this Title; nor is the commissioner required to issue a notice of violation before referring an alleged violation to the Attorney General for criminal prosecution or in a matter requiring immediate enforcement action.
- **Sec. 4. 38 MRSA §347-A, sub-§2,** as amended by PL 1999, c. 127, Pt. A, §54, is further amended to read:
- **2. Hearings.** The commissioner shall give at least 30 days' written notice to the alleged violator of the date, time and place of any hearing held pursuant to subsection 1, paragraph A, subparagraph (3). The notice must specify the act or omission which that is claimed to be in violation of law or regulation.
- Any hearing conducted under the authority of this subsection must be in accordance with the provisions of Title 5, chapter 375, subchapter IV 4. At the hearing, the alleged violator may appear in person or by attorney and answer the allegations of violation and file a statement of the facts, including the methods, practices and procedures, if any, adopted or used by that person to comply with this chapter and present such evidence as may be pertinent and relevant to the alleged violation.
- After <u>a</u> hearing, or in the event of a failure of the alleged violator to appear on the date set for a hearing, the commissioner shall, as soon as practicable, make findings of fact based on the record and, if the commissioner finds that a violation exists, shall issue an order aimed at ending the violation <u>and that may include required corrective action and a civil penalty calculated pursuant to section 349, subsection 2. The person to whom an order is directed shall immediately comply with the terms of that order.</u>
- **Sec. 5. 38 MRSA §347-A, sub-§7,** as enacted by PL 2001, c. 365, §2, is amended to read:

- 7. Landowner liability for actions of others. An owner, lessee, manager, easement holder or occupant of premises is not subject to criminal sanctions or civil penalties or forfeitures for a violation of laws or rules enforced by the department or the board if that person provides substantial credible evidence that the violation was committed by another person other than that person or a contractor, employee or agent of the owner, lessee, manager, easement holder or occupant. This subsection does not prevent the department, the board or a court from requiring an owner, lessee, manager, easement holder or occupant of premises to remediate or abate environmental hazards or damage or to reimburse the department for the cost of such remediation or abatement. An Once notified in writing of a violation, an owner, lessee, manager, easement holder or occupant of premises is subject to criminal sanctions or civil penalties or forfeitures for failure to remediate or abate a violation of this Title or an environmental hazard or damage; to reimburse the department for the cost of such remediation or abatement; or to comply with a lawful administrative order or court order to remediate or abate environmental hazards or damage for such remediation or abatement.
 - A. The department shall investigate substantiated allegations by an owner, lessee, manager, easement holder or occupant that the violation was caused by another person.
 - B. If an owner, lessee, manager, easement holder or occupant is subjected to criminal sanctions or civil penalties or forfeitures, or if such a person is required to remediate or abate environmental hazards or damage as a result of violations by another person, the owner, lessee, manager, easement holder or occupant has a cause of action against the actual violator to recover all damages and costs, including attorney's fees, incurred in connection with the environmental damage, and all costs, including attorney's fees, incurred in bringing the action to recover.
 - C. This subsection does not apply to persons who are defined as "responsible parties" under chapter 3, subchapters H-A 2-A and H-B 2-B; chapter 13, subchapter H-A 2-A; or chapter 13-B.
- **Sec. 6. 38 MRSA §347-C,** as repealed and replaced by PL 2017, c. 137, Pt. A, §5, is amended to read:

§347-C. Right of inspection and entry

Employees and agents of the department may:

- 1. Property. Enter any property at reasonable hours in order to inspect the property to take samples, inspect records relevant to any regulated activity or as appropriate conduct tests as appropriate to determine compliance with any laws administered by the department or the terms and conditions of any order, regulation, license, permit, approval or decision of the commissioner or of the board; and
- **2. Buildings.** Enter any building with the consent of the property owner, occupant or agent, or pursuant to an administrative search warrant, in order to inspect the property or structure, including the premises of an industrial user of a publicly owned treatment works, and to take samples, inspect records relevant to any regulated activity or as appropriate conduct tests as appropriate to determine compliance with any laws administered by the department or the terms and conditions of any order, regulation, license, permit, approval or decision of the commissioner or of the board.

- **Sec. 7. 38 MRSA §349, sub-§2,** as corrected by RR 2009, c. 2, §116, is amended to read:
- **2. Civil penalties.** Except as otherwise specifically provided, a person who violates a law administered by the department, including, without limitation, a violation of the terms or conditions of an order, rule, license, permit, approval or decision of the board or commissioner, or who disposes of more than 500 pounds or more than 100 cubic feet of litter for a commercial purpose, in violation of Title 17, section 2264-A, is subject to a civil penalty, payable to the State, of not less than \$100 and not more than \$10,000 \$25,000 for each day of that violation or, if the violation relates to hazardous waste, of not more than \$25,000 \$65,000 for each day of the violation. This penalty is recoverable in a civil action or may be assessed in an enforcement hearing pursuant to section 347-A.
- **Sec. 8. 38 MRSA §349, sub-§5,** as amended by PL 1989, c. 890, Pt. B, §8 and affected by Pt. A, §40, is further amended to read:
- **5. Considerations.** In setting a penalty, the court shall consider, but shall <u>is</u> not be limited to, the following:
 - A. Prior violations by the same party;

- B. The degree of environmental damage that cannot be abated or corrected;
- C. The extent to which the violation continued following an order of the commissioner or board to correct it; and
- D. The importance of setting a civil penalty substantial enough to deter others from similar violations-;
- E. When sampling or submission of data is required, the effect that failing to submit data, providing inaccurate, incorrect or false data or failing to take required samples has on the department's ability to determine the extent to which the violation caused environmental damage or harm to human health; and
- F. The potential negative effect of the violation on voluntary compliance and self-reporting programs administered by the department.
- **Sec. 9. 38 MRSA §349, sub-§6,** as amended by PL 1997, c. 794, Pt. A, §8, is further amended to read:
- **6. Maximum penalties.** The maximum civil penalty may exceed \$10,000 \$25,000 for each day of that violation, but may not exceed \$25,000 \$65,000 for each day of the violation, when it can be shown that there has been a previous violation of the same law administered by the department, including, without limitation, a violation of the terms or conditions of an order, rule, license, permit, approval or decision of the board or commissioner, by the same party within the 5 preceding years, and the maximum criminal penalty may exceed \$25,000 \$65,000 for each day of violation, but may not exceed twice the amounts in subsection 1, when it can be shown that there has been a previous violation of the same law by the same party.
- **Sec. 10. 38 MRSA §353,** as affected by PL 2011, c. 653, §33 and amended by PL 2015, c. 124, §2, is repealed.
- **Sec. 11. 38 MRSA §2205, sub-§6,** as amended by PL 1995, c. 465, Pt. A, §77 and affected by Pt. C, §2, is further amended to read:

6. Interest. If an operator fails to make a timely payment of the fee, the operator shall pay interest on the unpaid amount due at the rate established by the department pursuant to section 341-I from the last day for timely payment to the date paid.

SUMMARY

This bill makes the following changes to the laws governing the Department of Environmental Protection.

- 1. It provides that fees or any portion of fees not paid within 90 days of their due date and accruing interest are a lien against real estate of a license holder.
- 2. It provides the department discretion to accept or refuse to accept an application submitted to the department after the activity requiring a permit has begun and lists factors the department may consider in exercising this discretion.
- 3. It provides that a notice of violation does not represent a final agency decision and is not appealable.
- 4. It provides that after a hearing an order of the Commissioner of Environmental Protection may include required corrective action and a civil penalty.
- 5. It specifies that an owner, lessee, manager, easement holder or occupant of premises is subject to criminal sanction or civil penalties or forfeiture for failure to remediate or abate a violation of environmental laws or an environmental hazard or damage or to reimburse the department for the cost of such remediation or abatement.
- 6. It clarifies the circumstances under which employees and agents of the department may enter property and buildings.
- 7. It increases the cap on civil penalties from \$10,000 to \$25,000 for each day of a violation or if a violation relates to hazardous waste from \$25,000 to \$65,000 for each day of a violation. It provides that civil penalties may be assessed in an enforcement hearing.
 - 8. It specifies additional factors a court may consider in setting a penalty.
- 9. It provides that the maximum civil penalty may exceed \$25,000 for each day of a violation but may not exceed \$65,000 for each day of a violation when it can be shown that there has been a previous violation of the same law administered by the department, including, without limitation, a violation of the terms or conditions of an order, rule, license, permit, approval or decision of the board or commissioner, by the same party within the 5 preceding years. It increases the maximum criminal penalty from \$25,000 to \$65,000 for each day of violation in cases involving subsequent violations.