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No. 1789

S.P. 605

In Senate, May 29, 2019

An Act To Restore the Authority of the Board of Environmental Protection

Reference to the Committee on Environment and Natural Resources suggested and ordered printed.

A handwritten signature in black ink, appearing to read 'D M Grant'.

DAREK M. GRANT
Secretary of the Senate

Presented by Senator FOLEY of York. (GOVERNOR'S BILL)

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

2 **Sec. 1. 32 MRSA §4174, 2nd and 3rd ¶¶**, as amended by PL 2017, c. 137, Pt.
3 A, §2, are further amended to read:

4 The ~~commissioner~~ Department of Environmental Protection shall establish the
5 criteria and conditions for the classification of wastewater treatment plants or systems,
6 using as a basis the standards established by the New England Water Pollution Control
7 Association.

8 The ~~commissioner~~ Department of Environmental Protection shall establish by rule
9 the qualifications, conditions and licensing standards and procedures for the certification
10 of individuals to act as operators.

11 **Sec. 2. 32 MRSA §4179**, as amended by PL 2017, c. 137, Pt. A, §3, is further
12 amended to read:

13 **§4179. Rules**

14 The ~~commissioner~~ Department of Environmental Protection shall adopt rules that
15 include, but are not limited to, provisions establishing the basis for classification of
16 treatment plants in accordance with section 4172 and provisions establishing
17 requirements for certification and procedures for examination of candidates.

18 **Sec. 3. 38 MRSA §341-B**, as amended by PL 2011, c. 304, Pt. H, §1, is further
19 amended to read:

20 **§341-B. Rules**

21 The purpose of the Board of Environmental Protection is to provide informed,
22 independent and timely decisions on the interpretation, administration and enforcement of
23 the laws relating to environmental protection and to provide for credible, fair and
24 responsible public participation in department decisions. The board shall fulfill its
25 purpose through ~~major substantive~~ rulemaking, decisions on selected permit applications,
26 decisions on appeals of the commissioner's licensing ~~and~~ actions, review of the
27 commissioner's enforcement actions and recommending changes in the law to the
28 Legislature.

29 **Sec. 4. 38 MRSA §341-D, sub-§6**, as repealed and replaced by PL 2011, c. 304,
30 Pt. H, §11, is further amended to read:

31 **6. Enforcement.** The board shall ~~hear appeals of emergency orders pursuant to~~
32 ~~section 347-A, subsection 3-;~~

33 E. Advise the commissioner on enforcement priorities and activities;

34 F. Advise the commissioner on the adequacy of penalties and enforcement activities;

35 G. Approve administrative consent agreements pursuant to section 347-A, subsection
36 I; and

1 H. Hear appeals of emergency orders pursuant to section 347-A, subsection 3.

2 **Sec. 5. 38 MRSA §341-H**, as amended by PL 2011, c. 538, §1, is further amended
3 to read:

4 **§341-H. Departmental rulemaking**

5 ~~The department may adopt, amend or repeal rules and emergency rules necessary for~~
6 ~~the interpretation, implementation and enforcement of any provision of law that the~~
7 ~~department is charged with administering as provided in this section.~~

8 Subject to Title 5, chapter 375, subchapter 2-A, the board may adopt, amend or repeal
9 reasonable rules and emergency rules necessary for the interpretation, implementation
10 and enforcement of any provision of law that the department is charged with
11 administering as provided in this section. The board shall also adopt, amend and repeal
12 rules as necessary for the conduct of the department's business, including the processing
13 of applications, the conduct of hearings and other administrative matters.

14 ~~**1. Rule-making authority of the board.** Notwithstanding any other provision of~~
15 ~~this Title, and except as provided in this subsection, the board shall adopt, amend or~~
16 ~~repeal only those rules of the department designated as major substantive rules pursuant~~
17 ~~to Title 5, chapter 375, subchapter 2-A. The board shall also adopt, amend and repeal~~
18 ~~routine technical rules as necessary for the conduct of the board's business, including the~~
19 ~~processing of applications, the conduct of hearings and other administrative matters.~~

20 ~~**2. Rule-making authority of the commissioner.** Notwithstanding any other~~
21 ~~provision of this Title, the commissioner shall adopt, amend or repeal only those rules of~~
22 ~~the department that are not designated as major substantive rules pursuant to Title 5,~~
23 ~~chapter 375, subchapter 2-A.~~

24 **3. Duties of department.** The department shall:

25 A. Identify in its regulatory agenda under Title 5, section 8060, when feasible, a
26 proposed rule or provision of a proposed rule that is anticipated to be more stringent
27 than a federal standard, if an applicable federal standard exists; and

28 B. During the consideration of any proposed rule, when feasible, and using
29 information available to it, identify provisions of the proposed rule that the
30 department believes would impose a regulatory burden more stringent than the
31 burden imposed by the federal standard, if such a federal standard exists, and shall
32 explain in a separate section of the basis statement the justification for the difference
33 between the agency rule and the federal standard; and.

34 C. ~~Notwithstanding Title 5, chapter 375, subchapter 2 or 2-A, the department shall~~
35 ~~accept and consider additional public comment on a proposed rule following the~~
36 ~~close of the formal rule-making comment period at a meeting that is not a public~~
37 ~~hearing only if the additional public comment is directly related to comments~~
38 ~~received during the formal rule-making comment period or is in response to changes~~
39 ~~to the proposed rule. Public notice of the meeting must comply with Title 1, section~~

1 406 and must state that the department will accept additional public comment on the
2 proposed rule at that meeting.

3 **3-A. Additional public comment.** Notwithstanding Title 5, chapter 375, subchapter
4 2 or 2-A, the board shall accept and consider additional public comment on a proposed
5 rule following the close of the formal rule-making comment period at a meeting that is
6 not a public hearing only if the additional public comment is directly related to comments
7 received during the formal rule-making comment period or is in response to changes to
8 the proposed rule. Public notice of the meeting must comply with Title 1, section 406 and
9 must state that the board will accept additional public comment on the proposed rule at
10 that meeting.

11 **4. Legislative review of a rule.** If a rule adopted by the ~~department~~ board is the
12 subject of a request for legislative review of a rule under Title 5, chapter 377-A, the
13 Executive Director of the Legislative Council shall immediately notify the ~~department~~
14 board of that request and of the legislative committee's decision under that chapter on
15 whether or not to review the rule.

16 **Sec. 6. 38 MRSA §342, sub-§9,** as amended by PL 2011, c. 304, Pt. H, §15, is
17 further amended to read:

18 **9. Rules.** The commissioner may ~~adopt, amend or repeal, in accordance with section~~
19 341-H, routine technical rules under Title 5, chapter 375, subchapter 2-A and shall submit
20 to the board new or amended ~~major substantive~~ rules for its adoption.

21 **Sec. 7. 38 MRSA §342, sub-§11-A,** as amended by PL 2011, c. 304, Pt. H, §16,
22 is further amended to read:

23 **11-A. Recommendations and assistance to board.** The commissioner shall make
24 recommendations to the board regarding proposed ~~major substantive~~ rules; permit and
25 license applications over which the board has jurisdiction; modification or corrective
26 action on licenses; appeals of license and permit decisions; enforcement actions; and
27 other matters considered by the board. The commissioner shall also provide the board
28 with the technical services of the department.

29 **Sec. 8. 38 MRSA §347-A, sub-§1, ¶A,** as amended by PL 2011, c. 304, Pt. H,
30 §19, is further amended to read:

31 A. Whenever it appears to the commissioner, after investigation, that there is or has
32 been a violation of this Title, of rules adopted under this Title or of the terms or
33 conditions of a license, permit or order issued by the board or the commissioner, the
34 commissioner may initiate an enforcement action by taking one or more of the
35 following steps:

36 (1) Resolving the violation through an administrative consent agreement
37 pursuant to subsection 4, signed by the violator and approved by the
38 ~~commissioner~~ board and the Attorney General;

39 (2) Referring the violation to the Attorney General for civil or criminal
40 prosecution;

1 (3) Scheduling and holding an enforcement hearing on the alleged violation
2 pursuant to subsection 2; or

3 (4) With the prior approval of the Attorney General, commencing a civil action
4 pursuant to section 342, subsection 7 and the Maine Rules of Civil Procedure,
5 Rule 3.

6 **Sec. 9. 38 MRSA §347-A, sub-§4, ¶D**, as amended by PL 2011, c. 304, Pt. H,
7 §20, is further amended to read:

8 D. The public may make written comments to the ~~commissioner~~ board at the
9 ~~commissioner's board's~~ discretion on an administrative consent agreement entered
10 into by the ~~commissioner~~ board.

11 **Sec. 10. 38 MRSA §347-A, sub-§6, ¶A**, as amended by PL 2011, c. 538, §6, is
12 further amended to read:

13 A. In the case of an administrative consent agreement, notice of the proposed
14 agreement and the proposed agreement must be posted on the department's publicly
15 accessible website at least 30 days before the ~~commissioner~~ board takes any action on
16 the agreement. The Attorney General and the department shall receive and consider
17 any written comments relating to the proposed agreement.

18 **Sec. 11. 38 MRSA §568-A, sub-§3**, as amended by PL 2017, c. 137, Pt. A, §13,
19 is further amended to read:

20 **3. Exemptions from deductible.** The commissioner may waive the deductible
21 requirement for an applicant's personal residence if the commissioner determines that the
22 applicant does not have the financial resources to pay the deductible. The ~~commissioner~~
23 department shall adopt rules to determine the standards to be used to assess an applicant's
24 ability to pay this deductible.

25 **Sec. 12. 38 MRSA §1319-O**, as amended by PL 2015, c. 124, §9, is further
26 amended to read:

27 **§1319-O. Rule-making authority; hazardous waste, waste oil and biomedical waste**

28 **1. Hazardous waste.** This subsection governs rulemaking for hazardous waste.

29 A. The ~~commissioner~~ department may adopt and amend rules identifying hazardous
30 waste. It is the intent of the Legislature that the ~~commissioner~~ department shall
31 identify as hazardous waste those substances that are identified by the United States
32 Environmental Protection Agency in proposed or final regulations. The Legislature
33 also intends that the ~~commissioner~~ department may identify as hazardous waste, in
34 accordance with subparagraph (2), other substances in addition to those identified by
35 the United States Environmental Protection Agency. Further, the Legislature intends
36 that a substance that has been identified as a hazardous waste by the ~~commissioner~~
37 department may be removed from identification only by further rulemaking by the
38 ~~commissioner~~ department.

39 Hazardous waste may be identified as follows.

1 (1) The ~~commissioner~~ department may identify any substance as a hazardous
2 waste if that substance is identified as hazardous by particular substance, by
3 characteristic, by chemical class or as a waste product of a specific industrial
4 activity in proposed or final rules of the United States Environmental Protection
5 Agency.

6 (2) The ~~commissioner~~ department may identify any substance as a hazardous
7 waste if the ~~commissioner~~ department, after evaluation based on existing data or
8 data reasonably extrapolated from previously conducted studies using similar
9 classes of substances or compounds under similar circumstances, has determined
10 that the substance is an acute or chronic toxin causing significant potential
11 adverse public health or environmental effects. An acute or chronic toxin may
12 include the characteristics of:

- 13 (a) Carcinogenicity;
- 14 (b) Mutagenicity;
- 15 (c) Teratogenicity; or
- 16 (d) Infectiousness.

17 Rules adopted under this subparagraph must be submitted to the joint standing
18 committee of the Legislature having jurisdiction over natural resources for
19 review.

20 (3) Whenever the ~~commissioner~~ department proposes to adopt or amend rules
21 identifying hazardous waste or removing hazardous waste from identification, the
22 ~~commissioner~~ department shall hold a public hearing.

23 (4) In addition to hazardous waste identified under subparagraphs (1) and (2), the
24 Legislature identifies the following chemicals, materials, substances or waste as
25 being hazardous waste:

- 26 (a) Polychlorinated biphenyls and any substance containing polychlorinated
27 biphenyls.

28 B. The ~~commissioner~~ department may adopt rules relating to the handling of
29 hazardous waste, including, but not limited to:

- 30 (1) Containerization and labeling of hazardous waste, consistent with applicable
31 rules of other federal and state agencies;
- 32 (2) Reporting of handling of hazardous waste; and
- 33 (3) Waste that is not compatible.

34 C. The ~~commissioner~~ department may adopt rules relating to transportation of
35 hazardous waste, including, but not limited to:

- 36 (1) Licensing of transporters of hazardous waste, conveyances used for the
37 transportation of hazardous waste and the operators of these conveyances; and
38 licensing fees must be paid to the Maine Hazardous Waste Fund; and

1 (2) A manifest system for hazardous waste that takes into consideration the
2 requirements of the United States Resources Conservation and Recovery Act of
3 1976, Public Law 94-580, as amended, and this subchapter.

4 D. The ~~commissioner~~ department may adopt rules relating to the interim and final
5 licensing and operation of waste facilities for hazardous waste, including, but not
6 limited to:

7 (1) Standards for the safe operation and maintenance of the waste facilities,
8 including, but not limited to, record keeping, monitoring before and during
9 operation of the facility and after its termination of use or closure, inspections
10 and contingency plans to minimize potential damage from hazardous waste;

11 (2) The training of personnel and the certification of supervisory personnel
12 involved in the operation of the waste facilities;

13 (3) The termination, closing and potential future uses of the waste facilities;

14 (4) Rules equivalent to regulations of the United States Environmental
15 Protection Agency that provide for licensing or permitting by rule; and

16 (5) Corrective action for all releases of hazardous waste or constituents from any
17 solid waste management unit at a treatment, storage or disposal facility seeking a
18 permit under this subchapter, regardless of the time waste was placed in the unit.
19 For purposes of this paragraph, "solid waste management unit" includes any
20 waste pile, landfill, surface impoundment or land treatment facility from which
21 hazardous constituents might migrate, regardless of whether the unit was
22 intended for the management of solid or hazardous wastes.

23 E. The ~~commissioner~~ department may adopt rules relating to evidence of financial
24 capacity of hazardous waste facilities' owners or operators, and of those who
25 transport hazardous waste, to protect public health, safety and welfare and the
26 environment, including, but not limited to:

27 (1) Liability insurance;

28 (2) Bonding; and

29 (3) Financial ability to comply with statutory and regulatory requirements or
30 conditions.

31 Evidence of financial capacity required by the ~~commissioner~~ department may include
32 one, or any combination, of the following: insurance, guarantee, surety bond, letter of
33 credit or qualification as a self-insurer. In establishing the required evidence of
34 financial capacity to further the purposes of this subchapter, the ~~commissioner~~
35 department may specify policy or other contractual terms, conditions or defenses that
36 are necessary or that are unacceptable.

37 F. By January 1, 2000, the board shall adopt, at a minimum, the universal waste
38 rules, excluding pesticides, promulgated by the United States Environmental
39 Protection Agency as defined in 40 Code of Federal Regulations, Parts 9, 260, 261,
40 262, 264, 265, 266, 268, 270 and 273.

41 **2. Waste oil.** This subsection governs rulemaking for waste oil.

1 A. The ~~board~~ department may adopt rules relating to the transportation, collection
2 and storage of waste oil to protect public health, safety and welfare and the
3 environment. The rules may include, without limitation, rules requiring licenses for
4 waste oil dealers and the location of waste oil storage sites that are operated by waste
5 oil dealers, evidence of financial capability and manifest systems for waste oil. A
6 person licensed by the department to transport or handle hazardous waste is not
7 required to obtain a waste oil dealer's license, but the hazardous waste license must
8 include any terms or conditions determined necessary by the department relating to
9 the transportation or handling of waste oil.

10 B. The ~~board~~ department may adopt rules relating to the registration, design and
11 operation of used oil collection centers for the purposes of section 1319-Y. Rules
12 adopted pursuant to this paragraph are major substantive rules as defined in Title 5,
13 chapter 375, subchapter 2-A.

14 **3. Handling and disposal of biomedical waste.** The ~~commissioner~~ department
15 shall adopt rules relating to the packaging, labeling, handling, storage, collection,
16 transportation, treatment and disposal of biomedical waste, including infectious and
17 pathogenic waste, to protect public health, safety and welfare and the environment.

- 18 A. The rules must include, without limitation:
- 19 (1) Registration of biomedical waste generators;
 - 20 (2) Handling of biomedical waste by generators;
 - 21 (3) Licensing of biomedical waste transporters and the conveyances used for the
22 transportation of biomedical waste;
 - 23 (4) Implementation of a biomedical waste tracking or manifest system;
 - 24 (5) Establishment of treatment and disposal standards; and
 - 25 (6) Categories of biomedical waste subject to regulation under this subsection,
26 consistent with the provisions of section 1303-C, subsection 1-A.

27 B. The ~~commissioner~~ department shall adopt rules governing the siting, licensing,
28 operational and record-keeping requirements for biomedical waste treatment, storage
29 and disposal facilities.

30 C. The ~~commissioner~~ department shall require evidence of financial capacity.

31 D. The ~~commissioner~~ department may assess licensing and registration fees
32 sufficient to pay for the department's administrative costs in regulating biomedical
33 waste.

34 E. The rules must provide transportation and disposal options for persons who
35 generate fewer than 50 pounds of sharps per month that allow:

- 36 (1) The generator or an employee of the generator to transport properly packaged
37 sharps to a licensed biomedical waste disposal facility or another medical facility
38 that has volunteered to serve as a collection point for sharps if no more than 50
39 pounds of sharps are transported in one trip; and

1 (2) The generator to mail properly packaged sharps to a licensed biomedical
2 waste disposal facility in this State or a facility in another state if the carrier
3 accepts those items and no more than 50 pounds are transported in any single
4 package.

5 For purposes of this paragraph, "sharps" means items that may cause puncture
6 wounds or cuts, including hypodermic needles, syringes, scalpel blades, capillary
7 tubes and lancets, and "properly packaged" means packaged in accordance with
8 department rules and rules or requirements imposed by the mail carrier.

9 **Sec. 13. 38 MRSA §1362, sub-§1, ¶A**, as amended by PL 2017, c. 475, Pt. A,
10 §67, is further amended to read:

11 A. Any substance identified by the ~~commissioner~~ department under section 1319-O;

12 **Sec. 14. 38 MRSA §1609, sub-§13**, as amended by PL 2009, c. 610, §6, is
13 further amended to read:

14 **13. Department rule-making authority; flame retardants.** If the commissioner
15 determines, in consultation with the Department of Health and Human Services, Maine
16 Center for Disease Control and Prevention and the Department of Public Safety, Office of
17 the State Fire Marshal, that a flame retardant is harmful to the public health and the
18 environment or meets the criteria as a prohibited replacement pursuant to subsection 14,
19 paragraph B and a safer alternative to the flame retardant as set forth in subsection 14 is
20 available, the ~~commissioner~~ department may adopt rules to prohibit the manufacture, sale
21 or distribution in the State of:

22 A. A mattress, a mattress pad or upholstered furniture intended for indoor use in a
23 home or other residential occupancy that contains that flame retardant;

24 B. A television or computer that has a plastic housing containing that flame
25 retardant; or

26 C. A plastic shipping pallet that contains that flame retardant.

27 The ~~commissioner's~~ department's rulemaking under this subsection must be made in
28 accordance with Title 5, chapter 375, subchapter 2-A. The department shall report any
29 rulemaking undertaken pursuant to this subsection to the joint standing committee of the
30 Legislature having jurisdiction over natural resources matters. The joint standing
31 committee of the Legislature having jurisdiction over natural resources matters may
32 submit legislation relating to the department's report. For purposes of this subsection,
33 "flame retardant" means any chemical that is added to a plastic, foam or textile to inhibit
34 flame formation. Rules adopted pursuant to this subsection are routine technical rules.

35 **Sec. 15. 38 MRSA §1691, sub-§11**, as enacted by PL 2007, c. 643, §2, is further
36 amended to read:

37 **11. Priority chemical.** "Priority chemical" means a chemical identified as such by
38 the ~~commissioner~~ department pursuant to section 1694, subsection 1.

39 **Sec. 16. 38 MRSA §1694, sub-§§1 and 2**, as amended by PL 2011, c. 319, §5,
40 are further amended to read:

1 **1. Criteria.** The ~~commissioner~~ department may designate a chemical of high
2 concern as a priority chemical if the commissioner finds, in concurrence with the
3 Department of Health and Human Services, Maine Center for Disease Control and
4 Prevention:

5 A. The chemical has been found through biomonitoring to be present in human
6 blood, including umbilical cord blood, breast milk, urine or other bodily tissues or
7 fluids;

8 B. The chemical has been found through sampling and analysis to be present in
9 household dust, indoor air or drinking water or elsewhere in the home environment;
10 or

11 D. The chemical is present in a consumer product used or present in the home.

12 **2. Designation.** The commissioner shall designate at least 2 priority chemicals by
13 January 1, 2011. The ~~commissioner~~ department may designate additional priority
14 chemicals if the commissioner finds that the chemicals meet one of the criteria listed in
15 subsection 1.

16 **Sec. 17. 38 MRSA §1694, last ¶**, as enacted by PL 2007, c. 643, §2, is amended
17 to read:

18 The ~~commissioner~~ department shall adopt rules to implement the provisions of this
19 section. Rules adopted pursuant to this section are routine technical rules as defined in
20 Title 5, chapter 375, subchapter 2-A.

21 **Sec. 18. 38 MRSA §1697, sub-§6**, as enacted by PL 2007, c. 643, §2, is amended
22 to read:

23 **6. Mercury-added products.** The ~~commissioner~~ department may designate
24 mercury or a mercury compound as a priority chemical for the purpose of adopting rules
25 under section 1696 to prohibit the manufacture, sale or distribution of a mercury-added
26 product that is not regulated under section 1661-C or 1667 prior to the effective date of
27 this section. The disclosure requirements of section 1695 do not apply to the
28 manufacturer or distributor of a children's product that contains the designated mercury or
29 mercury compound if the manufacturer has complied with the notification requirement
30 under section 1661-A.

31 **Sec. 19. 38 MRSA §3106, sub-§8, ¶A**, as enacted by PL 2015, c. 166, §14, is
32 amended to read:

33 A. A distributor that initiates the deposit under section 3103, subsection 2 or 4 has
34 the obligation to pick up any empty, unbroken and reasonably clean beverage
35 containers of the particular kind, size and brand sold by the distributor from dealers to
36 whom that distributor has sold those beverages and from licensed redemption centers
37 designated to serve those dealers pursuant to an order entered under section 3109. A
38 distributor that, within this State, sells beverages under a particular label exclusively
39 to one dealer, which dealer offers those labeled beverages for sale at retail
40 exclusively at the dealer's establishment, shall pick up any empty, unbroken and

1 reasonably clean beverage containers of the kind, size and brand sold by the
2 distributor to the dealer only from those licensed redemption centers that serve the
3 various establishments of the dealer, under an order entered under section 3109. A
4 dealer that manufactures its own beverages for exclusive sale by that dealer at retail
5 has the obligation of a distributor under this section. The ~~commissioner~~ department
6 may establish by rule, in accordance with the Maine Administrative Procedure Act,
7 criteria prescribing the manner in which distributors shall fulfill the obligations
8 imposed by this paragraph. The rules may establish a minimum number or value of
9 containers below which a distributor is not required to respond to a request to pick up
10 empty containers. Any rules adopted under this paragraph must allocate the burdens
11 associated with the handling, storage and transportation of empty containers to
12 prevent unreasonable financial or other hardship.

13 **Sec. 20. Transition provisions.** The following transition provisions apply to
14 changes in rulemaking and the impact on pending proceedings.

15 **1. Effect on existing rules.** All rules adopted by the Commissioner of
16 Environmental Protection prior to the effective date of this Act continue in effect until
17 amended or rescinded by the Board of Environmental Protection; and

18 **2. Effect on pending proceedings.** All regulatory proceedings pending before the
19 Board of Environmental Protection or the Commissioner of Environmental Protection on
20 the effective date of this Act are subject to the Maine Revised Statutes, Title 1, section
21 302.

22 **SUMMARY**

23 This bill amends the responsibilities and duties of the Board of Environmental
24 Protection. The bill:

25 1. Moves all rulemaking authority of the Department of Environmental Protection to
26 the board;

27 2. Adds to the board's enforcement responsibilities the duty to approve
28 administrative consent agreements and to advise the commissioner on enforcement
29 priorities and activities and on the adequacy of penalties and enforcement activities; and

30 3. Includes transition language to provide for the orderly transition of the rulemaking
31 authority and for procedures pending before the department on the effective date of this
32 legislation.