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ENVIRONMENT AND NATURAL RESOURCES

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STATE OF MAINE
HOUSE OF REPRESENTATIVES
129TH LEGISLATURE
SECOND REGULAR SESSION

COMMITTEE AMENDMENT " " to H.P. 1371, L.D. 1923, Bill, "An Act To Define as a Hazardous Substance under Maine Law Any Substance Defined under Federal Law as a Hazardous Substance, Pollutant or Contaminant"

Amend the bill by striking out the title and substituting the following:

'An Act Regarding Uncontrolled Hazardous Substance Sites'

Amend the bill by striking out everything after the enacting clause and inserting the following:

'Sec. 1. 38 MRSA §1362, sub-§1, ¶F, as amended by PL 1985, c. 746, §32, is further amended to read:

F. Any imminently hazardous chemical substance or mixture with respect to which the Administrator of the United States Environmental Protection Agency has taken action pursuant to the United States Toxic Substances Control Act, Section 7; and

Sec. 2. 38 MRSA §1362, sub-§1, ¶G, as amended by PL 1989, c. 878, Pt. B, §42, is further amended to read:

G. Waste oil as defined in section 1303-C;

Sec. 3. 38 MRSA §1362, sub-§1, ¶H is enacted to read:

H. Perfluoroalkyl and polyfluoroalkyl substances as defined in Title 32, section 1732, subsection 5-A; and

Sec. 4. 38 MRSA §1362, sub-§1, ¶I is enacted to read:

I. Residual substances relating to the illegal manufacture of methamphetamine and other synthetic drugs.

Sec. 5. 38 MRSA §1362, sub-§1-E, as enacted by PL 1993, c. 355, §59, is amended to read:

1-E. Site. "Site" means a licensed or unlicensed area or location where hazardous substances or substances that are pollutants or contaminants are handled or were handled

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1 or otherwise came to be located. "Site" includes all structures, appurtenances,
2 improvements, equipment, machinery, containers, tanks and conveyances on the site.

3 **Sec. 6. 38 MRSA §1362, sub-§1-F** is enacted to read:

4 **1-F. Pollutant or contaminant.** "Pollutant or contaminant" has the same meaning
5 as in the United States Comprehensive Environmental Response, Compensation and
6 Liability Act of 1980, 42 United States Code, Section 9601.

7 **Sec. 7. 38 MRSA §1362, sub-§4** is enacted to read:

8 **4. Uncontrolled pollutant or contaminant site.** "Uncontrolled pollutant or
9 contaminant site" means an area or location, whether or not licensed, at which substances
10 that are pollutants or contaminants are or were handled or otherwise came to be located, if
11 it is concluded by the commissioner that the site poses a threat or hazard to the health,
12 safety or welfare of any person or to the natural environment and that action under this
13 chapter is necessary to abate, clean up or mitigate that threat or hazard. "Uncontrolled
14 pollutant or contaminant site" includes all contiguous land under the same ownership or
15 control and includes without limitation all structures, appurtenances, improvements,
16 equipment, machinery, containers, tanks and conveyances on the site.

17 **Sec. 8. 38 MRSA §1364**, as amended by PL 1995, c. 462, Pt. A, §78, is further
18 amended to read:

19 **§1364. Powers and duties of the department**

20 **1. Technical services.** The commissioner shall establish a technical services
21 capability within the department to assist in the identification, evaluation and mitigation
22 of uncontrolled hazardous substance sites and uncontrolled pollutant or contaminant sites.

23 **2. Rules.** The board may adopt rules related to the handling of hazardous substances
24 and substances that are pollutants or contaminants; the investigation, abatement,
25 mitigation and cleanup of spills of hazardous substances and substances that are
26 pollutants or contaminants; and the investigation, designation and mitigation of
27 uncontrolled hazardous substance sites and uncontrolled pollutant or contaminant sites.
28 The board may provide by rule that any person who knows or has reason to believe that
29 any hazardous substance or substance that is a pollutant or contaminant is present in
30 ground water or soils beneath a site ~~which~~ that is owned or operated by that person
31 provide notice of that condition to the department if the concentration of the hazardous
32 substance or substance that is a pollutant or contaminant in ground water exceeds state or
33 federal recommended contaminant levels for drinking water or the concentration in soils
34 exceeds contaminant levels established by the board.

35 **3. Investigation and evaluation.** The commissioner may investigate and sample
36 sites where hazardous substances and substances that are pollutants or contaminants are
37 stored or handled to identify uncontrolled hazardous substance sites and uncontrolled
38 pollutant or contaminant sites. During the course of the investigation of a potential
39 uncontrolled hazardous substance site, the commissioner may require submission of
40 information or documents that relate or may relate to the site under investigation from
41 any person whom the commissioner has reason to believe may be a responsible party.
42 During the course of the investigation of a potential uncontrolled pollutant or contaminant
43 site, the commissioner may request information or documents that relate or may relate to

1 the site under investigation from any person whom the commissioner has reason to
2 believe may possess such information or documents. The information may include the
3 nature and amounts of hazardous substances, substances that are pollutants or
4 contaminants or other wastes that arrived or may have arrived at the site, manner of
5 transportation, treatment or disposal of the hazardous substances, substances that are
6 pollutants or contaminants or other wastes and any other information relating to the site
7 or to threats posed by the potential site.

8 **4. Designation of uncontrolled hazardous substance sites.** In accordance with
9 section 1365, the commissioner may declare a site to be an uncontrolled hazardous
10 substance site. The designation may be appealed only upon the issuance of an order
11 pursuant to section 1365, subsection 2, as provided in section 1365, subsection 4.

12 **4-A. Designation of uncontrolled pollutant or contaminant sites.** Upon finding,
13 after investigation, that a location at which substances that are pollutants or contaminants
14 are or were handled or otherwise came to be located may threaten or pose a hazard to the
15 public health, to the safety of any person or to the environment, the commissioner may:

16 A. Designate that location as an uncontrolled pollutant or contaminant site; and

17 B. In accordance with this section and other applicable provisions of this chapter,
18 take whatever action is considered necessary to abate, clean up or mitigate the threats
19 or hazards posed by the substances that are pollutants or contaminants at the site.

20 **5. Mitigation.** The commissioner may take whatever action necessary to abate,
21 clean up or mitigate the threats or hazards posed or potentially posed by an uncontrolled
22 hazardous substance site or uncontrolled pollutant or contaminant site or to protect the
23 public health, safety or welfare or the environment, including administering or carrying
24 out measures to abate, clean up or mitigate the threats or hazards, and implementing
25 remedies to remove, store, treat, dispose of or otherwise handle hazardous substances or
26 substances that are pollutants or contaminants located in, on or over an uncontrolled
27 hazardous substance site or uncontrolled pollutant or contaminant site, including soil and
28 water contaminated by hazardous substances or substances that are pollutants or
29 contaminants. When the necessary action includes the installation of a public water
30 supply or the extension of mains of an existing water utility, the department's obligation
31 is limited to construction of those works that are necessary to furnish the contaminated or
32 potentially contaminated properties with a supply of water sufficient for existing uses.
33 The department is not obligated to contribute to a water utility's system development
34 charge, nor to provide works or water sources exceeding those required to abate the
35 threats or hazards posed by the uncontrolled hazardous substance site or uncontrolled
36 pollutant or contaminant site. The department may pay the costs of operation,
37 maintenance and depreciation of the works or water supply for a period not exceeding 20
38 years if funds are available from Other Special Revenue or proceeds from the sale of
39 bonds. If a water supply well is installed after October 1, 1994 to serve a location that
40 immediately before the well installation was served by a viable community public water
41 system, and the well is or becomes contaminated with a hazardous substance or substance
42 that is a pollutant or contaminant:

43 A. ~~Neither~~ In the case of hazardous substance contamination, neither the
44 commissioner nor any responsible party is obligated under this chapter to reimburse
45 any person for the expense of treating or replacing the well if the well is installed in

1 an area delineated by the department as contaminated as provided in section 548,
2 subsection 1; and

3 B. ~~The~~ In the case of hazardous substance contamination, the obligation of the
4 commissioner or any responsible party under this chapter with regard to replacement
5 or treatment of the well is limited to reimbursement of the expense of installing the
6 well and its proper abandonment if the well is installed in an area other than one
7 described in paragraph A. The well owner is responsible in such a case for other
8 expenses of replacing or treating the water supply well, including the cost of any
9 pump or piping installed with the well.

10 For purposes of this subsection, "viable community public water system" has the same
11 meaning as in section 548.

12 **6. Accept funds.** The department may accept any public or private funds ~~which~~ that
13 may be available for carrying out the purposes of this chapter. The Uncontrolled Sites
14 Fund is established to be used by the department as a nonlapsing revolving fund for
15 carrying out the purposes of this chapter, including the long-term oversight of
16 uncontrolled hazardous substance sites and uncontrolled pollutant or contaminant sites.
17 Money in the fund, not needed currently to meet the obligations of the department in the
18 exercise of its responsibilities under this chapter, ~~shall~~ must be deposited with the
19 Treasurer of State to the credit of the fund and may be invested in such a manner as is
20 provided for by law. Interest received on that investment ~~shall~~ must be credited to the
21 fund.

22 **7. Acquisition of property; authority.** The department may acquire, by purchase,
23 lease, condemnation, donation or otherwise, any real property or any interest in real
24 property that the board in its discretion determines, by 2/3 majority vote, is necessary to
25 conduct remedial actions in response to threats or hazards posed or potentially posed by
26 an uncontrolled hazardous substance site or uncontrolled pollutant or contaminant site,
27 including, but not limited to:

28 A. Actions to prevent further threats or hazards and to mitigate or terminate the
29 threats or hazards;

30 B. Actions to clean up soils and ground water and remove hazardous substances or
31 substances that are pollutants or contaminants from an uncontrolled site such sites;
32 and

33 C. Replacement of water supplies contaminated or threatened by hazardous
34 substances or substances that are pollutants or contaminants.

35 The department may exercise the right of eminent domain in the manner described in
36 Title 35-A, chapter 65, to take and hold real property for any of the purposes described in
37 this subsection. The commissioner shall report on the circumstances of any taking by
38 eminent domain to the joint standing committee of the Legislature having jurisdiction
39 over natural ~~resource~~ resources matters during the next regular session following the
40 acquisition of any property by eminent domain. The department may transfer or convey
41 to any person real property or any interest in real property once acquired.

42 **Sec. 9. 38 MRSA §1367**, as amended by PL 2009, c. 121, §16, is further amended
43 to read:

1 **§1367. Liability; recovery by the State for abatement, clean up or mitigation costs**
2 **and for damages**

3 Each responsible party is jointly and severally liable for all costs incurred by the State
4 resulting from hazardous substances at the site or from the acts or omissions of a
5 responsible party with respect to those hazardous substances and for the abatement,
6 cleanup or mitigation of the threats or hazards posed or potentially posed by an
7 uncontrolled hazardous substance site, including, without limitation, all costs of acquiring
8 property. Each responsible party also is jointly and severally liable for damages for
9 injury to, destruction of, loss of or loss of use of natural resources of the State, the
10 reasonable costs of assessing natural resources damages and the costs of preparing and
11 implementing a natural resources restoration plan. The commissioner shall demand
12 reimbursement of costs, including interest, and payment of damages to be recovered
13 under this section. The interest rate charged may not exceed the prime rate of interest
14 plus 4%. Interest must be computed beginning 60 days from the date of a payment
15 demand by the commissioner. Payment must be made promptly by the responsible party
16 or parties upon whom the demand is made. Requests for reimbursement to the
17 Uncontrolled Sites Fund, if not paid within 30 days of demand, may be turned over to the
18 Attorney General for collection or may be submitted to a collection agency or agent or an
19 attorney retained by the department with the approval of the Attorney General pursuant to
20 Title 5, section 191. The Attorney General or an attorney retained by the department may
21 file suit in the Superior Court and, in addition to relief provided by other law, may seek
22 punitive damages. Notwithstanding the time limits stated in this paragraph, neither a
23 demand nor other recovery efforts against one responsible party may relieve any other
24 responsible party of liability.

25 In any suit filed under this section, the State need not prove negligence in any form or
26 matter by a defendant. The State need only prove that a defendant is a responsible party,
27 as defined in section 1362, and the site poses or posed or potentially poses or posed a
28 threat or hazard to the health, safety or welfare of any citizen of the State or the
29 environment of the State, to which the acts or omissions of the defendant are or were
30 causally related.

31 A person who would otherwise be a responsible party ~~shall~~ is not be subject to
32 liability under this section, if ~~he~~ the person can establish by a preponderance of the
33 evidence that threats or hazards posed or potentially posed by an uncontrolled hazardous
34 substance site, for which threats or hazards ~~he~~ the person would otherwise be responsible,
35 were caused solely by:

36 **1. Act of God.** An act of God;

37 **2. Act of war.** An act of war;

38 **3. Act or omission.** An act or omission of a 3rd party who is not that person's
39 employee or agent. A person seeking relief from liability for the acts or omissions of a
40 3rd party shall also demonstrate by a preponderance of the evidence that that person
41 exercised due care with respect to the hazardous substance and uncontrolled hazardous
42 substance site concerned, taking into consideration the characteristics of that substance
43 and site, in light of all relevant facts and circumstances and that that person took
44 precautions against foreseeable acts or omissions of any such 3rd party and the
45 consequences that could foreseeably result from such acts or omissions.

1 A. For purposes of this subsection, a person may demonstrate the exercise of due
2 care with respect to any uncontrolled hazardous substance site that that person has
3 acquired after hazardous substances were located on that uncontrolled site, if that
4 person shows that at the time that person acquired the uncontrolled site the person did
5 not know and had no reason to know that any hazardous substance that is the subject
6 of the release or threatened release was disposed on, in or at the uncontrolled site.

7 B. To establish that a person meets the criteria of paragraph A, a person must have
8 undertaken, at the time of acquisition, all appropriate inquiry into the previous
9 ownership and uses of the property consistent with good commercial or customary
10 practice in an effort to minimize liability. For purposes of this paragraph, the court
11 shall take into account any specialized knowledge or experience on the part of the
12 person, the relationship of the purchase price to the value of the property if
13 uncontaminated, commonly known or reasonably ascertainable information about the
14 property, the obviousness of the presence or likely presence of contamination of the
15 property, and the ability to detect that contamination by appropriate inspection; or

16 **4. Combination.** Any combination of the foregoing subsections.

17 Funds recovered under this section ~~shall~~ must be deposited into the Uncontrolled
18 Sites Fund and ~~shall~~ must be used by the department to carry out the purposes of this
19 chapter.

20 This section does not apply to uncontrolled pollutant or contaminant sites.

21 **Sec. 10. 38 MRSA §1367-B**, as enacted by PL 1991, c. 811, §4 and affected by
22 §7, is amended to read:

23 **§1367-B. Limited ~~exemption~~ exemptions from liability ~~for state or local~~
24 governmental entities**

25 **1. Limited exemption from liability for state or local governmental entities.**
26 Liability under section 1367 does not apply to the State or any political subdivision that
27 acquired ownership or control of an uncontrolled hazardous substance site through tax
28 delinquency proceedings pursuant to Title 36, or through any similar statutorily created
29 procedure for the collection of governmental taxes, assessments, expenses or charges, or
30 involuntarily through abandonment, or in circumstances in which the State or political
31 subdivision involuntarily acquired ownership or control by virtue of its function as a
32 sovereign. The exemption from liability provided under this subsection does not apply to
33 the State or any political subdivision that has caused, contributed to or exacerbated a
34 release or threatened release of a hazardous substance on or from the uncontrolled
35 hazardous substance site.

36 **1-A. Limited exemption from liability for publicly owned treatment works.** A
37 publicly owned treatment works is exempt from liability under section 1367 as a
38 responsible party under section 1362, subsection 2, paragraph C based on the contribution
39 by the publicly owned treatment works of effluent or sewage sludge to an uncontrolled
40 hazardous substance site, except that the exemption does not apply if the commissioner
41 determines that the publicly owned treatment works:

42 A. Has failed to follow best management practices for the disposal or use of effluent
43 or sewage sludge;

1 B. Has failed to comply with an information request or administrative subpoena
2 issued by the department under this chapter; or

3 C. Has impeded or is impeding, through action or inaction, the performance of a
4 response action or natural resources restoration at the uncontrolled hazardous
5 substance site.

6 For the purposes of this subsection, "publicly owned treatment works" has the same
7 meaning as in section 361-A, subsection 3-D.

8 **1-B. Limited exemption from liability for public water systems.** A public water
9 system is exempt from liability under section 1367 as a responsible party under section
10 1362, subsection 2, paragraph C based on the contribution by the public water system of
11 water treatment residuals to an uncontrolled hazardous substance site, except that the
12 exemption does not apply if the commissioner determines that the public water system:

13 A. Has failed to follow best management practices for the disposal or use of water
14 treatment residuals;

15 B. Has failed to comply with an information request or administrative subpoena
16 issued by the department under this chapter; or

17 C. Has impeded or is impeding, through action or inaction, the performance of a
18 response action or natural resources restoration at the uncontrolled hazardous
19 substance site.

20 For the purposes of this subsection, "public water system" has the same meaning as in the
21 federal Safe Drinking Water Act Amendments of 1996, 42 United States Code, Section
22 300f.

23 **2. Reimbursement for department expenses.** Notwithstanding the exemption from
24 liability provided in subsection 1, the State or any political subdivision that acquires or
25 has acquired ownership of property that encompasses an uncontrolled hazardous
26 substance site pursuant to any of the proceedings referred to in subsection 1 is liable for
27 any costs incurred by the department pursuant to this chapter during the period in which
28 the State or political subdivision had ownership of the property, up to the amount of the
29 proceeds from the sale or disposition of the property minus the out-of-pocket costs of the
30 sale or disposition.

31 **Sec. 11. 38 MRSA §1368**, as enacted by PL 1983, c. 569, §1, is amended to read:

32 **§1368. Emergency**

33 Whenever the commissioner determines that an emergency exists as the result of a
34 threat or hazard posed by an uncontrolled hazardous substance site or uncontrolled
35 pollutant or contaminant site, the commissioner shall immediately notify the Governor.
36 The Governor may declare an emergency and, in addition to whatever action is necessary
37 and available to ~~him~~ the Governor under law, may authorize the ~~Commissioner of~~
38 ~~Environmental Protection~~ commissioner in conjunction with the Commissioner of Public
39 Safety to:

40 **1. Take control.** Take control of the uncontrolled hazardous substance site or
41 uncontrolled pollutant or contaminant site and threatened adjacent areas;

1 1. It amends the definition of "hazardous substance" to include perfluoroalkyl and
2 polyfluoroalkyl substances and residual substances relating to the illegal manufacture of
3 methamphetamine and other synthetic drugs.

4 2. It adds definitions for the terms "pollutant or contaminant" and "uncontrolled
5 pollutant or contaminant site." It provides the Department of Environmental Protection
6 with authority to investigate, take control of, secure and take other action regarding
7 substances that are pollutants or contaminants at uncontrolled pollutant or contaminant
8 sites, including the removal of such substances. Under the amendment, the costs of such
9 state actions incurred in the investigation, mitigation, cleanup and other related activities
10 of substances that are pollutants or contaminants are to be borne by the State and not by
11 any individual parties associated with the uncontrolled pollutant or contaminant site or
12 with the substances at the site.

13 3. It provides a limited exemption from liability for publicly owned treatment works
14 based on the contribution by the publicly owned treatment works of effluent or sewage
15 sludge to an uncontrolled hazardous substance site.

16 4. It provides a limited exemption from liability for public water systems based on
17 the contribution by the public water system of water treatment residuals to an
18 uncontrolled hazardous substance site.

19 The amendment requires that, on or before January 15, 2022, the Department of
20 Environmental Protection report to the joint standing committee of the Legislature having
21 jurisdiction over environment and natural resources matters regarding the investigation or
22 removal of hazardous substances at certain uncontrolled hazardous substance sites and
23 the investigation or removal of substances that are pollutants or contaminants at certain
24 uncontrolled pollutant or contaminant sites.