



Maine Forest Products Council

The voice of Maine's forest economy

Companies represented on the MFPC Board

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Baskahegan Co.
BBC Lands LLC
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Columbia Forest Prod.
Cross Insurance
Family Forestry
Farm Credit East
Fontaine Inc.
H.C. Haynes
Huber Resources
Innovative Natural
Resource Solutions
J.D. Irving
Katahdin Forest Mgmt.
Key Bank
LandVest Inc.
Limington Lumber
Louisiana Pacific
Maibec Logging
ND Paper
Nicols Brothers
Pingree Associates
Pixelle Specialty Sol.
Pleasant River Lumber
Prentiss & Carlisle
ReEnergy
Richard Wing & Son
Robbins Lumber
Sappi North America
Southern Maine Forestry
Stead Timberlands
TD Bank
Timber Resource Group
Timberstate G.
Wadsworth Woodlands
Wagner Forest Mgt.
Weyerhaeuser

MFPC Testimony in Opposition to LD 780 An Act Regarding Uncontrolled Hazardous Substance Sites

April 5, 2021

Patrick Strauch, Executive Director

Senator Benner, Representative Tucker and distinguished members of the Environment and Natural Resource Committee. I am Patrick Strauch from Exeter, Maine, and the Executive Director of the Maine Forest Products Council (MFPC).

I am here representing Maine's forest product manufacturers who together with the logging and landowner sectors represent more than \$8 billion in economic contribution to the state's economy, and more than 33,000 direct and indirect jobs.

We are supportive of revisions to the Maine Uncontrolled Hazardous Substances Sites law¹ to reflect more accurately the provisions in the federal CERCLA or Superfund Law² and enable the Maine Department of Environmental Protection (DEP) to take action on contaminated sites.

However, the language in LD 780 creates authority for the DEP that exceeds CERCLA provisions.

Including the terms "*pollutant or contaminant*" in the definition of *hazardous substances*, but not the reciprocal limitations on this designation in the CERCLA law greatly expands the authority of the DEP. Under CERCLA, EPA can expend its **OWN** money to clean up sites designated with *pollutants and contaminants* but **CANNOT** recover costs or issue orders to private parties as allowed under the *hazardous substances* designation.

¹ Uncontrolled Hazardous Substance Site Law, 38 M.R.S §§1361-1371

² 42 U.S. Code Chapter 103, Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund)

Essentially EPA assigns **lifetime liability** to materials officially designated as *hazardous substances*, but only limited authority to *pollutants or contaminants*. The definitions for pollutant and contaminate were adopted to allow EPA maximum flexibility to do clean-ups on a variety of materials, without forcing EPA to go through rulemaking – in other words, to allow EPA to tackle emerging threats at government expense without delay.

During the discussion of this bill in the 129th Legislature, we offered an amendment to the Maine Uncontrolled Hazardous Substances Site law (UHSS) (see attached) that would allow the Department to use the Uncontrolled Sites Fund to investigate and mitigate risks posed by emerging contaminants. The Department would be able to:

- Use its investigative authority under section 1364 (1), (3), (5-7).
- Use its emergency authority under section 1368 to:
 - Take control of the uncontrolled site and threatened adjacent areas;
 - Secure the uncontrolled site;
 - Eject all persons from the uncontrolled site;
 - Dispose, treat, store or otherwise handle all hazardous substances located on the uncontrolled site; take whatever other action is deemed necessary to abate, clean up or mitigate the threat or hazard posed by the uncontrolled site.

This amendment would match the federal CERCLA (Superfund) structure in the Maine UHSS law to enable DEP to take action on a class of emerging substances that have not yet been listed as a “hazardous substance” by EPA. But not assign lifetime liability for these compounds until they are listed as Hazardous Substances through the EPA process.

It’s important to realize this bill does not allow the state (or anyone) to sue any PFAS manufacturers. UHSSL (and CERCLA) don’t apply to products; only to persons who either arrange for disposal. past and current owners and operators of contaminated property, and transporters who choose the site of disposal. In other words, it doesn’t apply to DuPont or 3M or any other past or present PFAS producer, it applies to Maine businesses both large and small. The “polluters” in many cases were doing what DEP encouraged and licensed them to do.

We would be glad to meet with the DEP to discuss revisions to the bill that achieve their objectives and enable action to take place to secure and remediate contaminated sites.

Thank you.

AMENDMENT TO

LD 780 An Act to Define a Hazardous Substance Under Maine Law Any Substance Defined Under Federal Law As A Hazardous Substance, Pollutant or Contaminant.

Concept: Duplicate the federal CERCLA (Superfund) structure in the Maine Uncontrolled Hazardous Substances Site Law (UHSS) to enable DEP to take cleanup action on a class of emerging substances that have not yet been listed as a “hazardous substance” by the EPA. Within CERCLA, the terms “pollutant and contaminant” are included in the definition section of the law (see attached CERCLA description). CERCLA then establishes EPA response authority (§9604) to include both a “hazardous substance” and “pollutant or contaminants”. This authority provides EPA with the ability to take immediate site action and initiate and complete remediation using federal funds.

The definitions of pollutant and contaminant were adopted to allow EPA maximum flexibility to do cleanups a wide variety of materials, without forcing EPA to go through rulemaking – in other words, to allow EPA to tackle emerging threats at government expense without delay.

However, the extremely powerful authority to impose liability on others, by issuing orders under CERCLA section 106, and by recovering federal costs under CERCLA section 107 (§9606 & 9607) was and is reserved by Congress for hazardous substances are identified by rulemaking under other laws (the Clean Air Act for Hazardous Air Pollutants, the Clean Water Act for Toxic Pollutants, hazardous waste under RCRA) or that EPA identifies by rulemaking under CERCLA as a hazardous substance.. The reason for this structure was to ensure the extremely powerful CERCLA liability scheme – the order authority and the ability to do cost recovery -- were limited to those substances that were the subject of thoughtful rulemaking. Remember that CERCLA liability is retroactive to the beginning of time, is a matter of strict liability (so fault and negligence, if any, is irrelevant), and is joint and several (so 100% of the costs can be recovered from just one party).

The proposal is to make the UHSS law parallel -- by giving the DEP the authority to use government funds to address those limited and emergency matters that justify government action and expenditures.

UHSSL Proposed Amendment:

- Add separate definitions of “Pollutant or Contaminant” (identical to CERCLA) to the Definition section (Title 38, §1362).
- Add the term “Pollutant or Contaminant” to the Powers and duties of the department (Title 38, §1364) with the intent to authorize cleanup action by the commissioner and to designate sites, without accessing cost recovery or order authority. In other words, the terms “pollutant” and “contaminant” would not be included within the term “hazardous substance” and DEP would not have the ability to recover costs (section 1367) or designate uncontrolled substance sites or issue orders (section 1364(4) or 1365). DEP would be able to use its investigation authority under 1364 (1), (3), (5)-(7) and its emergency authority under 1368.

Title 42. THE PUBLIC HEALTH AND WELFARE

SECTIONS OF CERCLA HIGHLIGHTING THE DIFFERENCES BETWEEN “HAZARDOUS SUBSTANCES” AND “POLLUTANT OR CONTAMINANT” DESIGNATIONS:

Chapter 103. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY

Subchapter I. HAZARDOUS SUBSTANCES RELEASES, LIABILITY, COMPENSATION

§9601. Definitions

(14)

The term “hazardous substance” means (A) any substance designated pursuant to section 311(b)(2)(A) of the Federal Water Pollution Control Act [33 U.S.C. 1321(b)(2)(A)], (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C. 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C. 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 307(a) of the Federal Water Pollution Control Act [33 U.S.C. 1317(a)], (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C. 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 7 of the Toxic Substances Control Act [15 U.S.C. 2606].

(33)

The term “pollutant or contaminant” shall include, but not be limited to, any element, substance, compound, or mixture, including disease-causing agents, which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring; except that the term “pollutant or contaminant” shall not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of paragraph (14) and shall not include natural gas, liquefied natural gas, or synthetic gas of pipeline quality (or mixtures of natural gas and such synthetic gas).

§ 9604. Response authorities (*Includes: hazardous substances & pollutant or contaminant*)

(a) REMOVAL AND OTHER REMEDIAL ACTION BY PRESIDENT; APPLICABILITY OF NATIONAL CONTINGENCY PLAN; RESPONSE BY POTENTIALLY RESPONSIBLE PARTIES; PUBLIC HEALTH THREATS; LIMITATIONS ON RESPONSE; EXCEPTION

§ 9607. Liability (*Includes: hazardous substances*)

(a) COVERED PERSONS; SCOPE; RECOVERABLE COSTS AND DAMAGES; INTEREST RATE; “COMPARABLE MATURITY” Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—