

Office of Policy and Legal Analysis

Date: April 14, 2021

To: Joint Standing Committee on Environment and Natural Resources

From: Dan Tartakoff, Legislative Analyst

Re: LD 780, An Act Regarding Uncontrolled Hazardous Substance Sites (DEP bill)

Summary of bill

This bill makes the following changes to the State's uncontrolled hazardous substance sites law.

1. It amends the definition of "hazardous substance" in the laws governing uncontrolled hazardous substance sites by including substances defined as hazardous substances or pollutants or contaminants under the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA").
2. It provides a limited exemption from liability for publicly owned treatment works based on the contribution by the publicly owned treatment works of effluent or sewage sludge to an uncontrolled hazardous substance site.
3. It provides a limited exemption for public water systems based on the contribution by the public water system of water treatment residuals to an uncontrolled hazardous substance site.

The bill also requires that, on or before January 15, 2023, the DEP report to the joint standing committee of the Legislature having jurisdiction over environment and natural resources matters regarding the uncontrolled hazardous substance sites where the department has used its authority to require responsible parties to investigate or remove hazardous substances that are pollutants or contaminants and, for each site, information identifying the substance involved.

CERCLA – additional background

Under CERCLA, "hazardous substance" and "pollutant or contaminant" are specifically defined terms (definitions provided at end of analysis). The State's uncontrolled hazardous substance sites law, however, defines "hazardous substance" to include "Any substance designated pursuant to the United States Comprehensive Environmental Response, Compensation and Liability Act of 1980, Public Law 96-510, Sections 101 and 102 (Superfund)" (emphasis added) (full definition provided at end of analysis). The designation of a hazardous substance or a pollutant or contaminant under CERCLA triggers a number of potential requirements or responsibilities and potential liability to responsible parties for cleanup costs. A substance may meet the definition of "hazardous substance" or "pollutant or contaminant" under CERCLA, however, without being formally "designated."

Accordingly, under current state law, those substances that have not been formally designated under CERCLA are not considered "hazardous substances" even if they meet the federal definition for "hazardous substance" or "pollutant or contaminant." DEP has the authority under state law to respond to "hazardous substances" that may endanger the public health or the environment through

investigation, mitigation of risk and remediation of contamination, some of which may be conducted by or the costs of which may be passed on to “responsible parties.”

LD 1923 (2020) – additional background

As referenced at the hearing, this bill is essentially the majority report to LD 1923, An Act To Define as a Hazardous Substance under Maine Law Any Substance Defined under Federal Law as a Hazardous Substance, Pollutant or Contaminant, which was considered by ENR during the 2020 legislative session but not enacted prior to final adjournment of the 129th Legislature.

The minority report to LD 1923 amended the definition of “hazardous substance” under state law to specifically include PFAS and meth lab residuals. It also provided DEP with the authority to take action with respect to uncontrolled sites contaminated with substances that meet the federal definition of “pollutant or contaminant,” regardless of whether such substances are designated under CERCLA, and to expend state resources in addressing such contamination; however, the amendment did not authorize DEP to impose liability for those sites on private parties.

List of legislators/entities that submitted written testimony and/or spoke at the hearing

Proponents – Department of Environmental Protection, Defend Our Health, Institute for Agriculture and Trade Policy, Maine Conservation Voters, Sierra Club Maine, additional members of the public.

Opponents – Maine Forest Products Council.

Neither for nor against – Maine Municipal Association, Maine Rural Water Association, Maine Water Environment Association.

Notes, issues and proposed amendments

1. *Maine Municipal Association, concerns* – expressed concerns regarding municipal liability/responsibility for contaminated properties that might be acquired by a municipality. Inclusion of a municipal exemption from liability under the uncontrolled sites law appears to be suggested as a way of addressing these concerns.
2. *Maine Rural Water Association, proposed amendment* – recommends clarification that the “best management practices for the disposal or use” of effluent or sewage sludge (page 1, lines 34-35) or water treatment residuals (page 2, lines 4-5) refers to those best practices applicable at the time of the action and not to any future standards that could be applied retroactively.

Fiscal information

Not yet available from OFPR. Note that the fiscal note that accompanied the majority report amendment to LD 1923 identified potential future biennium Other Special Revenue Funds cost and revenue increases with the following description:

“The addition of new definitions to the ‘hazardous substance’ term under the State’s Uncontrolled Hazardous Substance Sites law may expand the scope of investigation and remediation that the Department of Environmental Protection (DEP) conducts. DEP may elect to designate additional sites as uncontrolled sites in future years, which may result in additional expenditures made from and revenues credited to the Uncontrolled Sites Fund. No estimate of these expenditures and revenues is made at this time.”

42 U.S.C. §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]. The term does 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 this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

(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).

38 MRSA §1362(1)

1. Hazardous substance. "Hazardous substance" means:

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

B. Any substance identified by the board under section 1319;

C. Any substance designated pursuant to the United States Comprehensive Environmental Response, Compensation and Liability Act of 1980, Public Law 96-510, Sections 101 and 102 (Superfund);

D. Any toxic pollutant listed under the United States Federal Water Pollution Control Act, Section 307(a);

E. Any hazardous air pollutant listed under the United States Clean Air Act, Section 112;

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

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