OFFICE OF POLICY AND LEGAL ANALYSIS
Bill Analysis

To: Joint Standing Committee on Judiciary

From: Peggy Reinsch, Legislative Analyst

LD 363 An Act Regarding the Statute of Limitations for Injuries or Harm Resulting from Perfluoroalkyl and Polyfluoroalkyl Substances

LD 627 An Act Relating to the Statute of Limitations for Injuries or Harm Resulting from Perfluoroalkyl and Polyfluoroalkyl Substances

Public Hearing Date: March 17, 2021

SUMMARY

LD 363 and LD 627 contain the same language with slightly different format. The bills were heard together in a single public hearing.

Each bill provides that an action arising out of any harm or injury caused by a perfluoroalkyl or polyfluoroalkyl substance must be commenced within 6 years after the plaintiff discovers or should have discovered such harm or injury.

Each bill makes clear that the notice of claim and statute of limitations provisions of the Maine Tort Claims Act apply to actions against governmental entities that arise out of any harm or injury caused by a perfluoroalkyl or polyfluoroalkyl substance.

TESTIMONY

Proponents

- Representative Evangelos for Representative Pluecker, sponsor LD 363 (written testimony)
- Representative Wayne Parry, sponsor LD 627 (written testimony)
- Representative Rudnicki, cosponsor (written testimony)
- Senator Maxmin, cosponsor LD 363 (written testimony only)
- Representative Fay (written testimony only)
- Jerry Reid, Governor's Chief Counsel (written testimony only)
- Hon. Sharon Treat, Institute for Agriculture and Trade Policy (written testimony)
- Hon. Henry Ingwersen (written testimony)
- Bruce Harrington, Fairfield
- Catherine Harrington, Fairfield
- Harry Irving, Fairfield
- Fred Stone, Stoneridge Farm, Arundel
- Julie-Marie Bickford, Maine Dairy Industry Association
- Scott Faber, Environmental Working Group (written testimony)
- Susan Faunce, attorney (written testimony)
- Marilyn Tozier, Fairfield
- Ashley Goldrup, Fairfield Water Concerned Citizens
- Kelly Rogers, Fairfield
- Lawrence Higgins, Fairfield Water Concerned Citizens
- Nathan Saunders, Fairfield (written testimony)

- Troy Reny, Fairfield Water Concerned Citizens
- Lani Graham, PFAS Task Force (written testimony)
- Sarah Woodbury, Defend Our Health (written testimony)
- Heather Spaulding, Maine Organic Farmers and Gardeners Association (written testimony)
- Jason Beaudry, Dover-Foxcroft (written testimony only)
- Benjamin Staples, Scarborough (written testimony only)
- Jade Staples, Scarborough (written testimony only)
- Hunter Smith, Sierra Club Maine (written testimony only)
- Kenneth Pelletier, Fairfield (written testimony only)
- Krysta Pelletier, Fairfield (written testimony only)
- Kyle Pelletier, Fairfield (written testimony)
- Nicholas Pelletier, Fairfield (written testimony)
- Anthony Moffa (written testimony only)
- Kate Manahan, Kennebunk (written testimony only)
- Marc Landry, Fairfield (written testimony only)
- Janice Landry, Fairfield (written testimony only)
- Barbara Kenney, Fairfield (written testimony only)
- Pat Ianni, Falmouth (written testimony)
- Janet Drew, York (written testimony only)
- Melissa Boisonneault, Fairfield (written testimony only)
- Jennifer Armstrong, Kennebunkport (written testimony only)
- Rhonda Robinson, Fairfield (written testimony only)
- Michelle Pelletier, Fairfield (written testimony only)
- Terry Poulin, Fairfield (written testimony only)
- Nicholas Lyking, Fairfield (written testimony only)
- Elizabeth Hutton Lyking, Fairfield (written testimony only)
- Penelope Higgins, Fairfield (written testimony only)
- James Greene, Fairfield (written testimony only)
- Deborah Greene, Fairfield (written testimony only)
- Christine Deblois, Fairfield (written testimony only)
- Joseph Deblois, Fairfield (written testimony only)
- William and Stephanie Carter, Fairfield (written testimony only)
- Julie Bjelko, Fairfield (written testimony only)

    - PFAS contamination is a growing problem across the state of Maine.
    - You will hear from farmers and homeowners whose lives have been upended due to PFAS contamination. The contamination on their land happened years ago, in some cases more than 20 years ago; all those impacted had no idea that this toxic chemical was even on their land or in their water.
    - Current Maine law gives them little recourse to get any help or compensation from those responsible for the contamination.
    - This bill would allow those that are impacted by PFAS contamination the ability to take legal action within six years of discovery of PFAS pollution, instead of six years after the pollution originally occurred, as is currently written.
    - You have all likely heard the heartbreaking stories about the contaminated farm in Arundel, Stoneridge Farm, as well as the contamination of Tozier farm in Fairfield.
    - However, farmers are not the only ones impacted by this issue. At last count there are over 40 contaminated wells in Fairfield, near the Tozier farm.
    - This is in addition to families in Presque Isle, residents in Houlton, and others across the state are already dealing with PFAS contamination and few solutions.

- In my hometown of Warren, we are grappling with how to proceed on a site contaminated with PFAS and currently assessing what the impact is to the community's groundwater.
- Passage of LD 363 would also provide an avenue for homeowners like these with contaminated drinking water wells to seek damages.
- As more testing is done, we will find more contaminated land and water across the state.
- Under current Maine law, the cost of this pollution threatens to fall on farmers, landowners and eventually Maine taxpayers as the cost for cleanup rises and land has to be abandoned to become uncontrolled hazardous waste sites.
- While Maine is a leader in many areas, we are behind the curve on this issue.
- 37 other states already have similar discovery rules in place that allow cases to proceed on the basis on when the pollution was discovered, as is proposed in LD 363, rather than when it first occurred.
- Additionally, updating this law and addressing this disparity is one of the many recommendations that came out of the Governor's PFAS Task Force in January of 2020.
- Passage of this bill is essential to ensuring that whoever created this mess will be responsible to pay to clean it up. Farmers and other impacted communities deserve the opportunity to seek justice for the harm done to themselves and their families.
- It is on behalf of my constituent Fred Stone that I submitted this bill. Mr. Stone's farm was "ground zero" for the underlying per- and polyfluoroalkyl substances (PFAs) predicament here in Maine.
- When I started working with Mr. Stone a little over four years ago, we did not realize that his farm was just the tip of the iceberg. We are now seeing cases throughout the State. If you do not have a case in each of your districts, it is not because there are not any, it is merely because none have been found yet.
- PFAs are nicknamed "Forever Chemicals", thus this is truly a long-term problem.
- Changing the statute of limitations is important, as none of the affected farm owners knew there was an issue.
- The environmental agencies told them the sludge they were spreading was safe. Those told this have now seen their farms destroyed. Accordingly, with the proposed change, impacted farmers will at least have an avenue for getting help.
- My predecessor, The Honorable Henry Ingwersen, brought forward LD 2160 last year. However, due to the COVID-19 shutdown, it was never brought to the floor for passage. Mr. Stone was assured the initiative would be brought forth again, so I instructed the Revisor's staff to draft the bill based upon what the Committee worked through previously.
- L.D. 627 is hugely important to those afflicted already, as well as to those not aware of an existing problem.
- In July of last year, I was informed by the DEP that PFAS was discovered in the milk of a local farm and that they were investigating it, would keep me informed. In October, I was cc'd in a letter to the Fairfield Town Manager that some wells in Fairfield have tested high. Since that time more and more wells have tested very high.
- The people in my community, my friends and neighbors are scared, and angry about the PFAS issue. They are concerned about their health and their property values. They are worried about their children and grandchildren. Can you blame them?
- These bills will give folks recourse for injuries or harm now that they know there is contamination. What if they can't sell their homes? What if they can't grow their gardens anymore? What if they can't go hunting on their own property? What if they can't raise animals? There needs to be recourse somewhere.
- Perfluoroalkyl and polyfluoroalkyl substances, also known as PFAS or forever chemicals, are ubiquitous but harmful chemicals that our bodies are unable to break down. Much like mercury or lead, these substances can accumulate in our bodies, building to

dangerous levels over time. According to the CDC, accumulation of PFAS may have a range of negative effects on the body, including increased risk of some cancers, high cholesterol levels and particular risks for those who are pregnant, infants and children.

- Here in Maine, we've had several documented instances of PFAS contamination – including one dairy farm with potentially the highest level of PFAS contamination in milk recorded in our country.
- While we encounter PFAS in many different places in our lives, farmers who used sludge to fertilize were unknowingly exposing themselves and their families, land, crops and animals to dangerously high levels. Not only does this endanger their personal health, it destroys their livelihood.
- PFAS contamination is invisible and is often not discovered until long after the contamination occurs.
- LD 363 would amend the law so that the clock begins running on the statute of limitations not when the contamination occurs, but when it is discovered or should reasonably have been discovered.
- Filtering or decontaminating water and soil of PFAS is expensive; so are medical bills and rebuilding a career after the farm you thought would carry you into retirement can no longer operate.
- People affected by PFAS deserve legal recourse against polluters to help pay for these expenses, and this bill is an important step in helping them seek justice.
- This is a large class of chemicals that have between five and seven thousand different potential chemical structures. These are man-made compounds with one of the strongest chemical bonds. This is what makes them so persistent, they simply don't break down over time.
- You'll hear about the 8 chain (or long-chain or C-8) bond and the 6 chain (or short-chain or C-6) classes. It is possible the conversation will include words like "safer" or "not proven harmful". This is the language that the representatives of the manufacturers of these chemicals use and have been using for years to describe the health impacts of PFAS. PFAS have been used to make non-stick and water- and grease-proof coatings for all sorts of consumer products. They have also been used in fire-fighting foam.
- Industry began phasing out the use of long chain PFAS as early as 2000 and US EPA named a related chemical (PFOA) as an emergent contaminant in 2014. Initially these products were allowed to be used in consumer applications based on the Generally Recognized as Safe (GRAS) process that the FDA uses when evaluating food contact materials, according to a December, 2017 peer reviewed article in the journal PLOS Biology
- If the companies who produced these chemicals knew that they could be hazardous farther back than Maine's statute of limitations allows, and the expense of cleanup is to be borne by property owners and taxpayers, doesn't it make sense to allow farmers like Fred Stone, water and sewer districts, other industries and people who have been harmed by these chemicals to be able to receive damages so that we as a society don't bear the brunt of the cost of the cleanup while those that profited off the manufacture of these chemicals continue to be held harmless?
- That is the goal of LDs 363 and 627. The cost of cleaning PFAS contamination will be more expensive than Maine can afford and the time of allowing corporate profits at the expense of our health and our economy should end.
- This bill is an important part of holding those responsible for rendering some of our farms unfarmable, private drinking water wells unusable and for causing increased taxpayer expense for cleanup of toxic sludge, places where PFAS containing firefighting foams like AFFF have been used, unknowingly causing persistent chemical contamination, which will cost millions and millions of dollars to clean up.

- When Governor Mills took office, she recognized the need for a comprehensive and objective assessment of the challenges that PFAS contamination presented
- In March 2019, she issued an executive order establishing the Governor's *Task Force on the Threats of PFAS Contamination to Public Health and the Environment*
- The Task Force produced a report setting forth a series of recommendations related to regulation, legislation, additional investigation and funding, among other things. The report can be found here: https://www.maine.gov/pfastaskforce/materials/report/PFAS-Task-Force-Report-FINAL-Jan2020.pdf
- The issue of whether to recommend a change in Maine's statute of limitations governing actions for harm caused by PFAS arose very late in the Task Force's work
- Eight members of the Task Force voted to recommend that the Legislature "consider revising the statute of limitations for private claims to be within six years of discovery of contamination on private property – the recommendation that the Legislature "consider" such a change reflected that the Task Force itself has little opportunity to study the implications of this significant statutory amendment, but a strong majority agreed that the issue deserved at least the thorough review the legislative process can provide
- Although changing rules of generally applicability to address specific matters should be done cautiously, LD 627's amendment to the statute of limitations is justified by the unique threat that PFAS contamination presents
- This change would not by itself impose liability on the particular actor for the costs of remediation or other damages, but instead would allow parties to pursue otherwise valid claims so long as they commence the action within six years of when their injury is discovered or reasonably should have been discovered
- Unfortunately, there will never be enough public money available to address the needs for PFAS contamination investigation, testing and remediation
- Expanding the potential for individual litigants to pursue these claims without governmental assistance is an appropriate policy response to this daunting challenge
- Maine's Statute of Limitations is out of date. It was conceived of without understanding chemicals with properties such as PFAS, which silently and invisibly contaminate soil, water, plants and livestock, bioaccumulate in food and in human bodies, move great distances through groundwater and persist for decades.
- Unlike the statutes of limitations in 37 other states, Maine's law hasn't been updated to clarify that it runs from the time the plaintiff discovers or reasonably should have discovered the harm or injury and the connection to the chemicals.
- Instead, the standard set forth in 14 MRSA §752, "within 6 years after the cause of action accrues," is ambiguous text and somewhat circular text that could lead to further litigation in order to access the courts.
- The mismatch between how PFAS acts in the real-life environment, and the legal test set forth in Maine's one-size-fits-all statute of limitations, is vividly illustrated by what's going on in Fairfield and the neighboring communities of Benton and Unity Township.
- Neither the farmer who spread sludge on farmland in the area nor the residents whose wells have been contaminated with PFAS knew that they were being exposed to high levels of this chemical until the milk was tested and traced back.
- Failure to fix Maine's statute of limitations could result in a significant denial of justice.
- Time is of the essence. We have already lost a year to the pandemic, so that even though similar legislation moved through this committee last year, the Legislature as a whole never met to vote on it. Passage of this legislation is only one of several PFAS policies Maine must move promptly to adopt, but it is an important action because it implements the "polluter pays" principle that underlies Maine's longstanding approach to cleaning up and paying for pollution.
- I first became aware of PFAS contamination in Maine when I met Fred Stone in 2018. Fred and his wife Laura own and operate Stoneridge Farm, a 100-acre dairy farm in

Arundel. Stoneridge Farm has been in their family for over 100 years, and Fred and Laura are the third generation to own and operate the farm.

- Fred's problems began in November of 2016, when he received a letter from the local water district saying that tests showed a well providing his and his cows' drinking water was contaminated with over twice the EPA advisory limit of 70 parts per trillion (ppt) for PFOS, a chemical Fred had never heard of before and had no idea how it got there. The Maine DEP later concluded that the source of the contamination was wastewater sludge spread on the farm as fertilizer under a state-sponsored program from 1983 - 2004.
- In 2016 Fred began voluntary testing of his water, soil, hay used for feed, cows, milk, and both his and Laura's blood and found it all to be highly contaminated with PFAS. There are currently soil locations on Fred's farm that still test as high as 800,000 parts per trillion.
- Fred has not been able to sell his milk to Oakhurst Dairy since January of 2019 due to readings in his milk as high as 1,400 parts per trillion. He has thrown out his milk, installed a water filtration system, and bought hay and feed from elsewhere, all at his own expense. Fred also took the extreme and painful measure of slaughtering over half of his dairy cows, yet the PFAS contamination has persisted. To date Fred has spent around $250,000 to try and keep his dairy farm in operation by lowering the PFAS levels in his milk, to little avail.
- Under current Maine law, individuals, businesses, farms and municipalities affected by PFAS contamination may be prevented from seeking a civil remedy because the existing Maine statute of limitations for personal injury and damage to real property is limited to six years from the occurrence of contamination.
- PFAS chemicals were widely produced and distributed for decades before their harmful effects became known by individuals. Furthermore, PFAS contamination in Maine due to land-spreading, landfill leachate, the use of firefighting foam, and other sources may have occurred decades before any affected individual became aware of the contamination and subsequent harm from these PFAS compounds.
- At least 38 other states recognize a discovery rule in cases where people or property are injured by substances with latent harmful effects, such as PFAS.
- This proposed legislation and the addition of a discovery clause into Maine statute is specific to PFAS because this is a majority recommendation of the Governor's PFAS Task Force, which was specifically charged to examine the extent of PFAS use and contamination in Maine and come up with recommendations regarding this "forever chemical."
- It is especially fitting that a discovery rule be enacted especially for PFAS because of its ability to bioaccumulate in soil and water and its persistence in the environment for a long, long period of time.
- As we here in Maine move forward in actualizing many of the pioneer recommendations of the Governor's PFAS Task Force such as identifying prioritized locations through testing of soil, groundwater, and surface water, we will likely discover more sites including farms and private properties where PFAS contamination exists.
- Sludge, for instance, was applied to farms across the state of Maine beginning in the 1980's. By the year 2000, over 225 locations statewide were permitted to receive it.
- We know now that milk from yet another dairy and beef farm in central Maine was recently found to have milk contaminated at up to 150 times the Maine health standard for PFAS and likely the highest recorded levels in the country.
- Surrounding wells have also been found to be heavily contaminated.
- In addition, drinking water has been found to be contaminated in Kennebunk, Presque Isle, and Houlton, as well as at an elementary school in Trenton.

- Should these costs be borne by the public, as is the case with the Kennebunk, Kennebunkport, and Wells Water District where the ratepayers are footing the bill for a very expensive water filtration system for one of their wells contaminated by PFAS?
- Should private citizens be left to fend for themselves, as is the case with Fred and Laura Stone who've had no help to save their farm except from generous friends and neighbors?
- Or should municipalities, water districts, farmers, and businesses be able to seek compensation from the manufacturers, who've known since at least the 1970's that PFAS harms human health and does not break down in the environment, and who knowingly concealed this information from the public?
- At its heart this bill is about environmental justice and fairness for the hard-working people of Maine.
- With the work of the PFAS Task Force and its resulting report and recommendations, Maine has shown that it can possibly be a leader in protecting its private citizens from the damages to the environment, human health, livelihoods, and property due to toxic chemicals such as PFAS.
- Enacting this one majority recommendation from the PFAS Task Force may not return Fred and Laura Stone to dairy farming at Stoneridge Farm again - that working dairy farm down the road is likely gone forever. However, enacting this Task Force recommendation will remove one hurdle in the way of Fred, Laura, and likely many other Mainers who are seeking justice for the loss of their family's livelihood and good health caused by this terrible chemical.
- Toxic tort law has long recognized that statutes of limitations should be modified to accommodate injuries caused by toxic chemicals like PFAS, including property damages.
- Other New England states have legislative or judicial "discovery" rules to accommodate toxic injuries to people and property.
    - For example, Connecticut has adopted exceptions from the state's statute of limitation that apply to risks similar to those being considered by Maine's legislature, including property damages caused by hazardous chemicals substances or pollutants. In Connecticut, "no action to recover damages for personal injury, death or property damage caused by exposure to a hazardous chemical substance or mixture or hazardous pollutant released into the environment shall be brought but within two years from the date when the injury or damage complained of is discovered or in the exercise of reasonable care should have been discovered."
    - In Rhode Island, for example, the statute of limitations begins to run when the "person discovers, or with reasonable diligence should have discovered, the wrongful conduct of the manufacturer."
    - In Massachusetts, "[a]ctions by persons other than the commonwealth to recover for damage to real or personal property shall be commenced within three years after the date that the person seeking recovery first suffers the damage or within three years after the date the person seeking recovery of such damage discovers or reasonably should have discovered that the person against whom the action is being brought is a person liable pursuant to this chapter for the release or threat of release that caused the damage, whichever is later."
    - In New Hampshire, for example, actions shall be brought within 3 years of the date when the plaintiff "possessed actual knowledge."
    - In Vermont, the "discovery rule provides that the limitations clock does not begin running until the plaintiff knows or should know of the injury and cause."
    - Other states with similar "discovery" rules include Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Mississippi, Missouri, Montana, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Pennsylvania, South Carolina, Texas, Tennessee, Washington, Wisconsin and Wyoming.

- For example, the State of Ohio has adopted exceptions to the state's statute of limitations that address risks similar to those being consider by Maine's legislature. In particular, Ohio's exceptions address the risks posed by exposure to hazardous or toxic chemicals, including chromium, chemical defoliants, certain estrogens, and asbestos. In each of these cases, the statute of limitation in Ohio "accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first."
- In Alabama, where thousands of acres of Alabama farmland have been damaged by biosolids contaminated with PFAS, state law also exempts property owners damaged by toxic substances from the state's statute of limitations.
  - Specifically, the state law says: "Where the personal injury, including personal injury resulting in death, or property damage (i) either is latent or by its nature is not discoverable in the exercise of reasonable diligence at the time of its occurrence, and (ii) is the result of ingestion of or exposure to some toxic or harmful or injury-producing substance, element or particle, including radiation, over a period of time as opposed to resulting from a sudden and fortuitous trauma, then, in that event, the product liability action claiming damages for such personal injury, or property damage must be commenced within one year from the date such personal injury or property damage is or in the exercise of reasonable diligence should have been discovered by the plaintiff or the plaintiff's decedent, and in such cases each of the elements of the product liability action shall be deemed to accrue at the time the personal injury is or in the exercise of reasonable diligence should have been discovered by the plaintiff or the plaintiff's decedent;"(emphasis added)
- In Alaska, the discovery rule under which the statute does not begin to run until the claimant discovers, or reasonably should have discovered, the existence of the elements essential to his cause of action.
- In Colorado, a cause of action for injury to person, property, reputation, possession, relationship, or status shall be considered to accrue on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence.
- In Kansas, the statute of limitations "shall not commence until the fact of injury becomes reasonably ascertainable to the injured party.
- In Missouri, the "cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment, and, if more than one item of damage, then the last item, so that all resulting damage may be recovered, and full and complete relief obtained."
- In Montana, the statute of limitations does not begin to run "until the facts constituting the claim have been discovered or, in the exercise of due diligence, should have been discovered."
- Mississippi: the "cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury."
- North Carolina: the "cause of action, except in causes of actions referred to in G.S. 1-15(c), shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs.

    - South Carolina: All actions "must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action."
    - Texas: The accrual of a cause of action to "be deferred if the nature of the injury incurred is inherently undiscoverable and the evidence of injury is objectively verifiable."
    - Wisconsin: "the discovery rule dictates that a cause of action does not accrue until the nature of the injury and the cause or at least a relationship between the event and injury is or ought to have been known to the claimant."
- Fairness dictates that individuals or property owners who were unaware of their exposure to PFAS should be permitted to seek civil remedies after the harm has been discovered.
- PFAS releases from manufacturers do not yet have to be reported through the Toxic Release Inventory.
- Most states do not require manufacturers or utilities to test biosolids for the presence of PFAS or to report their results.
- Until the federal and state authorities recently required utilities to test for PFAS in drinking water, few Americans were aware of the presence of these "forever
- chemicals" in our food and water.
- Under current Maine law, many individuals, business owners, and municipalities affected by PFAS contamination may be prevented from seeking a civil remedy. PFAS chemicals were widely produced and distributed for decades before their harmful effects became generally known. As a result, PFAS contamination due to land-spreading, landfill leachate, the use of firefighting foam, and other sources may have occurred decades before any affected individuals became aware of the contamination or aware that contamination was harmful.
- However, Maine's current statute of limitations for personal injury and damage to real property is limited to six-years. 14 MRSA §752. While there are some exceptions to this general rule, there is a risk that individuals and/or entities who want to bring a civil claim for PFAS contamination may encounter significant legal challenges from defendants claiming that the statute of limitations has expired because the current law is unclear about when a statute starts to run.
- The discovery rule will enable individuals, business owners, and municipalities to pursue civil remedies caused by contamination or exposure to PFAS chemicals that might otherwise have been time barred, where such chemicals or their effects were unknown or undisclosed to the injured person/entity for many years.
- Although we could have requested a broad discovery rule relating to matters beyond PFAS chemicals, we have limited the bill to a discovery rule pertaining specifically to PFAS since they are forever chemicals. Because these chemicals are forever chemicals, it is particularly unfair to impose strict deadlines.
- The investigation by the EPA and information obtained during litigation has shown that the manufacturers of these chemicals knew that these chemicals caused harm to human health, were not biodegradable and persistent in the environment. The manufacturers knowingly concealed this information from the public. The public, who was not aware of the dangers of these chemicals, should not suffer because the manufacturers chose to hide this information.
- Allowing a discovery rule for those individuals and entities harmed by PFAS does not guarantee the success of any claim or case. It merely affords affected landowners and farmers the opportunity to attempt to prove their case in court. These cases are very difficult to prove and require an extensive amount of scientific proof and expert testimony. Such litigation is expensive and time intensive. As a result, it is likely that only meritorious cases will be pursued and succeed in a lawsuit.

- Permitting private litigation of these matters allows the costs of investigating and prosecuting these claims to be shifted to the private sector. Landowners, farmers, municipalities, and taxpayers should not bear the burden of the expensive costs associated with remediating these chemicals. Rather, private corporations which are most responsible for the contamination should pay the cost of remediating their chemicals.
- Many municipal wastewater/sewer districts and water districts have been contaminated by PFAS.
- This bill will allow municipalities to seek remedies against big national corporations who manufactured these chemicals.
- Some have raised the concern that this bill will expose municipalities to risk of litigation. However, this is highly unlikely because the Maine Tort Claims Act (MTCA) provides legal immunities and protections for municipalities and governmental entities including wastewater/sewer and water districts. The law only allows for limited exceptions to immunity based on:
    1. the ownership, maintenance or use of vehicles, machinery or equipment;
    2. the construction, operation, or maintenance of any public building or appurtenances to any public building;
    3. the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalines, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water, but only to the extent that the discharge, dispersal, release or escape complained of is sudden and accidental; and
    4. the performance of construction, street cleaning or repair operations on highways, town ways, sidewalks, etc.

  See 14 M.R.S.A 8104-A.
- These exceptions to immunity are limited and it would not apply to any PFAS related lawsuits.
- Under the MTCA, municipalities would be protected from PFAS lawsuits. The summary section of the proposed bill explicitly states that, "the notice of claim and statute of limitations provisions of the Maine Tort Claims Act apply to actions against governmental entities that arise out of any harm or injury caused by perfluoroalkyl and polyfluoroalkyl substances" making clear that the protections afforded to governmental entities in the Maine Tort Claims Act would not in any way be altered by this bill.
- Furthermore, the discovery rule would allow municipalities and governmental entities who have been harmed to bring private civil claims against the manufacturer of these chemicals to pay for the costs of remediation and other damages that the cities and towns have suffered as a result of contamination.

Opponents

- Charlie Soltan, Maine Association of Insurance Companies (written testimony only)

    - Insurance is a product that seeks to protect individuals and business, whether private or public, from the financial risks caused by the actions of themselves or others.
    - Insurance is offered and priced based on a set of actuarial calculations that seek to take in the probability of expected risk within a limited period for those risks to materialize.
    - Insurance is also based on the collective risk that all insureds share. Thus, for example, the cost of insuring our individual cars, homes or businesses costs far less than the value of our homes, cars or businesses that we insure or the liability protection we secure.
    - Risks that are unknown, and/or uninsurable, do not factor in the costs for insurance, thereby keeping it affordable.

- Statutes of limitation have been enforced throughout history, from both Greek and Roman periods and remains a fundamental part of American law.
- Statutes of limitations encourage actions to be brought while evidence and witnesses are available and memory is accurate. A long dormant matter litigated, whether civil or criminal, without such fresh or available evidence and witnesses results in more injustice than justice.
- In the insurance context, having a risk, especially one that is completely unknown at the inception of a policy and that then is also virtually of unlimited duration, is impossible to quantify or price. Were unknown risks, or risks of vast societal impact like war to be covered, it would result in policies that will not be written, or if written, of such limited scope to be impractical, or would be priced so that it is not affordable.
- This negates the whole concept of insurance to the detriment of individuals, governments, business and society as a whole.
- PFAS compounds illustrates how such a risk created decades ago, had it been known, would have resulted in a complete lack of insurance coverage for the risks associated with it, as no insurance company could have nor would have, underwritten such a risk and for such a duration.
- To now have insurance policies respond to suits for these risks, decades after the 6 year of statute of limitations have run, is contrary to the principles supporting the accessibility, affordability and breadth of insurance that gives some financial protection to those that seek such coverages.
- As the January 2020 Final Report from the Maine PFAS Task Force states: "The scientific understanding of how PFAS impacts people and the environment is still developing, and for thousands of PFAS compounds much remains unknown."
- They go on to state that "Maine is similar to other states trying to manage a shifting landscape while keeping pace with changes in our knowledge of this emerging contaminant and protecting human health with limited resources and authority."
- The report also underscores the prevalence of the products and use of those products containing PFAS.
- Therefore, it is completely unknown to what degree individuals, business or government or quasi-governmental agencies will be sued for damages.
- The legislation before you is not limited in any way for determining who or what will be sued for damages. Will it be the manufacturers of the chemicals, the manufacturers that created products containing the chemicals or plastics, the people that used and disposed of products with the chemicals, the disposal sites that held the products, the treatment facilities that repurposed waste containing the chemicals, the farmers that produced products containing the chemicals, the fishing industry harvesting the fish that contained the chemicals, the governments that failed to appropriately regulate the chemical, the childcare provider that provided the toys containing the chemical, or the small Maine business that packaged their product in containers having the chemicals? And who else?
- We therefore submit the two proposed bills are overly broad and detrimental to creating appropriate and more societal solutions to the developing hazards of PFAS.
- We can no more litigate our way out of this problem than we can litigate our way out of Covid-19. Some societal hazards, whether natural or manmade, demand a wider more practical response. This legislation does not support such a response.

Neither for nor against

- Leonard Blanchette, Brunswick Sewer District, Maine Water Environment Association (written testimony)
- Brad Sawyer, Maine Rural Water Association (written testimony)
- Bruce Berger, Maine Water Utilities Association (written testimony)

- Tim Wade, Maine Water Environment Association (written testimony only)
    - Wastewater and drinking water systems have been the unknowing and unwilling recipients of the compounds commonly referred to as PFAS. These systems should not be held liable for chemicals over which they have no control. Rather, the manufacturers of the chemicals as well as the manufacturers of goods containing such chemicals should bear the burden of the effects these chemicals are having on our environment and public health.
    - While we understand the bills as drafted would allow for some protection under the Maine Tort Claims Act (14 MRSA §8103), we still have concerns about the costs our customers may face because of this legislation, which may detract from other investments that are important to public health.
    - For example, the liability absorbed by the landfill sites and beneficial reuse contractors who currently receive biosolids from our member systems would require them to institute massive process and management controls that will ultimately lead to large scale increases in our tipping fees, or refusal to accept our waste product. This would cause further disruption in our ability to serve our customers, beyond the current impacts experienced over the past couple of years that have increased Maine biosolid management costs by over 30% since the emergence of PFAS concerns related to biosolids.
    - To cover likely further increased fees, wastewater systems will be forced to raise rates or re-allocate funds from other important projects that protect our environment.
    - In short, even if water systems are not directly liable under this bill, the impact of this bill on entities who currently receive biosolids from our member systems will raise operating costs, constrain their ability to receive biosolids in the future, and reduce investments in other important projects.
    - Stated another way, in seeking to fix one environmental issue related to PFAS, this bill – if not further amended – will likely create new environmental challenges.
    - MeWEA is in full support of science-based approaches to limits on PFAS, and we support this legislation in terms of holding the manufacturers of PFAS compounds wholly accountable.
    - We do not believe this legislation should affect the good work that your wastewater and drinking water systems perform to ensure public safety and environmental health, nor should it be the responsibility of the customers and taxpayers to fund these injury claims.
    - We ask that you consider a complete exemption for all water and wastewater utilities and consider the indirect impacts that this legislation could have on those utilities in terms of our contractors receiving the biosolids.
    - Please focus this legislation where it belongs: the corporate entities that profit from the use of the compounds.
    - Rural Water understands the necessity for Mainers who have suffered economically, and possibly physically, due to PFAS contamination to have a fair attempt at recouping losses.
    - We strongly support the notion that the manufacturers and distributors of these chemicals should be on the hook for remediation costs and not the average Mainer. Wastewater treatment facilities are not creators of these compounds but rather unwilling receivers due to PFAS laden human waste being brought to their facility.
    - At this point it is extremely likely that we all have some amount of PFAS in our body and are inadvertently contributing to the problem.
    - We appreciate that both pieces of legislation retain the protections for public entities that are found in the Maine Tort Claims Act.
    - The taxpayers, or ratepayers, should not be left holding the bill after decades of unknowing use of these chemicals.

- When looking at PFAS legislation we urge you to consider the entire issue instead of individual pieces of legislation in a vacuum. These bills are part of that puzzle and continue to leave open some liability for publicly owned treatment works (POTW) but we are hopeful that they are not the ultimate target of this legislation.
- The Maine Rural Water Association has taken steps to start discussions with utilities not only in Maine but around the country on the issue of PFAS.
- We hope to play an active role in solving this problem for Maine people and hope you will view us as a resource moving forward.
- Managers and operators of water and wastewater systems are committed to protecting public health and the environment.
- Water and wastewater systems are neither producers or users of Per and Poly-fluoroalkyl Substances (PFAS).
- Unfortunately, some water and wastewater systems have become unwitting conveyors of this material.
- Testing for PFAS in drinking water, wastewater and bio-solids has been occurring for less than 10 years and only in the past several years has the testing technology been adequate to identify PFAS at very low levels.
- Only about 35 of the thousands of PFAS compounds are currently tested for in drinking water.
- If a water system's source of drinking water was contaminated with PFAS, that contamination was likely delivered to consumers. If the water utility removes the PFAS through its treatment process, the PFAS will be found in the residual material it must disposed of. If a wastewater utility receives PFAS in the wastewater it receives from customers, that PFAS will be found in the wastewater discharge as well as in the bio-solids it must dispose of.
- While we strongly support the effort to hold polluters and manufacturers responsible, we are concerned the broad language of LD 363 and 627 may have an unintended consequence of subjecting water and wastewater utilities to liability exposure, including a costly duty to defend in court, for the activities of others over which utilities have little control.
- As the local entity, utilities may be the easier target but are not the proper target of litigation.
- We do appreciate that both bills include language expressly stating that the extended "discovery rule" for PFAS will not supersede applicability of the Maine Tort Claims Act. However, this exemption does not cover water utilities that are operated by private companies. We believe such water utilities also need the same protection afforded to quasi-governmental water districts and municipal water departments under this bill.
- For this reason, we respectfully request that language be added to exempt "water utilities" from the extended discovery rule of this bill so that all water systems are treated the same, regardless of the form of ownership.

BACKGROUND

LD 2160 in the 129th Legislature addressed the same issues. The majority report is captured in the text of both LD 363 and LD 627. The minority report limited the application of the discovery rule to manufacturer of PFAS and PFOS. (Four members were absent and did not vote.)

NCSL information on PFAS and state and federal action: https://www.ncsl.org/Portals/1/Documents/legisbriefs/2021/MarchLBs/PFAS%20Contamination_07.pdf (contains additional links)

FISCAL IMPACT:

Not yet determined