

MAINE STATE LEGISLATURE

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116th MAINE LEGISLATURE

FIRST REGULAR SESSION-1993

Legislative Document

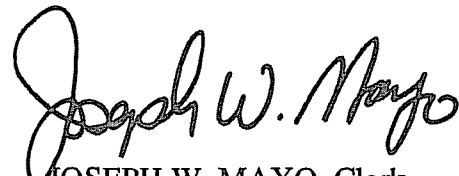
No. 554

H.P. 435

House of Representatives, February 18, 1993

An Act to Establish Mediation to More Efficiently and Fairly Enforce the State's Environmental Laws.

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


JOSEPH W. MAYO, Clerk

Presented by Representative MELENDY of Rockland.

Cosponsored by Representatives: ADAMS of Portland, AHEARNE of Madawaska, AIKMAN of Poland, ALIBERTI of Lewiston, ANDERSON of Woodland, BAILEY of Township 27, BAILEY of Farmington, BARTH of Bethel, BEAM of Lewiston, BOWERS of Washington, BRENNAN of Portland, CARROLL of Gray, CATHCART of Orono, CLARK of Millinocket, CLOUTIER of South Portland, CLUKEY of Houlton, COFFMAN of Old Town, COLES of Harpswell, CONSTANTINE of Bar Harbor, COTE of Auburn, DiPIETRO of South Portland, DONNELLY of Presque Isle, DORE of Auburn, DRISCOLL of Calais, DUTREMBLE of Biddeford, ERWIN of Rumford, FAIRCLOTH of Bangor, FARNUM of South Berwick, FARREN of Cherryfield, FITZPATRICK of Durham, FOSS of Yarmouth, GEAN of Alfred, GOULD of Greenville, GRAY of Sedgwick, HALE of Sanford, HATCH of Skowhegan, HEINO of Boothbay, HICHBORN of Howland, HOGLUND of Portland, HUSSEY of Milo, JACQUES of Waterville, JALBERT of Lisbon, JOHNSON of South Portland, JONES of Pittsfield, JOSEPH of Waterville, KETTERER of Madison, KILKELLY of Wiscasset, KNEELAND of Easton, KONTOS of Windham, KUTASI of Bridgton, LARRIVEE of Gorham, LEMKE of Westbrook, LIBBY of Buxton, LIPMAN of Augusta, LOOK of Jonesboro, LORD of Waterboro, MARTIN of Van Buren, MICHAEL of Auburn, MICHAUD of East Millinocket, MITCHELL of Vassalboro, MITCHELL of Freeport, MORRISON of Bangor, MURPHY of Berwick,

Additional cosponsors on next page

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

2
3 **Sec. 1. 38 MRSA §347-A, sub-§1**, as amended by PL 1989, c. 890,
4 Pt. A, §31 and affected by §40, is further amended to read:

6 **1. General procedures.** Whenever Except as provided in
7 section 347-D, whenever it appears to the commissioner, after
8 investigation, that there is or has been a violation of this
9 Title, of rules promulgated under this Title or of the terms or
10 conditions of any board or commissioner license, permit or order,
11 the commissioner may do one or more of the following, including,
12 but not limited to:

14 A. Resolve the violation through an administrative consent
15 agreement approved by the board and the Attorney General;

16 B. Refer the violation to the Attorney General for
17 prosecution;

18 C. Schedule and hold an enforcement hearing on the alleged
19 violation pursuant to subsection 2; or

20 D. With the prior approval of the Attorney General,
21 initiate a civil action pursuant to section 342, subsection
22 7.

23 **Sec. 2. 38 MRSA §347-D** is enacted to read:

24 **§347-D. Mediation**

25 **1. Mediation requirement.** The commissioner may not
26 undertake any action under section 347-A, subsection 1, paragraph
27 A, C or D or refer any alleged violation to the Attorney General
28 for civil litigation prior to offering the alleged violator the
29 opportunity to resolve the alleged violation through mediation
30 under this section.

31 A. The commissioner may not propose to begin a civil
32 enforcement action as a means of inducing a person to sign
33 an admission or consent agreement or to pay a fine, and a
34 proposed admission, consent agreement or fine may not be
35 presented to a person by the commissioner until the
36 conclusion of the mediation process under this section.

37 B. When a person is an applicant before the department for
38 a permit of any kind, the commissioner may not use the
39 permit process, by delay, by adverse action or by threat of
40 either, as a negotiating point or tool in the mediation
41 process under this section to induce that person to sign an
42 admission or consent agreement or to pay a fine.

2 2. Appointment and assignment of mediators. The Chief
4 Judge of the District Court shall appoint from among experienced
6 members of the Maine State Bar a panel of qualified mediators
8 sufficient in number to ensure that the burden on each member is
10 not unreasonable. The mediators are not considered employees of
12 the State for any purpose. Appointment of a mediator to each
14 case must be by the Chief Judge using any method that securely
puts the selection of the mediator beyond the control of the
parties. The Chief Judge shall establish rules and guidelines
for the mediation process. The Chief Judge shall set fees to be
paid to mediators not exceeding \$200 per day. The mediator's fee
must be paid by the party requesting the mediation.

16 3. Immunity from civil liability. A person serving as a
18 mediator under this section is immune from any civil liability,
as are employees of governmental entities, under the Maine Tort
Claims Act for acts performed within the scope of duties of the
mediator.

20 4. Notice of mediation offer. The offer of mediation must
22 include for each alleged violation:

24 A. The specific law allegedly violated, the specific acts
26 that are alleged to constitute violations and the specific
date or dates of the alleged violation;

28 B. A summary, presented with reasonable completeness and
30 specificity, of relevant evidence that the violation did in
fact occur; and

32 C. An explanation of the mediation process and of the
34 alleged violator's right to request mediation.

36 If the alleged violator does not accept the offer of mediation
within 20 days of the commissioner's offer, the commissioner may
proceed under section 347-A.

38 5. Mediation initiated. If mediation is requested, a
40 mediator must be promptly appointed. The mediator shall then
42 contact the parties and schedule a mediation session. The
44 mediation schedule and procedures must be established by the
mediator under rules adopted by the Chief Judge of the District
Court.

46 6. Good faith; agreements. Both parties shall participate
48 in the mediation in good faith, putting forth the facts and their
50 views honestly and fully and endeavoring to reach a fair and just
settlement based upon the facts of the case and to establish a
relationship of trust and good will. Any agreement reached by

2 the parties through mediation on any issues must be reduced to
3 writing, signed by the parties and presented to the board for
4 approval as an administrative consent agreement.

6 7. Termination for lack of good faith. If the mediator at
7 any time determines that either party is not participating in the
8 mediation in good faith or is attempting to use the mediation
9 process for delay or other improper purposes, the mediator may,
10 after reasonable warning to the parties, terminate the mediation
11 and give the parties in writing the reasons for the termination.
12 If the mediator finds that either party failed to make a good
13 faith effort to mediate, the mediator may assess attorney's fees
14 and costs.

16 A. If the mediation is terminated because the mediator
17 determines that the commissioner is not participating in
18 good faith, the commissioner may not bring any civil
19 enforcement action for the alleged violation or violations
20 that were the subject of the mediation.

22 B. If the mediation is terminated because the mediator
23 determines that the alleged violator is not participating in
24 good faith, the commissioner may proceed under section 347-A.

26 C. Either party may appeal the mediator's determination
27 within 30 days to the Chief Judge of the District Court or
28 the judge's designee, who may for good cause shown appoint a
29 new mediator and order that mediation continue or authorize
30 the commissioner to proceed under section 347-A.

32 8. Voluntary termination. The alleged violator may request
33 the termination of the mediation at any time. Upon termination
34 the commissioner may proceed with an enforcement action under
35 section 347-A.

36 9. Duration of mediation. If after 90 days the parties
37 have not been able to reach a mutually agreeable settlement, the
38 mediation is terminated and the department may proceed under
39 section 347-A. This period may be extended by mutual agreement
40 of the parties.

42 10. Mediation proceedings inadmissible. Evidence disclosed
43 or statements made by the alleged violator during mediation are
44 inadmissible as evidence in any subsequent proceeding.

46
48 **STATEMENT OF FACT**

50 This bill establishes a mediation process for the resolution
of potential environmental violations. The Commissioner of

2 Environmental Protection must make an offer of mediation prior to
proceeding with any administrative enforcement action or civil
litigation.

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