

# MAINE STATE LEGISLATURE

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# 124th MAINE LEGISLATURE

## FIRST REGULAR SESSION-2009

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Legislative Document

No. 476

S.P. 179

In Senate, February 10, 2009

### **An Act To Amend Certain Laws Administered by the Department of Environmental Protection**

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Submitted by the Department of Environmental Protection pursuant to Joint Rule 204.  
Reference to the Committee on Natural Resources suggested and ordered printed.

A handwritten signature in cursive script that reads "Joy J. O'Brien".

JOY J. O'BRIEN  
Secretary of the Senate

Presented by Senator GOODALL of Sagadahoc.  
Cosponsored by Representative DUCHESNE of Hudson.

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

2 **Sec. 1. 38 MRSA §341-D, sub-§4**, as amended by PL 2007, c. 661, Pt. B, §§2 to  
3 4, is further amended to read:

4 **4. Appeal or review.** The board shall review, may hold a hearing at its discretion on  
5 and may affirm, amend or, reverse or remand to the commissioner for further proceedings  
6 any of the following:

7 A. Final license or permit decisions made by the commissioner when a person  
8 aggrieved by a decision of the commissioner appeals that decision to the board within  
9 30 days of the filing of the decision with the board staff. The board staff shall give  
10 written notice to persons that have asked to be notified of the decision. The board  
11 may allow the record to be supplemented when it finds that the evidence offered is  
12 relevant and material and that:

13 (1) An interested party seeking to supplement the record has shown due  
14 diligence in bringing the evidence to the licensing process at the earliest possible  
15 time; or

16 (2) The evidence is newly discovered and could not, by the exercise of  
17 diligence, have been discovered in time to be presented earlier in the licensing  
18 process.

19 The board is not bound by the commissioner's findings of fact or conclusions of law  
20 but may adopt, modify or reverse findings of fact or conclusions of law established  
21 by the commissioner. Any changes made by the board under this paragraph must be  
22 based upon the board's review of the record, any supplemental evidence admitted by  
23 the board and any hearing held by the board;

24 B. License or permit decisions made by the commissioner that the board votes to  
25 review within 30 days of the next regularly scheduled board meeting following  
26 written notification to the board of the commissioner's decision. Except as provided  
27 in paragraph D, the procedures for review are the same as provided under paragraph  
28 A;

29 C. License or permit decisions appealed to the board under another law. Unless the  
30 law provides otherwise, the standard of review is the same as provided under  
31 paragraph A; and

32 D. License or permit decisions regarding an expedited wind energy development as  
33 defined in Title 35-A, section 3451, subsection 4. In reviewing an appeal of a license  
34 or permit decision by the commissioner on an application for an expedited wind  
35 energy development, the board shall base its decision on the administrative record of  
36 the department, including the record of any adjudicatory hearing held by the  
37 department, and any supplemental information allowed by the board using the  
38 standards contained in subsection 5 for supplementation of the record. The board  
39 may remand the decision to the department for further proceedings if appropriate.  
40 The chair of the Public Utilities Commission or the chair's designee shall serve as a  
41 nonvoting member of the board and is entitled to fully participate but is not required  
42 to attend hearings when the board considers an appeal pursuant to this paragraph.

1 The chair's participation on the board pursuant to this paragraph does not affect the  
2 ability of the Public Utilities Commission to submit information to the department for  
3 inclusion in the record of any proceeding before the department.

4 **Sec. 2. 38 MRSA §343-D, sub-§2**, as enacted by PL 1991, c. 804, Pt. C, §3 and  
5 affected by §5, is amended to read:

6 **2. Terms.** Except for the commissioner, who shall serve a term coincident with that  
7 person's appointment as the commissioner, all members are appointed for staggered terms  
8 of ~~3~~ 4 years. A vacancy must be filled by the same appointing authority that made the  
9 original appointment. Appointed members may not serve more than 2, ~~3-year~~ 4-year  
10 terms.

11 **Sec. 3. 38 MRSA §343-H, sub-§3, ¶B**, as amended by PL 2001, c. 695, §1, is  
12 repealed.

13 **Sec. 4. 38 MRSA §343-H, sub-§4**, as amended by PL 2003, c. 551, §4, is further  
14 amended to read:

15 **4. Reporting.** The directors shall jointly report on the activities of all state agencies  
16 and state-supported institutions of higher learning under the initiative to the joint standing  
17 committee of the Legislature having jurisdiction over natural resources matters and the  
18 joint standing committee of the Legislature having jurisdiction over state government  
19 matters. The directors must submit their report no later than January 1, 2006, and  
20 biennially thereafter. The report must identify the successes of and the obstacles to  
21 implementation of the initiative and may include recommendations for any statutory  
22 changes necessary to accomplish the initiative.

23 **Sec. 5. 38 MRSA §344, sub-§9**, as enacted by PL 1989, c. 890, Pt. A, §27 and  
24 affected by §40, is amended to read:

25 **9. License renewals, amendments, surrender and transfers.** For purposes of this  
26 section, a request for a license or permit renewal, amendment, surrender or transfer is  
27 considered an application subject to decision by the department.

28 **Sec. 6. 38 MRSA §361-A, sub-§1-J**, as amended by PL 2007, c. 292, §16, is  
29 further amended to read:

30 **1-J. Code of Federal Regulations.** "Code of Federal Regulations" means the  
31 codification of regulations published in the Federal Register by the Federal Government,  
32 and includes those regulations effective on or before July 1, ~~2007~~ 2009.

33 **Sec. 7. 38 MRSA §361-A, sub-§1-K**, as amended by PL 2007, c. 292, §17, is  
34 further amended to read:

35 **1-K. Federal Water Pollution Control Act.** "Federal Water Pollution Control Act"  
36 means federal Public Law 92-500 or 33 United States Code, Sections 1251 et seq.,  
37 including all amendments effective on or before July 1, ~~2007~~ 2009.

1           **Sec. 8. 38 MRSA §552, sub-§2**, as amended by PL 1997, c. 364, §30, is further  
2 amended to read:

3           **2. State need not plead or prove negligence.** The intent of this subchapter is to  
4 provide the means for rapid and effective cleanup and to minimize direct and indirect  
5 damages and the proliferation of 3rd-party claims. Accordingly, any person, vessel,  
6 licensee, agent or servant, including a carrier destined for or leaving a licensee's facility  
7 while within state waters, who permits or suffers a prohibited discharge or other polluting  
8 condition to take place is liable to the State for all disbursements made by it pursuant to  
9 section 551, subsection 5, paragraphs B, D, E, H and I, or other damage incurred by the  
10 State, including damage for injury to, destruction of, loss of, or loss of use of natural  
11 resources and, the reasonable costs of assessing natural resources damage and the costs of  
12 preparing and implementing a natural resources restoration plan. In any suit to enforce  
13 claims of the State under this section, to establish liability, it is not necessary for the State  
14 to plead or prove negligence in any form or manner on the part of the person causing or  
15 suffering the discharge or licensee responsible for the discharge. The State need only  
16 plead and prove the fact of the prohibited discharge or other polluting condition and that  
17 the discharge occurred at facilities under the control of the licensee or was attributable to  
18 carriers or others for whom the licensee is responsible as provided in this subchapter or  
19 occurred at or involved any real property, structure, equipment or conveyance under the  
20 custody or control of the person causing or suffering the discharge.

21           **Sec. 9. 38 MRSA §561**, as amended by PL 1995, c. 399, §5 and affected by §21,  
22 is further amended to read:

23           **§561. Findings; purpose**

24           The Legislature finds that significant quantities of oil are being stored in  
25 aboveground and underground storage facilities; that leaks and unlicensed discharges  
26 from these facilities pose a significant threat to the quality of the waters of the State,  
27 including the ground water resources; that protection of the quality of these waters is of  
28 the highest importance; and that their protection requires proper design and installation of  
29 new and replacement ~~underground~~ oil storage facilities, as well as monitoring,  
30 maintenance and operating procedures for existing, new and replacement facilities.

31           The Legislature intends by the enactment of this subchapter to exercise the police  
32 power of the State through the department by conferring upon the department the power  
33 to deal with the hazards and threats of danger and damage posed by the storage and  
34 handling of oil ~~in underground facilities~~ and related activities; to require the prompt  
35 containment and removal of pollution occasioned thereby; to provide procedures whereby  
36 persons suffering damage from these occurrences may be promptly made whole; to  
37 establish a fund to provide for the investigation, mitigation and removal of discharges or  
38 threats of discharge of oil from ~~aboveground and underground~~ storage facilities, including  
39 the restoration of contaminated water supplies; and to guarantee the prompt payment of  
40 reasonable damage claims resulting therefrom.

41           The Legislature further finds that preservation of the ground water resources and of  
42 the public uses referred to in this subchapter is of grave public interest and concern to the  
43 State in promoting its general welfare, preventing disease, promoting health and

1 providing for the public safety and that the State's interest in this preservation outweighs  
2 any burdens of absolute liability imposed by the Legislature in this subchapter upon those  
3 engaged in the storage of oil, petroleum products and their by-products ~~in underground~~  
4 ~~storage facilities.~~

5 **Sec. 10. 38 MRSA §563, sub-§4**, as amended by PL 2007, c. 655, §4, is further  
6 amended to read:

7 **4. Registration fees.** The owner or operator of an underground oil storage facility  
8 shall pay a fee to the department of \$100 for each tank registered under this section  
9 located at the facility, except that single family homeowners are not required to pay a fee  
10 for a tank at their personal residence. The fee must be paid at the time the tank is first  
11 registered and every 3 years thereafter upon receipt of a bill from the department. The  
12 department may prorate the fee ~~for new installations to put all tank owners and operators~~  
13 ~~on the same billing cycle as appropriate.~~

14 **Sec. 11. 38 MRSA §568, sub-§1**, as amended by PL 2007, c. 655, §6, is further  
15 amended to read:

16 **1. Removal.** Any person discharging or suffering a discharge of oil ~~to groundwater~~  
17 ~~from an oil storage facility~~ in the manner prohibited by section 543 and any other  
18 responsible party shall immediately undertake to remove that discharge to the  
19 commissioner's satisfaction. Notwithstanding this requirement, the commissioner may  
20 order the removal of that discharge pursuant to subsection 3 or may undertake the  
21 removal of that discharge and retain agents and contractors for that purpose, who shall  
22 operate under the direction of the commissioner. Any unexplained discharge of oil ~~to~~  
23 ~~groundwater~~ within state jurisdiction must be removed by or under the direction of the  
24 commissioner. Any expenses involved in the removal of discharges, whether by the  
25 person causing the discharge, the person reporting the discharge, the commissioner or the  
26 commissioner's agents or contractors, may be paid in the first instance from the Ground  
27 Water Oil Clean-up Fund, including any expenses incurred by the State under subsection  
28 3, and any reimbursements due that fund must be collected in accordance with section  
29 569-A or 569-B.

30 **Sec. 12. 38 MRSA §568, sub-§4, ¶A**, as amended by PL 1991, c. 494, §9, is  
31 further amended to read:

32 A. Any person who causes, or is responsible for, a discharge ~~to ground water from~~  
33 ~~an oil storage facility~~ in violation of section 543 is not subject to any fines or  
34 penalties for a violation of section 543 for the discharge if that person promptly  
35 reports and removes that discharge in accordance with the rules and orders of the  
36 commissioner and the board.

37 **Sec. 13. 38 MRSA §569-A, sub-§2**, as amended by PL 2005, c. 330, §23, is  
38 further amended to read:

39 **2. Third-party damages.** Any person claiming to have suffered property damage or  
40 actual economic damages, including, but not limited to, loss of income and medical  
41 expenses directly or indirectly as a result of a discharge of oil ~~to ground water prohibited~~

1 ~~by section 543~~ from an oil storage facility, in this subsection called the "claimant," may  
2 apply to the commissioner within 2 years after the occurrence or discovery of the injury  
3 or damage, whichever date is later, stating the amount of damage alleged to have been  
4 suffered as a result of that discharge. The commissioner shall prescribe appropriate forms  
5 and details for the applications. The commissioner may contract with insurance  
6 professionals to process claims. The commissioner, upon petition and for good cause  
7 shown, may waive the 2-year limitation for filing damage claims.

8 All 3rd-party damage claims for which no determination of award has been made must be  
9 processed in accordance with the substantive and procedural provisions of this section.

10 A. When a responsible party is known, the commissioner shall send by certified mail  
11 to the responsible party notice of claim and written notice of the right to join the  
12 claims proceeding as an interested party. A responsible party shall provide written  
13 notification of intent to join to the department within 10 working days of receipt of  
14 this notice. If the responsible party joins as an interested party and formally agrees in  
15 writing to the amount of the damage claim, any determination of the amount of the  
16 claim and award is binding in any subsequent action for reimbursements to the fund.  
17 If a claimant is not compensated for 3rd-party damages by the responsible party or  
18 the expenses are above the applicant's deductible and the claimant, the responsible  
19 party and the commissioner agree as to the amount of the damage claim, or if the  
20 responsible party does not join as an interested party or when the responsible party is  
21 not known after the commissioner has exercised reasonable efforts to ascertain the  
22 responsible party, and the claimant and the commissioner agree as to the amount of  
23 the damage claim, the commissioner shall certify the amount of the claim and the  
24 name of the claimant to the Treasurer of State and the Treasurer of State shall pay the  
25 amount of the claim from the fund.

26 B. If the claimant, the responsible party and the commissioner are not able to agree  
27 as to the amount of the damage claim, or if the responsible party does not join as an  
28 interested party in a timely manner or when the responsible party is not known after  
29 the commissioner has exercised reasonable efforts to ascertain the responsible party,  
30 and the claimant and the commissioner are not able to agree as to the amount of the  
31 damage claim, the claim is subject to subsection 4.

32 C. A claimant shall take all reasonable measures to prevent and minimize damages  
33 suffered by the claimant as a result of a discharge of oil. Reasonable measures  
34 include title searches and site assessments for the acquisition of commercial or  
35 industrial properties.

36 D. Third-party damage claims must be stated in their entirety in one application.  
37 Damages omitted from any claim at the time the award is made are waived unless the  
38 damage or injury was not known at the time of the claim.

39 E. Damage claim awards paid from the fund to a claimant may not include any  
40 amount the claimant has recovered on account of the same damage by way of  
41 settlement with the responsible party or the responsible party's representative or  
42 judgment of a court of competent jurisdiction against the person causing or otherwise  
43 responsible for the discharge.

1 F. It is the intent of the Legislature that the remedies provided for 3rd-party damage  
2 claims compensated under this subchapter are nonexclusive. A court awarding  
3 damages to a claimant as a result of a discharge of oil to ground water prohibited by  
4 section 543 shall reduce damages awarded by any amounts received from the fund to  
5 the extent these amounts are duplicative.

6 G. Payments from the fund for 3rd-party damage claims may not exceed \$200,000  
7 per claimant.

8 H. A 3rd-party damage claim for damages to real estate may not include the  
9 devaluation of the real estate associated with the loss of a water supply if the  
10 commissioner finds under section 568, subsection 2 that a public or private water  
11 supply is available and best meets the criteria of that subsection and the property  
12 owner did not agree to be served by that public or private water supply. If a water  
13 supply well is installed after October 1, 1994 to serve a location that immediately  
14 before the well installation was served by a viable community public water system,  
15 and the well is or becomes contaminated with oil:

16 (1) A 3rd party may not recover damages under this subchapter for the expenses  
17 of treatment or replacement of the well if the well is installed in an area  
18 delineated as contaminated as provided in section 548, subsection 1; and

19 (2) A 3rd-party damage claim under this subchapter with regard to treatment or  
20 replacement of the well is limited to reimbursement of the expense of installing  
21 the well and its proper abandonment if the well is installed in any other area.

22 For purposes of this paragraph, "viable community public water system" has the same  
23 meaning as in section 548.

24 I. A claimant is not eligible for compensation under this subsection for costs,  
25 expenses or damages related to a discharge if the commissioner determines that the  
26 claimant is a responsible party as defined under section 562-A, subsection 17.

27 J. Prior to forwarding a claim to the hearing examiner under subsection 4, the  
28 commissioner may require that the amount of the claim be finalized.

29 K. Third-party damage claims may not include expenditures for the preparation and  
30 prosecution of the damage claim such as legal fees or real estate appraisal fees.

31 L. The commissioner may dismiss a 3rd-party damage claim for untimely filing, for  
32 failure by the claimant to provide the information necessary to process the claim  
33 within 60 days after the claimant receives written notice that the claim is insufficient  
34 for processing or for ineligibility as determined by the commissioner under paragraph  
35 I. A dismissal may be appealed to Superior Court in accordance with Title 5, chapter  
36 375, subchapter 7.

37 **Sec. 14. 38 MRSA §584-A, sub-§1**, as amended by PL 1999, c. 79, §1, is  
38 repealed and the following enacted in its place:

39 **1. Particulate matter.** For purposes of statutory interpretation, rules, licensing  
40 determinations, policy guidance and all other actions by the department or the board  
41 relating to the control of particulate matter, any reference to an ambient air quality  
42 standard is interpreted to refer to the national ambient air quality standard for particulate



1 matter established pursuant to Section 109 of the federal Clean Air Act as amended, 42  
2 United States Code, Section 7409.

3 **Sec. 15. 38 MRSA §1367, first ¶**, as amended by PL 2007, c. 655, §16, is further  
4 amended to read:

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

28 **Sec. 16. 38 MRSA §1609, sub-§6**, as enacted by PL 2007, c. 296, §1, is repealed.

29 **Sec. 17. 38 MRSA §1609, sub-§11**, as enacted by PL 2007, c. 296, §1, is  
30 amended to read:

31 **11. Application.** This section does not apply to the sale of ~~used products~~:

32 A. Used products;

33 B. Products if the presence of polybrominated diphenyl ether is due solely to the use  
34 of recycled material; or

35 C. Replacement parts that contain the "octa" or "penta" mixtures of polybrominated  
36 diphenyl ether if the parts are for use in a product manufactured before January 1,  
37 2006.

38 **Sec. 18. Maine Revised Statutes headnote amended; revision clause.** In  
39 the Maine Revised Statutes, Title 38, chapter 3, subchapter 2-B, in the subchapter  
40 headnote, the words "underground oil storage facilities and ground water protection" are  
41 amended to read "oil storage facilities and ground water protection" and the Revisor of

1 Statutes shall implement this revision when updating, publishing or republishing the  
2 statutes.

3 **SUMMARY**

4 This bill:

5 1. Amends the Maine Revised Statutes, Title 38, section 341-D, subsection 4 to add  
6 "remand" to the list of actions the Board of Environmental Protection may take in  
7 response to an appeal of a commissioner's licensing decision;

8 2. Amends the length of terms on the Pollution Prevention Advisory Committee  
9 from 3 years to 4 years;

10 3. Amends the Clean Government Initiative by removing the requirement to file  
11 biennial plans and adding state-supported institutions of higher learning to those agencies  
12 whose activities must be reported to the Legislature;

13 4. Clarifies the Department of Environmental Protection's authority to consider  
14 license amendment and surrender applications;

15 5. Amends Title 38, section 361-A, subsections 1-J and 1-K to change the reference  
16 date in the definitions of "Code of Federal Regulations" and the "Federal Water Pollution  
17 Control Act" from July 1, 2007 to July 1, 2009;

18 6. Authorizes the department to recover the cost of preparing and implementing a  
19 plan to restore natural resources damaged by the discharge of oil or hazardous matter  
20 from the persons responsible for the discharge;

21 7. Clarifies the scope and purpose of Title 38, chapter 3, subchapter 2-B, which  
22 governs oil storage tanks;

23 8. Amends the laws governing oil storage tanks to clarify that a person who suffers a  
24 discharge from an oil storage tank must clean it up immediately whether or not the  
25 discharge is shown to reach groundwater, encourage the reporting of discharges from oil  
26 storage tanks whether or not the discharge is known to have reached groundwater and  
27 clarify that money may be disbursed from the Ground Water Oil Clean-up Fund to pay  
28 damages related to a discharge from an oil storage facility whether or not the discharge is  
29 shown to have reached groundwater;

30 9. Amends Maine's ambient air quality standards for particulate matter to make them  
31 consistent with national ambient air quality standards for particulate matter;

32 10. Requires the Commissioner of Environmental Protection to charge interest at a  
33 rate of 15% per annum on amounts owed to the Uncontrolled Sites Fund by responsible  
34 parties; and

35 11. Clarifies the applicability of the laws banning the sale of products that contain  
36 polybrominated diphenyl ether.