

MAINE STATE LEGISLATURE

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130th MAINE LEGISLATURE

FIRST REGULAR SESSION-2021

Legislative Document

No. 436

S.P. 178

In Senate, February 16, 2021

**An Act Regarding the Authority of the Department of
Environmental Protection Regarding Applications, Permits and
Fines**

Submitted by the Department of Environmental Protection pursuant to Joint Rule 204.
Received by the Secretary of the Senate on February 11, 2021. Referred to the Committee
on Environment and Natural Resources pursuant to Joint Rule 308.2 and ordered printed.

A handwritten signature in black ink, appearing to read 'D M Grant'.

DAREK M. GRANT
Secretary of the Senate

Presented by Senator BRENNER of Cumberland.

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

2 **Sec. 1. 38 MRSA §341-I** is enacted to read:

3 **§341-I. Fees, interest and lien authority**

4 **1. Applicability.** Notwithstanding any provision of this Title to the contrary, this
5 section applies to all fees established pursuant to this Title.

6 **2. Interest.** In addition to other remedies specifically authorized in this Title, the
7 department shall charge interest at a rate of 15% per annum on any fee or portion of a fee
8 not paid by its due date, unless the commissioner finds the amount too small or the
9 likelihood of recovery too uncertain.

10 **3. Lien established.** A fee or any portion of a fee not paid within 90 days of its due
11 date and accruing interest is a lien against real estate of a license holder.

12 A. A certificate of lien signed by the commissioner must be sent by certified mail to
13 the license holder or agent of record prior to being recorded and may be filed in the
14 office of the clerk of the municipality in which the real estate is located. The lien is
15 effective when the certificate is recorded with the registry of deeds for the county in
16 which the real estate is located. The certificate of lien must include a description of the
17 real estate, the amount of the lien and the name of the owner as grantor.

18 B. When the amount for which a lien has been recorded under this subsection has been
19 paid or reduced, the commissioner, upon request by any person of record holding
20 interest in the real estate that is the subject of the lien, shall issue a certificate
21 discharging or partially discharging the lien. The certificate must be recorded in the
22 registry in which the lien was recorded pursuant to paragraph A. Any action of
23 foreclosure of the lien must be brought by the Attorney General in the name of the State
24 in the Superior Court for the judicial district in which the real estate subject to the lien
25 is located.

26 **Sec. 2. 38 MRSA §344, sub-§2-C** is enacted to read:

27 **2-C. After-the-fact application.** For an application submitted to the department after
28 an activity requiring a permit pursuant to this Title has begun, the department may either
29 accept or refuse to accept, in whole or in part, the application for processing. When
30 considering whether to accept an application submitted after the date and time it is required
31 to be submitted pursuant to this Title, the department may consider relevant factors
32 including, but not limited to, the following:

33 A. The amount of time that has passed since the application was required to be
34 submitted;

35 B. The impact on the environment caused by the activity that is the subject of the
36 application;

37 C. Other violations of rules, statutes or licenses related to the activity that is the subject
38 of the application;

39 D. The applicant's prior noncompliance with rules, statutes or licenses and deadlines
40 for submission of applications under this Title;

1 E. The potential negative effect on voluntary compliance programs and other licensing
2 programs within the department caused by accepting the application; and

3 F. The deterrent effect a refusal to accept the application would have on both the
4 applicant and others that perform activities requiring approval by the department
5 without first submitting a timely application.

6 **Sec. 3. 38 MRSA §347-A, sub-§1, ¶B**, as repealed and replaced by PL 1993, c.
7 204, §1, is amended to read:

8 B. Before initiating a civil enforcement action pursuant to paragraph A, the
9 commissioner shall issue a notice of violation to the person or persons the
10 commissioner considers likely to be responsible for the alleged violation or violations.
11 The notice of violation must describe the alleged violation or violations, to the extent
12 then known by the commissioner; cite the applicable law, rule and term or condition of
13 the license, permit or order alleged to have been violated; and provide time periods for
14 the alleged violator to take necessary corrective action and to respond to the notice. A
15 notice of violation does not represent a final agency decision and is not appealable. For
16 violations the commissioner finds to be minor, the notice may state that further
17 enforcement action will not be pursued if compliance is achieved within the time period
18 specified in the notice or under other appropriate circumstances. The commissioner is
19 not required to issue a notice of violation before issuing an emergency order pursuant
20 to subsection 3 or other applicable provision of this Title; nor is the commissioner
21 required to issue a notice of violation before referring an alleged violation to the
22 Attorney General for criminal prosecution or in a matter requiring immediate
23 enforcement action.

24 **Sec. 4. 38 MRSA §347-A, sub-§2**, as amended by PL 1999, c. 127, Pt. A, §54, is
25 further amended to read:

26 **2. Hearings.** The commissioner shall give at least 30 days' written notice to the alleged
27 violator of the date, time and place of any hearing held pursuant to subsection 1, paragraph
28 A, subparagraph (3). The notice must specify the act or omission ~~which~~ that is claimed to
29 be in violation of law or regulation.

30 Any hearing conducted under the authority of this subsection must be in accordance with
31 the provisions of Title 5, chapter 375, subchapter IV ~~4~~. ~~At the hearing, the alleged violator~~
32 ~~may appear in person or by attorney and answer the allegations of violation and file a~~
33 ~~statement of the facts, including the methods, practices and procedures, if any, adopted or~~
34 ~~used by that person to comply with this chapter and present such evidence as may be~~
35 ~~pertinent and relevant to the alleged violation.~~

36 After a hearing, or in the event of a failure of the alleged violator to appear on the date set
37 for a hearing, the commissioner shall, as soon as practicable, make findings of fact based
38 on the record and, if the commissioner finds that a violation exists, shall issue an order
39 aimed at ending the violation and that may include required corrective action and a civil
40 penalty calculated pursuant to section 349, subsection 2. The person to whom an order is
41 directed shall immediately comply with the terms of that order.

42 **Sec. 5. 38 MRSA §347-A, sub-§7**, as enacted by PL 2001, c. 365, §2, is amended
43 to read:

1 **7. Landowner liability for actions of others.** An owner, lessee, manager, easement
2 holder or occupant of premises is not subject to criminal sanctions or civil penalties or
3 forfeitures for a violation of laws or rules enforced by the department or the board if that
4 person provides substantial credible evidence that the violation was committed by another
5 person other than that person or a contractor, employee or agent of the owner, lessee,
6 manager, easement holder or occupant. This subsection does not prevent the department,
7 the board or a court from requiring an owner, lessee, manager, easement holder or occupant
8 of premises to remediate or abate environmental hazards or damage or to reimburse the
9 department for the cost of such remediation or abatement. ~~An~~ Once notified in writing of
10 a violation, an owner, lessee, manager, easement holder or occupant of premises is subject
11 to criminal sanctions or civil penalties or forfeitures for failure to remediate or abate a
12 violation of this Title or an environmental hazard or damage; to reimburse the department
13 for the cost of such remediation or abatement; or to comply with a lawful administrative
14 order or court order ~~to remediate or abate environmental hazards or damage for such~~
15 remediation or abatement.

16 A. The department shall investigate substantiated allegations by an owner, lessee,
17 manager, easement holder or occupant that the violation was caused by another person.

18 B. If an owner, lessee, manager, easement holder or occupant is subjected to criminal
19 sanctions or civil penalties or forfeitures, or if such a person is required to remediate
20 or abate environmental hazards or damage as a result of violations by another person,
21 the owner, lessee, manager, easement holder or occupant has a cause of action against
22 the actual violator to recover all damages and costs, including attorney's fees, incurred
23 in connection with the environmental damage, and all costs, including attorney's fees,
24 incurred in bringing the action to recover.

25 C. This subsection does not apply to persons who are defined as "responsible parties"
26 under chapter 3, subchapters ~~H-A~~ 2-A and ~~H-B~~ 2-B; chapter 13, subchapter ~~H-A~~ 2-A;
27 or chapter 13-B.

28 **Sec. 6. 38 MRSA §347-C**, as repealed and replaced by PL 2017, c. 137, Pt. A, §5,
29 is amended to read:

30 **§347-C. Right of inspection and entry**

31 Employees and agents of the department may:

32 **1. Property.** Enter any property at reasonable hours in order to inspect the property
33 ~~to~~, take samples, inspect records relevant to any regulated activity or as appropriate conduct
34 tests ~~as appropriate~~ to determine compliance with any laws administered by the department
35 or the terms and conditions of any order, regulation, license, permit, approval or decision
36 of the commissioner or of the board; and

37 **2. Buildings.** Enter any building with the consent of the property owner, occupant or
38 agent, or pursuant to an administrative search warrant, in order to inspect the property or
39 structure, including the premises of an industrial user of a publicly owned treatment works,
40 ~~and to~~ take samples, inspect records relevant to any regulated activity or as appropriate
41 conduct tests ~~as appropriate~~ to determine compliance with any laws administered by the
42 department or the terms and conditions of any order, regulation, license, permit, approval
43 or decision of the commissioner or of the board.

1 **Sec. 7. 38 MRSA §349, sub-§2**, as corrected by RR 2009, c. 2, §116, is amended
2 to read:

3 **2. Civil penalties.** Except as otherwise specifically provided, a person who violates a
4 law administered by the department, including, without limitation, a violation of the terms
5 or conditions of an order, rule, license, permit, approval or decision of the board or
6 commissioner, or who disposes of more than 500 pounds or more than 100 cubic feet of
7 litter for a commercial purpose, in violation of Title 17, section 2264-A, is subject to a civil
8 penalty, payable to the State, of not less than \$100 and not more than ~~\$10,000~~ \$25,000 for
9 each day of that violation or, if the violation relates to hazardous waste, of not more than
10 ~~\$25,000~~ \$65,000 for each day of the violation. This penalty is recoverable in a civil action
11 or may be assessed in an enforcement hearing pursuant to section 347-A.

12 **Sec. 8. 38 MRSA §349, sub-§5**, as amended by PL 1989, c. 890, Pt. B, §8 and
13 affected by Pt. A, §40, is further amended to read:

14 **5. Considerations.** In setting a penalty, the court shall consider, but ~~shall~~ is not be
15 limited to, the following:

16 A. Prior violations by the same party;

17 B. The degree of environmental damage that cannot be abated or corrected;

18 C. The extent to which the violation continued following an order of the commissioner
19 or board to correct it; ~~and~~

20 D. The importance of setting a civil penalty substantial enough to deter others from
21 similar violations;

22 E. When sampling or submission of data is required, the effect that failing to submit
23 data, providing inaccurate, incorrect or false data or failing to take required samples
24 has on the department's ability to determine the extent to which the violation caused
25 environmental damage or harm to human health; and

26 F. The potential negative effect of the violation on voluntary compliance and self-
27 reporting programs administered by the department.

28 **Sec. 9. 38 MRSA §349, sub-§6**, as amended by PL 1997, c. 794, Pt. A, §8, is further
29 amended to read:

30 **6. Maximum penalties.** The maximum civil penalty may exceed ~~\$10,000~~ \$25,000
31 for each day of that violation, but may not exceed ~~\$25,000~~ \$65,000 for each day of the
32 violation, when it can be shown that there has been a previous violation of the same law
33 administered by the department, including, without limitation, a violation of the terms or
34 conditions of an order, rule, license, permit, approval or decision of the board or
35 commissioner, by the same party within the 5 preceding years, and the maximum criminal
36 penalty may exceed ~~\$25,000~~ \$65,000 for each day of violation, but may not exceed twice
37 the amounts in subsection 1, when it can be shown that there has been a previous violation
38 of the same law by the same party.

39 **Sec. 10. 38 MRSA §353**, as affected by PL 2011, c. 653, §33 and amended by PL
40 2015, c. 124, §2, is repealed.

41 **Sec. 11. 38 MRSA §2205, sub-§6**, as amended by PL 1995, c. 465, Pt. A, §77 and
42 affected by Pt. C, §2, is further amended to read:

1 **6. Interest.** If an operator fails to make a timely payment of the fee, the operator shall
2 pay interest on the unpaid amount due ~~at the rate established by the department pursuant to~~
3 section 341-I from the last day for timely payment to the date paid.

4 **SUMMARY**

5 This bill makes the following changes to the laws governing the Department of
6 Environmental Protection.

7 1. It provides that fees or any portion of fees not paid within 90 days of their due date
8 and accruing interest are a lien against real estate of a license holder.

9 2. It provides the department discretion to accept or refuse to accept an application
10 submitted to the department after the activity requiring a permit has begun and lists factors
11 the department may consider in exercising this discretion.

12 3. It provides that a notice of violation does not represent a final agency decision and
13 is not appealable.

14 4. It provides that after a hearing an order of the Commissioner of Environmental
15 Protection may include required corrective action and a civil penalty.

16 5. It specifies that an owner, lessee, manager, easement holder or occupant of premises
17 is subject to criminal sanction or civil penalties or forfeiture for failure to remediate or
18 abate a violation of environmental laws or an environmental hazard or damage or to
19 reimburse the department for the cost of such remediation or abatement.

20 6. It clarifies the circumstances under which employees and agents of the department
21 may enter property and buildings.

22 7. It increases the cap on civil penalties from \$10,000 to \$25,000 for each day of a
23 violation or if a violation relates to hazardous waste from \$25,000 to \$65,000 for each day
24 of a violation. It provides that civil penalties may be assessed in an enforcement hearing.

25 8. It specifies additional factors a court may consider in setting a penalty.

26 9. It provides that the maximum civil penalty may exceed \$25,000 for each day of a
27 violation but may not exceed \$65,000 for each day of a violation when it can be shown that
28 there has been a previous violation of the same law administered by the department,
29 including, without limitation, a violation of the terms or conditions of an order, rule,
30 license, permit, approval or decision of the board or commissioner, by the same party
31 within the 5 preceding years. It increases the maximum criminal penalty from \$25,000 to
32 \$65,000 for each day of violation in cases involving subsequent violations.