

# MAINE STATE LEGISLATURE

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**LAWS**  
OF THE  
**STATE OF MAINE**

AS PASSED BY THE  
ONE HUNDRED AND FOURTEENTH LEGISLATURE  
**FIRST SPECIAL SESSION**

August 21, 1989 to August 22, 1989

and

**SECOND REGULAR SESSION**

January 3, 1990 to April 14, 1990

THE GENERAL EFFECTIVE DATE FOR  
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July 14, 1990

PUBLISHED BY THE REVISOR OF STATUTES  
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TITLE 3, SECTION 163-A, SUBSECTION 4.

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J.S. McCarthy Company  
Augusta, Maine  
1990

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**PUBLIC LAWS**  
**OF THE**  
**STATE OF MAINE**

**AS PASSED AT THE**  
**SECOND REGULAR SESSION**

**of the**  
**ONE HUNDRED AND FOURTEENTH LEGISLATURE**

**January 3, 1990 to April 14, 1990**

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2. Conformance. Require the person responsible to abide by the necessary changes determined in subsection 1 and determine if the changes have been made;

3. Report. Give the written findings of the initial investigation and any determination of compliance to the complainant and the person responsible; and

4. Procedure. An investigation or other action under this section may be taken only after notice and hearing and utilizing the requirements of Title 5, chapter 375, subchapter IV.

If the person responsible does not adopt generally accepted manure handling practices, the commissioner shall send a copy of the written report to the Department of Environmental Protection and refer the matter in writing to the Attorney General. The Attorney General may institute an action to abate a nuisance and the court may order the abatement with costs as provided under this chapter. If the commissioner, upon investigation, finds that the person responsible for the manure is following generally accepted manure handling practices, the commissioner shall advise the complainant and the person responsible in writing.

The commissioner shall adopt rules in accordance with the Maine Administrative Procedure Act, Title 5, chapter 375, for the interpretation and implementation of this section, including a definition of "generally accepted manure handling practices."

If the commissioner finds that improper manure handling may have affected water quality and the person responsible does not adopt generally accepted manure handling practices, the commissioner shall advise the Commissioner of Environmental Protection that a potential water quality violation exists and the Commissioner of Environmental Protection may respond as appropriate.

Sec. 3. 38 MRSA §342, sub-§8 is enacted to read:

8. Agricultural impacts. The commissioner shall notify and regularly inform the Commissioner of Agriculture, Food and Rural Resources on proposed legislation or rules that may affect agricultural activity.

See title page for effective date.

## CHAPTER 837

H.P. 1527 - L.D. 2112

### An Act Relating to the Protection and Advocacy Agency for Persons with Disabilities

**Emergency preamble.** Whereas, Acts of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

**Whereas,** the United States Congress enacted the Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 United States Code, Section 247a; and

**Whereas,** the United States Congress amended the Developmental Disabilities Assistance and Bill of Rights Act, 42 United States Code, Section 6000, in 1987; and

**Whereas,** these federal statutory changes are not reflected in Maine law although the State is receiving federal funds allotted pursuant to both federal acts; and

**Whereas,** in order for the State to ensure the continued performance of the duties for which it has requested and received federal funding, enabling legislation should be enacted and amended as necessary to conform to federal legislation; and

**Whereas,** people with mental illness who do not reside in a facility are without protection and advocacy services and cannot be assisted under the federal protection and advocacy laws; and

**Whereas,** in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore,

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

Sec. 1. 5 MRSA Pt. 24 is enacted to read:

#### PART 24

#### PROTECTION AND ADVOCACY AGENCIES

#### CHAPTER 511

#### PROTECTION AND ADVOCACY FOR PERSONS WITH DEVELOPMENTAL OR LEARNING DISABILITIES OR MENTAL ILLNESS

##### §19501. Policy

It is the policy of the State to ensure that the legal and human rights of all developmentally disabled persons and mentally ill individuals residing in the State are protected through the establishment of a protection and advocacy system pursuant to 42 United States Code, Section 6042 et seq. and Section 10801 et seq.

##### §19502. Designation

The Governor shall designate an agency, independent of any state or private agency that provides treatment, services or habilitation to persons with developmental disabilities or mental illness, to serve as the protection and advocacy agency for persons with disabilities. The agency shall also protect and advocate for the rights of persons with learning disabilities.

**§19503. Definitions**

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.

**1. Abuse.** "Abuse" means the act or failure to act, knowingly, recklessly or intentionally, that causes, or may cause, injury or death. "Abuse" includes, but is not limited to, rape or sexual assault, the striking of an individual, the use of excessive force in the use of bodily restraints and the use of bodily or chemical restraints in a manner that is not in compliance with federal and state laws, regulations and rules.

**2. Agency.** "Agency" means the protection and advocacy agency for persons with disabilities, designated by the Governor.

**3. Developmental disability.** "Developmental disability" means a disability attributable to a mental or physical impairment or combination of mental and physical impairments that:

A. Is manifested before the person reaches 22 years of age;

B. Is likely to continue indefinitely;

C. Results in substantial functional limitations in 3 or more of the following areas of major life activity:

(1) Self care;

(2) Receptive and expressive language;

(3) Learning;

(4) Mobility;

(5) Self direction;

(6) Capacity for independent living; and

(7) Economic self-sufficiency; and

D. Reflects the person's need for a combination and sequence of special, interdisciplinary or generic care, treatment or other services that are of a life-long or extended duration and are individually planned and coordinated.

**4. Exploitation.** "Exploitation" means the illegal or improper use of an individual or the individual's resources for another's profit or advantage.

**5. Facility.** "Facility" means any foster home; boarding home; nursing home; group home; hospital; state mental health institute; state, county or municipal detention facility; shelter; any other facility licensed or funded by the State, or any subdivision of the State, for the provision of residential services or treatment; or any

other facility providing residential services that is operating without a license, but is required to be licensed under the laws of the United States, this State or any subdivision of this State.

**6. Learning disability.** "Learning disability" means a disorder exhibited in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell or to do mathematical calculations.

**7. Mental illness.** "Mental illness" means a significant mental illness or emotional impairment, as determined by a qualified mental health professional.

**8. Neglect.** "Neglect" means a negligent act or omission that causes or may cause an individual's injury or death or that places an individual at risk of injury or death. "Neglect" includes, but is not limited to, failure to establish or carry out an individual program, treatment or habilitation plan or the deprivation of or failure to meet essential needs, including needs for adequate nutrition, clothing, health care and a safe environment.

**9. Personnel.** "Personnel" means salaried staff employed by the agency.

**10. Persons with disabilities.** "Persons with disabilities" means persons with a developmental disability, a learning disability or a mental illness.

**§19504. Organization**

The protection and advocacy agency for persons with disabilities, designated by the Governor, must meet the following requirements.

**1. Governing authority.** The agency is governed by an authority established in accordance with the following.

A. Members must be selected in accordance with the agency's policies and procedures.

B. By October 1, 1990, membership must include the chair of the advisory council, described in subsection 2, and other individuals who represent or who are knowledgeable about the needs of the clients served by the agency.

C. The governing authority is responsible for the planning, design, establishment of priorities and implementation and functioning of the agency, subject to the provisions of subsection 2.

**2. Advisory council.** The agency shall establish an advisory council with the following membership and duties.

A. The advisory council shall advise the agency on policies and priorities to be followed in carrying out

the duties of the agency as the protection and advocacy agency for mentally ill individuals.

B. Members of the advisory council must include attorneys, mental health professionals, individuals from the public who are knowledgeable about mental illness, a provider of mental health services, individuals who have received or who are receiving mental health services and family members of those individuals. At least 1/2 of the membership must consist of individuals who have received or who are receiving mental health services and family members of those individuals.

### §19505. Powers and duties of the agency

The agency has the following powers and duties.

1. Information and referral. The agency may provide information on and referral to programs and services addressing the needs of persons with disabilities.

2. Advice. The agency may advise and educate individuals on the rights of persons with disabilities and otherwise support and assist those persons in the protection of and advocacy for those rights.

3. Pursuit of remedies. The agency may pursue administrative, legal and other appropriate remedies on behalf of persons with disabilities.

4. Investigation. The agency may investigate allegations of abuse, exploitation or neglect of persons with disabilities. The agency may initiate an investigation upon receipt of a report that an incident of abuse, exploitation or neglect has occurred or is occurring. The agency may also initiate an investigation on its own initiative when it has probable cause to believe that abuse, exploitation or neglect has occurred or is occurring.

5. Report. The agency shall prepare an annual report for submission to the Governor, the Legislature, the Commissioner of Mental Health and Mental Retardation and the Secretary of the United States Department of Health and Human Services. The report must describe the activities, accomplishments and expenditures of the agency during the most recently completed fiscal year.

### §19506. Agency access to records, facilities, persons with disabilities and reports

For the purposes of this chapter, agency personnel in the performance of duties pursuant to section 19505 must be granted access to records, facilities, persons with disabilities and reports as follows.

1. Records. Agency personnel must be granted access to all records, other than records created in the course of a criminal investigation by the Attorney General, a district attorney's office or a law enforcement agency, that:

A. Pertain to a person who is a client of the agency, if the person or the person's legal guardian or other legal representative has authorized the agency to have that access;

B. Pertain to an individual who is or was a person with disabilities and who is the subject of a complaint received by the agency or who the agency has probable cause to believe has been or is being abused, exploited or neglected, and who is:

(1) By reason of a mental or physical condition, unable to authorize the agency to have access; and

(2) Either under public guardianship or without a legal guardian or other representative who may authorize the agency to have access; or

C. Describe incidents of abuse, exploitation, neglect or injury, and the steps taken to investigate those incidents, prepared by any staff person of any facility serving persons with disabilities or by any agency charged with investigating allegations of abuse, exploitation, neglect and injury occurring at facilities that serve persons with disabilities.

2. Persons with disabilities. Any department, agency, board, commission or office of the State or of any subdivision of the State, and any private agency or individual licensed or funded by the Federal Government or the State or any subdivision of the State that operates or administers any program or facility providing services to persons with disabilities shall permit agency personnel performing duties pursuant to section 19505 to meet with those persons. The program or facility must allow agency personnel to communicate privately with the persons with disabilities.

3. Facilities. Any facility that serves persons with disabilities shall permit entrance to the premises of the facility by agency personnel performing duties pursuant to section 19505.

4. Reports. The agency must be provided copies of each annual survey report and plan of corrections for cited deficiencies made pursuant to Title 22, chapter 405 and pursuant to 42 United States Code, Sections 1395 et seq. and 1396 et seq. with respect to any facility serving persons with disabilities within the State. The reports and plans must be provided to the agency within 30 days of completion.

### §19507. Confidentiality of information; representation of individuals with disabilities

1. Disclosure of nonidentifiable information. Authorized agency personnel, in the performance of their duties under section 19505, may disclose information, materials and records that do not contain personally identifiable data.

**2. Disclosure to subject.** Disclosure of information to a person with mental illness who is the subject of records is subject to this section.

A. Authorized agency personnel may disclose information from the records obtained pursuant to section 19506 to a mentally ill individual who is the subject of the records, except when a mental health professional associated with the organization providing the records, who is responsible for supervising the provision of the mental health services to the individual, notifies the agency in writing that, based on the professional's determination, disclosure would be detrimental to the health of the subject individual.

B. Upon receipt of written notification pursuant to paragraph A, the agency may not disclose information from the records to the subject individual unless another mental health professional has reviewed the records and, based upon the professional's judgment following review, determines that disclosure would not be detrimental to the health of the individual. The reviewing mental health professional must be selected by:

(1) The individual;

(2) The individual's guardian or other legal representative; or

(3) The agency, acting on behalf of an individual whose guardian is the State or an individual whose guardian or other legal representative is not the State, has not selected, within a reasonable time after receipt of notice pursuant to paragraph A, a mental health professional to review the records.

**3. Disclosure of identifiable information and representation.** Agency personnel may represent persons with disabilities or disclose information, materials and records containing personally identifiable information when one of the following occurs.

A. The person gives consent.

B. The person has been judged incompetent or is a minor, and the individual's guardian or other legal representative gives consent.

C. The person, by reason of a mental or physical condition, is unable to give consent and is without a legal guardian or other representative who may consent on behalf of the individual.

D. The person is under public guardianship and the agency proceeds according to the provisions of subsection 4.

E. The surrogate parent of a developmentally disabled or learning disabled minor authorizes the agency to represent the person in, or to disclose

information regarding, special education matters governed by Title 20-A, chapter 303, subchapter I, or 20 United States Code, Sections 1401 to 1485.

**4. Public guardians.** Before the agency represents or discloses personally identifiable information pertaining to a person with a disability who is under public guardianship, the agency and the public guardian shall adhere to the following procedures.

A. The agency shall give the public guardian written notice of its intent to represent or disclose personally identifiable information pertaining to a person with a disability who is under public guardianship.

B. After giving notice pursuant to paragraph A, the agency may represent the person or disclose the information unless, within 5 working days, the public guardian gives to the agency written notice of its objections.

C. The objections of the public guardian to the agency's representation or disclosure may only be based upon the public guardian's belief that the actions of the agency would be detrimental to the person's interests. The written notice must state the public guardian's basis for that belief and the case name, docket number and court that established the public guardianship.

D. If the public guardian established under Title 18-A, article V, objects under paragraph B, the agency may petition the Probate Court that established the guardianship for permission to represent the person.

E. If the person is a child for whom the Department of Human Services has been granted custody under Title 22, section 4034, 4035 or 4038, the agency may petition the court that granted custody for permission to represent the child. The agency must provide notice of the petition to the department at the same time the petition is filed with the court but need not provide notice to other parties to the original protective proceeding. The petition must be granted unless the Department of Human Services demonstrates that representation by the agency would be detrimental to the child's interest. The court shall issue an order approving or denying the petition within 10 days of the filing of the petition.

F. In cases of emergency requiring immediate agency representation in judicial or administrative proceedings, the agency need not await the public guardian's response to its notice of intent to represent. In these instances the public guardian may raise objections in the proceedings in which the agency represents the person with disabilities.

G. The agency and state agencies acting as public guardians shall, within 6 months of the effective

date of this subsection, enter into cooperative agreements, in writing, describing how this subsection will be implemented.

**§19508. Application to residents in children's homes**

This chapter also applies to exceptional students in children's homes, emergency shelters, family foster homes, specialized children's homes and residential child care facilities, as defined in Title 22, section 8101, and to other residential educational facilities, including the Governor Baxter School for the Deaf and other similar facilities.

Sec. 2. 22 MRSA c. 961, as amended, is repealed.

**Emergency clause.** In view of the emergency cited in the preamble, this Act shall take effect when approved.

Effective April 17, 1990.

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## CHAPTER 838

### H.P. 1628 - L.D. 2255

#### An Act to Exempt Forestry Activities in Forested Wetlands from Regulation Under the Natural Resources Protection Laws

**Emergency preamble.** Whereas, Acts of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

**Whereas,** the current exemption for forestry activities in the natural resources protection laws is confusing and difficult to implement; and

**Whereas,** this Act clarifies the intent of this exemption; and

**Whereas,** this change should be effective as soon as possible to allow the forest products industry to operate within the parameters of this exemption; and

**Whereas,** in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore,

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

Sec. 1. 38 MRSA §436-A, sub-§5-A is enacted to read:

5-A. Forested wetland. "Forested wetland" means a freshwater wetland dominated by woody vegetation that is 6 meters tall or taller.

Sec. 2. 38 MRSA §439-A, sub-§5, as amended by PL 1989, c. 403, §8, is further amended to read:

**5. Timber harvesting.** Municipal ordinances ~~shall~~ must regulate timber harvesting within the shoreland area, except surrounding existing forested wetlands or harvested forested wetlands that are not zoned for resource protection. Notwithstanding any provision ~~in a provision~~ in a local ordinance to the contrary, standards for timber harvesting activities ~~shall may not~~ shall be ~~no~~ less restrictive than the following:

A. Selective cutting of no more than 40% of the trees 4 inches or more in diameter, measured at 4 1/2 feet above ground level, in any 10-year period, provided that a well-distributed stand of trees and other natural vegetation remains; and

B. Within a shoreland area zoned for resource protection abutting a great pond there ~~shall may~~ shall be no timber harvesting within the strip of land extending 75 feet inland from the normal high-water line except to remove safety hazards.

The board may adopt more restrictive guidelines consistent with the purposes of this subchapter, which ~~shall must~~ shall then be incorporated into local ordinances.

Sec. 3. 38 MRSA §480-B, sub-§§2-B and 2-C are enacted to read:

2-B. Forest management activities. "Forest management activities" means timber stand improvement, timber harvesting, forest products harvesting and regeneration of forest stands.

2-C. Forested wetland. "Forested wetland" means a freshwater wetland dominated by woody vegetation that is 6 meters tall, or taller.

Sec. 4. 38 MRSA §480-C, sub-§3, as amended by PL 1989, c. 430, §4, is further amended to read:

**3. Application.** This section applies to all protected natural resources statewide without regard to whether they have been mapped pursuant to section 480-I, ~~except that significant~~ Significant wildlife habitat that is not within any other protected natural resource must be mapped before this section applies.

Sec. 5. 38 MRSA §480-Q, sub-§7, as amended by PL 1989, c. 430, §7, is repealed.

Sec. 6. 38 MRSA §480-Q, sub-§7-A is enacted to read:

7-A. Forestry. Forest management activities, including associated road construction or maintenance, in or adjacent to an existing forested wetland, or a harvested forested wetland, as long as:

A. The activity results in a forest stand that meets the minimum stocking requirements in rules adopted pursuant to Title 12, section 8869. This requirement takes effect when those rules are adopted;