

MAINE STATE LEGISLATURE

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LAWS
OF THE
STATE OF MAINE

AS PASSED BY THE

ONE HUNDRED AND FIFTEENTH LEGISLATURE

THIRD SPECIAL SESSION

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ONE HUNDRED AND SIXTEENTH LEGISLATURE

FIRST REGULAR SESSION

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J.S. McCarthy Company
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PUBLIC LAWS
OF THE
STATE OF MAINE

AS PASSED AT THE
FIRST REGULAR SESSION

of the
ONE HUNDRED AND SIXTEENTH LEGISLATURE

1993

an amendment to its agenda with the Legislature and Secretary of State under section 8053-A at the time of rule proposal.

See title page for effective date.

CHAPTER 363

H.P. 797 - L.D. 1083

An Act to Establish the Fund Insurance Review Board

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

Whereas, the Legislature needs to ensure that applicants for coverage to the Groundwater Protection Fund's insurance provisions are handled quickly and without undue hardship to the applicants; 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 §12004-G, sub-§11-A is enacted to read:

11-A.	<u>Fund</u>	<u>Expenses</u>	<u>38 MRSA</u>
<u>Environ-</u>	<u>Insurance</u>	<u>Only for</u>	<u>§568-B</u>
<u>ment/</u>	<u>Review</u>	<u>Certain</u>	
<u>Natural</u>	<u>Board</u>	<u>Members</u>	
<u>Resources</u>			

Sec. 2. 38 MRSA §562-A, sub-§§1-A and 1-B are enacted to read:

1-A. Aboveground oil storage facility. “Aboveground oil storage facility” also referred to as a “facility” means any aboveground oil storage tank or tanks, together with associated piping, transfer and dispensing facilities located over land or water of the State at a single location for more than 4 months per year and used or intended to be used for the storage or supply of oil. Oil terminal facilities, as defined in section 542, subsection 7 and propane facilities are not included in this definition and are not eligible for coverage by the fund.

1-B. Aboveground oil storage tank. “Aboveground oil storage tank” also referred to as a “tank” means any aboveground container, less than 10% of the capacity of which is beneath the surface of the ground and is used or intended to be used for the stor-

age or supply of oil. Included in this definition are any tanks situated upon or above the surface of a floor and in such a manner that they may be readily inspected.

Sec. 3. 38 MRSA §562-A, sub-§2, as enacted by PL 1989, c. 865, §2, is amended to read:

2. Applicant. “Applicant” means the owner or operator of an underground oil storage facility or an aboveground oil storage facility that may have a discharge of oil and who is seeking coverage of eligible clean-up costs and 3rd-party damage claims from the fund.

Sec. 4. 38 MRSA §562-A, sub-§9-A is enacted to read:

9-A. Fund Insurance Review Board. “Fund Insurance Review Board” or “review board” means the board created in section 568-B.

Sec. 5. 38 MRSA §562-A, sub-§14, as enacted by PL 1989, c. 865, §2, is amended to read:

14. Occurrence. “Occurrence” means a contamination incident or prohibited discharge associated with one or more tanks or piping at an underground oil storage facility or an aboveground oil storage facility within one year.

Sec. 6. 38 MRSA §562-A, sub-§17, ¶¶C and D, as enacted by PL 1989, c. 865, §2, are amended to read:

C. Any person other than those identified in paragraph A or B who caused the prohibited discharge of oil or who had custody or control of the oil at the time of the prohibited discharge; or

D. Any person who owned or operated the underground oil storage facility from the time any oil arrived at that facility; ; or

Sec. 7. 38 MRSA §562-A, sub-§17, ¶E is enacted to read:

E. With regard to sections 568-A, 569-A and 570, persons described in paragraphs A to D with regard to aboveground oil storage facilities.

Sec. 8. 38 MRSA §568-A, sub-§1, ¶A, as enacted by PL 1989, c. 865, §15 and affected by §§24 and 25 and amended by PL 1991, c. 433, §3 and affected by §7, is repealed and the following enacted in its place:

A. The applicant must submit within 180 days of reporting the discharge a written request to the commissioner to be covered by the fund. The request must include:

(1) A description of the discharge and the locations threatened or affected by the discharge, to the extent known;

(2) An agreement that the applicant shall pay the deductible amount specified in subsection 2; and

(3) Documentation that the applicant is in substantial compliance with the requirements of paragraph B.

Within 15 working days of receipt of a request, the commissioner must determine whether the request is complete. If the commissioner determines that the request is incomplete, the commissioner shall, within the 15 working days inform the applicant of the additional information required to complete the request. Within 90 days of receipt of an applicant's completed request for coverage by the fund submitted pursuant to this paragraph the commissioner must issue an order approving or denying the applicant's request. Failure to issue an order within this period constitutes approval of the applicant's request for coverage by the fund.

When the commissioner determines that a site previously remediated to the commissioner's satisfaction requires further remediation, the owner or operator of the site may apply for coverage of eligible clean-up costs and 3rd-party damages claims from the fund, notwithstanding the person's failure to meet the 180-day deadline described in this paragraph.

Sec. 9. 38 MRSA §568-A, sub-§1, ¶B, as amended by PL 1991, c. 494, §§10 and 11, is further amended to read:

B. An applicant is in substantial compliance when the commissioner finds, considering all the relevant circumstances, including but not limited to all reasons for noncompliance submitted by the applicant pursuant to paragraph A, that the following requirements are substantially met:

(1) The compliance schedule, in section 563-A, for nonconforming facilities except that those facilities or tanks required to be removed by October 1, 1989, have until October 1, 1990, to be removed before they are considered out of compliance;

(2) Any outstanding consent agreement or clean-up order issued by the commissioner under section 568, subsection 3, regarding violations of this subchapter;

(3) Any outstanding court order or consent decree regarding violations of this subchapter;

(4) For motor fuel storage and marketing and retail facilities, the following requirements:

(a) Applicable design and installation requirements in effect at the time of the installation or retrofitting requirements for leak detection as covered by section 564, subsections 1 and 1-A;

(b) Section 564, subsection 1-B, overfill and spill prevention equipment, and any rules adopted pursuant to that subsection;

(c) Section 564, subsection 2-A, paragraphs B to I, not including paragraph G, and any rules adopted pursuant to that subsection; and

(d) Payment of any fees required under section 569, subsection 4-A, paragraph C;

(5) For consumptive use heating oil facilities:

(a) Section 565, subsection 1, if applicable; and

(b) Section 565, subsection 2; and

(6) For waste oil, and heavy oil and airport hydrant facilities with discharges that are not contaminated with hazardous constituents, compliance with rules adopted by the board regarding:

(a) Design and installation requirements in effect at the time of the installation, if applicable;

(b) Retrofitting of leak detection and corrosion protection, if applicable;

(c) Overfill and spill prevention;

(d) Monitoring of cathodic protection systems;

(e) Testing requirements for tanks and piping on evidence of a leak;

(f) Maintenance of a leak detection system; and

(g) Reporting leaks.

The burden of proof is on the department to show a lack of substantial compliance. The commissioner shall make written findings of fact when making a determination under this paragraph. These findings are subject to appeal to the board Fund Insurance Review Board as provided in subsection 3-A. ~~The board's decision is subject to judicial review pursuant to Title 5, chapter 375, subchapter VII.~~

The requirements in subparagraphs (1) to (6) do not apply to owners or operators of aboveground oil storage facilities. The Fund Insurance Review Board shall develop, in consultation with the State Fire Marshal, the documentation requirements for claims submitted by owners of aboveground oil storage facilities.

A finding of lack of substantial compliance does not render an applicant ineligible for coverage by the fund for any future occurrence, if the applicant is in substantial compliance at the time of the future application.

Sec. 10. 38 MRSA §568-A, sub-§2, as amended by PL 1991, c. 817, §23, is further amended to read:

2. Deductibles. Applicants eligible for coverage by the fund under subsection 1 shall pay up to the ~~initial~~ costs deductible amount for expenses resulting from cleaning up and compensating eligible 3rd-party damages from a discharge prohibited under section 543 on a per occurrence basis according to the following schedule:

Number of facilities owned by facility owner	Costs paid by applicant
1	\$2,500
2 to 5	5,000
6 to 10	10,000
11 to 30 <u>20</u>	50,000 25,000
<u>21 to 30</u>	<u>40,000</u>
over 30	100,000 62,500

The commissioner shall pay any eligible additional costs up to \$1,000,000 associated with activities under section 569-A, subsection 8, paragraphs B, D and J resulting from a discharge from the fund. The commissioner shall pay the expenses directly, unless the applicant chooses to pay the expenses and seek reimbursement from the fund. The commissioner may pay any costs eligible for coverage by the fund above \$1,000,000 from the fund but the commissioner shall recover these expenditures from the responsible party pursuant to section 569-A.

Sec. 11. 38 MRSA §568-A, sub-§3-A is enacted to read:

3-A. Appeals to review board. An applicant aggrieved by an insurance claims-related decision of the commissioner, including but not limited to decisions on eligibility for coverage, eligibility of costs and waiver and amount of deductible, may appeal that decision to the Fund Insurance Review Board. The public members of the review board shall hear and render a decision on the appeal. Except as provided in review board rules, the appeal must be filed within 30 days after the applicant receives the commissioner's decision on the matter. The appeals panel must hear an appeal at its next meeting

following receipt of the appeal, unless the appeals panel and the aggrieved applicant agree to hear the appeal at a different time. If the appeals panel overturns the commissioner's decision, reasonable costs, including reasonable attorney fees, incurred by the aggrieved applicant in pursuing the appeal to the review board must be paid from the fund. Decisions of the appeals panel are subject to judicial review pursuant to Title 5, chapter 375, subchapter VII. The review board may adopt rules determining the timing of filing appeals on questions of eligibility of costs for payment by the fund.

Sec. 12. 38 MRSA §568-B is enacted to read:

§568-B. Fund Insurance Review Board created

1. Fund Insurance Review Board. The Fund Insurance Review Board, as established by Title 5, section 12004-G, subsection 11-A, is created for the purposes of hearing and deciding appeals from insurance claims-related decisions of the commissioner as well as adopting rules and guidelines necessary to the furtherance of its duties and responsibilities under this subchapter. The review board consists of 8 members appointed for 3-year terms as follows:

A. Three persons representing the petroleum industry, appointed by the Governor, one of whom is nominated by the Maine Oil Dealers Association, one of whom is nominated by the Maine Petroleum Association and one of whom is a retailer who owns fewer than 5 retail outlets, as defined in Title 10, section 1672, subsection 6, to be chosen by the Governor;

B. Three members of the public who are not employed in the petroleum industry and who do not have a direct and substantial financial interest in the petroleum industry to be appointed by the Governor;

C. The commissioner or the commissioner's designee; and

D. The State Fire Marshal or the fire marshal's designee.

Members described in paragraphs A and B are entitled to reimbursement for direct expenses of attendance at meetings of the review board or the appeals panel.

2. Powers and duties of review board. The Fund Insurance Review Board has the following powers and duties:

A. To hear appeals from insurance claims-related decisions of the commissioner pursuant to section 568-A, subsection 3-A;

B. To adopt rules in accordance with Title 5, chapter 375, subchapter II establishing criteria for de-

termining substantial compliance for aboveground oil storage facilities; and

C. To contract with the Finance Authority of Maine for such assistance in fulfilling the board's duties as the board may require.

J, as **Sec. 13. 38 MRSA §569-A, sub-§8, ¶¶I and** enacted by PL 1991, c. 817, §26, are amended to read:

I. All costs associated with the Board of Under-ground Oil Storage Tank Installers; ~~and~~

J. Payments to or on behalf of applicants eligible for coverage by the fund under section 568-A, subsection 1 for expenses above the deductible specified in section 568-A, subsection 2 incurred in commissioner-approved clean-up activities and specified in an agreement under section 568-A, subsection 4; ;

L are **Sec. 14. 38 MRSA §569-A, sub-§8, ¶¶ K and** enacted to read:

K. All costs associated with the Fund Insurance Review Board; and

L. Costs incurred by the Office of the State Fire Marshal to implement the duties assigned to the State Fire Marshal in this chapter.

Sec. 15. 38 MRSA §570-H, sub-§2, as enacted by PL 1989, c. 865, §21 and affected by §§24 and 25, is amended to read:

2. Adequacy of fund. On or before February 15, ~~1992~~ 15th of each year, the commissioner with the cooperation of the ~~Bureau of Insurance~~ Fund Insurance Review Board, shall report to the joint standing committee of the Legislature with jurisdiction over energy and natural resources on the department's and the board's experience administering the fund, ~~the 3rd-party commercial risk-pool account~~, clean-up activities and 3rd-party damage claims. The report must also include an assessment of the adequacy of the fund to cover anticipated expenses and any recommendations for statutory change.

Sec. 16. 38 MRSA §570-K, sub-§1, as enacted by PL 1991, c. 494, §16, is repealed.

Sec. 17. 38 MRSA §570-K, sub-§4 is enacted to read:

4. Exemption. The following aboveground oil storage facilities are exempt from the requirements of this section:

A. Facilities or portions of facilities that are used exclusively for the storage of #2 and other home heating oil and consist of an individual tank of 660

gallons or less capacity or an aggregate tank capacity of 1320 gallons or less; and

B. Facilities containing only liquefied petroleum gas or liquefied natural gas.

Sec. 18. 38 MRSA §570-L is enacted to read:

§570-L. Budget approval; aboveground tanks program

This section establishes a budget process for expenses of the State Fire Marshal and the Fund Insurance Review Board.

1. Fund Insurance Review Board. The chair of the Fund Insurance Review Board shall submit budget recommendations for disbursements from the fund in accordance with section 569-A, subsection 8, paragraph K. The budget must be submitted in accordance with Title 5, sections 1663 to 1666.

2. State Fire Marshal. The State Fire Marshal shall submit budget recommendations for disbursement from the fund in accordance with section 569-A, subsection 8, paragraph L. The budget must be submitted at the time the State Fire Marshal's budget is otherwise presented.

Sec. 19. Fund Insurance Review Board report on aboveground oil storage facilities. By January 15, 1994, the Fund Insurance Review Board shall submit a report to the Joint Standing Committee on Energy and Natural Resources on the status of review board activities and coverage of aboveground tanks, including the following information:

1. With regard to aboveground oil storage facilities, the requirements with which an applicant must be in substantial compliance;
2. Any other rules adopted by the review board or the State Fire Marshal regarding aboveground storage tanks;
3. Any recommendations developed by the review board for legislation to codify standards and procedures for insurance coverage for aboveground oil storage facilities; and
4. Policy recommendations with regard to the aboveground oil storage facility program.

The review board is authorized to submit legislation with this report.

Sec. 20. Interim procedure for determining eligibility for aboveground oil storage facilities. Until legislation is enacted specifying a process for determining eligibility for coverage of aboveground oil storage facilities by the Groundwater Oil Clean-up Fund, the State Fire Marshal shall make those determinations. The determinations must be made in accordance with

rules adopted by the Fund Insurance Review Board for determining substantial compliance. Applications may not be filed and determinations may not be made until the review board has adopted rules setting forth the criteria for determining substantial compliance for aboveground oil storage facilities. With respect to aboveground oil storage facilities, the State Fire Marshal has the same powers and duties as the Commissioner of Environmental Protection in receiving insurance claims, determining eligibility and waiving deductibles as provided in the Maine Revised Statutes, Title 38, sections 568-A and 569-A. The State Fire Marshal may appoint, subject to the Civil Service Law, such employees as may be necessary to carry out the responsibilities of the Office of the State Fire Marshal under Title 38, chapter 3, subchapter II-B. Any person so employed is under the administrative and supervisory direction of the State Fire Marshal.

Sec. 21. Application; retroactivity.

Aboveground oil storage facilities are eligible for coverage by the Groundwater Oil Clean-up Fund retroactively to April 1, 1990. An owner or operator of an aboveground oil storage facility may apply to the State Fire Marshal for coverage for a discharge that has not involved the expenditure of state funds for clean-up costs or 3rd-party damage claims prior to April 1, 1990 and has not been the subject of a clean-up order issued prior to April 1, 1990. Applications must be filed no later than 180 days after the Fund Insurance Review Board adopts rules relating to substantial compliance for aboveground oil storage facilities.

Any person denied eligibility for a discharge from an underground oil storage facility after April 1, 1990 may reapply to the Department of Environmental Protection for a new determination of eligibility. The determination of eligibility must be made using the new definition of substantial compliance contained in the Maine Revised Statutes, Title 38, section 568-A.

Notwithstanding the Maine Revised Statutes, Title 1, section 302, any application pending before the Department of Environmental Protection on the effective date of this Act is appealable to the Fund Insurance Review Board and any person with an appeal pending before the Board of Environmental Protection on the effective date may elect to withdraw the appeal from the Board of Environmental Protection and file it with the Fund Insurance Review Board.

Sec. 22. Assistance to Fund Insurance Review Board. In providing assistance to the Fund Insurance Review Board, the Finance Authority of Maine is authorized to employ professional and nonprofessional staff to serve at the pleasure of the Chief Executive Officer.

Sec. 23. Allocation. The following funds are allocated from Other Special Revenue to carry out the purposes of this Act.

	1993-94	1994-95
FUND INSURANCE REVIEW BOARD		
Fund Insurance Review Board		
All Other	\$150,000	\$150,000
Provides for the allocation of funds for administrative and general operating costs of the board.		
FUND INSURANCE REVIEW BOARD TOTAL		
	\$150,000	\$150,000
PUBLIC SAFETY, DEPARTMENT OF		
Office of the State Fire Marshal		
Positions	(2.0)	(2.0)
Personal Services	\$54,612	\$55,536
All Other	4,600	3,000
Capital Expenditures	17,500	
Provides for the allocation of funds for one additional Fire Protection Specialist Assistant position, one additional Clerk Stenographer II position and general operating costs necessary to make eligibility determinations.		
DEPARTMENT OF PUBLIC SAFETY TOTAL		
	\$76,712	\$58,536
TOTAL ALLOCATIONS	\$226,712	\$208,536

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

Effective June 16, 1993.

CHAPTER 364

H.P. 292 - L.D. 379

An Act to Require an Employer Majority on the Board of Governors of the Workers' Compensation Residual Market Mechanism

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