

MAINE STATE LEGISLATURE

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**STATE OF MAINE
115TH LEGISLATURE**

**Final Report
ENVIRONMENTAL CRIMES
September 1992**

**Staff Report
to the
Standing Committee on
Energy & Natural Resources
and
Joint Standing Committee on
Judiciary**

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EXECUTIVE SUMMARY

Background

This report arises out of legislation introduced in the First Regular Session of the 115th Legislature. LD 1654, An Act to Facilitate Criminal Enforcement of the Environmental Laws, would have revised the criminal penalties section of Title 38 of the Maine Revised Statutes by increasing Class E environmental crimes to Class C crimes and making other changes. The bill was carried over to the Second Regular Session, reported out of Committee as a divided report, recommitted to Committee, reported out again with a three-way division, and eventually died between the House and the Senate. As LD 1654 died, LD 2461, An Act to Increase Penalties on Deliberate Polluters, was introduced in its place. LD 2461 increases specific environmental violations to Class C crimes, but also provides specified exemptions. LD 2461 was carried over from the Second Regular Session to the next Special Session, anticipated to be convened in the Fall of 1992.

The Judiciary Committee and the Energy and Natural Resources Committee jointly requested the Legislative Council for a staff study to be completed by September 1, 1992, to provide information to the Legislature that will help with the deliberations on LD 2461. This report by the Office of Policy and Legal Analysis is the result of the staff study authorized by the Legislative Council.

Summary

Thes purposes of this report are to provide the Legislature with a conceptual and theoretical discussion of criminal enforcement of environmental violations and an analysis of recent environmental enforcement activities in Maine. This is accomplished through a review of general criminal concepts, including a brief discussion on underlying criminal law theory, discussions of the culpable mental state as an element of a crime and discussions on those aspects of criminal law related to environmental crimes that arose during the Legislature's consideration of LD 1654 and LD 2461. The general criminal penalty and other criminal provisions found in Title 38 of the Maine Revised Statutes are discussed. Recent environmental enforcement experience at the federal level is reviewed, including a summary of federal criminal penalties for environmental violations and discussions on the role of the federal sentencing guidelines in environmental prosecution and enforcement. Where appropriate, comparisons between Maine law, federal law and the laws of other states are presented and discussed. This discussion is followed by a review of state and federal environmental enforcement actions over the past decade and an analysis of Maine administrative and judicial enforcement actions taken in the last four years under the laws administered by the Department of Environmental Protection. Criminal environmental cases over the past decade, which consist of five cases brought by the State and one case brought by the Federal government, are discussed individually. Data on civil environmental actions, which consist of nearly 700 administrative and judicial enforcement actions between July 1, 1988 and June 30, 1992, were aggregated and are reviewed based on the type and location of violations, the monetary penalties imposed on violators, the type of violator, and other variables that provide some insight into patterns of environmental enforcement activity in the State.

Although this review of criminal theory, criminal environmental law enforcement and environmental enforcement experience in Maine can provide insight into some of the issues raised during discussions on LD 2461 and LD 1654, questions as to whether certain actions should be criminalized or what the level of penalty should be for those actions implicate many socio-political questions which are not particularly susceptible to quantitative analysis. The level of criminal sanction imposed on certain types of behavior reflects the priority society places on discouraging that behavior, and determining the appropriate level of penalty for certain types of environmental violations will require society, through its Legislature, to make choices about how those violations compare to other types of antisocial behavior. While discussion of criminal law theories and a review of the historical record of environmental enforcement activities and sanctions can provide some context for those choices, decisions on criminal sanctions will ultimately reflect societal values and preferences, especially with respect to environmental crime and punishment in general.

Observations

The following general observations can be made from the data included in this report. It is not possible, based on the nature of this study and the information available for review, to present definitive conclusions. Environmental laws are relatively new, and large discrepancies exist in the extent and manner in which the states and the federal government monitor and enforce environmental violations. In addition, much of the data that is available is descriptive of the individual violations and monetary sanctions and does not include other circumstances surrounding a violation.

Observations drawn from the information in this report are:

- Although the maximum available term of imprisonment for different criminal environmental violations is generally lower in Maine than in other states, the maximum fine permitted under Maine law for hazardous waste crimes and water pollution crimes falls generally in the middle of the other states' fines. For air pollution crimes, Maine fines are generally higher than fines in a majority of states.
- The pattern of enforcement activities in Maine suggest that a large percentage of the violations that occur are determined by the DEP to be minor violations which are resolved informally through technical assistance and voluntary compliance. The resources and tools available to the State to enforce more significant violations are overwhelmingly applied towards resolving those violations through civil channels, with only a small minority of the violations actually resulting in criminal enforcement actions.
- A majority (88%) of all formal environmental enforcement actions over the past 4 years were resolved by administrative consent agreements with the Board of Environmental Protection. The remaining formal enforcement actions (12%) were resolved through the judicial system either by the DEP through the Rule 80K process (5.6%), or by the Attorney General through Superior Court consent decrees (6.3%) or criminal actions (0.3%).

- During the past four years, the State has resolved two criminal environmental enforcement actions, resulting in fines totalling \$17,000 and 21 days of incarceration for one individual. The federal government resolved one criminal environmental enforcement action during that period, resulting in fines totalling \$2,201,000.
- Enforcement actions taken by the DEP and the Department of the Attorney General over the past four years have resulted in a record of sanctions that appears to recognize differences among the types of violations and degree of culpability of the violator. The extent to which those sanctions are serving as a deterrent, however, is not known. Discussion and analysis of federal and state environmental enforcement under various optimal penalty theories began only recently and several researchers have noted serious limitations in the data needed to undertake such an analysis.
- The DEP has reported that as many as 90% of the complaints it receives are either determined not to be violations or are minor violations that can be resolved easily and informally through technical assistance and voluntary compliance. Of the 10% that do result in formal enforcement actions, a large majority (91.5%) involve only one type of violation, a majority (59.8%) involve violations of the Natural Resources Protection Act, and nearly half (47.4%) result in fines less than \$1,000.
- Based on fines imposed, enforcement actions can be characterized as consisting of a large number of actions with relatively small fines, and a small number of actions with relatively large fines. As a group, the 3% of the actions with fines in excess of \$100,000 comprise nearly 70% of the total for all fines imposed over the past four years.
- Violations in the areas of air emissions, water pollution, underground tanks and hazardous wastes appear to draw heavier average fines than actions for violations of the Natural Resource Protection Act, the Site Law, surface oil spill legislation, septage laws and solid waste requirements. Many factors could be influencing this apparent difference, including the often long-term nature of air, water and underground oil tank violations.
- Overall, the average fine resulting from judicial enforcement actions is higher than the average administrative enforcement fine. Although nearly 90% of the 684 formal enforcement actions over the past four years were resolved administratively by the Board of Environmental Protection, a majority of the \$11,164,652 in fines were imposed in judicial enforcement actions. This may be due to, among other factors, the nature of the circumstances accompanying particular cases which make them more appropriately suited for either judicial or administrative action rather than an indication of disparate treatment for similar cases depending on the type of action.
- Average fines imposed in actions involving more than one type of violation appear to be higher than average fines imposed in enforcement actions with only one type of violation.

- Criminalization of environmental violations is a relatively recent phenomenon. Criminal law theorists continue to debate whether criminal penalties are appropriate for environmental violations.
- Statutes criminalizing environmental violations are numerous at the federal level and among the states. Those statutes, however, do not appear to have been developed in a coordinated manner, and enforcement and judicial interpretation has been inconsistent. Little analysis have been published regarding the impact or effectiveness of criminal statutes in curbing environmental violations.
- Enforcement actions over the past four years show a pattern. The maps in figures D-5 through D-13, which were prepared by the Department of Conservation through the Geographic Information Systems (GIS) office, illustrate enforcement activity that closely follows population, development and industrial activity across the state.

I. BACKGROUND

The modern environmental movement is commonly said to have begun with the publishing and media popularizing of Rachel Carson's *Silent Spring*.¹ Criminal prosecution gained momentum in the 1980's culminating toward the end of the decade with the upgrading of penalties for several federal environmental crimes and increased emphasis and resources within the Department of Justice for prosecution of environmental crimes. Increased interest on the federal level was followed by burgeoning growth in state regulation and enforcement. As it appeared to some that civil enforcement was inadequate to deter environmental violations, attention was turned to criminal law.

This staff study report is one step in a long progression of activities focusing on legislating changes in the application of criminal principles to environmental violations in Maine. This series of activities began with the introduction of LD 1654, An Act to Facilitate Criminal Enforcement of the Environmental Laws, referred to the Joint Standing Committee on Judiciary of the 115th Legislature on April 24, 1991. No legislation in this area was enacted before adjournment of the Second Regular Session on March 31, 1992, although LD 2461, An Act to Increase Penalties on Deliberate Polluters, is still pending before the Legislature. At the request of both the Joint Standing Committee on Judiciary and the Joint Standing Committee on Energy and Natural Resources, this report was prepared after the adjournment of the Second Regular Session. The Committees requested the report in recognition of the fact that more information regarding criminal enforcement of environmental laws is needed for thorough consideration of the new bill, LD 2461. The September 1, 1992 date for completion of the study was chosen to allow discussion of the report's information at the Special Session that, in March, was anticipated to be held later in September.

A. LD 1654, An Act to Facilitate Criminal Enforcement of the Environmental Laws

The Department of the Attorney General requested Representative Treat of Gardiner, Representative Jacques of Waterville, Senator Gauvreau of Androscoggin and Representative Marsh of West Gardiner to sponsor legislation in the First Regular Session of the 115th Legislature for the purpose of making enforcement of the existing environmental laws easier. The Department submitted LD 1654, An Act to Facilitate Criminal Enforcement of the Environmental Laws, for five specific purposes. First, the bill increases state penalties to make them more consistent with federal penalties for environmental crimes. Second, the bill expands the enforcement tools available to the State by increasing the classification of environmental violations from Class E (the current classification found in the general violations section) to Class C, which is the Maine equivalent of raising the classification from misdemeanor to felony status. These expanded enforcement tools are: the ability to use the Grand Jury to investigate complex environmental cases, the longer statute of limitations (from three years to six years) to discover and develop complex cases, and the movement of criminal cases - often very complex and time consuming - from

¹Susan Hedman, *Expressive Functions of Criminal Sanctions in Environmental Law*, The George Washington Law Review, 59 (1991), pp. 891-892.

District Court to Superior Court, where civil environmental cases are litigated. The third purpose behind LD 1654 was to add to the statute a state of mind or required criminal intent for environmental violations. The current general statute mentions no culpable mental state; the bill added in the three highest culpable mental states of "intentional," "knowing" and "reckless." The Department of the Attorney General's fourth purpose in proposing the bill was to add the culpable mental states of "intentionally" and "recklessly" for conviction of records falsification and criminal hazardous waste violations. Fifth, the bill was intended to improve the State's ability to remedy environmental harm following a criminal conviction by expanding the restitution provisions of the Criminal Code.

LD 1654, because of its focus on the criminal aspects of the subject, was referred to the Joint Standing Committee on Judiciary. The Committee held a public hearing on the bill on May 8, 1991. Supporters testifying at the hearing included the sponsors and representatives of the Department of the Attorney General, the Department of Environmental Protection, and the Natural Resources Council of Maine. Testifying in opposition to the bill were representatives of Bath Iron Works, the Maine Association of Realtors, and the Maine Chamber of Commerce and Industry. A representative of the Maine Motor Transport Association testified neither for nor against the bill, but provided information about the bill's application. Determining that the legislation would need more of the Committee's time than was available in the First Regular Session, the Judiciary Committee requested the leave of the Legislative Council to hold the bill until the Second Regular Session of the 115th Legislature. Although the Committee had hoped that the opposing parties interested in the bill would use the interim to work on reducing their differences, no agreements were reached. In January of 1992, the Judiciary Committee reopened deliberations on the bill. The Department of the Attorney General submitted a proposed amendment in response to concerns raised in opposition to the bill. In late January, a 7-member majority of the Committee reported out an amendment to the bill (Committee Amendment "A" to LD 1654), the 6-member minority voted Ought Not To Pass. After lengthy debate in the House of Representatives on February 25 and March 3, the bill was recommitted to the Judiciary Committee to address concerns raised in the debate. Recommitting the bill also gave the Energy and Natural Resources Committee an opportunity to provide background information regarding the underlying environmental laws and to comment on the bill prior to floor debate. The Judiciary Committee reconvened on the bill, but ultimately sent three reports to the floor: Two committee amendments (Report A: Committee Amendment "B" to LD 1654, 8 members supported; Report B: Committee Amendment "C" to LD 1654, 3 members supported) and one Ought Not To Pass report (Report C, 2 members supported). The Ought Not To Pass report was accepted in the House, while the Senate adopted Report A, Ought to Pass as Amended by Committee Amendment "B". The major differences between Committee Amendment "B" and Committee Amendment "C" are the following:

• Committee Amendment "B" raised the following activities to a Class C crime:

- *illegally handling any special wastes for a commercial purpose;*
- *discharging any pollutant into the waters of the State for a commercial purpose, with the exceptions of certain agricultural practices and activities associated with the use, construction, maintenance and emergency repair activity for forestry and municipally maintained roads; and*
- *emitting any air contaminant from a stationary source for a commercial purpose.*

• Committee Amendment "C" raised to a Class C crime:

- *transporting any hazardous substance or special waste without having a required license or permit, transporting any hazardous substance or special waste to a location that does not, in fact, have a required license or permit for handling that waste, and accepting such waste for disposal or storage without a required license or permit.*

• Committee Amendment "B" limited the authority to prosecute crimes under the new subsection to the Attorney General. It also provided an affirmative defense similar to the unavoidable malfunction provision that currently applies to civil penalty actions. Committee Amendment "C" contained neither provision.

The bill and all its amendments eventually died between the House and the Senate when no further action was taken on it; LD 2461 was introduced on March 30, 1992 as possible compromise legislation.

LD 1654 and its Amendments are included in Appendix B

B. LD 2461, An Act to Increase Penalties on Deliberate Polluters.

LD 2461, An Act to Increase Penalties on Deliberate Polluters, sponsored by Representative Marsh of West Gardiner, Senator Gauvreau of Androscoggin, Representative Treat of Gardiner and Representative St. Onge of Greene, arose out of the many discussions involving LD 1654. It raises specific environmental crimes from Class E crimes to Class C crimes, while providing for specified exemptions from the higher classification. The bill was referred to the Judiciary Committee in the House on March 30, 1992; the Senate did not refer the bill to a committee. On March 31, both bodies of the Legislature approved the joint order proposing to carry over the bill until the next special session of the 115th Legislature.

LD 2461 is included in Appendix B. Appendix C is a comparison of LD 2461 and the current law.

C. Staff study

The Joint Standing Committee on Energy and Natural Resources and the Joint Standing Committee on Judiciary together requested a staff study on enhancement of penalties for environmental crimes. The chairs of the Committees sent a joint letter to the Legislative Council on March 30, 1992 requesting the assignment of staff within the Office of Policy and Legal Analysis to collect background information for consideration of LD 2461 for use during the next special session. The chairs suggested that the data to be collected include information about past violations and enforcement actions in Maine, information regarding similar laws in other states and on the federal level, and a discussion of criminal law concepts applicable to criminal environmental law interpretation and enforcement. See request letter in Appendix A. This report is the product of the Office of Policy and Legal Analysis' efforts to provide useful information to the Legislature as requested in March of 1992.

II. Criminal Law Concepts

This section describes the nature of criminal law, the elements of a crime and the distinction between crimes and civil violations. Where relevant, these issues are related to the Maine Criminal Code, (Title 17-A of the Maine Revised Statutes Annotated)

A. What is a crime?

A crime is an act or failure to act that is in violation of statute and that may be punished by fine and, in most cases, imprisonment for an individual and by fine for a corporation.

B. Purposes of criminal sanctions

Criminal law is the exemplification of the manner in which a society declares those acts that it considers so morally reprehensible as to be deserving of public censure and punishment. It is distinguished from civil prohibitions by the nature of its punishment, stigma, community judgment through the right to a jury trial and the thought that a criminal owes a debt to society.²

Modern sentences for criminal violations extend far beyond the traditional sanctions of fines and imprisonment. This expansion has included conditions such as compensation to victims, published apologies, community service, and payment of government costs.

The purposes of criminal punishment have been described as prevention or deterrence, incapacitation (removal of the offender from society), just punishment and rehabilitation. However, in any philosophical discussion of the purposes of criminal punishment, it becomes clear that the relative importance placed on these objectives varies widely from one commentator to the next. Even the United States Sentencing Commission divided over whether the principal aim of criminal sanctions ought to be based upon the offender's culpability and the resulting harm or on the level of punishment necessary to effectively reduce the likelihood of future crime.³

Almost all commentators agree that a criminal statute meets none of its purposes if it is not enforced.⁴

²Peter Low, Criminal Law (St. Paul, MN: West Publishing, 1984), p. 46

³United States Sentencing Commission, Federal Sentencing Guidelines Manual, (December 1991), p.3

⁴M. Kuruc, "Putting Polluters in Jail: the Imposition of Criminal Sanctions on Corporate Defendants Under Environmental Statutes", Land and Water Review, 20, (1985), p.101.

C. Optimal penalty theory

Some theorists, usually coming from a background in the field of economics, maintain that the purpose of criminal punishment should be to minimize the costs of illegal conduct including all remedial, detection and procedural costs. Under this theory, sometimes referred to as optimal penalty theory, fines produce the optimal level of prevention when they equal the costs to society of the violation plus the cost of detecting violations, divided by the probability of detection. Penalties imposed in the economic arena that are too small will be absorbed as a cost of production. Penalties that are too high will result in overprevention which increases the cost of production thereby reducing demand for the product, penalizing labor, and inhibiting expansion. These theorists may view criminal fines as no more effective than civil fines in ensuring maximum compliance.⁵

The optimal use of nonmonetary sanctions is viewed somewhat differently. Under this theory nonmonetary sanctions are appropriate when monetary sanctions are inadequate to deter the prohibited activity. This may happen if the size of the violator's assets are smaller than the monetary sanction, there is a high probability of escaping sanctions, there is an independent high level of private benefits gained from the illegal activity, there is a high probability of the act resulting in harm or the magnitude of the harm is high.⁶

D. Elements of a crime

The four basic elements of a crime include the forbidden conduct, the attendant circumstances required, intent and causation. (17-A MRSA §32)

1. The act. The first element of a crime is an act or failure to act that is in violation of statute. In older times, common law crimes existed that consisted of acts declared crimes by the courts, rather than the legislature, based upon long-standing standards of community moral expectations and understandings. Under the Maine Criminal Code, which became effective in 1976, common law crimes no longer exist in Maine. (17-A MRSA §3-A) The more generally applicable crimes are categorized in the Criminal Code; however, many crimes are specifically identified outside of that code.⁷
2. Attendant circumstances. The second element of a crime involves the circumstances that must attend an act in order for it to be a crime. For example, the crime of robbery is

⁵Michael Block, "Optimal Penalties, Criminal Law and the Control of Corporate Behavior", Boston University Law Review, 71 (1991).

⁶Steven Shavell, "Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent", Columbia Law Review, 85, No. 5 (1985), p.1236-7.

⁷Margaret J. Reinsch and Jill Ippoliti, "Final Report: Penalties Outside the Criminal Code", Staff Report to the Joint Standing Committee on Judiciary, State of Maine 114th Legislature. (November 1990).

committed if a person commits or attempts to commit a theft and at the same time the person recklessly inflicts bodily injury on another or takes any of a number of other actions involving the use of force against another. (17-A MRSA §651) Attendant circumstances are sometimes thought of as part of the criminal act rather than as a separate element of a crime.⁸

3. Intent. The third element of a crime is intent. Culpable intent is the state of mind of a person that justifies blameworthiness or criminal responsibility for the person's actions. Almost all crimes require some element of criminal intent. Terms commonly used in criminal statutes to describe a culpable state of mind include "intentionally," "willfully," "purposely," "knowingly," "recklessly," and "negligently." Criminal intent is sometimes referred to as *mens rea*.

General principles. Crimes that specifically require no culpable state of mind are called strict liability crimes. Strict liability crimes require only that the person committed the acts that comprise the crime; the person's state of mind is irrelevant. Crimes identified as public welfare offenses (i.e. those created for the purpose of regulating activities that affect the public health and welfare) originated as strict liability crimes. No culpable state of mind is required because persons who have assumed the responsibility for the public health and welfare by engaging in a regulated activity may be presumed to have the responsibility for following the regulations provided for that activity. On the federal level, these principles were developed mostly in the area of food and drug regulations and have been applied frequently to environmental statutes. In United States v. Dotterweich, 218 U.S. 57 (1910), the United States Supreme Court held that a state of mind is not necessary for a public welfare crime. A statute that appears to be a public welfare offense that does not have a specified required state of mind may be viewed by a court as a strict liability offense if no contrary legislative intent is specified.⁹ Likewise a court may look to the traditional nature of a crime to interpret the meaning of states of mind which are provided in the law. Environmental crimes are frequently viewed as falling within the category of traditional public welfare crimes with the result that some courts have adopted a broad definition of specified states of mind when determining legislative intent especially when interpreting the kind of culpable mental state that is necessary to convict corporate owners and managers for the actions of lower level corporate employees. (See United States v. Park, 421 U.S.658 (1975))¹⁰ (See also discussion of vicarious liability below.)

⁸Low, op. cit., pp. 1-2

⁹Andrew Goldberg, "Corporate Office Liability for Federal Environmental Statute Violations", Boston College Environmental Affairs Law Review, 18 No. 2 (1991).

¹⁰Jane Barrett and Veronica Clarke, "Perspective on the Knowledge Requirement of Section 6928(d) of RCRA after United States v. Dee", The George Washington Law Review, 59 (1991), p. 872.

Intent is sometimes spoken of as being general or specific. These concepts are carried over from the concepts of common law crimes that no longer exist in Maine. General intent requires that the person had the intent to do a thing that the law prohibits. It does not require that the person know that the intended action is in violation of the law. In order to prove general intent it is not necessary to show that the person intended an exact result or harm. Specific intent requires that the person have an additional intent to perform some additional action or accomplish some additional result. For example, in the common law crime of burglary, it was necessary to show not only intent to enter the dwelling of another, it was also necessary to show that the person charged had the intent to commit a felony there.

The Maine Criminal code. The Maine Criminal Code defines four culpable states of mind: intentionally, knowingly, recklessly and criminal negligence. 17-A MRSA §35 defines these terms as follows.

17A §35. Definitions of culpable states of mind

1. "Intentionally."

A. A person acts intentionally with respect to a result of his conduct when it is his conscious object to cause such a result.

B. A person acts intentionally with respect to attendant circumstances when he is aware of the existence of such circumstances or believes that they exist.

2. "Knowingly."

A. A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.

B. A person acts knowingly with respect to attendant circumstances when he is aware that such circumstances exist.

3. "Recklessly."

A. A person acts recklessly with respect to a result of his conduct when he consciously disregards a risk that his conduct will cause such a result.

B. A person acts recklessly with respect to attendant circumstances when he consciously disregards a risk that such circumstances exist.

C. For purposes of this subsection, the disregard of the risk, when viewed in light of the nature and purpose of the person's conduct and the circumstances known to him, must involve a gross deviation from the standard of conduct that a reasonable and prudent person would observe in the same situation.

4. "Criminal negligence."

A. A person acts with criminal negligence with respect to a result of his conduct when he fails to be aware of a risk that his conduct will cause such a result.

B. A person acts with criminal negligence with respect to attendant circumstances when he fails to be aware of a risk that such circumstances exist.

C. For purposes of this subsection, the failure to be aware of the risk, when viewed in light of the nature and purpose of the person's conduct and the circumstances known to him, must involve a gross deviation from the standard of conduct that a reasonable and prudent person would observe in the same situation.

If a state of mind is specified in a statute, it refers to all of the elements of the crime unless legislative intent indicates otherwise. Statutes outside the Code may specify other states of mind; however, the Code provides that in that case the element of intent is satisfied if the person acted intentionally or knowingly. Crimes where no state of mind is specified nevertheless require a culpable mental state unless the statute or legislative intent indicates otherwise. (17-A MRSA §§34 and 35)

4. Causation. The final element requires that the act be the cause of the result which the statutory provision was intended to prohibit. For example, If A shoots B intending to kill her but only wounding her slightly but B is killed when the ambulance taking her to the hospital collides with a train, A's action is not thought to be the cause of B's death if the wound by itself would not have caused B's death. Therefore A is not guilty of murdering B. (A would probably still be guilty of attempted murder, however.)

E. The Maine Criminal Code

The Maine Criminal Code, Title 17-A, was enacted in 1975 and took effect May 1, 1976. The Code was developed by the Criminal Law Revision Commission to organize the State's criminal laws, to centralize uniform rules relating to the criminal law and to provide a classification scheme that would aid the Legislature in making policy judgments about the seriousness of an offense.¹¹

The Maine Criminal Code is based on the Model Penal Code, a model criminal code that was proposed in 1962 by the American Law Institute and that forms the basis for the criminal codes in a number of states. It provides a classification scheme for crimes, a listing of substantive offenses and the general principles that apply to all crimes. Under 17-A MRSA §6 those general principles are made applicable to crimes contained in statutory provisions outside the Code unless a different treatment is clearly required. Environmental crimes created in Title 38, or elsewhere, are covered by these general principles unless the statute clearly requires a different treatment. General principles of Title 17-A that apply to crimes outside the Criminal Code include the Code's definitions, scheme of classification, statutes of limitations, procedural issues, liability of third parties, defenses, provisions relating to conspiracy, attempt and solicitation and provisions relating to punishments.

F. How does a crime vary from a civil violation?

Crimes vary from civil violations in several important respects. The most obvious difference is that the sanctions for violating a criminal prohibition include imprisonment. A violation of a civil prohibition will not result in imprisonment although it can result in the imposition of significant monetary penalties and court ordered activities directed toward remedying the harm caused by the violation. If a monetary penalty is too high, however, it is possible that a court may consider it too punitive and consider it a criminal statute. A criminal conviction may also result in probation with conditions, such as public apology, court ordered remedial activities or community service. A civil violation may not automatically authorize a court to require such actions or other equitable relief unless the statute specifically gives that authority.

¹¹Jon Lund "Maine Criminal Code: Introduction to the Proposed Code", Maine Revised Statutes Annotated, (St. Paul, MN: West Publishing, 1983), pp. 287-291.

The procedural aspects of the prosecution of a crime also vary considerably from those that apply to civil violations. The government is required in a criminal case to prove its case "beyond a reasonable doubt." This is a much higher standard than the general civil standard of proof by "a preponderance of the evidence." A defendant in a criminal case is entitled to much greater procedural protection than in a civil case. A criminal defendant has the right to avoid self-incrimination. A defendant has a right to have an attorney appointed if significant imprisonment is a possible sanction. Criminal investigations must be conducted much more carefully in order to ensure that the evidence obtained during the investigation can be used in court.

Another important distinction between criminal and civil prosecution is the effect that the prosecution can have on the defendant. In addition to the risk of imprisonment, a criminal charge is much more socially stigmatizing than a civil prosecution for both the defendant and the defendant's family. This can be true even if the defendant is ultimately acquitted. A conviction can jeopardize the defendant's ability to engage in a profession. This is especially true if the crime is a felony. Sometimes a conviction can result in the loss of a license. Conviction of a crime may discourage customers, and in some instances, conviction is grounds for limiting eligibility for benefits from and contracts with the federal government. (See discussion of listing, debarment and suspension, below.)

Another distinction is the right to a jury trial. Under Article III, Section 2, clause 3 and the 6th Amendment to the United States Constitution and under Article I, Section 6 of Maine Constitution a person charged with a crime is entitled to a jury trial. Juries are not available in District Court where Class D and E crimes are usually tried; therefore, if the defendant, in the trial of a Class D or Class E crime, requests a jury, the case is transferred to Superior Court. Article I, Section 20 of the Maine Constitution guarantees a jury trial in those civil cases where a jury trial was available prior to 1820. This right is usually available in suits for damages, but does not appear to give the right to a jury trial in the prosecution of civil violation of environmental laws.

III. Environmental Crimes in Maine

This section describes the general provisions of Title 38 relating to environmental crime, provisions relating to hazardous waste and provisions regarding other environmental crimes that vary from the general penalty.

A. The general penalty

38 MRSA §349 contains what is usually referred to as the "general penalties" for violation of environmental laws. Section 349 contains two general criminal penalties.

1. Violation of laws, etc.

Subsection 1 of section 349 makes it a Class E crime to violate "...any provisions of the laws administered by [DEP], including, without limitation, a violation of the terms or conditions of any order, rule, license, permit, approval or decision of the [BEP] or commissioner" or to dispose of "...more than 500 pounds or more than 100 cubic feet of litter for a commercial purpose, in violation of Title 17, section 2264." The minimum fine for a violation is \$100; the maximum, \$25,000 for each day of violation. A violator may be imprisoned for up to six months.

Subsection 1 does not apply to actions covered in 38 MRSA §1319-T which provides criminal penalties related to hazardous waste. (See below for discussion of §1319-T.)

Section 349, subsection 2, provides civil penalties for the same actions.

2. False reporting and tampering

Subsection 3 of section 349 makes it a Class E crime to "...knowingly make[] any false statement, representation or certification in any application, record, report, plan or other document filed or required to be filed or required to be maintained by any provision of law administered by [DEP], or any order, rule, license, permit, approval or decision of the [BEP] or commissioner" or to "tamper[] with or render[] inaccurate any monitoring devices or method required by any provision of law, or any order, rule, license, permit, approval or decision of the [BEP] or commissioner" or to "fail[] to comply with any information submittal required by the commissioner pursuant to section 568, subsection 3 or section 1364, subsection 3." The fine for violation is a maximum of \$10,000. A violator may be imprisoned for up to six months.

B. Hazardous waste

38 MRSA §1319-T provides criminal penalties for actions involving hazardous waste.

1. Class C crime. Subsection 1 makes it a Class C crime knowingly to engage in any of the following activities with respect to any hazardous waste identified by BEP which the person "... believes may be harmful to human health or knows or has reason to know" that it has been so identified:

- Transport the waste without a required license or permit;
- Transport the waste to a waste facility knowing or consciously disregarding a risk that the facility does not have the required license or permit;
- Handle the waste without the required license or permit; or
- Handle the waste at a location knowing or consciously disregarding a risk that the location does not have a required permit for treatment, storage or disposal.

Violation of subsection 1 may be punished by imprisonment of three to five years. A fine may be imposed up to \$50,000 for each day of violation.

2. Class D crime. Subsection 2 of section 1319-T makes it a Class D crime knowingly to engage in any of the following activities with respect to any hazardous waste identified by BEP that the person "... knows or has reason to believe has been so identified or may be harmful to human health":

- Establish, construct, alter or operate a waste facility without a required licenses or permit;
- Handle or transport hazardous waste in violation of the terms of any condition, order, rule, license, permit, approval or decision of BEP or the commissioner with respect to handling or transporting hazardous waste; or
- Give custody or possession of a hazardous waste to a person whom the person giving the waste knows or has reason to believe does not have a required license or permit or will transport or handle the waste in violation of the hazardous waste laws and rules.

Violation of subsection 2 may be punished by imprisonment of one to three years. A fine of up to \$25,000 may be imposed for each day of violation.

C. Other provisions of Title 38

The general penalties in section 349 relate to the provisions of Title 38 administered by the Department of Environmental Protection. This study does not address prohibitions contained in Title 38 that are not administered by the DEP, for example harbor masters laws.

Among the provisions of Title 38 that are administered by DEP, most of the prohibited activities contain no specific criminal or civil penalties, thereby incorporating the general penalties in section 349. These provisions include most air and water pollution violations that do not involve hazardous materials.

A few prohibitions in Title 38 are accompanied by specific penalties that differ from section 349. For instance, 38 MRSA §841 prohibits the operation of a dam in violation of an order of the Commissioner of DEP establishing a water level regime for the body of water. Subsection 3 of that section provides for violation a civil forfeiture of \$100 to \$10,000 for each day of violation. This civil penalty is essentially the same as the civil penalty provided in the general penalty section (section 349). Where those differences occur, it is unclear which penalty governs. For instance, it is unclear whether the existence of a specific civil penalty in section 841 is surplusage or whether it is intended to provide the sole penalty for a violation of that section, thereby superseding the criminal penalties provided in section 349. Legal theories can be presented that would justify the supremacy of either the general or the specific penalties. A few prohibitions in Title 38 contain penalties completely separate from the general penalties in section 349 because the actions prohibited do not fall within the general prohibition language of section 349. For instance, section 1310-B makes it a Class D crime to solicit or accept or give a pecuniary benefit for the disclosure of certain confidential information provided to DEP.

Two prohibitions in Title 38 that vary from the general penalty merit mentioning. 38 MRSA §571 establishes a Class A crime for the intentional or knowing contamination of water sources used for domestic purposes or public water supplies. The statute appears quite broad and has been in existence since 1878. Prosecutions under this section appear to be rare. None are cited in the Maine Revised Statutes Annotated. 38 MRSA §2604 provides a Class D crime for several actions related to the new motor vehicle emission inspection law that was enacted in the Second Regular Session of the 115th Legislature and goes into effect January 1, 1994. Neither of these sections make any cross-reference to section 349.

D. Other environmental violations

30-A MRSA §4452 provides penalties for violation of local land use ordinances. Among the ordinances covered by this section are shoreland zoning ordinances adopted pursuant to 38 MRSA c. 3 (see 38 MRSA §444), waste water discharge licensing authority (see 38 MRSA §413, subsection 3) and numerous other land use laws located in Title 22 and Title 30-A. Section 4452 provides a civil penalty from \$100 to \$2,500 for violation of those ordinances with the possibility of enhancement to \$25,000 if the same party has a previous conviction within the previous two years of violation of the same statute. The penalty may also be enhanced to twice the economic benefit resulting from the violation. Violations are prosecuted in the name of the municipality.

Crimes contained in other statutes outside of Title 38 that might, in a broad sense, be considered "environmental crimes" have not been included within the scope of this report.

IV. Federal Environmental Crimes

This section describes the federal criminal penalties for environmental violations, recent enforcement experience on the federal level and the role of federal sentencing guidelines.

A. Federal Statutes

The relative importance of environmental crime on the federal level has been gradually increasing over the last 20 years as the environment has assumed an increasingly important role in national public policy. Provisions of federal law criminalizing actions affecting the environment are numerous. A recent law review article lists 67 separate prohibitions in federal law that can subject the violator to criminal sanctions.¹² The statutory structure of the prohibitions is relatively uncoordinated. One action could result in the violation of several different laws.¹³ The meaning of the laws, as interpreted through the federal court system, is evolving. Consistency of interpretation by the federal courts has not yet been achieved.

A summary of the provisions of major federal environmental criminal laws is contained in Appendix D, Figure D-1. The major sources of federal environmental criminal prosecutions are the Clean Air Act (CAA) (42 U.S.C. §7401 et seq.), the Clean Water Act (CWA) (33 U.S.C. §1251 et seq.), and the Resources Conservation and Recovery Act (RCRA) (42 U.S.C. §6901 et seq.). To a certain extent, federal prosecutors have also used traditional criminal laws of conspiracy, making false statements, mail and wire fraud, aiding and abetting and the Racketeer Influenced Corrupt Organization Act (RICO) statutes to prosecute environmental crimes where appropriate. These traditional laws are sometimes used because they provide for harsher penalties than are available under purely environmental criminal laws.¹⁴

B. Prosecutorial experience on the federal level

Prosecution of environmental crimes on the federal level is a relatively recent phenomenon. The period of the 1980s was one of growth on the federal level, not only in the increasing number of environmental criminal laws, but also in the enforcement resources of the federal Environmental Protection Agency, in the number of prosecutions and in the total amount of punishment imposed.¹⁵ In recent years, federal enforcement statistics have leveled off. Some

¹²Robert Adler and Charles Lord, "Environmental Crimes: Raising the States", The George Washington Law Review, 59 (1991)

¹³Eva Fromm, "Commanding Respect: Criminal Sanctions for Environmental Crimes", St. Mary's Law Journal, 21 (1990), p. 825.

¹⁴*Ibid.*, pp. 848-852

¹⁵Richard Leon, "Environmental Criminal Enforcement: A Mushrooming Cloud", St. John's Law Review, 63, No. 4 (1989), p.862.

commentators have hypothesized that the leveling off is mostly attributable to a leveling of enforcement resources.¹⁶

Enforcement of environmental crimes on the federal level can lack a certain amount of cooperation. A former head of the Environmental Crimes Unit of the Land and Natural Resources Bureau of the Department of Justice has described the period of the 1980s as one in which there was a natural tension between the EPA with the initial enforcement responsibility and the DOJ with prosecutorial responsibility. EPA investigators tended to believe that DOJ placed a low priority on environmental crimes, and DOJ believed that they were unable to prosecute some cases because EPA investigatory methods did not meet their normal expectations for criminal investigations.¹⁷ Although the relationship continues to improve, there still remain some inconsistencies among regional EPA offices with regard to the decision of which cases to pursue criminal prosecution and which to handle through the civil route.¹⁸ Investigation ordinarily begins at EPA; however, local United States Attorneys may also become involved in the initial investigation of environmental crimes. Although EPA has established guidelines for prosecution of environmental crimes, there is no central mechanism for uniform review to prioritize those cases that are actually brought to trial and to encourage nationwide consistency in treatment. EPA guidelines for enforcement priorities include evidence of culpability, extent of harm or threat, compliance with recordkeeping and reporting requirements, disregard for environmental requirements, and deterrent value.^{19, 20}

¹⁶Adler and Lord, op. cit., p. 808.

¹⁷Justin Starr, "Turbulent Times at Justice and EPA: the Origins of Environmental Criminal Prosecutions and the Work that Remains", The George Washington Law Review, 59, No. 4 (1991), pp. 905-907.

¹⁸John DeCicco and Edward Bonanno, "A Comparative Analysis of the Criminal Law of the 50 States", The Criminal Justice Quarterly, 9 No. 4., (1988), p. 218.

¹⁹Gregory Bibler, "Counseling the Client on Environmental Crimes", The Practical Lawyer, 37, No. 5 (1991) pp. 39-40.

²⁰The Maine Department of the Attorney General has issued a memorandum to DEP staff which contains criteria for evaluating whether cases should be pursued criminally or civilly. Criteria include the extent of the harm, the state of mind of the violator, history of the violator, economic motivation, impact on the regulatory program, involvement of the violator with other crimes, and the likelihood of prosecuting individual defendants as opposed to corporations. Department of the Attorney General, Memo, Maine's Environmental Criminal Statutes 1, (undated). The Board of Environmental Protection has adopted a policy, with involvement from the Attorney General's Office, for DEP staff to determine when and how to enter into consent agreements. BEP, Enforcement Guidance Document: Administrative Consent Agreement Policy. The policy directs staff to consider the following factors: Environmental impact, cause and circumstances of a violation, corrective action once notified of violation, and prior violations within the past 5 years.

The Department of Justice, in 1991 issued prosecutorial guidelines to "...give federal prosecutors direction concerning the exercise of prosecutorial discretion in environmental criminal cases and to ensure that such discretion is exercised consistently nationwide." These guidelines outline the factors that federal prosecutors should consider when deciding which cases to prosecute. These factors include voluntary disclosure by the offender, cooperation by the offender, preventive measures and compliance programs of the offender, the pervasiveness of noncompliance, internal disciplinary action and subsequent compliance efforts. The guidelines are intended to "...encourage voluntary self-auditing, self-policing and voluntary disclosure of environmental violations."²¹

C. Federal statistics

A recent review of federal enforcement activity concluded that while recent years have seen increased numbers of referrals of cases from EPA to DOJ and a slight trend toward longer sentences of imprisonment, there is an apparent unwillingness of the "system" to bring indictments against powerful individuals in influential corporations, and compliance with existing environmental laws remains poor.²² This same review indicated that the average corporate fine for an environmental crime was 60% of the maximum amount for a one day violation and the average individual fine was 10% of the maximum. Although length of prison sentences was up, the amount of time actually served was down.²³

According to statistics of the DOJ, for FY83 through FY92, 899 federal criminal indictments were issued against individuals (618 or 68.7%) and corporations (281 or 31.3%) for committing environmental crimes. Of this total, guilty pleas or convictions were obtained in 676 cases or 75.2% of the indictments. Over the same period a total of 387 years, 5 months, 13 days of prison time was imposed, with 189 years, 7 months, 11 days actually served. The number of indictments and the total amount of fines and prison sentences were relatively small in the early 1980s and had increased approximately threefold by the end of the decade.²⁴

²¹U.S. Department of Justice, "Factors in Decisions on Criminal Prosecutions of Environmental Violations in the Conduct of Significant Voluntary Compliance or Disclosure Effects by the Violator", (memorandum) July 1, 1991.

²²Adler and Lord, op. cit., pp. 789, 795.

²³Ibid, p. 802.

²⁴Hutchins, "Environmental Criminal Statistics FY 83 through FY 91", U.S. Dept. of Justice Memorandum, 1992.

D. Sentencing guidelines

In response to a perceived need to improve the fairness and consistency of the federal sentencing system, the Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) established the United States Sentencing Commission as an independent agency in the judicial branch of the federal government with responsibility for developing sentencing guidelines to be followed by the federal courts when sentencing convicted criminals. The purpose of the guidelines is to bring honesty, uniformity, and proportionality in the sentencing for crimes at the federal level.^{25,26}

The guidelines for imprisonment developed by the Sentencing Commission create categories of offense behavior and offender characteristics (criminal history of the offender). The categories are combined in a table that indicates the range of suggested sentences for a particular offense. A sentencing judge may make variations from the table for circumstances not taken into consideration by the guidelines, but those variations are subject to appeal. The guidelines for fines are established on the basis of offense level, provide fairly large variations and require the court to take a number of factors into consideration when determining the appropriate fine within the range. Factors taken into consideration include the seriousness of the offense, harm or loss to the victim, providing just punishment, providing adequate deterrence, the defendant's ability to pay, restitution or reparations defendant has made, previous convictions, and "other pertinent equitable considerations."²⁷

Chapter 2, Part Q of the guidelines covers offenses by individuals involving the environment. The categories of offenses are 1) knowing endangerment resulting from mishandling hazardous or toxic substances, pesticides or other pollutants, 2) mishandling of hazardous or toxic substances or pesticides; recordkeeping, tampering, and falsification, 3) mishandling of other environmental pollutants; recordkeeping, tampering and falsification, 4) tampering or attempted tampering with a public water system, 5) threatened tampering with a public water system, 6) hazardous or injurious devices on federal lands, and 7) specially protected fish, wildlife, and plants; smuggling and otherwise unlawfully dealing in fish wildlife, and plants. The guidelines identify a base offense level for each category and provide for upward or downward level adjustments based upon the circumstances surrounding the crime.

²⁵United States Sentencing Commission,(Manual) op. cit., p. 2.

²⁶Although no comparable sentencing system exists on the State level, the Bureau of Air Quality of DEP has adopted a penalty assessment guideline to be used by staff when determining the level of penalty that is appropriate for a given violation. (Bureau of Air Quality, DEP, BAQC Penalty Assessment Guideline, 2/6/92.

²⁷United States Sentencing Commission, (Manual) op. cit., §51.2(d).

Chapter 8 of the guidelines, which was newly adopted in 1991, provides sentencing guidelines for organizations, including corporations and other business entities. Chapter 8 is based upon the following principals:

- the organization must, whenever practical, be ordered to remedy the harm caused by the offense;
- if the organization operated primarily for a criminal purpose or by criminal means, it must be deprived of all of its assets not needed to pay legitimate debts;
- the fine should be based upon the seriousness of the offense (determined by the greatest of the pecuniary gain to the corporation, the pecuniary loss to the victim/public or the amount of the guideline offense level fine table) and the culpability of the organization (determined by the preventive measures taken by the organization prior to the offense, the level of involvement of certain personnel and the organization's behavior after the offense was committed);
- probation is appropriate if needed to ensure the implementation of another sanction or to reduce the likelihood of future criminal activity.²⁸

The guidelines do not yet establish amounts for fines for organizations. This issue was postponed for further study and report in 1992.

The sentencing guidelines apply only to prosecutions that were initiated after adoption of the guidelines. Persons whose prosecutions were initiated before the effective date of the guidelines are sentenced under procedures in effect before the guidelines took effect. Sentencing experience after the implementation of the sentencing guidelines indicates that the result has been longer sentences of imprisonment and larger fines.²⁹

²⁸Ibid., p. 347.

²⁹United States Sentencing Commission, "Federal Sentencing Guidelines: A Report on the Operations of the Guidelines System...", (1991).

V. Environmental crimes in other states

This section provides an analysis of the environmental criminal penalties available under the laws of other states.

A. Criminal penalties in other states

Comparisons of state environmental laws are difficult. Published comparisons are usually restricted to the provisions in state statutes. The actual impact of states' laws upon environmental activity, however, is greatly affected by the importance placed upon enforcement by both the regulatory agency and the prosecutorial agency. Likewise, treatment of environmental crimes by the state court system can have an important impact.

The environmental laws of other states vary greatly as do the penalties that are imposed for violations. A detailed listing of all such laws would occupy many pages.^{30,31} Figure D-2 in Appendix D contains a listing of maximum penalties for state environmental crimes based upon a compilation by the National Association of Attorneys General (NAAG). The charts categorize environmental crimes as hazardous waste, water pollution and air pollution. Other environmental crimes, a miscellaneous category in the NAAG compilation, have not been summarized because the subjects vary too widely to allow useful comparison. The maximum imprisonment and fine listed for each category in Figure D-2 is the maximum of all of a state's laws in that category even though the state may have more than one prohibition and more than one level of punishment. For the purpose of comparison, a flat fine was treated the same as a fine which applies on a daily basis. Based upon the information contained in Figure D-2, it is possible to compare other state's penalties with Maine's. These comparisons are contained in Figure D-3 and are summarized as follows.

Hazardous waste. In the category of hazardous waste, Maine's criminal penalties appear to be somewhat lower than 24 other states'. This difference is more pronounced for imprisonment (24>ME; 17<ME; 8=ME) than for either individual fines (23>ME; 22<ME; 4=ME) or corporate fines (24>ME; 21<ME; 4=ME).

Water pollution. In the category of water pollution Maine's length of imprisonment is lower than almost all other states' (41>ME; 3<ME; 5=ME). Maine ranks close to the middle of states in amount of fines in this category. While more states have higher individual fines than Maine, the highest number of states have fines equal to Maine's (17>ME; 12<ME; 20=ME). The same is true for corporate fines (17>ME; 13<ME; 19=ME).

³⁰Summaries of Federal and State Environmental Criminal Enforcement Statutes. National Association of Attorney's General. (1991)

³¹John DeCicco and Edward Bonano, op. cit.

Air pollution. In the category of air pollution Maine's maximum length of imprisonment is lower than a majority of other states (26>ME; 19<ME; 4=ME). Maine's fines are equal to or higher than most other states for both individuals (6>ME; 29<ME; 14=ME) and corporations (8> ME; 28<ME; 14=ME).

When evaluating these comparisons it should be noted that any summary of state's environmental crimes is complicated by the diversity of prohibitions among the states. A limited cross check of the NAAG charts indicates a potential lack of reporting consistency in that some states' entries cover a wide range of crimes that affect the environment; for instance, New Hampshire's entries include 13 separate water pollution violations with maximum imprisonment ranging from three months to one year, maximum individual fines ranging from \$500 to \$25,000 per day, and maximum corporate fines ranging from \$500 to \$50,000 or \$25,000 per day. Other state's entries show a narrow listing; for instance, Maine reported only the provisions of 38 MRSA §§349 and 1319-T.

A recent revision of Minnesota's environmental criminal law has received some attention. Minnesota's revision coordinates its environmental criminal statutes, authorizes pollution control agency staff to issue administrative field citations, broadens the State's civil and criminal powers and increases penalties for environmental violations.³² Other features of the law include a comprehensive definition of the term "knowingly" that specifically provides that knowledge does not require that the person have knowledge of the law, regulations or applicable testing procedures. Under the new Minnesota law a "responsible corporate official" has knowledge justifying conviction of an environmental crime if the official is an official of the corporation, not just an employee, has direct control or supervisory responsibility for the activities related to the violation and the person had information that would lead a reasonable and prudent person in the official's position to learn the facts. The new law also provides an exemption from criminal liability for air and water violations when notice is given to the state agency and action is taken promptly to remedy the violation.

³²American Bar Association, "Special Committee on Environmental Crimes", 1991 Annual Report, (1992), p. 155.

B. Enforcement in the states

Enforcement of environmental crimes on the state level is characterized by a lack of coordination among jurisdictions and uneven enforcement of existing laws.³³ States vary widely in the substance of their environmental laws and the overlying framework of criminal laws and procedure. The aggressiveness of enforcement of the laws is varied. Analytical comparisons are rare. This study was unable to locate any recent comprehensive comparisons of states' actual experience with the prosecution of environmental laws. Only one report was located containing information about another state's enforcement record. A 1990 review of Massachusetts' criminal enforcement activity indicated that between January 1987 and June 1990 the Massachusetts Attorney General reported 18 successful environmental criminal prosecutions. Massachusetts, in 1989, created an Environmental Crimes Strike Force to combine staffs from both law enforcement and scientific areas of expertise to improve the detection and investigation of environmental crimes.³⁴

As an additional complicating factor, judicial interpretation of critical issues may vary from state to state. While many articles have been written about federal court interpretations of the provisions of federal environmental criminal laws, little has been written about state courts' decisions. In fact, environmental criminal laws are a new enough development that few cases would appear to have reached a state appellate court level. None have been decided by the Maine Supreme Judicial Court.

³³See Section VII.D.1 of this report for a discussion of the literature analyzing states' experience with environmental enforcement.

³⁴Raymond Dougan, "State Environmental Enforcement Action", Massachusetts Law Review, (1990), p. 118

VI. Key aspects of criminal law

This section describes various aspects of criminal law as they relate to environmental crimes. Where appropriate, comparisons have been made between Maine law, federal law, and the laws of other states.

A. Criminalization of environmental violations

The overarching question of environmental criminal law is whether environmental violations are the appropriate subject for criminal penalties or whether the goals of society with regard to the environment could be accomplished more effectively and more appropriately through use of the civil laws.

Proponents of a role for the criminal law identify the potential seriousness of the harm caused by environmental violations, not only to the environment but also to human life and health and to property. They cite studies that indicate that public opinion considers environmental crimes to be more serious than many other forms of serious crime.³⁵ They believe that serious criminal penalties are necessary to affect changes in corporate behavior that has traditionally been oriented toward maximizing profit³⁶. Under these theories the fear of imprisonment is necessary before some corporate officials will have sufficient incentive to fully educate themselves about their environmental obligations and take actions to comply.³⁷ Proponents sometimes argue for a reduced level of culpability in order to increase the effectiveness of criminal prohibitions, for instance a reduction in the required state of mind from "knowingly" to "recklessly" or "criminal negligence."³⁸

Opponents indicate that environmental laws and regulations are seemingly endless, complicated, confusing and sometimes contradictory. They argue that most corporations are good citizens who try very hard to fulfill their environmental obligations. Most violations, they maintain, are minor and the result not of loose morals or evil intent but of honest mistake, lack of knowledge or understanding of the law or because of accident or an overriding necessity. Under this theory, the fear of criminal sanctions is so dramatic a deterrent that it also deters beneficial economic activity with marginal risks and restricts economic development. Opponents sometimes argue for an increased level of culpability to ensure that if criminal penalties are applied to environmental violations, they will involve only those persons whose actions were truly taken with an

³⁵Polls indicate 70% of the public favor jail for polluters. Hedman, op.cit., p. 889.

³⁶James Strock, "Environmental Criminal Enforcement: Priorities for the 1990's", The George Washington Law Review, 59, No. 4 (1991), p. 922.

³⁷Hedman, op. cit., p. 894.

³⁸Anthony Celebrezze, "Criminal Enforcement of State Environmental Law: The Ohio Solution", Harvard Environmental Law Review, 14 (1990), p. 218.

intent to do evil deeds.³⁹ Arguments have also been made that criminal sanctions without an adequate level of intent violate the Due Process Clause of the U. S. Constitution and threaten democratic values by using criminal prosecution as a means of educating corporate employees regarding the dangers of environmental violations.⁴⁰

B. Prosecutorial discretion

The legislative branch of government makes the laws and the judicial branch adjudicates them, but it is the executive branch that has the responsibility to enforce them. One aspect of this enforcement responsibility is the concept of "prosecutorial discretion." Under this concept the prosecuting agency of government has the discretion to decide which violations of a law to prosecute and which not to prosecute and whether to prosecute criminally or civilly if there is an option. That discretion is absolute, and there is no way to challenge it unless the discretion is handled in an unconstitutional way (e.g. a prosecutor could not decide to prosecute only members of one racial group). A prosecutor may decide not to prosecute a case because the law or evidence is murky, because the harm from the violation was slight or nonexistent, because the cost is high and resources small, or because priorities are on other types of crime. Such a decision does not violate constitutional rights. (United States v. Batchelder, 442 U.S. 114 (1979); see also State v. Pickering 462 A. 1151 (Me. 1983).)

C. De minimus violations

The concept of de minimus violations is derived from the Latin expression *de minimus non curat lex*, "the law does not concern itself with small or trifling matters." The concept may be used by a court to dismiss a prosecution that causes minimal harm.⁴¹ The Maine Criminal Code, 17-A MRSA §12, authorizes a court to dismiss a prosecution for a violation if it finds that the defendant's conduct was (1) within a "customary license or tolerance," not refused by the person whose interest was infringed and not inconsistent with the purpose of the law defining the crime, or (2) did not actually cause or threaten the harm sought to be prevented by the law or did so to a trivial extent.

³⁹Kevin Gaynor and Jodi Remer and Thomas Bartman, "Environmental Criminal Prosecutions: Simple Files for a Flawed System", The Villanova Environmental Law Journal, 3, No. 1 (1992), pp. 27-28.

⁴⁰Hedman, op. cit., pp. 878-899.

⁴¹John Ferdico, Ferdico's Law and Justice Dictionary (St. Paul, MN: West Publishing, 1992), p. 132.

D. Vicarious liability

The concept of "vicarious liability" is a principle of law by which a person may be found criminally liable for actions of another person based upon the relationship between the two persons. Ordinarily, the relationship between the two persons is that of employer and employee. In the context of environmental crimes, it usually relates to the relationship between a corporation and its employees, the relationship between a supervisor or corporate manager and employees of the corporation, or the relationship between partners in an enterprise. Issues of vicarious liability arise when the prosecution seeks to charge an organization or a supervisor or manager within the corporation for environmental violations taken by an employee of the organization. This action is usually taken on the theory that a manager or supervisor had responsibility for the activity that resulted in the violation, could or should have known of the actions of the violating employee or could or should have taken a more active role in enforcing the expectations of the organization that employees be aware of and follow environmental requirements. This theory is usually referred to as the "responsible corporate officer" doctrine. In the context of criminal law, the responsible corporate officer doctrine arose primarily in the area of strict liability crimes (see discussion of criminal intent above). The principle has been applied by federal courts in environmental criminal cases in order to find the level of intent (usually knowing) specified in the statute in the conviction of corporate officials not actually engaging in the prohibited activity. Some commentators have argued that the use of the responsible corporate officer doctrine is inappropriate when a statute specifies a required state of mind.⁴² The CAA and the CWA provide for liability of responsible corporate officers by including them within the definition of "person." Neither of these statutes provides a definition of who falls within the meaning of responsible corporate officer. (42 USC §7413(c)(3) and §1319(c)(6)) RCRA does not specifically mention responsible corporate officers.⁴³

Under the responsible corporate officer doctrine, corporate officials have been found criminally liable based upon a number of different theories. The standards for what constitutes a responsible corporate officer have been developed almost entirely through case law, and courts have not always been consistent. Some courts have imposed criminal liability based upon the corporate officer's position within the organization. A more likely theory is based upon the officer's responsibilities within the organization. If those responsibilities include the activities that constitute the violation or prevention of those activities, a court may be willing to find or infer

⁴²Karen Hansen, "Knowing Environmental Crimes", *William Mitchell Law Review*, 16 (1990).

⁴³See Barrett for comprehensive discussion of the RCO doctrine as related to RCRA.

knowledge of the activities. "Willful blindness," purposefully ignoring evidence of violations within the organization, may also be used by a court to find or infer knowledge. The state of mind may be inferred if the corporate official refused to receive information about the illegal activities or created an atmosphere that indicated to other employees that illegal activities would be tolerated or expected or because the official's position in the corporation required an awareness of the type of activities where the violation occurred.

Criminal statutes ordinarily provide "no person may . . ." The term "person" almost always explicitly or implicitly includes organizations; however, the provisions of the criminal law frequently do not specifically address the state of "mind" that is necessary to convict an entity that has no mind as we ordinarily think of that term. The usual method of establishing the necessary state of mind is through the state of mind of the agents of the organization that actually engaged in the illegal activity.

Theories of vicarious liability are sometimes addressed through definition of a statute's requirement of knowledge as a state of mind. Two recent federal cases have discussed this requirement in a RCRA context. The United States Court of Appeals for the Sixth Circuit has ruled that knowledge of RCRA's permit requirements is not necessary for a criminal conviction of disposing of hazardous waste without a permit. U.S. v. Dean, No. 91-5970 (6th Cir. 7/8/92). The Ninth Circuit has ruled that knowledge of permit status is necessary for conviction of transportation of hazardous waste to an unlicensed facility. U.S. v. Speech, No 90-50708, (9th Cir. 6/29/92). Federal Courts of Appeals have ruled inconsistently on the issue of corporate officer liability, and petition for review of the issue has been made to the United States Supreme Court. Production Plated Plastics Inc. v. U.S., 91-1869 cert. filed 5/20/92.⁴⁴

The Maine Criminal Code, 17-A MRSA §§60 and 61 provide the standards for imposition of vicarious liability in Maine. Section 60 provides that an organization (corporation, partnership or unincorporated association) is guilty of a crime if: (1) it fails to discharge a duty prescribed by law and the omission is prohibited by the criminal code or designated a criminal offense or (2) conduct constituting a crime is engaged in by an agent of the organization acting within the scope of agent's office or employment. Section 61 specifies when an individual may be criminally liable for conduct on behalf of an organization. It provides that an individual is criminally liable for conduct the person performs in the name of an organization to the same extent as if the conduct had been performed in his own

⁴⁴(See Muchnicki for comparison of differences among U.S. Courts of Appeal regarding interpretation of the meaning of "knowingly.")

name. It also provides that an agent of an organization who has primary responsibility for a duty to act is criminally liable if he recklessly fails to perform the required act.

Section 61 appears to make a distinction between actions of employees and a failure to perform a duty. That section does not appear to subject to criminal liability supervisors, managers or officers of an organization for conduct performed by other employees of the organization. However, where a duty has not been performed, section 61 places criminal responsibility with the agent of the organization having "primary responsibility for the duty." It is unclear given section 61, how the responsible corporate officer doctrine would be applied in Maine. There does not appear to be any case law in Maine on this issue.

E. Felony/misdemeanor distinction

Under Maine law Class A, B, and C crimes are felonies and Class D and E crimes are misdemeanors although the Criminal Code does not use those terms. A felony conviction subjects the offender to a possible term of imprisonment of one year or longer. There are several distinctions between felonies and misdemeanors that are relevant to a discussion of the proper classification of environmental crimes.

One distinction is the difference in treatment of the initiation of the prosecution. Class A, B and C crimes must be initiated by indictment through the Grand Jury process. (Maine Constitution, Article I, Section 7 and 17-A MRSA §9, Opinion of the Justices, 338 A.2d 802 1975.) In order to obtain an indictment, the prosecutor must bring the evidence against a person to a grand jury which hears the prosecutor's case and decides whether to issue an indictment based upon the evidence. Class D and E crimes are initiated by information or complaint. In order to bring a case, the prosecutor need only file papers with the court and serve notice on the person charged.

A second distinction is that Class A, B and C crimes are tried in Superior Court; Class D and E crimes are ordinarily tried in District Court unless a jury trial is requested in which event the case is transferred to Superior Court.

A third distinction is the statute of limitations. The statute of limitations for Class A, B, or C crimes (other than criminal homicide in the first or second degree or certain sex crimes when the victim is less than 16 years old) is six years. For Class D and E crimes the statute of limitations is three years. (17-A §8).

A fourth distinction is in the right to court-appointed counsel. An indigent defendant charged with a Class A, B or C crime is entitled to a court-appointed counsel. For Class D or E crimes, the court is not required to appoint counsel for an indigent defendant if the court determines that in the event of conviction a sentence of imprisonment will not be imposed.⁴⁵

Other consequences of a felony conviction that do not apply to a misdemeanor conviction include restrictions on the right to possess firearms (15 MRSA §393) and limitations on the right to engage in certain professions.

F. Listing, debarment and suspension under Federal law

Federal laws provide for additional repercussions beyond fines and imprisonment for organizations violating federal environmental laws.

1. Listing. A facility is mandatorily listed by the federal government if it is owned, leased or supervised by a person convicted of a criminal violation of §113(c)(1) of the CAA or §309(c) of the CWA. A facility may be listed at the discretion of the listing official if there is continuing or recurring noncompliance with §113(2) of the CAA, conviction of violation of a state or local clean air or clean water standards, a federal, state or local civil ruling involving noncompliance with air and water standards, or violation of an administrative order under the CAA or CWA. Listing applies only to the specific facility, not to its corporate relations. If a facility is listed, it is ineligible for all executive branch loans, grants and contracts. (40 CFR Part 15)
2. Debarment. A facility may be debarred by the federal government for conviction or civil judgment of fraud or a criminal offense relating to a public or private agreement, antitrust violations, embezzlement, forgery or related activities or offenses indicating a lack of business integrity or honesty. Debarment applies to all divisions or other organizational elements of the offending facility and may apply to affiliates. A debarment results in government-wide exclusion from federal financial and nonfinancial assistance and benefits under federal programs and activities. (40 CFR §32.300 et seq.)
3. Suspension. Suspension has the same effect as debarment but may be applied against a facility suspected of activities justifying debarment pending the outcome of judicial or administrative proceedings. (40 CFR §32.400 et seq.)

⁴⁵Me. R. Crim. Proc. 44.

G. Extradition

Article IV, Section 2, clause 2 of the United States Constitution requires a State to extradite persons accused of "treason, felony, or other crime" in another State. To implement that requirement, Maine and 46 other states have enacted the Uniform Criminal Extradition Act (15 MRSA chapter 9) which requires a governor of a state to surrender a person charged with a crime in another state when so requested by the executive authority of the other state. Although extradition is available for all classes of crimes, it is ordinarily only pursued for felonies (Class A, B or C crimes in Maine) because the procedures are time-consuming and may not be worth the effort when only Class E penalties are at stake. Limited amounts of money are available in extradition accounts controlled by the district attorneys and there is reluctance to reduce the available funds by extraditing persons charged with Class E crimes.

H. Defenses

Criminal law provides that even though a person may have committed an act with the requisite intent to constitute a crime, additional circumstances may exist that will exonerate the defendant. These circumstances are called defenses. There are two types of defenses; regular defenses and affirmative defenses. The difference is important because the two are treated differently with regard to the burden of proving their existence.

1. Regular defenses. A regular defense is an exonerating circumstance that, once raised, is treated like other elements of the crime and must be disproved by the prosecution beyond a reasonable doubt. Regular defenses provided in the general provisions of Title 17-A include: public duty, military duty, avoidance of competing harms, duress, defense of premises, defense of property, special relationships, law enforcement, defense of a person and consent of the victim. Specific criminal statutes may also provide for circumstances that constitute a defense to a crime. A regular defense is ordinarily raised by the defendant because the defendant is in the position to have the most information about the defense. (17-A MRSA §101.)
2. Affirmative defenses. Unlike a regular defense, an affirmative defense, once raised, must be proved by the defendant by a preponderance of the evidence in order to entitle the defendant to an acquittal, for example, insanity is an affirmative defense. 17-A MRSA §101 provides that an defense must be explicitly designated as an affirmative defense in order to shift the burden of proof from the prosecution to the defendant.

VII. Environmental enforcement actions in Maine

The tables, maps and graphs that are discussed in the following sections can be found in Appendix D, and are referenced in the text as Figures D-4 through D-23.

A. Overview

Figure D-4 presents an overview of criminal and civil environmental enforcement actions resolved between July 1, 1988 and June 30, 1992 by the State and federal government. Figure D-4 indicates that 801 environmental enforcement actions have been resolved over the past 4 fiscal years, resulting in fines totalling \$14,268,702 and 21 days of incarceration for one individual. The 3 criminal actions resolved during the period, which are discussed in more detail below, consist of one criminal action resolved by the federal government and 2 criminal actions resolved by the State. The remaining 798 enforcement actions consist of 1 civil action resolved by the federal government, 3 civil actions resolved jointly by the state and federal governments, 679 civil actions taken to enforce laws administered by the Department of Environmental Protection (DEP) and 115 civil actions taken to enforce laws administered by the Land Use Regulation Commission.⁴⁶ The administrative and judicial actions taken to enforce laws administered by the DEP are reviewed in more detail in subsequent sections of this report. The 115 actions taken to enforce laws administered by the LURC are not discussed further in this report, however, because of their limited relevance to the substance of LD 2461.

B. Criminal enforcement actions

The 3 criminal enforcement actions listed in Figure D-4 are summarized below.

• State v. Druce. On January 22, 1992, John Dix Druce pled no contest to two misdemeanor charges of violating the conditions of a wastewater license issued by the DEP while employed as the manager of the Spruce Point Inn in Boothbay Harbor. The violations involved intentional bypasses of the sand filter wastewater treatment system at the Spruce Point Inn. Mr. Druce received a six month suspended sentence and was fined \$25,000, with \$10,000 suspended. He was also placed on one year probation and ordered to perform 300 hours of community service work. (The maximum penalty for each license violation, as provided by 38 MRSA §349, sub-§1, is \$25,000 a day, plus imprisonment of up to six months.) State v. Druce, No. CR-91-18 (Me. Super. Ct. Lin. Cty., Jan. 22, 1992)

⁴⁶For the purposes of this report the term "civil action" includes non-criminal enforcement activities pursued through either judicial or administrative systems.

• United States v. International Paper Company. On July 3, 1991, International Paper Company pled guilty in the United States District Court for the District of Maine to four felony violations of Title 42, United States Code, Section 6928 (the Resource Conservation and Recovery Act) and one felony violation of Title 18, United State Code, Section 1001. The violations included storing and treating hazardous waste without a permit and making false material statements to both state and federal authorities regarding the generation and handling of hazardous waste. The Court ordered International Paper to pay fines totalling \$2,201,000. (The maximum fine for each violation of 42 U.S.C. §6928 is \$500,000 a day plus a special assessment of \$200; the maximum fine for a violation of 18 U.S.C. §1001 is \$500,000 plus a special assessment of \$200.) United States v. International Paper Co., No. 91-00051-B (D. Me. July 3, 1991)

• State v. Koslosky. On July, 12, 1990, Donald Koslosky pled guilty in Bath District Court to 14 counts of falsifying monthly sewage treatment reports while serving as superintendent of the Bath sewage treatment plant. The falsified reports were submitted to the DEP between October of 1987 and October of 1989. Mr. Koslosky was sentenced to six months imprisonment, all but 21 days suspended, and was fined \$2,000. He was also placed on one year probation and ordered to perform 200 hours of public service work. (The maximum penalty for each violation of 38 MRSA §349, sub-§3, is \$10,000 plus imprisonment of up to six months.) State v. Koslosky, No. 90-00346 (Me. Dist. Ct. 6, Bath-Bruns., July 12, 1990)

The State also resolved several criminal environmental actions prior to July of 1988. Although documentation of environmental enforcement actions becomes increasingly difficult the further back in time one looks, a summary of criminal environmental cases extending back to 1981 is presented below.

• State v. Lipman Brothers, Inc. and Shaw. On February 7, 1983, Lipman Brothers, Inc., of Lewiston, was convicted in Cumberland County Superior Court of four counts of illegal disposal of hazardous materials and was fined a total of \$50,000. The illegal disposal involved discharges of 1200 gallons of ammonia into Portland Harbor between the dates of January 4, 1982 and January 7, 1982. Mr. Ray Shaw, an employee of one of the Lipman Brother's subsidiaries, was also convicted of 4 counts of illegal disposal of hazardous materials and was fined \$4,000, with \$3,500 suspended. (The maximum penalty for each violation of 38 MRSA §1306-A (now §1319-T), a Class C crime, is \$25,000 a day plus imprisonment of up to five years.) State v. Lipman Brothers, Inc. and Shaw, No. CR-82-477 (Me. Super. Ct., Cum. Cty., Feb. 7, 1983)

• State v. Hinman and North Anson Reel Company. On March 12, 1982, North Anson Reel Company and the corporation's Treasurer, Mr. Richard Hinman, pled guilty in Somerset County Superior Court to two counts of discharging a pollutant without a license. The violations involved discharging a chemical known as PQ-10, a wood preservative, into the Carrabassett River. North Anson Reel Company was fined \$25,000. Mr. Hinman was fined \$5,000. (The maximum penalty for a violation of 38 MRSA §413, as provided by §349, sub-§1, a Class E crime, is \$25,000 a day plus imprisonment of up to six months.) State v. Hinman and North Anson Reel Co., No. CR-82-160 (Me. Super. Ct. Som. Cty., March 12, 1982)

• State v. Guilford Industries, Inc. and Ellis. On January 8, 1981, Guilford Industries, Inc., of Guilford, Maine, and Barry Ellis, of Parkman, Maine, pled guilty in Piscataquis County Superior Court to illegally discharging tris (2,3 dibromopropyl phosphate) into the Piscataquis River in 1979. Guilford Industries also pled no contest to a charge of knowingly corrupting waters used for domestic purposes. Guilford Industries received a fine of \$32,000. Mr. Ellis received a fine of \$5,000. (The maximum penalty in 1979 for a violation of 38 MRSA §571, a Class A crime, was \$50,000 for an organization (no fine established for a natural person for a Class A crime until 1991) plus up to 20 years imprisonment. The maximum penalty for a violation of 38 MRSA §413, as provided by §349, sub-§1, a Class E crime, is \$25,000 a day plus imprisonment for up to six months.) State v. Guilford Industries, Inc. and Ellis, No. CR-79-54 (Me. Super. Ct. Pisc. Cty., Jan. 8, 1981)

In addition to these cases, the State also resolved several criminal environmental actions during the 1970's, most of which resulted in acquittals. Based on the recollections of staff at the Department of the Attorney General, a wetlands filling case was prosecuted against two defendants in Rockland District Court (convicted in district court, but later acquitted in Superior Court), an oil spill case was prosecuted against a plastics company (acquittal) and a records falsification case was prosecuted against an individual employed at a paper company waste treatment facility. In that case, the defendant pled guilty and received a suspended sentence.

Several other criminal actions have been brought by the State that, although not prosecuted under the environmental statutes in Title 38, could be characterized as "environmentally related" criminal actions. In one case, a jury in Oxford County Superior Court found a local insulation company guilty of forging asbestos air sampling test results and forging a certification of completion from a training course on asbestos removal techniques. The company was fined a total of \$3,000.⁴⁷

⁴⁷ State v. United Insulation Corp., No. CR-87-350 (Me. Superior Ct. Oxford County, June 9, 1988).

In a second case, a laboratory hygienist hired to test airborne asbestos during an asbestos removal project in Waterville was convicted of attempted theft by extortion and sentenced to 7 days in jail for offering to conceal his knowledge of an asbestos contaminated rug if the contractor were to pay him \$500.⁴⁸ In a third case, the Penobscot County Superior Court in December of 1986 found an individual guilty of perjury for making false statements while testifying under oath before the Board of Environmental Protection two years earlier. That conviction, which was affirmed by the Supreme Judicial Court of Maine in April of 1989, imposed a one year prison sentence, with all but 60 days suspended.⁴⁹

C. Federal civil actions and joint state/federal actions

Three civil actions were resolved jointly by the State and federal government during the four year period. Those joint actions, which resulted in combined state and federal fines of \$1,448,000, involved violations of the federal Clean Air Act and state air quality laws by International Paper Corporation, violations of an air emission license by J.M. Huber Corporation and violations of the federal Clean Water Act and provisions of a National Pollutant Discharge Elimination System (NPDES) permit by the City of South Portland.

In addition to those actions, at least one federal civil action is known to have been resolved during the period, although others may have occurred. The federal civil action included in Figure D-4, which resulted in a \$20,000 fine against the City of Bangor for violations of the federal Clean Water Act and provisions of an NPDES permit, is the only federal civil action that could be adequately documented within the time permitted for this study. Three other federal civil actions which may have been resolved during the period were not included in Figure D-4 because documentation of those actions was not available from the Army Corps of Engineers or the Environmental Protection Agency prior to the time this report was printed.

D. Enforcement of DEP laws; administrative and judicial actions

The remainder of this report presents a review of actions taken by the State to enforce laws administered by the Department of Environmental Protection, or rules, permits or licenses adopted or issued by the department pursuant to its authority under Title 38, section 341 *et seq.* Those laws, and the rules, permits and licenses adopted or issued by the DEP pursuant to those laws, regulate a wide range of activities affecting the environment, including those activities addressed in LD 2461; the disposal of certain types of special wastes, the discharge of pollution into the waters of the State and the emission of air contaminants.

⁴⁸State v. Eason, No. 87-4769 (Maine District Court, Waterville, January 30, 1989).

⁴⁹State v. Vahsling, 557 A 2d 946 (Me 1989).

This review, which includes all DEP enforcement actions formally resolved between July 1, 1988 and June 30, 1992, does not review in detail any actions taken to enforce environmental laws administered by other state agencies or any actions taken to enforce land-use or other environmental ordinances adopted by municipalities. Limiting this review to DEP enforcement actions resolved during fiscal years 1989, 1990, 1991 and 1992 was necessary because the information on enforcement actions taken by the DEP prior to that period appears to be limited and, according to the DEP, is not totally verifiable.⁵⁰ Agencies other than DEP which administer and enforce laws regulating activities affecting the environment include, but are not limited to, the Land Use Regulation Commission (LURC), which enforces planning, zoning and subdivision laws in the unorganized townships and plantations of the State pursuant to its authority under Title 12, section 681 *et seq.*, and the Board of Pesticides Control, which enforces pesticide control laws statewide pursuant to its authority under Title 22, section 1471-A *et seq.* This review also does not include any violations resolved informally by the DEP through voluntary compliance. Violations that may be resolved informally include minor violations that can be easily corrected by the violator or that do not indicate any knowing or intentional culpability. In August, 1990, the DEP estimated that only about 10% of complaints of violations result in formal enforcement action. The remaining 90% of the complaints are either determined not to be violations or are violations that are resolved informally through technical assistance and voluntary compliance. The types of formal enforcement referenced in this report are:

- *Administrative consent agreements.* The Department of Environmental Protection generally attempts to resolve environmental violations initially through the Board of Environmental Protection using the administrative consent agreement process. Administrative consent agreements, which must be approved by the Attorney General's Office, typically describe the violation(s), include an admission that the violation occurred, establish the monetary penalty and set forth any after-the-fact permit requirements or remedial actions.

- *Rule 80K actions in District Court.* The Commissioner of Environmental Protection may proceed with a civil enforcement action in Maine District Court using Rule 80K of the Maine Rules of Civil Procedure. Rule 80K permits a person who is not an attorney (but who has a certificate of familiarity with court procedures issued by the Commissioner of Human Services) to file a civil action in District Court to enforce certain environmental laws administered either at the state or the local level. Persons who exercise Rule 80K authority are usually certified employees of state agencies or municipal officers.

⁵⁰The DEP has noted deficiencies in data on Maine environmental enforcements. In their 1989 enforcement report, the DEP stated that data for years prior to fiscal year 1989 came from a "myriad of sources and are not totally verifiable".

Title 38, section 342, allows the Commissioner of Environmental Protection to authorize certified employees of the department to bring civil actions in District Court using Rule 80K for violations of land use laws listed in Title 4, section 152, sub-§6.⁵¹

• *Superior court consent decrees.* Enforcement actions which are referred to the Department of the Attorney General by the Department of Environmental Protection are most commonly resolved by the Department of the Attorney General as civil actions in Superior Court in the form of a court order and consent decree.

• *Criminal prosecutions.* Acting on behalf of the State, the Department of the Attorney General has discretion to decide whether to file a case as a civil or a criminal enforcement action. As previously noted, the Department of the Attorney General has resolved two criminal cases involving violations of environmental laws since July 1, 1988.⁵²

1. Review of relevant literature

It appears that few historical or quantitative analyses of environmental penalties have been performed at either the State or federal level. At the state level, Lerman (1981) evaluated the DEP's enforcement of four environmental statutes; the Site Location of Development Act, the Alteration of Coastal Wetlands Act, the Mandatory Shoreland Zoning Act and the Solid Waste Management Act. His evaluation was qualitative in nature, and focused mostly on the effectiveness of administrative systems in the department through the use of case studies and interviews with staff and municipal officials. In a multi-state examination of hazardous waste crime in the Northeast, Rebovich (1986) reported very generally on Maine's experience with enforcement of state hazardous waste laws over an eight year period spanning the late 1970's and early 1980's. That report was not an analysis of any one state's enforcement mechanisms, but focused on developing a profile of hazardous waste offenders regionally and gaining insights into interstate hazardous waste criminal networks. Also in 1986, the DEP submitted extensive testimony on its enforcement programs to the Joint Standing Committee on Audit and Program Review. The usefulness of that testimony as a tool for providing any historical insight into the DEP's enforcement program is limited, however, since the data is not presented in a manner comparable to more recent records maintained by the DEP and was never compiled or summarized.

⁵¹Rule 80K authority was extended to the Land Use Regulation in the Second Regular Session of the 115th Maine Legislature (PL 1991, c.687).

⁵²On August 4, 1992, a grand jury in Hancock County Superior Court issued an indictment against an Ellsworth resident for illegal transport of hazardous materials. The illegal transport of hazardous materials is a violation of Title 38, §1319-T, sub-§1, ¶A, and is a class C crime.

Analyses that compare enforcement of environmental laws among the states are equally rare. In addition to work by Rebovich (1986), DeCicco and Sant'Angelo (1988) published a comparative analysis of the criminal environmental laws of the fifty states which found uneven enforcement among the states and a lack of substantive uniformity among the states' environmental laws. That report lists the substantive and sentencing provisions of states laws pertaining to hazardous and toxic wastes, water pollution and air pollution. More recently, the National Association of Attorneys General (NAAG 1991) has published a compilation of federal and state environmental criminal enforcement statutes. A summary of that compilation can be found in Appendix D, figure D-1 and D-2..

At the federal level, empirical analyses of federal environmental enforcement efforts have been conducted or discussed by Cohen (1992) and Titenberg (1992), both of whom have published analyses of criminal sanctions imposed for violators of federal environmental laws. Those studies, and many of the studies previously mentioned, note the lack of systematic records on which to base an analysis of environmental enforcement activities and the scarcity of verifiable or consistent historical data.⁵³ The relative "newness" of the environmental laws is often cited as a cause for those problems and the limited amount of research in the field, as is the disparity among the states in the methods and resources used to enforce those laws.⁵⁴

2. Data Sources

Most of the information used in this section was obtained from the DEP or from the Department of the Attorney General, which maintains a fairly complete library of administrative consent agreements, consent decrees and related material dating back to the early 1980's. Based on materials reviewed for this report, it appears that the first systematic recording and summarization of environmental enforcement actions began during the first half of fiscal year 1989, when the enforcement and procedures division within DEP began to record the name of each violator, the date each enforcement action was resolved, the bureau that brought the enforcement action, the amount of fine imposed on the violator and the type of enforcement action taken (i.e., administrative consent agreement, consent decree, 80K judgment or criminal prosecution). In the second half of fiscal year 1989, prompted by legislation enacted during the First Regular Session of the 114th Legislature,⁵⁵ the DEP began to prepare and publicly disseminate more formal monthly summaries of environmental

⁵³See Lerman (1981), Rebovich (1986), DiCicco (1988), Cohen (1992) and Titenberg (1992). The DEP also noted similar deficiencies in data on Maine environmental enforcements. In their 1989 enforcement report, the DEP stated that data for years prior to fiscal year 1989 came from a "myriad of sources and are not totally verifiable".

⁵⁴DeCicco op.cit.

⁵⁵Public Laws of 1989, Chapter 110.

enforcement actions. Those monthly enforcement reports, along with other records maintained by the enforcement and procedures division, apparently constitute the only systematically collected record of DEP enforcement actions available and were an important source of data for this report. Improved reporting and record keeping systems also allowed the department to subsequently begin issuing annual summary reports of state environmental enforcement actions. The first annual enforcement report, which summarized actions resolved during FY89, was issued by the DEP in August of 1989. Although the DEP also initiated a computerized enforcement tracking system at about that time, no information from that system was used in this report since implementation problems continue to limit its usefulness as a record-keeping and analytical tool.

The DEP developed and provided the data on the types of violations cited in each enforcement action discussed in this report and reviewed and revised the information characterizing the nature of remedial actions. Consent agreements and consent decrees on file at the Department of the Attorney General also served as source documents for information on actions during fiscal year 1989. Both agencies were very helpful in providing information and in assisting with the verification of data and in resolving ambiguities created by conflicting or missing data.

Although the record-keeping systems and the reliability of data on state environmental enforcement actions appear to have improved since 1988, the manner in which summary data on enforcement actions is currently being collected created some difficulties in reconciling the individual enforcement actions and fines listed in the DEP's monthly reports against the total number of actions and fines presented in its annual enforcement reports. Complete collections of primary source documents such as consent agreements, consent decrees and judicial decisions are not located in any one place, and the methods used by the DEP to develop monthly and annual summary data from records of individual actions are not well documented. As a result, some minor discrepancies appear between the data presented here and data previously published by the DEP. The total actions and total fines contained in this report differ slightly from those listed in the department's annual reports for fiscal years 1989, 1990 and 1991. The discrepancy in the number of actions is small, about one percent, and is probably attributable to a difference in methods used to sum enforcement actions.⁵⁶ The difference in total fines is also small, also about one percent, but its cause is uncertain. Undoubtedly, those differences could be fully reconciled by further discussions with the DEP.

3. Fines as a measure of monetary sanctions

The only quantitative measure of penalties imposed by enforcement actions that was available for this report was the monetary fine imposed on the violator by the Board of Environmental Protection (BEP) or the courts.⁵⁷

⁵⁶For the purposes of this report, OPLA counted on enforcement action only once. The DEP, when compiling their annual enforcement reports, created a minor double-counting discrepancy by counting significant multi-media actions as separate actions by each of the bureaus involved.

⁵⁷The term "fines", as used in this report, includes both criminal and civil monetary sanctions.

Several caveats must be stated about the usefulness of fines as accurate measures of the total economic cost of environmental sanctions. Several researchers who have attempted to assess the deterrent effect of environmental penalties have stressed the importance (and the difficulty) of capturing the full economic costs of environmental sanctions.⁵⁸ Only rarely do fines alone appear to capture the full cost of the sanction.

Some of the factors that can contribute to either increasing or decreasing the real total cost of the sanction paid by the violator include stipulated penalties (fines that are contingent on future actions by the violator), requirements to perform remedial work, the time value of money, tax considerations and suspensions of monetary penalties. Although the source documents specify the extent to which stipulated penalties *may* apply, the extent to which that *were* applied to reduce or increase the monetary cost of the sanction is not known. The costs incurred by a violator to perform remediation work, which was required in nearly 65% of all DEP enforcement actions, are also not known. Converting fines from nominal dollars (presented here) to real dollars (inflation-adjusted dollars) becomes increasingly important in determining the real economic cost of a sanction, particularly for analyses that span long periods of time or that include large fines with payment schedules stretched over many years.⁵⁹ The extent to which tax exemptions, or other tax considerations, and suspended fines reduced monetary cost of the sanction were not included in this review, since that information, although available for some enforcement actions, was not available for most actions.

For these reasons, the data on fines presented in this report are not, and should not be interpreted as, estimates of the total economic cost of the sanctions or as an absolute measure of the punitive or deterrent effect of the sanctions. To the extent that fines are used in this report, they are used only to show aggregate fines for different types of violations or to compare relative differences in average fines imposed between different categories. Efforts to assess the deterrent effect of economic sanctions imposed on environmental violators would require substantially more information than is presently available.

4. Discussion of administrative and judicial actions

Figures D-5 through D-13 are maps of Maine, each of which shows the statewide distribution of one category of environmental enforcement action. These maps, which were prepared by the Department of Conservation through the Geographic Informations Systems (GIS) office, show a pattern of enforcement activity that closely follows population, development and industrial activity across the state. The large areas of the maps that appear to show little or no activity are, in fact, areas in which most land use violations are subject to enforcement by the LURC. Those areas appear blank since, as noted earlier, a review of LURC enforcement actions is not included in this report.

⁵⁸Cohen (1992), Titenberg (1992) and U.S. General Accounting Office (1991).

⁵⁹A December 1990 consent decree which imposed a \$1,025,000 fine on Lincoln Pulp & Paper established a 10-year payment schedule.

With respect to actions taken to enforce laws administered by the DEP, Figures D-14 through D-23 summarize the administrative and judicial enforcement actions resolved between July 1, 1988 and June 30, 1992. Pending or otherwise unresolved actions are not included. The database used in this analysis includes, for each enforcement action, the date the action was resolved, the bureau at the DEP that brought the action, the type of action (consent agreement, consent decree, 80K judgment, or criminal action), the name(s) of the violator(s), the type(s) of violations cited in the action, the location of the violation, an indication as to whether an after-the-fact permit and remedial action was required, the total fine imposed, and residence (town and state) of the violator. For the purposes of this report, violations were categorized as violations of the Natural Resource Protection Act (NRPA), the Site Location of Development Act and laws governing underground tanks, surface oil spills, hazardous waste, air emissions, septage, solid waste (other than septage) and water discharges.

As can be seen from Figure D-14, a large majority (88%) of the 684 enforcement actions were resolved by the Board of Environmental Protection through the administrative consent agreement process. The remainder of the actions (12%) were resolved judicially, either by the DEP through the 80K process (5.6%), or by the Attorney General through Superior Court consent decrees (6.3%) or criminal actions (0.3%). The two criminal actions resolved by the State were discussed earlier in this report.

Figure D-15 shows the number of enforcement actions resolved in each of the past four fiscal years, the total fines imposed in each year and the average annual fines. As can be seen, the 684 enforcement actions resolved over the past four fiscal years resulted in fines totalling \$11,164,652. Although the data presented in Figure D-15 is useful for descriptive purposes, it is difficult to use this type of summary data to draw inferences about trends in environmental enforcement. Four years of data may not be enough to show longer term trends, particularly when annual increases and decreases are seen in almost all of the variables, and the number of cases resolved is not a particularly good measure for assessing trends. Meaningful insight into trends in enforcement activities would require an analysis that controls for such factors as the time taken to resolve enforcement actions, the number of violations that occur and the resources available to the agencies engaged in the enforcement activities. The only variable in Figure D-15 that may indicate a trend over the period is the total annual fines imposed by administrative enforcement actions, which increases in each of the four fiscal years.

Figures D-16 and D-17 suggest that more than 90% of enforcement actions over the period were actions involving only one type of violation (single-media actions), and that nearly 50% of all actions resulted in fines of less than \$1,000. Enforcement actions involving multiple types of violations (multi-media actions) were relatively uncommon (less than 10%), although they accounted for nearly half of all fines imposed. Nearly 60% of the enforcement actions involved violations of the Natural Resources Protection Act.

Figure D-18 compares average fines imposed in single-media enforcement actions to average fines imposed in multi-media enforcement actions. That comparison suggests that multi-media enforcement actions tend to result in larger fines. While the average fine for single-media enforcement actions was under \$10,000, the average fine for multi-media enforcement actions was nearly \$90,000. Figure D-18 also shows that multi-media enforcement actions, which comprise 8.5% of all enforcement actions, resulted in nearly half of all fines imposed over the period.

Figure D-19 presents a more detailed break-down of the 626 single-media enforcement actions resolved over the period. From Figure D-19, it can be seen that 61% of the single media actions involved violations of the Natural Resources Protection Act (NRPA) and that the average fine of \$1,121 for single-media NRPA violations is the smallest average fine for all types of violations. The highest average fine for single-media violations are found in enforcement actions involving air violations (average fine of \$78,000), water violations (average fine of \$28,964), underground tanks (average fine of \$23,895) and hazardous wastes (average fine of \$15,499). Figure D-19 also suggests that fines imposed through judicial resolutions tend to be higher than fines imposed through administrative resolutions. For single-media violations, the average fine imposed in administrative resolutions was \$6,799, while the average fine imposed in judicial resolutions was \$35,371.

Figure D-20 categorizes the enforcement actions according to the whether the violators were individuals, business entities, governmental entities or combinations or those groups. In most enforcement actions (52%), the violators were individuals. The average fine for those enforcement actions, which consisted mostly of single-media NRPA violations, was \$1,555. In many other enforcement actions (39%), the violators were business entities. The average fine for violators who were business entities was \$36,510.

Several factors appear to contribute to the difference in average fines between enforcement actions with individuals and enforcement actions with businesses. The types of violations in each of the groups are very different, as are the distribution of fines within the groups. For example, while actions with individuals typically involved violations that receive the lowest average fines (NRPA and site law), actions with businesses more often involved the types of violations that receive the highest average fines. Actions with businesses included most of the air violations (84%), most of the water violations (55%), most of the underground oil tank violations (73%), most of the hazardous waste violations (93%) and many of the multi-media actions. In addition, the average of fines on businesses is affected by a relatively small number of enforcement actions with relatively large fines. Eighteen of those 264 actions resulted in fines totalling \$7,102,023; more than 70% of all fines imposed on businesses. The median fines shown in Figure D-20 indicate that 50% of the actions with businesses had fines of \$5,000 or less, and 50% of the actions with individuals had fines of \$750 or less. Both of those groups, individuals and business entities, appear to have received significantly higher fines under judicial enforcement actions than under administrative enforcement actions.

Figures D-21 and D-22, which summarize enforcement actions based on the residence of the violator, indicate that 11% of the actions involved out-of-state persons or business entities. Most enforcement actions involving out-of-state violators were resolved administratively (96%) and most of the out-of-state violators were from either Massachusetts (41%) or New Hampshire (24%). The general distribution of violations among resident and out-of-state violators is similar; most being single media enforcement actions to enforce NRPA or Site Law violations.

As previously noted, enforcement actions often included requirements for remedial actions. Figure D-23 shows that, in addition to fines, remediation was required in 65% of the enforcement actions. The requirement that a violator apply to the DEP for a permit "after the fact" was included in 18% of the enforcement actions. Both requirements, remediation and "after the fact" permits, were included in 5% of the enforcement actions, and 23% of the enforcement actions included neither remediation nor after the fact permit requirements.

VIII. Conclusion

Although this review of criminal theory, criminal environmental law enforcement and environmental enforcement experience in Maine can provide insight into some of the issues raised during discussions on LD 2461 and LD 1654, questions as to whether certain actions should be criminalized or what the level of penalty should be for those actions implicate many socio-political questions which are not particularly susceptible to quantitative analysis. The level of criminal sanction imposed on certain types of behavior reflects the priority society places on discouraging that behavior, and determining the appropriate level of penalty for certain types of environmental violations will require society, through its Legislature, to make choices about how those violations compare to other types of antisocial behavior. While discussion of criminal law theories and a review of the historical record of environmental enforcement activities and sanctions can provide some context for those choices, decisions on criminal sanctions will ultimately reflect societal values and preferences, especially with respect to environmental crime and punishment in general.

APPENDIX A

Study Request



MAINE STATE LEGISLATURE
Augusta, Maine 04333

March 30, 1992

Sen. Charles P. Pray, Chair
Legislative Council
115th Legislature

Re: Staff study on environmental crimes

Dear Senator Pray:

The Joint Standing Committee on Energy and Natural Resources joins with the Joint Standing Committee on Judiciary to request a staff study on enhancement of penalties for environmental crimes. As you know, legislation attempting to revise the criminal sanctions for environmental violations has been the subject of many discussions, meetings and floor debates. A new bill (LD 2461) has been proposed to be held over until the next special session when legislators will have more time to understand the implications of each element.

The Committees therefore request assignment of staff within the Office of Policy and Legal Analysis to collect background information and analyze the proposals in the new bill and, if time permits, others being advanced by interested parties. We suggest that the tasks to be performed in the staff study include:

- Identification of violations and crimes currently codified in Title 38 of the Maine Revised Statutes Annotated. An examination of land use violations located in Title 30-A may be useful for comparison and to ensure consistency;
- Collection and analysis of data regarding environmental violations in Maine, including case studies of particularly egregious violations, and comparison of possible treatment of those violations under federal law or the laws of other states;
- Collection of information regarding criminal penalties under federal law and in other states, including: prohibited activities; culpable mental states; severity of potential penalties; imposition of penalties, including jail time; necessity for felony status;
- Review of model legislation prepared on environmental crimes;

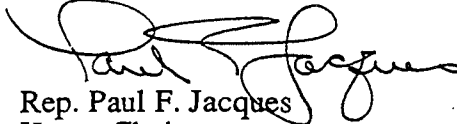
- Summary of criminal law concepts and their uses in the environmental enforcement arena, including: the use of affirmative defenses; culpable mental states; prosecutorial discretion; de minimus infractions;
- Analysis of potential application of LD 2461; and
- Collection and analysis of any other information that would be useful to the Legislature's deliberation on environmental crimes.

We would request that the staff report to both Committees no later than September 1, 1992.

Thank you for your consideration.



Sen. Bonnie L. Titcomb
Senate Chair
Energy and Natural Resources



Rep. Paul F. Jacques
House Chair
Energy and Natural Resources

Sincerely,



Sen. N. Paul Gauvreau
Senate Chair
Judiciary



Rep. Patrick E. Paradis
House Chair
Judiciary

#3866LHS

APPENDIX B

L.D. 2461 and L.D. 1654



115th MAINE LEGISLATURE

SECOND REGULAR SESSION-1992

Legislative Document

No. 2461

H.P. 1778

House of Representatives, March 30, 1992

Approved for introduction by a majority of the Legislative Council pursuant to Joint Rule 27.
Reference to the Committee on Judiciary suggested and ordered printed.

A handwritten signature in cursive script, reading "Ed Pert".

EDWIN H. PERT, Clerk

Presented by Representative MARSH of West Gardiner.

Cosponsored by Senator GAUVREAU of Androscoggin, Representative TREAT of Gardiner
and Representative ST. ONGE of Greene.

STATE OF MAINE

IN THE YEAR OF OUR LORD
NINETEEN HUNDRED AND NINETY-TWO

An Act to Increase Criminal Penalties on Deliberate Polluters.

(AFTER DEADLINE)



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

Sec. 1. 38 MRSA §349, sub-§1-A is enacted to read:

1-A. Criminal penalties; Class C crime. A violation of this subsection is a Class C crime.

A. A person violates this subsection if that person, in violation of this Title, a department rule or a significant term or condition of an applicable order, license, permit or approval of the department and for a commercial purpose, intentionally or knowingly:

(1) Disposes of incinerator facility ash, biomedical waste, waste oil, asbestos, asbestos-containing waste, wastewater treatment plant sludge, paper mill sludge, other sludge waste, contaminated soils, contaminated dredge spoils, spent filter media or residue, or debris or residuals from nonhazardous chemical spills;

(2) Discharges a pollutant into the waters of the State from a direct discharge, excepting:

(a) Agricultural activities conducted in accordance with best management practices as set forth in Title 17, section 2805, subsection 2;

(b) Activities associated with the use, construction, maintenance or repair of a public or private road or way; or

(c) Stormwater, noncontact cooling waters or flume or process discharges that are not contaminated by a waste stream; or

(3) Emits an air contaminant into the ambient air from a building, structure, facility or installation, except for usually anticipated excess emissions of a licensed contaminant emitted during cold start-ups and plant shutdowns.

B. As used in this subsection, the following terms have the following meanings.

(1) "For a commercial purpose" means the discharge or emission as part of a business, industrial or commercial enterprise, for a fee or for other type of remuneration.

2 (2) "Significant" means affecting the discharge of
4 water pollutants or emission of air contaminants into
 the environment.

6 (3) "Intentionally" and "knowingly" have the same
8 meaning as established in Title 17-A, section 35.

10 C. The department may not present or threaten to present
12 criminal charges under this subsection to obtain an
 advantage in a civil or administrative enforcement action.

14 D. The Attorney General has exclusive authority to bring a
16 prosecution under this subsection. With respect to each
18 case in which the Attorney General has initiated a criminal
20 prosecution under this subsection, the Attorney General
22 shall, within 30 days of that initiation, and within 30 days
24 of final resolution, file a written report with the
 Executive Director of the Legislative Council for
 transmission to the joint standing committees of the
 Legislature having jurisdiction over energy and natural
 resources matters and over judiciary matters containing a
 brief synopsis of the facts of the case and reference to the
 specific pollutants or contaminants involved.

26 E. It is an affirmative defense to a prosecution under this
28 subsection that:

30 (1) The pollutant or contaminant that was discharged
32 or emitted is licensed or does not require a license
 during operations;

34 (2) The discharge or emission resulted substantially
36 from a malfunction beyond the control of the
38 defendant. There is no affirmative defense under this
40 paragraph if the malfunction was caused substantially
 by poor maintenance, reckless operation or any other
 reasonably preventable condition or preventable
 equipment breakdown;

42 (3) The defendant has taken reasonable steps under the
44 circumstances to minimize or prevent the discharge or
 emission;

46 (4) The defendant terminated the discharge or emission
 as soon as reasonably possible; and

48 (5) The defendant reported the discharge or emission
 to the department.

2 It is prima facie evidence of compliance with subparagraphs
3 (3) and (4) that the defendant complied with oral or written
4 instructions by the department.

6 F. It is an affirmative defense to a prosecution under this
7 subsection that:

8 (1) The discharge or emission was of a specific
9 pollutant or contaminant that a license had not
10 specifically prohibited or limited during normal
11 operations;

12 (2) The defendant is otherwise lawfully licensed to
13 discharge or emit pollutants or contaminants;

14 (3) The defendant reported the discharge or emission
15 to the department; and

16 (4) The department has taken no action to prohibit,
17 limit or regulate that discharge or emission.

18 G. The provisions of Title 17-A, section 12 on de minimis
19 violations apply.

20 H. Notwithstanding Title 17-A, sections 4-A and 1301, the
21 fine for a violation of this subsection may not exceed
22 \$25,000.

23 Sec. 2. 38 MRSA §349, sub-§3, as affected by PL 1989, c. 890,
24 Pt. A, §40 and amended by Pt. B, §7, is repealed and the
25 following enacted in its place:

26 3. Falsification of environmental records. A person is
27 guilty of criminal falsification of environmental records if that
28 person intentionally or knowingly:

29 A. Makes a false material statement, representation or
30 certification in a document filed with the department or
31 required to be maintained by a person or entity other than
32 the department pursuant to this Title, department rules or
33 the terms and conditions of any applicable order, license,
34 permit or approval of the department;

35 B. With intent to deceive the department, fails to monitor,
36 sample or report any discharges or emissions of pollutants
37 as required by an applicable order, license, permit or
38 approval of the department; or

C. With intent to deceive the department, fails to make any information submittal required by the commissioner under section 568, subsection 3 or section 1364, subsection 3.

Falsification of environmental records is a Class C crime except that, notwithstanding Title 17-A, sections 4-A and 1301, the fine may not exceed \$10,000.

"Material," as used in paragraph A, means capable of affecting the course or outcome of a licensing or other proceeding or capable of affecting the department's ability to monitor compliance under an order, license, permit or approval.

Sec. 3. 38 MRSA §349, sub-§3-A is enacted to read:

3-A. Tampering with a monitoring device. A person is guilty of tampering with a monitoring device if that person intentionally or knowingly tampers with or renders inaccurate a monitoring device or a device for sampling, preservation, handling or analytical measurement required by this Title, department rules or the terms and conditions of an order, license, permit or approval of the department. Tampering with a monitoring device is a Class C crime, except that, notwithstanding Title 17-A, sections 4-A and 1301, the fine may not exceed \$10,000.

FISCAL NOTE

Raising the class of crime for violations of certain environmental laws will impact the correctional system.

Sentences imposed for a Class C crime, unless 9 months or less, must be served in a state correctional institution. The cost per sentence is \$40,640 based upon an average length of stay of one year and 9 months.

Sentences imposed for Class E offenses must be served in a county jail facility. The cost per sentence for a Class E crime is \$4,020 based upon an average length of stay of 67 days. The additional costs to the counties for housing each person sentenced under the Class E violations will require full funding by the State as a state mandate pursuant to the Maine Revised Statutes, Title 30-A, section 5684. The General Fund appropriations required to reimburse these costs can not be estimated at this time.

The additional workload and administrative costs associated with the minimal number of new cases filed in the court system

2 can be absorbed within the budgeted resources of the Judicial
Department.

4 The additional costs associated with filing written reports
with the Legislature can be absorbed by the Department of the
6 Attorney General utilizing existing budgeted resources.

8

STATEMENT OF FACT

10

This bill is intended to clarify the existing criminal
12 provisions of the environmental laws and to facilitate the
enforcement of those provisions by the State.

14

The bill raises the class of crime for specific violations
16 of the environmental laws from a Class E crime to a Class C crime.

18 The bill further revises the language on falsification of
environmental records.

20

The bill further reclassifies the crimes of interfering with
22 monitoring and testing devices and failure to provide information
to be Class C crimes.

24



115th MAINE LEGISLATURE

FIRST REGULAR SESSION-1991

Legislative Document

No. 1654

H.P. 1129

House of Representatives, April 24, 1991

Reference to the Committee on Judiciary suggested and ordered printed.

A handwritten signature in cursive script, reading 'Ed Pert'.

EDWIN H. PERT, Clerk

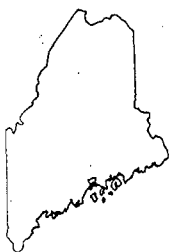
Presented by Representative TREAT of Gardiner.

Cosponsored by Representative JACQUES of Waterville, Senator GAUVREAU of Androscoggin and Representative MARSH of West Gardiner.

STATE OF MAINE

IN THE YEAR OF OUR LORD
NINETEEN HUNDRED AND NINETY-ONE

An Act to Facilitate Criminal Enforcement of the Environmental Laws.



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

Sec. 1. 17-A MRSA §1322, sub-§3, ¶C-1, as enacted by PL 1989, c. 872, §5 and c. 924, §13, is repealed and the following enacted in its place:

C-1. "Environmental clean-up expense" means any reasonable expense incurred for products and services needed or used to remove any waste or pollutant discharged or caused to be discharged into the environment by the defendant, to restore the environment to its condition prior to the discharge of the waste or pollutant, and to dispose of the waste or pollutant in accordance with the standards under state and federal environmental laws.

Sec. 2. 17-A MRSA §1322, sub-§3, ¶C-2 is enacted to read:

C-2. "Expense of an emergency response" means reasonable costs incurred by a public agency in reasonably making an appropriate emergency response to the incident, but only includes those costs directly arising because of the response to the particular incident. Reasonable costs include the costs of providing police, fire fighting, rescue and emergency medical services at the scene of the incident, as well as the compensation for the personnel responding to the incident. "Public agency" means the State or any county, municipality, district or public authority located, in whole or in part, within this State that provides or may provide police, fire fighting, ambulance or other emergency services.

Sec. 3. 38 MRSA §349, sub-§1, as amended by PL 1989, c. 820, §9, is repealed and the following enacted in its place:

1. Criminal penalties. A person is guilty of a criminal violation of the environmental laws if that person intentionally, knowingly or recklessly:

A. Discharges any pollutant into the waters of the State, in violation of this Title or department rules, or in violation of the terms or conditions of any order, license, permit, approval or decision of the department;

B. Emits any air contaminant into the ambient air in violation of this Title or department rules, or in violation of the terms or conditions of any order, license, permit, approval or decision of the department;

C. Handles solid waste in a quantity in excess of 500 pounds or 100 cubic feet in violation of this Title or department rules or in violation of the terms or conditions

2 of any order, license, permit, approval or decision of the
3 department;

4 D. Discharges any hazardous waste or hazardous matter onto
5 the land or into the ambient air or waters of the State, in
6 violation of this Title or department rules or in violation
7 of the terms and conditions of any order, license, permit,
8 approval or decision of the department;

10 E. Transports any hazardous waste without having the proper
11 license or permit as required by this Title or department
12 rules;

14 F. Transports any hazardous waste to any location that does
15 not have a license or permit for the handling of hazardous
16 waste as required by this Title or department rules;

18 G. Handles any hazardous waste without having obtained a
19 license to do so as required by this Title or department
20 rules;

22 H. Handles any hazardous waste in any location that does
23 not have a license or permit for the handling of hazardous
24 waste as required by this Title or department rules;

26 I. Establishes, constructs, operates or materially alters
27 any facility for the handling of hazardous waste without
28 having obtained a proper license or permit as required by
29 this Title or department rules;

30 J. Handles or transports any hazardous waste in a manner
31 that violates the terms or conditions of any order, rule,
32 license, permit, approval or decision of the department with
33 respect to the handling or transporting of hazardous waste;

36 K. Gives over hazardous waste to a 3rd person who does not
37 have a license or permit to transport or handle hazardous
38 waste as required by this Title or department rules;

40 L. Transports or causes to be transported any hazardous
41 waste without accurately completing a manifest and filing
42 that manifest with the department, as required by this Title
43 or department rules; or

44 M. Violates the provisions of this Title or department
45 rules or the terms or conditions of any other order, rule,
46 license, permit, approval or decision of the department.

48 A violation of paragraphs A to C is a Class C crime, except that
49 notwithstanding Title 17-A, sections 4-A and 1301, the fine may
50 not exceed \$25,000.

2 A violation of paragraphs D to K is a Class C crime, except that
4 notwithstanding Title 17-A, sections 4-A and 1301, the fine may
 not exceed \$50,000 for each day of violation.

6 A violation of paragraphs L or M is a Class D crime, except that
8 notwithstanding Title 17-A, sections 4-A and 1301, the fine may
 not exceed \$10,000.

10 **Sec. 4. 38 MRSA §349, sub-§3,** as affected by PL 1989, c. 890,
12 Pt. A, §40 and amended by Pt. B, §7, is repealed and the
 following enacted in its place:

14 **3. Falsification of environmental records.** A person is
16 guilty of criminal falsification of environmental records if that
 person intentionally, knowingly or recklessly:

18 A. Makes any false statement, representation or
20 certification in any document filed with the department
22 pursuant to this Title, department rules or pursuant to the
 terms and conditions of any order, license, permit, approval
 or decision of the department;

24 B. Makes a false statement, representation or certification
26 in any document required to be maintained by a person or
28 entity other than the department pursuant to this Title,
 department rules or pursuant to the terms and conditions of
 any order, license, permit, approval or decision of the
 department;

30 C. Fails to monitor, sample or report any discharges or
32 emissions of pollutants as required pursuant to the terms
34 and conditions of any order, license, permit or approval or
 decision of the department; or

36 D. Fails to make any information submittal required by the
38 commissioner under section 568, subsection 3 or section
 1364, subsection 3.

40 Falsification of environmental records is a Class C crime, except
42 that, notwithstanding Title 17-A, sections 4-A and 1301, the fine
 may not exceed \$10,000.

44 **Sec. 5. 38 MRSA §349, sub-§3-A** is enacted to read:

46 **3-A. Tampering with a monitoring device.** A person is
48 guilty of tampering with a monitoring device if that person
50 recklessly tampers with or renders inaccurate any monitoring
52 device or a device for making any sampling, preservation,
 handling or analytical measurement required by this Title,
 department rules or the terms and conditions of any order,
 license, permit, approval or decision of the department.
 Tampering with a monitoring device is a Class C crime, except

2 that, notwithstanding Title 17-A, sections 4-A and 1301, the fine
3 may not exceed \$10,000.

4 5 **STATEMENT OF FACT**

6
7 This bill is intended to clarify the existing criminal
8 provisions of the environmental laws and to facilitate the
9 enforcement of those provisions by the State.

10
11 First, the bill incorporates all the criminal provisions
12 currently existing in the Maine Revised Statutes, Title 38,
13 including those provisions relating to hazardous waste.

14
15 Second, the bill amends Title 38, section 349, subsection 1
16 by expressly stating the culpable mental states of
17 "intentionally," "knowingly" and "recklessly." Title 38, section
18 349, subsection 1 is currently silent as to the level of culpable
19 mental state required for a conviction of a criminal violation
20 under the environmental laws.

21
22 Third, the bill raises the class of crime for violations of
23 environmental laws other than hazardous waste from a Class E
24 crime to a Class C crime. The bill, however, specifies the
25 conduct subject to the higher degree of sanctions. The bill
26 retains a general violation section for conduct that violates
27 unspecified terms and conditions of the law and licenses,
28 permits, approvals or decisions issued by the department. A
29 violation of the general violation section is classified as a
30 Class D crime.

31
32 With respect to the hazardous waste provisions, the bill
33 simplifies the statutes by using terms that are already defined
34 in Title 38, rather than defining those terms within the criminal
35 penalty section. In addition, the bill reduces the culpable
36 mental state required for a conviction of a hazardous waste crime
37 from "knowingly" to "recklessly." The purpose of the change is
38 to incorporate into state law federal concepts of imposing
39 liability on those persons who engage in "willful blindness" or a
40 "conscious avoidance" of hazardous waste violations. The
41 reckless standard, which is defined under Maine's Criminal Code
42 as a "conscious disregard of the risk," Title 17-A, section 35,
43 subsection 3, removes any incentive to avoid becoming familiar
44 with the legal requirements for handling hazardous waste.

45
46 The bill also amends the definition of "environmental
47 clean-up expense" and resolves a numbering conflict by
48 renumbering the definition of "expense of an emergency response"
as Title 17-A, section 1322, subsection 3, paragraph C-2.

L.D. 1654

(Filing No. H-945)

STATE OF MAINE
HOUSE OF REPRESENTATIVES
115TH LEGISLATURE
SECOND REGULAR SESSION

COMMITTEE AMENDMENT "A" to H.P. 1129, L.D. 1654, Bill, "An Act to Facilitate Criminal Enforcement of the Environmental Laws"

Amend the bill by inserting after the enacting clause the following:

'Sec. 1. 17 MRSA §2264-A, sub-§3, as enacted by PL 1989, c. 820, §5, is amended to read:

3. Disposal of more than 500 pounds or more than 100 cubic feet of litter for a commercial purpose. A person who disposes of more than 500 pounds or more than 100 cubic feet of litter for a commercial purpose is subject to the penalties for disposal of litter or solid waste under Title 38, section 349.'

Further amend the bill by striking out all of sections 3 and 4 and inserting in their place the following:

'Sec. 3. 38 MRSA §349, sub-§1, as amended by PL 1989, c. 820, §9, is repealed and the following enacted in its place:

1. Criminal penalties. A person is guilty of a criminal violation of the environmental laws if that person intentionally or knowingly:

A. Discharges any pollutant into the waters of the State in violation of this Title, department rules or any significant term or condition of any order, license, permit, approval or decision of the department;

B. Emits any air contaminant into the ambient air in violation of this Title, department rules or any significant term or condition of any order, license, permit, approval or decision of the department;

2 C. Disposes of solid waste in a quantity in excess of 500
4 pounds or 100 cubic feet in violation of this Title,
department rules or the terms or conditions of any order,
6 license, permit, approval or decision of the department;

8 D. Handles special waste in violation of this Title,
department rules or any significant term or condition of any
10 order, license, permit, approval or decision of the
department;

12 E. Discharges any hazardous waste or hazardous matter onto
14 the land or into the ambient air or waters of the State in
violation of this Title, department rules or the terms and
16 conditions of any order, license, permit, approval or
decision of the department;

18 F. Transports any hazardous waste without having the proper
20 license or permit as required by this Title or department
rules;

22 G. Transports any hazardous waste to any location that does
24 not have a license or permit for the handling of hazardous
waste as required by this Title or department rules;

26 H. Handles any hazardous waste without having obtained a
28 license to do so as required by this Title or department
rules;

30 I. Handles any hazardous waste in any location that does
32 not have a license or permit for the handling of hazardous
waste as required by this Title or department rules;

34 J. Establishes, constructs, operates or significantly
36 alters any facility for the handling of hazardous waste
without having obtained a proper license or permit as
38 required by this Title or department rules;

40 K. Handles or transports any hazardous waste in a manner
that violates any significant term or condition of any
42 order, rule, license, permit, approval or decision of the
department with respect to the handling or transporting of
44 hazardous waste;

46 L. Gives over hazardous waste to a 3rd person who does not
have a license or permit to transport or handle hazardous
waste as required by this Title or department rules;

2 M. Transports or causes to be transported any hazardous
4 waste without accurately completing and filing a manifest
6 with the department as required by this Title or department
8 rules; or

10 N. Violates the provisions of this Title, department rules
12 or the terms or conditions of any other order, rule,
14 license, permit, approval or decision of the department.

16 Criminal violation of the environmental laws under paragraphs A
18 to D is a Class C crime except that, notwithstanding Title 17-A,
20 sections 4-A and 1301, the fine may not exceed \$25,000.

22 Criminal violation of the environmental laws under paragraphs E
24 to K is a Class C crime except that, notwithstanding Title 17-A,
26 sections 4-A and 1301, the fine may not exceed \$50,000 for each
28 day of violation.

30 Criminal violation of the environmental laws under paragraphs L
32 and M is a Class D crime except that, notwithstanding Title 17-A,
34 sections 4-A and 1301, the fine may not exceed \$25,000.

36 Criminal violation of the environmental laws under paragraph N is
38 a Class E crime except that, notwithstanding Title 17-A, sections
40 4-A and 1301, the fine may not exceed \$25,000.

42 "Significant," as used in paragraphs A, B, D and K, or
44 "significantly," as used in paragraph J, means capable of
46 affecting the discharge of pollutants, emission of air
contaminants or the handling of special waste or hazardous waste.

Sec. 4. 38 MRSA §349, sub-§3, as affected by PL 1989, c. 890,
Pt. A, §40 and amended by Pt. B, §7, is repealed and the
following enacted in its place:

3. Falsification of environmental records. A person is
guilty of criminal falsification of environmental records if that
person intentionally or knowingly:

A. Makes a false material statement, representation or
certification in any document filed with the department
pursuant to this Title, department rules or the terms and
conditions of any order, license, permit, approval or
decision of the department;

COMMITTEE AMENDMENT "A" to H.P. 1129, L.D. 1654

2 B. Makes a false material statement, representation or
4 certification in any document required to be maintained by a
6 person or entity other than the department pursuant to this
 Title, department rules or the terms and conditions of any
 order, license, permit, approval or decision of the
 department;

8 C. Fails to monitor, sample or report any discharges or
10 emissions of pollutants as required by the terms and
12 conditions of any order, license, permit, approval or
 decision of the department with intent to deceive the
 department;

14 D. Fails to make any information submittal required by the
16 commissioner under section 568, subsection 3 or section
 1364, subsection 3 with intent to deceive the department;

18 E. Fails to monitor, sample or report any discharges or
20 emissions of pollutants as required by the terms and
22 conditions of any order, license, permit, approval or
 decision of the department; or

24 F. Fails to make any information submittal required by the
26 commissioner under section 568, subsection 3 or section
 1364, subsection 3.

28 Falsification of environmental records under paragraphs A to D is
30 a Class C crime except that, notwithstanding Title 17-A, sections
 4-A and 1301, the fine may not exceed \$10,000.

32 Falsification of environmental records under paragraphs E and F
34 is a Class E crime except that, notwithstanding Title 17-A,
 sections 4-A and 1301, the fine may not exceed \$10,000.

36 "Material" as used in paragraphs A and B means capable of
38 affecting the course or outcome of any licensing or other
40 proceeding or capable of affecting the department's ability to
 monitor compliance under any order, license, permit, approval or
 decision.'

42 Further amend the bill in section 5 in subsection 3-A in the
44 3rd line (page 3, line 48 in L.D.) by striking out the
 following: "recklessly" and inserting in its place the
 following: 'intentionally or knowingly'

46 Further amend the bill by inserting after section 5 the
 following:

2 'Sec. 6. 38 MRSA §1319-T, as amended by PL 1991, c. 548, Pt.
4 A, §32, is repealed.'

6 Further amend the bill by renumbering the sections to read
consecutively.

8 Further amend the bill by inserting at the end before the
statement of fact the following:

10 **FISCAL NOTE**

12 Raising the class of crime for violations of certain
14 environmental laws from a Class E crime to a Class C crime and
classifying general violations as a Class D crime will have an
16 impact on the correctional system.

18 Sentences imposed for a Class C crime must be served in a
state correctional institution. The cost per sentence is \$40,640
20 based upon an average length of stay of one year and 9 months.

22 Sentences imposed for Class D and Class E offenses must be
served in county jail facilities. The net additional costs to
24 the counties for housing each person sentenced under these crime
reclassifications represent a state mandate that must be
26 reimbursed pursuant to the Maine Revised Statutes, Title 30-A,
section 5684. The General Fund appropriations required to
28 reimburse these costs can not be estimated at this time. The
cost per sentence for a Class D crime is \$7,140 based upon an
30 average length of stay of 119 days. The cost per sentence for a
Class E crime is \$4,020 based upon an average length of stay of
32 67 days.

34 An increase in the maximum fine for Class D offenses may
increase General Fund revenue by an amount that can not be
36 estimated at this time.

38 The additional workload and administrative costs associated
with the minimal number of new cases filed in the court system
40 will be absorbed within the budgeted resources of the Judicial
Department.'

42 Further amend the bill by renumbering the sections to read
44 consecutively.

STATEMENT OF FACT

This amendment deletes the culpable mental state of recklessness as proposed by the bill for all criminal violations of the environmental laws. Remaining in the bill as amended are the 2 highest culpable mental states of "intentional" and "knowing," of which at least one must be proved to establish commission of the enumerated environmental crimes. The Maine Revised Statutes, Title 17-A, section 34, which applies to all crimes outside the Maine Criminal Code, provides that when the definition of a crime specifies the state of mind sufficient for the commission of that crime but does not distinguish among the elements of the crime, the specified state of mind applies to all the elements of the crime unless a contrary purpose plainly appears. The bill as amended includes in the definitions of these crimes the states of mind of "intentional" or "knowing." By including these culpable mental states without specifying different application to the various elements of the crimes, this amendment makes the specified mental states apply to each element of the crime. This means, for example, that not only must the person intentionally or knowingly discharge a pollutant into the waters of the State, but that the person must do so with the knowledge or intent that the discharge was in violation of the law, rules or authorization.

The Maine Criminal Code provisions governing the "competing harms" defense apply to all crimes and criminal prosecutions. Title 17-A, section 103 provides that conduct a person believes necessary to avoid imminent physical harm to that person or others is justifiable if the desirability and urgency of avoiding that harm outweigh, according to ordinary standards of reasonableness, the desirability and urgency of avoiding the harm that the statute defining the crime charged seeks to prevent. This means, for example, that a person charged with violating a significant term of a discharge license by intentionally bypassing a specific treatment process can raise the defense that the action was taken because in that specific circumstance not bypassing the process would have put others in danger of imminent physical harm and thus the violation was justifiable.

The amendment also requires that if the crime to be proved is the discharge, emission or handling of pollutants, contaminants, special waste or hazardous waste in violation of any order, license, permit, approval or decision of the Department of Environmental Protection, that discharge, emission

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or handling must be in violation of a significant term or condition of that authorization. "Significant" or "significantly" is used in the amendment to mean that a violation of a significant term or condition is capable of affecting the discharge of pollutants, emission of air contaminants or the handling of special waste or hazardous waste. This will avoid the fear of felony-level prosecutions for technical violations of licenses and permits when the violation is not the discharge, emission or handling itself.

The amendment changes the criminal action involving solid waste from the term "handles" to the more specific term "disposes of."

The amendment adds a reference including as a criminal offense the handling of special waste in violation of Title 38, department rules or any significant term or condition of any order, license, permit, approval or decision of the department.

The bill increased from Class D to Class C the hazardous waste violation of giving or handing over hazardous waste to a 3rd person who is not licensed. The amendment retains the Class D classification.

The amendment provides for a possible maximum fine of \$25,000 for a Class D offense, which is an increase from the \$10,000 maximum proposed by the original bill.

The amendment changes the "catch-all" environmental crime provision, encompassing all environmental violations not specifically enumerated in the preceding paragraphs, to a Class E crime with a fine of up to \$25,000.

The amendment also revises the language on falsification of environmental records. The culpable mental state is again limited to "intentional" or "knowing" by deleting "reckless" from the original bill. The false statements must be material false statements to be criminal violations, which are classified as Class C crimes. "Material" is defined for these purposes to mean capable of affecting the course and outcome of any licensing proceeding or capable of affecting the department's ability to monitor compliance. This definition is adapted from current perjury laws. In addition, failure to monitor, sample, report or make information submittals as required is a Class C crime if there is intent to deceive the department. If the State is not

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able to prove the intent to deceive, the offense is a Class E crime.

The amendment changes the culpable mental state for tampering with a monitoring device from "reckless," as proposed in the original bill, to "intentional" or "knowing." This is in keeping with the other culpable mental state changes in the amendment.

The amendment repeals Title 38, section 1319-T, which separately sets out criminal activity with regard to hazardous waste.

The Department of Corrections prepared the following correctional impact statement on the original bill pursuant to Title 34-A, section 1402:

"[The original bill] would create 13 new criminal violations of which 11 would be Class C offenses, punishable of up to 5 years imprisonment, and 2 Class D offenses which are punishable of up to 3 years.

- Class C: A sentence imposed for a Class C offense, unless 9 months or less, must be served in a State correctional facility. Because this would be a new offense, there is no basis to predict its specific impact on our correctional system. However, looking at sentences served for Class C offenses in correctional facilities, the average length of stay was found to be 1 year and 9 months. The average cost per day in a correctional facility is \$58. Based on this data, the projected cost to the State for each person sentenced under this new Class C crime would be about \$36,900.

- Class D: A sentence imposed for a Class D offense must be served in a county jail facility. Because this would be a new offense, there is no basis to predict its specific impact on our county jail system. However, looking at sentences served for Class D offenses in county jails, the average length of stay was found to be about 119 days. The average costs per day in a county jail is \$57. Based on this data, the projected cost to a county for each person sentenced under this new Class D crime would be about \$6,780."

Reported by the Majority of the Committee on Judiciary
Reproduced and distributed under the direction of the Clerk of the House
2/18/92

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STATE OF MAINE
HOUSE OF REPRESENTATIVES
115TH LEGISLATURE
SECOND REGULAR SESSION

COMMITTEE AMENDMENT "B" to H.P. 1129, L.D. 1654, Bill, "An Act to Facilitate Criminal Enforcement of the Environmental Laws"

Amend the bill by striking out all of sections 3 and 4 and inserting in their place the following:

Sec. 3. 38 MRSA §349, sub-§1, as amended by PL 1989, c. 820, §9, is further amended to read:

1. Criminal penalties. Any person who intentionally or knowingly violates any provisions of the laws administered by the department, including, without limitation, a violation of the terms or conditions of any order, rule, license, permit, approval or decision of the board or commissioner, or who intentionally or knowingly disposes of more than 500 pounds or more than 100 cubic feet of litter for a commercial purpose, in violation of Title 17, section 2264, is guilty of a Class E crime and may be punished accordingly, except notwithstanding Title 17-A, ~~sections 4-A and 1301, subsection 1, paragraph C, or subsection 3, paragraph E,~~ the fine for such a violation may ~~not be less than \$100 nor more than~~ exceed \$25,000 ~~for each day of the violation.~~

This subsection does not apply to actions subject to the criminal penalties set forth in subsection 1-A or section 1319-T.

Sec. 4. 38 MRSA §349, sub-§1-A is enacted to read:

1-A. Criminal penalties; Class C crime. A violation of this subsection is a Class C crime except that, notwithstanding Title 17-A, sections 4-A and 1301, the fine for such a violation may not exceed \$25,000.

2 A. A person is guilty of a criminal violation of the
4 environmental laws if that person intentionally or knowingly:

6 (1) Handles or transports for a commercial purpose any
8 of the following in violation of this Title, department
10 rules or any significant term or condition of any
12 applicable order, license, permit, approval or decision
14 of the department: boiler and incinerator ash,
16 biomedical waste, waste oil, asbestos and
18 asbestos-containing waste, industrial and industrial
20 process waste, wastewater treatment plant sludge, paper
22 mill sludge, other sludge waste, debris and residuals
24 from nonhazardous chemical spills, contaminated soils
26 and dredge spoils, sandblast grit and nonliquid paint
28 waste, high and low-pH waste, spent filter media and
30 residue and construction and demolition debris;

32 (2) Transports or causes to be transported for a
34 commercial purpose any of the following to any location
36 that does not have a license or permit for the handling
38 of these wastes as required by this Title or department
40 rules: boiler and incinerator ash, biomedical waste,
42 waste oil, asbestos and asbestos-containing waste,
44 industrial and industrial process waste, wastewater
46 treatment plant sludge, paper mill sludge, other sludge
48 waste, debris and residuals from nonhazardous chemical
50 spills, contaminated soils and dredge spoils, sandblast
 grit and nonliquid paint waste, high and low-pH waste,
 spent filter media and residue and construction and
 demolition debris;

(3) Excepting agricultural activities conducted in
 accordance with best management practices as set forth
 in Title 17, section 2805, subsection 2 and activities
 associated with the use, construction, maintenance and
 emergency repair activity for forestry and municipally
 maintained roads, discharges any pollutant into the
 waters of the State from any direct discharge for a
 commercial purpose in violation of this Title,
 department rules or any significant term or condition
 of any applicable order, license, permit, approval or
 decision of the department; or

(4) Emits any air contaminant into the ambient air
 from any building, structure, facility or installation
 for a commercial purpose in violation of this Title,
 department rules or any significant term or condition
 of any applicable order, license, permit, approval or
 decision of the department.

2 B. As used in this subsection, the following terms have the
4 following meanings.

6 (1) "For a commercial purpose" means the discharge of
8 pollutants either as part of a business, industrial or
 commercial enterprise or for a fee or other type of
 remuneration.

10 (2) "Significant" means affecting the discharge of
12 water pollutants or emission of air contaminants into
 the environment.

14 C. The department may not present or threaten to present
16 criminal charges under this subsection solely to obtain an
 advantage in a civil or administrative enforcement action.

18 D. The Attorney General has exclusive authority to bring a
20 prosecution under this subsection. With respect to each
22 case in which the Attorney General has initiated a criminal
24 prosecution under this subsection, the Attorney General
26 shall, on February 1, 1993 and on February 1, 1994, and
 thereafter upon request of either of the joint standing
 committees described in this paragraph, file a written
 report with the joint standing committees of the Legislature
 having jurisdiction over energy and natural resources
 matters and over judiciary matters containing the following
 information: a list of cases that have been initiated or
 resolved in the previous 12-month period, a brief synopsis
 of the facts of each case and the results of those cases
 that have been completed or resolved.

32 E. It is an affirmative defense to a prosecution under this
34 subsection that:

36 (1) The discharge or emission source has a license for
38 the pollutant or contaminant that was discharged or
40 emitted or does not require a license for the emission
 or discharge of the pollutant or contaminant for normal
 operations;

42 (2) The discharge or emission resulted substantially
44 from an unavoidable malfunction beyond the control of
46 the defendant. There is no affirmative defense under
 this paragraph if the malfunction was caused
 substantially by poor maintenance, reckless operation
 or any other reasonably preventable condition or
48 preventable equipment breakdown;

(3) The defendant took reasonable steps under the circumstances to minimize or prevent the discharge or emission or has caused such steps to be taken;

(4) The defendant terminated the discharge or emission or caused the discharge or emission to be terminated as soon as reasonably possible; and

(5) The defendant reported the discharge or emission or has caused the discharge or emission to be reported to the department as required by this Title, department rules or the terms or conditions of the applicable order, license, permit, approval or decision of the department.

Sec. 5. 38 MRSA §349, sub-§3, as affected by PL 1989, c. 890, Pt. A, §40 and amended by Pt. B, §7, is repealed and the following enacted in its place:

3. Falsification of environmental records. A person is guilty of criminal falsification of environmental records if that person intentionally or knowingly:

A. Makes a false material statement, representation or certification in any document filed with the department or required to be maintained by a person or entity other than the department pursuant to this Title, department rules or the terms and conditions of any applicable order, license, permit, approval or decision of the department;

B. Fails to monitor, sample or report any discharges or emissions of pollutants as required by the terms and conditions of any applicable order, license, permit, approval or decision of the department with intent to deceive the department; or

C. Fails to make any information submittal required by the commissioner under section 568, subsection 3 or section 1364, subsection 3 with intent to deceive the department.

Falsification of environmental records is a Class C crime except that, notwithstanding Title 17-A, sections 4-A and 1301, the fine may not exceed \$10,000.

"Material," as used in paragraph A, means capable of affecting the course or outcome of any licensing or other proceeding or capable of affecting the department's ability to monitor compliance under any order, license, permit, approval or decision.'

COMMITTEE AMENDMENT "B" to H.P. 1129, L.D. 1654

2 Further amend the bill in section 5 in subsection 3-A in the
3rd line (page 3, line 48 in L.D.) by striking out the
following: "recklessly" and inserting in its place the
4 following: 'intentionally or knowingly'

6 Further amend the bill by renumbering the sections to read
consecutively.

8
10 Further amend the bill by inserting at the end before the
statement of fact the following:

12 **FISCAL NOTE**

14 Raising the class of crime for violations of certain
environmental laws will impact the correctional system.

16 Sentences imposed for a Class C crime, unless 9 months or
18 less, must be served in a state correctional institution. The
cost per sentence is \$40,640 based upon an average length of stay
20 of one year and 9 months.

22 Sentences imposed for Class E offenses must be served in a
county jail facility. The cost per sentence for a Class E crime
24 is \$4,020 based upon an average length of stay of 67 days. The
additional costs to the counties for housing each person
26 sentenced under the Class E violations will require full funding
by the State as a state mandate pursuant to the Maine Revised
28 Statutes, Title 30-A, section 5684. The General Fund
appropriations required to reimburse these costs can not be
30 estimated at this time.

32 The additional workload and administrative costs associated
with the minimal number of new cases filed in the court system
34 will be absorbed within the budgeted resources of the Judicial
Department.

36 The additional costs associated with filing written reports
38 with the Legislature can be absorbed by the Department of
Attorney General utilizing existing budgeted resources.'

40

42 **STATEMENT OF FACT**

44 This bill as amended is intended to clarify the existing
criminal provisions of the environmental laws and to facilitate
46 the enforcement of those provisions by the State. The bill and
the amendment amend the Maine Revised Statutes, Title 38, section
48 349, subsection 1 by expressly stating the culpable mental state

required for proof of an environmental crime. The existing provision is silent as to the level of intent required for conviction of a criminal violation under the environmental laws.

The original bill contained a culpable mental state of "reckless" (a "conscious disregard" of the risk that the actor's conduct will result in an environmental violation) for all environmental crimes. This amendment requires that the State prove that the individual acted either "intentionally" or "knowingly." Under the Maine Criminal Code, Title 17-A, section 34, the State will have to prove not only that the defendant intentionally or knowingly engaged in the environmental violation, but that the person did so with the knowledge or intent that the person's conduct was in violation of the law, rules or permit.

The bill raised the class of crime for many violations of the environmental laws from a Class E crime to a Class C crime. Currently, all environmental crimes, other than specific hazardous waste crimes, are classified only as the State's lowest level misdemeanor. This amendment differs from the bill in that it raises the class of only selected categories of environmental crimes. This amendment makes no changes to the current definition and classification of hazardous waste crimes.

This amendment raises the classification for specific intentional and knowing violations of the air pollution, water pollution, biomedical waste and special waste laws from Class E to Class C. The air pollution violations are limited to emissions from stationary sources for commercial purposes, while the water pollution violations are limited to direct or point source discharges for commercial purposes. Violations of only "significant" terms or conditions of orders, rules, licenses, permit, approvals or decisions are elevated to Class C status. The State must prove that the intentional or knowing violation of the license affected the discharge of pollutants, emission of air contaminants or the handling of special waste or biomedical waste.

This amendment limits prosecutorial discretion in several ways. First, it extends to members of the Department of Environmental Protection the ethical rule prohibiting lawyers from threatening criminal prosecution solely to gain advantage in a civil matter. Second, it limits prosecution of the Class C crimes under Title 38, section 349 to the Attorney General, eliminating the possibility that district attorneys could initiate such actions. Third, it creates an affirmative defense similar to the unavoidable malfunction provision that currently applies to civil penalty actions.

COMMITTEE AMENDMENT "B" to H.P. 1129, L.D. 1654

2 The amendment further revises the language on falsification
of environmental records. The culpable mental state is limited
4 to intentional or knowing conduct, thus deleting the "reckless"
level of intent in the original bill. The amendment classifies
6 the falsification of environmental records as a felony only if
the false statements are "material." "Material" is defined as
8 "capable of affecting the course and outcome of any licensing
proceeding or capable of affecting the department's ability to
10 monitor compliance." This definition is adapted from current
perjury laws. In addition, the failure to provide information as
12 required by the Department of Environmental Protection is a Class
C crime only if there is an intent to deceive the department. If
14 the intent can not be proved, the offense is a Class E crime.

Reported by Report "A" of the Committee on Judiciary
Reproduced and distributed under the direction of the Clerk of the
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3/27/92 (Filing No. H-1306)

STATE OF MAINE
HOUSE OF REPRESENTATIVES
115TH LEGISLATURE
SECOND REGULAR SESSION

COMMITTEE AMENDMENT "C" to H.P. 1129, L.D. 1654, Bill, "An Act to Facilitate Criminal Enforcement of the Environmental Laws"

Amend the bill by inserting after the enacting clause the following:

'Sec. 1. 17 MRSA §2264-A, sub-§3, as enacted by PL 1989, c. 820, §5, is amended to read:

3. Disposal of more than 500 pounds or more than 100 cubic feet of litter for a commercial purpose. A person who disposes of more than 500 pounds or more than 100 cubic feet of litter for a commercial purpose is subject to the penalties for disposal of litter or solid waste under Title 38, section 349.'

Further amend the bill by striking out all of sections 3 and 4 and inserting in their place the following:

'Sec. 3. 38 MRSA §349, sub-§1, as amended by PL 1989, c. 820, §9, is repealed and the following enacted in its place:

1. Criminal penalties. A person is guilty of a criminal violation of the environmental laws if that person intentionally or knowingly:

A. Discharges any hazardous waste or hazardous matter into the waters of the State in violation of this Title, department rules or any significant term or condition of any applicable order, license, permit or approval;

B. Discharges any hazardous waste or hazardous matter into the ambient air in violation of this Title, department rules or any significant term or condition of any applicable order, license, permit or approval;

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2 C. Discharges any hazardous waste or hazardous matter onto
3 the land in violation of this Title, department rules or the
4 terms or conditions of any applicable order, license,
5 permit, approval or decision of the department;

6 D. Transports any hazardous substance or special waste
7 without having the proper license or permit as required by
8 this Title or department rules;

10 D-1. Accepts for disposal or storage any hazardous
11 substance or special waste without having the proper license
12 or permit as required by this Title or department rules;

14 E. Transports any hazardous substance or special waste to
15 any location that does not, in fact, have a license or
16 permit for the handling of that waste as required by this
17 Title or department rules;

18 F. Handles any hazardous waste without having obtained a
19 license to do so as required by this Title or department
20 rules;

22 G. Handles any hazardous waste in any location that does
23 not have a license or permit for the handling of hazardous
24 waste as required by this Title or department rules;

26 H. Establishes, constructs, operates or significantly
27 alters any facility for the handling of hazardous waste
28 without having obtained a proper license or permit as
29 required by this Title or department rules;

32 I. Handles or transports any hazardous waste in a manner
33 that violates any significant term or condition of any
34 applicable order, rule, license, permit, approval or
35 decision of the department with respect to the handling or
36 transporting of hazardous waste;

38 J. Gives over hazardous waste to a 3rd person with the
39 knowledge that that person does not have a license or permit
40 to transport or handle hazardous waste as required by this
41 Title or department rules;

42 K. Transports or causes to be transported any hazardous
43 waste without accurately completing and filing a manifest
44 with the department as required by this Title or department
45 rules; or

COMMITTEE AMENDMENT "C" to H.P. 1129, L.D. 1654

2 L. Violates the provisions of this Title, department rules
3 or the terms or conditions of any other applicable order,
4 rule, license, permit, approval or decision of the
5 department.

6 Criminal violation of the environmental laws under paragraphs A
7 to I is a Class C crime except that, notwithstanding Title 17-A,
8 sections 4-A and 1301, the fine may not exceed \$50,000 for each
9 day of violation.

10 Criminal violation of the environmental laws under paragraphs J
11 and K is a Class D crime except that, notwithstanding Title 17-A,
12 sections 4-A and 1301, the fine may not exceed \$25,000.

13 Criminal violation of the environmental laws under paragraph L is
14 a Class E crime except that, notwithstanding Title 17-A, sections
15 4-A and 1301, the fine may not exceed \$25,000.

16 "Significant," as used in paragraphs A, B and I, or
17 "significantly," as used in paragraph H, means capable of
18 affecting the discharge of hazardous waste or hazardous matter.

19 Sec. 4. 38 MRSA §349, sub-§3, as affected by PL 1989, c. 890,
20 Pt. A, §40 and amended by Pt. B, §7, is repealed and the
21 following enacted in its place:

22 3. Falsification of environmental records. A person is
23 guilty of criminal falsification of environmental records if that
24 person intentionally or knowingly:

25 A. Makes a false material statement, representation or
26 certification in any document filed with the department or
27 required to be maintained by a person or entity other than
28 the department pursuant to this Title, department rules or
29 the terms and conditions of any applicable order, license,
30 permit, approval or decision of the department;

31 B. Fails to monitor, sample or report any discharges or
32 emissions of pollutants as required by the terms and
33 conditions of any applicable order, license, permit,
34 approval or decision of the department with intent to
35 deceive the department; or

36 C. Fails to make any information submittal required by the
37 commissioner under section 568, subsection 3 or section
38 1364, subsection 3 with intent to deceive the department.

Falsification of environmental records is a Class C crime except that, notwithstanding Title 17-A, sections 4-A and 1301, the fine may not exceed \$10,000.

"Material" as used in paragraph A means capable of affecting the course or outcome of any licensing or other proceeding or capable of affecting the department's ability to monitor compliance under any order, license, permit, approval or decision.'

Further amend the bill in section 5 in subsection 3-A in the 3rd line (page 3, line 48 in L.D.) by striking out the following: "recklessly" and inserting in its place the following: 'intentionally or knowingly'

Further amend the bill by inserting after section 5 the following:

'Sec. 6. 38 MRSA §1319-T, as amended by PL 1991, c. 548, Pt. A, §32, is repealed.'

Further amend the bill by renumbering the sections to read consecutively.

Further amend the bill by inserting at the end before the statement of fact the following:

'FISCAL NOTE

Raising the class of crime for violations of certain environmental laws will impact the correctional system.

Sentences imposed for a Class C crime, unless 9 months or less, must be served in a state correctional institution. The cost per sentence is \$40,640 based upon an average length of stay of one year and 9 months.

Sentences imposed for Class E offenses must be served in a county jail facility. The cost per sentence for a Class E crime is \$4,020 based upon an average length of stay of 67 days. Sentences imposed for Class D offenses must be served in a county jail facility. The cost per sentence for a Class D crime is \$7,140 based upon an average length of stay of 119 days. The additional costs to the counties for housing each person sentenced under these violations represent a state mandate that must be reimbursed pursuant to the Maine Revised Statutes, Title 30-A, section 5684. The General Fund appropriations required to reimburse these costs can not be estimated at this time.

An increase in the maximum fine for criminal violations of the environmental laws may increase General Fund revenue by an amount that can not be estimated at this time.

The additional workload and administrative costs associated with the minimal number of new cases filed in the court system will be absorbed within the budgeted resources of the Judicial Department.'

STATEMENT OF FACT

This amendment is the minority report of the Joint Standing Committee on Judiciary.

The amendment deletes the culpable mental state of recklessness as proposed by the bill for all criminal violations of the environmental laws. Remaining in the bill as amended are the 2 highest culpable mental states of "intentional" and "knowing," of which at least one must be proved to establish commission of the enumerated environmental crimes. The Maine Revised Statutes, Title 17-A, section 34, which applies to all crimes outside the Maine Criminal Code, provides that when the definition of a crime specifies the state of mind sufficient for the commission of that crime but does not distinguish among the elements of the crime, the specified state of mind applies to all the elements of the crime unless a contrary purpose plainly appears. The bill as amended includes in the definitions of these crimes the states of mind of "intentional" or "knowing." By including these culpable mental states without specifying different application to the various elements of the crimes, this amendment makes the specified mental states apply to each element of the crime. This means, for example, that not only must the person intentionally or knowingly discharge hazardous waste into the waters of the State, but that the person must do so with the knowledge or intent that the discharge was in violation of the law, rules or authorization.

The Maine Criminal Code provisions governing the "competing harms" defense apply to all crimes and criminal prosecutions. Title 17-A, section 103 provides that conduct a person believes necessary to avoid imminent physical harm to that person or others is justifiable if the desirability and urgency of avoiding that harm outweigh, according to ordinary standards of reasonableness, the desirability and urgency of avoiding the harm that the statute defining the crime charged seeks to prevent. This means, for example, that a person charged with violating a

COMMITTEE AMENDMENT "C" to H.P. 1129, L.D. 1654

significant term of a discharge license by intentionally bypassing a specific treatment process can raise the defense that the action was taken because in that specific circumstance not bypassing the process would have put others in danger of imminent physical harm and thus the violation was justifiable.

The amendment also requires that if the crime to be proved is the discharge of hazardous waste or hazardous matter in violation of any order, license, permit, approval or decision of the Department of Environmental Protection, that discharge must be in violation of a significant term or condition of that authorization. "Significant" is used in the amendment to mean that a violation of a significant term or condition is capable of affecting the discharge of hazardous waste or hazardous matter. This will avoid the fear of felony-level prosecutions for technical violations of licenses and permits when the violation is not the discharge itself.

The amendment also makes the following a Class C crime: transporting any hazardous substance or special waste without having a required license or permit, transporting any hazardous substance or special waste to a location that does not, in fact, have a required license or permit for handling that waste, and accepting such waste for disposal or storage without a required license or permit.

The bill increased from Class D to Class C the hazardous waste violation of giving or handing over hazardous waste to a 3rd person who is not licensed. The amendment retains the Class D classification.

The amendment provides for a possible maximum fine of \$25,000 for a Class D offense, which is an increase from the \$10,000 maximum proposed by the original bill.

The amendment changes the "catch-all" environmental crime provision, encompassing all environmental violations not specifically enumerated, to a Class E crime with a fine of up to \$25,000.

The amendment also revises the language on falsification of environmental records. The culpable mental state is again limited to "intentionally" or "knowingly" by deleting "recklessly" from the original bill. The false statements must be material false statements to be criminal violations, which are classified as Class C crimes. "Material" is defined for these purposes to mean "capable of affecting the course or outcome of any licensing or other procedure or capable of affecting the

COMMITTEE AMENDMENT "C" to H.P. 1129, L.D. 1654

department's ability to monitor compliance." This definition is adopted from current perjury laws. In addition, failure to monitor, sample, report or make information submittals as required is a Class C crime if there is intent to deceive the department.

The amendment changes the culpable mental state for tampering with a monitoring device from "reckless," as proposed in the original bill, to "intentional" or "knowing." This is in keeping with the other culpable mental state changes in the amendment.

The amendment repeals Title 38, section 1319-T, which separately sets out criminal activity with regard to hazardous waste.

The amendment also adds a fiscal note to the bill.

The Department of Corrections prepared the following correctional impact statement pursuant to Title 34-A, section 1402:

"[The original bill] would create 13 new criminal violations of which 11 would be Class C offenses, punishable of up to 5 years imprisonment, and 2 Class D offenses which are punishable of up to 3 years.

- **Class C:** A sentence imposed for a Class C offense, unless 9 months or less, must be served in a State correctional facility. Because this would be a new offense, there is no basis to predict its specific impact on our correctional system. However, looking at sentences served for Class C offenses in correctional facilities, the average length of stay was found to be 1 year and 9 months. The average cost per day in a correctional facility is \$58. Based on this data, the projected cost to the State for each person sentenced under this new Class C crime would be about \$36,900.
- **Class D:** A sentence imposed for a Class D offense must be served in a county jail facility. Because this would be a new offense, there is no basis to predict its specific impact on our county jail system. However, looking at sentences served for Class D offenses in county jails, the average length of stay was found to be about 119 days. The average costs per day in a county jail is \$57. Based on this data, the projected cost to a county for each person

COMMITTEE AMENDMENT "C" to H.P. 1129, L.D. 1654

2 sentenced under this new Class D crime would be about
\$6,780."

Reported by Report "B" to the Committee on Judiciary
Reproduced and distributed under the direction of the Clerk of the
House

3/27/92

(Filing No. H-1307)

APPENDIX C

L.D. 2461 Compared to Current Law

LD 2461 Compared to Current Law

SUMMARY: LD 2461 makes changes in criminal provisions of Title 38, section 349, the general penalty for air and water pollution violations. The bill creates a Class C crime category for certain types of discharges or emissions. It raises to Class C penalties for false reporting and tampering with monitoring devices. The effect of these changes raises the period of imprisonment; however, fines remain the same as current law. The bill also makes some changes intended to clarify current law. No changes are made in §1319-T relating to handling and transportation of hazardous waste. Details are outlined below.

CURRENT LAW

Title 38 section 349:

1. Subsection 1

Class E crime
6 mos./\$25,000 day

Any person who:

- A. violates any provision of laws administered by DEP any order, rule, license, permit, approval or decision, or
- B. disposes of more than 500 pounds or more than 100 cubic feet of litter for a commercial purpose in violation of T17 §2264.

2. Activities covered in subsection 1-A in LD 2461 would be covered under subsection 1 of current law.

LD 2461

1. No change from current law.

2. Subsection 1-A (NEW)

Class C crime
5 yrs./\$25,000 flat fine

Any person who

- A. in violation of T38, DEP rule or a term or condition of a DEP order, license, permit, approval affecting the discharge of water pollutants or emission of air contaminants

CURRENT LAW

LD 2461

- B. for a commercial purpose
 - C. intentionally or knowingly
 - D. disposes of (most types of special waste)
 - i. incinerator ash
 - ii. biomedical waste
 - iii. waste oil
 - iv. asbestos
 - v. asbestos containing waste
 - vi. wastewater treatment plant sludge
 - vii. paper mill sludge
 - viii. other sludge waste
 - ix. contaminated dredge soils
 - x. spent filter media or residue
 - xi. debris or residuals from non-hazardous chemical spills
- or
- E. discharges a pollutant into water from a direct discharge but not including:
 - i. agricultural activities approved by DoAFRR
 - ii. activities associated with public or private road or way
 - iii. storm water, non-contact cooling waters or uncontaminated flume or process discharges
- or
- F. emits air contaminant into ambient air
 - i. from a building, structure, facility or installation
 - ii. but not including usually anticipated excess emissions of a licensed contaminant during cold start-ups and plant shut downs
 - G. A.G. has exclusive authority to prosecute.
 - H. Report of prosecution required to Legislature.

Subsection 9 provides similar exemption from civil penalties

3. Subsection 3

6 mos./\$10,000 flat fine

Any person who

A. knowingly

B. makes a false statement, representation or certification any document filed or required to be maintained by DEP, law order, rule, license, permit, approval or decision

or

I. Affirmative defense #1

- i. that pollutant or contaminant was licensed or doesn't require license
- ii. malfunction beyond reasonable control or prevention of defendant
- iii. reasonable steps taken to minimize or prevent
- iv. discharge or emission discontinued as soon as reasonably possible, and
- v. defendant reported discharge to DEP

J. Affirmative defense #2

- i. that discharge or emission was of substance not specifically prohibited or limited
- ii. defendant fully licensed
- iii. defendant reported discharge or emission, and
- iv. DEP taken no action to limit or regulate discharge or emission

3. Replaces part of current subsection 3

Class C crime

5 yrs./\$10,000 flat fine

Any person who

A. intentionally or knowingly

B. makes a false material statement, representation or certification in document filed with DEP or required to be maintained by a person or entity other than DEP pursuant to T38, DEP rules, applicable order, license, permit or approval

or

CURRENT LAW

- C. tampers with or renders inaccurate a required monitoring device or method

or

- D. fails to comply with required information submittal.

LD 2461

- C. with intent to deceive DEP, fails to monitor, sample or report discharges or emissions required by order, license, permit or approval

or

- D. with intent to deceive DEP, fails to make required information submittal under section 568.3 (oil discharges) or 1365.3 (hazardous substance sites)

4. replaces part of current subsection 3

Class C crime
5 yrs./\$10,000 flat fine

Any person who

- A. intentionally or knowingly
- B. tampers with or renders inaccurate monitoring device or device for sampling, preservation, handling or analytical measurement
- C. required by law, rules, order, license, permit or approval

APPENDIX D
Figures, Tables and Charts

**FEDERAL ENVIRONMENTAL CRIMES
HAZARDOUS WASTE**

STATUTE	STATE OF MIND	PROHIBITED ACT	LEVEL OF VIOLATION	MAXIMUM IMPRISONMENT	MAXIMUM FINE		NOTES
					INDIVIDUAL	CORPORATION	
Resources Conservation and Recovery Act (RCRA)							
42 U.S.C. §6928	Knowingly	Transports or causes to be transported to facility which does not have permit.	Class D Felony	5	\$50,000/day or \$250,000	\$50,000/day or \$500,000	1,2
42 U.S.C. §6928	Knowingly	Treats, stores or disposes without permit or in knowing violation of material condition or requirement of permit or of interim status regulations or standards.		5	\$50,000/day or \$250,000	\$50,000/day or \$500,000	1,2
42 U.S.C. §6928	Knowingly	Omits material information or makes any false material statement or representation in document filed, maintained or used for purposes of compliance with federal or state regulations.	Class E Felony	2 years	\$50,000/day or \$250,000	\$50,000/day or \$250,000	1,2
42 U.S.C. §6928	Knowingly	Generates, stores, treats, transports or handles and knowingly destroys, alters, conceals or fails to file any document required to be maintained or filed for purposes of compliance with federal or state regulations.	Class E Felony	2 years	\$50,000/day or \$250,000	\$50,000/day or \$250,000	1,2
42 U.S.C. §6928	Knowingly	Transports without required manifest or causes to be transported without manifest.	Class E Felony	2 years	\$50,000/day or \$250,000	\$50,000/day or \$500,000	1,2
42 U.S.C. §6928	Knowingly	Exports without consent of receiving country or not in conformance with applicable international agreement.	Class E Felony	2 years	\$50,000/day or \$250,000	\$50,000/day or \$500,000	1,2
42 U.S.C. §6928	Knowingly	If done knowingly and knows at time that places another person in imminent danger of death or serious bodily injury.	Class C. Felony	15 years	\$250,000	\$1,000,000	2,3
Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)							
42 U.S.C. §9603(b)		As person in charge of facility from which hazardous substance is released (other than federally permitted release) in quantity equal to or greater than specified, fails immediately to notify National Response Center as soon as had knowledge, or submits in such notification any information knows to be false or misleading.	Class E Felony	3 years	\$250,000	\$500,000	1,2
42 U.S.C. §9603(d)(2)	Knowingly	Knowingly destroys, mutilates, erases, disposes of, conceals or renders unavailable or unreadable, or falsifies, any records regarding disposal of hazardous substances at facility.	Class E Felony	3 years	\$250,000	\$500,000	1,2
42 U.S.C. §9612(b)(1)	Knowingly	Knowingly gives or causes to be given false information as part of claim under federal Superfund statute.	Class E Felony	3 years	\$250,000	\$500,000	1,2

Figure D-1

**FEDERAL ENVIRONMENTAL CRIMES
HAZARDOUS WASTE**

STATUTE	STATE OF MIND	PROHIBITED ACT	LEVEL OF VIOLATION	MAXIMUM IMPRISONMENT	MAXIMUM FINE		NOTES
					INDIVIDUAL	CORPORATION	
Emergency Planning and Community Right-to-Know Act							
42 U.S.C. §11045(b)(4)	Knowingly & Willfully	Knowingly and willfully fails to provide required notification under federal Emergency Planning and Community Right-to-Know Act.	Class E Felony	2 years	\$250,000	\$500,000	1,2
Hazardous Materials Transportation Act							
49 U.S.C. App. §1809(b)	Knowingly	Knowingly unlawfully, alters, removes, defaces, destroys or tampers with any marking, label, placard or description on document, or with any package, container, motor vehicle, rail freight car, aircraft or vessel, required or used for transportation of hazardous material.	Class D Felony	5 years	\$250,000	\$500,000	1,2
	Willfully	Willfully violates federal Hazardous Materials Transportation Act, or order or regulation.	Class D Felony	5 years	\$250,000	\$500,000	1,2

Notes:

- 1: Provides for more severe penalties for subsequent violations
- 2: Provides for twice the amount gained or lost, whichever is greater
- 3: Provides enhanced penalties

Compiled by OPLA from: Summaries of Federal and State Environmental
Criminal Enforcement Statutes. National Association of Attorneys General (1991)

**FEDERAL ENVIRONMENTAL CRIMES
WATER POLLUTION**

STATUTE	STATE OF MIND	PROHIBITED ACT	LEVEL OF VIOLATION	MAXIMUM IMPRISONMENT	MAXIMUM FINE		NOTES
					INDIVIDUAL	CORPORATION	
Rivers and Harbors Act of 1989 (REFUSE Act)							
33 U.S.C. §406		Violates provisions prohibiting obstruction of navigable waters.	Class A Misdemeanor	1 year	\$100,000	\$200,000	2,4
33 U.S.C. §411		Violates provisions prohibiting deposit of refuse in navigable waters.	Class A Misdemeanor	1 year (minimum 30 days)	\$100,000	\$200,000	2,4
Federal Water Pollution Control Act (Clean Water Act – CWA)							
33 U.S.C. §1319(c)	Negligently	Violates sections providing effluent limitations, national standards of performance, and toxic and pretreatment standards; covering records and reports, and inspections; prohibiting discharges of oil or hazardous substances; or covering aquaculture or disposal or use of sewage sludge.	Class A Misdemeanor	1 year	\$25,000/day or \$100,000	\$25,000/day or \$200,000	1,2,4
33 U.S.C. §1319(c)	Negligently	Violates any permit condition or limitation implementing any such section in NPDES or SPDES permit.	Class A Misdemeanor	1 year	\$25,000/day or \$100,000	\$25,000/day or \$200,000	1,2,4
33 U.S.C. §1319(c)	Negligently	Violates requirement in federal or state pretreatment program or in permit for dredged or fill material issued by Corps of Engineers or state.	Class A Misdemeanor	1 year	\$25,000/day or \$100,000	\$25,000/day or \$200,000	1,2,4
33 U.S.C. §1319(c)	Negligently	Introduces into sewer system or POTW any pollutant or hazardous substance which knew or reasonably should have known could cause personal injury or property damage or (other than in compliance with all federal, state or local requirements or permits) which causes POTW to violate effluent limitation or federal or state permit condition.	Class A Misdemeanor	1 year	\$25,000/day or \$100,000	\$25,000/day or \$200,000	1,2,4
33 U.S.C. §1319(c)	Knowingly	If done knowingly.	Class E Felony	3 years	\$50,000 or \$250,000	or \$500,000	1,2,3
33 U.S.C. §1319(c)	Knowingly	If done knowingly and knows at time that places another person in imminent danger of death or serious bodily injury.	Class C Felony	15 years	\$250,000	\$1,000,000	1,2,3
33 U.S.C. §1319(c)	Knowingly	Knowingly makes any false material statement, representation or certification in any document filed or required, or knowingly falsifies, tampers with or renders inaccurate any monitoring device or method.	Class E Felony	2 years	\$250,000	\$500,000	1,2
33 U.S.C. §1321(b)(5)		As person in charge of vessel or onshore or offshore facility, as soon as has knowledge of discharge of oil or hazardous substance in excess of specified quantity, fails immediately to notify appropriate federal agency.	Class D Felony	5 years	\$250,000	\$500,000	2

**FEDERAL ENVIRONMENTAL CRIMES
WATER POLLUTION**

STATUTE	STATE OF MIND	PROHIBITED ACT	LEVEL OF VIOLATION	MAXIMUM IMPRISONMENT	MAXIMUM FINE		NOTES
					INDIVIDUAL	CORPORATION	
Marine Protection, Research, and Sanctions Act of 1972							
33 U.S.C. §1415(b)	Knowingly	Knowingly violates provisions regulating ocean dumping or regulations or permits.	Class A Misdemeanor	1 year	\$100,000	\$200,000	2,4
33 U.S.C. §1415(b)		If activity involves dumping medical waste into ocean waters.	Class D Felony	5 years	\$250,000	\$500,000	2,3
Act to Prevent Pollution from Ships							
33 U.S.C. §1908(a)	Knowingly	Knowingly violates Marpol Protocol or chapter governing prevention of pollution from ships.	Class D Felony	6 years	\$250,000	\$500,000	2
Shore Protection Act of 1988							
33 U.S.C. §2609(c)	Knowingly	Knowingly violates chapter governing shore protection from municipal or commercial waste.	Class E Felony	3 years	\$250,000	\$500,000	2
Safe Drinking Water Act (SDWA)							
42 U.S.C. §300h-2(b)	Willfully	Willfully violates any requirement of underground injection control program under Safe Drinking Water Act or order.	Class E Felony	3 years	\$250,000	\$500,000	2
42 U.S.C. §300i-1		Tampers with public water system.	Class D Felony	5 years	\$250,000	\$500,000	2
42 U.S.C. §300i-1		Attempts to tamper, or makes threat to tamper, with public drinking water system.	Class E Felony	3 years	\$250,000	\$500,000	2
Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)							
42 U.S.C. §9603(b)		As person in charge of vessel from which hazardous substance is released (other than federally permitted release) into or onto navigable waters, adjoining shorelines or waters of contiguous zone, or which may affect natural resources of United States, in quantity equal to or greater than specified, fails immediately to notify National Response Center as soon as has knowledge, or submits in such notification any information knows to be false or misleading.	Class E Felony	3 years	\$250,000	\$500,000	1,2

Notes:

- 1: Provides for more severe penalties for subsequent violations
- 2: Provides for twice the amount gained or lost, whichever is greater
- 3: Provides enhanced penalties
- 4: Fine is greater if results in death

Compiled by OPLA from: Summaries of Federal and State Environmental
Criminal Enforcement Statutes. National Association of Attorneys General (1991)

**FEDERAL ENVIRONMENTAL CRIMES
AIR POLLUTION**

STATUTE	STATE OF MIND	PROHIBITED ACT	LEVEL OF VIOLATION	MAXIMUM IMPRISONMENT	MAXIMUM FINE		NOTES
					INDIVIDUAL	CORPORATION	
Clean Air Act (CAA)							
42 U.S.C. §7413(c)	Knowingly	Knowingly violates any requirement or prohibition of state implementation plan, any compliance or penalty order, any requirement or prohibition regarding new source performance standards, any NESHAP, section relating to inspections, section relating to solid waste combustion, section relating to preconstruction requirements, any emergency order, permit, or requirement or prohibition relating to acid deposition control or stratospheric ozone control, or any requirement of any rule, order, waiver or permit or for payment of fee (other than for mobile source) to United States.	Class D Felony	5 years	\$250,000	\$500,000	1,2
42 U.S.C. §7413(c)	Knowingly	Makes any false material statement, representation, or certification in, or omits material information from, or alters, conceals or fails to file or maintain any document.	Class E Felony	2 years	\$250,000	\$500,000	1,2
42 U.S.C. §7413(c)	Knowingly	Fails to notify or report as required.	Class E Felony	2 years	\$250,000	\$500,000	1,2
42 U.S.C. §7413(c)	Knowingly	Falsifies, tampers with, renders inaccurate or fails to install any monitoring device or method.	Class E Felony	2 years	\$250,000	\$500,000	1,2
42 U.S.C. §7413(c)	Knowingly	Knowingly fails to pay fee owed to United States.	Class A Misdemeanor	1 year	\$100,000	\$200,000	1,2
42 U.S.C. §7413(c)	Negligently	Negligently releases into ambient air except in accordance with standard or permit any hazardous air pollutant or extremely hazardous substance, and at time negligently places another person in imminent danger of death or serious bodily injury.	Class A Misdemeanor	1 year	\$100,000	\$200,000	1,2
42 U.S.C. §7413(c)	Knowingly	If done knowingly and knows at time that places another person in imminent danger of death or serious bodily injury.	Class C Felony	15 years	\$250,000	\$1,000,000	1,2,3

Notes:

- 1: Provides for more severe penalties for subsequent violations
- 2: Provides for twice the amount gained or lost, whichever is greater
- 3: Provides enhanced penalties

Compiled by OPLA from: Summaries of Federal and State Environmental Criminal Enforcement Statutes. National Association of Attorneys General (1991)

HAZARDOUS WASTE

Figure D-2

State	Statutory Reference	Level of Violation	Maximum Imprisonment	Maximum Fine		Notes
				Individual	Corporation	
Alabama	22-30-19(e)		10 years	\$50,000/Day	\$50,000/Day	1
Alaska	46.03.790	Class A Misdemeanor	1 year	\$5,000	\$200,000	2
Arizona	49-925	Class 3 Felony	10 years	\$150,000	\$1,000,000	
Arkansas	8-7-204	Felony	20 years	\$250,000/Day	\$250,000/Day	
California	25189.6	Public Offense	3, 6, or 9 years	\$250,000/Day	\$250,000/Day	
Colorado	18-13-112	Class 4 Felony	8 years	\$500,000	\$500,000	
Connecticut	22a-131a		5 years	\$250,000	1,000,000	3
Delaware	6309		1 year	\$25,000/Day	\$25,000/Day	1
Florida	895.01.08	1st Degree Felony	30 years	\$10,000	\$10,000	3,4
Georgia	12-8-82		15 years	\$250,000	\$250,000	3
Hawaii	128D		3 years	\$50,000/Day	\$50,000/Day	1
Idaho	49-2211	Misdemeanor	1 year	\$10,000/Day	\$10,000/Day	1
Illinois	111 1/2-1044(b)	Class 2 Felony	7 years	\$500,000/Day	\$500,000/Day	
Indiana	13-7-13-3	Class D Felony	2 years	\$25,000	\$25,000	1
Iowa	716B.2	Agg. Misdemeanor	2 years	\$25,000/Day	\$25,000/Day	1
Kansas	65-3441	Class C Felony	10 to 20 years	\$15,000	\$15,000	3
Kentucky	224.994(6)	Felony	5 years	\$25,000/Day	\$25,000/Day	
Louisiana	30:2183(G)		15 years	\$250,000/Day	\$250,000/Day	
Maine	1319-T	Class C Crime	5 years	\$50,000/Day	\$50,000/Day	
Maryland	7-265	Felony	5 years	\$100,000/Day	\$100,000/Day	
Massachusetts	Ch. 21C.10		20 years	\$100,000/Day	\$100,000/Day	
Michigan	323.10	Felony	5 years	\$1,000,000	\$1,000,000	3
Minnesota	609.671 Subd. 3	Felony	10 years	\$100,000	\$1,000,000	
Mississippi	17-17-29(5)	Misdemeanor	1 year	\$25,000/Day	\$25,000/Day	
Missouri	260.379.3	Class D Felony	5 years	\$1,000/Day	\$1,000/Day	1
Montana	75-10-418		3 years	\$25,000/Day	\$25,000/Day	1
Nebraska	81-1508(1)(g)	Felony	6 months	\$10,000/Day	\$10,000/Day	
Nevada	459.600		1 year	\$25,000/Day	\$25,000/Day	1
New Hampshire	147-A:16	Class B Felony	7 years	\$50,000/Day	\$50,000/Day	
New Jersey	2C:17-2	2nd Degree Crime	10 years	\$100,000	\$300,000	2
New Mexico	74-1-11	2nd Degree Felony	9 years	\$100,000	\$250,000	
New York	ECL 71-2714	Class C Felony	15 years	\$200,000	\$200,000	2,3
North Carolina	130A-26.1	Class H Felony	10 years	\$250,000/Day	\$250,000/Day	
North Dakota	23-20.3-09		2 years	\$50,000/Day	\$50,000/Day	
Ohio	3734.02	Felony	4 years	\$25,000/Day	\$25,000/Day	1
Oklahoma	63.1-2011	Misdemeanor	6 months	\$10,000/Day	\$10,000/Day	
Oregon	466.995		1 year	\$10,000/Day	\$10,000/Day	
Pennsylvania	35.6018.606	1st Degree Felony	20 years	\$500,000/Day	\$500,000/Day	
Rhode Island	23-19.1-18	Felony	5 years	\$10,000/Day	\$10,000/Day	
South Carolina	44-56-130	Misdemeanor	1 year	\$25,000/Day	\$25,000/Day	1
South Dakota	34A-11-21	Class 4 Felony	10 years	\$10,000	\$10,000	
Tennessee	68-46-114	Class C Felony	15 years	\$10,000	\$10,000	
Texas	361.222	Offense	30 years	\$500,000	\$1,500,000	3
Utah	26-14-13	Felony	15 years	\$250,000	\$1,000,000	
Vermont	10.6612		5 years	\$250,000	\$250,000	
Virginia	10.1-1455	Felony	15 years	\$250,000	\$1,000,000	1
Washington	70.015.085	Class B Felony	10 years	\$20,000	\$20,000	3
West Virginia	20-5E-15	Felony	4 years	\$250,000	\$250,000	3
Wisconsin	144.74(2)		5 years	\$100,000	\$200,000/Day	1
Wyoming	35-11-901		1 year	\$25,000/Day	\$25,000/Day	1

Notes:

- 1: Provides more severe penalties for subsequent violations.
- 2: Provides for twice the amount gained or lost, whichever is greater
- 3: Provides enhanced penalties.
- 4: Up to 3 times gross value gained or loss, whichever is greater (plus court costs/costs of investigation and prosecution)

WATER POLLUTION

State	Statutory Reference	Level of Violation	Maximum Imprisonment	Maximum Fine		Notes
				Individual	Corporation	
Alabama	22-22-14		1 Year	\$25,000/Day	\$25,000/Day	1
Alaska	46.03.742	Class C Felony	5 Years	\$50,000	\$500,000	2
Arizona	49-263	Class 2 Felony	14 Years	\$150,000	\$1,000,000	
Arkansas	8-4-103(a)	Felony	20 years	\$250,000/Day	250,000/Day	2
California	13387		15 years	\$250,000	\$1,000,000	1,3
Colorado	25-1-114	Class 3 Felony	8 years	\$750,000	\$750,000	
Connecticut	22a-376(c)	Class D Felony	5 years	\$10,000	\$10,000	
Delaware	6807(c)		2 years	\$5,000	\$5,000	
Florida	403.161	3rd Degree Felony	5 years	\$50,000/Day	\$50,000/Day	3
Georgia	12-5-53	Felony	15 years	\$250,000	\$1,000,000	3
Hawaii	342D-34		15 years	\$250,000	\$1,000,000	3
Idaho	39-117	Misdemeanor		\$10,000	\$10,000	5
Illinois	111 1/2-1044(j)	Class 4 Felony	3 years	\$25,000/Day	\$25,000/Day	1
Indiana	13-7-13-3	Class D Felony	2 years	\$25,000	\$25,000	1
Iowa	455B.191	Agg. Misdemeanor	2 years	\$50,000/Day	\$50,000/Day	1
Kansas	65-169	Misdemeanor		\$500/Day	\$500/Day	
Kentucky	224.994(4)	Class D Felony	5 years	\$25,000/Day	\$25,000/Day	
Louisiana	30:2025(F)	Felony	10 years	\$1,000,000	\$1,000,000	3
Maine	349	Class E Crime	6 months	\$25,000/Day	\$25,000/Day	
Maryland	4-417	Misdemeanor	1 year	\$25,000/Day	\$25,000/Day	1
Massachusetts	Ch. 111.170		2 years	\$25,000/Day	\$25,000/Day	
Michigan	323.10	Felony	5 years	\$1,000,000	\$1,000,000	3
Minnesota	609.671 Subd. 8	Felony	3 years	\$50,000	\$50,000	
Mississippi	49-27-57	Misdemeanor	30 days	\$1,000	\$1,000	4
Missouri	644.076		1 year	\$25,000/Day	\$25,000/Day	1
Montana	75-5-632	Offense	1 year	\$25,000/Day	\$25,000/Day	1
Nebraska	81-1508(1)(b)	Misdemeanor	6 months	\$5,000/Day	\$5,000/Day	
Nevada	503.430	Misdemeanor	6 months	\$1,000/Day	\$1,000/Day	1
New Hampshire	485.58	Misdemeanor	1 year	\$25,000	\$50,000	
New Jersey	58:10A-10(f)	1st Degree Crime	20 years	\$250,000	\$1,000,000	
New Mexico	74-6-5(o)	Misdemeanor	1 year	\$10,000	\$10,000	
New York	ECC 71-1933(5)	Class C Felony	15 years	\$250,000	\$500,000	3
North Carolina	143-215.6B	Class H Felony	10 years	\$250,000/Day	\$250,000/Day	1,3
North Dakota	61-28-08		1 year	\$25,000/Day	\$25,000/Day	1
Ohio	6111.99(A)		1 year	\$25,000	\$25,000	
Oklahoma	21.1194	Misdemeanor	1 year	\$500	\$500	
Oregon	468.990	Misdemeanor	1 year	\$25,000/Day	\$25,000/Day	
Pennsylvania	35.691.602	3rd Deg. Misdemeanor	1 year	\$25,000/Day	\$25,000/Day	1,3
Rhode Island	46-12-14		5 years	\$25,000/Day	\$25,000/Day	
South Carolina	48-1-320	Misdemeanor	2 years	\$25,000/Day	\$25,000/Day	
South Dakota	34A-2-21	Class 1 Misdemeanor	1 year	\$10,000	\$10,000	
Tennessee	69-3-115	Class E Felony	6 years	\$25,000	\$25,000	
Texas	26.2125	Offense	20 years	\$500,000/Day	\$1,000,000/Day	
Utah	26-11-16		6 months	\$10,000	\$10,000	
Vermont	10.1275		6 months	\$25,000/Day	\$25,000/Day	
Virginia	62.1-44.32	Felony	15 years	\$250,000	\$1,000,000	1,3
Washington	Ch. 200, Sec. 604	Class C Felony	5 years	\$10,000	\$10,000	
West Virginia	20-5A-19	Misdemeanor	1 year	\$25,000/day	\$25,000/day	
Wisconsin	147.21		6 months	\$25,000/Day	\$25,000/Day	1
Wyoming	35-11-901		1 year	\$25,000/Day	\$25,000/Day	1

Notes:

- 1: Provides more severe penalties for subsequent violations.
- 2: Provides for twice the amount gained or lost, whichever is greater
- 3: Provides enhanced penalties.
- 4: Up to 3 times gross value gained or loss, whichever is greater (plus court costs/costs of investigation and prosecution)
- 5: Or \$1,000/day (whichever is greater)

AIR POLLUTION

State	Statutory Reference	Level of Violation	Maximum Imprisonment	Maximum Fine		Notes
				Individual	Corporation	
Alabama	22-28-22(a)		1 Year			
Alaska	46.03.790	Class A Misdemeanor	1 Year	\$5,000	\$200,000	2
Arizona	49-502	Class 1 Misdemeanor	6 months	\$2,500/Day	\$20,000/Day	
Arkansas	8-4-103(a)	Felony	20 years	\$250,000/Day	\$250,000/Day	2
California	42400.2	Misdemeanor	1 year	\$25,000	\$25,000	
Colorado	18-13-110	Class 2 Petty Offense		\$25	\$25	1
Connecticut	22a-175		1 year	\$25,000/Day	\$25,000/Day	1
Delaware	6028		6 months	\$25,000	\$25,000	
Florida	403.161	3rd Degree Felony	5 years	\$50,000/Day	\$50,000/Day	3
Georgia	None listed					
Hawaii	None listed					
Idaho	39-117	Misdemeanor		\$10,000	\$10,000	
Illinois	None listed					
Indiana	13-7-13-3	Class D Felony	2 years	\$25,000	\$25,000	1
Iowa	None listed					
Kansas	None listed					
Kentucky	224.994(4)	Class D Felony	5 years	\$25,000/Day	\$25,000/Day	
Louisiana	30:2025(F)	Felony	10 years	\$1,000,000	\$1,000,000	3
Maine	349	Class E Crime	6 months	\$25,000/Day	\$25,000/Day	
Maryland	2-609.1	Misdemeanor	1 year	\$25,000	\$25,000	1
Massachusetts	Ch. 111 Sec. 142A	Misdemeanor	1 year	\$25,000/Day	\$25,000/Day	
Michigan	336.26	Misdemeanor		\$10,000&\$2,000/day	\$10,000&\$2,000/day	
Minnesota	609.671, Subd. 12	Felony	3 years	\$50,000/Day	\$50,000/Day	
Mississippi	49-17-43(e)			\$25,000/Day	\$25,000/Day	
Missouri	None listed					
Montana	75-2-412	Offense		\$1,000/Day	\$1,000/Day	
Nebraska	81-1508(1)(f)	Misdemeanor		\$5,000/Day	\$5,000/Day	
Nevada	445.705	Misdemeanor	6 months	\$1,000	\$1,000	
New Hampshire	125-C:17	Misdemeanor	1 year	\$1,000	\$50,000	
New Jersey	26:2C-19(f)	3rd Degree Crime	5 years	\$7,500	\$22,500	3
New Mexico	74-2-14	4th Degree Felony	18 months	\$5,000	\$5,000	
New York	ECL 71-2113(2)	Misdemeanor	1 year	\$25,000/Day	\$25,000/Day	1
North Carolina	143-215.114B	Class H Felony	10 years	\$250,000/Day	\$250,000/Day	1,3
North Dakota	23-25-10		1 year	\$25,000/Day	\$25,000/Day	1
Ohio	3704.05		1 year	\$25,000/Day	\$25,000/Day	
Oklahoma	63.1-1802	Misdemeanor	1 year	\$500/Day	\$500/Day	
Oregon	468.995(1)	Class A Misdemeanor	1 year	\$2,500	\$2,500	
Pennsylvania	35.4009	Summary Offense	30 days	\$1,000/Day	\$1,000/Day	1
Rhode Island	23-23-14		30 days	\$500/Day	\$500/Day	
South Carolina	48-1-320	Misdemeanor	2 years	\$25,000/Day	\$25,000/Day	
South Dakota	None listed					
Tennessee	68-25-112(a)	Misdemeanor		\$1,000/Day	\$1,000/Day	
Texas	382.091	Offense	5 year	\$150,000/Day	\$300,000	1
Utah	26-13-18	Class A Misdemeanor	1 year	\$2,500	\$10,000	
Vermont	10.568			\$2,000	\$2,000	
Virginia	10.1-1320	Misdemeanor		\$1,000/Day	\$1,000/Day	
Washington	70.94.430	Gross Misdemeanor	1 year	\$1,000	\$1,000	3
West Virginia	None listed					
Wisconsin	144.426(2)		6 months	\$25,000/Day	\$25,000/Day	1
Wyoming	35-11-901		1 year	\$25,000/Day	\$25,000/Day	1

Notes:

- 1: Provides more severe penalties for subsequent violations.
- 2: Provides for twice the amount gained or lost, whichever is greater
- 3: Provides enhanced penalties.

STATE MAXIMUM CRIMINAL PENALTIES FOR ENVIRONMENTAL CRIMES IN COMPARISON TO MAINE

	<u>Number of States Greater than Maine</u>	<u>Number of States Less than Maine</u>	<u>Number of States Equal to Maine</u>
Hazardous Waste			
Prison (ME= 5 years)	24	17	8
Individual Fines (ME= \$50,000/day)	8 fine per day 15 flat fine 23 total	14 fine per day 8 flat fine 22 total	4 fine per day 0 flat fine 4 total
Corporate Fines (ME= \$50,000/day)	8 fine per day 16 flat fine 24 total	14 fine per day 7 flat fine 21 total	4 fine per day 0 flat fine 4 total
Water Pollution			
Prison (ME= 6 months)	41	3	5
Individual Fines (ME= \$25,000/day)	4 fine per day 13 flat fine 17 total	3 fine per day 9 flat fine 12 total	16 fine per day 4 flat fine 20 total
Corporate Fines (ME= \$25,000/day)	4 fine per day 13 flat fine 17 total	3 fine per day 10 flat fine 13 total	16 fine per day 3 flat fine 19 total
Air Pollution			
Prison (ME= 6 months)	26	11*	4
Individual Fines (ME= \$25,000/day)	5 fine per day 1 flat fine 6 total	9 fine per day 12 flat fine 21 total	10 fine per day 4 flat fine 14 total
Corporate Fines (ME= \$25,000/day)	3 fine per day 5 flat fine 8 total	8 fine per day 11 flat fine 19 total	10 fine per day 4 flat fine 14 total

* 8 states list no air pollution crime.

Compiled by OPLA from Summaries of the Federal and State Environmental Criminal Enforcement Statutes , The National Association of Attorney's General (1991)

Criminal and Civil Environmental Enforcement Actions Resolved in Maine
Between July 1, 1988 and June 30, 1992

(Includes Federal Actions, Joint State/Federal Actions and State Actions)

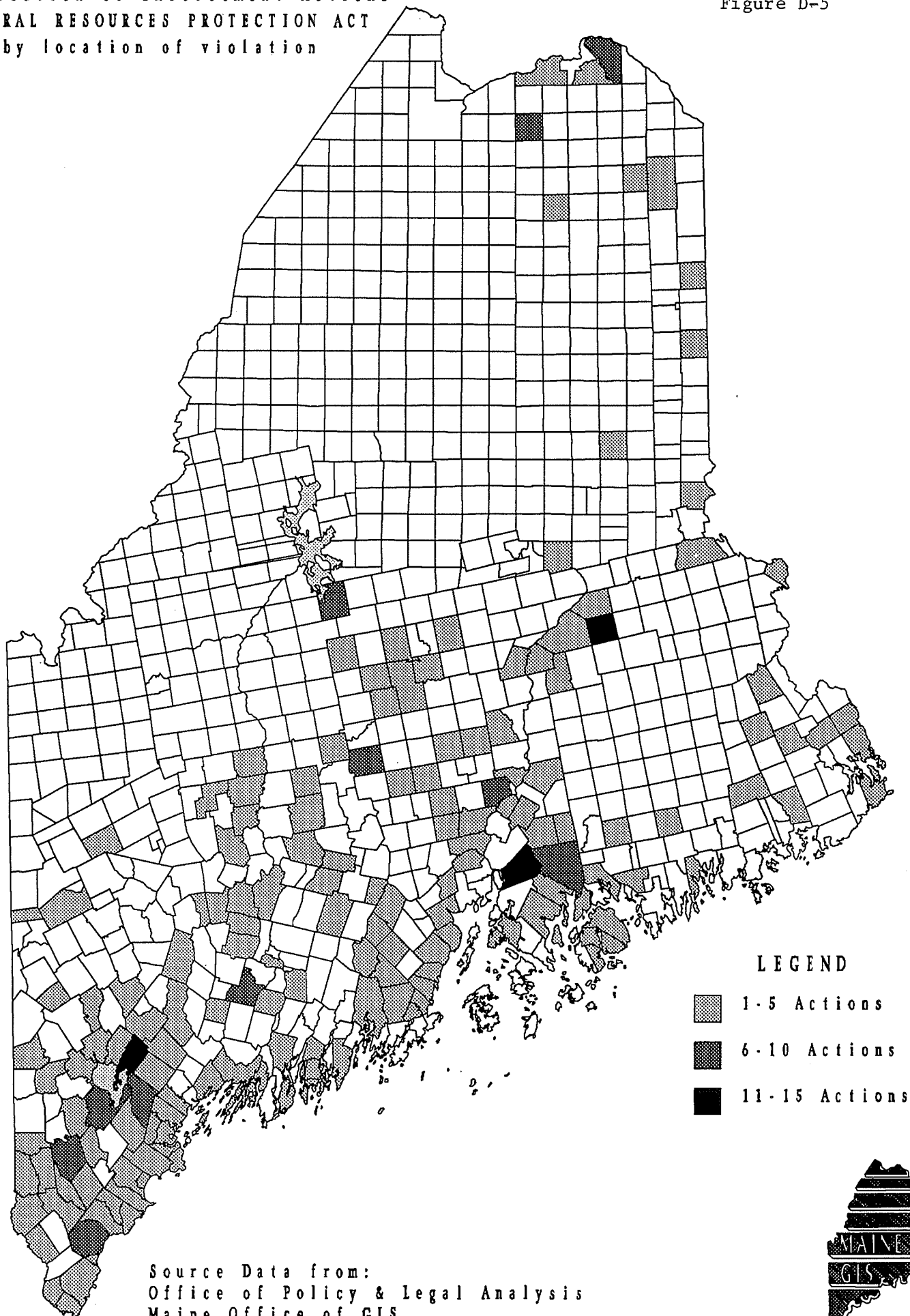
	Federal Actions	Joint State/Federal Actions	STATE ACTIONS		Row Totals
			Under DEP Laws	Under LURC Laws (A)	
Resolved Criminal Actions					
<i>Number of Actions</i>	(B) 1	-	(C) 2	-	3
<i>Mean Fine</i>	-	-	\$13,500	-	\$742,667
<i>Total Fines</i>	\$2,201,000	-	\$27,000	-	\$2,228,000
<i>Incarcerations</i>					
<i>Persons Jailed</i>	-	-	1	-	1
<i>Time Served</i>	-	-	21 Days	-	21 Days
Resolved Civil Actions					
<i>Number of Actions</i>	(D) 1	(E) 3	679	115	798
<i>Mean Fine</i>	-	\$482,667	\$15,197	\$2,209	\$15,089
<i>Total Fines</i>	\$20,000	\$1,448,000	\$10,318,652	\$254,050	\$12,040,702
Column Totals					
<i>Number of Actions</i>	2	3	681	115	801
<i>Mean Fine</i>	\$1,110,500	\$482,667	\$15,192	\$2,209	\$17,814
<i>Total Fines</i>	\$2,221,000	\$1,448,000	\$10,345,652	\$254,050	\$14,268,702

- Notes:**
- A. Does not include LURC actions resolved between 7/1/88 and 12/31/88.
 - B. United States v. International Paper Company, No. 91-00051-B (D. Me. July 3, 1991).
 - C. State v. Koslosky, No. 90-000346 (Me. Dist. Ct. 6, Bath-Bruns., July 12, 1990) and State v. Druce, No. CR-91-18 (Me. Super. Ct., Lin. Cty., Jan. 22, 1992).
(In State v. Koslosky, defendant received a six month suspended sentence. In State v. Druce defendant received a six month sentence, all but 21 days suspended.)
 - D. The only federal civil action for which documentation could be obtained within the time frame of this study was United States v. City of Bangor & Maine, No. 88-0048-B, (D. Me. June 28, 1991).
(This case could arguably be listed as a "joint action", rather than a Federal action, since the State ended up as a plaintiff. It's included here as a Federal action, however, since it began as an "over-filing" by the EPA that named the State as a defendant.)
Several other actions may have been taken under the Clean Water Act or Section 10 of the federal Rivers and Harbors Act, but documentation was insufficient to include those actions in this table.
 - E. Joint actions resolved against International Paper Company (8/89), J.M. Huber Corporation (5/91) and City of South Portland (1/92).

Sources: Compiled by OPLA from information provided by the Office of the Attorney General, the Department of Environmental Protection, the Maine Land Use Regulation Commission and from documents obtained from federal and state courts in Maine.

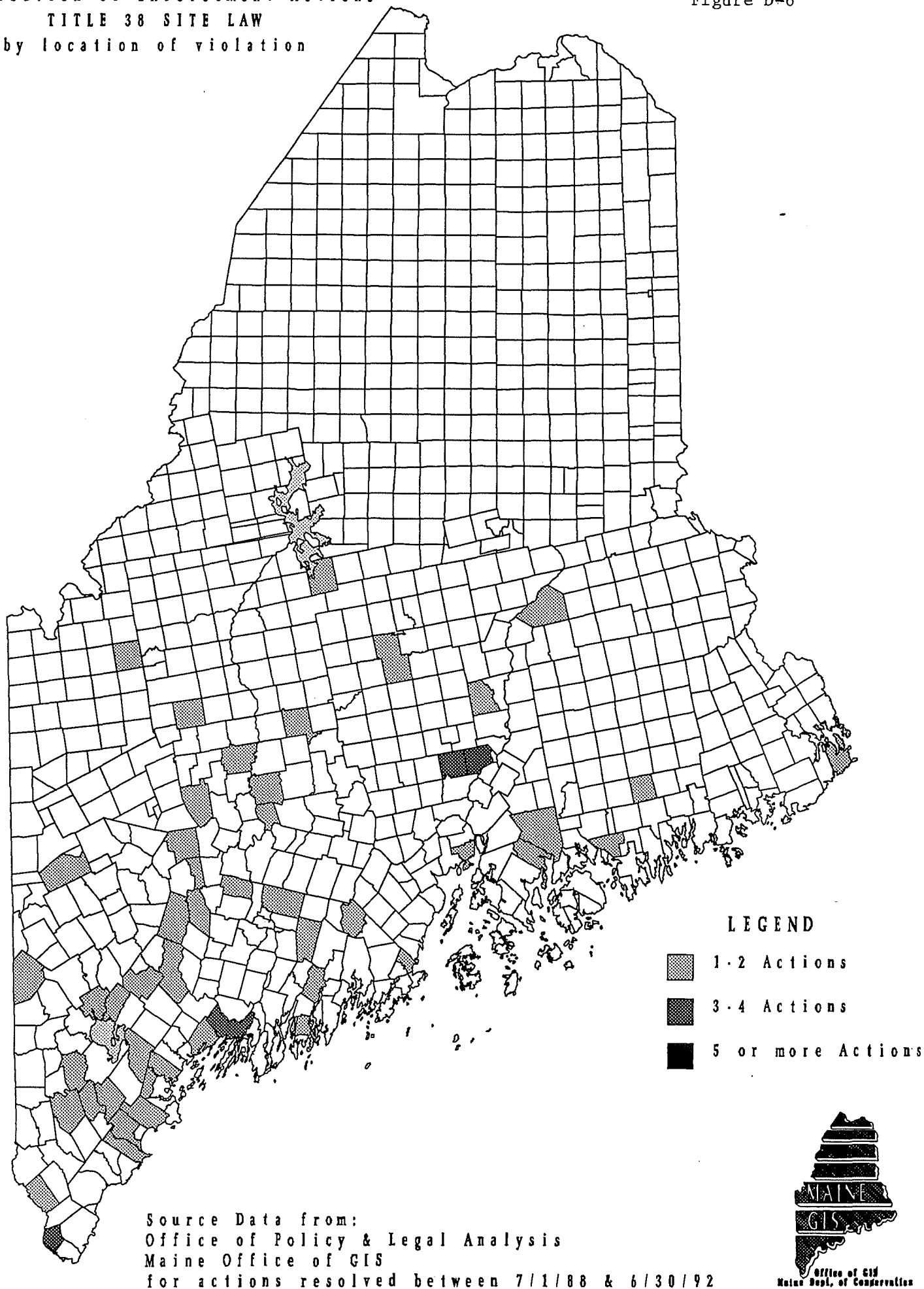
distribution of Enforcement Actions
NATURAL RESOURCES PROTECTION ACT
by location of violation

Figure D-5



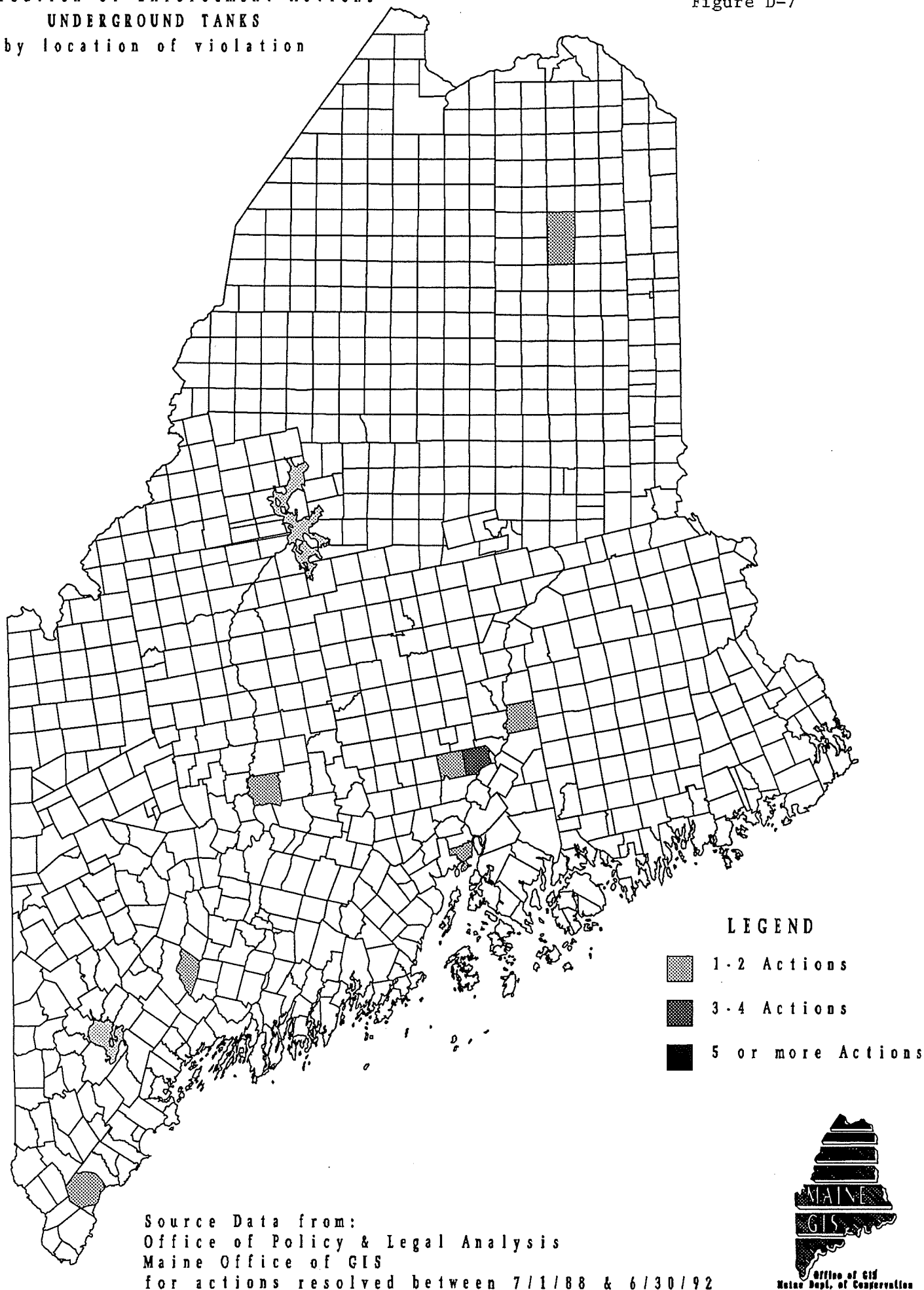
Distribution of Enforcement Actions
TITLE 38 SITE LAW
by location of violation

Figure D-6



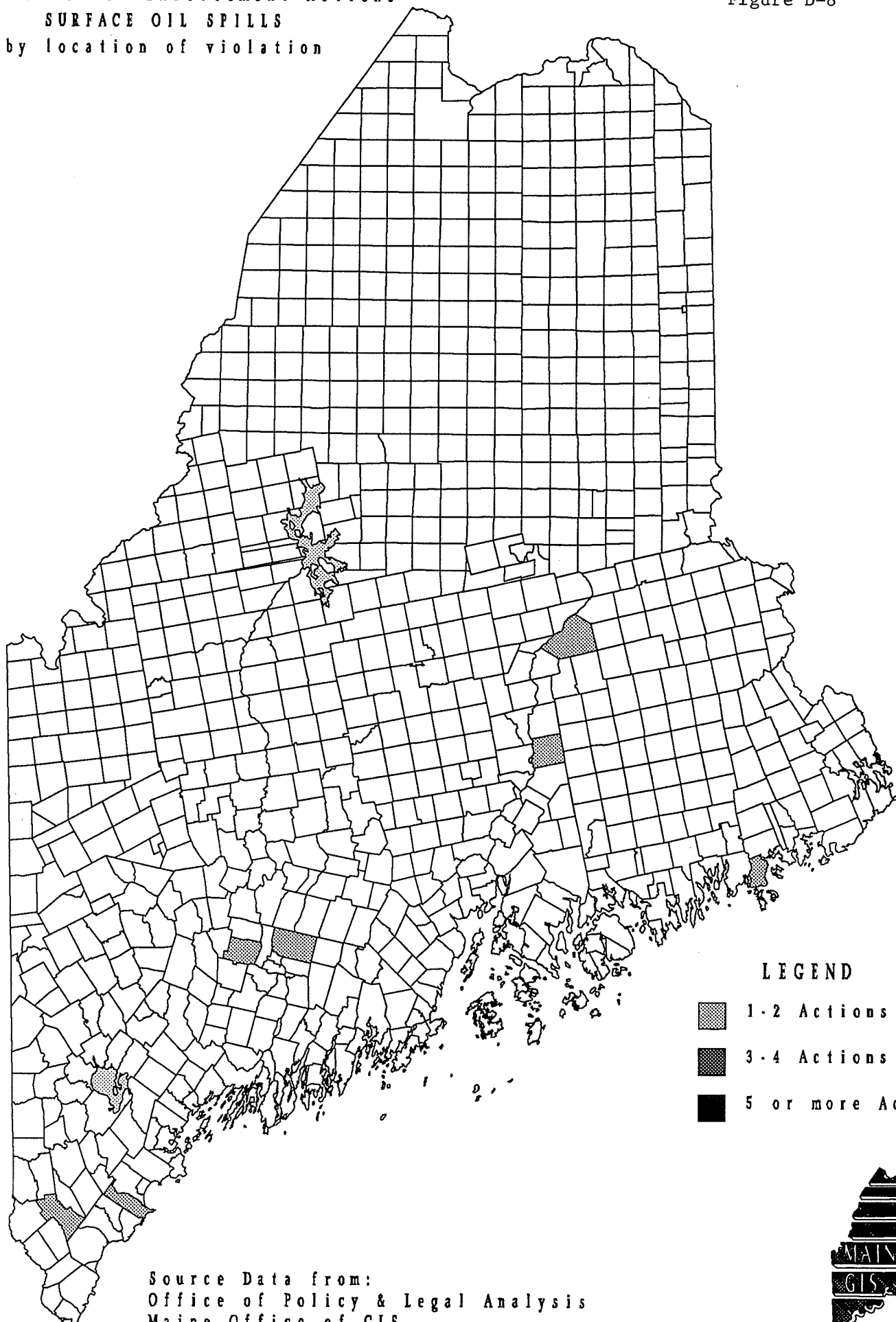
Distribution of Enforcement Actions
UNDERGROUND TANKS
by location of violation

Figure D-7



Distribution of Enforcement Actions
SURFACE OIL SPILLS
by location of violation

Figure D-8



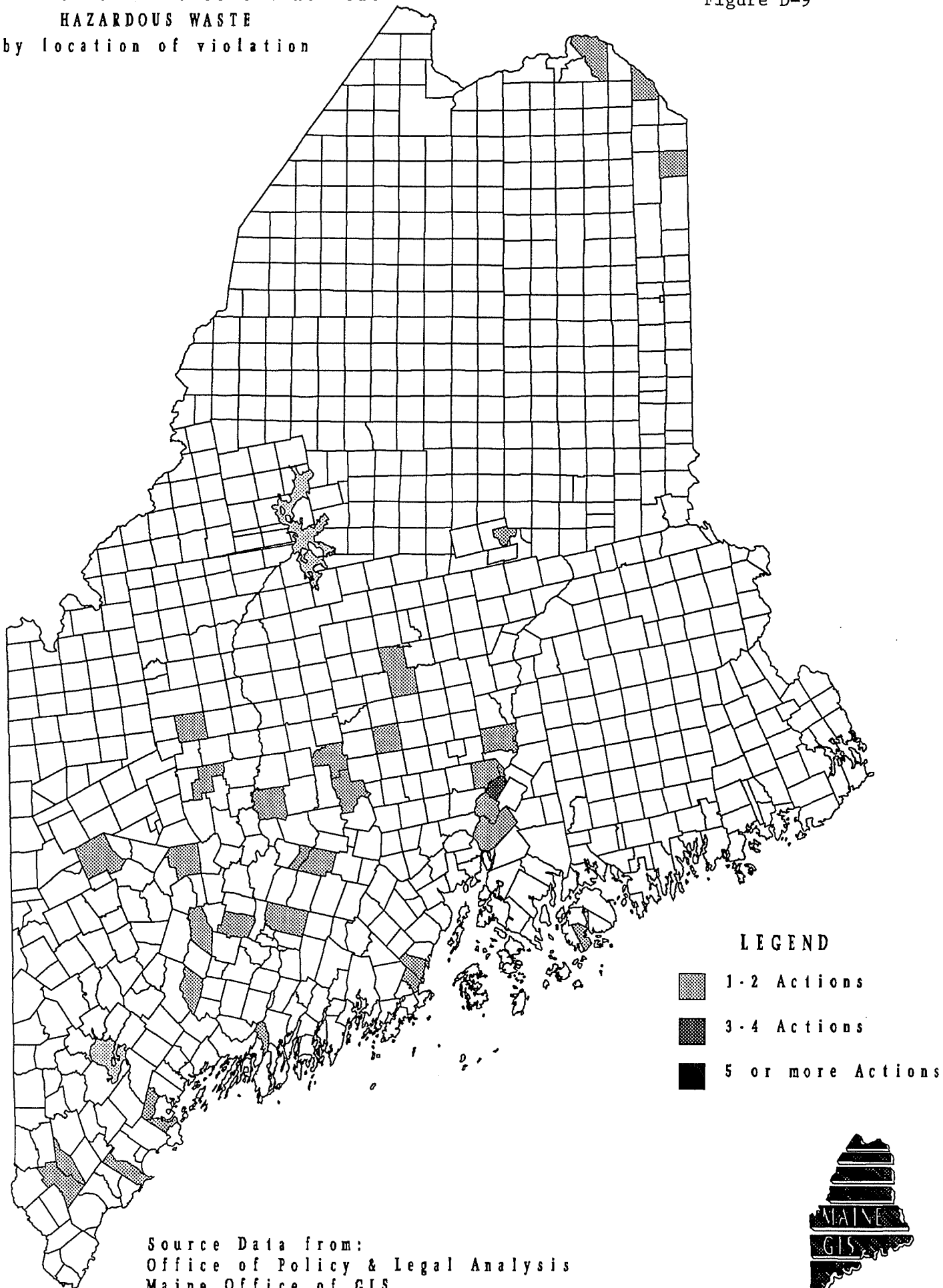
LEGEND

- 1-2 Actions
- 3-4 Actions
- 5 or more Actions



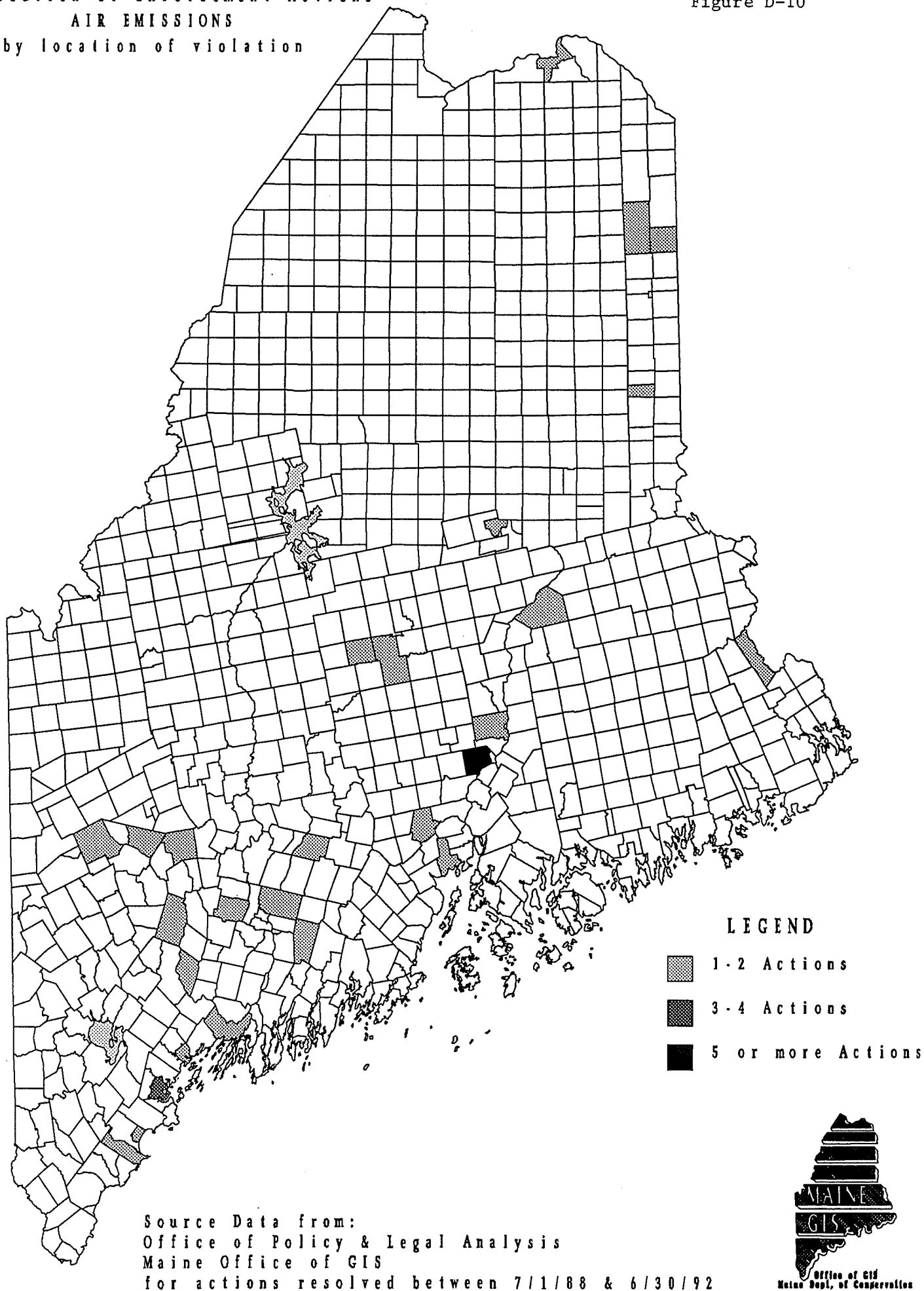
Distribution of Enforcement Actions
HAZARDOUS WASTE
by location of violation

Figure D-9



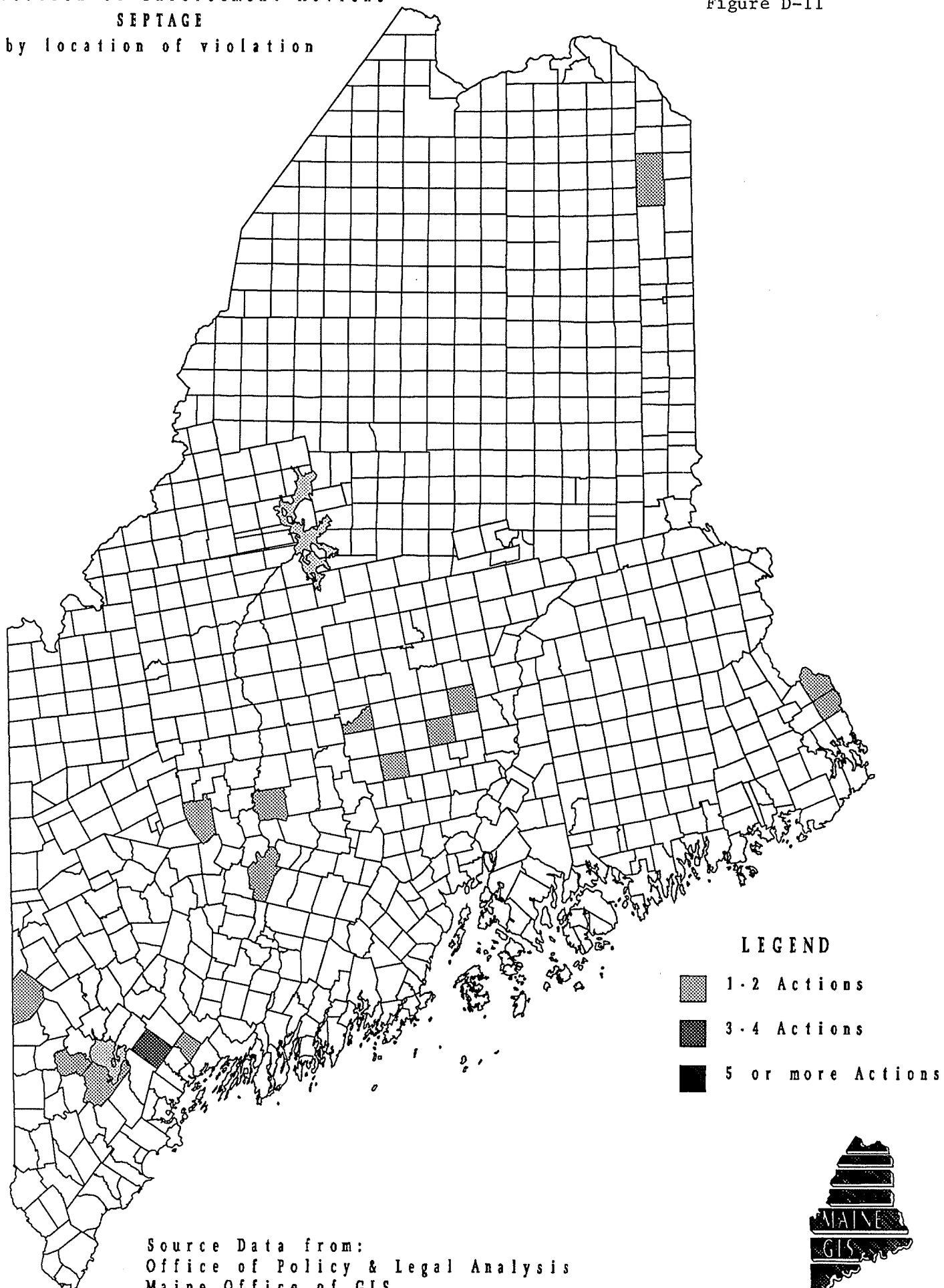
Distribution of Enforcement Actions
AIR EMISSIONS
by location of violation

Figure D-10



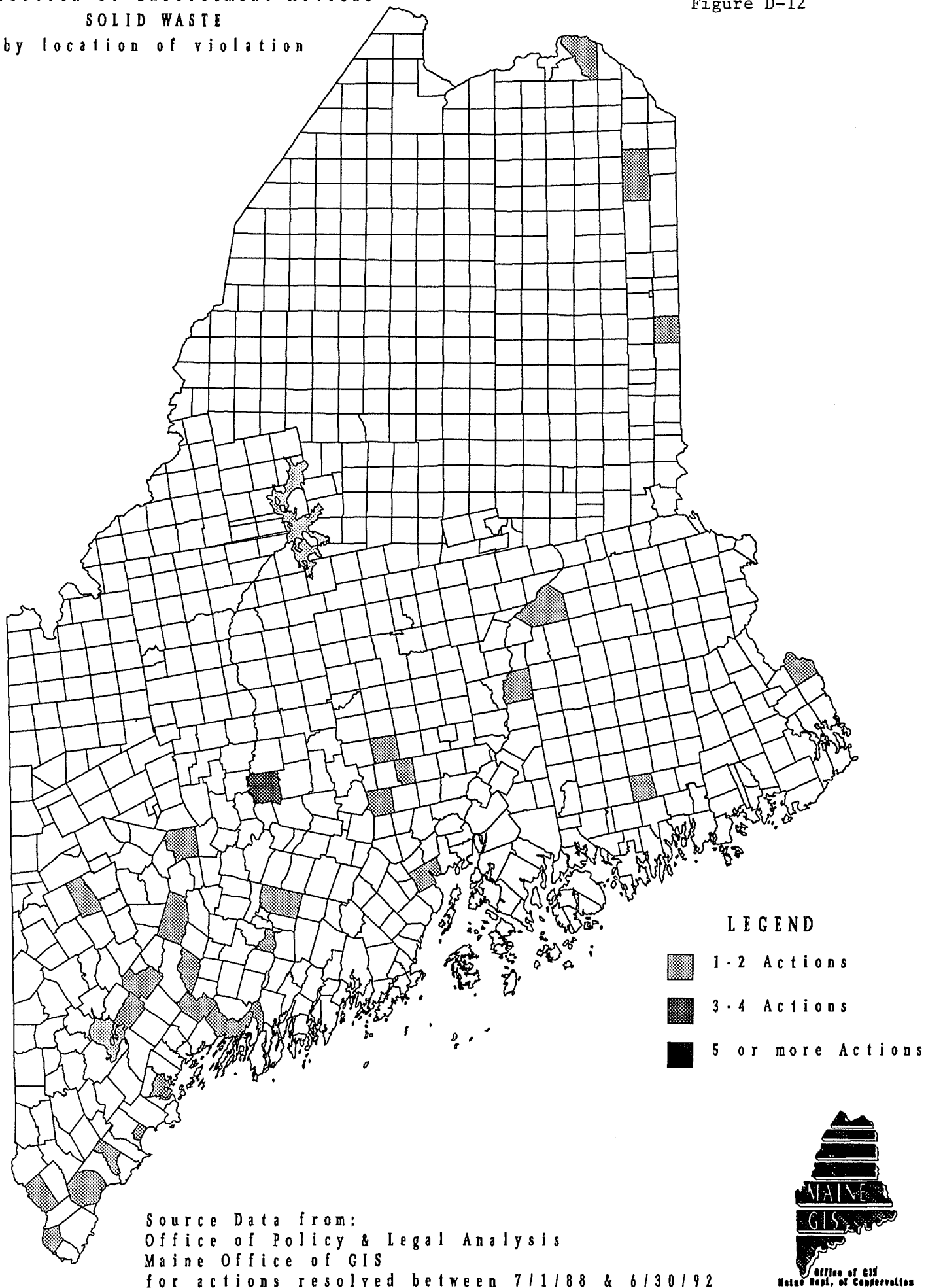
Distribution of Enforcement Actions
SEPTAGE
by location of violation

Figure D-11



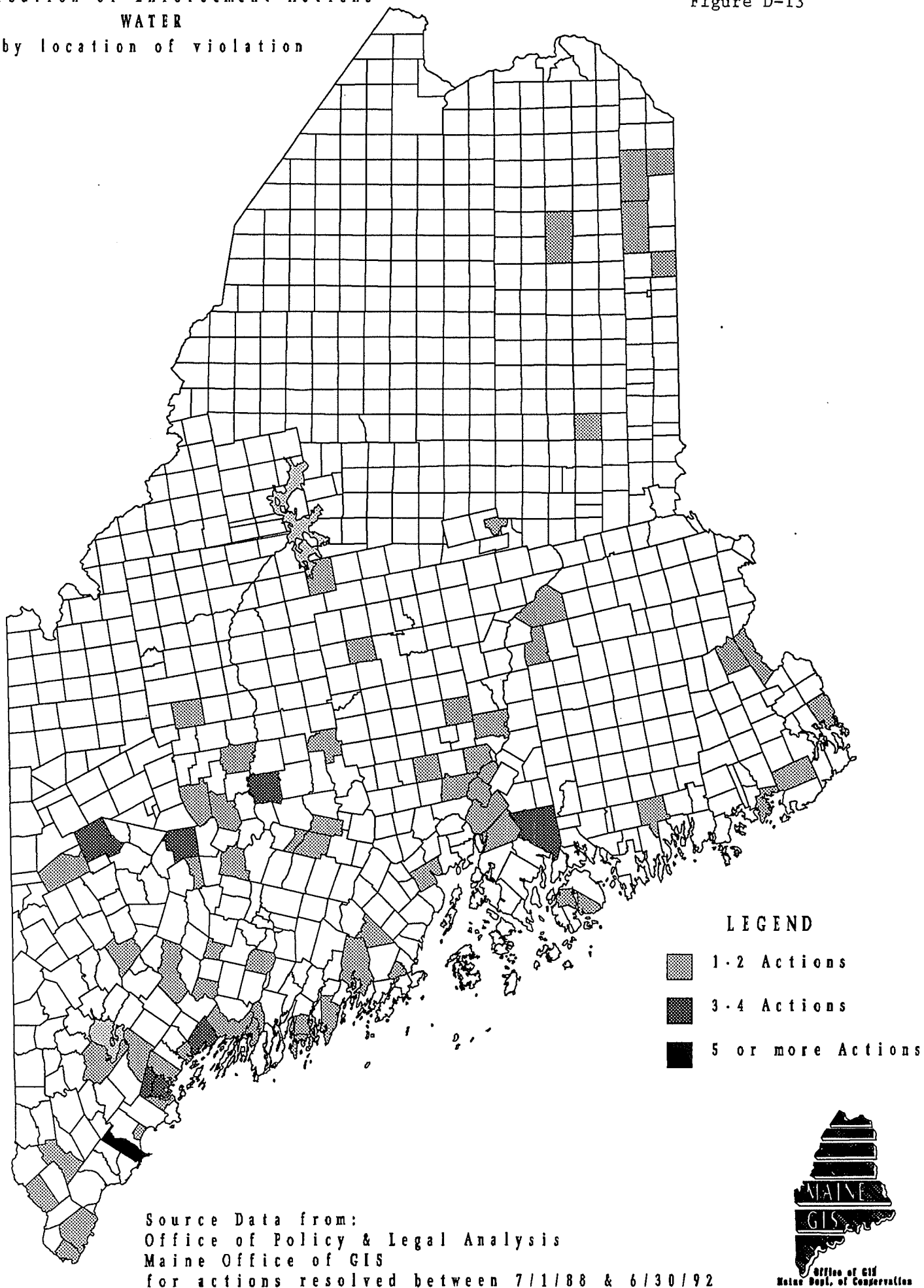
Distribution of Enforcement Actions
SOLID WASTE
by location of violation

Figure D-12



Distribution of Enforcement Actions
WATER
by location of violation

Figure D-13

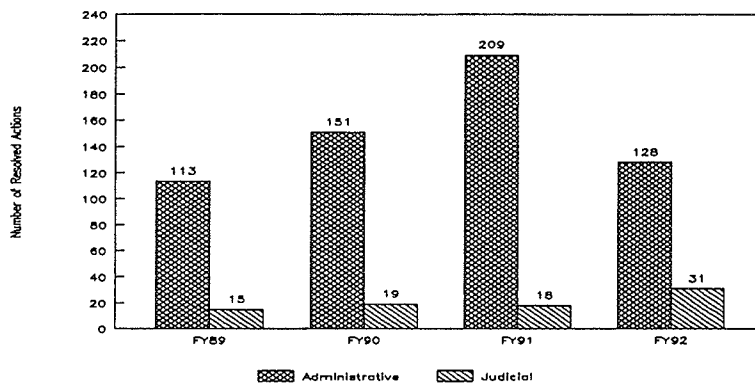


Summary of Enforcement Actions Taken Under Laws
Administered by the Department of Environmental Protection
Between July 1, 1988 and June 30, 1992

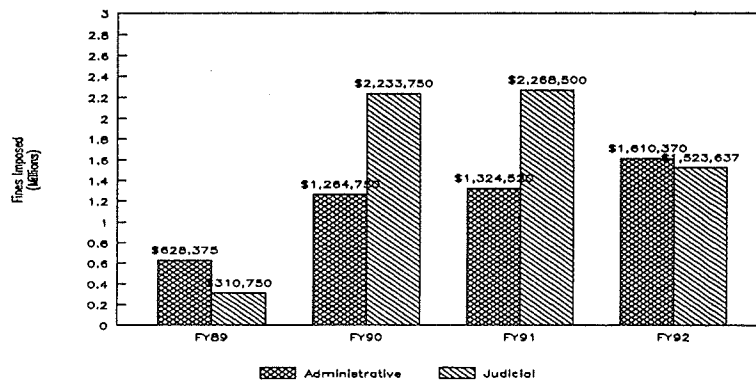
	<u>Number of Actions</u>	<u>Percent of all Actions</u>
Administrative Actions		
<i>Consent Agreements</i>	601	87.9%
Judicial Actions		
<i>Rule 80K Judgements</i>	38	5.6%
<i>Consent Decrees</i>	43	6.3%
<i>Criminal Prosecutions</i>	<u>2</u>	<u>0.3%</u>
TOTAL ACTIONS	684	100.0%

Figure D-15

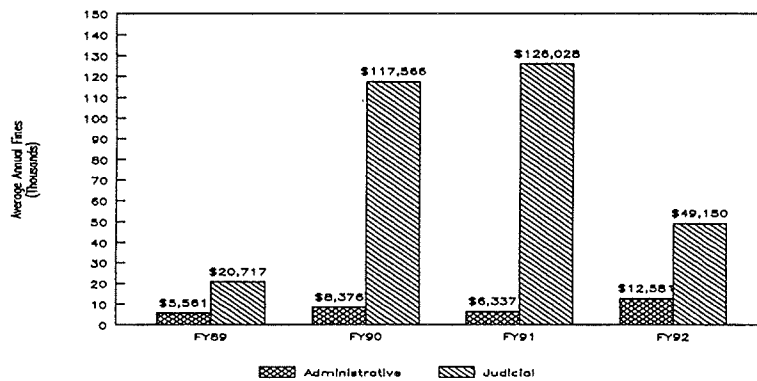
Number of Enforcement Actions Resolved per Fiscal Year



Total Fines Imposed per Fiscal Year



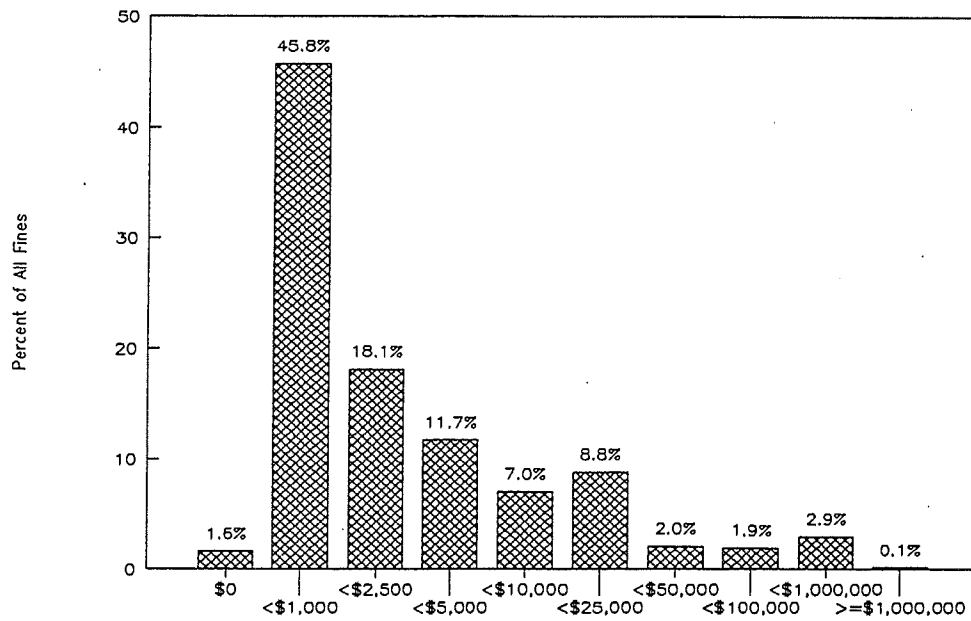
Average Fines Imposed per Fiscal year



Notes: Totals for resolved enforcement actions and fines presented here differ slightly from those reported by the DEP in its annual enforcements reports for FY89, FY90 and FY91.

Source: Derived by OPLA from DEP monthly enforcement reports.

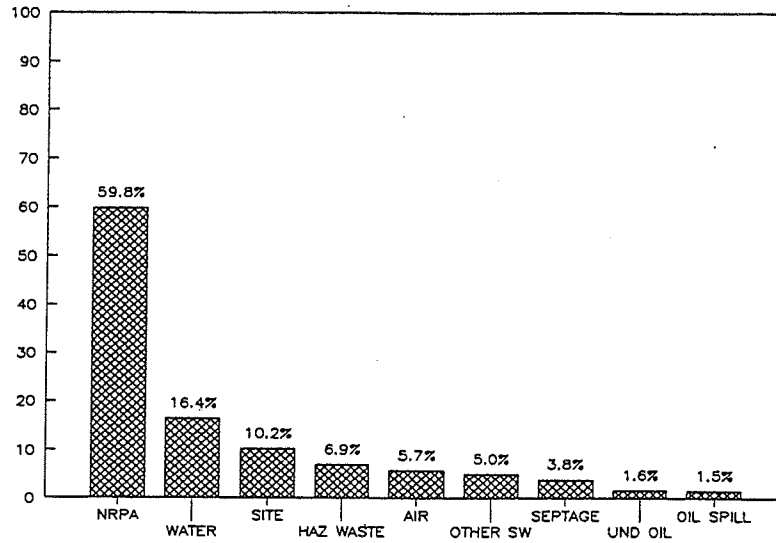
Frequency Distribution of Fines Imposed by Maine
For Violations of Environmental Laws, by Size of Fine Imposed.



Notes: Distribution of fines imposed between July 1, 1988 & June 30, 1992.

Sources: Derived by OPLA from DEP monthly enforcement reports.

Distribution of Types of Violations Cited in Enforcement Actions
 (Actions to Enforce Laws Administered by the D.E.P Resolved Between 7/1/88 & 6/30/92)



Notes: Percentages for all types of actions total more than 100% due to enforcement actions that included multiple types of violations (multi-media actions).

Sources: Derived by OPLA from data provided by the Department of Environmental Protection.

Comparison of Fines Between Actions with Only One Type of Violation
And Actions with Multiple Types of Violations

	Actions With Only One Type of Violation	Actions With Multiple Types of Violations	All Actions
Number of Actions	626	58	684
Mean Fine	\$9,584	\$89,057	\$16,323
Median Fine	\$1,000	\$6,000	\$1,500
Total Fines	\$5,999,365	\$5,165,287	\$11,164,652

Sources: Compiled by OPLA from data provided by the Department of Environmental Protection.

Administrative and Judicial Fines for Actions Involving Only One Type of Violation

Type of Violation	Administrative Enforcement Actions	Judicial Enforcement Actions	Total
NRPA			
Number of Actions	356	25	381
Mean Fine	\$1,133	\$952	\$1,121
Median Fine	\$750	\$650	\$750
Total Fines	\$403,175	\$23,800	\$426,975
Site Law			
Number of Actions	48	3	51
Mean Fine	\$7,283	\$11,000	\$7,502
Median Fine	\$5,000	\$5,000	\$5,000
Total Fines	\$349,594	\$33,000	\$382,594
Underground Tanks			
Number of Actions	6	4	10
Mean Fine	\$10,583	\$43,863	\$23,895
Median Fine	\$6,500	\$36,500	\$6,500
Total Fines	\$63,500	\$175,450	\$238,950
Surface Oil Spills			
Number of Actions	4	2	6
Mean Fine	\$11,000	\$12,000	\$11,333
Median Fine	\$10,500	-	\$12,000
Total Fines	\$44,000	\$24,000	\$68,000
Hazardous Wastes			
Number of Actions	37	3	40
Mean Fine	\$14,796	\$24,167	\$15,499
Median Fine	\$9,500	\$25,000	\$10,000
Total Fines	\$547,450	\$72,500	\$619,950
Air Emissions			
Number of Actions	24	3	27
Mean Fine	\$60,360	\$221,333	\$78,246
Median Fine	\$3,300	\$264,000	\$5,000
Total Fines	\$1,448,636	\$664,000	\$2,112,636
Septage			
Number of Actions	22	2	24
Mean Fine	\$1,687	\$2,750	\$1,775
Median Fine	\$1,000	-	\$1,000
Total Fines	\$37,110	\$5,500	\$42,610
Solid Waste			
Number of Actions	14	7	21
Mean Fine	\$5,150	\$17,707	\$9,336
Median Fine	\$2,000	\$5,000	\$2,000
Total Fines	\$72,100	\$123,950	\$196,050
Water			
Number of Actions	54	12	66
Mean Fine	\$16,225	\$86,288	\$28,964
Median Fine	\$6,050	\$35,300	\$9,850
Total Fines	\$876,150	\$1,035,450	\$1,911,600
Total (One Type of Violation)			
Number of Actions	565	61	626
Mean Fine	\$6,799	\$35,371	\$9,584
Median Fine	\$1,000	\$2,500	\$1,000
Total Fines	\$3,841,715	\$2,157,650	\$5,999,365

Sources: Compiled by OPLA from data provided by the Department of Environmental Protection

Summary of Enforcement Actions by Type of Violator

	Administrative Enforcement Actions	Judicial Enforcement Actions	Total
Individuals			
<i>Number of Actions</i>	312	43	355
<i>Mean Fine</i>	\$1,233	\$3,890	\$1,555
<i>Median Fine</i>	\$700	\$1,000	\$750
<i>Total Fines</i>	\$384,669	\$167,250	\$551,919
Business Entities			
<i>Number of Actions</i>	233	31	264
<i>Mean Fine</i>	\$16,040	\$190,369	\$36,510
<i>Median Fine</i>	\$3,550	\$50,000	\$5,000
<i>Total Fines</i>	\$3,737,296	\$5,901,437	\$9,638,733
Governmental Entities			
<i>Number of Actions</i>	42	6	48
<i>Mean Fine</i>	\$15,170	\$41,825	\$18,502
<i>Median Fine</i>	\$3,000	\$21,425	\$4,400
<i>Total Fines</i>	\$637,150	\$250,950	\$888,100
All other			
<i>Number of Actions</i>	14	3	17
<i>Mean Fine</i>	\$4,921	\$5,667	\$5,053
<i>Median Fine</i>	\$2,000	\$1,000	\$2,000
<i>Total Fines</i>	\$68,900	\$17,000	\$85,900
Total			
<i>Number of Actions</i>	601	83	684
<i>Mean Fine</i>	\$8,033	\$76,345	\$16,323
<i>Median Fine</i>	\$1,200	\$3,000	\$1,500
<i>Total Fines</i>	\$4,828,015	\$6,336,637	\$11,164,652

Notes: Enforcement actions were categorized as actions against individuals, business entities, governmental entities and "other" according to the following criteria. Actions that listed a municipal or quasi-municipal entity or any agency of state or federal government as a violator were designated as actions against a governmental entity. Actions that did not include any governmental agency but that identified all violator(s) as a corporation, a sole proprietorship or other form of business were designated as actions against business entities. Actions listing individuals, without any indication of business affiliation, were categorized as actions against individuals. Actions that clearly listed combinations of these categories were included in the "all other" category.

Source: Compiled by OPLA from monthly reports of the Department of Environmental Protection and review of consent agreements, consent decrees and other material filed or provided by the Attorney General's Office.

Summary of Enforcement Actions, by Residence of Violator

	Number of Administrative Actions	Number of Judicial Actions	Total
In-State Violators			
<i>Maine</i>	528	80	608
Out-of-State Violators			
<i>Arizona</i>	1	-	1
<i>California</i>	1	-	1
<i>Connecticut</i>	6	-	6
<i>Florida</i>	5	-	5
<i>Massachusetts</i>	30	1	31
<i>Maryland</i>	1	-	1
<i>New Brunswick</i>	1	-	1
<i>New Hampshire</i>	16	2	18
<i>New Jersey</i>	3	-	3
<i>New York</i>	4	-	4
<i>Pennsylvania</i>	1	-	1
<i>Rhode Island</i>	1	-	1
<i>Texas</i>	2	-	2
<i>Virginia</i>	1	-	1
Sub-Total(Out-of-State)	73	3	76
TOTAL (All States)	601	83	684

Notes: For the purposes of this report, an action was designated as an action against an "out-of-state" violator if the action included any violator with an address other than Maine.

Source: Derived by OPLA from monthly D.E.P. enforcement reports, consent agreements and court documents.

 Summary of Enforcement Actions: In-State and Out of State Violators

	In-State Violators	Out-of-State Violators	Total
<i>Single-media Enforcement Actions</i>			
Number of Actions	388	71	459
Mean Fine	\$2,414	\$1,932	\$2,339
Median Fine	\$800	\$850	\$800
Total Fines	\$936,469	\$137,150	\$1,073,619
<i>Multi-media Enforcement Actions</i>			
Number of Actions	53	5	58
Mean Fine	\$97,104	\$3,760	\$89,057
Median Fine	\$7,500	\$1,500	\$6,000
Total Fines	\$5,146,487	\$18,800	\$5,165,287

Notes: Comparisons of single-media enforcement actions are limited to NRPA, site law, surface oil spills and solid waste violations. No enforcement actions against out-of-state violators involved underground tank, hazardous waste, air, septage or water violations. No significant difference was found between average fines for in-state and out-of-state violators for single-media enforcement actions. Although noted here for reference purposes, average fines between in-state and out-of-state multi-media actions are not directly comparable, since the in-state multi-media actions include types of violations (ie; air, water, hazardous waste, underground tanks and septage) that were not reported for any out-of-state action.

Source: Derived by OPLA from monthly DEP enforcement reports, consent agreements & consent decre

Number of Actions that Required After-The-Fact Permits or Remedial Actions

	Administrative Enforcement Actions	Judicial Enforcement Actions	Total
After-the-Fact Permit (ATFP) Only	84	5	89
Remediation Only	353	56	409
Both ATFP and Remediation Required	31	1	32
Neither ATFP or Remediation Required	133	21	154
Totals	601	83	684

Notes: An action was designated as requiring remedial action if the enforcement document required any action to repair or mitigate the effects of the violation. Remediation ranged from replanting areas and removing fill or structures, to improving wastewater treatment facilities and installing air pollution control equipment. After-the-fact permit requirements were noted in either the monthly reports of the D.E.P. or in the consent agreements and court documents filed with the Attorney General.

Source: Compiled by OPLA from data provided by the Department of Environmental Protection.

APPENDIX E

Bibliography

Selected Bibliography

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