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ONE HUNDRED AND TWENTY-SECOND LEGISLATURE

COMMITTEE ON JUDICIARY

April 25, 2006

Honorable Scott W. Cowger, Senate Chair
 Honorable Theodore S. Koffman, House Chair
 Joint Standing Committee on Natural Resources
 122nd Maine Legislature

Dear Senator Cowger and Representative Koffman:

Introduction

This letter is the report of the Joint Standing Committee on Judiciary pursuant to Title 1, section 434 on the proposed committee amendment to **LD 2043, An Act to Further Reduce Mercury Use and Emissions**. The Committee reviewed the draft dated 3/17/06, and makes the recommendations described below.

We would like to thank Representative Daigle for his presentation of the proposed amendment to the Committee. His thorough knowledge about the underlying confidentiality process currently utilized by the Department of Environmental Protection, as well as his understanding of the proposed amendment, were both enlightening and instrumental in our understanding of the proposal.

Process

The Judiciary Committee met during the afternoon of Thursday, March 30, 2006. We reviewed the proposed public record exception in the proposed committee amendment and evaluated it in the context of the nine criteria established in Title 1, section 434:

- A. Whether the record protected by the proposed exception needs to be collected and maintained;
- B. The value to the agency or official or to the public in maintaining a record protected by the proposed exception;
- C. Whether federal law requires a record covered by the proposed exception to be confidential;

- D. Whether the proposed exception protects an individual's privacy interest and, if so, whether that interest substantially outweighs the public interest in the disclosure of records;
- E. Whether public disclosure puts a business at a competitive disadvantage and, if so, whether that business's interest substantially outweighs the public interest in the disclosure of records;
- F. Whether public disclosure compromises the position of a public body in negotiations and, if so, whether that public body's interest substantially outweighs the public interest in the disclosure of records ;
- G. Whether public disclosure jeopardizes the safety of a member of the public or the public in general and, if so, whether that safety interest substantially outweighs the public interest in the disclosure of records ;
- H. Whether the proposed exception is as narrowly tailored as possible; and
- I. Any other criteria that assist the review committee in determining the value of the proposed exception as compared to the public's interest in the record protected by the proposed exception.

In examining the criteria we agreed that the information required to be collected and maintained by the Department of Environmental Protection is necessary and is of significant value in carrying out the responsibilities entrusted to the DEP concerning the reduction of mercury, and therefore criteria A and B were met. We noted that an exception falling under criterion C would require no further evaluation. We recognized that the proposed exceptions would most likely fall under criterion E, which would protect the business's proprietary interests. We acknowledged that criterion H would also have to be applied in evaluating the proposed exception.

Evaluation and recommendations

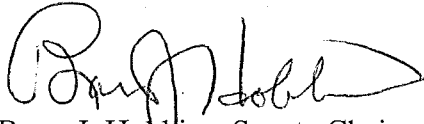
The proposed committee amendment to LD 2043 contains an exception to the public records laws covering mercury reduction plans submitted to the DEP under 38 MRSA §585-B, sub-§6. As Representative Daigle explained, this confidentiality protection is essential in order to have businesses provide the entirety of their mercury reduction plans to the Department for evaluation and approval. Allowing public access to the information could result in reverse engineering of proprietary information, and would end up making Maine a hostile location for such businesses. We agree that the process is an appropriate method of ensuring the regulatory authorities receive the information necessary to protect the environment and the public health and welfare without giving away information to competitors. The proposed amendment requires that the mercury reduction plans be subjected to the existing DEP process for evaluating whether to treat the information submitted as confidential. We find that criterion E is met. We also believe that the process of evaluating whether the protection should be granted ensures that the confidentiality coverage is narrowly tailored, thus meeting criterion H.

We believe that the existing evaluation process used by the Department of Environmental Protection to determine if information submitted to the Department warrants "confidential

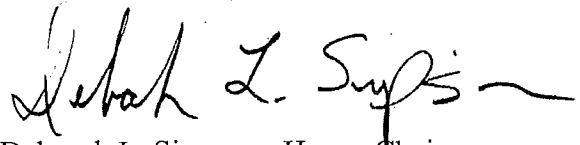
business information” protection, as described in Title 38, section 1310-B, is an excellent model. We will be recommending it for consideration by the Right To Know Advisory Committee, and we thank Representative Daigle and the Natural Resources Committee for bringing it to our attention...

In conclusion, the Judiciary Committee finds that the proposed public record exception contained in the proposed committee amendment to LD 2043 meets criteria A, B, E and H of Title 1, section 434, subsection 2. We make no recommendations for changes.

Sincerely,



Barry J. Hobbins, Senate Chair
Joint Standing Committee on Judiciary



Deborah L. Simpson, House Chair
Joint Standing Committee on Judiciary