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STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

JOHN ELIAS BALDACCI
GOVERNOR

DAWN R. GALLAGHER
COMMISSIONER

March 31, 2005

Senator Scott W. Cowger, Chair
Representative Theodore S. Koffman, Chair
Joint Standing Committee on Natural Resources
122nd Maine Legislature
State House
Augusta, Maine 04333

Dear Senator Cowger and Representative Koffman:

Attached you will find the report "Managing the Cost of Abandoned Waste in Maine's Residential E-Waste Collection and Recycling System". The Department of Environmental Protection is submitting this report as required by PL 2004, Chapter 661, *An Act to Protect Public Health and the Environment by Providing for a System of Shared Responsibility for the Safe Collection and Recycling of Electronic Waste*.

Specifically, the law requires the Department to report on whether the handling and recycling costs attributable to abandoned waste in Maine's computer monitor and television recycling system should be included in the reasonable operational costs of consolidation facilities. This report discusses this option as well as alternatives, and requests a decision from the Natural Resources Committee on which option to pursue.

We look forward to discussing this report with you and the other members of the Committee.

Sincerely,

Dawn R. Gallagher
Commissioner

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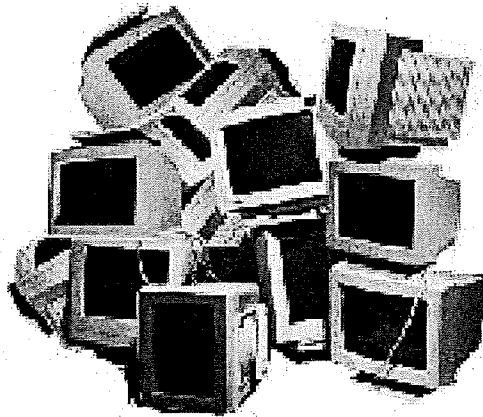
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Report to the Joint Standing Committee on
Natural Resources
First Session of the 122nd Maine Legislature

**Managing the Cost of Abandoned Waste
in Maine's Residential E-Waste
Collection and Recycling System**



Submitted by the
Maine Department of Environmental Protection
in accordance with P.L. 661, Second Special Session of the 121st

March 2005

Background

In 2004, the Second Special Session of the 121st Maine Legislature passed Public Law Chapter 661, "An Act to Protect the Public Health and the Environment by Providing for a System of Shared Responsibility for the Safe Collection and Recycling of Electronic Waste". This is the first law adopted by a state in the U.S. that requires manufacturers to pay part of the cost of collection and recycling of their television and computer monitor products generated as waste by households.

The shared responsibility system established by this law requires municipalities to ensure that waste televisions and computer monitors are delivered to an in-state consolidation center. From this point forward, the consolidation centers are responsible for billing each manufacturer for the cost of handling, transportation and recycling of that manufacturer's products. (Alternatively, manufacturers may opt to assume responsibility for ensuring the recycling of their products from the consolidation centers.) During the legislative session, some who testified raised the concern that there could be manufacturers that would not pay the bills sent by consolidators. They would in effect "abandon" the cost of managing their waste in the system, with no clear mechanism for assigning these costs elsewhere in the shared responsibility system. Because Maine was the first state to adopt a law like this, it was not possible for the Legislature to determine the likelihood that abandoned waste would be a significant problem, and therefore no basis to decide whether a law, rule or policy was needed to address it.

P.L. 661 includes a provision that requires the Department of Environmental Protection to adopt rules that identify the criteria that consolidation facilities must use to determine reasonable operational costs attributable to the handling of computer monitors and televisions that they can bill to the manufacturers. The Legislature recognized that one option for allocating the cost of managing abandoned waste is to include those costs as part of the reasonable operational costs for which consolidators can bill manufacturers that are participating in the shared responsibility system. To determine whether the cost of managing abandoned waste may become a significant problem and if so, whether that cost may be included as part of the reasonable operational cost of a consolidation facility, the following provision was added to and adopted as part of P.L. 661:

Sec. 4. Report on abandoned waste. By March 30, 2005, the Department of Environmental Protection shall report to the joint standing committee of the Legislature having jurisdiction over natural resource matters on whether the handling and recycling costs attributable to abandoned waste should be included in the reasonable operational costs of consolidation facilities. For purposes of this section, "abandoned waste" means a covered electronic device that is not an orphan waste and for which a manufacturer does not pay the consolidation facilities' handling and recycling costs within 90 days of the 3rd monthly billing.

Scope of the abandoned waste problem

To define the scope of the potential abandoned waste problem, it is necessary to know the universe of manufacturers, the percentage of each manufacturer's products in the waste stream, and the likelihood of compliance with Maine's law by each manufacturer. To determine each of these factors, the Department performed the following activities:

- Created a list of all known operating manufacturers of televisions & computer monitors and the brands for which they carry responsibility under Maine's law. This was done through Internet research and through analysis of data generated from e-waste collection programs in North America and Europe.
- Collected and analyzed available data on the percent of each of these manufacturer's products recouped by municipal collection programs in the U.S. The bulk of the data was provided by the State of Florida, which has been running a data collection project on e-waste collection programs in Florida, and from a six-month study by Hennepin County, Minnesota in 2004.
- Assessed the likelihood of compliance with Maine's law based on whether each manufacturer submitted their plan for compliance with the law by March 1, 2005 as required by 38 MRSA §1610.6.A(1).

Prior to March 1, 2005, the Department mailed information about Maine's e-waste law and the requirement for manufacturers to submit a Compliance Plan by March 1, 2005 to 69 computer monitor and television manufacturers identified as possible subject to Maine's law. These manufacturers' products comprised approximately 88% of the units identified in the e-waste collection programs in Florida and Hennepin County, MN. Department staff is continuing research and analysis to determine whether the brands represented by the remaining 12% are orphans or the responsibility of existing manufacturers.

As of March 25, 2005, 28 manufacturers had submitted Compliance Plans to the Department, and an additional 1 manufacturer had contacted the Department to arrange for a slightly delayed submittal date. The products of these 29 manufacturers comprise an estimated 71% of residential waste computer monitors and 78% of residential waste televisions in Maine. Prior to March 1, 2005, the Department contacted an additional 39 manufacturers, but has not yet received plans from these manufacturers. These manufacturers produced approximately 18% of the waste computer monitor units and 9% of the waste television units identified in the waste collection events in Florida and Minnesota. Since March 1, the Department has identified and contacted 7 additional existing manufacturers that are responsible for approximately 9% of the television waste stream to apprise them of their responsibilities under Maine's e-waste law. Because of this late notice to these manufacturers, we have extended the plan submittal deadline for them until March 31, 2005. (See Appendix A for a listing of manufacturers that have been contacted by the Department and the percentage of their products identified by the Florida and Minnesota collection events.)

Approximately 525 additional possible brands were recorded by the collection events in Florida and Minnesota. These brands were identified by the people receiving the units at the collection events based on readily visible labels, so at least some of the names of these brands appear to be product descriptors rather than actual brands. Of these, 519 brands each accounted for 20 units or less. The remaining brands account for less than 100 units each (100 units represents 0.28% of the waste stream studied) except for one brand which we've determined is orphaned and accounts for 0.677% of the TV waste stream. At the time this report was written, Department staff had identified almost 3% of the TV waste stream as likely orphans, and continues working to identify whether each of the remaining brands is a likely orphan or the responsibility of existing manufacturers.

**Summary of MANUFACTURER Information
as of 3/24/05**

Status	Number of Manufacturers	% waste TVs	% waste computer monitors
Contacted prior to 3/1 and submitted plans	29	78%	71%
Contacted prior to 3/1, but did not submit plans	39	5%	18%
Contacted since 3/1	7	9%	<1%
No contact identified	525	8%	11%

On March 24, 2005 the Department initiated enforcement action against the manufacturers that had been provided with sufficient notification of their responsibility to submit a plan for compliance by March 1, 2005. We mailed a Notice of Violation (NOV) to each of these manufacturers, informing them that they are in violation of Maine law and requesting submittal of their plan ASAP but no later than April 8, 2005 (Appendix B is a generic version of this NOV). The names of all manufacturers that do not respond adequately to the NOV will be referred to the Attorney General for further enforcement action. The DEP also will work with the AG to determine when to notify retailers that beginning January 1, 2006, televisions, computer monitors, and CPUs produced by manufacturers that are not in compliance with the law may no longer be sold in Maine.

Based on the data and plans received to date by the Department and assuming that no additional manufacturers submit plans for compliance, no more than 22% of the television waste stream and no more than 29% of the computer monitor waste stream can potentially be abandoned waste in the Maine e-waste collection and recycling system, and much of this will be likely identified as orphan waste.

Mechanisms to minimize the abandoned waste problem

Under existing law, there are two enforcement mechanisms that can be used to address the problem of abandoned waste. The first is the use of the Department's enforcement

authority under 38 MRSA section 347-A and 349 to gain compliance with the provisions of 38 MRSA §1610. The second is the use of collection agencies and/or legal action by consolidators to force the payment of bills by manufacturers.

As noted above, the Department has already begun pursuing enforcement against the manufacturers that have not submitted plans as required by 38 MRSA §1610.6.A(1). Each manufacturer has received at least three mailings from the Department that explained the manufacturer's legal responsibilities under Maine's e-waste law. On March 24th, each manufacturer that did not submit a plan was mailed a Notice of Violation (NOV) by the Department (a sample is included as Appendix B). Each NOV requires that the manufacturer contact the Department within 5 working days of receipt of the NOV to discuss its violation and determine the corrective action it will take to come into compliance with the law. The Department will then refer the case to the Maine Attorney General's Office for prosecution in Superior Court. The purpose of pursuing enforcement is to gain compliance, with the result that all existing manufacturers participate in Maine's shared responsibility system for the recycling of computer monitors and televisions.

Once the law goes into effect, there is additional legal recourse beyond enforcement action by the State to ensure that manufacturers pay the costs of consolidation and recycling of their products and a pro rata share of the orphans. Under the law, consolidators bill manufacturers for their share. If a manufacturer does not pay its bill within 90 days, consolidators can utilize a collection agency to recoup these unpaid bills. The cost of this collection service would be borne by the consolidators.

Options to reimburse consolidators for the costs of managing and recycling abandoned waste

Within Maine's e-waste system, there are three parties that could potentially be called upon to reimburse consolidators for the costs of managing and recycling abandoned waste. These include municipalities, manufacturers, and the State. Consolidators could bill the municipality from which the waste was generated. Alternatively, the cost of managing abandoned wastes could be considered a reasonable operational cost of consolidators to be paid by the participating manufacturers. A third option is for the State to pay the consolidators' costs of recycling abandoned waste.

None of these options is ideal, as they each require a non-responsible party to meet financial obligations already assigned to someone else under Maine law. To evaluate each option, it may be helpful to consider the objectives established for designing Maine's e-waste system (see the Maine DEP January 2004 "Report to the Joint Standing Committee on Natural Resources - A Plan for the Collection and Recycling of Cathode Ray Tubes in Maine, referred to subsequently as the "Maine DEP 2004 e-waste report"). These include, in part, for the system to minimize additional costs to municipalities, and to be relatively simple, clear, and consistent so that all players understand their role in implementation.

Assigning responsibility for the entire cost of collection, consolidation, and recycling of abandoned waste to municipalities would be counter to the objective of minimizing additional costs to municipalities, and could be challenged as an unfunded mandate.

To evaluate the options of the manufacturers or the State paying the costs of recycling abandoned waste in relation to the objective of keeping the e-waste collection and recycling system relatively simple, clear and consistent, we need to review the respective roles assigned to manufacturers and the State by the law. As the system is designed, manufacturers have the responsibility of paying the cost of managing their products plus a portion of the orphan share of the waste stream. The State has funded the development of some of the local collection infrastructure, and has the responsibility of enforcing the e-waste law. Given these respective responsibilities, it is possible to consider managing abandoned waste similarly to orphan waste, i.e., assign the manufacturers a pro rata share of the costs, or as strictly an enforcement problem to be handled by the Department.

One clear drawback to assigning responsibility for financing the recycling of abandoned waste to the manufacturers that are participating in the system is that this can be viewed as punishing those that are in compliance with the law. Some manufacturers may perceive this arrangement as an incentive to abandon their waste into the system. As additional manufacturers choose not to pay their bills from the consolidators, the cost of abandoned waste would increase, thus increasing the costs to the manufacturers that are in compliance and eliminating the costs to the manufacturers that are not in compliance.

The issue of abandoned waste is, at its heart, an issue of enforcement. When viewed from this perspective, it makes sense to integrate the costs of managing abandoned waste within the enforcement powers of the Department. One way to do this is for the Department to pay consolidators for the costs associated with managing abandoned waste and then seek cost recovery. A law that allows for recovering costs plus punitive damages, similar to the provisions of the Uncontrolled Sites Law, would provide added incentive to manufacturers to comply with their e-waste responsibilities.

Potential cost of managing abandoned waste

Given that the Department has just begun enforcement action to gain additional manufacturer compliance with the requirement to submit a compliance plan, at this point in time it is not possible to definitively determine the cost of managing abandoned waste in Maine's e-waste recycling system, or even whether there will be any. If all identified manufacturers come into compliance in response to DEP enforcement actions and the remaining unclaimed brands are identified as orphans, then there will be no abandoned waste in the system, and the cost will be \$0. The other extreme is to assume that no additional manufacturers will comply with the law and instead will choose to abandon their waste, and that all currently unclaimed brands are abandoned rather than orphans, the cost of recycling the abandoned electronic waste could range between \$130,000 and \$200,000.

If all brands that have not yet been identified as the responsibility of a current manufacturer are assumed to be orphans, and no additional manufacturers come into compliance, the cost of managing abandoned waste is estimated to be between \$41,000 and \$66,000 (depending on cost assumptions). (See Appendix C for calculations of cost estimates.)

Summary

One question that remained unanswered when Maine's e-waste law was adopted last year was who should bear the costs of consolidation and recycling of televisions and computer monitors produced by manufacturers that refuse to fulfill their financial responsibilities under the law, i.e., who should bear the costs of "abandoned waste" attributable to viable yet uncooperative manufacturers. The Legislature requested that the Department examine the possibility of including this cost within the reasonable operating costs of consolidation. At this time, the cost of managing abandoned waste can only be roughly estimated to fall between no cost and approximately \$200,000.

Since the law directs consolidators to bill manufacturers for reasonable operational costs of handling their products, the effect of including the recycling of abandoned waste in consolidators' operational costs would be to pass these costs on to participating manufacturers. This means that the manufacturers in compliance with the law would be required to pay the costs for non-compliant manufacturers. Such an arrangement would indirectly provide manufacturers with a significant disincentive to comply with the law.

Alternatively, the cost of abandoned waste could be borne by the municipalities that generate the waste. Arguably, one of the underlying objectives of Maine's e-waste law is to minimize any cost increases to municipalities when they change from disposal to recycling of TVs and computer monitors. Requiring municipalities to bear the costs of abandoned waste could significantly increase their costs and therefore is counter to the objective of minimizing municipal costs.

Maine's e-waste law clearly assigns enforcement responsibilities to the Maine DEP. The issue of abandoned waste could be viewed solely as an enforcement issue. It is simple and consistent to maintain the issue of managing the costs of abandoned waste within Maine DEP's authority. This can be achieved by authorizing the Maine DEP to reimburse consolidators for the cost of managing and recycling abandoned computer monitors and televisions, and providing the Department strengthened enforcement power by adding a treble cost recovery provision to the e-waste law.

Next Steps

Based on this analysis of the potential abandoned waste issue, the Department recommends the following next steps:

- ❖ The Department and Attorney General's Office will continue working to minimize the amount of abandoned waste in Maine's e-waste collection and recycling system by vigorously pursuing enforcement actions against manufacturers that have not submitted a Plan of Compliance indicating their intent to meet their obligation under the law.
- ❖ The Legislature should direct the Department to implement one or more of the following options for managing the cost of handling and recycling of abandoned waste televisions & computer monitors:
 1. Treat abandoned wastes as orphans within the Maine e-waste system, with the cost of management charged through pro rata share to the compliant manufacturers;
 2. Require municipalities to pay consolidators for the cost of managing and recycling abandoned waste televisions and computer monitors from their residents; or
 3. Reimburse consolidators for the cost of managing abandoned waste and add a cost recovery provision to the e-waste law that allows the Department to recoup treble costs and enforcement costs from non-compliant manufacturers.

Appendices

Appendix A - List of contacted manufacturers of televisions & computer monitors, with date plan submitted (if applicable), and estimated percent of waste stream.

Appendix B – Sample Notice of Violation to manufacturers that have not submitted compliance plans

Appendix C – Cost calculations for possible abandoned wastes

Appendix A
Contacted Manufacturers and Estimated Share of Waste Stream

This summary is based on manufacturer plans received (or promised shortly*) and the most recent waste stream data from FL & MN. MEDEP is continuing to communicate with manufacturers and to analyze the data received, and expects to update this information frequently.

<u>Manufacturers contacted, plan filed or filing scheduled*</u>	Date plan filed	Estimated % of Waste TVs	Estimated % of Waste Computer Monitors
Apple	2/25	0.156	11.253
Best Buy	3/1		
Daewoo	2/28	1.515	0.302
Dell	2/28		5.276
Envision*	3/2	0.542	0.618
Fujitsu	3/1	0.035	
Funai	3/16	5.660	0.130
Gateway	2/23		6.445
HP	3/1		11.762
Hitachi	3/1	1.621	1.031
Hyundai	3/18	0.020	0.096
IBM	2/28		6.651
JVC	3/1	2.559	
LG Electronics	3/1	12.765	1.450
MPC	2/11		1.264
Mitsubishi Electric and NEC/Mitsubishi	3/1	3.738	0.508
NEC Solutions (America)	3/1	0.758	13.267
Panasonic	3/1	7.261	0.426
Philips	3/1	8.385	
Planar	3/17	0.015	
Radio Shack	3/1	0.728	0.385
Samsung	2/24	4.857	3.971
Sharp	3/1	4.100	
Sony	2/28	4.566	2.336
Sun Microsystems	3/1		0.330
TTE	3/11	16.177	0.041
Toshiba	3/1	2.494	0.392
ViewSonic	1/19		3.023
Subtotals		77.952	70.957
<u>Manufacturer contacted, no plan filed</u>			
Acer			3.050
AKAI		0.005	
Amtron			0.021
Apex		0.181	
ATARI			0.014
Aydin			0.007
BenQ			0.007
Brother			0.268

COMPAL			0.007
COMPUDYNE			0.227
CTX			5.196
Daytek			0.048
Eizo-Nanao			0.082
Epson			0.502
Honeywell			0.048
Iiyama			0.247
Impression			0.062
KDS			1.896
Microtek			0.007
Miracle			0.014
Mitac			0.041
Motorola		0.171	
Nakamichi			0.481
Pioneer		0.005	
Pixie			0.165
Princeton			0.316
PROVIEW		0.753	2.954
Relisys			0.632
Sampo		0.492	0.206
Sanyo		3.342	0.076
Sceptre			0.055
Silicon Graphics			0.027
Tatung		0.015	0.144
TTX			0.110
Unisys			0.103
Vistamax		0.095	
WEN TECHNOLOGY			0.021
Wyse		0.020	0.646
Yamaha		0.020	
	Subtotals	5.099	17.680
<u>Manufacturers contacted after 3/1/05</u>			
JC Penney		1.796	
Kmart		0.020	
KTV		0.557	
Memorex		0.853	0.062
Montgomery Ward		2.353	
Sansui		0.763	
Sears		2.318	
	Subtotals	8.660	0.062
	Total estimated share all contacted manufacturers	91.711	88.699

If you have additional data that may be relevant, please send that information by e-mail to carole.a.cifrino@maine.gov and to susan.a.alderon@maine.gov.

Appendix B
Sample Notice of Violation

Sent Certified Mail No.: _____

NOV Number: 2005-EW__

Date of Issue: March 24, 2005

{Name}

{Address line 1}

{Address line 2}

{Address line 3}

DEP understands that COMPANY NAME is a manufacturer of televisions and computer monitors. Some or all of that equipment is believed to be subject to Maine's Electronic Waste Law, 38 M.R.S.A. § 1610. The E-waste Law was put in place by Maine's Legislature to minimize risks to human health and the environment as a result of improper disposal of these items.

DEP believes COMPANY NAME is subject to the requirement that a plan be developed for collection, recycling and reuse of those computer monitors and televisions. That plan was due for submission by March 1, 2005. DEP notified COMPANY NAME of the requirement on {Date of notification}. A review of our records shows that COMPANY NAME has thus far failed to submit the required plan. As such, enclosed is a Notice of Violation (NOV) that includes a compliance schedule.

A failure by COMPANY NAME to meet the compliance conditions in the NOV, including contact with Carole Cifrino within five days of receipt, will result in DEP pursuing an additional enforcement action that will include monetary penalties. Violation of a law administered by the department is subject to a civil penalty of not less than \$100 and not more than \$10,000 for each day of that violation.

Failure by COMPANY NAME to comply with Maine's E-waste Law, including the requirement to submit a plan, will also result in the prohibition of the sale in Maine of televisions, computer monitors and central processing units manufactured by COMPANY NAME beginning January 1, 2006 in accordance with 38 M.R.S.A. §1610.3.

You can contact Carole Cifrino by calling (207)287-7720 or by e-mail at carole.a.cifrino@maine.gov.

Sincerely,

Stephen K. Davis, Director
Bureau of Remediation & Waste Management

STATE OF MAINE

DEPARTMENT OF ENVIRONMENTAL PROTECTION

Bureau of Remediation & Waste Management

17 State House Station

Augusta, Maine 04333

Telephone: (207) 287-2651

◆◆ NOTICE OF VIOLATION ◆◆

ALLEGED VIOLATOR'S NAME: <i>[Click here to type the name]</i>	NOV NUMBER: <i>[Click here to type the number]</i>
ADDRESS: <i>[Click here to type the mailing address]</i>	DATE ISSUED: March 24, 2005
MUNICIPALITY, STATE AND ZIP CODE: <i>[Click here to type municipality, State and zip code]</i>	CERTIFIED MAIL NUMBER: <i>[Click here to type the number]</i>
POINT OF CONTACT (IF DIFFERENT FROM ALLEGED VIOLATOR): <i>[Click here and type the name]</i>	TELEPHONE NUMBER: <i>[Click here to type the alleged violator's number]</i>

YOU ARE HEREBY NOTIFIED THAT YOU OR YOUR COMPANY IS ALLEGED TO BE RESPONSIBLE FOR THE VIOLATION(S) OF MAINE'S ENVIRONMENTAL LAWS, REGULATIONS OR DEP ORDERS DESCRIBED IN THE NEXT PARAGRAPH OF THIS NOTICE. RESOLUTION OF THIS MATTER MAY BE SUBJECT TO ADDITIONAL ENFORCEMENT, INCLUDING MONETARY PENALTIES, AS PROVIDED FOR UNDER MAINE LAW, 38 M.R.S.A. §§ 347-A, 348 AND 349 (see attached), AND/OR OTHER APPLICABLE REGULATIONS AND STATUTES.

SUMMARY OF VIOLATIONS:

Failure to file a plan with the Maine Department of Environmental Protection by March 1, 2005 for the collection and recycling or reuse of computer monitors and televisions as required by 38 M.R.S.A. §1310.6.A

REQUIRED CORRECTIVE ACTIONS:

Within five (5) days of receiving this NOV, contact the case manager listed below, and file a plan for the collection and recycling or reuse of computer monitors and televisions in conformance with the requirements of 38 M.R.S.A. §1610.6.A(4) no later than April 8, 2005.

A FAILURE TO CONTACT THE CASE MANAGER WITHIN FIVE (5) DAYS OF RECEIVING THIS NOV IS CONSIDERED AN AGGRAVATING FACTOR IN SETTING ANY MONETARY PENALTY NECESSARY TO RESOLVE THIS MATTER.

ENFORCEMENT CASE MANAGER:

Carole Cifrino

Direct-line: (207) 287-7720

DISTRIBUTION:	Case File	Enforcement File	X	AG's Office	EPA	Other: _____
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Appendix C

Cost calculations for possible abandoned wastes

§ 342. **Commissioner, duties.** The Commissioner of Environmental Protection shall have the following duties:

....

7. **Representation in court.** The commissioner may authorize licensed Maine attorneys with active bar status who are employees of the department and certified employees of the department to serve civil process and represent the department in District Court in the prosecution of violations of those laws enforced by the department and set forth in Title 4, section 152, subsection 6-A. Licensed Maine attorneys do not need to file the certification referred to in the Maine Rules of Civil Procedure, Rule 80K(h). Certification of nonattorney employees must be provided as under Title 30-A, section 4453.

§ 347-A. **Violations**

1. **General procedures.** This subsection sets forth procedures for enforcement actions.

A. Whenever it appears to the commissioner, after investigation, that there is or has been a violation of this Title, of rules adopted under this Title or of the terms or conditions of a license, permit or order issued by the board or the commissioner, the commissioner may initiate an enforcement action by taking one or more of the following steps:

(1) Resolving the violation through an administrative consent agreement pursuant to subsection 4, signed by the violator and approved by the board and the Attorney General;

(2) Referring the violation to the Attorney General for civil or criminal prosecution;

(3) Scheduling and holding an enforcement hearing on the alleged violation pursuant to subsection 2; or

(4) With the prior approval of the Attorney General, initiating a civil action pursuant to section 342, subsection 7 and the Maine Rules of Civil Procedure, Rule 3.

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

2. **Hearings.** The commissioner shall give at least 30 days' written notice to the alleged violator of the date, time and place of any hearing held pursuant to subsection 1, paragraph C. The notice shall specify the act or omission which is claimed to be in violation of law or regulation.

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

After hearing, or in the event of a failure of the alleged violator to appear on the date set for a hearing, the commissioner shall, as soon as practicable, make findings of fact based on the record and, if the commissioner finds that a violation exists, shall issue an order aimed at ending the violation. The person to whom an order is directed shall immediately comply with the terms of that order.

3. **Emergency orders.** Whenever it appears to the commissioner, after investigation, that there is a violation of the laws or regulations which the department administers or of the terms or conditions of any of the department's orders, which is creating or is likely to create a substantial and immediate danger to public health or safety or to the environment, the commissioner may order the person or persons causing or contributing to the hazard to immediately take such actions as are necessary to reduce or alleviate the danger. Service of a copy of the commissioner's findings and order issued under this emergency procedure shall be made by the sheriff or deputy sheriff within the county where the person to whom the order is directed operates or resides. In the event that the persons are so numerous that the specified method of service is a practical impossibility or the commissioner is unable to identify the person or persons causing or contributing to the hazard, the commissioner shall make the order known through prominent publication or announcement in news media serving the affected area.

The person to whom the order is directed shall comply with the order immediately. The order may not be appealed to the Superior Court in the manner provided in section 346, but the person may apply to the board for a hearing on the order which shall be held by the board within 48 hours after receipt of application. Within 7 days after the hearing, the board shall make findings of fact and continue, revoke or modify the order. The decision of the board may be appealed to the Superior Court in the manner provided by section 346.

4. Administrative consent agreements. Following issuance of a notice of violation pursuant to subsection 1 and after receipt of the alleged violator's response to that notice or expiration of the time period specified in the notice for a response, in situations determined by the commissioner appropriate for further enforcement action, the commissioner may send a proposed administrative consent agreement to the alleged violator or violators.

A. Except as otherwise expressly agreed to by the Attorney General, all proposed administrative consent agreements must be reviewed and approved by the Department of the Attorney General before being sent to the alleged violator.

B. All proposed administrative consent agreements sent to the alleged violator must be accompanied by written correspondence from the department, in language reasonably understandable to a citizen, explaining the alleged violator's rights and responsibilities with respect to the proposed administrative consent agreement. The correspondence must include an explanation of the factors considered by the commissioner in determining the proposed civil penalty, a statement indicating that the administrative consent agreement process is a voluntary mechanism for resolving enforcement matters without the need for litigation and an explanation of the department's procedures for handling administrative consent agreements. The correspondence must also specify a reasonable time period for the alleged violator to respond to the proposed administrative consent agreement and offer the opportunity for a meeting with department staff to discuss the proposed agreement. Consent agreements shall, to the greatest extent possible, clearly set forth all the specific requirements or conditions with which the alleged violator must comply.

C. After a proposed administrative consent agreement has been sent to the alleged violator, the commissioner may revise and resubmit the agreement if further circumstances become known to the commissioner, including information provided by the alleged violator, that justify a revision.

D. The public may make written comments to the board at the board's discretion on an administrative consent agreement entered into by the commissioner and approved by the board.

E. When the department and the alleged violator can not agree to the terms of a consent agreement and the department elects to bring an enforcement action in District Court pursuant to section 342, subsection 7, the District Court shall refer the parties to mediation if either party requests mediation at or before the time the alleged violator appears to answer the department's complaint. The parties must meet with a mediator appointed by the Court Alternative Dispute Resolution Service created in Title 4, section 18-B at least once and try in good faith to reach an agreement. After the first meeting, mediation must end at the request of either party. If the parties have been referred to mediation, the action may not be removed to Superior Court until after mediation has occurred.

5. Enforcement. All orders of the department may be enforced by the Attorney General. If any order of the department is not complied with, the commissioner shall immediately notify the Attorney General.

6. Public participation in enforcement settlements. After the State receives authority to grant permits under the Federal Water Pollution Control Act, 33 United States Code, 1982, Section 1251 et seq., as amended, in any civil enforcement action brought under this section, section 348 or 349 involving discharges regulated by the Federal Water Pollution Control Act, the department shall publish notice of and provide at least 30 days for public comment on any proposed settlement as follows.

A. In the case of administrative consent agreements, the proposed agreement must be filed with the board and notice of the filing must be placed on the board's agenda at least 30 days before the board takes any action on the agreement. The Attorney General and the department shall receive and consider, and the department shall provide the board with summaries of, any written comments relating to the proposed agreement.

B. In the case of judicial enforcement, each proposed judgment by consent must be filed with the court at least 30 days before the judgment is entered by the court. Prior to the entry of judgment, notices of the proposed judgment must be published in a newspaper having general circulation in the area in which the alleged violation occurred, and the Attorney General and the department shall receive and consider, and file with the court, any written comments relating to the proposed judgment.

C. The Attorney General shall reserve the right to withdraw or withhold its consent to the proposed judgment if the comments, views or allegations concerning the judgment disclose facts or considerations that indicate that the proposed judgment is inappropriate, improper or inadequate and oppose an attempt by any person to intervene in the action. When the public interest in this notification process is not compromised, the Attorney General may permit an exception to publication as set forth in this section in a specific case where extraordinary circumstances require a period shorter than 30 days or a notification procedure other than that set forth in this section.

7. Landowner liability for actions of others. An owner, lessee, manager, easement holder or occupant of premises is not subject to criminal sanctions or civil penalties or forfeitures for a violation of laws or rules enforced by the department or the board if that person provides substantial credible evidence that the violation was committed by another person other than a contractor, employee or agent of the owner, lessee, manager, easement holder or occupant. This subsection does not prevent the department, the board or a court from requiring an owner, lessee, manager, easement holder or occupant of premises to remediate or abate environmental hazards or damage or to reimburse the department for the cost of such remediation or abatement. An owner, lessee, manager, easement holder or occupant of premises is subject to criminal sanctions or civil penalties or forfeitures for failure to comply with a lawful administrative order or court order to remediate or abate environmental hazards or damage.

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- A. The department shall investigate substantiated allegations by an owner, lessee, manager, easement holder or occupant that the violation was caused by another person.
- B. If an owner, lessee, manager, easement holder or occupant is subjected to criminal sanctions or civil penalties or forfeitures, or if such a person is required to remediate or abate environmental hazards or damage as a result of violations by another person, the owner, lessee, manager, easement holder or occupant has a cause of action against the actual violator to recover all damages and costs, including attorney's fees, incurred in connection with the environmental damage, and all costs, including attorney's fees, incurred in bringing the action to recover.
- C. This subsection does not apply to persons who are defined as "responsible parties" under chapter 3, subchapters II-A and II-B; chapter 13, subchapter II-A; or chapter 13-B.

§ 347-C. Right of inspection and entry. Employees and agents of the Department of Environmental Protection may enter any property at reasonable hours and enter any building with the consent of the property owner, occupant or agent, or pursuant to an administrative search warrant, in order to inspect the property or structure, take samples and conduct tests as appropriate to determine compliance with any laws administered by the department or the terms and conditions of any order, regulation, license, permit, approval or decision of the commissioner or of the board.

§ 348. Judicial enforcement

- 1. **General.** In the event of a violation of any provision of the laws administered by the department or of any order, regulation, license, permit, approval or decision of the board or commissioner or decree of the court, as the case may be, the Attorney General may institute injunction proceedings to enjoin any further violation thereof, a civil or criminal action or any appropriate combination thereof without recourse to any other provision of law administered by the department.
- 2. **Restoration.** The court may order restoration of any area affected by any action or inaction found to be in violation of any provision of law administered by the department or of any order, rule, regulation, license, permit, approval or decision of the board or commissioner or decree of the court, as the case may be, to its condition prior to the violation or as near thereto as may be possible. Where the court finds that the violation was willful, the court shall order restoration under this subsection unless the restoration will:
 - A. Result in a threat or hazard to public health or safety;
 - B. Result in substantial environmental damage; or
 - C. Result in a substantial injustice.
- 3. **Injunction proceedings.** If the department finds that the discharge, emission or deposit of any materials into any waters, air or land of this State constitutes a substantial and immediate danger to the health, safety or general welfare of any person, persons or property the department shall forthwith request the Attorney General to initiate immediate injunction proceedings to prevent such discharge. The injunction proceedings may be instituted without recourse to the issuance of an order, as provided for in section 347-B.
- 4. **Settlement.** A person who has resolved that person's liability to the State in an administrative or judicially approved settlement and is implementing or has fully implemented that settlement pursuant to its terms is not liable for claims by other potentially liable persons regarding response actions, response costs or damages, including without limitation natural resource damages, addressed in the settlement. The settlement does not discharge any other potentially liable persons unless its terms so provide. The protection afforded by this subsection includes protection against contribution claims and all other types of claims under state law that may be asserted against the settling party for recovery of response costs or damages incurred or paid by another potentially liable person, if those actions, costs or damages are addressed in the settlement, but does not include protection against claims based on contractual indemnification or other express contractual agreements to pay the costs or damages. A potentially liable person who commences an action against a person who is protected from suits under this subsection is liable to the person against whom the claim is brought for all reasonable costs of defending against the claim, including all reasonable attorney's and expert witness fees. This section is not intended to create a right to contribution or other cause of action or to make a person liable to pay a portion of another person's response costs, damages or civil penalties.

§ 349. Penalties

- 1. **Criminal penalties.** Except as otherwise specifically provided, a person who intentionally, knowingly, recklessly or with criminal negligence violates a law administered by the department, including, without limitation, a violation of the terms or conditions of an order, rule, license, permit, approval or decision of the board or commissioner, or who 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-A, commits a Class E crime. Notwithstanding Title 17-A, section 1301, the fine for a violation of this subsection may not be less than \$2,500 and not more than \$25,000 for each day of the violation, except that the minimum amount for knowing violations is \$5,000 for each day of violation.

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

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2. Civil penalties. Except as otherwise specifically provided, a person who violates a law administered by the department, including, without limitation, a violation of the terms or conditions of an order, rule, license, permit, approval or decision of the board or commissioner, or who disposes of more than 500 pounds or more than 100 cubic feet of litter for a commercial purpose, in violation of Title 17, section 2265-A, is subject to a civil penalty, payable to the State, of not less than \$100 and not more than \$10,000 for each day of that violation or, if the violation relates to hazardous waste, of not more than \$25,000 for each day of the violation. This penalty is recoverable in a civil action.

2-A. Supplemental environmental projects. In settling a civil enforcement action for any violation of any of the provision 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, the parties may agree to a supplemental environmental project that mitigates not more than 80% of the assessed penalty. "Supplemental environmental project" means an environmentally beneficial project primarily benefiting public health or the environment that a violator is not otherwise required or likely to perform.

A. An eligible supplemental environmental project is limited to the following categories:

- (1) Pollution prevention projects that eliminate all or a significant portion of pollutants at the point of generation;
- (2) Pollution reduction projects that significantly decrease the release of pollutants into a waste stream at the point of discharge to a point significantly beyond levels required for compliance;
- (3) Environmental enhancement projects in the same ecosystem or geographic area of the violation that significantly improve an area beyond what is required to remediate any damage caused by the violation that is the subject of the enforcement action;
- (4) Environmental awareness projects substantially related to the violation that provides training, publications or technical support to members of the public regulated by the department;
- (5) Scientific research and data collection projects that advance the scientific basis on which regulatory decisions are made;
- (6) Emergency planning and preparedness projects that assist state and local emergency response and planning entities in preparing or responding to emergencies;
- (7) Public health projects that provide a direct and measurable benefit to public health.

B. Supplemental environmental projects may not be used for the following situations:

- (1) Repeat violations of the same or substantially similar law administered by the department by the same person;
- (2) When a project is required by law;
- (3) If the violator had previously planned and budgeted for the project;
- (4) To offset any calculable economic benefit of noncompliance;
- (5) If the violation is the result of reckless or intentional conduct; or
- (6) If the project primarily benefits the violator.

Any settlement that includes a supplemental environmental project must provide that expenditures are not tax deductible and are ineligible for certification as tax exempt pollution control facilities pursuant to Title 36, chapters 105 and 211.

3. Falsification and tampering. A person may not knowingly:

- A. Make a false statement, representation or certification in an application, record, report, plan or other document filed or required to be maintained by any law administered by the department or by any order, rule, license, permit, approval or decision of the board or commissioner;
- B. Tamper with or render inaccurate a monitoring device or method required by any law or by any order, rule, license, permit, approval or decision of the board or commissioner; or
- C. Fail to comply with an information submittal required by the commissioner pursuant to section 568, subsection 3 or section 1364, subsection 3.

4. Violations. (repealed)

5. Considerations. In setting a penalty, the court shall consider, but shall not be limited to, the following:

- A. Prior violations by the same party;
- B. The degree of environmental damage that cannot be abated or corrected;
- C. The extent to which the violation continued following an order of the commissioner or board to correct it; and
- D. The importance of setting a civil penalty substantial enough to deter others from similar violations.

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- 6. Maximum civil penalty.** The maximum civil penalty may exceed \$10,000 for each day of that violation, but shall not exceed \$25,000 for each day of the violation, when it can be shown that there has been a previous violation of the same law by the same party within the 5 preceding years.
- 7. Notification.** The commissioner shall notify all newspapers of general circulation in the State of all administrative consent agreements, court-ordered consent decrees and adjudicated violations involving laws administered by the department.
- 8. Economic benefit.** If the economic benefit resulting from the violation exceeds the applicable penalties under subsection 2, the maximum civil penalties may be increased for each day of the violation. The maximum civil penalty may not exceed an amount equal to twice the economic benefit resulting from the violation. The court shall consider as economic benefit, without limitation, the costs avoided or enhanced value accrued at the time of the violation by the violator not complying with the applicable legal requirements.
- 9. Unavoidable malfunctions.** The following considerations apply to violations resulting from unavoidable malfunctions.
- A.** The commissioner may exempt from civil penalty an air emission in excess of license limitations if the emission occurs during start-up or shutdown or results exclusively from an unavoidable malfunction entirely beyond the control of the licensee and the licensee has taken all reasonable steps to minimize or prevent any emission and takes corrective action as soon as possible. There may be no exemption if the malfunction is caused, entirely or in part, by poor maintenance, careless operation, poor design or any other reasonably preventable condition or preventable equipment breakdown. The burden of proof is on the licensee seeking the exemption under this subsection. In the event of an unavoidable malfunction, the licensee must notify the commissioner in writing within 48 hours and submit a written report, together with any exemption requests, to the department on a quarterly basis.
- B.** An affirmative defense is established for a wastewater discharge in excess of license limitations if the discharge results exclusively from unintentional and temporary noncompliance with technology-based limitations because of factors entirely beyond the reasonable control of the licensee and the licensee has taken all reasonable steps to minimize or prevent any discharge and takes corrective action as soon as possible. There is not an affirmative defense if the malfunction is caused, entirely or in part, by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance or careless or improper operation. The burden of proof is on the licensee seeking the affirmative defense under this subsection. In the event of an unavoidable malfunction, the licensee must notify the commissioner orally within 24 hours, and in writing within 5 days.

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Appendix C

Cost calculations for possible abandoned wastes

The following calculations are based on the information that the Department has to date on brands identified in e-waste collection event is Florida and Minnesota, the estimated number of units expected in the Maine residential waste stream and the cost per unit based on data generated during 2002 by EPA and 2003 in Florida (see Appendix L of the Maine DEP 2004 e-waste report) or the cost per unit currently offered by a sample consolidator to Maine municipalities (\$0.18 per pound for mixed e-waste, equivalent to \$9.00 per unit for televisions and \$5.40 per unit for computer monitors).

Assume no additional manufacturers come into compliance and no additional brands are identified as orphans (assuming 3% televisions orphaned):

Estimated # waste televisions = 40,000 units

Estimated % TVs abandoned = 19%

Recycling cost per unit from receipt at consolidation = \$13.75/unit (2003 cost)

$40,000 \text{ units} \times 0.19 \times \$13.75/\text{unit} = \$104,500$ for TVs

Recycling cost per unit from receipt at consolidation = \$9.00/unit (current sample cost)

$40,000 \text{ units} \times 0.19 \times \$9.00/\text{unit} = \$68,400$ for TVs

Estimated # waste computer monitors = 40,000

Estimated % computer monitors abandoned = 29%

Recycling cost per monitor from receipt at consolidation = \$8.65/unit

$40,000 \times 0.29 \times \$8.65/\text{unit} = \$100,340$ for computer monitors

Recycling cost per monitor from receipt at consolidation = \$5.40/unit (current sample cost)

$40,000 \times 0.29 \times \$5.40/\text{unit} = \$62,640$ for computer monitors

Total maximum annual cost of managing abandoned waste =
\$204,840 (2003 costs) or \$131,040 (current sample cost)

Assume that all contacted manufacturers come into compliance and all the remaining brands that have not yet been identified as orphans are actually abandoned waste:

Estimated # waste televisions = 40,000 units

Estimated % TVs abandoned = 5%

Recycling cost per unit from receipt at consolidation = \$13.75/unit

$40,000 \text{ units} \times 0.05 \times \$13.75/\text{unit} = \$27,500$ for TVs

Recycling cost per unit from receipt at consolidation = \$9.00/unit (current sample cost)

$40,000 \text{ units} \times 0.05 \times \$9.00/\text{unit} = \$18,000$ for TVs

Estimated # waste computer monitors = 40,000

Estimated % computer monitors abandoned = 11%

Recycling cost per monitor from receipt at consolidation = \$8.65/unit

$40,000 \times 0.11 \times \$8.65/\text{unit} = \$38,060$ for computer monitors

Recycling cost per monitor from receipt at consolidation = \$5.40/unit (current sample cost)

$40,000 \times 0.11 \times \$5.40/\text{unit} = \$23,760$ for computer monitors

Total estimated cost of managing abandoned waste =
\$65,560. (2003 costs) or \$41,760 (current sample cost)

