1	H.410
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2	Introduced by Representatives Masland of Thetford, Cheney of Norwich,
3	Botzow of Pownal, Branagan of Georgia, Christie of Hartford,
4	Clarkson of Woodstock, Copeland-Hanzas of Bradford, Deen of
5	Westminster, Emmons of Springfield, Jerman of Essex, Johnson
6	of Canaan, Kitzmiller of Montpelier, Krowinski of Burlington,
7	Lanpher of Vergennes, Macaig of Williston, Marek of Newfane
8	McCullough of Williston, Miller of Shaftsbury, Pearson of
9	Burlington, Poirier of Barre City, Ram of Burlington, South of
10	St. Johnsbury, Townsend of South Burlington, Weed of
11	Enosburgh, Wizowaty of Burlington, Wright of Burlington, and
12	Young of Glover
13	Referred to Committee on
14	Date:
15	Subject: Conservation and development; waste management; brownfields
16	Statement of purpose of bill as introduced: This bill proposes to amend the
17	state brownfields law to establish conditions under which a municipality,
18	regional development corporation, or regional planning commission will be
19	held harmless from liability due to the acquisition of real property on which a
20	hazardous material release may have occurred.

1	An act relating to brownfields
2	Sec. 1. LEGISLATIVE INTENT
3	It is the intent of the General Assembly that:
4	(1) It is appropriate to confer a limited defense to liability for hazardous
5	material cleanup when a municipality, regional development corporation, or
6	regional planning commission conforms to the requirements of 10 V.S.A.
7	§ 6615(d)(3), in the case of municipalities, and 10 V.S.A § 6615(d)(4).
8	(2) It is of vital importance for purchasers of commercial properties to
9	conduct environmental site assessments that conform to statutorily recognized
10	standards.
11	(3) In construing the defense to liability established pursuant to
12	10 V.S.A. § 6615(f), the courts of this State will be guided by the construction
13	of similar terms contained in 42 U.S.C. § 9601(35)(A)(i) and (B), as amended,
14	and the courts of the United States.
15	(4) It is appropriate to confer limited defense to liability for secured
16	lenders and fiduciaries under state law that is equivalent to under federal law.
17	(5) In construing the defense to liability established pursuant to
18	10 V.S.A. § 6615(g), the courts of this State will be guided by the construction
19	of similar terms contained in 42 U.S.C. §§ 9601(20)(F) and 9707(n), as
20	amended, and the courts of the United States.

- Sec. 2. 10 V.S.A § 6602 is amended to read:
- 2 § 6602. DEFINITIONS
- For the purposes of this chapter:
  - (1) "Secretary" means the secretary of the agency of natural resources

    Secretary of Natural Resources, or his or her duly authorized representative.

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(4) "Hazardous waste" means any waste or combination of wastes of a solid, liquid, contained gaseous, or semi-solid form, including but not limited to those which are toxic, corrosive, ignitable, reactive, strong sensitizers, or which generate pressure through decomposition, heat, or other means, which in the judgment of the secretary Secretary may cause, or contribute to, an increase in mortality or an increase in serious irreversible or incapacitating reversible illness, taking into account the toxicity of such waste, its persistence and degradability in nature, and its potential for assimilation, or concentration in tissue, and other factors that may otherwise cause or contribute to adverse acute or chronic effects on the health of persons or other living organisms, or any matter which may have an unusually destructive effect on water quality if discharged to ground or surface waters of the state State. All special nuclear, source, or by-product material, as defined by the Atomic Energy Act of 1954 and amendments thereto, codified in 42 U.S.C. § 2014, is specifically excluded from this definition.

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2	(6) "Person" means any individual, partnership, company, corporation,
3	association, unincorporated association, joint venture, trust, municipality, the
4	state State of Vermont or any agency, department or subdivision of the state
5	State, federal agency, or any other legal or commercial entity.
6	* * *
7	(10) "Facility" means all contiguous land, structures, other
8	appurtenances, and improvements on the land, used for treating, storing, or
9	disposing of waste. A facility may consist of several treatment, storage, or
10	disposal operational units.
11	* * *
12	(13) "Waste" means a material that is discarded or is being accumulated
13	stored, or physically, chemically, or biologically treated prior to being
14	discarded or has served its original intended use and is normally discarded or is
15	a manufacturing or mining by-product and is normally discarded.
16	* * *
17	(16)(A) "Hazardous material" means all petroleum and toxic, corrosive,
18	or other chemicals and related sludge included in any of the following:
19	(i) any substance defined in section 101(14) of the federal
20	Comprehensive Environmental Response, Compensation and Liability Act
21	of 1980;

(ii) petroleum, including crude oil or any fraction there	eof:	there	on 1	v fraction	anv f	or	oil	crude	luding	inc	roleum.	) netr	(ii)
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- (iii) hazardous wastes, as determined under subdivision (4) of this section;
- (B) "Hazardous material" does not include herbicides and pesticides when applied consistent with good practice conducted in conformity with federal, state, and local laws and regulations and according to manufacturer's instructions. Nothing in this subdivision shall affect the authority granted and the limitations imposed by section 6608a of this title.
- (17) "Release" means any intentional or unintentional action or omission resulting in the spilling, leaking, pumping, pouring, emitting, emptying, dumping, or disposing of hazardous materials into the surface or groundwaters, or onto the lands in the state State, or into waters outside the jurisdiction of the state State when damage may result to the public health, lands, waters, or natural resources within the jurisdiction of the state State.

15 \*\*\*

(23) "Secured lender" means a person who holds indicia of ownership in a facility, furnished by the owner or person in lawful possession, primarily to assure the repayment of a financial obligation. Such indicia include interests in real or personal property which are held as security or collateral for repayment of a financial obligation such as a mortgage, lien, security interest, assignment, pledge, surety bond, or guarantee and include participation rights, held by a

1	financial institution solely for legitimate commercial purposes, in making or
2	servicing loans. The term "secured lender" includes a person who acquires
3	indicia of ownership by assignment from another secured lender.
4	* * *
5	(34) "Participation in management" means, for the purpose of
6	subsection 6615(g) of this title, a secured lender's or fiduciary's actual
7	participation in the management or operational affairs of a facility. It does not
8	mean a secured lender's or fiduciary's mere capacity to influence, or
9	unexercised right to control, facility operations. A secured lender or fiduciary
10	shall be considered to have participated in management if the secured lender or
11	fiduciary:
12	(A) exercises decision-making control over environmental
13	compliance related to the facility, such that the secured lender or fiduciary has
14	undertaken responsibility for hazardous materials handling or disposal
15	practices related to the facility; or
16	(B) exercises control at a level comparable to that of a manager of the
17	facility, such that the secured lender or fiduciary has assumed or manifested
18	responsibility:
19	(i) for the overall management of the facility encompassing

day-to-day decision making with respect to environmental compliance; or

20	13

1	(ii) over all or substantially all of the operational functions, as
2	distinguished from financial or administrative functions, of the facility other
3	than the function of environmental compliance.
4	(35) "Regional development corporation" means a nonprofit corporation
5	organized in this State whose principal purpose is to promote, organize, or
6	accomplish economic development, including providing planning and resource
7	development services to local communities, supporting existing industry,
8	assisting the growth and development of new and existing small businesses,
9	and attracting industry or commerce to a particular economic region of the
10	State.
11	(36) "Regional planning commission" means a planning commission
12	created for a region established under 24 V.S.A. chapter 117, subchapter 3.
13	Sec. 3. 10 V.S.A. § 6615 is amended to read:
14	§ 6615. LIABILITY
15	(a) Subject only to the defenses set forth in subsections (d) and (e) of this
16	section:
17	(1) the owner or operator of a facility, or both;
18	(2) any person who at the time of release or threatened release of any
19	hazardous material owned or operated any facility at which such hazardous
20	materials were disposed of;

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20	1	J

(3) any person who by contract, agreement, or otherwise arranged for
disposal or treatment, or arranged with a transporter for transport for disposal
or treatment, of hazardous materials owned or possessed by such person, by
any other person or entity, at any facility owned or operated by another person
or entity and containing such hazardous materials; and
(4) any person who accepts or accepted any hazardous materials for
transport to disposal or treatment facilities selected by such persons, from
which there is a release, or a threatened release of hazardous materials shall be
liable for:
(A) abating such release or threatened release; and
(B) costs of investigation, removal, and remedial actions incurred by
the state State which are necessary to protect the public health or the
environment.

\* \* \*

(d)(1) There shall be no liability under this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of hazardous material and the damages resulting therefrom were caused solely by any of the following:

- (A) an act of God;
- (B) an act of war;

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circumstances.

(C) an act or omission of a third party other than an employee or	
agent of the defendant, or other than one whose act or omission occurs in	
connection with a contractual relationship, existing directly or indirectly, with	
the defendant. If the sole contractual arrangement arises from a published	
tariff and acceptance for carriage by a common carrier by rail, for purposes of	
this section, there shall be considered to be no contractual relationship at all.	
This subdivision (d)(1)(C) shall only serve as a defense if the defendant	
establishes by a preponderance of the evidence:	
(i) that the defendant exercised due care with respect to the	
hazardous material concerned, taking into consideration the characteristics of	
that hazardous material, in light of all relevant facts and circumstances; and	
(ii) that the defendant took precautions against foreseeable acts or	
omissions of any such third party and the consequences that could foreseeably	
result from those acts or omissions; or	
(D) any combination of the above.	
* * *	
(3) A municipality shall not be liable under <u>subdivision (a)(1) of</u> this	
section as an owner provided that the municipality can show all the following:	
(A) The property was acquired by virtue of its function as sovereign	
through bankruptcy, tax delinquency, abandonment, or other similar	

1	(B) The municipality did not cause or, contribute to the
2	contamination of, or worsen a release or threatened release of a hazardous
3	material at the property.
4	(C)(i) The municipality has entered into an agreement with the
5	secretary regarding sale of the property acquired or has undertaken abatement,
6	investigation, remediation, or removal activities as required by subchapter 3 of
7	this chapter Secretary, prior to the acquisition of the property, requiring the
8	municipality to conduct a site investigation with respect to any release or
9	threatened release of a hazardous material and an agreement for the
10	municipality's marketing of the property acquired.
11	(ii) The Secretary shall consult with the Secretary of Commerce
12	and Community Development on the plan related to the marketing of the
13	property.
14	(iii) The municipality may only assert a defense to liability after
15	implementing a site investigation at the property acquired and taking
16	reasonable steps defined by the agreement with the Secretary to market the
17	property.
18	(iv) In developing an agreement regarding site investigation, the
19	Secretary shall consider: the degree and extent of the known releases of
20	hazardous materials at the property; the financial ability of the municipality;

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1	and the availability of state and federal funding when determining what is
2	required by the agreement for the investigation of the site.
3	(4) A regional development corporation or regional planning
4	commission shall not be liable under subdivision (a)(1) of this section as an
5	owner provided that the regional development corporation or regional planning
6	commission can show all the following:
7	(A) The regional development corporation or regional planning
8	commission did not cause, contribute, or worsen a release or threat of release at
9	the property.
10	(B) The regional development corporation received, in the 12 months
10 11	(B) The regional development corporation received, in the 12 months preceding the acquisition of the property, a performance contract for economic
11	preceding the acquisition of the property, a performance contract for economic
11 12	preceding the acquisition of the property, a performance contract for economic development pursuant to 24 V.S.A. chapter 76. The requirement of this
11 12 13	preceding the acquisition of the property, a performance contract for economic development pursuant to 24 V.S.A. chapter 76. The requirement of this subdivision (d)(4)(B) shall not apply to regional planning commissions.
11 12 13 14	preceding the acquisition of the property, a performance contract for economic development pursuant to 24 V.S.A. chapter 76. The requirement of this subdivision (d)(4)(B) shall not apply to regional planning commissions.  (C)(i) The regional development corporation or regional planning
11 12 13 14 15	preceding the acquisition of the property, a performance contract for economic development pursuant to 24 V.S.A. chapter 76. The requirement of this subdivision (d)(4)(B) shall not apply to regional planning commissions.  (C)(i) The regional development corporation or regional planning commission has entered into an agreement with the Secretary, prior to the

the regional development corporation's or regional planning commission's

marketing of the property acquired.

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1	(ii) The Secretary shall consult with the Secretary of Commerce and
2	Community Development on the plan related to the marketing of the property.
3	(iii) The regional development corporation or regional planning
4	commission may only assert a defense to liability after implementing a site
5	investigation at the property acquired and taking reasonable steps defined by
6	the agreement to market the property.
7	(iv) In developing an agreement regarding site investigation, the
8	Secretary shall consider: the degree and extent of the known releases of
9	hazardous materials at the property; the financial ability of the municipality;
10	and the availability of state and federal funding when determining what is
11	required by the agreement for the investigation of the site.
12	(e) Any person who is the owner or operator of a facility where a release or
13	threatened release existed at the time that person became owner or operator
14	shall be liable unless he or she can establish by a preponderance of the
15	evidence that after making, based upon a diligent and appropriate investigation
16	of the facility, in conformance with the requirements of section 6615a of this
17	title, that he or she had no knowledge or reason to know that said the release or
18	threatened release was located on the facility.
19	* * *

(g)(1) A secured lender or a fiduciary, as that term is defined in 14 V.S.A.

§ 204(b), shall not, absent other circumstances resulting in liability under this

1	section, be liable as either an owner or operator under this section merely
2	because of any one or any combination of more than one of the following:
3	* * *
4	(J) in an emergency, requiring or undertaking activities to prevent
5	exposure of persons to hazardous materials or to contain a release; or
6	(K) requiring or conducting abatement, investigation, remediation, or
7	removal activities in response to a release or threatened release, provided that:
8	(i) prior notice of intent to do any such activity is given to the
9	secretary Secretary in writing, and, unless previously waived in writing by the
10	secretary Secretary, no such activity is undertaken for 30 days after receipt of
11	such notice by the secretary Secretary;
12	(ii) a workplan is prepared by a qualified consultant prior to the
13	commencement of any such activity;
14	(iii) if the secretary Secretary, within 30 days of receiving notice
15	as provided in subdivision (i) of this subdivision (K), elects to undertake a
16	workplan review and gives written notice to the secured lender or fiduciary of
17	such election, no such activity is undertaken without prior workplan approval
18	by the secretary Secretary;
19	(iv) appropriate investigation is undertaken prior to any
20	abatement, remediation, or removal activity;

1	(v) regular progress reports and a final report are produced during
2	the course of any such activity;
3	(vi) all plans, reports, observations, data, and other information
4	related to the activity are preserved for a period of 10 years and, except for
5	privileged materials, produced to the secretary Secretary upon request;
6	(vii) persons likely to be at or near the facility are not exposed to
7	unacceptable health risk; and
8	(viii) such activity complies with all rules, procedures, and orders
9	of the secretary: or
10	(L) foreclosing on the facility and after foreclosure: selling; winding
11	up operations; undertaking an investigation or corrective action under the
12	direction of the state or federal government with respect to the facility; or
13	taking any other measure to preserve, protect, or prepare the facility prior to
14	sale or disposition, provided that:
15	(i) a secured lender shall be liable as an operator if the secured
16	lender participated in the management of the facility; and
17	(ii) a secured lender shall be liable as an owner if during the
18	course of any transaction of the property, the secured lender fails to disclose
19	any known release or threat of release.
20	(2) There shall be no protection from liability for a secured lender or a
21	fiduciary under subsections (g) and (h) of this section this subsection if the

secured lender or fiduciary causes, worsens, or contributes to a release or threat
of release of hazardous material. A secured lender or fiduciary who relies on
subdivision (g)(1)(K) of this section, or an agreement with the secretary
entered into under subsection (h) of this section shall bear the burden of
proving compliance with this subdivision.
(h)(1) Subject to the provisions of this subsection, the secretary may enter
into an agreement with a secured lender or a fiduciary regarding a facility from
which there is a release or threat of release of hazardous materials. Upon
entering into an agreement with the secretary, a secured lender or fiduciary, to
the extent allowed by the agreement and in compliance with the terms and
conditions of the agreement, may:
(A) in the case of a secured lender, take possession, foreclose or
otherwise take full title to the facility; and
(B) undertake other activities at the facility in addition to those of
subdivisions (g)(1)(A) (K) of this section, including use of the facility and new
development.
(2) Such an agreement may be entered into only when the secretary has
determined, in the secretary's sole discretion, that there exists a release or
threat of release, that there will be a substantial benefit to the public health or
the environment that would not otherwise be realized and that the proposed

activity will not cause, worsen or contribute to a release or threat of release of

hazardous materials at the facility or expose persons likely to be at or near the facility to unacceptable health risk. Prior to entering into an agreement which provides for any abatement, investigation, remediation, or removal activities to be taken by a secured lender or fiduciary in response to a release or threatened release, the secretary shall cause notice to be published in a local newspaper generally circulated in the area where the facility is located. The notice shall set forth the abatement, investigation, remediation, and removal activities proposed, shall state that the secretary is considering entering into an agreement providing for such activities, and shall request public comment on the proposed activities within 15 days after publication. The decision of the secretary as to whether an agreement should be entered into and the terms and conditions of any agreement shall be final.

(3) Such an agreement, if previously approved by the attorney general, may provide for the payment, in whole or in part, of past or future costs described in subdivision (a)(4)(B) of this section and may limit, in whole or in part, the secured lender's or the fiduciary's liability under this section.

(4) A proposal by a secured lender or fiduciary to enter into such an agreement shall be accompanied by a fee of \$1,000.00. If the secretary's costs related to the proposal exceed the fee paid, then any agreement shall provide for the secured lender or fiduciary to reimburse the secretary for the additional costs incurred. The fee and any excess costs paid to the secretary under this

<del>subsection sha</del>	ell be deposited into	o the contingency	fund established under
subsection 128	33(a) of this title.		

(5) If the secured lender or fiduciary enters into an agreement with the secretary, complies with the agreement and does not cause, worsen or contribute to a release or threat of release of a hazardous material, the maximum liability of such person under this section to the state for costs or injunctive relief shall be as provided in the agreement or, in the absence of such a provision, the fair market value of the property at the time of the agreement, estimated as if there were no release or threatened release of any hazardous materials, less any costs reasonably incurred by the person for any abatement, investigation, remediation or removal activity undertaken in compliance with subdivision (g)(1)(K) of this section or incurred in compliance with the agreement.

14 \*\*\*

15 Sec. 4. 10 V.S.A. § 6615a is added to read:

## § 6615a. DILIGENT AND APPROPRIATE INVESTIGATION FOR

## **HAZARDOUS MATERIALS**

(a) Except as provide for in subsection (b) of this section, a diligent and appropriate investigation, as that term is used in subsection 6615(e) of this title, means, for all properties, an investigation where an owner or operator of a property conforms to the standard developed by the Secretary in rule for a

1	diligent and appropriate investigation. If no standard exists, the owner or
2	operator of a property shall conform to one of the following:
3	(1) the all appropriate inquiry standard set forth in 40 C.F.R. Part 312, as
4	amended; or
5	(2) the current standard for phase I environmental site assessments
6	established by the American Society for Testing and Materials;
7	(b) In the case of residential property used for residential purposes, diligent
8	and appropriate investigation shall mean a facility inspection and title search
9	<u>that:</u>
10	(1) reveal no basis for further investigation; and
11	(2) do not reveal that the property was used for or was part of a larger
12	parcel that was used for commercial or industrial purposes.
13	Sec. 5. EFFECTIVE DATE
14	This act shall take effect on July 1, 2013.