

1 S.37

2 Introduced by Senators Campion, Sears and Bray

3 Referred to Committee on Judiciary

4 Date: January 18, 2019

5 Subject: Conservation and development; judiciary; toxic substances; strict
6 liability; medical monitoring damages

7 Statement of purpose of bill as introduced: This bill proposes to hold any
8 person who releases a toxic substance strictly, jointly, and severally liable for
9 any harm resulting from the release. The bill also proposes to establish a
10 private right of action for medical monitoring damages incurred due to
11 exposure to a toxic substance.

12 ~~An act relating to medical monitoring damages.~~

An act relating to medical monitoring

13 It is hereby enacted by the General Assembly of the State of Vermont:

14 ~~*** Strict Liability; Toxic Substance Release ***~~

15 Sec. 1. 10 V.S.A. chapter 159, subchapter 5 is added to read:

16 Subchapter 5. Strict Liability for Toxic Substance Release

17 § 6685. DEFINITIONS

18 As used in this subchapter:

19 ~~(1) "Harm" means any personal injury or property damage.~~

1 ~~(2) "Release" means any intentional or unintentional, permitted or~~
2 ~~unpermitted, act or omission that allows a toxic substance to enter the air, land,~~
3 ~~surface water, groundwater, or any other place where the toxic substance may~~
4 ~~be located in one or more of the following amounts:~~

5 ~~(A) more than two gallons or pounds;~~

6 ~~(B) two gallons or pounds or less if the amount released poses a~~
7 ~~potential or actual threat to human health; or~~

8 ~~(C) for any toxic substance regulated under the Comprehensive~~
9 ~~Environmental Response, Compensation, and Liability Act, 42 U.S.C.~~

10 ~~§§ 9601-9675, as amended, the reportable quantity specified under 40 C.F.R.~~
11 ~~§ 302.4.~~

12 ~~(3)(A) "Toxic substance" means any substance, mixture, or compound~~
13 ~~that has the capacity to produce personal injury or illness to humans through~~
14 ~~ingestion, inhalation, or absorption through any body surface and that satisfies~~
15 ~~one or more of the following:~~

16 ~~(i) the substance, mixture, or compound is listed on the U.S.~~
17 ~~Environmental Protection Agency Consolidated List of Chemicals Subject to~~
18 ~~the Emergency Planning and Community Right-To-Know Act, Comprehensive~~
19 ~~Environmental Response, Compensation and Liability Act, and Section 112(r)~~
20 ~~of the Clean Air Act,~~

1 ~~(ii) the substance, mixture, or compound is defined as a~~
2 ~~“hazardous material” under section 6602 of this title or under rules adopted~~
3 ~~under this chapter;~~

4 ~~(iii) testing has produced evidence, recognized by the National~~
5 ~~Institute for Occupational Safety and Health or the U.S. Environmental~~
6 ~~Protection Agency, that the substance, mixture, or compound poses acute or~~
7 ~~chronic health hazards;~~

8 ~~(iv) the Department of Health has issued a public health advisory~~
9 ~~for the substance, mixture, or compound; or~~

10 ~~(v) the Secretary of Natural Resources has designated the~~
11 ~~substance, mixture, or compound as a hazardous waste under this chapter.~~

12 ~~(B) “Toxic substance” shall not mean:~~

13 ~~(i) a pesticide regulated by the Secretary of Agriculture, Food and~~
14 ~~Markets; or~~

15 ~~(ii) ammunition or components thereof, firearms, air rifles,~~
16 ~~discharge of firearms or air rifles, or hunting or fishing equipment or~~
17 ~~components thereof.~~

18 § 6686. LIABILITY FOR RELEASE OF TOXIC SUBSTANCES

19 (a) Any person who releases a toxic substance shall be held strictly, jointly,
20 and severally liable for any harm resulting from the release.

1 ~~(b) Any person held liable under subsection (a) of this section shall have~~
2 ~~the right to seek contribution from any other person who caused or contributed~~
3 ~~to the release. The right to contribution under this subsection shall include the~~
4 ~~right to seek contribution from a chemical manufacturer that released a toxic~~
5 ~~substance when a court determines that the manufacturer failed to warn a~~
6 ~~person of a toxic substance's propensity to cause the harm complained of.~~

7 ~~(c) Nothing in this section shall be construed to supersede or diminish in~~
8 ~~any way existing remedies available to a person or the State at common law or~~
9 ~~under statute.~~

10 Sec. 2. DEPARTMENT OF FINANCIAL REGULATION; REPORT ON
11 INSURANCE POLICY PRICING AND AVAILABILITY

12 ~~(a) The Commissioner of Financial Regulation shall monitor how the~~
13 ~~imposition of strict liability for toxic substance releases pursuant to 10 V.S.A.~~
14 ~~chapter 159, subchapter 5 affects the pricing and availability of commercial~~
15 ~~general liability insurance policies, residential homeowner's insurance~~
16 ~~policies, and other insurance policies in the State. The Commissioner of~~
17 ~~Financial Regulation shall evaluate whether:~~

18 ~~(1) insurance policies in the State are more expensive or less available~~
19 ~~due to the strict liability provisions of 10 V.S.A. chapter 159, subchapter 5,~~
20 ~~and~~

1 ~~(2) the insurance market in the State is negatively affected in~~
2 ~~comparison to the national market solely due to the strict liability provisions of~~
3 ~~10 V.S.A. chapter 159, subchapter 5.~~

4 ~~(b) On or before January 15, 2020, and annually thereafter, the~~
5 ~~Commissioner of Financial Regulation shall report to the Senate Committee on~~
6 ~~Finance and the House Committee on Commerce and Economic Development~~
7 ~~the results of its evaluation under subsection (a) of this section.~~

8 * * * Medical Monitoring Damages * * *

9 Sec. 3. 12 V.S.A. chapter 219 is added to read:

10 CHAPTER 219. MEDICAL MONITORING DAMAGES

11 § 7201. DEFINITIONS

12 As used in this chapter:

13 (1) "Disease" means any disease, ailment, or adverse physiological or
14 chemical change linked with exposure to a toxic substance.

15 (2) "Exposure" means ingestion, inhalation, contact with the skin or
16 eyes, or any other physical contact.

17 (3) "Medical monitoring damages" means the cost of medical tests or
18 procedures and related expenses incurred for the purpose of detecting latent
19 disease resulting from exposure.

20 (4) "Release" means any intentional or unintentional, permitted or
21 unpermitted, act or omission that allows a toxic substance to enter the air, land,

1 ~~surface water, groundwater, or any other place where the toxic substance may~~

2 be located in one or more of the following amounts:

3 (A) more than two gallons or pounds;

4 (B) two gallons or pounds or less if the amount released poses a
5 potential or actual threat to human health; or

6 (C) for any toxic substance regulated under the Comprehensive
7 Environmental Response, Compensation, and Liability Act, 42 U.S.C.

8 §§ 9601-9675, as amended, the reportable quantity specified under 40 C.F.R.

9 § 302.4.

10 (5)(A) "Toxic substance" means any substance, mixture, or compound
11 that has the capacity to produce personal injury or illness to humans through
12 ingestion, inhalation, or absorption through any body surface and that satisfies
13 one or more of the following:

14 (i) the substance, mixture, or compound is listed on the U.S.
15 Environmental Protection Agency Consolidated List of Chemicals Subject to
16 the Emergency Planning and Community Right-To-Know Act, Comprehensive
17 Environmental Response, Compensation and Liability Act, and Section 112(r)
18 of the Clean Air Act;

19 (ii) the substance, mixture, or compound is defined as a
20 "hazardous material" under 10 V.S.A. § 6602 or under rules adopted under

21 10 V.S.A. Chapter 159,

1 ~~(iii) testing has produced evidence, recognized by the National~~
2 ~~Institute for Occupational Safety and Health or the U.S. Environmental~~
3 ~~Protection Agency, that the substance, mixture, or compound poses acute or~~
4 ~~chronic health hazards;~~

5 ~~(iv) the Department of Health has issued a public health advisory~~
6 ~~for the substance, mixture, or compound; or~~

7 ~~(v) the Secretary of Natural Resources has designated the~~
8 ~~substance, mixture, or compound as a hazardous waste under 10 V.S.A.~~
9 ~~chapter 159; or~~

10 ~~(vi) the substance, when released, can be shown by expert~~
11 ~~testimony to pose a potential threat to human health or the environment.~~

12 ~~(B) "Toxic substance" shall not mean:~~

13 ~~(i) a pesticide regulated by the Secretary of Agriculture, Food~~
14 ~~and Markets; or~~

15 ~~(ii) ammunition or components thereof, firearms, air rifles,~~
16 ~~discharge of firearms or air rifles, or hunting or fishing equipment or~~
17 ~~components thereof.~~

18 ~~§ 7202. MEDICAL MONITORING DAMAGES FOR EXPOSURE TO~~

19 ~~TOXIC SUBSTANCES~~

20 ~~(a) A person with or without a present injury or disease shall have a cause~~
21 ~~of action for medical monitoring damages against a person who released a~~

1 e substance if all of the following are demonstrated by a preponderance of the
2 evidence:

3 (1) The person was exposed to the toxic substance as a result of tortious
4 conduct by the person who released the toxic substance, including conduct that
5 constitutes negligence, battery, strict liability, trespass, or nuisance.

6 (2) There is a probable link between exposure to the toxic substance and
7 a latent disease.

8 (3) The person's exposure to the toxic substance increases the risk of
9 developing the latent disease. A person does not need to prove that the latent
10 disease is certain or likely to develop as a result of the exposure.

11 (4) Diagnostic testing is reasonably necessary. Testing is reasonably
12 necessary if a physician would prescribe testing for the purpose of detecting or
13 monitoring the latent disease.

14 (5) Medical tests or procedures exist to detect the latent disease.

15 (b) A court shall place the award of medical monitoring damages into a
16 court-supervised program administered by a medical professional.

17 (c) If a court places an award of medical monitoring damages into a court-
18 supervised program pursuant to subsection (b) of this section, the court shall
19 also award to the plaintiff reasonable attorney's fees and other litigation costs
20 reasonably incurred.

1 ~~(d) Nothing in this chapter shall be deemed to preclude the pursuit of any~~
2 ~~other civil or injunctive remedy available under statute or common law,~~
3 ~~including the right of any person to recover for damages related to the~~
4 ~~manifestation of a latent disease. The remedies in this chapter are in addition~~
5 ~~to those provided by existing statutory or common law.~~

6 ~~(e) This section does not preclude a court from certifying a class action for~~
7 ~~medical monitoring damages.~~

8 * * * Effective Date * * *

9 Sec. 4. EFFECTIVE DATE

10 ~~This act shall take effect on July 1, 2019.~~

* * * *Strict Liability; Toxic Substance Release* * * *

Sec. 1. 10 V.S.A. chapter 159, subchapter 5 is added to read:

Subchapter 5. Strict Liability for Toxic Substance Release

§ 6685. DEFINITIONS

As used in this subchapter:

(1) "Establishment" means any premises used for the purpose of carrying on or exercising any trade, business, profession, vocation, commercial or charitable activity, or governmental function.

(2) "Facility" means all contiguous land, structures, other appurtenances, and improvements on the land where toxic substances are manufactured, processed, used, or stored. A facility may consist of several treatment, storage, or disposal operational units. A facility shall not include land, structures, other appurtenances, and improvements on the land owned by a municipality.

(3) "Harm" means any personal injury or property damage.

(4) "Large facility" means a facility:

(A) where 10 or more full-time employees have been employed at any one time; or

(B)(i) where an activity within the Standard Industrial Classification code of 20 through 39 is conducted or was conducted; and

(ii) that is owned or operated by a person who, when all facilities or establishments that the person owns or controls are aggregated, has employed 500 employees at any one time.

(5) "Person" means any individual; partnership; company; corporation; association; unincorporated association; joint venture; trust; municipality; the State of Vermont or any agency, department, or subdivision of the State; federal agency; or any other legal or commercial entity.

(6) "Release" means any intentional or unintentional, permitted or unpermitted, act or omission that allows a toxic substance to enter the air, land, surface water, groundwater, or any other place where the toxic substance may be located.

(7)(A) "Toxic substance" means any substance, mixture, or compound that has the capacity to produce personal injury or illness to humans through ingestion, inhalation, or absorption through any body surface and that satisfies one or more of the following:

(i) the substance, mixture, or compound is listed on the U.S. Environmental Protection Agency Consolidated List of Chemicals Subject to the Emergency Planning and Community Right-To-Know Act, Comprehensive Environmental Response, Compensation and Liability Act, and Section 112(r) of the Clean Air Act;

(ii) the substance, mixture, or compound is defined as a "hazardous material" under section 6602 of this title or under rules adopted under this chapter;

(iii) testing has produced evidence, recognized by the National Institute for Occupational Safety and Health or the U.S. Environmental Protection Agency, that the substance, mixture, or compound poses acute or chronic health hazards;

(iv) the Department of Health has issued a public health advisory for the substance, mixture, or compound;

(v) the Secretary of Natural Resources has designated the substance, mixture, or compound as a hazardous waste under this chapter; or

(vi) the substance can be shown by expert testimony to cause harm.

(B) "Toxic substance" shall not mean:

(i) a pesticide regulated by the Secretary of Agriculture, Food and Markets; or

(ii) ammunition or components thereof, firearms, air rifles, discharge of firearms or air rifles, or hunting or fishing equipment or components thereof.

§ 6686. LIABILITY FOR RELEASE OF TOXIC SUBSTANCES

(a) Any person who releases a toxic substance from a large facility shall be held strictly, jointly, and severally liable for any harm resulting from the release.

(b) Any person held liable under subsection (a) of this section shall have the right to seek contribution from the manufacturer of the toxic substance that was released.

(c) Nothing in this section shall be construed to supersede or diminish in any way existing remedies available to a person or the State at common law or under statute.

Sec. 2. REPEAL; STRICT LIABILITY FOR TOXIC SUBSTANCE RELEASE

10 V.S.A. chapter 159, subchapter 5 (strict liability for toxic substance releases) shall be repealed on July 1, 2024.

Sec. 3. DEPARTMENT OF FINANCIAL REGULATION; REPORT ON INSURANCE POLICY PRICING AND AVAILABILITY

(a) The Commissioner of Financial Regulation shall monitor how the imposition of strict liability for toxic substance releases pursuant to 10 V.S.A. chapter 159, subchapter 5 affects the pricing and availability of commercial general liability insurance policies, residential homeowner's insurance policies, and other insurance policies in the State. The Commissioner of Financial Regulation shall evaluate whether:

(1) insurance policies in the State are more expensive or less available due to the strict liability provisions of 10 V.S.A. chapter 159, subchapter 5; and

(2) the insurance market in the State is negatively affected in comparison to the national market solely due to the strict liability provisions of 10 V.S.A. chapter 159, subchapter 5.

(b) On or before January 15, 2020, and annually thereafter, the Commissioner of Financial Regulation shall report to the Senate Committee on Finance and the House Committee on Commerce and Economic Development the results of its evaluation under subsection (a) of this section.

** * * Medical Monitoring * * **

Sec. 4. 12 V.S.A. chapter 219 is added to read:

CHAPTER 219. MEDICAL MONITORING

§ 7201. DEFINITIONS

As used in this chapter:

(1) "Disease" means any disease, illness, ailment, or adverse physiological or chemical change linked with exposure to a toxic substance.

(2) "Establishment" means any premises used for the purpose of carrying on or exercising any trade, business, profession, vocation, commercial or charitable activity, or governmental function.

(3) "Exposure" means ingestion, inhalation, contact with the skin or eyes, or any other physical contact.

(4) "Facility" means all contiguous land, structures, other appurtenances, and improvements on the land where toxic substances are manufactured, processed, used, or stored. A facility may consist of several treatment, storage, or disposal operational units. A facility shall not include land, structures, other appurtenances, and improvements on the land owned by a municipality.

(5) "Large facility" means a facility:

(A) where 10 or more full-time employees have been employed at any one time; or

(B)(i) where an activity within the Standard Industrial Classification code of 20 through 39 is conducted or was conducted; and

(ii) that is owned or operated by a person who, when all facilities or establishments that the person owns or controls are aggregated, has employed 500 employees at any one time.

(6) "Medical monitoring" means a program of medical surveillance, including medical tests or procedures for the purpose of early detection of signs or symptoms of latent disease resulting from exposure.

(7) "Person" means any individual; partnership; company; corporation; association; unincorporated association; joint venture; trust; municipality; the State of Vermont or any agency, department, or subdivision of the State; federal agency; or any other legal or commercial entity.

(8) "Release" means any intentional or unintentional, permitted or unpermitted, act or omission that allows a toxic substance to enter the air,

land, surface water, groundwater, or any other place where the toxic substance may be located.

(9)(A) "Toxic substance" means any substance, mixture, or compound that has the capacity to produce personal injury or illness to humans through ingestion, inhalation, or absorption through any body surface and that satisfies one or more of the following:

(i) the substance, mixture, or compound is listed on the U.S. Environmental Protection Agency Consolidated List of Chemicals Subject to the Emergency Planning and Community Right-To-Know Act, Comprehensive Environmental Response, Compensation and Liability Act, and Section 112(r) of the Clean Air Act;

(ii) the substance, mixture, or compound is defined as a "hazardous material" under 10 V.S.A. § 6602 or under rules adopted under 10 V.S.A. chapter 159;

(iii) testing has produced evidence, recognized by the National Institute for Occupational Safety and Health or the U.S. Environmental Protection Agency, that the substance, mixture, or compound poses acute or chronic health hazards;

(iv) the Department of Health has issued a public health advisory for the substance, mixture, or compound; or

(v) the Secretary of Natural Resources has designated the substance, mixture, or compound as a hazardous waste under 10 V.S.A. chapter 159; or

(vi) exposure to the substance can be shown by expert testimony to increase the risk of developing a latent disease.

(B) "Toxic substance" shall not mean:

(i) a pesticide regulated by the Secretary of Agriculture, Food and Markets; or

(ii) ammunition or components thereof, firearms, air rifles, discharge of firearms or air rifles, or hunting or fishing equipment or components thereof.

§ 7202. MEDICAL MONITORING FOR EXPOSURE TO TOXIC SUBSTANCES

(a) A person with or without a present injury or disease shall have a cause of action for the remedy of medical monitoring against a person who released a toxic substance from a large facility if all of the following are demonstrated by a preponderance of the evidence:

(1) The person was exposed to the toxic substance as a result of tortious conduct by the person who released the toxic substance.

(2) There is a probable link between exposure to the toxic substance and a latent disease.

(3) The person's exposure to the toxic substance increases the risk of developing a latent disease. A person does not need to prove that the latent disease is certain or likely to develop as a result of the exposure.

(4) Diagnostic testing is reasonably necessary. Testing is reasonably necessary if a physician would recommend testing for the purpose of detecting or monitoring the latent disease based on the person's exposure.

(5) Medical tests or procedures exist to detect the latent disease.

(b) A person's present or past health status shall not be an issue in a claim for medical monitoring.

(c) If medical monitoring is awarded, a court shall order the liable person to fund a court-supervised medical monitoring program administered by one or more health professional.

(d) Upon an award of medical monitoring under subsection (c), the court shall award to the plaintiff reasonable attorney's fees and other litigation costs reasonably incurred.

(e) Nothing in this chapter shall be deemed to preclude the pursuit of any other civil or injunctive remedy available under statute or common law, including the right of any person to recover for damages related to the manifestation of a latent disease. The remedies in this chapter are in addition to those provided by existing statutory or common law.

(f) This section does not preclude a court from certifying a class action for the remedy of medical monitoring.

* * * Effective Date * * *

Sec. 5. EFFECTIVE DATE

This act shall take effect on July 1, 2019.