

1 TO THE HOUSE OF REPRESENTATIVES:

2 The Committee on Judiciary to which was referred Senate Bill No. 37
3 entitled “An act relating to medical monitoring” respectfully reports that it has
4 considered the same and recommends that the House propose to the Senate that
5 the bill be amended by striking out all after the enacting clause and inserting in
6 lieu thereof the following:

7 * * * Medical Monitoring * * *

8 Sec. 1. 12 V.S.A. chapter 219 is added to read:

9 CHAPTER 219. MEDICAL MONITORING

10 § 7201. DEFINITIONS

11 As used in this chapter:

12 (1) “Disease” means any disease, illness, ailment, or adverse
13 physiological or chemical change linked to exposure to a toxic substance.

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

17 (3) “Exposure” means ingestion, inhalation, or absorption through any
18 body surface.

19 (4) “Facility” means all contiguous land, structures, other
20 appurtenances, and improvements on the land where toxic substances are
21 manufactured, processed, used, or stored. A facility may consist of several

1 treatment, storage, or disposal operational units. A facility shall not include
2 land, structures, other appurtenances, and improvements on the land owned by
3 a municipality.

4 (5) “Large facility” means a facility:

5 (A) where an activity within a Standard Industrial Classification code
6 of 10 through 14, 20 through 39, 40 through 42, 44 through 46, or 49 is
7 conducted or was conducted; and

8 (B)(i) where 10 or more full-time employees have been employed at
9 any one time; or

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

13 (6) “Medical monitoring” means a program of medical tests or
14 procedures for the purpose of early detection of signs or symptoms of a latent
15 disease resulting from exposure.

16 (7) “Operator” means a person who manages, conducts, or directs the
17 operations of a facility.

18 (8) “Owner” means a person who owns or controls a facility. “Owner”
19 shall not mean a person who without participating in the management of the
20 facility holds indicia of ownership primarily to protect a security interest.

1 (9) “Person” means any individual; partnership; company; corporation;
2 association; unincorporated association; joint venture; trust; municipality; the
3 State of Vermont or any agency, department, or subdivision of the State;
4 federal agency; or any other legal or commercial entity.

5 (10) “Release” means any act or omission that allows a toxic substance
6 to enter the air, land, surface water, or groundwater.

7 (11) “Tortious conduct” means negligence, trespass, nuisance, product
8 liability, or common law liability for ultra-hazardous or abnormally dangerous
9 activity.

10 (12)(A) “Toxic substance” means any substance, mixture, or compound
11 that may cause personal injury or disease to humans through ingestion,
12 inhalation, or absorption through any body surface and that satisfies one or
13 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;

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) exposure to the substance is shown by expert testimony to
11 increase the risk of developing a latent disease.

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

13 (i) a pesticide when applied consistent with good practice; in
14 conformity with federal, State, and local laws, rules, and regulations; and
15 according to the manufacturer’s instructions; or

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

19 § 7202. MEDICAL MONITORING FOR EXPOSURE TO TOXIC

20 SUBSTANCES

1 (a) A person without a present injury or disease shall have a cause of action
2 for the remedy of medical monitoring against a person who is the owner or
3 operator of a large facility from which a toxic substance was released if all of
4 the following are demonstrated by a preponderance of the evidence:

5 (1) The person was exposed to the toxic substance as a result of tortious
6 conduct by the owner or operator, or persons under the control of the owner or
7 operator, who released the toxic substance.

8 (2) As a proximate result of the exposure, the person has a greater risk
9 of contracting a latent disease.

10 (3) Diagnostic testing is reasonably necessary. Testing is reasonably
11 necessary if, shown by expert testimony, a physician would prescribe
12 diagnostic testing because the person's increased risk of contracting the disease
13 due to the exposure makes it reasonably necessary to undergo diagnostic
14 testing different from what would normally be prescribed in the absence of the
15 exposure.

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

17 (b) If the cost of medical monitoring is awarded, a court shall order the
18 defendant found liable to pay the award to a court-supervised medical
19 monitoring program administered by one or more appropriate health
20 professionals, including professionals with expertise in exposure to toxic

1 substances or expertise with treating or monitoring the relevant latent disease
2 or diseases.

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

6 (d)(1) This chapter shall be the exclusive remedy for a person without a
7 present injury to bring a cause of action to seek medical monitoring due to
8 exposure to toxic substance.

9 (2) Except as provided under subdivision (1) of this subsection, nothing
10 in this chapter shall be deemed to preclude the pursuit of any other civil or
11 injunctive remedy or defense available under statute or common law, including
12 the right of any person to seek to recover for damages related to the
13 manifestation of a latent disease. The remedies and defenses in this chapter are
14 in addition to those provided by existing statutory or common law.

15 (e) This section shall not increase the rights and remedies available under
16 21 V.S.A. chapter 9 to an employee who suffers a personal injury by accident
17 arising out of and in the course of employment, provided that 21 V.S.A.
18 chapter 9 shall not limit the right of a person who has not suffered a personal
19 injury by accident arising out of and in the course of employment to bring a
20 cause of action for medical monitoring.

21 Sec. 2. APPLICATION TO EXPOSURES PRIOR TO EFFECTIVE DATE

1 any other person or entity, at any facility owned or operated by another person
2 or entity and containing such hazardous materials; ~~and~~

3 (4) any person who accepts or accepted any hazardous materials for
4 transport to disposal or treatment facilities selected by such persons, from
5 which there is a release, or a threatened release of hazardous materials ~~shall be~~
6 liable for; and

7 ~~(A) abating such release or threatened release; and~~

8 ~~(B) costs of investigation, removal, and remedial actions incurred by~~
9 ~~the State which are necessary to protect the public health or the environment.~~

10 (5) any person who manufactured for commercial sale a hazardous
11 material and who knew or should have known that the material presented a
12 threat of harm to human health or the natural environment.

13 * * *

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

18 (A) An act of God.

19 (B) An act of war.

20 (C) An act or omission of a third party other than an employee or
21 agent of the defendant, or other than one whose act or omission occurs in

1 connection with a contractual relationship, existing directly or indirectly, with
2 the defendant. If the sole contractual arrangement arises from a published
3 tariff and acceptance for carriage by a common carrier by rail, for purposes of
4 this section, there shall be considered to be no contractual relationship at all.

5 This subdivision (d)(1)(C) shall only serve as a defense if the defendant
6 establishes by a preponderance of the evidence:

7 (i) that the defendant exercised due care with respect to the
8 hazardous material concerned, taking into consideration the characteristics of
9 that hazardous material, in light of all relevant facts and circumstances; and

10 (ii) that the defendant took precautions against foreseeable acts or
11 omissions of any such third party and the consequences that could foreseeably
12 result from those acts or omissions.

13 (D) Any combination of subdivisions (A)-(C) of this subdivision (1).

14 * * *

15 (5) A person shall not be liable under subdivision (a)(5) of this section
16 provided that the person demonstrates that he or she provided an adequate
17 warning of the harm posed by the hazardous material known or which should
18 have been known at the time the hazardous material was manufactured.

19 * * *

20 (i) In an action brought by the Secretary under this section, a responsible
21 person may implead, or in a separate action a responsible person may sue,

1 another responsible person or persons and may obtain contribution or
2 indemnification, except that a person who is solely liable pursuant to
3 subdivision (a)(5) of this section shall not be able to implead or to sue a person
4 pursuant to this subsection. A responsible person who has resolved its liability
5 to the State under this section through a judicially approved settlement and a
6 secured lender or fiduciary with whom the Secretary has entered into an
7 agreement under subsection (h) of this section shall not be liable for claims for
8 contribution or indemnification regarding matters addressed in the judicially
9 approved settlement or in the agreement. Likewise, a person who has obtained
10 a certificate of completion pursuant to subchapter 3 of this chapter shall not be
11 liable for claims for contribution or indemnification regarding releases or
12 threatened releases described in the approved corrective action plan, as
13 amended. Such a settlement or agreement or certificate of completion does not
14 discharge any other potentially responsible person unless its terms so provide,
15 but it reduces the potential liability of other potentially responsible persons by
16 the relief agreed upon. A secured lender or fiduciary with whom the Secretary
17 has entered into an agreement under subsection (h) of this section may not seek
18 contribution or indemnification on the basis of such agreement from any other
19 potentially responsible person. In any action for contribution or
20 indemnification, the rights of any person who has resolved its liability to the
21 State shall be subordinate to the rights of the State.

