Introduced by Senators Sears and Campion

Referred to Committee on

Date:

Subject: Judiciary; cause of action; toxic substances; medical monitoring

Statement of purpose of bill as introduced: This bill proposes to establish a cause of action for the remedy of medical monitoring for a person who is exposed to a proven toxic substance. In addition, the bill would provide that a person is liable for abating a release or threatened release of hazardous material and the costs of investigation, removal, and remedial actions incurred by the State if the person manufactured a hazardous material for commercial sale and knew or should have known that the material presented a threat of harm to human health or the natural environment.

An act relating to establishing a cause of action for medical monitoring expenses

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

* * * Medical Monitoring * * *

Sec. 1. 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 to exposure to a proven toxic substance. A disease is serious if it has the potential to cause death, disability, or chronic pain.

(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, or absorption through any body surface.

(4) “Facility” means all contiguous land, structures, other appurtenances, and improvements on the land where proven 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 an activity within a Standard Industrial Classification code of 10 through 14, 20 through 39, 40 through 42, 44 through 46, or 49 is conducted or was conducted; and
(B)(i) where 10 or more full-time employees have been employed at
any one time; or

(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 tests or
procedures for the purpose of early detection of signs or symptoms of a latent
disease resulting from exposure.

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

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

(9) “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.

(10)(A) “Proven toxic substance” means any substance, mixture, or
compound that may cause personal injury or disease to humans 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;

(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, mixture, or compound is shown by expert testimony to increase the risk of developing a serious latent disease.

(B) “Proven toxic substance” shall not mean:
(i) a pesticide when applied consistent with good practice; in conformity with federal, State, and local laws, rules, and regulations; and according to the manufacturer’s instructions; or

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

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

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

§ 7202. MEDICAL MONITORING FOR EXPOSURE TO PROVEN TOXIC SUBSTANCES
(a) A person without a present injury or disease shall have a cause of action for the remedy of medical monitoring against a person who is the owner or operator of a large facility from which a proven toxic substance was released if all of the following are demonstrated by a preponderance of the evidence:

(1) exposure at a rate significantly greater than the general population;
(2) to a proven toxic substance;
(3) as a result of tortious conduct of the defendant;
(4) as a result of the exposure, plaintiffs have suffered an increased risk of contracting a serious disease;

(5) the increased risk makes it medically necessary for the plaintiffs to undergo periodic medical examination different from that prescribed for the general population in the absence of exposure; and

(6) monitoring procedures exist that are reasonable in cost and safe for use.

(b) If the cost of medical monitoring is awarded, a court shall order the defendant found liable to pay the award to a court-supervised medical monitoring program administered by one or more appropriate health professionals, including professionals with expertise in exposure to toxic substances or expertise with treating or monitoring the relevant latent disease or diseases.

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

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

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

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

* * * Hazardous Material Releases * * *

Sec. 2. 10 V.S.A. § 6615 is amended to read:

§ 6615. LIABILITY

(a) Subject only to the defenses set forth in subsections (d) and (e) of this
section, the following persons shall be liable for abating a release or threatened
release of hazardous material and the costs of investigation, removal, and
remedial actions incurred by the State that are necessary to protect the public
health or the environment:

(1) the owner or operator of a facility, or both;
(2) any person who at the time of release or threatened release of any
hazardous material owned or operated any facility at which such hazardous
materials were disposed of;

(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; and

(A) abating such release or threatened release; and

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

(5) any person who manufactured for commercial sale a hazardous
material and who knew or should have known that the material presented a
threat of harm to human health or the natural 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 resulting damages were caused
solely by any of the following:

(A) An act of God.

(B) An act of war.

(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.

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

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

* * *

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

Sec. 3. APPLICATION OF LIABILITY

Notwithstanding any contrary provision of 1 V.S.A. § 214, the amendment
contained in 10 V.S.A. § 6615(a)(5) shall apply to any relevant release of a
hazardous material regardless of the date of the relevant release, including
releases that occurred prior to the effective date of 10 V.S.A. § 6615(a)(5).

*** Effective Date ***

Sec. 4. EFFECTIVE DATE

This act shall take effect on July 1, 2021.