

1 S.113

2 Introduced by Senators Sears and Campion

3 Referred to Committee on Judiciary

4 Date: March 9, 2021

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

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

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

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

17 * * * Medical Monitoring * * *

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

19 CHAPTER 219. MEDICAL MONITORING

20 § 7201. DEFINITIONS

1 As used in this chapter:

2 (1) “Disease” means any disease, illness, ailment, or adverse
3 physiological or chemical change linked to exposure to a proven toxic
4 substance. A disease is serious if it has the potential to cause death, disability,
5 or chronic pain.

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

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

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

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

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

1 ~~(B)(i) where 10 or more full-time employees have been employed at~~
2 ~~any one time, or~~

*(B)(i) where, at any one time, 10 or more full-time or full-time
equivalent employees have been employed; or*

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

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

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

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

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

18 (10)(A) “Proven toxic substance” means any substance, mixture, or
19 compound that may cause personal injury or disease to humans and that
20 satisfies one or more of the following:

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

6 (ii) the substance, mixture, or compound is defined as a
7 “hazardous material” under 10 V.S.A. § 6602 or under rules adopted under
8 10 V.S.A. chapter 159;

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

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

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

18 (vi) exposure to the substance, mixture, or compound is shown by
19 expert testimony to increase the risk of developing a serious latent disease.

20 (B) “Proven toxic substance” shall not mean:

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

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

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

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

12 § 7202. MEDICAL MONITORING FOR EXPOSURE TO PROVEN TOXIC

13 SUBSTANCES

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

18 (1) exposure at a rate significantly greater than the general population;

19 (2) to a proven toxic substance;

20 (3) as a result of tortious conduct of the defendant;

(4) as a proximate result of the exposure, plaintiffs have suffered an increased risk of contracting a serious disease;

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

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

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

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

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

18 (2) Except as provided under subdivision (1) of this subsection, nothing
19 in this chapter shall be deemed to preclude the pursuit of any other civil or

1 injunctive remedy or defense available under statute or common law, including
2 the right of any person to seek to recover for damages related to the
3 manifestation of a latent disease. The remedies and defenses in this chapter
4 are in addition to those provided by existing statutory or common law.

5 (e) This section shall not increase the rights and remedies available under
6 21 V.S.A. chapter 9 to an employee who suffers a personal injury by accident
7 arising out of and in the course of employment, provided that 21 V.S.A.
8 chapter 9 shall not limit the right of a person who has not suffered a personal
9 injury by accident arising out of and in the course of employment to bring a
10 cause of action for medical monitoring.

11 * * * Hazardous Material Releases * * *

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

13 § 6615. LIABILITY

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

19 (1) the owner or operator of a facility, or both;

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

4 (3) any person who by contract, agreement, or otherwise arranged for
5 disposal or treatment, or arranged with a transporter for transport for disposal
6 or treatment, of hazardous materials owned or possessed by such person, by
7 any other person or entity, at any facility owned or operated by another person
8 or entity and containing such hazardous materials; ~~and~~

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

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

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

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

19 * * *

20 (d)(1) There shall be no liability under this section for a person otherwise
21 liable who can establish by a preponderance of the evidence that the release or

1 threat of release of hazardous material and the resulting damages were caused
2 solely by any of the following:

3 (A) An act of God.

4 (B) An act of war.

5 (C) An act or omission of a third party other than an employee or
6 agent of the defendant, or other than one whose act or omission occurs in
7 connection with a contractual relationship, existing directly or indirectly, with
8 the defendant. If the sole contractual arrangement arises from a published
9 tariff and acceptance for carriage by a common carrier by rail, for purposes of
10 this section, there shall be considered to be no contractual relationship at all.

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

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

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

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

20 * * *

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

5 * * *

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

1 but it reduces the potential liability of other potentially responsible persons by
2 the relief agreed upon. A secured lender or fiduciary with whom the Secretary
3 has entered into an agreement under subsection (h) of this section may not
4 seek contribution or indemnification on the basis of such agreement from any
5 other potentially responsible person. In any action for contribution or
6 indemnification, the rights of any person who has resolved its liability to the
7 State shall be subordinate to the rights of the State.

8 Sec. 3. APPLICATION OF LIABILITY

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

13 * * * Effective Date * * *

14 Sec. 4. EFFECTIVE DATE

This act shall take effect on July 1, ~~2021~~ 2022.