OFFICE OF ATTORNEY GENERAL

TESTIMONY PRESENTED IN OPPOSITION TO L.D. 882:

AN ACT TO CREATE A 5-YEAR STATUTE OF LIMITATIONS FOR ENVIRONMENTAL VIOLATIONS

SPONSORED BY SENATOR SNOWE-MELLO

BEFORE THE JOINT STANDING COMMITTEE ON JUDICIARY

DATE OF HEARING:
APRIL 25, 2007

Senator Hobbins, Representative Simpson and Members of the Judiciary Committee, my name is Jerry Reid, and I am an Assistant Attorney General in the Natural Resources Division of the Attorney General's Office. I am here today to speak on behalf of Attorney General Steven Rowe in opposition to L.D. 882. The Attorney General opposes this bill for several specific reasons that I will explain, but generally speaking we oppose it because it would undermine the State's ability to enforce its environmental laws.

L.D. 882 would require DEP and the Attorney General to "initiate" an enforcement action under these laws within five years of the date that the DEP or the Attorney General had "knowledge" of the violation. As an initial matter, this language is confusing and subject to different interpretations. What does the bill mean by "initiating" an enforcement action? Does that refer to the DEP's issuance of a Notice of Violation, which typically begins the enforcement process? Does it refer to filing the case in court, which is usually how statutes of limitation apply? Or does it mean something else? It's not clear from the language of the bill and this will cause confusion from the outset.

Similarly, how does one determine when either the DEP or the Attorney General first gain "knowledge" of a particular violation for the purpose of triggering the five year window for initiating enforcement? In some instances, for example when a permit holder self-reports violations to DEP in writing, this may be clear enough. But in many other circumstances it will be difficult to determine. Bear in mind that DEP is an agency with hundreds of employees located at four offices across the State: Presque Isle, Bangor, Augusta and Portland. DEP's field inspectors have routine and casual interactions with the regulated community throughout the State every day. If the specific date that DEP gains "knowledge" of a potential violation takes on great legal significance, as it would under this bill, it's easy to foresee many factual disputes arising about how that date should be determined in a given case. The result will be new confusion about how the environmental statutes may be applied and enforced.

A five year statute of limitations would also force DEP to initiate the enforcement process against large industrial facilities much more frequently than is the current

practice. Typically, under some major environmental laws such as the Clean Air Act and Clean Water Act, DEP will address enforcement at a given facility not every year, but every 7, 8 or even 10 years. It's important to understand that these facilities, even when they are well run, often accumulate hundreds of relatively minor permit violations in a given year. DEP and the Attorney General do not have the staff to seek penalties for these violations every year, and the facilities themselves in most cases prefer to go through the enforcement process much less frequently. Some paper mills have raised concerns in the past that going through the enforcement process more frequently, such as every three years, could have the effect of placing the facility on EPA's list of "significant violators", which can be triggered simply by the number of enforcement actions against a facility. Filing a single enforcement action for 10 years of violations, as opposed to 10 separate actions over that same ten years, is more efficient for all involved. L.D. 882 would make this practice, which works well both for the agency and the regulated community, impossible.

Imposing a new five year statute of limitations would also have the unintended consequence of actually increasing litigation in this area. The only way to clearly avoid losing violations to the new five year deadline would be to file a given case in court, something that is rarely necessary to resolve enforcement actions today. We estimate that 95% of enforcement actions are now resolved out of court through administrative consent agreements, which avoid the time and expense associated with litigation for both sides. If this bill is passed, the State will be forced to file lawsuits as a protective measure whenever a consent agreement cannot be finalized within the new statutory deadline. In this way, L.D. 882 will actually increase litigation in our courts, and add new and unnecessary costs to the enforcement of the State's environmental laws.

Finally, the language of L.D. 882 could be read as preventing the State from seeking penalties for on-going violations that pose a serious threat to the environment or public health. If a violator could demonstrate that any DEP employee had knowledge of the violation five years ago, it could argue that it is immune from civil penalties for even the most serious violations of the law, including on-going toxic discharges to the air or water. This is true because the bill makes no distinction between on-going violations of the law and isolated incidents. Clearly, changing the law in a way that could immunize such a serious, long term violator is problematic.

Thank you for your consideration, and I'd be happy to respond to any questions you may have.

Maine Revised Statutes

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§347 Title 38: WATERS AND NAVIGATION §347-B
Chapter 2: DEPARTMENT OF ENVIRONMENTAL PROTECTION
Subchapter 1: ORGANIZATION AND POWERS

§347-A. Violations

8. Limitations on air and wastewater discharge enforcement actions. The following limitations apply to air and wastewater discharge enforcement actions.

A. If a licensee has reported to the department a violation of chapter 4 or of rules adopted under chapter 4, an enforcement action for civil or administrative penalties brought by the department or the Attorney General for that violation must be initiated within 10 years of the date the licensee reported the violation to the department. [2007, c. 337, §1 (NEW).]

B. If a licensee has reported to the department a violation of chapter 3, subchapter 1, article 2 or of rules adopted under chapter 3, subchapter 1, article 2, an enforcement action for civil or administrative penalties brought by the department or the Attorney General for that violation must be initiated within 10 years of the date the licensee reported the violation to the department. [2007, c. 337, §1 (NEW).]

[2007, c. 337, §1 (NEW) .]

SECTION HISTORY
1989, c. 311, §4 (NEW). 1989, c. 890, §§A31,32,40 (AMD). 1993, c. 204, §§1,2 (AMD). 1995, c. 123, §§3,4 (AMD). 1995, c. 560, §I16 (AMD). 1997, c. 794, §A5 (AMD). 1999, c. 127, §A54 (AMD). 2001, c. 365, §2 (AMD). 2003, c. 245, §5 (AMD). 2005, c. 330, §5 (AMD). 2007, c. 292, §12 (AMD). 2007, c. 337, §1 (AMD).

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