

1 H.410

2 Introduced by Representatives Masland of Thetford, Cheney of Norwich,
3 Botzow of Pownal, Branagan of Georgia, Christie of Hartford,
4 Clarkson of Woodstock, Copeland-Hanzas of Bradford, Deen of
5 Westminster, Emmons of Springfield, Jerman of Essex, Johnson
6 of Canaan, Kitzmiller of Montpelier, Krowinski of Burlington,
7 Lanpher of Vergennes, Macaig of Williston, Marek of Newfane,
8 McCullough of Williston, Miller of Shaftsbury, Pearson of
9 Burlington, Poirier of Barre City, Ram of Burlington, South of
10 St. Johnsbury, Townsend of South Burlington, Weed of
11 Enosburgh, Wizowaty of Burlington, Wright of Burlington, and
12 Young of Glover

13 Referred to Committee on

14 Date:

15 Subject: Conservation and development; waste management; brownfields

16 Statement of purpose of bill as introduced: This bill proposes to amend the
17 state brownfields law to establish conditions under which a municipality,
18 regional development corporation, or regional planning commission will be
19 held harmless from liability due to the acquisition of real property on which a
20 hazardous material release may have occurred.

1 An act relating to brownfields

2 Sec. 1. LEGISLATIVE INTENT

3 It is the intent of the General Assembly that:

4 (1) It is appropriate to confer a limited defense to liability for hazardous
5 material cleanup when a municipality, regional development corporation, or
6 regional planning commission conforms to the requirements of 10 V.S.A.
7 § 6615(d)(3), in the case of municipalities, and 10 V.S.A § 6615(d)(4).

8 (2) It is of vital importance for purchasers of commercial properties to
9 conduct environmental site assessments that conform to statutorily recognized
10 standards.

11 (3) In construing the defense to liability established pursuant to
12 10 V.S.A. § 6615(f), the courts of this State will be guided by the construction
13 of similar terms contained in 42 U.S.C. § 9601(35)(A)(i) and (B), as amended,
14 and the courts of the United States.

15 (4) It is appropriate to confer limited defense to liability for secured
16 lenders and fiduciaries under state law that is equivalent to under federal law.

17 (5) In construing the defense to liability established pursuant to
18 10 V.S.A. § 6615(g), the courts of this State will be guided by the construction
19 of similar terms contained in 42 U.S.C. §§ 9601(20)(F) and 9707(n), as
20 amended, and the courts of the United States.

1 * * *

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

6 * * *

7 (10) "Facility" means all contiguous land, structures, other
8 appurtenances, and improvements on the land, used for treating, storing, or
9 disposing of waste. A facility may consist of several treatment, storage, or
10 disposal operational units.

11 * * *

12 (13) "Waste" means a material that is discarded or is being accumulated,
13 stored, or physically, chemically, or biologically treated prior to being
14 discarded or has served its original intended use and is normally discarded or is
15 a manufacturing or mining by-product and is normally discarded.

16 * * *

17 (16)(A) "Hazardous material" means all petroleum and toxic, corrosive,
18 or other chemicals and related sludge included in any of the following:

19 (i) any substance defined in section 101(14) of the federal
20 Comprehensive Environmental Response, Compensation and Liability Act
21 of 1980;

1 financial institution solely for legitimate commercial purposes, in making or
2 servicing loans. The term “secured lender” includes a person who acquires
3 indicia of ownership by assignment from another secured lender.

4 * * *

5 (34) “Participation in management” means, for the purpose of
6 subsection 6615(g) of this title, a secured lender’s or fiduciary’s actual
7 participation in the management or operational affairs of a facility. It does not
8 mean a secured lender’s or fiduciary’s mere capacity to influence, or
9 unexercised right to control, facility operations. A secured lender or fiduciary
10 shall be considered to have participated in management if the secured lender or
11 fiduciary:

12 (A) exercises decision-making control over environmental
13 compliance related to the facility, such that the secured lender or fiduciary has
14 undertaken responsibility for hazardous materials handling or disposal
15 practices related to the facility; or

16 (B) exercises control at a level comparable to that of a manager of the
17 facility, such that the secured lender or fiduciary has assumed or manifested
18 responsibility:

19 (i) for the overall management of the facility encompassing
20 day-to-day decision making with respect to environmental compliance; or

1 (ii) over all or substantially all of the operational functions, as
2 distinguished from financial or administrative functions, of the facility other
3 than the function of environmental compliance.

4 (35) “Regional development corporation” means a nonprofit corporation
5 organized in this State whose principal purpose is to promote, organize, or
6 accomplish economic development, including providing planning and resource
7 development services to local communities, supporting existing industry,
8 assisting the growth and development of new and existing small businesses,
9 and attracting industry or commerce to a particular economic region of the
10 State.

11 (36) “Regional planning commission” means a planning commission
12 created for a region established under 24 V.S.A. chapter 117, subchapter 3.

13 Sec. 3. 10 V.S.A. § 6615 is amended to read:

14 § 6615. LIABILITY

15 (a) Subject only to the defenses set forth in subsections (d) and (e) of this
16 section:

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

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

1 (B) The municipality did not cause or contribute to the
2 ~~contamination of~~, or worsen a release or threatened release of a hazardous
3 material at the property.

4 (C)(i) The municipality has entered into an agreement with the
5 ~~secretary regarding sale of the property acquired or has undertaken abatement,~~
6 ~~investigation, remediation, or removal activities as required by subchapter 3 of~~
7 ~~this chapter~~ Secretary, prior to the acquisition of the property, requiring the
8 municipality to conduct a site investigation with respect to any release or
9 threatened release of a hazardous material and an agreement for the
10 municipality's marketing of the property acquired.

11 (ii) The Secretary shall consult with the Secretary of Commerce
12 and Community Development on the plan related to the marketing of the
13 property.

14 (iii) The municipality may only assert a defense to liability after
15 implementing a site investigation at the property acquired and taking
16 reasonable steps defined by the agreement with the Secretary to market the
17 property.

18 (iv) In developing an agreement regarding site investigation, the
19 Secretary shall consider: the degree and extent of the known releases of
20 hazardous materials at the property; the financial ability of the municipality;

1 and the availability of state and federal funding when determining what is
2 required by the agreement for the investigation of the site.

3 (4) A regional development corporation or regional planning
4 commission shall not be liable under subdivision (a)(1) of this section as an
5 owner provided that the regional development corporation or regional planning
6 commission can show all the following:

7 (A) The regional development corporation or regional planning
8 commission did not cause, contribute, or worsen a release or threat of release at
9 the property.

10 (B) The regional development corporation received, in the 12 months
11 preceding the acquisition of the property, a performance contract for economic
12 development pursuant to 24 V.S.A. chapter 76. The requirement of this
13 subdivision (d)(4)(B) shall not apply to regional planning commissions.

14 (C)(i) The regional development corporation or regional planning
15 commission has entered into an agreement with the Secretary, prior to the
16 acquisition of the property, requiring the regional development corporation or
17 regional planning commission to conduct a site investigation with respect to
18 any release or threatened release of a hazardous material and an agreement for
19 the regional development corporation's or regional planning commission's
20 marketing of the property acquired.

1 section, be liable as either an owner or operator under this section merely
2 because of any one or any combination of more than one of the following:

3 * * *

4 (J) in an emergency, requiring or undertaking activities to prevent
5 exposure of persons to hazardous materials or to contain a release; ~~or~~

6 (K) requiring or conducting abatement, investigation, remediation, or
7 removal activities in response to a release or threatened release, provided that:

8 (i) prior notice of intent to do any such activity is given to the
9 ~~secretary~~ Secretary in writing, and, unless previously waived in writing by the
10 ~~secretary~~ Secretary, no such activity is undertaken for 30 days after receipt of
11 such notice by the ~~secretary~~ Secretary;

12 (ii) a workplan is prepared by a qualified consultant prior to the
13 commencement of any such activity;

14 (iii) if the ~~secretary~~ Secretary, within 30 days of receiving notice
15 as provided in subdivision (i) of this subdivision (K), elects to undertake a
16 workplan review and gives written notice to the secured lender or fiduciary of
17 such election, no such activity is undertaken without prior workplan approval
18 by the ~~secretary~~ Secretary;

19 (iv) appropriate investigation is undertaken prior to any
20 abatement, remediation, or removal activity;

1 (v) regular progress reports and a final report are produced during
2 the course of any such activity;

3 (vi) all plans, reports, observations, data, and other information
4 related to the activity are preserved for a period of 10 years and, except for
5 privileged materials, produced to the ~~secretary~~ Secretary upon request;

6 (vii) persons likely to be at or near the facility are not exposed to
7 unacceptable health risk; and

8 (viii) such activity complies with all rules, procedures, and orders
9 of the ~~secretary~~; or

10 (L) foreclosing on the facility and after foreclosure: selling; winding
11 up operations; undertaking an investigation or corrective action under the
12 direction of the state or federal government with respect to the facility; or
13 taking any other measure to preserve, protect, or prepare the facility prior to
14 sale or disposition, provided that:

15 (i) a secured lender shall be liable as an operator if the secured
16 lender participated in the management of the facility; and

17 (ii) a secured lender shall be liable as an owner if during the
18 course of any transaction of the property, the secured lender fails to disclose
19 any known release or threat of release.

20 (2) There shall be no protection from liability for a secured lender or a
21 fiduciary under ~~subsections (g) and (h) of this section~~ this subsection if the

1 secured lender or fiduciary causes, worsens, or contributes to a release or threat
2 of release of hazardous material. A secured lender or fiduciary who relies on
3 subdivision (g)(1)(K) of this section, ~~or an agreement with the secretary~~
4 ~~entered into under subsection (h) of this section~~ shall bear the burden of
5 proving compliance with this subdivision.

6 ~~(h)(1) Subject to the provisions of this subsection, the secretary may enter~~
7 ~~into an agreement with a secured lender or a fiduciary regarding a facility from~~
8 ~~which there is a release or threat of release of hazardous materials. Upon~~
9 ~~entering into an agreement with the secretary, a secured lender or fiduciary, to~~
10 ~~the extent allowed by the agreement and in compliance with the terms and~~
11 ~~conditions of the agreement, may:~~

12 ~~(A) in the case of a secured lender, take possession, foreclose or~~
13 ~~otherwise take full title to the facility; and~~

14 ~~(B) undertake other activities at the facility in addition to those of~~
15 ~~subdivisions (g)(1)(A) (K) of this section, including use of the facility and new~~
16 ~~development.~~

17 ~~(2) Such an agreement may be entered into only when the secretary has~~
18 ~~determined, in the secretary's sole discretion, that there exists a release or~~
19 ~~threat of release, that there will be a substantial benefit to the public health or~~
20 ~~the environment that would not otherwise be realized and that the proposed~~
21 ~~activity will not cause, worsen or contribute to a release or threat of release of~~

1 ~~hazardous materials at the facility or expose persons likely to be at or near the~~
2 ~~facility to unacceptable health risk. Prior to entering into an agreement which~~
3 ~~provides for any abatement, investigation, remediation, or removal activities to~~
4 ~~be taken by a secured lender or fiduciary in response to a release or threatened~~
5 ~~release, the secretary shall cause notice to be published in a local newspaper~~
6 ~~generally circulated in the area where the facility is located. The notice shall~~
7 ~~set forth the abatement, investigation, remediation, and removal activities~~
8 ~~proposed, shall state that the secretary is considering entering into an~~
9 ~~agreement providing for such activities, and shall request public comment on~~
10 ~~the proposed activities within 15 days after publication. The decision of the~~
11 ~~secretary as to whether an agreement should be entered into and the terms and~~
12 ~~conditions of any agreement shall be final.~~

13 ~~(3) Such an agreement, if previously approved by the attorney general,~~
14 ~~may provide for the payment, in whole or in part, of past or future costs~~
15 ~~described in subdivision (a)(4)(B) of this section and may limit, in whole or in~~
16 ~~part, the secured lender's or the fiduciary's liability under this section.~~

17 ~~(4) A proposal by a secured lender or fiduciary to enter into such an~~
18 ~~agreement shall be accompanied by a fee of \$1,000.00. If the secretary's costs~~
19 ~~related to the proposal exceed the fee paid, then any agreement shall provide~~
20 ~~for the secured lender or fiduciary to reimburse the secretary for the additional~~
21 ~~costs incurred. The fee and any excess costs paid to the secretary under this~~

1 ~~subsection shall be deposited into the contingency fund established under~~
2 ~~subsection 1283(a) of this title.~~

3 ~~(5) If the secured lender or fiduciary enters into an agreement with the~~
4 ~~secretary, complies with the agreement and does not cause, worsen or~~
5 ~~contribute to a release or threat of release of a hazardous material, the~~
6 ~~maximum liability of such person under this section to the state for costs or~~
7 ~~injunctive relief shall be as provided in the agreement or, in the absence of~~
8 ~~such a provision, the fair market value of the property at the time of the~~
9 ~~agreement, estimated as if there were no release or threatened release of any~~
10 ~~hazardous materials, less any costs reasonably incurred by the person for any~~
11 ~~abatement, investigation, remediation or removal activity undertaken in~~
12 ~~compliance with subdivision (g)(1)(K) of this section or incurred in~~
13 ~~compliance with the agreement.~~

14 * * *

15 Sec. 4. 10 V.S.A. § 6615a is added to read:

16 § 6615a. DILIGENT AND APPROPRIATE INVESTIGATION FOR
17 HAZARDOUS MATERIALS

18 (a) Except as provide for in subsection (b) of this section, a diligent and
19 appropriate investigation, as that term is used in subsection 6615(e) of this
20 title, means, for all properties, an investigation where an owner or operator of a
21 property conforms to the standard developed by the Secretary in rule for a

1 diligent and appropriate investigation. If no standard exists, the owner or
2 operator of a property shall conform to one of the following:

3 (1) the all appropriate inquiry standard set forth in 40 C.F.R. Part 312, as
4 amended; or

5 (2) the current standard for phase I environmental site assessments
6 established by the American Society for Testing and Materials;

7 (b) In the case of residential property used for residential purposes, diligent
8 and appropriate investigation shall mean a facility inspection and title search
9 that:

10 (1) reveal no basis for further investigation; and

11 (2) do not reveal that the property was used for or was part of a larger
12 parcel that was used for commercial or industrial purposes.

13 Sec. 5. EFFECTIVE DATE

14 This act shall take effect on July 1, 2013.