

S.37. An Act Relating to Medical Monitoring

As Passed by Senate	As Currently Proposed by House
<p style="text-align: center;">* * * Strict Liability; Toxic Substance Release * * *</p> <p>Sec. 1. 10 V.S.A. chapter 159, subchapter 5 is added to read:</p> <p style="text-align: center;"><u>Subchapter 5. Strict Liability for Toxic Substance Release</u></p> <p><u>§ 6685. DEFINITIONS</u></p> <p><u>As used in this subchapter:</u></p> <p>(1) <u>“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.</u></p> <p>(2) <u>“Facility” means all contiguous land, structures, other appurtenances, and improvements on the land where 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.</u></p> <p>(3) <u>“Harm” means any personal injury or property damage.</u></p> <p>(4) <u>“Large facility” means a facility:</u></p> <p style="padding-left: 20px;">(A) <u>where 10 or more full-time employees have been employed at any one time; or</u></p> <p style="padding-left: 20px;">(B)(i) <u>where an activity within the Standard Industrial Classification code of 20 through 39 is conducted or was conducted; and</u></p> <p style="padding-left: 20px;">(ii) <u>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.</u></p> <p>(5) <u>“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.</u></p>	

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<p>(6) “Release” means any intentional or unintentional, permitted or unpermitted, act or omission that allows a toxic substance to enter the air, land, surface water, groundwater, or any other place where the toxic substance may be located.</p> <p>(7)(A) “Toxic substance” means any substance, mixture, or compound that has the capacity to produce personal injury or illness to humans through ingestion, inhalation, or absorption through any body surface and that satisfies one or more of the following:</p> <ul style="list-style-type: none"> (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 section 6602 of this title or under rules adopted under this chapter; (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 this chapter; or (vi) the substance can be shown by expert testimony to cause harm. <p>(B) “Toxic substance” shall not mean:</p> <ul style="list-style-type: none"> (i) a pesticide regulated by the Secretary of Agriculture, Food and Markets; or (ii) ammunition or components thereof, firearms, air rifles, discharge of firearms or air rifles, or hunting or fishing equipment or components thereof. 	

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<p>§ 6686. LIABILITY FOR RELEASE OF TOXIC SUBSTANCES</p> <p>(a) Any person who releases a toxic substance from a large facility shall be held strictly, jointly, and severally liable for any harm resulting from the release.</p> <p>(b) Any person held liable under subsection (a) of this section shall have the right to seek contribution from the manufacturer of the toxic substance that was released.</p> <p>(c) Nothing in this section shall be construed to supersede or diminish in any way existing remedies available to a person or the State at common law or under statute.</p> <p>Sec. 2. REPEAL; STRICT LIABILITY FOR TOXIC SUBSTANCE RELEASE</p> <p>10 V.S.A. chapter 159, subchapter 5 (strict liability for toxic substance releases) shall be repealed on July 1, 2024.</p> <p>Sec. 3. DEPARTMENT OF FINANCIAL REGULATION; REPORT ON INSURANCE POLICY PRICING AND AVAILABILITY</p> <p>(a) The Commissioner of Financial Regulation shall monitor how the imposition of strict liability for toxic substance releases pursuant to 10 V.S.A. chapter 159, subchapter 5 affects the pricing and availability of commercial general liability insurance policies, residential homeowner’s insurance policies, and other insurance policies in the State. The Commissioner of Financial Regulation shall evaluate whether:</p> <p>(1) insurance policies in the State are more expensive or less available due to the strict liability provisions of 10 V.S.A. chapter 159, subchapter 5; and</p> <p>(2) the insurance market in the State is negatively affected in comparison to the national market solely due to the strict liability provisions of 10 V.S.A. chapter 159, subchapter 5.</p> <p>(b) On or before January 15, 2020, and annually thereafter, the Commissioner of Financial Regulation shall report to the Senate Committee on Finance and the House Committee on</p>	

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<p><u>Commerce and Economic Development the results of its evaluation under subsection (a) of this section.</u></p> <p style="text-align: center;">* * * Medical Monitoring * * *</p> <p>Sec. 4. 12 V.S.A. chapter 219 is added to read:</p> <p style="text-align: center;"><u>CHAPTER 219. MEDICAL MONITORING</u></p> <p><u>§ 7201. DEFINITIONS</u></p> <p><u>As used in this chapter:</u></p> <p>(1) <u>“Disease” means any disease, illness, ailment, or adverse physiological or chemical change linked with exposure to a toxic substance.</u></p> <p>(2) <u>“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.</u></p> <p>(3) <u>“Exposure” means ingestion, inhalation, contact with the skin or eyes, or any other physical contact.</u></p> <p>(4) <u>“Facility” means all contiguous land, structures, other appurtenances, and improvements on the land where 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.</u></p> <p>(5) <u>“Large facility” means a facility:</u></p> <p style="padding-left: 20px;">(A) <u>where 10 or more full-time employees have been employed at any one time; or</u></p> <p style="padding-left: 20px;">(B)(i) <u>where an activity within the Standard Industrial Classification code of 20 through 39 is conducted or was conducted; and</u></p> <p style="padding-left: 40px;">(ii) <u>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.</u></p>	<p style="text-align: center;">* * * Medical Monitoring * * *</p> <p>Sec. 1. 12 V.S.A. chapter 219 is added to read:</p> <p style="text-align: center;"><u>CHAPTER 219. MEDICAL MONITORING</u></p> <p><u>§ 7201. DEFINITIONS</u></p> <p><u>As used in this chapter:</u></p> <p>(1) <u>“Disease” means any disease, illness, ailment, or adverse physiological or chemical change linked to exposure to a toxic substance.</u></p> <p>(2) <u>“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.</u></p> <p>(3) <u>“Exposure” means ingestion, inhalation, or absorption through any body surface.</u></p> <p>(4) <u>“Facility” means all contiguous land, structures, other appurtenances, and improvements on the land where 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.</u></p> <p>(5) <u>“Large facility” means a facility:</u></p> <p style="padding-left: 20px;">(A) <u>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</u></p> <p style="padding-left: 20px;">(B)(i) <u>where 10 or more full-time employees have been employed at any one time; or</u></p> <p style="padding-left: 40px;">(ii) <u>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.</u></p>

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<p>(6) “Medical monitoring” means a program of medical <u>surveillance, including medical tests or procedures</u> for the purpose of early detection of signs or symptoms of latent disease resulting from exposure.</p> <p>(7) “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.</p> <p>(8) “Release” means any intentional or unintentional, permitted or unpermitted, act or omission that allows a toxic substance to enter the air, land, surface water, groundwater, or any other place where the toxic substance may be located.</p> <p>(9)(A) “Toxic substance” means any substance, mixture, or compound that <u>has the capacity to produce</u> personal injury or <u>illness</u> to humans through ingestion, inhalation, or absorption through any body surface and that satisfies one or more of the following:</p> <p>(i) <u>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;</u></p> <p>(ii) <u>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;</u></p> <p>(iii) <u>testing has produced evidence, recognized by the National Institute for Occupational Safety and Health or the U.S. Environmental Protection Agency, that the substance,</u></p>	<p>(6) “Medical monitoring” means a program of medical <u>tests or procedures</u> for the purpose of early detection of signs or symptoms of a latent disease resulting from exposure.</p> <p>(7) “Operator” means a person who manages, conducts, or directs the operations of a facility.</p> <p>(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.</p> <p>(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.</p> <p>(10) “Release” means any act or omission that allows a toxic substance to enter the air, land, surface water, or groundwater.</p> <p>(11) “Tortious conduct” means negligence, trespass, nuisance, product liability, or common law liability for ultra-hazardous or abnormally dangerous activity.</p> <p>(12)(A) “Toxic substance” means any substance, mixture, or compound that <u>may cause</u> personal injury or <u>disease</u> to humans through ingestion, inhalation, or absorption through any body surface and that satisfies one or more of the following:</p> <p>(i) <u>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;</u></p> <p>(ii) <u>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;</u></p> <p>(iii) <u>testing has produced evidence, recognized by the National Institute for Occupational Safety and Health or the U.S. Environmental Protection Agency, that the substance,</u></p>

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<p><u>mixture, or compound poses acute or chronic health hazards;</u></p> <p style="padding-left: 40px;"><u>(iv) the Department of Health has issued a public health advisory for the substance, mixture, or compound;</u></p> <p style="padding-left: 40px;"><u>(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</u></p> <p style="padding-left: 40px;"><u>(vi) exposure to the substance can be shown by expert testimony to increase the risk of developing a latent disease.</u></p> <p><u>(B) “Toxic substance” shall not mean:</u></p> <p style="padding-left: 40px;"><u>(i) a pesticide regulated by the Secretary of Agriculture, Food and Markets; or</u></p> <p style="padding-left: 40px;"><u>(ii) ammunition or components thereof, firearms, air rifles, discharge of firearms or air rifles, or hunting or fishing equipment or components thereof.</u></p>	<p><u>mixture, or compound poses acute or chronic health hazards;</u></p> <p style="padding-left: 40px;"><u>(iv) the Department of Health has issued a public health advisory for the substance, mixture, or compound;</u></p> <p style="padding-left: 40px;"><u>(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</u></p> <p style="padding-left: 40px;"><u>(vi) exposure to the substance is shown by expert testimony to increase the risk of developing a latent disease.</u></p> <p><u>(B) “Toxic substance” shall not mean:</u></p> <p style="padding-left: 40px;"><u>(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</u></p> <p style="padding-left: 40px;"><u>(ii) ammunition or components thereof, firearms, air rifles, discharge of firearms or air rifles, or hunting or fishing equipment or components thereof.</u></p>
<p><u>§ 7202. MEDICAL MONITORING FOR EXPOSURE TO TOXIC SUBSTANCES</u></p> <p><u>(a) A person with or without a present injury or disease shall have a cause of action for the remedy of medical monitoring against a person who released a toxic substance from a large facility if all of the following are demonstrated by a preponderance of the evidence:</u></p> <p style="padding-left: 40px;"><u>(1) The person was exposed to the toxic substance as a result of tortious conduct by the person who released the toxic substance.</u></p> <p style="padding-left: 40px;"><u>(2) There is a probable link between exposure to the toxic substance and a latent disease.</u></p>	<p><u>§ 7202. MEDICAL MONITORING FOR EXPOSURE TO TOXIC SUBSTANCES</u></p> <p><u>(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 toxic substance was released if all of the following are demonstrated by a preponderance of the evidence:</u></p> <p style="padding-left: 40px;"><u>(1) The person was exposed to the toxic substance as a result of tortious conduct by the owner or operator, or persons under the control of the owner or operator, who released the toxic substance.</u></p> <p style="padding-left: 40px;"><u>(2) As a proximate result of the exposure, the person has a greater risk of contracting a latent disease.</u></p>

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<p>(3) The person’s exposure to the toxic substance increases the risk of developing a latent disease. A person does not need to prove that the latent disease is certain or likely to develop as a result of the exposure.</p> <p>(4) Diagnostic testing is reasonably necessary. Testing is reasonably necessary if a physician would recommend testing for the purpose of detecting or monitoring the latent disease based on the person’s exposure.</p> <p>(5) Medical tests or procedures exist to detect the latent disease.</p> <p>(b) A person’s present or past health status shall not be an issue in a claim for medical monitoring.</p> <p>(c) If medical monitoring is awarded, a court shall order the liable person to fund a court-supervised medical monitoring program administered by one or more health professional.</p> <p>(d) Upon an award of medical monitoring under subsection (c), the court shall award to the plaintiff reasonable attorney’s fees and other litigation costs reasonably incurred.</p> <p>(e) Nothing in this chapter shall be deemed to preclude the pursuit of any other civil or injunctive remedy available under statute or common law, including the right of any person to recover for damages related to the manifestation of a latent disease. The remedies in this chapter are in addition to those provided by existing statutory or common law.</p>	<p>(3) Diagnostic testing is reasonably necessary. Testing is reasonably necessary if, shown by expert testimony, a physician would prescribe diagnostic testing because the person’s increased risk of contracting the disease due to the exposure makes it reasonably necessary to undergo diagnostic testing different from what would normally be prescribed in the absence of the exposure.</p> <p>(4) Medical tests or procedures exist to detect the latent disease.</p> <p>(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.</p> <p>(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.</p> <p>(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 toxic substance.</p> <p>(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.</p>

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<p>(f) This section does not preclude a court from certifying a class action for the remedy of medical monitoring.</p>	<p>(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.</p> <p>Sec. 2. APPLICATION TO EXPOSURES PRIOR TO EFFECTIVE DATE</p> <p>Notwithstanding 1 V.S.A. § 214, the right of a person to bring a cause of action for medical monitoring under 12 V.S.A. chapter 219 shall apply retroactively to an exposure to a toxic substance that was discovered by the person in the six years prior to July 1, 2019, irrespective of any statute of limitations in effect at the time of the discovery of the exposure. [Deleted]</p> <p style="text-align: center;">* * * Hazardous Material Releases * * *</p> <p>Sec. 3. 10 V.S.A. § 6615 is amended to read:</p> <p>§ 6615. LIABILITY</p> <p>(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:</p> <ul style="list-style-type: none"> (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,

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	<p>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</p> <p>(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</p> <p>(A) abating such release or threatened release; and</p> <p>(B) costs of investigation, removal, and remedial actions incurred by the State which are necessary to protect the public health or the environment.</p> <p>(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.</p> <p style="text-align: center;">* * *</p> <p>(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:</p> <p>(A) An act of God.</p> <p>(B) An act of war.</p> <p>(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:</p>

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	<p>(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</p> <p>(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.</p> <p>(D) Any combination of subdivisions (A)-(C) of this subdivision (1).</p> <p style="text-align: center;">* * *</p> <p>(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.</p> <p style="text-align: center;">* * *</p> <p>(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</p>

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<p style="text-align: center;">* * * Effective Date * * *</p> <p>Sec. 5. EFFECTIVE DATE <u>This act shall take effect on July 1, 2019.</u></p>	<p>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.</p> <p>Sec. 4. APPLICATION OF LIABILITY <u>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).</u></p> <p style="text-align: center;">* * * Effective Date * * *</p> <p>Sec. 5. EFFECTIVE DATE <u>This act shall take effect on July 1, 2019.</u></p>