

HOUSE No. 4562

The Commonwealth of Massachusetts

In the Year Two Thousand Ten

An Act to protect citizens of the Commonwealth from unsafe and injurious landfills..

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Section 2 of Chapter 21H, as appearing in the 2008 Official Edition, is
2 hereby amended in lines 3 through 8, inclusive, by striking the definition of “Assessment” in its
3 entirety and inserting in place thereof the following definition:--

4 “Assessment,” a project to investigate, monitor, survey, test and gather information to
5 identify the existence, source, nature and extent of pollution, a threat of pollution or public
6 nuisance and the extent of risk posed to the public health, safety or welfare, or to the
7 environment. The term shall also include without limitation studies, services, or investigations to
8 plan, manage and direct assessment, containment, closure and clean up.

9 SECTION 2. Said section 2, as so appearing, is hereby amended in lines 25 through 29,
10 inclusive, by striking the definition of “Clean up” in its entirety and inserting in place thereof the
11 following definition:--

12 “Clean up”, a project for the treatment, removal or disposal of pollution from or at any
13 existing or closed facility or any location to which such pollution has come to be located, which

14 cleanup actions shall include, without limitation, actions which restore potability to a drinking
15 water supply or which prevent the contamination of said supply, including without limitation the
16 planning, design, and implementation of appropriate means of assessment and remediation of the
17 contamination problem. Clean up shall also include any appropriate means to prevent or abate a
18 public nuisance, including, without limitation, any planning, design or implementation of such
19 abatement or prevention measures.

20 SECTION 3. Said section 2, as so appearing, is hereby amended in lines 30 through 34,
21 inclusive, by striking the definition of “Closure” in its entirety and inserting in place thereof the
22 following definition:--

23 “Closure”, a project for the deactivation and completion of a facility, including without
24 limitation planning, design and implementation of capping, containment, completion and any
25 other activity necessary or incidental to minimize or prevent damage, or threats of damage, to the
26 public health, safety or welfare, or to the environment including from public nuisance. Closure
27 also includes the post-closure maintenance and monitoring of a facility to ensure the integrity of
28 closure, cleanup, and containment measures and to detect and prevent any adverse impacts,
29 including but not limited to adverse impacts from public nuisance, on public health, safety or
30 welfare, or the environment.

31 SECTION 4. Said section 2, as so appearing, is hereby amended in lines 42 through 46,
32 inclusive, by striking the definition of “Containment” in its entirety and inserting in place thereof
33 the following definition:--

34 “Containment”, a project for the prevention of leachate, landfill gas or vapor generation
35 and/or migration from a facility, including without limitation planning, design and

36 implementation of surface sealing, grading, drainage control, lining, slurry trenching, grout
37 curtain sheeting, landfill gas collection, landfill gas treatment and other activities necessary or
38 incidental to control of leachate, landfill gas or vapor generation or migration. Containment shall
39 also include all means to prevent pollution, threat of pollution or public nuisance conditions from
40 adversely affecting public health, safety or welfare, or the environment.

41 SECTION 5. Said section 2, as so appearing, is hereby amended in lines 60 through 64,
42 inclusive, by striking the definition of “Facility” in its entirety and inserting in place thereof the
43 following definition:--

44 “Facility”, any place or site where solid waste has been or will be deposited, dumped,
45 stored, transferred or treated, including any landfill, refuse transfer station, refuse incinerator
46 rated by the department at more than one ton of refuse per hour, refuse composting plant, or
47 other work for treating or disposing of solid waste, including existing and closed facilities.

48 SECTION 6. Said section 2, as so appearing, is hereby amended in line 126 by inserting
49 after the definition of “Motor vehicle” the following definition:--

50 “Motor vehicle”, a vehicle propelled by an internal combustion engine or an electric
51 motor, such as an automobile, van, truck, motorized construction equipment, motorized
52 recreational vehicle, motorcycle or forklift.

53 SECTION 7. Said section 2, as so appearing, is hereby amended in lines 131 through
54 136, inclusive, by striking the definition of “Pollution” in its entirety and inserting in place
55 thereof the following definition:--

56 “Pollution”, any spilling, leaking, pumping, pouring, emitting, emptying, discharging,
57 injecting, escaping, leaching, dumping or disposing of any solid, liquid or gaseous material
58 which, because of its quantity, concentration or other characteristics, is or may be injurious to
59 human, plant or animal life or to property, or may unreasonably interfere with the comfortable
60 enjoyment of life or property.

61 SECTION 8. Section 4 of said chapter 21H, as so appearing, is hereby amended by
62 striking the section in its entirety and inserting in place thereof the following section:--

63 Section 4. The department is hereby authorized and directed to establish a program for (i)
64 the discovery and assessment of pollution, threats of pollution or public nuisance, caused by
65 existing or closed facilities, (ii) the containment and clean up of such pollution, threats of
66 pollution or public nuisance, and (iii) the closure of existing facilities causing such pollution,
67 threats of pollution or public nuisance.

68 (a) In implementing assessment under said program, the department either may take or
69 arrange for such assessments or may award grants to public bodies, in accordance with rules and
70 regulations adopted by the department pursuant to chapter thirty A after public hearing, for up to
71 one hundred per cent of the costs for such assessments. Such assessments may include without
72 limitation studies, surveys, monitoring, testing and other investigations to identify the existence,
73 source, nature and extent of such pollution and to assess the extent to which such pollution
74 presents an existing or potential danger to the public health, safety or welfare, or the
75 environment, and studies, services and investigations to plan, manage and direct necessary
76 containment, clean up or closure activities.

77 (b) After the discovery of pollution, a threat of pollution or public nuisance, caused by an
78 existing or closed facility, the department, in accordance with enforcement authority set forth in
79 applicable statutes and regulations, shall notify the owner and/or operator of the facility of (i) any
80 requirements to correct such pollution, threat of pollution or public nuisance, and to bring the
81 facility into conformance with applicable statutes and regulations, and of the steps which must be
82 taken to do so; (ii) the need for any assessment, or if adequate assessment has been made, the
83 need for containment, closure or clean up activities to eliminate, minimize or prevent such
84 pollution or threat of pollution or to abate, contain or clean up a public nuisance; (iii) any
85 funding available for such assessment, containment, closure or clean up activities under section
86 three; (iv) the department's authority to take or arrange for any such projects under subsection
87 (c); and (v) the liability provisions of subsections (e) to (h), inclusive, for the costs incurred by
88 the department in taking or arranging for such activities.

89 (c) Subject to the provisions of subsections (b) and (d), the department is authorized (i) to
90 take or arrange for assessment of such pollution, threats of pollution or public nuisance, (ii) to
91 take or arrange for containment activities in response to such pollution, threats of pollution or
92 public nuisance, which will prevent or minimize pollution or threat of pollution so that it does
93 not migrate or otherwise cause or threaten substantial present or future danger to the public
94 health, safety or welfare, or the environment, or, which will prevent or minimize public nuisance
95 conditions, and (iii) to take or arrange for such closure or clean up activities as may be necessary
96 to prevent, minimize or mitigate damage to the public health, safety or welfare, or the
97 environment, which may result from such pollution, threats of pollution, or to prevent, minimize
98 or mitigate public nuisance conditions.

99 (d) Prior to taking or arranging for any assessment or any containment, closure or clean
100 up activities under subsection (c), the department shall have informed the owner or operator of
101 the facility or other legally responsible person as set forth in subsection (b) and the department
102 shall have notified said owner and/or operator of its intent to take or arrange for such activities;
103 provided that, if the department determines that an imminent threat exists to the public health,
104 safety or welfare, or to the environment, or that significant public nuisance conditions exist that
105 warrant immediate action, then the department shall not be required to provide notice or conduct
106 assessment prior to implementing containment or cleanup activities to abate or minimize such
107 imminent threat or significant public nuisance conditions. Notice under subsection (b) and (c)
108 shall also not be required when the department is unable to determine the identity or location of
109 the owner or operator of the facility or of any other legally responsible person, or when because
110 of an emergency or other circumstances, the giving of such notice would be impractical.

111 (e) Except as otherwise provided in this section, the owner or operator of an existing or
112 closed solid waste facility which causes pollution, threat of pollution or public nuisance, and any
113 person who is otherwise legally responsible for such pollution, threat of pollution or public
114 nuisance, shall be liable to the commonwealth for all costs of any further assessment and any
115 containment, closure and clean up incurred by the department relative to such pollution, threat of
116 pollution or public nuisance pursuant to subsection (c). Except as provided in subsection (f), such
117 liability shall be joint and several.

118 (f) Any person otherwise liable for any costs as set forth in subsection (e) who establishes
119 by a preponderance of the evidence that only a portion of such costs is attributable to pollution,
120 threat of pollution or public nuisance for which he is included in said subsection (e) shall be
121 required to pay only such portion.

122 (g) All persons liable under this section who are liable for pollution, a threat of pollution
123 or public nuisance, caused by an existing or closed solid waste facility, for which the department
124 has incurred costs for assessment, containment, closure or clean up under subsection (c), shall be
125 liable, jointly and severally, to the commonwealth in an amount up to three times their liability as
126 set forth in this section; provided, however, that if any person establishes by a preponderance of
127 the evidence that only a portion of such costs is attributable to pollution, threat of pollution or
128 public nuisance for which he is included in said subsection (c), in which case they shall be
129 required to pay up to three times such portion.

130 (h) Where the person liable for such pollution, threat of pollution or public nuisance is a
131 city or town, there shall be no liability for the costs of assessment taken or arranged by the
132 department, and the provision of subsection (g) relating to treble liability for costs incurred by
133 the department for containment, closure or clean up shall not apply to such public body, and any
134 liability to the commonwealth under this section, in the case of a city or town shall not be
135 included in the debt of such city or town for the purpose of ascertaining its legal borrowing
136 capacity, if after receiving notice under subsection (b), and prior to any action by the department
137 under subsection (c), such city or town has taken action to obtain financial resources to support
138 any necessary containment, closure or clean up projects, including without limitation issuing
139 revenue bonds under section twenty-eight C of chapter forty-four or applying in good faith for
140 financial assistance pursuant to section three.

141 (i) No indemnification, hold harmless or similar agreement or conveyance shall be
142 effective to transfer the liability imposed under this section from the owner or operator of any
143 existing or closed solid waste facility or from any other person who may be liable for pollution,
144 threat of pollution or public nuisance under this section to any other person. Nothing in this

145 paragraph shall bar any agreement to insure, hold harmless, or indemnify a party to such
146 agreement for any liability under this section.

147 (j) The department, as necessary to carry out the provisions of subsections (a) and (c)
148 may enter into contracts for consultant services, including but not limited to engineering,
149 technical, legal, administrative, accounting, community information, financial, management and
150 investigatory function, and may acquire personal property and interests in real estate by leases,
151 purchases or eminent domain under the provisions of chapter seventy-nine and may pay any
152 relocation benefits required by law.

153 (k) For the purpose of the administration and enforcement of this chapter and chapter
154 111, section 150A, and for the protection of public health, safety, or welfare, or the environment,
155 authorized personnel, agents and contractors of the department may enter any facility at
156 reasonable times and upon reasonable notice, to investigate, sample and inspect any records,
157 conditions, equipment, practice or property. Where necessary to ascertain facts relevant to, or not
158 available at, such facility, any person shall, upon request by any officer, employee or duly
159 authorized representative of the department, furnish information relating to said facility or to
160 pollution, threat of pollution or public nuisance therefrom and shall permit said officers,
161 employees or authorized representatives to have access to, and to copy, all records relating to
162 said facility or to pollution, threat of pollution or public nuisance therefrom. In the event that the
163 department reasonably determines as a result of such investigation, sampling or inspection that
164 there has been pollution, threat of pollution or public nuisance from or at such facility, the
165 department and its authorized personnel, agents, representatives or contractors may enter such
166 facility and areas proximate thereto and undertake such actions pursuant to this chapter and
167 regulations promulgated hereunder relative to the assessment, containment, closure or clean up

168 of pollution, threat of pollution or public nuisance as it reasonably deems necessary. During the
169 course of any assessment, containment, closure and clean up activities, the department may
170 restrict or deny entry to the facility and proximate property to protect the public health, safety or
171 welfare, or the environment, and to provide for the efficient, expeditious and safe conduct of
172 such actions; such restriction and denial shall not preclude access by an owner or operator of
173 such facility; provided, however, that such owner or operator complies with all safety and
174 operational protocols and requirements imposed by and to the satisfaction of the department; and
175 provided, further, that such owner or operator does not interfere with the efficient, expeditious
176 and safe conduct of the department's assessment, containment, closure or cleanup activities. The
177 department may access and utilize funds from the financial assurance mechanisms for a facility
178 at which there has been pollution, threat of pollution or a public nuisance to address such
179 pollution, threat of pollution or public nuisance where the owner or operator has failed to
180 adequately address, as determined by the department, such pollution, threat of pollution or public
181 nuisance after having an opportunity to do so pursuant to subsection (b) and (d) herein.

182 (l) Nothing in this section shall preclude the department from acting to address pollution
183 or threats of pollution caused by facilities under the authority of section four of chapter twenty-
184 one E.

185 (m) Notwithstanding any other general or special law to the contrary, civil actions
186 brought by the attorney general pursuant to this chapter to recover costs incurred by the
187 commonwealth, and actions brought by the attorney general to enforce action by owners or
188 operators, shall be commenced within five years from the date the commonwealth incurs all such
189 costs or five years from the date the commonwealth discovers that the person against whom the
190 action is being brought is a person liable pursuant to this chapter for pollution, threat of pollution

191 or public nuisance on account of which the commonwealth has incurred such costs, whichever is
192 later.

193 (n) The department may establish an administrative record upon which the department
194 shall base the selection of assessment, containment, closure and cleanup activities in those cases
195 where the department itself, or acting through its agents or contractors, carries out an assessment,
196 containment, closure or cleanup activities. The administrative record shall be available to the
197 public at the department office most convenient to the facility in question. The department may
198 also place duplicates of the administrative record at any other location.

199 The department shall promulgate regulations establishing standards for the content of the
200 administrative record. Until such regulations take effect, the administrative record shall consist
201 of all items developed and received pursuant to procedures used by the department for selection
202 of the assessment, containment, closure and cleanup activities, including procedures, if any, for
203 the participation of interested parties and the public, on the date this section first takes effect.

204 The development of an administrative record, the selection of assessment, containment,
205 closure or cleanup activities pursuant to this chapter, and the issuance of a notice by the
206 department to any owner or operator of a facility or to any other legally responsible person
207 asking that such person undertake assessment, containment, closure or cleanup actions shall not
208 be adjudicatory proceedings and shall not be subject to those provisions of chapter thirty A, or of
209 any other law, governing adjudicatory proceedings.

210 (o) Nothing in this section shall be construed as a defense to liability.

211 SECTION 9: Notwithstanding and special or general law to the contrary, the provisions
212 of Chapter 21H shall apply to the site known as the Crow Lane landfill, located in Newburyport,
213 Massachusetts, upon passage of this act.