Maine Forest Products Council

The voice of Maine's forest economy

Testimony Neither For Nor Against LD 1761
"An Act to Prohibit Indemnification Agreements"

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Good afternoon, Senator Carney, Representative Kuhn and members of the Judiciary Committee. My name is Krysta West. I live in Readfield, and I am submitting testimony on behalf of the Maine Forest Products Council neither for nor against LD 1761, "An Act to Prohibit Indemnification Agreements."

For 65 years, the Maine Forest Products Council has served as the voice of Maine's forest economy, representing hundreds of members from all facets of the forest products industry. Our members include pulp and paper mills, sawmills, secondary wood processors, foresters, loggers and truckers. We also represent commercial landowners sustainably managing more than 8 million acres of forestland.

The Maine Forest Products Council is concerned about how this legislation may impact the ability of our members to negotiate contractual agreements to manage risk. The Council generally supports the premise that a party should not be able to contract away liability for harm caused by its own unsafe actions. At the same time, our members routinely enter into agreements that allow others to perform activities on their land including logging, road construction, utility crossings, recreational use, leases and access arrangements where the member does not control the manner, methods, equipment, personnel, or safety practices involved. In those situations, contractual risk allocation has long been a necessary and reasonable tool to ensure that responsibility rests with the party best positioned to prevent harm. However, there are areas of ambiguity this bill creates that could complicate our members' ability to manage risk clearly and predictably.

We understand that current Maine law allows contracts to assign risk for negligence, but courts strictly construe these indemnity provisions. They scrutinize them to ensure that the arrangement is the clear and specific intent of the parties, and that it does not unfairly burden a party, based on the facts and circumstances of each case.
Given the current state of the law, this legislation raises a number of questions about how this bill would limit the ability of contracting parties to assign risk and limit the discretion of courts to determine the enforceability of an indemnity provision on a case-by-case basis.

- As a not-for-profit organization that seeks to protect its Officers and Directors, would this prevent us from securing Directors and Officers insurance? This issue was raised at the informational session and warrants careful consideration.

- Landowners managing hundreds of thousands of acres enter into contractual agreements with a variety of public and private entities and individuals for a variety of reasons. How will the limitation on indemnification impact access to private land for activities such as bear baiting, camp leases, and trails?

- Indemnification clauses can be important to conservation easement agreements, especially to those that include public access to protect landowners in the case that the landowner liability law is weakened or changed in the future. If this bill were to pass, landowners may be less willing to utilize important funds, such as Land for Maine's Future, to conserve land.

- Visitors to the North Maine Woods are required to sign an agreement that indemnifies landowners for claims arising from the use, occupation or visitation of the privately owned land. This is an important provision, in addition to the Landowner Liability statute, to protect landowners from damage claims arising from recreational activities since there are access gates and small fees that pays for the management of recreational access. Landowners may be less willing to participate in the North Maine Woods model in the absence of these indemnification agreements.

  (Agreement language included below)

- Some contracts, such as road and railroad crossing agreements, only benefit one party. If risks cannot be assigned to that party, how would that access be affected?

- Right of Way access easements are regularly used by landowners of all sizes to provide access, allow for forestry operations, etc. How will the changes proposed by LD 1761 impact the indemnification that is utilized for these agreements, especially for easements that benefit one landowner, but not the other?

- Landowners of all sizes engage in contracts with logging companies of all sizes to carry out harvesting operations. Under current law, courts have discretion to determine if an indemnity clause in a contract is fair and clear. How will eliminating that discretion impact small family woodlot owners and will it require overly prescriptive contract language with logging contractors to mitigate new risk associated with this policy change?

- Can affiliated companies transfer risk among each other when there are valid mutually beneficial business reasons to assign risk?

- Foresters are tasked with ensuring that operations follow all applicable rules, guidelines and policies. This includes inspecting infrastructure ahead of planned forestry operations. Under this policy shift, how will foresters understand the duty of care required for private property, and will the lack of a clear understanding result in widespread closure of forestry roads to mitigate risk?

Thanks for your attention to these questions. We urge the Committee to carefully consider this broadly worded legislation to avoid unintended consequences, such as limiting or significantly changing the dynamic of public use of private property. We would be happy to answer any questions that you may have, although as you can see, we have a lot of questions at this point as well.

NMW Visitor agreement indemnification language:

Permittee agrees that the permittors, the North Maine Woods Organization and the owners of real property represented by said Organization shall not be liable or held responsible in any manner, and permittee agrees to hold harmless and indemnify said Organization, owners and permittors for any injury, damage, accident or harm to the person, property, guests, employees, invitees, agents or family of the permittee arising out of or in any way connected with the use, occupation or visitation by the permittee, his guests, employees, invitees, agents or family of the described site or any land or property of the owners or permittors. Permittee further agrees to indemnify and hold the permittors, North Maine Woods Organization and said owners, harmless against any and all claims, suits, damages, or causes of action of any nature whatsoever by any person arising out of or in any way connected with the use, occupations or visitation of the described site or any land or property of the permittors or owners, or by any other acts or failure to act, by permittee, his employees, invitees, agents or family. The forgoing indemnification shall include without limitation the costs of defending any such claim including reasonable attorney's fees.