

As Introduced

132nd General Assembly

Regular Session

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H. B. No. 737

Representative Arndt

Cosponsors: Representatives Seitz, Johnson

A BILL

To amend section 3746.04 and to enact section 1
3746.122 of the Revised Code to establish 2
immunity from liability for a release or 3
threatened release of hazardous substances from 4
a facility for certain bona fide prospective 5
purchasers. 6

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That section 3746.04 be amended and section 7
3746.122 of the Revised Code be enacted to read as follows: 8

Sec. 3746.04. Within one year after September 28, 1994, 9
the director of environmental protection, in accordance with 10
Chapter 119. of the Revised Code, shall adopt, and subsequently 11
may amend, suspend, or rescind, rules that do both of the 12
following: 13

(A) Revise the rules adopted under Chapters 3704., 3714., 14
3734., 6109., and 6111. of the Revised Code to incorporate the 15
provisions necessary to conform those rules to the requirements 16
of this chapter. The amended rules adopted under this division 17
also shall establish response times for all submittals to the 18

environmental protection agency required under this chapter or 19
rules adopted under it. 20

(B) Establish requirements and procedures that are 21
reasonably necessary for the implementation and administration 22
of this chapter, including, without limitation, all of the 23
following: 24

(1) Appropriate generic numerical clean-up standards for 25
the treatment or removal of soils, sediments, and water media 26
for hazardous substances and petroleum. The rules shall 27
establish separate generic numerical clean-up standards based 28
upon the intended use of properties after the completion of 29
voluntary actions, including industrial, commercial, and 30
residential uses and such other categories of land use as the 31
director considers to be appropriate. The generic numerical 32
clean-up standards established for each category of land use 33
shall be the concentration of each contaminant that may be 34
present on a property that shall ensure protection of public 35
health and safety and the environment for the reasonable 36
exposure for that category of land use. When developing the 37
standards, the director shall consider such factors as all of 38
the following: 39

(a) Scientific information, including, without limitation, 40
toxicological information and realistic assumptions regarding 41
human and environmental exposure to hazardous substances or 42
petroleum; 43

(b) Climatic factors; 44

(c) Human activity patterns; 45

(d) Current statistical techniques; 46

(e) For petroleum at industrial property, alternatives to 47

the use of total petroleum hydrocarbons. 48

The generic numerical clean-up standards established in 49
the rules adopted under division (B) (1) of this section shall be 50
consistent with and equivalent in scope, content, and coverage 51
to any applicable standard established by federal environmental 52
laws and regulations adopted under them, including, without 53
limitation, the "Federal Water Pollution Control Act Amendments 54
of 1972," 86 Stat. 886, 33 U.S.C.A. 1251, as amended; the 55
"Resource Conservation and Recovery Act of 1976," 90 Stat. 2806, 56
42 U.S.C.A. 6921, as amended; the "Toxic Substances Control 57
Act," 90 Stat. 2003 (1976), 15 U.S.C.A. 2601, as amended; the 58
"Comprehensive Environmental Response, Compensation, and 59
Liability Act of 1980," 94 Stat. 2779, 42 U.S.C.A. 9601, as 60
amended; and the "Safe Drinking Water Act," 88 Stat. 1660 61
(1974), 42 U.S.C.A. 300f, as amended. 62

In order for the rules adopted under division (B) (1) of 63
this section to require that any such federal environmental 64
standard apply to a property, the property shall meet the 65
requirements of the particular federal statute or regulation 66
involved in the manner specified by the statute or regulation. 67

The generic numerical clean-up standards for petroleum at 68
commercial or residential property shall be the standards 69
established in rules adopted under division (B) of section 70
3737.882 of the Revised Code. 71

(2) (a) Procedures for performing property-specific risk 72
assessments that would be performed at a property to demonstrate 73
that the remedy evaluated in a risk assessment results in 74
protection of public health and safety and the environment 75
instead of complying with the generic numerical clean-up 76
standards established in the rules adopted under division (B) (1) 77

of this section. The risk assessment procedures shall describe a methodology to establish, on a property-specific basis, allowable levels of contamination to remain at a property to ensure protection of public health and safety and the environment on the property and off the property when the contamination is emanating off the property, taking into account all of the following:

(i) The implementation of treatment, storage, or disposal, or a combination thereof, of hazardous substances or petroleum;

(ii) The existence of institutional controls or activity and use limitations that eliminate or mitigate exposure to hazardous substances or petroleum through the restriction of access to hazardous substances or petroleum;

(iii) The existence of engineering controls that eliminate or mitigate exposure to hazardous substances or petroleum through containment of, control of, or restrictions of access to hazardous substances or petroleum, including, without limitation, fences, cap systems, cover systems, and landscaping.

(b) The risk assessment procedures and levels of acceptable risk set forth in the rules adopted under division (B) (2) of this section shall be based upon all of the following:

(i) Scientific information, including, without limitation, toxicological information and actual or proposed human and environmental exposure;

(ii) Locational and climatic factors;

(iii) Surrounding land use and human activities;

(iv) Differing levels of remediation that may be required when an existing land use is continued compared to when a

different land use follows the remediation.	106
(c) Any standards established pursuant to rules adopted	107
under division (B) (2) of this section shall be no more stringent	108
than standards established under the environmental statutes of	109
this state and rules adopted under them for the same contaminant	110
in the same environmental medium that are in effect at the time	111
the risk assessment is conducted.	112
(3) Minimum standards for phase I property assessments.	113
The standards shall specify the information needed to	114
demonstrate that there is no reason to believe that	115
contamination exists on a property. The rules adopted under	116
division (B) (3) of this section, at a minimum, shall require	117
that a phase I property assessment include all of the following:	118
(a) A review and analysis of deeds, mortgages, easements	119
of record, and similar documents relating to the chain of title	120
to the property that are publicly available or that are known to	121
and reasonably available to the owner or operator;	122
(b) A review and analysis of any previous environmental	123
assessments, property assessments, environmental studies, or	124
geologic studies of the property and any land within two	125
thousand feet of the boundaries of the property that are	126
publicly available or that are known to and reasonably available	127
to the owner or operator;	128
(c) A review of current and past environmental compliance	129
histories of persons who owned or operated the property;	130
(d) A review of aerial photographs of the property that	131
indicate prior uses of the property;	132
(e) Interviews with managers of activities conducted at	133
the property who have knowledge of environmental conditions at	134

the property;	135
(f) Conducting an inspection of the property consisting of a walkover;	136 137
(g) Identifying the current and past uses of the property, adjoining tracts of land, and the area surrounding the property, including, without limitation, interviews with persons who reside or have resided, or who are or were employed, within the area surrounding the property regarding the current and past uses of the property and adjacent tracts of land.	138 139 140 141 142 143
The rules adopted under division (B) (3) of this section shall establish criteria to determine when a phase II property assessment shall be conducted when a phase I property assessment reveals facts that establish a reason to believe that hazardous substances or petroleum have been treated, stored, managed, or disposed of on the property if the person undertaking the phase I property assessment wishes to obtain a covenant not to sue under section 3746.12 of the Revised Code.	144 145 146 147 148 149 150 151
(4) Minimum standards for phase II property assessments. The standards shall specify the information needed to demonstrate that any contamination present at the property does not exceed applicable standards or that the remedial activities conducted at the property have achieved compliance with applicable standards. The rules adopted under division (B) (4) of this section, at a minimum, shall require that a phase II property assessment include all of the following:	152 153 154 155 156 157 158 159
(a) A review and analysis of all documentation prepared in connection with a phase I property assessment conducted within the one hundred eighty days before the phase II property assessment begins. The rules adopted under division (B) (4) (a) of	160 161 162 163

this section shall require that if a period of more than one 164
hundred eighty days has passed between the time that the phase I 165
assessment of the property was completed and the phase II 166
assessment begins, the phase II assessment shall include a 167
reasonable inquiry into the change in the environmental 168
condition of the property during the intervening period. 169

(b) Quality assurance objectives for measurements taken in 170
connection with a phase II assessment; 171

(c) Sampling procedures to ensure the representative 172
sampling of potentially contaminated environmental media; 173

(d) Quality assurance and quality control requirements for 174
samples collected in connection with phase II assessments; 175

(e) Analytical and data assessment procedures; 176

(f) Data objectives to ensure that samples collected in 177
connection with phase II assessments are biased toward areas 178
where information indicates that contamination by hazardous 179
substances or petroleum is likely to exist. 180

(5) Standards governing the conduct of certified 181
professionals, criteria and procedures for the certification of 182
professionals to issue no further action letters under section 183
3746.11 of the Revised Code, and criteria for the suspension and 184
revocation of those certifications. The director shall take an 185
action regarding a certification as a final action. The 186
issuance, denial, renewal, suspension, and revocation of those 187
certifications are subject to Chapter 3745. of the Revised Code, 188
except that, in lieu of publishing an action regarding a 189
certification in a newspaper of general circulation as required 190
in section 3745.07 of the Revised Code, such an action shall be 191
published on the environmental protection agency's web site and 192

in the agency's weekly review not later than fifteen days after 193
the date of the issuance, denial, renewal, suspension, or 194
revocation of the certification and not later than thirty days 195
before a hearing or public meeting concerning the action. 196

The rules adopted under division (B) (5) of this section 197
shall do all of the following: 198

(a) Provide for the certification of environmental 199
professionals to issue no further action letters pertaining to 200
investigations and remedies in accordance with the criteria and 201
procedures set forth in the rules. The rules adopted under 202
division (B) (5) (a) of this section shall do at least all of the 203
following: 204

(i) Authorize the director to consider such factors as an 205
environmental professional's previous performance record 206
regarding such investigations and remedies and the environmental 207
professional's environmental compliance history when determining 208
whether to certify the environmental professional; 209

(ii) Ensure that an application for certification is 210
reviewed in a timely manner; 211

(iii) Require the director to certify any environmental 212
professional who the director determines complies with those 213
criteria; 214

(iv) Require the director to deny certification for any 215
environmental professional who does not comply with those 216
criteria. 217

(b) Establish an annual fee to be paid by environmental 218
professionals certified pursuant to the rules adopted under 219
division (B) (5) (a) of this section. The fee shall be established 220
at an amount calculated to defray the costs to the agency for 221

the required reviews of the qualifications of environmental 222
professionals for certification and for the issuance of the 223
certifications. 224

(c) Develop a schedule for and establish requirements 225
governing the review by the director of the credentials of 226
environmental professionals who were deemed to be certified 227
professionals under division (D) of section 3746.07 of the 228
Revised Code in order to determine if they comply with the 229
criteria established in rules adopted under division (B) (5) of 230
this section. The rules adopted under division (B) (5) (c) of this 231
section shall do at least all of the following: 232

(i) Ensure that the review is conducted in a timely 233
fashion; 234

(ii) Require the director to certify any such 235
environmental professional who the director determines complies 236
with those criteria; 237

(iii) Require any such environmental professional 238
initially to pay the fee established in the rules adopted under 239
division (B) (5) (b) of this section at the time that the 240
environmental professional is so certified by the director; 241

(iv) Establish a time period within which any such 242
environmental professional who does not comply with those 243
criteria may obtain the credentials that are necessary for 244
certification; 245

(v) Require the director to deny certification for any 246
such environmental professional who does not comply with those 247
criteria and who fails to obtain the necessary credentials 248
within the established time period. 249

(d) Require that any information submitted to the director 250

for the purposes of the rules adopted under division (B) (5) (a) 251
or (c) of this section comply with division (A) of section 252
3746.20 of the Revised Code; 253

(e) Authorize the director to suspend or revoke the 254
certification of an environmental professional if the director 255
finds that the environmental professional's performance has 256
resulted in the issuance of no further action letters under 257
section 3746.11 of the Revised Code that are not consistent with 258
applicable standards or finds that the certified environmental 259
professional has not substantially complied with section 3746.31 260
of the Revised Code; 261

(f) Authorize the director to suspend for a period of not 262
more than five years or to permanently revoke a certified 263
environmental professional's certification for any violation of 264
or failure to comply with an ethical standard established in 265
rules adopted under division (B) (5) of this section; 266

(g) Require the director to revoke the certification of an 267
environmental professional if the director finds that the 268
environmental professional falsified any information on the 269
environmental professional's application for certification 270
regarding the environmental professional's credentials or 271
qualifications or any other information generated for the 272
purposes of or use under this chapter or rules adopted under it; 273

(h) Require the director permanently to revoke the 274
certification of an environmental professional who has violated 275
or is violating division (A) of section 3746.18 of the Revised 276
Code; 277

(i) Preclude the director from revoking the certification 278
of an environmental professional who only conducts 279

investigations and remedies at property contaminated solely with 280
petroleum unless the director first consults with the director 281
of commerce. 282

(6) Criteria and procedures for the certification of 283
laboratories to perform analyses under this chapter and rules 284
adopted under it. The issuance, denial, suspension, and 285
revocation of those certifications are subject to Chapter 3745. 286
of the Revised Code, and the director of environmental 287
protection shall take any such action regarding a certification 288
as a final action. 289

The rules adopted under division (B) (6) of this section 290
shall do all of the following: 291

(a) Provide for the certification to perform analyses of 292
laboratories in accordance with the criteria and procedures 293
established in the rules adopted under division (B) (6) (a) of 294
this section and establish an annual fee to be paid by those 295
laboratories. The fee shall be established at an amount 296
calculated to defray the costs to the agency for the review of 297
the qualifications of those laboratories for certification and 298
for the issuance of the certifications. The rules adopted under 299
division (B) (6) (a) of this section may provide for the 300
certification of those laboratories to perform only particular 301
types or categories of analyses, specific test parameters or 302
group of test parameters, or a specific matrix or matrices under 303
this chapter. 304

(b) Develop a schedule for and establish requirements 305
governing the review by the director of the operations of 306
laboratories that were deemed to be certified laboratories under 307
division (E) of section 3746.07 of the Revised Code in order to 308
determine if they comply with the criteria established in rules 309

adopted under division (B) (6) of this section. The rules adopted 310
under division (B) (6) (b) of this section shall do at least all 311
of the following: 312

(i) Ensure that the review is conducted in a timely 313
fashion; 314

(ii) Require the director to certify any such laboratory 315
that the director determines complies with those criteria; 316

(iii) Require any such laboratory initially to pay the fee 317
established in the rules adopted under division (B) (6) (a) of 318
this section at the time that the laboratory is so certified by 319
the director; 320

(iv) Establish a time period within which any such 321
laboratory that does not comply with those criteria may make 322
changes in its operations necessary for the performance of 323
analyses under this chapter and rules adopted under it in order 324
to be certified by the director; 325

(v) Require the director to deny certification for any 326
such laboratory that does not comply with those criteria and 327
that fails to make the necessary changes in its operations 328
within the established time period. 329

(c) Require that any information submitted to the director 330
for the purposes of the rules adopted under division (B) (6) (a) 331
or (b) of this section comply with division (A) of section 332
3746.20 of the Revised Code; 333

(d) Authorize the director to suspend or revoke the 334
certification of a laboratory if the director finds that the 335
laboratory's performance has resulted in the issuance of no 336
further action letters under section 3746.11 of the Revised Code 337
that are not consistent with applicable standards; 338

(e) Authorize the director to suspend or revoke the certification of a laboratory if the director finds that the laboratory falsified any information on its application for certification regarding its credentials or qualifications;

(f) Require the director permanently to revoke the certification of a laboratory that has violated or is violating division (A) of section 3746.18 of the Revised Code.

(7) Information to be included in a no further action letter prepared under section 3746.11 of the Revised Code, including, without limitation, all of the following:

(a) A summary of the information required to be submitted to the certified environmental professional preparing the no further action letter under division (C) of section 3746.10 of the Revised Code;

(b) Notification that a risk assessment was performed in accordance with rules adopted under division (B) (2) of this section if such an assessment was used in lieu of generic numerical clean-up standards established in rules adopted under division (B) (1) of this section;

(c) The contaminants addressed at the property, if any, their source, if known, and their levels prior to remediation;

(d) The identity of any other person who performed work to support the request for the no further action letter as provided in division (B) (2) of section 3746.10 of the Revised Code and the nature and scope of the work performed by that person;

(e) A list of the data, information, records, and documents relied upon by the certified environmental professional in preparing the no further action letter.

(8) Methods for determining fees to be paid for the 367
following services provided by the agency under this chapter and 368
rules adopted under it: 369

(a) Site- or property-specific technical assistance in 370
developing or implementing plans in connection with a voluntary 371
action; 372

(b) Reviewing applications for and issuing consolidated 373
standards permits under section 3746.15 of the Revised Code and 374
monitoring compliance with those permits; 375

(c) Negotiating, preparing, and entering into agreements 376
necessary for the implementation and administration of this 377
chapter and rules adopted under it; 378

(d) Reviewing no further action letters, issuing covenants 379
not to sue, and monitoring compliance with any terms and 380
conditions of those covenants and with operation and maintenance 381
agreements entered into pursuant to those covenants, including, 382
without limitation, conducting audits of properties where 383
voluntary actions are being or were conducted under this chapter 384
and rules adopted under it; 385

(e) Reviewing information submitted under section 3746.122 386
of the Revised Code and issuing a concurrence letter. 387

The fees established pursuant to the rules adopted under 388
division (B) (8) of this section shall be at a level sufficient 389
to defray the direct and indirect costs incurred by the agency 390
for the administration and enforcement of this chapter and rules 391
adopted under it other than the provisions regarding the 392
certification of professionals and laboratories. 393

(9) Criteria for selecting the no further action letters 394
issued under section 3746.11 of the Revised Code that will be 395

audited under section 3746.17 of the Revised Code, and the scope 396
and procedures for conducting those audits. The rules adopted 397
under division (B) (9) of this section, at a minimum, shall 398
require the director to establish priorities for auditing no 399
further action letters to which any of the following applies: 400

(a) The letter was prepared by an environmental 401
professional who was deemed to be a certified professional under 402
division (D) of section 3746.07 of the Revised Code, but who 403
does not comply with the criteria established in rules adopted 404
under division (B) (5) of this section as determined pursuant to 405
rules adopted under division (B) (5) (d) of this section; 406

(b) The letter was submitted fraudulently; 407

(c) The letter was prepared by a certified environmental 408
professional whose certification subsequently was revoked in 409
accordance with rules adopted under division (B) (5) of this 410
section, or analyses were performed for the purposes of the no 411
further action letter by a certified laboratory whose 412
certification subsequently was revoked in accordance with rules 413
adopted under division (B) (6) of this section; 414

(d) A covenant not to sue that was issued pursuant to the 415
letter was revoked under this chapter; 416

(e) The letter was for a voluntary action that was 417
conducted pursuant to a risk assessment in accordance with rules 418
adopted under division (B) (2) of this section; 419

(f) The letter was for a voluntary action that included as 420
remedial activities engineering controls or institutional 421
controls or activity and use limitations authorized under 422
section 3746.05 of the Revised Code. 423

The rules adopted under division (B) (9) of this section 424

shall provide for random audits of no further action letters to 425
which the rules adopted under divisions (B) (9) (a) to (f) of this 426
section do not apply. 427

(10) A classification system to characterize ground water 428
according to its capability to be used for human use and its 429
impact on the environment and a methodology that shall be used 430
to determine when ground water that has become contaminated from 431
sources on a property for which a covenant not to sue is 432
requested under section 3746.11 of the Revised Code shall be 433
remediated to the standards established in the rules adopted 434
under division (B) (1) or (2) of this section. 435

(a) In adopting rules under division (B) (10) of this 436
section to characterize ground water according to its capability 437
for human use, the director shall consider all of the following: 438

(i) The presence of legally enforceable, reliable 439
restrictions on the use of ground water, including, without 440
limitation, local rules or ordinances; 441

(ii) The presence of regional commingled contamination 442
from multiple sources that diminishes the quality of ground 443
water; 444

(iii) The natural quality of ground water; 445

(iv) Regional availability of ground water and reasonable 446
alternative sources of drinking water; 447

(v) The productivity of the aquifer; 448

(vi) The presence of restrictions on the use of ground 449
water implemented under this chapter and rules adopted under it; 450

(vii) The existing use of ground water. 451

(b) In adopting rules under division (B) (10) of this section to characterize ground water according to its impacts on the environment, the director shall consider both of the following:

(i) The risks posed to humans, fauna, surface water, sediments, soil, air, and other resources by the continuing presence of contaminated ground water;

(ii) The availability and feasibility of technology to remedy ground water contamination.

(11) Governing the application for and issuance of variances under section 3746.09 of the Revised Code;

(12) (a) In the case of voluntary actions involving contaminated ground water, specifying the circumstances under which the generic numerical clean-up standards established in rules adopted under division (B) (1) of this section and standards established through a risk assessment conducted pursuant to rules adopted under division (B) (2) of this section shall be inapplicable to the remediation of contaminated ground water and under which the standards for remediating contaminated ground water shall be established on a case-by-case basis prior to the commencement of the voluntary action pursuant to rules adopted under division (B) (12) (b) of this section;

(b) Criteria and procedures for the case-by-case establishment of standards for the remediation of contaminated ground water under circumstances in which the use of the generic numerical clean-up standards and standards established through a risk assessment are precluded by the rules adopted under division (B) (12) (a) of this section. The rules governing the procedures for the case-by-case development of standards for the

remediation of contaminated ground water shall establish 481
application, public participation, adjudication, and appeals 482
requirements and procedures that are equivalent to the 483
requirements and procedures established in section 3746.09 of 484
the Revised Code and rules adopted under division (B) (11) of 485
this section, except that the procedural rules shall not require 486
an applicant to make the demonstrations set forth in divisions 487
(A) (1) to (3) of section 3746.09 of the Revised Code. 488

(13) A definition of the evidence that constitutes 489
sufficient evidence for the purpose of division (A) (5) of 490
section 3746.02 of the Revised Code. 491

At least thirty days before filing the proposed rules 492
required to be adopted under this section with the secretary of 493
state, director of the legislative service commission, and joint 494
committee on agency rule review in accordance with divisions (B) 495
and (C) of section 119.03 of the Revised Code, the director of 496
environmental protection shall hold at least one public meeting 497
on the proposed rules in each of the five districts into which 498
the agency has divided the state for administrative purposes. 499

Sec. 3746.122. (A) As used in this section: 500

(1) "Bona fide prospective purchaser" and "facility" have 501
the same meanings as in 42 U.S.C. 9601. 502

(2) "Director of environmental protection" or "director" 503
includes an authorized representative of the director of 504
environmental protection. 505

(B) For purposes of immunity under division (D) of this 506
section, a person may obtain a concurrence letter from the 507
director of environmental protection stating that the person is 508
a bona fide prospective purchaser. To obtain the concurrence 509

letter, the person shall submit to the director all of the 510
following: 511

(1) A phase I environmental site assessment of the 512
facility that meets the procedures of the ASTM international 513
standard recognized in 40 C.F.R. 312.11; 514

(2) Documentation demonstrating compliance with the most 515
current ASTM international standard for identifying and 516
complying with continuing obligations; 517

(3) Other documentation requested by the director 518
demonstrating that the person is a bona fide prospective 519
purchaser. 520

(C) (1) The director shall review the information submitted 521
under division (B) of this section, make a determination of 522
whether the person is a bona fide prospective purchaser of the 523
facility, and do one of the following not later than thirty days 524
after the date on which the information is received: 525

(a) If the director determines that the person is a bona 526
fide prospective purchaser, issue the person a concurrence 527
letter. 528

(b) If the director determines that the person is not a 529
bona fide prospective purchaser, notify the person in writing of 530
that determination. 531

(2) If the director is unable to determine whether a 532
person is or is not a bona fide prospective purchaser under 533
division (C) (1) of this section, the director may request the 534
person to submit additional information for purposes of making 535
that determination. The director shall make the determination 536
not later than thirty days after the date on which the person 537
submits the additional information to the director. 538

(3) A person that is denied a concurrence letter under 539
division (C) (1) (b) of this section may resubmit the information 540
required under division (B) of this section. After receipt of 541
resubmitted information, the director shall make a determination 542
in accordance with division (C) (1) of this section. 543

(D) In a civil action, a person is immune from liability 544
to this state for performing investigational and remedial 545
activities to address a release or threatened release of 546
hazardous substances from a facility if all of the following 547
apply: 548

(1) The person demonstrates that the person is a bona fide 549
prospective purchaser of the facility. A concurrence letter 550
obtained by the person with regard to the facility under this 551
section constitutes such a demonstration. However, a person may 552
make the demonstration without obtaining a concurrence 553
letter under this section. 554

(2) The state's cause of action against the person rests 555
upon the person's status as an owner or operator of the 556
facility; 557

(3) The person does not impede a response action or a 558
natural resource restoration at the facility. 559

Section 2. That existing section 3746.04 of the Revised 560
Code is hereby repealed. 561